MEMORANDUM
REGARDING RECENT ELECTION CONTEST OPINION

Date: October 10, 2020
From: Richard Michael (909-378-5401)
To: Any Lawyer Interested in Stopping Public Corruption on the Ballot

RE: Denny v. Arntz* (http://www.leagle.com/decision/incaco20200917027)

* Note that a request to publish this opinion has been made on behalf of Arntz. The court loses jurisdiction on October 19, 2020 if the court takes no further action.

Introduction

We're considering asking for review of this case by the California Supreme Court.

With that in mind, we're interested in what would get the court's attention in a petition for certiorari.

Below is my analysis of the opinion. It is followed by questions that we may raise to the court in a petition.

We did not expect that getting the courts to abide by the rules in Division 16 of the Elections Code ("Code") would be the biggest challenge.

Quick Reference Citations

Canales v. City of Alviso (1970) 3 Cal.3d 118
http://www.leagle.com/decision/19701213cal3d1181112

Enterprise Residents Etc. Committee v. Brennan (1978) 22 Cal.3d 767
http://www.leagle.com/decision/197878922cal3d7671743

Friends of Sierra Madre v. City of Sierra Madre (2001) 25 Cal.4th 165
http://scocal.stanford.edu/opinion/friends-sierra-madre-v-city-sierra-madre-32171

Rideout v. City of Los Angeles (1921) 185 Cal. 426
http://www.courtlistener.com/opinion/3303454/rideout-v-city-of-los-angeles/

Election Contest Special Proceedings

I have extensively read and researched the election contest ("Contest") in California. The supreme court has set the law that Contests are limited to the rules set out in the Code. The first

version of the Code was Stats. 1850, Ch. 36, Sec. VI. It hasn't changed in its fundamental aspects in 170 years.

In all of the lower court Contests, the courts have universally ignored all aspects of the Code.

From other recent appellate opinions, it appears that courts are not following the Code and the lawyers, appearing to be ignorant of the Code, all treat the proceedings as just another civil action. (See Vosburgh (2020) Fresno County, where the court has told the lower court to consider assessing attorney's fees in favor of the prevailing party.)

Procedural Background

The statement of contest laid out all of the four elements required by the Code to file a Contest.

The Code itself is biased against dismissing Contests.

The trial court failed to follow the Code from the outset, over Denny's objection, at every stage. As a result the case dragged on and on when treated as a civil action. Whatever Counsel did, the trial court judge agreed. Whenever Denny objected, he was overruled.

The demurrer wasn't based on any of the grounds outlined in the Code of Civil Procedure, but upon other theories that the Contest was barred by law.

Opinion Analysis

Background Section B.

In the first sentence, the court set the tone by calling the action a "lawsuit." It was a Contest.

The next paragraph went right to the heart of the demurrer's pre-election remedy theory. This "exhaustion of remedies" theory has been held by the courts to be a judge-made procedure that is found in neither the Code of Civil Procedure nor the Code.

The court agreed with each of the trial court's findings. Those focused on (1) a definition in 16002, (2) the impartial analysis (which was not the primary ground, but one of the issues likely to evade appellate review), and (3) a "requirement" of proof that the outcome of the election was effected.

Discussion Section A.

While there's nothing wrong with the standard of review, it applies only to demurrers in civil actions under the CCP. There is nothing in the Code that provides for a CCP demurrer. So the court continues with its prejudice toward treating it as an appeal from a civil action.

Discussion Section B.

Here is where the court goes off the rails in following the misleading quote from Friends of Sierra Madre -- "must be held valid unless plainly illegal."

Friends of Sierra Madre was not a Contest. It did not cite the source of its partial quote, which it turns out was the leading case on Contests, the case cited by Denny in both the trial court and on appeal, Rideout.

Rideout (citing previous opinions), in one cohesive paragraph summarizes the entirety of Contest law. It has been unchanged in California for 170 years. Note that from 1850 to the advent of the Court of Appeal system, all Contest appeals were heard directly by the supreme court, as required by the Code. Therefore, there is a rich, early history of supreme court opinions on the subject.

The Rideout language is often cited, but most citations refer to more recent cases which pick out certain phrases without giving full context. I'm not going to cite the whole summary here, but the critical part is the very next sentence in the Rideout opinion.

So right after making the statement:

"That is to say, the election must be held valid unless plainly illegal."

The court expands upon this concept with this.

"Accordingly, a distinction has been developed between mandatory and directory provisions in election laws; a violation of a mandatory provision vitiates the election, whereas a departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the result of the election has been changed or the rights of the voters injuriously affected by the deviation."

Therefore, if Elections Code 13119 is mandatory after the election, no proof of a changed election result is required. The election is toast.

This is the law in every state.

