

John Caher: Welcome to Amici, news and insights from the New York Judiciary and Unified Court System. I'm John Caher of the Office of Court Administration.

Today we are very fortunate to have two guests—Justices Marcy Kahn of the Appellate Division, First Department, and Justice Elizabeth Garry of the Appellate Division, Third Department.

On December 14, 2016, Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks announced the formation of a new commission to highlight and address issues of concern to LGBT individuals within the justice system and the legal profession. Justice Garry and Justice Kahn co-chair the commission.

First, how did the commission come about? Whose idea was it, and how long has it been in the works? Judge Kahn, do you want to tackle that?

Justice Kahn: Sure.

A generation ago, back in 1988 at the time of the creation of the Franklin Williams Commission on Minorities, some of the handful of lesbian and gay judges—myself included and also in particular then-Justice Richard C. Failla [the first openly gay person elected to state Supreme Court. Justice Failla died of AIDS in 1993]—urged the Office of Court Administration to address the concerns of discrimination against LGBT users of the court system at the same time and in the same way it had committed to do with respect to other minorities in the courts through the Franklin Williams Commission. Our request to become part of the Franklin Williams Commission was not accepted, and the reason that was given was that it had to do with the federal funding streams going to the Franklin Williams Commission.

Issues of concern to LGBT litigants, lawyers, judges and court staff continued to proliferate, especially with regard to treatment of transgender criminal defendants and people with HIV/AIDS. Very few LGBT people in the courts in the '80s and early '90s were open about their sexual orientation in those days, and there was no established method for reporting instances of discrimination, nor was there any confidence among attorneys and court staff that airing complaints would not result in some sort of recrimination. Over the years, of course, the number of openly lesbian and gay judges and lawyers in the courts has

increased, supported by the Lesbian and Gay Bar Association of Greater New York, OCA's Gender Fairness Committees, progressive court administrators, and, for the last 10 years, the Gay-Straight Alliance. We now have reached the point at which the new Chief Judge and Chief Administrative Judge have made it an early priority to launch and support this LGBT commission.

John Caher: This has been a long time in coming. The Franklin Williams Commission was set up by Chief Judge Wachtler in the late '80s.

Justice Kahn: That's right.

John Caher: That was a first in the nation initiative, I believe, as is this, right?

Justice Kahn: That's right. I should say that for the last decade or so, the push to at least provide a parallel institution of some permanence to address these issues has been led by the Gay-Straight Alliance. It has now been realized, and we're all quite pleased about that.

John Caher: Seems kind of late in coming, but I guess better late than never. Judge Garry, what is the mission here? What are you trying to accomplish?

Justice Garry: It's very exciting, John.

We've just scheduled the first meeting of the commissioners, which will occur in a few weeks from now. I fully anticipate that following that first meeting we'll develop what you'd call a formal mission statement.

With that said, the Chief Judge has clearly set forth her intentions in a press release. If you don't mind, I don't think I could say it better and I'm going to quote from the language in her press release that our mission will be to: "Promote equal participation in and access to the courts and legal profession by all persons, from initiatives to enhance judicial and workplace diversity, to efforts to help ensure that issues facing LGBT litigants are fairly addressed by the courts."

The vision is further set forth that it will be in collaboration with existing advocacy organizations, bar associations and community groups to raise awareness and foster a supportive environment for LGBT people. The top-most priorities that were identified are enhancing judicial diversity and bringing LGBT people into the non-judicial workforce.

John Caher: Okay. So, what is this commission? How many members are there? How is it staffed? How is it set up?

Justice Kahn: Right now we've got 21 commissioners, two co-chairs, and one full-time executive director. The executive director is Mark Levine, who's a long time non-judicial staff member of the court system and has led the Gay-Straight Alliance for, I think, the entirety of its existence. We break down a little bit differently than the Williams Commission does. We have 15 judicial members, four members who are attorneys, two members who are non-judicial staff members, and one representative of the bar. That's where we are right now.

John Caher: It seems well represented. Why was something like this even necessary? Judge Garry, you read some quotes from the Chief Judge's press release, that cited the need for equality and fairness. So, apparently we're not there yet?

Justice Garry: As the Chief Judge recognized in forming and initiating this commission, there have been tremendous gains. The last decade or so, living as an openly lesbian person, has been a tremendous time. Despite the recent gains and advances—and this is again really her initiative and her language—we have issues with equal citizenship of this historically oppressed and marginalized community. People are still very much feeling discrimination, exclusion, bullying, violence.

