

**A REPORT BY
THE 2016-2017 CONTRA COSTA COUNTY GRAND JURY**
725 Court Street
Martinez, California 94553

Report 1704

**Selection of Ballot Measure
Arguments**

APPROVED BY THE GRAND JURY:

Date: 5/31/17


JIM MELLANDER
GRAND JURY FOREPERSON

ACCEPTED FOR FILING:

Date: 5/30/17


JOHN T. LAETTNER
JUDGE OF THE SUPERIOR COURT

Contra Costa County Grand Jury Report 1704

Selection of Ballot Measure Arguments

TO: Contra Costa County Clerk-Recorder-Registrar

SUMMARY

The Contra Costa County Civil Grand Jury (Grand Jury) investigated the procedures used by the Elections Division of the Contra Costa County Clerk-Recorder-Registrar (Registrar) to select ballot measure arguments to include in the Voter Guide for the November 2016 election. This investigation focused on the legal requirements for selection of competing ballot arguments, the methods used by the Elections Division in making the selections, and how that information is communicated to the public.

The Grand Jury found that the Registrar followed the legal guidelines in the selection of ballot arguments. However, the Grand Jury recommends that the Registrar consider producing detailed documentation of the ballot argument selection process. The Grand Jury also recommends that the Registrar consider developing procedures that indicate how authors of competing ballot arguments may collaborate regarding inclusion of a ballot argument in the Voter Guide.

METHODOLOGY

In the course of its investigation, the Grand Jury:

- Reviewed and researched complaints filed with the Grand Jury in this matter
- Interviewed the complaining parties
- Interviewed officials of the Registrar's office
- Reviewed internal documents from the Registrar's office
- Reviewed California State Elections Code (Elections Code) Sections §9100-9190, and other relevant Elections Code Sections
- Reviewed public documents produced by the Registrar's office, including the "Guide to Filing Arguments For County, Cities, School Districts and Special Districts - 2016" (Argument Guide), and the "Voter Guide and Sample Ballot" (Voter Guide) for the 2016 November General Election (Election)

- Checked for any court decisions interpreting Section §9166 of the Elections Code
- Performed Internet research on topics relevant to the investigation
- Consulted with the Grand Jury's legal advisor

BACKGROUND

The election process provides citizens the opportunity to determine the direction of their government at the national, state, and local levels. Public confidence in the integrity, fairness, and impartiality of Elections Officials is critical to the election process. In Contra Costa County, the Registrar is the elected public official responsible for conducting all elections. The County Elections Division, under the direction of the Registrar, is tasked with performing all election functions.

Voters select from candidates for public office and approve or reject ballot measures. In California Voter Guides are produced and supplied to the public by the appropriate authorities. The County Elections Division is responsible for producing the Voter Guide for local issues, and provides summaries and complete texts of each ballot issue. The Voter Guide also contains arguments for and against those ballot issues, along with rebuttal arguments.

Under California law, The Registrar's office selects ballot arguments for inclusion in the Voter Guide. The Grand Jury's investigation focused on the processes, procedures, and information provided to the public used in this selection process.

DISCUSSION

Legal Matters

The legal procedures for the filing of ballot measures and the submission of arguments for and against ballot measures are set forth in California Elections Code §9100-9190 for County measures, §9200-9295 for City measures, and §9500-9509 for School District measures. The ballot argument selection process for County measures is governed by §9166 of the California Elections Code. Very similar statutes govern the ballot argument selection process for City and School District measures (Elections Code §9287 & §9503).

After inclusion of an initiative on the ballot, a period is established in which "For" and "Against" arguments may be submitted. Upon the close of that period, elections officials select one "For" and one "Against" argument for publication in the Voter Guide. In rare cases, if no ballot argument is submitted, it will be noted in the Voter Guide.

The Elections Code establishes the selection priority to be used by elections officials when competing ballot arguments are submitted. Regarding county measures, Elections Code §9166 describes the order of priority:

If more than one argument for or more than one argument against any county measure is submitted to the county elections official within the time prescribed, the county elections official shall select one of the arguments in favor and one of the arguments against the measure for printing and distribution to the voters. In selecting the argument the county elections official shall give preference and priority in the order named to the arguments of the following:

- a) The board of supervisors or a member or members of the board.*
- b) The individual voter, or bona fide association of citizens, or combination of voters and associations, who are the bona fide sponsors or proponents of the measure.*
- c) Bona fide associations of citizens.*
- d) Individual voters who are eligible to vote on the measure.*

City Measures governed by Elections Code §9287 substitute “*The legislative body, or member or members of the legislative body authorized by that body*” for priority (a) above. School District Measures governed by Elections Code §9503 similarly substitute “*The governing board of the district or a member or members of the board.*” Otherwise, the order of priority is the same. When considering County Measures, arguments submitted by the Board of Supervisors have priority over arguments submitted by private citizens or by associations of citizens.

The Grand Jury was interested in the case of multiple ballot arguments of the same priority being submitted for a particular measure, and the process for selecting between those competing arguments for inclusion in the Voter Guide. The Elections Code is silent as to how elections officials should select between multiple ballot arguments of the same priority.

