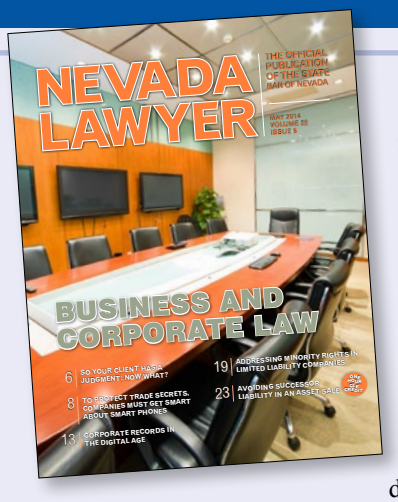
LETTERS TO THE EDITOR



As a 2005 graduate of the Boyd School of Law and the only openly transgender attorney admitted to the Nevada Bar, I find the the words "appalled" and "disgusted" are grossly inadequate to describe my reaction to the bigoted and discriminatory "President's Message" in May's Nevada Lawyer, but those words will have to suffice since you're a family magazine.

It is axiomatic that the highest duty of a lawyer, particularly a prosecutor, is to do justice. For more than a decade, same-sex couples in Nevada have been denied the rights enjoyed by their fellow citizens in the areas of family law, inheritance, hospital visitation and end of life decisions. While her realization was tardy, Ms. Masto deserves praise – not condemnation – for finally ending the official defense of a policy that injures gay and lesbian Nevadans every day it is in operation.

Finally, Mr. Lefebvre's transparent attempt at LDS-code talking (re: the last line about Nevada being the "State of Deseret") is simply offensive.

Mr. Lefebvre should issue a complete apology and retraction for the editorial, which is a direct insult to all queer (gay, lesbian, bisexual and trans.) attorneys who are members in good standing of the State Bar of Nevada. If he's not willing to do that, he should resign, because clearly he lacks the capacity to represent ***all*** of the state bar's members – not just the ones who happen to be white, straight men. ■

Christina A. DiEdoardo, Esq.,
San Francisco, California

This letter responds to the "President's Message" in your May edition, the fundamental flaw of which is the author's substitution of his personal interpretation of the Law of Deseret in the place of guiding principles of U.S. and Nevada law. How ironic that he violates the tenant of separating church and state while complaining that no one is defending the Constitution. That, combined with his uninformed statement that "[s]exual preferences … are about behavior," lays the foundation for an editorial that is profoundly disrespectful and dismissive of the fundamental rights that same-sex couples should be afforded. Religious beliefs are sacred, but they are also personalized and subjective, which is why they may not be invoked to deprive people of their personal liberties.

First, sexual orientation is an indelible and immutable characteristic. Did Mr. Lefebvre at some point decide to be a heterosexual, and does he believe he has the same propensity to fall in love and pair-bond with a man or a woman, depending on how he chooses to behave on a given day?

Second, contrary to the author's assertion that the present judicial trend toward enforcing marriage equality is the result of lucky breaks divorced from the merits, literally millions of dollars are being spent to litigate this issue. In the California trial, opponents of marriage equality were invited to bring everything they had, only to see their evidence collapse pathetically under cross-examination. There are over 1,000 Federal rights afforded to those who can legally marry. There is no legal basis under which they may be withheld, whether the analysis flows from an equal protection or fundamental rights analysis. Mr. Lefebvre's cavalier dismissal of this effort demonstrates a lack of education on the subject.

Third, there is generally wide latitude for an attorney general to exercise discretion when deciding whether to defend a statute, especially where it violates the state or U.S. Constitution. State attorneys have refused to enforce laws that impermissibly restrict the right to bear arms or access abortions. Marriage equality is not an isolated example. Every day, the momentum for recognizing the basic rights of LGBT people builds. To ignore that is to be on the wrong side of history.

Fourth, as any eighth-grade government student can explain, our nation's checks and balances are designed to intervene and protect the rights of those in the minority, because the majority cannot always be depended upon to do so. Even if a majority of Nevadans did not support same-sex marriage, which they do, the will of the majority would not be justification for depriving the minority of fundamental equality.

