NEW YORK STATE BAR ASSOCIATION
Journal
NYSBA
JUNE/JULY 2019
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DIVERSITY: A Moral Imperative

Stonewall 50: Reflecting on the LGBTQ Rights Movement in New York State

The NY Attorney Who Fought for Marriage Equality

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by Lewis Silverman

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Diversifying the Legal Profession: A Moral Imperative

This summer marks the 50th anniversary of the Stonewall uprising, a series of violent demonstrations against discriminatory police tactics outside a gay bar in the Greenwich Village neighborhood of Manhattan.

The protests lasted for six days, following a police raid that occurred in the early morning hours of June 28, 1969. The event is widely heralded as the start of what is today known as the LGBTQ+ rights movement, which has achieved far reaching legal victories over the ensuing half century.

THE POWER OF LAWYERS TO ACHIEVE SOCIAL JUSTICE

The success and strength of this movement represents one of the most extraordinary chapters in American legal history. It also demonstrates the power of lawyers to safeguard liberty, eliminate discrimination, and achieve social justice.

When I attended law school in the mid-1980s, it would have required prophetic powers to envision a society that viewed sexual orientation as a legal irrelevancy and same-sex marriage as a constitutional right. The AIDS epidemic was raging, taking the lives of 46,344 people by 1989, and three out of four cases were gay men. Fear gripped the nation. Homophobia was rampant.

Moreover, the law of the land was *Bowers v. Hardwick*, a 1986 U.S. Supreme Court decision that upheld a ban on sodomy in Georgia after a gay man was criminally charged for having consensual sexual relations with another male in the bedroom of his home.

Undaunted, lawyers continued to battle for equality in the courts. In 1989, the New York Court of Appeals handed down *Braschi v. Stahl Associates*, which held that the surviving partner of a same-sex relationship was "family" and therefore had the right to remain in a rent-regulated New York City apartment even though his name was not on the lease. At the time, legal acknowledgement of same-sex relationships was almost nonexistent.

In 2003, 17 years after the *Bowers* decision, the Supreme Court righted its wrong in *Lawrence v. Texas*, by striking down a Texas law that criminalized homosexual sex. The Court declared: "*Bowers* was not correct when it was decided [and] is not correct today."

More Supreme Court victories followed. In 2013, *United States v. Windsor* compelled the federal government to recognize same-sex marriage. Two years later, in *Obergefell v. Hodges*, the Court ruled that same-sex couples had a constitutional right to marry, legalizing same-sex marriage across the country.

These transformational changes in American jurisprudence tell an inspiring story of how lawyers can help create a more just and diverse society. Now, the time has come for the legal profession to apply the same determination to diversify itself.

THE LEGAL PROFESSION'S DIVERSITY IMBALANCE

The hard truth is that law is one of the least diverse professions in the nation. Our clients are women and men, straight and gay, of every race, color, ethnicity, national origin, and religion. Yet, the legal profession is not nearly as inclusive as the people we represent.

Indeed, a diversity imbalance plagues law firms, the judiciary, and every other sphere where lawyers work. Consider these facts:

- According to a recent survey, only 5 percent of active attorneys self-identified as black or African American and 5 percent identified as Hispanic or Latino, notwithstanding that 13.3 percent of the total U.S. population is black or African American and 17.8 percent Hispanic or Latino.
- Minority attorneys made up just 16 percent of law firms in 2017, with only 9 percent of the partners being people of color.
- Men comprise 47 percent of all law firm associates, yet only 20 percent of partners in law firms are women.
- Women make up only 25 percent of firm governance roles, 22 percent of firm-wide managing partners, 20 percent of office-level managing partners, and 22 percent of practice group leaders.

- Less than one-third of state judges in the country are women and only about 20 percent are people of color.

This state of affairs is unacceptable. It is a moral imperative that our profession better reflects the diversity of our clients and communities, and we can no longer accept empty rhetoric or half-measures to realize that goal. As Stanford Law Professor Deborah Rhode has aptly observed, "Leaders must not simply acknowledge the importance of diversity, but also hold individuals accountable for the results." It's the right thing to do, it's the smart thing to do, and clients are increasingly demanding it.

NYSBA LEADS ON DIVERSITY

On diversity, the New York State Bar Association is leading by example.

This year, through the presidential appointment process, all 59 NYSBA standing committees will have a chair, co-chair or vice-chair who is a woman, person of color, or otherwise represents diversity. To illustrate the magnitude of this initiative, we are celebrating it on the cover of the *Journal*.

Among the faces on the cover are the new co-chairs of our Leadership Development Committee: Albany City Court Judge Helena Heath and Richmond County Public Administrator Edwina Frances Martin. They are highly accomplished lawyers and distinguished NYSBA leaders, who also happen to be women of color.

Another face on the cover is Hyun Suk Choi, who co-chaired NYSBA's International Section regional meeting in Seoul, Korea last year, the first time that annual event was held in Asia. He will now serve as co-chair of our Membership Committee, signaling NYSBA's commitment to reaching out to diverse communities around the world.

This coming year as well we will develop and implement an association-wide diversity and inclusion plan.

In short, NYSBA is walking the walk on diversity. For us, it is no mere aspiration, but rather, a living working reality. Let our example be one that the entire legal profession takes pride in and seeks to emulate.

HENRY M. GREENBERG can be reached at hmgreenberg@nysba.org

PICTURES FROM THE FRONT COVER

Row 1 (left to right)
Aviva Abramovsky, Chair, Task Force on Autonomous Cars and the Law; Dean, University at Buffalo School of Law
Cynthia Arato, Vice Chair, Special Committee on Free Expression in the Digital Age; Partner, Shapiro Arato Bach, New York City
T. Andrew Brown, Chair, Finance Committee; Founder and Managing Partner, Brown Hutchinson, LLP, Rochester, NY
Aleece Burgio, Co-chair, Committee on Cannabis Law; Senior Counsel, McGuire Development Co., Buffalo, NY
Ashlee Cartwright, Vice chair, Committee on Animals and the Law; Staff Attorney, Salvation Army, West Nyack, NY
Sally Curran, Co-chair, Committee on Legal Aid; Executive Director, Volunteer Lawyers Project of Onondaga County, Inc., Syracuse, NY
Gail Ehrlich, Vice chair, Committee on Law, Youth and Citizenship; Solo Practitioner and Pro Bono Attorney, Pace Family Court Legal Program, Westchester, NY
Cheryl Fisher, Co-chair, Committee on Civil Rights; Counsel, Magavern Magavern Grimm LLP, Buffalo, NY

Row 2
Erin Flynn, Chair, Committee on Lawyers in Transition; Associate, Clair & Gjertsen, Scarsdale, NY
Emily Franchina, Chair, Committee to Review Judicial Nominations; Principal, Franchina Law Group, Garden City, NY
Barbara Gillers, Co-chair, Committee on Standards of Attorney Conduct; Professor of Law, New York University School of Law, New York City
Sarah Gold, Co-chair, Committee on Law Practice Management; Principal, Gold Law Firm, Albany, NY
Claire Gutekunst, Chair, Nominating Committee; Executive Director, Judges and Lawyers Breast Cancer Alert; Principal, Gutekunst ADR, Yonkers, NY
LaMarr Jackson, Chair, Committee on Mass Disaster Response; Solo Practitioner, Rochester, NY
Seymour James, Co-chair, Task Force on Parole Reform; Partner, Barket Epstein Kearon Aldea & LoTurco, LLP, New York City
Shawndra Jones, Vice chair, Committee on Continuing Legal Education; Senior Counsel, Epstein Becker & Green, P.C., New York City

Row 3
Cheryl Korman, Co-chair, Committee on Courts of Appellate Jurisdiction; Partner, Rivkin Radler LLP, Uniondale, NY
Glenn Lau Kee, Chair, Committee on Association Structure and Operations; Partner, Lau-Kee Law Group PLLC, New York City
Bernice Leber, Chair, Committee on Annual Awards; Partner, Arent Fox, New York City
Susan Lindenauer, Co-chair, Committee on Families and the Law; New York City
Camille Mackler, Co-chair, Committee on Immigration Representation; Director of Legal Initiatives, New York Immigration Coalition, New York City
Edwina Frances Martin, Co-chair, President's Committee on Access to Justice; Commissioner and Public Administrator, Richmond County, NY
Maria Matos, Co-chair, Working Group on Puerto Rico; Committee on Character and Fitness, New York City
Kelly McNamee, Vice chair, Committee on Communications and Publications; Associate, Greenberg Traurig, Albany, NY

Row 4
Hyun Suk Choi, Co-chair, Membership Committee; Member, Choi & Park LLC, New York City
Jessica Parker, Co-chair, Committee on Veterans; Regulatory Project Manager, Credit Suisse, New York City
Hon. Karen Peters, Chair, Committee on New York State Constitution; Chair, New York's Permanent Commission on Justice for Children, Albany, NY
Margaret Phillips, Co-chair, Task Force on the Role of the Paralegals; Professor, Daemen College, Buffalo, NY
Hon. Helena Heath, Co-chair Committee on Leadership Development; Judge, Albany City Court, Albany, NY
Marian Rice, Co-chair, Committee on Law Practice Management; Partner, L'Abbate, Balkan, Colavita & Contini, LLP, Garden City, NY
Sandra Rivera, Chair, Committee on State Legislative Policy; Principal, Rivera Law, PLLC, Albany, NY
Sarah Rogerson, Co-chair, Committee on Immigration Representation; Professor of Law, Albany Law School, Albany, NY

Row 5
Mirna Santiago, Chair, Committee on Diversity and Inclusion; Deputy Counsel, Acaia Network, Bronx, NY
Maryann Saccomando Freedman, Co-chair, Task Force on the Role of Paralegals; Of Counsel, Cohen & Lombardo, P.C., Buffalo, NY
Sheila Shea, Co-chair, Committee on Disability Rights; Director, Mental Hygiene Legal Services, Third Judicial Department, Albany, NY
Carol Sigmond, Vice chair, Committee on Committees; Partner, Cohen Seglias Pallas Greenhall & Furman PC, New York City
Soma Syed, Chair, Committee on Lawyer Referral; Principal, Soma Syed & Associates, Queens, NY
Vivian Wesson, Vice chair, Committee on Attorney Professionalism; Senior Assistant General Counsel, Marsh & McLennan Cos., New York City
Hon. Margaret Finerty, Co-chair, Task Force on Mass Shootings and Assault Weapons; Partner, Getnick & Getnick, New York City
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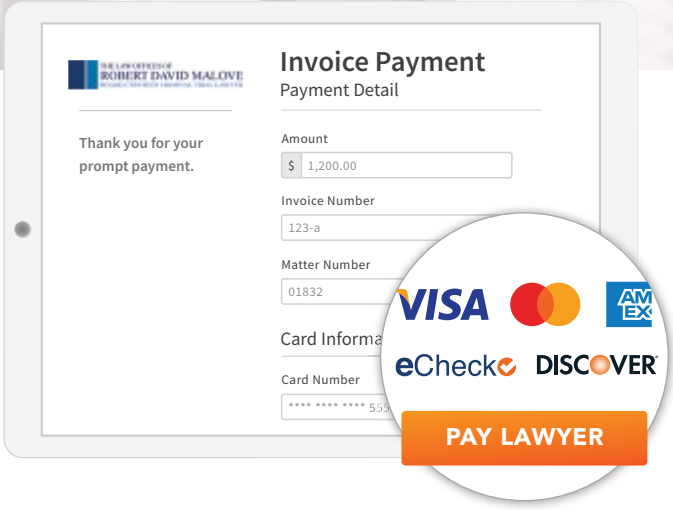

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LGBT Rights: Th

By Lewis Silverman

e First 50 Years

Although the gay liberation movement dates back to the early 1950s, its public galvanization is usually traced to what is known as the Stonewall Riots.

In June 1969, the police raided the Stonewall Inn, a bar in Greenwich Village in Manhattan frequented by homosexuals. The police attempted to arrest the patrons, but the patrons fought back. Over the next few days, the protest grew as activity spread to surrounding streets in a public show of disapproval of the actions of the police. Gay rights became a rallying theme, and the movement spread from Christopher Street throughout the world.

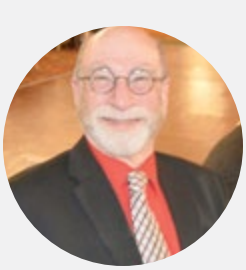
Like so many moments in history, recollections and impressions of the events that have come to be referred to simply as Stonewall vary significantly. But it is widely accepted that this event five decades ago was a turning point in the gay rights movement.

Today, Stonewall symbolizes different things to different people. For example, several of the articles on the coming pages mention the Stonewall Riots – each one with its own particular description – and use Stonewall as a starting point to talk about different aspects of LGBT history and the LGBT experience.

For me, it is electrifying to recognize the gains that have been made in just 50 years. When I was admitted to practice law in 1977, intimate relations between two adults of the same gender were a crime in New York. That didn't remain for long and in 1980 the New York Court of Appeals decriminalized sexual relations between two people of the same gender (*People v. Onofre*[1]) and the United States Supreme Court followed suit with *Lawrence v. Texas*[2] in 2003. Most other countries have also done so, although a few holdouts remain.

Family law and personal privacy were revolutionized by a series of decisions written by now-retired Justice Anthony Kennedy, which culminated in a decision requiring all states to recognize same-sex marriage,[3] and the movement has expanded to include many categories of sexual minorities and gender non-conforming individuals.

Despite being a world-wide social movement, the evolution of what are now generally referred to as LGBT rights has also been intensely personal. Behind the headlines, the struggle has been a determination of individuals to achieve acceptance from their family, in their workplace, in their social setting.



Lewis Silverman is a traffic court judge in Suffolk County. He is a retired law professor from Touro College, Jacob D. Fuchsberg Law Center, and is chair of the NYSBA Committee on LGBT People and the Law. proflew@optonline.net

For some of us, discrimination on the personal level prompted the call to action so that we could live free and open lives. For others, acceptance from family, friends and colleagues caused us to seek the same for those not so fortunate. In either event we, as lawyers, have led the call to action, to challenge existing discriminatory laws in the courts and to lobby our legislators for changes.

The New York State Bar Association has been a major driving force in this evolution. Understanding that the LGBT rights movement draws many parallels with the earlier civil rights movement for racial minorities, NYSBA established a Special Committee on LGBT People and the Law, which is now a permanent committee of the association. The Committee has drafted policy positions that have been adopted by NYSBA, prepared amici briefs for cases of import, and offered CLE programs to educate our legal community on all aspects of the law and litigation strategies.

When the New York State Legislature was debating the Marriage Equality Act in 2011, NYSBA was a major supporter of the bill and helped ensure its passage. When the legislature adopted the Gender Expression Non-Discrimination Act (GENDA) earlier this year, NYSBA already had an official memorandum supporting the legislation and was able to speak with authority as the bill moved very rapidly to adoption.

NYSBA has chosen to commemorate the 50th anniversary of that first spark in the LGBT rights movement, the Stonewall Riots, with this special issue of the *Journal*. Some of the articles contained in this issue are historical and legal summaries of what has changed. Others bring the issues down to the intensely personal: how discriminatory laws and rules prompted members of the legal profession in New York to act, and how the hard-fought gains have changed our individual lives for the better. The articles are snapshots of attorney activism, working for the betterment of a segment of society, led by an association in which civil rights and social justice are a core mission in deeds as well as words.

The struggle is by no means over. Especially in areas of personal liberty, changes in the law tend to recognize already established changes in society. It is possible that in the area of LGBT rights, the law has moved society along, although there is still resistance in some areas and many legal issues have yet to be resolved.

Some argue that the LGBT rights movement is on a collision course with the First Amendment rights of free religion and free speech. Transgender individuals and other sexual minorities are still fighting for basic rights and freedoms, sometimes against fierce resistance.

Rights gained are not uniform from state to state and nation to nation. Only 21 American states have laws banning discrimination against lesbians and gay men, and many of those statutes do not include protections for transgendered people. In parts of the world being gay is still considered a capital offense, as recently evidenced in the kingdom of Brunei.

Just as the civil rights movement has yet to achieve complete equality for all Americans regardless of the color of their skin, the LGBT rights movement has much hard work to do in the coming years and decades.

What will the LGBT movement look like over the next 50 years? It's impossible to predict the future, of course, but in the coming years there will surely be both wins and losses in the fight for LGBT rights, just as there have been throughout the past decades.

We expect more hard work and more progress as transgendered people continue to fight for equal rights and recognition in society. Around the world, as some countries continue to expand LGBT rights, others may step up persecution of LGBT citizens. Later this year, the U.S. Supreme Court will take up the issue of whether discrimination based on sexual orientation and gender identity and expression is a form of sex discrimination and therefore banned under the Civil Rights Act of 1964. The decision in this matter will give Americans an indication of how the Court's new conservative majority will approach LGBT rights in the coming years.

There is one thing we can predict with confidence: In the future just as in the past, this revolution will be led by lawyers and members of the New York State Bar Association, and we will continue our efforts to ensure individual liberties and social equality for all.

A NOTE ABOUT TERMINOLOGY

As the movement that started at Stonewall has grown and expanded, it has become more inclusive, and with that inclusivity has come new ideas about how to label the movement and those who are a part of it.

The New York State Bar Association Committee on LGBT People and the Law was established in 2008, and NYSBA generally uses LGBT to refer to the movement. Others prefer LGBTQ, with the "Q" signifying "queer" or "questioning." Still others use LGBTQIA, where "I" indicates "intersex" and "A" represents "asexual" or "allied." Some simply use LGBTQ+ to indicate inclusivity.

In the spirit of that inclusivity – and in a departure from our usual practice of standardizing language and usage across all *Journal* articles – we have allowed contributors to this issue of the *Journal* to use whatever label they prefer.

1. 51 N.Y.2d 476 (1980).
2. 539 U.S. 558 (2003).
3. *Obergefell v. Hodges,* 576 U.S. ___ ; 135 S. Ct. 2584; 192 L. Ed. 2d 609 (2015).

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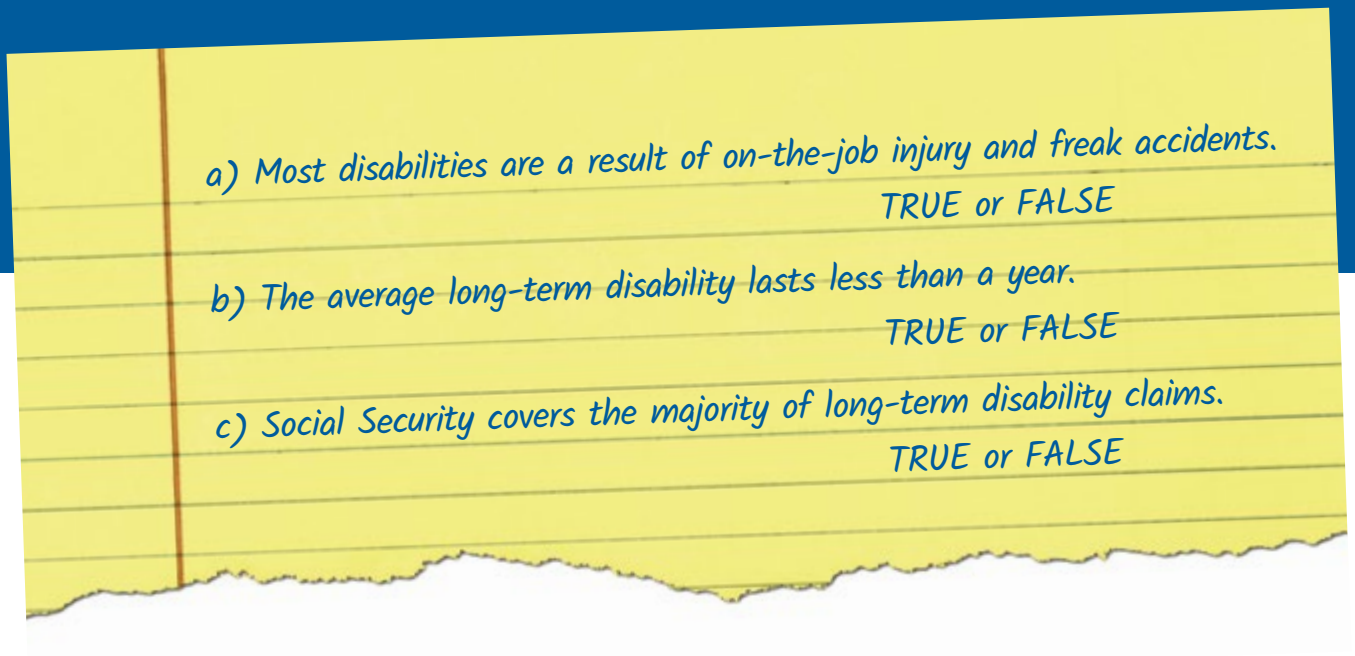

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b) 64% of initial Social Security Disability claims applications were denied in 2018.[2]
c) The duration of the average long-term disability claim is nearly 3 years (34.6 months.)[3]

[1,2] https://disabilitycanhappen.org/disability-statistic/ updated March 2018
[3] https://disabilitycanhappen.org/overview/ viewed Feb 2019

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History A Look

By Hon. Elizabeth A. Garry

As we look back upon the birth of the LGBTQ+ rights movement and the concept of gay pride, we must necessarily revisit the position and status of our community in American society prior to the outburst at Stonewall. A long history of legal discrimination had constrained their relationships, childrearing, housing, employment opportunities and many other aspects of private and public life. This entrenched prejudice provided the backdrop for activists who challenged the notion that they must choose between living in secrecy or suffering the severe consequences of widespread and accepted societal scorn and hatred.

CONTEMPT AND RIGHTEOUS UGLINESS

As with other painful chapters of our nation's history, we must reckon with the fact that our laws and the attitudes expressed in judicial decisions reflected and reinforced those of the social majority. Many early opinions demonstrate the tendency at the time, not only to pathologize and criminalize the lives and relationships of LGBTQ people, but also to regard them with unvarnished contempt and righteous ugliness.

In the middle of the 20th century most states, including New York, had anti-sodomy laws in effect, criminalizing both same-sex and heterosexual conduct. The extent to which these laws are rooted in history has been the subject of controversy and discussion in the U.S. Supreme Court, with some jurists opining that these laws had "ancient roots"[1] and others later finding this statement erroneous, as "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter," and "American laws targeting same-sex couples did not develop until the last third of the 20th century."[2] Without dwelling upon this disputed historical genesis, it is fair to say that in the mid-20th century there was active and widespread discrimination as to any form of same-sex intimate relations. Any such conduct was viewed as abhorrent, and homosexuals were socially regarded as mentally unfit or deranged individuals.

In the 1950s and 1960s, the "Lavender Scare" led to the firing of thousands of LGBTQ people from the federal workforce. In reporting on a United States Senate Appropriation Subcommittee's unanimous call for an "investi-

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Reminds Us: Back at the Law

gation of alleged homosexuals in the Executive Branch of the Government," *The New York Times* matter-of-factly explained that "[p]erverts are described by intelligence officers as poor security risks because of their vulnerability to blackmail."[3] President Dwight D. Eisenhower signed Executive Order 10450 in 1953, directing agency heads to investigate and terminate the employment of individuals engaged in certain activities, including "sexual perversion." This order formalized the federal government's policy of rooting out LGBTQ people, who were deemed "dangerous security risks . . . susceptible to the blandishments of foreign espionage agents" due to their purported "lack of emotional stability . . . and the weakness of their moral fiber."[4] These steps further marginalized LGBTQ+ people and discouraged openness or organization, given the threat to their livelihoods should any suspicion arise regarding their sexuality.

