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Preface

This manual is intended to give you an overview of the legal issues that most commonly affect gay men, lesbians, bisexuals, transgender folks, and people living with HIV. It is designed as a reference manual for responding to GLAD Answers calls. The manual is inevitably a work in progress, as the laws continually change over time. However, the information included here will assist you in identifying potential GLAD cases, educating callers about their legal rights, and referring callers to appropriate resources, including attorneys, legal services and social service agencies. Topics such as employment and family law are discussed at length because many of our calls are about these issues. You will receive calls that go beyond what this manual covers. Consult with your supervisor when this happens.

Since the law is always changing, this manual should not be distributed outside of GLAD, because it may be misconstrued as providing legal advice. Instead, this manual provides legal information; legal advice, in contrast, is a recommendation of a particular course of action after an attorney’s thorough review of all the facts and circumstances in a matter.

The manual was originally based on Massachusetts law, because the majority of our calls come from Massachusetts. However, with each edition, we try to include more information on the other New England states. If you get calls from another New England state and the relevant information is not in the manual, you should consult the state specific overview publications or contact your supervisor.

Working on GLAD Answers can be both challenging and rewarding. It is a wonderful opportunity to learn a lot of information and to share that information with others. Working with callers is a chance to teach, think creatively, solve problems, and empower others. Our legal system is at best bewildering and at worst inaccessible. Your job is to give callers the information and tools they need to fight back against discrimination and access the legal system. The more people know about and exercise their legal rights, the closer we all come towards achieving equal justice under law.
The Work of GLAD

GLAD’s Mission

Through strategic litigation, public policy advocacy and education, GLBTQ Legal Advocates & Defenders (GLAD) works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has four major programs: the Civil Rights Project, the AIDS Law Project, the Transgender Rights Project and the Public Affairs & Education Department.

Impact Litigation

The Civil Rights Project, AIDS Law Project and Transgender Rights Project focus on impact litigation; i.e. they represent individuals or groups in cases which they believe will establish favorable legal precedents for the gay, lesbian, bisexual, transgender or HIV-impacted communities. Our hope is that by focusing our limited resources on a few important cases, we can effect change in the legal system for all gay, lesbian, bisexual, transgender and HIV+ people, rather than just resolving individual problems which have little or no impact for a broader group of people. In our legal system, if you get a high court to rule favorably on an issue, other courts must look to that decision and rule similarly or have a good reason for not ruling similarly. That is the power of impact litigation. Through one court victory, GLAD can change the law for an entire state, region or even for the country. Because the focus of our work is impact litigation and our resources are limited, we take very few of the cases that we are consulted about. GLAD is not a legal service organization that provides legal representation to everyone who calls. Unfortunately, many people who call us do not realize that we do impact litigation and do not provide legal services. One of your jobs will be to educate callers about GLAD in general and impact litigation in particular.

Public Education And GLAD Answers

Although we cannot represent many of the people who would like us to, GLAD’s Public Affairs & Education Department does everything possible to make sure that as many people as possible know about their legal rights and how to access the legal system. When people call us for assistance on a legal problem, we provide legal information over the phone or in writing. If we are unable to provide the information needed, we refer the caller to other groups who can help. GLAD also acts as a resource for attorneys in the community, providing them with consultations and with sample legal documents to assist them in their representation of gay, lesbian, bisexual, transgender and HIV+ clients. GLAD Answers allows us to assist thousands of people each year.

GLAD Answers is also known as “intake” because in addition to providing information, you will be screening callers to determine whether or not their case is a potential impact case. In this sense, you are doing “intake” for our litigation projects. The attorneys who run the projects are looking for very particular kinds of cases, and the kinds of cases they want can change over time, as the law changes, and as the issues facing our communities change. It is critical that you become able to distinguish between a potential impact case and a routine call that should be referred to a private attorney. Don’t worry, you can always ask for help.

The majority of calls we receive, however, are not impact cases. Rather, they are from people who have experienced discrimination or have other legal issues and need to learn more about how the law affects them. That’s where you come in. GLAD Answers workers must be clear that what we provide is legal information; not legal advice or legal representation. Often, callers expect GLAD to represent them. You must make it clear that we do not represent most people who call. We simply do not have enough attorneys or support staff. Nor can we give legal advice over the phone. In addition to being unethical, there is no way to truly assess a situation in a short phone conversation. While we cannot provide that kind of guidance to a caller, it is often the case that the caller does in fact need legal advice or representation. Only a qualified attorney can really advise someone of their full range of legal rights and options. GLAD meets the need for legal advice and representation through its Lawyer Referral Service, described below.

The Lawyer Referral Service

There is a tremendous need for legal representation in the gay, lesbian, bisexual, transgender, and HIV+ communities. Understandably, people want to go to an attorney who will be sympathetic to and knowledgeable about their concerns. To meet this need and offer assistance to all the people GLAD cannot represent directly, GLAD has established the Lawyer Referral Service (LRS). The LRS is a listing of private attorneys who have
agreed to accept referrals from GLAD. They provide us with information about their specialized areas of practice. You will be matching callers with suitable attorneys. We will talk more about the nuts and bolts of making referrals later on. You will be making referrals to LRS attorneys in many of the calls you handle.

You will often get calls from people who cannot afford an attorney. The demand for affordable legal representation far exceeds what is available. Some attorneys will work on a contingency basis. That means that an attorney will not charge a client much up front but will take a percentage of whatever money settlement or award there is. Attorneys usually will not work on a contingency basis unless they think that there is a good possibility that the client is likely to win a substantial award. The LRS notes which attorneys will work on contingency.

GLAD works to identify LRS members who will accept pro bono referrals. This means that they are occasionally willing to take on a case for free. As you can imagine, there are far more people seeking free legal services than attorneys able to provide for them. There may also be other legal organizations or free legal services available to the caller. The section about “Making LRS Referrals” will describe how you should handle these various kinds of calls.
Introduction to Handling GLAD Answers Calls

**Introduction**

GLAD Answers handles over 2,000 calls each year. The majority of calls can be dealt with quickly and simply. Others will require more time. The work of GLAD focuses specifically on discrimination based on sexual orientation, gender identity and expression, or HIV status. However, people call GLAD with a myriad of legal and non-legal needs that fall outside the scope of our work. One of your tasks is to quickly assess what type of issue the caller has, whether or not it is an appropriate GLAD concern, and what information or referral can be given. You will get an unbelievable range of calls while working on GLAD Answers. Be prepared for endless variety.

**What Am I Supposed To Be Doing, Exactly?**

**THE ROLE OF THE GLAD ANSWERS WORKER**

So what have you signed up for anyway? Your work on GLAD Answers will be much easier if you are clear about the purpose of your role. Your task is to work creatively with each caller to help him or her come up with as many options as possible for resolving the problem about which he or she has called. You cannot solve a problem for someone else, but you may be able to give him or her tools and resources needed to help that person decide on the best approach to take. The legal system is bewildering at best, and the information, referrals, and support you offer callers may make the difference between an individual being able to exercise his or her full legal rights or not. Although the legal system has severe limitations and may not provide solutions for everyone, do not underestimate the power of educating people about their legal rights.

- Imagine the power of finding out for the first time, that domestic violence laws can protect you from your same-sex batterer.
- Imagine learning that your public school has a legal obligation to protect you from the kids that taunt you every day because they think you are a “faggot.”
- Imagine learning that, despite what your ex-husband says, he cannot take your kids away simply because you are a lesbian or because you have HIV.
- Imagine hearing that your employer may have to accommodate you as your AIDS-related illness makes it increasingly difficult for you to perform well at work.

**INFORMATION, NOT ADVICE**

From this manual and the training, you will learn a lot about the legal rights of gay men, lesbians, bisexuals, transgender folks, and people with HIV. Your job is to share that knowledge. It is not your job, however, to advise people about what they should do. Keep your conversations with people informational and factual. Stay away from suggesting what they should do. Remember that you are an educator, not a legal advisor. You’ll see below that, in addition to practical concerns about giving people advice over the phone, there are also serious malpractice risks that would be raised if GLAD Answers’ workers gave advice to callers.

**BRAINSTORMING ALTERNATIVES**

Sometimes there is not a legal solution to a problem, or a caller may not want to pursue something through the legal system. Work with callers to think about other options, such as writing a letter to their local paper, getting involved with the issue politically, filing a complaint with the Better Business Bureau, community organizing, etc... You may be able to refer the caller to socially or politically focused organizations; browse the Agency Referral Database (see more below) to find appropriate referrals. It helps to find out from the caller what kind of solution he or she is hoping for. Be creative!

**ISSUE SPOTTING**

One of the most important skills you will be asked to develop on GLAD Answers is the ability to identify the issue a caller is presenting. Often, callers won’t have a name for what they are describing. They will simply tell their stories. Sometimes the issue is obvious: the woman who is worried that her ex-husband will take her children is dealing with a custody issue. Other times, it can be subtler, or a second issue may be hidden between the lines. If a
teen calls about extreme harassment by peers, the issue may not simply be a matter to be resolved by the school; perhaps there is a criminal component as well. Someone calling with questions about marriage may really be asking what legal protections are available to safeguard his relationship with his partner. You need to ask a lot of questions. Without fully understanding the problem, you can’t provide all the information the caller may need.

Sometimes an individual may be hesitant to state that he or she is LGBT or living with HIV. Support and encourage him or her to relate all the details of the story; reiterate that all of the calls we receive are confidential. You may have to ask directly if the issue is related to sexual orientation, gender identity, or HIV status. Sometimes just hearing you say those words will give the caller the confidence to open up.

**FLAGGING CALLS**

Because you are on the front lines, you play a role in helping GLAD attorneys find cases to litigate. While most calls requiring legal representation fall outside of GLAD’s mission of impact litigation, you will occasionally get a call about an issue our attorneys are particularly interested in. Please take a look at the list of such issues on the Flag That Call! sheet. If you think you might be dealing with an “impact” issue that GLAD’s attorneys might be interested in, simply tell the caller that you need to discuss his/her situation with your supervisor and that you’ll get back to him or her as soon as possible. Do not refer the caller to outside attorneys until you have confirmed that it is not an issue in which GLAD is interested. On the other hand, do not suggest that GLAD might take an individual’s case; we don’t want to raise his or her hopes unnecessarily.

**PUBLIC RELATIONS**

For many people, you are their only contact with GLAD. Therefore, you need to serve as an ambassador, representing the organization professionally, with courtesy, and as generously as you can. We like to think of GLAD as an information hub and a place where people turn for legal and community resources. You can play a vital role in helping them feel like they’ve come to the right place by going the extra mile to find information and resources for people who call.

**OUR LIMITS**

Perhaps, the most difficult thing about working on GLAD Answers is realizing that sometimes we cannot help people. Each of you will get calls from people in real need whom you cannot help. We do our best to connect callers with other resources and agencies, but sometimes there is simply nowhere to send someone. Prepare yourself for those calls and for having to tell people that we cannot help them.

**YOUR ROLE, SUMMARIZED**

- Listen to the caller’s story
- Help identify the issue(s) at play
- Flag special cases for GLAD attorneys
- Provide relevant information, written materials (particularly publications), and link to information on GLAD’s website
- Provide legal referrals, if appropriate
- Provide non-legal referrals, if necessary
- Explain GLAD’s mission when we cannot meet a caller’s need

**What to Expect**

GLAD Answers is open for calls every weekday afternoon, 1:30-4:30 PM, in English and we have a translation service we can use if a caller would like to speak in another language. If people call outside of those hours we generally ask them to call back, unless the matter is urgent. If someone is unable to talk during those hours we will make arrangements for a staff member to call them at another time.

In general, each shift is staffed by 1-4 trained volunteers and supervised by one of GLAD’s staff. Volunteers return messages that have come in during the morning and respond to calls that come in during the shift. GLAD attempts to return all calls the same day they come in. In addition, some calls from previous days may require follow-up. Volunteers speak with callers to find out why they are calling and then provide them with legal information and
referrals about the issue of concern. Sometimes you can tell the caller what he or she needs to know right away; other times you will have to do some research and call them back or follow up with a letter or email.

The shift supervisor is available to answer questions and suggest referrals. You can also consult with other volunteers. At the end of the shift, all volunteers and the supervisor meet and discuss the day’s calls.

There is no way to predict how many calls will come in during a shift. Some days only one person calls; other days more than a dozen people call. In general, the average is between 6-9 calls per shift. We also receive intakes by email and letter to which you will be asked to respond. If you are working at a particularly slow time, you may be asked to help out with other tasks, such as clerical work.

Calls that are potential impact cases or which are particularly complicated or difficult will be given to a staff person for follow-up.

Tips For Working With Intake Callers – Best Practices

Most GLAD Answers volunteers are nervous when they begin. People tend to worry about the “nightmare” calls or difficult situations that they anticipate. In fact, most calls are routine, and few callers are really difficult. Nonetheless, the information below is meant to prepare you and put your mind at ease in case you should get a difficult call. These “tips” are based on the experience of staff members who have handled hundreds of calls. Our hope is that you can learn from our experience and not make the same mistakes we did. Of course, each of you will develop your own style and technique for handling calls. If you have a technique that you find works well, please share it with others.

The best rule of thumb is to try to put yourself in the caller’s shoes. If you were calling GLAD, what would you want to hear? How would you want to be treated?

THE CALLER’S STATE OF MIND

The bottom line is you do not know what a caller is feeling or experiencing when they call GLAD. However, keep in mind that many people who are calling GLAD for the first time are in some kind of crisis. People generally do not call a law office unless something has gone wrong. Some people are upset and/or angry. Others may be confused by what has happened. Be patient and empathetic while attempting to keep people focused on the legal issue at hand. If necessary, try to refer people to counseling and community agencies for emotional support.

TREAT PEOPLE WITH RESPECT AT ALL TIMES

Treat people with respect no matter how hostile, unbelievable, etc. they sound. It is not our job to judge people. For example, you may object to gay men engaging in “public” sex. It would not be appropriate for you to let the caller know that you disapprove. Stay professional and respectful regardless of your personal opinions. Put aside your personal biases and work with the caller to provide information and resources about the problem he or she called about. Volunteers are representing GLAD when they are on the phone; what they say reflects on the whole agency. If you get a call about something that personally offends you or seems like it is too much to handle, you should give the call to someone else and talk to your supervisor.

BE AWARE THAT MANY CALLERS ARE SCARED

It takes a lot of guts for some people to call us. Some people may just be reaching out to the gay community for the first time; some may not identify as “gay” or “lesbian”; some may be traumatized by what they have experienced; others may be intimidated about calling a law office or have concerns about confidentiality. Be patient with callers who seem frightened. Acknowledge the courage it took for someone to call. Meet people where they are at; i.e. try to put yourself in their shoes.

EMPATHIZE

Most callers want to know that we understand what they are going through and respect them. Let callers know you understand that what they’re going through is difficult, scary, new, bewildering, etc. If people believe that you genuinely want to understand their experience, they will be much more responsive to your suggestions and referrals.
It is OK for you to say to someone, “it sounds like what you’ve been through is terrible” or “I’m sorry you have to go through this.” Listen to what people are telling you, ask questions if you don’t understand. One of the most important and powerful things you can do as a GLAD Answers worker is to listen and let people know that they are not alone.

**DON’T GRILL PEOPLE AS IF THEY WERE WITNESSES ON TRIAL**

A common phenomenon among eager, young law students is the tendency to grill callers about their stories. While we should let people know the kinds of questions they can expect about their case, most people will become defensive when barraged with questions. They can take your tone to mean that you do not believe them. You may want to explain that you are asking questions, not because you don’t believe the caller, but because you need to get all of the information possible for your intake. You may also talk with the caller about the fact that other people may ask them the same questions in the future and that they need to think about how they will respond.

**DON’T GIVE PEOPLE THE RUN-AROUND OR GIVE THEM FALSE HOPE**

Understand that you may be talking to someone who has been bounced from agency to agency. Empathize with people who have been given the run-around. Don’t just refer them; rather explain why you think GLAD cannot help them and why you think the referral is appropriate.

A corollary is: take the time to give good referrals, even if that means calling the person back. It saves time in the end. Bad referrals always come back (i.e., the caller will call again because the referral did not work out).

Be realistic with people about what they can expect from a referral. For example, if you are not sure if the agency you are referring to can really help someone, you should tell the caller that you are not sure about whether or not the agency can help. Remember sometimes no one can help.

**ADMIT IGNORANCE & NEVER GUESS OR MAKE THINGS UP**

All of you will get questions that you don’t know or don’t remember the answer to. That is totally OK. When in doubt, just tell the caller “I’m sorry. I don’t know the answer to that off the top of my head. I’ll have to call you back.” It is fine to put someone on hold or get off the phone with them and consult your manual or your supervisor. After you are confident about the answer, call them back. If you “kind of”, “sort of” think you might remember the answer to a question... take the time to look it up or ask someone so that you can be sure. You are not doing anyone a favor by giving out inaccurate information.

**TAKE THE TIME TO FIND AN ANSWER**

Do not underestimate what you know or what you can find out. Between our volunteers, staff, and written resources, GLAD has a ton of information in the office. If you get a call that you think is strange or obscure, chances are that someone in the office has either heard the question before or has some thoughts about where the caller can go for help. Before telling someone we cannot help them, take the time to find out. Try telling callers something like, “I’m not sure that we have that information or we’ll be able to help you, but let me take your name and number. If I find anything useful, I will call you back.” We are not a general information clearinghouse and we cannot answer every question, but if we have the information we should share it.

**ALWAYS FOLLOW THROUGH ON YOUR CALLS**

If you tell a caller that you are going to get back to them, do so. Remember that GLAD has a wide array of written and electronic materials that you can send to callers as a way of following up. If you run out of time, make sure your shift supervisor knows what follow up remains and indicate the status of the call clearly on the intake.

**ALWAYS LEAVE OPEN THE POSSIBILITY OF ADDITIONAL CONTACT – GET CONTACT INFO**

It is almost inevitable that at some point you will forget to tell a caller something or will need to correct information. Don’t worry. Almost every omission or mistake can be fixed. Save yourself some embarrassment by remembering to always get the caller’s name, phone number, email and mailing addresses. You should always tell callers that they can call GLAD back if they have additional questions or problems with the referral we gave. It’s also a good
idea to tell callers that you will call them back if you think of anything else that may be helpful to them. That way if you do have to call back, the caller is expecting it.

**DON'T PROMISE THAT SOMEONE WILL CALL THEM BACK WITHIN A SPECIFIC TIME-FRAME**

If you need to look into a matter further or have a supervisor follow up on a call, please find out if a matter is time-sensitive and assure them that we understand their urgency. Please refrain from telling the caller that we will call back by a specific time, because a rapid response is not always possible, and we don’t want the caller to feel ignored if follow-up takes us longer than anticipated.

**DOCUMENT THE CALL**

It is essential that you document in the database both what the caller told you and what you told the caller. Please make certain to put the date and your initials at the beginning of each entry. Also, make certain that you have recorded all the contact information correctly. This information is needed should additional follow-up be necessary or if the caller calls again for additional information. See the “Nuts and Bolts Database Guide” section for a more detailed discussion.

**Emotionally Charged Calls**

Eventually, after working on the GLAD Answers for a long time, many types of calls will become routine – you’ll know the answers off the top of your head or you’ll know where to find them. However, emotionally charged calls have no textbook answers, and each one can be demanding and draining, no matter how long you’ve worked on GLAD Answers. Below are some common types of emotional calls and suggestions for how to handle them in the moment.

*Note 1:* If a call is too emotionally difficult for you to comfortably handle, feel free to pass it to another volunteer or your supervisor.

*Note 2:* At the end of each GLAD Answers shift, you will have an opportunity to talk through each of your calls with your supervisor. Do not hesitate to share your emotional reactions to calls (to express the frustration or anger or despair that sometimes accompany difficult conversations). It is important to take advantage of this outlet, so the emotions from GLAD Answers do not build up and interfere with your volunteer experience or negatively spill over into the rest of your life.

**PEOPLE IN CRISIS**

Being in crisis simply means that something has happened that has shaken a person up so that he or she is off balance. You may not always realize that someone is “in crisis,” but if a caller sounds really upset, or agitated, or if they are crying, or having trouble speaking, or their thoughts seem disjointed, they may be in crisis. Being in crisis is a natural response to a traumatic or frightening event. It can be triggered by a number of things, but you are most likely to encounter it with callers who have been threatened with or experienced physical violence. It is also a common response in parents who are concerned about losing their children in a custody battle or their children being harmed.

Make sure people are physically safe (victims of violence). Help “normalize” their experience (i.e. explain that it is common for victims of violence to have flashbacks, have difficulty concentrating or sleeping. It’s common for people who are harassed at work to have their performance slip, etc...) For more on working with victims of violence, see the section on violence.

Help focus callers and focus yourself by asking concrete questions or by giving them concrete tasks. Offer them whatever reassurance you can without misleading them. (e.g. I know you’re concerned about having your kids taken away, and you may, in fact, have a battle ahead of you, but I want you to know what the case law says about lesbian custody…. Here are some things you can do to protect your family…”). Keep in mind that the more upset someone is, the less likely it is that he or she will really absorb the information you are giving. You may have to repeat some information or send a follow up letter or email giving the information in writing. A good general tip for any caller is to recommend any of our publications that address the legal issues that affect the caller. That way the caller can read the information and then call us back with questions.
ANGRY OR BELLIGERENT CALLERS

Occasionally we get callers who are angry. Most often callers are angry because of what has happened to them. Some of this anger may get directed at you. Try not to take it personally. Do your best to understand what is really going on and how we can help. If you react by getting angry back, it will probably escalate the situation.

Sometimes, the caller may be angry at GLAD or at something a staff member or volunteer did. If this is the case, try to find out what happened that made them angry. We need to know if they have a legitimate complaint. Politely ask people for details and tell them that you will bring their concerns immediately to your supervisor. If they want to talk directly to the supervisor, put the call through. GLAD promptly investigates all complaints.

If you are dealing with a caller who is unreasonably angry and abusive and does not respond to your efforts to find out what is going on, find an appropriate way to get off the phone. For example, you might say, “It is difficult for me to try and help you when you are this upset. Can you call back when you are feeling calmer?” All of these calls are rare, so don’t worry too much about them.

Remember if you feel like you are struggling with a call, you can always ask your supervisor for help or to handle the call.

PRANK CALLS & HATE CALLS

Prank calls are a reality of this job. Fortunately for those of us working on the GLAD Answers, most of these calls are screened out by our reception staff. However, they do occasionally get through. Expect to hear from everyone from raving homophobes to crackpots. The Fenway Violence Recovery Program is attempting to document hate calls received at gay and lesbian organizations. If a hate call comes in, record as much information about the call as possible and report it to your supervisor. If someone is abusive or vulgar, hang up. It is not your job to listen to someone’s hatred.

BUT WHAT IF THEY’RE CRAZY?

Even so-called “crazy” people have legitimate legal issues. Your job is to help the people who call, not to evaluate their mental health or even the veracity of their stories. Do your best to see if there is a legal issue lurking behind the fanciful tale. Give people the benefit of the doubt and try to address their legal concern even if their story seems unlikely. Even “disturbed” people have the right to good legal information. It is always appropriate to share information with callers whether or not you believe their stories. If someone is truly in need of mental health services, offer them appropriate referrals. We have good resources for people dealing with mental illness. If the person is incoherent or the problem about which he or she is calling is not a legal one, tell them politely that we cannot assist them and why.

How to Tell People You’re Not an Attorney…But You Can Help Them Anyway

For malpractice reasons and for other reasons discussed in a later section, you must tell each and every caller that you are not an attorney and that you cannot give them legal advice. It can be tricky to fit this disclaimer into your conversations with people. And if you don’t work the disclaimer in with some finesse, you can end up sounding like you have nothing to offer the caller.

Emphasize what you CAN do, not what you cannot do. For example, you might say, “before we get started, I want you to know that I am not an attorney and cannot give you legal advice. But I have been trained to answer questions and to provide you with whatever legal information and referrals we have.”

Another way is to start the conversation about the GLAD Answers process: ‘the way our GLAD Answers system works is that I’m going to get some information from you about why you called. Although I am not an attorney and cannot give you legal advice, I will then share with you whatever information I can. If GLAD cannot help you directly, I will do my best to refer you to someone who can.”

If people are skeptical about your ability to help, feel free to tell them that their call will be reviewed by your supervisor.
How To Tell People We Cannot Take Their Case:  Tell Them What We Can Do

Unfortunately, many people who call us think that we provide general legal services for the gay community or they think that their case is an impact case when it is not.  You will inevitably face the disappointment of people who want us to represent them when we cannot.  Think of these situations as an opportunity to educate people about what GLAD really does.

Be upfront with people about what we can and cannot do for them.  If someone wants GLAD to represent him or her and you are clear that it is not a potential impact case, the best thing to do is to explain the nature of impact litigation.  Explain that GLAD has limited resources and focuses on those cases that we believe are going to establish new legal precedents.  You might also explain that thousands of people call us each year and we only have a small number of staff attorneys.  If someone is persistent in his or her belief that he or she has an impact case, tell the caller you will bring the call to the attention of a staff member and we will call her or him back.

Also explain that for the hundreds of callers we cannot represent, we do our best to provide information and referrals to knowledgeable and sympathetic attorneys through the Lawyer Referral Service.  You can also tell them that GLAD attorneys are available to consult with any lawyers working on gay, lesbian, bisexual, transgender and HIV-related cases that are within GLAD’s areas of expertise.

As hard as it can be to tell someone we cannot help him or her, do not make excuses for why we cannot assist someone; just tell the truth.  GLAD does a tremendous amount of work with the limited resources we have.

Types Of Calls

The majority of calls we receive are from individuals facing discrimination due to their sexual orientation, gender identity, or HIV status.  This manual and the training are designed to help you deal with those calls.  However, GLAD receives a variety of other kinds of calls.  We mention some of them below so that you will also be prepared to respond to them.

WHAT DOES GLAD DO?

Many people call simply wanting a better understanding of GLAD’s work.  You can explain our mission to them: GLBTQ Legal Advocates & Defenders (GLAD) is New England’s leading legal rights organization dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression.  Also, refer them to our website, www.glad.org, for more in-depth information.  If a caller does not have internet access, offer to send him or her a brochure and information about GLAD Answers.

CALLS FROM OUTSIDE OF NEW ENGLAND

We do not keep a list of attorney referrals for callers outside of the New England area.  You can find numbers for legal organizations doing work similar to GLAD and numerous other groups nationwide in GLAD’s agency referral database (ARD).

Top 3 legal referrals outside New England:

- Lambda Legal Defense & Education Fund.  Lambda is a legal organization very similar to GLAD that serves the country outside of New England.  Lambda has 5 regional offices.

- National Center for Lesbian Rights.  NCLR is a great resource, particularly for family law and transgender issues and is not limited to serving only lesbians.

- American Civil Liberties Union.  The ACLU’s Lesbian & Gay Rights Project does excellent work on the national level, and the ACLU’s state chapters can serve as more local resources.
**LEGAL BUT NOT LGBT OR HIV-RELATED CALLS**

Some of the calls we receive are from people in the gay, lesbian and bisexual community who have legal concerns that are not necessarily related to sexual orientation, gender identity, or HIV. GLAD serves as a clearinghouse for legal referrals in New England for the LGBT community, so we will provide referrals for almost any kind of matter, as long as an appropriately matched attorney can be found in the Lawyer Referral Service. Also, the attorneys in our Lawyer Referral Service will take cases from people who are not members of the LGBTQ/HIV communities.

Sometimes a caller needs a referral to another advocacy agency with special expertise. For example, someone with a question about the rights of youth (that may or may not have to do with sexual orientation, gender identity, or HIV status) might best be served by the Children’s Law Center. GLAD’s Agency Referral Database (ARD) can help you find appropriate resources (see description of the ARD below). It will take time for you to become familiar with all of the possibilities. In the meantime, consult with your supervisor if you are not sure where to refer someone.

**NON-LEGAL CALLS**

Did you know that if you Google “Gay or Lesbian” anything, you often get GLAD’s website? Remember when you were first coming out and didn’t know where to go or who to contact? GLAD ends up with a lot of calls from folks trying to find “the gay community.” Keep in mind that some callers may be reaching out for the first time and are easily scared off. While it is not our job to be a clearinghouse for all gay and lesbian concerns, we do try to redirect people as kindly and quickly as possible.

GLAD maintains an agency referral database (ARD) of over 1,500 LGBT/HIV-related services and organizations. You can use key words to search for referrals throughout New England. If you cannot locate the proper referral, direct the callers to the Gay and Lesbian Helpline nearest them: In MA, the number for Fenway’s Gay and Lesbian Helpline is 617-267-9001. When in doubt, refer to a Helpline.

**INFORMATION REQUESTS**

We get a number of calls from students and others who simply want a particular piece of information, like the name of a case or a copy of a memo. GLAD’s public education efforts do involve reaching the broader community and educating as many people as possible about the legal rights of gay men, lesbians, bisexuals, transgender people, and people with HIV. Therefore, we do our best to respond to each request. However, these calls are a lower priority than those involving people facing discrimination and/or needing legal assistance.

**LGBT PEOPLE NEEDING SUPPORT**

We get calls from people who need support related to their sexual orientation or who are concerned about a gay family member. Fortunately, there are numerous professional, social, and support groups for people dealing with issues of sexual orientation. Below are listed some of the most common referrals.

- **Coming Out Issues:** In the Boston area, Fenway Community Health Center provides individual and group counseling. The Cambridge Women’s Center has several groups that focus on coming out issues for lesbian and bisexual women.
- **Parents, Friends and Family Members of Gay, Lesbian and Bisexual People:** Parents and Friends of Lesbians and Gays (PFLAG) is an excellent support and action group that has chapters throughout New England (866) 427-3524. In the Boston area there are also groups for wives of gay men.
- **Other Mental Health Services:** For other mental health issues, refer to Fenway, check under “mental health” in the ARD.
- **For referrals outside of Massachusetts:** Consult the ARD or check with your supervisor.

**CASE MANAGERS OR OTHER SOCIAL SERVICE PROVIDERS**

Case managers and other social service providers sometimes call with questions about either their clients’ needs or their own. Please make sure to find out what agency they are calling from. This information may help us serve them better, and it allows GLAD staff to maintain better-informed relationships with our colleagues.
POLITICS AND LEGISLATION

Often people call wanting to know about what legislation exists or is being promoted that affects gay, lesbian and bisexual people. Some people want to “get involved” in the fight for lesbian, gay and bisexual rights. Other callers may have a particular concern that really cannot be addressed through the courts and is better to pursue through legislation. On the state level, these calls should be referred to political groups such as Mass Equality. This group works on lobbying legislation to promote gay rights. It is listed in the Agency Referral Database. If the questions relate to federal legislation or politics, they should be referred to The National LGBTQ Task Force or the Human Rights Campaign (HRC).

CASES AND BRIEFS

Occasionally, people call requesting copies of briefs or case decisions related to GLAD’s work. Briefs and decisions from many of GLAD’s most prominent cases may be available on our website.

MEDIA COMPLAINTS

Sometimes people call because they are upset about the portrayal of gay men and lesbians in the media or because they have confused us with Gay and Lesbian Alliance Against Defamation (GLAAD). Encourage people to write the editor of the publication if appropriate or refer them to GLAAD. GLAAD is also a good resource for people interested in boycotting a company because of its homophobic policies. GLAAD’s number is 1-800-GAY-MEDIA.

Calls You Should NOT Take – Pass Them To Staff

Usually the receptionist will sort incoming calls appropriately, and you should only be getting GLAD Answers calls. However, sometimes calls meant for a staff person slip through to GLAD Answers. If you get one of the following calls, please direct it to your supervisor:

LAWYERS

☐ Because GLAD is seen as a resource in the legal community regarding LGBT civil rights and the rights of people with HIV, attorneys sometimes call us for information or assistance on their cases. Unless they are asking for a discreet resource (for instance, a certain GLAD publication that they know by name), they are probably best served by consulting with GLAD’s attorneys directly. If you discover you are speaking with an attorney, ask for their contact information and the subject of their call and pass their message to your supervisor.

PRESS

☐ Calls from the press should be given to your supervisor.

DUTY TO WARN

☐ If you receive a call from a social worker or health professional concerned about a “duty to warn” about someone with HIV/AIDS the call should be given to your supervisor.

EVENTS & FUNDRAISING

☐ Any inquiries about events, development or fund raising activities or problems should be referred to your supervisor.

SPEAKER REQUESTS

☐ Requests for speakers should be given to your supervisor.
Introduction

Most of this manual is designed to equip you with GLAD’s unique wealth of legal knowledge about GLBT and HIV civil rights, so you can share information about the law with callers. This fabulous chapter, however, is dedicated to explaining the practical aspects of working on GLAD Answers: the concrete resources GLAD has put together to serve the community, answering GLAD Answers calls, and the way we document calls to ensure the service we provide is thorough and consistent.

Use The Manual For Reference

When you are on the phone, do not try to answer people’s complex questions based on whatever legal information you have memorized. Refer to the manual, and the information on GLAD’s website often for:

- In-depth information/Details about the law
- Language suggestions – this stuff can be hard to explain, and we’ve done it once already…
- Checklists and key points – there is too much information to remember without them

GLAD’s publications on various legal issues can be another great resource while you are on the phone. They often explain legal concepts more fully than the manual, and some publications have lists of common referral agencies. There is also a “model language” section on the website for frequently asked questions.

Major Resources – The LRS, the ARD, and GLAD’s Publications and Website

Some people who call GLAD Answers are served well by a simple conversation that provides basic legal information. However, the vast majority of callers need concrete, practical resources in addition to basic information. Rest assured, you have resources at your disposal to help you serve GLAD Answers callers fully.

**GLAD’S LAWYER REFERRAL SERVICE (LRS)**

Because GLAD cannot represent even a small fraction of all the people who call us, we operate a Lawyer Referral Service to match callers needing lawyers with attorneys who are knowledgeable about and sympathetic to the issues of gay men, lesbians, bisexuals, transgender people and people with HIV/AIDS. This arrangement should benefit everyone involved: our callers get referrals to appropriate attorneys; the attorneys get business and the chance to build their practices and expertise; and GLAD is able to serve the people who call us.

While these attorneys have agreed to accept referrals from GLAD, they are not required to actually take the case or represent the caller. The attorney may be too busy, may have a conflict of interest, or may have other reasons for not representing the caller. In such cases, the caller may call us back for additional referrals.

**How The LRS Works**

- You screen for potential impact cases which would be turned over to GLAD staff attorneys
- You assess the type of legal matter in non-impact cases in order to make appropriate referrals
- You give each caller the names of three attorneys from GLAD’s referral list or only one if it is a pro-bono referral.
- Attorney names are given according to a set rotation so that referrals are distributed evenly throughout the referral list.

**GLAD’S AGENCY REFERRAL DATABASE (ARD)**

GLAD’s Agency Referral Database is a tremendous resource. It lists over 1,500 organizations that provide legal and non-legal services throughout the country, with a brief description of each. You can search for resources by keyword, agency name, city, state, languages spoken, or service area.
We try to update the information in the ARD annually. Each record has a field showing when the record was last updated. If a caller informs you of a correction that needs to be made, please write down the details and pass the information along to your supervisor, so the resource can be kept as current and useful as possible.

GLAD’S PUBLICATIONS AND WEBSITE: INFORMATION AND RESOURCES TO SEND

GLAD has produced publications and has a wealth of information on its website. Sending written information or links to information on GLAD’s website can be a good way to follow up with an intake caller, particularly if you did not get to cover everything you wanted to or if the area of law is complex.

Making Legal Referrals

ATTORNEY REFERRALS ARE NOT ALWAYS THE ANSWER

Reason 1: We do not want to refer out cases that GLAD might be interested in litigating. Is the caller’s situation a potential impact case? If so, talk to your supervisor and do not refer the matter to an outside attorney. (A list of issues we are interested in can be found on the Flag That Call! sheet).

Reason 2: Many callers are not well served by calling an attorney. Callers who do not have prospective cases will likely waste their time and energy calling LRS attorneys, because even the nice lawyers of our referral service cannot always answer questions free of charge.

Reason 3: We also want to maintain the good will of the attorneys, by sparing them too many purely informational calls.

Therefore, PLEASE do not provide attorney referrals in a knee-jerk manner: “Take three attorneys and call me in the morning…”

WHEN SHOULD I REFER CALLERS TO ATTORNEYS?

Make referrals when:

• The caller has asked for an attorney referral; or

• The caller is interested in pursuing a claim

Otherwise:

• Consider which agency referrals might be appropriate

• Remember that legal services agencies and state bar associations can also be good resources for people seeking legal help.

WHAT TO TELL CALLERS ABOUT THE LRS

When you provide callers with referrals, you should make sure that they understand the following:

1) They should mention that the referral came from GLAD.
2) LRS attorneys are LGBT-friendly and HIV-friendly and have experience in the areas of law indicated in the database.
3) LRS attorneys are licensed to practice and are in good standing with the Bar Association.
4) LRS attorneys are in private practice and are not on the staff of GLAD.
5) GLAD does not maintain information about their rates. All fee arrangements must be negotiated by the caller and the attorney, independent of GLAD.

6) We give each caller three names (one for pro-bono referrals) to encourage him or her to “shop around” and find the attorney with whom he or she is most comfortable. It is perfectly appropriate for callers to interview attorneys and ask them about their experience, their work style, and their fee arrangements.

7) If the referrals do not work out, the caller should call us back for additional referrals.

8) GLAD lawyers are available to consult with attorneys working on LGBT or HIV-related cases. The caller is welcome to mention that to whomever he or she retains.

WHAT IF THE CALLER HAS NO MONEY?

