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THE CONFLICT BETWEEN ILLINOIS RULE 1.6(b) AND THE AIDS CONFIDENTIALITY ACT

SCOTT H. ISAACMAN*

INTRODUCTION

As the number of people infected with HIV¹ escalates,² so does the frequency of HIV-positive individuals consulting attorneys.³ These clients may wish legal assistance with estate planning and durable powers of attorney for health care and property;⁴ continuing medical and insurance benefits;⁵ divorce, custody, and visitation;⁶ employment problems;⁷ and a host of other legal issues.

With HIV-positive clients, an ethical dilemma may arise. During the course of determining background information, the client will disclose his or her serostatus⁸ and intimate relationships with

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1. HIV is the designation, by the International Committee on the Taxonomy of Viruses, of the human immunodeficiency virus, the causative agent of AIDS. *Human Immunodeficiency Virus*, 232 SCIENCE 697 (1986). See also ILL. REV. STAT. ch. 111½, para. 7303(c)(1991).

2. Centers for Disease Control, *The Second 100,000 Cases of Acquired Immunodeficiency Syndrome - United States*, 41 MORBIDITY & MORTALITY WEEKLY REP. 28 (1992).

3. *A Report on AIDS-Related Lawsuits*, 7 MEDICAL ETHICS 1 (1992).

4. See generally Emily Berendt & Laura L. Michaels, *Your HIV Positive Client: Easing the Burden on the Family Through Estate Planning*, 24 J. MARSHALL L. REV. 509 (1990).

5. Mark Scherzer, *Insurance and Employee Benefits*, ch. 8 in AIDS PRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE (Paul Albert et al., eds., 3d ed. 1991).

6. See generally Kristin Booth Glen, *Parents with AIDS, Children with AIDS: The Law Is Only Now Starting to Catch Up With This Family Nightmare*, 29 JUDGES' J. 14 (Spring 1990); Andrew Shepard, *AIDS and Divorce*, 23 FAM. L. Q. 1 (1989).

7. REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, 119-120 (1988).

8. Serostatus is a colloquial phrase for the HIV blood test results. The test is a serologic analysis giving positive, indeterminate, and negative results. Serostatus is generally referred to as seropositive or seronegative.

others.⁹ Quite possibly, the client may be unwilling to inform sexual partners¹⁰ and may even expressly request the attorney's help in keeping the HIV results from others. Knowing that certain conduct¹¹ can transmit HIV,¹² knowing that transmission can result in a fatal disease,¹³ and knowing that such conduct can be a felony offense,¹⁴ what should the attorney do?

As of August 1, 1990, the Code of Professional Responsibility was replaced by the Illinois Rules of Professional Conduct.¹⁵ Under

9. The relationships referred to here concern specifically identified sexual contacts, such as those between husbands, wives, or lovers.

10. Suzanne E. Landis et al., *Results of a Randomized Trial of Partner Notification in Cases of HIV Infection in North Carolina*, 326 NEW ENG. J. MED. 101 (1992); Gary Marks et al., *Self-disclosure of HIV Infection to Sexual Partners*, 81 AM. J. PUBLIC HEALTH 1321 (1991); John M. Zenilman et al., *Effect of HIV Posttest Counseling on STD Incidence*, 267 JAMA 843 (1992).

11. The U.S. Public Health Service stated: "HIV has three main modes of transmission: sexual contact with an infected person, exposure to infected blood or blood products (mainly through needle-sharing among IV-drug users), and perinatal transmission from an infected woman to her fetus . . ." Centers for Disease Control, *AIDS and Human Immunodeficiency Virus Infection in the United States: 1988 Update*, 38 MORBIDITY & MORTALITY WEEKLY REP., at 2 (Supp. 1989).

