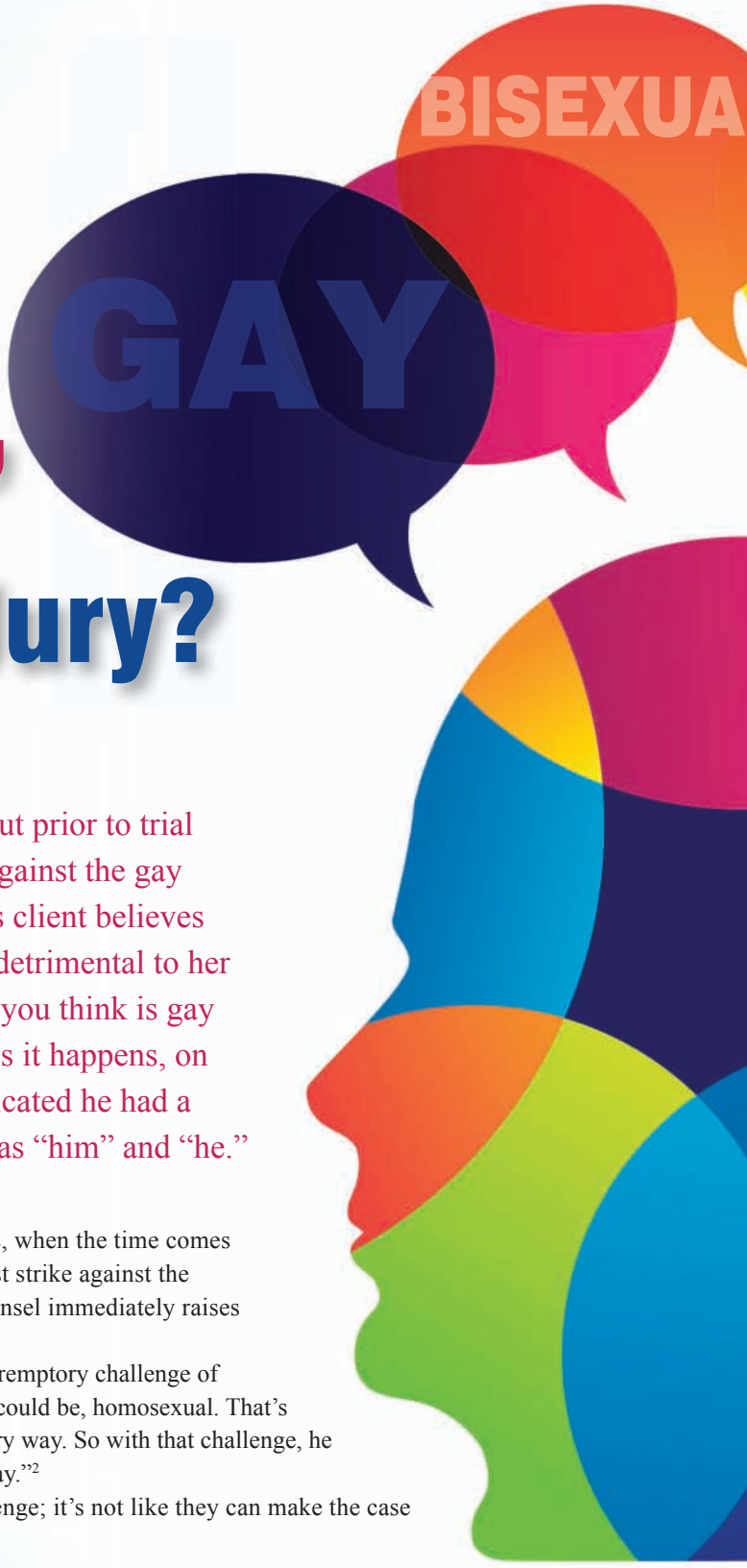
Can You Remove "The Gay Person" From The Jury?



