

FEATURES

Who's Advocating What Here?

by Robert Meyers and Victoria Frigo

Direct democracy, a concept employed by the Founding Fathers of the United States to present questions directly to the voters, has regained popularity recently, in the form of legislative referendums and citizen initiatives. But serious ethical issues may develop for city and county managers if their governments choose to promote or oppose ballot measures by using public dollars.

Some jurisdictions limit local government expenditures in this arena, requiring government actions—if allowable at all—to be balanced in viewpoint and strictly educational in purpose and tenor. Only a minority of jurisdictions holds that governments may spend public money to advocate for or against ballot questions, and even this minority adds the caveat that the issue being supported or opposed must have emerged from an elected body. (See Figure 1 for an overview of states' decisions.)

Less clear is whether localities have the right to oppose ballot questions arising from citizens' initiatives. Regardless of the degree to which local governments fund advocacy campaigns, however, their managers can maintain fairness, impartiality, and professionalism during referendum or initiative elections.

Figure 1. Comparison of States Limiting Government Advocacy

This table provides a synopsis of various rationales given by state and federal courts that have addressed the legality of publicly funded advocacy of referendums and initiatives.

State	Neutrality Required?	Legal Rationale
Alabama	No	The city of Birmingham was allowed to urge passage of a bond to provide funds for several public projects because the advertising costs were incidental to Birmingham's obligation "to determine the needs of its citizens and to provide funds to service those needs." A federal court concluded that a state subdivision has a right to self-advancement and self-protection. Therefore, a city's advocacy for passage of its own proposals is consistent with its role.
Arizona	No	A state court found that Tucson could legally publicize its support of two propositions with pamphlets, a Web site, and a television spot. The rationale was that the city did not employ "express advocacy," which the court defined as "communication that, taken as a whole, unambiguously urges a person to vote in a particular manner." The court concluded that reasonable minds could differ on whether the city expressly advocated or unambiguously urged a particular vote.
California	Yes	A California parks department could disseminate neutral

		information relevant to its purpose, but the government agency could not expend public funds to promote a partisan position in an election campaign. The California court stated, "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 the several competing factions."
Colorado	Yes	The state treasurer could not expend public monies to compensate department staff for formulating and distributing press releases that opposed a ballot measure and urged voters to defeat it. Efforts by the director and his staff were considered "contributions in kind" and violated the Fair Campaign Promises Act, which limits state-employee contributions during elections to \$50. The Colorado state court observed that "jurisdictions that have addressed the issue so far agree almost uniformly that, during an election, communication from the state may inform but not attempt to sway the electorate."
Washington, D.C.	Yes	The District of Columbia could not expend funds in an attempt to defeat a citizen-initiated petition requiring the city to provide overnight homeless shelters. A federal appellate court concluded that the money that D.C. had spent in trying to defeat the petition violated a congressional appropriation statute that expressly forbade D.C. from engaging in publicity or propoganda for the purpose of influencing legislation.
Florida	No	Public funds and county resources used by Leon County to advocate for passage of a bond referendum were legal, even though the state supreme court noted that the county's campaign slogans reflected a "slight lack of neutrality that should not be encouraged in ballot language." The court continued, "One duty of a democratic government is to lead the people to make informed choices through fair persuasion. . . . Local governments are not bound to keep silent in the face of a controversial vote that will have profound consequences for the community."
Massachusetts	Yes	In spite of the city of Boston's broad authority under its home-rule charter, the city could not urge its inhabitants to vote for a proposed amendment to the state constitution because, "traditionally, municipalities have not appropriated funds to influence election results." The fact that local governments were not specifically mentioned in statutes governing elections indicated to the Massachusetts court that "the Legislature did not even contemplate such municipal action could occur."
New York	Yes	A state court found that the New York constitution prohibits giving or loaning "the money of the state" to aid "any private corporation or association, or private undertaking." The case involved then-Governor Mario Cuomo and the

