

A PUBLIC REPORT
TO THE
VENTURA COUNTY TRANSPORTATION COMMISSION

*Use of Government Resources
on Measure B Campaign*



GREGORY D. TOTTEN
District Attorney
County of Ventura
State of California

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INTRODUCTION

The District Attorney's Office has concluded its investigation and review of the alleged use of Ventura County Transportation Commission funds and resources to promote the passage of local ballot Measure B in 2004. The Ventura County Transportation Commission and its Executive Director, Ginger Gherardi, cooperated fully with this investigation.

This review was conducted in response to a June 17, 2005, request from the Ventura County Transportation Commission (hereinafter VCTC or Commission) and an independent citizen complaint also dated June 17, 2005. These requests for review followed a series of May 2005 news articles in the *Ventura County Star* about telephone calls made to campaign consultants from VCTC offices.

SUMMARY AND FINDINGS

At the request of the Ventura County Transportation Commission (VCTC) and a private complainant, the Ventura County District Attorney reviewed VCTC expenditures of public funds and resources to promote the passage of a half-cent sales tax to finance transportation improvements. Measure B, which required a two-thirds vote, was ultimately rejected by the voters in the November 2, 2004 election (58.3 percent NO, 41.7 percent YES).

The District Attorney's review focused on the contents of phone conversations and other relevant VCTC activities on the Measure B campaign to determine whether public resources were used for "information" or "promotional" purposes. It is lawful to use public resources to provide objective factual information regarding a ballot measure. It is unlawful to use public resources to promote a particular position on a ballot measure. Use of public resources for such promotional purposes may give rise to civil and criminal liability and potential administrative sanctions.

We have determined there is insufficient evidence to support a criminal prosecution and consequently have closed this investigation with the following findings:

1. There is evidence establishing that VCTC Executive Director Ginger Gherardi and her staff used VCTC staff time and office resources to provide "information" to the public and others on the 2004 campaign for ballot Measure B.
2. There is insufficient evidence to prove beyond a reasonable doubt that Ms. Gherardi or her staff made expenditures of VCTC funds or resources for "promotional" rather than "informational" purposes in violation of Government Code section 54964. Thus, there is insufficient evidence to warrant a criminal prosecution.
3. Though the evidence is insufficient for criminal prosecution, the actions of VCTC staff in support of Measure B, when viewed in their totality, were improper under California judicial decisions.

Specifically, VCTC spent \$35,000 in public funds to conduct a voter poll in December 2003. In the spring of 2004, VCTC paid \$50,000 to a political consulting firm to assist in developing a public education plan for the proposal, and \$163,380 to print and mail approximately 575,150 postcards to registered voters. VCTC spent \$25,000 in public funds to conduct a second poll in April 2004. The District Attorney concluded that the expenses associated with these mailings were promotional in nature and did not fit within the legal authorization for the expenditure of public funds for informational purposes.

VCTC staff made numerous telephone calls to political consultants on VCTC public phones. Some of these calls properly provided information, but others were political in nature. However, it could not be determined which of the political calls were made after Measure B qualified for the ballot, and whether those calls were from VCTC telephones or private telephones.

During the campaign, Ms. Gherardi and one other staff member sent a number of e-mails to campaign staff and supporters from public computers at the VCTC offices. The District Attorney concluded that these communications were improper under decisional law, but were not violations of criminal law. Nor will the e-mails be civilly prosecuted because they involved minimal cost to the public, were not addressed to voters, and some of the e-mails may have been sent inadvertently. The District Attorney concluded that a reference to Measure B in an August 2004 news release did not constitute political advocacy and was not improper.

VCTC did not report its expenditures under the Political Reform Act and the Fair Political Practices Commission (FPPC) regulations. Whether reporting was required depends upon the resolution of complex legal issues as to whether they constitute independent expenditures or in-kind contributions under the Political Reform Act and FPPC regulations. The District Attorney has referred this issue to the Fair Political Practices Commission, which has the primary responsibility to interpret these reporting requirements, and which may bring administrative actions for failure to comply.

The District Attorney concluded the conduct as a whole violated California decisional law as improper expenditures of public resources for political purposes. However, neither criminal prosecution nor a civil action by the District Attorney is appropriate based upon expiration of the statute of limitations for some violations, the timing of some of the activity relevant to when the measure was certified for the ballot, the absence of an enforcement mechanism for some violations, and lack of evidence that the conduct was intentional or negligent. The District Attorney is referring the matter to the Fair Political Practices Commission, which has authority to impose administrative fines, for its evaluation and possible enforcement action.

It must be emphasized that there is no evidence VCTC staff intentionally sought to violate campaign finance law. Nor is there any evidence of a willful dereliction of duty by VCTC members or their staff. To their credit, they obtained and relied upon the advice of legal counsel regarding the parameters for use of public resources on a ballot measure.

The campaign for Measure B represents a prime example of the inherent difficulties associated with this area of law and policy. While the merits of Measure B are irrelevant for purposes of this review, the investigation revealed VCTC staff fervently believed the success of Measure B was critical to address transportation needs in Ventura County. Several staff members even contributed money and volunteered many hours of their own time to the campaign. Campaign correspondence disclosed that Ms. Gherardi, in particular, felt considerable pressure to ensure the success of Measure B and, as result, played a very active role in the campaign.

Restricting the use of public resources on ballot measures is vital to the integrity of elections and our most fundamental notions of democracy. The body of law governing this area is complex and often difficult to reconcile with a public agency's perception of its larger policy and service responsibilities. As California voters are increasingly asked to make policy decisions at the ballot box, and public officials are likewise expected and even compelled to

participate in the debate, there are greater pressures and opportunities to run afoul of this prohibition.¹

While we have concluded there is insufficient basis for criminal charges against VCTC, their conduct gives rise to legitimate criticism for campaign activity that violates the law as established by our courts. The overarching objective of this report is to prevent a repeat of these mistakes by VCTC or any other public agency in the future.

¹ For example, local government officials would have great interest in a statewide initiative that would slash local funding and rightfully want to participate in the public debate.

FACTUAL BACKGROUND

VCTC PUBLIC EDUCATION PLAN FOR SALES TAX INITIATIVE

The Ventura County Transportation Commission (VCTC) is a governing board, established in 1988, under the authority of California Public Utilities Code section 130050.1. The Commission is comprised of appointed community members and local public officials (Pub. Util. Code § 130054.1). The Commission develops and implements transportation policies, projects, funding, and priorities under the legislative authority granted by section 180001 of the Public Utilities Code.

Measure B, a local ballot initiative on the November 2, 2004, ballot, sought the implementation of a local sales tax to address local transportation development and repair projects. Passage of the initiative required a two-thirds vote. The ballot initiative failed (58.3 percent NO, 41.7 percent YES).

For more than a decade, VCTC had periodically considered a half-cent sales tax as a means of providing additional funding for highway construction and repair. This proposal was once again considered by VCTC at its regularly scheduled meeting on December 5, 2003. Later that month, VCTC spent \$35,000 in public funds to conduct a voter poll that found significant but insufficient support to achieve the two-thirds vote required for approval. The poll was administered under the direction of a Sacramento-based consulting firm, Townsend Raimundo Besler & Usher (TRB&U). The poll found that voter support ranged from 59 to 66 percent depending on the questions posed to prospective voters. In a January 20, 2004, memorandum, a consultant with TRB&U summarized their analysis of the poll as follows:

In other words, a half-cent sales tax increase to meet Ventura County's growing transportation challenges can be a **winning proposition** with the right program to educate voters. We recommend that Ventura County Transportation Commission launch an education campaign to build public awareness around transportation management problems and a blueprint for transportation improvements that might be included in a future ballot measure. (Emphasis added.)

