LEGAL ETHICS AND AIDS: AN ANALYSIS OF SELECTED ISSUES

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ARTICLE

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I. INTRODUCTION

AIDS or Acquired Immune Deficiency Syndrome can be seen as a series of epidemics.¹ First and foremost, AIDS is a medical epidemic potentially affecting a significant portion of our population.² Because AIDS is incurable, fatal, and communicable, it has also generated an epidemic of fear throughout the world.³ The medical epidemic and the epidemic of fear have in turn spawned a legal epidemic of legislation and litigation which is having a profound effect upon society and the practice of law.⁴

While these epidemics have been studied in great detail,⁵ there has been no

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1. The name AIDS or Acquired Immune Deficiency Syndrome was developed at the Centers for Disease Control in Atlanta, Georgia. "This association of different diseases—of which several often existed in the same patient—represented by definition a 'syndrome.' " Krim, AIDS: The Challenge to Science and Medicine, in AIDS: The Emerging Ethical Dilemmas, HASTINGS CENTER REPORT 2 (special supp., Aug. 1985). "Part of the challenge of the epidemic is the unparalleled diversity of factors intertwined in its development: sociology, psychology, politics, ethics, and law," Osborne, The AIDS Epidemic: Discovery of a New Disease, in AIDS AND THE LAW: A GUIDE FOR THE PUBLIC 17 (1987). AIDS has also been referred to as a pandemic, see Marco, AIDS 1986: A Medical-Legal Explosion, 33 MED. TREAT. TECH. Q. 360 (1987).


Dr. Jonathan Mann speaking at the Third International Conference on AIDS, called the economic, political, social and cultural reaction to HIV infection the 'third epidemic' related to AIDS. The first two, he said, were the 'silent' epidemic of infection in the mid-late 1970s and the manifestations of that infection, first documented in the U.S. in 1982. Together, he said, the three epidemics constitute what the WHO recently called 'a worldwide emergency.'

Third World Upheaval Seen Caused by AIDS, 3 AIDS POLY & L. 3, 4 (June 17, 1987).

3. See text accompanying notes 18-58 infra, for a discussion of the epidemic of fear.


comprehensive analysis of the ethical and moral responsibilities of lawyers who are confronted by AIDS-related dilemmas. The medical profession has produced guidelines, policy statements, and commentary concerning the ethical and moral ramifications of AIDS on their profession. The legal profession in contrast has remained relatively silent, apparently content to rely on the general provisions of the ABA Model Code of Professional Responsibility (Model Code) or the ABA Model Rules of Professional Conduct (Model Rules) to provide assistance to practitioners. This article will briefly summarize the impact of the three epidemics, identify selected AIDS-related ethical issues which can arise in legal practice, and then analyze these issues in light of existing legal ethical standards. Attorneys must be cognizant of the ethical issues surrounding AIDS if they are to respond to them in an ethi-
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A. The Medical Epidemic

The facts underlying the medical epidemic are startling, grim, and well documented. AIDS is a retrovirus, known as the Human Immunodeficiency Virus (HIV), which kills by suppressing the immune system of the victim resulting in death from opportunistic infections. There is no known cure, and no vaccine is available for protection. AIDS is therefore considered to be universally fatal at this time. Since 1981 when AIDS was first recognized as a new disease, over 37,000 people have died from its consequences. Estimates place the number of persons exposed to the virus at between 1 and 1.5 million. Projections indicate that by 1992 over 365,000 persons will have been diagnosed with AIDS. The disease has tended to strike disproportionately at homosexual or bisexual men and intravenous drug users, and also at the Black and Hispanic populations in the United States. Because the virus is also transmitted through heterosexual contact and the blood supply, appropriately appropriate, rational, and compassionate manner.

14. Id. at 72; C. Koop, United States Surgeon General, Report on Acquired Immune Deficiency Syndrome (1986); Quarterly Report to the Domestic Policy Council on the Prevalence and Rate of Spread of HIV and AIDS in the United States, 259 J.A.M.A. 2657 (1988). Although not all people with the virus will develop AIDS, they can pass the virus on to others.
15. PHS Conference Estimates 365,000 Cases Through 1992, 3 AIDS Pol’y & L. 5 (June 15, 1988). The 365,000 estimate was made by Dr. James Curran, Centers for Disease Control AIDS Director. Curran also estimated an additional 88,000 AIDS cases will be diagnosed through the end of 1993, for a total of 453,000.
ply, it remains a threat to the entire population. This medical threat has in turn generated widespread fear.

B. THE EPIDEMIC OF FEAR

Fear of AIDS is growing, sometimes reaching to the level of hysteria or panic among certain segments of the population. This epidemic, sometimes dubbed "AFRAIDS," causes tremendous emotional suffering and discrimination for persons with AIDS, HIV-infected persons, or even for those merely suspected of having the disease.

Rational Fear of AIDS

Since AIDS is fatal and communicable there is obviously just cause for fear of infection by the virus. Education is essential for an intelligent, reasoning response to the threat. Except for children who are born with the disease and those infected through blood transfusions or bone grafts, the risk is not based on who you are, but rather on what you do.

While the disease is communicable, it is not transmitted through normal,
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non-sexual social interaction or through casual contact. 24 AIDS is passed primarily by transmission of body fluids through sexual contact, blood transfusion or infected intravenous needles. 25 In fact, some commentators have taken the position that HIV virus is actually relatively difficult to communicate to others, at least in comparison with air or water born epidemics of the past. 26

For some occupations the fear of AIDS is quite rational. For example, doctors or nurses may be stabbed by an infected scalpel or needle or be sprayed by a patient's blood during surgery. 27 There is a real possibility of accidental infection if precautions are not taken or if a practitioner is careless. Ambulance attendants, dentists, morticians, and laboratory technicians may also come into contact with infected body fluids and must therefore take appropriate precautions. 28

A legitimate fear of contracting AIDS may also arise from involvement with persons infected with HIV who wish intentionally to transmit the disease to another person. Several instances have been reported of HIV-infected persons attempting to bite, spit on, or scratch police or corrections officers. 29 Infected blood has been thrown on police and emergency medical technicians. 30 There is even an instance of HIV-infected blood serum being placed


26. Gostin, supra note 22, at 8; "One American of eminence has described this virus as 'the least infectious disease that we have ever come across'; but, at the same time, it is not going to go away, as the Black Death went away." Jeffries, AIDS—The New Black Death?, 54 MEDICO-LEGAL J. 158 (1986); Wright, AIDS: A Brief Overview, 12 NOVA L. REV. 973, 976-77 (1988).


in a corrections officer’s coffee.\textsuperscript{31} No cases have been reported where such activities have actually resulted in the transmission of the virus. Although HIV has been found in saliva, the virus concentration is significantly lower than concentrations found in blood, thus representing much less of a threat.\textsuperscript{32}

A more realistic threat of intentional transmission of HIV is presented by the infected person who engages in unprotected sex, either heterosexual or homosexual, with an unknowing partner.\textsuperscript{33} Such acts may be based upon a feeling of revenge against an individual, or the world in general, or an “I just don’t care” attitude.\textsuperscript{34} As will be seen, intentional transmission situations present complex problems for medical and legal practitioners caught in the bind between their patient’s or client’s expectation of confidentiality and the

32. See Heyward and Curran, supra note 13, at 80;

Medical experts indicate that there is no known case of transmission of AIDS through a human bite. Dr. Martha Rogers of the National Centers for Disease Control in Atlanta reported that in none of the 24,576 AIDS cases in the United States had the disease been contracted through such means. Low concentrations of the AIDS virus have been found in saliva, but one medical professional maintained that there was certainly no risk of transmission since the skin was not broken by the bite.

Biological Update U-110 (Nov. 1986); but see Arizona Officer is Infected After Contact With Inmate, 3 AIDS POL’Y & L. 11 (Oct. 19, 1988), where “a guard was infected during an assault by a prisoner in which the officer made contact with the inmate’s body fluids through an open wound.”


34. For an interesting ancient account of how some people reacted to the plague, see Thucydides’ History of the Peloponnesian War 155 (translated by Rex Warner, Penguin Books 1972):

In other respects also Athens owed to the plague the beginnings of a state of unprecedented lawlessness. Seeing how quick and abrupt were the changes of fortune which came to the rich who suddenly died and to those who had previously been penniless but now inherited their wealth, people now began openly to vent their acts of self-indulgence which before then they used to keep dark. Thus they resolved to spend their money quickly and to spend it on pleasure, since money and life alike seemed equally ephemeral. As for what is called honour, no one showed himself willing to abide by its laws, so doubtful was it whether one would survive to enjoy the name for it. It was generally agreed that what was both honourable and valuable was the pleasure of the moment and everything that might conceivably contribute to that pleasure. No fear of god or law of man had a restraining influence. As for the gods, it seemed to be the same thing whether one worshipped them or not, when one saw the good and the bad dying indiscriminately. As for offences against human law, no one expected to live long enough to be brought to trial and punished.
desire to protect unsuspecting third parties from infection.\textsuperscript{35} These rational fears of transmission of AIDS are aggravated by more extreme, and common, irrational reactions.

Irrational Fear of AIDS

An unreasoning fear of AIDS continues within a large portion of the population, despite substantial proof that HIV is not transmitted through normal casual contact in social, educational or business settings.\textsuperscript{36} Ignorance of the means of transmission, compounded by unfounded rumor, has generated fear and hostility.\textsuperscript{37}

There are also those, who although educated to the realities of AIDS, do not believe what they have been taught. They fear that they may become infected no matter what the odds, no matter what the precautions. Anyone infected with the virus, and members of suspect groups, are viewed as potential threats. Underlying this fear is the pervasive belief that medical science is still uncertain about many aspects of the disease and the fact that scientists have been unable to find a cure.\textsuperscript{38} Since there are no absolute guarantees, and even some doctors are afraid to treat persons with AIDS,\textsuperscript{39} why

\textsuperscript{35} See notes 291-299 infra and accompanying text dealing with confidentiality and privacy issues.

\textsuperscript{36} McMillan, \textit{Toward a National AIDS Policy}, 74 A.B.A.J. 123 (July 1, 1988); D. Altman, supra note 18, at 2; The house of the Ray family, whose three boys were infected with the AIDS virus, was set afire in a dispute over whether the boys could attend the public schools. "Some people who defended the Rays at the time say that, in retrospect, the townspeople were not venal, just scared and ignorant of what AIDS is and how the disease is transmitted." Schmalz, \textit{AIDS Issue Lingers in Florida Town}, N.Y. TIMES, October 6, 1988, at A16, col. 1; see also supra note 24.

\textsuperscript{37} "You may be sure, also, that the report of these things lost nothing in the carriage. The plague was itself very terrible, and the distress of the people very great, as you may observe of what I have said. But the rumor was infinitely greater. ..." D. Defoe, \textit{A Journal of the Plague Year} (1665) in \textit{9 Works of Daniel Defoe} 248-249 (1904); Belden and Donelan, \textit{Discrimination Against People With AIDS: The Public's Perspective}, 319 NEW ENG. J. MED. 1022-26 (1988). The results found by the authors include: 81 percent of respondents believe that identifying persons with HIV infection should take priority over personal privacy. 20 percent believed that AIDS is a deserved punishment and that those with AIDS "are getting their rightful due." 29 percent of those polled said they believe HIV-positive persons should have their status tattooed on their bodies. 25 percent said they would refuse to work alongside a person with AIDS, and that an employer should be able to fire an employee because of AIDS. The percentage of people who believe that persons with AIDS should be segregated from public places ranged from 21 to 40 percent.


take a chance?

Fear of AIDS has stripped many people of their capacity to be rational. Their irrational fear is encouraged by the nature of the disease, by inflammatory reporting of AIDS-related matters in the news media, and by the impact of powerful social taboos. In these contexts, AIDS-phobia is associated with deep-seated fears of human sexuality, death, and stigma.

Sex and AIDS are intimately related since sexual activity, and especially homosexual activity, is the most frequent manner of transmission of the virus. Seventy percent of the cases of AIDS in the United States have involved homosexual or bisexual men, and therefore the disease has sometimes been referred to as the "gay plague."

Lurid stories of homosexual promiscuity, especially reports of activities in public bathhouses, convince some that AIDS results from individual excess and lack of personal morality. Even without the threat of AIDS, homosexuality is viewed by many as antithetical to normal family life and as an unclean and corrupt form of sexuality. Consequently, homosexuals with AIDS are viewed as having willfully violated traditional moral codes, and AIDS is seen as the punishment or divine retribution for their sins. Persons with AIDS, it is held, are responsible for their own self-inflicted illnesses. AIDS thus can lead to a reversal of roles, where the victims are


42. Schulman, supra note 41, at 1115-17; Brandt, AIDS: From Social History to Social Policy, 14 L. MED & HEALTH CARE 231, 234-35 (1986).

43. See supra note 16.


46. Dolgin, supra note 44, at 197-98; Brandt, Historical Analogies to the AIDS Epidemic, in AIDS AND PATIENT MANAGEMENT: LEGAL, ETHICAL AND SOCIAL ISSUES 159, 161 (1986).

47. "Fundamental ministers have been the most reliable exponents of this version of AIDS as punishment for sin. Thus, the Moral Majority's Jerry Falwell is reputed to have claimed that 'AIDS is the wrath of God upon homosexuals.'" Ross, supra note 11, at 41; see Eisenberg, supra note 38, at 245.

considered the ultimate wrongdoers and a threat to society.49

AIDS above all is associated with a fear of death.50 It forces those with the disease, or those who fear the disease, to face the uncomfortable thought of a potentially painful death and an end to their being.51 AIDS has in a broader sense become a metaphor for death-personified with all its attendant cultural significance and fear.52

Not only do people fear AIDS as a disease, but they also fear the stigma which attaches to those who are afflicted. AIDS is associated with high risk groups comprised primarily of homosexual men and intravenous drug abusers.53 The AIDS stigma is therefore targeted at groups who are already stigmatized by society.54 The fear of being labeled by society as unclean and dangerous is justified, since the result is often ostracism, quarantine, discrimination, or even violence.55

Impact of the Fear of AIDS

Historically, people have reacted to the danger of epidemics by, if possible, distancing themselves from the disease and its victims.56 However, if it was not possible to escape from or quarantine the carriers of the infection, then society has often made scapegoats of the victims and the majority group has

50. Schulman, supra note 41, at 1117.
51. Id.; Ross, supra note 11, at 40.
52. AIDS is perhaps first of all a metaphor of personified death. The personal account literature is full of references to people who 'lost' lovers or friends to AIDS. 'AIDS took three people on this street,' an acquaintance told me. A young man with AIDS says, 'Why did it get me?' In Life magazine, 'AIDS struck the Burk family'; it 'laied their bodies open to lethal infections.' Here, AIDS becomes powerful and independent. It goes about choosing its victims, a grim reaper hiding behind ordinary sexual relationships. In Rolling Stone, Edmund White uses this metaphor quite specifically: 'Gay sex has become equated with death. Behind the friendly smiling face, bronzed and mustachioed, is a skull.' The ubiquitous use of the word victim is part of the AIDS as death metaphor. Death in our culture is not a kindly God looking to bring his people back to his presence. It is a skeletal figure, stealing people and taking them into the realm of darkness. AIDS is death, out looking for victims. (ffns. omitted).
53. Many of the drug abusers are Black or Hispanic and therefore might be said to face multiple stigmas. See supra note 16.
55. Id. at 60-63; Farmet, supra note 11, at 53.
vented their wrath and their fears upon those bearing the stigma.\textsuperscript{57}

Unfortunately, this pattern is being repeated again. Those bearing the stigma of AIDS in the United States face innumerable forms of discrimination and are subject to ostracism and threats of violence.\textsuperscript{58} They are frequently deprived of education, housing, employment, insurance, adequate health care, and fundamental rights simply because many members of our society fear them. In response to this massive wave of discrimination caused by the epidemic of fear, and also in response to the political and economic burdens resulting from the medical epidemic, a legal epidemic of law and litigation has been spawned.

