NATIONAL CENTER ON LAW & ELDER RIGHTS

How Can Legal Assistance Providers Better Meet the Needs of LGBTQ+ Older Adults?

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Introduction

Free and low-cost legal assistance provides a critical service for low-income individuals of all ages. Without these services, those of limited means would face additional barriers in accessing the courts, protecting their rights and interests, and accessing programs and services. However, individuals with low-income are diverse, and different communities experience unique, and sometimes compounded, legal problems that are seldom addressed in a one-size-fits-all manner. This issue brief addresses specifically how legal assistance providers can best serve LGBTQ+2 older adults. It identifies specific legal needs among LGBTQ+ older adults and promising practices to consider when serving them.

Overall, low-income older adults frequently require legal help accessing health care and public benefits, retaining housing, and avoiding eviction or foreclosure. They may also need support when making decisions if they develop dementia or other cognitive impairments. LGBTQ+ older adults often have additional legal needs layered on top of those. For example, many LGBTQ+ individuals have suffered housing or employment discrimination and continue to experience this discrimination, or the effects of it, as they age. With equal access to marriage in 2015, LGBTQ+ older adults may still need legal help ensuring access to spousal benefits. Transgender older adults may have similar legal needs, while also needing help specific to their gender identity, such as name change documents.

The Older Americans Act (OAA) requires that services are aligned with and responsive to the interests of older adults with the greatest economic and social needs. Greatest social need is defined as including sexual orientation, gender identity, or sex characteristics, as well as HIV status and other factors.³ Thus, it is important that legal assistance programs funded under the OAA seek to reach and serve LGBTQ+ older adults and build expertise in solving the legal issues most relevant to them.

All legal services organizations can be prepared to reach and serve LGBTQ+ older adults. The American Bar Association's Standards for the Provision of Civil Legal Aid <u>Standard 4.4</u> asks that a legal aid organization ensure its staff and governing body can provide assistance in a culturally competent manner to those people most affected by poverty, racism, discrimination and other forms of structural oppression, including LGBTQ+ identity.

Discrimination and Poverty Among LGBTQ+ Older Adults

As an aging population and rising inequality lead to higher rates of poverty among all older adults, LGBTQ+ individuals are even more likely to age into poverty. Employment discrimination leads to lower earnings over a lifetime and lower lifetime Social Security benefits. Lack of traditional access to the financial benefits of marriage has left some LGBTQ+ older adults without access to partner pension benefits. Discrimination in the form of the lack of legal protections for LGBTQ+ individuals in areas like housing, health care, education, and

¹ The issue brief is based in part on a Justice in Aging special report released in 2016.

² This issue brief primarily uses the acronym LBGTQ+ for lesbian, gay, bisexual, transgender, or queer and others who identify as part of the community. However, we will utilize other acronyms when citing a source that uses a variation of this acronym.

^{3 45} CFR §1321.3.

employment financially penalize LGBTQ+ people throughout their lives. LGBTQ+ older adults are still living with the legacy and impacts of past discrimination. As a result, they continue to face a higher risk of poverty than the general population. LGBT people as a group had higher odds of being poor than cisgender straight people—17% higher compared to cisgender straight women and 15% higher compared to cisgender straight men. Since the COVID-19 pandemic hit, new analyses indicate that these inequities persist with a higher percentage of LGBT than non-LGBT people having incomes below the federal poverty level. These poverty rates persist in part because LGBTQ+ individuals report significantly lower annual household incomes than the general population.

At the intersection of race, sexual orientation and gender identity (SOGI), and age, LGBTQ+ older adults of color often grapple with economic insecurity stemming from various factors, including workplace discrimination, limited educational and job training opportunities, and a higher likelihood of living in poverty. The COVID-19 pandemic has further exacerbated these economic challenges, as many LGBTQ+ older adults of color lost their jobs or experienced reduced hours and income. The cumulative impact of discrimination and limited opportunities contributes to higher poverty rates among LGBTQ+ older adults of color compared to other demographic groups.

Facing intersecting forms of discrimination and limited opportunities compound challenges that lead to higher poverty rates among LGBTQ+ older adults compared to their non-LGBTQ+ counterparts. For instance, nearly one-third of LGBTQ+ older people live at or below 200% of the federal poverty level, compared to a quarter of non-LGBTQ+ older people. Poverty rates are even higher for LGBTQ+ people of color, those aged 80 and older, bisexual older people, and transgender older people.