		commissioner of the state Office of Economic Development , who directed that a newsletter be printed and distributed at state expense. The newsletter contained factual information, as well as a plea to oppose the alleged Republican position on welfare and Medicaid reform.
New Mexico	Unsettled	The city of Las Cruces expended \$80,000 in public funds as part of a mass-media campaign to encourage voters to support the city's purchase of a private electric utility. The state appellate court did not rule because the election had passed, rendering the issue moot. In <i>dicta</i> , however, the court cited numerous jurisdictions that found support "for the general proposition that, at some threshold level, a public entity must refrain from spending public funds to promote a partisan position during an election campaign."
Oklahoma	Yes	Although the city of Tulsa impermissibly expended public money to promote passage of bond issues through activities such as developing voter surveys, compiling a campaign strategy manual, and paying for newspaper ads, an Oklahoma court concluded that the electoral process had not been "contaminated by these activities." Under the relevant state statute, the court stated that one must prove conclusively, by clear and convincing evidence, that the result of the election <i>would have been substantially different</i> but for the unlawful acts of public officials.
Oregon	Yes	The health department could not use taxpayers' funds to engage in an aggressive anti-fluoridation policy. An Oregon court found that "excessive or questionable efforts by government to manufacture the consent of the governed calls the legitimacy of its action into question."

STATE COURT RULINGS

Florida Law Favors Government Advocacy

The Florida Supreme Court has concluded that local governing bodies have not only the right but also the duty to advocate on matters they believe are beneficial or detrimental to their constituents. In the 2004 election campaign, Miami-Dade County spent \$800,000 to urge citizens to approve a \$2.9 billion general-obligation bond program.

This project was intended to support the largest capital construction program in the history of Miami-Dade County (and the third-largest municipal

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bond program of its kind in the nation). Leaflets and other print advertising, funded with public dollars, asked citizens in three languages to make "Miami-Dade a better place to live, work, and play" by voting on eight bond questions aimed at improving the general infrastructure and certain cultural and recreational facilities.

The Miami-Dade County manager also enlisted business, religious, and civic leaders to serve as "ambassadors" to advance the bond program. Not only did these volunteers host more than 100 meetings extolling the benefits of the project, but individual organizations and newly formed political action committees also raised private funds to conduct economic impact studies, lead focus groups, poll the electorate, and buy TV ads.

A month before the election, one privately funded poll costing \$200,000 showed that the number of voters undecided about supporting the bond issues was increasing. As a result, a business group dedicated an additional \$400,000 of its own funds to television advertising.

The ads featured grade-school children urging their parents, in English and Spanish, to "Vote with your heart. Vote yes for each part." All eight referendums passed, by margins ranging from 58 to 71 percent. The Miami-Dade County manager attributed the success of the campaign to the innovative, grass-roots approach that joined public and private efforts.

NEW MEXICO SIDESTEPS A DECISION

Less satisfactory were actions taken by the city of Las Cruces, New Mexico, during a special municipal election in August 1994. Following a decade-long battle with the local utility company, the city was advised that it could save 10 to 20 percent on electric rates if a buyout of the privately held transmission system could be negotiated.

The city spent \$80,000 to hire advertising firms, conduct public opinion surveys, employ new personnel, and purchase brochures, yard signs, billboards, and advertising on television and radio and in newspapers to advocate for city ownership of the utility. Additionally, public employees were assigned to special advocacy tasks, and public facilities were made available for meetings. Voters approved the purchase by a vote of 9,672 to 5,159, and the state legislature authorized the sale of tax-exempt revenue bonds to finance the deal.

But the spending was far from over. The purchase price of the utility company was argued in a long court battle, and a citizen sued the city for wrongfully using public funds in a partisan fashion. By 1999, the city had paid out nearly \$8 million in legal fees. At this point, a deregulation law was on the books, and a newly elected city council no longer saw the merits of buying the utility.

Although some of the city's expenses were recovered, the \$8 million figure did not include in-house costs, which, according to the Las Cruces city manager, were impossible to calculate. In the end, the New Mexico Court of Appeals refused to address the legality of spending public funds on the advocacy campaign because the controversy was moot.

