

# **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**



**January 2001**



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## FOREWORD

An ongoing priority of the Judicial Council of California has been ensuring that the court system is fair and accessible to all persons in the state of California. As part of its efforts to meet this challenge, the council created the Access and Fairness Advisory Committee. There has been a growing awareness of the number of gay men and lesbians who are involved in various ways with the court system, as judges, attorneys, court users, and court employees. Reflecting this awareness, the court rules have changed to specifically prohibit sexual orientation discrimination. In addition, in recent years, the Chief Justice has spoken to various lesbian and gay bar associations throughout the state. With this background in mind, the Access and Fairness Advisory Committee undertook to examine the question of fairness and sexual orientation in the California court system. This report is the result of that examination.

This report represents the findings and conclusions of the advisory committee. The committee is made up of judges and attorneys of differing sexual orientations and racial, political, and philosophical backgrounds from various parts of the state. We want to thank the dedicated members of the advisory committee's Sexual Orientation Fairness Subcommittee, who have devoted long hours to the development of the surveys, the analysis of the survey results, and the drafting of this report. Some of these subcommittee members have contributed their time and talent for more than four years. We hope to make this an ongoing project of the subcommittee of the advisory committee.

We dedicate this report to the gay and lesbian judges and attorneys who are no longer with us, but whose work, energy, and courage led to this report.

Hon. Frederick P. Horn, Chair  
Access and Fairness Advisory Committee

Hon. Jerold A. Krieger, Chair  
Sexual Orientation Fairness Subcommittee





# EXECUTIVE SUMMARY

The Access and Fairness Advisory Committee of the Judicial Council established a Sexual Orientation Fairness Subcommittee to address issues of bias as they relate to sexual orientation. The subcommittee was charged with making a written report, including recommendations, to the Judicial Council. This report represents that effort and is the first of its kind in the nation and unique in its approach and results. No other court or entity in the country has undertaken such an extensive review of the issue of sexual orientation fairness in a state court system.

## *METHODOLOGY*

The Sexual Orientation Fairness Subcommittee first conducted five focus groups composed of attorneys in San Jose, San Francisco, San Diego, Sacramento, and Los Angeles.<sup>1</sup> These attorneys were asked to identify barriers, if any, facing gay and lesbian legal professionals and their gay and lesbian clients. The following issues were identified from the input received:

- Sexual orientation bias influencing judicial decision making;
- Lack of knowledge and understanding of sexual orientation issues and nuances;
- Need for preservation of privacy;
- Disrespect and mistreatment due to sexual orientation bias and homophobia;
- Bias in the substantive law and court procedures;
- Exclusion from informal legal system networks;
- Lack of equal employment opportunities/benefits for attorneys and court personnel; and
- Barriers to court accessibility, including lack of substantive law that addresses gay and lesbian relationship issues and language in current court forms that does not reflect the relationship status of gay and lesbian litigants.

Focus group participants agreed that the critical component for improving access to justice for gay men and lesbians is education of judges, lawyers, court personnel, and jurors.

The results of the focus groups helped inform the second phase of the subcommittee's work: determining to what extent, if any, actual or perceived sexual orientation bias exists in the courts. To accomplish this, the subcommittee retained consultants Drs. Dominic J. Brewer and Maryann Jacobi Gray to develop survey instruments to survey two groups: (1) gay and lesbian court users; and (2) court employees, regardless of sexual orientation. Both instruments were designed to meet the following objectives:

- Focus on the California court system;
- Obtain data from every part of the state; and

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<sup>1</sup> For a more complete summary of the focus group meetings, see Appendix A, "Focus Group Summaries."

- Emphasize gay and lesbian court users' direct experiences and observations in addition to perceptions.

Thus, the surveys emphasize what actually happened to respondents in addition to what they perceive happens to them or others. Gay men and lesbian court user respondents were asked to report on their most recent contact with California courts as well as one other significant contact since 1990 where sexual orientation became an issue. Fifty-eight percent of the court users receiving the survey completed and returned it, for a total response of 1,225 court users; 1,525 court employees responded to the court employee survey out of approximately 5,500 employees who were sent the survey. Both surveys were distributed in the fall of 1998. Survey responses were returned through early 1999.

Respondents were allowed anonymity so they could answer freely. Anonymity was particularly important given the sensitivity of the research subject: sexual orientation bias.

According to the consultants, being able to identify 2,100 gay men or lesbian court users and having 1,225 respond to the survey is remarkable. Gay men and lesbians constitute a significantly large group in our society that has a "hidden identity": that is, that an individual is gay or lesbian is not always immediately apparent from any outward, physical appearance or surname. Many gays and lesbians choose not to publicly identify their sexual orientation.

The court employee survey generated a number of negative responses to the survey itself. These negative statements underscore some of the findings from the survey, which indicate that some court employees are unconcerned or hostile with respect to sexual orientation issues in the courts.

## ***CHARACTERISTICS OF SURVEY RESPONDENTS***

A significant majority of court user survey respondents shared the following characteristics: they were white men; gay; living in an urban area; well educated, with either an undergraduate or graduate degree; affluent, with an income of at least \$60,000 a year; and selectively "out," primarily with family and friends and at work. In addition, they had relatively few contacts with the court, typically two to three contacts since 1990; their primary contact was with the criminal or civil court; and their court contact, where sexual orientation became an issue, was most often as a juror, witness, litigant, or attorney.

A significant majority of court employee respondents shared the following characteristics: they were white, heterosexual, married women; earned less than \$50,000 a year; had no college degree; and worked full time as permanent court employees. They had worked for the courts for 12 years, including 7 years in the current position, which was court clerk, clerical staff, or mediator; and they had participated in court proceedings at least once a month, with almost half participating on a daily basis. Of the court employee respondents who identified themselves as gay or lesbian, over one-third were totally "out" at work, over one-third were selectively "out" at work, and over one quarter were not "out" at work at all.

## ***SUMMARY OF FINDINGS***

The following are the subcommittee's interpretative findings based on the survey results and the analysis of those results, which are set forth in full in the consultant's report found at Appendix C. The subcommittee's findings draw reasonable inferences from the information set forth in the tables, comparing and contrasting the information from those tables. Accompanying each finding are references to the particular tables relied on and analysis that elucidates and provides important context for the finding. Since both the court user and court employee surveys asked about direct observations of the experiences of lesbians and gay men in the California courts, the findings from both surveys are combined and arranged by topic. These findings are not inclusive of all the reasonable inferences that may be drawn from the data but, rather, represent those findings that highlight the most significant areas of concern for the Access and Fairness Advisory Committee.

Interpreting the survey results for sexual orientation bias perceptions and actual biased conduct is difficult. Lesbians and gay men as a group are less visible than other minority groups, such as Blacks<sup>2</sup>, Hispanics, and Asians, and women. For the most part, unless gays and lesbians choose to be "out" or unless they are "outed" during the course of a court proceeding, any bias or prejudice held by court participants is difficult to measure. The vast majority of gay men and lesbian court participants are not "out" in court proceedings. Thus, the survey results and findings must be considered with that overlaying context in mind.

The majority of respondents held the perception that they were treated the same as everyone else and treated with respect by those who knew their sexual orientation, which is a positive statement about the courts and judges. This general finding, however, does not completely reflect gay males' and lesbians' experience with the courts. The factor of invisibility, taken into consideration with other survey data, suggests that the experience of many gay men and lesbians in the courts is much less favorable when gays and lesbians have more contact with the courts and when sexual orientation becomes an issue in the court contact. This data is reflected in many of the findings described in this report.

## **USE OF THE COURTS**

### **Overall Perceptions of Gay and Lesbian Court Users**

- 1. Most lesbian and gay court users believed they were treated the same as everyone else and treated with respect by those who knew their sexual orientation.**

### **Treatment Related to Sexual Orientation**

- 2. Fifty-six percent of the gay and lesbian respondents experienced or observed a negative comment or action toward gay men or lesbians:**

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<sup>2</sup> Blacks refers to African Americans and others of African descent regardless of national origin.

- a. Where the contact with the court was one in which sexual orientation became an issue; or
  - b. With the offending conduct coming most frequently from a lawyer or court employee.
3. One out of every five court employee respondents heard derogatory terms, ridicule, snickering, or jokes about gay men or lesbians in open court, with the comments being made most frequently by judges, lawyers, or court employees.
4. Lawyers and judges more frequently make the limited number of positive comments or take positive actions toward gay and lesbian court users. Court employees are least likely to make any positive comments.
5. Forty-eight percent of court employees who observed negative actions or heard negative comments in open court took no action in response.
6. Court employees who took no action in response to negative comments or actions directed at lesbians or gay men in court did so, among other reasons, because:
  - a. They did not believe the incident was serious enough to intervene;
  - b. They believed nothing constructive would come from intervening;
  - c. They feared some form of retaliation; or
  - d. They feared that they would be thought to be a lesbian or a gay man.
7. Of the court employees who intervened upon observing negative actions or hearing negative comments directed at lesbians or gay men in open court, 40 percent reported that the negative comments stopped or decreased in frequency, and 38 percent reported that their intervention had no effect on reducing or stopping the negative comments.

## **Disclosure of Sexual Orientation/Responding to Requests for Personal Information**

8. Fifty-six percent of gay and lesbian court users in a contact in which sexual orientation became an issue did not want to state their sexual orientation, and 38 percent felt threatened in the courtroom setting because of their sexual orientation.
9. Twenty-nine percent of gay men and lesbians in a contact in which sexual orientation became an issue believed that someone else stated their sexual orientation without their approval, and 25 percent felt forced to state their sexual orientation against their will.
10. During their most recent contact with the California courts, 44 percent of gay men and lesbians participated either as a juror or in jury voir dire. When asked to disclose personal information in that context, 48 percent were asked if they were married, and most responded incompletely to that question. Overall, 26 percent of all lesbian and gay court users were asked if they were married.

## Perceptions

11. Fifty percent of lesbian and gay court users believed that the courts are not providing fair and unbiased treatment for lesbians or gay men.
12. Sixteen percent of lesbian and gay court users believed that the courts have been unsuccessful on *all* of the following measures:
  - a. Being available to resolve disputes involving lesbians or gay men;
  - b. Being open or accessible to lesbians or gay men; and
  - c. Providing fair and unbiased treatment of lesbians or gay men.
13. In evaluating the success of the courts in providing access and being available to resolve disputes involving lesbians and gay men, lesbian and gay court employees rated the courts significantly lower than did heterosexual court employees.
14. In a contact with the court in which sexual orientation became an issue, lesbians and gay men had significantly more negative perceptions of fairness in the California courts.
15. When the court contact focused on issues relating to sexual orientation, 26 percent of lesbian and gay court users believed they were not treated the same as everyone else, 30 percent believed they were not treated with respect by those who knew their sexual orientation, and 39 percent believed that their sexual orientation was used to devalue their credibility.
16. In their most recent contact with the California courts, 22 percent of lesbian and gay court users felt threatened in that setting because of their sexual orientation, whether or not sexual orientation became an issue in that contact. However, in another contact when sexual orientation *did* become an issue, 38 percent of lesbian and gay court users felt threatened in the court setting because of their sexual orientation.
17. Lesbian and gay court users believed that their sexual orientation was raised as an issue almost as often when it did not pertain to the case as when it did pertain to the proceedings or to their reason for using the courts.

