

Saint Louis University Public Law Review

Volume 24
Number 1 *Out of the Closet and Into the Light:
The Legal Issues of Sexual Orientation (Volume
XXIV, No. 1)*

Article 14

2005

Miss Susan's Etiquette Tips for the Socially Conscious Judge: A Guide to Honorable Conduct Toward Gays and Lesbians in the Courtroom

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Recommended Citation

Haumont, Bradley Zane and Koenig, Susan Ann (2005) "Miss Susan's Etiquette Tips for the Socially Conscious Judge: A Guide to Honorable Conduct Toward Gays and Lesbians in the Courtroom," *Saint Louis University Public Law Review*: Vol. 24 : No. 1 , Article 14.
Available at: <https://scholarship.law.slu.edu/plr/vol24/iss1/14>

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**MISS SUSAN'S ETIQUETTE TIPS FOR THE SOCIALLY
CONSCIOUS JUDGE: A GUIDE TO HONORABLE CONDUCT
TOWARD GAYS AND LESBIANS IN THE COURTROOM**

BRADLEY ZANE HAUMONT* AND SUSAN ANN KOENIG**

Dear Reader,

You're a judge, and you're loving life. The governor is a close, personal friend of the family. You recently joined the most exclusive country club in town. Your youngest daughter just graduated from Harvard Law School with honors. Best of all, you have the satisfaction of sitting on a long, hard (but surprisingly comfortable) bench whenever you are not relaxing at the golf course. You—and only you—make the difficult decisions that no one else is qualified to make. You are at the pinnacle of your legal career. Life is good.

Then, from out of nowhere, the *gay issue* rears its well-coifed head, and suddenly you feel unbalanced. Your law clerk just came out of the closet. Your spouse is nagging you to officiate at a cousin's same-sex wedding in Boston. Yesterday you received a survey from the American Civil Liberties Union testing your knowledge of gay and lesbian legal issues. Tomorrow, a bisexual teacher will appear in your courtroom on a name change matter. Next week, you must preside over a custody battle between two lesbian mothers who, until quite recently, were raising a child together. The room starts to spin, and you find yourself feeling nostalgic for the simple days of your first year in law school.

Never fear, Miss Susan is here!¹ For more than thirty years, I've been the queen bee of gay and lesbian jurisprudence. Through my extensively syndicated advice column, I've helped thousands of judges reason through the most flummoxing of gay and lesbian legal issues. Moreover, I've been able to impart crucial words of wisdom to the judicial elite that make this country great. Now, for the very first time, I have collected some of my most

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1. Miss Susan is a fictional advice columnist who should not be confused with any person, living or dead—most especially not the authors.

inspirational columns for the edification of the larger judicial community. Here, you will gain fascinating insight into areas as diverse as criminal law, adoption law, family law, and name-change law.

As you delve into my letters, you may notice an overarching theme—that good manners and good law often coincide.² My philosophy is that if you can remember to be polite, to be respectful of others, and to acknowledge the essential humanity of every living person, you will almost always be guided to the correct legal conclusion. Keep this in mind as you read the questions and answers that follow.

Very truly yours,
Miss Susan

Dear Miss Susan,

Yesterday, a young man came into my courtroom and took the witness stand. Would you believe he had the gall to admit under oath that he is a practicing homosexual? I was so shocked that I almost fell off my bench! After a few minutes, though, I was overcome by a morbid sense of curiosity. It's not that I'm gay or anything; it's just that I've never met a homosexual before. So I asked ten or fifteen rather intimate questions about the witness's sexual proclivities. Despite my restraint, the witness appeared to be offended by my questions. Do I owe him an apology?

Love,
Judge Curious

Dear Judge Curious,

A certain amount of curiosity is to be expected when meeting people with backgrounds and experiences which are different from our own. It is therefore quite natural that you would have questions when meeting a gay man for the very first time.³ In satisfying your curiosity, however, you must be careful not to abandon common courtesy. It sounds as if your questions dealt with the sort

2. In fact, Miss Susan's personal motto is "Good Manners and Good Law Often Coincide." She embroiders it on pillows in her spare time.

3. I doubt, however, that this is the first gay man you have met. When considering *Bowers v. Hardwick*, 478 U.S. 186 (1986), United States Supreme Court Justice Lewis F. Powell remarked he did not believe he had ever met a homosexual before. JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 272-73 (2001). Ironically, Justice Powell was speaking to his gay law clerk. *Id.* at 272.

of delicate, personal issues that most people would not enjoy answering in open court. If your questions were not directly relevant to any legal issue in the case, then I can well imagine that the young man was offended. As such, I believe you may owe him an apology.

To assist you in the future, I have devised a simple rule of thumb: unless you know someone very well, don't ask any personal questions that you wouldn't feel comfortable asking your own mother.⁴ For instance, I do not want to know how many sexual partners my mother has had over the course of her lifetime; I therefore make it a rule never to ask a stranger (of any sexual orientation) how many sexual partners he or she has had. Obviously, there may be times when your judicial duties will require you to violate the rule of thumb, but I think it will serve you well in most situations.

I wish I had been able to give this advice to the Illinois judge who presided over *In re C.M.A.*,⁵ a lesbian adoption case. In that case, the judge asked the petitioners several questions which can only be described as inappropriate.⁶ The Appellate Court of Illinois was quite disturbed by the judge's "insensitive probing and wrongful interrogation of the adoptive parents' early sexual history."⁷ The court found that this irrelevant line of questioning was evidence of the judge's prejudice against lesbians.⁸

I hope this case underscores the importance of apologizing to the young man. I know it can be very difficult for a judge to acknowledge that he or she may have made a mistake, but I have the utmost respect for those who recognize when an apology is required.⁹

Very truly yours,
Miss Susan

Dear Miss Susan,

4. If this standard seems too subjective, then you could substitute "an objectively reasonable mother" for your mother.

5. 715 N.E.2d 674 (Ill. App. Ct. 1999).