So, despite raising this both at trial and on appeal, the courts have simply ignored the law. At the hearing, when Denny raised Rideout, the judge responded with "That's old law." (Ignoring the fact that it was the basis for the Friends of Sierra Madre dicta.)

Neither the trial court, nor Arntz's counsel, addressed the critical mandatory versus directory distinction. The appellate opinion refuses to address it as well.

In fact, still in the same paragraph, the court gives the litany of Contest grounds, focusing on the "defendant" definition.

That definition was added to the Code in 1939. It is not a simple definition. It was part of the 1939 Code repeal and reorganization that did not change the law. There was a specific reason for the definition that distinguishes candidates who might be contestants (not required) and

candidates who might be defendants in the context of challenges to the number of legal votes.

The court simply ignores supreme court opinions like Canales and Enterprise. But more importantly, it does not address the conflict of reaching its conclusion that defendants must be candidates. If that were so, then a Contest could never be filed against a special election for a measure, because there are no candidates. That conflicts with the language from 16100 that "Any elector ... may contest any election..." The language about "any election" appeared for the first time in the 1939 Code revision, but was not a change in the law, it was a reflection of the law as it stood. There were many Contests that had been filed against measure elections before 1939, including Rideout itself.

Even many of the opinions relied on by Counsel were not against candidates, most interestingly, Friends of Sierra Madre.

Finally, the court's narrow focus on 16002 (same 1939 Code revision that didn't change the law), ignores all the potential defendants covered by Division 18 of the Elections Code, which in almost all respects, do not apply to candidates.

All this was raised on the appeal. The court ignoring it was either shoddy work, or it had already decided the outcome and was trying to dress up its opinion with misdirection.

The rest of the opinion attempts to distinguish the opinions Denny raises on factual differences when they support Denny's arguments, but makes no such factual distinctions for opinions that support the court's conclusion.

Questions to the Supreme Court

These are the primary questions I think might interest the supreme court. Are they good enough? Do you have better suggestions or insight into what might catch the court's interest?

1. Can a court ignore 170 years of California statutory law and Supreme Court opinions that treat an election contest special proceeding as expressly limited to the legislatively created procedural scheme, but instead treat it as a civil action.

2. Are Elections Code 13119 ballot provisions mandatory after an election and thus violation of its provisions so intimately influence the voter's decision that violation vitiates the election as held by this court for more the 150 years?

3. Are trial courts bound to observe the procedure contained in Division 16 of the Elections Code to the exclusion of all Code of Civil Procedure or judge-made procedure?

4. Does the statutory scheme created by the Legislature in pursuance of its constitutional duty to "prohibit improper practices that affect elections" place a duty upon election officials and the courts to enforce those provisions with respect to special elections on measures (direct legislation)?

5. Is it now incumbent upon the sovereign people, after paying their employees to make and enforce the laws allowed by the constitution, to take their employees to court every time that they fail to perform the duties they have sworn to perform? In other words, do the laws mean anything?

6. Does the judge-made procedure of exhaustion of remedies, although not provided for anywhere in the Division 16 of the Elections Code, apply to election contest special proceedings?

7. Does the definition of "defendant" as a "candidate" in Elections Code 16002 preclude all election contest special proceedings against measures and against all persons, except candidates, who may have committed an offense against the elective franchise as provided by Division 18 of the Elections Code?

Final Question

8. Could the legislature, in 1984, lawfully create an exemption for judges with respect to the conflict of interest provisions of the initiative statute Proposition 9 of 1974, commonly known as the Political Reform Act?

Discussion

This is the topper. In Denny v. Arntz I, we did not raise the issue at trial of judges being paid by the county deciding cases where the county was a party. In Denny v. Arntz II, we did and expounded on it in court filings. We were given this opportunity when, immediately upon the same judge being assigned, we filed a peremptory challenge to disqualify him under the Code of Civil Procedure. When he ignored the challenge and went along on his merry way, we filed an extensive objection based on both the Code of Civil Procedure regarding gifts to judges and the Political Reform Act conflict of interest provision.

Sturgeon IV?: Does Law Have to Change to Disqualify Bribed California Judges?

Maybe not.

Sturgeon refers to the three cases challenging the practice of Los Angeles County (and other counties and courts) in California paying judges "supplemental judicial benefits." The cases were litigated by Paul Orfanedes of Judicial Watch.

Earlier this year, a conflict of interest disclosure complaint against a San Francisco judge was shot down by the FPPC; After some pressure to get the specific reason for rejection, we got that it was based on Government Code 82048(b)(1). Fair enough.

But look at what the FPPC argued in this case.

Fair Political Practices Com. v. Suitt (1979) 90 Cal.App.3d 125

http://www.leagle.com/decision/197921590calapp3d1251209

Read the case, especially the reasoning of section (2).

