

REPORT OF THE WORKING GROUP ON THE ROLE OF SEX AND SEXUALITY*

I. INTRODUCTION

The Working Group on Sex and Sexuality considered four overlapping but distinct aspects of a child client's identity, expression and behavior—gender, sexual orientation, gender identity, and sexual conduct. The Group was specifically focused on the lawyer's obligation:

- to understand these aspects of human identity and their potential significance to the lawyer-client relationship and legal proceedings;
- to be alert to discriminatory treatment of children on these grounds; and
- to ensure that every child client has equal access to services and benefits and receives fair and respectful treatment.

For the purposes of this report, the term “gender” refers to whether a child is male or female. Gender bias often prompts disparate treatment of girls in child welfare, delinquency, mental health, special education and other systems of care. These systems often respond to girls by imposing narrowly proscribed ideas about appropriate female behavior and activities. For example, the mental health system might diagnose a girl with conduct disorder for “aggressive” behavior that would be seen as normal for a boy; an educational program might offer girls vocational training only in low-paid, traditionally female occupations; a probation officer might recommend that the court detain a girl for a minor offense where a boy in similar circumstances would be released, because she is seen as “promiscuous.” Gender bias may also fuel discriminatory treatment of boys, often based on mistaken assumptions that boys are inherently aggressive and impulsive. For example, a probation officer might automatically treat a boy as a ‘perpetrator’ in an incident of sexual conduct between two children. The combination of racial bias and gender bias is particularly powerful, routinely leading to disproportionate punishment of African American and Latino boys based solely on their race and gender.

The term “sexual orientation” refers to whether a child is, or is perceived to be, heterosexual, gay, lesbian, or bisexual. Several reports have documented that children and youth in schools, child welfare, and juvenile justice systems routinely experience harassment, discrimination, and violence based on their actual or perceived sexual orientation.¹ For example, a group home might reject a child because he identifies as gay; school officials might ignore peer violence or harassment directed at a child perceived to be a lesbian; caregivers

* This Working Group consisted of the following members: Martha Matthews (Report Preparer and Group Moderator), Shannan Wilber (Report Preparer and Group Reporter), Alice Bussiere, Barbara Fedders, Dan Filler, Nesheba Kittling, Jody Marksamer, Laurie Schaffner, Andy Shookhoff, Kim Taylor-Thompson, and Joanne Thompson.

¹ See, e.g., Lambda Legal Defense and Education Fund, *LGBTQ Youth Risk Data*, <http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=1662> (last visited May 15, 2006).

might compel a child to participate in “reparative therapy,” treating a child’s sexual orientation as a problem to be corrected. Recent research demonstrates that children are aware of their own sexual orientation at increasingly younger ages.² Sexual orientation biases harm even young children whose sexual orientation is unknown. A young child placed with foster parents who openly express bias against gay people learns at an early age to equate being different with inferiority.

The term “gender identity” refers to a child’s internal, deeply felt sense of being male, female, or something other or in between. The term “transgender” refers to youth whose gender identity differs from their biological sex or the sex they were assigned at birth.³ Whether or not they identify as transgender, children and youth may suffer discrimination when their appearance or behavior does not conform to societal norms of masculinity and femininity. For example, a foster parent might disparage a male child who wants to study ballet; a group home might refuse to allow a transgender youth who identifies as female to wear feminine clothing; or a juvenile delinquency judge might impose a harsher disposition on a girl because she has a masculine appearance. Residential institutions, educational programs and other services that operate according to strict gender segregation pose particularly difficult challenges to transgender or gender non-conforming youth.

The term “sexual conduct” refers to all forms of sexual behavior (from kissing to sexual intercourse), and is distinct from gender, sexual orientation or gender identity. Government agencies and systems of care have a legitimate interest in preventing children and youth from engaging in unsafe and otherwise harmful sexual conduct. However, these systems often pathologize or criminalize developmentally typical sexual behavior, and react more punitively to sexual conduct by children in state custody than reasonable parents would react to the same conduct by their own children. For example, a child welfare caseworker might label a young child a “sexual predator” because of an incident of sexual touching with another child of similar age; or a group home might punish children for age-appropriate displays of affection such as holding hands and kissing. Public systems may also react more punitively to sexual conduct between youth of the same gender than they would react to heterosexual sexual conduct. For example, juvenile prosecutors may file statutory rape charges against the older of two boys who engage in consensual sex, while declining to prosecute opposite-sex couples in similar circumstances. In addition, public systems may criminalize sexually active youth who are, in fact, victims of adult exploitation. Thus, young women who are being exploited in the commercial sex trade are often arrested for prostitution. Finally, public systems may illegally interfere with a young person’s access to reproductive health services—again as a means of controlling or punishing consensual sexual conduct.

