

Transgender Law Center

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Some Courtroom Concerns of the Transgender Community¹

Members of the transgender community have many of the same courtroom concerns that everyone has. We want to be respected, to be heard, and to be able to understand the legal proceedings and outcomes. We are also concerned about adequate accommodations for non-English speakers, respect of cultural differences, and elimination of racial and economic bias.

In addition to these concerns, transgender litigants may also have some relatively unique concerns based on gender identity. While individual members of our community will undoubtedly have additional concerns, issues of concern that have been reported to our organizations include preservation of privacy, use of correct name and pronoun, elimination of gender-identity bias, and protection of transgender criminal defendants.

Privacy

Transgender people who petition for a court order recognizing their name and/or gender must appear before a California Superior Court Judge. The emotions an individual petitioner might feel during this process run from fright to exhilaration to boredom.

For someone who does not openly identify as transgender, fear about having the petition denied may be compounded by fear that their transgender status will be revealed to other people in the courtroom. It's possible that someone else in the courtroom may only know this person by the name and in the gender they are asking the court to officially recognize. Therefore, a casual comment by the judge may inadvertently "out" the petitioner.

Questions about a petitioner's prior identity are sometimes unavoidable in a proceeding of this sort. No one is asking that those inquiries not occur. However, if they are not necessary, we do ask that the procedure be completed with as much discretion as possible.

Use of correct name and pronoun

While respect is a concern of everyone in a courtroom, it is very important that transgender people are shown respect by being addressed by the correct name and pronoun. While this might seem like a simple thing to do, our experiences show that it is not always done.

In some cases, the gender of the transgender person is a contested or material issue in the underlying proceeding. More often, however, it is not. Even in cases where a person's gender is a contested issue, there is no reason that a transgender person should be addressed by an old name

¹ These four areas of concern are only a few of the courtroom concerns that members of the transgender community have. If you are interested in additional information about transgender issues, please contact either the National Center for Lesbian Rights or the Transgender Law Center at the numbers or email addresses above.

or a birth-assigned gender. The better practice, and the one adopted by most courts, is to refer to the person by his or her preferred name and gender. Where the person's gender is at issue in the case, the court can note that using the person's preferred pronoun is a matter of courtesy and does not indicate how the court will resolve the legal issues in dispute. In practice, it often happens that a party in the courtroom (the judge, an attorney, the court reporter, a bailiff, etc.) will address a transgender person by the wrong name or pronoun out of ignorance, bias, or hostility. In addition to personally showing respect to transgender people in the courtroom, a judge should request, and if necessary demand, that everyone else does the same.

Elimination of gender-identity bias

Gender-identity bias can exist in many ways, both subtle and overt. In addition to the ways described above, it can manifest as a general uneasiness or distrust of a witness or party. Bias often appears most clearly in child custody cases. Transgender parents often fear that gender identity bias will unfairly affect their chances in a custody battle.

One way this can happen is during a court-ordered fitness evaluation. Often times, the mental health professional appointed by the court is not well-versed in issues of gender identity. The evaluator may therefore focus much of the evaluation on the person's gender identity, while ignoring the many other aspects of the parent's life. It is possible that an evaluator in a situation like this may be able to produce report that is, on its face, bias-free. However, the report is still likely to be unbalanced if it places an inordinate emphasis on the parent's transgender status, or allows knowledge of the parent's transgender status to distort other information.

As much as possible, a judge should assign these cases to an evaluator who has training and experience in working with the transgender community. When that is not possible, a judge should give sufficient weight to any independent analysis submitted by a transgender parent that seeks to balance out a report that may, intentionally or not, contain gender-identity bias.

Safety of criminal defendants

Often times, criminal defendants who are in custody have special concerns about their safety while awaiting their time in the courtroom. While these defendants are in a jail setting, minimal efforts are made to provide for their safety. However, when they are waiting to appear before a judge even these minimal protections often disappear.

Sometimes a transgender defendant is held in a separate or "secure" cell at the courthouse. However, that cell is often next to or across from cells of other criminal defendants. When this is the case, the transgender defendant is then often the target of verbal abuse. Other times, a transgender defendant is housed in the same cell or room as other defendants. In these cases, verbal abuse often escalates to physical and sexual violence.

Judges must play a role in insuring the safety of transgender criminal defendants. Because of the nature of criminal cases, defendants are often brought to a courthouse for several hours and appear before a judge for only several minutes. Steps must be taken to protect defendants from the physical and emotional danger that this situation presents.

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