In my view, the commission will be guided, in all that we're going to do and undertake, by the fundamental goal of achieving full rights for all citizens of our state. The essence of that when it comes right down to it—and I think about it and reflect on that—will be making real the promise of liberty and justice for all. If there's one place and one sphere of our government, John, that really should be naturally empowered to lead the way in that undertaking and in honoring and protecting our individual liberties, then it's certainly the Judiciary. That's why this is such an appropriate and timely and necessary undertaking.

John Caher: It's also a historic one, I believe. Now are we talking about litigants—the people who visit our courts—or people who work in our courts, or both?

Justice Garry: Absolutely both.

Justice Kahn: Absolutely, and we know from those early days 30 years ago that litigants would be victimized by homophobic treatment, that attorneys who were coming to court would also experience it and would very often talk to

those of us who were openly gay judges in the 1980s and '90s about it. Certainly it was an issue for court staff, and really sometimes for the lesbian and gay judges.

Justice Garry: I would not view this as primarily an inward looking commission. The goal and function of the courts is always public service. What we're seeking, the fundamental mission, is to best provide access to justice for all of the citizens of our state, to have courthouse doors that are open to all of our citizens in a way that feels meaningful and real. We should not have a feeling, for any citizen of our state, "Will I be treated fairly? Will my needs be heard?" That's one of the fundamental purposes of the commission, as I see it, and probably the greater purpose.

John Caher: That seems just so basic and self-evident, but apparently the reality is different than the promise?

Justice Kahn: That's true, and we've seen over the years that, for example, lesbian, gay and transgender victims of domestic violence are very reluctant to come to court, even more so than their straight counterparts, because they fear being ridiculed, or treated unfairly, or that their concerns will not be understood, that there won't be as many resources available to serve them, which has historically been true. Part of what we're about, as Justice Garry says, is to try to enhance the court system's openness and ability to assure access to justice for all so that the members of this community feel confident that they can seek and obtain justice when they come to our courts.

John Caher: That seems so key because whether people are technically accurate or not about whether they are treated fairly and viewed fairly when they come to court, if they don't perceive fairness, it's just as bad as if it truly isn't fair, right?

Justice Kahn: That's true.

John Caher: Now could you both explain how you two came to be involved? You're at somewhat opposite ends of the state. How did you two become involved in this initiative?

Justice Garry: I was invited to speak this spring at a Pride event that was held at the New York County Courthouse by the Gay-Straight Alliance. That was in Manhattan. That's when I first heard that there was a commission that was being considered, and I was asked whether I would consider taking part. I immediately responded with great enthusiasm, and particularly

because I simultaneously heard that there was also a possibility that Judge Kahn, who was at that same event, would also consider stepping forward.

Honestly, the opportunity to work with her—I know her work both through her writings in legal publications and I know of her reputation for the work she's done with the Tribal Courts Committee—in an undertaking of this sort was just exactly what I would hope to work toward in my career. I said, "Yes, I'll step forward."

Justice Kahn: Had I known that Judge Garry would say that, I would not have allowed her to go first! Thank you. I'm very flattered and honored by what you say.

As I say, this had been an issue on a front or back burner of some sort or another for decades. The Gay-Straight Alliance was really pushing hard for it and had secured the agreement of the Office of Court Administration and our then new chief judge, Chief Judge DiFiore, last spring to establish this groundbreaking institution, first of its kind in the county, we believe.

Mark Levine of the Gay-Straight Alliance asked me if I was willing to be recommended to the Chief Judge along with Justice Garry to be the co-chairs of it. I was deeply honored. I have known Judge Garry for a long time, but because we sit in very different parts of the state, I don't have any opportunity to work with her. This gave me that opportunity, and I was very excited about that. So far in our just few months of working on this together, I've been proven right, it's a wonderful thing to work with her. On the recommendation of the Alliance to the Office of Court Administration and the chief judge, we were selected.

John Caher: Sounds like a perfect partnership. Judge Kahn, I believe you were the first openly lesbian person appointed to be a judge at the New York City Criminal Court way back in 1987. What was the reaction back then? What sort of issues did you have to contend with in the late '80s?