THE UNDERLYING PREMISE: SAME-SEX CONDUCT WAS IMMORAL

Even in cases that incrementally expanded the rights of LGBTQ people, the decisions accepted the underlying premise that same-sex conduct was immoral and potentially harmful to institutions. In the 1969 case of *Norton v Macy*,[5] the U.S. Court of Appeals for the D.C. Circuit noted that it was "not prepared to say that the [Civil Service] Commission could not reasonably find appellant's homosexual advance to be 'immoral,' 'indecent,' or 'notoriously disgraceful' under dominant conventional norms. But the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity."[6] The court would not foreclose the possibility that being gay could affect an employee's fitness for duty: "The homosexual conduct of an employee might bear on the efficiency of the service in a number of ways. Because of the potential for blackmail, it might jeopardize the security of classified communications. As we acknowledged in *Dew v. Halaby*, it may in some circumstances be evidence of an unstable personality unsuited for certain kinds of

work. If an employee makes offensive overtures while on the job, or if his conduct is notorious, the reactions of other employees and of the public with whom he comes in contact in the performance of his official functions may be taken into account. Whether or not such potential consequences would justify removal, they are at least broadly relevant to 'the efficiency of the service.'"[7]

Legal decisions continued to reflect this attitude toward the private and family lives of LGBTQ+ people as well. In the mid-1970s, courts frequently found in custody cases that a parent's same-sex relationship would cause emotional disturbance to children. While it was common in this period for women to retain custody upon separation from their husbands, allegations of lesbianism[8] led to the loss of custody and imposition of restrictions on visitation, expressly requiring the complete exclusion of any same-sex partner (or other homosexuals) from contact with the children.[9]

Although it is not the role of courts to make social policy, we in the legal community all play a critical role in interpreting and applying changing laws through changing times.

A notable cultural shift frequently referenced in the case law[10] was the declaration by the American Psychiatric Association in 1973 that homosexuality would no longer be included in the listing of mental disorders.[11] The Association simultaneously issued a statement that many of the problems suffered by gay men and lesbians were the direct result of societal homophobia, rather than any internal individual process.[12]

BRASCHI AN IMPORTANT TURNING POINT

The landmark case that would start to shift our state's jurisprudence with respect to recognizing same-sex relationships would not come until 1989 with *Braschi v. Stahl Associates Co.*[13] In *Braschi*, the Court of Appeals overturned a determination of the Appellate Division, First Department, that the New York City rent control regulations should be applied only to "family members within traditional, legally recognized relationships."[14] The Court held instead that a surviving same-sex partner of 11 years was entitled to protection as a "family member" of the deceased tenant, declaring that the regulatory "protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."[15]

But progress occurred in fits and starts. Just under two years later, in interpreting provisions of the Domestic Relations Law regarding visitation rights, the Court of Appeals in *Alison D. v. Virginia M.* chose the certainty of biology in defining family bonds, rather than reaching a best interests analysis.[16] This case arose following the separation of a lesbian couple who had planned, conceived, and raised a child during the term of their relationship. Despite the uncontroverted evidence in the record that the non-biological co-parent had formed a significant bond with the child, the Court made a strong statement that it remained solely the province of the biological parent to determine who may associate with the child.[17] [18]

Braschi notwithstanding, without a right to marry, same-sex couples were required to meticulously structure their family relationships to protect their interests and minimize, as best they could, the impact of discriminatory laws. In the early 21st century, the courts regularly applied existing laws governing business relationships to same-sex personal relationships. Thus, where the Domestic Relations Law did not apply, the law of business sometimes did. Partnership and joint venture laws were applied,[19] contract law was applied to domestic partnership agreements,[20] and releases were enforced,[21] among other provisions.[22] While these arrangements would provide some limited protection to couples with the wherewithal to seek them out, they fell far short of the benefits readily available to opposite-sex couples. Same-sex partners were denied survivors' rights and privileges,[23] worker's compensation protections,[24] and other family and property rights that would flow automatically to legally married spouses.

THE CRITICAL ROLE OF THE LEGAL COMMUNITY

We have seen tremendous strides toward equality for same-sex couples in recent years, and this retrospective is not intended merely as a grim rumination on darker

times. History reminds us to appreciate progress, while remaining sensitive to the ongoing struggle facing so many people – those who identify as LGBTQ+ and otherwise. Although it is not the role of courts to make social policy, we in the legal community all play a critical role in interpreting and applying changing laws through changing times, as well as exploring the contours of the protections provided by our federal and state constitutions, statutes and other rules and regulations. We are fortunate to now have better access to information about how our own biases affect our decision making, and to be more focused on being mindful in our interaction with people of various backgrounds. For instance, we are more conscious than at any time in the past of the challenges facing gender nonconforming and transgender individuals, and our civic institutions are actively taking steps to increase the level of respect and protection afforded to these members of our community. As we recall our history of fear and discrimination, we are reminded of the importance of fulfilling our societal roles in a thoughtful manner that does not foster or perpetuate contempt or prejudice toward any group or individual.

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1. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

2. *Lawrence v. Texas*, 539 U.S. 558, 559 (2003).

3. William S. White, *Inquiry by Senate on Perverts Asked*, N.Y. Times (May 20, 1950), https://timesmachine.nytimes.com/timesmachine/1950/05/20/113156266.pdf.

4. Associated Press, *Federal Vigilance on Perverts Asked*, N.Y. Times (Dec. 15, 1950), quoting a report of an Expenditures Subcommittee of the United States Senate.

5. 417 F.2d 1161 (D.C. Cir. 1969).

6. *Id.* at 1165.

7. *Id.* at 1166.

8. We have found no case law explicitly referencing gay men in a parental role/context in this period.

9. *See DiStefano v. DiStefano*, 60 A.D.2d 976 (4th Dep't 1978); *Jane B, In re*, 85 Misc. 2d 515 (Sup. Ct., Onondoga Co. 1976). By 1984, however, *DiStefano* was being cited for the proposition that homosexuality alone would not render an individual unfit as a parent (*see Guinan v. Guinan*, 102 A.D.2d 963, 964 (3d Dep't 1984)).

10. *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 699 (2000); *People v. Medina*, 179 Misc. 2d 617, 621 (Crim Ct., N.Y. Co. 1999); *Lori M., In re*, 130 Misc. 2d 493, 495 (Fam. Ct., Richmond Co. 1985).

11. It was removed from the next printing of the Diagnostic and Statistical Manual of Mental Disorders. *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders*, at 282 (3d ed. 1980).

12. *See* Richard D. Lyons, *Psychiatrists, in a Shift, Declare Homosexuality No Mental Illness*, N.Y. Times (Dec. 16, 1973).

13. 74 N.Y.2d 201 (1989).

14. *Id.* at 206.

15. *Id.* at 211.

16. 77 N.Y.2d 651 (1991).

17. *Id.* at 655–57.

18. Excepting specific statutory provisions, i.e, Domestic Relations Law §§ 71 (regarding infant siblings) and 72 (regarding grandparents) (*see Alison D. v. Virginia M.*, 77 N.Y.2d at 657).

19. *See Cytron v. Malinowitz*, 1 Misc. 3d 907(A) (Sup. Ct., Kings Co. 2003).

20. *See Carnuccio v. Upton*, 15 A.D.3d 212 (1st Dep't 2005).

21. *See Young v. Williams*, 47 A.D.3d 1084 (3d Dep't 2008).

22. For example, the Banking Law relative to joint accounts.

23. *Cooper, In re*, 187 A.D.2d 128, 131–32 (2d Dep't 1993); *Raum v. Restaurant Assocs., Inc.*, 252 A.D.2d 369 (1st Dep't 1998).

24. *Valentine v. American Airlines*, 17 A.D.3d 38 (3d Dep't 2005) (holding that the "significant administrative burdens" associated with processing the claims of domestic partners and the desire to "streamline the processing and payment of" benefits constituted sufficient grounds to deny consideration of domestic partners' claims).

Stonewall 50: Reflecting on the History of the LGBTQ Rights Movement in New York State

Christopher Riano has served as Assistant Counsel to the Governor since 2019, and previously was the first openly LGBTQ General Counsel at the State Liquor Authority from 2017-2019. Christopher also serves as a Lecturer in Constitutional Law and Government at Columbia University. His first book, co-authored with William N. Eskridge, Jr., the John A. Garver Professor of Jurisprudence at Yale Law School, is on the constitutional history of the marriage equality movement, and is forthcoming from Yale University Press in 2020.

Alphonso David has served as Counsel to the Governor since 2015 and is the first openly LGBTQ person to serve in this statutory role. Previously Alphonso served as New York State's first Deputy Secretary for Civil Rights, where he was instrumental in spearheading the passage of New York's marriage equality legislation in 2011. During his time as an Attorney at Lamda Legal, Alphonso was part of the team that spearheaded the impact litigation on the *Hernandez* case.

Kate Millett Speaking at Gay Rights Demonstration with Madeline Davis, Albany, New York, 1971 (Photo by Diana Davies)[1]

Since its promulgation in 1934, New York State's Alcoholic Beverage Control Law has included a crucial provision that historically has given wide latitude to law enforcement to regulate licensed establishments and to quell any disorderly conduct. The statutory provision states: "No person licensed to sell alcoholic beverages . . . shall suffer or permit such premises to become disorderly." In the 1950s and 1960s, law enforcement officials around the state often stretched their construal of "disorderly" to include the mere presence of LGBTQ individuals within a licensed premise as a violation against public order and morality. As early as the 1940s, New York State courts had ruled that the State Liquor Authority (SLA), and by extension other law enforcement authorities, could legally close down bars and arrest patrons that served "sexual variants," making it permissible for the SLA and law enforcement to target members of the LGBTQ community.[2]

It was this interpretation that, in the years preceding Stonewall, sparked early LGBTQ activism by the Mattachine Society and their infamous April 21, 1966 "Sip-In." Showing a similar dedication and purpose as the civil rights activists in the 1960s who participated in "sit-in movements," these young men went from bar to bar that day with a note reading, "We are homosexuals. We believe that a place of public accommodation has an obligation to serve an orderly person, and that we are entitled to service so long as we are orderly." After receiving frictionless service at a number of establishments, the group eventually made their way to an establishment called Julius, where they anticipated resistance because of an incident the day before when the New York City Police Department had entrapped a patron for "gay activity." They sidled up to the bar, passed the bartender their note, and were immediately refused service. The next day, April 22, *The New York Times* ran an article with the headline "3 DEVIATES INVITE EXCLUSION BY BARS; But They Visit Four Before Being Refused Service, in a Test of S.L.A. Rules."

This period of social uprising and legal uncertainty lit a fuse that resulted in the explosive events of June 28, 1969, where at 1:20 a.m. the New York City Police Department, including members of the Public Morals Squad, raided the Stonewall Inn shouting, "Police! We are taking the place!" The Stonewall Inn was host to many members of the local LGBTQ community, and also served as an adopted home and safe haven for many LGBTQ youth, including many members of the community who lacked a place to live after being ostracized by family and friends. In many instances, these young individuals were not welcome at, or could not afford, other meeting places. Throwing bottles and anything else at hand, the patrons that night fought back against the New York City Police Department to preserve their ground. This courageous act of civil disobedience at the Stonewall Inn became the battle cry that announced a wave of new movements for LGBTQ rights.[3]

FROM RIOTING TO POLITICAL ACTION

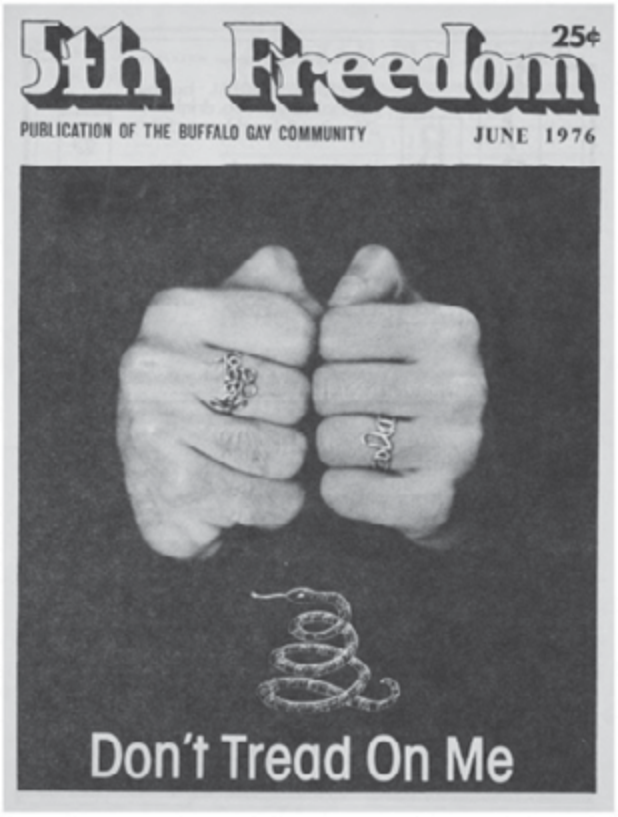
In the wake of the Stonewall riots, and in a state like New York that is known for its activism, it did not take long for the bravery of the riots to translate into political action. On June 28, 1970, a year after Stonewall, the now annual New York City Pride March was conceived as "Christopher Street Liberation Day," an homage to the Stonewall Inn's address on Christopher Street in Greenwich Village. Several dozen dedicated advocates, led by "The Mother of Pride" Brenda Howard, had spent months planning the event and soliciting financial backing from several different groups and organizations. On the day of the march, thousands of young men and women marched from Sheridan Square to Sheep Meadow in Central Park. The founder of the Gay Liberation Front, Michael Brown, noted, "[We'll] never have [the] freedom and civil rights we deserve as human beings unless we stop hiding in closets and in the shelter of anonymity . . . We have to come out into the open and stop being ashamed, or else people will go on treating us as freaks. This march . . . is an affirmation and declaration of our new pride." The march extended for around 15 blocks, and its thousands of participants carried the banner of an important new civil rights movement that was swiftly taking shape.[4]

ACTIVISM ACROSS NEW YORK STATE

While LGBTQ people in New York City were taking the lead on "pavement politicking," a group from Buffalo was taking the Stonewall movement directly to the seat of power within the New York State Capitol in Albany. By 1970, Madeline Davis was well-known as an early member of the Mattachine Society of the Niagara Frontier and a participant in the group's Political Action Committee. She worked tirelessly to lobby the Buffalo Police Department to stop raiding gay bars and asked the *Buffalo News*

to stop publishing the names of LGBTQ people arrested during those raids in an effort to shame them.

By 1971, the same year that New York State Assemblyman Al Blumenthal and State Senator Manfred Ohrenstein introduced the first legislative version of the Sexual Orientation Non-Discrimination Act (SONDA), Madeline Davis was leading the charge in the 1971 March on Albany for gay rights. In a time-honored tradition that continues to this day, the 1971 March spent the first day protesting on the steps of the Capitol and the second day inside the building lobbying members of the legislature on behalf of the LGBTQ community. Feeling emboldened on her return to Buffalo, Madeline penned the song "Stonewall Nation," in which she wrote, "*You can take your tolerance and shove it, We're going to be ourselves and love it, The Stonewall Nation is gonna be free.*" Madeline Davis would go on to teach "Lesbianism 101" at the State University of New York at Buffalo in 1972, and that same year would be elected to serve as the first out lesbian at the Democratic National Convention, supporting George McGovern in his candidacy for United States President.[5]



Don't Tread on Me, 5th Freedom, June 1976. See endnote 6.

Madeline Davis also helped to build up the Mattachine Society of the Niagara Frontier. With the help of others within the group, the Mattachine Society began publishing *Fifth Freedom*, which would become one of Western New York's most prominent LGBTQ rights publications during the 1970s. The June 1976 edition featured an image of the rattlesnake on the famous Gadsden Flag from the era of the American Revolution with its motto "Don't Tread on Me."

That same year one of the first LGBTQ rights bills, which would have protected some members of the LGBTQ community from both employer and property owner discrimination, was introduced in the legislature. After a crushing election-year vote within the State Assembly that went against the bill by 94-35, the bill's sponsor, Assemblyman William Passannante of Manhattan, was quoted as saying, "Nobody tells you [that] you have to condone homosexuality. It's not our right to interpret anyone's lifestyle." While the group did not find early success, they were pushing the legislative envelope in strikingly original ways during the 1970s.[6]

JUDICIAL DECISIONS ALSO ADVANCE THE MOVEMENT

As impressive as early engagement and crusading in New York City, Albany, and Buffalo may have looked, early LGBTQ rights in New York State would not be secured within the elected parts of state government, but instead by actions taken within the New York State Judiciary. In 1980, many decades before the 2003 United States Supreme Court decision in *Lawrence v. Texas*, which found that sodomy laws were unconstitutional pursuant to the 14th Amendment to the United States Constitution, the New York Court of Appeals struck down the 1965 New York State law that made consensual sodomy a criminal misdemeanor. In *People v. Onofre*, the Court of Appeals voted 5-2 that "personal feelings of distaste," and even "disapproval by a majority of the populace . . . may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision protected under the right of privacy drawn from the United States Constitution."[7]

In the 1980s, as the AIDS epidemic ravaged the LGBTQ community, particularly within major urban areas, New York State's complex schemes for rent control and rent stabilization provided a fraught battleground for LGBTQ rights. In New York State, the battle between property owners and tenants was being decided based on a traditional definition of family based on marriage certificates and bloodlines that made succession rights inaccessible to LGBTQ couples. For years, the Division of Housing and Community Renewal and the legislature grappled unsuccessfully with a number of proposals to attempt to clarify the definition of family in order to identify who was allowed to keep a rent-controlled or rent-stabilized apartment upon the death of family members. At the same time, a number of cases were coming before the New York State Supreme Court where LGBTQ couples pleaded for equal treatment, and some State Supreme

New York remains one of the leading states for LGBTQ rights, specifically because of a tradition where our fellow citizens actively engage with each branch of our government.

Court Justices found that succession rights were unjustly withheld from long-term partners. The only proposed legislation that provided rights to unmarried partners – ensuring protections for all unmarried co-habitants after five years – came in 1989 from then-Governor Mario Cuomo, and that measure died prior to getting any real traction.[8]

After a number of lower courts had begun providing relief to tenants, the New York Court of Appeals in 1989 finally stepped into the administrative and legislative void to consider the question of succession rights when reviewing the applicability of the state's rent laws to an unmarried LGBTQ couple. Leslie Blanchard and Miguel Braschi had met in 1976 and together enjoyed a highly coveted rent-controlled apartment. By May 1986, Blanchard was diagnosed with AIDS, and he died with Braschi at his hospital bedside in September of that year. Braschi expected to keep the couple's rent-controlled apartment because he believed he was a "family" member and protected by state law, but the property owner disagreed. Given the stigma around HIV/AIDS at that time, Braschi's lawyers specifically ensured that the papers filed with the Court were silent about his late partner's illness.

While not specifically ruling that Braschi was entitled to succession rights, the New York Court of Appeals cut through the inaction of the Division of Housing and Community Renewal and the legislature, finding that family "should not be rigidly restricted to those people who have formalized their relationship . . . in the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." Braschi never anticipated being a pioneer, and he passed away from AIDS only a year after the Court of Appeals ruled in his favor. Yet his legacy would sustain the succession rights of countless members of the LGBTQ community going forward.[9]

AN OUT GAY LEGISLATOR, AND LEGISLATIVE PROGRESS

On the heels of the *Braschi* decisions, additional changes were stirring within the New York State Legislature. The 1990 election of Assemblywoman Deborah Glick, who

was the first out gay member of the New York State Assembly and who campaigned on an election platform dedicated to the passage of the Sexual Orientation Non-Discrimination Act, was a turning point for legislative action on LGBTQ rights in New York State. Within three years of Glick's election, SONDA would pass the New York State Assembly, in February of 1993, by a vote of 90-50. While Glick was now at the forefront of advancing LGBTQ rights in Albany, it would take until December 17, 2002 for SONDA to pass both houses of the New York State Legislature and then to be signed into law by Governor Pataki.

By 2004, marriage equality rights for the LGBTQ community were in the balance in *Hernandez v. Robles*. After an impressive back and forth between the parties, Supreme Court Justice Doris Ling-Cohan found that marriage equality was a constitutional right. But the Appellate Division, First Department subsequently reversed her, finding, "Deprivation of legislative authority, by judicial fiat, to make important, controversial policy decisions prolongs divisiveness and defers settlement of the issue."

The process for getting to the Court of Appeals took three long and difficult years. After an unprecedented oral argument, where 44 same-sex couples and 17 lawyers took part, the litigants and their counsels waited with cautious optimism. The legal briefs were strong, the oral arguments were persuasive, and the litigants were certainly aggrieved by a deprivation of basic, fundamental rights and protections. On July 6, 2006, Judge Robert Sherlock Smith issued the decision for a 4-2 Court, writing that the "New York Constitution does not compel recognition of marriages between members of the same sex. Whether such marriages should be recognized is a question to be addressed by the Legislature." Marriage equality would eventually come to New York not by the courts, but by the committed focus of the Executive and Legislative branches many years later in 2011.[10]

While marriage equality was eventually secured in New York, the struggle for long-sought rights and liberties for LGBTQ New Yorkers continues to motivate social activism and political struggles, leading to some important recent victories. Most recently, in 2019, New York State finally enacted the Gender Expression Non-Discrimination Act (GENDA), which protects transgender individuals from discrimination. GENDA was first introduced in 2003 and first approved by the Assembly in 2008, and subsequently passed in that house every year for 10 years, but each year died in the Senate.

The process for passing the bill was tortured and hard fought. LGBTQ advocates had explored every option working with the Executive and Legislative branches, business groups, and other stakeholders to expressly prohibit discrimination based on gender identity and expression under the state's Human Rights Law. The Executive branch advanced regulations to prohibit discrimination based on gender identity and expression, but advocates continued to fight to enshrine those protections in law. Finally, after approval by the Senate, the bill was signed into law by Governor Andrew Cuomo on January 25, 2019.

Today, upon the 50th anniversary since Stonewall and the birth of the LGBTQ rights movement in New York State, we should celebrate the history, the struggles, and the progress of the movement. New York remains one of the leading states for LGBTQ rights, specifically because of a tradition where our fellow citizens actively engage with each branch of our government. While New York State has often taken up the mantle of LGBTQ rights, significant questions still exist at the federal level, including the right to be free from discrimination at the workplace, the right of transgender individuals to serve their country in the armed forces, as well as the right to have equal access to public accommodations. We recognize there is significantly more work still to be done, and as we look ahead to challenges on the horizon we continue to be inspired by the events in 1969 at a Greenwich Village bar.

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1. Manuscripts and Archives Division, The New York Public Library. "Kate Millett speaking at gay rights demonstration, Albany, New York, 1971," *The New York Public Library Digital Collections* 1971, http://digitalcollections.nypl.org/items/510d47e3-57aa-a3d9-e040-e00a18064a99.

