



# LESSONS FOR LAW REFORM LITIGATORS

*Alan Morrison*

**J**O BECKER'S *FORCING THE SPRING* has been thoroughly reviewed, both praised and criticized thoroughly. Only a writer with a different angle on the book can justify further commentary. That task is especially formidable because Becker's story is that of the highly publicized constitutional challenge to Prop 8, which banned same-sex marriages in California, and its ending is known to everyone who pays even passing attention to what the Supreme Court does.

That said, from one who spent most of his legal career at the Public Citizen Litigation Group as a law reform litigator, the story – or more properly stories – in this book do offer important lessons for those who seek to bring about social change and advance their views of a more just society through the court system.

## TRIAL: THE KEY EVENT

**T**o many, persuading super lawyers Ted Olson and David Boies to represent the challengers of Prop 8 seemed like the most significant part of the story and the critical lesson: get marquee and bipartisan names on your side. But to me, the District Judge Vaughn Walker's insistence on holding a trial, with live witnesses on both sides, was the best thing for the plaintiffs and the worst news for the

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defenders of Prop 8. In most law reform cases – and that is how the challengers, their lawyers, and their backers saw the case from the start – the facts are not in dispute, and the parties agree to resolve the case on cross-motions for summary judgment. There will often be discovery that elaborates on the facts, as there was here, but in the end everything comes in on paper, and the judge never sees live witnesses. And in many cases that is entirely sensible.

But in the Prop 8 litigation, having a trial made a big difference. First, the four plaintiffs told their stories to Judge Walker, explaining how being gay and unable to marry, dramatically and negatively affected their lives. This was especially important because California already allowed domestic partnerships that provided almost all tangible protections that marriage did, but without the official approval of the state and the community. Hearing those stories could not have failed to have an impact on the judge and helped the appellate judges who read their testimony see what this case meant in human terms.

Second, having a trial required the defenders of Prop 8 to produce expert witnesses to explain why allowing same-sex marriages would produce the various harms that were offered to justify the ban. Those witnesses had to prepare reports summarizing their opinions and were then questioned under oath at pre-trial depositions by the plaintiffs' lawyers. Largely because of this pre-trial process, four of the defense's six experts were withdrawn and did not testify. Most important, the defense could not rest on articles and books, but had to bring live witnesses to convince the judge that striking the ban would not only harm children of same-sex marriages, but also make marriages between opposite-sex couples less likely to occur.

At trial, the plaintiffs produced strong evidence that children of same-sex marriages did just fine, and the best that the defense could do was to suggest that the conclusion was still uncertain, because same-sex couples had only recently begun raising children, and so there was not enough evidence to make a definitive determination. But the fact that there was a live trial – and not simply paper submissions – made the most difference when the Prop 8 defenders claimed that same-sex marriage was bad for opposite-sex couples, in making those marriages somehow less likely. The defense provided

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no evidence for that claim, and Judge Walker made a specific finding that no such harm could be shown. Early in the case, Chuck Cooper, who was lead counsel for the defense, responded to Judge Walker's query on what kind of harm to opposite sex couples there might be, with "I don't know, I don't know." That seemed a very damaging admission by Cooper, but what really mattered was not what he could say, but the fact that he could find no independent expert willing to declare in open court, subject to the penalty of perjury, that same-sex marriage harmed opposite-sex marriages.

The third way in which the trial was vital to the effort at law reform litigation was its role as an educational tool for the millions of Americans who have no connection with gay men or lesbian women, let alone a same-sex couple. The trial enabled the press to connect the plaintiffs' lives to those of straight Americans, who saw that there were more similarities between the groups than differences. Their stories also showed that the harms inflicted by Prop 8 were real and affected the lives of same-sex couples and, perhaps more importantly, their children, every day. The stories told in the courtroom became the stories told in the news – which would simply not happen absent live witnesses, real cross-examination, and the judge's participation. That impact would have been even greater if the Supreme Court had not ill-advisedly prevented Judge Walker from having the trial recording made available in video, as well as written form. The educational aspect of the Prop 8 trial continues and will be an important legacy for cases outside California and for the overall debate on LGBT rights.