You should start out knowing that the need for affordable or free legal services exceeds the demand. We will not be able to find legal representation for everyone who needs it. However, callers have a few possibilities:

1) The caller can contact the referrals we gave him or her and try to NEGOTIATE an affordable rate.

2) We can try to find the caller an attorney willing to accept contingency referrals. When attorneys work on a contingency basis, the client does not pay the attorney much up front. Rather the attorney agrees to take a cut of whatever money might be won from a case. This is only possible for cases where a financial award is a possible outcome.

3) If the caller truly has no money, and you cannot find a contingency referral, we can try to refer the caller to an attorney willing to work pro bono, or free. In these cases we provide one attorney name instead of three.

4) The caller may be able to access free or reduced fee legal services if he or she meets the appropriate eligibility criteria. There are a variety of legal service programs. While most are not geared specifically towards gay, lesbian, or bisexual issues, it may still be appropriate to refer callers to those services. In general, those agencies tend to be good about sexual orientation issues. In Massachusetts, Mass Legal Services has a Legal Resource Finder that finds possible no cost or low cost legal aid if the person qualifies. Go to https://www.masslegalservices.org/FindLegalAid.

Sending Written Materials

1) In most cases, you will be sending letters to prisoners, because most people not in prison have email addresses to which we can send the information, often as links. If you mail information, write a cover letter for each package. You may need to explain the materials or clarify something. Even if the person is expecting the package, write a quick note.

2) Attach a “LEGAL MAIL FROM ATTORNEY – DO NOT OPEN” label on the front and back of an envelope if it is going to a prisoner.

Documentation: Learn to Love It!

Welcome to the wonderful world of law—you must document everything. It is important to document what action was taken on each call so that if there is a problem later, we will know exactly what the caller was told. With many different people involved in intake, we can only know the status of a call if each intake worker leaves clear notations about what has and has not been done. Good records also make it easier for your supervisor to review the calls and make sure that we have helped someone to the fullest extent possible. It also helps if someone else needs to follow up on a call. Quite often, people call us back for more information or because they misplaced the referrals we gave or need additional referrals. Having documented their contact with GLAD makes it easy to respond to these kinds of requests. Finally, documentation is important if there is a problem or a complaint from a caller. GLAD receives very few complaints and so far we have been able to resolve every one we have received because we kept good records of our dealings with the caller.
GLAD keeps track of every GLAD Answers call in a database designed for that purpose. You must create a new record in the database for every call you receive. You will document information the caller told you about herself or himself, his or her story, and what you told the caller. You will document what referrals, if any, you made. You will document the times and dates you returned calls. You will document whatever written information you may have sent and any correspondence between you and the caller. Oh, how you will document!

Starting and Ending a GLAD Answers Shift

There are a few basic procedures associated with the beginning and end of each GLAD Answers shift. The following description contains some references to the GLAD Answers Data Entry database, which is described in greater detail below.

**Starting a GLAD Answers Shift**

Log onto the computer and the GLAD Answers Data Entry database using the username and password you will be given.

Figure out what intakes need attention:

- Use the **Find Pending** button to see what needs to be done. You should follow up on any open intakes, even if you did not begin the intake yourself. If it is unclear what follow-up is needed, check with your supervisor. After clicking the button, look under “Found” in the left-side pane to see the number of pending records found. You can flip through the set of found records by clicking on the Rolodex Icon in the upper left.

- Check the Intake mailbox to see if any letters are awaiting a response.

**Ending a GLAD Answers Shift**

At the end of the shift, you will go over calls with your supervisor to check in about difficult questions and decide if any calls need follow-up. You can find all the calls you have handled during the shift, by using the **My Calls** button on the Contact History page. After a prompt for your name and the date, the database will automatically collect all of your calls.

Starting and Ending a Call

**Starting a Call**

Before opening a new record:

1) Ask if the caller has called before, and/or

2) Search for the caller in both the GLAD Answers Data Entry database and Main Database (see below).

Many callers will not immediately tell you that they have spoken to someone at GLAD before, but it saves us all time and energy to know this information up front.

**Ending a Call**

1) Decide whether to keep the call Pending or mark it Closed. Does this caller need anything further? Are we expecting to hear from him or her again?

You do not have to save your work before moving from one call to the next. The database automatically saves all updates as they are made.
Responding To Phone Messages, Emails and Letters

GLAD Answers responds to inquiries made by phone, email, and by regular mail. Please prioritize GLAD Answers inquiries and respond to them in the following order: (1) Phone Calls (2) Email (3) Letters.

**PHONE MESSAGES**

People call GLAD for legal information at all hours of the day, not just during GLAD Answers hours. When calls come in at other times, the call is forwarded to the voicemail on one of the phones in the GLAD Answers Room and at the beginning of each shift, one of the volunteers will listen to and create a record for each message.

**LETTERS**

When you come into the office, please check the Intake mailbox for any letters requesting information from GLAD.

**E-MAILS**

GLAD receives emails for GLAD Answers in one central account. When an email arrives for GLAD Answers, a staff member copies the relevant information directly into the ‘GLAD Answers Data Entry’ database, to await your response.

Always copy the body of your response into the **Response Narrative**.

**ALL CORRESPONDENCE**

Intake letters and emails can sometimes be much more difficult than phone intakes. Often the information provided by the person seeking help is incomplete. This is especially true in the case of emails, where people sometimes even forget to tell us what state they live in. If a person writes or emails with a complicated or incomplete question and gives us their phone number, respond by phone. (In these cases, do not identify as GLAD).

**Be As Thorough As Possible**

1) Respond with as much information as you can, and send whatever written materials are relevant.

2) Assume that the person needs resources and provide referrals. It is unlikely that you will have the opportunity to write back and forth and offer the referrals later.

3) Always give GLAD’s GLAD Answers telephone number and hours of operation in your correspondence. Encourage the person to call GLAD Answers if she or he has questions. There is no substitute for a one-on-one conversation about a person’s particular situation.

**Be Professional**

Any correspondence you write on GLAD’s behalf should be *professional*, even email (which may seem like an informal mode of communication).

1) All correspondence should be typed using Word.

2) Regardless of the style of the information request, your response should include appropriate salutations, full sentences, and capital letters.

3) Sign any letters or emails you write: Your First Name, GLAD Answers Volunteer.

**Introduction to GLAD Answers Data Entry’ Database**

GLAD uses a program called FileMaker Pro for the databases that support the GLAD Answers (although this will be changing shortly to a different database, called iCarol, which you will learn to use to manage your shift schedule). This chapter provides a brief introduction to FileMaker to help you started using GLAD’s system, and you will also be given information on how to use some features of iCarol, but that is not included in this Manual. Relax! The program is easy to use, and the files you will be using are clear and intuitive.
You can access all the files you need through a single file: the “GLAD Answers Data Entry” database. This is where volunteers record individual calls.

**OPENING THE FILE**

Each desktop computer has an icon labeled “FileMaker Pro.” Click on that and then click on “Hotline Data Entry.” If you are nervous about the responsibility of having access to GLAD’s database, don’t worry… you can’t delete any records. However, check frequently to make sure that you are entering information for the right person (using the wheel on the mouse will move you to different intakes).

**STRUCTURE OF THE DATABASE**

There are seven pages to the file, and each page has a set of navigation buttons to move around from one to another:

- Contact History
- Caller Info
- Call Description
- Referrals
- Written Materials
- Demographics
- Staff

In general, you may need to add information to any or all of these pages (except Staff), based on the nature of the call. Each page is described separately in the sections that follow.

**HOW TO USE THE FILE**

Use the “rainbow” navigation buttons at the top of every page to move around from one page to another within a single intake record.

The Contact History page serves as the “Home” page for the Data Entry file, since it is the first page you see when you open the file, and it has two important buttons used for manipulating records:

**Search for Caller Button – What Is It and How Do You Use It?**

Every page has a **Search for Caller** button, which deserves an explanation. When you click on this button a pop-up box appears which allows you to search for the caller either in the GLAD Answers Data Entry database (the one you will be working in) or in the Main Database. When a call is closed and reviewed by staff, it gets moved into another file, the Main Database. The Main Database is just a place to store old records. The **Main DB** button does not move you to another page, as the other navigation buttons do. Instead, it opens up the Main Database file to allow you to search the file for existing records to find out if an individual called GLAD before, as in the case of a Conflict of Interest check.

To find a specific record, enter as much information as you need in the **Name**, **Address**, and **Intake** fields, then click the **Find** button.

- **If no matching records are found**: a pop-up window will notify you.
- **If one or more records are found**: Look under “Found” in the left-side pane to see the number of matching records found. You can flip through the set of found records by clicking on the Rolodex Icon in the upper left

While you are in the Main Database file, at any time, you may use the following buttons to move around:
• **View Print Layout** button: At any time you may view the entire record by clicking this button, then use the **Return to Call** button to get back.

• **Return to Data Entry** button – Use this to get back to the Data Entry file.

• **Download this Record for Editing** button – Use this button to copy the current record from the Main DB into the Data Entry file. This allows you to re-open an existing call for updating. Once the call has been downloaded, you may edit it just as with a new call. When it is once again Closed, it will be Reviewed by the staff and uploaded back into the Main DB.

After you have searched the Main Database for the caller, you should also do a search of the Data Entry Database. When you click on the **Data Entry** button you will get a blank **Caller Info** screen. Fill in as much information as you think is needed and hit the **Find** button. If records are found, you can flip through them by clicking on the Rolodex Icon in the upper left.

### Contact History Page

This page contains information related to interactions between GLAD and the caller relating to this call. There are several different sections of the Contact History page, with fields appropriate to each:

#### PINK NAVIGATION BUTTONS

- **New Call** – This will create a new empty record, and move to the Caller Info section.
- **Find Pending** – This will find all calls needing volunteer attention. (Check at the beginning of each shift).
- **Print this Call** – Allows you to see all the details of the call at once. Use this button if you want to print a record for a staff member to take a look at.
- **Find My Calls** – Shows you all the calls you handled during your GLAD Answers shift.

### INTAKE

You cannot add data to this section. It displays existing information about the initial intake for the call.

### CONTACT LOG

This section lists all contacts that have been recorded for the call, including instances when we have received or left messages. To add a new contact, use the **Enter a Contact** button. This will bring you to the **Contact Record** page, where you can add the following information:

- **Name** – yours!
- **Date** of the contact (entered automatically)
- **Time** of the contact (entered automatically)
- **Type of Contact** (NOTE that you are not allowed to add an “additional contact / written reply” if an “initial intake” has not been previously entered)

After entering the contact information, use the **Return to Data Entry** button to get back to the record of the call.

### Writing Letters

You will want to write letters to follow up on some calls. This section also has two buttons to help you make letter-writing easy:

1) The **Write/View** button will insert the caller’s contact information directly into a letter template, giving you a head start. When you are done, the letter will be stored in the database for reference. Just remember
to make sure the salutation is appropriate (add a title – Mr. or Ms. – when possible) and add your first name in the closing.

2) After writing the letter, you have to return to the Data Entry screen by clicking on the Continue button and then click the Print Letter button to print. Print it on GLAD letterhead.

CLOSING INFO

When the call is completed and is ready to be reviewed by the staff, change the Close Status from Pending to Closed.

FOLLOW-UP

Some calls marked “Pending” will have a description of recommended follow-up indicated in Follow-Up Notes. This description was written by a volunteer or supervisor who wanted to recommend particular next steps. If you put a comment here please enter a date and your initials at the beginning so that the next person doing the follow-up will know whom to contact if there are any questions. Many “Pending” calls will have nothing marked under Follow-Up Notes, but a next step should be evident from the Contact Log (for example, if there is no initial intake, we have not spoken with the caller, so we need to call them) or the Call Description Page.

Caller Info Page

This page contains information related to the person calling. Please try to get as much of this information as possible.

NAME AND ADDRESS / CONTACT INFORMATION

- Fill in as much information as you can get from the caller. (Not everyone is willing to give this information. Assure the caller that all information is completely confidential. If they are still reluctant to give any identifying information, try to at least get a first name).

- Find out the state in which the caller has the legal issue. The law varies from state to state so it is critical that you know what state the caller is talking about. If the caller is calling from outside New England, you need to explain that our agency and our information (for the most part) is limited to New England and refer them to an appropriate agency. The exception to this is if she or he is calling about a national issue or law, such as immigration, military, or Social Security.

- Ask If the Caller Would Like to Be Added to GLAD’s Mailing List. If a caller seems happy with the service provided by our Legal GLAD Answers and/or wants to know more about GLAD, ask them if they would like to be added to our mailing list. This is a way for people to keep informed about the work that GLAD is doing, and any changes in New England law. You can explain that they will receive our newsletters and periodic information about GLAD events.

- Ask the caller if it’s OK to identify GLAD if you need to contact them again, and for the caller’s preferred contact method. If it is not O.K. to identify GLAD, explain to the caller that you will just leave your name. When in doubt, do NOT identify GLAD, since you jeopardize a client’s confidentiality.

OTHER INFORMATION

- If the caller is an attorney or social service provider, check the yes radio button and alert your supervisor.

- Indicate the caller’s gender. Be particularly sensitive to the use of pronouns with transgender callers.

- If the caller was referred to GLAD by another agency or individual, indicate it in the Referred By box.
CONFLICT OF INTEREST

- In cases of non-HIV related personal disputes, a conflict of interest check must be performed (see Policies and Procedures chapter). Due to the privacy rights of people with HIV, we do not do conflict of interest checks for HIV related calls. GLAD does not handle disputes involving HIV transmission. In these cases, refer the caller to the Massachusetts Bar Association Lawyer Referral Service and NOT to our own LRS.
  
  o First, enter the name of the other party in Name to Check.
  
  o Use the Search for Caller button to see if the other party has called before, as described above.
  
  o Set Has a Conflict Check been done? to yes, and if a conflict is found, set Conflict Found? to Yes.
  
  o If there is a conflict of interest you will need to inform the caller that because of a conflict of interest we can only provide him or her with agency or lawyer referrals. DO NOT disclose to the caller the reason for the conflict of interest (i.e. do not confirm that the other person has called GLAD). You may provide agency and lawyer referrals to the caller, but you should end the call as quickly as possible.

Call Description Page

This page stores detailed information about the call – what the call is about, what we have told the caller in response.

CALL IS RELATED TO

This is a quick way to capture the overall nature of the call.

- GLBT, HIV/AIDS, Non-GLBT Non-HIV/AIDS – Please choose the appropriate radio button.

- Call Issue Area: For more detailed description, please select the appropriate area(s). NOTE: You may select more than one. For an issue area that does not appear in the list, please enter it in the Other field.

NARRATIVE OF THE CALL

Why were they calling? What is their story? Include as much detail as possible. What did you tell them? This section can be quite lengthy in some circumstances. The narrative text fields “What the Caller Told You” and “Response Narrative” may be added to for each successive contact, resulting in a complete history of what the caller said and what was said in reply. Please indicate the date and your initials at the beginning of both “What the Caller Told You” and the “Response Narrative”, so there is a clear record of what each volunteer did.

DISCLAIMER

You must say with each and every call, “I am not a lawyer and I cannot give you legal advice.” (See above section called “How to Tell People You’re Not an Attorney…But You Can Help Them Anyway”). Remember to set I Gave the Disclaimer to Yes.

Referrals Page

ATTORNEYS

This section allows you to search for LRS attorneys and record the attorney referrals you make. As described above, the Lawyer Referral Service is comprised of a list of participating attorneys. The system maintains a history of the last referral given to each lawyer, and referrals are given in a round-robin fashion so that no single attorney gets overloaded with referrals.
Use the buttons under **Find LRS Attorneys** to access the LRS system. There are two ways to access the LRS system, **Pro-Bono** and **Fee for Service**. For each of these, the system works the same way:

1) Use the **Search For Attorney** button to open the LRS Attorney database.

2) The next screen will ask you to pick the geographical region for which the referral needs to be made as well as the practice area. Choose from the two drop-down lists, and click **Continue**.

3) You will be presented with a list of attorneys practicing in the region, beginning with the oldest prior referral. Use the **Areas of Practice** list and the caller’s location to search for a lawyer that fits the needs of the caller. If the person’s zip code is on the **Caller Info** tab, the green box on the right will tell you how many miles each attorney is from the caller.

4) Give the caller the attorney’s contact information (or otherwise write the information down to give to the caller later).

5) Record the referral by clicking the **Record Referral to this Attorney** button. This will return you to the Referrals Page, and will automatically enter the name and date for the referral. (Note: Once you have recorded the attorney you cannot delete it and the attorney goes to the end of the rotation. So you may want to write down your referrals and wait until you end the call before recording them.)

6) If you want to cancel the attorney search and return to Data Entry, use the **Return to Data Entry** button.

7) To continue this process and make additional referrals, use the **Continue Search for Attorney** button.

Provide no more than 3 Fee for Service referrals at a time. For Pro-Bono referrals, provide only one (1) at a time.

In addition, you may use the **Show Atty** buttons to see the attorney contact information for any referrals that have already been recorded.

**AGENCIES**

This section provides you with a list of the most common agencies we refer people to, and gives you access to the Agency Referral Database to search for any others to meet a more specialized need. If you find an appropriate agency, there is an area at the bottom of the record that has the contact information that you can then copy and paste into your narrative.

- Use the **Search Agency Referral Database** button to access the ARD. This button puts you in Find Mode.
- To search by Type, select from the **Type of Agency** list, and then click **Find**.
- To search by Name, enter a name in the first Mailing Address field and click **Find**.
- **If no matching records are found**: a pop-up window will notify you.
- **If one or more records are found**: Look under “Found” in the left-side pane to see the number of records found. You can flip through the set of found records by clicking on the Rolodex Icon in the upper left.
- You can use the **Return to Data Entry** button to quickly move back to the Referrals page in the GLAD Answers Data Entry file

To record a referral to an agency, select one or more agencies from the list. If you refer someone to agencies that are not in the list, enter them in the **Other Agencies** field.
The Other (Simpler) Pages

‘**Written Materials**’ Page

Similar to the Agencies lists, select from these lists to record any GLAD publications that you referred the caller to and indicate whether you directed the caller to [www.glad.org](http://www.glad.org) or mailed the print version and also indicate if the caller requested the Spanish version.

‘**Demographics**’ Page

This page captures various pieces of demographic information regarding the caller. **Please enter as much of this data as you are able to collect from the caller during the course of the call, without intrusive questioning.** Please enter the caller’s **Gender** for every call. The **Primary Language** and **Race/Ethnicity** fields have “Other…” entries. Click on these to add choices that are not in the list. Any demographic information you record will assist GLAD in better understanding and documenting who calls the GLAD Answers.

‘**Staff**’ Page

This page is for Staff use only. It is used to record the process of reviewing each call after it is Closed, and for uploading Closed and Reviewed records to the Main Database. As an GLAD Answers volunteer, you do not have the ability to use any of the features of this page.
Confidentiality

Talking About Cases & Clients

All GLAD clients and callers have the right to absolute privacy and confidentiality. Over the years, GLAD has earned the trust of the community. People are willing to call us only because they believe that all the information they give us will remain confidential. In addition, because GLAD is a law office, all communications are considered privileged “attorney-client” communication that must remain confidential. In many cases we are being given information that callers are not sharing with their partners, their employers or their families. To them, and to us, the information is extremely sensitive. Even though you may not be an attorney, that privilege extends to you and anyone working in a law office. A breach of confidentiality could open GLAD up to a malpractice suit.

So just what is confidential? Names of callers or clients and the details of calls or cases should NEVER be discussed outside the office. Volunteers should never discuss a case or a GLAD Answers call with someone besides office staff unless specifically asked to do so by one of the attorneys on staff. Press people and others may call to inquire about cases, but these calls should immediately be directed to your supervisor. Volunteers should not even acknowledge that someone is or is not our client or that someone has called GLAD, because sometimes clients do not wish others to know that they are being represented by GLAD or that they have contacted a law office. You may not disclose to anyone the names of people who have called. Do not confirm or deny that someone has called. Simply say, “I’m sorry, I cannot disclose that information.” If you have any questions about what is confidential and what is not, please consult your supervisor. A breach of confidentiality is grounds for dismissal.

Returning Calls/Leaving Messages

When returning calls, be aware that even saying you are calling from GLAD can inadvertently “out” someone or reveal other confidential information. If the message or intake form says “GLAD OK” then you can leave a message saying that you are calling from GLAD. Unless you know for sure that it is OK to leave a message, simply leave your name and number. Keep in mind that when you are calling someone, s/he may not be able to talk at the moment because others might be present. Always start a conversation by asking “Can you talk now?” or “Is this a good time to talk?”

Third Party Calls & Requests

Sometimes a person will call on behalf of someone else. Whenever possible try to talk directly to the person involved. Never leave information with someone other than the caller/client unless the caller/client has explicitly given you permission to talk to someone else about the problem. Such permission should be noted on the intake form.

People also call sometimes asking us to send written materials to another person. Often these requests are on behalf of a friend, an inmate in the same jail, or a family member. We cannot fulfill requests like these for the same reasons described above: Unexpectedly receiving literature from GLAD could inadvertently “out” someone, and in explaining why we are sending them the packets we would almost necessarily reveal the identity of the original person who called us. Further, there are people who request LGBT-related information for third parties as a way to harass that person. If a caller asks you to send something to another person, tell them we can only do so if the person calls us himself or herself. In the case of an advocate requesting materials for a client, we can send the advocate the literature, which they can then pass on to the client themselves.

Consulting Others About a Call

Similarly, if you feel it would be helpful to talk to another professional outside of GLAD about a case (for example, someone at the Violence Recovery Program), you must get permission from the client and your supervisor first.
Conflicts Of Interest – LGBT Calls

What’s the Problem?
Attorneys have very clear rules about conflicts of interest. That means that they cannot talk to both parties in a dispute. Their job is to represent the interests of one side exclusively. For example, if GLAD were to represent a lesbian who was fighting for custody of her children with her ex-lover, we could in no way assist her ex-lover.

Even though you may not be an attorney and we are not giving legal advice, because the GLAD Answers is ultimately supervised by GLAD attorneys, we need to be aware of the conflict of interest rule. The reasons for this concern follow:

If a GLAD attorney decides to represent someone who called the GLAD Answers, they may not be able to do so if we have talked to the other party. This is known as being “conflicted out” of a case. Talking to both sides of a dispute raises issues about fairness and confidentiality. GLAD has to constantly make sure that we are not talking to both sides in a dispute.

Where are Conflicts Likely to Arise?
You are most likely to encounter problems in disputes between same-sex partners or former partners, such as custody cases, same-sex breakups, same-sex domestic violence cases and same-sex property disputes. Fortunately, it is rare that both parties in a dispute call us. An important exception to this rule is when the call involves a person with HIV. Never ask a person with HIV to reveal the name of the person with whom he/she has a conflict.

So, How Do I Avoid Conflicts?
When you are handling a domestic violence call, custody call or same-sex breakup call, or any call involving a dispute with another LGBT person, be sure to get the names of all the parties involved in the dispute. Before continuing the call, put the caller on hold and do a conflict check through both the main and data entry databases. (Open the database and search for the caller’s (ex- ) partner’s name. Try a variety of spellings to make sure you have searched as fully as possible). Explain to the caller the rules about conflicts of interest in general terms before putting them on hold.

NEVER DISCLOSE THE NAME OF ANYONE WHO HAS CALLED US. That means that if the other party has already contacted us, you cannot tell the caller that. You simply need to say, “I’m sorry, we have a conflict of interest.” We can still provide the caller with the public information on our website and with referrals to other agencies or attorneys in our LRS. Do not answer the caller who asks you if “Jane” called. Just repeat that we have a conflict of interest. Do NOT say, “I can’t talk to you because Jane already called and talked to us.”

Similarly, you should never disclose to one caller any information that you received from another caller. For example, you may not realize GLAD has talked to the other party until someone starts to tell you his or her problem. Obviously, it would be inappropriate to say something like, “When your ex called, he gave a really different story.” Again, you do not want to say anything that could potentially breach confidentiality.

Conflicts of Interest – HIV Calls
Because of the privacy rights of people with HIV, it is important never to ask someone to reveal the name of someone who is HIV-positive. For this reason, we generally do not do conflict of interest checks for HIV calls.

Protecting GLAD From Malpractice
I Am Not A Lawyer, But I Play One On TV
In addition to concerns about confidentiality and conflicts of interest, concerns about malpractice should be uppermost in your mind. Not being an attorney on GLAD’s staff, you must be extremely careful about giving callers only legal information, not legal advice. You must explicitly state that you are NOT an attorney since many people who call GLAD automatically assume that the person on the other end of the phone is a lawyer. To each and every caller seeking legal help, state “I am not an attorney and cannot give you any legal advice.” There is a place on the intake screen to check off that you have made this disclaimer. Some suggestions about how to work this disclaimer into your conversations were discussed above in the section on “Tips For Working With Callers.”
Don’t Evaluate Cases
Even with that caveat to the caller, be careful what information you give out. For example, callers will often ask, “Do you think I have a case?” or “Is this worth pursuing?” or “What my boss did is illegal, right?” Never try to evaluate the merits of someone’s case. Never tell someone whether another person’s actions towards him or her were illegal or not. Such evaluations can only be made by an attorney who has had time to review all the facts of the case. Often people who call us are desperate for an opinion because they are scared about what is going to happen. No matter how persistent the caller is, tell the caller that you cannot give him or her an opinion. Remember your job is to talk about the law generally; don’t try to apply it to a caller’s specific situation. Explain to callers that only an attorney can evaluate if and how the law applies in a particular case.

No Promises
Never promise anyone that we will take his or her case. GLAD’s attorneys have to strategically choose the impact cases that will move the law forward. Sometimes even when a call comes in about an appropriate and compelling GLAD case, we may not have the resources to help. Try saying something like, “GLAD is only able to take callers on as clients less than 1% of the time. If we can’t represent you directly, we can provide you with information on the topic, and referrals to attorneys and community organizations.” You can explain that we have only a small number of attorneys working in all areas of the law throughout six different states and that they have to take the cases that will change the law for large numbers of people.

If you are talking with someone who is extremely insistent about having a lawyer review their case, tell them you will have your supervisor review it and that the supervisor would be able to pass it on to the attorneys. For people who just won’t quit, you can always pass the call directly to your supervisor or have your supervisor give them a call back.

Your Best Defense: I’ll Call You Back
If you do not know the answer to a caller’s question, rather than guess or give them partial information, take their name and number, research the question and call them back later. It is better to admit ignorance than to give out incorrect information. If someone were to rely on incorrect information that she or he got from GLAD, it could put us at risk for a lawsuit.
# Employment Discrimination Based on Sexual Orientation or Gender Identity

## Introduction

Many of the calls we get are related to employment discrimination. Employment discrimination can take many forms, and not all employment discrimination is related to sexual orientation or gender identity. All the New England States have statewide laws prohibiting discrimination on the basis of sexual orientation and gender identity or expression. Although these laws are similar in many respects, people seeking advice should always consult an attorney who is versed in the laws and judicial practices of the state where the discrimination took place. A table outlining each of the laws can be found on the bulletin boards in the GLAD Answers Room.

Unless otherwise indicated, the material contained in this section refers primarily to Massachusetts, though many of the principles may apply in other states.

## Massachusetts Anti-Discrimination Law

### What the Law Prohibits

The so-called Gay Rights Bill (Laws 1989, c. 516) passed in Massachusetts in 1989 after 17 years of lobbying. Now the Gay Rights Bill is codified in Massachusetts General Laws c. 151B and in c. 272. Chapter 151B deals with employment, housing, services and credit and was amended in 2012 to include gender identity. Chapter 272 deals with public accommodations and was amended in 2016 to include gender identity. Under the law, it is unlawful to discriminate against someone in employment because of his/her sexual orientation or gender identity. This law includes both self-identified gay, lesbian, bisexual and transgender people as well as those perceived to be gay, lesbian, bisexual or transgender.

Employment discrimination includes refusal to hire or promote, firing, demotion, unequal compensation and differential treatment. Race, age, religion, sex, national origin and disability discrimination are similarly prohibited. It is a good idea to always ask callers if there are other discrimination issues, in addition to sexual orientation or gender identity.

### Exemptions

There is a broad exception from the law for:

- Religious institutions
- Employers with fewer than 6 employees in Massachusetts


## Sexual Orientation or Gender Identity Discrimination

### Unfairness vs. Discrimination: At Will Employment

Employers have a great deal of latitude in how they treat employees. The general rule governing employees is called “at-will employment.” The bottom line with at-will is that an employee can be fired for a good reason, a bad reason, or no reason at all. A person can be legally fired for a lot of reasons, including a “bad personality match,” lack of professionalism, tardiness, etc. However, they cannot be fired for a discriminatory reason or in breach of a contract.

It is the task of the client to prove that he/she was fired, demoted, etc. because of discrimination and not because of some legitimate reason. These are referred to as “differential treatment” cases, because the gay, lesbian or transgender employee is treated differently than similarly situated persons. In almost every case, the employer will argue that the action taken against the client was because of a legitimate, non-discriminatory reason and not because of the client's sexual orientation or gender identity. Ultimately, the client must show that sexual orientation or gender identity motivated the adverse action and that the employer’s reasons for the action are pre-textual, i.e., a smokescreen for discriminatory action.
Basic Elements of a Discrimination Claim

To prove discrimination on the basis of sexual orientation or gender identity, the client must show:

1) The employer knew or figured out that he/she was gay or transgender
2) The client was qualified for the position from which he or she was fired
3) Adverse action was taken against him/her because of his/her sexual orientation or gender identity.

These three elements make up what is known as the *prima facia* case.

**Adverse Action / Job-related Harm**

The employee must have suffered some job-related harm in order to file a claim of discrimination. A homophobic or transphobic environment is probably not grounds for a discrimination claim, unless the employee can show that he/she suffered adverse consequences because of that environment. Generally, the adverse action is termination of employment, refusal to hire or promote, demotion, or a work environment so hostile that it interferes with the employee’s ability to do the job.

**Proving Discriminatory Conduct**

Sometimes the discrimination is blatant. For example, the client’s boss may have said homophobic things to the client before firing him, or a co-worker finds out that the client was demoted because he was transgender. Even when the discrimination is blatant, the client must have people who are willing to testify about the discriminatory conduct or must have other incontrovertible proof.

More often, however, the discrimination is less obvious. In the absence of direct comments, there are several things to look for:

1) **Timing:**
   In many cases, people will be fired, harassed or demoted right after it becomes known or widely suspected that they are gay or transgender. Sometimes a client will call who has had a perfect work performance record and after their sexual orientation or gender identity becomes known, their employer begins to scrutinize their work and come up with reasons to fault their performance. They begin to get poor evaluations and are ultimately fired for poor job performance. In other cases, soon after the employee’s sexual orientation or gender identity becomes known, the company “restructures” or has to unexpectedly lay off the employee. Whenever a restructuring or layoff only involves one person, there is good cause to be concerned.

2) **Different treatment:**
   Often when discrimination occurs, gay, lesbian or transgender employees will note that they are treated differently than their straight or cis-gender peers. For example, they will be punished or discharged for violating a rule that others violate with impunity. The more a client can document that they are being treated differently than similarly situated peers, the stronger their case for discrimination will be.

3) **Conflicting reasons for employer’s actions:**
   Often when an employer fires someone because they are gay, lesbian or transgender, they trip themselves up in trying to fabricate a “legitimate” reason for the discharge. Sometimes, employers will give different reasons for their actions against a client at different times, or different managers within the company will give different reasons. Any discrepancies that can be uncovered can be used to discredit the employer’s claim that their action was non-discriminatory.

4) **Deviations from generally followed procedures:**
   Sometimes when an employer is trying to get rid of a gay, lesbian, bisexual or transgender employee, they fail to follow their own policies and procedures. For example, policies about verbal and written warnings for misconduct may be ignored when the real motivation for a discharge is discrimination. Or an employer claims they had to lay...
off an employee because of financial reasons when, in fact, if that were true they should have laid off an employee with less seniority.

5) *Inadequate paper trail:*
Sometimes there is nothing in the client’s personnel record to justify adverse treatment. Again, comparing the treatment of others who were in the same position as the caller can be fruitful.

6) *Disparate impact cases:*
There are cases in which an employer has a neutral policy whose impact falls more heavily on (i.e., hurts) a protected group, even though the policy may say nothing about that group. In some cases, people can file discrimination cases against employers for such policies. For example, if an employer subjects all management employees to psychological tests which tend to screen out gay, lesbian or transgender people, there may be a case.

### Sexual Harassment Cases

We often get calls from people who are being harassed by co-workers or employers because they are gay, lesbian, bisexual or transgender. Often clients report that they are shunned, ridiculed, excessively scrutinized or harassed by fellow employees or supervisors. Frequently, the LGBT employee is then blamed for not “getting along with” or not “fitting in with” other employees.

**Harassment by a Supervisor**

In Massachusetts, the law makes a distinction between two types of sexual harassment. One type, harassment by a supervisor, sometimes called *quid pro quo* harassment, occurs (a) where submission to or rejection of the advances, requests or conduct is used as a basis for the employment decisions affecting the individual; or (b) the behavior is explicitly or implicitly a term or condition of employment. Be on the lookout for sexual invitations or activity between the caller and his/her superiors. The gender identity and/or sexual orientation of the harasser and the harassed should not prevent someone from filing a claim. For example, a gay man can sexually harass another gay man, or a woman could sexually harass a man.

**Harassment by Peers**

The other type of sexual harassment, harassment by peers, is more often what we get calls about. Harassment by peers may violate state law if the conduct has the purpose or effect of unreasonably interfering with an individual’s job performance or by creating an intimidating, hostile, or offensive work environment.

Most courts evaluate the working environment with an objective standard: would a reasonable person find this work environment hostile and offensive? As with cases of sexual harassment involving women, the definition of a “reasonable person” is being debated in the courts. Some recent decisions (see *Robinson v. Jacksonville Shipyards, Inc.* and *Ellison v. Brady*) suggest that the perspective of the victim must be taken into account when evaluating hostile environment claims.

In addition to protection under employment laws, people who are being harassed may have additional protection under more general civil rights laws (M.G.L. c. 1, sec. 11H-J). This law protects persons whose “secured rights” under state or federal law are interfered with through “threats, intimidation or coercion.”

In general, clients experiencing sexual harassment will report things like homophobic remarks, pornography being left at their desk, offensive sexual remarks, sexual gestures, and the like. Isolated comments do not constitute a hostile environment. The harassment must be so pervasive that it unreasonably interferes with the individual’s work.

**The Employee’s Responsibility: Duty to Report**

In cases of sexual harassment by co-workers, the employer must have knowledge of the harassment before the company is liable under the law. That is, the client must make clear that the harassment occurred, that it is unwelcome, and that he/she wants it to stop.

The burden is on the employee to 1) prove that the harassing conduct is unwelcome 2) report it to the supervisor. Even though reporting sexual harassment can be extremely difficult, the client must do it if he or she wants to pursue legal action. Clearly, therefore, the individual should not joke along with the comments, but should make his/her
displeasure known. Anyone who “goes along with” or encourages the sexual behavior will have a harder time making a claim. The client should make efforts to document his or her attempts to get the problem redressed by submitting a written complaint or memo or, at the very least, by keeping a written chronology or journal.

**Harassment by Superiors**

When pervasive sexual harassment comes from the employee’s superior, there is likely to be no duty to report. However, reporting it is still the safer course. Sexual harassment by superiors, particularly if it involves sexual behavior, results in automatic liability for the company.

**The Employer’s Responsibility: Duty to Investigate and Remedy**

Once informed of harassment, employers have a duty to investigate and resolve the situation. If they fail to do so, they are liable under state laws. One difficulty with sexual harassment cases is that the law is unclear about what constitutes a reasonable resolution of the situation and the time frame for doing so.

**Constructive Discharge**

In Massachusetts, if an employee’s job becomes so unpleasant that s/he feels that s/he has to quit, s/he may still have a discrimination claim. This situation is referred to as “constructive discharge.” This is a difficult standard to meet, but simply put, even if you are not fired, but leave because of discriminatory conduct, you can still file a claim.

**Accusations of Sexual Harassment**

Another common call involving sexual harassment is one from gay, lesbian or transgender employees who have been falsely accused of sexual harassment. Because one of the most common stereotypes about LGBT people is that they are promiscuous and sexually inappropriate, accusations of sexual harassment are often taken on face value rather than being fairly investigated. Proof that an employer credited allegation against a gay employee when the same allegation against a non-gay employee would not be credited may demonstrate sexual orientation discrimination. Similarly, an employer’s failure to follow established procedures in a complaint against an LGBT employee could also demonstrate sexual orientation discrimination.

**Possible Resolutions To Employment Discrimination Claims**

There are a number of different ways to redress harassment and discrimination in the workplace, many of which are described below. It can be important, especially for people contemplating legal action, to have exhausted all the available channels within their company before proceeding to litigation.

**Internal Resolutions**

Sometimes, most often in cases of sexual harassment, the employer will have an internal grievance procedure in place. The process varies from company to company, but an employee can consult his or her employee manual or can speak to someone in the human resources division about how this policy works. In larger companies, there may even be someone appointed to handle affirmative action, civil rights and sexual harassment complaints. It is important that the company be notified formally, in writing, of the harassment, in addition to verbally informing one’s supervisors. Keep copies of all correspondence relating to acts of discrimination.

**Union Grievances**

If a client is a member of the union, s/he should first try to have the problem redressed through the union grievance process. Union procedures differ; the client should contact their union representative and ask how to pursue a discrimination complaint. Time lines on union grievances are strict, so encourage the caller to move quickly on this.

