

**Lambda Legal Defense  
and Education  
Fund, Inc.**

***National Headquarters***

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October 7, 1996

National Lesbian and Gay Law Association  
1555 Connecticut Ave., NW #200  
Washington, DC 20036-1111

Dear Colleagues:

Lambda has begun to intensify its efforts to address sexual orientation bias in the courts. Recently we filed a complaint of judicial bias against a state judge (the proceedings are confidential), and, as an outgrowth of our work on the complaint, we are also working to promote efforts to study the issue of sexual orientation bias in the courts and to develop curricula for educating judges on such bias. In the event that you can participate in these efforts, or are already pursuing similar efforts, we would like to provide information below that you may find helpful.

**I. Pursuing Relief in Cases of Judicial Bias**

Twenty-seven states have adopted the ABA's 1990 Model Code of Judicial Conduct, which bars discrimination based on sexual orientation. For your convenience, we have attached a copy of the relevant ABA model code provisions at Appendix A. There are virtually no reported cases of complaints based upon the new code provisions, despite the documentation that we discuss below of commonplace incidents of bias by judges (if you are aware of such cases, many of which may be unreported, we would be grateful if you would bring them to our attention so that we can make them available to others).

Attached is a copy of a form complaint, based in part upon the complaint we have filed against the state judge. See Appendix B. While we do not wish to diminish the justifiable fears involved in filing a complaint of judicial bias, we urge you to consider an educational outreach to your membership to heighten awareness of the twenty-seven states' non-discrimination rules for judicial conduct, so those who feel they are able to pursue their entitlement to redress may do so.

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## **II. Promoting Studies of Sexual Orientation Bias in the Courts**

An exciting development occurred at this summer's ABA convention, when the ABA adopted a resolution that "urges state, territorial and local bar associations to study bias in their community against gays and lesbians within the legal profession and the justice system and make appropriate recommendations to eliminate such bias." See copy of the resolution at Appendix C (the official publication should be available by November).

The ABA resolution arises from studies of sexual orientation bias in the justice system by several groups, including The Association of the Bar of the City of New York. See copy of the Association's March 1996 report at Appendix D. In May 1996, the Judicial Council of California issued a request for a proposal from consultants for a \$25,000 grant to study sexual orientation bias in the state's courts. See copy of the RFP at Appendix E.

We urge you to consider having your members contact friends at bar associations in their respective states to promote discussion of the ABA's recent resolution.

## **II. Promoting Education of Judges on Sexual Orientation Bias**

In contrast to the vast set of educational materials available to judges on race and gender bias, there appears to be little currently available on sexual orientation bias. The state of Washington and the District of Columbia have developed important but limited materials. See copies of excerpted materials at Appendix F (if you are aware of any further materials, we would be grateful if you could bring them to our attention so that we can make them available to others as models). In the absence of comprehensive materials incorporated into judicial education programs around the country, we are in the position of educating judges one at a time, case by case.

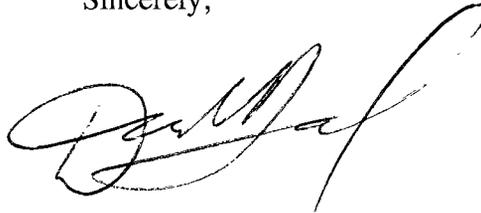
A key group for the development of judicial education materials on sexual orientation bias is the National Association of State Judicial Educators (NASJE). NASJE is divided into four regions with regional directors assigned to each region. See attached list of regional directors at Appendix G. We urge you to consider having your members call their respective regional directors and expressing their hope that NASJE will help in the development of materials on sexual orientation bias in the courts, particularly in light of the adoption in twenty-seven states of the ABA's 1990 model code provision prohibiting discrimination on the basis of sexual orientation.

\* \* \*

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Thank you for your time in reviewing our proposals. We hope the information that we have provided is useful to you, and we welcome your constructive feedback as to how we might better proceed with our efforts to promote fairness in the courts for lesbians and gay men.

Sincerely,

A handwritten signature in black ink, appearing to read 'David Buckel', written in a cursive style.

David Buckel  
Staff Attorney

DB/sq  
encs.

A

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Model Code of Judicial Conduct Canon 3

**CANON 3: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY**

August 1990

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law [FNa1]. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law a1. and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require [FNa2.] order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require a2. similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

Commentary:

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

(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 socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Commentary:

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge shall require a2. lawyers in proceedings before the judge  
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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. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law a1.. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law a1. applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel [FNa3.] whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law a1. to do so.

#### Commentary:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies.

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**B**

COURT ON THE ....  
SUPREME COURT OF THE STATE OF ....

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IN THE MATTER OF :  
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 ..... , :  
 Complainant, :  
 :  
 vs. : COMPLAINT OF  
 :  
 JUDGE ..... , : .....  
 :  
 Judicial Officer. :

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STATE OF )  
 ) SS:  
 COUNTY OF )

, being duly sworn, deposes and states as follows:

1. My name is ..... , and my address is .....
2. This is a Complaint against Judge ..... for misconduct in violation of Canons 2 and 3 of the Judges' Code of Judicial Conduct, and for wilful misconduct under Art. .... of the ..... Constitution.
3. The judicial misconduct of which I complain occurred in Room .... of the .... Court of .... on .... , at approximately .... , in the proceeding of State against \_\_\_\_\_ , Case # ... , Complaint # ... .

4. Judge .... presided over the .... case.

5. The proceeding involved .....

.....  
.....  
.....

6. The day in Court was very important to me, because

.....  
.....

7. But on that day Judge .... did not allow the ....  
[state] judicial system to apply its process to my efforts and  
those of the mediator, the police department, and the  
prosecutor's office.

8. Once Judge .... found out that I was a lesbian

.....  
.....

9. After Judge ....'s outburst, the entire courtroom  
laughed at us.

10. I have never been so humiliated, hurt, and  
disgusted as I was that day.

11. Judge .... communicated to me that I was not  
worthy of respect in the .... [state's] Courts because of who I  
am.

12. Judge .... said from the bench that he would not  
give me access to the .... [state] Courts because of who I am,  
and that I had to solve ..... outside the

Courts, and that I might actually go to jail if I needed and requested assistance from the Courts.

13. I am a human being, I am a tax-paying citizen, I am a proud .....

14. However Judge .... feels about lesbians, he has a duty to conduct the business of the court and handle whatever case is before him and a duty to be respectful; otherwise the .... [state] justice system makes no sense.

15. After consultation with my attorneys, Lambda Legal Defense and Education Fund, Inc., I believe I am entitled to redress for the misconduct of Judge .... .

16. In denying me access to the .... [state] Courts, in treating me so disrespectfully, in ..... , Judge .... has violated the Judge's Code of Judicial Conduct, Canons 2 and 3.

17. Judge .... has violated Canon 2 in that he has failed to respect and comply with the law in dismissing a case on improper grounds, and he has certainly not acted "in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

18. Judge .... has violated Canon 3 in that he has not performed his duty impartially and diligently, which requires being .....

19. Judge .... has also violated .... of the .... [state] Constitution, because his caustic disrespect and dismissal of a matter based solely on his bias constitutes wilful misconduct.

20. While I have no desire to tarnish the reputation of the .... [state] Court system, and I have no desire to mar the office or the accomplishments of Judge .... , I believe redress is necessary when ethical violations and misconduct result in the denial of access to the courts.

21. I am also concerned that Judge .... may have denied access to the Court to other lesbians or gay men.

22. I am told that in 1990 similar concerns led to the American Bar Association's adoption of a Model Code of Judicial Conduct that bars bias or prejudice on the basis of sexual orientation. See Nancy D. Polikoff, Educating Judges About Lesbian and Gay Parenting: A Simulation, 1 Law and Sexuality 173, 176-177 (1991).

23. Therefore, I respectfully request that this Court enforce the State's Code of Judicial Conduct and the State's Constitution at .... , and in so doing restore justice by making it clear that the doors of the Court are not closed to me because of who I am, by:

- a. investigating whether or not others have suffered the closing of the Court's doors as I have, to determine if more extensive remedial action is appropriate;

- b. under this State's Code of Judicial Conduct, reprimanding Judge .... for his violations of Canons 2 and 3, and directing that Judge ... undergo sensitivity training with respect to lesbians and gay men in the judicial system; and, in addition to, or in the alternative,
- c. under this State's Constitution at .... , censuring Judge .... for his wilful misconduct.

Respectfully,

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Subscribed and sworn to before  
me on this \_\_\_\_\_ day of \_\_\_\_\_, 1996

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Notary Public



**KING COUNTY BAR ASSOCIATION  
BAR ASSOCIATION OF SAN FRANCISCO  
LOS ANGELES COUNTY BAR ASSOCIATION**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

**RESOLVED** That the American Bar Association urges state, territorial and local bar associations to study bias in their community against gays and lesbians within the legal profession and the justice system and make appropriate recommendations to eliminate such bias.

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# THE RECORD

OF THE ASSOCIATION OF THE BAR  
OF THE CITY OF NEW YORK

VOLUME 51

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MARCH 1996

# REPORT OF FINDINGS FROM THE SURVEY ON BARRIERS AND OPPORTUNITIES RELATED TO SEXUAL ORIENTATION

by THE SPECIAL COMMITTEE ON LESBIANS AND GAY MEN IN THE LEGAL PROFESSION

*Since its establishment in 1990, one of the purposes of the Special Committee on Lesbians and Gay Men in the Legal Profession has been to assist in the identification and elimination of barriers to full participation in the profession by lesbians and gay men. The Committee has undertaken several areas of study directed at ascertaining the degree to which lesbian and gay attorneys face discrimination in the legal profession. This particular Report will focus on the state court system, based on the results of a survey conducted by the subcommittee on the judiciary and the judicial system. The primary purpose of the survey was to gather information on whether the respondents had experienced or witnessed discriminatory statements or actions based on the sexual orientation of judges, lawyers, litigants and others who appear in the state courts. The report immediately following will explore the experiences of gay and lesbian law students in New York City metropolitan area law schools.*

## INTRODUCTION

The Association of the Bar of the City of New York established the Special Committee on Lesbians and Gay Men in the Legal Profession in 1990. One of the Committee's purposes is to assist in the identification and elimination of barriers to full participation in the legal profession by lesbians and gay men. Creation of the Committee underscores the bar's commitment to eliminating discrimination in the legal profession on the basis of sexual orientation. The Committee's mandate is similar to previous efforts by the Association of the Bar in establishing committees on Minorities in the Profession and Women in the Profession.

The Committee has undertaken several areas of study directed at ascertaining the degree to which lesbian and gay attorneys face discrimination in the legal profession.<sup>1</sup> One of the areas studied was the state court system. The courts are at the center of our state's justice system and are a primary work arena for many attorneys. The unique role played by the courts as pro-

<sup>1</sup> Other areas of study include the legal profession and law schools. The Special Committee issued a report on the experiences of gay men and lesbians in the practice of law. See 48 The Record 843, *Report on the Experience of Lesbians and Gay Men in the Legal Profession* (Nov. 1993).

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tectors of legal rights and adjudicators of law and equity demands that they safeguard their reputation for ethical and moral conduct. This cannot be done if the courts are perceived as condoning or endorsing discriminatory behavior.

This report is the conclusion of the results derived from a survey conducted by the subcommittee on the judiciary and the judicial system. The survey was conducted in March 1994 and was sent to all lawyers working for the New York City Legal Aid Society ("LAS"), some 1,100 in number. The primary purpose of the survey was to gather information on whether the respondents had experienced or witnessed discriminatory statements or actions based on the sexual orientation of judges, lawyers, litigants and others who appear in the state courts.<sup>2</sup>

## I. BACKGROUND

Discrimination based on sexual orientation within the court system is a concern of the Special Committee. A three-page mail survey was designed<sup>3</sup> to measure the extent of any positive or negative comments and actions regarding sexual orientation in the courtroom. The survey combined a series of closed-ended questions about the knowledge and amount of positive and negative actions and comments in the courtroom toward gay men and lesbians. The survey ended with a series of open-ended questions, where LAS lawyers provided details on the types of comments and actions they reported. The subject of the survey was limited to the comments and actions in the courtroom of judges, lawyers, court officers, court personnel, litigants and jurors. There were no questions directed at discrimination in the LAS lawyers' offices or private lives.<sup>4</sup>

The questionnaire was distributed in March 1994 to all of the lawyers who work for the Legal Aid Society with a cover letter from the Society's Managing Attorney.<sup>5</sup> Legal Aid lawyers were chosen because they practice

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<sup>2</sup> The Subcommittee conducted a survey of all state court judges sitting in New York City. The responses to that survey were not necessarily representative of the population surveyed. Although the results of the prior survey were qualitative, they indicated a need to conduct a quantitative survey for a more accurate assessment of the problems faced by lesbians and gay men in the court system.

<sup>3</sup> The survey was designed with the assistance of Mitchell Cohen, Ph.D. of the Partnership for Community Health, Inc., a non-profit research group that specializes in quantitative and qualitative research. The Partnership also assisted in the evaluation of the survey data and in the preparation of this report.

<sup>4</sup> Copies of the survey may be obtained by contacting the Office of the Secretary of the Association.

<sup>5</sup> The Committee wishes to express its appreciation to Alexander D. Forger, a former member of this committee and formerly the Chairman of the Legal Aid Society's Board of Directors, and to Archibald R. Murray, Chairman of the Board of the Legal Aid Society. The Committee also wishes to acknowledge the assistance provided by Susan Hendricks, Esq., of the Legal Aid Society's Special Litigation Unit.

in all of the civil and criminal courts in New York City, and, consequently, their experiences and observations are generally representative of the types of activities that take place in the courtroom.

Of the 1,099 questionnaires distributed, 229 lawyers responded, for a response rate of twenty-one percent. No follow-up mailing was conducted.

## II. RESPONDENT DEMOGRAPHICS

The demographics of those responding to the survey reflect the population of LAS lawyers. There are slightly more women than men in the LAS, and slightly more women (51%) than men (45%) returned their surveys. About three-fourths of the lawyers responding are Caucasian, 7% Latino, 7% African American, 4% Asian or Pacific Islander, 3% Native American, and 4% defined themselves as "other" ethnicity. This slightly under-represents African Americans, who comprise about 11% of the LAS lawyers, and over-represents Native Americans, who comprise about 1% of all LAS lawyers. Although this may bias answers about discrimination toward African Americans, it is unlikely to have significant impact on questions about discrimination relating to sexual bias.

Of the 216 that answered the question on sexual orientation, 78% defined themselves as heterosexual, 4% as gay male, 5% as lesbian, 3% as bisexual, and 1% as "other" (which, based on comments written in the margins, was someone who felt the categories were too static.) Ten percent (10%) chose the option "no answer."

The lawyers who responded to the survey have slightly more experience with the LAS than all LAS lawyers. Twenty-nine percent (29%) of the lawyers in the survey indicated that they worked eight or more years at LAS, while the true proportion is 18%. At the other extreme, the sample under-represents lawyers who have worked less than three years at LAS. In general, however, the sample accurately represents the majority of LAS lawyers—those who have worked at LAS between three and eight years—with 20% practicing between three and four years and 30% practicing between five and eight years. The greatest number of lawyers responding to the survey practiced between two and eight years. Nineteen percent (19%) of the lawyers reported practicing under three years, 20% reported practicing three or four years, and 30% reported practicing between five and eight years. The remaining 29% reported practicing over eight years.

### A. Where They Work

The sample of LAS lawyers generally represents the divisional breakdown of all LAS lawyers, and the survey indicates that LAS lawyers have considerable in-court experience. Ninety-four percent (94%) of the LAS

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lawyers say they frequently or sometimes appear in court. The sample represents lawyers who practice in the different courts, some of whom practice in more than one court. Forty-five percent (45%) of the lawyers reported practicing in the Criminal Court and said they spent an average of 56% of their time in court. Thirty-one percent (31%) said they practiced in the Criminal Term of the Supreme Court and spent a little more than half (51%) of their time in court. Twenty-three percent (23%) said they practiced in the Appellate Division and spent, on average, half their time in court. Twenty-one (21%) reported working in the Civil Term of the Supreme Court and said they spent about 30% of their time in court. Fewer than 20% of the lawyers practice in Housing, Civil, Family or Federal Courts. The time they spend in court ranges, on average, between 31% and 80%.

For the six courts in the five counties of New York City, the location of litigation differs by type of court. Lawyers surveyed who are litigating civil cases are more likely to practice in New York County than in Kings and Bronx Counties. Criminal litigation is split about evenly between New York and Kings Counties, with about half as many lawyers practicing in Bronx and Queens Counties. More Legal Aid Society lawyers report practicing in the First Department than in the Second Department, and more report working in the Southern District Court than in the Eastern District Court.

### **III. KNOWLEDGE OF COMPLAINTS AGAINST COURT PERSONNEL REGARDING SEXUAL ORIENTATION DISCRIMINATION**

Of the 229 lawyers responding, 15 (7%) knew of a formal or informal complaint against court personnel regarding sexual orientation discrimination. Of those, two resulted in corrective action, and 12 resulted in no corrective action. (In one instance the result was unknown.)

### **IV. KNOWLEDGE OF SELF-IDENTIFIED GAY MEN OR LESBIAN LAWYERS OR JUDGES**

A little over half (57%) of the lawyers responding knew of self-identified gay or lesbian lawyers who worked in the courts. Forty-four percent (44%) knew a judge who self-identified as gay or lesbian.

### **V. COMMENTS AND ACTIONS REGARDING SEXUAL ORIENTATION IN THE COURTS**

LAS lawyers were asked a series of questions to measure negative and positive comments and actions toward sexual orientation. One set asked about specific actions toward judges, lawyers, litigants, witnesses or jurors based

on their perceived sexual identity. Another set asked "how frequently" they had heard or seen different types of negative or positive comments or actions.

**A. Frequency of Comments and Actions by Judges, Lawyers and Court Personnel**

Jokes were the most frequent type of negative comment.<sup>6</sup> Over one-third of the lawyers surveyed reported frequently or sometimes hearing jokes about gay men or lesbians (38%). "Private" ridicule or snickering and disparaging comments about lawyers, litigants, witnesses or jurors were mentioned by nearly as many respondents (35% in each instance). Thirty percent (30%) of the lawyers noted instances where derogatory names were used in relation to sexual orientation. Regarding a particular case, 20% of the LAS lawyers reported hearing negative remarks about sexual orientation. In terms of positive remarks or treatment, less than 20% of the LAS lawyers reported that they occurred frequently or sometimes, and more than half said they never occur.

**B. Comments and Actions Regarding Sexual Orientation of Lawyers and Judges**

The LAS lawyers were asked to specify whether specific comments or actions were made by judges, lawyers or court personnel. The most frequent negative and positive comments regarding the sexual orientation of judges and lawyers were made by other lawyers. About two in five lawyers (41%) reported that they had heard other lawyers make negative comments about judges or lawyers based on their sexual orientation. In contrast, 17% had heard lawyers make positive comments about their colleagues.

There were fewer actions than comments reported regarding sexual orientation. Still, 16% of those lawyers answering the survey reported that other lawyers had acted negatively toward judges or lawyers regarding their sexual orientation. In comparison, 7% reported positive actions by lawyers toward lawyers or judges regarding their sexual orientation. When asked to describe the types of instances in their own words, they included:

*I have heard a former colleague and an attorney currently practicing in Bronx Family Court refer to homosexuality as immoral, based on religious beliefs.*

<sup>6</sup> Self-identified lesbian lawyers were more likely, and self-identified gay lawyers were slightly more likely, than other lawyers to detect comments and actions against fellow lawyers and litigants by judges, lawyers and court personnel. However, the vast majority of discriminatory actions were reported by self-identified heterosexual lawyers.

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*After a hearing, a defense attorney turned to the assistant DA and called him a "flaming faggot." The assistant responded, "Flaming, no; faggot, yes."*

*One instance I recall is a lawyer commenting on the sexual orientation of a judge and speculating that he was also a pedophile (unfounded).*

After lawyers, court personnel were heard to make the most negative comments regarding sexual orientation. About a third (35%) of the LAS lawyers had heard court personnel make negative comments about judges or lawyers, while 6% had heard court personnel make positive comments<sup>7</sup> regarding the sexual orientation of judges or lawyers. About one in five (19%) reported that court personnel had acted negatively toward lawyers or judges based on their sexual orientation. Three percent (3%) of the LAS lawyers reported court personnel acted positively toward judges or lawyers because of their sexual orientation. The types of instances recalled included:

*I have heard jokes from lawyers and court officers directed at two lesbian judges. While some comments are made from male attorneys because they are mad or frustrated by the judge, other comments are made in an attempt to be clever or funny.*

*A gay male attorney was taking a long time to interview a male defendant during arraignments. The judge, ADA and court personnel joked that the attorney was probably trying to date the defendant.*

Negative comments were least likely to be from judges. Still, 11% of the LAS lawyers report frequently or sometimes seeing negative treatment by judges toward gay and lesbian lawyers appearing before them. Fourteen percent (14%) of the lawyers had heard judges make negative comments about judges or lawyers based on their sexual orientation. In contrast, 7% of the judges were heard to make positive comments. One in ten (10%) of the LAS lawyers reported that judges acted negatively toward judges and lawyers based on their sexual orientation. Six percent (6%) reported positive action by judges toward lawyers or judges based on their sexual orientation. Despite the relatively small number recalling judges making negative comments, when asked to provide details about the types of comments and activities, those citing judges were among the most frequently noted. An example:

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<sup>7</sup> Of those who said they heard positive comments regarding the sexual orientation of judges or lawyers, none of the respondents provided examples of those comments.

*A judge once told me in private that one of my adversaries had a big problem. I wasn't aware of him having a problem and I told the judge I wasn't aware of any. The judge said, "Don't you know he's gay."*

In several instances they were directed against attorneys who were perceived to be lesbians. For example:

*When I indicated I was familiar with the hotel [involved in a case] the judge said, "Oh, I didn't know it was a gay hotel!" This was in front of a courtroom full of people.*

*I've heard that a judge treats one lesbian attorney very harshly—some feel that the judge is a closet lesbian and is envious of the lawyer who is "out."*

Some negative comments were also noted from litigants. For example:

*Pejorative references about Judge A, who is self-identified as HIV positive, and toward Judges B, C and D, self-identified lesbians and recent former Housing Court judges in Brooklyn. Most of the references are from landlords or agents.*

### **C. Comments and Actions Regarding Sexual Orientation of Litigants, Witnesses and Jurors**

Court personnel and lawyers are the most likely to make negative comments or engage in negative activities regarding the sexual orientation of litigants, witnesses and jurors. Forty-three percent (43%) of the LAS lawyers reported that they heard other lawyers or court personnel make negative comments about litigants, witnesses or jurors based on their sexual orientation. In contrast, 10% had heard lawyers and 5% had heard court personnel make positive comments about litigants, witnesses or jurors.

There were fewer actions than comments reported regarding sexual orientation of litigants, witnesses or jurors. Still, 21% of those lawyers answering the survey reported that other lawyers had acted<sup>8</sup> negatively toward litigants, witnesses or jurors regarding their sexual orientation. In comparison, 6% reported positive actions by lawyers toward litigants, witnesses or jurors regarding their sexual orientation. A quarter (25%) of the LAS lawyers reported that court personnel had acted negatively toward litigants, witnesses or jurors based on their sexual orientation. Four percent (4%) of the LAS lawyers reported court personnel acted positively toward litigants, witnesses or jurors because of their sexual orientation.

<sup>8</sup> Actions were not defined in the survey questionnaire and few respondents provided examples. Actions could include hand gestures, body movements or facial gestures.

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When asked to describe these instances in their own words, by far the most frequent complaint was against court officers and other non-judicial court personnel. A total of 46 specific instances was mentioned as discrimination against defendants. The most frequently mentioned were negative comments by court personnel against male transvestites (8) and, in general, against homosexual prisoners (7). Examples of comments include:

*Court officers referring to witnesses as "fags" in private conversations.*

*When the comments deal with defendants, it is usually court personnel, e.g., "What do we do with the flamer?" (or faggot, etc.) Then the person is paraded around the pens and kept separate (for his/her own protection, of course).*

*I think the most negative comments come in arraignments, where clients are just coming into the system.*

There were a number of comments that lesbian or gay defendants were not treated equally. One lawyer also noted disparate treatment of complainants:

*I have found that the DA's office treats crimes against gay people less seriously than a perceived "straight" person. The DA's office fears a Queens jury will not be sympathetic to a homosexual complainant.*

Fewer LAS lawyers reported judges making negative comments or acting negatively toward litigants, witnesses or jurors based on their sexual orientation. Eighteen percent (18%) of the lawyers had heard judges make negative comments about litigants, witnesses or jurors based on their sexual orientation. In contrast, 2% of the judges were heard to make positive comments.

Only slightly fewer actions than comments were observed by the LAS lawyers. Fifteen percent (15%) of the LAS lawyers reported that judges acted negatively toward litigants, witnesses or jurors based on their sexual orientation. Five percent (5%) reported positive action by judges toward litigants, witnesses or jurors based on their sexual orientation.

When asked to detail some of these comments and activities for judges, LAS lawyers said:

*I have a sense in plea bargaining that in cases where a gay person is the victim, such as an assault case, that the case is less serious because of the person's status.*

Gay jurors are completely invisible, i.e., no acknowledgment that a juror may not be married yet have significant partners and children.

*Individuals believed to be gay or lesbian are routinely treated poorly with regard to bail or parole at arraignments and in other petty ways, but seldom so in regard to actual disposition of a case.*

*Judge X has made it clear that he finds homosexuals to be the most unreliable witnesses.*

Finally, of those who reported positive actions and comments in a courthouse from judges, lawyers or court personnel, one respondent provided a description of a positive remark:

*Positive comments occur in conversation with other lawyers who are my friends.*

**VI. RULES AND PROCEDURES MOST LIKELY TO EXPAND OPPORTUNITIES AND REDUCE BARRIERS FOR LESBIANS AND GAY MEN WORKING FOR OR APPEARING IN THE STATE AND FEDERAL COURT SYSTEMS**

The LAS lawyers were asked to suggest in their own words rules and procedures most likely to expand opportunities and reduce barriers for lesbians and gay men appearing in the court system. The largest number of LAS lawyers (25) said that rules and procedures banning discrimination based on sexual orientation should be adopted. Seven made the point that they should be clear, and another seven added that they had to be enforced. For example:

*Disciplinary action against sexual harassment and particularly for derogatory behavior toward gay men and lesbians.*

The second most frequent suggestion (22) was the implementation of sensitivity training for all court personnel. For example:

*Required sensitivity training in sexual discrimination and/or harassment with a component for gay/lesbian discrimination.*

*Training on anti-discrimination laws and sensitivity for all court personnel.*

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*More education especially presented from openly gay individuals would promote more understanding.*

The next most frequent suggestion (14) was that nothing should be done. There were two variations on this theme. About half said nothing should be done because they were not witness to any discrimination. The other half indicated that nothing should be done because it would be useless. For example:

*Being an African-American female, I am well aware that you cannot successfully legislate open-mindedness, diversity or basic fairness. This is sad and unfortunate.*

A few lawyers made the point that there had to be an identifiable process for the complaint and that action had to be taken. Another added that the system should be anonymous.

A few lawyers suggested adopting a policy supporting diversity and initiating affirmative recruiting for gay, lesbian and bisexual persons. One added that there should be more openings for gays and lesbians.

Most LAS lawyers suggested that judges should be more active in preventing discrimination in their courtroom. One lawyer suggested:

*Obviously all forms of discrimination should be strictly barred and judges must take steps to regulate behavior in their courtroom.*

Several other suggestions were mentioned by a handful of LAS lawyers, including:

- Publish grievance proceedings.
- Place anti-discrimination signs/distribute brochures.
- Establish the ability to switch counsel based on sexual discrimination.
- Ban derogatory words.
- Have an in-court observer and apprise court officials.

A few lawyers made the point that the courtroom discrimination mirrored that in society and what needed to be done was general education of the public at large. Another two lawyers cited particular instances dealing with discrimination related to AIDS. Their suggestion was to provide AIDS edu-

cation for court personnel.

Finally, a few lawyers noted that the best way to decrease discrimination in the courtroom is for more lawyers and judges to be open about their sexual orientation. For example:

*Of course, I would never insist that anyone "come out" who does not wish to. But, the more people are aware that gays and lesbians surround them every day, the more their consciousness will be raised.*

A few lawyers noted that the solution may not be simple because of the fear of discrimination. One lawyer said:

*Several attorneys who I either worked with or frequently litigate against seemed very uncomfortable revealing any facts about their sexual identity for fear of discrimination.*

A lesbian who has tried this approach notes:

*It took a good year before my co-workers learned I was no different than they were except of my sexual orientation. Talk about it—raise awareness!!*

One lawyer summed up the difficulty by noting:

*It's probably going to take more time and exposure ... It's a double-edged problem. People shouldn't be discriminated against. And, unfortunately the more a group pushes for acceptance, the angrier they get, the more the majority turns off to them. The people in the middle don't want to be told what they can and can't say/think, any more than they want to hear idiotic, demeaning jokes about gay men and lesbians. Exposure and balance is my only suggestion on how to proceed (emphasis in original).*

### VII. CONCLUSIONS

The survey revealed that there are many instances of anti-gay and -lesbian bias and some instances of discrimination in the court system. Although jokes and ridicule are the most frequently cited and are evidence of bias, there were also a number of discriminatory actions noted. Some distinction must be made between biased comments and discriminatory actions.

Biased comments, although less significant an intrusion, do threaten the integrity of the court system. The greatest offenders for making biased com-

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ments were other lawyers and court personnel. Court personnel were also noted to engage in anti-gay and -lesbian bias such as court officers' use of derogatory references for male transvestites and homosexual prisoners. The courts must be seen to act affirmatively to discourage open hostility toward minority groups in society.

Discriminatory actions affect the rights and privileges of gay and lesbian parties and their lawyers. The court system must respond with firmness to those whose actions threaten the rights of parties before the court. The Committee agrees with the lawyers who noted that judges are most often seen as the singular and most effective source for this response. The judge rules the courtroom and must be seen as doing so with due regard for protecting the rights of gay and lesbian litigants and lawyers. Some judges were perceived as acting particularly hostile toward lesbian lawyers.

Court personnel were noted as being particularly insensitive in their comportment toward litigants. There appears to be a systematic bias against male gay and transvestite litigants that starts when they are jailed to await trial, are arraigned and have bail set.

When asked what could be done, many LAS lawyers mentioned the need for rules and procedures against bias and discrimination that are publicized and enforced. The enforcement must begin with the judge in the courtroom and extend to the administration of the court system. Regular and on-going sexual orientation sensitivity training for all court personnel—judicial and non-judicial—was recommended as one simple and effective remedy.

Being openly gay as a lawyer or judge which can serve to defeat discrimination by setting an example was mentioned as a solution. Others noted the difficulty of this strategy because of fear of discrimination. These fears are limitations imposed by society and cannot be tolerated in the court system. Education, affirmative recruitment and effective anti-discrimination programs are needed.

The survey responses contained a disturbing number of reported negative comments and actions toward gay and lesbian lawyers, judges, litigants, witnesses and jurors. Although the courts are likely to reflect the values of the larger society, the Committee feels that the level of bias is intolerable. When over 30% of the LAS lawyers reported negative comments, jokes, private ridicule, snickering and other derogatory comments, and when 20% reported case related bias, then some remedy is necessary. When over 15% of the lawyers reported negative actions toward litigants, witnesses and jurors and toward judges and fellow lawyers by lawyers and court personnel, then some remedy is necessary. When over 15% of the judges are reported to have made negative comments or taken negative actions toward gay and lesbian litigants, witnesses and jurors, it reflects an unacceptable level of discrimination toward gay men and lesbians in the court system.

The specific comments related by the LAS lawyers indicate that bias ranges from disrespectful references to comments which are potentially dangerous to the integrity of the court system. Calling someone a "faggot" or making a joke about another's personal life during court proceedings indicates highly inappropriate behavior on the part of the judge, lawyer or court personnel who made the comment. The survey indicated that lesbian lawyers and judges may be the target of anti-gay bias. The public disclosure and amateur psychiatry that a lawyer's or judge's demeanor is due to his or her sexual orientation has no place in a courtroom.

Perhaps the most disturbing comment reported was that cases dealing with lesbians and gay men are considered "less important" than other cases, are less likely to come to trial and, when they do, are taken less seriously.

The Committee recommends the following actions, some of which were suggested by the LAS lawyers.

1. Court personnel should not be permitted to treat gay men, lesbians or transvestites without equal respect in the court. Judges must set the tone and uphold the rules of the court. When any form of discrimination occurs, judges should respond with appropriate disciplinary action, *e.g.*, admonish the offender from the bench, refer the offender to a supervisor or professional disciplinary body. If discrimination is institutionalized by signs or procedures in the court, it should be removed or discontinued.

2. The persistent, if rare, linking of sexual orientation with "sickness," male sexual orientation with pedophilia, and personality traits with sexuality shows a lack of education by judges, lawyers and court personnel who make such comments. We strongly suggest sensitivity training for all court personnel. The Committee volunteers to help establish guidelines and curricula for these sessions. In this same vein, we call on gay and lesbian court personnel to come forward and correct these misperceptions when they hear of them.

3. We call for the adoption of clear guidelines and rules prohibiting biased comments and acts of discrimination based on actual or perceived sexual orientation. We encourage stronger enforcement of those rules that do exist. Where there is a suspicion of systematic sexual bias in any court, we strongly endorse the use of independent observers and, if found to be true, the prompt and firm punishment of those involved in the biased or discriminatory behavior.

4. The comments that gay and lesbian cases are not treated the same as other cases or that bail is unjustly applied, warrants further study. There may well be valid reasons for gay and lesbian complainants to be reluctant to

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pursue their cases, but there should not be an attempt to discourage an otherwise willing complainant to proceed based on his or her sexual orientation.

In conclusion, the Special Committee recognizes that sexual orientation bias exists in our society and is frequently manifested by comments and actions. Nevertheless, our state courts stand for justice and fairness. They play a vital role in protecting individuals from acts of discrimination and unfair treatment. Given this unique role, bias and discrimination cannot be tolerated in our courts. The Association and this Special Committee are committed to using the findings from this report to further their efforts at eliminating bias and discrimination confronting lesbians and gay men in the legal profession.

*February 1996*

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## Judicial Council of California

Administrative Office of the Courts

303 Second Street, South Tower • San Francisco, California 94107 • Phone 415/396-9100 FAX 415/396-9358

TO: POTENTIAL BIDDERS

FROM: Administrative Office of the Courts  
Meri Glade Massara, Attorney

DATE: May 10, 1996

SUBJECT: REQUEST FOR PROPOSALS: **Consultant**  
Analysis and Report of Sexual Orientation Fairness in the Courts  
Based on Statewide Roundtable Discussions; Preparation of  
Supplemental Written Survey of Court Employees and Others

You are invited to review and respond to the attached Request for Proposals for:  
Analysis and Report of Sexual Orientation Fairness in the Courts  
(RFP 96-\_\_-\_\_\_\_).

**Proposal Due Date:** Proposals must be received by 5:00 p.m. on **Monday, June 10, 1996**, at:

Judicial Council of California  
Administrative Office of the Courts  
303 Second Street, South Tower  
San Francisco, California 94107  
ATTN: Meri Glade Massara, Project Manager

**Commencement of Performance:** Performance will begin as soon as the contract is signed and approved by the Judicial Council, but no later than June 28, 1996. Contract development and approval may take as long as four weeks.

For further information regarding the RFP, please contact Meri Glade Massara, Project Manager at (415) 396-9131 or Arline Tyler, Staff Counsel to the Judicial Council Standing Advisory Committee on Access & Fairness at (415) 396-9128.

Attachments



## 1.0 General Information

### 1.1 Background

The Judicial Council, chaired by the Chief Justice of the California Supreme Court, is the chief policymaking agency of the California judicial system. The California Constitution directs the council to improve the administration of justice by surveying judicial business, recommending improvements to the courts, and making recommendations annually to the Governor and the Legislature. The council also must adopt rules for court administration, practice, and procedure, not inconsistent with statute, and perform other functions prescribed by law. The Administrative Office of the Courts is the staff agency for the council and assists both the council and its Chair in performing their duties.

### 1.2 Project Objectives

The Judicial Council Access and Fairness Standing Advisory Committee, appointed by Chief Justice Malcolm M. Lucas in March 1994, was created to improve and broaden access, fairness, and diversity in the judicial system. The advisory committee's charge is consistent with the council's Long-Range Strategic Plan, in which access and fairness are targeted as primary goals.

The Advisory Committee's Subcommittee on Sexual Orientation Fairness is currently studying ways in which actual or perceived bias based upon sexual orientation affects the quality of justice in the California court system. The subcommittee seeks to identify a broad range of issues through a variety of research methods, including inquiring through several statewide focus groups, about actual or perceived bias in the courts based on sexual orientation. An analysis of the focus group participants' perceptions, opinions, and experiences are critical to helping the subcommittee develop a strategy to respond to sexual orientation bias, actual or perceived, in the courts.

Data will also be collected on a statewide basis through the use of written questionnaires and surveys, telephone, and in-person interviews.

During the assessment process, the focus group discussion transcripts will be summarized and the dominant issues will be highlighted. Eventually, recommendations will be developed. The recommendations will include suggested procedures for monitoring implementation and evaluation of programs.

The project is expected to take approximately one year and to be performed by the consultant between June 28, 1996 to May 5, 1997.

### 1.3. Project Organization

The project is organized and conducted by the Judicial Council Access and Fairness Committee's Subcommittee on Sexual Orientation Fairness. The committee members represent a broad range of interests and expertise in the fields of law, human rights advocacy, education, and service as judicial officers. The members of the committee, each of whom has valuable expertise to share, represent a comprehensive cross-section of legal professionals.

The Project Manager will monitor the ongoing progress of the project. The selected consultant will be required to submit to the Project Manager regularly scheduled written reports of activities and tasks accomplished. These reports will also be reviewed by the subcommittee and the subcommittee may require regularly scheduled meetings with the consultant. The timeline for submitting the final and interim reports is more fully described under paragraph 3.0 *Proposed Consultant Services*.

### 2.0 Purpose of this RFP

The Judicial Council seeks the services of a consultant with expertise in standardized research methods and familiarity with issues relating to sexual orientation fairness and bias or perceived bias based upon sexual orientation in the state court system. The consultant is expected to conduct a statewide assessment and make recommendations for the development of educational programs and programs to improve access.

The consultant will also assist the Access and Fairness Committee and Project Manager in the development of assessment tools and in the preparation of a final project report with recommendations.

### 3.0 Proposed Consultant Services

- 3.1. Consultant will review and provide a stand alone, comprehensively written, quantitative analysis of the focus group testimony (which may exceed five different focus group discussions), and include a summary and analysis of the transcripts in the final report of the subcommittee.
- 3.2. Using the summary and analysis of the transcripts, the consultant will assist the subcommittee in developing a written questionnaire to broaden the subcommittee's inquiry to court personnel and other users of the court system.

- 3.3. Consultant will perform a nationwide literature search on studies addressing the topic of sexual orientation fairness in the courts, corrections institutes, juvenile detention facilities and other law related areas.
- 3.4. Based on the focus group and written inquiries, and independent research, the consultant will develop a set of recommendations for the improvement of access to the courts to avoid bias or the appearance of bias based on perceptions of sexual orientations of those who come in contact with the justice system and include these recommendations in a final project report.
- 3.5. The project timeline will be as follows. The consultant shall begin work on June 28, 1996, and complete the work, including producing a final report, no later than May 5, 1997. The consultant will produce a draft summary and analysis of the transcripts of the attorney focus groups no later than September 13, 1996. The consultant shall identify dominant issues and assist the subcommittee in developing and circulating a written questionnaire to court personnel and other users of the court system no later than February 13, 1997. The consultant shall analyze the responses to the questionnaires and conduct independent research, producing a draft report to the subcommittee no later than April 5, 1997 and a final report no later than May 5, 1997.

#### 4.0 Specifics of Response

##### 4.1. Bidder Information:

- 4.1.1. Name, address, telephone number(s), and social security number or tax identification number.
- 4.1.2. Provide five copies of the proposal signed by an authorized representative of the company, including name, title, address, and telephone number of a person who is the responder's representative.
- 4.1.3. Provide resumes describing the background and experience of key staff, as well as each individual's ability and experience in conducting the proposed assessment activities.
- 4.1.4. Describe key staff's knowledge of gay, lesbian and bi-sexual issues and sexual orientation bias or the appearance of bias in the California court system.

- 4.1.5. List names, addresses, and telephone numbers of clients for whom the consultant has conducted assessments or surveys.
- 4.1.6. Describe experience in the development of survey instruments, the conducting of surveys and participation in other activities related to examination of gay, lesbian and bisexual issues and sexual orientation bias or the appearance of bias in the California or other court systems.
- 4.2. Research Method:
  - 4.2.1. Describe proposed research/analysis program design utilizing the basic format outlined in this RFP: Include specific information as to the questions to be asked and types of demographic, process and outcome data to be collected in order to address the project objectives.
  - 4.2.2. Describe data collection instruments that would be developed.
  - 4.2.3. Describe the methodology you would use to collect and analyze the data.
  - 4.2.4. Include specific information as to sample selection, research design and data analytical plans.
  - 4.2.5. Describe how you will supervise the collection of data.
  - 4.2.6. Describe how you will obtain Committee and Project Manager review and approval of all research design elements developed for the project data collection.
  - 4.2.7. Describe how you will work with the Committee and Project Manager and local courts to ensure that data is gathered in an accurate and uniform manner.

## 5.0 Cost Proposal

Submit a detailed line item budget showing total cost of the services. Fully explain and justify all budget line items in a narrative entitled "Budget Justification." Indicate any services that bidder can provide at below or reduced cost (i.e., through utilization of student interns) in order to maximize the value of the awarded contract.



## 9.0 Evaluation of Proposal

The proposal shall be evaluated by the AOC using the following criteria:

- A. Quality of work plan submitted
- B. Experience on similar assignments
- C. Credentials of staff to be assigned to the project
- D. Ability to meet timing requirements to complete the project
- E. Reasonableness of cost projections



**1995**  
***District and Municipal Court***  
***Spring Conference***



***Gay and Lesbian Issues***  
***in the Legal Profession***

***Red Lion Inn***  
***Pasco, Washington***  
***May 21-25, 1995***

# *Gay and Lesbian Issues in the Legal Profession*

## *Faculty*

The Honorable Vicki Sietz - Moderator  
Ms. Jan Dyer  
Mr. Michael Hogan  
Ms. Jean Rietschel

## *Program Description*

This program will consist of a viewing of Abby Ginzberg's film entitled "Inside Out," a panel discussion and group discussion focusing on issues of discrimination against gay and lesbian litigators and litigants.

### **As a result of this program, participants will be able to:**

1. Increase awareness of the issue of discrimination against gay and lesbian litigants and litigators.
2. Create an atmosphere where lesbians and gays are not fearful of disclosing their sexual orientation, due to its potential damage to their roles as litigants, litigators, court personnel, including the bench itself.

TIME SCHEDULE

Time

8:30 to 8:45	Greetings and opening comments.
8:45 to 9:20	Abby Ginzberg film entitled "Inside Out."
9:20 to 10:20	Panel discussion featuring Lawrence R. Besk, Jean Rietschel and Laurie Jenkins.
10:20 to 10:30	Break
10:30 to 11:20	Group Discussion
11:20 to 11:30	Evaluation

**KING COUNTY BAR  
ASSOCIATION**

**GAY AND LESBIAN ISSUES IN THE LEGAL PROFESSION  
FALL JUDICIAL CONFERENCE 1994**

The King County Bar Association Task Force on Lesbian and Gay Issues in the Legal Profession held its first monthly meeting in November, 1993. The task force consists of approximately 25 lawyers and judges from small and large private practices, government agencies, academia, courts, agencies and corporations. The focus is on eliminating discrimination against Gays and Lesbians in courtrooms, law offices, and other law-related professional settings.