6. *Id.* at 676. The appeals court did not articulate the precise questions asked, but stated that the lower court judge questioned "each petitioner regarding her 'coming out' process as a lesbian, her early sexual experiences, and whether petitioners were currently in a lesbian sexual relationship." *Id.*

7. *Id.* at 679.

8. *Id.* The court found it proper that the judge had been removed from the case for bias. *Id.* at 680.

9. Even Justice Powell eventually admitted that he had "probably made a mistake" in voting with the majority in *Bowers*. MURDOCH & PRICE, *supra* note 3, at 339.

Last week, Mr. P. and Mr. C., two gay men, came into my courtroom and asked me to change both their last names to Faerie. Not only that, but Mr. P. wanted to change the last name of his six-year-old son, Harry, as well. I have reviewed the name change laws for my state, and I know that I must refuse a name change if it is intended to perpetrate a fraud on the community. I think it is fraudulent for them to hold themselves out as a family because gay marriage isn't recognized in my state. Naturally, I was forced to deny their petition. They must think they need special rights or something because they filed an appeal with the state supreme court. Should I be worried about a reversal?

Love,
Judge Traditional

Dear Judge Traditional,

My crystal ball is a little cloudy today, but when I gaze into your future, I get the distinct impression that you could be overruled on appeal. Of course, I'm not a judge, so I can't rely solely on mysticism to support my opinions. Perhaps what we both need here is some clarity.

Your understanding of the law appears to be basically sound. Most jurisdictions prevent a person from changing his or her name for fraudulent purposes.¹⁰ Most jurisdictions also refuse to extend marriage rights to gay and lesbian couples.¹¹ I suspect, however, that you may have mixed up these two propositions of law when you ruled on the gay couple's name change petition.

I hope it may give you some small comfort to know that you're not the only judge who confuses name change petitions with marriage licenses. In a recent New Jersey case, *In re Bacharach*, a lesbian petitioned the court to hyphenate her last name to include the name of her life partner.¹² The trial judge was concerned that members of the public would mistakenly believe that the women were legally married.¹³ He felt that even the slightest "imprimatur" of legitimizing a same-sex relationship would violate public policy, so he denied the petition.¹⁴

The Appellate Division of the New Jersey Superior Court saw the case differently. The court noted that it is improper for judges to impose personal

10. *See, e.g.*, N.J. STAT. ANN. § 2A:52-1 (2004); 54 PA. CONS. STAT. ANN. § 701(b) (2004).

11. *See, e.g.*, ALASKA CONST. art. I, § 25; GA. CONST. art. I, § 4, para. 1; HAW. CONST. art. I, § 23; KY. CONST. § 233a; LA CONST. art. XII, § 15; NEB. CONST. art. I, § 29; OHIO CONST. art. XV, § 11; UTAH CONST. art. I, § 29. Massachusetts is the notable exception to the rule. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

12. *In re Bacharach*, 780 A.2d 579, 580 (N.J. Super. Ct. App. Div. 2001).

13. *Id.* at 580-81.

14. *Id.* at 581.

views on public policy when presiding over a name change proceeding.¹⁵ Even if public policy were relevant, the court found that there was no public policy that would prevent same-sex partners from sharing a hyphenated surname.¹⁶

Focusing on the heart of the trial judge's objection to the proposed name change, the court correctly pointed out that the legality of gay marriage was not at issue in *Bacharach*.¹⁷ Dismissing the trial judge's concerns about public confusion over the issue as "farfetched and inherently discriminatory," the court went on to state that arguments equating a name change with the legalization of gay marriage were "specious."¹⁸ The court then held that the proposed name change was not for fraudulent purposes and directed the trial judge to grant the petition.¹⁹

The *Bacharach* opinion proved to be quite persuasive, and its reasoning was adopted by courts in New York, Ohio, and Pennsylvania in cases with nearly identical facts.²⁰ My crystal ball notwithstanding, this emerging trend in name-change law is what leads me to believe that your case might be reversed on appeal. The lesson here is that name changes and marriages are entirely separate matters. Do your best to keep them straight in the future.

Before I close, I want to address one other concern. I sense that you harbor a deep-seated disapproval of same-sex couples who "masquerade" as families by adopting the same surname. I would just challenge you to open your mind to the possibility that they really are a family. Same-sex couples often regard a name change as a method of publicly expressing their commitment to each other.²¹ A married person who adopts his or her spouse's name is probably motivated by similar concerns. If you look closely, I'm sure you'll find evidence of other similarities between same-sex couples and other families.

Very truly yours,

15. *Id.* at 584. In a rare moment of modesty, the court admitted that "[j]udges have no monopoly on wisdom, no clairvoyance into the public mind and no right to impose personal views or values on the citizenry of our state." *Id.*

16. *Id.*

17. *In re Bacharach*, 780 A.2d at 585.

18. *Id.*

19. *Id.*

20. See *In re Daniels*, 773 N.Y.S.2d 220 (Civ. Ct. 2003); *In re Bicknell*, 771 N.E.2d 846 (Ohio 2002); *In re Miller*, 824 A.2d 1207 (Pa. Super. Ct. 2003).

21. The petitioner in *Bacharach* eloquently summarized her reasons for changing her name:

What it will do for me is it will give me a more satisfying feeling that I have cultivated family . . . I am simply saying that I am committed to somebody in my life, that I want to express that commitment through adding a name to my name so that I can have a more solid . . . solid feeling of, this is my family. The two of us are family.

In re Bacharach, 780 A.2d at 585.

Miss Susan

Dear Miss Susan,

I'm very worried about a ten-year-old girl whose custodial determination I have under advisement. A psychologist (and renowned researcher from the local junior college) testified that if the mother is given custody, the child can expect to be ridiculed for the rest of her life because her mother is a defiant and hostile lesbian. This is a very sweet little girl. Should I deny custody to the mother, even though I have concerns about the alcoholic father?

Love,
Judge Concerned

Dear Judge Concerned,

I can only imagine how anguishing it must be to have the fate of a child in your hands. In weaker moments, I may envy your black robes and your dickeys, but I never envy the difficult custodial determinations that judges are often called upon to make. While you alone must determine what is in the best interests of the child, I may be able to offer some observations to assist in your decision.