### RESOURCES REALLY HELP

**I**t was with more than a little envy that I learned about the vast team of lawyers and a seemingly unlimited expense budget that supported the plaintiffs. Becker's book describes the original plan under which the organization that was created to fund the lawsuit and supporting activities – American Foundation for Equal Rights or AFER – agreed to pay Olson's firm, Gibson Dunn, \$2.9 million for the entire case, while co-counsel David Boies agreed to do his share for \$250,000, plus expenses for both firms. I lost count of the num-

ber of Gibson lawyers on the case and their willingness to spend whatever time was necessary to track down every open legal or factual question and read everything on the subject of every expert in the case. Although Olson is very much in demand as an appellate lawyer, he was available whenever he was needed and maintained his role as overall commander-in-chief throughout the case. And there was plenty of money for expenses, including retaining expert witnesses. But the time and expenses mounted up, and according to the publicly-available Form 990s filed by AFER,, Gibson was paid \$5,946,660 for fees and expenses through March 31, 2013, which was shortly after the case was argued in the Supreme Court. Boies was paid \$468,089 in the year in which the trial took place, and may have been paid more, but the 990s only have to publicly report amounts paid in a given year in excess of \$100,000. On top of that, the lawyers from the City of San Francisco, which had intervened on the plaintiffs' side, provided considerable additional help. If we had undertaken a case like this when I was at the Public Citizen Litigation Group, we would probably have had two lawyers assigned, with another available for back up, as well as two or three others to review important drafts and to be judges at moot courts.

Moreover, the backers of the lawsuit also funded a massive and highly effective public relations campaign that accompanied the lawyers and the plaintiffs at every step. Becker reported no figures on those expenses, but AFER's 990s through March 31, 2013, reported \$3,266,155 for their public awareness campaign, on top of the reported \$7,142,276 in legal bills, most of which went to the two lead law firms. I doubt that these PR efforts had any impact on any judge, but they were vital to spreading the educational messages from the trial and the appellate opinions that supported the plaintiffs.

## GOOD NEWS CAN BE BAD NEWS AND VICE VERSA

**T**he plaintiffs' lawyers seemed elated when the two main defendants of Prop 8, the Governor and Attorney General of California, declined to defend it. The plaintiffs might then have had a de-

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fault judgment in favor of two couples, but not the sweeping law-reforming victory that they sought. But to no one's surprise, the proponents of the initiative that added Prop 8 to the California constitution joined the lawsuit and defended the ban. The defense was handled by very able lawyers and directed by clients who firmly believed in their cause. They also had access to substantial funds, although the amount was not provided to Becker, and it was surely less than what the plaintiffs had, although it does not appear that lack of funding was a serious problem for the defense.

The bad news came when the case got to the court of appeals. Neither the Governor nor the Attorney General appealed, and there was substantial doubt that the proponents of the initiative had standing to appeal Judge Walker's ruling that Prop 8 was unconstitutional. Absent a proper appeal, the decision below would stand, but because plaintiffs' counsel had chosen not to make this a class action, wisely, in my opinion, because it would have added complexity in a situation in which everyone assumed that one test case would be enough. But that left the door open for the Prop 8 proponents to argue that Judge Walker's decision would apply only to the four named plaintiffs. Prop 8, they contended, would still be in effect for everyone else in California. Moreover, even if that limitation did not hold up, everyone agreed that the decision would have no effect outside of California unless affirmed by a higher court.

As much as Olson and his team might have wished otherwise, this problem was so obvious that a higher court would raise it on its own. Therefore, they had to argue that there was no proper appeal, even though they desperately wanted to take their case to the Supreme Court where they thought they could prevail. The court of appeals was sufficiently troubled by the issue that it asked the California Supreme Court whether, under California law, the proponents of Prop 8 had the right to defend an initiative and appeal from the adverse ruling. When that court gave its green light, the federal Court of Appeals for the Ninth Circuit agreed that federal law allowed the appeal, and then affirmed Judge Walker, by a vote of 2-1, on a very narrow basis that would have applied only to Prop 8. Meanwhile almost a year had gone by, all because the official state

defendants had agreed with the plaintiffs, and during that time, no same-sex couples had been married in California despite Judge Walker's ruling.

A similar good news, bad news scenario, arising from a similar problem, was playing out in the cases challenging the provision of the Defense of Marriage Act that limited the application of the term "marriage" in more than 1100 federal laws to opposite-sex couples. The Obama Justice Department was defending the law, but gay and lesbian groups were trying to persuade it to reverse course. The first DOMA case resulted in a district court ruling striking the law down on Equal Protection grounds, which the Justice Department appealed. Just before its appellate brief was due, the Government reversed its position and said it would no longer defend DOMA. In my view, the decisions of the Attorneys General of California and the United States not to defend their respective laws were improper, but the deeper lesson is that, in both instances, those decisions both slowed down the cases and raised serious standing issues that imperiled the broad rulings that both groups of plaintiffs sought.

