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GENDER AFFIRMING LANGUAGE IN IMMIGRATION COURT

June 2024

I. Introduction to Gender Terminology and the Importance of Gender Inclusivity in a Courtroom Setting

This practice advisory—designed for counsel for noncitizens, attorneys from Immigration and Customs Enforcement (“ICE”) Office of the Principal Legal Advisor (“OPLA”), immigration judges, and immigration court interpreters—focuses on methods for creating a gender-affirming courtroom by:

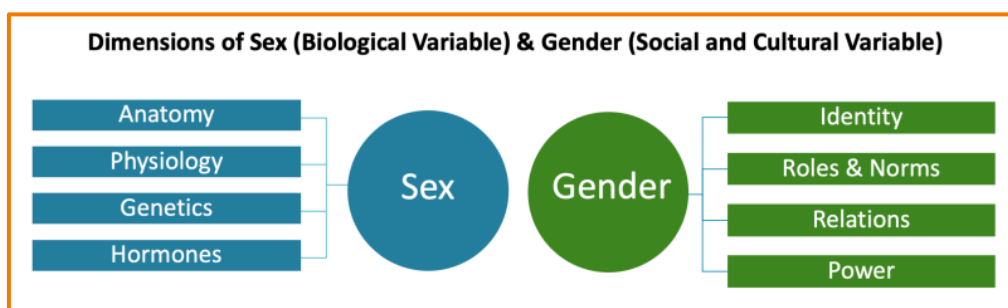
- Establishing a baseline for gender expansive cultural humility;
- Recommending practices to affirm gender identity in court proceedings; and
- Outlining professional conduct requirements for attorneys, interpreters, and judges.

It is intended as both a primer on how gender expansive identities can be affirmed in courtroom settings and a reference point for ensuring that people of different gender identities are respected in court.

Crucially, this practice advisory represents a starting point, not an endpoint, of gender affirmation in the courtroom. The advisory will broadly reference the social implications of gender—the way that gender structures power, allocates privileges, and impacts opportunities—with an understanding that the material implications of these constructions will continue to manifest in the courtroom, regardless of best practices. The historic and ongoing policing of gender makes it particularly critical that those in the legal profession are cognizant of the impact of gender and are committed to implementing gender affirming practices wherever possible in their work.

A. Gender Terminology

Foundational to gender affirming practices is differentiating sex and gender. Sex is the biological category that a person is assigned at birth based on anatomical and genetic characteristics. Gender is a socially constructed set of roles, behaviors, and expectations that are frequently reinforced in cultural and systemic institutions.¹



*From the National Institutes of Health Office of Research on Women’s Health:
<https://orwh.od.nih.gov/sex-gender>.*

¹ For more information about distinguishing sex from gender (as well as how both relate to sexuality), see “Gender, Sex, and Sexuality” from the Gender and Sexuality Resource Center at Princeton University. <https://www.gsrc.princeton.edu/gender-sex-and-sexuality>.

Gender Affirming Language in Immigration Court

Distinguishing gender from assigned sex at birth also acknowledges that an individual's personal understanding and experience of their gender (known as their gender *identity*) is distinct from how they might present or express their gender in public (which is their gender *expression*). Gender identity and gender expression are not interchangeable. As discussed later in this section, an individual's gender expression can change based on a variety of factors (including their perception of whether it is safe to disclose their identity) and may not reflect their gender identity.

The term “cisgender” describes individuals whose gender identity conforms to their assigned sex at birth, while “transgender” refers to those whose gender identity does not match the sex assigned to them at birth.² Additionally, the “gender non-conforming” label includes individuals whose gender identity or expression does not conform to cultural or social expectations of gender, while “nonbinary” describes those whose gender identities do not fall into the static categories of man or woman.

Majority culture within the United States treats both sex and gender as binary. In this construction, sex and gender can only be distinguished as male or female. This inaccurate construction ignores the many scientifically recognized categories of sex³ and the expansive possibilities of gender identity. Importantly, many cultures have conceptions of gender that exist entirely outside of (rather than in response to) the restrictive gender binary that is systematized in United States immigration courts and which are not captured under these labels.⁴ Creating a practice that is respectful of all genders requires a culturally humble approach to gender expansive identities that consistently challenges the idea of a gender binary.

While “transgender,” “gender non-conforming,” and “non-binary” can act as umbrella terms to describe a variety of different genders, everyone will have different preferences for which terms should be used to describe their gender identity. This practice advisory will use the term “gender expansive” to refer broadly, if imperfectly, to all genders that exist outside of the cisgender binary.

² It is preferable to use the term “assigned sex at birth,” rather than “sex” or “biological sex.” “Assigned sex at birth” highlights that sex and gender labels are designated by people (not obtained automatically), whereas “biological sex” has been politicized to suggest a permanent identifier and to lend scientific credence to anti-trans political projects. For additional information, see “Stylebook and Coverage Guide,” the Trans Journalists Association. styleguide.transjournalists.org/#asab.

³ Sex is typically categorized as female or male, but there is considerable variation among the biological features that comprise sex and the expression of these features. Canada Institutes of Health Research, cihr-irsc.gc.ca/e/48642.html. “Intersex” is the typical term to describe a person whose sex characteristics do not fall within the range of typically male or female. This can include sex characteristics that are identifiable at the time of birth or those which develop naturally during puberty. For more information, see “InterACT: Advocates for Intersex Youth”. interactadvocates.org/faq/.

⁴ For examples of numerous gender-diverse cultures, see a “Map of Gender Diverse Cultures:” www.google.com/maps/d/u/0/viewer?ll=-3.81666561775622e-14%2C-95.02075200000002&z=1&mid=1zDWxhBN5aOofwpE-FkZWQsiFDIE.