The first thing to realize is that no one is perfect. As human beings, every parent is certain to have both "good" qualities and "bad" qualities.²² Thus, in every custodial determination, the court will be called upon to choose between two flawed individuals.²³ Rather than dwell on parental deficiencies, the court should focus its attention on the needs of the children.²⁴

Arguably, one factor a court could consider is a child's need to be free from social stigma. In *M.P. v. S.P.*, the trial judge awarded custody to the father instead of the lesbian mother.²⁵ On appeal, the father argued that the custodial determination should be upheld because the children would be embarrassed by their mother's sexual orientation.²⁶

22. In *Conkel v. Conkel*, 509 N.E.2d 983, 985 (Ohio Ct. App. 1987), the court stated "[t]oo long have courts labored under the notion that divorced parents must somehow be perfect in every respect. The law should recognize that parents, married or not, are individual human beings each with his or her own particular virtues and vices."

23. In *M.P. v. S.P.*, 404 A.2d 1256, 1262 (N.J. Super. Ct. App. Div. 1979), the court noted that "the decision as to where custody shall lie must be made in terms of available alternatives."

24. *Conkel*, 509 N.E.2d at 986.

25. *M.P.*, 404 A.2d at 1257.

26. *Id.* at 1261.

The Appellate Division of the New Jersey Superior Court was not convinced by the father's argument.²⁷ The court observed that awarding custody to the father would not lessen any alleged embarrassment for the children.²⁸ Their children would be subject to embarrassment whether their mother had custody or not.²⁹ It was beyond the court's power to shield the children from the social consequences of their mother's sexual orientation.³⁰

Moreover, the court suggested that sheltering children from difficult realities may not be in their best interests.³¹ While the court candidly admitted that the children might face some adversity if the mother were given custody, it also held out hope that the children might learn valuable lessons along the way.³² For instance, the children would certainly learn "that we do not forsake those to whom we are indebted for love and nurture merely because they are held in low esteem by others."³³ Indeed, the court concluded that removing the children from their mother's custody would deprive them of those qualities that they would need to cope with any social stigma that could flow from their mother's sexual orientation.³⁴

In a similar case, *Conkel v. Conkel*, the Ohio Court of Appeals determined that popular disapproval of homosexuality should play no role in parent-child adjudications.³⁵ The *Conkel* court found guidance in *Palmore v. Sidoti*, where the United States Supreme Court confronted social stigma flowing from interracial relationships.³⁶ In *Palmore*, the trial court awarded custody to the father because he feared that the child would be stigmatized by her mother's

27. *Id.* at 1262.

28. *Id.* The court noted that "[n]either the prejudices of the small community in which they live nor the curiosity of their peers about defendant's sexual nature will be abated by a change of custody." *Id.*

29. *Id.*

30. *M.P.*, 404 A.2d at 1262.

31. *Id.* at 1262-63.

32. *Id.* at 1263. Although *M.P.* was decided in 1979, the lessons summarized by the court are equally relevant today:

It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.

Id.

33. *Id.*

34. *Id.* The court ultimately reversed the trial court's custodial determination and awarded custody to the mother. *Id.*

35. *Conkel*, 509 N.E.2d at 987. While the issue in *Conkel* was visitation, the principle announced by the court is equally applicable in custody cases.

36. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

cohabitation with an African-American.³⁷ In reversing the custody decision, the Supreme Court stated that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”³⁸

Returning to your question, I would urge you to consider whether the child’s interests will be served by reflexively denying custody to the mother. Assuming for a moment that the child will be ridiculed for the rest of her life, granting custody to the father will not reduce the child’s exposure to ridicule. Her mother will still be a defiant and hostile lesbian.³⁹ In any event, I’m not sure that the child of a lesbian mother has any greater potential for embarrassment than a child whose mother is obese.

Putting all issues of social stigma to the side, the question before the court is whether an alcoholic father or a defiant mother is better equipped to meet this little girl’s needs in the future. Although each faces personal challenges, I’m sure that both of her parents love her very much. However, custody should be awarded to the parent who can best see to her physical and emotional well-being, regardless of that parent’s sexual orientation.⁴⁰

Very truly yours,
Miss Susan

Dear Miss Susan,

I’m reviewing a jury instruction for my first capital murder case. The prosecutor has submitted the following recommended instruction: “If you find that the defendant is a faggot, you may weigh the defendant’s sexual orientation as an aggravating factor when you determine whether to impose the death penalty.” I attended a two-hour sensitivity class three years ago, so I understand the importance of language in the courtroom. The word “faggot” is obviously too inflammatory to be included in a jury instruction, but I’m unsure if it should be replaced with “gay man” or “practicing homosexual.” What would you recommend?

Love,
Judge Sensitive

37. *Id.* at 431.

38. *Id.* at 433.

39. What exactly *is* a defiant and hostile lesbian? The trial judge in *Pleasant v. Pleasant*, 628 N.E.2d 633, 639 (Ill. App. Ct. 1993), felt it was important to include the following in his findings of fact: “The respondent is a defiant and hostile admitted lesbian.” I’m thinking of founding a group called “Defiant and Hostile Lesbians” (DHL) to advocate for lesbian legal rights.

40. *See In re R.E.W.*, 471 S.E.2d 6, 9 (Ga. Ct. App. 1996).

Dear Judge Sensitive,

I applaud your attention to language in the courtroom. Everyone, regardless of sexual orientation, feels more comfortable when judges avoid unnecessarily harsh and abrasive language. You are of course correct that the word “faggot” is almost never used in polite society. I’m shocked that a prosecutor would even proffer such an instruction!

While we are on the subject of language, I would also advise you to steer clear of the phrase “practicing homosexual.” The word “practicing” (or “non-practicing”) in this context is apparently meant to indicate whether a person is sexually active or not. In my opinion, this is really too much information for most conversations. For instance, I don’t imagine that my grandfather has been sexually active for several years now, but I doubt he would like being called a non-practicing heterosexual. If you need to refer to a person’s same-sex orientation, the words “gay” and “lesbian” are appropriately descriptive and inoffensive.

