

A Pride Month Primer on Cultural Competency for Attorneys Working with the LGBTQIA2S+ Community

by Ed Fox

Welcome back to another feature of our Equity and the Law column. A brainchild that started over sandwiches with sides of ranch when Shawntal Mallory with Nebraska Legal Diversity Council, Stefanie Pearlman from the University of Nebraska College of Law, and Yvonna Summers from Creighton University School of Law all decided that we would activate around NSBA Executive Director Liz Neeley's invitation to highlight equity and inclusion topics within our profession. Through this article in The Nebraska Lawyer, we will collaboratively address different aspects of diversity, equity, and inclusion throughout the legal field and provide an educational perspective on how to implement equity and inclusion to promote a more diverse Bar. The Nebraska State Bar Association has been actively including continuing legal education opportunities geared towards cross-cultural competency and branching that educational component into a publication seemed like a natural next step. It then only felt logical to enlist the assistance of the co-chairs of the NSBA Diversity Section, Yvonne Sosa from the Federal Public Defender, and Alisha Jimenez from Lancaster County Attorney's Office. After emails and Zoom calls, ideas and excitement we have created this column for the readers of The Nebraska Lawyer.

In an increasingly diverse world, the question of what duties attorneys owe towards acquiring cultural competence for communities an attorney may not personally identify with will constantly require reevaluation. At minimum, the Rules of Professional Conduct provide a baseline, but attorneys may choose to expand their cultural knowledge even further for business or personal ethical considerations. Every year in June, for example, attorneys are likely to encounter public expressions of "Pride Month" for the "LGBTQIA2S+" community.

This article, offered during such a Pride Month, is intended to outline the professional duties owed towards individuals within the LGBTQIA2S+ community and to provide a general primer on key issues that an attorney may encounter when working with individuals within that community. Obviously, an article cannot encompass every possible issue that may arise, but it is intended to provide baseline considerations an attorney may find valuable while also providing attorneys with necessary terminology/concepts they can use to ask questions and find out answers when encountering a new situation.

Nebraska Rule of Professional Conduct § 3-508.4

The Nebraska Rules of Professional Conduct state that it is professional misconduct to "engage in conduct that is prejudicial to the administration of justice."¹ The rules provide an example of such conduct, specifically an attorney "engag[ing] in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers or court personnel on the basis of the person's race, national origin, gender, religion, disability, age, sexual orientation or socio-economic status."²

Addressing the scope of the rule, the rule expressly pre-

Ed Fox



Ed Fox is a partner in Kutak Rock LLP's Omaha office Litigation Department, as part of its Financial Services Litigation Practice Group. Ed's practice is focused on government regulatory and enforcement actions. Ed is also a member of Kutak Rock's LGBTQIA+ Affinity Group and is Kutak Rock's 2024 Leadership Council on Legal Diversity (LDLC) Fellow.



cludes discrimination based on “sexual orientation.” This clearly would encompass individuals who identify as gay, lesbian, or bisexual (or bi+) (relevant terms will be discussed in more detail below). What is not clear from the language of the rule, however, is to what extent the rule encompasses concepts of gender identity, including individuals who identify as transgender. Recent legal decisions, as well as the use of the term gender in the Rule, would caution, however, that practitioners should broadly define the terms included in Rule 8.4(d) to include matters of gender identity. In particular, recent 8th Circuit decisions reflect that discrimination against transgender individuals based on their status constitutes sex-based discrimination entitled to heightened constitutional scrutiny.³

Thus, at minimum, an attorney interacting with the LGBTQIA2S+ community must have sufficient knowledge and cultural competence about the community to ensure the attorney does not “engage in adverse discriminatory treatment” of individuals based on their status as members of the community. This cultural competence likely includes, at minimum, understanding key terms likely to have import to LGBTQIA2S+ individuals.

Key Terminology Related to the LGBTQIA2S+ Community

The first step in gaining cultural competence related to the LGBTQIA2S+ community is simply learning and understanding the words, phrases, labels, and terminology relevant to the community. For many practitioners (particularly those who may not have had exposure to members of the LGBTQIA2S+ community), even the acronym “LGBTQIA2S+” may be a mystery. Though this article format does not permit a comprehensive glossary of terms, certain terms and phrases are necessary for basic cultural literacy towards this community. With respect to the acronym itself, these terms include:⁴

Lesbian: Lesbian refers to an individual identifying as a woman who is emotionally, romantically, and/or physically attracted to other individuals identifying as women.

Gay: Gay (a.k.a. “homosexual”) is broadly used to describe individuals who are emotionally, romantically, and/or physically attracted to individuals of the same gender. Gay is commonly, though not exclusively, used to refer to individuals who identify as male and who are emotionally, romantically, and/or physical attracted to other individuals identifying as male.

