

**AMERICAN BAR ASSOCIATION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
REPORT TO THE HOUSE OF DELEGATES**

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association amend the Association's Goal IX to state: To
- 2 promote full and equal participation in the legal profession by minorities, women, persons with
- 3 disabilities, and persons of differing sexual orientations and gender identities.

REPORT

Purpose of this Recommendation

The eleven Goals of the American Bar Association reflect the specific ideals that the ABA aspires to serve in all its work. When originally adopted in 1991, Goal IX was “to promote full and equal participation in the legal profession by minorities and women.” In 1999, the Association, reflecting the desirability of ensuring professional opportunities for the disabled, amended Goal IX to include “persons with disabilities.” In furtherance of Goal IX, the Association has taken a host of actions that have greatly increased opportunities for minorities, women and persons with disabilities to achieve their full potential as members of the bar.

Over the last twenty years, the House of Delegates has also adopted numerous policies opposing discrimination on the basis of sexual orientation in many settings, including law schools, the judicial system and the profession. The House recently extended its non-discrimination commitment to oppose bias based on gender identity.¹ Consistent with those policies, and to further the goal of diversity, the Board of Governors adopted a Strategic Plan in August 2006 that includes, in its diversity strategy, a pledge to increase the number of lawyers of all diverse groups so that the ABA is truly representative of American society.

The proposed recommendation will amend Goal IX to incorporate in its express terms the diversity commitment reflected in existing ABA policies and philosophy. The proposed amendment will serve the chief purposes of Goal IX: to ensure that all persons, including those who are members of groups that historically have been discriminated against, are provided with full and equal opportunities within the legal profession; and to affirm that diversity in the legal profession is beneficial for all lawyers, just as it is for the community at large.

Current ABA Policy on Sexual Orientation and Gender Identity

The Association has a long and proud tradition of actively opposing discrimination on the basis of sexual orientation, and the Association recently extended that opposition to discrimination on the basis gender identity. For example, the Association has adopted policies calling upon local, state, and federal lawmakers to prohibit such discrimination in employment, housing, public accommodations, credit, education, and public funding.² The ABA also has opposed

¹ As used herein, the term “sexual orientation” means homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived; and “gender identity” refers to a person’s self-identification as a man or a woman, even if that identification does not correspond with the person’s biological sex. These definitions are consistent with similar uses of these terms in prior ABA reports and recommendations.

² See, e.g., resolutions adopted 8/89 (urging prohibition of sexual orientation discrimination in employment, housing and public accommodation); 8/06 (urging prohibition of discrimination on the basis of actual or perceived gender identity or expression, in employment, housing and public accommodations).

discrimination on the basis of sexual orientation in many areas of family law.³ Pursuant to this commitment and these various policies, the ABA actively has participated in lobbying for effective federal anti-discrimination legislation and has filed numerous Supreme Court amicus briefs urging the adoption of strong anti-discrimination positions with respect to sexual orientation.⁴

The Association has taken steps to help eliminate barriers against the equal participation by gay and lesbian persons in the profession. For example, the ABA's law school accreditation standards have been amended to require that law schools provide equal educational and employment opportunities without regard to, among other things, sexual orientation.⁵ Within the larger profession, the ABA has urged the study and elimination of judicial bias on the basis of sexual orientation, among other bases.⁶

Why This Recommendation Is Necessary

Through previous recommendations, the ABA has recognized that lesbian, gay, bisexual, and transgender people face pervasive discrimination in all aspects of life, including within the legal profession. As discussed in more detail below, studies sponsored by numerous state and local bar associations around the country have consistently demonstrated that, while progress is being made, discrimination against lesbian, gay, bisexual, and transgender people within the profession persists. It is particularly important for the Association to take affirmative steps to promote full and equal participation for such persons within the profession, not only to further the ABA's diversity commitment, but also because such persons still receive little statutory protection from discriminatory employment practices. As of November 2006, only 16 states and the District of Columbia explicitly prohibit employment discrimination on the basis of sexual orientation⁷ and

³ See, e.g., resolutions adopted 8/95 (regarding a parent's sexual orientation and child custody or visitation determinations); 2/99 (regarding sexual orientation and adoption); 8/03 (regarding second-parent adoptions by same-sex and other unmarried couples); 2/06 (regarding a parent's sexual orientation in adoption and foster care determinations).

