

---

# REPORT FROM THE FAMILY LAW PROJECT

Saturday, August 28, 1993

---

## Second Annual International Conference on Transgender Law and Employment Policy

**PROJECT MODERATOR:** *Connie Moore, Attorney*

By Phyllis Frye:

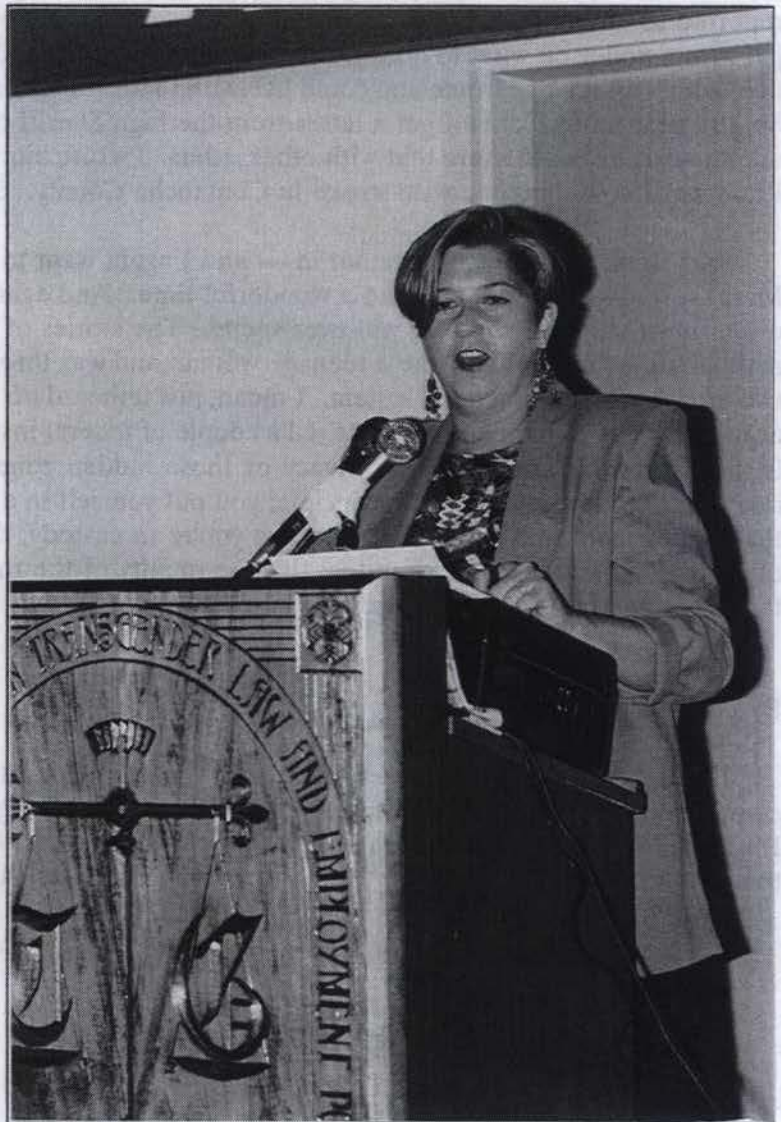
Okay, it's time for Family Law. That sounds like a television show intro.

It is with honor that I present Ms. Connie Moore, a true kick-ass, Family Law attorney. She and I have collaborated to make some transgender law in a rural county for a non-op female-to-male. She's going to tell you about it. I'd love to tell you about it, but she's already told me she's going to tell you about it.

She was our family law moderator last time. She told me that last time, going in, she didn't know a whole lot about us in the area of family law. I spent a good bit of time educating her. She kind of pushed the committee around. She came this year. She told me, "I already know what's going on, so we'll work it out." The committee pushed her all over the place this time. Y'all were very aggressive, assertive, and demanding of your rights. She had a ball. She is going to now present, not her report but, your report. Welcome Connie Moore.

