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ALTERNATIVE FACTS: THERE IS
NO BIAS IN THE LEGAL
PROFESSION
(1.0 BIAS HOURS)

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A Question of Bias



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The current presidential campaign has served up its share of statements and attitudes offensive to many, whether by the candidates or their campaign staff. The comments in question have resulted in unwanted scrutiny for both campaigns.

Closer to home, the San Diego Union-Tribune recently reported the California Commission on Judicial Performance has charged San Diego Superior Court Judge Gary Kreep with misconduct for, among other things, remarks he has made while on the bench. One example cited by the newspaper: while discussing a prostitution case in 2013, Judge Kreep allegedly said: "Speaking of prostitution, here's Ms. Westfall," after City Attorney Karolyn Westfall entered Judge Kreep's courtroom.

In a second incident, also from 2013, Judge Kreep asked Deputy Public Defender Leticia Hernandez if she was a citizen of Mexico. After Hernandez replied she is a U.S. citizen, Kreep allegedly said: "I wasn't planning on having you deported," according to an excerpt of the court transcript in the complaint.

These incidents should serve as reminders to all associated with the legal profession of the need to consider our own implicit biases when addressing and interacting with others. In an effort to address questions of bias and discrimination by California lawyers, the Second Commission for the Revision of the Rules of Professional Conduct has proposed Rule 8.4.1 to the Rules of Professional Conduct.

Proposed Rule 8.4.1 is based upon existing rule 2-400, but expands its scope to prohibit unlawful discrimination based upon any protected characteristic or for the purpose of retaliation. For purposes of this proposed rule, "protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived race, national origin, sex, gender, sexual orientation, religion, age or disability. The full text of proposed Rule 8.4.1 may be found [here](#).

Two versions of proposed Rule 8.4.1 were presented for public comment until the end of September. Alternative 1, or "ALT1," is the commission's recommended version of the proposed rule.

In addition to extending the prohibition on discrimination or harassment beyond the management or operation of a law firm, and adding additional protected categories and enlarging the rule to encompass retaliation, ALT1 also eliminates the current rule's requirement of a final civil determination of wrongful discrimination before a disciplinary investigation may commence or discipline may be imposed.

The second alternative ("ALT2"), which the commission did not approve, requires a pre-adjudication finding of wrongful discrimination, a precondition criticized by a number of commentators.

If either alternative is approved by the State Bar Board of Trustees, with a decision expected by March 2017, proposed Rule 8.4.1 will then be submitted to the California Supreme Court. If adopted by the Court, proposed Rule 8.4.1 of the Rules of Professional Conduct will follow closely on the heels of ABA Model Rule 8.4(g), which the ABA House of Delegates adopted at

its annual meeting on August 8, 2016. As reported by the ABA in September, 25 jurisdictions have already adopted an anti-discrimination provision in their black letter Rules of Professional Conduct.

ABA Model Rule 8.4, as adopted, provides:

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Both proposed Rule 8.4.1 and ABA Model Rule 8.4(g) are intended to balance practitioners' concerns with operating a business free of excessive governmental oversight and input with fundamental public policy concerns regarding access to justice. As the commission observed in Comment [1] to proposed Rule 8.4.1, "[c]onduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal."

The Commission further noted: "this Rule imposes on all law firm lawyers the responsibility to advocate corrective action to address known harassing or discriminatory conduct by the firm or any of its other lawyers or nonlawyer personnel." While alleged victims of any conduct prohibited by proposed Rule 8.4.1 are not required to advocate for corrective action, such an expectation will extend to other California lawyers if the rule is adopted as written.

No portion of this article is intended to constitute legal advice. Be sure to perform independent research and analysis. Any views expressed are those of the author only and not of the SDCBA or its Legal Ethics Committee.

The Committee recommended twenty-three steps for San Francisco legal employers that would address sexual orientation bias in the workplace. BASF unanimously adopted a resolution endorsing the Committee's report in August 1991.⁶

The Committee identified the following three broad problem areas: (1) antidiscrimination policies; (2) recruitment and hiring; and (3) retention, advancement and compensation. Highlights of their recommended findings:

(1) *Antidiscrimination Policies:*

- Many employers fail to include prohibitions against sexual orientation discrimination or discrimination based on HIV status in their antidiscrimination policies.⁷

(2) *Recruitment and Hiring:*

- Recruiters and hiring committees may screen out applicants whose resumés reflect involvement in gay and lesbian activities.
- Interviewers may make overtly anti-gay comments or may unintentionally alienate gay applicants through a particular line of questioning.⁸

(3) *Retention, Advancement, and Compensation:*

- Many firms have not tried to create a workplace that is hospitable for gay attorneys. One visible manifestation is that employees often feel comfortable making homophobic remarks or jokes in the office.⁹
- Employers may insist that openly gay attorneys keep their personal life separate from their professional life. At larger firms, socialization is an important part of an attorney's career and can often help in advancement and in making important contacts. Employers who do not welcome same-sex partners at firm functions make it more difficult for a gay attorney to succeed. The Committee found that this forced separation of personal and professional lives often increases the stress felt by gay and lesbian attorneys, which can lead to diminished productivity and a sense of isolation. This sense

6. *Id.* at 1.

7. *Id.* at 5.

8. *Id.* at 6.

9. *Id.* at 8.

of isolation may lead to the loss of valuable gay and lesbian employees.¹⁰

- Many employers continue to assume that clients will not want to work with a gay lawyer.¹¹
- Through the use of subjective adjectives in evaluations of job performance, some employers will condemn a gay attorney who comes out to a client or brings a partner to an office function for their "immaturity" or "bad judgment."¹²
- Many employers have not revised their personnel and benefits policies to ensure that gay attorneys are treated fairly.¹³

The Committee then made its twenty-three recommendations. Beneath each recommendation they included the names of firms that had these policies in place at the time the report was compiled.