The TRB&U memorandum also recommended that the public education plan include a direct mail program to registered voters, outreach activities (such as a news conference, opinion editorials and speakers bureaus) and a follow-up poll to “reassess voter sentiment before making a final determination regarding a possible November ballot measure.” The memorandum contained proposed alternative budgets of \$524,900 or \$383,000, depending upon the extent of the mailings.

On January 21, 2004, VCTC held a special meeting where the proposed Public Education Plan was considered. At this meeting, VCTC approved the basic components of the Public Education Plan and a proposed plan budget of \$275,000. The Commission also directed Executive Director Ginger Gherardi to seek additional donations for financing of the plan. The plan was again placed on the agenda at the Commission’s February 6, 2004, meeting where staff recommendations to move forward with the plan were approved. The plan contained a table of specific “Tactic/Audience” actions corresponding to time periods for the actions between February and April 2004. Among other action items, the table included the following tasks expressly focusing on improving voter support for the half-cent sales tax:

- *Supply a PowerPoint presentation, handouts and/or coaching for elected officials who want to take this issue to the public.*
- *Coordinate message with like-minded public agencies as well as civic and social organizations. (Emphasis added.)*
- *Use print and electronic news media to bring the public up to speed about the condition of our local roads and transit systems, and the impact thereon of budget developments at the state and federal levels.*
- *Approach the public directly with the problem and strategy for solving it. (Emphasis added.)*
- *Develop informational piece for direct mail (solicit city/agency/corporation funding and/or in-kind support). (Emphasis added.)*
- *Distribute informational piece via direct mail.*

At the February 6 meeting, proposed ballot language for the initiative was also included in the agenda package provided to the Commission. The vast majority of the provisions in this

first version of the proposed ballot language were identical to those ultimately submitted to the voters on the November 2, 2004, ballot.²

VCTC POSTCARDS

To execute the education plan, VCTC staff developed a series of ten glossy two-sided postcards (attached as exhibit A). One side of the card typically featured a picture of poor traffic and road conditions at an identified Ventura County location. The picture included the VCTC logo and a related “catch phrase” such as “Greetings from Highway 101” and “Greetings from my Street”. On the other side, the postcards contained text explaining the problem shown in the picture. The text also directly stated the problem could be corrected if a transportation tax measure was passed.

At least one of the postcards was mailed to **every registered voter** in Ventura County during the spring of 2004. Other more targeted cards were mailed to voters in the geographic area near the traffic problem depicted in the picture. VCTC staff also distributed the cards at various public meetings and events. It was reported in VCTC communications that Waste Management/Simi Valley Landfill, Centex, California State University Channel Islands, and the City of Port Hueneme also distributed the cards via U.S. Mail. The postcards were additionally given to Metrolink for seat drops and delivered to city halls, libraries, and senior centers throughout the county for placement on information counters. Most Ventura County voters received three cards in the mail over a period of several weeks.

VCTC used a private vendor to print 605,000 cards. Another vendor was used to mail an estimated 575,150 cards to registered voters between March 10 and March 24, 2004. The Commission spent \$163,380 in taxpayer funds to print and mail the cards. Beyond this figure, VCTC also spent \$50,000 in public funds for consultant services and an undetermined amount of staff time in developing the cards. While the VCTC Commission itself clearly

² A few of the provisions on the actual ballot contain different statutory references and some minor text changes, and one provision modified the allocation of proceeds increasing the city and counties share from 30 to 40 percent.

approved a direct mail program and some commissioners saw the postcards before distribution, there is no public record of a vote to approve the actual cards before they were mailed.

APPROVAL OF SALES TAX MEASURE FOR BALLOT

California Public Utilities Code section 180206 requires the board of supervisors and the city councils representing both a majority of the cities and a majority of the population living in cities to approve the sales tax expenditure plan before such a measure can be placed on the ballot. In conformity with this requirement, during the spring of 2004, VCTC staff made presentations to each Ventura County city and the Ventura County Board of Supervisors, ultimately gaining the required approval.

Thereafter, the Commission authorized an additional poll of registered voters. VCTC spent \$25,000 in public funds to conduct the second poll during mid-April 2004. In a May 6, 2004, memorandum, the consultant from TRB&U concluded the poll results, “suggest that voter support for a sales tax for transportation improvements remains high and growing in Ventura County.” During the polling period, several news stories appeared regarding other polls and related actions by the Board of Supervisors. The pollster reported that these stories appeared to reduce support for the half-cent sales tax proposal. Before the stories appeared, poll figures revealed a 68 percent support figure. After the stories appeared, support declined to 60 percent.

Notwithstanding the lower numbers, VCTC officially approved the half-cent sales tax proposal (that became Measure B) at its regularly scheduled meeting on May 7, 2004. The proposed language was then submitted to Ventura County Board of Supervisors on June 15, 2004, and approved for placement on the November 2, 2004, ballot.

VCTC NEWS RELEASE

On August 23, 2004, after Measure B was officially on the ballot, Commission staff issued a news release concerning a new electric bus called “The Wave,” at California State University Channel Islands (attached as exhibit B). The release was issued on VCTC letterhead and

touted the electric bus as a service that would facilitate transportation around the campus in an environmentally sensitive manner.

In doing so, the release also included the following quote from University President Richard Rush supporting Measure B:

This bus, **and support of Measure B** – the half cent transportation sales tax on the November ballot which will help to improve the safety of the Lewis Road entry into the campus – are important transportation developments in our partnership with the Community. (Emphasis added.)

CAMPAIGN E-MAILS

During the height of the campaign, VCTC Executive Director Ginger Gherardi sent a number of e-mails to campaign staff and supporters from her public computer at the Commission offices. The District Attorney's Office requested copies of these e-mails from VCTC but was advised they had been deleted from Ms. Gherardi's computer, and no hard copies had been retained.

The contents of the e-mails were previously summarized in a September 25, 2004, *Ventura County Star* newspaper article. According to the article, one of the e-mails containing a campaign flier had been sent from her home computer to campaign committee members and two campaign consultants. The e-mail asked the recipients to review the flier and contact her at work the next day. The second e-mail had also been composed at her home but was distributed from her office computer. This e-mail detailed the status of campaign fundraising and was sent to the campaign's financial committee. The third e-mail was also composed at her home and distributed from her office. It was sent to two campaign committee members and attached a campaign mailer "for your records."

Ultimately, through additional investigation, in November 2005, the District Attorney's Office located a number of campaign related e-mails, including several that appear similar to the description contained in the above-referenced news article. Most of the e-mails discovered were sent from private computers. However, the investigation did uncover

campaign-related e-mails sent from public computers at VCTC and one e-mail sent from a private computer that invited the recipients to contact the author at the VCTC office. The e-mails sent from public computers included several from Ms. Gherardi and another VCTC employee, Sue Munday. These e-mails are attached as exhibit C including, but not limited to, the following:

1) An August 3, 2004, e-mail sent at 11:19 a.m. by Gherardi from her office computer to a campaign consultant stating, “Here is the logo jpeg. I don’t know that the cards are final – that is up to Chelsea & Bill. Ginger” A draft “Yes on B” campaign postcard is attached to the e-mail. **The actual pictures and photographic layout on the campaign card is identical to one of earlier postcards distributed in March as a part of the public education plan.**³ (Emphasis added.)

