

## **CONFIDENTIALITY OF MEDICAL INFORMATION: LAW AND THE AIDS PATIENT**

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### INTRODUCTION

The Acquired Immune Deficiency Syndrome (AIDS) virus was discovered in 1981. No cure currently exists for the deadly disease. AIDS impairs the body's ability to fight infections, and most AIDS victims die from secondary infections. Certain groups of people, particularly homosexual men and intravenous drug users, run the greatest risk of contracting AIDS. People transmit AIDS through exchanges of body fluids, usually semen or blood. The most common transmission is through sexual activity; however, the virus can also be transmitted through needles that have been in contact with infected blood. This transmission occurs not only when drug users share needles, but also when a health worker accidentally sticks himself or herself with a needle used to draw an AIDS patient's blood. AIDS is caused by a virus called HIV. A person can carry the virus for several years before converting to an active case of AIDS. Blood tests can identify the HIV virus, but only after an asymptomatic period of time between six weeks and one year. The tests for the HIV virus are not always accurate.

Between one and four million people currently have AIDS in the United States.<sup>1</sup> The unique medical, legal and social issues surrounding AIDS challenge health care providers as they strive to protect the privacy of AIDS patients, while at the same time, attempt to slow the spread of the virus and provide a safe work place for employees. This paper will examine policy, legal, and constitutional issues surrounding this challenge.

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1. Michael MacDonald, Kathryn C. Meyer & Beth Essig, Health Care Law: a Practical Guide sec. 20.07(1) (1990).

#### AND POLICY CONSIDERATIONS

The concept that a patient's medical information should be confidential has its ethical basis in the Hippocratic Oath which cautions that "whatsoever things I see or hear concerning the life of a man, in attendance on the sick or even apart therefrom which ought not be noised about, I will keep silent thereon, counting such things to be professional secrets."<sup>2</sup> However, in today's world the circle of those who are privy to such secrets is growing. Many people in a hospital review patient records. In addition to physicians and nurses treating the patient, hospital quality assurance staff, employees of agencies that accredit hospitals, and insurance case managers review medical records routinely. Studies estimate that between seventy-five and one hundred people may have access to medical records in a typical U.S. hospital.<sup>3</sup> Given that the likelihood of someone discovering that a patient has tested HIV positive seems rather great, should steps be taken to insure that positive test results be held in strict confidence? Or do some people "need to know?"

The primary argument for releasing information about positive HTV test results is the need to preserve life and protect others from physical harm.<sup>4</sup> A person infected with HIV already may have infected, or could still infect, sexual partners, those with whom she or he has shared needles for intravenous drug use, anyone who might have received a blood transfusion with the infected person's blood, or health workers, who have sustained or might sustain needle-stick injuries after drawing the patient's blood. The disclosure of a positive HIV test enables HIV patients to minimize the risk of infection to others. Early diagnosis of the infection allows for treatment with such drugs as Zidovudine (AZT) which help AIDS victims to sustain good health for as long as possible. People who learn from disclosure that they are at risk of AIDS can be tested on a regular basis for such early diagnosis and treatment. Disclosure also allows for the alteration of behavioral patterns with respect to precautionary measures for the high exposure risk group.

On the other hand, proponents of protecting patient confidentiality argue that a full and free exchange of information between medical

<sup>2</sup>James Walker Smith, Hospital Liability sec. 14.04(1) (1987). The American Medical Association's Principles of Medical Ethics also prohibits a physician from revealing the confidences of a patient gleaned over the course of treatment unless the law or welfare of the public or the individual so demands. Confidentiality in light of both the AMA's Principles of Medical Ethics and the Hippocratic Oath are discussed in *Hague v. Williams*, 181 A.2d 345 (NJ. 1962).

<sup>3</sup>BARRY FURROW ET AL., HEALTH LAW: CASES, MATERIALS, AND PROBLEMS (1987) at 220; Taur, *AIDS: Toward an Ethical Public Policy*, 1988 BIOMEDICAL ETHICS REV. 79, 83.

