
REPORT FROM THE INSURANCE LAW PROJECT

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Second Annual International Conference on Transgender Law and Employment Policy

PROJECT MODERATOR: James R. Kuhn, Attorney

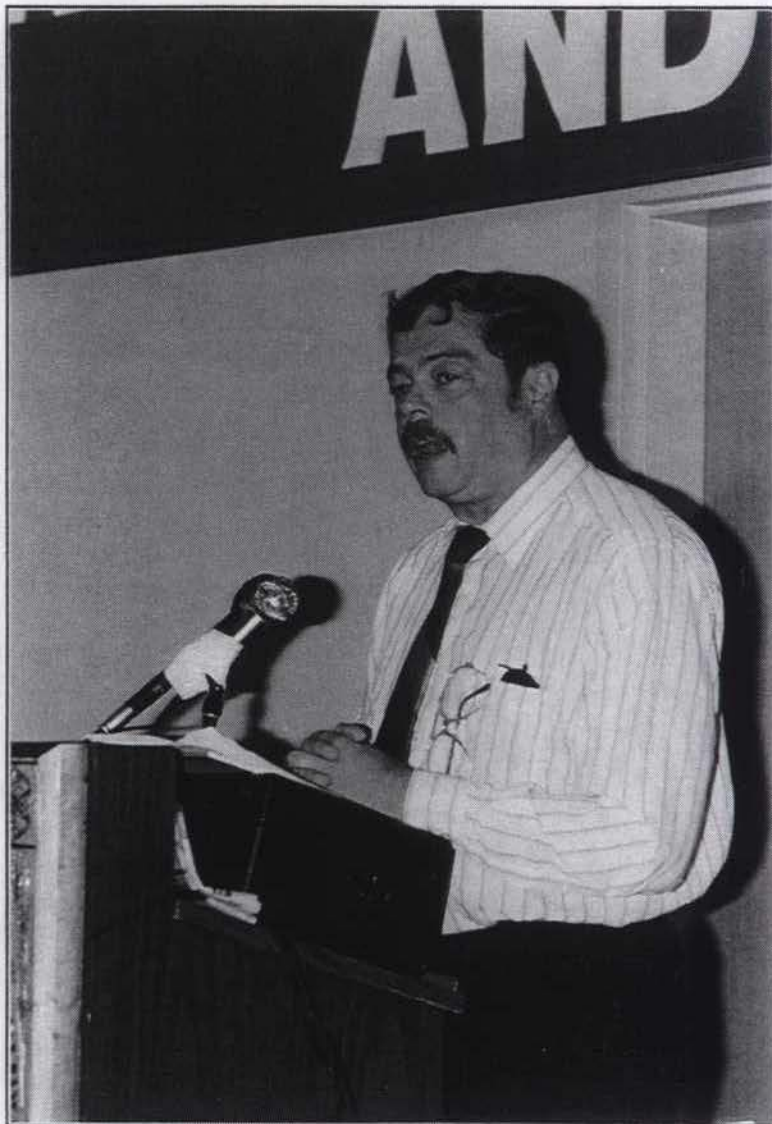
By Phyllis Frye:

I wish to present to you Attorney, Jim Kuhn. Jim is an attorney in private practice who was our insurance moderator last year. I am very excited by the fact that, in addition to the insurance law recap and presentation on what is new, if anything, he's also been able to access some good information on the upcoming Clinton Health Plan. I think he's going to give us some strategies or ideas on how we might be able to affect that formulation to help us. I'm not certain because that's his committee.

By Jim Kuhn:

Thank you Phyllis. I'm going to open by saying that this year has been a more active conference and a more committed input in our session than we had last year. I think people are becoming more used to what we're doing here and are being far more assertive than they were last year. So, I had a lot of help with preparing this. I want to particularly acknowledge two people, Pat Grace, and Sister Mary Elizabeth, who were particularly helpful in preparing the report of this committee.

We're going to start by making some reference to last year's "Proceedings." I'm not going to go back into all of that except to say that nothing much has changed. I must regrettably report that I was accurate in predicting what the Supreme Court of the United States would do in the H&H Music case. It allowed employers to arbitrarily cap or exclude coverage when they're self-insured or



James R. Kuhn, Attorney,
Insurance Law Project Moderator

under the various ERISA [*Employees Retirement Income Securities Act*] plans that are now in effect.

