



Positive Justice Project

Guidance for a Legal Advocate Representing an HIV-Positive Client in a Criminal Exposure Case

The elements of criminal HIV exposure statutes vary by jurisdiction. Most penalize defendants when they do not disclose their HIV status before having specific kinds of contact with another person. What defines disclosure, and whether or not it took place, is often at the center of criminal cases.

The risk of actual harm is also at issue in some cases, especially when the defendant is on antiretroviral therapy and has an undetectable viral load. Although it is not impossible for someone with a low viral load to transmit HIV, experts agree that a low viral load significantly reduces the risk of HIV transmission. Use of a condom during sex also greatly reduces the transmission risk. Spitting or biting pose virtually zero risk of HIV transmission, and there has never been a single documented case of HIV transmission via saliva.

After identifying the elements of the offense with which the client is charged, and determining what the prosecution will need to prove, it may be helpful to have some or all of the following information about the client:

- When was s/he diagnosed as being HIV-positive?
- After diagnosis, was s/he counseled about the modes of HIV transmission and prevention methods?
- Is s/he on antiretroviral therapy?
- Was s/he on antiretroviral therapy at the time of the alleged contact?
- Did s/he tell the other person that s/he was HIV-positive?
- If not, why not?
- Would the other person have some other way of knowing about her/his HIV status?
- What type of contact was involved (sex, spitting, biting, etc.)?
- Did the other person consent to the contact?
- Did the other person consent to the contact after knowing that s/he was HIV-positive?
- If the contact involved sex, was a condom used?
- What kind of sex was involved (vaginal, anal, oral, sex toys)?
- If state law criminalizes exposing others to HIV in any way, did s/he know about the law?

It will also be helpful in most cases to prepare or obtain the following (in addition to relevant case law, statutes, and regulations):

- Information from a reliable source, such as a federal, state, or local health department, about the relative HIV transmission risks of various conduct.
- Testimony or affidavit from a medical expert about HIV transmission, including language indicating that HIV is not transmitted via casual contact, HIV is not transmitted via spitting or biting, and HIV is less likely to be transmitted when a condom is used or when a person's viral load is undetectable.