SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 04/06/2018 TIME: 04:14:00 PM DEPT: C17

JUDICIAL OFFICER PRESIDING: Craig Griffin
CLERK: Lenora Silva
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT:

CASE NO: **30-2018-00980421-CU-WM-CJC** CASE INIT.DATE: 03/19/2018
CASE TITLE: **Daniels vs. Neal Kelley, Orange County Registrar of Voters**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT ID/DOCUMENT ID: 72788261
EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 4/5/18 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

I. PROCEDURAL CONSIDERATIONS.

A. Procedural Law

Except where the Elections Code statutes are on point, courts look to the statutes on traditional writs of mandate for practice and procedure in handling petitions for writ of mandate under the Elections Code. (See Code of Civil Procedure § 1109; Knoll v. Davidson (1974) 12 Cal.3d 335, 338.).
A writ petition can be amended as any other pleading to conform to proof. (See Franchise Tax Bd. v. Municipal Court (1975) 45 Cal.App.3d 377, 384; Code of Civil Procedure § 469. In considering whether to grant a petition for writ of mandate, courts may receive evidence by declarations, documentary evidence, or testimony by live witnesses. (American Federation of State, County and Municipal Employees v. Metropolitan Water Dist. of Southern California (2005) 126 Cal.App.4th 247, 263; Appelgate v. Dumke (1972) 25 Cal.App.3d 304, 315; California School Employees Assn. v. Del Norte County Unified Sch. Dist. (1992) 2 Cal.App.4th 1396, 1405; see also CCP §1094; CRC 3.1306.) Generally, the petitioner bears the burden of pleading and proving the facts on which the claim for relief is based. (Gilbert v. City of Sunnyvale (2005) 130 Cal.App.4th 1264, 1274.)

The parties' papers refer interchangeably at times to a series of statutes that are not truly interchangeable. Although certain statues, notably Elections Code sections 13313 and 13314, provide

for challenge by writ of mandate, but they are not the same.

Section 13313 concerns challenges to candidate statements (per §13307), and expressly requires clear and convincing proof showing a false or misleading statement in materials under 13307 before a writ striking the statement can be issued. Although petitioner attaches Ms. Albert's candidate statement, the petition does not on its face challenge that statement.

Elections Code § 13314 is broader. Under that provision, a petition for writ of mandate can be granted for errors, omissions or neglect of duties in violation of the Elections Code, including the placing of a name on the ballot, or printing of a ballot, voter information guide, state voter information guide or other official matter. In appropriate circumstances, the section allows persons to challenge the qualifications and elections of candidates. (*C.f. Fuller v. Bowen* (2012) 203 Cal.App.4th 1476, 1485 (holding that under constitutional terms of separation of powers, that a court could not under §13314 disqualify a person from candidacy for state legislature on the grounds of residency requirements). This section says nothing about requiring proof by the clear and convincing evidence standard. Section 13314 provides the basis for the petition's challenge to Ms. Albert's qualifications to serve as District Attorney.

Finally, Elections Code 13107 concerns the appearance of the names and titles of candidates on the ballot, including the candidate's designation on the ballot (See §13000, §13107). Regulations exist implementing section 13107 (for example, 2 CCR *§§ 20714,* 20711, and 20710.)

The petition on its face seeks to challenge only the phrase "civil rights," in Ms. Albert's ballot designation; however, petitioner argues in his supporting papers that the entire designation of "civil rights attorney" should be stricken. In her opposition papers, Ms. Albert expressly recognized that petitioner is seeking to strike the entirety of her designation. Ms. Albert agreed during oral argument to petitioner's amendment of the writ petition to include all of her ballot designation.

B. Standing

Under § 13314, an elector can petition for a writ of mandate. Under § 13313, a voter can seek such a petition. Elector and voter have definitions in Elections Code § 321, and 359. (See also Chula Vista Citizens for Jobs and Fair Competition v. Norris (9th Cir. 2015) 782 F.3d 520, 527 (referring to the difference between elector and voter); Kunde v. Seiler (2011) 197 Cal.App.4th 518, 528; and CCP § 1086.) Petitioner has asserted standing as a registered voter and resident of the County of Orange. Ms. Albert, has not contested this.

