

AMERICAN BAR ASSOCIATION

AIDS Coordinating Committee

740 15th Street, NW
Washington, DC 20005-1022
Tel.: 202/662-1025
Fax: 202/662-1031
Website: www.abanet.org/AIDS

2005-2006

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The Honorable Richard T. Andrias
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New York Supreme Court
Appellate Division/First Department
27 Madison Ave., Rm. 406
New York, NY 10010
Tel.: (212) 340-0436

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3020 Gentan Ct., NE
Washington, DC 20017
Tel.: (202) 234-0831

National Bar Association

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3700 Lindell Blvd.
St. Louis, MO 63108
Tel.: (314) 977-2751

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Washington, DC 20016
Tel.: (202) 686-9090

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STAFF

Michael L. Pates, Esq.
Project Director

Anna R. Dolinsky
Project Assistant

Via Electronic and First-Class Mail

August 22, 2006

Bernard M. Branson, M.D.
Associate Director for Laboratory Diagnostics
Division of HIV/AIDS Prevention
National Center for HIV, STD and TB Prevention
Centers for Disease Control and Prevention
1600 Clifton Rd.
Atlanta, GA 30333

Re: Proposed Revised Recommendations for HIV Testing of Adults, Adolescents,
and Pregnant Women in Health Care Settings

Dear Dr. Branson:

On behalf of the American Bar Association (ABA) and its AIDS Coordinating Committee, thank you for inviting the ABA to comment on the CDC's proposed "Revised Recommendations for HIV Testing of Adults, Adolescents, and Pregnant Women in Health Care Settings."

The ABA established the Committee in 1987 to coordinate the Association's analysis of and response to the myriad domestic and international legal issues engendered by HIV/AIDS. Over the years, the Committee has produced numerous policies, programs, conferences, and publications on HIV/AIDS-related issues, including access to health care; access to insurance; employment discrimination; government benefits; public accommodation; efficacy of needle exchange programs; international human rights protections; combating stigma and discrimination; and HIV testing. Ensuring that the public health and legal communities work together effectively in fashioning responses to these issues is central to the Committee's mission.

Current ABA policy on HIV testing emphasizes informed consent as critical to ensuring that patients are prepared to recognize and navigate the physical, emotional, social, and legal consequences of a positive HIV test. In light of this policy, we respectfully urge your consideration of two concerns we have identified and one suggestion we offer with regard to the proposed recommendations. Our concerns are: (1) that the recommendations conflate what is appropriate for pre-test counseling from a public health perspective with what legally is necessary for informed consent; and (2) that they appear to abandon the CDC's 2001 guideline urging that all newly-tested HIV positive persons be referred promptly for legal counseling on how to protect privacy to prevent discrimination. Our suggestion is that the CDC recommend that legal counseling be mentioned in brief during the pre-test process to assure patients that their rights can be protected in the event of a positive test result, which will lessen fear about the public effects of a positive result and encourage more people to agree to be tested.

Pre-test Public Health Counseling vs. Informed Consent Law

The CDC has concluded that the need to increase the number of people tested now outweighs the public health need for pre-test counseling. In response, it has proposed that such counseling be replaced with a general medical consent to care. That proposal, however, conflates the public health interest with the legal interest in pre-test counseling.

The legal interest derives from the doctrine of informed consent, which requires that a patient be informed of the risks and benefits of the proposed care before consent is obtained. By definition, a general medical consent encompasses only that care for which the risks and benefits are generally known. The risks and benefits of an HIV test, by contrast, involve complex physical, emotional, social and legal consequences, and thus cannot be encompassed by a general medical consent. Indeed, the CDC itself has

acknowledged this difference, for it has emphasized the importance of specially protecting the privacy of an HIV test result in every edition of its *Guidelines for HIV Counseling, Testing and Referral*.

The example of genetic testing is illustrative. No one argues that a general medical consent to care is legally sufficient for genetic testing, because the consequences of such tests are not well-known and far from routine. In fact, the evidence of a request for a genetic test is treated with a heightened degree of care because it may indicate a suspicion of a problem the presence of which may cause great legal or social difficulties for the patient involved. From a public health perspective, medical advances may one day warrant that genetic testing become routine, just as the CDC has concluded that medical advances and the need to slow the rate of new infections today warrant routine HIV testing. But the public health meaning of routine — that is, 'always' — is not its legal meaning. Its legal meaning is that the risks associated with a positive result are routine — and with HIV testing, as with genetic testing, they are not.