(1) *Management Commitment to Equality and Diversity*: Employers need to make a commitment to equality and diversity in recruitment, hiring, retention, advancement, and compensation.¹⁴

(2) *Antidiscrimination and Equal Employment Opportunity Policies*: Employers should publish antidiscrimination policies, which specifically prohibit sexual orientation bias. Policies should also explain that AIDS and HIV-related conditions are treated the same way as any other disability.¹⁵

(3) *Training*: Training programs should be offered to educate employees about sexual orientation issues.¹⁶

(4) *Representation on Hiring Committees*: Employers should appoint at least one lesbian or gay attorney to the hiring committee. Having an openly gay attorney on the committee can help to educate other committee members about their overt or unconscious biases against lesbian and gay applicants.¹⁷

(5) *Recruitment Letters*: Employers should send recruitment letters to law school lesbian and gay student groups.¹⁸

(6) *Gay-Sensitive Contacts*: Firm employees sensitive to gay issues should be identified to applicants both during the initial in-

10. *Id.* at 9-10.

11. *Id.* at 10.

12. *Id.*

13. *Id.* at 11.

14. *Id.* at 12.

15. *Id.* at 13.

16. *Id.*

17. *Id.* at 13-14.

18. *Id.* at 14.

interview process and in the recruitment material sent to law schools.¹⁹

(7) *Firm Resumés*: Firm resumés that include the *pro bono* activities of employees should include lesbian or gay-related *pro bono* services provided by members of the firm.²⁰

(8) *Specialized Training for All Interviewers*: Training for interviewers should cover sensitivity to and awareness of sexual orientation issues.²¹

(9) *Welcome Packets*: If welcome packets are given to new employees, they should include information about community gay and lesbian resources as well as a copy of the firm's antidiscrimination policy.²²

(10) *Mentoring Program*: A mentoring program can serve as a support structure within the firm. A mentor can serve as an advocate for the new lawyer. The mentor should be a partner or supervising attorney with a commitment and sensitivity to the role of mentor.²³

(11) *Nondiscrimination in Performance Evaluations, Work Assignments and Grievance Procedures*: Employers need to promote fairness and objectivity in performance evaluations. Perceptions of client biases should not impact the work assignments given to gay and lesbian attorneys. The employer should also provide a neutral process for lodging grievances.²⁴

(12) *Social Function Policy*: All invitations to office functions should use neutral terms such as "guest."²⁵

(13) *"Spouse" Lists*: If spouse lists are kept, the employer should list the domestic partners of gay and lesbian employees who would like their partner to be listed.²⁶

(14) *Professional Associations*: Employers should pay attorneys' membership dues to lesbian and gay professional associations if they pay dues for other professional associations.²⁷

19. *Id.*

20. *Id.*

21. *Id.* at 14-15.

22. *Id.* at 15.

23. *Id.*

24. *Id.* at 15-16.

25. *Id.* at 16.

26. *Id.*

27. *Id.* at 16-17.

(15) *Internal Newsletters*: If the firm has an employee newsletter, the employer should ensure that periodic articles relating to gay and lesbian issues appear within it.²⁸

(16) *Informal Exchanges*: Employers should sponsor social events, such as dinners or lunches, for lesbian and gay attorneys.²⁹

(17) *Lunch Programs*: If a firm has regular lunches that focus on particular legal issues, it should include programs on lesbian and gay legal issues.³⁰

(18) *Health Benefits*: Health benefits should be offered equally to same-sex domestic partners and spouses, as well as to children of gay and lesbian couples.³¹

(19) *Parenting Leave*: Parenting leave policies should be gender-neutral and not require a biological relationship between the parent and child.³²

(20) *Child Care*: If child care is provided to employees, it should be available to nonbiological children of employees as well.³³

(21) *Care-Taking Policies and Bereavement Leave*: Caretaking leave should be allowed for the care of a domestic partner or an employee's nonbiological child. Bereavement leave should be allowed for the death of a domestic partner or the immediate relative of a domestic partner to the same extent it is permitted for married couples.³⁴

(22) *Relocation Benefits*: Employers should reimburse new employees for the cost of relocating domestic partners if these expenses are reimbursed for the spouses of new employees.³⁵

(23) *Employee Assistance Programs*: If benefits are made available to employees and their families, these benefits should apply equally to domestic partners and nonbiological children.³⁶

28. *Id.* at 17.

29. *Id.*

30. *Id.*

31. *Id.* at 17-18.

32. *Id.* at 18.

33. *Id.*

34. *Id.*

35. *Id.* at 19.

36. *Id.*

II.

Title: *Report on the Experience of Lesbians and Gay Men in the Legal Profession*

Published by: The Record of the Association of the Bar of the City of New York ("ABCNY")³⁷

Prepared by: The Committee on Lesbians and Gay Men in the Legal Profession
The Association of the Bar of the City of New York

Date Published: August 1993

One of the goals of the Committee on Lesbians and Gay Men in the Legal Profession, which was formed in 1990, was to identify and eliminate "barriers to full participation in the legal profession faced by lesbians and gay men."³⁸ The survey was written and conducted by the Employment Practices Subcommittee of the Committee on Lesbians and Gay Men in the Legal Profession. A forty-three question survey was drafted to gather basic demographic data and anecdotal information from gay and lesbian attorneys in specific areas. The questions asked for yes or no answers as well as for explanatory comments. Survey participants could either identify themselves or remain anonymous.³⁹

The Subcommittee received membership lists from organizations such as the Lesbian and Gay Law Association of Greater New York, Lamda, Gay and Lesbian Committee of the National Lawyers Guild and the American Civil Liberties Union Gay and Lesbian Rights Project. Members of the Subcommittee also sent copies of the survey to individuals who expressed an interest in distributing them. Over 600 copies were distributed and 229 completed surveys were returned.⁴⁰

The demographic breakdown was as follows: Sixty-six percent of the participants were men. Sixty-four percent of the participants were gay men. Thirty percent were lesbians, three percent bisexual, and three percent straight. Ninety-two percent of participants were white. Fifty percent worked in law firms. Sixty-four percent were between the ages of thirty and forty.⁴¹

37. For a copy of the report, call: (212) 382-6695.

38. Committee on Lesbian and Gay Men in the Legal Profession, *Report on the Experience of Lesbians and Gay Men in the Legal Profession*, 48 REC. ASS'N B. CITY N.Y. 843, 844 (1993).