Mr. Lefebvre is right that an apology is due, but it should be directed to the law-abiding, loving couples who are deprived of their rights merely because of who they love. He also owes members of the bar an apology for a message that is disrespectful, uninformed and outside the chartered scope of someone speaking under the auspices of leadership for our state bar. ■

Jeffery A. Garofalo, Esq., Las Vegas, Nevada

Mr. Alan Lefebvre's column in the May issue of the Nevada Lawyer was at odds with the best traditions of tolerance and respect for dissenting views that characterize the legal profession and the Nevada bar. I think of Alan as a friend and respect his leadership of the state bar. I am certain he did not intentionally denigrate anyone, but the words of the column speak for themselves and require a response.

The Supreme Court's decisions last year in *Hollingsworth v. Perry* and *United States v. Windsor* had the effect of invalidating statutes that prohibited or placed unequal burdens on same-sex partners. As challenges to prohibitions on same-sex marriage proliferate, states – from Virginia and Ohio to Utah and Arkansas – are now confronting the likelihood that their statutes or constitutional provisions are unenforceable. It is gratifying to see courts around the country redressing longstanding inequities to ensure that all of our citizens enjoy the equal protections to which they are entitled under the Constitution, including the right to marry.

Both *Hollingsworth* and *Windsor* involved decisions by government officials not to defend laws they believed to be unconstitutional. And in neither case did the Supreme Court question the prerogative of state officials to exercise that discretion. Our own Attorney General has made a similar well-reasoned decision to withdraw the state's petition to the 9th Circuit, presumably after considering the ever-growing corpus of case law which points to the unenforceability and unconstitutionality of restrictions on marriage.

Every day at the Boyd School of Law we try to instill in our students a sense of justice and a respect for all – without exception. It's of course the right thing to do, but it's also what our Constitution expects of us. ■

Daniel W. Hamilton Dean & Richard J. Morgan Professor of Law, UNLV William S. Boyd School of Law

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As members of the faculty and staff of UNLV's William S. Boyd School of Law, we were dismayed to read the May 2014 *Nevada Lawyer* column by Alan J. Lefebvre, written in his capacity as president of the State Bar of Nevada. We fear that the tone of Mr. Lefebvre's undignified column brings disrespect on the bar and undermines principles of professionalism that we endeavor to instill in our students.

Mr. Lefebvre's ostensible subject was Nevada's prohibition on same-sex marriage. He disparaged the conclusion by Attorney General Catherine Cortez Masto and endorsed by Governor Brian Sandoval that the ban cannot be defended in federal court. There are reasonable debates to be had about how our state's officials should respond to a rapidly shifting legal landscape. But such debates require a climate of mutual respect.

The mission of the State Bar of Nevada is, in part, to "elevate the standard of honor, integrity and courtesy in the legal profession" and "to promote a spirit of cordiality" among lawyers. In our roles as faculty and staff at Nevada's only law school, we want to pass these values on to our graduates. It is thus regrettable that Mr. Lefebvre's essay consists largely of insults, ad hominem attacks, sarcasm and sectarian references that are simply inappropriate for the leader of an important institution in a vibrant and diverse state.

We recognize that issues like marriage equality naturally inspire passionate responses. But in the legal profession passion must be expressed with dignity and thoughtful analysis. Mr. Lefebvre's column was lacking in the civility that should guide the behavior of every Nevada attorney. It is a serious disappointment for such indignity to emanate from the leader of the state bar. ■

The views expressed above are those of the undersigned individuals and not of the Boyd School of Law or the University of Nevada, Las Vegas:

Rachel J. Anderson, Professor; Ian C. Bartrum, Assoc. Professor; Peter Brandon Bayer, Assoc. Professor; Linda L. Berger, Family Foundation Professor; Mary Berkheiser, Professor; Elaina Bhattacharyya, Director of Special Programs; Christopher L. Blakesley, The Cobeaga Law Firm Professor; Jennifer Carr, Director of the Academic Success Program; Robert Correales, Professor; Linda Edwards, E.L. Cord Foundation Professor; Eric H. Franklin, Assoc. Professor; Ruben J. Garcia, Professor; Sara Gordon, Assoc. Professor; Jennifer Gross, Assoc. Professor; Lynne Henderson, Professor Emerita; Tera Hodge, Judicial Clerkship & Public Interest Coordinator; Lori D. Johnson, Asst. Professor-in-Residence; Michael Kagan, Assoc. Professor; Kay Kindred, Ralph Denton Professor; Sylvia Lazos, Justice Myron Leavitt Professor; Francine J. Lipman, William S. Boyd Professor; Elizabeth L. MacDowell, Assoc. Professor; Thomas Main, William S. Boyd Professor; Fatma Marouf, Assoc. Professor; Andrew Martineau, Asst. Professor; Thomas B. McAffee, William S. Boyd Professor; Angela Morrison, Visiting Asst. Professor; Ann C. McGinley, William S. Boyd Professor; Rebecca Nathanson, James E. Rogers Professor; Lydia Nussbaum, Assoc. Professor; Ngai Pindell, Professor; Terrill Pollman, Professor; Jeanne Price, Assoc. Professor; Nancy B. Rapoport, Gordon Silver Professor; Addie C. Rolnick, Assoc. Professor; Keith A. Rowley, William S. Boyd Professor; Sean Saxon, Assoc. Professor; Rebecca Scharf, Assoc. Professor; Chad Schatzle, Asst. Professor; Elaine Shoben, Judge Jack and Lulu Lehman Professor; Christine Smith, Assoc. Dean for Administration and External Relations; Jeffrey Stempel, Doris S. & Theodore B. Lee Professor; Jean Sternlight, Michael and Sonja Saltman Professor; Layke Stolberg, Director of Career Development; David S. Tanenhaus, James E. Rogers Professor; Stacey A. Tovino, Lincy Professor of Law; Marketa Trimble, Assoc. Professor ; Jean M. Whitney, Asst. Professor-in-Residence; Matthew Wright, Assoc. Professor

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I join my William S. Boyd School of Law colleagues in reproving the unseemly tone of State Bar of Nevada President Alan J. Lefebvre's "Message from the President," (*Nevada Lawyer* May, 2014). Moreover, I deeply disagree with Mr. Lefebvre's ridicule of the Judiciary's overarching insight that due process of law necessitates protecting innate dignity, including personhood linked to sexual orientation.

As his prime example, Mr. Lefebvre mocks as "untethered" and "gossamer threads of fancy" the Ninth Circuit's decision extending *Batson* protection to forbid peremptory strikes based on potential jurors' sexual orientation. He argues that such due process rights belong only to race, sex and other human aspects that are, in his words, "apparent and indelible." Mr. Lefebvre urges that homosexuality is, by contrast, "overt" and only "about behavior." I think he is profoundly mistaken, because discrimination often occurs when bigots construe "apparent" factors, particularly a person's appearance and demeanor, to evince homosexuality.

Perhaps more importantly, apparentness and indelibility are not the only characteristics deserving due process protection. For instance, a person may be religious, even though, unlike race and sex, devoutness may be neither "apparent" (by which I take Mr. Lefebvre to mean *obvious*) nor "indelible" (by which I take Mr. Lefebvre to mean *permanent*). I would be surprised if Mr. Lefebvre believes that because religious devotion can be unobvious and changeable, government may discriminate freely – such as prohibiting Jews from serving on juries. To prove such discrimination unlawful, Mr. Lefebvre cannot raise the First Amendment because legal inability to be a juror does not prevent Jews from worshiping where, when and as they choose. Thus, legal norms banning such discrimination must stem from the due process clauses (although ironically Mr. Lefebvre might find

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relevant analogies within the spirit of the First Amendment, or similar "penumbras" that his column derides).