⁴ For example, in 2003, the ABA filed an amicus brief in *Lawrence v. Texas*, urging the Court to overturn its 1986 decision in *Bowers v. Hardwick*. *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas statute that prohibited consensual sexual conduct between two persons of the same sex); ABA Amicus Brief, 2003 WL 164108. In 1996, the ABA also filed an amicus brief in *Romer v. Evans*, in which the United States Supreme Court struck down an amendment to the Colorado Constitution that prohibited the state and local jurisdictions from enacting provisions which prohibited discrimination on the basis of sexual orientation. *Romer v. Evans*, 517 U.S. 620 (1996); ABA Amicus Brief, 1995 WL 17008433.

⁵ Resolution adopted 8/94 (requiring equal educational and employment opportunities regardless of, among others, sexual orientation).

⁶ Resolution adopted 9/91 (urging study and elimination of judicial bias based on, among others, sexual orientation).

⁷ The 17 jurisdictions (including D.C.) are: California, Connecticut, D.C., Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington. Cal. Gov. Code § 12940; Conn. Gen. Stat. § 46a-81c-m; D.C. Code §§ 2-1401.01 - 2-1401.02, 2-1402.11, 2-1402.21, 2-1402.31,

only 6 statutes explicitly prohibit employment discrimination on the basis of gender identity.⁸ There is no federal statute prohibiting employment discrimination on the basis of either sexual orientation or gender identity.

As numerous bar studies confirm, prejudice and harassment on the basis of sexual orientation gender identity is common.⁹ Such behavior thwarts the diversity goals of the Association by impeding the participation in the profession of persons who are its targets. In addition, professional advancement for gay and lesbian lawyers is unquestionably impeded by the barriers of discrimination.¹⁰ Thirty percent of judges and attorneys surveyed by a Task Force of the Arizona State Bar¹¹ reported that they believe that lesbian and gay attorneys are disadvantaged in the profession because of their sexual orientation.¹² A 1993 study by the Association of the Bar of New York City found that 54% of the participants believed that their sexual orientation negatively affected their ability to succeed in the legal profession.¹³ Respondents, for example, reported the following:

2-1402.41, 2-1402-71, 2-1402-73; Haw. Rev. Stat. §§ 515-2 – 7, Haw. Rev. Stat. §§ 378-1 – 3, Haw. Rev. Stat. § 489.2 – 3; 775 ILCS 5/1-102; Me. Rev. Stat. Ann. Tit. 5, §§ 4553 & 4571-76; Md. Code art. 49B § 5; Mass. Gen. Laws Ann. Ch. 151B, §§ 3 & 4; Minn. Stat. §§ 363A.01 – 363A.41; Nv. Rev. Stat. § 613.330; N.H. Rev. Stat. Ann. §§ 21-I:42, 354-A:2, 354-A:6; N.J. Stat. Ann. §§ 10:5-1 – 49; N.M. Stat. Ann. §§ 28-1-2, 28-1-7, 28-1-9; N.Y. Exec. Law §§ 296, 296-a; R.I. Gen. Laws §§ 28-5-3, 28-5-7, 34-37-4, 34-37-4.3, 11-24-2; 21 Vt. Stat. Ann. § 495, 9 Vt. Stat. Ann. § 4503; 8 Vt. Stat. Ann. §§ 10403 & 4724; 3 Vt. Stat. Ann. § 963; Wash. Rev. Code §§ 49.60.130-175, 176, 178, 180, 190, 200, 215, 222-225, 300.

⁸ The states are: California, Illinois, Maine, Minnesota, New Mexico, and Rhode Island. Cal. Govt. Code §§ 12926 & 12940; 775 ILCS 5/1-102; Me. Rev. Stat. Ann., tit. 5, §§ 4571076 & § 4553 (definitions); Minn. Stat. §§ 363A.01 – 363A.41; N.M. Stat. Ann. §§ 28-1-2, 28-1-7, 28-1-9; R.I. Gen. Laws §§ 28-5-3, 28-5-7, 34-37-4, 34-37-3.4, 11-24-2. For a complete list of the jurisdictions that prohibit discrimination on the basis of gender identity, see <http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions>.

⁹ For a detailed analysis of the first 11 bar association studies on sexual orientation in the profession, see 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 (1998).

¹⁰ 4 S. Cal. Rev. L. & Women's Stud. 297, 311.

