

Legal Article

Responsible Representation Of Your First Transgendered Client

By Phyllis Randolph Frye and Katrina C. Rose

If a transgendered person has not entered your law office seeking representation, in all likelihood one will soon(1) or, perhaps, one already has and you've simply not been aware because the person was closeted(2) and the case didn't appear to directly deal with transgender law.

Many practitioners eventually will face this question: To fairly and ethically represent transgendered clients, what special knowledge is needed? The answer is both simple and complex. One needs the ability to dispense with personal assumptions about transgendered people(3) and professional assumptions about transgender law.

Transgender 101

Transgendered people are aware that, historically, mass media has generated innumerable negative images(4) of them, as well as representations of transgender law(5) and science which, even when well-intended, are often inaccurate — and misinformation is as much of a danger as bigotry. Consequently, any article on transgender law must necessarily include some very basic terms which practitioners will encounter when working with transgender legal issues.

Transgender: Although once used to describe a person who lives as a member of the sex opposite of that designated at birth but without undergoing genital surgery,(6) the term has become an umbrella term encompassing all forms of being at odds with “traditional” concepts of gender.(7)

Transsexual: A person who desires to change bodily sex characteristics, irrespective of whether the person has undergone, or intends to undergo, corrective genital reconstruction surgery (CGRS), also referred to as sex reassignment surgery (SRS).(8)

Intersex: Persons who were born with mutated, incomplete, or dual genitals; with chromosomal patterns other than XX or XY; or whose gender identity development was affected in some manner by pre-natal hormonal imbalances.(9) The term “hermaphrodite,” though still in use, is now disfavored.

Crossdresser/Transvestite: Although some assert that there are differences between the two, these terms both refer to persons whose gender variance is expressed on a part-time basis,(10) though “transvestite” is now the less favored term.

MTF/FTM: Indicates the type of gender transition or variance at issue, either male-to-female or female-to-male.

Initial Client Interview And Representation in Court

Ethically, you *must* consider the most basic of issues: how to address a transgendered

client with dignity from the moment the client first enters your office. The client's pronoun of preference will depend primarily upon whether the person is full-time, in transition, or part-time.(11) Eventually, you will have to consider how to talk *about* the client(12) over the phone (to opposing counsel, to the court, and possibly to the press) and how to carry yourself while in court among your peers and before a judge or jury.(13) Though many transgendered people are unable to find any representation at all because of some of the same prejudicial societal forces that likely caused them to seek counsel in the first place,(14) ethics, as well as plain good manners, should lead those who will not adequately prepare and work through these issues to decline to accept transgendered clients.

Employment Law Issues(15)

Though the number of jurisdictions with anti-discrimination protections is growing,(16) most employers(17) and jurisdictions do not yet afford such protection, often putting practitioners in the position of telling victims of anti-transgender employment discrimination something they do not want to hear: they have no legal recourse against the discrimination.

Texas anti-discrimination law(18) likely would not be interpreted favorably and federal law, though increasingly favorable, is still quite muddy. Most transgendered people were specifically excluded from the Americans With Disabilities Act.(19) While Title VII does prohibit discrimination because of sex,(20) attempts during the 1970s and 1980s to have federal courts interpret "because of sex" to encompass "because of *change* of sex"(21) failed, leaving extremely negative precedent in their wake.(22) However, more-recent "gender stereotyping" litigation derived from *Price Waterhouse v. Hopkins*(23) appears promising, actually resulting in an Ohio transsexual Title VII plaintiff surviving a summary judgment defense motion.(24) How the Fifth Circuit will deal with this — what one commentator has called "*Hopkins* in Drag"(25) — is unclear; the case of a man fired for cross-dressing *away from work* was not appealed following a questionably-reasoned adverse summary judgment.(26)

Firing or refusing to hire otherwise-qualified transgendered people can be based on simple prejudice(27) but is usually couched in terms of dress codes(28) and/or restroom issues.(29) Regarding the latter, simply working with an apprehensive employer to find some accommodation should not be overlooked as a solution.(30) The vast majority of transgendered people who *do* transition are willing to go to great lengths to accommodate employers' concerns about both the timing of the transition at work and which restroom they should use after transition.(31) However, in situations that grow adversarial, be aware that OSHA Regulations mandating that restroom facilities "shall be provided" for all employees, though not a full solution to the restroom issue for a transgendered employee, could be used to negotiate a solution more palatable than termination.(32)

Insurance Issues

Most insurance carriers exclude medical coverage for anything related to transgender

health issues.(33) A major difficulty occurs when carriers with transgender-exclusion clauses go to great lengths to construe virtually anything regarding a transgendered person's health as being sufficiently linked to the gender transition so as to fall within the exclusion.(34)

