CONFIDENTIALITY

I. Introduction[1]

Most people with HIV face some issue regarding public knowledge of their status. While previous chapters dealt with the discrimination they face in obtaining employment, insurance, and access to public accommodations, public knowledge of their status may easily touch other parts of their lives, such as child custody or maintenance of personal relationships.

In the long run, only adequate public education will solve these problems. The effort to educate the public about HIV/AIDS has made great progress since the early years when the disease was first discovered. However, there are still a lot of misconceptions about the means of transmitting HIV and the ability of people with HIV to lead normal lives. These misperceptions lead to discrimination and a need for some people with HIV/AIDS to keep their status confidential. We need to educate people that someone living with HIV/AIDS is not going to accidentally infect a casual acquaintance, that HIV/AIDS is a disability that millions of people are living with everyday, and that there is no need to assume that people with HIV/AIDS cannot be parents, spouses, friends, co-workers, teachers, professionals, or mentors. Until the public understands the reality of life with HIV/AIDS, an infected person (or a person who has been exposed to HIV or who is perceived as having AIDS) will probably want to maintain some control over public knowledge of his/her status.

There are several ways to maintain that control through the legal system. Section II of this chapter discusses California statutes that determine who can be forced to take an HIV test, have tests taken without one's knowledge, or have test results revealed against one's will. Similarly, Section III discusses California statutes that offer general control over medical records, which may directly or indirectly reveal a person's HIV status. Section IV discusses federal and state constitutional protection of privacy.

This is the final chapter in the manual in part because it refers to several previous chapters. It is also last in the hope that the next edition of this manual won't need it at all. Perhaps by then, other people will no longer single out those with HIV, and laws regarding confidentiality will not be necessary to protect against the prejudices of others.

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[1] This chapter was based on the work of many people. The original chapter was written by Gary James Wood Esq., former co-chair of ALRP and a member of the BALIF Board of Directors. The 1990 chapter was updated by Timothy R. Pestotnick, Esq., former co-chair of AIDS Law and Policy in San Diego and General Counsel to the AIDS Foundation of San Diego. Additions to the 1995 update depended upon work by practicing attorney Michael Gaitley, and research by Roger Doughty, Esq., Ann Blessing, Esq., Karen Mandel and Betsy Johnsen, Esq.

The AIDS Legal Referral Panel (ALRP) would like to thank Melissa Davis for her research and writing for the 2004 edition of the Confidentiality Chapter. We also wish to acknowledge ALRP staff and volunteers for their valuable contributions: Molly Stafford, Esq., Carolyn von Behren, Eric B. Read, Scott Jarvis, and ALRP's law clerks. The 2004 Confidentiality Chapter was edited by Tanya Reeves, Esq., Client Services Director.

II. AIDS Testing Statutes in California[2]

A. Confidentiality Extended to HIV/AIDS Test Results

In 1985, California became the first state to implement an AIDS statutory scheme that included confidential HIV testing. To encourage voluntary participation by those at risk of HIV infection and to facilitate the screening of blood donations, the new statute ensured that any person tested for the AIDS antibody would be secure in the confidentiality of the test result.[3]

In California, anonymous testing is available throughout the state at Alternative Test Sites (ATS) administered by county health departments. HIV tests at these sites are free, and test site counselors do not collect any identifying information from test subjects. Instead, test subjects receive a unique number that corresponds to their specimen and test result. Anonymous testing is also available in some clinical settings such as family planning and sexually transmitted disease clinics.

In contrast to anonymous testing, confidential testing links the subject's identity to the test result. Confidential testing is available at publicly funded confidential test sites as well as at private health care settings. While a person's name and contact information will be taken at these confidential test sites, the confidentiality of test results is protected, and unauthorized disclosure is prohibited.[4]

1. California's Non-Name Reporting Regulations

a) AIDS Cases

California has reported AIDS cases since 1983, in accordance with the federal Centers for Disease Control and Prevention (CDC) guidelines. California Health and Safety Code §121025 protects the confidentiality of AIDS-related public health records that were developed or acquired by state or local public health agencies.[5] Any personally-identifying information in these records must remain confidential and cannot be disclosed without written authorization from the person named in the record or his/her guardian or conservator, *except* to other local, state, or federal public health agencies, or to researchers who need the information to carry out their duties in the investigation, control, or surveillance of the disease.[6]

Disclosures of other types of records that identify the test subject are also prohibited without prior written authorization.[7] This confidentiality extends to records from research institutions, blood banks, alternative test sites, and medical care providers.[8] California Health & Safety Code §120980 provides for a civil penalty of up to $1,000 for each negligent unauthorized disclosure of a test result and $1,000 to $5,000 for each willful disclosure. A negligent or willful disclosure that results in economic, bodily, or psychological harm to the test subject is a misdemeanor punishable by imprisonment of up to one year and/or a fine of up to $10,000.[9]

Attorneys and advocates should note that §120980 only applies to disclosures of test results. In *Urbaniak v. Newton*, the California Court of Appeals held that the statute

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[2] Much of the information in this section was taken from "A Brief Guide to California's HIV/AIDS Laws 2002," a brochure put out by the Department of Health Services, Office of AIDS.
[3] Cal. Health & Safety Code § 120990 (West 1995).
[4] Cal. Health & Safety Code § 120975 (West 1995).
[5] Cal. Health & Safety Code § 121025 (West 1995).
[6] Cal. Health & Safety Code §§ 120990-121070 (West 1995).
[7] Cal. Health & Safety Code § 120980 (West 1995).
[8] Cal. Civ. Code § 56.05 (West 1981).
[9] Cal. Health & Safety Code § 120980 (West 1995).

applies only to disclosures by persons having access to the record of the results of a blood test.[10] Under this holding, the only person who could be held liable for unlawful disclosure under the statutes was the physician who actually performed the test.[11] In this case, the plaintiff disclosed his HIV status to a nurse in the office of a physician who was conducting a neurological exam on behalf of an insurance company for a former employer, against whom Mr. Urbaniak had a worker's compensation action. The examining doctor, allegedly having discovered the patient's HIV-positive status from the nurse, mentioned this in his report, which he sent to counsel for the employer's insurer, who in turn sent copies of the report to the insurer. Eventually copies of the report reached the Workers' Compensation Appeals Board and plaintiff's chiropractor. The Court stated that the use of the word "record" could only refer to the record of a blood test. Because the physician's office did not perform an HIV test on Mr. Urbaniak, the physician could not be found liable under §120980.[12] However, the Court did remand the case back to the trial court to determine Mr. Urbaniak's cause of action against the physician for invasion of his constitutional right of privacy.[13]

b) HIV Infections

In 2002, §121340 was added to the Health and Safety Code, making HIV (in the absence of an AIDS diagnosis) a reportable communicable disease in California.[14] Prior to 2002, state and county health departments were required to report AIDS cases, not HIV infections. While the results of an HIV test are either anonymous or confidential (depending upon the testing site), the Department of Health Services collects information on the number of HIV-positive test results. Effective July 1, 2002, California began a new system of reporting HIV infection by Non-Name Code.[15] This reporting system is designed to track trends in the HIV epidemic while protecting the privacy of those who receive a confirmed HIV test result.[16]

The Non-Name reporting process for HIV infections involves six separate parties: (1) the health care provider who orders the test, (2) the laboratory that performs the test, (3) the local health department, (4) the Department of Health Services (DHS), (5) the Office of AIDS (OAS), and (6) the Centers for Disease Control (CDC). The local health department, DHS/OA, and the CDC will not have a record of the HIV-infected individual's name, only the case report with the non-name code.