² Caitlin Ryan, Presentation of Research at Child Welfare League of America National Conference, Preconference Institutes (March 8, 2005) (program available at <http://www.cwla.org/conferences/2005NATIONAL.pdf>).

³ The term “LGBT” (lesbian, gay, bisexual and transgender) is used as an umbrella term for youth whose sexual orientation and/or gender identity differs from that of the majority.

A youth's identity and experiences with respect to gender, sexual orientation, gender identity and sexual conduct are closely interrelated, and they all intersect with race, ethnicity and culture. None of these aspects of human identity can be viewed in isolation. Public systems may react very differently to a white middle-class gay youth than to a low-income African American or immigrant gay youth. Because of the uniquely influential role of race in our culture, and particularly in public systems serving children and their families, the Working Group expressly addresses race in many of our recommendations.

The Working Group began with the premise that lawyers for children should provide nondiscriminatory and culturally competent⁴ representation of their clients with regard to each child's gender, sexual orientation, and gender identity, and should strive to ensure that the placements and services their clients receive from public systems of care are also nondiscriminatory and culturally competent. The Working Group recommends that lawyers take account of these issues in several ways. First, through professional training and reflective, self-critical practice, lawyers should strive to ensure that their own internal biases do not compromise the quality and effectiveness of their advocacy on behalf of child clients. Second, lawyers should be alert to bias or discrimination based on the gender, sexual orientation, gender identity or sexual conduct of their child clients, and should seek to remedy such inequities on a case-by-case basis. Third, lawyers should advocate for law and policy changes to promote systems of care that are fair, safe, and respectful of the human dignity of each child.

II. PRACTICE RECOMMENDATIONS

A. *Lawyer-Client Relationship*

Recommendation One: Lawyers should approach each client with an open mind, and avoid making assumptions based on actual or perceived race, gender, sexual orientation, or gender identity.

Commentary: Lawyers should maintain an attitude of respect and openness toward their clients, and guard against the tendency to make assumptions based on stereotypes.

Recommendation Two: Lawyers should be aware of their own biases based on differences from their clients, and lack of familiarity with clients' identity and situation. Lawyers should also avoid over-identifying with clients.

Commentary: Biases and assumptions based upon cultural attributes and differences are often unconscious. Lawyers should be mindful of the ways in which their own cultural identity and background may influence their perceptions and point of view, and the ways in which it may differ from that of their clients. Similarly, lawyers who share cultural attributes with their clients

⁴ In this context, the term "culturally competent" means responding effectively and respectfully to children of all cultures, languages, social and economic classes, races, ethnic backgrounds, religions, and other diversity factors (including gender, sexual orientation, and gender identity) in a manner that recognizes, affirms, and values the worth of individuals, families, and communities and protects and preserves the dignity of each. NASW NATIONAL COMMITTEE ON RACIAL AND ETHNIC DIVERSITY, NATIONAL ASSOCIATION OF SOCIAL WORKERS, NASW STANDARDS FOR CULTURAL COMPETENCE IN SOCIAL WORK PRACTICE (2001).

Spring 2006]

GROUP REPORT: SEX AND SEXUALITY

645

should not confuse their own experiences and perceptions with those of their clients.

Recommendation Three: Lawyers should find verbal and nonverbal ways to ensure that clients feel it is safe to discuss sex, sexual orientation or gender issues with them when appropriate, and should use language that does not contain implicit assumptions regarding the client's sexual orientation, gender identity, or sexual conduct.

