



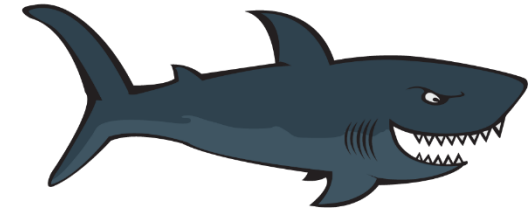
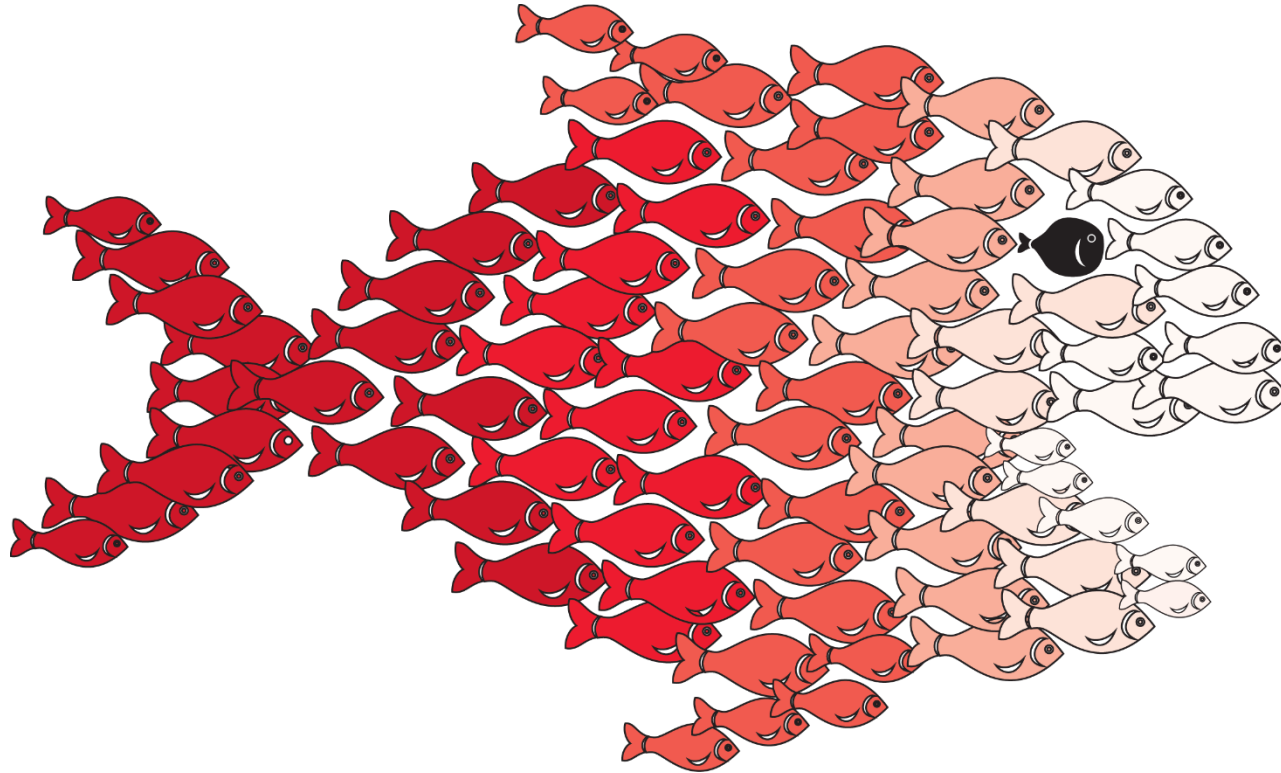
LGBTQ Anti-Discrimination Law in California

