



NEW YORK  
CITY BAR

Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

**REPORT TO GOVERNOR ANDREW CUOMO  
REGARDING LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) RIGHTS**

**COMMITTEE ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER RIGHTS**

**MAY 2011**

The New York City Bar Association (“City Bar”) is an organization of over 23,000 lawyers and judges dedicated to improving the administration of justice. The Committee on Lesbian, Gay, Bisexual and Transgender Rights (the “Committee”) addresses the legal and policy issues as well as employment rules and procedures in legal institutions and the court system affecting lesbians, gay men, bisexuals and transgender (“LGBT”) individuals. The Committee respectfully submits this report to Governor Cuomo in order to convey the City Bar’s position regarding much-needed policy changes to establish equal rights and protections for LGBT constituents in four important areas.

**I. REPEAL OF THE MEDICAID EXCLUSION OF MEDICALLY NECESSARY HEALTH SERVICES FOR TRANSGENDER NEW YORKERS**

New York State’s regulatory exclusion of state Medicaid insurance coverage for any care, services, drugs, or supplies for the purpose of gender reassignment threatens the lives of transgender New Yorkers and should be repealed.<sup>1</sup> It is time for New York to adopt the recommendation of the American Medical Association and follow municipalities and private employers making this much-needed change — a change that will have minimal impact in terms of cost, but will make an enormous difference in the lives of transgender individuals seeking medically necessary transition-related health services.

Lack of access to health insurance coverage for transgender health services has drastic consequences.<sup>2</sup> Transgender people without access to appropriate health care face crises in all aspects of their lives and work, resulting in disproportionately large human costs for the communities in which they live and work. Indeed, a recent survey by the National Center for Transgender Equality and the National Gay and Lesbian Task Force (“2010 Transgender Health Survey”) of over 6,450 transgender and gender-nonconforming people found that twenty-eight percent (28%) of respondents had postponed medical care when sick due to discrimination and a shocking forty-one percent (41%) had attempted suicide (as compared to 1.6% of the general

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<sup>1</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 505.2(l).

<sup>2</sup> Pooja S. Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People*, 4 SEXUALITY RES. & SOC. POL’Y 7, 10 (2007), available at <http://www.srlp.org/files/SRLPmedicaidarticle.pdf>.

population).<sup>3</sup> Transgender individuals who cannot avail themselves of medically necessary transition-related health care may not be able to present themselves in a manner consistent with their gender identity, making them more vulnerable to acts of violence, discrimination and harassment. For example, without access to transition-related health care, a transgender person may not be able to obtain gender-matched identification.<sup>4</sup> Transgender people who do not have identification matching their gender identity or expression report very high levels of harassment (40% of respondents in a 2011 survey), violence, and discrimination when presenting identification documents.<sup>5</sup>

Similarly, transgender and gender non-conforming employees report that they are often forced to present in the wrong gender to keep their jobs (32% of respondents in the same 2011 survey).<sup>6</sup> Access to medical services for transition-related care may change these results and reduce the risk of violence for some.<sup>7</sup>

Since the adoption of New York's exclusion in 1997,<sup>8</sup> the medical community has established that transition-related medical services are medically necessary and effective for some transgender individuals. Gender Identity Disorder ("GID") is a serious medical condition

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<sup>3</sup> See Jaime M. Grant, Lisa A. Mottet & Justin Tanis, *National Transgender Discrimination Survey Report on Health and Health Care* (Oct. 2010), available at [http://transequality.org/PDFs/NTDSReportonHealth\\_final.pdf](http://transequality.org/PDFs/NTDSReportonHealth_final.pdf).

<sup>4</sup> *Id.* at 23. Most government-issued identification permits a change in gender, but not without proof of medical treatment of some kind. For example, the U.S. Department of State recently changed its policies, allowing transgender individuals to obtain a new passport with a corrected gender identity based on a certification from an attending physician that the applicant has undergone appropriate clinical treatment for gender transition. Proof of sex reassignment surgery, however, is no longer required. U.S. Dep't of State, Office of the Spokesperson, Washington, D.C., *New Policy on Gender Change in Passports Announced* (June 9, 2010), <http://www.state.gov/r/pa/prs/ps/2010/06/142922.htm>. This policy is helpful, but a passport change would be out of reach for anyone who cannot afford the clinical treatment and is otherwise Medicaid-eligible.

<sup>5</sup> The National Gay and Lesbian Task Force and the National Center for Transgender Equality, *Injustice At Every Turn: A Report of the National Transgender Discrimination Survey* (2011) at 5, available at [http://transequality.org/PDFs/NTDS\\_Report.pdf](http://transequality.org/PDFs/NTDS_Report.pdf) (40% of survey participants who presented ID (when it was required in the ordinary course of life) that did not match their gender identity/expression reported being harassed, 3% reported being attacked or assaulted, and 15% reported being asked to leave.); at 132 (reporting that 41% of survey respondents whose driver's licenses did not reflect the gender they have transitioned to reported denial of equal treatment or service and 48% reported harassment/disrespect in retail stores).

<sup>6</sup> *Id.* at 60.

<sup>7</sup> See *id.* at 118 (reporting that 42% of transgender and gender non-conforming respondents were forced to present in the wrong gender to access shelter and that those who had had surgery had slightly lower rates (35%) of forced gender coercion); at 126-28 (reporting that survey respondents who are visual non-conformers reported higher rates of physical attack or assault in places of public accommodation (10%) than those who are visual conformers (6%)).

<sup>8</sup> New York's Medicaid exclusion of medical services for gender reassignment was adopted in 1997, based on the assumption that such treatment was "not medically necessary" and "experimental." Dep't of Health, Notice of Adoption: Gender Reassignment, 20 N.Y. Reg. 5 (Mar. 25, 1998). As described below, this assumption has been invalidated by several medical authorities and organizations, including the American Medical Association.

recognized as such in both the Diagnostic and Statistical Manual of Mental Disorders (4<sup>th</sup> Ed., Text Revision) (DSM-IV-TR) and the International Classification of Diseases (10<sup>th</sup> Revision). In 2008, the American Medical Association (“AMA”), the largest professional association of physicians, residents, and medical students in the United States, passed resolutions to affirm that, without medical treatment, GID can result in clinically significant psychological distress, debilitating depression, and even suicide.<sup>9</sup> The AMA recommends a combination of mental health care, hormone therapy, and sex reassignment surgery, determined on an individual basis.<sup>10</sup> Other medical associations have followed suit, including the American Academy of Family Physicians, the American Psychological Association, the National Association of Social Workers, and the World Professional Association for Transgender Health.<sup>11</sup> These organizations have recognized the efficacy and medical necessity of transition-related health care and have called upon both public and private insurance companies to remove discriminatory exclusions to care.<sup>12</sup> The consensus is clear that these treatments *must be covered* as medically necessary health care.<sup>13</sup>

New York’s Medicaid program should follow the increasing number of municipalities and private employers providing coverage for all of the mental health, medical, and surgical treatments necessary to provide adequate health care to transgender people.<sup>14</sup> Transgender people are the only group of New Yorkers currently excluded from Medicaid coverage based on their identity. Providing full coverage for transgender health services will therefore put

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<sup>9</sup> American Medical Association House of Delegates, Resolution 122 (A-08): Removing Financial Barriers to Care for Transgender Patients, *available at* [http://www.tgender.net/taw/ama\\_resolutions.pdf](http://www.tgender.net/taw/ama_resolutions.pdf) (last visited Apr. 13, 2011).