ERISA is still the law that applies to almost all of you as employer-paid. If they pay so much as \$1 of the premium, it's an ERISA plan for health, disability, and life insurance and most other benefits you receive from your employment. Most people are under that. It means that you have a federal lawsuit and that you have attorneys' fees, if you're successful, only if the judge, on the local bench, in his infinite wisdom decides to award them to you. That is not much of an incentive for you to pursue your rights. We're going to talk more about that later.

Thanks to Sister Mary Elizabeth for telling me about the evolution of the Medicare and Medicaid rules and the evolution in private insurance. Transgenderal health problems are virtually never covered by what you have today. I had two people talk to me at this conference — in private; about to make the transition. "I'm going to change my name, and I've been getting coverage for hormonal treatments up until now. What happens when they find out what's really going on here?" I don't know what your doctors have been telling these nice people, how you've been getting the coverage. But if you change your name, yes, you are sending up a red flag.

The insurance industry — we've discovered this over the last few years as the problems with AIDS has brought this out rather dramatically — is not a charitable institution. They're in it to make money. And if they find out that there are some expensive diseases going on, they find a way to cut back on the benefits they have to pay you. Transgenderism is right up there with number one, out of the chute. I've never found an insurance company, quite frankly, that has a heart that went beyond its bank account.

What we are facing now and the only hope for all of us — this is not just applied to the transgender community or to people with AIDS, it applies to everybody in this country — is universal health care. We have to have it. The system is broke; it does not work. People are not covered or they are not covered adequately or it costs way too much. It is difficult for an individual to get any kind of coverage on much less than \$300 a month and that's cheap. When your life and health depend upon your ability to make an additional car payment every month, that is a shame. You should have access to medical health care that keeps you healthy and economically productive without having to worry about your ability to pay for it.

We are hopeful. Frankly, I think it is maybe the stand or fall of the Clinton Administration. They will either pass some kind of universal health care and be re-elected or they will fail to pass it, and they will not be re-elected. Then we'll have to deal with an awful lot of sick people, who have no place to go and no money to pay for it with.

What we're hoping comes out of Clinton and the Congress — I don't want to lay it all on Mr. Clinton because Congress will have its input — is a portable, basic, health care without regard to your pre-existing conditions. By portable I mean you can change jobs, you can quit your job, you can be self employed, or you can be unemployed. You will still have basic health coverage.

The issue for this conference is where or if the transgenderals fit in this? Well, how are we going to define what basic health care is? The phrase that keeps arising is "medically necessary." I thank Ms. Grace for what I am about to go into. The significant goal and general health care reform for this community should be support for a broad definition of the key term "medically necessary." Medically necessary, or its equivalent term, and I leave that up to the drafters, will be the primary standard for what will be paid for in the new health care system.

Now, there are many issues working in a proper definition of medically necessary care. Perhaps the most fundamental issue is whether medically necessary means a response to disease, an injury, an abnormality, that is, care for people who are already sick who are presenting a condition or whether it additionally means maintenance of health and restoration of health. Is it preventive in its nature?

Two kinds of cosmetic surgery are commonly considered medically necessary: restoration following trauma and accident; or correction of a physiological abnormality such as birth defect. I think there's a number of places where transgender health care issues could be hidden under those terms. I would prefer to have them there.

You've already been ruled out of disability coverage or being considered for disability. You're specifically excluded from the Americans of Disability Act by name, with all due respect and thanks to the Honorable Jesse Helms of North Carolina. You do need to avoid having similar language put in any health care reform package. If you're excluded by name there's not a damn thing, pardon my French, there's nothing you can do for it. You have to hide, and I don't mean going into the closet at all, hide your issues under the broadest possible base you can find.

We want everybody covered, so make sure that you're not excluded by name. If everybody's covered, you're going to get in there. It may take you some litigation and some administrative proceedings. There may be a lot of lawyers making money after this, but give us a shot at it. I think you will survive.

Now getting back again to Ms. Grace's presentation. The definitions of health have various grounds. Physiological normality is one; capacity for social function is another. For example, the latter is the activities of daily living standard for disability as a qualification for long term care. With the broadest possible definition of medically necessary and the definitions of health care that includes social functioning, you should be able to argue that counseling, hormone therapy and SRS are medically necessary and therefore should be covered in the package.

