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# Discovering and Addressing Sexual Orientation Bias in Arizona's Legal System

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# DISCOVERING AND ADDRESSING SEXUAL ORIENTATION BIAS IN ARIZONA'S LEGAL SYSTEM

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## I. WHAT LED THE STATE BAR OF ARIZONA TO ESTABLISH THE TASK FORCE ON GAY AND LESBIAN ISSUES

In August 1996, the American Bar Association ("ABA") recommended that each state bar survey its members concerning issues surrounding sexual orientation bias in the legal system.[1] The following month, two Phoenix, Arizona attorneys contacted the

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1. *See* ABA, REPORT #10A (Aug. 1996) (calling on 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.").



 

president of the State Bar of Arizona ("State Bar")[2] on behalf of an independent Lesbian & Gay Bar Association, recommending that the State Bar establish a task force to undertake a study of discrimination against gays and lesbians in the bar and justice system and, if any discrimination were found, to make recommendations to ameliorate it.[3] The State Bar of Arizona's Board of Governors ("Board of Governors") accepted this recommendation over dissent on February 14, 1997,[4] and appointed a Task Force on Gay and Lesbian Issues ("Task Force") to assess the atmosphere for gays and lesbians involved in, or having contact with, Arizona's justice system.[5]

This was not the first special task force the State Bar had appointed.[6] The Board of Governors provided funding for the Task Force's telephonic monthly meetings and its internal correspondence, as the State Bar had done for prior task forces and for the State Bar's standing committees.[7] The Task Force was commissioned to complete surveys and prepare a report within twenty-four months.[8]

## II. HOW THE TASK FORCE WAS ESTABLISHED

The Board of Governors first appointed as members of the Task Force two gay and lesbian attorneys, the co-chairs of Phoenix's Gay and Lesbian Lawyers group, who had approached the Board of

2. The State Bar of Arizona is a mandatory bar; all attorneys admitted to practice law in the state are dues-paying members. *See* STATE BAR OF ARIZ., STATE BAR INFORMATION (last visited Aug. 21, 2002), *at* http://www.azbar.org/StateBarInfo/history.asp.

3. *See* REPORT TO THE BD. OF GOVERNORS, STATE BAR OF ARIZ. FROM ITS GAY AND LESBIAN TASK FORCE 6 (1999) [hereinafter GAY AND LESBIAN TASK FORCE REPORT] (noting that the co-chairs of Phoenix's Gay and Lesbian Lawyers group, after reading New York and California surveys concerning discrimination against gays and lesbians in the judicial system, decided such a survey was needed in Arizona and drafted and presented a plan to the Board of Governors).

4. *See id.* at app. (recording, in the minutes of the Board of Governors' February 14, 1997 meeting, the dissent of Board member Peter Neiser). The grounds for his dissent were unclear. *See id.*

5. *See id.* at 1 (noting when and for what purpose the Task Force was commissioned).

6. *See, e.g.*, STATE BAR OF ARIZ., SECTIONS & COMMITTEES (last visited Aug. 21, 2002) (noting that the Board of Governors periodically appoints a task force to address specific issues for a specified time period), *at* http://www.azbar.org/Sections/; *see also* Michael D. Kimerer, *What does the Bar do for Me?*, 32 ARIZ. ATT'Y 8 (1996) (describing the work of the State Bar's Task Force on Technology, Task Force on Indigent Representation and Task Force on the Practice of Law).

7. *See generally* GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at app. (excerpting minutes of the Board of Governors' February 14, 1997 meeting, in which the Board approved the Task Force's proposed $2,265 budget).

8. *Id.* at 6.

Governors to request that the State Bar follow the ABA recommendation.[9] The Task Force then recommended as initial members a group of twenty individuals who were diverse in their geographic locations within the state, areas of legal expertise, ethnicity, gender and sexual orientation.[10] The Chair of the Board of Governors accepted the recommendation of the Task Force and appointed its remaining members, who were gay, lesbian, bisexual and heterosexual attorneys, practicing at large and small firms, in government, and at non-profits, as well as law professors and law college deans, all from different areas of the state.[11]

## III. THE TASK FORCE SURVEYS

The Task Force held its first meeting in March 1997 and met monthly thereafter in small groups in Phoenix and Tucson with individuals in other jurisdictions connected by phone.[12] As with other State Bar task forces and committees, State Bar employees were assigned to staff the Task Force, arrange conference calls, distribute minutes and agendas and produce general correspondence.[13]

The Task Force discussed the work that had been done by the State Bar's previous task forces on minority and women's issues, as well as the work of bar organizations in New York City, Los Angeles County, San Francisco, King County, Washington, and Hennepin County, Pennsylvania, that had studied sexual orientation bias and prejudice among legal employers.[14] The Task Force obtained copies of the King County and New York studies and contacted attorneys in California who were working on studies there.[15] The Task Force

9. *See id.* at 6-7 (listing members of the Task Force and noting that one of the co-chairs of Phoenix's Gay and Lesbian Lawyers group served as the chair of the Task Force).