By David Nahmias, Impact Fund

AIDS Legal Referral Panel Training

December 10, 2019

Who We Are

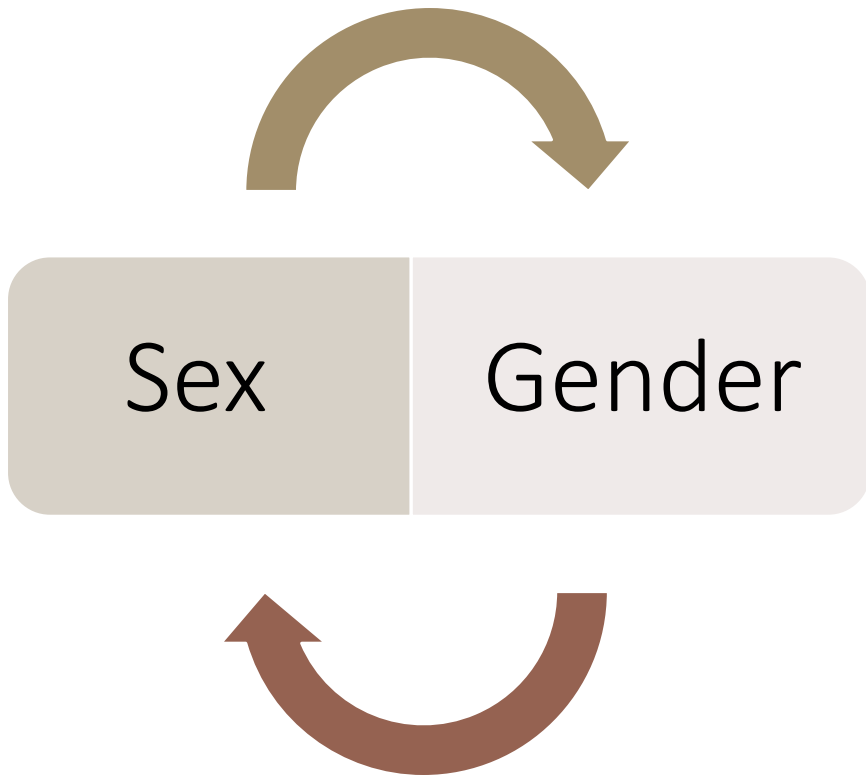


 **IMPACT FUND**
Strategic Litigation for Social Justice

Agenda

- I. Introduction
- II. Sources of Anti-Discrimination Law
- III. Forms of LGBTQ Discrimination
- IV. Practice Tips for LGBTQ Clients

Sex and Gender in California



- Sex includes and means gender, and vice versa.

Gov. Code § 12926(r)(2); 2 CCR § 11030(c)

- Includes a third party's *perceptions* of one's sex.

2 CCR § 11030(c)

Protected Characteristics

Gender
Identity

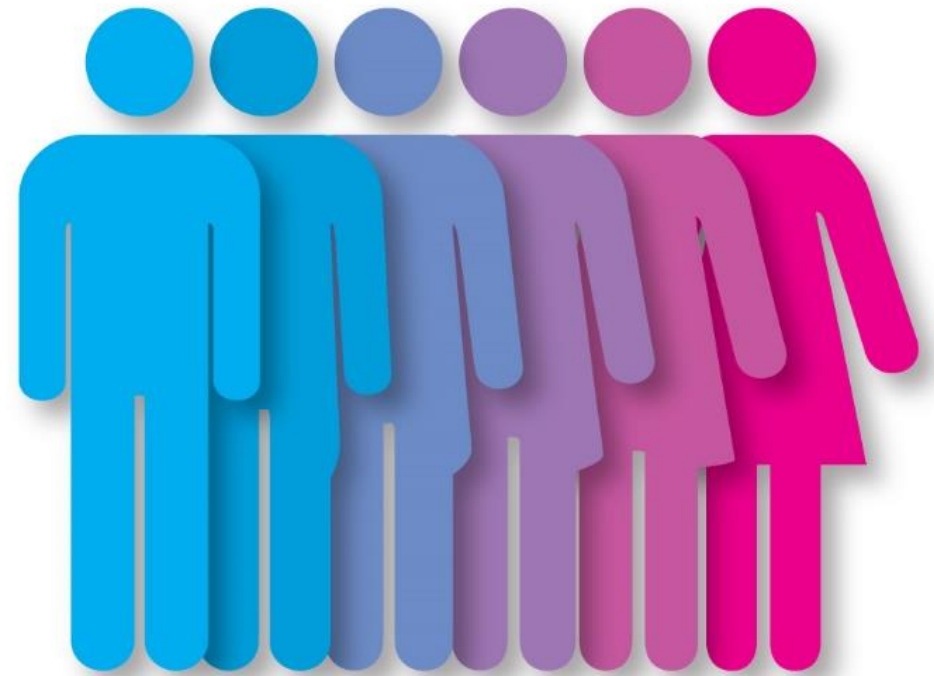
Gender
Expression

Sexual
Orientation

Sex
Stereotype

Transgender

Transitioning



See Gov. Code § 12926; 2 CCR § 11030

LGBTQ People in California

- 1.62 million LGBTQ people in CA (5.3%)
- 26% transgender people surveyed report discrimination at work that year
- 17% LGBTQ Bay Area residents said their lawyers were not sensitive to their needs



Sources of Anti-Discrimination Law

California's Anti-Discrimination Laws

- Gov. Code § 12940 (FEHA) (**employment**)
- Gov. Code § 12955 (FEHA) (**housing**)
- Ed. Code § 220 (**education**)
- Civ. Code § 51 (Unruh Act) (**public accommodations**)
- Civ. Code § 51.7 (Ralph Act) (**hate crimes**)
- Gov. Code § 11135 (**public agencies**)
- Health & Safety Code § 1365.5, Ins. Code § 10140
(Insurance Gender Nondiscrimination Act) (**healthcare**)

