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## **Sexual Orientation and Gender identity Discrimination: Practical Advice to Protect Against and Remedy LGBTQ Discrimination While Complying With Relevant Law**

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**Presented by:**  
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Equal Employment Opportunity

**Sexual Orientation and Gender  
identity Discrimination: Practical  
Advice to Protect Against and  
Remedy LGBTQ Discrimination While  
Complying With Relevant Law**

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**Top Compliance Traps**

1. Addressing discrimination is simple: Just treat everyone equally and don't be mean.
2. Where do I begin? The law seems to be all over the place!
3. Being proactive sounds great but I am already overwhelmed! If someone complains about harassment, we will call our attorney and deal with it then.
4. Thanks, but... we have an accepting community / we do not have many LGBTQ people around so this is not an issue for us.

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**What We'll Cover...**

1. The "Hot Button" Issues
  - Why compliance is so difficult
2. Overview of the Law
  - Where we are now and where we could be head
3. Compliance Checklist
  - Specific Steps you can take to comply with the law
4. What Do I Do Now?
  - An action plan you can start now

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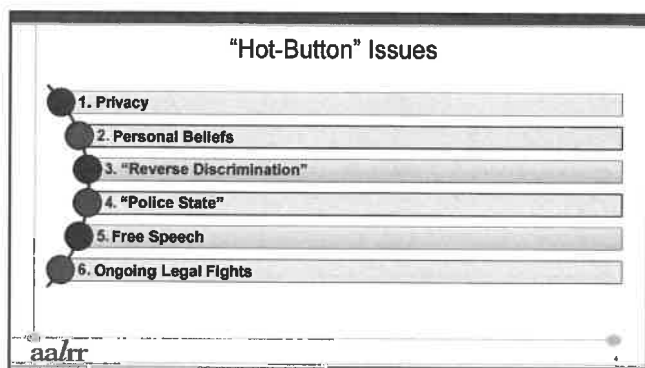
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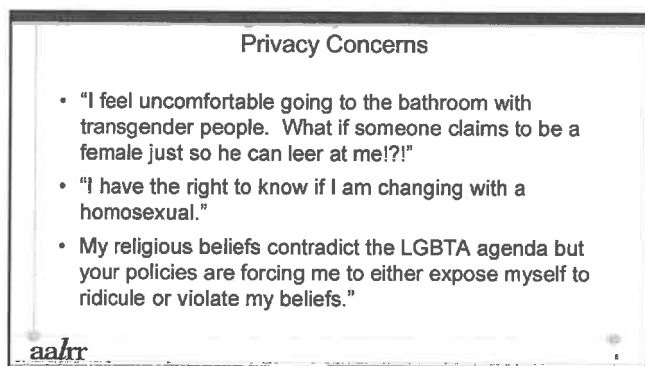
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**Personal Beliefs**

- "I understand the law regarding LGBTQ rights but participating in any event that promotes the LGBTQ agenda offends my beliefs."
- "I am fine with your lifestyle but it seeing a man in a tight skirt is detracting me so can you tone it down?"
- "I believe transgenderism is a sickness and making seem okay is harming society as well as confused individuals."

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**"Reverse Discrimination"**

- "I am okay with gay people but Bruce keeps asking me out. He is harassing me!
- "John loudly discussing his sex life with his boyfriend is making me uncomfortable."
- "I have a religious right and obligation to stand up against the sin of homosexuality."

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**"Police State"**

- "Are you going to investigate me every time I make a joke or say something about gay people or 'transgenders'?"
- "My friend and I call each other 'fag' all the time. We think its funny so what is the harm?"
- "I told Kate that she throws like a dude as a compliment!"

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### "Free Speech"

- "I am going to where a shirt with a bible passage proving that homosexuality is a sin and you cannot stop me because free speech!"
- "I believe there are only two genders and have the right to express my beliefs as long as I am not threatening someone."
- "I can post whatever I want on my Facebook page when I am at home."

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### "Ongoing Legal Fights"

- "I know what the law says but there are cases happening right now that claim this law is unconstitutional."
- The Trump Administration says that anti-discrimination law no longer applies to transgender people."
- "California law violates the United States Constitution!"

