

Sexual Orientation Bias, in. Bias, Arizona's Legal System

by Amelia Craig Cramer and Amy Todd

Do openly gay and lesbian attorneys practicing law in Arizona encounter discrimination in the courtroom, or is their sexual orientation a “non-issue”? Will the Arizona legal community enter the new millennium with a progressive and open-minded approach to diversity issues surrounding sexual orientation, or must gay and lesbian attorneys remain trapped behind closet doors to ensure successful careers? Do gay and lesbian parties and witnesses experience bias in our legal system? Are Arizona judges and attorneys aware that their work is governed by Ethical Canons and Rules of Professional Conduct that specifically prohibit bias and discrimination based on sexual orientation?

In August 1996, the American Bar Association recommended that all state bars survey their members concerning issues surrounding sexual orientation bias in the legal system. Responding to this call, in February 1997 the State Bar of Arizona established a Task Force on Gay and Lesbian Issues (the “Task Force”) to take the pulse of the Arizona legal community. The initial purpose of the Task Force was to conduct a comprehensive survey of the entire community, from judges, attorneys and law students to the gay men and lesbians in the larger community who seek access to our legal system. This extensive survey, completed over the course of two years, was designed to determine whether discrimination against gay men and lesbians exists in the justice system and to report the survey results to the State Bar of Arizona. The Final Report issued last year and troubling information revealed through the survey responses indicate that much work remains to be done before gay men and lesbians are treated fairly and equitably in our legal system.

In 1997, the Task Force accepted the voluntary services of Dr. Phoebe M. Stambaugh, Ph.D., a social scientist from Northern Arizona University, to create an appropriate survey instrument. Separate, but similar, surveys were created for Arizona attorneys and law professors, judges, law students, court personnel, law enforcement personnel and gay and lesbian residents. The surveys were distributed group by group, and all were returned and collated. The Task Force obtained private grant funding with which it hired Dr. Mary Bernstein and a research team from Arizona State University to review and analyze the survey results, to determine which findings were of statistical significance, and to determine how best to report the findings.

Significant Survey Findings

Overall, the survey revealed that lesbians and gay men are at a substantial disadvantage in all areas of contact with the justice system in Arizona. Seventy-seven percent of judges and attorneys surveyed reported that they have heard disparaging remarks about gay men and lesbians in the legal arena, and 47 percent have heard those remarks in public areas of the courthouse. In one example, a survey respondent heard a judge, in reference to a gay man on trial for assault, state that the defendant’s sexual behavior—which was not at issue in the case—was “an outright defamation of nature.” In other examples, judges and attorneys reported having heard court personnel say that they did not want to work with a particular lawyer because she is a lesbian. Some lawyers and judges also reported having heard litigants, jurors and witnesses say that they did not want to work with a gay or lesbian lawyer.

One of the survey questions asked the lawyers, law professors and judges surveyed whether they believe that gay men and lesbians are subjected to discrimination in the justice system. More than 30 percent said “yes.” Thirteen percent of judges and attorneys reported that they personally have observed acts of discrimination by judges on the bench in open court toward men or women perceived to be gay or lesbian. In one example, an adoption placement was denied solely because the adoptive mother was a lesbian. In another example, a woman sought to change her surname to that of her partner. There was an unnecessary postponement she was sure was due to her being a lesbian. One gay man had his battery complaint dismissed as “asked for” just because he is gay.

Other reported incidents of discrimination have arisen when judges have enforced state laws that are blatantly discriminatory, even when such laws may be unconstitutional. See *Romer v. Evans*, 517 U.S. 620 (1996) (Colorado’s anti-gay Amendment 2 declared unconstitutional because a law treating gays, lesbians and bisexuals more harshly than heterosexuals violates equal protection).