12. Although other routes of HIV transmission occur, this article focuses on heterosexual transmission because the Centers for Disease Control reported that heterosexuals have the highest increase in rate of HIV transmission. Ruth Berkelman et al., *Women and AIDS: The Increasing Role of Heterosexual Transmission in the United States*, Abstract W.C. 102, VII International Conference on AIDS (Florence, Italy 1991). For heterosexual transmission in general, see Isabelle De Vicenzi, *Heterosexual Transmission of HIV*, 267 JAMA 1919 (1992); Vincent F. Guinee, *Heterosexual Transmission of HIV*, 267 JAMA 1918 (1992); Nancy S. Padian et al., *Female-to-Male Transmission of Human Immunodeficiency Virus*, 266 JAMA 1664 (1991); James R. Allen & Valerie P. Setlow, *Heterosexual Transmission of HIV: A View of the Future*, 266 JAMA 1695 (1991); Francesco Chiodo et al., *Risk Factors in Heterosexual Transmission of HIV*, Abstract Th.C. 583, VII International Conference on AIDS (Florence, Italy 1991); Alberto Saracco, *Incidence of Seroconversion in Women Who Are Steady Partners of HIV Infected Men*, Abstract Th.C. 586, VII International Conference on AIDS (Florence, Italy 1991); and Nancy S. Padian et al., *The Effect of Number of Exposures on the Risk of Heterosexual HIV Transmission*, 161 J. INFECTIOUS DISEASES 883 (1990).

The same analysis applies to male homosexual contacts and to unsterile needle-sharing. Both pose risks of HIV transmission. See INSTITUTE OF MEDICINE, *CONFRONTING AIDS: UPDATE 1988*, 45 (1988).

13. HIV transmission eventually causes AIDS in the recipient. NATIONAL RESEARCH COUNCIL, *AIDS: THE SECOND DECADE*, 39 (1990); Dennis Osmond, *Progression to AIDS in Persons Testing Seropositive for Antibody to HIV § 1.1.6*, in THE AIDS KNOWLEDGE BASE (P.T. Cohen et al., eds., 1990).

For the progression of HIV infection to AIDS and death, see generally, George F. Lempe et al., *Survival Trends for Patients with AIDS*, 263 JAMA 402 (1990). In Illinois, of all the AIDS cases diagnosed in 1985, 88% of those individuals have died from the disease. ILLINOIS DEPARTMENT OF HEALTH, *AIDS/HIV SURVEILLANCE REPORT*, at 5 (1992).

14. ILL. REV. STAT. ch. 38, para. 12-16.2 (1991). The constitutionality of this statute is under consideration since it was declared unconstitutionally vague in *State v. Caretha Russell*, No. 91cf1304 (St. Clair 1992).

15. ILL. ANN. STAT. ch. 110A, art. VIII (Smith-Hurd Supp. 1992).

Illinois Rule 1.6(b), a lawyer is required to reveal confidential information to "prevent the client from committing an act that would result in death or serious bodily harm."¹⁶ An HIV-infected client who is engaging in sexual conduct¹⁷ with others is committing acts which can transmit HIV,¹⁸ lead to the development of AIDS,¹⁹ and cause death.²⁰ Even if an attorney is unfamiliar with the transmissibility of HIV, Illinois Rule 1.6(c)(2)²¹ suggests that the attorney should reveal the client's HIV status and conduct to others in order to prevent the commission of a crime. Whenever an HIV-infected person knowingly engages in sexual activity with another without first disclosing his or her HIV status, he or she violates the Illinois HIV transmission law²² and poses a risk of serious bodily harm and death to sexual contacts.

The state supreme court rules seem to direct lawyers to breach confidentiality in situations where the client expresses a determination to commit an act that would result in the possible transmission of HIV to a foreseeable and identifiable (or identified) third person.²³ Where then is the ethical dilemma? Another law, the AIDS Confidentiality Act,²⁴ prohibits disclosure of a person's HIV status.²⁵ Violation of this law is a misdemeanor offense²⁶ and allows for both statutory²⁷ and civil remedies for trammelling an individual's privacy right.²⁸ This article reviews attorney-client confidentiality and AIDS, the AIDS Confidentiality Act, and the Act's conflict with the Illinois Supreme Court Rules for attorney conduct. The article then suggests guidelines to solve this particular quagmire until an authority resolves this issue.

16. ILL. ANN. STAT. ch. 110A, Rule 1.6(b)(2) (Smith-Hurd Supp. 1992).

17. Compare with "intimate contact" definition in ILL. REV. STAT. ch. 38, para. 12-16.2(b) (1991). Sexual conduct is defined in ILL. REV. STAT. ch. 38, para. 12.12(e) (1991).