Companies likely could obtain transgender-inclusive coverage at a cost far more reasonable than might be expected.(35) Beyond this, if objections are raised claiming that transgender medical procedures are still "experimental" in nature, point out that even early anti-transgender decisions, by their very existence, prove that such procedures are not new.(36) To combat an assertion that such procedures are merely "cosmetic," point out that recent research(37) clearly demonstrates that such medical procedures are not "cosmetic" because transsexualism is an inherent function of the brain.(38)

Identity Documentation And Family Law Issues

Although the number of distinct problems that can arise for a transgendered person in this area of the law are almost limitless (not to mention how they can, in turn, affect other issues(39), the basic matters that a transgendered person, most likely a transsexual, is apt to seek counsel regarding are change of name and correction of gender status — and the legal effect of the latter.

A change of name in Texas is relatively easy compared to some other states, though a verified petition and an appearance in court before a judge is required.(40) Judicial discretion applies,(41) and, though no Texas statute or decision(42) forbids granting a change from a name commonly associated with one gender to a name commonly associated with another gender for a pre-surgical transsexual, some judges will refuse to do so until after proof of having undergone surgery.(43) As for a "change" of gender designation, it is essential to argue that for a transgendered person, a change of name without a correction of the gender designation on state-issued identification (M to F or F to M) acts as an *incomplete* change of name.

Presenting to the court the full picture of both the science and the law — and how transsexuals fit into it — is crucial. Notably, *Littleton v. Prange*'s take on Texas' birth certificate amendment procedures' applicability was based on a trial court decision from Ohio and an appellate level decision from Oregon interpreting a statute vastly different from that of Texas.(44) More importantly, no Texas statute specifically forbids issuance of an order recognizing the gender transition of transsexuals.(45) Given this, it is well within the bounds of ethics to draw the court's attention to law from other states to argue that *Littleton* misapplied Texas law and that non-transsexual-specific birth certificate statutes, such as Texas', can be utilized by transsexuals.(46)

Also be aware that a transsexual's passport can be amended to reflect post-CGRS reality.(47) Beyond this, bear in mind that plenty of transsexual Texas residents were born elsewhere and for these persons the difficulty in securing a new or amended birth certificate will depend on the state or nation in which the person was born.(48)

Of course, even after securing a change of name and order conforming the person's gender marker to post-transition reality, at some point the issue of the legal *effect* of the post-transition gender designation will arise. Not surprisingly, it is most likely to arise in marriage,(49) as it did in *Littleton v. Prange*. In a jurisdiction where the law purports to ban legal recognition of any union deemed to be between members of the same sex,(50) the legal gender status of a person has ramifications which potentially can preempt all other substantive and procedural issues. Nevertheless, not all transgender-related marriage concerns directly involve legal gender status.(51)

Issues Not Specifically Related to Gender Status

Even disputes which involve something as far removed from gender status as one spouse discovering that the other spouse crossdresses can become incredibly bitter. Such a newly-discovered transgender aspect of your client may well be the reason for the divorce. If so, your client will be very frightened of being further outed at work or to relatives and the other spouse could be threatening such exposure unless your client gives what is tantamount to an unconditional surrender. Given that whether the spouse follows through on such a threat will be outside of your client's control, a preemptive strike, by which your client comes out first, should at least be considered.

Much of the above also applies to transsexuals in the early stages of the transition process. Irrespective of whether your client desires to eventually transition, in any family law matter opposing counsel may well try to use outmoded medical and psychological protocols to gain leverage in preliminary hearings, especially regarding issues of custody and visitation.(52) Draw the court's attention to the most recent medical and legal developments and search for the best medical experts early on in the process. The importance of properly educating a court that is determining child custody cannot be overstated.(53) The stakes, of course, are high. Not only have transgendered people lost custody of their children because of various aspects of gender variance,(54) but transsexuals actually have had their parental rights terminated solely for transitioning.(55)

Gender Status Issues

Legislation introduced to limit the adoption rights of homosexuals could cause some of the above custody matters to become transsexual-inclusive despite not, at least currently, specifically targeting transsexuals.(56) As was recently illustrated in Florida's *Kantaras v. Kantaras*, married heterosexual couples consisting of a post-transition transsexual and a non-transsexual can adopt children, but only if viewed as a legally opposite sex couple if the state also has a ban on adoption by homosexuals, as Florida does have(57) and as Texas has considered fairly recently.(58) This issue goes beyond marriage or relationship validity to the status of the individual because an unmarried homosexual or transsexual easily could be the preferred adoptive choice by a deceased relative or friend with surviving children.

