

Selected Legal Issues for LGBTQ Participants and Families in Collaborative Courts

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Canons of Judicial Ethics

▶ Canon 3(B) Adjudicative Responsibilities

- ▶ A judge shall be patient, dignified and courteous to litigants, jurors, witnesses and lawyers...and shall require similar conduct of lawyers and all staff and court personnel under the judge's direction and control
- ▶ A judge shall perform judicial duties without bias or prejudice. A judge shall not...engage in speech, gestures or other conduct that would be reasonably perceived as bias or prejudice, including but not limited to bias or prejudice based upon...sex, gender...sexual orientation
- ▶ A judge shall require lawyers to refrain from words or conduct that would reasonably be perceived as bias or prejudice including among other bases sex, gender or sexual orientation.

Canons of Judicial Ethics

▶ Canon 3(C) Administrative Responsibilities

- ▶ A judge shall diligently discharge administrative responsibilities, on the basis of merit, without bias or prejudice...and in a manner that promotes public confidence in the integrity of the judiciary. A judge shall not, in the performance of administrative duties, engage in speech, gestures or other conduct that would be reasonably perceived as bias or prejudice based upon...sex, gender...sexual orientation
- ▶ A judge shall require staff and court personnel under the judge's direction and control to observe appropriate standards of conduct and to refrain from manifesting bias or prejudice based upon...sex, gender...sexual orientation...in the performance of their official duties

LGBTQ Fairness in the Courts

Research Findings

- ▶ *Sexual Orientation Fairness in the California Courts (Final Report)(2001)* Judicial Council Access and Fairness Advisory Committee.
- ▶ Findings supported by subsequent studies including 2016 national Lambda Legal survey.
- ▶ Methodology: Attorney focus groups; surveys to self-identified lesbian/gay (L/G) court users and court employees.
- ▶ Looked at both perceptions of bias and observed bias conduct.
- ▶ Findings: Good news. Most L/G court users believed they were treated the same as everyone else and treated by respect by those who knew their sexual orientation. Courts typically rated higher in fairness than other government agencies.
- ▶ Findings: Not so good news. Perception of fairness was less favorable the greater the court contact and when sexual orientation became an issue in the court contact. Impact of “visibility” for LGBTQ court users.

LGBTQ Fairness in the Courts

Research Findings

- ▶ Perceptions: 26% of L/G court users believed they were not treated the same as everyone else.
- ▶ Perceptions: 30% believed they were not treated with respect by those that knew their sexual orientation.
- ▶ Perceptions: 39% believed their sexual orientation was used to devalue their credibility.
- ▶ Observed Conduct: 56% of L/G court users experienced or observed negative comment or action.
- ▶ Observed Conduct: One of five court employees heard negative/derogatory comments in open court.
- ▶ “Outing” in the court. 29% believed someone else reported their sexual orientation without their approval; 25% felt forced to state against their will.

LGBTQ Fairness in the Courts

Research Findings

- ▶ Court Employee Intervention: 65% who observed negative action/comment outside the courtroom took no action. Stated reasons for not intervening:
 - ▶ 62% “not serious enough to intervene”
 - ▶ 23% “nothing constructive would happen
 - ▶ 8% “feared retaliation”
 - ▶ 15% “never thought of intervening”
 - ▶ 2% “feared they would be thought to be lesbian or gay”

LGBTQ Competency Training in the Courts Requirements

- ▶ AB 868 (2013) Courts: training programs: gender identity and sexual orientation.
 - ▶ Mandates training requirements for courts: court appointed council for dependency minors, family law judges, mediators, CASAs and others
 - ▶ This bill requires that training for judicial officers, mediators and others who perform duties in family law matters to also include the effects of gender identity and sexual orientation on family law proceedings.
 - ▶ This bill requires that existing training for dependency hearing judges, dependency counsel appointed for child and CASAs, to also include instruction on cultural competency and sensitivity relating to, and best practices for, providing adequate care to lesbian, gay, bisexual, and transgender youth.