Commentary: Information concerning the sexual conduct, gender identity or sexual orientation of the client may or may not be relevant to the legal proceeding or essential to the lawyer's understanding of the case. In either case, this type of information is sensitive and uniquely personal. To the extent practicable, clients should control the timing and scope of their disclosure of sensitive personal information. Lawyers should create an atmosphere of trust and respect to help clients feel comfortable discussing these issues. One concrete method of cultivating respect and trust is to use language that is inclusive and avoids presumptions. Thus, lawyers should not ask female clients if they have a boyfriend, or if they use birth control; instead, questions should be worded so they do not build in assumptions about sexual orientation and sexual conduct. (For example: "Are you in a relationship?" "Are you sexually active?" "Are you worried about getting pregnant?").

Recommendation Four: Lawyers should be aware of their discomfort discussing sex, sexual orientation, and/or gender identity, and develop the ability to discuss these topics with clients in a candid and respectful manner, or if necessary refer clients to health or social work professionals.

Commentary: Lawyers who convey their discomfort discussing these topics may unintentionally make it difficult for their clients to disclose information that could be important to the case. To improve their ability to represent all clients zealously, lawyers should develop the ability to engage in open and respectful discussion of issues related to sexual conduct, sexual orientation and gender identity, e.g. through professional training and/or peer mentoring.

Recommendation Five: Lawyers should develop the ability to respond appropriately and supportively to clients' disclosures of past sexual abuse and/or trauma.

Commentary: A disturbingly high percentage of juvenile clients—particularly girls—report being victims of sexual abuse, exploitation and trauma. The client's disclosure of these incidents may be shocking and deeply upsetting. Lawyers may find these disclosures difficult to absorb, and may wish to avoid these discussions. However, the lawyer's full understanding of the nature of the client's victimization is often crucial to her or his understanding the case. Thus, lawyers should seek the training and support necessary to develop the skills to listen and respond sensitively to every aspect of a client's story.

Recommendation Six: Lawyers should respect their clients' gender identity.

Commentary: All persons have a gender identity, which may or may not correspond to their biological sex or the sex they were assigned at birth, and may or may not conform to societal expectations regarding masculinity and femininity. All persons express this identity through their appearance and

behavior. Lawyers should respect the gender identity of their clients by using the name chosen by the youth and the pronoun that corresponds with his or her gender identity. They should not insist on referring to a client by his or her 'legal' name or pronoun if this conflicts with the client's self-identification. It is not always possible to identify clients' gender by their name or appearance; lawyers may sometimes make mistakes about clients' gender when first meeting them. When lawyers make this type of mistake, they should respectfully acknowledge the error and try not to repeat it.

Recommendation Seven: Lawyers should protect the confidentiality of information concerning a client's sexual orientation, gender identity or sexual conduct, and should not disclose the information without the client's express consent. When disclosure might advance the client's interests, lawyers should consult with the client about the benefits and risks of disclosure.

Commentary: Like all client communications, a youth's disclosure to her attorney of information concerning his or her sexual orientation, gender identity or sexual conduct is protected by the attorney-client privilege. Thus, the attorney may not be compelled to disclose the information without the client's consent. However, in some circumstances, it may be in the client's interest to disclose the information. For example, it may be important for a social worker or probation officer to understand that the client has experienced conflict with his or her family because of the client's sexual orientation. This information may help to assess the potential for family reconciliation, or to understand the client's behavior or adjustment. The lawyer should work closely with the client to determine whether and to whom such a disclosure should be made.

B. Individual Client Representation

Recommendation One: Lawyers should challenge excessive or punitive juvenile court intervention based upon consensual sexual conduct, and examine whether such intervention may be disproportionate or biased because of the client's gender, sexual orientation and/or race.

Commentary: In most jurisdictions, consensual sexual conduct is unlawful if one or both of the participants are minors. However, the decision to prosecute is discretionary, and prosecutors often decline to pursue charges if the sexual conduct between minors is truly entered into voluntarily by both participants. When prosecutors pursue charges in these cases, juvenile defenders should be alert to differential treatment based upon the sexual orientation, gender or race of the youth involved. Lawyers should challenge discriminatory application of the law on these grounds.

Recommendation Two: Lawyers should oppose statements or practices by courts and agencies that reflect assumptions that a youth is sexually active because of the youth's gender, sexual orientation or race.

