

## Reflections on the 30<sup>th</sup> Anniversary of *In re Eimers*

Larry D. Smith, Esq.

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This year, we celebrate the 30<sup>th</sup> anniversary of a milestone in diversity for our legal community: the Florida Supreme Court's landmark decision, *In re Eimers*, 358 So. 2d 7 (Fla. 1978). In it, the Supreme Court was asked "whether an applicant with an admitted homosexual orientation who is fully qualified for admission to The Florida Bar in all other respects can qualify for admission under the . . . strict prohibition against . . . admission to The Florida Bar for a person not determined to be of good moral character. . . ." *Id.* at 7. The Court responded: "We answer this question in the affirmative, noting that our response is limited to situations in which the applicant's sexual orientation or preference is at issue. This opinion, then, does not address itself to the circumstance where evidence establishes that an individual has actually engaged in homosexual acts." *Id.* at 8.<sup>1</sup> For the first time, the Court had held that being gay<sup>2</sup> did not *per se* disqualify a person from becoming an attorney.

Three years later, in *Fla. Bd. Of Bar Examiners v. NRS*, 403 So. 2d 1315 (Fla. 1981), the Supreme Court was asked to answer the "delicate issue" it had avoided in *Eimers*: ". . . to what extent the Florida Board of Bar Examiners, in

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<sup>1</sup> Justice Boyd dissented, noting that he would have remanded the case "for an inquiry into whether the Petitioner has committed homosexual acts of the kind criminally outlawed by Section 800.02, Florida Statutes." *Id.* at 10. The U.S. Supreme Court has since ruled such statutes unconstitutional. *See, Lawrence v. Texas*, 539, U.S. 558, 580 (2003) ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.")

<sup>2</sup> The term "gay" is used herein as a shorthand reference meant to encompass all members of the gay, lesbian, bisexual and transgender (GLBT) community.

furtherance of its effort to determine the fitness of applicants for admission to The Florida Bar may inquire into an applicant's sexual conduct." *Id.* at 1316. In *NRS*, at an informal hearing, the Board inquired about the Petitioner's sexual conduct. The Petitioner admitted a continuing sexual preference for men but refused to answer questions about his past sexual conduct but indicated that he had no present intention regarding homosexual acts. He did state that he would obey all the laws of Florida. The Board, however, requested that the Petitioner return to answer additional questions. He declined and asked the Supreme Court to order the Board to certify him for admission to practice. In doing so, "The Board concedes that, except for the issue of sexual conduct, it has no adverse information concerning petitioner's fitness." The Court offered a lukewarm victory: ". . . the Board may ask the petitioner to respond to further questioning if, in good faith, it finds a need to assure itself that the petitioner's sexual conduct is other than noncommercial, private, and between consenting adults. . . otherwise, the Board shall certify his admission." *Id.* at 1317.

Thus, *Eimers* is an important benchmark in a longer journey. As noted recently by the United States Supreme Court:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom. *Lawrence v. Texas*, 539, U.S. 558, 579 (2003)

An understanding of the challenges facing gay attorneys in Florida begins with a look elsewhere. Florida has conducted no substantive survey data on the effect of an attorney's sexual orientation on his or her professional life. Other jurisdictions have. The results are disappointing.

A decade ago, the UCLA Women's Law Journal published "An Examination of the First Eleven Studies of Sexual Orientation Bias by the Legal Profession." This important work in 1998 looked back over the decade preceding it and made important observations still relevant today. For example, it looked at a set of responses posed in 1988 by the San Francisco Bar Committee on Lesbian and Gay Issues. Among its findings, that Committee noted that collecting data documenting sexual orientation discrimination is especially difficult because many gay lawyers and law students are not willing to "out" themselves. From that, one may observe that survey numbers are conservative. Even so, having some empirical data confirms what most gay attorneys already knew: some employers insist that openly gay attorneys keep their "personal" life separate from their "professional" life despite a finding that socialization is an important part of an attorney's career and can often help in advancement and in making important contacts. Thus, the study concluded, employers who do not welcome same-sex partners at firm functions make it more difficult for a gay or lesbian attorney to succeed while at the same time increasing the stress felt by gay attorneys. This, in turn, leads to diminished productivity and a sense of isolation.

In 1994, the Los Angeles County Bar Association conducted a survey of its members concerning gay issues. This more formalized survey contained

surprising numbers. For instance, 66% of those surveyed indicated that attorneys in their office made anti-gay statements or jokes. About half the time, the comment was made to or in front of someone who was gay or perceived to be gay.

In 1995, a Task Force in King County, Washington, worked, consulted and studied for two years before producing their landmark final report, *In Pursuit of Equality*. Looking at the challenges facing gay lawyers, it concluded: “The current state of affairs is a disgrace.”