LGBTQ Competency Training in the Courts Requirements

- ▶ Judicial Council action on AB 868 (Judicial Council Report and Action)
 - ▶ California Rule of Court 5.660 Court appointed attorney for child (Competent Counsel—education) Specific requirement for instruction on cultural competency and sensitivity relating to best practices and adequate care to lesbian, gay, bisexual and transgender youth in out-of-home placement.
 - ▶ Rule 10.479 (Appellate and trial court personnel) (“Fairness and access” education)
 - ▶ Rule 10.469(e) (Justices, judges and subordinate judicial officers) (“Fairness and access” education)

Other California Statutes Addressing LGBTQ Issues

- ▶ AB 458 (2003) The California Foster Care Non-Discrimination Act
 - ▶ This bill adds to the rights contained in the policy referred to above, the rights of a foster child to have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status.
 - ▶ This bill requires training for administrators, licensing personnel, licensed foster parents, and relative caretakers to include training about these rights.
- ▶ AB 1856 (2012) Foster Youth: LGBT Cultural Competence
 - ▶ Requires foster care providers to receive instruction through existing training programs on cultural competency and sensitivity with respect to lesbian, gay, bisexual, and transgender (LGBT) youth in out-of-home care.
 - ▶ Foster care providers include administrator of a group home facility, licensed foster parent, and relative or nonrelative extended family member caregiver
 - ▶ Adds to the delineated rights of all children in foster care the right to have caregivers and child welfare personnel who have received instruction on cultural competency and sensitivity relating to, and best practices for, providing adequate care to LGBT youth in out-of-home care

Employment and Housing Protections

- ▶ Title VII Civil Rights Act
 - ▶ Prohibits discrimination by covered employers on the basis of race, color, religion, sex or national origin. Sexual orientation and gender identity discrimination not specifically listed but EEOC has interpreted and enforced as a violation of the specified category of “sex discrimination”.

Employment and Housing Protections

- ▶ EEOC Position: (Equal Employment Opportunity Commission)
 - ▶ 2015 EEOC ruled that employment discrimination on the basis of sexual orientation is prohibited under Title VII under the specified statutory category of sex discrimination. EEOC continues with this position.
 - ▶ 2012 EEOC ruled that employment discrimination on the basis of gender identity or transgender status is prohibited under Title VII as sex discrimination. The decision held that discrimination on the basis of gender identity qualified as discrimination on the basis of sex whether the discrimination was due to sex stereotyping, discomfort with the fact of an individual's transition, or discrimination due to a perceived change in the individual's sex.
 - ▶ 2017 US Attorney General reverses position and issues a directive stating that Title VII in the 1964 Civil Rights Act does not prohibit discrimination in the workplace on the basis of gender identity.

Employment and Housing Protections

US Court of Appeals Rulings

- ▶ US Court of Appeals Decisions:
 - ▶ US Court of Appeals (7th Circuit/Chicago) ruled that Title VII of the Act allows discrimination claims on the basis of sexual orientation by a vote of 8-3.
 - ▶ US Court of Appeals (11th Circuit/Atlanta) ruled Title VII does not include claims for sexual orientation discrimination in employment.
 - ▶ US Court of Appeals (2nd Circuit/New York) full panel ruled Title VII does include sexual orientation claims, reversing earlier ruling by 3-judge panel.
- ▶ Sets up possible US Supreme Court review to resolve divergent rulings.

Employment and Housing Protections

- ▶ Federal Fair Housing Act of 1968 & Fair Housing Act Amendments of 1988.
 - ▶ No specific mention of sexual orientation or gender identity but...gender stereotypes could be used in specific circumstances under the prohibition of discrimination based on person's sex.
- ▶ California Fair Employment and Housing Act. Sexual orientation, gender identity and expression are specifically protected under California law regarding employment & housing issues.
- ▶ California SB 396 Employment: gender identity, gender expression, and sexual orientation (2017-2018)
 - ▶ This bill requires employers with 50 or more employees to include, as a component of prescribed training and education for supervisors, training inclusive of harassment based on gender identity, gender expression, and sexual orientation.
 - ▶ This bill expands the definition of an “individual with employment barriers” to include transgender and gender nonconforming individuals. The bill also would authorize the appointments to the board representing the state workforce to include representatives of community-based organizations that serve transgender and gender nonconforming individuals.

Conversion Therapy

- ▶ What is conversion therapy?
- ▶ What is not conversion therapy?
- ▶ Also referred to as “sexual orientation change efforts” and “reparation therapy”.
- ▶ Historical Background
 - ▶ Early medical/psychological community views that variant sexual orientation/identity was a disorder/pathology.
 - ▶ “Treatment” approaches over time.
 - ▶ Changes to the paradigm

Conversion Therapy

Current Scientific Consensus

- ▶ APA (American Psychological Association) removed all references to sexual orientation as a disorder (1987)
- ▶ No valid scientific evidence that sexual orientation can be changed (2001 US Surgeon General report).
- ▶ Mental health professionals should avoid telling clients they can change sexual orientation through therapy or other treatments (APA Resolution 2009)
- ▶ Potential harm to clients from such therapies outlined (APA Resolution 2009)
- ▶ Interventions aimed at gender conformity or heterosexual orientation including gender identity, gender expression and sexual orientation are coercive, can be harmful & should not be part of behavioral health treatment (*for children & adolescents*). US Dept. of Health and Human Services (2015)

