



Guidance for People Living with HIV Who Are Threatened with, or Are Facing, Criminal Prosecution for HIV Nondisclosure or Exposure

Dozens of states and territories have laws that criminalize HIV exposure and/or nondisclosure of HIV status for sexual contact, needle-sharing, and/or contact with “body fluids” such as saliva. Even where there are no laws specifically addressing HIV exposure or nondisclosure of status, individuals living with HIV have been prosecuted under general criminal laws, such as assault or attempted murder. Although these laws criminalize conduct that is either consensual (both people agree to it) or involves no significant risk of HIV transmission, these laws make people with HIV vulnerable to prosecution simply for being HIV positive.

If you think you might be in danger of being arrested and charged with a crime for nondisclosure or exposing another person to HIV, there are some things you can do as “damage control:”

- DO try to have proof that you told your partner your HIV status BEFORE SEX— for example, a diary entry, having your partner agree to video or write an agreement that he/she knows your HIV status. Regularly document how you have complied with the law. The impact that disclosure can have on intimacy, or the “heat of the moment” may make this step unrealistic. However, it is one important way that you may be able to fight a conviction, depending on the law in your state. If you are using condoms, it also can be helpful to keep a record of that (for instance in a diary). Remember, for proof of your HIV status disclosure to be useful, it has to happen BEFORE sex. An email that confirms this, if you are comfortable with the risk that emails can be widely circulated, can also serve as proof. Be aware that even if you disclosed your status on your profile or in chats on a website such as Adam4Adam or Match there may not be a permanent record of that disclosure. Make sure that if you are disclosing your status to people online that you get a screenshot of that conversation (with the date and time) of your disclosure.
- DO NOT EMAIL anything that ever could be used against you or that shows a desire to keep your HIV status secret, or about any worries you have about revealing your HIV status to a partner.
- DO discuss and confirm with your health care provider that you disclose your status to partners before sex, and make sure that your provider documents this in your medical records. If you actually can take a potential partner to your doctor or case manager to document HIV status disclosure and counseling before sex, that is ideal, but may not be practical in most instances. Taking your partner with you to a doctor or counselor after sex will not protect you from accusations that you had sex with a partner without disclosing your HIV, or even from criminal exposure charges in states where condom use is not a defense, although it may help if the law in your state only makes it a crime to not use protection, such as condoms.
- DO tell your doctor and other health care providers to NOT disclose or discuss your medical information to the police without a court order (different from a subpoena), and only after you and/or your health care provider have had the opportunity to oppose the court order for your records. Let them know that they should tell you immediately if they are contacted by the police

or other law enforcement personnel, and that you expect them to defend against the disclosure of your personal records to the police or a prosecutor.

- ❑ **KNOW the law in your state.** Find out what the laws are in your state. Talk to staff at an HIV legal organization in your state that understands criminal law, or look at the information online at The Center for HIV Law and Policy, which has a guide on every state and U.S. territory's HIV-specific laws and other laws that have been used to prosecute people with HIV, as well as what has happened in each state with respect to HIV-specific prosecutions. Go to: <http://www.hivlawandpolicy.org/resources/view/564>.
- ❑ **CONSIDER lining up a lawyer.** If you have the money, you can try to identify an experienced criminal defense lawyer. Talking to a lawyer can help you understand your rights in your state and what you can do if you think you might be in danger of being arrested. However, if you have *not* been arrested or charged and do not have money for a private attorney, you generally will not be able to get advice from a criminal defense attorney at this stage. You can find a lawyer by going to the resources listed below, or in some instances by asking a case manager or social worker at an AIDS Service Organization (ASO) for help.
- ❑ **DO NOT TALK** to the police or answer questions about your situation without a lawyer. If you are questioned or approached before being arrested, do not say anything other than politely asking if you are being charged with a crime.
- ❑ **DO NOT TELL** the police or detective that you are HIV positive and **DO NOT** consent to an HIV test. Be polite, but do not talk!