CALIFORNIA RESTRICTS ADVOCACY

Public spending in California is limited to impact studies. Nevertheless, the stakes were especially high for cities and counties during the 2004 electoral cycle. The 2004 Local Taxpayers and Public Safety Act, or Proposition 1A, sought to prohibit the California legislature from snatching property taxes from cities, counties, and special districts. The proposed amendment would allow the state to borrow local funds but only if the governor had proclaimed a "significant state hardship" and only if the state's previous loans from local governments had been repaid.

To avoid the ban on government advocacy before elections and, at the same time, to support the interests of cities and counties, the League of California Cities joined with coalition partners to found a nonprofit entity called LOCAL (Leave Our Community Assets Local). LOCAL raised more than \$9 million in private donations to purchase television advertising and to fund other media events.

Proposition 1A was approved overwhelmingly by 83.6 percent of the voters. The league attributed the stunning victory to LOCAL efforts, but throughout the campaign, city and county managers had faced ongoing quandaries over the extent to which they could support the LOCAL coalition.

CONSIDERATIONS FOR LOCAL MANAGERS

Avoiding the Appearance of Divided Loyalties or Interests

Tenet 7 of the Code of Ethics adopted by the International City/County Management Association requires that members avoid political activities that might undermine their reputations for fairness, impartiality, and professionalism. This ethical principle was reiterated, specifically with the California dilemma in mind, in a February 2004 PA Times article by Elizabeth Kellar titled "Professionalism vs. Politics: What Are the Issues?"

The article advised California members that their role was to assist their governments in presenting the official position these localities had taken on Proposition 1A. Additionally, because California law allows public resources to be used to evaluate a ballot measure's impact on the local government, managers could present information-based talks on the issues, as long as the presentations were fair and impartial. Finally, the article stated, although the ICMA Code of Ethics permits members to make contributions to causes, including ballot measures, ICMA cautions members to consider how their personal support for a cause may be viewed in light of their official responsibilities.

What were the consequences of the managers' activism of Proposition 1A? In "California Pushes the Envelope on Advocacy," October 2005, Public Management, Kellar interviewed several California managers and observers. The consensus was that city and county managers did a good job of raising ethical issues before moving into action. Not a single complaint reached the executive director or legal counsel of the League of California Cities.

One issue that concerned some California managers, however, was that employees might feel obligated to make financial contributions when they know their boss is an advocate for a cause, even if the boss does not solicit contributions in the work place.

Additional Common-Sense Guidelines

Building on what was learned in California, here are six further recommendations that managers should follow when their local governments are engaged in initiatives and referendums, regardless of professional or jurisdictional limitations. (See also Figure 2 for a useful "self-questionnaire" that managers might employ in their decision making.)

Figure 2. Self-Questionnaire

Here are some questions that can help local government managers assess their own localities' history of advocacy, as well as their own past behaviors regarding these campaigns and their attitudes toward advocacy.

1. Has your local government or a local government agency in your jurisdiction spent public funds before an election to educate voters (i.e., to disseminate neutral, balanced information) on an issue?
2. Has your local government or a local government agency in your jurisdiction spent public funds prior to an election to advocate (i.e., to actively campaign for or against) an issue?
3. If your local government has spent public funds to educate or advocate, what type of issue or issues were involved? Transportation? Health care? Housing?

Gambling? Education? Other? (Describe.)

4. In general, what is the range of money spent from public funds on a typical neutral, educational campaign, including wages earned by government employees assigned to the task?
5. In general, what is the range of money spent from public funds on a typical advocacy campaign, including wages earned by government employees assigned to the task?
6. If your government has collaborated with nongovernmental organizations in educational or advocacy campaigns, briefly describe the nature of the collaboration(s).
7. If your government has engaged in advocacy campaigns (i.e., taken a position for or against), have the campaigns been successful?
8. Have you consulted a government attorney on the legality of government advocacy for or against an issue in your jurisdiction?
9. Indicate any legal or ethical prohibitions that you believe would ban government advocacy in your jurisdiction.
10. Have you advocated for or against an issue before an election, in your individual capacity as a public manager-not as a candidate for office?
11. Is government advocacy (i.e., the spending of public funds to support or defeat an issue before the electorate) consistent with your personal philosophy about how government should operate?
12. Explain briefly your personal position on the merits and/or deficiencies of government advocacy.