The language of the various HIV reporting statutes has generated some confusion. A strict construction of one statute would have prohibited a medical care provider from disclosing a patient's antibody status to the provider's own staff members even if such disclosure were in the best interests of both staff and patient. However, inclusion of a person's HIV test result in his/her medical record is not considered a disclosure under Health and Safety Code §120980.[17] Section 120985 permits a physician who orders an HIV test to record the results in the patient's medical record, or otherwise disclose it

[10] *Urbaniak v. Newton*, 226 Cal. App. 3d 1128 (1991).
[11] *Id.*
[12] *Id*. at 1143.
[13] *Id. at* 1140.
[14] Cal. Health & Safety Code §121340 (West 2002).
[15] Cal. Code Regs. Tit. 17, Div. 1, Chap. 4, Sub. 1, Art. 3.5, §§ 2641.5-2643.2.
[16] Office of AIDS and ETR Associates, *HIV Reporting by Non-Name code Regulations* (visited June 4, 2003) <http://www.etr.org/hivnonname/unit1_2.html>.
[17] Cal. Health & Safety Code § 120985 (West 1995).

without written authorization to the patient's health care providers for the purpose of diagnosis, care, or treatment of that patient.[18]

c) Public Health Records Related to Persons with AIDS

Health and Safety Code §121025 protects the confidentiality of public health records related to persons with AIDS.[19] This section also prohibits the use of such records to determine the insurability of any person.[20] In addition, Health and Safety Code §120980 prohibits the use of the results of an HIV test for determination of insurability, except for life and disability insurance under certain conditions. Refer to Chapter Six: Insurance and Employee Benefits, for more discussion on the impact of these laws when obtaining insurance.

2. Situations When Test Results Are Not Confidential

a) Parolees and Probationers

Penal Code §7520 requires correctional officials to notify parole and probation officers when an individual with HIV or AIDS is released.[21] The parole or probation officer must then ensure that the parolee or probationer contacts the county health department or a physician for information on counseling and treatment options available in the county of release.

Penal Code §7521 requires that if the HIV-infected individual has not informed his/her spouse of this condition, the parole or probation officer may ensure that the spouse is notified by the correctional institution's chief medical officer or the physician treating the spouse or the parolee/probationer.[22] Sometimes a parole or probation officer will enlist the assistance of local law enforcement officers in taking a parolee or probationer into custody. In the case of a parolee/probationer with HIV/AIDS, the parole or probation officer must inform the law enforcement officers of the parolee's or probationer's condition, if s/he has a record of assault on a peace officer.[23]

b) Medical Duty to Partners or Spouses

Health and Safety Code §121015 permits, but does not require, a treating physician and/or surgeon to disclose an individual's confirmed positive HIV test result to the individual's spouse or any person reasonably believed to be the sexual or needle-sharing partner of the individual.[24] Such disclosure may be made only for the purpose of diagnosis, care, and treatment of the person notified, or to interrupt the chain of HIV transmission. The disclosure may *not* include any identifying information about the HIV-infected individual.

Prior to disclosing an individual's test result, the physician must discuss the results with the patient and offer appropriate emotional and psychological counseling, including information regarding the risks of transmitting HIV and methods of avoiding these risks.[25] Further, the physician must inform the patient of the intent to notify partners and must attempt to obtain the patient's voluntary consent for partner notification. Upon notifying a partner or spouse of an HIV-infected person, the physician

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[18] *Id.* "Health care provider" does not include a health care service plan. *See* Cal. Civ. Code § 56.05(d) (definitions of health care provider) (West 1981).
[19] Cal. Health & Safety Code §121025(a) (West 1995).
[20] *Id.* at (f).
[21] Cal. Penal Code §7520 (West 1988).
[22] Cal. Penal Code §7521(a) (West 1988).
[23] *Id.* at (b).
[24] Cal. Health & Safety Code § 121015(a) (West 1995).
[25] *Id.* at (b).

and/or surgeon must refer the spouse or partner for appropriate care, counseling, and follow-up.[26]

County health officers may notify a spouse or partner of an HIV-positive individual, but cannot disclose the identity of the person or the physician making the report.[27] Upon completion of partner notification efforts, all records regarding the contacted person maintained by the county health officer, including but not limited to identifying information, must be expunged. As long as records of contact are maintained, the county health officer must keep confidential the identity and HIV status of the individual tested as well as the identity of the person contacted.[28]

In order for a physician to disclose an individual's HIV status to a spouse or sexual partner, the physician must know identifying information about who they are and how they can be contacted. Nowhere in the statute is it mandated that patients identify spouses or sexual partners to their physicians or provide contact information for those who they do identify. People with HIV/AIDS who receive free or government-subsidized health services are often afraid of jeopardizing their eligibility for these types of programs, and they do not know their rights as to what information is protected and what is not. These clients should be assured that they do not need to identify their sexual partners in order to receive medical treatment. However, most clients who are in need of legal services in this area have already disclosed information about their sexual partners and are now in danger of having their HIV status disclosed to their partners without their consent.

B. Mandatory Non-Confidential HIV Testing

Another source of controversy in the California statutes lies in the criminal arena. Early cases involved allegedly HIV-positive defendants who spit at or bit an arresting police officer. Although it is abundantly clear that such activity does not transmit HIV, as recently as September 2002, the California Court of Appeals, Fifth District, upheld a statute requiring mandatory testing for persons resisting arrest.[29]

1. First Responders

Proposition 96 amended §121060 of the Health and Safety Code in November 1988,[30] allowing the court to order a person to submit to an HIV test if s/he is charged in a criminal complaint in which it is alleged that s/he interfered with the official duties of a police officer, firefighter, or emergency medical personnel by biting, scratching, spitting, or transferring blood or other bodily fluids[31] on, upon, or through the skin or membranes of these first responders.[32] This law was approved despite the fact that in the United States, no peace officer, correctional officer, or "first responder" has been infected with HIV through occupational exposure.

Pursuant to this amendment, the first responder or the district attorney must make a written request for testing the defendant. The court will then conduct a hearing in order to show that probable cause exists to believe that a transfer of blood or other bodily fluids

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[26] Cal. Health & Safety Code § 121015(a) (West 1995).
[27] *Id.* at (d).
[28] *Id.* at (e).
[29] *People v. Hall*, 101 Cal. App. 4th 1009 (Cal. Ct. App. 2002).
[30] Cal. Health & Safety Code § 121060 (West 1995).
[31] *See Johnetta v. Municipal Court*, 218 Cal. App. 3d 1255 (Cal. Ct. App. 1990) (holding that other bodily fluids includes sweat).
[32] Cal. Health & Safety Code § 121060 (West 1995).

took place between the defendant and the first responder. If probable cause exists, the court will order testing and copies of the test results will be given to the defendant, each requesting first responder, and if applicable, to the officer in charge and the chief medical officer of the place in which the defendant is incarcerated or detained.[33]

The Court of Appeals affirmed §121060's validity in *Johnetta v. Municipal Court*.[34] The defendant in *Johnetta* sought to prevent the court from enforcing an order to submit to an HIV test at the request of a sheriff's deputy whom he had bitten. The Court upheld Proposition 96 and §121060, finding that even though there were no cases reported of someone having contracted HIV through a bite, it was theoretically possible that transmission could have occurred.[35] The Court argued that "[b]ecause the disease is lethal, we should err on the side of caution until we have enough evidence to demonstrate that no cause for concern exists."[36]

In *Johnetta*, the Court openly acknowledged that there was a lack of data on the transmission of HIV through saliva and that the medical community could not advise patients that it was a complete impossibility.[37] However, since the Court's ruling in 1990, there still have yet to be cases of transmission from saliva. According to the San Francisco AIDS Foundation in *AIDS 101: Guide to HIV Basics*, HIV can only be transmitted through blood, semen, vaginal fluids and breast milk.[38] In addition, saliva, sweat, urine, and other bodily fluids do not transmit HIV, because they either do not contain HIV or because they contain a quantity too small to result in transmission.[39]

Despite the commonly held medical opinion that HIV is transmitted by blood, semen, vaginal fluids and breast milk, the Court of Appeals, Fifth District, recently ordered a defendant to submit to mandatory testing because while resisting arrest, the defendant became very sweaty and the arresting officer suffered an abrasion under his eye and a scrape on his knee.[40] The Court, interpreting §12060 strictly, reasoned that "other bodily fluids" included sweat and therefore it was authorized to order the HIV test.[41] In both *Hall* and *Johnetta* the defendants argued that the statute was invalid because it violated the Fourth Amendment's search and seizure clause.[42] Information regarding this topic will be handled later in the chapter.