39. *Id.* at 849.

40. *Id.* at 850.

41. *Id.* at 850-51.

The Committee acknowledged that the survey was not indicative of the experiences of lesbians and bisexual women or of non-white gay attorneys. The Committee is currently attempting to expand the input of people of color and women.⁴²

The Committee also noted that, because of the method of dissemination, the results may not be a representative sample of what gay and lesbian lawyers experience or feel on certain issues because the participants were overwhelmingly out and members of gay legal organizations. For instance, the fear of adverse impact of coming out on the job is probably quite a bit higher among gay attorneys in general than is reflected in this report.⁴³

After discussing the methodology of the report, the Subcommittee focused on each of the five specific areas targeted in the questionnaire: 1) hiring and retention; 2) discrimination, antidiscrimination policies and benefits; 3) visibility of lesbians and gay men at the workplace; 4) treatment or perceived treatment of lesbians and gay men; and 5) perceptions of the effect of being lesbian or gay on a legal career.

(1) *Hiring and Recruitment*: The information included in this section focused on the interview process. Nearly 70% of participants did not include any employment history or membership in organizations that might suggest that the person was gay.⁴⁴ However, approximately 15% of participants' employers told applicants that they sought diversity in the workplace and welcomed a "gay and lesbian perspective".⁴⁵

(2) *Discrimination, Antidiscrimination Policies, and Benefits*: The Subcommittee solicited personal accounts of sexual orientation discrimination, written policies that prohibited discrimination, and employee benefits policies that extended to domestic partners of lesbian and gay employees.⁴⁶

- *Discrimination*: Seventy-two percent of participants were unaware of specific incidents of discrimination against gay or lesbian attorneys being reported to management. Among participants who had personally experienced discrimination, only one in four reported the incident to a supervisor or a co-worker.⁴⁷

42. *Id.* at 851-52.

43. *Id.* at 851.

44. *Id.* at 852.

45. *Id.* at 853.

46. *Id.*

47. *Id.* at 854.

- **Employment Policies:** A slight majority of participants reported that their employers had formal policies and procedures that prohibit sexual orientation discrimination. However, only 24% of participants' employers had a formal grievance procedure to follow in reporting violations.⁴⁸

- **Benefits:** About half of participants were given bereavement leave for their domestic partners and the partners' children. But only 3% had health coverage for domestic partners and the partners' children.⁴⁹

(3) *Treatment or Perceived Treatment of Gay and Lesbian Attorneys:* Sixty percent of the participants replied that they were not aware of discriminatory attitudes or treatment from coworkers or clients. Among the 40% of participants who were aware of these attitudes, many mentioned that homophobic jokes were often exchanged in the workplace.⁵⁰

(4) *Visibility at the Workplace:* Fifty-eight percent of participants were out to most people at their job. Another 30% reported that a small number of their coworkers were aware. A discussion on subtle ways that gay and lesbian attorneys are encouraged not to be out at the workplace follows.⁵¹

(5) *Participants' Perceptions of the Effects of Being Lesbian or Gay:* Fifty-four percent of participants felt that their sexual orientation negatively affected their ability to succeed in the legal profession.⁵²

The report ends with a conclusory section on the direction to be taken and a set of recommendations for employers. The Commission particularly stressed the need for employers to implement concrete grievance procedures for employees to follow when filing a complaint about sexual orientation discrimination. Meaningful enforcement mechanisms need to be provided in order for the system to work effectively.⁵³

(1) Employers must be committed to equality and diversity in the workplace.

(2) Employers should implement antidiscrimination and equal employment opportunity policies.

48. *Id.* at 857.

49. *Id.*

50. *Id.* at 860.

51. *Id.* at 865-67.

52. *Id.* at 868.

53. *Id.* at 877.

- (3) Employers should provide comparable benefits to all employees.
- (4) Employers should employ greater sensitivity in the hiring process.
- (5) Employers should provide training on workplace-related issues affecting gays and lesbians.
- (6) Employers should eliminate discriminatory aspects of workplace conditions and practices.⁵⁴

III.

Title: *1991 Demographic Survey of the State Bar of California: Comparisons of Gay and Nongay State Bar Members*

Published by: The State Bar of California⁵⁵
Standing Committee on Sexual Orientation
Discrimination ("CSOD")

Date Published: January 1994

Although the published version of this report provides no background information on the impetus for the survey or the methods used, there is some information about this survey in the introduction to the "Report and Recommendations Regarding Sexual Orientation Discrimination in the California Legal Profession" issued by the State Bar of California.⁵⁶ According to the report, in 1991, the State Bar of California distributed a demographic survey to 14,300 randomly selected active Bar members. SRI International reanalyzed that data in 1994, at CSOD's request, to determine if there were significant differences between the responses of self-identified gay attorneys and those of other participants.⁵⁷

The survey poses four questions that assessed the following: (1) distribution of the participants by legal profession (solo practitioner, partner, associate, corporate in-house counsel, government attorney); (2) distribution by size of law firm; (3) distribution by income; and (4) percentage of time spent on uncompensated law-related activities. The data was analyzed and

54. *Id.* at 878-82.

