

Trans-forming Legal Practice: Recognizing and Eliminating Bias Based on Gender Identity and Expression

Jon W. Davidson, Chief Counsel
Freedom for All Americans Education Fund

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The Transgender Community

First, Some Important Terminology



Transgender: a broad term describing people whose gender identity is **different** from the gender they were thought to be when they were born

Cisgender: a description of people whose gender identity is **the same** as the gender they were identified as at birth

Gender Identity: an individual's **internal knowledge of their gender** – for example, their knowledge that they are a man, a woman or another gender, such as non-binary

Nonbinary: **not** identifying or expressing one's gender as either **exclusively male or female**

Transgender female: someone who knows they are female but was identified as male at birth

Transgender male: someone who knows they are male but was identified as female at birth

Gender Expression: how a person **externally presents** their gender, through things like behavior, clothing, hairstyle, voice or body characteristics

More terminology



Gender Non-Conforming: not appearing or acting consistently with traditional gender roles, expectations or stereotypes

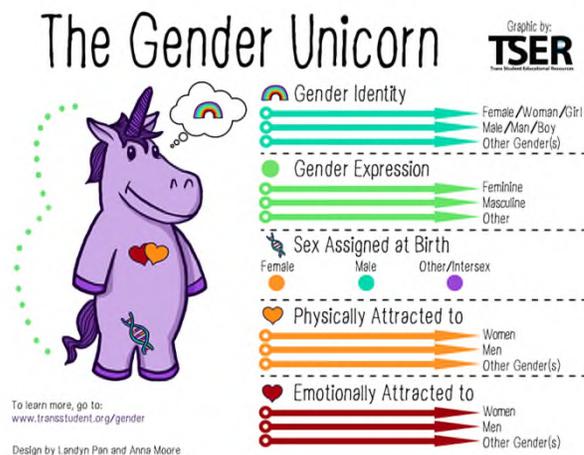
Gender Dysphoria: the **distress** some transgender people experience resulting from the mismatch between their gender identity and the gender they were identified as at birth

Gender Transition: the **period during which a person begins to reveal and live according to their gender identity** rather than the gender they were thought to be when they were born, including changing their clothing, appearance (sometimes through hormone therapy or surgeries), their name, the pronouns they use, their facility usage or their identity documents

Gender Affirmation Surgeries: any of a number of surgeries that some transgender people undergo as part of their gender transition

Intersex: a description of people **born with** one or more of a range of **variations in sex characteristics** that fall outside of traditional conceptions of male or female bodies

Important Distinctions



Some Prominent Transgender Lawyers and Leaders



Hon. Victoria Kolakowski

Shannon Minter

Laverne Cox

Mia Yamamoto

Masen Davis

Martine Rothblatt



Kylar Broadus

Danica Roem

Blake Liggio

DJ Healey

Kris Hayashi

Bamby Salcedo

The Lives of Transgender, Gender Non-conforming, Nonbinary, and Intersex people

- According to the Williams Institute, approximately **1.4 million adults** in the U.S. (and more than 218,000 in California) **identify as transgender**. It's estimated that nonbinary individuals make up 25-35% or more of the transgender population, but studies have not been done on the general population. Experts estimate more than 500,000 Americans were born with intersex traits.
- Many transgender people live or have lived in extreme poverty. According to the 2015 U.S. Transgender Discrimination Survey (which surveyed 28,000 respondents) transgender people are nearly **four times** more likely than the general population **to have a household income of less than \$10,000 per year** and twice as likely to be unemployed. **One in five** transgender people have experienced **homelessness** in their lives.
- In the year prior to completing the survey, **46%** of respondents were **verbally harassed** and **9%** were **physically attacked** because of being transgender. During that same time period, **10%** of respondents were **sexually assaulted**, and **47%** had been sexually assaulted at some point in their lifetime. At least **29** transgender people were **murdered** in the U.S. in 2018, **82%** of whom were transgender women of color.

More about Transgender People's Lives



- **57%** of transgender respondents experienced significant **family rejection** because they are transgender.
- **22%** of respondents who have interacted with police reported **harassment by police**, with much higher rates reported by people of color.
- **One-third** of transgender people who have transitioned have **not been able** to change **any** of their identification documents to reflect their gender identity. Only one-fifth have been able to update **all** their identification documents.
- **41%** of transgender respondents reported **attempting suicide** compared to 1.6% of the general population, with rates rising for those who lost a job due to bias (55%), were harassed or bullied in school (51%), or were the victim of physical assault (61%) or sexual assault (64%).

