



THE STATE BAR OF CALIFORNIA
Center for Access and Fairness



Understanding Transgender Law and Transgender Clients

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*The State Bar
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Understanding Transgender Law and Transgender Clients

This brochure was created as an educational tool for attorneys and other legal professionals. Transgender issues are an emerging area of law and this brochure provides basic information about what “transgender” means, relevant areas of the law, and steps you can take to make your practice more transgender-friendly.



Definitions

>> What does “transgender” mean?

Transgender is an umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth or the stereotypes associated with that sex. The term may include transsexuals, cross-dressers, and people who do not conform to gender stereotypes. Many transgender people identify as female-to-male (FTM) or male-to-female (MTF). People who transition from female-to-male are commonly referred to as “transgender men.” People who transition from male-to-female are commonly referred to as “transgender women.” Transgender people may or may not access transition related health care (hormones, surgery, etc.) as part of their transition from one gender to another.

>> What are “gender identity” and “gender expression”?

Gender identity is a person’s own, internal sense of being a male or female and is a characteristic that we all have. For transgender people, their birth-assigned sex does not correspond to their gender identity. **Gender expression** is a term to describe the ways in which almost all of us manifest our gender identity. A person generally manifests gender identity through behavior, clothing, hair, voice and/or body characteristics that are usually considered male or female (although increasingly, people are also identifying as gender-variant because neither male nor female describes their expression).

>> Is there a difference between gender identity and sexual orientation?

Yes. Sexual orientation and gender identity are two different characteristics that we all possess. **Sexual orientation** describes a person's physical, romantic, emotional and/or spiritual attraction to others. **Gender identity** is defined above and relates to people's understanding of themselves. Transgender people may be heterosexual, lesbian, gay, bisexual or asexual. For example, a person who transitions from male to female and is attracted to other women would be identified as a lesbian.

>> What does "transition" mean?

Transition is the process of changing expression from one gender to another. There are many different ways to transition. It can be a complex process that takes place over a long period of time, usually several years or, for some people, it is a one- or two-step process that happens more quickly. Either way, it begins with self-awareness and acceptance. Transition can also include: telling one's family, friends, and/or co-workers; changing one's name and/or sex on legal documents; accessing hormone therapy; and possibly undergoing medically necessary surgical procedures. It is important to note that for some people who transition, surgery is not a part of their journey or they are unable to access it due to cost or complicating medical issues.

>> What does "gender variant" mean?

Gender-variant includes individuals who do not identify as either male or female. Some people will describe their identity as somewhere in between male and female (androgynous) and others will describe it as being something altogether different. The term also applies to people who identify as male or female, but whose gender expression is non-stereotypical. The

most common examples are masculine women and effeminate men. Gender variant can be included within the umbrella of “transgender,” but not everyone who meets this definition will identify as transgender.

Changing Documentation. Having identity documents that match gender identity, instead of birth-assigned gender, is a vitally important issue for most people who are transitioning. Currently, all forms of government identification can be changed, but the process for doing so varies from document to document.

>> **How does a transgender person change a name?**

While not everyone who fits within the definition of transgender undergoes a name change (even if they are transitioning from one gender to another), many do. The procedures to change a person’s name are the same for everyone, including a transgender person. There are two ways to change a person’s name in California. First, a person can obtain a **court-ordered name change** in accordance with the California Code of Civil Procedure (See Code of Civil Procedure §1275, et. seq.). This method requires the person requesting a name change to pay a court filing fee. It also requires the requesting person to publish the request for a name change in a newspaper of general circulation and possibly appear at a court hearing. On rare occasions, a judge will ask someone who is changing a name from one commonly associated with one gender (“Jennifer”) to a name commonly associated with another gender (“Mark”) whether the person has had surgery yet. California law does not support such a question and the answer to it should not bear on whether the petition is granted. Individuals under the age of 18 require parental or guardian support to apply, unless the person is an emancipated minor.

The second method of changing a name is the **common law name change**. Although this method quickly

is falling into disfavor due to concerns about identity fraud, it theoretically remains a recognized method of legal name change. A person simply changes his or her name without legal proceedings by adopting another name and using it as his or her own. Not all government agencies or non-government organizations will accept a common law name change. Those that do may require the person to have lived with the new name for a certain number of years before the agency or organization will recognize the change.

>> **Can a transgender person change a driver's license and social security card?**

The gender designation on a person's driver license or state identification card may be changed regardless of whether the identification card holder has accessed medical treatment as part of a transition. However, the person's physician must complete the relevant Department of Motor Vehicles form and attest to the fact that the person is expressing a gender identity "full time" (for instance, a doctor for a person who is transitioning from female-to-male must know that the person is living as a man full-time even if the patient has not accessed testosterone as part of his transition). In most cases, this same form may be used to change the name on the driver license or state identification card. An individual under the age of 18 will need parental support unless the person is an emancipated minor.