<sup>10</sup> *Id.*

<sup>11</sup> American Academy Family Physicians, Summary of Actions, 2009 National Conference of Special Constituencies, 2009 Resolutions, *available at* <http://www.aafp.org/online/en/home/cme/aafpcourses/conferences/leader/ncsc/elections/resolution.html> (last visited Apr. 13, 2011); American Medical Association, House of Delegates, Resolution: 122 (A-08), *available at* [http://www.tgender.net/taw/ama\\_resolutions.pdf](http://www.tgender.net/taw/ama_resolutions.pdf); American Psychological Association, Policy Statement: Transgender, Gender Identity, & Gender Expression Non-Discrimination (Aug. 2008), *available at* <http://www.apa.org/about/governance/council/policy/transgender.aspx>; National Association of Social Workers, Transgender and Gender Identity Issues, *available at* <http://www.socialworkers.org/da/da2008/finalvoting/documents/Transgender%202nd%20round%20-%20Clean.pdf> (last visited Apr. 13, 2011); World Professional Association for Transgender Health, Clarification on the Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A. (June 17, 2008), *available at* <http://www.tgender.net/taw/WPATHMedNecofSRS.pdf>.

<sup>12</sup> *See, e.g.*, World Professional Association for Transgender Health, Clarification on the Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A., *supra* note 11.

<sup>13</sup> *Id.*

<sup>14</sup> The Human Rights Campaign’s Corporate Equality Index lists sixty-six employers - including eight of the top twenty Fortune 500 companies and seventeen of the *American Lawyer* top 200 law firms - that provide insurance coverage for transgender-related treatment, including surgical procedures, for employees and their covered dependents. Human Rights Campaign, Corporate Equality Index, (Oct. 1, 2010), <http://www.hrc.org/issues/7644.htm>.

transgender patients in the same position as all other patients in that only medically necessary services will be covered.

Furthermore, without access to Medicaid, transgender individuals are disproportionately denied medically necessary health care, as a disproportionate number of transgender people are low-income.<sup>15</sup> A September 2009 survey by the National Center for Transgender Equality and the National Gay and Lesbian Task Force also found that fifteen percent (15%) of transgender people surveyed lived on \$10,000 per year or less, a rate double that of the general population, and that twenty-seven percent (27%) had incomes of \$20,000 or less.<sup>16</sup> Those surveyed were also unemployed at a rate nearly double the national average at the time of the survey—thirteen percent.<sup>17</sup> New York law must recognize the growing consensus among leading companies and municipalities and address the health crisis facing low-income communities by providing full coverage for transgender health services in the state Medicaid insurance plan.

## II. MARRIAGE EQUALITY FOR SAME-SEX COUPLES

### A Majority of New Yorkers Support Marriage Equality

In over a decade's worth of reports and amicus briefs,<sup>18</sup> the City Bar has demonstrated that the right to a civil marriage – regardless of a spouse's sex – is essential for full equality for all New Yorkers. As the New York Court of Appeals concluded in 2006 in *Hernandez v. Robles*,<sup>19</sup> full marriage equality requires the Legislature to act. Such action would now reflect the will of a majority of New York voters, who have shown their support for same-sex marriage in recent polls conducted by Siena College (58%) and Quinnipiac University (56%).<sup>20</sup>

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<sup>15</sup> See Somjen Frazer, Empire State Pride Agenda Foundation, LGBT Health and Human Services Needs in New York State 12 (2009) available at <http://www.prideagenda.org/Portals/0/pdfs/LGBT%20Health%20and%20Human%20Services%20Needs%20in%20New%20York%20State.pdf> (“preliminary research suggests that transgender people are . . . more likely to be unemployed and very low income”).

<sup>16</sup> National Center for Transgender Equality and National Gay and Lesbian Task Force, *National Transgender Discrimination Survey* (Nov. 2009), available at [http://www.thetaskforce.org/downloads/reports/fact\\_sheets/transsurvey\\_prelim\\_findings.pdf](http://www.thetaskforce.org/downloads/reports/fact_sheets/transsurvey_prelim_findings.pdf).

<sup>17</sup> *Id.*

<sup>18</sup> See New York City Bar Committee Reports, [http://www2.nycbar.org/Publications/reports/index\\_new.php?type=subject&alpha=S](http://www2.nycbar.org/Publications/reports/index_new.php?type=subject&alpha=S) (last visited April 28, 2009).

<sup>19</sup> *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (N.Y. 2006).

<sup>20</sup> See Siena Research Institute, *Siena College Poll: Cuomo is Budget Winner Say Voters, as His Ratings Go Higher; After Budget, Voters Feel Better About Legislature, Not its Leaders* (Apr. 11, 2011), available at [http://www.siena.edu/uploadedfiles/home/Parents\\_and\\_Community/Community\\_Page/SRI/SNY\\_Poll/041111SNYPollReleaseFINAL.pdf](http://www.siena.edu/uploadedfiles/home/Parents_and_Community/Community_Page/SRI/SNY_Poll/041111SNYPollReleaseFINAL.pdf); see also Quinnipiac Univ. Polling Institute, *Gay Marriage Wins Highest Support Ever in New York, Quinnipiac University Poll Finds; Voters Oppose Public Financing For State Candidates* (Jan. 27, 2011), available at <http://www.quinnipiac.edu/x1318.xml?ReleaseID=1553>. See also CNN Opinion Research Corporation,

## The Inability to Marry in New York Causes Real Harm to New York's Same-Sex Couples and Their Families

The City Bar lauds New York's public servants for the actions they have taken in recent years to help advance the goal of recognizing the validity of same-sex marriages performed in other jurisdictions. However, such recognition has only come from cobbling together piecemeal statutes,<sup>21</sup> executive measures and regulations,<sup>22</sup> with significant gap-filling occurring through expensive and contentious legal battles in our courtrooms in order to secure much needed legal protections for same-sex relationships.<sup>23</sup> Though we are now in a position where same-sex couples who marry out-of-state are able to reliably enjoy this patchwork of protections, it is no substitute for the full panoply of automatic legal rights and respect afforded to opposite-sex

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*CNN Opinion Research Poll* (Apr. 19, 2011), available at <http://i2.cdn.turner.com/cnn/2011/images/04/19/rel6h.pdf> (national polls show that a majority of Americans (51%) now favor legalizing same-sex marriage, which is consistent with polling results in New York).

<sup>21</sup> See N.Y. PUB. HEALTH LAW § 4201 (McKinney 2006) (recognizing registered domestic partnerships for purposes of disposition of partner remains); N.Y. EXEC. LAW § 354-b.2(b) (McKinney 2004) (supplemental burial allowance for domestic partners of deceased military personnel killed in combat); N.Y. WORKERS' COMP. LAW § 4 (McKinney 2002) (workers' compensation benefits for surviving domestic partners of September 11, 2001 terrorist attacks); 2002 N.Y. Sess. Laws, ch. 73, § 1(7) (McKinney) (legislative history stating that domestic partners are intended to be eligible for federal Victims Compensation Fund).