By Connie Moore:

Thank you Phyllis. I appreciate that. You've got me started off exactly where I was going to start. I'll tell you just a little bit about the difference between last year and this year and refer you to last year's "Proceedings". If you don't have them, make sure you buy a copy of them. If you are reading this in the written "Proceedings" and didn't purchase last year's "Proceedings", then make sure you do that too,



Connie Moore, Attorney,  
Family Law Project Moderator

because this year the Family Law Project took on a different focus and a different direction.

Last year we focused on case law around the world, and the "Proceedings" last year include a summarization of that case law which is still very relevant and very helpful. We're not going to regurgitate any of that this year. What we're doing is concentrating more on progressive strategies for change, legislation that we may want to look at very closely, and how we can make change for the transgendered community in the Family Law area.

First of all what I'd like to do is thank the work of the committee: Leslie and Susan and Karen and Ruby and many others that came and participated in it. We had some really interesting discussions. We had some pretty heated discussions at times. We went back and forth, different ideas, different opinions, and I'm going to try to do my best to share everyone's opinion with you today.

First of all, let's look at some federal legislative possibilities to make some progressive strategies for change. We began our discussions focusing on the use of the labels "M" and "F" as an identifier. I was prepared to discuss ways to get around it, ways to change it, and how you can go from state to state and modify this document and modify that. The committee sat me down and said, "No. Wait a minute. Let's not talk about what we need to do to change it. Let's talk about what we need to do to get rid of it." I was enlightened.

I think the discussion really focused on the discriminatory practice of using the "M" and the "F" label, per se, as a piece of identifying information. They reminded me, I'm not old enough to remember this, of when race used to be on your driver's license as a type of identifying information. We discussed the constitutional arguments that could have been made and could be made in this area regarding the fact that we have federal laws on the books that prohibit a discrimination based on many areas — no, not transgendered areas, but on the basis of sex, on the basis of religion, and on the basis of race. If we were to back up from the specific rights of the transgendered and face more on the rights that are already there and already guaranteed, under the U.S. Constitution, specifically prohibiting discrimination against a person based on their sex, then we could use some of the same arguments that have been made to eliminate the use of race on driver's licenses and other identifying documents.

We got into a bit of a discussion on how the labels "M" and "F" were used — male and female on driver's licenses, and birth certificates. What was the purpose? What was the reason? Was it necessary? Was it unnecessary? Was it discriminatory? I think that the consensus of the committee, quite clearly, is that if you cannot be discriminated against simply on the basis of your sex, then why do they even need to know what your sex is? So the first strategy for change that came out of our committee is to work for federal legislative action based on the Constitution and the other laws in this country for removing the use of "M" and "F" as identifying information in any documentation.

The next strategy for change that we discussed also at the U.S. federal level was to work for legislative action to provide a uniform policy of birth certificate amendment for those who wish to change it. We realized in our discussions that there is a wide varying pattern of amending birth certificates from state to state. As we looked at some of last year's materials, also from country to country. Many states will allow birth certificate changes for the opportunity to change one's sex after SRS. Many states never allow that change.

Some states will allow a change in the manner of a strike through and replacement of information or the attaching of an amendment, so not only does it then become obvious that it's changed, it becomes very obvious that it's changed. It's not something that's just glanced over, it's something that attention is drawn to considerably. Other states allow for a corrected birth certificate to be issued which completely deletes the old information and replaces it with corrected information. Texas is one such state.

The suggestion was that we take some of the most liberal state laws allowing for changes of birth certificates and use that as a model for federal legislation to create a federal uniform policy of birth certificate amendments for those who wish to change it. The strategy here and the arguments that can be used again include the U.S.

Constitution. It seems clearly wrong to this committee for someone to be born in Texas and be able to completely change their birth certificate so that the old birth certificate is never referred to; meanwhile, for someone to be born in Tennessee will not be allowed ever to change the birth certificate. We're talking about something that you're born with here. Where you're born, you can't go back and change that. Everybody that was born in Tennessee and Ohio can't say, "Whoops I don't like that, let me move first." It doesn't work. Your birth records stay in the state of your birth.

