



LGBTQA LAW SECTION

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Chief Justice Elizabeth T. Clement
Michigan Supreme Court
925 W. Ottawa Street
Lansing, MI 48915

March 24, 2023

CHAIR-ELECT

Christine A. Yared
Grand Rapids

Re: ADM File No. 2022-03
Proposed Amendment of MCR 1.109

SECRETARY

Alan D. Baldrige
Ann Arbor

Dear Chief Justice Clement,

TREASURER

Alanah Marie Haskin
Royal Oak

On behalf of the State Bar of Michigan LGBTQA Section we are writing in support of ADM File No. 2022-03, which amends MCR 1.109(D)(1)(b) by adding language that allows, but does not require, parties and attorneys to include their preferred pronouns in a case caption and requires the court (not another party, attorney, or member of the public) to use the preferred pronoun if a pronoun is used to refer to that person. In those very narrow circumstances where the court believes that use of the designated pronoun would lead to an unclear record, the court may use the person's name or another respectful means of address.

COUNCIL

John M. Allen, Ferndale

Alan D. Baldrige, Ann Arbor

Alecia Golm, Ann Arbor

THE INTEREST OF THE LGBTQA SECTION OF THE STATE BAR OF MICHIGAN¹

Alanah Marie Haskin, Royal Oak

Jay D. Kaplan, Detroit

Sharifa Kerene Moore, Ann Arbor

Hon. Amanda J. Shelton, Royal Oak

The LGBTQA Section of the State Bar was established in 2016 and has grown to 262 dues-paying members whose Mission is to “review law, cases, regulations, and other legal matters that affect lesbian, gay, bi-sexual, transgender, questioning, and allies of this State and to promote the fair and just administration of those laws.” Identifying individuals in a way that comports with their inherent identity is essential to the fair and just administration of all laws and vital to this Court’s mandate and commitment of Access to Justice.

Katherine Marie Stanley, Flint

1. Respectful Treatment of Litigants and Attorneys by Courts is an Important Characteristic for a Judicial System

Kaylie Kinney Straka, Flint

Jessie Renee Thueme, Detroit

The proposed court rule amendment promotes the just and appropriate treatment of all individuals appearing before the court by prohibiting judges, referees, and court staff from using a pronoun that is inconsistent with the disclosed preference of the party or attorney. The proposed amendment is fully consistent with the Court of Appeals statement in *People v Gobrick*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2021 (Docket No. 352180), p 2 n 1, where the opinion states:

Christine A. Yared, Grand Rapids

IMMEDIATE PAST CHAIR

Donald C. Wheaton, Jr.

All individuals deserve to be treated fairly, with courtesy and respect, without regard to their race, gender, or any other protected personal characteristic. [*Id.*]

It is also consistent with the Concurring statement by Justice Welch, joined by Chief Justice McCormick, in denying leave to appeal which states:

The Court of Appeals majority provided a detailed explanation in a footnote as to how and why it was using a gender-neutral pronoun in its opinion. The Court of Appeals' simple use of a footnote and gender-neutral pronoun demonstrates that words matter and that a small change to an opinion, even if unrelated to the merits, can go a long way toward ensuring our courts are viewed as open and fair to all who appear before them. [*People v Gobrlick*, ___Mich___; 981 NW2d 59 (2022) (Docket No. 164080) (WELCH, J., concurring); slip op at 2.]

The ethical rules that bind judges and attorneys require the respectful treatment of all participants in the justice system. MRPC 6.5; Code of Judicial Conduct, Canon 3 (A)(14). This obligation should be stated to include respectful treatment of nonbinary and transgender individuals.

2. Misgendering People is Harmful and Creates an Unsafe Environment

Discrimination against transgender people also extends to the courts. In a study conducted by Lambda Legal Defense and Education Fund, 33% of transgender litigants (the number increases to 53% for transgender litigants of color) report hearing judges, attorneys, or other court employees making negative comments about their gender identity and or sexual orientation. According to the report, transgender people often have contact with judges, attorneys and court employees who refuse to acknowledge or respect their gender identity, do not use their preferred names and pronouns, and in the case of judges, may even make rulings that force transgender people to deny their true identity.² The 2016 US Transgender Survey reports that 13% of transgender persons who visited a courtroom or courthouse in the past year were denied equal treatment or service and verbally harassed, or physically attacked because of being transgender.³ Given the mistreatment of transgender people by the courts, it should not come as a surprise that Lambda's report shows that only 28% of transgender and gender non-conforming people surveyed trust the courts to provide fair treatment.⁴ Notably, overall trust in the courts was found to be lower than trust in the police, where significant harassment and mistreatment also occurs.⁵