A person may also change a name and gender designation with the Social Security Administration (SSA), but will need supporting documentation. As of late 2005, the SSA requires a court-ordered name change. SSA also requires proof (generally in the form of a surgeon's declaration) that a person has "completed" sex reassignment surgery before the agency will update the person's gender designation in the SSA records. These changes must be made at the local Social Security office.

>> **Can a transgender person change a birth certificate?**

Yes, in some states; no, in others. In California, a transgender person may change name and gender designation on the California birth certificate with a court order (See Health & Safety Code §103425, et seq.).

The California statute allowing this change outlines the process a person must go through to petition the court for a change of gender order. The process includes submitting a surgeon's declaration recognizing that the person has undergone surgery that "changes sex characteristics." Many courts utilize equitable jurisdiction to allow people born outside of California to get court recognition of their change of gender as well. However, their state of birth may or may not recognize that order for the purpose of issuing a new birth certificate.

>> **Can a transgender person change a passport?**

Yes. The primary method for changing a name on a passport is by a court order. However, a second method (which is used in practice but is not a written policy or law) requires proof that the person has been using the name for the past five years. The Passport Agency has become much more strict about this practice in recent years, requiring that the passport holder meet a high burden of proof of use of the new name. The passport office will only issue a ten-year passport in the correct gender (for someone transitioning from male-to-female, that is female) if the passport holder has "completed sex reassignment surgery." There is no clear guidance for interpreting this phrase. Those transgender persons who are not deemed to have "completed sex reassignment surgery" can request a one-year passport with the correct gender marker which can be renewed in that gender if the passport holder produces a surgeon's declaration within the one year period.

>> **Can a transgender person change immigration documents?**

Yes. A transgender person can change a green card, visa, employment authorization and/or naturalization certificate. Generally, a person will need a court-ordered name change and a surgeon's declaration in order to get documentation that correctly reflects identity.

>> **Can a transgender person change non-government records, such as bank records?**

Yes. Each business usually has its own policy. Many institutions are interpreting federal law to require the institution to change the name on a person's account only if the account holder has a court-ordered name change.

Marriage and Custody Rights. Many transgender people have difficulty creating strong protections for their families because in California gender is still a criterion for getting married and because gender stereotypes may impact perceptions of whether an individual will be a good parent.

>> **Does a spouse's transition void or terminate a marriage that was entered into prior to the transition?**

It is unlikely that transition, by itself, will dissolve a marriage in California. This situation, which is sometimes called a pre-transition marriage, comes up when two people marry, and at some later point, one of the spouses transitions. For example, a couple that got married as a male/female couple is now living as a female/female couple. It is well settled in California that the only ways to end a marriage are divorce or death. Although there is no controlling statute or case law directly on point, it is strongly believed that a marriage begun prior to a person's transition continues to exist after the transition.

>> **Can a transgender person get married based on gender identity instead of the birth-assigned gender?**

This situation, sometimes referred to as a post-transition marriage, occurs when a person has transitioned and becomes engaged to a person who is now opposite sex (for instance, someone who has transitioned from female-to-male becomes engaged to a non-transgender woman). In some other states, Kansas for instance, courts have invalidated post-transition marriages. However, in California, at least one trial court has upheld such a marriage. The question that is unanswered is: at what point in transition can someone's gender identity be recognized as the legal sex for purposes of marriage? In the above example, the variable is: when is the person who is female-to-male legally considered to be a man? Given the lack of clarity on this issue, it is important for couples to preserve as many rights as possible in the event their marriage is ruled invalid if challenged. Some options include creating a memorandum of understanding between the spouses, designating financial powers of attorney, drafting health care directives and executing wills.

>> **Should a person's transgender status affect custody or visitation rights?**

No. Even though a transgender parent's gender identity may be used against that person in a custody or visitation hearing, nothing in California law allows a judge to factor that identity into a custody or visitation hearing absent proof of harm to the child. Educating judges on this point is a key part of representing transgender parents.

Employment and Public Accommodations



>> **Are transgender persons protected from employment discrimination?**

Yes. In California, the Fair Employment and Housing Act (FEHA) expressly protects transgender individuals from employment discrimination since the passage of the Gender Nondiscrimination Bill of 2003. Federal law is not as clear, but there is reason to believe that Title VII of the 1964 Civil Rights Act would protect transgender individuals.

Accordingly, under the provisions found in FEHA, a person's transgender status should not play a role in hiring, promotion, training or retention. Further, a transitioned employee has the right to be addressed by the name and pronouns that correspond with that person's gender identity. The employee also has the right to have his or her employment records reflect his or her gender identity. As California recognizes common law name changes, a person does not need a court-ordered name change to exercise this right. The employee also does not need court recognition of a gender change to effectuate a gender change in employment records. All employees have the right to safe and appropriate restroom facilities, including, arguably, the right to use a restroom that corresponds with the employee's gender identity regardless of the employee's sex assigned at birth. An employer also is expressly prohibited under FEHA from denying the employee the right to dress in a manner suitable for that employee's gender identity.



>> Are transgender persons protected from public accommodation discrimination?

