

From the Column-nist: **Over and “Out”**.

by Steven Berger, November 2021

... For my last column as co-editor of *Columns*, I couldn't help but be inspired by Judge Houser's words in her acceptance speech after receiving the College's Distinguished Service Award. From my remote location in front of my computer in Scottsdale, I watched and listened to our awardee, the esteemed Judge, discuss her journey in the profession. She thanked many of her mentors and colleagues from whom she had learned over the years. And, of course, she thanked her wife for years of support and encouragement.

Wait, her wife? These simple words were delivered without extra explanation, emphasis, fanfare or attention. From my vantage point, I observed no gasps, no shuffling, no fidgeting. My head swirled with thoughts about the College's current initiatives on Diversity, Inclusion and Equity, but also with my own personal journey as an openly gay man in the legal profession. I really had to stop and smile and recognize the moment and what it exemplified in progress toward equal rights and changes in our profession and our broader society.

In the spirit of the DEI Commission's request that Fellows share their personal stories, I am taking the liberty to do so in this column. Hopefully others will continue to come forward and tell their own stories so we may all learn from one another. It's hard to know what it's like to walk in someone else's shoes if they are well worn but invisible.

In 1984 I graduated law school, started a Ninth Circuit Clerkship, and continued with the wrestling about my own sexuality that I had done during my law school years. Like many of my contemporaries that came to terms with their own gay identities in that era, I had dated women throughout high school and college. In essence, the first part of my journey was to “come out” to myself, and to give myself the permission to explore what I knew longed for – a primary relationship with another man. Me? A nice Jewish boy that was blessed with external and internal expectations of a wife, 2.5 kids, and an active life in synagogue and community? How could I accept the reality of a life that was going to differ from my assumed future path?

As I made my way through the maze of “coming out” (reading, therapy, coming out support group, family drama, exploring a new world in the most secretive way I could – all fodder for another column), I was cognizant of what I might face in my personal life with friends and family. Most looming, though, was what would happen with my

professional life. I was then working at a large local firm. I had met other gay lawyers in the Arizona legal community that had experienced discrimination on account of coming out of the closet or simply exhibiting traits that stereotypically were assumed to exhibit the appearance of being gay. One friend lost his job when a client's complaint about the firmness of his handshake led a partner at his firm to investigate his sexual orientation and cause his firing. Later, a young (and more brash) summer clerk placed a photo of his male partner in his private office on his desk. The photo was no less decent than any other lawyer's spousal photo. He was instructed to remove the photo. Another friend lost a new client relationship when identified as a gay man – not self-identified mind you but assumed and questioned about it. Conversations at legal and business lunches, golf games, happy hours and pre-meeting chatter often included off-color jokes, insults, and malicious comments regarding gay sexual orientation. No one seemed to even consider whether anyone present was gay. Either they didn't care, or they didn't have any consciousness that they might be in "mixed" company.

Which leads to the next career related dilemma – when and to whom do I disclose? What is the appropriate business situation to correct assumptions like: "tell me about your wife" or "I happened to see two men kissing at the SF Airport last week – isn't that nauseating?" Sounds obvious today, but in 1980's Phoenix, the gay lawyers informal happy hour was still held in a remote location without any identifying sign, and the gay lawyers at my firm (about 4-5 of us out of 80) were still having secret breakfasts. In the progression from in to out, reliance on discretion from friends or colleagues with whom I shared my orientation meant a hard to accept loss of control over the information – a growing up lesson that perhaps I might have learned earlier in life. Because of my personal nature and the natural progression of things, my secrecy slowly gave way to openness.

A lot was going on in the background. The AIDS crisis kept the subject of sexuality in the news. Many were confronted with illness of family members, friends and business colleagues whose gay identity was not previously known to them. The health crisis ripped off the closet doors in certain circumstances, and of course the reactions were as varied as the identities of those affected – spanning from complete rejection and alienation to acceptance and transformation.

My journey was interesting in that my colleagues at the first law firm I had worked at in college, as a law clerk, and then as an associate, knew me before I came out and after a while I realized I had no idea who "knew" and who didn't. I learned to gain the strength not to worry about it too much but it created many socially awkward moments, for example, as friends tried to fix me up with very eligible women.

As part of my community activities, I had taken on the role of a “Big Brother” in the Big Brothers program. In the extensive interview process, the staffer told that my Meyers Briggs test indicated a probability that I was gay. The staffer asked me point blank, and I said no, because the rule at the time was gays were not eligible to be participate. Most of the time if participating in something where my sexual orientation would have been an issue, I simply could avoid the issue and “pass” as straight. In this situation, I had to pay dishonesty as the price of admission to something I wanted to do. I knew that I had the time, resources, and skills to help a fatherless boy and refused to let the rules preclude me from doing so. Secrecy forced these choices where few of us wanted to be dishonest.