<sup>4</sup>See Turkington, *Confidentiality Policy for HIV-related Information: An Analytical Framework for Sorting Out Hard and Easy Cases*, 34 VIUL L REV. 871, 887 (1989). See also Furrow, *AIDS and the Health Care Provider: The Argument for Voluntary HIV Testing*, 34 VnLL REV. 823 (1989).

professionals and patients is necessary for optimal diagnosis and treatment. Since people who fear they may be HIV positive also fear public prejudice, they may refuse medical treatment if they believe that such treatment will result in the disclosure of their condition. Whereas people who are informed of their condition are more likely themselves to lessen the risk of transmission through behavioral modifications, continued ignorance, coupled with fear and misplaced hope, could increase the spread of the disease.<sup>5</sup> While sound policy arguments exist on both sides of the confidentiality/disclosure issue, legislative mandates in a few states may guide in part the resolution of that dispute.

#### STATUTORY CONSIDERATIONS

Some state statutes require the confidentiality of patient records, subject to specific exceptions. For example, a New Mexico statute provides, *inter alia* that "all health information that relates to and identifies specific individuals as patients is strictly confidential and shall not be a matter of public record or accessible to the public...[However] a custodian of information may furnish the information upon request to a governmental agency or its agent, a...licensed health facility, or staff committees of such facilities, and the custodian furnishing the information shall not be liable for damages to any person for having furnished the information."<sup>6</sup> Nevertheless, the threat of potential litigation concerning the interpretation of such general confidentiality provisions in light of the current AIDS crisis may offer little assurance to health care providers with respect to the proper course of action for minimizing liability.

In contrast, New York, Florida and Georgia have enacted statutes specific to HIV information. The New York statute allows, but does not obligate, physicians to disclose confidential HIV information to spouses, sexual partners or those who have shared hypodermic needles or syringes with the infected person; however, the physician must have counseled the infected person, must reasonably believe that the individual will not inform the contacts, and must inform the patient of the intent to disclose the HIV information.<sup>7</sup> Florida limits discretionary notification to a sexual partner or needle sharing partner if the patient disclosed the contacting name, the patient refuses to notify the contact, and if the health care practitioner notifies the patient of the intent to inform the contact. Again, the health care provider is not obligated to disclose the HIV information.<sup>8</sup> Both statutes require that a party seeking access to protected patient information demonstrate a substantial

<sup>5</sup>Turkington, *id.*, at 885. See also Note, *The Constitutional Rights of AIDS Comers*, 99 HARV. L. REV. 1274 (1986).

<sup>6</sup>N.M. STAT. ANN. sec. 14-6-1 (1987).

<sup>7</sup>N.Y. Pub. Health Law sec. 2782 (4)(a) *et seq.* (McKinney Supp. 1989).

<sup>8</sup>FLA. STAT ANN. sec. 455.2416 (West Supp. 1989).

or compelling interest that is furthered by disclosure, and that there is no alternative means for gaining the needed information.<sup>9</sup> Georgia allows discretionary disclosure to spouses, sexual partners or children if an attempt is first made to notify the infected person that disclosure is going to be made.<sup>10</sup> In the absence of clear legislative guidance on the issue of confidentiality and the AIDS patient,<sup>11</sup> health care workers and institutions certainly are subject to non-statutory causes of action with respect to the release or the refusal to release medical records of HIV positive patients.

#### COMMON LAW CONSIDERATIONS

The release of confidential patient information could result in liability based upon one or more theories of tort law.<sup>12</sup> Negligence, the most common cause of action alleged in hospital liability cases,<sup>13</sup> could form one such basis of liability. To establish negligence, the plaintiff must show that the defendant owed a duty of care to the plaintiff, that the duty was breached, and that a casual connection exists between the defendant's breach and the plaintiff's injury or loss. Therefore, if a health care facility failed to require proper identification of persons seeking information regarding an HIV positive patient,<sup>14</sup> or failed to secure adequately the medical files of such a patient from casual viewing, liability in tort would attach, providing these omissions were the proximate cause of damages to the patient.