55. For a copy of the report, contact: Committee on Sexual Orientation Discrimination, The State Bar of California, 555 Franklin Street, San Francisco, CA 94102-4498, (415) 561-8200.

56. COMM. ON SEXUAL ORIENTATION DISCRIMINATION, THE STATE B. OF CAL., REP. AND RECOMMENDATIONS REGARDING SEXUAL ORIENTATION DISCRIMINATION IN THE CAL. LEGAL PROFESSION 2 (1996).

57. *Id.*

separated to reflect the responses from gay and non-gay attorneys in light of their age and by number of years in practice.⁵⁸

The survey highlights each area where there was a statistically significant difference between gay and non-gay attorneys. These areas included: distribution by legal profession for those under forty, distribution by income for those over forty, and distribution by income for those with more than ten years of experience.⁵⁹

The study provides no recommendations.

IV.

Title: *The Prevalence of Sexual Orientation
Discrimination In The Legal Profession in
Massachusetts*

Prepared by: The Massachusetts Lesbian and Gay Bar
Association⁶⁰

Date Published: March 1994

The Massachusetts Lesbian and Gay Bar Association ("MLGBA") conducted this survey to expose the prevalence of discrimination against gays and lesbians in the legal profession. Two hundred members of the MLGBA received copies of the surveys. Sixty-four (32%) completed surveys were returned.⁶¹ Questions focused on discrimination in the workplace, anti-gay comments, treatment of openly gay or lesbian attorneys, and employment benefits.⁶²

Although 69% of participants said they had not personally experienced sexual orientation discrimination and only 22% thought that being gay could negatively affect advancement, many participants gave anecdotal accounts of discrimination. Some responses mentioned perceived barriers to partnership. Others cited being passed over for advancement or quality work assignments.⁶³

Participants were asked if they had heard anti-gay remarks or jokes made by coworkers or by judges and mediators.

58. SRI INT'L, 1991 DEMOGRAPHIC SURVEY OF THE STATE B. OF CAL.: COMPARISONS OF GAY AND NON-GAY STATE B. MEMBERS 1-4 (1994).

59. *Id.*

60. For a copy of the report, contact: The Massachusetts Lesbian and Gay Bar Association, P.O. Box 9072, Boston, MA 02111.

61. MASS. LESBIAN AND GAY B. ASS'N, THE PREVALENCE OF SEXUAL ORIENTATION DISCRIMINATION IN THE LEGAL PROFESSION IN MASS. 1 (1994).

62. *Id.*

63. *Id.*

reaction to the Committee's study. Following the findings are a list of recommendations endorsed by the Committee.

(1) *Sexual Orientation Discrimination in Employment*

- *Recruitment and Hiring:* The Attorney Surveys revealed that 15% of participants believed that their employer discriminated in considering an applicant who is gay or perceived to be gay. Approximately the same percentage of participants actually witnessed or experienced anti-gay bias in the hiring process.⁷²

- *General Work Environment:* Forty percent of the Attorney Survey participants believed that their work environment was less hospitable to gay and lesbian attorneys than it was to heterosexual attorneys. Sixty-six percent reported that attorneys in their office make homophobic comments or jokes. Many participants attribute this to a lack of awareness about gay people or gay-related issues.⁷³ Attorneys reported that unconscious bias against gay and lesbian attorneys has a negative impact on the work environment.⁷⁴

- *Work Assignments:* Approximately 15% of Attorney Survey participants said that clients have expressed a desire not to work with gay attorneys. Similarly, over 12% report that partners in their office have expressed the same preference. Eleven percent of participants in the Attorney Survey report that they had knowledge of, or had themselves experienced, sexual orientation discrimination in the distribution of work assignments.⁷⁵

- *Evaluations, Promotions and Advancement:* Seventeen percent of Attorney Survey participants felt that their employer disfavored gay and lesbian attorneys when making decisions about promotions and advancement. The report stated that discrimination was more prevalent in promotions than in hiring and retention because the criteria used for advancement was much more subjective than that used for hiring. Discrimination is easier to hide because many factors are evaluated when considering someone for advancement.⁷⁶

72. *Id.* at 311.

73. *Id.* at 314-17.

74. *Id.* at 319-20.

75. *Id.* at 320-21.

76. *Id.* at 322-26.

- *Retention and Career Path:* The data in this section comes largely from the State Bar Demographic Survey. However, the Attorney Survey seems to support these statistics, suggesting that gay and lesbian attorneys were generally less satisfied with their jobs than heterosexual attorneys and that much of this dissatisfaction stems from a perception that they were at a disadvantage because of their sexual orientation.⁷⁷

- *Compensation:* Almost 30% of Attorney Survey participants believed that gay and lesbian attorneys probably received compensation which was less than their heterosexual counterparts. Gay and lesbian attorneys also fared worse than their heterosexual counterparts because of employee benefit policies. Almost two-thirds of the gay Attorney Survey participants and half of all the Attorney Survey participants felt that their employers had not made an effort to ensure that the domestic partners or lesbian and gay attorneys had access to the same employee benefits as spouses of heterosexual attorneys.⁷⁸

(2) *Visibility of Gay and Lesbian Attorneys in the Profession*

- *"The Closet" as Evidence of Sexual Orientation Discrimination:* A slight majority of gay Attorney Survey participants report that they were out to most of their superiors. Only 39% were out to most of their coworkers. Fewer than 10% were out to clients, judges, or opposing counsel. The report emphasized the stress and emotional cost that comes from being in the closet. This was reflected both in the survey responses and in the focus groups.⁷⁹

- *Employer Pressure to Remain "Closeted":* Nearly 25% of gay Attorney Survey participants reported that lawyers in their offices said that being openly gay demonstrated poor judgment. Almost 75% of participants believed that it would harm a gay or lesbian attorney's career to "come out" to clients. Gay participants were more likely to think that their career could be harmed by "coming out."⁸⁰

- *Social and Professional Relations Between Gay and Heterosexual Attorneys:* The questions in the survey that

77. *Id.* at 326-27.

