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DRAFTING TITLES, SUMMARIES AND IMPARTIAL ANALYSES

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I. Introduction

For initiative and referenda measures, the City Attorney plays a unique role in drafting ballot titles, summaries and impartial analyses. Courts have recognized the city attorney's analysis generally carries greater weight with voters than do the partisan arguments published by the "yes" and "no" campaigns on a given measure. Accordingly, the law requires the City Attorney to draft the title, summary and analysis in a manner that favors neither side. Rather, they must inform voters at both the petition and election stages, without utilizing the partisan rhetoric characteristically used by measure proponents and opponents.

This paper outlines below the basic requirements for drafting titles, summaries and impartial analyses and discusses issues with which City Attorneys should be familiar at all stages of the process.

II. Ballot Title and Summary

Within fifteen days after a notice of intent to circulate an initiative petition is filed, the City Attorney must prepare a non-argumentative ballot title and summary. Cal. Elec. Code § 9203. The title and ballot summary must describe the purpose of the initiative measure. The purpose of the title and summary are to: 1) reduce the risk voters are misled when signing the petition; 2) provide the signers a neutral explanation of the proposed ordinance at the time they sign the petition; and, 3) prevent signatures from being submitted in support of a different measure than that for which they were procured. *MHC Financing Ltd. Partnership v. City of Santee* (2005) 125 Cal.App.4th 1372, 1389; *Alliance For a Better Downtown Millbrae et al. v. Wade* (2003) 108 Cal.App.4th 123, 130-31.

Preparation of the ballot title and summary is a ministerial act. The City Attorney must provide both within the time required even if the City Attorney believes the measure is illegal.

Schmitz v. Younger (1979) 21 Cal. 3d 90 (Attorney General had no authority to refuse to prepare title and summary for state initiative which he thought violated the single-subject rule). However, this does not prevent a City Attorney from seeking judicial relief; rather, the rule is that “without prior judicial authorization, he may not delay or impede the initiative process while claims of the measure's invalidity are determined.” *Id.* A City Attorney may petition a court for relief from the duty to prepare the title and impartial analysis where, for example, the proposed initiative is unconstitutional. E.g., *Jahr v. Casebeer* (1999) 70 Cal. App. 4th 1250.

A. Title

The City Attorney need not be bound by the title the initiative proponent may have given the measure. The title, however, must describe the initiative in a manner that is not an argument for or against the initiative, and must not be likely to create prejudice for or against the measure. Cal. Elec. Code § 9203(b).

The petition circulator must print the title provided by the City Attorney across the top of each page of the petition. Cal. Elec. Code § 9203(b).

B. Summary

The summary is limited to 500 words. As with the title, it must not be an argument for or against the measure, or likely to create prejudice for or against the measure. Cal. Elec. Code § 9203.

Note: Geographical names, such as “City of Redondo Beach”, count as only one word. Cal. Elec. Code § 9. Elections Code Section 9 provides other guidelines on counting words, including how to count dates, Web addresses, etc.

The key is to summarize the measure in plain, neutral language. No analysis of the measure is included in the summary. Also, the title and summary need not include a complete catalogue of all the provisions in the measure. See *Amador Valley Joint Union High School Dist. et al. v. State Board of Equalization* (1978) 22 Cal.3d 208, 243. It is sufficient that the summary describe the chief purposes and points of the measure. Upon completion, the ballot title and summary should be provided promptly to the filer.

C. Challenges to the Title and Summary

Until 2003, Election Code Section 9204 permitted only initiative proponents to seek a writ of mandate to require the title and ballot summary be amended. However, the Legislature amended Section 9204, effective January 1, 2003, to permit any resident of the precinct to

challenge the title and summary. Cal. Elec. Code § 9204. A writ will only issue to compel the City Attorney to rewrite the title or summary if clear and convincing proof establishes the title or summary is false, misleading or otherwise inconsistent with the requirements of Section 9203. *Id.* If reasonable minds may differ as to the adequacy of the summary, courts will find the challenged summary sufficient. See, e.g. *Brennan v. Board of Supervisors of the City and County of San Francisco* (1981) 125 Cal.App.3d 87, 96.