A more likely source of potential tort liability based in negligence, however, concerns third party liability. The common law recognizes a duty to warn with respect to the release of health care information if such a release is needed to prevent physical harm to third parties.<sup>15</sup> The hallmark case in

<sup>9</sup>Fla. Stat. Ann. sec.381.609 (2)(f) (West Supp. 1989); N.Y. Pub. Health Law sec. 2785 (McKinney Supp. 1989).

<sup>10</sup>GA. CODE ANN. sec. 24-9-47(a) (Harrison Supp. 1990).

<sup>11</sup>For the discussion of a possible solution see Comment, *Discrimination Against AIDS Victims in Health Care Treatment A Legislative Solution*, 21 U.W. LOS ANGELES L REV. 107 (1990).

<sup>12</sup>For a general discussion of tort liability and the confidentiality of patient files see Annot., *Physician's Tort Liability for Unauthorized Disclosure of Confidential Information About Patient*, 48 ALR. 4th 668 (1986).

<sup>13</sup>ARTHUR F. SOUHWICK, *THE LAW OF HOSPITAL AND HEALTH CARE ADMINISTRATION* (2nd ed. 1988) at 543.

<sup>14</sup>Some third parties legally might be entitled to medical information. See *infra* notes 22-25 and accompanying text.

<sup>15</sup>Turkington, *supra* note 4 at 888. Moreover, most states statutorily impose a duty upon physicians to report terminal conditions and contagious diseases to health officers. See e.g., CAL. HEALTH & SAFETY CODE sec. 3125 (West 1979); IND. CODE ANN. sec. 16-1-9.5-1 *et seq.* (Bums 1991).

this area, *Tarasoff v. Regents of University of California*<sup>16</sup> extended the common law duty to warn family members and health care workers of contagious conditions<sup>17</sup> to a duty to warn of a patient's mental condition if the patient posed a threat of physical harm to third parties. This decision has been interpreted to stand for the proposition that physicians are not liable for breaching a duty to keep patient communications secret if the interests of the public or other specific third parties outweigh the prejudice to the patient. The *Tarasoff* doctrine extends only to readily identifiable victims, not to the community at large, and the harm must be reasonably foreseeable.<sup>15</sup> However, any duty to warn foreseeable third persons who are at risk of an HIV positive patient's condition must be weighed against the patient's right to privacy. It is this clash in tort law, the duty to warn versus the right to privacy, which exposes health care providers to the greatest liability risk.

Case law recognizes that a physician's revelations of private facts about a patient's treatment to which consent was not granted, could constitute an invasion of privacy.<sup>19</sup> The Restatement (Second) of Torts states that "one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."<sup>20</sup> Undoubtedly, a reasonable person would expect and desire information about a positive HIV test to remain confidential. Controversy, however, might surround who is the "public" and the legitimacy of a third party's concern.<sup>21</sup> In *Belle Bonfils Memorial Blood Center v. District Court of Denver*<sup>22</sup> the court ruled that a patient infected with

16.131 Cat. Rep. 14, 551 P. 2d 334 (1976). *Tarasoff* invoked the confidentiality of a psychiatrist's evaluation of a patient in light of the patient's dangerous propensities directed toward a third party.

<sup>17</sup>The common law in some states requires a physician to disclose the existence of contagious diseases to spouses and immediate family members. *See e.g.* *Hoffman v. Blackmon*, 241 So. 2d 752 (Fla. Ct. App. 1970). Also some jurisdictions may exempt the release of confidential medical information to a spouse from invasion of privacy claims. *See infra* note 24 and accompanying text.

<sup>18</sup>*Southwick, supra* note 13 at 491.

<sup>19</sup>*See e.g.*, *Home v. Patton*, 287 So. 2d 824 (Ala. 1973) (disclosure of information to employer constituted an invasion of privacy); *Doe v. Roe*, 43 Misc. 2d 201, 400 N.Y.S. 2d 668 (1977) (psychiatrists unauthorized use of confidential information in a book was a compensable invasion); *Vassiliades v. Garfunckel's Brooks Bros.*, 492 A 2d 580 (Col. App. 1985) (unauthorized use of before and after photographs by plastic surgeon for department store presentation constituted an invasion of privacy). *See also* *Humphers v. First Interstate Bank*, 298 Or. 706, 696 P. 2d 527 (1985), where the Oregon supreme court held that an action for invasion of privacy would only lie if anyone else who disclosed the same information without any privilege also would be liable.