2) A September 21, 2004, e-mail sent at 3:17 p.m. by Gherardi from her office computer to campaign committee members stating, “Attached is the final artwork for the front of the absentee piece. It is ready to go to the printer – Call me immediately if there is any problem. Thanks. Ginger” Attached to the e-mail was the front side of an absentee voter mail piece featuring a picture of poor traffic conditions and a statement urging support of Measure B from the Chair of the Ventura County Taxpayers Association. The featured picture was very similar to the pictures contained in the previously distributed post cards.

3) A September 21, 2004, e-mail sent at 3:26 p.m. by Gherardi from her office computer to campaign committee members stating, “Here is the full absentee piece. Ginger.” Both sides of the absentee mail piece were attached to this e-mail. In addition to the traffic picture described above, the back side of the attached mail piece contained an argument in support of Measure B that also described how the funds would be spent.

4) A September 21, 2004, e-mail sent at 11:02 p.m. by Gherardi from her home computer to campaign committee members. The e-mail attached a campaign flyer (not located) and provides a brief update about her efforts that day on Measure B. She also invites the recipients to contact her the next day at the office.

In her interview, Ms. Gherardi stated that she drafted the e-mails on her home computer during the late night and early morning hours. She then sent them to her office computer so she could forward them to e-mail addresses she had at work.

³ This draft campaign mailer was never distributed to voters. Compare exhibit C-12 with exhibit A-1.

CAMPAIGN TELEPHONE CALLS FROM VCTC OFFICES

Following the election and failure of Measure B, the *Ventura County Star* newspaper made public records requests of the VCTC for release of telephone records preceding the November election. The VCTC complied with the requests and provided “thousands” of telephone records to the newspaper. The *Star* assigned several staff members to review the telephone records from VCTC to determine if staff time and resources were used to support the passage of Measure B. The *Star* also interviewed VCTC staff members, including Gherardi, and persons associated with the campaign to support Measure B. From those interviews, the *Star* published stories detailing the use of agency funds and resources during the campaign on Measure B. The *Star* reported that between July and November 2004, VCTC staff made numerous telephone calls to Cerrell and Associates and other Measure B political consultants at an estimated cost of \$66.64.

The District Attorney’s Office obtained and reviewed a copy of the VCTC telephone records from this period. A summary of the VCTC calls to consultants is attached as exhibit D. The District Attorney’s review examined the billing records for a total of eight VCTC phone numbers, including both office and mobile phones. The billing records for these phones were examined for phone calls to 21 separate office, home and mobile numbers utilized by political consultants working on the Measure B campaign. The District Attorney’s review identified 75 calls made from VCTC phone numbers to consultants between June and November 2004. This review only identified outgoing calls to the consultants. The review did not find any incoming calls from consultants to VCTC offices and staff even though incoming numbers were available in the billing records.

Following the news stories about the phone calls, Ms. Gherardi sent a three-page memorandum to “All VCTC Commissioners” on May 9, 2005. In this memorandum, she summarized her version of the Commission’s activities with the Measure B campaign firm and other consultants and the use of VCTC staff time.⁴ Gherardi explained that these calls and all other VCTC staff activity related to the ballot measure were made to provide “informational” material, clarification, and factual data in crafting the ballot language and

⁴ See exhibit E.

addressing questions posed by the public and other government agencies. Gherardi noted that she served on the Measure B campaign committee until September 2004, and that members of the VCTC staff “volunteered their time and money” to support Measure B. Gherardi’s memorandum also stated, “It is unreasonable to expect that anyone, consultant or staff, will remember the exact content of brief conversation or even the specific questions asked on any given day.”

On the same date as Ms. Gherardi’s memo (May 9, 2005), VCTC General Counsel Mitchel B. Kahn submitted an additional legal memorandum entitled “USE Of VCTC FUNDS, PERSONNEL TIME RE: MEASURE B.” This legal memorandum discusses the general law regarding the use of public resources on ballot measures, and emphasizes the legal authorization to use public resources for informational purposes.⁵

Consultants involved in the Measure B campaign were interviewed as a part of this investigation and generally agreed that all calls from VCTC to them were related to Measure B. The general subjects discussed during these calls primarily involved information activities, although one of the consultants recalled discussing fundraising and campaign strategy issues with Ms. Gherardi. Three of the consultants expressed concerns about the appropriateness of Ms. Gherardi’s involvement in the campaign. However, none of those interviewed were able to specifically recall a particular conversation they had with Ms. Gherardi or other VCTC staff after Measure B qualified for the ballot that crossed the line from informational activities to campaign promotion. Nor could they recall the dates of any conversations or identify whether the calls came from a public phone at the VCTC offices or a private phone.

⁵ See exhibit F.

APPLICABLE LAW

California Government Code section 54964 codifies restrictions on local agency expenditures in support of, or in opposition to, ballot measures or the election of candidates. Generally, 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. (Gov. Code § 54964 (a).) The VCTC is a local agency defined by the statute. (Gov. Code § 54951.) The Measure B ballot initiative met the qualifications of a ballot measure as defined by section 54964 (b)(1) once it was certified for the ballot by the Board of Supervisors on June 15, 2004.

No penalty provision is specifically identified for a violation of Government Code section 54964. However, a violation could be enforced criminally under Government Code section 1222, which provides, “Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor.” Even though section 1222 is written in terms of an omission, it has been interpreted to apply to both malfeasance and nonfeasance. For example, the Attorney General of California has concluded that section 1222 might apply to a school board that gives unauthorized cash payments to board members instead of statutorily authorized insurance benefits on the theory that it is an omission to comply with the terms of a statute. (83 Ops.Cal.Atty.Gen. 124 (2000).) Similarly, the Attorney General has concluded that section 1222 could apply to the unauthorized release of peace officer personnel records. (82 Ops.Cal.Atty.Gen. 246 (1999).)

Government Code section 54964 specifically exempts local agency expenditures that:

. . . provide information to the public about the possible effects of a ballot measure on the activities, operations, or policies of the local agency, if both of the following conditions are met:

(1) The informational activities are not otherwise prohibited by the Constitution or laws of this state.

(2) The information provided constitutes an accurate, fair, and impartial presentation of relevant facts to aid the voters in reaching an informed judgment regarding the ballot measure.

(Gov. Code § 54964 (c).)

This statute was adopted by the California Legislature in 2000. (Stats. 2000, ch. 840 (Assem. Bill No. 2078), § 1.) It partially codified significant decisional law from California courts regarding the use of public resources on ballot measures. Much of the decisional law arises out of private lawsuits where individual citizens or organizations alleged improper use of public resources and sought either injunctive or declaratory relief against a public official or public agency.

Stanson v. Mott (1976) 17 Cal. 3d 206 is the leading California Supreme Court case concerning the use of public resources on ballot measures. In that case, Stanson filed a lawsuit alleging the California Department of Parks Director (Mott) used public funds to print and distribute materials promoting approval of an initiative bond that was on the ballot. Stanson also alleged the Director spent state funds on several employees for travel and other expenses related to promotion of the ballot measure. In reversing a lower court's dismissal of Stanson's suit, the Supreme Court held that "a public agency may not expend public funds to promote a partisan position in an election campaign."

