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AVOIDING UNINTENDED DISCLOSURE: REPRESENTING CLIENTS WITH HIV AND AIDS

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I. INTRODUCTION

When the HIV/AIDS epidemic was initially recognized in the United States, many attorneys wondered what it would mean to represent a client with HIV. As the number of HIV-infected individuals grew, so did the need for attorneys to represent them. Specifically, attorneys questioned whether or not their duty of confidentiality would expose them to civil liability from failing to protect a third party.¹ In response to this concern, several law review articles were written discussing the dilemma faced by attorneys bound by professional rules of conduct.² These articles focused on the needs of the attorney and the public rather than the HIV-infected client,³ though there was some discussion on clients engaged in risky sexual behavior.⁴ Even when no affirmative duty to disclose existed, the discussions rarely focused on the client and his need for confidentiality.

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¹ Anne L. McBride, *Deadly Confidentiality: AIDS and Rule 1.6(b)*, 4 GEO. J. LEGAL ETHICS 435, 435 (1990) (inquiring whether an attorney could disclose his client's HIV status to a third party).

² See, e.g., W. James Ellison, *Legal Ethics Condones AIDS Transfer: A Disclosure Dilemma*, 12 WHITTIER L. REV. 327 (1991); Laurie S. Kohn, Note, *Infecting Attorney-Client Confidentiality: The Ethics of HIV Disclosure*, 9 GEO. J. LEGAL ETHICS 547 (1996); McBride, *supra* note 1; Janine Sisak, *Confidentiality, Counseling, and Care: When Others Need to Know What Clients Need to Disclose*, 65 FORDHAM L. REV. 2747 (1997).

³ See Rachel Vogelstein, *Confidentiality vs. Care: Re-Evaluating the Duty to Self, Client, and Others*, 92 GEO. L.J. 153, 163 (2003) (explaining that, in the past, confidentiality rules have been beneficial to individuals at the expense of third parties and the public interest).

⁴ See McBride, *supra* note 1, at 445 (“Although engaging in heterosexual intercourse while infected with AIDS is not criminal in many jurisdictions, it does constitute behavior which could result in serious bodily harm.”).

Few, if any articles, have focused on the effects disclosure has on the client and the ways in which attorneys can avoid disclosure.

Few attorneys representing clients with HIV/AIDS will be faced with the moral dilemma discussed in law review articles written twenty years ago.⁵ More commonly, the attorney and client will be in agreement about whether disclosure of the client's seropositivity is necessary or advisable. When the client has determined that he does not want this confidential information disclosed, the lawyer must make every effort to avoid both intended and unintended disclosure. Due to the nature of the information and the discrimination that the client could possibly face, the attorney must be hyper-vigilant to avoid disclosure and take additional measures to protect the information from disclosure. This article draws from my experiences teaching in and supervising student attorneys enrolled in the UDC HIV/AIDS Legal Clinic (Clinic) and uses examples from the Clinic to discuss a lawyer's ethical duties to a client with HIV or AIDS. The article begins with a description of the Clinic, a brief overview of the HIV/AIDS epidemic, and a discussion of the history of confidentiality laws protecting HIV-related data from improper disclosure. The article argues that Rule 1.6 of the ABA's Model Rules of Professional Conduct provides a floor to lawyers representing clients with HIV and AIDS and not a ceiling. Lawyers representing clients with HIV and AIDS owe a heightened duty of confidentiality.

II. THE UDC HIV/AIDS LEGAL CLINIC

Persons with HIV have a need for legal services that are both related and unrelated to their HIV infection. The HIV/AIDS Legal Clinic at the University of the District of Columbia David A. Clarke School of Law (now included as part of the General Practice Clinic) has provided legal services to this population since 1990,⁶ making it the second oldest such

⁵ As will be discussed in Part V.B. of this article, only one state bar ethics opinion, from the Delaware Bar Association Professional Ethics Committee, was issued on the subject. *See infra* Part V.B. *See also* Delaware Bar Ass'n Prof'l Ethics Comm., Formal Op. 1988-2 (1988). Ethics opinions are "advisory opinions on the ethical propriety of hypothetical attorney conduct." California State Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 11-0004 (2014).

⁶ UDC-DCSL HIV/AIDS Legal Clinic, FACEBOOK, <https://www.facebook.com/pages/UDC-DCSL-HIVAIDS-LEGAL-CLINIC/112875788731724?sk=info> (last visited Oct. 5, 2014). The HIV/AIDS Legal Clinic is not currently being offered. The General Practice Clinic allows the school to serve more people, while also maintaining a commitment to the HIV/AIDS community.

clinic in the nation.⁷ The Clinic's mission is to provide comprehensive, holistic legal services to District of Columbia residents infected with and affected by HIV/AIDS.⁸

The Clinic was established less than a decade after AIDS was formally recognized by medical professionals in the United States⁹ and three years after the FDA approved the first drug for the treatment of HIV.¹⁰ In 1990—the year that the Clinic began representing persons with HIV and AIDS—there were 100,000 reported AIDS cases in the United States¹¹ and an estimated 8 million people worldwide living with HIV.¹² In 1993, the life expectancy for a symptomless person infected with HIV was less than seven years.¹³ By contrast, there are currently 35 million infected persons world-wide,¹⁴ and an American diagnosed with HIV can expect to live for approximately 24 years on average.¹⁵

Traditionally, the Clinic's work focused on compassionate release for HIV-infected prisoners,¹⁶ social security,¹⁷ and end-of-life planning,

⁷ *Id.* See also U.D.C. David A. Clarke School of Law HIV/AIDS Legal Clinic, LAWHELP.ORG, <http://www.lawhelp.org/dc/organization/udc-david-a-clarke-school-of-law-hiv-aids-leg/life-and-estate-planning-guardianship/powers-of-attorney> (last visited Jan. 13, 2015); *General Practice Clinic*, UDC DAVID A. CLARKE SCHOOL OF LAW, <http://www.law.udc.edu/?page=GenPracticeClinic> (last visited Jan. 13, 2015).

⁸ *General Practice Clinic*, UDC DAVID A. CLARKE SCHOOL OF LAW, <http://www.law.udc.edu/?page=GenPracticeClinic> (last visited Oct. 5, 2014).

⁹ The CDC began referencing AIDS in 1982. See Centers for Disease Control, *Update on Acquired Immune Deficiency Syndrome (AIDS) — United States*, 31 MORBIDITY & MORTALITY WKLY. REP., 507–08 (1982). See also *id.* at 513–14.

¹⁰ In 1987, AZT became the first approved treatment for HIV disease. See *Overview of HIV Treatments*, AIDS.GOV, <http://aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/treatment-options/overview-of-hiv-treatments> (last visited Oct. 5, 2014).

¹¹ *A Timeline of AIDS*, AIDS.GOV, <http://aids.gov/hiv-aids-basics/hiv-aids-101/aids-timeline> (last visited Oct. 5, 2014).

¹² *Worldwide HIV & AIDS Statistics*, AVERT, <http://www.avert.org/worldwide-hiv-aids-statistics.htm> (last visited Oct. 6, 2014).

¹³ See, e.g., Mike Stobbe, *HIV Patients Live Years after Diagnosis*, USA TODAY (Nov. 11, 2006, 3:59 AM), http://usatoday30.usatoday.com/news/health/2006-11-11-hiv-study_x.htm.

¹⁴ *Worldwide HIV & AIDS Statistics*, *supra* note 12.

¹⁵ Stobbe, *supra* note 13.

¹⁶ See William B. Aldernberg, Note, *Bursting at the Seams: An Analysis of Compassionate-Release Statutes and the Current Problem of HIV and AIDS in U.S. Prisons and Jails*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 541, 548 (1998) (explaining that compassionate release is the early release of HIV-infected prisoners from jail as they near death).

including last will and testaments,¹⁸ living wills,¹⁹ powers of attorney,²⁰ and standby guardianships.²¹ However, as the average life expectancy has increased by more than fifteen years,²² the demand for such services has decreased.²³ As a result, HIV-infected clients present legal issues either completely unrelated or only tangentially related to their HIV-status. While the client's HIV status may have little to no bearing on the case, it does, however, affect the attorney–client relationship. Through our work

¹⁷ Persons who have HIV/AIDS and cannot work may qualify for disability benefits from the Social Security Administration. *Paying for HIV Care*, WOMENSHEALTH.GOV (July 1, 2011), <http://womenshealth.gov/hiv-aids/living-with-hiv-aids/paying-for-hiv-care.html>. The Social Security Administration provides disability benefits under two programs: the Social Security disability insurance program for people who paid Social Security taxes; and the Supplemental Security Income program for people who have little income and few resources. *Id.* But see Adrienne Jones, *The More Things Change, the More They Stay the Same: A Section 504 Examination of the Social Security Administration's Use of 1993 Medical Criteria to Determine Disability in 2014*, 22 AM. U. J. GENDER SOC. POL'Y & L. 651, 652 (2014) (“Access to social security benefits for individuals asserting HIV infection-related claims has decreased considerably in recent years.”).

¹⁸ A last will and testament is “[t]he instrument ultimately fixing the disposition of real and personal property at the testator's death.” *Last Will*, BLACK'S LAW DICTIONARY 1736 (9th ed. 2009).

¹⁹ A living will is “[a]n instrument, signed with the formalities statutorily required for a will, by which a person directs that his or her life not be artificially prolonged by extraordinary measures when there is no reasonable expectation of recovery from extreme physical or mental disability.” *Living Will*, BLACK'S LAW DICTIONARY 1018 (9th ed. 2009).