18. See *supra* note 12, for a discussion of the transmission of HIV through heterosexual activity.

19. See *supra* note 13.

20. See *supra* note 13.

21. ILL. ANN. STAT. ch. 110A, Rule 1.6(c)(2) (Smith-Hurd Supp. 1992).

22. ILL. REV. STAT. ch. 38, para. 12-16.2 (1991).

23. This terminology follows the language used by the California Supreme Court in a lead case involving a therapist's duty to third parties. *Hedlund v. Superior Ct. of Orange County*, 669 P.2d 41 (Cal. 1983). See also Michael L. Closen & Scott H. Isaacman, *The Duty to Notify Private Third Parties of the Risks of HIV Infection*, 21 J. HEALTH & HOSP. L. 295 (1988).

24. ILL. REV. STAT. ch. 111½, para. 7301 et. seq. (1991).

25. ILL. REV. STAT. ch. 111½, paras. 7309, 7310 (1991).

26. ILL. REV. STAT. ch. 111½, para. 7312 (1991).

27. ILL. REV. STAT. ch. 111½, para. 7313 (1991).

28. ILL. REV. STAT. ch. 111½, para. 7314 (1991).

I. ATTORNEY-CLIENT CONFIDENTIALITY AND AIDS

When an individual consults an attorney, the client expects the attorney will keep all the information that is discussed confidential, especially personal information.²⁹ The American Bar Association's Model Code of Professional Responsibility³⁰ and Model Rules of Professional Conduct,³¹ rules of evidence,³² and court decisions affirm this generalized expectation.³³ As recently as 1989, the American Bar Association³⁴ specifically addressed confidentiality in relation to a client with AIDS³⁵ who engages in risk activities with others.³⁶ After reviewing Disciplinary Rule 4-101, the committee concluded that a client's AIDS condition should be protected as privileged information.³⁷ Disciplinary Rule 4-101 states:

Preservation of Confidences and Secrets of a Client

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

29. See generally William D. Popkin, *Client-Lawyer Confidentiality*, 59 TEX. L. REV. 755 (1981).

30. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1983).

31. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1990).

32. 8 JOHN T. MCNAUGHTON, WIGMORE ON EVIDENCE § 2292 (1961). See also FED. R. EVID. 501.

33. See generally EDWARD W. CLEARY, MCCORMICK ON EVIDENCE §§ 87-97 (1984); 8 JOHN T. MCNAUGHTON, WIGMORE ON EVIDENCE §§ 2290-2323 (1961).

34. *American Bar Association Policy on AIDS*, 21 U. TOL. L. REV. 9 (1989).

35. Many early works discussing AIDS misinterpret HIV infection and AIDS. See Michael L. Closten & Scott H. Isaacman, *HIV-AIDS and Governmental Control of Information: International Denial of Human Rights*, 4 ST. THOMAS U. L. REV. 107 (1992). Except where unavoidable, this article will refer to HIV disease or HIV infection.

36. Risk activities include sexual intercourse and sharing unsterile needles. INST. OF MEDICINE NAT'L. ACADEMY OF SCIENCES, *CONFRONTING AIDS: UPDATE 1988*, 3 (1988).

37. *Report of the AIDS Coordinating Committee*, 21 U. TOL. L. REV. 19, at 39-40 (1989).

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.³⁸

In the discussion of exceptions to the confidentiality privilege, the committee mentioned disclosure could occur when "the information is necessary to prevent the commission of a crime."³⁹ At the time the report was drafted, HIV-specific criminal transmission statutes were unusual,⁴⁰ and the transmissibility of HIV was not widely understood.⁴¹

The hypothetical of an HIV-infected client engaging in sexual conduct with an uninformed partner arose in a state that follows the Model Rules. In 1988, when the issue arose before the Delaware Bar Association, the Ethics Committee opined that an attorney could not disclose the client's HIV status to a specifically identified sexual contact without the client's consent.⁴² The committee felt that transmission through sexual conduct was not certain and noted that Delaware did not have a criminal law specifically prohibiting the conduct in question.⁴³ Why the committee felt that "certain" transmission through sexual contact was required⁴⁴ in order to permit warning an exposed individual is unclear.

