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MAGAZINE

In This Issue:

Funding the Election Process

In Defense of the Electoral College

Removal of an Elected County Officer from Office

Should We Change the Way We Elect Presidents?

The official publication of the Riverside County Bar Association

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Riverside Lawyer

MAGAZINE

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Mission Statement

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Mission Statement

The mission of the Riverside County Bar Association is to:

Serve its members, and indirectly their clients, by implementing programs that will enhance the professional capabilities and satisfaction of each of its members.

Serve its community by implementing programs that will provide opportunities for its members to contribute their unique talents to enhance the quality of life in the community.

Serve the legal system by implementing programs that will improve access to legal services and the judicial system, and will promote the fair and efficient administration of justice.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), Tel-Law, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Inland Empire Chapter of the Federal Bar Association, Mock Trial, State Bar Conference of Delegates, and Bridging the Gap.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of Riverside Lawyer published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Annual Joint Barristers and Riverside Legal Secretaries dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

MBNA Platinum Plus MasterCard, and optional insurance programs.

Discounted personal disability income and business overhead protection for the attorney and long-term care coverage for the attorney and his or her family.

Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are $25.00 and single copies are $3.50.

Submission of articles and photographs to Riverside Lawyer will be deemed to be authorization and license by the author to publish the material in Riverside Lawyer.

The material printed in Riverside Lawyer does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.

Calendar

SEPTEMBER

18 RCBA Annual Installation Dinner
Mission Inn – 5:30 p.m.

23 LRS Committee
RCBA – Noon

24 EPPTL Section
RCBA 3rd Floor – Noon
(MCLE)

25 – 28 State Bar Annual Meeting / Conference of Delegates
in Monterey
(MCLE)

26 Enrobement Ceremony
Judge Jackson Lucky
Department 1 – 4:00 p.m.

OCTOBER

1 Bar Publications Committee
RCBA – Noon

6 CLE Committee
RCBA – Noon

7 Environmental Law Section
"General Construction Permit"
Speaker, Keith Elliott
RCBA Bldg., 3rd Floor – Noon
(MCLE)

8 Mock Trial Steering Committee
RCBA – Noon

9 SBCBA Installation Dinner
National Orange Show Grounds – 6:00 p.m.

10 General Membership Meeting
Joint w/ Public Service Law Corporation
"Oops, the State of Affairs of the Riverside Superior Courts"
Judge Richard Fields
RCBA 3rd Floor – Noon
(MCLE)

13 Holiday – Columbus Day

President's Message

by E. Aurora Hughes

I have had the pleasure of practicing law for the past 29 years and am truly humbled at being given the opportunity to serve as President of the Riverside County Bar Association. I hope to serve you well and to live up to the reputation my predecessors have built for the RCBA.

One of my first interviews for a job as an attorney was with a firm in Riverside. I knew nothing about Riverside when I drove out from my apartment in the Mid-Wilshire District of Los Angeles. When I found the address, I presented myself to a pleasant woman who looked to be in her early 40s. When I told her I was there for an attorney interview, she seemed surprised. I showed her my confirmation letter and she chuckled slightly to herself. She said, "This will be fun," and asked me to take a seat. I did so while she retreated to a back office. She came out shortly and told me to follow her. "This should be interesting," she said.

I dutifully followed her to a closed door. She knocked twice, and as she stepped through the doorway, she said, "This is E. A. Rory Hughes, your two o'clock interview for the associate position." A dark-haired gentleman in a navy blue pinstripe suit sat behind his desk, head down, reading and apparently editing a document. He didn't look up, but told me to sit down. I sat and pulled out my résumé and my references should he ask for them. I waited. He took his time. I sat quietly.

When he completed his editing, he looked at me. He seemed shocked. He said, "Who are you?" I said, "I'm Rory Hughes. I have an interview with you." He fished through some papers on his desk and picked up my résumé and cover letter. He said, "Rory Hughes – I thought you were a man. We don't hire women."

I said. "My resume has my full name. Rory is short for Aurora, which is a female name." He said "I thought that was an ancestral name." I suggested that since he had decided to interview me based upon my résumé, he was apparently interested in my qualifications, so why should my being a woman stop him from interviewing me?

He said, "Sorry, we have both wasted our time. We do not hire women." He rose, as did I. He gently took my elbow and escorted me, not only out of his office, but out of the entire suite. As the door closed behind me, I could hear him telling the receptionist that all further candidates needed to be screened to be sure they were men.

I was bitterly disappointed that he would not even consider me simply because I was a female. That was my first impression of Riverside – a good ol' boys' club. I thought that Riverside was a terrible place for women lawyers and that it was a backward community when it came to civil rights.

That was in 1979. I did not return to Riverside until 1990, when my then-employer, LaFollette, Johnson, DeHaas & Fesler, decided to open a Riverside branch office and I was asked to assist Robert Warford in opening it. Since I am a firm believer in second chances, I agreed and transferred to Riverside. It is a decision I have never regretted.

In the 29 years since that first interview, things have really changed. So have my impressions of Riverside. It is now, in my opinion, one of the cutting-edge communities when it comes to the law and the courts. While other courtrooms are still deciding on whether to allow attorneys to bring in "ELMOS" during trial, Riverside has installed fully automated courtrooms, with plugs for attorneys' computers, ELMOS and other equipment, built-in viewing screens and state-of-the-art equipment. Riverside has disabled-friendly jury boxes and witness seats. It has several female judges and a tremendous number of female lawyers. But the biggest change I have noted is the attitude of the male attorneys. The vast majority of attorneys I have dealt with while practicing in Riverside have treated me with respect and civility and as an equal. I am thankful for the progress Riverside has made and for the innovative steps the members of the court and the bar have taken

to make Riverside County the leading county it has become for this state.

It is my hope to continue to attract new attorneys to our county, to foster new ideas, and to teach tolerance for our differences. I would like to see programs and talks designed to educate the general public regarding the court process and to address the needs of not only the legal profession, but also the public, which uses the services and experiences the legal process. To that end, I would like to see attorneys speak at schools, businesses and public functions regarding the shortage of judicial officers, the nature of the judicial process and how it affects everyday life, and to find out what our community needs from us and its courts to understand and to be able to navigate the complexities of the courts and to become active and informed participants in the process.

Barristers

by Christopher L. Peterson

Christopher Peterson

It is my honor to take over as Barristers President this upcoming season. Coming off of the successful year we just had, it is my goal to continue the tradition and hopefully expand on the great strides our Barristers group has been making over the last few years. For those who do not know, Barristers provides the younger attorneys in our community with an opportunity to meet colleagues who are in a similar stage of their careers, to build contacts, and to learn different aspects of the legal practice from tremendous guest speakers who graciously volunteer their time to speak to our group.

I am proud to welcome our incoming board members. The Vice-President will be David Cantrell of Lobb, Cliff & Lester. Kirsten Birkedal of Thompson & Colegate will return as Secretary. Jean Serrano of Heiting & Irwin, who stepped in last season to help fill a midseason vacancy, will return as Treasurer. Finally, our newest board members, taking over the Members at Large position, will be Jeff Boyd of Best Best & Krieger and David Lee of Varner & Brandt.

