Confidentiality vs. the Duty to Warn

HIV-Disclosure Guidelines for Social Workers

(Please Note: This pamphlet contains general information and does not replace legal advice tailored to specific situations. The penalties for failure to warn OR for wrongful disclosure can be serious. Therefore, if you face a conflict between maintaining patient confidentiality and warning a third party, you should consult an attorney.)

Mental health professionals often feel caught in a legal dilemma with respect to a client's HIV status. On one hand, there is the basic duty to keep client information confidential. This is especially true of information about HIV-infection, which can be embarrassing or harmful to the client if revealed to others. On the other hand, there may be a duty to warn others if the client poses some threat to them.

A conflict between these duties can arise in many different situations. Examples: The client may be reluctant to tell his spouse or partner about his infection; the client may be an adolescent who does not want her parents to know; the client may be an I.V. drug user who shares needles with others; or the client may be a sex-industry worker.

Understandably, mental health providers want clear, straightforward answers about when to maintain confidentiality and when and to whom a disclosure must be made, i.e., clear guidelines on how to avoid liability. Unfortunately, the law does not always provide definitive answers. This is partly because both the duty of confidentiality and the duty to warn are relatively new and their scope has yet to be clearly defined by Louisiana's legislature or courts. Moreover, because of sharply differing views on how best to control the spread of HIV, some of the statutes governing this area appear to contradict one other. There is no way to know which view will govern until this issue is addressed by the courts.

This pamphlet first discusses practical steps you can take to avoid this dilemma. It then provides an outline of relevant laws so that practitioners can better understand the conflict in this area and be aware of when to seek help with decisions about a confidentiality/duty to warn problem.

Practical Steps

1. Avoid learning of contacts.
   Although there may be no sure answers once faced with this conflict, it is often possible to avoid it in the first place. The duty to warn does not require that providers search out possible threats posed by a client. Thus, a provider can avoid this dilemma simply by not asking for information about whom the client may have exposed. You can and should still counsel the client about the need for disclosure to those whom he has exposed and on the need for preventing exposure. Inform the client of the severe criminal and civil liability for exposing another, and offer help in making a disclosure if the client wants help. However, do not ask whether the client has exposed or is exposing anyone. Definitely do not ask for the names of those contacts.

2. Have the client disclose.
   If you learn that a client is engaging in activities which could infect others, but you do not know of any specific contacts, explain to the client the harm he is doing and the steps he can take to prevent this.
You may also want to mention the civil and criminal penalties for intentionally exposing another to HIV. The
criminal penalty is up to 10 years at hard labor. In the cases which have gone to trial, judges have imposed the
maximum penalty. Prison is an extremely unfriendly place for inmates with HIV. Medical care is not of the same
standard a person would receive outside of prison and an inmate with HIV/AIDS can generally not be released
on a medical waiver or medical parole, even if he is in the final stages of the disease.

The client may also be sued for money damages for intentional exposure. In such cases, awards are usually in
the hundreds of thousands of dollars.

3. Have the client consent to disclosure.

Some clients fear making a disclosure to past contacts precisely because of criminal or civil liability. These
clients may be willing to warn a contact if their identities are not revealed. In this situation, it may not be a good
idea for the social worker to directly notify a contact. Some contacts will deduce the identity of the client simply
by who is making the disclosure. Others will react with hostility or violence when informed by a stranger that they
may have HIV. For these reasons, you or the client should call the HIV/AIDS Services Program, in the
Epidemiology Division of the Office of Public Health (OPH), Louisiana Department of Health and Hospitals, at
(504) 568-7524. You will have to provide the names, addresses, and physical descriptions of the contacts. You
should not disclose the identity of your client. OPH will notify the contacts that they may have been exposed and
that they should be tested.

If you feel you have no alternative but to make a direct disclosure, ask the client to sign a written consent,
specifying what is to be told and to whom.

Laws on Confidentiality/Disclosure

As mentioned before, both the "duty of confidentiality" and the "duty to warn" are relatively new and their scope
has yet to be clearly defined by Louisiana's legislature or courts. Moreover, there is an ongoing debate over how
best to control the spread of HIV. One view calls for mandatory reporting and contact tracing. The other view
believes that these measures will only drive the disease underground, making it harder to control. This second
view calls for education and voluntary disclosure. Both these views have to some degree been incorporated in to
the law, causing different statutes to apparently contradict one another. Again, their is no way to know which
view will prevail until after the courts have addressed this issue.