78. *Id.* at 329-32.

79. *Id.* at 338-39.

80. *Id.* at 340-42.

prompted the most written comments were those that dealt with bringing a same-sex partner to office social events. Many participants wrote that the attitudes of coworkers towards them began to change after they brought a same-sex partner to an event. Other participants who chose not to bring partners to these social events felt isolated from the social networking that takes place at firm events.⁸¹

(3) *Employer Policies Against Sexual Orientation Discrimination*

- *The Prevalence of Nondiscrimination Policies:* Approximately 67% of Employer Survey participants stated that their firm had a nondiscrimination policy that expressly addressed sexual orientation discrimination.⁸²

- *The Implementation of Nondiscrimination Policies:* The responses to both Attorney and Employer surveys indicated that nondiscrimination policies have not eliminated sexual orientation discrimination.⁸³ Many Attorney Survey participants did not feel that nondiscrimination policies were respected in recruiting and hiring. Thirty-three percent of Attorney Survey participants believe that their employer did not take steps to guarantee that performance reviews and work assignments were not affected by sexual orientation bias.⁸⁴

- *The Awareness of Bias and Response to Complaints:* There was a wide disparity in responses to the Employer and Attorney Surveys regarding the prevalence of homophobic comments and jokes. Only 26% of Employer Survey participants stated they were aware of homophobic comments or jokes in the workplace, in contrast to almost 66% of Attorney Survey participants. The report hypothesized that this difference could be because the problem was not being reported to employers.⁸⁵

- *The Communication of Nondiscrimination Policies:* Participants to both surveys indicated that employers need to more clearly communicate their sexual orientation nondiscrimination policy. Over 55% of Employer Survey partici-

81. *Id.* at 345-46.

82. *Id.* at 349.

83. *Id.* at 350.

84. *Id.* at 352.

85. *Id.* at 354-55.

pants stated that their firms did not include sexual orientation bias in education programs addressing bias issues.⁸⁶

(4) *The Reaction to the Study and the Committee Itself:*

- The Committee's experience in conducting this study provided evidence of anti-gay bias within the legal profession. The average response rate to mail questionnaires is between 20% and 30%. The response rate here was significantly smaller. The Committee received many angry responses to the bar association's use of member dues to fund such a survey.⁸⁷

The report concludes with a series of six recommendations for legal employers and five recommendations for the LACBA.

Recommendations for Employers

- *Adopt, Implement, and Publicize a Nondiscrimination Policy Relating to Gay Attorneys:* Employers should adopt nondiscrimination policies that expressly cover sexual orientation. Procedures for filing grievances should be publicized, and complaints should be taken seriously and investigated quickly.⁸⁸
- *Encourage Nondiscriminatory Recruitment and Hiring of Qualified Gay Attorneys:* Interviewers should be trained so as to eliminate even subtle bias against sexual orientation. Gay attorneys presently employed in an office should be involved in the hiring process and a list of supportive contact attorneys should be provided to applicants.⁸⁹
- *Promote a Workplace Climate That Ensures Equal Employment Opportunity for Gay Attorneys:* Employers should ensure that work assignments, performance evaluations, compensation, and promotion are not withheld because of an attorney's sexual orientation. Employers should provide education and sensitivity training about sexual orientation bias.⁹⁰
- *Provide Gay Attorneys and Their Same-Sex Domestic Partners with Employee Benefits Comparable to Those Pro-*

86. *Id.* at 356-57.

87. *Id.* at 357-58.

88. *Id.* at 360-61.

89. *Id.* at 361.

90. *Id.* at 361-62.

vided to Heterosexual Attorneys and Their Opposite-Sex Spouses: Particularly important are health insurance benefits for same-sex partners. If employees cannot get coverage for their same-sex domestic partner, employers should help them find individual coverage and contribute the same amount towards this coverage as they would for a spouse. Employers should also grant sick leave, caretaking leave, bereavement leave, and parenting leave to gay and heterosexual attorneys equally.⁹¹

- *Provide Gay Couples the Same Opportunities to Socialize with Colleagues as Heterosexual Couples:* Employers should provide same-sex couples the same chance to socialize with coworkers and colleagues that they provide heterosexual couples. Invitations should use terms such as "partner" or "significant other," instead of "spouse."⁹²

- *Do Not Encourage Gay Attorneys to Be "Closeted" at Work or in Their Professional Activities:* Employers need to allow gay employees to be open about their sexual orientation. The goal for the office should be to create an atmosphere of acceptance.⁹³

Recommendations for LACBA

- *Publish this Report:* If the LACBA widely distributes this report, much needed educational materials about sexual orientation issues will be available to people within the legal profession.

- *Encourage Employers to Implement the Recommendations:* The LACBA should provide model policies for member employers to follow as well as other assistance for employers who wish to implement these recommendations.

- *Provide Information on Domestic Partner Benefits:* LACBA should act as a clearinghouse for information on the options available for domestic partner benefits.

- *Sponsor and Promote Relevant CLE Programs:* The LACBA should offer continuing legal education programs that cover sexual orientation bias.

- *Sponsor Programs to Counteract Sexual Orientation Discrimination:* The LACBA should sponsor support groups,

91. *Id.* at 363.

92. *Id.* at 364.

93. *Id.*

mentoring, and other programs that will help counteract the effects of sexual orientation bias in the legal profession.⁹⁴

VI.

