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Examining Judicial Civility in New York Courts for Transgender Persons in the Wake of United States v. Varner

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  - *Examining Judicial Civility in New York Courts for Transgender Persons in the Wake of United States v. Varner*

In January 2020, the United States Court of Appeals, Fifth Circuit, issued a decision in *United States v. Varner*,[1] that a federal court cannot require litigants, judges, court personnel or anyone else to refer to litigants using pronouns matching their gender identity. In the *Varner* decision, the Fifth Circuit sets forth three bases to support the determination not to use the pronouns requested by a transgender litigant, being: (1) no federal statute mandated that the Court grant the request, and the Court declined to grant the requests as prior federal courts "have done so purely as a courtesy to the parties";[2] (2) the Court wanted to protect against concerns of judicial impartiality,[3] and; (3) the Court was concerned that the task of referring to a litigant with requested pronouns would be overly burdensome.[4]

In light of this decision, we must now examine the manner in which transgender individuals are treated within the New York State Court System, taking into consideration the historic treatment of Lesbian, Gay, Bisexual and Transgender (LGBT) people by the Courts. We find that substantial progress has been made in New York's Courts, notably by the New York State Rules of Judicial Conduct, which compels a New York State Court to not to act in accordance with the *Varner* decision, because to do so would fail to respect the litigant's gender identity and expression by using pronouns that conflict with the litigant's gender.

An Historical Perspective on the Treatment of LGBT People in the New York State Court System

Without question the New York State court system is now among one of the most progressive in the nation with respect to the manner in which LGBT people are treated. That was not always the case. In a 1982 decision, the Hon. Kristin Booth Glen[5] noted, "There is no question that gay people have historically been oppressed by the laws and the court system, and that anti-homosexual views, conscious or otherwise, have dominated the legal arena . . . [G]iven the pervasiveness of cultural bias against gays judges themselves are frequently not free from anti-homosexual preferences."[6]

Several years later, the Hon. Paula J. Hepner,[7] who served as the Supervising Judge of Kings and Richmond County family courts, writing about her in-court experiences with LGBT persons, also noted concern pertaining to her judicial colleagues:

When I was appointed a family court judge in the 1990s, a copy of the Code of Judicial Conduct was distributed during orientation for new judges. . . . During the orientation, no reference was made to the obligation to perform the duties of judicial office without bias or prejudice, or to the additional obligation that judges have to require that lawyers in proceedings before them refrain from manifesting bias or prejudice by their words or conduct. Nor was it ever pointed out that judges have a duty to see that court staff, court officials or others subject to their direction and control do not manifest bias or prejudice in their behavior or conduct . . . There was no discussion at our new judge orientation of what it means to manifest bias and prejudice by words, behavior or conduct.[8]

As the Chair of a work group tasked with LGBT sensitivity training, Judge Hepner recalls experiencing pushback from judges:

The second encounter the work group had with resistance happened at the October 2006 training program for the delinquency judges. To say that it received a lukewarm reception would be an understatement. The judges were critical of the interactive format. They accused the presenters of 'talking down' to them. They sighed, rolled their eyes and read the newspaper throughout.[9]

Judge Hepner has noted far more positive experiences in her later role as a member of the Committee for Lesbian, Gay, Bisexual and Transgender Matters of the New York City Courts: "Over the past 10 years, there has been a major shift in the audiences to whom we have presented our LGBT training programs and the receptions our programs have received." She continued,

But the task of making our courthouse environments friendly, welcoming, and safe for the members of diverse LGBT communities we serve is far from finished . . . Pursuing these goals and objectives requires strong judicial leadership. . . . Judges are in a unique position to bring about systemic change within their state and local judicial systems through coalition building, by coordinating education and training programs for judges, clerks, court officers, prosecutors, defense attorneys, law guardians, guardians ad litem, attorneys for children, probation officers, caseworkers, and court-appointed forensic mental health evaluators.[10]

The New York State courts heard the call of Judge Hepner, and in December 2016, the New York State Unified Court System established a new commission regarding LGBTQ issues for both employees and litigants with a stated mission of, "promoting equal participation and access throughout the court system by all persons regardless of sexual orientation, gender identity, or gender expression."[11] This Commission has been highly successful, conducting seminars and trainings throughout the State of New York.

In January of 2018, the New York State Unified Court System, with the support of the New York State Bar Association,[12] took action to bring the groundbreaking training Judge Hepner engaged in decades ago to all attorneys within the State by establishing a new category of Continuing Legal Education (CLE): "Diversity, Inclusion and Elimination of Bias."[13] The new rule states any programs falling under this category must relate to the practice of law and may include, among other things, implicit and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with members of the public, judges, jurors, litigants, attorneys and court personnel.