However, the court also emphasized that a public agency may appropriately expend public funds to merely provide objective information about a ballot measure, noting:

It is true that in California the need for the dissemination of information concerning ballot measures is somewhat diminished by the existing statutory procedures providing for the preparation of "pro" and "con" ballot arguments (see Elec. Code §§ 3527.1- 3527.4; Gov. Code §§ 88000-88007) as well as an "impartial analysis" of all ballot measures by the Legislative Analyst. (See Gov. Code § 88003.) Nothing in these salutary ballot pamphlet provisions, however, suggests that other public agencies are foreclosed from providing objective information on a proposed ballot measure, and we believe it would be contrary to the public interest to bar knowledgeable public agencies from disclosing relevant information to the public, so long as such disclosure is full and impartial and does not amount to improper campaign activity. (*Stanson* at 221 fn 6 (emphasis added).)

The court recognized that it is often in the public’s best interest to receive a full disclosure of all relevant factors when discussing ballot and other initiative issues. The Court said, “[I]t is generally accepted that a public agency pursues a proper ‘informational’ role when it simply gives a ‘fair presentation of the facts’ in response to a citizen’s request for information or, when requested by a public or private organization, it authorizes an agency employee to present the department’s view of a ballot proposal at a meeting of such organization (citations omitted).” (*Stanson* at 221.)

Ultimately, the court concluded that if Stanson’s allegations were true, the expenditures were improper:

The complaint alleges, inter alia, that defendant Mott authorized the dissemination of agency publications “which were merely not informative but . . . promotional” and sanctioned the distribution, at public expense, of promotional materials written by a private organization formed to promote the passage of the bond act. **If plaintiff can establish these allegations at trial, he will have demonstrated that defendant did indeed authorize the improper expenditure of public funds, and plaintiff will be entitled, at least, to a declaratory judgment to that effect: if he establishes that similar expenses are threatened in the future, he will also be entitled to injunctive relief.** (*Stanson* at 222-223 (emphasis added).)

There are very sound and compelling policy reasons for the prohibition against the use of public funds to promote a partisan position on a ballot measure. As the court noted in *Stanson*:

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 . . . ; 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. (*Stanson* at 217.)

Other court decisions and authorities provide additional guidance concerning the use of public resources on a ballot measure. For example, public officials and agencies may use public funds to formulate and draft proposed initiative language and even seek out a willing

proponent to fund and advance the initiative. (*League of Women Voters v. Countywide Criminal Justice Coordination Committee* (1988) 203 Cal. App. 3d 529, 550. See also, *Stevens v. Geduldig* (1986) 42 Cal. 3d 24, 36.) This type of preparatory activity is authorized because “the action is not taken to attempt to influence the voters either to qualify or to pass an initiative measure.” (*League of Women Voters* at 550.)

A legislative body may also use public funds to take a public position to endorse or oppose a ballot initiative provided the decision is made in the regular course of the body’s public hearing. (*King County Council v. Pub Dis. Com’n* (Wash. 1980) 611 P. 2d 1227, cited with approval in *League of Women Voters v. Countywide Criminal Justice Coordination Committee*, at 560.) However, use of public resources to purchase bumper stickers, posters, or advertising is clearly improper campaign activity. (*Mines v. Del Valle* (1927) 201 Cal. 273, 276; 35 Ops.Cal.Atty.Gen. 112, 114 (1960).) Distribution of campaign literature at public expense is prohibited (51 Ops.Cal.Atty.Gen. 190, 194 (1968)), and campaign expenditure reporting requirements under the Political Reform Act apply to both private and public expenditures. (*Fair Political Practices Com. v. Suitt* (1979) 90 Cal. App. 3d 125, 132.)

Even though a proposed measure is not yet officially on the ballot, it still may be improper to expend public resources to influence voters on a future ballot measure. (*Common Cause v. Duffy* (1987) 200 Cal. App. 3d 730; *Miller v. Com. on Status of Women* (1978) 87 Cal. App. 3d 762; and 73 Ops.Cal.Atty.Gen. 255, 266 (1990).)

In *Common Cause v. Duffy*, *supra*, a taxpayers lawsuit was brought against San Diego County Sheriff Duffy for using public resources to distribute postcards to citizens intended for subsequent mailing to the Chief Justice of California (Rose Bird) urging her to resign. The taxpayers prevailed in the trial court and were awarded attorney’s fees. On appeal, the sheriff contended the attorney’s fees were improper. In affirming the lower court’s decision and award of attorney’s fees, the court of appeal found the distribution of the postcards to be improper, even though the sheriff contended the postcards did not involve a political issue since the postcards did not mention any election, campaign, vote or ballot measure. In rejecting this claim, the court stated:

Here, the postcards were printed by a private campaign committee, Crime Victims for Court Reform, expressly organized to force Rose Bird to resign and failing that to defeat her in the retention election. The postcards did not merely present the facts both good and bad as to the Chief Justice's tenure or her judicial opinions but rather argued only one side. Distribution of these postcards was not "informational" activity; it was political. **The fact the retention election was more than two years away did not make the postcards any less political. The campaign involving the retention of Chief Justice Bird was already underway as evidenced by the organization of campaign committees, e.g., Crime Victims for Court Reform and the Committee to Conserve the Courts . . .** (*Supra* at 24-25.) (Emphasis added.)

In *Miller v. Com. on Status of Women*⁶, *supra*, members of a state agency, the California Commission on the Status of Women, prepared brochures, white papers, news articles, radio tapes and television spot announcements and gave speeches advocating the Legislature's ratification of the Equal Rights Amendment to the United States Constitution. The Equal Rights Amendment was not a matter for the electoral process since it was a subject for ratification in the Legislature. However, the commission's lobbying efforts also sought to develop grass roots support for the amendment by urging voters to lobby their legislators. The court relied upon *Stanson v. Mott* and emphasized that it was "not the objective of the promotional activity but the audience to which it is directed" that was the key focus for determining the propriety of the expenditure and held that "any expenditures of public funds to marshal public support for the Equal Rights Amendment were unauthorized . . ." (*Miller* at 771-772.) In reaching this result, the court stated:

It is one thing for a public agency to present its point of view to the Legislature. It is quite another for it to use the public treasury to finance an appeal to the voters to lobby their Legislature in support of the agency's point of view. The latter "undermines or distorts the *legislative* process" just as clearly as "the use of the public treasury to mount an election campaign . . . [distorts] the integrity of the *electoral* process." (*Miller* at 768-769.)

Similarly, relying upon the *Miller* holding, the Attorney General has concluded that public agencies may not expend public funds to gather signatures to "qualify" an initiative or referendum for the ballot. (See 73 Ops.Cal.Atty.Gen. 255, *supra* at 266.) In reaching this conclusion, the Attorney General stated:

⁶ For subsequent history on issue of attorneys fees, see *Miller v. California Com. on Status of Women II* (1985) 176 Cal. App. 3d 454.

In our view, securing signatures at public expense for a proposed initiative would “cross the line of improper advocacy or promotion of a single point of view in an effort to influence the electorate.” Procedurally, once a proposed initiative or referendum is filed either at the state or local level, it is the proponents’ task to qualify the measure for the ballot by obtaining the requisite number of signatures and filing the petition Accordingly, using public funds to obtain signatures would aid the proponents by essentially financing their partisan task. As such, the funds would be used to advocate the position taken by the proponents that the measure they support should not only qualify for the ballot, but should be adopted by the electorate. This we believe is the clear message that is given to the electorate when signatures on a petition are sought. The point of neutrality would be passed. This the public agency cannot do without clear and explicit authorization under *Stanson v. Mott*.