C. THE LEGAL EPIDEMIC

Legitimate concerns exist as to how society should respond to the AIDS epidemic. Who should provide care and treatment for those with AIDS? Who will fund research to combat the disease and educational programs necessary to prevent its spread? What mechanisms are needed to eliminate AIDS-related discrimination? The legal epidemic of AIDS is the product of the institutional responses to these and other issues. In just seven years the legislation, administrative actions, and litigation in response to the AIDS epidemics have created a major new body of law.\textsuperscript{59}

\textsuperscript{57} See, D. Altman, \textit{supra} note 18, at 13; Albury, \textit{Historical Reaction to "New" Diseases}, 18 \textsc{Australian J. Forensic Sci.} 5, 6-7 (Sept. 1985); Dolgin, \textit{supra} note 44, at 201; Schulman, \textit{supra} note 41, at 117-18.

\textsuperscript{58} Nickens, \textit{AIDS, Race, and the Law: The Social Construction of Disease}, 12 \textsc{Nova L. Rev.} 1179-80 (1988);

The chairman of President Reagan's AIDS Commission . . . issued sweeping recommendations for changes to the nation's response to the epidemic, saying 'significant flaws' in the existing system have permitted widespread discrimination against people with AIDS or HIV infection and have prevented a comprehensive response to the AIDS crisis. Watkins' recommendation was prompted by testimony at commission hearings over the past several months that he said convinced him that AIDS-related discrimination 'is the rule, not the exception.' . . . This is a nation that's frankly discriminating against other members of society.

\textit{Anti-Bias, Confidentiality Laws Asked in Draft Report}, 3 \textsc{AIDS Pol'y \& L.} 6 (June 15, 1986);

The stigma against AIDS patients is not fading, making it doubly tough for patients and their families and friends to face the illness openly. . . . With AIDS spreading at frightening speed, specialists . . . see few encouraging signs that society is going to respond to the epidemic in a moral and ethical manner. Most discouraging, is that people are not more compassionate to children with AIDS. History shows that infectious diseases which began in stigmatized population groups never lose that stigma. The attitude is the victims brought it on themselves.

\textit{Stigma Against Patients Not Ebbing, Conference Told}, 2 \textsc{AIDS Pol'y \& L.} 7 (Dec. 16, 1987).

\textsuperscript{59} It is beyond the scope of this article to provide even a cursory examination of the substantive law of AIDS; yet the legal literature is rich in articles exploring these themes. See, e.g., Pabst, \textit{Protection of AIDS Victims From Employment Discrimination Under the Rehabilitation Act}, 1987 U. \textsc{Ill. L. Rev.} 355; \textit{The Constitutional Rights of AIDS Carriers}, 99 \textsc{Harvard L. Rev.} 1274 (1986);
To respond to the legal issues surrounding the AIDS epidemic, bar associations have established coordinating committees and support groups and sponsored educational programs and studies of AIDS-related issues in an effort to grapple with the wide-ranging legal implications of AIDS. The American Bar Association has lobbied Congress to develop a federal AIDS policy including voluntary testing, confidentiality, counseling, and anti-discrimination provisions.

The organized bar has also begun to recognize the rapidly accelerating need for pro bono legal assistance to those with AIDS since their condition often leaves them in a state of financial difficulty. Individual attorneys and law firms have championed the rights of persons with AIDS in the nation's courts across a broad spectrum of legal settings. Some attorneys have even specifically focused their practices on representation of clients with AIDS because of their special needs.

Unquestionably the legal profession is deeply and intimately involved in virtually all aspects of the legal epidemic of AIDS.


60. For a critical evaluation of the legal profession’s response to AIDS, see Quade, A Lawyer With AIDS, 14 HUM. RTS. 23, 24 (Summer 1987).

61. See, e.g., ABA DISCUSSION DRAFT, supra note 6; Reidinger, ABA Committee Coordinates AIDS Program, 74 A.B.A.J. 79 (July 1, 1988); ABA AIDS Project Staffed by IRR, 15 HUM. RTS. 5 (Fall 1987); New York State Bar Association, AIDS—The Legal Issues (1988) (text of an education program dealing with the substantive legal issues of AIDS); Friedman, The AIDS Crisis: A Well Defined Role for Lawyers, 2 WASH. LAW. 60 (Nov.-Dec. 1987). This article describes a number of bar association activities directed at the AIDS problem. The National Lawyers Guild has also developed an AIDS network. AIDSPRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE 1-2 (2d ed. 1988); Silas, Legal AIDS: Bars Offer Help to Persons with AIDS, 14 BAR LEADER 16 (Nov.-Dec. 1988).

62. See McMillan, supra note 36, at 123; Summary of Action Taken by the House of Delegates of the American Bar Association, Report 115A of the Young Lawyers Division 26 (Feb. 8-9, 1988); see infra note 166 for text of Report 115A.

63. In New York City, for example, Gay Men’s Health Crisis and the Bar Association for Human Rights-Greater New York both have pro bono and referral programs aimed at providing legal assistance to people with AIDS-related legal problems. In Washington, D.C., the Whitman-Walker Clinic has a Legal Director on staff who coordinates the work of hundreds of volunteer lawyers. Similar programs are organized by gay bar groups and AIDS service organizations in Boston, Chicago, Los Angeles, and San Francisco, among others. In addition, representation in HIV-related impact or test-case litigation is provided by several lesbian and gay legal organizations, such as Lambda Legal Defense and Education Fund headquartered in New York City, and its affiliates.

ABA DISCUSSION DRAFT, supra note 6, at 14, fn. 2; Friedman, supra note 61, at 60; Leonard, Employment Discrimination Against Persons With AIDS, 10 U. DAYTON L. REV. 681, 682-83 (1983); Silas, supra note 61.

64. See generally C. Collins, AIDS LAW & LITIGATION REPORTER (1986), for an extensive collection of cases on all substantive areas of AIDS litigation.

65. See 200 N.Y.L.J., Aug. 26, 1988, at 3, for a listing of some New York attorneys who have been active in AIDS-related cases.
AIDS. Yet, it is not always evident what responsibilities attach to this involvement.

II. THE LEGAL PROFESSION'S MORAL AND ETHICAL RESPONSIBILITIES TO PERSONS WITH AIDS

The legal profession has already had significant, active involvement with substantive legal issues resulting from the AIDS epidemics and frequent contact with persons suffering from AIDS. Yet surprisingly, the profession has failed to recognize the impact and influence of AIDS on attorney's ethics.

AIDS continues to expand beyond the target groups of homosexuals and intravenous drug users and will soon affect significant portions of the general population including increasing numbers of attorneys.66 It is a problem that will not go away until well after a cure or vaccine is discovered.67

Other professions have recognized the long-term nature of the problem and faced the ethical problems head-on by developing policy statements to guide their members' activities.68 The legal profession has failed to address these issues, thus creating an ethical and moral vacuum which often leaves the determination of what is an appropriate response to the individual attorney. My analysis will look at both legal ethics and morals in determining the appropriate professional response to persons with AIDS. Legal ethics or ethically mandated professional conduct is premised on the canons, rules, and ethical considerations set forth in the lawyers' professional codes and ethics opinions.69 Ordinary or "everyday" morality or moral conduct, in contrast to professional conduct, is derived from the conscience, or religious or cultural background of the individual attorney.70 A moral position may

66. Although no statistics are available, it is clear that many attorneys have been infected with HIV. See, e.g., Gallo, Fired, They Said, for 'Malaise', 10 NAT'L L.J. 6 (Sept. 14, 1987); Quade supra note 60, at 23; Kerlow, Firms Confront AIDS, Find Choices Baffling, 9 LEGAL TIMES 1 (March 23, 1987); Schachter, AIDS: Law Firm Strategies for Developing a Responsible Approach, 13 LEGAL ECON. 43 (Sept. 1987).

67. For a general overview of drug development law and policy relative to AIDS, see ABA DISCUSSION DRAFT, supra note 6, at 135-151; "The timetable for developing a vaccine is uncertain, and it is unlikely that a cure will be found that is of use to the thousands of persons who currently have the disease. People with AIDS have a life expectancy of less than three years from the time of diagnosis." AIDS PRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE, 1 (2d ed. 1988).

68. See supra note 7.

69. See C. WOLFRAM, MODERN LEGAL ETHICS 68-70 (1986); Wasserstrom, Roles and Morality, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 25, 32 (Liban ed. 1983), examines the morality of role-based behavior suggesting that attorneys are often called upon to perform actions which would be immoral if done by laymen. What is ethical conduct for an attorney under law may be incompatible with "universalistic demands of morality."

70. [It is the possibility of a divergence between professional morality and 'ordinary' or 'everyday' morality that lends particular interest to the notion of a professional morality. Indeed, it is this possibility that gives content to the idea of a professional morality at all,
not necessarily be professionally ethical or even legal.71

Attorneys must recognize that ethical dilemmas resulting from AIDS can begin as early as the creation of the attorney-client relationship, and include such fundamentals of legal ethics as confidentiality and the duty of loyalty. The impact of AIDS on legal ethics is too pervasive to ignore, but where is a practitioner to search for guidance?

The Model Code adopted by the American Bar Association in 1969 and the Model Rules adopted in 1983 were developed much too early to anticipate the reality and impact of AIDS in the mid-to-late 1980's.72

These codes make no mention of AIDS or any other communicable disease. It seems probable that our country's faith in technology and science worked against members of the organized bar anticipating an incurable disease with such widespread legal and ethical ramifications.73 Also, it may be that a focus on one or more diseases is too narrow for a professional code since such codes are only meant to establish basic principles and cannot possibly cover every situation which might arise in practice.74

Another possible reason that the legal profession has not yet appreciated the need for ethical guidance in response to AIDS is that, at least superficially, it appears that the profession is responding quite well to the needs of persons with AIDS. There is no record of ethical complaints being filed with grievance committees against attorneys based on AIDS-related matters, as there have been for doctors and dentists.75 Formal and informal ethics opin-

as opposed merely to a set of conventions or styles of etiquette associated with certain professions.


A host of situations can be imagined in which the dictates of a lawyer's professional responsibilities are clear, but with respect to which the question remains whether it is morally good or even morally permissible for the lawyer to follow these dictates. In such situations, a lawyer must simply (or, more often, not so simply) take stock of his or her commitments to the profession and to nonprofessional values and principles, and decide. Wolf, Ethics, Legal Ethics, and the Ethics of Law in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 38, 52 (Luban ed. 1983); "[W]hen professional and moral obligation conflict, moral obligation takes precedence. When they don't conflict, professional obligations rule the day." Luban, The Adversary System Excuse, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83, 118 (Luban ed. 1983); see generally C. Fried, Right and Wrong 189-90 (1978); T. Beuchamp, Philosophical Ethics: An Introduction to Moral Philosophy 5-7, 11 (1982). 72. See supra note 2.

73. See generally MODEL CODE Preliminary Statement; MODEL RULES Scope.


75. See supra note 39; but see Zeldis, Bias Claims by AIDS Victims Mounting at Rights Agency,
ions appear mute on the subject of AIDS. The media has generated little negative public relations for attorneys relative to AIDS. The legal literature focuses heavily upon substantive AIDS-related legal issues, but has generally ignored the legal ethical component.

This "good press" or "lack of press" may be misleading. It is only a matter of time before AIDS-related ethical dilemmas become a serious concern for the profession. This article will next anticipate some of the areas in which AIDS-related ethical dilemmas may arise and apply existing legal ethical standards in an attempt to resolve them.

III. AREAS OF CONCERN

Three major areas of concern have been selected for analysis in which ethical dilemmas concerning AIDS seem most likely to arise in the practice of law, and which have so far received little attention in the legal literature. These are AIDS-related discrimination by attorneys, confidentiality and privacy, and the lawyer with AIDS.

A. AIDS-RELATED DISCRIMINATION BY ATTORNEYS

Attorneys are not immune from the fear of AIDS. Some attorneys are fearful of AIDS despite the medical consensus that HIV cannot be transmitted in a normal business setting, such as the interaction between attorney and client. One could hypothesize a situation where an attorney feared some

199 N.Y.L.J. 1, at col. 4, 3, at col. 1 (Jan. 15, 1988), for complaints against attorneys to a human rights commission.

76. See supra note 6.

77. There has been some negative media reaction to judges and court employees overreacting to AIDS in the courtroom. See CSEA See No Need for Special Garb in AIDS Cases, 199 N.Y.L.J. 1, col.4 (Aug. 19, 1987); Rubenfeld, supra note 4, at 19; see also, Galan, How Firms Face AIDS, 9 Nat'l L.J. 1, 33 (March 23, 1987); Smothers, 3 Judges Exclude AIDS Defendants, N.Y. Times, Dec. 14, 1988, at A27, col. 1.

78. "Defense counsel rarely if ever visit defendants who are incarcerated in the AIDS unit of Rikers Island Hospital. While Legal Aid Society paralegals have begun making regular visits to persons in that unit who are represented by Legal Aid attorneys, no 18-B panel has yet made provisions to ensure adequate communications between defendants and 18-B counsel." The Association of the Bar of the City of N.Y., Committee on State Legislation, AIDS and the Criminal Justice System: A Preliminary Report and Recommendation, 42 The Record 901, 922 n. 29 (1987) [hereinafter AIDS and The Criminal Justice System]; "The defendant cannot receive effective assistance of counsel under these circumstances because appointed counsel is preoccupied with worrying about catching the AIDS virus through contact with his client through the [cut] on his thumb." — "Houston District Judge A.D. Azios holding lawyer Kenneth Smith in contempt for refusing to sit beside a client who claims he has AIDS." Quotes, 74 A.B.A.J. 33, col. 2 (Nov. 1, 1988);

Given the rapid growth of the HIV epidemic, and the corresponding increase in HIV-related legal issues, countless courts throughout the United States have come into contact either with some type of case involving HIV-related issues or with a litigant with AIDS or HIV infection. Court personnel, including judges, are not immune from experiencing the same problems, concerns, and fears which AIDS and HIV have engendered in other seg-
AIDS has generated little analysis in which ethical issues are raised in the practice of law in the legal literature. Confidentiality and protection against attorneys to a human

Some attorneys are employees overreacting to AIDS Cases, 199 N.Y.L.J. 1, 1 (1994). How Firms Face AIDS, 9
attorneys and their clients. A survey of AIDS in the legal community revealed that 18-B panel has yet made a


not receive effective assistance may be preoccupied with worrying he cut on his thumb. — contempt for refusing to sit (Nov. 1, 1988).

An increasing HIV case has come into contact with AIDS or from experiencing the... 1987); Triantafillou and Withers, supra note 41, at 7.

B. ABA DISCUSSION DRAFT, supra note 6, at 19. "Can lawyers ethically or legally refuse to provide services to people with AIDS or HIV infection (or those suspected of having either)?"

ABA DISCUSSION DRAFT, supra note 6, at 179-187.
HIV-infected, may be in violation of state or local statutes prohibiting discrimination in public accommodations.84

Reliance on anti-discrimination statutes in these situations to protect the rights of persons with AIDS may, however, prove illusory. In most cases, it would be extremely difficult to prove the motivations behind a particular attorney's refusal to accept a client. Such a refusal may be more appropriately examined in the context of legal ethics and morality than as a matter of law, and that will therefore be the focus of this analysis.