C. Request for Judicial Notice

Evidence Code §452(c) permits judicial notice to be taken of official acts of the legislative, executive and judicial departments of the state. "The State Bar is a constitutional entity, placed within the judicial article of the California Constitution, and thus expressly acknowledged as an integral part of the judicial function." It is "an administrative arm of th[e] [Supreme] court for the purpose of assisting in matters of admission and discipline of attorneys." (*In re Rose* (2000) 22 Cal.4th 430, 438.) Evidence Code § 452(d) permits judicial notice to be taken of records of any court of the state. Evidence Code §452(h) permits judicial notice to be taken of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable

accuracy. Case law shows that courts have taken judicial notice of records of the State Bar posted on its official website. *In re White* (2004) 121 Cal.App.4th 1453, 1469 n.14 ("We take judicial notice of records of the State Bar, posted on its official website. . . "); *accord In re Sodersten* (2007) 146 Cal.App.4th 1163, 1171 n.1; *People v. Vigil* (2008) 169 Cal.App.4th 8, 12.

The parties' requests for judicial notice of court and State Bar records are GRANTED. The Court DENIES Ms. Albert's request for judicial notice of her unfiled bankruptcy complaint.

II. PETITIONER'S CHALLENGE TO MS. ALBERT'S NAME APPEARING ON THE BALLOT

A. Qualifications for Office of District Attorney and Duties of the Office

The legislature has declared that the district attorney is an officer of the county. (Govt Code §24000).). The district attorney is to be elected by the people. (Govt Code § 24009). However, the legislature has enacted a statute, Govt Code § 24002, specifically governing eligibility for the office: "A person is not eligible to the office of district attorney unless he has been admitted to practice in the Supreme Court of the State."

On its face, section 24002 speaks only to having been admitted to the bar, but is silent on the effect of a suspension or disbarment on eligibility. But the companion statutes on the duties of the office of the district attorney speak loudly on this issue.

Govt Code §26500 declares: "The district attorney is the public prosecutor" who "shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses." Govt Code §26051 provides that the district attorney shall be "engaged in criminal proceedings in the superior court or in civil cases on behalf of the people." Under Govt Code § 26520: "The district attorney shall render legal services to the county without fee and may render legal services to school districts and to other local public entities as requested." Govt Code §26507: "A district attorney, city attorney, or any combination thereof, may, in agreement with other district attorneys or city attorneys, act jointly in prosecuting a civil cause of action of benefit to his own county in a court of the other jurisdiction."

Unquestionably, the foregoing duties each require an active license to practice law. During oral argument, Ms. Albert conceded she must be qualified to practice in order to take office as district attorney. But this does not end the inquiry.

Under Elections Code § 13.5(a) and (b), a person is not considered a legally qualified candidate for the office of district attorney unless he or she has filed a declaration of candidacy and other declarations and documentation, sufficient to establish in the determination of the election official that the person meets each qualification established for service in that office by the relevant provision â€" for the office of district attorney, it is Government Code §24002, supra.

Elections Code § 8040(a) provides a template, as follows: "The declaration of candidacy by a candidate shall be substantially as follows: . . . I meet the statutory and constitutional qualifications for this office. . . " (*See also* Elections Code § 8020(a).)
In particular, Petitioner challenges the "special qualifications" declaration of Ms. Albert which was signed and submitted on March 9, 2018, which attests: "I ... meet the qualifications for District Attorney as required by Government Code 24002 . . . I understand that no person shall be elected to the office of

District Attorney unless he/she has been admitted to practice in the Supreme Court of United States

B. The Date of Ms. Albert's Actual Suspension from Practice of Law

Petitioner complains that Ms. Albert's declaration of candidacy was false because her license to practice as an attorney was suspended at the time it was filed. Ms. Albert disagrees, citing to screen shots from the State Bar of California's website at that time period reflecting her status as active. She further contends neither the State Bar nor the California Supreme Court established the start date for her probation and attendant actual suspension. Further, she asserts she was never provided notice of her suspension. Finally, she contends her bankruptcy prevented her suspension, and that after the minimum 30 actual suspension, she is entitled to automatic reinstatement, as the conditions that she pay court-ordered sanctions and the costs of her prosecution by the State Bar are dischargeable debts.

The Court concludes from the evidence presented that Ms. Albert had already been suspended from the practice of law at the time she filed her candidate statement and remains so to this day. Although Elections Code section 13314 does not dictate a heightened standard of proof, the Court nonetheless finds the evidence of the fact and timing of her suspension clear and convincing.

For proof, the Court need look no further than its judicial notice of the dockets of the State Bar Court and the California Supreme Court. On June 30, 2017, the Review Department of the State Bar issued its Opinion, recommending, inter alia, suspension from the practice of law for one year, with execution of suspension stayed, with Ms. Albert being placed on one year's probation with a number of stated conditions, including suspension from the practice of law for a minimum of 30 days until the fulfillment of number of terms and conditions, including the payment of court-ordered sanctions in previous court maters.