A very recent California Attorney General opinion is particularly instructive on the scope of permissible preparatory government expenditures for a contemplated ballot measure. (88 Ops.Cal.Atty.Gen. 46 (2005).) In this opinion, the Attorney General considered, among other issues: (1) whether a community college district could use district funds to hire a consultant, conduct opinion surveys, and establish focus groups to assess the public’s knowledge and support for a bond measure; and (2) whether the college district could use district funds to hire a consultant to develop and implement a strategy for building the broadest possible coalition in support of the measure, including financial support. The Attorney General concluded that while funds could properly be used to assess public support, they could not be used if the purpose or effect is to develop a campaign to promote approval of the bond measure. In reaching this conclusion, the Attorney General stated:

We conclude that in preparation for submitting a bond measure to the electorate for approval, a community college district may not use district funds to hire a consultant to develop and implement a strategy for building the broadest possible coalition in support of the measure and the financial support for a campaign (88 Ops.Cal.Atty.Gen. 46, *supra* at 53.)

In determining whether materials are “promotional” as opposed to “informational,” there is no hard and fast rule. Careful consideration will be given to the style, tenor and timing of the material or advertisement. (35 Ops.Cal.Atty.Gen. 112 (1960).) In this opinion, the Attorney General reviewed an advertisement placed in a newspaper by a school board the day before an election on a school bond. The advertisement did not directly urge a yes vote but instead stated in large letters that “a classroom emergency exists now” and listed reasons why

additional funds were needed by the school district. The Attorney General concluded that even though the advertisement did not urge a yes vote, it was an improper expenditure of public funds:

Viewed as a whole, the advertisement cannot properly be held to be a publication primarily designed to educate the voters as to the activities carried on by or the condition of the schools of the district The style, tenor, and timing of the advertisement placed by the board of trustees points plainly to the conclusion that the publication was designed primarily for the purpose of influencing the voters at the forthcoming school bond election. (35 Ops.Cal.Atty.Gen. at 114.)

In *Buckley v. Valeo* (1976) 424 U.S. 1, 44, fn. 52, the court listed so-called “magic words” of advocacy necessary to restrict political speech such as “vote for,” “support,” or “cast your ballot.” Regulations of the Fair Political Practices Commission define “expressly advocates” as also including language which, “taken as a whole, unambiguously urges a particular result in an election.” (Cal. Code Regs., tit. 2, § 18225, subd. (b)(2).) This standard has been applied to expenditures by government agencies regarding ballot measures. (*Schroeder v. Irvine City Council* (2002) 97 Cal. App. 4th 174, 186.) However, a more recent decision by the California Court of Appeal casts doubt on the FPPC regulation by limiting “express advocacy” to “explicit words of advocacy.” (*Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal. App. 4th 449.) The court stated:

While “the examples of express advocacy listed in the *Buckley* footnote are illustrative rather than exhaustive because there are a variety of other words and phrases that convey precisely the same meaning,” . . . the definition of “express advocacy necessarily requires the use of language that explicitly and by its own terms advocates the election or defeat of a candidate.” (*Id.* at pp. 470-471.)

The same analysis would apply to ballot measures.

ANALYSIS OF VCTC ACTIVITIES RELATED TO MEASURE B

A thorough analysis of the propriety of VCTC staff phone calls to Measure B campaign consultants cannot be accomplished in a vacuum; we must also consider other activities of VCTC in connection with this ballot measure. The postcards, news release, campaign e-mails, and telephone calls when viewed in their totality reveal a disturbing pattern of activities directed at influencing voters to support the sales tax.

POSTCARDS

VCTC was the primary proponent of Measure B and in that capacity participated in the development of the ballot language and significant additional preparatory activities that contemplated this measure being on the ballot. The Board of Supervisors approved Measure B for the ballot on June 15, 2004. Under Government Code section 54964(b)(1), a public expenditure to support or oppose an initiative is only unlawful if the initiative has been “certified to appear on a regular or special election ballot.” When the Board of Supervisors approved Measure B on June 15, they effectively “certified” it for the ballot. Thus after June 15, 2004, a public agency, even the proponent, could not use public funds and/or resources to “promote” the ballot measure.

This important distinction of timing may have influenced VCTC staff decisions regarding the postcards. The development and distribution of the ten high-gloss, unambiguous promotional postcards was accomplished with public resources at considerable taxpayer expense. Had this occurred after ballot certification, the conduct would have clearly violated Government Code section 54964. While the timing of the postcards does not meet the requirements for criminal charges under Government Code sections 54964 and 1222, it was still an improper public expenditure under California decisional law.

The cards went far beyond the type of preparatory activity approved in *League of Women Voters v. Countywide Criminal Justice Coordination*, *supra*, because they were distributed to influence voters. The Commission’s use of voter polls before and after the postcard

distribution confirms the intent to target and influence the voter audience.⁷ Moreover, ballot preparatory activity demonstrated a strong determination to submit the tax measure to the voters despite apparent obstacles. The proposed ballot language was prepared and submitted to the Commission concurrently with the public education plan and results from the first poll. Commission staff diligently appeared before every city council in the county and the Board of Supervisors to garner statutorily required support for the new sales tax expenditure plan. Even though results of the second poll were only slightly better than the first, VCTC still moved forward with the ballot measure. In short, it appears that VCTC staff, at a minimum, consciously anticipated the tax measure appearing on the November ballot when they distributed the postcards in March 2004. The postcards specifically refer to voter approval of a half-cent transportation sales tax in Ventura County, with cost estimates for specified projects that would be funded by the measure.

The postcards cannot be reasonably characterized as the type of “informational” material the court approved in *Stanson v. Mott* for several reasons. First, they were polished, professionally developed marketing pieces designed to influence voters, not simply inform them. Political consultants have long recognized that voters are more easily influenced by negative rather than positive ads. No commuter likes congestion and traffic, and by depicting photos of congested traffic, the postcards sought to capitalize on such negative voter sentiment. The postcards even used catch phrases, such as “Greetings from Highway 101” that, when placed in the context of the photo, were provocative rather than informational. Thus, the postcards were much like the “state of emergency” advertisement that the Attorney General previously concluded was promotional. (35 Ops.Cal.Atty.Gen. 112 (1960).)

In this regard, the proposed Measure B campaign card attached to Ginger Gherardi’s August 3, 2004, e-mail is particularly telling. At the time this e-mail was sent, Measure B was already certified for the ballot, and the campaign to obtain voter support was well under way. Urging a ‘yes’ vote on Measure B was the paramount objective of any campaign flyer. With this foremost goal in mind, VCTC staff consciously distributed a draft campaign mailer containing identical photographs and even the exact photographic layout as one of the ten

⁷ The first poll, but not the second poll, was legally authorized under the authority of *League of Women Voters v. Countywide Criminal Justice Coordination, supra*.

postcards previously distributed in March. While this proposed mailer was never distributed to voters, VCTC staff's willingness to consider this design demonstrates their recognition of the postcards' promotional value.