The Nature and Extent of Bias Based on Gender Identity and Expression

Forms of Gender Identity and Expression Bias



- **Failing to hire, firing, denying a promotion, denying preferential work assignments or providing unequal pay or benefits** based on an employee's gender identity or expression (including perceptions that they do not comply with gender stereotypes) or their planning or having made a gender transition
- Subjecting someone to physical, sexual or verbal **harassment** based on their gender identity or expression, including subjecting them to anti-transgender derogatory terms or jokes, disparaging comments or sexually-oriented comments or inquiries
- **Not allowing someone to dress in accordance with their gender identity**
- Persistently **refusing to use** or to reflect in business records the **name or pronouns** the person uses: "dead-naming" and misgendering
- **Denying** someone **equal goods or services**
- **Denying** someone **equal access to** a common **restroom** corresponding to their gender identity

The Prevalence of Gender Identity and Expression Bias



The 2015 U.S. Transgender Survey found that:

90% of those surveyed reported experiencing harassment, mistreatment or discrimination on the job or took actions like hiding who they are to avoid it. **26%** had lost their jobs based on their gender identity or expression. In the **year prior** to completing the survey, **30%** of respondents who had a job reported being fired, denied a promotion, or experiencing some other form of mistreatment in the workplace due to their gender identity or expression, such as being verbally harassed or physically or sexually assaulted at work.

53% of respondents reported being verbally harassed or disrespected in a place of public accommodation. In the year prior to completing the survey, **one-third** of those who saw a health care provider had at least one negative experience related to being transgender, such as being verbally harassed or refused treatment because of their gender identity.

Transgender **people of color** faced even higher rates of discrimination due to the compounding effects of racial bias.

Gender Identity and Expression Bias in the Legal Profession and the Courts



The 2015 U.S. Transgender Discrimination survey found that, of those respondents who had visited or used legal services from an attorney, clinic, or legal professional in the past year and believed personnel knew they were transgender, **6%** reported being denied equal treatment or service, verbally harassed, or physically attacked because of being transgender.

- of those respondents who had been to a courthouse in the past year and believed personnel thought they were transgender, **12%** reported being denied equal treatment and **12%** reported being harassed or disrespected by judges or court personnel.

According to another recent national survey, out of the more than 1,000 survey respondents who were in contact with courts:

- **19%** reported hearing a judge, attorney, or other court employee make negative comments about a person's sexual orientation, gender identity, or gender expression.
- Among transgender and gender non-conforming people of color, the rate was **53%**.
- Among women who are transgender, the rate was **66%**.

Prohibitions on Gender Identity and Expression Bias in Employment

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)

“It shall be an unlawful employment practice for an employer—

(1) to **fail or refuse to hire** or to **discharge** any individual,
or otherwise to **discriminate** against any individual with respect to his
compensation, terms, conditions, or privileges of employment,
because of such individual’s ... **sex**”



Why the Ban on Sex Discrimination Encompasses Discrimination Based on Gender Identity and Expression

- **Sex-stereotyping:** The Supreme Court held in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that discrimination against someone for not appearing, acting, or identifying in ways associated with stereotypes about the sex they were identified as at birth is a form of sex discrimination.
- **Sex as a motivating factor:** 42 U.S.C. § 2000e-2(m) provides that “an unlawful employment practice is established when the complaining party demonstrates that ... sex, ... was a motivating factor for any employment practice, even though other factors also motivated the practice.” All discrimination against transgender and gender non-conforming people is motivated by reactions to the sex they were identified as at birth, the sex they now identify as, or both.
- **“Change” in sex:** Just as an employer who has no problem with Christians or Jews but who takes adverse actions against those who convert from one religion to the other clearly is discriminating based on religion, so an employer who has no problem with (cisgender) men or women but takes actions against those who transition is discriminating based on sex.

