The World Has Changed – Are You Prepared To Successfully Resolve Modern Family Ethics Issues?

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We learned about honesty and integrity - that the truth matters... that you don't take shortcuts or play by your own set of rules... and success doesn't count unless you earn it fair and square.

-Michelle Obama

I. Surviving the Changing World

We live in a world where 50 people were charged in federal court with paying anywhere from $200,000 to $6.5 million to get their children into colleges and universities such as Yale, Stanford, Georgetown, Boston University, Northeastern, UCLA, USC, University of Texas at Austin and Wake Forest.[1] And one of the parents who paid to doctor his daughter's ACT scores was a high-profile attorney.[2] This scandal rocked the very foundations of our higher education system, and may have long-lasting implications on our culture surrounding standardized testing and the higher education admission process, particularly with respect to athletes.

This scandal is only representative of the fact that many of the things we have "known" to be constant and steady actually possess neither of those characteristics. As advisors dealing with individuals on their personal affairs, business matters and family matters, we need to be prepared and thoughtful about these shifting sands.

The very first rule of the ABA Model Rules of Professional Conduct provides that "A lawyer shall provide *competent representation* to a client."[3] To meet this rule, a lawyer must maintain the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[4] What exactly does it mean to maintain the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation? The comments to MRPC 1.1 indicate that "the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."[5]

Things like gender that once seemed fixed are now fluid due to advances in medical technology and the law. The nuclear family has been redefined over the past decade, both in our culture and our laws. Marijuana, once illegal, is now permitted in in some form in more than 30 states, including 11 states that allow recreational use. Documents images are easily modified after they are "finalized." Money is being manufactured by computers through cryptocurrency. Documents are e-signed. Alexa and our iPhones listen to our every word and then tell our computers what ads to have pop up in our browser, on Facebook and elsewhere.

Estate planners are in the unique position of working with clients on planning at a very personal level, and we need to be thoughtful about the issues that may shake our clients as the tectonic plates of our society continue to shift. We can become a more complete resource for our clients by learning about and being prepared to advise our clients on issues they face.

II. Cultural Awareness

Jackie Robinson once said "I'm not concerned with your liking or disliking me... All I ask is that you respect me as a human being." Advisors on the front lines with individuals and families often have exposure to the very private and personal lives of their clients. We may come across people who have different religious, political or ideological views that are in direct opposition to our own beliefs.

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[1] *See* Friedman, Zack, *30 Fast Facts About the College Admissions Scandal*, Forbes, available at https://www.forbes.com/sites/zackfriedman/2019/03/18/30-facts-college-admissions-scandal/#78e1de9d12a0 (last visited October 13, 2019).

[2] *See* Eustachewich, Lia, *Lawyer Gordon Caplan Gets Month in Jail for College Admissions Scandal*, New York Post, available at https://nypost.com/2019/10/03/lawyer-gordon-caplan-gets-month-in-jail-for-college-admissions-scandal/ (last visited October 13, 2019).

[3] Rule 1.1 of the ABA Model Rules of Professional Conduct.

[4] *Id.*

[5] Comment to Rule 1.1 of the ABA Model Rules of Professional Conduct.

It is not only good risk management, but it is also good business, to consider a client's "culture" when communicating with clients. Culture is embodied in "the way of life of a particular people, especially as shown in their ordinary behavior and habits, their attitudes toward each other, and their moral and religious beliefs."[6] Culture is not always visible or apparent to the general public, and it takes observation, curiosity and rapport to ascertain a client's culture. For example, you *typically* could not walk down the street and be able to accurately determine someone's religious beliefs, national origin, sexual orientation, profession, ethnicity, or socioeconomic upbringing, to name a few; yet, all of these and more are a part of a person's culture. Providing services tailored, as much as possible, to a client's culture is part and parcel with competence. Consider that, perhaps, to be the best advisors possible to our clients, *cultural competence* is a concept we, as estate planners, should embrace more intentionally.

Many estate planners focus on tax and death planning, setting aside the softer family issues. Much like internists and family doctors, we treat individuals and families from birth through death and everything in between. Given our unique position, we can do more than just solve problems – we can try to foresee issues and prevent them from blossoming into larger problems. All people have a culture.

Sometimes clients have similar cultures to those of the estate planning attorney. Sometimes the attorney and the client have very different cultures. Even if the attorney and the client do not have overlapping cultures, the attorney can still provide competent representation to the client, particularly if the attorney has taken the time to become educated about other cultures. To be sure, keeping abreast of cultural shifts in society can aid the attorney in determining what legal problems may be involved in different situations that are outside the scope of the attorney's own culture.

Working with families, we can be more effective when we view our job as treating the whole person. *Cultural competence* means that practitioners have the skillset to effectively communicate beyond their own culture.[7] To illustrate cultural competence, consider the following example:

> *Lawyer Betty is referred a new client, Kathy, who needs some estate planning work. While Kathy has a large estate, she is not particularly concerned with taxes and her primary goal is ensuring that her daughter, Vicki, and Vicki's family are adequately provided for upon Kathy's passing. In conversation with Kathy, Betty learns that Vicki and her partner, Matt, are expecting a child. Betty assures Kathy that the estate plan will provide for Vicki and, ultimately, for the unborn child of Vicki and Matt. Betty prepares her usual estate documents, providing that in the event of Kathy's passing, the assets held in trust will be distributed to Kathy's descendants,* per stirpes*. In the event Kathy has no descendants, the trust provides that the assets would be distributed to Kathy's heirs-at-law. Kathy signs all of the estate documents and is happy knowing that she has arranged her affairs.*
>
> *A few years later, Betty receives a call that Kathy has passed. The caller, who is the successor trustee of Kathy's trust, informs Betty that tragically, Vicki predeceased Kathy. Betty assures the trustee that Vicki and Matt's child, Audrey, is a beneficiary of the trust.*

Based upon these facts, is there any additional information you might want to know? Did you make any assumptions about facts regarding the family structure based on your culture?

We are in a period of evolution of the definition of "family". The era of single-income families (where the husband is the sole earner) is over. Planners need to be thoughtful about understanding their own implicit biases to create an environment of open communication with our clients about their families. Many clients will have experienced negative reactions from those close to them about nontraditional relationships. Being thoughtful about the psychological impact of what our clients and their families experience in the world can make attorneys better able to elicit information and encourage open communication. In turn, this can make attorneys more effective estate planners.

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[6] Cambridge Dictionary, *Culture*, available at https://dictionary.cambridge.org/us/dictionary/english/culture (last visited September 4, 2019).

[7] Chopp, Debra, *Addressing Cultural Bias in the Legal Profession,* NYU Rev. of L. and Soc. Change 41, no 3 (2017): 367-406, at 374.

For generations, men have been the dominant power group.[8] Women were relegated to household tasks.[9] According to Pew Research, the family dynamics have vastly changed over the past 50+ years. In 1960, in households of married couples with children under 18, only the father was employed in about 70% of households, only the mother was employed in about 2% of households, and dual income households only made up about 25% of the households.[10] By 1980, the percentage of dual income and father only households were about equal.[11] By 2012, dual income households overwhelmingly became the norm.[12] 60% of households in 2012 were dual income, 31% had the father as the sole income earner.[13] Only 6% of households in 2012 had a mother as the sole income earner.[14] In opposite sex households, 39.3% of women are now the primary breadwinners, while 62.8% of women are co-breadwinners (meaning, they contribute at least a quarter of the family's earnings).[15] In sum, the transition of from single earner to dual-income families over the past half century has been significant.

Due to our upbringings, many people, regardless of gender, may have an implicit bias that causes them to assume men are the primary breadwinners in the household. As demonstrated by the statistics above, however, the times are changing. Estate planners should consider these changing family dynamics when meeting with clients, and adjust the questions we ask to avoid conveying these assumptions or missing the opportunity to ask important questions because we think we know the answers.

III. Family Planning

Families come in all shapes, colors, and sizes. Some families may have two parents, some have only one. Some families may have two opposite-sex parents, and some may have two parents of the same sex. Planning for families that are growing by nontraditional means can be more challenging because it is harder to create the right flexibility and to contemplate medical and legal advancements that may impact the effect of the documents we write.

A. Adoption

Adoption is "a legal proceeding that creates a parent-child relation between persons not related by blood; the adopted child is entitled to all privileges belonging to a natural child of the adoptive parents (including the right to inherit)."[16] There are several ways to adopt a child: domestic adoption of an infant, domestic adoption from foster care, international adoption, second parent adoption, and stepparent adoption.

Domestic adoption is the placement of U.S. born infants for adoption by their birth parents, who legally consent to the adoption, with an adoptive family residing in the U.S. Prospective adoptive parents typically work with an adoption agency throughout the process, from in-take and completion of the home study through placement. International adoption is the adoption of a child from a country other than the United States through an agency or independently.[17] Foster care is another route some families take to expanding their family. Approximately 400,000 children in the United States are in foster care, and, of those, about 100,000 are legally free for adoption.[18]

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[8] Gowland, Lelia, *The Unconscious Bias Women have Against Women,* Forbes, available at https://www.forbes.com/sites/leliagowland/2018/06/25/the-unconscious-bias-women-have-against-women/#65f171f2ca64 (last visited October 18, 2019).
[9] *Id.*
[10] Pew Research Foundations, *The Rise in Dual Income Households*, June 18, 2015, available at https://www.pewresearch.org/ft_dual-income-households-1960-2012-2/ (last visited September 28, 2019).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Boushey, Heather, *The New Breadwinners,* Center for American Progress, October 2010, available at https://cdn.americanprogress.org/wp-content/uploads/issues/2009/10/pdf/awn/chapters/economy.pdf (last visited September 28, 2019).
[16] https://www.vocabulary.com/dictionary/adoption
[17] *Adoption Options Overview,* Human Rights Campaign, available at https://www.hrc.org/resources/adoption-options-overview (last visited February 18, 2019).
[18] *Frequently asked questions about adopting from foster care,* Adopt US Kids, available at https://www.adoptuskids.org/adoption-and-foster-care/overview/faq (last visited February 18, 2019).

Affording adoption is a significant issue impacting many families. The fees and costs for adoption depend on the agency, but may range from $20,000 to $45,000.[19] To help offset this cost, there is a federal adoption credit. For 2018, the federal adoption credit is equal to $13,810 per child; however, this is subject to a modified adjusted gross income phaseout that begins at $207,140 and ends at $247,140.[20] Some states also offer an adoption credit. The new Illinois adoption tax credit, for example, is equal to $5,000 for a child adopted in Illinois and up to $2,000 for a child adopted outside of Illinois.[21] Additionally, many employers offer adoption assistance programs which provide reimbursement for some adoption-related costs and fees. Understanding resources that may provide financial relief in the adoption process so that we can steer clients to seek the help available to them can make us more complete advisors for our clients.

Current adoption statistics place the total number of adoptions taking place each year at about 110,373, of which 41,023 are related adoptions and 69,350 are adoptions by unrelated persons.[22] Although there has been a decrease in the total number of adoptions over the past decade, the decline can be attributed to the significant drop in international adoptions by Americans and a significant decline in the number of related adoptions.[23] The number of domestic infant adoptions has remained stable, if even slightly increased (averaging 18,329 per year), and the number of infant adoptions represents .5% of all live births.[24] To put this into perspective, as an estate planner, you are likely to encounter *at least* one family who has, is, or will adopt children in your career.

How do you discuss adoption with your clients? Would you be surprised to learn that there is some terminology that can be hurtful? When talking with families who have been touched by adoption, keep the following language in mind:

- *Birth parent/family* rather than *real parent/family*.
- *Parent* rather than *adoptive parent*. Even though the parent may have adopted the child, the parent is the child's parent - no qualifiers are necessary here.
- *Son/daughter/child* rather than *adopted son/daughter/child*. Again, no qualifiers are needed. Using the term *adopted* places an unnecessary qualification on the relationship.
- *Place* rather than *give up/give away.* Placing a child for adoption is a positive act of love.

Sometimes children who have been adopted look like their parents; sometimes they do not. Although different outward appearance is an indicator that there are facts that might impact estate planning with respect to how the family was formed, consider sensitive ways to ask the necessary question. Never ask: "Where did you get him/her?" or "where did he/she come from?" – especially in front of the child. Consider the following scenario: you meet a Caucasian woman with a brown child. You immediately think: Adoption. This may not necessarily be the scenario, however. Yes, this could be an adoption. The family could be interracial. The child could be a foster placement. The woman could be the child's caregiver. A tactful way of addressing this is "Are you an adoptive family?" (placing the modifier on the family in a positive way, rather than on the child).

B. Adoption Hurdles for LGBTQ Clients

As of March 31, 2016, when Mississippi's ban on same-sex couples adopting was struck down, same-sex couples can jointly adopt in all 50 states.[25] Although adoption by same-sex couples is legal in all fifty states, some states permit *state-licensed* child welfare agencies to refuse to place children with LGBTQ people and/or same-sex couples if doing so conflicts with their religious beliefs.[26] Thus, while many adoption agencies are working to implement policies and practices necessary to welcome

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[19] Children's Bureau, *Planning for Adoption,* November 2016, available at https://www.childwelfare.gov/pubpdfs/s_costs.pdf (last visited September 28, 2019).
[20] Internal Revenue Service, *Topic Number 607- Adoption Credit and Adoption Assistance Programs,* available at https://www.irs.gov/taxtopics/tc607 (last visited February 18, 2019).
[21] Kate Thayer, *New Illinois Adoption Tax Credit Eases Financial Burden on Families*, Chicago Tribune, July 18, 2018.
[22] Jones, Jo, Ph.D and Paul Placek, Ph.D., *Adoption: By the Numbers,* National Council for Adoption, 2017, available at https://www.adoptioncouncil.org/publications/2017/02/adoption-by-the-numbers (last visited September 28, 2019).
[23] *Id.*
[24] *Id.*
[25] *Campaign for Southern Equality v. Mississippi Dept. of Human Services*, 175 F. Supp. 3d 691 (S.D. Miss. 2016).
[26] *Foster and Adoption Laws,* Movement Advancement Project, available at http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws (last visited October 26, 2019).

the LGBTQ community, depending on where the prospective adoptive parent(s) live, finding an LGBTQ-friendly adoption agency may be a challenge.[27] In Illinois, Equality Illinois has published a listing of all of the adoption agencies in Illinois and whether the agency will work with LGBTQ clients.[28]

Not all countries that allow adoptions by Americans allow same-sex couples to adopt.[29] Countries where it *may* be possible for same-sex American couples to adopt include Colombia, Brazil, Mexico (some states), and the Philippines.[30] The Human Rights Campaign maintains a list of agencies providing services to American same-sex couples seeking to adopt from abroad.

