Cultural Competency in Hawai‘i: Affirming Gender Identity and Expression

By Ian F. Tapu and Rebecca A. Copeland

“Let’s go around the room and share our name and pronouns.”
“Hey, Alex and I use he/him/his.”
“I’m Vanessa and use she/her/hers.”
“My name is Alex and my pronouns are they/them/their.”
“I’m Charlie and I use zie/zim/zir.”

Did you know these conversations are occurring more frequently in Hawai‘i?

Hawai‘i has always celebrated its diversity. The Aloha State is a melting pot of people, cultures, and experiences from around the world. As current and aspiring legal professionals, working in Hawai‘i’s legal community with those from all backgrounds requires a high level of cultural competency and understanding. In fact, the Hawai‘i State Bar Association (“HSBA”) states as one of its main goals is “[t]o eliminate unfair bias, prejudice and discrimination and to create meaningful opportunities for underrepresented groups in the legal system.”

Expanding the legal profession’s capacity and sensitivity toward sexual and gender minorities, a term which we use to refer to those who identify as lesbian, gay, bisexual, asexual, intersex, transgender, or non-binary, directly supports HSBA’s aim “[t]o promote the integrity and competency of lawyers in Hawai‘i.” In particular, it is important to have cultural competency regarding transgender, non-binary, and other gender nonconforming individuals in a way that validates and affirms their gender identity and expression. In the latest 2017 Gallup poll, 4.5 percent of U.S. adults and 8.1 percent of millennials, defined as those born between 1980 and 1999, identify as lesbian, gay, bisexual, or transgender.

Additionally, the Williams Institute at UCLA estimates that there are 8,450 transgender individuals in Hawai‘i, ranking the Aloha State number one in terms of the highest percentage of adults who identify as transgender.

Transgender and other gender non-conforming individuals face the additional burden of being misgendered or “deadnamed” in day-to-day affairs. Misgendering is the act in which someone intentionally or unintentionally uses pronouns or honorifics that the person does not use. Deadnaming is when a person is called by the person’s “birth name” or “given name” with which the person no longer identifies. Misgendering and deadnaming can lead to feelings of anxiety, low self-esteem, negative body image, and isolation from family, friends, and coworkers. If someone suffers from gender dysphoria, being misgendered or deadnamed can also heighten the effects of dysphoria. In fact, in a 2014 study, 32.8 percent of those who were misgendered felt stigmatized and also had a reduced sense of strength and continuity in their identities. The effects can directly and negatively impact rapport and trust with a client and create an unsupportive and exclusive work culture and environment.

Hawai‘i has often been at the forefront of the nation in regard to the rights of sexual and gender minorities, especially now in the realm of gender identity and expression, as evidenced by the numerous legal protections that exist. The state has expanded protections by prohibiting discrimination based on sexual orientation and gender identity or expression in education, public accommodations, housing, and employment.

In 2011, the scope of the Hawai‘i Civil Rights Commission’s mandate was amended to include gender identity or expression as a “form of sex discrimination.” According to the Hawai‘i Legislature when it amended the statute:

Your Committee finds that discrimination on the basis of gender identity or expression is abhorrent and, according to testimony submitted to your Committee, a true problem for transgender individuals. According to the 2009 National Transgender Discrimination Survey, transgender individuals experience unemployment and poverty at twice the rate of the general population and ninety-seven percent of the Survey’s respondents reported experiencing harassment or mistreatment while at work. This measure intends to send the message that Hawai‘i’s laws protect against this type of discrimination, whether based on actual or perceived sexual orientation, and that this type of discrimination is illegal and unacceptable.

The Legislature also noted that the amendment was not a new change in the law, but rather to bring the statute in line with Hawai‘i Civil Rights Commission’s existing interpretation of “sex” to include “gender identity or expression.” Additionally, in 2015, the Hawai‘i legislature extended the
right of individuals to petition to change gender markers on birth certificates without having to undergo invasive surgery or hormonal transition. Further, effective July 1, 2017, Rule 2.3 of the Hawai’i Revised Code of Judicial Conduct was amended to prevent judges and lawyers from manifesting “bias or prejudice, or engaging in harassment” based on gender identity or expression.