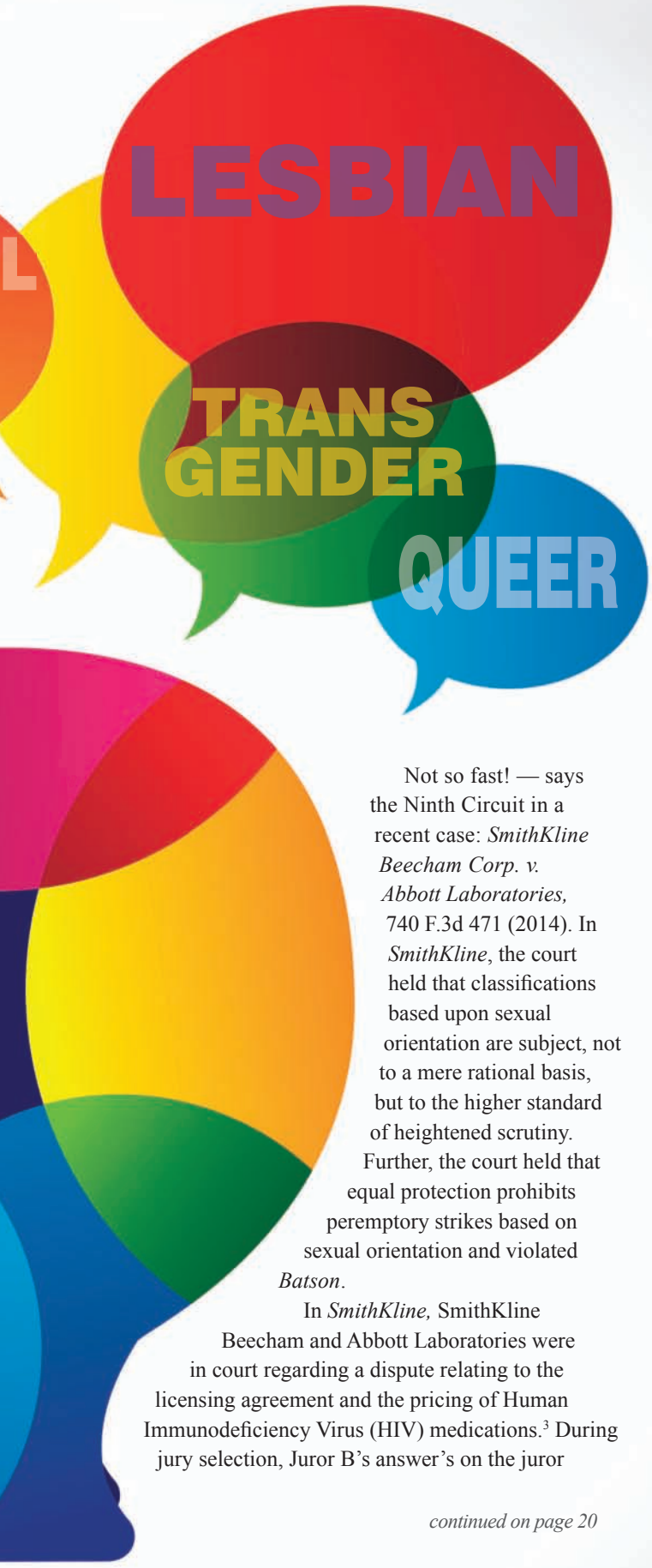
BY KEVIN KAMPSCHROR, ESQ.

Imagine this hypothetical: You find out prior to trial that your client is highly prejudiced against the gay community. For whatever reason, this client believes the presence of a gay juror would be detrimental to her case, and asks you to remove anyone you think is gay from the jury pool during voir dire. As it happens, on a jury questionnaire, a male juror indicated he had a "partner" and referred to that partner as "him" and "he."

In accordance with your client's instructions, when the time comes for peremptory challenges, you exercise your first strike against the juror whom you believe to be gay. Opposing counsel immediately raises a *Batson*[1] challenge, and argues:

"Okay, the first challenge, your honor, is a peremptory challenge of someone who is, who I think is, or appears to be, could be, homosexual. That's use of the peremptory challenge in a discriminatory way. So with that challenge, he wants to exclude from the pool anybody who is gay."[2]

You tell the court that this is your first challenge; it's not like they can make the case that you are excluding gay people as a group.



Not so fast! — says the Ninth Circuit in a recent case: *SmithKline Beecham Corp. v. Abbott Laboratories,* 740 F.3d 471 (2014). In *SmithKline*, the court held that classifications based upon sexual orientation are subject, not to a mere rational basis, but to the higher standard of heightened scrutiny. Further, the court held that equal protection prohibits peremptory strikes based on sexual orientation and violated *Batson*.