Historically, an attorney could represent or not represent a particular person for any reason whatsoever, without violating any ethical norm.85 This traditional view, allowing unfettered discretion, continues to be widely accepted today. The right to choose one's own clients, to discriminate on any basis the attorney deems appropriate, is considered a privilege inherent in the practice of law.86 The Model Code states that "[a] lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client."87 With one exception, there are no disciplinary rules applicable to whether an attorney may discriminate in his or her selection of clients.88

84. ABA DISCUSSION DRAFT, supra note 6, at 15. The DISCUSSION DRAFT raises the question of whether "state and local public accommodation laws adequately protect people with AIDS or HIV from discrimination in the procurement of services" as one of the salient questions in need of further analysis and discussion. Id. at 187.

85. "It by no means follows ... that all causes are to be taken by him indiscriminately. ... He has an undoubted right to refuse a retainer, and decline to be concerned in any cause, at his discretion. It is a discretion to be wisely and justly exercised." Sharswood, An Essay on Profession Ethics 84 (5th ed. 1884); "To be sure, he is an official authorized by the public to represent any individual who may apply to him for legal services, but he has a freedom of choice. He is at liberty to decline a case, with or without reason." Archer, Ethical Obligations of the Lawyer 60 (1910), (Rothman Reprint, 1981); "No lawyer is obligated to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel."; CANONS OF PROFESSIONAL ETHICS, Canon 31 (1908); "Except where assigned by the court to defend those who cannot afford to pay counsel, the lawyer may choose his own cases and for any reason or without a reason may decline any employment which he does not fancy." H. DRINKER, LEGAL ETHICS 139 (1953); see also O. CARTER, ETHICS OF THE LEGAL PROFESSION 44 (1915).

86. "As a professional matter, it is clear in the United States that no lawyer has a duty to represent any client, except perhaps those who are unable to obtain counsel." C. WOLFRAM, supra note 69, at 571; "But a lawyer may refuse to represent a client for any reason at all—because the client cannot pay the lawyer's demanded fee; because the client is not of the lawyer's race or socioeconomic status; because the client is weird or not; tall or short, thin or fat, moral or immoral." Id. at 573; J. BURKOFF, CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY § 5-1 (1987); M. Freedman, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 10-11 (1975); "A lawyer has no obligation to undertake any particular client's cause, and may also limit the responsibility he agrees to assume." HAZARD AND HODES, supra note 74, at 287.

87. MODEL CODE EC 2-26.

88. MODEL CODE DR 2-109:

(a) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:

(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise
Therefore, under the Model Code no disciplinary action can ordinarily be brought for such discrimination, and the attorney has professional discretion to accept or reject any client.\(^9^0\)

The Model Rules address the issue of whether an attorney may or should decline representation in three situations. The first is court appointments,\(^9^1\) the second is where the representation would violate legal or ethical rules,\(^9^2\) have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

But the mandatory withdrawal rules of Model Code DR 2-110(B) also serve as mandatory non-representation rules. "If a lawyer knows from an initial consultation with a client that circumstances exist that would bring one of the mandatory withdrawal rules into play, the lawyer may not, sensibly enough, even begin the representation." C. Wolfram, supra note 69, at 551.

89. "The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Model Code Preliminary Statement; see Wolfram, A Lawyer's Duty to Represent Clients, Repugnant and Otherwise, in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics 214, 216 (Luban ed. 1983) [hereinafter Wolfram, Duty to Represent].

90. Wolfram, Duty to Represent, supra note 89, at 217; "Lawyers are not required by their present code, and certainly not by morality or the ethics of lawyers as here interpreted, to defend any client who comes along unless there is no one else to do so." Held, The Division of Moral Labor and the Lawyer, in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics 60, 72 (Luban ed. 1983).

91. Model Rules Rule 6.2 states that a lawyer shall not seek to avoid a court appointment except for good cause. Good cause exists if the representation constitutes an "unreasonable financial burden on the attorney." Model Rules Rule 6.2(b).

This subsection permits a lawyer to decline an appointment by a tribunal to represent a person if the appointment 'is likely to impose an unreasonable financial burden, in terms of out-of-pocket expenses or foregone income. What constitutes an 'unreasonable' burden will vary from lawyer to lawyer and from situation to situation. Furthermore, it may be difficult to determine how 'likely' is likely enough.

Hazard and Hodes, supra note 74, at 496. Good cause also exists if the client or the cause is so repugnant to the lawyer that it would impair the attorney-client relationship or the attorney's ability to represent the client. Model Rules Rule 6.2(c).

This subsection recognizes that proffered client or his cause may be so repugnant as to impair an appointed lawyer's ability to perform adequately. An extreme example would be a lawyer appointed to a case that he hoped the client would lose. In such a case, the representation would be improper, and the lawyer could (and should) be excused under subsection (a) as well as subsection (c). Rule 6.2(c) applies only when the lawyer's repugnance is of such intensity that the quality of his representation is at risk.

Hazard and Hodes, supra note 74, at 496-97.

92. The second situation which requires the attorney to decline representation is where the attorney would be asked by the client to violate legal or ethical rules. Model Rules Rule 1.16(a)(1) applies this prohibition to all representations, and Model Rule 6.2(a) is its corollary in the case of court appointments. See Hazard and Hodes, supra note 74, at 495.
and the third is where the attorney has a physical or mental impairment. Except in these three rather narrow situations, an attorney may at his discretion accept or reject a client under the Model Rules, just as he may under the Model Code.

An application of both lawyers' professional codes to our AIDS question leads inevitably to the conclusion that an attorney may ethically discriminate against persons with AIDS, or those who test positive for HIV, or homosexuals, Blacks, Hispanics, or anyone else who may seem like an AIDS threat or a repugnant character. Given the broad mandate to discriminate, unless such action is found to be unlawful, AIDS-phobia is arguably an acceptable reason for an attorney to reject a client in the United States.

This result is dissatisfying and disquieting. Total discretion to accept or reject clients perpetuates a policy which runs contrary to the evolution of a non-discriminatory and open society in the United States. Our society has rejected discrimination based on race, sex, color, religion, and handicap over the past fifty years. The conclusion that an attorney has unlimited discretion to reject clients by utilizing any criteria, including fear, hate, or even pure whimsy, goes too far to the end of the spectrum of attorneys' rights. In theory it is necessary to allow such unrestrained flexibility to support attorneys' personal autonomy and personal freedom to contract, but at what price? Does this privilege to bluntly discriminate place the legal profession in an awkward, indefensible position relative to civil rights in our society?

Some commentators have argued that an attorney should have no choice but to accept every person who wishes to be his or her client. This absolute position has been universally rejected by the American bar. However, in limited circumstances attorneys in the United States may now be coerced into representing clients, whom they might rather not represent, when the court appoints them to a case. An obligation to accept these appointments is supported by the Model Code, the Model Rules, and the contempt power of

93. Model Rules Rule 1.16(a)(2). Since this provision relates to the health of the attorney, not the client, it would not be applicable to the discriminatory rejection of a potential client with AIDS.
95. See Fried, The Lawyer as Friend: The Moral Foundation of the Lawyer-Client Relation, 85 Yale L.J. 1060, 1078 (1976); see also Monroe Freedman note in note 101 infra.
96. See Newman, Representing the Repugnant Client, 86 Case & Com. 22, 24 (Nov.-Dec. 1981), suggesting that an attorney should not have the right to reject potential clients based on the moral repugnance of the client or his cause; Younger, Professional Responsibility, 43 Brooklyn L. Rev. 863, 865 (1977); Kalish, The Attorney's Role in the Private Organization, 59 Neb. L. Rev. 1, 3 (1980).
97. See supra notes 85, 86.
the courts.\textsuperscript{99} It should also be noted that the practice in England and Canada is that barristers must accept, in the absence of special circumstances, reasonably founded cases which are brought to them, assuming an appropriate professional fee.\textsuperscript{100}

A third position can be postulated as to the right of an attorney to select or reject his clients. This "middle ground" would both reject the traditional position of unfettered discretion as immoral and contrary to public policy regarding discrimination, and also reject a mandate to accept all clients as being too coercive, rigorous, and unworkable. Under the third position an attorney would retain discretion to select his or her own clients, but could not discriminate against any person based on suspect criteria such as race, religion, or handicapping condition. I believe this middle position can easily be supported by the legal profession as an ethical mandate which would be an appropriate response to discrimination against potential clients who may have been stigmatized by AIDS. It would also be an appropriate moral choice.

The traditional position, allowing unrestricted discretion in the choice of clients, is subject to moral criticism even though it may be technically ethical under existing lawyers' codes.\textsuperscript{101} Obviously, there are times when an attorney may at his discretion not accept a potential client with AIDS.\textsuperscript{95} A lawyer may be called upon to deny representation because of the health of the client, not on the basis of his or her sexual orientation.\textsuperscript{96}

\textsuperscript{99} Model Rules Rule 6.2 and comments [1] [2]; Model Code EC 2-29, EC 2-30. Court appointment may be made under statute or under the court's inherent power to appoint in criminal and civil settings.

\textsuperscript{100} See H. Drinker, supra note 85, at 139;

An American lawyer is free to decline any retainer. There may be a reason for denying such a right to the English barrister. His retainer comes through the hands and at the instance of another legal practitioner, who personally has satisfied himself that the action ought in justice to be brought or defended, as the case may be. To refuse to accept it would reflect on him.

Baldwin, The New American Code of Legal Ethics, Columbia L. Rev. 541, 544-545 (1908); "The barristers oath, provides that 'he shall not refuse causes of complaint reasonably founded.' However, a solicitor has always had the right to accept or refuse a retainer." Barristers and Solicitors, 3 Canadian Encyclopedic Digest § 39, (Ontario, 3rd ed.); R. Walker, The English Legal System 229 (4th ed. 1976); Rostow, The Lawyer and His Client, 48 A.B.A.J. 25, 28-29 (Jan. 1962).

So I shall not be particularly concerned with the precise limits imposed on the lawyer's conduct by positive rules of law and by the American Bar Association's Code of Professional Responsibility except as these provide a background. I assume that the lawyer observes these scrupulously. My inquiry is one of morals: Does the lawyer whose conduct and choices are governed only by the traditional conception of the lawyer's role, which these positive rules reflect, lead a professional life worthy of moral approbation, worthy of respect—ours and his own?

Fried, supra note 95, at 1061;

In short, a lawyer should indeed have the freedom to choose clients on any standard he or she deems appropriate. As Professor Fried points out, the choice of client is an aspect of the lawyer's free will to be exercised within the realm of the lawyer's moral autonomy. That choice, therefore, cannot properly be coerced. Contrary to Fried's view, however, it
ney needs discretion to reject a client. If the client wishes to bring a suit to harass another,102 or if the matter is beyond the attorney's competence,103 or if there is a conflict of interest,104 the attorney must usually reject the client.105 But in situations where the rejection is not based on such considerations, but rather upon the potential client's status as one afflicted with AIDS or as a member of a suspect group, such discrimination must be viewed as morally wrong.106 Excuses for rejecting clients based on race, sexual persuasion, handicap, or other stigma should be unequivocally denounced by the legal profession as unethical, and the lawyers' codes should be modified to reflect this reality.107

While an attorney is under no ethical obligation to accept every person who may wish to be his or her client, neither should he or she lightly decline such employment.108 Nor, regardless of personal feelings, should an attorney decline representation because the client or his cause is unpopular or because of adverse community reaction.109

The personal preference of an attorney to avoid an adversary alignment

can properly be subjected to the moral scrutiny and criticism of others, particularly those who feel morally compelled to persuade the lawyer to use his or her professional training and skills in ways that the critics consider to be more consistent with personal, social, and professional ethics.


102. MODEL CODE DR 2-109(A)(1); MODEL RULES Rule 3.1 and comment [2], MODEL RULES Rule 4.4.
103. MODEL CODE DR 6-101, EC 6-1; MODEL RULES Rule 1.1; MODEL RULES Rule 1.16 comment [1].
104. MODEL CODE DR 5-101(A); MODEL RULES Rule 1.7(b).
105. The major exception in the case of a conflict of interest is if the client consents after full disclosure. MODEL CODE DR 5-101(A); MODEL RULES Rule 1.7(a)(2) and (b)(2).
106. But to say that a lawyer's choice of clients is a matter of individual discretion is hardly to say that it is beyond moral criticism. Many of the hypothetical reasons . . . for rejecting a client—such as the race or other accidental characteristics of a client—are morally objectionable ones, although they do not violate a mandate of the lawyer codes.

One is certainly entitled to say that a lawyer acts immorally if the lawyer rejects, on the ground of ethnic origin, a prospective client who is nonetheless readily able to find as competent a lawyer.

C. Wolfram, supra note 69, at 574;

Whether a person is entitled to a lawyer depends on what the lawyer is being used for. Every lawyer, therefore, has an inescapable responsibility to determine whether a request for legal assistance is proper or not. Where improper assistance is sought, it is the duty of the lawyer to refuse legal services.

HAZARD AND HODES, supra note 74, at 19.

107. See generally quote from C. Wolfram, supra note 106.
109. MODEL CODE EC 2-27.
wishes to bring a suit to one accused of being a pervert or
one connected with the community's political
interests. In such situations, an attorney's
obligation to his client is not easily
understood, but this alone does not justify rejection
of employment of unpopular or repugnant clients.110 Assuming that every attorney in the community
rejected such clients, they would either go without representation, or in
appropriate cases have an attorney appointed by a court.111

The professional codes strongly endorse the representation of unpopular
clients in the case of court appointments.112 While there may be many valid
reasons for not wishing to accept a court appointment, "... the norm estab-
lished by Ethical Consideration 2-29 is still germane: a lawyer should
decline to represent a client only for compelling reasons."113 If an attorney is
appointed pursuant to statute or under the court's inherent powers, the attorney
may be prohibited from declining the appointment except for "good
cause."114

The attorney's representation of unpopular clients, despite potential
threats of harm to the attorney or his economic well-being, has been estab-
lished as part of the mystique of the legal profession.115 It is a professional
duty based on the monopoly to practice law held by attorneys116 and on the
constitutional right of United States citizens to the assistance of counsel.117
Yet, the concept even predates the Constitution, as illustrated by John Ad-
ams' defense of the British soldiers after the Boston Massacre in the colonial
era.118

This theme is also popular with the media. The image of the brave attor-

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103. See supra note 112; Hazard and Hodes, supra note 74, at 494.
104. See supra note 112; Hazard and Hodes, supra note 74, at 494.
105. "History is replete with instances of distinguished and sacrificial services by lawyers who
have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should
not decline representation because a client or a cause is unpopular or community reaction is ad-
106. See Newman, supra note 96, at 24, see also infra note 139.
107. U.S. CONST. amend. VI.
108. See Reid, A Lawyer Acquitted: John Adams and the Boston Massacre, 18 AM. J. LEGAL
ney representing an innocent, unfortunate, underdog client against the weight of society is appealing. Nevertheless, the media, and society in general, are often outraged when an attorney does everything in his or her power to effectively represent those whom society currently views as reprehensible. Mass murderers, rapists, and child molesters have been viewed as undeserving of zealous representation. Nazis, communists, and major environmental polluters may also be viewed in the same light. Homosexuals and drug abusers, especially those stigmatized with AIDS, can easily fall into the category of unpopular clients, but they are still deserving of effective representation even though there may be costs to the attorney.

The Model Rules also recognize that an attorney’s freedom to select clients is qualified. These ethical standards suggest that an attorney does not have carte blanche to pick and choose his or her clients in all instances. The privilege is not absolute. Implicit in the standards is encouragement of attorneys to exhibit courage and integrity in representing clients whom they do not like. In applying these standards to the rejection of a client because the potential client may be HIV-infected, the attorney is making a moral choice, which must not be made lightly. Such a choice should be made only for good cause.