And so there is a fundamental difference between the way people in this country are treated depending upon where they're born. We feel, in the committee, that this was an unconstitutional difference and should be replaced with the uniform policy of birth certificate amendment. Along those same lines, and I'm not sure what the personal identification committee worked on and did, and I hope that I'm not, and our committee did not repeat too much of the work that went on in that committee, but we also worked on the identification issues somewhat in the area of driver's licenses.

One of the reasons why we initially got into the identity information in the first place is because many of the statutes that allow someone to go get a marriage license issued or in many other things that persons want to do within the family law area are begun with a piece of identifying information, be it a birth certificate, be it a driver's license or some other identifying information. So your personal identity is very much wrapped in some of the rights and privileges that you enjoy in the family law area.

It was pointed out to us in the committee and we found this incredibly interesting that the Department of Transportation is doing a study right now on the possibility of issuing, for lack of a better word, a national driver's license. The Department of Transportation is studying whether it should take the issuance of driver's licenses away from the state and do a national driver's license. And the theory behind the study is, as I understand it, to issue a national license.

It will have a mag strip on the back of it that will include your DWI record, points, traffic, driving record. Those are the kinds of things that will go with you from state to state. At any time you are stopped and pursued for traffic violations then either the state trooper or the county sheriff will be able to run it through a machine right there in the patrol car and find out who this person is. This can be good and bad.

We have had some discussion on a California policy that is doing something very similar to that now. They, in fact, have a mag strip on the back of the California Driver's License. Part of what the Department of Transportation is considering is whether or not the sex, male or female, will be a part of the identifying information that is on that license. So, there is discussion and testimony being presented at a hearing about the relevance and the necessity of putting sex as identifying information on a driver's license.

Like I said, there's a flip side to this. In California, it was pointed out to us, also included on this information is alias information and other names that someone has gone by. That very possibly the former name that you have used may be on the mag strip. One person indicated that essentially upon presenting her driver's license to a state trooper, she was outed immediately. It was right there for all the world to see — formerly known as or also known as. I guess not all the world to see, but for all the world who has a little mag strip decoder. But the officer that was stopping her had readily identifiable information as to her name now and her former name.

This Department of Transportation study that is going on takes on an even more important reason to get involved in presenting information to the Department of Transportation. If we don't use this window of opportunity — that's the word that was used in our committee, we consider this a window of opportunity that the committee is in fact investigating this information, and now is the time — if we wait, it will be too late. We must use this window of opportunity to, not only lobby and make sure that the driver's license does not include the "M" and the "F" labels, but in fact, make sure that the flip side that we discussed, the dangers that we discussed about referring back to former names that have been legally changed, should not be included on there.

It's not to be too invasive of one's privacy.

When we first started talking about this committee work at my office, I was in a discussion with my paralegal about the Texas Family Code and what could be changed, and what should be changed. Phyllis had told me specifically she wanted us to deal more legislatively this year than the case law last year — to kind of take a different focus. We were really examining our family code to find out what, if anything, would be particularly helpful to include in the code that would assist and eliminate some of the discriminatory practices that we're finding. My paralegal kept coming back around to Section 1.01 of the Texas Family Code, which says, "a man and a woman may petition and obtain for a marriage license." That's where the Family Code starts in Texas.

The first five words in the Texas Family Code are "a man and a woman." We talked and we talked, and she kept saying, "I'm telling you, what you just need to do is you need to change 1.01 to 'a person can apply for a marriage license'." And I said, "Alison, that's real great. I love that. I think it sounds wonderful. I would love it. It would be incredibly liberating, but don't you think that's going just a little too far? Don't you think that we might never be able to do that?" I walked into the office, I guess this was Thursday afternoon, after we had been sitting in workshop for an hour and a half discussing why do we need to have the "M" and "F" labels. "Let's just take them off the driver's license," and "Let's just take them off the birth records," and "Let's just do this." I walked into the office, and she said, "Well, how did it go today? What are y'all going to do?" I said, "We're going to change 1.01 of the Texas Family Code to eliminate 'a man and a woman' may apply for a marriage license."