The Elections Code is also silent as to the meaning of “bona fide.” However, Black’s Law Dictionary, a legal reference, defines “bona fide” in part as “*In or with good faith; honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense. Innocently; in the attitude of trust and confidence; without notice of fraud, etc.*” California Evidence Code §664 presumes that officials exercise their duty properly, and the inclusion of the term “bona fide” in the Election Code suggests an implied duty to include verification of the “bona fide” status of an “association of citizens.” How that duty is to be exercised is not specified in the Elections Code, and thus is left to the discretion of election officials.

Documentation of Selection Process

The Elections Division has no written procedures to govern the process for selection of the argument to be published in the Voter Guide when multiple ballot arguments of the same priority have been submitted. When competing arguments are submitted, the Elections Division currently evaluates those arguments and selects the one considered to be the most effective.

The Elections Division published the Argument Guide (http://www.cocovote.us/wp-content/uploads/2016_Guide-to-Filing-Arguments-and-Rebuttals1.pdf), prior to the November 2016 election, that provides information on ballot argument submission procedures and timing. The Grand Jury examined this document, specifically the information regarding the ballot argument selection process. This document does not describe the specific methodology by which County Elections Officials shall select between ballot arguments of the same priority.

Selection Process in Various California Jurisdictions

Elections Code §9166 states that Election Officials “*shall select*” one argument “For” and one “Against” each initiative, but is silent on the selection process when ballot arguments are of the same priority, and depends on Election Officials’ discretion. The Grand Jury reviewed published procedures for selecting between multiple ballot arguments of the same priority from various jurisdictions in California. Several jurisdictions provide detailed information on the processes used to select a ballot argument when multiple ballot arguments of the same priority are submitted as summarized below:

1. Mechanical procedures
 - a. Random drawing of lots – generally performed in public, or among interested parties
 - b. Date of submission – earliest date has preference
2. Objective additional selection criteria (used for selection between associations)
 - a. The length of time the association has been in existence
 - b. Whether an association’s membership consists primarily of citizens residing in the jurisdiction
 - c. The number of members enrolled in the association
 - d. Whether an officer of more than one bona fide association and/or one or more citizens of the jurisdiction have signed the argument
3. Collaboration
 - a. Elections Officials ask multiple argument writers to mutually agree as to which argument should be included
4. Subjective criteria
 - a. Judgment of Elections Officials
5. Various combinations of the above

County Elections Division Current Practices

The Registrar employs the following practices in ballot argument selection:

- Groups or individuals qualified by the Elections Code are allowed to submit ballot arguments.
- The selection priority of multiple ballot argument submissions is governed by the Elections Code.
- When arguments of the same priority are submitted, Elections Officials select which argument to include in the Voter Guide by exercising their judgment, based on their assessment of the strength of the argument.
- The Elections Division requires documentation to qualify associations as bona fide.
- The Elections Division has no documented procedure to verify the bona fide status of an association of citizens.
- The individuals signing an argument on behalf of a bona fide association are not required to be registered voters in the jurisdiction.
- Parties are encouraged to collaborate when multiple arguments are submitted.
- There are currently no written procedures to facilitate such collaboration.

FINDINGS

- F1. The procedures used by the Registrar and the Elections Division in ballot argument selection conform to the requirements of the Elections Code.
- F2. The Elections Division does not have written procedures governing the selection of multiple ballot arguments of the same priority.
- F3. The selection process between multiple ballot arguments of the same priority is based upon a subjective evaluation by Elections Officials.
- F4. The section in the Argument Guide that addresses the filing of multiple arguments of the same priority does not clearly set out the process by which the Registrar and the Elections Division exercise their discretion to select the argument to include in the Voter Guide.
- F5. Although the Argument Guide contains language encouraging parties to collaborate in the filing of arguments, it has no procedure indicating how parties filing arguments may collaborate.
- F6. The Argument Guide includes no procedure by which an association of citizens may establish its bona fide status.

RECOMMENDATIONS

- R1. Prior to the next election, the Registrar should consider developing internal procedures to clarify the process for selecting between multiple ballot arguments of the same priority.
- R2. In the next and subsequent revisions of the Argument Guide, the Registrar should consider including procedures that clarify the process for selecting between multiple ballot arguments of the same priority.
- R3. Prior to the next election, the Registrar should consider developing internal procedures to facilitate collaboration between parties that file competing ballot arguments.
- R4. In the next and subsequent revisions of the Argument Guide, the Registrar should consider including procedures to facilitate collaboration between parties that file competing ballot arguments.
- R5. Prior to the next election, the Registrar should consider developing internal procedures by which an association of citizens can establish its bona fide status.
- R6. In the next and subsequent revisions of the Argument Guide, the Registrar should consider including procedures by which an association of citizens can establish its bona fide status.

REQUIRED RESPONSES

| | Findings | Recommendations |
|--|----------|-----------------|
| Contra Costa County Clerk-Recorder-Registrar | F1 to F6 | R1 to R6 |

These responses must be provided in the format and by the date set forth in the cover letter that accompanies this report. An electronic copy of these responses in the form of a Word document should be sent by e-mail to ctadmin@contracosta.courts.ca.gov and a hard (paper) copy should be sent to:

Civil Grand Jury – Foreperson
725 Court Street
P.O. Box 431
Martinez, CA 94553-0091