<sup>20</sup>RESTATEMENT (SECOND) OF TORTS sec. 652D (1987).

<sup>21</sup>In the hallmark case which balanced an individual's right to privacy with First Amendment concerns, *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975), the Court held that an action for invasion of privacy could not be maintained when the subject matter of the publicity is a matter of legitimate concern to the public.

<sup>22</sup>763 P. 2d 1003 (Colo. 1988).

AIDS from a blood transfusion had a greater interest in obtaining information about the donor than the donors' interest in privacy, but prevented full disclosure of the donor's name or address. In another blood donor case, the court held that the plaintiffs interests in discovery were less important than the interest of the donor in anonymity.<sup>23</sup> Nevertheless, a spouse's interest in obtaining information would probably outweigh the patient's interest in confidentiality based upon non-HIV cases.<sup>24</sup> Whether that policy choice would extend to a lover or an ex-spouse might be debateable.<sup>25</sup>

If the revelation of positive HIV tests was inaccurate, the health care provider would risk liability for defamation in addition to an invasion of privacy claim. Defamation is the communication of an untrue statement of fact to a third party that injures the plaintiffs reputation by exposing him or her to hatred, ridicule, or contempt.<sup>26</sup> If a health care provider charted an inaccurate test finding on a patient's record and that record was viewed by quality assurance reviewers, accrediting agency inspectors or anyone else unprivileged, the publication requirement for defamation would be satisfied. If the patient could then prove the revocation of health insurance or the loss of employment or housing occurred as a result, damages would be established. Moreover, the publication of an erroneous HIV test result could constitute *slander per se*. The Restatement (Second) of Torts states that the imputation of a loathsome and communicable disease is subject to liability without proof of harm.<sup>27</sup>

Nevertheless, the health care provider may enjoy a qualified privilege against any defamation suit if the defamatory statement was transmitted to a third party with proper motive or purpose<sup>24</sup> and after a reasonable attempt was

<sup>23</sup>Rasmussen v. South Florida Blood Service, Inc., 500 So. 2d 533 (Fla. 1987).

<sup>24</sup>See e.g., Mikel v. Abrams, 541 F. Supp. 591 (W.D. Mo. 1982) (disclosure of patient's condition to wife not unreasonable); Curry v. Com, 277 N.Y.S. 2d 470 (1966) (physician not liable for revealing information obtained during treatment to spouse); Penneson v. Provident Life & Accid. Ins. Co., 154 So. 2d 617 (La. Ct. App. 1963) (no disclosure to husband of wife's medical records during the marriage would violate wife's right to privacy). *But see* MacDonald v. Clinger, 446 N.Y.S. 2d 801 (1982) (revelation by psychiatrist to spouse of intimate details without consent is a breach of the fiduciary duty of confidentiality).

<sup>25</sup>A Kansas district court enjoined an HMO from disclosing the positive results of a patient's AIDS test to an ex-spouse. Doe v. Prime Health/Kansas City, Inc., discussed at 75 ABAJ. 84 (January 1989).

<sup>26</sup>See generally, L.H. ELDRIDGE, THE LAW OF DEFAMATION (1978).

<sup>27</sup>Restatement (Second) Of Torts sec. 572 (1987). Although Comment (b) of the Restatement suggests that such liability extends to the publication of statements concerning infections ordinarily contracted *only* through sexual intercourse, it is unlikely that this provision would be interpreted and applied so narrowly given the degree of stigma attached to the AIDS virus.