2. Health Care Providers

When the person feared to be HIV positive does not actively cause the alleged exposure, the methods used to discover that person's status are relatively humane. If, in the course of providing health care, a provider is exposed (e.g., a needle stick in a hospital lab), s/he may obtain the patient's HIV status from the patient's physician if the patient consents to release the information.[43] The patient cannot be compelled to undergo an HIV test, and no new blood or tissue samples can be taken for the purpose of

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[33] Cal. Health & Safety Code § 121060 (West 1995); Cal. Health & Safety Code § 121055 (West 1995).
[34] *Johnetta v. Municipal Court*, 218 Cal. App. 3d 1255, 1261 (Cal. Ct. App. 1990).
[35] *Id.* at 1263.
[36] *Id.* at 1266.
[37] *Id.* at 1267.
[38] San Francisco AIDS Foundation, *How HIV Is Spread* (Visited March 9, 2004) <http://www.sfaf.org/aids101/transmission.html>.
[39] *Id.*
[40] *People v. Hall*, 101 Cal. App. 4th at 1019 (2002).
[41] *Id.* at 1021.
[42] *Johnetta v. Municipal Court*, 218 Cal. App. 3d at 1260 (1990); *People v. Hall*, 101 Cal. App. 4th at 1021 (2002).
[43] Cal. Health & Safety Code §120262(A)(2)(c) (West 2002).

discovering HIV status. The law also provides for counseling.[44] If the patient refuses to have his/her status revealed and refuses to undergo a test or to have any already existing blood or tissue samples tested, then available blood or tissue samples can be tested nevertheless.[45] However, unless the patient consents, the results will not be revealed to the patient and will be kept out of all medical records.[46]

If a health care provider, acting without good faith, performs an HIV test or makes a disclosure of HIV status that results in economic, bodily, or psychological harm without adhering to the statutory procedure, s/he is guilty of a misdemeanor, punishable by imprisonment in the county jail for a period not to exceed one year and/or a fine not to exceed $10,000.[47]

3. Sex Offenders

Penal Code §1202.1 requires persons *convicted* of certain sex offenses, as well as minors who have been adjudged wards of the court or placed on probation for such offenses, to submit to an HIV test. These offenses include rape (including statutory and spousal rape), unlawful sodomy, and oral copulation. In addition, testing is required for individuals convicted of lewd or lascivious acts with a child if the court finds there is probable cause to believe that a bodily fluid capable of transmitting HIV was transferred from the defendant to the victim. The clerk of the court must convey the test results to the state Department of Justice and the local health officer. The prosecutor must advise the victim of the right to receive the test results and refer the victim to the local health officer for counseling. The victim, in turn, may disclose the test results as s/he deems necessary to protect his/her health and safety, or the health and safety of his/her family, sexual partner, or anyone who has been exposed to possible transmission. The local health officer must also disclose the test results to the defendant and provide appropriate counseling. The Department of Justice must then disclose the test results of any previously convicted sex offender, upon the request of the prosecutor or defense attorney, in connection with any subsequent investigation or prosecution of the test subject for prostitution or certain sex crimes.[48]

California Penal Code §1202.1 concerns *criminal convictions*, while Health and Safety Code §121055 permits the testing of persons, including minors, *charged* with certain sex crimes. These crimes include, but are not limited to, rape (including statutory and spousal rape), unlawful sodomy, oral copulation, and lewd or lascivious acts with a child. At the request of the alleged victim, if the court finds probable cause to believe that a transfer of a bodily fluid took place between the defendant and the alleged victim during the alleged crime, the court shall order the defendant to submit to an HIV test. The test results must be provided to the defendant, the alleged victim, and if the defendant is incarcerated or detained, to the officer in charge and the chief medical officer of the detention facility.[49] However, the results cannot be used in any current pending criminal proceeding.[50]

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[44] *Id*. at (A)(1)(b)(1).
[45] Cal. Health & Safety Code §120262(C)(2) (West 2002).
[46] *Id*. at (C)(5).
[47] Cal. Health & Safety Code §120263 (West 2002).
[48] Cal. Penal Code §1202.1 (West 1988).
[49] Cal. Health & Safety Code §121055 (West 1995).
[50] Cal. Health & Safety Code §121065 (West 1995).

The constitutionality of these and other statutes that allow for mandatory testing of people either charged with or convicted of certain crimes has sparked heated debates among scholars, most finding the statutes to be unconstitutional.[51] However, the courts continue to use the "special needs" analysis which weighs government interest against privacy rights. Most often, the government wins because of the deadly nature of HIV/AIDS, the way it is spread, and the state's interest in controlling the disease.[52]

4. Prostitutes

Penal Code §1202.6 requires that individuals *convicted* of prostitution complete instruction in the causes and consequences of AIDS and submit to an HIV test. The test results must be disclosed to the test subject, the court, and the California Department of Health Services (DHS). The court and DHS must maintain the confidentiality of the report, but DHS must furnish copies of the report to a district attorney upon request.[53] If an individual has a previous conviction for prostitution, tested positive for HIV in connection with that conviction, and was informed of the test results, any subsequent prostitution conviction is elevated from a misdemeanor to a felony.[54]

In *Love v. Superior Court*, individuals convicted of soliciting the act of prostitution challenged the constitutionality of Penal Code §1202.6, which allowed the court to order them to undergo AIDS testing.[55] The petitioners challenged the testing requirement on the grounds that it violated their Fourth Amendment right to be free from unreasonable searches.[56] In response, the Court ruled that the governmental interest in preventing the spread of AIDS presented a special need[57] and outweighed its intrusion of Fourth Amendment rights, making it a reasonable search and seizure.[58] The "special needs" doctrine, used to weigh a governmental interest against a person's constitutional rights, has been highly criticized by scholars, but remains good law.[59] A closer analysis of the "special needs" doctrine can be found later in this chapter.

5. Persons Charged with a Crime

Penal Code §1524.1 allows, at the request of the crime victim, court-ordered HIV testing of any person *charged* with a crime.[60] Before issuing a search warrant for the defendant's blood, the court must find that there is probable cause to believe that blood, semen, or other bodily fluids have been transferred from the defendant to the victim, and that there is probable cause to believe that the defendant committed the alleged offense.

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[51] *See* Sean Anderson, *Individual Privacy Interests and the 'Special Needs' Analysis for Involuntary Drug and HIV Tests*, 86 California Law Review 119 (1998). *See also* Allison N. Blender, *Testing the Fourth Amendment for Infection: Mandatory AIDS/HIV Testing of Criminal Defendants at the Request of a Victim of Sexual Assault*, 21 Seton Hall Legislative Journal 467 (1997); Bernadette Pratt Sadler, *When Rape Victim's Rights Meet Privacy Rights: Mandatory HIV Testing, Striking a Fourth Amendment Balance*, 67 Washington Law Review 195 (1992); Raymond S. Franks, *Mandatory HIV Testing of Rape Defendants: Constitutional Rights Are Sacrificed in Vain Attempt to Assist Victim*, 94 West Virginia Law Review 179 (1991).

[52] *See Love v. Superior Court*, 226 Cal. App. 3d 736, 740 (1990). *See also Johnetta v. Municipal Court,* 218 Cal. App. 3d at 1260 (1990); *People v. Hall*, 101 Cal. App. 4th at 1021 (2002).

[53] Cal. Penal Code §1202.1 (West 1988).

[54] Cal. Penal Code § 647(f) (West 1987).

[55] *Love v. Superior* Court 226 Cal. App. 3d at 744 (1990).

[56] *Id*. at 740.

[57] The court in *Love* relied heavily on the "special needs" doctrine found in *Johnetta v. Municipal Court*, 267 218 Cal. App. 3d 1255 (1990) and *Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602 (S. Ct. 1989).

[58] *Love v. Superior Court*, 226 Cal. App. 3d 740 (1990).

[59] *See* James Grant Snell, *Mandatory HIV Testing and Prostitution: The World's Oldest Profession and the World's Newest Deadly Disease*, 45 Hastings Law Journal 1565 (1994).

[60] Cal. Penal Code § 1524.1 (West 1988).

A victim may also request HIV testing of a person who has been accused and written up in a police report, but not charged, with certain alleged sex crimes. This provision applies only if (1) the accused has been charged with a separate sex crime against either the same victim or against another victim, (2) there is probable cause to believe that the accused committed the uncharged sex offense, and (3) there is probable cause to believe that blood, semen, or certain other bodily fluids could have been transferred from the accused to the victim.

