



PROSECUTOR GUIDE

**TO JURY SELECTION IN CASES WITH
LGBTQ+ VICTIMS OF DOMESTIC**

**VIOLENCE, SEXUAL ASSAULT, AND
STALKING**

PREFACE

The *Prosecutor Guide to Jury Selection in Cases with LGBTQ+ Victims of Domestic Violence, Sexual Assault, & Stalking* was authored by Ruth Perrin, Jane Zhi, and Anya Lynn-Alesker of the American Bar Association Commission on Domestic & Sexual Violence (ABA CDSV) and John Wilkinson, Holly Spainhower, Jon Kurland, Patti Powers, Mary MacLeod, and Jennifer Newman of AEquitas. Additional contributions were made by Emil Rudicell and michael munson of FORGE.

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The opinions, findings, conclusions, and recommendations expressed in this Guide are solely those of the authors and do not necessarily reflect the views of the Department of Justice Office on Violence Against Women, the November 2022 roundtable participants, or LGBTQ+ Legal Access Project partners.

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I. INTRODUCTION

A prosecutor's first opportunity to combat potential bias during a criminal trial is jury selection. Jury selection, also known as voir dire, provides an opportunity to address bias, correct misconceptions, and strive for fairness in the process. Jury selection is also an opportunity to educate the panel about the crime and parties, to obtain promises to follow instructions on the law, and to plant seeds about the concepts of fairness and justice in the context of the current case. For cases involving LGBTQ+ victims, a comprehensive voir dire strategy is key to ensuring that anti-LGBTQ+ bias does not determine the outcome of the trial.

Some LGBTQ+ people are *significantly* more likely to experience domestic violence, sexual assault, or stalking in their lifetime. The LGBTQ+ community encompasses a broad variety of identities who experience varying rates of violence.

Nearly half of transgender people, which includes nonbinary people, transgender men, and transgender women, experience sexual violence during their lifetime, and 54% reported experiencing intimate partner violence during their lifetime.[1]

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[1] The 2015 U.S. Transgender Survey found that nearly half of transgender people experience sexual assault during their lifetime, and over half experience intimate partner violence. Nat'l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 198 (2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. Thirty-five percent of survey respondents reported physical violence by an intimate partner, and twenty-four percent experienced severe physical violence by an intimate partner, higher than the rates of the general population. *Id.* at 198-211.

Bisexual women also experience notably high rates of violence; the 2016/2017 National Intimate Partner and Sexual Violence Survey documented that in their lifetimes, nearly 80% of bisexual women experience contact sexual violence, 45% experience rape, half experience stalking, and about 70% experienced intimate partner violence.[2] The same study found that bisexual men and gay men experience sexual violence and stalking at significantly higher rates than heterosexual men. Just under 60% of bisexual and gay men experience contact sexual violence in their lifetimes, compared to 29.3% of heterosexual men, and about 1 in 4 experience stalking, compared to 1 in 6 heterosexual men.[3]

Given the prevalence of this violence, prosecutors handling cases involving intimate partner violence, sexual assault, and stalking will undoubtedly interact with LGBTQ+ survivors – whether they are “out” or not.

Historically, LGBTQ+ communities have reported negative experiences with law enforcement and the criminal justice system and, as a result, may be reluctant to engage with criminal systems.[4]

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[2] Ctrs. for Disease Control & Prevention, Nat’l Ctr. for Injury Prevention & Control, The National Intimate Partner and Sexual Violence Survey 2016/2017 Report on Victimization by Sexual Identity 6, 14, 17, *available at*

<https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualIdentity.pdf>.

[3] *Id.* at 6, 14, 19. “Contact sexual violence” includes rape, being made to penetrate someone else, sexual coercion, and/or unwanted sexual contact.

[4] Transgender people face higher rates of police mistreatment, incarceration, and physical/sexual assault by law enforcement; this is particularly true for transgender people of color. US Transgender Survey, *supra* note 1, at 84. LGBTQ+ people are as much as three times more likely to be incarcerated than their heterosexual and cisgender counterparts. Mel Langness & Gabi Velasco, “No Cops at Pride”: How the Criminal Justice System Harms LGBTQ People, Urban Institute, June 30, 2020, <https://www.urban.org/urban-wire/no-cops-pride-how-criminal-justice-system-harms-lgbtq-people>. Forty percent of gay and bisexual men participating in a 2015 study believed that contacting the police in response to a violent incident from an intimate partner would be unhelpful or very unhelpful; fifty-nine percent believed that the police would be less helpful to a gay or bisexual man than to a heterosexual woman in the same situation. Christy Mallory, Amira Hasenbush & Brad Sears, Discrimination and Harassment by Law Enforcement Officers in the LGBT Community 2, Williams Institute (Mar. 2015), *available at* <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf>.

In light of these experiences, LGBTQ+ survivors may distrust or be reluctant to engage with criminal justice professionals, seeing law enforcement and court systems as unwilling to help them. LGBTQ+ survivors may also experience bias during prosecution. One study examining homophobic attitudes among juror pools found that the subjects studied were more likely to blame LGBTQ+ victims for being raped than their heterosexual counterparts.[5]

It is incumbent upon prosecutors to build trust with the LGBTQ+ community and with individual LGBTQ+ survivors, and to ensure they have equal access to legal systems for crimes committed against them. This requires work to uncover and mitigate biases at every stage of the criminal process.