2. *See* ABCL § 2 and ABCL § 106(6). *See, i.e., People v. Arenella*, 139 N.Y.S.2d 186 (N.Y.C. Magistrates Court, Dec. 29, 1954); *see also People v. Bart's Restaurant Corp*, 42 Misc.2d 1093 (N.Y.C. Crim. Ct, May 8, 1964); *see also Becker v. New York State Liquor Auth.*, 21 N.Y.2d 289 (1967). *See generally* George Chauncey, Gay New York: Gender, Urban Culture, and the Makings of the Gay Male World, 1890-1940 (New York: Basic Books, 1994).

3. Jim Farber, *Before the Stonewall Uprising, There was the 'Sip-In',* N.Y. Times, April 20, 2016, https://www.nytimes.com/2016/04/21/nyregion/before-the-stonewall-riots-there-was-the-sip-in.html; Thomas A. Johnson, *3 DEVIATES INVITE EXCLUSION BY BARS; But They Visit Four Before Being Refused Service, in a Test of S.L.A. Rules*, N.Y. Times, April 22, 1966, at 43, https://www.nytimes.com/1966/04/22/archives/3-deviates-invite-exclusion-by-bars-but-they-visit-four-before.html; *see generally* David A. Carter, Stonewall: the riots that sparked the gay revolution (New York: St. Martin's Press, 2004).

4. *See* Lacey Fosburgh, *Thousands of Homosexuals Hold a Protest Rally in Cental Park*, N.Y. Times, June 29, 1970, at A1, https://www.nytimes.com/1970/06/29/archives/thousands-of-homosexuals-hold-a-protest-rally-in-central-park.html.

5. There is a wealth of information on Madeline Davis, including an accessible digital collection, within The Dr. Madeline Davis LGBTQ Archive of Western New York, housed at SUNY Buffalo State, https://library.buffalostate.edu/archives/LGBTQ. *See also* Jeffry J. Iovannone, *Madeline Davis: Lesbian Delegate*, https://medium.com/queer-history-for-the-people/madeline-davis-lesbian-delegate-a5623a3fc77f.

6. *Don't Tread on Me*, 5th Freedom, June 1976. Retrieved from the New York Heritage Digital Collections held by SUNY Buffalo State, http://history.nnyln.net/digital/collection/YBM002/id/746

7. *People v. Onofre*, 51 N.Y.2d 476 (N.Y. 1980).

8. Numerous people have written on the lead up to *Braschi;* one of the best is found in the National Research Counsel (US) Panel on Monitoring the Social Impact of the AIDS Epidemic; Jonsen AR, Stryker J, editors. Washington (DC): National Academies Press (US); 1993. *See, i.e., Gelman v. Castaneda,* NYLJ, Oct. 22, 1986, at 13, col. 1 [Civ.Ct. N.Y. County]*; see also Two Associates v. Brown*, 502 N.Y.S. 2d 604 (Sup. Ct. 1986) (reversed by *Two Associates v. Brown*, 127 A.D.2d 173 (1st Dept. 1987)).

9. *Braschi v. Stahl Assocs.*, 7 N.Y.2d 201 (1989).

10. *See Hernandez v. Robles*, 7 N.Y.3d 338 (NY 2006). For a comprehensive background and discussion of the history of the marriage equality movement in the United States, *see* William N. Eskridge, Jr. and Christopher Riano, *From Outlaws to In-Laws*, Yale University Press, 2020 (Forthcoming).

Everyone Can Be a Winner in Baseball Arbitration:

History and Practical Guidance

By Edna Sussman and Erin Gleason

"Somebody's gotta win and somebody's gotta lose and I believe in letting the other guy lose."
—Pete Rose, all time Major League Baseball leader in hits

While it may be that in baseball there has to be a winner and a loser, that is not necessarily the case in arbitration. Baseball Arbitration, also known as Final Offer Arbitration (FOA), is a process that is rarely discussed in commercial and international practice, though it offers efficiencies that would be "winners" for both parties. In FOA, parties have the opportunity to manage risk and drive settlement—features that are advantageous for both sides. It is time to focus on the application of this useful tool, which can help parties avoid the extremes of winning or losing in arbitration and perhaps enhance their chances of achieving the win-win of an agreed-upon settlement. Moreover, the FOA process generally shortens the time to the issuance of the award and opens the door for discussions about other mechanisms to streamline the proceeding and save time and costs. The following discussion provides a brief history of FOA and offers practical guidance for its application by parties and arbitrators.

OVERVIEW

In its most basic form, FOA allows parties to submit proposed final offers/award amounts to an arbitrator. Upon the conclusion of the arbitration, the arbitrator is bound to issue an award with one of the final offers submitted as the award value.

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Erin Gleason, www.gleasonadr.com, serves as an independent arbitrator in commercial and insurance disputes, with membership on the AAA Commercial Arbitration Panel and the CPR Institute Panel of Distinguished Neutrals. She co-chairs the New York City Bar Association President's Committee for the Efficient Resolution of Disputes.

While the process goes back to the trial of Socrates, modern-day references to FOA emerged in the 1950s in the context of collective bargaining agreements in the United States. At the time, the use of strikes as part of the dispute resolution process became too unsettling—parties needed better tools to facilitate negotiations. In this context, FOA was seen as an ideal way to resolve impasse arising from union and management disputes. It created a structured dispute resolution process, which was less disruptive and provided enhanced transparency of process.

It was not until the 1970s that the use of FOA was introduced to the world of baseball, and when FOA assumed its more popular moniker, "baseball arbitration." After years of strife between teams and players over finding the right balance of power in player contract and salary negotiations, FOA was adopted as a means for addressing power imbalances that had arisen in negotiations.[1]

But FOA was also seen as a way of stemming the risks associated with allowing an arbitrator to render awards without specific direction from the parties. It was almost necessarily assumed that an arbitral award, absent FOA direction from the parties, would result in splitting the difference between two numbers, another common concern expressed today despite numerous studies that have disproved this urban legend.[2]

FOA sought to eliminate these risks because parties could add controls to a process that otherwise felt too susceptible to compromises in decision making. It also came with the added incentive for parties to think critically about making more concerted efforts toward fruitful negotiations prior to the hearing—thus obviating the need for the arbitral process altogether.

This point is most intriguing—an arbitral process that was seemingly founded to avoid arbitration altogether.

THE PSYCHOLOGY OF FOA

In the years after FOA was introduced to Major League Baseball, the practice was studied by lawyers, psychologists and sociologists alike. Fascination with this process primarily stems from the effect it had on the decision-making processes of the parties and the arbitrators.

For example, in one study volunteer arbitrators were given a series of hypothetical fact patterns and were then asked to produce conventional arbitration awards and also respond to FOA scenarios for those same disputes. The purpose of the experiment was to observe the variation among arbitrators' awards where they had free rein to make a decision versus the final offer cases where the arbitrator was forced to choose between two proposals submitted by the parties.[3]

Interestingly, while there were differences in the final determinations rendered by arbitrators across the pools of hypothetical conventional arbitration and FOA cases, arbitrators' methods for making decisions demonstrated "a substantial degree of underlying consistency." The awards studied tended to show that arbitrators based their awards on the facts presented and relied less on the demands or offers made.

Years later, another study examined the negotiation patterns of parties involved in FOA processes.[4] This time, the research focused on why parties would allow the decision to be made by an arbitrator, instead of retaining the decision-making power themselves. The sophistication of parties to the negotiation, along with their relative optimism about their positions, were examined to understand how parties approached the process.

Controlled experiments confirmed that parties' optimistic expectations increased the distance between their final offers. The findings here demonstrate the importance of more fully informing party expectations as an effective way of improving negotiated outcomes. The study also highlighted an important consideration in managing one's expectations—the value in considering counter-party valuations and the merits of an opposing party's case. To the extent that parties are able to move toward limiting—or eliminating—the biases in their own expectations, they are more likely to reach voluntary settlements more often.

Most significantly, study after study has demonstrated that using an FOA process enhances the chances of settlement. As summarized: "Negotiators have a strong incentive to make realistic appraisals of the probable decision of the arbitrator and to submit offers and demands that are fairly close to what they really expect the arbitrator to award." It creates "an environment in which negotiators… find it in their respective self-interest to exchange reasonable offers and demands."[5] Thus adopting the FOA process drives parties towards conduct that facilitates settlement.

FOA VARIATIONS

FOA is utilized in many fields other than baseball and collective bargaining disputes. International negotiations over trade and political issues, mergers and acquisitions disputes, real estate, tax, insurance, and other commercial matters are routinely submitted for FOA. Indeed scholars have suggested the process should be employed and would be particularly useful for the resolution of investor state disputes.[6] And baseball arbitration has recently been utilized in several states, including pursuant to a 2015 New York law, to mandate baseball arbitration to resolve disputes relating to patients' unexpected medical bills.[7] Recently the U.S. DC Circuit Court found that the irrevocable offer to engage in baseball style arbitration made the government's theories in its effort to block AT&T's acquisition of Time Warner "largely irrelevant."[8]

While all versions of FOA have in common the submission of final offers, there are several variations to consider, and the ramifications of the associated process decisions must be carefully assessed. Options include the following:

Traditional FOA. Under this process, the parties submit proposed final offers/award amounts to the arbitrator. Once the parties submit these figures to the arbitrator, they are usually unable to make any revisions to the number submitted. Upon the conclusion of the arbitration, the arbitrator is bound to issue an award with one of the final offers submitted as the award value.

Night Baseball. This process differs in that the final offers are either concealed from the other party or from the arbitrator. As with traditional FOA, parties in night baseball agree among themselves that the final award must be one of the offers proposed prior to the award's issuance. The parties may provide that their proposal is never exchanged with the other party and the arbitrator must choose one proposal. Or the parties may provide that the proposal not be shared with the arbitrator, who will issue an award, and the parties agree to select as the final award the number that is closest to the arbitrator's award amount. Or as another alternative, the parties might limit the arbitrator's power in rendering the award so that no monetary value would be specified by the arbitrator—the arbitrator would only rule in favor of one party or the other. The prevailing party's final offer would then constitute the final award amount.

High-Low Arbitration. Under this variation, parties agree to a range for the arbitral award: an award that is greater than the bracketed amount is reduced to the higher of the offers; an award that is rendered below the lower amount is increased to the lower of the offered amounts. And any award within the agreed range receives no adjustment. The arbitrator is not informed of the range. Under another variation of high-low, the arbitrator is informed of the offers but limited to issuing an award within the range.

Mediation and Last Offer Arbitration. "MEDALOA" is yet another option. A MEDALOA process involves two steps, starting with the mediation. If mediation does not resolve the dispute, the parties submit their last offers to the mediator, who is then asked to serve as an arbitrator and choose the award amount. Additional proceedings and presentation of evidence before the issuance of the award may or may not be provided.

DRAFTING THE CLAUSE

As is always the case, careful drafting of the arbitration clause is essential. We focus here only on the aspects of the clause that pertain specifically to FOA options.[9] A mere reference to "baseball arbitration," or "first-offer arbitration" is not sufficient to ensure that the process will be executed in the manner intended.

OBJECTIVE: The first issue that must be considered is why is an FOA procedure being adopted. Is it to promote settlement? Is it to manage risk? Is it to streamline the proceeding to provide a more cost-efficient process? Or is there some other objective? The answer to that question is central to determining the process choice.

If it is to promote settlement, the objective for which FOA was originally devised, several exchanges of offers preceding the hearing are advisable. A night baseball process in which the offers are never shared with the opposing party would defeat the whole point of the exercise.

To promote settlement, a process that calls for two or more rounds of exchanges of final offers prior to the hearing and before the final and unchangeable offer is submitted to the arbitrator would encourage settlement. The International Centre for Dispute Resolution's Final Offer Arbitration Supplementary Rules provide such a structure and can be incorporated into the arbitration agreement.[10]

If the objective is to manage risk, a high-low limit process might be most effective, but this requires a successful negotiation between the parties to arrive at a range that they are willing to accept.

If the objective is to streamline the proceeding by shortening the time to award but to otherwise have a full opportunity to present and assess the merits, a proposal made to the arbitrator at the conclusion of the hearing when the parties are better informed might be the best process choice.

But in all events, the process by which parties will exchange offers should be clear from the arbitration clause. And while parties may hope that a settlement will be achieved, the clause must assume that an award is possible and ensure that the arbitrator and lawyers understand from the plain language of the clause how the process should be conducted. Accordingly, issues that should be considered in the drafting of the arbitration clause include:

TIMING: While typically the FOA is required by the arbitration agreement, it can be equally useful when proposed after the dispute has arisen. In the words of Nobel Prize economist Daniel Kahneman and his colleague Max Bazerman, who have closely studied how to manage risk through the use of FOA in business disputes: [the FOA] "strategy allows one side to encourage reasonableness on the part of the other by making a demonstrably fair offer at the outset and then, if the other side is unreasonable, challenging it to take the competing offers to an arbitrator who must choose one or the other rather than a compromise between them."[11] FOA has been successfully used as a process choice after the dispute has arisen and its availability at that juncture should be kept in mind.

RULES SELECTION: Whether selecting an ad hoc process with the adoption of non-administered rules or an institutionally administered arbitration, it is important to specify not only the arbitral rules that will govern the dispute resolution process but also expressly state that the parties have tailored the application of those rules to include an FOA process.

THE FINAL OFFERS: The number of rounds of exchanges of offers, when the offers are exchanged, whether or not they will be shared among the parties, and whether they will be shared with the arbitrator may be specified and should be stated if a particular process is sought.

SCOPE: Parties may specify whether the FOA process they choose relates to any dispute that arises under the contract, or if the FOA process should be limited to discrete issues (including specific monetary aspects of the dispute). FOA is often most effective in the context of claim value, or where liability issues have been clarified. As discussed above, FOA may be useful post-dispute where liability is established to determine damages.

ARBITRATOR'S AUTHORITY: Expressly limiting the arbitrator's authority to require that the arbitrator follow the process selected by the parties is essential.

BASIS FOR DECISION: Parties may wish to consider whether they want to provide some guidance to the arbitrator as to the basis upon which the arbitrator should make his or her decision. Should the arbitrator pick the offer, that is viewed as more "reasonable," a somewhat vague term that leaves the arbitrator some discretion within the dictates of the authority granted? Or should the arbitrator be required to select the final offer that was provided by the party that the arbitrator finds would have prevailed on the merits? Or should the arbitrator be required to select the final offer that was closer to the quantum of damages that the arbitrator concluded would have been awarded but for the FOA process?

AWARD: An award resulting from an FOA process may be reasoned but is frequently issued as a bare award. Parties may wish to specify their preference so there is clarity on this important point. It should be kept in mind that a bare award is not enforceable in some jurisdictions around the world,[12] so thought should be given to where enforcement might be sought in deciding whether an award should be reasoned or not.

The authors are not aware of any decisions that have dealt with whether an award that provides reasons on the merits but is limited in its choice of damages is enforceable as a reasoned award. But in light of the fact that consent awards are widely accepted as enforceable, and the issuance of awards based on an ex aequo et bono equitable decision, while rarely sought, is accepted as an alternative arbitra-

tion decision-making process, it would seem that there would be no enforcement issue with a reasoned award that adopted an FOA process.

In a reasoned award, the arbitrators' discussion would not only include the standard elements—history of the case, recitation of facts, and discussion of the applicable law, etc.—but, in addition to the explanation of the FOA process within the procedural section that would be included in any FOA award, the arbitrator's analysis of why the winning final offer was selected should be provided.

GUIDANCE FOR PARTIES

In an FOA arbitration, the selection of the final offer to be proposed by a party is perhaps the most critical aspect. Careful thought must be given to providing a final offer that the arbitrator will find to be the most appropriate resolution in light of the case presented. Parties would be well advised to conduct a comprehensive case evaluation process and pursue a thorough vetting of a claim's strengths, both on the merits and on damages.

The reasonableness of a counter-party's position should also be carefully evaluated. Finally, consideration should be given to the concessions the party is willing to make to maximize the chance that it will have the prevailing final offer.

As was observed in the research on FOA discussed earlier in this article, party over-confidence, lack of preparation, or hostility toward counter-parties may not only hinder settlement. It may also defeat the ability to prevail in the arbitration. These factors can cause a party to provide a final offer that the arbitrator will not find to be the better choice. Some counsel have employed the use of a mock arbitration in order to assist them in determining the number that should be provided as the final offer.[13]

Arbitrator selection is important as always. Parties may wish to ensure that the arbitrators selected understand the parameters of their role in this unique process and are comfortable with the limitations imposed on their authority. To that end, parties may wish to issue joint questionnaires to arbitrators, or conduct interviews, inquiring as to familiarity with FOA and whether the arbitrator has served in other FOA processes.

GUIDANCE FOR ARBITRATORS

The parties' choice of an arbitral process guides the manner in which the arbitrator may manage the case. But in this instance, the challenges that an arbitrator may face in rendering an enforceable award are as unique as the FOA process itself. Certainly, the clause should provide that an award that follows the process shall be enforceable.

What actions can an arbitrator take if he or she feels that one or both of the offers are out of line? If the claimant's offer seems too high, but awarding the respondent's offer is too low, does the arbitrator have any recourse?

If the arbitrator deviates from the FOA process, refusing to select one of the offers submitted and inserting his or her own instead, will the award be enforceable? The short answer is that the arbitrator has little to no ability to deviate from the provisions of the arbitration agreement.

In some cases where the arbitrator feels that the process will lead to an unfair outcome in light of the facts and the law, the arbitrator may consider whether it would be appropriate to ask the parties if they are committed to following the FOA process set forth in their agreement—or, alternatively, ask whether the parties would be agreeable to switching to a high-low process. Before making any such suggestion, the arbitrator must consider whether changing the process would favor one party over another and would demonstrate partiality toward one of the parties. In the right circumstances, such a discussion may be appropriate. Unless both parties agree to a change, however, the parties' arbitration agreement dictating the FOA process governs.

CONCLUSION

FOA offers parties with yet another option for streamlining arbitration. Various iterations of FOA have emerged over the past 70 years to help foster settlement, manage cost, increase efficiency and/or reduce risk in arbitrated disputes. While FOA may not be appropriate for every dispute, careful drafting, planning and case analysis can produce a winning outcome for all.

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1. See Benjamin A. Tulis, *Final Offer "Baseball" Arbitration: Contexts, Mechanics and Applications,* 20 Seton Hall J. Sports & Ent. L. 85 (2010), *available at* https://bit.ly/2Pc2edp.

2. See Ana Carolina Weber et.al, *Challenging the "Splitting the Baby" Myth in International Arbitration*, Vol. 31 Journal of Int'l Arbitration No. 6: 719 (2014), *available at* https://bit.ly/2rh9N8N.

3. See Henry S. Farber and Max H. Bazerman, *The General Basis of Arbitrator Behavior: An Empirical Analysis of Conventional and Final Offer Arbitration*, National Bureau of Economic Research Working Papers Series (1984), *available at* https://bit.ly/2reJjVF; Max H. Bazerman and Henry S. Farber, *Divergent Expectations as a Cause Of Disagreement In Bargaining: Evidence From A Comparison Of Arbitration Schemes*, National Bureau Of Economic Research (1987), *available at* https://bit.ly/2RlrdN4.

4. See David L. Dickinson, *The Chilling Effect of Optimism: The Case of Final-Offer Arbitration*, *Economic Research Institute Study Papers,* Paper 259 (2003).

5. Charles Adams, *Final Offer Arbitration: Time for Serious Consideration by the Courts,* Neb. Law Rev, Vol. 66 Issue 2, p. 247 (1987) (summarizing the studies and the psychological theories).

6. Joost Pauwelyn, *Baseball Arbitration to Resolve International Law Disputes: Hit or Miss?,* FL. Tax Rev., Vol. 22 (2018)

7. John Tozzi*, Senators Borrow from Baseball Arbitration to Solve Problem of Surprise Medical Bills*, Bloomberg (February 7, 2019), *available at* https://www.sfgate.com/news/article/Senators-borrow-from-baseball-arbitration-to-13597577.php

8. *United States v. AT&T*, 2019 WL 921544 (U.S. Ct. of App. D.C. Cir. 2019).

9. For a general discussion of considerations in the drafting of an arbitration clause, see Edna Sussman and Victoria A. Kummer*, Drafting the Arbitration Clause: A Primer on the Opportunities and the Pitfalls*, Dispute Resolution Journal (February/April 2012), *available at* https://bit.ly/2GXlRXG.

10. The rules are available at https://bit.ly/2rgjdRW.

11. See Max H. Bazerman and Daniel Kahneman, *How to Make the Other Side Play Fair*, Harvard Business Review (September 2016), *available at* https://bit.ly/2bC5r7J.

12. *See e.g.* Article 37 of the Spanish Arbitration Act; Article 823(5) of the Italian Civil Procedure Code, cited in Danilo Ruggero Di Bella, *Final Offer Arbitration: A Procedure to Save Time and Money*, Kluwer Arbitration Blog (January 25, 2019), *available at* http://arbitrationblog.kluwerarbitration.com/2019/01/25/final-offer-arbitration-a-procedure-to-save-time-and-money/

13. See Edna Sussman and James Lawrence, *Mock Arbitration for your Case: Optimizing your Strategies and Maximizing Success,* Fordham International Law Journal, Vol. 41, Issue 4 (2018).

ROFR – the Devil Is in the Details

By Peter Siviglia

It's hard not to think of that famous quote from the movie *The Godfather* when reviewing the facts underlying *Clifton Land Co. v. Magic Car Wash LLC*:[1]"I'm gonna make him an offer he can't refuse." That sums up the dilemma in *Clifton,* as ably chronicled by Robert Kantowitz in two separate articles in this *Journal*.[2] In that case, a car wash operator hoped to buy another car wash from an owner who wasn't ready to sell, but who gave the hopeful buyer a Right of First Refusal (ROFR), putting it first in line to purchase the property if and when the owner changed its mind. Eventually the owner decided to sell to a third party and, under the ROFR, gave the holder the opportunity to buy the property under the same terms and price that the third party had offered the owner. But there was a catch: the third party's offer contained a provision that a car wash could no longer be operated on the property. In effect, the ROFR holder faced an offer it had to refuse, as its purpose in buying the property was to keep that car wash open. So the hopeful buyer took the owner to court.

Although the Appellate Division, Third Department eventually straightened things out by finding the seller had acted in bad faith, the question remains: Could this dilemma have been avoided and, if so, how? The answer is yes, and this article offers models that show how.[3]

A ROFR is an option, and an option is one of the most – if not the most – valuable of contracts. Unfortunately, as evidenced by *Clifton*, an option doesn't always get the respect it deserves, especially in the realm of real estate.

The basic rule in writing any option, not just one for real estate, is *never to leave any detail open for negotiation*. To leave open details is to build a playground for litigators, and the cost of litigation – wholly apart from its uncertainty – will far exceed the cost to prepare a proper option agreement. Not only should the option contain the entire contract of sale, it also should require that the down payment accompany the exercise.

Rights of first refusal come in two guises:

(1) a right of first refusal based on a *bona fide* offer from a third party, and

(2) a right of first refusal based on an offer by the owner.

I always advise against granting rights of first refusal because the procedures involved can result in loss of a sale or loss of a market, especially in the case a right based on a third party offer. Nevertheless, in case the client decides to shun this advice, following are samples for both types of the option. Note that in each case the option (A) specifies the requirements to which the offered price must conform, and (B) attaches as an exhibit the purchase contract which will govern the sale in case the option is exercised.