Commentary: Court officers and agency staff may make assumptions about the sexual activity of young people, particularly gay youth and African American girls, and impose overly restrictive limitations on young people whom they assume are engaging in sexual conduct. Often, these restrictions have no relationship to the basis for the initial juvenile court intervention. For example, group homes may have policies forbidding gay youth from having a

roommate, based upon the assumption that the youth will attempt to initiate sexual activity with any youth who shares the room.

Recommendation Three: Lawyers should oppose the introduction of evidence of a client's sexual orientation or sexual conduct when it is not relevant to the legal matter or when it is introduced for the purpose of penalizing the youth.

Commentary: It is unethical and prejudicial for a prosecutor or agency counsel to seek to influence the outcome of juvenile court proceedings by introducing evidence that a youth is gay or lesbian, or has engaged in sexual conduct, where these matters are not related to the court proceedings.

Recommendation Four: Lawyers should be alert to collateral consequences—immigration consequences, sex offender registration requirements, etc.—that may result from a decision to plead guilty to a sex offense or from a youth being labeled as a 'sex offender' in child welfare, mental health or other non-criminal systems.

Commentary: Youth may be unaware that a guilty or *nolo contendere* plea to an offense defined by state law as a 'sex crime' may have life-long negative consequences, including registration requirements, being barred from employment or volunteer work in jobs involving children, and being denied legal residency or citizenship status. Juvenile public defenders should ensure that clients are fully informed of the potential consequences before deciding to enter a plea. Moreover, even in the noncriminal context of child welfare and mental health systems, there may be serious and long-term consequences for children who are labeled in court or agency records as "sexual predators," "sexually acting out," etc. Lawyers should challenge the factual basis for such designations, and guard against the labeling of clients based on unverified allegations or non-coercive conduct common among children of that age.

Recommendation Five: Lawyers should challenge gender and race bias in delinquency charging, adjudication and dispositions.

Commentary: Juvenile delinquency systems may impose more severe sanctions on girls, particularly girls of color, for fighting and other "aggressive" conduct that would not be taken as seriously if committed by a boy. Conversely, boys of color may be stereotyped as "dangerous" simply because of their gender and race, and receive more severe sanctions than white boys or girls, even for nonviolent offenses.⁵ Lawyers should be alert to these and other forms of gender/race bias in charging and sentencing decisions.

Recommendation Six: Lawyers should advocate for clients' right to express their sexual orientation and gender identity, and advocate for placements and services that are respectful of the clients' race, gender, sexual orientation and gender identity.

Commentary: LGBT youth in child welfare, juvenile justice and mental health systems often conceal their sexual orientation or gender identity from other youth in order to avoid harassment. Lawyers should advocate that, instead of pressuring LGBT youth to remain "closeted," public systems should

⁵ See, e.g., Building Blocks for Youth, *Resources for Disproportionate Minority Confinement/Overrepresentation of Youth of Color*, http://www.buildingblocksforyouth.org/issues/dmc/facts_mandate.html (last visited May 15, 2006).

take steps to educate all youth and staff about respect for diversity, prevent peer harassment, and ensure safety and fairness for all youth.

Recommendation Seven: Lawyers should monitor clients' placements to ensure that they are not subjected to harassment or discrimination based on race, gender, sexual orientation or gender identity. When directed by the client, lawyers should object to programs and services that reinforce stereotypes based on race, gender, or sexual orientation.

Commentary: As stated in the commentary to recommendation six, above, lawyers should advocate for placements and services that ensure safety and equal treatment for all youth regardless of sexual orientation and gender identity. Also, lawyers should challenge sex segregation in educational, vocational, and recreational programs, in cases where their clients agree that the segregation is unnecessary and harmful. Sex segregation in programming for youth often reinforces gender stereotypes and negatively impacts clients whose gender identity, skills or interests do not conform to 'masculine' or 'feminine' stereotypes.

Recommendation Eight: Lawyers should utilize empirical research, expert testimony and accepted professional standards to support nondiscriminatory treatment and services for LGBT youth.

