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"I don't think there is a piece of the Gay civil rights agenda that is not at least in part being fought in the courts," says Kevin Cathcart, "and there isn't a part that isn't being fought by Lambda."



by Clint Steib

Courting Gay civil rights

In and out of court, Lambda enjoys key role in movement

by Peter Freiberg

When a small group of New Yorkers decided to establish a Gay legal organization in 1973, they found themselves in an unexpected quandary: They had to file a lawsuit just to secure the right to form their group.

The New York State Secretary of State, wielding the authority to reject incorporation papers, ruled

First of two parts

that, since sodomy was still a crime in New York, a Gay legal group was, well, illegal.

But the courts rejected the state's argument, and Lambda Legal Defense and Education Fund was born — an organization with a volunteer board of directors but no office, no employees, and no court cases.

How times have changed: Today, as Lambda moves toward its 25th anniversary next year, the organization is in the forefront of the Gay civil rights movement, with increasing influence on both the movement and American society.

Lambda, without a doubt, is on a roll.

In five years, the organization's budget has almost doubled — from \$1.6 million to \$3.1 million. Its legal staff has nearly tripled — from four attorneys to 11. In addition to its New York headquarters, it has regional offices in the Midwest (Chicago) and on the West Coast (Los Angeles), and is scheduled to open its third regional office in Atlanta in June.

"There is no [Gay] political organization that has that kind of [national] presence," asserts Arthur Leonard, a longtime Gay legal activist, professor at

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In and out of the courtroom, Lambda has a key

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New York Law School and former member of Lambda's board.

But the increase in resources, which has allowed Lambda to take on a bigger docket of cases, does not alone explain the group's growing prominence.

"They're good," says Matt Coles, executive director of the ACLU's National Lesbian and Gay Rights Project. "They've got good lawyers working there."

And as litigation has become a more important part of the movement, says Coles, "an organization that's basically devoted to litigation becomes a more influential voice."

Litigation has brought defeats as well as victories. The low point was in 1986, when the U.S. Supreme Court issued its harshly worded *Bowers v. Hardwick* decision upholding the constitutionality of state sodomy laws banning private consensual sex between Gay couples.

But Kevin Cathcart, Lambda's executive director, says that in the last few years, "The courts have been a relatively successful place for Lesbians and Gay men to go — a more successful place in many ways than political avenues have been for expanding Lesbian and Gay civil rights."

"I don't think there is a piece of the Gay civil rights agenda that is not at least in part being fought in the courts," says Cathcart, "and there isn't a part that isn't being fought by Lambda."

Kerry Lobel, executive director of the National Gay and Lesbian Task Force (NGLTF), says, "There's no question that Lambda does essential strategic thinking for our movement by identifying pivotal legal cases." Gay legal groups, Lobel says, can often choose cases; Gay political groups often have their battles chosen by anti-Gay activists.

At the same time, asserts Lobel, "We're able to win legal victories because we've won tremendous political and cultural victories."

"I think they go hand in hand," says Lobel. "Lambda can only be successful because our local, state, and national political groups are ... creating a climate where our cases succeed."

Lambda's focus is on "impact" or "test case" litigation — cases in which decisions will affect not only the individuals bringing the lawsuit but will advance the cause of equal rights for Gay people generally.

In addition to its AIDS Project, established early in the epidemic to combat AIDS-related discrimination, Lambda litigation involves employment, custody and adoption, sodomy laws, military, youth, anti-Gay referenda, immigration, and other issues.

When selecting cases, Lambda looks for clients who "are so good, so strong" that their case will not be sidelined by personal issues, says Cathcart.

"For test case litigation," says Cathcart, "you need really good facts and plaintiffs who can withstand the ... glare of publicity."

Lambda's test case orientation sometimes generates criticism from individ-



Jean Dubofsky, lead attorney on the Colorado case, says the case was difficult at first because Lambda "didn't have a person who had experience practicing law."

uals who believe they were discriminated against and don't understand why Lambda won't represent them.

"We're constantly having to explain to people who call up [that] we're not a private law firm; we're not a legal services organization," says Cathcart. "We look for the cases that will have an impact on the civil rights of Lesbians and Gay men."

Despite its central role in the movement, Lambda has escaped many, if not all, of the kinds of attacks to which national Gay political organizations like the HRC and NGLTF are often subject.

Robert Bailey, an openly Gay political scientist at Rutgers University, says this is partly due to a widespread feeling among activists that legal strategy is best decided by lawyers, whereas everyone feels qualified to debate political strategy.