In a majority of jurisdictions, options (including rights of first refusal) to purchase real estate are subject to the rule against perpetuities. However, options contained in a lease of real estate, like the options that follow, are often excepted. *See Options and Related Rights and the Rule Against Perpetuities,* John C. Murray, N. Y. Real Property Law Journal, Fall, 2014.

The models below are designed to be part of a lease as, for that context, they must treat a wide variety of contingencies so they can be adapted easily to other situations.[4]

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A. RIGHT OF FIRST REFUSAL -- GOOD FAITH OFFER BY A THIRD PARTY

NOTE: ADJUSTMENTS TO THE MODEL BELOW MAY WELL BE REQUIRED TO CONFORM IT TO THE TERMS AND TERMINOLOGY OF THE APPLICABLE LEASE.

Owner will not sell all or any portion of the Property prior to the end of the lease term except as provided in this Section.

If Owner receives a "good faith offer" (as that term is hereinafter defined) to purchase the entire Property, Owner will promptly notify Lessee thereof, including with that notice a copy of that offer ("Notice of Offer").

A "good faith offer" is a contract signed by Owner and a buyer that is unrelated to and has no affiliation with Owner (the "buyer") providing for the sale of the Property to the buyer in its condition as of the date of the contract, *[Consider/modify: ordinary wear and tear excepted]*, free and clear of all liens, claims, violations and other encumbrances, with the entire purchase price payable in cash, in U.S. dollars,[5] at closing of title and with title to close not later than *[specify number in words]* (*[specify number in figures]*) days after expiration of the "Offer Period" (as hereinafter defined), with no provision for adjustment to -- or for reimbursement of any portion of -- the purchase price, with real estate taxes, transfer taxes and other fees, charges and costs pertaining to the sale or to the Property allocated between Owner and the buyer as provided in Sections *[specify section numbers]* of the Exhibit,[6] and subject to the following conditions and to no other condition:

(i) Lessee's rights under this Lease, *[as applicable (see the alternative provisions at the end of this form) including // excluding this Section]*;

(ii) conveyance to buyer of marketable title; and

(iii) if desired, buyer obtaining a loan secured by a mortgage on the Property to enable buyer to purchase the Property provided that such loan is at a then-current market rate of interest for that type of loan to a prospective mortgagee with a credit rating similar to that of the buyer and that the amount of the loan does not exceed *[specify percentage in words and figures, but not more than 80%]* of the purchase price.

[Add any other mutually acceptable conditions]

Within *[specify number in words]* (*[specify number in figures]*) days after Lessee receives the Notice of Offer (the "Offer Period"), Lessee will notify Owner whether it will purchase the Property at the price for the Property specified in the good faith offer. If Lessee notifies Owner that it elects not to purchase the Property, or if Lessee does not notify Owner of its election within the Offer Period, or if Lessee's election is not made in accordance with the requirements of this Section, Lessee's rights in respect of that good faith offer will terminate, and Owner may sell the Property to the buyer in accordance with the terms of that good faith offer, within *[specify number in words]* (*[specify number in figures]*) days after expiration of the Offer Period,[7] and

[select: without amendment to the good faith offer // with only such amendments to the good faith offer that do not preclude the sale under the next paragraph].

If Owner does not sell the Property to the buyer in accordance with the provisions of the preceding paragraph, including within the time period specified in that paragraph, or

[as applicable:

if the good faith offer is amended, //

if the price for the Property under the good faith offer is [consider: reduced // changed], or if any other arrangement is made that would have the effect of [consider: reducing // changing] that price (including, without limitation, any arrangement with regard to payments on account of taxes, fees, charges and costs respecting the Property or its sale),]

then Owner may not sell the property to the buyer or any other buyer except by complying with the provisions of this Section in respect of any new good faith offer or in respect of the changed good faith offer as if it were a new good faith offer subject to the provisions of this Section.

If Owner does sell the Property to the buyer, Owner will promptly notify Lessee of the date title closed, including with that notice a statement *[consider: under oath]* that the sale was made entirely in accordance with the provisions of this Section.

If, however, Lessee notifies Owner within the Offer Period that it elects to purchase the Property, Owner will sell the Property to Lessee and Lessee will purchase the Property from Owner at the price for the Property under the good faith offer and pursuant to the terms of the contract of sale attached hereto as an Exhibit. To be effective Lessee's notice of its election to purchase must be accompanied by payment by bank check of the down payment specified in the Exhibit. Notice by Lessee to Owner in accordance with this paragraph will constitute execution by Lessee and Owner of the contract set forth in the Exhibit, and the date of that contract will be the date of the good faith offer.[8]

If Lessee elects to purchase the property

(i) the term of this Lease will end on closing of title, but if title does not close at or before the end of lease term, the term of this Lease will be extended to the closing of title or until termination of the contract of sale, whichever is the first to occur, and

(ii) if the contract of sale is terminated before the end of the term of this Lease, this Lease will, nevertheless, remain in effect until the end of its then stated term.

If the term of the lease is extended under item (i) above, Lessee *[Consider: will continue to pay rent and other amounts owing under the Lease as the terms relating to rent and other amounts exist immediately prior to the extension period // will not be required to pay rent and other amounts owing under the Lease during the period of the extension]*.

Closing of title will be without prejudice to rights and obligations accrued under this Lease to the time title closes.

If Lessee's right to exercise the option to purchase the Property has accrued, and if before Lessee exercises the option and before the option expires, the Property suffers damage, Lessee may exercise its option to purchase the Property at any time up to and including the later of (i) the last day on which Lessee may exercise the option (excluding this paragraph), or (ii) the tenth business day after all amounts payable under Owner's insurance in respect of the damage are agreed in writing with the insurers. Owner will permit Lessee and/or its insurance advisor to attend any discussions and negotiations with Owner's insurers respecting the amounts payable on account of the damage. If this paragraph applies and if Lessee exercises its option, all property insurance proceeds payable with respect to the damage will be paid to Lessee notwithstanding any other provision in this Lease, and Owner and Lessee will make appropriate arrangements to assure those proceeds are paid to Lessee.[9]

Lessee's rights and Owner's obligations under this Section will terminate on proper termination of this Lease due to Lessee's default. However, if this Lease terminates or is terminated for any other reason after Lessee's right to exercise the option has accrued and before Lessee has exercised the option, Lessee's rights and Owner's obligations under this Section will remain in full force and effect and Lessee's right to exercise the option will terminate after the expiration of *[specify number of days in words and figures]* following termination of the Lease; but if termination is due to damage to the Property, the provisions of the preceding paragraph dealing with exercise of the option and insurance will apply.

Time is of the essence.

Select one of the Following Alternatives

A

Lessee's rights under this Section will also terminate upon sale of the Property to a buyer in accordance with the provisions of this Section.

B

While this Lease remains in effect, a sale of the Property to a buyer will not extinguish the provisions of this Section: Lessee's rights under this Section will obtain in respect of any purchaser of the Property.

B. RIGHT OF FIRST REFUSAL: OWNER'S OFFER

NOTE: ADJUSTMENTS TO THE MODEL BELOW MAY WELL BE REQUIRED TO CONFORM IT TO THE TERMS AND TERMINOLOGY OF THE APPLICABLE LEASE. ALSO NOTE THAT THIS RIGHT OF FIRST REFUSAL CAN BE USED IN LIEU OF THE ONE BASED ON A GOOD FAITH OFFER.BY A THIRD PARTY.

Owner will not sell all or any portion of the Property prior to the end of the lease term except as provided in this Section.

If Owner wishes to sell the entire Property, Owner will first offer Lessee the right to purchase the Property in accordance with the contract of sale attached hereto as an Exhibit. Owner will give Lessee written notice of that offer stating in the notice the price for the Property ("Notice of Offer").

Within *[specify number in words]* (*[specify number in figures]*) days after Lessee receives the Notice of Offer (the "Offer Period"), Lessee will notify Owner whether it will purchase the Property at the price specified in the Notice of Offer. If Lessee notifies Owner that it elects not to purchase the Property, or if Lessee does not notify Owner of its election within the Offer Period, or if Lessee's election is not made in accordance with the requirements of the following paragraph, Lessee's right to purchase the Property in accordance with Notice of Offer will terminate, and Owner may, within *[specify number in words]* (*[specify number in figures]*) days after expiration of the Offer Period, sell the Property to a buyer at the price set forth in the Notice of Offer and under a contract of sale in the form attached hereto as an Exhibit without amendment thereto except to add the price set forth in the Notice of Offer. As used in the preceding sentence "sell" means execution of the contract of sale and closing of title thereunder.

If Owner does not sell the Property to a buyer in accordance with the provisions of the preceding paragraph, including within the time period specified in that paragraph, then Owner may not sell the Property without first complying the requirements of this Section.

If Owner does sell the Property to a buyer in accordance with the provisions of the second preceding paragraph, Owner will promptly notify Lessee of the date title closed, including with that notice a statement *[consider: under oath]* that the sale was made entirely in accordance with the provisions of this Section.

If, however, Lessee notifies Owner within the Offer Period that it elects to purchase the Property, Owner will sell the Property to Lessee and Lessee will purchase the Property from Owner at the price for the Property stated in the Notice of Offer and pursuant to the terms of the contract of sale attached hereto as an Exhibit. To be effective Lessee's notice of its election to purchase must be accompa-

nied by payment by bank check of the down payment specified in the Exhibit. Notice by Lessee to Owner in accordance with this paragraph will constitute execution by Lessee and Owner of the contract set forth in the Exhibit, and the date of that contract will be the date of the Notice of Offer.[10]

If Lessee elects to purchase the Property

(i) the term of this Lease will end on closing of title, but if title does not close at or before the end of lease term, the term of this Lease will be extended to the closing of title or until termination of the contract of sale, whichever is the first to occur, and

(ii) if the contract of sale is terminated before the end of the term of this Lease, this Lease will, nevertheless, remain in effect until the end of its then stated term.

If the term of the lease is extended under item (i) above, Lessee *[Consider: will continue to pay rent and other amounts owing under the Lease as the terms relating to rent and other amounts exist immediately prior to the extension period // will not be required to pay rent and other amounts owing under the Lease during the period of the extension]*.

Closing of title will be without prejudice to rights and obligations accrued under this Lease to the time title closes.

If Lessee's right to exercise the option to purchase the Property has accrued, and if before Lessee exercises the option and before the option expires, the Property suffers damage, Lessee may exercise its option to purchase the Property at any time up to and including the later of (i) the last day on which Lessee may exercise the option (excluding this paragraph), or (ii) the tenth business day after all amounts payable under Owner's insurance in respect of the damage are agreed in writing with the insurers. Owner will permit Lessee and/or its insurance advisor to attend any discussions and negotiations with Owner's insurers respecting the amounts payable on account of the damage. If this paragraph applies and if Lessee exercises its option, all property insurance proceeds payable with respect to the damage will be paid to Lessee notwithstanding any other provision in this Lease, and Owner and Lessee will make appropriate arrangements to assure those proceeds are paid to Lessee.[11]

Lessee's rights and Owner's obligations under this Section will terminate on proper termination of this Lease due to Lessee's default. However, if this Lease terminates or is terminated for any other reason after Lessee's right to exercise the option has accrued and before Lessee has exercised the option, Lessee's rights and Owner's obligations under this Section will remain in full force and effect and Lessee's right to exercise the option will terminate after the expiration of *[specify number of days in words and figures]* following termination of the Lease; but if termination is due to damage to the Property, the provisions of the preceding paragraph dealing with exercise of the option and insurance will apply.

Time is of the essence.

Select one of the Following Alternatives

A

Lessee's rights under this Section will also terminate upon sale of the Property to a buyer in accordance with the provisions of this Section.

B

While this Lease remains in effect, a sale of the Property to a buyer will not extinguish the provisions of this Section: Lessee's rights under this Section will obtain in respect of any purchaser of the Property.

C. CONCLUSION

Enough???!!! Well, you'll be happy to know

Th... th... th... that's all for now folks.

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1. *Clifton Land Co. v. Magic Car Wash, LLC*, No. 526319 (Third Dep't, Oct. 18, 2018 (hereafter "App. Div. Slip Op.").

2. *Ruff! Ruff! ROFR!*, 90 N.Y. St. B.J. 26, June 2018; *ROFR Redux: Its Bite Is as Effective as Its Bark*, 91 N.Y. St. B.J. 36, May 2019.

3. This article is based, in part, on an article by the author, *Options to Purchase Real Estate*, that appeared on the November 2018 (Vol. 48) of the Uniform Commercial Code Law Journal and materials from Chapter 12 of Commercial Agreements – A Lawyer's Guide to Drafting and Negotiating (Thomson Reuters).

4. For additional treatment of and models for other types of options, please see Chapter 12 of Commercial Agreements – A Lawyer's Guide to Drafting and Negotiating.

5. Lest the third party offer specify a type of payment that the option holder cannot match or might not want to match, like a specific Picasso painting or a batch of a cryptocurrency.

6. This exhibit is the form of contract – referenced later in the model – between the owner and lessee in the event the lessee exercises its option to buy the property. With regard to the allocation between owner and lessee of taxes and other fees, charges and costs pertaining to the property: In the case of a net lease, the lessee pays those items, so they would not be allocated. But transfer taxes and other fees and charges pertaining to the sale must be addressed. Also add, as appropriate under the circumstances, any other terms that a good faith offer must contain.

7. The number of days here should be the same as the number of days in the definition of a "good faith offer" (third paragraph of this model).

8. The contract of sale between owner and lessee as set forth in the exhibit should state that on closing of title the condition of the property will – absent any special provisions regarding damage – be its condition as of the date of the contract, subject to ordinary wear and tear and to any other mutually acceptable changes. Hence, the option provides that the date of the contract between owner and lessee will be the date of the good faith offer – that is, the date of the contract between owner and the third party buyer. In addition, the exhibit should state: (i) the price for the property will be the price as determined under the applicable section of the lease, and (ii) the percentage of that price required for the down payment. Provision should also be made on how to complete any blank spaces. *Nothing should be left to negotiation. See 12:1 of Commercial Agreements, supra.*

9. The price has been determined by the third party's offer before the damage occurs. Hence the provisions regarding insurance. If the option has been exercised before the damage, the contract of sale, which is attached as an exhibit and which is deemed signed on exercise, will govern. The lease will contain other provisions dealing with the effect of damage to the property, including damage prior to accrual of the right to exercise the option and the possibility of termination.

10. The contract of sale between owner and lessee as set forth in the exhibit should state that on closing of title the condition of the property will – absent any special provisions regarding damage – be its condition as of the date of the contract (to wit, the date of the Notice of Offer), subject to ordinary wear and tear and to any other mutually acceptable changes. In addition, the exhibit should state the price for the property will be the price as determined under the applicable section of the lease. The exhibit will state the percentage of that price required for the down payment. Provision should also be made on how to complete any other blank spaces, though there should be none. *Nothing should be left to negotiation.*

11. The price has been determined by the owner's offer before the damage occurs. Hence the provisions regarding insurance. If the option has been exercised before the damage, the contract of sale, which is attached as an exhibit and which is deemed signed on exercise, will govern. The lease will contain other provisions dealing with the effect of damage to the property, including damage prior to accrual of the right to exercise the option and the possibility of termination.

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THE NEW YORK BAR FOUNDATION

Advancing Justice and Fostering the Rule of Law

By Mariette Geldenhuys

Mariette Geldenhuys has practiced law in Ithaca, New York for the past 30 years, in areas including LGBT family law, estate planning, and adoption. She is a member of the National Family Law Advisory Council of the National Center for Lesbian Rights; the New York State Bar Association Committee on LGBT People and the Law; the Finger Lakes Women's Bar Association; and the National LGBT Bar Association. She is the Founder and Founding President of the Ithaca Area Collaborative Law Professionals. She currently serves as Co-Chair of the LGBT Committee of the Women's Bar Association of the State of New York. wwwgeldenhuyslaw.com

I have lived in Tompkins County, New York, current population approximately 105,000, since 1987. Located in the rural Finger Lakes region of the state, it is home to Cornell University, Ithaca College and Tompkins Cortland Community College. The county and its seat, the City of Ithaca, are now nationally known as a welcoming community for LGBTQ people; however, this was not always the case.

There was a time when being "out" in this community was far less accepted than it is now. In some instances, it was very risky or even downright dangerous. Many of us experienced homophobic hostility; I still remember the night when someone banged on the front door of my and my partner's home after midnight and shouted homophobic slurs at us. Incidents like these motivated many of us to work for civil rights protection on the local level at a time when such legislation seemed unattainable at the state level. The current supportive community is the result of decades of activism by LGBTQ residents, including LGBTQ lawyers.

ITHACA TAKES ACTION EARLY ON

The City of Ithaca led the way by amending its City Code to prohibit discrimination on the basis of sexual orientation in 1984, making it one of the first municipalities in the country to enact such a provision. The city also adopted a domestic partnership law in 2002 that gave same-sex couples the option to register with the city as domestic partners. This registration was largely symbolic but provided proof of domestic partnership for the increasing number of local employers who extended health insurance benefits to same-sex partners, including the City of Ithaca, Cornell University, Ithaca College, Tompkins Cortland Community College, Tompkins County, the Ithaca City School District and others.

A glaring omission from the 1984 code provision was that it did not cover gender identity and expression and therefore did not protect transgender and gender-fluid residents. A subsequent amendment of the City Code on January 4, 2017 added gender identity and expression as a protected class.

The struggle for the inclusion of sexual orientation in Tompkins County's human rights law (known as Local Law C) was much more extensive. Legislators on the county Board of Representatives were sharply divided, and meetings at which the measure was discussed were heated, with large numbers of supporters and opponents in attendance and impassioned and polarized speakers both for and against the measure.

A TOUGHER FIGHT IN TOMPKINS COUNTY

When Local Law C was first put to a vote on July 9, 1991, it was defeated by a vote of 8 to 7. This was a profound disappointment for the supporters of the law, both in the county legislature and in the community. Supporters of the law rallied and started actively campaigning for its passage. A few of us in the local legal community met with our then-New York State Assemblyman, Martin Luster, also an attorney, to review the language of the proposed law and strategize about ways to increase the chances of its passage. At Mr. Luster's suggestion, we modified the language of the law to substantially conform with the New York State Human Rights Law and to add sexual orientation as a protected class, so that case law interpreting the state law could also be applied to the local law. At that time, the state Human Rights Law did not include sexual orientation as a protected class. It was amended effective January 16, 2003 by the adoption of the Sexual Orientation Non-Discrimination Act.

One of the most poignant moments came when a local lawyer and his lesbian sister spoke on opposite sides of the issue.

Meanwhile, members of the community met with individual legislators to explain the importance of this measure and the risks faced by LGBTQ constituents in the absence of such a law. Additionally, we hoped to humanize the issue and that legislators who opposed the law would shift their views once they got to know their LGBTQ constituents and were no longer considering only an abstract concept. Our goal was to convince one legislator, Charles Evans, who represented a portion of the Town of Dryden, to change his vote, so that the law would pass by 8 votes to 7.

On the night of December 2, 1991, when Local Law C was put to a vote for the second time, so many peo-

ple wanted to attend and speak that the meeting was moved from the legislature's chambers to the Ithaca High School gymnasium. Seating in the vast room was divided into two sections: one side for supporters of Local Law C and the other for opponents. The atmosphere was extremely tense, and Sheriff's deputies patrolled the aisle between the "pro" and "con" groups.

Many people spoke passionately on each side of the issue. It was very difficult for us as members of the LGBTQ community to sit in a public meeting and hear so many of our colleagues, neighbors, and acquaintances condemn us and urge the legislature not to protect us from discrimination. One of the most poignant moments came when a local lawyer and his lesbian sister spoke on opposite sides of the issue.

Finally, the legislature voted, and this time, the measure passed by 9 votes to 6. The LGBTQ crowd and our supporters were on our feet, cheering and hugging each other. As we had hoped, Charles Evans had changed his vote. What we had not expected was the "yes" vote of James Mason, the chairperson of the legislature at the time and the representative for a portion of the Town of Enfield. Many of the supporters met afterwards to celebrate this enormously significant milestone.

ADDING PROTECTIONS FOR TRANSGENDER INDIVIDUALS

The county law also did not initially include gender identity and expression as a protected class. This was remedied by Local Law Number 1-2004, which expanded Local Law C to include gender identity and expression. On the state level, the Gender Expression Non-Discrimination Act, which included gender identity and expression as a protected class in state human rights legislation, was not adopted until January 25, 2019 and became effective on February 24.

Looking back, it is difficult to imagine that the issue of protecting LGBTQ people from discrimination was ever so contentious in our accepting, supportive community. We take pride as a community that we addressed these issues in local legislation many years before similar laws were enacted on a statewide level.

