

# Table of Contents

## Volume 1

### PART A. FAMILY AND PROPERTY

#### CHAPTER 1. RAISING CHILDREN AND THE NEW FAMILY LAW

##### I. OVERVIEW

§ 1:1 Introduction

##### II. CUSTODY DISPUTES BETWEEN PREVIOUSLY “TRADITIONAL” PARENTS

§ 1:2 Generally

§ 1:3 The “best interests” standard

§ 1:4 The irrelevance of sexual orientation and gender  
identity to “best interests”

§ 1:5 The irrelevance of sexual orientation—*Lawrence v.*  
*Texas*

§ 1:6 —Same-sex marriage

§ 1:7 —Nexus and specificity

§ 1:8 —Lifestyle and affairs

§ 1:9 — —Post-divorce cohabitation

§ 1:10 — —Post-divorce same-sex marriage or civil union

§ 1:11 —Sanctions for homophobia

§ 1:12 Sexuality and parental fitness

##### III. ALTERNATIVE FAMILIES AND ESTABLISHING PARENTAGE

§ 1:13 Generally

§ 1:14 Children of civil unions or same-sex marriage

§ 1:15 Marital presumption

§ 1:16 The UPA and state parentage acts

§ 1:17 Guardianship, agreements and other protections

§ 1:18 More than two parents

##### IV. CUSTODY BETWEEN PARENTS AND “OTHERS”

§ 1:19 Generally

- § 1:20 The rebuttable presumption
- § 1:21 Nonparent visitation and custody statutes
- § 1:22 *De facto* parents, estoppel and judicial recognition
- § 1:23 Equitable adoption

## **V. ADOPTION**

- § 1:24 Generally
- § 1:25 Second-parent
- § 1:26 Joint
- § 1:27 Attacks on prior adoptions

## **VI. PARENTAL STATUS FROM STATE TO STATE**

- § 1:28 Generally
- § 1:29 Children of civil unions and same-sex marriage
- § 1:30 Adoptions
- § 1:31 Surrogacy and assisted reproduction

## **VII. REPRODUCTIVE TECHNOLOGY AND PARENTAL STATUS**

- § 1:32 Generally
- § 1:33 Assisted reproduction
- § 1:34 Surrogacy and gestational agreements

## **CHAPTER 2. SAME-SEX MARRIAGE, CIVIL UNIONS AND OTHER PROTECTIONS FOR COUPLES**

- § 2:1 Introduction
- § 2:2 History and overview of same-sex marriage
- § 2:3 Defense of Marriage Acts
- § 2:4 Civil unions and comprehensive domestic partnership
- § 2:5 Limited domestic partnership, reciprocal beneficiaries, and designated beneficiaries
- § 2:6 American Indian Tribal Nations
- § 2:7 Recognition and retroactivity of marriage, domestic partnerships, and civil unions
- § 2:8 Forming and dissolving domestic partnerships, civil unions, and other non-marital statuses
- § 2:9 Practical considerations: dissolution, retroactivity and common law same-sex marriage
- § 2:10 Employee benefits for same-sex partners
- § 2:11 Taxation of partner benefits

TABLE OF CONTENTS

**CHAPTER 3. COHABITATION AND  
PROPERTY OWNERSHIP AGREEMENTS**

**I. OVERVIEW**

- § 3:1 Introduction
- § 3:2 Avoiding conflicts of interest

**II. COHABITATION AGREEMENTS**

- § 3:3 Requirements
- § 3:4 Contents and interview checklist
- § 3:5 —Income and assets
- § 3:6 —Jointly owned property
- § 3:7 —Future joint acquisitions
- § 3:8 —Pooling
- § 3:9 —Support
- § 3:10 —Residence
- § 3:11 —Recordkeeping
- § 3:12 —Relationship termination
- § 3:13 —Dispute resolution
- § 3:14 —Miscellaneous
- § 3:15 —Tax consequences
- § 3:16 Separate versus commingled property
- § 3:17 Buy-sell and escrow arrangements
- § 3:18 Support

**III. REAL PROPERTY CO-OWNERSHIP  
AGREEMENTS**

- § 3:19 Overview
- § 3:20 Rights and responsibilities
- § 3:21 Interview checklist
- § 3:22 —Recitals
- § 3:23 —Purchase contributions
- § 3:24 —Proceeds on sale
- § 3:25 —Necessary payments
- § 3:26 —Records and accountings
- § 3:27 —Payment failure
- § 3:28 —Default
- § 3:29 —Repairs
- § 3:30 —Improvements
- § 3:31 —Possession
- § 3:32 —Rental rights
- § 3:33 —Sale; right of first refusal
- § 3:34 —Right of partition
- § 3:35 —Mediation

- § 3:36 —Arbitration
- § 3:37 —Attorney's fees
- § 3:38 —Covenant "running with the land"
- § 3:39 —Attorney represents both parties

#### **IV. ENFORCEABILITY OF EXPRESS OR IMPLIED CONTRACTS**

- § 3:40 *Marvin v. Marvin*
- § 3:41 *Marvin* holdings throughout the states
- § 3:42 *Marvin* and same-sex couples
- Appendix 3A. Consent to Joint Representation
- Appendix 3B. Model Cohabitation Agreement with Provisions for Separate or Commingled Property
- Appendix 3C. Model Cohabitation Agreement Providing for Support
- Appendix 3D. Model Cotenancy Agreement

### **CHAPTER 4. FEDERAL TAXES**

#### **I. OVERVIEW**

##### **A. INTRODUCTION**

- § 4:1 Post-Obergefell tax issues
- § 4:2 Chapter overview

#### **II. TAX PRACTICE FOR LAWYERS REPRESENTING SAME-SEX COUPLES**

- § 4:3 Introduction
- § 4:4 Advising couples
- § 4:5 Duty to advise regarding tax consequences
- § 4:6 Advising a client to take a position on a tax return: possible penalties
- § 4:7 Sources of federal tax law
- § 4:8 Tax procedure