The prosecutor must advise the alleged victim of the right to request testing and must refer the victim to the local health officer for help in determining whether to make such a request. The local health officer is also responsible for disclosing the test results to the alleged victim and the accused and must offer appropriate counseling to each. The prosecutor may not use the test result to determine whether to file a criminal charge.[61]

In *Humphrey v. Appellate Division*, the defendant was *charged* with molesting or annoying a child, sexual battery, and misdemeanor child abuse.[62] The warrant was based on information from the mother of the two minor victims who submitted an affidavit on their behalf stating that "as true and accurate to the best of her knowledge and belief, the defendant had engaged in sexual misconduct with her daughters."[63] The defendant challenged the warrant as lacking probable cause. The court found that, because Penal Code §1524.1 expressly incorporates the traditional probable cause standard, the state need establish "only a fair probability of a transfer of fluids, not its truth beyond a reasonable doubt."[64] Accordingly, the court authorized the drawing of blood from the defendant for HIV testing.

6. Prisoners

Sections 7510-7519 of the California Penal Code establish procedures through which custodial and law enforcement personnel are required to report situations in which they have reason to believe they have come into contact with the bodily fluids of an inmate, a person arrested or taken into custody, or a person on probation or parole, in a manner that could result in HIV infection.[65] These reports must be filed with the chief medical officer of the applicable custodial facility.[66] The employee may request the HIV testing of the person who is the subject of the report.[67] The chief medical officer shall order a test only if there is a significant risk that HIV was transmitted.[68]

These sections also permit inmates to file similar requests stemming from contacts with other inmates.[69] Additionally, the chief medical officer may order an HIV test in the absence of any incident report or request from an inmate or employee, if the medical officer concludes an inmate exhibits clinical symptoms of HIV infection or AIDS.[70] Further, custodial officers or correctional staff may file a report of any observed

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[61] *Id.*
[62] *Humphrey v. Appellate Division*, 29 Cal. 4th 569, 572 (S. Ct. 2002).
[63] *Id.*
[64] *Id.* at 574.
[65] Cal. Penal Code § 7510(a) (1988).
[66] *Id.*
[67] *Id.*
[68] Cal. Penal Code § 7511(b) (West 1988).
[69] Cal. Penal Code § 7512 (West 1988).
[70] Cal. Penal Code § 7511 (West 1988).

or reported behavior[71] known to cause the transmission of HIV.[72] The chief medical officer may investigate these reports and require HIV testing of any inmate as deemed necessary as a result of the investigation.[73] All reports made by the chief medical officer are confidential.[74]

The chief medical officer or judge must have probable cause in order to mandate HIV testing of an individual being held by the state. In the case of *In re Khonsavanh*, the Superior Court ordered HIV testing of a juvenile who was convicted of four counts of attempted murder and assault with a firearm.[75] The Court of Appeals found that the lower court erred in ordering the testing because there was no evidence that the juvenile exchanged bodily fluids with anyone or exhibited signs of HIV/AIDS.[76]

Health and Safety Code §121070 establishes a separate procedure for testing persons in custody.[77] It requires that any medical personnel working in any state, county, or city jail, prison or other detention facility, who receives information that an inmate has been exposed to or is infected with HIV, or has an AIDS related condition, must report that information to the officer in charge of the detention facility. The officer in charge must notify all employees, medical personnel, contract personnel, and volunteers at the facility who have direct contact with the inmate or the inmate's bodily fluids. Those receiving this information must maintain the confidentiality of any personally identifying data. Any willful unauthorized disclosure is punishable as a misdemeanor.

Finally, with the high rate of sexual assault by inmates against other inmates, coupled with the possibility of HIV transmission, some have argued that prison conditions violate the Eighth Amendment protections against cruel and unusual punishment.[78] However, courts have yet to rule that the risk of HIV transmission presents a valid Eighth Amendment claim.[79]

C. Intentional Transmission

Health and Safety Code §120291 states that any person who exposes another to HIV by engaging in unprotected sexual activity is guilty of a felony, when the infected person (1) knows s/he is infected, (2) has not disclosed his/her HIV positive status, and (3) acts with the intent to infect the other person with HIV. The felony charge is punishable by incarceration in the state prison for three, five, or eight years. Unless the victim consents otherwise, the name and any other identifying characteristics of the victim shall remain confidential.

For all the controversy that this statute has generated, not a single case has been heard on the appellate level. Stories about prosecution of cases of intentional transmission are likely to be urban legends, representing generally baseless fears in the community. Rather than targeting a frequent offense, this statute was probably enacted to

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[71] Vermont was the first state in which the prison system distributed condoms. Mississippi, Philadelphia, San Francisco County, and New York City are among the few other jurisdictions that allow condom distribution. *The Social Impact of AIDS in the United States* 185 (Albert R. Jonsen and Jeff Stryker, eds., National Academy Press 1993).
[72] Cal. Penal Code § 7514 F (West 1988).
[73] Cal. Penal Code § 7511 (West 1988).
[74] Cal. Penal Code § 7517 (West 1988).
[75] *In re Khonsavanh*, 67 Cal. App. 4th 532, 534 (1998).
[76] *Id.* at 537-538.
[77] Cal. Health & Safety Code § 121070 (West 1995).
[78] David M. Siegal, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 Stanford Law Review 1541 (1992).
[79] *Id.* at 1542.

bring more peace of mind to the community. Attorneys and advocates should note, however, that within the last three years local district attorneys have successfully charged persons for intentional transmissions. A San Francisco defendant was acquitted, and no one has been convicted at the time of this writing.

1. Three Year Sentence Enhancement for Sex Offenders Aware of Status

Penal Code §12022.85 provides for a three-year sentence enhancement for a conviction of rape (including statutory and spousal rape), unlawful sodomy, or oral copulation, if the defendant knew that s/he was HIV positive at the time of the commission of the offense. An HIV test result obtained pursuant to Penal Code §1202.1 or Penal Code §1202.6 may be used to prove prior knowledge. (See Sections on Sex Offenders and Prostitution, pages X and Y.)

III. General Medical Records Confidentiality Statutes

HIV-specific safeguards fall within more general protections of medical confidentiality, which deter unauthorized disclosures and provide a basis of remedy when damaging disclosures do occur.

Underlying both federal and state confidentiality schemes is the medical profession's tradition of physician confidentiality, developed from the Hippocratic oath and the necessity of trust between patient and doctor. However, exceptions to the general rule of nondisclosure of medical information have developed, including: patient waiver, disclosure to institutional staff in order to provide more comprehensive medical care, disclosure of a patient's general status to a hospital visitor, and in California, the duty to warn against public peril as developed from the *Tarasoff* exception. The *Tarasoff* exception refers to the case, *Tarasoff v. Regents of the University of California*, in which the Supreme Court of California imposed an affirmative duty on therapists to warn a potential victim of intended harm by the client, stating that "[t]he protective privilege ends where the public peril begins."[80]

A. Federal Statutes

Several federal statutes address medical confidentiality and numerous confidentiality requirements are found in other statutes and programs, such as the Americans with Disabilities Act (ADA), the Privacy Act, the Family and Medical Leave Act (FMLA), Medicare and Medicaid.

1. **Health Insurance Portability and Accountability Act (HIPAA):** HIPAA protects the privacy of health information by establishing national health privacy and security standards. HIPAA requires that individually identifiable health information must be protected from unlawful access or disclosure.[81]
2. **Americans with Disabilities Act:** The ADA requires employers to treat as confidential medical information acquired during the course of pre-employment medical exams and requests for reasonable accommodations.[82]
3. **Privacy Act:** The Privacy Act of 1974 mandates "no agency shall disclose any record…except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains."[83]

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[80] 17 Cal. 3d 425, 442 (S. Ct. 1976).
[81] The law applies to health plans, health care clearinghouses, and to any health care provider who electronically transmits health information. 45 C.F.R. § 160.102, 160.103.
[82] 42 U.S.C.A. § 12112(d)(2) (1990).
[83] 5 U.S.C.A. § 522a(b) (1988).

4. **Family and Medical Leave Act:** The FMLA requires employers to treat as confidential medical records obtained pursuant to an employee's request for disability leave.[84]
5. **Medicare and Medicaid:** Medicare and Medicaid require hospitals to have specific procedures to ensure confidentiality of patient records.[85]

B. California Statutes

Beginning in the late 1970s and early 1980s, most states passed medical records confidentiality statutes. These acts usually required a patient to consent in writing to any disclosure of medical records by health care providers. In 1982, California adopted the Confidentiality of Medical Information Act (CMIA).[86] In general, CMIA prohibits disclosure of any medical information by health care workers without: (1) authorization from the patient, (2) a proper subpoena or other court order, (3) a legal search warrant, or (4) other appropriate legal authority.[87] CMIA protects only against *unauthorized* disclosures.