In *SmithKline,* SmithKline Beecham and Abbott Laboratories were in court regarding a dispute relating to the licensing agreement and the pricing of Human Immunodeficiency Virus (HIV) medications.[3] During jury selection, Juror B's answer's on the juror

continued on page 20

continued from page 19

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questionnaire revealed that he was gay (he used the masculine pronoun "he" when referring to his partner). Juror B also indicated that he took an Abbot or GSK medication and also had friends with HIV.

This case received a significant amount of attention in Nevada when it was decided because, at the same time, *Sevcik v. Sandoval,* a case regarding marriage equality, was before the Ninth Circuit and, subsequent to the *SmithKline* decision, then-Attorney General Catherine Cortez-Masto declared that Nevada's arguments opposing same-sex marriage were no longer applicable because of the *SmithKline* decision. Thereafter, same-sex marriage began in Nevada.

Despite that, it is important to analyze the impact of the *SmithKline* decision outside the realm of marriage equality, and to recognize the implications of the case on other forms of discrimination against the gay community. Although *SmithKline* did indeed pave the way for marriage equality in Nevada (which continues today), the decision sent a much more bold and robust message that extends well beyond marriage equality. The decision signals that sexual orientation is finally going to receive the deference that race or gender do under the law.

In 2013, the landmark *United States v. Windsor* [4] case was decided at the U.S. Supreme Court, and the case was cited throughout the *SmithKline* decision. However, *Windsor* was decided in the context of estate planning, and the court did not expressly declare what level of scrutiny it applied to the equal protection claim made in that case. *SmithKline* addressed this directly: gays and lesbians have been "systematically excluded from the most important institutions of self-governance" – and have experienced significant discrimination – and allowing a juror to be removed because they self-identify as gay continues "this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals."[5] The court noted that the Constitution does not allow state action to have the effect of "'denoting inferiority' upon a class of people."[6]

SmithKline addressed some very central issues, as well as the foundation of what it means and looks like, to discriminate against someone because of their sexual orientation. In *SmithKline*, because the defendant struck the only juror who identified as gay, and because the subject matter of the litigation was HIV medications that significantly involved gay men, the plaintiff had established a prima facie case of intentional discrimination under *Batson*.[7] The Ninth Circuit pointed out that, prior to this case, it had held that "when jury pools contain little racial or ethnic diversity, a strike of the lone member of the minority group is a 'relevant consideration' in determining whether a prima facie case has been established."[8] The court did make a connection between the sexual orientation of the juror and the subject of the litigation. Therefore, given that the subject of the litigation is an issue of consequence to the gay community, removing the only gay juror in the form of an impermissible strike based on sexual orientation increases substantially.[9] The court also boldly dismissed alternative reasons for striking the juror. "Ordinarily, it does not matter what reasons the striking party *might* have offered because "[w]hat matters is the *real* reasons [the juror was] stricken."[10]

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SmithKline also has public servant applications. If a party were allowed to remove a juror based solely on sexual orientation, it would potentially remove an entire section of society that could otherwise serve as competent, fair jurors. The Ninth Circuit reasoned that striking jurors based on sexual orientation would perpetuate a false, negative narrative that members of the gay community are incompetent — based only on their sexual orientation — to take an oath and serve as fair and impartial jurors.

Your client is not happy when you explain the *SmithKline* holding to her. She feels she should not have to have gay people on the jury and is wondering if she can make a complaint to the judge or the governor. You explain that it does not work like that. NL

1. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct.1712 (1986)
2. *SmithKline Beecham Corp v. Abbott Laboratories, 740 F.3d 471 (2014).*
3. *Id.*
4. *U.S. v. Windsor*, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013).
5. *SmithKline Beecham Corp.*, 740 F.3d at 485.
6. *Brown v. Board of Education*, 347 U.S. 483, 75 S.Ct. 686 (1954).
7. *SmithKline Beecham Corp., 740 F.3d at 476-77.*
8. *Id.* at 476 quoting *Crittenden v. Ayers*, 624 F.3d 943, 955 (9th Cir. 2010).
9. *Id.* at 476.
10. *Id.* at 479 quoting *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004) (emphasis in original).

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