**Filing a Complaint at the EEOC**

The federal Equal Employment Opportunity Commission (EEOC) is the agency responsible for enforcing the federal employment anti-discrimination law call Title VII. The EEOC Commissioner recently clarified that any LGBT person who has experienced workplace discrimination on the basis of sexual orientation or gender identity may file a complaint claiming sex discrimination. If you file with the state anti-discrimination agency there is a way to cross file with the EEOC. The Trump administration is trying to roll back many of these gains.
Filing a Complaint at the MCAD
If the client believes that s/he was discriminated against because of his/her sexual orientation or gender identity, s/he has a right under Massachusetts law to file a discrimination complaint at the Massachusetts Commission Against Discrimination (MCAD). Anyone who feels s/he has been discriminated against has the absolute right to file and should demand that right if the MCAD discourages them from filing. The next section offers more detail about the MCAD process.

For information about pursuing a complaint in other New England states, see the LGBT Overview publication for that state.

Pursuing A Complaint At The MCAD
Inform clients of this right and advise them that there is a 300-day statute of limitations (i.e., they have 300 days to file a complaint from the last act of discrimination—usually the employee’s termination). Although employment discrimination complaints can be withdrawn from the MCAD into other courts, the MCAD is probably the most sympathetic forum for such complaints, and all discrimination complaints in this state must be started there.

The Complaint Consultation
Let people know that the procedure for filing a complaint is simple, and they do not need an attorney to file. They simply arrange with the MCAD to go in and talk to an MCAD employee. The MCAD will schedule a Complaint Consultation to determine whether the Commission has the legal authority to review and investigate the complaint. If the MCAD determines that they have jurisdiction, they will arrange for the client to meet with an investigator to “tell their story.” Clients should be aware that the MCAD is not their advocate; at this point in the process they are a neutral investigatory agency. The MCAD may try to discourage clients from filing because of a backlog of cases. They are not supposed to make any determination at this consultation beyond jurisdiction, and clients should be made aware that they have the right to file as long as the MCAD has jurisdiction.

Filing the Complaint
Following the consultation, the MCAD will then lead them through the steps to file a complaint. In general, the complaint consists of a short, factual account of the discriminatory conduct.

Investigation and Probable Cause
Once a complaint is filed, the case will be assigned to an investigator. A copy will be sent to the employer, who then has 20 working days to respond, although extensions are routinely granted. After their response is received, the MCAD will send the complainant the employer’s explanation and ask them to rebut it -- i.e., explain why it is wrong and that discrimination is, in fact, the real reason for the adverse action. Then the MCAD makes an initial finding of “probable cause” or “no probable cause.”

Mediated Resolutions and Public Hearings
If probable cause is found, the MCAD becomes an advocate for the individual complainant. The MCAD will seek to resolve the dispute between the two parties. Often cases are settled at this point. Clients who do not have private counsel should be very clear going into settlement talks about what they want from the case.

If no resolution can be found, the matter goes to a Public Hearing before an MCAD Commissioner who hears testimony and serves as the judge in the matter. When the Complainant does not have an attorney, an MCAD attorney will prosecute the case on behalf of the Commission.

At the end of the Public Hearing, the parties file legal briefs that are reviewed by the Commissioner before s/he issues a decision. If the Commission finds in favor of the respondent, the case is dismissed. If the Commissioner finds in favor of the complainant, s/he may order a number of remedies. These include back pay (for employment cases) and emotional distress damages. In cases of housing discrimination, remedies may include monetary damages reflecting housing expenses incurred as well as emotional distress damages. In both employment and housing cases, the MCAD has the authority to assess reasonable attorneys’ fees and costs. The MCAD process can take many months or even years.
Some people may not wish to pursue a complaint and go through the entire MCAD process, but wish to communicate something to the entity that discriminated against them. This is most common in the case of someone fired from a job—the individual might not want the hassle of a full claim but may want their employer to implement a sexual orientation training for current employees. It is possible for a person to initiate an MCAD complaint and only take it to the mediation stage, then withdraw the complaint.

**What About Attorneys?**

At some point in this process, the client may want the help of an attorney. Some people want to talk to an attorney before they go to the MCAD. It is certainly appropriate to refer people to private attorneys if that is what they desire. To save time and money, we recommend that clients gather documents and write a chronology before their first meeting with an attorney. The Fair Employment Project (617-390-2593) is another resource that can provide information and in some cases a pro bono attorney to assist with the complaint.

**To File or Not to File?**

Clients often want to know if they should file a complaint. As non-attorneys who do not have all the facts and circumstances, we cannot make a determination about whether or not someone should file a complaint. However, we can explain the procedure to people and let them know their rights under the law. In many cases, people who have already been fired have little to lose by filing with the MCAD. Even if they do not prevail in their complaint, they will doubtlessly raise the company’s awareness just by filing a claim. A claim can always be withdrawn from the MCAD if the client decides s/he does not want to pursue it. On the other hand, if s/he fails to file before the 300-day statute of limitations, s/he is barred forever from pursuing a claim on those grounds. Therefore, although we cannot endorse the filing of complaints, we do encourage people to make use of the Civil Rights Law and to seek remedies for discrimination whenever possible.

**Retaliation**

People who are still working at the company which is discriminating against them always have legitimate concerns about how they will be treated when their employer finds out they have filed a claim against the company. Under the law, claimants are protected from retaliation. This means it is illegal for the employer to take any adverse action against an employee because they filed a discrimination claim. However, retaliation is common. In fact, retaliation claims often prevail at the MCAD. Inform callers that an employer can, and often does, make the employee’s situation very unpleasant. Clients in this situation may want to consult with a private attorney to see if there is some other avenue to pursue.

**Filing When Employers Fail to Remedy Sexual Harassment**

People facing sexual harassment can also file a claim at the MCAD if the company fails to remedy the situation once notified that harassment has occurred. In some cases, however, a private attorney can effectively intervene on behalf of a client through writing letters or meeting with the employer on the client’s behalf. In large companies, clients who are getting no help from their supervisors in resolving situations of harassment may want to consult with the civil rights officer or affirmative action officer in their human resources or personnel department. Generally, people in those positions can advise clients of grievance procedures and are often more sensitive to issues of race, gender, gender identity and sexual orientation.

**Filing Anonymously -- MCAD’s Pseudonym Policy**

If an individual is concerned about his or her sexual orientation, gender identity, or HIV status becoming public as a result of filing an MCAD complaint, let them know that they can always file a claim using a pseudonym. By using a pseudonym, their actual name does not appear in their file and is not available to the public.

**What To Do When You Get Employment Calls**

First, determine if the call has to do with discrimination on the basis of sexual orientation or gender identity. If it is another type of employment issue, the call should be referred to an attorney in GLAD’s Lawyer Referral Service specializing in employment cases, or to a legal aid organization if the client has no money (see the ARD). If the problem has to do with the client’s HIV status, refer to the HIV-related discrimination sections of this manual. If it is related to another disability, refer it to the Disability Law Center.
Follow the checklist:
If the call is, in fact, about discrimination on the basis of sexual orientation or gender identity, you should refer to the questions on the checklist at the beginning of this section. By asking the checklist questions, you can help a client begin to think along the right lines to file a discrimination complaint.

What The Caller Can Do
If, in fact, there does seem to be discriminatory conduct, you can suggest the following:

1) Make a Chronology
Make a chronology of events leading up to and following the adverse action. Include as much detail as possible—who said what to whom, who witnessed it, when and where it happened. By writing a chronology, clients not only create a record of what happened while it is fresh in their minds, they also have the opportunity to reflect on patterns of behavior they may not have noticed before. Often, in the process of doing a chronology, clients remember important events or comments that indicate discriminatory conduct. Clients should pay particular attention to homophobic or transphobic comments, disparate treatment, and conflicting justifications for adverse treatment.

In cases of harassment, clients should write down all offensive comments and actions and should save any written notes or pornography. They should also document in writing their efforts to have the situation redressed; i.e., memos to their supervisors, letters confirming the contents of a meeting, etc.

2) Get a Letter of Recommendation
Some employers fire an employee saying that the reason is downsizing, or some other reason unrelated to the person’s performance. If the employee feels that the real reason for the firing was their sexual orientation or gender identity, they may be able to get a letter of recommendation from the employer before they leave. This can be very helpful later if they pursue a discrimination complaint, because the employer will have a harder time changing their story and claiming that the employee was actually doing badly at their job.

3) Get the Personnel File—Sometimes
Obtain a copy of the personnel file. Please note that this can be difficult for clients who are still working at a company. Although employees in CT, MA, and NH are legally entitled to a copy of the file (and employees in other states may be also, though the law in this area is not clear), asking for it can tip an employer off that the client is considering legal action. Warn clients of this possibility. They are the ones best able to determine if getting the file would do more harm than good.

Under Massachusetts G.L. c. 149 sec. 52C, everyone is entitled to a complete copy of his or her personnel file. Clients should request their file in writing, keeping a copy of the letter and sending it certified, return receipt. Sometimes employers will actually fabricate documents and add them to an employee’s file to strengthen their pretextual reasons for getting rid of someone. Getting a complete copy of the file not only reveals what is in the file, but also prevents the possibility of employers back-dating negative documents and placing them in the file. Keep the contents of the file in the exact order in which you received them.

4) Get Copies of Written Policies & Procedures
Get copies of written policies and procedures. Again, this can be difficult for people still working at the company. However, it is important to be able to assess if the employer is following his or her own written guidelines.

5) Apply for Unemployment
Even if the caller does not think that they will be eligible because he or she was fired, applying for unemployment sends a clear signal that the caller does not agree with the employer’s actions. More importantly, the application process requires the employer to give information about the firing and provides the complainant an opportunity to tell his or her story in a way that is documented.

6) Protect Yourself from Harassers
If a caller is being sexually harassed, s/he should try not to be left alone with the harasser. This is both for his/her protection and so that there will be witnesses to any future harassment.
Other Employment-Related Legal Claims

In addition to claims under M.G.L. c. 151B, in some cases people experiencing discrimination on the job may have other legal claims. These are complicated areas of law, and you should not get into them with callers. Just be aware and let callers know that they may have other legal claims and should consult an attorney for an evaluation of the full range of their legal remedies.

Breach of contract:

Although often based on a written contract, sometimes these cases are based on the employer handbook or personnel manual. The courts are more likely to find a contract claim when the employer and employee have bargained about the terms of the manual, the employee is required to sign the manual, and the employer consistently adheres to the manual. The courts are less likely to find a contract claim if the manual is used for guidance only or if the employer retains the right to change the policies unilaterally. Only a lawyer can evaluate a breach of contract claim.

Invasion of privacy:

(M.G.L. c.214, sec.1B) For example, asking for and/or disclosing information that is private. In some cases, disclosure of sexual orientation or gender identity may be an invasion of privacy. Again, a lawyer must evaluate such claims.

Negligent or intentional infliction of emotional distress.

Breach of duty of good faith and fair dealing, wrongful termination, termination in violation of public policy, defamation, and others.

If clients wish to pursue claims outside the scope of the discrimination claim at the MCAD, it is best to refer them to a private attorney experienced in employment law. In general, these cases are very difficult to prove.

Employment Concerns For Teachers

Sometimes we get calls from teachers who have faced adverse treatment for coming out in the classroom or for talking about homosexuality or transgender issues with students. While all of the above laws apply to teachers, there may be more difficult issues involved with teachers. In Massachusetts the law explicitly specifies “morality” and “unbecoming conduct” as criteria for hiring, suspending, firing and giving tenure to teachers (M.G.L. c.71, secs. 38, 42, 42D and M.G.L. c. 258A, sec. 25). Perhaps fortunately, no Massachusetts cases have interpreted the term “moral character” and the few cases interpreting “unbecoming conduct” have dealt with language, corporal punishment and possession of drugs.

If you get a call from a teacher, get as much information as possible about the situation and bring the call to the attention of your supervisor.

Limited Constitutional Rights for Public School Teachers (and other governmental employees):

Right to Free Speech

Although teachers retain their constitutional rights, these rights are not absolute. In general, judges balance the teacher’s rights as a citizen against the interest of the state as an employer in promoting and maintaining efficiency and order in the schools.

In Massachusetts, a teacher should be able to come out to co-workers and in his/her private life with no adverse consequences. As far as discussing the issue in the classroom, the courts have ruled that an employee’s right to speak freely depends on whether the speech is a matter of public concern rather than private concern and whether the speech causes interference with the effective functioning of the school. There are several cases around the country that hold that coming out is private and/or disruptive.

Academic Freedom

While teachers have some latitude in experimenting with teaching style and curriculum, a teacher’s right to exercise a particular academic freedom will depend on whether the language, statement or publication is relevant to the
curriculum; whether the material was age appropriate; the quality of the materials; and whether or not they had a disruptive effect on students. Statements about LGBT people need to be in the context of the course work.
HIV Employment Discrimination

Introduction
It has been established for many years that HIV or AIDS, even when asymptomatic, is a “disability” under federal and state disability discrimination laws. Therefore, people who are HIV-positive or who have AIDS are protected from employment discrimination under the federal Americans with Disabilities Act (ADA) and Massachusetts General Law C. 151B, Section 4(16), as well as the disability non-discrimination laws of the other New England states.

As you will see from the material below, much of what you learned about handling a sexual orientation or gender identity employment discrimination call is applicable to an HIV-related employment call.

However, there are some important differences between disability law and sexual orientation or gender identity discrimination law. The most important difference is known as the employer’s obligation to provide “reasonable accommodations” to an employee with a disability. Employers have an affirmative obligation, under certain circumstances, to modify or adjust job requirements or duties if an employee with HIV is experiencing health-related problems which make it difficult to perform the job. Helping a caller understand the circumstances under which a “reasonable accommodation” may be required is a tremendous service that you can provide. It may allow an employee with HIV to stay employed longer and to maintain an income as well as health and disability benefits.

All of the New England states have similar disability laws, so the information below is relevant throughout New England.

Who is protected by disability discrimination laws?
Disability discrimination laws apply to:

a) Persons with AIDS or who are HIV-positive, even if they are asymptomatic and have no present physical impairment.

b) Persons who are “regarded” or “perceived” as having HIV. For example, this includes an employee who does not have HIV, but whom an employer assumes based on stereotypes is HIV-positive or at risk for HIV.

c) Under the ADA, but not Massachusetts law, a person who does not have HIV, but who “associates” with a person with HIV, such as friends, lovers, roommates, business associates, advocates and caregivers of persons with HIV.

HIV Employment Discrimination Claims
There are two types of claims that may be brought against employers under disability discrimination laws.

Adverse Treatment Based On HIV Status
An employer may not take adverse action against an applicant or employee simply on the basis that the person is HIV-positive or has AIDS. This means that an employer may not terminate, refuse to hire, rehire or promote, or otherwise discriminate in the terms and conditions of employment based on the fact that a person is HIV-positive or has AIDS.

As with discrimination based on sexual orientation or gender identity, the focus here is whether a person with AIDS or HIV was treated differently than other applicants or employees in similar situations simply because of his or her HIV status.

Examples of unlawful HIV-related discrimination:

- An employer may not refuse to hire a person with HIV based on fear that HIV will be transmitted to other employees or to customers or clients.
• An employer cannot refuse to hire or make an employment decision based on the possibility, or even probability, that a person will become sick and will not be able to do the job in the future.
• An employer cannot refuse to hire a person because it will increase health or workers’ compensation insurance premiums.

Similar to other types of discrimination claims, the applicant or employee must be able to show the three elements of the prima facia case:

1) The employer knew or had reason to know the employee’s HIV status;
2) The employee was qualified to perform the job functions (with or without reasonable accommodation); and
3) Adverse action was taken against the employee because of his or her HIV status.

The different ways to prove discrimination noted in the Sexual Orientation and Gender Identity Employment section of this manual are equally applicable to HIV-related discrimination.

Reasonable Accommodation

Persons with disabilities, such as AIDS, may experience health-related problems that make it difficult to meet some job requirements or duties. For example, a person may be exhausted or fatigued and find it difficult to work a full-time schedule. Or, an employee may have to schedule medical appointments during work hours.

In certain circumstances, the employer has an obligation to modify or adjust job requirements or workplace policies in order to enable a person with AIDS to perform the job duties. This is known as a “reasonable accommodation.”

Examples of reasonable accommodations include:

• Modifying or changing job tasks and responsibilities;
• Establishing a part-time or modified work schedule;
• Permitting time off during regular work hours for medical appointments;
• Reassigning an employee to a vacant job;
• Making modifications to the physical layout of a job site or acquiring devices such as a telephone amplifier to allow, for example, a person with a hearing impairment to do the job.

There is no fixed set of accommodations that an employee may request. The nature of a requested accommodation will depend on the particular needs of an individual employee’s circumstances.

It is the employee’s obligation to:

• Ask for the accommodation (rather than expect an accommodation will be provided by the employer without a request);

• Inform the employer of the nature of the disability; and

• Request a reasonable accommodation that will allow the employee to perform the job.

If an employee requests a reasonable accommodation, an employer is entitled to receive documentation of an employee’s HIV status or AIDS diagnosis-usually a letter from a doctor. The purpose of this type of verification is to permit the employer to understand the nature of the employee’s disability and thereby implement an appropriate reasonable accommodation.
Does an employer have to grant a request for a reasonable accommodation?

Just because the employee requests a reasonable accommodation does not mean that an employer has a legal obligation to grant it. An employer does not have to grant a reasonable accommodation that will create an “undue burden” or, significant difficulty or expense, for the employer’s operation.

When is a “reasonable accommodation” for an employee an “undue burden” for an employer?

In determining whether a requested accommodation creates an undue hardship for an employer, courts examine a number of factors, which include:

- the employer’s size, budget and financial resources;
- the cost of implementing the requested accommodation; and
- how the requested accommodation affects or disrupts the employer’s business.

Again, there are no definitive rules here and each situation must be examined on a case-by-case basis.

The reasonable accommodation must enable the employee to do the job.

An employer only has an obligation to grant the reasonable accommodation if, as a result of the accommodation, the employee is then qualified to perform the essential job duties. An employer does not have to hire or retain an employee who cannot perform the essential functions of the job, even with a reasonable accommodation.

You should never tell a caller that s/he is entitled to a particular accommodation. However, you may want to help the caller think about the types of job modifications that will enable him or her to perform the job duties.

Variation By State

Note: In Connecticut and New Hampshire, state anti-discrimination law does not obligate an employer to provide a “reasonable accommodation” to an employee with a disability. Therefore, individuals from Connecticut and New Hampshire are only protected in this way under federal law (ADA), which does not apply to employers with fewer than 15 employees.

Employment Inquiries About Health

Under the ADA and Massachusetts law, an employer cannot require an HIV test as a condition of employment.

Prior to employment an employer cannot ask questions which are aimed at determining whether an employee has a disability. Examples of prohibited pre-employment questions are;

- Have you ever been hospitalized or under the care of a physician?
- Are you taking any medications?
- Do you have any health problems that would make it difficult for you to do this job?

Under the ADA and Massachusetts law, after an offer of employment, the employer may require a physical examination solely for the purpose of determining if an employee can perform the essential job functions with the reasonable accommodation.

Pursuing An Employment Discrimination Claim

Let the caller know the statute of limitations for filing a discrimination claim in his or her state. Claims under Massachusetts law must be filed with the MCAD within 300 days of the discriminatory act. See the chart, Anti-Discrimination Laws & Procedures in New England for other New England states’ statute of limitations.

Discrimination claims under the federal Americans with Disabilities Act are handled by the Equal Employment Opportunity Commission (EEOC). In jurisdictions where a state or local agency hears discrimination claims, a charge must be presented to that agency. In such jurisdictions, you may file charges with EEOC within 300 days of the discriminatory act, or 30 days after receiving notice that the state or local agency has terminated its processing of the charge, whichever is earlier. An employee filing a disability discrimination claim with the MCAD does not have...
to file a separate claim with the EEOC. There is a box he or she can check on the MCAD complaint form to have the MCAD file the claim with the EEOC. The EEOC will then defer to the MCAD’s investigation.

**Federal Rehabilitation Act**

If the employer receives federal funding, it is also subject to a federal law known as the Rehabilitation Act of 1973. This law is similar to the ADA in its prohibitions of discrimination based on disability. Programs that usually receive federal funds and are thus subject to the Federal Rehabilitation Act include public schools, hospitals, doctors who receive payment through Medicaid, many state or local government entities (police, fire, prisons), etc. While the substantive provisions of this statute are similar to the ADA, there is a different remedial scheme:

No filing with EEOC or state human rights agency (MCAD or equivalent) is required. Claims based on the Federal Rehabilitation Act must be filed in state or federal court. The statute of limitations for filing a claim based on the Federal Rehabilitation Act may be longer than the statute of limitations for filing under state discrimination law or the ADA and is particular to each state.

**The Family And Medical Leave Act**

The Family and Medical Leave Act (FMLA) is a federal law passed in 1993. It requires that certain employers permit up to twelve weeks of unpaid leave per twelve-month period for:

- the birth or adoption of a child;
- recovery from the employee's “serious health condition”; or
- care of an immediate family member with a “serious health condition.”

**Who is Eligible?**

An employee is eligible for FMLA leave if he or she:

- Has completed 12 months of total service (not necessarily consecutive);
- Has worked more than 1,250 hours during the 12-month period immediately preceding the leave; and
- The employer has 50 or more employees within 75 miles of the worksite.

**What is a “Serious Health Condition”?**

To be eligible for leave, an employee must have a “serious health condition” rendering him or her incapable of performing job duties. A “serious health condition” includes:

- Any period of incapacity or treatment in or consequent to inpatient care in a hospital or residential care facility;
- Any period of incapacity requiring absence from work or other regular daily activities of more than three consecutive calendar days or any period of incapacity that involves two or more visits to a health care provider or other medical personnel or one visit to a healthcare provider resulting in subsequent supervised continuing treatment;
- Any period of incapacity or treatment due to a “chronic” serious health condition that requires periodic visits to a healthcare provider, continues over an extended period of time, and may cause episodic rather than continuing periods of incapacity.

**What Type of Leave Are You Eligible For?**

An employee does not necessarily have to take all twelve weeks of leave at one time.

FMLA leave can be taken as “intermittent leave” or reduced schedule leave if it is “medically necessary.”
Intermittent leave is taken in separate “blocks of time” as short as one hour or as long as several weeks, for such things as medical appointment or periods of recovery.

If FMLA leave is taken as intermittent leave, the employer has the right to transfer the employee temporarily to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave. The position must provide equal pay and benefits, although not necessarily equivalent duties.

What Information Can The Employer Require About You As A Condition Of FMLA Leave?

Certification
An employer can require written certification from a health care provider of a “serious health condition.” An employer can challenge certification and at its own expense require a physical examination by a second health care provider. If there is a conflict between the two providers, a third provider who is agreed upon by both the employer and the employee is consulted and the third opinion is final.

Notice
An employer is entitled to thirty days’ notice for FMLA leave or as much notice as is “practicable” under the circumstances.

Compensation and Benefits During FMLA Leave
The employer must maintain an employee’s group health insurance coverage for the duration of the FMLA leave at the level and under conditions of coverage that would have been provided if the employee were not on leave.

Return and Reinstatement
At the end of FMLA leave, an employee must be returned to the “same” or an “equivalent position” with the same seniority rights and benefits as when the FMLA leave commenced. An equivalent position is defined as “virtually identical pay, benefits, and working conditions” and the “same or substantially similar duties and responsibilities.”

Additional Things to know about the FMLA
An employer may require that an employee substitute paid vacation, personal leave, or sick/medical leave for the unpaid leave under the FMLA.

If an employee fails to return from FMLA leave, an employer can obtain reimbursement from the employee for group health insurance premiums if: 1) the reason for not returning is not related to the health condition; or 2) the reason for not returning is within the employee’s control.

An employer who violates the FMLA may be liable in a civil action for monetary damages and injunctive relief. An employee may also file a complaint with the United States Department of Labor Wage and Hour Division.

What about Hepatitis C?

Is Hepatitis C Protected Under Disability Law?
It is unclear whether Hepatitis-C is grounds for protection under the ADA and Massachusetts law. GLAD’s AIDS Law Project feels that it should be, but there is case law going both ways, and no definitive legal decision yet. It can certainly be argued that Hepatitis-C is a disability under the ADA definition.
Public Accommodations

Sexual Orientation and Gender Identity Discrimination in Places of Public Accommodation

GLAD occasionally gets calls from people who have been refused access to public accommodations or services because of their sexual orientation or gender identity. In general, these calls are from people kicked out of stores, bars or restaurants or from couples denied credit or bank loans. Many times, these complaints come from LGBT people who are “visible”, i.e. wearing clothing that identifies them; publicly displaying affection with someone of the same sex; dressing in drag. GLAD has represented such groups in their public accommodations claims. In 1996, GLAD won a judgment at the MCAD which awarded $10,000.00 each to three complainants who were thrown out of a straight bar for dancing with and kissing their same-sex partner.

Massachusetts Public Accommodations Statute

Like employment and housing, prohibitions against discrimination on the basis of sexual orientation in public accommodations was added to Massachusetts law through the 1989 Lesbian and Gay Civil Rights Bill and gender identity was added in 2016. “Public Accommodations” is broadly defined to include any place that holds itself out for patronage by the general public; including all stores, clubs and even sidewalks. The law prohibits people running places of public accommodations from treating any protected group differently in access or use of their services. Companies found to be violating this law can be fined.

What to Tell Callers

Callers who have been discriminated against in a place of public accommodation should write a detailed chronology of what happened, including the names and locations of any witnesses. Inform callers of their right to file a complaint at their state anti-discrimination commission. Make sure they understand the statute of limitations. The procedure for filing a complaint is the same as that for employment and housing complaints.

Public Accommodations Law And HIV

Title III of the Americans with Disabilities Act defines a “place of public accommodation” broadly and includes virtually any private business or entity. The definition specifically includes a “professional office of a health care provider, hospital or other service establishment.”

See GLAD’s publications about legal protections for people with HIV in each New England state for state-specific information.

The Massachusetts Public Accommodations Statute is more general than the ADA and defines a “place of public accommodation” as any place that is generally open to and accepts or solicits the patronage of the general public. While some health care providers have argued that the Massachusetts statute does not cover private medical offices, courts are almost certain to rule that a physician’s office is a place of public accommodation, unless the doctor has adopted strict patient selection criteria – such as accepting patients only by referral from other doctors-whereby the doctor does not really accept patients from the general public.

In addition, Massachusetts law prohibits “any distinction, discrimination, or restriction on account of ...disability” in the admission to or treatment in a place of public accommodation. While this language is much more general than the ADA, it should prohibit the same type of conduct.

Access To Health Care – Refusal To Treat

GLAD’s AIDS Law Project frequently receives calls from persons with HIV who claim that a hospital, doctor or dentist has either refused to provide medical treatment or provided negligent or substandard medical care because of the patient’s HIV status.

It is illegal and, according to the American Medical Association and the American Dental Association, unethical for a doctor or dentist to refuse to treat a patient, or to provide unequal or restricted services, because the patient is HIV-positive or has AIDS.
The legal challenges to these “refusal to treat” cases is through state and federal laws which prohibit discrimination in access to a “place of public accommodation” on the basis of disability—specifically, Massachusetts General Law c. 272, Section 98 and Title III of the Americans with Disabilities Act (ADA). Medical offices, hospitals and other health care settings are places of public accommodation.

Illegal Discrimination in Access to Health Care

Under Title III of the ADA, it is illegal for a doctor, dentist or other health care provider to:

1. Deny an HIV-positive patient the “full and equal enjoyment” of services or to deny an HIV-positive patient the “opportunity to benefit” from services in the same manner as other patients.
2. Establish “eligibility criteria” for the privilege of receiving services, which tend to screen out patients who have tested positive for HIV.
3. Provide “different or separate” services to patients who are HIV-positive or fail to provide services to patients in the most “integrated setting.”
4. Deny equal services to a person who is known to have a “relationship” or “association” with a person with HIV, such as a spouse, a partner, child, or friend.

The Following Specific Practices are Therefore Illegal:

1. Declining to treat a person with HIV based on a perceived risk of HIV transmission or because the doctor simply does not feel comfortable treating a person with HIV.
2. Agreeing to treat a patient only in a treatment setting outside the regular office for infection control purposes, unless there is a legitimate medical reason to do so;
3. Requiring that a patient take an HIV test prior to providing medical treatment.
4. Limiting the scheduled times for treating HIV-positive patients, such as insisting that an HIV-positive patient come in at the end of the day;
5. Referring an HIV-positive patient to another practitioner, unless the required procedure is outside the scope of the doctor’s usual practice or specialty. The ADA requires that referrals of HIV-positive patients be made on the same basis as referrals for other patients. It is, however, permissible to refer a patient for specialized care if the patient has HIV-related medical complications that require expertise, and/or treatment by the doctor would put the patient at risk;
6. Increasing the cost of services to an HIV-positive patient in order to use additional infection control precautions beyond those required by OSHA and the Centers for Disease Control and Prevention. Under certain circumstances, it may well be an ADA violation to even use unnecessary additional precautions which tend to stigmatize a patient simply on the basis of HIV status.

Typical Defenses Raised by Healthcare Providers

1. Doctors and dentists may claim that a refusal to treat a patient with HIV is legitimate because they fear they might contract HIV themselves through needle sticks or other exposure to blood. However, studies of healthcare workers have determined that the risk of contracting HIV from occupational exposure is negligible, especially with the use of universal precautions. Both the American Medical Association and the American Dental Association have issued policies that it is unethical to refuse to provide treatment to a person with HIV.
2. A more subtle form of discrimination occurs when doctors or dentists claim that they are not qualified or equipped to treat the patient and refer the patient elsewhere. In these cases, the merits of a discrimination claim depend on whether the patient’s condition reasonably required medical services outside the doctor’s experience or expertise, or whether the refusal to treat and subsequent referral are a pretext for discrimination on the basis of HIV status.

Medical Malpractice Claims

In cases where a doctor has provided substandard or negligent treatment because of a patient’s HIV status, the caller may also have a medical malpractice claim for common law negligence. If the caller asks about a medical
malpractice claim, it is very important to explain that GLAD focuses on discrimination claims and not on medical malpractice claims. To pursue a medical malpractice claim, the caller should seek an attorney through the LRS.

**Complaining About Health Care Providers to Boards of Registration**

If an individual feels that they have not been treated appropriately by a health care professional, but they do not wish to pursue a discrimination complaint (legal action can be more than most people are bargaining for), they may wish to consider filing a written complaint with the board of registration that oversees the health care provider’s licensing (Board of Registration in Medicine, Dentistry, Nursing, Pharmacy, etc). This information can often be found in GLAD’s Agency Referral Database and/or online.

### Access to Other Public Places

Between the provisions of the Massachusetts Public Accommodations Statute and Title III of the ADA, people with HIV cannot be refused admission to or treated differently than other patrons in businesses or public places, including bars, restaurants, inns or hotels, schools, stores, taxis, airplanes, and health clubs.

### Access to Day Care Centers and Schools

Under guidelines issued by the Massachusetts Department of Public Health and the Massachusetts Department of Education, children or adolescents with HIV or AIDS cannot be excluded from day care centers or other early childhood settings, elementary schools, or high schools simply because of their HIV status.

However, the guidelines provide that no children should be admitted to a program, regardless of known HIV infection, if they have bloody diarrhea or open, oozing mouth or skin sores that cannot be covered or successfully treated with medication, or exhibit biting of an unusual frequency or severity that would be accompanied by actual transfer of blood from the biter, as might happen only from a student with chronically bloody gums or mouth.

**For further information, callers in Massachusetts should be referred to:**

HIV/AIDS Program  
Massachusetts Department of Education  
Health, Safety & Student Support Services  
781-338-6324

Massachusetts Department of Public Health  
AIDS Bureau  
250 Washington Street, 3rd Floor  
Boston, MA 02108  
617-624-5300 or Toll-Free 800-235-2331

### Do Public Accommodations Laws Always Include Schools?

Whether schools are considered public accommodations varies from state to state:

**Connecticut**

Connecticut’s public accommodations law may include schools (the CHRO thinks it does, but there is no definitive court decision).

**Maine**

Maine’s public accommodation law specifically includes schools.

**Massachusetts**

Massachusetts public accommodations law does not include schools within its definition.

**New Hampshire**

New Hampshire’s public accommodations law does not include schools within its definition.
Rhode Island
Rhode Island’s public accommodations law does not specifically include schools but is written in an open manner.

Vermont
Vermont’s public accommodation law specifically includes schools.

<table>
<thead>
<tr>
<th>Enforcement Provisions</th>
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<tbody>
<tr>
<td>Under the Massachusetts Public Accommodation Law, a complaint must be filed with the Massachusetts Commission Against Discrimination within 300 days of the discriminatory act. Complainants may be awarded injunctive relief (an order is issued demanding that the respondent cease discriminating on the basis of HIV-status) and emotional distress damages.</td>
</tr>
</tbody>
</table>

Under the ADA, an individual may file a lawsuit in state or federal court to seek an injunction that the defendant cease the discriminatory conduct. There is no requirement to go first to an administrative agency like the MCAD. In addition, the United States Attorney General may sue, although limited resources mean that this happens infrequently. The Attorney General may request that the court award the plaintiff money damages and assess a civil penalty of up to $50,000 for a first offense and $100,000 for a second offense. In cases against doctors or dentists, callers may also file complaints with the Board of Registration in Medicine and the Board of Registration in Dentistry.
**Housing Discrimination**

### Sexual Orientation and Gender Identity Housing Discrimination

**Sexual Orientation and Gender Identity Discrimination in Housing**

M.G.L. chapter 151B makes it illegal to discriminate in housing on the basis of sexual orientation. Exemptions are made in the law for owner-occupied buildings with only two units. Callers in all of the New England states who feel that they are being denied or evicted from housing because of their sexual orientation or gender identity have the right to file complaints with their state anti-discrimination commission. Remember to tell callers about the statute of limitations (300 days in MA). Callers should take care to keep all written records related to the discrimination, such as leases, letters from real estate agents, and correspondence with the landlord.

Also, although the federal Fair Housing Act (HUD) doesn’t have “sexual orientation or gender identity” as a protected characteristic, it may still be possible to file a complaint with U.S. Department of Housing and Urban Development (HUD). For more information see: [http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination).

### Harassment

Calls from people who are being harassed in their homes are even more common than evictions or refusals to rent. Sometimes the harasser is a neighbor; sometimes it is the landlord or building management. M.G.L. chapter 151B also covers harassment of tenants by landlords or building management. A recent MCAD case awarded over $20,000 to two tenants who were harassed by their building management because of their sexual orientation.

Callers experiencing this kind of harassment are often extremely upset and traumatized by the behavior, as it interferes with their ability to feel safe in their own home. All callers with housing-related harassment should be encouraged to call the Fenway Violence Recovery Program and should be informed of their right to pursue criminal charges when appropriate.

If the harasser is someone other than the landlord, it is important to report the harassment to the landlord in writing. If the landlord generally takes action to address harassment against other tenants, but fails or refuses to take action when the tenant is gay, lesbian, bisexual, or transgender they may be discriminating on the basis of sexual orientation or gender identity. Also, if there are three or more serious incidents of harassment, the caller can take out a Harassment Prevention Order by going to his/her local court (GLAD’s MA LGBT Overview publication has more information about this.)

### Callers Facing Eviction

If someone is facing immediate eviction, refer him or her to a private attorney who handles housing cases or a legal services agency. Greater Boston Legal Services assists indigent people with housing issues. If the caller is from outside of Boston, refer them to Mass Legal Services, [https://www.masslegalservices.org/findlegalaid](https://www.masslegalservices.org/findlegalaid)

### Housing Discrimination And HIV

Under state disability law throughout New England, it is illegal to refuse to rent or sell property because of a person’s HIV status. People who believe that they have been discriminated against in housing due to their HIV status may file a claim with the state anti-discrimination commission. Don’t forget to tell the caller about the statute of limitations.

In addition to rights under state law, the Fair Housing Act is a federal statute that protects people with HIV from housing discrimination. Under this statute, a lawsuit can be filed in court or the person can file a complaint with HUD. Unlike the Massachusetts statute, this law protects not only people with HIV, but also anyone who has “associated” with a person with HIV, such as a friend, spouse, lover, or roommate of a person with HIV. Certain housing is exempt under the Fair Housing Act: owner-occupied buildings with no more than four units; single-family housing sold or rented without the use of a broker; housing operated by organizations and private clubs that limit occupancy to its members.
## Summary of Housing Discrimination Laws in New England

<table>
<thead>
<tr>
<th>State</th>
<th>Exemptions</th>
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<tr>
<td><strong>Connecticut</strong></td>
<td>• 4 or fewer apartments when the owner occupies one apartment</td>
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<tr>
<td></td>
<td>• rental of a room in an owner occupied unit</td>
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<tr>
<td><strong>Massachusetts</strong></td>
<td>• 2 family owner occupied buildings</td>
</tr>
<tr>
<td><strong>Maine</strong></td>
<td>• 2 family owner occupied buildings</td>
</tr>
<tr>
<td></td>
<td>• Rental of a room in an owner occupied building where not more than 4 rooms are rented</td>
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<tr>
<td><strong>New Hampshire</strong></td>
<td>• single-family house rented by owner</td>
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<tr>
<td></td>
<td>• 3 or fewer apartments when owner occupies one apartment</td>
</tr>
<tr>
<td></td>
<td>• 5 or fewer rooms when the owner or owner’s family live in one room</td>
</tr>
<tr>
<td><strong>Rhode Island</strong></td>
<td>• 3 or fewer units and the owner occupies one</td>
</tr>
<tr>
<td><strong>Vermont</strong></td>
<td>• 3 or fewer apartments and the owner or a member of the owner’s immediate family occupies one apartment</td>
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Privacy and Confidentiality Issues Related to HIV/AIDS

GLAD’s AIDS Law Project receives many calls from people who claim that someone – for example, a doctor, dentist, pharmacist, boss, police officer, relative, or neighbor – disclosed their HIV status to others without their consent.

