

THE NEED FOR ACCURACY AND IMPARTIALITY OF BALLOT MEASURE QUESTIONS

EXECUTIVE SUMMARY

In every California election, voters are asked to approve numerous ballot measures proposed by state, county, and municipal governments as well as other government agencies. While their subject matter is wide-ranging, all ballot measures have at least one thing in common: they all start with a question – a question required by law to be brief, accurate and impartial.

In response to a citizen’s complaint that local ballot questions have failed to live up to these requirements, the grand jury investigated how government sponsored (as compared to citizen initiated) ballot questions are typically prepared in Alameda County. Our investigation focused exclusively on the accuracy, transparency and impartiality of ballot questions (formally known as “ballot labels” and also called “ballot titles”) and on the processes used to draft them – without regard to the policy questions underlying the measures.

The grand jury found several problems in the ways ballot questions are drafted. In general, we found ballot questions suffer from a “proponent’s bias” that is a natural outgrowth of the typical process through which questions are selected, drafted, and proposed. We organized this and other problems we identified into several categories, each exemplified by the language of one or more of the questions we reviewed. In general, we found that ballot questions too often fall short of what voters have a right to expect in terms of transparency and impartiality, even when satisfying minimum legal standards.

The grand jury believes voters deserve better ballot questions. We are proposing the Alameda County Board of Supervisors create an advisory panel, comprised of citizen volunteers, which would review ballot questions for truthfulness and impartiality. In the period leading up to each election, the advisory panel would review and rate questions submitted on a voluntary basis by the jurisdictions proposing them. We believe such a panel and process would improve transparency and completeness of ballot questions while working within the tight timelines required for ballot submissions.

BACKGROUND

We use the term “ballot question” to refer to the question posed to voters in connection with every ballot measure. The ballot question, formally called the “ballot label” in state law, must

not exceed 75 words.³ Although they are legally required to be accurate and impartial, ballot questions are often criticized for failing to live up to these requirements. For example, in a June 2020 joint editorial, the San Jose Mercury News and East Bay Times complained that ballot questions are too often misleading and manipulative: “too many local government leaders, their attorneys and taxpayer funded campaign consultants continue to write ballot measures and voter material to tout the benefits while glossing over, or even hiding, the true costs.”⁴ The editorial proposed several guidelines that municipal officials should follow when they draft ballot questions.

In response to a citizen’s complaint echoing these editorial opinions, the grand jury investigated how government-sponsored (as compared to citizen-initiated) ballot questions are typically drafted in Alameda County. Throughout our investigation, we focused only on the *language of the ballot questions*—the degree to which the questions accurately, transparently and impartially reflected the measures concerned—without regard to the merits of the measures. Consistent with this approach, although the grand jury selected six ballot measures for in-depth study, our purpose was not to investigate the jurisdictions or officials that drafted the questions for those measures. Rather, we sought to understand more generally the processes through which ballot questions are written and revised prior to their approval by city councils or equivalent bodies.

The grand jury believes voters deserve better ballot questions. We are proposing the Alameda County Board of Supervisors create an advisory panel, comprised of citizen volunteers, which would review ballot questions for truthfulness and impartiality.

The grand jury reviewed applicable legal requirements for truth and impartiality of ballot questions, and the processes by which questions are challenged in court. An understanding of both dimensions – the underlying legal requirements that questions must satisfy *and* the legal standards that courts apply when questions are challenged – is necessary to fully appreciate the context in which government officials prepare ballot questions.

The California Elections Code imposes the same requirements for accuracy and impartiality on all ballot questions put to voters, whether by the state government or by county or local governments or other jurisdictions such as school boards or transit districts. If the measure imposes a tax, or raises the rate of a tax, the ballot question must include the amount of money to be raised annually and the rate and duration of the tax to be levied.⁵ And whether or not a tax is involved, every ballot question must

³ Cal. Elec. Code § 9051(b).

⁴ Editorial: Stop deceiving Bay Area voters on local tax measure costs. San Jose Mercury News, June 26, 2020. East Bay Times, June 26, 2020, updated June 29, 2020.

⁵ Cal. Elec. Code § 13119(b).

be “a true and impartial synopsis of the purpose of the proposed measure, and shall be in language that is neither argumentative nor likely to create prejudice for or against the measure.”⁶

In challenges to the accuracy and impartiality of ballot questions over the years, courts have interpreted these requirements to mean that “[election] materials must reasonably inform the Voters of the character and purpose of the proposed measure”⁷ and that the “main purpose of these requirements is to avoid misleading the public with inaccurate information.”⁸ The ballot question “cannot be misleading ... It must reasonably inform the voter of the character and real purpose of the proposed measure.”⁹ With regard to impartiality, a court has stated that “the wording on a ballot or the structure of the ballot cannot favor a particular partisan position.”¹⁰ The California Court of Appeal stated its understanding of “partial” to mean that “the council’s language signals to voters the council’s view of how they should vote, or casts a favorable light on one side of the [issue] while disparaging the opposing view.”¹¹

