

HIV Testing of Defendants of Felony Sexual Assault

A Satellite Videoconference/Webcast sponsored
by the AIDS Institute, Office of the Medical Director

March 13, 2008

Questions and Answers

	The Law
1.	Are there any implications of the law that may apply to children and adolescents who have been sexually assaulted? Criminal Procedure Law § 210.16(5) states: “The application for an order to compel a defendant to undergo an HIV related test may be made by the victim but, if the victim is an infant or incompetent person, the application may also be made by a representative as defined in section twelve hundred one of the civil practice law and rules.”
2.	What if the victim is a minor — can a parent request the information for the minor? Criminal Procedure Law § 210.16(7)) states “Test results shall be disclosed subject to the following limitations . . . disclosure of confidential HIV related information shall be made to the defendant upon his or her request, and disclosure to a person other than the defendant shall be limited to the person making the application....”
3.	How long will it take for a response from the courts after a victim applies for defendant testing? Criminal Procedure Law § 210.16(2) states: “The request must be filed with the court prior to or within forty-eight hours after the indictment or superior court information has been filed with the superior court....” The law does not address the time the court has to respond. The purpose of the law is to provide medical or psychological benefit for the survivor, which would imply a timely response.
4.	How long does it take from the time the person is charged with the assault to be indicted for the assault? From the time someone is “accused” of the assault to the time they are indicted is variable. If the prosecutor decides there is sufficient evidence that a suspect has committed an offense, the prosecutor will prepare charges formally accusing the defendant with committing a felony offense and will formally notify the defendant of those charges at an arraignment. After the arraignment, if the defendant gives up the right to have the case presented to a grand jury, the prosecutor will file a superior court information; otherwise, there may be a preliminary hearing or the case may go directly to a grand jury. If the grand jury indicts the defendant, the prosecutor will file the indictment. Depending upon how the district attorney decides to prosecute the case and whether the defendant exercises or waives the right to a speedy trial, the amount of time it would take for a grand jury to indict a defendant would vary.
5.	If the victim is a minor, who applies for defendant testing? See answer to question 1.
6.	If the victim is a minor, who gets the results? See answer to question 2.

7.	<p>Does the law apply to ongoing sexual abuse? The law applies to a defendant who is being prosecuted for one or more specific felony sexual offenses.</p>
8.	<p>Does the law allow for the testing of the defendant's blood for hepatitis B and hepatitis C? The law does not address hepatitis B and hepatitis C.</p>
9.	<p>Are there any data on the percentage of the 1,747 defendants convicted of sexual offenses in 2007 who would be incarcerated and the average (pre-trial) length of such incarcerations? There are no data accessible to us at this point that addresses this.</p>
10.	<p>Does this law apply to juveniles charged as a juvenile delinquent in family court for sexual offenses or only if they are charged in adult criminal court? CPL 210.16 does not apply to a juvenile delinquent. It would apply to a juvenile offender who is prosecuted in the same manner as an adult. A person 14 or 15 years of age can be prosecuted as a juvenile offender for a number of crimes, of which two crimes — rape in the first degree and criminal sexual assault in the first degree — appear to have the requisite element of sexual intercourse or oral sexual contact or anal sexual contact, which would trigger the HIV testing requirement. Any person who has attained the age of 16 is an adult for purposes of criminal responsibility.</p>
The Defendant	
10.	<p>Does the defendant's specimen need to be collected in a "chain of custody" procedure? This is not evidence, therefore, there is no chain of custody.</p>
11.	<p>Can the defendant be tested once arrested or not until an indictment is made? The defendant can only be tested if indicted.</p>
12.	<p>Given the differences explained between sharing the defendant's court-ordered test results, as outlined this afternoon and in Article 27F, does a defendant's positive test get reported on a Provider Report Form, which ultimately goes through the NYSDOH PNAP Tracking System? All HIV positive tests in NYS are reported to NYS DOH by the lab and by the provider.</p>
13.	<p>Notification can be made to the victim's contacts. What about the defendant's contacts?</p>