The due process theory invalidating religious prejudice in selecting juries is the same theory that invalidates bias based on race, sex and, yes, sexual orientation. Official discrimination premised on hostility, bigotry, intolerance or the desire to harm violates due process by demeaning the *dignity* – the humanity – of individuals and groups who are causing no true societal harm. In fact, "dignity," rightly, has become the core concept animating due process of law, as Supreme Court decisions emphasize. Although not crystalline, due process dignity analysis is hardly "untethered … gossamer threads of fancy." Reasonable minds can differentiate laws preventing genuine harm from laws fostering untoward prejudice. Accordingly, discerning human dignity facilitates the Judiciary's earnest attempt to enforce due process, what even the champion of judicial restraint Justice Felix Frankfurter aptly called "ultimate decency in a civilized society" (*Adamson v. California,* 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring). ■

Prof. Peter B. Bayer, William S. Boyd School of Law

As a section, we are outraged by the recent "Message from the President" authored by Alan J. Lefebvre, Esq., President of the Nevada State Bar, entitled "DERELICTION OF DUTY … OR IS IT RULE BY THE GUARDIANS?" published in the May 2014 edition of *Nevada Lawyer*. The column harshly condemns the Attorney General, Catherine Cortez Masto, for the state's decision to withdraw its defense to Nevada's same-sex marriage ban. In so doing, Mr. Lefebvre's opinions heavily rest on religious and conservative ideological grounds, a direct violation of the State Bar of Nevada by-laws and an abuse of the office of bar president.

The president is the state bar's official spokesperson. As such, Mr. Lefebvre's column – authored by: "President, State Bar of Nevada" – and its appearance in *Nevada Lawyer* presents his opinion with the tacit approval of the Nevada state bar. Indeed, many media outlets and members of the public misconstrued his opinions as the state bar's official position on marriage equality in Nevada. The ideas espoused by Mr. Lefebvre, however, are neither shared by the members of this section nor fair-minded members of the bar.

The column expressly violates the state bar's by-laws addressing media relations; specifically, Section 3.1, which prohibits bar representatives from making statements concerning their personal opinions and limits statements to the media to being informational in nature. Upon violation of such edict, Policy 8.4 provides that bar members may formally object to such statements and require the Board of Governors to address such objection at the next board meeting and provide a written response.

The column does not represent a legally balanced (much less, accurate) view on the issue of marriage equality in Nevada. Rather than being informational, Mr. Lefebvre's position consists wholly of ideological statements. Mr. Lefebvre omits that Governor Sandoval, a Republican, agreed with the Democratic Attorney General's decision to withdraw the State's defense to Nevada's same-sex marriage ban. He also disregards an Attorney General's higher duty to see that justice is done, especially, where, as here, new legal precedent rendered the state's position untenable.

The column could not be construed as "informative," omitting easily ascertainable facts and information that would have presented a balanced legal analysis. Under the Nevada Constitution, the Attorney General takes an oath and swears to "support, protect and defend the constitution and government of the United States, and the constitution and government of the State of Nevada." Mr. Lefebvre only emphasizes the duty to uphold the Nevada Constitution, insinuating the Attorney General's duty to uphold Nevada's Constitution and majority voters outweighs the duty to uphold the U.S. Constitution. This duty requires providing "equal justice under law," a phrase inspired by the federal equal protection clause and used to protect historically discriminated groups from discrimination. In June, 2013, the United States Supreme Court ruled the Defense of Marriage Act Section 3, was violative of the U.S. Constitution by depriving same-sex couples of the equal liberty of persons. *United States v. Windsor*, 570 U.S. 12 (2013)

Thereafter, numerous federal courts began striking marriage amendments to state constitutions as also being violative. In many instances, state attorney generals decided, based on *Windsor*, they no longer could support or defend their state's marriage ban. Mr. Lefebvre's column fails to address the evolution of legal treatment of LGBT persons or actions by attorney generals in other states to discontinue defending similar bans on such bases, including Kentucky, Oregon, Pennsylvania and Virginia. Had the column presented a spectrum of positions on the issues, or a historical account of the cases and arguments on both sides, the LGBT Section could believe the purpose of the column was to illuminate the topic; however nothing could be further from the truth. ■

The board of the LGBT Section of the State Bar of Nevada

In the latest edition of *Nevada Lawyer Magazine* the president of the State Bar of Nevada penned an editorial criticizing State Attorney General Catherine Cortez Masto's decision to no longer defend the state's ban on same-sex marriage. As attorneys in the state of Nevada, we agree with Governor Brian Sandoval – himself a former federal judge – that Attorney General Masto was correct in dropping the state's defense of a ban on marriage.