Second, the text on the back of the cards consistently pushed voters to support the transportation tax measure. By using provocative language criticizing state government for a lack of funding while describing a road or highway problem in harsh terms emphasizing the new tax as a solution, the postcards unequivocally urged support. For example, a review of the postcards reveals the following phrases:

- *We are already gridlocked . . .*
- *Traffic is already moving at a snail's pace . . .*
- *Right now traffic is slower than molasses . . .*
- *Pennies on purchases . . . add up to millions of dollars*
- *Transit riders . . . deserve better service*
- *We are totally at [the] mercy of the State budget*
- *The bus and dial-a-ride systems are more than a convenience – they're a lifeline*
- *We are losing the battle to keep our local streets safe and free of potholes*
- *Virtually transforming the road into a parking lot*
- *Shortchanged!*
- *Running on Empty*

One of the postcards states, "The Ventura County Transportation Commission has drafted a plan to make local roads safe and get our highways moving again. A local half-cent transportation sales tax, if placed on the November 2004 ballot and approved by Ventura County voters, would generate approximately \$50 million a year" to accomplish various listed benefits, which "could begin construction within six months of Ventura County voters' approval of a local sales tax measure." It is our opinion that this language, by its own terms, expressly advocates passage of an identified bond measure, even under the restrictive test of *Governor Gray Davis Committee v. American Taxpayers Alliance*, discussed above.

Third, the text on the back of the postcards was not objective. For example, one of the postcards dealt with the need for improvements to Highway 101. The postcard emphasized that given the state budget crisis and lack of local funding, Highway 101 improvements would have to wait until the year 2048. The text then asserted in bold print that if the half-cent sales tax was approved, **“Development of this project could start immediately upon passage of such a measure in Ventura County.”** This bold statement was somewhat misleading. Distribution of the cards began on March 10, 2004. One day earlier, on March 9, 2004, Ms. Gherardi appeared before the Board of Supervisors, where she offered the following statement concerning the timing of the improvements to Highway 101 if the half-cent sales tax was approved:

On 101, and this is the question that Supervisor Flynn asked, the total cost of that project is \$545 million. It’s about \$350 million to get from the LA county line to highway 33. The remaining money is from 33 up to the Santa Barbara County line and the likelihood is that project would be done in pieces. It would not be done all in one big contract but we would be doing selected areas of it. **We can’t start this in six months but we can get this into construction within three to five years which is a heck of lot better than 2048 and that’s basically the difference that we’re looking at here.** (Emphasis added.)

While the terms “development” and “starting construction” are not synonymous, the testimony before the Board of Supervisors appears largely inconsistent with the assertion in the postcard that development could start immediately. The objectivity of the postcards is also lessened by their failure to acknowledge or address the claims of opponents that a local transportation tax would actually lessen state funding, and highway expansion would generate more development and growth and lead to more vehicle traffic and pollution.

The original goal of the public education plan – namely increasing voter support for the sales tax measure – is also more consistent with a “promotional” rather than “informational” objective. The plan was developed by TRB&U, a political consulting firm whose Web site touts an ability to influence voters.⁸ The vast majority of cards were selectively distributed to

⁸ The TRB&U Web site (www.trbu.com) states: “Our principals have a solid 30-year track record of winning tough races. From polling & strategy development to grass roots operations and direct voter contact, we design and manage campaigns that win Whether it’s working behind the scenes with decision-makers or

registered voters, not the broader audience of all Ventura County households. During the distribution period, VCTC staff also attended city council meetings to make presentations on the proposal to obtain the required city approval for the expenditure plan. Further, the “Yes on B” campaign committee had already been developed and scheduled its first meeting before the Board of Supervisors even certified the initiative. Thus, like the campaign to oust Rose Bird in *Common Cause v. Duffy*, *supra*, the campaign for Measure B was underway long before it was officially placed on the ballot, and the cards were used to “promote” the tax when it was reasonable to assume it would be on the ballot.

Government Code section 54964(b)(1) expressly requires the measure to be “certified to appear on a regular or special election ballot” before the statutory prohibition against the use of public funds can be enforced. Distribution of the postcards effectively used public resources to “promote” an anticipated ballot measure, while skirting the legal prohibition contained in Government Code section 54964 by virtue of their timing. Moreover, since violations of this section are misdemeanors, prosecution must be commenced within one year of violation,⁹ and as they were distributed from March 10 through March 24, 2004, the statute of limitations expired long before any complaint was submitted to the District Attorney’s Office. Thus, no criminal prosecution may be brought in connection with the postcard distribution.

However, the California decisional law discussed at length above leaves little doubt the postcards were improper and exposed the Commission to a private party action seeking declaratory and injunctive relief. While a private organization or citizen could have brought such a lawsuit, and in our view would have prevailed, California law does not authorize the district attorney to bring such a civil action. “[T]he California Supreme Court has held that the district attorney may not prosecute a civil action in the absence of specific legislative authorization (*People v. McKale* (1979) 25 Cal. 3d 626, 632-633 [159 Cal. Rptr. 811, 602

mounting a grass roots campaign to rally the public behind your cause – we help our clients succeed throughout the political process, not become a victim of it.”

⁹ Penal Code section 802(a) and Government Code section 1222. Since this violation is a misdemeanor, the one-year statute of limitations is not extended for late discovery of the violation. See Penal Code section 803(c).

P.2d 731]; *Safer v. Superior Court* (1975) 15 Cal. 3d 230, 236) . . .” (*Worth v. Superior Court* (1989) 297 Cal. App. 3d 1150, 1152.)

Government Code section 8314 does authorize the District Attorney or the Attorney General to seek civil penalties in the amount of \$1,000 per violation “for any elected state or local officer, including any state or local appointee, employee, or consultant, [who] use[s] or permit[s] others to use public resources for a campaign activity.^[10]” This section applies only to violations that are “intentionally or negligently” committed. As noted above, there is no evidence that VCTC staff intentionally sought to violate campaign finance law. Indeed proof of either an intentional or a negligent violation would be difficult because evidence establishes that VCTC actually sought and relied upon legal advice on Measure B activities.

There is also an issue regarding whether the distribution of the postcards qualifies as “campaign activity” under this statute since it relies upon definitions contained in California’s Political Reform Act.¹¹ Under the Act and related FPPC regulations, if the postcards are found to be an “independent expenditure,” they must expressly advocate the “*qualification*, passage or defeat of a clearly identified ballot measure.”¹² (Emphasis added.) The term “qualification” typically refers to the process of gathering signatures necessary to place an initiative on the ballot rather than the process of a legislative body directly placing a measure on the ballot. Alternatively, if the postcards are found to be an “in-kind contribution,” since VCTC was the proponent of Measure B, “express advocacy” is not required. Since the Fair Political Practices Commission has the primary authority for interpreting and implementing the Political Reform Act, which includes the authority to make the determination of whether the postcards were an independent expenditure or contribution, the District Attorney is referring this matter to them for independent review. If the FPPC determines the postcards to be an in-kind contribution, VCTC may be subject to either civil or administrative penalties in an action by the FPPC.

¹⁰ There is a four-year statute of limitations for violations of this statute. Government Code section 8314 (c)(3) provides “No civil action alleging a violation of this section may be commenced more than four years after the date the alleged violation occurred.”

¹¹ Gov. Code § 81000 et seq.

¹² Gov. Code § 82031; Cal. Code Regs., tit. 2, § 18225.

Beyond Government Code section 8314, there is no statutory authorization for the District Attorney to bring a civil action seeking declaratory and/or injunctive relief for the improper use of public resources on a political campaign.

NEWS RELEASE

The VCTC news release and staff e-mails were issued long after Measure B was officially certified for the ballot.¹³ As a result, both of these staff actions fall within the period under Government Code section 54964 when public resources may not be expended to “promote” a ballot measure. However, for the reasons discussed below, there is insufficient evidence to prove criminal violations for either of these actions.

