SC Litigation Update: Language Inclusivity

September 30, 2022

Media Contact
Powers Tanis
Director of Strategic Marketing and
Communications 803.221.4907
email@mgclaw.com

Language Inclusivity in the Practice of Law

As legal professionals, we interact every day with people from different backgrounds with unique experiences and identities, including our clients, colleagues, judges and juries. When communicating with each other in writing or speech, we must avoid language that inadvertently reflects implicit bias. By instead using inclusive language, we prevent offending and marginalizing the people we depend on for the enduring success of our legal practice.

When we interview a witness, speak to legal staff, or present to jurors, we do not know their unique personal background or the backgrounds of their friends, family and community. We should never assume that we know a person's gender identity, sexual identity, socioeconomic status or disability status. While it is generally best to avoid categorizing people, there are many times in the legal practice that we must address race, ethnicity, gender, socioeconomic status or disabilities. When discussing these issues, it is important to ensure that our use of language aligns with modern guidelines for inclusivity. While avoiding offensive language seems obvious, implicit bias has the potential to cloud our view of what constitutes offensiveness. Acceptable terminology has changed immensely over the last several years, and will continue to change, so we must continue to educate ourselves in order to remain inclusive.

The legal system has historically perpetuated inequality by using language to marginalize individuals. For more than two centuries, American law and jurisprudence adopted and promoted racist language.[1] The Declaration of Independence called Native Americans "merciless Indian Savages."[2] This language was later used to refer to the residents of U.S. territories of Guam, Puerto Rico and the Philippines as "alien races" and "savage tribes."[3] The U.S. Supreme Court called African Americans "beings of an inferior order."[4] South Carolina's history of racism in law and jurisprudence is particularly egregious; even after the Civil War, South Carolina's Black Codes and Jim Crow laws reinforced antebellum racial hierarchies.[5]

As attorneys, we have both a privilege and responsibility to use the legal system as a tool to pursue justice and equity, especially given the fraught history of our profession and state. One such way we can use our positions to create a more equitable society is through our language. While it can be difficult to determine what others may perceive as offensive, the American Psychological Association (APA) has published comprehensive guidelines for language inclusivity based on scientific research on individual responses to specific terminology. These guidelines can be easily applied to the legal profession. The most recently published APA guidelines for language inclusivity focus on three main areas of inclusivity: 1) Person-First or Identity-First Language; 2) Identity Related Terms; 3) Avoiding Macroaggressions in Conversations.[6] Applying these guidelines to the legal profession allows us to ensure that we are conforming to the current standards of inclusivity.[7]

When discussing a disability, we should be mindful of the choice between person-first or identity-first language. This is common in the context of workers' compensation or personal injury cases, where disabilities can be a central topic. The choice between identity-first and person-first language may differs based on the context and individuals involved. Person-first language is generally, but not always, preferred. The APA suggests referring to someone as "a person who uses a wheelchair," rather than "a person who is confined to a wheelchair" or "wheelchair-bound." Another example of person-first language is, "a person who is blind." Such person-first language preserves the humanity of the individual without reducing their identity to their disability. While this provides a respectful baseline standard, terminology may change in the context of litigation. For example, it may become necessary to highlight how a disability became an inseparable part of a person's identity because of an accident. Regardless, legal professionals should give thought to the choice between person-first or identity-first language, with a focus on respecting the affected individuals.

In the context of disabilities, while both person-first and identity-first language are acceptable, the APA cautions against using pictorial metaphors and negativistic terms that imply restriction because this may insult or disparage a particular group. However, as with many diverse groups, 'insiders' (members of that group) may use terms with one another that are not appropriate for outsiders. In legal practice, advocates may similarly use certain terminology when speaking on behalf of their insider client, if it is beneficial to the client in the context of the legal matter. However, advocates should remain mindful of the importance of inclusivity and communicate with their clients to confirm that they are using language approved by their client.

While identity-first terms, such as "disabled person," or person-first terms, such as "person who has a disability," are both generally acceptable to use, there remain offensive terms that should never be used, such as "special needs," "physically/mentally challenged," "physically/mentally retarded," "handi-capable," and "crippled." Similarly, the APA recommends referring to someone as "a person with a traumatic brain injury," rather than "brain damaged," which is a term that is likely to be universally offensive. Likewise, when discussing mental disabilities, negative terms such as "crazy" or "nuts" should be avoided. When discussing substance abuse, rather than calling someone "an alcoholic" or "a drug addict," the APA recommends "person with alcohol use disorder" or "person with substance use disorder."