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Where do I begin? The law seems to be all over the place!

### Main Points

- California law explicitly protects students and workers against discrimination or harassment on the basis of gender identity, sexual orientation, and gender expression.
- Thus, debates about whether federal law provides such protections are only indirectly relevant in California.

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Nondiscrimination

**California: Education Code Section 220**

No person shall be subjected to discrimination on the basis of disability, gender, **gender identity, gender expression**, nationality, race or ethnicity, religion, **sexual orientation**, or ...immigration status, in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid.

Similar language in Fair Employment and Housing Act applies to any employer with 5+ employees, except a religious association or corporation not organized for private profit.

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California Law: Transgender Students

**"Equity in Higher Education Act"**

California Code of Education § 66250 *et seq.*

(Amended by California Senate Bill 777 (2007) and Assembly Bill 887 (2011))

- Effective January 2008 – Expanded prohibition against discrimination in "any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid" to include discrimination on the bases of gender, gender identity, and gender expression. (Cal. Ed. Code § 66270)
- Effective January 2012 – Amended definition of "gender" to include a person's sex, as well as a person's gender identity and gender expression, and defined "gender expression" as meaning one's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth. (Cal. Ed. Code § 66260.7)

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The Compliance Checklist

1. Create Supportive Environment
2. Address Harassment and Bullying
3. Prevent Discrimination
4. Establish Complaint Procedures
5. Develop Trainings
6. Implement Gender Identity Policy

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**The Compliance Checklist**

- ☐ **Understand Key Terms**
  - Gender Identity
  - Gender Expression
  - Gender Stereotyping
- ☐ **Policy and Procedure**
  - Update Information
  - Circulate & Publicize
- ☐ **Poster Information**
  - DFEH Transgender Rights in the Workplace
  - Announce Prohibition of All Types of Discrimination

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**Creating a Supportive Environment**

Active  
Commitment

- Encourage and schedule discussions of what discrimination is, how it is prevented, and how to handle it
- Inform everyone where additional support and specific information can be obtained

Transition

- Transition period is not "all-or-nothing" and may not be linear
- Can be expressed in different ways, i.e. "non-binary"

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**The Compliance Checklist**

**Hostile Environment**

- ☐ Unwelcoming
- ☐ Interference
- ☐ Severe or Pervasive
- ☐ Subjective/Objective
- ☐ Direct or Indirect

**Examples**

- ☐ Violations Privacy
- ☐ Improper Pronouns
- ☐ Sex Stereotypes

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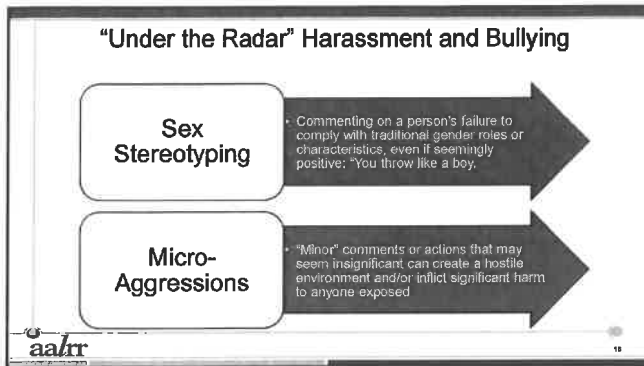
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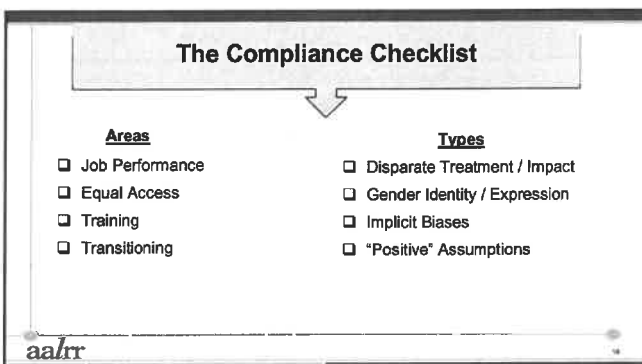
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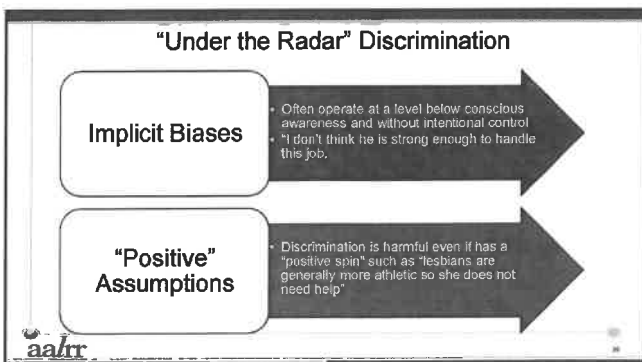
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**The Compliance Checklist**