With regard to the news release, VCTC incorporated the following quote from California State University Channel Islands President Richard Rush:

This bus, and support of Measure B – the half cent transportation sales tax on the November ballot which will help to improve the safety of the Lewis road entry into the campus – are important transportation developments in our partnership with the community.

Beyond this sole reference to Measure B, the balance of the lengthy news release focused on a new electric bus called “The Wave.” The University had good reason for interest in Measure B because if approved, funds would have become available for the expansion of Lewis Road, a project directly improving traffic entering the University campus. While the quote indirectly urges support for Measure B, it is factually accurate and does not contain the provocative tone and language typically associated with “promotional” campaign material. Moreover, the statement did not come directly from VCTC staff or a member of the Commission, but instead came from an independent, albeit interested, University official.¹⁴ As a consequence, while we believe it would have been more prudent for VCTC staff to exclude the reference to Measure B from the news release, this action is not the type of “promotional” activity Government Code section 54964 seeks to proscribe.

¹³ The Ventura County Board of Supervisors certified Measure B for the ballot on June 15, 2004. The news release was issued on August 23, 2004. The e-mails were distributed primarily in August and September 2004.

¹⁴ University President Richard Rush was a member of the “Yes on B for a Better Ventura” Campaign Committee.

E-MAILS

The e-mails attached in exhibit C primarily involved Gherardi and one other staff members' use of public computers for communications within the Measure B campaign committee. One campaign-related e-mail, sent by Gherardi from her private computer, also invited several committee members to contact her at the VCTC office about the campaign. These communications consistently involved distributions that were limited to members of the internal working committee and/or campaign political consultants. There is no evidence that VCTC staff used public computers to broadcast promotional campaign e-mails to a large audience, such as voters. Instead, the e-mails typically involved campaign communications such as the distribution of draft campaign flyers for review and comment. The e-mails appear to involve only minimal cost.

Expenditures are unlawful under Government Code section 54964 only if they involve “a payment of local agency funds that is used for communications that expressly advocate the approval or rejection of a clearly identified ballot measure.” (Gov. Code § 54964(b)(3).) The plain language and legislative history of section 54964 strongly suggest that it was adopted to prevent government agencies from using public funds to directly influence voters on ballot measures or candidates.¹⁵

The VCTC staff e-mails do not appear to meet this standard. In this case, the communications were to committee members and consultants, who, by virtue of their position on the campaign, were already supportive of Measure B. They were not distributed to voters and on their face appear intended more for internal campaign communications than

¹⁵ Government Code section 54964 was adopted by the Legislature in 2000. See Stats. 2000, chapter 840, section 1, Assem. Bill No. 2078 (Granlund). The bill's author, Assemblyman Granlund, stated the bill was necessary because there had been abuses of the Secretary of State's guidelines for registering voters and encouraging voter participation. See August 25, 2000, Senate Rules Committee Floor Analysis. The analysis also cited an expenditure of public funds by the City of Irvine as an example demonstrating the need for the proposed legislation. The City of Irvine expended \$300,000 in public funds for get-out-the-vote, phone banks, and absentee mailers in support of Measure F, a local initiative designed to undermine efforts to make El Toro Marine Corps Air Base an international airport. (The expenditures had been the subject of an unsuccessful lawsuit that pre-dated the legislation. See e.g., *Schroeder v. Irvine City Council* (1992) 97 Cal. App. 4th 174.) Thus, the communications targeted by legislation involved those directed to voters. See also, *Buckley v. Valeo* (1976) 424 US 1, 44-45.

advocacy. At least one of the draft mailers sent in this manner was never distributed to voters.

Alternatively, one might argue that the e-mails should fall within the statute's ambit because they involved preparatory activity directly related to mail pieces that were ultimately intended to "expressly advocate" a voter position on Measure B. We believe it is unlikely a court would adopt the latter interpretation due to the contents of the communications, the small number and cost of e-mails actually sent, and the recipients' status as committee members – not voters.

Furthermore, even if the e-mails were construed to meet this requirement, the statute of limitations for prosecution expired on September 21, 2005, nearly two months before the District Attorney's Office was able to obtain copies of the subject e-mails. Consequently, no criminal charges related to the e-mails can be filed.

The analysis, however, does not end at this point. The distribution of e-mails involved the use of public computers within the framework of a campaign committee and paid political consultants. The committee and consultants were working diligently to secure the passage of Measure B. The *Yes on B for a Better Ventura County* Committee was already a registered recipient committee with the Secretary of State that was actively engaged in raising and spending funds to support the campaign.¹⁶ Though the distribution of e-mails was not widespread and may have been inadvertent as reported by Gherardi, when considered within the context of other campaign related activities by VCTC staff, we conclude it was an improper use of public resources under decisional law. Therefore, using public computers in this manner further exposed the Commission to a lawsuit for declaratory and/or injunctive relief.

Government Code section 8314 may also apply to the e-mails. However, subsection (b)(2) of this statute provides, "Campaign activity does not include the incidental and minimal use of public resources such as equipment or office space for campaign purposes, including the

¹⁶ The *Yes on B for a Better Ventura County* Committee first registered with the Secretary of State on July 8, 2004. The committee's campaign report for the period July 1 through September 30, 2004, reflects total contributions to the committee in the amount of \$110,627 and expenditures of \$205,809.

referral of unsolicited political mail, telephone calls and visitors to private political entities.” Beyond the limited description contained in the statute itself, there is no further statutory or case law clarification of the terms “minimal” and “incidental.” Given the pattern of conduct by VCTC and the numbers of campaign e-mails, the District Attorney does not believe they were merely “incidental” or “minimal.” However, due to the de minimis cost of the e-mails distributed via public computers and the contention that at least some of these e-mails were sent inadvertently, we do not believe prosecution of these incidental violations is warranted in the exercise of prosecutorial discretion. As discussed further below, we are referring these matters to Fair Political Practices Commission for their independent determination of whether further action is warranted.

PHONE CALLS

VCTC telephone records were examined for the period June through November 2004 to identify any phone calls made to political consultants working on the campaign. The bills for eight different VCTC phone numbers were reviewed for calls to 21 separate consultant phone numbers. Five separate consultants worked on the campaign in various capacities. A total of 75 phone calls to consultants were identified, covering 5 hours 29 minutes (See exhibit D).¹⁷ The records also reveal that many of the phone calls were very brief, lasting only one to three minutes. The District Attorney’s investigation found no evidence of VCTC phones being used for voter phone banks or other high volume phone contacts directly with voters.

VCTC staff and their counsel have consistently maintained these calls were solely for the purpose of providing information to consultants in response to inquiries from the public and other sources. In her May 9, 2005, memorandum regarding this issue, Gherardi wrote that some of the phone calls were necessary to finalize the ballot language because County Counsel rejected the original language submitted. She also indicated that VCTC staff received and responded to numerous calls from consultants requesting information and/or clarification on facts concerning the initiative. Other calls were necessary to schedule various community presentations given by VCTC staff and selected Commissioners.

¹⁷ The *Star* news article identified 88 phone calls at a combined length of 9.5 hours.

California Government Code section 54964(c)(2) permits a local agency to disseminate “accurate, fair, and impartial presentation of relevant facts to aid the voters in reaching an informed judgment regarding the ballot measure.” VCTC staff’s use of public phones on Measure B violates the prohibition contained in Government Code section 54964(a) only if it can be proven that VCTC phone resources were used to “promote” Measure B in accordance with subsection 54964(b)(1).¹⁸ Determining the character of these phone calls necessarily requires an examination of the content of the phone conversations to find out if “promotional” or “informational” subjects were discussed.