#### **III. THE ROLE OF STATE LAW IN FEDERAL TAX LAW**

- § 4:9 Generally
- § 4:10 Defining marital status
- § 4:11 Parent/child relationships
- § 4:12 Other family relationships
- § 4:13 State property law

#### **IV. TAXATION OF MARRIED SAME-SEX SPOUSES**

- § 4:14 Retroactivity

## TABLE OF CONTENTS

§ 4:15 Effect of marriage on tax liability

### **V. UNMARRIED PARTNERS**

- § 4:16 Overview
- § 4:17 Cohabitation agreements
- § 4:18 —Pooling of income
- § 4:19 —One partner supports the other
- § 4:20 Property agreements
- § 4:21 Other partner agreements
- § 4:22 Claiming your partner as your dependent
- § 4:23 Dependency status of children
- § 4:24 Tax benefits are available with “qualifying child”
- § 4:25 Transfers of property between cohabitants
- § 4:26 Tax deductions—Allocation issues
- § 4:27 —Medical expenses
- § 4:28 —Home mortgage interest
- § 4:29 —Property taxes
- § 4:30 Dissolution issues
- § 4:31 —Payment of support
- § 4:32 —Division of property—Income tax issues
- § 4:33 — —Gift and estate tax issues
- § 4:34 Federal tax issues at death of a partner

### **VI. SPECIAL RULES THAT MAY APPLY TO REGISTERED DOMESTIC PARTNERS OR CIVIL UNION PARTNERS**

- § 4:35 RDPs and CUPs—Overview
- § 4:36 —Filing status
- § 4:37 —Possible tax benefits of status
- § 4:38 RDPs and community property—Application of community property rules in general
- § 4:39 —Allocation of deductions
- § 4:40 —Property divisions at divorce

### **VII. MEDICAL EXPENSE DEDUCTIONS—ISSUES FOR LGBT CLIENTS**

- § 4:41 Medical expense deductions for sex reassignment surgery (SRS)
- § 4:42 Medical expense deductions for costs associated with assisted reproductive technology (ART)

### **VIII. PRACTICE AIDS**

- § 4:43 How to exclude imputed income that Employer mistakenly reports on W-2 for fair market value of health plan coverage for unmarried dependent

- § 4:44 Declaration of tax dependency for domestic partner  
and/or domestic partner's child and/or grandchild

## **CHAPTER 5. DEATH AND INCAPACITY**

### **I. INTRODUCTION**

- § 5:1 Introduction  
§ 5:2 Scope of chapter

### **II. TAX CONSIDERATIONS**

- § 5:3 Federal Tax considerations in general  
§ 5:4 Federal Tax Considerations: Marital deduction  
planning  
§ 5:5 Lifetime gifts  
§ 5:6 Joint tenancy  
§ 5:7 Life insurance in the Taxable Estate  
§ 5:8 Using an ILIT to keep life insurance out of the taxable  
estate  
§ 5:9 Federal income tax issues for gifts and inheritances  
§ 5:10 State tax issues

### **III. ESTATE PLANNING FOR SAME-SEX MARRIED COUPLES**

- § 5:11 General considerations  
§ 5:12 Potential hostility to the marriage by family members  
§ 5:13 Ethical issues—Joint representation  
§ 5:14 Fact Gathering

### **IV. REPRESENTING UNMARRIED COUPLES**

- § 5:15 General considerations  
§ 5:16 Ethical issues  
§ 5:17 Cohabitation agreements

### **V. REPRESENTING COUPLES WHO ARE REGISTERED UNDER STATE LAW BUT OTHERWISE UNMARRIED**

- § 5:18 The effect of state registration laws  
§ 5:19 Federal law consequences of non-recognition: Tax law  
§ 5:20 Federal law consequences of non-recognition: Social  
security  
§ 5:21 Federal law consequences of non-recognition: ERISA

### **VI. ESTATE PLANNING CONSIDERATIONS FOR ALL CLIENTS: DOCUMENTS TO CONSIDER**

- § 5:22 Directives to physicians (living wills)

## TABLE OF CONTENTS

- § 5:23 Wills
- § 5:24 Naming Beneficiaries in a Will (or Trust)
- § 5:25 Naming children as beneficiaries in a will (or trust)
- § 5:26 Naming contingent beneficiaries in a will (or trust)
- § 5:27 Funerals; burial instructions
- § 5:28 Revocable trusts
- § 5:29 Reconciling Non-probate beneficiary designations with estate plan
- § 5:30 Powers of Attorney: overview
- § 5:31 Durable powers of attorney
- § 5:32 Health care authorization (proxy)
- § 5:33 Revocation of powers of attorney

## VII. PRACTICE AIDS

- § 5:34 Sample letter agreeing to joint representation for estate planning
- § 5:35 Questionnaire for the preparation of wills
- § 5:36 Durable Power of Attorney (General)
- § 5:37 Durable Power of Attorney
- § 5:38 Hospital Visitation Authorization

# PART B. CIVIL RIGHTS AND DISCRIMINATION

## CHAPTER 6. EMPLOYMENT

### I. OVERVIEW

- § 6:1 Introduction

### II. GATHERING AND ASSESSING PRELIMINARY FACTS

#### A. INTRODUCTION

- § 6:2 The sexual orientation issue
- § 6:3 The situation
- § 6:4 Written account—Preparation for litigation
- § 6:5 —Contemporaneous memorandum
- § 6:6 Documents and records
- § 6:7 Witnesses
- § 6:8 Possible adversaries