The diversity of our board is an example of how Barristers has had a rebirth in the last few years. Our meetings have brought out so many members from different law firms, as well as solo practitioners. In order to build our attendance, I will be visiting different law firms to give my pitch on the benefits of becoming a Barristers member. I would also encourage all of the law firms in the community to do the same with their new attorneys.

Our meetings will continue to be on the second Wednesday of the month, starting in October. The meetings will be held at the Cask 'n Cleaver, located at 1333 University Avenue in Riverside. You will be receiving reminders, including a list of the speakers.

I encourage everyone to attend. I look forward to seeing you in October!

Christopher L. Peterson, President of Barristers, is a senior attorney with Reid & Hellyer in Riverside.

Funding the Election Process

by M. Stephen Cho & Christopher C. Shattuck

Those of you who have been bombarded with ads relating to the presidential or congressional elections, you must be wondering where all of the money comes from to pay for those ads. Simply put, the money comes from anyone and everyone, but with certain restrictions. One of the most important restrictions in campaign financing law is the McCain-Feingold legislation, formally known as the Bipartisan Campaign Reform Act of 2002 (BCRA). (Pub. L. No. 107-155, 116 Stat. 81 & codified in scattered sections at 2 U.S.C.)

Introduction to Campaign Financing Law

Prior to the enactment of the BCRA, there were many loopholes in campaign financing law. (Brown & Spalding, *Grass Roots Democracy, or Free Speech Abridged?* (Dec. 2002) 10 Nev. Lawyer 8.) More specifically, people and organizations were circumventing the Federal Election Campaign Act of 1971 (FECA) limits on money, or hard money, that could be donated to candidates by coming up with innovative ways to qualify for an exemption or find a loophole under FECA. (Id. at pp. 8-9.) If the people or organizations qualified for an exemption or found a loophole under FECA, there was no limit on the amount of additional money, or soft money, that could be donated. (*Ibid.*) As a result, the 1990s witnessed a huge increase in the amount of soft money being spent on campaigns. (Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty* (2006) 75 Fordham L.Rev. 1593, 1605.)

The typical scenario in the 1990s was for people, organizations, and corporations to donate the maximum amount of hard money allowed under the law, approximately $1,000. (Brown & Spalding, *supra*, 10 Nev. Lawyer 8.) To provide additional soft money support to the candidate, these donors would sponsor ads that advocated support for the candidate, all the while not mentioning any of the "magic words" that would invoke FECA regulation. (Comment, *Reformation of 527 Organizations: Closing the Soft Money Loophole Created by the Bipartisan Campaign Reform Act of 2002* (2006) 66 La. L.Rev. 809, 827.) Additionally, these donors would give soft money to groups that would organize "get out the vote" drives, which would act to the advantage of specified candidates via a loophole under FECA. (Potter, *McConnell v. FEC Jurisprudence and Its Future Impact on Campaign Finance* (2006) 60 U. Miami L. Rev. 185.) In recognition of the growing amount of soft money being spent on elections and the resulting deterioration of the integrity of the election process, both parties came together to create the BCRA.

Mechanics of the BCRA

The BCRA was signed into law by President George W. Bush on March 27, 2002 and began regulating campaign donations received on or after January 1, 2003. (Pub. L. No. 107-155.) The primary purpose of this bill was to eliminate soft money contributions and to regulate election communications, or electioneering communications. (Pub. L. No. 107-155, 116 Stat. 81 & Potter, *supra*, 60 U. Miami L. Rev. 185.)

Soft money contributions were nearly eliminated by the BCRA. (Pub. L. No. 107-155, 116 Stat. 81, 81-88.) The BCRA specifically banned political parties and political action committees (defined as "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office . . .") from receiving or soliciting soft money contributions. (Comment, *Regulating Nonconnected 527s: Unnecessary, Unwise, and Inconsistent With the First Amendment* (2006) 55 Emory L.J. 193, 197.) However, the BCRA did not regulate or restrict the amount of money that could be solicited or received from section 527 groups (named after section 527 of the Internal Revenue Code, 26 U.S.C. § 527), which advocate voting or political action without rising to the level of influencing a voter to side with a specific candidate. (Note, *The Future of Soft Money in Federal Elections: The 527 Reform Act of 2005 and the First Amendment* (2005) 67 U. Pitt. L.Rev. 445, 457.)

These section 527 groups are the most influential soft-money exempted groups in the country. In the 2004 election cycle, these groups spent a total of $550 million. (Note, *The Future of Soft Money, supra*, 67 U. Pitt. L.Rev. at p. 457.) Again, these section 527 groups are exempt from taxes under the Internal Revenue Code and are exempt from regulation under the BCRA, since they do not advocate for a candidate or engage in electioneering communications. (*Ibid.*) Unlike section 527 groups, individuals and corporations are limited to donating $2,000 per candidate, per election and $25,000 per year to a national party. (Pub. L. No. 107-155, 116 Stat. 81, 102-03.) While the BCRA has failed to completely wipe

out this soft money loophole for section 527 groups, it has done an excellent job in curtailing election communications.

The BCRA has been effective in prohibiting organizations from financing election communications, or electioneering communications. (Potter, *supra*, 60 U. Miami L. Rev. 185.) "An electioneering communication is any broadcast, cable, or satellite communication which refers to a clearly identified federal candidate, is made within thirty days of a primary election or sixty days of a general election, and is targeted to the candidate's state or district." (*Ibid.*) Additionally, the BCRA requires any individual who finances an electioneering communication costing more than $10,000 to file notice with the Federal Election Commission (FEC), the federal group that carries out rulemaking and enforcement of the BCRA. (*Id.* at p. 187.) While the FEC spends a significant portion of its time enforcing rules on electioneering communications and soft money bans, there is another provision of the BCRA that is equally important.

An equally important provision of the BCRA is found at section 312. (Pub. L. No. 107-155, 116 Stat. 81, 106.) This section contains the penalty provisions for violation of the BCRA. More specifically, section 312 provides that if anyone violates a $25,000 aggregate limit on hard money, they shall be fined or imprisoned for not more than five years, and if anyone violates a $2,000 aggregate limit on hard money, they shall be fined or imprisoned for not more than one year. (*Ibid.*) While the penalty provisions are strict, these provisions were designed to deter people from improperly influencing the election process. For those individuals and organizations that were deterred by the penalty provisions, a different route was taken to remedy the situation.

Constitutionality of the BCRA

Like many unpopular laws, the BCRA has been challenged numerous times regarding its constitutionality. As a matter of fact, the drafters of the BCRA predicted that this law would be challenged and provided for expedited review by the United States Supreme Court. (Pub. L. No. 107-155, 116 Stat. 81, 113-14.) But even with the numerous constitutional challenges, the BCRA has survived and is primarily intact. (*Davis v. Federal Election Com'n* (2008) ___ U.S. ___ [128 S.Ct. 2759]; *FEC v. Wisconsin Right to Life, Inc.* (2007) ___ U.S. ___ [127 S.Ct. 2652, 168 L.Ed.2d 329]; *McConnell v. Federal Election Comm'n* (2003) 540 U.S. 93 [124 S.Ct. 619, 157 L.Ed.2d 491].) Thus it appears that for the near future, presidential and congressional nominees alike will have to abide by the BCRA.