Despite Ms. Albert's professed ignorance of the commencement of her probation, the Opinion expressly provided: "The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter." On December 13, 2017, the Supreme Court denied Ms. Albert's petition for review, and imposed the discipline recommended in the State Bar Opinion.

The effective date of Supreme Court orders imposing discipline is set forth in Rule 9.18 of the Rules of court, which provides:
"Unless otherwise ordered, all orders of the Supreme Court imposing discipline . . . become final 30 days after filing. The Supreme Court may grant a rehearing at any time before the decision or order becomes final."

The apparent purpose of the 30 day period is to allow time for consideration of a petition for rehearing. The Rules further provide that the Supreme Court may extend the time for rehearing beyond the 30 day period, but no more than 60 days. Rule 8.532.

In the present case, Ms. Albert timely filed a petition for rehearing. The following day, the Supreme Court

extended the time to consider the petition, ruling: "The time for granting or denying rehearing in the above-entitled case is hereby extended to and including March 13, 2018, or the date upon which rehearing is either granted or denied, whichever comes first." The Court denied rehearing on February 14, 2018 without further comment.

Ms. Albert argues that because the Supreme Court's rehearing denial order did not indicate that probation had commenced, she had not yet been suspended. The Court disagrees. As set forth above, the State Bar opinion and the Rules of Court make it abundantly clear that her suspension was imposed on February 14, 2018, a fact confirmed by the current State Bar website and a letter provided by the State Bar. That the State Bar was tardy in updating its website status for Ms. Albert does not alter her suspension date.

C. The Effect of Ms. Albert's Suspension on Her Qualification for Office

Ms. Albert contends that even if currently suspended from the practice of law, she should nonetheless remain on the ballot because she intends to regain her ability to practice law before the election is held. In support of her argument, she cites Elections Code § 8550 which provides: "At least 88 days prior to the election, each candidate shall leave with the officer with whom his or her nomination papers are required to be left, a declaration of candidacy which states all of the following: . . . (e) That, *if elected, the candidate will qualify* for the office." As she notes, the words, "will qualify for office" suggest that the candidate need not be currently qualified so long as she is able to qualify for the office when she takes office.

The forward looking section 8550 appears somewhat in conflict with section 8040(a) which, as noted above, provides a template requiring the candidate to attest that "*I meet* the statutory and constitutional qualifications for this office." In considering this apparent contradiction, the Court recognizes that the right to be considered for and to hold public office whether by election or appointment is a fundamental constitutional right. (*Zeilenga v. Nelson* (1971) 4 Cal.3d 716, 720.) "The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. Ambiguities are to be resolved in favor of eligibility to office". (*Carter v. Commission on Qualifications of Judicial Appointments* (1939) 14 Cal.2d 179, 182; *See also Woo v. Superior Court* (2000) 83 Cal.App.4th 967, 977.)

In determining whether Ms. Albert should be declared, at this point, ineligible for the office of District Attorney, a review of the scant case law regarding qualification-based challenges to candidates is instructive.

In *Samuels v. Hite* (1950) 35 Cal.2d 115, the Supreme Court considered the now repealed Code of Civil Procedure section 159a, which provided: "No person shall be eligible to the office of justice of the peace, of a justices' court of Class A, unless he shall have been admitted to practice before the Supreme Court of this state, for a period of at least two years . . . ." (*Id.* at 116). At the time the candidate in *Samuels* attempted to file his declaration, he had less than two years of practice, but asserted he was qualified to run because he would have two years of practice by the time he would be sworn into office.

The Supreme Court disagreed, observing: "In this state . . . it has long been the law that a candidate, to be 'eligible' (when the time of eligibility is not expressed), must be qualified at the time of election; the word 'eligible' means 'capable of being chosen-the subject of selection or choice." (*Id.* at 116-17). Because the candidate in *Samuels* would not be qualified as of the date of the election, he was precluded from seeking office.

The other case considering this issue is *Walter v. Adams* (1952) 110 Cal.App.2d 484. In *Walter,* a city judge was running to be judge of a district. To qualify, he had to either (1) be an incumbent, (2) be admitted to practice law, or (3) have successfully passed a Judicial Council exam. He was not considered an incumbent because he had previously abandoned his city judge position, and he was not admitted to practice. Conceding the first two strikes, the candidate argued that under *Samuels*, his eligibility can be measured no earlier than the time of the election. In other words, because he intended to take Judicial Council examination at some point in the future, any effort to remove his name from the ballot would be premature.