For this reason, all five consultants that worked on the Measure B campaign were interviewed. Unfortunately, none of them could recall the specific contents of any one conversation. Instead, they generally characterized the content of their conversations with VCTC staff as “informational” in nature. For example, consultants recalled requesting information regarding accident statistics, Caltrans projects, anticipated road repairs, highway expansion projects, and other information they believed the public needed to know to make an informed decision on the ballot. They also described VCTC as being the primary source of information about Ventura County roads and how the initiative would affect county transportation. However, three consultants recalled, without significant detail, campaign related conversations with VCTC staff. One consultant stated that every conversation with VCTC staff was “completely related” to Measure B, and a significant number of those calls involved fundraising discussions. The consultant also generally recalled other conversations that involved information and ideas about campaign flyers and mailers. Another consultant stated that some of the calls from Gherardi “crossed the line,” moving from factual information to campaign strategy including fundraising and sign posting.

None of the consultants could state with any confidence whether phone calls they received from VCTC staff were made from public phones or private phones. Nor could any of the consultants specifically recall a particular conversation involving promotional discussions

¹⁸ Government Code subsection 54964(b)(1) provides in pertinent part, “Expenditure means a payment of local agency funds that is used for communications that expressly advocate the approval or rejection of a clearly identified ballot measure”

with any degree of detail. Nor could they recall the date of any conversation with VCTC staff about campaign strategy.

Notwithstanding the VCTC phone records of calls made to campaign consultants, the only definitive evidence available to determine if VCTC funds were used to promote Measure B lies with the recollection of the parties contacted by phone from the VCTC during business hours. As noted above, no one interviewed could specifically remember a particular conversation that crossed the line from informational to promotional during the Measure B campaign.

Under these circumstances, while there is evidence that Ms. Gherardi and other VCTC staff engaged in conversations with consultants that involved campaign strategy and fundraising,¹⁹ there is insufficient evidence to establish when these conversations occurred and whether public telephones were used for these communications. Moreover, like the e-mails, these conversations were limited to internal members of the campaign and did not involve direct communications to the voters. For all these reasons, there is insufficient proof to establish beyond a reasonable doubt that any VCTC staff member violated Government Code section 54964 by virtue of making campaign-related calls from VCTC telephones.

REPORTING REQUIREMENTS OF FAIR POLITICAL PRACTICES ACT

A governmental entity may be considered a “committee” under California’s Political Reform Act (Gov. Code § 81000 et seq.) that is required to report independent expenditures in excess of \$1,000 that expressly advocate the qualification, passage or defeat of a clearly identified ballot measure.²⁰ In this matter, the VCTC expenditure of \$163,380 in taxpayer funds for the printing and distribution of the postcards to Ventura County voters and distribution of campaign related emails via public computers may be a violation(s) of the independent expenditure reporting requirements. As discussed above, the postcards may alternatively

¹⁹ In fact, VCTC staff use of public computers for campaign communication supports an inference that public telephones were also used for campaign communications.

²⁰ Gov. Code §§ 82013, 82031 and 84203.5; Cal. Code Regs., tit. 2, §§ 18215, 18225 and 18420; *Fair Political Practices Com. v. Suitt* (1979) 90 Cal. App. 3d 125, 128-132.

constitute an “in-kind” contribution by VCTC to the Measure B campaign under the Political Reform Act reporting requirements.

The District Attorney has authority to bring a criminal misdemeanor prosecution for a knowing or willful violation of the reporting requirements within four years of the violation. (Gov. Code § 91000.) The District Attorney and the Fair Political Practices Commission also have authority to bring a civil action for intentional or negligent violations of reporting requirements. (Gov. Code §§ 91001(b), 91004.) The FPPC also has authority to bring an administrative action for violations of reporting requirements. (See Gov. Code §§ 83116, 83116.5.) In the present case, the determination of VCTC’s reporting obligation rests in the interpretation of whether the postcards are an independent expenditure or an “in-kind” contribution under the Political Reform Act and a related administrative regulation adopted by the FPPC. (See Cal. Code Regs., tit. 2, §§ 18420, 18225.) While we believe the evidence is insufficient to prove an intentional violation of reporting requirements, there may be a basis for civil or administrative action by the FPPC, which does not require that such intent be established. (See Cal. Code Regs., tit. 2, §§ 18420, 18225.)

For those reasons, as to the reporting requirements in the present case, the District Attorney is deferring to the Fair Political Practices Commission, which has primary responsibility for interpreting and implementing this statutory scheme. (Gov. Code §§ 83111, 83112.) Violations of the Act’s reporting requirements may be subject to civil fines and prosecution in the discretion of the Fair Political Practices Commission.²¹ Consequently, we are referring a copy of this report to that agency for their independent review as to whether further action is warranted and appropriate.

²¹ Gov. Code §§ 83116, 91000 et seq.

CONCLUSIONS

1. The printing and mailing of the postcards was an improper expenditure of public funds in support of a ballot measure under California decisional law. This expenditure cannot be prosecuted as a crime under Government Code section 54964 because the postcards were distributed prior to ballot certification and the one-year statute of limitations for criminal prosecution has expired.
2. Due to insufficient evidence that the violations were intentional and/or negligent in light of VCTC staff's reliance on the advice of its counsel, and uncertainty as to whether this statute applies to measures that have not yet been placed on the ballot by the Board of Supervisors, the District Attorney declines to bring a civil action for the distribution of the postcards under Government Code section 8314.
3. The inclusion of one reference to Measure B in the August 2004 news release regarding new bus service for California State University Channel Islands did not constitute promotional campaign material and did not violate campaign laws.
4. The distribution of e-mails cannot be prosecuted as a crime under Government Code section 54964 because they were distributed to campaign staff and to coworkers rather than to voters, and the statute of limitations has expired. Nor will the distribution of e-mails be civilly prosecuted under Government Code section 8314 because they were not sent to voters, some may have been sent inadvertently and the cost to the public was minimal. Further, administrative sanctions appear to be the most appropriate consequence for such conduct. We are thus referring the matter to the FPPC for its evaluation and possible administrative enforcement action.
5. The telephone calls to campaign staff included permissible informational conversations. While some of these calls involved campaign communications, there is insufficient evidence to establish whether those calls were made from Commission

telephones, or when such calls were made for purposes of any criminal or civil prosecution.

6. VCTC may have had a responsibility to report their expenditures under California's Political Reform Act. Because the evidence is insufficient to establish a criminal violation and because the FPPC has primary responsibility for interpreting reporting requirements, the District Attorney is referring the issue to the Fair Political Practices Commission for its evaluation and possible administrative enforcement action.

While no charges can be filed by the District Attorney in this case, the District Attorney's investigation revealed a disturbing pattern of improper activities by VCTC staff in support of Measure B. These activities used public resources to advocate a position with voters and to facilitate campaign communications among members of a registered campaign committee. By doing so, VCTC staff exposed the agency and themselves to potential civil and criminal liability and public criticism. While the actions most certainly were motivated by a genuine desire to improve transportation, they were still improper.

As noted at the beginning of this report, the restriction of public expenditures on ballot issues is important to ensure fair elections and protect our democracy. Given the breadth of ballot measures facing local government officials during most election cycles and the inherent difficulties associated with this complex area of law, this report is being broadly distributed to local government officials. By doing so, the District Attorney hopes it proves useful in helping officials avoid similar problems on future ballot measures