PositiveJusticeProject

Guidance for People Living with HIV Who Are At Risk of, or Are Facing, Criminal Prosecution for HIV Nondisclosure or Exposure

Thirty-six states and territories have laws that criminalize HIV exposure and/or nondisclosure of HIV status for sexual contact, needle-sharing, and/or contact with "body fluids" such as saliva. Even in states that do not have specific laws on HIV exposure or disclosure requirements, people living with HIV have been prosecuted under general criminal laws, such as assault or attempted murder. Although these laws criminalize conduct that is either consensual (both people agreed to it) or carried no significant risk of HIV transmission, these laws can be used to prosecute people just for being HIV positive.

If you think you might be in danger of being arrested and charged with a crime for nondisclosure (not telling someone your HIV status) or exposing someone to HIV, there are some things you can do as "damage control":

- ❑ DO try to have proof that you told your partner your HIV status BEFORE SEX. Here are some ways to do that:
  - Keep a diary and write entries in it describing the times you talked with your partner about being HIV positive BEFORE your first sexual encounter (anal, oral, or penile-vaginal sex). Make sure that you write the date by each entry and that they are truthful. If you are using condoms, it also can be helpful to keep a record of that in your diary.
  - Ask your partner to make a video of her/him talking about your HIV status. Mention the date in the video.
  - Write an agreement or a letter that your partner signs and dates showing that she/he knows your HIV status.

  None of these steps are easy but they can document how you have complied with the law. When you are in love, or in the "heat of the moment," it may seem impossible to do any of these things. But remember that these are tools that may help you fight an arrest or conviction, depending on the law in your state. Remember, the best form of proof is something that shows you disclosed your HIV status BEFORE having sex. One way to prove when you told someone is by sending an e-mail that mentions it. The date on the e-mail is proof of when someone had this information, which is good. But there is no guarantee that the person receiving it may not send the e-mail on to other people in the future. So don't put your HIV status in an e-mail if you are concerned about this risk.

  Disclosing your status on your internet profile or in chats on websites such as Adam4Adam or Match.com DOES NOT guarantee that there will be a permanent record of that disclosure. This is because the electronic contents of those sites are dumped regularly to make room for new material. If you are disclosing your HIV status to people online, make sure you get a screenshot of that conversation (with the date and time shown) of your disclosure.

- ❑ DO NOT EMAIL anything that ever could be used against you or that shows a desire to keep your HIV status secret, or that expresses any worries you have about revealing your HIV status to a partner.

- ❑ DO talk to your health care provider about the fact that you tell your partners about your HIV status before sex (oral, anal, penile-vaginal). Ask your provider to document this and show you where it is written in your file.

- ❑ One good way to protect yourself is to take your partner with you to a doctor or case manager visit so the doctor or case manager can document having talked with both of you about your HIV status. It is

ideal if you can do this before you have sex for the first time. If this is not possible, it is still useful to go to an appointment together and talk about when you disclosed your status and how you are using condoms. Your provider can then document this conversation. Taking your partner with you to a doctor or counselor after you start having sex will not completely protect your from accusations that you had sex with that partner before disclosing your HIV, or even from criminal exposure charges in states where condom use is not a defense. But it may provide some help if your health care professional is willing to testify that your partner said during the visit that she/he knew your HIV status before you had sex for the first time and stated that you always use condoms during sex.

- ❑ DO tell your doctor and other health care providers to NOT disclose or discuss your medical information to the police without a court order (different from a subpoena). Ask your health care providers not to discuss anything about you until they have talked to you and you have had a chance to oppose the court order. Ask them to tell you immediately if they are contacted by the police or other law enforcement personnel, and say that you expect them to refuse to disclose your records to the police or a prosecutor. They have the right to refuse to disclose.
- ❑ KNOW the law in your state. Find out what the laws are in your state. Talk to staff at an HIV legal organization in your state that understands criminal law or look at the information online at The Center for HIV Law and Policy, which has a guide on every state and U.S. territory's HIV-specific laws and other laws that have been used to prosecute people with HIV, as well as what has happened in each state with respect to HIV-specific prosecutions. Go to: http://www.hivlawandpolicy.org/resources/view/564. If you belong to an HIV support group, ask the organization running it to line up a lawyer to come talk to your group about the laws in your state.
- ❑ CONSIDER lining up a lawyer. If you have the money, you may want to consult an experienced criminal defense lawyer. Talking to a lawyer can help you understand your rights in your state and what you can do if you think you might be in danger of being arrested. However, if you have *not* been arrested or charged and do not have money for a private attorney, you generally will not be able to get advice from a criminal defense attorney at this stage. To find a lawyer look at the resources listed below, or ask a case manager or social worker at an AIDS Service Organization (ASO) for help.
- ❑ DO NOT TALK to the police or answer questions about your situation without a lawyer. If you are questioned or approached before being arrested, say nothing. Just politely ask if you are being charged with a crime.
- ❑ DO NOT TELL the police or detective that you are HIV positive and DO NOT consent to an HIV test. Be polite, but do not talk!