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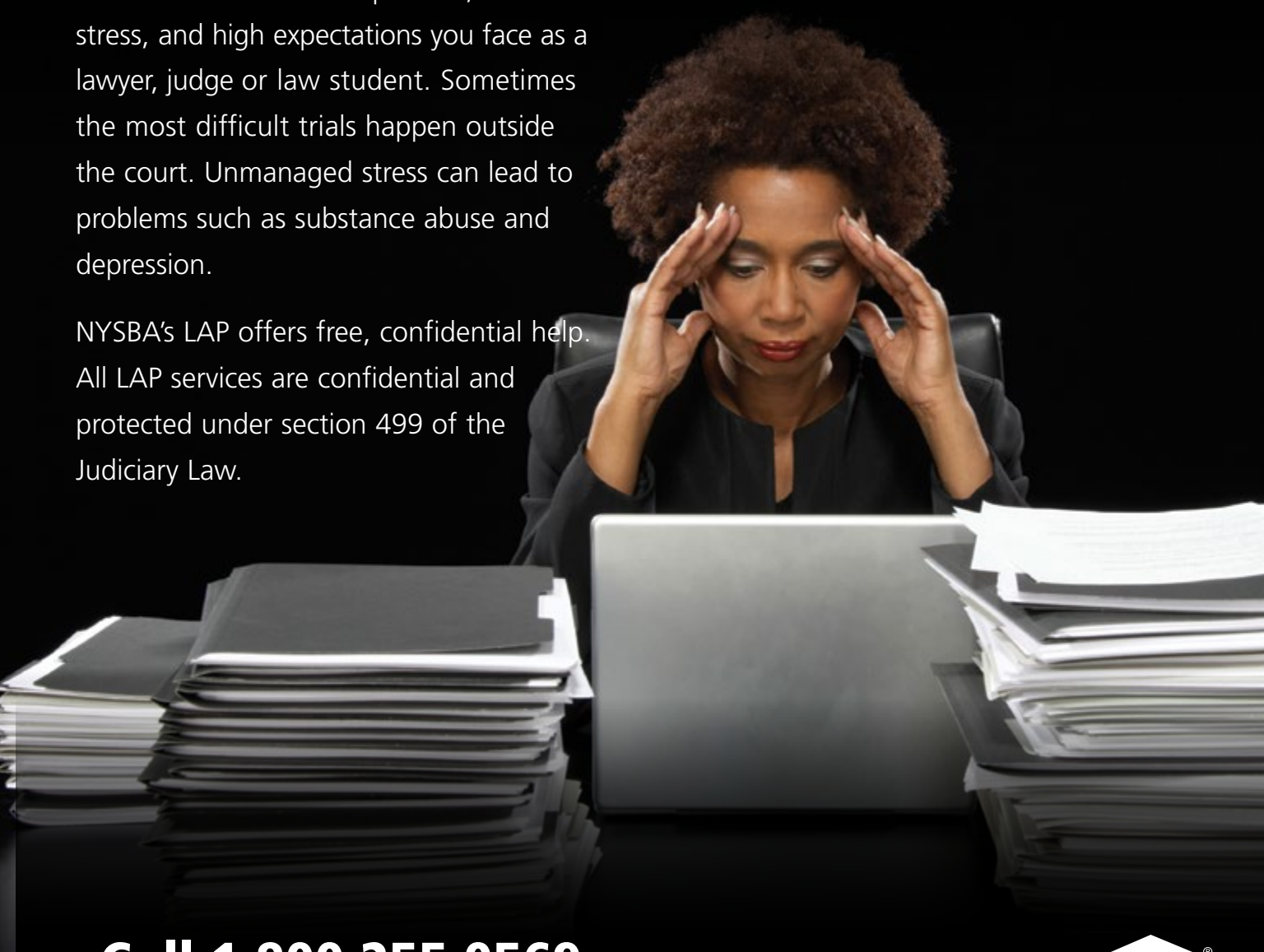

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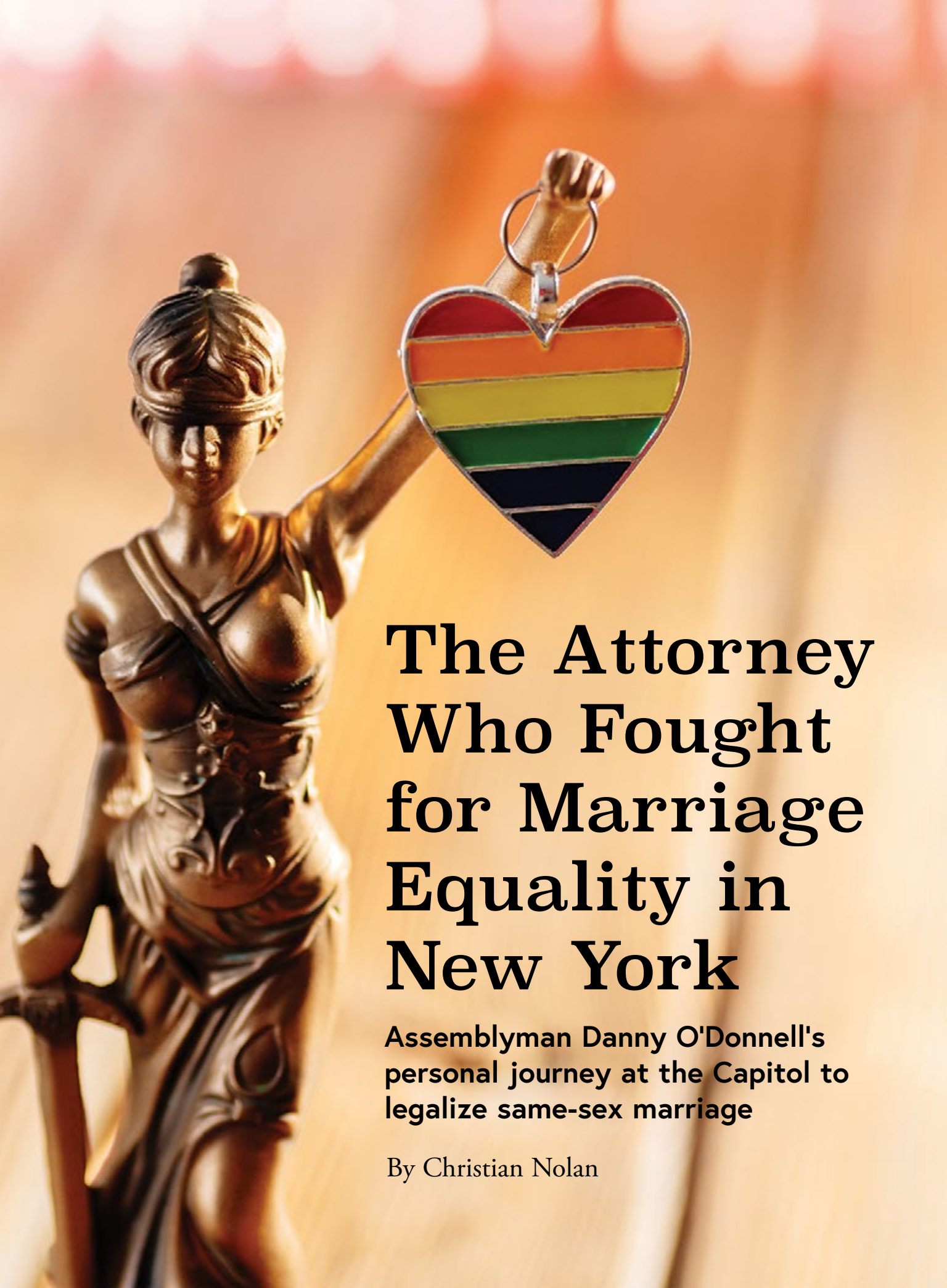


The Attorney Who Fought for Marriage Equality in New York

Assemblyman Danny O'Donnell's personal journey at the Capitol to legalize same-sex marriage

By Christian Nolan

In 2004, not long after being the first gay man elected to the New York Assembly, Danny O'Donnell and his partner of over 30 years, John Banta, agreed to be named plaintiffs in a lawsuit that alleged the denial of same-sex marriage violated the state Constitution.

At a press conference announcing the lawsuit, O'Donnell was asked why he and his partner didn't simply cross the border into Massachusetts to get their marriage license.

O'Donnell responded: "I was born and raised in New York. I'm an elected official in New York. I want to get married here."

With a 4-2 majority opinion penned by Judge Robert S. Smith, the Court of Appeals in 2006 ruled against the same-sex couples. The decision stated that the Legislature intended for marriage to be between a man and a woman and that it would take further legislative action to allow same-sex marriage.

Then-Chief Judge Judith Kaye dissented, calling the ruling "an unfortunate misstep" and compared it to the barring of interracial marriage.

"The long duration of a constitutional wrong cannot justify its perpetuation, no matter how strongly tradition or public sentiment might support it," Kaye wrote in her dissent, which was joined by Judge Carmen Beauchamp Ciparick.

The ruling, however, provided O'Donnell with a pathway for how to achieve marriage equality in New York. After all, as a public interest attorney elected to represent Manhattan's Upper West Side in the Assembly, he knows how to legislate.

And so began O'Donnell's five-year journey for marriage equality, one that came full circle at his 2012 wedding when he and Banta were legally married by none other than former Chief Judge Kaye.

PERSONALIZED LETTERS

Early on in April 2007, marriage equality legislation had just 25 votes in the state Assembly but by June of the same year, O'Donnell had garnered enough support that it passed with 85 votes. Although this was just the beginning of a long road, he described that accomplishment as "miraculously quick."

"We knew we needed to lay that groundwork to get the Senate to possibly take it up," said O'Donnell.

Although there were some rumblings it could pass the Senate, he knew it was too soon and there weren't enough votes. Since controversial bills are not typically considered during election years, marriage equality was not taken up again until 2009. That year it passed the Assembly twice but failed to get enough support in the Senate each time.

Throughout the process, O'Donnell stayed calm and kept his cool with his colleagues, particularly Republicans dead set against same sex marriage. He knew he would need at least some Republican votes to make history.

So each week, O'Donnell sent personalized letters to his colleagues in the Legislature considering the bill. His first letter explained why he and his partner wanted to get married.

"John and I thank you for taking the time to consider this," he wrote.

Other letters would explain the political landscape, legal landscape or even a moral perspective.

"I had to pivot to try different avenues to get in someone's heart and brain," said O'Donnell.

O'Donnell also included letters from people out of state to provide perspective in the materials he sent. For instance, in one letter he had a state senator from a conservative district in California – who had been a no vote but later became a yes vote – explain how, politically, you can do this and survive.

He even sent his colleagues a letter he received from an unexpected ally, Mildred Loving, a plaintiff in the landmark *Loving v. Virginia* U.S. Supreme Court case, which struck down all state laws banning interracial marriage.

COLOR-CODED SPREADSHEETS

O'Donnell also kept meticulous color-coded spreadsheets that he continually updated and sent to then-Assembly Speaker Sheldon Silver and the speaker's senior staff each

week. Names in green were yes votes, no votes were in red and purple indicated the maybes.

"Shelly gave me the bill and said, 'Go get the votes, Danny' and I did," O'Donnell recalled. "That's the way he was. Implicit in that was despite being an Orthodox Jew, he was voting with me. It wasn't an easy vote in his community."

O'Donnell did not only personalize the materials he sent to his colleagues, but he was also unrelenting in person, as he wanted the no votes to be made to his face. He said he had many "intense, personal one-on-one conversations."

"Don't you want to come to my wedding?" he would say to his colleagues on the other side of the aisle voting 'no.'

O'Donnell's partner of many years was often by his side at the Capitol. This was a strategic move as much as it was to lend support.

"My husband is tall, good looking. Everyone loves him," said O'Donnell. "I knew it would be effective to have my colleagues see my relationship with my husband."

O'Donnell said he also needed to remove certain stigmas he faced from the opposition, such as that his wedding would be him walking down the aisle "wearing a Vera Wang dress."

"A few Democratic colleagues told Shelly they wanted to vote no but they couldn't vote against me," O'Donnell recalled.

He added that Assemblymember Deborah Glick also worked on convincing colleagues to support the legislation. In 1990, Glick was the first openly lesbian or gay person elected to the New York State Legislature.

PUBLIC PERCEPTION

By 2011, polling data changed, as did public perception of same-sex marriage. About 38 percent were in favor of same-sex marriage in polls when the legislation was first introduced in 2007 but that increased to 58 percent by 2011.

Despite the increased public approval, O'Donnell admitted that not only was it difficult to try to convince Republicans to vote yes, it also wasn't easy to maintain yes votes over a five-year period, especially as some lawmakers are voted in and out.

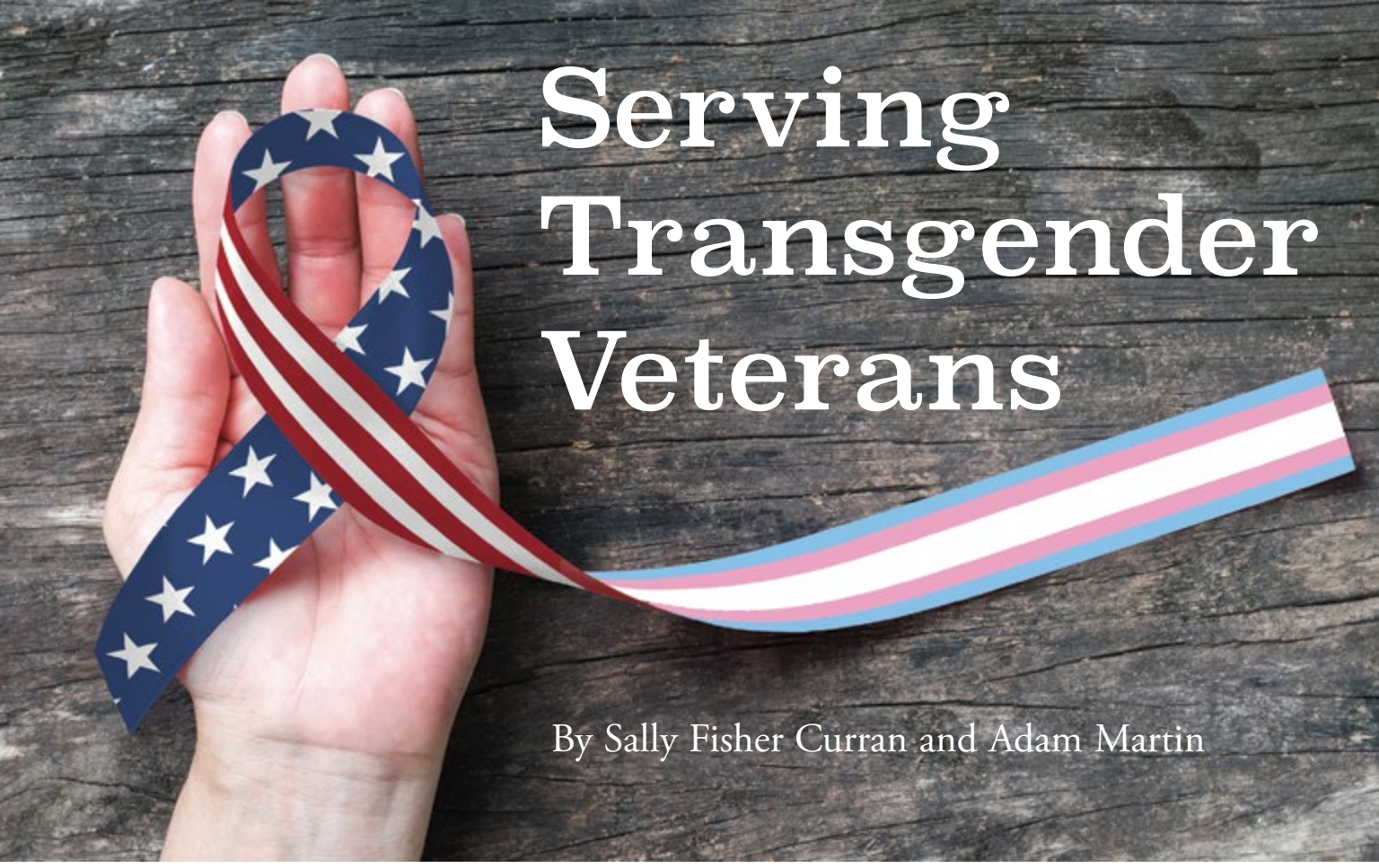
"By the time 2011 came around, I only had 76 votes. That created a great deal of anxiety for me," said O'Donnell.

Gov. Cuomo, meanwhile, was waiting until he thought had enough votes in the Senate to introduce a bill. At Silver's behest, O'Donnell drafted a bill for the Assembly. Then once Cuomo introduced his bill, O'Donnell rescinded his. O'Donnell was then asked by the governor to draft another bill stating that same-sex marriage did not overrule the First Amendment, so as to protect religious institutions. This was done as part of negotiations with Republican lawmakers.

It all worked out in the end. O'Donnell knew he had enough votes. As the two bills went to the Senate floor after passing the Assembly "it was the greatest sense of euphoria I've ever had in my life," said O'Donnell.

On January 29, 2012 after the new law took effect, O'Donnell and Banta were married at a ceremony attended by over 400 people. The guest list included his sister Rosie O'Donnell, Gov. Cuomo, Chuck Schumer, family, friends and many of his colleagues who voted "yes."

Nolan is NYSBA's Senior Writer.



Serving Transgender Veterans

By Sally Fisher Curran and Adam Martin

For more than ten years, our organization, the Volunteer Lawyers Project of Onondaga County, has operated a legal clinic for veterans at the local Veterans Administration (VA) Vet Center. But it wasn't until we started doing name and gender marker changes for transgender individuals that we started seeing a substantial number of transgender veterans seeking assistance. Perhaps owing to the relatively high veteran population in New York,[1] we are now seeing significant numbers of transgender veterans seeking services, and we want to shed light upon this often overlooked group of veterans and some of the unique challenges they face.

Sally Fisher Curran is the Executive Director of the Volunteer Lawyers Project of Onondaga County, Inc. and from 2016-2018 was an Adjunct Professor at Cornell Law School teaching the Advocacy for LGBT Communities Clinic/Practicum.

Adam Martin is a 2L at Syracuse University College of Law. An Army veteran with a desire to provide legal help to the chronically underserved, Adam has practiced with a student practice order under the supervision of lawyers at the Volunteer Lawyers Project of Onondaga County, Inc. since May 2018.

Looking at Veterans Health Administration records, the Williams Institute estimates that nationally there are 134,000 transgender veterans[2] – a statistic that indicates that transgender individuals serve in the military at a significantly higher rate than do their non-transgender U.S. counterparts. The 2015 U.S. Transgender Survey found that 18 percent of transgender individuals were veterans, nearly twice the prevalence of the cisgender[3] U.S. population.[4] With New York being home to 4.2 percent of all veterans nationally,[5] it is likely that there are nearly 5,500 transgender veterans here.

While the transgender veteran population has never been specifically studied in New York, a confluence of challenges that veterans and transgender individuals face almost certainly creates a unique need for legal services, and at the same time stands as a barrier to obtaining legal services.

It is well known that veterans reintegrating to civilian life often struggle to seek legal assistance when it is needed. As highlighted by NYSBA's Committee on Veterans in a 2012 report, not only does military culture make it more difficult to acknowledge that one needs help, as doing so may be perceived to be a sign of weakness, but returning veterans sometimes struggle with mental health challenges such as post-traumatic stress disorder, traumatic brain injury, substance abuse, and more.[6]

FOR TRANSGENDER VETERANS, A HIGH LEVEL OF PHYCHOLOGICAL DISTRESS

For the transgender community, widespread discrimination, rejection and harassment stand as serious barriers to obtaining assistance and lead to high levels of psychological distress.[7] While there are many legal services programs with special programs to connect with veterans, and some have special programs to connect with transgender individuals, the number of such programs for both veterans and transgender individuals is relatively small. Without intentional outreach that spans both the veteran and the transgender communities, it is likely that transgender veterans are not connecting with the services they need.

Many of the legal problems that transgender veterans face are the same as problems that cisgender and non-veterans face – divorce, consumer debt issues, employment, etc. But there are at least two areas where transgender veterans face unique challenges: identification and health care.

One of the first things that transgender individuals reach out for legal services about is updating and correcting their legal name and gender marker. Having identification that does not match one's gender expression can pose a significant safety risk – 25 percent of people with mismatched IDs reported being verbally harassed, 16 percent were denied services or benefits, nine percent were asked to leave a location or establishment and two percent were assaulted or attacked.[8]

Upon discharge from the military, service members are provided with a DD Form 214, the Certificate of Release or Discharge from Military Duty. Unlike other types of military records, a DD214 must be presented when seeking veterans' benefits, and it is often requested when seeking employment or other services. While it is technically possible to update one's DD 214, the process is complicated and discretionary. A transgender veteran must show that an injustice will be done if the DD 214 is not updated. Each case is reviewed individually and decisions can take many months to be rendered. Not having a streamlined process with clear guidelines for making changes exposes veterans to violations of their privacy, harassment and potentially physical violence.

ASSISTANCE WITH NAME CHANGES NOT PROVIDED BY MANY LEGAL ORGANIZATIONS

Many legal aid organizations do not assist with name changes, much less have expertise with applications to correct military DD 214s. It is not surprising, therefore, that in a recent study of veterans who had separated from the military over 10 years ago, only two percent of respondents who had applied for a corrected DD 214 received it. Another six percent had applied and been denied, while 92 percent had never attempted to update their document.[9]

A further complication for veterans updating their identity documents and records is that the VA is a huge umbrella organization whose numerous appendages sometimes are not set up to pass information from one branch to another. For example, a veteran changing her name in the Veterans Healthcare system will find that, unless she also separately changes her name in the Veterans Benefits system – an entirely separate office, with separate personnel and methods – she may be known as her former name and gender in one, and her updated name and gender in the other. Worse, one system sometimes overrides the other when certain steps are not taken in the correct order, resulting in the veteran having to go through the process all over again.

Especially in upstate New York, there are not enough lawyers who have competency in serving transgender clients.

Another challenge is that employees are not uniformly trained in the process of updating one's name and gender marker. When we recently called a VA benefits office asking for general information regarding the process of updating a DD 214 for one of our clients, we found that the person was unaware that transgender individuals might be able to update their DD 214. This experience demonstrates that policy improvements do not automatically create changes in processes and applications.

Luckily, veterans are accustomed to such institutional complications, and have learned to be persistent. As Katie, one of our transgender veteran clients, says, "It's the only way you ever get anything." Katie, a proud Marine who served for 14 years in the 1980s and 1990s, says that her military service trained her to face challenges head-on and to be resourceful. Which, as it turns out, is great preparation for the transitioning process.

Having several "backup plans" in place, Katie, like other transgender veterans, has worked to find the essential people within her local VA who can make the necessary connections. Still, she is now six months through the waiting process on her DD 214 update, as the records review board, which reviews all kinds of records updates, only meets twice per year. Needless to say, there is a huge backlog.

ACCESS TO APPROPRIATE HEALTH CARE A MAJOR CONCERN

For transgender veterans, access to appropriate health care is another major concern. Transgender veterans not only need access to mental health treatment, but also hormones and, in many instances, surgery. In 2011, the

VA implemented a Transgender Healthcare Directive, which instructs all VA staff to provide care to transgender patients "without discrimination in a manner consistent with care and management of all Veteran patients."[10]

This Directive has opened the door for local VA facilities to connect with transgender veterans. For example, the Syracuse VA Hospital hosts a special event twice a year for transgender veterans, complete with medical specialists, representatives from community organizations, music, food, and speakers. For all who attend, it is a successful means to fostering positive relationships between transgender veterans and their VA care providers.

Not every VA intentionally reaches out to and welcomes their transgender patients in this way. "It would be nice if all VAs did this," remarked Veronica, a transgender veteran attendee, "but it's really the case that, 'if you've seen one VA, you've seen … one VA'." To be sure, while many VA providers – the general practitioners, the endocrinologists, the social workers and therapists – are sympathetic and responsive to issues faced by transgender veterans, practitioners can only do what the larger organization allows.

VA DOES NOT COVER NEEDED SURGERIES

Many veterans receive some or all of their medical and mental health treatment through the VA. While transgender veterans can obtain mental health treatment for gender dysphoria and can receive hormones through the VA, they are denied coverage of any surgeries related to gender identity,[11] even when the same surgery is covered for issues not related to gender identity. Health treatment outside of the VA may not financially be a possible for many transgender veterans, as they may not be able to afford or have access to secondary health insurance.

TriCare, typically the most accessible and affordable option for veterans, is only available to retirees (both medical retirement or through length of service). Since 2016, TriCare has included coverage of mental health and hormone treatment for gender dysphoria, but this plan also excludes coverage for surgeries related to gender dysphoria.[12] If transgender veterans can afford to shop for insurance on the marketplace, especially in New York, their transition-related surgeries should be covered, though these insurance plans can be prohibitively expensive and it can be difficult to find surgeons skilled in these procedures in many parts of the state.

The blanket denial of coverage for surgical treatment related to gender dysphoria can cause significant problems for transgender veterans. Jeff, a 49-year-old female-to-male (FTM) transgender veteran who has been on testosterone for three years, is generally pleased with the quality of care he has received from his endocrinologist and primary care team at the Syracuse VA. But the lack of access to surgery, he says, is "not just frustrating … it's actually painful." Elaborating, he explains, "FTMs on testosterone experience menopausal-like symptoms: the uterus and other tissues shrink, I get hot flashes, and the hormonal changes bring on severe cramping."

While non-transgender woman veterans would be evaluated and potentially referred for hysterectomies without obstacle, transgender veterans do not have this treatment option, even if their doctor deems it medically necessary. "It's not like it's an unusual or uncommon procedure," Jeff says. "I'm menopausal age … if I wasn't on testosterone, if I wasn't transgender, they'd do it with very few questions asked. But, basically, it's 'Sorry, you'll just have to suffer'."