## THE COURT AS A WORKPLACE

### Court Employees' Experiences

18. Lesbian and gay employees were at least four times more likely to experience negative actions or comments based on sexual orientation than were heterosexual employees.
19. Forty-two percent of the court employees who experienced a negative incident at work based on their sexual orientation took no action in response.

20. **Of those employees who did take some action in response to an incident at work based on their sexual orientation, 49 percent reported that their intervention or action had no effect.**
21. **One in five lesbian and gay court employees reported experiencing discrimination (as opposed to only negative comments or actions) at their workplace based on their sexual orientation. Two percent of the heterosexual court employees reported being discriminated against based on sexual orientation.**
22. **Sixty-five percent of the court employees who experienced discrimination based on sexual orientation took some action, of which 56 percent reported that nothing resulted from that action.**
23. **Of those court employees who reported experiencing discrimination based on sexual orientation but took no action, 46 percent did not take any action because they thought nothing constructive would come of doing so, and 23 percent feared negative consequences.**

## **Court Employees' Intervention**

24. **Sixty-five percent of court employees who observed a negative action or heard a negative comment outside the courtroom took no action.**
25. **Court employees who observed a negative action or heard a negative comment outside the courtroom and did not intervene did not do so for the following reasons:**
  - a. **Sixty-two percent did not feel the incident was serious enough to intervene;**
  - b. **Twenty-three percent believed nothing constructive would happen;**
  - c. **Eight percent feared some form of retaliation;**
  - d. **Fifteen percent never thought of intervening; and**
  - e. **Two percent feared they would be thought to be lesbian or gay.**
26. **Of those employees who did intervene upon observing negative actions or comments toward lesbians or gay men outside the courtroom, 54 percent reported that the negative actions or comments stopped or decreased in frequency.**

## **Court Employees' Observations/Perceptions**

27. **Thirty-two percent of court employees heard ridicule, snickering, or jokes about lesbians and gay men in settings other than open court; 28 percent reported hearing negative comments; and 21 percent heard derogatory terms about gay men or lesbians.**
28. **Ninety-four percent of court employees stated that they believe that the personnel policies of their workplace are fair to lesbians and gay men, and 88 percent believe that lesbians and gay men are treated the same as other employees.**

29. **Court employees reported the following perceptions as a gay man or lesbian in the workplace:**
  - a. **Twenty-nine percent believe that being open about being a gay man or a lesbian is unsafe;**
  - b. **Fifty-eight percent believe it is better if gay men and lesbians are not open about their sexual orientation; and**
  - c. **Forty percent acknowledge that jokes or comments are made about lesbians and gay men behind their backs.**
30. **Lesbian and gay court employees believed the courts are less fair to all court users than did heterosexual court employees.**
31. **Heterosexual court employees rated the courts significantly higher in evaluating the success of the courts in providing access, being available to resolve disputes, and providing fair and unbiased treatment of all categories of sexual orientation than did lesbian and gay court employees.**

## ***HIGHLIGHTS OF THE RECOMMENDATIONS***

Based on these findings, the Access and Fairness Advisory Committee made recommendations in the following categories: education and training; attitudes, treatment, and users' experiences with the courts; recognizing sexual orientation diversity within the courts; the courts as a workplace; specific access issues, including jury service and specific subject-matter assignments; outreach; and future research. The highlights of the recommendations are summarized here.

### **TO THE JUDICIAL COUNCIL**

1. *Education and Training*: The advisory committee recommends that the Judicial Council widely disseminate this report to the judiciary, court employees, and the public.
2. The advisory committee further recommends that the Judicial Council approve the following statements of policy:
  - a. *Education and Training*: All courts should affirm the need for all courts to ensure fairness and access to lesbians and gay men, pursuant but not limited to the requirements of the Standards of Judicial Administration, sections 1 and 1.5, and the Code of Judicial Ethics, canons 2 and 3.
  - b. *The Courts as a Workplace*: The Judicial Council endorses the development and implementation of local court personnel policies and practices to eliminate sexual orientation discrimination and bias in the court as a workplace, including effective intervention in incidents of sexual orientation discrimination or bias and the prevention of retaliation against any individual reporting such incidents.

- c. *Outreach*: The Judicial Council encourages the local courts to include sexual orientation in their community outreach programs.

## **REFERRALS TO THE CENTER FOR JUDICIAL EDUCATION AND RESEARCH (CJER)**

1. *Education and Training*: The advisory committee recommends that the CJER's fairness education programs encourage judges, including but not limited to those judges with criminal, family, juvenile, and probate assignments, to be sensitive to and aware of sexual orientation diversity issues, which particularly affect these areas.
2. *Education and Training*: The advisory committee recommends that the CJER and the Judicial Administration Institute of California (JAIC) incorporate the findings and recommendations of this report into their educational programs for bench officers and court staff.
3. *The Courts as a Workplace*: The advisory committee recommends that the JAIC and CJER, in association with the Access and Fairness Advisory Committee, develop a training and education program for court staff that would be delivered, on a statewide or regional basis, within six months of permanent employment status to new employees. Current employees would receive instruction through continuing education programs.

## **TO BE INCORPORATED INTO THE ADVISORY COMMITTEE WORK PLANS**

The advisory committee recommends that the following recommendations be incorporated into the work plans of the advisory committee and its subcommittees:

1. *Attitudes, Treatment, and Users' Experiences with the Courts*: The advisory committee will develop means to assist courts in implementing the Standards of Judicial Administration, sections 1 and 1.5, and the Code of Judicial Ethics, canons 2 and 3, and review and revise, as appropriate, any procedures or forms to include sexual orientation issues.
2. *Recognizing Sexual Orientation Diversity Within the Courts*: The advisory committee and State Bar staff will work collaboratively with local bar associations and community groups to develop workshops on judicial selection and the election process that encourage diversity, including sexual orientation diversity, in the appointment and election of judges.
3. *Future Research*: The advisory committee will undertake a comprehensive review of the court process to quantify the extent to which lesbians and gay men face barriers to participation in the legal system. The review should track all recommendations made by this committee and identify any new issues that have arisen in the interim.



# INTRODUCTION

The Access and Fairness Advisory Committee of the Judicial Council is pleased to present this report on sexual orientation fairness in the California courts. This report appears to be the first of its kind in the nation. No other court or entity in the country has undertaken such an extensive review of the issue of sexual orientation fairness in a state court system. This report represents the cumulative effort of many individuals and groups over a several year period under the direction of the Sexual Orientation Fairness Subcommittee of the Access and Fairness Advisory Committee of the Judicial Council.

The Sexual Orientation Fairness Subcommittee was appointed by Access and Fairness Advisory Committee chair, Judge Benjamin Aranda III (now deceased), of the Los Angeles County Municipal Court, South Bay Judicial District. Judge Donna Hitchens of the Superior Court of San Francisco County was named subcommittee chair.

As stressed by Chief Justice Ronald M. George during a 1997 speech made to Bay Area Lawyers for Individual Freedom (BALIF), “ensuring fairness and access is a continuing task; thus, the work previously undertaken by specialized advisory committees and task forces was folded into the mandate of the Standing Advisory Committee on Access and Fairness.”

The subcommittee’s mandate is to examine issues of bias as they relate to sexual orientation and make a written report, including recommendations, to the Judicial Council. To begin its inquiry, the subcommittee conducted five focus group meetings: in San Jose, San Francisco, San Diego, Sacramento, and Los Angeles. These focus groups were composed of attorneys, who were asked to identify barriers, if any, facing gay and lesbian legal professionals and their gay and lesbian clients.

Using information obtained from the focus groups, the subcommittee, with the assistance of survey and research consultants Drs. Dominic J. Brewer and Maryann Jacobi Gray, developed two ground-breaking surveys: one for gay men and lesbian court users and the other for court employees, heterosexual, gay, and lesbian. These surveys focused on the actual experiences of court users and employees as well as the perceptions of court users and employees to determine to what extent, if any, sexual orientation bias exists in the courts.

Identifying gay and lesbian users of the court to survey was a difficult and challenging task that required the assistance of various national and local lesbian and gay advocacy and service organizations. Through the use of these organizations’ mailing lists, the subcommittee circulated a flier asking individuals to identify whether they had used the California courts in the past 10 years, and if so, whether they were willing to participate in the survey. As a result of these fliers, questionnaires were sent to 2,100 court users, and 58 percent completed the survey, for a total response of 1,225 court users.

The court employee survey was designed for and sent to employees of the California court system, *regardless of sexual orientation*. Among those included were court clerks, court

reporters, administrators, and attorneys. The survey was distributed to approximately 5,500 employees, of whom 1,525 responded.

The subcommittee analyzed the data from both surveys, with the assistance of the consultants, to ensure statistical accuracy. The extensive data collected is compiled in the consultants' report, attached as an appendix to this report. The subcommittee findings from the survey data highlight actual experiences as well as perceptions of sexual orientation bias in the courts. Some findings show that courts generally treat gay and lesbian court users the same as any other court user. Other findings demonstrate that, in particular situations and under certain circumstances, sexual orientation bias exists.

The subcommittee also included an analysis of the findings to provide valuable and necessary context. Interpreting survey results that address experiences related to sexual orientation is difficult. Lesbians and gay men as a group are less visible than other minority groups, such as Blacks, Hispanics, and Asians, and women. Unless gay men and lesbians choose to make their sexual orientation known, or unless someone else discloses their sexual orientation during the course of a court proceeding, any bias or prejudice held by court participants is difficult to attribute to sexual orientation. The vast majority of gay and lesbian court participants do not disclose their sexual orientation in their contacts with the courts, nor is a court participants' sexual orientation readily apparent. Thus, the survey results and findings must be considered in that context, as well as along with other factors that are unique to lesbians and gay men as a group. The analysis accompanying the findings attempts to provide that context and set forth these other factors that affect the interpretation of the survey results.

The overriding purpose of this report is to provide valuable information regarding the extent of any actual or perceived sexual orientation bias in the courts to the California State Judiciary at the request and direction of the former Chief Justice, the Honorable Malcolm Lucas, and current Chief Justice, the Honorable Ronald George. While there is good news in the survey results, there are areas that deserve the judiciary's attention to ensure that all court users and employees are treated fairly, respectfully, and without fear that their sexual orientation, if known, will result in biased or negative treatment in California courts.

## METHODOLOGY OBJECTIVES AND HIGHLIGHTS

By the year 2020, approximately 50 million people will make California their home. This number represents an increase of 66 percent from the 1990 population recorded in the U.S. Census of that year.

