

The Model Standards Project

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Defending LGBTQ Youth

How do you know if your client is LGBTQ?

Although there is no way to determine the exact number of lesbian, gay, bisexual, transgender, or questioning (LGBTQ) youth involved in the juvenile justice system, social scientists have estimated that LGBTQ youth represent between 4 and 10% of the overall population of youth involved with these systems. Despite the lack of determinative data, it is safe to assume that you will represent young people who are LGBTQ in the course of your career -- whether or not their sexual orientation or gender identity is immediately apparent to you.

While many young people are openly lesbian, gay, bisexual or transgender in some areas of their life, it is not likely that your LGBTQ clients will immediately offer this information to you. Although you may suspect that a client is LGBTQ, you should not make assumptions based on how a client looks or acts. Nor is it useful to immediately ask about sexual orientation or gender identity before you have established a trusting relationship with your client. LGBTQ youth have been socialized to hide, and may not feel comfortable discussing these issues.

The best approach is to spend the time necessary to earn your client's trust, and to take affirmative steps to signal your openness and acceptance of these issues. You can create a supportive environment by displaying posters or books that demonstrate an acceptance of LGBT people. You can simply state that you need to know as much as possible about the young person in order to help him or her, and that you will not be judgmental. If the subject of dating or sexuality comes up, avoid language that assumes heterosexuality.

Youth may test whether you will accept them by giving you hints (such as not using a pronoun when talking about a romantic partner or telling you that they have LGBTQ friends or family) and checking your response. These hints provide you with an opportunity to show that you are open-minded and accepting of LGBT people.

If your client reveals that he or she is LGBTQ, don't ignore it. Talk to him or her about it, listen to his or her experiences, and find out how you can be supportive. Talking about their sexual orientation or gender identity may be easier for some youth than others. Merely by being open to the possibility that your client may be LGBTQ, you are setting the stage to develop the trust that will facilitate this discussion.

Why is your client's sexual orientation or gender identity important?

- **Discriminatory or inappropriate charges**

It is not uncommon for a youth to be charged with a sex offense for engaging in consensual, same-sex activity. Although the underlying conduct is characterized as predatory or coerced, investigation often reveals that two or more young people were engaging in consensual activity. Typically, the impetus for filing formal charges comes from an adult, such as a parent who finds the behavior abhorrent and insists that his or her child is a victim. Another common scenario occurs when young people in a group care facility or school are discovered engaging in same-sex sexual activity. School or facility administrators may feel obligated to identify a "perpetrator" or scapegoat in an effort to shield themselves from liability for inadequate supervision. Charges can also be filed at the insistence of a youth who has willingly engaged in same-sex conduct, but later feels shame or regret. The criminalization of consensual same-sex conduct may also be perpetuated by homophobic police, prosecutors, or courts.

We have encountered many cases in which LGBTQ youth are labeled as sex offenders. The ramifications of this characterization are very significant. Aside from being stigmatized and ostracized, these youth often undergo inappropriate treatment -- an integral part of which often requires them to admit that they are sex offenders. When they resist this label, they are considered intractable and untreatable. The result is to subject them to more restrictive environments, to further restrict their liberty, to subject them to more intensive "treatment," and to extend their time in the system. LGBTQ youth who are adjudicated sex offenders are also subject to many state laws requiring them to register as sex offenders. This identity severely limits their choices, their liberty, and their ability to become productive, healthy young adults.

Juvenile defenders should be alert to the tendency to overcharge youth who have engaged in same-sex conduct, or to treat these youth more harshly than youth who have engaged in otherwise similar heterosexual conduct. Defense counsel should move to dismiss discriminatory

charges on both constitutional and statutory grounds. Close investigation and vigorous advocacy at the outset is crucial.

- **Evidence of mitigation**

LGBTQ youth are significantly overrepresented among homeless and runaway youth. Many run to escape strife or abuse at home related to their identity or orientation. Others are kicked out. Once on the streets, many youth engage in survival crimes, such as prostitution or petty theft. LGBTQ youth also face horrendous discrimination, harassment and abuse in schools. Those who ultimately fight back may be charged with a criminal offense. Chronic truancy often serves as aggravating evidence. However, LGBTQ youth often skip school to escape daily bullying or violence.

It is important to look behind the charges to understand the motivation for the underlying conduct. These contextual facts can help create a completely different picture of the youth before the court, and can serve to mitigate the charges.