Practice Pointer: Definitions

Sex: Biological categorization that a person is assigned at birth based on anatomical and genetic characteristics

Gender: Socially constructed set of roles, behaviors, and expectations frequently reinforced in cultural and systemic institutions

Gender Identity: An individual's internal understanding and experience of their gender

Gender Expression: How an individual presents or expresses their gender externally

Cisgender: Individuals whose gender identity conforms to their assigned sex at birth

Transgender: Individuals whose gender identity does not match the sex assigned to them at birth

Gender non-conforming: Individuals whose gender identity or expression does not conform to cultural or social expectations of gender

Nonbinary: Those whose gender identities do not fall into the categories of man or woman

Gender expansive: Broad term for those whose gender exists outside of a cisgender binary

B. Gender Pronouns

Pronouns are an indispensable part of respecting and affirming gender identity for both cisgender and gender expansive people. Gendered pronouns are pronouns used to refer to people in place of their name and which specifically reference gender. These pronouns most commonly are “she/her/hers,” “he/him/his,” or “they/them/theirs” (for groups of people or for individuals)⁵ - however a wealth of other gender pronouns exist and are being created by gender expansive individuals so they can be referred to correctly. These types of neopronouns⁶ may include ze/zir/zirs, ze/hir/hirs, ey/em/eir, and many others.⁷

Some individuals use “mixed pronouns,” meaning that they identify with a combination of pronouns. When an individual uses a combination of pronouns (such as she/they, ze/he, etc.) it can mean that they would like the pronouns to be used interchangeably (ie. “She just walked in the door; I have been waiting for them.”) or that they would like to use different pronouns depending on the context (e.g., Using “he” in front of family and “ze” when around friends). While these terms provide a useful framework to refer to individuals of gender expansive identities, these categorizations of gender identity and expression should not be taken as comprehensive or definitive identifiers of gender.

⁵ The use of “they/them” to describe a single individual traces back to at least 1375 and is in fact older than the use of “you” as a singular pronoun. For additional information, please see “A brief history of singular ‘they’” from the Oxford English Dictionary: www.oed.com/discover/a-brief-history-of-singular-they/?tl=true.

⁶ As with singular “they,” neopronouns are not a new phenomenon, and have existed since at least the 18th century. For more information on background and use of neopronouns, see “A guide to neopronouns, from ae to ze”: www.cnn.com/us/neopronouns-explained-xe-xyr-wellness-cec.

⁷ This is not an exhaustive list of gender pronouns or a complete guide on how to navigate using gender pronouns respectfully. For additional information, see “Pronouns & Inclusive Language,” LGBTQIA Resource Center. lgbtqia.ucdavis.edu/educated/pronouns-inclusive-language.

Practice Pointer: Gender Across Cultures

Cultures worldwide have myriad understandings of and terminology for gender and sex. While the U.S. tends toward a binary perception of gender there are numerous cultures in the world that recognize three or more genders.

- The indigenous Zapotec people of southern México have recognized the *muxes* as a third gender since before Spanish colonization.⁸
- In Indonesia, the people of South Sulawesi recognize five genders: cisgender male, cisgender female, transgender male, transgender female, and *bissu*, a fifth gender that is considered both male and female.⁹
- There are four genders recognized in Samoa, including the *fa'afafine* and *fa'afatama*, meaning “in the manner of women” and “in the manner of man,” respectively.¹⁰
- In India, the *hijra* are a third gender that are revered within the Hindu religion and who perform dances, songs, and blessings at both births and weddings of Hindus.¹¹

⁸ See “This community in southern Mexico has defied the gender binary for generations,” CNN (Apr. 7, 2023), www.cnn.com/travel/article/muxes-mexico-gender-binary-cec/index.html.

⁹ See “Beyond Gender Categories: The Bissu of Sulawesi,” Counterpoint Knowledge (Jun. 1, 2022), www.counterpointknowledge.org/beyond-gender-categories-the-bissu-of-sulawesi/.

¹⁰ See “Fa'afafines and Fa'afatamas: the Four Genders in Samoa,” Culture Trip (May 5, 2021), theculturetrip.com/pacific/samoa/articles/fa-afafines-the-third-gender.

¹¹ See “The Third Gender and Hijras,” Harvard Divinity School (2018), rpl.hds.harvard.edu/religion-context/case-studies/gender/third-gender-and-hijras.

C. **Complications of Gender in Court**

Gender is not linear, stagnant, or permanent and it is shaped in part by the cultural, temporal, and situational context in which an individual exists. A person's gender identity or expression may change depending on their understanding of gender, their experiences, and their perceived safety in a given situation.

Coming out (or self-disclosing a gender expansive identity) can present a range of risks — from discrimination and economic exclusion to physical violence. While acts of physical violence or discriminatory policies can be more easily identified as gender-based violence, others (such as gender expansive people not being granted legal recognition and thus receiving fewer protections under laws against gender-based violence) can be normalized or made nearly invisible.¹² These risks are heightened for gender expansive people of color (who face additional barriers of structural and individual racism in addition to gender-based violence)¹³ and noncitizens (who are targeted on the basis of their immigration status and are particularly vulnerable to violent displacement).¹⁴

¹² For more information about the multifaceted discrimination and violence faced by gender expansive individuals, see “Injustice at Every Turn: A Report of the National Transgender Discrimination Survey.” The National Center for Transgender Equality and The National Gay and Lesbian Task Force (2011), www.thetaskforce.org/app/uploads/2019/07/ntds_full.pdf.