So, I'm really excited about the truly progressive way this committee has dealt with this issue, with this identifying issue. On first glance, my knee-jerk reaction is, "Boy, this is just a little bit broad. This is something that we may never see in our lifetimes. We're really going to raise their eyes with this." I have to tell you that there was some kind of concern in the committee too.

Although I'm trying very hard to focus very much on the positive aspects that came from the committee, and I feel like I owe that to the committee, I also owe the committee and you an opportunity to tell you very briefly, very briefly about some of the negative change that did come out of that discussion so that we do go into this with our eyes opened. Some of the members of the committee felt that these broad ideas were, in some respect, very dangerous.

It was pointed out that we would be challenged, of course, every step of the way by the bureaucrats. This was really just an issue of bureaucracy. The issuance of the driver's license, and the issuance of the birth certificates was so deeply rooted and the red tape and the bureaucracy and the compelling state interests and the reasons for the state to keep track of us, and that we were really going to be in for some pretty serious arguments from the other side.

I don't doubt that and I don't think anybody in the committee did doubt that or argued with that. I don't think that, I don't think that any of us would feel that it's very realistic to think that any of the ideas that we are proposing here this week are going to be met with open arms. Yes, we're going to have compelling arguments from the other side, and I think that what we decided was the best thing to do is keep your eyes wide open. Anticipate the arguments that you're going to meet and be ready to refute those arguments with good testimony and good evidence.

So, we spent the first day of our committee talking, I would say mostly, about the identification issue per se. It was not so much on how it affects the family law, but how the identification issue per se is discriminatory and if we could start there, then it would be like a domino effect. The ripples in all areas of the law would just fall right behind.

The next day we spent our discussion mainly around our families and our children. The committee wants to reiterate what we started last year. The case law that is in the first "Proceedings", is still very valuable and

still up-to-date but is old. Many of those cases come from the early seventies. The ideas and the attitudes of society has changed significantly since the early seventies.

Most everyone, or I should say everyone, in the Family Law Committee was familiar with the litigation that's going on in Hawaii right now regarding the right of persons of the same sex to marry. This is the first challenge to same-sex marriage that has been met in over 20 years. People had just quit challenging it. The law, it seemed like there were so many of them and so in place. They weren't going to go anywhere and every time we challenge them we lose, so we quit.

I'd like to bring your attention back very briefly to something that Alice Oliver-Parrot said yesterday which struck so close to home for me. She said, "A loss is nothing more than one step closer to a win." We have to quite looking at these cases as this is a losing case and this is a losing case, but this is another step closer to the day that we're going to win this fight. It hit very close to home personally for me yesterday. I hope that you will take that thought and let me reiterate her words and take those with you.

The focus of our discussion yesterday was on changing the family through mainly the court system. There's really nothing wrong per se with most of the family law statutes. Most of the family law statutes revolve around best interest of the child. It's real hard to argue with that. That is what the courts look to when they're making decisions about our families.

What this committee had a problem with in family law was the assumptions, the underlying assumptions, that are used by a large part of society in applying those laws. Family law is about associations, the people that we surround ourselves with, our spouse, our loved ones, our significant others, our children. What society has done is base the family law on the old patriarchal family unit, this model of mother and father and son and daughter, standard heterosexual stereotypes, if you will.

One of the things that we want to encourage through our litigation is to abandon this male/female paradigm and to demand that our chosen families be given the same rights and opportunities and freedom of association as our blood families. Change the usage of gender terms, such as mother and father in the statutes. Change these to two parents, conservators, spouse, care-giver, child. Use non-gender terms.