When considering the language of ballot questions relating to tax or bond measures, one must also keep in mind the voting requirements for approving tax measures proposed by local governments. The California Constitution categorizes all local taxes as either “general taxes” or “special taxes.”¹² A “general tax” is “any tax imposed for general governmental purposes” and a “special tax” is “any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.”¹³ When proposed by a local government entity, general taxes must be approved by a majority vote, whereas special taxes must be approved by a two-thirds vote.¹⁴ Measures proposing local government bonds must be approved by a two-thirds vote, while school bonds must be approved by a 55% vote.¹⁵

In the context of the above requirements, local governments have a substantial amount of flexibility when they draft ballot questions, in three respects. First, rules prohibiting public officials from advocating for or against a ballot measure do not apply until *after* the measure has been approved for the ballot by a city council or county board of supervisors.¹⁶ This is

⁶ Cal. Elec. Code § 13119(c).

⁷ Horneff v. City & County of San Francisco (2003) 110 Cal.App.4th 814, 820, [2 Cal.Rptr.3d 79].

⁸ Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 243 [149 Cal.Rptr. 239, 583 P.2d 1281].

⁹ Becerra v. Superior Court (Aug. 11, 2020, C092405) ___ Cal.App.3d ___ [pp. 8] (internal quotation marks and citations omitted).

¹⁰ Huntington Beach City Council v. Superior Court (2002) 94 Cal.App.4th 1417, 1433, 115 Cal.Rptr.2d 439; cf. Horneff v. City & County of San Francisco (2003) 110 Cal.App.4th 814, 822–823, [2 Cal.Rptr.3d 79].

¹¹ Martinez v. Superior Court (2006) 142 Cal.App.4th 1245, 1248, 48 Cal.Rptr.3d 660 (alterations in original).

¹² City of S.F. v. All Persons Interested in Matter of Proposition C (2020) 51 Cal.App.5th 703, 711 (citing Cal. Const. Art. XIII C, § 2, subd. (a)).

¹³ Cal. Const. Art. XIII C, § 1, subds. (a), (d).

¹⁴ City of S.F. v. All Persons Interested in Matter of Proposition C (2020) 51 Cal.App.5th 703, 711 (citing Cal. Const. Art. XIII C, § 2, subds. (b), (d)).

¹⁵ Cal. Const. Art. XIII A, § 1, subd. (b)(3) (Prop. 39, § 4, as approved by voters Nov. 7, 2000).

¹⁶ League of Women Voters v. Countywide Criminal Justice Coordination Committee (1988) 203 Cal.App.3d 529, 550.

because the process of developing and drafting a proposed measure is viewed as ordinary legislative activity, not partisan activity.¹⁷

Second, citizens wishing to challenge the accuracy or impartiality of a question face an uphill battle. Before being placed on the ballot for an upcoming municipal election, a ballot question is subject to a 10-day public examination period, during which any voter in the jurisdiction may petition a court for an order to delete or amend the language of the measure.¹⁸ But when a question is challenged, a court will review the language only for “substantial compliance” with the statutory mandates for truth and impartiality.¹⁹ Moreover, the officials who drafted the language are afforded “considerable latitude” in composing the ballot question, and courts *must* presume the language they drafted to be accurate.²⁰ A court order to amend the language of a question will be issued “only upon *clear and convincing proof* that the material in question is false, misleading, or inconsistent with [legal] requirements.”²¹ As one court reviewing a challenged question put it, a ballot question “need not be the ‘most accurate,’ ‘most comprehensive,’ or ‘fairest’ that a skilled wordsmith might imagine.”²²

Third and finally, local ballot questions are not subject to review by a government official or office independent from the proposing government entity. This is in contrast to measures proposed by state government, as to which the state attorney general is charged with preparing all ballot question in compliance with the same accuracy and impartiality standards.²³ Unlike local government officials who prepare ballot questions and other materials, the state attorney general is prohibited from preparing ballot materials on measures for which the attorney general is a proponent.²⁴

INVESTIGATION

Basis for Selecting Questions

The grand jury considered a number of ballot questions submitted to voters over the past several elections. We selected five ballot questions from measures included on ballots in the November 2020 general election and one from the November 2016 election. These included one county measure, four municipal measures and one school board measure.

¹⁷ League of Women Voters v. Countywide Criminal Justice Coordination Committee (1988) 203 Cal.App.3d 529, 550.

¹⁸ Cal. Elec. Code § 9295(b)(1); McDonough v. Superior Court of Santa Clara (2012) 204 Cal.App.4th 1169, 1173 (citing § 9295).

¹⁹ McDonough v. Superior Court of Santa Clara (2012) 204 Cal.App.4th 1169, 1174 (citing Martinez v. Superior Court (2006) 142 Cal.App.4th 1245, 1248 [48 Cal.Rptr.3d 660]).

²⁰ Yes on 25, Citizens For An On-Time Budget v. Superior Court (2010) 189 Cal.App.4th 1445, 1452, 118 Cal.Rptr.3d 290.