Arguably the most diverse state in the nation, California's demographic profile in 2020 will include a white population of 40.5 percent (down 16.5 percent from the 1990 Census), with Hispanics comprising up to approximately 41 percent of the population, and Asian Americans, Pacific Islanders, and Native Americans constituting a total of 12 percent. The smallest minority group in number, Blacks will make up 6 percent of the population. Further, by 2020, the number of different languages and dialects spoken in this state, currently 224, will increase and create added demand for skilled court interpreters.

The multicultural society of the future will also include significant communities of gays and lesbians whose members are found in all the racial categories and many of the language groups referenced in the preceding paragraph. In a 1991 demographic survey commissioned by the California State Bar Association, approximately 4 percent of members under 40 years of age and approximately 3 percent of all bar members identified themselves as gay, lesbian, or bisexual.<sup>3</sup>

In 1994, two publications were released addressing biased treatment and discrimination directed at gay and lesbian attorneys by legal employers. The Bar Association of San Francisco released its *Manual of Model Policies and Programs to Achieve Equality of Opportunity in the Legal Profession*. The manual included specific recommendations to legal employers on achieving equal employment opportunity for lesbian and gay attorneys and law students.

In June 1994, the Los Angeles County Bar Association Committee on Sexual Orientation Bias released its report on sexual orientation discrimination by legal employers in Los Angeles County. The report suggests that sexual orientation bias is a widespread and often virulent problem throughout California. Among Los Angeles legal professionals surveyed, more than 50 percent believe that the work environment is less hospitable for gay and lesbian attorneys than for heterosexual attorneys. Specifically, sexual orientation discrimination is seen as negatively affecting performance evaluations, promotions, career advancement, benefits, and salary.

The backdrop for the continuing discussion of the Access and Fairness Advisory Committee's mandate to examine issues of unfair treatment or bias in the courts was the Los Angeles survey. Consequently, the advisory committee decided it would also monitor sexual orientation bias issues related to access to the judicial system and fairness in the state courts and establish new areas of inquiry, as appropriate. This decision advanced one of the most important goals of the Judicial Council, which is to ensure that all court users are treated equally and fairly regardless of race, ethnicity, culture, sexual orientation, gender, disability, age, or income.

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<sup>3</sup> Los Angeles County Bar Association Committee on Sexual Orientation Bias, *Report on Sexual Orientation Bias*, p. 1 (June 1994).

The Sexual Orientation Fairness Subcommittee set, as one of its first priorities, the goal of determining to what extent, if any, sexual orientation bias, either actual or perceived, exists in the courts. To accomplish that objective, after the focus groups had been concluded, the subcommittee retained consultants Drs. Dominic J. Brewer and Maryann Jacobi Gray to work with the subcommittee to develop instruments to survey two groups: court users and court employees.

## ***SUMMARY OF SURVEY OBJECTIVES***

Two separate survey instruments were developed and distributed: to gay and lesbian court users and to court employees, regardless of sexual orientation. Underlying the design of both instruments were the following objectives:

- Focus on the California court system;
- Obtain data from every part of the state; and
- Emphasize gay and lesbian court users' direct experiences and observations in addition to their perceptions.

Thus, the surveys emphasize what actually happened to respondents in addition to what they perceive happens to them and to others.

Respondents were allowed anonymity so they could answer freely. Anonymity was particularly important given the sensitivity of the research subject: sexual orientation bias.

## ***COURT USER SURVEY***

The court user survey was designed to determine the following about gay or lesbian users of the court: (1) whether they experienced or observed bias, discrimination, ridicule, or discomfort based on sexual orientation while using the courts; (2) whether they had positive experiences based on sexual orientation while using the courts; and (3) whether they believed they were shown the same treatment and respect in the courts as others. These respondents were asked to report on their most recent contact with California courts as well as one other significant contact since 1990 in which sexual orientation became an issue. With the assistance of various national and local lesbian and gay advocacy and service organizations, the subcommittee identified 2,100 court users. Fifty-eight percent completed the survey, for a total response of 1,225 court users.

## ***COURT EMPLOYEE SURVEY***

The court employee survey was designed for and sent to employees of the California court system, *regardless of sexual orientation*. Among those included were court clerks, reporters, administrators, and attorneys. The survey was distributed to approximately 5,500 employees, of whom 1,525 responded. Of those, 64 identified themselves as lesbian, gay male, or bisexual.

Despite the smaller sample of lesbian or gay court employee survey respondents, the responses are still statistically significant. Additionally, many of the survey questions asked for court employees' direct observations of the experiences of lesbian and gay persons in the California courts, which are questions that all court employees, regardless of their sexual orientation, were qualified to answer. The survey instrument was designed to determine the following: (1) whether employees observed negative behaviors toward gay men or lesbians in open court or other work settings; (2) whether employees experienced negative actions or heard negative comments directed toward themselves based on their actual or perceived sexual orientation; (3) whether employees experienced discrimination based on their sexual orientation; and (4) whether employees believed that gay men and lesbians are shown equal treatment and respect in the courts. The survey asked court employees to base their responses on experiences over the past year only.

Both survey questionnaires were distributed in the summer and fall of 1998.

## ***SIGNIFICANCE OF RESPONSES RECEIVED***

According to the consultants, being able to identify 2,100 gay or lesbian court users and having 1,225 respond to the survey is remarkable. Gay men and lesbians constitute a significantly large group in our society that has a "hidden identity"—that is, that an individual is gay or lesbian is not always immediately apparent by any outward, physical appearance or surname. Many gays and lesbians do not choose to publicly identify their sexual orientation.

The court employee survey itself generated a number of negative responses. These negative statements underscore some of the findings from the survey, which indicate that some court employees are unconcerned or hostile with respect to sexual orientation issues in the courts.

A sampling of the responses is as follows:

- "I have received your survey on sexual orientation and found it to be degrading and offensive. . . . I am sure the Judicial Council could find better use of the talent, time and money that is being wasted on a minority of court personnel."
- "This is the most offensive survey I have ever encountered. . . . Send it to someone who cares."
- "Some of us have *real* jobs—this is a blatant waste of taxpayer money—who cares about this crap!"
- "I decline to answer your survey as I feel it covers a matter that is not appropriate to talk about in the work place."
- "I find it incredible, and as a taxpayer, I am offended, that money is allowed to be spent on such a stupid survey. I can further assure you that, as a court clerk, I have better things to do than keep track of extraneous remarks regarding gays and lesbians."
- "I, as a heterosexual, am getting a little tired of the whole hoo-haw and feel that if any individual thinks he/she is being mistreated, he/she should bring this to the attention of the appropriate authority."



# CHARACTERISTICS OF SURVEY RESPONDENTS

## *COURT USER RESPONDENTS*

A significant majority of the respondents to the court user survey shared the following characteristics:

- Were white men (90 percent);
- Were gay (69%);
- Were living in an urban area (66%);
- Were well educated, with either an undergraduate or graduate degree (83%);
- Were affluent, with an income of at least \$60,000 a year (48%);
- Were selectively “out,” primarily with family and friends and at work (61%);
- Had relatively few contacts with the court, most likely two to three contacts since 1990 (70%);
- Had primary contact with the criminal or civil court (73%); and
- Most recent contact with a California court was most often as a juror (60%); and when contact with the court was one in which sexual orientation became an issue, most often that contact was as a participant, either as a litigant or attorney (32%).

Tables 1 through 3 provide a statistical profile of the court user respondents.

## *COURT EMPLOYEE RESPONDENTS*

A significant majority of court employees who responded to the court employee survey shared the following characteristics:

- Were white heterosexual, married women (93%);
- Were earning less than \$50,000 a year (66%);
- Had no college degree (66%);
- Were full-time, permanent court employees (98%);
- Had worked for the courts for 12 years, 7 in the current position;
- Were employed as court clerks, clerical staff, or mediators; and
- Had participated in court proceedings at least once a month, with almost 50 percent participating on a daily basis.

Of court employees who identified themselves as gay or lesbian:

- Over one-third were totally “out”<sup>4</sup> at work;
- Over one-third were selectively “out” at work; and
- Over one quarter were not “out” at work at all.

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<sup>4</sup> See the definition of “out” in the “Definitions” section, p. 18.

Respondents in the court employee survey were considerably less likely to openly identify themselves as lesbian or gay at work as compared to court users, where 93 percent were totally “out” or selectively “out” in their respective workplaces (although not in the court setting).



# FINDINGS<sup>5</sup>

## *PREFACE*

The following are the subcommittee's interpretative findings based on the survey results and the analysis of those results, which are set forth in full in the consultant's report found at Appendix C. The subcommittee's findings draw reasonable inferences from the information set forth in the tables, comparing and contrasting the information from those tables. Accompanying each finding are references to the particular tables relied on and analysis that elucidates and provides important context for the finding. Since both the court user and court employee surveys asked about direct observations of the experiences of lesbians and gay men in the California courts, the findings from both surveys are combined and arranged by topic. These findings are not inclusive of all the reasonable inferences that may be drawn from the data but, rather, represent those findings that highlight the most significant areas of concern for the Access and Fairness Advisory Committee.

Interpreting the survey results for sexual orientation bias perceptions and actual biased conduct is difficult. Lesbians and gay men as a group are less visible than other minority groups, such as Blacks, Hispanics, and Asians, or women. For the most part, unless gays and lesbians choose to be "out," or unless they are "outed" during the course of a court proceeding, any bias or prejudice held by court participants is virtually impossible to measure. The vast majority of gay and lesbian court participants are not "out" in court proceedings. Thus, the survey results and findings must be considered with that overlaying context in mind.

That the majority of respondents hold the perception that they were treated the same as everyone else and treated with respect by those who knew their sexual orientation is a positive statement about the courts and judges. That finding, unfortunately, is not an unqualified statement of gays' and lesbians' experiences with the courts. The factor of invisibility, taken into consideration with other survey data, suggests that the experience of many gay men and lesbians in the courts is much less favorable when gays and lesbians have more contact with the courts and when sexual orientation becomes an issue in the court contact. This data is reflected in many of the findings that follow.

The invisibility of gay men and lesbians in society generally and in the court system in particular makes the finding that nearly one in four respondents believe the court system is not fair for lesbians and gay men a very serious concern. Of equal concern is the finding that lesbians and gay men, when their sexual orientation is known in a court proceeding, more frequently experience bias based on their sexual orientation.

Whether the level of bias and unfair treatment would be greater if gay men and lesbians were more visible either as court participants or court employees is a reasonable inquiry based on the results of this survey. Given the present circumstances, where gay men and lesbians hide, and often feel forced to hide, their identities, lives, and relationships, the extent of bias and unfair

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<sup>5</sup> Beginning on p. 25, these findings are annotated with analysis and reference to the supporting survey data.

treatment of gay men and lesbians in the courts cannot be fully documented. Nonetheless, the following findings and survey results give us some important insights about their experiences with the courts.