In New York, forty-four percent of LGBTQ+ older adults report concerns over the necessity of working well beyond retirement age, compared with only 26 percent of non-LGBTQ+ people. This is a consequence of spouses or partners of older LGBTQ+ people having either died or retired before marriage equality passed. Therefore, they may be unable to access Social Security survivor benefits, their partner's benefits, or assets. Furthermore, 34 percent of LGBTQ+ older adults and 54 percent of older transgender and gender-nonconforming people fear being compelled to go back in the closet to secure elder housing. 15

⁴ Center for American Progress, Map, et al, <u>Paying an Unfair Price: The Financial Penalty for Being Gay in America</u>, (September 2014; Updated November 2014).

⁵ UCLA Williams Institute, <u>LGBT Poverty in the United States: A Study of Differences Between Sexual Orientation and Gender Identity</u> <u>Groups</u>, (October 2019).

⁶ UCLA Williams Institute, *LGBT Poverty in the United States: Trends at the Onset of COVID-19*, (February 2023).

⁷ SAGE National Resource Center on LGBTQ+ Aging, <u>Health Equity & LGBTQ+ Older Adults of Color: Engaging Individuals, Communities, and Organizations</u>, (2023).

⁸ *Id.*

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¹⁰ AARP & SAGE, Disrupting Disparities: Solutions for LGBTQ New Yorkers Age 50+, (January 2021).

¹¹ *Id.*

¹² SAGE National Resource Center on LGBTQ+ Aging, New Report Reveals Disparities for LGBTQ+ Seniors, (January 2021).

¹³ *Id.*

¹⁴ Id.

¹⁵ *Id.*

Legal Needs

Access to Economic Security Benefits

Many older adults rely on safety net benefits like Social Security and SSI to survive. Likewise, private and public pension income can make the difference between paying the rent and experiencing a loss of housing. Because legal decisions, such as the federal decision that struck down the Defense of Marriage Act (DOMA), have cleared the way for LGBTQ+ individuals to marry, more LGBTQ+ individuals are entering into marriage, which can provide additional financial security through Social Security survivor benefits if a spouse dies. But for very low-income individuals married to a person with a higher income, the additional income can prevent them from receiving benefits they may rely on, or cut existing benefits, such as SSI eligibility and amount of benefits being effected by mariage. Marriage can also impact eligibility for private or public pension benefits. For this reason, LGBTQ+ older adults may need legal counseling to understand how marriage could affect their eligibility for benefits or the amount they receive. Legal assistance providers can build the expertise needed to help LGBTQ+ older adults fully understand the impact marriage can have on Social Security, SSI, and pension income.

Some surviving same-sex partners and spouses across the country continued to be denied Social Security survivor's benefits because they were unable to be married for at least nine months before their partners and spouses died, due to discriminatory state marriage laws. ¹⁶ Two recent court cases have remedied this issue, and now the Social Security Administration can no longer deny survivor's benefits to those same-sex survivors who could not previously meet the marriage-related requirements as a result of discriminatory laws. ¹⁷ Legal assistance attorneys can help LGBTQ+ older adults navigate the process of seeking these <u>survivor benefits</u> by helping them provide necessary documentation and prepare claimants to answer eligibility questions. ¹⁸

Access to Veterans Benefits

Older LGBTQ+ Veterans have unique legal needs and may face barriers to accessing services and supports. The effects of now repealed policies like "Don't Ask Don't Tell" still persist. Many LGBTQ+ individuals who have served in the military do not identify as "Veterans" and fear discrimination and prejudice when engaging with social services.

Legal assistance providers can familiarize themselves with the challenges this community faces and provide person-centered services to LGBTQ+ Veterans, including considering using terminology that may resonate most with this group. Helping clients with discharge upgrades or corrections can help ensure that they have access to critical benefits and resources.¹⁹

Health Inequities and Discrimination in Health Care

LGBTQ+ older adults experience a range of health inequities that make access to health care even more imperative for this population. LGBTQ+ individuals may experience discrimination in health care delivery and lack of health insurance throughout their lifespan. These barriers to inclusive and competent health care can cause compounding health inequities over time as LGBTQ+ individuals age.²⁰ The cycle of poor health outcomes continues, leading to higher health care costs, which can push older LGBTQ+ individuals into poverty, even if they were not already poor.²¹

¹⁶ National Center on Law & Elder Rights, Patching the Safety Net: Survivor's Benefits for LGBTQ Older Adults, (January 2022).