¹¹ Report to the Bd. of Governors, State Bar of Ariz. From its Gay and Lesbian Task Force (1999) (hereinafter "Arizona Task Force Report").

¹² Amelia Craig Cramer, *Discovering and Addressing Sexual Orientation Bias in Arizona's Legal System*, 11 Am. U.J. Gender Soc. Pol'y & L. 25, 31 (2002).

¹³ Committee on Lesbian and Gay Men in the Legal Profession, Report on the Experience of Lesbians and Gay Men in the Legal Profession, 48 Rec. Ass'n B. City N.Y. 843, 868 (1993). These statistics are similar to the results of a more recent study of attorneys practicing in the Second Circuit. The 1997 Report on Sexual Orientation Fairness in Second Circuit Courts found that "44% of respondents stated that it is a disadvantage in the Second Circuit courts to be perceived as a gay man and 35% of respondents stated that it is a disadvantage to be perceived as a lesbian." This report is available at <http://www.le-gal.org/legalfair.htm>

- “The partners of our firm unanimously hold homosexual conduct to be wrong. We do not employ and would not knowingly employ a homosexual attorney or homosexual staff member.”¹⁴
- “[A]n apparently gay, but not out, associate was shifted to unpopular work, his work was inappropriately denigrated, and he was passed over for partnership as ‘just not fitting in’ with the partnership. As he had the option to remain as of counsel, his work couldn’t have been the problem.”¹⁵

The studies also reveal that lesbian, gay, and bisexual attorneys are subject to pay disparities and unequal access to law firm partnerships.¹⁶

Also documented by the studies is the pervasive workplace hostility faced by some lesbian, gay, bisexual, and transgender lawyers from both peers and such leaders as law firm managing partners. A 1996 Report produced by the Los Angeles County Bar Association found that 66% of respondents reported that workplace colleagues made homophobic comments or jokes.¹⁷ People in this and other studies reported that discriminatory comments were made by associates, partner and managers. For example, the 1999 Report of the D.C. Bar Association Sexual Orientation Task Force reported the following narrative comments by respondents:

- “Managing partner openly refers to gays as ‘faggots.’”¹⁸
- “[a]n attorney here posted [on] the glass front of his office a newspaper column suggesting that AIDS was the just retribution of God against individual sinners. No one in the company told him to take it down.”¹⁹

The troubling statistics reported by the L.A. County Bar Association are similar to the findings of other bar associations. A 1996 study by the Special Committee on Lesbians and Gay Men in the Profession of the Association of the Bar of the City of New York found that over 40% of lawyers had heard other lawyers make homophobic comments about judges or lawyers and 35%

¹⁴ D.C. Bar Association Sexual Orientation Task Force Report, II.A.1. (1999).

¹⁵ *Id.*

¹⁶ William B. Rubenstein, *Queer Studies II: Some Reflections on the Study of Sexual Orientation Bias in the Legal Profession*, 8 UCLA Women’s L.J. 379, 393 (1998) (citing SRI Int’l, 1991 Demographic Survey of the State B. of Cal.: Comparisons of Gay and Non-gay State B. Members 3 (1994); Comm. on Sexual Orientation Discrimination, The State B. of Cal., Rep. and Recommendations Regarding Sexual Orientation Discrimination in the Cal. Legal Profession 2 (1996)).

¹⁷ Durkin, *supra* note 7, at 356. The Los Angeles County Bar Association Report on Sexual Orientation Bias is available at 4 S. Cal. Rev. L. & Women’s Stud. 297, 311 (1995) (hereinafter “L.A. County Bar Association Report”).

¹⁸ D.C. Bar Association Sexual Orientation Task Force Report, I.B.1. (1999), available at http://www.dcb.org/inside_the_bar/structure/reports/task_force/.