The rule further clarifies the definition of this new category, stating "[t]hese programs may include, among other things, diversity, inclusion and elimination of bias based on, for example, race, ethnicity, national origin, gender, sexual orientation, gender identity, religion, age or disability."[14]

New York State Rules of Judicial Conduct Prohibiting Bias or Prejudice

Beyond the advances within the courts set forth above, New York's judiciary is prevented from engaging in or allowing others within the Courts to engage in bias or prejudice.

The Rules of the Chief Administrator mandate that

(4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.[15]

Moreover these Rules note that

(5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.[16]

The First and Second Departments of the Appellate Division have also adopted Rules of Practice pertaining to court decorum requiring

(a) In the administration of justice the judge shall safeguard the rights of the parties and the interests of the public. The judge at all times shall be dignified, courteous, and considerate of the parties, attorneys, jurors, and witnesses. In the performance of his duties, and in the maintenance of proper court decorum the judge is in all respects bound by the canons of judicial ethics.[17]

Numerous judges have been removed from the bench for violation of these rules for having engaged in actions of bias and prejudice, many of which include the use of racial slurs.[18] With respect to one decision removing a judge for having made racial slurs the Court of Appeals held,

We are in complete agreement with the Commission's determination that a deliberate and calculated remark of this nature, even if isolated, 'casts doubt on [petitioner's] ability to fairly judge all cases before him,' and seriously violated the governing rules related to his duty to uphold the integrity and impartiality of the judiciary and to avoid even the appearance of impropriety . . . [19]

Application of the New York State Rules of Judicial Conduct to the Use of Pronouns, Gender Identity and Gender Expression

As gender identity and gender expression are included within the categories in which a judge is to refrain from manifesting, by words or conduct, bias or prejudice, a question arises: does the failure to use the pronouns requested by a litigant, as in the Varner matter, rise to the level of a violation of the New York State Rules of Judicial Conduct?

In the four reported cases wherein a New York State court addresses the situation in which a transgender individual has asked the use of pronouns to conform to the litigant's gender identity and appearance, the Courts have agreed to do so while making a notation in a footnote of the decision.[20] One decision goes beyond the Court's use of pronouns for a litigant and addresses the pronouns used by the adversary: "The Court recognizes the right of persons of trans-gender experience to indicate their gender preference grammatically. Therefore, although the City refers to Carlos Sanchez as 'he,' the Court will refer to Carlos Sanchez with feminine pronouns, as presented in the Petitioner's moving papers."[21] It is noteworthy, in these reported cases, that the concerns raised in the Verner decision do not appear to have arisen, as no concerns of impartiality were raised by the litigants, and the communication between the parties and the Court were not hindered.

Based upon the Court rules and legal citations included above, members of the judiciary within the State of New York are duty-bound not only to refer to a litigant, attorney, witness or other party in the court system by the pronoun they request, but they must also direct opposing counsel, other parties and court staff to do so as well. A failure to do so would manifest bias and prejudice as to the subject individual's gender identity and gender expression. This conclusion is inevitable when examining the similarity of misgendering an individual (referring to an individual by pronouns or honorifics that are not theirs) and exposing an individual to racial slurs, sexist comments or other words or conduct in the protected categories referenced in the Rules of Judicial Conduct.[22] There should be no distinction between the categories, and the Rules of Judicial Conduct must be equally applied to all categories.

Notably, misgendering an individual in the context of employment and housing is in violation of New York State Law.[23] In one decision, where a plaintiff asserted a claim of discrimination based upon the continued use of male pronouns despite the plaintiff having expressed a gender identity of female, the Court held, "As for the treatment to which plaintiff was subjected, accepting the allegations as true for the purposes of this motion to dismiss, the purposeful use of masculine pronouns in addressing plaintiff, who presented as female, and the insistence that she sign a document with her birth name despite the court-issued name change order, is not a light matter, but one which is laden with discriminatory intent," and continued, "[i]t cannot be said that plaintiff felt demeaned for any reason other than abject discriminatory reasons."[24]

New York State's adoption of gender identity and gender expression as protected classes that cannot be discriminated against follows a realization of the damaging impact that referring to a transgender individual by an improper pronoun can have upon that individual, causing shame, anxiety and helplessness.[25] In discussing this from the perspective of a transgender individual,