How We Got Here

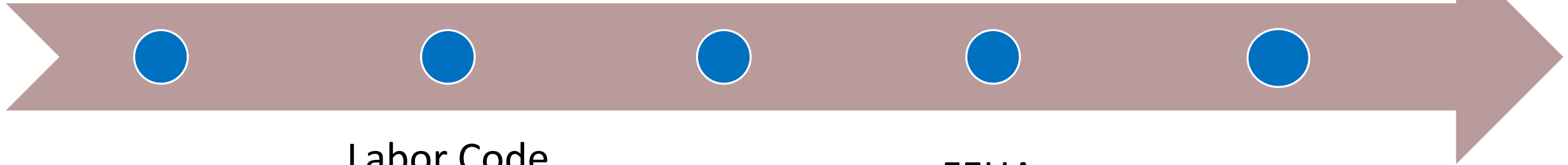
*Gay Law
Students Ass'n
v. Pac. Tel. &
Tel. Co.* (1979)

Labor Code
§ 1102.1
(1992)

FEHA –
Sexual
orientation
(2000)

FEHA –
Gender
(2004)

FEHA –
Gender
identity/
expression
(2012)



At Work

- Refusal to hire, discharge, or discriminate in compensation, terms, conditions, or privileges of employment
- Expressly prohibits harassment
- Workplaces with 5+ employees
 - Harassment exception for >1 employee
- Private employers, unions, staffing agencies

FEHA Gov. Code § 12940

2 CCR §§ 11030-34 (Transgender Rights Regulations)



In Public Spaces

- Full and equal accommodations in all business establishments of every kind whatsoever
- Defines “sex” as including gender, gender identity/expression
- Includes perceived, associational discrimination
- Interpreted broadly



Unruh Act. Civ. Code § 51

Other Sources of Law

- **California Constitution**

- Heightened scrutiny? *In re Marriage Cases* (2008) 43 Cal.4th 757

- **Federal Law – for now**

- *Schwenk v. Hartford* (9th Cir. 2000)
- **Title VII:** *Bostock v. Clayton Cty.*; *Altitude Express v. Zarda*; *R.G. & G.R. Harris Funeral Homes v. E.E.O.C.*

- **U.S. Constitution**

- **Local Non-Discrimination Ordinances**

- *But see Delaney v. Super. Fast Freight* (1993) 14 Cal.App.4th 590

Forms of Unlawful Discrimination

What Does Discrimination Against LGBTQ Workers Look Like?

- “Traditional”
 - Harassment
 - Termination
 - Failure to hire, promote
- Outing
- Assault, workplace violence
- Misgendering
- Restroom access
- Dress code
- Unequal benefits (health insurance, disability, etc.)
- Health insurance denials

When Is Discrimination Actionable?

Adverse Action

- Failure to hire
- Failure to promote
- Denial of benefits

Harassment

- Quid Pro Quo
- Hostile Work Environment

Sexual Harassment

Quid pro quo

Hostile work environment

- Conduct unwelcome
- “Severe or pervasive.” *Meritor Savings Bank v. Vinson* (1986)
- “Disrupt the victim’s emotional tranquility in the workplace, affect the victim’s ability to perform the job as usual, or otherwise interfere with or undermine the victim’s personal sense of well-being.”

Gov. Code § 12923(a) (2019)

SB 396: Sexual Harassment Trainings

- Transgender rights poster
- Trainings must cover gender identity, gender expression, sexual orientation
- Practical examples
- Trainers must have LGBTQ-related knowledge and expertise



Codified at Gov. Code §§ 12950; 12950.1

Names and Pronouns

- Right to use preferred name, gender, pronouns, including gender-neutral pronouns
- Legal name only to “meet a legally-mandated obligation”
- Misgendering potentially actionable if rises to unlawful harassment

2 CCR § 11034(h)



Restroom Access

- Facilities corresponding with gender identity/expression
- Gender-neutral, single occupancy preferred
- “Comparable, safe, adequate” without regard to sex
- Cannot require proof of medical treatment
- Employer may make reasonable, confidential inquiry of an employee

2 CCR § 11034(e)



Additional Transgender Protections

- Gender non-conforming / non-binary protections
- Prohibits mandatory gender question on job applications
- Employers may not inquire about sex, gender, gender identity as condition of employment
- Employee may initiate communications about gender identity
- Dress, grooming standards consistent with gender identity



People With HIV/AIDS

- ADA
- FEHA protections
- Confidentiality, disclosure issues
- Health insurance
- Disability benefits