As task force chair Scott Smith said: "The legal profession needs to set an example of eliminating bigotry and treating each person with dignity and respect. Unfortunately, there is still too much discrimination against both clients and attorneys in the legal setting."

It is one goal of this task force to recommend policies to law schools, law firms, and other employers on recruiting, health and related benefits, career advancement, and social functions. The recommendations will be based in part on a collection of anecdotal evidence of discrimination, differential treatment or behavior. That submitted with these materials are just a few of the examples that have been presented to the task force, that clearly demonstrate this discrimination and differential treatment. If you know of any other examples that you would like to share with the task force, we ask that you contact Lisa Schuchman, our communications committee chair. Ms. Schuchman can be contacted at 520 E. Denny, Seattle, WA 98122, 325-1424 (fax) or 325-2801 (telephone). The stories can relate to your own, a client's or friend's experiences, things you have seen or heard, or practices of which you are aware. All stories will be collected and made part of a report of the task force.

**OFFICERS**  
Mary H. Wechsler  
*President*  
J. Richard Manning  
*First Vice-President*  
Scott A. Smith  
*Second Vice-President*  
Daniel S. Gottlieb  
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Ronald L. Roseman '95  
Zanetta L. Fontes '96  
Eric V. Jeppesen '96  
Thomas E. Kelly, Jr. '96  
Palmer Robinson '96  
Diana Carey '97  
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Frederick L. Noland '97

**ABA DELEGATE**  
Lucy P. Isaki

**CHAIRPERSON  
YOUNG LAWYERS  
DIVISION**  
Susan M. Edison

**EXECUTIVE DIRECTOR**  
Alice C. Paine

**TASK FORCE ON LESBIAN AND GAY ISSUES IN THE LEGAL PROFESSION**

**Chair:**  
Scott A. Smith

**Task Force Members:**

Jill J. Beaver  
Lawrence R. Beek  
Hon. Bobbe Bridge  
Elizabeth Calvin  
Stew Cogan  
Eileen Concannon

Jan Dyer  
Hon. C. Kenneth Grosse  
Michael Hogan  
David M. Horn  
Alma Kimura  
Jonathan A. Kroman

Annamarie Levins  
Ann Levinson  
Phyllis A. Miller  
Dan Nye  
David W. Pavlick  
Jean Rietschel

Lisa E. Schuchman  
Hon. Vicki Seltz  
Mark B. Shepherd  
Robert Weiden

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Seattle, WA 98164-1060  
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FAX: 206.382.1270

In addition to the anecdotal information that has been presented to the task force, two separate surveys have been conducted dealing with issues surrounding gays and lesbians in the legal profession. In May of this year the task force itself surveyed numerous law firms in King County regarding their policies in relation to their gay and lesbian employees. At present, 50 law firms, small, medium and large have responded to the survey.

For the firms surveyed, only 14 reported having policies designed to address gay men and lesbians in the office. Twelve firms reported having one or more openly gay or lesbian attorneys on staff, and the same number reported that they had openly gay or lesbian non-attorney employees on staff.

Only 9 firms reported that attorneys or staff had received diversity training, and these firms were roughly equally split on whether they had obtained this training from in-house staff or outside trainers. Eighteen of the firms indicated they would be interested in receiving additional or first-time diversity training, particularly in regard to sexual orientation issues, 4 said "maybe" and 3 were "not sure," but 20 said "no, not interested." As to the issues to be addressed at the training, the issues of bias, discrimination and stereotypes attracted by far the largest response, followed by issues of recruitment, hiring policies and practices; and promotion and retention policies and practices.

In addition to the survey conducted by the task force, another survey has been conducted by LEGALS, P.S., a lesbian and gay legal association that is independent of the task force. Though their survey has not been completed, some of the comments made in the responses exemplify the problems that need to be addressed by the task force:

**QUESTION:** Were you open about being gay or lesbian when you were applying for jobs?

"[I wasn't out because] I wanted a job and didn't want to be discriminated against at that point."

"I didn't want it to potentially work against being considered."

"Yes, and I didn't get hired, which is why I am in solo practice."

**QUESTION:** How does either being "out" or "closeted" affect your professional life or emotional health?

"I worked in a large firm that was homophobic and sexist. I couldn't tolerate it. [I don't work there anymore.]"

"I assume certain avenues are closed to me because I am "out" and unwilling to be otherwise."

"Being out does make me concerned that people in powerful positions may care and treat me adversely."

QUESTION: What experiences of homophobia have you had as a lawyer?

"I have had opposing counsel refer to me as "that dyke lawyer" on three or four occasions..."

"A friend who wants to be a judge is very closeted because she believes being out would ruin her prospects of becoming a judge."

"I had opposing counsel make unflattering remarks in court about my sexual orientation. He was assuming that I was a lesbian."

"I feel I am talked about in my office behind my back."

"I witnessed a judge change a ruling because my client was gay."

"I know people who have not been promoted to partner because of being gay."

"I frequently see cases where lawyers freely allege a parent to be unfit because they are gay."

"When I went to work in juvenile law, some questioned whether a gay male lawyer should be working with juvenile males."

The above excerpts are just a few of the comments and concerns that have been presented to the task force.

One of the goals of the task force is also to sensitize the bench to some of these issues and concerns of the gay and lesbian litigators, and litigants. That is the purpose of this seminar. In addition to the movie "Inside Out" by Abby Ginzberg, there will be a panel discussion with three lawyers that are "out" in their legal communities, to be followed by a group discussion. In addition, submitted with these materials are selected articles that also deal with the gay and lesbian lawyer, and the problems that they encounter. For additional reading, we would suggest Tulane University's Law and Sexuality. A Review of Lesbian and Gay Legal Issues, Volume 1, Summer 1991, and the article entitled "Myths About Sexual Orientation. A Lawyers Guide to Social Science Resources."

## ADDENDUM 1: GOALS

1. *The King County Bar Association Should Create A Task Force With The Goals Identified Below.*

**Rationale:** A task force is a more significant commitment by the Association toward the goals of the task force. A task force can focus community interest and energy to a greater degree than a committee can.

2. *The Mission Of The Task Force Will Be To Work Toward The Elimination Of Discrimination In The Legal Profession On The Basis Of Sexual Preference.*

To accomplish this mission, the task force will have the following specific goals and objectives:

- a. Prepare a report that describes the problems and suggests solutions. We view this as one of the major goals of the task force.
  - i. Use a combination of scientific and unscientific means to document the problems found:
    - (1) In employment contexts,
    - (2) In court, and
    - (3) In other professional settings.
  - ii. Assemble information about the ways other legal communities have addressed these issues. For example, the Bar Association of San Francisco has gone through a similar process. The information and reports it generated will be useful to the task force.
- b. Increase awareness and sensitivity. The task force will undertake some specific efforts along these lines, and will create models for others to use.
  - i. Publicize the ongoing work of the task force.
  - ii. Work with the CLE and Programs Committee, the Bar Bulletin, and other media to publicize and promote the work of the task force.
  - iii. Identify and/or develop training programs to increase awareness and sensitivity in the workplace and in the courts.

- c. Develop programs and policies to reduce discrimination.
  - i. Assemble and/or develop model employment policies and programs:
    - (1) Non-discrimination, anti-discrimination, and equal employment policies, including:
      - (a) Recruiting and hiring policy,
      - (b) Health benefits policy,
      - (c) Social function policy, and
      - (d) Work assignment, performance review, and career advancement policies.
    - (2) Commitment by management to equality and diversity.
  - ii. Consider ways to work with the law schools toward the task force's goals.
  - iii. Serve as a model for other bar associations (e.g., county, WSBA) that may be interesting in carrying out these goals in other geographic areas.
- d. Establish a means for continued coordination and cooperation among interested organizations after the task force disbands.
- e. Recommend a structural or organizational means of continuing with the task force's work after it disbands.

FOR IMMEDIATE RELEASE

April 2, 1993

Contact: David Akana  
Commission on Judicial Conduct  
P.O. Box 1817  
Olympia, WA 98507  
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COMMISSION ON JUDICIAL CONDUCT ADMONISHES JUDGE WILLIAM J. O'ROARTY

The Commission on Judicial Conduct admonished Judge William J. O'Roarty of the King County District Court, Northeast Division. From an agreed statement of facts, the Commission determined that Judge O'Roarty questioned a defendant inappropriately in court.

The Stipulation and Order of Admonishment was entered at the Commission's public business session on Friday, April 2, 1993.

An admonishment is a written action of the Commission of an advisory nature that cautions a judge not to engage in certain proscribed behavior.

\* \* \*

BEFORE THE COMMISSION ON JUDICIAL CONDUCT  
OF THE STATE OF WASHINGTON

FILED  
APR 2 1995

COMMISSION ON  
JUDICIAL CONDUCT

In Re the Matter of )  
 )  
Honorable William J. O'Roarty )  
King County District Court )  
Northeast Division )  
P.O. Box 425 )  
Redmond, WA 98073-0425 )  
\_\_\_\_\_ )

No. 92-1244-F- 38

STIPULATION AND ORDER  
OF ADMONISHMENT

The Commission on Judicial Conduct ("Commission") and the Honorable William J. O'Roarty ("Respondent"), Judge of the King County District Court, do hereby stipulate and agree as provided for herein.

The Commission is represented in these proceedings by David Akana, Commission counsel, and the Honorable William J. O'Roarty represented himself.

STIPULATION

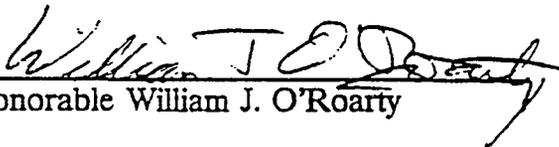
1. The Honorable William J. O'Roarty, Respondent herein, is now and was at all times discussed herein a Judge of the King County District Court, Northeast Division.
2. On or about February 7, 1992, Respondent conducted an arraignment hearing concerning a charge of no valid operator's license in State v. Chester E. Van Antwerp, Cause No. 139030. During the proceeding, Respondent directed sensitive questions and comments to the defendant related to AIDS. At the time, the courtroom was crowded with spectators and others awaiting their turn to address the court.
3. Respondent's comments and questions appeared to others to be demeaning and to violate the defendant's basic expectation of privacy.

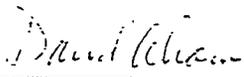
4. The Commission and Respondent stipulate that while serving in his capacity as judge of the King County District Court, Judge O'Roarty did act contrary to Canons 1, 2(A), and 3(A)(3) of the Code of Judicial Conduct.

AGREEMENT

Respondent does hereby agree to accept an admonishment as described in RCW 2.64.055 and 2.64.010(1). Respondent accepts the Commission's determination that his described conduct constitutes a violation of the Code of Judicial Conduct and agrees not to engage in such conduct in the future.

DATED this 22<sup>d</sup> day of March, 1993.

  
Honorable William J. O'Roarty

  
David Akana, WSBA # 5523  
Counsel for Commission on Judicial  
Conduct

# Educating Judges About Lesbian and Gay Parenting: A Simulation

Nancy D. Polikoff\*

*In this article, Professor Polikoff describes her participation in a District of Columbia judicial education program on lesbian and gay parenting. She contrasts the program in which she was involved with other judicial education programs to show that simulation is a superior method for educating judges about complex topics such as lesbian and gay parenting. Professor Polikoff argues that simulation, by harmonizing the form of the program with its content, offers audience participants a richer learning experience than can be obtained through lecture, discussion, or analysis of hypothetical situations. She further argues that such simulations are especially useful in directing the judge's (the court's) attention away from the lesbian or gay parent's sexual orientation in custody cases and toward the proper question before the court—the best interest of the child. Pro-*

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\* Associate Professor, American University Washington College of Law. This article was made possible by a summer research grant provided by American University Washington College of Law.

I would like to thank Janet Albert for research assistance and Lauren Taylor for editorial assistance. I would like to express my appreciation to Lee Haller, M.D., of Rockville, Maryland, who generously gave of his time and expertise to help develop and write the mock psychiatric report used in the program discussed in this article and who testified at the mock hearing as the expert witness. I would also like to acknowledge the work of all subcommittee members and advisors to the subcommittee: District of Columbia Superior Court Judges Curtis E. von Kann, Sylvia Bacon, Nan Huhn, and Kaye Christian and attorneys John W. Karr and Jane Dolkart; as well as the work of the other participants and commentators for the mock hearing: District of Columbia Superior Court Judges Ricardo Urbina and Henry Kennedy; attorneys Deborah Luxenberg and Armin Kuder; psychiatrists Jean Hamilton, M.D., and Lawrence Brain, M.D.; and parents Wayne Schwandt and Elizabeth Lytle.

This article is dedicated to Judith Fetterley, Professor of English, State University of New York at Albany. It was in Judy's classroom, in the fall of 1971 at the University of Pennsylvania, that I became a feminist, through her course's examination of women in American literature. The impact of her course on most of us who took it prompted us to continue meeting as a consciousness-raising group. In that group, which opened to accept new members, I met the first openly identified lesbian I had ever known, a lesbian mother who had lost custody of her children. Judy's course, and the consciousness-raising group that followed, planted within me the seeds of awareness that shaped my adult life, personally, professionally, and politically, more than any other single factor.

Judy wrote a book based on the ideas that emerged from her course. JUDITH FETTERLEY, *THE RESISTING READER: A FEMINIST APPROACH TO AMERICAN FICTION* (1978). It was one of the first books of feminist literary criticism, and she dedicated it to several of us in her class. I always planned to dedicate my first book to her, in recognition and appreciation of the profound impact she had upon my life. Lest she have to wait another 20 years for that first book to emerge, I dedicate this article to her. I hope this article is a particularly fitting tribute to her, as its dominant message concerning the relationship between structure and content is also one I first learned from her, 20 years ago, in a college classroom.

Thanks, Judy.

*essor Polikoff provides the materials developed for the District of Columbia program—fact summary, psychiatric report and recommendation, and transcript of the simulation itself—in an appendix so that others may use them to develop similar judicial education programs throughout the country.*

## I. INTRODUCTION

Lawyers who represent lesbian and gay parents in custody and visitation disputes have long made judicial education a part of their work.<sup>1</sup> From the first articles written to assist lawyers handling such cases,<sup>2</sup> it has been understood that judges laboring under ignorance, prejudice, homophobia, and heterosexism would need to be educated, both to dispel widely held myths and to recognize and overcome prejudice.<sup>3</sup>

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1. The first litigation manual written to assist lawyers representing lesbian mothers in custody disputes states:

Most people, including judges, probation officers and social workers, make a number of assumptions about the nature of lesbian relationships and the impact on children being raised in a lesbian home. . . . The attorney, absent evidence to the contrary, must assume the judge will share many of these stereotypes and rule on that basis unless convinced otherwise.

The evidence presented at trial should take two forms—personal and educational. . . . Educational evidence includes testimony and exhibits that are specifically designed to rebut stereotypes about lesbian mothers.

DONNA J. HITCHENS, *LESBIAN MOTHER LITIGATION MANUAL*, 63-64 (1982). This litigation manual was a long time in the making. Its acknowledgements section begins as follows:

The concept of a *Lesbian Mother Litigation Manual* was first conceived by Barbara Price back in the mid-1970s. Due to incredible time pressure, lack of funding and the fast pace at which the law was changing, the people interested in producing such a manual were never able to complete it. Thanks to a grant from the Rosenberg Foundation, the Lesbian Rights Project was able to make the manual a priority.

*Id.* (no page number). Before the manual was published, lawyers planning strategies for representation of lesbian mothers, including judicial education strategies, relied upon a handful of published articles, *see infra* note 2, workshops on lesbian mother child custody presented at the annual National Conference on Women and the Law beginning in 1973, and bibliographical material and advice and counseling provided by the Lesbian Rights Project beginning in 1977.

2. *See, e.g.*, Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 *BUFFALO L. REV.* 691, 727-31 (1976); Donna Hitchens & Barbara Price, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 *GOLDEN GATE U.L. REV.* 451, 463-71 (1978-79).

3. Myth is defined as "a notion based more on tradition or convenience than on fact." Prejudice, on the other hand, is "the act or state of holding unreasonable preconceived judgments or convictions" or "irrational suspicion or hatred of a particular group." *American Heritage Illustrated Encyclopedic Dictionary* 1124, 1335 (1987). Myth may be more easily subject to correction by means of a mental health professional testifying that, for example, homosexuality is not a mental disorder and a parent's homosexuality does not result in the children being homosexual. Prejudice is less amenable to correction. In commenting upon prejudice as a driving force in lesbian or gay parent child custody determinations, one scholar noted:

The 1980s' cases from the courts of the southern and central United States generally approach gay parent cases from a position of overt homophobia. The rules have, time and again, been bent to enforce the morals and fears of the bench as they relate to parents and children. On one hand, if the trial court has found against the gay parent, then the appellate court decides it cannot interfere because of the strong policy of setting aside the judgment of the court theoretically best able to judge the participants. On the other hand, if the trial court has allowed a gay person to keep or visit his or her child, then the appellate court finds a clear abuse of discretion. Uncontroverted evidence of no harm is ignored. Experts are relied upon,

For the most part, this education has occurred in the context of individual cases. Lawyers representing lesbian and gay parents often call witnesses to educate judges; these witnesses primarily are mental health professionals who testify that homosexuality is not a mental illness, that the children will not be harmed by living with a lesbian or gay parent, that the children will not become lesbian or gay as a result of living with a lesbian or gay parent, that lesbian and gay people do not have a propensity to molest children, and so on. Lawyers also have filed trial briefs referring to the vast body of literature about lesbian and gay parents and their children, thereby hoping to provide a context for understanding a particular family.<sup>4</sup>

This form of judicial education is inefficient and expensive. It places the burden on individual litigants whose cases go to trial to muster the resources to compensate for a huge social problem. The effort, even when successful, educates only one judge. It must be constantly repeated.

The solution is judicial education programs that reach a large number of judges outside the context of individual cases. Although it has been more than fifteen years since the first articles appeared in the legal literature on lesbian and gay child custody and visitation disputes, and although the need for judicial education has always been stressed, I know of only two judicial education programs that have addressed this subject.<sup>5</sup> In con-

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not based on their level of their knowledge, but based on how closely their prejudices conform to those held by the court.

Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties—Part II*, 11 U. DAYTON L. REV. 275, 354 (1986). Professor Rivera contributed more than any other individual to publicizing the numerous custody and visitation disputes involving lesbian and gay parents through the mid-1980s. Cases from the 1970s, including numerous trial court decisions, are discussed in Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 883-904 (1979).

4. For example, in a dispute between a nonbiological lesbian mother and the parents of the biological lesbian mother, which took place after the death of the biological mother, the attorney for the lesbian mother filed a trial brief citing, among other things, cases from other jurisdictions and the American Psychiatric Association's position on homosexuality. Janine Ratcliffe's Memorandum of Law Addressing Issues to be Raised at Trial (brief filed Feb. 17, 1989), *In re Pearlman*, No. 87-24,926 (Fla. Cir. Ct., Broward Cty., Mar. 31, 1989), *reprinted in part*, 15 Fam. L. Rep. (BNA) 1355 (May 30, 1989) (in which the court awarded custody to the nonbiological lesbian mother). In a case requesting the adoption of a two-year-old girl by a gay man living with his lover of 17 years, an *amicus curiae* brief to the trial court judge reviewed the psychological literature supporting the position that gay men are not unhealthy, that gay men are not prone to molest children, that the father's sexual orientation would not affect the child's sexual orientation, and that the children of lesbian and gay parents are not unduly subject to stigma or harassment. Lambda Legal Defense and Education Fund, Inc., *amicus curiae* brief, *In the Matter of the Adoption of Hope*, No. A10815-88 (N.Y. Family Ct., New York Cty.) (in which the adoption was granted).

5. One of those programs is described at length in this article. The other was offered by the National Council of Juvenile and Family Court Judges in March 1988. That program was designed by a membership organization, Gay and Lesbian Parents Coalition International, and it consisted of a gay adoptive father who is active in that organization and a Missouri trial judge who responded to the father's comments. The program did not include either a lawyer who could balance the judge's analysis of court decisions (Missouri has the largest number of restrictive decisions in the country on custody and visitation for lesbian and gay parents. *See, e.g., T.C.H. v. K.M.H.*, 693 S.W.2d 802 (Mo. 1985); *S.L.H. v. D.B.H.*, 745 S.W.2d 848 (Mo. Ct. App. 1988); *G.A. v. D.A.*, 745 S.W.2d 726 (Mo. Ct. App. 1987); *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. Ct. App. 1987); *J.L.P.(H.) v. D.J.P.*, 643

trast, education about gender and race bias, and about the substantive legal areas in which such bias is likely to flourish, is widespread.<sup>6</sup>

More progress may have been made against sex and race bias, because the goal of eradicating such discrimination has greater legitimacy. Numerous federal and state antidiscrimination statutes and the heightened constitutional scrutiny to which classifications based on race and sex are subject may contribute to this legitimacy.

If this is true, then the American Bar Association's 1990 adoption of a *Model Code of Judicial Conduct* that bars bias or prejudice on the basis of sexual orientation should help legitimize addressing lesbianism and homosexuality in judicial education programs.<sup>7</sup> Specifically, the newly adopted *Model Code* reads:

S.W.2d 865 (Mo. Ct. App. 1982).), or a mental health professional who could address the common concerns about the well-being of children in lesbian and gay families. These circumstances limited the program's value. In addition, the program was limited by its speaker/discussion format. For a discussion of simulation as the preferred structure for a judicial education program, see *infra* Part II.

6. For example, the National Judicial Education Program to Promote Equality for Women and Men in the Courts

has a basic course on how sex[-]stereotyped thinking about women and men affects decision making, fact finding, courtroom interaction, communication and sentencing. The project adapts this course to specific states and to highlight specific topics. Components of the course which may be given together or singly are the overall courtroom environment and substantive law areas including divorce, rape, domestic violence and custody.

FOUNDATION FOR WOMEN JUDGES, *JUDICIAL EDUCATION: A GUIDE TO STATE AND NATIONAL PROGRAMS* 191 (1986). In 1985 alone, the National Judicial Education Program taught at the American Academy of Judicial Education, the National Judicial College, the Colorado Judicial Conference, the Illinois Judges Association, and the Missouri Bar and Judicial Conference. *Id.* at 190-91. The National Judicial College offers a course entitled *Equal Justice in the Courts* that addresses gender and race bias. *Id.* at 187. For a comprehensive guide to the integration of gender fairness issues into the judicial education curriculum, see LYNN HECHT SCHAFFRAN, *PROMOTING GENDER FAIRNESS THROUGH JUDICIAL EDUCATION: A GUIDE TO THE ISSUES AND RESOURCES* (1989).

As of 1990, nine state court systems had published reports on gender bias, and studies were underway in 17 additional states and the District of Columbia. Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 *GEO. J. LEGAL ETHICS* 1, 1 (1990). The December 1989 Final Reports of the Michigan Supreme Court Task Forces on Racial/Ethnic Issues in the Courts and on Gender Issues in the Courts jointly recommended as follows:

Education is an essential tool in efforts to eliminate race/ethnic and gender bias from the Michigan court system. Bias exists not only in the court system, but in the society which it mirrors. An educational approach is, therefore, appropriate because it focuses on understanding, not on blame. . . .

Several states and jurisdictions have successfully initiated educational programs to generate understanding of race/ethnic and gender bias in the courts. These programs have involved various formats [including] overview programs which discuss racial/ethnic and gender bias in a broad area such as 1) racial stereotypes and racial/ethnic biased attitudes in judicial decision making and in statutes; 2) dynamics of court interaction; 3) substantive law programs, domestic relations, criminal justice . . . . Additional attention should be given to the integration of race/ethnic and gender bias issues throughout all educational curricula . . . .

MICHIGAN SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE COURTS, FINAL REPORT 74, 76 (1989).

7. In addition, four states (Wisconsin, Massachusetts, Hawaii, and Connecticut), the District of Columbia, and dozens of cities and localities have antidiscrimination statutes that provide protection against discrimination on the basis of sexual orientation. For a complete list of such statutes and local ordinances, contact Lambda Legal Defense and Educational Fund, Inc., 666 Broadway, New York, NY 10012. The likelihood that judges will be required to apply these laws should legitimize the necessity for judicial education.

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 socioeconomic status, and shall not permit staff, court officials and others subject to the judge's discretion and control to do so.<sup>8</sup>

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. This Section does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.<sup>9</sup>

The revisions to the *Model Code* as originally drafted in May 1989 prohibited bias only on the basis of race, sex, religion, and national origin.<sup>10</sup> After comments were submitted to the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility and to its Judicial Code Subcommittee, sexual orientation and several other factors were added. The ABA summarized comments received on the initial draft of the revisions and noted the concern that excluding certain factors from the list might lead some to conclude that bias on the basis of those factors was proper.<sup>11</sup> The summary of comments also stated:

There has [*sic*] been substantial problems in the treatment of parties both within the courtroom and the way judicial decisions are made—the lack of adherence to any of the evidence that's put forward in the case. Recognizing this fact begins the process of understanding the complexity and difficulty of dealing with the rendering of justice for *all* people; some of it starts with the legal professions and the judiciary.<sup>12</sup>

8. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(5) (1990) (adopted by the House of Delegates of the American Bar Association, Aug. 7, 1990).

9. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(6) (1990) (adopted by the House of Delegates of the American Bar Association, Aug. 7, 1990). In 1990, New Jersey also adopted amendments to its code of judicial conduct. The amended code reads as follows:

A judge should be impartial, and should not discriminate because of race, color, religion, age, sex, sexual orientation, national origin, marital status, socioeconomic status, or handicap.

N.J. CODE OF JUDICIAL CONDUCT, Canon 3.A.(4) (1990).

10. MODEL CODE OF JUDICIAL CONDUCT Rule 3(B)(5) (Discussion Draft 1989).

11. MODEL CODE OF JUDICIAL CONDUCT Rule 3(B)(5) (Compendium of Comments, 1989, at 41).

12. *Id.* There has never been a systematic study of judicial bias based upon sexual orientation. One interesting analysis of judicial bias in reported appellate decisions is Lawrence Goldyn, *Gratuitous Language in Appellate Cases Involving Gay People: "Queer Baiting" from the Bench*, 3 POL. BEHAV. 31 (1981). This analysis concludes:

In a substantial number of . . . cases, courts use gratuitous language which is only remotely if at all necessary for the disposal of the case at bar. In the context of legal discourse, this language is derogatory, showing contempt for homosexuals and homosexuality. . . . [I]n the

The *Model Code* is the first official mandate to judges to refrain from bias based on sexual orientation.<sup>13</sup> The requirement covers "judicial duties," and, although conduct in the courtroom is stressed in the commentary,<sup>14</sup> "judicial duties include all the duties of the judge's office prescribed by law,"<sup>15</sup> of which substantive decision-making is one. Thus the new *Model Code* supports the legitimacy, indeed the necessity, of educating judges to avoid bias and prejudice based on sexual orientation.<sup>16</sup>

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context of the normal language found in legal opinions, [the language of the courts] is quite immoderate.

*Id.* at 32-33 (footnotes omitted).

Since the adoption of the *Model Code*, one example of a possible violation that has come to public attention consists of two statements made by United States District Court Judge Oliver Gasch in a case involving the dismissal from the U.S. Naval Academy of a man who stated he was gay. In hearing the matter, the judge twice used the term "homo". The judge stated, concerning access to Pentagon studies, that "[t]he most I would allow is what is related to this plaintiff, not every homo that may be walking the face of the earth at this time." The judge further asked, as part of a dialogue with the plaintiff's lawyer, whether the basis of the challenge to the plaintiff's dismissal from the Naval Academy was "[t]hat he's a homo and knows other homos. Is that it?" Michael York, *Judge Uses Epithet for Gay Man; Plaintiff Called 'Homo' in Hearing*, Wash. Post, Mar. 9, 1991, at B1, col. 1.

13. Bias based upon sexual orientation was the focus of a disciplinary proceeding before the *Model Code* was enacted. The Texas State Commission on Judicial Conduct issued an order of public censure against state District Judge Jack Hampton for remarks made after his sentencing of a criminal defendant for the murder of two gay men. Among other things, the judge had stated to a reporter following the sentencing that "the victims were homosexuals. They were out in the homosexual area picking up teenage boys. Had they not been out there trying to spread AIDS [Acquired Immune Deficiency Syndrome] around, they'd still be alive today. I hope that's clear." He also stated that "some murder victims are less innocent in their deaths than others." Order of Public Censure of Morris Jackson Hampton, Judge, 238th District Court, Dallas, Texas, Nov. 27, 1989. A special master appointed by the Supreme Court of Texas had previously concluded that the judge had not violated that portion of the *Code of Judicial Conduct* requiring a judge to "conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The State Commission on Judicial Conduct disagreed, noting that the judge's comments, "*per se*, were destructive of public confidence in the integrity and impartiality of the judiciary." Deeming the judge's statements "irresponsible," the Commission went on to state that "any activity by a judge which detracts from public confidence in the integrity and impartiality of the judiciary is not acceptable and must not be tolerated." *Id.*

14. "Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias." MODEL CODE OF JUDICIAL CONDUCT 11 (1990).

15. MODEL CODE OF JUDICIAL CONDUCT, Canon 3(A).

16. Addressing bias and prejudice in decision-making may be more controversial than addressing bias and prejudice in, for example, how lesbian or gay litigants and attorneys are spoken to. This is because judges may believe that decision-making is about the interpretation or application of the law, and may be reluctant to see how prejudice would affect their legal judgment. The following is a useful characterization: "Prejudice imports the formation of a fixed anticipatory judgment as contradistinguished from those opinions which may yield to substantial evidence." *In re Adoption of Richardson*, 251 Cal. App. 2d 222, 232-33, 59 Cal. Rptr. 323, 330 (1967). It is the "fixed anticipatory judgment" that lesbians and gay men are inappropriate custodians, based on myths, stereotypes, and faulty assumptions, that judicial education must address in order to ensure that judges can fulfill their obligation under *Model Code* Canon 3(B)(5).

Materials designed to address other biases in the court system have also had to address the potential reluctance of judges to explore bias in the decision-making process. A resource guide on the eradication of gender bias in the courts discusses judicial decision-making as follows:

Programs that explore the decision[-]making process can draw on the many substantive law areas discussed in this guide for examples of how gender bias can affect that process. These programs can make clear that everyone has personal beliefs and biases as a result of cultural

The new *Model Code* provides an opportunity to develop and replicate around the country judicial education programs designed to reduce prejudice against lesbian and gay parents in custody and visitation disputes. This article identifies the goals of a judicial education program on lesbian and gay parenting and argues that the most effective means of achieving the goals is through a program using simulation rather than speakers. The article illustrates this point by describing and analyzing a program I helped design, develop, and present at the Thirteenth Annual Judicial Conference of the District of Columbia held in June 1988. The materials developed for this program are provided in an appendix at the end of this article.<sup>17</sup>

## II. SIMULATION: HARMONIZING FORM AND CONTENT

The primary goal of a judicial education program in this area is to discourage judges from automatically disfavoring a lesbian or gay parent in a custody or visitation dispute. Put in terms of the legal standard for deciding custody cases, it is to discourage judges from viewing a parent's homosexuality as inherently inconsistent with the best interests of the child and to encourage judges to focus on a best-interests-of-the-child determination based upon all facts relevant to that child's life.<sup>18</sup> Second, judicial education programs inform judges of the mental health literature on

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conditioning and individual life experiences. The challenge is to be alert to biased thinking and not allow it to translate into biased decisions.

These programs can also address the need for an accurate information base in order to make informed decisions. A great deal of gender bias results from lack of information about the economic and social realities of women's and men's lives. For example, older homemakers are often awarded *de minimus* spousal support at divorce because judges do not understand the great difficulties these women face in obtaining paid employment. In some cases, rapists receive minimal sentences because the victim did not sustain the physical injuries typical of non-sexual assaults, and the judge is unaware of the profound psychological injury inflicted by rape, whether the rapist is an acquaintance or a stranger.

Some judges believe that being made aware of the factual context in which various kinds of cases arise will prejudice them. A course about decision[-]making can explain why this is not so, and why judges will make less biased decisions if they work from an accurate knowledge base, rather than basing their decisions on abstractions or personal assumptions.

L.H. SCHAFFRAN, *supra* note 6, at 47. Similarly, an accurate knowledge base is necessary to reduce bias on the basis of sexual orientation. This is especially true whenever childrearing by lesbians and gay men is at issue, as the assumptions, cultural conditioning, and lack of accurate information are especially pronounced in this area.

A recent provocative article on strategies to eradicate gender bias in the courts focuses primarily on reducing biased legal interpretation after noting that bias in courtroom conduct is relatively easy to resolve because "judges have an investment in appearing impartial which . . . they will work to protect." Czapanaskiy, *supra* note 6, at 6.

17. *Appendix: Judicial Education Program Materials* begins at 199.

18. Those relevant factors are often contained in state statutes. *See, e.g.*, MICH. COMP. LAWS § 25-312(3) (1990); MINN. STAT. ANN. § 518.17 (West 1990). In some states the custody statutes are silent and have left the development of relevant factors to the courts. *See, e.g.*, *Montgomery County Dep't of Social Services v. Sanders*, 38 Md. App. 406, 381 A.2d 1154 (1977). The *Uniform Marriage and Divorce Act*, the custody portion of which has been adopted in total or in a modified form in a number of states, requires judges to consider:

the effects of being raised by a lesbian or gay parent and thereby dispel judicial attitudes based on ignorance rather than prejudice.<sup>19</sup>

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parents or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.

UNIFORM MARRIAGE AND DIVORCE ACT, § 402, 9A U.L.A. 561 (1987).

That judicial bias based on group membership is improper in child placement determinations is supported by *Adoption of Richardson*, 251 Cal. App. 2d 222, 59 Cal. Rptr. 323 (1967). In that case, the appellate court held that the trial judge should have disqualified himself from hearing an adoption petition brought by a couple who were both deaf and mute. The judge had written a letter to the director of the adoption bureau stating, in part, "I believe . . . *this adoption should be nipped in the bud . . . as in my opinion, we are not doing right by the youngster in signing and approving an adoption to deaf-mutes.*" *Id.* at 229, 59 Cal. Rptr. at 327-28 (emphasis in original). The appellate court stated:

Here the judge had a fixed opinion of the unfitness of petitioners solely because they were deaf-mutes. He was under some influence which so swayed his mind in one direction as to prevent his deciding the case according to the evidence. This leaning or inclination against all deaf-mutes without regard to their character, abilities and demonstrated fine qualities is inconsistent with a state of mind fully open to conviction which the evidence might produce.

*Id.* at 232, 59 Cal. Rptr. at 330.

In a subsequent child custody case involving one parent with a physical disability, the California Supreme Court reversed an award to the nondisabled parent. The court noted that the judge did not have a "totally closed mind," but found that "his judgment was affected by serious misconceptions as to the importance of the involvement of parents in the purely physical aspects of their children's lives." *In re Marriage of Carney*, 24 Cal. 3d 725, 598 P.2d 36, 41, 157 Cal. Rptr. 383, 388 (1979). The court noted that, as in the *Richardson* case, uncontradicted expert testimony established a good relationship with the child and that the disability would have no adverse effect on the child's development. *Id.* Courts in some lesbian and gay parent custody opinions have disregarded uncontradicted expert testimony concerning the effects of being raised by a lesbian as a result of analogous misconceptions. *See, e.g., Constant A. v. Paul C.A.*, 344 Pa. Super 49, 64 n.8, 496 A.2d 1, 8 n.8 (1985). In *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987), the court noted that the mother had submitted psychological research, but stated that "[o]f course, the trial court has the authority to find the evidence presented not credible."

19. This article does not discuss at length the material available to dispel the common misconceptions that contribute to negative decisions about lesbian and gay parents. That material is discussed in Patricia J. Falk, *Lesbian Mothers: Psychosocial Assumptions in Family Law*, 44 AM. PSYCHOLOGIST 941 (1989); Donna J. Hitchens & Martha J. Kirkpatrick, *Lesbian Mothers/Gay Fathers*, in EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW 115 (Diane H. Schetky & Elissa P. Benedek eds. 1985); David J. Kleber, Robert J. Howell, & Alta Lura Tibbits-Kleber, *The Impact of Parental Homosexuality in Child Custody Cases: A Review of the Literature*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 81 (1986). An important recent study whose findings have not yet been included in summaries of the literature is Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, in HOMOSEXUALITY AND THE FAMILY 134 (Frederick W. Bozett ed. 1989) (originally published as 18 JOURNAL OF HOMOSEXUALITY Nos. 1/2 (1989)). This study of 36 adolescents ages 13 to 19 years, half living with lesbian mothers and half living with heterosexual mothers, found, among other things, no statistically significant differences in the self-esteem scores of the two groups, no evidence that the children of lesbian mothers were socially stigmatized, and only one self-identified homosexual of the 36 teenagers studied. That teenager was from the heterosexual mothers' sample. The American Psychological Association, 1200 17th Street N.W., Washington, DC 20036, and the National Center on Lesbian Rights, 1663 Mission Street, 5th Floor, San Francisco, CA 94103, both provide resources to mental health professionals and litigants on research available to dispel myths and stereotypes about lesbian and gay parents and their children.

For a discussion of the distinction between denial of custody to lesbian and gay parents based on myths that can be dispelled and based on homophobia and heterosexism, see Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 544-67 (1990).

It might appear that these goals could be accomplished through an educational program featuring speakers, especially mental health professionals, and perhaps a lawyer to analyze existing law and a lesbian or gay parent to add a human dimension. However, such programs produce a profound dissonance between form and content and should therefore be avoided.

A typical problem in lesbian-mother custody disputes is precisely that judges have a tendency to focus on the mother's lesbianism, rather than on the child's best interests. The task of the mother's attorney is to try to maintain a focus on the best interests of the child by presenting a full and rich picture of the family's life, from the minutiae of meal preparation to the dramas of school or peer relationship crises. A case presented as a vote of approval or disapproval of the mother's lesbianism is much less likely to succeed than a case presented as a determination of who can best meet the needs of the child.<sup>20</sup>

Given this task, a judicial education program that, through speakers, focuses only on a discussion of lesbian and gay parents, reinforces the wrong message. It suggests by its very structure that the issue in custody cases where a parent is lesbian or gay is the parent's sexual orientation. Even a disclaimer as part of the program that sexual orientation is *not* the issue cannot dispel the message conveyed by the form: if it is okay to focus a program on lesbianism/homosexuality and parenting, then it must be okay to focus a case with a lesbian or gay parent on that parent's sexual orientation. Such a program also inevitably calls for blanket approval or disapproval of lesbian or gay parents having custody.<sup>21</sup> Just as a case presented as a referendum on lesbian or gay parenting is less likely to be

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[C]ourts and legislatures will discount or ignore research findings that support outcomes they consider socially or politically undesirable. The failure of the lesbian-mother custody research to end bias against lesbian mothers in custody determinations demonstrates this principle. The influence of this research often depends upon the political acceptability of the findings rather than upon the methodological quality of the studies. Thus, even a large, longitudinal study concluding that children of lesbian mothers are well-adjusted [*sic*] would be unlikely to lead to universal acceptance of lesbian-mother families. As long as homophobia and heterosexism exist, opposition to lesbian and gay parenting will exist as well.

*Id.* at 566-67 (footnotes omitted).

Obviously, judicial education to counteract ignorance is easier than judicial education to overcome prejudice. The program described in this article attempted to tackle the latter by giving a "voice" to homophobia through the cross-examination by the father's attorney and attempting to respond to it. For a discussion of the cross-examination, see *infra* subpart III(F).

20. [T]he primary goal of the mother's attorney should be to prevent the mother's sexual preference from becoming the central issue of the case. Opposing counsel undoubtedly will attempt to use the trial as a forum for airing stereotypical, negative generalizations about lesbians. It will be up to the mother's attorney to focus the court's attention, instead, on the quality of the relationship between the particular mother and her children. . . . The mother's attorney must attempt to direct the court's focus so that the lesbian mother is perceived primarily as a mother and only tangentially as a lesbian.

Hunter & Polikoff, *supra* note 2, at 720-21.

21. The discussion at the National Council of Juvenile and Family Court Judges program was decidedly along these lines.

successful, an educational program presented as such a referendum risks unnecessarily polarizing the participants.

The alternative approach harmonizes the form of the program with its content: simulation of a custody dispute between a lesbian or gay parent and a heterosexual parent. Simulation can include written materials that describe in great detail the factual context of the dispute and testimony of a mental health expert that conveys the substance of the professional literature on lesbian and gay parenting as well as a recommendation on who should be awarded custody. A simulation dramatizes the complexity of a family situation of which the mother's lesbianism is but one piece. Thus, judges are asked to learn about lesbian and gay parenting in a form parallel to the form in which they must decide the outcome of custody cases they adjudicate.

Simulation has other advantages, and these advantages have made simulation the core technique of clinical legal education. The assumption of a role facilitates a richer learning experience than that obtained through lecture, discussion, or even analysis of hypotheticals. Outside of the clinic, law professors have used simulations to enhance the classroom learning experience.<sup>22</sup> While simulations are commonly understood to teach "lawyering," they are also used in law schools to teach substantive law.<sup>23</sup>

Customarily, simulation requires participation in roles. A theatrical presentation to an audience may require the audience to watch a simulation, but it does not make the audience part of the simulation. An audience of judges is unique, however. The role of a judge in a trial is to listen to the evidence, make factual findings, apply the law, and render a decision. Judges, therefore, can be in an audience and still assume the role of judge, thereby engaging directly in the simulation.<sup>24</sup>

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22. See, e.g., Philip G. Schrag, *The Serpent Strikes: Simulation in a Large First-Year Course*, 39 J. LEGAL EDUC. 555 (1989).

23. See, e.g., Michael Botein, *Simulation and Roleplaying in Administrative Law*, 26 J. LEGAL EDUC. 234 (1974); Kenney Hegland, *Fun and Games in the First Year: Contracts by Roleplay*, 31 J. LEGAL EDUC. 534 (1982); Robert P. Davidow, *Teaching Constitutional Law and Related Courses Through Problem-Solving and Role-Playing*, 34 J. LEGAL EDUC. 527 (1984). Simulation is the core substantive law teaching methodology at the City University of New York Law School at Queens College.

24. The contrast between audience as theater/simulation watchers and audience as participant/judges was found in the District of Columbia judicial conference. The simulation described in this article required the audience to participate as judges. Another presentation required the audience to watch a series of skits illustrating senior partner-junior partner and lawyer-client interactions raising issues of racism. In the presentation on racism, the audience had no role other than audience.

### III. THE 13TH ANNUAL JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA

The District of Columbia has an annual, mandatory judicial education program.<sup>25</sup> This program, called the Judicial Conference, includes state-of-the-judiciary reports from the chief judges of the two courts in the District of Columbia: the general jurisdiction District of Columbia Superior Court and the District of Columbia Court of Appeals. It also includes a substantive focus selected by the District of Columbia Court of Appeals judge in charge of the conference that year. In 1988, the designated judge was Theodore R. Newman, Jr., and the focus of the conference was race, sex, and sexual orientation in the law.