Misgendering people does not apply exclusively to nonbinary and transgender individuals. As noted in a report by the National Center for State Courts on Gender Inclusivity in the Courts:

The history of misgendering does not exclusively apply to nonbinary and transgender communities. Concerted efforts have been made to ensure that the traditionally masculinized words in English become gender-neutral to reflect an evolving world where women are increasingly represented in every field. Historically, the masculinization of society has been the norm and is even reflected in the way we talked about humans, referring to them as man or mankind. The masculine bias was also

prevalent in the positions and occupations that historically were only open to men such as policeman, chairman, fireman, etc.⁶

Additionally,

Misgendering is disrespectful, causes embarrassment and humiliation, expresses social subordination, deprives individuals of privacy, threatens their safety, is dehumanizing, deflates credibility, obscures understanding, and infringes and curtails the autonomy of gender minorities. Misgendering causes a host of psychological and physiological injuries and is a form of microaggression.⁷

Allowing judges, attorneys, and court employees to continue to misgender attorneys and litigants is not harmless, and should be discouraged by reasonable rules such as the proposed amendment to MCR 1.109.

3. Elliott-Larsen Civil Rights Act

The Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, prohibits discrimination based on sexual orientation and gender identity, both under Supreme Court precedent and more explicitly under the statute as recently amended. Misgendering a person is a discriminatory act and creates an unsafe and hostile situation and impedes Access to Justice. Accordingly, the court rule should be amended to reflect existing law.

4. Access to Justice

As this court has recognized, Access to Justice is a vital part of our judicial system for which the promises of fairness, equality, due process, and liberty are part of the fabric which our judicial system and our constitutions are based, yet for LGBTQ+ people that reality and promise has not been met.

The LGBTQ+ population is a statistically vulnerable population. For example, LGBTQ+⁸ people are uniquely vulnerable to the negative economic impacts from the COVID-19 pandemic by disproportionately experiencing risk factors such as poverty, food insecurity, and employment in highly impacted industries.⁹ Research has also shown that LGBTQ+ people are almost four times more likely than non-LGBTQ+ people to experience violent victimization, such as aggravated or simple assault, sexual assault, and rape.¹⁰ Discrimination severely impacts a large part of the LGBTQ+ population, which also contributes to their “second-class” status as a statistically vulnerable population.¹¹

There are a significant number of individuals within the LGBTQ+ community who are impacted by many barriers to full Access to Justice in Michigan. In our state, 5% of the workforce is LGBTQ+ and many of these individuals need access to relief from the courts. For example, among all transgender people who worked in 2015, 27% were fired, denied a promotion, or not hired for a job due to their gender identity or expression.¹² One study found 27% of same-sex tester couples were discriminated against, despite being provided with better credentials in terms of income, down payment, and credit than the different-sex tester couples.¹³ In the education context, a study focusing on transgender students found that 79% of those who were “out” or perceived as transgender experienced some kind of harassment, including prohibitions on dressing according to their gender identity, harsher discipline, harassment, or

physical or sexual assault.¹⁴ That study also found that 30% of transgender people in Michigan had experienced some kind of mistreatment in a place of public accommodation in the year prior to the study.¹⁵

Access to Justice in the criminal courts is also especially important to transgender individuals. In 2021, the Washtenaw County Prosecuting Attorney found that “[h]ate crimes perpetrated on the basis of sexual orientation and gender identity are at ‘unacceptably high levels’—and rising.”¹⁶ The Federal Bureau of Investigation stated that hate crimes based on sexual orientation represent “16.7 percent of all hate crimes, the third largest category after race and religion.”¹⁷

More than 50 years ago, Chief Justice Warren Burger noted that “[a] sense of confidence in the courts is essential to maintain the fabric of an ordered liberty for a free people[,]” and further that when “a free people who have long been exploited . . . come to believe that courts cannot vindicate their legal rights from fraud” an “incalculable damage [occurs] to society.”¹⁸ This truth endures.

The LGBTQ+ population, and transgender persons in particular, are in great need of Access to Justice. Accordingly, the proposed amendment to MCR 1.109 is very important to increase the likelihood this community can actually experience full Access to Justice.