The Duty of confidentiality.

There are at least two statutes that deal with specific instances of client confidentiality. LA R.S. 37:2718(b)
applies only to social workers and prohibits disclosures of a client's statements without the client's written
consent. A second statute, LA R.S. 40:1300.11-16, the HIV Testing & Confidentiality statute, prohibits of HIV test
results by anyone without the client's specific written consent. (Exceptions to these statutory prohibitions are
discussed below).

These two statutes are merely specific instances of a basic legal principle: the right of privacy. This
embraces the right to have embarrassing or personal information kept private. Anyone who reveals such
information about another has committed the tort of invasion of privacy. The "victim" may bring a private lawsuit
against that person seeking compensation for the embarrassment and other damage he has suffered as a result
of the disclosure. The right is based on the Louisiana Civil Code, Art. 2315, but is left to the courts to define in
detail. There are, so far, few Louisiana cases on invasion of privacy and none having to do with HIV. However, in
the cases that do exist, information about a person's medical conditions has always been considered private.
Because of the sigma attached to HIV-infection, it is likely courts will find a heightened duty to keep HIV
information confidential.

There is an exception to this duty. Disclosure is permissible, despite the client's objection, if doing so is
necessary to prevent a greater harm to a third person. In deciding whether a particular disclosure is permissible,
it is necessary to consider the following factors: the harm to the client in making the disclosure, the probability
that harm will result of the third party if the disclosure is not made, and the nature of the harm to the third party.
Even if disclosure is allowed, it is necessary to do so in the way that is least harmful to the client.

Both of the specific confidentiality statutes mentioned above contain provisions that parallel this exception. LA
R.S. 37:2718(B3) allows disclosure by a social worker where a statement by the client "reveals the contemplation
of a crime or a harmful act." (Note: This statute may allow disclosure to ongoing contacts, but apparently does
not authorize disclosure to past contacts).
The disclosure provision contained in the HIV Confidentiality Statute is more detailed and helps illustrate the different factors that must be weighed when making a decision on disclosure. LA R.S. 40:1300.14 E. allows a physician, and only a physician inform a contact of a patient's HIV-infection if the following two conditions are met. First, there must be a significant risk of infection to the contact. Second, the patient must have been counseled on the need to inform the contact, but refuses to do so. If these conditions are met, the physician may tell the contact that he or she may have been exposed. The physician may not reveal the patient's name. To further safeguard the patient's identity, the physician must offer the patient the option of having a public health officer make the disclosure. (Note: This statute contains language that implies its provisions are suggestions, not requirements).

The above laws provide no clear-cut rule on disclosure by social workers, psychologists, case managers, nurses, or counselors. The general tort rule is a very vague standard based on subjective evaluations of the factors discussed above. The HIV Confidentiality Statute, the law which most closely governs this situation, does not authorize disclosure by anyone other than a physician. Thus you should be very cautious when deciding to disclose a client's HIV status; in essence you are gambling that a judge or jury will view these factors in the same light as you have.

The Duty to Warn.

The laws discussed above do not require disclosure; rather they allow disclosure in some situations. Historically, there has been no legal duty to rescue others from harm or warn them of impending dangers.

However, an exception to this rule has recently evolved for mental health professionals. This is often called a "Tarasoff" duty, after the California court case in which it was first created. Under current Louisiana law, a psychiatrist, psychologist, board certified social worker or marriage and family therapist is required to warn a third party of a danger where he following conditions are met: a client has communicated a threat of physical violence, the victim is clearly identified, and the client has the apparent ability and intent to carry out the threat.

This rule is set forth at LA R.S. 9:2800.2. Although, on its face, that statute only limits liability for breach of confidentiality, the Louisiana Supreme Court has interpreted it as creating an affirmative duty to warn. Mental health professionals covered by the statute must make a reasonable effort to notify both the potential victim and the law enforcement authorities in the area of the victim.