Although it is also legal in all fifty states for LGBTQ persons to adopt from foster care, some states allow the agencies to refuse to place with same-sex couples if doing so would conflict with the agency's religious beliefs.[31] States that permit state-licensed child welfare agencies to refuse to place children with LGBTQ people and same-sex couples are Alabama, Kansas, Michigan, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and Virginia.[32] Guides like those produced by Equality Illinois are helpful for finding agencies that will work with LGBTQ clients, and it enables us to be more thorough advisors to our clients if we are aware of such local resources.

A current case being litigated by Lambda Legal is *Marouf v. Azar.* Fatma Marouf, a Professor of Law and Director of the Immigrant Rights Clinic at Texas A & M University School of Law had become acquainted with the resettlement of refugee children from Syria in the United States through her work with the Immigrant Rights Clinic.[33] Fatma and her wife, Bryn, had decided that they wanted to adopt a refugee child.[34] After the initial interview with the agency, which is affiliated with the United States Conference of Catholic Bishops and funded by the Department of Health and Human Services, they were denied the opportunity even to apply to serve as foster parents because they did not "mirror the Holy Family."[35] In February 2018, Lambda Legal filed suit on behalf of the couple and there has been no decision yet on the merits of the case.

In March, the Michigan Attorney General said it would not enforce a 2015 law that allowed child-placement agencies to not provide any services that conflicted with their sincerely held religious beliefs if the agencies were under contract with the state.[36] St. Vincent Catholic Charities challenged the Michigan Attorney General's position and filed a preliminary injunction, arguing that the Michigan Attorney General's policy violates their first Amendment rights and the federal religious Freedom Restoration Act. The district court granted St. Vincent's preliminary injunction request, stating in its opinion that the policy "strongly suggests the State's real goal is not to promote non-discriminatory child placements, but to stamp out St. Vincent's religious belief and replace it with the State's own. … It would disrupt a carefully balanced and established practice that ensures non-discrimination in child placements while still accommodating traditional Catholic religious beliefs on marriage."[37]

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[27] *How Can I Find an LGBTQ-Friendly Adoption of Foster Care Agency?,* Human Rights Campaign, available at https://www.hrc.org/resources/how-can-i-find-an-lgbt-friendly-adoption-agency (last visited October 26, 2019).
[28] *Growing Your Family: A Guide for Prospective LGBT Adoptive Parents,* Equality Illinois, available at http://www.equalityillinois.us/wp-content/uploads/2016/01/EI-Adoption-Guide_FINAL-1.20.pdf (last visited October 26, 2019).
[29] *Countries That Allow for International Adoptions by LGBT Prospective Parents,* The New Family, August 18, 2016, available at: https://thenextfamily.com/2016/08/countries-that-allow-for-international-adoptions-by-lgbt-prospective-parents/ (last visited October 26, 2019).
[30] *Id.*
[31] *Foster and Adoption Laws,* Movement Advancement Project, available at http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws (last visited October 26, 2019).
[32] *Foster and Adoption Laws,* Movement Advancement Project, available at http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws (last visited October 26, 2019).
[33] *Marouf v. Azar*, Lambda Legal, Complaint and Filings available at: https://www.lambdalegal.org/in-court/cases/marouf-v-azar (filings last accessed October 9, 2019).
[34] *Id.*
[35] *Id.*
[36] David Eggert, *Judge Allows Religious-Based Michigan Adoption Agencies to Turn Away LGBTQ Couples*, Time, September 27, 2019, available at: https://time.com/5687870/michigan-adoption-agencies-lgbt-parents/ (last accessed October 9, 2019).
[37] *Id.*

C. Surrogacy

Surrogacy refers to a woman carrying through gestation and giving birth to a baby for a couple who cannot conceive on their own. Surrogacy laws vary state by state, with some states banning surrogacy entirely.[38] To complicate matters, there are two types of surrogacy: traditional and gestational. The surrogacy industry grew by 1000 percent internationally between 2006 and 2010 and the industry is now worth up to $6 billion annually.[39]

Partial surrogacy is where the surrogate's eggs are used, and, therefore, the surrogate is genetically related to the child.[40] The term "traditional surrogacy" is also used, as this arrangement was how surrogacy developed.[41] Full or gestational surrogacy is where "all of the genetic material involved originates either from the intended parents or donors." [42] New York, New Jersey, Indiana, and Michigan are the only states that expressly prohibit surrogacy.[43] In some states, there are no statutes and the laws regarding surrogacy are based on case law.[44] Finally, full and/or partial surrogacy is regulated by statute in 14 states.[45]

With so many parties involved, it seems almost unnecessary to state that agreements among the parties involved should be in writing. In particular, finding a donor for genetic material carries legal, health and other risks that need to be evaluated and for which certain representations may be desired in writing.[46]

In *C.G. v. J.H*,[47] a lesbian couple had been living together in Florida. One of the moms gave birth to a child conceived via intrauterine insemination using an anonymous sperm donor in 2006. The couple continued to live with each other and the child until February 2012. After the dissolution of the couple's relationship, the biological mother would only allow the non-biological mom contact with the minor child once a week, despite requests for more time. The biological mom and child moved to Pennsylvania without notifying the non-biological mom. After the move, the non-biological mom had minimal and inconsistent contact with the child.

In 2015, the non-biological mom filed a custody complaint seeking shared legal and partial physical custody of the child, arguing that she "acted [and continues to act] as a mother to the minor child [and that] the minor child was conceived by the mutual consent of the parties, with the intent that both parties would co-parent and act as mothers to the minor child."[48] The biological mom objected to the complaint, arguing that the non-biological mother lacked standing to bring an action because she was not a parent and did not stand *in loco parentis* to the minor child. The biological mom further alleged that the non-biological mom made clear that she did not want the minor child and made minimal contributions to raising the minor child. The trial court found that the non-biological mother did not jointly participate in the minor child's conception nor did she hold the child out as her own.[49] It further found "the 'term' parent is limited to the biological or adopted parents of the child" and

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[38] Finkslstein, Alex, Sarah Mac Dougall, Angela Kintominas, and Anya Olsen, *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking*, Report of the Columbia Law school Sexuality & Gender Law Clinic, May 2016, p. 3.
[39] *Id.* at p. 6.
[40] *Id.* at p. 5.
[41] *Id.* at p. 5.
[42] *Id.* at p. 5.
[43] *Id.* at pp. 55-63.
[44] States where surrogacy is governed by case law include: Arkansas, Arizona, Connecticut, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming. *Id.*
[45] Alabama, California, Colorado, Delaware, Florida, Illinois, Maine, Nevada, New Hampshire, North Dakota, Texas, Utah, Virginia, and Washington all have laws allowing, but regulating, surrogacy. *Id.*
[46] *How Do I Safely Find a Sperm or Egg Donor?,* surrogate.com, available at https://surrogate.com/intended-parents/the-surrogacy-process/how-do-i-safely-find-a-sperm-or-an-egg-donor/ (last visited February 18, 2019).
[47] *C.G. v. J.H.,* 193 A. 3d 891 (Penn. 2018)
[48] *Id.*
[49] *Id.* at 907.

rejected the non-biological mother's intent argument.[50] The Pennsylvania Supreme Court agreed with the trial court and refused to reverse the decision of the trial court.[51]

Contrast the decision in *C.G. v. J.H.* with *Partanen v. Gallagher*.[52] In that matter, a lesbian couple had been in a committed, non-marital relationship between 2001 and 2013. The parties did not dispute that the non-biological mother gave "full acknowledgement, participation, and consent" to the biological mother giving birth to two children using in vitro fertilization. The non-biological mother did not formally adopt the children. After the parties separated, the non-biological mother sought a declaration of parentage. The biological mother contested, arguing that the non-biological mother lacked a biological connection to the children.[53] The Massachusetts Supreme Court reversed the finding of the trial court and found that a showing of a biological connection was unnecessary, and that the non-biological mother showed that the pregnancies were "undertaken with the full acknowledgement, participation, and consent of" the non-biological mother.[54] The Court also found that both mothers "received the child into their home and openly held out the child as their child."[55]

In light of these cases, committed, non-married couples using artificial reproductive technology to build a family should be sure to formalize their parentage through a stepparent/partner adoption or a parentage agreement. Parties relying on courts to find – or not find – a legal parent-child relationship do so at great risk.

D. Drafting Considerations

When children or grandchildren become a part of a family through adoption or surrogacy, standard boilerplate may not adequately address how those descendants are to be treated. Particularly where one or both parents are not the biological parents of the child, or where a formal legal proceeding has not taken place, a classic definition of descendants (or a lack of definition in the documents that leaves the determination to statutory and common law) may exclude adopted children that the settlor would want to include. Even though the state probate acts may provide that an adopted child is a descendant of an adopting parent for purposes of inheritance[56], it is good practice to be sure that documentation clearly addresses how legally adopted descendants are treated for purposes of the instrument.

Where a couple does not actually go through a re-adoption process for the non-biological parent, most boilerplate will not include that child in the non-biological parent's document as a descendant. Consider modifying old boilerplate to provide the trustee discretion to determine that a non-biological, non-adoptive child is treated as a person's "child" for purposes of the document where there was an acknowledgment of parent-child relationship and/or where the non-biological, non-adopting parent held the child out as his or hers to the public.

IV. Polyamory[57]

The rights of people who choose to live together in romantic relationships frequently are dependent upon marital status with respect to legal and tax benefits. Spousal status has important consequences for tax planning, employee and governmental benefits and general definitional assumptions under common law. The right of a child to inherit and, in some circumstances, the ability to obtain insurance, social welfare, or legal benefits, also may be contingent upon the marital status of their parents.

As societal norms have changed, couples are choosing to live together and have a family without feeling that legal marriage is a necessity. In fact, individuals who have married sometimes agree to remain married while each party pursues his or her own

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[50] *Id.* at 898.
[51] *Id.* at 911.
[52] *Partanen v. Gallagher,* 475 Mass. 632, 59 N.E.2d 1133 (Mass. 2016).
[53] *Id.* at 641, 1141.
[54] *Id.* at 643-44, 1142-43.
[55] *Id.*
[56] 755 ILCS 5/2-4.
[57] This section has been adapted from the chapter by Lauren J. Wolven and Carrie A. Harrington, *Planning for Polyamorous Relationships*, chapter 4, *The Tools & Techniques of Estate Planning for Modern Families, Third Edition* (Wendy S. Goffe, Kim Kamin & Stephan R. Leimberg eds.), National Underwriter Company (2019) available at https://www.nationalunderwriter.com/ebooks/the-tools-techniques-of-estate-planning-for-modern-families-3rd-edition-bundle.html.

romantic interests outside the marriage. Merriam-Webster defines "polyamory" as "the state or practice of having more than one open romantic relationship at a time."[58] Situations that involve multiple amorous parties require thoughtful planning and implicate ethical issues for advisors that necessitate careful consideration.

A. Plural Marriage

Polygamous marriage probably is the form of relationship most people call to mind when they hear the term "polyamory". It has been addressed in-depth by the courts and normalized somewhat by cable television shows like "Big Love" and "Sister Wives". *Reynolds v. United States*[59] addressed the constitutionality of the Morill Anti-Bigamy Act, which was signed into law by President Abraham Lincoln in 1862. The law was upheld against the constitutional challenge, with the court finding that laws cannot regulate religious beliefs, but they may regulate religious practices or actions.

Polygamous marriage remains illegal in the United States today, and criminal prosecution is a real threat for individuals living in such arrangements. The typical structure of a polygamous marriage involves one legal spouse and one or more "spiritual" spouses who commit to each other for life. People who engage in these relationships actually prefer the term "plural marriage."[60] Plural marriage communities, for obvious reasons relating to societal attitudes and repercussions from possible criminal charges, tend to keep to themselves. They send out members of their circle to become lawyers, accountants and other needed professionals so that the affairs of the community can be handled from within. Because plural marriage communities provide for themselves in order to protect their members, it would be rare for most estate planners to be asked to engage in planning for a traditional plural marriage family.

Bigamy is another commonly encountered form of plural marriage that occurs outside of plural marriage communities. While state statutes differ, bigamy typically is defined as intending to enter into or actually entering into marriage while already married or with knowledge that the other person is married.[61] Some states have adopted more expansive laws to capture bigamous intent. For example, Colorado law provides that any "married person who, while still married, marries, enters into a civil union, or cohabits in this state with another person commits bigamy."[62] Similarly Georgia law states that a "person commits the offense of bigamy when he, being married and knowing that his lawful spouse is living, marries another person or carries on a bigamous cohabitation with another person."[63] Arguably, anyone who stays legally married but lives with another person in a marriage-like relationship is committing bigamy under the laws of Colorado and Georgia, presumably even if it is a consensual "open marriage" situation.

Some scholars argue that the recent same-sex marriage cases have opened the door to polygamy - specifically that the Supreme Court's ruling in *Obergefell v. Hodges* establishes marriage as a "broadly applicable right," the implications of which extend as far as legalizing polygamy as a natural extension of the decision.[64] Their arguments note that the marriage equality movement has eroded traditional marriage arguments by effectively rejecting the idea that procreation and child-rearing are the

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[58] Merriam-Webster online dictionary, available at https://www.merriam-webster.com/dictionary/polyamory.

[59] 98 U.S. 145 (1878).

[60] *See* Jonathan Turley, "A Moral Victory: The Sister Wives Case and the Rejection of State Morality Codes." Web blog post. *Jonathan Turley, Res ipsa loquitur—The thing itself speaks*, 22 Dec. 2013. https://jonathanturley.org/2013/12/22/a-victory-for-morality-the-sister-wives-case-and-the-rejection-of-state-morality-codes/ (Blog post written by Jonathan Turley, the lead attorney for appellees in *Brown v. Buhman*, 822 F.3d 1151 (10th Cir. 2016); Turley argued for the right of 'plural families' to be free from prosecution).

[61] Utah Code Ann. § 76-7-101 (West); LSA-R.S. 14:76; La. Stat. Ann. § 14:76;
N.C. Gen. Stat. Ann. § 14-183; 720 Ill. Comp. Stat. Ann. 5/11-45; N.J. Stat. Ann. § 2C:24-1 (West).

[62] Colo. Rev. Stat. Ann. § 18-6-201 (West).

[63] Ga. Code Ann. § 16-6-20 (West).

