manatt

May 4, 2009

California Supreme Court Vargas Decision Reaffirms Prior Case Law Prohibiting the Use of Public Funds for Campaign Activities, but Upholds Informational Efforts That Do Not Utilize Public Funds for Campaign Activities

The California Supreme Court, in a very recent decision, Vargas v. City of Salinas, Case No. S140911 (April 20, 2009), clarified some of the legal ambiguities governing the use of public funds in connection with election campaigns. California Government Code section 54964(b) prohibits a local agency's expenditure of funds for "communications that expressly advocate the approval or rejection of a clearly identified ballot measure." Prior to passage of that statutory prohibition, the California Supreme Court had decided in the pivotal case of Stanson v. Mott, 17 Cal. 3d 206 (1976) that the use of public funds for campaign materials was unlawful in the absence of clear statutory authorization, but that reasonable expenditures of public funds for informational purposes to provide voters with a fair presentation of relevant facts and information to aid them in reaching an informed judgment relating to an issue on which the agency had labored was permitted. Because the distinction between permitted "informational" and prohibited "campaign" expenditures could be elusive, the Stanson decision provided some examples. The use of public funds to purchase bumper stickers, posters, advertising floats, or television and radio spots, as well as the dissemination of campaign literature prepared by private proponents or opponents of a ballot measure was "unquestionably" improper. On the other hand, the public agency pursued a proper "informational" role when it simply gave a "fair presentation of the facts" in response to a citizen's request for information, or, when requested by a private or public organization, it authorized an agency employee to present the department's view of a ballot proposal at a meeting of such organization.

The principal questions before the California Supreme Court in Vargas were:

1) The question of whether the intervening passage of the "express advocacy" prohibition in Government Code section 54964(b) had created a safe harbor that did away with the need to engage in any "style, tenor, and timing" analysis under Stanson so long as there was no express advocacy for or against any particular ballot item or candidate in the materials paid for or circulated with public funds; and

2) The question of whether or not such a "style, tenor, and timing analysis" permitted a public agency to publicly state its opinion on the merits of a pending ballot measure so long as it presented a fair picture that avoided any additional expenditures devoted to actively campaigning for or against the measure.

On the first question, the Vargas decision rejected the statutory "express advocacy" standard as not sufficient, by itself, to protect the electorate from unconstitutional uses of public funds to attempt to influence the democratic process. Accordingly, it reaffirmed the need for the broader "style, tenor, and timing" analysis set out in its prior decisions, even where the challenged materials contained no "express advocacy" that would trigger the statutory bar.

For the reasons discussed below, we conclude that the statute relied upon by the Court of Appeal

> was not intended, and should not be interpreted, to displace the analysis and standards set forth in our decision in *Stanson, supra,* 12 Cal. 3d 206. We further conclude that a municipality's expenditure of public funds for materials or activities that reasonably are characterized as campaign materials or activities – including, for example, bumper stickers, mass media advertisement spots, billboards, door-to-door canvassing, or the like – is not authorized by the statute in question, even when the message delivered through such means does not meet the express advocacy standard. Vargas, at p. 3.

Later in the decision the Court further explained:

> Thus, when viewed from a realistic perspective, the "express advocacy" standard does not provide a suitable means for distinguishing the type of *campaign* activities that (as *Stanson* explains) presumptively may not be paid for with public funds, from the type of *informational* material that presumptively may be compiled and made available to the public through the expenditure of such funds. ... [W]e reject the contention that the line drawn in S*tanson* between the use of public funds for *campaign activities* and the use of such funds for *informational material* is unduly or impermissibly vague. ... The circumstance that *in some instances* it may be necessary to consider the style, tenor, and timing of a communication or activity to determine whether, from an objective standpoint, the communication or activity realistically constitutes *campaign* activity rather than *informational* material, does not render the distinction between campaign and informational activities impermissibly vague. ... Accordingly, we conclude the campaign activity/informational material dichotomy set forth in *Stanson*... remains the appropriate standard for distinguishing the type of activities that presumptively may not be paid for by public funds, from those activities that presumptively may be financed from public funds. Vargas, at pp. 39-40.

In short, the mere avoidance of any expression of support for, or opposition to, a particular election item or candidate in materials created or circulated by a public agency may not be enough to protect against a criminal prosecution for misuse of public funds.

On the other hand, on the second question, the Vargas decision concluded that application of the "style, tenor, and timing" standard did not bar public dissemination of statements of opinion by a public entity in the ordinary course of its operations on a ballot measure affecting it, or require the agency to give access to its Web site or newsletter to opposing viewpoints, at least under the circumstances in the case before it. The decision explained:

> A full reading of the *Stanson* decision reveals, that our opinion's statement that the government "may not take sides" in election contests ... properly must be understood as singling out a public entity's "use of the public treasury *to mount an election campaign* as the constitutionally suspect conduct, rather than as precluding a public entity from analytically evaluating a proposed ballot measure and publicly expressing an opinion as to its merits." ... Accordingly, we agree ... that *Stanson* does not preclude a government entity from publically expressing an opinion with regard to the merits of a proposed ballot measure, so long as it does not expend public funds to mount a campaign on the measure. ... The potential danger to the democratic electoral process to which our court adverted in *Stanson*... is not presented when a public entity simply informs the public of its opinion on the merits of a pending ballot measure or of the impact on the entity that passage or defeat of the measure is likely to have. Rather, the threat to the fairness of the electoral process to which *Stanson* referred arises when a public entity or public official is able to devote funds from the public treasury, or publicly financed services of public employees, to *campaign activities* favoring or opposing a measure. Vargas, at pp. 43 and 44.