#### B. THE CLIENT

- § 6:9 The client

- § 6:10 —Needs and wants
- § 6:11 —Damages
- § 6:12 —Resources
- § 6:13 —Vulnerabilities

### III. ANALYZING RELEVANT LAW

#### A. PRELIMINARY CONSIDERATIONS

- § 6:14 Public vs. private employer
- § 6:15 Location of the wrong
- § 6:16 Other research issues

#### B. DISCRIMINATION

##### 1. Overview

- § 6:17 Generally
- § 6:18 U.S. Constitution

##### 2. Federal statutes

- § 6:19 Title VII
- § 6:20 —The *Bostock* Decision
- § 6:21 —Sexual harassment
- § 6:22 — —Quid pro quo
- § 6:23 — —Hostile work environment
- § 6:24 —Sex stereotyping
- § 6:25 —Transgender employees
- § 6:26 —Circuits’ interpretations of the “because of . . . sex” requirement
- § 6:27 —The limits of sexual “categories” exposed
- § 6:28 — —When desire transcends “category”
- § 6:29 — —The “bisexual exemption” to Title VII liability
- § 6:30 — —Bisexual invisibility in *Bostock*
- § 6:31 42 U.S.C.A. § 1983
- § 6:32 42 U.S.C.A. § 1985(3)
- § 6:33 42 U.S.C.A. § 1981
- § 6:34 Equal employment in federal government
- § 6:35 Analyzing relevant law—Discrimination and Retaliation distinguished—Federal statutes—Discrimination and Retaliation distinguished
- § 6:36 —Anticipating potential employer defenses to Title VII liability under Faragher and Ellerth—Discrimination—Federal statutes—Anticipating potential employer defenses to Title VII liability under Faragher and Ellerth

##### 3. State and local law

- § 6:37 State law



## TABLE OF CONTENTS

§ 6:38 Local law

### 4. Torts

§ 6:39 Privacy

§ 6:40 —Defining party's expectation

§ 6:41 —Showing harm of intrusion

§ 6:42 Tort causes of action—Assault, battery and harassment

§ 6:43 Infliction of emotional distress

§ 6:44 Wrongful discharge

§ 6:45 Other torts

### 5. Contract

§ 6:46 “Standard” contract causes

§ 6:47 Breach of implied covenant of good faith and fair dealing

### 6. Constitutional and political rights and other sources of authority

§ 6:48 Generally

§ 6:49 Free speech and association

§ 6:50 Privacy

§ 6:51 Equal protection and due process

§ 6:52 Other sources of authority

## IV. OTHER EMPLOYMENT-RELATED PROBLEMS

§ 6:53 Generally

§ 6:54 Security clearances

§ 6:55 Licensing and occupational certification

§ 6:56 Potential relevance of criminal law

## V. IDENTIFYING BEST FORMS OF LEGAL REPRESENTATION AND MOST APPROPRIATE CAUSES OF ACTION

§ 6:57 Evaluating client's needs

§ 6:58 Evaluating facts, law and resources—Facts and the law

§ 6:59 —Resources

§ 6:60 Timing

§ 6:61 Determining appropriate emphasis on issue of sexual orientation

§ 6:62 —Anticipating defense use of sexual orientation issues

§ 6:63 Empowering the client

## VI. HANDLING THE CASE

### A. OVERVIEW

§ 6:64 Generally

§ 6:65 The media

## B. PLEADING

- § 6:66 Choosing forum and venue
- § 6:67 Prefiling steps, settlements
- § 6:68 Subject-matter jurisdiction
- § 6:69 Personal jurisdiction
- § 6:70 Shaping the issues
- § 6:71 Multiple-wrongs case: Gaining all available remedies
- § 6:72 Anticipating adversary motions to dismiss and demurrers
- § 6:73 Preparing for pretrial appeals
- § 6:74 Preliminary injunctions and other equitable remedies; Expedited, special relief
- § 6:75 Scope of suit and identifying interested persons
- § 6:76 —Class actions
- § 6:77 —Organizational plaintiffs and *Amici*
- § 6:78 —Intervention, joinder, consolidation, and related cases

## C. DISCOVERY

- § 6:79 Outlining evidence
- § 6:80 Costs
- § 6:81 Preliminary steps
- § 6:82 Documents
- § 6:83 Depositions
- § 6:84 Limiting adversarial discovery
- § 6:85 Common discovery problems—Pinning down defenses
- § 6:86 —Dealing with intimidation and fear in employment context
- § 6:87 —Perjury
- § 6:88 —Triumphing in the paper war

## D. NEGOTIATION

- § 6:89 Negotiations and settlement
- § 6:90 Pretrial and trial processes—Judge or jury?
- § 6:91 —Anticipating courtroom problems
- § 6:92 Appeal—Marshalling amici
- § 6:93 —Presenting coherent theories
- § 6:94 Practice theory

# CHAPTER 7. STATE INITIATIVES

## I. INTRODUCTION

- § 7:1 Overview

## TABLE OF CONTENTS

- § 7:2 Legal theories preceding the U.S. Supreme Court *Evans v. Romer* decision
- § 7:3 Colorado's Amendment 2

## II. CASE STUDY: EVANS V. ROMER

- § 7:4 *Evans v. Romer*: Legal challenge to Amendment 2—  
Procedural background
- § 7:5 —U.S. Supreme Court ruling on Amendment 2
- § 7:6 —*Evans v. Romer* dissent

## III. STATE INITIATIVE

- § 7:7 State initiative processes
- § 7:8 —Voter legislation
- § 7:9 —Substantive challenges to initiatives
- § 7:10 — —Guaranty clause challenges
- § 7:11 — —Proper initiative subjects
- § 7:12 —Procedural challenges to initiatives
- § 7:13 — —Single subject rule
- § 7:14 — —Ballot title challenges
- § 7:15 — —Signature requirements
- § 7:16 — —Signature verification
- § 7:17 Conclusion