The Model Rule failed to protect the consort of an HIV-infected client in a state without a criminal transmission law. Arguably, the Model Rule would fail to protect a sexual contact even where a state has an HIV-specific criminal transmission statute if the lawyer has no understanding about the transmissibility of HIV. Model Rule 1.6(a) and 1.6(b)(1) state:

38. MODEL RULES OF PROFESSIONAL CONDUCT (1983).

39. *Id.*

40. Donald H. J. Hermann, *Criminalizing Conduct Related to HIV Transmission*, 9 ST. LOUIS U. PUB. L. REV. 351, 370 (1990).

41. Even today, a fair number of individuals do not understand HIV transmission. See Centers for Disease Control, *HIV/AIDS Knowledge and Awareness of Testing and Treatment — Behavioral Risk Factor Surveillance System*, 1990, 41 MORBIDITY & MORTALITY WEEKLY REP. 794, 801 (1992).

42. ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, Op. 1988-2 (1990).

43. Anne L. McBride, *Deadly Confidentiality: AIDS and Rule 1.6(b)*, 4 GEO. J. LEGAL ETHICS 435 (1990).

44. *Id.* at 436.

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.⁴⁵

Thus, Model Rule 1.6 only permissively allows an attorney to reveal client information to prevent "a criminal act that is likely to result in imminent death or substantial bodily harm."⁴⁶ The degree of certainty needed to employ the exception is based on the attorney's subjective perspective⁴⁷ that a crime will occur and that the crime will cause imminent death or imminent bodily harm.⁴⁸ If the attorney has no understanding of HIV disease, how could the lawyer form a reasonable belief that disclosure is necessary?

Even if an attorney is well versed in the medical facts about HIV, Rule 1.6 requires "imminent death or substantial bodily harm."⁴⁹ The requirement of imminence works well in situations such as when a client undergoing a divorce decides to abbreviate the proceedings by killing the spouse with a firearm, but fails when the client plans retribution using a slow, progressive, incurable infection. HIV infection progresses from an asymptomatic phase to a symptomatic phase over a ten year period,⁵⁰ and then progresses to death in another three to seven years.⁵¹ For the slower, non-imminent conduct causing another bodily harm and subsequent death, the attorney must remain a silent bystander under the Model Rule.

Matters relating to disclosure of confidential information concerning a client's conduct⁵² are simplified by the Illinois Rules of Professional Conduct.⁵³ Illinois Rule 1.6 states:

45. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a), (b)(1) (1990).

46. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1990).

47. The rule states: "to the extent the lawyer reasonably believes necessary." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1990). Compare with McBride, *supra* note 43, at 436 (citing the Delaware Attorney Bar Ethics Committee requiring certainty).

48. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 12 (1990).

49. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1990).

50. Osmond, *supra* note 13.

51. George F. Lempe et al., *Survival Trends for Patients with AIDS*, 263 JAMA 402 (1990). In Illinois, of all the AIDS cases diagnosed in 1985, 88% of those individuals have died from the disease. ILLINOIS DEPARTMENT OF HEALTH, AIDS/HIV SURVEILLANCE REPORT, 5 (1992).

52. Past conduct does not apply, only present and future conduct. See, e.g., EDNA SELAN EPSTEIN & MICHAEL M. MARTIN, *THE ATTORNEY CLIENT PRIVILEGE*, 88-93 (2d ed. 1989).

53. ILL. ANN. STAT. ch. 110A, art. VIII (Smith-Hurd Supp. 1992).

(a) Except when required under Rule 1.6(b) or permitted under Rule 1.6(c), a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.

(b) A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm.

(c) A lawyer may use or reveal:

(1) confidences or secrets when permitted under these Rules or required by law or court order;

(2) the intention of a client to commit a crime in circumstances other than those enumerated in Rule 1.6(b).⁵⁴

Illinois Rule 1.6 omits the requirement of a crime and also drops the requirement of imminence in relation to bodily harm and death. Moreover, when an attorney knows that certain conduct⁵⁵ transmits HIV⁵⁶ and knows that HIV transmission results in a fatal disease,⁵⁷ he or she *must* disclose the client's serostatus.⁵⁸ In contrast to the permissive language of Model Rule 1.6, Illinois Rule 1.6 requires disclosure.⁵⁹

If the attorney is unaware of the medical facts concerning HIV disease, under Illinois Rule 1.6(c)(2),⁶⁰ the attorney may disclose the client's serostatus. Sexual conduct by an HIV-infected individual is a felony offense in Illinois,⁶¹ and it is reasonable to expect someone licensed to practice law to be aware of the law. In sum, the new Illinois Supreme Court Rules either mandate or allow attorney disclosure of a client's confidence.⁶² Unfortunately, the AIDS Confidentiality Act⁶³ complicates the issue.