²¹ Cal. Elec. Code § 9295(b)(2); McDonough v. Superior Court of Santa Clara (2012) 204 Cal.App.4th 1169, 1173 (emphasis and alteration added).

²² Martinez v. Superior Court (2006) 142 Cal.App.4th 1245, 1248 (citations omitted).

²³ Cal. Elec. Code § 9051.

²⁴ Cal. Elec. Code § 9003.

We attempted to choose a mix of questions from different jurisdictions and on a range of subjects. The questions we selected stood out based on their language considered in relation to the substance of the measures described and the degree to which, based on our initial review, the questions’ language failed to convey the substance of the measures involved.

In choosing the questions, the grand jury felt strongly that our selection should not be based in any way on grand jurors’ opinions about the underlying measures. Jury discussion focused on the appropriateness of the wording of measures rather than their merits. Therefore, our report should not be interpreted as a commentary on the merits of any of the measures involved. As with the purpose and scope of our review, our conclusions are directed solely to the language of questions, and not the merits of the measures.



In the course of choosing the questions, we asked several jurisdictions to describe in writing how they prepare ballot questions generally. After we selected the questions, we then interviewed officials from the selected jurisdictions to inquire about the methods they use to draft ballot questions, both generally and with reference to the specific questions we reviewed.

Questions Selected for Review

The measures we selected were the following (except as noted for Dublin Unified School District Measure H, the measures appeared on the ballot for the November 3, 2020, general election):

1. Alameda County Measure W – The Alameda County Board of Supervisors proposed to adopt a 0.5% sales tax for general fund purposes (in addition to existing county sales taxes). The measure passed 50.09% to 49.91%. The ballot question read as follows:

“Shall a County of Alameda ordinance be adopted to establish a half percent sales tax for 10 years, to provide essential County services, including housing and services for those experiencing homelessness, mental health services, job training, social safety net and other general fund services, providing approximately \$150,000,000 annually, with annual audits and citizen oversight?”

2. Berkeley Measure JJ – The Berkeley city council proposed to amend the city’s charter to change how annual compensation is determined for the mayor and councilmembers. Instead of setting compensation based on a fixed amount subject to cost-of-living increases, the measure proposed to set the mayor’s compensation at an amount equal to the median three-person household income for Alameda County, and to set councilmember pay at 63% of the

mayor's amount. The measure was approved by a vote of 65% to 35%. The ballot question read as follows:

“Shall the measure amending the City Charter to provide that compensation for the office of Mayor be set at Alameda County’s median three-person household income from the California Department of Housing and Community Development and that of Councilmembers maintained at 63% of the Mayor's compensation, with annual increases based on changes in Area Median Income, but which may be lowered for unexcused Council meeting absences or negotiated salary reductions for City employees, be adopted?”

3. Dublin Unified School District Measure H (November 8, 2016 general election) –The school district governing board proposed to issue \$283 million in bonds to fund its general operations. The measure passed by a vote of 60% to 40%. The ballot question read as follows:

“To protect quality education with funding that cannot be taken by the State, construct schools to prevent overcrowding; update aging classrooms/science labs; continue providing 21st century technology; ensure classrooms meet fire/safety codes, and improve energy/operational efficiency, utilizing savings for instruction shall Dublin Unified School District issue \$283 million in bonds at legal rates, with annual audits, citizens oversight, no money for administrators, and all funds staying in Dublin?”

4. Hayward Measure OO – The Hayward city council proposed to amend the city’s charter to remove a requirement that residents who serve on council-appointed advisory commissions must be registered voters, and to eliminate gender-based terminology from the charter. The measure passed by a vote of 67% to 33%. The ballot question read as follows:

“To create more opportunities for residents to volunteer, and to honor Hayward's commitment to diversity, shall the Charter of the City of Hayward be amended to eliminate the requirement of being a qualified elector/registered voter to serve on City Council-appointed advisory commissions, and shall the Charter be amended to eliminate gender-based designations and titles and instead use neutral, gender-free designations and titles?”

5. Piedmont Measure TT – Piedmont’s city council proposed to increase the city’s real estate transfer tax. The measure failed to pass by a vote of 48% to 52%. The ballot question read as follows:

“Shall the City of Piedmont, to be in alignment with neighboring East Bay Cities, increase the real estate transfer tax from \$13.00 to \$17.50 per \$1,000 of transfer price, generating \$948,462 annually until ended by voters, to provide general tax revenue for

city services and to repair and maintain city facilities including police and fire stations, parks, and recreation facilities, and other city infrastructure, be adopted?”

6. San Leandro Measure VV – The San Leandro city council proposed to increase the city’s real estate transfer tax. The measure passed by a vote of 53% to 47%. The ballot question read as follows:

“To maintain City of San Leandro services, with revenue that cannot be taken by the State, including: repairing potholes/streets; supporting seniors, families and local small businesses through COVID-19 economic recovery; preserving 911 emergency response; maintaining youth violence prevention programs; and general city services; shall San Leandro increase the existing real property transfer tax rate, collected when property is sold, by \$5 per \$1,000 in valuation, generating an additional \$4,000,000 annually, until repealed by voters, all funds benefiting San Leandro?”