In the end, the Supreme Court found standing and reached the merits in DOMA, but not in Prop 8, thus depriving Olson of his chance for a nationwide result. Assuming that Olson was correct in wanting the Court to reach the merits, he would have been better served by having the California officials as his real adversaries, which would have made it more difficult for the Supreme Court to duck the merits after the Court of Appeals had affirmed Judge Walker's decision. The same is true for the challengers to DOMA, but they at least achieved their goal, albeit a year later. While it is doubtful that the California officials would have defended Prop 8 if Olson had pleaded with them to do so, it is quite likely that the Obama Administration would have maintained its prior opposition if the DOMA challengers and their supporters had not pressured it to switch sides.

There is one other side-effect of not having state officials defending Prop 8 that almost surely did not bother Olson and his team, but surely would have given most public interest lawyers some pause. Under the applicable federal law, if the State had defended Prop 8 and lost, it would have been liable for the payment of the plaintiffs'

attorneys' fees and expenses. However, with only the proponents of Prop 8 defending it, fees were not available. In the DOMA case the Attorney General also did not defend the law. However, because there is no comparable fee-shifting statute to the one that would have been applicable in the Prop 8 case, the decision not to defend DOMA had no effect on the fee aspect. In addition, in contrast to Prop 8, Roberta Kaplan of Paul Weiss represented the plaintiff in the DOMA case at no charge, with her firm also picking up all the expenses.

## RACING TO THE SUPREME COURT

When the Prop 8 challenge was announced, many in the LGBT community were opposed to a federal challenge, or at least very skeptical about whether it was being filed too soon. At a time when very few states allowed same-sex marriage, and when more than thirty had outlawed it in their constitutions, they feared that the Court would not be ready take such a huge leap. An adverse ruling could set back the cause of same-sex marriage for years, even decades, much as the defeat in *Bowers v. Hardwick* delayed the end of laws criminalizing sodomy for more than 15 years. Part of that concern was genuine, based on different assessments by different lawyers as to the risks and benefits of an immediate challenge to Prop 8, but part of it was based on issues of "turf": Who will get to do the big case when it gets to the Supreme Court and who will decide on the strategy of getting the right case there. Those differences are inevitable in all public interest litigation areas today, unlike the 1950s, when there was only the NAACP taking on segregation.

But there was another more narrow reason for wanting to slow down Prop 8 and any similar federal court cases: Challenges to DOMA were already underway, and the relief sought in them was seen by most observers as much more limited. The plaintiffs in the DOMA cases were not asking the federal courts to require any state to adopt same-sex marriage. They only wanted to have the Court tell the federal government that, once a state had legalized same-sex marriage, the federal government had no basis to treat those marriages differently from those with opposite-sex partners. Thus, while a DOMA victory would have a major impact on how federal

laws were applied, states that disapproved of same-sex marriages could continue as before. Furthermore, principles of federalism, on which supporters of Prop 8 relied, worked against DOMA where Congress had stepped into an area that had traditionally been left to the states. Finally, striking down DOMA would give those states like California that already had civil unions or domestic partnerships, providing the tangible benefits of marital rights under state law, but without allowing same-sex couples to call themselves married, a new incentive to take the final step because doing so would add federal benefits to those accorded by the state.

In the end, the cases arrived at the Supreme Court at about the same time, and the Court decided to hear Prop 8 and DOMA on consecutive days. Ironically, the slow downs caused by the refusals to defend had much to do with this timing aspect, although the likely recusal of Justice Kagan from the first DOMA case, due to her minor involvement with it when she was the Solicitor General, also contributed to the selection of a later-filed case as the DOMA vehicle.

Was one side or the other right about the DOMA-Prop 8 race, or perhaps was it best for their supporters that they were both heard together? Not just with the benefit of hindsight, it is hard to accept the proposition that having Prop 8 decided before DOMA was in the best interests of supporters of LGBT rights. It should have been obvious to all that a favorable DOMA ruling would make major changes in the operation of federal programs, but would leave dissenting states to go on as before. But it was just as clear that in the Prop 8 case, especially if the Court had issued a broad ruling on the merits and knocked it down, more than thirty states would have had to comply over deep resistance. With school desegregation and abortion rulings firmly in mind, it is hard to imagine the Court going that far unless necessary. In fact, while the Court declined to reach the merits in Prop 8 because of the standing defect, it did an end run on a similar problem in the DOMA case, and then struck down that law.

