

# MCLE ON THE WEB

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TEST # 53  
1 HOUR CREDIT  
ELIMINATION OF BIAS

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## Bias In The Courtroom

### *California's expanded domestic partnership law means more lawyers may have to address anti-gay attitudes*

By KRISTA GLASER and JOSE D. ALARCON

Bias in the courtroom, the mediation room, the conference room and the law office may be more prevalent than you think. Bias comes in many forms, and one prevalent form is against lesbian, gay, bisexual and transgender (LGBT) people. While the court system should be a safe haven from discrimination, according to a 2001 Judicial Council report, anti-LGBT acts and comments are heard frequently from lawyers, judges and court personnel. Some do nothing in response to such comments, while others are personally affronted by such comments and leave the courthouse or the law office feeling that the legal system does not protect them.

What are the statistics on anti-LGBT bias in the legal profession, what has been done to eliminate such bias and what can you do about it? More practitioners will have to confront these questions as LGBT people more frequently and openly rely on the legal system to address issues that arise from the expansion of California's domestic partnership law, AB 205.

### **The statistics**

A preliminary comment is required before any statistics are reported on LGBT people. Sexual orientation and gender identity are often "invisible" characteristics. One's sexual orientation and gender identity are not necessarily obvious, and a perception of such status may be far from the truth. Because sexual orientation and gender identity can be "invisible" identities, and because homophobia often prevents people from identifying openly as LGBT, any statistic on LGBT people fails to include some people. For a wide variety of reasons, numerous people will not identify as LGBT on any legal or judicial form or questionnaire, which leads to under-representation. Furthermore, the representation of LGBT people in surveys is often weighted towards those who can most "easily afford to be out": white, affluent, gay men in urban areas.

While these individuals are generously represented in LGBT surveys, there are many people who face more hurdles in openly identifying as LGBT, such as women, people of color, low-income, rural and/or transgender. While not represented as much in surveys, these groups' identities and experiences are just as legitimate as those represented in the surveys.

In 2001, the Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee published "Sexual Orientation Fairness in the California Courts." In its survey, the subcommittee received responses from 1,255 gay or lesbian court users and from 1,525 court employees. Unfortunately, the statistics do not address gender identity.

Fifty-six percent of the gay or lesbian court users reported experiencing or observing a negative comment or action toward gays or lesbians. Twenty percent of the court employees surveyed reported hearing derogatory remarks or jokes about gays or lesbians in open court. These court employees stated that they heard the remarks or jokes usually from judges, lawyers or other court employees. Forty-eight percent of these court employees took no action in response to the derogatory remarks or jokes made in open court.

When sexual orientation became an issue in court (for example, a lawsuit alleging employment discrimination based on a woman identifying as a lesbian), 38 percent of gay or lesbian court users felt threatened in the courtroom because of their sexual orientation, while 29 percent said someone else stated their sexual orientation without their approval and 25 percent felt forced to state their identity against their will. Half of all gay or lesbian court users felt the courts did not

provide fair and unbiased treatment for gays or lesbians.

For the court users who participated in voir dire, 48 percent were asked if they were married, and the majority responded incompletely to that question. In other words, potential jurors were forced to define themselves as “married” or “single” at a time (2001) when many gay or lesbian couples were in committed relationships but not permitted by law to marry.

The question of marriage forced many gays or lesbians to deny their relationships because they were not legally “married,” giving attorneys the impression these potential jurors were single when in fact many were not. The question denied the vast array of potential relationships that do not fall into the black-and-white instruction, “Check if married.”

## **What’s been done to eliminate bias?**

In 2003, the Judicial Council adopted a change to the voir dire process, effective Jan. 1, 2004. The Judicial Council revised sections 8 and 8.5 of the California Standards of Judicial Administration and form MC-001, the Juror Questionnaire for Civil Cases. Because the previous voir dire language failed to recognize domestic partnerships and relationships other than marriage, the new language seeks to provide more complete information and to create a greater feeling of inclusion and non-bias for LGBT potential jurors.

“Marital status” has been changed to “anyone with whom you have a significant personal relationship” in addition to a “spouse.” “Anyone with whom you have a significant personal relationship” includes “a domestic partner, life partner, former spouse or anyone with whom you have an influential or intimate relationship that you would characterize as important.” Lists posted in many courtrooms that ask for prospective jurors’ marital status and a spouse’s employment status now request the name and employment status of one’s spouse or anyone with whom there is a significant personal relationship.

The changes made by the Judicial Council are significant in scope. Prospective jurors who walk into a courtroom may have never before entered a courtroom or interacted with anyone in the legal profession. Their experiences with judges, attorneys and court personnel should be positive and free of bias. LGBT prospective jurors should feel comfortable in the courtroom and be able to freely describe their personal relationships.

The change from “married” to “significant personal relationship” allows LGBT individuals an avenue to describe a relationship that may not be a legal “marriage” but is long-standing and valid. The hope from the Judicial Council would be that these voir dire changes help pave the way to the eventual elimination of bias for LGBT people interacting with the legal system.

Eliminating bias against LGBT people in the legal system goes hand-in-hand with new laws that provide for greater legal rights for LGBT people. As of Jan. 1, 2005, California-registered domestic partners are subject to nearly all the rights, protections, duties and obligations under state law that apply to married partners. Assembly Bill 205, known as the California Domestic Partner Rights and Responsibilities Act, was signed into law on Sept. 19, 2003, by Gov. Gray Davis. AB 2580 was signed in 2004 to clarify sections of AB 205. AB 205 creates legislative application of marital laws to non-marital relationships (See Family Code §297.5 and §299).