The Court of Appeal in *Walter* disagreed. Observing the candidate failed to sit for the Judicial Council examination earlier in the year, the court noted:

"We cannot agree with his argument that under such circumstances he could conceivably fulfill all of the requirements of a candidate for such office as to the date of election . . . .

"The situation thus presented is not at all analogous to that in the case of *Samuels v. Hite,* 35 Cal.2d 115 [216 P.2d 879], the case relied upon by [him] "There can be no question but that the Legislature provided three qualifications of eligibility, (1) incumbency as of January 1, 1952, (2) admission to the practice of law or (3) the successful passing of an examination prescribed by the Judicial Council.

"It may be argued that in the *Samuels* case if the candidate could have shown (which he could not) that he would have been eligible as of the date of the election he would have satisfied the requirements of section 159 (a) of the Code of Civil Procedure. However, that is not the situation presented in the instant case. Here the condition of [the candidate]'s eligibility was not something exclusively within his control such as the taking of the qualifying examination given by the Judicial Council. In fact, as stated, such an examination was given on February 16, 1952, but he failed to avail himself of the opportunity to take the same. Furthermore the condition of his eligibility was not such as could be met by the mere passage of time as may be inferred in the Samuels case, since he admits he is not licensed to practice law in this state. Therefore, in the absence of any showing to the contrary, we conclude that the petition is not premature."

Walter v. Adams (1952) 110 Cal.App.2d 484, 491â€"492.

The principle gleaned from *Samuels* and *Walter* is that where a candidate not presently qualified can become so by the mere passage of time or by action on matters entirely within the candidate's control,

any challenge to eligibility before the election is premature. But where the unqualified candidate will not become qualified by the mere passage of time, but requires the acquiescence of a third party, she is subject to challenge as of the time her candidacy declaration is filed.

As for Ms. Albert specifically, her actual suspension from the practice of law is not out of her hands. The Supreme Court's Order on her discipline provided a minimum 30-day actual suspension that will continue until she pays specified sanctions issued in other cases, totaling $5,738, plus interest. There are other probation terms and conditions in the Order that must be met, including the payment of over $18,000 in costs, but are not specified as prerequisites to the termination of her actual suspension. Ms. Albert admittedly has not complied with the condition for the payment of the sanctions, but the amount required is not insurmountable.

Petitioner contends that Ms. Albert will be unable to end her actual suspension by the time of the election because (1) she is bankruptcy and (2) she has continued to practice law despite being suspended, and will face further suspension by the State Bar as a result thereof. As for Ms. Albert's bankruptcy, she asserts she is making payments to the State Bar as part of her Chapter 13 plan of reorganization.

True, Ms. Albert is in bankruptcy, and the payment of the outstanding sanctions is part of her Chapter 13 plan. But given reinstatement of her ability to practice will restore her primary source of income to her, it is inconceivable that the Bankruptcy Court would preclude her from paying the required amount before the election. .

As for Ms. Albert's alleged unauthorized practice of law, the evidence clearly indicates she continued to practice law after her actual suspension became effective. But whether the State Bar will refuse to reinstate her ability to practice law based on such violation of the State Bar Act is at this point speculative. Indeed, the State Bar may find persuasive Ms. Albert's defense that at the time she made the court filings, the State Bar website listed her status as active. Certainly, this Court cannot adjudicate issues regarding the unauthorized practice or attorney discipline, as they fall within the exclusive jurisdiction of the California Supreme Court and its administrative arm, the State Bar. (*Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1710 ("inherent judicial power of the superior court does *not* extend to attorney disciplinary actions. That power is exclusively held by the Supreme Court and the State Bar, acting as its administrative arm").

In sum, the Court must deny Petitioner's request to have Ms. Albert's name stricken from the ballot. If, at the time of the election, it appears Ms. Albert is unqualified for the office of District Attorney, a challenge may be made by separate writ petition under Elections Code section 16100(b), if made within 5 days after completion of the official canvas. (Elections Code § 16421.)

III. PETITIONER'S CHALLENGE TO MS. ALBERT'S NAME APPEARING ON THE BALLOT

A. The Law Concerning Ballot Designations

Elections Code §13107(a)(3) provides: ". . . immediately under the name of each candidate . . . may appear at the option of the candidate only one of the following designations: . . . (3) No more than three words designating either the current principal professions, vocations, or occupations of the candidate, or the principal professions, vocations, or occupations of the candidate during the calendar year immediately preceding the filing of nomination documents."

Elections Code §13107(e) provides: "The Secretary of State and any other elections official shall not accept a designation of which any of the following would be true: . . . (1) It would mislead the voter . . . " (*See also 2 CCR §20710.)* "A major purport of the Elections Code is to insure the accurate designation of the candidate upon the ballot in order that an informed electorate may intelligently elect one of the candidates." (*Salinger v. Jordan* (1964) 61 Cal.2d 824, 826; *see also Rubin v. City of Santa Monica* (9th Cir. 2002) 308 F.3d 1008, 1012.)

