



# NEW YORK CITY BAR

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## REPORT ON LEGISLATION<sup>1</sup>

**A.7757-A**  
**S.4484-A**

**M. of A. Robinson**  
**Sen. Huntley**

**A.7610**  
**S.3293**

**M. of A. Gottfried**  
**Sen. Duane**

**A.7892-A**  
**S.5660**

**M. of A. Towns**  
**Sen. Monserrate**

**S.6734**

**Sen. Hannon**

## HIV-RELATED TESTING

### BACKGROUND

The need to increase HIV-related testing is acknowledged by all those involved in the public health community and those treating and working with individuals with HIV/AIDS. Indeed, the primary legislative proposals being considered by New York policymakers each provide that an offer of HIV testing be made mandatory in certain facilities in New York, a step which would by itself greatly increase the number of people who will be tested for the HIV virus. The concerns of public health officials and of health services providers is that the test be integrated as much as possible into routine medical care, to encourage patients to be tested and facilitate implementation in medical facilities. Although a preventative vaccine or definitive cure for AIDS remains elusive, significant treatment options now are available to persons infected with the virus or the disease. The countervailing concerns are that (i) HIV infection status and AIDS remain conditions which are associated with both stigma and discrimination, in a way different from other diseases that are routinely tested for, and (ii) a person's consent to the testing be truly knowing and voluntary.

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<sup>1</sup> This statement was developed by the Executive Committee of the Association after receiving and reviewing extensive information and input from the Association committees with the greatest expertise in this area. It has been endorsed by the Association's Health Law Committee, which is comprised of practitioners working in the health care field who come together to address legal and policy issues affecting health care and public health. This is a revised and reissued version of a December 2009 report.

## CDC RECOMMENDATIONS

In September 2006, the Centers for Disease Control promulgated revised recommendations regarding HIV-related testing. The main features of the CDC recommendations are:

- *HIV screening is recommended for patients in all health-care settings after the patient is notified – orally or in writing – that testing will be performed unless the patient declines (opt-out screening). Screenings should be voluntary and undertaken only with the patient’s knowledge and understanding that HIV testing is planned. Oral or written information should include an explanation of HIV infection and the meanings of positive and negative test results, with an opportunity to ask questions and decline testing.*
- *Persons at high risk for HIV infection should be screened for HIV at least annually.*
- *Separate written consent for HIV testing should not be required; general consent for medical care should be considered sufficient to encompass consent for HIV testing.*
- *Prevention counseling should not be required with HIV diagnostic testing or as part of HIV screening programs in health-care settings.*

## PENDING LEGISLATION

There are four separate proposals before the State Legislature that would establish mandatory offering of HIV testing in New York. The Huntley-Robinson bill (S.4484-A/A.7757-A) was designed to track the CDC recommendations. It would provide for notification to patients that HIV testing will be done<sup>2</sup>; provide an opportunity for patients to opt-out of HIV testing; require no separate written consent form; have the health care provider note the patient’s verbal consent in the patient’s chart or include an opt-out provision in a general written consent form; and not require counseling for a negative test result.

The Duane-Gottfried bill (S.3293/A.7610) would require more expansive pre-test counseling; require prior written consent (which could be part of a general consent form with a clear place for the patient to opt-out of HIV testing in writing); allow oral consent for HIV tests conducted subsequent to receipt of the patient’s written consent; and require post-test counseling even for negative results. The pre-and post-test counseling could be accomplished by providing written materials to the patient and the written consent need not be separate from other medical consents.

The Monserrate-Towns bill (S.5660/A.7892-A) would require streamlined pre-test counseling; allow for either oral consent documented in the patient’s medical record or written consent (which could be part of a general consent form with a clear place for the patient to opt-out of HIV testing in writing); and not require counseling for a negative test result.

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<sup>2</sup> Notification means informing the patient of the purpose of the specific test and its significance, while offering an opportunity for questions.

The Hannon bill (S.6734) would require comprehensive pre-test counseling; require prior written consent (which could be part of a general consent form with a clear place for the patient to opt-out of HIV testing in writing); allow oral consent for HIV tests conducted subsequent to receipt of the patient's written consent; and require counseling for both positive and negative test results, with the counseling being more expansive in the case of positive results.

## **CITY BAR PROPOSAL**

We are sensitive to both the need to increase and facilitate testing and the concerns that persons are entitled to receive information to consider in deciding whether to be tested. We believe the appropriate balance is as follows:

- There should be pre-test counseling sufficient to provide the patient, in the CDC's words, with "knowledge and understanding" that HIV testing is planned. In our view, understanding requires that the type of pre-test counseling information set forth in the Duane-Gottfried bill be provided. This information can be conveyed orally or in writing. The patient should be offered a meaningful opportunity to ask questions. Even if written consent is not required, we do not believe that the pre-test information should be reduced beyond that set forth in the Duane-Gottfried bill.<sup>3</sup>
- The patient should be offered testing on an opt-out basis.
- There need not be separate written consent to HIV-related testing. However, where the provider uses a general form to obtain a patient's consent to medical care or health services, it should contain a place for the patient to opt-out of HIV testing. Where no general consent form is in use, the health care provider may document in the patient's chart that the patient was offered HIV-related testing, and note whether the patient did or did not opt out.
- If there is a positive test result, counseling and referral must be provided, as both bills contemplate.
- Information about HIV transmission and risks should be provided in all cases, even in the case of a negative test result. We believe that, to facilitate testing in a health facility setting, this information could be provided prior to testing, including information regarding avoiding high-risk behavior and that the test may not show the presence of HIV during the period immediately following a patient's initial infection with HIV, a period of several weeks and sometimes longer.
- Though neither bill places that much focus on follow-up protocols, these protocols must better ensure that patients receive necessary medical care. Achieving this result has been elusive but it is critical to stemming the spread of HIV regardless of which approach to testing the Legislature ultimately adopts. In addition, there should be reports required, designed to learn the effects of the new law, including the number of tests conducted, the number of people who opt-out of the testing, the number of positive results and the

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<sup>3</sup> We took specific note of the procedures adopted by the Department of Veterans Affairs in August 2009, wherein separate written consent requirements were eliminated but a series of protocols regarding counseling and follow-up were underscored as a means to maintaining patient protections. *See* 38 CFR Part 17.

number of complaints regarding involuntary testing and any increase in the incidence of discrimination against persons with a positive diagnosis. In addition, there should be efforts to collect information on the effectiveness of follow-up for persons whose tests are positive, to gauge the extent to which those people obtain treatment. The legislature should use the results of the follow-up protocols to determine whether further legislative action is needed, including potentially increased resources to enforce existing laws providing for confidentiality of patient records and prohibiting discrimination against infected persons.

## **CONCLUSION**

In closing, we stress our support for the institution of mandatory testing offers for HIV/AIDS as contemplated in all four bills. We urge the Legislature to establish the mandatory offer of HIV-related testing, and to adopt the approach we have outlined above, to effectively address this pressing public health crisis.

Revised and Reissued March 2010