²⁰ A power of attorney is “[a]n instrument granting someone authority to act as agent or attorney-in-fact for the grantor. Or, the legal ability to produce a change in legal relations by doing whatever acts are authorized.” *Power of Attorney*, BLACK'S LAW DICTIONARY 1290 (9th ed. 2009).

²¹ “The purpose of standby guardianship is to allow parents, who have chronic, debilitating, or terminal medical conditions or illnesses, to make care and custody plans for their children now that will become effective at some future date.” *AIA Fact Sheet*, STANDBY GUARDIANSHIP 1 (Aug. 2000), <http://standbyguardianship.org/pdf/AIA-SBGFactSheet.pdf>.

²² See *A 15-Year Jump in Life Expectancy for People with HIV*, AIDSMEDS (July 16, 2013), http://www.aidsmeds.com/articles/life_expectancy_1667_24239.shtml (“American and Canadian people whose HIV is treated with antiretrovirals (ARVs) enjoyed an increase in life expectancy of 15 years between the time periods of 2000 to 2002 and 2006 to 2007.”).

²³ But see Nancy J. Knauer, *Gay and Lesbian Elders: Estate Planning and End-of-Life Decision Making*, 12 FL. COASTAL L. REV. 163, 166–67 (2010) (noting the increased importance of estate-planning documents since the HIV/AIDS epidemic of the late 1980s).

in the Clinic, it is clear that attorneys who represent clients with HIV and AIDS must be aware of the unique nature of the virus and the enhanced ethical duties to those clients.

III. THE HIV/AIDS EPIDEMIC

HIV, the human immunodeficiency virus, is a lentivirus²⁴ that causes the acquired immunodeficiency syndrome (AIDS), a condition in which progressive failure of the immune system allows life-threatening opportunistic infections and cancers to thrive.²⁵ HIV is spread through contact with the blood, semen, vaginal fluid, or breast milk of a person infected with HIV. HIV cannot be transmitted through casual contact.²⁶

Symptoms related to HIV are usually due to a different infection in the body.²⁷ Some symptoms related to HIV infection include diarrhea, fatigue, fever, headache, mouth sores, skin rashes, muscle stiffness and aching, and swollen lymph glands.²⁸ People who become infected with HIV may not have any symptoms for up to 10 years, and many people have no symptoms at all on the day they are diagnosed with HIV.²⁹

More than 35 million people are infected with HIV worldwide.³⁰ Of those infected, an estimated 1.1 million live in the United States.³¹ Washington, D.C., where the Clinic is located, has the highest rate of HIV diagnosis in the United States.³² “[A]pproximately 2.7% of the population is living with HIV, which exceeds UNAIDS’ definition of a ‘generalized’ epidemic.”³³

²⁴ “*Lentivirus* is a genus of slow viruses of the Retroviridae family, characterized by a long incubation period.” *What is Lentivirus?*, NEWS MEDICAL (Sept. 16, 2014), <http://www.news-medical.net/health/Lentivirus-What-is-Lentivirus.aspx>.

²⁵ *HIV/AIDS: MedlinePlus Medical Encyclopedia*, MEDLINEPLUS (May 19, 2013), <http://www.nlm.nih.gov/medlineplus/ency/article/000594.htm>.

²⁶ *Id.*

²⁷ *See Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Statistics: Worldwide*, AMFAR, <http://www.amfar.org/about-hiv-and-aids/facts-and-stats/statistics--worldwide> (last updated July 2014).

³¹ *Statistics: United States*, AMFAR, <http://www.amfar.org/About-HIV-and-AIDS/Facts-and-Stats/Statistics--United-States> (last updated July 2014) (approximately 18.1% are unaware of their HIV-positive status).

³² *The HIV/AIDS Epidemic in Washington, D.C.*, HENRY J. KAISER FAMILY FOUND. (July 2012), <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8335.pdf>.

³³ *Id.* A “generalized” epidemic is “having HIV prevalence greater than 1% of the population.” *Id.*

Globally, nationally, and in the District of Columbia, Africans and African Americans have high rates of HIV infection.³⁴ Women are also disproportionately affected by the epidemic. Worldwide, “[w]omen constitute more than half of all people living with HIV/AIDS.”³⁵ In the United States, “[w]omen account for one in five new HIV diagnoses and deaths caused by AIDS.”³⁶ African American women are at greater risk than white women.³⁷ The HIV infection rate among African American women is nearly twenty times higher than the rate among white women.³⁸ In Washington, D.C., Black women represent a third (34%) of Blacks living with HIV and 92% of all infected women.³⁹

There is no cure for HIV/AIDS;⁴⁰ however, the U.S. Food and Drug Administration (FDA) has approved thirty-seven antiretroviral drugs to treat HIV infection and suppress the virus.⁴¹ While the drugs extend and improve the quality of life, an estimated 36 million people have died of AIDS worldwide since the first cases were reported in 1981.⁴² Through

³⁴ See AMFAR, *supra* note 30 (“More than two-thirds (70%) of all people living with HIV, 24.7 million, live in sub-Saharan Africa—including 91% of the world’s HIV positive children. In 2013, an estimated 1.5 million people in the region became newly infected. In 2013, an estimated 1.5 million people in the region became newly infected. An estimated 1.1 million adults and children died of AIDS, accounting for 73% of the world’s AIDS death in 2013.”); AMFAR, *supra* note 31 (“African Americans accounted for 47% of new HIV infections diagnosed in 2011, although, they comprise only 14% of the [U.S.] population.”); HENRY J. KAISER FAMILY FOUND., *supra* note 32 (African Americans have the highest HIV prevalence in Washington D.C.).

³⁵ *Statistics: Women and HIV/AIDS*, AMFAR (July 2014), <http://www.amfar.org/About-HIV-and-AIDS/Facts-and-Stats/Statistics--Women-and-HIV-AIDS>.

³⁶ *Id.*

³⁷ See AMFAR, *supra* note 31.

³⁸ *Id.*

³⁹ HENRY J. KAISER FAMILY FOUND., *supra* note 32.

⁴⁰ *About HIV/AIDS*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 12, 2014), <http://www.cdc.gov/hiv/basics/whatishiv.html#panel0>.

⁴¹ See *Antiretroviral Drugs Used in the Treatment of HIV Infection*, U.S. FOOD & DRUG ADMIN. (Sept. 25, 2014), <http://www.fda.gov/forpatients/illness/hivaids/treatment/ucm118915.htm>. The drugs are categorized as: multi-class combination products, nucleoside reverse transcriptase inhibitors, nonnucleoside reverse transcriptase inhibitors, protease inhibitors, fusion inhibitors, entry inhibitors, and HIV integrase strand transfer inhibitors. *Id.*

⁴² *Global AIDS Overview*, AIDS.GOV (Dec. 18, 2013), <http://aids.gov/federal-resources/around-the-world/global-aids-overview>.

2010, the cumulative estimated number of deaths of persons with an AIDS diagnosis in the United States was 636,048.⁴³

IV. HIV-SPECIFIC CONFIDENTIALITY LAWS

In the early 1990s, a study performed in the United States discovered ongoing stigmas associated with AIDS.⁴⁴ One-third to one-fifth of the public either viewed infected persons negatively, believed the infection was deserved, or believed that such infection warrants punitive measures to be taken against the infected person.⁴⁵ Such views caused discrimination and violence.⁴⁶ Discrimination became apparent as employment, health services, insurance, and housing began being denied to infected persons.⁴⁷

To address the ramifications of a disease viewed as greatly unique, laws were put in place by individual states to protect infected persons.⁴⁸ These included confidentiality laws intended to provide a way for persons to be tested for HIV without fear of reprisal.⁴⁹ Confidentiality laws were enacted to encourage people to get tested by offering them assurances of confidentiality.⁵⁰ One court dealing with the issue of confidentiality amidst the HIV/AIDS epidemic stated that maximum confidentiality is “an essential public health measure.”⁵¹ The court explained that the state has an interest in having “clear and certain rules” protecting those affected by HIV from improper disclosure.⁵² Enhancing the confidentiality of HIV-related information would encourage individuals to have their health

⁴³ *HIV Surveillance Report: Diagnoses of HIV Infection in the United States and Dependent Areas, 2011*, CENTERS FOR DISEASE CONTROL & PREVENTION, Feb. 2013, at 45.

⁴⁴ Gregory M. Herek & John P. Capitanio, *Public Reaction to AIDS in the United States: A Second Decade of Stigma*, 83 AM. J. PUB. HEALTH 574, 574 (1993).

⁴⁵ *Id.* at 575.

⁴⁶ Richard Parker & Peter Aggleton, *HIV and AIDS-related Stigma and Discrimination: A Conceptual Framework and Implications for Action*, 57 SOC. SCI. & MED. 13, 22 (2003).

⁴⁷ Roger Doughty, *The Confidentiality of HIV-Related Information: Responding to the Resurgence of Aggressive Public Health Interventions in the AIDS Epidemic*, 82 CAL. L. REV. 111, 124 (1994).

⁴⁸ *Id.* at 141.

⁴⁹ *Id.* at 165.

⁵⁰ *People v. Pedro M.*, 630 N.Y.S.2d 208, 212 (N.Y. Crim. Ct. 1995).

