Treating Patients With Infectious Disease
Health care providers may not ethically refuse to treat someone because he or she has a communicable disease, even though exposure to the disease may put the provider’s health at risk. The AMA Code of Medical Ethics, Section 10.05, states “Physicians cannot refuse to care for patients based on race, gender, sexual orientation, or any other criteria that would constitute invidious discrimination, nor can they discriminate against patients with infectious diseases.” Many physicians, nurses, and other health care providers have made the ultimate sacrifice in caring for patients who have deadly infectious diseases. The list of these unsung heroes continues to grow as new threats, such as SARS, challenge medical science to find new vaccines and cures.

Universal Precautions
Health care providers should be familiar with the protocols designed to minimize the risk of exposure to infectious disease and take necessary precautions. However, the protocols followed must be based upon objective, scientific evidence to avoid a claim of discriminatory treatment.

Reporting Requirements
All Tennessee physicians, hospitals, laboratories, and other health care providers are required by law to report known or suspected cases of communicable disease to the health authorities in the town or county where the infected person or persons are found. This reporting requirement includes identifying information but does not violate the ethical principle of physician-patient confidentiality or the Health Information Portability and Accountability Act (HIPAA).

Tennessee has four reporting categories. Diseases listed under Category 1 require immediate telephonic reporting, followed by a written report using the appropriate form. Diseases listed under Category 2 require only a written report using the designated form. Category 3 covers HIV/AIDS and requires special confidential reporting to designated health department personnel. Category 4 covers blood lead test results.

The form for reporting non-HIV communicable diseases is available at: http://health.state.tn.us/Downloads/ph-1600.pdf. This form also lists which diseases are classified under the different categories. Forms for reporting HIV/AIDS are available at: http://health.state.tn.us/STD/forms.htm. Different forms are used for pediatric and adult cases of HIV/AIDS.

Duty to Warn Third Parties
Disclosing a patient’s confidences to a third party without the patient’s authorization may be a breach of confidentiality and HIPAA. However, there are exceptions to the rule when public policy interests outweigh the privacy rights of an individual patient. The Tennessee
Supreme Court has recognized that a health care provider may have a duty to warn identifiable persons in the patient’s immediate family against foreseeable risks emanating from a patient’s illness.

In Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993), the doctor did not advise the patient’s wife that he had died from Rocky Mountain Spotted Fever. Although this is not a communicable disease, the fact that one family member contracted it made it likely that others in the family also had been exposed. She died within a week after her husband, and her son sued the doctor. The court held that the physician had a legal duty to warn identifiable immediate family members of the symptoms of the disease, the incubation period, and the need for immediate medical treatment upon manifestations of any symptoms.

Health Care Providers With an Infectious Disease
A health care provider who has an infectious disease must take precautions against exposing a patient to that disease. Section 9.13 of the AMA Code of Medical Ethics states: “A physician who knows that he or she has an infectious disease, which if contracted by the patient would pose a significant risk to the patient, should not engage in any activity that creates a significant risk of transmission of that disease to the patient. The precautions taken to prevent the transmission of a contagious disease to a patient should be appropriate to the seriousness of the disease and must be particularly stringent in the case of a disease that is potentially fatal.”

HIV/AIDS
HIV/AIDS has probably spawned more lawsuits and legislation than all other communicable diseases combined. Because of the sensitive nature of HIV/AIDS, many of the legal rules for this disease are different than the rules for other communicable diseases. This factsheet will briefly identify and discuss some of the legal issues that health care providers need to know about HIV/AIDS.

Screening. Screening or testing for HIV is mandated by law in Tennessee (1) for people who are arrested for certain crimes, (2) when emergency workers, health care workers, or law enforcement and correctional officers are exposed to bodily fluids, (3) for blood donations, and (4) when ordered by the court. Routine screening is required for all pregnant women as early in their pregnancy as possible and again in their third trimester, but they may opt out. Their written refusal must be noted in the medical chart. The Center for Disease Control and Prevention (CDC) recommends routine screening for everyone, unless they opt out.