<sup>28</sup>See Berry v. Moench, 331 P.2d 814 (Utah 1958) (psychiatrist's revelation of information obtained in confidence to another physician is conditionally privileged). See generally Southwick, *supra*, note 13 at 495-96.

made to verify the accuracy of the information. In a 1920's case *Simonsen v. Swenson*,<sup>29</sup> a physician mistakenly diagnosed the plaintiffs sores as being a syphilis infection and warned the owner of the hotel where the plaintiff was residing that the plaintiff had a contagious disease. The Nebraska supreme court held that the physician was not liable since he acted in good faith, without malice and with reasonable grounds for the diagnosis. Whether that result would follow today with respect to either an incorrect or correct HIV positive diagnosis seems doubtful.<sup>30</sup>

Indeed, today any of the previously discussed causes of action would probably be accompanied by a claim for either the intentional or negligent infliction of emotional distress, depending upon the facts of the case and the applicable state common law. It is certainly conceivable that some disclosures of HIV positive test results could constitute extreme and outrageous conduct.<sup>31</sup> One final common law cause of action might exist with respect to liability for disclosure. Some jurisdictions recognize an implied contract of confidentiality in the doctor-patient relationship.<sup>32</sup> Thus, an unauthorized release of the medical records of an HIV positive patient could result in a breach of the implied covenant, regardless of the legitimacy of the interests of third parties.<sup>33</sup> While any of the previously discussed areas of tort liability for public health care providers must be viewed in light of the appropriate state or federal Tort Claims Act, public health care providers have one additional avenue for concern as well.

#### CONSTITUTIONAL CONSIDERATIONS

The primary constitutional concern for the public health care provider with respect to patient confidentiality is the First Amendment's right to privacy, made applicable to state and local governments by the Fourteenth

<sup>29</sup>177 N.W. 831 (Neb. 1920). *See also* *Collins v. Howard*, 156 F. Supp. 322 (D.C. Cir. 1957) (no liability on part of physician or hospital for revealing to employer inaccurate blood tests for alcohol content).

<sup>30</sup>In *Hope v. Landau*, 486 N.E. 2d 89 (Mass. App. 1985), the plaintiff had been diagnosed as HIV positive. A picture was taken of him from a back angle and was used in a newspaper article about AIDS research. The patient consented to the photograph only after being assured by the doctor that his likeness would be unrecognizable. Unfortunately, that, arguably, was not the case. The court held that the plaintiff stated a cause of action for violation of the physician-patient privilege because of the physician's prior assurances. However, a cause of action was not stated for invasion of privacy since the applicable statute only allowed recovery for commercial appropriation.

<sup>31</sup>An Arizona court in *Valencia v. Duval Corp.*, 645 P. 2d 1262 (Ariz. App. 1982) held that in order to maintain a cause of action for invasion of privacy, the conduct of the defendant physician had to meet the extreme and outrageous conduct test of the intentional infliction of emotional distress.

<sup>32</sup>*See* *Home v. Patton*, 291 Ala. 701, 287 So 2d 824 (1973).

<sup>33</sup>*See generally* Southwick, *supra*, note 13 at 508-09.

Amendment to the Constitution. In *Whalen v. Roe*<sup>34</sup> the Supreme Court upheld a New York state law which required the names and addresses of patients, who had a doctor's prescription for certain drugs, to be registered, determining that the law properly balanced the public interest with the individual's privacy interest. While the *Whalen* Court did not recognize expressly a right to privacy with respect to medical records *per se*, subsequent lower court decisions seemingly recognize a right to privacy with respect to the unwarranted disclosure of personal information.<sup>35</sup> If there is a constitutionally protected privacy interest in the confidentiality of some personal data, then an action would lie against a governmental entity and possibly its employees for an unreasonable disclosure under federal civil rights legislation.<sup>36</sup>

Much of the recent litigation concerning the disclosure of an HIV positive patient's status by a governmental unit or agent has occurred with respect to correctional institutions. Prison inmates, though incarcerated, retain certain fundamental rights to privacy;<sup>37</sup> however, those rights must be balanced against societal issues and issues of security. In *Turner v. Safley*<sup>34</sup> the Supreme Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."<sup>39</sup> The court further noted that if an alternative could fully accommodate the prisoner's right at a *de minimis* cost to valid penological

<sup>34</sup>429 U.S. 589,97 S. Q. 869, 51 L. Ed. 2d 64 (1977).

