

**Proposed Principles Governing Mandated HIV Testing of Persons Accused of Certain Crimes
State of New York
AIDS Advisory Council**

- 1) HIV testing should be made available on a voluntary basis to accused persons prior to initiation of mandatory testing.
- 2) Preconviction HIV testing, initiated at the request of the victim, should be mandated only if the other principles mentioned herein are met, and should include pre and post counseling as provided for in Public Health Law Article 27-F.
- 3) Exposures that present a significant risk of HIV transmission should meet the applicable definitions of "significant risk body substances" and the circumstances which constitute "significant risk of transmitting or contracting HIV infection" as presently defined in NYCRR 63.9 and stated below:

NYCRR 63.9(b) "Significant risk body substances" are blood, semen, vaginal secretions, breast milk, tissue and the following body fluids: cerebrospinal, amniotic, peritoneal, synovial, pericardial, and pleural.

NYCRR 63.9(c) Circumstances which constitute "significant risk of transmitting or contracting HIV infection" are:
(1) sexual intercourse (vaginal, anal, oral) which exposes a non-infected individual to blood, semen or vaginal secretions of an infected individual;
(2) sharing of needles and other paraphernalia used for preparing and injecting drugs between infected and non-infected individuals;
...
(5) other circumstances not identified in paragraphs (1) through (4) during which a significant risk body substance (other than breast milk) of an infected individual contacts mucous membranes (e.g., eyes, nose, mouth), non-intact skin (e.g., open wound, skin with a dermatitis condition, abraded areas) or the vascular system of a non-infected person. Such circumstances include, but are not limited to needlestick or puncture wound injuries and direct saturation or permeation of these body surfaces by the infectious body substance.

NYCRR 63.9(d) Circumstances that involve "significant risk" shall not include:
(1) exposure to urine, feces, sputum, nasal secretions, saliva, sweat, tears or vomitus that does not contain blood that is visible to the naked eye;
(2) human bites where there is no direct blood to blood, or blood to mucous membrane contact;
(3) exposure of intact skin to blood or any other body substance;...

4) A hearing should be held prior to issuance of a mandatory HIV testing order. At the hearing, the prosecution should be required to demonstrate probable cause to believe:

- a) that an assault was committed;
- b) that the accused committed the assault;
- c) that the circumstances of the assault presented a significant exposure to HIV; and
- d) that the test results will provide information that meets the standards of substantial medical benefit to the victim. Substantial medical benefit should be found only when the following elements are satisfied:

- A decision is pending about beginning, continuing or discontinuing a medical intervention for the victim, in accord with current medical consensus or generally accepted treatment guidelines, and based on knowledge of the victim's baseline HIV status, and
- The results of an HIV test of the accused could reasonably affect that decision, and
- The decision cannot be made based on the results of an HIV test of the victim.

The determination of (c) and (d) above should be made in consultation with a recognized public health authority such as the local health officer.

- 5) The HIV test results should be disclosed only to the victim and the accused, but allowing the accused to exercise the prerogative not to be informed of his/her serostatus.
- 6) The confidentiality of the HIV test results is protected pursuant to PHL 27-F, except as required to inform the victim and for the victim to inform his or her physician, sexual partners and family members, with civil penalties for unauthorized disclosure to other parties.
- 7) The use of information obtained by mandated HIV testing should be limited by making test results not admissible as evidence in the criminal or subsequent civil proceedings.
- 8) All judicial proceedings related to a decision to order testing, and if so ordered, the testing itself, should be conducted in the most expedited manner possible, and should be consistent with accepted principles of due process. Upon motion of either the accused or the victim, the presiding judge should have the power to conduct these proceedings in closed session, and/or to seal the judicial record of the proceedings.

In order to protect the accused from inappropriate testing and unauthorized disclosures, the procedural protections embodied in this policy, including a probable cause hearing, limited disclosure, and confidentiality protection, are particularly important and merit careful consideration by policymakers and drafters of statutory language.

These principles reflect the current status of HIV-related diagnostic technology, clinical management and interventions. Advances in scientific/medical knowledge will be monitored by the AIDS Advisory Council to ensure timely and responsible policy recommendations.

Adapted and expanded from Gostin LO, Lazzarini, Z, Alexander, D, Brandt, AM, Mayer, KH, Silverman, DC; HIV Testing, Counseling, and Prophylaxis After Sexual Assault; JAMA 1994; 271: 1436-1444.

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