Neither adoption nor child custody was at issue in *Littleton v. Prange*, however, but the

validity of the marriage between Christie Lee and Jonathan *Littleton* was the threshold issue in the tort action over Mr. *Littleton*'s death. In 1999 the San Antonio Court of Appeals, with no factual record regarding whether post-surgical transsexual Christie Lee's chromosomes are XX, XY, or some other pattern,(59) held that the couple's marriage was same-sex and, therefore, invalid, depriving Christie Lee of suing as Jonathan's surviving spouse. In any litigation in which you find yourself arguing against *Littleton*, one must be able to forcefully argue against not only the application of Texas' anti-same-sex marriage statute(60) but also the decision upon which *Littleton* was primarily based: *Corbett v. Corbett*,(61) a 1970 British trial court decision in which the "chromosomes = sex" standard was created. In addition to pointing out that *Corbett* is not universally adhered to,(62) the current British government has indicated that it plans to overturn *Corbett* legislatively.(63) And, although the case which recently reached England's highest court did not yield a ruling that *Corbett* was wrongly decided in 1970, the Law Lords did hold that *Corbett*-based English matrimonial law now violates transsexuals' human rights.(64)

Criminal and Prison Law Issues

One of many issues not addressed in *Littleton* was the position in which that court's ruling would place heterosexual Texas couples with a transsexual spouse with respect to the Homosexual Conduct Statute.(65) Even if the U.S. Supreme Court's ultimate decision in *Lawrence v. Texas*(66) renders any such concerns moot, other transgender-specific criminal law issues exist. Most anti-crossdressing laws have been either repealed or invalidated,(67) though some still exist. Anti-mask laws, though susceptible to constitutional challenge,(68) also still exist(69) — and some, at least in the past, have been used against transgendered people.(70)

Whether merely arrested on a minor charge or indicted and convicted for a major felony, the very real potential for abuse by guards or other prisoners makes transgendered people terrified of being behind bars,(71) irrespective of how they find themselves in that situation.

Transgendered people often are classified and kept in the homosexual areas of the inmate populations, either male or female. This is inappropriate as there is as much danger of assault and rape from homosexual inmates as there is from heterosexual inmates. They should be kept in administrative separation, not isolation,(72) for their own safety. Again, to be punished for committing a crime is one thing,(73) but to be doubly punished(74) by being subjected to dangerous conditions is another.

Many transgendered people in the criminal justice system will be first offenders and eligible for a bond, but because of being teased, harassed, misclassified, and even sexually assaulted while within the system,(75) they are usually in such a state of fear or distress that they cannot make a rational decision about a plea bargain, even one for a minimum fine or a short sentence. Even if the initial plea offer is for time served, fight for a bond. Why saddle someone who is not guilty with a conviction just to get them get out of jail?(76) If the case goes to trial, voir dire the panel on the issue of your client

being transgendered and how that would affect their ability to weigh the evidence without bias, as potential jurors have openly admitted to anti-transgender prejudice.(77)

Ensure that if employment is a condition of probation, the court acknowledges *on the record and to the court liaison* that failure to become employed as a result of anti-transgender discrimination does not constitute failure to meet that condition. Ensure that, if your client is placed in a halfway house or homeless shelter, the court acknowledges *on the record and to the court liaison* that the residence be instructed that this person is transgendered and should not be required to transition back to the prior gender.(78)

Ensure that, if substance abuse counseling is a condition of probation, the court acknowledges on the record and to the court liaison that the program be instructed to address the transgender guilt issue as related to dependency and that the transgendered probationer is to be treated with dignity in the new gender presentation. If none of this is addressed, then your client is being set up to fail.

You may find yourself representing a transgendered person who is already incarcerated or who, even with the best possible plea bargain, may still be facing time behind bars. For every lock-up in which your client is placed, give legal notice *and file it with the court* as to each jailing official in charge that your client is to be treated humanely, suggesting *Kosilek v. Maloney*,(79) a federal district court opinion from Massachusetts, as guidance.

Although most precedent regarding the rights of incarcerated transgendered persons is depressingly negative, significant positive precedent exists that could be beneficial in certain narrow privacy rights issues — specifically, the right not to have certain medical information, including one's status as a post-operative transsexual, disclosed by prison medical personnel.(80) Other leading transgender prison rights cases are *Farmer v. Brennan*,(81) *Schwenk v. Hartford*,(82) and the recent *Kosilek v. Maloney*.(83)

Authors' Note:

The authors understand that prior to accepting, or even being faced with the decision of whether to accept, a transgendered client, many practitioners may have preconceived notions of the transgendered, either from religion, popular culture or, perhaps, even an encounter with a transgendered person who may have, for lack of a better phrase, let down the side.