Yes. In California, transgender individuals are expressly protected under the provisions of the Unruh Civil Rights Act (California Civil Code §51), which prohibits businesses from providing differential treatment, services or pricing to anyone based upon gender. Gender has been clarified to include gender identity.

Immigration, Health Care Law and Youth



>> **Can a transgender person immigrate to the United States?**

Yes. Transgender individuals may immigrate to the United States. As noted previously, people can change name and gender on U.S. immigration documents. Increasingly, asylum applicants who can demonstrate that they experienced gender identity-based persecution in their home country, or fear such persecution upon return to their home country, qualify for asylum. Over the last several years, the Citizenship and Immigration Service (formerly the INS) has attempted to deny recognition to post-transition marriages for the purpose of immigration. The Board of Immigration Appeals, however, has rejected each such attempt, and in 2005, issued a strong decision requiring CIS to recognize post-transition marriages as valid, if the state in which the couple lives recognizes them.

>> **Can a transgender person be denied health care coverage from a private health insurance company based upon transgender status? Can private health insurance explicitly exclude coverage for transition-related procedures?**

No. In California, the Insurance Gender Non-Discrimination Act of 2005 makes it unlawful for insurance companies to deny health care coverage based upon anti-transgender bias. So, a company in the individual or family market cannot deny a transgender



person simply because that person is transgender. It is less clear whether coverage can be denied to someone needing hormones or surgery as part of the transition. Also, if a person has coverage (through an employer, for instance), a person cannot be denied a particular procedure simply because that person is transgender. For instance, a transgender man who has not had genital surgery cannot be denied coverage for a routine visit to his gynecologist. However, the legality of excluding transition-related procedures (a common practice in the health insurance industry) has yet to be decided.

>> **Does the law protect transgender youth?**

Yes. California Education Code §200 protects youth in schools against discrimination and harassment based upon gender identity. School districts in California have not yet fully implemented the provisions of Education Code §200 (two exceptions being Los Angeles and San Francisco Unified School Districts). Districts can implement the provisions through passing local regulations explaining a school's duty to be non-discriminatory.

Creating a Transgender Welcoming Practice



- [1] **It isn't always about a person's transgender status.** Sometimes the legal challenge facing a transgender person is unrelated to gender identity. It is important not to focus so narrowly on the fact that a person is transgender that you end up making that characteristic more important than the actual reason the person is seeking your services. It is also important that you help your client focus on the real issue and steer away from focusing on gender identity, if that is not the core legal issue.
- [2] **Be aware of assumptions you are making about a person's gender.** It is very common to assume that you know a person's gender or gender identity based on sex stereotypes. It is important to be open to someone's self-identity. If you are unsure, it is appropriate to ask how the person would like to be addressed.
- [3] **Reach out to attorneys who have experience working with transgender issues.** Because so many legal issues concerning transgender people are issues of first impression or are still being developed, it's important that you connect with knowledgeable attorneys, as you begin to frame your legal arguments.
- [4] **Use the correct name and pronoun in all correspondence, court papers, and settlement agreements.** Except in extremely rare circumstances, it is very important that you

use the name and pronoun that corresponds to a person's gender identity (for example, if your client transitioned from female to male, use male pronouns). It may be necessary to footnote the person's prior name or to clarify in an initial letter that the recipient of the letter may know your client by a prior name or gender, but that you will be referring to the client by the current name and gender. It is also important that you respectfully urge opposing counsel, court staff and judicial officers to do the same.

- [5] Make sure your office has transgender-friendly policies.** Your intake forms should account for a person having an AKA and should encourage or allow people to identify their sex based on their current gender identity. Your restrooms should be accessible to people based on their gender identity (as opposed to their birth sex or genital anatomy). Where possible, it is always a good idea to have a gender-neutral option available. Finally, your co-workers should be trained in basic transgender cultural competency.

RESOURCES

Transgender Law Center (TLC)
870 Market Street, Suite 300
San Francisco, CA 94102
www.transgenderlawcenter.org
(415) 865-0176

Lambda Legal
Western Regional Office
3325 Wilshire Boulevard, Suite 1300
Los Angeles, CA 90010
www.lambdalegal.org
(213) 382-7600

National Gay and Lesbian Task Force
8704 Santa Monica Boulevard, #200
West Hollywood, CA 90069
(310) 855-7380
<http://www.thetaskforce.org/issues/transgender>

National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
www.nclrights.org
(415) 392-6257

In addition, several California cities have LGBT bar associations that may be of help to you.

In Los Angeles, contact:
Lesbian & Gay Lawyers Association
www.lgla.net

In Sacramento, contact:
Sacramento Lawyers for the Equality
of Gays and Lesbians (SacLEGAL):
<http://www.saclegal.org/>

In San Diego, contact:
The Tom Homann Law Association
www.thla.org

In San Francisco, contact:
Bay Area Lawyers for Individual Freedom (BALIF)
www.balif.org

The State Bar of California
Center for Access & Fairness
www.calbar.org/AFCouncil

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The purpose of this booklet is to provide general information on the law, which is subject to change, and is not intended to provide legal advice. If you have a special legal problem, you may want to contact a lawyer.

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