<sup>22</sup> See Memorandum from David Nocenti, Counsel to the Governor, N.Y. State, to All Agency Counsel, New York State (May 14, 2008), available at [http://data.lambdalegal.org/in-court/downloads/exec\\_ny\\_20080514\\_martinez-decision-on-same-sex-marriages.pdf](http://data.lambdalegal.org/in-court/downloads/exec_ny_20080514_martinez-decision-on-same-sex-marriages.pdf) (last visited Apr. 11, 2011). See also Westchester Cnty. Exec. Order No. 3 of 2006 (Spano, Cnty. Exec.) (county recognizes same-sex marriages for purposes of couple rights and benefits); Letter from Anthony W. Crowell, Special Counsel to Hon. Michael A. Bloomberg, to Alan Van Capelle, Exec. Dir., Empire State Pride Agenda (Apr. 6, 2005) (New York City recognizes civil unions and same-sex marriages for purposes of couple rights and benefits); Letter from Michael A. Cardozo, N.Y.C. Corp. Counsel, to Hon. Michael A. Bloomberg (Nov. 17, 2004) (New York City pension plans recognize same-sex marriages, civil unions and equivalents); Letter from Alan G. Hevesi, N.Y.S. Comptroller, to Mark E. Daigneault (Oct. 8, 2004) (recognizing civil unions and same-sex marriages for purposes of state pension benefits); Letter from Frederic P. Schaffer, Gen. Counsel & Vice Chancellor for Legal Affairs, CUNY, to Anthony W. Crowell, Special Counsel to the Mayor (June 17, 2005) (recognizing civil unions and same-sex marriages for purposes of state agency CUNY's pension system); Exec. Order No. 113.30 (2001) (Pataki, Gov.), codified at 9 N.Y.C.R.R. § 5.113.30 (2001) (compensation for surviving same-sex partners of World Trade Center victims); Ian Fisher, *Cuomo Decides to Extend Domestic-Partner Benefits*, N.Y. TIMES, June 29, 1994, at B4; Kevin Sack, *Pataki Drops Threat to Close Down Government*, N.Y. TIMES, Mar. 29, 1995, at A1 (gubernatorial extension of health insurance benefits to same-sex domestic partners of New York State executive branch employees).

<sup>23</sup> *Martinez v. Cnty. of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep't 2008) (requiring recognition of valid out-of-state same-sex marriages). See also *Godfrey v Spano*, 57 A.D.3d 941, 871 N.Y.S.2d 296 (2d Dep't 2008) (upholding Westchester County executive order recognizing same-sex marriages), *aff'd*, 13 N.Y.S. 3d 358, 920 N.E.2d 328, 892 N.Y.S.2d 272; *Lewis v. N.Y.S. Dep't of Civil Svcs.*, 60 A.D.3d 216, 872 N.Y.S.2d 578 (3d Dep't 2009) (upholding Civil Service Dept. recognition of same-sex marriages), *aff'd sub nom. Godfrey v. Spano*, 13 N.Y.S. 3d 358, 920 N.E.2d 328, 892 N.Y.S.2d 272; *Godfrey v. DiNapoli*, 22 Misc.3d 249, 866 N.Y.S.2d 844 (Sup. Ct. Albany County 2008) (upholding New York State comptroller recognition of same-sex marriages); *Beth R. v. Donna M.*, 19 Misc.3d 724, 853 N.Y.S.2d 501 (Sup. Ct. N.Y. County Feb. 25, 2008) (recognizing marriage for purpose of awarding divorce and child custody). See also *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 212-13, 543 N.E.2d 49, 55, 544 N.Y.S.2d 784, 790 (1989) (state administrative code grants rent stabilization successor rights for unmarried life partners).



couples who are able to marry in New York. Moreover, the protections afforded to same-sex couples who have been married out-of-state provide no benefit to same-sex couples in stable, loving, long-term relationships within New York where the partners are unable to, or have chosen for one reason or another not to, avail themselves of out-of-state marriage.

As long as this distinction between same-sex couples residing in New York who have been able to marry out-of-state and those who have not remains, even despite the efforts of governors, state officials, local executives and legislators of both parties up to this point, the lack of equal marriage rights will continue to generate decades of litigation, complex private domestic partnership agreements, and scattershot legislation and regulations necessary to establish inheritance, divorce, child custody, pension and tort rights under a range of relationship recognition rules.

Furthermore, the failure to afford same-sex New Yorkers the rights and protections that their opposite-sex counterparts have available to them sends a clear message to same-sex couples and their children – that their families are less deserving of the rights and protections automatically granted to opposite-sex couples who are permitted to marry in New York. It cannot be denied that the lack of protections for unmarried same-sex couples in New York has a long-lasting and stigmatizing impact on these families. This impact is made worse by the fact that the policy of not permitting same-sex couples to marry in New York does nothing to change the discriminatory attitudes of private citizens towards same-sex couples and in fact bolsters those same attitudes in many instances.<sup>24</sup> Ultimately and sadly, such discrimination and stigmatization have effects that are felt well outside of the marriage context. The daily impact on our gay and lesbian youth who deal with the trickle-down effects of treating same-sex couples as being less deserving of marriage equality in particular is shockingly compelling.<sup>25</sup>

All of this is to say that New York's more than 50,000 same-sex couples,<sup>26</sup> and their families, confront many of the same life challenges as, and are in most other respects equal to, their opposite-sex counterparts, but many of them do so without the protections and security afforded

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<sup>24</sup> See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 974 (N.D. Cal. 2010) (expert testimony of social epidemiologist noting specifically that “laws are perhaps the strongest of social structures that uphold and enforce stigma”); see also Gregory Herek, Regina Chopp, & Darryl Strohl, *Sexual Stigma: Putting Sexual Minority Health Issues in Context*, in *The Health of Sexual Minorities: Public Health Perspectives on Lesbian, Gay, Bisexual, and Transgender Populations* 171, 181 (Ilan Meyer & Mary Northridge, eds. 2007) (“[T]he legal system is an important institution through which stigma is expressed and reinforced. . . . [L]aws that advantage one group over another also send a message to society about the relative status of the ingroup and the outgroup”).

<sup>25</sup> See, e.g., Joseph Kosciw, Emily Greta, Elizabeth Diaz, & Mark Bartkiewicz, *The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools* 26 (2010) (reporting that 84.6% of lesbian and gay students had been verbally harassed because of their sexual orientation and 40.1% had been physically harassed); see also *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000) (in light of the disproportionate number of lesbian and gay youth who take their own lives each year, courts have recognized that the reduction of antigay bias “may involve the protection of life itself.”).