You want to sell it to people who are conservative, and you hear constant grumbling about budgetary constraints and financial constraints. They need to maintain you so that you are, what I call, economically productive. If you're on welfare, you are a drain. If medical care will make you economically productive and keep you in the work force, whether that work force is on the job or as someone staying home to take care of a house and children, it's better than sitting there living off the county.

From their point of view, you would think that they would get tired of transgenerals and people with AIDS and people with other disabilities being dependent upon the welfare system when we would otherwise be able to work and be productive. Now, to me that's the best argument we can use on conservative folks. "You want to render me unable to work, fine, you're going to support me. You're going to feed me, you're going to house me, and I'm not going to give anything back to you because I'm not making any taxable income." Hit them with it. Where do they want you to be in a society? I know they want to ignore you, if they possibly can, but they can't ignore you because you are entitled to the welfare. You have presumably been paying taxes for it.

The problem I find in the details, and the details of this is what is medically necessary, and more importantly who gets to define it. There'll be some definition in any statute that is passed. There'll be some legislative history on the subject, but it's going to be up to the administrative types, the people who write the regulations. In addition to lobbying for the broadest possible inclusive language in the coverage in the statute, you're going to have to lobby the people who are writing up the regs. If you forget that then you can be aced out, perhaps not even knowing it until those regs appear on the Code of Federal Regulations and you're sitting there, "Oh, my God." So, don't forget that point of the lobbying.

We don't know for a fact who is going to write these regulations. If we go back to the body of precedent, it is the Medicare regulations from the Health Care Finance Administration. They have not been friendly to you in the past, and they probably won't be again. If it gets thrown to the Health and Human Services Department, I think you got a shot at it. You need to keep enough loop-holes, if you wish, so the lawyer can drive your case through them and get you the coverage to which you should be entitled.

Again, going back to the fundamental principle here, you should be allowed to seek whatever necessary

health care it is to make you economically productive and a contributing member of society without having to live with yourself as handicapped or as mentally disturbed or mentally ill.

One other thing to watch out for in this entire fight, by the way, is that all of us who are not senior citizens need to avoid getting into some kind of turf war battle with the seniors. We don't need to be amputating Medicare to cover us. They don't need to be taking away from us to cover themselves. There should be enough for everybody here. But beware of that turf war because the seniors will win it every single time. They out-vote most of the rest of us.

Also, the issue, and it's the phony issue, of how we're going to tax ourselves to pay for this. Frankly this is a phony issue. What are you paying in insurance premiums now? This is not discretionary income, people. It's out of your pocket. My carrier at the moment is Mutual of New York. Does it make a lot of difference to me that I mail the check to Rochester, New York or I mail it to Washington or maybe to Austin depending on how your plan works? Actually, no it doesn't. And it will be difficult for me to get worse coverage from the government than I'm getting from Mutual of New York on a conversion policy now.

We talked about that last year and there hasn't been much done in terms of state regulation. One of the problems that we faced over the last couple of decades with insurance law is what we have fifty-one, counting the District of Columbia and not counting Puerto Rico for the sake of argument, systems of insurance regulation in this country, most of which don't work. The insurance board in this state is what I would call a toothless tiger and then I'm being kind. I usually have words of four letters or less to describe their activities in regulating the insurance industry. They're owned by the insurance industry. I have written the Governor. I have written members of the legislature.

A conversion policy, conversion, let me tell you, a conversion policy happens this way. You quit your job or your employer switches coverage. You have a pre-existing condition. Transgenderism, folks, is pre-existing condition which is going to knock you out. You're uninsurable. Just get over it. You're as uninsurable as a person with AIDS.

You get this conversion policy for which you're going to be paying a couple of grand a year. That doesn't sound like a lot compared to what you're paying now but read that coverage. I saw a conversion policy from an insurance company down in Galveston that's renamed American International or American General, excuse me. Their conversion policy gives \$40 a day for your hospital. You need surgery, we'll give you a hundred bucks. No outpatient or inpatient drugs. You can go to a doctor four times a year, and they'll pay fifty bucks for it each time. That's generous, I suppose, and that policy cost my client a couple of grand a year.