For example, a victim of domestic violence perpetrated by a same-sex partner reported that she was unable to obtain a special, expedited “domestic violence” order of restraint after a single beating. It was not until she had suffered multiple beatings that a general restraining order prohibiting ongoing harassment was available from the court, still not a “domestic violence” order. The reason that this victim had to await additional beatings before obtaining a restraining order is that the definition of “domestic violence” in state law, A.R.S. § 13-3601, excluded same-sex victims from special protections, such as orders of restraint available after one incident of violence and such as state-sponsored social services, including protective housing and counseling.¹ The problem of the discriminatory state law was compounded in this reported example by the fact that, when the judge finally did impose a restraining order, he issued a mutual restraining order—in other words an order restraining not only the perpetrator of the violence, but also an order restraining the victim. This, the victim said, made her feel unfairly punished and blamed for being victimized.

Another example of a discriminatory state law enforced by the court was reported by a woman who, along with her partner of five years, was in

the process of adopting a child. The woman lamented the fact that the family court would permit her to adopt only as a "single" parent and would not permit her life partner, the other parent, to adopt their child—leaving the child without important rights to child support and government benefits (such as Social Security) from the second mother, and leaving the second mother in fear of being at the whim of her partner with respect to shared custody in the event they ever separate.

In other examples, gay men and lesbians in life-long relationships reported being unable to obtain civil marriage licenses and hundreds of important legal benefits incident to civil marriage, even though they have been married through religious ceremonies in their churches and synagogues and even though they have assumed the responsibilities of marriage. For instance, one gay man was without any legal right to previously shared property and income after his 19-year relationship with another man ended.

One gay man was fired from his job

several years ago because he is gay. He sued, claiming he had been discriminated against. The trial judge instructed the jury that such discrimination is perfectly legal and does not violate public policy because the employer was a private company.²

The percentage of discriminatory incidents observed by gay men and lesbians who work inside our legal system is double that observed by those in the larger community. Of the lesbian and gay survey respondents who work within the justice system, 33 percent have witnessed discrimination against lesbians and gay men, compared to only 16 percent of the gay respondents in the community at large. These results indicate that the more contact a gay man or lesbian has with the justice system, the more likely he or she is to observe incidents of discriminatory conduct. Sixteen (16) percent of the gay and lesbian respondents commented that they hesitate to contact the legal justice system out of fear of discrimination and/or publicity. And the same percentage expressed hesita-

tion to contact the legal justice system because, as one put it, they thought "it would be futile."

Judges and attorneys surveyed admitted to having very little knowledge of the Ethical Canons and Rules of Professional Conduct forbidding discrimination or bias based on sexual orientation as well as case law or statutes which impact gay men and lesbians. Ninety percent of judges and attorneys have never attended any training sessions designed to address sexual orientation issues. Approximately 60 percent of judges surveyed stated that they have little knowledge of case law or legislation relevant to gay men and lesbians, while 21 percent admitted that they are not knowledgeable about the judicial canons prohibiting discrimination based on sexual orientation.

Attorneys surveyed also displayed a lack of knowledge on this score, with only six percent familiar with any case law in Arizona and only 13 percent aware of Ethical Canons prohibiting sexual-orientation discrimination. As an interesting aside, 16 percent of the

attorneys surveyed claimed the optimistic but mistaken belief that they were aware of (nonexistent) Arizona state statutes prohibiting discrimination based on sexual orientation. The only laws in Arizona that prohibit sexual-orientation discrimination are the federal and state constitutions (applicable only to governmental discrimination) and local ordinances in Tucson (prohibiting discrimination in employment, housing and public accommodations) and Phoenix (prohibiting discrimination in employment by city contractors with more than 35 employees).³

Tolerance for the negative treatment of gay men and lesbians is alarmingly high in Arizona law schools, as reflected by the following survey results: 88 percent of law students have heard disparaging remarks in private interactions, 73 percent in public interactions, and 34 percent of law students surveyed even heard these comments in particular law school classes. Forty percent of gay and lesbian law students reported that they would not feel comfortable bringing a same-sex date or partner to a school-related event. Two law students reported being excluded from social functions because they are gay. One reported negative treatment by a professor based on sexual orientation. Another reported receiving a lower grade based upon sexual orientation. Such discriminatory actions, if they are occurring and are tolerated in law school, presumably will only continue to be fostered in our legal community absent concerted efforts on behalf of judges and attorneys within the system to eradicate this environment of discrimination and hostility toward gay and lesbian individuals. Statutes, rules and regulations prohibiting sexual-orientation discrimination should be put in place and enforced so that those who perceive they are suffering from discrimination can seek investigations and obtain relief in appropriate cases.

