AMERICAN BAR ASSOCIATION

AIDS COORDINATING COMMITTEE
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
CRIMINAL JUSTICE SECTION
CENTER FOR HUMAN RIGHTS
COMMISSION ON DISABILITY RIGHTS

RESOLUTION

RESOLVED, That the American Bar Association urges governments and relevant private stakeholders to both recognize and work to reduce, through appropriate legal and policy means, the social determinants of health that drive the HIV/AIDS epidemic, such as poverty, stigma, discrimination, and racism; housing, food, and transportation insecurity; over-criminalization of HIV non-disclosure; and misinformation about HIV transmission risk;

FURTHER RESOLVED, That the American Bar Association urges governments and relevant private stakeholders to ensure health care equity to marginalized populations disproportionately impacted by HIV, including those who are economically disadvantaged; underserved racial and ethnic minorities; LGBT persons; people with disabilities; and residents of underserved geographic regions;

FURTHER RESOLVED, That the American Bar Association urges governments and relevant private stakeholders to provide and maintain updated, evidence-based information pertaining to HIV transmission risks, prevention options, and health care resources available to individuals living with, affected by, or at risk of HIV;

FURTHER RESOLVED, That the American Bar Association urges governments and relevant private stakeholders to ensure comprehensive health care and HIV education and prevention services;

FURTHER RESOLVED, That the American Bar Association urges governments not to criminalize HIV status or HIV non-disclosure, except in the narrow circumstances where there exist (1) a clear specific intent to harm, (2) a substantial risk of transmission, and where (3) transmission occurs;

FURTHER RESOLVED, That the American Bar Association urges governments and relevant private stakeholders to ensure affordable, reliable, and safe housing to people with HIV or AIDS, and to combat housing discrimination based on HIV or source of income;
FURTHER RESOLVED, That the American Bar Association urges governments and relevant private stakeholders to ensure affordable legal services to people with HIV or AIDS; and

FURTHER RESOLVED, That the American Bar Association urges governments and relevant private stakeholders to ensure that no stigma based on sexual orientation, gender identity and expression is created by administrative guidance provided in the promulgation or implementation of laws and regulations regarding HIV and AIDS.
REPORT

In 1987, under the visionary leadership of President Robert MacCrate, the ABA established the AIDS Coordinating Committee to identify, analyze, and address legal issues surrounding the AIDS epidemic. In so doing, the ABA sought to reduce rampant fear and demonization of people with HIV, the virus that causes AIDS,¹ and to help craft appropriate legal protections for all concerned.

In pursuit of these purposes, the Committee held hearings nationwide to gather the expertise of lawyers, health care providers, policymakers, and persons living with or affected by HIV/AIDS in fashioning and implementing responsive ABA policy. The result of these hearings was an omnibus policy recommendation, adopted by the ABA in 1989, covering a broad range of issue areas.

What the Committee itself had anticipated would be a relatively brief existence, assuming HIV/AIDS would be cured or controlled within a few years, has continued for three decades as the epidemic became a pandemic and even, according to then-Secretary of State Colin Powell, a national security threat. In response to these persistent challenges, the Committee produced numerous additional policies; issued informational reports for the bench and bar; held various events and panel discussions; expanded its scope to include international concerns; and, since 2002, conducted biannual national conferences for HIV law practitioners, policymakers, and advocates. Since 2012, the Committee also has honored committed advocates with the Alexander D. Forger Awards for Sustained Excellence in the Provision of HIV Legal Services and Advocacy.

Among other Committee-initiated policy developments over the years, in 2004 the ABA endorsed a comprehensive, human rights-based approach to addressing the pandemic. And, in 2007, the ABA endorsed the medical-legal partnership model, which trains medical personnel to recognize “social determinants of health” affecting patients with HIV and refers them to lawyers placed on-site to address those legal or policy concerns before they can intensify and compromise the patient’s well-being and effective management of their HIV status.