Another area of consideration for inclusivity, especially in the context of criminal cases, is the reference to people as "victims" or "survivors." Generally, the APA suggests referring to these individuals as "a person who has experienced. . ." or "a person who has been impacted by. . ." Similarly, rather than calling someone a "criminal" or "convict," the APA recommends referring to these individuals as "a person who is/was incarcerated." This choice of language could change in certain legal contexts, but we should remain aware of the potential offensiveness of these terms and make the conscious choice to use the terminology that best respects the interests of our clients and others.

As for identity-related terms, we can reduce bias by avoiding inconsistent nonparallel terminology, avoiding negative condescending expressions, and using gender-neutral language. In the practice of law, categorizing people by gender, race and socioeconomic status may be important when discussing things such as discrimination or the demographics of a venue. When doing so, the APA recommends the use of consistent and parallel terminology. For example, in the context of race, while the APA finds it acceptable to use either the term "Black" or "African American," the use of both "White" and "African American" together in the same writing or conversation is problematic.[8] A speaker or writer should strive to use "Black" if using "White" in the same writing or conversation. Similarly, when referring to people based on gender, the references should be parallel, such as "Men" and "Women" rather than "Men" and "Ladies" or "Girls."[9]

Another way to improve the inclusivity of our language is by adopting gender-neutral terminology. While it may remain common to address the jury as "Ladies and Gentlemen of the Jury" or address a letter as "Dear Sir" or "Dear Madam," these phrases are needlessly binary. We often blindly send letters labeling people as Mr. or Ms. without knowing someone's self-identified pronoun. To improve, we can instead address the "Members of the Jury" and when writing letters, we can simply use someone's legal name without a gendered salutation. When addressing professionals, we can also use non-gendered titles. We can easily avoid gendered generics. For example, titles and professions should not be gendered in terms such as, "foreman," "waitress" and "congressman." Instead, we should adopt terms such as, "foreperson," "server" and "congressperson." Indeed, there are ways to draft all legal documents to be completely gender neutral. By updating legal forms to be gender neutral, we avoid needlessly mislabeling others or drawing attention to gender when it is irrelevant.

In addition to attorneys and legal staff, the judiciary can also make strides towards inclusivity by using gender-neutral terminology. The use of gender-neutral language in legal opinions avoids inadvertent sexism and ambiguity. The foundation of our legal knowledge comes from legal opinions, which serve as the groundwork for most of our legal writing and communication. Judicial opinions are forever cited and republished, which means that the language will continue to be used in the future. The language contained within orders and opinions influences the language used in all legal communication, inside and outside of courtrooms. Though unintended, it remains common to see language framed in the male perspective, such as "his rights." The use of terms such as "his rights" only serves to distract the reader, as the rights at issue are certainly applicable to all persons regardless of gender. Instead, a person's rights should be gender neutral. Similarly, common legal standards are often framed in the male perspective, such as the "reasonable man standard," which should be referred to as the "reasonable person standard." This gender-neutral language is more precise and inclusive.

Another area for improvement in our legal communication is the avoidance of microaggressions as recommended by the APA. Microaggressions are "brief and commonplace daily verbal, behavioral or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory or negative" statements towards others.[10] Some examples include: Asking someone who speaks English with an accent, "Where are you *from*?" Or mistaking a person of color for a service worker.[11]

Some terms remain common inside and outside of the legal profession and are used without understanding the origin of the words or phrases. Many of these are terms we might use without intending any harm. For example, phrases like "long time no see" or "no can do," actually originate from stereotypes making fun of nonnative English speakers. Asking for a meeting by calling a "pow-wow" is another such example. It is difficult to overhaul our way of thinking and speaking, yet important to understand the ways that our language might unintentionally cause harm to those around us.

Even some traditional legal terminology can be deemed offensive. For example, rather than referring to people as "illegal aliens," legal professionals can use the terms "undocumented people" or "people who lack documents required for legal immigration." Another term used for years in the legal profession was "Chinese wall," which refers to the ethical separation of individuals within the same organization. We now understand that the term is culturally insensitive and an inappropriate reflection on Chinese culture and trade. This term has been replaced with the term "ethical wall" or "screened" as preferred by the American Bar Association Model Rules of Professional Conduct.[12]

The APA also cautions against unnecessarily violent language. Examples that we commonly see in the legal profession include phrases such as, "killing it," "taking a stab at it" or "pulling the trigger." Brandeis University's Prevention, Advocacy, and Resource Center's "Suggested Language List," developed by students who have been impacted by violence, includes these types of terms as language that should be avoided.[13] Especially for attorneys who work with persons who have experienced or been impacted by violence, or perpetrators of violence, using such phrases might cause unintentional harm.

This is just one of many ways in which thoughtful attention to *whom* we are addressing can reduce harms caused by language.

The APA also cautions against the use of language that does not precisely say what it means, such as, "committed suicide" or "failed suicide." Framing the language in this manner implies unnecessary judgment about suicidality. Instead, we should use phrases such as, "died by suicide." This change is easy to implement when discussing suicide in the legal practice.