Finally, it is important to note that transgender veterans face the same difficulty that all veterans face when seeking free legal assistance. If they are 100 percent disabled and receiving veterans' benefits they receive too much money to qualify for free legal assistance, because most legal aid funders set caps at 125 percent to 200 percent of the federal poverty guidelines. At the same time, these transgender veterans do not earn enough to be able to afford an attorney.

Moreover, especially in upstate New York, there are not enough lawyers who have competency in serving transgender clients. So even when a transgender veteran can afford an attorney, it can be difficult to find one who understands the unique challenges they face, or who even knows how to do a name change.

Ultimately, while services for transgender veterans have certainly improved in recent years, there is much more that can be done in New York to ensure that these individuals receive the services they need, and the care to which they are entitled.

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1. According to the National Center for Veterans Analysis and Statistics, New York has the fifth-highest veteran population in the United States https://www.va.gov/vetdata/docs/Demographics/New_Vetpop_Model/Vetpop_Infographic_Final31.pdf.

2. https://williamsinstitute.law.ucla.edu/research/military-related/us-transgender-military-service/.

3. Cisgender is a term used to refer to the non-transgender population. It means a person whose gender identity aligns with their sex assigned at birth.

4. The Report of the 2015 U.S. Transgender Survey, p. 167, https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

5. "Veteran Statistics: New York." US Census Bureau, https://www2.census.gov/library/visualizations/2015/comm/vets/ny-vets.pdf.

6. "Report and Recommendations of Special Committee on Veterans," adopted by NYSBA House of Delegates Nov. 2012, http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=81379.

7. *See* The Report of the 2015 U.S. Transgender Survey, *supra*. n.4.

8. *Id*. at 82.

9. *Id*. at 171.

10. VHA Directive 1341, "Providing Health Care for Transgender and Intersex Veterans," May 23, 2018, https://www.albuquerque.va.gov/docs/ProvidingHealthCareforTransgenderandIntersexVeterans.pdf.

11. *Id.*

12. https://tricare.mil/CoveredServices/IsItCovered/GenderDysphoriaServices.

What's in a Name? For Transgender People, *Everything*

By Milo Primeaux

I couldn't believe my ears.

It was November 2006. I was 22 years old and standing alone in the courtroom with a judge, his law clerk, and the court recorder in Columbus, Ohio. All other cases had already been heard, and mine was the last to go. I was so grateful the judge kept my case for last, as I was seeking a legal name change from a very feminine given name to a masculine one – my grandfather's, to be exact – and I didn't really want a bunch of strangers to know that there was a transgender person in their midst.

Milo Primeaux is a queer transgender person (he/him) and long-time LGBTQ+ rights advocate. He runs a solo virtual LGBTQ+ civil rights legal practice out of Livingston County, and is the founder and CEO of Just Roots Consulting, a firm dedicated to developing LGBTQ+ industry leaders nationwide. MiloPrimeauxEsq@gmail.com https://miloprimeaux.com

I had thought, perhaps foolishly, that the judge did so out of compassion and to help me maintain my privacy and safety. I realized quickly that I was wrong.

After verifying that I was the name change petitioner, the judge paused for a few moments and just stared at me. I began sweating profusely through the new suit my dad bought me to celebrate this exciting milestone. It was the first three-piece suit I had ever owned. I had felt dapper and confident when I walked in, but something about the way the judge looked at me then made me feel small and afraid. Then he spoke.

"It says here you are a transgender. So have you had the surgery?"

For a moment I was stunned into silence – which, for me, is *highly* unusual. I always have a lot to say, especially when it comes to advocating for equitable treatment of transgender people. Even at that point, I had spent years educating the public about how to treat transgender people with respect and dignity. I had organized conferences and rallies and protests and community potlucks – all for the purpose of building understanding and compassion around the needs of our communities. I was fearless and tireless in my advocacy of others.

And yet there, all by myself in that courtroom with a man in a black robe elevated above me holding the key to my future, I lost my voice. I was alone in my fear, as I could not find an attorney to take my case *pro bono*, and even as a full-time student with a full-time job I could not afford to pay someone to help. In that moment, I had no choice but to carry on.

I smiled nervously stuttered some reply about how there is no such thing as "the surgery" and in any case I didn't see how it was relevant to my name change petition. To this he responded with a barrage of increasingly invasive, dehumanizing, and irrelevant questions. Why did I want to lose such a beautiful given name? Was my family supportive? Did I always dress like a man? Did I ever still dress like a woman? Did I take hormone replacement therapy? What changes did testosterone make in my body? Did my reproductive system still work, and did I plan to have it removed soon? What kind of sexual partners did I have, if any, and did they know I am "a transgender"? And so on.

When it was over, when I answered all the questions to his satisfaction, he signed my order. I finally had my name change – something I had desired for much of my life – and yet I left the courtroom feeling absolutely deflated, degraded, and humiliated. It was one of the worst days of my young adult life.

Fast-forward 13 years, and I am now the attorney I needed so desperately that day in Columbus, Ohio. Since graduating from the City University of New York (CUNY) School of Law in 2013, I have assisted and represented over 500 transgender clients with name changes in Washington, D.C., Virginia, Maryland and New York. I have also trained thousands of attorneys and judges about the name change process.

I now run a solo virtual LGBTQ civil rights practice out of my farm home in Livingston County in upstate New York, serving transgender and other queer clients across the state who need name changes or experience discrimination in their workplaces, medical offices, schools, grocery stores, and so on. I also founded Just Roots Consulting, LLC, a firm dedicated to developing LGBTQ+ industry leadership among employers nationwide.

My ultimate professional goal is to ensure that *every* transgender person can go to *any* attorney in their local area and obtain the same level of competent, confident, and respectful service, regardless of where they live and how much money they make. I want to render myself irrelevant as a niche attorney – that day will be a true victory for our community.

To that end, I want to take this opportunity to call you into action. Yes *you*, intrepid reader. You too can be part of the grand and completely achievable dream of making legal assistance accessible and affirming for all transgender clients. Here's how to get started.

REVAMP YOUR INTAKE QUESTIONS

Periodically review your intake forms and client management systems to be more trans-affirming. Look especially at how you ask about a client's preferred versus legal name, pronouns (e.g., she/her, he/him, they/them), and honorifics (e.g., Ms., Mr., Mx.). Update or remove any questions that unnecessarily enforce norms around gender, marital status, or traditional family structures, and think of ways to make these questions open-ended. Doing this at the outset will signal to transgender and other LGBTQ clients that you willingly welcome and acknowledge their lived experiences and you are someone they can trust.

TAKE NAME CHANGE CASES AT AFFORDABLE RATES

What's in a name? For a transgender person, it's *everything*. And yet, *only 1 out of 10* trans people are able to update all of their government-issued identity documents to reflect their authentic name and gender marker. I am one of those other nine trans people with mismatching IDs (thanks, Texas Vital Records), and the result is unnecessary exposure to transphobic discrimination,

I finally had my name change – something I had desired for much of my life – and yet I left the courtroom feeling absolutely deflated, degraded and humiliated.

harassment, and violence throughout all aspects of my life.

Handling a trans person's name change is literally *life-changing* and *life-saving* – *and* it's incredibly easy for an attorney to do. Sections 60-65 of the New York State Civil Rights Act lay out a clear and simple process for obtaining a name change. With your help, most transgender petitioners can also get the statutory publication requirement waived and their court records permanently sealed for their safety.

A major key is affordability. Name change petitions are very formulaic, and do not take much time for an attorney to handle. That's why I strongly encourage *all* attorneys – whether public interest folks in legal services or private practitioners – to agree to handle them *pro bono*, low-*bono*, or on a sliding-scale fee. For example, on average it takes me a total of three hours to complete a name change from intake to closing letter, and over the past year in private practice I earned an average of $500 per name change helping 50 trans clients who used my honor-based sliding-scale fee system. Every client paid what they could afford, no questions asked, and I provided swift, efficient, and effective legal help so they could move on with their lives. That is community allyship in action.

INCREASE YOUR COMMUNITY ENGAGEMENT AND ACCOUNTABILITY

Finally, get involved. Show up at events and programs hosted by local transgender and LGBTQ communities. Offer to give free seminars to community members on whatever topic you know fluently – maybe it's estate planning, starting a business, family law matters, or navigating the criminal justice system – you name it, the topic will appeal and apply to people in LGBTQ communities, too. Meet with local trans and LGBTQ leaders to learn more about how you can be of service to the community.

Leverage your positions of influence on boards and bar associations to shed light on inequities impacting transgender and LGBTQ people in your area and across the state. Build trusting relationships with organizations that are doing good work to support transgender people. Solicit and accept critical feedback from your new community partners on how to continuously improve your welcoming and affirming practices and services.

Doing these things and more will effectively create and maintain a culture of accountability throughout the legal profession so that together we can all raise our bars of excellence in solidarity with transgender people.

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We've Come a Long Way – but We Still Have a Long Way to Go

By Michele Kahn

The Stonewall Riots in 1969 are commonly accepted as the beginning of the gay rights movement. At that time, there was a New York criminal statute that allowed police to arrest people wearing less than three gender-appropriate articles of clothing[1] (yes, that is what I just said), and there were numerous other laws that made being gay, or acting or appearing gay, illegal.

The police would routinely raid gay bars, including the Stonewall Inn, and would frequently harass and beat the patrons. On June 28, 1969, the police once again raided the Stonewall Inn, but this time the patrons fought back. Notice had been served that the gay community would no longer accept harassment, intimidation, or assault. The ensuring years saw gay liberation, the AIDS crisis, the U.S. military's "Don't Ask, Don't Tell" policy, the Defense of Marriage Act and mini-DOMAs, and more.

CHALLENGES FOR LESBIAN AND GAY PARENTS

Fast forward to 2003. Our son was an infant. He fell off the changing table while we were visiting my wife's sister in California. We were in a panic. Our son was in obvious distress; we didn't know what was wrong with him; we were new parents; and we were 3,000 miles from home. We went to the local hospital. As we were registering, the administrator asked "father's name?", and we said, "We are his two mothers; he doesn't have a father." She looked at us as if we were from another planet.

That was uncomfortable, but it got worse. As they were wheeling our son in for x-rays, we both naturally went in with him. The tech stopped us and said, "Only his mother can go in with him." We said, "We are both his mother." She was completely dumbfounded and stood there staring at us – not moving, not taking our baby into the x-ray room, not doing anything. Somehow, we managed to stay calm. I said, as steadily as I could, something to the effect of: "Our son has two mothers. He needs an x-ray and then has to be seen by a doctor. We are both coming in with you. Please get moving."

Fast forward to 2010. I have a client who is separating from her long-term partner. They are not married. They have two children – each partner gave birth to one child, but neither partner has legally adopted the child of the other. Obviously, they both want what is best for the children, but they are also breaking up, and people are generally not the best version of themselves when they are going through a breakup. At one point, they actually threaten each other that they will take "their" respective child – meaning that they will split up the siblings. At the time, there is no legal recourse for either to assert parental, custodial, or visitation rights against the other's child. Happily, we resolved the matter, and the siblings stayed together.

The administrator asked "father's name?" and we said, "We are his two mothers; he doesn't have a father." She looked at us as if we were from another planet.

Now it is 2011. New York State passes marriage equality! My partner – by then we had been together 20 years – and I get married. Our son is healthy and strong despite the mishap when he was an infant, and he is our best man. But when we travel to other states, we still have to carry our adoption papers proving that my wife legally adopted him. We still have to carry our health care proxies appointing each other to make medical decisions because our status as spouses and the presumptive person to make medical decisions for each other is not a given in many states.

I handle second parent adoptions[2] for numerous couples during these years – because even though our marriages are "equal" in New York, they are not equal everywhere else. There is no guarantee that our marriages will be recognized outside of New York State, and there is certainly no guarantee that, in the absence of a second parent adoption, our parentage will be recognized.

MARRIAGE EQUALITY: YES. PROTECTION FROM DISCRIMINATION: MAYBE.

Jump to 2015. The United States Supreme Court holds that gay people have a Constitutional right to be married.[3] Couples who choose to can now be married everywhere in the country. Euphoria! Except it quickly becomes apparent that you can "be married on Sunday and fired on Monday" in many states, because those states do not have laws that protect employees from discrimination on the basis of sexual

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orientation. Many states still permit discrimination against LGBT people in housing and numerous other areas. The Supreme Court announced in April of this year that it will decide whether Title VII of the Civil Rights Act of 1964, which forbids employment discrimination based on sex, bars discrimination based on sexual orientation or transgender status. So we will soon have a definitive statement on whether, if you're married on Sunday, you can still be fired on Monday.

It is now 2019. Marriage equality is the law of the land. Polls show that almost 75 percent of Americans support same-sex marriage.[4] And yet. The United States Supreme Court has upheld the President's ban that prevents transgender people who *want to serve* our country and *defend us* from serving in the military.

So-called "religious freedom laws" are legalizing and institutionalizing discrimination. Tennessee has a law that allows mental health counselors to decline to see LGBT clients based on the counselors' religious beliefs.[5] The federal Department of Health and Human Services (HHS) granted South Carolina a waiver from federal non-discrimination requirements for its foster care program, so it can now refuse to allow prospective parents who do not share their religious beliefs to even apply to become foster parents. HHS has formally established a conscience division that will allow medical practitioners to deny treatment to LGBT people on religious grounds and will allow other glaring discrimination. Freedom of religion is a paramount American value – but permitting religion or "conscience" to be used as a justification for discrimination just legalizes discrimination.

I marched on Washington for LGBT rights in 1987 and 1993. I represented and continue to represent many LGBT clients who do not have equal protection under the law. Sixteen years ago, I had to stay calm when a nurse treating my infant son couldn't fathom that he could have two mothers. We still carry our son's adoption papers when we travel.

Sometimes it's "one step forward, two steps back"; and sometimes it's "two steps forward, one step back." The moral of the story is that we all have to keep pressing forward – for gays, lesbians and transgender folks, and for everyone else who is a minority or outcast – until we can all share in the "blessings of liberty."[6]

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1. https://www.history.com/topics/gay-rights/the-stonewall-riots.
2. Second parent adoption means that a parent can adopt the child without cutting off the other parent's legal relationship to the child.
3. *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015).
4. Gallup Poll, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx.
5. Lambda Legal, https://www.lambdalegal.org/states-regions/in-your-state.
6. Preamble, United States Constitution.

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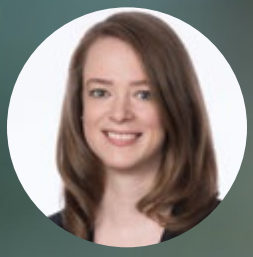
NYSBA NEW YORK STATE BAR ASSOCIATION

Other Than Gay

Acknowledging Homogeneity in "LGBT" Diversity Efforts

By Kelly L. McNamee



Kelly L. McNamee (mcnameek@gtlaw.com) is an associate resident in Greenberg Traurig, LLP's Albany office, where she focuses on complex commercial litigation, antitrust litigation, government investigations, securities enforcement and breach of contract matters. She is a graduate of the University of Rochester and Hofstra University School of Law.

It was the lunch I had been looking forward to all summer.

I had been to at least 10 lunches with fellow summer associates, numerous partners, and the head of recruiting for the firm, but I felt in some substantial way that the lesbian, gay, bisexual, and transgender (LGBT) affinity group lunch would be different.

I had no idea what to expect from a summer associate position at one of the largest law firms in Manhattan. With the assumption that I would end up working in the not-for-profit world, I opted to attend a fairly low-ranked law school in exchange for full tuition assistance and a chance to participate in a unique fellowship program for students engaged in advocacy on behalf of the LGBT community.

After my first semester, a handful of professors urged me to consider private practice and to participate in on-campus interviews. For those who have never endured the process, on-campus interviews consist of a grueling few weeks wherein first- and second-year law students sit through what feels like hundreds of 10-minute interviews with representatives from some of the most highly regarded law firms in the world, in hopes of receiving a call back interview and, eventually, a summer associate position.

THE "PERFECT" LGBT JOB CANDIDATE

My classmates and I were told, time and time again, that the chance of one of us taking a summer associate spot from a deserving Yale or Columbia student was a long shot. Yet, I was – almost literally – pushed through the interview process, with more than one mentor making it clear that I should not shy away from highlighting my lesbianism to interested firms. One even noted that I was the "perfect" LGBT candidate because, as she more than insinuated, my somewhat feminine presentation would allow a firm to check the diversity box without fear of how my presentation might challenge traditional gender norms in the conference or court room.

For me, the social events were the most intimidating part of the summer associate experience. I lived in Brooklyn before deciding to attend law school, temping and working as a paralegal at a midsize personal injury firm in Midtown for three years. Although I lived within striking distance of many of them, I never before had the type of disposable income needed to actually purchase a meal at many of the restaurants I visited that summer. These lunches were sometimes thrilling, sometimes tedious, and always utterly daunting.

The LGBT affinity group lunch was my beacon, the place I envisioned finding my community. It was not until sitting down at the white oblong table at ABC Kitchen in Lower Manhattan, however, that I realized I was the only woman attending the lunch. Even still, I assumed that the white gay men sitting with me would welcome me into the group. The majority did just that. I felt warmth and acceptance from senior associates, the head of recruiting, and many of my fellow LGBT summer associates. The discomfort I felt at other lunches – especially while fielding the typical "Where are you attending law school?" and "Where are you living?" questions from the double-Harvard who is "staying in his parent's Park Avenue pied-à-terre" – dissipated.

After we ordered, the conversation turned to the struggles LGBT people face in private practice, especially Big Law environments. As the discussion grew more and more personal, as these types of conversations often do, one summer associate ended his story with the following exclamation: "It is just so much easier to be a lesbian in society than a gay man!"

I was stunned. It was not that my colleague's story of struggling through college as an effeminate man in a culture unquestionably obsessed with male masculinity was misplaced. Toxic masculinity is a real issue with broad and important implications, especially for gay men and gender non-conforming folks. That said, almost all women, gay or straight, will likely understand the angst I felt in that moment. I was the only woman at a table full of white men, essentially being challenged to explain how my struggles could possibly equal theirs, to speak for all queer women, to defend my place at the table.

My colleague's position was nothing I had not heard before. "Lesbians are celebrated in the media." "Their sexuality is heralded, almost worshipped!" "Where a gay male couple is viewed with disgust and suspicion, a lesbian couple is viewed with appreciation and desire." I was quiet and let the conversation go on. Arguments in favor of his contention flew back and forth across the table, echoing more of the same.

My nervousness and desire to simply move past this topic were palpable. I clammed up and forced a smile. Perhaps sensing my unease, the firm's head of recruiting shot me a kind look and asked, "Kelly, what do you think?" My voice cracked, and I could feel my face burn with embarrassment and an eagerness to say the right thing. After attempting a few words meant to acknowledge my colleagues' sincerity, I simply asked my companions to look around the table and note the number of female-identifying queers joining us for lunch.

Little about my physical presentation invites questions about my sexuality. I am, for the most part, assumed to be a straight, white professional woman.

While I received a handful of approving nods, my colleagues were silent for what felt like far too long. Finally, a senior associate sitting directly across from me smiled broadly and yelled, "You go, girl!" I was beyond appreciative. The mood at the table eased, and the discussion flowed, almost naturally, to the need to stop fetishizing female sexuality, particularly lesbianism, and how these issues, along with toxic masculinity, inhibit queer participation in predominantly male professions.

WHAT DOES LGBT DIVERSITY MEAN IN BIG LAW?

The remainder of our discussion was riveting, and I still look back on that lunch with fondness and a gratitude for being urged to speak up. Still, I left lunch that day questioning how I fit into Big Law culture and, specifically, what LGBT diversity efforts in private practice mean to the number of talented queer attorneys who do not fit the white, cisgender, and male epitome.

After graduation, I was excited to accept an offer to return full-time to the firm where I spent that summer. I've since moved on, spending a couple years at another law firm in Manhattan before returning to my wife's hometown to join Greenberg Traurig's Albany office a few years ago. Each firm has made their devotion to LGBT diversity clear, and I have never personally felt discriminated against for being an out lesbian. In fact, I love my job and have always felt welcomed and respected by my colleagues.

As noted above, however, I "pass." Little about my physical presentation invites questions about my sexuality. Unless I am attending an event with my wife, participating in an LGBT-focused group, or speaking to someone with excellent gaydar, I am, for the most part, assumed to be a straight, white, professional woman.

Putting aside frustrations about femme invisibility in and outside of the queer community, the privilege of passing allows me, and those like me, fully to take advantage of efforts to advance LGBT diversity in private practice. I check an all-encompassing box labeled "LGBT" but, apart from my femaleness, do not do much to challenge the quintessential image of a young attorney in Big Law. My gay, cisgender, white, male colleagues do even less.

This is not merely one person's observation. Despite the increased emphasis on diversity and inclusion within the legal field over the past decade or so, the legal profession remains one of the least diverse of any profession.[1] In fact, notwithstanding many employers' commitment to LGBT equality within their firms, the National Association for Law Placement, Inc. (NALP) has consistently noted that "important studies by major bar associations have found that LGBT lawyers still experience discrimination in the workplace."[2] Recent employment data demonstrates that lesbian, gay and bisexual law school graduates were "far more likely to be working for a public interest organization . . . and less likely to be working at a [private] law firm compared with any other demographic group based on gender and race/ethnicity."[3]

It is well understood that diversity – and specifically, a "commitment to treating and compensating LGBT lawyers fairly and equally" – is key to attracting and retaining the best and brightest young lawyers.[4] Although advances in this area should be commended, law firm leadership cannot become complacent. Real, in-depth discussions regarding ways to expand diversity efforts in the legal community must continue.

One topic that should be considered is the homogenous nature of the "LGBT" diversity category. As bell hooks noted in her powerful (or some might say, notorious) critique of Sheryl Sandberg's book, *Lean In*, "race, class, sexuality, and many other aspects of identity and difference ma[k]e explicit that there was never and is no simple homogenous gendered identity that we [can] call 'women'[.]"[5] The same can be said for the "LGBT" moniker, especially with respect to diversity efforts in private practice.

EMBRACING "INTERSECTIONALITY"

Discussions should call for a more accurate representation of the queer community in the legal profession, one that embraces or, at the very least, acknowledges the reality of intersectionality. Without this, efforts to improve LGBT diversity will either plateau or continue to provide a limited platform aimed to assist only those members of our community who already enjoy the perks of some real, or perceived, privilege.

Private practice as a whole would benefit from these discussions. The brilliant transgender man who graduated summa cum laude from a top school, sat through 25 on-campus interviews, and failed to receive a single call back offer, would appreciate these discussions. The firm that attempted to recruit a black, gender non-conforming queer person with credentials to die for and a reluctance to even consider a position in private practice for fear of discrimination would be eager to participate in these discussions. And, I would wager, the white, privileged, gay men I had lunch with nearly 10 years ago, many who now sit in positions of power across the country, would welcome and seek to advance these discussions.

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1. Allison E. Laffey and Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives,* American Bar Association (May 2, 2018), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/.

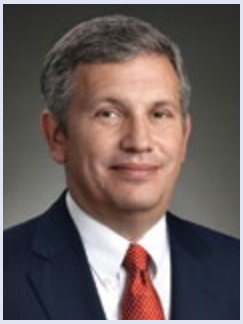
2. NALP, Recruiting, Hiring, and Retaining LGBT Lawyers, https://www.nalp.org/recruitinghiringretaininglgbtqlawyers.