For those who, even if able to understand how to effectuate a gender transition in legal terms, simply can't fathom what goes on from the transgendered person's perspective, the authors suggest analyzing Andrew Martin, Robin Williams' character in Bicentennial Man.(84) Why are humanity and self-determination not bestowed upon transgendered people? Irrespective of the specific legal issue which may be involved in your representation of a transgendered client, at some point you will be faced with the latter question, either internally or from the court.

Or both.

The authors sincerely hope that the insights, knowledge, and nuances provided herein

will aid you to become an effective, ethical legal counsel for your next (or first) transgendered client.

Notes

1. As noted in one of the best historical analyses of transsexualism, an estimate has indicated that one in 11,900 persons “born male” and one in 30,400 persons “born female” had actually gone as far in the gender transition process as taking hormones. Joanne Meyerowitz, *How Sex Changed — A History of Transsexuality in the United States* 9 (2002).
2. See generally Phyllis Randolph Frye, *The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle Over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 Wm. & Mary J. Women & L. 133 (2000).
3. Among others, any assumption one may have about transgendered people being uniformly Caucasian and male-to-female. *Id.* at 163-65.
4. In addition to far too many episodes of the infamous *Jerry Springer Show*, a very brief list includes: *First Monday: First Monday* (CBS television broadcast Jan. 15, 2002); *Ally McBeal: Boy to the World* (FOX television broadcast Dec. 1, 1997); and *Hedwig and the Angry Inch* (New Line 2001).
5. *First Monday*, *supra* note 4, in addition to an insulting portrayal of a transsexual attorney featured arguments in a case obviously patterned after the facts of *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), yet likely left viewers with the impression that, contrary to the holding in *Hernandez-Montiel*, persecution based on innate sexual identity was not grounds for asylum.
6. Frye, *Cider House Rules*, *supra* note 2 at 153 fn. 83.
7. Meyerowitz, *How Sex Changed*, *supra* note 1 at 10.
8. Meyerowitz, *How Sex Changed*, *supra* note 1 at 5; see also Alyson Dodi Meiselman, Phyllis Randolph Frye and Katrina C. Rose, *Slavery, Sex & Gender, and the Ancient Doctrine of State Decisis: A Re-Examination of the Doctrine in Light of Time-Influenced Legal Reasoning and the current State of Transgender Legal Issues*, 2 Geo. J. Gender & L. 735, 747, fn. 72 (2001). see also, *In re Heilig*, 816A.2d 68 (Md.2003) at 72, fn. 3..
9. See *Heilig*, *id.* at 73-75; Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 Ariz. L. Rev. 265, 267 fn.7 (1999); and the website of the Intersex Society of North America (ISNA), <<http://www.isna.org>>.
10. Terms such as “drag queen,” “drag king,” and “female impersonator” also refer to those whose gender variance is part-time, but generally associated with entertainment.

11. See Frye, *Cider House Rules*, *supra* note 2 at 155-63; *see also*, Patrick Letellier, *Beyond He and She: A Transgender News Profile*, The Good Times (Santa Cruz, Cal.), Jan. 9, 2003, *available online at*: <http://news.findlaw.com/ap/other/1110/1-10-2003/20030110000004_04.html>
12. An inability to utilize a client's preferred pronouns over the phone is tantamount to telling opposing counsel that one's heart is not fully into representing the transgendered client.
13. *See Gay Ex-Cop Wins Case — Not Guilty*, This Week In Texas, Feb. 24, 1989 at 15-16.
14. Rudy Serra and Annette E. Skinner, *Counseling the Gay, Lesbian, or Transgender Client*, 80 Mich. B.J. 52 (2001).
15. *See generally* Jamison Green and Larry Brinkin, *Investigation Into Discrimination Against Transgendered People*, A Report by the Human Rights Commission, City and County of San Francisco (Sept. 1994).
16. *See* Minn. Stat. § 363.01 (41a) (West Supp. 2002); R.I. Gen. Laws § 28-5-51 (2001); 2003 N.M. Laws Ch. 383, *codified* at N.M. Stat. Ann. § 28-1-7 (A) (effective July 1, 2003); and *Enriquez v. West Jersey Health Systems*, 777 A.2d 365, 373 (N.J. Super App. Div. 2001), cert. denied, 785 A.2d 439 (N.J. 2001); *see also*, *Current Coverage Stats of Nondiscrimination Protections For Transgendered Citizens*, <<http://www.ntac.org/ProtectedJurisdictions.pdf>>; and <<http://transgenderlaw.org/>>. Even cities with conservative reputations, such as Dallas, have recently passed transgender inclusive, non-discrimination ordinances. Dallas Code ' 46-1, et. seq. (2002).
17. Notably, the State Bar of Texas amended *Non-Discrimination Policy*, Board of Directors, Policy Manual, § 20.01.01, to include "sexual orientation," pronounced at the June 14, 2001, Board of Directors Meeting to be transgender-inclusive.
18. Tex. Lab. Code Ann. § 21.051 (Vernon 1996) (prohibiting discrimination "because of race, color, disability, religion, sex, national origin, or age").
19. 42 U.S.C. § 12211(b)(1) (2002).
20. 42 U.S.C. §§ 2000eB2(a)(1) (2000).
21. *See* Meiselman, et. al., *supra* note 8 at 751-52, fn. 95.
22. *Ulane v. Eastern. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); and *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).
23. 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75 (1998); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000). *see also* Katrina C. Rose, *When is an Attempted Rape Not an Attempted Rape? When the Victim is a*