The subcommittee responsible for the one-and-a-half hour slot on sexual orientation and the law selected the topic of "weighing homosexuality of a parent in child custody decisions." The subcommittee included judges and hearing commissioners<sup>26</sup> of the Superior Court, who did not have any particular expertise or experience in the subject matter, and attorneys, including myself, who did have some experience with custody law generally and lesbian and gay child custody in particular.

Throughout the planning of the program, the judges and hearing commissioners on the subcommittee expressed no fixed views on lesbian and gay custody. While none expressed general comfort with lesbian mothers or gay fathers, none conveyed the impression that she or he would never award custody to a lesbian mother or gay father. This small group of judges and hearing commissioners thus appeared representative of the majority of judicial officers who seek to perform their duties conscientiously but who are influenced, as are all people, by the culture around them. Attorneys on the committee, including myself, who had substantial experience in the area and had openly expressed positive views of gay and lesbian parenting, provided extensive materials to the rest of the committee on the legal and the psychological dimensions of lesbian and gay parenting. This included leading cases both in favor of and against lesbian and gay parents and all of the published psychological materials on the mental health of children raised by lesbian mothers.

#### A. *The Legal Framework*

The legal framework within which the subcommittee operated is particularly notable. The District of Columbia is the only jurisdiction in the

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25. D.C. CODE ANN. 11-744 (Supp. 1990). Approximately 19 states have mandatory judicial education programs for their state court judges that would be broad enough to encompass the type of training suggested in this article. See FOUNDATION FOR WOMEN JUDGES, *supra* note 6.

26. Superior Court hearing commissioners have limited duties. They are permitted to hear contested custody cases upon the consent of both parties. DISTRICT OF COLUMBIA SUPERIOR COURT GENERAL RULES OF THE FAMILY DIVISION, Rule D(c) (1990).

country with a statute addressing sexual orientation and custody. The court has the authority to determine temporary custody

without conclusive regard to the race, color, national origin, political affiliation, sex, or sexual orientation, in and of itself, of a party.<sup>27</sup>

The court has continuing jurisdiction in custody matters, and

[w]ith respect to matters of custody and visitation, the race, color, national origin, political affiliation, sex, or sexual orientation, in and of itself, of a party shall not be a conclusive consideration.<sup>28</sup>

Although the statutes were enacted in 1976, there is no District of Columbia appellate case law applying or interpreting them.

Because of this statute, the absolute position denying custody to lesbian and gay parents was not a legitimate voice in our presentation. The language of the statute was especially useful in persuading some members of the subcommittee that it was inappropriate to present a psychiatrist with a viewpoint different from the one we chose to testify in the simulation.

In replicating this type of program elsewhere, the existing legal framework would have to be considered. About a third of the states have no reported case law involving custody determinations when one parent is lesbian or gay.<sup>29</sup> Of those with appellate case law, only thirteen have decisions from the highest court of the state.<sup>30</sup> Some states have only one, relatively brief, opinion,<sup>31</sup> while others have many, extensively reasoned

27. D.C. CODE ANN. § 16-911(a)(5) (Supp. 1990).

28. D.C. CODE ANN. § 16-914(a) (Supp. 1990). The remainder of the District of Columbia custody statute provides:

In determining the care and custody of infant children, the best interest of the child shall be the primary consideration. To determine the best interest of the child, the court shall consider all relevant factors including, but not limited to:

- (1) the wishes of the child as to his or her custodian, where practicable,
- (2) the wishes of the child's parent or parents as to the child's custody,
- (3) the interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may emotionally or psychologically affect the child's best interest,
- (4) the child's adjustment to his or her home, school, and community, [and]
- (5) the mental and physical health of all individuals involved.

D.C. CODE ANN. § 16-914(a) (Supp. 1990).

29. The most comprehensive compilation of reported cases on lesbian and gay custody is contained in the BIBLIOGRAPHY OF PSYCHOLOGICAL AND LEGAL MATERIALS ON LESBIAN AND GAY PARENTING, available from the National Center on Lesbian Rights, 1663 Mission Street, Suite 550, San Francisco, CA 94103. That bibliography shows that reported cases exist in Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, New Jersey, New York, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia.

30. *Id.*

31. *See, e.g.,* Stroman v. Williams, 291 S.C. 376, 353 S.E.2d 704 (S.C. Ct. App. 1987).

opinions.<sup>32</sup> In some jurisdictions, the reported opinions are in conflict with one another.<sup>33</sup>

The legal framework of each state would determine the advisability of a program there. In Missouri and Virginia, for example, where virtually *per se* rules exist against awarding custody or extensive visitation to lesbian or gay parents who live with their lovers,<sup>34</sup> trial court judges cannot be "educated" to ignore appellate law.<sup>35</sup> On the other hand, judges in states such as Alaska and South Carolina, with generally favorable, but not extensively reasoned appellate law,<sup>36</sup> are ripe for education. A national program, for example one held by the National Judicial College in Reno or by the National Council of Juvenile and Family Court Judges, would have to account for the wide disparity in state appellate court opinions.<sup>37</sup>

### B. *The Fact Pattern*

The subcommittee discussed extensively the fact pattern that formed the basis of the simulation. The most effective fact pattern for this type of program is one that appears typical, that contains facts sympathetic to both parties, and that, apart from sexual orientation, presents little or no reason to award custody to the heterosexual parent. The facts should be typical, because any extreme fact situation risks the possibility that the judges will not extrapolate from the program to the bulk of the cases they decide. For example, if the heterosexual father is part of a satanic cult that requires children to watch and participate in animal sacrifices (and occasionally sacrifices the children themselves), a decision to place the child with the lesbian mother will come too easily.

Our "typical" facts included two children, a nine-year-old boy and a twelve-year-old girl.<sup>38</sup> The presence of one male and one female child dis-

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32. The National Center on Lesbian Rights bibliography, *supra* note 29, lists seven reported appellate opinions from Missouri.

33. *Compare* *In re Jane B.*, 85 Misc. 2d 515, 380 N.Y.S.2d 848 (Sup. Ct. 1976) *with* *M.A.B. v. R.B.*, 134 Misc. 2d 317, 510 N.Y.S.2d 960 (Sup. Ct. 1986). *Compare* *In re J.S. & C.*, 129 N.J. Super. 486, 324 A.2d 90 (1974) *with* *M.P. v. S.P.*, 169 N.J. Super. 425, 404 A.2d 1256 (1979).

34. *See* Missouri cases cited *supra* note 5; *Roe v. Roe*, 228 Va. 722, 324 S.E.2d 691 (1985).

35. The unfavorable appellate decisions in those jurisdictions do not preclude all possible judicial education. Trial judges are still likely to encounter lesbian and gay parents who do not live with their lovers, and education may encourage judges to consider their claims more favorably. Furthermore, education within the state, coupled with increased favorable analysis in other states, may facilitate reconsideration of some of the harshest decisions.

36. *See* *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985); *Stroman v. Williams*, 291 S.C. 376, 353 S.E.2d 704 (S.C. Ct. App. 1987).

37. It is particularly unfortunate that the one program on custody disputes involving lesbian and gay parents that the National Council of Juvenile and Family Court Judges has sponsored did not account for or educate about this disparity. The Missouri judge on the panel represented the restrictive view of that state's opinions, and no materials or speakers balanced his viewpoint for the benefit of judges in the audience from states with less restrictive court decisions or no court decisions at all.

38. The fact pattern used in the simulation is provided in the Appendix, pt. I, Factual Summary, at 199.

couraged distinctions based on the sex of the children. The ages were selected so that the children were old enough to have a history of living with their mother after the marital separation, old enough to be embarking soon on adolescence, old enough to have their preferences considered, yet young enough to have their preferences given only limited weight.

It was also typical that the case was an action to modify custody instigated by the father several years after the divorce when he discovered that the mother was a lesbian and was living with her lover. This is a very common scenario. Additionally, the father was remarried, and his new wife was willing to assume childrearing responsibility. This fact is often used to support the request of fathers for changes in custody, even outside the lesbian mother context.<sup>39</sup>

Furthermore, the mother in our fact pattern had good parenting skills and the children were well adjusted. These facts are consistent with reported decisions involving lesbian or gay parents. The judges on the subcommittee explicitly wanted to present the father favorably. They did not want any serious problem with his request for custody that would tip the balance against him. For example, in the first fact pattern we considered, the father had become erratic in his child support payments and visitation and had then stopped making child support payments after his new baby was born to his second wife. Although this scenario is both typical and highly realistic, some felt it would produce undue sympathy for the mother, and, in the final fact pattern, the father maintained his support obligation. He also maintained consistent visitation with the children, even though he had moved to another city four years earlier.

Although I hoped that after the simulated hearing as many judges as possible would "rule" in favor of the lesbian mother, it was important that the fact pattern not be cleansed of all factors that have ever been used as reasons to deny a lesbian mother custody. Those who might be inclined to create a fact pattern likely to result in the mother's victory should consider the benefit of including more difficult facts, thereby allowing the expert witness to address them.

The most common distinction courts make appears to be between lesbian or gay parents who live with lovers (or otherwise openly engage in a relationship) and those who do not. Several courts have suggested that denial of custody is not based on the parent's sexual orientation but rather on the fact that the child is exposed to the relationship in the home.<sup>40</sup> A fact pattern that buys into this distinction does a great disservice to the educational goals of the simulation. A judge who is willing to grant custody to a lesbian mother only because her sexual orientation is completely

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39. See, Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 *WOMEN'S RTS. L. REP.* 235, 241 (1982).

40. See, e.g., *N.K.M. v. L.E.M.*, 606 S.W.2d 179 (Mo. Ct. App. 1980); *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981); *Roe v. Roe*, 228 Va. 722, 324 S.E.2d 691 (1985).

hidden from her children has not been forced to grapple with the heart of her or his objections to lesbian and gay parenting. Thus, the fact pattern we developed involved a lesbian mother who lived with her lover.

Similarly, the father's remarriage undoubtedly made it more difficult for judges to resist placing the children in a "traditional" family. This fact, however, gave the expert witness an opportunity to explain why he would leave the children with their mother despite the father's remarriage. Another potentially problematic fact was that the then-eleven-year-old daughter learned of the lesbian relationship when she awakened from a bad dream and walked in on her mother and her mother's lover embracing in bed.<sup>41</sup>

Overall, the facts we developed reflect a balance between getting most judges to rule for the lesbian mother and creating a factual context that will transfer to as many cases as possible. On the one hand, the judges were more likely to rule for the mother, because this was a modification action and she had had successful custody for seven years. It is to be hoped that having "ruled" once for a lesbian mother, the judges would carry that process to all custody cases, including initial determinations. On the other hand, the judges were less likely to rule for the mother, because the father presented a traditional nuclear family unit and because the mother was living with her lover. Nevertheless, the number of cases in which these facts are presented and the importance of grasping the opportunity to persuade judges to rule for a lesbian mother under these circumstances, pointed toward including these facts.

### *C. The Expert's Role*

The psychiatrist selected to be the expert witness in the simulation played a crucial role in fact development beyond the brief scenario the subcommittee created. He was asked to write a report to the court similar to one he would write in any custody dispute.<sup>42</sup> Good mental health eval-

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41. This fact was part of the original draft written by a hearing commissioner on the subcommittee. I would not have included it. Rather, I would have had the mother tell her children directly of her relationship with her lover. The suggestion that the older daughter and the nine-year-old son would not know of the mother's lesbianism, even though she was living with her lover, without being explicitly told or without walking in on a sexual interaction, reinforces the sexual aspect of lesbianism. I did not try to change this part of the facts, however, because I did not want to be perceived by the subcommittee as trying to stack all the facts in the mother's favor. Also, there are lesbian mothers who do not discuss their lesbianism with their children. Therefore, I did not find the scenario wholly unrealistic. The overall program included commentators who interjected their thoughts at various points. One was a lesbian mother, who noted that

[i]n my opinion, [the silence of the lesbian mother in the simulation], both in actions and in words, about the lesbianism was not in the best interest of the children. It's inconceivable to me that my twelve year old, even my eight year old, would not understand that I was a lesbian. . . . I believe a child is much better protected when a parent discusses issues as they come up, or, better yet, before they come up and in terms the child understands.

42. This report is provided in the Appendix, pt. II, Psychiatric Report and Recommendation, at 200.

uations are filled with facts to support the ultimate recommendation. Thus, we gave the psychiatrist the factual outline the committee developed, and, through discussions I had with him, we added "real life" to the characters. He contributed some of the factual details (it helps to have an expert with imagination!), and I contributed others.<sup>43</sup> Among the facts added were that the daily routine of the mother's household included her lover getting the children off to school because the mother left for work early; that the mother had turned down a promotion because it would have meant longer hours at work away from her children; that the children's stepmother was a teacher and religiously observant; and that the father was distressed that his son was not more interested in sports and, furthermore, that he tended to blame this on his ex-wife's influence. The psychiatrist also developed a scenario for how the mother handled her daughter's discovery of her lesbianism, and he presented the father's negative attitude toward the mother as potentially damaging to the children.

A more simple simulation (such as a discussion based on a hypothetical) may enable the audience to distance themselves from the message by thinking that, if  $x$ ,  $y$ , or  $z$  fact were different, then a different conclusion would be reached. A well-designed and rich simulation creates so many facts that it demonstrates the complexities of family life and the likelihood that the changes in certain facts would produce different complexities rather than simplicity. I believe we accomplished that to the greatest degree possible in this simulation.<sup>44</sup>

#### D. *Preparing the Script*

We could not present an entire trial in one-and-a-half hours. The decision to show that part of the trial that included direct and cross-examination of the expert witness allowed us to educate judges about the effects on children of living with a lesbian mother. It also allowed us to continue a structure consistent with the substantive message: the psychiatrist made a

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43. The psychiatrist contributed a number of facts that reflected his own clinical and developmental orientation. He found it necessary, for example, to explain such factors as the mother's lesbianism, the father's anger about the mother's lesbianism, the father's choice of the mother as a wife, and the mother's choice of nursing as a career by discussing early childhood factors, complete with unresolved Oedipal conflict issues. If the report had been written by a clinical psychologist, it would almost certainly have included analysis of the results of standard psychological tests. I found myself balking at some of the content of the report, because of my own skepticism about the plausibility of the explanations provided. I would also likely have objections to a standard psychological report given my skepticism about many of the standard psychological tests. *See generally*, JAY ZISKIN & DAVID FAUST, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* (4th ed. 1988). Nonetheless, judges are accustomed to these types of reports, and tackling the limitations of psychiatry and psychology while using the wisdom of those disciplines to educate and dispel myths about lesbian and gay parents is probably impossible.

44. Simulations are obviously less complex than life because they have boundaries that life does not. A fact-rich simulation simply stretches those boundaries as far as possible. Those clinical law professors who teach in "live-client," as opposed to simulation, clinics are constantly advocating teaching from real cases in addition to simulation, because it is simply impossible to build into a simulation the myriad facts or human behaviors that influence the course of cases.

recommendation after considering the total family picture, and he considered the mother's lesbianism within that context. This reinforced our point that the best interests of the child, not the parent's sexual orientation, is the proper focus for the trial.

The selection of a mental health professional for this simulation was critical. We attempted to obtain one of the researchers who had published a study on lesbian mothers, but she was unavailable. We ultimately selected a local psychiatrist with substantial experience doing custody evaluations. I located this particular psychiatrist because years previously, in conjunction with another project, he had identified himself as interested in lesbian-mother custody cases, and I, therefore, had reason to believe that he would be open-minded about lesbian mothers. He was not an expert on lesbian and gay parents; he had had only a small amount of experience with lesbians and gay men. But he had a lot of experience with children of divorce and thus his selection reinforced our message that the focus of the proceeding was the children's best interests, not the mother's lesbianism.

There was some risk in selecting this psychiatrist. His lack of prior advocacy on behalf of lesbian and gay parents may have made him more attractive to the committee and more credible with the audience, but it made me less able to predict or control his responses. For example, when I wrote questions for cross-examination that included whether he considered homosexuality acceptable and whether it would be preferable for the children to be heterosexual rather than homosexual, I did not know in advance how he would respond, and I had to structure the questioning in part around his answers. I did spend a considerable amount of time with the psychiatrist, ensuring that he had all of the published and unpublished studies on lesbian and gay parents and talking with him about the common courtroom issues concerning lesbian and gay parents, as well as helping him structure his "report" by identifying those factors I considered crucial to address.

#### *E. Direct Examination*

I designed the direct examination to allow the psychiatrist to summarize the mental health literature about the effects on children of lesbian parenting; to describe the factors he considered critical in any custody determination and how the mother's lesbianism in this case fit into them; to tackle offensively those issues, such as possible stigma to the child, that would form a significant part of the father's case; and to cast a favorable interpretation on facts that judges could view negatively.

The psychiatrist was able to summarize the mental health literature, because it was part of his basis for assessing the significance of the

mother's lesbianism to the best interests of her children. His summary was brief, consisting of a conclusory statement that his

extensive review of the literature found that it is really a nonissue. There are no significant differences in all the studies that have been done, and there are a number of areas that have been looked at in terms of the children's mental health, their gender identity, their sense of self-esteem . . . .<sup>45</sup>

It is a limitation of the simulation form, and perhaps the most significant one, that it does not provide a forum for an in-depth review of each study on lesbian mothers. The subcommittee members were given copies of all the studies, and an extensive bibliography was given to all the judges.

In describing factors leading to his recommendation, the psychiatrist discussed those factors listed in the statute as well as the theory of psychological parenthood.<sup>46</sup> His recommendation was based on the facts that the children were functioning well and that the mother was the psychological parent. He characterized her lesbianism as something he considered, because it was an "unusual factor," and he identified as significant that the mother was comfortable with her homosexuality and that there had been no adverse impact on the children.

The issues I choose to handle offensively were the possibility of adverse peer reactions, the manner in which the daughter learned of the mother's lesbianism, and the fact that the two women slept in the same bed. For example, when discussing possible adverse peer reactions, the psychiatrist stated that

[this] is not a determining factor. The determining factor, as previously stated, is that the children be with their psychological parent. All children face adversity of some sort; adverse peer reactions may come up about any number of things. These children need to be with the mother, who can protect them and help them work through these adversities, whatever they may be. The mother is the psychological parent. She is the one best able to help them cope with the stresses of life.<sup>47</sup>

Finally, direct examination turned potentially negative facts into positive ones. A heterosexual parent's opposition to the other parent's sexual orientation is often accepted as understandable and supportable. Despite

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45. Appendix at 218. The transcript of the Judicial Conference Program is provided in the Appendix, pt. III, beginning at 213.

46. The concept of psychological parenthood was developed by Joseph Goldstein, Anna Freud, and Al Solnit in the early 1970s. A psychological parent is "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." Joseph Goldstein, Anna Freud, & Al Solnit, *BEYOND THE BEST INTERESTS OF THE CHILD* 98 (1973).

47. Appendix at 219.

the common understanding that a parent is not supposed to cast the other parent in a negative light, extreme distaste for a lesbian or gay parent often appears exempt from this general rule. In this case, I used direct examination to put the father's opposition in perspective. The psychiatrist testified that the father had not shielded the children from his anger toward their mother. The psychiatrist noted that the father's negative attitude appeared to make him less able to understand his children, giving as an example his interpretation of his son's lack of interest in sports as resulting from the mother's lesbianism.<sup>48</sup> Thus the father's hostility to the mother's lesbianism, rather than the mother's lesbianism itself, was portrayed as a problem for the children.

Similarly, the fact that the mother lived with her lover could be thought of as a negative fact, especially in light of extensive case law relying on living with a lover as the basis for denying custody. The psychiatrist testified not only to the good relationship between the lover and the children but to the harm to the children that would occur if she were no longer permitted to live in the household.

#### *F. Cross-Examination*

Cross-examination was a critical component of this simulation. I attempted to write a cross-examination that would play to judicial homophobia: that would focus on the unacceptability of homosexuality, the improper message to the children that would be conveyed by leaving them with their mother, and the psychiatrist's lack of credibility because he was not sufficiently critical of homosexuality.

I believe this point of view needs to be present in the simulation. Presenting it through cross-examination permits more control than presenting it through a person expressing these beliefs as his or her own. The subcommittee briefly considered a simulation with two experts, one of whom would recommend against granting custody to the mother. I felt strongly that this structure would give too much legitimacy to a homophobic perspective. My position prevailed in the subcommittee in part because District of Columbia law prohibits a *per se* rule against lesbian-mother child custody and in part because time constraints made an additional witness infeasible.

The voice of homophobia verbalizes those thoughts likely to be in the minds of some of the judges. Irrational fear and hatred of lesbians and gay men and moral pronouncements derived from the beliefs of some religions pervade society. These attitudes are especially prevalent in issues involving children, making lesbian and gay custody more threatening to some than, for example, providing protection against job discrimination. A judi-

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48. This is fully covered in the report. In fact, a portion of this part of the script was deleted by the moderator for time reasons.

cial education program could focus, not on one area of law, but on overcoming homophobia. Such a program could be effective, but it probably would not have been supported by members of our planning subcommittee, because it would have required them to acknowledge the existence of homophobia and to make overcoming homophobia the explicit goal of the program. It would be difficult to make this the identified goal of any judicial education program. It is easier to obtain recognition from judges that a particular legal dispute—in this case a custody conflict involving a lesbian mother—might come before them and that some information outside their range of experience, which could be provided in a training program, might assist them in performing their professional duties.

Incorporating a homophobic perspective into the simulation may not have successfully eradicated beliefs grounded in homophobia, but directly addressing those beliefs facilitated the judges' reconsideration of their own attitudes. Consider, for example, the following excerpt:

[FATHER'S ATTORNEY]: Well, now, isn't it fair to say that, if the court leaves these children in a lesbian home, it is, in effect, telling the children that homosexuality is acceptable?

[PSYCHIATRIST]: I would not presume to interpret what the court believes.

[FATHER'S ATTORNEY]: Well, but if the court removes them from this lesbian home and places them in the loving, caring, and competent home of their father and his new wife, to provide, essentially, a normal family household, it will at least be telling the children that homosexuality is not acceptable, isn't that right?

[PSYCHIATRIST]: That might be the intent of the order, but the children will interpret such a change in custody as a loss of their primary caretaker.<sup>49</sup>

The above line of questioning recognizes that some judges will want the children to believe that homosexuality is unacceptable. There may be only a slight chance that such a judge will be receptive to leaving the children with a lesbian mother, but the psychiatrist's response encourages such a judge to see that a different message other than the intended one is likely to be conveyed.

The cross-examination also suggested outrage at the openness of the mother's sexual orientation. It brought out both that the mother had lesbian and gay male friends who came to her home and that the psychiatrist did not find this fact particularly relevant to the children's best interests. One cross-examination question was designed specifically to imply danger to the son of being around gay men. It was phrased as follows:

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49. Appendix at 231.

[FATHER'S ATTORNEY]: So, her children, including her eight-year-old son, sometimes find themselves in the company of adult homosexuals, males as well as females. Isn't that correct?<sup>50</sup>

Also, designing the program to include commentators permitted participants other than the testifying psychiatrist to speak out against both the explicit and the implicit homophobia that formed the basis of the cross-examination.

### G. *The Commentators*

The simulation included participants not in roles. These participants were selected by various subcommittee members. A lesbian mother and a gay father were selected, as was a research psychiatrist sympathetic to lesbian and gay parenting. The other commentators were two well-known domestic relations attorneys, one of whom I knew to be comfortable with lesbian and gay parents, an additional practicing child psychiatrist, and a Superior Court judge. I did not know the views of the second attorney or the practicing psychiatrist, and I knew the judge to be thoughtful and open, but I did not know his views on homosexuality or lesbian and gay parenting.

The use of commentators interrupted the flow of the trial, thus helping to maintain the audience's interest. At selected points, the moderator would "freeze" the action and turn to one or more of the commentators to remark on the point being addressed in the hearing. Each commentator knew in advance what points she or he would be asked to address and, therefore, could prepare answers. This device also allowed participants to hear other perspectives through short answers to precise questions. Although I was worried that those commentators unfamiliar to me would play into homophobic myths and stereotypes, I could not control who all the commentators would be. The decision to include a lesbian mother and a gay father guaranteed a personalizing effect and further ensured that any judge subsequently hearing a lesbian or gay child custody dispute would have at least seen a lesbian and a gay parent before dealing with one in her or his courtroom.

The decision to use a research psychiatrist with a known positive view meant that a perspective would be available to counter any overt homophobia expressed. As it turned out, the commentators made an invaluable contribution. Although I might have "scripted" more perfect answers, their actual answers generally were supportive of the overall message of the program. The fact that those answers came from members of

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50. *Id.* at 231. For further discussion on the implications of this question, see *infra* subpart III(G).

the legal and psychiatric profession not identified with lesbian and gay advocacy made them invaluable.

For example, after the psychiatrist testified on cross-examination that he was not disturbed by the presence of other lesbians and gay men as guests in the mother's home, the program's moderator turned to the commentators for reactions. The practicing child psychiatrist on the panel, whose views on lesbian and gay parenting I had not previously known, responded as follows:

Of course, the environment they are in is significant, but I would remind you that the majority of children questioned about the influences that they experienced in any divorced family is the fact of the divorce itself. What you are assessing is whether or not this home can provide for their needs, and we all know that, to the degree that there is conflict or recrimination and the children get caught in the fighting between one party or another, those are the determinants that are most pathological for the children.<sup>51</sup>

Thus, the psychiatrist reinforced the program's message to focus on the children's needs, not on the mother's sexual orientation.

Perhaps more impressive was the judge-commentator's response to the insinuation in the cross-examination question that the son was in danger if he was in the presence of gay men. The judge stated:

I think this line of questioning is rather offensive in that it simply panders to the stereotype about gays. The stereotype that is being summoned by these questions is that a homosexual is more likely than a heterosexual to molest children. I don't think that any of the evidence supports this.<sup>52</sup>

The presence of commentators actually changed the course of one portion of the simulation. I did not script the rulings on objections offered during the simulation. These rulings were made by a Superior Court judge, who was acting as the judge in the simulation. The cross-examination included asking the psychiatrist if he was gay. During the rehearsal of the simulation, the judge-commentator was not present and the judge in the simulation required the witness to answer the question. During the presentation itself, the judge-commentator was asked to express his views on the objection by the mother's attorney to the question concerning the psychiatrist's sexual orientation. The judge-commentator replied:

I don't think the question should be allowed. The strongest argument to allow it in is that the question is relevant to show the bias of

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51. *Id.* at 231-32.

52. *Id.* at 232.

the witness. "Bias," as we all know, is a term of art and is used to indicate a considerable variety of mental attitudes, which are manifested in various ways. I don't believe, however, that because the witness shares an immutable characteristic, such as sexual preference or race, with the party, that he also shares with ten thousands of other people, tells you anything about the beliefs of the witness testifying for or against him in court. The most I can say is that we have a gut feeling that gays and blacks are favorably inclined with one another. I've never read any judge's opinions or findings of fact that indicate that a certain witness was less believable because the witness, like the party that called him to testify, was both black or both Jewish or both had light skins. So I don't think . . . the question should be allowed.<sup>53</sup>

After that answer, and a response from a lawyer-commentator that he would try to argue more for learning if the witness had spoken on gay rights issues or was a member of an organization that had taken positions,<sup>54</sup> the judge in the simulation sustained the objection. It was dramatic evidence that meaningful education was taking place through the simulation.

During a brief question-and-answer period, the commentators also played a significant role. The program's moderator asked, "How [does] homosexuality [develop], or what influences the sexual identity of a child?" The research psychiatrist resisted giving an answer, stating simply, "The short answer is that we don't know." When pushed, however, she made the following statement:

Perhaps the most important point that I could make, however, is that the question of what causes homosexuality is probably not the most important question to ask. I think that I could make this point most clearly by making an analogy. For example, we could ask, "What is the cause of one person's versus another person's favorite color?" We could call this color preference, or color orientation. Giving this example, I don't mean to trivialize the importance of the stigma attached to homosexuality in our society, but what I do want to make clear are the limitations when we ask questions about complex phenomena such as human behavior and preferences.

We could bring to bear multi-millions of dollars worth of scientific methods and resources, and so on, and put the whole NIH [National Institutes of Health] to work on the question of what determines color preference or homosexuality, and, after this million-dollar

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53. *Id.* at 228.

54. Perhaps the lawyer-commentator who made this remark was unaware that every major association of mental health providers, including the American Psychiatric Association, the American Psychological Association, and the National Association of Social Workers, has an official position that lesbianism or homosexuality is not a basis for denying a parent custody of his or her child. Thus it would be difficult to find any credible mental health witness who was not a member of an organization that had taken a position on this issue.

workup, what we would come up with would be, "Well, it's partly genes; it's partly environment; it's partly the person's experiences; and so on." I think it's really important to ask, "Where should we put our resources?"<sup>55</sup>

An attorney in the audience noted the absence from the program of a judge, lawyer, or psychiatrist who felt that homosexuality was a substantial negative factor. The judge who chaired the planning subcommittee quipped in response, "We had good luck." The moderator and the research psychiatrist then established that there was no literature based on collected and analyzed data supporting a position contrary to the one we had presented. One of the lawyer-commentators then noted:

There are people who are still quite openly racist, and I don't think they would add to the dialogue on racism . . . . I think what we are engaged in here is to try and eliminate what the statute says we should eliminate, and focus on the real issues, and I don't think you . . . do that by having someone here who says that the statute ought to be removed.<sup>56</sup>

#### *H. The Denouement*

At the close of the program, the moderator took a vote of the audience. An overwhelming majority of the judges and lawyers present voted to award custody to the mother. Although the education of the judges in that group was most notably successful, those judges who voted to change custody to the father had the experience of seeing their position a distinct minority. Perhaps this encouraged them to rethink their decision.

The message conveyed by the program and the vote that followed was reinforced in the wrap-up speech for the entire Judicial Conference. J. Clay Smith, Jr., then Dean of Howard University School of Law, spoke forcefully against homophobia. His speech, later reprinted in the journal that reaches all members of the District of Columbia Bar, included the following:

Homophobia is brought to the hollow log of the legal system as are racism and sexism. Can a homosexual parent receive a fair trial in a custody case? Do the rules of evidence and procedure disfavor them in the judicial process? Does entry into the legal process by a homosexual make one's sexual preference the issue in a custody case? Should it? These are sensitive questions, but answers are necessary unless we wish to risk applying the law solely on the basis of

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55. Appendix at 233. Reflecting her own psychobiological background, this psychiatrist then went on to discuss a recent hypothesis relating adult male homosexuality to prenatal hormone exposure.

56. *Id.* at 235.

homophobia . . . . [G]ay and lesbian parents should have as equal a right in a custody proceeding as any other citizen.<sup>57</sup>

#### IV. CONCLUSION

The program's successes can be identified. Every judge and hearing commissioner in the District of Columbia, and more than 300 practicing lawyers, learned about child custody disputes involving lesbian mothers. The four judges and one hearing commissioner<sup>58</sup> who participated most fully in the planning of this program received extensive education on the legal and psychological research concerning lesbian mothers. The favorable "vote" at the conclusion of the program solidified the message that living with a lesbian mother is not inconsistent with the best interests of children. At a reception following the program, many judges in the audience spoke with committee members and expressed appreciation for the information conveyed and responded positively to both the format and the content of the program. The subsequent article by Dean Smith reached the more than 55,000 members of the District of Columbia Bar. The simulation format succeeded both in holding audience interest and in focusing primarily on the best interests of the children, not the lesbianism of the mother.

There is no way to measure precisely the effects of the program. Its successes do not amount to the eradication of homophobia. For example, I had a conversation with two judges immediately after the program. Although both were impressed with the program and receptive to its content, both noted that they were influenced by and happy about the research demonstrating that children raised by lesbian mothers are no more likely than children raised by heterosexual parents to become lesbian or gay. I challenged their assumption that it was preferable to be heterosexual, yet both continued to assert that, because it is harder in the society to be lesbian or gay, it would be proper to consider avoiding that result as a factor in a child custody dispute if, in fact, children of lesbian and gay parents were more likely to be lesbian or gay. I regret that I did not pursue the conversation further. One of the judges was a black Hispanic, and I wish I had pointed out to him that, although society's prejudices

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57. J. Clay Smith, Jr., *Racism, Sexism and Gender Orientation in the Law, the Legal Process, and the Legal Profession*, 3 WASH. LAW., Jan./Feb. 1989, at 56, 60. Note that the use of the term "gender orientation," which this author used interchangeably with "sexual orientation," is inaccurate. Gender orientation refers to one's identity with a given gender, either male or female. It is distinct from sexual orientation, which refers to the gender of one's choice of sexual partners. The misuse of the term may have been unintentional, but it reinforces the myth that lesbians and gay men do not identify with their biological gender. This has been consistently disproved. See COUNSELING NON-ETHNIC AMERICAN MINORITIES 22 (Donald R. Atkinson & Gail Hackett eds. 1988) ("Sexual orientation should not be mistaken for gender identity. Gay men are men and gay women are women.")

58. Two years after the conference, the hearing commissioner who served on the committee became a judge of the Superior Court.

had undoubtedly made his life harder than the life he would have had had he been Caucasian, I doubt he would have chosen to be anyone other than who he is. Given this response from two judges whom I believe would be relatively fair in adjudicating a lesbian mother child custody dispute, the need for continuing education to change values and beliefs is apparent.<sup>59</sup>

Furthermore, there is still no appellate case law interpreting the District of Columbia statute, nor any reported trial court decisions involving a lesbian or gay parent. I am unaware of any lesbian or gay custody cases that have been tried in the District of Columbia since the 1988 judicial conference.<sup>60</sup> Our committee did not develop any instrument to measure judicial attitudes before and after the program. I would urge the use of such a device to measure the effects of subsequent programs in other jurisdictions or at national judicial conferences.

Programs designed to end prejudice against lesbian and gay parents in custody disputes fill a small part of a larger need to end bias against lesbians and gay men in the legal system. Efforts over the past ten years to end gender bias in the courts provide a model for the development of task force reports, curricula, publications, programs, and other resources to end bias on the basis of sexual orientation.<sup>61</sup> Those efforts can be built upon by considering the effectiveness of simulation as a method of educating judges and by ensuring that the format and structure of educational programs are consistent with the substantive message the programs are designed to convey.

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59. According to the Riddle Homophobia Scale, developed by Tucson psychologist Dorothy Riddle, the attitude expressed by these judges would be classified as "pity," characterized by "heterosexual chauvinism, [the belief that] heterosexuality is more mature and certainly to be preferred [and that] any possibility of becoming straight should be reinforced . . ." This attitude is still extremely homophobic. Only "repulsion," characterized by the view that lesbians and gay men are "sick, crazy, immoral, sinful, wicked" and that "anything is justified to change them," is considered more homophobic. The scale identifies homophobic levels of attitude, from most homophobic to least homophobic, as repulsion, pity, tolerance, acceptance. The scale identifies positive levels of attitudes, from least positive to most positive, as support, admiration, appreciation, nurturance. This scale is discussed in KATHY OBEAR, *OPENING DOORS TO UNDERSTANDING AND ACCEPTANCE: A FACILITATOR'S GUIDE TO PRESENTING WORKSHOPS ON LESBIAN AND GAY ISSUES* 14 (1988).

60. This, of course, does not mean that there have been no such cases.

61. See generally, L.H. SCHAFFRAN, *supra* note 6; Czapanskiy, *supra* note 6. Furthermore, some lessons can be learned from the work in recent years educating judges about Acquired Immune Deficiency Syndrome (AIDS). See generally, CLARK C. ABT & KATHLEEN M. HARDY, *AIDS AND THE COURTS* (1990). This volume was developed from transcripts of the national conference on AIDS and the Courts, held in Miami, Fla., Apr. 1-5, 1989, and attended by 250 state court judges, court administrators, lawyers, and others. The breadth of material covered in this judicial education program included much information relevant to substantive decision-making as well as to court management and treatment of litigants and court personnel infected with Human Immunodeficiency Virus (HIV).

## Appendix: Judicial Education Program Materials<sup>1</sup>

### I. FACTUAL SUMMARY

#### ERNEST A. JACKSON v. CHRISTINE JACKSON

Civil Action No. D-77-88

(A suit for custody of two minor children)

Christine Jackson and Ernest Jackson met in the summer of 1966 while both were undergraduate students at Georgetown University. Christine was a nursing student and Ernest studied electrical engineering. They courted for a brief period and were married on February 14, 1968, in the District of Columbia. Two children were born of the marriage, namely, Donna Jackson and Ernest Jackson, Jr. Donna is currently age twelve (12) and Ernest, Jr., is age eight (8). The family attended church regularly, and the children were active in Sunday School.

Christine and Ernest are ages forty (40) and forty-two (42), respectively. Ernest and Christine lived as husband and wife until June 2, 1981, at which time they separated. In August 1983, Ernest sought an absolute divorce. The parties were able to settle all matters including child custody, support, and property distribution. The children remained with Christine in the family home. Ernest moved to Philadelphia. Ernest pays child support and visits the children regularly. Ernest always boasted what a good and proper parent Christine was to the children. In March of 1985, Ernest remarried. His new wife Elaine is a school teacher and superintendent of her church's Youth Department. Ernest has become a deacon in the church. On February 24, 1987, Elaine gave birth to the couple's first child, Monica. Ernest has never missed making child support payments to Christine nor has he cancelled visits with the children, except occasionally.

Donna and Ernest, Jr., are normal, healthy children. Donna receives above average grades in school while Ernest's grades are average. Donna has just started her monthly menstrual cycle; however, she has little interest in boys at this time.

In May of 1986, Christine met Joan Rice at the home of a mutual friend. They began dating, and in March 1987 they began living together as lovers.

Ernest, Sr., learned that Christine and her roommate Joan may be lovers. He traveled to Washington, D.C., immediately to speak with Chris-

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1. The materials in this Appendix were prepared by the author and other subcommittee members responsible for presenting the judicial education program on sexual orientation at the Thirteenth Annual Judicial Conference of the District of Columbia in June 1988.

tine. He confronted her with the allegation, and Christine confirmed the fact. After heated words were passed, Ernest left, vowing to take the children away from Christine because she is an "unfit parent." Ernest subsequently hired an attorney to file papers in Court for emergency relief.

Donna is aware of her mother's relationship with Joan; however, Ernest, Jr., is not. Donna learned of her mother's relationship one night quite by accident when she awoke from a bad dream, went into her mother's room for comfort, and found Christine and Joan engaged in lovemaking. Christine spoke to Donna the next morning, at length, concerning the situation. Over the next several weeks Donna came back to her mother with questions. Christine answered her daughter's questions openly and honestly.

Donna has expressed a desire to remain with her mother with full knowledge of her mother's lesbian relationship with Joan. Ernest, Jr., is unaware of the circumstances of the suit but wants to remain with his mother. The case is set for trial today.

## II. PSYCHIATRIC REPORT AND RECOMMENDATION

June 6, 1988

In Re: Jackson v. Jackson

Dear Judge Urbina:

This report is prepared in my role as a court-appointed expert to render my psychiatric opinion to the court as to the best interest of the Jackson children with regard to custody and visitation.

Your request of me was to evaluate both children in regard to their mental health and whether they were showing any evidence of psychiatric disturbance. Additionally, you asked that I formulate an opinion, if possible, as to which parent would better serve as custodian for the children at this point in time. I indicated my willingness to do so, provided that both parents would participate in the evaluation as well. You subsequently ordered this. Both of the parents willingly participated. In addition, I asked each of them to have their current partners participate as well. Again, both partners were willing to do so. Thus, in addition to my examination of Ernest and Christine Jackson as well as their children, Donna and Ernest, Jr., I also saw Elaine Jackson (Mr. Jackson's current wife) and Joan Rice (Christine Jackson's roommate and lover).

### *Current Situation*

Christine Jackson and Ernest Jackson met in the summer of 1966 while both were undergraduate students at Georgetown University. They dated during college and were married on February 14, 1968, in the District of Columbia. Two children were born of the marriage, namely,

Donna Jackson and Ernest Jackson, Jr. Donna is currently age twelve (12) and Ernest, Jr., is age eight (8).

Christine and Ernest are ages forty (40) and forty-two (42) respectively. Ernest and Christine lived as husband and wife until June 2, 1981, at which time they separated. In August 1983, Ernest sought an absolute divorce. The parties were able to settle all matters including child custody, support, and property distribution. The children remained with Christine in the family home. Ernest moved to Philadelphia. Ernest paid child support and visited the children regularly. Ernest always boasted what a good and proper parent Christine was to the children. In March of 1985, Ernest remarried. His new wife Elaine is a school teacher and superintendent of her church's Youth Department. Ernest has become a deacon in the church. Ernest visited the children on a less regular basis after his marriage to Elaine. Elaine gave birth to the couple's first child on February 24, 1987.

In March of 1987, Christine began living with Joan Rice, who is her lover and life partner.

Ernest learned from a friend that Christine and her roommate Joan might be lovers. He went to Washington, D.C., immediately to speak to Christine. He confronted her with the allegation, and Christine confirmed the fact. After heated words, Ernest vowed to take the children away from Christine because she is an "unfit parent," and hired an attorney to file court papers.

Currently, Christine Jackson works full time as a registered nurse at George Washington University Hospital. She works a straight day shift. This means that she leaves the house at 6:30 a.m. in order to be at work at 7 a.m. Her shift ends at 3:30 p.m. She does not have evening meetings. She does not need to travel out of town. Her roommate, Joan Rice, leaves the house about 7:30 a.m. for her job as a health systems analyst. Generally, she returns home between 5:30 p.m. and 6 p.m. She occasionally has evening meetings. She does not need to travel either, except rarely to a business conference.

Because of the work schedules of these two women, although Ms. Jackson must leave early in the morning, Ms. Rice is at home long enough to see the children off to school. After school, Donna comes home. Her mother has made arrangements with a neighbor, whom Donna calls to check in with as soon as she gets home. This neighbor, as well as another one, are generally home after school, as they do not work. They have agreed to be available to Donna in the event of an emergency. The phone numbers of both of these women are said to be on the refrigerator, where they are readily available to Donna. After school, Ernest, Jr., rides the school bus back to the neighborhood, where he then goes directly to a neighbor's home with three other children for after-school daycare. His mother picks him up about 4 p.m., after she gets off from work.

Mr. Jackson, from the time of the separation in June of 1981 until the fall of 1983, visited the children every weekend and, oftentimes, one evening during the week. The visits occurred in the mother's home because the children were so young. On occasion, Mr. Jackson would take Donna out to play or to eat. This visitation arrangement between the two parents went smoothly, according to the history obtained from both of them.

Once Mr. Jackson moved to Philadelphia, the visits became less frequent, due to the time involved in traveling. He did, however, continue to visit on a regular basis that was approximately every other weekend. As Ernest, Jr., became older, more of the visitation took place outside of mother's home, since Mr. Jackson could take the children out on activities. Subsequent to marrying his current wife, Elaine, Mr. Jackson occasionally cancelled or changed his visitation schedule. In general, though, he continued to visit on approximately two weekends per month. In addition, over the entirety of the time, he has had two one-week vacations during which time he has had the children with him, either in Washington or in Philadelphia. Also, the parents have alternated holidays. Again, this visitation schedule has generally gone smoothly.

In regard to the marriage of Ernest and Christine Jackson, they met during college at a fraternity-sorority party. They continued to date throughout college and married when Mr. Jackson graduated.