While the moral obligation is strong, does the attorney have an ethical duty to represent persons with AIDS, assuming there is no compelling reason not to represent them? In considering this question, Charles Wolfram has compared the moral obligations and prerogatives of an attorney faced with a client seeking representation, whom the attorney owes no legal or ethical duty to represent, to the concept of the “rescuer.” He notes that


122. See supra notes 54-55.

123. “The actual role of a lawyer defending an unpopular client is often one of great tension, professional and personal isolation, and humiliation. Often it has been accompanied by a serious decline in the lawyer’s clientele and income. Although salutary, the role is also extraordinarily difficult, even personally dangerous.” C. Wolfram, supra note 69, at 576; see also Goldberger, Skokie: The First Amendment Under Attack by Its Friends, 29 MERCER L. REV. 761 (1978); Politi, Counsel for the Unpopular Cause: The Hazard of Being Undone, 43 N.C. L. REV. 9 (1964).

124. Model Rules Rule 6.2 comment [1].

125. Wolfram, Duty to Represent, supra note 69, at 218.
the concept of a legal duty to rescue is usually rejected, based on the common law's desire to find liability only where affirmative acts have been committed and because administration of a legal duty to rescue would be difficult. Factors such as morality are not considered by the courts in the creation of such a duty. Therefore, while an attorney may not be subject to damages in tort or discipline under the lawyers' code for failure to rescue, or in our case to accept an AIDS client, he or she may be subject to the moral reprobate of society and individual attorneys for such a refusal to provide legal services.

Under Wolfram's analysis, the philosophical basis for a duty to rescue can be explained either as a theory premised on a utilitarian calculus or on rights and obligations not necessarily related to the final consequences. Applying a utilitarian calculus, where the cost or inconvenience to the rescuer is nonexistent or slight and the benefit to the victim is great, the duty is obvious and has "a certain intuitive appeal." Other philosophical theories based on rights and non-utilitarian based obligations also recognize such a duty to rescue.

This duty to rescue, or to accept clients with AIDS, is clearly not absolute. Attorneys must still exercise discretion based upon their capacity to serve the client, the risk to the attorney, and the circumstances surrounding the particular client's legal needs.

126 Id. 127 Id.; see Weinrib, The Case for a Duty to Rescue, 90 YALE L.J. 247 (1980); but see Henderson, Process Constraints in Torts, 67 CORNELL L. REV. 901, 928-43 (1982), who supports the courts' refusal to create a duty to rescue.

128 Wolfram, Duty to Represent, supra note 89, at 218. "It is a logical truth that no one, lawyers and other professionals included, ought to do that which is overall immoral to do." A Goldman, supra note 121, at 90.

129 Wolfram, Duty to Represent, supra note 89, at 219; see Weinrib, supra note 127 at 250; C. Fried, supra note 71, at 128-30; T. Beauchamp, supra note 71, at 73, 109-112.

130 Wolfram, Duty to Represent, supra note 89, at 219; T. Beauchamp, supra note 71, at 80.

131 Wolfram, Duty to Represent, supra note 89, at 218;

The problem of rescue is a central issue in the controversies about the relationships between law and morality, between contract and tort, and between utilitarian and deontological ethics. . . . [T]ort law's adoption of a duty of easy rescue in emergencies would fit a common-law pattern, found principally in contract law, that gives expression to the law's understanding of liberty. This pattern reveals that the common law is already instinct with the attitude of benevolence on which a duty to rescue is grounded. The attitude of benevolence is accepted by many commentators as a basic moral intuition, yet the particular duty [to rescue] . . . can be systematically elaborated in both the utilitarian and deontological traditions.

Weinrib, supra note 127, at 293. For Weinrib's examination of the philosophical foundations for a duty of easy rescue, see Id. at 279-92, where he examines Jeremy Bentham's utilitarian approach and outlines a deontological analysis of the duty to rescue based on Kantian theories.

132 Wolfram, Duty to Represent, supra note 89, at 219.
refer the client to another attorney. In the case of a person with AIDS, virtually any type of legal matter could be involved, so this discretion must be broadly exercised but not used as an excuse to reject the client. Similarly, the lawyer’s capacity to assist a person with AIDS may be limited by conflicts of interest. An attorney’s AIDS-phobia could be so severe and unreasonable that the attorney cannot provide adequate representation under the circumstances. If the fear of AIDS is so dominant that it impairs independent professional judgment, the attorney must refuse the employment.

In evaluating whether to accept a client with AIDS an attorney may properly analyze the extent of the personal risk in the representation. If the risks are great, there is no preponderate moral duty to rescue, that is, to accept the client. The chance of HIV infection in the situation of the normal attorney-client relationship is considered to be virtually non-existent. There is therefore no physical risk to the attorney if he or she handles the relationship in an appropriate manner. The chance of losing other clients if one represents persons with AIDS presents a low risk since the rules of confidentiality would prevent the attorney or his staff from revealing that information. Even if other clients learned of the AIDS representation, the attorney would be required to balance the risk between the potential economic loss to himself and the inability of the person with AIDS to obtain necessary legal services through his or her chosen attorney.

In virtually all instances, providing legal assistance to a person with AIDS could be termed an “easy rescue,” presenting little actual risk to the attorney. Therefore, if the attorney has competence to complete the legal task required, if no conflict of interest exists, if the economic sacrifice is not great, and if the risk is minimal, then the attorney has a moral duty to accept AIDS clients who are in great need.

A duty to provide legal services for a person with AIDS, under the Wolfram analysis, may also depend on a high likelihood of significant and substantial danger to the person with AIDS if the legal services are not

133. Model Code DR 6-101(A)(1); Model Rules Rule 1.1.
134. Model Code DR 5-101(A); Model Rules Rule 1.7(b).
135. Model Code DR 5-101(A); Model Rules Rule 1.7(b); see Wolfram, Duty to Represent, supra note 89, at 219; see also supra note 78.
137. Id.; see supra notes 24-26 and accompanying text.
138. See supra note 78; Perhaps, except in the case of intentional infliction, there is no risk. See supra notes 29-34.
139. Model Code DR 4-101; Model Rules Rule 1.6; see infra notes 264-277 and accompanying text.
140. Wolfram, Duty to Represent, supra note 89, at 220.
141. Id.; see Weinrib, supra note 127, at 250, 268.
142. Id. Persons in great need are referred to as “necessitatus victims” by Wolfram.
of a person with AIDS,
legal, so this discretion must
not reject the client. Similarly,
may be limited by con-
sideration to the severe and an-
appropriate representation under
It is incumbent upon the attorney to refuse the
representation.\textsuperscript{136} If the
attorney has the ability to rescue, that is, to
the situation of the normal,
virtually non-existent.\textsuperscript{138}
if he or she handles the
demanding task of losing other clients if
since the rules of confi-
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with AIDS to obtain an
attorney.\textsuperscript{140}
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legal services are not

\textsuperscript{143} Wolfram, Duty to Represent, supra note 89, at 221.
\textsuperscript{144} Id.
\textsuperscript{145} ABA DISCUSSION DRAFT, supra note 6, at 13.
\textsuperscript{146} See generally AIDS PRACTICE MANUAL, supra note 78.
\textsuperscript{147} Despite claims that immediate incarceration could result in his death, an AIDS victim
who is suspected of fraud has been ordered jailed.
Judge A. Andrew Hauk ordered the incarceration after a psychiatrist testified that
Block was incapable of standing trial on fraud charges because the AIDS virus had in-
vaded Block's brain, causing organic dementia. Hauk subsequently delayed his order to
allow the defense to pursue a physical examination to determine whether Block's claims
that imprisonment could kill him could be supported. Block has also been told that he
might have a lethal form of pneumonia that could kill him within two or three months if
the necessary medication is unavailable. Block is accused of selling photocopier supplies
with deceptive sales techniques. In his defense he asserted: I'm accused of selling toner
for Xerox machines, I don't deserve to die for that. I didn't sell drugs to children!

\textsuperscript{148} See ABA DISCUSSION DRAFT, supra note 6, at 13-14; Hawkins, Preparing for Illness Inca-
-pacity and Death due to AIDS, in AIDS PRACTICE MANUAL, supra note 78, at III-1.
\textsuperscript{149} See Freedman, supra note 101, at 56; Wolfram, Duty to Represent, supra note 89, at 223.
these attorneys are delighted to have any new clients regardless of color, sexual persuasion, or condition. There are even law firms which focus their practices on the legal problems of persons with AIDS. So is there really a problem? Even assuming a wide-enough pool of attorneys so that a client with AIDS can somewhere, somehow, find counsel, there still is a moral and ethical issue involved. Rejection of potential clients because of AIDS-phobia damages the person with AIDS and those suspected of infection. It also damages the attorney who rejects them, and the legal profession as a whole.

The person with AIDS who is rejected as a client by an attorney suffers in a number of ways. First, the rejection may be psychologically devastating. Persons diagnosed with AIDS usually experience changes which can be overwhelming. Their entire concept of life is dramatically altered. The ability to plan for the future is uncertain. Social and family relationships are disrupted. They become isolated; they are sick; and they begin to fear loss of their personal autonomy and eventually their lives. Persons with AIDS find themselves on an emotional roller coaster with illnesses that fluctuate, instilling hope in times of well-being and severe depression when the illness returns.

The physical and emotional traumas of those with AIDS seem horrendous enough, but persons with AIDS also experience significant legal difficulties requiring them to seek out an attorney. Imagine the emotional impact of being rejected as a client on the basis of AIDS-phobia. At the bottom of a physical and emotional trough, the person seeks legal services because of AIDS-based discrimination which may have cost him or her a job or a home. He or she is then rejected by one who holds a monopoly on access to the legal system. Stigmatized, depressed, and abused, the AIDS client is told to seek legal help elsewhere. Having to seek another attorney might seem like a minor irritant to the rejecting attorney, but it can induce new anxieties and reduce the self-esteem of the person seeking legal aid.

Perhaps even more troubling may be the instance of the attorney who rejects not only those with AIDS, but also rejects members of suspect groups having a high incidence of HIV infection. Blacks, Hispanics, or homosexuals may suffer a form of double discrimination at the hands of attorneys. They may be stigmatized because of race or sexual preference, and also be-

150. See ABA DISCUSSION DRAFT, supra note 6, at 14; see also supra note 65.
151. SEXUAL ORIENTATION AND THE LAW, supra note 11, at § 13.02[2], p. 13-10; AIDS PRACTICE MANUAL, supra note 78, at I-3.
152. Id.
154. ABA DISCUSSION DRAFT, supra note 6, at 13-14.
155. Forstein, supra note 153, at 188.
156. See Nickens, supra note 58, at 1197, 1200-01.
cause HIV is present in statistically higher percentages among those segments of the population than it is among the general population.\textsuperscript{157}

Rejection of clients because of AIDS-phobia, in addition to inflicting psychological damage, can potentially cause damage to legal rights. The necessity of finding another attorney may result in substantial delay. The substitute attorney may have to spend substantial amounts of time familiarizing himself or herself with the client’s case or affairs. The second or third attorney may even be ineffective as an advocate. The possibility also exists that in some towns, alternate attorneys may not be available.\textsuperscript{158} One can easily imagine a situation where one attorney has AIDS-phobia, one has a conflict of interest and another is incompetent to handle the legal matter. Then, with all the delay caused by multiple rejections, the person with AIDS has died without having had access to the legal system.

Not only does the potential client suffer from an AIDS-based rejection, but the rejecting attorney does as well. Most easily measured is the financial loss that the attorney suffers. The economic benefit from the representation of that client will go to another attorney or possibly be lost to the legal profession, should the potential client in frustration just choose to forfeit his or her legal rights. Also, once it becomes clear that a particular attorney will not represent HIV-infected persons or members of suspect groups, the attorney may forfeit other clients from those groups even if they are not infected. The attorney who discriminates in the selection of his clients based on improper motives may be subjected himself to a lowering of reputation and self-esteem.\textsuperscript{159}

\textsuperscript{157}. Harrington, supra note 16, at 34; Levi, Protection of Personal Rights, in AIDS AND PATIENT MANAGEMENT: LEGAL, ETHICAL AND SOCIAL ISSUES 60, 61 (1986), Nickens, supra note 58, at 1179.

\textsuperscript{158}. Until quite recently, the delivery of pro bono or other legal services for persons with HIV-related legal problems was a task which fell almost exclusively on individual lesbian and gay attorneys, on pro bono programs instituted by gay and lesbian bar associations and legal organizations, and on AIDS-service organizations. As a result, the delivery of such services was largely limited to a few major metropolitan areas.

ABA DISCUSSION DRAFT, supra note 6, at 14;

Many of the problems associated with AIDS are particularly urgent in parts of the country that have a small number of cases. The civil rights of the gay community may be particularly vulnerable to attack in such areas, since there are not likely to be groups to which a recently diagnosed person can turn for practical assistance and reliable information. It can be impossible for a person with AIDS or ARC to locate sympathetic legal assistance under such circumstances.

AIDS PRACTICE MANUAL, supra note 75, at 1-2.

\textsuperscript{159}. “Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approval of professional peers.” MODEL RULES Preamble: A Lawyer’s Responsibilities, § 6; “Each lawyer must find within his own conscience the touchstone against which
AID-based discrimination may not subject an attorney to professional discipline, but it cannot be viewed as a good or compelling criterion for rejecting clients. While attorneys need discretion in the selection of clients, it is not acceptable to twist the intent of the rule granting them such discretion to have it used as an instrument of inappropriate discrimination. Such discrimination creates an appearance of impropriety on the part of the attorney and violates the basic tenet of the profession that "every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence."163

Finally, I would suggest that the legal profession as a whole suffers by taking the position that it is ethical for attorneys to discriminate in accepting or rejecting clients based on suspect or improper criteria. If the image of the individual attorney is lessened by rejecting clients for improper reasons, this appearance of impropriety reflects on and is damaging to the reputation of the entire profession. Any rule allowing discrimination based on suspect criteria is contrary to the position of the bar which seeks to eliminate improper discrimination in our society. The legal profession cannot publicly advocate support for anti-discrimination legislation and support for AIDS-related legislation, and then suggest that it is ethically appropriate for at-

to test the extent to which his actions should rise above minimum standards." MODEL CODE Preamble; Freedman, supra note 101, at 56; see also supra note 106.

160. See supra note 89.
161. See Fried, supra note 95, at 1078-79.
162. MODEL CODE Canon 9, EC 9-1, EC 9-2.
163. MODEL CODE EC 1-1; see also EC 2-1.
164. MODEL CODE Canon 9, EC 9-1, EC 9-2.
165.

The ABA has filed an amicus brief in Patterson v. McLean Credit Union urging the Supreme Court to affirm its 1976 ruling in Runyon v. McCrary.
The Association argues that Runyon 'simply confirmed the settled fact that Section 1981 reaches private conduct' and 'embodies a policy of the highest order of importance . . . the policy of extinguishing racial discrimination.'

'Section 1981,' The Association adds, 'has become a vital, everyday part of civil rights jurisprudence and practice,' and no 'legal or social development of the past several years could conceivably justify a retreat from Runyon.'

The ABA notes that its interest as amicus 'flows from its opposition to racial discrimination and its concern that the abandonment of such an important and well-considered Supreme Court precedent as Runyon would be harmful to the legal system.'

Reidinger, ABA Supports Runyon, 74 A.B.A.J. 80 (Nov. 1, 1988).

166.

Be It Resolved, That the American Bar Association supports the enactment of federal legislation such as S. 1575 and H.R. 3071 which:

(1) promotes an increased level of voluntary counseling and testing for AIDS;

(2) mandates that identifying information obtained as a result of such counseling of the individual except where such information is required to be provided by state of federal law and such law provides for the protection of the confidentiality of the identity of the individual; notwithstanding the foregoing, any contact tracing of sexual contacts provided by
torneys to discriminate on the basis of AIDS or HIV infection in the selection of their clients. The two positions are antithetical, and the adoption of both would be hypocritical. The legal professional has a responsibility to educate and lead the population in an understanding of AIDS-related societal and legal problems, not to expand the epidemic of fear.