Good v. equal

Lambda's many court victories have further lessened the likelihood of criticism, Bailey says.

Beatrice Dohrn, Lambda's legal director for the past three and a half years, lays a good part of recent judicial successes to an increasing reliance on "equality arguments" based on the equal protection clause of the 14th Amendment to the Constitution.

Instead of relying on testimony about Gay people's characteristics, says Dohrn, the "equality argument says you can't do anything different with respect to Gay people than you do with respect to heterosexual people."

For example, says Dohrn, in a case involving a Lesbian mother whose child is present when a lover stays overnight, Lambda previously might have emphasized that that situation "isn't bad for kids." Now, she says, Lambda stresses to the courts that, if they believe it's OK for heterosexuals, then it should also be OK for Gay people. "Just treat us the same," she tells the courts.

Last May's ruling by the U.S. Supreme Court striking down Col-

orado's anti-Gay Amendment 2, says Dohrn, "was the pinnacle of success for the equal protection argument."

In that ruling, the court majority said Amendment 2, which barred the state and municipalities from passing laws protecting Gay and bisexual people from discrimination, subjected them "to a special disability" and deprived them of equal protection of the laws.

The Amendment 2 case, in which Lambda and the ACLU were co-counsel along with Colorado attorney Jean Dubofsky, further heightened Lambda's visibility.

In November, another landmark victory arrived. A federal jury in Wisconsin ruled that three public school officials violated the constitutional rights of a Gay student, represented by Lambda, when they refused to intercede to stop repeated anti-Gay assaults against him at school. Ending a case that Lambda hopes will convince school officials nationwide to take action to stop anti-Gay harassment, the school district in Ashland, Wis., agreed to pay \$900,000 to student Jamie Nabozny.

But more than anything else, it was same-sex marriage that propelled Lambda into the media limelight in 1996.

Like other Gay legal and political groups, Lambda initially rejected getting involved in the issue in 1991, when three Gay couples filed a lawsuit in Hawaii to force the state to grant them marriage licenses. Some legal activists believed there was little chance of winning, others saw that the Gay community was divided, and a few did not consider marriage a desirable goal for the movement.

But Lambda attorney Evan Wolfson, an early and outspoken advocate of the right to marry, continued pushing for Lambda to join the case.

Lambda filed a friend of the court brief supporting the couples. After Dan Foley, the couples' straight private attorney, won a major victory at the state Supreme Court in 1993, Lambda accepted his invitation to become co-counsel and assigned Wolfson to the case.

Chai Feldblum, a former legislative counsel for the ACLU's Lesbian and Gay Rights Project, says Lambda's decision to get involved in the Hawaii marriage case led to "some sticky moments" initially with other legal groups. Eventually, she says, the other groups backed Lambda's move.

Foley says Lambda's help, financial as well as legal, was "invaluable" in securing last month's landmark opinion from Judge Kevin Chang — that the state has no grounds to refuse Gay couples a license. The Hawaii Supreme Court will make the final decision.

Cathcart estimates that, so far, the Hawaii trial and related marriage work has cost Lambda about \$250,000 in the past year and probably \$500,000 over the last three years.

Law v. politics

But Lambda's fight for marriage has gone beyond court. In 1994, the organization created a Marriage Project, di-

rected by Wolfson, to coordinate efforts by Gay-supportive groups and widen the base of backing for marriage rights. The Project made Lambda — and Wolfson in particular — the unquestioned leading advocate of the right to marry.

"[Wolfson] has taken a traditionally legal organization into the realm of public advocacy, media advocacy, and community organizing," says Urvashi Vaid, author and former NGLTF executive director. "Lambda didn't just put their eggs in the legal basket."

But the marriage issue demonstrates how Gay legal and political activism are inextricably linked. Gay activists in Hawaii lack money or staff to mount a major campaign to defeat a possible constitutional amendment banning same-sex marriage. If voters approve such an amendment, a legal triumph may be eviscerated by the weakness of Gay political activism.

The political fight over the ban on openly Gay servicemembers has also influenced Lambda's actions.

"The courts are all that's left," says Cathcart. "We lost that one politically, with [Congress's] passage of 'don't



Suzanne Goldberg says of the Colorado case: "Co-counsel relationships come down to the willingness of lawyers to respect their areas of expertise."

ask, don't tell."