¹³ *Id.* Black immigrants are subject to prolonged and arbitrary detention (including solitary confinement), excessive use of force, and medical neglect in immigration detention. Black immigrants are also disproportionately deported due to prior contact with the US criminal enforcement system, which results in part from the mass criminalization of Black and African American people in the United States. See Anti-Black Discrimination within US Immigration, Detention, and Enforcement Systems. humanrightsfirst.org/wp-content/uploads/2022/09/CERD-1pger_Anti-Black-Discrimination-within-US-Immigration-Detention-and-Enforcement-Systems-1.pdf; The State of Black Immigrants by the NYU Law Immigrant Rights Clinic and the Black Alliance for Just Immigration. baji.org/wp-content/uploads/2020/03/sobi-fullreport-jan22.pdf.

¹⁴ Gender-based violence is a normalized component, not an accidental off-shoot, of U.S. immigration policies. Surviving Deterrence: How U.S. Asylum Deterrence Policies Normalize Gender-Based Violence by Oxfam America and the Tahirih Justice Center, www.tahirih.org/news/transgender-asylum-seekers-the-impact-of-gender-based-violence-and-deterrence-policies-at-the-border/. Gender expansive individuals are frequently subject to medical neglect and inadequate access to mental health care, dehumanizing treatment, and solitary confinement, despite regulations and standards put forth by ICE. See “Complaint Underscoring Why People Who Are Transgender and Nonbinary Should Not Be Detained in Civil Immigration Detention,” National Immigration Project, Rocky Mountain Immigrant Advocacy Network, and American Immigration Council (Apr. 2024) nipnlg.org/sites/default/files/2024-04/CRCL_complaint-transgender-care.pdf . See also “Congressional letter to DHS Secretary Kirstjen Nielsen,” Transgender Law Center (Oct. 15, 2019), transgenderlawcenter.org/wp-content/uploads/2019/10/Complaint-on-LGBTQ-Detention-Final-October.pdf (describing how LGBTQIA individuals and individuals living with HIV are particularly subject to abuse in immigration detention, including “verbal, sexual and physical violence, negligence, inhumane housing conditions, and overuse of solitary confinement”).

Example

Rose is a transgender woman being held in immigration detention with men. When she is sexually harassed by the male detainees because of her gender expression, ICE moves her to protective custody—effectively solitary confinement—allegedly for her safety. After months of being held in isolation, without access to gender affirming care, Rose’s mental health deteriorates significantly, and she decides to accept deportation in lieu of presenting her asylum claim.¹⁵

Because of these risks, gender expansive individuals may choose not to come out in spaces where they do not feel safe (such as in detention centers, in front of medical professionals, or in the courtroom). In addition, the legal and financial barriers to acquiring a legal name change, especially when further complicated by immigration proceedings (particularly detained proceedings), may mean that a gender expansive individual’s correct name¹⁶ and pronouns are not reflected in their legal record. Consequently, documentation may include their “deadname”¹⁷ (the name that was given to them at birth, which they no longer identify with or use) instead of their correct name or may use incorrect pronouns or gender markers to refer to them.

Gender expansive people are often subject to policing, punishment, and violence by systemic norms, which is an essential context to understanding the harms encountered by gender expansive people in the courtroom—and how to help ameliorate them.

When a gender expansive person discloses their identity in court, this warrants immediate attention and recognition. Consistently misgendering someone (using terms that are inappropriate for a gender expansive person, such as the wrong name, gender, or pronouns) disrespects their personhood. It also places undue burden on the gender expansive individual to make corrections and extend courtesy to a person who has just disrespected them, by forcing them to either accept the misgendering or to out themselves on the spot and incur the risks of coming out. In that way, consistently disregarding an individual’s gender identity prioritizes convenience or comfort over the safety of the at-risk individual. Further, consistently misgendering either opposing counsel or a noncitizen in immigration proceedings violates ethical standards for counsel, interpreters, and judges, and can incur professional consequences, as detailed in Section IV.

As Section II describes, there are many ways to respectfully discuss an individual’s gender identity prior to court and affirm it throughout proceedings to create a more gender-affirming courtroom.

¹⁵ Transgender women frequently experience sexual assault while being held in immigration detention with men, strip searches by male guards, arbitrary lockdowns and solitary confinement, and limited access to routine and emergency medical care and gender-affirming care. See “Do You See How Much I’m Suffering? Abuse Against Transgender Women in US Immigration Detention” by Human Rights Watch, www.hrw.org/sites/default/files/report_pdf/us0316_web.pdf.

¹⁶ Note: “Correct name” refers at all times to the name used and preferred by the client. This is to contextualize and contrast the current name used/preferred from the legal/deadname. In other contexts, it is appropriate to simply say “a person’s name and pronouns” without any qualifier.

¹⁷ The term “deadname” is not used universally within the gender expansive community, as some individuals disagree with the negative context it implies. Among the other ways gender expansive people refer to their previous names are “assigned name” and “birth name.”

II. How Counsel for Noncitizens, Counsel for OPLA, and Immigration Judges Can Affirm Gender Identity in Court Proceedings

Using correct language is just one of the many ways individuals can affirm identity, yet — as described in Section I — doing so has a profound effect. Respecting noncitizens' identities in immigration proceedings through proper address is not only vitally important to ensure fair proceedings, but also part of attorneys' and judges' ethical responsibilities. Using a gender expansive noncitizen's correct name and pronouns also prevents re-traumatization, which is particularly necessary when a noncitizen has already survived persecution on account of their gender identity.

A. How Counsel for Noncitizens Can Affirm Their Clients' Identities Prior to Court Hearings

Counsel for noncitizens should learn and affirm their client's identity long in advance of any court hearing. Learning and affirming a client's identity has many components, but as a starting place, attorneys should confirm at the outset that they are using their client's correct name and pronouns. A conversation about identity can take place within the first client meeting.¹⁸ One way to enter this conversation is for attorneys to introduce their own identity first.

Example Introduction:

"My name is Reese and I use they/them pronouns because I am nonbinary. What is your name and how should I refer to you?"

"We've been getting to know each other for an hour, and I realized we never had a conversation about our identities. I am cisgender and use she/her pronouns. What about you?"