⁵¹ *Id.*

⁵² *Id.*

tested, select appropriate treatments, and changed the behaviors that may put them and others at risk of contracting the HIV virus.⁵³

Virtually every state has confidentiality provisions to prevent disclosure of certain materials as either HIV-specific or public health data.⁵⁴ To whom HIV-specific disclosure laws apply vary from state to state.⁵⁵ While some statutes explicitly list those who must comply, others do not.⁵⁶ Generally, these laws apply to all persons and institutions that conduct HIV testing or have direct access to test results, with the intent of prohibiting negligent or willful disclosure to a third party and attach penalties for violators.⁵⁷

Courts have yet to hold that HIV-specific statutes apply to attorneys,⁵⁸ however, three arguments suggest that these laws impose upon lawyers a heightened duty of confidentiality when representing clients with HIV/AIDS: (1) the attorney–client relationship is built upon confidentiality, and any state statute that adds additional layers of

⁵³ *Id.* (“The Legislative intent in creating Article 27-F of the Public Health Law was to encourage people to take an HIV test without having to worry about discrimination and to protect a person’s privacy rights.”).

⁵⁴ Lawrence O. Gostin et al., *Legislative Survey of State Confidentiality Laws, with Specific Emphasis on HIV and Immunization*, ELECTRONIC PRIVACY INFO. CENTER, http://epic.org/privacy/medical/cdc_survey.html (last visited Oct. 1, 2014). “Some states designate HIV-related information as ‘super confidential,’ which imposes special burdens on health care providers and grants patients a high degree of control over any disclosures.” *Id.* Some statutes distinguish “test results” from a person’s HIV status or “HIV-related information.” *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See, e.g., Pedro M.*, 630 N.Y.S.2d at 215. The government conceded that the District Attorney’s Office’s disclosure of a complainant’s HIV status was a violation of the state’s HIV-specific confidentiality statute, Public Health Law Article 27-F. *Id.* at 211. The statute states, “No person who obtains confidential HIV related information in the course of providing any health or social service or pursuant to a release of confidential HIV related information may disclose or be compelled to disclose such information” *Id.* (quoting N.Y. PUB. HEALTH LAW § 2782 (McKinney 2012)). Article 27-F also provides for a civil penalty of up to \$5,000 per occurrence for a violation of this statute. *Id.* (citing N.Y. PUB. HEALTH LAW § 2783 (McKinney 2012)). *But see Jeffrey H. v. Imai, Tadlock & Keeney*, 101 Cal. Rptr. 2d 916, 916–17 (Cal. Ct. App. 2001) (holding that the confidentiality statute did not apply to a law firm that used confidential medical records disclosing litigant’s HIV status in an arbitration proceeding). This article does not argue that the laws should apply to lawyers generally, but should inform the way that lawyers representing clients interpret their duty under Rule 1.6.

protection to the client should apply to lawyers;⁵⁹ (2) lawyers, like other professionals who must comply with the law, have access to HIV test results and other medical documentation revealing a client's HIV status;⁶⁰ and (3) lawyers are bound by ethical rules, which are to be interpreted consistent with the law.⁶¹ As the *Pedro* court held, “[S]trong confidentiality protections can limit the risk of discrimination and the harm to an individual's interest in privacy that unauthorized disclosure of HIV related information can cause.”⁶²

V. CLIENT CONFIDENTIALITY UNDER THE MODEL RULES OF PROFESSIONAL CONDUCT

A. *Model Rule 1.6*

A comment to Rule 1.6 of the American Bar Association (ABA) Model Rules of Professional Conduct states, “A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.”⁶³ The ABA has been the principal source of ethical confidentiality rules since the turn of the century.⁶⁴ In 1908, the ABA enacted the Canons of Professional Ethics.⁶⁵ In 1969, it enacted the Model Code of Professional Responsibility.⁶⁶ Later still, the ABA enacted the Model Rules of

⁵⁹ See Scott H. Isaacman, *The Conflict Between Illinois Rule 1.6(b) and the AIDS Confidentiality Act*, 25 J. MARSHALL L. REV. 727, 734 (1992) (arguing that although attorneys are not health care providers, HIV disclosures made by a client to an attorney clearly fall within the protection of the Illinois AIDS Confidentiality Act).

⁶⁰ See Kohn, *supra* note 2, at 572 (“These limited readings of HIV statutes indicate that an attorney who does not have access to a client’s medical records would not be liable for disclosure of her client’s HIV status in violation of a state confidentiality statute.”).

⁶¹ The preamble to the ABA Model Rules states that the Rules “should be interpreted with reference to the purposes of legal representation and of the law itself.” MODEL RULES OF PROF’L CONDUCT pmbl. 14 (2013). Comment 18 to ABA Model Rule 1.6 states: “Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law . . . is beyond the scope of these Rules.” *Id.* at R. 1.6 cmt. 18 (2013). See also Isaacman, *supra* note 59.

⁶² 30 N.Y.S.2d at 212.

⁶³ MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 2 (2013).

⁶⁴ Brian R. Hood, Comment, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure after the Death of the Client*, 7 GEO. J. LEGAL ETHICS 741, 750 (1994).

⁶⁵ *Id.*

⁶⁶ *Id.* at 751.

Professional Conduct in 1983.⁶⁷ Model Rule 1.6 governs the confidentiality of client information and contains both compulsory and discretionary provisions.⁶⁸ While an attorney's duty of confidentiality applies at all times and concerns all information relating to the representation of the client, the Rule permits disclosure under limited circumstances.⁶⁹ For the purposes of this article, the reader should assume that no exceptions exist which would permit disclosure of the client's HIV status over his object.

B. Ethics Opinions

The ABA Model Rules of Professional Conduct were adopted by the ABA House of Delegates only one year after AIDS was formally recognized by medical professionals in the United States.⁷⁰ As such, the Model Rules make no mention of HIV or AIDS and provide no specific guidance to attorneys representing infected client.⁷¹ The Rules do not contemplate the myriad of ethical issues that would arise, most of which relate to confidentiality or mandatory and permissive disclosure. Over the years, state bar ethics committees have provided little guidance through the issuance of formal or informal ethics opinions.

The first of such opinions was issued just five years later, in 1988.⁷² The Delaware Bar Association Ethics Committee was presented with a hypothetical involving an HIV-infected client engaging in sexual conduct with an uninformed partner.⁷³ The Committee opined that an attorney could not disclose the client's HIV status without the client's consent.⁷⁴ The decision was based on two factors: (1) the uncertainty of transmission through sexual conduct and (2) the absence of a state law criminalizing the

⁶⁷ *Id.* at 752. See also *Model Rules of Professional Conduct*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Oct. 5, 2014) [hereinafter *About the Model Rules*]. The Rules "serve as models for the ethics rules of most states," with California remaining "the only state that does not have professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct." *Id.*

⁶⁸ See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013).

⁶⁹ *Id.*

⁷⁰ Hood, *supra* note 64, at 752; *History of HIV & AIDS in the U.S.*, AVERT (May 30, 2014), <http://www.avert.org/history-hiv-aids-us.htm>.

⁷¹ See generally MODEL RULES OF PROF'L CONDUCT (2013) (nowhere in the entirety of the Model Rules is the term HIV or AIDS specifically mentioned).

⁷² Delaware Bar Ass'n Prof'l Ethics Comm., Formal Op. 1988-2 (1988).

⁷³ *Id.*

⁷⁴ *Id.* at 1-2.

conduct.⁷⁵ The committee opined that the facts presented did not implicate the exception to the rule requiring the attorney to maintain the client's confidences.⁷⁶ Therefore, the attorney could not disclose the client's HIV status without his permission but could strongly urge the client to make the disclosure.⁷⁷

In 1995, the Philadelphia Bar Association issued Ethics Opinion 95-19, which addresses whether an attorney responding to a discovery request could provide medical records disclosing his client's HIV status over his client's objection.⁷⁸ In a personal injury case, the defense requested complete medical information about the client's condition prior to the time of the accident.⁷⁹ In consideration of Rule 1.6 and the state AIDS confidentiality statute, the committee recommended that the attorney object to providing the documentation or seek a protective order.⁸⁰

Both ethics opinions make it clear that attorneys privy to information related to a client's positive HIV diagnosis must make efforts to keep that information confidential.⁸¹ While neither the Rules nor the opinions explicitly require lawyers to be proactive about avoiding unintended disclosure of client information, this mandate should be implied in all cases where the confidence or secret involves a client's positive HIV-status. This interpretation is consistent with HIV-specific confidentiality laws⁸² and ABA Model Rule 1.6(c), which states, "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."⁸³ Therefore, lawyers representing HIV-positive clients owe a heightened duty of confidentiality to protect the client's HIV-status.

VI. HEIGHTENED DUTY OF CONFIDENTIALITY

The duty of confidentiality arises from the attorney–client relationship; a heightened duty arises when the attorney receives information that the

⁷⁵ *Id.* at 4.

⁷⁶ *Id.* The Delaware rule implicated was identical to ABA Model Rule 1.6. *Id.* at 2.

⁷⁷ *Id.* The Ethics Committee further states that if the lawyer feels morally compelled to make the disclosure, he must do so with the understanding that he may have to accept discipline if he cannot convince a disciplinary authority to read a "moral compulsion" exception into the rule. *Id.*

⁷⁸ Philadelphia Bar Ass'n Prof'l Guidance Comm., Formal Op. 95-19 (1996).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* See also Delaware Bar Ass'n Prof'l Ethics Comm., *supra* note 72.

⁸² See, e.g., OHIO REV. CODE ANN. § 3701.243 (West 2014).