Consent. Unlike many states, Tennessee has no specific law that requires getting a special consent for HIV testing. However, the AMA Code of Ethics, Section 2.23, states that “Consent for HIV testing cannot be inferred from a general consent to treatment.” The Tennessee Health Department provides a separate HIV testing consent form on its Web site. The CDC recommends that HIV testing should be part of the general consent process rather than a separate consent.

Note: For screening and consent purposes, the CDC’s recommendations are in conflict with ethical and, in many states, legal requirements. This is because the CDC’s primary goal is to prevent the spread of the disease, while the legal and ethical considerations attempt to protect the patient’s privacy because of the extreme prejudice that historically has been directed against HIV/AIDS patients.

Counseling. Unlike many states, Tennessee has no specific law that requires a health care provider to give pre– or post-test counseling to someone who is tested for HIV, except in the case of pregnant women. If a pregnant woman refuses HIV testing, the health care provider should counsel her about the consequences of exposing unborn children to HIV. A pregnant woman who tests positive for HIV must receive post-test counseling. The Tennessee Health Department provides pre– and post-test counseling for all HIV tests conducted at each of its 95 health departments. Testing and counseling information is available at its Web site.

Confidentiality. The health care provider’s duty to report a case of HIV to the health department does not violate a patient’s right to confidentiality because the public interests outweigh the rights of the individual. Does a health care provider also have a duty or the right to warn third parties who may be at risk for HIV? Or, would such disclosure violate confidentiality?
Unless there is a state law that specifically allows a health care provider to warn a third party about potential exposure to HIV, such disclosure without the patient’s authorization would violate confidentiality and HIPAA, possibly resulting in lawsuits, monetary fines, and criminal penalties. Tennessee has two statutes that address this issue.

Tennessee Code Section 68-110-115 states: “A person who has a reasonable belief that a person has knowingly exposed another to HIV may inform the potential victim without incurring any liability.”

Tennessee Code Section 68-10-102 states: “If any attending physician or other person knows or has reason to suspect that a person having a STD is behaving so as to expose other persons to infection, or is about to behave, the attending physician or other person shall notify the municipal or county health officer of the name and address of the diseased person and the essential facts of the case.”

If the exposure has already occurred and it was done knowingly, the health care provider may warn the potential victim directly. If this test is not met, a direct warning to the victim is not authorized by statute, but the health care provider is required to report it to the health department so they can warn identifiable people at risk. Also, the health care provider should encourage the patient to tell anyone he or she has put at risk for contracting HIV.

The AMA Code of Medical Ethics, Section 2.23, states: “Exceptions to confidentiality are appropriate when necessary to protect the public health or when necessary to protect individuals, including health care workers, who are endangered by persons infected with HIV. If a physician knows that a seropositive individual is endangering a third party, the physician should, within the constraints of the law (1) attempt to persuade the infected patient to cease endangering the third party; (2) if persuasion fails, notify authorities; and (3) if the authorities take no action, notify the endangered third party.”

A key phrase is “within the constraints of the law.” It is not clear whether a rule similar to the one in the Rocky Mountain Spotted Fever case would apply to HIV because Tennessee has specific statutes that address how and when a physician may warn a third party about a potential exposure to HIV. Tennessee courts tend to strictly interpret statutes and are not likely to extend the meaning of the statute beyond its plain meaning. HIV/AIDS information is so highly confidential in some states that it is a crime to disclose this information to someone not specifically listed in the statute. If in doubt, seek legal counsel.

Fear of AIDS. Because of the seriousness of contracting HIV, potential exposure to the disease often causes extreme physical, mental, emotional, and social damage, particularly when the exposure is unexpected and not the result of any voluntary behavior of the victim. A number of lawsuits have resulted from the “fear of AIDS.” Many of these lawsuits are based upon exposure or possible exposure to HIV between health care provider and patient, between patients, between health care provider and employees, and between employees and patients.

Whether or not the victim is entitled to recover damages depends upon the evidence and which test has been adopted in the state where the suit is brought. Basically, there are two tests, although states have adopted variations of the two.