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[5] Bradley H. White & Sharon E. Robinson Kurpois, Effects of Victim Sex and Sexual Orientation on Perceptions of Rape, 46 Sex Roles 191, 199 (2002) (finding that “negative attitudes toward gay men and lesbians were positively related to traditional gender role attitudes and to more blame assigned to a [gay or lesbian] rape victim.”). See also Jennifer M. Hill, The Effects of Sexual Orientation in the Courtroom: A Double Standard, 39 J. Homosexuality 93, 102 (2000), (finding that jurors are more likely to perceive gay men accused of sexually assaulting straight men as guilty, than straight men accused of assaulting women or gay men charged with assaulting other gay men).

HOW TO USE THIS GUIDE

This Guide is designed to support you in drafting jury selection questions and related motions in limine to help you address anti-LGBTQ+ bias among potential jurors. This Guide is not intended to serve as a template for your specific case, but to provide information to consider, as well as strategies and lines of questioning that can be adapted for your case. The Guide also addresses how to object when opposing counsel strikes a potential juror based on their actual or perceived sexual orientation and/or gender identity.

II. PRELIMINARY CONSIDERATIONS

Understand relevant LGBTQ+ terminology, issues that affect LGBTQ+ communities, and best practices for working with an LGBTQ+ victim.

Building rapport and trust with a victim of intimate partner violence, sexual assault, or stalking is always crucial to effectively trying a case. In cases with LGBTQ+ victims, this necessarily requires gaining an understanding of the correct terminology to use, the biases that those in your community might have against LGBTQ+ people, and how bias will show up during a trial.

To learn about best practices for cases with LGBTQ+ victims, please refer to our [Prosecutor Guide to Best Practices in Cases with LGBTQ+ Victims of Domestic Violence, Sexual Assault, and Stalking](https://www.americanbar.org/groups/domestic_violence/our-projects/lgbt-legal-access/prosecutor-guide/) available at https://www.americanbar.org/groups/domestic_violence/our-projects/lgbt-legal-access/prosecutor-guide/

Know your community.

Your considerations will differ depending on where you are trying the case.

Consider if you are in a rural or urban jurisdiction.

In a smaller town or rural jurisdiction, individuals may be more likely to know one another prior to trial. This may be of concern to an LGBTQ+ victim who is not open about their identity. Discuss this concern with the victim and consider how to address the concern in court. Consider first asking the potential jurors if they know the victim. If anyone knows the victim, ask them if this would affect their ability to decide the case fairly. Ask that anyone who does know the victim and cannot decide the case fairly be dismissed, and leave the room, before continuing.

Understand the demographics of the jury pool.

In some locations, it may be easier to find potential jurors with similar lived experiences, beliefs, or identities as the victim in the case. In others, it may be unlikely that the potential jurors have similar identities to the victim; they may also not know anyone with similar identities. Educating potential jurors, and continuing to educate the jury panel throughout trial, is important in this situation.

Know if your jury pool will be large or small.

In a jurisdiction where the pool of potential jurors is small, you may need to prepare to do more educating of jurors with substantial biases rather than focusing on weeding out bias. You might also consider requesting that the court summon additional prospective jurors if you anticipate difficulty in seating a jury with the typical number.

Learn what issues may affect how potential jurors view the facts presented in the case.

Legislation restricting the rights of transgender people has been introduced into many state legislatures throughout the country. As a result, there is a significant amount of media coverage, disinformation, and misconceptions that may affect the jury pool's view of LGBTQ+ individuals. You should be aware of what this looks like in your city, state and nationally, and be prepared to educate the panel about prevalent misconceptions. The following resources can help you identify issues affecting LGBTQ+ people in your state:

- the ACLU has a [bill tracker](#) that logs anti-LGBTQ bills in the US.
- the Movement Advancement Project's [LGBTQ Equality Maps](#) detail laws that affect LGBTQ+ people.

Identify applicable jury selection laws, rules, and practices in your jurisdiction.

Voir dire rules and practices vary widely from jurisdiction to jurisdiction. Consider the following when it comes to understanding your jurisdiction's practices:

Are jury panelists questioned in public or private?

Typically, prosecutors and defense counsel ask questions of panelists on the record, in open court. Counsel will ask questions both of the entire group and of individual panelists in open court. This large group format provides attorneys with the opportunity to educate the entire jury pool by discussing the experiences of individual panelists. Some members of the jury panel, for instance, may have their own traumatic experiences; by asking them carefully constructed questions about their experiences, prosecutors may be able to educate other jurors about common dynamics and responses to trauma, as well as combat myths that often pervade these cases. For panelists who may be uncomfortable answering a specific question in a group setting, you should offer them an opportunity to answer the question outside the presence of the panel. Check your jurisdiction's rules and case law related to conducting portions of voir dire apart from the panel.

Does counsel ask the questions? Do the judges ask them?