Although the marriage was initially satisfactory, it was never particularly either a warm or rewarding relationship for either party. Mr. Jackson found himself increasingly dissatisfied with the lack of responsiveness from his wife. He saw her becoming increasingly withdrawn from him, but was at a loss to explain why. Christine Jackson did not find the heterosexual relationship rewarding, as she had hoped it would be. Because Mr. Jackson was working long hours, in his effort to advance his career, Christine Jackson found herself frequently alone during the evenings. She began involving herself in community activities. During these activities, she found herself becoming sexually attracted to women. As she attended the various meetings, she became increasingly aware of her homosexual identity. Finally, it was she who raised the idea of a separation. Mr. Jackson suggested that, instead, they make an effort at marital counseling. His wife agreed, and they attended approximately ten to twelve sessions before Christine Jackson declined further sessions, finding them to be futile. Mr. Jackson was just as happy to stop sessions as well, since he did not find them helpful either. Additionally, he had become interested in a female co-worker. Thus, it was by mutual consent that they agreed upon the separation.

They were able to agree, with the use of attorneys, on a separation agreement. Because Christine Jackson was very eager to have her husband visit, even in her home, and also wanted him to participate in childrearing issues, Mr. Jackson was willing to grant her sole custody.

There was initially disagreement about the amount of child support, but the attorneys involved were able to help the parties work this out.

Subsequent to his move to Philadelphia, Mr. Jackson met and married Elaine Fresno. They met while at a church function. As Elaine Jackson was very involved in her church, she encouraged Mr. Jackson to spend time in church activities as well, which he did. Of note is that subsequent to learning of his ex-wife's homosexuality, he has become even more religious and has even become a deacon in the church. Their marriage, which occurred in March of 1985, is seemingly quite stable. Both parties speak positively about the other. She continued in her profession as a school teacher until the semester break of the 1986-87 school year. She then left her position because she was pregnant. This pregnancy resulted in the birth of a daughter, Monica, on February 24, 1987. Elaine Jackson stayed out of school for the rest of that semester and over the summer to raise their daughter. However, in September 1987, she returned to her job. Monica has been placed in a neighbor's home for daycare during the time that Elaine Jackson is at her job.

Christine Jackson met Joan Rice in 1986 at the home of a mutual friend. They began dating and, in March of last year, began living together. The relationship is a close one. Each woman openly expressed to me her affection for the other, and each expressed her commitment to a long-term, stable relationship with the other. Neither of them has any interest in any other amorous relationship.

#### *Ernest A. Jackson*

Mr. Jackson is a forty-two-year-old man with a college degree in electrical engineering. He is the oldest of five children, having been born and raised in the D.C. area. His early childhood memories are generally pleasant. He describes his mother as being extremely warm, giving, and available to him while he was growing up, since she did not work outside the home. His father, prior to his retirement, was a business executive. Although Mr. Jackson speaks positively about his father, it is clear that the relationship with his father was formal and somewhat distant. His father was quite demanding of him, particularly in regard to academics. Mr. Jackson recalls an early childhood memory from when he and his mother were playing a game after school. On that particular day, his father came home early in the afternoon from work and immediately began castigating his son for playing around instead of doing his homework.

Mr. Jackson stated that this memory has stuck with him and he has always felt somewhat threatened by his father. As a consequence, he has worked hard not only in high school and college, but also in his career. In spite of having achieved almost straight A's throughout his education and having been involved in various club activities as well as now progressing

quite satisfactorily in his career, Mr. Jackson still believes that his father is not quite satisfied with his performance.

With regard to his marriage to Christine Jackson, it appears that one of the primary reasons that he may have chosen her is because she did not seem particularly interested in sex. Indeed, Mr. Jackson shows evidence of insecurity as a male, quite likely because of an ongoing Oedipal conflict from childhood (the Oedipal conflict for boys involves the wish to do away with father, and, subsequently, to fulfill the father's role with mother). The likelihood of this conflict existing seems supported by the fact that Mr. Jackson became quite irate when he confronted Christine with her homosexuality and she acknowledged it. This anger at his ex-wife is quite likely a projection (a turning against someone else) of his anger at himself and an effort to exonerate himself from this *faux pas*, both in his own eyes as well as his father's. His desire to take custody of the children away from his ex-wife appears to be, in part, a manifestation of an ongoing wish to punish her. However, on the other hand, he has much to offer these two children. He has a stable job and marriage. He is truly interested in both of his children and very much wants what is best for them. Clearly, in his eyes, this entails a change of custody. When asked about the children, he has a good deal of knowledge about their early development as well as their current functioning. He has made an effort to continue to be informed and his ex-wife has been happy to give him the information, even during the current proceeding. He is particularly interested in the academic functioning of both children.

He is quite concerned about the effect that his ex-wife's lesbianism will have on the children. He is appalled by the fact that she is openly practicing her homosexuality by having a live-in lover. It is his contention that such a situation cannot be conducive to the upbringing of these children, from either a mental health or a religious prospective. He has not addressed the issue directly with either of the children.

With regard to his interaction with Donna, he is clearly aware of her emerging pubescence. He is aware that she has started her menstrual periods and is cognizant of the fact that this represents a physical change that is heralding her psychological advancement into the face of adolescence. This is demonstrated by the fact that, although he is affectionate with her, he tends to interact with her now in a somewhat more distant fashion. For example, he no longer scoops her up and swings her around with a big hug to give her a greeting as he used to do. He states that Donna has become uncomfortable with him over the past year, whenever the topic of mother comes up. He believes that this is because Donna is aware of mother's sexual orientation and is quite uncomfortable with it.

With Ernest, Jr., he encourages all types of sports activities. Although he will play either board or video games with his son, he clearly wants to push his boy toward more aggressive and typically masculine activities.

He is disturbed by the fact that his son seems not to be particularly interested in any sports. Again, he sees this as a manifestation of his ex-wife's influence by causing his son to be more effeminate.

### *Elaine Jackson*

Elaine Fresno Jackson is the youngest of three children. She was born in New England. There were three moves during the time that she was growing up, prior to the time that she finished high school. All of these resulted from career moves by her father. Her father is deceased. Her mother currently resides on Long Island, New York.

Her early childhood memories are basically unremarkable. Of the three children, she was her father's favorite. After completing high school, she went directly to Pennsylvania State Teacher's College. She has been quite religious throughout her life, as has her entire family. Because of her religious beliefs, she neither drinks nor smokes. (Mr. Jackson used to drink moderately, but has recently given up alcohol altogether.) She is delighted about being a new mother. She is very much in support of her husband's efforts to obtain custody of the children. She recognizes fully that the burden of childcare will fall to her and is prepared for this. Since having been involved with Mr. Jackson, she has often participated in the visits with the children. She feels comfortable with them and believes that they are learning to accept her as well.

### *Christine Jackson*

The ex-Mrs. Jackson is an only child. She was born in Memphis, Tennessee. Her father was a career military officer. Thus, during her childhood, her family moved every two to three years, until she was in junior high school. At that time, her father received a permanent duty assignment in Washington, D.C.

She describes her father as being strict and somewhat overbearing. Mother was described as a typical homemaker—*i.e.*, someone whose primary function was to have meals ready for father at six-thirty every night and to keep the house clean. Her mother did not work outside of the home. She was, however, involved in her daughter's school. Christine Jackson's earliest memory is of swinging on a swing with her girlfriend. This is a happy memory. The swing set was in the backyard, and she recalls that mother, who was often in the kitchen, could look out the window and see them.

Her wish to be a nurse came into being very early in her life. She recalls that when she was growing up that she often wanted to take care of her dolls, while pretending that they had gotten some kind of cut or bruise that required medical attention. Her wish to be a part of a healing profession seems to be an overdetermined resolution to separate conflicts.

First of all, there appears to be a need for nurturance that was not adequately met by either father or mother during her childhood. Secondly, there was an early recognition, albeit vague and unconscious, of her own sexual tendencies. She can recall finding herself attracted to other girls from early adolescence. This was quite distressing to her for many years. She made efforts to deny her homosexuality. In high school, she dated several different boys in an effort to find someone to whom she would be attracted. Although she found many of the boys nice, and could be friends with them, she now recognizes that she was never really in love with any of them. Of note is that although she dated several different boys, she was not sexually active until she met her husband. Upon becoming involved with her ex-husband, she found herself more attracted to him than she had been to any other male in the past. It was because of this fact, as well as her wish not to be a homosexual, that she agreed to marry him. It was her hope that, by marrying and living a normal heterosexual lifestyle, she would be able to overcome her homosexual longings. However, as noted above, she found herself becoming increasingly aware, through the time of their marriage, that this was not working out as she had planned. She did not find the sexual part of their marriage exciting, except when she would fantasize during their foreplay that she was involved with another woman.

Her willingness to enter into marital counseling was her last effort to try to overcome her homosexual longings. Although she is aware that her ex-husband believes that she was not sincere in her efforts at working on marriage, she states this was not the case. Rather, she gave the best effort she could to the sessions. However, even though the therapy did help them open up their lines of communication so that they were spending more time together, she still did not feel sexually attracted to her husband. Eventually, believing it was in the best interest of both her husband and herself, she sought the separation. She is now fully accepting of her homosexuality. Some of her coworkers and all of her close family members know she is a lesbian.

It was through a mutual friend that her ex-husband found out about her homosexuality. When her husband confronted her with this, she was initially reluctant to discuss it with him. However, believing that she had now found a woman with whom she was going to have a long-term relationship, she believed that her ex-husband deserved to know the truth; therefore, she told him about herself. She now regrets having done so, primarily because of the litigation that has ensued and the disruption that the litigation has caused to the lives of herself, her children, and her lover.

With regard to her children, she clearly is quite committed to both of them. She has made a consistent and concerted effort to be as available to them as she can, both emotionally and physically. For example, she has worked hard to find herself a job in a hospital where she works straight days. She has been offered head nurse position, but has turned it down

because it would involve working from 8 a.m. until 5:30 or 6:30 p.m. Therefore, if she were to take this job, she would not be able to be at home with her children as early.

As noted above, her daughter, Donna, got up one night and found her and Joan embracing in bed. Donna was clearly distressed by this, as was Ms. Jackson. Donna wanted mother to talk with her that night about what was going on. Although Ms. Jackson had previously given some thought as to how to broach the subject with her daughter, she felt too emotionally unsettled to do so in the middle of the night. Additionally, she was not sure that, even if she was entirely prepared, that was the right time to do so. However, she did stay awake subsequent to putting Donna back to bed to collect her thoughts. As soon as Donna got up the next morning, she sat down with Donna to explain the situation. She described to me the way that she presented her sexual preference to her daughter that morning. The presentation was fairly short, but included most of the relevant facts. She indicated to Donna that she recognized that this was a shock to her and that she was quite willing to discuss it with her further. Over the next several weeks, Donna came back to her mother with questions, which mother answered openly and honestly, providing all of the information that Donna sought.

Donna has expressed the concern to mother that, because she (Donna) is not very interested in boys, she is wondering whether she might be homosexual as well. Mother has told her that there is no reason to think that she is and, at any rate, it is not something that she need be concerned about because whether Donna turns out to be homosexual or heterosexual mother indicated that she will love her just the same. Mother went on to explain to Donna that many boys and girls at their age are not particularly attracted to members of the opposite sex. She has talked further with Donna about her emerging puberty and adolescence. Mother has also talked with Donna about her feelings about father, including the separation and divorce.

Ms. Jackson knows that Donna is concerned about what other people will think about her relationship with Joan. She stated that Donna was surprised when she told her that friends who visit their home, including a married couple who live down the block, and who have a daughter a year ahead of Donna in school, know of the lesbian relationship. Mother is attentive to Donna's concerns about who knows or how to discuss it, and she responded to Donna's request to help her plan how to tell her best friend.

Donna has told her mother that she is not comfortable talking about mother's homosexuality with father because she knows that father disapproves. Mother has indicated to her that that is fine and has helped her find ways of diverting the topic should it arise. However, mother has

given Donna permission to talk with her father about this, should she so desire.

Ernest, Jr., is not aware of mother's homosexuality, as far as mother is aware (in fact, he does seem unaware of it). In her care of Ernest, Jr., she has made efforts to provide with him all of the activities that are appropriate for a boy. She has enrolled him in Little League as well as in soccer. She is aware that her son does not seem particularly interested in sports. She is also aware that he is not particularly adept at them. She states that his coordination is somewhat below average, which she believes is the reason he tends not to want to participate in the activities. On the other hand, he already is showing interest in Joan's computer. Mother encourages this, as does Joan. They have gotten some video games to play on the computer. Some of them are strictly for fun, whereas others are educational. They encourage him to use both.

Mother's interaction with both of her children is appropriate. She encourages them in what they want to do. When asked to plan a day with all three of them, mother was able to put her needs after theirs. She made suggestions as to places they could go or things they could do. If either of the children seemed not to want to do that, she readily gave up that idea and worked to help them find compromises so that all of them could enjoy the day.

### *Joan Rice*

Joan Rice is thirty-six years old, the older of two children born in Ellicott City, Maryland. Both her parents still reside there. She reports some sibling conflict during childhood and adolescence, but states that she is now very close to her brother, who is married and lives in Baltimore with his seven-year-old son. She feels she is still being integrated into the Jackson household, and she is satisfied to have this integration proceed slowly according mostly to the needs of the children. She loves both of the children and enjoys helping with caretaking. She rarely disciplines the children, believing that their mother is the appropriate person to do this. She enjoys family outings with the children and is especially pleased that Ernest gets along very well with her nephew, whom they visit at least once a month. Christine and the children are always included in family holidays and events, and she believes her family is accepting of her lifestyle.

Joan had her first sexual experience with a woman when she was nineteen years old, and, from the time she was twenty-three until she was thirty-two, she lived with a lover. She believes that relationship ended because they grew in different directions. She feels she knows herself much better now that she is older, and she believes that she and Christine share the common bases for a lifelong commitment.

*Donna Jackson*

Donna was seen with her mother and brother, as well as individually. In the joint sessions, she seemed to be a very early adolescent, wavering back and forth between wanting to act younger than her age and be a peer with her brother, versus acting more like a junior-high-school-age person (she is currently finishing sixth grade and will be going to junior high school next year). When she is functioning in that mode, she is much more aligned with her mother and wants to talk about more feminine interests, while spurning her brother. Overall, her mood is generally happy. She has accomplished the developmental phases of childhood that she should have completed by this age. She is competitive, particularly in gymnastics and swimming, both of which she enjoys. Although she clearly likes to win, she can readily acknowledge that there is another girl who regularly beats her in the back stroke and she seems able to tolerate losing.

With regard to school, she is functioning up to her capabilities. I reviewed her report cards as well as her aptitude scores. (She is of above average intelligence and is getting B's and A's in school.) She has functioned as president of her homeroom this year. This has given her a seat on the student council at school, which means that she makes a brief report to her classmates every month. Although she states that she was initially somewhat shy about doing so, she seems to have gained confidence in this as the year has progressed.

With regard to peers, she has three close girlfriends and others with whom she occasionally will get together. She can both have girls sleep over at her house as well as sleep away without difficulty.

After school, she is at home by herself until mother gets home. She has just started being able to do this, this year. She is quite proud of herself for this independence. She talks proudly about how she presented her case for staying alone to her mother and how she was able to convince her mother that this was alright. She enjoys this time by herself, without mother or brother, even though it is only an hour or so. Twice each week she does not take the bus home from school. Instead, she walks from the school to the nearby athletic building. On one of the days she takes a gymnastics lesson. On the other day she takes swimming.

In discussing mother's homosexuality, she was initially somewhat uncomfortable, even though she stated that her mother had told her that it was alright to talk about it with me. She says her mother has told her that being homosexual is nothing to be ashamed of and that loving somebody deeply is very special. Because she clearly has a good relationship with her mother, she believes this. She is obviously aware, however, that this is not the norm, just as it is not usual for two women to be living together. She has developed a rationalization to give to some people as to why this

is mother's living situation. She tells others that it is cheaper for mother to have someone else live with them to share expenses which, in fact, is true. She has also told some friends, and, although she was worried about this, it has not presented any problems in her friendships. One friend responded by telling her she had guessed it already, because her (the friend's) aunt is a lesbian who has been living with the same woman since before she was born. She states that she can discuss her concerns easily with her mother.

Donna is developing a comfort with Joan as well. She talked about "family" activities that involved not only her and her mother, but also her brother and Joan. These outings, she states, can be fun, as long as they don't happen too often, since the trips do interfere with the time that she can spend with her friends.

I also had a chance to see Donna and Ernest, Jr., with their father. Donna is more reserved with her father than with her mother. She gives the appearance of being somewhat on guard with him, even though I told her that we would not be discussing mother's homosexuality during that visit. As the interview progressed, she became more relaxed and was able to make a joke with her father. Both of them chuckled comfortably.

*Ernest Jackson, Jr.*

As with Donna, Ernest, Jr., was seen in the family setting with both mother as well as with father. Ernest turned eight in February of this year and is finishing up second grade. Overall, he is a pleasant, although somewhat quiet youngster. His developmental history has been basically unremarkable with the exception of the fact that his gross motor skills are not particularly good. However, his fine motor skills are excellent. This came out during the course of one of my individual interviews with him while he was describing his ability to build all sorts of various vehicles and structures out of Legos. He described in great detail the space station that he has built in the basement of his mother's home. I was able to get him to talk about his fantasies of being an astronaut and visiting Mars. (He talked with some disdain about going to the moon, as this had already been done. He sees himself as conquering new territories.) We talked some about sports. He tended to divert the conversation when this topic was raised. He did not acknowledge that he has any problems with his performance. Instead, his excuse was one of lack of interest. In regard to playing soccer, he stated that he could kick the soccer ball just fine, if he wanted to, but it really was not something that he enjoyed doing very often.

From a developmental standpoint, he has accomplished the tasks that he should have for his age. He seems to have achieved an acceptable degree of independence. He is not particularly interested in school, other

than lunch and recess, which are his favorite "subjects." However, as with Donna, I have looked at his report cards and the comments that have been made. It appears that he is making more than adequate progress in his academic pursuits.

With regard to peers, he has several boys with whom he likes to play. He is more comfortable when he can get them to play a game on his computer or play "make believe" using Legos. He will, however, play outside games with them as well.

He, more than Donna, seems to have been affected by the separation and divorce. This is shown in the Baby Bird story (which is a story about a baby bird falling out of the nest while the mother and father are both gone). He described how the bird felt lonely and scared for a while before the parents came back. Of note is that he had the mother bird coming back first, followed by the father bird. He went on to add that, although the mother and father bird had flown away in separate directions and had come back separately, they were very glad to be back all together again. This seems quite likely to be a manifestation of his wish for a reunion of the nuclear family. Also of note is that it was the mother bird who rescued the baby bird and got it back to the nest.

In his interaction with his mother and sister, his reticence disappeared. He was an active participant and, in fact, tended to talk a great deal. His mother occasionally had to encourage him to be quiet. He seemed responsive to her limit-setting. He demonstrated a strong attachment to his sister.

In the interaction with his father and sister, he again was quite talkative. Here, when the task was to find a family activity, he took the lead. He talked knowledgeably and proudly about how they had all been to downtown Philadelphia before to see the Liberty Bell. He told me that it was from the American "Revolution" and was a sign of America's freedom. He looked at his father as he was telling me about this. Father smiled at him and nodded approvingly. Clearly, this was information he had gotten from father during a previous trip while on a visit to Philadelphia. During the interview, Ernest sat close by his father on the couch in my office, but paid very close attention to his sister. Clearly, he is quite attached to his father and misses seeing him. The warmth that was shown with father was also present in the interview with mother, and he clearly enjoys being with her as well.

### *Impressions*

Overall, both of these children are functioning well. They are basically free from any psychopathology, although Ernest is showing some signs of reacting to the separation and divorce. In view of the fact that they have

developed normally so far while in the custody of their mother, I see absolutely no basis for changing custody.

According to the statutory criteria, the primary consideration in making a custody determination is "the best interest of the child." In reviewing the factors to be considered, I conclude that the children should remain with the mother. The basis for this is that there is a good relationship with the mother, and it is my belief that the continuity and stability of the living arrangements of the children should not be disturbed absent good cause. The only factor of significance in this case is the mother's homosexuality. Although this is clearly a factor that is already having an affect on Donna's life and will, when Ernest, Jr., becomes aware of it, have an affect on his life, I do not see that her homosexual preference has adversely affected either of the children.

Furthermore, the father appears less able than the mother to accurately perceive the needs of the children and tends to interpret the children's behavior through his own eyes rather than through their own. I am also concerned that the children's awareness of the father's negative attitude toward the mother, who is the children's primary love object, will be detrimental to the children, whereas the mother, although obviously stressed by the litigation, mostly behaves consistently with a recognition of the importance of the father in the children's lives.

Furthermore, Donna has stated that she wishes to continue to live with the mother. Ernest, Jr., has more difficulty choosing. His preference is that his mother and father would get back together gain. Other than that, he would not state a preference, except to firmly wish to remain with his sister. However, from the other material that was obtained, it appears that Ernest is somewhat more comfortable with mother than with father. Both children would experience loss if they were separated from each other at this time.

I hope this information is sufficient for your purposes. If you have any questions, or need any additional information, I should be happy to provide it for you.

Respectfully submitted,  
Lee H. Haller, M.D.  
15225 Shady Grove Rd., #305  
Rockville, Maryland 20850

LHH/tb

III. TRANSCRIPT OF JUDICIAL CONFERENCE PROGRAM<sup>2</sup>*Cast**Moderator*

Judge Sylvia Bacon

*Attorney for the Mother*

Jane Dolkart, Esq.

*Attorney for the Father*

Nancy D. Polikoff, Esq.

*Expert Witness*

Lee H. Haller, M.D.

*Presiding Judge*

Judge Ricardo Urbina

*Commentators*

Lawrence Brain, M.D.

Jean Hamilton, M.D.

Judge Henry Kennedy

Armin Kuder, Esq.

Deborah Luxenberg, Esq.

Elizabeth Lytle, lesbian mother

Wayne Schwandt, gay father

JUDGE BACON: Our topic this afternoon involves homosexuality. Until the 1970s and 1980s very few persons discussed their sexual orientation. Even fewer lawyers filed lawsuits involving the sexual orientation of their clients. And obviously the pages of the law books contained little or no reference to matters of sexual orientation. But, during the 1970s and '80s, homosexual orientation and homosexual relationships have been acknowledged as a significant factor in our society. And not surprisingly it follows that homosexual behavior becomes a part of our jurisprudence. Indeed in this last week, the Supreme Court of the United States has acted on a case involving the employment rights of persons with homosexual orientation. In this last year, the District of Columbia Court of Appeals has had occasion to write one hundred nineteen pages on a case involving a student organization, a matter with which I had some association. The area of the law, however, in which the issues of homosexuality are most frequently raised, is that of child custody. It is estimated that there are some three to four million lesbian mothers and gay fathers in the United States. In the past, these parents have faced a *per se*

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2. I wrote the script of the direct and cross-examination that formed the basis of this simulated hearing. I also identified the points in the hearing at which to turn to the commentators as well as the specific questions to ask them. The commentators gave their own answers to questions. Judge Bacon, as moderator, wrote her own opening remarks. The transcript of the hearing that appears here has been lightly edited.

unfitness rule. Historically, homosexual parents, like adulterous parents, were deemed unfit as a matter of law to assume the custody of the children. More recently, the courts have been viewing sexual orientation as only one of many factors to consider. The view, however, is not unanimous, and you will in note the materials that are available to you that the Subcommittee on Gay and Lesbian Rights of the District of Columbia Bar has prepared a listing of courts that are pro and con on these issues. Those materials also remind us that the District of Columbia is the only jurisdiction to provide by statute that custody must be determined without conclusive regard to race, color, national origin, political affiliation, sex, or sexual orientation of the parties. Serious questions arise, however, when it comes to determining the best interest of a child of a lesbian mother or a gay father. For example, are homosexuals psychologically or emotionally less stable? Is there evidence that children in homosexual households may be used or molested? Is a homosexual parent likely to raise a homosexual child? Does the child have sexual identity problems? Would children be stigmatized, ostracized, or otherwise negatively viewed as a result of living with a homosexual parent? In an effort to address some of these issues, the judicial conference has assembled a very knowledgeable panel, which you see seated to my left. We have a bevy of psychiatrists, we have a few judges, we have some lawyers, and, probably most significantly, a lesbian mother and a gay father have agreed to join us. We have also assembled a series of courtroom episodes that will be played out here to my right to illustrate the issues that I've touched on. As we begin, I am going to take the prerogative of impaneling you as members of the audience to be persons on one of those rare commodities in the District of Columbia, an advisory jury. And I now swear each of you, at the conclusion of these proceedings, to render a fair and impartial advisory verdict. Indeed, we will be taking a vote.

Now, let's start.

The case you are about to hear bears the caption of *Christine Jackson v. Ernest Jackson*. The material that details the facts are in your packets, but let me tell you that Ms. Christine Jackson now has custody of her two children. They are Donna, age twelve, and Ernest, age eight. She has had custody of them since the separation in 1981. Her former husband, Ernest Jackson, has remarried, and he now seeks to obtain custody. He has recently learned that his wife has a lesbian relationship with Joan Rice, and that Ms. Rice is living in the home of his former wife with the children. He is appalled, and I believe that his former wife readily admits to the relationship, has discussed it with Donna, and intends to live in that relationship as a permanent one. He's worried about his son, who doesn't appear

to be interested in what I'll call "boy-type" sports. Mr. Jackson's lawyer has filed suit for a change of custody. There's been the usual barrage of discovery and acrimonious exchanges. But, with great wisdom, our Judge Urbina has designated a court-appointed psychiatrist, Dr. Lee Haller, who will testify when we come tuning in to this case and hearing the expert examined by counsel on behalf of the mother, Ms. Dolkart, and then on behalf of the father, Ms. Polikoff.

Let me just give you, however, before we start, a couple of facts that surround this case. The Jacksons met in 1966 at Georgetown University; she was a nursing student, and he was in engineering. They got married, had two children, and lived a relatively uneventful marriage for twelve years. In 1981, they separated. The marriage had not been a warm one, and they tried counseling, but nothing worked, and Ms. Jackson was increasingly aware of her own homosexuality. At the time of the divorce, this issue of homosexuality was not on the table. He agreed to her custody, made the support payments regularly, and their separation and divorce were amicable. But now that he has heard of his wife's new situation, he is extremely concerned.

Dr. Haller has interviewed all the key players in this life drama, and, in due course, he will be telling you about his clinical findings. But let's turn now to where Dr. Haller is being qualified as an expert witness: Dr. Haller is a psychiatrist in private practice, and he teaches at Georgetown and George Washington University; he also teaches at the Children's Hospital; he has an impressive group of educational credentials; he has written and is published widely; and he is found to be a qualified expert. All of the preliminary foundations have been laid, and he's about to be asked one of the ultimate questions by Ms. Dolkart. Listen to see how the issue develops, talking about the stability, the sexual identity problems, peer problems, and the relationship of the children to these parents.

MS. DOLKART: Dr. Haller, have you formed an opinion on whether the custody of the children should be changed from Ms. Jackson to Mr. Jackson.

DR. HALLER: Yes, I have.

MS. DOLKART: And what is your opinion?

DR. HALLER: I believe that the children should remain in the custody of their mother.

MS. DOLKART: Could you describe the basis for that opinion?

DR. HALLER: Certainly. The basis I used to formulate my opinion is both psychiatric and legal. Fortunately the overriding principle in both disciplines is the best interest of the child. I considered also the specific factors listed in the D.C. statute in regard to custody, which

are the wishes of the child, the wishes of the children's parents, and the interaction or interrelationships of the child to its parents and siblings, and significant others, in terms of children's adjustment in the homes and the community, and finally, the mental and physical health of all individuals involved.

In addition to evaluating the mental health of each individual, the psychiatric evaluation should look at the psychological parent, which is the parent with whom the child is more attached, whom he turns to for nurturance and assistance. I did this as well. Utilizing these criteria, I determined that it was in the children's best interest—in both children's best interest—to remain in the custody of their mother as they have been with her since birth, are under her care, and both are functioning quite well, in a social, academic, as well as a mental health standpoint. There is no evidence of psychopathology for either of them. Christine Jackson has clearly been and remains quite attendant to her children's needs. For example, she declined a promotion in her job, because that promotion would entail a change in her hours—longer hours and different time—such that she would be less available to provide care for her children. Another example of appropriate care on her part has been that she has allowed her daughter Donna increasing independence and responsibility as she matures. Both children are clearly attached to the mother, in a positive way. In addition, Donna openly voiced her wish to remain with the mother. In short, the best interest of both children is to remain with her since she is the psychological parent of both children.

MS. DOLKART: Dr. Haller, by contrast, would you describe the children's relationship with their father?

MS. POLIKOFF: Your honor, I object to the characterization, "by contrast," it assumes the answer already.

MS. DOLKART: Your honor, I'll rephrase the question. Dr. Haller, will you describe the children's relationship with their father?

DR. HALLER: Certainly. Mr. Jackson is a very loving and caring father who has clearly made a concerted effort to maintain a relationship in his children's lives even though he has now moved to Philadelphia. However, since learning of his ex-wife's homosexuality, he has become quite angry at her. Unfortunately, he has not appropriately shielded the children from his anger at his ex-wife, which has a detrimental impact on them. Another concern I have about Mr. Jackson is his tendency to interpret the children's behavior and act upon his interpretation, rather than engaging in a discussion with the children. For example, with regard to Donna, he has assumed that her discomfort in discussing her mother with him is due to her discomfort with her mother's sexuality when in fact it is due to the fact that

she is disturbed by her father's anger and doesn't want to hear what he has to say.

Another example, this time with regard to Ernest, Jr., is that father has interpreted his rather minimal interest in sports as being the result of mother's homosexuality, and that she is making him effeminate. In fact, his son's relative lack of interest in sports is because he has rather poor gross motor coordination, such that he is not adept at playing outdoor sports. Instead, he has developed an interest in computers, which is an area in which he excels. Of note, incidentally, is that mother is very much aware of the situation of Ernest and has encouraged him by buying a home computer and programs appropriate for his age.

With regard to the children's attachment to the father: Donna tends to be somewhat guarded with him and does not readily volunteer her feelings or engage father in conversations involving sensitive issues. Ernest, Jr., on the other hand, is still very attached to father and sees him in a positive way, with the exception of the fact that he becomes uncomfortable when father tries to push him toward sports activities.

MS. DOLKART: Did you take into account the fact that Ms. Jackson is a lesbian in reaching your recommendation?

DR. HALLER: Yes, I did.

MS. DOLKART: In custody cases where the mother is a lesbian, are there specific factors related to the lesbianism that you would consider?

DR. HALLER: Certainly. In doing any custody evaluation, I take care to examine in detail any unusual factors or concerns that are highlighted by either parent. Certainly, in this case, the mother's lesbianism is such a factor. Therefore, I questioned her extensively about her homosexuality. I found her to have worked through this issue satisfactorily, such that she is now comfortable with herself being a homosexual. Secondly, I looked at the impact on the children. Based on the information that I have obtained from the parents as well as the interviewing material with the children, I could find no evidence of any significant adverse impact on either of the children. In addition, I asked the mother about how she would handle the children's questions about the homosexuality when they arise. Although she was somewhat uncomfortable in this area, in general she seemed to have the right answers. Also, I asked if she were to have a preference for whether the children should grow up to be homosexual or heterosexual. Her choice was that both be heterosexual, since it would be easier on them in their lives.

JUDGE BACON: At this point, let us turn away from our courtroom scene, and ask our experts to note that Dr. Haller's identification of

the lesbianism of the mother was a "unusual factor." Dr. Hamilton, is there any research that tells us what, if anything, is unusual, and how it should be dealt with when lesbians are seeking or have parental responsibility?

DR. HAMILTON: There is a body of literature that addresses lesbians as mothers, and, in general, there have been essentially no other differences between lesbians or heterosexual mothers as parents. In a general way, I believe that an evaluation would be the same, regardless of sexual orientation. In the sense that a psychiatrist always tries to evaluate the whole person, I agree with Dr. Haller's characterization that lesbianism would be included in that evaluation as something unusual, and I also agree that it would be important knowing that the woman was homosexual to evaluate her level of comfort with her homosexuality, and also her concern with her ability to help her children come to an understanding of her sexuality.

JUDGE BACON: Ms. Luxenberg, with that view from the academic side of things, that it's a factor, but one that research says does not reveal significant differences, how could you deal with it in court, where I think you might find some views that there's a substantial difference?

MS. LUXENBERG: Well, in court, as an attorney representing a mother in a case like this, I think it's very important to put a very complete picture of the family life and the relationship between mother and children, the same as in any other custody case. The key in any custody case is information, and factual information, and the more we can give the courts, the better it is, no matter what unusual factors there are.

JUDGE BACON: Let's return for some other issues that are brought out in examination.

MS. DOLKART: Dr. Haller, Dr. Hamilton referred to the existence of a professional body of literature. Did you rely on this literature in assessing the significance of Ms. Jackson's lesbianism to the issue of her retaining custody?

DR. HALLER: Yes, I did.

MS. DOLKART: Could you please summarize the findings that are documented in the literature?

DR. HALLER: Basically, my review as well, which was an extensive review of the literature, found that it is really a nonissue. There are no significant differences in all the studies that have been done, and there are a number of areas that have been looked at in terms of the children's mental health, their gender identity, their sense of self-esteem; there are no apparent differences regardless of whether they were raised in a homosexual or heterosexual household.

- MS. DOLKART: With respect to the Jackson children in particular, could you describe the gender identity of each child?
- DR. HALLER: Yes, both children have successfully completed the developmental phases of childhood that they should have by their ages. This includes an appropriate gender identity, *i.e.*, Ernest sees himself as a boy and is comfortable with that, and Donna sees herself as a girl and she is quite comfortable with that.
- MS. DOLKART: Could you describe, to the extent that you could ascertain it, the sexual orientation of each child?
- DR. HALLER: Yes, with respect to Ernest, Jr., he, of course, has no sexual orientation. An eight-year-old boy has no sexual drive. He's not interested in having any girlfriends, which is absolutely normal for someone of his age. With respect to Donna, she is on the cusp of adolescence and is just entering into it, both physically and emotionally. She has very recently begun hanging posters of male rock stars in her room, as opposed to female pop stars, so there is some indication of a shifting that she seems to be going along the normal lines toward interest in boys, although she as yet is certainly not interested in anything to do with a boyfriend. So, as best I can tell from both children, they are developing along normal lines, and there is no indication of any problems in either of them.
- MS. DOLKART: To the extent that you could ascertain, has living with a lesbian mother produced adverse peer reactions to these children to date?
- MS. POLIKOFF: Objection, your honor, the witness can't possibly know the answer to that.
- MS. DOLKART: Your honor, I asked Dr. Haller to the extent that he could ascertain it. This is an area that he did cover in his evaluation.
- JUDGE URBINA: Objection is overruled.
- DR. HALLER: I discussed this with the mother and with Donna. Donna has concerns in this area, but she has discussed her mother's homosexuality with two of her best friends, and it has worked out well for her. Each of the children, other than that, appears to have good peer relationships. They each have friends, which they play with. Ernest plays with boys and Donna has her activities with girls. Their activities are age and sex appropriate. Adverse peer reactions, although there are definite possibilities, have not come up at this point.
- MS. DOLKART: Doctor, you mention that it is a distinct possibility. In the face of that possibility—that some adverse peer reaction will happen to these children—why do you still believe that it is in their best interest to remain with their mother?
- DR. HALLER: Because the possibility of adverse peer reaction is not a determining factor. The determining factor, as previously stated, is that the children be with their psychological parent. All children face

adversity of some sort; adverse peer reactions may come up about any number of things. These children need to be with the mother, who can protect them and help them work through these adversities, whatever they may be. The mother is the psychological parent. She is the one best able to help them cope with the stresses of life.

**JUDGE BACON:** Let me interrupt here to inquire: Isn't Dr. Haller rather glossing over things when he suggests that all children have some adversities? I guess we all know how cruel children can be to each other, and I'd like to ask Ms. Lytle to see if she could tell us about her experience and her children's experience.

**MS. LYTLE:** Yes, the child who has a homosexual parent does have to face a certain amount of stigma. That stigma is the result of prejudice; it is not created by the lesbian or gay parent nor by the children. My children have responded to the stigma of having a homosexual parent by very selective openness on the issue. Their closest friends know, and a few others. They deliberately shielded themselves from the possible cruelty of their peers.

Most children, especially teenagers, feel different from the norm. If not a homosexual parent that might set them apart, it probably will be something else. It might be a parent's obesity, the way a parent dresses, or speaks, a physical handicap, poverty, or divorce. We can't completely shield our children from this adversity or stigma. We can teach them to face it openly; we can teach them tolerance and openness. We can show them to face this adversity with some measure of strength and courage. To me, these are the important issues. Homosexuality is not what distinguishes a good parent from a bad. And having a homosexual parent is not going to make a difference between a happy child and an unhappy one.

**JUDGE BACON:** Mr. Kuder, could you give us a lawyer's view on this? How would you have handled a decision? Would there have been other witnesses to call? And do you think Dr. Haller is in the real world on this one?

**MR. KUDER:** Without discussing Dr. Haller, certainly as a practicing attorney, certainly I would say you would want to address this whichever side you are on in the courtroom. If you are representing the homosexual parent, you would want to bring in witnesses to describe how well the children are doing with their peers, and, just as in any custody case, you want a balance, a selected group to deal with the stereotypes involved. That is, you would want to bring in a heterosexual father to say that his kids play with these kids, or heterosexual mother. On the other side, you would try to find instances of the children's lives where parents have refused to let their children spend the night or whatever, and you would again, trying to follow what Ms. Luxenberg said, put in the kind of information that if the

judge wants to pick up on it, will pick up that information in support of his or her opinion. I don't think the psychiatrist's word is the last word necessarily in the courtroom, although it is certainly very important.

JUDGE BACON: Let's turn back, then, to deal with another issue, and that is the problem of how the young person becomes aware of the parent's homosexuality.

MS. DOLKART: Dr. Haller, do you know how Donna Jackson became aware of her mother's lesbianism?

DR. HALLER: Yes, I do. She woke up in the middle of the night one night from a bad dream, and went to her mother's room for comfort, whereupon she found her mother and Joan Rice embracing.

MS. DOLKART: What effect if anything did this have on Donna?

DR. HALLER: She was distressed, embarrassed, and confused. However, the next day, she and her mother spoke about it, and they have begun discussing her mother's homosexuality and Donna seems to be working through the issue in a reasonable fashion.

MS. DOLKART: Is Ernest Jackson aware that his mother is a lesbian?

DR. HALLER: No, he doesn't recognize the word "lesbian" and isn't familiar with it. He does know that his mother loves Joan Rice very much, and he seems to accept Joan as a member of the household.

MS. DOLKART: Does he know that his mother and Joan sleep in the same bed?

DR. HALLER: Yes, he does.

MS. DOLKART: And what is his reaction to this fact?

DR. HALLER: Well, until very recently, when I examined him, he stated this as a matter of fact and did not appear to consider it significant. I understand that very recently he has begun to question his mother about why that is.

JUDGE BACON: Let's ask the members of our panel, if we might, is this too good to be true? Will a twelve year old really react to this information in this way? Dr. Hamilton, is there any research that says how this issue might be well handled with children? Or how would you recommend it be handled?

DR. HAMILTON: There's not very much in the research literature; however, there are a number of books and essays, which are somewhat anecdotal, that give examples of how different lesbian mothers have dealt with this information with their children, and obviously this will vary with both the child's age and with the mother's level of comfort with her own homosexuality, but, in general, I would say that it's best to begin to deal with it earlier rather than later, and to deal with it directly, rather than allow the possibility that the child may find out in this kind of way. As an example of how one might deal with the information with that earlier age child, from ages as

young as three to five, one can begin to talk about different kinds of families and to help the child understand that there are many different types of families, including living circumstances and the composition of the family.

JUDGE BACON: Let me interrupt, if I might, to ask first Ms. Lytle and then Mr. Schwandt what their experience was in dealing with these issues?

MS. LYTLE: Well, in my opinion, Christine Jackson's silence, both in actions and in words, about the lesbianism was not in the best interest of the children. It's inconceivable to me, that my twelve year old, even my eight year old, would not understand that I was a lesbian. It's also inconceivable to me that my twelve year old would find this out when she walked in on a bedroom embrace. My lesbianism has been a fact of my children's lives for eleven years now, since my son was eight and my daughter five. When Dan was eight, he told me that he wished that I had a boyfriend. He wanted me to be like other women. I explained why this could not be. When Sarah was twelve, we discussed her reluctance to have a birthday party at our house because of her concern that everyone she might invite would become aware of my lesbianism. We discussed the alternatives. My children are almost grown now, nineteen and fifteen, and we've discussed every question I am scheduled to answer today. To me, these open lines of communications, though painful at times, are essential to good parenting. I believe a child is much better protected when a parent discusses issues as they come up, or, better yet, before they come up, and in terms that the child understands. This is true regardless of the issues.

JUDGE BACON: Mr. Schwandt?

MR. SCHWANDT: I will agree with Elizabeth that the earlier the child is involved in the knowledge of the parent's homosexuality the better. It always doesn't come out the best for the parent, but it does give the child the skills and the knowledge to begin to deal with that, to begin the coming-out processes as the child of a gay or lesbian parent. I think those skills are very important to the child's development.

JUDGE BACON: Let's return to the courtroom and see what views Dr. Haller has on the quality of the relationship between the lesbian partners in this case, and the impact on the children.

MS. DOLKART: Dr. Haller, did you form an opinion concerning the quality and the stability of the relationship between Joan Rice and Ms. Jackson?

DR. HALLER: I did.

MS. DOLKART: And what is that?

DR. HALLER: It's a warm, loving, and giving relationship. It appears stable. Both women are interested in remaining committed to each other. Joan Rice has a good relationship with the Jackson children. She is not seen as a parent, but is an important member of the household for both children.

JUDGE BACON: I guess we all notice that Dr. Haller seems to treat the new lesbian relationship like we might treat a remarriage. Let's see if that's a legitimate way to do it. Dr. Brain?

DR. BRAIN: The fact is that in this situation we have two reconstituted families of both the father and his new wife, and the mother and her lover. I believe, also, that it is essential, that the core issue is, to examine the relationship and the totality of the relationship, the stability and mutuality of the relationship, because in this instance what we are trying to assess is the capacity of these people to be psychological parents, to meet the developmental needs of these children. That is the essential task of parents, and the role of the expert in this situation is to do that and to be able to present this as clearly to the court as possible.

JUDGE BACON: Mr. Schwandt, will you share with us views that you might have on the significance of the stability of a relationship in a homosexual parenting situation?

MR. SCHWANDT: I think what should be evaluated in both Joan and Christine's situation, on the one hand, and Ernest and Elaine's relationship is their willingness and ability to provide a loving, caring, and nurturing home. The lesbian relationship in its essence and by its nature is equivalent to the nongay relationship. Factors which are relevant in providing a good home are the same whether the adult relationship is gay or nongay. The basic issue here is one's ability and willingness to be a co-parent. Elaine's heterosexual orientation doesn't make her a better co-parent than Joan. Elaine could well be hostile to the children of Ernest's prior marriage. Joan is a lesbian who has never been heterosexually married and may indeed enjoy and even relish, the opportunity to parent, and to have children. The added benefit of the children in her relationship with Christine may make their bond stronger, and provide a relationship-enriching factor to their life together.

JUDGE BACON: Let me put the hard question to you, if I might, my colleague Judge Kennedy. What would you look to in assessing this relationship?