The relevance of the 1989 omnibus and subsequent policies have held up remarkably well to further developments in science, law, and policy. Led by founding Chair Barry Sullivan and his successors – Salvatore Russo, Robert E. Stein, Sidney D. Watson, Hon. Richard T. Andrias, Shelley D. Hayes, Dawn Siler-Nixon and, today, Richard A. Wilson – the Committee’s work has been characterized by a steadfast commitment to evidence in pursuit of the ABA’s institutional goals and objectives as they bear on people living with or affected by HIV or AIDS.

¹ “AIDS” stands for Acquired Immune Deficiency Syndrome; “HIV,” for Human Immunodeficiency Virus. A person with HIV does not per se have AIDS, which develops only after the person’s immune system has been sufficiently compromised by HIV over time. With the advent and improvement of life-sustaining drug therapies since 1996, persons with HIV who have reliable access and adherence to such therapies virtually never progress to AIDS and, as the Centers for Disease Control and Prevention recently concluded, cannot transmit the virus to others.
Yet the policies warrant updating to reflect insights gleaned and evolution of terminology over the last thirty years. In that sense, this recommendation is intended not to overwrite or repeal prior policies on HIV/AIDS, but to enhance them with modern language and renewed emphasis in an updated omnibus policy. Indeed, perhaps the greatest challenge (and disappointment) in the field of HIV law and policy is the need to educate successive generations anew about HIV and its implications for personal and public health. Though now a manageable chronic condition where access and adherence to treatment exist, HIV requires constant vigilance. This recommendation is meant to ensure that the ABA remains well placed and informed to contribute to that ongoing effort.

The issues addressed by the recommendation are summarized below.

I. Thematic

Social determinants of health. Social determinants of health are circumstances that are not ‘medical’ in nature but have an impact on health. Lawyers often are better situated than doctors to mitigate these circumstances to benefit a patient/client’s health and, by extension, to promote public health generally. The classic example is that of the asthmatic patient living in a mold-infested rental dwelling who, consequently, is not benefitting from standard medical treatments for asthma. By intervening to force the patient/client’s landlord to remove the mold, however, lawyers deploy their professional skillsets to improve the patient/client’s health. Such efforts and outcomes apply as well to people with HIV facing discrimination in employment, housing, health care, and other settings that, though not ‘medical’ in nature, affect their ability to manage HIV effectively.

Marginalized populations. Despite dramatic advances in HIV treatment, care, and prevention, racial minorities and other historically marginalized populations continue to be disproportionately negatively impacted by HIV and have less access to those advances. It therefore is incumbent upon policymakers and implementers, consistent with a human rights-based approach to HIV prevention, care, and treatment, to equalize and safeguard such access for these populations.

Evidence-based information. As a sexually transmitted disease, HIV has always borne a perceived ‘moral’ dimension that has impacted the public policy response, largely for the worse. From a public health perspective, it is critical that public policy on HIV reflect the latest verified data, science, and other evidence. A classic example is seen in abstinence-only sex education, which repeatedly has been shown to be ineffective (even counterproductive) in reducing the spread of HIV, despite the ‘moral’ messages intended. By contrast, comprehensive sex education, of which abstinence is presented as an option, repeatedly has proved an effective policy approach.

II. Specific

Health care and HIV prevention. Perhaps the most important factors in reducing the spread of HIV are to provide people living with HIV with appropriate care and treatment, and to provide those at risk with education and prevention services. HIV transmission becomes effectively impossible when persons with HIV receive and adhere to treatment; and those who do not have the virus are far less likely to acquire it when they are educated about risks and prevention measures.

Further, people with disabilities often lack access to comprehensive health care and HIV education and prevention services due to negative attitudes and misconceptions about their sexuality (e.g., that they are not or should not be sexually active). Moreover, health care and prevention services often are not physically accessible and lack support for alternative modes of communication, such as sign language, Braille, and simplified easy-to-read and adapted tools, and therefore may need to be modified or adjusted to ensure that persons with disabilities can access them on an equal basis with others.