<sup>26</sup> See Williams Inst., *Census Snapshot New York* (Apr. 2008), available at <http://www2.law.ucla.edu/williamsinstitute/publications/NewYorkCensusSnapshot.pdf>.

by marriage.<sup>27</sup> Many have modest incomes; approximately 20% are raising children under age 18; and more than 25% are in relationships where one partner has a disability.<sup>28</sup> The inability of these long-term couples to marry has devastating real-world consequences. For example, unmarried same-sex couples may not be able to obtain employer-sponsored health insurance that would cover the entire family, and even where they are able to do so, they are burdened with additional taxes on such coverage. Additionally, unmarried same-sex couples cannot rely on the spousal privilege in legal proceedings<sup>29</sup> or spousal protections in bankruptcy proceedings.<sup>30</sup> These challenges become even more complicated when an unmarried same-sex couple breaks up. In the absence of formal relationship dissolution such as divorce, there is no legal right to equitable property distribution, maintenance, custody or visitation, resulting in chaos and confusion for both partners and their children.<sup>31</sup>

Perhaps one of the greatest inequities, though, is the treatment of a surviving partner following the death of the other partner in a non-marital same-sex relationship. At a time when legal and financial clarity and protection are most needed, surviving partners are mostly left to fend for themselves in situations where traditional married couples are inherently protected by law. For example, a surviving unmarried partner does not have automatic succession rights to a rent-stabilized apartment following the death of the other partner and must qualify under stringent objective criteria as a “non-traditional couple.”<sup>32</sup> Nor does a surviving unmarried partner have a

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<sup>27</sup> Cf. Williams Inst., *Marriage, Registration and Dissolution by Same-Sex Couples in the U.S.* (July 2008), available at <http://www2.law.ucla.edu/williamsinstitute/publications/Couples%20Marr%20Regis%20Diss.pdf> (While it is unknown how many of New York’s same-sex couples have entered into lawful marriages outside of New York, arguably a majority have not done so. For example, even in states that provide legal recognition of same-sex couples, only approximately 40% of same-sex couples have married, entered a civil union, or registered their relationships.).

<sup>28</sup> Cf. *id.*

<sup>29</sup> See *Greenwald v. H & P 29th St. Assocs.*, 241 A.D.2d 307, 307, 659 N.Y.S.2d 473, 474 (1st Dep’t 1997) (“[T]he spousal privilege of CPLR 4502(b), which, by its terms, protects confidential communications between a ‘husband’ and ‘wife’ ‘during marriage,’ does not extend, in plaintiffs’ words, ‘to homosexuals in a spousal relationship.’”).

<sup>30</sup> See A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69 (1998) (seeking revision of the bankruptcy law “to ensure that it awards benefits based on the economic, rather than the marital relationship between two individuals”).

<sup>31</sup> See, e.g., *Cytron v. Malinowitz*, 1 Misc.3d 907(A) (Sup. Ct. Kings Co. 2003) (no statutory right to division of property for same-sex couples -- division must be based upon legal theories of partition or joint venture); *Debra H. v. Janice R.*, 2010 N.Y. Slip Op. 03755, 14 N.Y.3d 576 (N.Y. 2010) (finding very narrow exception to New York’s general rule that only biological or adoptive parents may seek visitation rights but only due to same-sex couple’s legal status established by Vermont civil union).

<sup>32</sup> See New York City Rent Guidelines Board, *Succession Rights FAQ*, available at <http://www.housingnyc.com/html/resources/faq/succession.html#rules> (last visited April 9, 2011); see also *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 212-13, 543 N.E.2d 49, 55, 544 N.Y.S.2d 784, 790 (1989) (State administrative code grants rent stabilization successor rights for unmarried life partners based on an objective assessment of the relationship, “including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services.”).

right to file a claim for wrongful death<sup>33</sup> or workers' compensation benefits<sup>34</sup> following the death of his or her same-sex partner. Similarly, unmarried same-sex couples enjoy no statutory inheritance rights, and even same-sex couples who carefully draft a will and other legal documents to establish a considered estate plan remain uncertain as to whether those expressions will suffice to fend off litigation.<sup>35</sup>

Instead of its traditional leadership in the area of equality and civil rights, New York lags on marriage equality. In the United States, five states and the District of Columbia have adopted same-sex marriage.<sup>36</sup> Globally, Canada and nine other countries have full marriage equality.<sup>37</sup> Yet New York's domestic laws deny unmarried same-sex couples at least 1,324 legal rights and duties<sup>38</sup> that married different-sex couples currently receive. Marriage provides the legal stability that many couples, lacking financial resources, knowledge or willingness to plan for the future, fail to create on their own. Half or more of the general public has failed to prepare many crucial documents: only 53% of New York State residents have a health care proxy;<sup>39</sup>

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<sup>33</sup> See *Raum v. Restaurant Assoc.*, 252 A.D.2d 369 (1st Dept. 1998) (surviving same-sex partner did not have right to bring wrongful death claim); see also *Langan v. St. Vincent's Hosp. of N.Y.*, 25 A.D.3d 90, 802 N.Y.S.2d 476 (2d Dep't 2005), *review denied*, 850 N.E.2d 672 (N.Y. 2006) (finding no right to bring wrongful death claim even where same-sex couple had formalized its relationship by civil union under Vermont law).

<sup>34</sup> See *Valentine v. American Airlines*, 17 A.D.3d 38, 40 (3d Dept. 2005) (finding that domestic partners are not "surviving spouses" under Workers' Compensation Law § 16(1-a)(2)); but see Worker's Compensation Law § 4, in which the New York legislature allowed domestic partners of those killed in the September 11, 2001 terrorist attacks to receive death benefits; cf. John O. Enright, *New York's Post-September 11, 2001 Recognition of Same-Sex Relationships: A Victory Suggestive of Future Change*, 72 FORDHAM L. REV. 2823 (2004) at 2829 (New Yorkers who lost a same-sex spouse or partner in the September 11, 2001 terrorist attacks were confronted by the invisibility of their relationships under state and federal laws relating to "(1) the right to distribution of property under probate law, (2) delegation of healthcare and monetary benefits from public and private sources, and (3) the right to damages payable under states' wrongful death statutes," which have traditionally only protected heterosexual spouses).

<sup>35</sup> See, e.g., *In re Estate of H. Kenneth Ranftle*, 81 A.D.3d 566, 917 N.Y.S.2d 195 (1st Dep't 2011) (holding that because the surviving partner was lawfully married in a foreign jurisdiction, deceased's sibling's challenge to validity of deceased's will should be dismissed).

<sup>36</sup> See Human Rights Campaign, *Marriage Equality & Other Relationship Recognition Laws* (updated February 5, 2011), available at [http://www.hrc.org/documents/Relationship\\_Recognition\\_Laws\\_Map.pdf](http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf) (the five states that are issuing marriage licenses to same-sex couples are Connecticut, Iowa, Massachusetts, New Hampshire and Vermont).

<sup>37</sup> See Wikipedia, [http://en.wikipedia.org/wiki/Same-sex\\_marriage](http://en.wikipedia.org/wiki/Same-sex_marriage) (last visited Apr. 27, 2011) (the ten countries that provide full marriage equality to same-sex couples are Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain and Sweden).

<sup>38</sup> See Empire State Pride Agenda Found. & N.Y.C. Bar, *1,324 Reasons for Marriage Equality in New York State* (June 12, 2007), available at [http://www.nycbar.org/pdf/report/marriage\\_v7d21.pdf](http://www.nycbar.org/pdf/report/marriage_v7d21.pdf).

