

To: All Agency Counsel
From: David Nocenti
Date: May 14, 2008
Re: Martinez decision on same-sex marriages

As you probably are aware, on February 1, 2008, the Fourth Department issued a decision in *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dep't 2008) that has significant implications for the position of state agencies in regard to same-sex marriages performed in other jurisdictions where they are legally recognized. Defendants' motion for leave to appeal was denied by the Court of Appeals on Thursday, May 8, 2008, on the grounds that the order appealed from was not final.

In *Martinez*, the Fourth Department held that legal same-sex marriages performed in other jurisdictions are "entitled to recognition in New York in the absence of express legislation to the contrary." This decision is consistent with the holdings of several lower courts. See, e.g., *Godfrey v. Spano*, 15 Misc.3d 809 (Sup. Ct. Westchester Cty. 2007), appeal pending (2d Dep't); *Godfrey v. Hevesi*, 2007 N.Y. Misc. LEXIS 6589 (Sup. Ct. Albany Cty. Sept. 5, 2007). The *Martinez* court also found that the failure to recognize such marriages may violate the New York Human Rights Law.

In light of these decisions, agencies that do not afford comity or full faith and credit to same-sex marriages that are legally performed in other jurisdictions could be subject to liability. In addition, extension of such recognition is consistent with State policy. In April 2007, the Department of Civil Service extended recognition to same-sex spouses in legal marriages from other jurisdictions for purposes of spousal benefits under the New York Health Insurance Program. Moreover, the Third Department recently dismissed an appeal from a decision that had upheld the prior policy of non-recognition as moot, citing *Martinez* in vacating the lower court decision. *Funderburke v. N.Y. State Dep't of Civil Service*, 854 N.Y.S.2d 466 (2d Dep't 2008).

As a result of the above, it is now timely to conduct a review of your agency's policy statements and regulations, and those statutes whose construction is vested in your agency, to ensure that terms such as "spouse," "husband" and "wife" are construed in a manner that encompasses legal same-sex marriages, unless some other provision of law would bar your ability to do so. A compendium of New York State statutes and regulations that use these terms, prepared by the Association of the Bar of the City of New York and the Empire State Pride Agenda Foundation, may be helpful in performing this review. A copy of this report is available at http://www.nycbar.org/pdf/report/marriage_v7d21.pdf.

In many instances, comity can be extended to legal same-sex marriages through an internal memorandum or policy statement directing staff on the construction of relevant terms in statute or regulation. In other cases, regulatory changes may be necessary.

Currently, same-sex marriages are legal in Canada, South Africa, Spain, Belgium, the Netherlands and Massachusetts. Some decisional law in Massachusetts has called into question whether individuals domiciled in states where same-sex marriage is not legally recognized may marry in Massachusetts. Nonetheless, when a Massachusetts official vested with legal authority, such as a clerk, has recognized such marriage, it should be afforded the same recognition as any other legally performed union.

Please follow up with me, in writing, by June 30, 2008, to indicate what actions you have taken in response to this memo, and any potential legal problems that have come to your attention.

Thank you for your assistance, and please feel free to contact me if you have any questions or would like to discuss this matter further.