[64] *See* Fredrik Deboer, *It's Time to Legalize Polygamy: Why Group Marriage Is the Next Horizon of Social Liberalism*. POLITICO (June 26, 2015), available at https://www.politico.com/magazine/story/2015/06/gay-marriage-decision-polygamy-119469 (last visited Jul. 23, 2018).

only justifications for marriage.[65] Chief Justice John G. Roberts's dissenting opinion in *Obergefell* raised the question of whether the rationale in the case could ultimately be used to legalize plural marriage down the road.[66]

B. Polygamy in the Modern Era

The term "polygamy" actually refers to a broad array of plural relationships, including polygyny (more than one wife), polyandry (more than one husband), and polyamory (more than one consensual romantic partner). Despite legal risks, polyamorous relationships continue in the United States and, frankly, do not always stand out as unusual in modern society. For example, Joe and Jane are married and have two children. After the children have "launched", Joe and Jane decide they need something more than what their relationship brings to their lives. They are still friends and enjoy their mutual family, social status and group of friends, so they do not want a divorce. Finding a more modern solution, Joe and Jane agree that they will remain married but will discreetly see other people. If Jane establishes a long-term romantic relationship with another person, she is in a polyamorous relationship.

A query on the internet for "polyamory" will result in multiple hits in popular news sources for articles such as *7 Polyamory Myths It's Time to Stop Believing*[67] and *6 Questions To Decide if a Polyamorous Relationship Is Right For You*.[68] Polyamorous relationships are an increasingly common phenomenon among ultra-high net worth individuals. For example, Warren Buffet engaged in an unconventional marital arrangement, remaining married to his first wife Susan until her death despite residing with his full-time partner, Astrid Menks.[69] And then there are the secret second family scenarios, such as that of Charles Kuralt, who secretly maintained a second family for more than 20 years.[70]

While there are many cases about polygamous situations dating back to the late 1800s in the United States, plural marriage cases are not a thing of the past. In 2008, the Missouri Court of Appeals dealt with the estate of George Davis and his two "wives".[71] George married Agnes in 1903 and had eight children. George, while remaining married to Agnes, began a relationship with Evelyn around 1943. George and Evelyn had a son, Thomas, born in February 1944. George and Evelyn held themselves out as husband and wife, and resided together with Thomas as a family in a home owned by George and Evelyn as tenants in common. In fact, they took title to their home in 1955 as "George S. Davis and Evelyn Davis, his wife." Thomas died intestate in 2003, resulting in a dispute between the George/Agnes descendants and Evelyn's family about which group would inherit. Because Evelyn was the known biological mother and was listed as such on Thomas' birth certificate, her family had clear legal heirship status. George, however, was not listed on the birth certificate as Thomas' father, which the court found imposed a higher burden of proof on Thomas' descendants through his father's bloodline. Ultimately, the court upheld the lower court's finding that the George/Agnes descendants established their relationship in accordance with the legal requirements.

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[65] *Id*. *See also*, Daniel Fisher, *Does A Victory For Gay Marriage Lead To Polygamy? Depends On The Reasoning.* Forbes (April 24, 2015), available at https://www.forbes.com/sites/danielfisher/2015/04/24/does-a-victory-for-gay-marriage-lead-to-polygamy-depends-on-the-reasoning/#66808aa33600 (last visited Aug. 25, 2018).

[66] *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Justice Roberts stating, "[a]lthough the majority randomly inserts the adjective 'two' in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not . . . [i]ndeed, from the standpoint of history and tradition, a leap from opposite-sex to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world.").

[67] Tara Struyk, *7 Polyamory Myths It's Time to Stop Believing*, Glamour (February 1, 2018 5:40 PM), available at https://www.glamour.com/story/7-polyamory-myths-its-time-to-stop-believing (last visited Aug. 3, 2018).

[68] Macaela MacKenzie, *6 Questions To Decide if a Polyamorous Relationship Is Right For You*, Women's Health (Jul. 30, 2018), *available at* https://www.womenshealthmag.com/relationships/a22531210/polyamorous-relationship/ (last visited Aug. 3, 2018).

[69] Áine Cain, *Inside billionaire Warren Buffett's unconventional marriage, which included an open arrangement and 3-way Christmas cards*, Business Insider (May 9, 2018, 10:04 AM), *available at* http://www.businessinsider.com/warren-buffett-marriage-wife-2017-10.

[70] *See* Paige Williams, *A Double Life On The Road*, The Washington Post (June 1, 1998), *available at* https://www.washingtonpost.com/archive/lifestyle/1998/06/01/a-double-life-on-the-road/8d436694-3487-4f05-8d48-0ef76ff23f83/?noredirect=on&utm_term=.57cf0fca8ba9 (last visited Aug. 3, 2018).

[71] *In re Estate of Davis*, 250 S.W.3d 768 (Missouri App. 2008).

Common law marriages, marriages that have not been properly dissolved under U.S. law, or marriages that are ignored by one party who subsequently enters into another marriage could create problems upon the death of a party to the marriage, even where the decedent is testate. If clients have lived in Colorado, Iowa, Kansas, Montana, New Hampshire, South Carolina, Texas, Utah, Pennsylvania, Ohio, Indiana, Georgia or Florida, then a higher level inquiry might be necessary about whether a client has a current or lingering common law marriage that needs to be addressed.[72]

C. Ethical and Planning Issues

Planning for the second non-spouse while the spouse is still in the picture presents one challenge. Secret relationships present an entirely different challenge. All polyamorous relationships implicate a host of ethical and legal issues for estate planning professionals. An attorney who represents only one party to a marriage and knows about the secret second family will be required by ethics rules to maintain the confidential information.

But compliance with ethics rules will not stop the surviving spouse from being angry, and possibly litigious, following the post-death revelation of the spouse's deception. In order to avoid the appearance that the attorney was complicit in a fraud on the spouse, consider expanding the engagement letter with such a client that more clearly establishes the ground rules. For example, the attorney might (1) forth that the client has shared a secret romantic relationship that the attorney has been specifically instructed to keep confidential, and (2) specify that the attorney will not meet with the spouse or make any representations to the spouse regarding the estate plan.

In all situations, even where polyamory is not shared with the advisors by the client, certain steps may help reduce the odds of creating litigation space for unintended recipients of the client's assets. Consider the following as part of the planning process:

- Ask the client to provide spouse/partner and child information in writing
- Include a clause in wills and trusts to identify the spouse/partner, children by name and relationship to the client
- Include a clause that specifically excludes unintended beneficiaries by name
- Advise the client to confirm retirement benefits and update beneficiaries and update beneficiaries consistent with the estate plan
- Advise the client to confirm insurance policies and update beneficiaries consistent with the estate plan

Engagement letters and careful planning will not resolve all issues, however. Consider the following hypothetical scenario:

> Attorney has been A's estate planning attorney for ten years. A (who the attorney knows is legally married to B) asks attorney to review a premarital agreement drafted by C's attorney because A tells attorney he is preparing to enter into a legal marriage. A admits he does not plan to divorce B.

Can attorney represent A in the premarital agreement? If a lawyer finds out or is told through the course of representation that her client has committed bigamy, the lawyer in most, if not all jurisdictions, should be protected from having to report such criminal conduct by the rules of professional conduct. Specifically, MRPC Rule 1.2(d) provides: "(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." The lawyer can counsel the client on the consequences of having committed bigamy, but if a married client comes to a lawyer and asks if he can get married again, the lawyer cannot aid or counsel the client on how to commit such bigamy.

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[72] States currently allowing common law marriage include: Colorado, Iowa, Kansas, Montana, New Hampshire, South Carolina, Texas and Utah. States that used to permit common law marriages and will recognize marriages entered into prior to the date that such marriages were abolished include: Pennsylvania, Ohio, Indiana, Georgia and Florida. Alabama, Rhode Island and Oklahoma also have case law upholding common law marriages. *See* http://www.ncsl.org/research/human-services/common-law-marriage.aspx (last visited October 19, 2019).

What if A tells attorney he has hired another attorney to represent him in the premarital agreement? Is attorney required to report the second attorney to the state disciplinary bar if second attorney knows A is married already? Should or may attorney report such information to A's second attorney or C's attorney if they don't know A is married already? Attorney likely is barred by the ethics rules from disclosing such information, but may wish to counsel A that he is committing a crime, and by doing so, putting the other attorney in an ethically precarious position. In a state like Georgia or Colorado that defines bigamy as marriage-like cohabitation with someone other than a spouse while legally married, an attorney drafting even a cohabitation agreement between A and C technically may be assisting in the commission of a crime. Knowing the law of bigamy in the state where you practice is important to avoid unintended violation of the ethics rules.

V. LGBTQ Issues

Significant legal developments impacting lesbian, gay, bisexual, transgender, and queer persons and their relationships have occurred in the last decade. For simplicity, when talking about a person who identifies as lesbian, gay, bisexual, transgender or queer, we will simply use "LGBTQ". Although each identifying subgroup faces its own specific legal and societal challenges, the LGBTQ community as a whole share overlap of particular legal issues. Understanding the unique issues, whether legal or practical, encountered by LGBTQ clients will increase our cultural competence and arguably, our overall competence as advisors.

"Q" is the newer initial added to the LGBTQ community's self-identifying acronym. The "Q" stands for "queer", which had become a pejorative phrase applied to the LGBTQ community. In the 1980s, the term was reclaimed by the community. Today, it is often used to reference individuals who choose not to identify as LGB or T and represents the more radical edge of the community. Merriam Webster online notes:

> *Over the past two decades, an important change has occurred in the use of queer in the senses that refer to sexuality. The older, strongly pejorative use has certainly not vanished, but use by some gay people and some academics as a neutral or even positive term has established itself. This development is most noticeable in the adjective but is reflected in the corresponding noun as well. The newer use is sometimes taken to be offensive, especially by older gay men who fostered the acceptance of gay in these uses and still have a strong preference for it.*[73]

Many lesbian, gay, bisexual, and transgendered persons are not comfortable enough to discuss their sexual orientation or gender identity, even with their healthcare providers.[74] Six percent of transgender people report having a negative experience with an attorney because of being transgender.[75] While there is no study solely focusing on estate planners, we can infer that there are probably many persons who do not feel comfortable discussing with us their sexual orientation, gender identity, or that of their family members. If we are more inquisitive in a thoughtful manner and become creative about how we "ask" for information, we may receive more details that will help us craft betters plans for our clients.

LGBTQ persons are now more visible than ever before, thanks, in part, to the laws changing to allow same-sex couples to legally marry and form families by adopting children jointly. As of July 31, 2018, approximately 114,000 same-sex couples in the United States are raising children.[76] Of those, 68% are raising children that are biologically related to one partner, 21.4% are raising adopted children, and 2.9% have foster children (for comparison, just 3% of different-sex couples are raising adopted children and 0.4% have foster children).[77]

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[73] Merriam-Webster online dictionary, available at https://www.merriam-webster.com/dictionary/queer.
[74] *Coming Out To Your Doctor*, Human Rights Campaign, https://www.hrc.org/resources/coming-out-to-your-doctor (last visited February 2, 2019).
[75] James, S. E., Herman, J.L., Rankin, S., Keisling, M., Mottet, L. & Anafi, M., *The Report of the 2015 U.S. Transgender Survey,* Washington, DC: National Center for Transgender Equality (2016).
[76] *Same-sex parenting in the US.,* The Williams Institute UCLA School of Law, July 31, 2018, available at: https://williamsinstitute.law.ucla.edu/press/press-releases/same-sex-parenting/ (last visited September 28, 2019).
[77] *Id.*

As of May 2018, almost 4.5% of the U.S. population identifies as lesbian, gay, bisexual, or transgendered.[78] About 5.1% of women and 3.9% of men identify as LGBTQ.[79] There are wide differences among generations.[80] 8.2% of millennials (defined as birth years 1980-1999) identify as LGBTQ, while 3.5% of generation X (birth years 1965-1979), 2.4% of baby boomers (birthday 1946-1964), and 1.4% of traditionalists (birth years 1913-1945) identify as LGBTQ.[81] Contributing factors to these differences may be the attitudes among generational peers, as well as the AIDS crisis. The number of openly LGBTQ millionaires and billionaires is growing rapidly.[82] As of 2014, about 0.4% of the 1,645 billionaires (about 65) globally identify as LGBTQ.[83]

Among the LGBTQ population, approximately 0.6% of the US population identifies as transgender.[84] One study found that twenty states and the District of Columbia have a higher percentage of transgender-identified adults than the national average (in order from highest to lowest percentage: Hawaii, California, New Mexico, Georgia, Texas, Florida, Oregon, Oklahoma, Delaware, Tennessee, Washington, Arizona, Nevada, Mississippi, Alabama, North Carolina, Louisiana, Arkansas, Vermont, and Minnesota).[85]

To demonstrate the impact overlooking these issues can have on estate plans and people, we revisit the hypothetical involving Kathy:

> *Over the course of the administration of Kathy's trust and estate, Betty discovers that Matt is a transgender male and is actually the parent who carried Audrey in gestation and gave birth to her. Vicki and Matt never married. Vicki is not listed as a parent on Audrey's birth certificate, was not biologically related to Audrey, and never adopted Audrey. Kathy's trust defines "descendants" according to a traditional definition that references biological relationship and adopted children only.*

Knowing that Kathy intended to provide for Audrey, Betty nonetheless instructs the trustee to distribute the trust assets to a descendant trust for Audrey under the trust. Kathy's sister, Judy, however, who was never accepting of Vicki's relationship with Matt, brings an action contesting the trust administration, alleging that she is Kathy's sole heir. The Court agrees. The result here was not consistent with Kathy's intent. Does Kathy bear fault for not sharing with Betty the details regarding Vicki and Matt's relationship and Audrey's birth? Absolutely.

Stories of clients not sharing full information are not uncommon. In such situations, it is important to ask ourselves why Kathy did not share that information with Betty. Kathy did not seem shy about discussing Vicki, Matt and their baby. Did Kathy feel comfortable being open with Betty about the modern structure of Vicki's family? Could Betty have asked better questions to elicit the information? Did Betty's own implicit bias prevent her from asking questions that would have elicited this

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[78] Tim Fitzsimons, *A record 4.5 percent of U.S. adults identify as LGBT, Gallup estimates,* NBC News, May 25, 2018, available at https://www.nbcnews.com/feature/nbc-out/record-4-5-percent-u-s-adults-identify-lgbt-gallup-n877486 (last visited October 20, 2019).

[79] Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%,* Gallup, May 22, 2018, available at https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx (last visited October 20, 2019).

[80] *Id.*

[81] *Id.*

[82] Robert Frank, *The LGBT Rich Are a Fast-Growing Market*, CNBC, October 30, 2014, available at https://www.cnbc.com/2014/10/30/the-lgbt-rich-are-a-fast-growing-market-.html (last visited October 20, 2019). *See also*, Leslie Dobbins, *14 Insanely Wealthy LGBT People*, The Advocate, February 12, 2015, available at https://www.advocate.com/arts-entertainment/people/2015/02/12/14-insanely-wealthy-lgbt-people (last visited October 20, 2019).