Courts apply a substantial compliance analysis to determine if the title and summary are false, misleading or partial to one side. *Martinez v. Superior Court* (2006) 142 Cal.App.4th 1245, 1248. The Court of Appeal has held “partial” to mean that the language somehow signals to voters the City Attorney’s view of how they should vote or casts a favorable light on one side of the issue while disparaging the other. *Id.* The language “need not be the ‘most accurate,’ ‘most comprehensive,’ or ‘fairest’ that a skilled wordsmith might imagine.” *Id.* So long as it is not misleading or biased, the statute’s purposes are met.

IV. Impartial Analyses

When a measure is placed on the ballot – whether by qualifying petition or at the direction of the city council, the city council may direct the City Attorney to prepare an impartial analysis of the measure. Cal. Elec. Code § 9280. If, however, the measure affects the organization or salaries of the office of the city attorney, the city council must designate someone other than the City Attorney to prepare the impartial analysis. *Id.*

A. Text of Analyses

The analysis is limited to 500 words or less and is printed in the voter information pamphlet immediately preceding the arguments for and against the measure. The purpose of the impartial analysis is to encourage a more informed electorate. Unlike the ballot title and summary, the City Attorney’s impartial analysis may discuss the legality or constitutionality of the measure. Cal. Elec. Code § 9280; see *King v. Lewis* (1990) 219 Cal. App. 3d 552. However, the impartial analysis must not be argumentative or likely to create prejudice for or against the measure. Accordingly, the analysis should be phrased in neutral language to avoid the appearance of favoring one side over the other. Many City Attorneys opt not to discuss the legality or constitutionality of the measure to avoid even the appearance of bias or advocacy.

In drafting the analysis, one should keep in mind that it is the City Attorney’s independent judgment that controls the final content of the impartial analysis. Neither the City Council nor the City Manager controls the text. For this reason, some City Attorneys prefer not to circulate drafts of his or her analysis to other city officials (city manager, mayor, etc.) for

comment or input so as to avoid any appearance that other officials improperly influenced the text of the analysis.

On the other hand, circulation of a draft analysis for comment is not prohibited and may lead to an improved analysis for distribution to voters. There are differing views of whether the draft analysis is exempt from disclosure under the “draft” exception of the Public Records Act (Gov. Code §6254(a)). Similarly, views differ as to whether circulated drafts and written comments provided to or from the City Attorney about circulated drafts are subject to disclosure or are protected by the work-product protection. (This debate centers largely on who the “client” is when preparing an impartial analysis.) These questions have not yet been decided by the courts.

B. Legal Challenges to Analyses

Pre-election: The elections official must make the impartial analysis available for public inspection in his or her office for ten calendar days immediately following its due date. Cal. Elec. Code § 9295. Legal challenges to compel pre-election changes in the text of the impartial analysis must be filed no later than ten calendar days after the analysis was due. *Id.* Although not prescribed in the Elections Code, as a practical matter, to permit the required 10-day inspection, the impartial analysis is usually due to the elections official no later than the deadline set by the official for filing arguments in favor or opposed to the measure. The court will not order the impartial analysis language changed absent clear and convincing evidence the analysis is false, misleading or partial to one side. Cal. Elec. Code § 9295(b)(2).

Post-election: Although such cases are rare, an omission, inaccuracy or misleading statement in a City Attorney’s analysis of a proposed measure may also result in the invalidation of a ballot measure once passed by the voters. The due process clause requires invalidation when the error prevented voters from making an informed choice. However, “[t]he bar is very high indeed for a litigant to successfully mount a post-election challenge to a ballot measure using a due process rationale based on defects in a county counsel’s impartial analysis,” *People ex rel Kerr v. County of Orange* (2003) 106 Cal. App. 4th 914, 934. A court will take into consideration the following factors: (1) the availability of the text of the ordinance to the public; (2) the extent of other informational activities and the content of these efforts; (3) the arguments for or against the measure appearing on the ballot; and (4) the materiality of the omission. *Horwath v. City of East Palo Alto* (1989) 212 Cal. App. 3d 766, 777-79 (challenge failed because newspaper articles and leaflets ensured voters were sufficiently informed; voters could obtain copy of ordinance at no charge).