Conclusion

In the months leading up to the next presidential or congressional elections, keep in mind the limits and restrictions on donations that these candidates may receive as prescribed under the BCRA. Additionally, make note of the candidates who strongly oppose the BCRA and question their reasons. Finally, be sure to voice your opinion and vote for your candidate of choice, whoever that may be.

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In Defense of the Electoral College

by Charles S. Doskow

On November 4 next, Americans will cast their votes for president, as we do every four years. Most of us are dimly aware that we are not voting directly for the man seeking the office, but for some vaguely defined "electors" who will, some time in December, cast the "electoral votes" of our state for the candidate who has received the most votes in the state. Those votes in the "Electoral College" will determine the winner of the presidency.

And that winner may not be the one who received the highest number of votes cast by the people.

Virtually every poll taken during the past few years has shown that a majority of Americans think that the winner of the popular vote for president should win the office. There are organized groups working to achieve that result. But we continue to elect presidents under the system that was created by the Constitutional Convention of 1787.

Why has the system not changed, despite change being supported by a majority of Americans? We will come back to that question after we review the origins of the Electoral College.

The delegates who met in Philadelphia in the summer of 1787 to draft a new constitution grappled with many difficult issues as they created a new national government from scratch. None involved more different viewpoints or created more division than the method of selecting the president.

Popular election was considered, but rejected. Some delegates did not trust the people at large to select wisely. The primitive communications of that time made it unlikely that most voters would be familiar with the candidates.

Election by Congress was rejected. That failed to gain support because it would make the president too dependent on Congress and would damage the separation of powers to which the convention was committed.

Giving power to the state legislatures was rejected.

One aspect of these debates is notable. At all times when the presidency and the selection process was being debated, every person in the room knew who the first president would be. George Washington was in the chair, presiding over all the plenary sessions of the Convention. In that sense, the delegates could have believed that whatever system was chosen would not be tested for at least one, and probably two election cycles.

It was at almost the last minute that choice by electors emerged as an idea that most delegates could support. The Committee on Deferred Matters brought forth the electoral college proposal. Each state would be allocated electoral votes in the number of the state's congressional delegation – two for its senators, plus one for each of its members of the House of Representatives. Each state would then select electors by whatever means it decided. The electors, it was believed, would be a coterie of notables, of independent mind and distinguished in public service.

The system was a pure invention.

It had several advantages. The large states received more voting power, but that was mitigated by the fact that giving each state at least three votes gave the small states a disproportionate, though smaller voice. The fact that the electors would be chosen in the states on the same specified day meant that agreements among candidates would be impeded.

But the final selling point was the tie-breaker. If no candidate received a majority of the electoral votes, the House of Representatives would vote until one candidate had a majority. Each state, regardless of its size or representation, would have one vote in the "contingent" election. In effect, the framers contemplated a two-step process, first selecting electors in the states, then the House choosing among qualified candidates.

The Convention appeared to make two assumptions about the system: First, that it would prevent the formation of political parties, and second, that most elections would end up in the House.

The system created has now lasted for 220 years, and it has served this country well, but the delegates' assumptions were dead wrong on how it would work.

Political parties began to coalesce almost immediately upon Washington taking office in 1790, and have dominated presidential elections since 1800. In so doing, they have prevented the splintering of interests that has been the bane of so many other political systems.

Only three elections have been decided in Congress, two in the House after the elections of 1800 and 1824, and one in the Senate, after the election of 1836.

Developments since the adoption of the Constitution coalesced to create the system we use today.

First, almost immediately, electors began to announce their preference, and the idea of their exercising indepen-

dent judgment went out the window. Selection of electors was made on a partisan basis; as early as 1792, some candidates for elector declared their commitment to a candidate. The idea of an independent elector died very quickly.

Second, the states soon adopted popular election of the electors. By 1824, three-quarters of the states held elections for electors pledged to a candidate. (The others were selected by the legislature.)

Third, by 1836, most states had adopted a winner-take-all system for casting their electoral votes. This is key, for it allows a state to use its full political power for a candidate, although that candidate has received well under 100 percent of the vote in the state.

These three developments, unforeseen by the founders, have shaped our system of selecting the president, and have thus shaped our republic.

The Twelfth Amendment, adopted in 1804, eliminated one ill-considered part of the original plan. Under Article II, as originally adopted, each elector cast two votes, with the second-place finisher becoming vice-president. This resulted in a 36-vote stalemate in 1800 (Jefferson was elected after one Burr supporter pulled his vote) and was quickly changed.

The election of 2000 has caused interest to grow in substituting a system of popular election. George Bush was a minority President in his first term, and John Kerry would have been the same with the switch of a few votes in Ohio in the 2004 election.

Why has the system not changed? The basic reason is the almost insuperable hurdle of amending the Constitution. Super-majorities in both Congress and the states are a formidable obstacle, and one unlikely to be overcome.

There is presently a movement (the National Popular Vote Plan) to accomplish change without amending the Constitution. Under its plan, every state would commit itself to cast its electoral votes for the winner of the national popular vote. The commitment is to be effective only when states with a majority of electoral votes have adopted the same agreement. There is a serious question whether such a resolution by several states would be a compact among states which, under the Constitution, would require congressional approval.

There is another reason the system has not changed: Neither political party is convinced that changing the system would be good for *it*.

It is a system consistent with the representative government that the Convention created, one based on republican principles.

But most importantly, the system has worked. It is inhospitable to small factions and regional interests. It sustains the two-party system.

Every presidential election has resulted in a peaceful transfer of power. Every state can exercise its power as a state to indicate its preference. We have never had general elections in this country; every vote has been by state or in the states.

There are serious practical problems with a national popular election in which every voting establishment could be the source of corrupt practices.

The framers who met in Philadelphia in 1787 had the delicate task of forming a central government strong enough to meet national needs for defense, the regulation of commerce and the other requirements of nationhood, while respecting and recognizing the role of the states as the building blocks of the country and as parallel governments, paramount within their own spheres of interest.

The federal-state balance has shifted in many areas, but it has remained constant in the area of presidential selection. As a process, it has served us well and should be retained.

Charles S. Doskow is Dean Emeritus and Professor of Law at the University of La Verne College of Law in Ontario. He is a past-president and current board member of the Inland Empire Chapter of the Federal Bar Association.

Removal of an Elected County Officer from Office

byAndrew Hartzell

Removing an elected county officer is not easy, nor should it be easy. The county officer was elected by the People, so if the elected official has not committed a criminal act, the path to removal should be difficult. This article provides an overview of the legal authority provided in the California Constitution and codes, along with the provision in the San Bernardino County Charter, for removing an elected county official from office.

Grand Jury Accusation

State law permits the grand jury to issue an accusation for the removal of an elected or appointed officer of the county, for "willful or corrupt misconduct in office." (Gov. Code, § 3060.) An accusation must be written in "ordinary and concise language" and "must be approved by at least 12 grand jurors." (Gov. Code, §§ 3060, 3061.) Upon issuing an accusation, the grand jury turns the accusation over to the district attorney, and the district attorney serves the accusation on the accused officer and notifies the accused in writing that he or she must appear before the superior court to answer the accusation. (Gov. Code, §§ 3062, 3063.) If the accused denies the truth of the accusation, there is a trial by jury in the superior court, which is conducted in all respects in the same manner as a trial of a criminal indictment. (Gov. Code, §§ 3065, 3070.) Thus, the accused is afforded the same rights as in a criminal trial. If the accused is convicted, a judgment of removal is entered in the court minutes. (Gov. Code, § 3072.)