II. THE AIDS CONFIDENTIALITY ACT

Prior to the state supreme court's adoption of the Illinois Rules of Professional Conduct,⁶⁴ the state legislature enacted the AIDS Confidentiality Act.⁶⁵ The purpose of the Act is to encourage citi-

54. ILL. ANN. STAT. ch. 110A, Rule 1.6(a), (b) (Smith-Hurd Supp. 1992).

55. See *supra* note 11.

56. See *supra* note 12.

57. See *supra* note 13.

58. Balla v. Gambro, Inc., 584 N.E.2d 104, 109 (Ill. 1991).

59. *Id.*

60. ILL. ANN. STAT. ch. 110A, Rule 1.6(c)(2) (Smith-Hurd Supp. 1992).

61. ILL. REV. STAT. ch. 38, para. 12-16.2 (1991).

62. The approach should start with persuading the client to disclose. When that fails, alternatives need to be considered. This article assumes the client refuses to change conduct and refuses to disclose to others who are identified as at-risk.

63. ILL. REV. STAT. ch. 111½, paras. 7301-7316 (1991).

64. ILL. ANN. STAT. ch. 110A, art. VIII (Smith-Hurd Supp. 1992).

65. P.A. 85-677 (1985).

zens to voluntarily test themselves for HIV.⁶⁶ To help reach that goal, the Act adds safeguards to protect confidentiality.⁶⁷ Section 9 states: "No person may disclose or be compelled to disclose the identity of any person upon whom a test is performed . . ."⁶⁸ In addition, Section 10 states: "No person to whom the results of a test have been disclosed may disclose the test results to another person except as authorized by Section 9."⁶⁹

This presents a problem when a client discloses his or her HIV status, and discloses an ongoing or future exposure of others to HIV.⁷⁰ While a section of the Act provides for numerous exceptions,⁷¹ the exceptions expressly apply to health care providers and to health care facilities.⁷² Attorneys are neither health care providers⁷³ nor health care facilities⁷⁴ and, because they are not included, do not appear to fall within this Section's provisions.

When a client discloses his or her HIV status to an attorney, such disclosure clearly falls within the protection of Sections 9 and 10. Violation of these respective Sections is a misdemeanor offense,⁷⁵ leaving the attorney liable for statutory damages,⁷⁶ attorney fees,⁷⁷ and other actions.⁷⁸ Furthermore, the Act does not preempt tort claims of violation of privacy or professional negligence.⁷⁹

III. CONCLUSION

Balancing the AIDS Confidentiality Act⁸⁰ and the Illinois Rules of Professional Conduct⁸¹ presents a legal dilemma. Balancing disclosure of a client confidence with permitting a client to commit a crime and possibly infect others with a deadly incurable

66. ILL. REV. STAT. ch. 111½, para. 7302(3) (1991).

67. ILL. REV. STAT. ch. 111½, paras. 7302(2), 7309, 7310 (1991). Indeed, the Presidential Commission also noted: "Rigorous maintenance of confidentiality is considered critical to the success of the public health endeavor to prevent the transmission and spread of HIV infection." REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, 126 (1988).

68. ILL. REV. STAT. ch. 111½, para. 7309 (1991).

69. ILL. REV. STAT. ch. 111½, para. 7310 (1991).

70. See *supra* note 52.

71. ILL. REV. STAT. ch. 111½, para. 7307 (1991).

72. *Id.*

73. ILL. REV. STAT. ch. 111½, para. 7303(f) (1991).

74. ILL. REV. STAT. ch. 111½, para. 7303(e) (1991).

75. ILL. REV. STAT. ch. 111½, para. 7312 (1991).

76. ILL. REV. STAT. ch. 111½, paras. 7313(1), 7313(2) (1991).

77. ILL. REV. STAT. ch. 111½, para. 7313(3) (1991).

78. ILL. REV. STAT. ch. 111½, para. 7313(4) (1991).

79. ILL. REV. STAT. ch. 111½, para. 7314 (1991).

80. ILL. REV. STAT. ch. 111½, paras. 7301-7316 (1991).

81. ILL. ANN. STAT. ch. 110A, art. VIII (Smith-Hurd Supp. 1992).

disease presents a poignant moral dilemma.⁸² Fortunately, there may be a solution.