[83] Natalie Robehmed, *Meet The World's LGBT Billionaires,* Forbes, *March 3, 2014,* available at https://www.forbes.com/sites/natalierobehmed/2014/03/03/meet-the-worlds-lgbt-billionaires/#615921d77e6c (last visited October 20, 2019).

[84] Andrew R. Flores, Jody L. Herman, Gary J. Gates, and Taylor N.T. Brown, *How Many Adults Identify As Transgender in the United States?,* The Williams Institute, June 2016, available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf (last visited October 20, 2019).

[85] *Id.*

information? Had Betty looked at her boilerplate in the last 10 years to consider whether her definitions have kept up with societal changes?

MRPC 8.4 provides that it is professional misconduct for an attorney to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." In order to avoid inadvertent comments that make clients or prospective clients uncomfortable and to maintain the integrity of the profession as required by the MRPC, we need to be thoughtful about understanding our implicit biases and creating an environment of open communication with our clients about their families. Many clients, like Kathy, will have experienced negative reactions from those close to them about nontraditional relationships. Being thoughtful about the psychological impact of what LGBTQ clients and their families experience in the world can make us better able to elicit information and encourage open communication.

A. Modern Terminology

Becoming comfortable with the terminology used by and preferred by the LGBTQ community helps have an open dialogue and create trust. Discussing sexual orientation and gender expression identity is something that will be less intimidating if we take the time to become familiar with common terms. Of course, it is always best to be an active listener and to use the terminology the client uses to reference themselves.

Although "male" and "female" can be used to describe both "sex" and "gender," they are not the same thing—nor are "male" and "female" the only options for either "sex" or "gender." "Gender is inextricably linked to sex, but not defined by it… Sex is generally assigned at birth, based on external genitalia, after which a broad range of biological, particularly reproductive, sex differences are assumed… Gender, on the other hand, is socially, culturally and personally defined [and] includes how individuals see themselves (gender identity), how other perceive them and expect them to behave (gender norms), and the interactions (gender relations) that they have with others."[86]

Gender relates to *identity, norms, and relations*. Facebook recognizes 71 different genders, including a "custom" gender. Why? Because lots of variations exist. Gender is something that is personal. At Appendix A are some terms defined by the Human Rights Campaign "to help give people the words and meanings to help make conversations easier and more comfortable."[87] If the advisor is not comfortable using the vocabulary to accurately and openly discuss sexual orientation and gender identity issues that may impact the planning, the client is more likely to sense that hesitation and have difficulty engaging in an open and honest conversation.

1. "Charged" Words and Phrases

The LGBTQ community historically has been an example of how to unite to create political and social momentum for change. There are countless reliable resources available on the internet that provide excellent educational material. The Gay & Lesbian Alliance Against Defamation (GLAAD), was formed by a small group of journalists in the 1980s in response to defamatory reporting about the LGBTQ community with respect to the HIV and AIDS crisis.

There are certain words and phrases that may be perceived as offensive, even if they are not intended by the user to be anything other than descriptive. To create an open and trusting environment, it is important to understand how members of the LGBTQ community may feel about certain "charged" words or phrases. A link to the GLADD Media Reference Guide – 10th Edition, is available in the footnotes, with express permission from GLADD.[88]

First and foremost, jettison the phrase "sexual preference" from your vocabulary. Suggesting that a person's sexual orientation is a choice is offensive to most of the LGBTQ community. "Sexual orientation" is the appropriate phrase, or simply

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[86] Krista Conger, *Of mice, men and women,* Stanford Medicine: Sex, Gender and Medicine, Spring 2017, available at https://stanmed.stanford.edu/2017spring/how-sex-and-gender-which-are-not-the-same-thing-influence-our-health.html (last visited September 29, 2019).

[87] *Glossary of Terms,* Human Rights Campaign, available at https://www.hrc.org/resources/glossary-of-terms (last visited February 2, 2019).

[88] *GLAAD Media Reference Guide – 10th edition*, available at *https://www.glaad.org/reference* (last visited February 3, 2019).

"orientation". Another word to avoid is "homosexual". Instead, use "gay", "gay man", "lesbian" or "gay person/ people." [89] The Associated Press, The New York Times, and The Washington Post restrict the use of the term "homosexual", which is a pretty good indicator that you should leave that word out of your vocabulary as well. Similarly, it is not necessary to identify a lifestyle as a "gay lifestyle" or "transgender lifestyle". No two married or unmarried couples have an identical lifestyle, whether they are LGBTQ persons or not.

Marriage between consenting adults is legal in the United States, regardless of gender or sexual orientation of the two individuals choosing marriage. It is no longer necessary to use modifiers such as "same-sex" when referencing marriage or "gay" when referencing a couple. And most importantly, it is ok to admit that you care about your client's feelings if you are just not sure what words to use and need to ask. Showing that you are aware of the issues your clients face and want to be sensitive to those issues may actually increase the connectivity of the relationship with the client.

2. Forget the Grammar You Learned in Grade School

When you were a kid in school, you teacher may have drilled into your brain that "they" refers to a group and using that word to refer to a singular person was incorrect. Well, your teacher was WRONG! The use of "they" to refer to a single individual has been part of the English language for hundreds of years.[90] According to the Merriam-Webster Dictionary, the "development of singular "they" mirrors the development of the singular "you" from the plural "you."[91] As of 2017, the Associated Press Style Book allows for the use of they/them/their if the person to whom the pronoun is referring prefers a gender-neutral pronoun (but, there is a caveat: it calls for explaining in text that the person prefers a gender-neutral pronoun and to be sure that the phrasing does not imply more than one person).[92]

All of us have preferred pronouns.[93] Most people use the terms she/her/hers, he/him/his, and they/them/theirs. If you are *cisgender* male (a *cis*gender person is someone whose gender identity matches the sex assigned to them at birth), you probably prefer "he/him/his." If someone referred to you as "she," you would probably be upset. When speaking with a client, listen for clues as to how the person self-identifies. If you are not sure, just ask.

For trans individuals, some people prefer pronouns that match their gender identity; others prefer more neutral pronouns. Below are some gender-neutral pronouns in use today:

- They/them/theirs
- Ne/men/nirs/nemself
- Ve/ver/vis/vis/verself
- Xe/xem/xyr/xyrs/xemself (pronounced like "ze")
- Ze/hir/hir/hirs/hirself; zie/hir/hir/hirs/hirself; ze/zir/zir/zirs/zirself; zie/zir/zir/zirs/zirself (pronounced like "zee" and "here")

B. Planning and Drafting Considerations

When working with any client, it is important to draft documents that are clear, accurate, and precise. With marriage laws being gender blind, drafting documents for LGBTQ persons is now largely the same as drafting for cisgender straight clients. But the law has not caught up to social reality in all aspects of planning, and revisiting old boilerplate to avoid the impact of stale law can be helpful. With the rule against perpetuities being virtually non-applicable in most jurisdictions and the high federal tax exemptions relating to estate and generation-skipping transfers, it is simply a reality that even if your clients are not

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[89] *See id.*
[90] Merriam-Webster, *Words We're Watching: Singular 'They',* available at https://www.merriam-webster.com/words-at-play/singular-nonbinary-they (last visited February 8, 2019).
[91] *Id.*
[92] Lauren Easton, *Making a case for a singular 'they'*, Associated Press, March 24, 2017, available at https://blog.ap.org/products-and-services/making-a-case-for-a-singular-they (last visited February 18, 2019).
[93] David Galowich, *How to Respectfully Use Gender Pronouns in the Workplace,* Forbes, August 2, 2018, available at https://www.forbes.com/sites/forbescoachescouncil/2018/08/02/how-to-respectfully-use-gender-pronouns-in-the-workplace/#188991486c40 (last visited February 18, 2019).

part of the LGBTQ community, there is likely to be a LGBTQ beneficiary of most long-lived trusts at some point in time. Thoughtful tweaks to boilerplate can avoid ambiguities and litigation by recognizing and plugging gaps in the law or its application.

1. Health Care

Adoption, surrogacy, and gender confirmation surgery are all very expensive. Many trustees have faced the dilemma of having to try to fit the square peg into the round hole on this topic. As an example, Sandy's grandfather made a gift to him years ago in an irrevocable trust for Sandy's benefit. The trust agreement provides for the classic standard of distributions to Sandy for health, education, maintenance, and support. None of those terms contains further definition in the document. Mark and Sandy are hoping to adopt. Given that the adoption fees are $40,000, Sandy asks the trustee if the trustee can make distributions to Sandy to cover the cost of adoption. The trustee asks you for your opinion.

Many trustees have stretched the definition of "health" to be able to authorize such a distribution. While "health" may be interpreted fairly broadly, adoption probably is not clearly within its borders. In trusts using standard HESM language, the term "health" has also been used as the basis for allowing a distribution to cover the costs of gender confirmation surgery and related procedures, counseling and medications. The costs of the gender confirmation process can be high, and so it is easy to imagine another beneficiary of the trust objecting to the expenditure. If "health" is specifically designed in estate planning documents to include gender confirmation procedures, an objecting beneficiary can be shut down quickly.

To allow for flexibility, consider clarifying the definition of the health standard to include the cost of family planning, such as adoption, infertility treatment, and surrogacy. A definition that would allow the trustee to make distributions for adoption and gender confirmation procedures might look something like this:

> *The terms 'health' and 'medical care' of a beneficiary shall be construed liberally by the trustee to provide any mental or physical care that the trustee shall determine to be in the interests of the beneficiary's well-being. Such terms specifically shall include distributions for all expenses (including legal fees and travel costs) related to (a) gender confirmation surgery and related procedures, including cosmetic or reconstructive surgery, counseling, and medications; and (b) family planning, such as fertility treatments, adoption, and surrogacy.*

The Tax Court has included gender confirmation surgery as an allowable deduction under Internal Revenue Code §213(d), so clients could make an unlimited gift to a loved one for gender confirmation surgery under Internal Revenue Code §2503(e).[94] Note, however, that breast augmentation surgery for the same Taxpayer was not allowed as a deductible medical expense.[95] For clients thinking about making a gift to couples of the same sex for adoption and surrogacy, such gifts are not included in the definition of healthcare under Internal Revenue Code §213.

3. Gender

Consider including a definitional provision that any gender references are intended as being inclusive of all possible genders (masculine, feminine, neutral). Having an acknowledgment that gender references in the document are not intended to be binding on the meaning of the document can be particularly helpful if there is a name change or gender confirmation that results in a client or beneficiary being other than the gender referenced in the documents. The name change issue arises even with cisgender clients, and so modifying planning document forms to include a provision that identifies key people such as family members provides a place for such name alternatives to be noted. With transgender clients, referencing legal name may be preferable to using the "a/k/a" identifier because the individual has intentionally ceased using the prior name. Therefore, it is more accurate to say they have a different legal name than to say they are "also known as" the gendered name they have shed in order to embrace who they truly are.

An example of a provision to address gender and name changes follows:

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[94] *O'Donnabhain v. Commissioner*, 134 T.C. 34 (US Tax Court 2010).
[95] *Id.*

Any reference to an individual named in this document shall continue to be a reference to that person even if such person has a reassignment of gender or a change of name. Gender references and legal names are used in this instrument for ease of identification, and a person shall not be deemed deceased or to be a different person due to a change of name or gender.

Providing in the boilerplate that gender change or legal name change are not designed to write a person out of the document may be important to avoid estate and trust disputes. For example, if a document provides for a gift of "$100,000 to my son, Brian, if he survives me", is Brian considered to not survive because Brian is now "Judy" and the settlor's daughter? As drafters, we provide for successor corporations when we make charitable gifts or name corporate fiduciaries in order to avoid confusion. Why not do the same for individuals?

4. Gender-Specific Gifts

Clients sometimes want to leave specific gifts to a person or class defined by gender. For example, a young client comes to you wanting to leave her engagement ring to her first-born daughter. The client does not have a daughter yet but plans to have children soon. The client subsequently has two children, both assigned female at birth. The first child transitions to male later in life, before the death of the grantor. The client dies not having updated the provision. The second child claims the ring belongs to her. What if, later in life, client adds a gift of "$1000 to each of my then living daughters." Client does not update the documents after daughter transitions to male. Does the daughter who has changed legal gender receive $1,000?

Rather than referring to gender without more, consider options that are more specific and that address the time at which gender is determined for purposes of qualifying for the gift. For example, if the gift should be tied to gender identified at birth, the provision might read: "To my oldest living child assigned a female at birth." In the alternative, if it is legally assigned gender at birth remaining unchanged that is the qualifier, then the provision might instead say: "To my oldest living cisgender daughter."

Just as advances in reproductive medical technology have necessitated careful consideration of who exactly is a descendant and when that status is determined, the progress in the medical community in gender confirmation procedures requires learning to think about gender as fluid. If a gift relates to gender identity, then specifying the timing for determination of gender can help to avoid unnecessary ambiguities and trust controversies.

C. Recent Supreme Court Decisions

On October 8, 2019, the Supreme Court heard three cases that may have a lasting impact on the LGBTQ communities.[96] The In June, the Court issued its opinion, holding that Title VII's prohibition on sex discrimination includes discrimination on the basis of sexual orientation and gender identity.

VI. Legally Changing Name and Gender

For transgender individuals who are planning to or have already begun to transition, a name change may be important so that the person's outward appearance and identification documents match. Documentation that does not match the person's outward appearance could place a client at risk; in fact, almost 10% of transgender individuals have experienced violence due to their gender identity or expression.[97] Being knowledgeable about the process to help a client have official documents that match outward gender and name enables us to help keep our clients safe. Each state and the federal government have different requirements for changing a person's legal name and gender on official documentation.

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[96] *Bostock v. Clayton County, Georgia,* 139 S.Ct. 1599 (2019); *Altitude Express Inc. v. Zarda*, 139 S.Ct. 1599 (2019), *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission,* 139 S.Ct. 1599 (2019).

[97] Flores, *How Many Adults Identify As Transgender in the United States. See also,* Chase Strangio, *Deadly Violence Against Transgender People Is on the Rise. The Government Isn't Helping*, The ACLU LGBT & HIV Project, August 21, 2018.