<sup>35</sup>See *Trade Waste Management Assn. Inc. v. Hughey*, 780 F. 2d 221 (3rd Cir. 1985) (medical history protected from random governmental intrusion); *United States v. Westinghouse*, 638 F. 2d 570 (3rd Cir. 1980) (employee medical records entitled to protection); *In re Search Warrant (Sealed)* 810 F. 2d67 (3rd Cir 1987), *cert. denied sub nom.*, *Rochman v. United States*, 483 U.S. 1007 (1987) (medical records within constitutional privacy right); *Carter v. Broadlawns Medical Center*, 667 F. Supp. 1269 (S. D. Iowa 1987) (public hospital violated patient's constitutional rights in giving chaplains open access to records). See also *Borrick v. Ryan*, 827 F. 2d 836 (1st Cir. 1987); *Schaill ex rel. Kross v. Tippecanoe County Sch. Corp.*, 864 F. 2d 1309 (7th Cir 1988). In *Doe v. Borough of Barrington*, 729 F. Supp. 376 (D. N. J. 1990), the court held that the family of an HTV positive citizen, who had voluntarily disclosed his condition to police officers upon arrest, should not have their complaint dismissed on summary judgment because the Borough violated their privacy rights in failing to adequately train the officers about AIDS and the need for confidentiality. The court also concluded that the family had a constitutional right of privacy in the information disclosed by an officer to other citizens after the arrest, and with whom not even casual contact had been made, and that given these circumstances, the state had no compelling interest in revealing that information to members of the public. *Doe v. Borough of Barrington*, 729 F. Supp 376, 385 (D.NJ. 1990).

36.42 U.S.C.A. sec. 1983 (1986).

<sup>37</sup>*Harris v. Thigpen*, 941 F. 2d 1495,1513 (11th Cir. 1991); *Woods v. White*, 689 F. Supp. 874, 876 (W.D. Wis. 1988), *affid without opinion*, 899 F. 2d 17 (7th Cir. 1990). For a further discussion of *Woods* see *infra* notes 44-47 and accompanying text.

38.482 U.S. 78 (1987).

39. *Id.* at 89.



interests, then that fact may be considered as evidence that the regulation does not satisfy the reasonable relationship standard.<sup>40</sup>

In addition to being subject to the balancing test, the acts or regulations of government medical personnel would enjoy a qualified immunity.<sup>41</sup> In *Baez v. Rapping*<sup>42</sup> a detainee of a county jail brought a civil rights action against the county medical director, jail warden and medical staff for issuing a medical precaution to the County Department of Correction after his hospitalization for a blood clot revealed the presence of the AIDS virus. The detainee alleged that the news of his condition was spread verbally by the medical staff as well. In upholding the defendants' motion for summary judgment the court held that the doctor and staff had acted within their official duties in examining the prisoner and reporting the prisoner's condition to the facility, and, thus, were within the scope of their qualified immunity.<sup>43</sup> In *Woods v. White*,<sup>44</sup> however, the court held that an invasion of privacy occurred without any justification under qualified immunity. In *Woods* the prisoner of a correctional institution alleged that medical personnel at the institution's Health Service Unit discussed with non-medical staff and with other inmates that he had tested positive for the AIDS virus.<sup>45</sup> In denying the defendant's motion for judgment on the pleadings, the court held that there existed a constitutional right to privacy in one's medical records and in the doctor-patient relationship which was not relinquished as a result of criminal incarceration,<sup>46</sup> and that the casual, unjustified dissemination of confidential medical information to non-medical staff and other prisoners hardly belonged to the sphere of a discretionary function to which qualified immunity would apply.<sup>47</sup>

Other prison cases have dealt with a policy of somehow segregating or distinguishing inmates with AIDS, a policy which by definition discloses the inmates' medical condition. The inmate in *Holley v. County of Erie*<sup>48</sup> alleged that her constitutional right to privacy was violated by the prison's practice of placing red stickers on documents and other items which effectively revealed her HIV status to nonmedical staff and inmates. The court held, under the

<sup>40</sup>*Id.* at 90. See *Block v Rutherford*, 468 U.S. 576 (1984) (rational relationship to legitimate governmental objective). See also *Thornburgh v. Abbott*, 490 U. S. 401 (1989); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Walker v. Sumner*, 917 F. 2d 382 (9th Or. 1990).