With the benefit of hindsight, DOMA has provided a major push to the follow-on cases to Prop 8 in other jurisdictions. Even the narrowest anti-DOMA ruling would have aided post-Prop 8 challenges,



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but three aspects of the decision were unexpectedly helpful. First, although the specific claim before the Court involved a purely economic harm from denial of an estate tax benefit, Justice Kennedy's opinion discussed many other injuries that echo those caused by state bans on same-sex marriage and also civil unions, thereby giving moral force to the post-Prop 8 challenges. Second, the broadly-written opinion also spoke powerfully about the loss of dignity (a term Kennedy used in one form or another eleven times) resulting from DOMA's unequal treatment. Although the context in future Prop 8-like cases was different, his language is so expansive that it has been quoted not only by subsequent plaintiffs, but also relied on by virtually every one of the fifteen courts that have decided such challenges, all in favor of the challengers as July 31, 2014. Third, in his dissent to the DOMA ruling, Justice Scalia protested that the decision was the next inevitable step toward striking down bans on same-sex marriages, even though the Court had not reached the merits of the Prop 8 challenge. Of course, if Prop 8 had been decided first, and if the plaintiffs had prevailed – a very big “if” – the majority opinion would have made DOMA an easy case. But if the plaintiffs had lost Prop 8, DOMA would have presented a decidedly more uphill battle.

It is also possible that having both cases heard together helped the Court reach the result that it did in DOMA. Thus, the Court was able to look more moderate by leaving bans on same-sex marriages in place (for now), while striking down the federal law only. In addition, the real stories of the Prop 8 plaintiffs and the burdens that Prop 8 and other forms of discrimination had on their lives and those of other gays and lesbians, may have given some of the Justices a deeper understanding of the harms from all forms of anti-gay bias, including, but not limited to, that contained in DOMA.

There cannot be a definitive answer as to who is right about how the races to the Supreme Court might have affected the outcome in these cases. That does not mean that such questions of timing and strategy, which will arise in future law reform litigations, are not worth debating. But those future debates should also be informed by our inevitable inability to account for unforeseen events and how they affect both timing and the merits.

THE IMPORTANCE OF LAWYERS' PRIVILEGES,  
OR NOT

The ethical rules governing lawyers are very clear: Client confidences are sacred and must not be breached. Moreover, two related privileges – the attorney-client and work-product privileges – prevent even courts from requiring lawyers to divulge information covered by them except in very limited circumstances. But Jo Becker was actually embedded in the team of plaintiffs' lawyers in the Prop 8 case for almost four years. She had access to all the key meetings and documents, with the only restriction that she not publish anything until the case was concluded. Presumably, every lawyer was aware of this understanding and the four clients agreed to it as well, as the privileges protect them, not their lawyers. The book is replete with very candid assessments of the case, sometimes in quite colorful language, and since Becker was free to report anything she read or heard, we can assume that she held back nothing of interest.

The basic elements of Becker's story are all public, but what makes the book so interesting is the inside discussion about strategy and tactics, all of which would surely be privileged. What struck me was not that this privileged information was suddenly revealing of what Olson and his team were doing behind the scenes, but how little was actually revealed that his opponents could not have figured out was likely to occur, generally before it happened. The book does not re-print discarded excerpts from draft briefs (probably because most readers would be turned off by having to plow through them), but it does have candid evaluations of Olson's performance at the moot courts he did before the Supreme Court argument. But none of this seemed to matter in the grand scheme. Put another way, it is hard to imagine that the case would have turned out any differently if the defenders of Prop 8 had the same access Jo Becker had while the case was going on.

These observations led me to three tentative conclusions. First, while I am not prepared to advocate the abolition of these two privileges, *Forcing the Spring* increased my previous skepticism about the fervor with which lawyers defend the privileges in all circumstances.

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All privileges deny to the other side and the ultimate trier of fact some relevant information that might affect the outcome of a case. Thus the importance of a privilege is vital in assessing whether an exception should apply, because the tradeoff between truth and other values tips more in favor of truth in some situations than others. While I would firmly support the privilege of a defendant in a criminal case to speak to his lawyer in utmost confidence, the right, for example, of tobacco industry lawyers to use that shield to prevent disclosure of research into the dangers of cigarettes may yield a different balance.