Rule 1.6(b) of the Illinois Rules of Professional Conduct requires disclosure, but does not state to whom the attorney must disclose the confidential information. Under Section 15 of the AIDS Confidentiality Act,⁸³ communication to the Illinois Department of Public Health should be protected from civil liability and criminal sanction. Section 15 states:

Nothing in this Act shall be construed to impose civil liability or criminal sanction for disclosure of a test result in accordance with any reporting requirement of the Department for a diagnosed case of HIV infection, AIDS or a related condition.⁸⁴

Undoubtedly, this section was designed to safeguard reporting of HIV infection in accordance with disease reporting requirements.⁸⁵ Attorneys, however, are not required to report diseases.⁸⁶ So this legislative exception also seems out of reach. But, since Section 15 uses the words "any reporting requirement,"⁸⁷ a legal argument can be made to protect such disclosure via a regulation designed for noncompliant HIV carriers.⁸⁸ A complaint from the attorney to the Department of Health noting the client's noncompliant behavior affords the agency an opportunity to fulfill its responsibility regarding individuals who continue to expose others to the virus.⁸⁹ Disclosure of the client's HIV status and sexual relationship with an identified individual would satisfy the command of Illinois Rule 1.6(b) without violating the spirit of the AIDS Confidentiality Act.⁹⁰

82. In theory, there may also be a common law duty to disclose. The Restatement states:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

- (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
- (b) a special relation exists between the actor and the other which gives to the other a right to protection.

RESTATEMENT (SECOND) TORTS § 315 (1965).

83. ILL. REV. STAT. ch. 111½, para. 7315 (1991).

84. *Id.*

85. Interview with Elise Aron, counsel to the Illinois Department of Health (May 28, 1992).

86. ILL. ADMIN. CODE tit. 77, § 693.30(a) (1991).

87. ILL. REV. STAT. ch. 111½, para. 7315 (1991).

88. ILL. ADMIN. CODE tit. 77, § 693.80(b) (1991).

89. ILL. ADMIN. CODE tit. 77, § 693.80(a) (1991).

90. To satisfy the common law "duty to warn," mental health professionals may "warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976). This has been termed the *Tarasoff* doctrine, which is largely based upon infectious disease precedent. In an infectious disease context, a better shorthand expression is the *Wordin* doctrine. See *State v. Wordin*,

Until a definitive statement issues from the state court or the Department of Health, an attorney may wish to document the client's stated intent to continue sexual activities and intent to withhold his or her serostatus. Any records containing such information must be carefully safeguarded. The attorney may then consider consulting the Illinois Department of Public Health. The department should be able to analyze the gravity of the situation and assess the need for notification. If notification occurs, an agent of the public health department can answer any questions the third party may raise when notified of the exposure and concomitant risk.

Discussing the situation with anyone else, such as the client's lover, may invite catastrophe.⁹¹ As with other ethical problems, attorneys may consult with other attorneys. However, the attorney must rigorously safeguard the identity of the client in all discussions with colleagues.⁹² In addition to soliciting peer opinions, attorneys may request an opinion from the state and national bar association ethics committees. However, such opinions are not legally binding and usually take time.⁹³ Moreover, in the interval between the request and the delivery of the opinion, sexual contacts may become infected.

14 A. 801 (1887). See Scott H. Isaacman, *Significance of Disease Reporting Requirements*, 3 *INFECTIOUS DISEASE NEWS* 23 (Oct. 1990).

If there were a common law duty to warn for attorneys in the described situation, notifying the public health department should satisfy that duty. From a pragmatic perspective, using public health officials also safeguards the anonymity of the attorney who ultimately wishes to retain clients and collect fees for rendered services.

91. The major concern is violence between the individuals and between the individuals and the attorney.

92. ILL. REV. STAT. ch. 111½, paras. 7309, 7310 (1991).

93. Of note, The John Marshall Law School Ethics Committee offers ethical opinions within 48 hours of most requests.