- **Safety considerations**

LGBTQ youth (and youth who are perceived to be LGBTQ) are at significant risk for harassment, violence, discrimination and bullying in almost any environment – including in their homes, schools, communities and placements. Counsel should consider the safety ramifications of every strategy decision throughout the proceedings. For instance, prevailing in a detention hearing only to send a young person home to an abusive homophobic parent is not a total victory. Similarly, while detention is harmful for any youth, it may be life threatening for a gay teenager. It is important to use caution in disclosing information about the sexual orientation or gender identity of your client – even to the court in some cases. While the information may be important to understand the alleged criminal conduct or to access appropriate services, there can also be a backlash. Counsel should actively involve the client in discussing the consequences of disclosure – both positive and negative – and attempt to strike the best balance to achieve the client’s overall goals.

While safety is an important consideration, counsel should be alert to any attempt to place LGBTQ youth in a more restrictive setting “for their own protection.” For example, many facilities place LGBT youth in isolation or protective segregation, which amounts to punishment on the grounds of sexual orientation or gender identity. We have also seen cases in which courts order

placement in a locked facility as a means of ensuring close supervision. In any group setting, safety should be ensured through enforcement of anti-harassment policies, rich staffing ratios, close supervision, and meaningful, constructive programming.

- **Dispositional planning**

Defense counsel should understand and consider the unique needs, strengths and experiences of their LGBTQ clients in order to develop appropriate dispositional plans. For example, lesbian and gay youth face unique and serious health challenges, including an increased risk for substance abuse, sexually transmitted disease, sexual assault, and in the case of young gay males, eating disorders. Transgender youth present distinct and complex medical concerns, including the ethical and practical dilemmas associated with hormone therapy. Some transgender youth obtain hormones “on the street,” subjecting themselves to the risks associated with contaminated needles, improper dosages and fraudulent practices. Counsel should be aware of these issues and should advocate that LGBTQ clients receive competent, sensitive health assessments and treatment as part of their disposition. These services should be available for adjudicated youth, whether or not they are in placement.

LGBTQ youth also benefit from community-based services that provide mentoring, support, and services designed to help them integrate their sexual orientation or gender identity. Some communities have drop-in centers or LGBT community centers that provide these services. Defenders should become familiar with these services, and advocate for their inclusion in dispositional plans.

LGBT youth also commonly suffer from the effects of chronic stress associated with harassment, coming out to family and friends, and having one’s sexual orientation discovered. Chronic stress can lead to increased levels of depression and anxiety. Research also confirms that the risk of suicide is significantly higher for lesbian, gay and transgender youth. Ironically, LGBTQ youth are also subjected to higher levels of inappropriate mental health treatment, including misdiagnosis of gender identity disorder, involuntary institutionalization, and “reparative” therapy or other interventions designed to change one’s sexual orientation or gender identity. For these reasons, it is essential that LGBTQ youth have access to supportive, inclusive mental health services. It is equally important to guard against the tendency to inappropriately pathologize LGBT youth. Again, mental health services should be accessible to incarcerated youth, youth in placement, and youth on probation.

For youth living at home, it is important to ensure that their school is a safe and supportive environment. Requiring regular school attendance as a probation condition is a set up for failure if it sends the youth into a battle zone. For these reasons, defense counsel should ensure that the young person is able to attend school in a safe, supportive setting. The same is true for evening reporting centers or any other programs in which the youth is required to participate. Requiring an LGBTQ youth to participate in homophobic or transphobic probation programs has no rehabilitative value and is harmful for the youth.

Defense counsel should ensure that any out-of-home placement or facility that an LGBTQ client is sent to is safe and capable of providing inclusive, appropriate, non-discriminatory care and programming. It is important to determine the attitudes, as well as the policies and programming, of the facility and its administration and staff. If your client is transgender, it is imperative to locate a placement, facility or program in which the client's gender identity is respected. Transgender youth should be permitted to dress in clothing consistent with their gender identity, to use the pronoun and name of their choice, and to have reasonable privacy for showering, dressing, etc.

- **Post-dispositional advocacy**

LGBTQ youth in secure and non-secure settings need strong advocates to ensure their continued safety and to hold juvenile facilities accountable. These youth are vulnerable to a host of harmful conditions and practices that, unfortunately, are not uncommon. Some facilities automatically classify and house LGBT youth as sex offenders. Others automatically isolate or segregate LGBTQ youth – either to protect them or to protect other youth from them. The latter practice is based upon the common myth that gay youth will “prey” upon other youth or sexualize any youth with whom they come in contact. By far the most common problem is rampant taunting and violence – both by staff and residents.

LGBTQ youth report being utterly isolated and without any support in these settings. You may be your client's only protection against discrimination or mistreatment. It is important that both your client and the facility staff know that you will intervene if your client is mistreated in a facility because of their sexual orientation or gender identity.

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