## ***DEFINITIONS***

In these findings, certain words are used with specific meanings that may differ from their common use. To help eliminate any miscommunication, these words are defined here and are used in the report as defined. These definitions also include phrases that survey drafters used in the survey questions and thus are used in reporting the survey results and findings.

***“Out” or “outed”***: Refers to individual gay men and lesbians whose sexual orientation is publicly known in a variety of settings: by family, at work, and/or by friends and colleagues. Normally, being “out” is a voluntary choice, but in some instances, an individual may be “outed” because someone else disclosed his or her sexual orientation.

***Positive comments and actions***: In those instances where respondents were asked to indicate how often “positive comments or actions” were made about sexual orientation, respondents interpreted those terms to mean comments or actions in which they were treated with respect and received equal treatment during the specific legal proceeding. Respondents did not indicate that “positive comments” were made about their individual sexual orientation, such as “oh, it’s great you’re a lesbian,” or that they were given preferential treatment, such as “since you’re gay, you can go to the front of the line.” Rather, “positive comments” or “positive actions” were exemplified by the following specific responses: “When interviewing jurors, the judge asked if we were married or had a live-in partner. The atmosphere was very comfortable.” “As a lesbian couple, we had a very positive experience with our second-parent adoption. The judge . . . was very warm and supportive.”<sup>6</sup>

***Another contact***: The survey questionnaire invited respondents to answer a series of questions about a contact with a California court *other than* the most recent but occurring since 1990—one in which the user was involved and in which sexual orientation became an issue in some way. Thus, findings that refer to “another contact” refer to this type of court contact. Although fewer lesbian or gay court users responded to this set of questions, and thus, interpreting these results requires some caution, the responses are still statistically significant. Because the two sets of questions (the most recent contact with the California courts and another significant contact) do not provide the same type of respondent profile, differences between them should not be attributed to a change over time or any other single factor.

***In-court experience***: This phrase refers to experiences by respondents that occurred within the physical confines of the courtroom.

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<sup>6</sup> *Sexual Orientation Fairness in the Courts, Results from Two Surveys*, January 2000, p. 19.

***Out-of-court experience:*** This phrase refers to experiences by respondents that occurred outside the physical confines of the courtroom but within the parameters of the courthouse, such as hallways, clerks' offices, and judges' chambers.

***Courts' openness and accessibility versus availability:*** In certain survey questions, respondents were asked to rate the courts on their openness and accessibility to lesbians and gay men as well as on the courts' availability to resolve disputes involving lesbians and gay men. The survey drafters chose "openness and accessibility" to mean formal, institutional access to the judicial process. "Availability to resolve disputes" was intended to elicit responses on the success of substantive legal doctrine or court officers to include lesbians' or gay men's issues. However, it is possible that survey respondents defined "access" and "availability" differently than the survey drafters.

***A contact in which sexual orientation became an issue:*** This phrase refers to a court user survey respondent's other recent, significant contact with the California courts. Seventy-four percent of those contacts involved certain issues relating to sexual orientation.

***Mean:*** In the statistical information reported in the analyses, the mean refers to the arithmetic average of a series of numbers or numerical responses. For example, the mean of the five numerical responses 1, 1, 4, 4, and 5 is 3 ( $1 + 1 + 4 + 4 + 5 = 15$ ;  $15/5 = 3$ ).

## ***USE OF THE COURTS***

### **OVERALL PERCEPTIONS OF GAY AND LESBIAN COURT USERS**

- 1. Most lesbian and gay court users believed they were treated the same as everyone else and treated with respect by those who knew their sexual orientation.**

### **TREATMENT RELATED TO SEXUAL ORIENTATION**

- 2. Fifty-six percent of the gay and lesbian respondents experienced or observed a negative comment or action toward gay men or lesbians:**
  - a. Where the contact with the court was one in which sexual orientation became an issue; or**
  - b. With the offending conduct coming most frequently from a lawyer or court employee.**
- 3. One out of every five court employee respondents heard derogatory terms, ridicule, snickering, or jokes about gay men or lesbians in open court, with the comments being made most frequently by judges, lawyers, or court employees.**
- 4. Lawyers and judges more frequently make the limited number of positive comments or take positive actions taken toward gay and lesbian court users. Court employees are least likely to make any positive comments.**

5. **Forty-eight percent of court employees who observed negative actions or heard negative comments in open court took no action in response.**
6. **Court employees who took no action in response to negative comments or actions directed at lesbians or gay men in court did so, among other reasons, because:**
  - a. **They did not believe the incident was serious enough to intervene;**
  - b. **They believed nothing constructive would come from intervening;**
  - c. **They feared some form of retaliation; or**
  - d. **They feared that they would be thought to be a lesbian or a gay man.**
7. **Of the court employees who intervened upon observing negative actions or hearing negative comments directed at lesbians or gay men in open court, 40 percent reported that the negative comments stopped or decreased in frequency, and 38 percent reported that their intervention had no effect on reducing or stopping the negative comments.**

## **DISCLOSURE OF SEXUAL ORIENTATION/RESPONDING TO REQUESTS FOR PERSONAL INFORMATION**

8. **Fifty-six percent of gay and lesbian court users in a contact in which sexual orientation became an issue did not want to state their sexual orientation, and 38 percent felt threatened because of their sexual orientation.**
9. **Twenty-nine percent of gay men and lesbians in a contact in which sexual orientation became an issue believed that someone else stated their sexual orientation without their approval, and 25 percent felt forced to state their sexual orientation against their will.**
10. **During their most recent contact with the California courts, 44 percent of gay men and lesbians participated either as a juror or in jury voir dire. When asked to disclose personal information in that context, 48 percent were asked if they were married, and most responded incompletely to that question. Overall, 26 percent of all lesbian and gay court users were asked if they were married.**

## **PERCEPTIONS**

11. **Fifty percent of lesbian and gay court users believed that the courts are not providing fair and unbiased treatment for lesbians or gay men.**
12. **Sixteen percent of lesbian and gay court users believed the courts were unsuccessful on *all* of the following measures:**
  - a. **Being available to resolve disputes involving lesbians or gay men;**
  - b. **Being open or accessible to lesbians or gay men; and**
  - c. **Providing fair and unbiased treatment of lesbians or gay men.**

13. In evaluating the success of the courts in providing access and being available to resolve disputes involving lesbians and gay men, lesbian and gay court employees rated the courts significantly lower than did heterosexual court employees.
14. In a contact with the court in which sexual orientation became an issue, lesbians and gay men had significantly more negative perceptions of fairness in the California courts.
15. When the court contact focused on issues relating to sexual orientation, 26 percent of lesbian and gay court users believed they were not treated the same as everyone else, 30 percent believed they were not treated with respect by those who knew their sexual orientation, and 39 percent believed their sexual orientation was used to devalue their credibility.
16. In their most recent contact with the California courts, 22 percent of lesbian and gay court users felt threatened in that setting because of their sexual orientation, whether or not sexual orientation became an issue in that contact. However, in another contact when sexual orientation *did* become an issue or when they were more active participants, 38 percent of lesbian and gay court users felt threatened in the court setting because of their sexual orientation.
17. Lesbian and gay court users believed that their sexual orientation was raised as an issue almost as often when it did not pertain to the case as when it did pertain to the proceedings or to their reason for using the courts.

## ***THE COURT AS A WORKPLACE***

### **COURT EMPLOYEES' EXPERIENCES**

18. Lesbian and gay employees were at least four times more likely to experience negative actions or comments based on sexual orientation than were heterosexual employees.
19. Forty-two percent of the court employees who experienced a negative incident at work based on their sexual orientation took no action in response.
20. Of those employees who did take some action in response to an incident at work based on their sexual orientation, 49 percent reported that their intervention or action had no effect.
21. One in five lesbian and gay court employees reported experiencing discrimination (as opposed to only negative comments or actions) at their workplace based on their sexual orientation. Two percent of the heterosexual court employees reported being discriminated against based on sexual orientation.

22. **Sixty-five percent of the court employees who experienced discrimination based on sexual orientation took some action, of which 56 percent reported that nothing resulted from that action.**
23. **Of those court employees who reported experiencing discrimination based on sexual orientation but took no action, 46 percent did not take any action because they thought nothing constructive would come of doing so, and 23 percent feared negative consequences.**

## **COURT EMPLOYEES' INTERVENTION**

24. **Sixty-five percent of court employees who observed a negative action or heard a negative comment outside the courtroom took no action.**
25. **Court employees who observed a negative action or heard a negative comment outside the courtroom and did not intervene did not do so for the following reasons:**
  - a. **Sixty-two percent did not feel the incident was serious enough to intervene;**
  - b. **Twenty-three percent believed nothing constructive would happen;**
  - c. **Eight percent feared some form of retaliation;**
  - d. **Fifteen percent never thought of intervening; and**
  - e. **Two percent feared they would be thought to be lesbian or gay.**
26. **Of those employees who did intervene upon observing negative actions or comments toward lesbians or gay men outside the courtroom, 54 percent reported that the negative actions or comments stopped or decreased in frequency.**

## **COURT EMPLOYEES' OBSERVATIONS/PERCEPTIONS**

27. **Thirty-two percent of court employees heard ridicule, snickering, or jokes about lesbians and gay men in settings other than open court; 28 percent reported hearing negative comments; and 21 percent heard derogatory terms about gay men or lesbians.**
28. **Ninety-four percent of court employees stated that they believe that the personnel policies of their workplace are fair to lesbians and gay men, and 88 percent believe that lesbians and gay men are treated the same as other employees.**
29. **Court employees reported the following perceptions about being a gay man or lesbian in the workplace:**
  - a. **Twenty-nine percent believe that being open about being a gay man or a lesbian is unsafe;**
  - b. **Fifty-eight percent believe it is better if gay men and lesbians are not open about their sexual orientation; and**
  - c. **Forty percent acknowledge that jokes or comments are made about lesbians and gay men behind their backs.**

- 30. Lesbian and gay court employees believed the courts are less fair to all court users than did heterosexual court employees.**
- 31. Heterosexual court employees rated the courts significantly higher in evaluating the success of the courts in providing access, being available to resolve disputes, and providing fair and unbiased treatment of all categories of sexual orientation than did lesbian and gay court employees.**





# ANNOTATED FINDINGS

## *USE OF THE COURTS*

### OVERALL PERCEPTIONS OF GAY AND LESBIAN COURT USERS

- 1. Most lesbian and gay court users believed they were treated the same as everyone else and treated with respect by those who knew their sexual orientation.**

#### *Analysis of 1:*

In their most recent contact, 89.2 percent of lesbian and gay survey respondents agreed somewhat or very strongly with the statement, “As far as I could tell, I was treated the same as everyone else,” and 80.4 percent of respondents agreed somewhat or very strongly with the statement, “I was treated with respect by those who knew my sexual orientation.” In another recent significant contact with the courts, 74.5 percent of the same pool of respondents agreed somewhat or very strongly with the statement, “As far as I could tell, I was treated the same as everyone else,” and 70.4 percent of respondents agreed somewhat or very strongly with the statement, “I was treated with respect by those who knew my sexual orientation.” (See Tables 10, 18.)