To conclude discussion of this issue, I draw a parallel between the medical and legal professions as to their handling of professional discretion in accepting or rejecting patients or clients with AIDS. The American Medical Association's Sixth Principle of Medical Ethics states: "[A] physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical services." This is similar to the legal profession's rule. However, the Council on Ethical and Judicial Affairs of the American Medical Association has interpreted Principle VI “as not supporting illegal or invidious discrimination,” including "categorical discrimination against a patient based solely on his or her seropositivity." A strong stand has been taken that a physician who is competent to handle the matter may not ethically refuse to treat a person who has tested positive for HIV. Discrimination based on fear or prejudice is rejected as antithetical to the principles of the health care community. Can the legal community afford to take a less positive stance?

law must be conducted without disclosing information identifying the infected individual; and

(3) prohibits discrimination against an ‘otherwise qualified individual’ as defined by such legislation in employment, housing, public accommodations, or governmental services, solely by reason of the fact that such individual is, or is regarded as being, infected by the HIV virus or having AIDS or an AIDS related condition.

ABA Policy on HIV-Related Discrimination, Summary of Action Taken By the House of Delegates of the American Bar Association, 1988 Mid Year Meeting, 26-27 (Feb. 8-9, 1988); ABA DISCUSSION DRAFT, supra note 6, at 2.

167.

[The function of professional ethics in the life of the group is not merely to avoid damaging conflicts between the code of the group and that of society, but actively to further, through the work of the group, the fulfillment of goals approved by the society to which the professional group belongs, and which it should serve.

Rosnow, supra note 100, at 26.

168. MODEL CODE EC-1, EC-2; MODEL RULES Rule 6.1; see ABA Commission on Professionalism, "...In the Spirit of Public Service:" A Blueprint For the Rekindling of Lawyer Professionalism 15, 47, 53 (1986).


170. AMA Council on Ethical and Judicial Affairs, Ethical Issues Involved in the Growing AIDS Crisis, 259 J.A.M.A. 360 (1988). Seropositivity means that the person has tested positive for HIV.


172. Id. at 1360-61.
Withdrawal of Legal Services Based on AIDS-Phobia

The obvious corollary to the issue of AIDS-based discrimination in accepting clients is the question of whether an attorney may withdraw from a representation, prior to completion of the client’s legal needs, because a client is discovered to have AIDS or to be HIV-infected. While historically attorneys have had great discretion in deciding whether to accept or refuse a new client, the same unqualified right has not existed to withdraw from existing representation.\(^{173}\) Both the Model Code and the Model Rules specify the conditions under which a withdrawal can take place.\(^{174}\) The attorney’s options with respect to withdrawal depend on whether the withdrawal is mandatory or permissive and may be affected by court rules.\(^{175}\) No matter how a representation concludes, the attorney may still be required to take reasonable steps to protect the client’s interests.\(^{176}\)

Three situations are addressed by the Model Code and the Model Rules in which an attorney must withdraw from representing a client, assuming, in the appropriate circumstances, approval by the court.\(^{177}\) The first situation deals with a client who wishes the attorney to violate or misuse the law or commit an unethically act in the course of the representation.\(^{178}\) The second relates to instances where the attorney’s physical or mental condition is such that it interferes with the representation.\(^{179}\) The final situation recognizes that a client may discharge his or her attorney at will,\(^{180}\) and that the attorney must then withdraw.\(^{181}\) In mandatory withdrawal situations, no attorney discretion is involved,\(^{182}\) so there is little likelihood that AIDS-related discrimination against clients will be a problem. It is in circumstances involving permissive withdrawal that AIDS-related discrimination problems are more appropriately analyzed.

While the Model Code and the Model Rules are in basic agreement over mandatory withdrawal, there is a variance in their provisions on permissive withdrawal.\(^{183}\)

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173. "Although a lawyer may refuse at his pleasure to take a case, he has not the same unqualified right to withdraw once he has undertaken one, except on non-compliance with a condition imposed on the acceptance of the retainer." H. DRINKER, supra note 85, at 140; CANONS OF PROFESSIONAL ETHICS Canon 44 states that "the right of any attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient."; Sharswood, supra note 85, at 84-85.

174. MODEL RULES Rule 1.16; MODEL CODE DR 2-110, EC 2-32; HAZARD AND HODES, supra note 74, at 287.

175. See MODEL RULES Rule 1.16; MODEL CODE DR 2-110.

176. MODEL RULES Rule 1.16(d); MODEL CODE DR 2-110(a)(2).

177. MODEL CODE DR 2-110(A)(1) and (B), EC 2-32; MODEL RULES Rule 1.16(c).

178. MODEL CODE DR 2-110(B)(1) (2); MODEL RULES Rule 1.16(a)(1).

179. MODEL CODE DR 2-110(B)(C); MODEL RULES Rule 1.16(a)(2).

180. HAZARD & HODES, supra note 74, at 294; C. WOLFRAM, supra note 69, at 545.

181. MODEL CODE DR 2-110(B)(4); MODEL RULES Rule 1.16(a)(3).

182. C. WOLFRAM, supra note 69, at 551.
discrimination in activities that may withdraw from a client’s needs, because a client may refuse to accept or refuse a new attorney. While historically attorneys have been allowed to withdraw from existing cases, the Model Rules specify the procedures for withdrawal. The attorney’s obligation to withdraw is governed by court rules. No matter what the procedures, the attorney must still be required to take reasonable steps to protect the client, including notifying the client in writing of the attorney’s intention to withdraw and providing the client with a complete accounting of all funds and documents in the client’s possession.

Withdrawal is also governed by the Model Rules in situations involving a client who is incapacitated or has died. The first situation requires the attorney to file a petition for appointment, and the second requires a court order. In both situations, the attorney is required to take reasonable steps to protect the client, including notifying the client’s next of kin or the court of the attorney’s intention to withdraw and providing the client with a complete accounting of all funds and documents in the client’s possession.

In basic agreement over the Model Code provisions on permissive withdrawal, the Model Code DR 2-110(C) allows permissive withdrawal only in cases where the attorney can demonstrate that withdrawing is in the best interests of the client, and where there is no danger of harm to the client. The provisions of the Model Code are very protective of the client’s interests and will not permit withdrawal by an attorney, except for good cause or with client consent, even in situations where the interests of the client are not harmed.

Application of the Model Code provisions indicates that an attorney cannot withdraw because of AIDS-phobia. Only one of the specific provisions as to cause could be possibly applicable. Disciplinary Rule 2-110(A)(4) provides that an attorney can withdraw if a mental condition in the attorney “renders it difficult for him to carry out the employment effectively.” To apply this provision to AIDS-phobia would be discriminatory and far-fetched application of the rule. It would not likely be found acceptable in a suit for breach of contract or by a court which might have to approve the withdrawal.

One might also imagine an attorney with AIDS-phobia making an argument to a court under DR 2-110(c)(6), that the threat of being infected with HIV by his client during his representation was “good cause” for his or her withdrawal. There would be no medical grounds to support such a contention, except in the extreme case of a client who wishes intentionally to infect his attorney. If the tribunal were to accept such an argument, it would then have to excuse every other attorney who so wished to escape the threat of AIDS, thus possibly resulting in a deprivation of delay in the client’s right to access to the legal system. The problem would rise to constitutional heights in the case of a criminal defendant. The impact on the effective administration of justice in accepting AIDS-phobia as a “good cause” excuse for withdrawal would be devastating and unworkable, especially in the criminal defense arena, or when working with a mentally incompetent AIDS client. Clearly, a decision by an attorney to withdraw based on AIDS-phobia is not based on compelling circumstances, and such a withdrawal.

183. MODEL CODE DR 2-110(C)(1)(a) (b).
184. MODEL CODE DR 2-110(C)(5).
185. MODEL CODE DR 2-110(C)(2) (3) (4).
186. MODEL CODE DR 2-110(C)(6); The provisions of MODEL CODE DR 2-110(C) are reinforced by provisions in MODEL CODE DR 2-110 (A)(1) (2) (3) which require permission by the tribunal to withdraw in proceedings before that tribunal, the necessity of taking steps not to prejudice the client, and a requirement to refund unearned fees.
187. C. WOLFRAM, supra note 69, at 551 (see footnote 85 in C. WOLFRAM for a comparison of Canon 44, DR 2-110 and Rule 1.16).
188. MODEL CODE DR 2-110(C)(4).
189. MODEL CODE DR 2-110(C)(6).
190. See supra notes 29-35 and accompanying text.
191. MODEL RULES Rule 1.16 comment [3].
192. MODEL CODE EC 2-32.
could lead to substantial legal and psychological harm to his or her client.\textsuperscript{193} Withdrawal under such circumstances would therefore be unethical under the Model Code, and potentially would subject the attorney to discipline.\textsuperscript{194}

In sharp contrast to the position of the Model Code are provisions of the Model Rules which offer two permissive withdrawal scenarios.\textsuperscript{195} The first scenario in Model Rule 1.16(b) allows an attorney to withdraw if “withdrawal can be accomplished without material adverse effect on the interests of the client.” Such a withdrawal is discretionary and can be made for no reason or for any reason, even without the client’s consent.\textsuperscript{196}

The second scenario is presented by other provisions of Model Rule 1.16 which more closely parallel the Model Code in permitting withdrawal for various forms of client misconduct,\textsuperscript{197} if there is an unreasonable financial burden on the lawyer,\textsuperscript{198} or if “other good cause for withdrawal exists.”\textsuperscript{199} The attorney’s discretion is still subject to court control in certain circumstances\textsuperscript{200} and to the duty to take steps to protect the client’s interests,\textsuperscript{201} except that the attorney may withdraw in the specified “good cause” situations even if the withdrawal materially prejudices the client’s interests.\textsuperscript{202}

An application of Model Rule 1.16(b) to the question of withdrawal based on AIDS-phobia results in a more ambiguous conclusion than under the Model Code. It appears that an attorney may withdraw from representation of a person with AIDS, or an HIV-infected person, if there will be no adverse material impact on the interests of the client. Of course, it is the attorney who will make the initial determination as to whether withdrawal in specific circumstances will be adverse, or material, or even if it affects the interests of the client.\textsuperscript{203}

This can raise interesting questions in the case of an attorney with AIDS-phobia. Will a frightened attorney consider the psychological impact on the client with AIDS of being “fired”\textsuperscript{204} by his attorney? Does the negative psychological impact adversely affect the client’s interests within the meaning of the rule? Does potential delay in reaching legal objectives have a materially

\textsuperscript{193} See supra notes 145-148 and accompanying text.
\textsuperscript{194} C. Wolfram, supra note 69, at 551.
\textsuperscript{195} Id.
\textsuperscript{196} MODEL RULES Rule 1.16 comment [1]; Hazard & Hodes, supra note 74, at 294.
\textsuperscript{197} MODEL RULES Rule 1.16(b)(1) (2) (3) (4) (5).
\textsuperscript{198} MODEL RULES Rule 1.16(b)(5).
\textsuperscript{199} MODEL RULES Rule 1.16(b)(6).
\textsuperscript{200} MODEL RULES Rule 1.14(c).
\textsuperscript{201} MODEL RULES Rule 1.16(d).
\textsuperscript{202} C. Wolfram, supra note 69, at 548; Hazard & Hodes, supra note 74, at 294.
\textsuperscript{203} One may question whether this results in a conflict of interest problem under MODEL RULES Rule 1.7(b). “A lawyer may not represent a client if the representation of that client may be materially limited . . . by the lawyer’s own interests.”
\textsuperscript{204} See Hazard & Hodes, supra note 74, at 294.
adverse effect on the client’s interests, in view of the considerations that AIDS is a fatal disease, that it might be difficult to obtain a substitute attorney, and that there might be an increase in the fees paid the substitute attorney? Does the client’s investment of time and money in his attorney, which will have to be repeated in educating the substitute attorney about his legal problems or needs, materially and adversely affect the client? 206

An attorney who is afraid of AIDS may well answer these questions in the negative. Such an attorney may also not care that an already stigmatized client will have to let even more people in the community know of his affliction with AIDS. Neither would such an attorney consider his or her actions to be abandonment of the client.

In the second scenario under Model Rule 1.16(b)(6), one finds that an attorney may withdraw if “other good cause for withdrawal exists,” although withdrawal may be subject in certain instances to approval by the courts. 208 If fear of HIV infection was considered to be “good cause” under this provision, then the attorney would be free to withdraw, even if the withdrawal were materially to prejudice the client’s interests. 209 One would assume that the courts would not find AIDS-phobia to be “good cause” as was discussed previously. 210 But in the setting of a representation where a tribunal or administrative agency was not involved, the attorney appears to have complete discretion to define “good cause for withdrawal,” subject only to potential future review. 211

It is not comforting to have to rely on the moral convictions of an attorney with severe AIDS-phobia to do what is professionally appropriate in these circumstances. The threat of discipline, or a malpractice action, or a discrimination action based on violation of state law would not be likely to affect the actions of such an attorney as much as the fear of AIDS. Neither would such actions provide significant reward to a jilted client who might be dead before the action was commenced, particularly when damages in such actions may be small or difficult to prove.

The Model Rules provision which would allow an attorney to withdraw from representing a person because he or she has AIDS or is HIV-infected provide an unnecessary loophole, which is not found in the Model Code, for improper discrimination. The psychological impact of being abandoned by one’s attorney is perhaps even worse than that of being initially rejected by

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205. C. Wolfram, supra note 69, at 551 n. 84.
206. HAZARD & HODES, supra note 74, at 287.
207. MODEL RULES Rule 1.16(b)(6).
208. MODEL RULES Rule 1.16(c).
209. C. Wolfram, supra note 69, at 548; HAZARD & HODES, supra note 74, at 294.
210. See supra notes 190-193 and accompanying text.
211. The comments under MODEL RULES Rule 1.16 really provide little help as to the meaning of “good cause” under MODEL RULES Rule 1.16(b)(6).
an attorney who is a stranger. The attorney-client relationship, once formed, creates a bond greater than that created by contract law alone. An attorney has moral and ethical commitments to follow through on his representation of a client. Withdrawal for inappropriate reasons reflects poorly on the individual attorney and the profession and creates a significant appearance of impropriety.

Underrepresentation of the Client with AIDS

Even if the ethical rules could be modified to preclude rejection of a client or withdrawal from representation, a potentially serious ethical problem can still arise. Where an attorney is trapped or locked-in to an attorney-client relationship with a person with AIDS, or an HIV-infected person, and the attorney suffers from AIDS-phobia or finds the person personally repugnant, the attorney confronts an ethical and moral dilemma.

Situations where an attorney has no option but to represent can arise frequently and in a variety of settings. Legal-aid lawyers or public defenders may have little choice concerning which defendants they are assigned and virtually no opportunity to withdraw. They may have extremely heavy case loads which could potentially contain several clients with AIDS. Government attorneys may have statutory responsibilities to represent certain public officials or boards and hence be forced into contact with persons with AIDS. Individual attorney may be called upon by a tribunal to represent criminal defendants or those with a disability and may have little or no op-

212. "A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty." Model Code EC 6-5.

213. Model Code EC 2-31; Model Rules Rule 1.16(c)(d); "But once the lawyer has agreed to represent the client—and certainly as long as the lawyer represents the client—it is morally wrong to defeat the client's expectations about the vigor and single-mindedness of the lawyer's actions on the client's behalf." Wasserstrom, Roles and Morality, in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics 25, 31 (Luban ed. 1983).

Once the lawyer has agreed to represent that client, this agreement should be considered binding unless the client has misled the lawyer or unless some other unusual development overrides the original agreement. That agreements ought to be kept is a moral principal applicable to any domain, but it should be given a higher priority in some domains than others. Though it is never an absolute principle that must under no circumstances be overridden, it should in the relationship between attorney and client be given a high priority. Persons have rights to professional legal representation; rights that should not depend on the whim of an excessively inconstant lawyer.