Recommendations

On a brighter note, several of the Task Force Report recommendations directed toward solving these

problems in the Arizona legal community already have been implemented. A recent trend in the employment area is for employers voluntarily to treat gay and lesbian employees equally, including by providing domestic partners the same insurance and medical leave benefits that are provided for the spouses of heterosexual married employees. The State Bar of Arizona, shortly after the issuance of the Task Force Report, began to provide domestic partnership benefits for its own employees. Unfortunately, the University of Arizona and Arizona State University have not done the same.

The State Bar has taken another positive step forward in raising the level of the Gay and Lesbian Task Force to permanent State Bar Standing Committee status. It established the Sexual Orientation and Gender Identity Committee on October 29, 1999. Additionally, the State Bar is now working toward requiring a component in the Professionalism Course to address issues of sexual orientation and diversity.

Of course, these constructive steps are only the beginning of a long road ahead. The Task Force has recommended the following additional actions by the State Bar to eradicate the current environment that condones hostility and discriminatory practices toward gay men and lesbians:

- Sponsor and support Continuing Legal Education seminars specifically targeting issues related to sexual orientation and the law.
- Encourage employers to foster workplace equality, including hiring, promoting and retaining openly gay and lesbian employees and encouraging and supporting the provision of equal compensation, including domestic partner benefits; and encouraging gay and lesbian employees to bring their partners to employment-related functions.
- Encourage those who observe or experience sexual orientation discrimination in the justice system to report disparaging comments and negative treatment to the State Bar and/or the Commission on Judicial Performance.
- Encourage the Commission on

Judicial Performance to survey and evaluate judges regarding their attitudes toward gay men and lesbians in the same way it surveys them regarding racial minorities and women.

By implementing these recommendations, the State Bar will take vital steps necessary to eradicate discrimination—increasing education, communication and understanding. Without them, members of our justice system may continue to feel free to discriminate against gay men and lesbians through such discrimination is contrary to the Ethical Canons and Rules of Professional Conduct that are central to our profession.

Ethical Canons and Rules of Professional Conduct

As stated earlier, the survey responses reveal that a large percentage of lawyers and judges are unaware of the ethical proscriptions against exhibiting anti-gay bias in the courtroom. Moreover, the survey indicated that many respondents report anti-gay bias is being exhibited in courtrooms throughout the state.

Judicial Canon 3(b)5 and 6⁴, U.S. District Court Rule 1.20⁵, and Local Bankruptcy Rule 1000-1⁶ all explicitly provide that sexual orientation bias by judges or lawyers is improper and unacceptable in the courtroom.

In addition, although no Arizona State Ethical Rule explicitly addresses bias or discrimination of any kind, such conduct probably violates Arizona's Rules of Professional Conduct because it is prejudicial to the administration of justice, presents a conflict of interest, and violates Supreme Court Rule 41(g), which obligates attorneys to "abstain from all offensive personality." Yet, according to State Bar Discipline staff commenting anonymously, and according to members of the State Bar Ethics Committee, bringing a case under Rule 41(g) is rare.