Some jurisdictions only allow judges to ask questions of the panel, sometimes allowing the parties to submit a list of questions for the judge to ask. Carefully consider the questions you want the judge to ask panelists and be prepared to argue the relevance of each question submitted. You should also consider the flow of questioning. Unlike party-led voir dire, during which you have the ability to address panelists' answers with subsequent questions and responses to educate the jury, judge-led voir dire typically limits the ability of parties to ask follow up questions. However, you may be able to submit additional written questions for the judge's consideration; be prepared with a list to follow up. In any circumstance, your ability to identify bias and educate panelists will be limited in judge-led voir dire. Consider alternative methods for educating panelists, such as expert witnesses.

Are there limits on the amount of time you have, the number of questions you can ask, or other limits that you need to consider?

If your jurisdiction limits the amount of time you have to question the jury panel or the amount of questions you may ask, identify the most relevant questions regarding biases related to the victim's identity and the crimes charged. If needed, argue for an expanded period of voir dire or to ask to submit additional questions. Be prepared to explain why the circumstances of the case warrant this.

Consider other laws that may be relevant to voir dire & your case.

In addition to the laws, rules, and practices that your jurisdiction has specifically for voir dire, you should be aware of related laws that may apply or that may become relevant during your case. For example:

Does your state consider sexual orientation and/or gender identity a protected class?

Some jurisdictions have statutes or case law stating that a person cannot be dismissed from a jury based on their sexual orientation and/or gender identity. You should be prepared to address this if defense counsel dismisses someone either explicitly or ostensibly based on their sexual orientation and/or gender identity. Even if your jurisdiction does not have non-discrimination protections in jury selection based explicitly on sexual orientation and/or gender identity, there may be other non-discrimination laws that you can use to argue that sexual orientation and/or gender identity are protected classes.

For a discussion of the state of the law on this issue, see Section V, beginning on page 21.

To see a complete list of statutes, case law, and rules on this subject, [see Appendix A to this Guide](https://bit.ly/3JnIrXV) available at <https://bit.ly/3JnIrXV>.

What crime victims' rights laws apply in your jurisdiction?

All 50 states, DC, and some U.S. territories have either statutes or constitutional provisions that provide rights to victims of crime in criminal cases. Many states specifically obligate prosecutors to uphold these rights. You should make sure you are aware of what rights a victim has in your jurisdiction and what your obligations are to uphold those rights. You might find these rights useful in arguing for or against certain jury selection questions.

Many states, for example, confer upon victims rights to dignity and privacy. Inappropriate and irrelevant questions about the victim's sexual orientation and/or gender identity may violate this right. Similarly, use of a victim's deadname or incorrect pronouns could violate this right.[6]

[The National Crime Victim Law Institute has a complete list of crime victims' rights laws here.](#)

What are your jurisdiction's professional rules of conduct for attorneys and judicial canons?

Many jurisdictions' rules of professional conduct for both attorneys and judges include requirements that they not discriminate based on sexual orientation or gender identity. You may be able to argue that jurors should not be dismissed due to their sexual orientation or gender identity, or that defense counsel should not be allowed to ask certain questions, based on ethics. Additionally, you may be able to use judicial canons to argue that the judge should not allow discriminatory and inappropriate questions to be asked during voir dire. Though ethical rules are not binding authority, they may nonetheless be persuasive in addressing certain conduct.

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[6] "Deadname" can be a noun or verb. When used as a noun, a deadname refers to the name that a transgender person no longer uses. Sometimes, a person's deadname is their legal name, while other people may change their legal name. Not all transgender people use the term "deadname" to refer to their former name. "Deadname" as a verb refers to the act of using a transgender person's former name, often as an intentional way to cause harm. Referring to a person by their deadname may have serious privacy, safety, mental health, and economic repercussions.

Review your court's juror questionnaire.

Many courts require people fill out a standard questionnaire well in advance of jury selection. These questionnaires are standardized forms that the clerk sends to ask about basic demographics as well as availability for a jury term. In many jurisdictions, these forms have not been reviewed or revised in a long time. You should review your court's standard form and consider if you may need to engage in advocacy with the court to alter the form. Determine the following:

- Is the requested information necessary? For example, is it necessary for a potential juror to disclose their marital status on a questionnaire? What about the name of the potential juror's spouse?
- Does the information requested assist any party in determining if this individual would be an appropriate juror?
- If the information is deemed necessary and helpful, are listed options inclusive of varied identities?
- Are any of the questions inappropriate? Specifically, could any of the questions adversely affect LGBTQ+ jury panelists?
- Is there an option to decline to answer questions related to gender, marital status, and other demographic questions?

In some jurisdictions, parties may offer and request that a case-specific questionnaire be distributed to potential jurors, typically after they are sworn. These questionnaires should also be carefully prepared and reviewed to ensure questions are appropriate and do not discriminate or inadvertently out potential jurors.

Consider including a question that allows potential jurors to request that they be asked personal questions (e.g., those that might inadvertently reveal their gender identity or sexual orientation, or those that might reveal that they were previously victimized or accused of a crime) outside the presence of the jury panel. This option may not be available in all jurisdictions.