How Jurisdictions Prepare Ballot Questions

Witnesses from all jurisdictions in our review reported using roughly the same process to develop ballot questions. Ballot questions, like the measures themselves, are drafted in a process involving relevant functional departments of the jurisdiction, usually involving the close involvement of the chief executive (city manager in the case of municipalities) and entity attorney (who may be employed by the entity or an outside attorney). Some jurisdictions provide additional opportunities for public input through public meetings or other review bodies. In some cases the entity attorney plays a coordinating role; more often staff of the city manager’s or administrator’s office lead the process. All jurisdictions follow an iterative process of exchanging and commenting on draft language. Consultants are often but not always used, depending on the issues involved. Not surprisingly, all jurisdictions reported that ballot questions are prepared according to the above-mentioned requirements of the California Elections Code. Perhaps more surprising, none of the jurisdictions reported having policies or guidelines that are used to assure compliance with legal requirements, beyond having the entity attorney participate in the process and ultimately sign off on the language. Witnesses from several jurisdictions said they would welcome guidelines or independent reviews of ballot questions that take into consideration the time constraints and deadlines involved in getting a measure on the ballot.

In all cases the entity’s governing body or council has the ultimate authority and responsibility for approving a ballot measure, including the corresponding ballot question. Ballot measures and questions are formally considered and adopted at a public meeting of the council, after which the clerk is directed to forward the measure (including the question) to the county Registrar of Voters to be placed on the ballot.

Problems Identified

The grand jury found several problems in the ways ballot questions are drafted, exemplified in the language of the questions we reviewed. We organized the problems into the following categories:

1. Inherent “Proponent Bias” – As a general matter, across all of the questions reviewed, we found ballot questions suffer from an inherent “proponent bias” that is a natural outgrowth of the typical process by which questions are selected, drafted and proposed. This overarching process-driven problem contributes to all of the more specific content-driven problems identified in subsequent sections of this report.

Based on witness testimony, the typical question-writing process, generally the same in all the jurisdictions we reviewed, is likely to lead to non-transparent, less than fully accurate, and overly partisan questions simply because all participants involved share a desire that the measure be approved. Indeed, some participants, such as consultants and pollsters, are involved for the very purpose of assuring a positive outcome. Witnesses from all jurisdictions interviewed described a question-writing process in which success is measured by whether or not the measure is likely to pass. Questions developed in such a process are more likely to reflect language that is the most favorable possible—while minimally satisfying requirements for not being argumentative or partisan—rather than language which the drafting group concludes to be most accurate and impartial. Given that all jurisdictions we reviewed followed much the same process, it would be surprising if a jurisdiction did *not* attempt to phrase its ballot questions in such favorable terms.

City and county counsel, involved in the process to advise on compliance with legal requirements, are nevertheless duty bound to represent the government entities proposing the measures involved. Hence, they also act, by necessity, as advocates for the proponents of a measure.

Although a city council’s (or other governing body’s) ultimate approval of a ballot question is open to public comment and participation, even citizens who may object to the language are more likely to do so because they are partisans for or against adoption of the measures concerned, not because they are concerned particularly with the accuracy or impartiality of the question. For the same reason, ballot questions on measures that enjoy substantial popular support are likely never to be challenged, no matter how non-transparent or partisan the question may be.

The ballot questions we reviewed generally fell short of what voters have a right to expect.

Finally, a citizen who objects to the language of a question after it has been adopted must act in a limited time period and faces an uphill battle, given the deference courts afford to question proponents discussed above. Judges review a challenged question only for “substantial compliance” with statutory requirements, and are required to presume that the question, as drafted by the forgoing process, is accurate. Challengers must overcome this presumption with clear and convincing evidence that a given question is inaccurate or partisan. The grand jury does not intend to suggest there is anything wrong with these legal standards. We only assert that the prospect of judicial review is unlikely to remedy other aspects of the question-drafting process in which accuracy and impartiality are not prioritized above other competing and valid considerations.

When everyone involved in drafting, reviewing, and approving a question desires and is motivated to have the question answered affirmatively, it is only natural that the question will be written in the most favorable terms possible. In such a process, even when participants are sincere in their efforts to comply with legal requirements for accuracy and impartiality, there do not appear to be any advocates for transparent and neutral language. The result of this process is predictable: ballot questions are likely to meet, but not exceed, legal standards while falling short of what voters have a right to expect in terms of truthfulness and impartiality.

We turn now to specific types of problems that result from such inherent proponent bias.