<sup>39</sup> See Siena Research Institute, *Siena New York Poll* (Apr. 11, 2005), available at [http://www.siena.edu/uploadedFiles/Home/Parents\\_and\\_Community/Community\\_Page/SRI/SNY\\_Poll/SNY\\_05Apr\\_ALL.pdf](http://www.siena.edu/uploadedFiles/Home/Parents_and_Community/Community_Page/SRI/SNY_Poll/SNY_05Apr_ALL.pdf) (last visited Apr. 11, 2011).



nationwide, only 50% of people have wills;<sup>40</sup> 42% have living wills,<sup>41</sup> and a mere 5-10% have prenuptial agreements.<sup>42</sup>

### **Civil Unions Would Be a Backward Step in New York**

Since New York already recognizes same-sex marriages validly performed in a foreign jurisdiction as discussed above, enacting civil unions would be a backward step in New York. Although civil unions have been advanced by some states as an acceptable compromise to marriage equality, the Association advocates only for legislation that supports full same-sex marital recognition. Civil unions enshrine second-class status in the law, and are not an adequate substitute for the status and rights conferred by marriage. In New York, civil unions would add very little to what some couples already enjoy by virtue of this state's recognition of their foreign jurisdiction marriages.

Most importantly, civil unions would not provide the widely-recognized legal status conferred upon married individuals by the federal government and other states.<sup>43</sup> Notwithstanding the fact that marriage portability and access to the over 1,138 federal rights, privileges and benefits<sup>44</sup> ranging from social security benefits and taxes to immigration will not occur while the Defense of Marriage Act ("DOMA")<sup>45</sup> remains in force, the Department of Justice's recent decision to no longer defend the constitutionality of DOMA<sup>46</sup> has strengthened the prospect of DOMA's demise in the near future. As a result, once DOMA is repealed or struck down, same-sex couples who enter into civil unions in New York would still be denied all federal rights and benefits, a

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<sup>40</sup> See Gary Langer, *You Know You Should But You Don't: Americans Say They Should Plan for The Future, But Don't*, ABCNEWS.COM (Aug. 26, 2002), available at [http://abcnews.go.com/sections/us/DailyNews/planning\\_poll020826.html](http://abcnews.go.com/sections/us/DailyNews/planning_poll020826.html) (last visited Apr. 11, 2011); *Most Americans Still Don't Have a Will, Says New Survey by FindLaw*, FINDLAW (Aug. 19, 2002), available at <http://company.findlaw.com/pr/2002/081902.will.html> (last visited Apr. 11, 2011).

<sup>41</sup> See Langer, *supra* note 23; Pew Research Ctr., *Strong Public Support for Right to Die*, Jan. 5, 2006, available at <http://www.people-press.org/reports/display.php3?ReportID=266> (last visited Apr. 11, 2011); Caroline Wellbery, "Improving Advance Directive Completion Rates," 72 AM. FAM. PHYSICIAN 694 (2005).

<sup>42</sup> See Arlene G. Dubin, *Prenups for Lovers: A Romantic Guide to Prenuptial Agreements* 15, Random House (2001); Gary Belsky, *Living by the Rules*, MONEY, May 1996, at 100, 102.

<sup>43</sup> See *Civil Unions vs. Civil Marriage*, NOW.ORG, available at [http://www.now.org/issues/marriage/marriage\\_unions.html](http://www.now.org/issues/marriage/marriage_unions.html) (last visited Apr. 11, 2011).

<sup>44</sup> See Letter from U.S. Gen. Accounting Office, to Hon. Bill Frist (Jan. 23, 2004) re: Defense of Marriage Act: Update to Prior Report, available at <http://www.gao.gov/new.items/d04353r.pdf> (last visited Apr. 11, 2011) ("Consequently, as of December 31, 2003, our research identified a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges.").

<sup>45</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 2420 (1996) (codified at 1 U.S.C. §§ 7 & 28 U.S.C. § 1738C).

<sup>46</sup> Letter from Eric Holder, U.S. Attorney Gen. to Hon. John A. Boehner (Feb. 23, 2011) re: Defense of Marriage Act, available at: <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (last visited on April 11, 2011).

consequence that is seemingly contrary to New York's intent as evidenced by its substantial recognition of out-of-state same-sex marriages.

As Vermont, New Jersey and other states have come to recognize, civil unions are poorly understood, erratically recognized and widely viewed as a second-class status by government officials, employers, hospitals, and the general public.<sup>47</sup> For example, in Vermont, residents who entered into civil unions have testified that they were not accorded all of the rights granted to them under Vermont's civil union law due in part to a general misunderstanding of civil union status.<sup>48</sup> Similarly, a New Jersey commission found, contrary to the popular notion that "civil unions" and "marriage" are equivalent if not in name, then in substantive state rights, that civil unions actually create challenges to equal health care access and perpetuate psychological harm to same-sex couples and their families, whereas marriage equality would have a positive impact.<sup>49</sup>

Even if technically equivalent rights exist, if one same-sex partner is suddenly hospitalized and the other denied visitation and other next of kin rights, a later lawsuit is cold comfort, particularly when some courts simply refuse to give civil unions effect.<sup>50</sup> Additionally, civil unions have been reported to create confusion for employers, especially with respect to the rights

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<sup>47</sup> See Joanna L. Grossman, *The Vermont Legislature, Inventor of the 'Civil Union,' Grants Full Marriage Rights to Same-Sex Couples: Why It Decided Civil Unions Were Not Sufficient to Ensure Equality*, FINDLAW (Apr. 13, 2009) available at <http://writ.lp.findlaw.com/grossman/20090413.html> (last visited Apr. 11, 2011); see also Tara Parker-Pope, *Well: How Hospitals Treat Same-Sex Couples*, N.Y. TIMES, May 12, 2009, available at <http://well.blogs.nytimes.com/2009/05/12/how-hospitals-treat-same-sex-couples/?apage=2> (last visited Apr. 11, 2011) (hospitals reportedly fail to recognize California and Oregon domestic partnerships); Tina Kelley, *Equality Elusive Under New Jersey Civil Union Law*, N.Y. TIMES, Apr. 13, 2007 (health insurance and tax confusion under civil unions); Tina Kelley, "Couples Not Rushing to Civil Unions in New Jersey," N.Y. TIMES, Mar. 21, 2007 (hospitals fail to respect New Jersey domestic partnerships); Laura Mansnerus, *Doubts Persist As New Jersey Moves Toward Civil Unions*, N.Y. TIMES, Dec. 14, 2006 (hospitals fail to respect New Jersey domestic partnerships).

<sup>48</sup> See Vermont Office of Legislative Council, *Report of the Vermont Commission on Family Recognition and Protection* (April 21, 2008), available at [http://hrc.vermont.gov/sites/hrc/files/pdfs/ss%20marriage/VCFRP\\_Report.pdf](http://hrc.vermont.gov/sites/hrc/files/pdfs/ss%20marriage/VCFRP_Report.pdf) (specifically noting that Vermonters who entered into civil unions "have encountered a multitude and variety of instances where they find the promise of equality to be unfulfilled. They find many of these instances to be significant, if not substantial, deficits in the civil union law, with clear and negative financial, economic, and social impacts on their lives and the lives of their children and families. In addressing the Commission's charge, these witnesses find "legal and practical challenges [with civil union]... as compared to heterosexual marriage couples.").