Language inclusivity is important in everyday communication with colleagues and clients in the office and in formal presentation in the courtroom. The legal community is currently making significant efforts to increase diversity among legal professionals and judicial representatives. As part of this effort, it is more important than ever to be mindful of our use of inclusive language to create a welcoming and accepting community. Workplace performance and mental health is significantly impaired if a professional is not comfortable in their ability to be open about their identity. Comfort comes from having safe spaces for all types of individuals, which requires, among other things, language inclusivity.

Clients, jurors, and the general public look to legal professionals to set the standard for acceptable decorum. As officers of the court, we have a duty to convey that all persons, regardless of their identity, should be treated equally and with respect. Indeed, we have an ethical and professional responsibility to conduct ourselves appropriately. Across the country, ethical guidelines are being amended to protect individuals who are underrepresented. As part of that protection, we should avoid bias, harassment, and discrimination of underrepresented individuals by remaining mindful of our language choices.

While likely inadvertent, non-inclusive language remains common in the legal profession. In just the last few years, I have personally witnessed countless examples of sexist, ageist, and racist statements made by clients, witnesses, and even advocates. Examples I have seen in front of a jury at trial include "little lady" to refer to a female professional, "child" to refer to a teenage driver and "the Black man" to identify the defendant. While not everyone takes offense to these terms or phrases, this choice of language remains unnecessary and offensive. Legal professionals can easily avoid offensive language and work with clients and witnesses to ensure that they too are using inclusive language.

While these recommendations may seem insignificant or unnecessary to some, they have the potential to make a substantial difference for those who are marginalized every day. If a small change can make even one person feel accepted and included, I will make that change in my legal practice. Respect is best earned by first demonstrating it. By making simple adjustments to enhance our communication and by remaining conscious of our own implicit biases, we can better ensure a safe, welcoming, and inclusive legal community.

Reprinted with permission of the SC Bar.

ABOUT THE AUTHOR

Monica Towle is an attorney in MGC's Columbia office, with a focus on litigation and insurance coverage. She is a graduate of the University of South Carolina where she received a BA in Political Science and a minor in Speech, Communication and Rhetoric. Monica received her JD from the University of South Carolina School of Law. She is an active member of the SC Bar Association Young Lawyers Division, Richland County Bar Association and South Carolina Women Lawyers Association. Monica has been recognized for her litigation practice by Best Lawyers©: Ones to Watch and Columbia Business Monthly's Legal Elite of the Midlands.

Endnotes

[1] Robert A. Williams. (2005). *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America.* University of Minnesota.

[2] Declaration of Independence. July 4, 1776.

[3] Downes v. Bidwell, 182 U.S. 244 (1901) and DeLima v. Bidwell, 182 U.S. 1 (1901)

[4] Dred Scott v. Sandford 60 U.S. 393 (1856)

---

[5] See, e.g., The Southern "Black Codes" of 1865-66, Constitutional Rights Foundation, https://www.crf-usa.org/ brown-v-board-50th-anniversary/south-ern-black-codes.html.

[6] American Psychological Association. (2021). *Inclusive language guidelines.* https:// www.apa.org/about/apa/equity-diversi-ty-inclusion/language-guidelines.pdf

[7] The guidelines published by the APA and cited herein provide comprehensive charts of recommended and problematic language, which serve as a beneficial resource for selection of appropriate language. American Psychological Association. (2021). *Inclusive language guidelines.* https:// www.apa.org/about/apa/equity-diversi-ty-inclusion/language-guidelines.pdf.

[8] American Psychological Association. (2019, September). *Racial and Ethnic Identity*. Retrieved from American Psychological Association: https://apastyle.apa.org/ style-grammar-guidelines/bias-free-lan-guage/racial-ethnic-minorities.

[9] American Psychological Association. (2019, September). *Gender*. Retrieved from American Psychological Association: https://apa-style.apa.org/style-grammar-guidelines/ bias-free-language/gender.

[10] Derald Wing Sue et al. (2007). *Racial Micro-aggressions in everyday life: Implications for Clinical Practice.* 62 American Psychologist 4, pp. 271-286.

[11] For a helpful list of examples of microag-gressions, see this document published by the University of Minnesota: https://sph. umn.edu/site/docs/hewg/microaggres-sions.pdf.

[12] American Bar Association. (May 2021). *Model Rules Of Professional Conduct As Adopted By Aba House Of Delegates, February 2002 - Center for Professional Responsibility:* https://www.americanbar.org/groups/ professional_responsibility/policy/eth-ics_2000_commission/e2k_redline/

[13] Brandeis University Prevention Advocacy and Resource Center. (n.d.). Suggested language list. https://sites.google.com/ brandeis.edu/parcsuggestedlanguagelist/