A judgment of removal may be appealed in the same manner as a criminal conviction, to the court of appeal. (Gov. Code, § 3075.) Although a county board of supervisors may request the grand jury to issue an accusation, the issuance of an accusation rests solely with the grand jury, and if it is issued, the proceeding is thereafter handled by the district attorney in the superior court.

Recall Petition and Election

The second option for the removal of a county elected officer is through the recall process. A petition to recall an elected county officer is initiated by submitting to the registrar of voters a notice of intent. (Elec. Code, § 11006.) If the registrar approves the form and wording of the petition, the proponents have 160 days to circulate the petition and to obtain signatures of ten percent of the registered voters of the county. (Elec. Code, §§ 11220, 11221.) Upon submission of the petition to the registrar, the registrar has 30 days to determine if there is a sufficient number of signatures. (Elec. Code, §§ 11224, 11225.) If there are sufficient signatures, the registrar submits a certificate of sufficiency to the board of supervisors, which then must within 14 days issue an order to set the recall election, which must be not less than 88 nor more than 125 days after the issuance of the order. (Elec. Code, §§ 11227, 11240, 11242.)

A recall petition may be initiated by any registered voter in the jurisdiction of the officer sought to be recalled. (Elec. Code, § 11005.) It would not be appropriate for a board of supervisors to initiate a recall petition; this process remains with registered voters, as opposed to governmental entities.

The County of San Bernardino's Charter

The California Constitution permits counties to adopt charters, and recognizes "Home Rule," which has been defined as "the right of the people of a charter county to create their own local government and define its powers within the limits set by the Constitution." (*Younger v. Board of Supervisors* (1979) 93 Cal.App.3d 864, 869.) Article XI, section 4 of the Constitution sets forth what a county charter must provide for, including: "An elected sheriff, an elected district attorney, an elected assessor, other officers, their election or appointment, compensation, terms and removal." (Cal. Const., art. XI, § 4, subd. (c).) The Constitution also specifies that charter counties have all the powers that are provided by the Constitution and by statute. (Cal. Const., art. XI, § 4, subd. (h); *Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1206-1207.) The provisions of a county charter are the law of the state, and have the same force and effect as a law enacted by the state legislature. (Cal. Const., art. XI, § 3, subd. (a).) Thus, the California Constitution, Article

XI, section 4, sets out the authority of the People to create and operate their own government and to define the powers of that government, within the limits set out by the Constitution. Article XI, section 4 both specifies and confines the authority of county charters.

There are 14 charter counties in California, including the County of San Bernardino. San Bernardino is the only charter county that has a provision for removing an elected official from office.

In 1912, the electorate of the County of San Bernardino approved the following charter provision:

> Any County officer other than supervisor may be removed from office in the manner provided by law; also any such officer may be removed by a four-fifths vote of the Board of Supervisors, for cause, after first serving upon such officer a written statement of alleged grounds for such removal, and giving him a reasonable opportunity to be heard in the way of explanation or defense. (San Bernardino County Charter, art. II, § 6.)

In 2002, the San Bernardino County Board of Supervisors approved Ordinance No. 3863, which added several sections to the County Code that, among other items, established clearer standards of conduct for all county elected officials and clarified when the charter provision referenced above could be exercised. County Code section 13.0404(b) states:

> The removal of an elected County officer is an extraordinary act and should occur in only the most egregious of circumstances and only when the interests of the citizens of the County cannot be reasonably served by any other means. These circumstances include the exposure of the County, or its employees, to irreparable harm.

County Code section 13.0404(c) defines what the term "cause" in the charter provision means, and establishes the following four criteria for a showing of "cause" to remove a county officer: (1) flagrant or repeated neglect of duties; (2) misappropriation of public property; (3) violation of any law related to the performance of the officer's duties; or (4) willful falsification of a relevant official statement or document.

When the ordinance was enacted, the Sheriff filed a legal action to challenge the power of the Board of Supervisors under this charter provision and the more recent County Code provisions. Both the superior court and the court of appeal upheld the charter and County Code pro-

visions as being constitutional. (*Penrod v. County of San Bernardino* (2005) 126 Cal. App.4th 185.)

Initiation of this process must be accomplished in an open meeting. If the Board of Supervisors decides to initiate an action under these provisions, there is little specific guidance as to how that process should proceed. However, due process must be afforded to the elected officer. The elected officer being removed must be given a written statement of the alleged factual grounds for removal. These charges must be written with sufficient specificity to enable the officer to defend against the charges. The officer must also be given all written materials upon which the charges are based. The officer must be given adequate time to prepare an explanation or defense. There must be a fair and impartial evidentiary hearing before the Board of Supervisors that is open to the public. While the burden of proof is not clearly set forth in the law, I believe the proper standard is clear and convincing evidence. If four members of the board determine, based only on the evidence presented at the hearing, that there is a sufficient showing of "cause" for removal of the officer, the board may remove the officer from his or her elective office.

Since the Board of Supervisors, sitting in a quasi-judicial capacity, would be the hearing body for the matter, the charges should be drawn up and ultimately presented in the hearing by independent "special" legal counsel retained specifically for that purpose. County Counsel would be the legal advisor for the Board at the evidentiary hearing, so that office cannot draw up the charges nor present them at the hearing. A decision by the Board of Supervisors removing an elected officer may be appealed to the superior court through a petition for a writ of administrative mandamus, and thereafter to the appellate courts.

Neither the California Constitution nor state legislation expressly grants the

board of supervisors the power to impose any form of corrective action on another elected officer, short of removal from office. Removal from office can be initiated only if provided in the county's charter. The San Bernardino County Charter provides that the Board of Supervisors may remove a countywide elected officer only for extraordinary cause. The Board may not impose lesser traditional disciplinary measures (such as an employment suspension or reduction in pay), because that action would usurp the power of the electorate to ultimately control and govern its elected officers.

Andrew Hartzell is a principal assistant county counsel with the County of San Bernardino

Should We Change the Way We Elect Presidents?

by David A. Sonner

When we go to the polls to vote for a president in November, we will not be voting directly for Barack Obama or John McCain, even though it might seem that way on our ballots. Instead, we will be voting for competing slates of presidential electors who, in turn, will vote in December to decide who our next president will be.

Our founders intended that those electors exercise their own judgment and discretion in choosing a president. Although infrequent, there are historical examples of presidential electors exercising their judgment and discretion to violate their pledge to vote for a specific candidate. In 1968, for example, Dr. Lloyd Bailey was elected in November as a Republican presidential elector pledged to Richard Nixon, but he decided to cast his electoral vote in December for George Wallace because he was concerned, he said, about Nixon's leftist leanings in early cabinet announcements.