⁸³ MODEL RULES OF PROF'L CONDUCT R. 1.6(c) (2013).

client is HIV-positive. Such information can be provided verbally or in writing and is not limited to test results.⁸⁴ The information may come from the client as a confidence or from a third party as a secret.⁸⁵ If the attorney receives a referral from an organization known to serve the population, as the Clinic routinely did, he may become aware of the client's HIV-status even before speaking with her directly.⁸⁶ Even when the client's status has no bearing on the merits of the case,⁸⁷ a client may disclose his or her status or provide documents that contain references to their HIV-status.⁸⁸

The difference between the traditional duty of confidentiality and a heightened duty of confidentiality is three-fold: (1) heightened confidentiality requires an attorney to protect the information from both intended or "knowing" disclosure *and* unintended disclosure;⁸⁹ (2) heightened confidentiality requires an attorney to make efforts to prevent disclosure by the client and third parties;⁹⁰ and (3) heightened confidentiality may require attorney to interpret the ethics rules more broadly and protect a client's HIV-status, even when it is not otherwise required by Rule 1.6.⁹¹

⁸⁴ See Gostin et al., *supra* note 54 (giving examples of when disclosing HIV-related information is permissible).

⁸⁵ See D.C. BAR ASS'N RULES OF PROF'L CONDUCT R. 1.6(b) ("'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.")

⁸⁶ *General Practice Clinic*, UDC DAVID A. CLARKE SCHOOL OF LAW, <http://www.law.udc.edu/?page=GenPracticeClinic> (last visited Oct. 5, 2014) ("The General Practice Clinic is a one-semester clinic in which student attorneys represent low-income clients, including those infected with and affected by HIV and AIDS . . .").

⁸⁷ This author acknowledges that a client's health status always impacts the relationship between the client and the lawyer as the client's HIV serostatus can be viewed as cultural identifier. See Sue Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 41 (2001) ("Cultural groups and cultural norms can be based on ethnicity, race, gender, nationality, age, economic status, social status, language, sexual orientation, physical characteristics, marital status, role in family, birth order, immigration status, religion, accent, skin color or a variety of other characteristics."). Thus, a basic understanding of the medical and psychosocial aspects of HIV and AIDS is crucial for any attorney representing a client with HIV.

⁸⁸ Gostin et al., *supra* note 54.

⁸⁹ See Michael Benson et al., *Do No Harm: The Importance of Safeguarding the Confidentiality of HIV-Positive Clients*, 18 N. C. ST. B. J., no. 3, 2013, at 19, 20.

⁹⁰ *Id.*

⁹¹ *Id.* at 20.

Heightened confidentiality, however, does not exempt the attorney from complying with other ethical duties, such as candor to the tribunal.⁹² In addition, a lawyer cannot rely on his duty to an HIV-positive client as an excuse for not responding to discovery requests unless a protective order is sought.⁹³ Opinions like *In re Griffith*⁹⁴ and Philadelphia Bar Association Ethics Opinion 95-19⁹⁵ clearly state that, while attorneys may rely on state laws and the public policy considerations underlying those laws to protect HIV-related information, they cannot violate other ethical rules in doing so.⁹⁶

In *In re Griffith*, an attorney was suspended from his practice for a year for allowing false statements to be made to the court and opposing counsel.⁹⁷ Not wanting to violate the state confidentiality law, the attorney did not reveal his client's HIV status during litigation.⁹⁸ The status was revealed inadvertently.⁹⁹ Subsequently, bar counsel sought a two-year suspension, but the Board of Bar Overseers recommended that the attorney be publically reprimanded instead.¹⁰⁰ On bar counsel's appeal, the attorney argued that a public reprimand was sufficient, in part because of uncertainty about what level of disclosure was permitted under an HIV

⁹² MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2013) (prohibiting an attorney from "knowingly mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer"); D.C. RULES OF PROF'L CONDUCT R. 3.3(a) (2007) (containing the same prohibition as the ABA Model Rules unless correcting the false statement "would require disclosure of information that is prohibited by Rule 1.6.").

⁹³ See *In re Griffith*, 800 N.E.2d 259, 265 (Mass. 2003) (noting that the attorney representing his client with HIV should have made an objection and asserted a privilege rather than withholding discovery requested which included HIV diagnosis); Philadelphia Bar Ass'n Prof'l Guidance Comm., Formal Op. 95-19 (1996) ("[A]n appropriate procedural response of your choosing such as objections contained in your discovery responses or a motion for protective order should allow you to fulfill your ethical obligation to your client under Rule 1.6 as well as your obligation to your opponent under Rule 3.4.").

⁹⁴ 800 N.E.2d 259 (Mass. 2003).

⁹⁵ Philadelphia Bar Ass'n Prof'l Guidance Comm., Formal Op. 95-19 (1996).

⁹⁶ See *In re Griffith*, 800 N.E.2d at 265 ("Lawyers, nonetheless, despite the tension of litigation are always responsible for maintaining the ethical standards of the profession . . ."); Philadelphia Bar Ass'n Prof'l Guidance Comm., Formal Op. 95-19 (1996).

⁹⁷ *In re Griffith*, 800 N.E.2d at 259–60.

⁹⁸ *Id.* at 265.

⁹⁹ *Id.* at 262.

¹⁰⁰ *Id.* at 260.

protective statute.¹⁰¹ The high court imposed a one-year suspension on the attorney, holding that the HIV legislation was not a mitigating factor since the attorney could have simply disclosed the treating clinic and then invoked privilege, if necessary.¹⁰²

The Philadelphia ethics opinion likewise states that attorneys wishing to avoid disclosure of HIV-related information must employ the appropriate procedural response, such as objecting to discovery requests or seeking a protective order.¹⁰³ This “should allow [the attorney] to fulfill [his] ethical obligation to [his] client under Rule 1.6 as well as [his] obligation to [his] opponent under Rule 3.4.”¹⁰⁴

VII. AVOIDING UNINTENDED DISCLOSURE

Attorneys are required to protect the client’s HIV-status from both intended or knowing disclosure *and* unintended disclosure by the attorney, the client, and third parties.¹⁰⁵ There is increased potential for unintended disclosure during litigation, where the attorney is corresponding with opposing counsel, interviewing witnesses, filing documents with the court, and engaging in other facets of the litigation process.¹⁰⁶ In each, the attorney must be hyper-vigilant to avoid disclosing the client’s HIV-status.¹⁰⁷ Understanding, however, that the consequences to the client are potentially the same regardless of the source of the disclosure, lawyers representing clients with HIV and AIDS should also make every effort to ensure that there is no unintended disclosure of the client’s HIV-status by anyone under the attorney’s “control.”

A. *Disclosure by the Attorney*

Being new to the profession, student attorneys enrolled in the Clinic are extremely cautious not to violate the Rules of Professional Conduct. For instance, the students became quite aware that even mentioning the

¹⁰¹ *See id.* at 264.

¹⁰² *Id.* at 265. The public reprimand was disposed of on appeal; the Supreme Judicial Court held that a one-year suspension was the appropriate sanction. *Id.*

¹⁰³ Philadelphia Bar Ass’n Prof’l Guidance Comm., Formal Op. 95-19 (1996).

¹⁰⁴ *Id.* Rule 3.4 requires fairness to opposing parties and attorneys. MODEL RULES OF PROF’L CONDUCT R. 3.4 (2013). Rule 1.6 requires a lawyer to not reveal information relating to the representation of a client unless the client gives informed consent. *Id.* at R. 1.6.

¹⁰⁵ *See* Benson et al., *supra* note 89.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Clinic's name may disclose the client's HIV status.¹⁰⁸ In one case, the students struggled with how to identify themselves on the telephone. While searching for a birth father in a custody case, the students called each "John Smith" in the telephone book. Not wanting to leave a message indicating that they were with the "UDC HIV/AIDS Legal Clinic", they identified themselves as being from the "UDC Legal Clinic". Similarly, the Clinic's letterhead and outgoing voicemail purposely fails to mention "HIV/AIDS".

The Clinic is one of a host of organizations whose name could potentially disclose a client's status. A review of the American Bar Association's Directory of Legal Resources for People with HIV/AIDS¹⁰⁹ reveals that 76% of organizations and projects serving the population have the word "HIV" and/or "AIDS" in their title.¹¹⁰ While eligibility may be limited to HIV-positive individuals, many provide general civil litigation services, including bankruptcy, landlord-tenant, and family law.¹¹¹ Of the organizations without "HIV" and "AIDS" in the title, some provide indication of their connection to the community by including the name Ryan White¹¹² or references to other gay men.¹¹³

¹⁰⁸ Not all of the Clinic's clients are HIV-positive. The Clinic represents persons infected with and affected by HIV. *General Practice Clinic*, UDC DAVID A. CLARKE SCHOOL OF LAW, <http://www.law.udc.edu/?page=GenPracticeClinic> (last visited Oct. 5, 2014). In addition, the Clinic represents parents in abuse and neglect cases. *Id.*

¹⁰⁹ *Directory of Legal Resources for People with HIV/AIDS*, A.B.A. (June 2006), https://www.americanbar.org/content/dam/aba/images/aids_coordinating_project/aids_directory.pdf.

¹¹⁰ *See id.* at 226–27.

¹¹¹ *General Practice Clinic*, UDC DAVID A. CLARKE SCHOOL OF LAW, <http://www.law.udc.edu/?page=GenPracticeClinic> (last visited Oct. 5, 2014).