Governor Sandoval and Attorney General Masto, members of two different political parties, agreed that the ban on marriage is indefensible. They were confident in making that decision and the idea they would do so in an election year filled with partisanship is even more reassuring and follows a bipartisan tradition throughout the states and country.

In states like California, Kentucky, Oregon, Pennsylvania and Virginia, the attorneys general chose not to spend taxpayer funds in an imprudent pursuit (http://www.washingtonpost.com/blogs/govbeat/wp/2014/02/20/six-attorneys-general-wont-defend-their-own-states-gay-marriage-bans/.) These actions mirror a bipartisan history of administrations from both parties declining to uphold laws they determine to be indefensible. The Clinton administration declined to enforce laws that discharged HIV positive members of the military from the Armed Services (http://www.scribd.com/doc/39330440/Dod-Hiv-Memo-Final). In 1990, then Solicitor General John Roberts (now Chief Justice), in the George W. Bush administration, refused to defend FCC Affirmative action policies (http://www.washingtonpost.com/wp-dyn/content/article/2005/09/07/AR2005090702394.html). Public servants have a duty to consider matters before them, analyze them, and determine the most prudent course of action. In this instance, the determination was made that defending Article 1, §21, *Limitation on recognition of marriage,* of the Nevada Constitution was not an appropriate use of public funds.

In taking to his member-funded bully pulpit, Mr. Lefebvre curiously omits a key case from his legal analysis – *United States v. Windsor*. This 2013, landmark U.S. Supreme Court case operates as the central guiding decision in *SmithKline Beecham Corp. v. Abbot Laboratories,* and for good reason. As the Ninth Circuit analyzed and explained in great detail, *Windsor* establishes heightened scrutiny for classifications based on sexual orientation. This *Windsor* decision is certainly relevant in the *SmithKline* case, given that "the privilege of peremptory strikes in selecting a jury is subject to the guarantees of the Equal Protection Clause." But, *Windsor* specifically struck down federal **non-recognition of same-sex marriage**. Any responsible court, attorney general or former federal judge, such as Gov. Sandoval, would be right to cite *Windsor* and the Ninth Circuit's reliance on *Windsor*, in determining whether a case defending a ban on marriage could be successful.

The Ninth Circuit plainly stated, "*Windsor*'s reasoning reinforces the constitutional urgency of ensuring that individuals are not excluded from our most fundamental institutions because of their sexual orientation." The Attorney General and Governor could cross their fingers and hope that somehow serving on a jury is a right somehow more fundamental than marriage, or that the Ninth Circuit would somehow distinguish an equal protection challenge related to jury selection and marriage (despite reliance on a Supreme Court case specifically dealing with same-sex marriage). But Nevada should be thankful that our leaders are not wasting taxpayer money on expensive litigation – based on such high hopes.

The author of the editorial suggests a ballot measure is the most appropriate path for marriage, and we couldn't disagree more. What couple should subject their commitment and love to one another to a vote of their neighbors or co-workers and wait for approval? Why should anyone be put in that position, especially when there is no legal or rational reason for doing so?

Public support for the freedom to marry continues to grow, with polls now consistently showing majority support in Nevada and nation. Marriage matters to gay and lesbian couples for the same reasons that it matters to all couples. Gay and lesbian couples share many of the same values as straight couples – like the importance of family, helping neighbors, making ends meet and raising children. They want to make a lifetime commitment to that special person with whom they want to grow old, and commit to them while standing with friends and family who support and celebrate that commitment.

We support Attorney General Masto and Governor Sandoval's sound decision, and wait for the chance to applaud the Justices of the 9th Federal Circuit as well. ■

Freedom Nevada: Lisa Rasmussen, Esq., Robert Langford, Esq., Ruben Garcia, Esq., Elisa Vasquez, Esq., Todd Eikelberger, Esq., Maggie McLetchie, Esq., Rachel Anderson, Esq., Vanessa Spinazola, Esq., Amanda Morgan, Esq., Kevin Kampschror, Esq., Kristine Kuzemka, Esq., Sheila Moore, Esq. and Leo Wolpert, Esq.