"As a community," says Cathcart, "I don't think we've been near as organized politically as we ought to be." And while the judiciary may often be sympathetic to the arguments of Lambda and other Gay legal groups, Cathcart warns that the courts "are not going to get too far ahead of where they perceive the rest of society to be."

Lambda is only one of several Gay legal groups. The others are the ACLU's Lesbian and Gay Rights Project; the National Center for Lesbian Rights; Gay Legal Advocates and Defenders (which works primarily in New England); and the Servicemembers Legal Defense Network (which focuses primarily on assisting military personnel). The Colorado Legal Initiatives Project, which formed around the Amendment 2 case, plans to become

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role in the national Gay civil rights movement

the regional Gay legal organization for the Rocky Mountain states.

But Lambda is the only national legal organization devoted solely to Gay and AIDS issues.

Lambda's current expansion builds on a major period of growth that occurred from 1986 to 1992, when Tom Stoddard was the organization's high-profile executive director. Stoddard was adept at being a media spokesperson.

"Every time he was in *The New York Times* and on *Good Morning America*," says Robert Murphy, an attorney who is writing a biography of Stoddard, "so was Lambda. That had a lot to do with making Lambda a nationally known organization." The publicity, says Murphy, "legitimated Lambda in the eyes of ... a lot of donors, including big donors."

Stoddard's stature also gave Lambda access to more cooperating attorneys — private lawyers, sometimes at prominent law firms, who agree to handle cases for a nonprofit group at no cost.

"That gave Lambda additional credibility in the courts," says Murphy. During the 1980s under Stoddard, Lambda, more than any other group, established the principle that AIDS-related discrimination was illegal under the law, Murphy says.

Despite many other accomplishments, says Murphy, Stoddard did not focus sufficiently on personnel management and administration. A major goal of Cathcart, says Murphy, has undoubtedly been "to really achieve mature administration and management."

Feldblum, now a professor at Georgetown University Law Center and a legal consultant to HRC, notes that Cathcart typically stays out of the media limelight and lets attorneys who work on cases do most of the speaking about them.

In an interview, Cathcart, who came to Lambda from Boston-based GLAD five years ago, says staying in the background reflects his personal style as well as his view that Lambda's lawyers are "often the ideal people to talk about the things they're doing."

Feldblum says that Cathcart focuses on running "an efficient, strong organization and [hiring] people of incredibly good quality."

Lambda v. local

Nevertheless, Lambda is not without its critics.

Bill Dobbs, a New York Gay activist and attorney, maintains that Lambda should have spoken out forcefully against the insistence of Gay Irish groups in Boston and New York that they were entitled to march in the St. Patrick's Day parades.

The Gay Irish groups' stance, Dobbs says, would have narrowed parade organizers' First Amendment rights and ultimately hurt the Gay community, which relies heavily on First Amendment protection.

Dohrn says Lambda was very aware of the First Amendment issue. The organization, she says, did not get involved in a New York lawsuit filed be-

fore her tenure by the Gay Irish group.

In a Boston suit — filed by GLAD — that went to the U.S. Supreme Court, Dohrn says, Lambda, in a "very limited brief," argued that that parade was a public event without any particular message and that Gay groups should be allowed to join.

But the brief, Dohrn says, acknowledged that if the court found the parade was a private event with its own message, then organizers were entitled under the First Amendment to exclude whoever they wanted. The court ruled that even without a message, a parade can choose the participants it wants.

Dobbs also calls Lambda's emphasis on the right to marry "retrogressive."

"I'm opposed to marriage," says Dobbs. "I ... think conforming is a bad idea, that the whole of society needs to be changed."

Some marriage activists have been angered by Lambda's efforts — led by Wolfson — to discourage marriage lawsuits in other states while the Hawaii case is pending. Lambda lawyers believe negative decisions elsewhere could set bad precedents and might affect the Hawaii outcome.

Eden Stone, a member of the Boston-based group Forum on the Right to Marriage, says her grass-roots group tends to be "a little more maverick" and open to "playing things by ear" than Lambda.

"Lambda ... completely shuts off debate," says Stone. "When we've talked of civil disobedience, such as applying for marriage licenses, they just say, 'No, we can't do anything until Hawaii is decided.' ... They certainly seem to think they know best and that other people should kind of toe the line."

But most marriage activists express agreement with Lambda's strategy and praise for its work.

"Lambda," says Demian (his full name), co-director of the Seattle-based Partners Task Force for Gay and Lesbian Couples, "is doing the lion's share of the effort to gain legal marriage, not only with the Hawaii case but in helping organizations across the nation."