III. MOTIONS IN LIMINE

One way to address concerns over anti-LGBTQ+ bias during jury selection is through motions in limine. Filing a motion in limine can not only prevent certain concerns before they arise, but it also provides an opportunity to educate the judge about sexual orientation and/or gender identity. Judges may not be familiar with terminology, issues affecting LGBTQ+ survivors, LGBTQ+ domestic violence dynamics, and other relevant topics.

Consider filing motions in limine on the following topics, where relevant.

Preventing the victim or witnesses from being misgendered or deadnamed during voir dire.

In general, you should talk to the victim about filing a motion to prevent them from being misgendered or deadnamed throughout proceedings. For a longer discussion of this, [see the Best Practices Guide available at this link](https://www.americanbar.org/groups/domestic_violence/our-projects/lgbt-legal-access/prosecutor-guide/) available at

https://www.americanbar.org/groups/domestic_violence/our-projects/lgbt-legal-access/prosecutor-guide/

Jury panels are typically told the names of the victim, defendant, and witnesses to ensure that no one knows anyone involved in the case. If a victim or witness is transgender, the defense may wish to reference that individual's deadname to determine whether anyone on the panel knows them. If prosecutors have filed a motion asking the Court to direct all parties to refrain from using a transgender victim or witness' deadname, the motion should address this potential concern.

If an individual transitioned some time ago, then voir dire questions about their former name are likely irrelevant. If a person only stopped using their deadname recently, it is possible that panel members may know the victim or witness by that name; under these circumstances, asking the parties if they know that person may be relevant or necessary. It may be possible to request that the panelists be asked if they know the correct name and if they know the deadname without explicitly stating that the deadname was the victim's former name. If it is necessary to state during voir dire that the deadname is the victim's former name, prosecutors should request that the court clarify that the deadname is only allowed for that limited purpose and that all parties should refer to the individual by their correct name during the remainder of the proceedings.

Limiting voir dire questioning on panelists' identities

You should request that potential jurors not be asked about their own sexual orientation or gender identity. Asking questions about a panelist's sexual orientation or gender identity risks outing them. "Outing" refers to when someone reveals another person's sexual orientation or gender identity without their permission. People are often out, meaning that they are open about sexual orientation or gender identity, in some contexts, but not others. Someone who is out in their personal life may nonetheless not want to reveal that they are LGBTQ+ in a public context like jury selection. Outing can have serious negative effects on a person's life, including risking their physical safety and mental well-being.

Additionally, jurors' identities are not relevant to their ability to fairly decide a case; their beliefs are what matters. There may be an incorrect assumption that an LGBTQ+ potential juror would be biased in favor of an LGBTQ+ victim. Try to counter arguments to this effect. In cases involving heterosexual perpetrators and victims, there is never an assumption that straight jurors will be biased in favor of either party due to their shared sexual orientation; there should be no assumption that LGBTQ+ jurors would have such a bias, either.

This type of motion also puts the court and defense on notice that you are prepared to prevent potential jurors from being struck based on their actual or perceived sexual orientation and/or gender identity.

Request any necessary alterations in standard voir dire practice.

Your jurisdiction's typical jury selection practices may not enable you to fully explore all relevant issues in particularly complex cases. For example, if your jurisdiction limits the amount of time you have for voir dire, you should consider filing a motion to request additional time and explain the issues that you need to explore with potential jurors. Connect those issues to the facts of the case and explain how exploring those issues is crucial to a fair outcome.

IV. JURY SELECTION STRATEGIES

This section discusses strategies for crafting jury selection questions in cases with LGBTQ+ victims. You will see questions below that illustrate the strategy being discussed. Please note the following about these strategies and sample lines of questioning:

(1) They should be adapted for your specific case. For instance, some of the examples refer to a victim as LGBTQ+. You should always be specific in your questions and ask panelists about the specific identities that will come up during the trial. If you use a sample question that is listed below, be sure to adapt it to specifically refer to the relevant identity. For example, you should not ask “would your opinion change if you learned the victim was LGBTQ+” but rather “would your opinion change if you learned the victim was bisexual?”

(2) Whenever possible, potentially controversial questions or topics should be contextualized. Ask questions leading up to these topics rather than, for example, beginning by asking a question such as “would you be more or less likely to believe a person who is gay compared to a person who is heterosexual?” This is discussed in greater detail below.

Craft lines of questioning that relate potential jurors' own experiences to those of the victim.

Depending on the makeup of your jury pool, it may be impossible to entirely weed out strong biases against LGBTQ+ people, or even strong biases on the topics of intimate partner violence and sexual assault. However, you can nonetheless ask questions to help potential jurors understand the victim's experiences by tying it to their own. It can help to slowly introduce the topics of LGBTQ+ relationships and domestic or sexual violence. While not everyone has experienced violent crime, most people have experienced something traumatic in their lives that you can tie to the case and help the panelist understand the experience of the victim. For example:

- How many of us have had a traumatic incident occur in our lives? That could be a violent crime such as domestic violence, but it could also be a car accident, medical emergency, natural disaster, or many other experiences.
- I'm not going to ask you to tell us what happened unless you choose to, but I want to ask you whether you were able to talk about what happened shortly afterwards?
- Did you remember all the details?
- Could you remember the chronological order of what happened?
- Did you ever discuss it with someone else?
- Did you turn to someone for help about what had happened?