Why don't our ballots list the names of these potentially important presidential electors? In fact, at one time, the names of the presidential electors and not the presidential candidates were on our ballots, but this caused problems. In Maryland in 1904, for instance, many Republican voters marked only the box for the first Republican presidential elector on their ballots, believing that box represented a vote for all eight Republican presidential electors. The result was that the Republicans received only one instead of all eight of Maryland's electoral votes. Fortunately, this did not affect the outcome of the 1904 election because Republican Teddy Roosevelt won a landslide victory.

Because of such problems, though, states started using "short ballots," which featured the names of the presidential candidates instead of the presidential electors. At first, these short ballots used wording such as "Presidential Electors for John Smith," but even that wording is now gone in many states. Many states now have laws that allow no mention of presidential electors on ballots, using only the names of the candidates and their party affiliation, and delegating to the parties the naming of slates of electors. This avoids the 1904 Maryland problem, but many voters now do not know that they are really voting for a slate of electors.

If we now have the names of the presidential candidates on all of our ballots, why don't we elect our presidents directly, by declaring the candidate who receives the most popular votes the winner? After all, many chief executives are elected that way – other countries directly elect their presidents that way and we directly elect our state governors that way.

Moreover, there are sound reasons for changing to direct election of the president. For instance, after a party wins the popular vote but loses the electoral vote, there typically is a lot of anger and bitterness throughout the country. The country becomes more politically polarized and political cooperation becomes more difficult. That happened after the contentious elections of 1824, 1876, 1888 and 2000.

According to the National Archives, there have been over 700 proposals to change the way we elect presidents made in Congress over the last two centuries. Despite all these proposals, there have been only two significant changes in our procedures for electing presidents. In both cases, the changes happened after contentious elections highlighted problems in our election procedures.

In the election of 1800, because of a tie in the electoral vote between Thomas Jefferson and his running mate for vice-president, Aaron Burr, the election moved to Congress, where a political battle ensued that took 36 ballots to resolve. Afterwards, the Twelfth Amendment, separating the tallies for president and vice-president, was incorporated into the Constitution.

In the election of 1876, Democratic and Republican presidential electors in four disputed states sent contending sets of electoral votes to Congress, notwithstanding that each state was entitled to only one set of electoral votes. Under the Constitution, Congress had to decide which of those contending sets of electoral votes to count, triggering enormous political battles in Congress and in a specially created Electoral Commission. As a result of that experience, Congress eventually passed the Electoral Count Act of 1887, now found in Title 3 of the United States Code, which provides rules to tell the states which electoral votes Congress will count in a dispute.

Is there a chance that another contentious election might highlight a problem in our election procedures? The answer is yes, perhaps with another contingent election in Congress.

The Constitution still provides that candidates must get "a majority of the whole number of Electors appointed" to be elected. Otherwise, the election moves to Congress, with the House electing the president and the Senate the

vice-president. Currently, if no candidate gets 270 or more electoral votes, then the election moves to Congress.

There are several ways to have a contingent presidential election in the House. A tie with each major candidate winning 269 electoral votes would send the election to the House. A "faithless" elector, acting like Dr. Lloyd Bailey in 1968 and violating his pledge to a candidate, could send a very close election to the House. Alternatively, a third party winning some electoral votes could send an election to the House. For example, if the 1948 or 1968 elections had been closer as between the major parties, third-party candidates Strom Thurman or George Wallace might have triggered a contingent election in the House, since both won electoral votes.

In a contingent election in the House, the Constitution says that each state gets one vote. To decide which candidate gets a state's one vote, that state's delegation in the House ballots among itself.

Why worry about a contingent election in the House? The answer lies in the urbanization of America and the current huge difference in population between big and small states. Consider an example. According to the most recent federal census, California has more than 68 times the population of Wyoming. In a contingent election in the House, however, Wyoming will have an equal vote with California. Indeed, in a contingent election in the House, all the small-population states will have enormous power, vastly disproportionate to their population.

The electorate's reaction to this obvious unfairness is open to speculation. Its reaction might depend on the circumstances surrounding a contingent election. History gives little solace for those hoping for bipartisanship in a contingent election, though, since party loyalty has always become intense in past election disputes. If such an election is resolved in a highly partisan way in the House, by a method that gives excessive power to small states, it might trigger a vigorous debate about changing the way we elect our presidents.

In 1823, Thomas Jefferson wrote that he considered our method of electing presidents "as the most dangerous blot on our Constitution, and one which some unlucky chance will some day hit." Without changing some of our procedures for electing presidents, such as the procedure for contingent election in Congress, our future will probably contain more disputed presidential elections that will try the patience of our nation.

A Shark Story

by Richard Hassen

It's no secret that the real estate industry is in severe trouble. Having enjoyed unparalleled prosperity while lending money with abandon, the lenders found that their fate was sealed with the first increase in payments under variable-rate mortgages. Faced with double and sometimes triple mortgage payments, homeowners, many with little or no equity remaining in their homes, merely abandoned them to the lenders. Others sought to preserve hearth and home by seeking to sell their homes for less than owed, to deed them back to the lenders, or to deal with a new crop of problem-solvers: the so-called "rescuers."

Whenever money and property are involved, you'll find sharks in the water, waiting to prey on people in trouble. This new breed of predators uses public records to locate homeowners who are in default on their mortgages. They make contact with the troubled homeowners and present themselves as rescuers who will help the distressed homeowners to keep their homes and avoid foreclosure. What they are really after is the house itself, and they care little about what happens to the hapless owners after they carry out their schemes.

While there are many such schemes, three variants are most popular. In the first, the scammers charge outrageous fees to do simple paperwork; they make a few phone calls, supposedly to the involved lender, and then abandon the homeowner after collecting the money, leaving little time to find another solution.

Another scam involves conning the homeowner into surrendering title to a third party, who cures the default on the mortgage and then leases the home back to the homeowner, with an option to repurchase it at a later time. These deals are deliberately set up so the terms of the option agreement cannot be met, or are so difficult to meet that the homeowner has little chance of repurchasing the home. Usually, the homeowner's credit is damaged by the previous failure to pay and he or she unable to obtain financing for a repurchase within the time span allotted in the agreement, usually one year. The unwitting former homeowner (now a tenant) gets evicted from the home and the "rescuer" resells the property at a profit.

A variation of this scheme occurs when the homeowner is allowed to "share" in the equity of the home by avoiding rent payments for a time period (payments are made from the proceeds of a new, inflated loan obtained against the home by the "rescuers"). At the end of this time, the homeowner is expected magically to seek out new financing, obtain a loan to pay off the inflated loan obtained by the rescuers, and repurchase the home. Unable to do so, the former owner is promptly evicted.

A third scam involves outright deceit and criminal fraud. The homeowner is asked to sign a document package that he or she is told is for new financing, but may in fact, conceal a transfer of title within the pile of papers. A favorite trick is to have the documents conveniently run out of space at the bottom of a page. The signature page, with no text on it, follows and is notarized. That page can then be attached to a completely different set of documents in which the home is transferred to the predators. The distressed homeowners are out on the street and never knew what hit them. And even worse, they may find themselves off the title to the property, but still subject to the existing loan and responsible for payments to the lender. A recent California case illustrating this type of scam is *People v. Martinez* (2008) 161 Cal.App.4th 754.