Despite this generally positive finding, several patterns emerged from the data that demonstrate that large numbers of lesbian and gay court users in a variety of contexts had much less favorable experiences and perceptions of fairness in the California courts.

### TREATMENT RELATED TO SEXUAL ORIENTATION

- 2. Fifty-six percent of the gay and lesbian respondents experienced or observed a negative comment or action toward gay men or lesbians:**
  - a. Where the contact with the court was one in which sexual orientation became an issue; or**
  - b. With the offending conduct coming most frequently from a lawyer or court employee.**
- 3. One out of every five court employee respondents heard derogatory terms, ridicule, snickering, or jokes about gay men or lesbians in open court, with the comments being made most frequently by judges, lawyers, or court employees.**

#### *Analysis of 2–3:*

Overall, 56 percent of gay and lesbian court users in a contact in which sexual orientation became an issue reported observing or experiencing a range of negative experiences directed toward themselves or other gay men and lesbians. Specifically, 36 percent heard negative comments about someone else; 29 percent heard negative remarks arising from a case; 23

percent heard negative comments about themselves; 26 percent experienced or heard ridicule, snickering, or jokes about lesbians and/or gay men; and 25 percent heard other negative remarks. Court employee survey responses support and corroborate the court users' experiences, particularly in the category of ridicule, snickering, or jokes.

In their most recent contact, 18 percent experienced or witnessed a negative incident toward lesbians or gay men. These negative courtroom experiences and observations are significantly more common than the negative experiences or observations made by gay and lesbian court users outside the courtroom. For example, only 15.7 percent of gay and lesbian court users observed or experienced ridicule, snickering, or jokes about lesbians and/or gay men in court, whereas 8.4 percent had those experiences out of court; 10.8 percent heard negative comments about someone else in court, and 4.5 percent heard negative comments out of court; 10 percent had negative actions taken against them in court, and 2.7 percent had negative actions taken against them out of court. Court employees, however, observed a larger number of negative comments or actions against lesbians or gay men while outside the courtroom. One-third of court employees observed these negative comments or actions in that setting. (See Tables 16, 29, 34; cf. Tables 7, 8.)

The negative experiences and comments reported occurred most frequently in court and were directed toward a participant, juror, witness, or party. Attorneys and court employees are most often the offending parties, not judges. Even if a judge is not personally behaving negatively toward lesbian or gay court users, the judge may need to address the behaviors and comments of others within his or her courtroom or courthouse. One respondent noted, "I was a jury prospect but it was evident that the defense lawyer didn't want gays on the jury. One of his questions to me during selection was Mr. X, would you say you have more straight friends or gay friends? I was discharged."

As noted by both court users and court employees, the negative comments or actions toward gay men and lesbians often included ridicule, snickering, or jokes about them or use of derogatory terms or comments about lesbians or gay men. These experiences are particularly significant when considered with finding 8, which shows that 56 percent of gay and lesbian court users did not want to state their sexual orientation, and 39 percent felt threatened because of their sexual orientation. One may more easily understand their fear and perception of threat based on their sexual orientation in light of findings 2 and 3, which show that over one-half of the court users and one in five court employees heard or experienced some kind of negative comment or action based on sexual orientation.

**4. Lawyers and judges more frequently make the limited number of positive comments or take positive actions toward gay and lesbian court users. Court employees are least likely to make any positive comments.**

*Analysis of 4:*

In their other contact with a California court, fewer than 15 percent of gay and lesbian court users heard or observed positive comments or actions. That percentage dropped to under 3 percent in their most recent contact. Although the occurrences of positive comments or actions

were relatively few in all court contacts by gay men and lesbians, most frequently, lawyers made those positive comments and took these actions, followed by judges. Court employees made positive comments and took positive actions less frequently. (See Tables 9, 17.)

In their most recent contact with the California courts, negative comments outweighed positive experiences by almost three to one. In their other contact, lesbian and gay court users reported over twice as many negative experiences and positive ones (56 percent to 26 percent). Thus, even though gay and lesbian court users heard positive comments, the negative comments and actions likely overshadowed the positive. The frequency of negative comments and actions may provide a basis for gay and lesbian court users to perceive bias when participating in court proceedings. (See findings 11–18 *infra*, on perceptions.) In reporting the data on positive comments, the committee does not suggest that judges are or should be engaged in favoritism toward gay or lesbian court users. Indeed, the open-ended survey responses show that positive comments or actions tended to be those in which gay and lesbian court users were treated with equal respect and fairness. Positive actions or comments included situations where the judge may have expressed support during a second-parent adoption or, in another instance, a survey respondent noted that “[t]he judge and lawyer made a point of notifying my ex that sexual orientation is not an issue in family law.”

- 5. Forty-eight percent of court employees who observed negative actions or heard negative comments in open court took no action in response.**
- 6. Court employees who took no action in response to negative comments or actions directed at lesbians or gay men in court did so, among other reasons, because:**
  - a. They did not believe the incident was serious enough to intervene;**
  - b. They believed nothing constructive would come from intervening;**
  - c. They feared some form of retaliation; or**
  - d. They feared that they would be thought to be a lesbian or a gay man.**

***Analysis of 5–6:***

Of the court employees who reported observing a negative action or comment in open court, 48 percent took no action, compared with 12 percent who confronted the person who made the comment, 9 percent who discussed the incident with a colleague or co-worker, and 6 percent who took some other action. Over 55 percent of court employees who observed a negative comment or action in open court did not feel the incident was serious enough to intervene; 24.6 percent believed nothing constructive would come of intervening. Seventeen percent failed to take action because they feared some form of retaliation such as being branded a troublemaker or reducing their chances for promotion. A smaller percentage, 16.2 percent, never thought of intervening. Three percent did not take action because they feared other people would believe they were a lesbian or a gay man. (See Tables 31, 33, 36, 38.)

The survey data in isolation makes it difficult to assess objectively why a significant majority of court employees faced with these situations did not believe the incidents serious enough to warrant intervention. However, some of the open-ended comments from the surveys are instructive: “I agreed with the jokes or comments.” “The negative comments were completely

valid.” “I didn’t care.” “The jokes didn’t bother me.” (See *Sexual Orientation Fairness in California Courts, Results from Two Surveys, January 2000*, p. 51.) “In the Central Valley, it’s almost understood you are an open target for this type of treatment.” These responses indicate that at least some court employees shared the negative opinions of lesbians or gay men. Consequently, they felt no obligation to report the incidents or considered them insignificant. That inference is further reinforced by the finding that many of the court employees stated that it did not even occur to them to report such conduct. Still other court employees may have believed the incidents were wrong, but feared some form of retaliation or believed they would be labeled a lesbian or a gay man. These responses lend additional support to the perception that the California courts do not always treat lesbians and gay men fairly.

- 7. Of the court employees who intervened upon observing negative actions or hearing negative comments directed at lesbians or gay men in open court, 40 percent reported that the negative comments stopped or decreased in frequency, and 38 percent reported that their intervention had no effect on reducing or stopping the negative comments.**

#### *Analysis of 7:*

Only 28.8 percent of court employees took some action upon observing negative actions or comments toward lesbians or gay men in open court in the past year, compared with 48.3 percent who took no action at all. (See finding 6.) The actions taken included confronting the perpetrator (12 percent), discussing the incident with a colleague or co-worker (8.8 percent), talking with someone else (1.7 percent), reporting the incident to a superior (1.4 percent), consulting a legal or employment advisor (0.3 percent), or taking some other action (4.4 percent). Only 6.9 percent reported that the person making the negative comment was reprimanded. (See Table 32.)

The intervention was as often ineffective as it was effective. That may be because, of those who observed a negative action or comment, only 1 percent reported the incident to a superior. A possible explanation for this may be that the offending party was a lawyer, and court employees may perceive that their superior does not have the authority to address and rectify the conduct. Most employees chose to discuss the incident with a co-worker, where the possibility of corrective action would be quite low. Thus, in the vast majority of cases, the employee intervention did not remedy the situation.

## **DISCLOSURE OF SEXUAL ORIENTATION/RESPONDING TO REQUESTS FOR PERSONAL INFORMATION**

- 8. Fifty-six percent of gay and lesbian court users in a contact in which sexual orientation became an issue did not want to state their sexual orientation, and 38 percent felt threatened in that setting because of their sexual orientation.**
- 9. Twenty-nine percent of gay men and lesbians in a contact in which sexual orientation became an issue believed that someone else stated their sexual orientation without**

**their approval, and 25 percent felt forced to state their sexual orientation against their will.**

*Analysis of 8–9:*

Although 60 percent of gay and lesbian court users felt comfortable stating their sexual orientation, almost as many did not want to state their sexual orientation during their contacts with the California courts. A significant minority (38 percent) felt threatened in the courtroom setting because they were gay men or lesbians. Over one in four gay or lesbian court participants' sexual orientation became known without their knowledge or against their will. (See Table 18.)

Initially, this data appears inconsistent. These responses, however, do not provide the underlying context of why lesbian or gay court users may not have wanted to state their sexual orientation or may have felt threatened, despite the finding that 60 percent said they felt comfortable stating their sexual orientation. There are many reasons why lesbians or gay men may not want to disclose their sexual orientation. Some of those reasons may stem from their personal experiences both inside and outside the courtroom, perceptions by others about the treatment of gay men and lesbians in the courtroom, their own overall comfort level with having their sexual orientation known in any context, or the way society in general perceives and treats gay men and lesbians.

However, other survey data may provide some insight into the degree of reluctance by lesbian and gay court users to disclose their sexual orientation in the courtroom setting. Finding 2 notes that 56 percent of gay and lesbian court users experienced or observed negative comments or actions based on their sexual orientation. Additionally, findings 15–17 set forth lesbian and gay court users' perceptions of unfairness and of feeling threatened in certain court settings based on their sexual orientation. This data also demonstrates a correlation between increased visibility of sexual orientation as lesbians or gay men and increased perceptions of unfair treatment and lack of respect in the courts.

Finally, as finding 18 states, lesbian and gay court users believed that sexual orientation was raised as an issue in a court proceeding when it was not relevant almost as often as when it was relevant. One might speculate that sometimes sexual orientation is being used as a litigation strategy by lawyers, and that judges should be ready to appropriately address this issue in the courtroom. An open response from one respondent provides some support for this speculation: “[A lawyer] questioned potential jurors about whether they would accept unbiased testimony from gay witnesses. The manner of question implied gays were unreliable witnesses, thus placing a bias in the minds of potential jurors.” Given the data underlying these findings, it is more understandable that even otherwise openly gay or lesbian court users might have some reluctance at disclosing their sexual orientation in the California courts.