<sup>49</sup> See New Jersey Civil Union Review Commission: Final Report, *The Legal, Medical, Economic & Social Consequences of New Jersey's Civil Union Law* (Dec. 10, 2008), available at <http://www.gardenstateequality.org/civilunionsdontwork/Final%20report%20of%20the%20CURC.pdf>.

<sup>50</sup> See, e.g., Langan, 25 A.D.3d, 802 N.Y.S.2d 476 (Despite a "close, loving, committed, monogamous relationship as a family unit in a manner indistinguishable from any traditional marital relationship", a surviving partner in an out-of-state civil union is not entitled to bring a wrongful death action in New York against an alleged tortfeasor because civil unions are not equivalent to marriage); but see Debra H. v Janice R., 14 N.Y.3d 576 (2010) (according comity to an out-of-state same-sex marriage for parentage purposes).

and benefits generally afforded to married employees.<sup>51</sup> Civil unions are also recognized to have a particularly disparate impact on people of color – African Americans and Latinos tend to have less financial resources to afford counsel to a dvocate that civil unions should be given the sam e status as a m arriage by an intransigent em ployer or government official or to prepare legal documents to avoid m isunderstandings in moments of crisis.<sup>52</sup> Permitting same-sex couples to marry is the only way to ensure tha t the full benefits and protections of marriage, to the extent permitted on a state level, are shared by all couples in New York.

In addition, civil unions are in st ark contrast to full m arriage equality offered by several of our neighboring states. As professi onal same-sex couples residing in New York grow to perceive our state as discrim inatory and unwelcoming, New York may start to see a flight of talent and loss of tax revenue to Connecticut and Massachusetts, which have become more attractive states of residence to same-sex couples now that they both provide fo r same-sex marriage.<sup>53</sup> Yet, full marriage equality is pro jected to add \$210 m illion to New York’s econ omy in the three years after enactment.<sup>54</sup>

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<sup>51</sup> See *Interim Report of the New Jersey Civil Union Review Commission* (Feb. 19, 2008), available at <http://www.nj.gov/lps/dcr/downloads/1st-InterimReport-CURC.pdf> (last visited Apr. 11, 2011) (The New Jersey Civil Union Review Commission was appointed by that state’s legislature to evaluate the effect on same-sex couples and their families of being provided civil unions rather than marriage. Among the report’s conclusions are that civil unions: create a second-class status, hurt children being raised by same-sex couples, have a disparate impact on people of color and do not provide the same employment protections as do full marital rights for same-sex couples in Massachusetts.). See also Christine Vestal, *Civil Unions Spread, but Gays Want to Wed*, STATELINE.ORG (May 31, 2007), <http://www.stateline.org/live/details/story?contentId=212354> (noting that “one in eight couples [in New Jersey] with a civil union license has been denied benefits by employers, insurers and financial institutions”) (last visited Apr. 11, 2011).

<sup>52</sup> See *Interim Report of the New Jersey Civil Union Review Commission supra* note 34. Cf. Brief for Ass’n of the Bar of the City of N.Y. et.al. as Amici Curiae Supporting Plaintiffs-Appellants, *Hernandez v. Robles*, 26 A.D.3d 98, 805 N.Y.S.2d 354 (2006) (Nos. 103434/2004, 1967/04) at 48, available at [http://www.nycbar.org/pdf/report/Hernandez\\_Marriage.pdf](http://www.nycbar.org/pdf/report/Hernandez_Marriage.pdf) (last visited Apr. 11, 2011) (similarly, lower-income same-sex couples residing in New York are priced out of the legal services that are needed to obtain recognition for their relationships).

<sup>53</sup> By open letter dated April 28, 2011, New York’s business leaders urged the legislature to pass a marriage equality bill so that New York can “remain competitive” and “recruit top talent” from around the world. See *An Open Letter from Business Leaders on The Importance of Marriage Equality*, available at <http://www.nytimes.com/interactive/2011/04/29/nyregion/20110429-Business-Leaders-Letter.html?ref=nyregion> (last visited May 1, 2011).

<sup>54</sup> See Jeremy W. Peters, *Would Gay Marriage Help the State Economy?*, N.Y. TIMES, May 26, 2009 (citing a 2009 update of a 2007 analysis conducted by the New York City comptroller’s office) available at <http://cityroom.blogs.nytimes.com/2009/05/26/would-gay-marriage-help-the-state-economy> (last visited Apr. 11, 2011); see also, Williams Inst., *The Effect of Marriage Equality and Domestic Partnership on Business and the Economy* (Oct. 2006) (increased benefits to businesses, including a \$2 billion gain in wedding and tourism-related revenues, and to federal and state budgets as a result of allowing same-sex marriage), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1035&context=uclalaw/williams> (last visited Apr. 11, 2011); Letter from Douglas Holtz-Eakin, Dir. Congressional Budget Office, to Hon. Steve Chabot, Chairman of the Comm. of the Judiciary of the House Subcommittee on the Constitution (June 21, 2004), re *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (one billion dollar net federal budget gain in each of first ten years

## **Passage of a Marriage Equality Bill Would Ensure Equality and Benefit All New Yorkers**

There is no legitimate reason for denying the basic civil right of marriage to same-sex couples or for creating second-class status by offering only civil unions and not full marriage equality. By passing a bill that provides full marriage equality, the legislature will clearly determine who is married under New York law and their rights and duties. When the bill becomes law, it will benefit New York and its residents. The City Bar respectfully requests the support of all New York State legislators to make marriage equality a reality.

### **III. EXECUTIVE RECOGNITION OF OUT-OF-STATE COMPREHENSIVE LEGAL RELATIONSHIPS**

By memorandum dated May 14, 2008 (the “Governor’s Marriage Directive”), former Governor Paterson’s Counsel’s Office, in accordance with the decision of the Appellate Division, Fourth Department, in *Martinez v. County of Monroe*, directed all Agency Counsel to extend recognition to lawful out-of-state same-sex marriages. After issuance of the Governor’s Marriage Directive, the City Bar’s LGBT Rights Committee submitted to the Governor’s Counsel’s Office a memorandum analyzing New York’s law on administrative recognition, *Scope of Gubernatorial Authority to Recognize Same-Sex Civil Unions and Other Substantial Legal Equivalents of Marriage Contracted Outside of New York State* (June 4, 2008) (“Gubernatorial Authority to Recognize”).

The Governor’s Counsel’s Office, through David Weinstein, subsequently requested from the City Bar an analysis of whether comity doctrine constitutes a basis for legal recognition in New York State of out-of-state civil unions. Specifically, Mr. Weinstein asked NYCBA to analyze the recent Court of Appeals ruling, *Debra H. v. Janice R.*,<sup>55</sup> in which the Court relied on comity doctrine as the basis for recognizing an out-of-state same-sex civil union.

In its September 30, 2010, memorandum, *Recent Developments in New York Recognition of Same-Sex Relationships*, which was submitted to Mr. Weinstein as an attachment to Carmelyn Malalis’ October 4, 2010, cover letter, the City Bar concluded that, under existing law, courts should affirm a directive from the Governor’s Counsel’s Office extending administrative recognition to out-of-state civil unions, and possibly California domestic partnerships, and other comprehensive legal relationships. The City Bar has performed further research on the incidence of comprehensive legal relationships in jurisdictions worldwide and on practical methods for determining which jurisdictions would qualify for New York administrative recognition. We would be glad to share this research with the Governor’s Counsel’s Office, and continue to advocate full recognition for all comprehensive legal relationships.