It was pointed out, and we laughed and remembered, that when we first saw the Ms, M-s designation that was going to take the place of Miss or Mrs, that, "Oh, boy, this is really going to take off, isn't it." And we realized several years later that it has. You very seldom see the word Mrs or Miss in print any more. All of the media uses the generic term, Ms. We want to take that one step further and begin to educate people and leave the gendered words alone. Get the gender words out of the code.

The Texas Family Code has recently undergone substantial revisions. In fact, they'll be effective this Wednesday, September the 1<sup>st</sup>. They have greatly changed a lot of the wording of the code. Most of the changes, I shouldn't say most of them, many of the changes are nonsubstantive. But they're changing the words that they used to eliminate the words that are discriminatory on their face. They have begun a push to remove the word "illegitimacy" from the Code and a lot of other things that are just inappropriate. They are taking the words that don't fit into some of the typical patriarchal family stereotypes out.

That is what we are encouraging each one of us to do — to work for legislation to remove the gendered terms from our family codes. And to do even more than that; push to change the attitude that our families, the family unit itself, is changed considerably. Family no longer means mom and dad and son and daughter.

We had a discussion about the arguments — with the successes — that the gay and lesbian community has used in this area. We were very careful to distinguish and point out and make sure we all understood that gay and lesbian arguments aren't necessarily transgendered arguments. But in the family law area, sometimes it can be very helpful and very useful to use some of the arguments in the family area that have been used by gays

and lesbians to benefit the transgendered community. One of the things that the gay and lesbian community has been able to do, with scattered success around the country and developing more and more successfully daily, is the changing of the assumption of the structure of the family. And so we would like to suggest that we look at these arguments, that we read these cases, that we don't ignore these cases, and that we use some of the same arguments to benefit this cause as well.

Another strategy that was discussed, which relates back to challenging some of the old laws, was not stopping at the trial court level when you lose. Since we've already decided that we're not going to accept these losses as losses, but we are going to accept these losses as one step closer to winning, you have to make that next step and take these cases to the Courts of Appeals. Take them to judges like Alice Oliver-Parrot, and others that are like her, that are committed to not just getting re-elected and not worrying about what the jury is going to say, not worrying about what all of the other things that go hand in hand where the trial court's concerns. Take them to the Appellate Courts who are concerned with upholding the Constitution and make the constitutional arguments that we've brought forth. Appeal these cases.

This was discussed in terms of increasing the accountability of the trial courts. One of the things that we've noticed more and more in our daily practice is that the trial judges know the rules. They figure if you don't appeal, then it really doesn't matter what the rules are. They know the rules, but they don't have to follow them. It is frustrating more and more when the judges blatantly don't follow the rules because they know nobody's going to challenge them. This committee says, "Stop that! Stop letting them do this. Demand accountability from the court and make them follow the rules. Appeal these decisions."

In an effort to take some of the losses and turn them into wins at the trial court level, as opposed to having to rely on the appeal, we talked about the strategy of being better prepared to go to court, with evidence and studies of children involved in transgendered families. We talked about the lack of scientific and sociological studies in this area. There are so many studies out there that can be used by the experts in a lot of other areas of law. Some of the ways that the lesbian and gay community are using the psychological studies and changing the family law is by using the studies to dispel myths, and to correct erroneous assumptions about their community.

One of the things that we discussed is we need to start pushing for the experts to start doing some studies on the children in our families. We will have the scientific evidence that can be used by an expert that will show that the best interest of the children is served when children are allowed to live with a parent that they're



Connie Moore, Attorney,  
Family Law Project Moderator

bonded to. We strongly urge that we start discussing in our associations, in our other professional associations, not just in the legal conferences, but in the other conferences and other associations, the need for psychological professionals to create and commission these studies.