- Transsexual*, 9 Am. U. J. Gen. Soc. Policy & Law 505 (2001) (analyzing Schwenk).
24. Doe v. United Consumer Financial Svcs., No. 1:01 CV 1112 (N.D. Ohio 2001); *see also* Rosa v. Park West Bank, 214 F.3d 213 (1st Cir. 2000) (credit opportunity case utilizing *Price Waterhouse* as guidance).
 25. Mary Ann C. Case, *Disaggregating Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L. J. 1, 33 (1995).
 26. Oiler v. Winn Dixie Louisiana, Inc., Civ. No. 00-3114, Section AIA, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002) (ignoring the *Schwenk* line of cases); *see also* Fidel Ortega, *Suit Against Winn-Dixie Dropped*, 365Gay.com Newscenter, Jan. 11, 2003, available online at <<http://365gay.com/NewsContent/011103winnDixieEnds.htm>>.
 27. In one survey of gays and lesbians, 76 percent of those who believed that they had suffered some form of discrimination felt as though the discrimination was not because of their sexual orientation but because of their “gender expression.” James M. Donovan, *Baby Steps or One Fell Swoop?: The Incremental Extension of Rights is Not a Defensible Strategy*, 38 Cal. W. L. Rev. 1, 34 (2001).
 28. *See* Frye, *Cider House Rules*, *supra* note 2 at 178-80 and 194-205.
 29. *Id.* at 182-88 and 205-07; Cruzan v. Special Sch. Dist. #1, 294 F.3d 981 (8th Cir. 2002), *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001); *Sommers v. Iowa Civil Rights Comm’n*, 337 N.W.2d 470 (Iowa 1983); and Doe v. City of Minneapolis, No. C2-02-817, 2002 Minn. App. LEXIS 1388 (Minn. App. Dec. 17, 2002).
 30. Contrary to the impression left by some, crossdressing at work by non-transitioning individuals is not a goal of transgender rights advocates. Carey Goldberg, *Public Lives — Issues of Gender, From Pronouns to Murder*, New York Times, June 11, 1999 at B2.
 31. *See* Denver Code of Ord. § 28.96 (c) & (d) (2002) (establishing full protection for “transitioned transsexuals” and “reasonable accommodation” for “transitioning transsexuals.”)
 32. *See* Frye, *Cider House Rules*, *supra* note 2 at 178-80 (citing 29 CFR ‘ 1910.141(c)(1)(i) (2002); and Standards Interpretations and Compliance Letters, April 6, 1998 — Interpretation of 29 C.F.R. 1910.141(c)(1)(I): Toilet Facilities. *Also see* DeClue v. Central Ill. Light Co., 223 F.3d 434 (7th Cir. 2000).
 33. *See* Heilig, *supra* note 8 at 78-79; Arthur S. Leonard, *Gender Change Insurance Nixed*, Gay City News, Dec. 27, 2002, available online at <<http://www.gaycitynews.com/gcn31/genderchange.html>>; and Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care*