3. NALP, 2016 NALP Employment Data, Infographic: LGBT, http://www.nalp.prg/lgbt_lawyers.

4. See *supra* n. 3.

5. bell hooks, *Dig Deep: Beyond Lean in,* The Feminist Wire (Oct. 28, 2013), https://thefeministwire.com/2013/10/17973.

Henry M. Greenberg, President



Henry M. "Hank" Greenberg of Albany, a shareholder at Greenberg Traurig, LLP, became president of the New York State Bar Association on June 1, 2019. He spent the previous year as president-elect and chair of the House of Delegates.

Greenberg concentrates his practice on civil litigation, criminal and civil investigations, and regulatory and administrative law. He is a former counsel to then-New York State Attorney General (now Governor) Andrew M. Cuomo, general counsel for the New York State Department of Health, and a federal prosecutor. Among other government posts, he also served as a law clerk to then-Associate Judge (later Chief Judge) Judith S. Kaye of the New York. Court of Appeals.

Previously, he served in NYSBA's House of Delegates as vice-president of the Third Judicial District, and chaired the Committee on the New York State Constitution, the Committee on Court Structure and Operations, the Legislative Policy Committee, the Steven C. Krane Special Committee on Law School Loan Assistance for Public Interest, and the Committee on Attorneys in Public Service. He chairs the New York State Third Department Judicial Screening Committee, serves on the statewide Judicial Screening Committee, and is counsel to the New York State Commission on Judicial Nomination, which nominates New York's Court of Appeals judges.

He is a vice chair of the Historical Society of the New York Courts, a life fellow of the New York Bar Foundation, a fellow of the American Bar Foundation, and a member of the New York State Judicial Institute on Professionalism in the Law and the Advisory Group of the New York State and Federal Judicial Council.

A frequent lecturer, Greenberg has been published numerous times on a wide range of legal subjects. He is a co-editor of the book *Judith S. Kaye in Her Own Words: Reflections on Life and the Law, with Selected Judicial Opinions and Articles.* In April 2019, Greenberg joined an impressive group of individuals from the highest levels of the profession who have delivered the Charles Evans Hughes Memorial Lecture, the annual event that honors Hughes's service to the nation and devotion to the law. Greenberg's lecture was titled "Charles Evans Hughes & The Role of New York's Organized Bar at a Time of Crisis for the Rule of Law."

Greenberg earned his law degree from Syracuse University College of Law, *cum laude,* and his undergraduate degree from the University of Chicago, with honors.

Scott M. Karson, President-elect

Scott M. Karson of Stony Brook, a partner at Lamb & Barnosky, is president-elect of the New York State Bar Association.

Karson is a commercial and municipal litigator with a concentration in appellate work and has argued more than 100 appeals in the state and federal appellate courts. He also chairs his firm's Professional Ethics Committee and its Litigation Committee.

A NYSBA member for 31 years, Karson has served on the Executive Committee as vice president for the Tenth Judicial District (Nassau and Suffolk counties), and still serves on the House of Delegates. He is a member and former chair of the Audit Committee and is a member of the Finance Committee, the President's Committee on Access to Justice and the Committee to Review Judicial Nominations. A longtime member of the Committee on Courts of Appellate Jurisdiction, Karson worked during his time as chair to clarify court rules to create a standard price that could be charged for court transcripts.

A past president of the Suffolk County Bar Association, Karson was the county bar's delegate to the American Bar Association (ABA) House of Delegates. As president-elect, he will be a NYSBA delegate to the ABA. He still serves on the ABA's Council of Appellate Lawyers. Karson is vice chair of the board of directors of Nassau Suffolk Law Services, the principal provider of civil legal services to Long Island's indigent population. He has twice received the Suffolk County Bar Association President's Award, in 1996 and 2011, and received the bar's Lifetime Achievement Award in 2018.

Karson earned his law degree from the Syracuse University College of Law, *cum laude*, and his undergraduate degree from the State University of New York at Stony Brook.

Sherry Levin Wallach, Secretary

Sherry Levin Wallach was re-elected to a third one-year term as secretary of the New York State Bar Association. She is of counsel to Bashian P.C. in White Plains and Brown Hutchinson in its New York City office.

A former chair of the Criminal Justice Section, Levin Wallach has served as vice president from the Ninth Judicial District to the Executive Committee, chaired the Membership Committee and co-chaired the Task Force on Incarceration Release Planning and Programs. Currently in her third four-year term on the House of Delegates, Levin Wallach serves on the Committee on Professional Discipline, the Committee on Mandated Representation, the Task Force on Parole Reform and chairs the Resolutions Committee.

Levin Wallach is co-founder of the NYSBA Young Lawyers Section Trial Academy, an annual program offering five days of intensive trial training, where she is a team leader and lecturer. The very popular Trial Academy just celebrated its 10th year, and typically operates at capacity. Levin Wallach organizes and lectures at continuing legal education programs for NYSBA and the Westchester County Bar Association on the topics of criminal and civil trial practice, ethics and DWI. She has written a chapter on DWI defense, "Best Practices for Defense Attorneys in Today's DWI Cases," in *Inside the Minds: Strategies for Defending DWI Cases in New York*, and articles on criminal justice issues and trial practice.

Levin Wallach concentrates her practice on criminal defense, estate planning, probate and estate administration, real estate, and general civil litigation in the state and federal courts. She is admitted to practice in New York, the U.S. District Courts for New York's Southern and Eastern Districts and the U.S. Supreme Court. She serves on Westchester and Putnam counties' 18B panels under their assigned counsel plans, which provide criminal defense for indigent people.

She is a former assistant district attorney of Bronx County and was principal at her law firm Wallach & Rendo, LLP for approximately 14 years.

Levin Wallach earned her law degree from Hofstra University School of Law, now the Maurice A. Deane School of Law at Hofstra University, and her undergraduate degree from George Washington University.

Domenick Napoletano, Treasurer

Domenick Napoletano of Brooklyn is the newly elected treasurer of the New York State Bar Association.

Napoletano is a solo practitioner focusing on complex commercial litigation and appellate work while maintaining a general practice. A number of his cases have appeared in published decisions, most involving real property, and tenancy and occupancy issues. He has also spearheaded various state and federal class action lawsuits, including one against the New York City Department of Finance for its imposition of 'vault taxes.'

Among his NYSBA activities, Napoletano served on the Executive Committee as vice president from the Second Judicial District, and the House of Delegates representing the Brooklyn Bar Association. Napoletano is a past president of the Brooklyn Bar Association, the Columbian Lawyers Association of Brooklyn, the Confederation of Columbian Lawyers of the State of New York and the Catholic Lawyers Guild of Kings County. He co-chairs the NYSBA's Committee on Civil Practice Law and Rules and is chair-elect of the General Practice Section. His service on NYSBA committees includes Finance, Leadership Development, Bar Leaders of New York State, Animals in the Law, the President's Committee on Access to Justice, Task Force on the Evaluation of Candidates for Election to Judicial Office and the Task Force on Mass Shootings and Assault Weapons. He is a member of the Working Group on Puerto Rico, and the Membership Committee's Subcommittee on Non-Resident Members.

Napoletano has served on the Attorney Grievance Committees for the 2nd, 11th and 13th Judicial Districts. He also has served in various capacities at legal services organizations in Brooklyn – as treasurer, advisory council member and member of the board of directors of the Bedford-Stuyvesant Legal Services Corporation and as vice president of the Bedford-Stuyvesant Foundation for Civil Justice.

While in college and throughout law school, Napoletano worked for then–New York State Assemblyman Michael L. Pesce, now the presiding justice of the state Supreme Court Appellate Term for the 2nd, 11th and 13th Judicial Districts. He earned his law degree from Hofstra University School of Law and his undergraduate degree from Brooklyn College.

8 questions
and a closing argument

Member Spotlight with Stevie Conlon

Conlon is vice president, tax and regulatory counsel for Wolters Kluwer. She lives in the Chicago area.

What do you find most rewarding about being an attorney?

I love being a lawyer, solving legal challenges to help customers and clients. For the past 15 years, I've been able to work on technology-driven solutions. I really enjoy building the compliance tools that help organizations save money, process time and get their regulatory requirements right. Being an attorney gives me the skills to do that.

Who is your hero or heroine in the legal world?

Eddie Cohen, who was undersecretary of Treasury during the Nixon administration. I met him, when he was a partner at the Washington, D.C., law firm Covington Burling and a tax professor at the University of Virginia School of Law. We bonded over mutual funds. Eddie was smart, optimistic, full of energy and truly interested in solving problems.

What or who inspired you to become a lawyer?

My dad was a tax lawyer. His enthusiasm for his work showed me that the law could provide a lifelong way to stay intellectually engaged and have fun while helping others.

When I was 12, my dad started giving me court opinions to read. Sometimes I would go back to his office with him after dinner. I could read anything I wanted in the law library and read a lot of the law encyclopedia "Am. Jur." When I was 14, my mom and younger brothers left town to attend a family funeral, and I stayed with my dad, who was in the midst of a trial. I watched him try an important case in federal Tax Court (*Ross Glove v. Comm'r*, 60 TC 569, 1973) that has been discussed in some of the tax journals I've read.

When I was starting high school, my dad recommended that I join the debate team and gave me a paperback copy of Wellman's *The Art of Cross Examination*, which I carried with me at school.

If you hadn't become an attorney, what career path would you have pursued and why?

Physics or computer science: I'm a math nerd. Working with technologists at Wolters Kluwer has really made me happy – like I'm back in high school with my math team and math club friends.

If you could dine with any lawyer – real or fictional – from any time in history, who would it be and what would you discuss?

U.S. attorneys general or Supreme Court justices, such as attorneys general Janet Reno and Alberto Gonzales, or justices Holmes, Brandeis, Cardozo or Douglas, because I'd like to get their insights on how they solved extremely difficult challenges they faced during their careers.

What do you think that most people misunderstand about lawyers and the legal system?

I think it centers around fear of what one doesn't know. That is, having a fear of consequences, and a simplistic understanding of what lawyers do, based on TV shows and movies.

If you could practice in a different area of the law other than your current area, what would it be?

I practice in a range of areas. I'm known for tax law, but I have dealt with a lot of legal disciplines in my prior transactional financial derivatives practice. Currently, I've been focused on many legal issues in the context of new technologies like blockchain and cryptocurrency. That said, intellectual property and patent law have always fascinated me.

What is your passion outside of work and the law?

Music. I'm a huge fan of opera. I listen to classical music in the mornings and classic rock in the evenings. On weekends, I play bass guitar in a Chicago-area AC/DC tribute band, TNT. Not long ago, I was at a music festival and found a seat at a crowded table in the shade. One of the people sitting there said, "Do you mind if I ask you a personal question?" As a transgender woman, I get that often enough. I said, "Sure, and I will choose whether to answer it." He asked, "Aren't you the bass player in TNT?"

Lawyers should join the New York State Bar Association because . . .

The networking opportunities are phenomenal. Membership also feeds the Renaissance person in me because you share your learning and learn so much from other lawyers, which reinforces the value of being a lawyer and the values lawyers hold.

Lawyer-to-Lawyer Referral

STOCKBROKER FRAUD, SECURITIES ARBITRATION & LITIGATION

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Attorneys- refer stockbroker fraud or other securities and commodities matters to a law firm with a history of obtaining significant recoveries for investors. Christopher J. Gray, P.C. has substantial experience representing investors in arbitration proceedings before the Financial Industry Regulatory Authority and the National Futures Association and in litigation in the state and federal courts. Cases accepted on contingent fee basis where appropriate. Referral fees paid, consistent with applicable ethics rules. Call or email Christopher J. Gray to arrange a confidential, no-obligation consultation.

The Yin-yang of Online and In-Person Networking

By Carol Schiro Greenwald

Networking is about relationship building: moving from the initial handshake with an unfamiliar person through many contacts until you know each other well enough to be colleagues, clients, referral sources or friends. The road to collegiality leads through many personalized connection points.

Many networkers think these "touches" are best achieved in person. Others, who use technology all day, every day, think that social media interactions are a logical 21st century substitute for in person connections.

Most effective networkers use both avenues to make and develop connections. They may meet online but follow up by meeting for breakfast in person. Or someone who has many in-person networking activities each week may still request LinkedIn "links" with these people, or use technology to transmit content through blogs, newsletters and articles.

Carol Schiro Greenwald, Ph.D. is a strategist, coach, trainer and networking guru for lawyers. This article is drawn from her new book, *Strategic Networking for Introverts, Extroverts and Everyone in Between* (American Bar Association, Law Practice Division, 2019).

Risk adverse networkers worry about too much sharing online because they fear loss of privacy, cyber theft, ethics issues, and misinformation. They worry about revealing private information to online contacts who turn out to not be what they seem. These networkers tend to limit their networking. They become:

- Lurkers who read online but never participate by sharing information or joining conversations,
- Limited-use networkers who only use the internet to share content.

Those who prefer online networking cite the time saved because they don't have to travel to and from a meeting place. They love the ease of connecting from anywhere—in their car, on a train, walking down the street. They also appreciate the intellectual and geographic potential of the web and the breadth of contacts and visibility options that are available online.

Combining the two networking avenues, the networking yin-yang approach, is a valuable form of networking because it balances the ubiquity of internet networking options with the in-the-flesh authenticity of in-person meetings. This article reviews the range of online networking activities and then highlights some effective ways to integrate in- person and online networking.

ONLINE NETWORKING

According to Attorney at Work's 4th Annual Social Media Marketing Survey (2018) lawyers have embraced social media!

- Eight out of ten lawyers use social media.
- 85% of those lawyers say social media is part of their marketing strategy. They use it primarily for brand building or to stay in touch with clients and contacts.
- Lawyers' favorite sites are LinkedIn and Facebook. Although the question wasn't asked, it would seem logical that B2C lawyers who work with individuals are more likely to use Facebook where they can connect to people in the context of their personal life, while B2B business lawyers are more likely to favor LinkedIn, called the No.1 online professionals' networking site.
- Increasingly lawyers see the ROI of online activities. Seven out of 10 lawyers say social media is "very" or "somewhat" responsible for bringing in new clients.

The web is an excellent venue for business and professional purposes. Online you can:

- Connect or reconnect with people you want in your network;
- Leverage the national and international breadth of the web to compete outside your local area;
- Build an online audience interested in your thought leadership, your services, or your online relationships with others;
- Broaden your mind by following the ideas and activities of influencers;
- Stay visible and top of mind.

Both LinkedIn and Facebook offer opportunities to join subject-matter, institutional [think company or college alumni groups], social, community, and demographic-focused groups that introduce you to communities of people with similar interests. Through this kind of group participation members get to know each other informally. When it becomes appropriate for you to offer information related to your work expertise, your reply is believable to the others because it occurs within the shared discussion context.

Participating in these conversations also provides an opportunity to learn about your target audience in terms of their interests, their opinions, their "hotspots," and

their jargon. This kind of knowledge helps you blend into your prospects' and clients' worlds.

The increasing online participation of lawyers is paralleled by an increasing number of lawyer-focused websites. A Google search for "lawyer or attorney social networking sites" yields 129 million entries. The sites range from open social networks like LinkedIn to lawyer directories to invitation-only, private networking groups. Some sites are platforms for disseminating content such as Justia and LexBlog. Others are listservs and single-subject groups that share knowledge informally among members. Because lawyers use LinkedIn more than any other online platform, we will look at some of its networking opportunities.

LINKEDIN

LinkedIn is the largest professional networking online site, with more than 500 million members. Professionals use the site to:

- Connect to people they know or want to meet;
- Connect to people they want to stay looped in with after they have met them;
- Circulate articles, event invitations and updates;
- Research people, companies, and places as part of their in-person networking preparations;
- Begin a dialogue with thought leaders;
- Make referrals and get referred;
- Join and participate in groups that are important to them or to their niche markets.

LinkedIn Groups: As with in-person networking, group memberships make it easier to build a solid contacts list because you can interact with many potential connections at once. There are literally thousands of LinkedIn groups. LinkedIn allows you to join up to 100 of them.

Of course, join your alumni groups, professional associations and online groups that parallel the in-person groups and organizations you belong to. Then, look for groups with like-minded people in similar professions who can help you expand your referral network. Join groups of people with similar interests.

Go where your clients, referral sources and those in allied industries and professions go. Join groups that provide information about industry or demographically-relevant trends. For example, health care, elder law and T&E lawyers could join AARP (an umbrella organization focused on the needs of those over 50 years old), retirement planning groups, trade and professional association groups ranging from geriatric consultants to health care providers, locally focused senior citizen advocacy groups, groups for financial planners, bankers and accountants who target the elderly and, of course, bar associations.

SIDEBAR: Helpful Hints for Online Networking

BE CONSISTENT

- Be the same person on and offline. The competencies you showcase online should be obvious in person when you talk about the benefits of your expertise.
- Remember what your goals are.
- Continue your in-person networking strategy online.

COURTESY FIRST—THANK PEOPLE

- When they connect with you.
- When they look at your profile.
- When they like, share, or comment on your posts.
- When they provide answers to your questions or make introductions for you.

KEEP ALL POSTS ON ALL VENUES PROFESSIONAL

- That photo of you on the beach that you posted 10 years ago is still available online. Think if it presents the image you want to present today. If it doesn't, take it down.
- Protect your online reputation.
- Remember online media, like in-person activities, has a social component—so emphasize sharing rather than selling.
- Give-to-get because what goes around comes around.

If you have a B2C focus, you may want to seek out groups built around the personal interests of those you want to work with, such as Mom's groups, PTAs, book clubs, religious social groups, hobby groups, etc.

LinkedIn groups can be excellent sources of career or practice-related information and innovative ideas. Join the groups that people you follow for their ideas belong to.

ONLINE ETIQUETTE

Just as in-person networking assumes certain attitudes and etiquette, so too does online networking. Personalization is important in both settings. For example, when you invite someone to link to you, it is a best practice

to add a few words about where you have met or who you know in common or why you want to connect with them.

When someone has looked at your LinkedIn profile, consider sending them a message saying, "Thank you for taking the time to review my profile. Can I help you in any way?" (or) "Would you like to meet for coffee?" If someone adds an online testimonial for you, send a message thanking them for their help.

When you participate in online conversations, use them as an opportunity to showcase your expertise or personal experience with the issue at hand. Don't say "Great article." Instead say, "Great article because [and then give a reason]." Your reasoning becomes a billboard showing everyone else in the group how you think and how you feel about issues shared in the group. A thoughtful conversation thread becomes a reputation builder establishing you as an expert.

COMBINING ONLINE AND OFFLINE NETWORKING

Many organizations do it for you. Online groups hold in-person events. In-person organizations use online options to form groups, send invitations, and so on. Most in-person networking groups have websites where the public can learn about the group. Many also offer member-only email-based listservs. Often, groups that meet in person use social media sites such as Meetup.com to attract members, announce their schedules, and have participants register for specific activities.

Effective personal networking should also combine online and in-person activities so that they complement and reinforce each other. In-person networking satisfies basic human needs. People are animals. We need to sniff out strangers, touch the merchandise and assess the authenticity of those we meet.

Researchers generally agree that there is a psychological difference between online and in-person relationships. Social media facilitates connections but creates little emotional involvement. By contrast, in-person encounters provide emotional and physiological benefits.

Grow your contacts list: Just as in-person networking is built around the give-to-get principle, so, too, take advantage of internet opportunities to share knowledge and make introductions. Use the reach of the internet to extend the possibilities that turn up with in-person networking.

When you meet in person, invite people to connect with you online. When you meet online and want to make sure there is a fit with your strategic networking goals, plan an in-person meeting or phone call. When you identify interesting people through group conversations, link to them and, if possible, invite them to join you for an in-person coffee.

LinkedIn offers an excellent yin-yang opportunity to grow your own network when people share those on their contact lists with colleagues. This is a multi-step process:

1. First you pick a colleague who is probably linked to people you would like to know.
2. Then you review that person's connections and

select one or two people you would like to meet.

3. You ask your connection to scan your connections and find individuals of interest.
4. Each person then invites their identified connections to a joint breakfast or lunch.
5. At the meal, the two who already know each other lead the conversation to highlight relevant aspects of their connections.
6. When successful, the two lead connectors have strategically broadened their networks. The sharing aspect of the activity speeds up the relationship building process.

Keep growing your contacts base. Add people you meet at in-person events. When you see synergies through online conversations or in-person conversations, make introductions. Use internet sites to search through rosters from your schools and previous employers to become reacquainted with old colleagues and friends.

Research people before you meet them: LinkedIn and other networking sites offer excellent options for investigating people before you meet them. Use the opportunity to learn about breakfast and lunch colleagues, guest speakers, networking group leaders, and so on.

- Read their online bios for a sense of what is important to them.
- Scroll down to the personal section to learn something about their private life.
- If the site shows you share contacts, be sure to make a note about this so you can begin a conversation on common ground.
- If you have never met in person, pay attention to the person's photograph so you will recognize them when you meet.

Think globally. Online offers a way to extend your reach beyond your local geographic area. Follow global trends online if it is appropriate for your business. When you travel, search your online contacts for people who live where you are going, and connect. Before conferences, research who else you know will be there and make plans to connect.

Keep in touch: The internet makes it easy to keep in touch between in-person meetings. For example, you can:

- Use online personalization reminders to send birthday cards, anniversary cards, and other appropriate personal cards to people you know.
- When you learn through online sites that people have work anniversaries, change jobs, marry or have children, send a note or a personalized card.
- If appropriate, send a note on the anniversary of a successful case.

Combining the advantages of online and in-person networking adds both depth and breadth to your initiatives. Use the breadth of the internet to share knowledge and expand your own intellectual horizons. Use the depth of in-person connections to move in a targeted way toward your personal and career goals.

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

DEAR FORUM:

I represented a client in a dispute including allegations that my client improperly took confidential proprietary data from the plaintiff. In the course of discovery, my firm obtained a copy of that data from our client, which we maintained on our computer network. After some initial discovery and motion practice in the case, we were replaced as counsel. At the time, I believed that we were not owed any additional fees by the now former client and I turned over the files requested by the incoming counsel, including a copy of the data. I kept digital copies of all of the files in the case, however, including the data. I later learned that our firm was owed significant fees by the client and, when advised of this, the former client started to complain about our work in the case and refused to pay our fees. Although I believe that the former client's complaints were not serious and were likely part of an attempt to negotiate a reduction in fees, we issued a retaining lien and declined to provide any further files requested by the new counsel until the payment issue was resolved.

I just received a call from the former client's new counsel who said that they settled the underlying matter with the plaintiff, but as part of the settlement all copies of the data needed to be destroyed within the next week, including any copies we have in our files. I reminded the new counsel that we had a lien on the file and we had not signed any agreement to destroy the data. The new counsel quickly said that we had no right to hold the client's data "hostage" and we had an obligation to destroy the client's data if the client directed it.

I don't believe that the new counsel is correct. I think that we have the right to retain copies of my former client's files (including discovery materials) in order to defend myself against any accusations of malpractice by the client. I don't want to prejudice the former client, but I think I have a legitimate reason to retain the data. Can I demand that my outstanding legal fees be paid and request a release from any wrongdoing from my former client as a condition of my destruction of the data?

Sincerely,
Lee Ninplace

DEAR LEE NINPLACE:

A dispute with a client about turning over files when there is an outstanding balance is an unpleasant fact of life that many attorneys will experience at some point in their careers. As much as the practice of law is a noble profession, it is also a business. Attorneys work on a fee-for-services basis and should be fairly compensated. The answer to your question requires a close analysis of various sections of the New York Rules of Professional Conduct (RPC).