A. Important Case History

The requirements and procedures for gender and name change updates to official documents are constantly evolving. Sometimes the evolution is by state legislative activity. Other times, change happens through the courts as in *F.V. v. Barron,* a 2018 case out of the U.S. District Court for Idaho, and *Love, et. al. v. Johnson,* a 2015 case out of the U.S. District Court for the Eastern District of Michigan.[98]

In *F.V.*, Plaintiffs asked the court for a declaration that Idaho's policy that automatically denies applications to change the listed sex on a birth certificate for any reason other than error was a violation of their constitutional rights.[99] One of the plaintiffs, a transgender female assigned male at birth, knew she was female from approximately age 6, began to live openly as a female at age 15, and had taken steps medically and socially to bring her body and expression of gender in line with her female gender identity.[100] For her, "living with a birth certificate declaring she is male is a permanent and painful reminder that Idaho does not recognize her as she is – as a woman."[101] She also felt, as discussed above, that "presenting an identity document that conflicts with her gender identity is both humiliating and dangerous" and it put her at risk for violence by disclosing against her will and intentions that she was a transgender individual.[102]

The other plaintiff in the case, Dani Martin, also knew from a young age that she was female, although assigned male at birth, and had taken steps, both medically and socially, to bring her body and gender expression in line with her gender identity. This mismatch between Dani's gender identity and the sex listed on her birth certificate had exposed her to harassment and embarrassment. In addition, the mismatch had also prevented her from making the change to other important records and perpetuated instances "where she [was] forced to disclose her transgender status, face embarrassment, harassment, and potential physical violence."[103]

The court found that Idaho's policy did not pass the rational basis test of the Equal Protection Clause of the Fourteenth Amendment, noting that Idaho could provide no justification for the policy to "automatically and categorically deny applications made by transgender people to amend the birth-assigned sex on their birth certificates to align with their gender identity."[104] The court analyzed whether discrimination against transgender individuals is sex-based discrimination in the context of Title VII and found that "to conclude discrimination based on gender identity or transsexual status is not discrimination based on sex is to depart from advanced medical understanding in favor of archaic reasoning."[105]

The Eastern District of Michigan similarly found for the plaintiffs in *Love* based on the Fourteenth Amendment.[106] In *Love*, plaintiffs sought a declaration that the Michigan Secretary of State's policy for changing the sex on state-issued identification was unconstitutional in that it was unduly burdensome and, in some cases, impossible for Plaintiffs, and other transgender individuals, to obtain a state ID that accurately reflected their gender. Michigan's policy for "changing sex" on a state ID provided that a birth certificate was the only document accepted as proof to change an individual's sex.

Emani Love was outed by a precinct worker as a transgender female when she went to vote and presented her state ID. Another plaintiff, a transgender male, had ordered drinks at a bar, presented her ID, and was consistently called "ma'am" by the workers at the bar. Another plaintiff, a transgender female was told "That's not you" when presenting her ID at a retail store. A transgender male plaintiff had a hostile experience at a hardware store.

The court found that these experiences "cut at the very essence of personhood protected under the substantive component of the Due Process Clause."[107] In its discussion, the court noted that state actions that infringe upon fundamental rights will be

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[98] *F.V., et. al. v. Barron, et. al.,* 286 F.Supp.3d 1131 (D. ID 2018); *Love, et. al. v. Johnson,* 146 F.Supp.3d 848 (E.D. Mich. 2015).
[99] *F.V.,* at 1134.
[100] *Id.* at 1138.
[101] *Id.* at 1138-139.
[102] *Id.* at 1139.
[103] *Id.*
[104] *Id.* at 1140.
[105] *Id.* at 1142-143.
[106] *Love, et. al. v. Johnson,* 146 F.Supp.3d at 850.
[107] *Id. at 855*

upheld under the substantive due process component of the Fourteenth Amendment "only where the governmental action furthers a compelling state interest, and is narrowly drawn to further the state interest."[108] The court held that Michigan's policy "bears little, if any, connection to [the state's] purported interest, and even assuming it did, there is no question that requiring an amended birth certificate to change the sex on one's license is far from the least restrictive means of accomplishing the state's goals."[109]

B. A Broad Spectrum of Law

The Center for Transequality publishes "grades" for the laws of each state. For purposes of this outline, we discuss the current laws in Illinois, Minnesota, Indiana, Michigan, Iowa, California, Florida, New York and Texas. These states provide a view of the most and least trans-friendly laws and cover a sampling of different regions. If you have a client who needs assistance in any state not discussed here, a good starting place is the National Center for Transgender Equality.[110] The law in this area is constantly in flux, so it is important to verify the laws and procedures with the relevant authority for each state before embarking on the path of assisting a client to change a legal name or gender.

1. Illinois

Illinois laws are considered somewhere in the middle of the pack as far as friendliness for trans individuals. The process is a bit complicated in Illinois, there are hurdles to name change, certification from a medical professional is needed, and no gender-neutral option is available.[111]

In Illinois, a person who has resided in the State for more than 6 months can petition the court to change their name.[112] In the heading, the petitioner must use their current name (not the new name).[113] The petition must be verified by an "affidavit of some credible person."[114] Prior to the hearing, the person must publish notification of their name change once a week for three consecutive weeks.[115] This process should be started at least six weeks prior to the hearing. [116] Once the person's name has been changed, he or she must notify the Secretary of State within 10 days. There are some limitations in Illinois as to who can change their name. Anyone who has been convicted of a felony in any state must wait ten years from the completion and discharge from his or her sentence, unless he or she has been pardoned.[117] In addition, any person convicted of a crime which requires the person to be registered on the sex offender registry cannot petition for a name change.[118]

To obtain a new driver's license with a new name, the person must appear at a Secretary of State Department of Motor Vehicles office and apply for a corrected driver's license and/or state ID.[119] If the person is also changing their gender marker on their license or state ID, acceptable documentation includes:

- A court order;
- Medical report form;
- Psychiatric report form;
- Physician's statement; or

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[108] *Id.*, at 856.
[109] *Id.*
[110] *See* www.transequality.org.
[111] *ID Documents Center,* National Center for Transgender Equality, available at https://transequality.org/documents (last visited October 26, 2019).
[112] 735 ILCS 5/21-101
[113] *Guide to Name and Gender Marker Changes,* Equality Illinois, available at http://www.equalityillinois.us/wp-content/uploads/2016/02/EI-Name-Change-Toolkit-Guide.pdf (last visited October 26, 2019).
[114] *ID Documents Center, supra.*
[115] *Guide to Name and Gender Marker Changes, supra.*
[116] *ID Documents Center, supra.*
[117] 735 ILCS 5/21-101(a).
[118] *Id.*
[119] Illinois Secretary of State, Driver's License/ Commercial Driver's License/ State ID Card, available at: http://www.cyberdriveillinois.com/departments/drivers/drivers_license/drlicid.html#nameChange (last visited April 9, 2019).

- Other acceptable documentation that a gender change has taken place or that the applicant is in the process of undergoing a gender change.

Effective January 1, 2018, persons born in Illinois may request to have their gender corrected on their birth certificate.[120] To do so, the applicant must submit the following to the Illinois Department of Vital Records:

- An Affidavit and Certificate of Correction Request, which must be signed by the applicant and notarized;
- A Declaration of Gender Transition, which must be signed by a licensed health care professional or licensed mental health professional who has treated or evaluated the applicant stating that the applicant has undergone treatment that is *clinically appropriate* for that individual for the purpose of gender transition, based on contemporary medical standards, or that the individual has an intersex condition, and that the sex designation on such person's birth record should be changed (emphasis added); and
- A valid government ID.

It is important to note that gender confirming surgery is no longer needed in Illinois. Not every person can undergo gender-confirming surgery and this relatively new public act allows persons who are unable to undergo gender-confirming surgery to still change their gender designation on their birth certificate to confirm their gender.

5. Minnesota

Minnesota generally is considered to have most trans-friendly and progressive laws in the Midwest to change a person's legal name, update their driver's license, and update their birth certificate.[121] Minnesota's process is relatively simple. A person who has resided in Minnesota for at least six months need only submit a petition to the court.[122] The person must appear personally at a hearing and present two (2) witnesses to prove the person's identity.[123] This change in identity is, however, of public record.[124]

According to Minnesota's Driver and Vehicle Services, sex is a self-designated descriptor.[125] "Applicants are not required under state or federal law to present documentation that confirms the information they submit."[126] The Minnesota Driver and Vehicle Services allows individuals to choose a sex marker of M, F, or X.

Individuals can apply to amend the sex marker on their birth certificate.[127] To do so, the individual would need to include a letter from a physician confirming appropriate clinical treatment for gender transition *or* a court order for gender change.[128] The original birth certificate will be kept confidential and only disclosed by court order.[129]

6. Indiana

Indiana forms are easy to understand; however, certification by a limited range of licensed professionals is necessary and a gender-neutral option is not available.[130] In Indiana, any person may change their name, unless they are confined to a Department of Correction facility.[131] To begin the process, the individual can petition a circuit court, superior court, or probate

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[120] Public Act 100-0360.
[121] *ID Documents Center, supra.*
[122] Minn. Stat. Ann. §§ 259.10
[123] *Id.*
[124] *ID Documents Center, supra.*
[125] Minnesota Driver & Vehicle Services, available at https://dps.mn.gov/divisions/dvs/Pages/self-designated-descriptors.aspx (last visited October 26, 2019).
[126] *Id.*
[127] Minnesota Department of Health, available at https://www.health.state.mn.us/people/vitalrecords/docs/bamendia.pdf (last visited October 26, 2019).
[128] Minn. Stat. Ann. §§ 144.218
[129] *Id.*
[130] *Id.*
[131] Ind. Code Ann. §§34-28-2-1 and 1.5.

court in the county in which the individual resides.[132] The petition must be subscribed and sworn before a notary public[133] and must include the person's:

- date of birth;
- current residence and mailing address;
- valid driver's license number, state identification card number or photo exempt identification card number;
- all previous names used by the person;
- proof of United States citizenship;
- a statement as to whether the person holds a valid United States passport, and;
- a description of all felony convictions against the person.[134]

After filing the petition, but before the hearing, the person must give notice of the petition by three (3) weekly publications in a newspaper of general circulation published in the county in which the petition is filed, or, if none, then in a newspaper nearest to that county, with the last publication being at least thirty (30) days prior to the hearing.[135] A person with a felony conviction within the last ten years can change their name, but the person must give notice of the filing petition to the sheriff of the county in which the petitioner resides, the prosecuting attorney of the county in which the petitioner resides, and the Indiana central repository for criminal history.[136] While court records are usually public, a person can make a Rule 9 request that court records be sealed.[137]

The Indiana Bureau of Motor Vehicles requires a person to officially change their name on their Social Security documentation and allow at least one business day after completing the name change before visiting the Indiana Bureau of Motor Vehicles to change the name on a driver's license.[138] The person must also provide (1) documentation supporting a legal name change, such as a marriage license, divorce decree, court order approving a change of legal name, and (2) an original or certified copy of an amended birth certificate showing a change of name.[139]

To change gender on a driver's license in Indiana, an individual must provide one of the following:

- A certified, amended birth certificate;
- A Physician's Statement of Gender Change using State Form 55617; or
- A physician's signed and dated statement, on letterhead that includes the following language: "<name> successfully underwent all treatment necessary to permanently change <name>'s gender from <prior gender> to <new gender>".[140]

As discussed below, Indiana does not require a physician's statement to change one's gender on the person's birth certificate – only a court order is needed. It is possible, therefore, to change one's gender marker in Indiana without treatment to permanently change one's gender.

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[132] Ind. Code Ann. §34-28-2-1.
[133] Ind. Code Ann. §34-28-2-2.
[134] Ind. Code Ann. §34-28-2-2.5.
[135] Ind. Code Ann. §34-28-2-3(a).
[136] Ind. Code Ann. §34-28-2-3(c).
[137] Indiana Court Rules, Administrative Rule 9(G)(5).
[138] Indiana Bureau of Motor Vehicles, *Amending Your Driver's License or Identification Card* available at https://www.in.gov/bmv/2564.htm (last visited October 26, 2019).
[139] *Id.*
[140] *Id.*

Indiana does not have a specific statute regarding changing a person's gender.[141] The code simply says that the Indiana state department may make additions to or corrections in a certificate of birth on receipt of adequate documentary evidence.[142] Adequate documentary evidence would include a court order.[143]

7. Michigan

Proof of surgery is not required in Michigan, and so it falls toward the middle of the pack with regard to trans-friendly rules and procedures. [144] A person requesting a legal name change should file a petition with the circuit court of the county in which they reside.[145] To do so, the person must be a resident of the county for at least one year.[146] The petition must provide a sufficient reason for the name change and show that the change is not sought with a fraudulent intent.[147] Under the statute, a person petitioning for a name change who has a "criminal record" is deemed to be seeking the change with a fraudulent intent, and the burden of proof is on the petitioner to rebut such a presumption.[148]

Michigan requires two complete sets of fingerprints taken at a local police agency for petitioners who are age 22 or older.[149] The prints are then processed with the state police and the FBI for comparison of records and to determine whether there are any pending charges against the individual or any conviction against the individual.[150] If there are no pending charges or convictions against the individual, then the department of state police is instructed to destroy its copy of the petitioner's fingerprints.[151] If the court ultimately grants the name change request to a petitioner who has a criminal record, then the order shall be forwarded to the Michigan state police and other agencies, as described in the statute.[152]

Publication generally is required as set forth in Michigan Supreme Court rules. If the individual petitioning for the name change can show good cause that there should be no publication, the Court can set aside the publication requirement and also order that the record of the proceeding be made confidential.[153] Good cause includes, but is not limited to "evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger, such as evidence that the petitioner or another individual has been the victim of stalking or an assaultive crime."[154] Evidence should include the petitioner's sworn statement stating the reason for the fear, however, if the fear is stalking or an assaultive crime, proof of an arrest or prosecution for the crime is not required.[155]

A person seeking to change their name on their driver's license or state identification card in Michigan must present their current, valid driver's license or state identification card, as well as proof of the name change (i.e., the court order).[156] If a person has changed their name more than once, then the person will need to bring in documentation showing their name change history (i.e., court orders, marriage certificates, or divorce decrees).[157]

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[141] Ind. Code Ann. §16-37-2-10.
[142] Ind. Code Ann. §16-37-2-10(b).
[143] See *Court Forms for Name and Gender Marker Changes,* Indiana Legal Services, available at https://www.indianalegalservices.org/NameGenderMarkerCourtForms (last visited October 26, 2019).
[144] *ID Documents Center, supra.*
[145] Mich. Comp. Laws Ann §711.1(1).
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] Mich. Comp. Laws Ann §711.1(2).
[150] *Id.*
[151] *Id.*
[152] Mich. Comp. Laws Ann §711.1(3).
[153] Mich. Comp. Laws Ann §711.3(1).
[154] *Id.*
[155] Mich. Comp. Laws Ann §711.3(2).
[156] Michigan Secretary of State, *How to Change your Name on a Driver's License or State ID Card,* available at: https://www.michigan.gov/sos/0,1607,7-127--25240--,00.html (last visited October 26, 2019).
[157] *Id.*

Until 2016, Michigan required proof of "gender confirmation surgery" to correct gender on state identification cards and driver's licenses.[158] As of March 10, 2016, the Michigan Secretary of State changed its policy to allow a passport denoting gender as sufficient proof to change the gender on Michigan state identification cards of driver's licenses.[159] The Michigan Secretary of State will also, reportedly, accept a court order of gender designation.[160]

Obtaining a corrected birth certificate is more difficult than the other processes in Michigan. Under §333.2831 of the Michigan Public Health Code, the Department of Vital Records will only issue a new birth certificate with a corrected sex designation if the request is accompanied by an affidavit of a physician certifying that sex-reassignment surgery has been performed.