1. Know the laws. Before taking any course of action, managers should consult their city or county attorneys for specific rules that may apply in their states. Once the limits of public spending are known, the local manager is in a good position to monitor time and other resources that can be allocated to supporting initiatives and referendums.

Specific restrictions may be found in home-rule charters, state campaign disclosure laws, ethics ordinances, court decisions, and attorney-general legal opinions. Several Florida attorney-general opinions, for example, address government involvement in referendums and initiatives. One opinion recognizes the authority of governing bodies composed of elected officials to spend public funds for advocacy but does not extend the same privilege to entities composed of appointed officials.

Special considerations involve both the federal Hatch Act and comparable state laws. Generally, these regulations prohibit government employees from engaging in political activity while on duty or in a government office. For instance, a local manager would not be permitted to solicit contributions from other employees to support a ballot issue. More particularly, soliciting contributions from subordinates might be viewed as coercive and a possible abuse of power. Numerous other restrictions under the Hatch Act and its state equivalents might also apply.

2. Know your constituents. Even if local law does not require it, the manager should encourage the gathering of legislative findings to identify the public interest to be served, as well as to justify the necessity of spending public funds for an educational or advocacy campaign.

3. Make it official. Once legislative findings have been obtained, the manager should encourage the legislative body to adopt a resolution formalizing the scope of the education or advocacy expenditure. In jurisdictions that do not allow government funding for political purposes, this prohibition should be clearly stated in the resolution. If the law allows public money to be spent, however, the resolution should include sufficient safeguards to ensure that funds are distributed according to the intended purpose.

4. Clarify roles. To avoid misunderstandings, the manager should identify which elected officials and/or staff will be deciding the form and appearance of the education or advocacy campaign. In Las Cruces, New Mexico, during the 1990s, the biggest advocate for the purchase of the utility company was the mayor. Once he left office, however, others were not willing to oversee the project with the same fervor.

If government employees will be shifted to new tasks to deliver the message, the local manager must evaluate the impact that these shifts will have on the overall functioning of the government. During the "Better Place to Live, Work, and Play" advocacy campaign in Miami-Dade County, some county employees volunteered to speak in favor of the bond referendums "off the clock," and others were "on county time" when collaborating with grass-roots leaders and managing the county's own ad campaign.

5. Distinguish financial sources. Identify the type of public resources that can be used in the advocacy or educational campaign. Even when state and local laws support public spending, other factors, such as bond regulations, may prevent tapping into certain assets.

6. Minimize liabilities. Set guidelines to minimize the government's liabilities if responsibilities are transferred to third parties like public relations firms or ad agencies. Monitor the output of these parties regularly to ensure that all laws are being followed. In Florida, advocacy language used in campaign advertising must be "fair" and not distort the truth.

DISCRETION IS THE BETTER PART OF VALOR

Although the law may be on your side, discretion is also advised. In one case, elected city commissioners in Coral Gables, Florida, had a legal mandate to advocate for a referendum to change the mayor's term limits. But because they could not arrive at a unanimous decision, the commissioners chose instead to spend public dollars to educate the electorate on the pros and cons of the issue. In other situations, governments may choose to avoid taking a stand if the initiatives involve recalls or if competing, contradictory citizens' initiatives are presented during the same election cycle.

Another option that helps ascertain the level of community support for an issue and, at the same time, conserves public dollars is placing nonbinding straw ballots before the voters during a regular election cycle. This strategy has been used many times throughout Miami-Dade County.

In the 2004 election in the city of Miami Beach, 55 percent of the electorate supported the straw ballot to develop Bay Link, an electrically operated streetcar that would connect the barrier island to the mainland. Before the straw poll, public support for Bay Link had been unclear because of the strongly conflicting rhetoric of political factions, both on and off the Beach.

In conclusion, local managers can accrue many advantages for their communities during referendums and initiative elections if they are guided by relevant laws and ethical considerations.

Robert Meyers (rmeyers@miamidade.gov) is executive director, and Victoria Frigo (frigov@miamidade.gov) is staff attorney for the Commission on Ethics and Public Trust, Miami-Dade County, Florida.

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