¹⁹ *Id.*

of them had heard court personnel making such comments.²⁰ And 77% of judges and attorneys surveyed in Arizona reported that they personally had heard negative comments about lesbian and gay people, and almost half reported that they had heard these homophobic comments in public areas of the courthouse.²¹

Although the environment for lesbian, gay, bisexual, and transgender lawyers is improving, discrimination and differential treatment continues, even in jurisdictions that appear to be more accepting and supportive of lesbian, gay, bisexual, and transgender people. For example, even though California prohibits discrimination on the basis of sexual orientation and gender identity in employment generally²² and within the legal profession specifically,²³ a 2001 Report on Sexual Orientation Fairness in the California Courts²⁴ found that “over one-fifth of all lesbian and gay court users felt threatened based on their sexual orientation.”²⁵ A 2001 study by the New Jersey judiciary reported similar findings,²⁶ despite the state’s prohibition on discrimination on the basis of sexual orientation and gender identity.²⁷

Conclusion

The Association’s strong commitment to diversity, as reflected in Goal IX and in the actions of ABA entities and members in promoting that commitment, help ensure that the profession will mirror the increasingly diverse communities it serves. The ABA has a long history of opposing

²⁰ Special Comm. on Lesbians and Gay Men in the Profession, Rep. of Findings from the Survey on Barriers and Opportunities Related to Sexual Orientation, 51 Rec. Ass’n B. City N.Y. 130, 130-31 (1996) (hereinafter “ABCNY Special Committee Report”). See also Durkin, *supra* note 7 at 134-35.

²¹ Cramer, *supra* note 9 at 31.

²² Cal. Govt. Code § 12940; Cal. Penal Code § 422.56.

²³ See, e.g., California Code of Judicial Ethics Canon 3(B)(6), which provides, “A judge shall require lawyers . . . to refrain from manifesting, by words or conduct, bias or prejudice based upon . . . sexual orientation[.]” See also Rules Governing Accreditation of Specialty Certification Programs for Attorneys 4.7 (effective June 1, 1997) (prohibiting discrimination on the basis of gender or sexual orientation, among other bases), available at <http://calbar.ca.gov/calbar/pdfs/specialization/Accred-Standards-6-97.pdf>.

²⁴ Judicial Council of the State of Cal., Sexual Orientation Fairness in the California Courts: Final Report of the Sexual Orientation Fairness Subcommittee of the Judicial Council’s Access and Fairness Advisory Committee (2001) (hereinafter California Sexual Orientation Fairness Report), available at <http://www.courtinfo.ca.gov/programs/access/documents/report.pdf#search=%22Los%20Angeles%20County%20Bar%20Association%2C%20Report%20on%20Sexual%20Orientation%20Bias%20%22>.

²⁵ Todd Brower, *Obstacle Courts: Results Of Two Studies On Sexual Orientation Fairness In The California Courts*, 11 Am. U.J. Gender Soc. Pol’y & L. 39, 49 (2002).

²⁶ New Jersey Judiciary’s Final Report of the Task Force on Gay and Lesbian Issues (2001), available at <http://www.judiciary.state.nj.us/taskforce/index.htm>.

²⁷ N.J. Stat. Ann. § 10:5-1 – 10:5-49; *Enriquez v. West Jersey Health Systems*, 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001).

discrimination on the basis of sexual orientation and gender identity, and amending Goal IX to expressly include within its terms those persons who are diverse by virtue of those characteristics will further serve the ideal of Goal IX to encourage full and equal opportunity within the profession.

Respectfully Submitted,

Robert E. Stein, Chair
Section of Individual Rights and Responsibilities
February 2007

GENERAL INFORMATION FORM

Submitting Entity: Section of Individual Rights and Responsibilities

Submitted By: Robert E. Stein, Chair
Section of Individual Rights and Responsibilities

1. Summary of Recommendation(s).

The resolution recommends that American Bar Association Goal IX be amended to state: To promote full and equal participation in the legal profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities.

2. Approval by Submitting Entity.

The Council of the Section of Individual Rights and Responsibilities approved the filing of this Report with Recommendation in principle on Oct. 27, 2006, during its fall meeting in Washington, D. C. The Executive Committee approved the filing of this Report with Recommendation on Nov. 15, 2006.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The Association has a long and proud tradition of actively opposing discrimination on the basis of sexual orientation, and the Association recently extended that opposition to discrimination on the basis of gender identity. For example, the Association has adopted policies calling upon local, state, and federal lawmakers to prohibit such discrimination in employment, housing, public accommodations, credit, education, and public funding. The ABA also has opposed discrimination on the basis of sexual orientation in many areas of family law. Pursuant to this commitment and these various policies, the ABA actively has participated in lobbying for effective federal anti-discrimination legislation and has filed numerous Supreme Court amicus briefs urging the adoption of strong anti-discrimination positions with respect to sexual orientation.