If you are arrested and charged with an HIV-related crime:

- ❑ DO NOT TALK TO THE POLICE. DO NOT VOLUNTEER ANY INFORMATION, OR ANSWER ANY QUESTIONS. If you are on medications and can't miss a dose, ask a friend or relative to contact your doctor. Your doctor should call the jail medical staff, tell them you have a condition requiring regular medication, and then get the medication to them and or make sure they have it. ALL YOU SHOULD SAY TO A POLICE OFFICER OR DETECTIVE WHEN ASKED QUESTIONS IS THAT YOU WOULD FIRST LIKE TO SPEAK WITH AN ATTORNEY. Do not believe anything you are told about how things will go more easily if you talk, or more harshly if you do not. This is almost never true. Providing information about your situation without a lawyer's advice first is NEVER to your advantage. The prosecutors' job is to prove that you are guilty of a crime – do not help them.
- ❑ KNOW YOUR RIGHTS. You have the right not to say anything to the police or anyone else. You also have the right to speak with a lawyer. If you cannot afford to hire a lawyer, the state must provide one

for you. A lawyer can explain your rights to you and help advise you on how to defend yourself. Remember, be polite, but be quiet.

- ❑ UNDERSTAND THE CHARGES AGAINST YOU. If you are arrested, make sure you ask what you are being accused of doing. The best person you can ask to explain the charges against you is a lawyer. You should always ask for any available written information about the complaint or charges against you anyway, so that you can read it and discuss it with your lawyer. If you need a public defender (free lawyer), it may take several days after your arrest for that person to be assigned to you.
- ❑ TAKE THE CHARGES SERIOUSLY. Being charged with a crime can have many negative consequences. Do not delay in finding help and support from organizations or individuals who may be able to counsel and support you for free. Please refer to the list of resources on the next page for organizations that provide legal assistance.
- ❑ DO NOT ASSUME THAT A PRIVATE ATTORNEY IS BETTER THAN A PUBLIC DEFENDER. A common mistake that defendants (people charged with crimes) make is assuming that a private attorney is better than a public defender. The fact that you are paying for a lawyer does not mean that you are getting better representation. The best lawyer is one that has experience in the county or area where you have been arrested, and who knows and has worked with the local law enforcement officials where your case is. You also need someone who is familiar with HIV and/or willing to work with other professionals who are. The most important thing here is to have a smart, EXPERIENCED CRIMINAL DEFENSE ATTORNEY who will take your case seriously.
- ❑ AVOID PEOPLE WHO SAY THEY CAN HELP YOU BECAUSE HIV DOES NOT CAUSE AIDS. You may be approached by people who claim they want to help you because an HIV test does not prove that you have HIV or AIDS and that HIV is not harmful to others. These are AIDS "denialists" -- people who do not believe that HIV is the cause of AIDS and that all AIDS treatments are toxic. They frequently approach defendants in cases that have shown up in the news. Their real interest in using your case is to get news coverage for themselves. It is best to tell these AIDS denialists to leave you alone because they likely will hurt rather than help your case.
- ❑ DO NOT SPEAK TO THE PRESS. Refer all questions to your lawyer. If you don't yet have a lawyer, say you will have your lawyer get in touch with them when she/he can. A surprising number of people in the media are not careful about getting the facts correct. It is not at all unusual to be misquoted. Many press people are more interested in a sensational story than in getting the story right. IT IS VERY RARE THAT A PERSON IN THE PRESS WILL PUT YOUR INTERESTS FIRST AND A GREAT STORY SECOND.

RESOURCES

Links for Attorneys and Legal Service Providers

List of state public defender offices:
http://www.nlada.org/Links/Links_Home#links_IndigentDefense

List of legal aid programs:
http://www.nlada.org/Links/Links_Home#links_LegalAidPrograms

Organizations that can advise you if you are charged with a criminal HIV nondisclosure or HIV exposure crime:

Lambda Legal, www.lambdalegal.org (national)

A list of Lambda Legal's regional offices can be found here:

http://www.lambdalegal.org/states-regions/lambda-legal-regions.html

ACLU AIDS Project, www.aclu.org/hiv-aids (national)

A list of local ACLU affiliates and chapters can be found here:
http://www.aclu.org/affiliates

GLAD, www.glad.org (New England area)
The AIDS Law Project of Pennsylvania, www.aidslawproject.org (Pennsylvania)
HIV Law Project, www.hivlawproject.org (New York)
AIDS Law of Louisiana, www.aidslaw.org (Louisiana)
Whitman-Walker Legal Services Clinic, www.wwc.org/hiv_aids_services/legal_services.html (Washington, DC metropolitan area)

Links to more information on HIV Criminalization and other legal resources:

Manual on HIV criminal laws and prosecutions:
http://www.hivlawandpolicy.org/resources/view/564

The Center for HIV Law and Policy's Positive Justice Project:
http://www.hivlawandpolicy.org/public/initiatives/positivejusticeproject

The Center for HIV Law and Policy, Resources on Criminal Law:
http://www.hivlawandpolicy.org/resourceCategories/view/2

List of legal research resources:
http://www.nlada.org/Links/Links_Home#links_LegalResearch

The Positive Justice Project is a project of The Center for HIV Law and Policy. The unifying goal of the Positive Justice Project is the repeal of HIV criminalization statutes — laws that create HIV-specific crimes or which enhance penalties for persons who are HIV positive and convicted of criminal offenses — and the end of arrests and prosecutions based on the fact of a positive HIV test. Learn more at: http://www.hivlawandpolicy.org/public/initiatives/positivejusticeproject