Regulations implementing the above include: (2 Cal. Code of Reg. §20710 *et seq.*) Under 2 Cal. Code Reg. § 20714(c), "In order for a ballot designation submitted pursuant to Elections Code § 13107, subdivision (a)(3), to be deemed acceptable by the Secretary of State, it must accurately state the candidate's principal professions, vocations or occupations, as those terms are defined in subdivisions (a) and (b) herein. Each proposed principal profession, vocation or occupation submitted by the candidate must be factually accurate, descriptive of the candidate's principal profession, vocation or occupation, must be neither confusing nor misleading, and must be in full and complete compliance with Elections Code § 13107 and the regulations in this Chapter."

Under § 20714(b)(1), "If a candidate is licensed by the State of California to engage in a profession, vocation or occupation, the candidate is entitled to consider it one of his or her "principal" professions, vocations or occupations if (i) the candidate has maintained his or her license current as of the date he or she filed his or nomination documents by complying with all applicable requirements of the respective licensure, including the payment of all applicable license fees and (ii) the status of the candidate's license is active at the time he or she filed his or her nomination documents."

Under § 20714(b)(2), "(2) A candidate who holds a professional, vocational or occupational license issued by the State of California may not claim such profession, vocation or occupation as one of his or her "principal" professions, vocations or occupations if (i) the candidate's licensure status is "inactive" at the time the candidate files his or her nomination document, or (ii) the candidate's license has been suspended or revoked by the agency issuing the license at the time the candidate files his or her nomination documents,"

B. Ms. Albert's Ballot Designation

Ms. Albert's ballot designation declares she is a "Civil Rights Attorney". Petitioner challenges this designation. In light of the Court's finding that Ms. Albert has been disqualified from the practice of law from February 14, 2018 to the present, her use of the word "Attorney" in her ballot designation is improper. To the extent that Ms. Albert may be contending that the status of "attorney" can be used

under the prong of the "principal professions... of the candidate during the calendar year immediately preceding the filing of the nomination documents" (§13107(a)(3)), regulation §20714(b)(2) is creates a restriction not just on the "current" profession but on the candidate's ability to invoke her status as attorney as a "principal" profession in general. (See §20714(b)(1),(b)(2).)

IV THE ISSUANCE OF A WRIT WILL NOT SUBSTANTIALLY INTERFERE WITH THE CONDUCT OF THE ELECTION

Respondent filed a declaration in connection with this petition expressing no position on the substantive matters here involved, but requesting that any decision made in this matter be final no later than April 13, 2018, to ensure the election is not delayed. Based on this declaration, the Court finds that the issuance
of the requested writ will not substantially interfere with the conduct of the election.

RULING

The Petition is GRANTED IN PART, AND DENIED IN PART.

Respondent is ORDERED to strike the ballot designation of "Civil Rights Attorney" of Real Party in Interest Lenore Albert.

Real Party's name shall remain on the ballot for the office of District Attorney.

Pursuant to California Code of Civil Procedure section 1110b any notice of appeal filed in this matter shall not operate as a stay of execution of this Order.

This Minute Order shall constitute as the formal order and Writ of Mandate.

IT IS SO ORDERED

CRAIG L. GRIFFIN

DATED: 4/6/18

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

DANIELS Plaintiff(s) Vs. NEAL KELLY, ORANGE COUNTY REGISTRAR OF VOTERS Defendant(s)	CASE NUMBER: 30-2018-00980421 CERTIFICATE OF SERVICE BY MAIL OF MINUTE ORDER, DATED 4/6/18

I, DAVID H. YAMASAKI, Executive Officer and Clerk of the Superior Court, in and for the County of Orange, State of California, hereby certify; that I am not a party to the within action or proceeding; that on 4/6/18, I served the MINUTE ORDER, dated 4/6/18, on each of the parties herein named by Electronic Service to:

Lenore Albert
lenorealbert@msn.com

Attorney Rebecca S. Leeds
Rebecca.leeds@coco.ocgov.com

Attorney Lee Fink
lee@leefink.com

Attorney Gregory A. Diamond
gad20@columbia.edu

DAVID H. YAMASAKI,
Executive Officer and Clerk of the Superior Court
In and for the County of Orange

DATED: 4/6/18

By: L. Silva
L. Silva, Deputy Clerk

CERTIFICATE OF SERVICE BY MAIL