¹⁸ While reviewing legal, detention, and medical records may give attorneys for noncitizens an idea of whether their client is gender expansive, these records are often faulty or incomplete. Further, clients may not want to "out" their identities to legal or medical institutions but still want to share their identity with attorneys. This is why it is crucial for attorneys for noncitizens to have at least one conversation with the client regarding this topic.

As discussed in Section I, gender (and the understanding of gender), gender-expression, and the language gender expansive individuals use to describe themselves can vary drastically. It may be helpful to use language that more clearly describes how the attorney would like to be addressed.

Introducing one's own identity before asking a client to disclose theirs is preferable and far more appropriate, particularly if an attorney is cisgender. A cisgender attorney asking for a client's identity without disclosing their own suggests that cisgender identities are the norm, and that cisgender identity can be assumed by merely looking at the way a person expresses their gender. Disclosing one's own identity first normalizes identity sharing, places attorney and client on equal footing, and encourages confidence.

Example Introduction:

"My name is Reese, and I am a woman. I like to be called Ms. Reese and be referred to with 'she' or 'her.' What name would you like me to call you by, and how do you like to be referred to?"

Due to the risks inherent in coming out (as described in Section I), some clients may be comfortable sharing their identity with their attorney but want to keep aspects of it private from the detention center or the Court. For example, a client may want to use different pronouns inside and outside of attorney/client meetings or be called by a different name only in private. It is important, therefore, for attorneys to ask their clients whether they are permitted to use the client's correct name and pronouns before the Court and in any other advocacy efforts on the client's behalf.

B. How Counsel for Noncitizens and Counsel for OPLA Should Affirm Noncitizens' Identities in Written Filings

Counsel should use a noncitizen's correct name and pronouns in filings submitted to the court, even if the noncitizen's name and gender have not been legally changed. If an attorney has concern that using a noncitizen's correct name (as opposed to their legal/deadname) may create confusion, the attorney can:

- Add a footnote after the correct name, explaining that the document will solely refer to the client by their correct name and pronouns moving forward;
- Put f/k/a (formerly known as) with the legal/deadname in case captions; or
- Insert the legal/deadname in parentheses ("Elena (Jose) Lombardo").¹⁹

Where counsel for the noncitizen is not sure whether counsel for OPLA is aware of a noncitizen's identity, using their correct name and pronouns in written filings will alert OPLA attorneys and the Court in advance as to how to properly refer to the noncitizen on the record. The practices described above are already recognized in some jurisdictions,

¹⁹ The authors note that, as a personal preference, they do not use the option of placing the deadname in parentheses, as it may give the impression that the individual can still be called by this name. However, the use of any of these options is practice- and potentially even case-specific, and counsel for noncitizens should determine individually the best way to ensure their client's identity is respected.

such as the 10th Circuit.²⁰ Defense counsel can also address with OPLA in court before the hearing starts and with the judge at the start of the hearing.

C. Properly Captioning and Referring to a Case

When a noncitizen has legally changed their name, the best practice is for their counsel to file a motion to update the name on the record of proceedings. This motion should include information about when and where the noncitizen's name was legally changed and should provide a copy of the legal name change order. Counsel for the noncitizen should also be sure to retain a certified copy of the name change order to present at a hearing, if requested.

Even if the noncitizen has not legally changed their name, the Court should ensure that the case caption refers to the noncitizen's correct name and should address the noncitizen by their correct name and pronouns throughout proceedings. There is a common misconception that immigration judges are required to refer to the noncitizen or to caption the case with *only* the noncitizen's legal name,²¹ but this is not the case. Indeed, the regulations state that a Notice to Appear ("NTA") *shall* contain the noncitizen's name *and any known aliases*,²² and the case caption should derive directly from the NTA. With that in mind, the noncitizen's correct name should, at minimum, be included as an alias in the case caption, thereby ensuring that the judge can refer to them by their correct name throughout the proceedings.

D. How Attorneys and Judges Should Affirm Noncitizens' Identities During Hearings

Defense counsel should endeavor to speak with counsel for OPLA, the immigration judge, and interpreters prior to the start of court to clarify their client's correct name and pronouns. Regardless, counsel for the noncitizen should state their client's correct name and pronouns on the record at the earliest possible opportunity. Counsel for the noncitizen may also encourage their client to introduce themselves on the record with their correct name and pronouns.

If discussing a client's gender identity, or if using a client's correct name and pronouns in a setting where the client may not have disclosed their identity universally (such as in a detention center), attorneys should first request that the courtroom is cleared to discuss confidential information. Given the risks of coming out, this request should be honored.²³ Additionally, having a clear courtroom can be framed as a safeguard required under the

²⁰ See e.g. the case caption in *Gonzalez Aguilar v. Garland*, No. 18-9570 (10th Cir. 2022) or the court order in *Juarez v. Choate*, Civil Action 1:24-cv-00419-CNS (D. Colo. Mar. 8, 2024).

²¹ There is also a common misconception that a person can only have one "legal" name. However, the name change process is complex and varies depending on which documents are getting changed. A person who is only partway through an extensive name change process could have a different *legal* name on their passport, birth certificate, drivers' license, social security card, green card, etc. See Baker, Austin and Green, J. Remy, "There is No Such Thing as a Legal Name," *Columbia Human Rights Law Review* 53.1, hrlr.law.columbia.edu/hrlr/there-is-no-such-thing-as-a-legal-name/.

²² See 8 C.F.R. § 1003.15(c)(1) (emphasis added).

²³ See 8 C.F.R. § 1003.27(b); see also *Immigration Court Practice Manual*, Ch. 4.9(a)(2).

Immigration and Nationality Act²⁴ or a reasonable accommodation²⁵ under Section 504 of the Rehabilitation Act.²⁶ Alternatively, counsel can request a side bar.

