CONSENT FOR HIV TESTING

This letter is in response to your inquiry concerning Texas law regarding HIV testing of patients. There are a number of aspects to this issue. The following information is presented.

State Law Requirements for HIV Testing

In some cases, Texas law allows a physician to "require" that a patient undergo an HIV test. Texas law provides that a person (such as a physician) may require another person to have an HIV test if a medical procedure is to be performed on the person that could expose health care personnel to AIDS or HIV infection, according to Board guidelines defining the conditions that constitute possible exposure to AIDS or HIV infection, and there is sufficient time to receive the test result before the procedure is conducted. [Texas Health & Safety Code § 81.102(a)(4)].

Texas Department of Health rules defines such procedures as invasive procedures involving surgical entry into tissues, cavities or organs, or repair of major traumatic injuries. Angiographic, bronchoscopic, endoscopic and obstetrical procedures are specifically included.

While some have interpreted the word "require" to mean that a physician may perform the test without the patient's consent, the better view is that the physician may "require" the HIV test as a condition of performing the procedures identified by TDH. Thus, some evidence of the patient's consent is still required. In all other cases, it seems that consent is required, as outlined below.

The next issue concerns the form of consent. While the AMA House of Delegates has adopted several policy statements to the effect that physicians should be allowed to perform HIV test without explicit informed consent, that policy does not comport with state law. The Texas legislature, in amending the Communicable Disease Prevention and Control Act in 1989, enacted a provision which prohibits the performance of an HIV test without obtaining the informed consent of the person to be tested. However, consent does not have to be written if there is documentation in the medical record that the test has been explained and the consent has been obtained. Section 81.106 of the Texas Health & Safety Code provides that a person who signed a general consent form for the performance of medical tests or procedures is not required to also sign a specific consent form relating to medical tests or procedures to determine HIV infection, antibodies to
HIV, or infection with any other probable causative agent of AIDS that will be performed on the person during the time in which the general consent form is in effect. However, the results of the tests or procedures to determine HIV infection performed under the general consent form may only be used for diagnostic or other purposes directly related to medical treatment.

However, there is one exception. If an HIV test is necessary to manage accidental exposure to health care workers to blood or other body fluids, no "specific consent" is necessary, so long as the test is performed under a "written infectious disease protocol" and the person is notified of the test result and the name of the person tested is destroyed after the test. (Texas Health & Safety Code §81.107).

In the event that the test shows that the patient is HIV positive, the statute provides that physicians must provide certain counseling to the patient at the time the positive result is disclosed. From a risk management standpoint, it is very important to notify the patient of the positive HIV test result. Studies indicate that as many as 36% of physicians do not always notify patients of abnormal test results. (McCarthy, BP. Patient Notification and Follow-up of Abnormal Test Results, Archives of Internal Medicine, February 12, 1996, pp. 327-331).

In addition, HIV test results are made confidential by law, but there may be a need to disclose that test result to a third party with the patient's consent. (Texas law allows disclosure of a positive HIV test result to the patient's spouse without the patient's consent, however.) (Texas Health & Safety Code, §81.103). In that case, a specific consent for release form is suggested, since there is a special law dealing with that issue apart from the Medical Practice Act. A form which combines consent to test, acknowledgement of counseling and consent to release is attached.

**Mandated HIV Testing of Pregnant Women & Newborns**

As a result of legislative action in 1995, physicians are now required to take blood samples for syphilis & HIV testing at the time of the first examination and visit, and within 24 hours of delivery. A sample of blood from the umbilical cord may be used instead of the mother's blood. In addition, the physician must, before conducting the test, (1) provide certain written information developed by TDH, and (2) inform the woman that the test is confidential but not anonymous, and explain the difference between an anonymous and confidential test. Neither test (prenatal or postnatal) may be conducted if the woman objects. (Texas Health & Safety Code §81.090). Positive test results require counseling as outlined above.

