When, if ever, can you divulge your ED patient’s HIV status?

**ED physician may have a duty to warn others**

A man with chest pain tells you that he uses cocaine and is positive for human immunodeficiency virus (HIV), then asks you to not tell his girlfriend who is about to enter the room. What are you most likely to be sued for: if you disclose the patient’s status, or if you don’t tell and his partner gets infected?

A patient’s status as HIV-positive is protected by federal and state law, says Erin McAlpin Eiselein, a health care attorney with Davis Graham & Stubbs in Denver, CO.

You may only disclose this confidential and protected health information if there is an exception to the federal or state law, says Eiselein.

However, in light of the California Supreme Court’s 1974 decision in *Tarasoff v. Regents of the University of California,* involving a patient who killed a specific

### What if HIPAA conflicts with your state’s law?

**Disclosure isn’t always prohibited**

According to Jill M. Steinberg, a health care attorney with Baker, Donelson, Bearman, Caldwell & Berkowitz in Memphis, TN, the Health Insurance Portability and Accountability Act (HIPAA) would prevent an ED physician from discussing a patient’s HIV status with any other person, even if that person could be potentially exposed to an infectious disease.

Instead, the ED physician should do what he or she can to obtain permission from the patient to disclose the information, and/or make a strong recommendation to the patient himself to disclose his HIV status.

“The physician should also document in the patient’s record that he was counseled to avoid unprotected intercourse, stop using drugs, and warn all of his sex partners of their potential exposure,” she says.

It is unlikely that a successful lawsuit could be maintained against the emergency physician for failure to tell a patient’s girlfriend of his HIV status even if she becomes infected, since HIPAA prevents the disclosure, says Steinberg.

“Without permission or a Health Care Power of Attorney, there are very few, if any, scenarios wherein an ED physician or nurse would be legally able to divulge patient information unless the patient is incompetent or comatose,” says Steinberg.

There appears to be no private right of action for a HIPAA violation. Patients complaining of violations are required to file their grievance with the Office of Civil Rights. However, suits may be filed by patients alleging a breach of confidentiality based upon state law rights of privacy.

### Laws may conflict

There may be situations where state law and federal law are in conflict, such as states that require the physician to notify a sexual partner or local health organization of the patient’s status as HIV-positive. “Failure to notify may put the physician in violation of state law. But notifying a non-patient of the patient’s status would be in violation of federal law,” says Steinberg.

However, ED physicians likely will not violate HIPAA by complying with a state statute that permits or requires reporting known contacts of a HIV-positive individual to a public health agency. “Such reporting probably would fall under the HIPAA exception for public health activities, so those state laws would not be contrary to HIPAA,” says Erin McAlpin Eiselein, a health care attorney with Davis Graham & Stubbs in Denver, CO.

Eiselein adds that there is a “good argument” that an ED physician notifying a contact or a local health agency about a possible HIV infection would not violate HIPAA for the additional reason that there is an exception for disclosures to avert a serious threat to health or safety.

Steinberg points to a Wisconsin case which found that an emergency medical technician invaded the privacy of an overdose patient when she told the patient’s co-worker about the overdose.

And in a Michigan case involving a pharmacy employee who loudly blurted out a patient’s HIV status in a crowded waiting room, the court of appeals upheld a jury verdict of $100,000 for slander, invasion of privacy, intentional infliction of emotional distress, and violation of a Michigan statute that protects the confidentiality of HIV results.

Before HIPAA, physicians had been sued for failure to disclose to third parties in limited instances, such as the *Tarasoff* case, notes Steinberg. Also, a physician was successfully sued in a case involving the failure to warn family members of the possibility that they also had been exposed to Rocky Mountain spotted fever when a relative had died of the disease.

With HIPAA now in effect, these lawsuits probably not be successful if filed today,” says Steinberg.

### References

individual after informing his psychologist that he intended to do so, physicians also have an obligation to warn a party in clear or imminent danger.

"The intersection between the physician/patient privilege and the physician's duty to warn raises a number of legal and ethical considerations," says Eiselein. "If an ED physician encounters this situation, he or she should immediately contact the hospital's legal counsel, as controlling laws vary widely by state."

Many states allow, but do not require, notification to third parties, while a few states require the notification. "In those states, the disclosure would be permissible," says Eiselein.

Michigan, for example, has enacted a statute requiring physicians to notify the contacts of an HIV-positive patient, if this disclosure is necessary to prevent further transmission of HIV.

"The ED physician can also discharge this duty by notifying a local health officer," adds Eiselein.

However, the Michigan statute is unusual. In the vast majority of states, such notification isn't mandated, and may not be allowed at all. "State statutes are all very different," says Eiselein. "Some allow disclosure to spouses. Others allow disclosure to sexual partners but not needle sharing partners, and others permit disclosure to anyone who may have been exposed to the virus."

In states in which notification is permitted, the ED physician will have to make a decision as to whether to notify a contact directly, or make a report to the local health agency, based upon the particular state law involved and the set of facts presented, says Eiselein.

She cautions that physicians who are statutorily authorized to notify a third party about a possible exposure to HIV should take care to strictly comply with such laws. "In many cases, this means providing the contact's name to a local health agency so that the agency can conduct the notification," says Eiselein. "Any questions about such a notification should be brought to the immediate attention of legal counsel."