In another blatant scheme, two individuals researched public filings and database lists of pending foreclosure sales to identify homeowners whose mortgage loans were in default. They then contacted the homeowners and offered to stop the foreclosures on the delinquent mortgages by providing short-term loans to cover outstanding debts and then refinancing the mortgage loans with the co-signature guaranty by an "investor" with good credit. Instead of arranging refinancing, the defendants submitted loan applications in the names of straw buyers who were purportedly purchasing the property as a residence to occupy. In some cases, the straw buyers were paid for the use of their personal information on the loan applications. In others, the defendants used the information of individuals without their knowledge, making those individuals victims of identity theft. All of the loan applications contained false information about the straw buyers' employment and income, which the financial institutions relied upon when funding the new loans. Loan proceeds went to pay off the loans in default, with most of the remaining amounts being skimmed off by the defendants. To disguise and conceal the amount of money that they were getting, the scammers wrote checks to third-party payees and then deposited the checks back into accounts under their own control or the control of a family member in what appeared to be a money-laundering scheme.

These types of schemes are not limited to California. In an unpublished opinion, the Michigan Court of Appeals

upheld a trial court decision declaring that a deed given by an owner in foreclosure would be treated as an equitable mortgage, where the facts indicated that the parties had unequal bargaining power and there was inadequate consideration for the conveyance. (*London v. Gregory* (Mich.App. 2001) 2001 WL 726940.)

Here's what happened. Virginia Gregory was the owner of real property against which a mortgage foreclosure action had been filed. Two days before foreclosure would be final and the owner's equity of redemption period would expire, Ms. Gregory entered into an agreement (without the assistance of counsel) whereby she conveyed the property to Leslie London by a warranty deed for $1. In consideration for this transfer, Ms. London agreed to redeem the property (for the redemption price of $38,231) and lease it back to Ms. Gregory for 18 months at a rental of $400 per month. The agreement also provided Ms. Gregory with an option to repurchase the property at the end of the 18 months for $48,239. This purchase option could be exercised only if Ms. Gregory made all rent payments on a timely basis. As it turned out, Ms. Gregory made only one rent payment, which was late. At the end of the lease term, Ms. London served Ms. Gregory with a 30-day notice to quit and commenced eviction proceedings. This would have left Ms. London in full possession of a property worth approximately $120,000, for an outlay of only $38,231 (the amount paid to redeem). However, the trial court declined to evict Ms. Gregory, instead ruling that she could remain in possession of the property and that the deed would be treated as an equitable mortgage.

Ms. London appealed, and the circuit court upheld the trial court decision. Ms. London appealed again; she argued that the lower courts had erred by refusing to hear testimony about the intention of the parties in entering into their agreement. Specifically, Ms. London claimed that she was not a mortgage lender, that there had been no loan application or discussion of a loan, and that there had been no discussion of Ms. Gregory's financial condition or ability to repay.

The Court of Appeals affirmed again. Acknowledging that "[t]he controlling factor in determining whether a deed absolute on its face should be deemed a mortgage is the intention of the parties," the court nevertheless said that "[s]uch intention may be gathered from the circumstances attending the transaction including the conduct and relative economic positions of the parties and the value of the property in relation to the price fixed in the alleged sale. Under Michigan law, it is well settled that the adverse financial condition of the grantor, coupled with the inadequacy of the purchase price for the property, is sufficient to establish a deed absolute on its face to be a mortgage. [Citation.]"

In an effort to stem the rising tide, the California legislature has enacted legislation "find[ing] and declar[ing] that homeowners whose residences are in foreclosure are subject to fraud, deception, harassment, and unfair dealing by foreclosure consultants from the time a Notice of Default is recorded . . . until the time surplus funds from any foreclosure sale are distributed to the homeowner or his or her successor. Foreclosure consultants represent that they can assist homeowners who have defaulted on obligations secured by their residences." (Civ. Code, § 2945, subd. (a).) It "further finds and declares that foreclosure consultants have a significant impact on the economy of this state and on the welfare of its citizens." (Civ. Code, § 2945, subd. (b).) The legislation continues with several pages of definitions and requirements aimed at regulating the conduct of foreclosure consultants. (Civ. Code, §§ 2945-2945.11.)

Whether this legislation will deter the predators is debatable. After all, whenever money and property are involved, you'll find sharks in the water waiting to prey on people in trouble.

Richard Hassen, of Hassen & Associates, has been in private practice since 1978, emphasizing all aspects of real property law, finance and litigation.

Is Internet Marketing for Lawyers the Wave of the Future?

by Kirsten S. Birkedal

This article explores the option of internet marketing for lawyers. As you are probably aware, the internet is often the first source many people go to for information. In fact, the yellow page advertisement book may soon become extinct. Lawyers who advertise in the yellow pages or in other hard-copy advertisements should begin to consider moving their advertisements onto the web.

Creating a website to advertise your legal services may not be as expensive as you think. For example, the average yellow page advertisement can cost from $2,000 to $7,500 to run per year. Billboard advertisements can cost even more. Just imagine if you placed that same budget into creating an informative website about you and your firm. The cost of creating your own user-friendly website is about the same as the cost of running a yellow page advertisement for one year. Plus, you will not have to pay that same amount the next year, because your site will most likely stay the same unless an update is required.

To create a website for your firm, make sure to hire to a web design and marketing firm that has an established track record of creating a professional product. You should invest in a website that informs people about your practice and your contact information so that you can easily sell your legal services. In addition, you should link to informative legal articles from your website, as well as to information about the areas of law in which you practice. This can be accomplished with the assistance of your web design and marketing firm and is highly recommended, because the more information you provide to your potential new clients, the more they will trust your services early on.

In addition to creating a website for your firm or updating your website, you should also consider your website's placement on a search engine like Google or Yahoo! What do I mean by a website's placement on a search engine? If you have a website already, go to Google and type in your firm name and city to see whether your website appears. If you do not have a website of your own, use the name and city of another firm that has a website. Once you type the name of the firm in the Google box and click "search," you will find the list of search results. Notice where your website appears. Does your firm appear at the top of the page? Or is your firm listed near the bottom? Is your firm even listed at all?

How can you get your website to appear when someone is searching for a type of legal practice you specialize in? Easy, you hire a web design firm that can implement a technique called "search engine optimization," often referred to as SEO. Search engine optimization is the process of improving the volume and quality of traffic to a web site from search engines like Google and Yahoo! via natural search results[1] of searches that contain target keywords. If a site is presented at the top of the search results, or, in other words, ranks the highest, then usually more searchers will visit that site. The objective of search engine optimization is to achieve high natural search engine placement for relevant keywords or keyword phrases.

For example, often when people are searching for information on legal services on the internet, they will type a question into the Google or Yahoo! search box like, "Who do I contact for a good landlord tenant attorney in Riverside, CA?" If you are lucky enough to have your firm's website appear after these search terms are entered, then you have most likely secured a potential new client.

Generally, searchers scan a search result page like from top to bottom and left to right, looking for a relevant result. Placement at or near the top of the rankings therefore increases the number of searchers who will visit a site. As a marketing strategy for increasing a site's relevance, search engine optimization considers how search algorithms work and what people search for.