Held, supra note 90, at 73.


relationship, once formed, respecting law alone. An attorney's work in his representation of a client reasonably reflects poorly on the attorney personally repugnant, knoma.

Whether to represent can arise frequently in legal representation. A lawyer or public defenders who are assigned and may have extremely heavy clients with AIDS. Gouthern lawyers to represent certain contact with persons with AIDS by a tribunal to represent may have little or no opportunity to withdraw. Some attorneys with AIDS-phobia may be afraid of their clients, but they may also need the income which would be generated by the representation. Other attorneys may wish to withdraw but would find that AIDS-phobia is not "good cause" for withdrawal, that withdrawal would materially and adversely affect the client's interests, or that the tribunal refuses to allow withdrawal because a court date is near. In all of these cases, whether for ethical, legal, or financial reasons, an attorney may be "trapped" into representing a person with AIDS, with no way out.

There are two alternatives for an attorney in such a situation. The attorney may provide legal representation which is competent, zealous, and safeguard the best interests of the client. The second alternative is that an attorney may, because of his or her fear of AIDS, underrepresent the client in a variety of ways.

Underrepresentation could take place because the attorney wishes to do everything in his or her power to avoid being in the presence of his client or those with whom the client associates. Desiring to avoid infection, he or she may inappropriately seek to settle a case, conclude a negotiation, or in criminal cases plea bargain, rather than take a case to trial. Perhaps the attorney will suggest that after further review and investigation, the client actually has no case or appeal. Some attorneys may go so far as to ignore or abandon their clients, as, for example, when the clients are housed in the AIDS ward in a prison hospital. Inadequate investigation or failure to spend adequate time interviewing the client or his or her family or friends may also represent forms of underrepresentation of the client with AIDS.

Fortunately, the Model Code and the Model Rules provide clear guidance in the situation of underrepresentation. In general, an attorney must provide competent and zealous representation and not allow his or her personal interests to interfere with professional judgement on behalf of the client. The competency issue is addressed in the Model Code by DR 6-101 which requires adequate preparation in handling a client's legal matters and makes it clear that an attorney shall not "neglect a legal matter entrusted to him." Once representation is undertaken, an attorney must "use proper

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218. See supra notes 207-210.
219. See AIDS and The Criminal Justice System, supra note 78.
220. See Model Code DR 6-101(A)(2), EC 6-4; Model Rules Rule 11 comment [5].
221. Model Code Canon 6.
222. Model Code Canon 7.
223. Model Code Canon 5.
care to safeguard the interests of his client." The Model Rules also provide that "a lawyer shall provide competent representation," including thoroughness and reasonable preparation. It is very clear that an attorney is required to be diligent and prompt and to keep his client reasonably informed as to the status of the client's legal matters.

Zealous representation includes specific duties to seek a client's lawful objectives through reasonably available means, to carry out the contract of employment, and not to damage a client during the course of the professional relationship. In exercising professional judgement the attorney should always strive to achieve the best interests of his or her client. In situations involving criminal defendants, infants, or incompetents, the attorney may even have greater responsibilities.

One might also argue that the attorney has violated the conflict of interest provisions of the lawyers' codes in each of the examples of underrepresentation, since the attorney has allowed personal interests to interfere with professional judgement. "Loyalty is an essential element in the lawyer's relationship to a client." If an attorney is not able appropriately to carry out a course of action for the client because of the attorney's personal fear of AIDS infection, his or her loyalty to the client is impaired. AIDS-phobia has become a compromising influence affecting the attorney's professional judgement and advice in the examples which were posited.

Where the attorney with AIDS-phobia is locked-in to the representation he or she is in a true dilemma. The options to reject the client outright or to withdraw from representation are not always available, as they would be in a normal conflict-of-interest situation.

Attorney’s Fees and the AIDS Surcharge

A final situation in which AIDS-based discrimination by attorneys may be encountered lies in the area of attorney's fees. May an attorney ethically take into consideration the fact that his client has AIDS when setting fees, or in
other words, may an attorney levy an AIDS surcharge? There are several reasons why an attorney may wish to charge a higher fee for providing legal services to a person with AIDS. These include: the fear of the risk that the attorney may become infected with HIV; concern that representing persons infected with AIDS will drive away other clients; the complexity and difficulty presented by many of the issues confronted when representing a client with AIDS; and finally, a particular attorney's expertise in dealing with AIDS-related legal issues.

Are these ethically acceptable reasons for adding an AIDS surcharge to an attorney's fee? Disciplinary Rule 2-106(A) of the Model Code mandates that a lawyer shall not charge a "clearly excessive fee." Whether the fee is clearly excessive is a lawyer-based determination. The test is whether a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee. What the client thinks about the reasonableness of the fee is not determinative under the Model Code test.

Model Rule 1.5(a) takes a much more straightforward approach by omitting the "clearly excessive" language, and providing simply that "[a] lawyer's fee shall be reasonable." Both DR 2-106(B) and Model Rule 1.5(a) then list identical factors which are to provide guidance in determining the reasonableness of the fee. Three of the eight listed factors are applicable in determining the ethical propriety of charging higher fees for clients with AIDS.

The first pertinent factor in determining reasonableness is the "time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." Many of the issues which can arise in representing a client with AIDS pertain to complex and difficult matters of constitutional law and statutory construction, often requiring significant research and development of new litigation strategies.
At the other extreme, an attorney may be frequently called upon to handle relatively routine legal matters, but these may be complicated by the fact that a large proportion of the clients having AIDS are homosexual or that the ravages and complications of the disease have caused physical and mental deterioration.\textsuperscript{245} In such scenarios, counseling, estate planning, and many family law related matters require enormous tact, discretion, and skill when AIDS is factored into the equation.\textsuperscript{246} It would therefore seem that the extra complexity resulting from AIDS, as well as the additional skill required of the attorney, would allow an attorney to charge a higher fee in those circumstances. Nevertheless, the overall fee still must not be clearly excessive or unreasonable.\textsuperscript{247}

A second factor which may be considered is the “likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.”\textsuperscript{248} Given the prevalence of AIDS-phobia and hysteria in our society, the concern that representation of clients with AIDS may drive away existing clients or preclude other professional employment may be well founded.\textsuperscript{249} This may be a legitimate reason to charge a higher fee, but the likelihood of the attorney forfeiting other clients must be apparent to the client with AIDS before a higher fee is charged.\textsuperscript{250} The higher fee charged the AIDS-client would, in essence, partially counterbalance the fees lost from the forfeited employment.

Another factor for determining reasonableness of the fee is the “experience, reputation, and ability of the lawyer or lawyers performing the services.”\textsuperscript{251} If particular attorneys or law firms have developed expertise in AIDS-related legal issues they should be permitted to receive a premium for the value of their reputation and ability. This would be the case for attorneys who now focus or limit their practices to AIDS-related matters.\textsuperscript{252}

\textsuperscript{245} See supra notes 16, 145-148, and accompanying text.

\textsuperscript{246} See Hawkins, \textit{Preparing For Illness, Incapacity and Death Due to AIDS}, in AIDS PRACTICE MANUAL, supra note 78, at III-1; Senak, \textit{When Your Client Has Aids}, 74 A.B.A.J. 76, 78 (July 1, 1988); Montoya, supra note 80, at 38, 39.

\textsuperscript{247} MODEL CODE DR 2-106(B); MODEL RULES Rule 1.5(a).

\textsuperscript{248} MODEL CODE DR 2-106(B)(2); MODEL RULES Rule 1.5(a)(2).

\textsuperscript{249} See supra note 80.

\textsuperscript{250} MODEL CODE DR 2-106(B)(2); MODEL RULES Rule 1.5(a)(2).

\textsuperscript{251} MODEL CODE DR 2-106(B)(7); MODEL RULES Rule 1.5(a)(7).

\textsuperscript{252} See supra note 65; MODEL CODE EC 2-14.
Once the attorney has weighed the various factors concerning reasonableness of fees and determined that the fee should be adjusted accordingly, the attorney must then inform the client of the basis for the fee. Under the Model Rules the basis or rate of the fee, especially when the attorney has not regularly represented the client, must be communicated to the client before or within a reasonable time of the commencement of the representation. There is no counterpart in the Model Code mandating such disclosure, but Ethical Consideration 2-19 states that it is desirable for the lawyer to reach a clear agreement as to the basis of the fee as soon as feasible after the lawyer is employed.

Basically, the attorney has the duty to consult with the client on fee questions, so that the client can make an intelligent decision on whether the fee is appropriate. Not only is the basis of the fee to be explained to the client, but the fee must be objectively reasonable. Therefore, it may well be that a client with AIDS will consent to pay a higher fee if he or she is informed that the lawyer has lost other clients because of the representation. Being charged a premium for specialized skills and expertise, or for resolution of complex matters, is commonplace, so this charge may also seem reasonable to the client. However, a surcharge which is premised on the attorney's fear of being infected with AIDS, despite the negligible chance of such infection, may elicit a negative response from the client with AIDS.

The negative response to an increased fee based on AIDS could take several forms. The client may go to another attorney who does not use the AIDS surcharge as part of the basis for his or her attorney's fee. In that instance the first attorney loses the economic benefit of representing the client.

Another alternative for the client would be to file a complaint with the local grievance committee, or other disciplinary agency, alleging that the fee was excessive and clearly unreasonable under the Model Code or Model Rules, depending on which was applicable in that jurisdiction. Such a complaint might result in fee arbitration, but it will rarely result in discipline against the attorney. Since DR 2-106(B) provides for a lawyer-based re-
view standard, and the disciplinary mechanisms are dominated by attorneys attempting to apply what are necessarily vague standards, only the most extremely unreasonable fee charges are likely to be found to be "clearly excessive" or unreasonable and hence result in discipline.259

The final alternative for the client may be a malpractice action seeking restitution and possibly punitive damages which is premised on an excessive fee charge.260 In either the discipline or malpractice settings the attorney's position will be significantly enhanced if the attorney had consulted with and obtained the consent of his client as to the basis of the fee.261 If the attorney had just added an AIDS surcharge to his fee without informing the client, he may be in violation of Model Rule 1.5(b) and in violation of the spirit of Ethical Consideration 2-19 of the Model Code.262

Discrimination by attorneys against persons with AIDS can have a negative impact on the attorney and the client. The results of a breach of confidentiality by an attorney or a member of his staff concerning the fact that a client had AIDS or is HIV-infected can also result in unfortunate and in some cases devastating consequences for the client.

B. CONFIDENTIALITY AND PRIVACY CONCERNS

Confidentiality and privacy are the premier ethical issues relative to AIDS in the health care professions,263 and they are also important principles in legal representation of clients with AIDS or HIV.264 The rules mandating confidentiality in the attorney-client relationship are the foundation upon which lawyers' professional codes have been erected.265

The rationale underlying the confidentiality rules is premised on three assumptions.266 First, laymen need to consult attorneys since laymen are untrained in legal processes and the complexity of the law.267 Second, if a client
needs to know the extent of his or her rights and obligations, there must be full disclosure to the lawyer of all facts known to the client, and the lawyer must be able to probe even further to elicit facts which might not seem important or significant to the client. The full value of legal representation cannot be achieved without such full disclosure. The final assumption is that clients are unwilling to disclose personal, incriminating, or sensitive information to their attorneys unless the clients can be sure that this information will remain confidential. These three assumptions directly apply to situations where an attorney is representing a client with AIDS or HIV.

The basic rules of confidentiality are set out in Model Code DR 4-101 and Model Rule 1.6. The Model Code establishes a two part standard. Information protected by the attorney-client evidentiary privilege under applicable law is referred to as a confidence. Secrets are defined as any other information obtained from the client in the professional relationship which may be embarrassing or detrimental to the client or that the client has asked the attorney to hold inviolate. The ethical obligation to guard the client's confidences and secrets is much broader than the attorney-client evidentiary privilege, because the ethical precept exists regardless of the nature or source of the information or the fact that others may share the knowledge. The general rule is that an attorney shall not knowingly reveal a client's confidences or secrets, or use them to the disadvantage of the client, or for the attorney's or a third person's advantage without the fully informed consent of the client.

The Model Rules eliminate the Model Code's distinction between confidence and secret. Model Rule 1.6 applies broadly to all information relating to the representation of the client. Simply stated, such client information shall not be revealed unless the client has consented after consultation. Under the Model Rules the attorney does not have to make a decision as to what information may be "embarrassing or detrimental" because all information relating to the representation is confidential.

An attorney can become aware that a client has AIDS or is HIV-infected

268. MODEL RULES 1.6 comment [2]; MODEL CODE EC 4-1; see A. Freedman, supra note 86, at 5.

269. MODEL RULES 1.6 comment [4]; see A. Freedman, supra note 86, at 5; Donegan, Justifying Legal Practice in the Adversary System, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 123, 144 (Luban ed. 1983).

270. MODEL CODE DR 4-101(A).

271. MODEL CODE DR 4-101(A).

272. MODEL CODE EC 4-4.

273. MODEL CODE DR 4-101(B)(1).

274. MODEL CODE DR 4-101(B)(2).

275. MODEL CODE DR 4-101(B)(3).

276. MODEL RULES 1.6(a).

277. MODEL RULES 1.6(a).
in a number of ways. The nature of the legal services to be performed could make existence of the syndrome evident. For example, a client may wish to bring an action against an employer who fired him because of AIDS. Similarly, a child’s dismissal from school based on AIDS or a client’s wish to bring a tort action because he or she has been transfused with HIV-tainted blood makes revelation of the condition essential. The information may also be revealed more indirectly in situations where the attorney is in the role of counselor, and the client tells of his or her condition just to have someone in whom to confide, or in an effort to gain sympathy. The client’s psychological and mental condition may also indicate to a perceptive attorney that the client has AIDS.

Clearly, the fact that a client has AIDS falls within the ambit of the confidentiality rules as ethically protected information which could injure or embarrass the client. Of course, in certain situations the information will become public knowledge, as when an AIDS discrimination case is brought to trial, in which case it becomes a matter of public record.

It is imperative that attorneys recognize that clients with AIDS or HIV infection are particularly vulnerable if their condition is revealed.278 The client’s personal life can be severely affected by the stigma of AIDS and by the implication that the client is a homosexual or possibly even a drug user.279 The impact from the stigma can attach to the entire family.280 Likewise, clients’ financial, business, or professional interests can be destroyed if word spreads of their infection, since they may be fired from their jobs or lose clients, customers, or patients. Once the confidence has been revealed, it is impossible to undo the damage.

The clients’ options in cases where the attorney reveals their condition may include filing a grievance or bringing a malpractice, defamation, or invasion of privacy action.281 Of course, the client may be dead before the case makes its way through the court system, and monetary damages cannot restore a person’s reputation. It is also ironic that if the client chooses to take the matter to court, the result will be a further broadcasting of the client’s secret to even more people.

Unless a client indicates otherwise, an attorney may disclose a client’s affairs to other attorneys in the firm, and the normal operations of a law office

280. Gray and Melton, supra note 7, at 657; Gostin, Curran & Clark, supra note 278, at 46.
can expose confidential information to non-lawyer support staff or outside agencies. Therefore, the attorney not only has a duty personally to maintain the confidences and secrets of his clients, but must also insure that other attorneys in the law firm, the staff of the law firm, and any outside support agencies do not reveal confidential client information to which they become privy. Gossip or indiscreet conversations concerning clients with AIDS or HIV by attorney or staff can have serious consequences for the client, the attorney, and the law firm. Because of the potential harm the duty of confidentiality continues even after termination of the representation.