Justice Kahn: John, first of all, my swearing in made the newspaper because my partner, Diane, held our family Bible as I took the oath of office from Mayor Ed Koch, and I thanked her for her support during the brief remarks I got to make at the induction. That was considered newsworthy at that time. I was assigned for my first year to Bronx Criminal Court, where I was not only the only woman judge on that court, but I was also the first openly gay judge ever to serve on any court in that county.

During that time, the first thing that stands out for me was that the court system was just struggling to find its way to deal with the widespread fears about the AIDS epidemic. Policies put in place during that time were, frankly, completely unsupported medically and scientifically, refuted by the Centers for Disease Control in their weekly publications and by many other non-governmental agencies at the time. The court system's initial policies dealing with people with AIDS, if you can believe that they actually had such a policy—they did—were highly discriminatory. This was, of course, before passage of any anti-discrimination laws in New York State or New York City.

Despite my junior standing as a first year judge of a lower criminal court, it fell to me because of my prior work in the LGBT and AIDS communities to educate and train the court officers and clerks about the nature of HIV disease and the manner of its transmission. That was an overarching aspect of my first year on the bench. The officers were really hungry for information, but somehow I was the only one providing it.

Of course in those early years, even in Manhattan, gay and lesbian lawyers and judges, as I've said, had to endure homophobic remarks and so-called jokes sometimes from non-judicial staff, sometimes from agency lawyers, and even on occasion from other judges. In those years, in the 1980s and '90s, I think it was largely due to the presence, which was new then, of a handful of out gay and lesbian judges who worked alongside everybody else, and the courthouse didn't burn down or anything, that people's attitudes began to change. People began to feel that they could be open about who they were. As more and more people knew more and more gay people, there was less fear, less bias, less discrimination.

John Caher: I guess it just takes time. Judge Garry, you came to public service a little bit later than that and in a much, much different location than New York City, a fairly remote rural area. What were your experiences?

Justice Garry: By the time I was really in a publicly out role, times had really changed. I did not have to suffer some of the same experiences in a public manner that Judge Kahn has just described. By 2009, when I was appointed by Governor Paterson to serve on the Appellate Division, Third Department, I have to say I was received very well at that court. I was quoted at that time, at the time of my appointment, as saying something along the lines of having the opportunity to join some of the best judges that I knew and having that opportunity to work with them.

John, that's been fully borne out over the eight years that I've had the chance to work in that court setting. I just couldn't really say enough good words about how I've grown to deeply respect my colleagues on that court for their hard work, their wisdom. I have not had the negative experiences that preceded that time.

There have been strides made in just the short period of decades. I remember serving as a law clerk to a judge where I began my legal career. I feared that just by association that if I was to be publicly outed at that point in my early career, that it would have a tremendous adverse effect upon him. In today's standards that's remarkable, but that's really how it was. By 2009, that had changed considerably.

The other thing, and the reason that this work is really important ... I've had a good experience, and I want to actually credit my current Presiding Justice, Karen Peters. She has been a source of outstanding support. When Judge Kahn spoke about her swearing-in, the former presiding justice of my court, Judge Cardona, actually had the sensitivity to call my entire family up for that event. I have a picture on my desk of my mother and my partner, who is now my wife, but at that time we were not able to be married. We had two of our children there. They were all up there with me with the Bible. It was a great day.

Anyhow, what's important and what's happened to me since has been absolutely transformative. That's why I really want to work with this commission and help the public access and help others who may be like myself in other upstate courts in particular. When I make any public appearance over the course of the last eight years, whether I'm speaking to a group of young scholars or I do an admissions ceremony, whatever role I may take when it's a public appearance in my judicial role, I will almost invariably have someone approach me and thank me for my part in representing them. Sometimes it'll be more than one person. The effect and the importance of that representation has become truly clear to me in the course of fulfilling that role.

When I was appointed, honestly, I didn't embrace it that fully. I wanted to be a merit candidate. I didn't want to be a diversity candidate. I think that's a pretty common experience, that speaks to a lot of people. I wanted to be a great judge, really doing great judge work. There was a part of me that didn't want the recognition for being a lesbian judge. I wanted to be a great judge. Bringing those two things together has been tremendous personal growth because the truth is that it's important to own and claim the identity and serve all of the people of New York State

in the judicial role. That representative part, it's important. I don't know if I've expressed it well, John, but it's so important. That's what this commission is about.