Commentary: Despite their repudiation by the American Psychological Association and other professional organizations, "reparative therapy" and other biased and harmful interventions designed to "cure" LGBT youth are still practiced. Also, some religious groups regard LGBT youth as immoral or sinful, and religiously affiliated group homes and foster homes may attempt to change a youth's sexual orientation or gender identity. LGBT youth, like all other youth, may have genuine needs for therapy and mental health treatment, and may wish to participate in religious activities. Lawyers should, however, protect clients from being subjected to harmful and coercive attempts at changing a youth's sexual orientation or gender identity, under the guise of therapy, mental health treatment, or moral or spiritual guidance.

Recommendation Nine: Lawyers should recognize clients' need to maintain connections to their families and communities, and should work with clients to resolve, where possible, family or community rejection of the youth based on sexual orientation, sexual conduct, or perceived transgression of gender norms.

Commentary: LGBT youth, and youth who are sexually active, often experience conflict and rejection in their families of origin. Many families need time and support to come to terms with their children's sexual orientation, gender identity, or sexual conduct. Lawyers should recognize the importance to many clients—even those who have experienced abuse or rejection by family members—of attempting to overcome family rejection and reestablish positive connections with parents, siblings and extended family members.

III. RECOMMENDATIONS FOR CHANGES IN LAW AND POLICY

A. *Proposed Statutory Changes*

Recommendation One: Legislatures should adopt statutes providing that lawyers, including lawyers in child welfare, delinquency, and family cases, are not mandated reporters of child abuse.

COMMENTARY: As discussed in the commentary to Recommendations I.A. 3-5, *supra*, it is often critical to effective advocacy for lawyers to discuss sensitive topics concerning sexuality with child clients. Attorney-client confidentiality is crucial in building a relationship of safety, trust and mutual respect. Many clients will be reluctant to disclose crucial information—e.g. about past sexual abuse or trauma, current sexual activity, or parental abuse triggered by a client’s “coming out” as LGBT—if their lawyers are required to report such disclosures to the authorities regardless of their clients’ wishes. Providing a safe place for clients to discuss these difficult and traumatic experiences allows the lawyer to help the client consider available options, including reporting; but, consistent with the lawyer’s role, it leaves to the client the decision of choosing from available options.

Recommendation Two: Legislatures should adopt statutes providing that courts and agencies serving children and families are prohibited from discriminating based on race, gender, sexual orientation, and gender identity. Rules of professional conduct for lawyers and judges should prohibit discrimination based on race, gender, sexual orientation, and gender identity.

Commentary: Currently, many nondiscrimination statutes and codes of attorney and judicial ethics cover some forms of bias, such as race and gender, but do not explicitly prohibit discrimination based on sexual orientation or gender identity. Nondiscrimination laws and ethical rules should be amended to cover these additional forms of bias.

Recommendation Three: Legislatures should decriminalize prostitution by persons under eighteen, and ensure that criminal penalties are not applied to juvenile victims of domestic or international human trafficking.

Commentary: Wherever children are statutorily unable to consent to sexual conduct, children involved in sexual commerce should be considered victims of commercial sexual exploitation and not criminalized in the juvenile or criminal courts.

Recommendation Four: Legislatures should exclude persons under eighteen from sex offender registry and community notification laws.

Commentary: The juvenile court was founded on the premise that young people are uniquely worthy of society’s rehabilitative efforts. Being placed on a sex offender registry and subjected to community notification requirements robs a young person of his or her chance at living a productive, healthy life. Where there is no evidence that subjecting young people to sex offender registries and community notification increases public safety, this practice should cease. Also, recent research on adolescent brain development demonstrates that youth under eighteen have not fully matured in their cognitive, moral, and

intellectual development.⁶ Thus, they should not suffer life-long penalties for offenses committed as juveniles.

Recommendation Five: Legislatures should adopt statutes that permit persons under the age of eighteen to petition for relief under existing state domestic violence order of protection laws.

Commentary: Many state statutes providing for the issuance of civil orders of protection or ‘restraining orders’ either limit such relief to adults, or are ambiguous as to their applicability to persons under eighteen. Also, some statutes limit such relief to persons who are married or cohabiting, and do not include “dating violence.” Youth often experience violence in intimate relationships, and civil orders of protection can be an important tool in empowering youth to end abusive relationships and prevent future violence.