In 1999, the District of Columbia Bar Task Force on Sexual Orientation and the Legal Workplace took a look at this issue. It found, *inter alia*, that “derogatory comments about lesbians and gay men appear to be not uncommon, and to be considered acceptable in some legal workplaces.” It also found that gays and lesbians continue to be under represented as partners in law firms that has negative consequences in terms of compensation as well as professional advancement. For example, the survey found that while 38.4% of heterosexual attorneys were earning \$150,000 or more, only 19.6% of lesbian and gay lawyers did so. On the more personal side, it found that lawyers were advised to conceal their sexual orientation or alter their appearance to look less stereotypically “gay.” One lesbian was told that she needed to appear more feminine, wear make-up and stop bringing her significant other to firm events.

A more recent survey was reported in 2006. Conducted by the Minnesota State Bar Association 2005 Self Audit, it found that 70% of gay attorneys have, at some point in their professional careers, hidden their sexual orientation or

identified themselves as heterosexual because of concern that revealing their orientation might negatively impact their careers. In this regard, the Audit found that the extent to which a lawyer's orientation was disclosed varied according to need and/or comfort level. Sexual orientation was revealed to co-workers 70% of the time but only 15% to Judges, court personnel or opposing counsel, 8% to opposing parties and only 2% to Bar examination administrators.

The 2006 survey also found that most gay attorneys perceive that they are assigned less favorable work and do not have the same chance of promotion in the legal profession as heterosexuals.

The data also revealed a significant gap in perception between gay attorneys and their straight counterparts. For example, 84% of gay attorneys reported bias in legal workplaces as a major or moderate problem while 67% of heterosexual attorneys reported it as a minor or non-existent problem. Similarly, while 69% of gay attorneys reported bias in courtrooms as a major or moderate problem, 67% of heterosexual attorneys reported it as a minor or non-existent problem. The discrepancy continued in general settings, with 52% of heterosexual attorneys agreeing that when people talk about diversity at work, they included sexual orientation while only 28% of the gay attorneys shared this view.

Equally unsettling is the current status of the work environment for gay attorneys. For example, the 2006 Survey found that 21% of gay attorneys reported that they have been denied employment, equal pay, benefits, promotion, or another employment opportunity within the past five years because of their sexual orientation. Their discontent was specific: 21% reported that they were

not given good work assignments; 18% received unequal pay; 11% were denied employment and 4% were told that clients did not want to work with them; 16% indicated that they had been verbally harassed in their workplaces within the last five years and 49% had heard or observed harassment based on sexual orientation directed toward someone else in their workplace.

Much progress has been made in the Florida legal system over the past thirty years. The Florida Bar Board of Governors recently adopted the findings of the First Annual Diversity Symposium that recommended, *inter alia*, that the Bar “Encourage fair and equitable treatment in all aspects of personnel management policies of employers without regard to race, color, national origin, gender, sexual orientation or disabilities.”<sup>3</sup> The Florida Bar and its leaders include sexual orientation in discussions about diversity and the website of the Central Florida Gay And Lesbian Law Association (GALLA) is maintained, in part, through a grant from the Florida Bar Foundation.

Challenges remain. For example, the Florida Supreme Court Standing Committee on Fairness and Diversity, created in 2004 to “eliminate from court operations inappropriate bias,” does not include sexual orientation in its purview.<sup>4</sup>

The Committee nevertheless received testimony on this oversight:<sup>5</sup>

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<sup>3</sup> *Diversity in the Legal Profession Final Report and Recommendations* was presented to The Florida Bar Board of Governors on August 13, 2004, and formally adopted by it on February 1, 2008.

<sup>4</sup> Administrative Order AOSC04-225, creating the Committee, notes that it is “established for the purpose of advancing the State Courts System’s efforts to eliminate from court operations inappropriate bias based on race, gender, ethnicity, age, disability, or socioeconomic status.”

<sup>5</sup> Testimony of the author on January 19, 2006 in his capacity as a member of the Board of Directors of the Central Florida Gay And Lesbian Law Association.

I am disappointed that the Chief Justice's Corrected Administrative Order establishing the Standing Committee failed to acknowledge the continuing struggle that gay/lesbian attorneys, judges and litigants face in our court system and in our profession. In January 2001, the California Judicial Council Access and Fairness Advisory Committee became the first state to comprehensively evaluate sexual orientation as it relates to the courts. The results are startling, especially when one remembers that California had more steps in place to avoid discrimination on the basis of sexual orientation than does Florida. For example, California:

1. Prohibited bias and discrimination in courts based on, among other things, sexual orientation;
2. Required all lawyers to have MCLE which included at least one hour dealing with the elimination of bias in the legal profession based on, among other things, sexual orientation;
3. The California Bar Board of Governors had, as early as 1996, passed and widely publicized, a resolution calling for the elimination of bias specifically in the area of sexual orientation;
4. California had passed a state wide law which prohibited discrimination on the basis of sexual orientation in employment;
5. The Rules of Professional Conduct specifically prohibited discriminatory conduct in a law practice on the basis of sexual orientation;
6. The California Judicial Council had, since 1994, maintained an Access and Fairness Advisory Committee with 5 subcommittees, one of which was entitled the Sexual Orientation and Gender Identity Committee;
7. The California Bar had a standing Committee on Sexual Orientation and Gender Identity.