Now, you read the policy, there's no way in the world you're going to get your premium back out of it. I don't care if you're dying of cancer. In other words, the policy is useless. It's not worth the paper it's printed on. Too many conversion policies are that way or are next to it.

If we don't get universal health care, then what would be the next stop would be that any insurance policy written in a given state should have a floor benefits package under it. We are hoping this will be preempted by the Feds, and we will have a national standard. That should solve a lot of people's problems. It will solve the doctors'. My doctor had three people, before he retired, had three people on his staff who did nothing else but process forms. And you paid for it because every time you paid his bill he paid those salaries. That's absurd and obscene, and that's just insurance companies. Medicare, Medicaid, Worker's Comp — everybody's got a different form; everybody's got a different standard of review. Getting to a national plan can simplify this for all of us. The problem is that if you do get an adverse ruling out of a national system, you're dead in all fifty-one states. Sometimes quite literally.

We had another issue that came up in the conference which, frankly, I hadn't thought that much about, but I should have because it seems logical. That is the issue of mental health care. The insurance policy coverages

of mental health care now are, quite frankly, primitive, and it's an issue that they'd just as soon not deal with. If you got the coverage at all, it's usually on a fifty percent reimbursable basis with a lifetime cap of somewhere in the low five figures.

I just got a mail-out from the State Bar. They've got a new insurance scheme that they're offering to us, courtesy of Prudential, who I've got a case pending against in the Fifth Circuit. I don't know whether to apply or not, but on mental health care this is a good policy. The rest of the coverage is pretty good. This is a good policy except for the \$25,000 lifetime inpatient psychiatric cap. If you go to Houston International Hospital — it's probably the best local, for-profit, private mental hospital — it's \$10,000 a week. That's for basic care; that is not covering extreme emergencies or ICU type care or emergency intervention. You get good care there. You do pay for it, however.

This policy also has — for outpatient services, going to see a psychiatrist or a therapist of one kind or another — they'll let you have \$2,500 a year to do that. Essentially, you're not covered. Of that \$2,500, you only get 50 percent of your reimbursement up to \$2,500 a year. So, you have to have five grand worth of care or you're going to be paying \$2,500 anyway. After that, you're on your own. It doesn't work. Mental health care in the national program — you've got to make sure it is not left out or is not put back on some kind of unrealistic cap.

This may or may not have anything to do with the transgenderal condition. There are other mental health problems that may assault you or you may confront during your lifetime. Anything from the loss of a loved one to a chemical dependency problem that you may have. It happens. And you don't want to be out in the cold trying to scrape up money when you've got a mental health problem sitting there worrying about how to pay for it. You're going to compound your problem.

Let's assume for the sake of argument that we've been successful with the legislation and some or all medically necessary benefits are granted and you're in there. We go to what looks like some kind of managed health care system. Managed health care means they're going to decide what you need. The issue again is who decides it, and if you don't like their decision, how do you review it? Do you have an appeal or a grievance process?

If your benefits are withheld — we get this with the ERISA plans now, or what's called employee benefits plans now — there's supposed to be an in-house appeal and review procedure, a grievance procedure, if you wish. Most of them are laughable or non-existent. Quite a few, even in big companies, a grievance procedure means you write to the same person who turned you down and ask them to review it again. Then you get to go to court.

Now, that's nice and it's nice to have rights to go to court with. How do you pay for one of us attorneys to protect your rights? Look at that in any plan or regulations that come down too because if you have to go to the courthouse and if you have to do it on your own hook, then it may cost you more in legal fees and court costs than the benefits you're suing for.

I have a gentleman a year ago who was denied coverage. He was a person with AIDS. He was denied coverage for his A-Z-T prescriptions. We were talking about \$7,000 in prescription and drug bills. He was going to a rather expensive pharmacy. There's no question he was entitled to them, yet the reason they refused to cover the A-Z-T was, "We don't know what this is for. You have to write and tell us what this is for." I don't know anything on God's earth that you can prescribe A-Z-T for besides AIDS, quite frankly. They covered all of this other stuff for AIDS. They covered his P-C-P hospitalization. They covered his blood test. But they said, "We don't know what this is for, explain why you're taking AZT." Trying to stay alive comes to mind.