2. Use of Favorable Language That is Irrelevant or Unnecessary to Describe the Measure.

Generally speaking, every question we reviewed contains language that is more likely to be read as supportive of the measure rather than an element of “a true and impartial synopsis.” Important to this kind of language is that it bears no relationship to the measure, or at least is unnecessary to describe the measure. For example, choosing to describe a permanent tax (i.e., one that does not expire by its own terms) as a tax that continues “until repealed by voters”

(San Leandro) or “until ended by voters” (Piedmont) may be logically correct, but it is not transparent. It is not transparent because it implies that the measure itself contains terms and conditions providing for its repeal, or at least that voters will have an opportunity to repeal the tax, even though no such provision or opportunity exists, or is required or planned, and any such activity would certainly not be initiated by the measure’s proponents. What possible reason can the measure’s proponents have for phrasing the time period of the tax in this way? A transparent and impartial description of the length of those taxes would state that they continue indefinitely, or that they do not expire, or that they are permanent.



Questions proposing tax and bond measures often incorrectly imply that funds raised by the measures will be dedicated to programs perceived to be more popular or important in the minds of voters. For example, in addition to raising the general vs. special tax problem discussed further below, the ballot question proposing Alameda County’s Measure W says the funds will be used “to provide essential services” and then goes on to list four specific categories of services, including “housing and services for those experiencing homelessness, mental health services, job training [and] social safety net” services before ending with the catch-all term “and other general fund services.” The clear implication is that the measure bears some relationship to the specifically mentioned “essential” services, or that such services will be eliminated or curtailed if the measure is not approved. In fact, there is no requirement for the tax proceeds to be used for any specific service, including those specifically mentioned in the question. Indeed, the word “homeless” does not appear anywhere in the operative text of the county ordinance proposed by the question (it does appear in one Whereas clause). Neither do the words “job,” “training,” “social,” “safety,” or “net”, whether used separately or in the ways they appear in the question (including in the Whereas clauses). Even the word “services” appears only in the Whereas clauses, but not in the text of the ordinance which prescribes how the proceeds of the tax must be spent. In fact, the county could choose to *eliminate* all of the services specifically mentioned in the text of the question without violating the requirements of the ordinance. A ballot question that uses 16 of its 54 words to describe spending on “essential services” which are not even *mentioned*, let alone prescribed, in the requirements of the underlying ordinance, cannot fairly be called “a true and impartial synopsis” of the proposed ordinance.

Similarly, San Leandro’s Measure VV suggests the proceeds from the proposed increase in its real estate transfer tax will be used “repairing potholes/streets; supporting seniors, families and local small businesses through COVID-19 economic recovery; preserving 911 emergency response; [and] maintaining youth violence prevention programs.” No such spending is required by the proposed ordinance, and none of the words or phrases in the above-quoted text appear anywhere in the ordinance, even though they take up roughly one-third of the question. The tax funds certainly *might* be used for the mentioned spending, but they may also be used for none of it. In either case, the question does not accurately describe the measure.

Also similarly, the question proposing Piedmont’s Measure TT recited a list of possible expenditures, including “to repair and maintain city facilities including police and fire stations, parks, and recreation facilities,” yet none of these expenditures was required by the proposed ordinance. That such spending *might* occur does not make the question an accurate and impartial synopsis of a measure, which may not result in any additional spending on the mentioned repair and maintenance. Piedmont’s measure also included the statement that a purpose of the measure was “to be in alignment with neighboring East Bay Cities.” The grand jury did not see how this statement related to a description of the measure or to its purpose.

Ballot questions often contain language that may be relevant to a measure, but that is nevertheless argumentative because it describes a reason for favoring the measure rather than describing the measure itself.

By extension, in the context of such unnecessary or irrelevant language in ballot questions, additional terms describing apparently related “audits” or “citizen oversight” compound the problem by overstating, by implication, the scope of such oversight mechanisms. For example, the question proposing Alameda County’s Measure W ends with the words “with annual audits and citizen oversight.” The natural implication of these words is that audits and oversight will relate to the “essential services” mentioned nearby. The ordinance implementing Measure W does include a citizen oversight committee and an annual audit requirement. However, the scope of both the audit and the oversight of the citizen’s committee will be limited to the

ordinance’s requirements – i.e., ensuring the sales taxes collected are placed in the county’s general fund and used for purposes consistent with general fund expenditures. Since, as discussed above, the ordinance does not require spending on the specifically mentioned services, the annual audits and oversight will by definition have nothing to do with monitoring such uses, *even if* the county chooses to spend the general funds raised on those services. Thus, the question is inaccurate to the extent it suggests these oversight mechanisms will ensure the use of tax proceeds for the specifically mentioned services.

3. Use of Language That Properly Relates to a Measure But is Argumentative. Ballot questions often contain language that may be relevant to a measure, but that is nevertheless argumentative because it describes a reason for favoring the measure rather than describing the measure itself. Courts reviewing ballot questions have found such phrasing, even if it well describes a purpose of the measure, “properly belong[s] in the ballot arguments in favor of the measure, not in the ballot question, which must be cast in neutral, unbiased language.”²⁵ For example, Hayward Measure OO begins with the phrase, “To create more opportunities for residents to volunteer, and to honor Hayward’s commitment to diversity,” before proceeding to describe the parts of the city charter proposed to be amended. Hayward officials described why the amendments were needed, and indeed the stated purpose may well amount to a compelling reason to support the measure. However, none of the charter amendments proposed by the measure, by their terms, will create additional opportunities to volunteer or enhance diversity. They relate solely to removing the requirement to be a registered voter in order to serve on council-appointed commissions. The introductory language suggests that the proposed measure contains provisions that create volunteer opportunities or honor diversity. Even if creating volunteer opportunities and honoring diversity were compelling reasons to vote in favor of Measure OO, the advocacy inherent in the introductory language was misleading and not impartial.