Laws governing HIV privacy and confidentiality issues vary from state to state. This chapter primarily addresses these legal issues in Massachusetts. For brief descriptions of privacy laws and protections in the other New England states, please see the end of the chapter.

In very limited circumstances, such as the disclosure of HIV antibody test results by a health care provider, the law provides a clear statutory prohibition. In most other situations, in which the law is not yet fully developed, we argue that the non-consensual disclosure of HIV status violates M.G.L. c. 214, sec. 1B, which prohibits unreasonable interference with a person’s privacy, or the constitutional right to privacy in the case of government action.

Confidentiality Of HIV Antibody Test Results

HIV-Specific Privacy Law

Massachusetts has a statute, M.G.L. c. 111, Section 70F, which provides that a physician, health care provider or health care facility cannot:

A) Test a person for HIV without first obtaining the person’s VERBAL informed consent (the change from written to verbal consent was made in 2012.)

B) Reveal to third-parties that a person took an HIV test without first obtaining the person’s written informed consent;

C) Disclose to third parties the results of a person’s HIV test without first obtaining the person’s written informed consent.

Massachusetts also has a specific statute pertaining to venereal diseases and genetic testing. Venereal diseases and genetic testing are also protected under the MA general privacy statute.

Informed Consent

Written informed consent means that a person must sign a specific release authorizing the health care provider to test for HIV.

A general release to a health care provider authorizing the disclosure of medical records and information is insufficient to authorize a health care provider to release information about HIV testing.

Under c. 111, Section 70F, the release must specifically authorize the disclosure of HIV test results and must state the purpose for which the information is being requested.

The Meaning of Informed Consent

A competent adult has the right to decide whether he or she wishes to undergo any medical treatment or testing. Without informed consent, the provision of medical treatment is considered to be a “battery,” a legal claim based upon non-consensual physical contact or intrusion with a person’s body.

In the context of medical treatment, informed consent means that a physician or health care provider must make the client aware of the nature, benefits, risks, and alternatives to treatment such that the client can make a voluntary, knowledgeable choice to accept or forego treatment. The health care provider does not have to inform the client of every possible risk, but only the significant risks which a reasonable person in the client’s situation would want to know in order to decide whether to accept or forego treatment.
In the context of HIV testing, it is sufficient that a person understand the general purpose and nature of an HIV antibody test including that the client will give a blood sample which will be tested for the presence of HIV antibodies; and the type of information which is revealed by an HIV antibody test.

**Testing and Counseling of Minors**

Under Massachusetts law, minors (persons under the age of 18) are generally considered to lack the legal capacity to consent to medical treatment, making parental permission necessary before a health care provider can legally administer treatment.

However, given the importance of making HIV testing available to adolescents there are two sources of law that authorize testing of a minor. Most testing centers will provide an HIV test to a minor, unless the person is significantly below the age of 18.

1. Massachusetts General Law c. 112, sec. 12F

This statute (known as the “emancipated minor” statute) says that a minor may give consent to medical care if s/he is:

- married, widowed, or divorced;
- a parent of a child;
- a member of the armed forces;
- pregnant or believes herself to be pregnant;
- living separate and apart from his or her parents and is managing his or her own financial affairs; reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health by the Department of Public Health (which includes HIV).

2. The “Mature Minor” rule

Courts have held that minors can provide informed consent for medical treatment if they are sufficiently mature and intelligent to understand the risks and benefits of treatment, regardless of financial independence or living situation.

Courts will typically assess the minor’s age, experience, education, training, judgment and demeanor, giving particular weight to how close the person is to majority, the benefits of the treatment or test (which are significant in the case of an HIV antibody test), and the complexity of the treatment.

Parents cannot obtain a child’s HIV test results if the child requested a confidential test.

**Remedy**

A health care provider or facility which tests for HIV without obtaining verbal informed consent or discloses HIV test results without written informed consent violates M.G.L. c. 93A, which protects consumers from unfair and deceptive trade practices. Under c. 93A, a person may bring a lawsuit to recover damages. It is an absolute prerequisite to a claim under c. 93A that at least 30 days prior to commencing a lawsuit a person must send a written demand letter to all defendants identifying the unfair or deceptive act (e.g., HIV test without informed consent, or unauthorized disclosure of HIV test results) and making a demand for relief (money damages).

**HIV Surveillance And Reporting**

State and federal governments try to track health and disease trends as accurately as possible. In the past, the government only concerned itself with gathering data about people with AIDS diagnoses, rather than all people infected with the HIV virus. As of January 1999, the Massachusetts state government began to collect data about HIV infection as well. In bureaucratic terms, HIV has become a “reportable” disease, but it is only reported to the state department of health. Recently the way in which this information is reported changed from using a “unique identifier” to the person’s name. The change was mandated by the federal government. Moreover, when a person is tested for HIV at an anonymous site, no case report is generated.

**Anonymous HIV Test Sites**

If you receive a call from someone who is considering taking an HIV test, you should refer them to the HIV/AIDS program of their state’s Department of Public Health. Anonymous HIV testing sites are available in every New
England state. At these anonymous testing sites, test results are identified by a number and will not become part of an individual’s medical records.

MA Department of Public Health HIV Counseling and Testing Hotline (800) 235-2331
VT Department of Public Health Aids Program (802) 863-7245
NH Department of Health and Human Services STD/HIV Program (603) 271-4502
Connecticut Department of Public Health Aids Division (860) 509-7801
Rhode Island Department of Public Health Office of AIDS/HIV (800) 726-3010
Maine Bureau of Health HIV/STD Prevention Program (207) 287-3747

Further Confidentiality Protections

It is important that callers understand that the scope of a person’s right to confidentiality of HIV status is not fully clear under Massachusetts law.

The Statutory Right to Privacy in Massachusetts
Massachusetts General Law Chapter 214, Section 1B provides:

“A person shall have a right against unreasonable, substantial or serious interference with his privacy.”

Courts have construed this statute to prohibit disclosure of facts about an individual of a highly personal or intimate nature, which will certainly include a person’s HIV status or AIDS diagnosis.

In analyzing whether there has been a violation of the statute, courts will determine whether there is any legitimate interest in the disclosure of a person’s HIV status and then balance that interest against the nature and substantiality of the intrusion into privacy.

For example:
If an employee reveals his or her HIV status to a supervisor, the supervisor may only reveal that information to others for a necessary business reason. It may be considered a legitimate business reason to discuss the employee’s HIV status with other management personnel in connection with a reasonable accommodation. However, it would not be a legitimate business reason to tell the employee’s co-workers or non-essential management personnel.

If a day care center or school revealed the identity of a child or student with AIDS to parents or other students, there is a good argument that such conduct violates c. 214, sec. 1B. There is no legitimate interest in disclosing the child’s HIV status, especially since the risk of transmission to others is virtually nonexistent.

The Constitutional Right to Privacy
Many courts have found that a person has a constitutional privacy right to the nondisclosure of HIV status. Courts have based this right on the Due Process Clause of the Fourteenth Amendment to the US Constitution which creates a privacy interest in avoiding disclosure of certain types of personal, intimate information.

The Constitutional right to privacy can only be asserted when the person disclosing the information is a state or government actor (e.g., police, prison officials, doctors at a state hospital).

Courts will balance the nature of the intrusion into a person’s privacy against the weight to be given the government’s legitimate reason for a policy or practice that results in the disclosure.

Is There Privacy After Death?
You may receive a call asking if privacy protections survive death. You should tell the caller that it is unclear under MA law whether privacy action survives death. There is some case law that supports the right of family members to
file a privacy claim when a deceased family member suffers damage. The law is still evolving, and it is not clear to what family members it applies.

**“Duty To Warn”**

**Confidential Communications Between a Counselor & a Client**

Communications between a counselor, therapist or social worker and a client are confidential. This includes communications about a client’s HIV status or any other medical information.

Massachusetts has specific statutes mandating that communications between a client and a licensed social worker, a social worker employed by state, county or municipal government, or an allied mental health or human services professional are confidential. These laws apply equally to licensed marriage and family therapists, licensed rehabilitation counselors, licensed educational psychologists, and licensed mental health counselors.

Even if a counselor is not covered by a specific statute, disclosure of confidential client information to a third person without the client’s permission will almost certainly violate c. 214, sec. 1B and also exposes the counselor to liability for negligence.

**Does a Counselor Have the Obligation or Right to Disclose a Client’s HIV Status to Sex Partners?**

You may receive a telephone call from a counselor who knows that a client is engaging in unsafe sex without having disclosed his or her HIV-positive status to the partner. The counselor feels torn between an obligation to maintain client confidentiality and a desire to prevent HIV infection in another individual. The counselor wants to know if s/he can legally breach confidentiality to warn the partner.

**The State of the Law on Duty to Warn and HIV**

Generally, a therapist or counselor has a duty or obligation only to the client, not to third persons. Combined with the counselor’s obligation to maintain a client’s confidentiality, this principle makes it extremely difficult for a counselor to ever legally disclose information about a client to a third party.

GLAD occasionally receives calls from counselors who mention a California case called Tarasoff v. Regents of the University of California. In that case, a patient in therapy made an explicit threat to kill his girlfriend—and then did, in fact, kill her. The parents sued the therapist for negligence, claiming that the therapist had a legal obligation not just to the client/boyfriend, but also a legal obligation to warn their daughter. The court ruled that a therapist treating a mentally ill person owes a duty to warn threatened persons against foreseeable danger created by the patient’s condition.

*Tarasoff is not Massachusetts or New England law.* No court in New England has ruled that such a duty to warn exists for therapists or mental health professionals (some other state courts have ruled that there is no duty to warn at all). *No court in the country has ever ruled on whether there is a duty to warn of possible HIV transmission.*

Massachusetts does have a statute which permits licensed social workers and certain licensed mental health professionals to warn third-parties if a client has communicated an “explicit threat to kill or inflict serious bodily injury” upon a reasonably identifiable victim, and the client has a history of physical violence which is known to the counselor (M.G.L. c. 112, sec. 35A and c. 23, sec. 36B). While no court has interpreted the scope of this language, it is a stretch to argue that it applies to potential HIV transmission.

**What to Say About the Duty to Warn:**

Given the lack of clarity of the law in this area, and the fact that this is such a high stakes issues, GLAD cannot provide legal advice to anyone who is torn by whether he or she should disclose a client’s HIV status. The counselor or therapist should speak with their supervisor or the agency’s lawyer for advice on what to do in such a situation. *Please refer these calls to your supervisor*

**Other Communications About a Person’s HIV Status**

GLAD’s AIDS Law Project sometimes receives the following type of question:
“I know someone who is HIV-positive and is having sex with a friend of mine. Is it illegal for me to tell my friend of the person’s HIV status?

Laws regarding privacy usually do not apply to this type of situation because the caller does not have any particular relationship (i.e., doctor, counselor, employer, or other business relationship) with the HIV-positive person that would create a legal duty to maintain confidentiality. However, it is important to tell the caller that the law of privacy as it relates to HIV is not entirely clear or established. It is possible that under certain circumstances, the caller could be liable for invasion of privacy.

The caller should consult a private lawyer if s/he wants formal advice. Do not give the caller your opinion about what is right or wrong in this situation.

Mandatory HIV Testing

Mandatory HIV Testing

Immigration
The HIV ban that kept people from entering the country and/or receiving Legal Permanent Resident status (a green card) ended on January 4, 2010. However, people who are ill may need to show that they will be able to pay for their health care and will not become a public charge.

Military
HIV testing is mandatory in the military and a positive test result is grounds for denial of entry into the military. If an individual tests positive for HIV during his/her service (testing is periodically required), his or her deployment options may be limited – for example, by restrictions in overseas travel – but he or she should not be discharged. The individual should be provided with medical care while serving, including HIV-related care, and should be given benefits upon service completion. If the individual becomes very sick with HIV related ailments while in the service, he or she may be honorably discharged. Refer callers with questions about HIV and the military to OutServ/SLDN.

Minors
Generally speaking, a minor’s parent or legal guardian can make him/her get an HIV test without his/her consent. If DSS has custody of the minor, they have the authority to mandate an HIV test.

Pregnant Women
GLAD occasionally receives calls asking if pregnant women are subject to mandatory HIV testing in Massachusetts. Pregnant women should never be forced to take an HIV test.

Prisons
HIV testing is not mandatory for prisoners at state facilities in MA. However, all prisoners in federal prison are subject to mandatory testing upon release from prison and could be subject to random involuntary testing during their time in prison. In addition, individuals who are considered to be part of “high risk groups” are tested upon entering the facility.

Sexual Assault
Massachusetts law does not provide for mandatory HIV testing of individuals who are convicted of sexual assault.

Sperm Donations
Massachusetts law mandates that all sperm donations be screened for HIV.

Life Insurance Testing
Life insurers can require an applicant to take an HIV test in order to determine whether to issue a policy. Life insurers may deny coverage based on a pre-existing condition, including HIV. A caller must check their individual policy for the policy’s definition of a pre-existing condition to determine whether such a clause will exclude them.
HIV Privacy Laws in the Other New England States

The following is a general description of the privacy laws and exemptions in the other five New England states. For more detailed information, refer to GLAD’s publications, Overview of Legal Issues for People with HIV, for each state.

CONNECTICUT

HIV-Specific Privacy Law and Exemptions
Connecticut changed its HIV-testing law in 2009 from specific informed consent to “general consent…for the performance of medical procedures and tests,” as long as the patient is told that:

- As part of the procedures or tests there may be an HIV test.
- Such testing is voluntary, and the patient has the right to decline the test.

If the patient declines HIV testing, that must be documented in the patient’s record.

Connecticut law permits nonconsensual “HIV-related tests” in the following situations:

- **Occupational Exposure.** “Significant exposure” to HIV which occurs during a person’s occupational duties.
- **Inability to Consent.** When the subject is unable to consent and the test is necessary for “diagnostic purposes to provide appropriate urgent care.”
- **Prisoners.** The Department of Correction may perform involuntary HIV testing on an inmate either because it is necessary for the diagnosis or treatment of an illness, or if the inmate’s behavior poses a significant risk of transmission to another inmate.
- **By Court Order.** When the court determines that there is a “clear and imminent danger to the public health or the health of a person and that the person has demonstrated a compelling need of the HIV related test result.” The court must weigh the need for the test result against both the privacy interests of the test subject and the public interest which may be served by involuntary testing.”
- **Newborns.** All newborns shall be administered an HIV-related test as soon after birth as medically appropriate, unless the infant’s parents object to the test as being in conflict with their “religious practice.”

Testing and Counseling of Minors
Connecticut law explicitly provides that the “consent of a parent or guardian shall not be a prerequisite to testing of a minor.” Section19a-582 (a).

Insurance Testing & Confidentiality
The insurer must obtain informed written consent to take any HIV-related test of an applicant.

Life and health insurers and health centers are not prohibited from disclosing a positive HIV-related test result to an organization that collects information about insurance applicants for the purpose of detecting fraud or misrepresentation, but such disclosure must be in the form of a code and could not therefore be used to reasonably identify an applicant’s test result as an HIV-related test. CGSA Section19a-587

HIV Surveillance
CT law permits the disclosure of HIV status to the Department of Public Health.

Confidentiality of HIV Test Results and Exceptions
Connecticut law contains a broad prohibition against the disclosure by any person, without a release, of “confidential HIV-related information.” CGSA Section19a-583(a). Exceptions to this law are:

- to a health care provider or facility when necessary to provide appropriate medical care
- to a health care worker or other employee where there has been a significant occupational exposure
• to employees of state mental health hospitals where the patient’s behavior poses a significant risk to other patients

• to life and health insurers

• to anyone allowed access by a court order

**Duty to Warn**
Under certain circumstances, Connecticut law permits, but does not require, both public health officers and physicians, to inform or warn partners that they may have been exposed to HIV. CGSA Section 19a-584.

Mental health professionals must consult an attorney or supervisor for advice if he or she believes that a client’s communications justify breaching client confidentiality and disclosing a client’s HIV status to a third person.

**MAINE**

**HIV-Specific Privacy Law and Exemptions**
Maine law mandates that an HIV test must be “voluntary and undertaken only with the patient’s knowledge that an HIV test is planned.” Maine, however, has eliminated its requirement that no HIV test may be conducted without a patient’s specific written informed consent. The law now requires only that “[a] patient must be informed orally or in writing that an HIV test will be performed unless the patient declines.” The law also requires that the information given to patients before the test include the meaning of positive and negative test results. In addition, the patient must have the opportunity to ask questions.

However, Maine law permits involuntary HIV testing in certain limited circumstances including:

- Testing of a person convicted of a sexual assault crime; a victim of a sex crime (or the parent or guardian, in the case of a minor or an incapacitated adult) may petition the court for an involuntary HIV test of a person who has been convicted of the sex crime; must be filed within 180 days of the conviction.

- HIV Testing in the context of occupational exposure, (in accordance with specific guidelines, refer to Maine HIV publication for details).

- Testing of donated blood products.

- Testing of newborn infants if either the HIV status of the mother is not known or the doctor believes that it is medically necessary.

**Testing and Counseling of Minors**
A physician may test a minor for HIV without obtaining the consent of the minor’s parent or guardian. A physician is not obligated to, but may, inform the minor’s guardian or parent of any medical treatment rendered, including HIV test results.

**HIV Surveillance**
A diagnosis of HIV infection must be reported to the Bureau of Health.

**Confidentiality of HIV Test Results**
Maine law prohibits the disclosure of HIV test results without written authorization to anyone other than the subject of the test.

**NEW HAMPSHIRE**

**HIV-Specific Privacy Law and Exemptions**
A physician, licensed nurse practitioner, employee of a health care facility, or employee of a blood bank, may administer an HIV test with the patient’s consent. In addition, upon notification of the HIV test results, New Hampshire law mandates “appropriate counseling” of the individual who was tested. New Hampshire law does not mandate written consent for an HIV test. Exceptions to the requirement of voluntary informed consent include:

- **Sexual assault crimes.** All people convicted are tested for HIV.
• **Prisoners.** Individuals who are convicted and confined to a correctional facility, or people committed to New Hampshire Hospital (the state psychiatric hospital), “may be tested without obtaining written informed consent to the testing, when the results of such tests are necessary for the placement and management of such individuals in the facility”.

• **Patient Emergencies.** When a person is incapable of giving informed consent, a physician may take an HIV test without informed consent if the test is “immediately necessary to protect the health of the [patient].”

• **Testing of Donated Blood Products**

New Hampshire does not provide any authorization for involuntary HIV testing of patients in the event of an exposure to a health care worker or emergency first aid personnel. (See New Hampshire HIV publication for details).

**Testing and Counseling of Minors**

Any minor over the age of 14 can provide consent to be tested and treated for HIV without the consent or knowledge of a parent or legal guardian. RSA Section 141-C:18, II.

A physician is not obligated to, but may, disclose a positive test result to a parent or legal guardian of a person who is under the age of 18. RSA S. 141-F:7, III. *If confidentiality is important to the individual, it is a good idea to talk to his/her doctor up front and understand his or her policies on this issue.*

**Insurance Testing & Confidentiality**

There is a separate set of laws under the state Unfair Insurance Trade Practices Act (RSA S. 417:4, XIX) which governs HIV testing by insurers, rather than the general HIV testing statute.

In order to test an insurance applicant for HIV, an insurer must obtain written consent on a form designated by the Department of Health and Human Services, containing information about the medical interpretations of positive and negative test results, disclosure of test results, and the purpose for which the results may be used.

The insurer can only disclose the results of a positive HIV test to the individual tested or any person the individual clearly authorized in writing on the form. The insurer must maintain all results and records “confidential and protected against inadvertent or unwarranted intrusion.”

**HIV Surveillance**

New Hampshire regulations require physicians, health care providers, and diagnostic labs to report HIV and AIDS cases to the Department of Public Health within 72 hours.

**Confidentiality of HIV Test Results and Exceptions**

NH law indicates that the identity of any person tested for HIV “shall not be disclosed to any person or agency except” the individual tested, their parent or legal guardian if they are a minor or a mentally incompetent adult, and the physician ordering the test. Written consent is required to disclose an individual’s HIV test results, or even that a person was the subject of an HIV test. Such written authorization must be HIV-specific and must include the reason for the request. RSA S. 141-F:8. The exceptions to this law are that a person’s HIV test results may be shared with:

- another health care provider of the patient’s
- an agency that receives blood donations

**Duty to Warn**

It is the view of GLAD’s AIDS Law Project that there is not clear justification for a breach of confidentiality under NH law. *For a legal opinion on how to handle a particular situation, a professional should consult with a supervisor or lawyer.*
RHODE ISLAND

HIV-Specific Privacy Law and Exemptions
Rhode Island General Law prohibits the administration of any HIV test without the oral informed consent of the patient. Exceptions to this requirement include:

- **Youth.** Any person under one year of age; any person between one and thirteen who “appears to be symptomatic for AIDS”; any person under the age of eighteen who is under DSS authority.

- **Occupational Exposure.** Rhode Island law permits involuntary HIV testing when “a person (complainant) can document significant exposure to blood or other bodily fluids of another person” in the course of performing occupational duties. (See RI HIV publication for details).

- **Emergency.** An involuntary HIV test is permitted “in any emergency, where due to a grave medical or psychiatric condition, it is impossible to obtain consent from either the patient, or the patient’s parent, guardian, or agent.”

- **Certain Criminal Convictions.** Rhode Island law requires mandatory HIV testing of any person convicted of: a) “possession of any hypodermic instrument associated with intravenous drug use”; b) “violating any provisions” of the prostitution and lewdness statute; and committing “any sexual offense involving sexual penetration,” where “the victim, immediate family members of the victim, or legal guardian of the victim” has petitioned the court to order testing.

- **Prisoners.** Rhode Island law requires mandatory testing of “every person who shall be committed to the adult correctional institution to answer for any criminal offense, after conviction.” In addition, “periodic testing for...HIV, including testing at the time of release and when deemed appropriate by a physician” is also required.

- **Sperm and Tissue Donation**

**Testing and Counseling of Minors**
In Rhode Island, persons under 18 may give legal consent for testing, examination, and/or treatment for any reportable communicable disease, which includes HIV and AIDS. RI ST 23-8-1.1.

**HIV Surveillance**
Rhode Island Department of Health regulations require that HIV test results be reported to the Department of Health.

**Confidentiality of HIV Test Results and Exceptions**
In Rhode Island, it is “unlawful for any person to disclose to a third party the results of an individual’s AIDS test without the prior written consent of that individual, or in the case of a minor, the minor’s parent, guardian, or agent on a form that specifically states that HIV test results may be released.” RI ST 23-6-17. The exceptions to this are:

- the patient’s physician can release the information to a third party under a number of circumstances
- the HIV status must be told to a person transporting a dead body
- a first responder or ambulance employee must be told if that person is exposed to the virus

**Duty to Warn**
In very limited circumstances a physician is permitted to inform a third party of a patient’s HIV status. Health care providers, including mental health professionals, must consult an attorney or supervisor for advice if he or she believes that a client’s communications justify breaching client confidentiality and disclosing a client’s HIV status to a third person.
VERMONT

HIV-Specific Privacy Law and Exemptions

Unlike most states, Vermont does not have a broad statute mandating specific informed consent for an HIV test. Therefore, an HIV test may be taken based on a general medical consent. However, there are specific informed consent procedures for an HIV test in the areas of insurance, medicine, and education. Vermont law permits involuntary testing/disclosure in the following situations:

- **Court Order.** A court may order the disclosure of an HIV test result if the person requesting the information demonstrates a “compelling need…that cannot be accommodated by other means.”

- **Sexual Assault.**
**HIV Insurance Issues – Coverage and Benefits**

Most people depend upon private insurance – whether health, disability income, or life insurance – to sustain their lives in the event of a catastrophic illness. Unfortunately, insurance companies have a variety of methods to avoid or restrict HIV-related costs. This has a devastating impact on the lives of people with HIV who are left with no income and no means to pay astronomical medical bills until they are sick or poor enough to qualify for Medicaid. This issue has become even more pressing with the advent of new, but expensive, treatment options, such as protease inhibitors. We are also seeing examples of insurance companies discriminating against people who are HIV- and on Truvada, either by denying them coverage or charging them much higher premiums.

While the problem of adequate access to health care must be addressed through comprehensive health care reform, litigation can still play a useful role in helping people with HIV maintain insurance coverage.

<table>
<thead>
<tr>
<th>Health Insurance – Pre-Existing Conditions</th>
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<tr>
<td>A “pre-existing condition” clause is language in an insurance policy saying that an insurer does not have to pay for claims that result from a condition that the person had during a defined period prior to the beginning of the insurance policy.</td>
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Under the Affordable Care Act (ACA), most health plans must cover pre-existing conditions, but parts of the ACA are under attack by the Trump administration and some states, so in the future this could again become an issue.

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<tr>
<th>Health Insurance – Caps On HIV-Related Benefits</th>
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<tr>
<td>Insurance companies and self-insured plans sometimes eliminate coverage for HIV-related illnesses or cap medical care benefits at a maximum dollar amount while maintaining higher benefit levels for other illnesses. It is our position that these caps are illegal under the ADA. However, courts around the country are still deciding these issues and the law remains unsettled.</td>
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**If a caller claims that HIV-related costs have been capped or eliminated, it is important to find out:**

1) The name of the employer, the number of employees, and the name of the insurer.
2) Whether the plan is self-insured or through the purchase of a group insurance plan.
3) The dollar amount of the cap and, if the caller knows, the benefit levels under the plan for other illnesses.
4) Whether the cap or exclusion was put into effect based on claims made by the caller or another specific employee.
5) Make sure that the caller obtains a copy of the plan.

*Please bring calls related to HIV caps to the attention of your supervisor.*

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<tr>
<th>Disability Benefit</th>
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<tr>
<td><strong>Applying for Disability Insurance</strong></td>
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<tr>
<td>Disability insurers can require an applicant to take an HIV test in order to determine whether to issue a policy. In Massachusetts, disability insurers may deny coverage based on a pre-existing condition. A caller must check their individual policy for the policy’s definition of a pre-existing condition to determine whether such a clause will exclude them.</td>
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If an individual contracts HIV after acquiring a disability insurance policy, his or her coverage may NOT be terminated based on his or her HIV-positive status.

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<th>Maintaining Long-Term Disability Insurance</th>
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<td>Whether it is private benefits from a long-term disability insurer or public benefits such as Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI), disability income benefits are a matter of survival for people who are unable to work full-time due to HIV or AIDS. Recently, GLAD’s AIDS Law Project has seen some long-term disability insurers terminate benefits they provide to people with HIV or AIDS who have been out on disability. Here is the problem we are beginning to see: While many people who have received disability benefits...</td>
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have been able to return to work due to improvements in their health, this is unfortunately not true for everyone. Insurers nonetheless may attempt to terminate benefits for people with AIDS who, while significantly improved, continue to be unable to work due to severe fatigue, side effects from medications, deficits resulting from past opportunistic infections, or other debilitating effects of advanced HIV disease. In the future, we may see similar issues arise with regard to public disability benefits, such as SSI or SSDI.

**Your Doctor Is Your Best Ally**

Callers may want to know if they are eligible for disability benefits. It is important that you explain to them that the insurer will look at their doctor’s records to determine their eligibility; therefore, their doctor is their best ally. A doctor’s records must reflect whatever ways their HIV is affecting them. *Even if they have not had a major opportunistic infection or a hospitalization recently, they still may be able to demonstrate that HIV creates significant limitations.*

For example, severe fatigue is a key reason why a person with HIV may not be able to work a full-time schedule. It is important that the individual keeps their doctor informed about things like fatigue, low energy, or side effects from medications *at every office visit*, even if the symptoms are not new. The individual should make sure their doctor understands how these symptoms limit them and that his or her doctor records this information in their medical record.

**Periodic Updates**

It is standard for insurers to request periodic updates from the individual and their doctor about their medical condition and typical daily activities. Failure to respond to these requests could have negative consequences for their coverage.

An individual should not feel the need to overstate or exaggerate their limitations to an insurer.

**Reevaluation of Disability Status and Termination of Coverage**

However, if you receive a call from someone whose disability status or benefits are being reevaluated (challenged) or have recently been terminated, please gather as much information as possible:

- The type of insurance, individual or group plan, name of insurance company
- A description of the caller’s health status and history
- The caller’s doctor’s name
- A description of previous and current correspondence with the insurer
- Has the insurer already terminated coverage or just indicated that it is conducting a review?

Please bring the matter to the attention of your supervisor. GLAD’s AIDS Law Project would like to help people understand the review procedure and evaluate how they can most effectively contest imminent or recent termination of coverage.

Refer callers experiencing difficulties with *public* disability benefits to the Disability Law Center (DLC); 800-872-9992, or to the Health Law Institute @ JRI Health; 617-988-8700.

**Life Insurance**

**Applying for Life Insurance**

Life insurers can require an applicant to take an HIV test in order to determine whether to issue a policy.

If an individual contracts HIV after acquiring a life insurance policy, his or her coverage may not be terminated based on his or her HIV-positive status.
**Life Insurance Incontestability After 2 Years**

Under Massachusetts law, a life insurer may not contest or rescind a life insurance policy based on a false statement in the application more than 2 years after the date of issuance of the policy. *This does not apply to health or disability insurance.*

**Cancellation Of An Insurance Policy Based On A Misrepresentation In The Application**

Prior to issuing life or disability insurance, insurers frequently require the applicant to answer questions about his or her medical history and current health status.

Unfortunately, insurers are allowed to ask an applicant about HIV test results and status, and whether the person has been diagnosed with AIDS or has any history of immune system disorders. Insurers are also allowed to require HIV antibody tests and physical examinations as part of the underwriting process.

An insurance policy is a contract that can be canceled or rescinded due to a misrepresentation in the application for insurance. In order to rescind a policy based on misrepresentation, the insurer must prove that:

a) The insured made a false statement on the application;

b) The false statement was “material”-that is, that it made an actual difference in the insurer’s decision whether to issue insurance; and

c) That the insurer actually relied on the false statement to its detriment

- Fraud can also include a failure to disclose a material fact in response to a question.
- A false statement in response to a question about HIV status or AIDS diagnosis is grounds for rescission of the policy.

However, some insurers do not ask about HIV status or AIDS, but cancel a policy alleging that a person with HIV or AIDS gave false answers to vague, nonspecific questions about a person’s general health. An insurer may also claim that a person with HIV failed to disclose minor ailments such as fatigue or a sore throat in response to questions about health impairment.

In these cases, there may be strong arguments against rescission of a policy on the grounds that the insurer did not ask specific enough questions or that the health conditions which the insurer claims should have been disclosed are minor and immaterial.

Every case is unique and depends on the questions asked by the insurer, the answers given by the applicant, and the person’s specific health status and history.
**HIV Transmission Issues – Civil and Criminal Liability**

### Criminal Prosecution and Forcible HIV Testing By Law Enforcement Agencies

**Criminal Prosecution**

In some states, HIV-positive people have been charged with and convicted of serious crimes, such as assault and battery with a deadly weapon, for spitting at or biting police officers or other law enforcement personnel. In addition, HIV-positive people have been charged with assault and battery with a deadly weapon, or even attempted murder, for engaging in sexual activity despite knowing their HIV status.

As far as we know, no such cases have been brought to trial in Massachusetts or elsewhere in New England.

You should cover the following points if you receive a telephone call from someone who is facing an HIV-related criminal prosecution.

1) What crime has the caller been charged with?
2) What are the circumstances that led to the criminal charges?
3) Find a good attorney immediately.
4) Do not plead guilty until speaking with an attorney.

**Mandatory HIV Testing of People Charged with or Convicted of Sexual Assault Crimes**

In some states, prosecutors have attempted to get court orders for the mandatory HIV-testing of people who have been charged with a sexual assault crime, even if the person has not yet been convicted. The federal Crime Bill passed in 1994 includes provisions for federal judges, under certain circumstances, to order forcible HIV testing of persons charged with sexual offense crimes in state or federal court.

While the case law in other states has permitted such testing, we believe that such testing does not provide any useful information to the survivor of a sexual assault crime and violates the defendant’s constitutional privacy and Fourth Amendment Rights.

If you receive a call from someone who is facing a mandatory HIV test, make sure to find out:

1) What crime has the caller been charged with?
2) When did the alleged criminal conduct occur?
3) Was the caller arrested pursuant to a warrant, and if not, has the court found probable cause that the person committed the crime?
4) Is there any hearing scheduled on the mandatory testing request and, if so, what court is it in and when?

**Can Someone Be Sued For Transmitting HIV?**

You may speak with a caller who wants to sue a sex partner for allegedly transmitting HIV or for having sex without disclosing their HIV-positive status.

There is potential civil liability for exposing another person to a contagious disease. You may remember that Rock Hudson’s lover successfully sued him for engaging in sex for many years without disclosing that he had AIDS.

There are a number of legal theories that can be used in such lawsuits, such as misrepresentation (inducing someone to act based on false statements), battery or intentional infliction of emotional distress.
What to Tell Callers Who Want to Sue a Sex Partner

You should indicate that GLAD’s AIDS Law Project is not able to handle these types of cases. You might want to speak with a personal injury lawyer who can tell you whether or not you have a case that is worth pursuing.

Refer the caller to the Massachusetts Bar Association’s Lawyer Referral Service at 617-654-0400 or 866-627-7577. The Lawyer Referral Service will provide the name of a personal injury lawyer in the caller’s geographic area.

In response to these calls, DO NOT:

1) Refer the caller to anyone on GLAD’s referral list.

2) Tell the caller whether they have a good case or can sue someone at all for HIV transmission. Simply tell the caller that we do not handle that type of case and refer them to the Massachusetts Bar Association’s Lawyer Referral Service.
Family Law

Introduction To Sexual Orientation and Family Law

Family Law: A Hot Topic
A large number of the calls GLAD receives have to do with family law issues. Many statutes governing family law were written for the so-called “traditional” family; i.e. a heterosexual married couple and their children. The families of same-sex couples (with or without children) defy this notion of a traditional family. In reality, only 27% of American families can be characterized as “traditional” in the married with children sense. Same-sex couples are only one group among many who must try and make the existing laws fit their family circumstances.

This chapter addresses family law as it pertains to issues of sexual orientation. For a consideration of family law and gender identity/expression, see the chapter on transgender legal issues.

Rethinking the Tyranny of Marriage and Biology
Same-sex couples face substantial obstacles to the legal recognition of their relationships and families. Historically, the legal system has recognized marital and biological family relationships as primary and has often refused to recognize other relationships at all. However, as variously configured families begin to demand recognition and legal value, some courts and legislatures have begun to recognize other relationships as family.

With few exceptions, courts rely on biology, adoption and marital status in determining the legal relationships among people. For same-sex couples, courts often insist on only using contracts between the partners to demonstrate a couple’s intentions and commitment to one another. See below for a discussion of ways same-sex couples can safeguard various aspects of their relationships with advance planning. For families with children, courts and legislatures too seldom recognize relationships based directly on substantive parenting behavior and a strong psychological bond between parent and child.

Same-Sex Couples and Children
Many same-sex couples have children in their lives. Same-sex couples may become parents through a former marriage, adoption, donor insemination and surrogacy. The non-biological parents of these children are in a precarious legal position as their relationship to their children may not always be legally recognized. Second-parent adoption is one way non-biological parents can legalize their relationships to the children raised by both partners.

Who Calls and Why
Intake calls about family law generally fall into three categories:

1) Families that are just forming (couples seeking to “legalize” their relationship);

2) Existing families who have or want to have children (calls about second-parent adoption, guardianship, etc.); and

3) Families that are splitting up (straight divorce and custody issues, gay/lesbian breakups, divorce and custody issues, property disputes, etc.)

In almost all cases, family law matters are protracted and require an attorney referral. While GLAD might be interested in taking an unusual family law case, we do not have the resources to handle routine custody, divorce and adoption issues. However, we can and should share with callers information and resource materials on these issues.

Forming Families – Legal Protections for Same-Sex Couples
Marriage, civil unions and domestic partnerships provide some automatic protections for same-sex couples and families, but there are steps that couples can take to protect their relationship and families even if their relationship is not legally recognized.
The System Favors Biological Families

When someone becomes incapacitated, the probate courts follow a prescribed system to determine who should be appointed guardian. When someone dies without a will, the courts will distribute his/her property according to laws that recognize only biological relatives or legally married spouses. Unfortunately, we often get calls from people having to fight their partner’s family over the funeral arrangements and the disposition of property.

Beating the System: Plan Ahead & Do the Paperwork

To ensure that someone other than the legal “next-of-kin” makes decisions about health care and finances and receives your property and/or remains, you must instruct the state through legal documents. Listed below are several documents that offer same-sex couples some legal protections. Even if a couple has a legally recognized relationship, GLAD recommends a “belt and suspenders” approach—which means supplementing the protections of marriage with the legal protections listed below.

1) Health Care Proxy Form:

Health Care Proxies are not legally recognized in all states but are valid under the laws of Massachusetts. A Health Care Proxy is probably the simplest of these documents to complete and does not require the services of an attorney. The form allows the person signing the document to designate one person and an alternate (in case the first person is unavailable) to make his/her health care decisions should s/he become incapacitated. Anyone over 18 years of age can be designated a health care proxy.

The Health Care Proxy form also grants the person designated as the health care proxy visitation rights and access to medical information. The person signing the document has the option of specifying in the document what kind of health care decisions s/he wants made under different medical circumstances. The form must be witnessed by two people other than the designated health care proxy and should be given to the primary health care provider as part of the person’s medical records. As with any legal documents, a copy should be kept in a safe place.

Health Care Proxy forms are generally done to ensure that a person’s partner (and not his/her biological family) will be allowed access to the person and will be the one responsible for making health care decisions. Without such protections, a person’s lover could potentially be barred from visiting and from being involved in his/her partner’s health care by hostile biological family members. Every New England state has a similar legal document, but they may be called by different names.

