



# Counseling the Gay, Lesbian, Bisexual, or Transgender Client

By Rudy Serra and Annette E. Skinner

**T**here has been no agreement on the number of gay men and lesbians in the general population. Alfred Kinsey's landmark research placed the number at 10 percent. In the 1996 election, five percent of voters nationwide and nine percent of voters in large cities were willing to self-identify to a stranger as gay or lesbian. This percentage increases if we include bisexual and transgendered individuals. It is very likely that attorneys will increasingly be asked to provide counseling and representation to gay men, lesbians, bisexual, or transgender (GLBT) individuals, and legal progress has been slow to support the rights of this large minority group. The purpose of this article is to give some practical suggestions for counseling these clients.

## **FAST FACTS**

*Powers of attorney, cohabitation agreements, and child custody agreements are all special family and estate planning needs that should be considered when counseling gay, lesbian, bisexual, or transgender clients.*

*Gay men are vulnerable to criminal prosecution and hate crimes and often require legal representation.*

*Transgender people experience more overt bigotry within the legal system than almost any other group. Practitioners must recognize that the TG condition is a medically recognized condition with treatment options.*

When you are uncertain of terminology, it is appropriate to ask clients if they prefer to be referred to as gay, lesbian, homosexual, transgender, or some other term. Although members of a minority group may use language that might otherwise be considered a slur, the professional should use accepted terminology. The phrase “sexual preference,” for example, (although used in the Michigan Public Health Code, MCL 333.20202) is obsolete and incorrect. Both science (The American Psychological Association) and law (MCL 28.257a) recognize and employ the term “sexual orientation” to refer to one who is homosexual, bisexual, or heterosexual.

The GLBT community is a significant consumer of legal services. The practitioner who rejects this community is not only rejecting economic opportunity, but also an important struggle for equal justice and human rights.

### SPECIAL NEEDS OF GLBT CLIENTS— FAMILY AND ESTATE PLANNING

Estate planning is a complex subject for any client. For GLBT clients, complications are compounded. They are similar to other clients in their desire to create families and provide for these families in their planning documents. However, “families” as a concept has a broader definition in the GLBT community. Issues such as parenting, ownership of property, and laws regarding intestate succession require different techniques and some creativity to help GLBT clients achieve their goals. This section gives some general guidelines for planning for togetherness and planning for disaster but does not address drafting wills and trusts, since the need for these documents does not differ significantly from traditional planning scenarios.

### Powers of Attorney

With GLBT clients, as with all clients who are part of nontraditional families, powers of attorney are critical. Decisions as personal as organ donation and burial wishes, made known informally to the

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long-term partner, may be denied by hospitals and funeral homes, based on the desires of the legally-recognized next of kin. If the client is involved in a relationship, the partner can be, and has been, excluded from participation in financial and medical decisions if the client becomes incapacitated. There have been cases where partners have been denied the ability to visit their loved ones in a hospital or nursing home, or to remain in a home in which their interest was equitable, but not legally protected. Properly drafted powers of attorney are the best way to enable the family of choice to make decisions, and these powers will be





crucial if the biological family chooses to attempt an unwelcome takeover in probate court through a conservatorship or guardianship.

In general, there are two powers of attorney that are critical to provide. The power of attorney for health care decisions lets your client name a person who will make medical decisions if he or she becomes unable to participate in these decisions. This can be the most important document your client signs. If a patient advocate is not named, hospitals frequently look to “next of kin” for a person to make care decisions. While some of us may want our parents or siblings to make the decisions, others of us desire to have members of our chosen families decide for us. This document lets your clients state their wishes about medical care, including whether they want to have life-prolonging treatments used, such as ventilators and feeding tubes. This is also a logical document to use to authorize organ and tissue donation and the ability to make burial decisions.

The second power of attorney deals with financial issues. This document will let the person named take care of finances if your client becomes unable to make financial decisions. This person can pay bills, deposit and withdraw money from bank accounts, sell and buy property, and pay taxes. The authority of this person can be as expansive or restricted as desired and may be revoked at any time.

### Cohabitation Agreements

You may receive a call from a client saying he or she has started a new relationship. The partners may be living together or planning to purchase a home and they want to own property jointly. Later, the client may ask for assistance in dissolving the relationship. One problem with seeking the equivalent of a marital property arrangement is that the courts are not prepared to treat the dissolution of same-sex relationships in the same way as a traditional divorce. Consider whether owning real property as joint tenants with rights of survivorship is the best option, given that one party generally cannot sue to partition the property in Michigan.