While these legal developments are noteworthy, sharp societal disparities still exist for the transgender community. In 2018, the Hawai’i State Department of Health conducted a study and published its findings in the Hawai’i Sexual and Gender Minority Health Report. According to the study, as compared to cisgender21 heterosexual youth, transgender youth are four times more likely (and lesbian, gay, bisexual youth are two times more likely) to skip school because they feel unsafe.24 Forty percent of transgender youth have been bullied either at school or electronically.25 And transgender youth are three times more likely to consider suicide and make a suicide plan than non-transgender youth.26 Fifty-eight percent of respondents in a 2015 national survey by the Center for Transgender Equality said “they were denied equal treatment or service, verbally harassed, and/or physically attacked in the past year.”27

Do these issues impact the members of the HSBA? Yes. Sexual and gender minorities interact with the bar in a variety of ways just as with all members of our community. Members of the LGBT community come into our courts as judges, court staff, attorneys, witnesses, jurors, or parties represented by an attorney or appearing pro se. Attorneys, judges, and court staff should understand how to interact with all individuals in a respectful way to fulfill the judiciary’s policy of non-discrimination. Individual members of the bar also have contact with clients, opposing counsel, co-counsel, families of clients or opposing counsel, and many others who may not identify within the binary, or who are otherwise part of the LGBT community. There are a variety of other ways in which individuals who are part of a sexual or gender minority may interact with the courts and members of the bar.

What can we as members of the bar do? Consistent with the HSBA goal “[t]o eliminate unfair bias, prejudice and discrimination and to create meaningful opportunities for underrepresented groups in the legal system[,]” we encourage members of the bar to endeavor to understand the complex and varied experiences and issues of those who are members of sexual and gender minorities, especially those who identify as transgender or non-binary. Here are a few practical tips:

- Use inclusive language. Avoid using language or asking questions that implicitly or explicitly assumes another person’s gender identity or sexual orientation, or excludes those who do not identify within the male/female binary. For example, say “everyone,” not “ladies and gentlemen.”

- Do not ask “Are you a guy or a girl?” Instead, you may ask, “What pronouns do you use?” There has been a shift from using the term “preferred gender pronoun” because a person’s pronouns are not just a preference, but central to their identity. Additionally, make it commonplace in introductions and group ice breakers to include pronouns in your work place or in other environments, including other organizations that you are involved with.

- Consistently use the name and pronoun that conforms to the other person’s gender identity. Again, if you are unsure, ask for their pronouns. In addition to using the identifying name and pronoun in all correspondence and court documents, request that co-workers, opposing counsel, court staff, and judges also do the same, and ensure that your request is followed.

- Update your office forms and applications to eliminate gender identification. At minimum, include a gender nonconforming option for those who do not identify within the binary of male or female. For those who have not been able to legally change their name, allow for a section in which the individual can write down their identifying name in addition to their legal name – then use that identifying name and/or identifying pronoun when speaking to that person, and when referring to them to others.

- Avoid asking transgender and gender nonconforming individuals to educate others about gender identity and expression. Doing so can feel tokenizing and exhausting. For those clients and/or coworkers who identify as transgender, it would be impossible to speak for the entire transgender community because every experience and voice is unique to the individual.

- Do not “out” individuals. This applies in any and all contexts whether in court, at the office, when you speak about someone to others, in correspondence, or in pleadings. The only time it is acceptable to tell a third party information about someone else’s sexual orientation and/or gender identity is if you were given express permission to do so. Just because some may know of a person’s sexual orientation and/or gender identity does not mean that everyone does, and does not mean that the person wants everyone to know. Coming out is profoundly personal and a life-long process. There is a legitimate fear of ridicule, harassment, violence, and losing loved ones.

- Do not use outdated terminology. Here are some terms that may be considered offensive and that should be avoided: sexual preference, tranny, homosexual, and hermaphrodite. Use “transgender” instead of “transgendered.”28 If you are ever in doubt, ask. Customs, norms, and language are continually in flux in many areas, and this area is no different. Words that may have been considered acceptable
in the past may now be considered offensive, hurtful, or improper.

- If possible, display welcoming signs and other indicators that your office or firm is a safe space for members of sexual and gender minorities. Consider including your own pronouns in your letter or email signatures; for example, “Pronouns: She/Her/Hers.” In fact, an increasing number of organizations include a person’s pronouns along with other identifying information provided in their email signature line.