2) Durable Power of Attorney:

Durable powers of attorney exist in some form in all states and must be prepared by an attorney. This document allows you to designate someone to manage your personal finances and/or your business affairs. It may also be used to allow you to designate a person to make medical decisions on your behalf and to nominate the person you want the court to appoint as your guardian should you become incompetent.

A Power of Attorney is only valid when you are competent; however, a Durable Power of Attorney becomes effective upon disability and remains effective despite your disability. Therefore, a Durable Power of Attorney provides the most protection and should be used whenever possible.

3) Joint Tenancy and Tenants by the Entirety:

Joint tenancy refers to the joint ownership of property, such as real estate and bank accounts. If a couple is acquiring property together and wants joint tenancy, they should make sure that both their names appear on ownership papers, such as deeds and titles. Joint tenancy with rights of survival means that if one of the parties dies, the other receives all of the property. Joint tenancy without rights of survival usually means that if one party dies his/her portion of the property reverts to his/her estate.

If couples are trying to jointly own property that one owned individually before the partnership, they should consult an attorney. Sometimes joint tenancy of property has tax consequences that should be explored by an attorney. Married couples are also able to hold property as Tenants by the Entirety. You should speak to an attorney about which form of ownership is most beneficial to your individual situation.

4) Will:

A will, which also must be prepared by an attorney, directs the distribution of property to the individuals and organizations you choose. You must choose an executor (administrator or personal representative) to carry out your
instructions. This job requires someone who is responsible as they will need to inventory your estate, pay all your
debts and distribute whatever assets remain. Lesbians and gay men with children should be sure to consult an
attorney about how they can nominate the guardian they would choose for their children in the event of their death.
**Marriage generally invalidates an existing will** unless the will specifically references the marriage in some way.

5) Burial Instructions:

Although burial instructions can be included in the will, it is a good idea to write a special letter of instructions
because burials are often completed before wills are located.

6) Living Together Contracts:

Some couples choose to execute documents outlining property and financial issues. Similar in some ways to pre-
uptial agreements, often these documents contain instructions on what will happen to joint property if the couple
breaks up. For many people, just the process of sitting down and discussing these issues is instructive and prevents
future disputes. These documents also make clear the intent of the parties at the time the document is executed.
These documents are useful for the couple in clarifying their intentions and expectations while they are getting along
and will be enforced by the courts.

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<tr>
<th>What To Tell Callers About Legal Protections For Their Relationships</th>
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<tr>
<td><strong>Inform People of the Options</strong></td>
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<tr>
<td>Advise callers of the possibilities. We strongly recommend that LGBT families consult a private attorney about executing some, if not all, of the documents described. We have many referrals to attorneys skilled in executing legal protections for “non-traditional” families.</td>
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<th>Families With Children</th>
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<td><strong>Getting Pregnant</strong></td>
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Artificial or alternative insemination (AI) (also known as donor insemination, or DI), is a common method by which
lesbians conceive children. In some cases, gay men act as sperm donors and are known to the donees. Many times,
women obtain sperm from a sperm bank or doctor’s office in which the identity of the donor is unknown.

**Make Agreements With Known Donors Prior to Insemination**

The real legal issues arise in situations where the donor is known to the donee and may have an interest in being an
active parent. Both the donor and the donee should address these issues prior to inseminating. (See section below on
Agreements). If the donor and donee truly want to co-parent the child, agreements are advisable to clarify issues of
support, joint decision-making, and what to do in the event of a dispute. If the donor and donee have different ideas
of how involved the other should be, then having a child without sorting out the issues in advance is a guarantee of a
painful and expensive legal battle that will not advantage anyone.

**The Donor’s Rights**

When the donor is known and does not want to be involved in the child’s life as a parent, women must take special
precautions to terminate the donor’s legal rights to the children. Because the legal system bases many of its family
law decisions on biology, sperm donors often have legal claims to the children conceived with their sperm (for
unmarried persons, these are referred to as paternity cases). In fact, the donor (regardless of how involved he has
been in raising the child) may have more legal claims to the child than the non-biological co-parent who has raised
the child every day of his/her life.

**Laws About Donor Insemination**

In the New England states, if a child is born into the marriage, then both spouses are presumed to be the parents and
are listed on the birth certificate. Since the parentage for the non-birth parent is through the marriage, if the couple
travels to a place where the marriage is not recognized then the parentage of the non-birth spouse may also not be
recognized. That is why GLAD strongly recommends that even married couples do a second-parent adoption for the
non-birth parent.
Limiting the Donor’s Rights

If people want to limit the donor’s ability to assert parental rights and responsibilities, there are several factors which people could consider: 1) using a physician to secure the sperm and perform the insemination; 2) having a court terminate the parental rights of the donor; and 3) and the intent of the parties (expressed orally, in writing or by conduct).

Some Issues Donors & Mothers Should Consider

Some people want the donor to retain rights and to participate in raising the child. In these cases, it is advisable that the parties involved carefully consider all of the possible issues that may arise. For example, who will pay medical expenses associated with pregnancy, what if there are complications, what if one of the parties dies or becomes disabled, who will contribute what financially, what if one party wants to move, who will decide the course of the child’s education, to what extent will each party be involved in child-rearing, what will be the involvement of extended family members? A myriad of questions must be considered. Sitting down with an attorney familiar with this area of law and executing a parenting contract is advisable (see below).

Conflicts of Interest Between Donors and Mothers

Because the interests of the donor and the mother(s) may conflict, each should be represented by a different attorney in executing such agreements. Practically speaking, the way this often works is that one attorney does the work and one of the parties gets another attorney to review it to make sure his or her interests are represented in the final agreement. It is much better to resolve any disputes before the child is born, than to end up in litigation later.

Again, as a practical matter, many women choose an anonymous donor to ensure that there are no custody disputes between the donor and the mother(s). A known donor can choose to initiate a paternity suit at any time during the child’s life, even many years after the child’s conception. An anonymous donor eliminates the risk of such paternity suits.

What To Tell Callers About Donor Or Artificial Insemination

Suggestions for Women

Many people who call GLAD about AI have not thoroughly thought out the legal implications of having a child by donor insemination. In most cases, when a known donor is being used, a referral to private attorney is appropriate. Both women using known donors and those using unknown donors can contact Fenway Community Health Center’s AI Clinic. Their number is 617-927-6243. Fenway has been doing AI for many years and has gathered a great deal of material on the issue. They also offer groups for people considering AI and for men considering being sperm donors.

Suggestions for Men

Men who call about the advisability of becoming known donors should be told the following about their rights and responsibilities. They should decide what kind of involvement they want to have with the child and communicate that to the mother(s). Unless they can all agree on everyone’s respective roles, they are not appropriate partners. If known, they are legally considered to be the father. This means that they could be held responsible for certain financial obligations. To terminate rights, the parties should consider doing the insemination through a clinic and executing a document that states the intent of the donor to give up any parental rights and responsibilities. If they plan to maintain contact with the child or even co-parent with the mother(s), suggest a written contract be signed by all parties specifying their intent and plans for raising the child. The bottom line is that they should see a lawyer.

Families Raising Children Together – Protection Of The Co-Parent

Introduction

As mentioned above, recognition of families in the courts relies heavily on biological ties. This puts the non-biological parents of children raised by gay and lesbian families in a precarious legal position. There are some steps parents can take to bolster their legal standing. One option is second-parent adoption, which is discussed in a later section. Second-parent adoption probably offers the non-biological parent the best legal security. In New England second-parent adoption is available in all six, although in New Hampshire it may require getting married. Other options include the documents listed below. Gay men and lesbians raising children together should consider the following protections:
a) Guardianship/co-guardianship papers:
Through a court process, guardianships allow the non-biological parent some access to school and medical records and decision-making. Guardianship rights are revocable at the will of the biological parent. Thus, the biological parent is still able to trump the non-biological parent in the event of a dispute.

b) Letters from the biological parent to institutions granting rights to third persons:
These allow the non-biological parent access to medical and school records and/or allow the non-biological parent right to visit and be involved in health care and educational decisions. These are not legally enforceable but may assist a sympathetic but reluctant administrator to feel like they are covering themselves.

c) Parenting Agreements/Donor Agreements:
Similar to Living Together Agreements described above, parenting agreements spell out the intent of all parties vis-à-vis their children. By way of example, the parties could include: two women with an unknown donor; a male couple with a lesbian mom; a single (for now) gay man and a single (for now) lesbian; and a lesbian couple and gay male couple (i.e. four parents). Thus, the parties may need several agreements. For instance, where a male couple is raising a child with a lesbian mom, the two men will need an agreement in the event they split up or one of them dies, and another agreement between the 2 men and the lesbian mom.

If the donor is known, the parties must take great pains to be clear about what his role, if any, is to be in the life of the child. GLAD highly recommends that couples planning to have children execute such documents before insemination begins so that both parties are clear on their responsibilities and rights. After the birth of a child, people change their minds about what they really want. For instance, a woman who gives birth to a disabled child may decide she wants help with child support, even though the parties had verbally agreed otherwise. More typically, people get excited about being a parent after the birth and may want greater involvement than they had anticipated, so the lines should be clear in advance of insemination or birth.

Typically, these agreements should be in writing. At a minimum, they must outline the support/financial responsibilities, custody and visitation rights of the parties, including what they will do in the event of separations, death and disability. It is best if people consult a lawyer about the actual agreement, but they can think through a lot of the issues themselves. Often these documents outline a mechanism to resolve unforeseen disputes. Often the documents outline mediation and arbitration provisions so that the parties can stay out of court.

Although these documents make clear the intent of the parties, they may not have legal weight in court. However, several cases from around the country have begun finding agreements between donors/fathers and donors/mothers to be enforceable as contracts. Nonetheless, this area of law is still unsettled.

WHAT TO TELL CALLERS ABOUT LEGAL PROTECTIONS FOR THE CO-PARENT
Inform callers of the options discussed above. Emphasize the importance of working out arrangements before there is any difficulty. If the couple decides to use any of the above documents, they will need an attorney. If they do not already have an attorney, refer them to an attorney experienced in family law. Be sure to mention that second-parent adoption may be a possibility.

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Adoption

Two Kinds of Adoption Calls
There are basically two types of adoption. In an agency adoption, a single person or couple goes to a private adoption agency or the state department of social or human services and seek to have a child placed with them for adoption. The other type of adoption, typically called second-parent adoption, involves a family with children where the only purpose of the adoption proceeding is to establish a legal relationship between the child to be adopted and one of his or her existing parents (e.g., the non-biological mother/father). Connecticut, Massachusetts, Maine and Vermont have specific statutes or court rulings allowing for second-parent adoption, and second-parent adoptions have been granted by certain lower courts in Rhode Island and New Hampshire and with the availability of marriage in New Hampshire and Rhode Island, married couples have the right to step-parent adoption. Second-parent adoption is addressed below. Please bring any calls where adoption petitions have been denied to the attention of your supervisor.
What To Tell People Who Call About Adoption:

Inform Callers of Their Right to Adopt Jointly
Inform people of their legal right to adopt jointly depending on the state. They will have to turn to the state department of social services, or an adoption agency.

Explain the Process
There is a lengthy process of finding a child and then screening the prospective parent that must occur even before the adoption petition goes to court. An integral part of the process, as with foster care applications, involves a study of the petitioner’s home. This is called a home study.

Home Studies: Find an Agency Where You Can Be Upfront About Your Sexual Orientation
Anyone seeking to adopt through the state or from an agency will need to go through the home study process. For people adopting through the state or an agency, people should be honest about issues of sexual orientation if asked, as deception could destroy chances for adopting. Although discrimination is prohibited, some adoption agencies are more “gay-friendly” than others. It is important to shop around. In some cases, married couples have been able to get the home study requirement waived.

Referrals for More Information
If people are just beginning to explore the possibility of adopting, you may want to refer them to the Child Welfare Information Gateway at 800-394-3366 or 703-385-7565 for general information on the process.

Inform GLAD Staff of Adoption Discrimination Cases
If callers have been denied the right to adopt because they are gay, lesbian or bisexual, find out the basis for their belief that the decision was discriminatory. Refer this to your supervisor.

Residency Requirements for Adoption
A state can generally only grant an adoption to its own residents. However, if an individual calls about adopting in a state other than where they live, it is a good idea to refer them to an attorney for consultation. In addition, an adoption agency in the state, the state Department of Public Health, or the state Department of Youth Services may be able to provide information about the requirements for establishing residency. Once an adoption has been completed, the parent is considered a parent in any state.

International Adoption
Many gay, lesbian, or bisexual people adopt children from foreign countries. However, those countries are not always friendly to gay people, so individuals seeking to adopt children from foreign countries sometimes hide their sexual orientation, even pretending to be single when they are in fact in a committed same-sex relationship and both partners intend to jointly parent the adoptive child. If a couple is married, the marriage may become an obstacle to adopting internationally. Couples considering marriage and international adoption should consult an experienced family law attorney. Most international adoptions will not be available to same-sex married couples.

Second-Parent Adoption

What is Second-Parent Adoption?
As mentioned earlier, if same-sex partners are not married, the non-biological or non-adoptive parent in a partnership has no legal ties to the child. Second-parent adoption is a process whereby the non-biological or non-adoptive parent is allowed to co-adopt her partner’s child without the biological or adoptive parent surrendering her rights to the child. In essence, both parents are given equal legal rights to their child. The law recognizes both equally as parents. Second-parent adoption does nothing to change the legal status of the partners to one another. It simply legally recognizes the relationship between the child and her/his non-biological parent. The result is that the child has two legal parents.
The Status of Second-Parent Adoption Cases

Good news in New England:

Massachusetts – Allows second-parent adoption (by Supreme Judicial Court decision, Adoption of Tammy, Sept. 10, 1993).

Vermont – Allows second-parent adoption (by State Supreme Court decision, Adoption of BLVB, June 25, 1993 and as codified by the State Legislature in 1995-1996.)


Rhode Island – Only some trial/family courts have allowed second-parent adoptions. There is no high court or legislative guarantee of this right, but second parent adoptions are fairly routine, and, now that Rhode Island has marriage, step-parent adoption is available for married or civil union couples.

Maine – Second-parent adoptions are allowed due to a GLAD victory (unanimous decision by State Law Court in Adoption of M.A, August 30, 2007).

New Hampshire – Officially only married couples and single individuals may adopt. The New Hampshire Supreme Court rejected a petition to jointly adopt by a divorced heterosexual couple in 1987. However, some second-parent adoptions have been granted at the lower court level. With the advent of marriage, step-parent adoption is available to married couples.

Outside New England:

This is an area of the law that is rapidly changing and in some states whether a same-sex couple is able to secure a second-parent adoption depends on the county they live in or even the judge who is hearing the petition. Refer couple who are asking about second-parent adoption outside New England to Lambda Legal, www.lambdalegal.org.

The Benefits of Second-Parent Adoption

Second-parent adoptions have several benefits. In addition to adding a sense of security and legitimacy to the family unit, it allows the child to inherit from both parents and to be put on the biological parent’s insurance and access to other financial benefits such as social security. More importantly, such adoptions secure the relationships of the parents and child in the event that the biological mother dies, or the couple splits up.

GLAD’s Role in Second-Parent Adoption Cases

GLAD was very involved in pursuing two second-parent adoption cases in Massachusetts. They are now referred to as Adoption of Tammy and Adoption of Susan. In Susan, we represented the parents; in the other case, we filed an amicus brief on myths about gay relationships, and the psychological health of children raised in gay and lesbian families. Subsequent cases have streamlined the process and eliminated differential treatment for gays and lesbians in Massachusetts substantially.

The second-parent adoption cases are good examples of GLAD’s work as an impact litigator. Having helped set good precedent with two cases, the door is now open for all gay, lesbian and bisexual parents. While we will probably not be filing any more cases ourselves, GLAD will work to streamline the process and to provide education and referrals to those seeking adoptions.

What To Tell People About Second-Parent Adoption

1) Explain to people what second-parent adoption is and its current status in states where these adoptions have been granted.

2) Inform people of other legal protections for same-sex families as described above. Refer them to a private attorney if appropriate.

3) Explain the process. As with other types of adoption, most second-parent adoptions will involve a home study.
4) Offer to send information on second-parent adoption if they are unfamiliar with it and are interested in learning more.

### Divorce: Child Custody And Visitation

GLAD sometimes gets calls from concerned gay men or lesbians who are about to or are in the process of getting a divorce, either from a same-sex or different-sex spouse. Although GLAD does not handle divorces, we have extensive referrals to attorneys who do.

#### What Is Meant By Custody & Visitation?

Although the term “custody” has different meanings in different states, it generally refers to who has the right to make important life decisions for the child (choice of religion, education, medical care) and who physically possesses the child. In many states, courts routinely award joint custody for decision-making, but award one parent primary physical custody. “Legal custody” refers to the custody granted to parties by the court. “Physical custody” refers to who actually has physical custody of the child; i.e. with whom the child resides. “Visitation” refers to the rights of access to the child for the parent who does not reside with the child at all, or a majority of the time.

#### The Best Interest of the Child Standard

Decisions about custody and visitation are supposed to be made with reference to the best interests of the child. Some states set out factors the court must examine in determining a child’s best interests; some are vague. Some states (none in New England) set out sexual orientation as a factor the court must look at (this is usually a bad sign).

#### Sexual Orientation as a Weapon in Custody Battles

Kids are pawns in divorce litigation. In particular, they are potent weapons for an ex-spouse with a wounded ego. Thus, it is often the case that an ex-husband will use his ex-wife’s sexual orientation to wrest custody of the children from her. However, it is certainly the case that women do the same thing to gay men. Custody disputes do not always arise at the time of divorce. Frequently, the husband will learn of his ex-wife’s sexual orientation sometime after the divorce and will seek to modify the custody agreement because he disapproves of her “lifestyle.”

#### Massachusetts: Sexual Orientation Can’t Be Used to Deny Custody

In Massachusetts, a person’s sexual orientation alone is not enough to disqualify him/her from being a custodial parent. Ever since 1980, there has been definitive case precedent on this issue (see Bezio v. Patenaude and Fort v. Fort). Sexual orientation is one of many relevant factors in determining the best interest of the child. The best interest of the child standard is supposed to be the over-riding consideration in child custody matters. These cases should be decided on issues of parental fitness, such as who is best able to parent the child and with whom the child has bonded. For information on other New England states, see GLAD’s state LGBT Overview publications.

#### Be Prepared to Fight the Sexual Orientation Issues

Despite this clear precedent and the best interest of the child standard, these cases are really civil rights cases and must be prepared as such. In other words, they require education of the judge about who lesbians are and what happens to kids who have lesbian mothers.

The attorney representing the parent must be ready to argue that existing prejudices cannot bar or interfere with a parent child relationship. (see Loving v. Virginia and Palmore v. Sidoti, miscegenation cases). GLAD can help attorneys with this kind of preparation.

#### Same-Sex Custody Disputes

You may get calls from people who are in a custody dispute with a same sex partner. It is critical, with these calls, that you do a conflict of interest check to determine whether the caller’s (ex-) partner has already called us. We are only able to provide assistance to the party on one side of a dispute and would not represent a biological parent who is arguing that a non-biological parent has no legal rights.

#### Non-biological Parents are at a Disadvantage

Callers who are non-biological parents to their children may be concerned that the biological parent will limit or cut off contact with their children. Find out if the couple had completed a second-parent adoption prior to splitting up. If so, you can reassure the caller that she should be allowed to petition the court for visitation or custody as a legal
parent. If the couple had not completed a second parent adoption, ask her if she was married to the other parent or had executed any other written agreements with her partner about parenting together. Was the caller named as a guardian? Did the couple write up a parenting agreement? Is there a known donor or father to the child? Also ask whether the caller was a primary caregiver to the child for significant periods of its life. Does the child bear her name?

De Facto Parenthood

Massachusetts
In 1999, a landmark ruling from the Supreme Judicial Court in Massachusetts in the case of E.N.O. v. L.M.M. established that a de facto, non-biological, non-adoptive same-sex parent may petition a court for visitation. De facto parenthood, according to this decision, is defined as an adult, not the child’s legal parent, who has resided with the child, and who has, for reasons primarily other than financial compensation, and with the consent of a legal parent, formed a de facto parent relationship or has performed a majority of the caretaking functions for the child, or who has been responsible for a share of caretaking functions at least as great as that of the parent with whom the child primarily has lived.

There is a presumption of parenthood if the child is born to parents with a marriage, but parentage could theoretically be challenged by another party with biological ties (sperm donor or surrogate) and might not be respected outside states that have marriages—so GLAD strongly recommends a second-parent adoption (the belt and suspenders approach).

Rhode Island
In 2000, the Rhode Island Supreme Court also ruled in favor of a non-biological mother who sought visitation with the son she and her partner had conceived and raised together.

There is a presumption of parenthood if the child is born to parents with a marriage or civil union, but parentage could theoretically be challenged by another party with biological ties (sperm donor or surrogate)—so GLAD strongly recommends a second-parent adoption (the belt and suspenders approach).

Connecticut
The State of Connecticut has a statute permitting claims for visitation in some circumstances by non-legal or non-biological parents. All questions should be referred to an attorney.

There is a presumption of parenthood if the child is born to parents with a marriage, but parentage could theoretically be challenged by another party with biological ties (sperm donor or surrogate) and not be respected in some other states, and so GLAD strongly recommends a second-parent adoption (the belt and suspenders approach).

New Hampshire
The Superior Courts of New Hampshire have allowed certain claims for visitation to go forward. In 2014, GLAD did a landmark case obtaining full parental rights for a non-bio mother who had raised the child for several years.

There is a presumption of parenthood if the child is born to parents with a civil union or marriage, but parentage could theoretically be challenged by another party with biological ties (sperm donor or surrogate) and not be respected in some other states, and so GLAD strongly recommends a second-parent adoption (the belt and suspenders approach).

Vermont
Under the 2018 Vermont Parentage Act, there are many ways to establish parentage, including as a de facto parent. GLAD still strongly recommends a second-parent adoption (belt and suspenders approach).

Maine
In 2004, GLAD won a ruling from Maine’s highest court (the Maine Law Court) that established the right of a non-biological parent to petition to be recognized as a de facto parent for purposes including custody and visitation, but again GLAD recommends a second-parent adoption. Like Vermont, Maine passed a Parentage Act in 2016 that addresses the ways in which parentage can be established.
A caller seeking custody or visitation as a de facto parent should make sure they are working with an attorney experienced in same-sex family law and should encourage their attorney to consult with one of the lawyers at GLAD.

**Standards of Practice**

When a same-sex family is breaking up, sometimes the biological parent calls to ask what their rights are in a custody dispute. (Again, please do a conflict of interest check.) While biological parents often have the legal upper hand, we want to encourage them to not take advantage of their biological relationship to the child to hurt their partner.

Please make sure you send these callers GLAD’s publication *Protecting Families: Standards for LGBT Families.* *Protecting Families* outlines ten crucial standards of practice to guide people’s decision-making when faced with an absence of relevant law and a court’s misunderstanding of our families. These guidelines have been endorsed by the Lambda Legal Defense and Education Fund, the National Center for Lesbian Rights, the American Civil Liberties Union, the Family Equality Council, COLAGE-Children of Lesbians and Gays Everywhere, The Human Rights Campaign, The National Gay and Lesbian Task Force, The Equality Federation, The National LGBT Bar Association, and numerous other organizations serving the social and legal needs of gay and lesbian families. Briefly, the guidelines are as follows:

1. Support the rights of LGBT parents.
2. Honor existing relationships regardless of legal labels.
3. Honor the children’s existing parental relationships after a break-up.
5. Seek a voluntary resolution.
6. Remember that breaking up is hard to do.
7. Investigate allegations of abuse.
8. The absence of agreements or legal relationships should not determine the outcome.
9. Treat litigation as a last resort.
10. Refuse to resort to homophobic/transphobic laws and sentiments.

**How To Respond To Calls About Child Custody Disputes**

*Callers Are Often Upset and Frightened*

Understandably, parents who are facing custody battles are often extremely upset when they call GLAD. Many callers believe their ex-spouse’s threats that he will get the kids because of the caller’s sexual orientation. For many people, there is nothing as frightening as the prospect that they might lose their kids. Often women are unaware of their rights under the law and believe they must choose between their children and their lesbian identity.

*Steps Callers Can Take*

While you should not get into the specifics of a caller’s situation, you can educate callers about the laws. The following are some steps you can take to assist the caller:

1) If the caller does not already have an attorney, refer her/him to an attorney in the Lawyer Referral Service who is experienced in family law. It is imperative that the caller is completely candid with her attorney about her sexual orientation so that the lawyer can prepare to combat all of the arguments that the other side might raise. Even if the caller herself does not identify as a lesbian, her attorney should be aware of possible accusations.

2) If the caller is not comfortable talking about her sexual orientation with her lawyer, she should consider changing lawyers.

3) Inform callers about the law, making clear that sexual orientation is only one factor among many used to determine the best interest of the child, and, in and of itself, is not a disqualifying factor.
4) Inform the caller (indeed, stress to them) that we will be happy to talk to his/her attorney about strategy and the law, as well as the resources we have available. In general, it is important to build a strong record in the trial court about the person’s parenting abilities and to be up front about the issue of sexual orientation. That way, if the judge makes a finding that appears to be based more on prejudice against the parent than on the merits of the case, there are good grounds for appeal.

5) Offer to send the caller or his/her attorney some of the resource material we have available. There are several groups that may also be able to provide the caller with information and/or support. These include not only legal groups but also support groups for gay and lesbian parents. Consult the ARD and/or ask your supervisor.

**Foster Care**

**History of the Issue**

One of GLAD’s most well-known cases involved Massachusetts foster care regulations. In 1985, two foster children were removed from the home of a gay male couple after an article about the placement appeared on the front page of the Boston Globe. The issue was not just whether or not gay people had a right to be foster parents. The hidden message in the case was about whether we were really appropriate parents at all.

In April of 1990, GLAD and The Civil Liberties Union of Massachusetts (CLUM) successfully settled the five-year-old case. It had been brought against the Executive Office of Human Services, which had created a ranking system for foster parents based on an antiquated notion of traditional family. This ranking system put heterosexual couples with previous parenting experience first and single individuals and unmarried couples last.

**Current Regulations**

Under the new guidelines, the type of family arrangement is not important. Gay men, lesbians, and bisexuals should be able to be foster parents both individually and as couples.

**Foster Care and Adoption**

All the New England states allow adoption and foster parenting by gay men, lesbians and bisexuals.

**How To Handle Calls About Foster Care**

As always, let people know their rights under the law. If someone is considering being a foster parent, s/he should be upfront about their sexual orientation. If s/he lies and is later found out, it could adversely affect his/her application.

If someone is having difficulty with the Department of Children and Families (DCF) and believes the problem has to do with his/her sexual orientation do an intake and we may be able to contact the DCF legal office.

**HIV & Family Law**

**Custody**

Courts and family members sometimes attempt to use HIV status as a reason to deny a parent custody of a child or to restrict visitation.

While there are no Massachusetts cases on HIV status as a factor in determining custody and visitation, there are compelling arguments that a parent’s HIV status, by itself, cannot be used as a reason to deny custody or visitation.

**Arguments Which Will Be Made Against Parents With HIV**

As you read about in the section on custody & sexual orientation, courts are supposed to make custody and visitation decisions based on the “best interest of the child.” The following are some of the arguments against parents with HIV which will have to be countered in custody and visitation proceedings.

1) The argument will be made that the HIV-infected parent will transmit HIV to children. Yet, there is absolutely no reason to believe that HIV can be transmitted by daily household contact.

2) Based on stereotypes about the nature of HIV and AIDS, people will argue that HIV infection renders a parent physically unfit to be a parent. While physical health is a factor which courts may consider, each situation must be based on an individualized assessment of the ability to be an effective parent. HIV-
infection may be asymptomatic for many years. A court may not presume that HIV-infection automatically means that a parent is physically unable to care for a child.

3) There will also be arguments that a child will be emotionally harmed by living with an ill parent or by the social stigma of HIV. However, there are strong arguments that courts should not give weight to factors which do not bear directly on the parent’s ability to provide for the child’s best interest, especially where a court would simply be sanctioning underlying social prejudices. In addition, many psychological experts believe that children are helped by dealing honestly with a parent’s HIV status and telling the child in age-appropriate terms about the process the parent is going through.

How To Respond To Calls About HIV & Custody

1) Find out the current status of the custody and visitation arrangements.

2) Find out the status of the legal proceedings. What court are the parties in and what has happened so far.

3) Determine how HIV has been raised (or threatened to be raised) in the legal proceedings.

4) Explain to the caller that HIV status, by itself, should not be considered by a court in determining custody or visitation. However, there is little case law in this area and the judge may need a lot of education about HIV and AIDS.

5) Find out if the caller has an attorney who is prepared to educate the judge about HIV if necessary.

6) Tell the caller that the AIDS Law Project will speak with his/her attorney about strategy and the law and help obtain experts or educational materials about HIV or AIDS.

7) If the caller does not have an attorney or does not feel that his or her attorney can adequately address the HIV-related issues, refer the caller to a family law attorney from GLAD’s referral list.

Guardianship and Temporary Agent

Under the newly enacted Massachusetts Uniform Probate Code, it is possible for a parent or guardian to appoint a temporary agent for a period of 60 days when the parent or guardian is incapacitated or not able to care for the child. There is also a court process for appointing a long-term guardian for a minor.
**Domestic Partnership Benefits**

**Introduction**

Domestic partnership is a code word for the increasing recognition of gay and lesbian families. Domestic partnership can refer to a variety of things: state provided benefits, municipal and county ordinances, and policies of private companies that recognize the families of same-sex couples for the purposes of extending benefits to them. Benefits may include health insurance, family medical or bereavement leave, equal pension benefits, relocation expenses, or access to company facilities. Such policies use criteria other than biology and marriage to determine what constitutes a “family.” Some policies include unmarried heterosexual couples, while others only recognize same-sex partners.

Hundreds of municipalities and companies recognize domestic partners. The whole debate surrounding same-gender marriage has led to an advance in domestic partnership policies by companies and ordinances. More and more people understand that denying gay men, lesbians, and bisexuals the same benefits as heterosexuals is simply unfair.

For lists of employers that offer domestic partnership benefits, see the Human Rights Campaign Corporate Equality Index.

**Legal Issues**

**The Massachusetts Gay & Lesbian Civil Rights Law Excludes DP Benefits**

Although employment benefits, such as sick leave and health insurance, can make up as much as 40% of an employee’s compensation, the Massachusetts Lesbian and Gay Rights Bill does not compel employers to extend these benefits to the partners of their gay and lesbian employees. In fact, within the text of the gays rights bill is a clause that actually states that nothing in the bill will be construed to mean that employers must extend domestic partnership benefits. This was one of many compromises made to get the bill through the legislature.

**The Excuses of the Opposition**

Opposition to domestic partnership policies are usually couched in terms of concerns about cost and concerns about fraud. Fortunately, there is a growing body of data that suggests these concerns are unwarranted. Very few people actually take advantage of domestic partnership policies, and there has been no evidence to suggest that fraud among domestic partners is any more widespread than that among married couples. Now that domestic partnership policies have been in place in some areas for several years, reports show that the cost of implementing these policies has been negligible.

**The Public Sector**

The state of Maine has established a domestic partnership registry that provides limited, but very important benefits (e.g. a Maine domestic partner is eligible for Social Security spouse benefits and can inherit like a spouse).

**What DP Ordinances Accomplish**

In general, these ordinances do two things. First, they grant sick leave, bereavement leave and health insurance to the families of gay, lesbian, and bisexual municipal employees. The most generous of these policies simply replaces the word “spouse” in all personnel policies with the word “domestic partner” thereby allowing gay men and lesbians access to the same benefits and policies as their straight colleagues. Less generous policies restrict benefits to sick and bereavement leave.

The second effect of these ordinances is that they allow same-sex couples living in the city (whether or not they are city employees) to register as “domestic partners”. Generally, such registration offers limited benefits such as the right to visit the partner in hospitals or jails and access to the school and medical records of any children being raised by the partners.

**What Do DP Ordinances Require?**

To obtain these benefits, most cities require that the employee sign an affidavit stating certain facts about the partnership, such as that the couple has been in committed relationship, they share finances, they are each other’s
sole domestic partner, and that they will notify the appropriate people should the partnership dissolve. Some cities require that the couple has been together a certain length of time before they are allowed to register.

Massachusetts – State and Municipal Employees
Same-sex married couples in Massachusetts who work for state, county or local government are required the be treated the same as different-sex married couples and so can add their spouse to the health plan. For the most part, Massachusetts state, county and municipal governments do not offer domestic partnership benefits to unmarried couples.

Private Sector

Company Policies
Domestic partnership policies in the private sector closely resemble those in the public sector. Although they vary, most policies include “domestic partner” in their personnel policies that refer to “spouse.” Usually by signing an affidavit and keeping it on file in the personnel office, employees are granted sick and bereavement leave, health insurance, and other benefits that are routinely granted to employees’ legal spouses. These benefits can include perks such as tuition waivers and company club memberships.

Even when employers provide these benefits, federal laws require different tax or other treatment of the benefits for domestic partners as compared to spouses. For example, an employee must pay income tax on the employer’s cost of his or her same-sex partner's health insurance benefits, but an employee with a spouse does not. For pensions, a domestic partner has no right to sign off if their partner decides to name someone other than them as the beneficiary of a pension although a spouse would have that right. In addition, a domestic partner has no right comparable to that of a spouse to sign off on their partner's designation of another person for survivor benefits.
**Marriage & Civil Unions**

**Introduction: Civil Marriage for Same-Sex Couples**

In 2015 the United States Supreme Court ruled that same-sex couples have the constitutional right to marry and have their marriage respected everywhere in the United States. Several foreign countries also allow same-sex couples to marry, but in many cases there are residency and other requirements that make it difficult for non-citizens to marry there.

In the New England states that GLAD serves, here is how marriage happened:

**Massachusetts - Goodridge Victory**

GLAD’s victory in Goodridge et al v. The Department of Public Health resulted in full equal marriage rights for same-sex couples for the first time in the U.S. As of May 17, 2004, same-sex couples became eligible for Massachusetts marriage licenses. Some out-of-state same-sex couples were able to marry in Massachusetts in late May, 2004. However, former Governor Romney quickly implemented an old law from 1913 that had rarely been used to prevent all non-Massachusetts same-sex couples from marrying in Massachusetts unless they intended to reside there. GLAD challenged the validity of this law in court, which finally resulted in allowing same-sex couples from Rhode Island or New Mexico the right to marry in Massachusetts. Then on July 31, 2008, Governor Patrick signed a repeal of the so-called “1913 Law,” and beginning on that date same-sex couples from anywhere in the world can marry in Massachusetts without intending to reside there.

**Connecticut – Kerrigan Victory**

On August 25, 2004, GLAD filed suit on behalf of eight gay and lesbian Connecticut couples who were denied marriage licenses in Madison, CT, challenging the State’s discriminatory denial of marriage rights to same-sex couples. On June 12, 2006, Judge Pittman denied the plaintiff’s motion, ruling that the exclusion of same-sex couples from marriage did not violate the Connecticut Constitution. The plaintiffs appealed this decision to the Connecticut Supreme Court. On May 14, 2007, GLAD Senior Attorney Ben Klein presented oral argument in the case before the Connecticut Supreme Court. On October 10, 2008, the Connecticut Supreme Court handed down a 4-3 decision in GLAD’s case, Kerrigan & Mock v. Department of Public Health, which permits same-sex couples from anywhere in the world to marry in Connecticut, since Connecticut has no residency requirement. Same-sex marriages in Connecticut began on November 12, 2008. Connecticut’s civil unions ended on September 30, 2010, and any existing Connecticut civil unions automatically converted into marriages on October 1, 2010.

**Vermont**

On April 7, 2009, the Vermont legislature overrode the governor’s veto on a marriage bill that would make marriage legal for same-sex couples. This was the first time that equal marriage rights were won through a legislature rather than through a court. On September 1, 2009, same-sex couples began to marry in Vermont and also on that date civil unions are no longer available although existing civil unions will continue to be respected and enjoy all the state rights that are given to a married couple.

**Maine**

On May 6, 2009, Maine’s Governor Baldacci signed a marriage equality bill into law that extends marriage rights to same-sex couples. However, the law was never implemented because it was repealed by a voter referendum in November 2009. Marriage equality supporters have placed a referendum on the November ballot to win back marriage rights for same-sex couples which was successful and beginning December 29, 2012 same-sex couples were able to marry there.

**New Hampshire**

On June 3, 2009, the New Hampshire General Court approved and Governor Lynch signed a marriage equality bill (House Bill 436, An Act Relative to Civil Marriage and Civil Unions) that extends the right to marry to same-sex couples effective January 1, 2010. At the insistence of the Governor, the legislature also passed two other bills (HB 73 and HB 310) which affirm religious freedom protections with regard to marriage. In addition, the legislation ended the ability of same-sex couples to enter into New Hampshire civil unions on the same effective date and automatically converted any existing New Hampshire civil unions into marriages effective January 1, 2011.
Rhode Island

In July 2011 Rhode Island passed a law allowing same-sex couples to enter into civil unions and in May 2013 Rhode Island became the last state in New England and the 10th state in the country to approve the right of same-sex couples to marry effective August 1, 2013.

Anti-Gay, Anti-Marriage Legislation (DOMAs)

The Federal Defense of Marriage Act (DOMA)

The 1996 federal Defense of Marriage Act (DOMA) Section 3 defined marriage as the union of a man and a woman for purposes of federal law. This meant that the federal government would not recognize any marriage between any same-sex couple for any legal purpose. DOMA Section 2 also permitted individual states to similarly limit their definition and recognition of marriage (although they have always had this right anyway). Because of DOMA same-sex married couples did not get access to the 1,138 federal laws that pertain to marriage.