10. *Id.* at 6 (describing members of the Task Force as "men and women, gay/lesbian, non-gay and people of color.").

11. *Id.* at 6-7.

12. GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at 6.

13. *See generally id.* at 7 (including in a list of Task Force members several staff members of the State Bar).

14. *See id.* at 6 (recounting that the attorneys who had initially contacted the State Bar to conduct a survey concerning discrimination against gays and lesbians in the judicial system were inspired to do so after reading similar surveys); *see also* Jennifer Durkin, *Queer Studies I: An Examination of the First Eleven Studies of Sexual Orientation Bias by the Legal Profession*, 8 UCLA WOMEN'S L.J. 343, 343 (1998) (summarizing the goals, methodologies, findings and recommendations of various studies of sexual orientation bias, including those conducted in New York, Los Angeles, San Francisco, King County and Hennepin County).

15. Durkin, *supra* note 14, provides a general overview of the King County, New York and California surveys.

decided to survey judges, attorneys, law students and members of the gay and lesbian community to ask whether they had observed bias or prejudice against gays and lesbians in the justice system, in the courtroom or outside the courtroom.[16] The Task Force discussed the possibility of surveying law enforcement officers as well, and decided to do so.[17]

The Task Force decided to hire professional social scientists to assist with the development of its survey instruments and with the tabulation of survey results to systematically collect and analyze information on sexual orientation discrimination to ensure that those results could be determined to have statistical significance.[18] The Task Force asked the Board of Governors to allocate funding for a social scientist and for the distribution of surveys. However, the Board of Governors declined, despite having provided full funding for other, similar task forces, and told the Task Force it would have to obtain funds from sources outside the Bar. In response, the Task Force persuaded a social scientist and statistician at Northern Arizona University ("NAU") to volunteer to assist in preparing its initial survey instrument and determining how many surveys would have to be distributed in order to receive a return rate that would produce statistically significant results.[19] Meanwhile, the Task Force applied for grant funding from a community charitable organization and from a university foundation. Later, when the social scientist from NAU was no longer able to volunteer her time, the Task Force was successful in obtaining grant funding and was able to hire a social scientist from Arizona State University ("ASU") to develop the remaining survey instruments, tabulate the results and advise the Task Force on the statistical significance of the results.[20]

With the assistance of social scientists, the Task Force developed separate survey instruments for judges, attorneys, law students and members of the gay, lesbian, bisexual and transgender community.[21]

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16. *See* GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at 7 (describing the survey instruments for the various groups).

17. *See id.* (noting that a research team created a special survey for police).

18. *See generally* Amelia Craig Cramer & Amy Todd, *Sexual Orientation Bias in Arizona's Legal System*, 37 ARIZ. ATT'Y 37, 37 (Oct. 2000) (observing that a social scientist would help review and analyze results, determine which findings were statistically significant, and determine how to best report the findings).

19. *See id.* (noting that the Task Force utilized the volunteer services of Dr. Phoebe M. Stambaugh, Ph.D., to create an appropriate survey instrument).

20. *See id.* (reporting that the Task Force used private grant funding to hire Dr. Mary Bernstein and her research team at ASU to help review and analyze survey results).

21. *See generally* GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at app.