If you are interested in utilizing search engine optimization for your law firm's website, then you will need to contact a firm like Frye/Wiles, a design, development and marketing firm based in Riverside. Frye/Wiles will be able to create your website or improve upon an old one in order to make it compatible with search engine optimization. Frye/Wiles can also help you implement search engine optimization for your website. For example, if your firm specializes in representing debtors in Chapter 7 bankruptcy, then Frye/Wiles will first identify how people search for this particular legal service on the web, noting specific search terms and phrases. Next, Frye/Wiles will optimize your firm's web page to include these specific terms and phrases

1 A natural word search result means the search engine owner is not paid per click when someone enters your site.

in order for your website to appear more often and in a top spot on Google.

The goal is not to attract the most traffic to your website, but rather to attract potential new clients who need your legal services and are ready to contact you. One of the founding partners of Frye/Wiles, Rob Frye, explains, "Search engine optimization will bring traffic to your website, but the key is to have that traffic convert to new clients." Frye/Wiles will monitor your website to determine how many people view your site and who contacts you for legal services thereafter. This service will assist you in understanding whether your website is being viewed by potential new clients or whether you need to reformat your optimization key words or website to attract different searchers.

Julian Sutter, an associate with Frye/Wiles who specializes in search engine optimization, states, "Search engine optimization allows law firms to obtain prequalified clients online." This means that if your website is optimized, then it will allow web searchers who are interested in your area of law to find you easily. For example, a potential new client may search the internet by typing into Google, "Riverside lawyer specializing in lemon law." If this search yields your firm as a top result, then you will be able to advertise directly to a client who needs you.

However, it is important to note that search engine optimization does not mean you are ensured top placement on Google's search page. In fact, search engines like Google may change their algorithms, so that at one moment your website could be featured at the top of Google's list and then fall to the bottom the next month. Therefore, in order to maintain proper placement on the search engine, your webmaster will have to monitor your placement and then change the algorithms if necessary to continue to hold your placement at or near the top.

Overall, lawyers need to rethink where they invest their advertising dollars and to spend more to build a website and have it optimized with key search terms. As a general rule, the cost of online advertising is lower than most other advertising media. In addition, unlike a billboard or an advertisement, an optimized website allows clients to find you when they are looking for the type of legal services you provide. As more and more people use online search engines to find the information they need, lawyers should make themselves accessible online in order to capture these potential new clients.

Kirsten S. Birkedal is an associate with Thompson & Colegate, LLP. If you are interested in website development or design services, contact Rob Frye or Julian Sutter at Frye/Wiles at (951) 530-1679, and check out their website at www.fryewiles.com.

Same-Sex Marriage in California: The California Supreme Court Decision and the Next Step Toward Equality

by Amanda Alquist

When the California Supreme Court issued its ruling in *In re Marriage Cases* (2008) 43 Cal.4th 757 on May 15, 2008 and effectively legalized same-sex marriage in California, I felt a sense of victory. Yet not for the reasons you may think. I was not a lawyer involved in the case, I know only a few people who were personally affected by the decision, and the ruling itself will not affect the marriage my fiancé and I will enter into this fall. But I was excited to hear the news nonetheless. Reading, researching and writing about same-sex marriage has been a labor of love since my undergraduate days. My first paper on same-sex marriage led to a senior project thesis detailing why civil unions were not enough for same-sex couples. Once in law school, I enrolled in seminar classes and wrote two separate articles on same-sex marriage, both of which will be published in law reviews this fall. To me, the California Supreme Court ruling validates everything I have written on the subject, a validation quite unexpected when I wrote that first paper in college.

The litigation leading to the ultimate decision in *In re Marriage Cases* began in 2004 as a response to the issuance of over 4,000 marriage licenses to same-sex couples in San Francisco. After Mayor Gavin Newsom announced city and county officials would begin issuing marriage licenses to same-sex couples, Randy Thomasson, the founder of Campaign for California Families, filed suit against the mayor and the county clerk to stop the issuance of the licenses. This case was eventually consolidated with five other California cases filed either by other organizations against same-sex marriage or by same-sex couples asserting their right to join in marriage.

The cases were assigned to San Francisco Superior Court Judge Richard A. Kramer for the purpose of determining the constitutionality of California's Family Code provision stating that only marriage between a man and a woman is valid or recognized in California. On April 13, 2005, the trial court ruled that the definition of marriage as between a man and a woman violated equal protection under the state constitution. Separate appeals were filed and consolidated into one case entitled *In re Marriage Cases*. On October 5, 2006, the appellate court found that the trial court erred in finding California's definition of marriage unconstitutional. The court emphasized that homosexuals could still form domestic partnerships in California, granting homosexual couples nearly all of the same rights as married couples under state law.

After this decision, petitions for review were sought in the California Supreme Court. The case was argued in March 2008, with proponents of same-sex marriage arguing that marriage is a fundamental privacy right and that the state does not have a legitimate interest in denying same-sex couples the right to enter into a marriage. The parties opposed to same-sex marriage argued that the traditional definition of marriage existed before California's statutes limited the institution to one man and one woman, and that the state had a legitimate interest in upholding this tradition.

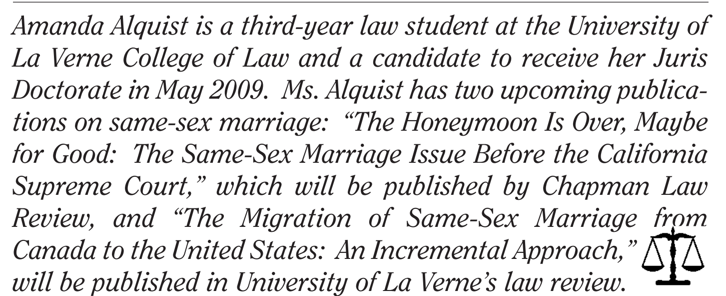
The California Supreme Court overturned the court of appeal ruling and held that defining marriage as between a man and a woman violates equal protection under the California Constitution. The court emphasized the fundamental interest at stake in entering into a marriage, finding it a fundamental basic civil right. The court held that the current California statutory scheme treated same-sex couples as second-class citizens. Since the ruling became final on June 15, 2008, marriage licenses have been issued to same-sex couples in counties across California.

The next step in this ongoing battle will be determined by the November 2008 election. A proposition to add a ban on same-sex marriage to the California Constitution will appear on the November ballot. If it passes, it will deny same-sex couples the right to enter into marriage in this state or have marriages performed outside of California recognized here. It is no surprise how I will vote this fall. In the several years I have spent following the same-sex marriage debate, one opinion has remained constant – same-sex couples deserve equal treatment under the law. This is a belief I thought too simplified within the same-sex marriage context, until I read the California Supreme Court's opinion, which emphasized the need for the equal treatment of homosexuals.

Some who are opposed to same-sex marriage and favor domestic partnerships or civil unions are unaware of a key fact. Unfortunately, it is a fact that is often overlooked in debates over same-sex marriage. While domestic partnerships in California (and civil unions in other states) offer *nearly* all of the same benefits as traditional marriage, they only offer *state* recognition of same-sex relationships. In denying same-sex couples the legal right to marry, they are not granted access to over 1,000 *federal* benefits. Legalizing same-sex marriage in California will not grant homosexuals access to these benefits because, under the Defense of Marriage Act of 1996, the federal government only recognizes marriage as between a man and a woman. Offering same-sex marriage at the state level is the first step to full equality for same-sex couples seeking the legal rights and responsibilities as well as the social recognition marriage confers.