GLAD filed two federal lawsuits, Gill et al v. OPM et al and Pedersen et al v. OPM et al., to overturn this federal discrimination. GLAD had victories in Gill at the Massachusetts federal district court level and at the 1st Circuit Court of Appeals. DOMA was declared unconstitutional in the Pedersen case by the Connecticut federal district court. These two DOMA cases together with a couple of others were sent to the U.S. Supreme Court for consideration. SCOTUS decided to take the ACLU’s Windsor case, partly because Justice Kagan would have had to recuse herself from GLAD’s Gill case. Oral Arguments were heard on March 27, 2013 and on June 26, 2013 the United States Supreme Court ruled that DOMA Section 3 was unconstitutional.

This means that same-sex married couples are entitled to all the federal benefits and protections that the federal government provides to married couples as well as being subject to all the responsibilities and obligations that are placed on married couples. For couples in a civil union or domestic partnership, if they live in a place that recognizes their relationship, they may be eligible for Social Security spousal benefits, but not for any other federal benefits.

Past Marriages/Civil Unions

Marriages - If you are married to another person of any sex (or in a civil union or state issued domestic partnership), you cannot marry your partner until you have divorced the other person. Entering into another marriage before you have legally ended the first is a crime.

Civil Unions – If you are marrying the same person, you shouldn’t have to dissolve your past civil union. The clerks may ask a couple if they have a civil union but it is only for statistical purposes. If you are marrying a different person, you must dissolve the past civil union. Even though civil unions aren’t marriage, they do create a legal spousal relationship between two individuals.

Age/Blood Relation Checks

Every state has age requirements and prohibitions against marrying certain blood relatives.

Bi-National Couples

Provided a couple married legally, their marriage will be respected for immigration purposes regardless of where they live. However, immigration law is very complex and GLAD strongly recommends that before taking any action a couple consult with an experienced immigration attorney. We can provide attorney referrals for couples residing in New England and another great resource for information and attorney referrals is Immigration Equality, www.immigrationequality.org.

International Adoption

Getting married will affect your ability to adopt as a single person. At present, virtually no foreign countries permit an openly gay or lesbian couple to adopt, thereby barring all international adoptions for married same-sex couples. If you wish to preserve your ability to adopt internationally, you should not marry.
Income Taxes

If you marry you will be required to file your federal and state taxes as married (either filing jointly or separately) regardless of where you live. For some married couples this will result in a tax savings and for others it will result in paying increased federal taxes.

Employee Benefits

Marriage may not automatically trigger spousal benefits from your employer. Moreover, marriage may disqualify you from coverage under some domestic partnership plans. Check with your employer if this issue is important to your decision to marry. There are two kinds of health plans—self-insured and insured. Self-insured plans are governed by a federal agency, ERISA. Because the federal employment anti-discrimination law, Title VII, does not include sexual orientation as a protected characteristic, some employers with self-insured plans choose to discriminate against same-sex spouses. For insured plans, the state insurance law that governs an insured plan is determined by where the owner of the plan is situated. The insurance laws of all six New England states require that same-sex spouses be treated the same as different-sex spouses.

Disqualification from Government Programs, Federal Benefits, and Domestic Partnership Programs

Getting married may make a person financially ineligible for certain government programs because such programs may treat your spouse’s income and assets as your own. GLAD did a case involving couples who married while DOMA was in effect and one of them was collecting SSI benefits because for federal purposes they were considered single. After DOMA was found unconstitutional, the couples continued to collect SSI and the federal government did not catch up with the fact that they were married and no longer eligible for SSI for many months. They were then told they owed thousands of dollars. The Social Security Administration agreed to setup a process where couples who were affected by this, could apply for a waiver so they didn’t have to repay the money. Additionally, important federal benefits may be unavailable to married couples. Also, if an employer-sponsored domestic partnership plan requires an employee to be unmarried, then marriage may disqualify the employee from benefits.

Alimony

Getting married will likely terminate your right to receive alimony from a spouse.

Divorce

Now that same-sex couples can marry anywhere in the United States, they can also divorce anywhere, provided they meet the state’s residency requirement.

Responsibilities Automatically Assumed Through Marriage

Marriage brings not only legal rights, but also sets up responsibilities of the spouses to each other, and to the larger society. Responsibilities that accompany civil marriage include:

- Commitment to Remain Married: Once two people marry in a civil ceremony, they cannot undo their marriage without first obtaining the permission of the state. The commitment to remain married, and the stability and continuity that provides for families and society, is why civil society provides married couples with extensive legal, social, and economic protections.

- Disqualification from Government Benefits Available to Single People: In some cases, an individual who would otherwise be eligible for Medicaid or student loans may become ineligible because his or her spouse’s income is counted together with his or her own income.

- Spousal Support: In some states, people are responsible for the necessary debts of their spouses, including medical bills, and for debts of the spouse.

- Support Following Divorce: In many cases, courts require people to help support their spouses even after the marriage breaks up.

- Child Support/Parental Responsibilities: In many situations, the spouse of a mother who gives birth is automatically responsible for child support.
Employment Benefits Overview

Employment benefits are generally governed by a vast array of federal and state laws, which give employers a tremendous amount of discretion. No state or federal law prevents an employer from providing equal benefits to their gay and lesbian employees. Yet, for many, the key legal question is whether the employer can be forced to provide the benefit. The answer depends on several factors including the benefit at issue, the type of plan offered by the employer, and the employee’s and employer’s states of residence.

Health Benefits

Unfortunately, the elimination of DOMA did not solve the problem of whether you are able to get your spouse on your company health plan. There are two kinds of health plans—self-insured and insured. Self-insured plans are governed by a federal agency, ERISA. Because the federal employment anti-discrimination law, Title VII, does not include sexual orientation as a protected characteristic, some employers with self-insured plans choose to discriminate against same-sex spouses. For insured plans, the state insurance law that governs an insured plan is determined by where the owner of the plan is situated. The insurance laws of all six New England states require that health plans treat same-sex spouses the same as different-sex spouses.

Pension Benefits

Neither federal law nor state law requires an employer to sponsor a retirement plan for its employees. Yet, if an employer chooses to offer a retirement plan, the plan must comply with a wide range of statutory and regulatory requirements. An employer has significant flexibility in determining the criteria for eligibility for benefits and the extent of benefits provided by the plan, so long as the plan does not violate any applicable state or federal law. The two main federal laws that impact retirement benefits to same-sex spouses are the Employment Retirement Income Security Act, also known as “ERISA,” which governs certain employee benefit plans, including most employment retirement plans and the rules of the Internal Revenue Service. In general, the only retirement plan benefits typically relevant to a spouse are surviving spouse benefits payable on the death of the employee and the right to have the employer’s benefits divided by a court order in connection with divorce or separation.

With the demise of DOMA, it appears that most retirement plans should treat same-sex spouses the same as different-sex spouses.

Certain Other Employment Benefits Must be Equal

ERISA does not apply to discretionary benefits that are arranged by your employer on a “pay-as-you-go” basis, meaning that your employer does not create a funded plan to provide these benefits.

These “non-ERISA benefits” generally include things like: bereavement leave, holiday gifts and pay, tuition assistance/educational reimbursement, union strike funds, access to on-premises facilities, transportation benefits, remembrance funds, discount sales to employees, relocation assistance, dependent care assistance plans, and excess benefits plans. If these benefits are provided to different-sex spouses, they must also be provided to same-sex spouses.

Taxes on Employee Benefits

Although the while DOMA was in effect, the federal government taxed any benefits that were provided to a same-sex spouse but that is no longer the case.

Family Law and Estate Planning

Adoption

Getting married will affect your ability to adopt as a single person. At present, virtually no foreign countries permit an openly gay and lesbian couple to adopt, thereby barring all international adoptions for married same-sex couples.

The Status of Children Born to a Married Same-Sex Couple

A child born during marriage is presumed to be the child of both spouses and both spouses are normally listed on the birth certificate. However, this presumption is rooted in the biology of heterosexual procreation and may not be applied consistently for same-sex couples, particularly if a known donor is involved. Nonetheless, GLAD strongly recommends doing a second-parent adoption in order to ensure that the non-biological parent’s parentage is secure in jurisdictions that do not respect marriages between same-sex couples.
Estate Planning
In many states, marriage automatically revokes an existing will unless it was expressly drafted in contemplation of marriage. If you marry, make sure your will is in place by adding a codicil that recognizes the existence of the marriage.

Even though many protections and rights are ostensibly guaranteed to all married couples, same-sex couples should take extra care to make sure certain protections are in place by creating the following agreements:

- Health Care Proxies
- Documents authorizing others to make financial decisions
- Documents directing the disposition of your remains
- Writing a new will (marriage automatically revokes an existing will in most states)

Getting Married Outside the United States

Canada
Same-sex couples may marry in Canada without having to prove residency. A license can be obtained at any town hall or “Office of Vital Statistics” in the jurisdictions that allow same-sex marriage.

Other Foreign Countries
There is a growing list of foreign countries where same-sex couples can marry, but many of them have marriage requirements that make it difficult for non-residents to marry there.

Marriage v. Civil Unions and Domestic Partnerships
Same-sex couples, who have non-marriage relationships that are equivalent to marriage (civil unions and registered domestic partnerships), with the possible exception of Social Security, do not have access to the 1,138 federal benefits of marriage and do not have the same stature and universal recognition that marriage provides.
**Transgender Legal Issues**

**Introduction**

Transgender legal issues are a high priority for GLAD. Gender nonconforming people -- including pre- and post-operative transsexual people, feminine men and masculine women, and more generally, anyone whose gender identity or expression differs from conventional expectations of masculinity or femininity – face serious discrimination in our society, ranging from questions of appropriate medical care to parental rights, from personal identification documents to the freedom to marry. And perhaps most common, transgender people often face harassment and discrimination based on their gender identity – mistreatment that threatens their freedom to work and live safely in their own communities.

Like gay men, lesbians and bisexuals, transgender people often find that the legal system is poorly equipped to deal with their needs and concerns. However, despite a history of exclusion under non-discrimination law, courts are increasingly establishing protection for transgender people. While in the 1970s and 1980s courts frequently found transgender people excluded from the law, this is no longer categorically the case. In several key cases decided more recently, courts overturned earlier unprincipled rulings excluding transgender people from existing laws. In addition, statewide legislation and local municipal ordinances increasingly add explicit coverage for transgender people. In fact, clear protections have been identified for transgender people in all the New England states where GLAD does its work. Several federal court decisions applicable to broad geographical areas have also reversed the earlier trend of transgender people’s exclusion from the law. Also, the federal Equal Employment Opportunity Commission (EEOC), which receives title VII complaints about discrimination in employment, has stated that transgender employees are protected under sex discrimination, although the Trump administration is trying to roll back this progress. See below for recent gains in anti-discrimination protection.

**Legal Principles for Inclusion of Transgender People Under Existing Anti-Discrimination Laws**

Until recently transgender people have had little or no protection under federal and state anti-discrimination statutes. Often, protection for transgender people in particular is simply not addressed in the law; therefore it has frequently been mistakenly assumed or judicially determined that existing anti-discrimination laws do not protect transgender people.

The fact of the matter is that transgender people need not be treated as special cases, but should be protected from discrimination based on ordinary principles of anti-discrimination law, such as protections against discrimination based on sex, disability, and sexual orientation.

**Discrimination Based on Sex**

Most instances of discrimination against transgender people can be fairly characterized as sex-based; action is taken against an individual because of stereotypical beliefs about the nature of men and women (about their appearance and behavior, including a belief that men and women cannot or should not change their sex). For this reason, transgender people may be able to pursue claims based on federal and state sex non-discrimination laws.

**Discrimination Based on Disability**

As with people with HIV, transgender people may be protected by disability anti-discrimination laws, due to the fact that their gender identity may be considered a serious health condition, whether physical or psychological, that substantially limits a major life activity. Or he or she may be ‘regarded as’ disabled, because the definition of disability used in non-discrimination law also extends to prohibit any discrimination arising from stereotypes and ignorance about physical and mental impairments. The irrational fears attached to transgender people are analogous to the type of stigma and stereotypes associated with HIV. When a transgender person is denied employment or services based on a negative reaction to their transgender identity (including their gender non-conforming personal appearance and presentation), that person may be protected because he or she has been “regarded as” having an impairment. Federal disability laws specifically exclude transgender people from protection, but this protection may be sought under state laws that have no such exclusion, and GLAD is currently working to try to get that exclusion removed.
Discrimination Based on Sexual Orientation

As a factual matter, many transgender people are often harassed or treated adversely because they are identified as, or perceived to be gay. Assumptions about a person’s sexual orientation may often arise either because of clothing the person wears or because of their gender presentation, which may be subtler than a person’s attire. In such cases, although the transgender individual may or may not be gay or lesbian, he or she may still have a claim based on existing laws that prohibit discrimination based on actual or perceived sexual orientation.

Protections for Transgender People Under New England and Federal Anti-Discrimination Law

In the last few years, GLAD has worked on a number of cases of importance to transgender people and has won landmark victories. These cases address the circumstances of particular individuals, but the precedents they establish impact us all. New legal developments indicate that transgender people are clearly protected against discrimination in various ways in Massachusetts, Connecticut, Rhode Island, Vermont, Maine, New Hampshire and on the federal level.

Massachusetts

Anti-Discrimination Protections

In November 2011, the Massachusetts legislature enacted a law, An Act Relative to Gender Identity,1 that was signed by the Governor and will go into effect on July 1, 2012. This law defines gender identity as “a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth.” The law also includes ways for a person to demonstrate their gender-identity.

The law provides prohibits discrimination based on gender identity in the following areas:

- Employment
- Housing & Commercial Space
- Credit
- Bonds & Insurance
- Mortgage Loans
- Admission or enrollment of a student in a charter or public school

The law did not prohibit discrimination based on gender identity in public accommodations, but in 2016 Massachusetts passed the long-awaited transgender public accommodations bill. Even prior to the passage of this law, MCAD provided anti-discrimination protections to transgender people under either sex or disability: In two landmark decisions issued on October 10, 2001, the Massachusetts Commission Against Discrimination ruled that transgender people are protected under Massachusetts state laws prohibiting sex and disability discrimination (see Jette v. Honey Farms & Millett v. Lutco).

In another victory, Doe v. Yunits, et al, GLAD filed suit against a Brockton, Mass. public school for refusing to allow Pat Doe, a transgender 8th grade student, to attend school in clothing that it considered to be inappropriate for a student the school believed to be a boy. Pat was assigned the sex of male at birth but has a female gender identity. Consistent with her gender identity, she had been wearing girls’ clothing for nearly 2 years. Rejecting the school’s argument that Pat’s wearing girls’ clothing is disruptive and makes other students uncomfortable, the judge who heard the case ruled in Pat’s favor, issuing a temporary injunction against the school. As a result, it may not prevent Pat Doe “from wearing any clothing or accessories that any other male or female student could wear without being disciplined.”

The Massachusetts Department of Elementary and Secondary Education (DESE) has published guidelines for public schools to follow to create a safe and supportive environment for transgender students—see http://www.doe.mass.edu/sfs/lgbtq/GenderIdentity.html.

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1 See http://www.malegislature.gov/Bills/187/House/H03810
Connecticut

Anti-Discrimination Protections

Effective October 1, 2011, Connecticut became the fourth state in New England to add gender identity and expression to its anti-discrimination laws in employment, housing, public accommodations, credit, public schools and some other areas. Gender identity or expression is defined as “a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence.” Attempts to amend the bill to exclude bathrooms, locker rooms and boarding houses failed.


In 2000, prior to the passage of the new law, the Connecticut Commission on Human Rights and Opportunities (CHRO) ruled that Connecticut state law prohibiting discrimination on the basis of sex encompasses discrimination against transgender individuals. (See Declaratory Ruling on Behalf of John/Jane Doe).

Rhode Island

Protection Based on Gender Identity and Expression

On July 17, 2001 Rhode Island became the second state in the nation – following Minnesota in 1993 – to adopt a non-discrimination law that clearly prohibits discrimination against transgender people in employment, housing, credit and public accommodations. The law amends all of the state’s non-discrimination laws to ensure that transgender people who face discrimination may seek redress in the form of injunctive relief and damages.

Vermont

Protection Based on Gender Identity

In May 2007, Vermont became the third state in New England to explicitly prohibit discrimination on the basis of gender identity. The law defines gender identity as “an individual’s actual or perceived gender identity, or gender related characteristics intrinsically related to an individual’s gender or gender-identity, regardless of the individual’s assigned sex at birth.” Vermont law prohibits discrimination in employment, public accommodation, housing, credit, and a variety of services.

Protection Based on Sex

GLAD worked with a police officer in the Town of Hardwick, Vermont, in Northern Vermont who was terminated from the police department when the Town Manager learned that he is transgender. Anthony Barreto-Neto, an experienced and skilled police officer, began working at the Hardwick Municipal Police Department in April 2002. Shortly after he began employment, town officials doing an internet search on Mr. Barreto-Neto found a website that described him as “transsexual.” Based on the information, town officials presumed his inability to do the job. Following the search and dissemination of the information to senior police department personnel, Barreto-Neto was subjected to a continuous pattern of harassment and inferior work conditions that became so severe he had to leave his job. In issuing its probable cause ruling, the Attorney General credited testimony of a former police chief, Gregory Rambo, that a town official directed him to make Barreto-Neto so uncomfortable that he would leave the force. The Town of Hardwick settled the claim. The settlement included a monetary payment to Barreto-Neto and a requirement that the town adopt a formal policy of nondiscrimination against transgender persons and train its employees on transgender issues. Importantly, the Attorney General's ruling established for the first time in Vermont that transgender persons are protected under the State's anti-discrimination laws.

Maine

On March 31, 2005, Governor Baldacci signed into law LD 1196, “An Act to Extend Civil Rights Protections to All People Regardless of Sexual Orientation,” which went into effect on December 28, 2005. It provides protection against discrimination based on sexual orientation (which according to LD 1196 means “. . . a person’s actual or
perceived heterosexuality, bisexuality, homosexuality or gender identity or expression”) (5 Me. Rev. Stat. sec. 4553 (9-C)). Since Maine’s definition of sexual orientation includes “gender identity or expression”, Maine was the second state in New England to provide explicit anti-discrimination protection to transgender individuals.

**Federal Level**

*No Federal Protection Based on Disability*

Unfortunately, federal disability laws exclude from coverage people with “gender identity disorders not resulting from physical impairments.” However, GLAD is trying to remove this exclusion.

*Protection Based on Sex*

Most cases where transgender people have sought protection under federal law have based arguments on Title VII, a law that prohibits an employer from discriminating against any employee on the basis of sex, among other categories.

A number of key cases have changed the way that Title VII should be interpreted. First, in *Price Waterhouse v. Hopkins*, the Supreme Court ruled that a person who failed to conform to gender stereotypes (specifically, a female employee at an accounting firm who acted aggressively and refused to wear makeup to ‘soften’ her appearance), was permitted to pursue a claim under Title VII. Later, *Schwenk v. Hartford* repudiated a previous 9th Circuit ruling that had denied the application of Title VII to a transgender woman. While not every circuit has followed the example of the 9th Circuit by clearly overturning precedent that created a transgender exclusion, the Supreme Court’s broad interpretation of Title VII effectively reverses those that have not done so explicitly.

In *Rosa v. Park West Bank & Trust Co.*, a claim was brought under the Equal Credit Opportunity Act, which has been construed consistently with the federal employment non-discrimination laws (Title VII). In a first-of-its-kind ruling from the United States Court of Appeals for the First Circuit that transgender people may be covered by federal sex discrimination laws, and thus protected from discrimination based on stereotypes of how men and women are supposed to look and act. The decision has broad implications for business, employers, and places of public accommodations because of its recognition that a claim brought by a transgender person may be one of sex discrimination.

Recently the federal Equal Employment Opportunity Commission (EEOC) clarified that transgender (and LGB) people are protected as a form of sex discrimination. So the EEOC has jurisdiction to hear employment discrimination cases based on gender identity or expression (or sexual orientation). The Trump administration is trying to roll back progress that has been made in this area.

**Other Legal Issues**

**Marriage**

Prior to the decision in *Obergefell v. Hodges*, which requires all states to allow couples of any gender the right to marry and to respect the marriages of couples married in any other state, marriage could be a thorny issue for transgender people. Most states use the gender on a birth certificate to determine the gender for purposes of marriage. Until recently, most states required the completion of gender affirming surgery to change the gender on a birth certificate and some states, even today, do not allow the gender to be changed. For many transgender people, having gender affirming surgery is neither affordable or even desired. So, if their birth gender and the gender of the person they were marrying were the same, until Obergefell many states would not allow the couple to marry.

Another potential problem was that if someone transitioned after marrying was their marriage still valid. Thanks to *Obergefell* these problems no longer exist, but one problem that still exists is that many states do not have a process for changing the gender on a marriage license if one spouse transitions after marriage.

**The Rights Of Transgender Parents**

Like gay men and lesbians, transgender people often find themselves fighting for the custody of their children. The standard in these cases is what is in the “best interests” of the child.
Fortunately, GLAD is presently unaware of any cases in New England in which a court has terminated the parental rights of a transgender person on the basis of gender identity alone. In any of the six New England states, in order to remove a child permanently from a biological parent (transgender or not), a judge must find, by clear and convincing evidence, that the parent is currently unfit to further the welfare and best interests of the child. GLAD would be interested in hearing from any parent whose parental rights are being threatened based on gender identity.

**USE OF PUBLIC RESTROOM FACILITIES BY TRANSGENDER PEOPLE**

Transgender people often risk physical harm and public humiliation when they choose a restroom facility. They are often unwelcome and uncomfortable in either the restroom of the sex ascribed to them at birth or their gender identity. This is also a frequent problem of people who “pass” or other cross-gendered people, who may not be free to use the restroom of their choice.

GLAD recently won a settlement in a case in Maine where a transgender woman was not allowed to use the women’s restroom at a restaurant. This is largely an untested area of the law. However, if a transgender person is threatened, assaulted, or harassed in a public restroom or any other public place, they may consider bringing criminal charges and/or pursue civil rights violations, regardless of remedies they have available under state or federal non-discrimination laws.

The issue of what bathroom a transgender person may use on the job is also of huge significance. Again, this is an area where there is lack of clarity under established case law, except in Maine where the Human Rights Commission has said that transgender employees must be allowed to use the restroom that conforms to their gender identity. GLAD takes the position that a transgender employee should be permitted to use the restroom that matches his or her gender identity. Although some employers have not complied with this approach initially, many are willing to change restrictive policies once they have received adequate education relating to the safety and health concerns of transgender people. Regardless, it is clear under federal and state law that a transgender employee must have access to some safe, clean restroom facilities.

**RIGHTS OF TRANSGENDER PEOPLE IN PRISONS**

Prison officials have not generally been receptive to transgender people, nor to the needs they have in order to live their lives consistently with their gender identity. In some cases, prisons have denied transgender people access to hormones and other medical treatment and have even denied them the ability to express their gender through clothing, make-up, accessories, and the like. While some courts have held that transgender people should receive some treatment or care, they have also found that there is no constitutional right of transgender people to any specific treatment involving hormone therapy, access to gendered clothing, sex reassignment surgery, or transfer to the appropriately gendered prison.

**Classification of Prisoners**

A primary issue of concern to a transgender person being placed into a correctional facility is how he or she will be classified for housing—whether the pre- or post-operative individual is going to be placed according to his or her ascribed birth sex or gender identity. Generally, prison authorities have historically confined prisoners who have had sex reassignment surgery with prisoners of the post-transition sex. But transgender people who have not had surgery have been imprisoned with inmates of the sex ascribed to them at birth. In addition, this determination is generally based on whether or not the transgender inmate has had genital surgery, placing, for example, an FTM transgender person who has not had genital surgery (even if he has had top surgery) in a women’s prison.

In addition to sex, classification of inmates is based on the following criteria: age; tendency for violent, disruptive behavior; sentence; type of crime; prior criminal history; educational level; need for protective custody; and employment history and skills. In the case of the classification of a transgender inmate, gender identity and the need for protective custody at least deserve special consideration. Unfortunately, this consideration often results in inappropriate segregation of the transgender inmate that leads to ineligibility for services and programs available to inmates in the general population. This is clearly an area where more advocacy is needed to ensure safe placement for all inmates that comes with access to the full range of prison services and programs.

**Protection for Transgender Prisoners Against Violence**

Under federal law, prison officials have a duty to exercise reasonable care to provide reasonable protection from an unreasonable risk of harm. (State laws may include more specific language about appropriate treatment of
prisoners). Specifically, prison officials have a duty under the Eighth and Fourteenth amendments to protect prisoners from violence at the hands of other prisoners. A prisoner need not wait to be assaulted to obtain relief for the infringement of this right. An unreasonable risk of harm is established where a prisoner shows that there is a “strong likelihood” that violence would occur. Prison officials who actually know of a substantial risk to a prisoner’s health or safety have a duty to respond reasonably to the risk, but the standard for proving such circumstances is very high. More specifically, the risk may be shown by evidence that the problem of inmate attacks was long-standing, pervasive, well documented, or expressly noted by the officials in the past.

Medical Treatment in Prison

The U.S. Constitution requires that prisoners be provided with a certain minimal level of medical treatment. At least one Massachusetts case, though, has held that the Constitution does not guarantee a prisoner the treatment of his or her choice. Nonetheless, a recent case decided by a federal district court in Massachusetts makes clear that a prison may not ignore a transgender prisoner's medical condition. Rather, a prison must obtain a medical assessment for the care and treatment of all prisoners and follow it notwithstanding any bias prison officials may have against providing such treatment to a transgender inmate. (Kosilek v. Maloney). In a second Kosilek case, the issue has been whether the DOC must provide sex reassignment surgery. A lower federal court ruled in favor of the prisoner, but the First Circuit Court of Appeals overturned that decision.

GLAD was recently involved in a case against the federal Bureau of Prisons (BOP), Adams v. BOP. It had been the policy of the BOP to only provide medical treatment to transgender prisoners at the level they were at when they entered the prison system. A memo that was sent to all the federal prisons as part of the settlement agreed to states: “In summary, inmates in the custody of the Bureau with a possible diagnosis of GID will receive a current individualized assessment and evaluation. Treatment options will not be precluded solely due to level of services received, or lack of services, prior to incarceration.” The memo also states that “current, accepted standards of care will be used as a reference for developing the treatment plan.”

Personal Identification & Documentation

Name Change

In most states, a name change requires a petition in a local probate court. A name change granted by a probate court does not typically appear as an amendment to the individual’s birth certificate. (In most states, if it is possible to amend a birth certificate, to do so requires a separate process. See below). Rather, it allows the individual to use the new name in a legal capacity, for everything from changing one’s driver’s license to signing official business paperwork. Most jurisdictions allow anyone, transgender or otherwise, to choose whatever name they wish to have as long as it is not adopted for fraudulent purposes. If you are inappropriately denied a request of name change, please call GLAD.

Social Security Identification

Name Change

Because Social Security cards are issued by the federal government, one must follow the same procedure to change them in every state.

Use Form SS-5 to apply for a Corrected Card. The form is available at any Social Security branch office and also online. To find the nearest office, call 800-772-1213 or visit http://www.ssa.gov. If you already have a card, you can apply by mail. If you are applying for a card for the first time, you need to go in person.

You will need either (a) one or more documents identifying you by both your OLD NAME and your NEW NAME (such as a court decree changing your name), or; (b) two identity documents – one in your old name and one in your new name. Generally, the Social Security Administration prefers to see a document with a photograph. However, they can generally accept a non-photo identity document if it has enough information to identify you (e.g., your name as well as your age, date of birth, or parents’ names).

Some documents the Social Security Administration accepts as proof of identity are:

- Driver's license
- Marriage or divorce record (including marriages of same-sex couples)
- Military records
• Employer ID card
• Adoption record
• Life insurance policy
• Passport
• Health Insurance card (not a Medicare card)
• School ID card

All documents must be either originals or copies certified by the issuing agency (i.e., no photocopies or notarized copies). Your documents will be returned to you.

There is no fee for changing the name on your Social Security card. You should receive your new card within two weeks.

**Gender Change**

In June 2013, the Social Security Administration (SSA) announced a new policy for updating Social Security records to reflect a person’s gender identity. Under the new policy, a transgender person can change gender on his/her Social Security records by submitting either government-issued documentation reflecting a change, or a certification from a physician confirming that the person has had appropriate clinical treatment for gender transition. This policy replaces SSA’s old policy, which required documentation of sex reassignment surgery. For more information see: [http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1667/](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1667/).

**Amendment Of Birth Certificates**

People born in any of the New England states may change their birth certificates according to the law. (For birth certificate amendment procedures in the New England states, see GLAD’s publication, *New England Name & Gender Change Guide*). However, many transgender people may be unable to fulfill state requirements for making birth certificate sex designation changes in practice, because many states have statutory provisions permitting birth certificates to be amended only upon completion of sex reassignment surgery.

In New England, Connecticut, Massachusetts, Vermont and Rhode Island do not require surgery in order to change gender on a birth certificate. At least three states forbid the amendment of birth certificates based on sex changes altogether (Kansas, Ohio and Tennessee)

**Driver’s License Changes**

Procedures for changing one’s name and sex designation on a driver’s license differ from state to state. In all six New England states, you do not need surgery in order to change the gender on a driver’s license, and in Massachusetts you can change the gender by self-attesting to your gender identity.

**Passports**

Because passports are issued by the federal government, one must follow the same procedure to change them in every state.

To change the name and sex designation that appear on a passport, a person must complete form DS-8. In addition, the individual must enclose a certified copy of the court decree ordering the name change.

In June 2010, the State Department announced a new policy to issue passports that reflect a person’s current gender. Under the new policy, a transgender person can obtain a passport reflecting his or her current gender by submitting a certification from a physician confirming that he or she has had appropriate clinical treatment for gender transition. This policy replaces the Department’s old policy, which required documentation of sex reassignment surgery. For a detailed description of this new policy, go to the National Center for Transgender Equality’s website at [http://transequality.org/PDFs/passports_2010.pdf](http://transequality.org/PDFs/passports_2010.pdf).

For more information, contact:

*National Passport Information Center*
Toll-free (877) 487-2778
[http://travel.state.gov](http://travel.state.gov) (click on “Passports”—there are forms that can be downloaded and detailed directions about how to fill out and submit the forms)*
Will My Health Insurance Cover Treatment for Gender Dysphoria?

In the past, the answer to this question was largely no, but recently enormous progress has been made in this area. The Insurance Commissioners in Vermont, Connecticut, Rhode Island and Massachusetts have issued bulletins requiring private health plans to cover treatment for gender dysphoria (GD), including surgery. These bulletins only cover insured plans which are governed by state law and do not cover self-insured health plans that are governed by a federal law called ERISA. Also, Medicare now covers treatment for GD. The Medicaid programs in every New England state, except Maine, will now cover treatment for GD.

If I Pay for Sex Reassignment Surgery, Can I Deduct It As A Medical Expense?

GLAD had a favorable ruling in a tax court case where a transgender woman claimed medical deductions for the treatment of her GD. The ruling made it clear that GD is a medical condition and therefore, that appropriate treatment of GD is medical care and can be claimed as an income tax deduction. If you are audited, as with any deduction, you need to have documentation that the particular treatment was appropriate medical care.
**Introduction**

GLAD receives many calls from victims of violence. Most often, calls are from people who have been victimized because they are perceived to be gay or lesbian or transgender. Others call because they are the victims of domestic violence. Often you will hear about harassment in the context of calls about employment or housing discrimination. It is important to let callers know, not only about the remedies for discrimination, but also that they may have additional remedies through the criminal system. The Fenway Violence Recovery Program (VRP) can provide all victims of violence, whether it is a case of a gay or transgender hate crime or domestic violence, with emotional support and legal advocacy. They also serve the important function of documenting anti-LGBT violence and hate incidents. All Massachusetts violence calls should be referred to them for documentation.

**Referrals:**

<table>
<thead>
<tr>
<th>State</th>
<th>Organization</th>
<th>Phone Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Massachusetts</td>
<td>Violence Recovery Program</td>
<td>800-834-3242 or 617-927-6250</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Connecticut Women’s Education &amp; Legal Fund</td>
<td>800-479-2949 or 860-247-6090</td>
</tr>
<tr>
<td>Maine</td>
<td>Maine Attorney General’s Office</td>
<td>207-626-8800</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Gay Info Line</td>
<td>800-750-2524</td>
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<tr>
<td></td>
<td>Attorney General’s Office</td>
<td>603-271-3658</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Attorney General’s Office</td>
<td>401-274-4400</td>
</tr>
<tr>
<td>Vermont</td>
<td>Vermont Network Against Domestic Violence and Sexual Assault</td>
<td>800-228-7395</td>
</tr>
<tr>
<td></td>
<td>Attorney General’s Civil Rights Unit</td>
<td>888-745-9195</td>
</tr>
</tbody>
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**Legal Issues**

The information below is just to give a rough idea of the legal concerns of victims of violence. GLAD generally does not handle criminal cases involving victims of violence unless the circumstances are extraordinary and/or will set important precedent. Do speak to your supervisor, however, about calls involving alleged police misconduct.

**Three Legal Options For Victims Of Hate-Motivated Violence**

1) Civil Rights Injunctions/Civil Rights Suit*

2) Criminal Complaints

3) Civil Suits

*(filed by the Attorney General or by the individual)*

**1) Civil Rights Injunctions (Civil Suit)**

Civil Rights Injunctions (also called Attorney General Injunctions) are available to prevent individuals from using “threats, intimidations, or coercion to interfere with or attempt to interfere with” rights secured under state and federal law. Usually what this means is if someone has been bashed or threatened and that interferes with his/her right to be free from discrimination in a place of public accommodation (the street, a business establishment, etc.), then s/he may have a civil rights claim.

Such injunctions typically forbid further harassment, assaults, intimidation of the victim or any other person and forbid coming within a certain distance of the victim. Violations of such injunctions are a criminal offense with substantial penalties. When a person applies for a Civil Rights Injunction, they are initiating a civil suit under the Massachusetts Civil Rights Act (MCRA).
Two ways to get an injunction:

- Through the office of the Attorney General. Contact the Attorney General’s Office-Civil Rights Division. The MCRA does not require the Attorney General to initiate a civil rights action. The victim needs to "convince" the AG to file on his/her behalf, and the process can take up to several months.

- Victims may initiate an MCRA suit independently if desired. To apply independently for a Civil Rights Injunction a person needs to file suit under M.G.L. c.12, 111. This involves filing an original complaint in court, usually with a lawyer. There is a $185 filing fee; it can sometimes be waived based on the victim's financial situation.

2) Criminal Complaints

a) General Criminal Charges
Physical assaults, threats or harassment against any person are forbidden by criminal statutes. Various criminal charges may be made against perpetrators. Criminal charges begin with criminal complaints and are generally issued by the police. Individuals can also file criminal complaints through the clerk magistrates at their district court or by filing a police report at a local police precinct. See further sections of this chapter for more details on that process.

b) Criminal Civil Rights Violations
The Massachusetts Civil Rights Act, in addition to providing for civil suits to redress conduct, makes it a crime to use "force or threat of force" to willfully injure, intimidate or interfere with the exercise of one’s guaranteed civil rights under state and federal law. If bodily injury results, the incident is a felony. The civil rights referred to here may include basic protections extended to all citizens such as the right to walk on the sidewalk or in a public park, the right to use their own property as they see fit, or the right to be free from discrimination in a place of public accommodation like a restaurant. To establish criminal liability, however, one must show the deprivation was caused by "force or threat of force."

c) The Hate Crimes Law
M.G.L. c. 265, sec. 39 makes it a crime to commit an assault or battery on a person with the intent to intimidate because of the person’s sexual orientation (also covered by this statute are race, color, religion, national origin or disability).

Bias Indicators
Not every assault or violent incident against a LGBT person is related to sexual orientation or gender identity. There are guidelines for determining whether or not an attack was motivated by bias. These guidelines list “bias indicators.” Some of the more common ones are hate speech (e.g., the perpetrator used epithets like fag, dyke, homos, etc. during the attack); location (e.g. in front of a gay bar, bookstore, in a cruising area); no other motivation for crime (e.g., person is beaten up but wallet is not taken; victim is easily identified as gay or lesbian (e.g. wears ACT-up t-shirt, pink triangle, holding hands with same-sex partner, etc...). When filing a police report, victims need to point out the bias indicators relevant to the attack and make sure the officer checks off the box indicating that the victim thinks the crime was bias motivated.

3) Civil Suits

a) Personal Injury Suits
Any person who has been assaulted or injured by another person that results in damages can pursue an action in civil court. Civil suits are brought by the victim themselves, with the help of an attorney. Favorable results may result in damage awards.

Hate Crime Reporting Law
Massachusetts and several other states have a hate crimes reporting law which mandates that the state collect and publish statistics on hate motivated crimes. Although this law provides no legal remedies for victims it is an important tool in documenting the prevalence of anti-gay and anti-lesbian violence. Hate incidents, such as verbal harassment, which may not rise to the level of a crime, should also be reported. All victims who call, whether or not
they want legal assistance, should call the VRP to report the attack/incident so that it can be documented statistically. The reports are completely anonymous. Attacks by police may also be reported under this law.

**Domestic Violence and Harassment Laws**

In Massachusetts, the laws which attempt to protect heterosexual women from domestic violence apply equally to gay men and lesbians. Anyone who is threatened or attacked by someone with whom they had a “dating” relationship may apply for a temporary restraining order (TRO) or a “stay away order.” More information on obtaining a TRO is given below. On May 10, 2010, a new law went into effect which allows someone to get a Harassment Prevention Order against ANY person who is harassing or abusing him/her. More information below.