In this example, rather than immediately asking a question such as “do you understand why a domestic violence victim might not disclose immediately?”, the line of questioning breaks down panelists' own related experiences and ties them to this response.

Connect questions about anti-LGBTQ+ bias, misconceptions, and myths to broader lines of questioning about intimate partner violence, sexual assault, and/or stalking.

It is important to contextualize LGBTQ+-specific questions for the panel and tie them to the relevant crime. For example, in a domestic violence case, prosecutors may want to start questioning about intimate partner violence generally and then continue to more specific issues related to intimate partner violence in an LGBTQ relationship, as in the example below:

The Defendant is charged with the crime of assault, which under the law, as the Court will instruct you, is a crime of domestic violence based upon the relationship of the Defendant with the victim. On the State's behalf, I want to ask you all some initial questions, touching upon the nature of the crimes that the Defendant is charged with.

- Should crimes committed by a person within a relationship be treated any differently than crimes committed by a person outside of a relationship?
- Do you think anyone knows a person's vulnerabilities better than their spouse, partner, or significant other? Can those vulnerabilities be exploited?
- Have you ever thought you knew someone, only to find out that you didn't really know them at all? What was this experience like?
- Is there anything about the nature of this crime/these crimes—which involve(s) graphic evidence of violence—that you feel would be difficult for you to fairly evaluate and discuss along with the other jurors?
- The evidence in this case will establish that the victim and/or the Defendant is LGBTQ+ and that they have been/are in a relationship. Does this evidence make any difference in your analysis and application of the law?

Once you have tied the panelist's experience to the case and the fact that the victim is LGBTQ+, you can then ask specific questions about LGBTQ+ domestic violence, sexual assault, or stalking:

- Are you able and willing to apply the law to the evidence in this case, in the same manner as you would with a heterosexual victim?
- Do you have such strong personal feelings about the victim's sexual orientation or gender identity – either positive or negative – that you would not be able to apply the law, which the Judge will give to you?

In a case where you have to establish a pattern of control that involved elements unique to LGBTQ+ relationships, you can similarly begin with broad questions about safety and violence, and narrow down to LGBTQ+ experiences. For example:

- Can you think of different reasons why a person may become afraid for their safety?
- Does it have to be a direct threat of violence, or can it be something that happened in the past in a similar situation?
- Can the threat of someone telling others about personal information be a serious concern?
- What if someone could be let go from their job if their boss learned the information? (Or kicked out of their house if their parents learned?)
- Can you think of an instance in which someone may stay in a relationship with a dangerous person because they threaten to reveal that type of information?
- This case involves a defendant and victim who are both men. Sometimes, LGBTQ+ people fear their identity being outed. Do you think that the threat of being outed could cause someone to stay in a dangerous situation?

By combining questions about domestic violence with specific questions about LGBTQ+ victims, prosecutors can understand jurors' misconceptions, while also educating the panel and raising the idea that everyone deserves to be treated fairly during the trial.

Ask questions about common myths and misconceptions about LGBTQ+ people and violence experienced by LGBTQ+ communities.

Prosecutors must familiarize themselves with commonplace myths and biases about the LGBTQ+ community and anticipate any issues that might affect jurors' ability to fairly assess the case. Craft questions to identify potential jurors' belief in anti-LGBTQ+ myths.

For example, some potential jurors may believe that LGBTQ+ people are less trustworthy. In general, our society expects LGBTQ+ people to come out to others about their identities, as many assume that others are cisgender and heterosexual until told otherwise. As a result, when LGBTQ+ people do come out to their loved ones, they are sometimes perceived as dishonest for previously keeping their sexual orientation or gender identity private. Transgender people in particular are often seen as deceitful when they do not tell people that they are transgender. Because intimate partner violence, sexual assault, and stalking cases so frequently rely on the testimony of the victim, it is crucial that you identify potential jurors who believe that LGBTQ+ witnesses are less trustworthy than cisgender heterosexual witnesses. You might ask:

- Would anyone here be more or less likely to believe the testimony of a witness on the stand, exclusively based on whether that person is LGBTQ+?
- Is there any reason that you feel you could not objectively consider the testimony of a witness, exclusively because they are a member of the LGBTQ+ community?
- The judge will instruct you on how to evaluate the credibility of witnesses. Is there any reason why you might apply these instructions differently to someone who is LGBTQ+?

As discussed in previous sections, you should also build up to these questions by connecting them to the panelists' experiences and helping contextualize the questions.