Given the potentially dire consequences to the client, and the legal profession’s traditionally strong reaction to breaches of confidentiality, it is imperative to determine whether there are any circumstances, short of fully informed client consent, where it may be appropriate to reveal the information that a client is HIV-infected or has AIDS to someone not affiliated with the law firm. The Model Code lists three situations in which a lawyer may reveal a client confidence or secret, all of which are reflected, with some modification, in the Model Rules or its comments.

The Model Code allows a lawyer to reveal confidences or secrets if permitted by a Disciplinary Rule or when “required by law or court order.” This exception is not included in the text of Model Rule 1.6, but it is addressed in the comments which state that a “lawyer must comply with the final orders of a court . . . requiring the lawyer to give information about the client.” Also, provisions of the law or the Model Rules may in various circumstances permit or require disclosure of information relating to the representation.

A second exception under the Model Code permits revelation of confidences and secrets when it is necessary for the attorney “to establish or collect his fee” or to defend himself or other members of the law firm from charges of wrongful conduct. Model Rule 1.16(b) is drafted more precisely to limit the information which can be disclosed to that which the lawyer reasonably believes necessary” to achieve protection for the lawyer. It would be unethical for an attorney to reveal information about the client’s AIDS status unless the revelation had some clear and direct relationship to

282. Model Code EC 4-2, EC 4-3.
283. Model Code DR 2-101(D), EC 4-5; Model Rules Rule 1.6(a) and comments [7] [8].
285. Model Code DR 4-101(C)(1); Model Rules Rule 1.6(a).
287. Model Rules Rule 1.6 comment [19].
288. Model Rules Rule 1.6 comment [20].
290. Model Rules Rule 1.6(b)(2).
resolution of the alleged matter at issue, be it disputed attorney's fees or defense of a malpractice action. Confidential information about AIDS should not be used as an improper lever to advance the attorney's own interests, even though the attorney may feel aggrieved by the client.

The exception which would appear most likely to place attorneys in an ethical dilemma concerning AIDS relates to the intention of a client to commit a future criminal act. The Model Code gives the attorney the option of revealing or ignoring his client's intention "to commit a crime and the information necessary to prevent the crime."\textsuperscript{291} The Model Rules provide the attorney with the same option, but only "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."\textsuperscript{292} It should also be noted that the Disciplinary Rule is applicable to any crime, while the Model Rule provision is much narrower, applying only to crimes having the potential of death or substantial bodily harm. It is also important to emphasize that under both lawyers' codes, the attorney has discretion whether or not to disclose.

Obviously, the fact that a client has AIDS, or is HIV-infected, is not itself a crime and does not fall under any exception to the basic rules of confidentiality. An attorney could, however, be placed in an ethical quandary if informed by a client that the client planned intentionally to infect a third party with the AIDS virus. There are a number of situations in which this situation could plausibly arise. For example, in a divorce setting, where the husband or wife was embittered and wants to get even with his or her spouse by intentionally passing on AIDS, would this constitute the crime of criminal assault? If a client, a criminal defendant, informs his attorney that he wishes to take revenge on a sadistic prison guard or a homosexual cellmate who raped him, or the judge who sent him to jail, must the attorney inform the authorities about the threat of a bite? Does the response change if the client appears to be mentally unbalanced or even insane and wishes to inflict AIDS on every sex partner he or she can accommodate? What of the situation where the attorney becomes aware that a client with a history of incest or sexual abuse of his children now has AIDS and wants the attorney to help him to gain custody of his children?

In analyzing these situations, an attorney must first determine whether these actions are crimes which will take place in the future, as set out in the Model Rules or the Model Code. If so, the attorney then has discretion to reveal the client's intent to commit these crimes under the Model Code. Under the Model Rules the attorney must determine if these crimes will result in imminent death or substantial bodily harm to the victim before the

\textsuperscript{291} MODEL CODE DR 2-101(C)(3).
\textsuperscript{292} MODEL RULES Rule 1.6(b)(1).
attorney has the option of revealing as much information as he or she reasonably deems necessary to prevent the criminal act. The intentional infliction of a communicable disease, such as AIDS, will be found to be a criminal act in most jurisdictions. It is not so clear, however, that heterosexual or homosexual sexual intercourse, or the bite of a person who is HIV-infected, will result in imminent death or substantial bodily harm. Even if a person becomes infected with HIV it is not clear that they will develop full-blown AIDS in the near future, if ever. The passage of the virus through saliva, while possible, is still not considered a significant threat.

Application of the provisions of the Model Rules in respect to intentional infliction of AIDS would therefore place the attorney in a more ambiguous position than under the Model Code. Nevertheless, under either of the lawyers’ codes the attorney has a tremendous amount of discretion in balancing his client’s rights to confidentiality, against the interests of the client’s wife, children, a third party, or society in being protected from HIV infection.

The lawyers’ codes tend to lean toward confidentiality in these circumstances because it is difficult to “know when such a heinous purpose will be carried out,” or if the client will change his or her mind. Also, the public is better served in most cases if the client is encouraged to communicate with his or her attorney fully and openly. The exercise of discretion in these situations requires the attorney to weigh all the factors involved and, at least,

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In 1987 alone, 29 bills containing criminal sanctions specifically addressed to transmission of HIV were introduced in state legislatures. To date, five states have enacted statutes which criminalized certain behavior when engaged in by persons who have tested positive for HIV or who actually have AIDS or AIDS-related Complex (ARC).

ABA Policy on AIDS & the Criminal Justice System 10 (Feb. 1989). “Twenty-four states have statutes which criminalize the exposure of others to sexually transmitted diseases”. Id. at 9. Although these statutes have rarely been enforced, there is renewed interest in their use. Similarly, quarantine laws, many of which were enacted before the rise of due process analysis and contain no provisions for hearing, notice or court orders, have enjoyed newfound life, both as alternatives to, and companions of, criminal sanctions.

The criminalizing of AIDS is primarily statutory in nature. New statutes are being enacted which are specifically concerned with AIDS-type conduct. Simultaneously, traditional criminal laws such as murder and manslaughter, endangerment, and assault are being used to encompass fact situations involving conduct by a defendant with positive HIV status.

Schechter, AIDS: How the Disease is Being Criminalized, 3 CRIM. JUST. 6, 7 (Fall 1988).

294. See supra note 26.

295. See supra note 32.


297. MODEL RULES Rule 1.6 comment [9].
to attempt to persuade the client to take suitable action not to infect other persons.\footnote{298} Because of the attorney’s discretion in whether to reveal the intent to commit a criminal act, this is an area where personal morality must take over to allow the attorney to do what is morally correct and appropriate.\footnote{299}

The ethical standards are rules of general applicability, but there are times when individual morality or conscience must override these standards,\footnote{300} or when unwritten exceptions to the rules apply. A client’s expressed intent to commit suicide may be such a situation, since it places an attorney in a dilemma requiring the attorney to decide whether to honor the confidentiality rules or to attempt to save the client’s life by informing others who may be able to prevent the suicide. The person with AIDS frequently suffers severe psychological problems including despair and anxiety, which are typical of persons suffering from other chronic or fatal diseases such as cancer.\footnote{301} Suicide may be more prevalent among persons with AIDS, however, because they suffer not only the mental and physical aspects of the disease, but also the social stigma which frequently causes loss of support from family and friends and an increase in stress.\footnote{302}

The confidentiality provisions of the \textit{Model Code} and \textit{Model Rules} make no reference to suicide. The only exception which could even remotely be applicable to allow for a breach of confidentiality in a suicide situation is that for future crimes. Most states at one time considered attempted suicide to be a felony, but this position has been uniformly rejected in recent years, and suicide or attempted suicide has been decriminalized.\footnote{303}

Some ethical guidance relative to a client’s expressed intention to commit suicide has been provided in the form of a New York State Ethics Opinion.

\footnote{298} Model Rules Rule 1.6 comment [13]; “The possibility that an attorney could incur civil liability as a consequence of his or her failure to alert third parties to the harm intended them by the attorney’s client” is suggested in J. Burkoff, \textit{supra} note 86, at § 6.5(f), p. 6-93 (citing Tarasoff v. Regents of the University of California, 17 Cal.3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1977)); C. Wolfram, \textit{supra} note 69, at 226; Hawkins v. King County, 24 Wash. App. 338, 602 P.2d 361, 366 (1979), suggests that a criminal defense attorney has “a common law duty to volunteer information about a client to a court considering pretrial release . . . limited to situations where information gained convinces counsel that his client intends to commit a crime or inflict injury upon unknowing third persons.”; \textit{Note, Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality}, 1 Geo. J. Legal Ethics 243, 254-255 (1987); \textit{see also} Gostin, Curran & Clark, \textit{supra} note 278, at 47-51.

\footnote{299} J. Burkoff, \textit{supra} note 86, at § 6.5(f), p. 6-89.

\footnote{300} Model Code Preamble; Model Rules Preamble; \textit{see supra} notes 69-71.


\footnote{302} \textit{Id.}

\footnote{303} \textit{AIDS Practice Manual}, \textit{supra} note 78, at XII-3.
ion. This opinion takes the position that the lawyer's response should depend on the wisdom and skill of the attorney and the particular circumstances present. If the attorney views the client's disclosure as a cry for help, the attorney should counsel the client and recommend that the client seek other assistance. If necessary to prevent the suicide, the attorney "may, and generally should," take appropriate action including revealing the client's intent to commit suicide to persons who might prevent it. The attorney is called upon to balance the need to preserve human life against the need to preserve client confidences.

The attorney has tremendous discretion in these situations, similar to his or her scope of discretion when dealing with a client's intent to commit a criminal act. In certain situations involving a client with AIDS, the attorney may wish to remain silent, for example, if the client is in pain and is rapidly deteriorating physically. In other circumstances, the client may be depressed because he or she has learned of a positive test for HIV, even though no symptoms of the disease have appeared. In this second scenario the revelation to the attorney may reflect a cry for help to which the attorney may respond. The attorney's revelation to third parties that his client wishes to commit suicide will surely also reveal the underlying reasons why. The problems which may result from others knowing of the client's HIV infection would not appear to weigh as heavily as the loss of the client's life in these circumstances.

Other situations involving clients with AIDS or HIV can also pose moral and ethical dilemmas for the attorney relating to confidentiality. Examples include a client who admits to an incestuous relationship with his young daughter, or a bisexual male who although having tested seropositive still refuses to inform his wife or male lover. These situations contain a tremendous potential for harm, but a strict application of the confidentiality rules may, as in the case of suicide, suggest non-disclosure. The attorney in such cases may be forced to rely on personal moral values, perhaps supporting them by an application of a balancing test which weighs the harm to the innocent victim against the confidentiality interests of the client.

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305. Id.
306. Id.
307. Id; see supra notes 291-293.
309. See R. Thurman, Client Incest and the Lawyer's Duty of Confidentiality (ABA Monograph Series, 1985), which examines an attorney's ethical dilemma when faced with the confidentiality issue in light of his client's revelation of an incestuous relationship with the client's nine-year-old daughter.
310. See Howe, supra note 81, at 137; Schulman, Suicide and Suicide Prevention: A Legal Analysis, 54 A.B.A.J. 855, 858-61 (Sept. 1968).
311. See R. Thurman, supra note 309, for a thorough analysis of the law and policies relating to
are very strong policy interests supporting each side of this equation, making it an even more difficult decision for the attorney caught in such a dilemma.

The need for strict adherence to the confidentiality provisions of the professional codes is usually critical in the case of a client with AIDS or infected with HIV because of the potential for severe damage which may be inflicted on the client's reputation, livelihood, and legal interests. Similar concerns are also evident in the case of an attorney who becomes afflicted with AIDS.

C. THE ATTORNEY WITH AIDS

Attorneys are not immune from AIDS. While no statistics are available, it is clear that a number of attorneys have contracted HIV, others have died from AIDS, and a number of law firms have recognized the need to develop firm policies in response. An attorney who tests positive for HIV or is diagnosed with AIDS, and other attorneys with whom he or she may be associated, are forced to confront a number of ethical questions. For example, does an attorney have a duty to inform clients of his or her condition? Can an attorney with AIDS provide competent and zealous representation? When and under what conditions must an attorney withdraw from a representation or even entirely from the practice of law because of AIDS? Is there an inherent conflict of interest which would prevent an attorney from responding properly to these other questions?

If attorneys are not immune from AIDS or the fear of AIDS, neither are they immune from the stigma associated with AIDS. There may be a significant adverse effect on an attorney when the fact or rumor of the attorney's infection spreads within a law firm or the community. The negative reaction to AIDS can damage an attorney's reputation and result in discrimination in a variety of subtle and not-so-subtle ways. The discrimination can appear within the firm where the infected attorney may be ostracized by other attorneys and the staff. The attorney with AIDS may find that it becomes more difficult or impossible to be promoted to partner, or to get a big raise, or to be given the opportunity to work on the most significant cases for the most valued clients.

Less subtle is the case where the attorney is simply fired for reasons sup-

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313. See supra note 66; see also Saichek, Survey Reveals Few Law Firms Have Policies on AIDS Victims, Chicago Daily L.J., Oct. 1, 1987, at 1; McMurray, Employee Finds Support and Understanding at Arent, Fox, LEGAL TIMES, March 23, 1987, at 31; Galen, supra note 77, at 1, 32; Jensen, AIDS: It's a Problem for the Firms, Too, 17 NAT'L L.J. 1, 22 (Dec. 11, 1988).

314. See Schachter, supra note 66, at 43.
posedly not related to AIDS.\textsuperscript{315} The threat of the loss of clients because of AIDS-phobia, especially in the case of a sole practitioner, represents a potential economic disaster. An attorney is particularly vulnerable to loss of clients because clients are free to discharge their attorney for any reason, whereupon the attorney has a mandatory duty to withdraw.\textsuperscript{316} For these reasons, the attorney with HIV or AIDS has an obvious need to keep the information about the infection a secret from his clients and associates as long as possible.

While it may be in the best interests of the attorney to keep this information confidential, does the attorney, nevertheless, have a duty to his clients to inform them of his condition? The answer is that there is no moral, ethical, or legal obligation to inform a client that an attorney has tested positive for HIV or has been diagnosed with AIDS, so long as there is no threat to the client of contracting the disease. The point has been made that while AIDS is contagious, the virus cannot be transmitted in the normal business setting of the attorney-client relationship.\textsuperscript{317} If there is no threat to the client or the client’s interests, and the price of disclosure is very high for the attorney, a utilitarian analysis would support the attorney’s right to keep this information confidential.

If a situation arose where there was a threat of transmission of HIV to the client, then a duty of informed consent concerning the threatening activity may exist. The only plausible ways that the virus can be transmitted are if the attorney is having sex with his or her clients or sharing intravenous drug needles with them. There are a host of good reasons for not having sex with one’s clients,\textsuperscript{318} or shooting-up drugs with a community needle,\textsuperscript{319} but fear of AIDS would certainly rank high on such a list. Once the attorney-client relationship has been formed the attorney has a duty of complete and undivided loyalty to a client.\textsuperscript{320} Clients place themselves in the hands of the attorney and a bond of confidence and trust often develops.\textsuperscript{321} The lawyer’s

\textsuperscript{315} See Saichek, supra note 313 (citing Bowers v. Baker & McKenzie, 1 B-E-D 86-115824, as the first AIDS discrimination suit filed against a law firm for allegedly firing an associate because he had AIDS); see also Leonard, AIDS and Employment Law Revisited, 14 Hofstra L. Rev. 11, 14 (1985); Laermer, Job Loss by Lawyer with AIDS Reviewed by Rights Agency, 198 N.Y.L.J., July 15, 1987, at 1, col. 3, also deals with the Bowers case; Galan, supra note 77, at 32; Jensen, supra note 313, at 22-23.

\textsuperscript{316} Model Code DR 2-110(B)(4); Model Rules Rule 1.16(a)(3).