¹¹² *Who Was Ryan White?*, HEALTH & ADMIN. RESOURCES, <http://hab.hrsa.gov/about/ryanwhite.html> (last visited Oct. 5, 2014). Ryan Wayne White, who died in April 1990, was an American teenager from Kokomo, Indiana, who became a national poster child for HIV/AIDS in the United States, after being expelled from middle school because of his infection. *Id.* Shortly after his death, Congress enacted The Ryan White Comprehensive AIDS Resources Emergency (CARE) Act in his honor. The act is the United States' largest federally funded program for people living with HIV/AIDS. *Id.*

¹¹³ *HIV Among Gay and Bisexual Men*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/risk/gender/msm/facts> (last visited Oct. 5, 2014). In 2010, gay and bisexual men accounted for 63% of estimated new HIV infections in the United States and 78% of infections among all newly infected men. *Id.*

Signage presents a different problem. Internally, signs are necessary to denote which office belongs to which clinic.¹¹⁴ In one case, a client needed to appoint a standby guardian to care for her minor son if she became incapacitated.¹¹⁵ This process requires the appointed guardian to sign an acceptance of the designation. For a variety of reasons, the client did not want anyone, including the designee, to know her HIV-status. Due to the urgency of the case and the student's availability, they scheduled to meet the client at the law school. During case rounds,¹¹⁶ however, it was mentioned that, while on campus, the designee may see the Clinic office sign and become aware of the client's status and true reason for needing a standby guardian. The venue was changed to ensure maintenance of the client's confidence.

Attorneys must also avoid unintended disclosure resulting from negligent storage of HIV-related documents. Commonly, files and documents are stored or transferred electronically using the "Cloud."¹¹⁷ Several other bar associations have issued ethics opinions on "cloud computing."¹¹⁸ DC Bar Ethics Opinion 281, issued in 1998, specifically refers to transmission of client confidential information by electronic mail.¹¹⁹ In it, the Ethics Committee changes course from a prior decision, stating that Rule 1.6 "does not require absolute security in protecting confidentiality; it requires reasonable effort to maintain confidentiality."¹²⁰ The Committee did, however, recognize that certain circumstances require attorneys to exercise a higher level of confidentiality.¹²¹ "What may

¹¹⁴ *Introduction to the Clinical Program*, UDC DAVID A. CLARKE SCHOOL OF LAW, <http://www.law.udc.edu/?page=ClinicIntro> (last visited Oct. 5, 2014). There are nine legal clinics at the University of the District of Columbia School of Law. *Id.* Although the clinics function as one law firm, each legal clinic has its own office and filing system, accessible only to students enrolled in the respective clinic. *Id.*

¹¹⁵ STANDBY GUARDIANSHIP, *supra* note 21.

¹¹⁶ Case rounds are a common feature of the seminar component of clinical programs. See Susan Bryant & Elliott S. Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?*, 14 CLINICAL L. REV. 195, 195 (2007) (exploring the learning goals and theory of case rounds).

¹¹⁷ The "Cloud" refers to a network of computer servers on which information is stored remotely. BLACK'S LAW DICTIONARY 311 (10th ed. 2014).

¹¹⁸ See, e.g., *Cloud Ethics Opinions Around the U.S.*, A.B.A., http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html (last visited Oct. 5, 2014).

¹¹⁹ See D.C. Bar Legal Ethics Comm., Formal Op. 281 (1998).

¹²⁰ *Id.*

¹²¹ *Id.*

ordinarily be permissible . . . may not be acceptable in the context of a particularly heightened degree of concern or in a particular set of facts.”¹²²

More recent opinions from other jurisdictions mention “the cloud” and reach similar conclusions.¹²³ The consensus of 14 jurisdictions is that “while ‘cloud computing’ is permissible, lawyers should proceed with caution because they have an ethical duty to protect sensitive client data.”¹²⁴ While the Rules do not prohibit the use of applications like Google Docs, specific privacy and security concerns, as well as unanswered questions, such as “Can the host view private documents?” and “Can documents ever be deleted from the server?” suggest that use of the “Cloud” to store HIV-related documents should be restricted.

Several years ago, the Clinic instituted the “HIV/AIDS Legal Clinic Standard Operating Procedure for Use of Google Docs.”¹²⁵ The Standard Operating Procedure (SOP) attempts to balance the benefits of using the “Cloud” (collaboration, efficiency, accessibility) with the confidentiality concerns by requiring a secure password and stringent privacy settings.¹²⁶ The SOP further prohibits uploaded documents containing client-identifying information.¹²⁷

B. Disclosure by a Third Party

While lawyers have less control over the actions of third parties and cannot be held liable for third-party actions,¹²⁸ care should be taken impress upon them the importance of maintaining the confidentiality of HIV-related information. In addition, the lawyer should remind the third party of his own duty not to disclose under ethical rules and state statutes.¹²⁹

¹²² *Id.*

¹²³ *See, e.g.,* A.B.A., *supra* note 118.

¹²⁴ Pennsylvania Bar Ass’n Comm. on Legal Ethics & Prof’l Responsibility, Formal Op. 2011-200 (2011).

¹²⁵ *See infra* Appendix.

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *See* D.C. RULES OF PROF’L CONDUCT R. 1.6(f) (2007). *See also* MODEL RULES OF PROF’L CONDUCT 1.6 cmt. 18 (2013) (requiring the attorney to exercise reasonable care to prevent the lawyer’s employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of the client).

¹²⁹ Commonly, professionals such as social workers and doctors are called as witnesses. *See* NASW Standards for Social Work Case Management, NAT’L ASS’N SOC. WORKERS 21 (2013), <http://www.socialworkers.org/practice/naswstandards/CaseManagementStandards2013.pdf>. Such witnesses may be prohibited from disclosing the client’s HIV status

This may not always be appropriate, however, especially when the third party is unknown to the lawyer or is not under his direction.¹³⁰ In these circumstances, attorneys representing clients with HIV and AIDS are duty-bound to make every effort to anticipate the risk of unintended disclosure by a third party.¹³¹

Proper witness preparation can decrease the likelihood that a witness with knowledge of a client's HIV-status will disclose inadvertently.¹³² While adhering to the ethical rule requiring candor to the tribunal, lawyers must advise witnesses to avoid using the words "HIV," "AIDS," or any term that might disclose the client's status.¹³³ Instead, when necessary, references can be made to a "medical issue," "condition," or "illness."¹³⁴

Examining witnesses from organizations with the terms "HIV" or "AIDS" in their title creates a unique challenge; however, even when the organization's title does not include "HIV" or "AIDS", the client's HIV-status can be disclosed by the fact that he or she receives services from an organization or individual known to provide services to infected persons. In *In re Griffith*, for example, a witness testified that her brother had received treatment from a particular physician.¹³⁵ Coincidentally, the opposing counsel knew, "apparently for reasons unrelated to [the] trial" that the doctor treated persons with HIV and AIDS.¹³⁶ Thus, not all unintended disclosure can be avoided; however, an attorney always has a

pursuant to state confidentiality statutes as well as professional standards and ethical rules. *See id.* Both the National Association of Social Workers standards and the American Medical Association Code of Medical Ethics require confidentiality. *Id.*

¹³⁰ *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 18 (2013). *See also* D.C. RULES OF PROF'L CONDUCT R. 1.6(f) (2007) (noting that an attorney must exercise reasonable care to prevent a third party from disclosing confidential information).

¹³¹ *See* Benson et al., *supra* note 89, at 22 (discussing the effects of inadvertent disclosure and the attorney's responsibility to avoid this type of disclosure).

¹³² *See* Liisa Renée Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 REV. LITIG. 135, 161 (1999) (discussing the importance of witness preparation and instructing a witness to use certain words when testifying).

¹³³ *See id.* ("[T]he attorney can properly advise her witness to avoid using technical jargon or colloquial expressions, since the attorney wants the witness to tell the jury a story that the jury can understand.").

¹³⁴ *See id.*

¹³⁵ *In re Griffith*, 800 N.E.2d 259, 262 (Mass. 2003).

¹³⁶ *Id.*

duty to make efforts consistent with ABA Model Rule 1.6 to prevent disclosure.¹³⁷

C. Disclosure by the Client

In the Clinic, students are taught to be client-centered lawyers. Throughout the semester, students are reminded that the client makes the major decisions and directs the lawyer. A client-centered approach is premised on the notion that because the client knows the facts about her situation that the lawyer does not, the decisions should be left to the client.¹³⁸ Those decisions, however, should be made after being fully counseled and advised by the attorney as to the potential outcomes, the pros and cons, and the likelihood of achieving a particular goal.¹³⁹

In their role as counselor, student attorneys often find it necessary to discuss disclosure with their clients.¹⁴⁰ This, however, is no substitute for the client receiving mental health counseling focused on disclosure.¹⁴¹ While there are two very distinct goals, a mental health professional's primary concern is the client's emotional health and lessening any detrimental impact resulting from disclosure.¹⁴² On the other hand, a

¹³⁷ See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 18 (2013). Comment 18 lists factors to be considered in determining the reasonableness of the lawyer's efforts. *Id.* Such factors include, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients. *Id.*

¹³⁸ See Katherine R. Kruse, *Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship*, 39 HOFSTRA L. REV. 577, 586 (2011).

¹³⁹ See Kohn, *supra* note 2, at 580.

¹⁴⁰ For purposes of this article, it is assumed that the client's HIV status is not the subject of the litigation and, thus, is not required to be disclosed. However, with any litigation, there is a risk that the client's status may be disclosed.

¹⁴¹ See WORLD HEALTH ORG., MENTAL HEALTH AND HIV/AIDS: BASIC GUIDELINES FOR ANTI-RETROVIRAL (ARV) THERAPY PROGRAMMES 18 (2005) (discussing the purpose of supportive counseling for disclosure of HIV/AIDS).