Additionally, some people may reduce LGBTQ+ identities to being solely about sex, equating identities with sexual acts. The tendency to sexualize LGBTQ+ people of all identities results in the stigmatization of LGBTQ+ identities as lewd or offensive. Some LGBTQ+ identities are more sexualized than others; consider the common conflation of bisexuality with promiscuity or the misconception that all transgender people engage in sex work. These beliefs can significantly affect a case with an LGBTQ+ victim. You should consider the specific identity of the victim and what misconceptions might apply to that specific identity in the context of the crimes charged. Ask jurors about those misconceptions. It is important to ask questions about these types of beliefs as well as educate the jury panel about LGBTQ+ relationships and relevant identities. For example:

- Do you think there is any instance where a person who identifies as LGBTQ+ “deserves” or is “asking for” physical violence or sexual violence?
- What about a situation where someone is transgender but doesn’t immediately reveal it to a sexual or romantic partner?
- The victim in this case is bisexual. Do you believe that a bisexual person “deserves” or is “asking for” physical violence or sexual violence? Does anyone believe that sexual violence against a bisexual person is less serious than against a heterosexual person?

You might ask more broadly about the panelists’ views of LGBTQ+ people in their community.

- Does anyone have a friend or family member who identifies as LGBTQ+?
- Would anyone feel uncomfortable if they had an LGBTQ+ co-worker or neighbor or teacher at their child’s school? What about a waiter or service provider?
- Is there any reason that you feel you could not objectively consider the testimony of a witness, exclusively because they are a member of the LGBTQ+ community?
 - Would you be uncomfortable in any way that may distract you from your commitment to listen carefully to all the evidence?

There are also many myths about LGBTQ+ intimate partner violence, sexual assault, and stalking that are tied to gender expectations and stereotypes which may affect a case with an LGBTQ+ victim. For example, some myths are:

- women cannot be abusers and that only men perpetrate abuse
- violence by one woman against another woman is not serious
- violence by one man against another man is just fighting between equals
- in a same sex relationship, the more masculine partner is the perpetrator and the more feminine partner is the victim
- a man being abused by another man would fight back or, in the alternative, if a man does fight back, then the abuse is mutual

Ask questions about these myths.

- Does everyone agree that physical abuse in a relationship is a serious crime regardless of the sex or gender of the parties ?
- Does anyone think that if a woman is physically abusive to a man, it isn't as serious as when a man is physically abusive to a woman?
 - What if both parties were women? Or both parties were men?
 - What about a transgender man, meaning someone whose assigned sex at birth was female but whose gender identity is male? Does anyone think that domestic violence perpetrated by a transgender man would be less serious?

For more information about the LGBTQ+ community, myths & stigma, and about LGBTQ+ intimate partner violence, sexual assault, and stalking, see these linked resources:

- American Civil Liberties Union, [Mapping Attacks on LGBTQ Rights](#)
- AJ Willingham & Scottie Andrew, [The truth about common LGBTQ misconceptions](#)
- Center for American Progress, [Widespread Discrimination continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways](#)
- Coalition to Stop Violence Against Native Women, [LGBTQ2S+](#)
- FORGE, [Trans/Non-Binary Individuals & Intimate Partner Violence: A brief overview](#)
- Human Rights Campaign, [Common Myths About LGBTQ Domestic Violence](#)
- Human Rights Campaign, [Responding to Harmful Misconceptions about LGBTQ People](#)
- Families Thrive, [Common Myths about IPV in LGBTQ+ Relationships](#)
- Movement Advancement Project, [Equality Maps](#)
- National Coalition Against Domestic Violence, [Domestic Violence & the LGBTQ Community](#)
- Trans Legislation Tracker, [2024 anti-trans bills tracker](#)



V. OBJECTING TO UNWARRANTED DISMISSALS OF LGBTQ+ PANELISTS

Non-discrimination in *Batson v. Kentucky*

The Equal Protection Clause prohibits parties from discriminating against jurors based on their membership in protected classes. In *Batson v. Kentucky*, the Supreme Court held that the Equal Protection Clause is violated when there is purposeful racial discrimination in jury selection as “it denies [the defendant] the protection that a trial by jury is intended to secure”—namely judgment by one’s peers.[8] The Court outlined a three-step process, discussed below on page 25, to determine when impermissible discrimination has occurred.[9] In its aftermath, courts have treated *Batson* as prohibiting the use of peremptory challenges in criminal cases based on a panelist’s membership in a protected class.[10]

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[8] *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).

[9] *Id.* at 96-98.

[10] *See, e.g.* *United States v. Watson*, 483 F.3d 828, 831 (D.C. Cir. 2007); *United States v. Santiago-Martinez*, 58 F.3d 422, 423 (9th Cir. 1995).

Protections Based on Sexual Orientation & Gender Identity

The Supreme Court has not held that sexual orientation and gender identity are protected classes and has not addressed anti-LGBTQ+ discrimination in the context of jury selection. However, some jurisdictions have their own statutes and case law that consider sexual orientation and gender identity protected classes. For a compilation of jurisdictions' laws on this subject, [see Appendix A](#) available at <https://bit.ly/3JnlrXV>.

To determine when a group is a protected class, the Supreme Court established a test that asks if:

- 1) the classified group has experienced a history of discrimination;
- 2) the distinguishing characteristic of the class has any bearing on a person's ability to contribute to society;
- 3) the group is politically powerless; and
- 4) the defining characteristic of the group is immutable or highly visible.[11]

.....