- ☐ Confidentiality, to the Extent Possible
- ☐ Report to Neutral Party
- ☐ Timely Updates and Response
- ☐ Impartial Assessment
- ☐ Resolve Issue and Prevent Future Occurrences

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**Key Components of Complaint Procedure**

**Confidentiality**

**Investigations**

- Process to provide anonymous complaints
- Explain confidentiality may affect investigation
- Cannot guarantee confidentiality

- Do not wait until complaint is received to establish process
- Timely updates

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**Compliance Checklist**

Form

- ☐ Supervisors
- ☐ Two Hours
- ☐ Qualified Trainers
- ☐ 6 Months from Hiring

Content

- ☐ Sexual Harassment
- ☐ LGBTQ
- ☐ Gender Identity
- ☐ Gender Expression

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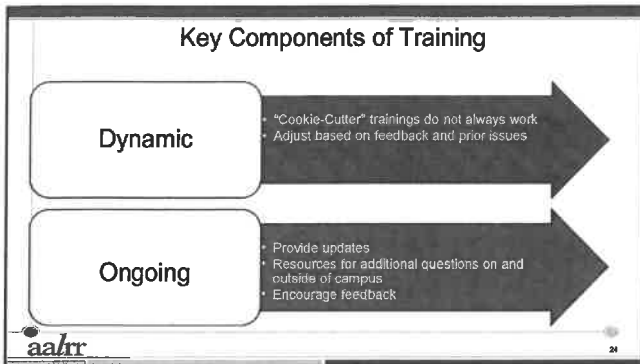
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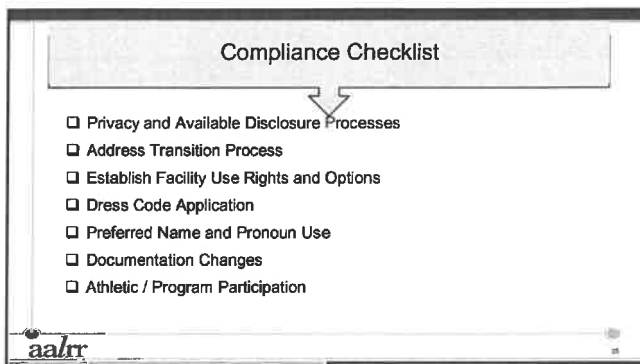
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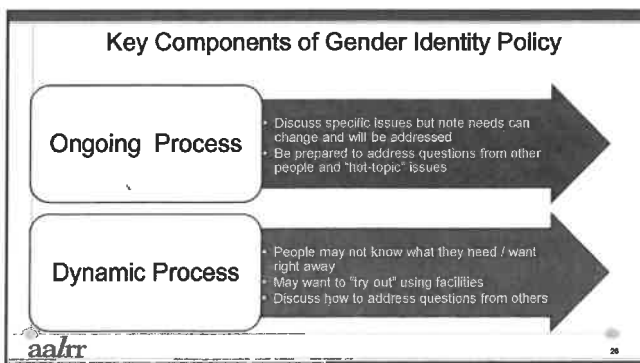
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**Implement Gender Identity Policy**