This leads me to the bigger problem with the jury instruction you are reviewing. I think if you carefully review the death penalty laws in your state, you’ll find that sexual orientation is not listed among the aggravating factors for the jury to consider.⁴¹ You may find factors like previous criminal convictions⁴² or the atrocious nature of the crime,⁴³ but a defendant’s sexual orientation is almost always irrelevant to the sentence imposed.

In those cases where prosecutors or judges have attempted to introduce irrelevant allegations of sexual orientation into jury deliberations, appellate courts have been less than forgiving. For instance, in *United States v. Birrell*, the prosecutor urged the jury to convict the defendant because he was “a homosexual and a car thief and a credit card thief” who could not be turned loose on society.⁴⁴ In a *per curiam* opinion, the United States Court of Appeals for the Ninth Circuit reversed the conviction because the prosecutor’s statements invited the jury to convict simply because the defendant was a homosexual, without regard to the defendant’s guilt or innocence.⁴⁵

In *Neill v. Gibson*, a capital murder case, the prosecutor in his closing argument reminded the jury that they were “deciding life or death on a person that’s a vowed [sic] homosexual.”⁴⁶ After defense counsel unsuccessfully

41. See, e.g., NEB. REV. STAT. § 29-2523(1) (2004).

42. See, e.g., *id.* § 29-2523(1)(a).

43. See, e.g., *id.* § 29-2523(1)(c).

44. *United States v. Birrell*, 421 F.2d 665, 666 & n.2 (9th Cir. 1970) (*per curiam*).

45. *Id.* at 666.

46. *Neill v. Gibson*, 278 F.3d 1044, 1060 (10th Cir. 2001).

objected, the prosecutor told the jury that, while sexual orientation was not an aggravating factor, they needed to consider “the type of person” they were sentencing.⁴⁷ The United States Court of Appeals for the Tenth Circuit characterized the prosecutor’s remarks as “improper” and stated that there was no legitimate justification for them.⁴⁸

Even outside the capital arena, injecting references to sexual orientation into the jury process can be suspect. In *Muzzy v. Cahillane Motors, Inc.*, a sexual harassment lawsuit, the trial judge instructed the jury to evaluate the plaintiff’s claim from the vantage point of “an objectively reasonable woman of lesbian orientation.”⁴⁹ The Supreme Judicial Court of Massachusetts reminded trial judges that providing unnecessary context to a reasonable person jury instruction could conjure negative stereotypes in the minds of the jury.⁵⁰ The court cautioned against including any irrelevant personal characteristics in jury instructions.⁵¹

Returning to your question, I would recommend that you *not* use the proffered jury instruction both because it is an inaccurate statement of the law and because it makes unnecessary reference to the defendant’s sexual orientation. The jury in your capital murder case needs to struggle with difficult questions. If the jurors were allowed to consider the defendant’s sexual orientation, they might be tempted to give in to their own prejudices rather than face the real issues before them. While I’m not usually an advocate of “Don’t Ask, Don’t Tell” policies, I think justice will be best served in this case by limiting the jury’s access to any information that could distract them from their task.

Very truly yours,
Miss Susan

Dear Miss Susan,

47. *Id.* at 1061.

48. *Id.* Without condoning the prosecutor’s conduct, the court ultimately affirmed denial of the defendant’s habeas corpus petition. *Id.* at 1064. The court held that improper remarks did not result in an unfair sentence because there was overwhelming evidence that the defendant’s crime was particularly heinous. *Id.* at 1061-62.

49. *Muzzy v. Cahillane Motors, Inc.*, 749 N.E.2d 691, 697 (Mass. 2001). I cannot help wondering how an objectively reasonable woman of lesbian orientation differs from a reasonable person.

50. *Id.* at 696.

51. *Id.* The court dismissed the plaintiff’s appeal because the plaintiff’s attorney agreed to the jury instruction before trial. *Id.* at 697.

I have a single-parent lesbian adoption case coming up for final hearing next week. Although nothing in my state's law explicitly prevents a homosexual from adopting, I know in my heart of hearts that it can never be right for a child to grow up with a pervert for a mother. Anyway, I don't see why a lesbian would want children in the first place. Homosexuals are well-known for their promiscuous lifestyles, so she would never be able to provide a stable home for anything bigger than a pussycat. Why can't she just be happy with a house full of cats?

Love,
Judge Vigilant

Dear Judge Vigilant,

I remember reading once about an aboriginal society where children are so precious that the word "child" also means "wealth." Cats are nice animals, but they don't enrich your life in quite the same way that a child does. (For one thing, children are much more affectionate than cats.) People who want to adopt recognize both the intrinsic value of a child and the difference they could make in the life of a child who is otherwise without parents.⁵² In that respect, I suspect that gays and lesbians are no different than any other prospective parents.

Naturally, you are not the first judge to consider an adoption by a gay or lesbian petitioner. *In re Charles B.* was an Ohio Supreme Court case dealing with this exact situation.⁵³ In resolving the issue, the court decided to treat gay and lesbian adoptions just like any other adoption and looked to the best interests of the child.⁵⁴ Although the petitioner was a gay man, nearly all of the evidence adduced at trial supported a conclusion that the petitioner would be a loving and supportive father.⁵⁵ There was no evidence that his sexual orientation would be detrimental to the welfare of the child.⁵⁶ Thus, the court overruled a lower appeals court ruling that homosexuals are *per se* ineligible to adopt in Ohio.⁵⁷ In doing so, the Court stressed that "all relevant factors" must

52. Tommy G. Thompson, Secretary of Health & Human Services, Remarks at the National Council for Adoption Awards Banquet (Mar. 26, 2003) (transcript available at <http://www.hhs.gov/news/speech/2003/030326.html>).

53. *In re Charles B.*, 552 N.E.2d 884, 885 (Ohio 1990).

54. *Id.* at 886.

55. *Id.* at 888-89.

56. *Id.* at 888.