Disclosure is discretionary (i.e., patient does not have to consent); however, in several specific circumstances, such as disclosure from a health care provider to other health care providers (e.g., emergency medical personnel, technicians and others), disclosure is allowed if necessary for the diagnosis or treatment of the patient.[88] The health care provider may also, in the absence of a contrary instruction from the patient, release information on the patient's general condition and treatment to an inquiring visitor at the hospital.[89] Violations of the act are punishable as misdemeanors and can subject the violating party to payment of compensatory damages, punitive damages not to exceed $3,000, attorney's fees not to exceed $1,000, and the cost of any ensuing litigation.[90]

CMIA does present some confidentiality concerns. Most importantly, it fails to prohibit aggressive state programs that involve name-reporting of HIV-positive persons, such as partner notification programs.

If your client's medical records have been disclosed, first discover whether the patient signed any written authorization for disclosure. Then examine whether the written authorization included permission to this particular health care provider to disclose this information to this particular third party. If it did not, ask whether the disclosure was relevant to the treatment and whether the third party had a legally cognizable interest in obtaining the information.[91]

IV. Constitutional Protections of Privacy

Recent federal and state anti-discrimination statutes that encompass the rights of people with disabilities demonstrate government recognition of privacy rights.

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[84] 29 U.S.C. § 2601 *et seq*. (1993); 29 C.F.R. § 825 *et seq*. (1995).
[85] 42 C.F.R. § 482.24 (b)(3) (2003).
[86] Cal. Civil Code §§ 56-56.37 (West 1982).
[87] Cal. Civil Code §§ 56.10-56.11 (West 1982).
[88] Cal. Civil Code § 56.10(c)(1) (West 1982).
[89] Cal. Civil Code § 56.16 (West 1982).
[90] Cal. Civil Code §§ 56.35-56.36 (West 1982).
[91] For additional discussions of these questions see the decisions in *Aden v. Younger*, 57 Cal. App. 3d 662 (1976); *Division of Medical Quality Assurance v. Gherardini*, 93 Cal. App. 3d 669 (1979); *Wood v. Superior Court*, 166 Cal. App. 3d 1138 (1985); *People v. Stockton Pregnancy Control Medical Clinic, Inc.*, 203 Cal. App. 3d 225 (1988); *and see Urbaniak v. Newton*, 226 Cal. App. 3d 1128 (1991).

Nonetheless, laws like the federal Americans with Disabilities Act (ADA) and California's Fair Employment and Housing Act (FEHA) still leave loopholes when it comes to protecting against the government's own action. When ADA cases have reached the United States Supreme Court in recent years, the trend has been to limit its protections significantly. Constitutional protection may be all that is available in some cases.

A. Federal Constitutional Protection

1. Unreasonable Search and Seizure

The United States Supreme Court has long recognized that intrusions into the human body, including blood, breath, and urine tests, are searches subject to the restrictions of the Fourth Amendment.[92] In addition, the California Supreme Court affirmed these decisions and used Fourth Amendment analyses to rule on cases involving mandatory blood testing.[93] The United States Supreme Court has not yet heard a Fourth Amendment challenge to mandatory HIV testing laws, but the Court is likely to use a "special needs" analysis, a Fourth Amendment Balancing Test, or a combination of both.[94]

a) "Special Needs" Doctrine

The "special needs" doctrine balances an individual's privacy rights against governmental interest to determine whether an administrative search is reasonable.[95] Over the last forty years, the United States Supreme Court has developed an administrative search exception to the general requirement of a warrant to avoid violation of the Fourth Amendment. Essentially, the exception holds that an ordinance can give administrative arms of the government the right to a limited inspection of property without a warrant when required by special needs, such as health and safety.[96]

In *Skinner v. Railway Labor Executives Association*, railway labor organizations challenged the Federal Railroad Administration's regulations governing drug and alcohol testing of railroad employees.[97] In *Skinner*, the Supreme Court recognized the "special needs" exception to the probable cause and warrant requirement when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[98] If a court determines that a "special need" exists, the court must then use a test to balance the individual's privacy interest against the government's need to conduct the search without a warrant.[99]

b) Balancing Test

The balancing test is used primarily to determine the validity of administrative searches where the warrant requirement has been abandoned in favor of statutory

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[92] *See Schmerber v. State of California*, 384 U.S. 757, 768 (S. Ct. 1966); *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 617 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (S. Ct. 1989); *Vernonia School District v. Acton*, 515 U.S. 646 (S. Ct. 1995).

[93] *See Loder v. City of Glendale*, 14 Cal. 4th 846 (1997); *Hill v. National Collegiate Athletic Association*, 7 Cal. 4th 1 (S. Ct. 1994).

[94] The "special needs" test was first recognized in *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (S. Ct. 1985) (Blackmun, J., concurring) *and see* Sadler, *supra* note 50, at 200-201; Blender, *supra* note 50, at 487.

[95] *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (S. Ct. 1967).

[96] *See* Anne L. Tunnessen, *McCabe v. Life-Line Ambulance Service: Another Extension of the Over-extended Administrative Search Exception*, 48 Mercer L. Rev. 1297 (1997) (giving a brief history of the administrative search exception and its practical implications).

[97] *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. at 612 (S. Ct. 1989).

[98] *Id.* at 619.

[99] Sadler, *supra* note 50, at 203 (citing *Skinner v. Railway Labor Executives' Assn.* at 619 (S. Ct. 1989)).

schemes that call for mandatory testing to support a state interest.[100] The following four factors have emerged through the United States Supreme Court's use of the balancing test:[101]

1) Individual's Expectation of Privacy

An individual's expectation of privacy regarding his/her bodily integrity can be diminished by certain outside circumstances.[102] Many of the California statutes governing mandatory HIV testing require testing of suspected or convicted criminals including sex offenders, individuals resisting arrest, and prostitutes. These persons are likely being held in custody in a city or county jail, where they would have a diminished expectation of privacy.[103] In addition, it can be argued that the convicted or suspected criminal has a diminished expectation of privacy because they are charged with engaging in criminal behavior during which bodily fluids may be transferred.

a. Invasiveness of the Search

Typically, when a government-imposed search requires a bodily invasion, as in the case of an HIV test, courts are less likely to uphold a warrant less search.[104] However, blood extraction is not considered a substantial invasion because blood tests are fairly common, the quantity of blood extracted is minimal, and the procedure almost never involves risk, trauma, or pain.[105]

The United States Supreme Court has yet to consider the constitutionality of mandatory HIV testing specifically. Previous cases have focused on drug and alcohol testing.[106] Arguably, an HIV test is ultimately much more invasive than a drug or alcohol test because it invades a person's body and reveals confidential medical information about that person.[107] The impact of a positive HIV test on an individual's life can be much more devastating than that of a positive drug or alcohol test.[108] Drug and alcohol tests measure the presence of a substance in a user's body. Over time the substance will metabolize and subsequent tests will return negative. In the case of HIV, the test determines a medical condition permanent to the subject's body. A positive HIV test has far greater consequence to the well-being and health of the subject, and carries a stigmatization greater than drunk driving or even that of a substance abuser.