Recommendation Six: Legislatures should adopt statutes that permit youth in the custody of state agencies to access reproductive health services to the same extent as youth who are not in custody.

Commentary: Youth in juvenile justice, child welfare, and mental health systems have the same constitutional and statutory rights to access to contraception, pregnancy testing and counseling, and abortion as youth in the general population, and should not be deprived of these rights solely because they are in public systems of care.

B. Proposed Policy Advocacy

Recommendation One: Lawyers should challenge policies and practices that unnecessarily sever family ties and stigmatize mothers based on race and poverty.

Commentary: Child welfare systems often disproportionately impose coercive and punitive interventions, which may lead to termination of parental rights, on poor women of color. Lawyers should challenge child welfare system policies and practices that harm children by treating parents unfairly on the basis of their race, gender, and poverty, and unnecessarily deprive children of the opportunity to remain in, or reunify with, their birth families.

Recommendation Two: Lawyers should challenge policies and practices that stigmatize, exclude or discriminate against parents, family members and/or foster or adoptive parents based on sexual orientation or gender identity.

Commentary: All available studies demonstrate that children raised by loving and committed LGBT birth parents or relatives, foster parents, or adoptive parents experience the same positive outcomes as children raised in loving and committed heterosexual families. In recent years, gay and lesbian adults have become foster and adoptive parents in substantial numbers, significantly increasing the “pool” of available placements for children in the child welfare system. Discrimination against LGBT birth families and prospective foster and adoptive parents is harmful to children and youth.

Recommendation Three: Lawyers should advocate development of resources for families of LGBT youth to prevent out-of-home placement and facilitate safe reconciliation.

⁶ See, e.g., FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE (2005).

Spring 2006]

GROUP REPORT: SEX AND SEXUALITY

651

Commentary: As discussed in the commentary to Recommendation I.B.9, above, even youth who have experienced abuse or rejection by their families or origin may benefit from efforts to support families in coming to terms with a child's sexual orientation or gender identity. Individual counseling and parent education, family preservation programs, community resources such as support groups for parents of LGBT youth and inclusive faith communities may all be helpful in maintaining or restoring connections between LGBT youth and their families. Lawyers should resist the tendency to "write off" families of origin as a resource for LGBT youth, and explore the possibilities that families may reconcile with time and support.

Recommendation Five: Lawyers should advocate for placements and services for children and families that are respectful, nondiscriminatory and culturally competent with respect to race, gender, sexual orientation, and gender identity and expression.

Commentary: International standards set by the United Nations' Convention on the Rights of the Child state that all children have the right to be treated with dignity and respect. Lawyers should challenge placements and services the client experiences as disrespectful, harmful or unsafe.

Recommendation Six: Lawyers should advocate for "gender-specific" services only if the client wants such services and they do not perpetuate assumptions and stereotypes based upon gender, sexual orientation and gender identity and expression.

Commentary: Gender-specific services should encourage healthy attitudes, behaviors and lifestyles, should be culturally competent, and should be inclusive of LGBT youth. Gender-specific services should challenge, not perpetuate, gender and race stereotypes.

Recommendation Seven: Lawyers should oppose policies and practices that purport to protect the safety of LGBT youth solely by isolating them from other youth.

Commentary: Research on the experiences of LGBT youth in child welfare and juvenile systems reveal that they are often placed in isolation or 'special housing' units, prohibited from having roommates, and/or required to shower, dress, and even eat alone. LGBT youth need and deserve safety, but they should be able to live in safe environments without being isolated or segregated from other youth. Separating LGBT youth implies that there is something wrong with them. Moreover, all young people benefit from living in diverse environments. Lawyers should challenge isolation and disparate treatment of LGBT youth and advocate for policies and practices that ensure the safety and dignity of all youth in placement, discourage peer harassment and violence, and encourage all youth to treat each other with respect and dignity.

Recommendation Eight: Lawyers should oppose policies and practices that criminalize or pathologize developmentally typical or common adolescent sexual behavior.