Another source of criticism, mostly hidden at the time, was a four-year battle to overturn Colorado's Amendment 2.

With so many attorneys and groups involved in a major, high-visibility case, the arrangement was "tricky" from the start, says Cathcart. There was also a separate legal organization formed to fight the amendment and help fund the case — the Colorado Legal Initiatives Project (CLIP).

According to both Cathcart and CLIP cofounder and spokesperson Mary Celeste, one source of conflict involved money matters, especially which organization was paying for certain expenses. Another source of tension was co-counsel relations.

According to Celeste, working with Mary Newcombe, Lambda's first attorney on the Amendment 2 case, was a "wonderful experience." But when Newcombe left the organization in late 1992, she was replaced by Suzanne Goldberg, who had graduated from law



Attorney Evan Wolfson, an early and outspoken advocate of same-sex marriage, pushed Lambda to join the Hawaii case.

school only two years earlier and who, according to Celeste, "didn't have the same kind of ... experience."

Dubofsky, a former Colorado Supreme Court justice who served as lead attorney on the case, says, "It was hard at the beginning, primarily because Lambda wanted to have a major role in the case, but they didn't have a person who had experience practicing law."

Dubofsky says that "gradually, over time, Suzanne got better at this" and, by the time the case got to the U.S. Supreme Court, was providing a "lot of help."

"So, many of the tensions that were there at the beginning eased over time," says Dubofsky, who calls Goldberg "very bright and very capable."

Goldberg says Dubofsky "is right, I was starting out in my career as a lawyer." But in Goldberg's and the ACLU's Coles' view, the source of conflict was differing opinions on some strategies.

Among the disagreements, according to Goldberg, were whether to seek a preliminary injunction to stop Amendment 2 from taking effect. Lambda and the ACLU said the legal team should seek a preliminary injunction; Dubofsky and others were afraid that losing on that difficult strategy so early in the legal challenge would diminish the chances of the lawsuit permanently overturning the initiative. They thought it would be better to let the initiative become law and wait for the litigation to overturn it. Ultimately, the legal team sought the injunction and won, and the anti-Gay law never took effect.

Goldberg, who is now a veteran of referendum cases in Cincinnati, Florida, Idaho and elsewhere, says of the Colorado case: "Like all relationships, co-counsel relationships come down to personalities and the willingness of lawyers to respect their [respective] areas of expertise. Sometimes that happens, sometimes it doesn't."

The local/Lambda relationship worked very well in Cincinnati, according to Scott Greenwood, a lawyer who represented the ACLU and who had

Goldberg and Lambda Midwest regional director Patricia Logue as a co-counsel in the fight against Issue 3.

Greenwood says that from the very beginning, when Logue and Goldberg began strategizing with him and another co-counsel, the Cincinnati team worked cooperatively.

Not only do Lambda's lawyers have expertise and "an unbelievable amount of energy," says Greenwood, but "they're not just academic lawyers, they know how to try cases, too."

Lambda's attorneys are also praised by most grassroots activists who have dealt with them.

Charlene Orchard, cochair of the Utah Human Rights Coalition, a Gay group, says, "I've got to tell you, they've been absolutely wonderful."

Last February, says Orchard, she needed arguments immediately on why a proposed law to clamp down on teachers' activities — and thereby scuttle Gay school clubs — was unconstitutional. She called Lambda attorney Jon Davidson, who quickly wrote and faxed the needed statement.

"That's what we used," says Orchard, "in our lobbying efforts."

Subsequently, says Orchard, she worked closely with Lambda attorney David Buckel in fighting a school club ban that was eventually enacted and may be challenged in the courts.

Lavi Soloway, a New York attorney, praises Lambda for forming the Lesbian and Gay Immigration Rights Task Force — under Goldberg's tutelage — and nurturing it until it became an independent organization with chapters around the country.

"This wouldn't have happened without Lambda," says Soloway. "No other group until then had taken any interest in [immigration]."

Praise also comes from non-Gay legal organizations. Nancy Ramirez, a staff attorney at the Mexican American Legal Defense and Educational Fund, says Lambda has influenced her organization to express positions on a number of Gay-related cases.

"When we get a call from Lambda about something that they're working on," says Ramirez, "we take it very seriously. We know the work they've done has been good work. ... It's a young organization that is making inroads in the legal realm, and I think there's going to be a lot more to come in the future." ▼

Part two: The Roundtable: Unlike their political counterparts, Gay legal activists have an ongoing mechanism for working together.

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