JUDGE KENNEDY: One precept in custody cases, which is virtually universally agreed upon, is the need for continuity and permanence in the child's environment. Indeed, one of the favorite buzz words in custody litigation is "stability." Obviously, then, the relationship between Ms. Jackson and her love interest, who lives in the home and

has formed a relationship with the children, is very important. I don't think that anyone would view with opposition that it would probably be very detrimental for the custodial parent to have a love interest or allow that love interest to form a relationship with the children and then come in and out of their lives. One thing that should not and cannot be ignored, that Mr. Jackson and his second wife, by making their marriage vows, have publicly stated their intention to establish a long-term relationship. While we all know about the high incidence of divorce, I would submit there is still some value to a publicly stated intention to remain together. Of course, Ms. Jackson and Ms. Rice were not able to make such a statement of their own intentions. For that reason, it is probably even more important for the psychiatrist to explain why he has concluded that Ms. Jackson's relationship with Ms. Rice is a stable one, that is, one that is likely to endure over a period of time.

JUDGE BACON: It often happens in a courtroom that things are taking a little longer than counsel had expected. I am going to ask them to speed along and address some circumstances that deal with the hostility of this father toward the homosexual relationship.

MS. DOLKART: Dr. Haller, in making your recommendation, did you take into account the father's attitude toward the mother's lesbianism?

DR. HALLER: Yes, I did.

MS. DOLKART: And could you briefly describe that attitude?

DR. HALLER: Yes. He believes his former wife is unfit to raise the children because of her homosexuality, which he finds to be immoral, and believes that the children should not be exposed to it or led to believe that it is acceptable behavior in any way. He believes that the children will not develop normally if they remain with Ms. Jackson. He also believes that she is selfishly putting her needs in front of those of his children, and, therefore, she is not a fit parent. Notice that his discussion of this is filled with anger and disgust.

JUDGE BACON: Let me interrupt here, and turn to our panel again. In view of what role this hostility might play in the case, Ms. Luxenberg, have you considered possibly excluding a hostile parent altogether from custody or visitation?

MS. LUXENBERG: Well, in fact, I think hostility to the other parent is very important in a custody determination, both in the issue of custody and also in visitation as well. It's very important to look at the effect of hostility on the children, and it impacts on custody litigation and in the ultimate court orders, and relitigation of cases when there are problems with visitation, playing games with the children in both custody and visitation matters. The judge really has to take this into

account, as do counsel, in fashioning orders to protect the children, and make sure they have access to both parents.

JUDGE BACON: Mr. Schwandt, you have had some experience with this hostility, and I'd like you to tell us about that experience, if you would.

MR. SCHWANDT: Within my life experience, I have had both sides of the coin. My ex-wife has, over the fifteen years since we have been divorced, worked slowly to educate my son against me, and I have not seen him for the last four years, because four years ago he decided that it was not okay to have a gay father, primarily from the kind of internalized experiences that he had, peer pressure, and use of the word "faggot" on the playground. My lover's ex-wife, on the other hand, has been very supportive of our relationship, and his three sons, who are nineteen, fifteen, and eleven, are an active part of our life. In fact, the youngest one will be coming to live with us at the end of this week.

JUDGE BACON: One way that some courts deal with the issue of homosexual behavior is to talk about restrictions on contact with children, and I am going to ask our participants to start at the top of page seven and illustrate that.

MS. DOLKART: Dr. Haller, if this court were to order as a condition that the children remain in Ms. Jackson's house, that Ms. Rice and Ms. Jackson no longer live together, what, if any, impact do you think that would have on the Jackson children?

DR. HALLER: Being happy to go along with the request of the court, I am happy to respond on the top of page seven. It would have a negative impact in two ways. First, the children would lose their caretaker, part of their caretaking. Ms. Rice is very much involved with their day-to-day activities, getting them off to school. Secondly, there would be an adverse impact in that it would adversely affect Christine Jackson, the mother, by having the loss of her loved one, and, to the extent that it impacts her, it obviously impacts adversely on the children.

MS. DOLKART: Dr. Haller, what if the court were to award custody to Mr. Jackson? Would this attitude have some impact on that?

DR. HALLER: Yes, I think it would be negative. The children are still very attached to their mother, and, if custody is changed to him, they would experience it as a loss. Their father's attitude would mean that it's not even an honored loss, since they could not mourn their mother adequately, because of his anger and inability to discuss the situation with them.

JUDGE BACON: Let's take a moment to discuss the question of whether or not, if custody were awarded to the mother, as recom-

mended by Dr. Haller, there might be any restrictions that arise that are reasonable or constitutional.

MR. KUDER: Aside from the constitutional and practical parts of it, it is, in fact, done. In our neighboring commonwealth of Virginia, a trial judge did it ordered the father not to sleep in the same bed as his lover when the child was present in the home in a case of a homosexual parent. The court of appeals went one step further, and said, "Forget the restriction," and took the child away. We have a body of law on this in the past, because this used to be done in straight sex cases, that is, you could have visitation or custody as long as the "paramour" (or some other loaded word) was not present. I can say that clients who have to make this choice feel the court is merely being punitive and that sometimes it's effective, and I do know one homosexual male couple that meticulously follows the restriction against having any other homosexuals in their home.

JUDGE BACON: Ms. Lytle, how would you feel about a restriction of the kind that we spoke about?

MS. LYTLE: I've lived with my lover and partner for the past ten years. The relationship has challenged me, enriched my life, and brought me happiness, and my children have indirectly benefitted from this. They have also benefitted in trivial terms by increased prosperity. And, in practical terms, by the availability of another loving adult in the household. More importantly I have been able to offer them a model of a primary relationship that contains intense love, stability, common interests, and concerns. My partner and my children care about each other, and they all have gained from the relationship with each other. Frankly, I don't think that restricting a parent from love—and that's what were talking about here—should be available to a judge. Such a restriction perpetuates homophobia. I'd like to think that our courts are prepared to create priorities that go against some of our culture's prejudices. I also think that exposure of our children to the diversity of humanity is in their best interest and in the best interest of society. It's only through such exposure that our next generation is going to learn that a person's sexuality has nothing whatsoever to do with their worth.

JUDGE BACON: Could I next ask Dr. Hamilton if, apart from the legality of the restrictions, any restrictions are needed for the welfare of the children?

DR. HAMILTON: Not only are restrictions not needed, but I believe that it would be absolutely inadvisable, and it would be psychologically damaging to the child. In the first case, if the parent's homosexuality were not a secret, it would give a bizarre and damaging message to the child in several ways. For one thing, it would be to say that the parent is in some way, ultimately, not an acceptable person,

but that the court, as the protector of the child, would go ahead and leave them in the custody of that person.

I think it would also be likely to induce guilt in the child, in terms of in some way feeling somewhat responsible for that sort of restriction in their parent's life. And, secondly, if the parent's homosexuality remained a secret, and this kind of restriction in a sense endorsed that as a secret, I think that it would have deleterious effects, because one of the things we do know as psychiatrists is that having a family secret is psychologically damaging.

JUDGE BACON: Now we have come to an end of the direct examination, and, as counsel has indicated, I will turn this over to Ms. Polikoff for the cross-examination of Dr. Haller. She has some questions for him about the desirability of homosexuality as compared to heterosexuality.

MS. POLIKOFF: Dr. Haller, do you believe that it is a desirable result for both of these children to grow up to be heterosexual?

DR. HALLER: Yes, I do.

MS. POLIKOFF: So, generally, you believe it's preferable to be heterosexual, rather than homosexual, isn't that right?

DR. HALLER: Correct.

MS. POLIKOFF: Now, you have that preference, but you are suggesting by your recommendation that this court should not have this preference. Isn't that right?

DR. HALLER: Not at all. There's no reason to believe that these children will grow up to be homosexual if left in the care of their mother, any more so than if they were raised in the care of their father.

MS. POLIKOFF: But you are, in effect, saying that the court should not prefer a heterosexual home over a lesbian home, even though you say yourself you believe that heterosexuality is preferable?

DR. HALLER: I would hope that the court would prefer the home that would best serve the interest of the children, which is the mother's.

MS. POLIKOFF: You conducted a thorough evaluation of Mr. Jackson and his wife, did you not?

DR. HALLER: I did.

MS. POLIKOFF: And you found them capable of raising these two children, did you not?

DR. HALLER: Basically, yes.

MS. POLIKOFF: So, you would prefer that the children be heterosexual, like Mr. Jackson and his wife, and, furthermore, you found Mr. Jackson and his wife capable of raising his children, and yet you concluded that the children should remain in a homosexual household. Isn't that what you did, Doctor?

DR. HALLER: Yes, I did, and the reason I did so was because the mother is the more capable parent and the children are primarily attached to her.

MS. POLIKOFF: I take it that it is an acceptable outcome to you if these children become homosexual, like their mother?

MS. DOLKART: Your honor, I object. That is not a relevant question.

JUDGE URBINA: Overruled. You may answer the question.

DR. HALLER: The best I can say is that the children, whether raised by mother or father, their sexual preference will not be affected.

MS. POLIKOFF: Would you say that you consider homosexual behavior to be acceptable behavior in today's society?

DR. HALLER: I consider it an increasingly accepted form of behavior, although it is still frowned on.

MS. POLIKOFF: Dr. Haller, are you gay?

MS. DOLKART: Objection, your honor.

JUDGE BACON: This seems like a good point to intervene again. There is obviously some reason to believe that Dr. Haller is much too sympathetic to the homosexual community, but let's ask the judges and the lawyers to comment very briefly on the propriety of the question. Let's start with you, Judge Kennedy.

JUDGE KENNEDY: I don't think the question should be allowed. The strongest argument to allow it in is that the question is relevant to show the bias of the witness. "Bias," as we all know, is a term of art and is used to indicate a considerable variety of mental attitudes, which are manifested in various ways. I don't believe, however, that because the witness shares an immutable characteristic, such as sexual preference or race, with the party, that he also shares with ten thousands of other people, tells you anything about the beliefs of the witness testifying for or against him in court. The most I can say is that we have a gut feeling that gays and blacks are favorably inclined toward one another. I've never read any judge's opinions or findings of fact that indicate that a certain witness was less believable because the witness, like the party that called him to testify, was black or they were both Jewish or both had light skins. So, I don't think (of course this should not be considered a precedent or anything), but I don't think the question should be allowed.

JUDGE BACON: A good tough cross-examination. Would you do it, Mr. Kuder?

MR. KUDER: After the judge ruled? I would say that there are other ways to get at the same thing. If this witness has spoken on gay rights issues, or is a member of an organization that has taken positions, I would argue a little bit more fervently for that information than I would for his own personal preference.

JUDGE BACON: You've had some advice, Judge Urbina, do you want to rule?

JUDGE URBINA: The objection is sustained.

JUDGE BACON: All right, let's turn back to the courtroom scene. I think Ms. Polikoff is off on morality and homosexuality.

MS. POLIKOFF: Is it safe to say, Doctor, that you do not find homosexuality to be abhorrent? Isn't that true?

DR. HALLER: That's correct.

MS. POLIKOFF: Or immoral?

DR. HALLER: Correct.

MS. POLIKOFF: Now, Mr. Jackson does find it to be abhorrent and immoral, isn't that right?

DR. HALLER: Yes, I believe it is.

MS. POLIKOFF: And you would agree, would you not, that such a view is held by a substantial portion of the population?

MS. DOLKART: Objection, your honor. That's outside the area of expertise of this witness, what the substantial portion of the population thinks.

MS. POLIKOFF: Your honor, I think this court needs to fully consider the impact of this witness' recommendation that the children continue to live in an unnatural situation. I think the court is entitled to know that the witness himself fully comprehends the impact of his recommendation.

JUDGE URBINA: Objection is overruled, on different grounds.

DR. HALLER: I can only answer that as a lay person, rather than as an expert, but I would agree.

MS. POLIKOFF: Now your recommendation is based, is it not, upon your conclusions concerning the best interest of the Jackson children?

DR. HALLER: Yes, it is.

MS. POLIKOFF: Do you consider it consistent with their best interest for them to view homosexual behavior as moral and acceptable?

DR. HALLER: Yes, I do. It is certainly not inconsistent with their best interest.

MS. POLIKOFF: Are you aware that the sexual activity in which Ms. Jackson and Ms. Rice engage is a crime in this jurisdiction?

MS. DOLKART: Objection, your honor. There is, first of all, absolutely no evidence concerning the client's sexual practices, and, furthermore, this line of questioning is irrelevant. Counsel is trying to make the mother's lesbianism the focus of this trial, and, in this jurisdiction, there is a statute that specifically states that the sexual orientation of a parent is not to be considered conclusive in determining custody, and I would request your honor to direct Ms. Polikoff to move on to a more relevant line of questioning.

JUDGE BACON: Before the judge has to rule, we'll give him a little more advice from our panel, and this time, Mr. Kuder, I'll let you start.

MR. KUDER: Well, of course, the statute only says that lesbianism or the male equivalent alone is not grounds for doing it one way or another, so you would certainly want to find out what the impact is on these children in the community in which they live, and I would try to bring in as many facts on that question as I could, whichever side of the issue I was on.

JUDGE BACON: Ms. Luxenberg, how would you deal with it?

MS. LUXENBERG: I agree with what Mr. Kuder said, although I would add something a little further, having just had the experience of litigating a case in which I represented a heterosexual mother and the father was gay, and it was a custody modification, and I stipulated at the outset that sexual orientation wasn't an issue, and AIDS [Acquired Immune Deficiency Syndrome] was also relevant in this case, and I stipulated that AIDS was not casually contagious, and the other side continually made the homosexuality an issue. And I basically sat there with my hands folded. I think you can bend over a little bit backwards when you have this kind of an issue, or any other issue that is considered "unusual." What is relevant is all of the factors set out in the D.C. code, what is overall relevant is the best interest of the child. To lose that focus is a mistake. Balancing in a difficult case is the difficult question.

JUDGE BACON: Let's turn away for a moment from the legal aspects of what's relevant and find out in human terms, if we can, from you, Dr. Brain, what's the impact of the moral and criminal statutes about homosexuality on the children?

DR. BRAIN: I think while it's an attractive topic, the essential issue here is the parenting skills of these parties. As I would remind you again, from numerous studies comparing heterosexual single mothers and lesbian mothers, there is no discernable difference and that the sexuality *per se* is not the central issue. What is the central issue is the parenting capacity and the capacity to meet the psychological needs of the children, that is what I would advise the court to focus on.

JUDGE URBINA: The question assumes conduct that is not in evidence in this case. The objection is sustained.

MS. POLIKOFF: Dr. Haller, you testified on direct, did you not, that every study of the matter concludes that these children are not more likely to be homosexual if they are raised by their lesbian mother?

DR. HALLER: Yes, I did.

MS. POLIKOFF: Dr. Haller, do you really believe that?

DR. HALLER: Yes.

- MS. POLIKOFF: Well, now, isn't it fair to say that, if the court leaves these children in a lesbian home, it is, in effect, telling the children that homosexuality is acceptable?
- DR. HALLER: I would not presume to interpret what the court believes.
- MS. POLIKOFF: Well, but if the court removes them from this lesbian home and places them in the loving, caring, and competent home of their father and his new wife, to provide, essentially, a normal family household, it will at least be telling the children that homosexuality is not acceptable, isn't that right?
- DR. HALLER: That might be the intent of the order, but the children will interpret such a change in custody as a loss of their primary caretaker.
- MS. POLIKOFF: Well, let's say the custody is not changed, and let's just say the children believe, therefore, that homosexuality is acceptable, which, as we said, a substantial portion of the population does not. Isn't it fair to say they will be less inhibited in engaging in homosexual behavior?
- DR. HALLER: Well, it's not fair to say that they are more likely to be homosexual. It may be more likely that they will experiment with homosexual behavior.
- MS. POLIKOFF: Well, and, if they experiment, as you say, with homosexual behavior, you would not conclude that such experimentation would be contrary to their best interests?
- DR. HALLER: Not necessarily. Both homosexuals and heterosexuals, as they are going through adolescence, will experiment with homosexual behavior.
- MS. POLIKOFF: Dr. Haller, would you say that the development of healthy peer relationships is a significant component of the mental health of children, especially adolescents?
- DR. HALLER: Yes, I would.
- MS. POLIKOFF: And in your judgement, would you expect these children to be affected in that regard, through, for example, teasing at school or being unable to have friends come to their home because of other parents' disapproval?
- DR. HALLER: It is certainly possible.
- MS. POLIKOFF: Dr. Haller, did you inquire of Ms. Jackson whether she has lesbian or gay male friends who come to her home and are in the presence of children?
- DR. HALLER: I did.
- MS. POLIKOFF: And she has those friends, doesn't she?
- DR. HALLER: Yes.
- MS. POLIKOFF: So, her children, including her eight-year-old son, sometimes find themselves in the company of adult homosexuals, males as well as females. Isn't that correct?

DR. HALLER: Yes, and there are heterosexuals there as well.

MS. POLIKOFF: Well, did you or did you not consider the fact that there are homosexuals who come to this home relevant to the children's best interest?

DR. HALLER: Not particularly.

JUDGE BACON: Let me ask the members of our panel at this point whether or not they are persuaded by Dr. Haller's responses on the impact of homosexuals associating with the children. Mr. Schwandt, do you want to try that one?

MR. SCHWANDT: Sure. The vast majority of gay people were raised in heterosexual environments. Although there were many nongay people in our homes, schools, or churches, their presence did not make us nongay. Sexual orientation is not determined by the sexual orientation of our parents or anyone else in our environment.

JUDGE BACON: Dr. Brain, how would you judge a good homosexual environment, one that would be safe for the children? Would you take the same view as Dr. Haller?

DR. BRAIN: Of course, the environment they are in is significant, but I would remind you that the majority of children questioned about the influences that they experienced in any divorced family is the fact of the divorce itself. What you are assessing is whether or not this home can provide for their needs, and we all know that, to the degree that there is conflict or recrimination and the children get caught in the fighting between one party or another, those are the determinants that are most pathological for the children.

JUDGE BACON: Judge Kennedy, how would you approach the matter of this impact on the children?

JUDGE KENNEDY: Well, I suppose I agree with Dr. Brain. I think this line of questioning is rather offensive in that it simply panders to the stereotype about gays. The stereotype that is being summoned by these questions is that a homosexual is more likely than a heterosexual to molest children. I don't think that any of the evidence supports this. So I agree with Dr. Brain.

JUDGE BACON: Let's turn back then to cross-examinations.

MS. POLIKOFF: Your honor, this concludes my cross-examination.

JUDGE URBINA: Doctor, I have one question for you. Is homosexuality a mental disease?

DR. HALLER: No, your honor, it is not. It was removed from the *Diagnostic and Statistical Manual [of Mental Disorders]*, which is the official publication of the American Psychiatric Association, in 1973, so it no longer is classified as a mental illness or disorder.

JUDGE URBINA: All right. Well, I think we've heard enough testimony for the day. This trial is recessed.

JUDGE BACON: Now, let's imagine that the judge is gone, so I, therefore, open it to the floor, and invite the audience to put questions to our panel, to our *dramatis personae* or to make comment. All right, let me put one now; I will take a little prerogative as a moderator. Would one of the psychiatrists like to tell us about how homosexuality develops or what influences the sexual identity of a child?

DR. HAMILTON: The short answer is that we don't know.

JUDGE BACON: Well, let's try genes, environment, Freudian complexes, whatever.

DR. HAMILTON: Well, to elaborate, we virtually have no ideas based on empirical data. In fact, we do know more about what does not cause homosexuality than what does. We have heard today that the sexual orientation of the parents does not cause, or prohibit from happening, the child's orientation, and so on. Most of the myths, in fact, have been shattered by the data.

Perhaps the most important point that I could make, however, is that the question of what causes homosexuality is probably not the most important question to ask. I think that I could make this point most clearly by making an analogy. For example, we could ask, "What is the cause of one person's versus another person's favorite color?" We could call this color preference, or color orientation. Giving this example, I don't mean to trivialize the importance of the stigma attached to homosexuality in our society, but what I do want to make clear are the limitations when we ask questions about complex phenomena such as human behavior and preferences.

We could bring to bear multi-millions of dollars worth of scientific methods and resources, and so on, and put the whole NIH [National Institutes of Health] to work on the question of what determines color preference or homosexuality, and, after this million-dollar workup, what we would come up with would be, "Well, it's partly genes; it's partly environment; it's partly the person's experiences; and so on." I think it's really important to ask, "Where should we put our resources?" This may not be a particularly important question, given that the answer is multiply determined.

On the other hand, one of the interesting hypotheses at this time is that there may, in fact, be some hormonal basis for at least adult male homosexuality in terms of exposure prenatally, this is *in utero*, to hormones that result from high levels of stress in the mother, and this can be assessed by giving pharmacologic doses of hormones and showing differential responses. So, to the extent that there may be some biological basis upon which sociocultural and other factors contribute, this is one possibility.

JUDGE BACON: I see we have a question. Yes sir.

AUDIENCE MEMBER: Would the views of the panel and witness be the same if the relationships, heterosexual and homosexual, were just as stable but not monogamous?

JUDGE BACON: Good question. Dr. Haller?

DR. HALLER: I am confused by your statement that they are just as stable but not monogamous.

AUDIENCE MEMBER: A *menage-a-trois*?

DR. HALLER: Whether it is a male and two females, or some other combination in the household?

AUDIENCE MEMBER: Any nonmonogamous, seemingly stable, family relationship.

DR. HALLER: It's an interesting question, but the basic factors remain unchanged, which is assessing all the things that were assessed in this case, which is looking at the two parents involved, and their emotional health and well-being, and how they take care of, nurture, and protect the children. To the extent that the relationship of other people living in the home impacts the children adversely, one would hope to correct that or shield the children from it. On the other hand, if it is to the children's benefit, there is no reason that I can think of right off the bat to automatically exclude the children. No more so than some other kind of communal living situation.

JUDGE BACON: Dr. Haller, we have another question.

AUDIENCE MEMBER: I would like to ask, the panel has indicated, that stability is useful to the children, and a large number of sexual partners that come and go would not be in the children's interest. My question to the panel is, if the parents were promiscuous, is it worse to be homosexually promiscuous or heterosexually promiscuous? Or is there a difference?

DR. BRAIN: I don't think there's any difference. I think that I've seen children in both situations, each find it distressing to wake up and find a stranger in your parent's bed. It's a distressing experience. What we are hoping the parents provide for their children is a sense of continuity and a sense of role modeling about the quality of the relationships. Promiscuous parents—either homosexual or heterosexual—are detrimental to their children, if they don't shield the children from that process and experience.

JUDGE BACON: Another question.

AUDIENCE MEMBER: I wonder whether the apparent absence from the panel of a judge, lawyer, or psychiatrist who felt that the homosexuality of a parent was a substantial negative factor, reflected the inability to find any such judge, lawyer, or psychiatrist.

JUDGE BACON: You might address that to Judge von Kann.

JUDGE VON KANN: We had good luck.

JUDGE BACON: I think what we found as we were investigating this area is that the focus really is on the factors that are outlined in the D.C. statute, without regard to sexual orientation. But let me inquire among our psychiatric experts and our lawyers in general, what do you find out there in terms of literature to the contrary? I gather there isn't literature to the contrary from Dr. Hamilton.

DR. HAMILTON: There is not empirical literature, meaning literature based on data that has been collected and analyzed; however, there is at least one psychiatrist who has done some writing and some speaking more from a psychoanalytic and a theoretical point of view.

MR. KUDER: There are people who are still quite openly racist, and I don't think they would add to the dialogue on racism, in the context of 1988. I do think, as I answered a couple of the questions, there are things that arise out of the situation that don't have anything to do with sexual preference other than they may be there, that people have to consider. Who can help but be moved by Ms. Lytle's comparison of experiences of her children to children of, say, a terribly obese person? I think what we are engaged in here is to try and eliminate what the statute says we should eliminate, and focus on the real issues, and I don't think you have to do that by having someone here who says that the statute ought to be removed.

JUDGE BACON: Another question.

AUDIENCE MEMBER: I understand Dr. Haller to say that his interest was in the best interest of the children, but, in determining this interest, he looked at the attitude of the father. Suppose they both had the same attitude and the same interest in the children—would your answer be the same?

DR. HALLER: Yes, it would, and the reason for that is the attachment of the children, and the one thing that is different about this particular scenario, is that the parents really don't start out on an even footing, because father has been separated from the children for quite some time, and this really is a change of custody setting. I am aware there are different legal criteria for that, and there are certainly different psychological criteria. But, even if it were an original custody determination, as we approached it here, the primary factors you are looking for are two: the attachment of the children and the parent who can best look after them. So, from my standpoint, even if father were not vehemently vindictive, as we painted him to be, the result will be the same.

JUDGE BACON: Dr. Brain?

DR. BRAIN: I would like to put a somewhat different twist on this and challenge my colleague here. Given the fact the father's attitude is a very negative one, people may be aware that Freud and Solnit have suggested in their book *Beyond the Best Interests of the Child* that

the custodial parent be given the right to determine visitation, and I would ask Dr. Haller in this particular case, given the father's attitude, would he encourage nonvisitation in order to protect the best interest of the children?

JUDGE BACON: Would you like to respond?

DR. HALLER: I'd be delighted. Dr. Brain and I have talked about these issues a great deal, because he and I come into contact with each other outside of the courtroom, rather than in the courtroom, and because we generally agree right down the road, so we rarely come into conflict in court. Joe Goldstein, who is an attorney; Anna Freud, who is a lay psychoanalyst; and Al Solnit wrote a book I'm sure everyone is familiar with, *Beyond the Best Interests of the Child*, several years ago, in which they introduced the best interest of the child and "the psychological parent," and that's been picked up. But they also said that, once you give sole custody to somebody, that parent ought to have sole determination over visitation, given the control of the child's life entirely. So, it's interesting, that in this particular instance, if you were to follow that line, which is not, as you are aware, being followed in the courts, that not only would custody be awarded to the mother, but she would have the authority to say, "I don't think, father, until you clean up your act toward me, that the kids are going to see you at all."

Now you can debate the pros and cons, and I think it would be wonderful to have that kind of debate somewhere down the line. My own inclination is to head in that direction. I hesitate to say so, because I want to encourage both parents to visit, and I want to encourage the involvement of both parents, because we know that mothers and fathers are tremendously important in raising children, and their mental health. On the other hand, over and over and over in my office, and I know other mental health professionals, we see children whose primary problem is the parents. One of them is tearing the other up, or the parents are doing battle with each other and the kids are caught in the middle.

So I am inclined, if I could, to suggest to the court that Mr. Jackson's visitation be terminated or supervised or that some type of restraint be put on that, as best the court can do, to encourage him strongly to deal with his anger in some other way than taking it out on his children. It's not a problem that he is angry at mother particularly—if that's what he wants to do, okay—but to foist that on the children is to their detriment. That's not fair to them.

JUDGE BACON: Thank you, Dr. Haller. As we come to the end of our time, I had promised the members of our courtroom scene, that they could step out of their roles if there was anything they wanted to say. Anybody?

DR. HALLER: The only thing I wanted to say is that we set this up intentionally so I would get to see everybody and that's the only way to do a legitimate child custody evaluation—is for the mental health professional, whoever it is, to be able to see mother and father. Otherwise, you have nothing to compare; so my hope is that the court system will be able to go along with that.

JUDGE BACON: Thank you. We do come to the end of our time.

I must remember that I told you that I would take a straw vote. How many of you would award custody to Ms. Jackson? Those of a contrary view? I think I can probably dispense with the special verdict and the polling, and merely say thank you.

**G**

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# THE LAMBDA UPDATE

THE NEWSLETTER OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND ■ VOLUME 13 ■ NO. 2 ■ SUMMER 1996

## U.S. Supreme Court Rules Amendment 2 Unconstitutional!

by Suzanne B. Goldberg

**T**he legal landscape for lesbians and gay men changed dramatically on Monday, May 20, with a United States Supreme Court ruling that clearly and unequivocally struck down Colorado's Amendment 2. A solid six-judge majority of the Court rejected gay bashing by ballot initiative, making clear that government cannot make laws based on animosity toward gay people. Concluding that Amendment 2's only purpose was to render gay people "unequal to everyone else," the Court held, "[t]his Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."

Amendment 2, passed by a slim majority of state voters in November 1992, sought to bar all levels of Colorado government from ever prohibiting discrimination against lesbian, gay, and bisexual Coloradans, no matter how great the need for such protections. Fortunately, as a result of nearly four years of legal action by Lambda and our co-counsel, Amendment 2 never took effect.

The Supreme Court's ruling marks a dramatic shift from its previous reliance on the "moral disapproval of homosexuality" to uphold Georgia's "sodomy" law in *Bowers v. Hardwick* ten years ago. We hope this signals the end to that case's legacy of legal sanctions for anti-gay discrimination. Affirming the hallmark of democracy, the Court said that the majority may not trample a minority's rights and berated Amendment 2 as being outside of "our constitutional tradition." All Americans, gay and non-gay alike, must have the same access to their government.

Importantly, the Court also put in its proper place right-wing extremists' "special rights" rhetoric, stating plainly, "[w]e find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people, either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."

The decision's first ripple effects should be felt almost immediately when the Court takes action on another Lambda case, *Equality Foundation v. The City of Cincinnati*, which challenges the Amendment 2-style revision to Cincinnati's city charter which voters passed in 1993. In this case, a federal appeals court had upheld Cincinnati's Issue 3 for the very same reasons the Supreme Court rejected Amendment 2. We are looking for a reversal of the appellate court's disastrous opinion once the Supreme Court sends the Cincinnati case back down for a new ruling in light of the decision in *Romer*.

We also are heading back to Alachua County, Florida in the coming months to argue that a charter amendment, which prohibits protections based on "sexual orientation," likewise reflects only anti-gay sentiment and must be

stricken as impermissible for the same reasons as Amendment 2. Other anti-gay initiative efforts in Oregon and Idaho may be grinding to a halt, thanks to the Court's wise ruling.

The decision's long-term effects, however, will not stop with anti-gay initiatives. We will use the ruling as a weapon in our legal arsenal to defeat all attempts by the government to treat lesbians and gay men as second-class citizens.

We also know that the battles ahead remain difficult. Even as this victory was announced, anti-gay groups across the country vowed to redouble their efforts to deny us equality. In addition to the spate of anti-marriage legislation across the country, proposals to limit our rights in education, in family law, and in other areas abound. Anti-gay violence, too, rages on at epidemic levels.

Although it provides us with significant legal momentum, the Court's decision has the practical effect of returning us to the status quo: gay people again have the right to seek protection against discrimination from our government. Still, Colorado, like forty other states, does not have a state-wide law prohibit-



Bob Roehr

**Amendment 2 plaintiffs and attorneys before the U.S. Supreme Court hearing in October 1995. Suzanne Goldberg is pictured at far left.**

ing sexual orientation discrimination. We must also redouble our efforts, relying on the moral force of the Court's powerful rejection of anti-gay prejudice, to demand full equality.

As we savor this victory and turn to on-going battles, we can draw strength and courage from this historic Supreme Court ruling, knowing that lesbians and gay men in America have moved a step closer to gaining equality. ▼

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Lambda Legal Defense and Education Fund is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men and people with HIV/AIDS, through impact litigation, education and public policy work. Founded in 1973, Lambda is not-for-profit and tax-exempt.

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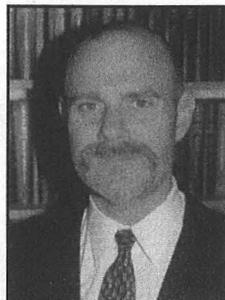
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**EXECUTIVE DIRECTOR'S UPDATE**

by Kevin M. Cathcart

**A**t the beginning of May, Lambda's Board of Directors met to discuss future growth for the organization and to plan for our next major expansion. I am very happy to announce the plan made at that meeting: Lambda



DM Reznik

**Kevin M. Cathcart**  
**Executive Director**

will be opening a Southern Regional Office, based in Atlanta, in the spring of 1997.

Six years ago, Lambda began operating on a regional office model, when we opened our Western Regional Office in Los Angeles. Starting off with just two staff people, that office now has three attorneys and legal, development, and administrative assistants, and does a wide range of work throughout its nine state region.

Three years later, in June 1993, Lambda expanded again, this time with the opening of our Midwest Regional Office in Chicago. This office also started with one attorney and one support staff person, and now has two attorneys and legal, development, and administrative assistants working to cover an eight state region.

Throughout the last six years we have been very happy with the results we have been able to achieve through our regional offices. They create a much greater Lambda presence in each area than we could ever have operating from one national office in New York.

This presence has a direct impact on our work, as we get more calls from people facing discrimination or needing information about lesbian, gay, or HIV-related discrimination. We are able to work more closely with local and regional organizations and attorneys, and are able to do much more public education, both through conferences and workshops and with the media, because the time and cost of travel is lessened.

As you read this Update, you will see many examples of the work of each of those offices, in both the docket and activities sections. And soon, when you read future Updates, you will see a similar increase in Lambda's work throughout the southeastern United States.

With Atlanta serving as our hub, we will be able to have a greater presence from Virginia to Florida to Louisiana, increasing our litigation and educational efforts and bringing Lambda's resources to bear on the civil rights work being done across the region.

From our experiences in Los Angeles and Chicago, we know that opening an office with only two staff people is not enough as we are then spread too thin to impact the region in the ways we want. So our goal for this new office is to open with four staff members: two attorneys and two support staff. In this way we think we will be able to have a real presence and immediately begin making a greater difference in lesbian, gay, and HIV-related civil rights work.

Work in the southeast is not new for Lambda; we have long been working in those states, and as you will read our current docket includes anti-gay referenda, access to health care, sodomy, custody, and criminal law matters across the region. But there is much, much more to do!

While this is an incredible step forward for Lambda, it is also an incredible challenge. A new office, with four staff and a full docket, adds between two and three hundred thousand dollars a year to Lambda's budget. While we leverage this, with the help of donated services from cooperating attorneys, into much more work, we still have to raise the initial money.

I hope that everyone who reads this Update and is excited about the prospect of this third regional office will help to spread the word, in the Southeast and across the country, about Lambda's work and goals. We need more members, more Partners and Liberty Circle donors, and more cooperating attorneys, to help us make a smooth transition to this new level of operations.

We will be working hard to make this expansion happen as quickly as possible. And if every member helped by getting one friend to join, or to increase their giving to a higher level, we could do so much more, so much faster. I hope that you when you read about the work detailed in this Update, you will want to help us with this plan. Thank you for this help, and for the support that makes all of Lambda's work possible. ▼

## LEGAL DIRECTOR'S UPDATE

by Beatrice Dohrn

**A**s this Update goes to press, I have been preparing a speech for a PFLAG event in Orlando, Florida. It has reminded me of how moving a moment it always is, at pride events, when the parental delegation marches by.

There's a tinge of sadness to this fact, though. Our delight implies surprise, and our surprise reflects how we've been taught to expect so little. Why are we surprised when we get the love and support of even our parents and friends?

We've all been exposed to the omnipresent message that it's no good to be gay (or at least, less good); if you are, you've disappointed your family, and if they tell you otherwise, they're lying.

In the legal arena, as in the social one, the battle for full and equal citizenship for lesbians and gay men is only beginning to come out from under the weight of our own community's lack of a sense of entitlement to full equality. We have been damaged as a community by all those negative messages about ourselves. It has taken time for us to find the voice to stand up and say that second-class citizenship is no longer enough.

We must demand full political support from all fair-minded Americans. But in obtaining it we must take into account the pace with which we ourselves have progressed. Think about how relatively quickly the landscape has changed, in terms of what we're asking for, and how we're demanding it. For example, just under twenty years ago, I was a young feminist working with NOW. The training on how to lobby in favor of the then-proposed federal Equal Rights Amendment (which never was adopted) taught us to treat as preposterous the notion that the ERA could lead to "gay marriage," and to reassure that such a thing was nowhere on the agenda. Look how much has changed!

It can't be surprising to us that we have a lot of work to do, as a result of all this



**Beatrice Dohrn**  
Legal Director

*Martin Gram*

change. If you think about how hard it has been for us to shed the negative effects of our oppression, you see that it's a lot to expect others to understand our changes without some help. We need to come out, and then talk and discuss and explain to fair-minded people, so that they too cover the ground that we've recently taken, and then join us in our fight against the backlash that's always provoked by progress.

It's a mistake to separate the legal arena from the social one, as each feeds the other

**It's a mistake to separate the legal arena from the social one, as each feeds the other in important ways. So, too, Lambda's legal and educational work constantly catalyze one another.**

in important ways. So, too, Lambda's legal and educational work constantly catalyze one another. The discussion that the legal battles has generated portends what the prospects are for winning full lesbian and gay equality. A lot of this discussion, of course, is happening over our efforts at securing the right to marry. That debate also feeds other topics, mostly revolving around ugly, old, and pernicious stereotypes, particularly concerning the relationship between lesbian and gay sexual orientation and children. Of course, we see this in all of our work on adoption, custody, or even visitation by gay or lesbian parents. The potent stereotypes are at issue in legislation that aims to foreclose recognition of lesbian and

gay marriages should we win the right to marry, but also in efforts to prohibit anything gay-tolerant from being spoken in or around a school, or in or around youth groups, or in or around even clubs that youth themselves choose to form and organize.

Lambda's litigation work is not less important now that our issues are before the court of public opinion. If anything, its significance and potential for broad impact is enhanced by the positive developments in the educational work. As a Lambda member, you already contribute in one important way to the potential for progress that we are realizing in this interesting time. In addition, we each should participate in the ongoing public discussion.

We'd all like to believe that the law is pure, and that our efforts to gain equal treatment will be evaluated on the merits, exclusively. In fact, though, judges are human, and they are members of our society, too. Particularly where social change is at issue, a climate of some receptivity is a very important background element to progress in the courts. Lambda's members, and the lesbian and gay community and our allies, have a very important role to play in fostering the development of that climate. ▼

### Publications List Expanded

See our newly expanded listings of Lambda publications on page 32 where you will find an introduction to three new Lambda publications as well as a number of papers, materials, and pamphlets that we have available.

## WESTERN REGIONAL OFFICE UPDATE

by Jennifer C. Pizer

**I**t is hard to believe that four months have flown by since I arrived here in Los Angeles. Thanks to the support of everyone in the office, I am finding my bearings and we are coalescing as a powerful team. Having served on the Lambda's board for three years, much at Lambda was familiar when I arrived. There were two things, however, that I had not fully appreciated: the truly outstanding caliber of the staff in this office, and the remarkable amount of critical community service that never appears in our litigation docket.

Most prominent is our work for equal marriage rights. From Alaska to New Mexico, and throughout California, every member of our staff is engaged in the effort to beat back the "anti-marriage" backlash.



**Jennifer C. Pizer**  
WRO Managing  
Attorney

Rocky Lewis

Jon Davidson and I have drafted model talking points, legislative testimony, and other briefing materials which are in use across the region. We work with local Freedom To Marry Coalitions and speak at community forums, to law schools, and with countless reporters.

As the "anti-marriage" bills have proliferated, so too have our partnerships with activists throughout the West. And, so far, the results have been impressive. Like never before, gay and non-gay people alike are speaking out, writing letters, and getting involved. Within this blossoming movement, Lambda continues to supply key analysis and leadership. In the California Freedom To Marry Coalition, for example, we not only supply legal information and analysis, but we also host regular statewide conference calls to facilitate the educational work. Behind this broad campaign is our recognition that the judges who will be hearing our marriage cases in coming years all live in the same society we do. Their understanding of the issues at hand is being shaped now, by the conversations taking place around them. The

pro-marriage editorials appearing in leading newspapers across the country are a sign of the unprecedented effectiveness of our coalitions.

In contrast with our long-term educational strategy on marriage, Lambda's staff is engaged continuously in pre-litigation groundwork which sometimes ripens into litigation and sometimes does not. For example, disputes about the free speech rights of students and teachers have flared up in recent months. Utah has passed sweeping legislation which aims to ban gay/straight student clubs and to muzzle gay-friendly teachers, *even on their time-off*. A less sweeping, but still obnoxious, effort to limit the rights of youth is underway in Glendale, California. Prompted by the request of a gay-straight student alliance for official club status, the school board has proposed requiring parental consent for all high school club participation.

At the first public hearing on the issue, a series of eloquent students testified about their desperate need for this club and the ter-

*continued on page 30*

## MIDWEST REGIONAL OFFICE UPDATE

by Patricia M. Logue

**T**he two-story courtroom of the federal Seventh Circuit Court of Appeals in Chicago is an elegant and daunting place. Judicial portraits hang on high, wood walls. A cavernous distance separates the three appellate judges from the attorney's lectern, and the lectern from the audience. The atmosphere is serious and conservative.

On March 28th, our client Jamie Nabozny walked proudly into that setting to have his "day in court." In response to his persistent complaints of anti-gay brutality from classmates over several years, Jamie had heard mostly silence from the Ashland, Wisconsin school dis-



**Patricia M. Logue**  
MRO Managing Attorney

Jean Young

trict. A federal trial court then dismissed Jamie's lawsuit, which sought to hold school officials accountable for their failure to protect him, without ever holding a hearing.

Lambda took Jamie's case on appeal to have his voice heard and to educate the public about the pervasive problem of anti-gay violence in our schools. Lambda strongly believed that Jamie, now a 20-year-old gay man, was entitled to sit in that courtroom and assert his constitutional right to equal protection from violence and harm. Clearly school officials, who told Jamie he simply would have to expect abuse because he is gay, made matters worse for him by tolerating violent, anti-gay attacks.

As I argued the case for Lambda and Jamie, I was struck by the empathy evident from the three-judge panel. They asked tough questions on the constitutional issues, but seemed to understand that Jamie's sexual orientation could not serve as an excuse for how he was treated.

When my opposing counsel suggested that every schoolchild experiences harassment, he was quickly taken to task by the court for comparing Jamie's horrific experience of violence and vilification to everyday teasing on the playground.

Of course, empathy does not always translate into victory. We still await a decision from a court that has been neither a trailblazer on lesbian and gay rights, nor easily persuaded to hold public schools liable under the Constitution. But this case is really about everyone's equal right to a safe learning environment.

The argument was a turning point for Jamie, who felt his claims were heard for the first time. Extensive press coverage of his appeal, and the largely sympathetic public response, has enhanced Jamie's sense of being heard after years of feeling silenced. Jamie's

*continued on page 30*

# Freedom to Marry 1996: Making the Transition From Defensive to Affirmative Work

by Evan Wolfson

**W**hen the history of our struggle to secure the freedom to marry is written, early 1996 will be remembered as the first round of the backlash — a backlash that began before we even lashed, before we even won the basic freedom to marry that all other Americans take for granted. It will be remembered for the battles we faced, fought, and mostly won in over thirty legislatures across the country.



**Evan Wolfson, Marriage Project Director**

Merrin Gram

It will be remembered for the explosion into public consciousness and active debate of lesbian and gay families, our entitlement to full equality, and our desire to have the same choice as others whether to enter the central social and legal institution of our society. It will be remembered for the huge strides we made in the non-gay world, as a mainstream religious denomination and the nation's lead-

ing newspaper, among many others, spoke up in favor of full and equal civil marriage rights for gay people.