Commentary: Adolescence is a complex stage of maturation in which achieving a sense of self—moral and sexual—is an important task. While there is a lack of societal consensus over what is normal or acceptable adolescent sexual behavior, it is still important to treat all youth with respect, dignity and fairness as they develop their sense of self, and begin to experience emotional

and sexual attraction to others. No legitimate state interest is served when public systems treat consensual sexual behavior that is common among adolescents as the basis for juvenile justice or mental health intervention.

Recommendation Nine: Lawyers should oppose the disproportionate application of status offense jurisdiction to girls. Lawyers should also oppose policies that permit the transfer of status offenders into the delinquency system for violation of probation conditions.

Commentary: “Status offenses” are conduct that is unlawful only because the offender is under eighteen. Truancy, runaway, and curfew laws are often disproportionately enforced against girls as a response to behavior that court actors perceive as promiscuous or incorrigible.⁷ Thus, girls disproportionately become involved in juvenile justice systems due to conduct that is not unlawful for an adult. In some jurisdictions, once they are placed on probation for status offenses, girls may be adjudicated delinquent for probation violations, and are thus criminalized without ever having actually committed a criminal offense. Lawyers should challenge this disproportionate and excessive use of status offense laws and seek creative alternatives to address the needs of girls who engage in behaviors such as truancy and running away.

Recommendation Ten: Lawyers should promote public health solutions to address juvenile prostitution, trafficking and other commercial sexual exploitation of youth, including prevention, education and harm reduction.

Commentary: As stated in the commentary to Recommendation III.A.3, *supra*, it is irrational and unjust to apply criminal sanctions for prostitution to youth who are under the statutory age of consent. Instead, the commercial sexual exploitation of youth should be addressed through public health strategies, including educating youth about the risks of prostitution and other unsafe sexual conduct, providing shelters and other services designed to prevent juvenile prostitution, and harm reduction interventions for youth engaged in prostitution such as providing educational materials, free and confidential STD testing, and information about shelters, support programs, job training and other resources for youth seeking to escape prostitution.

Recommendation Eleven: Lawyers should challenge policies and practices that unlawfully limit the access of youth in the custody of state agencies to reproductive health services.

Commentary: See Commentary to Recommendation III.A.6, *supra*.

Recommendation Twelve: Lawyers should advocate that youth, including youth of color and LGBT youth, participate in developing policies and practices affecting youth and their families.

Commentary: Organizations led by former foster youth and juvenile justice system youth, such as California Youth Connection and the Massachusetts Families for Kids’ Speak Out Team, have been effective in advocating for legislation and policy changes informed by the unique perspective of persons who have actually experienced the systems of care they are seeking to improve. Lawyers should promote and encourage youth participation in legislative advocacy and policymaking concerning child welfare, juvenile justice, education,

⁷ AMERICAN BAR ASSOCIATION & NATIONAL BAR ASSOCIATION, JUSTICE BY GENDER: THE LACK OF APPROPRIATE PREVENTION, DIVERSION AND TREATMENT ALTERNATIVES FOR GIRLS IN THE JUSTICE SYSTEM 19 (2001).

Spring 2006]

GROUP REPORT: SEX AND SEXUALITY

653

mental health, and other public systems affecting the lives of children and youth.

IV. LEGAL EDUCATION AND TRAINING

In these recommendations, the term ‘lawyer’ refers to children’s counsel, parents’ counsel, agency counsel, prosecutors, judges and hearing officers.

Recommendation One: Lawyers should obtain cultural competence training that includes race, gender, sexual orientation, and gender identity issues.

Commentary: Stereotypical assumptions and biases concerning race, gender, and sexuality may interfere with lawyers’ abilities to advocate for their clients. Lawyers should seek out, and professional organizations should make available, professional education to help lawyers learn to recognize and overcome assumptions and biases, and develop a respectful and nuanced understanding of the roles of race, gender, sexual orientation and gender identity in clients’ lives and their potential relevance to legal advocacy in clients’ cases.

Recommendation Two: Lawyers should receive training about child development, including sexual identity development, and the range of developmentally typical sexual behaviors.

Commentary: Recent advances in scientific research provide new insights into adolescent moral, cognitive, physical, and sexual development. For example, adolescents’ brains differ from adults’ in specific ways. Lawyers should seek, and professional organizations should provide, opportunities to learn about recent advances in the study of child and adolescent development, and the implications of new research for legal advocacy.