It was also suggested that we compile anecdotal studies ourselves and begin building a body of evidence, if you will, of situations that we all know. Let's begin that within our own communities and begin building our own studies. Have C.L.E., Continuing Legal Education, credits where these issues are taught. Much like this. It was suggested that we actually have a mock trial. Have some mock trial work so that persons could see how to cross examine or how to do a direct examination of a witness to elicit good facts about transgendered persons; or how to cross examine a biased expert who's sitting there promoting myths. Really work to try to push for better preparation and better leg work at the trial court stage.

We want to talk just a little bit — Phyllis wants me to talk a little bit — about some of the ways that we have of using the laws that are on the books already without having to go out and change the laws to make them fit the transgendered circumstances.

This specifically relates to Texas, and quite frankly, I'm not familiar with another state that has a Family Code quite like ours. I seem to echo the feelings of Alice Oliver-Parrot regarding the Texas Constitution, about how the Texas Constitution has a far greater level of protection than the Federal Constitution and to use that. So it's hard for me to take this outside of the context of Texas because this is the state that I do my family law work in. The family law — the Family Code here in Texas — has some pretty interesting provisions that we use in our daily work to uphold the benefit that we have taken upon ourselves to go get.

Let me give you an example. First of all, we don't have any provisions or specific prohibitions keeping two persons of the same sex, biological sex or otherwise — it doesn't talk about that in the Family Code, surprisingly enough — we have no specific prohibitions about two persons of the same sex named as conservators of a child. Now conservatorship is not quite a parent. It's not quite an adoption. But it's just one little step shy of being a parent. It allows for all of the parental decision making that's done. Conservatorship is the word that's used in Texas for the parent who gets custody of a child in a suit affecting the parent-child relationship. So conservatorship is very often used to obtain parental rights for two persons. It puts two persons on an equal footing who otherwise would not be allowed to adopt because they have the same biological sex.

Also, and this is the one that Phyllis is real excited about, she likes a whole lot, is Texas has a very unique Family Code as it relates to obtaining a marriage license and the validity of a marriage. First of all, many people were surprised by this. In Texas, to get a marriage license, you don't need to present a birth certificate. You need to present some type of identifying information with your age on it. What they're really looking for is to make sure you're old enough to get married. Okay. That's the focus of the statute for obtaining a marriage license.

So, if you go to the County Clerk's office, and you present a valid driver's license, it says who you are, it has a picture on it, it has a date of birth on it, you have to sign an application that says that everything you sign is true. But that application doesn't ask you anywhere on it whether you're male or female. So you can quite legally go, I know we don't want to tell anybody this, we're afraid that they're going to start requiring it, but you can go to the County Clerk's office in any county in Texas, present a valid driver's license and get a marriage license. This is exactly what happened in the case that Phyllis and I worked on a little bit together.

I need to back up just a little bit. There was another very important part of the Family Code. That was in Chapter 1 about how to get a marriage license. Chapter 2 of the Family Code talks about what you can do with it once you've got it. And what you can do with it once you got it is go have a ceremonial marriage and live together as spouses. And the Code says that the policy of this state is so great in creating families and in making sure that our family units are protected from all outside undue influences that two persons who obtain a valid marriage license and have a ceremonial marriage are married. Period. The validity of that marriage

cannot be attacked by anyone else even if fraud was used in obtaining the marriage license. So you completely circumvent any type of fraud arguments or anything else. Basically you get the license, you get married, and you're married. Period.

Now, that doesn't eliminate a cause of action that someone, who is an unwilling, unknowing party to this situation, would have. If you're unwilling, unknowing, unknowing — you wake up the next morning and find out what's happened — you always have the protection of annulment or other protection under the Code. You can still have a marriage declared void because fraud was involved in the marriage, but that's a very, very short window of opportunity. You can only do it right away. You can't stay married for several years and then say, "Oops we were fraudulent when we obtained this marriage license, we have no marriage." And in fact, that's exactly what we did.

We had a situation where a female-to-male, non-op, obtained a marriage license. He had a driver's license that said that he was male and obtained a marriage license. I guess it was about thirteen years ago. He, and the woman that he loved, had a ceremonial marriage, and they were happily married for many, many years. She decided that she wanted a divorce. She leaves him, and files a petition to declare the marriage void based on the fact that they are two biological women married here and the Texas Family Code prohibits that.