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following 50-state adoption of same-sex marriage), available at <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf> (last visited Apr. 11, 2011).

<sup>55</sup> 14 N.Y.3d 576, 930 N.E.2d 184, 904 N.Y.S.2d 263 (N.Y. 2010).

#### IV. THE GENDER EXPRESSION NON-DISCRIMINATION ACT

The Gender Expression Non-Discrimination Act (“GENDA”) adds “gender identity and expression” to the list of categories protected under various statutes prohibiting discrimination by the state and/or in employment, education, housing, and public accommodations, thus extending non-discrimination protections to transgender and gender non-conforming people.<sup>56</sup> It further adds “gender identity and expression” to the list of categories in the hate-crimes statute, making crimes motivated by animus toward a person’s gender identity or expression eligible for a penalty enhancement. The bill would help to protect transgender and gender non-conforming people from discrimination, harassment, and assault to the same extent such protections are now provided to racial minorities and gay and lesbian people under New York law.

Numerous lawsuits have been filed in New York alleging discrimination based on gender identity and expression. These lawsuits are often unsuccessful, however, because courts often hold that existing laws banning discrimination based on sex or sexual orientation do not protect transgender people. Further, although statewide data on anti-transgender bias crimes is unavailable, the New York City Gay and Lesbian Anti-Violence Project received 176 reports from transgender people for the period 2007 - 2009.<sup>57</sup> Under the current hate-crimes statute, acts of violence motivated by the victim’s transgender or gender non-conforming status are not eligible for a hate-crime penalty enhancement.

By passing GENDA, New York would not be breaking new ground; it would, merely be joining the thirteen states and the District of Columbia<sup>58</sup> and more than 136 localities across the country that have enacted laws prohibiting discrimination based on gender identity and expression<sup>59</sup>. The states that already have passed such laws are California, Colorado, Hawaii, Illinois, Iowa, New Jersey, Maine, Minnesota, New Mexico, Oregon, Rhode Island, Vermont and

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<sup>56</sup> The bill defines “gender identity and expression” as “having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth.” The term “gender identity” generally refers to a person’s innate psychological identification as male or female, which may or may not correspond to the sex assigned to that person at birth based on their physical characteristics and genitalia. The term “gender expression” encompasses all external characteristics and behaviors that are socially defined as either masculine or feminine, including dress, mannerisms, name, physical characteristics and speech patterns.

<sup>57</sup> Nat’l Coal. of Anti-Violence Programs, “Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2007,” at 43; Nat’l Coal. of Anti-Violence Programs, “Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2008,” at 56; Nat’l Coal. of Anti-Violence Programs, “Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2009,” at 66; *all available at [www.avp.org](http://www.avp.org)*. Statistical information concerning anti-transgender bias crimes is not systematically collected or reported by any municipal, state or federal agencies.

<sup>58</sup> Transgender Law and Policy Institute, *Non-Discrimination Laws that include gender identity and expression*, <http://www.transgenderlaw.org/ndlaws/index.htm> (last visited Apr. 13, 2011).

<sup>59</sup> Human Rights Campaign, *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, (Jan. 3, 2011), [http://www.hrc.org/issues/workplace/equal\\_opportunity/gender-identity-city-county-laws.htm](http://www.hrc.org/issues/workplace/equal_opportunity/gender-identity-city-county-laws.htm).



Washington.<sup>60</sup> Within New York, a number of localities already have passed laws prohibiting discrimination based on gender identity and expression, including Suffolk and Tompkins counties, and the cities of Albany, Buffalo, Ithaca, New York, and Rochester. According to a March 2008 poll conducted by the Global Strategy Group, 78% of registered New York voters support “the passage of a law that protects transgender people from discrimination in employment, housing, and public accommodations.”<sup>61</sup>

GENDA is an important step in protecting transgender and gender non-conforming people in their employment and housing, and protecting their safety, so that they can enjoy the financial and social stability necessary to become fully integrated and productive members of their communities. This bill, which has been passed by the New York State Assembly in 2008, 2009 and 2010, is necessary to counteract the pervasive discrimination faced by transgender and gender non-conforming people. Therefore, the Committee strongly supports GENDA and urges that it be passed by the Senate.

## V. JUDICIAL DIVERSITY

As the City Bar's Judicial Selection Task Force has stated, a “diverse judiciary is necessary to ensure that our populations are appropriately represented; to ensure that a broad array of views and experiences are brought to the bench; to regain the public’s confidence in the judiciary, and to restore the judicial system’s credibility in the public’s eyes.”<sup>62</sup> Self-identified members of the LGBT community are underrepresented in the New York State judiciary. There are concrete actions that the Governor can take to ensure that the New York State LGBT population is appropriately represented on the bench.

### Appointment of Openly LGBT Judges

According to the best available data, there are currently only 28 self-identified lesbian, gay, or bisexual New York State judges at the trial level or higher.<sup>63</sup> The Committee is unaware of a single openly self-identified transgender member of the New York State judiciary. Although reliable statistics are scarce, these numbers clearly do not represent the population from which judges are drawn; the percentage of judges who self-identify as LGBT appears to be nearly half

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<sup>60</sup> See The National Gay and Lesbian Task Force and the National Center for Transgender Equality, *Injustice At Every Turn: A Report of the National Transgender Discrimination Survey*, *supra* note 5.

<sup>61</sup> Empire State Pride Agenda Blog, *Poll: New Yorkers Overwhelmingly Support GENDA* (Mar. 5, 2008), <http://prideagenda.blogspot.com/2008/03/poll-new-yorkers-overwhelmingly-support.html>.

<sup>62</sup> The Judicial Selection Task Force of the Association of the Bar of the City of New York, *Recommendations on the Selection of Judges and the Improvement of the Judicial Selection System in New York State* 30 (Dec. 2006), available at [http://www.nycbar.org/pdf/report/Judicial\\_Selection\\_TaskForceReport\\_Dec2006.pdf](http://www.nycbar.org/pdf/report/Judicial_Selection_TaskForceReport_Dec2006.pdf).

<sup>63</sup> This figure is based on a February 4, 2011, conversation with Acting Supreme Court Justice Michael R. Sonberg, President of the New York Association of Lesbian and Gay Judges.

that of the general State population,<sup>64</sup> and disproportionately low with respect to the comparable figure for attorneys.<sup>65</sup>

In particular, the LGBT population is invisible or near-invisible in certain types of courts, as well as jurisdictions located outside of New York City. To date, the Committee is aware of only two openly self-identified LGBT justices of the Appellate Division, both recently appointed by Governor Paterson.<sup>66</sup> The Committee is unaware of any self-identified LGBT judges on the Court of Appeals or Court of Claims, or County, Surrogate's, and Family Courts outside of New York City.<sup>67</sup>

In light of the underrepresentation of the LGBT community on the New York bench, as well as the obvious benefits of a diverse judiciary reflecting all New Yorkers' experiences, the Governor should appoint qualified LGBT individuals to open judicial offices that are filled by gubernatorial designation.<sup>68</sup> There is an available pool of self-identified LGBT attorneys in New York State,<sup>69</sup> and every reason to believe that qualified individuals can be found within this pool.