The backlash continues, as does the extraordinary, pervasive, and rich public debate. Although we took some hits, there were also significant triumphs. To name just a few:

- 1) the endorsement of our equal civil marriage rights voted by the Rabbinate of Reform Judaism;
- 2) the powerful endorsement by the *New York Times* in its April 7 lead editorial, "The Freedom to Marry," as well as many other papers across the country;
- 3) the numerous heroic and moving statements by legislators speaking up in support of our equality and against anti-gay attacks;
- 4) the energized and effective response by gay and non-gay people in state after state to fight the wave of anti-marriage bills; and
- 5) the electoral victories of the good guys in four of the five elections I am aware of so far where our freedom to marry was made an issue;

Some are troubled by the fact that polls continue to show that only 1/3 of the public

**The Freedom to Marry movement offers us a chance to work with people in communities of faith, parents, and the many others who connect powerfully to the resonance and personal importance of marriage.**

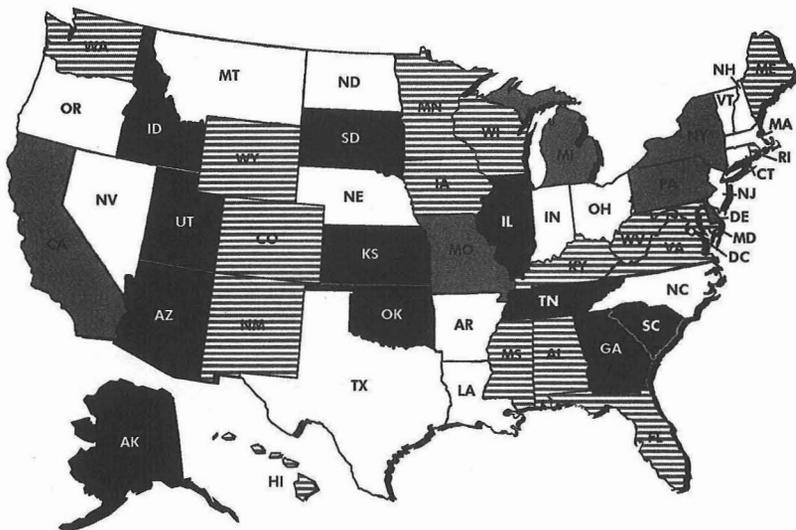
supports our equal marriage rights, while 1/3 remain adamantly hostile and the remaining 1/3 are not yet with us. Three points:

First, even as we have just begun our necessary work of reaching out to non-gay people and leaders in a way we have never really done before, 1/3 are already with us!

Second, the polls before and since the Supreme Court struck down the analogous discrimination on interracial marriage in 1967 showed similar public opposition; this is why courts have their role to play. Our Constitution does not put individual rights solely at the mercy of the tyranny of the majority.

Third, we have only just *begun* this critical work of reaching out and engaging non-gay Americans on a subject most of them have never had to think about before: lesbian and gay people, and marriage, in the same sentence. While changes in attitudes can take a long time (even today, polls show that 1/5 of Americans still believe interracial marriage should be illegal!), we can reach out to fair-minded people and help them move past the

## State-by-State Anti-Marriage Legislation\*



\*as of 5/30/96

## California High Court Rejects Religious Defense to Anti-Bias Laws

by Jon W. Davidson

**I**n a critically important case in which Lambda filed an *amicus* brief, the California Supreme Court ruled on April 9, 1996 that individuals cannot use their religious beliefs as a justification for discriminating against others. The case, known as *Smith v. Fair Employment and Housing Commission*, began in 1987 when Evelyn Smith refused to rent an apartment to Gail Randall and Kenneth Phillips because they were not married.

Smith owns four rental units in Chico, California, which she advertises as available to the general public. She does not reside on the premises and operates them for business purposes. Nevertheless, she claimed that because she believes that it would be a sin for her to rent her units to people who might engage in sex outside of marriage on the property, she should not be required to obey California's anti-bias laws, which forbid discrimination in housing based on marital status.

The case had direct implications for California's lesbian and gay community as California law also prohibits housing discrimination based on sexual orientation. Smith's lawyers admitted that her religious views would also lead her to refuse to rent to gay or lesbian couples. The case also has national importance because similar claims to a "religious freedom" defense against laws guaranteeing equal treatment in housing and



**Jon W. Davidson, WRO  
Supervising Attorney**

Rocky Lewis

employment are being raised across the country, including a case Lambda is involved with in which we are awaiting a decision from the Illinois appellate court, *Janiowski v. Rushing*.

The California Supreme Court agreed with the position presented in Lambda's *amicus* brief, ruling by a vote of 4 to 3 that the state's ban on discrimination did not pose a "substantial burden" on the landlord's religious beliefs. "Smith's religion does not require her to rent apartments," wrote Justice Kathryn Werdegar in the majority opinion. "Nor is investment in rental units the only available income-producing use of her capital."

The court rejected the landlord's appeal that the state was obliged to accommodate her religious views because the landlord easily could avoid any conflict with her beliefs by shifting her investment in the apartments to other ventures. The court's decision also was influenced by its concern that exempting Smith's commercial enterprise from anti-bias laws "would sacrifice the rights of her tenants to have equal access to public accommodations and their legal and dignity interests in freedom from discrimination based on personal characteristics."

Significantly, Justice Joyce Kennard, who dissented based on her view that there was a substantial burden on the landlord's beliefs and that California had not demonstrated that prohibiting marital status discrimination was a strong enough interest to overcome that burden, nevertheless specifically noted that "Analysis of whether there is a compelling interest in eliminating discrimination against homosexual couples may well involve different considerations; homosexual couples have been subject to a quite different, and continuing,

history of discrimination; also, their unmarried status is not a matter of voluntary choice."

Lambda cooperating attorney Clyde Wadsworth was the principal author of the brief filed in the case on behalf of Lambda, the National Center for Lesbian Rights, and Lawyers for Human Rights - the Lesbian and Gay Bar Association of Los Angeles. He explained to the press after the court's opinion was handed down that the decision "is a hopeful sign for lesbian and gay couples." He added that "the ruling makes clear that the state has no interest in sanctioning housing discrimination, even if purportedly rooted in religion."

Lambda's involvement in the case helped prevent the creation of a gaping loophole in the legal protections against discrimination based not only on marital status and sexual orientation, but on all grounds. It was not that long ago that African-Americans were denied housing and education based on a religious belief that integration was against God's plan, or that Jews and Catholics were excluded from communities, jobs, and businesses based on views likewise grounded in religion. As explained in Lambda's brief, while people's beliefs must be protected against government interference, when they enter the commercial marketplace, they are not entitled to use their free exercise rights "as a sword to attack the rights of others."

The California Supreme Court's agreement should be of significant help in Lambda's ongoing work to disprove right-wing assertions that anti-discrimination laws unfairly or unconstitutionally target religious adherents, by making clear whose liberty it is that is truly most at stake in these cases. ▼

## Affirmative Action and Lesbian and Gay Civil Rights: Common Ground

by Kim Paula Kirkley

**R**ecently, Lambda was contacted regarding an attack on affirmative action by a group of conservative students at a law school. The lawsuit, brought on behalf of a student

who claims he was denied a scholarship, targets minority presence grants for lesbians, gay men, and African-Americans. The grouping of these



**Kim Paula Kirkley  
Staff Attorney**

Martin Grant

communities together exposes the true interests of the radical right: to return to an era of discrimination and subjugation for all outside the white, conservative, patriarchal "norm."

Claiming that a scholarship restricted to gay men or lesbians violates the plaintiff's religious and political beliefs, the suit asserts that the university violates his first amendment rights. The lawsuit ignores the fact that the scholarship is privately funded and its purpose is to ensure that the rights outlined in the Constitution and the Bill of Rights apply to all, regardless of sexual orientation. The contemporary and historic discrimination and per-

secution of lesbians and gay men is utterly ignored. Additionally, the plaintiff disregards the fact that he continues to be free to hold his religious and political beliefs with no interference by the state. He simply fails to meet the scholarship's qualifications.

The attack on African-American presence grants is similarly flawed. Relying on the radical right's specious contention that they simply seek a color-blind democratic society, the suit contends that the university has improperly manipulated the law school's racial make-up

continued on page 30

## AIDS PROJECT UPDATE

by Catherine Hanssens

**T**he AIDS Project's caseload involving the ability of PWAs to get and keep jobs and essential services has continued to grow in the short months since the last Update. For anyone who doubted it, our docket proves a painful point: we're far from a truce in the battle on legal issues affecting the right of people with HIV to live productive, decent lives.



Martin Gram

**Catherine Hanssens  
AIDS Project Director**

We increasingly are involved in cases which seek to secure the clear application of the Americans with Disabilities Act and other federal and state anti-discrimination laws to HIV-related disparities in *all* aspects of the employment relationship and in the payment of benefits under health and disability policies. The resolution of these questions has a critical impact on the ability of PWAs and their loved ones to maintain a reasonable quality of life.

One of our more quietly dramatic struggles over the right of those with HIV to lead productive lives, however, has been waged outside the courtroom. Early this year, Congressman Bob Dornan finally succeeded in his long-standing campaign to secure federal legislation purging the military of all servicemembers with HIV. Until Dornan's amendment to the 1996 Defense Reauthorization Act was signed into law in February, servicemembers who tested positive for HIV during their terms of service were indistinguishable from other servicemembers with disabilities: their health was monitored and they were permitted to continue to serve and advance in their positions as long as they met the health requirements of their jobs. Servicemembers with HIV, along with those diagnosed with other disabilities such as cancer or heart disease, also were classified as "non-worldwide deployable," meaning that they could not serve in combat or abroad.

The 1049 servicemembers with HIV make up only 20% of those in the military classified as non-worldwide deployable. On average they have served their country for 10 years; some have served in the Gulf War; and many

have been honored for special contributions or bravery in service. High-level military officials argued that those with HIV represented years invested in training and valuable service, and in no way compromised military readiness. Nonetheless, Congressman Dornan argued that the presence of HIV-positive servicemembers undermined the combat-readiness of our troops, and unfairly allowed "homosexuals, drug abusers and those who patronized prostitutes" to avoid combat by contracting AIDS through conduct which violates the Code of Military Conduct.

**Early this year,  
Congressman Bob  
Dornan finally  
succeeded in his  
long-standing  
campaign to secure  
federal legislation  
purging the military of  
all servicemembers  
with HIV.**

Despite lobbying efforts primarily from Washington-based advocacy groups, President Clinton signed the amended Defense Reauthorization Act in early February. Prior to the signing, Kevin Cathcart and I, along with representatives from the ACLU, Human Rights Campaign, and Servicemembers Legal Defense Network, met with White House counsel Jack Quinn, Department of Justice liaison Walter Dellinger, White House gay liaison Marsha Scott, and several other administration officials. We made a final plea for a veto and, in its absence, strong arguments for an unequivocal statement that the amendment (signed into law to secure military funding including raises for current personnel) was irrational, unwarranted, and unconstitutional.

While we ultimately were unable to overcome the political rationale for the enactment, it was accompanied by stunning statements by top-level White House and military officials decrying the Dornan Amendment and voicing the view that the enactment was unconstitutional. Two months later, and a week after I attended a subsequent meeting with George Stefanopoulos and most of the same White House officials to argue that the administration had to take a more active role in rejecting the Dornan Amendment and working for its repeal, the provision requiring discharge of HIV-positive servicemembers was repealed.

At the other end of the spectrum of our work is our *amicus* participation in *Quill v. Vacco and Compassion in Dying v. State of Washington*, two ground-breaking cases invalidating state laws which criminalized physician-assisted suicide. These cases represent a major progression in right-to-die case law and the debate over assisted suicide. They may not carry the immediacy that quality-of-life issues such as opportunities for meaningful work and adequate health care do for most living with HIV. Yet, the ability to live, and die, according to one's own views of when meaningful life has come to an end involve a basic aspect of autonomy and self-empowerment, values central to the struggle of people living with AIDS. ▼

### Attention Attorneys

As you can see from our docket listings, Lambda relies on the assistance it receives from cooperating attorneys around the country. If you are interested in helping Lambda, consider joining our national network of volunteer cooperating attorneys.

Call or write our New York office and we'll send you a questionnaire to get more information about your area of practice and what kind of work you might be able to do for us — from representing clients to undertaking research. Or, if you are not already a Lambda member, return the membership coupon in the back of this Update and check the cooperating attorney information box.

Become a member of this volunteer network today and begin helping advance our rights!

## SAVE THE DATES

Don't miss out on these upcoming Lambda events...

Eighth Annual Hamptons Reception  
Saturday, July 6  
Sagaponack, New York

A Night in Casablanca  
Eighteenth Annual Fire  
Island Celebration  
Saturday, July 20  
Cherry Grove and Fire Island Pines

Fourth Annual Seattle Reception  
Thursday, August 8  
Seattle, Washington

Sixth Annual San Diego Reception  
Saturday, August 24  
San Diego, California

Tenth Annual Columbia County Labor  
Day Weekend Party  
Sunday, September 1  
Columbia County, New York

Ladies at the Links  
Sixth Annual Women's Golf Event  
and Bar-B-Que  
Sunday, September 8  
Chicago, Illinois

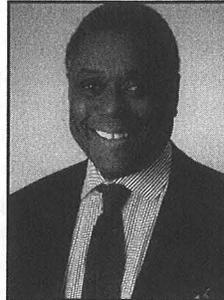
Fourth Annual Connecticut Reception  
Sunday, September 29  
Connecticut

For more information  
and reservations, call  
Events Coordinator  
Brian Simons  
at 212-995-8585.

## DEVELOPMENT DIRECTOR'S UPDATE

by William A. Peters

**J**ames Merrill Pulitzer Prize-winning poet and longtime Lambda major donor James Merrill died on February 6, 1995, at the age of 68. In his will he



Martin Gram

left Lambda a cash bequest of \$100,000, one of the largest single gifts in Lambda's history. Over the past 10 years, Merrill made substantial contributions to further Lambda's work. We would like to offer a special word of thanks to those individuals who, like James Merrill, have included Lambda in their estate planning, helping to ensure that our struggle can continue to benefit our community in the years to come.

**William A. Peters**  
Development Director

### Uncommon Clout Visa Card

We would also like to thank all the cardholders of the Uncommon Clout Visa Card who voted to have Lambda made the recipient of their funds. According to Community Clout president Jim Nathan and co-founder

Sean Strub, the Uncommon Clout Visa card made a total contribution of \$48,342 to 82 national and local non-profits in 1995. According to Nathan and Strub, Lambda Legal Defense and Education Fund was cardholders' top choice to receive funding.

### Laps for Lambda

From time to time, Lambda donors and supporters tell us about the unique things they have done to raise funds on our behalf. One of the more clever and strenuous efforts was recently accomplished by Lambda board member Barry Skovgaard. To celebrate his three years as co-chair of Lambda's board and to mark his retirement from that position, Barry swam 200 laps in his pool over Memorial Day weekend in an event he called "Laps for Lambda." By asking friends to sponsor each lap he swam, he was able to raise in excess of \$15,000 for Lambda.

With the inauguration of the first-ever Lambda swim-a-thon, I wonder what other ideas are out there? Let me hear your suggestions and inspirations. If you'd like more details on how Barry put together his "Laps for Lambda" project, please feel free to contact me. ▼

## MATCHING GIFTS

Giving a Gift to Lambda? Double Your Dollars! Find out if your employer offers a Matching Gift Program. Many companies will match every dollar you give to Lambda. Speak with your Personnel Department today! Someone from these companies already did...

Adobe Systems Inc • American Express Foundation • Apple Matching Gift Program • Avon Products Foundation • BP America Inc • Candle Foundation • Chase Manhattan Corporation • Chemical Bank • Chubb Life America • Citibank • Computer Associates International Inc • Continuum Productions Corp • Corbis Corporation • Digital Equipment Corporation • Eastern Mountain Sports • First Bank System Foundation • Gannett Communities Fund • Harcourt General • Helene Curtis Inc • Hoechst Celanese Foundation • The Home Depot • IDS Financial Services Inc • Law School Admission Services • Lehman Brothers • Levi Strauss Foundation • MacArthur Foundation • Massachusetts Mutual Life Insurance • Mayer, Brown & Platt • Microsoft • Morgan Guaranty Trust Co of New York • Mutual of America • Neiman Marcus Group • Newsweek • The New York Community Trust • The Overbrook Foundation • Paramount Communications Foundation • Pfizer • Philip Morris Companies Inc • Pitney Bowes • Principal Combined Fund • The Rockefeller Foundation • Otto L & Hazel T Rhoades Fund • Safeco Insurance Companies • Samuel Stroum Enterprises • Sara Lee Foundation • Schiff Hardin & Waite • Sony Pictures Ent. Inc • Sun Microsystems Foundation • US West Foundation • WMX Technologies Inc

## How to Avoid Making Uncle Sam the Beneficiary of Your Life Insurance

by Nan P. Bailey, MBA, CFP

**A**lthough the proceeds from most life insurance policies are typically not subject to income taxes, those proceeds are taxable as part of your estate. This applies to policies which you acquire and personally own, as well as the death benefits provided through your employer's group



Nan P. Bailey  
MBA, CFP

Rocky Lewis

term insurance policies.

There are several strategies which can be explored to avoid these estate taxes. One strategy is to transfer ownership of the policy to another person or an entity such as an irrevocable life insurance trust. You should, however, bear in mind that if you die within three years of the transfer date, the IRS will still treat the proceeds as part of your taxable estate.

Another way to avoid estate taxation is to name Lambda or another charity as the policy's beneficiary. It might even make sense to name a charity as the contingent or back-up beneficiary on your policy. Transferring the owner-

ship of a paid-up life insurance policy to a qualified charity of your choice may not only help you avoid estate taxes later on, but it also may enable you to receive an immediate income tax deduction.

Lambda has received very important financial support from being designated as the beneficiary on life insurance policies. Strategies such as this can enable you to leave a much larger estate than you anticipated and allow you to make more generous charitable gifts than you could otherwise afford. As always, you should consult with your professional financial advisor to see how this approach applies to you. ▼

## SPECIAL EVENTS

### Tampa Reception Monday, March 4

Local volunteer Jim Porter coordinated a reception for Lambda donors and supporters in Tampa, Florida. Held at the home of Penn Dawson, the reception featured Kevin Cathcart as the guest speaker.

### Key West at the Brass Key Thursday, March 7

*Key West at the Brass Key*, Lambda's second Key West reception, was held at the charming Brass Key Guest House and was attended by over 50 Lambda supporters. Kevin Cathcart was the guest speaker. This cocktail reception was initiated and executed by a dedicated local volunteer host committee including Kay Maunsbach and Molly Leeds, Frank Romano and Joe Liszka, Michael MacIntyre and Bob Anderson, and Michael Dively and Lee Prince.

### Hartford Reception Monday, March 11

Lambda was the featured guest at the monthly dinner meeting of the Hartford Gay Men's Professional Network. David Buckel and Bill Peters spoke to the nearly 100 network members present. Former Lambda military plaintiff Joe Steffan, who practices law in Connecticut, also spoke to the group about Lambda's role in his case.

### Major Donor Events New York: Thursday, March 14 Chicago: Thursday, May 2

As part of a series of receptions planned for major cities around the country, Lambda held two major donor events in New York City and Chicago to provide current and potential major donors an opportunity to meet area staff and board members and hear in-depth reports on Lambda's work. In New York, board member Michael Becker and his partner Paul Gardner hosted a small dinner for 30 people at which Catherine Hanssens discussed the work of the AIDS Project. In Chicago, the LaSalle National Bank sponsored and hosted a cocktail reception in their executive dining suite for nearly 50 Chicago area Lambda supporters. Guest speakers Genora Dancel and Ninia Baehr, the plaintiffs in our Hawaii marriage case, and Evan Wolfson spoke about their case.



Mona Noriega

Kevin Cathcart (center) with board members Michael Rauschenberg, Miriam Pickus, Bob Ollis, and Stuart Burden at the Chicago Major Donor Dinner.

### Women's Gallery Gala Saturday, March 16

Lambda's eighth annual women's event, *The Women's Gallery Gala*, drew a capacity audience of over 350 women to The Drawing Center in SoHo. Attendees enjoyed an evening of mixing, mingling, and greeting new and old friends at the reception that featured special guest entertainer Reno. Beatrice Dohrn opened the program portion of the event with an update on Lambda's legal work. This year's event was one of the most successful ever and raised over \$15,000.

### A Funny Thing Happened on The Way to the Forum Tuesday, April 16

This benefit performance of the hit Broadway musical starring Nathan Lane played to a sell-out Lambda audience of 250 supporters and raised over \$55,000! Guests gathered at the world famous Sardi's Restaurant for a pre-theater reception before enjoying the performance on the show's official "press night" with all the major reviewers and media in attendance.

### Spring in San Francisco Thursday, April 18

This sixth annual spring reception and first-ever dinner highlighted the work of Lambda's AIDS Project and celebrated the recent election of San Francisco's Charles Spiegel as co-chair of Lambda's Board of

## SPECIAL EVENTS

James K. Reisberg



**Jon Davidson, Jennifer Pizer, James C. Hormel, and Kevin Cathcart at the San Francisco reception.**

Directors and the appointment of Jennifer Pizer, formerly of San Francisco, to the position of managing attorney of the WRO. Jon Davidson gave guests at *Spring in San Francisco* a report on the efforts of Lambda's AIDS Project. The event took place at San Francisco's Spectrum Gallery. Guests were treated to a wonderful array of hors d'oeuvres, great conversation, and a spectacular view of the city and the Bay Bridge.

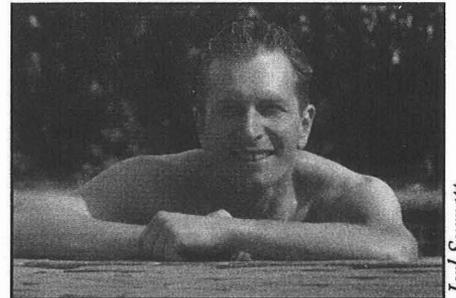
### Miami Night for Rights Saturday, May 18

The Third Annual "Night for Rights" sponsored by the Gay and Lesbian Lawyers Association (GALLA) was held at The Alexander Hotel in Miami Beach. The evening consisted of a dinner followed by a pool-side party. The proceeds from this event will go to both Lambda and GALLA. The guest speaker at the dinner was Richard Socarides, White House Liaison to the Department of Labor, who was introduced by Kevin Cathcart. The evening's program included the presentation of GALLA's annual Outstanding Advocate Award to Julia Dawson, a leading South Florida activist for lesbian, gay, and feminist issues.

### Laps for Lambda - Saturday & Sunday, May 25 & 26

Lambda board member Barry Skovgaard

held a one-man Lambda swim-a-thon over Memorial Day weekend to commemorate the end of his three-year tenure as board co-chair. He swam over two-hundred laps (over two miles!) over the two-day weekend. Through sponsorships from friends and colleagues, Barry raised over \$15,000 for Lambda through this event. ▼



Jeri Surratt

**Board member Barry Skovgaard does Laps for Lambda.**

### The 1996 Lambda Liberty Awards Monday, May 6

The 1996 Lambda Liberty Awards - Tenth Anniversary Celebration took place at New York City's Essex House. Our 1996 Lambda Liberty Awards honorees were Jed Mattes, literary agent and activist who has served as president of the Board of The Paul Rapoport Foundation since its inception in 1987 and is vice president of the Board of The Hetrick-Martin Institute; Congressman Gerry E. Studds, openly gay member of the United States Congress and staunch advocate of lesbian and gay civil rights who is particularly dedicated to ending the ban on homosexuals in the military; and Urvashi Vaid, former executive director of the National Gay and Lesbian Task Force and author of *Virtual Equality: The Mainstreaming of Gay and Lesbian Liberation*.

Four hundred Lambda supporters and friends gathered at The Essex House to pay tribute to this year's awardees - all of whom have contributed significantly towards ending discrimination against lesbians and gay men. Former board co-chair William Hibsher began the evening's program with a welcome on behalf of his fellow 1996 Lambda Liberty Awards Chairpersons - Jack Schlegel, past Liberty Award recipient Gloria Steinem, and former board co-chair Judith Turkel. Jack Schlegel then introduced *The Lambda Liberty Awards: A Ten Year Video Retrospective*, a presentation which captured the essence of the ten-year history of the award, the impact of Lambda, and the 1996 honorees. Following a hearty round of applause, Judith Turkel presented the 1996 Lambda Liberty Award to Jed Mattes; Kevin Cathcart presented to Urvashi Vaid; and former Lambda executive director Tom Stoddard presented to Congressman Gerry E. Studds. ▼



Arrel Ramirez

**Liberty Awards recipients Urvashi Vaid, Jed Mattes, and Congressman Gerry Studds.**

# Docket Update

## SEXUAL ORIENTATION DISCRIMINATION

### ANTI-GAY INITIATIVES

#### **Romer v. Evans (U.S. Supreme Court)**

VICTORY! On May 20, 1996 the United States Supreme Court struck down Colorado's state-wide anti-gay Amendment 2, which was passed by voters in 1992 and would prohibit all branches of state government in Colorado (including cities, school districts, and courts) from passing legislation or adopting policies prohibiting discrimination against lesbians, gay men, and bisexuals based on their sexual orientation. Amendment 2 had never taken effect because the Colorado courts, finding that the measure violated the right of gay people to participate equally in the political process, enjoined its enforcement.

The Supreme Court recognized that Amendment 2 "impose[d] a special disability" only on gay people, and disabled Colorado government from ever prohibiting discrimination against lesbians, gay men, and bisexuals, "no matter how local or discrete the harm, no matter how public and widespread the injury." Striking down the amendment as violating the U.S. Constitution's guarantee of equal protection of the laws, the Court ruled that the amendment could be explained by nothing more than anti-gay animus, and that such animus is *not* a legitimate basis for lawmaking.

Suzanne Goldberg and cooperating attorney Clyde Wadsworth (formerly of the law firm Wilson, Sonsini, Goodrich & Rosati, and now at Sloan & Pratt), handled the case for Lambda, along with the ACLU, the Colorado Legal Initiatives Project, and several Colorado attorneys — including former Colorado Supreme Court Justice Jean Dubofsky and Boulder attorney Jeanne Winer.

#### **Equality Foundation of Greater Cincinnati v. City of Cincinnati (U.S. Supreme Court)**

NO CHANGE. PETITION FOR CERTIORARI HELD. Like *Romer v. Evans*, this

case challenges an anti-gay ballot initiative, Issue 3, that would bar the passage or enforcement of any ordinances or policies which provide lesbians, gay men, and bisexuals with protected status in Cincinnati.

The U.S. Court of Appeals for the Sixth Circuit overturned our federal district court trial victory in a May 1995 decision. But the appellate panel barred Issue 3 from taking effect until a further appeal to the U.S. Supreme Court is decided. We filed a *certiorari* petition with the Court in August 1995 which is still pending and likely will be considered after the Court's decision in *Romer*. Our petition seeks review of the Sixth Circuit's rulings that Issue 3 serves a legitimate governmental interest and does not deny gay people equal access to the political process.

Patricia Logue and Suzanne Goldberg are working on the case with our co-counsel, Cincinnati civil rights attorney Alphonse A. Gerhardtstein, Scott Greenwood of the ACLU of Ohio, and Ohio attorney Richard Cordray.

#### **Lansing Equal Rights Task Force v. Lansing City Clerk (Michigan)**

NEW MATTER! In September, 1994, amendments were proposed to extend Lansing's existing fair housing law into the areas of employment, public accommodations, and public services, and to add protection against sexual orientation and other forms of discrimination. In the ensuing months, Lambda wrote several rejoinders to inaccurate opinion letters issued by the city attorney who took the position that the measure, although a fairly standard civil rights law, was unconstitutional and strongly opposed it. After 18 months of deliberation and debate, the amendments were passed by the Lansing City Council in March 1996.

Thereafter a group circulated petitions for a voter referendum on the new laws. Instead of publishing the text of the ordinance, the group circulated misleading flyers that wrongly stated what the law would do. For example, the law did not, as opponents claimed, give civil rights to pedophiles or restrict what min-

isters could preach. Although the city attorney who had opposed the ordinance declared the referendum petitions proper, Lambda was instrumental in helping the Lansing Equal Rights Task Force obtain a writ of mandamus from the Ingham County Circuit Court invalidating the petitions and requiring that new petitions fully disclose what the ordinance actually does. It is anticipated that the ordinance will be subject to voter approval on the November 1996 ballot and the Task Force is looking forward to a fair campaign fight.

Patricia Logue is Lambda's attorney on this matter.

#### **Ladehoff v. Keisling and Rose v. Keisling (Oregon)**

NO CHANGE. APPEAL BRIEFED. These two cases challenge several anti-gay initiatives slated for Oregon's 1996 ballot. The measures seek to ban public funding, education, and civil rights laws that would be beneficial to or supportive of lesbians, gay men, and bisexuals. We have asked the court to put *Ladehoff* on hold because the right-wing Oregon Citizens Alliance (OCA) intends to withdraw the challenged measures and pursue several new ones generally entitled "The Minority Status and Child Protection Act of 1996." Pending the OCA's formal withdrawal of the old measures, and we have brought *Rose* in response to the newest OCA efforts.

In *Rose*, we seek an injunction to block the Secretary of State from certifying the new petition for placement on the ballot as well as a declaration that the secretary has the authority and duty to determine whether placement of the measures on the ballot would violate the state or federal constitution. The Oregon trial court dismissed four counts of our complaint and granted summary judgment against us on the remaining two counts which urge that the measure violates Oregon's constitutional requirements for initiative proposals. We immediately appealed to the Oregon Court of Appeals and filed our brief in early December.

Suzanne Goldberg is working with ACLU cooperating attorneys Charles Hinkle and Katherine McDowell.

### **Morris v. Hill (Florida) formerly listed as Lassiter v. Alachua County**

DISCOVERY PROCEEDING. This case is a constitutional and statutory challenge to a county charter amendment in Florida. Alachua County's Charter Amendment 1, passed by voters in November 1994, prohibits the Board of County Commissioners from adopting any ordinance "creating classifications based upon sexual orientation, sexual preference, or similar characteristics, except as necessary to conform county ordinances to federal or state law." Our plaintiffs are lesbians and gay men who are advocates for gay and lesbian civil rights and advocates within the African American community, the community of people with disabilities, a variety of local churches, and mainstream political organizations. All participated in the campaign to have Alachua County's government pass its ordinances prohibiting sexual orientation discrimination in employment, housing and public accommodations.

We are in the discovery phase of our challenge to this anti-gay measure. We have received responses to our document requests and have responded to interrogatories to plaintiffs served by intervening defendant Concerned Citizens of Alachua County.

Suzanne Goldberg is working on this case with Lambda cooperating attorneys Walter Reiman, Jacqueline Charlesworth, and Jaime Shapiro of Paul, Weiss, Rifkind, Wharton & Garrison in New York. Lambda cooperating attorneys in Gainesville, Florida are Larry Turner and Robert Griscti of Turner & Griscti, P.A.

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## EMPLOYMENT

### **DeMuth v. Miller (U.S. Supreme Court)**

FINAL LOSS. CERTIORARI DENIED. Daniel Miller is a certified public accountant whose former employer fired him pursuant to a provision in his contract that said "homosexuality" would be "cause" for firing. The employer later sued Miller under a clause which provided that, if fired "for cause," Miller would have to pay hefty penalties if any of the firm's clients chose to do business with Miller. Miller came to Lambda after a trial in which the jury entered a \$124,000 verdict against him, and he has now had to turn over

\$110,000 plus substantial interest to his former boss.

In February 1996, the U.S. Supreme Court declined to review the Pennsylvania state court's determination that it was required to enforce the flagrantly discriminatory penalty clause. Our petition said that although Supreme Court precedent *should* make it plain that anti-gay animosity may not be enforced via state action, there has been confusion over this for some time. We had hoped that the Court might view this case as an opportunity to reaffirm the law's equal application to gay men and lesbians.

Markian Slobodian of Harrisburg is Miller's local counsel. Lambda's Beatrice Dohrn authored the petition for *certiorari*.

### **Grobesson v. City of Los Angeles (Federal Court, California)**

COMPLAINT FILED. Sgt. Mitch Grobesson, the first openly gay officer in the LAPD, settled a ground-breaking sexual orientation employment discrimination lawsuit against the city of Los Angeles over two years ago. As part of that settlement, the city agreed to rehire Grobesson and to implement sweeping changes in the recruiting, hiring, training, and personnel practices of the LAPD. However, the city has dragged its feet in implementing the agreed changes and has failed altogether to administer some of the settlement's terms. In addition, upon his return to the force, Sgt. Grobesson experienced an overwhelming pattern of harassment, retaliation for having brought the original suit, and interference with his first amendment rights. Among other things, the city has brought disciplinary charges against him for wearing his uniform at lesbian and gay and AIDS-related events and for recruiting gay and lesbian individuals to join the LAPD.

A new suit was filed in U.S. District Court in January 1996 against the City of Los Angeles and numerous members of the LAPD for violation of Sgt. Grobesson's federal and state constitutional rights to free speech, privacy, association, due process, and equal protection, for violation of state and local anti-discrimination laws, and for breach of the previous settlement agreement.

Bert Voorhees, Theresa Traber, and Fernando Olguin represent Sgt. Grobesson. Lambda, through Jon Davidson, is acting in an "of counsel" capacity in connection with

the lawsuit and also is assisting Grobesson's representatives in the pending disciplinary proceedings, which commenced March 18, 1996.

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## BENEFITS

### **University of Alaska v. Tumeo and Wattums (Alaska)**

LEGISLATIVE CHANGE. AWAITING DECISION. In this case, two University of Alaska employees have charged that the university discriminated against them based on marital status by denying them health benefits for their partners. The university compensates its employees in part by providing "dependent" health benefits but then restricts the definition of "dependent" to permit only legally married employees to qualify for the benefits. The plaintiffs won a ruling from the superior court holding that the plan discriminates based on marital status in violation of the state's Human Rights Act.

Lambda filed an *amicus* brief with the Alaska Supreme Court arguing that the plan does discriminate based on marital status. Our brief also provides the court with information regarding the increasing numbers of employers which currently provide equal benefits for their unmarried employees. The Alaska Supreme Court heard oral argument on December 15, 1995, and is expected to render its decision sometime soon. During April, the Alaska legislature amended the Human Rights Act's prohibition against marital status discrimination so that employers may provide greater benefits to married employees without violating the act. Lambda is working with the plaintiffs' attorney to respond to this new development.

Suzanne Goldberg, David Buckel, and Evan Wolfson wrote the brief for Lambda, in conjunction with Anchorage attorney Allison Mendel of the National Lesbian and Gay Law Association (NLGLA). Lambda was joined on the brief by NLGLA and NOW Legal Defense and Education Fund.

### **A.A.U.P. v. Rutgers, the State University of New Jersey (New Jersey)**

APPEAL BRIEFED. This lawsuit challenges the decision by Rutgers University and the New Jersey Division of Pensions and Health Benefits Commission to deny "dependent" health coverage to lesbian and gay

employees. Although the university provides "dependent" coverage — which includes a substantial array of health plan benefits including inpatient and outpatient hospital care, physical therapy and prescription drug coverage — as part of its compensation package to married employees for their spouses, it categorically denies the same benefits to unmarried employees for their partners.

Lambda filed an *amicus* brief with the New Jersey appellate division arguing that by hinging eligibility for health coverage on an employee's marital status, the defendants violate the state's law against discrimination, which prohibits marital status discrimination in employment compensation. Lambda filed a letter opposing the state's motion to strike portions of our brief. In April, the court denied the state's motion and granted Lambda's motion to appear as *amicus*.

Suzanne Goldberg wrote Lambda's brief, which the New Jersey Lesbian & Gay Law Association joined. Christine Burgess, a solo practitioner in New Jersey, is our cooperating attorney on the case.

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## MILITARY

### **Able v. U.S.A. (Federal Court, New York)**

AWAITING DECISION. This challenge to "Don't Ask, Don't Tell" is brought on behalf of six servicemembers: U.S. Army Reserve Lieutenant Colonel Jane Able, U.S. Coast Guard Petty Officer Robert Heigl, U.S. Army Reserve Captain Kenneth Osborn, U.S. Army Reserve Sergeant Stephen Spencer, U.S. Naval Reserve Lieutenant Commander Richard von Wohld, and U.S. Navy Seaman Werner Zehr. The lawsuit charges that "Don't Ask, Don't Tell" violates the First Amendment and equal protection clause of the U.S. Constitution.

In March 1995, Federal District Court Judge Eugene Nickerson issued an opinion finding those provisions of the ban which punish servicemembers for saying they are lesbian or gay unconstitutional. The government's appeal of this decision was argued to a three judge panel of the Second Circuit Court of Appeals on January 16, 1996.

*Able* is brought jointly with the ACLU. Beatrice Dohrn and Evan Wolfson are handling the case, with cooperating attorneys David Braff, Michael Lacovara, and Penny

Shane at Sullivan and Cromwell, and Matt Coles, Ruth Harlow, and Mark Elovitz at the ACLU.

### **Cammermeyer v. U.S. Army (Federal Court, Washington)**

AWAITING DECISION. Colonel Margarethe Cammermeyer was discharged from the military in June 1992 because she is a lesbian. Cammermeyer, a 28-year veteran of the Army and National Guard, and Chief Nurse of the Washington State National Guard, is the highest ranking servicemember to be discharged for being lesbian or gay. Among many other honors, she had received a Bronze Star for her service in Vietnam and was selected as the Veterans Administration Nurse of the Year in 1985.

Col. Cammermeyer was reinstated in June 1994, when U.S. District Court Judge Thomas S. Zilly held the old version of the military ban unconstitutional and ordered the Army to reinstate Cammermeyer to the Washington National Guard. While the Army has agreed that Cammermeyer's reinstatement is proper, it has appealed, challenging the trial court's finding that the military policy is unconstitutional. Briefs were filed in the Ninth Circuit Court of Appeals in the late summer of 1995 and the appeal was argued on December 4, 1995. We are now awaiting the decision.

Former Lambda staff attorney Mary Newcombe continues to represent Col. Cammermeyer as cooperating attorney for Lambda. Newcombe is assisted by Lee Michaelson; both attorneys are with Hedges & Caldwell in Los Angeles. Jon Davidson is the Lambda attorney on the case. Jeffrey Tilden and Michael Himes of the Seattle firm of Perkins Coie are co-counsel on behalf of the Northwest Women's Law Center.

### **Thomasson v. Perry (Federal Court, Virginia)**

LOSS. Paul Thomasson had been a lieutenant in the Navy for 9 years. The day after "Don't Ask, Don't Tell" was implemented, Thomasson presented a letter to his commanding officers saying, "I am gay." The Navy initiated separation proceedings against him and recommended his honorable discharge.

On April 5, 1996, the full 13-judge Fourth Circuit Court of Appeals upheld the discharge in a 9 to 4 ruling. The majority

opinion holds the law constitutional based on the government's assertion that "Don't Ask, Don't Tell" is a logical way to use expression as a gauge of those who will engage in prohibited conduct. Superficially, this argument holds up when the court, as it did here, elects not to examine the different conduct rules that are applied to gay and non-gay servicepeople. Six justices issued a concurring opinion which was yet more extreme than the majority saying that they would reinstate a status based ban, since they find this one intended to "create a sanctuary for homosexuals within the military!"

Lambda and the ACLU had submitted an *amicus* brief putting forward the theories developed in the *Able* case, which endeavors to expose the true purposes of the legislation.

Thomasson is represented by Mark Lynch and Allan Moore of Covington & Burling in Washington D.C. Lambda's Beatrice Dohrn and Jon Davidson worked on the brief with Ruth Harlow and Marc Elovitz at the ACLU Lesbian and Gay Rights Project.

### **Richenberg v. Perry (Federal Court, Nebraska)**

NEW CASE! APPEAL BRIEFED. Another challenge to "Don't Ask, Don't Tell," this case is on behalf of a captain in the Air Force. The federal district court upheld the law, finding that it does not violate either equal protection or first amendment guarantees.

Lambda and the ACLU have submitted an *amicus* brief in the appeal to the Eighth Circuit Court of Appeals, putting forward the theories developed in the *Able* case, which endeavors to expose the true purposes of the legislation.

Lambda's Beatrice Dohrn and Jon Davidson worked on the brief with Ruth Harlow and Marc Elovitz at the ACLU Lesbian and Gay Rights Project.

### **Holmes v. Perry and Watson v. Perry (Federal Court, Washington)**

NEW CASE! APPEAL BRIEFED. These two cases challenge the constitutionality of "Don't Ask, Don't Tell."

Holmes, a first lieutenant in the California National Guard won his case in a California federal district court. Watson, a lieutenant in the Navy, lost in the federal district court in Seattle, Washington. These two challenges to the military ban were consolidated for appeal to the United States Court of

Appeals for the Ninth Circuit.

As in other appeals on the constitutionality of the ban, Lambda and the ACLU have submitted an *amicus* brief based on the theories put forward in the *Able* case. Lambda's Beatrice Dohrn and the ACLU's Matt Coles worked on the brief.

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## FAMILY RELATIONSHIPS

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### MARRIAGE

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#### Baehr v. Lewin (Hawaii)

TRIAL SCHEDULED. This case involves two lesbian couples and one gay male couple who were denied marriage licenses by the State of Hawaii. It represents the most likely legal path toward winning the freedom to marry for lesbian and gay people in the United States.

Following the Hawaii Supreme Court's landmark ruling in May 1993 that denying marriage licenses to same-sex couples appears to violate the state constitutional guarantee of equal protection on the basis of sex, the case is now back before the trial court where the state must prove a "compelling" interest to justify the discriminatory policy, which will be subject to "strict scrutiny," the highest standard of judicial review. Our position is even stronger in light of the December 1995 report from the official State Commission on Sexual Orientation and the Law concluding that there is no legitimate (let alone "compelling") reason for denying gay men and lesbians the equal right to marry. After months of study, testimony, and hearings, the commission, created by the legislature, appointed by the governor, and chaired by Tom Gill, a highly respected former lieutenant governor and congressperson, officially recommended to the legislature that it end the discrimination against same-sex couples seeking civil marriage.

Co-counsel Dan Foley of the Honolulu firm of Partington & Foley, through the Hawaii Equal Rights Marriage Project (HERMP), and Evan Wolfson are preparing for the trial in September.

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### CUSTODY AND VISITATION

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#### J.A.L. v. E.P.H. (Pennsylvania)

NEW CASE! APPEAL BRIEFED. This is a lawsuit brought by a lesbian against her former partner seeking visitation and partial custody of the child they planned and had during

the course of their 9-year relationship. For a year after the break-up, the parties were able to agree on an arrangement that provided partial custody to J.A.L. Unfortunately, the biological mother stopped complying with the arrangement, and has resisted J.A.L.'s suit with the claim that as a person with no biological relationship to the child, J.A.L. has no standing to sue for partial custody or visitation.

The trial court's dismissal is now on appeal to the Pennsylvania Superior Court. Lambda filed an *amicus* brief urging the court to apply existing Pennsylvania law, which provides that those who've developed a parental relationship with a child may seek court ordered visitation or custody regardless of their biological relationship to the child.

Kim Kirkley and Beatrice Dohrn authored the brief and former board member Andrew Chirls of Wolf, Block, Schorr and Solis-Cohen acted as local counsel.

#### In re Marriage of B. (California)

NEW CASE! VICTORY! On February 9, 1996, we filed an *amicus* brief in this custody dispute on behalf of a woman whose ex-husband sought sole custody of their son based on her remarriage to a man living with AIDS. The ex-husband continued to argue that he should get custody even after the woman's second husband died, arguing that her exposure of the child to her second husband's disease and ultimate death showed poor judgment on her part. Our brief (which we hope will be a model for similar disputes around the country) presents the scientific evidence establishing that living in a household with a person with AIDS poses no risk to a child and demonstrates that the case law dealing with AIDS and family law precludes basing a custody determination on a decision to raise a child in a household that includes a person living with AIDS.

On February 20, 1996, Los Angeles Superior Court Judge Martha Goldin denied the ex-husband's motion for change of custody, a decision consistent with the position developed in our *amicus* brief.

Lambda's brief was authored by Jon Davidson and cooperating attorney Michael A. Grizzi of the law firm of Irell & Manella.