One way to deal with the potential for disaster is to develop a cohabitation agreement. A cohabitation agreement is drafted as a contract similar to a prenuptial agreement and may cover a variety of topics, such as division of household expenses, “alimony” considerations if one partner has given up a career to make the home a castle, contribution for educational expenses, ownership of property, and a mediation or arbitration clause.

The number of formats a cohabitation agreement can have is limited only by our imagination. Sometimes, creation of a formal partnership should be considered. Other times, a contract can be written that is less formal but includes several sections. The parties can agree to mediation or negotiation if they are unable to resolve differences.

### Children

The number of same-sex couples with children has increased dramatically. Whether the child is adopted or biological, one partner is legally identified as the parent. The courts across the country have not reached the same conclusion regarding the parenting rights and responsibilities of the second parent.

Unsettled questions regarding second parent adoption and parenting time upon dissolution of the relationship remain. We do not anticipate any progressive legislative changes that would provide standardization in this area in the foreseeable future.

The current state of affairs does not mean there is nothing to be done. There are some ways to try to ensure the parents will have equal rights and responsibilities. Two documents in general use are co-parenting agreements, in which the partners agree on present and future care and support and a power of attorney delegating parental authority. This power of attorney can authorize the second parent to make day-to-day decisions for the child. It can be patterned after one that "typical" parents use when they will be out of town and leave their child in the care of a friend or family member. These documents should be renewed every six months.

Finally, the will of the legal parent should name the second parent as the testamentary guardian for the minor child. There are significant problems if a noncustodial biological parent is living and his or her rights have not been terminated by the courts. Courts have held that the "second parent" will have no ability to gain custody upon the death of the custodial parent. These findings

have been made even in cases where there has been no contact or support from the noncustodial parent and the children have a long custodial relationship with the second parent.

### SPECIAL NEEDS OF GAY CLIENTS— CRIMINAL DEFENSE

In our experience, the legal weapon most frequently used against the gay community in Michigan, related to criminal issues, is the "gross indecency" and "abominable and detestable crime against nature" statutes. Surveys show that as many as 25 percent of the general population engages in anal sex and larger percentages in oral sex. For decades, experts have protested that the gross indecency and abominable crime statutes are being used to prosecute gay people who engage in anal and oral sex for the purpose of stigmatizing them as unconvicted felons and unfit parents. Both statutes are used to regulate private, adult, noncommercial, consensual sex. The authors believe that the state has no legitimate interest in attempting to regulate such activity.

In one study, Florida State University law professor William Eskridge, Jr. claims that gay men are arrested on misdemeanor charges for acts involving no force, no payment, and no injury to anyone, in numbers 20 times greater than heterosexual men.<sup>1</sup> Many Michigan men are being added to the "Sex Offender Registration" list every year solely because they showed a willingness to engage in private, consensual sex with another man. Case reports confirm that gay men are charged with prostitution when there has been no offer of or request for money and that they are charged with the felony of gross indecency for acts that do not qualify for that charge.

There are reports that some police conduct active and aggressive "bag-a-fag" operations in Michigan and that these operations are rife with misconduct, corruption,

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and constitutional violations. Defense counsel should never assume that the behavior of a client arrested for misbehavior in a public restroom justified the arrest. In numerous cases, innocent men who happened to be using a restroom where other men were engaging in sexual activity have been arrested along with everyone else present. In some cases, men have been arrested for making comments such as “I’m really good at oral” or “Sex in the park is free.” Such statements do not constitute an offer or request for money. They do not even include an offer or request for sex.

Defense counsel should suspect that such individuals were illegally arrested for being openly gay. It is often true that, merely because they showed a willingness to engage in homosexual sex, the police arrested them, impounded their cars, and forced them through months of expensive and arduous legal proceedings. When a client has done an act that is arguably, or even uncontestedly, illegal, it is singularly unhelpful for purposes of legal representation for counsel to express surprise, disgust, revulsion, or shock. In these situations, legal professionals should use the same combination of clinical detachment and professional assistance that is expected in other professions. Condemnation will impede disclosure, and a defense attorney needs all the facts.

Counsel should not blindly accept the police or prosecutor’s point-of-view on anti-gay operations. Typically, the claimed issue will be “public sex.” In almost all cases, the defendant will be charged for having sex in a “public place” without regard to whether privacy was in fact attained. The police have been known to climb on tables to spy into privacy windows nine feet off the ground, or linger in bathrooms for hours, routinely peering between the cracks of bathroom stalls. They have pretended to be gay men aggressively seeking sex and then have claimed it was the defendant who demonstrated inappropriate public behavior.