5. Michigan Code of Judicial Conduct

Michigan’s Code of Judicial Conduct requires both judges and court staff to treat litigants with both courtesy and respect. Canon 3(A)(14), which applies to the conduct of the judge and the judge’s staff, states as follows:

Without regard to a person’s race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect. To the extent possible, a judge should require staff, court officials, and others who are subject to the judge’s direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the court. [*Id.*]

Canon 3(B)(2) further requires a judge to:

direct staff and court officials subject to the judge’s control to observe high standards of fidelity, diligence, and courtesy to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacity. [*Id.*]

Unfortunately, these directives are insufficient to actually secure the courteous and respectful treatment of LGBTQ+ individuals. See section 2 of this letter.

The LGBTQA Section of the State Bar has worked with Michigan state courts and presented at the Michigan Judicial Institute in the hopes of ameliorating and removing these Access to Justice barriers. Moreover, our Section, in coordination with the State Bar and Court Administration, is working on a LGBTQ+ Bench Guide¹⁹ which we hope will assist courts and court staff in removing past and current

Access to Justice barriers. However, mere aspirational guidance is not sufficient and a Court Rule to preclude knowing misgendering is warranted.

6. Arguments Raised in Comments Opposing the Rule are Not Meritorious

The LGBTQA Section and the Court Rules Committee of the Section have reviewed and considered many of the previously submitted comments opposed to ADM File No. 2022-03. In sum, the comments seem to fall into two categories—those that believe gender is purely biological or physical (whether based on science or religion) and those who find Free Speech issues with the rule.

a. Biology

Contrary to assertions of some that gender is based solely on sex and can be objectively determined by simply looking at an individual, recent scientific studies demonstrate that there is a genetic and biological component to a person’s gender identity that goes beyond their physical characteristics.

“Transgender” is an umbrella term that refers to individuals whose gender identity is different from the sex assigned to them at birth.²⁰ Nonbinary, also referred to as “enby,” refers to individuals experience their gender identity or gender expression as falling outside the binary gender categories of “man” and “woman.”²¹ One excellent article that summarizes the complex science in the field, with references to the actual scientific work, was published by Scientific American in 2019.²²

Approximately 33,000 transgender people reside in the State of Michigan, throughout every county in the State.²³ In a 2021 nationwide study by the Williams Institute, it was estimated that 42% of transgender people (ages 18-60) identify as gender nonbinary and utilize they/them pronouns.²⁴ The lived experience of these thousands of people cannot be ignored because some individuals refuse want to acknowledge them, and no one has the right to insist that anyone must fall into a classification based solely on their sex organs.

This argument is really no different if the authority for their right to impose a gender label on people who reject that label for themselves comes from their religious beliefs. Our courts should never use religious tests to determine what people to treat with dignity and respect and which to punish for being different.

b. Free Speech

The drafters of the proposed amendment did a masterful job avoiding mandated speech while requiring respect for a litigant or attorney’s gender identity. The rule allows a person who is offended by the pronoun chosen by a person for themselves to use the person’s name or other respectful means of addressing the individual. A party can be called by their role, i.e., “plaintiff” or “respondent,” and an attorney can be called “plaintiff’s counsel” or “respondent’s lawyer,” if the court does not want to use the chosen pronoun. Simply said, the rule does not force the use of any particular pronoun, it merely prohibits the use of a pronoun not chosen by the party.

CONCLUSION

The LGBTQA Section strongly supports the proposed amendment to MCR 1.109. Adopting a rule on pronoun usage would align with consensus in the scientific and medical community regarding transgender identity and gender dysphoria, would expand access to our courts and public confidence in the fairness of our justice system, and would ensure that persons who come before a court can do so with an expectation that they will be treated with courtesy and respect.

Respectfully submitted,

Angie I. Martell

LGBTQA Section of the State Bar of Michigan

By: Angie Martell, Chair

¹ For additional information regarding the terms and definitions concerning gender identity and gender expression, see GLAAD's glossary of terms at: <https://www.glaad.org/reference/terms>.

² Lambda Legal, *Protected and Served?: Courts*, p 7 <https://legacy.lambdalegal.org/sites/default/files/publications/downloads/ps_executive-summary.pdf> (accessed March 2023).

³ James et al, *Executive Summary of the Report of the 2015 U.S. Transgender Survey* (Washington, DC: National Center for Transgender Equality, 2016) <<https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>> (accessed March 2023).

⁴ See note 1.

⁵ Lambda Legal, *Moving Beyond Bias: How to Ensure Access to Justice for LGBT People—A Training Curriculum Prepared by Lambda Legal's Fair Courts Project for Judges, Attorneys and Other Legal Professionals*, p 12 <https://www.lambdalegal.org/sites/default/files/publications/downloads/ll_moving-beyondbias_guide_final_singles.pdf> (accessed March 2023).

