AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

BE IT RESOLVED, That the House of Delegates approves the following language as a clarification of the policy statement adopted as C.3 of Report #135 at the Annual Meeting of the House of Delegates in August 1989, and that all sections of that policy statement numbered C.4 ff, be renumbered as C.5 ff.

C.3. If partner notification (i.e. contact tracing) is undertaken, state and local law should require the following:

Counseling. Partner notification should include counseling protocols that:

- Encourage HIV-infected individuals to either directly notify their partners that they may have been exposed to HIV, or provide the names of partners to the public health department or health care provider so that the department or provider can inform said partners of their possible exposure to HIV in accordance with the confidentiality protections provided for below; and

- Inform individuals prior to undergoing an HIV test of the scope of confidentiality protections and standards for disclosure under the privilege to disclose provided for below.

Voluntary Participation. An HIV-infected individual's disclosure of the name of partners should be voluntary. An HIV-infected individual's access to counseling, referral, and support services should not depend on disclosure of the names of partners.
Confidentiality. Identifying information pertaining to HIV-infected individuals should not be disclosed to anyone, including partners notified through the partner notification program, except as provided below. Such information, as well as identifying information regarding notified partners, should be afforded confidentiality protections.

Immunity. Health care providers and public health officials who are authorized by law to decide whether to disclose confidential HIV-related information should be immune from liability for such decision made in good faith.

C.4 Privilege to Disclose. If an HIV-infected individual discloses the identity of at-risk partners during counseling, but does not request the health care provider or public health official to inform said partners of their possible exposure to HIV, or the provider or official otherwise learns of the identity of at-risk partners, the provider or official nevertheless may disclose non-identifying information concerning exposure to said partners if, and only if, the official or provider:

- Urged the HIV-infected individual to notify the at-risk partner and the individual has refused, or has agreed, but after a reasonable opportunity, the official or provider has reason to believe that the individual has not done so; and

- Reasonably believes that the partner is at significant risk of HIV infection and that the partner is unaware of the risk.

If, however, a health care provider has independent knowledge of a current partner or partners through his/her professional relationship with the infected individual or said partner(s), and the provider meets the two-pronged test described above, the provider should disclose information concerning the risk of exposure and may disclose information concerning the HIV-infected individual to said partner(s).
I. Background

In February 1988, the House of Delegates adopted a policy statement regarding AIDS and HIV infection which stated, among other things, that "any contact tracing of sexual contacts provided by law must be conducted without disclosing information identifying the infected individual."

In August 1989, the House of Delegates had before it a package of policy recommendations regarding AIDS and HIV infection which included an elaboration on this earlier policy statement. The term of art used in the August 1989 recommendation, however, was "partner notification."

House of Delegates member from the State of Michigan, Michael Frank, proposed an amendment to this new policy statement, which was adopted by the House, which, among other things, revised the proposed policy to state that "health-care providers and public health officials shall disclose confidential HIV-related information to known partners if they reasonably believe that ..." This amended policy statement was read by the Young Lawyers Division and others as overturning the earlier policy adopted by the House in February 1988 by mandating disclosure of identifying information.

After talking with Mr. Frank, however, it turned out that this result was not intended by him and resulted from ambiguity in terminology. Mr. Frank totally supports the earlier policy regarding confidentiality during contact tracing. Mr. Frank's only intent was to provide that, within what is normally termed the "privilege to disclose," if a health care provider has independent knowledge of contacts from his professional relationship with patients, then the provider has an obligation to inform the contacts of their risk of exposure if the infected individual will not do so, and that the provider, in this single exception, should be allowed to disclose identifying information regarding the infected individual to the contact.

Upon learning of this confusion, the Young Lawyers Division worked with the prime sponsors of the "contact tracing" policy and the policy proposed in Honolulu, the Coordinating Committee on AIDS, and Mr. Frank to draft clarifying language which would on the one hand keep the prior policy regarding "contact tracing" undisturbed and on the other provide for the narrow exception to identifying information confidentiality advocated by Mr. Frank.

The result is this recommendation which, while not changing any of the intended substance of the policy statement, does contain numerous changes and additions in language meant to clarify the policy statement. The policy statement is supported by the Young Lawyers Division, the Section of Individual Rights and Responsibilities, the Coordinating Committee on AIDS, and Mr. Frank.
II. The Clarifying Language

A. Clarifying the Distinction Between Contact Tracing and Privilege to Disclose

The main problem that surfaced in discussions with various people was that the distinction between contact tracing and privilege to disclose needed clarifying. Unfortunately, many people do not understand that partner notification is a term of art used to refer to contact tracing. Because of this, Michael Frank's amendment turned out to be much broader than was its intent. Further, because there was no section dealing with the contact tracing process, those who did understand that the policy was discussing contact tracing could read the disclosure section as talking about disclosure within contact tracing, which is confusing, rather than talking about what is normally referred to as "privilege to disclose."

For that reason, the phrase "(i.e. contact tracing)" has been inserted at the beginning and the disclosure language has been moved to a separate section titled "Privilege to Disclose."

B. Clarifying Precisely Under What Conditions the Privilege to Disclose Exists

With regard to the disclosure section itself, the lead-in to the disclosure section as well as various other language changes are again meant to clarify when this exception comes into play. It does not change the substance of the section.