Title: *Legal Employers' Barriers to Advancement and Economic Equality Based Upon Sexual Orientation*

Published by: The Hennepin County Bar Association⁹⁵
Lesbian and Gay Issues Subcommittee

Date Published: June–August 1995

This report was produced by a subcommittee of the Hennepin County Bar Association ("HCBA") Diversity Committee. In the Fall of 1994, the Committee asked the Subcommittee to investigate the extent of sexual orientation bias in the legal communities of the Twin Cities.⁹⁶ The Twin Cities have civil rights protections and nondiscrimination ordinances that prohibit sexual orientation discrimination. The subcommittee hoped the report would help law offices comply more fully with these Human Rights Act requirements. In addition, the recommendations contained within the report are geared towards creating a working environment in which all employees are able to fulfill their potential.⁹⁷

The report does not go into great detail about the methods used to gather information. The subcommittee published advertisements in legal and community periodicals judged most likely to be read by gay and lesbian professionals. The advertisements invited people to contact the subcommittee if they were interested in participating in the interviews. Between January and February 1995, nine sessions of group and individual interviews were held. Subcommittee members moderated and recorded these interviews. Additional individual interviews were held through June 1995. There is no numerical breakdown of any kind, even in terms of how many people were interviewed or their gender distribution.

94. *Id.* at 365-66.

95. For a copy of this report, contact: Hennepin County Bar Association, Minnesota Law Center #350, 514 Nicollet Mall, Minneapolis, MN 55402-1021, (612) 340-0022.

96. LESBIAN AND GAY ISSUES SUBCOMM., HENNEPIN COUNTY B. ASS'N, LEGAL EMPLOYERS' BARRIERS TO ADVANCEMENT AND TO ECONOMIC EQUALITY BASED UPON SEXUAL ORIENTATION 1 (1995).

97. *Id.* at 5.

(6) *Complaint Processes Should Be Established to Address Incidents of Discrimination, Heterosexism, and Homophobia*: Schools should provide training for those who receive complaints so that they are equipped to handle lesbian and gay discrimination.¹⁵⁶

(7) *The Creation and Maintenance of Lesbian and Gay Law Student Organizations Should Be Encouraged*: Funding equal to that given to other student groups should be available for lesbian and gay groups.¹⁵⁷

(8) *Placement Offices Should Insure That Services Offered to Students Are Not Affected by Discriminatory Attitudes*: Information about potential discrimination against gays and lesbians within the legal profession needs to be explained sensitively to students. Placement officers should also remember that sometimes being out on a resume may work to a student's advantage.¹⁵⁸

X.

Title: *BASF Report on Employment Policies for Gay and Lesbian Attorneys*

Published by: The Bar Association of San Francisco¹⁵⁹
Committee on Sexual Orientation Issues

Date Published: 1996

After the Bar Association of San Francisco ("BASF") adopted the 1991 report, a copy of it was sent to each of the approximately 400 law firms that pays BASF dues for its attorneys.¹⁶⁰ In 1995, BASF decided to officially survey employers to measure and report how successfully the recommendations from the 1991 report had been adopted.¹⁶¹

The Committee drafted a survey consisting of twenty-eight yes or no questions. The questions were aimed at asking whether the firm does or does not do what the recommendation advised. For some questions, participants could check "not applicable," but they were asked why the recommendation was not applicable to their company (i.e. if a recommendation pertains to the hiring committee and the firm has no hiring committee).¹⁶²

156. *Id.*

157. *Id.* at 151-52.

158. *Id.* at 152.

159. For a copy of the report contact: The Bar Association of San Francisco, 685 Market Street, Suite 700, San Francisco, CA 94105, (415) 982-1600.

160. COMM. ON SEXUAL ORIENTATION ISSUES, B. ASS'N OF SAN FRANCISCO, BASF REP. ON EMPLOYMENT POLICIES FOR GAY AND LESBIAN ATTORNEYS 2 (1996).

161. *Id.*

162. *Id.* at 5.

The survey and a copy of the 1991 BASF report were sent to 339 firms and corporate legal departments. The survey responses were broken down based on the firm's size: small (1-15 attorneys), mid-size (16-50), or large (51 or more). However, only five mid-size firms returned the survey so they were analyzed with the large firms. A total of sixty-four firms, nineteen percent, responded to the survey.¹⁶³

The report advises some caution when interpreting the results of the survey. Caution is advised for several reasons: the results are only what the firms say they do and was not compared with the corresponding perceptions of their attorneys; only BASF firms were surveyed; and only a minority of the BASF firms responded. However, the Committee explained that it still felt the results were valid. BASF firms employ 4,500 attorneys in San Francisco. Therefore, a survey of these firms would likely reflect general trends in a large portion of the San Francisco legal community. Compliance with some of the recommendations became law since the 1991 report was issued, and many of the recommendations were easy to implement so compliance rates of nonresponding firms would probably be close to the same as those of responding firms.¹⁶⁴

The report supplies detailed summaries of the responses regarding each recommendation. There are "Selected Comments" for each recommendation that gave samples of the written comments made by the firms. There are also a "Summary of Responses" that discusses any disparities between large and small firms and lists reasons why a majority of firms might implement each recommendation. The Committee also supplied charts detailing the answers given to each question. Finally, compliance rates are given for each question. The compliance score was calculated by dividing the number of "yes" responses by the total number of "yes" and "no" responses. "Not applicable" responses were not added in when calculating the compliance score.¹⁶⁵

The final pages of the 1996 report discusses the Committee's conclusions based on the analysis of the survey responses. The Committee suggested that the compliance scores were the best way to judge the extent to which the recommendations had been implemented. The Committee then discussed the survey re-

163. *Id.* at 6.

164. *Id.* at 7.