- Institutions must honor privacy requests to the extent possible (see documentation requirement)
- Institutions cannot guarantee privacy
- If student does not want parent/guardian to know, institution must honor student's request unless health or safety of student is threatened
- Offer to assist with disclosure (i.e. "coming out party" or support to tell parents)

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**Implement Gender Identity Policy**

- "Public" and "Private" transitions
- Be prepared to address questions from others
- Generally, must accept and respect assertion of gender identity
- Transitions are not always "linear"
- Identify support services within and outside of institution

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**Implement Gender Identity Policy**

- California law requires bathroom and facility access based on gender identity
- Institutions may offer alternative private facilities but cannot require or pressure use
- All single-use bathrooms must be gender neutral

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Implement Gender Identity Policy

- Right to dress in manner consistent with gender identity or gender expression
- Dress code policies are acceptable if applied consistently based on gender identity
- ACLU view: good dress codes regulate clothes, not identities, and should not be split by gender
- See "I Am Who I Am" breakout session handout

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Implement Gender Identity Policy

- Allow use of gender-neutral pronouns
- Failure to use preferred name or pronoun may constitute harassment
- Change records to the extent possible (see below)
- Key component to maintaining privacy

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Implement Gender Identity Policy

- Must change all documents to preferred name and pronoun as follows...
- Legal name change needed only to update "official" records, which are few and far between (see CDE FAQ for more guidance)
- If some records have not been updated, segregate and restrict access to maintain privacy

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### Implement Gender Identity Policy

- > California law requires participation based on gender identity
- > Intramural and Intermural sports, physical education classes, overnight field trips, dances
- > Be prepared to prevent and address harassment

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### Take Home Points

- 1. Create Supportive Environment**
  - Define Key Terms; Update and Circulate Policy; Posters and Publicity
- 2. Address Harassment**
  - Hostile Environment; Identify Typical and "Hidden" Examples
- 3. Prevent Discrimination**
  - All Areas of Employment and Student Life; Address Typical Forms
- 4. Establish Complaint Procedure**
  - Confidentiality; Neutrality; Timely; Complete Resolution
- 5. Develop Training**
  - Sexual Harassment with LGBTQ Component
- 6. Implement Gender Identity Policy**
  - Areas of Compliance; Support Plan

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### So, Where Do I Go From Here...

- 1. Review Compliance Checklist**
  - Does your institution have a policy and/or procedure in place to address each item within the checklist?
  - See handout for further guidance on each item
  - Note that compliance cannot be achieved through checking a box:
    - Ask if your institution is meeting the overall intent of each item which is generally to provide a discrimination-free environment and establish a process to address issues as soon as they arise.

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### So, Where Do I Go From Here...

#### 2. Hot-Button Issues

- Ongoing Training is key
- All staff members do not need to know how to address all issues that may arise
- Staff should be prepared to recognize potential issues and know where to go for help
- Where are resources / help available?


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### So, Where Do I Go From Here...

#### 3. Create a Support Structure

- Who Is Generally In Charge of Addressing LGBTQ Issues (Title IX Coordinator)
- Publicize Name and Contact Information
- When In Doubt, Protect Safety and Then Discuss Legal Issues


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### POP QUIZ!!!!

- I feel uncomfortable going to the bathroom with transgender employees. What if someone claims to be a female just so he can leer at me!?!
  - Civil rights “trump” feelings of uncomfortableness
  - Concerns over “taking advantage” of gender identity rules are overstated
  - Institutions have a general obligation to protect employees from harm


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POP QUIZ!!!!

2. John talking about his boyfriend and their sex life is making me uncomfortable.

- Same conduct requirements apply regardless of sexual orientation
- Harassment issue: Interfere with ability to perform job functions?

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POP QUIZ!!!!

3. Are you going to investigate me every time I make a joke or say something about gender identity or homosexuality?

- Intent of comments do not determine hostile environment
- No "police state": Informal resolutions available

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POP QUIZ!!!!

4. I am going to post a Bible scripture in my cubicle that shows homosexuality is a sin and you cannot stop me because... free speech!

- Hostile environment created by speech
- "Employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights."