¹⁷ *Id.*

¹⁸ *Id*

¹⁹ National Center on Law & Elder Rights, Strategies for Addressing the Needs of LGBTQ+ Veterans, (May 2024).

²⁰ Journal of Health Care Law & Policy, <u>303 Creative: The Public Perils of Ignoring Public Health Harms in LGBTQ Rights Cases</u>, (2024).

²¹ The National Gay and Lesbian Task Force, *No Golden Years at the End of the Rainbow: How a Lifetime of Discrimination Compounds Economic and Health Disparities for LGBT Older Adults*, (August 2013).

Further, difficulty finding culturally competent care providers exacerbates these challenges.²² The challenge may be particularly true in long-term care settings, where a lack of cultural competency in the context of the intimacy of a residential setting can re-stigmatize LGBTQ+ residents.²³

Legal assistance providers can help LGBTQ+ older adults protect their rights and address some of these issues. The Affordable Care Act included increased protection against discrimination in health care settings through Section 1557. New regulations issued under Section 1557 make clear that Section 1557 protects against sex discrimination, including on the basis of sexual orientation and gender identity, consistent with the U.S. Supreme Court's holding in *Bostock v. Clayton County*. Furthermore, the new rule applies Section 1557 to all Medicare providers. This rule, along with other protections, serves as a powerful legal tool for legal services advocates to use on behalf of their LGBTQ+ clients. Section 256

Medicare and Medicaid

Many low-income older adults, including LGBTQ+ older adults, rely on a combination of Medicare and Medicaid to provide needed health care coverage. Legal assistance attorneys, many of whom have expertise in these essential health programs, can be aware of additional help that LGBTQ+ older adults may require to access needed Medicare and Medicaid services.

For example, LGBTQ+ couples should be counseled around eligibility for Medicaid, Medicare Savings Programs such as the Qualified Medicare Beneficiary (QMB) program, and the Part D Medicare Low Income Subsidy Program.²⁷ Being married may also allow an LGBTQ+ older adult to qualify for Medicare Part A coverage based on a spouse's work history if certain conditions are met.²⁸ For transgender older adults, legal assistance providers can be well-versed on Medicare's policies regarding gender identification, coverage of surgeries, transition-related drugs, and sex-specific procedures, as well as corresponding rules under their state's Medicaid program.²⁹ Finally, under a Medicare National Coverage Determination expected in September 2024, Medicare is poised to begin covering oral and injectable PrEP for HIV drugs.³⁰

Fighting Housing Discrimination, Evictions, and Accessibility Challenges

Housing affordability poses a critical challenge to many low-income older adults, and LGBTQ+ older adults also experience difficulty finding and retaining accessible, LGBTQ+ accepting, and friendly housing. Almost one quarter of transgender older people report experiencing housing discrimination.³¹ In 200 tests across 10 different states, 48% of same-sex couples seeking housing experienced differential treatment (as compared to heterosexual couples) when inquiring about housing in a senior living facility. More than half of LGBT older people report being discriminated against in employment and/or housing.³²

²² Health Affairs, For LGBTQ Patients, High-Quality Care in A Welcoming Environment, (May 2020).

²³ SAGE National Resource Center on LGBTQ+ Aging, <u>LGBTQ+ Older Adults Fear Discrimination in Long-Term Care, Need Protections: Study</u>, (August, 2021).

²⁴ Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116 (2024).

²⁵ U.S. Dep't of Health & Human Servs., *Nondiscrimination in Health Programs and Activities; Final Rule*, 45 C.F.R. Part 92, 81 FR 31375.

²⁶ U.S. Dep't of Health & Human Servs., LGBTQI+ Older Adults Know Your Rights, (2024).

²⁷ Justice in Aging & SAGE, Marriage, Medicare & Medicaid: What Same-Sex Couples Need to Know, (2023).

²⁸ Id.