- Re-sign your single stall restrooms as “Gender Neutral.” Consider also doing so for other restrooms.

- Show support and be accommodating in any way that the situation may call for. Be flexible. Put yourself in someone else’s shoes. Think: What if this were my child, my spouse, my friend, my family member, my loved one? How would I want them to be treated? What if it were me? How would I want to be treated?

This is not to be an exhaustive list. In fact, there are so many more concepts, words, and ideas – and so many issues that face members of our community who are transgender and gender non-conforming – that all cannot be addressed in a single article. However, it is the intent of this article to start a discussion, and begin the process of building a bridge to a more supportive and welcoming bar for individuals from all walks of life, including those from the transgender and non-binary community. Hawaii’s rich culture, along with the sister islands that make the fabric of Polynesia, can be a lesson in inclusivity. We need only look to the mahu of Hawai’i, the leiti of Tonga, and the fa‘afafine of Samoa, to understand that our Pacific heritage has long acknowledged the beauty, value, and power of people beyond the heteronormative, and recognizes the complexity of the human experience beyond the binary of male and female. In celebrating and affirming the diversity of the Aloha State, let our Pacific ancestors continue to lead the way.

1 Some individuals who use masculine pronouns identify as female, and some individuals who use feminine pronouns identify as male. As suggested in this article, it is a best practice to always ask someone what pronouns they use.
2 The use of “they/them/their” pronouns has become increasingly common. In 2016, the American Dialect Society officially sanctioned the singular use of “they.” Additionally in 2017, the Associated Press Stylebook, which is considered to be the foremost authority on grammar and word choice in journalism, added “they” as a singular, gender-neutral pronoun. The Washington Post also recently announced its approval of the singular “they.” These are only a few of the many examples of the use of “they” as a gender-neutral pronoun.
3 Zie (pronounced “Zee” /Zim/Zir are non-binary pronouns similar to they/them/their. Non-binary pronouns are pronouns that do not associate a person with a particular gender and are particularly used within the transgender and genderqueer communities. Similarly, other individuals also use the pronouns It/Its. Williams Institute, Pronouns, https://lgbt.williams.edu/resources/translations/pronouns/.
5 Id.
6 Transgender is “[a]n umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, or in some other way.” Human Rights Campaign, Sexual Orientation and Gender Identity Definitions, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions (last visited Apr. 7, 2019).
7 Someone who is non-binary is not male or female, may identify as both, may not identify with any gender, or their gender may change over time. National Center for Transgender Equality, Understanding Non-Binary People: How to Be Respectful and Supportive (Oct. 5, 2016), https://transqual-ity.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive.
11 According to the American Psychiatric Association: “Gender dysphoria involves a conflict between a person’s physical or assigned gender and the gender with which he/she/they identify. People with gender dysphoria may be very uncomfortable with the gender they are assigned, sometimes described as being uncomfortable with their body (particularly developments during puberty) or being uncomfortable with the expected roles of their assigned gender. People with gender dysphoria may often experience significant distress and/or problems functioning associated with this conflict between the way they feel and think of themselves (referred to as experienced or expressed gender) and their physical or assigned gender.” American Psychiatric Association, Parents & Families, Gender Dysphoria, https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (last visited Apr. 18, 2019).
13 Haw. Rev. Stat. § 513-2 (2018); Haw. Rev. Stat. § 489-2 (2011 & Supp. 2018); Haw. Rev. Stat. § Haw. Rev. Stat. -1 (2015). Sexual orientation is defined as “having a preference for heterosexuality, homosexuality, or bisexuality, having a history of any one or more of these preferences, or being identified with any one or more of these preferences.” ‘Sexual orientation’ shall not be construed to protect conduct otherwise proscribed by law.” Sexual orientation and gender identity are different concepts, and apply to different ways in which a person may self-identify. See footnote 10 (definition of gender identity or expression).

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17 Stand. Com. Rep. No. 1128 (2011). The Legislature also found that including gender identity and gender expression specifically in the statute was necessary because “all members of the community should have equal access to employment opportunities without regard to their gender expression or identity. Similarly, everyone should feel safe and secure in the workplace, without fear of harm or humiliation.” Stand. Com. Rep. No. 5 (2011). According to the Legislature:

Your committee finds that all members of the community should have equal access to employment opportunities without regard to their gender expression or identity. Similarly, everyone should feel safe and secure in the workplace, without fear of harm or humiliation.