Misgendering – referring to someone by the pronouns or honorifics of a gender that is not theirs – is a daily event for many trans people. Even those who are often read as our actual gender, rather than the one assigned at birth, colloquially referred to as having 'passing privilege,' live with at least the threat of misgendering, sometimes an intentional attempt by an adversary in a proceeding who perceives that there may be some advantage gained by bringing attention to our transgender status, or perhaps in a vain attempt to upset us and throw us off our task representing a client. Others, however, particularly those often perceived as being visibly transgender, can barely leave the house without being misgendered.[26]

When writing about gender identity and ethical rules to apply to decorum in the Courts, transgender attorney Ellen "Ellie" Krug wrote,

The takeaway from these and similar professional responsibility rules is that, as legal professionals, we owe ethical duties to each other. We simply cannot allow discomfort about transgender lawyers (particularly as to those who do not pass) to turn into a basis for discrimination. We are, as a profession, held to a higher standard than the general public. Moreover, there is an ancillary duty to call out lawyers (be it opposing or co-counsel, a firm member, or merely someone we happen to encounter in a courtroom) who seek to marginalize or harass transgender attorneys on the basis of their gender identity or presentation. Unfortunately, as more transgender attorneys enter the profession, some degree of harassment likely will occur, with locale, age, and a host of other factors coming into play. The profession must be vigilant against such conduct and not allow it to flourish.[27]

Attorney Krug is correct that our profession must be vigilant in protecting all transgender individuals within the New York State Courts and requiring that all judges adhere to the Rules of Judicial Conduct to meet the Court of Appeals mandate that, "members of the judiciary are held to higher standards of conduct than members of the public at large and that relatively slight improprieties [may] subject the judiciary as a whole to public criticism."[28] This is especially important considering that

[w]hen the overt conduct of a judge strengthens a community's . . . implicit biases, the judge, either by design or accident, potentially creates community harm by not only shaping the unconscious attitudes of jury pools and witnesses, but also by undermining the principle of equal treatment for all litigants who may come to accept that judicial favoritism is an unfortunate permanent feature of the judicial system.[29]

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 "people who have long been exploited . . . come to believe that courts cannot vindicate their legal rights from fraud" and "incalculable damage [occurs] to society."[30] While the Varner decision is not binding upon the New York State courts, Rule 8.4 of the New York Rules of Professional Conduct requires the opposite of the holding in Varner. The legal profession within New York must take note of it and reconfirm our commitment to diversity and inclusion, and the elimination of bias and prejudice within our Courts, because doing so is the only way to ensure that the legal system remains above reproach and retains the public's confidence.

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Kristen Prata Browde, Esq. is the President of the LGBT Bar Association of Greater New York and serves as co-chair of the National Trans Bar Association. Governor Andrew Cuomo appointed Kristen to the Steering Committee of the New York State Council on Women and Girls, and, after serving on his transition team, Westchester County Executive George Latimer appointed Kristen to the County's Women's Advisory Board. She also serves on the Boards of Directors of Equality NY, the Trans United Fund Political Action Committee and Princess Janae Place.

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[1] *See United States v. Varner*, 948 F.3d 250 (2020).

[2] *See id.* at 254–56 ("First, no authority supports the proposition that we may require litigants, judges, court personnel, or anyone else to refer to gender-dysphoric litigants with pronouns matching their subjective gender identity," and continued, "Congress knows precisely how to legislate with respect to gender identity discrimination, because it has done so in specific statutes," and finally, "But Congress has said nothing to prohibit courts from referring to litigants according to their biological sex, rather than according to their subjective gender identity").

[3] *See id.* at 256 ("Second, if a court were to compel the use of particular pronouns at the invitation of litigants, it could raise delicate questions about judicial impartiality. Federal judges should always seek to promote confidence that they will dispense evenhanded justice.")

[4] *See id.* at 256–58 ("Third, ordering use of a litigant's preferred pronouns may well turn out to be more complex than at first it might appear," and "Deploying such neologisms could hinder communication among the parties and the court," concluding, "Courts would have to do the . . . same. We decline to enlist the federal judiciary in this quixotic undertaking.")

[5] Hon. Kristin Booth Glen, Dean Emerita, received her B.A. in Political Science from Stanford University and her J.D. from Columbia University Law School, where she was a Harlan Fisk Stone Scholar. She clerked for the U.S. Court of Appeals for the Second Circuit and spent 12 years in private practice, and 15 years as a member of the judiciary, serving on the New York City Civil Court and the New York State Supreme Court. She served as Dean of the CUNY School of Law from 1995 to 2005.

[6] *See M.V.R. v. T.M.R.*, 454 N.Y.S.2d 779 (Sup. Ct., N.Y. Co. 1982).

