

Alameda County's Recall Rules Roulette

"Rather than making a clear choice between the charter or the state rules, the county clerk used both," write Joshua Spivak and David A. Carrillo of the California Constitution Center at Berkeley Law.



By Joshua Spivak and David A. Carrillo | April 23, 2024 at 06:00 PM

Alameda County recently faced the grim prospect of a recall drive qualifying against a prominent county official (District Attorney Pamela Price) that invoked outdated local recall laws that were unsuited to modern elections. So the county supervisors rolled the dice on a ballot measure to update those rules. In their argument in favor the supervisors claimed that Measure B would “make the recall election rules clearer and . . . help avoid long and expensive legal battles.” Measure B [passed](#), but it created rather than solved problems. That’s because the county clerk’s certifying process for the recall seemingly combined the old charter and the new state rules in a confused and arbitrary process that is ripe for challenge.

[Measure B](#) requires the county to use the [state’s recall rules](#) for local jurisdictions, which Alameda was free to ignore because it is a charter county. The legislature revised those state rules in 2022 to make recalls less appealing; in particular, the new state law makes signature gathering harder. For the Price recall, switching to the state rules would increase the signature qualification threshold from 73,135 (under the charter) to 93,907 (under the state rules) — a 22% increase. To avoid Measure B’s effects if it passed, the recall proponents filed their 123,374 signatures the day before the Measure B election, so the charter rules presumably applied.

Rather than making a clear choice between the charter or the state rules, the county clerk used both. The clerk applied the charter rule for the lower number of required signatures. But those charter rules required the clerk to verify all signatures in 10 days; that didn’t happen. Instead, the clerk used a random-sampling method that Elections Code section 11225(a) (but not the charter) allows and ultimately took over 40 days to certify the count. That exceeded the charter’s 10-day

deadline by a full month, but it was within section 11225(a)'s deadline for random-sampling counts.

The clerk's [published procedure](#) says that it did not enforce one key part of county charter section 62, which required signature gatherers to reside in Alameda County. That may have been a good call, because the Ninth Circuit has applied strict scrutiny to such a restriction and held it unconstitutional for creating severe burdens on the speech, voting, and associational rights of out-of-area gatherers. *Nader v. Brewer* (9th Cir. 2008) 531 F.3d 1028, 1036.

But in evaluating the signatures the clerk apparently did apply another provision from charter section 62, which required signers to state their occupation. It's unclear what happened (no comment from the clerk on this), but the clerk's basis for rejecting so many signatures —over 48,000, or 39% of those submitted — is a mystery that the recall proponents [claim](#) is explained by this unusual occupation requirement. (That also may be so arbitrary that it fails strict scrutiny under *Angle v. Miller* (9th Cir. 2012) 673 F.3d 1122, 1133.) By comparison, the 2021 Gavin Newsom recall failure rate was 19% and the 2022 Chesa Boudin recall had a 20% failure rate; neither of those campaigns required signers to state an occupation. If the clerk indeed was using the charter provision, why not just say so? The clerk was arguably correct in enforcing it, if the charter rules apply as the proponents claim. And other counties commonly report why signatures were rejected.

That's not the only procedural concern. The county is apparently following state law for the recall election date. The charter required a vote in 35 to 40 days after signature verification. State law, on the other hand, requires a stand-alone special election in 88 to 125 days, but allows combining the recall with the next regular election if it takes place within 180 days. That potentially permits the county to push this recall vote to November. But the county is already exposed if the charter rules applied since the recall election clock starts when the signatures are submitted. The proponents can argue that if the clerk had followed the charter rules the recall vote would happen by April 23.

And there's one more issue here where the choice of law has major consequences: choosing the replacement candidate. Under the charter, the new district attorney is selected in a same-day replacement race. But after the 2022 revision the state rules treat a successful recall as a regular vacancy in the office, filled in this case by the supervisors appointing a temporary replacement who will hold the position until at least the next regularly scheduled election in November 2024.

The upshot is that the clerk appears to have used both the charter and the state rules, resulting in a lower signature requirement (charter rules), an expanded timeframe (state rules), and a later election with an appointed county prosecutor rather than an immediate replacement race (state rules). Such a mix-and-match approach arguably breached one or the other set of rules by not following it completely. The proponents can argue that the charter rules apply, because the recall signature drive started and finished before Measure B passed. And the charter deadlines for the count and vote would have lapsed long before the equivalent state-law time limits. So the proponents can also argue that the clerk gamed this by waiting for Measure B to pass to take advantage of those longer state-law time limits.

This tangled evolution exposes the county to lawsuits regardless how the facts shake out because everyone has legitimate complaints: the proponents are aggrieved if the clerk used the state rules; Price can claim harms from using either the state or charter rules; and everyone can complain if the clerk mixed the rules. The choose-your-adventure approach to this process leaves the recall in a jumble, which the courts likely will need to sort out. Thus, Measure B achieved the opposite of clarifying the county's recall laws and avoiding conflict.

Alameda had good reason to amend its charter to revise an antiquated recall law. But the voters could have been better informed about what was being changed. And the arbitrary process here will leave no one happy because it obstructs the constitutional recall power and leaves a county prosecutor in limbo. Alameda County's spin of the recall rules wheel isn't going very well. Pity the poor judge who has to sort this out.

—o0o—

Joshua Spivak is a senior research fellow at and David A. Carrillo is the executive director of the [California Constitution Center](#) at Berkeley Law. The authors take no position on the recall vote itself.

Copyright 2024. ALM Media Properties, LLC. All rights reserved. Reprinted with permission from the March 14, 2024 online edition The Recorder © 2024 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or reprints@alm.com.