However, the courts in California have not made a distinction, in terms of bodily invasion, between HIV tests and drug or alcohol tests.[109] In *Johnetta v. Municipal Court*, the California Court of Appeals used a combination of the "special needs" balancing test when the petitioner challenged a court order to submit to an HIV test at the request of a police officer who he had bitten.[110] The Court in *Johnetta* upheld the reasoning that

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[100] *Id.* at 202.
[101] *Id.* at 203.
[102] *See Skinner v. Railway Labor Executives' Assn.* 489 U.S. at 627 (S. Ct. 1989) (finding that railroad employees have a lessened expectation of privacy because they work in pervasively regulated industry); *National Treasury Employees Union v. Von Raab* 489 U.S. at 672 (S. Ct. 1989) (holding that employees involved in drug interdiction have a decreased expectation of privacy because the job requires inquiry into their physical ability).
[103] *See Hudson v. Palmer* 468 U.S. 517, 527-528 (S. Ct. 1984).
[104] *Schmerber v CA.,* 384 U.S. at 770 (S. Ct. 1966).
[105] *Id.* at 721.
[106] *Id.* at 757; *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. at 627 (S. Ct. 1989)*; National Treasury Employees' Union v. Von Raab*, 489 U.S. 656 (S. Ct. 1989).
[107] Sadler, *supra* note 50, at 208.
[108] *Id.*
[109] *Johnetta v. Municipal Court*, 218 Cal. App. 3d 1255 (1990); *People v. Hall*, 101 Cal. App. 4th at 1022-1023 (2002).
[110] *Id.* at 1261.

blood extraction "is so minimal in nature that, under certain circumstances, the intrusion can be justified without probable cause in the face of a special need beyond the normal requirements of law enforcement."[111] When the petitioner claimed that HIV testing was more intrusive than drug or alcohol testing because of the psychological impact and the confidentiality issues, the Court acknowledged these issues, but ultimately decided that the assaulted officer's fear that he had been infected outweighed the psychological impact of the petitioner's potential HIV-positive test result.[112]

2) Government's Interest in the Search

The asserted government purpose for conducting the search is weighed heavily. Government interests include protection of prisoners, the prevalence of drugs in the United States, and the safety of public transportation.[113]

The state's interest in preventing the spread of HIV/AIDS is substantial. The number of lives lost and the amount of money spent in health care, education, and other service programs is sufficient evidence of the governmental interest. One of the purported goals of mandatory testing in these limited circumstances is to prevent further transmission of the disease by people who unknowingly have it and are spreading it to others, even if the transmission potential is very remote.[114] Because of the strong state interest in preventing the spread of HIV, the courts are likely to weigh the utility of the search more heavily in favor of the government to ensure that that prevention efforts are successful.[115]

3) Utility of the Proposed Search in Serving that Interest

Even if the government's interest is great, a search is considered unreasonable if the government's purpose is not furthered by the search.[116] An example of such a search can be found in *Delaware v. Prouse*. The Supreme Court held that random stops by police to check for unlicensed motorists and unregistered vehicles are violations of the Fourth Amendment, because they were not "sufficiently productive mechanisms to justify the intrusion upon Fourth Amendment interests."[117] In both *Skinner* and *National Treasury Employees' Union v. Von Raab,* the Supreme Court found that drug testing furthered the government's interest in deterring employees (railroad company and United States Customs Service workers, respectively) from using alcohol or drugs.[118]

In *Johnetta*, the petitioner argued that mandatory testing served no useful governmental purpose because the police officer whom had been bitten was free to have his/her own blood tested.[119] The Court of Appeals chose to rely on medical testimony that test results from the source of the infection would be useful in that the information would diminish the officer's anxiety.[120] However, others have disagreed and claimed that knowing the assailant's HIV status gives little assistance to the victim because the victim is in the same position both medically and psychologically, whether or not the test result

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[111] *Id.* at 1277.
[112] *Id.* at 1278.
[113] *Bell v. Wolfish*, 441 U.S. 520, 559 (S. Ct. 1979), *National Treasury Employees' Union v. Von Raab* 489 U.S. at 668-669 (S. Ct. 1989), *and see Skinner v. Railway Labor Executives' Assn*., 489 U.S. at 628-629 (S. Ct. 1989).
[114] *Johnetta v. Municipal Court*, 218 Cal. App. 3d at 1279-1280 (2002).
[115] Sadler, *supra* note 50, at 210.
[116] Sadler, *supra* note 50, at 205 (citing *Delaware v. Prouse*, 440 U.S. 648, 659 (S. Ct. 1979)).
[117] *Delaware v. Prouse*, 440 U.S. at 659 (S. Ct. 1979).
[118] *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. at 629 (1989); *Von Raab* 489 U.S. at 676 (S. Ct. 1989).
[119] *Johnetta v. Municipal Court*, 218 Cal. App. 3d at 1280 (2002).
[120] *Id*. at 1280. See also *Blender*, *supra* note 50 at 498-499.

of the assailant is known.[121] Furthermore, providing negative test results to the victim can cause problems, such as delayed treatment, if the assailant's test is administered too soon after exposure to the virus and the victim relies on the assailant's false negative.[122]

Attorneys and their clients need to keep challenging the court's outdated reasoning in many of these areas. When there is no scientific evidence to suggest that it is possible to contract HIV through certain activities (e.g., biting, spitting, or sweating), attorneys need to encourage the court to find against mandatory testing because of the punitive consequences it has on testees. The recent trend has been for courts to hold that a particular activity could result in transmission even though there is no evidence to indicate so. We need to pressure the courts to reconsider the point at which a testee's privacy interest outweighs the smallest percentile chance that someone may be infected through a particular activity.

2. Due Process, Equal Protection, and the Right to Privacy

Although the United States Constitution does not refer specifically to an individual's right to privacy, the Supreme Court has recognized a right to privacy through the interpretation of several other Amendments in the Bill of Rights. In *Griswold v. Connecticut*, the Court recognized a "penumbral" right to privacy that could be derived from the First, Third, Fourth, Fifth, and Ninth Amendments.[123] In *Roe v. Wade*, the Court held that the Fourteenth Amendment provides a right to privacy that is specifically applicable towards the states.[124]

In *Whalen v. Roe*, the Supreme Court addressed the question of whether a constitutional right to privacy protects against government-mandated disclosures of health information.[125] The issue in *Whalen* concerned a New York statute that required the state to be provided with a copy of every prescription for certain drugs. It further required the records to be kept confidential while in the state's possession.[126] In his decision, Justice Stevens found two types of privacy interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[127] Justice Stevens found that the statute did not pose a sufficiently grievous threat to either of these interests because of the adequate protection against disclosure in the legal duty to avoid unwarranted disclosures.[128]

Even though New York's statute was found to be constitutional, the Court's decision in *Whalen* was widely understood to confirm a constitutional right of informational privacy.[129] However, later cases limited this right through the use of a balancing test.[130] In *Nixon v. Administrator of General Services*, the Court recognized a right of informational privacy, but one that was subject to a balancing test that weighed

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[121] Sadler, *supra* note 50, at 210, Blender, *supra* note 50, at 496.
[122] Sadler, *supra* note 50, at 210.
[123] *Griswold v. Connecticut*, 381 U.S. 479 (S. Ct. 1965).
[124] 93 S. Ct. 705, 731-732 (S. Ct. 1973).
[125] *Whalen v. Roe*, 429 U.S. 589, 591 (S. Ct. 1977).
[126] *Id.* at 591.
[127] *Id.* at 599.
[128] *Id.* at 601.
[129] Norman Viera, *Unwarranted Government Disclosures: Reflections on Privacy Rights, HIV and Ad Hoc Balancing*, 47 Wayne Law Review 173, 178 (2001).
[130] *Id.*

the government's interests against those of the individual.[131] Justice Brennan wrote, "[t]he claim must be considered in light of the specific provisions of the Act, and any intrusion must be weighted against the public interest."[132] The use of this balancing test throughout the lower courts has led to a mixed victory for claimants seeking to protect their HIV status from mandatory disclosure.[133]

In almost every case where individuals were seeking to prevent government mandated disclosure of their HIV status, the courts favored the state. The balancing almost always weighed heavier on the side of protecting the public at large from accidental transmission.[134] These decisions often take only slight notice of the individual's privacy interest and the effects that disclosure can have on a person's employment, housing, personal relationships, and health.