The Association has taken steps to help eliminate barriers against the equal participation by gay and lesbian persons in the profession. For example, the ABA's law school accreditation standards have been amended to require that law schools provide equal educational and employment opportunities without regard to, among other things, sexual orientation. Within the larger profession, the ABA has urged the study and elimination of judicial bias on the basis of sexual orientation, among other bases.

5. What urgency exists which requires action at this meeting of the House?

Through previous recommendations, the ABA has recognized that lesbian, gay, bisexual, and transgender people face pervasive discrimination in all aspects of life, including within the legal profession. Studies sponsored by numerous state and local bar associations around the country have consistently demonstrated that, while progress is being made, discrimination against lesbian, gay, bisexual, and transgender people within the profession persists. It is particularly important for the Association to take affirmative steps to promote full and equal participation for such persons within the profession, not only to further the ABA's diversity commitment, but also because such persons still receive little statutory protection from discriminatory employment practices.

6. Status of Legislation. (If applicable.)

Not applicable.

7. Cost to the Association. (Both direct and indirect costs.)

Adoption of this Recommendation would result only in minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities, and the costs of updating documents which list the Association's goals.

8. Disclosure of Interest. (If applicable.)

There are no known conflicts of interest.

9. Referrals.

By copy of this form, the Report with Recommendation will be referred to the following entities:

Section of Administrative Law and Regulatory Practice
 Section of Antitrust Law
 Section of Business Law
 Criminal Justice Section
 Section of Dispute Resolution
 Section of Environment, Energy, and Resources
 Section of Family Law
 General Practice, Solo and Small Firm Section
 Government and Public Sector Lawyers Division
 Health Law Section
 Section of Intellectual Property Law
 Section of International Law
 Section of Labor and Employment Law
 Law Practice Management Section

Section of Legal Education and Admissions to the Bar
 Section of Litigation
 Section of Public Contract Law
 Section of Public Utility, Communications and Transportation Law
 Section of Real Property, Probate and Trust Law
 Section of Science and Technology Law
 Section of State and Local Government Law
 Section of Taxation
 Tort Trial and Insurance Practice Section
 Judicial Division
 Law Student Division
 Senior Lawyers Division
 Young Lawyers Division
 Center for Racial and Ethnic Diversity
 Commission on Domestic Violence
 Commission on Homelessness and Poverty
 Commission on Immigration
 Commission on Law and Aging
 Commission on Mental and Physical Disability Law
 Commission on Racial and Ethnic Diversity in the Profession
 Council on Racial and Ethnic Justice
 Commission on Women in the Profession
 American Immigration Lawyers Association
 Hispanic National Bar Association
 National Asian Pacific American Bar Association
 National Association of Women Judges
 National Association of Women Lawyers
 National Bar Association Inc.
 National Conference of Women's Bar Associations
 National Lesbian and Gay Law Association

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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EXECUTIVE SUMMARY

a) Summary of the Recommendation:

The Recommendation recommends that American Bar Association Goal IX be amended to state: To promote full and equal participation in the legal profession by minorities, women, and persons with disabilities, and persons of differing sexual orientations and gender identities.

b) Summary of the issue that the Recommendation addresses:

Studies sponsored by numerous state and local bar associations around the country have consistently demonstrated that, while progress is being made, discrimination against lesbian, gay, bisexual, and transgender people within the profession persists. Such behavior thwarts the diversity goals of the Association by impeding the participation in the profession of persons who are its targets. In addition, professional advancement for gay and lesbian lawyers is unquestionably impeded by the barriers of discrimination. It is particularly important for the Association to take affirmative steps to promote full and equal participation for such persons within the profession, not only to further the ABA's diversity commitment, but also because such persons still receive little statutory protection from discriminatory employment practices.

c) Explanation of how the proposed policy position will address the issue:

The eleven Goals of the American Bar Association reflect the specific ideals that the ABA aspires to serve in all its work. In furtherance of Goal IX, the Association has taken a host of actions that have greatly increased opportunities for minorities, women and persons with disabilities to achieve their full potential as members of the bar. Over the last twenty years, the House of Delegates has also adopted numerous policies opposing discrimination on the basis of sexual orientation in many settings, including law schools, the judicial system and the profession.

The proposed policy would amend the Association's Goal IX expressly to include persons of differing sexual orientation and gender identities.

d) Summary of Minority Views or Opposition

There is no known opposition to this proposal.