By analogy, my argument is that in 1974, judges were exempt because it was inconceivable that they would be paid in an unconstitutional manner, i.e., other than by the legislature.

Fast forward 20 years and creative county supervisors saw a way to surreptitiously raise their own salaries by tying them to judges salaries and providing judges supplemental judicial benefits.

So, here, I plug in [judges] for government employees, in general, in the critical reasoning of the court that holds that government entities are "persons" within the meaning of the Political Reform Act (Proposition 9).

"But a very obvious reason for the absence of discussion of [judges being excluded from the definition of public officials for conflict reporting purposes] is not that the act intended such to remain secret and undisclosed, but that [unconstitutional payments to judges] are per se illegal. Gifts of public money to [judges] are prohibited by [article VI, section 19] of the California Constitution. It was thus inconceivable in 1974 to the draftsmen of the initiative measure, and to the electorate, that public funds would be expended by or for the benefit of [judges]. Hence the need to specify such a proscription in the act would have been deemed unnecessary, and even demeaning to [judges] generally. It does not follow however that such expenditures were meant

to be unreportable, for the electorate would then be saying in effect: "We recognize that such a use of public money is illegal and unconstitutional, but where it nonetheless occurs, it may be kept secret." This is absurd. The act's silence bespeaks incredulity that such practices would occur rather than an intent to exempt them from disclosure."

"The act undeniably was intended to deal comprehensively with the influence of money, all money, on electoral and governmental processes. Its paramount purpose, as expressed in section [87100], is that ["No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."] [87103(c)] It would be anomalous in the extreme to hold that such a blatantly improper practice as a gift of public money to a [judge] was nevertheless intended to remain undisclosed under the act."

Government Code 81001(b) sets out the purposes of the PRA with respect to conflicts of interest.

"The people find and declare as follows:

...

(b) Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them;"

My argument is that, just like in Suitt, the above interpretation of the PRA with respect to conflicts is "obvious." Because the PRA was an initiative proposition, when the legislature enacted SBX2-11, it did not, nor could it, change the PRA without a vote of the people when it gave the payers and the judges immunity from liability.

In the election contests (Elections Code, Division 16) with which I am involved, we'll be raising this issue in any county in which we're up against bribed judges with the hope of having the issue addressed on appeal. We've already raised it in Denny II in San Francisco, which is about to go to appeal.

If any of the lawyers and other individuals or organizations that are copied on this wish to apply for amicus curiae status on this issue, please call me.

The purpose of this letter and my analysis is to demand the FPPC require judges to report "supplemental judicial benefits" on their annual Form 700 disclosure and advise that judges receiving such benefits must recuse themselves whenever they assigned a case where their benefactor is a party or is a material witness.

Specifically, I demand that you reinstate FPPC complaint against Judge Eric Schulman of the San Francisco County Superior Court.

PRA BACKGROUND

The purposes of the PRA (Proposition 9, 1974) with respect to conflicts of interest are set out in Government Code 81001(b).

"The people find and declare as follows:

...

(b) Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them;"

In 1974, when the PRA was adopted, there were NO exclusions from the definition of public official:

"Public official" means every member, officer, employee or consultant of a state or local government agency. (82048)

In 1984, the legislature amended 82048 to read (Stats. Chap. 727, Sec. 5), in relevant part:

"Public official" means every member, officer, employee or consultant of a state or local government agency, but does not include judges and court commissioners in the judicial branch of government. ...

On its own, this appears to put the entire judicial branch above the law, regardless that judges are elected or appointed and commissioners are appointed. I guess they must be angels.

Of the four categories of exclusions in the 1984 amendment, the three other excluded categories of state employees were made subject to a new statute (6038) that was not a blanket immunity from the PRA, but an alternative conflict statute.

Regardless of the reasoning at the time, this laid the groundwork for what was to follow. Without absolute immunity from the PRA, counties and county courts began to pay judges what has been characterized by the legislature as "supplemental judicial benefits." (Gov 62220CHECK) Clearly, a benefit is in the nature of a gift and not something earned as the result of specific work. The legislature even doubled down on the "gift" nature by requiring all judges in a county receiving the "identical" benefits. It also made it all-for-one and one-for-all by prohibiting judges to opt out of the "benefits" and forcing counties to pay all judges or none at all.

One might argue, and I do, that the legislature had no authority to immunize judges from the clear meaning and purpose of the PRA. Such an amendment, being contrary to the purpose of the initiative, would have to be ratified by a vote of the People. That didn't happen.

Today's law (amended in 2004 - Stats. Chap. 484) specifically excludes all judges from the definition of "public official" and thereby from conflict of interest statutes in Chapter 7.