The modern legal consensus is that gender identity and expression discrimination are forms of sex discrimination barred by Title VII

EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 360 (6th Cir. 2018); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004)

Numerous district court cases, including:

Boyden v. Conlin, 2018 U.S. Dist. LEXIS 158491 (W.D. Wisc. 2018); *EEOC v. A&E Tire*, 325 F. Supp. 3d 1129 (D. Colo. 2018); *E.E.O.C. v. Rent-a-Center East*, 264 F. Supp. 3d 952 (C.D. Ill. 2017); *Roberts v. Clark Cnty. Sch. Dist.*, 215 F. Supp. 3d 1001 (D. Nev. 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016); *Dawson v. H&H Elec., Inc.*, 2015 U.S. Dist. LEXIS 122723 (D. Ark. 2015); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostic Group*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm*, 2006 U.S. Dist. LEXIS 6521 (D. Pa. 2006); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, 2003 U.S. Dist. LEXIS 23757 (W.D.N.Y. 2003)



The EEOC Agrees



In *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 EEOPUB LEXIS (April 20, 2012), the Commission held that intentional discrimination against a transgender individual because of that person's gender identity is, by definition, discrimination based on sex.

Applying *Macy*, the Commission also has held that:

- an employer's restrictions on a transgender woman's ability to use a common female restroom facility constitutes disparate treatment, *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 EEOPUB LEXIS 896 (Mar. 27, 2015),
- intentional misuse of a transgender employee's new name and pronoun may constitute sex-based discrimination and/or harassment, *Jameson v. U.S. Postal Service*, EEOC Appeal No. 0120130992, 2013 EEOPUB LEXIS 1437 (May 21, 2013), and
- an employer's failure to revise its records pursuant to changes in gender identity stated a valid Title VII sex discrimination claim, *Complainant v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120133123, 2014 EEOPUB LEXIS 1009 (Apr. 16, 2014).

Numerous federal circuit courts further have held that discrimination and violence based on gender identity or expression are forms of sex discrimination or violence barred by the Constitution and other federal laws

- *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017) (Title IX of the Education Amendments Act of 1972 and the **Equal Protection Clause**).
- *Dodds v. U.S. Dept. of Education*, 845 F.3d 217 (6th Cir. 2016) (Title IX and the **Equal Protection Clause**).
- *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (the **Equal Protection Clause**).
- *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (**Equal Credit Opportunity Act**).
- *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (**Gender Motivated Violence Act**).

California Fair Employment and Housing Act



Cal. Gov. Code 12940:

“It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

- (a) For an employer, **because of ... gender, gender identity, [or] gender expression ... to refuse to hire or employ** the person ... or to **bar** or to **discharge** the person from employment ..., or to **discriminate** against the person **in compensation or in terms, conditions, or privileges of employment.**”

Other California Relevant Laws



- **Cal. Labor Code § 1101** provides that “No employer shall make, adopt, or enforce any rule, regulation, or policy: ... (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.” This has been interpreted to bar discrimination against employees who “come out.” *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610-11 (1979).
- **Cal. Gov’t Code § 12950** requires all employers to post a “Transgender Rights in the Workplace” **poster** developed by the CA Dept. of Fair Employment and Housing in a prominent and accessible location in the workplace.
- **Cal. Gov’t Code § 12950.1** requires all employers with 50 or more employees to provide sexual harassment **training and education** to each supervisory employee in California once every two years that is inclusive of and includes practical examples of harassment based on gender identity and gender expression.

California Employment Facilities Regulations



Cal. Code Regs. Tit. 2, § 11034(e)(2), adopted in 2017, mandates that:

- employers **permit employees to use facilities that correspond to the employee’s gender identity or gender expression**, regardless of the employee’s assigned sex at birth;
- employers with single-occupancy facilities under their control **use gender-neutral signage** for those facilities, such as “Restroom,” “Unisex,” “Gender Neutral” or “All Gender Restroom”;
- employers **provide measures** such as locking toilet stalls, staggered schedules for showering, shower curtains, or other feasible methods **of ensuring privacy** other than requiring an employee to use a separate facility or one that does not match their gender identity; and
- employers **not require employees to undergo, or provide proof of, any medical treatment or procedure, or provide any identity document, to use facilities** designated for use by those with the employee’s gender identity.

Other California Employment Regulations

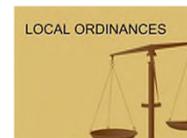
Cal. Code Regs. Tit. 2, § 11034(g) makes it unlawful for an employer to **impose** upon an applicant or employee any **physical appearance, grooming or dress standard** that is **inconsistent with an individual's gender identity or gender expression**, unless the employer can establish business necessity.

Cal. Code Regs. Title 2, § 11034(h)(4) only permits an employer using an employee's gender or legal name as indicated in a government-issued identification document if it is necessary to meet a legally mandated obligation; otherwise, the employer must **identify the employee in accordance with the employee's gender identity and preferred name**.