\textsuperscript{317} See Tamont, supra note 24; Heyward and Curran, supra note 13, at 78-80.


\textsuperscript{319} See supra notes 13 and 16.

\textsuperscript{320} Model Rules Rule 1.7 comments [1] [2] [4]; Model Code EC 5-1; see Dolgin, supra note 318, at 390-91; Patterson, Legal Ethics and the Lawyer’s Duty of Loyalty, 29 Emory L.J. 909 (1980).

\textsuperscript{321} Dolgin, supra note 318, at 592; see Watson, The Lawyer as Counselor, 5 J. FAMILY L. 7, 8 (1985).
duty is to further the client’s interests and do nothing which may harm or prejudice the client or conflict with the client’s interests.322 These fundamental principles governing the relationship between attorney and client are as applicable in the bedroom as in the attorney’s office.323 An attorney with AIDS has ethical and moral duties to inform the client of the attorney’s condition before having sex with that client or indulging in any other conduct which might transmit the disease.324 Violation of this ethical duty could result in professional discipline in addition to potential tort325 or criminal liability326 which may arise from such affairs.

It is interesting to note that the medical profession has determined that doctors do not have a duty to inform their patients that the doctor has HIV or AIDS.327 The doctor may not engage in any activity that creates even a minimal risk of transmitting the disease to a patient.328 If such a risk exists the doctor must disclose the risk to the patient and, unless truly informed consent is given, cease engaging in that activity.329 However, if no risk exists, disclosure of the doctor’s medical condition to a patient would serve no rational purpose.330 It is, however, recommended that a doctor disclose his or her condition to other physicians who can provide an objective assessment of the risks posed to the doctor’s patients.331

The question of the attorney’s competence must always be addressed when an attorney has been diagnosed with AIDS. If an attorney has merely tested positive for HIV and there are as yet no symptoms, the competency issue will arise only if the attorney’s emotional response interferes with the representation of clients.332 Once the virus attacks the immune system, however, the

322. MODEL CODE DR 7-101(A)(3); MODEL RULES Rule 1.3 comment [1]; see Dolgin, supra note 318, at 594; MODEL CODE DR 5-101(A) and EC 5-1.
323. See supra note 318.
325. How, supra note 81, at 140; see Comment, You Never Told Me . . . You Never Asked: Tort Liability for the Sexual Transmission of AIDS, 91 Dick. L. Rev. 529, 552 (1986), where the author concludes that a person with AIDS “who intentionally or negligently sexually transmits AIDS to another can be held liable under a cause of action for battery, fraudulent representation and/or negligence.”; see also Comment, Tort Liability For AIDS?, 24 Houston L. Rev. 957 (1987).
326. See supra note 293.
327. Ethical Issues Involved in the Growing AIDS Crisis, supra note 170, at 1361; AIDS AND THE LAW § 15.10 (Dornette ed. 1987); see Dentists Said Not Required to Inform Their Patients, 3 AIDS Pol’y & L. 10 (Mar. 9, 1988).
328. Ethical Issues Involved in the Growing AIDS Crisis, supra note 170, at 1361.
329. Id.; AIDS AND THE LAW § 15.10 (Dornette ed. 1987); Cook County Board Votes to Limit Doctor’s Privileges, 2 AIDS Pol’y & L. 3 (Feb. 11, 1987).
330. Ethical Issues Involved in the Growing AIDS Crisis, supra note 170, at 1361.
331. Id.
332. Merely being infected with HIV without other symptoms should have no effect on an attorney’s competence, but an attorney can become emotionally incapacitated. “Recent studies indicate that some people infected with HIV experience neurologic dysfunction as their first symptom of
attorney may experience frequent illness and symptoms of the disease. As the disease progresses the attorney's physical deterioration may require long periods of treatment or hospitalization. In many instances AIDS also causes severe psychological disorders including depression and dementia. The physical and psychological manifestation of AIDS, coupled with its emotional and financial side-effects, may cause an attorney to neglect his client's needs or to provide incomplete or incompetent representation.

The applicable ethical standards regarding competency and zealousness have been examined previously in the discussion of underrepresentation of the client with AIDS. These standards provide, in essence, that an attorney must protect the best interests of his or her clients; prepare adequately and thoroughly for their representation; be diligent, prompt, and knowledgeable; and keep his client reasonably informed. It is clear that an attorney must not neglect a legal matter to which he or she is entrusted. These issues rise to a constitutional level in a criminal defendant's representation when ineffective assistance of counsel can jeopardize a client's constitutional rights and interfere with the smooth and effective administration of justice.

While incompetence is hard to define, the American Law Institute and American Bar Association have provided a definition of legal competence which enunciates six factors for measuring an attorney's performance. The attorney must (1) be knowledgeable, (2) have skill in practice techniques, (3) have efficient law office management skills, (4) recognize issues beyond his or her competence and bring these to the client's attention, (5)

illness. Cognitive impairment may include decreased concentration, recent memory loss, mental slowing, unsteady gait, lack of coordination, social withdrawal and apathy.
prepare and carry through legal matters, and (6) be intellectually, emotionally, and physically capable.\textsuperscript{344} Conversely, failure to maintain these qualities or capabilities is legal incompetence.\textsuperscript{345}

Obviously, there are a vast number of potential excuses or reasons behind an attorney's incompetence, but in the case of an attorney with AIDS they would focus on the physical, psychological, and emotional consequences of the disease. Every case is unique. The effect of the disease may vary greatly from one attorney to another depending on the severity of the symptoms, how long the attorney has been afflicted, and whether the symptoms affect the physical or mental facilities of the attorney. Other factors also come to play, such as how much backup and support are available from associates and staff and the nature of the attorney's practice. Just as all attorneys are not equal in their competence, competence itself is not an absolute.\textsuperscript{346} Depending on the particular circumstances, there may be multiple levels of competency. A physically impaired attorney may well be physically able to draft documents until the disease has progressed quite far. Mental problems may extend from forgetfulness, which can be aided by a tickler system, to severe dementia where the attorney cannot serve clients in any capacity.

But when does the attorney cross the line between competent and incompetent representation? Once the line is crossed the attorney must refuse to accept new clients\textsuperscript{347} and also withdraw from representation of existing clients because the illness is having an adverse impact on the clients' interests.\textsuperscript{348} This need to disassociate from clients can take place over a period of time depending on the effects of the disease on a particular attorney. The attorney with AIDS must also recognize the responsibility to begin closing out or transferring client affairs before his physical and mental capabilities have deteriorated too far, so that he or she can minimize harm to the client.\textsuperscript{349} The duty to leave one's clients' affairs in order is clear and paramount.\textsuperscript{350}

A conflict of interest is inherent in the decision whether an attorney has

\textsuperscript{344} Id. The ALI-ABA draft further defines the definition of legal competence in seven sections of commentary which identify the key elements of competence as "information gathering, legal analysis, the formation of appropriate strategy, the execution of strategy in an accurate and effective way, timeliness, client communications, effective practice management and good ethical awareness and practice." Id. at 5.

\textsuperscript{345} Id.

\textsuperscript{346} Id.

\textsuperscript{347} Model Code EC 7-30; Model Rules Rule 1.16(a)(1)(2), 6.2(a), 1.1.

\textsuperscript{348} Model Rules Rule 1.16(a)(2); Model Code DR 2-110(B)(3); see Hazard and Hodes, supra note 74, at 289.

\textsuperscript{349} Model Rules Rule 1.16(d); Model Code DR 2-110(A)(2); EC 2-31; Hazard and Hodes, supra note 74 at 289.

\textsuperscript{350} Id.
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crossed or is nearing the line of incompetency or incapacity.351 Refusal to
accept new clients or withdraw from representing existing clients means a
Corresponding loss of income and possibly a corresponding loss of medical
and life insurance benefits when they are needed most. Costs of caring for
a person with AIDS can be great, and these costs are added to the other costs
of living or raising a family. The conflict arises between the need to stay in
practice and maintain income levels, versus the ethical duties to provide
competent representation and leave clients’ affairs in order.

The conflict of interest dilemma can be mitigated to some degree by the
infected attorney, by the law firm if he or she is associated with one, and by
the organized bar, if all are willing to recognize and act on their responsibilities.
The attorney with AIDS has a responsibility to consult regularly with
his doctors and also with other attorneys to obtain an impartial diagnosis of
his performance and abilities. Obviously this may be easier to do if the
infected attorney is a member of a law firm. A sole practitioner may need the
assistance of attorney colleagues or the organized bar.

The question will also need to be addressed as to whether an individual
attorney has a responsibility to inform the presiding judge in any current
litigation that the attorney is afflicted with AIDS and of its possible conse-
quences.352 If such a responsibility to inform the judge exists, the judge may
then play the role of an impartial observer of the attorney’s competence, es-
specially in a criminal trial. This responsibility to seek objective evaluation of
the afflicted attorney’s competence would be similar to that imposed on the
medical profession.353

The law firm can and should play a significant role when one of its part-
ners or associates is diagnosed with AIDS. The firm can materially ease the
plight of such attorneys by monitoring their performance and providing
assistance as needed. Since the law firm is liable for a partner’s or associate’s
incompetence, it is clearly in the firm’s self interest to take such measures.354
Law firms must recognize that the AIDS problem can hit any size or type of
law firm, and that it is advantageous to prepare a law firm policy for dealing
with attorneys and staff before the problem actually arises.355 This will en-

351. MODEL CODE DR 5-101(A), EC 5-1, EC 5-2; MODEL RULES Rule 1.7(b); see generally
Leonard, supra note 63, at 688, where the author notes the psychological and financial needs of
people with AIDS to keep working as long as they are physically capable of doing so.
352. The judge would be required to make a determination as to whether the attorney could
withdraw in any event. See MODEL RULES Rule 1.16(a)(2) and (c); MODEL CODE DR 2-
110(A)(1).
353. See AMA Council on Ethical and Judicial Affairs, Ethical Issues Involved in the Growing
354. C. WOLFRAM, supra note 69, at 236-37, MODEL RULES Rule 5.1(c).
355. See supra notes 66 and 313.
able the firm to respond objectively and quickly when AIDS-related problems are encountered.

The organized bar can do much to assist attorneys with AIDS. The American Bar Association has set up a Commission on Impaired Attorneys to assist alcohol and drug impaired attorneys.\(^{356}\) Perhaps the mandate of this commission could be expanded to assist attorneys with AIDS in finding counseling and other forms of assistance, as well as for help in determining if the attorney has a competency problem. Peer-support programs or panels at the state and local levels could also prove of great help to the attorney impaired with AIDS. While some programs now exist, much more can be accomplished in this area.\(^{357}\)

Situations may arise where an attorney’s performance in representing clients has deteriorated to the level where he or she is providing incompetent representation or where because of AIDS-phobia an attorney is violating other provisions of the professional codes. If another attorney gains unprivileged knowledge of these violations, that attorney must report this information to the tribunal or other authority that has jurisdiction over these violations and the power to investigate and act on them.\(^{358}\) The integrity of the legal profession can only be maintained if attorneys are willing to bring violations of ethical standards to the attention of the proper authorities.\(^{359}\) In the case of an attorney with AIDS, he or she may not have the capacity to recognize the damage being done to the client or the inherent conflict building up in the representation.\(^{360}\) Colleagues of the attorney with AIDS have a duty to act when they know of ethical violations in order to protect the attorney’s clients as well as the reputation of the bar.\(^{361}\)

IV. CONCLUSION

The issues identified for analysis in this article focused on the ethical ramifications of AIDS-based discrimination by attorneys, confidentiality dilemmas, and the responsibilities incumbent upon an attorney with AIDS. An application of the provisions of the Model Rules and the Model Code at times provided clear ethical guidance for resolution of these AIDS-related issues, but in some instances the result was ambiguous, while in others, the two codes provided differing responses or options to the resolution of the


\(^{357}\) See ABA DISCUSSION DRAFT, supra note 6, at 1-3; AIDS PRACTICE MANUAL, supra note 78, at Appendix I.

\(^{358}\) Model Code DR 1-103(a); Model Rules Rule 8.3(a).

\(^{359}\) Model Code EC 1-4; Model Rules Rule 8.3 comment [1].

\(^{360}\) See Model Code EC 1-6; Babuto, supra note 301, at 115-116.

\(^{361}\) See Model Code DR 1-103(A), EC 1-4; Model Rules Rule 5.1, 8.3(a).
issues. What is strikingly clear is that the personal morality of the individual attorney must continue to play a major role in the resolution of AIDS-related dilemmas, no matter what guidance is provided by the lawyer's codes, rules of law, or ethics opinions.

The focus of this analysis was limited to several important ethical issues relating to the AIDS epidemic, but a number of other ethical and moral issues remain to be addressed by the legal profession. Ethical issues relating to client autonomy or incompetency are likely to arise in many cases because of the physical and mental deterioration caused by the disease. AIDS is a major factor in the criminal justice system, because of the high number of drug abusers who become infected. This raises special ethical issues for judges, prosecutors, and attorneys representing defendants with AIDS. There is a great possibility for abuse by attorneys of AIDS-related information concerning third parties. This can include an attorney's revelation of such information to the press, improper use of such information to destroy the credibility of adverse witnesses or parties during a trial, or use of AIDS and anything connected to AIDS is an extraordinarily important issue, and any news is eagerly sought out by the press as newsworthy items for the fact that the entire country is phobic in regard to AIDS. As a result, cases often proceed with fictitious names or abbreviations of the parties' real names. Sometimes, the entire case is sealed, and occasionally even this is taken to extremes.

The threat or actual leak to the news media of AIDS-related information concerning an adversary, witness, or criminal defendant could completely forestall that party from pursuing a legal matter or receiving a fair trial. Such a leak could be so damaging to the interests and reputation of these persons that they may be willing to settle on unfavorable terms, to completely back away from a law suit, or in the case of a witness, not to testify. These situations smack of potential blackmail and would, depending on the circumstances, violate the trial publicity rules of the lawyers' professional codes. Model Rules Rule 3.6 (a)(b)(1)-(5), 3.5(a); see supra note 41 relative to hysteria in the news media.

During litigation there may be a number of opportunities for an attorney to utilize AIDS-related information concerning third parties to a client's advantage. The fact that a party has AIDS or the impact of the disease on a party may be a legitimate material factor in certain cases. See Alter, The Impact of the AIDS Crisis on Child Custody Decisions, in AIDS—LEGAL ASPECTS OF A MEDICAL CRISIS 643 (1985); Court Says Father With AIDS Should Have Custody of Son, 3 AIDS POL'y & L. 2 (Nov. 2, 1985). Difficulties arise when an attorney raises the fact that a party or witness has AIDS, not because it is a material factor in the case, but rather because the attorney believes that AIDS-phobia will reduce the party's or witnesses' credibility and hence the force of their testimony. If the fact of AIDS is immaterial, an attorney's questioning a witness about his or her condition may be viewed as a form of harassment or an attempt to embarrass or maliciously.
AIDS-related information as a bargaining chip in negotiations. Counseling the client with AIDS also presents ethical and moral dilemmas for even the most well-intentioned attorney.

The medical epidemic of AIDS has spawned a legal epidemic and an epidemic of fear. Until a cure for AIDS is discovered, the issues explored in this article and other AIDS-related ethical issues will continue to confront legal practitioners. The challenge to the profession is to provide education, guidance, and support services sufficient to allow practitioners to respond to the AIDS epidemics in an ethically appropriate, rational, and compassionate manner.

366. See generally Sexual Orientation and the Law, supra note 11, at § 1.02(3); C. WOLFE- RAM, supra note 69, at 713-718; A. Goldman, supra note 121, at 94-95; but see Schwartz, The Zeal of the Civil Advocate, in THE GOOD LAWYER: LAWYERS' ROLE AND LAWYERS' ETHICS 159 (Luban ed. 1983).