

Getting to the heart of the matter

Paul, Weiss attorney **ROBERTA KAPLAN** talks with Brunswick's **ELLEN MOSKOWITZ** about managing the message and the media in the legal fight for gay marriage

ROBERTA KAPLAN DESCRIBES HERSELF AS “a traditional commercial law litigator.” But that ignores her pioneering work in constitutional law, particularly in the area of equal protection and due process rights.

Her civil rights work has helped reshape US society, having argued landmark equal rights cases for gay people since the mid-1990s, work that prompted former President Bill Clinton to call her “a true American hero.”

A Partner with law firm Paul, Weiss, Rifkind, Wharton & Garrison, Kaplan currently serves as lead counsel for JPMorgan Chase on a multibillion-dollar liability case, and has recently won decisions for clients in the sharing economy, such as Airbnb and Hailo. But her most famous victory came in 2013, in the Supreme Court case *US v. Windsor* that centered on the tax-exempt status of an estate left to Edith Windsor by her longtime spouse, Thea Spyer. The decision found that restricting the legal privileges of marriage to heterosexual unions is unconstitutional.

Recently, Kaplan spoke to Brunswick about the strategies that won the day in the Supreme Court, and shared some of the lessons she took away from *Windsor* on the need for communications and storytelling to support legal arguments.

Why do you think the victory in *Windsor* happened when it did? Was it the case itself, or was it just the right time?

Both. In *Windsor*, we won because we brought the case, but also because at that time, there had been a fundamental shift in Americans' understanding of gay people – probably most importantly, on the part of the Supreme Court justices.

In civil rights litigation, there's an ongoing debate about the best strategy. Political organizing? Grassroots protest? Media work? Or do you bring court cases? If there's a lesson to be learned from *Windsor*, it's that the answer is “all of the above.”



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You've said that Edith Windsor was the perfect plaintiff in part because she had the perfect story. Why was storytelling so important?

The legal principles in *Windsor* are not complicated. The Constitution's Equal Protection Clause says all people should be treated with equal protection of the law – pretty simple. If you look at the progress of gay rights cases, what's changed is not the arguments, but how the judges understand them. The best way to change understanding is to tell stories, so the judges can see that the lives of gay people are no different from their own. The marriage Edie Windsor had with Thea Spyer for over four decades was no different than the marriages that many of the justices have had. We really wanted them to see that commonality.

You've also said it was important to tell one story, as opposed to a lot of stories. Why do you think that's true?

Up to that point, gay rights cases tried to present the full diversity of the community. So you'd have a male couple, a lesbian couple, an older couple, an African American couple. What advocates, myself included, did not realize, is when you have the story of many couples' lives, then the individual stories tend to get washed into the background.

With Edie Windsor we were able to refract the entire case through the story of her life. From Day One that was our strategy, and all the papers and reporting about the case highlighted that.

Knowing there would be intense public scrutiny, was the media always a part of the strategy?

Edie's story being front and center was the strategy from the outset, yes. If you look at our Supreme Court brief, the first nine pages are basically her and Thea's love story. Not a lot of Supreme Court briefs look like that. We wanted the press to grab that story and report it over and over and over again. We also insisted that any reporting not be about the lawyers. You will not find a story about me before the Supreme Court reached its decision.

Was there a risk of alienating the judges with a strategy that relied so heavily on the media?

That's one of the reasons we were so disciplined. We were careful to make the story about Edie – not the lawyers or our strategy. Even with Edie, she had to agree not to talk about issues that could be alienating, or distract from the essential story of love, companionship, family and the way in which she and Thea had shared their lives. Other parts of the story needed to wait until after we had a decision.

You wrote the 2015 petition *The People's Brief*, signed by more than 200,000 people. How do you reconcile such efforts outside the courtroom with an impartial judicial process?

Your case is built on legal strategies based on the merits and the facts. Any lawyer who deviates from that is making a huge mistake. On the other hand, judges are human beings and, like all human beings, they are affected by what goes on outside the courtroom, by life experiences, by what they see on TV, what happens in the news. For that reason, it was very important to be disciplined about the media and the story. And I think we

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A Partner in the New York office of law firm Paul, Weiss, Roberta Kaplan has been selected by *The National Law Journal* as one of “The 100 Most Influential Lawyers” in the US. In addition to successfully arguing in the US Supreme Court, Kaplan has represented clients that include Citibank, Columbia University and JPMorgan Chase. She is the author of the book *Then Comes Marriage: United States v. Windsor and the Defeat of DOMA*.

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succeeded. When you read Justice Kennedy's opinion, it's very clear that he was affected by the emotions, by the lives of Edie and Thea, their dignity and their common humanity.

What lessons from a case such as *Windsor* can be applied to commercial cases?

The most important is that you have to pay attention to the external forces influencing your case. Hiding your head in the sand and pretending the media is not there is not a wise strategy. With social media, the impact of any story is amplified to the nth degree. You have to be keenly aware of what people are interested in. You need a strategy for how you want the media to talk about the case. Even if you're in defensive mode you want to tell your client's story in the best possible light.

Lawyers are focused on judges and negotiating clients through the courts, but especially in a high-profile case, I think you're making a mistake not to have someone on board focused on the media and helping you tell a story that gets beyond the legal issues, and creates a narrative arc in which the nitty-gritty nature of the law comes to life.

What do you think will be the next big constitutional issues?

That's a good question. Issues of income inequality are going to be enormous. The divide between the very rich and the very poor is so extreme, and that is going to get increased attention. This is something the courts have really not paid very much attention to in the last 50, 60, 70 years. It touches on a lot of different areas of society.

Are those stories going to be harder to tell than the story you told in *Windsor*?

Some of them are, not all of them. Ultimately, you have to persuade both the American public and the court that those people out there who can't pay their court fees, or who are having trouble voting, or whatever it is, are the same as you and me, and the same as the judges. It's that core, common humanity – that I think actually animates the Constitution – that is so important to get across, and the media is an important tool to get that done.

ELLEN MOSKOWITZ, a former practicing lawyer, is a Partner in Brunswick's New York office. As head of the firm's US Litigation practice, she has advised both public and private companies on critical, enterprise-threatening issues, including some of the largest civil, criminal and regulatory cases of the last 10 years.