[11] See *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (holding that a class is not disadvantaged and therefore is not deserving of a protected status if “they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (finding that a suspect class is one “saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”)

Sexual Orientation

In *Obergefell v. Hodges*, the Supreme Court acknowledged that classifications based on sexual orientation fit neatly into the four-pronged test articulated in *Lyng v. Castillo* and subsequent jurisprudence, but it did not explicitly hold that sexual orientation is a protected class.^[12] The Court’s decisions in *United States v. Windsor* and *Obergefell* also suggest that discrimination based on sexual orientation deserves more than rational basis review, signaling that it should be considered a protected class.^{[13][14][15]} Many state and federal courts have found that sexual orientation classifications are subject to heightened scrutiny, which is a level of judicial review applied to laws that discriminate against protected classes.^[16]

.....
 [12] See *Obergefell v. Hodges*, 135 S.Ct. 2584, 2596 (2015).

[13] *United States v. Windsor*, 133 S.Ct. 2675, 2682-96 (2013); see also *SmithKline*, 740 F.3d at 481 (“In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.”).

[14] *Obergefell*, 135 S.Ct. at 2584-608 (declining to state what level of scrutiny was applied in finding that banning marriage for same-sex couples violated the Due Process and Equal Protection Clauses).

[15] Laws and other government actions that explicitly or seemingly discriminate against protected classes are subject to a higher level of judicial scrutiny—i.e., either strict or intermediate scrutiny—than laws that do not discriminate against protected classes, which are subject to rational basis review. In order to pass strict scrutiny, a law must involve a *compelling* government interest and be *narrowly tailored* to achieve that compelling interest. See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995). In order to pass intermediate scrutiny, a law must involve an *important* government interest and be *substantially related* to achieving that interest. See *Craig v. Boren*, 429 U.S. 190 (1976). Rational basis review, the most lenient standard, merely requires a court to find that a law is *rationaly related* to a *legitimate* government interest. See *Railway Exp. Agency v. New York*, 336 U.S. 106 (1949).

[16] See *SmithKline*, 740 F.3d at 484-89 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012); *Griego v. Oliver*, 316 P.3d 865, 884 (N.M. 2013); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 43 Cal. 4th 757, 841-44 (Cal. 2008); *Kerrigan v. Comm’r of Pub. Health*, 289 Conn. 135, 175-227 (Conn. 2008); see also *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

Gender Identity

Discrimination based on gender identity has not been found to be a protected class by the Supreme Court, but nevertheless, a prosecutor may argue that gender identity satisfies the four elements of the *Lyng v. Castillo* test. The *Obergefell* Court’s reasoning in cases involving sex discrimination can be considered applicable to cases involving gender identity. Furthermore, in *J.E.B. v. Alabama*, the Court extended *Batson* to protect against sex discrimination as well, finding that prospective jurors “have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.”[17]

In *Bostock v. Clayton County, Georgia*, the Supreme Court held that firing a person for being gay or transgender is sex-based employment discrimination, since discrimination against gay or transgender individuals—including the concomitant expectations about physical appearance, personality, and “masculinity and femininity”—necessitates discrimination based on sex.[18] Though *Bostock* focused on sex discrimination in employment, it is helpful as persuasive authority that sex-based protections in jury selection should extend to people who are LGBTQ+. Several federal circuit courts have similarly extended sex-based discrimination protections to gay and transgender plaintiffs.[19]

As you prepare for jury selection, you should determine whether your jurisdiction considers sexual orientation or gender identity a protected class.

[17] *Id.* at 127.

[18] *Bostock v. Clayton County, Georgia*, 590 U.S. 644, 669 (2020).

[19] *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior”); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (Stating that non-discrimination protections based on sex cover both sex and gender); *Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011) (“There is thus a congruence between discriminating against transgender [...] individuals and discrimination on the basis of gender-based behavioral norms. Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”).

Establishing Discrimination Based on Sexual Orientation & Gender Identity

In jurisdictions where sexual orientation and gender identity are considered protected classes, you can argue that a *Batson* analysis should be used in cases of discrimination against jurors based on their sexual orientation or gender identity.

In *Batson*, the Supreme Court held that a party must follow a three-step process to establish that a potential juror was improperly dismissed based on their membership in a protected class:

1. The party must first make a prima facie case showing discrimination;
2. Opposing counsel must then offer a neutral explanation for the strike; and
3. The judge must determine whether discrimination motivated the strike.[20]

As prosecutors, we may be only accustomed to responding to *Batson* challenges rather than making them, but remember, any party can raise a *Batson* challenge or challenge a peremptory strike based on the reasoning in *Batson*. While no one has a right to sit on a jury, everyone has the right to be treated fairly during the jury selection process. Furthermore, an individual has a right to be tried by a jury of peers, and that peerage should reflect the community in which the case is being tried. Finally, an individual's identity – their race, ethnicity, gender, gender identity or sexual orientation – is not a reflection of their ability to fairly hear the evidence in a case.

.....
[20] *Batson*, 476 U.S. at 86.

(1) Showing a Prima Facie Case of Discrimination

There is limited case law providing guidance on what constitutes a prima facie case of discrimination. Some courts look for patterns of discrimination—typically, the striking of more than one potential juror from a protected class. However, in some cases, even striking one juror from a protected class may be enough to create a prima facie case, depending on other factors.[21] A single juror strike should be evaluated in the context of the larger panel. For instance, if there is only one LGBTQ+ individual on the panel, striking them would raise suspicion; if there are multiple LGBTQ+ individuals and only one is struck, it would be more difficult to make out a prima facie case.

