



# Using the law to advance social justice

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Magar

## MICHELE MAGAR

Let's face it. Lawyers are no longer held in high esteem by many Americans. Forty-four percent of lawyers would discourage people from becoming attorneys, according to a recent poll by the American Bar Association.

When we apply to law school, many of us imagine careers working on cases that matter, that make a positive difference in peoples' lives. But all too often, we discover that law can be a frustrating vehicle for social justice.

As we find ourselves bogged down in tedious law and motion practice, or fending off the latest delaying tactic by defense attorneys who are paid by the hour while we front case costs and gamble we'll win delayed compensation, it's easy to lose sight of the fact that lawyers can and do make pivotal contributions towards the social good.

### "A dream come true"

The recent California Supreme Court decision upholding the right of same sex couples to marry, *In re Marriage Cases* (2008) 43 Cal.4th 757) is a clear reminder that the law can be used to advance society. The historic decision marks a giant step forward towards full equality for gay, lesbian, bisexual, and transgender people, and lawyers were at the center of it.

"The victory took a week to sink in," said San Francisco Chief Deputy City Attorney Terry Stewart, who along with Shannon Minter led the legal team that won the case. "It was a dream come true," said Stewart. "You read about civil rights cases in law school and you think they won't happen again."

Stewart, the City of San Francisco's top litigator, found herself leading "the coolest and most exciting case ever" after San Francisco Mayor Gavin Newsom began issuing marriage licenses to same sex couples four years ago.

"The degree of collaboration that went into this case was unlike anything I'd ever seen – it was the most important factor in our success," said Shannon Minter, Legal Director of the National Center for Lesbian Rights. Lawyers from Howard Rice, Lambda Legal Defense and Education Fund, and the American Civil Liberties Union provided backup.

"We all worked closely together on this case, and also with Equality California, to draft legislation, including factual findings we could then draw from for the briefs we presented to the Court," said Minter. "As the case kept going and the legislature added more laws granting equal treatment, we would add them to our brief. Equality California had commissioned polling research about the most effective messages for public education, and we used that information for our briefs."

"This case was never going to be about legal rights and benefits – neither straight nor gay people think about marriage that way," said Minter. "We wanted to convey, powerfully and repeatedly and clearly, that this is about human dignity and respect. That's why marriage is constitutionally protected, because it implicates deeply personal choices and beliefs. We wanted the Justices to really feel that as well as understand it doctrinally. They understood; it came through in their decision."

### Changing minds along the way

"We would have lost if we'd litigated this case any other way," said Stewart. "Change is incremental, and



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"Dreams can come true."



Attorneys celebrated in the parade included (left to right) Terry Stewart, Shannon Minter, Kate Kendell and Dennis Herrera.

Photos by Donna Baer



Celebrating victory at Dolores Park.

you have to change minds along the way."

Stewart took it upon herself to do exactly that when she became the first openly gay president of the San Francisco Bar Association in 1999. "We focused on supporting gay and lesbian lawyers in their effort to push for equal benefits within the legal community," said Stewart. "There were similar efforts within the academic community, Silicon Valley, big corporations, and local governments. Winning California's Domestic Partnership Act was the culmination of a long effort. When the State recognized we should get the same rights and benefits, it was not such a big leap for the Supreme Court to grant us the right to marry."

Early in the four-year court battle, Stewart asked her interns to mount a board on her office wall with photographs of and information about the Justices. "I had ongoing conversations with them in my head," said Stewart. "I knew time was on our side. They're human beings and they work in San Francisco. They had professional relationships with gay people."

As the case wore on, Stewart kept her emotions at bay. "I told myself [that] I can't get bogged down in fear, anger or grief, because that's not effective," she said. "I'd put it on a shelf - you can't persuade people from anger."

"I always had a fundamental underlying faith we'd win, but there were moments I was terrified that we wouldn't,"

said Minter. "When that happened, I worked harder. We did everything to increase our chances of winning: We made our briefs as good as possible; we developed a strategic plan for the *amicus* briefs; we made sure we were going all out on public education to give the Court as much support via public opinion as possible; and Equality California never stopped its legislative effort."

### The work continues

Minter's work didn't end when the High Court issued its decision. He is now working to defeat an initiative on the November ballot that would undo the decision by amending the California Constitution to ban same sex marriage.