¹⁴² *Id.* at 19–20. See also Stephanie Law et al., *Disclosure of HIV-Positive Status: Towards the Development of Guidelines, Strategies, and Interventions*, OHTN (March, 2013), <http://www.ohtn.on.ca/Pages/Knowledge-Exchange/Rapid-Responses/Documents/RR66-2013-Disclosure.pdf> (“There have been very few studies examining interventions targeting HIV disclosure. Of the interventions reviewed, those that guided HIV-positive individuals through an introspective process, and helped them develop a disclosure plan and the skills to communicate their status, were found to be most effective in increasing disclosure, and improving disclosure outcomes.”).

lawyer's goal is to impress upon the client the effect that disclosure might likely have on her case, positive or negative.¹⁴³

Clients routinely determine that they do not wish to have their HIV status disclosed. In one such instance, the student attorneys met with the client to prepare her testimony for an upcoming evidentiary hearing. The students explained that the law did not require her to inform the court of the nature of her illness and, if asked, she should allow them to address the court. The client indicated that she understood, and the students felt confident that she would adhere to the plan. During the hearing, however, the judge asked the client about her illness. Before the students could interject, the client informed the judge that she had HIV.

This disclosure by the client was unintended. The client went into the evidentiary hearing not wanting her HIV-status to be disclosed in a public proceeding. After the hearing, the client informed the student attorneys that, despite the advice she had been provided, she did not feel that she could avoid answering the judge's question. She regretted her decision to disclose her status and requested that the student attorneys take measures to minimize the effects of that disclosure.

When attorneys cannot avoid unintended disclosure, they should take remedial action.¹⁴⁴ In *People v. Pedro M.*, the court noted that sealing court records decreases the negative effects of unintended disclosure.¹⁴⁵ The student attorneys requested that the transcript be sealed and that no references to the client's HIV-status be included in the public record, including the court order. The request was granted.

VIII. THE CLIENT'S HIV STATUS AND RULE 1.6

Heightened confidentiality requires the attorney to interpret the ethics rules more broadly and protect a client's HIV-status even when it is not otherwise protected by the state Rule 1.6.¹⁴⁶ Two examples from the Clinic illustrate how basic confidentiality differs from heightened confidentiality.¹⁴⁷

¹⁴³ Kohn, *supra* note 2, at 580.

¹⁴⁴ See *People v. Pedro M.*, 630 N.Y.S.2d 208, 214 (N.Y. Crim. Ct. 1995) (discussing actions that may be taken when disclosure is unavoidable).

¹⁴⁵ *Id.* at 215 ("Since all of these court records and proceedings pertaining to this issue will be sealed, the chance of discrimination is limited.").

¹⁴⁶ See D.C. RULES OF PROF'L CONDUCT R. 1.6 (2007) (protecting information that is revealed in "confidence" or "secret").

¹⁴⁷ Exploring these examples during case rounds and supervision meetings also provides the opportunity to discuss client-centered representation. As a result, the students
(continued)

A. *Example 1*

The first example involves the Clinic's representation of Kevin, a young man whose HIV-status was disclosed publicly. Kevin was the subject of numerous newspaper articles and was featured in a documentary about HIV and AIDS. Furthermore, Kevin participated in national press conferences advocating for services to the HIV/AIDS community and was known locally as an advocate. The student attorneys inquired whether, absent a request from the client to do so, they had a duty to protect Kevin's HIV status. Assuming Kevin did not inform the student attorneys of his status in a privileged conversation, D.C. Rule 1.6 would not require them to protect Kevin's HIV-status. Unlike ABA Model Rule 1.6 and the rules of many other jurisdictions, D.C. Rule 1.6 does not label all information relating to legal representation as confidential.¹⁴⁸ As stated by the D.C. Bar in Ethics Opinion 324, "Material that is not privileged under applicable evidentiary law and does not meet the definition of a 'secret' under D.C. Rule 1.6(b) may be disclosed."¹⁴⁹

The client revealed his status publicly, and one could infer from his actions that further disclosure would be neither embarrassing nor damaging to him. Support for this lies in a report by the Ontario HIV Treatment Network, which posited that "[t]hose who choose to disclose to everyone face the highest risk of stigma and discrimination, but tend to be more prepared to deal with those negative outcomes, have a high sense of self-esteem and have a 'take me as I am attitude.'"¹⁵⁰ Despite these facts, heightened confidentiality would require the attorney to protect the client's HIV-status even if he did not explicitly ask that it be held in confidence.¹⁵¹

It is also important to note that, although the client's HIV-status may be a matter of public record, there is no public records exception to Rule 1.6.¹⁵² The Restatement (Third) of the Law Governing Lawyers creates an exception from the duty of confidentiality for "information that is

begin to view their ethical responsibilities from the HIV-infected client's perspective as well as from their own. From these vantage points, the students gain a greater appreciation for the consequences of unintended disclosure. Because the clinic practices in the District of Columbia, the D.C. Rules of Professional Conduct are applied to the examples presented.

¹⁴⁸ D.C. Bar Legal Ethics Comm., Formal Op. 324 (2004).

¹⁴⁹ *Id.*

¹⁵⁰ Law et al., *supra* note 142.

¹⁵¹ See MODEL RULES OF PROF. L CONDUCT R. 1.6 (2013).

¹⁵² See *id.* (omitting a public records exception).

generally known.”¹⁵³ “Generally known” information is information that is publicly available through electronic searches of public databases, in government offices, or in public libraries, unless it can be obtained only by means of “special knowledge or substantial difficulty or expense.”¹⁵⁴ The Restatement of the Law Governing Lawyers is not binding in any jurisdiction, however.¹⁵⁵

B. Example 2

The second example involves the Clinic’s representation of Marilyn, who retained the Clinic to assist her in appointing her sister as standby guardian for her three young children. The client was informed that her HIV-status would not be disclosed to the court. Before the case was finalized, Marilyn passed away. Her sister requested a copy of her file to complete the process.¹⁵⁶

Despite the advancements in medical treatment, attorneys representing clients with HIV will have clients who die from complications associated with their infection.¹⁵⁷ The heightened duty of confidentiality, like the basic duty of confidentiality, continues after the client’s death.¹⁵⁸ The D.C. Bar, through Ethics Opinion 324, allows attorneys to disclose confidential information when permitted under Rule 1.6, or if the attorney, using his

¹⁵³ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (1998). In 1986, the American Law Institute commissioned a panel to work on the Restatement of Law Governing Lawyers. Lawrence J. Lato, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 701–02 (1998). The Restatement’s provisions governing confidentiality are generally more liberal than the Model Rules. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(1)(a) (1998) (permitting certain disclosures so long as they will not “adversely affect a material interest of the client”).

¹⁵⁴ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (2000).

¹⁵⁵ BLACK’S LAW DICTIONARY 1428 (9th ed. 2009) (“Although the Restatements are frequently cited in cases and commentary, a Restatement provision is not binding on a court unless it has been officially adopted as the law by that jurisdiction’s highest court.”).

¹⁵⁶ The case file includes medical records and other documents referencing the client’s HIV status.

¹⁵⁷ An estimated 15,529 people with an AIDS diagnosis died in 2010. CENTERS FOR DISEASE CONTROL & PREVENTION, *supra* note 43. Cumulatively—from the beginning of the AIDS epidemic through 2010—an approximate 636,048 people in the United States with an AIDS diagnosis have died. *Id.*

¹⁵⁸ D.C. Bar Legal Ethics Comm., Formal Op. 324 (2004) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. e (1998)).

discretion, believes that the client would have wanted the disclosure.¹⁵⁹ Rule 1.6 permits disclosure under three circumstances: “informed consent, implied authority, or an applicable exception.”¹⁶⁰

While the basic tenets of client confidentiality may lead an attorney to conclude that the release of the file and the information contained within is “impliedly authorized . . . in order to carry out the representation,”¹⁶¹ heightened confidentiality requires the attorney to apply a higher standard.¹⁶² ABA Opinion 08-450 limits implied authority to “when the lawyer reasonably perceives that disclosure is necessary . . . and no client may be presumed impliedly to have authorized [harmful] disclosures.”¹⁶³ Unless the client had signed an agreement to the disclosure in writing prior to her death, information relating to the client’s HIV status must be protected and redacted from the file.¹⁶⁴

IX. CONSEQUENCES OF UNINTENDED DISCLOSURE

The confidentiality rules are premised on three rationales: (1) “laymen” must consult attorneys because laymen are untrained in the intricacies of the law; (2) when a client wants information regarding his or her rights and obligations, his or her lawyer must be fully informed of all facts known to the client, and the lawyer must be able to further inquire upon facts which may not seem significant to the client; and (3) clients are usually reluctant to disclose personal or incriminating information to their

¹⁵⁹ *Id.*

¹⁶⁰ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-450 (2008). *See also* D.C. RULES OF PROF’L CONDUCT R. 1.6(e)(1)–(6) (2007).

¹⁶¹ D.C. RULES OF PROF’L CONDUCT R. 1.6(e)(4) (2007).

¹⁶² *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-450 (2008). *See also* Abraham Abramovsky, *A Case for Increased Confidentiality*, 13 FORDHAM URB. L.J. 11, 14 (1985) (“[T]he Code implies that no consideration is more important than the duty of confidentiality Rule 1.6 reinforces the notion that client confidentiality should be a paramount consideration for the attorney.”); Benson et al., *supra* note 89 (“Compliance with the ethical rules when representing HIV positive clients calls for attorneys to be hyper-vigilant about possible disclosure of their client’s HIV status.”).