Now, \$7,000 in the great scheme of the federal courts down here is not a lot of money. He had to hire me. There's no question that he was going to get his money. The judge's attitude was, "This is a \$7,000 lawsuit. I

am not paid to sit on this bench and be a federal judge in all my infinite majesty to decide \$7,000 lawsuits. Settle it!" And when a judge looks at you and says, "Settle it! I don't want to hear it!" you start negotiating with the other side rather rapidly. We had to compromise on it.

Fortunately, the prescribing pharmacy had made a mistake in that it was charging him 18 percent interest and had neglected to get his signature to a finance agreement. This was usury. We did a compromise with the insurance company. We took about five grand and the other side paid \$750 in attorney's fees which means I was working for about \$7.50 an hour. I can do better in court appointments, trust me. We turned around and told the pharmacy, "Hi, this is usuary. If you try and come after us, we're going back at you for treble damages. It's been nice knowing you." My client pocketed the money and went on down the road and changed pharmacies. They agreed to continue to pay — to stop this silliness and they pay for the A-C-T from now on. But he shouldn't have had to do that. And if the pharmacy hadn't screwed up, he would have been out of pocket for benefits to which he was absolutely entitled.

ERISA law is real simple. Either you're entitled to the benefits or you're not. There's not a hell of a lot of middle ground here. There just isn't. I've got one now in a disability income in ERISA. The motions have all been filed, and we're going back and forth. The issue is when or whether he was disabled on a certain date and whether he waived his rights to apply for it because his company told him he didn't have it anymore. In fact he still did have it; they mislead him, and they managed to do it in writing, bless their hearts. That's why we're successful, I hope, in court. But the issue is not amount, he either gets all the benefits or he gets none. There is not a middle ground here. You can't negotiate this. Fortunately, he's one of those people that — we're talking about, oh, a couple of grand a month, and right now we're up in the \$70,000 figure for they haven't paid him — it's worth fussing over. We may even get the judge's attention on it. I don't know. It's a judge I haven't had before. I get to meet him next month for the first time. It's one of the reasons I've been a little bit distracted. I've been doing interrogatories on that case this week.

But the point being is if you have a right, if you're granted a right by the federal government in the area of health care or health care insurance, then make sure there's a way you can enforce that right that you can afford. Chief Justice Oliver-Parrot, who spoke to us at lunch yesterday, made the point that, "What do you use lawyers for? You use lawyers to enforce your rights. You don't have rights if you don't have access to the system. The lawyer is your access to the system." The lawyer cannot live on good deeds. We have to pay rent and taxes, too. If there's no way that we can be compensated, then we can't go after your rights.

If you are unemployed because of a transgenderal situation, if you are on disability income because of a transgenderal situation, then you can't afford us. Now, you may find somebody who's going to do it for free, but you can't rely on that every single time. You just can't. The lawyer's aren't necessarily a charity institution either. Hopefully under this system — I hope this is something people will lobby for — there should be some kind of initial review of your denial of benefits, particularly in a managed care situation. The procedure would be simple enough that any person with high school education could follow it through without needing an attorney and without losing their rights because they forgot some little jurisdictional point in their grievance procedure.

Watch these grievance procedures. The ones they have for job rights — and I've done this for the city and I've done it with private employers — if you miss a certain deadline then you've blown your whole case folks. You're out of court because you've missed a deadline.

The Texas Commission for Human Rights Act — if you don't file within six months of the adverse employment action, your case is gone. Now, I've had people who lost their jobs who were grieving because they lost a lover at the same time. They went home and hid for a year and they came back and said, "Oh, by the way, this is what they did to me." "Yeah, you've got a great case when did it happen?" "Last year." "Oh, well it's been nice talking to you, I'm sorry it's over." Before it even began. Watch for things like that.

When you do ~~have~~ have a doubt about your rights, do come see one of us. Most of us will tell you whether or not you've got a case or what your rights are and what your options are without charging you an arm and a leg. Or we'll charge you something nominal, if anything at all. But if you go through the review procedure that I mentioned, presuming they will have one in there, the Congress and Administration are not particularly lawyer friendly in this sense. They don't want us to be making a lot of money off the system. That's fine, but there's still got to be a provision for you to get your rights.