*Peterson v. Hewlett-Packard Co. (2004) 358 F.3d 599*

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**POP QUIZ!!!!**

5. Your diversity poster is harassing me because it discusses homosexuality and transgender issues which offend my personal beliefs.

- Try to work with employees to accommodate beliefs
- "[Employer] violated Title VII by failing to engage in the required dialogue with [Employee] upon notice of his concerns and by failing to clarify the challenged language to reasonably accommodate [Employee]'s religious beliefs"

Buonanno v. AT&T Broadband, LLC (2004) 313 F.Supp.2d 1089

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**POP QUIZ!!!!**

6. I am fine with your lifestyle but it may make visitors uncomfortable seeing a man in a tight skirt so can you tone it down?

- Dress code applies uniformly
- Public cannot impose discrimination
- Can use reasonable uniform dress code

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**POP QUIZ!!!!**

7. My coworker and I call each other "fag" all the time. We think it's funny, so what is the harm?

- Overhearing offensive words can create hostile environment
- Intent or target of comments do not matter

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**POP QUIZ!!!!**

8. Kate played really well during our softball game so I complimented her by saying she throws like a college guy.
- Gender stereotyping can create a hostile environment
  - Gender stereotyping = assumption based on sex
  - Just because someone does not complain does not mean comments are acceptable

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**POP QUIZ!!!!**

9. People should either decide between the men's and women's bathroom or use a private bathroom.
- Gender identity often involves a transition process
  - People are not required to "pick" a bathroom
  - Single occupancy bathrooms can be an option but are not required

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**POP QUIZ!!!!**

10. I have the right to know if I am working with a transgender employee.
- Employees have a right to keep gender identity / sexual orientation private
  - Employers cannot guarantee privacy

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**POP QUIZ!!!!**

11. The Trump Administration says that anti-discrimination laws no longer apply to LGBTQ employees
- State law provides protection against LGBTQ discrimination
  - California Department of Fair Employment and Housing Act

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**Question & Answer  
Session**

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**Thank You**

For questions or comments, please contact:

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## Stephen M. McLoughlin

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Stephen McLoughlin advises public and private agencies on a wide variety of transactional and litigation issues. He represents California community college districts, universities and school districts in education-related matters, providing advice and counsel concerning compliance with Title IX, transgender accommodations, First Amendment, and other constitutional rights of students and employees and related federal and state laws. He represents education clients in grievance arbitrations, administrative hearings, and civil litigation in state and federal court.

Mr. McLoughlin also drafts and negotiates contracts for property and general service matters, including technology-related services. He has experience with various land use issues, including the drafting of licenses, leases, easements and joint use agreements. Mr. McLoughlin has provided clients with analysis and guidance regarding federal regulations such as the American Recovery and Reinvestment Act.

Mr. McLoughlin has experience in all aspects of civil litigation, including claims against public agencies concerning contract administration and public works projects. Mr. McLoughlin also advises and represents school districts and community college districts on all construction-related matters.

### Honors & Recognitions

Mr. McLoughlin was named a 2015 and 2017 Southern California Rising Star by Super Lawyers. This honor is given annually to top attorneys under 40 years old, based on their legal work and peer recommendations.

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Litigation  
Real Estate  
Real Property

## Stephen M. McLoughlin

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### Events & Speaking Engagements

Mr. McLoughlin is a speaker at many events and conferences. He provides presentations and trainings for postsecondary institutions and school districts focused on compliance with Title IX and the Clery Act, in addition to related confidentiality provisions under FERPA. He has also spoken about federal regulations such as the American Recovery and Reinvestment Act.

### Publications

Mr. McLoughlin is a frequent contributor to the firm's publications and to external publications. His published writing includes:

- Co-author, "Green Materials and Construction" chapter in ABA's *The Law of Green Building*
- "Stewards of Justice in a Business World: How Lawyers Can Use the Theory of Procedural Justice to Keep Their Clients Happy and Protect the Integrity of Alternative Dispute Resolution Forums," *Trinity Law Review*
- Co-author, "California Court of Appeals Clarifies Payment Obligations under Prompt Payment Statutes," *Associated General Contractors of California*, Volume 40 Number 3