

Sexual Orientation and Gender Identity Bias

BY ELIZABETH F. SCHWARTZ

Too often, when people talk about bias, they neglect to address the homophobia and transphobia that continue to exist in every corner of our society. LGBTQ+ individuals and families may have gained some ground legally, politically, and culturally in America, but it is often said that no civil rights movement has ever ended—and the movement for full LGBTQ+ liberation is still far from its goals.

Starting Out

The first step in eliminating bias toward a community is gaining real understanding of that community. One piece of that is learning and honoring the terms members of that community use to affirm themselves. It's understandable that the many terms members of the LGBTQ+ community identify with can be confusing, and some may be tempted to dismiss the “alphabet soup” of identities. But feeling represented in language is deeply important, especially to those most marginalized by mainstream gender norms. Being an ally involves getting informed, including about the idea of the fluidity of gender and sexual orientation and the idea that both exist on a spectrum that is neither binary nor fixed.

It can take a bit of practice to get used to new acronyms and concepts, and when a mistake is made, such as misgendering someone (using the wrong pronoun) or making an incorrect assumption about the relationship they are in, it's best to briefly acknowledge the mistake, apologize, move on,

LGBTQ+ is an ever-evolving acronym meaning Lesbian, Gay, Bisexual, Transgender and Queer or Questioning. The plus sign is meant to embrace those not otherwise included.

Sexual orientation is to whom you're attracted.

Gender identity is the feeling inside which may or may not be different from sex assigned at birth.

Trans men are assigned female at birth (AFAB) and identify and live as males.

Trans women are assigned male at birth (AMAB) and identify and live as females.

Cisgender or “cis” for short refers to someone who is not trans, someone for whom their birth sex and gender identity are congruent.

Gender Nonconforming (GNC) people's dress or behavior differs from that which would typically correspond with male or female stereotypes.

Gender Nonbinary (GNB, NB, or Enby) people do not identify as strictly a male or female but rather reject the strict gender binary and may prefer “they/them” as a singular pronoun.



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and make every effort not to repeat it. Know that language is always evolving. This article will likely be out of date by the time it's printed. In this article, I use LGBTQ+, and I also refer to transgender and gender nonbinary people as TGNB.

In addition to learning preferred language, note a few common terms to avoid. The word *homosexual* puts our lives in purely sexual terms and is an out-of-favor pejorative. There's no LGBTQ+ lifestyle any more than there's a heterosexual lifestyle. The concept of pre-operative and post-operative is often inaccurate and offensive to TGNB people as many are non-op, meaning they either do not seek surgical interventions to affirm their gender identity or they do not have access to such treatments. Lastly, “transgendered” is not a word. Most terms that refer to sexual orientation and gender identity are adjectives describing a person, such as a transgender person or a gay person.

From Progress . . .

Reading headlines over the past six years, one might think that the LGBTQ+ community has won all the necessary battles leading to real equality. Nationwide marriage equality became the law of the land in 2015 (giving family lawyers a new niche to market to). A “Rainbow Wave” of openly LGBTQ+ politicians has been elected to public service. Adoption and surrogacy are more widely available to allow

the community to form and expand families. All LGBTQ+ Americans are now eligible to serve our country (despite the prior administration's attempts to roll back military service for transgender persons). And the 2020 U.S. Supreme Court decision in the *Bostock* case ruled Title VII of the Civil Rights Act of 1964 prohibits sexual orientation and gender identity discrimination in employment. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

... to Backlash

As history shows, when marginalized groups make progress, there's often a backlash. LGBTQ+ elders face isolation and discrimination as they age. LGBTQ+ youth are rejected by families of origin and represent 40 percent of homeless youth. Conversion therapy continues unfettered in many parts of the country, harming minors and adults under the pretext of the First Amendment. Religious freedoms are being weaponized against LGBTQ+ individuals and families. When added to other aspects of one's identity such as gender, race, socioeconomic status, disability, national origin, or religion, sexual orientation and/or gender identity can add another intersecting layer that compounds the discrimination experienced.