Attorneys for both parties should use the noncitizen's correct name and pronouns, and counsel for OPLA should address the noncitizen appropriately during cross-examination. If an OPLA attorney is unclear about the noncitizen's correct name and pronoun, they should ask for clarification as early on in proceedings as possible, and no later than the start of cross-examination. OPLA attorneys and judges who intentionally misgender or deadname noncitizens may be subject to professional consequences, as detailed in Section IV.

E. Using Gender Neutral Honorifics

Honorifics such as “Mr.,” “Ms.,” and “Mrs.” are inherently gendered and may not be appropriate for some gender expansive individuals. Unless the individual introduces themselves with an honorific, judges and attorneys should ask the individual what honorific they prefer prior to using the honorific in a form of address. Some gender expansive individuals (including attorneys) may prefer no honorific be used, and that they be referred to by either their first or last names instead; this request should be honored by all attorneys and court staff.

Some examples of more common gender-neutral honorifics²⁷ include:

- Mx (pronounced “mix”)
- Fren (like “friend” without the d)
- Ind (short for “individual”)
- M (pronounced “em”)

Regarding attorneys, if the Court is unsure of what honorific to use, “Attorney Lastname” is generally acceptable, or simply “Counsel.”

²⁴ See INA § 240(b)(3); see also *Matter of M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011). *Matter of M-A-M-* specifically permits judges to use wide discretion in applying safeguards in cases where a client is deemed incompetent; however, even if a client is competent, *Matter of J-R-R-A* incorporates and applies safeguards in contexts where a respondent is not deemed incompetent but still requires the safeguard in order to testify fully. 26 I&N Dec. 609 (BIA 2015).

²⁵ 29 U.S.C. § 794 (1973). Section 504 requires that qualified individuals with disabilities be provided reasonable accommodations to meaningfully participate in federally funded programs, including immigration court. Section 504 does not require that an individual has a diagnosed disability, such as gender dysphoria. Notably, being gender expansive in itself is not a disability; however, some gender expansive individuals also experience significant distress about their gender identity related to the mismatch between their sex assigned at birth and their gender identity. Being referred to as the wrong name, misgendered, or forcibly outed in unsafe spaces can exacerbate dysphoria and merit accommodation.

²⁶ Section 504 and its implementing regulations bind all components of the Department of Homeland Security and Department of Justice, including U.S. Citizenship and Immigration Service (USCIS), Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and the Executive Office for Immigration Review (EOIR). 29 U.S.C. § 794; 6 C.F.R. § 15.30, et seq.; 28 C.F.R. § 39.130, et seq. See *Galvez-Letona v. Kirkpatrick*, 54 F. Supp. 2d 1218, 1224–25 (D. Utah 1999), aff'd on other grounds, 3 F. App'x 829 (10th Cir. 2001); *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1053, 1056 (C.D. Cal. 2010).

²⁷ For more information on gender-neutral honorifics, see www.merriam-webster.com/wordplay/mx-gender-neutral-title; <https://ogletree.com/insights-resources/blog-posts/nonbinary-pronoun-usage-in-the-workplace-what-employers-are-doing-to-promote-inclusivity/>.

F. What Happens if a Party Makes a Mistake?

If attorneys or judges, despite their best intentions, use the wrong name or pronoun and catch themselves in the moment, they should correct themselves. They do not need to belabor the mistake or the correction.²⁸

Example: Correcting Mistakes

- “Counsel, can you clarify for me whether she - my apologies, *they* - arrived in 2012 or 2013?”
- “Ms. Oswego - apologies, Mx. Oswego, did you...?”

If an attorney or judge makes a mistake and does not immediately correct themselves, they may be corrected by counsel. When receiving correction, an appropriate response is to thank the person offering the correction and re-state the sentence with the correction.

Example: Correcting Mistakes

- J: “Counsel, can you clarify for me whether she arrived in 2012 or 2013?”
- C: “Your Honor, my client uses *they/them* pronouns. They arrived in 2013.”
- J: “Thank you, counsel. Did they cross through a port of entry?”

G. Affirming the Identities of Gender Expansive Counsel

While this practice advisory focuses primarily on the importance of gender affirming language when referring to a noncitizen in removal proceedings, it is equally important that the Court and opposing counsel refer to a gender expansive attorney with the same respect. Attorneys have a variety of options for introducing their pronouns and modes of address to the court. For example, attorneys may include their pronouns in their signature block when communicating with opposing counsel via email, below their signature on legal filings, or in their name listed on WebEx hearings.

In the courtroom, attorneys may introduce their pronouns as part of their entry of appearance, for example: “Kai Ortega, pronouns ‘*they/them*,’ on behalf of the respondent.” Attorneys may also introduce themselves off the record to opposing counsel and the judge with their pronouns. If an attorney is unsure how to address opposing counsel, among other

²⁸ Apologizing profusely can draw unwanted attention to the mistake or require emotional labor of the misgendered individual to comfort the person who misgendered them. See warwick.ac.uk/fac/cross_fac/academy/activities/learningcircles/transqueerpedagogies/queeringuniversity/resources/misgendering/.

options, they may share their own pronouns and respectfully ask how opposing counsel would like to be addressed or address opposing counsel using only their name or “Attorney Lastname.”

Note: Noncitizens may have a different mode of referring to their attorney that is permissible only between the client and the attorney. For example, an attorney may desire to be referred to as “Mx.” and with they/them pronouns by the judge, opposing counsel, and court staff, but allow their client to refer to them as “Ms.” or “she.” Judges should therefore not correct noncitizens referring to their own attorney unless the request for correction has specifically been made by the attorney.