165. *Id.*

sponses by breaking the twenty-three BASF recommendations down into those dealing with equal treatment directly and those dealing with the less tangible goal of creating an atmosphere conducive to diversity.¹⁶⁶

(1) *Equal Treatment*: Twelve of the recommendations are classified as dealing with equal treatment directly. Compliance rates tended to be higher for these recommendations than for those aimed at fostering diversity.¹⁶⁷

(2) *Fostering Diversity*: Eleven of the recommendations are classified as ones which fostered diversity. The Report states that comments by firms indicated that following many of these recommendations was often considered unnecessary because of the firms' general nondiscriminatory workplace. This would help to explain the lower compliance rates.¹⁶⁸

No recommendation has a compliance rate of less than 25%. No firm expressed hostility to the recommendations or the goals on which they were based. The report concludes with a discussion about encouraging future compliance with the recommendations aimed at fostering diversity. No further recommendations are made in this report.

XI.

Title: *Report and Recommendations Regarding Sexual Orientation Discrimination in the California Legal Profession*
Published by: The State Bar of California¹⁶⁹
Committee on Sexual Orientation Discrimination
Date Published: August 1996

The State Bar of California Committee on Sexual Orientation Discrimination ("CSOD") was asked to report to the Board of Governors on the extent of sexual orientation discrimination in the legal profession in California. This report detailed CSOD's efforts and included recommendations that the Board of Governors was encouraged to adopt.¹⁷⁰

166. *Id.* at 56.

167. *Id.* at 57.

168. *Id.* at 58-59.

169. For a copy of the report, contact: The State Bar of California, 555 Franklin Street, San Francisco, CA 94102, (415) 561-8200.

170. COMM. ON SEXUAL ORIENTATION DISCRIMINATION, STATE B. OF CAL., REP. AND RECOMMENDATIONS REGARDING SEXUAL ORIENTATION DISCRIMINATION IN THE CAL. LEGAL PROFESSION 1 (1996).

The CSOD examined the data collected in the 1991 State Bar Demographic Survey and the 1994 L.A. County Bar Association Report on Sexual Orientation Bias and also read the personal accounts of anti-gay bias recounted by lawyers in Los Angeles and San Francisco. The report gives a brief overview of the important findings from each of the surveys that the CSOD relied upon.¹⁷¹

The second section of the report details the CSOD's "Recommendations for Action by Legal Employers." These recommendations are consistent with those adopted by the BASF and the L.A. County Bar. This report urges legal employers to adopt, implement, and publicize antidiscrimination policies; effective grievance procedures, nondiscriminatory recruitment and hiring practices, nondiscriminatory procedures for promotion, compensation and work assignments, and benefit packages with the same set of benefits for all employees. Legal employers are also encouraged to refrain from maintaining work environments where gay attorneys are encouraged to, or feel compelled to, remain "closeted."¹⁷²

Finally, the CSOD asked the Board of Governors to adopt a resolution reminding lawyers and law firms that employment discrimination on the basis of sexual orientation is illegal and endorsing the recommendations made by the CSOD.¹⁷³

CONCLUSION

Given the number of studies that have already been conducted on sexual orientation bias by the legal profession in recent years, it has become clear that slowly, some portions of the legal profession have begun to recognize the serious nature of sexual orientation bias. I hope that this survey of the studies done to date and Professor Rubenstein's Article will assist further studies and research into this problem.

171. *Id.*

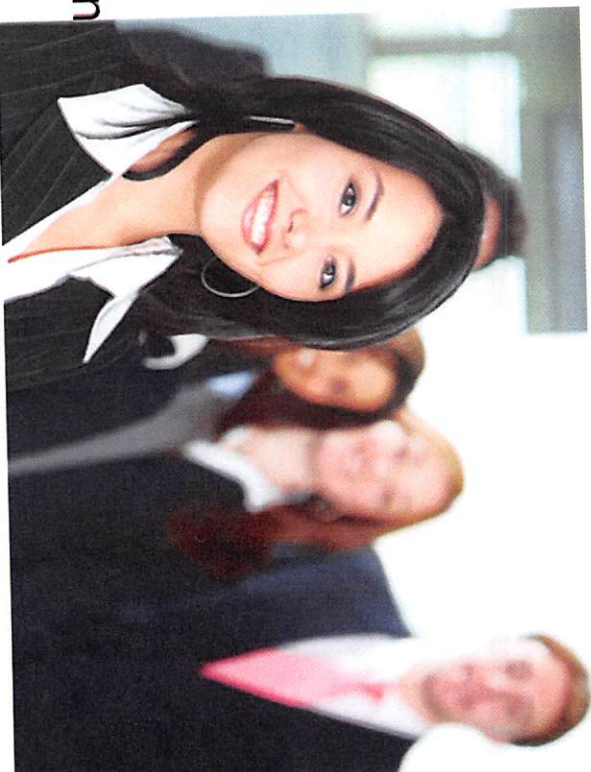
172. *Id.* at 6-7.

173. *Id.* at 8.

The Legal Industry

Times they are a-changing:

- Between 1951 and 1965, women made up 3% of law school classes
- In 1980, only 8% of practicing attorneys were women
- In 2005, women made up 30% of all practicing attorneys
- In 2012-2013, 47% of law degrees were awarded to women and women made up 34% of all practicing attorneys



Source: Martin, *Doing Justice, Doing Gender*, (SAGE Publications, Inc. 2007)
NALP Bulletin: 2010 Women and Minorities in Law Firms by Race and Ethnicity
Commission on Women in the Profession, ABA – A Current Glance at Women in the Law (July 2014)



Law Firms – We Can Do Better

LAW FIRM DEMOGRAPHICS ASSOCIATES		2010	2014-2015
Minorities		20.3%	21.6%
Minority Women		11.1%	11.5%
LGBT		2.7%	1.80%

LAW FIRM DEMOGRAPHICS PARTNERS		2010	2014-2015
Minorities		6.7%	7.33%
Minority Women		2.2%	2.45%
LGBT		1.6%	3.08%