²⁹ Justice in Aging & SAGE, Medicare & Transgender Older Adults: What Transgender People Need to Know, (2023).

³⁰ Centers for Medicare & Medicaid Services, <u>PrEP for HIV National Coverage Determination: Technical Frequently Asked Questions for Pharmacies.</u>

³¹ SAGE & National Resource Center on LGBT Aging, Facts on LGBT Aging, (2021).

³² Id.

It is important for legal assistance attorneys to understand the barriers low-income LGBTQ+ individuals face in securing housing. Legal services programs can be prepared to assist clients or refer them to other advocates when potential housing rights violations have occurred. LGBTQ+ older adults also face specific challenges and discrimination in finding and retaining long-term care in places where they can be themselves.³³ As a result, LGBTQ+ older adults may require legal assistance to contest nursing facility involuntary discharge cases.

They may also need legal help to <u>assert their basic residents' rights</u>, such as a right to choose their own physician or to have visitors. Legal assistance providers can closely follow policies intended to remedy these problems, such as a potential LGBTQ+ Older Adults Bill of Rights and corresponding guidance clarifying non-discrimination protections in long-term care settings.³⁴

Wills, Powers of Attorney, and Health Care Advance Directives

Advance planning documents are critical legal documents for LGBTQ+ older adults. These advance planning documents include wills, financial powers of attorney, and health care advance directives (sometimes called living wills, appointments of health care agent, or health care powers of attorney). Although progress has been made in recent years, legal challenges can still arise for LGBTQ+ individuals in terms of inheritance rights, health care decision-making, recognition of chosen family relationships, and ensuring that a LGBTQ+ individual's choices are honored.

From deciding how their property should be divided after their death, to appointing loved ones to make important health care or financial decisions during their lifetime, advance planning documents can help LGBTQ+ individuals keep control over their decisions and choices. In many instances, for example, advance planning can serve as an alternative to guardianship and help avoid the need for guardianship should the older adult become unable to make decisions about their own health, safety, and welfare. Importantly, unlike guardianship and other court involvement, advance planning tools are implemented with the consent and at the direction of the older adult and terminable at their instruction, thereby advancing LGBTQ+ older adults' self-direction and autonomy.

Legal assistance attorneys can continue to talk with individual clients and conduct community outreach about the importance of wills, powers of attorney, and health care advance directives. For LGBTQ+ individuals, advance planning may be complicated by the community's history, culture, and attitudes. Legal assistance providers and other advocates can address this through implementing community-focused and community-driven outreach strategies, including those that build trust by partnering with existing community institutions.

Assistance with Name Change Documents and Paperwork

While many legal services providers may not consider name changes as higher-level case priorities, the need for name change documents and paperwork is different for transgender individuals, particularly transgender older adults. Not only may transgender older adults have difficulty with service providers or getting help with public benefits if the name they use is different from the name on their documents, but it is important that their documents do not "out" them.³⁵ For these reasons, going through the process of changing one's legal name and gender is highly important for the dignity of transgender individuals. The process, however, can be complicated, especially for older people with decades of identity documents and public records. Frequently, the process takes place online. For older transgender individuals who do not have access to the internet or lack digital skills, navigating the maze of documents can be paralyzing. Legal assistance attorneys can meet an important need in helping transgender older adults navigate this complexity by providing this service and being well-versed in their state's process.

³³ SAGE & Human Rights Campaign Foundation, Finding an LGBTQ+ Inclusive Long-Term Care Community, (2021).

³⁴ Exec. Order No. 87 FR 37189, (2022).

³⁵ Psychology Benefits Society, *Invisibility Squared: The Challenges of Living as a Transgender Older Adult*, (March 2015).

Project Spotlights

There are a number of legal assistance providers working to address the legal needs of LGBTQ+ adults. Some of these include:

- Center for Elder Law & Justice's <u>Aging with Pride</u> program provides free civil legal services to
 meet the needs of the older LGBTQ+ community, including name changes, gender marker
 changes, advance planning, and long-term care resident advocacy.
- Center for Disability & Elder Law's <u>Proud to Thrive</u> program provides free or low-cost legal services for low-income LGBT+ older adults and persons with disabilities across Cook County. They also implement monthly legal clinics in LGBT+-affirming locations.
- <u>SAGEVets</u> is a statewide program that helps LGBTQ+ older adults who are veterans of military service improve their access to the VA and other Veteran services, as well as support their overall health and wellness. They provide legal counsel and representation on discharge status upgrades.