Conversion Therapy & California Legislation

- ▶ SB 1172 (2012) Sexual Orientation Change Efforts
 - ▶ This bill would prohibit a mental health provider, as defined, from engaging in sexual orientation change efforts, as defined, with a patient under 18 years of age. The bill would provide that any sexual orientation change efforts attempted on a patient under 18 years of age by a mental health provider shall be considered unprofessional conduct and shall subject the provider to discipline by the provider's licensing entity.
- ▶ AB 2943 (2018) (Pending)
 - ▶ This bill makes it unlawful for any individual to advertise, offer for sale, or sell services constituting sexual orientation change efforts (SOCE) with an individual in a transaction intended to result or that results in the sale or lease of goods or services to any consumer. This bill applies the same definition of "sexual orientation change efforts" as used in existing law.

Defense of Marriage Act (DOMA) Litigation

- ▶ DOMA: Federal legislation (1996) that
 - ▶ Allowed states to refuse to recognize same-sex marriages granted under the laws of other states. (*Section 2 of Act*)
 - ▶ Mandated non-recognition of same-sex marriages for all federal purposes. (Social security survivors benefits, veteran's benefits, tax laws including inheritance taxes, immigration, federal employee benefits, bankruptcy, etc.). (*Section 3 of Act*)
- ▶ US Supreme Court Decision
 - ▶ 2013 US Supreme Court, in *United States v. Windsor*, struck down *Section 3* of DOMA as unconstitutional. *Section 2* of Act was not at issue and remained in force.
 - ▶ Same-sex marriage recognized by federal government when performed in state that authorizes same-sex marriage.
 - ▶ Impact

California Proposition 8 & Related Court Cases

In re Marriage Cases

- ▶ California Proposition 22 (2000) as ordinary statute forbid recognition or licensing of same-sex marriages in California.
- ▶ May 2008 California Supreme Court finds Proposition 22 to be unconstitutional. (*In re Marriage Cases*)
- ▶ November 2008 California passes Proposition 8 as a constitutional amendment to forbid recognition or licensing of same-sex marriages in California.
- ▶ 2009 California Supreme Court upholds Proposition 8 as valid. (*Strauss v. Horton*)
- ▶ 2010 US District Court holds Proposition 8 unconstitutional under Due Process and Equal Protection clauses of US constitution. Stayed pending appeal.
- ▶ Various appeals with end result in 2013 US Supreme Court decision lets US District Court decision stand based on procedural issue not merits. Same-sex marriages in California immediately resumed. (*Hollingsworth v. Perry*)

Right of Same-sex Marriage

Obergefell v. Hodges (US Supreme Court)(2015)

- ▶ Issue Before US Supreme Court: Constitutionality of state-level bans on same-sex marriages. Does 14th Amendment require (1) states to license marriages between same-sex couples (2) states to recognize same-sex marriage lawfully entered into in another state?
- ▶ By 2015 thirty-six state already issued marriage licenses to same-sex couples.
- ▶ By 2015 13 states specifically prohibited same-sex marriage.

Right of Same-sex Marriage

Obergefell v. Hodges (US Supreme Court)(2015)

- ▶ Decision: Fundamental right protected under 14th Amendment Equal Protection and Due Process
 - ▶ the right to personal choice regarding marriage is inherent in the concept of individual autonomy.
 - ▶ the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals, a principle applying equally to same-sex couples.
 - ▶ the fundamental right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education"; as same-sex couples have children and families, they are deserving of this safeguard—though the right to marry in the United States has never been conditioned on procreation.
 - ▶ marriage is a keystone of our social order", and "[t]here is no difference between same- and opposite-sex couples with respect to this principle"; consequently, preventing same-sex couples from marrying puts them at odds with society, denies them countless benefits of marriage, and introduces instability into their relationships for no justifiable reason.
- ▶ Impact

Affordable Care Act (ACA)

- ▶ ACA provides important coverage for CC participants. Qualified plans must cover “pre-existing conditions” and include mental health and drug rehabilitation services.
- ▶ Non-discrimination under Section 1557 of ACA (Nondiscrimination in Health Programs and Activities (Final Regulations 45 CFR 92)).
 - ▶ “Race, color, national origin, sex, age, and disability”. LGBTQ protections are covered under “sex” category.
 - ▶ Transgender and gender non-conforming people
 - ▶ Lesbian, gay and bisexual people
 - ▶ Protections apply to both health settings (hospitals, clinics, pharmacies and labs) and health insurance providers

Concluding Remarks