57. *Id.* at 885, 890.

be considered in determining the best interests of the child, suggesting that the lower court erred in focusing on a single factor to the exclusion of all others.⁵⁸

This sort of single-minded focus may have been the crucial flaw for an Illinois judge in *In re C.M.A.*⁵⁹ Despite clear precedent stating that sexual orientation is irrelevant in adoption cases,⁶⁰ the lower court judge refused to grant two lesbian adoption petitions.⁶¹ In a bizarre twist, the lower court judge joined the unrelated adoption cases together and appointed the Family Research Council, a conservative think tank, as a “secondary guardian” to advocate the anti-gay point of view.⁶² Even after she was removed from the case for bias, she claimed that her removal had been unwarranted and continued to issue orders in the case.⁶³ The Appellate Court of Illinois found that the judge “obviously had a predetermined bias against lesbians” and affirmed the adoptions.⁶⁴ In doing so, the court remarked that “[n]o judge has the right or authority to ignore the rules governing our administration of justice.”⁶⁵

Although I can see that you are uncomfortable with the petitioner’s sexual orientation, I wonder if your objections to her “lesbian lifestyle” are based more on stereotypes than empirical data. Social science research suggests that children raised in gay and lesbian homes develop normally and lead healthy, happy lives.⁶⁶ Perhaps you should look at this case again and ask yourself whether you are also focusing too much on the petitioner’s sexual orientation and not enough on the best interests of the child.

Very truly yours,
Miss Susan

Dear Miss Susan,

My favorite Bible story when I was a little boy was the story of Sodom and Gomorrah.⁶⁷ As a judge, I sometimes feel the need to look beyond man’s law to the higher law that binds us all together as a civilization. In those moments,

58. *In re Charles B.*, 522 N.E.2d at 889.

59. *In re C.M.A.*, 715 N.E.2d 674 (Ill. App. Ct. 1999).

60. See *In re K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995).

61. *In re C.M.A.*, 715 N.E.2d at 676-77.

62. *Id.* at 678-79.

63. *Id.*

64. *Id.* at 679, 681.

65. *Id.* at 679.

66. See Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL’Y 191, 202 (1995).

67. *Genesis* 19:1-30.

I return to Sodom and Gomorrah for a solid legal precedent. Recently, I read the entire story of Sodom and Gomorrah into the record at the end of a bench trial right after I found that the gay defendant was guilty of first degree purse-snatching. I just don't understand why the state supreme court vacated the conviction and remanded the case for a new trial. Can you help?

Love,
Judge Pious

Dear Judge Pious,

I regard my own spirituality as a source of strength and passion, so I can appreciate that religious teachings play a central role in your life. However, you must not allow your religious beliefs to interfere with your judicial duties. Careless sermonizing in the courtroom can lead to unfortunate and unexpected results.

Let me illustrate my point with a parable from the State of Nebraska. In *State v. Pattno*, the presiding judge read aloud from a long biblical passage referring to homosexuality before sentencing a gay defendant.⁶⁸ The defendant appealed his sentence, arguing that the judge was biased against him because of his sexual orientation.⁶⁹

In analyzing the case, the Nebraska Supreme Court began by noting that criminal offenses (and the sentence imposed for committing a crime) are mandated by statute.⁷⁰ The defendant's sexual orientation was irrelevant to either his crime or his sentence, so the biblical passage was similarly irrelevant.⁷¹

The court also expressed concerns over the separation of church and state.⁷² Although there may be instances where a judge can properly express religious beliefs in the courtroom, the court discouraged the use of scripture in sentencing proceedings because it could appear that the judge is relying on personal religious views rather than the statute when determining the proper sentence.⁷³

68. *State v. Pattno*, 579 N.W.2d 503, 505-06 (Neb. 1998). Although the court did not provide a citation, the passage appears to be *Romans* 1:20-28.

69. *Pattno*, 579 N.W.2d at 506.

70. *Id.* at 508.

71. *Id.*

72. *Id.* at 508-09.

73. *Id.* at 509. The court was influenced by *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991), where the Fourth Circuit Court of Appeals observed that courts "cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges

When a judge relies on irrelevant considerations in sentencing a defendant, a reasonable person could be led to believe that the judge is biased.⁷⁴ Thus, the court found that there was at least an appearance of bias because the presiding judge may have relied on his own irrelevant religious beliefs when sentencing the defendant.⁷⁵ The sentence was therefore vacated because defendant was denied due process of law.⁷⁶

Your purse-snatching case is very similar to *Pattno*. The story of Sodom and Gomorrah had nothing to do with purse-snatching, so your state supreme court may have questioned whether you were convicting the defendant of purse-snatching or sodomy. Since sodomy is not illegal,⁷⁷ your supreme court may have felt that the best course of action was to remand for a new trial on the charge of purse-snatching alone. In the future, I would recommend that you read the story of Sodom and Gomorrah in church rather than in court.⁷⁸

Very truly yours,
Miss Susan

Dear Miss Susan,

I recently had a young professional mother come before me seeking to retain custody of her children. The evidence showed that she supports the Lambda Legal Defense Fund,⁷⁹ the Human Rights Campaign,⁸⁰ and the

announce their personal sense of religiosity and simultaneously punish defendants for offending it." *Pattno*, 579 N.W.2d at 508 (quoting *Bakker*, 925 F.2d at 740).

74. *Pattno*, 579 N.W.2d at 509.

75. *Id.*

76. *Id.*

77. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

78. If nothing else, I hope you will learn from your mistakes. Recently, the *Pattno* trial judge decided to disregard *Pattno* when sentencing a different defendant in a factually similar case. *State v. Bruna*, 686 N.W.2d 590, 617-18 (Neb. Ct. App. 2004). Prefacing his comments with "I would probably be better off not saying anything," the judge stated that "[i]f people would continue to read [the Bible], they would find that it's not a message of condemnation, but of hope." *Id.* at 617. The Nebraska Court of Appeals found that the trial judge's insertion of his own personal religious views was "explicit and unmistakable." *Id.* at 619. Thus, the trial judge had again deprived a defendant of due process, and the case was remanded for another sentencing. *Id.*

79. Lambda Legal is "a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS through impact litigation, education, and public policy work." LAMBDA LEGAL, at <http://www.lambdalegal.org/cgi-bin/iowa/index.html> (last visited Nov. 16, 2004).