It is not a criminal act in Michigan for two adults of the same sex to engage in noncommercial oral sex in private. The Supreme Court has implicitly refused to allow gross indecency charges based upon noncommercial adult oral sex in private.<sup>2</sup>

“Solicitation” is illegal only when the thing solicited is, itself, illegal. Since it is illegal to offer or accept payment for sex, solicitation of sex for money can be made a crime. An act is an “immoral” act, according to the Michigan Supreme Court, when it is prohibited by the criminal code. Accordingly, it is objectionable to many for the state to claim that sex between same-sex couples is immoral and that, therefore, soliciting such acts is illegal.

Gross indecency requires oral sex in public, payment, the involvement of a minor, or the use of force. Defense attorneys should object when gay men are victimized by being overcharged as felons for acts that qualify as disorderly conduct or lewd behavior in public (90-day misdemeanors). Felony charges have been used to intimidate some defendants to plead guilty to a misdemeanor. Prosecutors have threatened to “review the file” if the defendant fails to plead guilty on an appearance ticket for a misdemeanor. Counsel should vigorously oppose attempts to coerce defendants to plead guilty by threatening gross indecency charges. Likewise, a judge should not threaten a defendant with a more severe sentence if the defendant fights criminal charges. Such behavior undermines the right to trial by jury.



Victims of anti-gay violence, including police misconduct, should report the incidents to the Triangle Foundation (313-537-3323). Support in the form of referrals to physicians and support groups is available. Certainly, if counsel recognizes that a defendant is engaging in an obsessive-compulsive pattern of behavior, or was abusing alcohol or drugs, or evinces

other underlying pathology, an appropriate referral to a gay-friendly, health care professional is strongly advised.

GLBT people, of course, can be victimized by criminal law in ways other than by being named defendants. There are cases of inappropriate police responses to complaints of same-sex domestic violence. It appears far more unlikely that arrests will be made in such cases. Conversely, when arrests are made, both individuals will be arrested far more often than occurs among heterosexual couples.

Although the situation is improving through the efforts of the Triangle Foundation and the U.S. Attorney's Office, responses to reported hate crimes are often inadequate. Police are too often unreasonably reluctant to recognize bias-motivated violence, and state law too often fails to punish this form of domestic violence.

## SPECIAL NEEDS OF TRANSGENDER CLIENTS

The term "transgender" (TG) is an umbrella term intended to encompass a broad range of gender expressions, including cross-dressers, transvestites, transsexuals, and others. An increasing number of local civil rights ordinances, corporate policies, and other measures are explicitly including "gender identity" along with "sexual orientation" to clearly extend protection to TG persons.

TG people continue to experience more overt and unabashed bigotry within the legal system than almost any other group. Even gay people and organizations often misunderstand and reject TG interests. TG persons have reported being referred to as "it" by judges in open court and have complained about forced strip searches and inappropriate assignments in incarceration. TG individuals have complained that attorneys have refused to meet with them, have refused to accept them as clients, and have otherwise failed to provide professional services because of discomfort with TG clients.

The attorney-client relationship is one of trust, and no professional should attempt to provide services if trust, confidence, and competence are lacking in the relationship. At the same time, an individual's status as gay, lesbian, or as TG is a poor basis for declining representation. The practitioner must recognize that the TG condition is a medically recognized condition with well-documented symptoms and treatment options.

A practitioner may be consulted to obtain changes in legal documents or as a result of criminal charges. Pre-operative transsexuals sometimes face charges of fraud or impersonation, for example, when law enforcement officers stop an individual dressed as a woman who has a male driver's license. TG individuals sometimes face police intrusion because of disputes over their use of toilet facilities. In one instance, a state agent attempted to "verify" a TG person's eligibility to use a ladies room. Some communities have tried to enforce old laws forbidding men from wearing women's clothing, a clear violation of First Amendment freedom of expression doctrines.

## FOR MORE INFORMATION

The Sexual Orientation and Gender Identity Committee of the Open Justice Commission has developed training modules to address these issues. Speakers can be scheduled for any group and the training modules last from one hour to a full day. Please contact the authors for more information. ♦

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## FOOTNOTES

1. *Privacy Jurisprudence and the Apartheid of the Closet*, Florida State University Law Review (1997).
2. *People v Lino*, 447 Mich 567, 527 NW2d 434 (1994).