However, six months into a great pairing with a teenage boy that really needed a role model, I decided that I could not continue to participate and not be honest about my identity in the formal status evaluation meeting with the staffer. My decision was painful, but I had to do it. The staffer was terrific about it. She explained that if we told the boy’s mother, the agency would be required to terminate the formal match, but if his mom agreed, we could continue informally. We had a meeting in the agency office with mom and staffer, in which the staffer went through the developments and consequences. Mom was polite but said she needed time to think about things. That weekend she invited me to their home – where I was grilled by her with questions and then a tirade of anger and rage – all in front of my Little Brother. Not only was I never to contact him again she threatened to “out” me to the Chair of the Board of the Big Brothers organization, who just happened to be (as she knew) a partner in my law firm. I left the house shaking and in tears, sorry for the loss of the relationship I had developed with her son, humiliated, and fearful for my job. Who knows what she would tell the partner in her quest for somewhere to place her anger? I preempted that from happening by finding the partner and explaining the whole situation. He asked me, “did you ever touch this boy in an inappropriate way?” to which I answered a simple “no”. He then said not to worry about it. But, of course, I did worry, and carried the hurt connected with these events for many years.

In 1989 I interviewed with another large firm in Phoenix to join a former colleague in developing a bankruptcy and reorganization practice. The new firm’s “macho” culture was renowned. It was known for its cadre of excellent and aggressive lawyers, many of whom were former college and semi-pro athletes. In considering the move, I decided to make a fresh start as an “out” lawyer or not to go. So, after I received an offer, I did a Colombo-like coda...”Um, there’s just one more thing...” After revealing my orientation to the named partner senior partner (a former baseball player

and cantankerous plain talker) and him spitting his chewing tobacco into his spittoon, he informed me that it wouldn't make a d[arn] bit of difference to him or the firm, but he reminded me that it didn't mean I was going to get any special treatment. I didn't want special treatment. I wanted to not have to worry about discrimination in the workplace. His offer seemed like a decent deal. Of course, he smiled wisely and noted, "I can't guarantee what others' personal reactions will be, but I suspect you are equipped to deal with that yourself." And so, I enjoyed 10 successful years at that firm, and had many colleagues as guests at the "celebration" of what was to be a 12-year primary relationship (well before marriage was contemplated by us as a possibility or of course, legal).

As friends and acquaintances were struck and killed by the AIDS virus, my desire to work in the community became front and center. The public nature of joining an AIDS agency board, fundraising and trying to bring new people from different parts of the community (for example, the Jewish community within which I had been active from my teens onward) was going to be make my identity more public. But by then I had enough confidence gained from my own self-acceptance to overcome fears and move forward. All in all, I found that the clearer I was able to be about myself and my goals, the less resistance and more respect I received in the professional realm.

Ultimately, in 1999, I left the large firm practice behind and started a new firm with a close friend in the practice who had been on his own for 25 years. We were a bit of an "odd couple", but things turned out great. He liked to be introduced as my "law partner" to avoid any confusion (but a bit of humor never hurt). We forged a practice together and built the boutique firm at which I still practice.

During the 35-year timespan encapsulated above, monumental progress has been made in the community at large, the legal community and within the LGBT(QI) community. I have been told that my case was a catalyst for a change several years later in the Big Brothers policy, and that the ban on participation was terminated. The Bar Association has a LGBTQ section, as do many legal organizations. Lambda Legal and other excellent legal and advocacy groups abound and have the financial support of mainstream businesses and prominent law firms, support that was unheard of years ago. Most importantly to me, young gay and lesbian lawyers have many more choices today than before. The right to privacy and to marry *currently* are protected. And as is the evolution of such things, I and other white, cisgender males that have occupied many of the leadership roles in the gay community of yesterday are now learning to embrace and promote the rights, voices, needs and leadership of women, people of color, the transgender and gender-non-conforming individuals. I am thankful that being involved in one era of progress has given me a historical perspective to help me understand the nature

of change. Today I am blessed with a 19-year relationship, an accepting family, colleagues and friends, and a sense of optimism (even in the very difficult times in which we live).

It's been a great honor to co-edit this publication for the last 4 years and to write this column. For now, it's over and out! Thanks for your readership and participation.