80. The Human Rights Campaign is the largest gay and lesbian organization in the United States. It is "a bipartisan organization that works to advance equality based on sexual orientation and gender expression and identity, to ensure that gay, lesbian, bisexual and transgender

American Civil Liberties Union.⁸¹ She admitted on the witness stand that she often has private parties in her home on weekends when the children visit their father—parties where homosexuals are sometimes seen touching each other and kissing and fondling. It was so perverted that I almost had to call a recess and go to my private judicial toilet. Just the thought of it made me sick! Admittedly, there was no direct evidence that she was a lesbian (and she certainly didn't look like a lesbian). However, I think I should consider her apparent homoerotic tendencies when making my findings on the best interests of the children. This is a really important factor, isn't it?

Love,
Judge Squeamish

Dear Judge Squeamish,

I'm not sure I agree with your assertion that this woman has "homoerotic tendencies." Certainly, she has some gay friends and she donates money to gay-friendly organizations, but that doesn't necessarily make her a lesbian. It may simply indicate that she is open-minded and supportive of gay and lesbian rights. I am acquainted with many straight people who feel the same way. As a judge, you should be careful about making assumptions.

That being said, let's go ahead and assume for a moment that the mother in your case *is* a lesbian. There is a growing consensus in the legal community that a parent's sexual orientation is largely irrelevant in child custody determinations.⁸² For instance, in *Hassenstab v. Hassenstab*, the father sought a change in custody after the mother began an intimate relationship with another woman.⁸³ In looking at this case, the Nebraska Court of Appeals examined prior custody cases involving heterosexual parents.⁸⁴ In those cases, the Nebraska Supreme Court announced that a parent's sexual activity could

Americans can be open, honest and safe at home, at work and in the community." HUMAN RIGHTS CAMPAIGN, ABOUT THE HUMAN RIGHTS CAMPAIGN, at http://www.hrc.org/Template.cfm?Section=About_HRC (last visited Nov. 16, 2004).

81. The American Civil Liberties Union works "to defend and preserve the individual rights and liberties guaranteed to every person in this country by the Constitution and laws of the United States." AMERICAN CIVIL LIBERTIES UNION, THE ACLU: WHO WE ARE AND WHAT WE DO, at <http://www.aclu.org/about/aboutmain.cfm> (last visited Nov. 16, 2004).

82. See, e.g., *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985); *Jacoby v. Jacoby*, 763 So.2d 410, 413-15 (Fla. Dist. Ct. App. 2000); *In re Marriage of R.S.*, 677 N.E.2d 1297, 1301-02 (Ill. App. Ct. 1996); *Hassenstab v. Hassenstab*, 570 N.W.2d 368, 372-74 (Neb. Ct. App. 1997); *Damron v. Damron*, 670 N.W.2d 871, 875-76 (N.D. 2003).

83. See *Hassenstab*, 570 N.W.2d at 372-73.

84. *Id.*

not justify a change in custody “absent a showing that the minor child or children were exposed to such activity or were adversely affected or damaged by reason of such activity.”⁸⁵ The court of appeals determined that the same rule should apply to both heterosexual and homosexual parents.⁸⁶ Since there was no evidence that the child had been exposed to any sexual activity or that she had been harmed by the relationship, the court found that custody should remain with the mother.⁸⁷

As in *Hassenstab*, it seems that the mother in your case has been suitably discreet, as any good mother would be. Although gays and lesbians occasionally hug and kiss at her parties, it does not appear that her children were in attendance at those parties. Even if they had been present, I would hardly consider normal affection between consenting adults to be harmful to children.⁸⁸ Had the affection been heterosexual rather than homosexual in nature, I doubt you would have given it a second thought.

This leads me to my real point: I think you are uncomfortable with gays and lesbians. Please understand that this is merely an observation and not an accusation. The important thing for you to do is recognize your own discomfort and then move past it. As a judge, your paramount concern must be the best interests of the child. Putting aside your personal feelings about the mother’s sexual orientation, you must ask yourself whether a change of custody is really warranted. Viewed from that angle, you may decide that this mother isn’t so bad, even if she does support the American Civil Liberties Union.

Very truly yours,
Miss Susan

Dear Miss Susan,

I have this recurring nightmare that one day I will preside over a medical malpractice case where the entire jury is composed of gays and lesbians and transvestites. In my dream, I can’t tell which jurors are the gays, which are the lesbians, and which are the transvestites. (They all cross their legs *exactly* the same way.) My therapist tells me that my dreams are caused by a repressed

85. *Id.* (citing *Smith-Helstrom v. Yonker*, 544 N.W.2d 93, 100 (Neb. 1996); *Kennedy v. Kennedy*, 380 N.W.2d 300, 303 (Neb. 1986); *Krohn v. Krohn*, 347 N.W.2d 869, 872-73 (Neb. 1984)).

86. *Id.* at 370 (syllabus by the court ¶ 9).

87. *Id.* at 373.

88. In *Pleasant v. Pleasant*, 628 N.E.2d 633, 642 (Ill. App. Ct. 1993), the court observed that “[s]eeing two consenting adults hug and kiss in a friendly manner is not harmful to [the minor child].” The consenting adults in *Pleasant* were the child’s mother and her female partner. *Id.*

oedipal complex from my childhood. He encouraged me to circulate a memorandum among the prosecutors in my jurisdiction suggesting that preemptory challenges should be used to prevent all gays, lesbians, and transvestites from serving on juries. Although I was mostly motivated by my desire to make peace with my inner child, I also think that eliminating undesirable elements from juries will be a great contribution to my community. Don't you think so, too?

Love,
Judge Freud

Dear Judge Freud,

I wish you well on your journey of self-discovery! I wish more judges and attorneys could recognize when they need psychological counseling and seek assistance. I would, however, caution you on taking legal counsel from your therapist. While a therapist may be able to identify psychologically healing actions, those actions may not always comport with your judicial duties.