HIV criminalization. Longstanding ABA policy holds that criminal law should play a limited role in the public policy response to HIV. It remains the case, however, that a majority of HIV-specific state laws criminalize and severely punish3 non-disclosure of HIV status even in the absence of intent to transmit or where transmission could not have occurred. Time and experience have shown that these laws are ineffective at prompting disclosure, reducing HIV transmission, or promoting public health generally. Indeed, as noted in the National HIV/AIDS Strategy, criminalizing non-disclosure may be a barrier to HIV testing, prevention, and care (perhaps to avoid potential prosecution) while perpetuating HIV stigmatization (as the only sexually-transmitted infection typically singled out for prosecution), both of which undermine HIV prevention and public health.4 Moreover, it is now well established that a person living with HIV and in consistent care and treatment is, as the Centers for Disease Control and

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On September 21, 2017, Michael Johnson bypassed a new trial and entered a no-contest plea in the St. Charles County Circuit Court in Missouri. In exchange, he has accepted a sentence of 10 years in state prison. Because Missouri’s HIV criminal law hinges liability on whether or not the defendant can prove he disclosed his HIV status prior to sex—a virtual impossibility in most instances—Johnson decided to accept a plea deal that credits him with time served since his arrest nearly four years ago. Under Missouri’s law, one of the harshest in the country, Johnson could have faced nearly 100 years in prison if found guilty. He previously had been sentenced to 30 years in prison before the appeals court threw out the original conviction.


HIV-specific laws do not influence the behavior of people living with HIV in those States where these laws exist. DOJ issued best practice guidance for States that wish to reform their HIV-specific criminal statutes, and legislators should reconsider whether existing laws continue to further the public interest and public health. In too many instances, the existence and enforcement of these types of laws run counter to scientific evidence about routes of HIV transmission and effective measures of HIV prevention, and undermine the public health goals of promoting HIV screening and treatment.
Prevention recently declared, *incapable* of transmitting the virus to others. These insights only strengthen the ABA’s longstanding policy position on this issue and clarify the limited circumstances in which it would be appropriate to use the criminal law in this context.

**Housing.** Reliable housing often is the linchpin to managing HIV effectively. Without it, maintaining adherence to care and treatment and access to a broader support community becomes difficult to impossible. Preventing housing discrimination against people with HIV, and ensuring safe, affordable housing, therefore is critical to combatting the spread of HIV effectively.

**Legal services.** HIV legal services have proven pivotal to securing access to health care, employment, housing, public accommodation, and other supportive services that enable people with HIV to lead productive lives free of discrimination. When made available immediately after diagnosis (as in medical-legal partnership settings, for example), HIV legal services often save public resources by identifying and addressing potential legal issues before they become serious problems. In the process, such early legal interventions can identify broader trends in legal needs before they become common, thus further enabling the efficient deployment of public resources.

**Sexual orientation and gender identity.** As noted previously, HIV disproportionately impacts marginalized populations, including gay, bisexual, and transgender people, who are particularly subjected to discrimination in light of longstanding societal prejudices against them. Policymakers therefore should be particularly attuned to administrative regulations that may have the effect (if not the intent) of further disadvantaging these and other marginalized populations.

In sum, enormous progress has been achieved against HIV/AIDS since the first AIDS cases were identified in June 1981. What had been a terminal diagnosis can now be a manageable chronic condition. Vigilant, non-discriminatory public policy has been key to that progress, and will be elemental to maintaining and improving upon it. Likewise shall the legal profession remain indispensable to that effort.

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Scientific advances have shown that antiretroviral therapy (ART) preserves the health of people living with HIV. We also have strong evidence of the prevention effectiveness of ART. When ART results in viral suppression, defined as less than 200 copies/ml or undetectable levels, it prevents sexual HIV transmission. Across three different studies, including thousands of couples and many thousand acts of sex without a condom or pre-exposure prophylaxis (PrEP), no HIV transmissions to an HIV-negative partner were observed when the HIV-positive person was virally suppressed. This means that people who take ART daily as prescribed and achieve and maintain an undetectable viral load have effectively no risk of sexually transmitting the virus to an HIV-negative partner.
Respectfully submitted,

Richard A. Wilson
Chair, AIDS Coordinating Committee

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