# CHAPTER 8. MILITARY AND VETERANS

## I. INTRODUCTION

- § 8:1 Introduction
- § 8:2 Prior Policy
- § 8:3 Repeal

## II. OVERVIEW OF POLICY

- § 8:4 Serving in the post-DADT Military
- § 8:5 Access, family relationships and benefits
- § 8:6 Dependents: Identification, Healthcare, Planning for  
Deployment
- § 8:7 Emergency and death notification
- § 8:8 —Primary next of kin
- § 8:9 —Person Authorized to Direct Disposition
- § 8:10 Benefits afforded to the same-sex spouses of service  
members
- § 8:11 Selected financial benefits available to same-sex  
spouses/partners
- § 8:12 Additional benefits

## III. INVESTIGATIONS AND HARASSMENT

- § 8:13 Equal employment opportunity

- § 8:14 Military justice, military crimes
- § 8:15 Harassment/Equal employment opportunity

#### **IV. DISCHARGE REVIEW**

- § 8:16 Discharge review—Generally
- § 8:17 —Channels
- § 8:18 —Requesting and reviewing service records
- § 8:19 —Brief in support
- § 8:20 — —Obtaining regulations
- § 8:21 — —Obtaining cases
- § 8:22 — —Framing the arguments
- § 8:23 — —When homosexuality is the issue
- § 8:24 —Hearings
- § 8:25 —Adverse decision
- § 8:26 —Federal Court

#### **V. THE MILITARY AND HIV/AIDS**

- § 8:27 The Military and HIV/AIDS—Generally
- § 8:28 The military and HIV/AIDS—Testing and military service
- § 8:29 —Symptomatic personnel
- § 8:30 —Administrative discharge and disciplinary action
- § 8:31 —Protecting confidentiality
- § 8:32 —Unsafe sex prosecutions
- § 8:33 —Counseling suggestions
- § 8:34 —A look to the future

#### **VI. OTHER ISSUES**

- § 8:35 Transgender persons in the military

### **CHAPTER 9. IMMIGRATION**

- § 9:1 Introduction
- § 9:2 History of immigration law
- § 9:3 Overview of immigration system
- § 9:4 Entry and visas
- § 9:5 Same-sex marriage
- § 9:6 Permanent Partners Immigration and Uniting American Families Acts and Proposed Immigration Reforms
- § 9:7 Students
- § 9:8 Inadmissibility
- § 9:9 AIDS or HIV
- § 9:10 Removal
- § 9:11 The appeal process
- § 9:12 Asylum

## TABLE OF CONTENTS

- § 9:13 Asylum for lgbt clients or those perceived as such
- § 9:14 —Membership in a particular social group
- § 9:15 — —Imposing U.S. sexual categories on other nationals
- § 9:16 —Fear of persecution or punitive intent
- § 9:17 Preserving immigration status
- § 9:18 Citizenship and naturalization
- § 9:19 Children and parentage

## CHAPTER 10. LEGAL PROTECTIONS FOR TRANSGENDER AND GENDER NONCONFORMING PEOPLE

### I. INTRODUCTION

- § 10:1 Understanding transgender and nonbinary identities
- § 10:2 Clinical dimension of gender identity
- § 10:3 Intersecting issues of racial and economic injustice
- § 10:4 Becoming a better advocate and ally
- § 10:5 Understanding the rapidly developing landscape

### II. LEGAL THEORIES

- § 10:6 Sex discrimination
- § 10:7 Scope of *Bostock* and applicability beyond Title VII
- § 10:8 Disability discrimination
- § 10:9 Gender identity discrimination laws
- § 10:10 Equal protection
- § 10:11 Parental rights and occupational freedom

### III. SPECIFIC ISSUES AND APPLICATIONS

- § 10:12 Change of name and gender
- § 10:13 —Legal name change
- § 10:14 —Legal recognition of gender change
- § 10:15 —Nonbinary identities
- § 10:16 Employment
- § 10:17 Education
- § 10:18 Foster care and juvenile justice
- § 10:19 Health care
- § 10:20 Public accommodations and housing
- § 10:21 Family law
- § 10:22 —Gender transition within marriage
- § 10:23 —The right to marry
- § 10:24 —Transgender parents
- § 10:25 —Transgender children
- § 10:26 Transgender prisoners

- § 10:27 —Violence and sexual assault
  - § 10:28 —Access to medical treatment
  - § 10:29 —Right to live in accordance with one’s gender identity
  - § 10:30 Violence against transgender people
  - § 10:31 Immigration and asylum
- Appendix 10A. Additional Resources

## Volume 2

### **CHAPTER 11. CONSUMER GOODS, SERVICES AND ACCOMMODATIONS**

- § 11:1 Introduction
- § 11:2 Masterpiece Cakeshop to 303 Creative
- § 11:3 Religious exemption efforts
- § 11:4 Challenges for counsel
- § 11:5 Starting points
- § 11:6 Establishing substantive basis for claim
- § 11:7 Establishing substantive basis for claim—Federal protections
  - —The Equal Protection Clause
  - —Title IX Claims
  - —Title 42 U.S.C. § 1983
  - —The Americans with Disabilities Act
  - —Title II of the Civil Rights Act of 1964
  - —Title VII of the Civil Rights Act of 1964 (“Title VII”)
  - —42 U.S. Code § 1981
  - —The Fair Housing Act of 1968
  - —Fair Credit Reporting Act; Equal Credit Opportunity Act; Truth in Lending Act
- § 11:17 —State law
- § 11:18 —Common law
- § 11:19 — —Invasion of privacy
- § 11:20 — —Retaliation
- § 11:21 — —Breach of covenant of good faith and fair dealing
- § 11:22 — —Negligent or intentional infliction of emotional distress
  - —Abuse of process
- § 11:24 —Bathroom issues
- § 11:25 Proving the claim
- § 11:26 —Standing
- § 11:27 —Public interest business/public accommodation
- § 11:28 Damages
- § 11:29 Procedural strategies

## TABLE OF CONTENTS

- § 11:30 Subtle discrimination
- § 11:31 Know your opponent
- § 11:32 Defenses
- § 11:33 Statute of limitations
- § 11:34 Duty to serve/public accommodations
- § 11:35 Is the case worth pursuing?