	Partner notification will be offered to the defendant at the post-test HIV-positive counseling session.
14.	<p>Whose responsibility is it for testing if the defendant is in another jurisdiction when results are received, especially if the testing was requested several months after the assault?</p> <p>There may be times when the defendant and survivor will be in different counties. The counties will need to communicate and develop a plan.</p>
15.	<p>If the defendant is incarcerated, are there any obligations for jail staff or jail medical staff?</p> <p>Each county and jail should work together to develop a plan for implementing defendant testing. Jail staff may provide pre-test counseling, obtain specimens, and post-test counsel the defendant.</p>
	The Survivor
16.	<p>Who has the responsibility of informing the survivor that this testing is available? Is there a mandate for informing the patient?</p> <p>The Emergency Department may be the first point of contact with the survivor. Each ED should request survivor brochures to have on hand. Rape evidence kits will have survivor brochures in them. Other points of contact may be Rape Crisis volunteers, police departments, District Attorney survivor services. Each of these agencies may let the survivor know defendant testing is available.</p>
17.	<p>Why does the victim have to ask the court to re-test if the defendant is in the 3-6 month (sero-conversion) window? It should be mandatory to be re-tested. When will they be retested?</p> <p>The law states the survivor may request defendant testing if there is a medical and psychological benefit and that follow-up testing may also be requested. The tests that are recommended, viral load and standard Elisa, may not need follow-up testing.</p>
18.	<p>Would defendant testing still be offered even if the victim chooses not to start PEP?</p> <p>Defendant testing may be requested whenever a defendant is indicted on a felony sexual offense within 6 months of the assault and the survivor will gain medical or psychological benefit. The survivor's treatment is not a consideration.</p>
19.	<p>If the defendant tests negative but the survivor tests positive, will the defendant be offered PEP?</p> <p>The law pertains to defendant testing only.</p>
20.	<p>How does this affect special populations (autistic adults, those who do not have relevant social skills) and how will this information be made available to them?</p>

	See answers to questions 1 and 2.
21.	<p>What is the \$2,500 for? Is it part of the CVB reimbursement to ED and PEP? Does it cover anything else?</p> <p>Go to www.cvb.state.ny.us for a complete listing of services funded, an application for funding, and brochures.</p>
	Emergency Departments
22.	<p>What education is being provided to ED staff regarding:</p> <ul style="list-style-type: none"> • Pros and cons of obtaining defendant status “Counseling Messages” for survivors are being developed and will be available on the NYS DOH website. • Notifying survivors of defendant test results Emergency Departments will not be providing defendant test results. • HIV PEP management PEP guidelines have been in effect since 1998. All ED staff should be aware of these guidelines. Guidelines are available at www.hivguidelines.org. • What is the ED staff role in the above? The role of the ED in defendant testing is to: (1) Notify the survivor that defendant testing is available (provide survivor brochure); (2) Assess the need for PEP treatment according to guidelines; and (3) If PEP is ordered, notify the survivor of services offered by Crime Victims Board (possible payment for medications). <p>All materials and guidance for defendant testing are on www.hivguidelines.org. The HIV Clinical Education Initiative may be contacted for further education at 518-473-8815.</p>
23.	<p>If this happens in evenings or on weekends, are these defendants going to be showing up in local emergency departments? What are the local ERs responsibilities to test defendants? Who is going to be billed?</p> <p>Emergency Departments will not be doing defendant testing. The law states this is the responsibility of the state and local public health officer.</p>
24.	<p>How will the information that is being discussed and the law be disseminated to the front line in the ED and to the general public to assist the survivor?</p> <p>In early November 2007, all ED providers received an HPN alert notifying them of the law and their role. A satellite videoconference/ webcast was offered March 13, 2008.</p> <p>All materials and guidance are posted on www.hivguidelines.org. The HIV Clinical Education Initiative may be contacted for further education at 518-473-8815.</p>