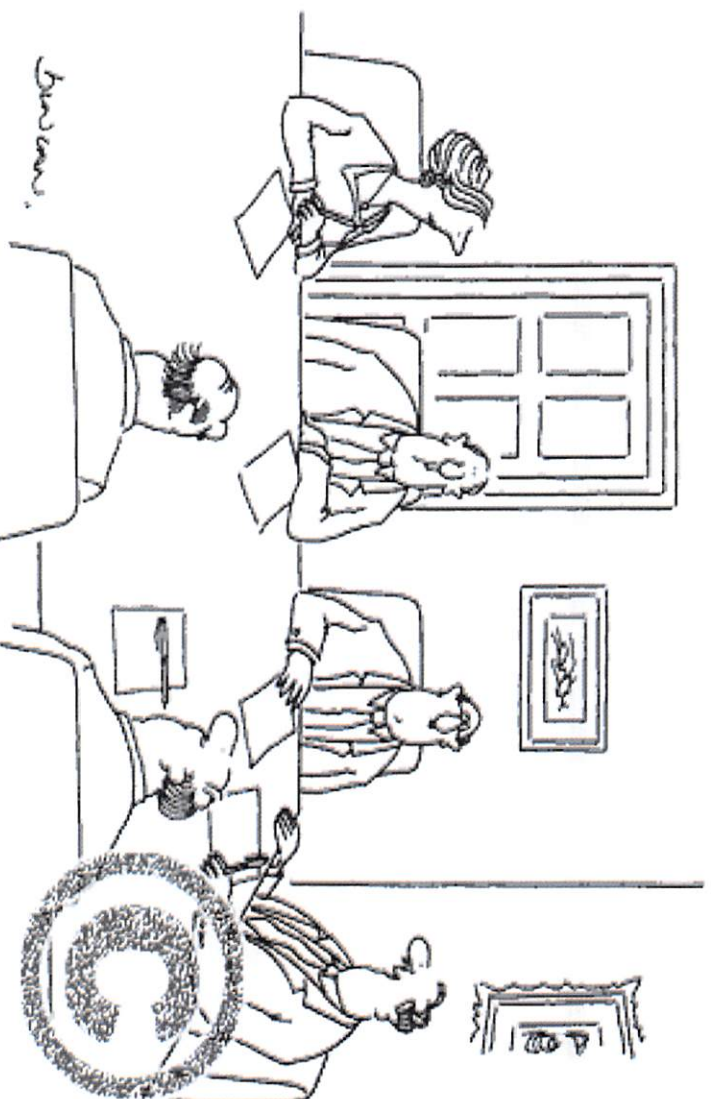
Source: NALP Bulletin:
Commission on Women in the Profession, ABA – A Current Glance at Women in the Law (July 2014)
NALP Bulletin, Dec 2015, LGBT Representation Among Lawyers in 2015

In-House Counsel

- Late 1990s: Less than 10% of Fortune 500 GCs were people of color
- In a Minority Corporate Counsel Association survey of top legal positions in corporate legal departments:
 - 20% were held by minorities
 - 36% were held by women (21% at Fortune 500 companies)
 - 16% were held by minority women



We Can Be Unaware of Our Biases



business.

"That's an excellent suggestion, Miss Triggs. Perhaps one of the men here would like to make it."

Unconscious Bias -Race

- Identical briefs from a hypothetical third-year associate, NYU grad, "Thomas Meyer" which contained following errors: 7 spelling/grammar errors, 6 substantive writing errors, 5 errors of fact, 4 errors in analysis

	African-American "Thomas Meyer"	Caucasian "Thomas Meyer"
Overall Score	3.2 / 5	4.1 / 5
Spelling errors noted	5.8 / 7	2.9 / 7
Technical errors noted	4.9 / 6	4.1 / 6
Errors in fact noted	3.9 / 5	3.2 / 5

Unconscious Bias - Gender

- Subjects given identical science papers from applicants with female or male names score male authors higher, particularly when topic is "male"

(Knoblock-Westerwick, Glynn, Huge, The Matilda Effect in Science Communication: An Experiment on Gender Bias in Publication Quality Perceptions and Collaboration Interest)

- Auditions behind a screen result in 25% to 46% increase in number of women hired for orchestral jobs

(Goldin & Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians)



Bullying

- Nasty, rude, and hostile behavior
- Yelling and screaming
- Vulgar language and cursing
- Throwing things



- Kicking cubicles or trash cans
- Threats and intimidation
- Excessive criticism
- Criticizing employees in front of co-workers

Bullying Statistics

- 27% of U.S. workers report being bullied
- 60% of women report bullying, 68% of the time by a another woman
- 32% of Hispanics and 33% of African Americans report bullying
- 72% of employers reactions either condone or explicitly sustain bullying; less than 20% take actions to stop it

Source: Workplace Bullying Institute – 2014 U.S. Workplace Bullying Survey

Micro-inequities



- Coined in 1974 by an MIT psychologist, "micro-inequities" are small events which are often ephemeral and hard-to-prove, often unintentional and unrecognized by the perpetrator.
- Occur wherever people are perceived to be "different"



Be Aware of the Signals You Give

- Small gestures can be perceived as evidence of bias:
 - Negative facial expressions
 - Dismissing the idea of one employee only to embrace it when offered by another
 - Leaving someone off a group email
 - Addressing some employees by chummy nicknames
 - Continually mispronouncing one employee's name

Reports of Bias Among Lawyers

- Categories of bias reported in 2011 survey of current and former Fortune 500 in-house attorneys
 - Treated differently than peers:
 - Race/ethnicity: 9%
 - Gender: 24%
 - Missed out on desirable assignments:
 - Race/ethnicity: 6%
 - Gender: 19%
 - Lacked access to informal/formal networking opportunities:
 - Race/ethnicity: 9%
 - Gender: 27%