- Discrimination Against Transsexuals, 11 Colum J. Gender & L. 88, fns. 21-22 and accompanying text (2002).
34. There are many anecdotal stories of this. However, where there is no recourse for the transgendered employee if the employer were simply to decide to terminate the employee, the issue is rarely pressed by the employee.
 35. Much concern was raised about the cost of coverage in the healthcare package adopted by the City of San Francisco in 2001. However, each city employee's premium cost was raised only by an extra \$1.70 per month, as opposed to the \$12 per month paid per employee for coverage related to treatment of chemical dependency. Cynthia Laird, Supes OK Health Benefits For TG City Workers, Bay Area Reporter, May 4, 2001.
 36. Meyerowitz, How Sex Changed, *supra* note 1 at 14-50 (2002). One key is to present to the court evidence other than the client's own knowledge about transsexualism. See *Spicer v. Terhune*, No. 02-16298, 2003 U.S. App. LEXIS 1550 at *2 (9th Cir. Jan. 13, 2003).
 37. J.-N. Zhou et al., *A Sex Difference in the Human Brain and Its Relationship to Transsexuality*, 378 Nature 68, 68-70 (1995).
 38. See Heilig, *supra* note 8 at 75-78; Frank Kruijver, et. al., *Male to Female Transsexual Individuals Have Female Neuron Numbers in the Central Subdivision of the Bed Nucleus of the Stria Terminalis*, 85 J. Clin. Endocrin. & Metab. 2034 (2000).
 39. Not having state-issued identification with the name that one regularly uses can have criminal law implications as laws do exist, in Texas and elsewhere, forbidding, for example, giving "an assumed or fictitious name" when a law enforcement officer asks for identification. See Tex. Pen Code Ann. § 38.02 (b) (Vernon 1994); Tex. Transp. Code Ann. § 501.155 (Vernon 1999) & § 521.451 (a) (5) (Vernon Supp. 2003); *see also* Minn. Stat. Ann. § 609.506 (1) (West Supp. 2002).
 40. Tex. Fam. Code Ann. § 45.101 et. seq. (Vernon 2002).
 41. Some Texas judges still require name change petitioners to comply with requirements no longer specified by statute. See Tex. Fam. Code Ann. §32.21 (b)(5), *repealed*, Act of June 19, 1993, 73rd Leg. R. S., Ch. 1034 §1 (fingerprinting). Although apparently within judicial discretion, this sort of requirement leads to forum shopping.
 42. Appellate case law from other states holds overwhelmingly that such a denial, based solely on not having had surgery, *is* an abuse of discretion. In re Maloney, 774 N.E.2d 239 (Ohio 2002); In re Eck, 584 A.2d 859 (N.J. Super. App. Div. 1991).

43. Waiting until after proof of surgery may take several years while the person attempts to keep or obtain a job in the medically prescribed gender role while using the name that is from the previous gender role.
44. 9 S.W.3d 223, 228-29 (Tex. App. B San Antonio 1999, pet. denied), *cert. denied*, 531 U.S.872 (2000) (citing *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. Stark Co. 1987); and *K. v. Health Div. of Human Resources*, 560 P.2d 1070 (Or.1977)).
45. Only Tennessee has such a statute. Tenn. Code Ann. § 68-3-203 (d) (1999).
46. *See Darnell v. Lloyd*, 395 F.Supp. 1210 (D. Conn. 1975); and 1975 Mass. A.G. Op. 62. But see, Fla.A.G. Op. 076-213 (1976).
47. *See Heilig, supra* note 8 at 86-87; and Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 San Diego L. Rev. 917, 932 fn. 77 (citing Bulletin from Carmen A. DiPlacido, Acting Deputy Assistant Secretary, Passport Services, to All Regional Directors, All Office Directors, and All Passport Services Staff (Passport Bulletin 92-22) (on file with Prof. Greenberg)). Federal administrative precedent exists recognizing a heterosexual marriage involving a post-transition transsexual and a non-transsexual. *See Veterans Admin. Gen. Counsel, Dept Veteran Affairs, Benefit Determinations Involving Validity of Marriage of Transsexual Veterans*, 1990 WL 605201 (Vet. Aff. Op. Gen. Couns. Prec. 15-90 May 25, 1990).
48. *See generally* Dr. Becky Allison, *U.S. States and Canadian Provinces Instructions For Changing Name and Sex on Birth Certificate*, <<http://www.drbecky.com/birthcert.html>>. Notably, however, Maryland's highest court recently recognized an equitable right of a transsexual born outside of Maryland to recognition of gender transition. *See Heilig, supra* note 8.
49. *But see* *Goins v. West Group*, 619 N.W.2d 424 (Minn. App. 2000), *rev'd*, 635 N.W.2d 717 (Minn. 2001) (employment); *and Baker v. Wade*, 553 F. Supp. 1121, 1147 (N.D. Tex. 1982), *appeal dismissed* 743 F.2d 236 (5th Cir. 1984), *rev'd on reh'g* 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986) (in which the state asserted that even the *possibility* of undergoing SRS should act to deny a gay male standing to challenge the Homosexual Conduct Statute).
50. 9 S.W.3d 223 (Tex. App. — San Antonio 1999, pet. denied), *cert. denied*, 531 U.S.872 (2000). Also, *see infra* note. 60.
51. *See Phyllis Randolph Frye and Alyson Dodi Meiselman, Same-Sex Marriages Have Existed Legally in the United States For a Long Time Now*, 64 Alb. L. Rev. 1031, 1038-41 (2001).
52. Frye, *Cider House Rules, supra* note 2 at 137-39.
53. *D.F.D. v. D.G.D.*, 862 P.2d 368, 374 (Mont. 1993) (trial court judge had admitted to not understanding "transvestism").