⁶ National Center for State Courts, *Gender Inclusivity in the Courts: How to Treat Everyone with Fairness, Dignity, and Impartiality*, p 3 <https://www.ncsc.org/__data/assets/pdf_file/0028/84916/Gender-Inclusivity-in-the-Courts.pdf> (accessed March 2023).

⁷ *Id.* at 4.

⁸ Michigan's Equality Profile, *Movement Advancement Project* <https://www.lgbtmap.org/equality-maps/profile_state/MI> (accessed March 2023).

⁹ Kasubhai, Judge, *Pronouns and Privilege*, 32 Or Women Law 3 (Summer 2021) <<https://oregonwomenlawyers.org/wp-content/uploads/2021/07/OWLS-AdvanceSheet-Summer-2021.pdf>> (accessed March 2023).

¹⁰ UCLA School of Law Williams Institute, *LGBT People Nearly Four Times More Likely Than Non-LGBT People to be Victims of Violent Crime* (October 2020) < <https://williamsinstitute.law.ucla.edu/press/ncvs-lgbt-violence-press-release/>> (accessed March 2023).

¹¹ Among the study's conclusions—more than 1/3 of LGBTQ+ people faced discrimination in the past year, with over half of LGBTQ+ people who experienced discrimination saying that it has moderately or significantly negatively impacted their psychological well-being. Moreover, to attempt to avoid being discriminated against, over half of LGBTQ+ people hide a personal relationship and 20-33% have altered other aspects of their personal or work lives. Gruberg et al, *The State of the LGBTQ Community in 2020*, Center for American Progress (October 6, 2020)

<<https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/10/06/491052/state-lgbtq-community-2020/#Ca=10>> (accessed March 2023).

¹² National Center for Transgender Equality, *2015 US Transgender Survey: Michigan State Report* (Washington, DC: National Center for Transgender Equality, 2017) <[https://transequality.org/sites/default/files/docs/usts/USTSMISStateReport\(1017\).pdf](https://transequality.org/sites/default/files/docs/usts/USTSMISStateReport(1017).pdf)> (accessed March 2023).

¹³ Michigan Fair Housing Centers, *Sexual Orientation and Housing Discrimination in Michigan*, pp 3, 9-10 <<https://www.opportunityhome.org/wp-content/uploads/2020/02/INTRODUCTION.pdf>> (accessed March 2023).

¹⁴ See note 11.

¹⁵ See note 11.

¹⁶ Savit, *Legal Guidance 2021-01: Hate Crimes Based on Sexual Orientation/Gender Identity* (February 12, 2021), p 1 <<https://www.washtenaw.org/DocumentCenter/View/19590/Legal-Guidance-Hate-Crimes-Based-on-Sexual-OrientationGender-Identity->> (accessed March 2023).

¹⁷ Ronan, *New FBI Hate Crimes Report Shows Increases in Anti-LGBTQ Attacks* (November 17, 2020) <<https://www.hrc.org/press-releases/new-fbi-hate-crimes-report-shows-increases-in-antilgbtq-attacks>> (accessed March 2023).

¹⁸ Burger, Chief Justice, *The State of the Judiciary—1970*, 56 ABA J 929, 934 (1970).

¹⁹ The LGBTQ+ Bench Guide is anticipated to be released in 2023.

²⁰ GLAAD's *Media Reference Guide Glossary of Terms: LGBTQ* (11th ed) <<https://www.glaad.org/reference/terms>> (accessed March 2023).

²¹ *Id.*

²² Sun, *Stop Using Phony Science to Justify Transphobia*, (Scientific American, June 2019) <<https://blogs.scientificamerican.com/voices/stop-using-phony-science-to-justify-transphobia/>> (accessed March 2023).

²³ Flores et al., *How Many Adults Identify as Transgender in the United States?* (Los Angeles: Williams Institute, June 2016), p 3 <<https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf>>.

²⁴ *Id.*

Public Policy Position
ADM File No. 2022-03: Proposed Amendment of MCR 1.109

The LGBTQA Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 232 members. The LGBTQA Law Section is not the State Bar of Michigan and the position expressed herein is that of the LGBTQA Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The LGBTQA Law Section has a public policy decision-making body with 11 members. The Section Council discussed ADM File No. 2022-03 at its March 1, 2023 meeting and adopted its position after a subsequent electronic vote. 11 members voted in favor of the Section's position, 0 members voted against this position, 0 members abstained, and 0 members did not vote.

Explanation:

The LGBTQA Law Section Council voted to support the amendment of MCR 1.109 proposed in ADM File No. 2022-03 for the reasons stated in the Section's March 24, 2023 letter (attached).

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