Cal. Code Regs. Title 2, § 11034(i)(1) makes it unlawful for an employer to **inquire about or require documentation or proof** of an individual's sex, gender, gender identity, or gender expression as a condition of employment.

And in case there were any doubt, **Cal. Code Regs. Title 2, §§ 11034(i)(2) and (4)** specify that it is unlawful to **deny employment** to an individual based wholly or in part on their gender, gender identity, or gender expression or to **discriminate** against an individual who is transitioning, has transitioned, or is perceived to be transitioning.

Local Employment Discrimination Ordinances



A number of California cities and counties also have adopted **ordinances** that **expressly bar employment discrimination** within their jurisdiction **based on gender identity or expression**.

See, e.g., **San Francisco Police Code § 3303(a)**

“It shall be unlawful for any person to do any of the following acts wholly or partially because of an employee's, independent contractor's or an applicant for employment's actual or perceived ... sex [or] gender identity ... (1): To fail or refuse to hire, or to discharge any individual; to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, including promotion; or to limit, segregate or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his/her status as an employee.”



California Rule of Professional Conduct 8.4.1(b)

In relation to a law firm's operations, a **lawyer shall not**:

- (1) on the basis of any protected characteristic [defined to include gender identity and expression],
 - (i) **unlawfully discriminate or knowingly permit unlawful discrimination;**
 - (ii) **unlawfully harass or knowingly permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract; or**
 - (iii) **unlawfully refuse to hire or employ a person, or refuse to select a person for a training program leading to employment, or bar or discharge a person from employment or from a training program leading to employment, or discriminate against a person in compensation or in terms, conditions, or privileges of employment; or**
- (2) unlawfully retaliate against persons.

Prohibitions on Gender Identity and Expression Bias in Public Accommodations

California Public Accommodations Laws



- The **Unruh Civil Rights Act**, Cal. Civ. Code §§ 51(b) (“All persons within the jurisdiction of this state are free and equal, and no matter what their sex, ... are entitled to the **full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.**”); 51(e)(5) (“‘Sex’ ... includes, but is not limited to, a person’s gender. ‘Gender’ means sex, and includes a person’s gender identity and gender expression. ‘Gender expression’ means a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.”)
- **Cal. Bus. & Prof. Code §125.6** further provides that all persons who hold a state professional license, including attorneys, are **subject to disciplinary action** if they refuse to perform the licensed activity; aid or incite the refusal to perform the licensed activity by another licensee; or discriminates or restricts the performance of the licensed activity because of any of the characteristics listed in the Unruh Civil Rights Act.

Local Public Accommodations Ordinances



A number of California **cities and counties** also expressly bar gender identity and expression discrimination in places of public accommodations within their jurisdictions.

See, e.g., **San Francisco Police Code § 3305(a)**

“It shall be unlawful for any person to do any of the following acts wholly or partially because of a person’s actual or perceived ... sex [or] gender identity ... (1) To **deny**, directly or indirectly, any person the **full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any business establishment or public accommodation.**”

Specific Prohibitions and Guidelines on Gender Identity and Expression Bias in the Practice of Law

California Rule of Professional Conduct 8.4.1



(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

- (1) **unlawfully harass or unlawfully discriminate** against persons on the basis of any protected characteristic; or
- (2) **unlawfully retaliate** against persons....

(c) For purposes of this rule:

- (1) “protected characteristic” means ... gender, gender identity, gender expression ... , or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;

California Code of Judicial Ethics



Canon 3B(5): “A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, **engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias, prejudice, or harassment**, including but not limited to bias, prejudice, or harassment based upon...gender, gender identity, [or] gender expression.”

Canon 3B(6): “A judge shall **require lawyers in proceedings** before the judge **to refrain from (a) manifesting**, by words or conduct, **bias, prejudice, or harassment** based upon...gender, gender identity, [or] gender expression....This canon does not preclude legitimate advocacy when...gender, gender identity, [or] gender expression are issues in the proceeding.”

California Rules of Court, Standard 10.20(a)



To preserve the integrity and impartiality of the judicial system, each judge should:

(1) Ensure fairness

Ensure that courtroom proceedings are conducted in a manner that is fair and impartial to all of the participants.

(2) Refrain from and prohibit biased conduct

In all courtroom proceedings, **refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias**, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, **whether** that bias is **directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants**.