B. California Constitutional Protections

1. Right to Privacy

In an unprecedented ballot initiative, Californians enacted a constitutional amendment in 1972 that secured for all citizens an "inalienable right" to privacy.[135] By 1980 the California courts had interpreted this provision as extending farther than the federal right to privacy.[136] Furthermore, the California Supreme Court has interpreted this amendment to apply in a wide variety of contexts concerning confidential information and its use.[137] As with the federal right, however, the California doctrine does not establish an absolute right to privacy. The California Supreme Court requires a showing of a countervailing state interest, substantively furthered by the invasion of the privacy interest, in order to overcome the individual's privacy right.[138]

In 1994, the California Supreme Court applied the constitutional privacy provision to an HIV-status/wrongful disclosure case. In *Heller v. Norcal Mutual Life Insurance Co.*, the Court held that a plaintiff alleging an invasion of a state constitutional right to privacy must establish: (1) a legally protected privacy interest, (2) a reasonable expectation of privacy in the circumstances, and (3) conduct by defendant which constitutes a serious invasion of privacy.[139] The Court further held that disclosure of the plaintiff's HIV status by a doctor to an insurance company did not violate a constitutionally protected interest when the plaintiff put her health status at issue by filing a medical malpractice suit against the doctor.[140]

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[131] *Nixon v. Administrator of General* Services, 433 U.S. 425, 458 (S. Ct. 1977).
[132] *Id.* at 458.
[133] Viera, *supra* note 128, at 194.
[134] *Id.* at 194
[135] Cal. Const. Art. 1, Sec. 1.
[136] *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 281 (1981); *Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 241 (1989).
[137] *See White v. Davis*, 13 Cal. 3d 757, 773 (S. Ct. 1975) (regarding improper use of information properly obtained.); *Chapter of the 7th Step Found., Inc. v. Younger*, 214 Cal App. 3d 145 (1989) (prohibiting a state agency from disseminating job applicants non-conviction arrest and detention records); *Cutter v. Brownbridge*, 208 Cal. App. 3d 230 (1986) (holding confidential communications between patient and therapist); *Porten v. U.S.F.*, 64 Cal. App. 3d 825 (1976) (prohibiting the unauthorized disclosure of a student's grades); *Atkisson v. Kern Co. Housing Auth.*, 59 Cal. App. 3d 89 (1976) (enjoining the enforcement of a housing regulation which effectively prohibited an extended family from residing under the same roof); *Kinsey v. Macur*, 107 Cal. App. 3d 265 (1980) (preventing a private party from sending mail to a wife disclosing her husband's past sexual history).
[138] *Heller v. Norcal Mutual Life Insurance Co.*, 8 Cal. 4th 30, 43 (S. Ct. 1994).
[139] *Id. (citing Hill v. National Collegiate Athletic Assn., supra.* 7 Cal.4th 1, 39 (1994)).
[140] *Id.*

In *Heller*, the California Supreme Court distinguished *Urbaniak*, a case in which a California Court of Appeals held a right to privacy under the California Constitution.[141] In *Urbaniak*, a doctor disclosed a patient's HIV-positive status to the attorney for the insurer of the patient's employer after the patient disclosed this status to the doctor's nurse.[142] The California Court of Appeals held that disclosure of HIV-positive status to a non-health care worker (i.e., the attorney for the insurer), when the status was originally disclosed only for the purpose of alerting health care workers to the need for taking safety precautions, was an invasion of the California constitutional right to privacy.[143]

In a more recent case, *Jeffrey H. v. Imai, Tadlock & Keeney*, a Court of Appeals distinguished the ruling in *Heller*.[144] In *Jeffrey H.*, a litigant brought action against a law firm that represented an opposing party in a personal injury action, alleging a claim for invasion of privacy after the law firm used confidential medical records which disclosed the litigant's HIV status in an arbitration proceeding.[145] The law firm, relying upon *Heller*, argued that the litigant could not have any reasonable expectation of privacy in his medical records because he brought an action for personal injury that put his medical condition at issue.[146] The Court responded in the plaintiff's favor by declaring that the litigant's HIV status did not "relate in any way to the physical or emotional injuries for which he sought recovery in the personal injury action."[147]

Thus, the crucial difference between these cases is whether or not the plaintiff had a decreased expectation of privacy in his HIV status due to the circumstances of the disclosure and whether or not the plaintiff's HIV status was relevant to these circumstances. In *Heller*, the party with the potentially harmful HIV-related information remained in control of that information. Because the party in control of the information is subject to strict privacy protections, an individual may have to face the difficult choice of trusting that this information will remain confidential and not cause further repercussions, or having to terminate any interactions with persons who are mandated to keep records of HIV status.

There are other important limitations on the scope of privacy protections afforded by the California Constitution. Perhaps the most significant limitation is the deference given to the state in implementing public health programs. In California, as in the federal arena, privacy protections will pose little barrier to the growth of aggressive measures like partner notification.

2. Right of Privacy Action Against Private Parties

The California Supreme Court in *Hill v. National Collegiate Athletic Association (NCAA)*, held that California's constitutional right to privacy provides a right of action against private parties.[148] In *Hill*, university students challenged the NCAA's drug testing program as unconstitutional under state privacy laws.[149] In response, the NCAA claimed that the Privacy Initiative did not create a right of action against private parties. While the Court had previously not specifically decided this issue, it relied on a number

[141] *Id.* at 42 (citing *Urbaniak*, 226 Cal. App. 3d 1128 (1991)).
[142] *Urbaniak*, 226 Cal. App. 3d at 1134 (1991).
[143] *Urbaniak*, 226 Cal. App. 3d at 1135 (1991).
[144] *Jeffrey H. v. Imai, Tadlock, & Keeney* 85 Cal. App. 4th 345, 354 (2001).
[145] *Id.* at 350-351.
[146] *Id.* at 354.
[147] *Id.* at 354.
[148] *Hill v. National Collegiate Athletic Assn.,* 7 Cal. 4th at 20 (S. Ct. 1994).
[149] *Id*.

of decisions from lower appellate courts and the intent of the voters who passed the initiative to decide that there was "persuasive evidence of drafter and voter intent to recognize a right of action for invasion of privacy against private as well as government entities."[150] The Court found that the NCAA was no different from a credit card company, an insurance company, or a private employer.[151]

This decision is extremely important for many individuals with HIV because it is often private parties such as credit card companies, insurance companies, and private employers that are trying to invade their privacy by mandating HIV tests.

V. Private Causes of Action

This section addresses common law causes of action between individuals, focusing on tort law. There are two main problems addressed here. The first problem arises when someone reveals your client's medical status against your client's will. A declaration that your client has AIDS or a statement concerning his/her HIV status, whether or not the statement is true, can be devastating.

The second problem arises when a person does not reveal his/her HIV/AIDS status and another party is injured as a result. There may be a duty to inform others, and liability may follow from the failure to do so.

A. Unwanted Disclosure of HIV/AIDS Status

Many clients call ALRP after disclosure or threats of disclosure of their HIV status. A few examples include:

- A member of a client's church revealed to everyone in the congregation that the client was sick with AIDS, and the congregation subsequently shut her out of church activities;
- A man's ex-lover threatened to tell his employer he was HIV positive;
- A woman's ex-lover posted signs all over the neighborhood warning people not to have sex with her because she is HIV positive;
- An insurer's claim report to an employer revealed that the worker's claims were HIV-related, after which the employer refused to promote him; and
- A creditor trying to collect past due debts called a client's neighbors and landlord, who then wanted to evict him.

The revelation of HIV status can create a wide range of damage. The individual responsible for the disclosure can be liable based on the torts of invasion of privacy, libel/slander, defamation, and intentional or negligent infliction of emotional distress. If found liable, s/he may have to compensate the plaintiff for the financial or emotional damage s/he produces, and may be prevented from continuing such behavior.

Even if your client decides against court action, you can provide immediate assistance by informing the offending party of the violation of the law. A sample "cease

[150] *Id.*
[151] *Id.* at 18.

and desist" letter is included in Appendix A. Such a letter may prevent further damage to a vulnerable client.

1. Procedural Issue: Confidentiality in Pleadings and Correspondence

Before discussing the specific torts available in these circumstances, attorneys should consider the important procedural aspects of privacy torts when representing a client with HIV/AIDS.

Prior to the litigation stage, all correspondence regarding the client should maintain the integrity of the client's situation. The attorney can protect his/her client's interests while still alerting the offender to his/her legal liability. For example, in the letter provided in Appendix A, the exact offense is not detailed and protects the privacy of the client by referring only to disclosure of his/her medical condition, while giving enough detail for the offender to identify the situation.

Attorneys should also consider protecting the client's privacy by omitting his/her name from the pleadings. The attorney must specifically request the court to allow the plaintiff to proceed anonymously (e.g., as "Jane Doe" or "John Doe"). A common method is to file an *ex parte* application requesting anonymous filing prior to filing the complaint. The *ex parte* application is a declaration asserting: 1) the reasons for the anonymous filing, and 2) that the attorney has personal knowledge of those reasons. Included with the *ex parte* application should be a Memorandum of Points and Authorities demonstrating the legal arguments in favor of anonymous pleading. *See* *Appendix B*: Sample Application and Order, and Appendix C: Sample Memorandum for Anonymous Pleading.