[7] Hon. Paula J. Hepner was appointed a Family Court Judge in 1990 and served as Supervising Judge, New York City Family Court, Kings and Richmond Counties, from 2008 to 2015.

[8]*See* Hon. Paula J. Hepner, (Ret.), "Blueprint for Respect: Creating an Affirming Environment in the Courts for the Lesbian, Gay, Bisexual, and Transgender Communities," 41 Wm. Mitchell L. Rev. 4, 2015

[9] *See id*.

[10] *See id*.

[11] *See* http://ww2.nycourts.gov/ip/lgbtq/aboutthecommission.shtml.

[12] *See* New York State Bar Association, Committee on Continuing Legal Education, Re: Proposed Diversity and Inclusion and Elimination of Bias CLE Requirement for New York State Attorneys, January 2017, https://nysba.org/app/uploads/2020/01/CLE-Diversity-Report-final.pdf.

[13] *See* 22 N.Y.C.R.R. § 1500.22.

[14] Angelica Cesario, "New York to Implement New Diversity CLE Requirement in 2018," Above the Law: Continuing Legal Education, Sept. 25, 2017, https://abovethelaw.com/lawline-cle/2017/09/25/new-york-to-implement-new-diversity-cle-requirement-in-2018.

[15] *See* 22 N.Y.C.R.R. § 100.3.

[16] *See* 22 N.Y.C.R.R. § 100.3.

[17] *See* 22 N.Y.C.R.R. § 604.1; 22 N.Y.C.R.R. § 700.5.

[18] *See Matter of Mulroy*, 94 N.Y.2d 652 (2000); *Matter of Esworthy*, 77 N.Y.2d 280 (1991); *Matter of Agresta*, 64 N.Y.S2d 327 (1985).

[19] *Matter of Schiff*, 83 N.Y.2d 689, (1994).

[20] *See Bumpas v. New York City Transit Auth.*, 859 N.Y.S.2d 893, (Sup. Ct., Kings Co. 2008); *Ava v. NYP Holdings, Inc.*, 885 N.Y.S.2d 247, (1st Dep't 2009); *Brian L. v. Administration for Children's Services*, 859 N.Y.S.2d 8, (1st Dep't 2008); *Hanna v. Turner*, 289 A.D.2d 182 (1st Dep't 2001)

[21] *See Hanna*, 289 A.D.2d 182.

[22] *See* Jessica A. Clark, "They, Them, and Theirs," 132 Harv. L. Rev. 894, Jan. 2019 ("Harassment that expresses disrespect for a person's gender identity is objectively hostile, just like harassment that expresses disrespect for a person's racial or religious identity. For example, imagine a scenario in which xenophobes harass a coworker they know to be from India by

referring to him as an "Arab." This deliberate ascription of an incorrect identity is a form of racism–among other things, it expresses the idea that all people with brown skin are "Arab" and that Indian identity is unworthy of respect. Similarly, intentional misgendering expresses stereotypes about what real "men" and "women" are and informs its target that their own gender identity is unworthy of respect. It is unreasonable to refuse to refer to a person by their first name, for example, calling a man "Jane" rather than "John," due to a disagreement about whether his male gender identity is valid. Likewise, it is unreasonable to insult him by referring to him as "she," as the Equal Employment Opportunity Commission has concluded. And if a person uses they/them pronouns, it is unreasonable to insist on referring to them as "he" or "she.").

[23] *See* N.Y. Executive Law § 296.

[24] *See Doe v. City of New York*, 976 N.Y.S.2d 360, (Sup. Ct., N.Y. Co. 2013).

[25] *See* Joli St. Patrick, "What You're Really Saying When You Misgender," The Body Is Not an Apology, May 26, 2017, https://thebodyisnotanapology.com/magazine/what-youre-really-saying-when-you-misgender.

[26] *Id*.

[27] Ellen Krug, "We Hear You Knocking: An Essay on Welcoming 'Trans' Lawyers," 41 Wm. Mitchell L. Rev. 181, 2015.

[28] *See In re Going*, 97 N.Y.2d 121 (2001).

[29] *See* Joshua E. Kastenberg, "Evaluating Judicial Standards of Conduct in the Current Political and Social Climate: The Need to Strengthen Impropriety Standards and Removal Remedies to Include Procedural Justice and Community Harm," 82 Alb. L. Rev. 1495, Albany Law Review, 2019.

[30] Chief Justice Warren Burger, The State of the Judiciary–1970, 56 A.B.A.J. 929, 934 (1970).