While trans people are only .06 percent of the U.S. population, trans youth were the targets of over 200 legislative actions in the first six months of 2021. LGBTQ+ people are disproportionately victims of hate crimes, with particularly horrific crimes, in both numbers and type, against TGNCB people, especially trans women of color.

Bostock was a welcome victory. However, that win did not deliver express protections in areas outside of employment where discrimination is rampant including housing, public accommodations, and lending. There are still twenty-eight states that don't have these explicit statewide protections. The Equality Act—the omnibus federal civil rights legislation that the House of Representatives passed in 2021 and, despite data indicating 70 percent nationwide support for its passage, is currently stalled in the Senate—provides all of those protections and more.

While the many gains the movement for LGBTQ+ justice has won are significant, this progress has still not resulted in full-lived equality. There remain big and small ways in which the LGBTQ+ community faces disparate treatment and bears different burdens, so help your law office be a place where fewer such barriers exist. The routine indignities of filling out office intake sheets that assume spouses must be husband and wife, parents are mother and father, and an individual is either male or female can make many people feel invisible, so do take a look at your client-facing materials.

The mainstream media continue to underrepresent LGBTQ+ people, almost exclusively portraying white cisgender heterosexual parents with children, so review your website and any printed firm collateral to be sure photos or illustrations are inclusive. To the extent that you post on social media, share LGBTQ+ stories.

Moving Forward, Serving All Families

Against this backdrop of the struggle for full lived equality is the work we do each day for the families we serve throughout the United States. As family lawyers, it is incumbent upon us to ensure the LGBTQ+ community is represented competently and compassionately. Some judges and opposing counsel make that job harder. Some families, including polyamorous families and three-parent families, have unique constellations that require us to think more broadly about our assumptions. One hallmark of the successful twenty-first-century family lawyer is comfort advocating for this traditionally underrepresented community. A recent global study indicated that one in five Gen Z young adults (born after 1997) does not identify as straight, so these matters will become more, not less, prominent in our law practices.

Part of the progress made in having LGBTQ+ families legitimized under the law means more are taking the traditional steps of marriage and parenting. One way to evidence a lack of bias is to become educated about the singular ways the legal system challenges the LGBTQ+ community. The following is a brief discussion of several general issues that might arise.

Divorce and Custody Issues

Hopefully this goes without stating, but sexual orientation and gender identity of a parent should be irrelevant in determining what is in the best interest of the child. A good rule of thumb is that if a parent is engaging in behavior that would be problematic whether straight, cis, or otherwise, then it is fair game to bring up in litigation. But if it's solely a salacious detail that is being raised as a tactic, that is not fair play. Sadly, homophobia and transphobia among attorneys, judges, and court staff remain common. Even the clients themselves could be self-hating, having experienced rejection from their families of origin and from society at large.

Yours can be a mediating voice in a case, where, for example, a parent of a trans kid comes to you and does not support the child's transition or use of hormone blockers, which delay the onset of puberty and the concomitant traumatic physical developments, while the other parent is supportive. Your compassionate approach can set the tone and even save the child's life, not to mention the parent-child relationship.

If your client has a problem with the sexual orientation or gender identity of their ex or their child, and if you're not able to have an honest conversation and help your client see the light and to focus on the legally relevant issues, perhaps you are not the best fit to represent that client. It may be that the client holds views that are personally offensive to you but do not come into play during your representation. However, if those views do intrude upon your work together, consider this: The competent lawyer does not want or need every client who walks in the door and certainly doesn't want the duty to zealously represent a client to be confused with harming a community by making homophobic or transpho-

bic arguments. Remember: Your quest to quash the opposition could result in precedent-setting bad law negatively impacting countless others going forward.

If opposing counsel is evidencing bias, there are remedies, starting with having an honest conversation lawyer-to-lawyer about the behavior, and, if need be, it can escalate to alerting the court and, ultimately, a complaint to the state bar association. Particularly as it relates to TGNB people, who have grown increasingly visible, there tends to be a real void of knowledge, so you might commence with the gentler approach of sharing basic information (perhaps this article!).