8. Iowa

Iowa has the most restrictive and least trans-friendly laws in the Midwest region. As described in greater detail below, the name change process is complex and burdensome. The state requires gender confirmation surgery in order to change a driver's license or birth certificate gender marker.

Persons who have attained the age of majority may petition the court for a legal name change.[161] The petition should be verified and filed in the district court of the county where the petitioner resides.[162] The petition should include all of the following information:

- Name at the time the petition is filed and county of residence;
- A description of the person, including height, weight, color of hair, color of eyes, race, sex, and date and place of birth;
- Residence at time of petitioner and any prior residences for the past five years;
- Reason for change of name, briefly and concisely stated;
- A legal description of all real property in this state owned by the petition; and
- The name the petitioner proposes to take.[163]

The petition should attach a certified copy of the person's birth certificate, and, if unavailable, the reason for the unavailability along with other forms of identification.[164] In addition to being filed with the clerk of court, the petition needs to be filed with the Iowa Department of Public Health.[165] If the person is married, the petitioner must give legal notice to the spouse.[166] The court may grant the petition any time after thirty days from the date the petition was filed.[167] The decree granting the name change must provide the following information:

- Petitioner's name and former name;
- Petitioner's height, weight, color of hair, color of eyes, race, sex, date and place of birth;
- The name of Petitioner's spouse and any minor children affected by the change; and
- A legal description of all real property owned by the petitioner.[168]

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[158] Brad Devereaux, *Transgender People Can Now Change Gender Marker on Michigan ID Without Surgery*, MLive, March 18, 2016, available at https://www.mlive.com/news/index.ssf/2016/03/transgender_people_can_now_cha.html (last visited April 9, 2019).
[159] *Id.*
[160] *ID Documents Center, supra.*
[161] Iowa Code Ann. §674.1.
[162] Iowa Code Ann. §674.2.
[163] *Id.*
[164] *Id.*
[165] Iowa Code Ann. §674.3.
[166] Iowa Code Ann. §674.6.
[167] Iowa Code Ann. §674.4.
[168] Iowa Code Ann. §674.5.

As with the petition, a copy of the decree must be furnished to the Iowa Department of Public Health.[169] The petition must also be sent to every county in Iowa where the petitioner owns real property.[170] The county recorder and auditor of each county where the petitioner owns real estate must index a change of name for each parcel of real estate.[171]

One of the more egregious parts of the Iowa Code provides that after the legal name change has been granted, "any new birth certificate issued to a person granted a change of name shall reflect the former name of the person issued the new birth certificate."[172] This forever requires the individual to reveal their history when they present their birth certificate. In addition, Iowa's code provides that the entire proceeding will be kept in the clerk of court's record and is to be indexed under the person's original name and their new name.[173]

Pursuant to Chapter 601 of the Iowa Administrative Code, a person who was born in Iowa and is requesting a change of sex designation on their state identification card or driver's license "must submit a certified amended or new Iowa birth certificate that documents the change of sex designation."[174] Persons who were born outside of Iowa may submit other documentation as described in the Code, but "the department may make further investigation or require further information necessary to determine whether a change of sex designation occurred."[175]

Changing sex designation on a birth certificate in Iowa requires surgery, so an Iowa resident who was born in Iowa must have had surgery in order to obtain a sex marker change on their driver's license.[176] Along with the application to change the person's sex marker designation, the Iowa Administrative Code provides that following treatment to change a sex designation, the person wishing to update their birth certificate shall submit to the state registrar a notarized affidavit from the physician and surgeon who completed the sex designation treatment that states: (1) The sex designation has been permanently changed by surgery or other treatment; (2) the medical procedures undertaken; and (3) the full name, address, state of medical license, and medical license number of the physician and surgeon.[177] The Iowa Administrative Code does provide that the county registrar and state registrar shall seal the original birth certificate and all related documents, and that they are only to be opened by the state registrar for administrative purposes or upon order of the court.[178]

9. California

California has some of the most trans-friendly laws and procedures for changing legal name and gender. The process is simple and streamlined. Changing name and gender can be completed in one step in California. A person only needs to fill out the form petition for name change (counties may have their own form) and file it with the court in the county in which the person resides.[179] As long as no good cause objection is filed within six weeks, the court will issue the order without a hearing.[180]

California is one of the few states that allow a selection of "non-binary." In order to update a person's gender marker on their driver's license or state identification card, a person can self-select "male," "female," or "nonbinary" on the application form.[181] California also has simplified the process for updating a birth certificate. A person submits an affidavit attesting, under penalty of perjury, that the request for a change of gender is to conform their legal gender to their gender identity and not for any

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[169] Iowa Code Ann. §674.7.
[170] Iowa Code Ann. §674.8.
[171] Iowa Code Ann. §674.14.
[172] Iowa Code Ann. §674.9.
[173] Iowa Code Ann. §674.11.
[174] Iowa Administrative Code §601.5(7)(a).
[175] Iowa Administrative Code §601.5(7)(b).
[176] Iowa Administrative Code §99.20.
[177] Iowa Administrative Code §99.20(1).
[178] Iowa Administrative Code §99.20(5).
[179] *How to Change your Name AND Gender (Adult)*, California Courts, available at http://www.courts.ca.gov/25797.htm (last visited February 12, 2019).
[180] *Id.*
[181] CA Senate Bill 179, Sections 16, 17, and 18.

fraudulent purpose. Like the driver's license, a person can choose "male," female," or "nonbinary."[182] California does not require a physician's declaration.

10. Florida

Florida's procedures are more complex for name change, but now are fairly simple for gender update on a driver's license or birth certificate. To obtain a name change in Florida, a person must file a petition in the county in which the individual resides.[183] The petition must show:

- That the petitioner is a bona fide resident of and domiciled in the county where the change of name is sought.
- If known, the date and place of birth of the petitioner, the petitioner's father's name, the petitioner's mother's maiden name, and where the petitioner has resided since birth.
- If the petitioner is married, the name of the petitioner's spouse and if the petitioner has children, the names and ages of each and where they reside.
- If the petitioner's name has previously been changed and when and where and by what court.
- The petitioner's occupation and where the petitioner is employed and has been employed for 5 years next preceding the filing of the petition. If the petitioner owns and operates a business, the name and place of it shall be stated and the petitioner's connection therewith and how long the petitioner has been identified with that business. If the petitioner is in a profession, the profession shall be stated, where the petitioner has practiced the profession, and if a graduate of a school or schools, the name or names thereof, date of graduation, and degrees received.
- Whether the petitioner has been generally known or called by any other names and if so, by what names and where.
- Whether the petitioner has ever been adjudicated a bankrupt and if so, where and when.
- Whether the petitioner has ever been arrested for or charged with, pled guilty or nolo contendere to, or been found to have committed a criminal offense, regardless of adjudication, and if so, when and where.
- Whether the petitioner has ever been required to register as a sexual predator.
- Whether any money judgment has ever been entered against the petitioner and if so, the name of the judgment creditor, the amount and date thereof, the court by which entered, and whether the judgment has been satisfied.
- That the petition is filed for no ulterior or illegal purpose and granting it will not in any manner invade the property rights of others, whether partnership, patent, good will, privacy, trademark, or otherwise.
- That the petitioner's civil rights have never been suspended or, if the petitioner's civil rights have been suspended, that full restoration of civil rights has occurred.[184]

Before a hearing on the petition, the person must submit fingerprints for processing with the state police and the FBI.[185] After the final judgement, the clerk of court will notify the Office of Vital Statistics and the Department of Law Enforcement.[186]

To change the name on a driver's license, an individual provides the order for name change to the Division of Motorist Services.[187] In 2011, the Florida Division of Motorist Services changed its policy regarding Gender Reassignment Requirements to provide that an individual no longer is required to have sex reassignment surgery to change their gender marker on their driver's license. Now, a person only needs to obtain a letter from their attending medical provider with the following information:

- Physician's full name;
- Medical license or certificate number;
- Issuing state or another jurisdiction of medical/ license certificate;
- Drug Enforcement Administration registration number assigned;
- Address and telephone number of the physician;

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[182] CA Senate Bill 179, Sections 11 and 14.
[183] Fla. Stat. Ann. 68.07(1).
[184] Fla. Stat. Ann. 68.07(3).
[185] Fla. Stat. Ann. 68.07(2).
[186] Fla. Stat. Ann. 68.07(5) and (6).
[187] Florida Department of Highway Safety and Motor Vehicles, *Name Changes,* available at https://www.flhsmv.gov/ddl/namechange.html (last visited February 16, 2019).

- Language stating that he/she is the attending physician for the customer and that he/she has a doctor/ patient relationship with the customer;
- Language stating that the customer is undergoing appropriate clinical treatment for transition to the new gender; and
- Language stating, "I declare under penalty of perjury under the laws of the United States the foregoing is true and correct."[188]

As of March 20, 2018, Florida no longer requires sex reassignment surgery to change the gender marker on a birth certificate.[189] A person simply needs to provide the same letter as the one described above for the Department of Motor Vehicles.[190] This update has not been codified yet, but General Counsel for the Department of Health has publicly stated the change of policy.[191]

11. New York

New York is unique in that New York State and New York City have different laws and procedures. New York City has recently made changes that are quite progressive. For name changes, New York State and New York City have the same rules and procedures. A petition for name change should be filed in the county court or supreme court in the county in which the person resides, or, if the person lives in New York City, either the supreme court or any branch of the civil court of New York City or a county of the city.[192] The name change petition needs to be verified and include the name, date of birth, place of birth, age, and residence of the individual and the proposed name.[193] The petition shall also specify:

- whether or not the petitioner has been convicted of a crime or adjudicated a bankrupt;
- whether or not there are any judgments or liens of record against the petitioner or actions or proceedings pending to which the petitioner is a party, and, if so, the petitioner shall give descriptive details in connection therewith sufficient to readily identify the matter referred to;
- whether or not the petitioner is responsible for child support obligations;
- whether or not the petitioner's child support obligations have been satisfied and are up to date;
- the amount of a child support arrearage that currently is outstanding along with the identity of the court which issued the support order and the county child support collections unit;
- whether or not the petitioner is responsible for spousal support obligations;
- whether or not the petitioner's spousal support obligations have been satisfied and are up to date; and
- the amount of spousal support arrearage that currently is outstanding along with the identity of the court which issued the support order.[194]

To change a name for a New York State driver's licenses or identification, a person must provide a court order.[195] To change one's gender, a person must provide "proof of a gender change," which can be a written statement from a physician, psychologist, psychiatrist, life counselor, clinical social worker, or other professional that is overseeing the gender change and certifies the change in gender.[196] For New York City residents, individuals can change their gender on their Municipal

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[188] Department of Highway Safety and Motor Vehicles, Division of Motorist Services, *Gender Reassignment Requirements,* Document ID Number: 034-2011 (July 29, 2011).
[189] Equality Florida, *Florida to Amend Birth Certificate Gender Marker Change Requirements,* available at https://www.eqfl.org/transactionfl/birth-certificates (last visited October 26, 2019).
[190] *Id.*
[191] *Id.*
[192] NY Civ. Rights Law §60.
[193] NY Civ. Rights Law §61(1).
[194] *Id.*
[195] New York State Department of Motor Vehicles, *Change Information on DMV Documents*, available at https://dmv.ny.gov/address-change/change-your-name-or-non-address-information-dmv-documents (last visited February 16, 2019).
[196] *Id.*

Identification Card by marking their desired gender on the application.[197] People have the option to choose male, female, or no gender.[198]

For individuals born in New York State, excepting New York City, a person must make a written request to the New York State Department of Health, Bureau of Vital Records.[199] The person must also provide a notarized affidavit from a physician, nurse practitioner or physician assistant: (1) "confirming that surgical procedures have been performed on the applicant to complete sex reassignment" or (2) "that the applicant has undergone appropriate clinical treatment for a person diagnosed with Gender Dysphoria as defined in the most current edition of the *Diagnostic and Statistical Manual of Mental Disorders* or language stating that the applicant has undergone appropriate clinical treatment for a person diagnosed with Transsexualism as defined in the most current edition of *International Statistical Classification of Diseases and Related Health Problems;* or as these diagnoses may be referred to in future editions."[200]

As of January 1, 2019, New York City has adopted progressive procedures regarding a change of gender on birth certificates for persons born in New York City. The city has eliminated the requirement to submit a letter from a physician, noting that practitioners simply comply with their patients' request, so the requirement did not add sufficient value.[201] Now, it is sufficient to submit a completed birth certificate correction application and a signed and notarized attestation of gender identity signed by the applicant (if over 18) or by the person's parent or guardian (if a minor).[202] New York City allows individuals to choose the "X" gender marker in addition to "M" or "F".[203]

12. Texas

Texas law is problematic for gender change, as the Texas courts have held that there is no process in the statutes to authorize a legal change in gender. Obtaining a name change is relatively easy in Texas. The applicant must file the petition for name change in the county in which the person resides.[204] The petition must be verified and include the following information:

- the present name and place of residence of the petitioner;
- the full name requested for the petitioner;
- the reason the change in name is requested;
- whether the petitioner has been the subject of a final felony conviction;
- whether the petitioner is subject to [the sex offender registration program];
- a legible and complete set of the petitioner's fingerprints on a fingerprint card format acceptable to Department of Public Safety and the Federal Bureau of Investigation;"
- the petitioner's sex, race, date of birth, driver's license number for any driver's license issued in the 10 years preceding the date of the petitioner; social security number; and assigned FBI number, state identification number, or any other reference number in a criminal history record system that identifies the petitioner.[205]

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[197] Sylvia Rivera Law Project, *How to Change Your ID Documents for Trans, Gender Non-Conforming, and Intersex (TGNCI) Individuals,* current as of 2019, available at https://srlp.org/resources/changeid/#IDNY (last visited February 16, 2019).
[198] *Id.*
[199] See Letter dated September 28, 2015 from Guy Warner, Director of Bureau of Vital Records available at http://www.transequality.org/sites/default/files/docs/id/Instruction%20sheet%2005-23-14.docx#overlay-context=documents/state/new-york (last visited February 17, 2019).
[200] *Id.*
[201] New York City Department of Health and Mental Hygiene Board of Health, *Notice of Adoption of Amendment to Article 207 of the New York City Health Code,* available at: https://www1.nyc.gov/assets/doh/downloads/pdf/notice/2018/noa-amend-article207-section207-05.pdf (last visited February 17, 2019).
[202] *Id.*
[203] *Id.*
[204] Tex. Fam. Code Ann. §45.101.
[205] Tex. Fam. Code Ann §45.102.

