Lessons Learned from Indiana

By J. Dominic Campodonico

Corporations Can Improve Diversity and Inclusion by Opposing Laws that May Lead to Discrimination

In 1990, the United States Supreme Court issued the decision of *Employment Division, Department of Human Resources of Oregon v. Alfred Smith, et al.*, allowing the criminal prohibition on the use of peyote, a drug used by members of the Native American Church for religious and sacramental purposes. 496 U.S. 913 (1990). In response to this decision, Congress passed and President Clinton signed the Religious Freedom Restoration Act of 1993 ("RFRA"). Congress exercised Section 5 of the Fourteenth Amendment in an effort to have the law applied to the states. In 1997, however, Congress's application of Section 5 was deemed unconstitutional and, consequently, RFRA only applies to the federal government. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

In a 2014 landmark decision, the Supreme Court recognized a for-profit corporation's religious protections under RFRA. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). Since then many states have proposed state RFRA laws to include for-

■ J. Dominic Campodonico has more than 17 years of experience serving as co-national litigation coordinating counsel, regional counsel, and local counsel in mass tort litigation involving manufacturers and distributors of a variety of pharmaceuticals, medical devices, and related products. He also assists clients with high-stakes matters that frequently occur simultaneously with product liability litigation, such as risk management, compliance, related litigation, and investigations. Mr. Campodonico is active in national diversity and inclusion efforts, which includes his service on DRI's Diversity Committee.

profit corporations. Some critics opine that the reason for recent influx of state RFRA laws is the legal recognition of marriage equality in various states. While members of the lesbian, gay, bisexual, and transgender ("LGBT") communities can now enjoy the legal protections and benefits of civil marriage in many states, some fear that state RFRA laws will be used by companies to deny services to LGBT individuals. For example, a Christian florist in the state of Washington was sued when she refused to provide a gay couple with floral arrangements for their wedding. Similarly, wedding photographers, bridal shops, bakeries, venues, and recently a pizzeria are examples of businesses that provide services to the public (*i.e.*, public accommodations) that want to be exempt from providing their services for LGBT weddings.

One state that recently passed its own RFRA law is Indiana. Of particular note, Indiana is one of 30 states that does not include LGBTs in its nondiscrimination framework. Stated differently, other states that have passed their own RFRA laws already include LGBTs in their civil rights laws, thus protecting them from discrimination in employment, housing, and public accommodation. Indiana offers no such protections. As a result, critics were much more vocal about Indiana's RFRA law. Additionally, Indiana's law offers sweeping protections for "religious objectors" that are typically not seen in other state RFRA laws. Of particular note is the provision that provides:

> A person whose exercise of religion has been substantially burdened, or is likely to be substantially burdened, by a violation of this chapter may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding, regardless of whether the state or any other governmental entity is a party to the proceeding.

Application of Indiana's RFRA law, given the absence of protections for LGBTs in its nondiscrimination framework, leads to an endless number of examples, whether intended or not, of permissible discriminatory acts. Notably, any type of business is conceivably able to assert a "religious objection" to providing services to those perceived to be LGBT. These businesses need not bear any relation to the wedding industry. The list of potential businesses—hotels, medical facilities, car services, restaurants—that could legally deny services to LGBTs is a reminder of United States Supreme Court case *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and biblical scripture used by segregationists to justify racial bigotry. More importantly, any subsequent legal proceeding will be met with a religious objection defense pursuant to the provision of the law.

Application of Indiana's RFRA law, given the absence of protections for LGBTs in its nondiscrimination framework, leads to an endless number of examples, whether intended or not, of permissible discriminatory acts.

With this backdrop, after Indiana's governor signed SB 101 into law, corporations advocated for change. Indiana corporations such as Cummins and Eli Lilly who previously opposed the bill were joined by others who were equally vocal. The CEOs of nine companies wrote a joint letter to the governor requesting immediate action to ensure that the RFRA law will not sanction discrimination against any resident of or visitor to Indiana. Angie's List announced that it was halting its plans to expand its Indiana headquarters, which was reported to have generated millions of dollars and hundreds of jobs for the state. Countless other companies opposed the law by (1) speaking out against the law (Nike's President and CEO noted the law was "bad for business, and bad for society as a whole"; Apple Inc.'s chief executive wrote an op-ed for The Washington Post condemning these discriminatory laws); (2) facilitating job transfers for Indiana employees (The CEO of salesforce.com, inc. agreed to provide relocation packages for Indiana employees who wanted to transfer to a different state); and (3) vocalizing concern about future conventions and events held in Indiana (the NCAA, host of this year's Final Four in Indianapolis, expressed apprehension as the law might affect student athletes and employees; Gen Con, a video game convention which reportedly brought 56,000 visitors to Indiana last year, stated the law may impact the location of its future conventions).

Within a week, Indiana legislators passed a "clarification bill," which the governor immediately signed into law. The amendment stated that the law does not allow the refusal of services, public accommodations, goods, employment, or housing on the basis of sexual orientation or gender identity, among other protected groups. At the same time, a similar measure in Arkansas was met with strong opposition by that state's largest private employer, Wal-Mart Stores Inc. As a result, the governor of Arkansas indicated he would not sign a RFRA law unless it mirrored the federal law. Once the Arkansas legislature revised the bill to meet the governor's directives, it was signed into law.

The lessons learned from Indiana, as well as Arkansas, are that corporations yield the ability to impact necessary change to ensure fairness in laws passed by states. Whether it is by speaking at legislative committee hearings, writing letters voicing concerns over measures, or taking public positions opposing laws, the avenues taken by corporations appear instrumental in affecting change to protect groups from potential discriminatory laws. In addition to the creative actions in Indiana, corporations can also ensure that outside law firms, particularly law firms in states that fail to offer protections in their nondiscrimination framework, protect LGBT individuals in their nondiscrimination policies. Additionally, in-house counsel should confirm that the relationship partners at outside law firms are actively involved in diversity initiatives. Finally, corporations can join organizations dedicated to diversifying the legal profession, such as DRI's Diversity Committee, and can partner with law firms in efforts to improve diversity in our profession.