## **CHAPTER 12. FIRST AND FOURTEENTH AMENDMENT RIGHTS**

### **I. INTRODUCTION**

- § 12:1 Generally

### **II. FREEDOMS OF SPEECH AND EXPRESSION**

- § 12:2 In general
- § 12:3 Student organizations
- § 12:4 —Higher education
- § 12:5 —Other student situations
- § 12:6 Public forums and publications
- § 12:7 Incorporation; tax-exempt status
- § 12:8 Liquor licenses
- § 12:9 Public employees
- § 12:10 Freedoms of association and assembly
- § 12:11 Freedom of the press
- § 12:12 Free exercise of religion; freedom from establishment of religion
- § 12:13 Other rights implicit in First Amendment: right to receive information and ideas
- § 12:14 Curricular and library restrictions

### **III. RELATIONSHIP OF FIRST AMENDMENT TO OTHER CONSTITUTIONAL GUARANTEES**

- § 12:15 Privacy
- § 12:16 Equal protection
- § 12:17 Due process

### **IV. LITIGATION STRATEGIES**

#### **A. JUSTICIABILITY AND LITIGABILITY OF FIRST AMENDMENT CLAIM OR DEFENSE**

- § 12:18 Discrimination purportedly justified under First Amendment
- § 12:19 Generally
- § 12:20 —State action

- § 12:21 —Case or controversy
- § 12:22 —Standing and parties
- § 12:23 —Forum
- § 12:24 —Pleading First Amendment issues
- § 12:25 —Countering arguments that LGBT expression is excepted from protected speech

## B. COUNTERING ARGUMENTS THAT LGBT EXPRESSION IS EXCEPTED FROM PROTECTED SPEECH

- § 12:26 Generally—Obscene speech
- § 12:27 —Fighting words
- § 12:28 —Clear and present danger
- § 12:29 —Commercial restrictions on speech: trademark, copyright and advertising
- § 12:30 —Other exceptions to freedom of speech
- § 12:31 —Countering “compelling governmental interest” arguments
- § 12:32 —Efficiency of government as employer
- § 12:33 —Preservation of marriage and family
- § 12:34 —Morality and decency
- § 12:35 —Health and safety

## C. DEALING WITH RECURRENT PROBLEMS

- § 12:36 Generally—“Flaunting”
- § 12:37 —Private suppression of speech and association
- § 12:38 —Deference to powerful institutions
- § 12:39 —Conflict between privacy and public rights
- § 12:40 —Judicial disrespect

# CHAPTER 13. JUVENILES

## I. INTRODUCTION

- § 13:1 Generally
- § 13:2 Education and reform
- § 13:3 Effective representation of LGBTQI youth

## II. LGBTQI YOUTH IN THE CHILD WELFARE SYSTEM

- § 13:4 The Child’s entry into the system
- § 13:5 Advocates for youth
- § 13:6 —Hearings
- § 13:7 Advocacy outside court
- § 13:8 Case planning meetings



## TABLE OF CONTENTS

- § 13:9 Issues regarding family and other placements
- § 13:10 Permanency hearings and review
- § 13:11 Reunification with the family
- § 13:12 Termination of parental rights and adoption
- § 13:13 Placement with a guardian or relative
- § 13:14 APPLA (Another Planned Permanent Living Arrangement)
- § 13:15 Appeal

## III. JUVENILE COURT LAW

- § 13:16 The role of the attorney for the child
- § 13:17 Arrest and adjudication
- § 13:18 —Delinquency
- § 13:19 —Status offenses—Incorrigibility
- § 13:20 — —Runaways
- § 13:21 Placement issues—Locating a placement
- § 13:22 —Role of probation department
- § 13:23 —Segregated housing and PREA
- § 13:24 —Rights in placement
- § 13:25 —Discrimination in placement and treatment
- § 13:26 —Discipline within institution
- § 13:27 —Freedom of communication and association within institution

## IV. MENTAL HEALTH

- § 13:28 Generally
- § 13:29 Voluntary admission to psychiatric hospital authorized by parent or guardian
- § 13:30 Hearings
- § 13:31 Rights within institution

## V. MEDICAL ISSUES

- § 13:32 LGBTQI competent medical care
- § 13:33 Special considerations for transgender youth
- § 13:34 Special considerations for intersex youth

## VI. AIDS AND ADOLESCENTS

- § 13:35 Generally
- § 13:36 Testing
- § 13:37 —Consent to testing and treatment
- § 13:38 —Testing without consent
- § 13:39 Confidentiality and disclosure
- § 13:40 —Litigation and motion practice
- § 13:41 —Access to services

## **VII. PUBLIC SCHOOLS**

- § 13:42 Bullying and harassment
- § 13:43 Equal access
- § 13:44 Records

## **VIII. MISCELLANEOUS ISSUES**

- § 13:45 Emancipation
- § 13:46 Identity documents
- § 13:47 —Name changes
- § 13:48 —Passports
- § 13:49 —Social Security record
- § 13:50 —Other documents
- Appendix 13A. Confidentiality Notice in Juvenile Court Proceeding
- Appendix 13B. Nationwide Health, Advocacy, and Social Service Resources for LGBTQ Youth
- Appendix 13C. HIDDEN INJUSTICE: Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Courts