Prosecutors should also pay careful attention to the defense’s interactions with individuals on the jury who may directly or by inference identify as LGBTQ+ during questioning. For example, defense attorneys commonly ask if anyone on the panel is a member of law enforcement or related to a member of law enforcement. If a male juror were to answer yes, and explain that their husband is a police officer, then it would be a reasonable inference that the individual is LGBTQ+. If the defense then asks that juror about other issues that are not also directed toward other panel members, that might indicate intentional discrimination. But the inverse may also be true; if the defense attorney does not ask the male juror additional questions that they ask of others, this might indicate that they are planning to strike him due to sexual orientation.

.....
[21] *Salazar v. State*, 795 S.W.2d 187 (Tex. Crim. App. 1990) (holding challenge to a single Hispanic potential juror could give rise to a *Batson* analysis, in which the prosecutor should have been required to show their notes on their reasoning for dismissing the juror). However, the court’s ruling in *Salazar* should be considered in the context of the case, which involved a prosecutor striking four other minority jurors who were Black, resulting in a selected jury that was entirely white.

You may also encounter a situation in which a potential juror is struck based on their perceived sexual orientation or gender identity, rather than their stated or suggested identity. For example, a defense attorney may believe an individual to be LGBTQ+ based on common stereotypes about LGBTQ+ appearances, clothing, or mannerisms, even if that individual has not identified themselves as LGBTQ+. It will be difficult for prosecutors to argue that the defense attorney has discriminated against the panel member in such situations—in order to raise a prima facie case, the prosecutor would themselves need to reference harmful LGBTQ+ stereotypes. However, prosecutors should pay careful attention to the defense’s questioning of individuals whom they may perceive to be LGBTQ+. If this individual is treated differently from other panelists and is ultimately struck, consider the feasibility of raising a *Batson* challenge.

(2) Neutral Explanation for Strike

Once the court determines that a prima facie case of intentional discrimination has been made by the challenging party, the burden shifts to the challenged party to rebut the presumption of discrimination. The challenged party may answer in a variety of ways to explain that a strike was not related to an individual jurors’ sexual orientation or gender identity. Prosecutors should pay careful attention to the proffered neutral reason. Does it make sense? Was this juror singled out for questions while other jurors were not? Is the so-called neutral explanation really related to sexual orientation or gender identity?

(3) *Showing Discrimination Motivated the Strike*

Finally, based upon the challenge, the proffered explanation, and arguments, the court will decide if intentional discrimination took place. While an adverse decision to a *Batson* challenge by the defense may raise an issue on appeal, an adverse decision to a *Batson* challenge by the prosecution will likely be the final decision on the matter.

As discussed above and below, many states have passed laws to include sexual orientation and gender identity as protected classes. Even if your state has not addressed the issue explicitly, good arguments can be made based on federal case law and ethical rules for both the bar and bench. Appendix A contains federal case law on sexual orientation and gender identity as protected classes. [Appendix A](https://bit.ly/3JnlrXV) is available here: <https://bit.ly/3JnlrXV>.

Prosecutors should be prepared for the defense to argue that, because the Supreme Court has not explicitly ruled that gender identity and sexual orientation are protected classes, a *Batson* challenge is unavailable. However, even if your state or federal circuit has not addressed the issue, good arguments can be made for why sexual orientation and gender identity are protected classes. In all cases, prosecutors should be prepared to make additional arguments beyond *Batson*, citing to applicable ethical rules and judicial canons.

VI. CONCLUSION

In *Batson*, Justice Marshall stated that “[o]ur criminal justice system ‘requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.’”[22] It is the prosecutor’s job to ensure this balance. In cases involving domestic violence, sexual violence, and stalking, however, it can be difficult to ensure that the victim is treated fairly. This is due in large part to widespread myths and misconceptions about the victims of these offenses. These challenges multiply for cases involving LGBTQ+ victims, who are subject to unique biases and myths about their identities, relationships, and gender roles. A thoughtful and well-prepared voir dire can help prosecutors identify these biases among potential jurors and correct misconceptions about LGBTQ+ victims. By helping to select a well-informed and impartial jury, prosecutors can make the criminal justice system more fair and respectful for LGBTQ+ victims and defendants alike.

.....
[22] *Batson*, 476 U.S. at 107 (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)).

QUESTIONS & ADDITIONAL SUPPORT

If you have questions about jury selection & anti-LGBTQ+ bias, you can reach out to us. ABA CDSV and AEquitas work together on ABA CDSV’s LGBTQ+ Legal Access Project to support attorneys and advocates working on cases with LGBTQ+ survivors of domestic violence, sexual assault, and stalking. We can provide training and technical assistance, including:

- Provide training to your agency on best practices for LGBTQ+ intimate partner violence, sexual assault, and stalking cases
- Consult on specific cases with LGBTQ+ victims
- Review office policies and procedures for inclusivity
- Connect you to local, state, and national resources