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<sup>64</sup> According to a February 4, 2011, conversation with David Bookstaver, Director of Communications of the New York Unified Court System, there are currently 1,267 New York State judicial offices at the trial level or higher. Thus, 2.2% of judges self-identify as LGBT. However, researchers have estimated that about 4.1%-4.2% of the New York State population identifies as lesbian, gay, or bisexual. Frazer, *supra* note 15, at 4; Gates, Gary J., The Williams Institute on Sexual Orientation Law and Public Policy, UCLA School of Law, *Same-Sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey* (Oct. 2006) at 11, apx. 1, available at <http://www2.law.ucla.edu/williamsinstitute/publications/SameSexCouplesandGLBpopACS.pdf>. There are no hard figures for how many New Yorkers identify as transgender: one report suggests the number is around 300,000. Frazer, *supra* note 15.

<sup>65</sup> In New York City, 3.1% of attorneys at 88 participating signatory law firms to the City's Bar Statement of Diversity Principles were identified as LGBT. See Association of the Bar of the City of New York, *2010 Diversity Benchmarking Study: A Report to Signatory Law Firms* at 9, available at <http://nylj.com/nylawyer/adgifs/decisions/012611barreport.pdf>. (last visited April 13, 2011). Public interest, government, and academic employers, as well as solo practitioners, were not included in the benchmark survey.

<sup>66</sup> Testimony of Robert F. Bacigalupi Before the New York State Senate Standing Committee on the Judiciary (June 5, 2009), at 6, available at <http://www.le-gal.org/site/documents/NYSSenateTestimony.pdf>.

<sup>67</sup> *Id.* at 2.

<sup>68</sup> The Governor appoints judges and justices of the New York Court of Appeals and Court of Claims, subject to Senate confirmation, directly appoints the justices of the four Departments of the Appellate Division, and designates the Presiding Justice of the Court of Claims and each Appellate Division Department. N.Y. Const., Art. VI, §§ 2[e], 4[c]; Court of Claims Act, Art. I, § 2[2], [3], [6]. In addition, subject to Senate confirmation, the Governor fills vacancies on the Supreme Court, as well as those County Courts, Surrogate's Courts, and Family Courts outside of New York City. N.Y. Const., Art. VI, § 21[a].

<sup>69</sup> National Organization for Women, *supra* note 39.

In particular, since the vast majority of self-identified LGBT judges and justices currently on the bench preside over downstate jurisdictions,<sup>70</sup> appointing LGBT individuals to upstate courts would immensely increase judicial diversity. Furthermore, the Committee strongly urges the Governor to make extra efforts to seek and appoint qualified transgender candidates to judicial office. Given the Governor's laudable decision to continue Governor Paterson's Executive Order prohibiting discrimination on the basis of gender identity or expression in state employment,<sup>71</sup> he should continue to demonstrate New York State's commitment to principles of equality and rectify the complete lack of representation of members of the transgender community on the bench.

### **Appointment of Members of the LGBT Communities to Judicial Screening Committees**

The Committee recognizes and commends the Governor's recent appointment of openly LGBT individuals to be panelists on the various gubernatorial judicial screening committees that evaluate candidates and advise him as to their appointment,<sup>72</sup> particularly in light of the fact that it is unaware of openly identified LGBT panelists having been appointed in the past. Should there be future screening committee vacancies, the Committee urges the Governor to continue to appoint members of the LGBT communities.<sup>73</sup> Doing so would undoubtedly further the goals expressed in the Executive Order establishing the Governor's Judicial Screening Committees: "ensuring a fair, impartial, independent, highly qualified, and diverse judiciary is essential to ensuring justice for all who come before New York's courts and to fostering public confidence in the integrity of judicial process" (emphasis added).<sup>74</sup>

### **Commitment to an Inclusive Definition of Judicial Diversity**

Finally, the Committee urges the Governor to publicly state his commitment to an inclusive definition of "diversity" in the context of judicial screening which expressly includes sexual orientation and gender identity or expression.

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<sup>70</sup> Only two of the 28 self-identified LGBT judges identified by Acting Supreme Court Justice Michael R. Sonberg, President of the New York Association of Lesbian and Gay Judges on February 4, 2011, preside over jurisdictions outside of New York City.

<sup>71</sup> Governor Cuomo's Executive Order No. 2, issued January 1, 2011, §E (continuing Governor Paterson's Executive Order No. 33, issued December 16, 2009 [Prohibiting Discrimination in State Employment on the Basis of Gender Identity]).

<sup>72</sup> See Daniel Wise, *Cuomo Taps NY Lawyers to Select Judges*, N.Y.L.J., May 4, 2011, at 1-2.

<sup>73</sup> The Governor is entitled to appoint four of the 12 members of the Commission on Judicial Nomination, which evaluates candidates for the Court of Appeals, as well as two of the 13 members of the State Judicial Screening Committee, and five of the 13 members on each of four Departmental Judicial Screening Committees. N.Y. Const., Art. VI, § 2[c], [d][1], [e]; Governor Cuomo's Executive Order No. 2, *supra* (continuing Governor Paterson's Executive Order No. 8, issued June 18, 2008, §§ [B][2] & [C][2] [Establishing Judicial Screening Committees to Ensure that Judicial Officer Appointments are of the Highest Quality], itself a reissuance of Governor Spitzer's Executive Order No. 4, issued January 1, 2007).

<sup>74</sup> Governor Spitzer's Executive Order No. 4, *supra* note 71, at ¶ 2.

Accordingly, the Committee recommends that the Governor either modify Governor Paterson's Executive Order No. 8 or issue his own Executive Order, which not only continues to endorse judicial diversity in the context of gubernatorial judicial screening, but which defines diversity as it is defined in the City Bar's Statement of Diversity Principles: "Diversity is an inclusive concept and encompasses, without limitation, race, color, ethnicity, gender, sexual orientation, gender identity and expression, religion, nationality, age, disability and marital and parental status."<sup>75</sup> That over 120 law firms and corporations have become signatories to this definition of diversity should be persuasive evidence of an important trend in the legal community, one that should be mirrored in the judiciary that presides over it.<sup>76</sup>

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We greatly appreciate the opportunity to express our thoughts regarding these important issues. We look forward to working with the Governor's office in the months ahead.

Respectfully,

Carmelyn P. Malalis  
*Chair*, Committee on Lesbian, Gay, Bisexual and Transgender Rights  
New York City Bar Association

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<sup>75</sup> The Association of the Bar of the City of New York, *Statement of Diversity Principles*, ¶1, available at [http://www.abcnyc.org/pdf/diversity\\_principles2.pdf](http://www.abcnyc.org/pdf/diversity_principles2.pdf) (last visited April 13, 2011).

<sup>76</sup> The Association of the Bar of the City of New York, *Signatories to the New York City Bar Statement of Diversity Principles*, available at [http://www.nycbar.org/pdf/diversity\\_principles1.pdf](http://www.nycbar.org/pdf/diversity_principles1.pdf) (last visited April 13, 2011).