# **PART C. CRIMINAL**

## **CHAPTER 14. CRIMINAL DEFENSE**

### **I. OVERVIEW**

- § 14:1 Introduction
- § 14:2 HIV criminalization

### **II. BUSINESS PRACTICES**

- § 14:3 Business practices—Getting the word out
- § 14:4 —Creating a safe, friendly environment for clients—First arrest and criminality
- § 14:5 — —Sexual identity
- § 14:6 — —Publicity: Family and employer
- § 14:7 — —Communication: The attorney as extension of client

### **III. INITIAL COMMUNICATIONS WITH CLIENT**

#### **A. PRE INTERVIEW**

- § 14:8 Initial communications with client—Telephone vs. in-person
- § 14:9 —Pre-interview—Date of first court appearances
- § 14:10 — —Clients in jail—Bail

## TABLE OF CONTENTS

- § 14:11 — — — Fear of rape
- § 14:12 — — — Targets of harassment
- § 14:13 — — — Isolation section

### B. INTERVIEW

#### 1. Overview

- § 14:14 Initial communications with client—Interview—  
Involving vs. Insulating Client
- § 14:15 — — — Prognosis
- § 14:16 — — — Confidentiality of communications
- § 14:17 — — — Written account of facts by defendant

#### 2. Fee

- § 14:18 Initial communications with client—Interview—  
Amount
- § 14:19 — — — Fee—When
- § 14:20 — — — Written agreement

#### 3. Strategy

- § 14:21 Initial communications with client—Interview—  
Strategy—Admit the act?
- § 14:22 — — — Evaluating client
- § 14:23 — — — Strategy Sending case to different counsel

#### 4. Ancillary consequences

- § 14:24 Initial communications with client—Interview—  
Ancillary consequences—Employment
- § 14:25 — — — Licensing/credentialing
- § 14:26 — — — Immigration
- § 14:27 — — — Security clearances

#### 5. Need for psychological/psychiatric counseling

- § 14:28 Initial communications with client—Interview—Need  
for psychological/psychiatric counseling—Client's  
emotional needs
- § 14:29 — — — Inducement to plea bargain
- § 14:30 — — — Preparation for sentencing

## IV. PRETRIAL PROCEEDINGS

### A. PRE-ARRAIGNMENT

- § 14:31 Pretrial proceedings—Pre-arraignment—Rejection by  
police or prosecutor
- § 14:32 — — — Attorney input into rejection decision
- § 14:33 — — — Independent significance of filing of case
- § 14:34 — — — Clearing arrest records after rejection of case

## B. PRETRIAL PROCEEDINGS

- § 14:35 Pretrial proceedings—Arraignment—Generally
- § 14:36 — — —Obtaining and analyzing police report
- § 14:37 — — —Coordinating with counsel for a co-defendant
- § 14:38 — — —Negotiating for dismissal
- § 14:39 — — —Factual innocence
- § 14:40 — — —Clearing record
- § 14:41 — — —Dealing with multiple charges
- § 14:42 — — —Demurrer: Challenging constitutionality of law  
on its face
- § 14:43 — — —Grounds
- § 14:44 — — —Standing
- § 14:45 — — —Procedures
- § 14:46 — — —Appeals and writs
- § 14:47 — — —Continuances in arraignment court
- § 14:48 — — —Pleas—Not guilty: Moving toward trial
- § 14:49 — — —Guilty or no contest: Next stop, sentencing
- § 14:50 — — —Plea bargaining
- § 14:51 — — —Creative dispositions—Continuance in  
contemplation of dismissal
- § 14:52 — — —Office hearings
- § 14:53 — — —Diversion
- § 14:54 — — —Probation violations

## C. PRETRIAL

### 1. Investigation of facts

- § 14:55 Pretrial proceedings—Pretrial—Investigation of  
facts—Generally
- § 14:56 — — —Reviewing accusatory pleading and police  
report
- § 14:57 — — —Interviewing witnesses
- § 14:58 — — —Visiting scene

### 2. Assessment of facts

- § 14:59 Pretrial proceedings—Pretrial—Assessment of facts—  
Location
- § 14:60 — — —Witnesses
- § 14:61 — — —Entrapment and enticement
- § 14:62 — — —Inconsistent defenses (or theories)

### 3. Motions

- § 14:63 Pretrial proceedings—Pretrial—Motions—Generally
- § 14:64 — — —Discovery
- § 14:65 — — —Nonstatutory motion to dismiss
- § 14:66 — — —Other motions

## TABLE OF CONTENTS

### 4. Preparation of evidence

- § 14:67 Pretrial proceedings—Pretrial—Preparation of evidence—Experts
- § 14:68 — — —Visual aids

## V. TRIAL AND AFTER

### A. FINAL CONSIDERATIONS BEFORE TRIAL

#### 1. Trial vs. Plea: Reprise

- § 14:69 Trial and after—Final considerations before trial—Trial vs. Plea: Reprise
- § 14:70 — — —Fact situation
- § 14:71 — — —Credibility contest
- § 14:72 — — —Plea bargain offered
- § 14:73 — — —Likely outcome
- § 14:74 — — —Employment consequences
- § 14:75 — — —Jury vs. Judge Trial
- § 14:76 — — —Will client take stand?