18 Id.
19 Haw. Rev. Stat. § 338-17.7 (2010 & Supp. 2018). In amending the statute governing birth certificates, the Hawaii Legislature found “that the majority of transgender individuals do not choose to undergo sex reassignment surgeries for various reasons, including prohibitive costs and other medical and personal reasons. Thus, the current statutory reference to a sex change operation is outdated. This measure would make it easier for transgender individuals to request a new birth certificate, allowing them to more readily amend their legal documents, including driver’s license and other forms of identification.” Stand. Com. Rep. No. 1045 (2015); accord Stand. Com. Rep. No. 1524 (2015).
20 Id.
21 Haw. Rev. Code of Judicial Conduct R. 2.3 (2017). The revisions in the Code of Judicial Conduct are in accord with the Hawaii Judiciary’s long-standing non-discrimination policy, which includes protection for individuals based on gender identity or expression and sexual orientation.
22 Haw. Rev. Code of Judicial Conduct R. 2.3 (2017). The revisions in the Code of Judicial Conduct are in accord with the Hawaii Judiciary’s long-standing non-discrimination policy, which includes protection for individuals based on gender identity or expression and sexual orientation.
23 Cisgender is the “term for someone who exclusively identifies as their sex assigned at birth. The term cisgender is not indicative of gender expression, sexual orientation, hormonal makeup, physical anatomy, or how one is perceived in daily life.” Trans Student Education Resources, LGBTQ+ Definitions, http://www.transstudent.org/definitions/ (last visited Apr. 18, 2019).
25 Id. at 30.
26 Id. at 33. A 2018 study by the American Academy of Pediatrics found a staggeringly high rate of suicide and attempted suicide amount transgender youth:

Nearly 14% of adolescents reported a previous suicide attempt; disparities by gender identity in suicide attempts were found. Female to male adolescents reported the highest rate of attempted suicide (50.8%), followed by adolescents who identified as not exclusively male or female (41.8%), male to female adolescents (29.9%), questioning adolescents (27.9%), female adolescents (17.6%), and male adolescents (9.8%). Identifying as non-heterosexual exacerbated the risk for all adolescents except for those who did not exclusively identify as male or female (i.e., nonbinary). For transgender adolescents, no other sociodemographic characteristic was associated with suicide attempts.

Russell B. Toomey, Amy K. Syvertsen, & Maura Shramko, Transgender Adolescent Suicide Behavior, 142 Pediatrics (Oct. 2018), https://pediatrics.aappublications.org/content/142/4/e20174218/suppl/1&ndsp_redirect_count=1&nfstatus=401&ntoken=00000000-0000-0000-0000-000000000000&nstatus=ERROR%3a%3a+Nor+local+token+last+visited+Apr. 7, 2019).
29 Haw. Rev. Stat. § 489-2 (2008 & Supp. 2018) provides that “[p]lace of public accommodation” means “a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors.” Haw. Rev. Stat. § 489-4 (2008 & Supp. 2018) further provides that “[t]he provision of separate facilities or schedules for female and for male patrons, does not constitute a discriminatory practice when such separate facilities or schedules for female and for male patrons are bona fide requirements to protect personal rights of privacy.” Restroom facilities for the use of one person do not qualify for this exception.

Ian F. Tapu is a third-year student at the University of Hawai‘i’s William S. Richardson School of Law and is the current President of the Lambda Law Students Association. Rebecca A. Copeland is a solo appellate practitioner. She sits on the several legal and LGBT community boards, including as Co-Chair of the Hawai‘i Judiciary’s Committee on Equality and Access to the Courts, Secretary of the Hawai‘i LGBT Legacy Foundation, and as a member of the HSBA’s Committee on Diversity, Equality, and the Law. As a then-board member of Equality Hawai‘i, she successfully advocated during the 2015 and 2016 Hawai‘i legislative sessions for the passage of the Transgender Birth Certificate Bill and the Transgender Insurance Bill, both of which were signed into law. She is also the mother of a transgender son.