²⁵ McDonough v. Superior Court of Santa Clara (2012) 204 Cal.App.4th 1169, 1176.

Similarly, Dublin USD’s introductory suggestion that funds from the bond measure proposed by Measure H would “protect quality education with funding that cannot be taken by the State” is argumentative and not descriptive of the proposed measure, since presumably all funds spent by a school district will be used for “quality education.” Both the San Leandro and Dublin USD questions mention that the proposed funds cannot be “taken by the state” even though it is not clear how school district or municipal revenues can ever be “taken” by the state government absent extreme circumstances such as insolvency. We found similar language such as “all funds benefiting San Leandro” and “all funds staying in Dublin” to be unnecessary and partisan. By definition, funds raised by a government entity will benefit and “stay” with that agency.

4. Omitting Obviously Relevant Information from Spending, Tax and Bond Questions. Ballot questions on measures with financial implications frequently omit information that should naturally be included in any description designed to be accurate and impartial. Many are examples of providing little or no useful information to the voter, while minimally satisfying the Elections Code requirement for tax measures.

For example, for measures that impose a tax or raise the rate of a tax, the Elections Code requires that the ballot question include the amount of money to be raised annually and the rate and duration of the tax to be levied. The question proposing Alameda County Measure W meets these requirements by stating the proposed ordinance will raise approximately \$150,000,000 annually and stating the rate and duration of the tax but stops there. Left unmentioned is, obviously, the rate of the *existing* county portion of the sales tax. California imposes a statewide sales tax of 7.25%, in addition to which local jurisdictions may impose additional sales taxes. Prior to Measure W, the Alameda County portion was 2.0%. As a result of Measure W, that portion increased to 2.5% — a 25% increase in the county portion.²⁶ Voters may not be aware of how total sales taxes are split among the state, counties, and cities. Hence, providing information to voters on the impact of the proposed increase on overall sales taxes throughout the county, perhaps stated in terms of a range, would enhance the question’s usefulness as an accurate and impartial synopsis. At the very least, in a question proposing to increase a tax, mentioning the existing rate of the *same tax* (i.e., the county sales tax) seems both natural and obvious. The county could have included such additional information in the question and still satisfied the 75-word limit, since the question as presented was only about 55 words long (including the roughly 16 irrelevant words suggesting spending that is not required by the measure, as discussed in section 2 above).

Similarly with San Leandro Measure VV, the question proposing to increase the city’s real estate transfer tax mentioned the amount of the increase—\$5 per \$1,000 of valuation, thus stating the “rate of the tax to be levied”—but, incredibly, failed to mention either the existing rate (\$6) or the proposed new rate (\$11). Voters were left unable to determine the amount of

²⁶ Some Alameda County cities impose additional sales taxes. As a result, the total sales tax in Alameda County (including state, county and municipal portions), without giving effect to Measure W, ranges from 9.25% to 9.75%.

tax that would be imposed in their own situations, whether or not the measure was approved. As with Alameda County, San Leandro could have saved some of the words used to imply spending that is not required by the measure, and used them instead to provide comparative information that should naturally be included in a description intended to be an accurate and impartial synopsis of the proposed tax.

On this point, perhaps Piedmont should be congratulated for the way it phrased its proposed real estate transfer tax increase, by asking voters whether Piedmont shall “increase the real estate transfer tax from \$13.00 to \$17.50 per \$1,000 of transfer price....” With approximately two words more than San Leandro, Piedmont’s question communicated the existing rate, the proposed new rate and the proposed change in the rate. Hence, with essentially zero additional text, the question provided a great deal more highly relevant information to the voter, even though it was information not strictly required by the California Elections Code.

The final example in this category is Berkeley’s Measure JJ. Although the measure by its terms proposed only to change the method for computing annual compensation for the mayor and councilmembers, the glaring and obvious result of these changes was relatively substantial pay increases for the elected officials who proposed the measure. Specifically, as a result of the measure, the mayor’s annual salary increased to \$107,300 from \$61,304, and each councilmember’s salary increased to \$67,599 from \$38,695—a 75% pay increase in each case. The ballot question fails to mention any of these figures, or even that the change in the method of calculating compensation would result in *any* immediate pay increase. Whatever one feels about the merits of the measure, the amounts and relative increases in *compensation to elected officials* that would result from a ballot measure proposed by *the same elected officials* are essential to an understanding of the question. Failing to mention any aspect of any of these amounts or changes rendered the question inaccurate, partisan or both.