III. Gender Affirming Interpretation

Attorneys and the Court are not the only participants in a hearing who are expected to treat gender expansive noncitizens and other participants with respect. The Code of Ethics and Professional Responsibility of the American Translators Association (“ATA”) states that interpreters shall “convey meaning between people, organizations, and cultures accurately, appropriately, and without bias, depending on the context of the source, purpose, readership or audience, and medium.”²⁹ SOSi, one of the main interpretation services for the Court, is a member of the ATA³⁰ and thus bound by this ethical tenet when interpreting for gender expansive noncitizens. Interpreters who violate this tenet may be sanctioned by the ATA and may have their membership suspended or revoked.³¹

When representing a gender expansive client, counsel for the noncitizen may wish to file a “Motion for [Language] Interpreter.” While the Court almost certainly has already scheduled an interpreter in the appropriate language, counsel for the noncitizen can use such a motion to signal to the Court ahead of time that the noncitizen intends to use gender neutral language to refer to themselves or others during testimony, and that counsel for the noncitizen expects that language to be interpreted correctly.

²⁹ See “American Translators Association Code of Ethics and Professional Responsibility,” www.atanet.org/about-us/code-of-ethics/.

³⁰ See “SOSi memberships,” www.sosi.com/languageservices/.

³¹ See ATA List of Sanctioned Members: www.atanet.org/about-us/code-of-ethics/sanctioned-members/. An individual member (July 2017) was censured privately for violation of the first tenet in ATA’s Code of Ethics and Professional Practice: “to convey meaning between people and cultures faithfully, accurately, and impartially”. The member was also required to complete an interpreter ethics program.

Practice Pointer: Gender Neutral Languages Beyond English

Many languages in the world are not gendered and/or already include gender-neutral pronouns,³² including Cree, Inuktitut, Mandarin Chinese (spoken), Persian, and Tagalog. Other languages – particularly those that denote gender in parts of speech such as verbs or adjectives – have evolved to include gender neutral alternatives and neopronouns. Some common gender-inclusive pronouns in other languages include:

Spanish: elle/elles or ellx/ellxs³³

Arabic: huma

French: iel/al

German: xier/xies/dier

Counsel for the noncitizen should be sure to arrive early to any hearing held in person to have time to discuss gender affirming language with the interpreter prior to going on the record. Or, in the event of a WebEx hearing, counsel for the noncitizen should request the opportunity to speak with the interpreter before beginning, whether in the main WebEx hearing room or in a breakout room. Counsel for the noncitizen should clearly state to the Court and to counsel for OPLA that they wish to confirm the interpreter’s awareness of the use of gender affirming terminology.

For interpreters without specific training on gender affirming terminology, it can be helpful for counsel for the noncitizen to advise the interpreter regarding how the noncitizen refers to themselves in their native language, how they refer to other gender expansive individuals, and regarding any other gender expansive language the noncitizen is likely to use during testimony. Counsel for the noncitizen can also confirm that the interpreter is aware of the noncitizen’s correct name, pronouns, and honorific in English.

³² For more information on gender-neutral phrasing in languages other than English, see langmusecad.wordpress.com/2022/06/27/speaking-of-pride-the-lgbt-community-and-linguistics/; blog.duolingo.com/gender-neutral-language-and-pronouns/; www.washingtonpost.com/world/2019/12/15/guide-how-gender-neutral-language-is-developing-around-world/.

³³ The use of gender-neutral pronouns and adjectives in Spanish can be somewhat contentious, with some people advocating for an -x suffix (“Latinx”) and others advocating for an -e suffix (“Latine”). Those who advocate for the -e suffix argue that the -x suffix was unpronounceable in Spanish or that it was a form of linguistic colonization. Those who advocate for the -x suffix respond that Spanish itself was a colonizer language and that the dismissal of the -x suffix devalues the linguistic contributions of diaspora Spanish speakers. For an example discussion, see www.slice.ca/decolonizing-queer-identities-in-latin-america-latinx-vs-latine/.

Example Interpreter Conversation:

Attorney Sam Smith knows that their client, Alex Rodriguez, refers to themselves in Spanish with gendered adjectives ending in -e and describes a non-binary friend as “elle.” Attorney Smith can approach the interpreter before the hearing to advise on these particulars and ask that the interpreter refer to Alex with they/them pronouns and as Mx. Rodriguez.

If counsel for the noncitizen is fluent in the noncitizen’s native language, counsel should listen closely to the interpretation throughout the hearing to ensure that gender affirming language is being used. If not, counsel for the noncitizen should enter an objection, noting the improper interpretation for the record. In addition, and especially in cases where counsel for the noncitizen is not fluent in the noncitizen’s native language, counsel should work with the noncitizen ahead of time to self-advocate in the event of misgendering or other improper forms of address by the interpreter, so that the noncitizen can pause their testimony and notify counsel and the Court that the interpreter is not saying the same words that they are. Any misinterpretations should be reflected in the record if an appeal becomes necessary.

Where an interpreter is continuously unable or unwilling to use the correct terminology for a noncitizen, they should be disqualified as an interpreter in the noncitizen’s proceedings. The Court may disqualify an interpreter where the interpreter is unable to interpret accurately or completely or where they demonstrate unprofessional behavior.³⁴ Given that the interpreter has sworn an oath to interpret accurately,³⁵ failure to do so results in a violation of the noncitizen’s right to due process.³⁶

IV. Potential Professional Consequences for Failing to Appropriately Address Gender Expansive Noncitizens or Attorneys

Immigration courts, like all judicial settings, must promote equity, fairness, propriety, and impartiality. Recognition and affirmation of gender-expansive participants in the court process is not discretionary, but a foundational requirement to ensuring that proceedings not only have the appearance of being, but actually are, fair and unbiased.³⁷

³⁴ See EOIR OPPM No. 04-08: Contract Interpreter Services at 12 (Oct. 20, 2004). While this OPPM has since been canceled by EOIR DM No. 23-02, Language Access in Immigration Court, these remain valid reasons to disqualify an interpreter, given that an immigrant is entitled to a full and fair opportunity to present their case. EOIR DM No. 23-02 at 1 (Jun. 6, 2023).