#### 2. Motions in limine

- § 14:77 Trial and after—Final considerations before trial—Motions in limine
- § 14:78 — — —Relevance of sexual orientation
- § 14:79 — — —Relevance of prior offenses
- § 14:80 — — —Relevance of previous complaints

### B. TRIAL PREPARATION

- § 14:81 Trial and after—Trial preparation

#### 1. JURY INSTRUCTIONS

- § 14:82 Trial and after—Trial preparation—Jury instructions
- § 14:83 — — —Standard instructions
- § 14:84 — — —Special instructions
- § 14:85 — — —Preparing for appeal

#### 2. CLOSING ARGUMENT

- § 14:86 Trial and after—Trial preparation—Closing argument
- § 14:87 — — —Introductory remarks
- § 14:88 — — —Burden of proof; Presumption of innocence; Reasonable doubt
- § 14:89 — — —Facts in light of jury instructions
- § 14:90 — — —Credibility
- § 14:91 — — —Hung jury

### 3. VOIR DIRE

- § 14:92 Trial and after—Trial preparation—Voir dire—  
Generally
- § 14:93 — — —General background information
- § 14:94 — — —Concepts of fair trial
- § 14:95 — — —Specifics of case
- § 14:96 — — —Specific examples

### 4. ONE TRIAL MATTERS

- § 14:97 Trial and after—Trial preparation—Opening  
statement
- § 14:98 — — —Examination of witnesses
- § 14:99 — — —Motion after close of people's case
- § 14:100 — — —Rules of evidence
- § 14:101 — — —Motions after trial

### 5. SENTENCING

- § 14:102 Trial and after—Sentencing—Generally
- § 14:103 — — —Preparation of documents and testimony
- § 14:104 — — —Probation department
- § 14:105 — — —Punishment
- § 14:106 — — —Registration
- § 14:107 — — —Postconviction activities

### 6. CONSIDERATION

- § 14:108 *Lawrence v. Texas*
- § 14:109 Constitutional challenges to criminal statutes after  
*Lawrence*

Appendix 14A. Sample Retainer Agreement

Appendix 14B. Sample Demurrer

Appendix 14C. Sample Jury Instructions

## CHAPTER 15. CRIMINAL JUSTICE

### I. CRIMINAL DEFENSE OF LESBIAN-GAY-BISEXUAL-TRANSGENDERED AND AIDS ACTIVISTS

- § 15:1 Introduction
- § 15:2 The prevalence of activism
- § 15:3 The role of the activist-lawyer
- § 15:4 Preparation for the demonstration
- § 15:5 —Pre-action meetings and information
- § 15:6 —Permits and issues of police communication

## TABLE OF CONTENTS

- § 15:7 —Legal support
- § 15:8 At the demonstration—The lawyer
- § 15:9 —Legal observers
- § 15:10 The arrest
- § 15:11 Common charges
- § 15:12 The judicial process—Arraignments
- § 15:13 —Pre-trial motions
- § 15:14 —Dismissals and sentences
- § 15:15 —Trial

## **II. LESBIANS, GAYS, BISEXUALS AND THE NON-GENDER-CONFORMING AS VICTIMS OF CRIMES**

- § 15:16 Introduction
- § 15:17 The scope and depth of the problem—Underreporting
- § 15:18 —Secondary victimization—By society and service agencies
- § 15:19 — —The criminal justice system
- § 15:20 — —The homosexual panic defense
- § 15:21 Defining “bias” violence
- § 15:22 Hate crimes legislation and remedies—State and local laws
- § 15:23 —The constitutionality of bias-crime laws
- § 15:24 —Federal legislation
- § 15:25 —Victim services agencies

## **III. PROBLEMS OF LESBIAN, GAY, BISEXUAL, AND NON-GENDER-CONFORMING PRISONERS**

- § 15:26 Introduction: the need for advocacy and public attention
- § 15:27 Seeking protection from harm
- § 15:28 —Sentencing
- § 15:29 —Remedies during incarceration
- Appendix 15A. Affirmation for Pre-Trial Motions in Demonstration Case

## **PART D. AIDS**

### **CHAPTER 16. REPRESENTING CLIENTS LIVING WITH HIV**

#### **I. OVERVIEW**

- § 16:1 Introduction

- § 16:2 Facts about HIV—Medical facts
- § 16:3 —Psychological and social concerns
- § 16:4 Facts about HIV/AIDS—Advancements in HIV treatment and prevention

## **II. PRACTICAL ISSUES IN REPRESENTING CLIENTS LIVING WITH HIV**

- § 16:5 Introduction
- § 16:6 Disclosure of HIV-positive status in litigation
- § 16:7 Use of pseudonym in litigation
- § 16:8 Case evaluation and settlement

## **III. PREPARATION FOR ILLNESS, INCAPACITY, AND DEATH**

### **A. OVERVIEW**

- § 16:9 Getting one's affairs in order
- § 16:10 Health, financial, and estate planning

### **B. CRITICAL DOCUMENTS**

- § 16:11 Generally
- § 16:12 Financial power of attorney
- § 16:13 Nomination of guardian and/or conservator
- § 16:14 Advance Health Care Directives
- § 16:15 Non-probate transfers on death
- § 16:16 Wills
- § 16:17 —Testamentary capacity and undue influence
- § 16:18 —Funeral plans and burial instructions
- § 16:19 Trusts
- § 16:20 Additional considerations for parents

## **IV. OBTAINING PUBLIC BENEFITS**

### **A. FEDERAL PROGRAMS**

- § 16:21 Generally
- § 16:22 Social security disability benefits—Social Security Disability Insurance (SSDI)
- § 16:23 —Supplemental Security Income (SSI)
- § 16:24 —Evaluation of the disability
- § 16:25 —Presumptive SSI benefits
- § 16:26 —Application process
- § 16:27 —Appeal process
- § 16:28 —Trial work period/return to work
- § 16:29 Medicaid
- § 16:30 Medicare