5. General Taxes vs. Special Taxes. This report has already discussed unnecessary or irrelevant language in questions proposing tax increases. Specifically, in section 2 we show how the questions proposing Alameda County Measure W, San Leandro Measure VV and Piedmont Measure TT each described spending that was nowhere required by the respective measures that were proposed. We questioned the need and purpose of such language, and believe its presence tends to make the questions inaccurate or partial, for the reasons given in section 2. But such references to specific spending or uses of funds raise another, separate problem which relates to the type of tax involved and the level of voter support needed to approve it.

Each of Alameda County Measure W, San Leandro Measure VV and Piedmont Measure TT proposed a *general tax*. That is, each proposed a tax (on sales in the case of Measure W and on real estate transfers in the cases of Measures VV and TT) that would produce revenues for the general fund of the government entities concerned. Because each was a general tax, approval by a simple majority of voters was required, as compared to a two-thirds majority required to approve special taxes.

Reading the ballot questions proposing those three measures in isolation, it would not be clearly apparent, at least to a person unfamiliar with the intricacies of California election law, that the taxes at issue are intended for general purposes. In each case, the reader's focus is

Ballot questions on measures with financial implications frequently omit information that should naturally be included in any description designed to be accurate and impartial.

naturally brought to the list of specific uses recited by the question, and which takes up a substantial proportion of the question. It would be reasonable for such a reader to conclude from this presentation that the proposed tax is intended to raise funds for the specific services mentioned. Yet if that was the case, neither Alameda County Measure W nor San Leandro Measure VV would have been approved, since each would have required two-thirds approval but in fact received only the approval of a simple majority (50.09% and 53.2%, respectively). (Piedmont's Measure TT failed to receive simple majority approval but would suffer from the same problem had it done so.)

Given the significant difference in the level of voter approval required for special as compared to general taxes, question drafters should be especially mindful of the ways they characterize the intended uses of the taxes concerned, particularly when general taxes are proposed. It is difficult to understand the rationale for listing the specific spending uses recited in Alameda County Measure W, San Leandro Measure VV and Piedmont Measure TT, if the rationale is other than to influence voters to have a more favorable view of the measure by mentioning those specific possible uses to the exclusion of countless others. In addition to inaccurately describing the measure, such an approach also introduces an important ambiguity when interpreting the results of the elections involved. For if voters are influenced to support a measure because they understand the funds will be directed to the specifically mentioned uses (and how can we know for certain that they are not), that means such voters are approving what they understand to be a special tax, not a general tax. This raises issues about the true meaning of their votes, when cast in favor of what is, in the end, properly determined to be a general tax.

6. Additional Considerations. In the course of our investigation, the point was often raised that the 75-word limit on ballot questions imposed by the Elections Code places question drafters in a difficult position, since it is rarely a simple task to convey the key elements of a ballot measure in such a limited number of words. Another frequent comment was that voters are afforded many other opportunities to learn about ballot measures, including, for example, the impartial analysis required to be prepared, and the arguments in favor and against measures that are made available to voters through voter guides. The implication seemed to be that focusing on the ballot question, to the exclusion of these and other information sources, may lead to a misunderstanding of the actual information in the mind of the voter when he or she ultimately is ready to make a choice on the basis of the ballot question.

The grand jury has considered these factors and finds that neither of them should diminish the strength of our criticisms. First and foremost, the law plainly requires ballot questions to be accurate and impartial in and of themselves, and whether or not considered in light of other materials that a voter may have access to. It is no excuse for an inaccurate or partisan question to say that the voters in question are generally sophisticated or civically involved. Moreover, the fact remains that the only aspect of a ballot measure that every voter is certain to see and read is the ballot question. Even if voters take the time to read additional materials on some measures, it is clear that many voters do not review additional materials for every question they are asked to answer on a ballot. This is especially true when there may be dozens of measures on a given ballot. In these instances, it is especially important that each question meet the standards of accuracy and impartiality required by state law. Municipal officials must be responsible for the accuracy and impartiality of their ballot questions.

By creating a ballot review advisory panel, Alameda County could become the state's leader for fairness and transparency in government.

As to the 75-word limit, we note that four of the six questions we reviewed did not reach that limit, and several included superfluous words bearing no relation to the measure unless they were included for impermissible partisan reasons. In short, a shortage of words does not seem to be the problem. Moreover, if the word limit itself generally posed an obstacle to accuracy and impartiality, we would expect to see inaccurate and partisan language distributed equally both in favor of and against measures. But that is not what we see.

CONCLUSION

For the reasons described above, the ballot questions we reviewed generally fell short of what voters have a right to expect. Although such outcomes are predictable based on the drafting processes used by government entities, and indeed have come to be expected by many voters used to reading ballot questions written in a style that has become commonplace, the grand jury believes such outcomes are not acceptable and should be resisted by all those with a role in observing the legal requirements for accuracy and impartiality. In our interviews, we found officials who are responsible for preparing questions to be sincere in their desire to meet the standards for accuracy and impartiality, even while their overarching goal in drafting the questions was to promote voter approval. All things considered, we understand how questions end up reading the way they do. As we have found, the root of the problem is inherent in the process by which questions are prepared, in combination with the standards applied in the event they are challenged. Given the dynamics of these processes, and the challenges faced by local governments who must appeal to voters to approve many of their plans and programs, it is difficult to imagine the problematic nature of ballot questions changing without some legislative or institutional initiative to spur improvement.