#### Inscoe v. Inscoe (Ohio)

APPEAL BRIEFED. Lambda has taken the appeal of Herbert Inscoe, Sr., a gay man who lost custody of his son after raising him

until he was 10. The trial court ruled that custody should be given to his ex-wife because Inscoe was openly gay and this fact allegedly had adversely affected his son. No evidence of adverse effects was cited. There was substantial evidence that Inscoe's son was doing well living with his father, his father's partner, and his sister, but nevertheless the court removed him from the home after ten years.

This appeal can now finally proceed as the court granted Lambda's December 1995 motion to release sealed home studies, a psychological report, and testimony of the minor that the trial judge considered but never permitted the parties to see. A mid-April ruling from the Court of Appeals held that the records must be released to protect Inscoe's due process rights. Because of these unexpected delays, Lambda's opening brief was filed on May 24, 1996 along with a motion to expedite oral argument which is pending. An *amicus* brief on gay and lesbian parenting issues was filed by the Ohio Human Rights Bar Association, the American Academy of Child and Adolescent Psychiatry, the Ohio Psychological Association and the National Association of Social Workers.

Patricia Logue is Lambda's attorney on the case. She was assisted by Kim Kirkley. Rita Fuchsman of Chillicothe, Ohio is the attorney for the *amici*.

#### Pulliam v. Smith (North Carolina)

AWAITING ARGUMENT. This is an appeal from a ruling of a North Carolina county court removing Fred Smith's two sons from his custody because he's gay and had been living with his partner for several years at the time of the court's decision. The ruling is replete with factual distortions, ill-supported assumptions, and homophobia. For example, the court allowed questions about and then relied on the particulars of the men's sex life. However, the mother's testimony about her sex life was deemed irrelevant. Custody of the boys, who are 4 and 8 and had lived with their father their whole lives, was shifted in July of 1995.

Our brief to the North Carolina Court of Appeals seeking reversal of that order was submitted in December 1995. We now await an argument date.

Beatrice Dohrn wrote the brief together with Steve Tannenbaum, of Milbank Tweed

Hadley & McCloy. Lambda is co-counsel in this case with Sharon Thompson of N.C. Gay and Lesbian Attorneys (NC GALA).

### **Schroeder v. Schroeder (Illinois)**

NEW CASE! APPEAL FILED. Lambda is appealing an adverse modification of custody ruling against a bisexual mother from Tazewell County, Illinois who lost custody of her son and daughter to her former husband several years after their divorce. Lambda's appeal of the trial court's ruling will be to the Appellate Court of Illinois for the Third District.

After a lengthy hearing showing that the children were doing well with their mother, the court switched custody to their father based on speculation that the children might one day face social condemnation as a result of their mother's sexual orientation and because their father's remarriage provided a "more stable family setting." Illinois law requires evidence of adverse effects from changed circumstances before custody can be modified for any reason. Where sexual orientation is made an issue, a party must show specific evidence of adverse effects before it can affect custody. The court cited no Illinois law but relied upon the infamous *Bottoms v. Bottoms* decision from Virginia which presumed that a lesbian mother was an unfit parent. Fortunately, the trial court stayed the effect of its order pending an appeal.

Patricia Logue is Lambda's attorney on the case. Her co-counsel is Zane Lucas of Carter and Grimsley in Peoria, Illinois.

### **In re: Ward (Florida)**

AWAITING DECISION. In this case, a Florida court removed a child from the custody of her mother because she is a lesbian. Custody was given to the child's father, with whom she has not had extensive contact and who was convicted of killing his previous wife. The trial judge was extremely troubled by the fact that the mother's adult daughter is a lesbian, and said he was changing custody to "give this child a chance."

The case is on appeal to the Florida Court of Appeals. Lambda submitted an *amicus* brief in an effort to educate the court about the falsity of the myths that the trial judge credited, including that the children of lesbian or gay parents are turned gay or lesbian. The right-wing Family Research Council submitted a brief based exclusively on research by Paul Cameron, the anti-gay

zealot whose work has earned him censure by the American Psychological Association among other groups.

Leslie Cooper of Robinson, Silverman, Pearce, Aronsohn & Berman assisted Lambda's Beatrice Dohrn in drafting the brief. Ward is represented by the National Center for Lesbian Rights.

### **SECOND-PARENT ADOPTION**

#### **In the Matter of G.K. and L.J., for the adoption of T.K.J. and K.A.K. (Colorado)**

AWAITING DECISION. This is an appeal from a court's dismissal of adoption petitions filed by two lesbian mothers. The women have two children, with each mother having given birth to one of the girls, who are now 6 and 10 years old. The couple has been together for over 17 years.

Notwithstanding a clear provision in Colorado law saying that the best interests of the children are more important than any particular provision of the adoption code, the judge dismissed the petitions because he interpreted the statute's provisions as requiring each biological mother to surrender her child and terminate their legal relationship to render the child "available for adoption."

Lambda submitted an *amicus* brief which was also signed by Colorado Lesbian & Gay Law Association. Cooperating Attorney James A. Henderson authored the brief with assistance from Lambda's Beatrice Dohrn.

### **FIRST AMENDMENT**

#### **Mackler v. City of Los Angeles (California)**

DISCOVERY PROCEEDING. This lawsuit, which arises from one of a series of demonstrations that took place in Los Angeles in the fall of 1991 following Gov. Pete Wilson's veto of a gay rights bill, raises significant issues about how the police deal with gay rights and other political demonstrations. While Peter Mackler was participating in this demonstration, an LAPD officer hit him in the face with a police baton with such force that Mackler was knocked to the ground and his glasses were broken and thrown 25 feet by the blow. That officer and another then grabbed Mackler by his feet and arms and threw him out of the way of the police. The

suit contends that these assaults were motivated by Mackler's sexual orientation, his political beliefs and affiliations, and his attempt to get the name of the police officer who earlier had been shoving him, without justification, with a police baton.

Suit was filed in October 1992 against the City of Los Angeles and former L.A. Chief of Police Daryl Gates. Both sides did extensive discovery, during which we learned the identity of the officer who assaulted Mackler. At a status conference held on October 3, 1995, the trial was scheduled to commence on January 21, 1997. The deposition of the officer who assaulted Mackler with the baton took place in January 1996 in Seattle. We are now considering bringing a motion to compel him to answer certain questions he refused to answer at the deposition.

This suit originally was filed by the ACLU of Southern California. Lambda is now co-counsel. Jon Davidson is Lambda's attorney on the case.

### **HOUSING**

#### **Smith v. Commission on Fair Employment and Housing (California)**

VICTORY! This case involves housing discrimination against an unmarried couple by a landlord who rejected them as tenants, claiming that renting an apartment to an unmarried couple would require her to "facilitate fornication" which she feels would be a sin. The landlord has asserted that California's law prohibiting discrimination should not apply to her because she feels it interferes with the exercise of her religion.

On April 9, 1996, the California Supreme Court vacated the court of appeals' decision in favor of the landlord. By a 4-3 vote, the California high court ruled that California's law prohibiting marital status discrimination in housing forbids discrimination against unmarried couples and, as Lambda had argued in an *amicus* brief, that landlords renting apartments to the general public have no constitutional or statutory exemption from that law, because any burden that refraining from discriminating might place on their religious beliefs could be avoided by simply selling their apartments and placing their capital in another investment. As similar free exercise of religion claims seeking to justify the viola-

## Why Alla Pitcherskaia Can't Go Home

by Suzanne B. Goldberg

Lambda's client Alla Pitcherskaia is afraid to return to her native Russia. Beginning at age 27, she was repeatedly threatened by the Russian government with being institutionalized against her will in psychiatric



Suzanne B. Goldberg  
Staff Attorney

Martin Gram

"hospitals" and subjected to electroshock "treatment" to stop her from being a lesbian.

In addition, from the moment she first protested anti-gay discrimination and harassment until the time she left Russia, Alla was repeatedly arrested, interrogated, detained, and beaten by Russian authorities for being a lesbian and an open supporter of lesbian and gay civil rights. Even further, when Alla was harassed and threatened countless times and ultimately kidnapped for several days by Russian organized crime members, she sought police assistance but was told by an officer, "I will not send my people to be fired upon, especially for perverts."

After coming to the United States and learning that the Russian government was continuing to pursue her back in Moscow, Alla applied for asylum. According to federal

law, individuals who have been persecuted or who have a well-founded fear of persecution on account of race, religion, national origin, political opinion, or membership in a particular social group are eligible to seek asylum in the United States.

In 1994, following strenuous efforts by Congressman Barney Frank, the International Gay and Lesbian Human Rights Commission, and Lambda, Attorney General Janet Reno issued an order stating that lesbians and gay men who demonstrate persecution as required by law should be considered eligible for asylum as members of a particular social group. Since that time, approximately 34 lesbians and gay men have been granted asylum in the United States on account of sexual orientation-based persecution, including another Lambda client, A.T., a gay man from Iran.

Distressingly, both the immigration judge and the Board of Immigration Appeals denied Alla's asylum claim. We now have brought Alla's case to the Ninth Circuit Court of Appeals, making it the first-ever case of a lesbian or gay asylum applicant to go to a federal appeals court.

We hope and expect that the Ninth Circuit will reverse the Board of Immigration Appeals' ruling, and that Alla, and other lesbians and gay men persecuted for being gay in their home countries, will be treated fairly under American asylum law and find a place of refuge in the United States. ▼

Kirkland & Ellis. The Corporation Counsel for the City of Chicago is defending the Commission on Human Relations.

## Sullivan v. 529 1st Street Housing Corporation, et al. (New York)

**CASE PROCEEDING.** Lambda filed a discrimination complaint with the Human Rights Commission against the board of directors of a cooperative apartment building which refused to permit a lesbian to transfer ownership shares to her former domestic partner. The complaint alleges that the co-op board's refusal to allow the share transfer, when such transfers take place freely between married individuals, constitutes sexual orientation and marital status discrimination, which is prohibited by New York City law.

Although our client was able to protect herself from eviction by reaching a settlement with the cooperative in a landlord/tenant action, we have urged the Human Rights Commission that cooperatives may not demand that apartment owners spend significant personal resources in order to stave off illegal eviction. In December, Lambda filed a set of documents with the Human Rights Commission to assist the commission in its investigation of this case.

Lambda's Suzanne Goldberg and cooperating attorney Morton Newburgh of Silverstein Langer Lipner and Newburgh represent Sullivan.

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## IMMIGRATION

### In re Pitcherskaia (Federal Court, California)

**APPEAL BRIEFED.** Alla Pitcherskaia is a Russian lesbian who seeks asylum in the U.S. because she suffered persecution in Russia based on her sexual orientation. Pitcherskaia was detained multiple times, threatened with involuntary psychiatric hospitalization and electroshock treatment to change her sexual orientation, and faced total police inaction when she was threatened by organized criminals.

In November, the Board of Immigration Appeals (BIA) denied her application for political asylum. The board concluded that these "incidents" did not constitute persecution. The BIA also did not recognize lesbians as a "particular social group" which would be

tion of all sorts of anti-discrimination laws have become increasingly common across the country, the outcome of this case is expected to have an important impact nationwide on the enforceability of anti-discrimination laws.

Jon Davidson is the Lambda attorney on the case. Amelia Craig assisted cooperating attorney Clyde Wadsworth (formerly of the law firm Wilson, Sonsini, Goodrich & Rosati, and now at Sloan & Pratt) in drafting Lambda's brief.

### Jasniowski v. Rushing (Illinois)

**AWAITING DECISION.** This case, like the *Smith* case in California, involves a landlord, Jasniowski, who refused to rent to a man and a woman who were roommates because of religious beliefs requiring him not to condone or facilitate fornication on his

property. The case was argued to the Illinois Appellate Court for the First District on May 30, 1996 and we await a decision. Jasniowski previously lost before the Chicago Commission on Human Relations and the Circuit Court of Cook County. Lambda drafted and filed an *amicus* brief on behalf of the tenants on August 11, 1995. Lambda argued that enforcement of the Chicago Fair Housing Ordinance did not infringe the landlord's free exercise rights and that the ordinance should be given a broad interpretation to advance its remedial purposes.

Patricia Logue is Lambda's attorney on the case. Lambda was joined in the *amicus* brief by the multi-member Chicago Area Fair Housing Alliance and the Spectrum Institute. Rushing is represented by Chicago Lawyers' Committee for Civil Rights Under Law and

eligible to seek political asylum. The board's chair issued a separate opinion stating that he would have granted Pitcherskaia asylum because, in his view, it was reasonably possible that Pitcherskaia would be institutionalized and possibly subjected to "intrusive psychiatric measures," which, in his opinion, would constitute persecution. We have appealed the ruling to the Ninth Circuit Court of Appeals. Our opening brief was filed in March.

Suzanne Goldberg is the Lambda attorney on the case. Lambda's co-counsel, Ignatius Bau, formerly of the San Francisco Lawyers' Committee for Civil Rights, presented the argument. Brian DeLaurentis wrote an *amicus* brief for the BIA on behalf of the Asian Pacific Legal Center, the Coalition for Humane Immigrant Rights of Los Angeles, and the Los Angeles Gay and Lesbian Community Services Center.

**Matter of Tenorio (Immigration and Naturalization Service)**

AWAITING DECISION. Marcelo Tenorio, a Brazilian gay man, is seeking asylum in the United States based on the fear that he would be persecuted or killed if he returned to his home country.

In July 1993, an immigration judge granted Tenorio political asylum. Shortly after, the INS appealed the decision, arguing that Tenorio failed to present sufficient evidence to prove the Brazilian government's inaction in the face of paramilitary death squads who round up and execute gay men. Lambda filed an *amicus* brief defending the judge's initial grant of political asylum and his evaluation of testimony presented both by Tenorio and a leader of Brazil's gay community, Dr. Luis Mott, who has performed extensive monitoring of the anti-gay attacks and the lack of response by police and government officials. An appeal is currently pending before the Board of Immigration Appeals.

Suzanne Goldberg wrote Lambda's *amicus* brief.

**YOUTH**

**Scouts**

**Dale v. Boy Scouts of America (New Jersey)**

APPEAL FILED. James Dale, an Eagle

**Students' Rights**

by David Buckel

Lambda is investigating the possibility of a lawsuit against the State of Utah over its recent efforts to limit the rights of students. In Salt Lake City last fall, a 17 year-old lesbian named Kelli Peterson was experiencing violence and harassment in her school, including one incident in which several students repeatedly hit her in the face with hockey sticks.



David Buckel  
Staff Attorney

Martin Grant

Unfortunately, such abuse is not very unusual in this country, as evidenced by the recent hearings held in several cities across the country concerning anti-gay violence in schools, and by Lambda's *Nabozny* case. What is different in this story, though, is that Kelli managed to avoid many of the coping behaviors used by so many teens who face anti-gay abuse: dropping out of school, substance abuse, and suicide attempts. Instead, Kelli found the strength to try to change the situation and attempted to form a gay/straight student club so teens could get together to discuss homophobia, support each other, and stop the violence.

In response, in February the Salt Lake City school board voted to ban all clubs in their school system so they wouldn't have to recognize the gay/straight club. In April the Utah state legislature voted to ban all clubs in

the entire state that deal with "human sexuality" and certain other topics. One legislator declared that "adult homosexuals" had invaded Utah's schools to "seduce and sodomize" Utah's children.

A group of legislators conducted a secret, and illegal, meeting with the state education department to influence them in part by showing anti-gay videotapes (which ironically were produced by the same video company that did the anti-Mormon videotapes distributed by extremist Christians in Utah). The legislators attacked Kelli's actions, and she has been referred to by some as the "devil's pawn." In a horrifying example of how this controversy has influenced the community, a group of high school students formed an organization called "SAFE," an acronym for Students Against Fags Everywhere.

Ironically, the newly passed state law violates a federal law that Utah's own Senator Hatch pushed through Congress ten years ago: the Equal Access Act. The act requires fairness in recognition of all student groups. Hatch sponsored the act in order to ensure that prayer groups were able to meet at schools. The Utah state legislature appears to want fairness only when it means fairness to groups it approves of.

All Kelli Peterson wanted to do was to stop the beatings and other forms of abuse she and others had suffered at school. Lambda is working with a coalition of local Utah groups and other legal groups to formulate the best challenge to the attack by the Utah state legislature and the Salt Lake City school board on Kelli's efforts and on the rights of students and teachers throughout the state. ▼

Scout, was invited to become an Assistant Scoutmaster before his twelve-year involvement with the Scouts came to an abrupt end. When a local newspaper ran a picture of Dale at a seminar on the psychological and health needs of lesbian and gay teenagers, he received a letter from the Boy Scouts revoking his membership simply because he is gay. Lambda filed this case in 1993, the first under New Jersey's law prohibiting sexual orientation discrimination.

In a long-delayed, harshly worded, but expected opinion, the lower court judge ruled for the Boy Scouts of America (BSA). In

rhetoric replete with phrases such as "sodomist," "criminal," and "immorality," the court refused to consider BSA a "public accommodation," refused to apply the law against discrimination to the Boy Scouts, generally gutted the caselaw governing other discrimination claims in New Jersey, and evaded the standards established by the U.S. Supreme Court for determining when organizations are truly private and thus have first amendment protection even to discriminate. We have appealed the decision and are preparing our briefs.

Dale is represented by Lambda together

with a team of co-counsel from the New York law firm of Cleary, Gottlieb, Steen & Hamilton, headed by cooperating attorneys Donna Costa and Tom Moloney, and the New Jersey firm of Evans, Osborne & Kreizman. Evan Wolfson and David Buckel are the Lambda attorneys on the appeal.

### **Curran v. Mount Diablo Council of the Boy Scouts of America (California)**

NO CHANGE. AWAITING ARGUMENT. This case is a challenge under California law brought by Tim Curran, a former Eagle Scout, to the Boy Scouts of America policy excluding all "known or avowed" homosexuals from membership in the Scouts.

The California Supreme Court granted review in this case and has decided, in a related case, that California's anti-discrimination law covers membership in organizations that regularly engage in commercial transactions with non-members. Appellate briefing of the case has now been completed and we are awaiting scheduling of oral argument. Helpful *amicus* briefs were filed on behalf of the National Association of Social Workers, PFLAG, the Gay, Lesbian and Straight Teachers Network, and the Gay, Lesbian, and Bisexual Parents Coalition, International, and on behalf of the Unitarian Church. The Unitarian Church's brief subsequently was joined by the American Friends Service Committee (Quakers), the Anti-Defamation League, and the Federation of Reconstructionist Congregations and Havurot.

Curran is represented by Jon Davidson, who became involved when he was staff counsel at the ACLU of Southern California and continues in this case on the ACLU's behalf. Lambda is now co-counsel, having previously drafted an *amicus* letter which was joined by the National Gay and Lesbian Task Force, the National Center for Lesbian Rights, Children of Lesbians and Gays Everywhere (COLAGE), and Bay Area Lawyers for Individual Freedom (BALIF) and Lawyers for Human Rights (LHR) — the lesbian and gay bar associations of San Francisco and Los Angeles.

### **Schools**

### **Nabozny v. Podlesny (Federal Court, Wisconsin)**

APPEAL ARGUED. Jamie Nabozny suf-

fered brutal anti-gay assaults as well as daily verbal epithets and physical harassment from seventh through eleventh grades in the Ashland, Wisconsin public schools, until he dropped out with a school counselor's blessing. Jamie was kicked repeatedly in the stomach by classmates to the point of requiring surgery, pushed into a urinal and urinated on and subjected to a mock sexual assault in a classroom. He attempted suicide several times. The school never took meaningful disciplinary action against Jamie's abusers despite repeated requests from his parents. Lambda argued that Jamie was denied protection from harm that would have been given to other students because he is gay and a boy, in violation of his equal protection rights. Jamie's substantive due process rights were violated because the school's indifference created a climate in which anti-gay abuse could flourish and enhanced the risk of harm Jamie faced.

Lambda presented oral argument on March 28th to the Seventh Circuit Court of Appeals in this first federal appeal challenging the failure of school officials to stop anti-gay violence and abuse in a public school. The three-judge panel took under advisement Lambda's claims of federal equal protection and due process violations.

Patricia Logue, who argued the appeal, and David Buckel are Lambda's attorneys on the case. Lambda's position is supported by an *amicus* brief written by attorney Cynthia Hyndman of Robinson, Curley & Clayton, P.C. and filed on behalf of the National Association of School Psychologists, the National Association of Social Workers, Horizons Community Services, and Parents and Friends of Lesbians and Gays (PFLAG).

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## **REPRODUCTIVE RIGHTS**

### **Pro-Choice Network v. Schenck (U.S. Supreme Court)**

CERTIORARI GRANTED. This case concerns the harassment of women seeking treatment at health centers by zealous anti-choice advocates who hound women as they approach clinics that perform abortions and provide other health services. Lesbians and gay men are likely targets of the type of harassment at issue in this case, yet legal, non-violent first amendment protest is highly important to our movement, therefore, we

advocate for a reasonable balance. We argue that campaigns of harassment such as the one in this case go beyond activity which is protected by the First Amendment.

The full Second Circuit Court of Appeals reinstated a district court order providing an injunction which provided a 15-foot buffer zone around clinic entrances into which only two anti-choice advocates could enter to do "sidewalk counseling," and an order requiring "counselors" to move 15 feet away from any person attempting to enter the clinic who refused "counseling," or tried to walk away. The opinion, which will now be reviewed by the Supreme Court, recognizes that the "buffer zone" is necessitated by the activities of the anti-choice extremists, and therefore finds the zone reasonable; it also finds the "cease and desist" order reasonable as it only applies when a person's wishes not to be approached are being violated. The U.S. Supreme Court has decided to consider this case.

Lambda joined an *amicus* brief authored by the NOW Legal Defense and Education Fund. Beatrice Dohrn is Lambda's attorney on the case.

### **Long Island Gynecological Services v. 1103 Stewart Ave. Associates (New York)**

VICTORY! The landlord for Long Island Gynecological Services (LIGS), a clinic which performs abortions, had issued "new building regulations" directly contradicting the clinic's lease, rescinding the clinic's authorization to provide abortion services, which was contained in their original lease. The landlord began eviction proceedings on the grounds that because the clinic continued to perform abortions, it was putting the other tenants at risk of anti-choice bias-related violence.

Aside from sharing the goals of the reproductive rights movement, as members of a minority group who are also targets of unlawful harassment and violence, we have a keen interest in assuring that the law not punish the victims of harassment and reward those who resort to violent and unlawful activity. New York State's Appellate Division, Second Department, has reversed the lower court's ruling that LIGS should be evicted.

Lambda joined an *amicus* brief authored by the NOW Legal Defense and Education Fund.

Beatrice Dohrn is Lambda's attorney on the case.

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## CRIMINAL LAW

### **Burdine v. Scott (Federal Court, Texas)**

NO CHANGE. CASE PROCEEDING. Calvin Burdine was convicted of a murder he maintains he did not commit. During the trial, the prosecutor urged the jury to sentence Burdine to death, arguing: "Sending a homosexual to the penitentiary certainly isn't bad punishment for a homosexual." The prosecutor also suggested Burdine presented a danger to the community based on Burdine's 1971 conviction for consensual sodomy. Our brief argues that the prosecutor's deliberate appeal to the anti-gay prejudices of the jury, including his suggestion that gay people deserve the death penalty, violated Burdine's rights under the Eighth and Fourteenth Amendments.

Shortly before Calvin Burdine was scheduled to be executed, Lambda joined a group of civil rights organizations in filing an *amicus* brief in support of Burdine's petition for a writ of habeas corpus and a stay of his execution. Agreeing that serious constitutional issues were raised, a federal district court judge has ordered the execution stayed and has begun further proceedings in the case.

Donna Dennis of Richard Spears Kibbe & Orbe, David Kahne of the Clark Read Civil Liberties Foundation, and Ruth Harlow of the ACLU authored the *amicus* brief. Suzanne Goldberg is Lambda's attorney on the case. Also joining the brief are the National Lesbian and Gay Law Association, the Texas Human Rights Foundation, and the Clark Read Civil Liberties Foundation.

### **Sodomy**

### **Christensen v. Georgia (Georgia)**

LOSS. This case arose as a consequence of a sting operation which the Georgia police set up at an isolated rest stop, targeting men who sought sex with men. An undercover officer solicited Christensen at the rest stop by suggesting they meet at the officer's room at a nearby Holiday Inn. Christensen was then arrested after he drove by the Holiday Inn.

The Georgia Supreme Court has rejected a state constitutional challenge to Georgia's

criminal laws penalizing "sodomy" and "solicitation of sodomy." In two disappointing plurality decisions, the judges decided not to find the Georgia law unconstitutional, either because they found the sodomy law permissible, or because they found that privacy rights do not apply to solicitation made in a public place.

Lambda co-authored and filed an *amicus* brief with the Stonewall Bar Association of Georgia. Beatrice Dohrn and Evan Wolfson worked with Stonewall's Jane Morrison and former Lambda board co-chair Harry Harkins.

### **Campbell v. Sundquist (Tennessee)**

NEW CASE! VICTORY! This challenge to Tennessee's "Homosexual Practices Act" was filed on behalf of several lesbian and gay Tennesseans, each of whom charged that the law violates their rights under Tennessee's state constitution.

Both the trial court and the court of appeals held that the law violates the right to privacy, which the state constitution protects. The Tennessee attorney general has filed an appeal with the state supreme court.

The plaintiffs in this case are represented by former Lambda legal director Abby Rubinfeld. Troy Elder, Barry J. Gilman, Robert C. La Mont, Mark M. Sexton, Michael A. Silver, Valerie J. Wald, and W. Kirk Wallace wrote the brief with Lambda's Suzanne Goldberg. New York's Skadden Arps Meagher and Flom is the cooperating firm in this case.

## AIDS-RELATED DISCRIMINATION

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### EMPLOYMENT

### **Ann Howard's Apricots v. Commission on Human Rights and Opportunities and John Doe (Connecticut)**

AWAITING DECISION. E. Jason Blondeau filed a complaint with the Connecticut Commission on Human Rights and Opportunities (CHRO) after being fired from his job as a waiter because of his employer's belief that he had AIDS. The

CHRO conducted hearings at which Blondeau testified. However, Blondeau died before his cross-examination was completed. The employer, Ann Howard's Apricots, then requested that all of Blondeau's testimony be stricken from the record. The CHRO refused and determined that Apricots had violated the state anti-discrimination law by firing Blondeau on the belief he had AIDS.

On appeal, the superior court struck Blondeau's testimony, reasoning that because Apricots' principal defense was that they fired Blondeau because he had "lost credibility with management" when he lied in response to questions about his health, Blondeau's testimony was "critically important" to the issue of his credibility and therefore could not be admitted without full cross-examination. The CHRO and Blondeau's estate appealed. Lambda, together with the Connecticut AIDS Action Council, filed a joint *amicus* brief in support of the CHRO and Blondeau, arguing in part that Blondeau's right to keep his HIV status private, and the lack of medical basis to support Apricots' questions about Blondeau's health status in the first place, renders the very claim that Blondeau was fired because he lied about his HIV status discriminatory.

Catherine Hanssens co-authored the brief to the Connecticut Supreme Court with Yale Law School student David Lesser of Yale's Jerome N. Frank Legal Services Organization.

The case was argued before the Connecticut Supreme Court in February 1996 by Greg Adler, attorney for the estate of Blondeau.

### **Terry Eckles v. Consolidated Rail Corporation et al. (Federal Court, Indiana)**

AWAITING DECISION. This case raises the important question of whether the ADA will fully protect employees with disabilities in a unionized workplace. The central issue is whether a seniority system in a collective bargaining agreement "trumps" the ADA's requirement that persons with disabilities be afforded reasonable accommodations which allow them to perform the essential functions of the job. Terry Eckles, who had eighteen years of service with Conrail and was a member of the union, has a disability which required the accommodation of a transfer to another work assignment which would allow him to avoid stairs and night shifts. The

union representative balked at the request; although Eckles briefly was allowed to transfer to a vacant position after filing a disability discrimination complaint, the union representative eventually rescinded the transfer and "bumped" into the position himself. In his lawsuit against Conrail and the union, Eckles sought a permanent placement that accommodated his disability and that protected him from being "bumped" out of the position by an employee with more seniority.

The federal trial court in Indiana granted summary judgment for the defendants on this issue, concluding that the ADA can never require reassignment to a position when the reassignment conflicts with the seniority provisions of a collective bargaining agreement. Eckles filed an appeal with the Seventh Circuit. The case was argued in April 1996.

Lambda joined the American Association of Retired Persons and the National Alliance for the Mentally Ill in an *amicus* brief opposing the district court's *per se* rule allowing a collective bargaining agreement to automatically preempt the ADA. Catherine Hanssens and Barry Taylor are the Lambda attorneys on this case.

### **Equal Employment Opportunity Commission V. CNA Insurance Companies, Continental Casualty Co., and Continental Assurance Company (Federal Court, Illinois)**

NEW CASE! APPEAL BRIEFED. For the 25 years that Cynthia Valladares-Toledo worked for CNA Insurance Co., she paid premiums on a long-term disability plan available to CNA employees which pays benefits to employees from the point of disability to age 65, but which limits benefits for mental health disabilities to two years. In 1992, diagnosed with severe depression and unable to work, she began receiving short-term disability benefits. When they ran out after a year, Valladares-Toledo was discharged because her disability made it impossible for her to return to work.

The EEOC was unsuccessful in its efforts to win continued benefits for Valladares-Toledo pending the conclusion of its administrative proceeding. The federal district court found that as a disabled former employee, Valladares-Toledo could not challenge CNA's discriminatory benefits plan because she was not currently a "qualified person with a dis-

ability" who could perform the essential functions of her former job. Lambda joined several disability rights and public interest organizations in an *amicus* brief to the Seventh Circuit Court of Appeals in support of the EEOC, arguing that allowing only those currently able to work to challenge discrimination in an aspect of employment as important as disability benefits is inconsistent with the meaning and purpose of the ADA and would adversely affect the ability of persons with disabilities, including those with HIV, from entering and remaining in the work force.

Lambda's attorney on the case is Catherine Hanssens, who worked with Sally Dunaway of the American Association of Retired Persons in the preparation of the *amicus* brief on behalf of AARP, Lambda, the Employment Law Center, the Bazelon Center for Mental Health Law, the Disabilities Rights and Education Defense Fund, the New York Lawyers for the Public Interest, and the

National Alliance for the Mentally Ill.

### **Equal Employment Opportunity Commission and Darlene Walters v. Metropolitan Educational Enterprises, Inc. (U.S. Supreme Court)**

NEW CASE! CERTIORARI GRANTED. Darlene Walters was fired after she filed a charge of gender discrimination against her employer Metropolitan Educational Enterprises. When the Equal Employment Opportunity Commission filed suit on her behalf in the Northern District of Illinois, Metropolitan moved to dismiss the case arguing that it did not have fifteen employees — the minimum number required to be considered an "employer" under Title VII of the Civil Rights Act of 1964. Although Metropolitan does have fifteen employees on its payroll, it contends that because some of these workers are part-time, they should not

### **Discriminatory Inquiries Eliminated**

by Barry C. Taylor

As we reported in the last Update, for the past ten years the Chicago Board of Education has required applicants to disclose their HIV status when applying for a teaching position. Applicants who divulged their seropositive status were then required to reveal their t-cell count, history of opportunistic infections, medical treatments, and even the manner in which they were infected.

Lambda learned of the board's policy when a teacher applicant contacted us to determine the legality of these pre-employment inquiries. Because the questions violated federal disability discrimination statutes, as well as personal privacy rights, we sent a letter to the Board of Education demanding that the discriminatory inquiries be eliminated and seeking damages for the emotional distress our client suffered from being subjected to the intrusive questions. In response to our



Barry C. Taylor, MRO  
AIDS Project Staff Attorney

Jason Smith

demand letter, the board eliminated the problematic inquiries and adopted a new policy.

It is significant that the board moved quickly to remove the HIV-specific inquiries. However, in their haste to adopt a new policy, the board retained certain aspects of the previous policy that are still in violation of federal discrimination laws or are contrary to current medical knowledge regarding HIV/AIDS. Additionally, the policy still permits the exclusion of HIV-positive school children for behaviors that public health officials agree pose no risk of transmission. We are currently working with the board to eliminate these remaining problems.

As we conducted our investigation into school-based AIDS policies, we found that many were drafted in reaction to the hysteria surrounding the efforts of a child from Indiana, Ryan White, to attend school in the 1980's. While many schools have revised these reactionary policies to reflect current medical knowledge and to comply with federal discrimination statutes, the Chicago Public School situation is a sobering reminder that institutions often fail to self-regulate. Hopefully, the widespread attention this case is generating will prompt schools and other employers and public accommodations to revisit policies adopted out of ignorance and irrational fear of HIV. ▼

be counted.

The Seventh Circuit Court of Appeals has affirmed the Illinois District Court's opinion agreeing with the employer and dismissing the case. The decision highlighted a split of authority among courts on the issue of how employees are counted for jurisdictional purposes under federal discrimination statutes, including the ADA. Accordingly, the United States Supreme Court has agreed to hear the case and briefing is proceeding.

This case raises important concerns about maximizing the reach of civil rights protections as methods which exempt part-time employees, creating loopholes in coverage that employers are sure to exploit to avoid having to comply with those laws — particularly the ADA. Lambda has joined other civil rights groups in submitting *amicus* briefs on behalf of the EEOC and Walters. Barry Taylor, Lambda's attorney on the case, is working on a brief with Helen Norton who is coordinating the *amicus* effort on behalf of the Women's Legal Defense Fund.

### **Robert Hadley v. The Village of Bloomingdale (Illinois)**

CASE WITHDRAWN. For several years, Robert Hadley has been a dispatcher for the police department in Bloomingdale, Illinois, a Chicago suburb. During the course of his employment, Hadley disclosed to his employer that he has AIDS. As a result of this disclosure, the village implemented a policy which requires Hadley to submit to a physical examination every six months to confirm that he does not pose a risk of HIV transmission in the workplace. Lambda and its co-counsel AIDS Legal Council of Chicago prepared a letter for the village requesting that the requirement that Hadley submit to a physical examination be eliminated, as a violation of the ADA.

Recently, Hadley experienced a sudden deterioration in his health and he has elected to go on long term disability leave, forcing him to abandon litigation. However, we are exploring alternative means of requiring a review of the discriminatory policy with the Department of Justice.

Barry Taylor is the attorney for Lambda and Julie Justicz is the attorney for co-counsel AIDS Legal Council of Chicago.

### **John Doe v. City of Chicago (Illinois)**

VICTORY! NEGOTIATIONS PRO-

CEEDING. Our client John Doe applied to be a teacher in the Chicago Public Schools. However, the school district application asked his HIV status. After Doe confirmed that he has AIDS, his physician was required to complete an HIV-specific questionnaire that inquired about Doe's treatments, T-cell count, any opportunistic infections as well as the manner in which he was exposed to HIV. In addition, Doe was required to submit to a physical and psychiatric examination every four months, a requirement imposed only on employees with HIV.

Lambda sent a demand letter to the Chicago Board of Education seeking elimination of the inappropriate health-related and HIV-specific inquiries and the physical and psychiatric monitoring of HIV-positive applicants. In response to our demand letter, the board quickly adopted a new policy which eliminated the discriminatory inquiries and monitoring. However, the board passed the policy without giving Lambda an opportunity to review it. Because the new policy still contains some inaccurate legal and medical information, Lambda, after consulting with other HIV advocacy groups and public health officials, is requesting that the board further refine its policy to conform with federal discrimination law standards and current medical knowledge regarding HIV/AIDS. Lambda's negotiations with the board also continue with respect to the compensation its client should receive.

Barry Taylor is Lambda's attorney on this case.

### **Leonard C. McNemar v. The Disney Stores, Inc. (Federal Court, Pennsylvania)**

AWAITING ARGUMENT. Leonard McNemar, an assistant manager at the Disney Store in New Jersey, had been employed there for four years when he was diagnosed with AIDS in October 1993 and briefly hospitalized. When he returned to work the following month, the district manager confronted him with questions about whether he had AIDS. About a week later, the manager fired McNemar, supposedly for a minor infraction, without severance pay and with immediate termination of his medical benefits. McNemar applied for state and federal disability benefits, and then sued, challenging his termination on the technical violation as a pretext for AIDS discrimina-

tion.

The federal trial court judge in Philadelphia dismissed the case, ruling that McNemar's application for disability benefits meant he could not claim to be, under the ADA, a "qualified person with a disability." The appeal, which is presently pending before the Third Circuit Court of Appeals, endeavors to establish the significant differences between the standards for receiving disability benefits, and those for an ADA claim of discrimination. We also argue that the policy imperatives underlying each statute are seriously undermined by the trial court's determination that a person who subsequently applies for benefits cannot seek redress for being fired for having AIDS.

Catherine Hanssens coordinated the *amicus* participation of the interested agencies, which produced briefs by the Equal Employment Opportunity Commission, the New Jersey chapter of the National Employment Lawyers Association, the American Association of Retired Persons, and a brief prepared and filed jointly by Hanssens and Vicki Laden and Jennifer Middleton of the Employment Law Center, and joined by the AIDS Law Project of Pennsylvania and the Disabilities Rights Education and Defense Fund.

## **HEALTH CARE WORKERS**

### **Mauro v. Medical Center (Federal Court, Michigan)**

AWAITING ARGUMENT. William Mauro was a surgical technician for Borgess Medical Center in Kalamazoo, Michigan. The medical center removed Mauro from his position after rumors surfaced that he was HIV-positive.

Mauro filed suit in federal court under the ADA and the Rehabilitation Act. The district court granted summary judgment in favor of the hospital. Despite the consensus that the risk of HIV transmission from Mauro to patients was extremely small, the court concluded that the presence of any risk, however remote, that Mauro could transmit HIV to surgical patients made him a "direct threat" to these patients and therefore not "otherwise qualified" to perform his duties as required by the ADA. Mauro appealed his case to the Sixth Circuit Court of Appeals. We are awaiting the schedule for oral argument. Without explanation the court denied

our motion to participate as *amicus* almost eight months after it was filed along with our brief. We are awaiting a ruling on our motion for reconsideration.

Barry Taylor and Catherine Hanssens prepared Lambda's *amicus* brief.

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## ACCESS TO HEALTH CARE

### **Craig Miller v. Dallas Avionics, Inc. (Texas)**

VICTORY! Dallas Avionics has a self-insured group health benefits plan for its employees which provides a \$1 million lifetime benefit for all medical expenses, except HIV-related expenses which are capped at \$5,000 per year and \$25,000 for an employee's lifetime. Craig Miller, an employee living with HIV, incurred medical expenses in excess of the \$5,000 cap and was denied coverage.

Lambda demanded that Dallas Avionics remove the cap and pay Miller's outstanding medical expenses. Within weeks, Dallas Avionics adopted a new employee benefits plan which eliminated the cap on AIDS-related health care coverage. After the filing of a charge alleging violation of the ADA with the Equal Employment Opportunity Commission, and additional negotiations, Dallas Avionics agreed to pay the balance of Miller's unpaid medical bills, incurred under Dallas Avionics' discriminatory insurance plan and amounting to approximately \$82,000.

Miller is represented by Lambda attorneys Catherine Hanssens and Barry Taylor, with assistance from Dallas-area cooperating attorney Cynthia Leiferman.

### **Donna Cole Winters v. Costco Wholesale Corp. (U.S. Supreme Court)**

LOSS. CERTIORARI DENIED. Donna Cole Winters, a participant in her employer's self-insured health benefits plan, filed suit when she was denied reimbursement of medical expenses for breast cancer treatments which the plan administrator considered experimental. Winters won in the district court. However, the Ninth Circuit Court of Appeals reversed, concluding that the decision of the plan administrator was reasonable. The Ninth Circuit also held that the rule of *contra proferentum*, under which any ambigu-

ities in a contract are interpreted in the favor of the plan beneficiary, is not applicable to self-funded Employees' Retirement Income Security Act (ERISA) plans that give a plan administrator explicit authority under the contract to determine benefits or to construe the terms of the plan.

Lambda had joined a number of national women's and disabilities' rights projects in an *amicus* brief urging the Supreme Court to review the Ninth Circuit's decision because of the special problems for women and persons with HIV disease if ambiguous provisions in insurance contracts that exclude coverage for "experimental," "investigational," or "medically unnecessary" treatments are no longer construed in a light most favorable to the insured. The U.S. Supreme Court has denied Winters' petition for *certiorari*.

Catherine Hanssens, Lambda's attorney on the case, worked on the brief with Linda Mangel of the Northwest Women's Law Center, which coordinated the *amicus* effort with the California Women's Law Center. Primary authors of the brief were L. Susan Slavin and M. Harriet Steinberg of the New York law firm, Slavin and Steinberg.

### **Galanty v. Paul Revere Life Insurance Company (California)**

COMPLAINT FILED. This lawsuit challenges an insurance company's rejection of a disability insurance claim filed by a man living with AIDS. The insurance company claims that, because Mark Galanty was HIV positive when they sold him insurance, he is not covered for any AIDS-related disability, because they contend that HIV is a "manifestation" of AIDS and the policy only covers disabilities caused by sicknesses that first "manifest" themselves after the policy is issued. The insurance company has taken this position even though Galanty had no symptoms of illness, continued to work, and paid premiums under the policy for five years after the policy was sold to him and in the face of an "incontestability" clause in the policy that prohibits the denial of claims for a disability (defined as an inability to perform one's occupation) that starts later than two years after the issuance of the policy. The lawsuit includes claims for breach of contract, breach of fiduciary duty, fraud, violation of the California Insurance Code, unfair business practices, and violation of California's civil rights laws.

Suit was filed in Los Angeles Superior Court on January 23, 1996. The insurance company removed the case to federal court and we filed a motion to remand the case to state court and opposed the motion to dismiss. On April 15, 1996, the federal court agreed with us that the case belonged in state court, granted our motion to remand, and (as we had suggested) declined to reach the merits of the motions to dismiss.

Jon Davidson is the Lambda attorney on the case with cooperating attorney Ian Kramer of the Los Angeles firm of Hedges & Caldwell.

### **Doe v. Chubb Sovereign Life Insurance (Federal Court, California)**

NEW CASE! COMPLAINT FILED. Jane Doe and her husband John Doe simultaneously applied to the same company for life insurance after the birth of their third child. The company had them both tested for HIV and John Doe tested positive, but Jane Doe did not. The insurance company then not only denied John Doe's application for life insurance, but also improperly used his test results to deny Jane Doe's application, informing her that the denial was based on her husband's "communicable" condition.

We have filed suit in federal court on behalf of both Jane and John Doe, alleging violation of the ADA, California's Unruh Civil Rights Act, provisions of California's Insurance and Business & Professions Codes, and violation of the California constitutional right of privacy.

Jon Davidson is the Lambda attorney on the case with cooperating attorney Timothy Cahn of the Oakland law firm known as Legal Strategies Group.

### **August Gonzales, as Administrator of the Estate of Timothy Bourgeois, Deceased v. Garner Fast Foods, Inc. (Federal Court, Georgia)**

AWAITING DECISION. Timothy Bourgeois was fired from his position with Garner Fast Foods when Garner discovered Bourgeois had HIV. Garner then imposed a \$40,000 life-time maximum cap on his health care claims through COBRA, a federal law created to ensure continuity in health benefits for former employees who received insurance through their employment.

Bourgeois has since died and August Gonzales, administrator of his estate, has charged that Garner's actions are in violation of ERISA and the ADA.

A federal district court dismissed Gonzales' claims, and Gonzales has appealed to the Eleventh Circuit Court of Appeals. At issue is whether the discriminatory practices of employers providing health insurance can be challenged under the ADA, which prohibits discrimination in employment and related benefits, by an employee who receives health insurance coverage through COBRA. The case was argued by counsel for Gonzales in January 1996 and a decision is pending.