Minter is leading the legal team that filed a challenge to the initiative with the California Supreme Court. The challenge rests on two arguments. The first is that the ballot is not an amendment, but rather a revision that would change the Constitution's underlying principles - something that can't be done via the initiative process. "The Supreme Court has made clear that laws that discriminate against lesbian, gay, bisexual or transgender people violate equal protection under the California Constitution and are subject to strict scrutiny," said Minter. "The ballot initiative represents a 180 degree change in that principle. A change that dramatic has to be made by the legislature."

The second argument pending before the Court is that the ballot summary used to gather signatures calling for the measure to be placed before voters was misleading, because it stated that the initiative would have no fiscal impact.

The Court's decision allows U.S. residents from any state to wed in California. That amounts to a lot of marriages. "The initiative will cost the state tens of millions of dollars in lost revenues, licensing fees, and commercial fees," said Minter.

The potential impact on the state economy if California voters defeat the ballot initiative has not gone unnoticed. On July 15, 2008, the Massachusetts State Senate unanimously repealed by voice vote a 1913 state law that bars marriages between non-residents whose home states don't recognize their unions. The Massachusetts House of Representatives is expected to follow suit, and Massachusetts Governor Deval Patrick has said he'll approve the measure. The Supreme Judicial Court of Massachusetts ruled that the state's same sex marriage ban violated the state constitution in 2003. (*Goodridge v. Dept. of Public Health* (2003) 798 N.E.2d 941.)

The vote in Massachusetts and the California Supreme Court decision holds special relevance for gay and lesbian couples in New York. On May 14, 2008, New York Governor David A. Paterson directed agencies in his state to recognize



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same-sex marriages performed in other states.

Back in California, Minter worries that the headlines announcing that gay couples may marry in California may lead voters here to assume the battle is over: "We can't be complacent. I hope people understand that we need everyone from now until November to go all out to defeat this initiative," said Minter. "If we mobilize, we'll win. If we don't, we won't. It's that close and that tight."

As Plaintiff was going to press, the California Supreme Court declined to hear the challenge to the November ballot initiative. The Court did not give a reason for its decision. The National Center for Lesbian Rights and its allies responded by issuing a statement expressing confidence that Californians would vote against the ballot initiative in November.

### **A special stake in the initiative**

According to Stewart, attorneys have a special stake in the outcome of the ballot initiative. "The independence of the judiciary is at stake," she said. "If the initiative passes, it will send a message to

the courts. The judiciary is sensitive to being overruled by the electorate, and the right wing is not afraid to go after judges.

"We need lawyers to become involved – to use their oratory skills, especially in Red counties, to speak to local groups like the Rotary Club and churches, and to write op-eds in their local paper," Stewart continued. "Lawyers are good at articulating why civil rights matter. If the rights of same sex couples can be stripped away, it can happen to any of us who happen to be unpopular at any given time."

"We also need funds to educate the public about the initiative, and the National Center for Lesbian Rights has created a new political action committee for this purpose called the No on 8/NCLR Social Justice Fund" said Minter. [For more information, visit [http://www.nclrights.org/site/PageServer?pagenam=nclr\\_getinvolved\\_NoOn8](http://www.nclrights.org/site/PageServer?pagenam=nclr_getinvolved_NoOn8).]

Minter has no regrets about the long hours he devoted to the case since it began four years ago. "Life is very short; in the long run we're all dead. I cannot imagine anything more gratifying than being able to work on these fundamental

human rights issues, and to think that you're able to make such meaningful change in the world and help people," said Minter.

"It's not just about changing the law. It's about increasing the understanding that everyone deserves dignity, equality and respect – it makes the world so much of a better place," Minter explained. "And it's also intellectually exciting. To work every day on such fascinating issues and feel so good about what you're doing, there's no amount of money in the world that can give you that."

*Michele Magar, a civil rights attorney and journalist based in San Francisco, is the founding executive director of RatifyNow, an international nonprofit whose mission is to provide support to grassroots advocates worldwide working to persuade their nation to ratify and enforce the new United Nations disability rights treaty (more information is available at [www.RatifyNow.org](http://www.RatifyNow.org)). She welcomes comments and ideas for future columns. Readers may reach her at [mmagar@plaintiffmagazine.com](mailto:mmagar@plaintiffmagazine.com).*