To change one's name for purposes of a driver's license, a person needs to provide a court order or an amended birth certificate indicating the name change.[206] In order to change gender marker on a driver's license in Texas, a person must provide either a court order or an amended birth certificate.[207]

As with changing a person's gender marker on the driver's license, a person needs to provide a court order to the Texas Vital Statistics that denotes the change in "sex" (note: the order must say "sex" and not "gender" to comply with the statute).[208] This is problematic because judges may not order the change in gender (or sex). For example, in *In re Brandon Groves McReynolds,* the Court of Appeals of Texas denied a petition of a transgender male who had completed gender confirming surgery.[209] Brandon was asking the trial court to change his legal gender from female to male.[210] The trial court did not grant his petition, finding that the Texas code did not allow for such a change.[211] The appellate court agreed, finding that "there is no statutory scheme expressly authorizing sex change orders or establishing procedures for obtaining such an order."[212] This finding prevented Brandon from receiving an amended birth certificate and a change in the gender marker on his driver's license, so his outward appearance and legal documents would not match.

C. Federal Identification Documents

1. U.S. Passport

Currently, the United States Department of State Foreign Affairs Manual provides that it is the policy of the Department that "sex reassignment surgery is not a prerequisite for passport issuance based on gender change."[213] The only documentation that is required is a medical certification of gender transition from a licensed physician "who has treated the applicant for her/his gender-related care or reviewed and evaluated the gender-related medical history of the applicant."[214]

The signed, original certification or statement must be on the physician's office letterhead.[215] Licensed physicians are defined only as doctors of osteopathy (D.O.s) or medical doctors (M.D.s).[216] The medical certification must include certain information of the doctor, as well as language stating (1) "that she/he has treated the applicant or has reviewed and evaluated the medical history of the applicant and that she/he has a doctor/patient relationship with the applicant"; and (2) "the applicant has had appropriate clinical treatment for gender transition to the new gender of either male or female."[217] A two-year limited validity passport is available for persons who have just begun and are in the initial states of the gender transition process, so long as the physician certification states that the individual is in the process of gender transition.[218] Note: the language in the physician's letter should mirror the language in the Foreign Affairs Manual, and deviation from the stated language may result in rejection of the application.[219]

13. Social Security

While the social security card itself merely states a person's name and social security number, sex is one piece of information currently requested on the SS-5 form to obtain a social security number and is maintained by the Social Security

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[206] Texas Department of Public Safety, *How to Change Information on your Driver License or ID Card,* available at http://www.dps.texas.gov/DriverLicense/changes.htm (last visited February 17, 2019).
[207] *Id.*
[208] Tex. Health & Safety Code §192.011.
[209] *In Re Brandon Groves McReynolds,* 502 S.W.3d 884, 885 (TX Ct. of Appeals, Dallas 2016).
[210] *Id.*
[211] *Id.*
[212] *Id.* at 888.
[213] 8 FAM 403.3-1(d).
[214] 8 FAM 403.3-1(e); 8 FAM 403.3-2(B)(a).
[215] 8 FAM 403.3-2(B)(a).
[216] 8 FAM 403.3-2(B)(c).
[217] 8 FAM 403.3-2(B)(d).
[218] 8 FAM 403.3-2(B)(f).
[219] *Know Your Rights,* National Center for Transgender Equality, available at: https://transequality.org/know-your-rights/passports (last visited February 12, 2019).

Administration.[220] This information can then be used to verify the identity of an individual.[221] The largest verification system, the Social Security Number Verification System, eliminated gender in the verification process in 2011; however, smaller systems may still match gender against Social Security Administration records.[222] If a person's gender does not match the sex as kept by the Social Security Administration, a "No-Match" could occur.[223]

In addition to "Identity" documents (such as a U.S. driver's license, state-issued identification card, or U.S. passport), persons wishing to change their gender marker with Social Security will need to provide one of the following:

- A fully-valid, 10-year U.S. passport showing the new gender;
- State-issued amended birth certificate showing the new gender;
- Court order directing legal recognition of change of gender; or
- Medical certification of appropriate clinical treatment for gender transition in the form of an original letter from a licensed physician.[224]

Any of the documents the applicant provides must have enough biographical data to clearly identify the individual.[225]

14. Selective Service

Current law provides that persons who were assigned male at birth and living in the United States must register with the Selective Service System within 30 days of their 18th birthday.[226] This means that male-to-female individuals must register.[227] Female-to-male individuals are not required to register.[228] Failure to register can mean a person could be permanently barred from federal student loan programs, placement in federally funded job training programs, placement in government jobs (including law enforcement) and obtaining a driver's license in some states.[229]

VII. Legalized-ish Marijuana

One of the fastest growing industries today is the marijuana industry. With marijuana now legal in more than 30 states for either medicinal or recreational purposes, clients are seeking advice about how to invest in and/or structure marijuana businesses, licensing related to the industry, and how to plan for the wealth created from the company.

Although states may legalize the production and sale of marijuana, it is still illegal at the federal level. MRPC 8.4 says it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." In addition, the oath taken by attorneys sworn into most states require the attorney to promise to uphold the laws and Constitution of the United States as well as the laws and Constitution of the licensing state.

Is an attorney permitted to advise a client with respect to a business that is legal in the state but a crime at the federal level? What about use of the product by the attorney? Is the answer different if the use is medical instead of recreational?

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[220] Carolyn Puckett, *The Story of the Social Security Number*, Social Security Bulletin, Vol 69, No. 2, 2009.
[221] *Id.*
[222] *Know Your Rights, supra.*
[223] *Know Your Rights, supra.*
[224] *How Do I Change My Gender on Social Security's Records?*, available at https://faq.ssa.gov/en-us/Topic/article/KA-01453 (last visited February 12, 2019).
[225] *Id.*
[226] *Selective Service Registration and the LGBTQ Community,* available at https://www.sss.gov/Portals/0/Resources/Newsletter/LGBTQ_Youth.docx (last visited February 12, 2019).
[227] *Id.*
[228] *Id.*
[229] *Id.*

A. Advising Clients in the Marijuana Industry

The contradiction created by the listing of marijuana as a controlled substance at the federal level and the legalization of marijuana at the state level presents a particular ethical conundrum for attorneys. In addition to the restrictions under MRPC 8.4 on an attorney engaging in criminal acts, MRPC 1.2 prohibits attorneys from counseling "a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Most state ethics rules governing the practice of law also contain a version of the language prohibiting attorneys from advising a client to violate the law or from assisting a client to violate the law.

Several ethics governing bodies have provided guidance to their attorneys regarding this conundrum. In August 2015, the Los Angeles County Bar Association Professional Responsibility and Ethics Committee issued an Opinion addressing the following questions:

- *Do the State Bar Act and the California Rules of Professional Conduct prohibit a member from advising a client on how to individually or collectively cultivate, distribute and consume marijuana in a manner that would not constitute a crime under California law even though such conduct by the client would violate federal law?*

- *Do the State Bar Act and the California Rules of Professional Conduct prohibit a member from drafting incorporation documents and incorporating a cooperative which would be engaged in collective cultivation of marijuana in a manner that would not constitute a crime under California law even though such conduct by the client would violate federal law?*

- *Do the State Bar Act and the California Rules of Professional Conduct prohibit a member from advising and assisting a client already cultivating and distributing marijuana regarding taking actions that would result in the activity not constituting a crime under California law even though such conduct by the client would violate federal law?*[230]

These questions hit the nail on the head. How is an attorney supposed to advise a client on something legal at the state level when that activity is at the same time illegal at the federal level? The guidance in the Opinion is helpful, in that it provides an attorney can counsel marijuana business clients without per se violating the California Rules of Professional Conduct; however, it stops short of giving a truly clear sense of where the line falls.

The Committee analyzed California law and the fact that the California courts had held that state agencies were not preempted by federal law from allowing medical dispensaries as permitted by state law. The Opinion also notes that the United States Department of Justice advised in October 2009 that it does not intend to prosecute those who are in compliance with state medical marijuana laws (absent other associated criminal activity such as money laundering or firearms violations).[231] In addition, the opinion warns Bar members that federal authorities might change their position, which potentially would subject the attorney to criminal prosecution at the federal level in the future.

Ultimately, the position reached is that a lawyer can advise a client how to comply with California law as long as they do not advise the client to violate federal law with impunity. Merriam Webster defines impunity as "exemption or freedom from punishment, harm, or loss."[232] The Opinion does not offer any examples of what advising a client to commit a federal crime with impunity looks like, but concludes:

> *It is the Committee's opinion that the answer to all of these questions is "no," provided that the member does not advise the client to violate federal law or assist the client in violating federal law in a manner that would enable the client to evade arrest or prosecution for violation of the federal law. In advising and assisting a client to comply with California law concerning the cultivation, distribution and consumption of marijuana,*

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[230] Los Angeles County Bar Association Professional Responsibility and Ethics Committee, *Opinion No. 527* (August 12, 2015).
[231] *Memorandum for Selected United States Attorneys*, issued by David W. Ogden, Deputy Attorney General, October 19, 2009.
[232] Merriam-Webster online dictionary, available at https://www.merriam-webster.com/dictionary/impunity.

> *a member must limit the scope of the member's representation of the client to exclude any advice or assistance to violate federal law with impunity. In so doing, the member must advise the client regarding the violation of federal law and the potential penalties associated with a violation of federal law.*[233]

At a minimum, this opinion seems to indicate that there is some room for attorneys to advise clients about the state law issues related to the marijuana business, as long as they remind the client it is a federal crime and could be subject to prosecution. Other state ethics opinions have provided similar advice to attorneys.[234] The general message of the opinions that have been issued is that attorneys may provide advice regarding compliance with state laws authorizing licensing, dispensaries and other business aspects of the marijuana industry. They may also (and probably should) advise clients regarding the consequences possible under federal law, but attorneys may not advise clients to or assist them in violating federal law. The Arizona Opinion 11-01 concluded:

> *In these circumstances, we decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in 'clear and unambiguous compliance' with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits. The maintenance of an independent legal profession, and of its right to advocate for the interests of clients, is a bulwark of our system of government. History is replete with examples of lawyers who, through vigorous advocacy and at great personal and professional cost to themselves, obtained the vindication of constitutional or other rights long denied or withheld and which otherwise could not have been secluded.*

The New York State Bar's Committee on Professional Ethics related its approval heavily to the policy position of the federal government at the time not to prosecute those in compliance with state marijuana laws.[235] Former Attorney General Jefferson B. Sessions, III issued a memorandum[236] rescinding the prior guidance that was discussed so heavily in the New York Opinion. Although the federal government seems to be continuing to leave the states alone with respect to control, regulation and enforcement of marijuana activities within those states that have legalized marijuana, an active change in federal policy might produce a different result than that reflected in those opinions that were issued on the basis of intentional federal disregard.

B. Use of Marijuana by Attorneys

Common sense would indicate that if an attorney has an illness and has been certified to use medical marijuana by a licensed physician as part of a course of treatment, and the attorney is using the medical marijuana responsibly and while present in the state where such use is legal, then the attorney should not be in violation of the ethics rules. Several attorney ethics governing bodies have issued opinions on medical use of marijuana and they have agreed with the common sense conclusion.

Colorado Bar Association's Ethics Committee, for example, addressed this issue in Formal Opinion 124.[237] The opinion concludes that a lawyer's medical use of marijuana in compliance with the law does not, in and of itself, violate the Colorado Rules of Professional Conduct. Like other substances, it is the attorney's use of the substance in a way that does not impact competence that is the critical issue.

> *Use and misuse of marijuana—or, for that matter, any other psychoactive substance, including alcohol, prescription medications, and certain over-the-counter drugs – even when permitted by law, can affect a lawyer's reasoning, judgement, memory, or other aspects of the lawyer's physical or mental abilities. A lawyer's medical use of marijuana, like the use of any other psychoactive substance, raises legitimate*

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[233] Los Angeles County Bar Association Professional Responsibility and Ethics Committee, *Opinion No. 527* (August 12, 2015).
[234] *See, e.g.,* Maine Op. 199 (July 7, 2010); Arizona Op. 11-01 (February 2011); New York Op. 1024 (September 29, 2014).
[235] *Memorandum for All United States Attorneys*, issued by James M. Cole, Deputy Attorney General, August 29, 2013.
[236] *Memorandum for All United States Attorneys*, issued by Jefferson B. Sessions, III, Attorney General, January 4, 2018.
[237] Colorado Op. 124 (Adopted April 23, 2012, Addendum December 10, 2012).

concerns about a lawyer's professional competence and ability to comply with obligations imposed by the ethics rules.[238]

As long as the attorney is competent pursuant to MRPC 1.1 and MRPC 1.16, meaning that the attorney is able to use their legal knowledge and skill, be thorough and prepared, and is proceeding in a way that does not impair the lawyer's ability to represent the client, then the use of medical marijuana does not violate the Colorado RPC.

The other issue addressed relates to that pesky MRPC 8.4, as discussed above in relation to attorneys advising clients in the marijuana business. In making its determination regarding the application of the rule, the Opinion references addressing parenting time where a parent is using medical marijuana. The Colorado Appellate Court found that parenting time could only be restricted if there was evidence that the use of medical marijuana represented a threat to the health and safety of the child.[239] As has been seen in other ethics opinions relating to the state/federal disconnect regarding marijuana legality and analogizing to the relationship between marijuana and harm referenced in the parenting time cases, the Colorado Opinion determined that there would need to be some "nexus between the violation of [federal criminal] law and the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

C. Reporting Obligation Regarding Substance Use

MRPC 8.3 is one of the rules that attorneys dislike the most. This rule requires attorneys to report on one another to the governing ethics commission if the lawyer knows that another lawyer has committed a violation of the MRPC "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Comment [2] of MRPC addresses reporting obligations by one attorney who witnesses another attorney breaking the law:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Depending on the rule of a particular state, it may be difficult to know whether marijuana use within the permissions of state law would rise to the level that requires reporting. The Colorado Opinion mentioned above addresses the issue.

