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State Bar of Michigan

LGBTQ+ LAW SECTION

LGBTQ+ Law Bench Card

The LGBTQ+ Law Section of the State Bar of Michigan prepared this Bench Card. You can access the most up-to-date version, with in-depth analysis, additional topics, citations, best practices, statistics, and resources at https://connect.michbar.org/lgbtqa/home.

Please send questions or comments to sbmlgbtq@gmail.com.

A Guide for Fair Treatment and Access to Justice for LGBTQ+ Individuals:

- Know and enforce nondiscrimination policies - federal, state, and local civil rights laws; court rules; school or agency policies; and applicable ethics rules.
- Don't make assumptions about a person's sexual orientation or gender identity based on their appearance or name.
- Ask counsel to provide their pronouns when putting their appearance on the record.
- Ask individuals who testify to state their pronouns.
- Ensure court staff and court partners are respectful to every individual appearing before the Court, regardless of sexual orientation and gender identity.

Key Case and Statutory Law

Bostock v. Clayton County, 590 U.S. ____ (2020). Employment discrimination based on a person's sexual orientation or gender identity constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

Obergefell v. Hodges, 576 U.S. 644 (2015). Marriage is a fundamental right and same sex couples and their children are equally entitled to the benefits of marriage under the Due Process Clause.

Windsor v. United States, 570 U.S. 744 (2013). The Defense of Marriage Act (DOMA), which prohibited same-sex married couples from federal benefits and protections which were available to opposite-sex married couples, violates the Equal Protection Clause.

Lawrence v. Texas, 539 U.S. 558 (2003). The criminalization of consensual sexual conduct between people of the same-sex violates the Due Process Clause.

Rouch World v. Dept. of Civil Rights, Michigan Supreme Court, Docket No. 162482, July 28, 2022. The Elliott-Larsen Civil Rights Act (ELCRA), MCL § 37.2302(a), applies to discrimination based on sexual orientation because the denial of "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service" on the basis of sexual orientation constitutes discrimination "because of ... sex."

ELCRA also applies to discrimination based on gender identity. Michigan Department of Civil Rights May 21, 2018 Interpretive Statement. ELCRA's protection against "discrimination because of ... sex" includes gender identity. *EEOC v RG*, 884 F3d 560 (CA 6, 2018). State courts have historically looked to federal courts for guidance on interpreting civil rights law. See *Civil Rights Comm v Chrysler Corp*, 80 Mich App 368 (1977); *Humeny v. Genex Corp.*, 390 F.3d 906 (6th Cir. 2004) ; *Northville Public Schools v Civil Rights Comm*, 118 Mich App 573 (1982); *Sumner v. Goodyear Co.*, 427 Mich. 505 (1986); and *Radtke v. Everett*, 442 Mich 368 (1993).

Specific Legal Topics

Family Law – Equitable Parentage – *Stankevich v. Milliron*, 313 Mich. App. 233, 235, 882 N.W.2d 194, 195 (2015) extended equitable parentage doctrine to same-sex married female couples. It allows a non-biological parent of a child born during a legal marriage to maintain legal parentage rights over a child born during a marriage. *Atkinson v. Atkinson*, 160 Mich. App. 601, 408 N.W.2d 516 (1987).

Birth Certificate – When a married woman with the husband's consent conceives through assisted reproductive technology ("ART") the child is considered a child of the marriage. MCL § 333.2824. Married parents must be listed on the birth certificate. MCL § 333.2824. *Obergefell* and *Pavan v. Smith*, 582 U.S. _____ (2017) require gender-neutral reading of statutes and entitle married couples who use ART to the benefits of presumed parentage.

Voir Dire – It is unconstitutional to use a peremptory challenge to exclude jurors based solely on their race or sex, or based on the assumption that members of a particular race or sex are incapable of fairly and impartially weighing evidence. *Batson* v. *Kentucky*, 476 U.S. 79 (1986); *JEB* v. *Alabama ex rel. TB*, 511 U.S. 127 (1994) Discrimination based on sexual orientation, gender identity or expression is discrimination based on sex. See *Bostock & Rouch World*.

Voir dire may include questions about anti-LGBTQ+ bias when a person's LGBTQ+ identity is relevant to case; *People v Six*, Docket No. 338238 (Mich. App. 2020), *after remand*, Docket No. 338238 (Mich. App. 2022).

Name Change Petitions – MCL § 711.3 allows the court to waive publishing requirement for good cause. MCR 3.613(E) allows the court to keep records of proceedings confidential.

Legal Authority for Courts to Use a Person's Stated Name and Pronouns

Michigan Court of Appeals – All individuals deserve to be treated fairly, with courtesy and respect, without regard to their race, gender, or any other protected personal characteristic. The use of nonbinary pronouns respects a person's request and has no effect on the outcome of the proceedings. *People v. Gobrick*, Docket No. 352180 (Mich. App. 2021).

Michigan Code of Judicial Conduct – Litigants, attorneys, staff, and the public expect judges to create an environment which models, facilitates, and encourages civility and equal access to justice. These obligations are also enshrined in the Code of Judicial Conduct:

- "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others…and should require similar conduct of lawyers, and of staff, court officials, and others…" Canon 3A(3).
- "Without regard to a person's race, gender, *or other protected personal characteristic*, a judge should treat every person fairly, with courtesy and respect. To the extent possible, a judge should require staff, court officials, and others… to provide such fair, courteous, and respectful treatment to persons who have contact with the court." Canon 3A(14).
- Sexual orientation and gender identity are protected classes. See *Bostock & Rouch World*.

Court Rules – The rules are to be construed, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties. MCR 1.105.

See online version for in-depth analysis, additional topics, citations, best practices, statistics, and resources at https://connect.michbar.org/lgbtqa/home.

Terms

Terms are evolving, fluid, and many terms previously used are now antiquated and/or offensive. See the online version for a list of terms to avoid.

Cisgender – People who have a gender identity that is the same as the sex they were assigned at birth.

Dead Name – Refers to the name given to a transgender person at birth which they no longer use.

Gender Dysphoria – A serious medical condition caused by a discrepancy between a person's gender identity and that person's sex assigned at birth.

Gender Expression – The way a person expresses their gender through dress, grooming habits, mannerisms, and other characteristics.

Gender Identity – A person's deeply felt internal sense of being male, female, both, or neither.

Gender Markers – A person's gender identity on documents such as a driver's license, birth certificate, or passport. Transgender people whose IDs do not reflect their gender identity are vulnerable to discrimination, harassment, and violence. Passport applications include use of a "X" for an unspecified or other gender identity. In Michigan a gender marker may be changed on a Michigan Driver's License, ID, or birth certificate.

Nonbinary – Describes gender identities that do not fit within the binary of male or female and are often demonstrated by an "X" on identification. e.g., passports, driver's license, birth certificate, etc.

Queer – Used by people who reject conventional categories such as LGBT or embrace a political identity as "queer" in addition to being LGB and/or T.

Sex – Sex reflects a combination of bodily characteristics including chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics, some that can be ambiguous or in conflict within an individual.

Sex Assigned at Birth – The sex designation given to someone at birth and generally based on appearance of external genitalia.

Transgender – An umbrella term that refers to people who have a gender identity different than the sex they were assigned at birth. It is not appropriate to use the term "transgendered."