I would first direct your attention to the Model Code of Judicial Conduct. Paragraph B(5) of Canon 3 provides that “[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . based upon . . . sexual orientation.”⁸⁹ I suspect that your memorandum could be perceived as conduct that is prejudicial toward gays and lesbians. Thus, your memorandum could provoke an ethics investigation.

Your memorandum also reminds me of *People v. Garcia*,⁹⁰ a relatively recent case from California. In *Garcia*, the trial judge, over the defense's objection, allowed the prosecutor to dismiss two known lesbians during jury *voir dire*.⁹¹ The defendant challenged his conviction based on the exclusion of gays and lesbians from the jury.⁹²

The California Court of Appeals began by analyzing United States Supreme Court cases barring racial and gender discrimination in jury selection.⁹³ From these cases, the *Garcia* court determined that that juries

89. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2000).

90. 92 Cal. Rptr. 2d 339 (Ct. App. 2000).

91. *Id.* at 340, 348-49. *Garcia* was a run-of-the-mill burglary case which did not otherwise involve issues related to sexual orientation. *Id.* at 340, 348. The potential jurors were questioned about their sexual orientation because they were both employed by a gay and lesbian foundation. *See id.* at 340.

92. *Id.* at 340-41.

93. The *Garcia* court examined *Batson v. Kentucky*, 476 U.S. 79 (1986), *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), and *Taylor v. Louisiana*, 419 U.S. 522 (1975). *Garcia*, 92 Cal. Rptr. 2d at 341-43.

must be representative of the community⁹⁴ and that “cognizable groups” within the community may not be systematically excluded from jury service.⁹⁵ A “cognizable group” is one whose members share a common perspective which is caused by membership in the group.⁹⁶ Exclusion based on group membership is impermissible because the practice relies on stereotypes to determine whether a juror is competent or impartial.⁹⁷ Excluding cognizable groups from juries also reduces the fact-finding potential of the jury.⁹⁸

The court found that gays and lesbians were a cognizable group because they “share the common perspective of having spent their lives in a sexual minority, either exposed to or fearful of persecution and discrimination.”⁹⁹ Since the community was “entitled to have that perspective represented in the jury” room,¹⁰⁰ the court held that gays and lesbians could not be excluded from jury service solely because of their sexual orientation.¹⁰¹ In an effort to better guard the jury room against discrimination, the court directed that potential jurors should not be questioned about their sexual orientation.¹⁰²

At this time, California is the only state to protect gays and lesbians in jury *voir dire*.¹⁰³ However, even if you do not live in California, the *Garcia* case demonstrates that restricting gay and lesbian participation in the judicial process may not benefit your community. If your intention in sending the memorandum was to make a positive contribution, perhaps you should pause and reconsider. Maybe your therapist could recommend another method of getting in touch with your inner child—one that won’t violate judicial ethics rules.

Very truly yours,

94. *Garcia*, 92 Cal. Rptr. 2d at 342. See also *Taylor*, 419 U.S. at 528.

95. *Garcia*, 92 Cal. Rptr. 2d at 343. See also *Batson*, 476 U.S. at 96.

96. *Garcia*, 92 Cal. Rptr. 2d at 343. A common perspective refers to something akin to common experiences—it does not mean that all members of the group share the same opinion. *Id.* at 344.

97. *Id.* at 342, 344. See also *J.E.B.*, 511 U.S. at 129.

98. *Garcia*, 92 Cal. Rptr. 2d at 344-45. The United States Supreme Court once observed that “[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.” *Peters v. Kiff*, 407 U.S. 493, 503 (1972).

99. *Garcia*, 92 Cal. Rptr. 2d at 344.

100. *Id.* at 346.

101. *Id.* at 347.

102. *Id.* The court remanded the case to determine whether the lesbians were excluded from the jury because of their sexual orientation or for a constitutionally permissible reason. *Id.* at 348-49.

103. In 2000, the California legislature codified the result in *Garcia*. CAL. CIV. PROC. CODE § 204 (West 2004).

Miss Susan

Dear Miss Susan,

In a recent family relations case, three credible witnesses testified that a lesbian mother was seen holding hands with another woman at a Unitarian Church picnic (an organization that is known to be a haven for lesbians). A framed photograph of the mother embracing the same woman in front of the Statute of Liberty was also introduced into evidence. I am concerned that the children will suffer from irreparable gender identity confusion if they are exposed to the lascivious behavior of their mother. Mothers are supposed to be role models for their children! I grudgingly granted visitation to the mother, but only in the presence of a heterosexual employee of the state department of social services, and never in the presence of another homosexual. Do you think I should have gone further and denied all contact between the mother and the children?

Love,
Judge Scandalized

Dear Judge Scandalized,

I'm not sure why you restricted visitation at all. The mother in this case appears to be a patriotic, church-going woman who is in a committed and loving relationship. I would say that she is an ideal role model for her children. Nevertheless, I see that you are concerned about the impact that the mother's new relationship may have on her children. I may be able to address those concerns by examining decisions of other courts in similar cases.

In *Pleasant v. Pleasant*, the trial judge ordered supervised visitation for a lesbian mother.¹⁰⁴ The trial judge was concerned because the mother was involved in a relationship with another woman and because she had attended a gay pride parade with her son.¹⁰⁵ In a rather amusing episode, the judge asked whether there had been any "unmasculine" men at the pride parade.¹⁰⁶ When

104. *Pleasant v. Pleasant*, 628 N.E.2d 633, 634-35 (Ill. App. Ct. 1993). The judge initially offered the mother unsupervised visitation if she would agree not to exercise visitation in the presence of "any other person of known homosexual tendencies" or at "any gathering or place of a 'homosexual nature.'" *Id.* at 637. The mother candidly told the judge that she would not be able to abide by his conditions. *Id.*

105. *Id.* at 636.