<sup>41</sup>*Procunier v. Navarette*, 434 U.S. 555,561 (1978). See also *Wood v. Strickland*, 420 U.S. 308 (1975).

<sup>42</sup>680 F. Supp. 112 (S.D.N.Y. 1988).

<sup>43</sup>*Id.* at 115. The court noted that the precaution sheet did not specifically state that Baez tested positive for AIDS, only that personnel needed to avoid his bodily fluids.

<sup>44</sup>686 F. Supp. 874 (W.D. Wis. 1988), *affid without opinion*, 899 F. 2d 17 (7th Or. 1990).

<sup>45</sup>*Id.*

<sup>46</sup>*Id.* at 875.

<sup>47</sup>at 877.

<sup>48</sup>776 F. Supp. 715 (W.D.N.Y. 1991).

*Turner* test, that the red sticker policy was an "exaggerated response" not reasonably related to the protection of the staff of the correctional institution.<sup>49</sup> In contrast, the Eleventh Circuit in *Harris v. Thigpen* held that the involuntary placement of seropositive prisoners into separate HIV dormitories was a reasonable infringement on privacy rights in light of the interests of other inmates at stake.<sup>50</sup> The court was concerned with the spread of the virus in the prison population through inmate to inmate assaults or homosexual activities, and the state's potential liability for intentionally exposing a prisoner to a known risk.<sup>51</sup>

Although these cases only deal with privacy rights in medical records in correctional institutions, the constitutional issue and liability under civil rights legislation still applies to other public health care facilities. In fact, the interest of the government in revealing the HIV status of an individual in a prison setting would be greater given the risks posed to the staff and others in the prison population. Hence, the balance is more likely to be struck in favor of the individual in other public institutional settings when the disclosure is challenged on grounds of reasonableness.

#### CHARTING A COURSE IN UNCERTAIN TIMES

The AIDS epidemic is evolving more quickly than the law that addresses the confidentiality of patient information. The duty to protect others from harm directly conflicts with the obligation to protect confidential patient information. Key aspects of public policy, however, provide some guidance to health care administrators. Clearly, hospitals should not release HIV patient information to the general public. For example, hospital administrators should not release the cause of hospitalization for individually named patients. At the other extreme, health care providers should not protect patient HIV test results to the extent of not notifying sexual partners or others immediately at risk. Hospital administrators owe a duty to protect from harm those at significant risk of infection.

In the absence of clear statutory directives, health care providers must counsel HIV-positive patients and pursue patient-authorized release of information whenever possible. If those efforts prove unsuccessful, the

<sup>49</sup>*Id.* at 733, referencing *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>50</sup>50.941 F. 2d 1495 (11th Cir. 1991), *affid in part*, *Harris v. Thigpen*, 727 F. Supp. 1564 (M.D. Ala. 1990).

<sup>51</sup>*Id.* at 1521. *But see Doe v. Coughlin*, 697 F. Supp. 1234 (N.D.N.Y. 1988), a case in which the court granted preliminary injunctive relief to HIV positive inmates who complained of their transfer to a separate dormitory for HIV positive prisoners. The court stated that "there are few matters of a more personal nature, and there are few decisions over which a person could have a greater desire to exercise control than the manner in which he reveals [his HIV] diagnosis to others. *Id.* at 1243.

provider should disclose the information only to people at a significant risk of infection, and only when the disclosure could significantly reduce or eliminate the risk of infection. Hospital policy should establish by whom such decisions will be made, and how the disclosures will occur.

Hospital administrators should formulate detailed guidelines for conducting HIV tests to minimize the occurrence of false-positive tests. Health professionals must adopt and enforce strict procedures to protect hospital medical records. Strict guidelines should be followed regarding the confidentiality of patient information and authorization for the release of such information. Policies must be written and staff must be trained to follow the policies. Staff should sign the policies they are to follow. Finally, health care professionals must take the lead in states lacking statutes which address these issues to draft and lobby for legislation that will clarify a health care provider's obligations in this complex arena.