**Victim/Witness Bill Of Rights**

In 1984, Massachusetts passed a bill granting those victims and witnesses who report crimes to the police the following rights:

1) Timely notification of court appearances, continuances and final disposition of cases.
2) Prompt disposition of cases.
3) Information and assistance regarding witness fees, victim compensation, employer and credit assistance, protection, social services, inmate status, transportation and child care, prompt return of property and a secure waiting area.
4) In felony cases, the opportunity to inform the court, orally or in writing, of the impact of the crime.

In every District Attorney office, there are victim witness advocates whose job it is to assist victims of crime. These advocates can be a tremendous resource. In general, they are gay-friendly, and in some counties, like Suffolk, they are among the most progressive law enforcement officials on gay issues in the state. We have information on how to contact the victim witness advocate in each county.

**Police Misconduct And Police Brutality**

**Is It Motivated by Homophobia or Transphobia?**

GLAD occasionally gets calls from people who have been mistreated by the police. In some cases, the mistreatment has to do with the officer not taking the complaint of the caller seriously or refusing to take action in instances where a LGBT person has been the victim of a crime. Try to assess if the inaction is, in fact, due to the caller’s sexual orientation or gender identity. Often police misconduct or insensitivity has nothing to do with the victim being LGBT. In other cases, homophobia or transphobia is clearly the motivation behind the mistreatment. It is not uncommon for police to verbally harass or even physically assault LGBT people.

Police misconduct calls should be referred to the VRP for purposes of documentation.

**Documentation and Filing a Complaint**

In the case of assault or other misconduct committed by a police officer, callers have the option of reporting the incident to the police themselves. In Boston, such complaints are filed with the Internal Affairs Departments. In other communities, the complainant simply writes a letter to the chief of police detailing the misconduct. As with all other kinds of complaints, a detailed chronology and access to witnesses are vital for a successful complaint to be brought. The VRP can assist clients in bringing these complaints.

**Other Options**

Victims of policy brutality or misconduct can seek a civil rights injunction from the Attorney General’s office. Victims may also consider talking to a private attorney about a civil suit for violation of their constitutional rights and seeking damages. People can also file an application for complaint against the officer at their district courthouse.

**Issues to Consider Before Filing Complaints Against the Police**

People often have valid concerns about the possible repercussions of filing complaints against the police. Some people experience an increase in harassment from the police after having filed a complaint. Another issue is that some people are uncomfortable being identified to police officers as a gay, lesbian, bisexual, transgender or HIV+
person. As an GLAD Answers worker, you cannot evaluate these potential outcomes with callers, only raise the issues that they might want to consider. People who want advice on how a complaint against the police might affect them should consult with an attorney. * These concerns are of particular importance for anyone with a current criminal matter pending.*

**GLAD's Interest in Police Brutality/Misconduct Cases**

Even if a caller is unwilling to go forward with a complaint, s/he should report the incident to the VRP so that they can track what police officers are committing these offenses. Such tracking has shown that very often one police officer will commit several offenses. Clearly, this documentation makes it easier to bring complaints against police and to have the concerns of the gay and lesbian community redressed. Pay attention to trends in calls. If GLAD is getting a lot of calls about a particular police officer or department, bring it to the attention of your supervisor.

### Responding To Survivors Of Violence

#### Safety Issues

While it is important to be sensitive to all callers, victims of violence who call are often in crisis and may require special attention. First, if the person is calling immediately after an attack, find out if s/he is in a safe place and if s/he needs medical attention. Often victims of violence remain fearful long after the attack, and feelings of vulnerability and increased isolation are prevalent in those who have been attacked because of their sexual orientation or gender identity. You may want to suggest that the victim find someone to stay with him or her. The VRP provides counseling to victims of violence and helps them make plans to stay as safe as possible.

#### Common Responses to Violence

Post traumatic stress disorder (PTSD) is common in victims of violence and is indicated by symptoms such as flashbacks, insomnia, jumpiness, nightmares, and difficulty concentrating. If a caller is concerned about these symptoms, reassure him/her that these reactions are normal and will dissipate with time. If they persist, the caller may want to seek a support group or individual counseling. Again, the VRP can provide these referrals.

Callers experiencing domestic violence may also feel especially frightened and vulnerable. Often others in the victim’s life refuse to take the abuse seriously, dismissing it as a “girl fight” or as a fair fight between men. People, both within and outside of the gay and lesbian community, are reluctant to acknowledge that same sex battering occurs.

In both gay-bashing and domestic violence cases, some victims will find that “coming out” issues are re-triggered. People who felt basically OK being gay may find that they are experiencing feelings of shame or fears about being too “out.”

#### Do Not Blame The Person Attacked

Whether the caller has been gay-bashed or battered, he or she is probably feeling overwhelmed and frightened. She or he may also be feeling guilty or ashamed and may be blaming him or herself for the attack. NEVER blame or even imply blame towards the caller no matter what the circumstances of the attack were. No one wants to be the target of violence. The blame rests solely on the perpetrator. Assure callers that the attack was not their fault and help them find appropriate emotional support and/or crisis intervention services.

#### Concerns About The Police

Because of the community’s history with the police, because of fears of being “outed” and other concerns, many LGBT victims of violence are afraid to come forward and pursue charges whether against the police or civilians. Let people know that they need not say they are gay, lesbian or transgender when reporting an attack; rather they can say that they were identified as such by the attacker. Nonetheless, many victims feel that they are unable to pursue a complaint in the criminal courts without serious disruptions in their personal and professional lives. Although prosecutions are desirable, a caller should never be pressured to pursue a complaint when s/he is reluctant to do so. Explain the reasons for going forward but also explain that the process is long and often unpleasant for all involved.

In some cities, police have designated a liaison to the LGBT community or have specially trained officers who deal with civil rights issues. Many callers feel more comfortable talking to these individuals rather than taking their chances with whatever officer happens to respond to their call.
What To Tell Callers Who Have Been Gay-Bashed Or Trans-Bashed

Refer Callers To The Violence Recovery Program (VRP)
All victims of hate crimes should be referred to the VRP. Even if the caller does not want to or is not able to pursue a criminal charge against the perpetrator, it is important that all incidents be documented under the Hate Crimes Reporting Act. Victims who are willing to pursue the issue should report the incident to the police even if the identity of the perpetrators is unknown.

Filing A Police Report
If the police are called within 4 hours of the incident, they are required to fill out a report. Victims can also walk into any local police station and file a report. In some cities, the police have appointed “civil rights officers.” These individuals are more likely to have received training on bias issues than regular officers and may be more sensitive to the concerns of those who have been gay-bashed. Victims should make sure that the report that gets filed includes any bias indicators such as hate language. Victims should request, and are entitled to, a copy of the report.

Boston Civil Rights Unit
In Boston, bias motivated crimes are sent to the Civil Rights Unit (CRU) whenever the reporting officer checks the CRU box on the report form. Victims who believe the attack was bias-motivated should make sure that this box gets checked as reporting officers are sometimes reluctant to attribute attacks as hate crimes. Having a police report makes a victim much more credible when pursuing an application for complaint. In fact, it is not possible to get a criminal complaint issued without one.

Seek Medical Attention
Any victim who has sustained an injury should be encouraged to seek medical attention. All injuries should be documented through medical records and pictures when possible. Victims should request that the examining physician make careful notations of all injuries. Victims should also prepare a detailed chronology of the incident and attempt to get the names and addresses of any witnesses. The VRP can provide medical services and referrals to providers who are gay and lesbian friendly.

Document What Happened
Callers should write down with as much detail as possible exactly what happened. If possible, they should get witnesses to do the same. They should gather any other documentation, such as medical records and police reports.

Seeking A Complaint
In some cases, the police will seek a complaint against the attacker, but in most cases it is up to the victim to seek a complaint. If the victim knows the name and the address of the perpetrator, they can pursue a complaint against them by going to the local district court and filling out an application for the complaint form.

Clerk’s Hearing/Probable Cause Hearing
Both the victim and the perpetrator will be summoned to appear in court for a clerk’s hearing (also known as a “magistrate’s hearing” or a “probable cause hearing”). After listening to both sides of the story, if the clerk finds that the incident probably happened and that the accused was probably involved, then a complaint will be issued.

Calls often think that this hearing is equivalent to a trial when, in fact, it is merely a step towards issuing a complaint. The clerk’s hearing is not to determine guilt or innocence. Nonetheless, clerks have a lot of power and it is a good idea for victims to go accompanied by a victim advocate from the Fenway or a lawyer. In serious cases, victims should have the hearing recorded by tape or by a court reporter.

Arraignments
If a complaint is issued, an arraignment will be scheduled. The arraignment is simply the point at which the accused enters a plea of guilty or not guilty. Usually, at the arraignment a trial date is set. The victim does not need to attend the arraignment.

Role Of The Victim In Criminal Cases
It is important for victims to recognize that they are not the prosecutor in the case; the Commonwealth of Massachusetts is. The victim is a witness for the Commonwealth.
Sometime after the complaint is issued, an Assistant District Attorney (ADA) will be assigned to the case. The victim, though generally consulted about how the case proceeds, is considered a witness to a crime against the state. If the victim feels strongly that the case should go to trial (i.e., that no bargains be struck) s/he must make that extremely clear to the ADA. Again, a victim advocate can be invaluable in this process. Each district court also has victim advocates who are available to answer questions and provide information. Victims should be made aware of their rights under the Victim/Witness Bill of Rights discussed above.

Attorney General Information
If the victim fears another attack from the original perpetrator, s/he should call the Attorney General’s office at 617-727-2200 about filing for a civil rights injunction. Sometimes, “no contact” provisions can be imposed as a condition of bail. Such injunctions stipulate not only that the attacker must stay away from the victim but also that the attacker must stay away from all persons sharing the victim’s protected class (i.e., all gay men and lesbians).

Stay Away Orders
If the victim fears another attack but is unable to get an injunction, he or she may try to get the judge to issue a stay away order. This can only happen in the context of pursuing criminal charges against the attacker. During the court proceedings, the District Attorney can ask the judge to order the perpetrator to stay away from the victim. Victims should be sure to tell their D.A. when they are afraid.

Callers Who Are Experiencing Domestic Violence or Harassment
LGBT victims of domestic violence should be referred to the VRP or to one of the domestic violence service agencies listed in the Agency Referral Database. These groups will provide information, legal advocacy and (in some cases) shelter to those who are being battered. While not all providers are sensitive to LGBT issues, many groups have been trained to be responsive to LGBT concerns. GLAD has written information we can send callers on this topic.

Documentation Is Crucial
As with gay or trans-bash victims, callers who are facing domestic violence should be encouraged to take every step they can to document the abuse. Medical records, police reports and detailed chronologies all serve to strengthen the victim’s case. Many victims of domestic violence are unwilling or unable to press charges against their attackers. Even if someone is reluctant to press charges, encourage them to document the abuse so that they will be prepared if they ever do decide to go forward. Victims should always call 911 when they are assaulted or threatened with assault. Even if the police fail to respond, 911 is required to keep records of calls which can be useful later in demonstrating patterns of abuse.

Temporary Restraining Orders
Anyone who fears abuse can apply for a temporary restraining order by going to the district court house and filling out an application with the clerk. At this point, they do not need to see a judge. If she or he is seeking a restraining order during non-business hours, he or she should go to the local police station. There is a judge available somewhere in the state, 7 days a week, 24 hours a day to issue TROs if necessary. The person seeking the TRO and the perpetrator must have at some time been in a “dating relationship” or be a close family member or roommate. A copy of the order will be served on the perpetrator and both parties will be summoned to court. At that time, the victim can apply for a longer-term restraining order. A violation of the restraining order is supposed to result in the immediate arrest of the attacker. Again, the VRP will help people through this process.

After 10 days, both parties are supposed to appear in court for a hearing about whether or not the order should be extended for a year. These orders can be tremendously powerful in the sense that the judge can order a variety of things, such as barring the perpetrator from the house (even if he or she owns it); ordering child support payments, etc.. Keep in mind, though, that a restraining order is just a piece of paper, and for many people the most dangerous time is when they take action against the attacker. Each individual will have to judge for him or herself what the best course of action is.

Unfortunately, some judges get bewildered by same-sex battering and issue what are known as “mutual restraining orders.” These orders require both parties to refrain from contacting the other. The problem is that these orders do not assign blame to the attacker and perpetuate the myth that same-sex battering is mutual or is a “fair fight.” Mutual restraining orders can adversely affect further legal proceedings by the victim. Furthermore, judges are not supposed to issue mutual restraining orders unless there has been a full hearing on the issue and the judge has issued written
findings of fact which demonstrate the need for mutual orders. Seldom does this happen. If you get a call in which mutual restraining orders were issued, tell your supervisor. It may be that the order was issued, not in the best interests of the victim, but because of the judge’s homophobia and ignorance.

**Harassment Prevention Orders**

Effective May 10, 2010, a law went into effect that provides the opportunity for persons who are victims of harassment to obtain a restraining order without needing a dating or close family relationship to the perpetrator, as is required to obtain a Domestic Violence Restraining Order (see above). You need to show that the harasser committed three or more acts against you of willful and malicious conduct that caused fear, intimidation, abuse or damage to property; or the harasser forced you to involuntarily engage in sexual relations; or the harasser violated any of the criminal laws in Chapter 265 that pertain to sex with a minor, indecent assault and battery, rape, stalking or the law in Chapter 272 that deals with drugging for sexual intercourse. As in the case of a TRO, the initial order is only issued for 10 days and then there is a hearing to see if it should be extended for up to a year.

**Resources For Callers Experiencing Domestic Violence**

Aside from the VRP, there are limited resources for gay and lesbian victims of domestic violence.

**Massachusetts:**

LGBT can contact The Network/La Red for support, advocacy, and some safe home services available and in some cases can provide pro bono legal assistance.

**Beyond Massachusetts:**

The agency referral database has listings for numerous other domestic violence services throughout New England.

**Same Sex Domestic Violence: Clues, Warning Signs & Risk Factors**

All of us encounter those who have been victims of domestic violence, whether we know it or not. In your work with clients, learn to think about and look for signs of domestic violence. Remember there is no typical profile of a batterer or a “victim.” Below are some of the indicators that a client may be experiencing domestic violence and abuse. If you notice that any or several of the following are true, you should investigate and ask about domestic violence. Take the initiative to ask and to break the silence surrounding domestic violence. Your client may not be in the position to volunteer the information.

**What To Listen For:**

*Fear of partner or ex-partner

*References to being hurt or yelled at by partner

  Comments about client’s partner like...
  “he gets really angry”
  “she doesn’t like it when I go out”
  “she’s really jealous”
  “she’s really possessive”
  “we’ve been fighting a lot”
  “things aren’t going well at home”
  “I feel like things are out of control”

*Partner has threatened to “out” caller to friends, family or coworkers

  Partner drinks or does drugs
  Partner has hit the children
  Partner or “victim” has threatened or attempted suicide
  Partner has weapon
  Partner has history of abusive or violent behavior (criminal history)?
  Partner has or has threatened to hurt friends or pets or to destroy property important to the victim
  Partner prevents “victim” from leaving the house, getting a job, seeing friends

*If the abuse was verbal...

  Were there threats of physical harm?
Did the caller fear for his/her physical safety?

*How has homophobia been used?
  threats to “out” client

*Have the police ever been involved?
  Was 911 ever called?
  does the caller have police incident reports?

*Is HIV involved?
  threatening to reveal HIV status
  withholding medical treatment
  refusing to engage in safer sex practices
  threats of desertion
  guilt tripping

*Did the client ever fight back? What happened?
  Be thorough in exploring the kinds of abuse because there may be creative ways to prosecute (e.g.,
  stalking: annoying phone calls: kidnapping: hate crime violation: etc...)

*What is the Nature of the relationship of the parties?
  How long together?
  How long have they been living together?

*If there are children
  Who has custody?
  Were the children planned together?
  Is custody an issue?
  Were the children ever abused?
  Financial situation
  Does the caller have access to money?
  Are finances joint or separate?
  Is personal property and/or real estate jointly owned?
  Whose name is on the lease or title?

*Was there a substantial dating relationship?
  Has your client ever tried to leave before? What happened?

*What has the caller already tried to resolve the situation?
  Restraining orders sought?
  What other service agencies are involved?
  This is important information not only to avoid recreating the wheel but because social service providers
  may be an important source of documentation (e.g., calls to a rape crisis center or domestic violence
  hotline).

*What is the caller’s immediate need?
  Shelter?
  Restraining order?
  Safety planning?
  Support (counseling, groups, friends, etc...)
  Financial assistance?
  Help with her children?
  Legal assistance?
  Work with your client to establish priorities.
**Criminal Sex Issues**

**Introduction**

GLAD gets a myriad of calls on criminal sex issues. As a general rule, GLAD does not handle criminal cases. Criminal calls should be referred to private attorneys in our Lawyer Referral Service unless there seems to be some extraordinary sexual orientation discrimination involved. There are many attorneys who specialize in criminal law and who are familiar with the legal concerns of lesbians and gay men. If a caller is unable to afford a private attorney, s/he should be referred to legal aid resources. Below is some brief information on the most common topics of inquiry.

**Public Sex**

GLAD gets calls on a fairly regular basis from men who have been arrested for public sex. Many different law enforcement agencies, including the state police, municipal police forces, university police forces, security officers at hotels, the police force at the T, and the “environmental police” of the state parks department, target gay men in known cruising areas. There are descriptions below of the more serious charges that can be brought in these cases. Sometimes men are arrested or ticketed at cruising areas but are charged with lesser misdemeanors such as trespassing or illegal parking.

Many of these men are traumatized. Some have been verbally, physically or sexually assaulted by the guard or officer who apprehended them. Many are deeply shaken to have criminal charges brought against them. They may fear disclosure of the arrest to family members, neighbors and work colleagues. The guidelines from the chapter on dealing with victims of violence may be helpful for you in understanding and dealing with these calls. Like victims of violence, these callers may tell their stories in a disjointed manner and have serious concerns about the repercussions of filing complaints about police behavior. Callers can be referred to the Violence Recovery Program to report abuses and for help dealing with the situation on a personal level.

**Massachusetts Public Sex Laws**

**Open & Gross Lewdness & Lascivious Behavior**

We often get calls from people who have been charged with “Open and gross lewdness” (M.G.L. c. 272, sec. 16). It carries a penalty of not more than two years in jail or a fine of not more than $300. Although this is not gay specific it is frequently used against gay men who are found having sex in “cruising areas”, such as parks and public rest rooms. To prove a charge of open and gross lewdness the Commonwealth must prove that the conduct was committed in “such a way as to produce alarm or shock” of someone other than the police officer.

Violation of this law is a felony. Two convictions of “open and gross” require registration as a sex offender (see below).

**Lewd & Lascivious Person / Indecent Exposure**

Callers are often also charged with “lewd and lascivious person” (M.G.L. c. 272, sec. 53). Indecent exposure is covered in this section as is publicly touching the “genitals, buttocks or female breasts for the purpose of sexual arousal, gratification or offense, by a person who knows or should know of the presence of a person or persons who may be offended by the conduct.” Commonwealth v. Sefrenka, 382 Mass. 108 (1980). There has been some debate in the courts over what constitutes a “public space.” No clear standard has been established.

This is a less serious charge, because it does not require a convicted person to register as a sex offender. The two laws are often applied interchangeably, but you should make callers aware of this significant difference.

**Police Behaving Badly**

**Rousting**

Occasionally we hear from callers who were in public areas such as rest stops on highways, public beaches or parks and were told by police to leave even though they were not engaged in any unlawful conduct. Men are targeted in this way sometimes because of rainbow stickers on their car, because they are recognized by police from previous
incidents, or simply because they happen to be in a cruising area where the officer is expecting gay men. GLAD terms this practice rousting. It is illegal. A person not engaged in criminal conduct has the right to use public facilities without being harassed or arrested by law enforcement officers.

GLAD won a temporary injunction in Doe v. Kelly barring the state police from rousting our client from rest stops along the highway and ultimately GLAD reached a settlement with the State Police that resulted in a General Order being issued that “officers should not order someone to leave a public area in the absence of unlawful conduct.” If you get calls involving rousting by the state police, bring them to the attention of your supervisor immediately. If you get calls about rousting by officers from other police forces, do a detailed intake, talk to the caller about their right to file complaints with the commanding officer of that force, and offer to send them a copy of the General Order in the Doe case (it is online under GLAD Cases). While other police forces are not bound by the injunction, it may convince them of the general illegality of this practice.

Entrapment

We occasionally get calls from people claiming that a plainclothes police officer arrested them for soliciting sex, after the police officer did something that provoked the solicitation. This is called entrapment. No entrapment occurs when the defendant has the intent and desire to commit the crime, and the officer, in good faith, merely furnishes the opportunity or encourages the defendant to perpetrate a crime that originated in the defendant’s own mind. In any case, these calls should be referred to good criminal counsel.

What To Tell Callers Facing Criminal Charges

Get a Good Attorney Right Away

Callers facing criminal charges are advised to find good criminal attorneys as soon as possible. Some of the sex crime charges are felonies, and all can potentially go on a person’s record. Representation for these charges can be expensive, but it is money well spent.

Plead Not Guilty

They should not plead guilty to anything, even if they are offered a good deal/leniient punishment, until they speak to an attorney. If a caller is facing an arraignment and does not have time to find counsel before his/her court date, encourage him/her to enter a plea of “not guilty” regardless of his/her actual involvement in the act. The criminal courts are full of plea bargains and deals, and someone who pleads guilty has thrown away a powerful bargaining chip. If necessary, they can enter a guilty plea later in the proceedings.

Remind callers from other states that the laws vary from state to state. Only an attorney versed in the laws of the state where the caller is facing charges can discuss fully the legal options of the accused.

Do Not Discuss Possible Outcomes

Understandably, callers facing criminal convictions are eager to know what is going to happen. Some callers may try to press you to predict the outcome of their case. This crosses the line from legal information to legal advice. Do not go down that road. There are many variables in the disposition of criminal cases; and they can be resolved in a variety of ways. Some are dismissed; some are plead to a lesser charge; some are continued without a finding (that basically means that if the person stays out of trouble for a designated time period, the charge is eventually dropped); others go to trial. The best thing to tell callers is, that even though you understand their anxiety, you cannot predict the outcome of their case. Only a good criminal attorney can realistically evaluate potential outcomes.

Age of Consent - Massachusetts

While sexual assault (non-consensual sex) is illegal no matter what the age of the alleged victim is, if someone is under 16 s/he is considered unable to consent to sexual intercourse of any kind. There is a question in Massachusetts law about whether a person between the ages of 16 and 18 can consent to “unnatural and lascivious” forms of sexual intercourse. Legally, anyone over 18 is an adult, and anyone over 16 can consent to sexual intercourse. However, the ages between 16 and 18 constitute a gray area for the ability to consent to homosexual acts.

In short, to be safe, gay men and lesbians over 18 should not engage in intercourse with anyone under 18.
Sex Offender Registration

Every state now has a law, sometimes called a “Megan’s law,” that requires convicted sex offenders released from prison to register with the state. The state can then make information about that individual available to the public. Some states publish names and pictures of convicted sex offenders on the internet.

In 2003, when two cases challenged the constitutionality of these laws, the U.S. Supreme Court upheld them, ruling:

1. Such laws do not violate the constitutional guarantee against ex post facto punishment, or punishment after the fact.

2. It does not violate the constitutional right to due process to deny offenders hearings to see if they continue to pose a danger to society.

The Massachusetts Registry

What types of crimes are deemed to be “sex offenses” in Massachusetts?

As you would expect with a law designed to ensnare dangerous and violent predators, most of the crimes involve violence or sex with children. However, a conviction for indecent assault and battery on a person over 14 is still a “sex offense” in some circumstances (M.G.L. c. 272, sec. 13H) as is a “second and subsequent adjudication or conviction for open and gross lewdness and lascivious behavior,” (M.G.L. c. 272, sec. 16). For a full list of sex offenses, see M.G.L. c. 6, sec. 178C.

What if I got a continuance without a finding? Or what if my conviction is very old?

The law only applies to people who were convicted (or “adjudicated” as a youthful offender) after August 1, 1981, or were still incarcerated, on parole or probation, or in civil commitment as of that date. So if you received a continuance without a finding, that is NOT a conviction and the law does not apply to you.

How can I find out what charges I have been convicted of?

You can contact your local police or call the Criminal History Systems Board (617-660-4600) to request a form to get your criminal records. You need to fill out the form, have it notarized, and then send it back to CHSB, 200 Arlington St., Suite 2200, Chelsea, MA 02150.

What obligations are imposed on “sex offenders”?

Most sex offenders will have to register annually with the Sex Offender Registry Board and provide personal data, work information, and other identification. Depending on the circumstances, some or all of this information may be made available to the public. More information can be found on the Sex Offender Registry Board’s website, www.state.ma.us/sorb.

Do I have a right to a hearing before I have to register?

In 2001, the Massachusetts Supreme Judicial Court concluded that the Sex Offender Registry Board can require an offender to provide his or her home and work address, and the Board can transmit this data, and other data regarding the offender, to police departments prior to providing the person a hearing to determine his or her classification.

However, police departments cannot disseminate information about a sex offender to the public until the Sex Offender Registry Board classifies the offender and the offender has an opportunity to challenge that recommended classification at an administrative hearing.

Sodomy Laws – Struck Down!

Sodomy Law History

In 1961, all 50 states had sodomy laws – laws prohibiting certain sex acts, even between consenting adults. Some laws banned those sex acts for all people; others banned them just for same-sex couples. Today, though some states still have sodomy laws on the books (including Massachusetts), those laws have been ruled unconstitutional.

In 1986, when civil rights lawyers challenged the constitutionality of sodomy laws, the U.S. Supreme Court ruled that sodomy laws are not an invasion of privacy (Bowers v. Hardwick).
In 2003, the Supreme Court overturned its decision in Bowers (Lawrence & Gardner v. Texas).

**Sodomy Today**

All sodomy laws in the US are now unconstitutional and unenforceable when applied to non-commercial consenting adults in private, except in the US Military which comes under a different system of law.
Prison Issues

Introduction

We often get calls or letters from gay, lesbian, bisexual and transgender prisoners. Many of the requests from prisoners are not within the scope of GLAD’s work. These include requests for legal representation on the original matter for which they were imprisoned, request for “pen pals,” and request for contacts with other lesbian and gay prisoners. Unfortunately, there are very few resources for prisoners in general, and even fewer resources specifically for lesbian and gay prisoners.

Keep in mind that most prisoners cannot be contacted by phone. If you are working with a prisoner, arrange a time for them to call you. In general, GLAD accepts collect calls from prisoners. When responding in writing to prisoners, affix the “LEGAL MAIL FROM ATTORNEY – DO NOT OPEN” stickers on both sides of the envelope. In theory, any mail thus addressed will not be read by prison officials.

Non-Legal Referrals For LGBT Prisoners

If prisoners are interested in making contacts in the LGBT community, refer them to the Fenway Help Line. Local papers as well as lesbian and gay magazines are also a good source of information for prisoners. Some newspapers print requests from prisoners for pen-pals, and GLAD has a list of pen-pal organizations. GLAD’s information packet for prisoners in New England has a list of general resources for prisoners.

Prisoners who are struggling with issues around being transgender should be sent our resource list for transgender people as well as our resource list for prisoners.

Prisoners from outside of New England should be sent the National Prisoner Resource List.

Legal Issues Of LGBT Prisoners

Legal Representation for Past Charges

Most prisoners who call GLAD either are looking for representation for past charges or are facing discrimination within the prison because they are lesbian, gay or transgender. If callers are seeking legal representation in order to appeal charges, referrals to private attorneys are appropriate. However, very often those incarcerated cannot afford private counsel. There are legal groups organized to assist prisoners. We can either give referrals over the phone or mail prisoners a list of legal services.

Discrimination Against and Harassment of LGBT Prisoners

The Department of Corrections’ (DOC) non-discrimination policy does not include sexual orientation, but M.G.L. c. 127, sec. 32 requires that prisoners be treated “equally and with kindness.” Nonetheless, many callers report that they have faced extreme harassment because they are gay, lesbian or transgender. Harassment is perpetrated by both inmates and correctional officers.

M.G.L. c. 124, sec. 1, requires the Commissioner of Corrections to investigate claims of misconduct in jails or prison. Any inmate who feels s/he is being harassed has the right to file a grievance about the conditions or treatment s/he has faced. In reality, few prisoners who file such complaints have had successful resolutions. Nonetheless, prisoners should be encouraged to file complaints, not only because it is the only mechanism in place right now to redress complaints, but also because it is a way of documenting the harassment and the individual’s attempts to get the situation resolved.

Prison Assault

Some prisoners call us because they have been attacked in jail by guards or by other prisoners. Prisoners can file police reports about physical or sexual assaults. Many do not do this, however, because of the risk of retaliation from the attacker(s). Some prisoners wait until they are out of jail to file reports about attacks against them.

Some prisoners call us because they feel they are in danger of being physically or sexually assaulted. They want to know what the prison is supposed to be doing to protect them from violent attacks. Many laws make it very difficult to hold prisons or guards responsible for prisoner on prisoner assaults. However, in certain circumstances, a prison
may be liable for having failed to prevent an assault if the prisoner can prove that the institution knew that a prisoner was in danger, but nonetheless was “deliberately indifferent” to the risk. One of the best ways to prove that the prison knew of the risk is to have a copy of a written notice the prisoner gave to the prison of the risk. This standard of deliberate indifference is a very difficult standard to prove in court and few of these complaints are successful. However, it is critical that prisoners know to use the formal complaint procedures at their institution and that they keep written records and copies of any complaints or requests for protection that they have filed.

Many prisoners who warn their jail that they are in danger of attack are placed in solitary confinement in order to protect them from other prisoners. In solitary, many are denied access to religious, educational and recovery programming at the institution, are allowed less access to legal resources, and have visitation privileges restricted, among other deprivations.

One of the important service organizations for prisoners in Massachusetts is Massachusetts Correctional Legal Services (MCLS). They do intakes and impact litigation on behalf of prisoners in Massachusetts who have disputes with prison officials. They cannot, for conflict of interest reasons, handle disputes that prisoners have with other prisoners.

**Legal Rights of Prisoners**

The legal rights of prisoners are covered in the Code of Massachusetts Regulations (CMR) at 103 CMR 934. The CMR must be given to any prisoner who requests it. Prisoner’s rights under the CMR include the following:

1) There must be a written policy explaining your right to speak with a lawyer.
2) There must be a written policy explaining your rights to seek help from the court or government officials.
3) You CANNOT be punished for filing a complaint.
4) There must be a program to help you prepare and file legal papers.
5) There must be a grievance policy by which you can make complaints and have those complaints heard and solved.

**Visitation Issues**

Occasionally, the lover of a lesbian or gay prisoner will call because they have experienced discrimination at the prison facility. Again, the CMR dictates rules governing visitation. These visitation rules must be made available upon request. Although no rule explicitly bars visits from same-sex partners (or anyone else), prison officials are given wide latitude in enforcing visitation regulations and can easily forbid future visits if they feel the rules have been violated.

One rule that has been enforced unfairly against lesbians and gay men is a prohibition on “physical contact that is excessive or inappropriate in a public place” (103CMR 483.15). While straight couples are often permitted extensive physical contact, same-sex couples have found their conduct limited by this rule.

However, those who find their visitation rights have been restricted do have some recourse:

1) The visitor must be given a reason for the ban on visiting.
2) The visitor must be told within a week, if and when s/he may start visiting again, or whether there will be restrictions on visiting.
3) Within 15 working days the visitor may seek a review of the restrictions and request a hearing with the Superintendent. The Superintendent must respond within two weeks of the request for review.
4) The inmate must get a copy of the prison superintendent’s decision.
5) The inmate may file a grievance about the treatment under the guidelines specified above.

**Physical Assault/Rape**

Many prisoners are physically assaulted and/or raped while incarcerated. They may have viable claims for civil rights violations under the state and/or federal constitution. Refer these cases to the same lawyers who do police misconduct or tort cases.
Refer Those Facing Charges or Seeking an Appeal to Attorneys

If a prisoner is seeking legal representation for a past charge, refer him/her to a private attorney or to a legal service for prisoners if s/he cannot afford an attorney. It is best to send a listing of these services to the inmate via mail. That way, the prisoner will have them in hand and be able to refer to them as needed.

Send Information to Those Being Harassed or Denied Visits

Prisoners who are facing harassment should be given the information about their rights outlined above. Our New England prisoner package for prisoners contains information detailing how to file a grievance. This should be sent to prisoners who are facing harassment or having problems with visitation rights. Prisoners facing extreme harassment, who have had no luck getting their grievances redressed, should be referred to the legal services listed in the package for prisoners.

Visitors Should Call Ahead

Those planning to visit an inmate should call the prison beforehand and request the rules for visitors. Prison officials often use seemingly insignificant rules, such as dress codes, to prohibit people from visiting. Furthermore, these rules are different in every facility. Knowing the rules beforehand can save time and frustration.

Access to Medical Care/ Treatment for HIV and Transgender Prisoners

In addition to the calls we get from gay and lesbian prisoners, we also receive calls and letters from HIV-positive and transgender prisoners looking for help. A concern of HIV-positive and transgender prisoners is access to medical treatment. Inmates sometimes call us to let us know they have not been receiving their HIV medication or hormone treatment, either during a time of transition (into prison or from one prison to another), when they are in segregation (‘lock-up’), or just in general.

Due to the deference which courts give to the judgments of prison officials and the high standards of proof required to establish a claim of inadequate medical care, litigating this type of case is extremely challenging. Nevertheless, access to medical care for prison inmates is an important issue and we want to follow up on meritorious cases.

The Deliberate Indifference Standard

A prisoner’s challenge to inadequate medical care/treatment is under the Eighth Amendment, which prohibits “cruel and unusual punishments.” Inadequate medical care under the Eighth Amendment must rise to the level of “deliberate indifference to serious medical needs of prisoners.” This means that a prisoner’s medical needs must be intentionally ignored, or treatment must be intentionally delayed, denied, or interfered with.

Therefore, a prisoner claiming inadequate medical care has to demonstrate two things:

1) **Objective** proof of deliberate indifference--serious deprivation of medical care. Mere differences of opinion as to a diagnosis or the proper course of treatment do not amount to deliberate indifference. We must demonstrate a deviation from the prevailing HIV and transgender treatment standards.

2) **Subjective** proof of deliberate indifference--prison personnel knew of an excessive risk to inmate health and disregarded it.

If a caller’s situation appears to fulfill some of the requirements above, it is important to get the following information to pass on to your supervisor:

- At which institution is the prisoner being held?
- What is his/her medical history?
- What type of medication is the person supposed to be on?
- Who prescribed those meds?
- Has the person’s medical regimen been interrupted (if so, when, and for how long?), or has the person never received their medication?
- Is the individual receiving any of the prescribed drugs?
• If the individual is not on medication, why not? why does s/he think s/he should be on medication?

• Who is interfering with the prisoner’s medical care (doctor, nurse, guards, warden, administrative procedure)? How?

• If the person’s medication was interrupted and resumed, does she know if her viral load and t-cell count have changed since that incident?

• Important dates (prison entry, changes in treatment, etc.)

• Has the prisoner filed a grievance about this situation?

Rights of Transgender People in Prison

(See the section on transgender prisoners in the Transgender Legal Issues publication).
Immigration

Introduction

Immigration law is a complex and highly specialized field; GLAD does not have expertise in this area. At the same time, the stakes for individuals who are making decisions about immigration issues – such as changing immigration status, or entering or leaving the country – are enormous. Therefore, GLAD only provides callers with the most basic information and referrals. Never try to give information specific to an individual caller’s situation.

What To Do with Immigration Calls – Always…

1. Refer callers to immigration experts who can give them more detailed information and advice.
2. Emphasize to each caller that they must consult an immigration attorney or agency for advice about their specific situation.
3. If the caller is nervous about confidentiality, explain that we do not share information about our callers with anyone and that such confidentiality is required by law.

What NOT To Do with Immigration Calls – Ever…

1. Never try to give information specific to an individual caller’s situation.
3. Don’t refer to anyone as “illegal.” Someone who does not have legal immigration status can be called “undocumented.”

Immigration & Sexual Orientation

• LGBT non-citizens are not excluded from entering the country and cannot be deported based on their sexual orientation.
• The ruling by the United States Supreme Court in the Windsor case that the Defense of Marriage Act (DOMA) was unconstitutional opened up an opportunity for many bi-national couples to access immigration benefits through marriage. A U.S. citizen who is married to a foreign national can now sponsor a same-sex spouse for permanent residency. In addition, provided the foreign national entered the U.S. on a valid visa, amnesty is usually granted if the foreign national is currently undocumented. However, the immigration laws are very complex and there are exceptions to every rule, so before doing anything, a bi-national couple should consult with an experienced immigration attorney.
• Individuals can gain legal immigration status through temporary visas (for study, work, or tourism) or more permanently through employer-based sponsorship or through close family members who are U.S. citizens.
• Some LBGT immigrants have been given asylum in the U.S. based on extreme persecution in their home countries, when the government is either the perpetrator of violence against gays, lesbians and transgender people or is unwilling or unable to stop extreme persecution that can be identified as committed against a particular social group such as LGBT people. Please refer callers interested in asylum to Immigration Equality and the International Gay and Lesbian Human Rights Campaign (IGLHRC).