¹⁶³ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-450 (2008).

¹⁶⁴ *Id.* When redacting information from the file, the attorney must be mindful to eliminate any documentation that might lead to discovery of the client’s HIV status. *Id.* *See also* Benson et al., *supra* note 89 (expressing the importance that “attorneys . . . be hyper-vigilant about possible disclosure of their client’s HIV status”); David Paul Horowitz, “*I Thought That Was Confidential*,” N.Y. ST. B.J., Sept. 2012, at 20, 21 (providing examples where records have been disclosed with redacted “identifying information” in HIV cases).

attorneys unless they are assured that this information will remain confidential.¹⁶⁵ Confidentiality rules form the foundation of the attorney–client relationship.¹⁶⁶ They were established to encourage clients to speak freely, openly and honestly with their lawyers.¹⁶⁷ As such, additional confidentiality requirements strengthen this relationship by guaranteeing that the client’s HIV-status will not be disclosed to a third party without the client’s permission.¹⁶⁸ Unintended disclosure negatively affects the attorney–client relationship, as well as the client and attorney individually.¹⁶⁹

A. *Consequences to the Client*

1. *Stigma*

Despite the changing perception of HIV and AIDS, persons infected with the virus still face social stigma.¹⁷⁰ Social stigma is the phenomenon whereby an individual with an attribute deeply discredited by his or her society is rejected as a result of that attribute.¹⁷¹ Stigma is a process by which the reaction of others spoils normal identity.¹⁷² Diseases associated with the highest degree of stigma share common attributes: the infected individual is viewed as responsible for having the illness; the disease is often progressive and incurable; the disease is misunderstood by the public; and the symptoms cannot be cloaked.¹⁷³ Thus, HIV/AIDS stigma is prevalent and includes “instrumental” AIDS stigma,¹⁷⁴ “symbolic” AIDS stigma,¹⁷⁵ and courtesy AIDS stigma.¹⁷⁶

¹⁶⁵ Robert T. Begg, *Legal Ethics and AIDS: An Analysis of Selected Issues*, 3 GEO. J. LEGAL ETHICS 1, 40–41 (1989).

¹⁶⁶ See ABA Comm. On Ethics & Prof’l Responsibility, Formal Op. 08-450 (2008).

¹⁶⁷ *Id.* See also D.C. RULES OF PROF’L CONDUCT R. 1.6 cmt. 2, 4 (2007).

¹⁶⁸ See *id.* See also Benson et al., *supra* note 89 (“Information about a client’s HIV status is especially sensitive and thus requires special care.”).

¹⁶⁹ See Kohn, *supra* note 2, at 548–49. See also *id.* at 565–66.

¹⁷⁰ Anish P. Mahajan et al., *Stigma in the HIV/AIDS Epidemic: A Review of the Literature and Recommendations for the Way Forward*, 22 AIDS S67, S67 (2008).

¹⁷¹ *Id.* at S70.

¹⁷² *Id.*

¹⁷³ *HIV/AIDS Stigma*, THE BODY (Aug. 2003), <http://www.thebody.com/content/art12405.html>.

¹⁷⁴ *Id.* (“Instrumental [AIDS] stigma [is] a reflection of the fear and apprehension . . . associated with any deadly and [infectious] illness.”).

¹⁷⁵ *Id.* (“Symbolic [AIDS] stigma [is] the use of HIV/AIDS to express attitudes toward the social groups or ‘lifestyles’ perceived to be associated with the disease.”).

Clinic clients, the majority of whom are African American females, commonly fear that family and friends will learn that they are infected. As attorney and mental health expert Tamara Lange wrote, “Particularly in rural areas and in African American, Latino/a and Native American communities, people say that they are afraid of being abandoned by their families and rejected by their churches.”¹⁷⁷ One Clinic client told the students that, once learning that she was HIV positive, her family began requiring that she eat from paper plates and plastic utensils. Another client indicated that she did not want to seek social services from a local provider for fear that her family would learn of her status. “Once the confidence has been revealed, it is impossible to undo the damage.”¹⁷⁸

2. *Discrimination and Physical Harm*

One manifestation of stigma is discrimination.¹⁷⁹ Despite Federal laws that protect people living with HIV and AIDS from discrimination,¹⁸⁰ infected persons often experience unjust and prejudicial treatment, especially in the workplace.¹⁸¹ A recent study conducted by the National Equal Employment Opportunity Commission (EEOC) ADA Research Project found that the allegations of HIV/AIDS discrimination were 10% more likely than other types of allegations to receive merit resolution from the EEOC.¹⁸² “To the extent that workplace discrimination is a behavioral manifestation of negative attitudes and stigmatization, the theory that deeper levels of both are applicable to persons with HIV/AIDS appears to be supported.”¹⁸³ A client of the Clinic experienced workplace discrimination when his supervisees, upon learning of his positive HIV-status, sought reassignment. When the requests were denied, one person submitted a letter of resignation.

¹⁷⁶ *Id.* (“Courtesy HIV-related stigma [is] stigmatization of people connected to the issue of HIV/AIDS or HIV positive people.”).

¹⁷⁷ TAMARA LANGE, *HIV & CIVIL RIGHTS: A REPORT FROM THE FRONTLINES OF THE HIV/AIDS EPIDEMIC 2* (2003).

¹⁷⁸ Begg, *supra* note 165, at 42.

¹⁷⁹ THE BODY, *supra* note 173.

¹⁸⁰ Donald H.J. Hermann, *The Development of AIDS Federal Civil Rights Law: Anti-Discrimination Law Protection of Persons Infected with Human Immunodeficiency Virus*, 33 *IND. L. REV.* 783, 784 (2000).

¹⁸¹ *See id.* at 785. *See also* Benson et al., *supra* note 89 (providing examples of the discrimination faced by clients of a law school clinic representing clients with HIV).

¹⁸² Liza Conyers et al., *Workplace Discrimination and HIV/AIDS: The National EEOC ADA Research Project*, 25 *WORK* 37, 43 (2005).

¹⁸³ *Id.* at 47.

During the course of the attorney–client relationship, many clients will express, either explicitly or implicitly, their desire for heightened confidentiality.¹⁸⁴ In one Clinic case, the client impressed upon the students the importance of confidentiality during their initial meeting. She informed them that she would “just die” if anyone found out that she had HIV. By contrast, another client repeatedly denied that he was HIV-positive and made efforts to convince his student attorney that he was not infected. Several months later, that client finally provided medical records to his student attorney.

Unintended disclosure is arguably more harmful to the client than intended disclosure because it denies the client the opportunity to prepare adequately for the potential ramifications.¹⁸⁵ In *People v. Pedro M.*, the victim of inadvertent disclosure worried that disclosure would “subject him to discrimination and possible physical attack.”¹⁸⁶ He also worried that his career as an entertainer would be in jeopardy if the information was to become public.¹⁸⁷ Similarly, in *United States v. Castillo*,¹⁸⁸ where a litigant’s HIV-status was inadvertently disclosed, the judge cautioned that the disclosure would “place the defendant in unnecessary danger and subject him to needing additional protection.”¹⁸⁹

3. Continued Disclosure

In addition to stigma, discrimination, and threat of physical harm, the disclosure, whether inadvertent or unintended, may open the floodgates to continued disclosure.¹⁹⁰ Courts have held that revealing information in a courtroom affects a person’s ability to later claim that the information is private.¹⁹¹ In *Doe v. Lockwood*, the court stated they did not believe “that

¹⁸⁴ See Janine Sisak, *Confidentiality, Counseling, and Care: When Others Need to Know What Clients Need to Disclose*, 65 *FORDHAM L. REV.* 2747, 2755 (1997) (“People with HIV might forego legal representation altogether if they suspected that HIV-related confidences would not be maintained.”).

¹⁸⁵ See Elizabeth King, *Waving Goodbye to Waiver? Not So Fast: Inadvertent Disclosure, Waiver of the Attorney-Client Privilege, And Federal Rule of Evidence 502*, 32 *CAMPBELL L. REV.* 467, 477 (2010) (arguing that there can be no unintentional waiver).

¹⁸⁶ *People v. Pedro M.*, 165 N.Y.S.2d 208, 211 (N.Y. Crim. Ct. 1995).

¹⁸⁷ *Id.*

¹⁸⁸ 430 F.3d 230 (5th Cir. 2005).

¹⁸⁹ *Id.* at 237.

¹⁹⁰ See *Pedro M.*, 165 N.Y.S.2d at 215 (recommending that attorneys should disclose to medical professionals who, in turn, may disclose to their clients).