Promising Practices in Outreach, Intakes, and Environment

In addition to developing expertise in the most pressing legal issues that LGBTQ+ older adults face, it is also important for legal assistance attorneys to develop ways to effectively engage with the older LGBTQ+ community. The fear of not being welcomed or understood can prevent LGBTQ+ older adults from seeking help when they need it. Cultural competency can be effectuated through many different practices that signal that a provider understands the unique issues, concerns, experiences, and history of a group. Comprehensive and regular training in cultural competency, like the SAGECare program, can help create more LGBTQ+ welcoming organizations.

The promising practices outlined below will help legal services providers serve a community whose members may not be easy to find, develop screening processes that will bring out underlying issues, and welcome and serve LGBTQ+ older adults effectively.

Outreach

Social isolation is something many older adults experience, but for LGBTQ+ older adults, the risk is even greater. LGBTQ+ older adults are more likely to live alone and may have less robust support networks.³⁶ Among LGBTQ+ older adults who came of age during a time of rampant discrimination, the fear of mistreatment or discrimination may prevent them from seeking the legal help they need.³⁷ Alternatively, they may seek legal help for one issue, but not mention sexual orientation or gender identity, effectively hiding other issues that they may need assistance with and preventing any analysis on how their identity may impact the legal issues they have identified.

For legal services organizations to effectively reach LGBTQ+ older adults, a good first step is to build partnerships with trusted, local organizations such as LGBTQ+ centers and faith-based groups that serve LGBTQ+ individuals. A champion within a partner organization—someone who can validate your organization and serve as a bridge to the community—is particularly useful.³⁸ In addition, a partnership is not built through one interaction. These organizations tend to offer programs and activities throughout the year, so consider a longer-term outreach strategy that includes various touchpoints, like Pride Month celebrations and others, as part of an overall strategy to build a presence and trust with the organization and LGBTQ+ older adults.

³⁶ SAGE & National Resource Center on LGBT Aging, *Facts on LGBT Aging*, (2021).

³⁷ SAGE & National Resource Center on LGBT Aging, <u>Inclusive Services for LGBT Older Adults: A Practical Guide to Creating Welcoming Agencies</u>, (2020).

³⁸ Justice in Aging, Equitable Guardianship Reform Series: Least Restrictive Alternatives to Guardianship, (April 2024).

Many of these organizations may have senior groups that would welcome someone from a legal aid organization as a speaker. Legal assistance providers could also offer to do free legal clinics for these groups on specific issues of high need, and consider even co-locating these services within a center on an ongoing basis. Legal assistance programs may also consider asking these organizations if they'd be willing to list legal services as a resource on their website, provide referral information to their social services staff, and allow informational materials in common spaces or with program staff.

Another way to reach LGBTQ+ older adults would be to advertise in local LGBTQ+ publications, especially those that might be read by an older audience. The advertising services could explicitly identify areas of high legal need for LGBTQ+ older adults, such as name changes or health care access. Including photos of LGBTQ+ older adults in communications also signals a certain level of visibility to prospective clients who are LGBTQ+ older adults. This can help create an environment even prior to the intake process that welcomes LGBTQ+ older adults.

As legal services providers develop relationships with community partners, they can consider further elevating the experiences of LGBTQ+ older adults through appointment to an organization's advisory and/or governance bodies.

Intake Process

A legal assistance intake process should be both comprehensive and culturally competent in order to best serve LGBTQ+ older adults. Regardless of the legal issue the client presents, intake questions should be comprehensive (but not overwhelming) so as to identify underlying legal issues an individual might be facing that require action. Cultural humility and cultural competence are also important in order to build trust between the attorney and client.

There are a few basic promising practices to follow. Gender identity or sexual orientation should never be assumed. It's common, particularly when talking to an older person, to assume heterosexuality. Providing culturally competent services includes not making assumptions about people's sexuality regardless of how they "present" or their age. Legal aid organizations can review call scripts with an eye toward inclusive language and ask questions about sexual orientation and gender identity in a neutral fashion.³⁹ An example of inclusive language is to ask if someone has a spouse, partner, or significant other.