**10. During their most recent contact with the California courts, 44 percent of gay men and lesbians participated either as a juror or in jury voir dire. When asked to disclose personal information, 26 percent were asked if they were married, and most**

**responded incompletely to that question. Overall, 26 percent of all lesbian and gay court users were asked if they were married.**

*Analysis of 10:*

In their most recent contact with the California courts, 26.1 percent of lesbian and gay court users were asked if they were married; 6.8 percent were asked if they had a domestic partner. Forty-six percent of gay men and lesbians participated either as a juror or in jury voir dire; 48.3 percent of those respondents were asked if they were married. (See Tables 5, 6.)

The question of marital status reinforces an assumption that individuals are either “married” in the traditional heterosexual sense or “single.” Thus, anyone whose life cannot be described by those categories feels invisible, and the question may, unintentionally or intentionally, create the perception of bias. The question of marital status, unless it is a relevant issue in a case, may undermine the credibility of the judicial process in several ways. First, it deprives the court and/or the lawyers of valuable information about relationships that may be needed or could be used to ensure a fair jury selection or court process. Second, it places gay or lesbian jurors or witnesses in an untenable situation of either disclosing their sexual orientation or answering the question narrowly and specifically in the terms asked, leaving them denying or being incomplete about the reality of their lives. Third, it may create a perception among gay and lesbian court users that their subsequent treatment in the court process may not be fully informed or fair. As one respondent to the survey noted: “All prospective jurors were asked about marital status. I have been in a monogamous relationship 33 years and consider myself married. It would have been wrong to deny my relationship but it would have been legal to do so.”

## **PERCEPTIONS**

- 11. Fifty percent of lesbian and gay court users believed that the courts are not providing fair and unbiased treatment for lesbians or gay men.**
- 12. Sixteen percent of lesbian and gay court users believed the courts were unsuccessful on *all* of the following measures:**
  - a. Being available to resolve disputes involving lesbians or gay men;**
  - b. Being open or accessible to lesbians or gay men; and**
  - c. Providing fair and unbiased treatment of lesbians or gay men.**

*Analysis of 11–12:*

In all their contacts with the California courts, 50.2 percent of lesbian and gay survey respondents rated the courts as somewhat or very unsuccessful in providing fair and unbiased treatment for lesbians and gay men. Similarly, on a 1-to-10 scale, with 10 being highest, they gave the courts a mean rating of 5.23 for fairness to lesbians and gay men, and 6.50 for fairness to people in general. (Higher scores indicate a higher level of fairness.) (See Table 20.)

In all their contacts with the California courts, 28.9 percent of lesbian and gay court users rated the courts as somewhat or very unsuccessful in providing access for lesbians and gay men; 71.9

percent rated the courts as somewhat or very successful. In those same contacts with the California courts, 44.9 percent of respondents rated the courts as somewhat or very unsuccessful in being available to resolve disputes involving lesbians and gay men; 55.1 percent rated the courts as somewhat or very successful.<sup>7</sup> Sixteen percent of lesbian and gay court users believed the courts were neither somewhat nor very successful on *any* of the three dimensions (fair treatment, access, and availability). (See Table 21.)

These findings are not inconsistent with finding 1, which shows that lesbian and gay court users generally perceived the courts as treating them the same as everyone else. Any apparent inconsistency in the survey data may be resolved when one examines the quality and duration of the individual's court contact. The data reflects a correlation between sexual orientation visibility and negative perceptions of the California courts by lesbians, gay men, and bisexuals. This correlation also appears to be a function of the duration of the contact. Consequently, individuals who merely have casual contacts with the courts, for example, paying a traffic ticket or being called for a venire panel, may understandably have more favorable impressions than those with more extended contacts or personal involvement. Findings 15–18 give specific illustrations of this correlation from the survey.

**13. In evaluating the success of the courts in providing access and being available to resolve disputes involving lesbians and gay men, lesbian and gay court employees rated the courts significantly lower than did heterosexual court employees.**

*Analysis of 13:*

Court users and court employees were asked the same questions on fair treatment, access, and availability. On a four-point scale, with the higher scores indicating a higher degree of fairness, heterosexual employees and lesbian and gay court employees show different attitudes about the courts' success in providing access and fairness. With respect to the courts' success in providing access for lesbians and gay men, heterosexual employees gave the court a mean score of 3.33, while lesbian and gay court employees gave the court a score of 2.83. Regarding the courts' availability to resolve disputes involving gay men and lesbians, heterosexual employees gave the courts a mean score of 3.19, compared to lesbian and gay employees' score of 2.54. (See Table 52.)

When asked about the success of the courts in providing fair treatment of lesbians and gay men, all court employees (heterosexuals, lesbians, and gay men) gave higher ratings than did lesbian and gay court users (employees rated the courts 3.29 compared to users' rating of 2.42 on a four-point scale, with higher scores indicating a higher degree of fairness). On the questions regarding access and availability to resolve disputes, the lesbian and gay court users and court employees ranked the courts as less successful than did the heterosexual court employees. (With respect to the courts' success in providing access for lesbians and gay men, lesbian and gay users gave the courts a mean rating of 2.79, lesbian and gay employees gave the courts a mean rating of 2.83, and heterosexual employees gave the courts a mean rating of 3.33. Regarding the courts' availability to resolve disputes involving gay men and lesbians, lesbian and gay users

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<sup>7</sup> For the distinction between the California courts' openness and accessibility to lesbians and gay men and the courts' availability to resolve disputes, see the "Definitions" section, p. 18, *supra*.

gave the courts a mean rating of 2.50, lesbian and gay employees gave the courts a mean rating of 2.54, and heterosexual employees gave the courts a mean rating of 3.19.) (See Tables 21 and 52.)

- 14. In a contact with the court in which sexual orientation became an issue, lesbians and gay men had significantly more negative perceptions of fairness in the California courts.**
- 15. When the court contact focused on issues relevant to sexual orientation, 26 percent of lesbian and gay court users believed they were not treated the same as everyone else, 30 percent believed they were not treated with respect by those who knew their sexual orientation, and 39 percent believed their sexual orientation was used to devalue their credibility.**

#### *Analysis of 14–15:*

Finding 14 compares lesbian and gay court user survey respondents' most recent contact with the California courts, which tended to be through jury service (60 percent), with another recent, significant contact. In the latter setting, 74.3 percent of those contacts involved certain issues relating to sexual orientation.

In the other recent, significant contact, which tended to focus on sexual orientation issues, 25.5 percent of lesbian and gay court users believed that they were treated differently from everyone else as far as they could tell, whereas 10.8 percent of them believed they were treated differently in their most recent contact.

Similarly, in the other recent, significant contact, which tended to focus on sexual orientation issues, 29.6 percent of lesbian and gay court users felt they were not treated with respect by those who knew their sexual orientation; however, in their primarily jury service contact, 19.6 percent of respondents felt that they were treated disrespectfully by those who knew their sexual orientation.

Finally, in the other recent, significant contact, which tended to focus on sexual orientation issues, 39 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, "My sexual orientation was used to devalue my credibility." In contrast, 13.6 percent of them agreed somewhat or very strongly with the statement, "My sexual orientation was used to devalue my credibility" in their most recent contact. (See Tables 14, 10, and 18, 11, and 19.)

Findings 14 and 15 look at lesbian and gay court users in a proceeding that was heavily focused on certain issues relating to sexual orientation. Running throughout the findings is the correlation between sexual orientation visibility and increased negative perceptions of the California courts. Lesbian and gay court users had more negative perceptions when sexual orientation became an issue in the court contact. Some examples from the survey responses illustrate this connection: "Defendant's lawyer . . . used my relationship and my partner as object of focus to denigrate my loss and income claim and create smoke and mirrors. That would not have been used in non-gay situation." "One defendant was a gay man suing an ex-lover—snickers and comments from jury members."



Moreover, in those situations, lesbian and gay court users believed more often that sexual orientation was used to devalue their credibility, and that they were treated differently and disrespectfully. “A jury member suggested that witness was gay and therefore his testimony could not be trusted.” (See *Sexual Orientation Fairness in California Courts, Results from Two Surveys, January 2000*, p. 19.) Another respondent stated, “I was discredited as a witness because they said I was probably ‘out at a club or something’ before I witnessed the accident.”

Similarly, court user survey respondents’ other recent significant contact with the California courts tended to be when they were a party, witness, or lawyer in the proceedings (55.1 percent, versus jury service during that contact, 22.2 percent), as compared to their most recent contact, which tended to be through jury service (60 percent). One might speculate that when more lesbian and gay court users played an active role in court, as a witness, party, or attorney, they also had more negative feelings. One possible explanation is that their extended contact and more active role may permit others to learn their sexual orientation. Thus, their added visibility as lesbians or gay men may increase the chances of negative experiences and perceptions. (See Tables 5 and 13, 10 and 18, 11 and 19.)

**16. In their most recent contact with the California courts, 22 percent of lesbian and gay court users felt threatened in that setting because of their sexual orientation, whether or not sexual orientation became an issue in that contact. However, in another contact when sexual orientation *did* become an issue or when they were more active participants, 38 percent of lesbian and gay court users felt threatened in the court setting because of their sexual orientation.**

*Analysis of 16:*

In their most recent contact with the California courts, 21.5 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, “I felt threatened because of my sexual orientation.” (See Table 10.)

In contrast, when sexual orientation became an issue in the court contact, 37.7 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, “I felt threatened because of my sexual orientation.” (See Table 18.)

Taken together, this survey data may demonstrate that increased visibility of sexual orientation as an issue in the court proceeding corresponds to an increased perception of threat.

Because the most recent court contact tended to be one in which sexual orientation was not pertinent to the contact (at least 81.4 percent of those court contacts did not involve sexual orientation issues), that response may be used as a relatively neutral baseline for a comparison with the other significant court contact. The majority of respondents’ most recent contact concerned jury service in some manner (60 percent), rather than participation as a party, witness, or lawyer in the proceedings (44.2 percent). Despite the relative neutrality of that court experience, over one-fifth of all respondents (21.5 percent) still felt threatened because of their sexual orientation. However, the number of lesbian or gay respondents who felt threatened because of their sexual orientation nearly doubled (37.7 percent) once sexual orientation became

more significant or they more actively participated in the court contact. Examples of perceptions of threats from the surveys include the following: “I felt intimidated—didn’t want them [two clerks and a police officer observed by respondent while in line] to talk about me the way they were talking about other gays—kept my mouth shut.” “Death threats and name calling. Not of me but of the lesbians directly involved in the case.”

**17. Lesbian and gay court users believed that their sexual orientation was raised as an issue almost as often when it did not pertain to the proceedings as when it pertained to their case or to their reason for using the courts.**

*Analysis of 17:*

Finding 17 looks at lesbian and gay court users in both their most recent contact and another recent, significant contact with the California courts. Both questions asked respondents about the connection between their sexual orientation and the court proceedings.

In their most recent contact, 15.3 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, “My sexual orientation was pertinent to the court proceedings,” and 11.2 percent of those same respondents agreed somewhat or very strongly with the statement, “My sexual orientation was raised as an issue even though it did not pertain to the case.” (See Table 10.)