## TABLE OF CONTENTS

- § 16:31 Food stamps
- § 16:32 Veterans' benefits

### B. STATE AND LOCAL PROGRAMS

- § 16:33 State disability insurance
- § 16:34 General assistance and welfare

### C. OTHER BENEFIT PROGRAMS

- § 16:35 Generally

## V. LEGAL PROTECTIONS FOR PEOPLE LIVING WITH HIV/AIDS

- § 16:36 Introduction
- § 16:37 The Americans with Disabilities Act (ADA)
- § 16:38 The Rehabilitation Act of 1973
- § 16:39 The Family and Medical Leave Act
- § 16:40 The Fair Housing Act
- § 16:41 State and local antidiscrimination laws
- § 16:42 State laws protecting the confidentiality of HIV-related information

## VI. CRIMINAL LAW AND HIV/AIDS

- § 16:43 Introduction
- § 16:44 HIV specific criminal statutes
- § 16:45 HIV as a sentence enhancement
- § 16:46 Collateral Consequences of HIV Criminal Convictions

## CHAPTER 17. HIV TESTING

### I. OVERVIEW

- § 17:1 Introduction
- § 17:2 HIV Testing: Background and Current Policy
- § 17:3 HIV Testing: Problems and Concerns with Current Policy
- § 17:4 Testing procedures

### II. PREVENTING DISCRIMINATION; ASSURING CONFIDENTIALITY OF RESULTS

- § 17:5 Anonymous and confidential HIV testing
- § 17:6 Reporting requirements
- § 17:7 Consent and Counseling requirements

### III. MANDATORY TESTING

- § 17:8 Generally

- § 17:9 Screening as public health tool
- § 17:10 Blood donations
- § 17:11 Workplace screening
- § 17:12 —Specific legislation
- § 17:13 —State handicapped discrimination laws
- § 17:14 —Federal handicapped discrimination laws
- § 17:15 —The Fourth Amendment
- § 17:16 —Other causes of action
- § 17:17 Insurance
- § 17:18 Family life
- § 17:19 Newborn infant screening
- § 17:20 Outside of employment—Persons accused or convicted of crimes
- § 17:21 —Police protection and first provider statutes
- § 17:22 —Other mandatory HIV testing provisions
- § 17:23 —Constitutional and other challenges
- § 17:24 Mandatory disclosure—Statutes and statutory remedies
- § 17:25 —Partner notification
- § 17:26 —Constitutional challenges

## **CHAPTER 18. EMPLOYMENT AND AIDS**

### **I. OVERVIEW**

- § 18:1 Introduction
- § 18:2 Conversion of benefits: Top priority

### **II. SURVEYING THE LEGAL THEORIES**

- § 18:3 Generally
- § 18:4 Rehabilitation Act of 1973
- § 18:5 —Federal government or agency as employer
- § 18:6 —Federal contractor as employer
- § 18:7 —Recipients of Federal Aid
- § 18:8 —Recent interpretations and applications of the Act
- § 18:9 Americans with Disabilities Act
- § 18:10 State statutory and regulatory protection
- § 18:11 Local ordinances
- § 18:12 Common law protection—Public policy
- § 18:13 —Promises made in the employee handbook
- § 18:14 —Implied covenants—Termination only for cause
- § 18:15 — —Good faith and fair dealing
- § 18:16 —Right to privacy; Defamation
- § 18:17 —Emotional distress

### **III. PRACTICAL CONSIDERATIONS**

- § 18:18 Understanding the requirement for exhaustion of administrative remedies

## TABLE OF CONTENTS

§ 18:19	Expedited trial dates; Preserving evidence with videotaped depositions
§ 18:20	Jury selection
§ 18:21	Mitigation
§ 18:22	Conclusion
Appendix 18A.	Sample Demand Letter for an AIDS-Based Termination Case
Appendix 18B.	Los Angeles Ordinance Prohibiting AIDS-Related Discrimination
Appendix 18C.	San Francisco Ordinance Prohibiting AIDS-Related Discrimination

## CHAPTER 19. INSURANCE AND AIDS

### I. OVERVIEW

§ 19:1	Introduction
§ 19:2	Regulatory overview
§ 19:3	Obtaining coverage for those with HIV
§ 19:4	Continuing Financial Challenge of AIDS

### II. MAINTAINING COVERAGE FOR THOSE WITH HIV

§ 19:5	Cancellation
§ 19:6	COBRA
§ 19:7	State laws

### III. OBTAINING CLAIMS PAYMENT FOR THOSE WITH HIV

§ 19:8	Process
§ 19:9	—Experimental treatments/off-label drugs
§ 19:10	Home care and private nursing
§ 19:11	Managed care issues
§ 19:12	HIV exclusion and caps
§ 19:13	Preexisting condition exclusions
§ 19:14	Disability claims
§ 19:15	Returning to work

### IV. RESISTING RESCISSION

§ 19:16	Generally
§ 19:17	Intent
§ 19:18	Materiality of undisclosed facts
§ 19:19	The impostor defense
§ 19:20	“End-runs” around incontestability

## **V. ANTIBODY TESTING AND DISCRIMINATION IN INSURANCE UNDERWRITING**

- § 19:21 Generally
- § 19:22 Antibody screening
- § 19:23 —As condition to application
- § 19:24 —Nonconsensual or without adequate information
- § 19:25 —Limiting the damage of positive
- § 19:26 Demographic screening

Appendix 19A. National Association of Insurance  
Commissioners Guidelines for Medical/  
Lifestyle Questions on Applications;  
Underwriting Guidelines Affecting AIDS  
and ARC

**Table of Laws and Rules**

**Table of Cases**

**Index**