If you end up having to go to court, there better be a way for us lawyers to be compensated. I'm not talking about the frivolous lawsuit. I don't mind the thing being contingent. If I'm dumb enough to bring a bad case, then I don't deserve to get paid. But if we bring one successfully to get your rights, you should not have to lose your benefits into a lawyer's pocket, or into the district clerk's pocket if you're paying a filing fee. Somebody needs to pay for that other than the victim.

No matter what system comes out, there's going to be either a provision or, as the law stands now, there's going to be a way to review these regulations in the courtroom. I'm assuming that any health care reform is going to be a subject of courtroom battles and administrative hearing battles for many, many years. There's no getting around it. Hopefully some of the early and big cases will be brought by the ACLU and groups of that kind. They're not worried about being compensated particularly. But there's still going to be the issue of the individual rights for each of you. And as Justice Parrot says, and I'll say it to you again, "If you can't access the system, you don't have those rights. They don't exist." A right without the means to enforce is no right at all.

Now, finally as to the lobbying. You've got a lot of company here. The health care system in this country is broken. It does not work. It isn't functioning. Everybody needs help; people with jobs, people without jobs, people of color, the gay and lesbian community, the transgenderal community. Everybody needs help with this. You don't have to have transgenderal issues as the cutting edge of this. I don't want to see you run the risk of having another Helms amendment tacked on the sentences specifically excluding it. Because there isn't anything we can do about that. So, go with the others.

Go with the broadest possible definition. The broadest possible inclusive or inclusionary language benefits not only you but everybody else. It benefits people with the handicaps; it benefits the people that have been discriminated against historically.

Everybody's been talking about getting out of the closet today. I'm going to make an ethical statement, if you wish, to the other attorneys and professionals in this room. When you get into the courthouse or you go in to bargain for your client, and you're sitting there worried about being out or being outed in the courtroom or in the conference, then your mind is not a hundred percent on your client, on his or her business, the way it should be.

To me you're committing malpractice.

Don't worry about it. You don't have to go down there wearing the pink triangle or carrying some kind of gay pride badge or whatever. You can go down there and be yourself, but for God's sake, don't worry about being out. You'll be surprised how many people know already, and don't care. I was surprised. I can remember many years ago telling my mother about that and she said, "Yeah, so what else is new?" She met my lover; what can I say?

But you just can't let — don't — you cannot let that ethically interfere with your ability to represent your client. You cannot be sitting there worried about your own personal issues that have nothing to do with your client's case. That's just bad law. It's bad professionalism, and it doesn't apply just to lawyers. You don't want some doctor operating on you worried about whether the surgical nurse is going to out him. It shouldn't be an issue.

Most people don't give a damn. They're busy worried about their clients or they're worried about the judge on the bench who's worried about the law and not worried about how you dress. If they are worried about it, it will prejudice your case, and there are remedies for it. You've come a long way over the years to be able to make a statement like that. But you just got to put it out of your mind.

I've always looked at it this way. You don't pay my rent, for God's sakes, don't tell me what to do.

As I said, I'm pleased to be here for the second year. I noticed it's a larger conference than last year, Phyllis. And again I have seen more energy this year than I did a year ago. More people more interested. You're not laying back. You cannot lay back and rely on other people or groups. It's nice to have allies, folks, but you can't rely on them to take care of you. You've got to do it yourself. You can't hope that somebody in that room where they're drafting the regulations of the legislation is going to look out for your interest. You need to be in the room with them.

I've seen that problem in the gay and lesbian political movement. So-and-so is going to take care of us — meaning some straight politician who has his or her own agenda, trust me. They may be using you for whatever they need. You need to be in the room there. If you're not in the room, you're not in the game. And if you're not in the game, you can't win. That's the bottom line. And if you don't play the game to begin with, you can't win the game. Thank you.

By Phyllis Frye:

I want to emphasize that Jim gave a great speech. I can't really add that much, but I want to emphasize this tax issue on the paying for this health care reform. Jim said that you're already paying very large premiums anyway and you're not getting a whole lot for it. I pay large premiums and my deductible is a thousand dollars. So, if I can have better access to the medical system and take most or all or maybe even a little bit more of what I'm paying in premiums to get nothing right now, I'm ahead and so are you.