In another recent, significant contact with the courts, 38.2 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, “My sexual orientation was pertinent to the court proceedings,” and 35 percent of those same respondents agreed somewhat or very strongly with the statement, “My sexual orientation was raised as an issue even though it did not pertain to the case.” (See Table 18.)

It is not surprising that any anti-gay prejudices, comments, or actions present in the court system would come to the foreground when sexual orientation issues are more important in the court proceeding. Although the same level of anti-gay feeling might exist below the surface of other court experiences, it may not become apparent unless sexual orientation plays a role in the proceeding.

The demographic profile of survey respondents reinforces this inference. Because lesbian and gay survey respondents were predominantly well-educated, relatively affluent, white males (see demographic data at p. 15), it may be assumed that these respondents ordinarily would have the most sophistication and ability to navigate through the judicial system. One typically would expect those individuals to have the most positive experiences and perceptions of the court system. Additionally, since most lesbian and gay court users’ sexual orientation is not easily identifiable, one also would expect more negative experiences and perceptions of unfairness when these individuals become visible as nonheterosexual. The survey data illustrates this correlation. (See findings 14–16.)

It also is significant that lesbian and gay court users believed that sexual orientation became an issue in the court proceeding when it was actually not relevant to the court contact almost as often as when it was, in fact, pertinent. (See finding 17.) Given the possible correlation between

the visibility of sexual orientation as an issue in the California courts and respondents' negative experience and perceptions of unfairness, the courts must address two separate and analytically distinct issues. First, the courts must address the negative experiences and perceptions of lesbians or gay men that follow when sexual orientation is legitimately at issue in the court contact. Second, the courts must be prepared to address sexual orientation issues in a court contact even when it is not pertinent to the proceeding.

Finally, given these data patterns, it is not surprising that many lesbian and gay court users believe that the courts are not providing fair and unbiased treatment for lesbians or gay men. (See finding 11.) Similarly, albeit to a lesser degree, lesbian and gay court users also believe that the courts are available neither to resolve their disputes nor to provide access to lesbians and gay men. (See finding 12.) Lesbian and gay court employees echoed these findings and had greater negative perceptions of the ability of the courts to provide access and fairness than did their heterosexual counterparts. (See finding 13.)

## ***THE COURT AS A WORKPLACE***

### **COURT EMPLOYEES' EXPERIENCES**

- 18. Lesbian and gay employees were at least four times more likely to experience negative actions or comments based on sexual orientation than were heterosexual employees.**

#### ***Analysis of 18:***

While 3 percent of heterosexual court employees reported hearing negative comments based on their sexual orientation in the past year, 20 percent of lesbian and gay court employees reported hearing such comments. Just 3 percent of heterosexual employees reported their sexual orientation as being the subject of jokes or ridicule, while 17 percent of lesbian and gay employees reported such incidents. Similarly, almost 3 percent of heterosexual employees reported experiencing negative actions based on sexual orientation, compared with almost 16 percent of lesbian and gay employees. Finally, 16 percent of lesbian and gay employees reported being called derogatory names based on their own sexual orientation, compared with 2 percent of heterosexual employees. This finding illustrates a significant disparity in the personal work experiences of gay and lesbian versus heterosexual employees. (See Table 40.)

- 19. Forty-two percent of the court employees who experienced a negative incident at work based on their sexual orientation took no action in response.**

#### ***Analysis of 19:***

Of the court employees who experienced some negative comment or action due to their sexual orientation, 42 percent chose to take no action in response, while 25 percent responded by confronting the person responsible for the negative comment or action. Twenty-one percent discussed the incident with a co-worker other than the perpetrator, while 10 percent talked to someone else. Sixteen percent reported the incident to a supervisor. Of the 42 percent of court

employees who chose to take no action in response to a negative incident based on the employees' sexual orientation, a majority did not think the incident was serious enough to warrant a reaction.

Of the court employees who took no action in response to a negative incident based on their sexual orientation, almost 60 percent of court employees reported that they took no action because they felt the incident was not serious enough to warrant intervention. Another 35.7 percent did not believe anything constructive would come from intervening. Almost 24 percent feared being branded a troublemaker, and just fewer than 12 percent took no action out of fear of losing a promotion. Almost 17 percent were unsure about how to intervene, and just over 7 percent did not act out of concern that they would be thought to be gay or lesbian. (See Tables 41, 43).

**20. Of those employees who did take some action in response to an incident at work based on their sexual orientation, 49 percent reported that their intervention or action had no effect.**

*Analysis of 20:*

For those employees who chose to take some action in response to a negative work experience based on the employees' sexual orientation, 49 percent reported that their intervention or action had no effect or that nothing happened, while 35 percent reported that the negative comments or actions stopped or decreased in frequency. Approximately 4 percent reported being branded as a troublemaker; one in five reported some other results. Examples of these other responses included the following: "It's like I don't exist anymore." (See *Sexual Orientation Fairness in California Courts, Results from Two Surveys, January 2000*, p. 60.) "Made me feel uncomfortable. Fewer invitations to group lunches, etc." (*Id.*) "People turned to commenting behind my back." (*Id.*) (See Table 42.)

**21. One in five lesbian and gay employees reported experiencing discrimination (as opposed to only negative comments or actions) at their workplace based on their sexual orientation. Two percent of the heterosexual employees reported being discriminated against based on sexual orientation.**

*Analysis of 21:*

Although it is not surprising that more lesbian and gay employees perceive that they are being discriminated against based on sexual orientation than do their heterosexual counterparts, it should be of serious concern that 20 percent of gay and lesbian employees experience discrimination at their workplace.<sup>8</sup> Further, if only one-third of the lesbians who identified themselves as gay or lesbian are "out" to their co-workers, it follows that this "out" group would experience a higher percentage of discrimination than employees who hide their lesbian or gay sexual orientation or who are heterosexual. (See Table 44.)

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<sup>8</sup> Table 44 indicates that 15.9 percent of lesbian, gay, or bisexual court employees reported experiencing job discrimination. However, because no bisexuals reported that discrimination, that figure understates the experiences of lesbian and gay employees; 18.2 percent of lesbians and 20.7 percent of gay male employees reported job discrimination.

- 22. Sixty-five percent of the employees who experienced discrimination based on sexual orientation took some action, of which 56 percent reported that nothing resulted from that action.**
- 23. Of those employees who reported experiencing discrimination based on sexual orientation but took no action, 46 percent did not take any action because they thought nothing constructive would come of doing so, and 23 percent feared negative consequences.**

*Analysis of 22–23:*

Although a majority of employees took some action in response to being discriminated against based on their sexual orientation, 56 percent reported that nothing resulted from that action, while 17 percent reported that discrimination stopped or decreased in frequency or severity, 6 percent stated that the discriminator(s) were reprimanded, and 11 percent reported that they were branded as troublemakers or some action was taken against them; 22 percent reported “other” as the effect of action taken in response to discrimination. (See Tables 45, 46.)

Of particular note is that a significant number of respondents (46.2 percent) did not take any action in response to being discriminated against because they thought nothing constructive would come of their action. As significant is the fact that 23.1 percent feared being branded as troublemakers, and that 15.4 percent believed that taking some action would reduce their chances for promotion. (See Tables 45, 47.)

“Other” was indicated as the reason for taking no action for 38.5 percent of the respondents. It is not possible to conclude what “other” represents in this sampling. The statements made by those who chose “other” may indicate a sense by the employees that nothing would result from taking action. This is evidenced by a sampling of the comments received: “Employee would not understand and would not change.” “When discrimination is subtle, how do you prove it? You can’t; people will just assume you are making an issue out of nothing.” (See *Sexual Orientation Fairness in California Courts, Results from Two Surveys, January 2000*, p. 61.)

## **COURT EMPLOYEES’ INTERVENTION**

- 24. Sixty-five percent of court employees who observed a negative action or heard a negative comment outside the courtroom took no action.**
- 25. Court employees who observed a negative action or heard a negative comment outside the courtroom and did not intervene did not do so for the following reasons:**
  - a. Sixty-two percent did not feel the incident was serious enough to intervene;**
  - b. Twenty-three percent believed nothing constructive would happen;**
  - c. Eight percent feared some form of retaliation;**
  - d. Fifteen percent never thought of intervening; and**
  - e. Two percent feared they would be thought to be lesbian or gay.**

### *Analysis of 24–25:*

Of those who witnessed a negative action or comment in a setting other than open court, 65 percent took no action, while 14 percent confronted the person who made the comment, 11 percent discussed the incident with a colleague or co-worker, 4 percent reported the incident to a supervisor, and 6 percent took some other action. The vast majority of court employees chose to take no action in response to negative comments that occurred in settings other than open court. (See Table 36.)

Some examples of actions taken by respondents are as follows: “I expressed my displeasure and walked out of the room.” (See *Sexual Orientation Fairness in California Courts, Results from Two Surveys, January 2000*, p. 50.) “These occurrences were always in the context of ‘jokes,’ and I directly said to the person that I don’t want to hear any jokes involving any kind of prejudice.” (*Id.*)

Of those who observed negative actions or comments in settings other than open court, 62 percent felt intervention was not warranted, while 23 percent believed nothing constructive would come from intervening, and 15 percent never thought of intervening. From findings 24 and 25, it can be difficult to assess objectively the nature of the comments or actions that a majority of these respondents deemed not serious enough to warrant intervention. Some of the open-ended comments made on the surveys about why employees did not intervene are instructive. Some examples are as follows: “I agreed with the jokes or comments.” (See *Sexual Orientation Fairness in California Courts, Results from Two Surveys, January 2000*, p. 51.) “The negative comments were completely valid.” (*Id.*) “I didn’t care.” (*Id.*) “The jokes did not bother me.” (*Id.*) “In the Central Valley, it’s almost understood you are an open target for this type of treatment.” From these responses, it appears that at least some respondents shared the negative opinions of lesbians or gay men expressed in the comments or actions they witnessed. (See Table 38.)

### **26. Of those employees who did intervene upon observing negative actions or comments toward lesbians or gay men outside the courtroom, 54 percent reported that the negative actions or comments stopped or decreased in frequency.**

### *Analysis of 26:*

In contrast to finding 7, finding 26 showed that 54 percent of employees who intervened after observing a negative action or comment in settings other than open court reported that the comments or actions stopped or decreased in severity or frequency, demonstrating that intervention by employees does result in a lessening in negative comments or behavior. Just over 35 percent of respondents reported that their intervention had no effect or that nothing happened after intervention. Only 4 percent reported that the person making the negative comments was reprimanded. It is significant that in settings other than open court, a higher percentage of respondents reported that their intervention did result in the comments’ decreasing or stopping altogether compared with employees who intervened upon observing comments in open court. Given that a higher percentage of comments overall occur in settings other than open court, it is encouraging that a majority of respondents who intervened when such comments

were made felt that their intervention made a difference. However, as findings 5 and 24 clarify, the majority of respondents failed to intervene when observing a negative action or comment directed at lesbians or gay men. That failure to intervene occurred despite the fact that when employees chose to intervene, the intervention was effective. These two findings clearly indicate a need for education as outlined in the “Recommendations” section of this report. (See Table 37.)