Ideally, I would like nothing more than to see same-sex marriage legalized in every state, with full federal recognition soon to follow. However, I am realistic and I understand that may not happen as soon as I and others who support this important gay rights issue would like. Therefore, I think the next important step is to advocate for federally recognized civil unions and domestic partnerships. While I agree with the California Supreme Court that labeling heterosexual unions "marriage" and homosexual unions "domestic partnerships" creates a second-class status for same-sex couples, I think ensuring the maximum amount of legal benefits, protections, and responsibilities would significantly benefit homosexuals. The lack of federal protection severely impacts and limits the ability of same-sex couples to protect their unions. This becomes especially important when couples travel outside of the state where their partnerships are sanctioned, for those couples who have children, and in relation to certain tax and survivorship benefits. Come November, Californians will have the opportunity to decide for themselves what the next step will be in the same-sex marriage debate.

Amanda Alquist is a third-year law student at the University of La Verne College of Law and a candidate to receive her Juris Doctorate in May 2009. Ms. Alquist has two upcoming publications on same-sex marriage: "The Honeymoon Is Over, Maybe for Good: The Same-Sex Marriage Issue Before the California Supreme Court," which will be published by Chapman Law Review, and "The Migration of Same-Sex Marriage from Canada to the United States: An Incremental Approach," will be published in University of La Verne's law review.



Same-Sex Marriage: The Hijacking of a Sinking Ship?

by Richard D. Ackerman

In May of this year, the California Supreme Court held in *In re Marriage Cases* (2008) 43 Cal.4th 757 that same-sex marriage must be allowed in this state as a matter of equal protection principles. The court soundly rejected any notion that marriage between a man and a woman is a sacred tradition or a historical institution worth protecting. The decision was rendered regardless of the fact that most men and women coming together for a lifetime commitment called "marriage" will have children and form the basic family unit. Indeed, the nuclear family unit remains the basic building block of all human society, and "marriage" between a man and a woman is an institution that has existed for thousands of years. The institution spreads across all social, historical, cultural and economic divides. It seems presupposed that the generations who came before us were simply ignorant of "equality" in developing the institution of marriage. This could be viewed as a rather vain presupposition.

In any event, the *Marriage Cases* holdings resulted in an opening of the proverbial floodgates, and the news media have been actively covering the vast number of "gay marriages" taking place ever since. While all of this might be a theoretical win for same-sex marriage advocates, it is the position of this writer that any celebrations may be premature, as there is a lack of practical insight as to what "marriage" really means in the United States, and same-sex marriage advocates may have found themselves in the awkward position of hijacking a sinking ship. These are only passive observations on the issues, and it is readily admitted that equal protection theory has its place in the overall analysis. Unjustified discrimination is always suspect and deserving of careful criticism by the courts.

First, those opposed to same-sex marriage have been able to successfully draft a ballot initiative that proposes to change the California Constitution so that same-sex marriage will not be recognized at all in California. As a result, the celebration of the court's ruling may be short-lived. The initiative will be on the November ballot, and past history indicates that California is close to evenly divided on the issue of same-sex marriage. In fact, Proposition 22 was passed in 2000 by a significant margin (61%). There does not seem to be any systematic proof that cultural mores have changed since then. Large voting blocs, such as moderates, Catholics, Evangelicals, Hispanics and African-Americans, seemingly continue to maintain traditional views on marriage. Moreover, homosexuality remains taboo in many demographic groups. While same-sex marriage advocates might want to claim that this is a matter of systematic cultural ignorance, there is great political risk in forcing any group into accepting gay marriage by judicial fiat.

Along these same lines, there seems to be a cogent argument that proponents of same-sex marriage should have introduced their own ballot initiative to legalize same-sex marriage. This would have avoided the public controversy associated with having the judiciary decide issues of general morality, the creation of rights not explicitly defined in the California Constitution, and/or matters that have already been decided by the People through Proposition 22. Judicial fiat over history, tradition, and established law is not a good approach to social engineering. If same-sex marriage proponents are confident that the general public supports their views, then one would think that a ballot initiative would easily qualify and be enacted by the vote of the People.

Secondly, should we really be redefining marriage at a time where approximately two-thirds of traditional marriages are resulting in divorce in California? Should we be redefining marriage when 42-45% of African-American women will never be married, but will still be left with the charge of raising a family? (See Kinnon, *The Shocking State of Black Marriage: Experts Say Many Will Never Get Married* (Johnson Publishing 2003); U.S. Dept. of Health & Human Services, *Births, Marriages, Divorces, and Deaths: Provisional Data for*

2005 (Centers for Disease Control 2006), Vol. 54, No. 20; see also www.divorcerate.org.)

Instead of redefining marriage, perhaps society ought to be focused on relieving the existing congestion in our family and child dependency courts. There are root problems that are not being dealt with. It is certainly no secret that child support enforcement in many communities is an ongoing issue, the high divorce rate for all socio-economic classes is destroying the spirits of affected children, and our judicial resources are stretched to an unimaginable limit. It does not seem that same-sex marriage advocates really gave much thought to the idea that they would be redefining a word that may have already, and quire sadly, lost most of its meaning and practical application.

Indeed, some might argue that the push for same-sex marriage was actually selfish. If being married is an unrealized status for single mothers or minorities, for whatever reasons, then any push for

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"equality" should arguably focus on these preexisting groups rather than pushing for marriage within a limited segment of the populace who otherwise already had the ability to participate in a domestic partnership. Why wouldn't one try to make successful domestic partnerships the new gold standard for what constitutes commitment?

Finally, one is left to wonder why it is that anyone would want to hijack a sinking ship called "marriage." While California has been told much about equality in the battle leading up to the court's ruling, little has been said about the fact that the only thing that may be sought is an equal opportunity at a statistically certain failure.

Perhaps a focus on redefining "long-term commitment," through a proven success rate with domestic partnerships, would have been the better political move. Instead, some would claim that California has been given a radical redefinition of marriage that ignores basic human biology and a cross-cultural history of the institution of marriage. Moreover, no explanation is given for the desire to take over the empty hull of this sinking ship. One might surmise that the traditionalists would say that gay marriage advocates are just simply trying to destroy what is left of marriage. If they are right, such efforts are senseless and leave unresolved the problems that are resulting in a massive failures of all marriages. If the traditionalists are wrong, one is left to wonder what same-sex marriage will add to making marriage beneficial for all persons and their children.

In sum, the basic human problems that cause divorce remain unresolved, and one is left to wonder if we will ever fix the problems surrounding the lack of a basic family unit in a number of identifiable demographic groups. We also must carefully consider whether anything will be gained by hijacking a sinking ship.

Rich Ackerman is a member of the RCBA's MCLE Committee, volunteers regularly with PSLC, is the managing partner of Ackerman, Cowles & Associates, litigated a portion of the Campaign for California Families v. Newsom case at the trial court level, and has been interviewed by hundreds of news media outlets on various constitutional law issues.

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