The CDC may have intended to acknowledge this concern in the section of the proposed recommendations beginning on p. 15 regarding regulatory and legal considerations. This section is inadequate, however, because it discusses only statutory or other impediments to such more specific issues as opt-out screening, confirmatory testing, and communicating test results. It also does not state clearly that each jurisdiction must carefully consider the legal meaning of informed consent in light of the public health considerations discussed in the proposed recommendations.

Legal Counseling to Prevent Discrimination

In its 2001 *Revised Guidelines for HIV Counseling, Testing and Referral*, the CDC recognized the legal profession's role in reducing the spread of HIV:

Legal services. Clients who test positive should be referred to legal services as soon as possible after learning their test result for counseling on how to prevent discrimination in employment, housing, and public accommodation by only disclosing their status to those who have a legal need to know. (MMWR 2001; 50 [No. RR-19]:37.)

This guideline reflects the view that by reducing the incidence of discrimination, such counseling will encourage more people to come forward to be tested. In his June 5, 2006, letter to CDC Director Dr. Julie L. Gerberding, then-ABA President Michael S. Greco commented on the guideline's importance:

[T]he ABA has viewed this guideline as a ground-breaking call to help public health slow the spread of HIV. Indeed, it may be argued that this guideline will become even more vital in light of the CDC's recent proposal to encourage routine voluntary testing.

In her August 8, 2006, response, Dr. Gerberding agreed:

We recognize that protection of the legal rights of people with HIV/AIDS is a necessary prerequisite for HIV prevention efforts. We look forward to continuing to work with the ABA to ensure that the public health and legal communities remain focused on the critical needs of those with HIV/AIDS.

We therefore are concerned that the legal services referral guideline appears to have been omitted from the current draft recommendations. The summary of the draft states at p. 1 that the proposed recommendations revise and update the 2001 *Revised Guidelines*, with no reference to the legal services guideline. Similarly, there is no mention of legal counseling in the section on communicating test results (pp. 12-13), or on p. 15, where legal issues are referenced.

Inasmuch as the draft recommendations concern populations that are as vulnerable to stigma and discrimination as any other, we respectfully request that the legal services guideline itself, or favorable reference to it, be included in the new recommendations.

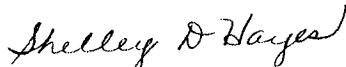
Reference to Legal Counseling as Part of Informed Consent

As discussed in the preceding section, by reducing the incidence of discrimination, post-test legal counseling on protecting privacy to prevent discrimination would encourage more people to come forward to be tested. We therefore suggest that the CDC recommend that brief reference to such counseling be made during the pre-test process because it will encourage patients to feel secure in agreeing to be tested. This reference could be incorporated into public health pre-test counseling, or the CDC could recommend to state and local jurisdictions that they include it as an element of what constitutes legally sufficient informed consent. Such information would:

- Advance the public health goal of encouraging more people to agree to testing;
- Help ensure informed consent by addressing the risk of discrimination that results from testing; and
- Be simple to provide. The AIDS Legal Council of Chicago incorporates all that is needed into a postcard titled, "Know Your Legal Rights" (<http://www.aidslegal.com/pages/outreach.html>).

Thank you again for the opportunity to comment. Michael Pates, Director of the ABA AIDS Coordination Project (tel.: 202/662-1025; e-mail: PatesM@staff.abanet.org), would be pleased to receive any questions or comments you may have in response.

Sincerely,



Shelley D. Hayes
Chair



Richard T. Andrias
Immediate Past Chair

cc: ABA AIDS Coordinating Committee and
Michael Pates, Director, ABA AIDS Coordination Project

Kevin Fenton, M.D., Ph.D.
Director, National Center for HIV, STD and TB Prevention
Centers for Disease Control and Prevention

Robert E. Stein and Tanya Terrell-Collier
Chair and Staff Director
ABA Section of Individual Rights and Responsibilities

Robert D. Evans and Ellen McBarnette
Director and Legislative Counsel
ABA Governmental Affairs Office

Paul R. DeMuro and Jill C. Peña
Chair and Staff Director
ABA Health Law Section