C. Clarifying the Circumstances Under Which the "Frank" Exception Becomes Operative

The "Frank" exception is contained in the last paragraph. It now defines more precisely the type and source of knowledge which brings the exception into operation and the type of information which should or may be disclosed.

D. Clarifying The Role of Counseling in Partner Notification and Privilege to Disclose

Language has been added to the counseling section to bring in the point that individuals are encouraged to provide names of partners for contact tracing as well as to notify partners themselves. Also, the notice provision contained in Mr. Frank's amendment has been moved so as to be contained within the counseling provision, which is where such notice is normally provided. The language itself has been revised so that it incorporates the various items normally included in notice provisions, rather than just the narrow point made by Mr. Frank.
E. Reinstating the Basic Policy on Confidentiality of Identifying Information.

The section on confidentiality has been returned to its originally proposed form, while providing for the Frank exception.

III. Why the Pre-Existing Policy on Contact Tracing is Critical

A. Voluntary Testing Is Key to Controlling the Spread of AIDS

One of the most important means of controlling the spread of the disease is by encouraging individuals, particularly those in high risk groups, to be tested for HIV infection. Testing is important regardless of the result because if individuals find out they have not been infected, they will have a very good reason for adapting their sex practices so that the risk of future infection is nil. On the other hand, if someone finds out that they have been infected, they can alter their sex practices so that there is no risk of them infecting someone else or being infected again.

B. Confidentiality Is A Sine Que Non For Testing

Virtually all federal and state public health authorities are in agreement that without strict confidentiality provisions, testing will be less successful as a vehicle of control because the individuals will not come forward to be tested. The reasons for this are obvious. Given the fear and confusion that surrounds AIDS and the AIDS-related discrimination that has resulted, very few individuals would want to risk their jobs, their job-related insurance, their housing, and other services for the sake of finding out whether they are HIV sero-positive.

C. Disclosing Identifying Information During Contact Tracing Would Destroy Confidentiality

The amendment adopted in Honolulu states that "health-care providers and public health officials shall disclose confidential HIV-related information to known partners if they reasonably believe that ..." If left intact, this section would vitiate the confidentiality provisions that form the heart of both the ABA's policy and various bills that have been introduced in Congress since the physician or public health official would be allowed to disclose the protected information provided s/he believed that the individual would not notify the other people. Although there is an understandable public health concern that argues for contact tracing, it needs to be done by convincing the individuals through counseling to do it themselves or to consent to it being done, or if that is not successful, to inform the at risk individual that s/he has had contact without disclosing any identifying information.
IV. Summary

The original policy on contact tracing adopted by the House of Delegates was good public health policy. It was supported in the House of Delegates by the Chairman of the Board of Trustees of the American Medical Association and the Commissioner of Public Health of the State of New Jersey. This recommendation merely seeks to correct the unintended result of Mr. Frank's amendment, thus reinstating the earlier policy, while maintaining the exception to the general policy advocated by Mr. Frank. Through language changes and additions, the distinction between partner notification/contact tracing and privilege to disclose have been clarified. The prime movers of the original recommendations, Mr. Frank, and the Coordinating Committee on AIDS all are in agreement on this language.

Respectfully submitted,

Walter H. White
Chairperson
Young Lawyers Division

Richard K. Donahue
Chairperson
Section of Individual Rights and Responsibilities
GENERAL INFORMATION FORM

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Submitting Entity: Young Lawyers Division

Submitted By: Walter H. White, Chairperson

1. Summary of Recommendation(s).

Clarifies the recommendation adopted by the House of Delegates in August 1989 so that the policy statement is consistent with the intent. Specifically, the obligation of health care providers to notify contacts and their discretion to disclose identifying information, contained in an amendment proposed and adopted by the House, is limited, as intended by the proponent, to the situation in which the provider has independent knowledge of such contacts from his professional relationship with patients.

2. Approval by Submitting Entity.

YLD Executive Council, April 1989
IR&R Executive Council, May 1989

3. Previous submission to the House or relevant Association position.

This recommendation clarifies the recommendation adopted as amended by the House in August 1989.

4. Need for Action at This Meeting.

Because of confusion as to the terminology used, the amendment adopted by the House in fact went much further than was intended by the proponent and overturned existing ABA policy. This clarification is necessary in order to be consistent with the intent of the language adopted and to be consistent with the existing ABA policy.

5. Status of Legislation. (If applicable.)

6. Cost to the Association. (Both direct and indirect costs.)

7. Disclosure of Interest. (If applicable.)
8. **Referrals.**

This matter has already been referred to Michael Frank, the proponent of the amendment in Honolulu, Section of Individual Rights and Responsibilities, and the Coordinating Committee on AIDS. Mr. Frank, IR&R, and the Coordinating Committee are in agreement with the proposed clarifying language.

The matter is being referred to the various individual interested entities: Sections of Administrative Law and Regulatory Practice, Criminal Justice, Family Law, General Practice, Labor and Employment Law, Litigation, Tort and Insurance Practice, Urban, State and Local Government Law, the Judicial Administrative Division, the Forum Committee on Health Law, and the Commission on Mentally Disabled.

9. **Contact Person.** (Prior to meeting.)

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10. **Contact Person.** (Who will present the report to the House.)

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