54. *Compare* J.K.S. v. D.K.S., 943 S.W.2d 766 (Mo. App. 1997); and *In re* V.H., 412 N.W.2d 389 (Minn. App. 1987); with *D.F.D.*, 862 P.2d at 371-77 (no evidence that husband's crossdressing justified award of sole custody to wife); and *In re* T.J., No. C2-87-1786, 1988 Minn. App. LEXIS 144 (Minn. App. Feb. 2, 1988).
55. *Daly v. Daly*, 715 P.2d 56 (Nev. 1986); *but see*, *Christian v. Randall*, 516 P.2d 132 (Colo. App. 1973) (female-to-male transsexual prevailing in custody dispute).
56. Though few anti-adoption or anti-custody proposals have ever specifically included the transgendered, a 1996 Missouri proposal did. Chris Bergeron, *Missouri Legislators File Anti-Gay Parenting Bill*, News-Telegraph, April 12-25, 1996 at 10 (quoting 1996 Mo. H.B. 1637).
57. *See* *Kantaras v. Kantaras*, No. 98-5375CA (Fla. Cir. Ct. Pasco Co. Feb. 21, 2003), *opinion available online at* <http://www.courtvt.com/archive/trials/kantaras/docs/opinion.pdf>; and Fla. Stat. § 63.042 (3) (2002).
58. 1999 Tex. H.B. 382, 76th Leg. R.S.
59. Far too often there is no recognition of intersexed people and how their unquestionable existence negates any assertion that “You are either born male or female, and there are no in-betweens.” David B. Cruz, *Disestablishing Sex and Gender*, 90 Cal. L. Rev. 997, 1015 (2002). A transsexual client's medical history may well reveal some intersex indicia and case law exists, even in jurisdictions which rigidly adhere to *Corbett v. Corbett*, 2 All E.R. 33 (P. 1970), that can remove an apparent transsexual from the strictures of *Corbett*. *Compare* *W. v. W.*, [2000] 3 FCR 748, with *Bellinger v. Bellinger*, [2003] UKHL 21 (House of Lords). One of the earliest published American cases involving any transgender issue involved an intersexed woman. *Piepho v. Piepho*, 88 Ill. 438 (Ill. 1878) (recognizing the marriage between the woman and a man under the facts of the case, but noting that such a marriage could be voidable, but not void *ab initio*); *but see*, *Marriage of C and D* (Falsely
60. Not a true “DOMA” as that acronym has come to be associated with statutes specifically aimed at denial of recognition of same-sex marriages performed in other jurisdictions. Tex. Fam. Code Ann. § 2.001 (Vernon 1998); *see also* Bill Analysis at 42, 1973 Tex. H.B. 103; and James W. Harper and George M. Clifton, *Heterosexuality: A Prerequisite to Marriage in Texas?*, 14 S. Tex. L. Rev. 220 (1973). Also, Rob Shivers, *Texas Gay Marriage Apparently Within Law*, *The Advocate*, Nov. 8, 1972 at 7, suggesting heavily that transsexuals were not the target of the statutory proscription. The legislative history of the existing statute apparently was not brought to the attention of San Antonio Court of Appeals in *Littleton*. The ‘true’ DOMA enacted by the 2003 Legislature does not contain specific anti-transsexual language. *See* Tex. Fam. Code § 6.204 (effective Sept. 1, 2003).
61. 2 All E.R. 33 (P. 1970).