In recognition of these practical realities, the grand jury proposes that the Alameda County Board of Supervisors create an advisory commission composed of impartial and representative citizen volunteers committed to the ideals of accuracy and impartiality, who would review and rate ballot questions according to applicable legal standards as well as general principles of transparency and objectivity. Jurisdictions could submit questions for review on a voluntary basis, in parallel to the development of the questions. The commission would be empowered to develop a 0 to 10 rating or a simple “fair/unfair” or “pass/fail” rating, and would rate all questions in each election, after their adoption, regardless of whether a jurisdiction had submitted the question to the panel for review. In this way jurisdictions would have an incentive to have their questions reviewed prior to adoption, so as to obtain a favorable rating. The advisory panel would also assist jurisdictions in developing better questions, by serving as a neutral appraiser of questions for which there could be divergent views within a particular agency. By reviewing and rating questions based on uniform standards, the proposed panel would also promote greater uniformity in question language, facilitating voters’ understanding.

The grand jury believes such a panel and process would improve the overall quality of ballot questions and enhance the legitimacy of elections in which ballot measures are approved or rejected. Alameda County could become the state’s leader for fairness and transparency in government.

FINDING

Finding 21-16:

Local ballot questions, as currently written, were not always fully transparent, complete, and impartial, impeding voters from making informed decisions.

RECOMMENDATION

Recommendation 21-17:

The Alameda County Board of Supervisors should create an independent advisory committee or commission to conduct a review and issue non-binding ratings, based on uniform standards and guidelines, of ballot questions of measures proposed by all local jurisdictions within the county. The committee members must be committed to the ideals of accuracy and impartiality reflected in state law. The committee should be implemented in time for the 2024 elections. *For an example of how the committee might work, please see Appendix B.*

REQUEST FOR RESPONSES

Pursuant to California Penal Code sections 933 and 933.05, the grand jury requests each entity or individual named below to respond to the enumerated Findings and Recommendations within specific statutory guidelines, no later than 90 days from the public release date of this report.

Responses to Findings shall be either:

- Agree
- Disagree Wholly, with an explanation
- Disagree Partially, with an explanation

Responses to Recommendations shall be one the following:

- Has been implemented, with a brief summary of the implementation actions
- Will be implemented, with an implementation schedule
- Requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a completion date that is not more than 6 months after the issuance of this report
- Will not be implemented because it is not warranted or is not reasonable, with an explanation

RESPONSES REQUIRED

Alameda County Board of Supervisors

Finding 21-16

Recommendation 21-17

APPENDIX B

PRINCIPAL ELEMENTS OF PROPOSED INDEPENDENT ADVISORY COMMITTEE OF COMMISSION TO REVIEW AND RATE BALLOT QUESTIONS

This is only a suggested format based on the grand jury's investigation.

The goals of the commission would be to evaluate upcoming local ballot measures for fairness and accuracy, and to represent all of Alameda County by assuring that multiple constituencies are represented, and to be neutral and impartial. The grand jury supports the creation of a committee but would be open to alternatives such as an elected individual (ombudsman) who could provide the same function. As envisioned by the grand jury, the review process would be advisory and would be consistent with existing state election laws without requiring any amendments. An example of the committee makeup could include a mixture of taxpayers' associations, civic organizations, representatives of labor, local elected officials, etc.

As proposed, the committee would have seven members and would rate the proposed ballot measure in advance of its placement on the ballot for an upcoming election. The grand jury supports either an actual numerical system such as 0 to 10, or a simple pass/fail system. The term of the members would be four years, with staggered start times so that all would not be termed out at once. No one could serve more than two consecutive terms but could again volunteer after a four-year void in service. The committee could be selected similarly to how the Alameda County Civil Grand Jury is currently selected – an initial interview and then a drawing for each position on the committee. This body would operate with legal and staff support from the county counsel. The grand jury encourages the county, cities and other public agencies and districts to utilize and support this concept to show their commitment to unbiased and transparent wording for all ballot measures.

The committee, once established, will develop standards or guidelines as to what language should, and should not, be included in ballot questions under review, based on the central points raised in this grand jury report, including for both tax and non-tax measures, general and special taxes, and bond measures. The committee will accept draft ballot question language early in order to allow potential discussions with the jurisdiction in advance of deadlines to submit the final language to the county Registrar of Voters, at the option of the submitting jurisdiction. A jurisdiction may amend and resubmit ballot questions as many times as it wishes (if time allows). Whether or not submitted in advance, the question will be rated once the deadline for all measures to be on the ballot has passed.