Commentary to the ABA Model Rules includes an explicit prohibition against any lawyer, "in the course of representing a client, knowingly manifest[ing] by words or conduct, bias or prejudice based upon race, sex,

religion, national origin, disability, age, *sexual orientation*, or socioeconomic status,” finding that such conduct is prejudicial to the administration of justice. Rule 8.4, Comment [2], ABA Model Rules of Professional Conduct (emphasis added). Rule 42, Rules of the Supreme Court of Arizona, explicitly recognizes that Arizona’s Rules of Professional Conduct are based upon the ABA Model Rules. However, the Arizona Supreme Court would not necessarily deem the new commentary to the ABA Model Rules at 8.4, Comment [2] to be applicable to Arizona absent explicit adoption. So, it is hoped by members of the Task Force, by the new Committee on Sexual Orientation and Gender Identity, and by the Ethics Committee of the State Bar that Arizona will adopt an amendment to its Ethical Rule 8.4 explicitly prohibiting sexual orientation bias. Until then, existing Ethical Rule 8.4(d), which makes it professional misconduct for a lawyer to “engage” in conduct that is “prejudicial to the administration of justice,” arguably already covers such conduct. It has been so interpreted by some administering Bar discipline. Nevertheless, a more explicit comment will be preferable so as to eliminate any uncertainty.

Conclusion

An overwhelming number of survey respondents indicate that they have either known of or have witnessed discrimination against gay men or lesbians within our justice system. Additionally, comparing the survey results of community members at large to those who work within the legal system reveals the troubling statistic that the more contact a gay man or lesbian has with the legal system, the more likely he or she is to encounter discrimination. Judges and attorneys express a disturbing lack of knowledge regarding Judicial and Ethical Canons and Rules of Professional Conduct that prohibit bias or prejudice against gay men and lesbians. These results reflect a pervasive discriminatory attitude and portray a legal culture that currently condones acts of bias and prejudice toward gay men and lesbians.

It is axiomatic that citizens of Arizona should receive fair and equitable

treatment in our justice system. Our Ethical Canons and Rules of Professional Conduct require such tolerant and open-minded behavior of all members of the Arizona Bar. The time has come for members of the Arizona legal system to make concerted efforts to increase education and communication with the hope of breaking down the walls of homophobia that currently prevent gay men and lesbians from receiving equal treatment in our legal system. 🏳️

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ENDNOTES:

1. In the Spring of 2000, the domestic violence statute was amended by the legislature so that the definition of “domestic violence” victim now includes victims of the same sex as the perpetrator.
2. The Court of Appeals held, in an unpublished opinion in that case, that if the employer had been the state or another governmental entity, such discrimination would most probably have been found to violate the constitutional guarantee of equal protection. *Blain v. Golden State Container*, No. 2 CA-CV 94-0102, unpublished memorandum decision at 3 (Ariz. Ct. App. May 5, 1994) (“A strong argument is made that such [governmental] discrimination is unconstitutional.”)
3. Tucson City Code, Ch. 17, Art. II, §§ 17-1 - 17-16; Phoenix City Code, Art. II, § 188-10.01; Phoenix Ordinance Nos. G-3485, 3558.
4. Judicial Canon 3(b)5 and 6, Rule 81, Rules of the Supreme Court – the Arizona Code of Judicial Conduct, provides: (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, *sexual orientation* or economic status, and shall not permit staff, court officials or others subject to the judge’s direction or control to do so. (6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, *sexual orientation*, or socioeconomic status, against parties, witnesses, counsel or others...
5. Rule 1.20, Rules of Practice of the U.S. District Court for the District of Arizona, provides: Litigation, inside and outside the courtroom, in the United States District Court for the District of Arizona, must be free from prejudice and bias in any form. Fair and equal treatment must be accorded all courtroom participants, whether judges, attorneys, witnesses, litigants, jurors, or court personnel. The duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias toward another on the basis of categories such as gender, race, ethnicity, religion, disability, age or *sexual orientation*.
6. Rule 1000-1, Local Rules, United States Bankruptcy Court, provides: Litigation, inside and outside the courtroom, in the United States District Court for the District of Arizona, must be free from prejudice and bias in any form. Fair and equal treatment must be accorded all courtroom participants, whether judges, attorneys, witnesses, litigants, jurors, or court personnel. The duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias toward another on the basis of categories such as gender, race, ethnicity, religion, disability, age or *sexual orientation*.