Under the reasonable fears test, a plaintiff may recover if his or her fear of contracting HIV is “reasonable.” No actual exposure needs to be proved. The time frame for which damages may be calculated is the “window of anxiety.” The window closes when the plaintiff learns or should have learned that the possible exposure did not result in contracting HIV.

Under the actual exposure test, a plaintiff may recover only if the plaintiff can prove (1) that he or she was actually exposed to HIV (2) through a medically accepted channel of transmission. If both tests are not met, the plaintiff cannot recover, but it is not required that the plaintiff actually contract HIV. Tennessee follows the actual exposure test.

HIV Positive Health Care Providers. The AMA Code of Medical Ethics, Section 9.131, states: “A physician who knows that he or she is seropositive should not engage in any activity that creates a significant risk of transmission of the disease to others.” A number of
states require that an HIV positive physician obtain informed consent from the patient before performing any procedure that would put the patient at risk. What activities constitute a significant risk is open for debate, but courts have found that an activity may pose a significant risk even though the probability of exposure is low because the ultimate outcome of contracting HIV is death. The AMA Code of Medical Ethics suggests that an HIV positive physician seek the advice of colleagues to determine which activities can be pursued without creating a risk to patients.

HIV positive health care providers also need to be aware that in many states, including Tennessee, it is a crime to knowingly expose someone to HIV without his or her knowledge and consent. Tennessee law makes it a felony for any person with knowledge that he or she is infected with HIV to knowingly engage in intimate contact with another. “Intimate contact” is defined as “the exposure of the body of one person to a bodily fluid of another person in any manner that presents a significant risk of HIV transmission.”

Suppose an HIV positive surgeon performs an invasive procedure on a patient, and there is a risk, albeit a small one, that blood from an accidental cut on the surgeon’s hand could drip into the patient’s open incision. Has the surgeon committed a felony under Tennessee law? Although one may assume that the intent of the law was aimed at sexual activity and needle sharing, the language is so broad that it is possible to interpret it to include an HIV positive health care provider who performs an invasive procedure.

The surgeon could not defend on the grounds that no bodily fluids were actually mingled. A Tennessee rape case held that the prosecution does not need to show actual contact with bodily fluids, only that there was a risk of contact. However, it would be a complete defense if the surgeon had disclosed his or her HIV status to the patient and obtained written informed consent. It is a defense if the victim knew that the defendant was infected with HIV and gave advance consent with that knowledge.

Conclusion
Legally and ethically, treating communicable disease is like a juggling act where the balls in the air include protecting the public, protecting the patient’s privacy, protecting identifiable third parties, and protecting the health care providers, not only from the infectious disease itself, but from the legal ramifications of dropping one of the balls. Except for HIV/AIDS, the emphasis for treating communicable disease has been on protecting the public health. The stigma of HIV/AIDS caused a shift from this position to an emphasis on protecting the patient’s privacy. Perhaps, the recommendations of the CDC to make HIV testing part of the routine exam for everyone without a separate consent is the beginning of treating HIV/AIDS like any other communicable disease. However, currently following those recommendations would violate ethical principles and the law in many states.

Helpful Web sites
Communicable and Environmental Disease Services — TN
http://health.state.tn.us/CEDS/index.htm

TN Dept. of Health Notifiable Disease Report
http://health.state.tn.us/Downloads/ph-1600.pdf

TN HIV/AIDS/STD Section
http://health.state.tn.us/STD/forms.htm

TN HIV Prevention Services Program
http://health.state.tn.us/STD/counseling.htm

TN Dept. of Health
http://health.state.tn.us/

Center for Disease Control and Prevention (CDC)
http://www.cdc.gov/

Disclaimer: The information contained in this factsheet is educational in nature and provided as a public service. It is neither a comprehensive statement of the law nor intended as legal advice, and it should not be relied upon as such. The information is based upon federal and Tennessee law, and the law in other states may be different. Laws may change without notice, rendering the information contained in this factsheet inaccurate. If you have specific legal questions, please consult an attorney.

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