Local Court Rules

Numerous federal and California courts have local rules that prohibit bias in proceedings in those courts. For example:

Local Rules of Practice in Civil Proceedings before the United States District Court for the Northern District of California, Rule 11-4(b)

“The practice of law before this Court must be free from prejudice and bias. **Treatment free of bias must be accorded all other attorneys, litigants, judicial officers, jurors and support personnel.** Any violation of this policy should be brought to the attention of the Clerk or any Judge for action....”

Local Rules of the Santa Clara Superior Court, General Rule 3(A)

“The Santa Clara County Superior Court is committed to ensuring that courtroom proceedings are conducted in a manner that is fair and impartial to all of the participants. Any complaints about bias or the appearance of bias, including but not limited to bias based on ... gender identity ..., whether that bias is **directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants,** may be directed to the presiding judge, the court executive or the sitting judge.”

California Attorney Guidelines



California Attorney Guidelines of Civility and Professionalism

Sections 3 (“An attorney should treat clients with courtesy and respect.”); 4(d) (“in communications about the legal system and with adversaries ... (d) ...an attorney should not disparage another’s personal characteristics”); 4(f) (“An attorney should avoid hostile, demeaning or humiliating words.”); 11 (“An attorney’s conduct in dealings with nonparty witnesses should exhibit the highest standards of civility.”); 11(c) (“An attorney should take special care to protect a witness from undue harassment or embarrassment.”); 14(d) (“An attorney should refrain from conduct that inappropriately demeans another person.”); 17(a) (“An attorney should not inquire into, attempt or threaten to use, private facts concerning any party or other individuals for the purpose of gaining an advantage in a case.”)

Numerous local bar associations and federal and state courts have adopted similar **guidelines of professional conduct, civility codes, and standards of professional courtesy.**

Best Practices for Working with Transgender and Gender Non-conforming Clients, Witnesses, Court Personnel, Opposing and Co-counsel, and Co-workers

Best Practices



- Rule of thumb: **Would I ask this if they weren't trans?**
- Never ask questions designed to detect whether someone is transgender and **never ask about a transgender person's body, medical care or surgical status** (unless this is relevant to your representation of them). This information is private. If a person is willing to talk about it, they will let you know. Use the same discretion you would use with any other person.
- **Respect the name and pronouns the person uses.** If you don't know what pronouns to use, ask. A good way to do this to say, "Hey, I'm Dan and I use male pronouns. What about you?" If you make a mistake, move on and find another opportunity to use the correct pronoun. Making a big deal of a mistake just makes it more uncomfortable.
- Don't ask a transgender person what their "real name" is and, if you know a prior name, don't share it without permission.

More Best Practices



- **Don't disclose** that someone is transgender **without their consent**.
- **Don't make assumptions about a transgender person's sexual orientation.** Remember, sexual orientation and gender identity are different things.
- Don't refer to someone as "a transgender." Transgender is an adjective.
- Don't use terms such as "transgendered" or "tranny," which many transgender people find offensive. Don't use phrases such as "biological sex" or "born a man (or woman)."
- **Avoid backhanded compliments or "helpful" tips**, such as "I would never have known you were transgender. You look so pretty. You look just like a real woman." or "I'd date him even though he's transgender." or "You'd pass so much better if were wore more makeup or had a better wig."
- **Treat everyone with respect and dignity.**

Best practices for employers



- **Adopt a nondiscrimination policy** that explicitly bars treating transgender and gender non-conforming people worse than other workers (as 82% of Fortune 500 companies have done) and that emphasize the need to use a person's correct name and pronoun and the importance of confidentiality.
- Ensure that employees have **access to restrooms and locker rooms** that match who they are. Add an all-gender restroom option.
- Ensure that the employees' **health insurance plans** include coverage for transition-related health care or supplement the plans with self-insurance if they do not.
- Make sure employees know **how to intervene** if workers make inappropriate comments about a transgender coworkers' appearance or medical history.
- Provide mandatory **training** on trans issues to all employees; don't wait until an employee or applicant discloses they are transgender--create a welcoming environment and don't expect transgender employees to take on this burden.

Best Practices for Attorneys



- Use the name and pronouns used by your client, including in correspondence, court papers, and agreements
- Don't make assumptions; ask open ended questions
- Don't ask questions about a client's transition unless necessary to the representation
- Do not disclose that a client is transgender unless it is relevant to the representation and you have the client's consent
- In handling cases dealing with transgender issues, consult with transgender rights organizations or attorneys with experience with such issues
- Make sure opposing counsel and the court address your client appropriately
- Treat everyone with dignity and respect

Questions?

Thank you



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