If you are arrested and charged with an HIV-related crime:

- ❑ **DO NOT TALK TO THE POLICE. DO NOT VOLUNTEER ANY INFORMATION, OR ANSWER ANY QUESTIONS.** If you are on medications that you must have, try to have a friend or relative contact your doctor to get confirmation to the jail medical staff that you have a health condition that requires regular medication, along with the needed medications. **ALL YOU SHOULD SAY TO A POLICE OFFICER OR DETECTIVE WHEN ASKED QUESTIONS IS THAT YOU WOULD FIRST LIKE TO SPEAK WITH AN ATTORNEY.** Do not believe anything you are told about how things will go more easily if you talk, or more harshly if you do not – this is virtually never the case. Providing information about your situation without getting a lawyer's advice first is **NEVER** to your advantage. It is the prosecutor's job to prove that you are guilty of a crime -- do not help them.
- ❑ **KNOW YOUR RIGHTS.** You have the right not to say anything to the police or anyone else. You also have the right to speak with a lawyer. If you cannot afford to hire a lawyer, the state must provide one for you. A lawyer can explain your rights to you and help advise you on how to defend yourself. Remember, be polite, but be quiet.
- ❑ **UNDERSTAND THE CHARGES AGAINST YOU.** If you are arrested, make sure you ask what you are being accused of doing. The best person you can ask to explain the charges against you is a lawyer, but always ask for any available written information about the complaint or

charges against you. If you will be assigned a public defender, it may take several days after your arrest for a lawyer to be assigned to you.

- ❑ TAKE THE CHARGES SERIOUSLY. Being charged with a crime can have many negative consequences. Do not delay in finding help and support from organizations or individuals who may be able to counsel and support you without charge, such as the Center for HIV Law and Policy, www.hivlawandpolicy.org, and others (see list below for additional examples).
- ❑ DO NOT ASSUME THAT A PRIVATE ATTORNEY IS BETTER THAN A PUBLIC DEFENDER. One of the most frequent mistakes that people make is assuming that a private attorney is better than a public defender. The fact that you are paying for a lawyer does not mean that you are getting better representation. The best lawyer is one that has experience in the county or area where you have been arrested, who knows and has worked with the local law enforcement officials where your case is, and who is familiar with HIV and/or willing to work with other professionals who are. The most important thing here is to have a smart, EXPERIENCED CRIMINAL DEFENSE ATTORNEY who will take your case seriously.
- ❑ AVOID PEOPLE WHO SAY THEY CAN HELP YOU BECAUSE HIV DOES NOT CAUSE AIDS. You may be approached by people who claim they want to help you because an HIV test does not prove that you have HIV or AIDS, or because HIV is not harmful to others. AIDS “denialists” -- people who do not believe that HIV is the cause of AIDS and that all AIDS treatments are toxic -- frequently approach defendants in cases that have received press coverage, and may be interested in using your case to advance their cause. These people should be avoided because they likely will hurt rather than help your case.
- ❑ DO NOT SPEAK TO THE PRESS. Refer all questions to your lawyer. If you don’t yet have a lawyer, say you will have your lawyer get in touch when possible. A surprising number of people in the media are not careful about getting the facts correct. It is not at all unusual to be misquoted. Many press people are more interested in a sensational story than in getting the story right. IT IS VERY RARE THAT A PERSON IN THE PRESS WILL PUT YOUR INTERESTS FIRST AND A GREAT STORY SECOND.

Resources

For lists of public defender offices, legal aid programs, and legal research resources, visit the web site of the National Legal Aid and Defender Association (NLADA) at www.nlada.org and click on “Links” at the bottom of the page. For information about HIV specific laws and prosecutions, please see the Center for HIV Law and Policy website at www.hivlawandpolicy.org.

Direct Links

List of state public defender offices:

http://www.nlada.org/Links/Links_Home#links_IndigentDefense

List of legal aid programs:

http://www.nlada.org/Links/Links_Home#links_LegalAidPrograms

List of legal research resources:

http://www.nlada.org/Links/Links_Home#links_LegalResearch

Manual on HIV criminal laws and prosecutions:

<http://www.hivlawandpolicy.org/resources/view/564>

Some other organizations that can advise you before, or when, you are charged with a criminal HIV nondisclosure or HIV exposure crime:

Lambda Legal, www.lambdalegal.org (national)

ACLU AIDS Project, www.aclu.org/hiv-aids (national)

GLAD, www.glad.org (New England area)

The AIDS Law Project of Pennsylvania, www.aidslawpa.org (Pennsylvania)

HIV Law Project, www.hivlawproject.org (New York)

AIDS Law of Louisiana, www.aidslaw.org (Louisiana)

Whitman-Walker Legal Services Clinic, www.wwc.org/hiv_aids_services/legal_services.html
(Washington, DC metropolitan area)

The Positive Justice Project is a project of The Center for HIV Law and Policy. The unifying goal of the Positive Justice Project is the repeal of HIV criminalization statutes — laws that create HIV-specific crimes or which enhance penalties for persons who are HIV positive and convicted of criminal offenses -- and the end of arrests and prosecutions based on the fact of a positive HIV test. Learn more at: <http://www.hivlawandpolicy.org/public/initiatives/positivejusticeproject>