Perhaps this background makes the California findings more startling:

- 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.
- 32% of ***court employees*** heard ridicule, snickering, or jokes about lesbians and gay men in settings ***other than*** open court.
- 28% reported hearing negative comments and 21 % heard derogatory terms about gay men or lesbians.
- 48% of court employees who observed negative actions or heard negative comments in open court took no action in response.
- 56% 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% felt threatened in the courtroom setting because of their sexual orientation.

This, in part, led Ronald George, Chief Justice of California and President of the Conference of Chief Justices, to note just last year that “The public is entitled **in every state** to a forum accessible to all and free from bias – regardless of race, ethnicity, gender, **sexual orientation**, disability, or economic status. CCJ [Conference of Chief Justices] and COSCA [Conference of State Court Administrators] are committed to working to achieve that goal.” (Emphasis added). Thus, the failure to even mention gays or lesbians as part of Florida's efforts to ensure "Fairness and Diversity" a scant few months later is especially disappointing.

Although the Administrative Order remains silent on the issue of sexual orientation, the Committee's website<sup>6</sup> now notes that “The Committee was established to assist the courts in identifying and eliminating any bias based on

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<sup>6</sup> [http://www.flcourts.org/gen\\_public/family/diversity/index.shtml](http://www.flcourts.org/gen_public/family/diversity/index.shtml) (last visited April 4, 2008)

race, gender, ethnicity, age, disability, financial status, or any characteristic that is without legal relevance.” Progress.

We have much to celebrate as we look back on the *Eimers* decision and its progeny. As we celebrate that progress, we acknowledge that, as attorneys, we are called to lead so that “As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” *Lawrence* at 579. That search is neither short nor easy. The Constitution’s promise of equality is profound but comes with both risk and disappointment.<sup>7</sup> We must be committed to taking our place in history, educating our colleagues about remaining challenges and, working together to reduce them. We should be respectful of those who disagree but resolute in the rightness of our claim for equal treatment; cooperative in our approach to solve problems but uncompromising in our principles which bring those problems to light.

This anniversary is about celebrating courage -- courage to stand up, be different, speak out and move forward. It is not about freedom for sex but freedom from discrimination. If we can, as Mahatma Ghandi urged, “be the change you want to see in the world,” perhaps we can not only find equity in the legal workplace, but instill hope in future generations and reduce a suicide rate among gay teens that is three times that of their straight counterparts<sup>8</sup> and the number one cause of teen death among gay teens.<sup>9</sup>

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<sup>7</sup> Eimers was ultimately disbarred in 1987 for his mishandling of client money and a conviction for money laundering – things which inarguably pose a rational relationship to fitness to practice law but none to a person’s sexual orientation.

<sup>8</sup> “In 1989, the United States Department of Health and Human Services (HHS) issued its “Report on the Secretary's Task Force on Youth Suicide,” which found that “A majority of suicide attempts by homosexuals occur during their youth, and gay youth are 2 to 3 times more likely to

The *Eimers* decision brought change. As celebrated on Panel Four of his Memorial in Washington D.C., Thomas Jefferson long ago noted that change is both inevitable and positive:

I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.<sup>10</sup>

The change wrought by *Eimers* directly affected a small number of people applying for the Bar but indirectly changed the standard by which all persons who seek to become lawyers are to be judged. It refocused the inquiry away from notions based on prejudice and onto the “content of their character.” This we can celebrate, regardless of orientation.

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attempt suicide than other young people. They may comprise up to 30 percent of (the estimated 5,000) completed youth suicides annually.” Blumfield, Warren J. and Laurie Lindop, *Gay, Lesbian, Bisexual and Transgender Teen Suicide*, <http://pactsnetwork.org/grace/docs/Youth%20Suicide.pdf> (last visited April 4, 2008).

<sup>9</sup> Testimony of the American Psychological Association submitted to the U.S. Senate, September 7, 2001. See, <http://www.apa.org/ppo/issues/psuicidetest901.html> (last visited April 3, 2008).

<sup>10</sup> Noted on Panel One is another of Jefferson’s truths upon which our democracy is founded: “We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain inalienable rights, among these are life, liberty, and the pursuit of happiness, that to secure these rights governments are instituted among men.”