³⁵ See 8 CFR § 1240.5.

³⁶ *Matter of R-C-R-*, 28 I&N Dec. 74, 77 (BIA 2020) (stating that a noncitizen “who faces removal is entitled to a full and fair removal hearing under both the [Immigration and Nationality] Act and the Due Process Clause of the Fifth Amendment”).

³⁷ “A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.” ABA Model Code of Judicial Conduct, Rule 2.3 (Feb. 14, 2020) (emphasis added).

Therefore, while hearing participants may feel that using the correct name and pronouns for a gender expansive noncitizen or attorney is optional/based on personal preference or may even erroneously think that doing so is not permitted, there may be professional consequences for failing to respectfully address a noncitizen or opposing counsel. While inadvertent and isolated misgendering generally does not rise to the level of harassment, persistent and/or intentional failure to use a noncitizen's correct name and pronouns may constitute sex-based discrimination.³⁸

As noted above, interpreters can be sanctioned by the ATA and have their membership suspended or revoked. For attorneys and judges, they may be subject to internal discipline by EOIR, the DOJ, or ICE; state bar complaints; and, in the event of a biased decision by a judge, remand following appeal, potentially to a new judge given the bias that has been demonstrated.

A. Immigration Judges

Immigration judges are required to abide by the Ethics and Professionalism Guide for Immigration Judges ("the Guide").³⁹ Section IX of the Guide requires that immigration judges be "patient, dignified, and *courteous*, and act *in a professional manner* towards all litigants, witnesses, lawyers and others with whom the immigration judge deals in [their] official capacity, and should not, in the performance of official duties, by words or conduct, manifest improper bias or prejudice."⁴⁰ In a note following Section IX, the Guide states:

"Examples of manifestations of prejudice or bias include but are not limited to epithets; slurs; *demeaning nicknames*; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and *irrelevant reference to personal characteristics*."⁴¹

Such a manifestation of prejudice or bias, including the intentional use of the incorrect name or pronouns for participants in proceedings, would support recusal, should counsel for the noncitizen file a motion to recuse. Should the immigration judge refuse to recuse themselves, and should they issue a decision on the merits that is informed by the demonstrated bias, remand by the Board of Appeals to a different immigration judge would not only be appropriate but required by principles of fundamental fairness.

Intentional use of the incorrect name or pronouns for participants in a proceeding may be grounds for discipline by EOIR based judicial misconduct, defined as "conduct by a judge that may adversely affect the fair, effective, or expeditious administration of the work of EOIR's adjudicating components."⁴² This mistreatment of noncitizens or attorneys may result in corrective action (including counseling the adjudicator orally or in writing, consulting with OCIJ senior leadership to arrange for individualized training, and/or

³⁸ See *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015). Although this case arose in the employment context, it provides a relevant example of how intentional misgendering can rise to the level of discrimination.

³⁹ See "Ethics and Professionalism Guide for Immigration Judges," www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf.

⁴⁰ *Id.* (emphasis added).

⁴¹ *Id.* (emphasis added).

⁴² See "Judicial Complaint Process", www.justice.gov/eoir/page/file/1100946/dl?inline.

initiating a performance-based action) or disciplinary action (including a written reprimand, suspension without pay, or removal from federal service).⁴³

In addition to the requirement to abide by the Guide, immigration judges are considered attorney adjudicators and are also subject to the oversight of the Department of Justice's Office of Professional Responsibility ("OPR").⁴⁴ Intentional use of the incorrect name or pronouns for participants in a proceeding may require an investigation by OPR, which could find that the immigration judge violated their obligation to be fair and impartial by exhibiting belligerence, hostility, or bias, resulting in the potential need for discipline.⁴⁵ Should such a finding be made by the OPR's Professional Misconduct Review Unit ("PMRU"), the PRMU has the authority to refer the matter to the appropriate bar authority.⁴⁶

B. Counsel for OPLA

As attorneys under the purview of Immigration and Customs Enforcement ("ICE"), counsel for OPLA is subject to the ICE Employee Code of Conduct ("Code of Conduct").⁴⁷ Under the Code of Conduct, ICE employees must be "professional, *polite, respectful, considerate*, helpful, and patient in all official activities that involve contact with fellow workers or members of the public, even in the face of considerable provocation."⁴⁸ Violations of Code of Conduct can be reported to the OPLA Chief Counsel assigned to the immigration court where proceedings took place. Where counsel for OPLA intentionally uses the incorrect name or pronouns for a participant in proceedings, defense counsel may request that Chief Counsel reassign the case to an OPLA attorney who has not demonstrated bias in the performance of their duties. ICE also has an Office of Professional Responsibility similar to that within the Department of Justice, which investigates complaints of misconduct.⁴⁹

C. State Bar Complaints

Immigration judges and counsel for OPLA are all required to be attorneys licensed in at least one state. As such, they may also be subject to discipline under their state's bar rules, should they intentionally use the incorrect name or pronouns for a participant in immigration court proceedings. While each state's bar sets its own rules for professional conduct, many are based on the Model Rules of Professional Conduct ("MRPC"),⁵⁰ which hold that it is professional misconduct for an attorney to "engage in conduct that the

⁴³ *Id.*

⁴⁴ 8 C.F.R. § 1003.109 ("Complaints regarding the conduct or behavior of Department attorneys, Immigration Judges, or Board Members shall be directed to the Office of Professional Responsibility, United States Department of Justice. If disciplinary action is warranted, it shall be administered pursuant to the Department's attorney discipline procedures.")