To make a long story short, depositions were taken back and forth, and the male, my client, would never under oath never admit that he had no penis. He consistently stated that he had an underdeveloped penis because of the hormonal therapy and other things that he had gone under. The body changes that he had gone through, instead of having a clitoris, he had an underdeveloped penis. The other attorney never could get him to admit that he had no penis.

The trial court judge looked at this and looked at this. It really didn't revolve around biology as much as it revolved around the fact that we had a valid marriage here. We had a valid marriage license here and thirteen years later somebody couldn't say, "Oops, this isn't a valid marriage." We presented it in the form of a motion for summary judgment before we had to go to trial on the issue and he thought about it. He thought about it, and he got up, and he said, "Well, y'all will have to excuse me. I'm going to take a short recess, and I'll be back and give you my decision." He went back in his chambers.

About an hour later, he emerges red-eared. It's obvious, he's been on the phone all over the state going, "What am I going to do here? What am I going to do here?" He gets on the bench, and he says very softly that he has reviewed the pleadings and, "This marriage is valid. We'll start trial at 1:00 o'clock on the issue of property division." He hammered his little gavel, and he got up and left. Essentially that was it. The clerk had to tell our opposing counsel — she still didn't get it — the effect of what he had said. She still just thought that, "We have two biological women here. You just can't do that in Texas." But we did.

Phyllis wanted us to point out the flip side of this. The female-to-male can state under the law that there is an underdeveloped penis. The flip side of this the male-to-female non-op can position herself so that she has clitoral hypertrophy, vaginal agenesis, and ectopic ovaries. So, you never really have to admit under oath that you weren't born as a biological woman. You can use the terms that are already medically sound and medically recognized as taking the gender that you choose.

I think I'm probably getting close to being out of time. I want to again remind you that the focus this year was a little different. It wasn't quite as much as taking their laws and cramming them down their throats as we did last year. We really did focus on changing the laws, changing society's attitudes and the paradigms and the models that are used for our families.

The Family Code is not, generally, statutory intensive. Very much of it comes from the case law, and it turns on a case by case basis on what the facts are. Present the facts and present them in the best light for your client. And keep pushing for change that you believe will come.



I'd like to leave you with some words from Thomas Jefferson, which seemed to me so appropriate as they were making their points yesterday. I just kept thinking, as I was taking notes and taking notes, about society changing. I kept thinking about a rainy November night last year when I was standing at the Jefferson Memorial in D.C. in one of my advance planning trips for the work that I did on the March on Washington. I didn't want to be there. I wasn't real happy about having to do some of the stuff that I was doing. And I stood there about 10:00 o'clock on a rainy November night in the cold reading the words at the Jefferson monument. I just started crying because they hit me so hard.

Let me just read them to you. Thomas Jefferson wrote: "I am not an advocate for frequent changes in laws and constitutions, but laws and constitutions must go hand in hand with the progress of the human mind, as that becomes more developed, more enlightened, and as new discoveries are made, new truths discovered and manners and opinions change. With the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regime of their barbarous ancestors."

Take the words of Thomas Jefferson and ram the Constitution down their throats. Make that Constitution stand for the equal protection of all the citizens, not just a part of the citizens.

By Phyllis Frye:

Thank you. Connie mentioned this national driver's license project. We can't let that go. That is a window of opportunity. I need somebody here, it doesn't have to be just one person. I need one or more people here that's going to volunteer to follow up on that. So, start raising your hands now. Who's going to follow up on that national driver's license, make sure whatever has to be done so that we have some input in D.C., takes care of that. Otherwise it doesn't get done. Otherwise it doesn't get done.

Think about it. I'm going to ask you about it again at dinner. We've got to get that covered. *[Volunteers came forward during the break. This is detailed at the end of the Gender Rights report.]*