

# THE RIGHT TO PRIVACY

A review of the right for those with  
HIV/AIDS

ALL RIGHTS RESERVED

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*"In the future, everyone will have privacy for fifteen minutes."*

# THE PRINCIPLE

There can be no doubt that disclosure of HIV positive status may under appropriate circumstances be entitled to protection under article I, section 1. The condition is ordinarily associated either with sexual preference or intravenous drug uses. It ought not to be, but quite commonly is, viewed with mistrust or opprobrium. Under the test of tortious invasion of privacy, it is clearly a "private fact" of which the disclosure may "be offensive and objectionable to a reasonable [person] of ordinary sensibilities."

*Urbaniak v. Newton* (1991) 226 Cal. App. 3d 1128, 1133-1134

# SOURCES FOR PRIVACY PROTECTION

## Constitutions

- United States
- California

## Statutes

- California Health and Safety Act
- California Penal Code
- California Business and Professions Code
- California Information Practice Act
- HIPAA

## Common Law

# CONSTITUTIONAL BASES

## CALIFORNIA

All people are by nature free and Independent and have inalienable rights. Among these are pursuing and obtaining . . . .privacy. Article 1 Section 1

## UNITED STATES

- *Griswold v. Connecticut*
- *Whalen v. Roe*
- *Nixon v. Administrator*

# AIDS TESTING STATUTES

# PROHIBITONS AGAINST MANDATORY TESTING

Suitability for employment – Health and Safety Code Section 120980

Insurability – Health and Safety Code Section 120980

# WHEN AIDS INFORMATION MUST BE PROVIDED

- When applying for a marriage license – Family Code Section 358

- Pregnant Women –

  - H&S Code section 125107 –

    - HIV information to be provided re modes of transmission, risk reduction behavior, referral information*

    - Blood specimen be tested and results sent to MD and local health officer*

  - H&S Code section 125090 -

    - HCP to inform about intent to do test and right to decline*



# ANONYMOUS V. CONFIDENTIAL TESTING

## ANONYMOUS

H&S Code section 120885-95:  
administered at county health  
departments – no identification  
information is collected – unique  
number is given – results given in  
person

## CONFIDENTIAL

H&S Code Section 120975 – test is  
linked to patient's identity.

No person shall be compelled in  
any civil, criminal, administrative,  
legislative or other proceedings to  
identify the person

# MANDATORY HIV TESTING

- Criminal offenses other than prostitution – rape (statutory and spousal rape, unlawful sodomy or oral copulation; lewd and lascivious acts with children if there is probable cause to believe individual has HIV/AIDS)
- Prostitution – PC 1202.6 – must receive instruction and be tested –
- HIV Exposure from an Arrestee – H&S Code section 121060 – peace officer, firefighter, custodial officer, custody assistant
- Person charged with a crime – PC 1524.1 if requested by crime victim
- Wards of the Department of Youth Authority – W&I Section 1768.9
- Parolees and Probationers – PC 7520

# REPORTING OF HIV AND AIDS CASES

# REPORTING OF HIV/AIDS CASES

## HIV

- *Health care providers and clinical laboratories must report HIV infection by patient name to local health officers*
  - H&S Code Section 121022(a)
- *Local health officers must report HIV cases by patient name to CDPH*
  - CCR Title 17, Sections 2641.5 – 2643.20

## AIDS

- *CDPH must establish a list of AIDS cases*
  - H&S Code Section 120130
- *Health care providers and clinical laboratories must report AIDS cases by patient name to local health officers*
- *Local health officers must report AIDS cases by patient name to CDPH*
  - CCR Title 17, Sections 2500, 2502

# DISCLOSURE OF HIV TEST RESULTS

... AND CONFIDENTIALITY

# LAB TESTS

If requested by patient and approved by HCP, results can be posted on internet or other electronic method

. . . . EXCEPT any laboratory test for HIV

# HIV/AIDS CONFIDENTIAL PUBLIC HEALTH RECORDS

All public health records relating to HIV or AIDS developed or acquired by state or local public health agencies

*SHALL be confidential*

*SHALL not be disclosed*

Health and Safety Code Section 121025(a)

. . . EXCEPT

. . . as provided by law for public health purposes or as permitted by patient or guardian or conservator.



# . . . UNLESS

When the confidential information is necessary to carry out the duties of the agency or researcher

. . . Then state and local public health agencies can disclose personally identifying information to other local, state or federal public health agencies or collaborating researchers.

# BUT NEVER

. . . shall a record be disclosed or required to be disclosed in the context of any civil, criminal, or administrative proceeding.

# PENALTIES

If negligently disclosed:

Civil penalty not to exceed \$2500 plus court costs

If intentionally disclosed:

Civil penalty not less than \$5000 and not more than \$10,000

If disclosure results in economic, bodily or emotional harm

Guilty of a misdemeanor – one year in jail and fine not to exceed \$25,000

Civil – personal liability

# SAME IS TRUE FOR DISCLOSURE OF HIV TEST RESULTS

There must be written authorization for disclosure of HIV Test Results

Violation applies to anyone – not just public health records

- *Health and Safety Code Section 120980*

# WRITTEN AUTHORIZATION EXCEPTIONS

## By a physician

*If she records the results in the record or if she discloses it to health care providers for the purpose of diagnosis, care or treatment of the patient*

*Does not authorize any other form of disclosure*

H&S Code section 120985

## Partner notification

*MD not civilly or criminally liable for disclosure to a partner “reasonably believed to be the spouse, sexual partner, or person who has share a hyperdermic needle”*

## Must not identify the patient:

*“no physician and surgeon shall disclose any identifying information about the individual believed to be infected, except as required in Section 121022 or with the written consent of the individual . . .”*

# CONFIDENTIALITY OF MEDICAL RECORDS

# Federal

Health Insurance Portability and Accountability Act

Americans with Disabilities Act

Privacy Act

Family and Medical Leave Act

Medicare and Medicaid

# CALIFORNIA

## Confidentiality of Medical Information Act

Cal Civ Code 56-56.37 et seq



# REMEDIES

.... and waiver

# PRIVATE CAUSES OF ACTION

- ✓ *Unwanted Disclosure of HIV/AIDS Status*
  - Invasion of Privacy
  - Negligence
  - Negligence Per Se
  - Defamation

# PROCEDURAL CONSIDERATIONS

How to protect your client's identity

FINAL EXAM