The judges' surveys were sent to all 291 full time judges in the state[22] with return envelopes addressed to the social scientist at NAU to ensure confidentiality. Twenty-nine percent returned a completed questionnaire.[23] A student at NAU, under the direction of the social scientist, then made follow-up calls to the judges who identified themselves on the survey responses.[24]

The Task Force revised the survey instrument for attorneys, again with the assistance of the social scientist.[25] The attorney survey was mailed to a random sample of approximately 450 attorneys across the state.[26] Twenty-nine percent returned the survey to NAU.[27] Again, a student at NAU made follow-up calls under the direction of the social scientist to respondents who identified themselves on the survey responses.[28]

The Task Force used the same procedure to modify the survey instrument to tailor it to law students.[29] The survey was then distributed to law students at both law schools within the state: ASU and the University of Arizona.[30] Twenty-two percent of the 465 University of Arizona law students surveyed and 12% of 476 ASU law students surveyed returned the survey.[31]

A subcommittee of the Task Force drafted a separate survey for the gay, lesbian, bisexual and transgender community.[32] The entire Task

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(attaching the surveys developed for judges, attorneys, law students and the gay community). The surveys aksed respondents about their backgrounds, their work experience and any observed instances of discrimination based on sexual orientation, their knowledge of professional interactions or issues relating to sexual orientation, and their own attitudes about sexual orientation and the legal profession. *Id.*

22. *Id.* at 8.

23. *Id.*

24. *Id.* at 7. Reportedly, one judge complained about the survey being conducted.

25. The revision reflected the difference in the attorney versus judicial work environment. *Id.*

26. GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at 8 (noting that the attorney survey was mailed to a random selection of 452 attorneys listed in the State Bar's membership database).

27. *Id.*

28. *Id.* Reportedly, several attorneys complained about the survey being conducted.

29. The survey was revised to reflect the different context surrounding "students' perceptions of discrimination and their experiences within the legal system." *Id.* at 8-9.

30. *Id.* at 8.

31. GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at 9.

32. *Id.* at 7 (noting that the subcommittee felt that a shorter survey with more general questions than those addressed to the legal community would be easier to distribute to a greater number of people and would have a greater chance of being

Force and the social scientist then reviewed the survey.[33] It was distributed widely in gay and lesbian news publications, to gay and lesbian community organizations, such as gay community centers and gay and lesbian chambers of commerce for distribution to their membership, churches and synagogues known to have predominantly gay, lesbian, bisexual and transgender congregations, and at gay and lesbian cultural events, such as gay pride parades.[34] The Task Force oversaw the distribution of 800 surveys to the gay community, of which 384, or 48%, were returned.[35]

The social scientist from ASU developed a special survey instrument to be distributed to police officers.[36] However, this survey was distributed only to one police department — the City of Tucson Police Department — because the chiefs of police in five other municipal police departments refused to participate in the survey, despite initially indicating that they would do so.[37]

## IV. RESULTS OF THE SURVEYS

Once the surveys were returned, the ASU social scientist collated them and analyzed the data.[38] Members of the Task Force then discussed which statistically significant data would be most important to report.[39]

### *A. Responses to the Surveys' Content*

Some negative comments about the survey itself were reported on survey responses as well as via letters and telephone calls to the State

completed).

33. *See id.*

34. *See id.* at 9 (observing that the bulk of the surveys returned had been distributed at the 1998 Phoenix Gay and Lesbian Film Festival, while many other surveys that were returned had been distributed to lesbian and gay churches, the Lambda Legal Group, and the Mayor's Task Force on Gay, Lesbian, Bisexual and Transgender Issues).

35. GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at 10.

36. *Id.* at 7.

37. *See generally id.* at 9 (reporting, at the time of the April 1999 Report, that the Task Force had contacted five police departments and several had agreed to cooperate). In order to maintain confidentiality and not single out the Tucson Police Department, the results of that survey have not been published or otherwise revealed by the social scientists even to the Task Force members. However, the results of the police department survey have been shared with the leadership of the Tucson Police Department which has used them to improve its treatment of gay, lesbian and bisexual officers and civilians.

38. *See* Cramer & Todd, *supra* note 18, at 37 (reporting that Dr. Mary Bernstein and her research team reviewed and analyzed survey results).

39. GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at 1 (noting that the professional social scientist as well as members of the Task Force analyzed results).

Bar and letters to the *Arizona Attorney* magazine, an official publication of the Bar. However, these negative comments were few in number.

