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October 1, 2004

VIA E-MAIL AND FIRST CLASS MAIL

Susan Duncan Lee, Esq.
Deputy Attorney General
Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Re: Opinion Request 04-211: Use of Public Funds to Conduct Poll Regarding Public Finance Measures

Dear Ms. Lee:

Introduction. Thank you for the opportunity to express my view of the following question posed by Senator Hollingsworth: “May a community college district use district funds to hire a consultant to evaluate the possible voter response to a district bond measure?” The views expressed here are my own and do not reflect the views of any of my clients. I am not conversant in the statutory laws governing community college districts in particular and therefore comment on the constitutional and statutory issues pertinent to this question as they apply to California government agencies in general.

Summary of Conclusions. As I understand the law, it is permissible to expend public funds on polling and other efforts to frame a question for the ballot, whether that question be a financial issue or a matter of substantive policy. Once a measure qualifies for the ballot, however, public funds (including the results of a publicly funded poll) may not be used to advocate one result or another, although neutral efforts to educate the public about the consequences of a measure, both pro and con, may be publicly funded.

Discussion. The key authorities in this context are *Stanson v. Mott*, 17 Cal.3d 206 (1976) and Government Code Section 8314. *Stanson* found that the State Parks Department had violated the law by using public funds to promote the passage of a park bond measure. After surveying decisions of other states, the California Supreme Court stated:

“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 (*see, e.g.*, Madison, **The Federalist Papers**, Nos. 52, 53; 10 Richardson, **Messages and Papers of the Presidents** (1899) pp. 98-99 (President Jefferson)); the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process.”

17 Cal.3d at 217. However, the Court also concluded that neutral efforts to educate the public about pending ballot measures may be publicly funded:

“It does not necessarily follow, however, that the department was without power to incur any expense at all in connection with the bond election. In *Citizens to Protect Pub. Funds v. Board of Education, supra*, 98 A.2d 673, the New Jersey decision discussed above, the court, while condemning the school board's use of public funds to advocate only one side of an election issue, at the same time emphatically affirmed the school board's implicit power to make 'reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed judgment when voting upon the proposal.' (98 A.2d at p. 676.)”

It is also clear that government agencies may frame measures for the ballot using public funds, just as they may frame legislation to be adopted by legislators:

“Clearly, prior to and through the drafting stage of a proposed initiative, the action is not taken to attempt to influence voters either to qualify or to pass an initiative measure; there is as yet nothing to proceed to either of those stages. The audience at which these activities are directed is not the electorate per se, but only potentially interested private citizens; there is no attempt to persuade or influence any vote. It follows those activities cannot reasonably be construed as partisan campaigning. Accordingly, *we hold the development and drafting of a proposed initiative was not akin to partisan campaign activity, but was more closely akin to the proper exercise of legislative authority.*”

League of Women Voters v. Countywide Criminal Justice Coordinating Committee (1988) 203 Cal.App.3d 529 (emphasis added; citations omitted).

Given that government agencies may use public funds to frame measures for the ballot and may engage in neutral public education efforts about ballot measures, it follows that they

may use reasonable means to do so. Polling the public to determine what measures might find public support, and might meet the needs of the community as the community members themselves see them, are reasonable means to these ends. Accordingly, such polls should be viewed as lawful, provided, of course, they do not cross the line into express advocacy of a particular electoral outcome.

Also relevant to this discussion is Government Code Section 8314, which provides, in relevant part:

“(a) 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.*

(b) For purposes of this section:

...

(2) ‘Campaign activity’ means an activity constituting a contribution as defined in Section 82015 or an expenditure as defined in Section 82025. ‘Campaign activity’ does not include the incidental and minimal use of public resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities.

...

(d) *Nothing in this section shall prohibit the use of public resources for providing information to the public about the possible effects of any bond issue or other ballot measure on state activities, operations, or policies, provided that (1) the informational activities are otherwise authorized by the constitution or laws of this state, and (2) the information provided constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure.* (Emphasis added.)

This statute relies on definitions in the Political Reform Act of “contribution” and “expenditure.” Government Code Sections 82015, 82025. These definitions, in turn, are amplified by regulations of the Fair Political Practices Commission (FPPC), 2 CCR Sections 18225(a) & (b). Review of those authorities makes clear that the essence of what makes a use of money a “contribution” or an “expenditure” subject to campaign reporting requirements is that the money is spent “for political purposes.” “Political purposes” are defined by the FPPC as

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entailing express advocacy of a particular electoral outcome. 2 CCR Sections 18225(a)(1), 18225(b).