Immigration & HIV

• The HIV ban that kept people from entering the country and/or receiving Legal Permanent Resident status (a green card) ended on January 4, 2010.
• Immigrants living in the U.S. may be concerned about what government benefits they can access without qualifying as a public charge. Callers with benefits questions should be referred to legal services or immigration centers such as those listed on the resource list.
• All immigrants can make use of a variety of forms of public emergency assistance (even undocumented immigrants). Emergency assistance includes emergency Medicaid, HIV testing, emergency shelter and food, treatment for mental illness and/or substance abuse, help from violence prevention programs.
• Individuals who face extreme persecution in their home country based on their HIV status may be eligible for asylum in the U.S. Please refer callers interested in asylum to Immigration Equality and the International Gay and Lesbian Human Rights Campaign (IGLHRC).
Youth and Student Rights

Tips For Handling Student Calls

Youth calls are a high priority for GLAD. Before referring out any youth-related calls, speak with your supervisor.

When you get a call about student harassment or discrimination, you should get as many details as possible about what took place.

- Have other students, teachers, or faculty witnessed the harassment?
- What (if anything) has the student done to get the situation addressed by parents or school administrators?
- What (if anything) has the school done to rectify the matter?
- What would the student ideally like to see happen?

Keep in mind that many young people may not be out to their families and that they may not clearly identify as gay, lesbian, bisexual or transgender. In addition, they may be very concerned about confidentiality. Assure them that all information is confidential and that we cannot disclose anything without their permission. If it is problematic for GLAD to contact the person at home, give him or her our toll-free number (1-800-455-GLAD) and ask him or her to call back at a particular time. For anonymous support by and for queer youth, refer youth to the Fenway Peer Listening Line at 1-800-399-PEER.

Student Rights – An Introduction

Everyone, including students, possesses constitutional rights. The right to free speech and to express one’s opinions, the right to choose with whom you associate, and the right to peaceful assembly, all endure as the building blocks of a free society. Despite constant pressure to censor in the name of upholding parochial values, legislation and court decisions have ensured that:

- Gay, lesbian, bisexual, transgender, and questioning students have the right to attend school in safety, without facing harassment or violence. Massachusetts recently passed one of the strongest anti-bullying laws in the country. For details, see GLAD’s publication: Massachusetts Students: What to Do if You’re Being Bullied.

- Students have the right to express political points of view, even on controversial issues. In Merrimack, New Hampshire, students wore armbands to protest school policies against “promoting homosexuality.” Students in South Hadley, Mass. were successful in striking down their school’s dress code prohibiting ‘obscene, profane, lewd or vulgar’ clothing.

- Because the freedom to learn (as defined by the courts), assures students access to information and ideas, areas in which schools may restrict books, materials, or classroom discussion based on vocabulary or content are limited.

- Because of both associational rights and specific legislation protecting those rights, students have the right to form Gay Straight Alliances which should receive official school recognition comparable to that afforded other non-curriculum related clubs.

- Students have the right to participate in extra-curricular activities on an equal basis with other students. A federal court in Rhode Island established in 1980 that a gay male student had the right to bring a male date to the senior prom. The court looked at his decision to bring a male date as "symbolic speech" and ruled that he must have the same benefits and access to student activities as all other students.

This does not mean that students can do whatever they want, whenever they want, or that federal courts will serve as the arbiters of all disputes that arise in the schools around these issues. Sometimes the constitutionally protected
rights of students and teachers conflict with the courts’ deference to the historically broad discretion enjoyed by school committees to advance their own policies through the local curriculum. Hard and fast rules governing the resolution of these conflicts are few.

One clear rule is that school board policies must be related to “legitimate pedagogical concerns.” More broadly, school committees and administrative personnel in a school may not impose one and only one viewpoint on a subject matter.

The Right of Students to Attend School in Safety

Federal and state laws and constitutional provisions should ensure the right of all students, including gay, lesbian, bisexual and transgender students (“LGBT”) to attend school in safety. Unlawful harassment compromises a student’s ability to take advantage of educational opportunities and often interferes both with a student’s academic performance and emotional and physical well-being.

**FEDERAL LAW**

**Sexual Harassment and Other Forms of Sex Discrimination**

Under federal law, sex discrimination is prohibited by both Title IX and general principles of equal protection of the laws. Sexual harassment can be a form of sex discrimination. Unlawful harassment compromises a student’s ability to take advantage of educational opportunities and often interferes both with a student’s academic performance and emotional and physical well-being.

A student may file a complaint of discrimination with the Department of Education’s Office of Civil Rights based on the harassing conduct of both school employees and fellow students, and, in cases where the school has reacted with deliberate indifference, may proceed in court to seek monetary damages. The administrative remedies available through OCR also provide strong incentives for schools to promulgate and enforce anti-sexual harassment policies.

There is no excuse for schools’ inaction when it comes to harassment. Federal regulations require federal fund recipients (any public schools, including public charter schools) to adopt and publish sexual harassment grievance procedures. There are good reasons to expect state courts to impose liability on an educational institution for sexual harassment, but regardless of the courts’ receptivity to claims, schools are well-advised to strictly enforce policies against sexual harassment in order to avoid OCR oversight and intervention.

**Harassment By Peers**

Most cases involve “peer” or “student-to-student” harassment based on a claim of “hostile environment.” Traditionally, cases of harassment by peers have been rooted in a claim that the peer harassment creates a hostile environment for the student being harassed. As in an employment setting, hostile environment harassment refers to the educational atmosphere created when unwelcome conduct of a sexual nature is so severe, persistent or pervasive that it unreasonably interferes with a student’s educational opportunities or ability to participate in or benefit from an educational program or activity.

It is the position of OCR that schools are not legally responsible for the actions of sexually harassing students. But OCR does hold schools responsible for their own discrimination in failing to respond to harassment once they know harassment is happening. When a school has notice of a hostile environment created by its students, it must take immediate and appropriate steps to remedy the harassment. In May 1999, the United States Supreme Court decided that a school could be liable for peer-on-peer harassment if the school was deliberately indifferent to sexual harassment of which it has actual knowledge.

As a matter of federal law, sexual harassment has occurred when:

1. a student is subjected to unwelcome verbal or physical conduct of a sexual nature
2. which has the purpose or effect of unreasonably interfering with an individual's education
3. by creating an intimidating, hostile or sexually offensive educational environment.
A few elements of this definition are worthy of further comment. Sexual conduct must be unwelcome in order to constitute harassment; that is, the student must not have requested or invited it and must regard the conduct as undesirable or offensive. If a student actively participates in sexual banter and discussions and gives no indication that he or she objects, then generally there is no evidence that the conduct is unwelcome. However, acquiescence in the conduct or failure to complain does not mean that the conduct was welcome, since there are many reasons why a student could fail to object. Even if a student has participated in sexual banter in the past, he or she may nonetheless indicate that the same conduct is now unwelcome.

The conduct covered by the harassment laws is wide-ranging, e.g., touching, sexual talk, gesturing or innuendo, graffiti, sexual advances. It may be that sexually charged taunting and innuendo is enough for a student to claim sex discrimination, even without physical overtures or contact. It would be poor judgment for a teacher or principal to wait for a student to be sexually assaulted to decide to address harassment. Determining whether conduct is severe, persistent or pervasive should be examined both subjectively and objectively in light of all relevant circumstances.

Taken together, this means that no student should have to tolerate a school environment filled with sexual taunts and abuse simply because of his or her gender. While it does not mean that every offense or slight is the basis for a lawsuit, it does mean that students should feel safe and confident about seeking information and remedies when harassed by their peers, teachers, school staff or coaches whether on the bus, in the classroom, locker room, or bathroom or on the playing field.

**Anti-Gay and Same-Sex Harassment**

For schools to protect themselves and their students, it is critical that they not envision “harassment” too narrowly. Most people think of boys harassing girls as the model for sexual harassment, but it may also include girls harassing boys, boys harassing boys, or girls harassing girls. One can say with a degree of certainty that if a school responds inadequately as a general matter, or only responds to claimed harassment by boys toward girls but does not respond in kind to harassment of boys, it is likely discriminating based on sex.

The OCR has also clarified and explained its position on when claims of anti-gay discrimination may be addressed under federal law. It provides:

> Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students may constitute sexual harassment prohibited by Title IX. For example, if students heckle another student with comments based on the student’s sexual orientation (e.g., “gay students are not welcome at this table in the cafeteria”) but their actions or language do not involve sexual conduct, their actions would not be sexual harassment covered by Title IX. On the other hand, harassing conduct of a sexual nature directed toward gay or lesbian students (e.g., if a male student or a group of male students target a lesbian student for physical sexual advances) may create a sexually hostile environment, and therefore, may be prohibited by Title IX. It should also be noted that some State and local laws may prohibit discrimination on the basis of sexual orientation. Also, under certain circumstances, courts may permit redress for harassment on the basis of sexual orientation under other federal legal authority.

In other words, harassment is unlawful when it is based on conduct of a sexual nature: it does not matter if the student victim is of the same sex as the harasser or is gay or lesbian.

Moreover, although decided under Title VII and not Title IX, a recent Supreme Court decision made clear that same-sex sexual harassment charged under Title VII is actionable. That means that boys, in some circumstances, can be liable for sexually harassing boys and likewise for girls. Although Title VII case law does not determine the outcome of Title IX cases, it provides some guidance to courts and litigants in how comparable questions of law may be decided.

**State Laws**

**Massachusetts**

Massachusetts prohibits sex, sexual orientation and gender identity discrimination in its schools, whether committed by school employees or fellow students. M.G.L. c. 76, sec. 5. In fact, the “Guidelines to School Districts On Addressing Sexual Harassment” issued by the Massachusetts Department of Education, assume peer harassment is
prohibited by state law. In addition, Massachusetts recently passed one of the strongest anti-bullying bills in the country that requires any school employee who witnesses bullying to report it to the appropriate administrator and then the school is required to investigate and take appropriate action. Also, the Massachusetts Department of Elementary and Secondary Education (DESE) has published guidelines for public schools to follow to create a safe and supportive environment for transgender students—see http://www.doe.mass.edu/sfs/lgbtq/GenderIdentity.html.

**Sex Discrimination**

M.G.L. c. 151C defines fair educational practices and specifically prohibits “sexual harassment of students in any program or course of study in an educational institution. M.G.L. c. 151C, sec. 2(g). It also defines sexual harassment similarly to federal law with respect to both sexual misconduct by a teacher and harassment by peers. Everything said above about federal law is relevant in the state context also. It is very likely that same-sex sexual harassment is within the prohibitions of chapter 151C. Claims under this law may be brought to the MCAD.

**Sexual Orientation and Gender Identity Discrimination**

In Massachusetts, students cannot be treated differently from other students based on their actual or perceived gender identity or sexual orientation. M.G.L. c. 76, sec. 5, enforced through section 16 of the same law, provides:

> No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and course of study of such public school on account of race, color, sex, gender identity, religion, national origin or sexual orientation.

This law applies to discrimination with respect to school admission, but more importantly will affect the administration’s responsibility to make sure LGBT students are treated fairly once admitted. Massachusetts law also protects against the common occurrence of harassment of those who are perceived to be LGBT, regardless of their actual sexual orientation or gender identity. The basic rule of non-discrimination is equal treatment. So, for example, if the vice-principal for discipline acts to resolve the harassment complaints of girls generally, but not when the harassment is directed at a female student because she is thought to be a lesbian, the school is engaging in sexual orientation discrimination.

**Protections Against Discrimination in Schools Based on Sexual Orientation and/or Gender Identity in Other New England States**

**Connecticut**

Sexual orientation and gender identity or expression are included in Connecticut’s public school non-discrimination law. Conn. Gen. Stat. 10-15c was amended in 1997 to add “sexual orientation” and in 2011 to add “gender identity or expression” to the list of characteristics upon which discrimination is forbidden in public schools.

It provides that:

> “The public schools shall be open to all children five years of age and over... and each such child shall have, and shall be so advised by the appropriate school authorities, an equal opportunity to participate in the activities, programs and courses of study offered in such public schools, . . . without discrimination on account of race, color, sex, gender identity or expression, religion, national origin or sexual orientation. . . .”.

Technically, the law addresses equal opportunity with respect to activities, programs and courses of study. While a school would not likely say, “Don’t come here,” or “You can’t take track,” their actions may imply as much. For example, if a school fails to redress pervasive harassment against you at the school generally or in a particular class or activity, this may violate the letter of the non-discrimination law. At this time, the student rights law does not itself contain a mechanism for lawsuit based on violations of the law, but it may nonetheless prove to be the source of a private right of action. In any event, the law is a powerful tool in advocating for change in a school to institute training programs and to deal with problems when they arise.

In 2011, Connecticut passed a very strong anti-bullying law that requires schools to have an anti-bullying policy in place that requires school staff to report and the school administration to take appropriate action on any bullying incidents. For more detailed information see GLAD’s publication, Rights of Students in Connecticut Public Schools.
The Connecticut Commission on Human Rights and Opportunities (CHRO) has published guidelines for public schools to follow regarding transgender students at:

**Maine**

Maine’s anti-discrimination law expressly protects students from discrimination based on sexual orientation. Under this law, a school cannot – because of sexual orientation or gender identity and expression – exclude a person from participating in, or deny them the benefits of, or discriminate in any program or activity. Sometimes harassment of LGBT people is sexual harassment which might warrant a claim under the state law, 5 Me. Rev. Stat. sec. 4602 (1). The complainant must file a complaint with the Maine Human Rights Commission within 6 months and the commission will conduct the same type of investigation as it does in other types of discrimination cases, 5 Me. Rev. Stat. sec. 4611. In May 2012, a new strong anti-bullying law, *An Act to Prohibit Bullying and Cyberbullying in Schools*, was signed into law by the Governor.

Also, GLAD recently won a case in Maine that requires schools to allow transgender students to use the bathroom that conforms to their gender identity. Some school districts in Maine have established guidelines for schools to follow regarding transgender students.

**New Hampshire**

New Hampshire recently passed an anti-bullying law that is one of the strongest in the country. This law enumerates LGBT students as one class of students who are frequently targeted for bullying. Some school districts in New Hampshire have established guidelines for schools to follow regarding transgender students.

**Rhode Island**

State law says that students, staff members and teachers all have the right to attend or work at a safe school, whether elementary, secondary or post-secondary. R.I. Gen. Laws, secs. 16-2-17, 16-81-1. These provisions empower schools to expel disruptive students.

In addition, a 2010 Board of Regents Policy provides in part as follows:

> . . . all students, without exception, have the right to attend a school in which they feel safe and able to express their identity without fear. . . . certain students, because of their actual or perceived sexual orientation or gender identity/expression, have been subject to discrimination through abuse, harassment, bullying and/or exclusion from full participation in educational activities.

> Therefore, it is the Policy of the Board of Regents that no student shall be excluded from any educational program or activity or discriminated against, bullied, or harassed in any public educational setting based upon actual or perceived sexual orientation or gender identity/expression. . . This policy shall include but is not limited to admissions, guidance services, co-curricular and extra-curricular activities.

> Each local school district is urged to review programs, services and activities to assure that such offerings are conducted in a manner that is free of inadvertent or intentional bias based upon sexual orientation and/or gender identity/expression. Each local school district is required by law to address harassment and bullying based on sexual orientation and/or gender identity/expression through the development and enforcement of appropriate student and staff behavior and disciplinary policies. . .

The Board of Regents policy can be found at: [http://www.thriveri.org/RIDE%20Discrimination%20Policy%202010.pdf](http://www.thriveri.org/RIDE%20Discrimination%20Policy%202010.pdf). Technically, the policy covers exclusion from a public school or discrimination in taking advantage of school programs. It does not provide any mechanism for court or administrative enforcement of the policy.

Rhode Island recently passed the “Safe Schools Act” which requires the Rhode Island Department of Elementary and Secondary Education to develop a strong statewide anti-bullying policy. Rhode Island has established a policy

**Vermont**

Vermont law prohibits discrimination based on sexual orientation or gender identity in places of public accommodation, which is defined to include schools. Vt. Stat. Ann. tit. 9 §§ 4501, 4502. Moreover, a statute designed to ensure equal educational opportunities states that educational services must be furnished in a non-discriminatory manner, free from harassment, hazing, and bullying. Vt. Stat. Ann. tit. 16 § 165.

Vermont recently strengthened its policies on bullying, hazing and harassment and recognized LGBT students as a class of students who are frequently targeted for harassment. Vermont has established a policy for schools to follow regarding transgender students at: http://education.vermont.gov/sites/aoe/files/documents/edu-best-practices-transgender-and-gnc.pdf

*Even in states that do not have a student rights law including sexual orientation and gender identity, students facing discrimination and harassment may have legal recourse under student rights laws based on sex, sexual harassment laws, or criminal statutes. In addition, individual schools or school systems may have non-discrimination policies that include sexual orientation and gender identity, which students can ask to have enforced on their behalf.*

**The Rights of Transgender Students & Other Students Who Fail to Conform to Sex Stereotypes**

Laws protecting students from discrimination based on sex, such as Title IX or state anti-discrimination law, may be used to protect students who fail to conform to sex stereotypes, including transgender students, as demonstrated by these two GLAD cases:

In *Doe v. Yunits, et al*, GLAD filed suit against a Brockton, Mass. public school for refusing to allow Pat Doe, a transgender 8th grade student, to attend school in clothing that it considered to be inappropriate for a student the school believed to be a boy. Pat was assigned the sex of male at birth but has a female gender identity. Consistent with her gender identity, she had been wearing girls’ clothing for nearly 2 years. Rejecting the school’s argument that Pat’s wearing girls’ clothing is disruptive and makes other students uncomfortable, the judge who heard the case ruled in Pat’s favor, issuing a temporary injunction against the school. As a result, it may not prevent Pat Doe “from wearing any clothing or accessories that any other male or female student could wear without being disciplined.” A single justice of the Appeals Court upheld the injunction.

In another case, two brothers from Fall Mountain, New Hampshire who were called names and abused both verbally and physically by groups of students throughout their high school years filed suit against the school district and various school officials and personnel, claiming that the harassment they faced arose from the perpetrators’ sex-based stereotypes of masculinity, thereby violating Title IX. The United States District Court for the District of New Hampshire credited the suit brought by the brothers as stating a legitimate claim of sex discrimination under Title IX.

As noted above, Maine, Connecticut, Rhode Island, Vermont and Massachusetts anti-discrimination laws that deal with schools specifically protect transgender students from discrimination in any program or activity.

**What To Do About Harassment/Bullying**

**WHAT STUDENTS CAN DO:**

- Keep notes of the harassment, including the date, time, and place of harassing incidents, the names of individuals involved, and a description of the incidents and circumstances. A student should never give away his or her only copy of such notes to anyone.

- Every school, with the exception of some (but not all) private schools, must, by law, have in place an anti-bullying policy. It must be posted on the school’s website, and you can also request it from school administrators. It must include:
  - A prohibition on bullying, cyber-bullying and retaliation
• Clear procedures for you to follow to confidentially and anonymously report bullying
• The procedures the school will take to respond to and investigate reports of bullying
• The range of disciplinary actions that may be taken against a bully
• Clear procedures for restoring a sense of safety to the bullied student and assessing the bullied student’s needs for protection, including protection from retaliation for reporting the bullying
• Procedures to notify parents or guardians of the victim and the bully
• Procedures for providing, when necessary or requested, counseling to bullies and victims

You should make yourself familiar with this policy. It is important to get a sense of what will happen when you or someone else reports bullying so that you can remain in control of the situation. Under the anti-bullying law any school employee who witnesses bullying must report it to the administration.

• Uncomfortable bringing the problem up alone? Find a supportive teacher, guidance counselor or fellow student who can support.

**NOTE:** Without notice, the administration will not know there is a problem. Take special care to contact the right person (likely the Title IX coordinator). When the student does contact that person or any member of the administration, he or she should ask what steps that person will take, when they will take those steps, and when the student can expect to hear back from them.

**WHAT ADMINISTRATORS CAN & MUST DO:**

Once notified of possible sexual harassment of students or bullying, the school administration is legally required to take immediate and appropriate steps to investigate the situation and take steps reasonably calculated to end any harassment/bullying, eliminate a hostile environment if one has been created, and prevent harassment/bullying from occurring again. A court may also find the administration liable if an appropriate official with authority to intervene actually knew of the misconduct and, acting with deliberate indifference, failed to stop the misconduct.

Prevention, as the saying goes, is much less costly than the cure. To protect its students and itself, a school must develop comprehensive and user-friendly policies and procedures against harassment/bullying; distribute them widely; educate students, faculty, staff and parents in the need for the policies and procedures; and, finally, follow them scrupulously (without exception).

**Remedies for Harassment**

**FEDERAL LAW**

When a school has determined that harassment or objectionable conduct has occurred, it must remedy the harassment and take steps to prevent it from recurring. Schools are generally allowed to impose gradually increasing discipline as needed on the students who are found to have been responsible for harassing.

For a severe incident, however, more serious and immediate steps may be required. Responsive measures, such as separating the students, should be designed to minimize the burden on the student who was harassed.

If the school takes no action, or if a student or his or her parent disagrees with the actions taken by the school administration, the student and his or her parents have the right to file a complaint at the U.S. Departments of Education (“DOE”), Office of Civil Rights (“OCR”). The OCR will take complaints based on sex, and will take sexual orientation-based complaints as described above. OCR has the power to investigate a school’s response to allegations of sexual harassment and require the school to remedy any deficiencies.

**MASSACHUSETTS STATE LAW**

In May 2010, Governor Patrick signed strong anti-bullying legislation that cements the state’s commitment to changing the culture of bullying in schools. GLAD was involved in the drafting and legislative process from beginning to end, and our contributions will ensure that schools pay close attention to the disproportionate bullying of LGBT kids.
The law now requires schools to draft and enforce an anti-bullying policy with specific requirements: that staff report all bullying to the school principal, that principals notify parents of both bully and victim when an incident occurs, and that schools train staff in how to prevent and respond to bullying. The bill also gives an oversight role to the Department of Elementary and Secondary Education (DESE), which will create a model bullying policy and promulgate regulations with further requirements for schools.

In addition, for complaints of sexual harassment in any program or course of study covered under M.G.L. c. 151C, individuals can file complaints with the MCAD within 300 days of the unfair educational practice. The MCAD will investigate, and if it concludes harassment occurred, will issue an order requiring the school to cease and desist from the harassment.

OTHER REMEDIES

Students and their parents or guardians may also be able to go to criminal court and take out complaints against other students for committing hate crimes, assault, sexual assault and other crimes. For example, if a student believes his or her day-to-day safety is in jeopardy, in appropriate cases, he or she may be able to obtain a “civil rights injunction” ordering the harasser to stop abusing them and to refrain from any contact with them. See the chapter on Violence & Harassment for further details.

The Rights of Students to Form LGBT Groups

Whether and what kinds of student groups may exist in the school community has long been a source of controversy. But for even longer, the First Amendment has been interpreted to mean that public school students have a right to associate with each other and to speak freely. While there is no federal case yet directly on point, Gay Straight Alliances and similar groups should fall within the collegiate tradition of permitting student groups to band together for support or to engage in non-curricular activities. There is particular support in Massachusetts state law and from the Department of Education strengthening the rights of students to form GSAs.

First Amendment

The United States Supreme Court has recognized that “coming out” is expressive conduct protected by the First Amendment. Moreover, a student group cannot be denied recognition by a school based on the expressed viewpoint of its members, such as the viewpoint that ‘being gay is good,’ or that ‘gay people deserve full equality.’ In other words, a school administration cannot pick and choose the groups it wants in its school based on its opinion of the desirability of a group’s viewpoint. Moreover, it is impermissible for a school to place limits on gay students’ political activity that are not placed on other students.

A school administration remains free, however, to evaluate a student group based on neutral factors that are applied to all other groups, such as a group’s unwillingness to abide by school rules. The best approach in any case is to examine whether the same rules are being applied to everyone, or whether special/different rules are being applied to the gay student group.

The mere fact that a LGBT student group may be controversial is not sufficient justification for the administration to oppose or ban it. Even if an administration fears a group will cause others to create disturbances, courts long ago recognized that “hecklers” cannot be allowed to essentially “veto” speech with which they disagree, or which is unpopular, without jeopardizing all types of speech. Instead, the administration must show that the restriction on speech is "necessary to avoid material and substantial interference with schoolwork or discipline." This requires the administration to show that there really is a reasonable probability of interference, not just discomfort with students expressing an unpopular viewpoint. If the school cannot demonstrate these factors, it is likely that the administration's banning of the group is based on no more than dislike for the group’s message, thereby violating the students’ rights.

Forming Non-Curricular Groups: The Equal Access Act

The Equal Access Act (EAA) is a federal law, enacted in 1984, applicable to all public high schools which (a) receive federal funds and (b) allow non-curriculum related groups to use the school for a meeting place (creating a “limited public forum”).

This law offers additional protection for Gay Straight Alliances (GSAs) and is a powerful tool for student expression. Under the EAA, a school cannot discriminate against student groups based on the "religious, political,
philosophical or other” content of their speech. As long as there is at least one other non-curricular group that is allowed to meet at the school, then the school must allow, for example, a GSA to form.

It is not enough for a school with at least one other non-curricular group to allow a GSA to meet at the school. Because the Act prohibits denial of “equal access,” a school may not deny any of the attendant privileges of official recognition to the GSA that is accorded other groups. For example, if official recognition includes access to school facilities such as the school newspaper, public address system, or other student activity events, the GSA must similarly be provided access.

The Equal Access Act is so clear, and so specific about applying to secondary schools, that it may be an even stronger tool than the First Amendment for convincing the administration to let a GSA form. Because it is so clear, it may also be easier to seek a remedy under the EAA than under the Constitution. Of course, state law is an important source of rights in Massachusetts, too, particularly M.G.L. c. 76, sec. 5 (discussed above).

The Right to Learn About LGBT Issues – Curricular & Library Censorship

The right of students to receive information and ideas has long been protected by the First Amendment. The main case on this point, known as Pico, ruled that a school board could not necessarily remove books from middle and high school libraries which it characterized as “anti-American, anti-Christian, anti-Semitic, and just plain filthy.” According to the Court, “students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding” and “[t]he school library is the principal locus for such freedom.”

While cases involving library censorship and removal of previously approved materials present the strongest First Amendment claims for students, censorship in the classroom is also likely to be frowned upon by the courts. As Justice Rehnquist explained in Pico,

> There would be few champions...of the idea that our Constitution does permit the official suppression of ideas...[T]he prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school-work or discipline, is not constitutionally permissible.

Thus, even though exposure to certain ideas or materials may conflict with a school board’s own views, the freedom to learn means that students have a right to be exposed to all sides of controversial issues.

Sexuality Education in Massachusetts – Parents Can Opt Out

There is one wrinkle to these general principles in Massachusetts. Under a law, M.G.L. c. 71, sec. 32A, parents must be notified and may elect to remove their children from those curricula that primarily involve human sexual education or human sexuality issues. According to draft regulations by the State Department of Education interpreting this law, the new law is not an excuse for parents to remove their children from any class discussion referencing sexuality, for example, or to prevent their children from reading works by gay authors or studying the historical and cultural movement to obtain civil rights for gay people. Instead, the notice and opt-out provisions only apply to “courses (typically, sex education or portions of a health education or science course), school assemblies or other instructional activities and programs that focus on human sexual education, the biological mechanics of human reproduction and sexual development, or human sexuality issues…” No law requires consent from parents before students may take a course involving sex education; only notification is required. Schools should be aware that applying this law too broadly into areas of the curriculum beyond sex education could trigger complaints of unlawful censorship.

The Right to Express Opinions About LGBT Issues – Censorship of Student Ideas

The rights to speak, to write and otherwise to communicate ideas outside of the classroom are also often protected by law. When a school creates a forum generally open for use by student groups, whether it be a bulletin board or publication, it cannot deny a student group access to that forum based on the content of its message. The only exception, rarely met, is when a “regulation is necessary to serve a compelling state interest and…is narrowly drawn to achieve that end.” In short, the same rules which apply to other people and groups in the school about posting notices on the school bulletin board, and publishing articles in the student paper should also apply to gay, lesbian and bisexual student issues. These rights are guaranteed by both the First Amendment and even more broadly by
Massachusetts state law. Other New England states may have similarly broad protections; check with your supervisor.

One sticking point concerns student newspapers. Under a case called Hazelwood, school administrators have wide discretion to regulate activities that are considered part of the school's curriculum. Although this is a broad generalization, the law appears to be that anything the school is required to "sponsor" is considered curricular. In Hazelwood, the Supreme Court upheld a school's decision to delete articles on pregnancy and divorce from a student newspaper published by a school journalism class because the class was considered part of the curriculum and thus under control of school authorities. A school’s ability to censor even school-sponsored publications is not unfettered: it may not engage in viewpoint discrimination, and whatever actions it takes must be motivated by a “legitimate pedagogical interest.” However, for any type of publication, there is no legal protection for “low” value speech such as matters considered obscene, defamatory, fighting words or incitement.

Students' rights in Massachusetts are greater than those that exist in most states. In Massachusetts, Hazelwood is less of an issue since a specific state law prohibits schools from censoring all student newspapers -- whether or not they are part of the curriculum -- based on viewpoint. If there is an editorial board for the paper, it must apply the same standards to editing submissions by a gay, lesbian or bisexual student or about gay issues as to all other submissions. The only limitations on student expression are that it may not cause disorder or disruption in the school, and it must not be “low value” as defined above.

**What About The Rights Of Students At Private Schools?**

Private school calls are always tricky; most laws protecting students from discrimination and harassment apply only to public schools. Therefore, with regard to private schools, we can only provide general information for callers to consider and talk over with an attorney:

- The anti-bullying laws of Massachusetts, Rhode Island and Vermont cover many private schools.
- Federal non-discrimination statutes, such as Title IX, typically apply to any school that receives federal financial assistance; they may, therefore, apply to certain private schools.
- In Massachusetts, M.G.L. c. 151C covers any institution that accepts students from the general public. As described above, this statute does not pertain to sexual orientation discrimination directly, but rather to sexual harassment. Any religious school would be exempt from coverage under state anti-discrimination law.
- Criminal statutes apply to extreme harassment and violence against youth, whether in public or private school, or no school at all. For further information, see the chapter on Violence & Harassment.

When a call concerns discrimination and harassment at a private school, get as much information as possible and refer the matter to your supervisor.
Military Issues

The issue of gay men and lesbians in the military has been hotly debated. For fifty years the military had a policy banning homosexuals from serving. Anyone suspected of being LGBT was subject to investigation and discharge. It is estimated that tens of thousands of LGBT people were discharged and that many millions of dollars were spent investigating, discharging and replacing LGBT service people.

GLAD occasionally gets calls from service members who either face discharge or who have questions about their rights under the law. We also get calls from people enrolled in ROTC programs who have questions about their rights as LGBT people.

Legal Issues

Don’t Ask, Don’t Tell
On July 19, 1993, President Clinton issued a statement revising military policy. In this statement he declared that the military would no longer ask recruits their sexual orientation but that all existing military regulations regarding conduct would be enforced. The regulations he referred to presumably are those prohibiting sexual “misconduct” such as sodomy. According to a memo by Clinton’s Secretary of Defense, Les Aspin, “Homosexual conduct is a homosexual act, a statement by the service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted homosexual marriage. A service member cannot engage in homosexual conduct thus defined either on or off base.” LGBT organizations tried for years to get this policy repealed and finally in 2011 it was.

Some Sexual Activity Violates Military Law
The military prohibits a variety of sexual activity, including sodomy (although there are attempts to repeal this). Many of the charges can result in serving time in the brig (temporary confinement). Service members should be careful not to admit to engaging in any sexual activity.

Transgender People and the Military

Transgender people were allowed to legally enlist and serve in the military in 2016. This is now under attack by the Trump administration and GLAD and several other organizations have lawsuits against the attempt to change this.

What To Tell Callers About The Military

Accused Service Members Should Say & Sign Nothing Before Consulting a Civilian Attorney.
Any service members accused of misconduct should say and sign nothing before consulting a civilian attorney. Remember it is especially important that service members do not disclose any sexual behavior.

Referrals for Gay Men & Lesbians Facing Discharge
Refer callers to the organization below which specializes in helping gay men and lesbians in the military:

OutServe-SLDN
P.O. Box 65301
Washington, D.C. 20035-5301
(202) 328-3244
Fax: (202) 797-1635
sldn@sldn.org
www.sldn.org

Callers who are veterans should be referred to:

New England Gay, Lesbian and Bisexual Veterans
P.O. Box 657
Canton, MA 02021
617-697-1045
www.glbtvetsofnewengland.org

Military Issues
Troubleshooting

How To Handle GLAD Answers Calls When You Feel Like You Don’t Know Anything

1) RELAX...
Please remember, all you are doing is having a conversation. You all know how to have a conversation. You listen, you ask questions, you chat.

*Check it out! You can do steps 1-8 without remembering anything about the law.

One of your primary jobs is to be a fact finder. All you have to do is find out what the story is. Worry about the information-giving part later.

Gather lots of information (this will buy you some time, it is critically important in assessing how to help someone, and it helps GLAD evaluate which calls are potential impact cases).

2) INTRODUCE YOURSELF AND THE GLAD ANSWERS PROCESS
A sample:

“Hi, thank you for calling GLAD. My name is Darcy and I’m an GLAD Answers worker. What I’d like to do is get some information from you, see if I can answer questions, or if I can’t help you, I’ll try to refer you to someone who can. After I get some facts from you, I’ll use the resources available to me to try and provide you with as much information as possible. I may have to put you on hold or call you back before I can answer your questions, but I’ll do my best to help you.”

3) ASK BROAD OPEN-ENDED QUESTIONS
What kind of situation are you calling about?

Can you tell me what has been happening?

What kind of issue are you calling about?

What prompted you to call GLAD?

Do you think this related to your sexual orientation, gender identity, or HIV status? How? Why?

4) GET SPECIFIC FACTS (WHAT, WHEN, WHERE, HOW, WHO, WHY)
Facts are critical to developing a case and for pin-pointing what laws might apply. It is not enough to find out someone feels like he was fired because he is gay. Get details...

What happened?
When did it happen and for how long (get dates)?
Where did it happen?
How did it happen? (what motivated it, what led up to it...)?
Who are the players?
Why do you think it happened? Why do you think this happened at this time?
Can you tell me more precisely what happened, what was said, what you experienced?
Can you give me some examples of (what was said to you...how your privacy was breached...etc...)?
How did you find out this information?
How do you think this is related to sexual orientation or HIV status?
What have you done already to try and resolve this?
Do you have other questions I can help you with?
Is there anything else you think I should know?

Ask questions to summarize what you don’t understand,

See the checklists for additional questions for specific topic areas
5) SUMMARIZE WHAT THEY’VE TOLD YOU AND MAKE SURE YOU UNDERSTAND THE PROBLEM
Some samples:

“It sounds like there are three different concerns you have…how you get the harassment to stop…whether or not you can pursue criminal charges…and whether or not the police acted appropriately when they responded to your call. Am I understanding you correctly?”

“You have raised several issues. What is your most pressing concern right now?”

“Let’s be sure I understand this correctly…You said that…”

“I am a little unclear about the sequence of events you described. When did you first start experiencing harassment?… When were you fired?”

6) MAKE SURE YOU UNDERSTAND WHAT THE CALLER WANTS
Some samples:

“Ideally, how would you like to see this resolved?”

“What would you like to see happen?”

“What are you hoping to achieve?”

7) EMPATHIZE
Some samples:

“I’m really sorry that this happened.”

“I’m sorry you had to go through this.”

“It sounds like this has been really frustrating.”

“Congratulations, you and your partner must be very happy.”

8) TRANSITION
Some samples:

“OK, thank you for giving me so much information.”

“I appreciate your explaining what’s going on.”

“It’s been very helpful to hear what’s been happening”

“OK, I think I have pretty good sense now of what the issues are.”

9) IF YOU ARE READY...TELL THEM WHAT THE LAW SAYS
or
IF YOU DON’T KNOW WHAT YOU WANT TO SAY YET, TELL THE CALLER YOU DON’T KNOW
Some samples:

“Now that I have a clearer sense of why you’re calling, I would like to take a moment to see what information we have in the office that addresses your concerns. Would you like to hold or would it be better if I called you back?”

“I honestly don’t know the answer to that, but if you can wait a moment, I’ll ask my supervisor.”
“I know we have information in the office about that but I really couldn’t tell you off the top of my head. Would you mind holding, while I look it up?”

10) LOOK UP THE INFORMATION AND/OR TALK TO YOUR SUPERVISOR
There is no excuse for NOT talking to your supervisor; that is why you have them. You will learn more from getting supervision on calls than you will from the training manual.

Don’t worry about being too pesky. Your supervisor will tell you if you are bugging them or if he or she cannot be interrupted.

11) GET BACK ON THE PHONE AND SHARE WHAT YOU’VE LEARNED
Some samples:

“OK, here’s what I found out…”

“I have some information for you, but before we begin, I want to let you know that I am not an attorney and I cannot give you legal advice.”

or

TELL THEM THAT THE ISSUE NEEDS TO BE REVIEWED BY YOUR SUPERVISOR BEFORE WE CAN GET BACK TO THEM

13) GET ALL THEIR IDENTIFYING INFORMATION
Name (with proper spelling)
Address
Phone (can we identify GLAD when we call or leave messages)
Email

14) DON’T FORGET YOUR DISCLAIMER!!!!

15) MAKE ANY APPROPRIATE REFERRALS

16) END THE CALL
Samples:

“Is there anything else I can help you with?”

“Do you have any other questions?”

“If I think of anything else I’ll give you a call.”

“Good luck. I hope everything works out.”

17) DOCUMENT THE CALL IN THE DATABASE
Include all relevant details
Indicate what you told the caller
Indicate all referrals

18) REMINDERS
Don’t panic!!! There are very few true legal emergencies… and you can always ask for help.
Never use absolutes...never say “you should.”…and avoid “I think.”

Keep the information factual.

Err on the side of NOT referring calls out until you have checked it out with a supervisor.