Recommendation Three: Lawyers should learn to communicate with clients, in a developmentally appropriate manner, about sexual orientation, gender identity and sexual behavior. This should include the ability to respond appropriately to disclosures of sexual assault and abuse.

Commentary: See Commentary to Recommendations II.A.3-5, *supra*.

Recommendation Four: Lawyers should receive training on addressing families’ adverse reactions to a child’s sexual orientation, gender identity, or sexual conduct.

Commentary: See Commentary to Recommendation II.B.9, *supra*.

Recommendation Five: Lawyers should be familiar with community-based programs and resources, and learn to assess whether such programs provide inclusive and nondiscriminatory services with respect to race, gender, sexual orientation and gender identity.

Commentary: See Commentary to Recommendations II.B. 6-8, *supra*.

Recommendation Six: Lawyers involved in individual representation of children should know about the range of remedies for individual and systemic civil rights violations.

Commentary: When a client has been harmed by discrimination by a public agency based on gender, sexual orientation, or gender identity, including an agency’s failure to prevent peer harassment or violence, the lawyer has an ethical obligation to inform the client of all available causes of action and available referrals for relief.

Recommendation Seven: Lawyers should receive training on how to ethically resolve conflicts between their clients' wishes and their personal views about sexual orientation, gender identity, and sexual activity, and to recognize when their personal views may make it necessary for them to withdraw from representation.

Commentary: Some lawyers may have personal or religious views about sexual orientation and/or gender identity that make it difficult to provide effective advocacy for an LGBT client. Conversely, lawyers who support the rights of LGBT persons may find it difficult to advocate for a juvenile accused of "gay bashing," or a client who wants to undergo "reparative therapy" to change his sexual orientation. Lawyers should seek professional training and peer mentoring to recognize and overcome personal biases, but should also recognize situations where their personal views may interfere with effective advocacy to the extent that they are ethically obligated to withdraw from the representation.

Recommendation Eight: Educational materials designed for attorney trainings addressing diversity or bias should include sexual orientation and gender identity.

Commentary: Many "diversity" trainings offered to lawyers at professional conferences and continuing legal education activities address gender, race, and socioeconomic status, but omit any mention of sexual orientation and gender identity. Since these are aspects of human identity that often evoke personal biases and stereotypes, and because many lawyers are uncomfortable discussing with clients, these topics should be included in diversity trainings.

V. RECOMMENDATIONS FOR FURTHER STUDY

Recommendation One: Judges and court administrators should support studies to identify and determine the extent of any disparate treatment of children and families based on race, gender, gender identity, and sexual orientation. These studies should focus on both courtroom conduct and the decision-making in cases.

Commentary: Judges and court administrators should support confidential and anonymous studies, which comply with federal human subjects protection guidelines, to identify areas of disparate treatment and improve the fairness of judicial decision making in the child welfare and juvenile justice legal systems.

Recommendation Two: Courts and agencies should collect and report data that can identify and determine the extent of disparate treatment of children and families based on race and gender.

Commentary: Currently, there are no federal or state systematic data management systems in place to track disaggregated data on children and families involved in the child welfare, juvenile justice, mental health and other public systems on variables such as race, age, gender, etc. Without these data, it is impossible to make statistically valid claims of bias or discrimination—or to ameliorate such problems.

Recommendation Three: State and national bar associations and other professional groups should study and make recommendations on whether non-

Spring 2006]

GROUP REPORT: SEX AND SEXUALITY

655

lawyer professionals (such as psychologists and social worker) working with lawyers on child welfare, delinquency, family law, and other cases involving children should or should not be mandated reporters of child abuse.

Commentary: See Recommendation III.A.1, *supra*. The Working Group did not discuss whether non-lawyer professionals working with lawyers should also be excluded from mandatory reporting laws, to further ensure that child clients are able to discuss sensitive topics concerning sexuality without the fear that their disclosures will be reported to the authorities against their wishes. This is an important topic for further study and discussion, however, because many organizations that represent children in child welfare, juvenile justice and other public system employ non-lawyer professionals (such as social workers) to visit and interview clients, consult with lawyers on placements and services, etc.