The 2004 amendment rearranged the four existing exclusions and added one for federal employees. (SB-1353

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200320040SB1353)

Chapter 7 provides a broad statement of the prohibition on conflicts of interest:

"No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (87100)

It further clarifies what a "financial interest" is.

The original language:

"Any source of income, other than loans by a commercial lending institution in the regular course of business, aggregating two hundred fifty dollars ($250) or more in value received by or promised to the public official within twelve months prior to the time when the decision is made; or" (87103(c))

has been slightly modified for clarification, but has closely tracked the original intent.

"Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars ($500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made." (87103(c))

FPPC NOT FOLLOWING IT'S OWN STANDARD

In 1979, the FPPC filed a suit to get make state employees who worked for campaigns subject to the PRA in Fair Political Practices Com. v. Suitt (1979) 90 Cal.App.3d 125.

Except for the blanket exception, superior court judges in some counties would be subject to the conflict of interest reporting and the recusal requirement.

It is disingenuous, at best, for the FPPC to go after individual candidates with limited power and not hold 90% of the state's superior court judges to the same standard.

THE STURGEON CASES

Starting in 2008 Judicial Watch conducted three lawsuits against the County of Los Angeles for paying judges huge amounts in violation of the California constitution.

Sturgeon I found the payments unconstitutional. The legislature in a rush to save the judges

immediately enacted a law written by justices of the Supreme Court to make every legal and retroactively gave the judges immunity from criminal and civil liability for the illegal payments.

Sturgeon II challenged the new statute. The court took a wait and see attitude to see if the legislature would correct it.

When the legislature didn't act, in Sturgeon III, the Court of Appeal found religion and claimed that there was no need to change the statute. It was perfect as it was.

JUDGES AND COUNTIES HAVE BEEN SCREWING THE PUBLIC FOR 35 YEARS

As the backdrop for the only two amendments to 82048, the legislature enacted the judicial exclusion before the counties began paying judges in the late 1980s or early 1990s (See Sturgeon I). The amendment in 2004, according to the legislative history, was strictly to add another exclusion and not change or ratify the 1984 change.

Thus the Suitt opinion fits very directly into a rather strong argument that, whether or not the legislature had the authority to make the change, the circumstance of 90% of the superior court judges in California receiving payments from their counties could not have been foreseen by the legislature.

The prophylactic SBX2-11 in 2009 pretty clearly shows that the legislature was not even aware of the situation until Sturgeon I was decided.

Below I substitute the judges being paid (bribed) by the counties into the Suitt opinion. It's a perfect fit.

"But a very obvious reason for the absence of discussion of [judges being excluded from the definition of public officials for conflict reporting purposes] is not that the act intended such to remain secret and undisclosed, but that [unconstitutional payments to judges] are per se illegal. Gifts of public money to [judges] are prohibited by [article VI, section 19] of the California Constitution. It was thus inconceivable in 1974 to the draftsmen of the initiative measure [or the legislature in 1984], and to the electorate, that public funds would be expended by or for the

benefit of [judges]. Hence the need to specify such a proscription in the act would have been deemed unnecessary, and even demeaning to [judges] generally. It does not follow however that such expenditures were meant to be unreportable, for the electorate would then be saying in effect: "We recognize that such a use of public money is illegal and unconstitutional, but where it nonetheless occurs, it may be kept secret." This is absurd. The act's silence bespeaks incredulity that such practices would occur rather than an intent to exempt them from disclosure."

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Gov 82048

1969-1978
http://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1978/78Vol4_StatRecord.pdf#page=1141

1974 Initiative (adopted June 4, 1974) ad

1979-1988
http://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1988/88Vol4_StatRecord.pdf#page=680

Stats 1984, Ch. 727

SECTION 1: Section 6038 is added to the Business and Professions Code, to read:

6038. Attorney members of the Judicial Council, members of the Commission on Judicial Performance who are not judges, and employees designated in the Conflict of Interest Code of the State Bar of California are subject to the provisions of this article with respect to the making, or attempting to influence, governmental decisions of their respective state agencies other than decisions of a judicial or quasi-judicial nature.

SEC. 5. Section 82048 of the Government Code is amended to read:

"Public official" means every member, officer, employee or consultant of a state or local government agency, but does not include judges and court commissioners in the judicial branch of government. "Public official" also does not include members of the Board of Governors and designated employees of the State Bar of California, members of the Judicial Council, and members of the Commission on Judicial Performance, provided that they are subject to the provisions of Article 2.5 (commencing with Section 6035) of Chapter 4 of Division 3 of the Business and Professions Code as provided in Section 6038 of that article. (82048)

1989-1998
http://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1998/Vol_6.pdf#page=1397

-none-

1999-2008
http://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/2008/1876_2008_Volume5.pdf#page=1123

2004 484 Am