Rights and duties under federal law do not apply to registered domestic partners. This includes Social Security rights, rights under immigration law, veterans’ benefits and treatment as a couple under federal tax law. Also, not all state laws are applicable. For instance, the Proposition 13 exemption from reassessment of jointly held property, upon separation or termination of the marriage or after death, does not apply to domestic partners. Since Proposition 13 was created by initiative and incorporated into the California constitution, it therefore cannot be extended by legislative action to include domestic partners.

Domestic partnerships, as defined by Family Code §297, consist of two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring. To register as domestic partners, both persons must be members of the same sex or members of the opposite sex if one or both partners are over the age of 62. The parties must have a common residence, not be married or in a domestic partnership with another person, are not blood related, both be at least 18 years old, and both consent to and file a Declaration of Domestic Partnership.

As a result of the expansion of the domestic partnership laws, more LGBT people considering registering as domestic partners will look to the legal system for guidance in matters related to property, finances, taxes, parenting and adoption, and public and private benefits. In so doing, LGBT individuals will no longer be as “invisible” in the legal system as in the past.

For instance, as required for a marital dissolution, a judicial process generally will be required for the dissolution of a domestic partnership. There is an exception to this process for partners who were registered for less than five years, where neither owns real property, there are no children, there are no disputes over property or debts, the right to spousal support is waived, and the total value of community property assets is less than approximately \$32,000. If all of the above conditions are met, then an administrative termination of the domestic partnership is allowed for under Family Code §299(a).

Otherwise, domestic partners must seek their dissolution in superior court, which now has jurisdiction over dissolution, nullity and legal separation. As a result, California Rule of Court 5.28 makes it clear that other than the initial Petition and Response, the same forms are to be used for dissolutions, legal separations and annulments of domestic partnerships as are used in cases of marriage. The significance herein is that judges will be addressing the legal claims of domestic partners more frequently than before Jan. 1, 2005.

Along with the dissolution requirements for domestic partnerships comes the need for sensitivity to individuals with a wide variety of relationships. It is even more important now that LGBT people do not experience bias in the legal world, as they are gaining more rights and responsibilities and they are simply in court more often. Language needs to be inclusive and domestic partnerships in California should be a part of the lexicon of California courts. The Judicial Council's action to include "significant personal relationships" in a voir dire is a prime example of what can be done to eliminate bias against LGBT individuals.

## **What can you do about it?**

Some attorneys may feel that the elimination of bias is a distant goal they cannot achieve. However, it is important to know that steps can be taken in the daily world of attorneys to eliminate bias. As the 2001 Judicial Council report concluded, many court employees and LGBT court users experience anti-LGBT remarks in the courtroom, from blatant jokes to more subtle snickering or under-the-breath comments.

Judges, attorneys and court personnel can help to eliminate bias against LGBT individuals by not treating court users differently, regardless of sexual orientation and/or gender identity. Judges, attorneys and court personnel who overhear anti-LGBT jokes or remarks can take action. The 2001 Judicial Council report found that 48 percent of court personnel who overheard homophobic remarks in open court took no action, either because they did not think their action would change anything or because they were scared they themselves would be targeted. Taking action against bias in the workplace is the first step to the prevention of future bias.

It is important not to make assumptions. If you are a judge who overhears an attorney make a joke about gay men, do not assume the joke is harmless. If you are an attorney interviewing a male witness, you can ask, "Do you have a partner?" rather than "Do you have a wife?"

If one out of every two court users who are gay or lesbian believes that the court system does not fairly and equally treat LGBT individuals, then it is important for all members of the legal profession, gay or straight, attorney, judge or legal assistant, to acknowledge that the court system should be fair regardless of sexual orientation or gender identity. If the elimination of bias is taken seriously, the next survey of LGBT court users may illustrate more positive interactions with a system designed to provide fairness for all.

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■ *Krista Glaser, a graduate of Hastings College of the Law, and Jose D. Alarcon, a staff attorney at Bet Tzedek Legal Services in Los Angeles, are members of the State Bar Committee on Sexual Orientation and Gender Identity Discrimination.*

## **Test — Elimination of Bias**

### **1 Hour MCLE Credit**

1. To register as domestic partners, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62.
2. During the voir dire process, prospective jurors must identify as married or single.
3. California registered domestic partners have all the same rights and benefits under both state and federal law as married couples.
4. Similar to a marital dissolution, the dissolution of all domestic partnerships, even those of little duration or with no children, requires a judicial process.
5. To avoid a judicial process when terminating a domestic partnership, the parties must waive their right to spousal support.
6. A U.S. citizen in a registered domestic partnership with a foreign national can file a spousal petition with the BCIS to immigrate his or her domestic partner.
7. Jointly held property between domestic partners will be reassessed for property taxes upon the separation or dissolution of the relationship or after death.
8. According to the 2001 Judicial Council report, half of the gay and lesbian court users surveyed did not find fair and unbiased treatment for gays or lesbians.
9. Statistics on sexual orientation and gender identity are often under represented.
10. AB 205 is not yet in effect.
11. Anyone with whom you have a significant personal relationship includes more than a spouse.
12. One need not file a Declaration of Domestic Partnership in order to have a domestic partner under the laws of California.
13. Anti-LGBT comments have never been heard in open court.
14. The Judicial Council's changes to the voir dire process also apply to the Juror Questionnaire for Civil Cases.
15. An administrative termination of a domestic partnership is required to dissolve a domestic partnership.
16. Social security benefits will extend to all persons registered as domestic partners.
17. With the expansion of domestic partnership rights, the LGBT community will have to rely less on the court system.
18. Domestic partnerships consist of two adults who have chosen to share one another's lives in an intimate and committed relationship.
19. Judges and court personnel can do little to help eliminate bias against LGBT court users.
20. The need to eliminate bias against LGBT people in the legal system is inherent with a system designed to provide fairness to all.

### **Certification**

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour in elimination of bias.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

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