RPC 1.15(c)(4) states that a lawyer shall, "promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive." RPC 1.16(e) provides that upon the termination of an attorney's representation, the "lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including … delivering to the client all papers and property to which the client is entitled." Even if the circumstances surrounding the end of the attorney-client relationship were unfair to the attorney, the lawyer is obligated to take reasonable steps to mitigate any prejudice the client may face by discharging their counsel. *See* RPC 1.16 Comment [9]. RPC 1.16 Comment 9, however, specifically notes that a "lawyer may retain papers as security for a fee only to the extent permitted by law." *Id.,* citing RPC 1.8(i)(1). We will address this point in greater detail below. In this context, "papers" refer to the client's file maintained by the attorney whether it is in electronic or paper form. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 967 (2016 ed.).

In Formal Opinion 766, the New York State Bar Association (NYSBA) Committee on Professional Ethics

("Committee") stated that the question of whether certain documents belong to the client is a question of law and not ethics. The New York Court of Appeals has held that a client has "presumptive access to the attorney's entire file on the represented matter, subject to narrow exceptions." *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.,* 91 N.Y.2d 30, 37 (1997). *See also* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 968. These exceptions include documents subject to a duty of non-disclosure to a third party or documents intended for internal law firm office review and use. *See id.* The Court of Appeals in *Sage Realty* explained that clients are not necessarily entitled to law firm documents intended for internal law firm use and held that lawyers have a need "to be able to set down their thoughts privately in order to assure effective and appropriate representation…. This might include, for example, documents containing a firm attorney's general or other assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation." 91 N.Y.2d 30, 37-39 (1997). The Court also noted that these types of documents are not likely to be helpful to the client or new counsel, which also militates in favor of allowing an attorney to retain these types of documents. *See id.* at 38.

Clients often expect the following items to be included in their files: documents the attorney obtained from third parties through discovery, subpoenas or requests, court papers and pleadings, transactional documents (closing documents and contracts), correspondence with the client, third parties or opposing counsel, research and work product (such as draft memoranda or internal e-mails addressing legal issues). *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 969.

But, as noted above, a lawyer can – under certain circumstances – hold a client's file as security for payment of legal fees. *See* NYSBA Comm. on Prof'l Ethics, Op. 1164 (2019), citing NYSBA Comm. on Prof'l Ethics, Op. 780 (2004). In addition, RPC 1.6(b)(5) specifically permits a lawyer to reveal a client's confidential information in order to establish or collect fees due and owing or to defend against accusations of misconduct. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 972. In this regard, the Committee has opined that a lawyer may properly insist on a release from a former client as a condition of the lawyer forgoing his interest in maintaining a copy of the file. *See* NYSBA Comm.

on Prof'l Ethics, Op. 1164 (2019), citing NYSBA Comm. on Prof'l Ethics, Op. 780 (2004). There are certain "extraordinary circumstances," however, that would override a lawyer's interest in retaining a client file. *See* NYSBA Comm. on Prof'l Ethics, Op. 1164 (2019). For example, "where the client has a legal right to prevent others from copying its documents and wishes for legitimate reasons to ensure that no copies of a particular document be available under any circumstance." *Id.*, citing NYSBA Comm. on Prof'l Ethics, Op. 780 (2004). The circumstances, however, will require a fact-intensive analysis to balance the interests of the client and lawyer in any situation where the interests of the lawyer and client differ with respect to the file retention by the lawyer. The Committee opined that "[t]his balance determines the extent to which the lawyer may condition compliance with a client's demand for destruction of a file on protections for the lawyer's benefit." *Id.* The Committee offered some helpful factors and common considerations when balancing the interests of clients and lawyers. Lawyers should consider: (1) the strength of the client's ownership claim; (2) the sensitivity of the materials; (3) the centrality of the sensitivity of the materials to the object of the representation; (4) the legitimacy of the client's request for destruction; (5) the extent to which the documents comprise the client file (one document versus the entire file); (6) difficulty with the destruction of the documents; (7) risk of liability for the attorney; and (8) availability of methods to protect the lawyer's interest. *Id.*

The situation presented in NYSBA Comm. on Prof'l Ethics, Op. 1164 (2019) is very similar to your inquiry. In that opinion, the inquirer also had an interest in maintaining a former client's file from a litigation representation due to concern over potential suits by the former client and the adverse party in the case. *Id.* The former client requested deletion of certain files as part of a settlement agreement with the adverse party. *Id.* In that instance, the Committee answered that it was appropriate for the lawyer to condition the destruction of the client's files upon the execution of a simple hold-harmless agreement. *Id.* The Committee noted, however, that there is some ambiguity with respect to whether the lawyer could *insist* that the former client pay advance legal fees and expenses in the event of a subsequent claim arising out of the files before complying with the client's request to destroy its file. *Id.*

Based upon the Committee's analysis, we agree that you may condition the deletion of your former client's files on the signing of a hold-harmless agreement. *Id.* It does not seem you have a basis to deny that the client owns the documents or that destruction of the file would place an undue burden on you. The files at issue, and their potentially proprietary information, also appear to be the central aspect of the litigation for which you were engaged. *Id.* The destruction in exchange for a hold-harmless agreement balances the interests of your former client with your interest in being protected against future claims. We believe that you are also permitted to maintain an inventory list of the documents destroyed (including the file names, sizes and dates for data supplied by the former client) as an additional level of protection from future claims. *Id.*

With respect to your retaining lien, when clients fail to pay, New York lawyers ordinarily have the right to assert a retaining lien over the client's file. RPC 1.8(i)(1); *see* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 969. However, there is a catch. As noted in RPC 1.16 Comment 9, a "lawyer may retain papers as security for a fee *only to the extent permitted by law*." *Id.* (emphasis added), citing RPC 1.8(i)(1). While retaining liens are permissible in New York, other jurisdictions take a different tack. For example, New Jersey Rule of Professional Conduct 1.16(d) prohibits lawyers from asserting common law retaining liens. *Id.* New Jersey's highest court based its decision to abolish common law retaining liens on a report from the New Jersey Supreme Court's Advisory Committee on Professional Ethics that found that "it is rare for a lawyer with any sense of professionalism to assert a common law retaining lien when a client's interest in return of the file is acute." *Id.*

In New York, courts have generally held that attorneys cannot be required to turn over files to a client or successor counsel unless the fee dispute is resolved or some security is put in place for the attorney's fees where a valid retaining lien is in place. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 594 citing *American Stevedoring, Inc. v. Red Hook Container Term., LLC*, 2015 WL 7725445 (1st Dept. Dec. 1, 2015). *American Stevedoring* noted a potential exception in cases of "exigent circumstances." *See id.*

From the details you have given us, it appears that you have a valid basis to refuse to destroy the files until your retaining lien has been resolved. We strongly suggest, however, that you investigate whether your retaining lien is completely valid and reasonable before conditioning destruction of the files on its resolution. For example, if you were removed as counsel for cause, the amount of your legal fees and retaining lien were unreasonable, or there is some other deficiency in your retaining lien, it may not be enforceable and you could expose yourself to liability if your refusal to comply with the former client's direction derails the settlement. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 594. While your former client should have involved you in the settlement agreement, and the 10-day request may be unreasonable considering the outstanding retaining

lien, there is some risk in taking an aggressive approach if there is any question as to the validity of your lien. If you want to mitigate that risk, an alternative option is to condition the destruction of the files on your former client placing the amount of the retaining lien in an escrow account subject to the resolution of the fee dispute. This will ensure that the lien is secured and the former client is not prejudiced in complying with its settlement agreement obligations.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com) and
Carl F. Regelmann, Esq.
(regelmann@thsh.com)
Alexandra Kamenetsky Shea
(shea@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

My partner and I have a two-person firm that we have operated out of a small shared office for many years. With the advances in technology over the last two decades, such as e-filing, video conferencing, file transfer programs, high speed internet, and email, we decided that we don't really need our office space as much as we did only 20 years ago. And it isn't just our office technology that has reduced the need for our office space. Our clients prefer to conduct most of their communications with us electronically and they aren't interested in spending time traveling to our office if they can avoid it. We meet with clients periodically in the office for certain matters, like the signing of wills and deposition preparation, but when we don't have client meetings scheduled, we usually just work from home to avoid our commutes. Our office lease is about to expire and we are seriously considering alternatives to our traditional office space.

One option I have read about is a "virtual office." As I understand the virtual office business model, we could pay a fee to have access to a meeting space as we need it. My preliminary research suggests that it would be a significant reduction of our overhead costs and I don't think it will impact our business significantly as long as we have a reliable location where we can meet with clients when we need to schedule a face-to- face meeting.

I know that there are restrictions on how attorneys maintain their offices and I don't want to run afoul of my ethical obligations. I think it will also be beneficial to our clients since many of the virtual offices are centrally located and it will be easier for many of our clients to travel to our "virtual" office space when we do meet in person. What issues do I need to consider if we decide to transfer to a virtual office? For instance, what address can we put on our letterhead and our website?

Sincerely,
Neo

Bringing Our 'Full Selves' to Work

As LGBTQ lawyers practicing today, we take for granted the freedom many of us now enjoy to "bring our full selves" to work. But as I look around at the photographs of my husband in my office and think about the ease with which I now talk about us as a couple and a family to my colleagues, I remember that it wasn't always that way.

I was nine years old in 1969, the year of the Stonewall uprising. I had no real idea then that I was gay, much less that a melee between drag queens and police officers in a bar in Greenwich Village would have an impact on my life.

When I started practicing law at a large corporate law firm 15 years after Stonewall, still coming to terms with my own sexuality, the professional world was not exactly "gay-friendly." There were no out gay attorneys or other professionals at my firm or, to my knowledge, among the clients for whom I worked. The world for gay people, a world that had seemed so promising and headed toward freedom and openness in the decade fol-

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lowing Stonewall, had changed dramatically in the few years before I arrived at that job, and not for the better.

By 1984, we were in the midst of the AIDS epidemic, with an unsympathetic president and a fearful public. For many gay people entering the professional world then, coming out at work was unthinkable. There was a very real fear that revealing your sexuality could mean the loss of your job and, with it, the loss of health insurance benefits.

It is easy to forget that legal protections against employment discrimination for gay people would not arrive in New York City until 1986, or statewide in New York until 2003. Even if you weren't at risk of being fired, coming out at work seemed incompatible with being on track to partnership and long-term career success at a law firm.

And, so, even as I was gradually coming out to friends and family, for a long time I remained closeted at work. For a number of years, my professional life and personal life were two different worlds. As colleagues my age married and started families, at work I remained ostensibly "single." It would be naïve of me to think that no one at work knew I was gay, but I nevertheless was not ready for a long time to reveal my truth to my colleagues.

It's painful to remember that even after I began a serious relationship with the man who would ultimately become my husband, I still occasionally brought female friends to law firm events where a "date" was required or expected. And yet each time a homophobic joke or remark was made in my company — which sadly was still a fairly common occurrence — I became more convinced that the closet was the safest place to be at work.

What changed finally? By the 1990s some advancements for the gay community as a whole were being won in society, but we were also suffering defeats, like "Don't Ask, Don't Tell" and the Defense of Marriage Act. There never seemed to be a good time to come out at work.

Ultimately, however, there came a tipping point for me, a point at which I realized that the hard work of being a successful lawyer wasn't worth the effort if I could not integrate my personal life and my work life in the same way my straight colleagues did. I also came to realize that it was unfair and disrespectful to my partner for me to continue to be closeted at work.

And so, a few months before I was to be considered for partnership at my law firm in 1995, I decided it was time to finally bring my partner to a law firm social event. Looking back, what I remember most about that evening is how unmemorable it was, how normal it seemed to have him there with me, and how little my colleagues seemed to care.

In the two decades since then, there has been enormous progress in the expansion of civil rights for LGBTQ people. Today in the professional world (at least in most of New York), we understand the value of diverse and inclusive workplaces. We know that our clients are increasingly demanding diverse teams of lawyers, including LGBTQ lawyers, to work on their matters. We understand the untenable position people are placed in when they are forced to keep their work lives and personal lives in totally separate baskets.

And, as experienced LGBTQ lawyers, we know the importance of being out at work and acting as role models for younger lawyers. To be sure, these values still are not yet embraced uniformly across the country, and there remains much work to do on this front, but from where I sit, and from where I started, there is much reason for continued hope and optimism.

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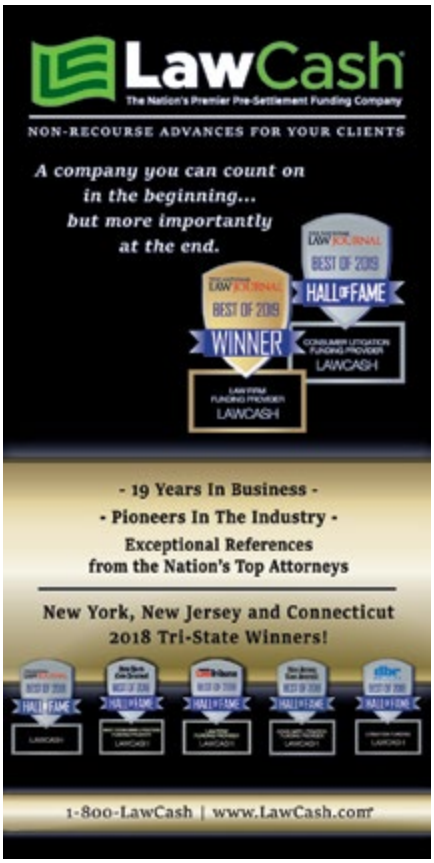

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Thoughts on Legal Writing from the Greatest of Them All: Fred Rodell

"There are two things wrong with almost all legal writing. One is its style. The other is its content."[1]

Fred Rodell, a Yale law professor for more than four decades, is most famous for his biting commentary on the American legal profession – in particular, on its legal writing. He was among the first to advocate for clear, accessible legal language. He's also the founder of America's legal-writing curriculum, inspiring the legal-writing courses now mandatory at nearly every law school in the common-law world. Throughout his illustrious career, he published many works, including *Woe Unto You, Lawyers!* in 1939. But it's his 1936 *Virginia Law Review* article, "Goodbye to Law Reviews," that landed him an immortal place in legal education.

Fred Rodelheim Jr. was born in 1907 in Philadelphia, Pennsylvania, changing his name to Rodell when he was 16. He attended Haverford College (1926), going on to graduate from Yale Law School (1931). He had no desire to practice law. He never took the bar exam. Academia was his outlet for his begrudging passion for the law.

During his time as a Yale professor, Rodell, although well-liked by many, never shied from making enemies, including Harvard Law School and Justice Felix Frankfurter.[2] He had no fear critiquing his own alma mater, a practice that many, including himself, believed barred him from receiving an endowed faculty chair.[3]

Rodell passed away in 1980 at 73, refusing to allow his loved ones to hold a funeral

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or memorial service for him. But his legacy continues through his words, his students, and the continuous development of legal-writing training for law students, lawyers, and judges.[4]

STYLE

> *"It does not matter that even in the comparatively rare instances when people read to be informed, they like a dash of pepper or a dash of salt along with their information. They won't get any seasoning if the law reviews can help it."*[5]

When Rodell published his contempt for law reviews, he took his first swings at their writing style. His main concern with law journal writing and the profession altogether was with tone.

Rodell's article immediately disputed what he saw as legal writing's "cardinal principle": that "nothing may be said forcefully and nothing may be said amusingly."[6] When he discussed the issue of "force," he spoke directly to the over use of passive and metadiscoursive phrases like "It would seem" and "It is suggested," on which writers lean to avoid discrediting their words by attaching "pronouns of the first person."[7]

Rodell observed that lawyers who personalize their thoughts delegitimize their claims. He found it absurd that a professional "taboo" prohibits stating that a Justice, "in a long-winded and vacuous opinion, managed to twist his logic and mangle his history so as to reach a result which is not only reactionary but ridiculous." The profession's norm is to promote the perception of objectivity and detachment. Rodell wrote that "[l]ong sentences, awkward constructions, and fuzzy-wuzzy words that seem to apologize for daring to venture an opinion are part of the price the law reviews pay for their precious dignity."

On humor, Rodell stated that "I know no field of learning so vulnerable to burlesque, satire, or occasional pokes in the ribs as the bombastic pomposity of legal dialectic."[8] Again, Rodell pointed to the profession's need to be stuffy. As he later claimed, the desire for "The Law" to remain inaccessible, understood only by those who've learned the jargon, may be its greatest shortcoming. "[T]he English language," he explained, "is most useful when it is used normally and naturally," and normal people turn to humor to add dimension to their thoughts.[9] Why, he noted, should this be forbidden when discussing the law?

Rodell militated against footnotes, too. He stated that "[e]very legal writer is presumed to be a liar until he proves himself otherwise with a flock of footnotes."[10] Rodell opined about two types of footnotes: the explanatory and the probative.[11] The explanatory footnote allows authors to articulate the "obscure and befuddled" argument in the text.[12] The probative footnote, "a long list of names of cases that the writer has had some stooge look up and throw together for him, ... [a]re what make the legal article very, very learned."[13] A footnote, to Rodell, is something that's become "the thing to do" but is rarely useful.[14] Writers should make their case in the text without restating it at the bottom of a page. Alternatively, a writer whose points are made succinctly shouldn't try to conform to a lawyer's stylistic norm. "In any case," Rodell reasoned, "the footnote foible breeds nothing but sloppy thinking, clumsy writing, and bad eyes."[15]

CONTENT

> *"[T]he articulate among the clan of lawyers might, in their writings, . . . recognize that the use of law to help toward their solution is the only excuse for the law's existence, instead of blithely continuing to make mountain after mountain out of tiresome technical molehills."*[16]

Rodell minced no words introducing his readers to the second "thing wrong" in legal writing. It's "the content of legal writing that makes the literature of the law a dud and a disgrace."[17] The legal profession, although drowning in pomp and circumstance, has a critical role in society. The real "job" of lawyers is to use their advanced knowledge of the law and the legal system to solve problems. Rodell's concern is that the profession has taken a turn too far into the theoretical realm and forgotten its practical role. A serious imbalance arises while lawyers and legal scholars think about hurdles in the law, rather than tackling the tangible issues before them. The irony of Rodell's sentiment can't be understated. He chose never to practice. He dedicated his legal mind, instead, to the scholarly pursuit of the law.[18]

IMPACT

> *"[T]he law is nothing more than a means to a social end and should never, for all the law schools and law firms in the world, be treated as an end in itself."*[19]

Following Rodell's death in 1980, a student reflected on the main lesson he learned from his former professor: "The purpose of our writing is to explain and persuade. We are more likely to be successful in those goals if we

are able to express ourselves simply and clearly."[20] This student, Charles Alan Wright, was in Rodell's first-ever Legal Writing Seminar. Rodell's seminar became the first of its kind; it taught law students how to write like and for non-lawyers.[21]

At the time, Wright regaled, Yale Law Dean Wesley A. Sturges was so intrigued by this new way to teach he dropped by the class.[22] Rodell asked Sturges to read aloud a paragraph from an article Sturges wrote in the *Yale Law Journal*. Rodell then asked Sturges to explain what that paragraph meant. When the Dean obliged, in conversational English, Rodell inquired: "Why didn't you write it that way?"[23]

Ultimately, Rodell's seminar laid the foundation for a legal-writing curriculum many other law schools adopted, an accomplishment that made him proud.[24] As longtime friend Justice William O. Douglas wrote upon Rodell's retirement, "[o]ne who took his course did not memorize; he thought in depth."[25]

Law school deans and future professors aren't the only ones Rodell influenced. Justice Abe Fortas, a former student, was one of several Supreme Court Justices to cultivate a relationship with Rodell. Upon the professor's passing, Justice Fortas wrote, "Here's to Give 'em Hell Fred Rodell. Irresponsible, irreplaceable, irrecusable, irrefragable, irrefutable, irreversible, irrevocable, irremovable, and totally irresistible."[26] Hanging in Rodell's home was a picture of the 1968 Supreme Court. On it, a note from the Chief Justice: "To Fred Rodell, [in] whom this court has had no greater friend, from his friend Earl Warren."[27]

In his 2007 opinion in *Funny Cide Ventures, LLC v. Miami Herald Pub. Co.*, Florida Judge Gary M. Farmer Sr. wrote an entire foreword announcing his stylistic shift due to a "maverick law Professor."[28] He quoted Rodell's 1936 "Goodbye to Law Reviews*"* and expressed his desire to "make a good act of contrition" and "do some penance" for his "generous contribution to this legal ennui" against which Rodell fought so hard.[29] Judge Farmer sought to build off Rodell's call for clarity and accessibility by sometimes bringing into an opinion "some of the forms associated with fiction."[30] "Good fiction," he wrote, "is set in human experience."[31] These words embody Rodell's message.

In 2014, the *Virginia Law Review* published an article revisiting Rodell's now-infamous piece from 80 years earlier. Although the author, Judge Henry T. Edwards, took issue with Rodell's harsh voice, Edwards agreed with many of the views, chief among them the push for the legal education to emphasize practice over theory.[32] Rodell would be pleased to see scholars care about putting knowledge to use.

Fred Rodell's teachings on writing have had more impact on legal-writing education than any law professor before or since. The problems he critiqued haven't been wholly corrected, as he himself noted in the quadranscentennial reprinting and revisiting of "Goodbye to Law Reviews."[33] Much legal writing remains inaccessible and opaque. Luckily, Rodell left us with some humorous advice: "The best way to get a laugh out of a law review is to take a couple of drinks and then read an article, any article, aloud. That can be really funny."[34]

The Legal Writer will continue its series on what we can learn from the great writing teachers—lawyers and non-lawyers.

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3. Jean R. Hailey, *Fred Rodell Dies*, Washington Post (June 7, 1980), https://www.washingtonpost.com/archive/local/1980/06/07/fred-rodell-dies/eb21df2d-3228-4611-a08a-0b9754d52535/?noredirect=on&utm_term=.9c6db7d2f252.
4. Wright, *supra* note 2, at 1455.
5. Rodell, *supra* note 1, at 39.
6. *Id*. at 38.
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19. Rodell, *supra* note 1, at 45.
20. Wright, *supra* note 2, at 1457-58.
21. *Id*. at 1457.
22. *Id*. at 1458.
23. *Id.*
24. Hailey, *supra* note 3.
25. William O. Douglas, Foreword, 84 Yale L.J., 1, 2 (1974).
26. Hailey, *supra* note 3.
27. Sydney Zion, *Fred Rodell*, The Nation (June 21, 1980), https://www.thenation.com/article/fred-rodell/.
28. *Funny Cide Ventures, LLC v. Miami Herald Pub. Co.*, 955 So. 2d 1241, 1243 (Fla. Dist. Ct. App. 2007).
29. *Id.*
30. *Id.*
31. *Id.*
32. Harry T. Edwards, *Another Look at Professor Rodell's* Goodbye to Law Reviews (Nov. 20, 2014, 12:10 PM), http://virginialawreview.org/sites/virginialawreview.org/files/Edwards_Book.pdf.
33. Fred Rodell, *Goodbye to Law Reviews Revisited*, 48 Yale L.J. 279, 280 (1962).
34. Rodell, *supra* note 1, at 40.

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