### *B. Reports of Hostile Environment*

The survey results were presented to the State Bar Board of Governors in a written report in April 1999.[40] The results were startling. Seventy-seven percent of judges and attorneys surveyed reported that they had personally heard disparaging remarks about gays and lesbians, and 47% had heard those remarks in public areas of the courthouse![41] Nearly 90% of law students reported that they had heard disparaging remarks about gays and lesbians with 73% having heard them in public.[42] Twenty-nine percent of the gay and lesbian employees within the justice system reported that they had heard negative remarks about gays and lesbians.[43]

Given the high incidence of disparaging remarks about gays and lesbians, the Task Force concluded that there was a hostile environment for gays and lesbians in the legal profession and in the justice system.[44]

### *C. Reports of Negative Treatment*

Thirty percent of judges and attorneys surveyed reported that they believe that lesbians and gays suffer discrimination in the legal profession, and 13% had observed negative treatment by judges in open court toward those perceived to be gay or lesbian.[45] Forty-five percent of judges and attorneys had heard negative remarks about a lesbian or gay person in the context of a particular case.[46] Eight percent had heard court personnel indicate a preference not to work

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40. *See generally id.*; *see also* STATE BAR OF ARIZ., GAY AND LESBIAN TASK FORCE, EXECUTIVE SUMMARY (last visited June 24, 2002) (providing a synopsis of the results of the survey), *available at* http://www.azbar.org/Sections/Committees/SOGI/summary.asp.

41. GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at 18.

42. *Id.* (reporting that 85% of law student respondents had witnessed at least one of the four categories of negative behavior: speech, negative preference, negative treatment and discrimination). Eighty-eight percent had heard disparaging comments in private interactions, 73% in public interactions, and 34% in a particular law school class. *Id.*

43. *Id.* at 19.

44. *Id.* at 20 (concluding that the more contact with the legal/justice system, the more likely gays and lesbians are to witness discrimination or experience a hostile environment).

45. GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at 20.

46. *Id.* at 1.

with a lawyer because he or she was perceived to be gay or lesbian.[47] Four percent of judges and attorneys surveyed had heard litigants, jurors and/or witnesses indicate a preference not to work with a gay or lesbian lawyer.[48]

Ten percent of law students surveyed had seen gay or lesbian law students discriminated against by professors, staff or students, and 7% of law students surveyed believed that gays and lesbians are discriminated against in school.[49]

Of the members of the lesbian, gay, bisexual and transgender community who responded, 22% said they had observed discrimination against gays within the justice system.[50] Nineteen percent reported they had personally suffered discrimination.[51] Of the lesbian, gay, bisexual and transgender respondents who work within the justice system, 33% reported witnessing sexual orientation discrimination.[52]

The Task Force concluded that there was a significant incidence of negative treatment of gays and lesbians in the legal system in Arizona.[53]

### *D. Admitted Deficits in Knowledge and Training*

Surprisingly, 21% of judges confessed they were not very knowledgeable or not knowledgeable at all about the judicial canons prohibiting discrimination on the basis of sexual orientation.[54] Similarly, only 13% of attorneys reported being aware of ethical rules prohibiting sexual orientation discrimination.[55] Only 1% of law

47. *Id.* at 20-21.

48. *Id.* at 21.

49. *Id.* The Task Force noted with curiosity the disparity between the percentages of judges, attorneys and law students who had heard anti-gay comments or had observed anti-gay treatment and the lower percentages of those who characterized such negative comments and treatment as "discrimination."

50. *Id.* at 22.

51. GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at 22.

52. *Id.* (comparing the 33% figure with the 16% of gay and lesbian respondents who do not work within the justice system who have witnessed discrimination).

53. *Id.* at 23 (concluding that "when lesbian and gay men confront the justice system, they often face discrimination and harassment from those who are supposed to help them.").

54. *Id.* at 29. Arizona Judicial Canon 3(b)5 and 6, U.S. District Court Rule 1.20, and Arizona Local Bankruptcy Rule 1000-1 all explicitly provide that sexual orientation bias by judges or lawyers is improper and unacceptable in the courtroom. *See* ARIZ. S. CT. R. 81, CODE OF JUD. CONDUCT Canon 3 (1999); U.S. DIST. CT. D. ARIZ. R. 1.20; U.S. BANKR. CT. D. ARIZ. R.1000-1.

55. GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at 29. Rule 8.4 of the ABA Model Rules of Professional Conduct includes a prohibition against any lawyer "engag[ing] in conduct that is prejudicial to the administration of justice." MODEL

students indicated that they were aware of the various judicial canons and ethical rules prohibiting discrimination based on sexual orientation.[56]

## V. RECOMMENDATIONS BY THE TASK FORCE

In its April 1999 Report, the Task Force made numerous recommendations:

1. The Task Force recommended that the Board of Governors publish the Task Force Report and make the Report available to all attorneys, judges, law professors and law students in Arizona and further recommended that the executive summary be distributed to all Arizona judges and members of the State Bar and to all instructors at the law schools within the state.[57]
2. The Task Force recommended that the Board of Governors establish a standing Committee on Gays and Lesbians and the Law, comparable to the State Bar's existing Committee on Minorities and Women and the Law.[58]
3. The Task Force recommended that the State Bar encourage the Commission on Judicial Performance Review to survey and evaluate judges regarding their treatment of gays and lesbians in the same way that it surveys and evaluates judges regarding their treatment of racial minorities and women.[59]
4. The Task Force recommended that those who observe or experience sexual orientation discrimination in the justice system be encouraged to report disparaging comments and

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RULES OF PROF'L CONDUCT R. 8.4(d) (2002). Comment 3 to this ABA Model Rule explicitly finds that the prohibition extends to any lawyer, "in the course of representing a client, knowingly manifest[ing] by words or conduct, bias or prejudice based upon . . . sexual orientation . . ." among other factors, such as race, religion, national origin, disability, age or socioeconomic status. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2002). Arizona has adopted ABA Model Rule 8.4 in Arizona Supreme Court Rule 42, the Arizona Rules of Professional Conduct, ER 8.4, and formally adopted Comment 3, interpreting Rule 8.4's prohibition on conduct prejudicial to the administration of justice in May 2002, effective December 1, 2002. *See* ARIZ. S. CT. R. 42, ARIZ. RULES OF PROF'L CONDUCT ER 8.4 (2002).

56. GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at 30.

57. *Id.* at 34 (recommending widespread distribution of the Report to provide needed education on gay people and sexual orientation discrimination).

58. *Id.* Although the Task Force had been established to address solely sexual orientation issues, the Task Force recognized this focus as under-inclusive. Gender identity issues were deemed by the Task Force to be of serious concern as well, so the Bar established the committee as the Sexual Orientation and Gender Identity Committee in October 1999. *See* STATE BAR OF ARIZ., SEXUAL ORIENTATION & GENDER IDENTITY COMMITTEE (last visited Aug. 21, 2002), *at* http://www.azbar.org/Sections/Committees/SOGI/home.cfm.

59. GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at 36.

negative treatment to the State Bar and/or the Commission on Judicial Performance Review.[60] Toward that end, the Task Force later recommended that the State Bar petition the State Supreme Court to amend the Arizona Rules of Professional Conduct, specifically the comment to Ethical Rule 8.4, to provide language mirroring the language of the comment to ABA Model Rule 8.4, recognizing that conduct manifesting prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status is prejudicial to the administration of justice and therefore violates the ethical rule.[61]

5. The Task Force recommended that a component be added to the State Bar's mandatory continuing legal education course on professionalism to address issues of sexual orientation diversity and that the State Bar sponsor and support other continuing legal education seminars specifically devoted to issues related to sexual orientation and the law.[62] The Task Force also recommended that the Judicial Conference be encouraged to provide specific education on the judicial canons prohibiting sexual orientation discrimination[63] and that the law schools be encouraged to provide courses on sexual orientation and the law and to include legal issues affecting gays and lesbians within other courses.[64]
6. The Task Force recommended that domestic partner benefits be provided to all State Bar employees, that all State Bar-sponsored insurance plans include domestic partner benefits, and that the State Bar serve as a clearinghouse for information on insurance options relating to domestic partners and gay families.[65] Additionally, the Task Force recommended that legal employers be encouraged to foster workplace equality for gays and lesbians in hiring, promotion, retention and

60. *Id.*

61. *See* Cramer & Todd, *supra* note 18, at 40 (noting that members of the Task Force, the Committee on Sexual Orientation and Gender Identity, and the Ethics Committee of the State Bar hoped that Arizona would adopt an amendment to Ethical Rule 8.4 to explicitly prohibit sexual orientation bias). In May 2002, the Arizona Supreme Court amended the rule to include the anti-bias language. *See infra* note 75 and accompanying text.

62. GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at 33-34 (suggesting that the Continuing Legal Education Committee encourage the inclusion of gay and lesbian issues, where appropriate, in every continuing legal education seminar).

63. *Id.* at 36.

64. *Id.* at 5.