Bisexual: Bisexual is commonly used as an umbrella term (and often noted using the form bi+)⁵ to refer to individuals who identify in themselves the potential to be emotionally, romantically, and/or physi-

cally attracted to individuals of more than one gender, not necessarily at the same time, in the same way, or to the same degree. The “bi” in bisexual can refer to attraction to an individual’s own gender and genders different from the individual’s own gender.

Transgender: Often referred to simply as “trans,” transgender is a term used to describe situations in which an individual’s gender identity does not necessarily match the sex they were assigned at birth. Transgender individuals may or may not take steps to alter their bodies hormonally and/or surgically to match the gender of their gender identity.

Queer: The term queer is used by some members of the LGBTQIA2S+ community to describe themselves or the community more broadly. The term is occasionally used to describe the community of those individuals who do not consider themselves to be cisgender and heterosexual, or who identify with a fluid sexuality.

Intersex: Intersex is a term used to refer to individuals who do not conform medically to the biological division of male and female. An individual may identify as intersex as a result of variations in hormones, chromosomes, internal or external genitalia, or any combination of any or all primary and/or secondary sex characteristics. Intersex is related to biological sex and, as such, it is not considered to be a gender identity or sexual orientation.

Asexual: The term asexual refers to an individual who does not experience sexual attraction. Asexual individuals may experience relationships, attraction, and physical arousal differently than other asexual individuals. Asexual individuals may exist on a spectrum with respect to sexual and romantic attraction.

Two-Spirit: Two-spirit is a term used in some American Indian and Native American communities to refer broadly to individuals who identify as having both male and female spirits or essence. In many native cultures, two-spirit individuals were treated as having a distinct gender; such individuals were not considered male or female. Two-spirit is a concept not easily definable to non-native populations and with substantial variation within native traditions.⁶

Beyond the acronym, there are other terms and concepts that are important for basic understanding. These include:

Gender: Gender is a controversial and often misunderstood concept. Gender, as used with respect to the LGBTQIA2S+ community, is distinct from

EQUITY AND THE LAW

biological “sex.”⁷ Gender refers to socially constructed roles, behaviors, activities, and attributes related to an individual’s assigned sex, i.e. the socially recognized aspects of being a “man” or a “woman.”

Gender Identity: Gender identity refers to an individual’s self-conception of their gender, irrespective of that individual’s assigned sex. Gender identity may or may not correspond to an individual’s assigned biological sex.

Nonbinary: The term nonbinary describes individuals who do not identify exclusively as male or female. Such individuals may describe themselves as not falling within the “male-female binary” and may identify as being both male and female, some-

where in between, or outside of those categories all together. Some individuals may use the term nonbinary exclusively or may also use terms such as “Enby,” “genderqueer,” “gender non-conforming,” “gender diverse,” or related terms.

Cisgender: The term cisgender, or “cis,” refers to individuals whose gender identity aligns with their assigned sex.

It is important to note that becoming knowledgeable and conversant with terminology important to the LGBTQIA2S+ community is not simply academic. When interacting with and addressing members of the LGBTQIA2S+ community, the use of labels and correct terminology is essential. The use of correct terminology to reflect an individual’s self-identity can have a multitude of benefits, including recognizing



**The Nebraska State Bar Association - Nebraska Lawyers Foundation
presents the**

21st Annual GREATER NEBRASKA GOLF SCRAMBLE

Friday, June 14, 2024

at Dakota Dunes Golf Course in Dakota Dunes, SD

960 Dakota Dunes Blvd, Dakota Dunes, SD 57049



Golf Scramble - Friday, June 14, 2024

Format: 4-Person Scramble
Lunch & Driving Range: 10:30 AM - 12:00 PM
Shotgun Start: 12:00 PM
Dinner: 5:00 PM
Entry Fee: \$200 per golfer
Includes: Lunch, dinner, green fee, cart, range balls & door prize drawings
Players: Pairings will be made for individual and partial team entries

Room Reservations & Additional Golf Outings

A block of rooms are reserved at Holiday Inn Express & Suites Sioux City North. Rooms are available Thursday, June 13th - Saturday June 15th at \$144.00 + tax/night. Call (605) 206-2610 and ask for Nebraska State Bar Association group rate or Block Code NSB or reserve online at <http://tinyurl.com/58jv6kvd>.

To make tee times on Thursday, June 13th or Saturday, June 15th, after 1:00 p.m., contact Dakota Dunes Golf Course at 605-232-3000. The rate is \$100 + tax.

**Scan the QR code or visit the NSBA Event Calendar
at www.nebar.com to register your team.**

Contact Sam Clinch at (402) 742-8125 or sclinch@nebar.com with questions.