The most helpful authority in this area is an advisory letter from FPPC staff to a Deputy City Attorney of Oakland who asked if the City might use public funds to conduct a poll prior to placing a matter on the ballot:

“If Oakland makes ‘independent expenditures’ of \$1,000 or more in a calendar year, Oakland will be considered a committee and will be required to file campaign statements. (Section 82013(b).) An ‘independent expenditure’ means an expenditure made in connection with a communication that *expressly advocates the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election* but which is not made to or at the behest of the affected committee. (Section 82031).

... A payment is made for political purposes if it is made to an organization formed or existing primarily *for the purpose of influencing or attempting to influence the action of voters for or against the qualification or passage of any measure* (Section 82015(a)(2)(D).)

“Question # 1

“You would like to know whether the cost of a poll would be considered a campaign expenditure by the City of Oakland if city staff commissions the poll to determine the feasibility of a ballot measure, presents the results to the city council and the city council adopts a resolution to place the measure on the ballot.

“We have advised that payments made by an individual or entity, other than a candidate or committee, in connection with *activities that are exploratory in nature, such as taking a poll of the voters to determine what issues are considered significant, are not considered ‘expenditures.’* (Powell Advice Letter, No. A-85-241.) We have also advised that a person’s obligation to report expenditures in support of or in opposition to a ballot measure does not begin until the matter becomes a measure. (In re Fontana (1976) 2 FPPC Ops. 25.) ... [A] ... proposition submitted to a popular vote by a legislative body becomes a measure when the legislative body places the proposal on the ballot.

“Accordingly, the cost of the poll to determine whether to place a measure on the ballot will not be a reportable expenditure prior to the city council taking action to place the measure on the ballot.”

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Hicks Advice Letter, No. I-98-007 (Feb. 20, 1998) at pp. 3-6 (emphasis added). The FPPC did conclude that, if the poll results were subsequently used for purposes of express advocacy, the cost of the poll would be “recaptured” and would be reportable at that time:

“Although a person’s obligation to report expenditures in support of or in opposition to a ballot measure does not begin until the matter becomes a measure, we have advised that expenditures made prior to that time may need to be recaptured in the first campaign report. (Martini Advice Letter, No. A-93-378.) In addition, we have advised that payments made to conduct a survey may become reportable expenditures if the subsequent use of the survey results would constitute an expenditure. (Winkler Advice Letter, No. A-86-035.)

“An ‘expenditure’ is defined as a payment made for political purposes. (Regulation 18225(a).) *A payment is made for political purposes if it is for the purpose of influencing or attempting to influence the action of the voters for or against the qualification or passage of any measure.* (Regulation 18225(a)(1).) *A payment made in connection with a communication is considered to be made for political purposes if the communication expressly advocates the qualification, passage or defeat of a clearly identified ballot measure.* (Regulation 18225(b).)

“Thus, if Oakland uses the results of the poll in a communication, such as an advertising campaign, that expressly advocates the qualification or passage of a ballot measure, then the cost of conducting the survey, as well as the cost of making the communication, would be a reportable expenditure at the time the communication is distributed. (Pessner Advice Letter, No. A-78-080).”

Id. at pp. 6-7 (emphasis added); *see also* FPPC Memo re Truckee Mountain Area Protection Campaign Committee, File No. 97/572 (April 16, 1998) (reaching similar conclusions).

Thus, spending public money on a poll to aid in framing a ballot measure is not a “contribution” or an “expenditure” under the Political Reform Act unless and until the poll result is used to expressly advocate passage or defeat of a measure. Thus, the use of public funds for such a poll does not violate Government Code Section 8314. Nor would such use violate the rule of *Stanson v. Mott*, because that doctrine also prohibits only expenditures used to engage in express advocacy.

Conclusion. Based on these authorities, and unless there is some statutory restriction peculiar to community college districts, I conclude that the answer to the Senator’s question must be: “Yes, public funds may be used to hire a consultant to evaluate the possible voter response to a district bond measure provided that the results of the consultant’s work are not used to expressly advocate for or against the passage of any resulting bond measure.”

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Thank you for the opportunity to comment on these issues.

Very truly yours,

Michael G. Colantuono

MGC:mc

c: Joanne Speers, General Counsel, League of California Cities
Michael Martello, Mountain View City Attorney, Chairman of League FPPC Committee