



# California Corporate & Securities Law

## Should A Proxy Card Specify A Choice Of Law?

September 19, 2011 by [Keith Paul Bishop](#)

One of the jobs of an inspector of election is to determine the validity and effect of proxies. See, e.g., Cal. Corp. Code § 707(b) and 8 Del. Code § 231(b)(2). However, the validity and effect of proxies will depend upon state law. I'm guessing that many people assume that the law of the state of incorporation governs proxies. However, I'm not so sure that this assumption is accurate in all cases.

### A Proxy Is An Agency Relationship

A proxy is evidence of an underlying agency relationship pursuant to which a shareholder grants the recipient (aka "proxy holder") the power to vote at a meeting. See Cal. Corp. Code § 178 and *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1355 (Del. 1985). Under Section 291 of the Restatement (Second) of the Conflicts of Laws, the rights and duties of a principal and agent are determined by the local law which, with respect to the particular issue, has the most significant relationship to the parties and the transaction.

### The Most Significant Relationship May Not Be With The State Of Incorporation

When a corporation located here in California solicits proxies, it is entirely possible that both the shareholder (the principal) and the proxy holder (the agent) are located in this state. It is also very likely that the meeting will be held in California. Hence, performance by the agent will take place here as well. In these circumstances, one might reasonably conclude that California has the most significant relationship to both the parties and the transaction, regardless of state of incorporation.

### The Parties Can Choose

It might be argued that this result could place significant burdens on inspectors of election and issuers. However, this objection can be easily resolved by including a choice of law provision in the proxy. While I'm not aware of a reported California decision addressing the enforceability of a choice of law in a proxy, Vice Chancellor [Leo Strine, Jr.](#) of Delaware has held:

*Although our law relating to the voting of corporate shares is of paramount interest to Delaware, there is no offense to Delaware of allowing parties to subject agreements about irrevocable proxies to a law that places different strictures on such proxies than does Delaware law, absent some reason that those strictures offend a fundamental protection by the DGCL [Delaware General Corporation Law]. .*

Please contact [Keith Paul Bishop](#) at Allen Matkins for more information [kbishop@allenmatkins.com](mailto:kbishop@allenmatkins.com)

<http://www.calcorporatelaw.com/>

. . . Therefore, I find no reason to apply Delaware law in a situation where the parties have made a clear choice of law in favor of a sister state.

[TR Investors, LLC v. Genger](#), C.A. No. 3994-VCS (Del. Ch. July 23, 2010) *aff'd in part and rev'd in part* [Genger v. TR Investors, LLC](#), Case 592, 2010 (Del. Supr. July 18, 2011) (the trial court's choice of law was not appealed).

### Why Not Choose?

So why not add "This proxy is governed and must be construed and enforced in accordance with the laws of \_\_\_\_\_" to your next proxy card?

Please contact **Keith Paul Bishop** at Allen Matkins for more information [kbishop@allenmatkins.com](mailto:kbishop@allenmatkins.com)

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