62. *See Goodwin v. United Kingdom*, [2002] 2 FCR 577 (Eur. Ct. Hum. Rts.); *In re Kevin*, No. SY8136 of 1999, [2001] FamCA 1074 (Fam. Ct. Austl.), *aff'd*, [2003] FamCA 94 (Fam. Ct. Austl.) (en banc); *Secretary, Dep't of Soc. Security v. S.R.A.*, [1993] 118 A.L.R. 467, 472 (Fed. Ct. Gen. Div. Austl.); *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. App. Div.), *cert. denied*, 364 A.2d 1076 (N.J. 1976).
63. Rosie Winterton, MP, *Government Announcement on Transsexual People*, Lord Chancellor's Department (Dec. 13, 2002), *available online at* <http://www.lcd.gov.uk/constitution/transsex/statement.htm>.
64. *Bellinger v. Bellinger*, [2003] UKHL 21 (House of Lords). Despite this, as well as having ordered the government to pay the costs of the transsexual woman's appeal, the Law Lords refused to recognize the Bellingers' marriage, effectively leaving transsexuals in England with a right but no remedy in English courts. However, Elizabeth Bellinger has indicated that she might seek redress in the European Court of Human Rights. Joshua Rozenberg, *Lords Reject Appeal Over Transsexual Marriage*, Daily Telegraph, April 11, 2003. *see also*, Helen G. Berrigan, *Transsexual Marriage: A Trans-Atlantic Judicial Dialogue*, 12 Law & Sex. 87, 111 (2003).
65. Tex. Pen. Code. Ann. § 21.06 (Vernon 1994).
66. 41 S.W.3d 349 (Tex. App. B Houston [14th Dist.], *pet. denied*), *cert. granted*, 123 S.Ct. 661 (2002).
67. *See Doe v. McConn*, 489 F. Supp. 76 (S.D. Tex. 1980); and Frye, *Cider House Rules*, *supra* note 2 at 194-95. *See also* *City of Chicago v. Wilson*, 389 N.E.2d 522; 1978 (Ill. 1978); and *City of Cincinnati v. Adams*, 330 N.E.2d 463 (Ohio Mun. Ct. Hamilton Co. 1974).
68. Mark Hamblett, *Law Banning Mask Wearing Found Unconstitutional*, New York. L.J., Nov. 20, 2002.
69. City of Laredo Code of Ordinances § 21-1 (b) (2001).
70. *Garcia v. State*, 443 S.W.2d 847 (Tex. Crim. App. 1969) (decided on factual rather than constitutional grounds).
71. *See Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); and Frye, *Cider House Rules*, *supra* note 2 at 146, fns. 56-57. Also laudable, in spite of the somewhat insulting episode title, for dramatizing the barbaric treatment that transsexuals are subjected to in jail is *Law and Order: SVU: Fallacy* (NBC television broadcast April 18, 2003).
72. Isolation, if an option, may be what your client will prefer.
73. Notably, one of the leading Eighth Amendment decisions of the U.S. Supreme Court involved a pre-operative MTF transsexual. *Farmer v. Brennan*, 511 U.S. 825 (1994)

74. *E.g.*, jails and prisons sometimes decide administratively, rather than medically, to withhold hormones. *See* *Kosilek v. Maloney*, 221 F.Supp.2d 156 (D. Mass. 2002). *see also* *De'Lonta v. Angelone*, No. 01-8020, 2003 U.S. App. LEXIS 10446 (4th Cir. May 27, 2003).
75. *See* Sandra McCulloch, *Woman Suing For Stay in Men's Prison*, Times Colonist (Victoria, B.C.), Aug. 27, 2002.
76. Just as there will be situations where a client will not want to hear that a plea bargain may be the best course of action, there may be situations in which you, as counsel, will not want to hear a client's desire to plea when you "know" that the situation is unjust. Ultimately, however, it is the *person* and not the *issue* who is your client.
77. In a California murder trial in which the victim was an FTM, the *prosecution* challenged a potential juror. *People v. Gutierrez*, 52 P.3d 572 (Cal. 2002).
78. *See* Green, *Investigation*, *supra* at note 16 at Findings 14 & 18 (homeless shelters are not known for respecting rights of gender identity).
79. 221 F.Supp.2d 156 (D. Mass. 2002).
79. 221 F.Supp.2d 156 (D. Mass. 2002).
80. *See* *Doe v. Delie*, 257 F.3d 309 (3rd Cir. 2001) (HIV status); and *Devilla v. Schriver*, 245 F.3d 192 (2nd Cir. 2001) (HIV status and transsexual status).
81. 511 U.S. 825 (1994).
82. 204 F.3d 1187 (9th Cir. 2000).
83. 221 F.Supp.2d 156 (D. Mass. 2002).
84. *Bicentennial Man* (Touchstone Pictures and Columbia Pictures (1999)). The essence of the analogy, of course, is that Martin's move toward humanity is aided by human intervention and is *not merely cosmetic*. For another human-intervention analogy to marriage proscriptions of the past, see Berrigan, *supra* note 64 at 113-15.

Houston lawyer **Phyllis Randolph Frye** received a B.S. and M.S. from Texas A&M University and an MBA and J.D. from the University of Houston. She is licensed to practice law and engineering in Texas and was co-counsel in *In re Heilie*, 816 A.2d 68 (Md. 2003). For more information on Frye, visit [http:// transgenderlegal.com](http://transgenderlegal.com).

Katrina Rose is licensed to practice law in Texas and Minnesota. She received a B.E.D. from Texas A&M University and J.D. from South Texas College of Law.