EQUITY AND THE LAW

an individual's autonomy, "supporting community building," "reducing marginalization," providing safety and "psychological well-being," and facilitating more effective communication.⁸ Beyond the benefits to the client, such knowledge will also help the practitioner avoid inadvertently acting in a manner that may be inconsistent with the ethical obligations imposed by the Rules of Professional Conduct. Even more, it may simply make good business sense to ensure clients, potential clients, and potential referral sources who identify as LGBTQIA2S+ feel respected based on their interactions with you.

A cautionary note about terminology is required, however. While the above terms are intended to provide a general background to assist with developing cultural competency, it is important to realize that the definitions of these terms are often fluid and may vary based on factors such as the age of the individual in question. For example, though younger members of the community have often adopted the term "queer" and have attempted to "reclaim" the term in light of its historical use as a slur, some members of the community with different lived experiences may have negative associations with that term. As such, a good general rule is that the term queer should be used only by those who claim it as an identity or when describing someone else's claimed identity (i.e., "my client identifies as queer").

Avoiding Pitfalls When Working with LGBTQIA2S+ Individuals

In addition to working toward using the correct terminology, there are a variety of best practices attorneys should consider using when working with members of the LGBTQIA2S+ community to avoid creating potential conflict and/or violating the rules of ethics.


Avoid making assumptions: A common pitfall is making assumptions about either the sexual orientation or gender identity of individuals you may come into contact with professionally, whether potential clients, witnesses, or opposing parties. In particular, assuming the gender of an individual's spouse/partner, or the nature of their private relationships, may cause offense and will only reinforce stereotypes.

Using outdated forms: Forms that lack options recognizing additional gender identities and/or partner relationships may alienate potential clients. Consider revising forms to remove gender norms (i.e., "spouse/spouse" instead of "husband/wife" as default; "parent" instead of "mother/father," etc.)

Ensure staff cultural competency: Make sure your staff and those who work with your clients and third parties have basic cultural understanding to facilitate efforts to respect all they interact with on behalf of your firm/office.

Maintain confidentiality for client safety: In addition to legal confidentiality, it is essential to maintain your client's confidentiality regarding their sexual orientation and gender identity. It is important not to "out" your client without their consent, to your staff or to anyone else.

Communicate with your client: The best approach is to communicate with your client. If you are unsure about their pronouns, their relationship status, or other aspects of their gender identity or status, ask them and have the conversation.

Treating clients, litigants, and those we come into contact with as attorneys with respect and without prejudice regarding sexual orientation and gender identity is not only our ethical obligation but is also good business practice. Though no single article can provide cultural competency to an entire population of people, understanding the basics should assist in avoiding the most serious pitfalls and provide the building blocks for meaningful conversations to take place. 

Endnotes

- ¹ Neb. R. Prof. Cond. § 3-508.4(d).
- ² *Id.* Rule 3-508.4 does provide that subsection (d) "does not preclude legitimate advocacy when these factors are issues in a proceeding." The term "legitimate advocacy" is not defined or explained in the comments, however.
- ³ See, e.g., Order on Appeal, *Brandt et al. v. Rutledge et al.*, Case No. 21-2875 (Aug. 25, 2022); Order on Appeal, *Linn Mar Comm. Sch. Dist. et al. v. Found. For Moral Law et al.*, Case No. 22-2927 (Sept. 29, 2023).
- ⁴ The definitions for key terms and phrases provide here have been taken and adapted from the PFLAG National Glossary, available online at <https://pflag.org/glossary/>. PFLAG describes itself as "the first and largest organization dedicated to supporting, educating, and advocating for LGBTQ+ people and their families." See <https://pflag.org>. These definitions are not intended to be comprehensive, but to provide a general understanding for minimum levels of cultural competence.
- ⁵ Some individuals may identify as "pansexual" instead of bisexual. Pansexual is an individual whose emotional, romantic and/or physical attraction is to any individuals, inclusive of all genders.
- ⁶ For further reading on the concept of two-spirit, see Samantha Mesa-Miles, *Two Spirit: The Trials and Tribulations of Gender Identity in the 21st Century*, Indian Country Today, Sept. 13, 2018 (available at <https://ictnews.org/archive/two-spirit-the-trials-and-tribulations-of-gender-identity-in-the-21st-century>).
- ⁷ An individual's "assigned sex" is that sex which an infant is assigned at the time of birth, typically defined by visible sex organs and physical characteristics.
- ⁸ See David. D. Wahl, Ph.D., *The Importance of Emerging Gender and Sexual Identity Labels*, Psychology Today, Dec. 23, 2021 (available at <https://www.psychologytoday.com/us/blog/sexual-self/202112/the-importance-emerging-gender-and-sexual-identity-labels>).