Organizations can review their forms to ensure that they include inclusive language, such as a blank space for gender identity, rather than two check boxes for Male and Female. When asking about a client's gender identity, they can also be asked about their pronouns. If a person seems uncomfortable with any of your questions, move on. 40 After a relationship or trust has been developed, they may come back to the question later. Inclusive Questions for Older Adults: A Practical Guide to Collecting Data on Sexual Orientation and Gender Identity provides more information on gathering information from clients and prospective clients.

When asking sensitive questions at intake, legal assistance organizations can emphasize that the information being gathered is confidential. Keep in mind that because many initial intakes are conducted by telephone, it may not be possible to gauge body language and other in-person visual cues, so preparing more open-ended questions can help reveal other unmet legal needs and provide more context for the representation.

If a referral to another provider is necessary, programs should be mindful that any recommendations or referrals are to a trusted organization that provides culturally competent services to the LGBTQ+ community.

³⁹ SAGE & National Resource Center on LGBT Aging, *Inclusive Services for LGBT Older Adults: A Practical Guide to Creating Welcoming Agencies*, (2020).

⁴⁰ Id.

Welcoming Environment

It is important to make your organization affirmatively welcoming to LGBTQ+ older adults, rather than simply neutral. There are a few ways to ensure that LGBTQ+ older adults know that they have arrived in a place that can serve them sensitively and respectfully. Visual cues such as rainbow flags or Pride stickers or posters are one way to convey that message. As mentioned before, marketing materials or posters can include photos of people that show a diverse spectrum of older adults, including same-sex couples and diversity of gender presentation. Flyers advertising senior centers that provide services aimed at LGBTQ+ older adults in your community can also signal that the organization is aware of this community and the challenges that it faces. Likewise, educational materials that include legal information specific to LGBTQ+ older adults, such as the information produced by the National Resource Center on LGBT Aging, can serve as additional cues.

In the office, restrooms can also be well-signed, making it clear that they are for all genders.⁴² Another crucial component of a welcoming environment is to ensure that the organization is affirmatively welcoming to LGBTQ+ older adults in a way that is visible to all clients to signal that any disrespect toward LGBTQ+ people is unacceptable.

A welcoming environment can also include the recruitment and retention of a diverse staff. Diverse hiring practices may help better serve the LGBTQ+ community and bring diverse viewpoints and skills to an organization. All staff should be trained in the legal issues that LGBTQ+ older adults might experience in order to better serve clients.

Conclusion

Legal services organizations play an important role in alleviating the effects of poverty on low-income Americans. Because LGBTQ+ older adults have lived with decades of discrimination that have led to higher rates of poverty, this group of older adults has a great need for legal services to defend their rights and ensure they have access to the income supports, health care, and housing they need. Low-income LGBTQ+ older adults also have distinct legal needs that some other groups do not have, such as the need to fight discrimination in housing and health care, to navigate the legal complexities of name and gender changes, and to understand how new laws around same-sex marriage may impact their particular situation. Legal services organizations can help ensure that low-income LGBTQ+ older adults have an opportunity to age in dignity with the services and supports they need by gaining competence in the legal issues facing this group, by finding creative and community-centered ways to reach older LGBTQ+ individuals who need help, and by building trust.

Additional Resources

- SAGE & National Resource Center on LGBT Aging, <u>Facts on LGBT Aging</u>
- National Center on Law & Elder Rights
 - » Patching the Safety Net: Survivor's Benefits for LGBTQ Older Adults
 - » Strategies for Addressing the Needs of LGBTQ+ Veterans
 - » Equity Tool
- Justice in Aging & SAGE
 - » Marriage, Medicare & Medicaid: What Same-Sex Couples Need to Know
 - » Medicare & Transgender Older Adults: What Transgender People Need to Know

⁴¹ *Id.*

⁴² Id.

- SAGE & Human Rights Campaign Foundation, <u>Finding an LGBTQ+ Inclusive Long-Term Care Community</u>
- SAGE & National Resource Center on LGBT Aging, <u>Inclusive Services for LGBT Older Adults: A Practical Guide to Creating Welcoming Agencies</u>
- SAGE, <u>Inclusive Questions for Older Adults: A Practical Guide to Collecting Data on Sexual Orientation and Gender Identity</u>

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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