65. *Id.* at 35.

compensation, including domestic partner benefits.[66]

7. Finally, the Task Force recommended that gays and lesbians be explicitly included in State Bar-sponsored mentoring programs.[67]

## VI. RESPONSE TO RECOMMENDATIONS

After a brief delay, the Board of Governors responded positively to virtually all the Task Force recommendations.[68] It recommended for publication an article in the *Arizona Attorney* magazine reporting a summary of the Task Force's major findings.[69] However, the State Bar Board of Governors declined to copy and distribute the report to all members of the Bar, because it determined that to do so would be too expensive.[70]

On October 29, 1999, the State Bar established a permanent standing Committee on Sexual Orientation and Gender Identity,[71] and the State Bar has sponsored several continuing legal education programs recommended by that Committee, including at its annual convention. In addition, the State Bar added a component to the required continuing legal education professionalism course addressing issues of sexual orientation diversity.[72]

As it had agreed to do, the State Bar Board of Governors wrote to the Commission on Judicial Performance Review requesting that it modify its annual survey of judges to include questions pertaining to the judges' treatment of gays and lesbians. A member of the State Bar Committee on Sexual Orientation and Gender Identity attended

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66. *Id.*

67. GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at 36 (recommending that the State Bar sponsor group, mentoring or other programs for gay attorneys to counteract the effects of sexual orientation discrimination in legal employment).

68. *See From the Boards*, 35 ARIZ. ATT'Y 40 (June 1999) [hereinafter *From the Boards*] (reporting that the Board of Governors endorsed the Task Force Report and approved its recommendations); *see also* Cramer & Todd, *supra* note 18, at 39 (noting that as of October 2000, the State Bar had implemented several of the Task Force's recommendations).

69. The resulting article was Cramer & Todd, *supra* note 18.

70. *See From the Boards*, *supra* note 69, at 40 (relaying that the Board voted to publicize the Task Force Report on the State Bar's website and disseminate the full report to State Bar entities which would implement the Task Force's recommendations).

71. *See* Cramer & Todd, *supra* note 18, at 39 (reporting the elevation of the Gay and Lesbian Task Force to permanent committee status); *see also* STATE BAR OF ARIZ., SEXUAL ORIENTATION AND GENDER IDENTITY COMMITTEE, *supra* note 58.

72. *See generally* ARIZ. S. CT. R. 45(a) (mandating every active member of the State Bar to annually complete a minimum of three hours of continuing legal education in the area of professional responsibility, which provides instruction in both ethics and professionalism).

one of the Commission's meetings and made a presentation on the subject. After a delay of approximately one year, the Commission on Judicial Performance Review responded by modifying its annual survey pursuant to the request.

The State Bar began offering domestic partner benefits to all its employees immediately[73] and asked the new standing Committee on Sexual Orientation and Gender Identity to make available to legal employers information regarding how they could provide domestic partner benefits.[74]

On May 31, 2002, pursuant to a petition from the State Bar initiated by its Committee on Sexual Orientation and Gender Identity, the Arizona Supreme Court ordered an amendment to Rule 42 of the Rules of the Arizona Supreme Court, Ethical Rule 8.4(d), effective December 1, 2002, by adding the following after the first paragraph:

> A lawyer who in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. This 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. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.[75]

## VII. POST MORTEM

In addition to sponsoring continuing legal education programs on issues relating to sexual orientation and gender identity, the Arizona State Bar Committee on Sexual Orientation and Gender Identity will work to promote training at the state Judicial Conference focused upon the judicial canons prohibiting sexual orientation bias and to promote courses at the law schools devoted to legal issues pertaining to sexual orientation and gender identity. The Committee also is considering a new recommendation that juror questionnaires be modified to include references to domestic partners in the questions pertaining to marital and familial status.

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73. Cramer & Todd, *supra* note 18, at 39.

74. *See generally* GAY AND LESBIAN TASK FORCE REPORT, *supra* note 3, at app. (attaching "Domestic Partner Benefits Explained" and "Model Domestic Partner Benefits Policy").

75. ARIZ. S. CT. R. 42, ARIZ. RULES OF PROF'L CONDUCT ER 8.4 cmt. (2002).

It may prove useful in five or ten years for the State Bar of Arizona to conduct follow-up surveys to determine whether the implemented recommendations have succeeded in diminishing the pervasiveness of sexual orientation bias and prejudice within Arizona's justice system. At that time, it might be interesting to include within that survey some new questions. These could include questions about how legal employers are treating and compensating their gay, lesbian, bisexual and transgender employees; questions concerning positive comments to and treatment of gay, lesbian, bisexual and transgender lawyers, litigants, witnesses, jurors, court personnel and judges; and questions addressing the intersection of sexual orientation and gender identity bias with bias based upon race, gender, religion, disability, age, socioeconomic status and other factors.