## **COURT EMPLOYEES’ OBSERVATIONS/PERCEPTIONS**

- 27. Thirty-two percent of court employees heard ridicule, snickering, or jokes about lesbians and gay men in settings other than open court; 28 percent reported hearing negative comments; and 21 percent heard derogatory terms about gay men or lesbians.**

### *Analysis of 27:*

A significant number of court employees observed negative actions or comments by judges, lawyers, or court employees in work settings other than open court in the year preceding the survey. Over 17 percent reported hearing ridicule, snickering, or jokes one to three times in the year prior to the survey; 6 percent heard ridicule, snickering, or jokes four to six times in the prior year; and 9 percent of respondents heard or observed ridicule, snickering, or jokes about lesbians or gay men more than six times in that same time period. This frequency was similar with respect to negative comments, with 16 percent of employees hearing negative comments about gay men or lesbians one to three times in the preceding year. Six percent heard such comments four to six times, and 6 percent heard negative comments more than six times in the preceding year. (See Table 34.)

- 28. Ninety-four percent of all court employees stated that they believe that the personnel policies of their workplace are fair to lesbians and gay men, and 88 percent believe that lesbians and gay men are treated the same as other employees.**
- 29. Court employees reported the following perceptions about being a gay man or a lesbian in the workplace:**
- a. Twenty-nine percent believe that being open about being a gay man or lesbian is unsafe;**
  - b. Fifty-eight percent believe it is better if gay men and lesbians are not open about their sexual orientation; and**
  - c. Forty percent acknowledge that jokes or comments are made about lesbians and gay men behind their backs.**

### *Analysis of 28–29:*

The statistics in these findings appear to be contradictory. Most respondents agreed that their written workplace policies were fair to lesbian and gay men and that lesbian and gay employees were treated the same as other employees. However, the disparity comes in the application of those workplace policies. For example, 29 percent of all court employees believe that being

open about being gay or lesbian is unsafe, 58 percent of the employees believe that it is better if gays and lesbians are not open about their sexual orientation, and 40 percent acknowledge that jokes or comments are made about lesbian and gay people behind their backs. Seventeen percent agreed that it is harder to be hired if you are suspected of being lesbian or gay, 13 percent agreed that sexual orientation is used to devalue the credibility of some gay or lesbian employees, and 10 percent agreed that prejudice against gay men and lesbians is widespread at work. Thus, another explanation for the apparent contradiction is that to the extent that a person is not visible or identified as a gay or lesbian, the application of the policy is perceived to be fair. When the gay or lesbian employee is more visible, employees believe that the policies are applied less fairly. Given these results and the reasonable inferences that can be drawn from them, it appears that lesbian and gay employees are often expected to remain closeted about their sexual orientation or to risk suffering discrimination. Note that 93 percent of the respondents to the survey were heterosexual, and 59 percent were legally married, which are facts likely known by co-workers. (See Tables 48, 49.)

**30. Lesbian and gay court employees believed the courts are less fair to all court users than do heterosexual court employees.**

**31. Heterosexual court employees rated the courts significantly higher in evaluating the success of the courts in providing access, being available to resolve disputes, and providing fair and unbiased treatment of all categories of sexual orientation than did lesbian and gay court employees.**

*Analysis of 30–31:*

On a scale of 1 to 10, with higher scores indicating higher levels of fairness, lesbians and gay men rated the courts with a mean score of 6.44 as to fairness to lesbians and gay men and 7.15 as to fairness to people in general. Heterosexuals rated the courts with a mean score of 7.88 in rating the courts as to fairness to lesbians and gay men and 7.98 in rating the courts as to fairness to people in general. (See Table 50.)

On a four-point scale, with the higher scores indicating a higher degree of success, heterosexual employees and gay and lesbian employees have strikingly different attitudes about the courts' success in providing access and fairness. With respect to the courts' success in providing access for lesbians and gay men, heterosexuals gave the court a mean score of 3.33, while lesbians and gay men gave the court a mean score of 2.83. Regarding the courts' availability to resolve disputes involving gay men and lesbians, heterosexuals gave the courts a mean score of 3.19 compared to lesbians and gay men, who gave a mean score of 2.54. Heterosexual respondents believe the courts are fairer toward gay men and lesbians than gay men and lesbians believe. This attitude by heterosexuals, who are the vast majority of employees in the court system, would appear to set a tone in the workplace that is reflected in other findings. (See Table 52.)



## **RECOMMENDATIONS**

Based on these findings, the Access and Fairness Advisory Committee made recommendations in the following categories: education and training; attitudes, treatment, and users' experiences with the courts; recognizing sexual orientation diversity within the courts; the courts as a workplace; specific access issues, including jury service and specific subject-matter assignments; outreach; and future research.

### ***TO THE JUDICIAL COUNCIL***

1. The advisory committee recommends that the Judicial Council widely disseminate this report:
  - a. To educate judges and court personnel about the public perception that bias and insensitivity toward court users on the basis of sexual orientation exist; and
  - b. To ensure the public that their views are taken seriously.

The advisory committee further recommends that the Judicial Council approve the statements of policy described in this section.

### **EDUCATION AND TRAINING**

2. All courts should affirm the need for all courts to ensure fairness and access to lesbians and gay men, pursuant but not limited to the requirements of the Standards of Judicial Administration, sections 1 and 1.5, and the Code of Judicial Ethics, canons 2 and 3.

### **RECOGNIZING SEXUAL ORIENTATION DIVERSITY WITHIN THE COURTS**

3. The local courts should develop a diverse pool of law students, including gay men and lesbians, as applicants for judicial clerkships and student internships in the courts.

### **THE COURTS AS A WORKPLACE**

4. The Judicial Council endorses the development and implementation of local court personnel policies and practices to eliminate sexual orientation discrimination and bias in the court as a workplace, including effective intervention in incidents of sexual orientation discrimination or bias and the prevention of retaliation against any individual reporting such incidents.

### **SPECIFIC SUBJECT-MATTER ASSIGNMENTS**

5. The Judicial Council urges local courts that administer systems of alternative dispute resolution to use neutral parties trained in issues regarding sexual orientation.

## **OUTREACH**

6. The Judicial Council encourages the local courts to include sexual orientation in their community outreach programs.

## ***REFERRALS TO THE CENTER FOR JUDICIAL EDUCATION AND RESEARCH (CJER)***

### **EDUCATION AND TRAINING**

7. CJER and the Access and Fairness Advisory Committee, in conjunction with the Administrative Office of the Courts (AOC), should develop methods to familiarize judges and nonjudicial court personnel with California and federal laws relating to sexual orientation fairness and nondiscrimination and implement programs to develop and provide information, training, and education for all persons concerning sexual orientation fairness. The purposes of the program would be to improve access to and fairness in the courts for persons of all sexual orientations and to improve awareness of sexual orientation issues.
8. CJER and the Judicial Administration Institute of California (JAIC) should incorporate the findings and recommendations of this report into their educational programs for bench officers and court staff.

### **THE COURTS AS A WORKPLACE**

9. JAIC and CJER, in association with the Access and Fairness Advisory Committee, should develop a training and education program for court staff that includes sexual orientation bias issues that would be delivered, on a statewide or regional basis, within six months of employment to new employees. Current employees would receive education and training on sexual orientation bias issues on a regular, periodic basis as part of their continuing education programs.

### **SPECIFIC SUBJECT-MATTER ASSIGNMENTS**

10. CJER should include sexual orientation diversity issues and fairness training for judges with specific subject-matter assignments, including but not limited to those judges assigned to criminal, family, juvenile, and probate courts, and, in particular, should include such diversity and fairness training in the orientation programs for judges with new assignments in these areas. Existing bench books for family law bench officers should include sexual orientation issues, as family law issues present significant opportunity for insensitivity or bias to influence decision making.

## ***TO BE INCORPORATED INTO THE ADVISORY COMMITTEE WORK PLANS***

The advisory committee recommends that the recommendations described in this section be incorporated into the work plans of the advisory committee and its subcommittees.

### **ATTITUDES, TREATMENT, AND USERS' EXPERIENCES WITH THE COURTS**

11. The advisory committee will direct staff to draft a proposed amendment to section 1(c) of the Standards of Judicial Administration to ensure that retaliation against any individual reporting incidents of discrimination will not be permitted.
12. The advisory committee will consult with the Judicial Council's Rules and Projects Committee to develop the necessary procedures to assist courts in implementing the Standards of Judicial Administration, sections 1 and 1.5, and the Code of Judicial Ethics, canons 2 and 3.
13. The advisory committee will consult with the Judicial Council's Rules and Projects Committee to review and revise, as appropriate, any procedures or forms to address sexual orientation issues. Such review should include the effect, if any, of California registered domestic partnership legislation on existing forms or Rules of Court.

### **RECOGNIZING SEXUAL ORIENTATION DIVERSITY WITHIN THE COURTS**

14. The advisory committee and State Bar staff will work collaboratively with local bar associations and community groups to develop workshops on judicial selection and the election process that encourage diversity, including sexual orientation diversity, in the appointment and election of judges.
15. The advisory committee will direct staff to draft a revision to Standard of Judicial Administration section 1.5 to include court commissioners.

### **THE COURTS AS A WORKPLACE**

16. The advisory committee shall study and report on sexual orientation bias or lack of fairness in the recruitment, hiring, and promotion of court employees.

### **JURY SERVICE**

17. The advisory committee, in conjunction with other appropriate organizations, will develop sample questions for voir dire that appropriately address the issues of domestic partnership and sexual orientation.

## **FUTURE RESEARCH**

18. The advisory committee will undertake a study to determine whether there is bias or unfairness based upon sexual orientation on an institutional basis in cases including but not limited to child custody and visitation, adoption, conservatorships and guardianships, dissolutions, criminal law, and public accommodations. The advisory committee will address these issues in conjunction and cooperation with other Judicial Council standing committees and task forces already established.
19. The advisory committee will undertake data and information collection, independently or in conjunction with other court surveys, to develop baseline data on the current state of the courts' ability to respond to sexual orientation, gender identification, and gender expression issues, including but not limited to:
  - a. Surveys of information and attitudes of bench officers and court staff;
  - b. Surveys of information and concerns of gay and lesbian bench officers;
  - c. Surveys of education and training made available to court personnel and judges in each court;
  - d. Surveys of complaint mechanisms; and
  - e. Surveys of court users, court personnel, and bench officers to measure the effectiveness of actions taken pursuant to this report.
20. The advisory committee will develop assessment mechanisms to determine the experiences of gay men, lesbians, and persons of diverse gender identification and gender expression with respect to court orders, judgments, settlements, and verdicts.
21. The advisory committee will track the implementation of all recommendations made by this committee and identify any new issues that have arisen in the interim.