Second, the work-product privilege is already qualified, and Becker's book gives further support for limiting its application (unintentionally I assume). One reason for that privilege is to prevent one side from free-loading on the effort of opposing counsel, but that rationale expires when a case is concluded. Creating an end point for work-product materials would be especially important when the lawyers work for a government agency whose records are generally subject to release unless an exception applies. At the very least, there should be a reasonable end point a few years after a case is closed, under which a government agency would have to show exceptional circumstances for continued withholding of work-product materials.

Third, speaking mainly to plaintiffs' lawyers and probably only in law reform cases like Prop 8 or DOMA, spending time trying to pry loose attorney-client and work-product materials may not be worth the effort, especially where there are limits on resources and time. In many cases, the information is available from other sources, and while the privileged material may have the additional benefit of candor, the question for the lawyer is: How much real help will those disclosures be? Courts could also consider allowing disclosure and then not allowing the particular information to be heard by the jury, in those few cases that actually go to trial. But regardless of what the law may become, plaintiffs' lawyers should ask themselves, before embarking on a major battle over allegedly privileged information, "What am I likely to find in the best case scenario, and what will I be able to do with it if I find it?" And if I were a cost-conscious general counsel of a company being sued for many millions of dollars, I

might think about asking that question in reverse before I paid hundreds of thousands of dollars in lawyers' fees to review every email for any possibly privileged information, instead of limiting the review to records of the general counsel's office: "What is the worst thing the plaintiffs could find in the rest of our files, and how could they possibly use it to their great advantage?"

## DISCLOSURES AND DISQUALIFICATIONS

After the Prop 8 case had been tried, but before Judge Walker issued his decision, the San Francisco Chronicle reported that the Walker was gay. Thereafter, in an interview he gave after announcing his retirement from the bench, he acknowledged that he was in a long term relationship with a man. Defense counsel then sought to overturn his ruling, arguing that he should have both disclosed his relationship and should not have heard the case because he would have been able to marry his partner if Prop 8 were struck down. Opponents countered by arguing that a female judge need not step aside when a claim of gender bias is raised, nor must an African-American when the claim is racial discrimination. But unlike such cases, Judge Walker's personal situation was surely not obvious, let alone known to defense counsel, although the fact that he was gay had been the subject of rumors in the San Francisco legal community for some time. Leaving aside the legal merits of a timely motion to recuse Judge Walker, it surely would have been better if he had told the parties about his relationship with his male partner before the case was tried. Defense counsel could then have made a considered decision as to whether to make a recusal motion, based on facts and not simply rumors.

The other disclosure issue would not have resulted in a recusal motion, but it provides a wonderfully ironic twist to the case. The details, especially with respect to timing, are not entirely clear in Becker's book, but there are enough known facts to illustrate the potential dilemma for counsel. Chuck Cooper, lead counsel for the defenders of Prop 8, has a step-daughter, whom he has treated as his own since she was seven when Chuck married her mother. She told Cooper, no later than December 2012, after the Court agreed to

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hear Prop 8, that she was a lesbian and loved a woman whom she wished to marry in a state where it was legal to do so. Knowing Chuck as I do, I am confident that he promptly told his client and allowed the client to decide whether to seek new counsel at that late date. There was no obligation to tell the Court or the plaintiffs of these facts, and Becker learned them from Cooper only after Prop 8 was decided. Chuck has, as I knew he would, embraced his daughter's decision and rejoiced in her June 2014 wedding. This part of the story is a reminder to lawyers in high profile law reform cases that one must always be on the lookout for intersections between our personal lives and our work, however inconvenient they sometimes may be, and to find a way to manage the sometimes competing interests of our families and our ethical obligations to our clients.

*Forcing the Spring* as a whole, and this final vignette in particular, bring home how much our country has changed. As recently as 2009, the notion that we would now be on the brink of the availability of same-sex marriages in every state would be discarded as fantasy, but that is where we are. If the lawyer chosen to defend Prop 8 has a daughter who marries another woman, with his blessing, it is clear proof of how narrow the divide has become between straights and gays and lesbians in our society.

To me, the speed and breadth of this change is best illustrated by thinking back to the Vietnam War era when the draft forced thousands of young men opposed to that war into very difficult choices. Some fled to Canada, others went to jail, while others lied or went on crash diets or maimed themselves to avoid being drafted. The one thing that they did not do, even though it would have automatically exempted them from military service, was say that they were gay. And why didn't they choose that option? Because being gay in 1970 was worse than going to Vietnam. *Forcing the Spring* is an important part of the story of how we got from there to here, and it also has many lessons for law reform lawyers who seek to bridge the next gap in the effort to achieve social justice in America.