**HIV Testing in Situations Not Otherwise Covered**

By implication, all other HIV testing of patients must be consensual. Evidence of informed consent is required, as is counseling in case of a positive result.
ADA Implications of HIV Testing

Furthermore, if the patient is HIV positive, there are important obligations under the Americans with Disabilities Act (ADA) of which you should be aware. The ADA prohibits discrimination against the persons with disabilities in all phases of employment, and prohibits discrimination against persons with disabilities in places of "public accommodation," such as a physician's office.

What is less generally known is that HIV positive patients (and persons with a number of other conditions, such as deafness) are considered to have a disability under the ADA. In other words, their disease is also a disability, which entitles them to certain legal protections. The general rule is that a public accommodation cannot refuse to serve a person with a disability simply because of the disability. Applied to physicians' offices, it means that a physician cannot refuse to accept an HIV positive person as a patient simply because that person has the HIV infection.

It is alleged that some physicians will not treat HIV positive or AIDS patients because they believe that such patients present an unacceptable level of risk to themselves and their employees. However real that risk may be, the position cannot be legally defended. There have been several ADA enforcement actions in this area. According to press releases issued by the U.S. Justice Department, several large awards have been obtained from dentists who refused to treat HIV positive patients, including (1) $100,000 penalty from a Houston dental company in September of 1994, (2) a $29,000 penalty from a Connecticut dental office in January 1995 and (3) a $120,000 penalty from a New Orleans dentist in March 1995. The ADA could just as easily be enforced against physician's offices. Furthermore, the United State Supreme Court held that HIV infection is a disability, and that it does not pose a direct threat to fill cavity of an HIV positive patient. (Bragdon v. Abbott, 524 U.S. 624).

One cannot refuse to treat HIV positive or AIDS patients and find justification in the policies of organized medicine, dentistry, or government agencies that deal with public health. The Centers for Disease Control and Prevention, the American Medical Association and the American Dental Association have issued policy guidelines that state that there is no medical justification for excluding persons from dental care solely on the basis of their HIV positive or AIDS status. All three organizations recommend the use of "Universal Precautions" to prevent the transmission of blood borne diseases, including HIV, in the health care setting (Texas law also mandates use of universal precautions). In addition, Occupational Health and Safety Administration regulations require medical and dental facilities to use Universal Precautions in all facilities for all patients, regardless of known HIV or AIDS status.

Under the ADA, it is also arguable that a physician who (for example) refuses to perform an obstetrical procedure unless the patient first is HIV tested commits a violation. This is because the ADA also prohibits discrimination against persons who are perceived to have a disability. Thus, if a patient refuses consent to the HIV test, and a physician refuses to
perform the listed procedure because, without the test result, he or she perceives the patient to be HIV positive, there is a potential violation of the ADA. This has the potential effect of nullifying the above quoted provision of state law, although there is no case law or administrative interpretation on this issue as of the revision date of this document.

However, a physician may refer an HIV positive patient to another physician who does have the ability to treat HIV infection, if the physician does not have the ability to treat HIV infection. One can also decline such persons as patients for reasons other than the HIV infection which would apply to non-disabled patients as well, such as non-payment of charges, non-compliance with treatment regimen, failure to keep appointments, disruptive behavior and so forth. This is another area of the ADA not well developed at present, so there are a number of legitimate unanswered questions about these issues.

Consequences of Uninformed Testing

Although some physicians may do HIV test without the patient's knowledge, thinking that this is the best way to protect themselves, the practice is legally indefensible. A physician has a duty to inform his patient of the results of all tests that are performed. This duty has both ethical and legal origins. If a physician performs an HIV test on the patient without the patient's knowledge, and the result is positive, the physician is then in the uncomfortable position of being required to tell the patient the results of a test which the patient did not know was being ordered in the first place. Not only would the patient have a claim for having been subjected to an unauthorized HIV test but may have a claim for infliction of emotional distress as well. In addition, Texas law provides that a person who "requires" HIV/AIDS tests commits a Class A Misdemeanor criminal offense when done in violation of the Communicable Disease Prevention and Control Act.

Office of the General Counsel
Texas Medical Association

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