This statute has yet to be construed with respect to the disclosure of HIV information, so it is not clear what is required. It is possible that it simply does not apply to HIV exposure. The courts could determine that the HIV Confidentiality Statute exclusively controls when HIV-status may be disclosed: if that statute does not allow disclosure, then you may not disclose regardless of LA R.S. 9:2800.2. Even if LA R.S. 9:2800.2 is not preempted by the Confidentiality statute, it is still unclear when it requires a warning. For example, does sharing needles or failing to practice safer sex constitute a "threat of physical violence" for purposes of this statute? Does the statute require or allow informing past contacts (where the harm has already occurred) or only where the exposure is likely to occur in the future (threatened)?

There are additional laws governing disclosure when children are at risk. The Louisiana Children's Code, Ch.C. Art. 609, et. Seq., creates a duty to report dangers to a child's physical or mental health or welfare. It also immunizes from civil or criminal liability any person making a good faith disclosure. Under this statute, it is necessary to report to the Louisiana Department of Social Services, Office of Community services, instances in which an infected child or possibly infected child is not receiving adequate medical care. It is also necessary to report situations in which a child is put at risk of being infected.

While the duty to report such situations is clear, the mere fact that a child or parent has HIV does not permit a report or disclosure of HIV status. Such a report should be considered only if there is danger of infection, or if it is necessary in order to get treatment for the child.

Minimizing liability when faced with a conflict.

When faced with a conflict, it may be impossible to accurately guess what the law requires. There are, however, some steps you can take to minimize your personal liability in the event you guess incorrectly. The first is to document all your attempts to have the client disclose and/or stop exposure prone activities. Also document the client's response. If you later choose to disclose and are sued by the client, you will have proof that you took measures short of disclosure and that these proved inadequate. If you choose not to disclose and are sued by a third party, you will have proof that you took substantial measures to protect the third party. Showing a judge or jury that your decision was thoughtfully made may help minimize any damages they award against you.
Other Considerations

The second step you can take to protect yourself is to follow your employer's policy on disclosure. Although you may still be sued and may still lose, your employer will likely have to reimburse you if you were following its policy. All organizations where disclosure conflicts could arise, e.g., hospitals, social work agencies, medical offices, should have a policy on disclosure. The policy should be developed by management in conjunction with the organization's attorney. This attorney will ultimately have to defend the organization if it is sued, so he or she must be consulted on the formulation of the policy. If your employer does not have a policy on disclosure, request that it develop one.

When making a disclosure decision, always double check with your supervisor to make sure you are correctly applying the policy. If the policy is vague or does not cover the particular situation you are facing, you or your supervisor should additionally consult with your employer's attorney. Document all of your requests, consultations and conversations. Do not reveal the client's identity during these consultations.

If you are in private practice and do not have an attorney or a supervisor to talk to, talk with your consultation group about what to do.

Social workers who are or may seek to become board certified should additionally check with the Louisiana Board of Certified Social Workers, P.O. Box 345, Prairieville, LA 70709, (504) 673-3010. One of the most important things in making a decision such as this is to have documented support from other professionals in the community for your decision.

Yet another step you should consider is to shift this decision to someone else. If you work in the same agency or same hospital as the client's physician (or psychiatrist), you can discuss the client exposure prone activities with that physician, leaving the decision about disclosure to the physician. Because the HIV Confidentiality Statute allows disclosure only by physicians, referring the matter to the physician might release you from further legal obligation. In any event, it shows a conscientious effort to protect the rights of all parties and should minimize any damage award against you.

In deciding when to disclose, you and your organization should take a broad view of the situation. If your organization develops a reputation for disclosing HIV-information, many clients will avoid you entirely or will withhold information. Thus, you will lose the ability to counsel people on the need to avoid exposing others and on the need to disclose to those whom they may have exposed. Although in the short run you may protect one or two people, in the long run you could lose the ability to prevent many others from becoming infected.

You should also be aware that making an unnecessary disclosure or making a disclosure in a way that needlessly frightens or alarms the contact could make you liable to the contact for the emotional harm you have caused that person. Be certain that there is a realistic risk of infection. Infection requires blood to blood contact, such as may occur while sharing i.v. needles or during sex. Usual household or social contact does not pose a risk of infection. If you are uncertain whether there is a risk, consult a medical or public health expert.

Additionally, never simply inform someone that he or she has been exposed: many people still equate HIV-infection with a near-term death sentence. Be prepared to tell the contact what exposure means, what infection means, what treatments are available, and where to go for further help or information.