¹⁹¹ *Nat’l Polymer Products, Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 421 (6th Cir. 1981).

an individual can claim constitutional protection in the privacy of information that he or she has intentionally revealed, without coercion by the state, to the public. More specifically, where an individual reveals private information in a courtroom, the information is no longer either objectively or subjectively ‘private.’”¹⁹² It is a “well-established principle of American jurisprudence that the release of information in open trial is publication of that information and, if no effort is made to limit its disclosure, operates as a waiver of any rights a party had to restrict its further use.”¹⁹³ Thus, lawyers need to take special care to prevent clients from revealing their HIV-status during a court proceeding, either through testimony or in documents filed with the court.¹⁹⁴

Furthermore, opposing counsel is not prohibited from using and re-disclosing the client’s HIV status.¹⁹⁵ DC Bar Opinion 256, for example, permits attorneys who receive materials containing client’s confidences and secrets to retain and use the documentation.¹⁹⁶ The committee stated, “An interpretation of the ethical rules that required the receiving lawyer to protect the confidentiality of these materials would, we believe, place too much of a burden on the exercise of a lawyer’s obligation to represent his client zealously and diligently.”¹⁹⁷ There is nothing in the opinion to suggest that the analysis would change depending on the nature of the secret or whether it was relevant to the case.¹⁹⁸ Precedent from other jurisdictions suggests that it would not.¹⁹⁹

In *People v. Pedro M.*, the court held that the legislative intent in enacting a state HIV-confidentiality law would not be compromised by allowing an attorney to re-disclose HIV-related information that she had received inadvertently.²⁰⁰ In that case, the prosecution turned over medical records to defense counsel, which referenced the complainant’s HIV status.²⁰¹ After being alerted of the disclosure, the prosecution moved for an order to redact the HIV status of the complainant from the medical

¹⁹² *Doe v. Lockwood*, No. 95-3499, 1996 WL 367046, at *4 (6th Cir. June 27, 1996).

¹⁹³ *Nat’l Polymer Products*, 641 F.2d at 421.

¹⁹⁴ This assumes that the client’s HIV status is not relevant to the cause of action.

¹⁹⁵ D.C. Bar Legal Ethics Comm., Formal Op. 256 (1995).

¹⁹⁶ This interpretation applies when the attorney has no reason to believe that the information has been disclosed inadvertently before he reads it. *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (citing *Aerojet-General Corp. v. Transp. Indem. Ins.*, 22 Cal. Rptr. 2d 862 (Cal. Ct. App. 1993)).

²⁰⁰ *People v. Pedro M.*, 630 N.Y.S.2d 208, 214 (N.Y. Crim. Ct. 1995).

²⁰¹ *Id.* at 211.

records and for an order directing defense counsel not to disclose the complainant's HIV status to her client.²⁰² The court granted the request to redact the documents²⁰³ but held that it would not interfere with the attorney–client relationship by barring the attorney from making the disclosure to her client.²⁰⁴

B. Consequences to the Attorney

Disclosing a client's confidences without her consent can severely impair the attorney–client relationship and may result in disciplinary action against the attorney.²⁰⁵ According to Rule 1.6 of the Model Rules of Professional Conduct, “[f]ailure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.”²⁰⁶ While a “[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached,”²⁰⁷ disclosing a client's HIV-related information in violation of HIV-specific confidentiality laws is a misdemeanor in most jurisdictions.²⁰⁸ The violating attorney may be subject to a tort action for breach of fiduciary duty, improper disclosure, and breach of privacy.²⁰⁹ Further still, “[a]n aggrieved client might pursue remedies for such disclosure through several possible causes of action: a tort action for invasion of privacy, malpractice, intentional infliction of emotional distress, breach of a confidentiality statute or breach of contract.”²¹⁰

²⁰² *Id.*

²⁰³ *Id.* at 214. *See also id.* at 215 (“In addition, the HIV status of the victim has not been shown to be relevant in the assault case at bar and such information will be precluded from use at trial by either side.”).

²⁰⁴ *Id.* at 215.

²⁰⁵ *See* MODEL RULES OF PROF'L CONDUCT R.1.6 cmt. 2 (2013) (“The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively . . .”).

²⁰⁶ MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 19 (2013).

²⁰⁷ MODEL RULES OF PROF'L CONDUCT cmt. 20 (2003).

²⁰⁸ *See* Gostin et al., *supra* note 54. Whether HIV-specific confidentiality laws apply to attorneys is beyond the scope of this article.

²⁰⁹ *See, e.g.,* Nolley v. Cnty. of Erie, 776 F. Supp. 715 (W.D.N.Y. 1991); Doe v. Roe, 599 N.Y.S.2d 347, 347 (N.Y. App. Div. 1993); People v. Pedro M., 630 N.Y.S.2d 208, 209 (N.Y. Crim. Ct. 1995); *In re V.*, 566 N.Y.S.2d 987, 987 (N.Y. Ct. Cl. 1991).

²¹⁰ *See* Kohn, *supra* note 2, at 566.

Even in cases where a client has no direct duty to the HIV-infected person, attorneys have been admonished for violating confidentiality.²¹¹ In one notable case, *United States v. Castillo*, the judge publically reprimanded an attorney when he disclosed the HIV-status of a non-client defendant.²¹² Although the court and defense attorney made efforts not to discuss the nature of the defendant's illness during a public sentencing hearing, the prosecutor intimated that the defendant might have "full-blown AIDS."²¹³ As told by the court, "[The prosecutor] . . . deliberately in open court, in the presence of many other people, including fellow prisoners of this defendant, disclosed the defendant's status, indicating even the possibility that he might have full-blown AIDS, which is a direct violation of the confidential nature of this type of disclosure."²¹⁴ The court continued, "I can only determine from that action that the counsel acted out of stupidity or maliciously and deliberately to try to disclose that information in front of other prisoners in an effort to create harm or danger for this defendant."²¹⁵

X. CONCLUSION

Advancements in the treatment of HIV and AIDS have extended the average lifespan of an infected person.²¹⁶ As such, HIV-infected persons have a variety of legal needs completely unrelated to their "seropositivity."²¹⁷ Attorneys representing these individuals must be mindful of the client's need for confidentiality because the stigma and discrimination of HIV-infected persons has not abated.²¹⁸ Ethical rules prohibit an attorney from knowingly violating client confidentiality by disclosing client secrets and confidences.²¹⁹ Due to the unique nature of

²¹¹ *United States v. Castillo*, 430 F.3d 230, 235–36 (5th Cir. 2005).

²¹² *Id.*

²¹³ *Id.* at 235.

²¹⁴ *Id.*

²¹⁵ *Id.* (stating that the attorney's actions were completely unnecessary, thoughtless, and rude).

²¹⁶ Stobbe, *supra* note 13.

²¹⁷ Christine Coumarelos & Zhigang Wei, *The Legal Needs of People with Different Types of Chronic Illness or Disability*, LAW & JUST. FOUND. NEW S. WALES, May 2009, at 1, 1. "Seropositivity" is defined as "giving a positive (or negative) result in a test of blood serum, especially for the presence of a virus." CONCISE OXFORD ENGLISH DICTIONARY 1315 (11th ed. 2004).

²¹⁸ Gregory M. Herek & John P. Capitano, *Public Reactions to AIDS in the United States: A Second Decade of Stigma*, 83 AM. J. PUB. HEALTH, 574, 576 (1993).

²¹⁹ MODEL RULES OF PROF'L CONDUCT R.1.6 (2013).

HIV and AIDS, attorneys representing infected persons are duty-bound not only to maintain client confidences but also to be proactive about avoiding unintended disclosure of a client's serostatus.²²⁰ This heightened duty of confidentiality benefits the client and impacts the attorney, her practice, and the manner in which she approaches the attorney-client relationship.

²²⁰ MODEL RULES OF PROF'L CONDUCT R.1.6 cmt. 16–17 (2013). *See supra* note 217 for the definition of “seropositive.”

APPENDIX A**UNIVERSITY OF THE DISTRICT OF COLUMBIA
DAVID A. CLARKE SCHOOL OF LAW****HIV/AIDS LEGAL CLINIC****STANDARD OPERATING PROCEDURES FOR USE OF GOOGLE
DOCS**

I, _____, hereby agree to abide by the following terms and conditions in using Google Docs to share documents related to the representation of clients in the HIV/AIDS Legal Clinic:

- I agree to use a Google password that is considered *high security* (high security means at least one uppercase letter, one lowercase letter, one number, one symbol, and at least eight characters in length).
- I agree to use a *high security* password on any personal computer or laptop that provides direct access to my Google account.
- I agree to use a password on any phone, tablet, mp3 player, or other portable electronic device that provides direct access to my Google account.
- I agree to use only the following generic terms in referring to clients in any document used on Google Docs: Mother, Father, Foster Mother, Foster Father, Paternal Aunt, Paternal Uncle, Maternal Aunt, Maternal Uncle, Paternal Grandmother, Paternal Grandfather, Maternal Grandmother, Maternal Grandfather, Adoptive Mother, Adoptive Father, Minor Child, and any other appropriate pseudonyms.
- I agree to ensure that no other individual has access to my accounts, passwords, the clinic account, or password and I agree to not link my account or the clinic account to any other account.
- I agree to make sure “private” is the default setting for my Google Docs documents.
- I agree that I will only share clinical documents with those students currently enrolled in the HIV/AIDS Legal Clinic, and the professors of the HIV/AIDS Legal Clinic.
- I agree that “only the owner can change permissions” will be selected for all clinic documents.

- I agree that once I have shared the clinic document with the appropriate persons and changed the permissions setting, I will change the owner of the document to professor of the HIV/AIDS Legal Clinic.
- I agree that I will immediately report any unauthorized access to my account, the clinic account, or a clinic document, in any form, to a professor of the HIV/AIDS Legal Clinic and take immediate steps to prevent future unauthorized access.
- I agree that I will immediately report any lost or stolen device with access to my account, the clinic account, or any other clinic materials to a professor of the HIV/AIDS Legal Clinic, immediately change my account password, and coordinate the changing of the clinic account password to prevent unauthorized access to clinic documents.
- I agree that when my clinical rotation is over, I will remove my access to all clinic documents stored on Google Docs.

I understand that my actions must comply with the UDC-DCSL Honor Code. If I fail to abide by any of these requirements, I will be subject to disciplinary and any other appropriate action.

Student Date