Catherine Hanssens prepared the *amicus* brief in support of Gonzales on behalf of the American Medical Association, the American Foundation for AIDS Research, the American Public Health Association, and Gay Men's Health Crisis.

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## STANDARDS OF CARE

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### CDC AIDS DEFINITION

#### **S.P. et al. v. Sullivan (Federal Court, New York)**

SETTLEMENT FINALIZED! This class action lawsuit challenges the Social Security Administration's (SSA) reliance, in its pre-1993 regulations, on a grossly inadequate definition of AIDS for awarding Social Security disability benefits. Those SSA regulations grant presumptive eligibility for disability benefits to those with HIV only if their doctor certified that they had one of the opportunistic infections which the Centers for Disease Control then recognized as HIV-related. Because the CDC list did not include many of the diseases which manifest in women, drug users and low-income people, those applicants disproportionately had to satisfy a very difficult "functional" standard to qualify for benefits.

In July 1993, the SSA announced new regulations governing disability benefits for people with HIV which address virtually all of the concerns raised by our lawsuit. The new regulations add the predominant manifestations of HIV in women, drug users, and low income people as criteria by which HIV-infected individuals can presumptively qualify for disability benefits. Because this

case was a class action, reaching a final settlement was a time consuming process requiring extensive negotiation with SSA as well as time for those affected by the proposed settlement to comment on its terms. In February 1996, Judge Cedarbaum of the Southern District of New York approved the settlement.

Terry McGovern of the HIV Law Project is lead counsel on the case. Other participants include MFY Legal Services, Brooklyn Legal Services, Cardozo Law School's Bet Tzedek Legal Services, and the Center for Constitutional Rights. Suzanne Goldberg is Lambda's attorney on the case.

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### HEALTH CARE FACILITIES

#### **Porter v. Axelrod (New York)**

NO CHANGE. This lawsuit challenges New York State's standards of care for residential health care facilities for persons with HIV/AIDS. Because the state greatly weakened its guidelines at the behest of the Roman Catholic Archdiocese of New York, which obtained state approval to operate two HIV residential facilities, the standards eventually adopted do not provide adequate assurance of good HIV and gynecological services, nor do they require a pledge of non-discrimination.

The filing of this case successfully barred the discriminatory issuance of the permits, perhaps making continuation of the lawsuit unnecessary. We are exploring ways to bring this case to a conclusion.

Lambda is co-counsel with Winthrop, Stimson, Putnam & Roberts and the Coalition for the Homeless. Evan Wolfson is handling the case for Lambda.

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### RIGHT TO PRIVACY

#### **Anderson v. Romero (Federal Court, Illinois)**

PARTIAL VICTORY! DISCOVERY PROCEEDING. In this case, a prison inmate's HIV status was inappropriately revealed by prison officials, who subjected him to discriminatory treatment and medically unnecessary "precautions." The inmate, Dennis Anderson, who has since died, sued Illinois Department of Corrections (IDOC) officials for violations of his right to privacy, other constitutional

rights, and state law provisions.

IDOC moved to dismiss the complaint, asserting that because the guards' actions were within the scope of their employment, and because the rights of HIV-positive prisoners were not clearly established, the corrections defendants are immune from suit. The motion was denied, and IDOC filed an appeal in the Seventh Circuit Court of Appeals. The Seventh Circuit reversed the district court's ruling and held that the right to privacy for HIV-positive prisoners was not clearly established at the time of the incident allowing the guards to assert a defense of qualified immunity. The court affirmed the district court's ruling in favor of the plaintiff for constitutional violations of due process and cruel and unusual punishment. Upon remand to the district court, IDOC moved to dismiss the pendent state claims, including a claim under the Illinois AIDS Confidentiality Act. Recently, IDOC's motion was denied and discovery is proceeding.

Barry Taylor prepared Lambda's *amicus* brief to the Seventh Circuit. Anderson is represented by the law firm of Jenner & Block.

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### RIGHT TO DIE

#### **Timothy Quill, M.D. et al. v. Dennis Vacco (Federal Court, New York)**

VICTORY! This case challenged New York's criminalization of physician-assisted suicide. Lambda joined six other organizations and the daughter of one of the deceased plaintiffs in this appeal of the federal district court's ruling that a mentally competent and terminally ill person facing severe suffering has no constitutional right to assisted suicide.

In April 1996, in the second federal court decision of its kind, the Second Circuit Court of Appeals reversed the lower court and invalidated New York's law criminalizing physician-assisted suicide. While refusing to find a fundamental constitutional right to doctor-assisted suicide, the court concluded that New York law's distinction between competent, terminally ill adult patients requesting the termination of life-support systems, and those seeking assistance from their physicians through the provision of medication to expedite death served no rational purpose and therefore violated the latter's constitutional

right to equal protection of the laws. New York State Attorney General Dennis Vacco has vowed to seek review of the decision by the U.S. Supreme Court.

Coordination of *amicus* participation, and drafting of the brief, was handled by Cary LaCheen of New York Lawyers for the Public Interest, and cooperating attorney Claudia Hammerman of Paul, Weiss, Rifkind, Wharton & Garrison, with assistance from Lambda's Catherine Hanssens.

**Compassion in Dying v. State of Washington (Federal Court, Washington)**

VICTORY! This challenge to the Washington State statute criminalizing any assistance to suicide argues that it interferes with the constitutional right of a terminally ill, competent adult to seek assistance from her physician to accelerate her death.

In March 1995, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit reversed a favorable decision by the district court. A petition for rehearing was filed and the full Ninth Circuit agreed to hear the case *en banc*. In March 1996, the full court reversed the panel's earlier ruling, issuing a ground-breaking decision which is extraordinary in its depth and eloquence. The court of appeals concluded that there is a constitutionally-protected liberty interest in determining the time and manner of one's own death. It then concluded that a Washington state law prohibiting physicians from prescribing life-ending medication for use by terminally ill, competent adults who wish to hasten their own deaths violates this fourteenth amendment due process right. Shortly after issuing the opinion, the court granted the State of Washington's petition and agreed to rehear the case.

The *amicus* strategy was coordinated by the ACLU of Washington, whose cooperating attorneys Karen Boxx, Julie Farris, Keller Rohrbach of the firm Allen Hansen and Maybrown drafted the brief. Lambda, along with over a dozen other groups, joined in a brief urging affirmance. Beatrice Dohrn is Lambda's attorney on the case.

**CRIMINAL LAW**

**State of Mississippi v. Marvin**

**McClendon (Mississippi)**

APPEAL FILED. In October 1994, two gay men, Robert Walters and Joseph Shoemaker, were shot and killed in Laurel, Mississippi. Upon arrest, Marvin McClendon confessed to the murders, claiming that the victims sought to sexually assault him. The court permitted the defense to conduct post-mortem HIV tests on the victims, upon defense counsel's insistence that positive results would be "equivalent to [the victims] carrying a loaded gun."

Lambda filed a brief in support of the Jones County District Attorney's pre-trial motion to exclude any evidence related to the victims' HIV status or sexual orienta-

tion. At the February 1995 trial, the judge ruled that the HIV status of the victims was relevant, and permitted defense counsel to introduce as evidence the test results of the two men. Despite this, the jury rejected the justifiable homicide defense and found the defendant guilty on two counts of murder. After denial of his motion for a new trial, the defendant appealed. After consultation with Lambda, the Jones County District Attorney filed a cross-appeal on the admission of the victims' HIV test results. Lambda agreed to assist the District Attorney with the appellate briefing of the case.

Catherine Hanssens and Barry Taylor are the Lambda attorneys on this case. ▼

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### Lambda Offices

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# Lambda Program Activities

## CONFERENCES & SPEAKING ENGAGEMENTS

### PFLAG

On January 16, Jon Davidson spoke to PFLAG-Los Angeles about the outlook for lesbian and gay rights and AIDS issues in 1996. In March, Board of Directors treasurer Fran Goldstein spoke about Lambda's work and activities to PFLAG in Bergen County, New Jersey. And Beatrice Dohrn spoke at the Central Florida PFLAG's annual fundraising dinner "An Evening Out with PFLAG," in Orlando, Florida on April 28.

### Illinois Department of Public Health

In January, Barry Taylor submitted testimony to the Illinois Department of Public Health in Chicago against a proposal mandating the establishment of a state registry of people who test positive for HIV.

### California Assembly Judiciary Committee

Jon Davidson testified before California Assembly Judiciary Committee on January 24 in opposition to AB 1982, a bill that would deny recognition to same-sex marriages entered into in other states. Jennifer Pizer participated in a briefing on AB 1982 for staff of the California Senate Judiciary Committee on March 8.

### Aspen Human Rights Summit

Kevin Cathcart participated in this forum held in Aspen, Colorado during Aspen Gay Ski Week in January. Co-sponsored by the Colorado Legal Initiatives Project, Human Rights Campaign, and the Aspen Gay and Lesbian Community, the forum featured a discussion about the status of the gay movement with panelists Jeanne Winer, Marsha Scott, David Clarenbach, Kevin Cathcart, Rev. Mel White, and Daniel Zingale. CLIP's Mary Celeste moderated the discussion, which drew a crowd of approximately 350 people.

### Ann Sather's Restuarant

Evan Wolfson and Pat Logue spoke with people interested in Freedom to Marry

Coalition work at this Chicago restaurant on January 25. Logue also met there with Men of All Colors Together on February 2, and with members of the Chicago Professional Networking Association on February 21, to discuss equal marriage rights and other gay rights issues.

### Feminist Majority Expo

On February 4, Suzanne Goldberg spoke on a panel concerning "Violence Against Women" and discussed violence against lesbians, including issues of domestic violence and the attacks on the lesbian feminist Camp Sister Spirit in Mississippi, at the Feminist Majority Expo in Washington D.C.

### Chicago Bar Association

Pat Logue spoke about the Cincinnati and Colorado anti-gay initiative cases to the Women in Law Committee of the Young Lawyers Section of the Chicago Bar Association on February 6.

### Pace University School of Law

Suzanne Goldberg spoke about "The Role of Lawyers in Devising and Implementing a Strategy for Political Action and Community Activism" at a program entitled, "Advocating for Social Justice: Lawyering for Social Change," sponsored by Public Interest Law Students Organization in White Plains, New York, on February 8.

### Lesbian and Gay Law 1996

On February 10, Suzanne Goldberg appeared on panels entitled, "Lesbian Jurisprudence" and "Life after *Romer v. Evans*," at this program sponsored by the Lesbian and Gay Law Association of Greater New York and the Lesbian and Gay Association of Law Students at Brooklyn Law School.

### Rutgers Public Interest Law Foundation Program

Kim Kirkley spoke at this Rutgers program on February 12 regarding obtaining employment in public interest law.

### Midwest Lesbian & Gay College

### Student Conference

Barry Taylor was a panelist at this conference in Beloit, Wisconsin in February. His panel addressed HIV-related discrimination, with specific focus on the ADA and youth issues.

### Southwestern School of Law

On February 13, Jennifer Pizer spoke on a panel at Southwestern in Los Angeles about careers in public interest law.

### Black Lesbian and Gay Leadership Conference

Kim Kirkley, with Shannon Mintner of the National Center for Lesbian Rights and Kelli Evans of the American Civil Liberties Union of Northern California, presented a workshop on "Preserving and Protecting Lesbian and Gay Families" at this ninth annual conference held in February in Dallas, Texas.

### DePaul Law School

On February 14, Pat Logue was a panelist on "The Right to Marry" at this Chicago law school as part of its week-long "Discrimination to Diversity" series.

### Race, Culture and the Law

Kim Kirkley was the keynote speaker at this symposium sponsored by the *Women's Rights Law Reporter* on February 21 at Rutgers School of Law in Newark, New Jersey.

### Virginia Polytechnic University

Kim Kirkley spoke to the Lesbian, Gay and Bisexual Alliance at VPU in Blacksburg,



Ilse Dohrn with her daughter Beatrice Dohrn and Carole Benowitz, PFLAG Gulf Region Director, at "An Evening Out With PFLAG."

Virginia in February 22 regarding the civil rights of lesbians and gay men.

### How Democracy Works

Jennifer Pizer spoke on a panel at the "Media and Democracy Congress," a gathering of alternative media professionals and progressive activists in San Francisco on February. The session was the public unveiling of a user-friendly publication entitled "How Democracy Works," which offers rebuttal answers to some of the fallacious arguments made by the radical right. It was authored largely by Suzanne Goldberg, with assistance from Jon Davidson and others.

### National Women Law Students Association

Suzanne Goldberg was a panelist at the NWLSA's annual conference on March 2 at the University of Wisconsin Law School at Madison. She spoke about "Challenging Gender Roles Through Law."

### Tampa Business Guild

Kevin Cathcart spoke about Lambda's plans for opening a Southern Regional Office in Atlanta in 1997, at a dinner meeting with the Tampa Business Guild on March 5.

### Freedom to Marry

Jon Davidson spoke at a Freedom to Marry Coalition meeting in San Diego on March 9. The *Gay & Lesbian Times* published an article about his talk on March 14.

### Women in Network

On March 9, Suzanne Goldberg was the keynote speaker, along with former Lambda legal director Paula Ettlbrick, at an event for Women in Network called, "Will You Marry Me?" held in Ft. Lauderdale, Florida.

### GLSTN Midwestern Conference

David Buckel delivered a presentation about public high school teachers' first amendment rights to over 250 teachers at the annual midwestern conference of the Gay, Lesbian, and Straight Teacher's Network on March 9. At the conference, Jamie Nabozny received the "Pathfinder" award. The conference also was attended by Gerry Crane, the music teacher in Michigan who had a private religious commitment ceremony that caused

his school board to issue a proclamation condemning homosexuality and declare that they would "monitor" Crane.

### Perk!

David Buckel and Lambda plaintiff Jamie Nabozny talked about fighting anti-gay violence in high schools to a city-wide group of high school students and youth advocates on March 10 at the Perk! coffeehouse in Chicago.

### University of Illinois Law School

In March, Barry Taylor was a guest lecturer for a law school class addressing the impact of the ADA on HIV-related discrimination at University of Illinois in Champaign, Illinois.

### Mandatory Newborn HIV Testing

Catherine Hanssens drafted a position paper setting forth the medical, public health, and legal deficiencies of proposals advocating involuntary or mandatory newborn HIV testing. The paper was circulated in response to a policy statement by the AIDS Healthcare Foundation of Los Angeles in support of the implementation of mandatory newborn HIV screening. Hanssens also drafted comments to the New York State Department of Health on proposed regulations allowing involuntary newborn testing in New York state.

### Albuquerque

On March 11 and 12, Jennifer Pizer met with gay community activists and participated on a panel at a well-attended town hall meeting on marriage. She also met with activists about coalition building for marriage organizing, and with members of the newly-formed New Mexico Lesbian & Gay Bar Association



**Kim Kirkley spoke on behalf of the National Conference of Black Lawyers at a rally in support of Pennsylvania death row inmate Mumia Abu-Jamal.**

and the Albuquerque City Attorney about strategies for enforcement of the Albuquerque non-discrimination executive order and a potential domestic partnership ordinance.

### Queer Law at Brown

Suzanne Goldberg was the keynote speaker at "Queer Law in the 90's" on March 13 at Brown University.

### Dornan Amendment

Kevin Cathcart and Catherine Hanssens joined several other AIDS advocates at a February 6 meeting with White House officials to discuss strategy dealing with the Dornan Amendment to the Defense Reauthorization Act which required the discharge of servicemembers with HIV. Hanssens also attended a follow-up meeting on April 17 prior to the April 25 repeal of measure.

### LA AIDS Program Office

On March 13, Jon Davidson spoke at the Los Angeles County AIDS Program Office Task Force forum in opposition to mandatory HIV testing of pregnant women and newborns.

### John Marshall Law School

Pat Logue, Evan Wolfson, and Barry Taylor participated in John Marshall Law School's "Interdisciplinary Conference: The 10th Anniversary of *Bowers v. Hardwick*" on March 15 in Chicago. The conference was held on the tenth anniversary of *Bowers* and was sponsored by the Mayor's Advisory Committee on Gay and Lesbian Issues.

### Where To After Hawaii

Evan Wolfson and Pat Logue attended a meeting co-sponsored by Lawyers for Lambda



**Michigan teacher Gerry Crane, Jamie Nabozny, and David Buckel at the GLSTN Awards ceremony where Jamie received the Pathfinder Award.**

and the Lesbian and Gay Bar Association of Chicago on March 15, and a discussion with Saga Lynx in Bloomington, Illinois on March 16. Logue moderated the "Equal Marriage Rights" discussions and Wolfson was the featured speaker at both events.

### Treatment & Access

On March 18, Catherine Hanssens attended a national planning conference on treatment and access issues, organized and attended by national advocacy and treatment organizations such as AIDS Action Council and the AIDS Healthcare Foundation of Los Angeles.

### New Jersey Domestic Partnership Coalition

On March 20, with the co-chairs of the New Jersey Domestic Partnership Coalition, Suzanne Goldberg met with two attorneys who are counsel to Governor Christine Todd Whitman regarding issues related to domestic partnership recognition in New Jersey.

### Affirmative Alliances

Kim Kirkley was a panelist at a discussion entitled "Affirmative Alliances: the Constructions of Black Liberation and Queer Liberation" sponsored by the Office of Diverse Community Affairs and the Bisexual/Gay/Lesbian Alliance of Rutgers University, New Brunswick, on March 26.

### American Public Health Association

Catherine Hanssens prepared an abstract selected by the American Public Health Association for presentation at their annual conference on the need for cooperation and communication between public health and legal professionals in dealing with ADA interpretation and enforcement.

### Columbia Law School

Kim Kirkley was a panelist at Columbia University on March 28 regarding the radical right's attack on the civil rights of lesbians and gay men as it related to the panels' topic of "Modern Discrimination Against Women."

### Lesbian & Gay Civil Rights Roundtable

Lambda's legal staff attended this March meeting of the roundtable in San Francisco. The roundtable is a twice-yearly meeting of

lawyers from lesbian and gay civil rights groups across the country which serves as a think-tank on lesbian, gay, and HIV-related legal issues.

### University of Illinois

Barry Taylor was a panelist for a continuing education seminar for dentists focusing on the duty to treat under the ADA at the University of Illinois School of Dentistry in Chicago in April.

### UCLA Law School

On April 2, Jon Davidson spoke at UCLA regarding why large law firms should become involved in public interest legal work.

### Mandatory Testing Issues

Catherine Hanssens worked with ad hoc New York Coalition Against Mandatory Testing in formulating statements and assisting grassroots opposition to state legislative proposals allowing involuntary HIV testing of persons charged and convicted of a range of acts mostly unconnected to theoretical forms of HIV transmission. She also worked with ESPA, GMHC, and the Legal Aid Society on the development of an alternative legislative proposal providing free PCR/viral load testing to crime victims sustaining a significant blood or semen exposure as a consequence of a criminal act.

### Glendale School Board

On April 4, Jennifer Pizer testified before the Glendale School Board against a proposed policy to require parental consent for high school membership in voluntary, non-curricular student clubs.

### Brooklyn Law School

On April 11, Beatrice Dohrn appeared on a panel sponsored by the Lesbian and Gay Alliance for Law Students. The program was entitled "Best Interests of the Child: Gay & Lesbian Parenting," and she spoke about how the courts can best be used to gain recognition for lesbian and gay families.

### Skadden Fellowship Symposium

Suzanne Goldberg was a panelist on a "Creative Responses to Client Needs" at the Skadden Fellowship Symposium on April 12.



Michael Scott Rauschenberg, Mona Noriega, Jamie Nabozny, David Buckel, Evette Cardona, and Barry Taylor at Perk! in Chicago.

### Loyola Law School

Jennifer Pizer addressed students at Loyola in Los Angeles about marriage on April 16.

### Kent Law School

On April 17, Pat Logue participated on an equal marriage rights panel at this Chicago law school on the legal theory, tax, estate, and employee benefits aspects of marriage.

### Michigan Protection and Advocacy Service

In April, Barry Taylor was the keynote speaker for a statewide continuing legal education seminar addressing HIV/AIDS litigation and public policy issues in Detroit, Michigan.

### CUNY Law School

Suzanne Goldberg was a panelist for a discussion about "Lawyering for Social Justice" on April 18 at the City University of New York.

### Southwestern Law School

On April 20, Jon Davidson spoke at Southwestern regarding the litigation of *Curran v. Mount Diablo Council of the Boy Scouts of America*.

### Out & Equal in the 90s

Jennifer Pizer spoke on the relationship between marriage and domestic partnership at a plenary session of this NGLTF Workplace Organizing conference on April 21 in San Francisco.

### LA Community Center

Jennifer Pizer was welcomed to Los Angeles at a "community reception" held at the Los Angeles Gay and Lesbian Community Services Center. The event, held on April 23, was hosted by Lorri Jean, executive director of

the Center and former Lambda board member.

### AT&T LEAGUE

Pat Logue and Barry Taylor attended this "Professional Development Conference" on May 3 in Chicago. Taylor was a panelist for a forum addressing the ADA and discrimination against people with HIV/AIDS in the workplace. Logue participated in two panel discussions about equal employment issues. Lambda board member Miriam Pickus of the Chicago Commission on Human Rights also participated in one of those panels.

### State Bar of California

Jennifer Pizer appeared as a panelist at the state bar's "Women & Law" conference on May 4. She addressed strategies for protecting non-traditional families with a focus on marriage, second-parent adoption, and other current issues in lesbian and gay family law.

### San Luis Obispo

Jennifer Pizer addressed the lesbian and gay business association of San Luis Obispo on May 8. She gave an update on current legal issues including marriage, problems affecting lesbian and gay youth, the Amendment 2 decision, and the military cases.

### The Marriage Project

Evan Wolfson continued to travel the country to work with local activists and leaders on strategy and public education on our struggle to win and keep the freedom to marry and attended meetings of the National Freedom to Marry Coalition. Among the places already listed, Wolfson has spoke with groups in Princeton, Berkeley, Philadelphia, and Pittsburgh. He also attended conferences and town hall meetings in Topeka and Atlanta.

### MEDIA

#### Midwest AIDS Media

In January, Barry Taylor appeared on CLTV's *Front & Center* to discuss a proposal mandating the establishment of a state registry of people who test positive for HIV; he also addressed this topic on *Aware Positive Health Talk Radio* in April. Taylor was featured on *Aware* again in May when he discussed Lambda's challenge to the Chicago Board of

Education's HIV policy.

### America's Talking

Catherine Hanssens appeared as a guest on this show in January to discuss testing boxers for HIV infection.

### Newstalk TV

On January 23, Beatrice Dohrn appeared on *Newstalk* on the issue of "Multiculturalism," the show was part of a week of national celebration of diversity.

### UCLA Bruin

Jennifer Pizer was quoted by the *Bruin* in a series of articles about the military ban.

### Across America

Catherine Hanssens was a guest on a nationally-syndicated conservative radio talk show debating the merits of the Dornan Amendment, the portion of federal defense legislation requiring the discharge of servicemembers with HIV.

### Utah: No Promo Homo

Jon Davidson was interviewed by the *Salt Lake City Tribune* regarding Utah legislation that seeks to censor teachers' speech, and

David Buckel appeared on the radio to discuss Utah's proposed "no promo homo" statute on NPR's affiliate in Salt Lake City on February 15 and on the CBS Radio *News Hour* show on February 16.

### Trial Magazine

Catherine Hanssens co-authored an article on cutting-edge issues in application of Title I of the ADA to HIV-related employment discrimination with Philadelphia attorney Ronda Goldfein. The article was published in the February 1996 edition of *Trial*, a national magazine published by the Association of Trial Lawyers of America, which focused on "People at Risk."

### Geraldo Rivera

Suzanne Goldberg appeared on *Geraldo* on February 20 to discuss the *Ward* case in which the custody of a child was given to the child's father, a convicted murderer, over its lesbian mother.

### Lawline

In February, Catherine Hanssens was a guest on this nationally-syndicated television program on mandatory testing issues, debat-

### Romer v. Evans Press

ABC, NBC, and CNN joined other media at victory press conferences held in New York and Chicago with Lambda and the ACLU. Lambda's staff spoke with media all over the country about the Supreme Court's decision in the Amendment 2 case.

Suzanne Goldberg was quoted in lead articles in the *New York Times*, the *Wall Street Journal*, *San Francisco Examiner*, *USA Today*,

as well as in wire stories of the Associated Press, and the *Colorado Springs Gazette-Telegraph*, *Orlando Sentinel*, *Philadelphia Enquirer*, *Dallas Morning News*, *Oregonian*, the *Gainesville Sun*, the *Albuquerque Tribune*, the *Picayune* in New Orleans and many more. She appeared on CNN Radio, WCBS' *Gil Gross Show*, NPR, New York Public Radio, the *Bob Grant Show*, and *News Talk Television*.

Beatrice Dohrn, Pat Logue, Jon Davidson, and David Buckel were also interviewed by and quoted in several papers including Chicago's *Daily Herald*, *Windy City Times*, and *Outlines*, New York's *Daily News*, the *Colorado Springs Telegraph*, the Associated Press, and the *Los Angeles Times*. They also appeared on several television and radio shows including CLTV, WVON's *Cliff Kelley Show*, WKTA's *Rob Sherman Show*, *Diversity Radio*, CNBC's *After Hours*, Salt Lake City Public Radio, KQED-AM in San Francisco, KPFK-FM Pacifica/L.A., ABC's Washington D.C. affiliate WMAL-AM, and KCAL-TV in Los Angeles.



**Matt Coles of the ACLU and Suzanne Goldberg at the Amendment 2 victory press conference.**

ing Dennis Safron of the American Alliance for Rights and Responsibilities.

**Nabozny News**

David Buckel appeared on several radio and television shows to discuss the *Nabozny* case, including on Chicago's *Aware* radio show on March 9 and on NPR's Wisconsin affiliate on March 20. Pat Logue also discussed the case and its implications on an hour-long state-wide call-in talk show on Wisconsin Public Radio on April 4.

**Outlines/POZ**

Barry Taylor writes a monthly column for *Outlines*, a gay publication in Chicago, which focuses on how the ADA can be utilized to protect the legal rights of people with HIV/AIDS. Catherine Hanssens also writes a monthly column on AIDS-related legal issues for *POZ Magazine*. Hanssens also worked with POZ writer Evan Forster on an investigative article addressing the topic of people with HIV who have chosen to adopt children.

**The Body**

Catherine Hanssens makes on-going contributions on Lambda's behalf to the legal issues section of a World Wide Web site called *The Body*, a multimedia AIDS and HIV information resource. It can be contacted at <http://www.thebody.com>.

**Eyes Right!**

Suzanne Goldberg's article, "Civil Rights, Special Rights and Our Rights" has been published by South End Press in an anthology entitled *Eyes Right! Challenging the Right Wing Backlash*. The anthology was edited by Chip Berlet of Political Research Associates.

**Marriage Media**

Evan Wolfson continued to appear on radio and television talk shows to discuss the freedom to marry. His credits include CBS's *Day and Date*, and a same-sex marriage roundtable with Andrew Sullivan, Bob Knight, and Robert George on *Charlie Rose*. Beatrice Dohrn also appeared on *Newstalk Television* and *America's Talking* in regards to equal marriage rights. Jennifer Pizer appeared on KCAL evening news and on KCRW on "Which Way LA?"

**St. John's Law Journal**

Catherine Hanssens edited comments for a St. John's Law School symposium on the ADA and insurance for publication in an upcoming edition of the school's law journal.

**NBC Radio**

Catherine Hanssens was a guest on this national radio program on the Dornan Amendment and the discharge of servicemembers with HIV from the military in March.

**Success Stories**

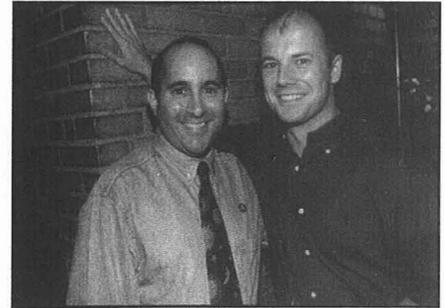
Lambda's Woman's Gallery Event was covered by Pat Lewis of Lewis Productions for Warner Cable. It was featured on Monday, April 1 on the cable television show *Success Stories*.

**Church & State**

Jon Davidson was interviewed by *Church & State* magazine regarding the California Supreme Court's decision in *Smith v. Fair Employment and Housing Commission*.

**CBS Evening News & Lawline**

Catherine Hanssens appeared on the *CBS Evening News* regarding the press con-



Evan Wolfson and Andrew Sullivan appeared together on *Charlie Rose*.

ference at the White House at which the Dornan Amendment was announced unconstitutional, and *Lawline* with Alan J. Schnurman on the subject of whether victims of violent assault have the right to know the HIV status of their assailant.

**Aware & Lesbigoay Radio**

Beatrice Dohrn appeared on a number of radio shows including on *Lesbigoay Radio* on the *Able* case, and *Aware* talk radio on the U.S. Supreme Court decision not to review *DeMuth v. Miller*.

**WOOD Radio**

David Buckel appeared on WOOD Radio in Grand Rapids, Michigan about school teacher Gerry Crane. ▼

**LAMBDA ON TV!**

Now, in addition to reading *The Lambda Update*, you can also get the latest about crucial cases and issues by turning on your television. The televised edition of *The Lambda Update* is produced and aired nationally by the Gay Cable Network. The 8-minute segments feature Lambda attorneys discussing the latest developments in Lambda cases. The Update airs as a part of GCN's Gay USA in the following markets:

MARKET	DAY	TIME	CH.
New York City Manhattan Cable	Thursdays	11:00pm	35
Paragon Cable	Thursdays	2:30am	34
Queens Public TV	Fridays	10:00pm	56
Staten Island	Thursdays	10:00pm	35
Washington DC	Fridays	8:00pm	25
Atlanta	Mondays	11:00pm	12
Long Beach, CA	Fridays	1:00pm	33
Denver	Thursdays	10:30pm	12

Tune in Today to *The Lambda Update!*

*MRO Update cont. from page 4*

willingness to come forward has put a spotlight on a problem many have wanted to hide away.

Certainly other kids in Jamie's situation have taken hope from his fight. Lambda has received countless calls from parents and their gay and lesbian children seeking help in fighting anti-gay harassment in their school districts. David Buckel, my co-counsel from our New York office, has tirelessly pursued remedies for schoolchildren facing violence and has drafted a publication that outlines resources and legal theories that can help in some circumstances.

We all need to reinforce the message that the problem of anti-gay violence and harassment in schools is not gay and lesbian kids. When a gay kid is beat up, as when a woman is raped or a man is held at knife point, the problem lies with the assailants. That is where responsible officials need to focus. When homophobia is allowed to cloud this basic issue, we are all put at risk. ▼

*WRO Update cont. from page 4*

rible, chilling effect a parental consent requirement would have. We testified about the substantial constitutional interests at stake. In the end, less than a majority of the board appeared convinced, but a further hearing was scheduled. As in Utah, we are working with a coalition to prepare for litigation. But here, given the milder political climate, we hope to coax the board away from its plan. Although litigation would likely yield a valuable precedent, our first concern is for the students and teachers of Glendale. If we can obtain a constitutionally-sound compromise, they can have immediate relief.

At the second hearing, we urged the board to adopt a notification policy, which would simply inform parents about the clubs. To our delight, and the delight of the many concerned students, parents, teachers, and community members who packed the hearing room that night, the board voted to follow our recommendation, acknowledging that the district's funding should be spent on education rather than on futile litigation. Their new notification policy may not be perfect in our view, but it is a vast improvement and creates a situation we can readily monitor in the coming months. ▼

*Freedom to Marry... cont. from page 5*

scare tactics and stereotypes thrust in their face by our religious-political extremist enemies.

As smalltown newspapers, courageous legislators, religious leaders, and the *New York Times* have shown, we can get non-gay support, and certainly non-gay consideration, of this basic claim to equality and protection for our families. We have their attention, and, now that Americans are being given something to work with and think about, we can reach the persuadable non-gay public that is not yet with us. It was critical that we beat back the backlash so as to keep the public discussion and our legal work alive; we did. Now, round two.

In the second half of 1996, we must shift our focus from "backlash mode" to "affirmative mode." The local and state groups, Freedom to Marry Coalitions, and activists who fought defensively must now immediately shift to undertaking the critical work of framing and sustaining the public discussion on our freedom to marry, and must train and launch non-gay and gay people to go now group by group asking non-gay people for their support of the Marriage Resolution and our equal marriage rights. If we fail to use the remaining half of 1996 to do this public education and outreach work, we will find ourselves facing the second wave of the backlash in January 1997 precisely where we were in January 1996. While America is now talking about our freedom to marry — and thus our lives — we cannot afford to spend the remainder of this year as the only ones not

talking about it.

The momentous gains and breakthroughs of early 1996 show us that the emerging national debate over our freedom to marry offers us much to work with. It gives us a wonderful vocabulary with which to talk about our lives, through diverse and compelling true stories, to non-gay people. It fractures the hateful and often inane rhetoric and "logic" of our opponents, who suddenly must contort themselves to explain why as they fight to force everyone else in the world to get and remain married, gay people alone should not have that choice. They have been reduced to having to argue that marriage should be a "special right" (!) reserved for heterosexuals.

The Freedom to Marry movement offers us a chance to work with people in communities of faith, parents, and the many others who connect powerfully to the resonance and personal importance of marriage. And it grabs people's attention, enabling us to be heard, and our families and lives to be seen, affecting all the many issues and battles we care about.

If you live in one of the frontline states of 1996 — the thirty-plus states where we fought against the backlash — now is the time to make the transition to the affirmative work we are called upon to undertake in the remainder of the year. If you live in a state spared this fight so far, now is your chance to lay the foundation for the fight to come. *Call Lambda and other National Freedom to Marry Coalition groups, and find out how to get involved where you live.* ▼

*Affirmative Action ...continued from page 6*

by awarding minority presence grants. However, it conspicuously ignores contemporary endemic racial discrimination, as well as the ripe and stagnating effects of more than 400 years of racial subjugation. Plainly, the lawsuit ignores all racial manipulation which harms African-Americans.

Moreover, the lawsuit fails to mention the largest group of beneficiaries of affirmative action in higher education, "legacies" — the privileged children of alumni. The preferences extended to legacies are seldom mentioned in attacks on affirmative action because they benefit groups who due to government endorsed discrimination (i.e. "jim crow laws" and institutionalized homophobia) are seeking to maintain their privileges — just as the radical right

is seeking to maintain sexism, classism, and racism.

On the other hand, lesbians, gay men, and people of color are generally portrayed as undeserving of any action which seeks to address the effects of rampant contemporary and historic oppression. Clearly, the radical right favors cultural manipulation which advances its interest in maintaining a society that condones and endorses discrimination. Lambda is working with those fighting this lawsuit, as well as other attacks on civil and human rights. We recognize, and this lawsuit demonstrates, that sexual orientation discrimination is related to all types of arbitrary discrimination. In other words, we, the outsiders, stand on common ground. ▼

## STAFF UPDATE

**L**ambda welcomes **April Burns**, who joined Lambda's National Headquarters staff in the Spring as an administrative assistant in the legal department. April also volunteers with the New York Anti-Violence Project's Hotline and Lesbian Outreach Project. **Tom Cook** has also joined our staff in New York as our computer consultant. Tom has managed computer systems for an entertainment law firm in Manhattan and most recently for an airline charter company in the Okavango Delta in Botswana. We would also like to congratulate **Gillian Chi** in her promotion from legal assistant to paralegal.



DM Reznik  
Tom Cook and April Burns

## Board Update

The new Board of Directors officers for the next year include: Noemi Masliah and Charlie Spiegel, co-chairs; Wayne Braveman, secretary; and Fran Goldstein, treasurer. Noemi, Wayne, and Fran are repeating their tenures from last year. Barry Skovgaard has stepped down as co-chair after serving in that role since 1993; he remains on the Board of Directors.

Lambda welcomes three new board members who joined our ranks in the Spring. **Cynthia Asensio** is an attorney in private practice for the firm of Van Wey & Johnson in Dallas. She is co-chair of the Board of Directors of the Dallas-based non-profit Leadership Lambda which provides general and intensive leadership training for people in the gay and lesbian community by actively promoting racial, gender, and economic inclusiveness. She is also involved with the HRC-affiliated Dallas Black Tie Dinner Committee. Cynthia has also helped coordinate several Dallas-area fundraisers for Lambda.

**Michael Scott Rauschenberg** is a Director of International Business Development for Helene Curtis in Chicago. A native of Atlanta,

Michael has lived in Chicago for the past 17 years and is active in many community organizations including Test Positive Aware Network and HRC. He helped organize many Chicago events for Lambda over the last three years including the Lambda Launch and the Bon Foster Memorial Luncheon.

Also joining the Board of Directors from Chicago is **Stuart Burden**. Stuart is a program officer with the John D. and Catherine T. MacArthur Foundation's Population Program. He coordinates the Population Program's grantmaking in Brazil and Mexico. Stuart is a member of the board of Funders Concerned about AIDS and a member of the steering committee of the Working Group on Funding Lesbian and Gay Issues. In addition, he is a member of the Association of Black Foundation Executives and Hispanics in Philanthropy.

Our thanks to **Doug Jones** who recently left Lambda's Board of Directors.

## Interns

The National Headquarters had the assistance of two second-year NYU Law students. **Lisa Kung**, in her second semester as a Lambda intern, researched public schools issues including state sex-education mandates in public schools as they relate to same-sex education and general issues for the "State of Human Rights in Georgia" project. **Mike Imbacuan** also did research on youth issues, as well as for the *Dale amicus* brief and the constitutionality of Alabama's sodomy statute. Former Fall intern **Barry Burland** continues to assist Lambda as a volunteer for our Thursday night intake line.

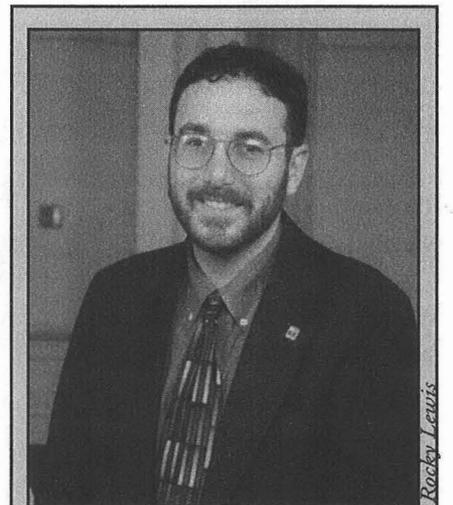
Also assisting the Lambda staff this semester were **Tim O'Neal Lorah** and **Julian Miller**, both third-year law students at New York Law School. They interned through the school's Individual Rights Workshop with Evan Wolfson and Beatrice Dohrn serving as their respective "mentors."

The MRO had two Northwestern University Law School interns this semester.



Rocky Lewis  
New Lambda board members Stuart Burden, Cynthia Asensio, and Michael Scott Rauschenberg.

Third-year student **Brian Cromer** did research on a range of sexual orientation and HIV matters. Second-year student **Howard Wasserman**, received academic credit through Northwestern's public interest practicum researching issues involving Michigan teacher Gerry Crane as well as the proposed Lansing, Michigan referenda to repeal its newly expanded human rights ordinance. ▼



Rocky Lewis  
**Charlie Spiegel,  
New Board Co-Chair**

Charlie Spiegel has been a member of Lambda's Board of Directors for six years and served as Secretary from 1992-1994. Charlie is a partner in the San Francisco office of Sonnenschein Nath & Rosenthal.

# LAMBDA PUBLICATIONS

## Publications

### Adoption by Lesbians and Gay Men: An Overview of the Law in the 50 States

**NEW** Legal information for anyone interested in adopting a child or seeking information about adoption. The publication discusses second-parent, agency, and private placement adoptions and gives an overview of the law in each of the states as they pertain to the rights of lesbians and gay men to seek these adoptions. *Price: \$10*

### Civil Marriage for Lesbians and Gay Men: Organizing in Communities of Faith

**NEW** An interdenominational compilation of materials for clergy members and lay people who wish to contribute to the struggle to win and keep the freedom to marry. Includes background materials, sample sermon texts, Marriage Project resources, and much more. Underwritten by a grant from the Riverside Community Church. *FREE!*

### Stopping the Anti-Gay Abuse of Students in Public High Schools

**NEW** A primer for students, parents, and attorneys who are ready to take action against anti-gay abuse in our nation's public school system. Includes steps that should be taken prior to the consideration of legal action and helpful information about what legal remedies are available to parents, students, and teachers in fighting anti-gay abuse. *\$10*

### Anti-Gay Initiatives: Pre-Election Challenges to Anti-Gay Ballot Initiatives

Over 1000 pages of all materials and papers filed in the challenges to anti-gay initiatives brought during the early '90s. *\$90*

### Co-parent Rights Packet

Addresses custody/visitation disputes within four lesbian couples. Contains briefs and bibliographies of law review articles and cases. *\$15*

### Custody/Visitation Packet

An overview of the state of custody and visitation law including a sample brief with references to psychological research. *\$15*

### Health Care Reform: Lessons from the HIV Epidemic

Extensive policy report on meaningful and effective reform; perfect for policymakers and analysts. *\$15*

### HIV & Family Law: A Survey

The most exhaustive survey available of family law issues associated with the HIV epidemic. *\$10*

### Life Planning: Legal Documents for Lesbians & Gay Men

Newly updated! Everything you always wanted to know about wills, powers of attorney, cohabitation and parenting agreements, and funeral arrangements. *\$7.50*

### The Little Black Book: This One Can Keep You Out of Trouble

The definitive people's guide concerning entrapment and what to do about it. Underwritten by the H. van Ameringen Foundation. *FREE! (Bulk orders available)*

### Negotiating for Equal Employment Benefits: A Resource Packet

Facts and strategy advice for those seeking employment benefits for their partners. *\$15*

### OUT on the Job, OUT of a Job: A Lawyer's Overview of the Employment Rights of Lesbians and Gay Men

Guide to legal protections, anti-discrimination laws, and other remedies for employment discrimination. *\$7.50*

### Sexual Orientation, HIV, and Immigration Law

An excellent starting point for questions surrounding U.S. immigration policy. *\$5*

## Also Available

(free of charge unless otherwise specified)

### How Democracy Works: A Primer on Civil Liberties, Civil Rights, and the Public Debate

### Transcript of the oral argument in Romer v. Evans before the U.S. Supreme Court \$5

### Policy Paper on Mandatory Newborn Testing

### Paper: Parental Consent and Related Tort Liability Issues When Youth Providers Work with Lesbian, Gay, Bisexual, and Transgendered Youth

### Paper: Using Tort Theories on Behalf of Lesbian, Gay, Bisexual, and Transgendered Students in Public Schools: A Preliminary Analysis.

### Memo: Legal Status Update on Same-Sex Sexual Harassment

### Memo: Constitutional and Legal Defects in the Proposed Federal Legislation on Marriage and the Constitution

### Article: Trial Magazine, "Protecting HIV+ Workers: Whose ADA Is It Anyway?"

## Other Resources

For the cost of copying, Lambda makes available copies of briefs we have written. If you face an issue similar to one we've addressed in the past, we'll be happy to share our work with you. For more information or to request a specific brief or paper, call us at 212-995-8585.

## Publications Order Form

To order any of these publications, fill out the information below and return this form to: LLDEF, 666 Broadway, Suite 1200, New York, NY 10012-2317, Attn: Publications. Make check or money order payable to: LLDEF.

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