The Vargas plaintiffs challenged the following City activities: (1) the preparation of principally informational material that was "moderate in tone," regarding the budget cuts that the City anticipated making if a ballot measure seeking the repeal of an existing utility tax passed, a "natural subject to be reported upon" by the City, together with factual information regarding the cost of the tax in "an objective and nonpartisan manner;" that (2) was posted on the City's already existing Web site; (3) copied and made available at the city clerk's office and local public libraries; and (4) included in the City's regular quarterly newsletter mailed to all City residents, "rather than a special edition created and sent to would-be voters." Under these circumstances the Vargas decision concluded that the City's actions fell on the permitted "informational," rather than the forbidden "campaign," category:

> In sum, a variety of factors contributes to our conclusion that the actions of the City that are challenged in this case are more properly characterized as providing information than as campaigning: (1) the information conveyed generally involved past and present facts ... ; the communications avoided argumentative or inflammatory rhetoric and did not urge voters to vote in

a particular manner or take other actions in support of or in opposition to the measure; and (3) the information provided and the manner in which it was disseminated were consistent with established practice regarding use of the Web site and regular circulation of the city's official newsletter. Vargas, at p. 49.

In short, the style, tenor, and timing standard applies both substantive and procedural aspects: a factual, moderate tone to the substance of the communication that avoids express advocacy of any particular vote; and an avoidance of extra expenses for campaign-like activities, particularly those that are not already budgeted and paid as an ordinary part of the entity's established practices.

FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:

Michael Toumanoff Mr. Toumanoff has specialized, for over 15 years, in the law affecting public retirement system fiduciaries, and has represented and advised several California public pension systems, including ACERA, LACERA, SBCERA, and the Pasadena Fire & Police Retirement System, on a variety of issues. Mr. Toumanoff has authored and co-authored formal opinions on many issues concerning California public pension systems, including the first comprehensive opinion on the then newly enacted Proposition 162 for the State Association of County Retirement Systems in 1993; the scope of members' vested constitutional rights in a variety of contexts; the financial provisions of the 1937 County Employees Retirement Law under both the regular and alternate provisions in Articles 5 and 5.5; benefit issues; conflict issues concerning trustees with conflicting public duties; and the fiduciary aspects of particular investments.

Ashley Dunning Ms. Dunning is a litigator and fiduciary advisor, with substantial expertise representing trustees, public and private entities, and nonprofit organizations in resolving complex disputes and advising on issues involving fiduciary obligations, governance, and California's public retirement, conflict of interest, open meetings and public records laws. She appears regularly before boards of trustees and in court proceedings throughout California on these issues. Ms. Dunning also regularly provides training on these topics to clients and at conferences throughout the country.

Randall W. Keen Mr. Keen's practice focuses on implementation of California's landmark greenhouse gas reduction mandates under AB 32, energy issues before the California Public Utilities Commission, public contracting, administrative law (including administrative hearings and writs), and legislative and statutory analysis. He advises clients on the regulations adopted by state agencies, including the California Air Resources Board, the California Energy Commission and the California Public Utilities Commission, that mandate reductions in greenhouse gas emissions and the potential effect of those regulations on client operations. He has represented a broad base of clients on electric industry restructuring matters and other aspects of state and federal energy regulation. He has worked on issues such as direct access, cogeneration, exemptions from rolling blackouts, DWR exit fees, interruptible load programs and utility rate cases before the CPUC for clients including government agencies, municipal entities, refineries, healthcare and hospital chains, and commercial and retail entities. He has also represented a municipal utility on eminent domain and municipalization issues.

George Kieffer Mr. Kieffer serves on the firm's Executive Committee and on the Board of Directors of ManattJones Global Strategies, LLC, an international consulting firm and wholly owned affiliate of Manatt, Phelps & Phillips. He has extensive general business and regulatory practice experience and oversees major business litigation, business transactions, government-related, and land use matters. He chairs the firm's Government & Regulatory Policy Division and is regularly engaged to address major strategic legal and policy issues for businesses and public entities. In that role, he works with a broad variety of practice groups and specialists within the whole firm.

Please send comments and suggestions to Thomas McMorrow.

To subscribe to the Legislative Updates newsletter, click here.
To unsubscribe, click here.

Legislative Updates Editor: Thomas McMorrow
Technical Problems: Patty Azimi

Albany | Los Angeles | New York | Orange County | Palo Alto | Sacramento | San Francisco | Washington, D.C.
ATTORNEY ADVERTISING pursuant to New York DR 2-101(f)