25.	<p>As a SANE nurse, what is my obligation/responsibility to inform the survivor of defendant testing? Provide the survivor brochure and answer any questions as needed.</p>
	<p>Medical Guidance</p>
26.	<p>Is rapid HIV testing of the defendant recommended when less than 42 days have occurred since the assault? If not, why? Rapid testing is not recommended. The medical criteria committee determined that to receive the most accurate results on which to base a decision to discontinue medication, you must use a viral load test and standard ELISA.</p>
27.	<p>Have there been changes in PEP meds? In January 2008, an alternative regimen was added. Guidelines are available at www.hivguidelines.org. The regimen is:</p> <p>Zidovudine (AZT) 300 mg po bid and Lamivudine (3TC) 150 mg po bid or Combivir 1 po bid PLUS Tenofovir 300 mg po qd with food</p> <p>OR Alternative Option</p> <p>Zidovudine 300 mg PO bid PLUS Emtricitabine 200mg PO qd + Tenofovir 300 mg PO qd or Truvada 1 PO qd</p>
28.	<p>What is the clinical guidance for defendant testing if the defendant is available less than 7 days following the alleged assault? If the defendant is indicted less than 7 days from the time of assault, a viral load and a standard Elisa would be ordered. A positive test would be accurate; a negative test could not be used to make a determination to discontinue medication. Another court order would need to be requested for follow-up testing after 7 days.</p>
	<p>Wadsworth Laboratory and specimen handling</p>
29.	<p>If a defendant has been erroneously tested positive (and both victim and defendant have been given medication) and the prosecution used this evidence to enhance the severity of the punishment, can the laboratory personnel be held liable? The test results are not disclosed to the court and cannot be used as evidence in a criminal or civil suit.</p>

30.	Are drug resistance patterns run on positive specimens? No resistance testing is done on defendant HIV tests.
31.	Does the listing of county health departments indicate who the public officer is for each county? The list of counties on the New York State Association of County Health Officials website identifies the commissioner of the health department. Each county should contact their DA and offer a contact person name and address to send defendants for testing and the days/hours available for testing.
32.	Is Wadsworth capable of performing confirmatory testing on oral samples if the defendant is unable to provide a blood sample? No.
	Disclosure
33.	What repercussions are there, if any, for the victim that discloses the perpetrator's HIV status indeterminately? The survivor would be in violation of the law.
34.	On the slide titled redisclosure by victim of defendant's test results, you say such redisclosure is permitted to past contacts. What is meant by past contacts? Would this be limited to contacts after the alleged assault? This refers to contacts that the survivor may have exposed since the assault. These contacts would be told they may have been exposed to HIV and encouraged to be tested for HIV. No names would be used.
35.	If the patient speaks to the media (even if the results can't be given to the court) could it be difficult to find unbiased jurors? Speaking to the media would be a violation of the law.
36.	If the survivor wishes, is he/she then allowed to let the court know that she has been exposed — in essence, telling the court that the defendant is positive? No.
	Other
37.	What education is provided to correctional facilities and what is their role? After indictment, defendants may be on bail or in jail. They probably won't be in a state prison. The jail should be in communication with the county public health officer to be part of the team for defendant testing. The county and jail can work together to set up a process for defendants that are in the custody of the jail. For education: All materials and guidance are posted on www.hivguidelines.org . The HIV Clinical

	<p>Education Initiative may be contacted for further education at 518-473-8815.</p>
	<p>Comments:</p>
	<p>Child Advocacy Centers should be added to the listed of resources, since they do a lot of coordination of these cases. This link provides a directory of Child Advocacy Resource and Consultation Centers – http://www.nyscarcc.org/directory/map.php</p>
	<p>The Satellite Videoconference is archived on the web: The New York State Department of Health AIDS Institute is pleased to announce that an archived copy of the HIV Testing of Defendants of Felony Sexual Assault is available for viewing online.</p> <p>To view the archived webcast: 1) download the most recent copy of REAL Player from the DOH website at: http://nyhealth.gov/events/webcasts/ (scroll to the bottom of the page for the link) 2) open the REAL Player program and in the address line paste or type in the following address:</p> <p style="text-align: center;">rtsp://real.hvcc.edu/hiv/defhiv2x.rm</p> <p>3) When prompted for a user ID type in: hivdef 4) When prompted for a password type in: view 5) View the program.</p> <p>If you have any difficulty viewing the program please call HIV Education and Training Programs at 518-474-3045.</p>