⁴⁵ U.S. Dep't of Justice, Office of Professional Responsibility, Annual Report, at 13-14 (2007), available at www.justice.gov/sites/default/files/opr/legacy/2009/10/16/annualreport2007.pdf (concluding that professional misconduct had occurred and that the IJ "should have known that her belligerent and hostile conduct and selective consideration of the evidence undermined the fairness of the hearing and created an appearance of partiality in the immigration court" and recommending discipline but IJ retired).

⁴⁶ See Justice Manual 1.4-320: www.justice.gov/jm/jm-1-4000-standards-conduct#1-4.320.

⁴⁷ See www.ice.gov/doclib/foia/dro_policy_memos/employee-code-of-conduct.pdf.

⁴⁸ *Id.* at Sec. 5.4.

⁴⁹ See www.ice.gov/about-ice/opr.

⁵⁰ See American Bar Association, "Model Rules of Professional Conduct," www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, *gender identity*, marital status or socioeconomic status in conduct related to the practice of law.”⁵¹

The intentional use of a participant’s incorrect name or pronouns plainly constitutes harassment and discrimination on the basis of gender identity. The consequence for this type of misconduct varies from state to state, but may include public reprimand, additional continuing legal education requirements, suspension, or disbarment.

Ultimately, the intentional use of the incorrect name or pronoun demonstrates a clear bias and opens immigration judges and attorneys up to various types of complaints and discipline. We hope that this practice advisory will help all participants in the immigration court setting to have a better understanding of the respectful use of correct names and pronouns for gender expansive individuals so that discipline is never needed.

V. Conclusion and Recommendations for Institutional Change

Gender and sexuality—and our understandings of both—are context- and culture-dependent, fluctuating, and deeply personal. It is the professional and ethical responsibility of counsel for noncitizens, counsel for OPLA, and immigration judges to create a space that is safe and gender-affirming for noncitizens in proceedings, one that is primed for impartial, unbiased, and just outcomes.

Moreover, employees of the federal government, including OPLA attorneys and EOIR staff, are prohibited from engaging in discriminatory conduct on the basis of gender identity.⁵² Additionally, as discussed *supra* Section II.D, the Department of Justice, the Department of Homeland Security and their component parts (including EOIR and ICE), are bound by Section 504 of the Rehabilitation Act and its implementing regulations.⁵³ Intentional or repeated conduct that fails to affirm gender identity for noncitizens or counsel thus can constitute disability discrimination in violation of Section 504.⁵⁴

Beyond what we have already discussed in this advisory, we respectfully offer the following recommendations for ways that EOIR can help create a gender-affirming courtroom for noncitizens and all hearing participants:

- Create a procedure for captioning cases based on a respondent’s correct name and for easily changing names on the file.
- Ensure that interpreters/interpretation services contracted by EOIR have had training in gender-neutral terminology in their target languages.

⁵¹ MRPC 8.4(g) (emphasis added).

⁵² See *Bostock v. Clayton County*, 590 U.S. 644 (2020). In *Bostock*, the Supreme Court held that the prohibition on discrimination “because of . . . sex” under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., covers discrimination on the basis of gender identity and sexual orientation.

⁵³ 29 U.S.C. § 794; 6 C.F.R. § 15.30, et seq.; 28 C.F.R. § 39.130, et seq. See *Galvez-Letona v. Kirkpatrick*, 54 F. Supp. 2d 1218, 1224–25 (D. Utah 1999), aff’d on other grounds, 3 F. App’x 829 (10th Cir. 2001); *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1053, 1056 (C.D. Cal. 2010).

⁵⁴ See *supra*, fn. 21.

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- Set internal guidelines for immigration judges and court staff on using correct names and pronouns on different types of court documents and in proceedings, including corrective measures where someone fails to do so and disciplinary measures for intentional misgendering/misnaming that suggests discriminatory intent.
- Provide mandatory training for all EOIR staff, including new staff at time of hire, that aligns with the information contained in this practice advisory, to ensure that the agency adheres to its obligations of non-discrimination.
- Provide updated training, as needed, norms and terminology around gender shift, or as court procedures change.
- Permit immigration judges to engage in progressive discipline for attorneys, ranging from rejecting filings with incorrect information to referring an attorney to the EOIR Attorney Discipline Program⁵⁵ or the ICE Office of Professional Responsibility, where counsel engages in intentional misgendering or deliberate failure to use a respondent's or counsel's correct name and pronouns.
- Add a section to the Immigration Court Practice Manual describing how counsel and the Court should properly address a gender expansive noncitizen in written filings and when speaking in court, as well as the consequences for failure to do so.
- Capture data on any issues that arise with the use of gender-affirming language (including, for example, instances of interpreters who are not trained in the use of gender-neutral language, failures to review the record for a respondent's correct name and/or pronouns prior to the hearing, difficulties with updating the record with a respondent's proper name and pronouns, instances of intentional misgendering and resulting discipline etc.) and analyze the need to allocate resources for training and supervision.

In short, while this advisory discusses ways that individual hearing participants can contribute to creating fair, unbiased proceedings, EOIR should work to make changes on an institutional level that can ensure a safe environment for gender expansive individuals.

⁵⁵ See "EOIR Attorney Discipline Program," www.justice.gov/eoir/attorney-discipline-program. EOIR may discipline a practitioner for engaging in "contumelious or otherwise obnoxious conduct" or for engaging in "conduct that is prejudicial to the administration of justice or undermines the integrity of the adjudicative process." 8 C.F.R. §§ 1003.102(g), (n).

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Nota bene: Given the fluid, ever-evolving nature of gender, sexuality, and accepted gender-affirming terminology, as well as the authors' hope that this practice advisory will lead to changes regarding the treatment of gender expansive individuals in proceedings, it is our expectation that this advisory will need updates in the future based on critical feedback and user experience. To provide feedback, please email: communications@acaciajustice.org.