106. *Id.* at 637.

the mother denied that she had seen any unmasculine men, “the judge argued with her about the presence of so-called ‘unmasculine’ men.”¹⁰⁷

On appeal, the Appellate Court of Illinois found that the restrictions were unwarranted.¹⁰⁸ The court noted that “[t]here is a strong public policy to preserve the relationship between a parent and child,” and liberal visitation is generally preferred.¹⁰⁹ Visitation should only be restricted if the child would be endangered by visitation.¹¹⁰ Since the court found no evidence that the child had been harmed by his mother’s relationship or by the trip to the pride parade, the restrictions on visitation were removed.¹¹¹

Applying a slightly different standard, Maryland’s highest court reached a similar conclusion in *Boswell v. Boswell*.¹¹² In *Boswell*, the trial judge restricted a gay father’s visitation by prohibiting overnight visits and to exclude the father’s male partner from being present during visitation.¹¹³

On review, the Maryland Court of Appeals began with the presumption that “the child’s best interests are served by reasonable maximum exposure to both parents.”¹¹⁴ As in *Pleasant*, visitation could only be restricted if the child were subject to actual or potential harm.¹¹⁵ The court emphasized, however, that a finding of actual or potential harm must be supported by evidence rather than stereotypes or personal bias.¹¹⁶ The court found no evidence that the children had been harmed by the relationship.¹¹⁷ Therefore, the restrictions were removed because they were not in the children’s best interests.¹¹⁸

Pleasant and *Boswell* illustrate the importance of contact between non-custodial parents and their children. Although it is sometimes difficult for a child to adjust to a parent’s new relationship, the parent is still an important part of the child’s life. If it isn’t too late, I would urge you to reconsider your decision to restrict visitation in this case. You should ask yourself whether the mother’s relationship with another woman really endangers the welfare of the

107. *Id.*

108. *Id.* at 635.

109. *Pleasant*, 628 N.E.2d at 640.

110. *Id.*

111. *Id.* at 635, 642. The court noted that the child appeared to have enjoyed the pride parade. *Id.* at 642.

112. *Boswell v. Boswell*, 721 A.2d 662 (Md. 1998).

113. *Id.* at 665. In addition to the father’s partner, the visitation order also excluded “anyone having homosexual tendencies . . . or . . . anyone that the father may be living with in a non-marital relationship.” *Id.*

114. *Id.* at 672.

115. *Id.*

116. *Id.* at 678.

117. *Boswell*, 721 A.2d at 678-79.

118. *Id.* at 679.

children. On taking a second look, you may see that the best interests of the children are better served by a more liberal visitation schedule.

Very truly yours,
Miss Susan

Dear Miss Susan,

I'm up for re-election next month, so I'm anxious not to offend any gay or lesbian voters. Unfortunately, I get really flustered when a homosexual appears in my courtroom. Are they called "lesbians" or "homosexual women"? And what exactly is a "lipstick lesbian"? Is the word "gay" an adjective or a noun? When is it appropriate to say "queer"? When they show up in pairs, should I assume that they are paramours? Please help! The election is coming up very soon!

Love,
Judge Candidate

Dear Judge Candidate,

Good luck in the upcoming election! I admire your willingness to learn how to respectfully address your gay and lesbian constituents. I think you'll find that the terminology is not so difficult. As with many other endeavors, ordinary common sense will serve you well. For example, I'm sure you already know that the word "homo" is unconscionably rude and should not be used in polite company.

Of course, a sterling vocabulary is not achieved simply by eliminating colorful middle-school taunts from everyday usage, so I am happy to answer your questions about proper word choice. The terms "gay" and "lesbian" are generally inoffensive and can be correctly used as either nouns or adjectives.¹¹⁹ The phrase "homosexual woman" is new to me, but it sounds awkward and overly clinical, so I would advise you to avoid it. A "lipstick lesbian" is just a very feminine lesbian. This is a slang term, so you should probably avoid it as well.

The word "queer" is more problematic. In the past, the word "queer" was a mean-spirited euphemism for "homosexual."¹²⁰ For older gays and lesbians,

119. See Amy Miller, *Professionalism and Sexual Orientation*, NEB. LAW., Jan. 2004, at 8.

120. *Id.*

the word has strong negative connotations.¹²¹ However, the word has been reclaimed, and it is not uncommon for younger gays and lesbians to self-identify as “queer.”¹²² My own rule of thumb is that I don’t use the word “queer” when speaking to anyone who is older than me. As a judge, though, you may wish to be more cautious and avoid the word altogether.¹²³

When you see gays and lesbians in groups of two, you should not assume that they have an intimate relationship. They may just be friends. I’m sure you have friends of the opposite sex with whom you are not intimate. Gays and lesbians are not so different.

If it turns out that they are a couple, I would caution you to avoid the word “paramour.” A paramour is an illicit lover.¹²⁴ The word “illicit” means unlawful,¹²⁵ and there is nothing unlawful about gay or lesbian relationships.¹²⁶ Instead, I would recommend that you say “life partner” or “companion.”

I hope that these suggestions on word choice will help you feel more comfortable when you see gays and lesbians in your courtroom. Remember that common sense and good manners will assist you in nearly every situation you encounter. Again, I wish you well in the upcoming election.

Very truly yours,
Miss Susan

Dear Reader,

I hope that after reading the foregoing letters you will have gained some insight into the world and gay and lesbian jurisprudence. Perhaps you have realized that gays and lesbians are really not so different from any other person who finds his or her way into your courtroom. More to the point, perhaps you noticed that the legal standard applied in any given case does not vary with the sexual orientation of the parties involved in the litigation.

If nothing else, I hope you may learn from the mistakes of other judges who were less than kind to the gay and lesbian individuals who appeared before them. If you can remember my personal motto—that good manners and good law often coincide—I’m sure your opinions will always be just and well-reasoned.

Very truly yours,

121. *See id.*

122. *Id.*

123. Ms. Miller also recommends avoiding the word. *Id.*

124. OXFORD ENCYCLOPEDIA ENGLISH DICTIONARY 1055 (1991).

125. *Id.* at 709.

126. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

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Miss Susan