NEVADA LAWYER

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Message from the President

By Alan J. Lefebvre, Esq., President, State Bar of Nevada

DERELICTION OF DUTY … OR IS IT RULE BY THE GUARDIANS?

Our Attorney General dropped the Constitution as a client … on the steps of the Ninth Circuit; actually, it was in the clerk's office. You get the point; the AG fired the client — the Nevada Constitution — in *Sevcik v. Sandoval* (D. Nev. 2012).

We all took the attorney's oath, promising to defend the Nevada Constitution; the Nevada Attorney General took the oath a second time, when assuming office "to support and defend the Constitution of the United States and the State of Nevada." For the Nevada Attorney General, that oath has particular importance, as no one else has the same standing, duty or opportunity to defend the state Constitution so directly.

Let's remember why oaths are given … they are given because the task sworn to is really hard … like a soldier's oath. Doing the duty may mean you die. Nobody said that the AG job would always make you popular, to all the people, all the time; it can be really hard to do the job, sometimes. After all, Henry VIII took Saint Thomas More's head over an unfavorable legal opinion on divorce law niceties.

The oath is not to just defend every *other* article of the Constitution. The duty applies when it is more than 110 degrees and on overcast days alike.[1]

The duties of the office are specified, as one would suspect. The duty to defend what the electorate enacts as their Constitution seems pretty basic, not at all beyond the call.[2]

WHAT'S THIS ABOUT?

Article 1 Section 21 of the Nevada Constitution, enacted in 2000, provides in the simplest of language:

> Limitation on recognition of marriage.
>
> Only a marriage between a male and female person shall be recognized and given effect in this state.

The Attorney General was called to defend this provision; she won at the trial court level, and then repudiated that duty on appeal. It was reported in the February 10, 2014, edition of the paper, matter of factly, that the Attorney General decided on the basis of a decision by the Ninth Circuit (a panel decision authored by Judge Reinhardt) that there was compelling justification for abandoning the clients' Constitution and her own victory for the Constitution before Chief Judge Clive Jones.[3] My, it is enough to take your breath away!

In a business dispute matter, the Ninth Circuit held on January 24 that "heightened scrutiny" would be given to a constitutional challenge in jury selection. *SmithKline Beecham v. Abbott Laboratories.* The circuit court panel (three out of 29 judges) ruled that potential jurors could not be excluded from a jury based on sexual orientation (by the use of a preempt according to the *Batson* protocol), extending to gays and lesbians a civil right that the U.S. Supreme Court has previously promised only to women, racial minorities and others identified by something that is apparent and indelible about them — their skin color or the fact they are women (and thus not men).

No other court has held that; Judge Reinhart declared strict scrutiny applied. (Sexual preferences aren't overt and are about behavior, so how were members of the venire singled out for exclusion in a business pharmacy case?) This challenged juror, a male, made reference to his husband … *and revealed he was an employee of the Ninth Circuit*. Who would not pull the trigger on a court employee and be justified?

Wow! The Attorney General tapped out, on that basis?

The *SmithKline/Abbott Laboratories* opinion was not even final on February 10 when the AG withdrew the appellee's brief filed January 24 in *Sevcik v. Sandoval*. Forty-five days later, on March 27, 2014**,** a sua sponte en banc call for rehearing was made, commanding

simultaneous briefs in *SmithKline/Abbott Laboratories.*[4] The Attorney General's brief on the basis of the opinion of three judges.[5]

What could justify that action, when the rehearing time before the circuit had not expired in *SmithKline/Abbott Laboratories*? Even if the circuit affirms the panel (which is unlikely given its gossamer threads of fancy), the ruling was not final. The *SmithKline/Abbott Laboratories* panel opinion is almost as untethered as Justice William O. Douglas' in *Griswold v. Connecticut*; remember that case from law school? There, the source of the right privacy sprung from "penumbras emanating" from shooting stars or clusters thereof, or something like that.

So, what does a panel decision in *SmithKline/Abbott Laboratories* have to do with a state constitutional provision, enacted by the clients, the voters, in the year 2000? ("Come on!" you say: "What's a constitution between friends!") What became of the rule of law?

Expediency was chosen over the amendment process when "a genderless marriage" initiative is on the Nevada ballot in 2016. Honestly, if the voters get to vote again and change the Constitution or not, that is healthy and good for a robust, vibrant society; well, isn't it? The voters' initiative process will like be mooted.

WHAT IS THE EFFECT OF THE DEFAULT?

Before the U.S. Supreme Court ruled in *Hollingsworth v. Perry,* the "sit on your hands approach" seemed merely a cute stunt, ala the California governator and Jerry Brown, that state's AG. Remember their move, withdrawing the defense of voter-enacted Prop 8 for symbolic reasons? However, we later learn from the justices of the U.S. Supreme Court in *Hollingsworth* that the actual proponents of California's Prop 8 didn't have Article III standing to maintain the appeal; the Supreme Court never ruled on the merits, because the California AG stood down. The de jure default trick worked, and the rigged game paid dividends; Judge Vaughn Walker's judgment from the show trial stood unchallenged after affirmance by the Ninth Circuit. Viola, a straight-up affirmance at the Supreme Court!

There was nobody to catch the defense of the California voters who went to the polls; voting was meaningless by the 52 percent of the California voting public who voted to amend that state's Constitution in 2008, in the presidential general election. In Nevada, it was 67 percent in 2000. (Article 19, Sec. 2 of the Nevada Constitution provides: "The *people reserve to themselves* the *power* to propose, by *initiative petition*, statutes and amendments to statutes and *amendments to this Constitution*, and *to enact or reject them at the polls*.")

Now, knowing that there are unfavorable consequences of pulling the Nevada brief makes the very act seem disrespectful to the voting public.[6]

The AG likely feared the consequences if she didn't yank the brief and thus the defense of the appeal supporting the state Constitution. She may be justified.[7] There are lots of powerful, vengeful people among the elite. The progressives' pieties are to be followed without deviation or the heresy axe will fall.

I know one thing for certain; when this is all over, somebody in the federal government owes an apology to the State of Deseret.[8] ■

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1. http://www.freep.com/apps/pbcs.dll/article?AID=/201403251154/OPINION04/303250017.
2. NRS 228.170 Commencement or defense of action to protect interest of State; prosecution of prisoners and persons acting in concert with prisoners.
   1. Whenever the Governor directs or when, in the opinion of the Attorney General, to protect and secure the interest of the State it is necessary that a suit be commenced or defended in any federal or state court, the Attorney General shall commence the action or make the defense.
3. http://www.worldmag.com/2014/02/nevada_ag_drops_marriage_law_defense; http://www.reviewjournal.com/news/nevada-officials-won-t-defend-gay-marriage-ban
4. http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000692
5. http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000692
6. The AG's alternative was to notice the Court Clerk of subsequent legal authority that might impact the case, by s mere letter notice of subsequent authority: see FRAP 28(j). County Clerks of two Nevada counties (which are charged with license issuance) were also sued and relied on the State to defend; the Clerks/Counties must have agreed with the Governor's decision.
7. http://www.nationalreview.com/article/375426/new-inquisition-victor-davis-hanson
8. http://en.wikipedia.org/wiki/Utah_War; http://en.wikipedia.org/wiki/Reynolds_v._United_States

Questions? Comments?

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