Similarly, with judges' biases, start with education. I like to give the judge the benefit of the doubt and hope a private conversation and providing a few resources will resolve the bias, which, after all, is rooted in unfamiliarity. In terms of broader judicial education, this has been a growing trend given how critical it is the bench treats all litigants without bias of an explicit or implicit nature. Unfortunately, these educational opportunities, at least those at their jurisdiction's conferences and colleges, tend to be optional as they relate specifically to LGBTQ+ education, so the audience can be somewhat self-selecting. A particularly obstinate judge who is holding on to conservative views about sexual orientation and/or gender identity might have to be recused.

Historical bias also shows its face in our aspects of cases we might take for granted. One might assume that marriage equality leads to uniform divorces. However, there are concerns particular to LGBTQ+ married folks. Among them is the date of marriage. Because of the relatively recent arrival of the freedom to marry, many couples have been married a short period of time but in a committed relationship for much longer. While family law of course varies by state, one relatively universal concept is that the date of marriage controls for purposes of division of marital assets. That might result in a relatively unfair distribution to the impecunious spouse. Date of marriage also controls for purposes of awarding spousal support, so a person who is counting on alimony from a long-term relationship is often shocked at the entitlement, if any, from a short-term marriage. Counsel might want to be more equitably minded in negotiations in such cases, thinking more expansively of what's fair in light of the facts, not just the law.

Similarly, if an LGBTQ+ couple comes to you for premarital counseling, think about whether the strategic use of a prenuptial agreement could resolve the imbalance the default in the law would provide if a marital dissolution happened in the short term. Some lawyers trained in collaborative family law have found those principles to be of use in such cases and utilize the collaborative process to make prenuptial agreements more equitable for couples marrying after many years together. For those couples who raced to the altar without such counseling (and the pent-up demand for marriage equality led many to do so), consider drafting a postnuptial agreement if they are an option in your jurisdiction.

Please also be aware of clients with multiple relationship

statuses. Prior the freedom to marry, there have been other types of relationship recognition in different jurisdictions, and many couples did not wait for marriage, collecting whatever other types of recognition were available. Always inquire whether the couple has a civil union, registered domestic partnership, reciprocal beneficiary, or some other nonmarital legal relationship status, and be sure you dissolve all statuses in the pleading when dissolving the marriage.

This also goes for your premarital counseling checklist: Inquire whether they have any prior relationship recognition or status with anyone else that they haven't dissolved. Even if that status isn't recognized in your state, it's best to get it dissolved to avoid bigamy.

Family Formation Issues

Ever since Florida's ban against LGBTQ+ people adopting children was declared unconstitutional in 2010, there is no state that has such a formal ban. Still, bias persists in both public and private adoption.

Adoption from the foster care system can be fraught with bias, which in some cases is state-sanctioned discrimination funded by your tax dollars. The 2021 *Fulton v. Philadelphia* case heard the request of Catholic Social Services to refuse to place foster children with otherwise eligible LGBTQ+ parents because they argued their "sincerely held religious beliefs" entitled them to discriminate. 141 S. Ct. 1868 (2021). The U.S. Supreme Court decided the case on narrow grounds that merely requires the City of Philadelphia to change how exceptions to the nondiscrimination policy are granted. Governments may continue to prohibit discrimination even by religious entities. Of course, the Court could take this issue up again in the future, given its focus on religious liberty and prohibiting discrimination based on religion.

Private adoption refers to situations where an expectant mom is choosing adoptive parents with whom she will place her baby at birth. The adoptive family typically chooses the provider who will do the court-required home study, so they can choose someone LGBTQ+-friendly. Getting chosen by an expectant mom can be challenging for LGBTQ+ people, although there are cases where gay men are not chosen because of, not in spite of, their gayness due to positive associations some may have with common stereotypes.

Insemination also produces ample instances of bias. Same-gender female couples still report being turned away from fertility clinics and experiencing denials of health insurance coverage when seeking fertility treatment. Trans men who seek to biologically reproduce using their own bodies also face insidious bias.