John Caher: You have expressed it very well. I'm pleased and amazed, and I don't know if you agree with me on this or not, at how much progress has been made. Honestly, did either of you 20 years ago think that same sex marriage would be the law of the land in this country in your lifetime, or that same sex marriage would be widely accepted? There's a certain generation, a certain segment that's never going to accept it, but I think by and large it's well accepted. I certainly didn't see that sort of a transformation coming in what is really, well I guess it depends on your perspective, a short time. It seems like we've made a lot of progress in a reasonably short period.

Justice Garry: I did think it was coming, but I didn't think it would be coming so quickly.

Justice Kahn: I think it has surprised me, John. One of the reasons I went to law school was because people like me were not allowed to get married. That's a long time ago now. I remember being very discouraged by the Baker case, which said that gays had no right to marriage in 1973. That was one of the motivating factors that got me into this profession. I think that a lot of people who've been active in the movement for LGBTQ rights, many of whom by the way are on our commission, did not expect attitudes and legal standards to change as rapidly as they have.

Again, I credit this to people stepping forward and being honest about who they are even though in many cases it has taken a great deal of courage for people to do that, and many people have suffered greatly for doing that. They've been disowned by their families, they have lost their jobs, they've lost their housing, they couldn't get all manner of health services. People have suffered a lot in this struggle. I think it's because people have come forward and people have said, "I may have a theoretical thought about gay people or homosexuality, but my next door neighbor is gay and he's fine." As they come to know more people and realize that we're part of the fabric here, attitudes do change. As you know, they have changed even more rapidly among the millennials and generations that are coming behind people like us.

Throughout my career whenever I've spoken, and I've been open about who I was since the early 1980s and spoken publicly since that time, I've never said that anyone ought to come out as a political gesture and they had a political duty to do that even though I have long thought that this is

how we effect change, when people can see us. It's easier to hate people you can't see.

I believe it's really a very personal decision that each person has to make based upon their psychological makeup, and to come to when they're ready. I can't fault anyone on political grounds for deciding sooner rather than later or later rather than sooner, or maybe never, to be open about who they are. You have to be comfortable with it, although I think that those of us who have come out in our professional lives, not just in the law but certainly in the law, have found that it really makes the experience of our lives much more rewarding.

I will say that certainly in more recent years in my career, the acceptance and warmth and collegiality of my colleagues has been very gratifying as well. The support that we've seen from our straight colleagues has been very important.

John Caher: Is a day coming in our lifetimes when a person's sexual identity or sexual orientation is inconsequential, irrelevant, and maybe no more significant to the judgment of a person than their height or hair color?

Justice Kahn: I don't view it that way. As diverse as it is, LGBTQ community has a culture. It's multi-faceted. I don't think it's something anyone would want to turn loose of any more than a person's racial or religious heritage is anything that they would want to jettison and forget about and eliminate from their identity.

John Caher: I didn't mean it like that. I meant in terms of judging a person. Will we get to the point where a person's sexual identity simply doesn't factor in to an assessment of their character, whether they are a good person, whether they are a good friend?

Justice Kahn: I think a lot of young people feel that way. We heard the refrain a lot in the '60s, and '70s, and '80s that, "We don't want to know about your sexual orientation. We don't care, so keep it to yourself," which basically meant ...

John Caher: Don't ask, don't tell?

Justice Kahn: Something like that. We don't want to hear from you. We don't want to know about you. We don't want to consider your concerns or your issues. We don't want to consider that you might have difficulty going about your daily routine. For example, if you're a transgender person, you

might be addressed with the wrong pronoun or denied the opportunity to use a bathroom in which you were comfortable. We don't have to think about you is really what was being expressed through that kind of refrain.

Justice Garry: I do hear exactly what you're saying, Judge Kahn, and at the same time what John was trying to say was that that aspiration of can we reach toward a world where people are evaluated or judged on character and merit and not these other things. That's always worth reaching for.

Justice Kahn: I agree with that. I agree with that.

John Caher: Judge Garry, Judge Kahn, I really appreciate your time and your efforts on this commission. It's clearly a historic moment in New York and apparently in the nation. I foresee great things in this, and I'm sure you do as well.

Justice Garry: Yes, we're excited about it.

Justice Kahn: We are, we are. Thank you very much for having us, John. We appreciate it. We're glad to have this as a sendoff as we get our commission launched.

John Caher: Thank you for listening to this edition of Amici. If you have a suggestion for a topic on Amici, call John Caher at 518-453-8669 or send him a note at jcaher@nycourts.gov. In the meantime, stay tuned.