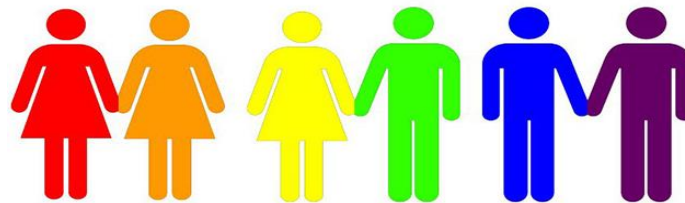
Healthcare Access

- Insurance Gender Non-Discrimination Act
- Early cases: Gender-affirming surgery is medically necessary and must be covered by Medi-Cal
- Unruh Act provides protections against religious refusals



Registered Domestic Partners

- RDP's have same rights and benefits as spouses
- Equal healthcare coverage for RDP's as spouses.
- Businesses may not deny benefits to RDP's that they extend to spouses (Unruh Act).
 - *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824
- SB 30 (2019): RDP's not just for same-sex couples anymore



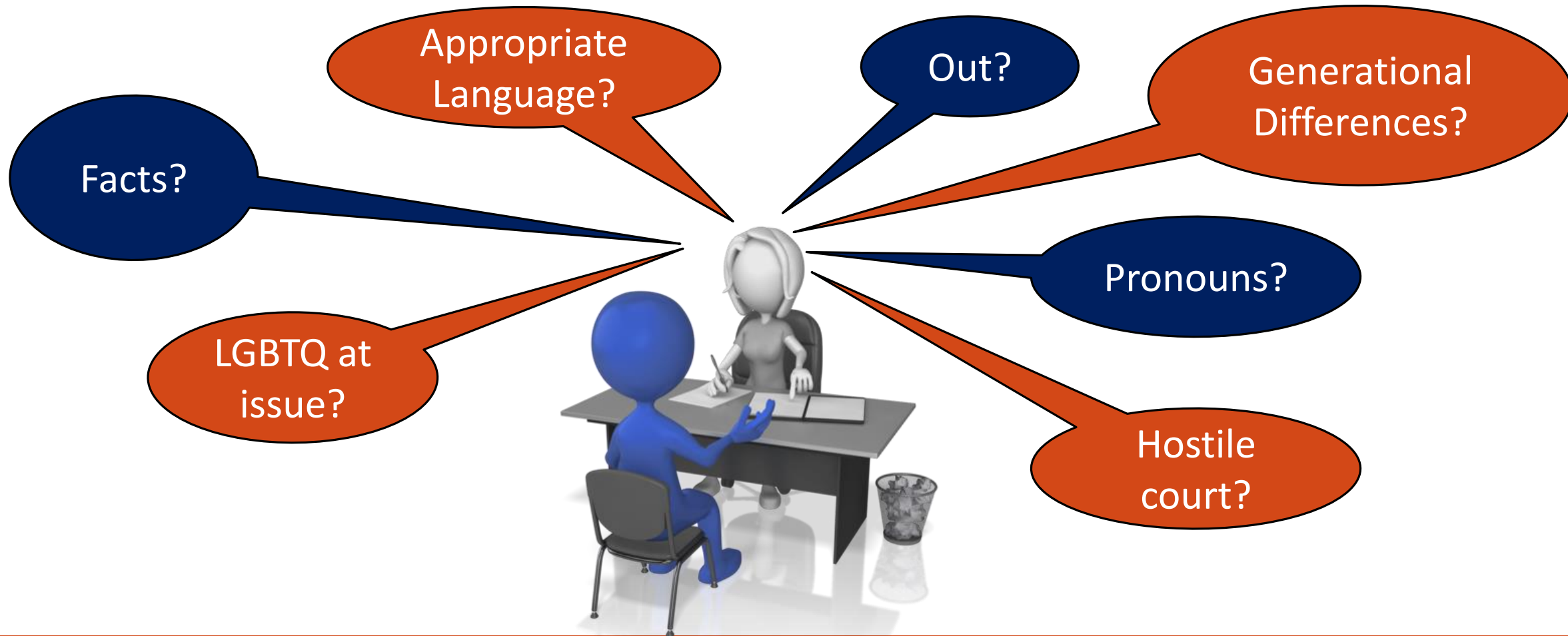
Fam. Code § 297.5(a);
Ins. Code §§ 381.5(a), 10121.7(a);
H&S Code § 1374.58(a)

Rule of Prof'l Conduct 8.4.1



Lawyers may not discriminate or retaliate against, harass, or refuse/terminate representation of a client because of her gender identity, gender expression, or sexual orientation.

Special Considerations for LGBTQ People



Creating a Welcoming Environment

- Post visible LGBTQ-related images in your office and provide inclusive materials.
- Post “gender-neutral” signage for public restrooms.
- Ask clients for preferred name and pronouns in initial intake, then use them.
- Respect client confidentiality.
- Identify and eliminate all homophobic and transphobic language.
- Include all staff in training and discussions about inclusive office culture.
- Model an affirming and respectful attitude!

Ask for Help!



Thank You!

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