Because marriage equality doesn't mean parentage equality, confirmatory adoptions or other judgments are obtained when a married couple wishes to confirm the parental rights of both parents even though they are both on the child's birth certificate. In some states, this could be a parentage order pre-birth or post-birth, and in many states

this is effectively a stepparent adoption. Of course, the marital presumption should apply, unless you end up with a homophobic judge or a biological mother in a marital dissolution action bent on disproving the parental rights of the nonbiological mother. This doesn't mean that a nonbio mom who doesn't adopt isn't a legal parent; it's just the strong suggestion—a “belt and suspenders” approach—to not rely solely on a birth certificate and to get a court order, which should be given full faith and credit in any jurisdiction in which it's presented.

Lastly, surrogacy is the path to parenthood frequently chosen by gay men. They face not only homophobia but also sexism because of the belief around the roles that women and men stereotypically play as parents.

Gender Marker Changes

For individuals whose sense of self does not align with their sex assigned at birth, they might seek to correct their gender marker (from male to female, vice versa, or to X, a nonbinary gender identifier). Changing a passport, social security card, and driver's license can be more straightforward than correcting a birth certificate. While it might be relatively easy to change a gender marker in various jurisdictions, some states have no case law or statutory authority to authorize this. Even if there is no specific authority on point, often there is nothing prohibiting it, but rather state law is silent. In those cases, judges can use their inherent powers of general jurisdiction to do equity. Typically, there are no opposing parties, and these gender marker changes are quite literally lifesaving for TGNCB people. Note that, while some might choose to have gender confirmation surgery, many do not but still would be able to produce a letter from a doctor attesting to the hormone therapy as part of the gender transition.

A Quick Note on Estate Planning

While it is beyond the scope an article for a family law magazine, each of us would be wise to also have a basic comprehension of the estate planning tools that every LGBTQ+ individual and couple should have in place. Homophobia is still prevalent in hospitals and assisted living facilities, many of which are faith-based. Anecdotes abound of LGBTQ+ individuals and couples denied the opportunity to be by the bedside of their loved one, even if married, because of the “sincerely held religious beliefs” of healthcare providers. Please advise LGBTQ+ clients and friends to take care of memorializing, in writing and in strict compliance of the law of the state of residence, their intentions for what happens on death or disability, especially if it is different than what the default of the law would provide.

Estate planning documents are important whether a couple is married or not. There are powers granted by documents such as a durable power of attorney that are, contrary to popular perception, not granted by virtue of a marriage. Also, estate plans provide for alternate beneficiaries

and decision-makers, so there is a “Plan B” if the first person predeceases or is unable to serve in the needed capacity. Importantly, plenty of LGBTQ+ couples do not seek to marry. There can be countless reasons for them not to (in fact, I wrote a whole book about the topic); it doesn't mean they aren't committed to one another. Some don't want to pay higher income taxes, others aren't wild about the institution of marriage, yet others don't relish the automatic rights marriage brings on death and divorce. These and other more unique family structures challenge us to think more expansively about what makes a family.

Conclusion

Hopefully you feel better informed about some of the legal needs of this underrepresented and oft-discriminated-against population, appreciating that challenges can often be amplified in our cases as emotions run high in the practice of family law.

It's similarly important to be aware that when a person has multiple marginalized identities, that intersection frequently results in an exponentially increased negative impact of whatever is otherwise going on. So, if one is a disabled lesbian of color living in a rural community fighting for her property rights upon divorce, the layers of bias experienced are manifold, and far worse than an able-bodied cisgender gay man living in a metropolis. Switch that conflict to one about parental rights, however, and the sexism men experience as parents might give that mom the upper hand.

While those struggling for LGBTQ+ liberation have made and are continuing to make great strides, there is a long way to go, especially for the most vulnerable. Family law attorneys are in a unique position to bring a measure of justice to those who have long lived and loved outside the legal system. A holistic approach to each party in each conflict is essential. If you have a thorny issue arise, don't go rogue. Feel free to look up and reach out to an LGBTQ+ legal organization such as NCLR, Lambda Legal, ACLU, or GLAD for support.

Please also take the time to evaluate and challenge your own implicit and explicit biases, educate your colleagues and judges, modernize your language, and change your forms, websites, and social media collateral to reflect twenty-first-century realities. It's good for business, and it's the right thing to do. **FA**



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