While the general rule requires that all parties to an action be specifically named in the complaint,[152] courts have made exceptions to this rule by allowing anonymous pleadings in certain circumstances.[153] The Ninth Circuit, in *United States v. Doe*, allowed a prisoner to file using a pseudonym because of the risk that the plaintiff would be injured by other inmates.[154] The Court stated, "[t]he identity of the parties in any action… should not be concealed except in an unusual case, where there is a need for the cloak of anonymity…to protect a person from harassment, injury, ridicule, or personal embarrassment."[155]

In the case of privacy torts, a plaintiff with HIV/AIDS has a substantial interest in keeping his/her HIV status private because of the potential social stigma that might result from such disclosure. In *Doe v. Rostker*, the District Court for the Northern District of California held that there are exceptions to the rule that parties cannot proceed anonymously when "a common threat running through the case is the presence of some social stigma or the threat of physical harm to the plaintiffs attaching to the disclosure of their identities to the public record."[156]

There are plenty of sources supporting the argument to allow plaintiffs to plead anonymously. The consequences of disclosure in the plaintiff's life have the potential to cause serious harm, including emotional suffering, discrimination, and embarrassment. Without anonymous pleadings, plaintiffs might otherwise be forced to choose between

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[152] Cal. Code of Civ. Proc. §422.40 (West 1971).
[153] *See e.g., Doe v. Rostker*, 89 F.R.D. 158 (N.D. Cal. 1981), *United States v. Doe*, 655 F.2d 920 (9th Cir. 1981), *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000).
[154] *U.S. v. Doe,* 655 F.2d at 922 (9th Cir. 1980).
[155] *Id*.
[156] *Doe v. Rostker*, 89 F.R.D. at 161 (N.D. Cal. 1981).

losing their privacy or forgoing a lawsuit in which they might have a legitimate claim to damages.

2. Invasion of Privacy

There are four privacy torts:

- Public disclosure of a private fact;
- Creation of a false light in the public eye;
- Appropriation of name or likeness; and
- Unreasonable intrusion upon the seclusion of another.[157]

For someone with HIV, *public disclosure of a private fact* will likely be the most relevant tort. A plaintiff asserting this cause of action must show:

1. public disclosure;
2. of a private fact;
3. which would be offensive and objectionable to the reasonable person; and
4. which is not of legitimate public concern.[158]

Regarding the threshold issue of whether HIV status is a "private fact," the court noted in *Urbaniak* that HIV status is "clearly a 'private fact' of which disclosure may 'be offensive and objectionable to a reasonable [person] of ordinary sensibilities'."[159] In many cases, satisfying this element will be the easiest aspect of bringing this cause of action.

The "public disclosure" and "public concern" elements can present greater challenges. After reviewing numerous cases, one commentator stated, "[t]wo things [are] clear: disclosure must be made to a number of people to support a claim; and publicizing allegedly 'private facts' is permissible if the facts are of legitimate public interest or to some degree already in the public domain."[160]

In *Hill*, the California Supreme Court noted that "the common law right to privacy 'may not be violated by word of mouth only' and can be infringed only by 'printings, writings, pictures, or other permanent publications…"[161] However, the Court also noted that "in an age of oral mass media, widespread oral disclosure (e.g., radio) may tread upon our state constitutional right to privacy as readily as written dissemination."[162] The Court also stated that "less than public dissemination of information" may violate the state constitutional right to privacy when a professional or fiduciary relationship based on confidentiality is involved.[163]

This cause of action can be significantly limited by the First Amendment right to free speech.[164] If the matter at issue is one of public interest concerning a public figure, the disclosure will be allowed. For example, in *Diaz v. Oakland Tribune*, the Court found that the sex-change operation of a community college's student officer was "newsworthy" enough for newspaper publication.[165]

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[157] *See* William L. Prosser, *Privacy*, Cal. L. Rev. 383 (1960).
[158] Restatement (Second) of Torts § 652D.
[159] *Urbaniak v. Newton*, 226 Cal. App. 3d at 1140 (1991) (citing *Forsher v. Bugliosi*, 163 Cal. Rptr. 628 (1980)).
[160] Roger Doughty, *The Confidentiality of HIV-Related Information*, 82 Cal. L. Rev. 111, 159 (1994).
[161] *Hill v. National Collegiate Athletic Assn.* 26 Cal. Rptr. 2d at 850 (S. Ct. 1994) (citing *Grimes v. Carter*, 241 Cal. App. 2d 694, 699 (1966)).
[162] *Hill v. National Collegiate Athletic Assn.,* 7 Cal. 4th at 27 (S. Ct. 1994).
[163] *Id*.
[164] *See Cox Broadcasting Corp v. Cohn*, 420 U.S. 469 (S. Ct. 1975); *Florida Star v. B.J.F.*, 491 U.S. 524 (S. Ct. 1989).
[165] *Diaz v. Oakland Tribune, Inc.* 139 Cal. App. 3d 118 (1983).

3. Defamation

Another tort addressing the disclosure of private information arises from California's defamation statute. The law is codified under Civil Code §§ 44, 45, 46, and 47. Under §45, *libel* is defined as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."[166]

Section 46 defines *slander* as a false and unprivileged publication that is orally uttered via radio or any mechanical or other means which:

- Charges any person with crime, or with having been indicted, convicted, or punished for crime; or
- Imputes in him the present existence of an infectious, contagious, or loathsome disease; or
- Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; or
- Imputes to him impotence or a want of chastity;
- Which, by natural consequence, causes actual damage.[167]

In those circumstances in which a person falsely attributes an AIDS diagnosis to another, the applicability of the defamation statutes is clear, unless the writing is privileged in some way. In *Dorsey v. National Enquirer*, a newspaper reported that in child support proceedings, the mother of a celebrity's child claimed the celebrity had AIDS, but the celebrity tested negative for HIV. The Ninth Circuit held that a newspaper was not liable for defamation under Cal. Civil Code §47(d), granting a privilege to "a fair and true report in a public journal, of a judicial, legislative, or other public official proceeding, or anything said in the course thereof…."[168]

To most attorneys, unless the statement is false and unprivileged, defamation is unusable. However, creative application of the tort should not be overlooked. Defamation could apply to facts in which a communication may have been given an *actionably false impression*. For example, an action may arise when a physician, based merely upon the knowledge that a person was an intravenous drug user and had taken the HIV antibody test, falsely stated the person was HIV positive.[169]

Finally, there has been one case in which a slander action was maintained when the defendant published that the plaintiff had AIDS when the plaintiff was actually HIV positive, but did not have AIDS.[170] This situation has not yet been heard by an appellate court.

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[166] Cal. Civil Code § 45 (West 1872).
[167] Cal. Civil § 46 (West 1872).
[168] *Dorsey v. National Enquirer*, 973 F.2d 1431, 1434 (9th Cir. 1992). *See also Snipes v. Mack*, 381 S.E.2d 318 (Ga. Ct. App. 1989) (an HIV-negative woman won $100,000 in damages after her ex-boyfriend posted signs saying that she had AIDS; *McCune v. Neitzel*, 457 N.W. 2d 803 (Neb. S. Ct. 1990) (man was awarded $25,000 after suing an acquaintance who spread a rumor that he had AIDS).
[169] *See Vigil v. Rice*, 397 P.2d 719 (N. M. S. Ct. 1964).
[170] *See* jury decision in *Shuck v. Martin* (Mult. Co. Cir. Ct., Or., filed 1987, verdict 7-26-88).

B. Duty to Inform

In this section, the legal ramifications of non-disclosure of HIV/AIDS status are discussed. There are criminal penalties for intentional transmission of HIV/AIDS, but there can also be civil damages. This issue raises several interesting questions: Does failure to disclose positive status warrant liability if the person whom the partner has exposed becomes infected? What are the differences between exposure without infection and actual transmission of HIV?

For both exposure and actual transmission, the underlying causes of action are the same. The differences arise in the burden of proof and recoverable damages. The various causes of action to consider are: 1) fraudulent misrepresentation, 2) negligence, 3) battery, 4) intentional infliction of emotional distress, and 5) liability based on statutory violation.

The usual tort defenses equally apply under state law: 1) consent, 2) comparative fault, 3) contributory negligence, and 4) assumption of risk. California is a "pure" comparative fault state, in which the plaintiff's damages are reduced in proportion to the amount of negligence attributable to him/her. The plaintiff who has not acted reasonably under the circumstances in the court's view, perhaps engaging in unprotected sex with numerous partners or sharing unsterilized needles, might have his/her award reduced.