If a lawyer's use of medical marijuana materially impairs the lawyer's ability to represent the client, Rule 1.16(a)(2) requires the lawyer to withdraw from the representation. If another lawyer knows that the lawyer's use of medical marijuana has resulted in a Colo. RPC violation that raises a substantial question as to the using lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, then the other lawyer may have a duty under Colo. RPC 8.3(a) to report those violations to the appropriate disciplinary authority.[240]

This statement stops short of saying an attorney must report and leaves an attorney discretion to determine whether there is a "material impairment" and a "substantial question" as to fitness to practice law. A lawyer's partners and supervisors may be held to a slightly higher standard, however. Because those who are impaired are not always aware of their impairment, and so if a lawyer is "unable or unwilling to deal with the consequences of that impairment, the firm's partners and the impaired lawyer's supervisors have obligations under Colo. RPC 5.1(a) and (b) to take reasonable steps to ensure that the impaired lawyer complies with the ethics rules."[241] The MRPC 5.1 holds partners and those with managerial authority responsible for

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[238] *Id.*
[239] *In re Marriage of Parr*, 240 P.3d 509, 512 (Colo.App. 2010).
[240] Colorado Op. 124 (Adopted April 23, 2012, Addendum December 10, 2012).
[241] *Id.*

the actions of another attorney in violation of the MRPC if the partner/manager knows "at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[242]

The American Bar Association Formal Opinion 03-429 may provide additional guidance as to what the obligations may be for reporting with respect to an attorney who is impaired by marijuana use that is otherwise legal. That Opinion deals with impaired lawyers and reporting obligations with respect to impaired attorneys.

VIII. Living and Working During a Pandemic

A. The Importance Of Setting Boundaries: Six Tips For Lawyers Working Remotely From Home:

1. Pick the right location.

When working out of your house, it's important to /create a designated workspace (not your bed!). If you can't designate an entire room as an office, at least set up a desk in the corner of a room. However, it's also important to avoid feeling isolated.

2. Get the correct tools.

Invest in technology designed to help remote workers. Zoom, Skype and Teams are great resources for video conferencing and communication, while cloud-based legal practice management solutions like Rocket Matter will assist with collaboration, task management and document sharing. Of course, you should also ensure you have a secure, reliable wireless network.

3. Establish a routine.

Without a proper schedule, it can be difficult to stay motivated and productive while remote. Try creating a "heading to work" routine that will help you mentally gear up for the day. You might exercise, shower, eat breakfast, then get dressed. Also, break for lunch and end your work day around the same time of day each day, if possible.

4. Avoid distractions.

Some people relish the peace and quiet of working from home (if you're lucky enough to have it). Others have difficulty focusing, whether due to children, household tasks or other distractions. Do whatever you can to avoid distractions during designated 'work' time – whether that means buying noise-cancelling headphones or arranging your schedule so that you work whenever you feel you are most productive (not necessarily 9-5). Set aside designated times for breaks.

5. Check in regularly.

When it comes to remote work, communication is critical. Since you're no longer right next to your co-workers, schedule check-in meetings with them to connect on projects, daily tasks and other company news. You'll feel more connected to the staff which, in turn, can also help to combat loneliness.

6. Don't forget to leave work.

When you work from home, you're technically always in your office. However, you've got to log off at the end of the day. That's why, when you set a schedule, stick with it – no matter how tempting it might be to respond to a client's email at 11 p.m. Put down your phone for the evening and don't check your email until the next morning.

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[242] MRPC 1.5(c)(2).

B. Privilege and Confidentiality Issues With Working Remotely

1. Maintaining attorney-client privilege in an atmosphere of working remotely

Attorneys have an ethical duty of confidentiality, see ABA Model Rule 1.6, and that duty includes the obligation to protect privileged communications. The privilege is an evidentiary rule that protects information from being disclosed in discovery or at trial, and applies to communications made and kept in confidence between an attorney and client for the purpose of seeking or providing legal advice

Because one element of privilege is that the communication must be confidential, generally privilege does not attach (for example) to a communication that is made in the presence of a third party or without regard for who might hear. Although privilege belongs to the client, it can also be waived by agents of the client, including attorneys, as long as doing so is within the scope of the agent's authority. Such authority may be express or implied, and waiver may occur without client's knowledge or consent. In many cases, the involvement of third parties waives the privilege because it means the confidential communications are being shared outside the attorney-client relationship. However, third parties may fall within the "circle of privilege" depending on the role they are playing and, for some courts, the reasonable expectations of the client (e.g., agents, translators, facilitators, or (in certain cases) consultants).

If using video conference or speaker phone, can other people in the house overhear? Is Alexa listening?

Tip: Be careful to make sure that anyone participating in (or able to overhear) the attorney-client communication falls within the circle of privilege, and should warn clients not to share those communications with anyone else

2. Maintaining confidentiality for non-privileged communications in an atmosphere of working remotely

MRPC 1.6: prohibits a lawyer from disclosing "information related to the representation," with some exceptions. Lawyers have a general duty to keep information about our representations confidential, and that duty extends far beyond privileged communications (e.g., work product, information and documents our clients have provided, facts we've learned in the course of our representation, and even publicly available information).

Jurisdictional approaches to this issue vary (e.g., N.Y.R. Prof. Conduct 1.6: lawyers may reveal information "generally known in the local community or in the trade, field or profession to which the information relates" unless it is privileged, likely to be embarrassing or detrimental to the client, or the client has requested that it be kept confidential).

3. Metadata!!!!

Metadata is "…a description or definition of electronic data, or data about data. Often, metadata can only be accessed in certain viewing modes. Metadata can include descriptive HTML tags and information about when a document was created, and what changes have been made on that document." Word and other similar processing software systems may permit external parties to review the metadata within a document created internally.

Increased circulation of documents via e-mail while working remotely increases the risk that metadata could be disclosed inadvertently. Depending upon what the metadata is, this could be viewed as a violation of MRPC 1.6 if that information is confidential. The disclosure of the same is also a violation of MRPC 1.1 on competence as the lawyer is deemed to understand that this metadata exists.

Tip: Various systems now exist that overlay on the email system to scrub the document of the metadata and convert the document to a .pdf before sending. If the proper systems are in place, the software will ask when a document is presented if it should be screened, etc. For the lawyer not to purchase and implement such software could be a violation of MRPC 1.1 and could result in the violation of MRPC 1.6.

C. Avoiding the "Need for Speed" in the age of COVID-19

In a pandemic-stricken world, there's a tendency for clients to want/expect an immediate response, which makes us all want (or need) to respond right away. This "need for speed" poses a significant risk for attorneys, given that our advice often concerns situations that are factually and legally complex, and we can be held liable if we get it wrong.

Emails and text messages are easy to send, but basically impossible to retract or delete (and have the same impact in court as a formal letter). Ethics rules also include a duty to supervise nonlawyer staff, which is more challenging from a distance in a virtual workplace.

Tip: Have policies and procedures in place to ensure that the people who help us serve our clients are properly instructed about information security, and consider regular training sessions.

D. Duty of Competence

The very first rule of the ABA Model Rules of Professional Conduct provides that "A lawyer shall provide competent representation to a client." To meet this rule, a lawyer must maintain the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The comments to MRPC 1.1 indicate that "the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."

A lawyer's obligation to maintain the requisite competence and skill includes a duty to keep abreast of relevant technology. When working from home, and attorney needs to employ reasonable efforts to avoid cyberattacks, particularly from 'phishing' emails. Some tips for protecting information include:

- Employ strong (not weak) encryption for home Wi-Fi network, emails, attachments and storage devices (e.g., laptops)
- Use two-factor authentication for remote access to office systems and online accounts
- Consider sufficiency of hardware and software security measures, and cybersecurity training for lawyers and non-lawyer staff, specifically with a view to working remotely
- Use secure connection to office computers and documents, and to the Internet (e.g., cloud-based DMS; VPN; remote desktop services (RDS); and virtual desktop infrastructure (VDI))
- Keep operating systems and anti-malware applications current and updated
- Back up data regularly
- Update your home router's firmware

E. Technological Resources (these are ideas, not endorsements)

- Options for home office hardware and applications
  - Plug and go portable second monitor: AOC I1601FWUX 15.6" USB-C powered portable monitor ($179 on Amazon)
  - Mouse: Logitech M825 wireless/Bluetooth keyboard and mouse ($55 at Costco)
  - Scanner:
    - GeniusScan - https://apps.apple.com/us/app/genius-scan-pdf-scanner/id377672876

- iPhone Files or Notes applications - https://www.macrumors.com/how-to/scan-documents-ios-files-app/

- Stand-alone option – ScanSnap iX 1500

- Videoconferencing:

  - Google Meets

  - Skype for Business

  - Zoom (but beware privacy and security flaws!)

  - Microsoft Teams

- Practice management software for law firms

  - Actionstep, a cloud-based practice management software, is offering free access to law firms that are struggling to enable remote working amid the COVID-19 crisis.

  - Rocket Matter says that, to help law firms work remote during COVID-19 quarantines, it is offering three free months of its cloud-based "Essentials" practice management and time and billing product by signing up at the following website: http://bit.ly/rme-3mo

  - Lawcus, the practice management platform, is offering new users a minimum of six months of free service and training to support their law firm to work remotely. Also, they are offering to defer payments for existing customers and new data conversions for up to 180 days on request. Email for information: support@lawcus.com.

- Case management software: CasePacer, case management software for plaintiff law firms, is offering: free standard case import up to 250 cases; no subscription costs and a deferred pricing option for up to two years; and access to CasePacer materials, including tips and tricks for working from home.

- Family law practice management: PartUs, a secure, cloud-based platform that allows attorneys, clients, mediators and other divorce professionals to manage their cases, is offering a free 90-day trial for attorneys. More information can be found at: www.partus.com.

- Videoconferencing for small firms: Legaler is offering free access to its secure online video chat platform to firms of 10 lawyers or fewer. Legaler's platform allows lawyers to schedule, host and archive secure video meetings with multiple participants and screen sharing.

- General counsel and senior risk management knowledge resource: The Senate offers a free Senate for lawyers (and others) to ask and answer questions on coronavirus, such as "Is the coronavirus a Force Majeure event?" It is also offering free pilots. See more at: covid19.senate2sense.com. The Senate is a platform aimed primarily at general counsels and other senior risk managers who need to check their position rapidly on complex issues.

- Contract drafting: Donna, a contract-drafting plug-in for Microsoft Word, is offering an extended three-month free trial to help homeworking lawyers without a printer move from paper contract reviews to onscreen.

- Client intake and CRM: SimplyConvert, a client intake and CRM platform, has put together a white paper to explain how it and other legal tech tools can make sure client opportunities are not missed with staff working remotely. Lawyers Working Remotely – Don't Panic Over Missed Opportunities. It is also offering a 30-day free trial.

- Billing: Time Miner, an application that goes back through your activity and finds billable time, is offering a seven-day free trial. (Note: This is its standard offer, not a special one related to coronavirus.)Conclusion

IX. Conclusion

None of the issues outlined above are easy to address, and sometime they are not even readily identifiable. The more alert we are to the issues facing us as our practice continues to evolve, the better we will be able to avoid violating an ethics rule or coming precariously close without being cognizant of the danger we are in. As Benjamin Franklin said, "We are all born ignorant, but one must work hard to remain stupid." Let us not work hard toward the wrong end, but rather, let us instead be aware of our changing world and work every day to be smart.

APPENDIX A
HUMAN RIGHTS CAMPAIGN GLOSSARY OF TERMS

Androgynous: Identifying and/or presenting as neither distinguishably masculine nor feminine.

Asexual: The lack of a sexual attraction or desire for other people.

Bisexual: A person emotionally, romantically or sexually attracted to more than one sex, gender or gender identity though not necessarily simultaneously, in the same way or to the same degree.

Cisgender: A term used to describe a person whose gender identity aligns with those typically associated with the sex assigned to them at birth.

Closeted: Describes an LGBTQ person who has not disclosed their sexual orientation or gender identity.

Coming out: The process in which a person first acknowledges, accepts and appreciates their sexual orientation or gender identity and begins to share that with others.

Dead name: (n.) Name assigned at birth, if an individual chooses to no longer use that name (also can be "birth name" or "given name"). Note: not everyone chooses to change their name; (v.) the act of calling someone by the name assigned to birth rather than the individual's chosen name.

Gay: A person who is emotionally, romantically or sexually attracted to members of the same gender.

Gender dysphoria: Clinically significant distress caused when a person's assigned birth gender is not the same as the one with which they identify. According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), the term - which replaces Gender Identity Disorder - "is intended to better characterize the experiences of affected children, adolescents, and adults."

Gender-expansive: Conveys a wider, more flexible range of gender identity and/or expression than typically associated with the binary gender system.

Gender expression: External appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.

Gender-fluid: According to the Oxford English Dictionary, a person who does not identify with a single fixed gender; of or relating to a person having or expressing a fluid or unfixed gender identity.

Gender identity: One's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.

Gender transition: The process by which some people strive to more closely align their internal knowledge of gender with its outward appearance. Some people socially transition, whereby they might begin dressing, using names and pronouns and/or be socially recognized as another gender. Others undergo physical transitions in which they modify their bodies through medical interventions.

Intersex: An umbrella term used to describe a wide range of natural bodily variations. In some cases, these traits are visible at birth, and in others, they are not apparent until puberty. Some chromosomal variations of this type may not be physically apparent at all.

Lesbian: A woman who is emotionally, romantically or sexually attracted to other women.

LGBTQ: An acronym for "lesbian, gay, bisexual, transgender and queer.

Living openly: A state in which LGBTQ people are comfortably out about their sexual orientation or gender identity – where and when it feels appropriate to them.

Non-binary: An adjective describing a person who does not identify exclusively as a man or a woman. Non-binary people may identify as being both a man and a woman, somewhere in between, or as falling completely outside these categories. While many also identify as transgender, not all non-binary people do.

Outing: Exposing someone's lesbian, gay, bisexual or transgender identity to others without their permission. Outing someone can have serious repercussions on employment, economic stability, personal safety or religious or family situations.

Pansexual: Describes someone who has the potential for emotional, romantic or sexual attraction to people of any gender though not necessarily simultaneously, in the same way or to the same degree.

Queer: A term people often use to express fluid identities and orientations. Often used interchangeably with "LGBTQ."

Sex assigned at birth: The sex (male or female) given to a child at birth, most often based on the child's external anatomy. This is also referred to as "assigned sex at birth."

Sexual orientation: The scientifically accurate term for an individual's enduring physical, romantic and/ or emotional attraction to members of the same and/or opposite sex, including lesbian, gay, bisexual, and heterosexual (straight) orientations. Avoid the offensive term "sexual preference," which is used to suggest that being gay, lesbian, or bisexual is voluntary and therefore "curable." People need not have had specific sexual experiences to know their own sexual orientation; in fact, they need not have had any sexual experience at all.

Social transitioning: This term refers to the number of changes that can be made in a trans person's social life and situation, including use of a different name, use of different pronouns, surface transformations of the physical appearance, use of a bathroom that suits the person's gender more accurately, and other differences in social role or living situation.

Transgender: An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.