Many possible scenarios for lawsuits

If you divulge a patient's HIV status, the patient could sue you for breach of physician-patient privilege, breach of confidential physician-patient relationship, invasion of privacy, and intentional or negligent infliction of emotional distress. If you fail to disclose this information, however, a third party could sue you for failure to warn, intentional or negligent infliction of emotional distress.

There also may be claims for breach of a particular statute imposing a duty of confidentiality on HIV-related information. For example, a New York appellate court held that a plaintiff could seek punitive damages from a physician for breach of the physician's duty of confidentiality and violation of a New York law prohibiting disclosure of HIV-related information.2

"The failure to warn cases will be most successful in states such as Michigan, that have placed an affirmative duty on the physician to notify a sexual partner or a local health organization of the patient's status as HIV-positive," says Eiselein.

Physicians have been sued for both disclosing HIV status in violation of a confidentiality statute, and failing to warn a third party about possible HIV infection.34

The American Medical Association's policy on HIV testing states that "Physicians must honor their obligation to promote the public's health by working to prevent HIV-positive individuals from infecting third parties within the constraints of the law. If an HIV-positive individual poses a significant threat of infecting an identifiable third party, the physician should: (a) notify the public health authorities, if required by law; (b) attempt to persuade the infected patient to cease endangering the third party; and (c) if permitted by state law, notify the endangered third party without revealing the identity of the source person."

"Another idea is to inform the patient about the criminal liability he or she will face for willful or even negligent exposure," says Eiselein.

The majority of states have some type of statute criminalizing unprotected sexual activity of a person who is HIV-positive. "Some states even criminalize a person's failure to notify a sexual partner of his or her status as HIV-positive," says Eiselein.

Otherwise, says Eiselein, ED physicians are gener-

Sources

For more information, contact:
• Erin McAlpin Eiselein, Davis Graham & Stubbs, 1550 Seventeenth St., Suite 500, Denver, CO 80202. Phone: (303) 892-7308. Fax: (303) 893-1379. E-mail: erin.eiselein@dgslaw.com
• Matthew Rice, MD, JD, FACEP, Northwest Emergency Physicians of TEAMHealth, 505 S. 336th St., Suite 600, Federal Way, WA 98003. Phone: (253) 838-6180, ext. 2118. Fax: (253) 838-6418. E-mail: Matt_Rice@teamhealth.com
• Jill M. Steinberg, Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, 165 Madison Ave., Suite 2000, Memphis, TN 38103. Phone: (901) 577-2234. Fax: (901) 577-0776. E-mail: jsteinberg@bakerdonelson.com

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ally only legally able to divulge a patient’s medical information when the patient consents or there is a court order compelling such disclosure. “Other than those two categories, the exceptions are very limited, and again, are heavily state law dependent,” she says.

In addition, there are many state laws expressly prohibiting disclosure of a patient’s status as HIV-positive. “This is an additional layer of patient confidentiality protection,” says Eiselein.

**Warn patients of specific risks**

ED physicians should not disclose a patient’s HIV status, except when there is a legal mandate to do so and even in this case, this is preferably done through a third party, such as a public health official, advises Matthew Rice, MD, JD, FACEP, an ED physician with Northwest Emergency Physicians of TEAMHealth in Federal Way, WA.

“When there is a person at specific risk of harm—a ‘Tarasoff’ type of situation—then an exception might be considered. But this would be a highly unusual case,” says Rice. If your patient is aware of their HIV-positive status, but indicates that he or she is going to continue to have unprotected sexual contacts with a specific person without appropriate protections, then there is a specific risk to a specific person and, thus, a potential duty for the ED physician to take action to protect this individual.

Even if this is not the case, however, clinicians should clearly document instructing the HIV-positive patient to avoid risky behaviors that could infect others, such as sharing needles and exchange of bodily fluids. Also, it should be documented that you have explicitly informed them about ways to prevent exchanges of bodily fluids. “I would be specific about this, so there is no doubt the patient has been warned of what to be careful about,” adds Rice.

**References**


**CNE/CME Questions**

42. Which scenario exposes the ED physician to legal risks when caring for a patient with methicillin-resistant *Staphylococcus aureus* (MRSA)?
   A. Giving empirical coverage with vancomycin
   B. Adding bactrim to keflext or using clindamycin
   C. Using trimethoprim/sulfamethoxazole as a
   D. Use of keflext for a soft tissue infection that progresses to sepsis

43. Which is true regarding state laws for disclosure of a patient’s HIV status?
   A. No states require notification to third parties who may be at risk.
   B. Notification isn’t mandated in most states.
   C. If notification is required, all individual(s) at risk must be contacted directly by the ED physician.
   D. States uniformly permit disclosure to spouses.

44. Which is recommended regarding documentation by the ED physician caring for an HIV-positive patient?
   A. Avoid documenting explicit instructions about ways to prevent transmission of the disease.
   B. Document only in general terms about avoiding risky behaviors.
   C. Be specific that you have informed the patient about ways to prevent exchanges of bodily fluids.
   D. No documentation is needed unless the patient specifically states they intend to have unprotected intercourse with specific individuals.

Answers: 42. D; 43. B; 44. C