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Introduction

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SYMPOSIUM:
JOB RESTRICTIONS AND DISCLOSURE
REQUIREMENTS FOR HIV-INFECTED HEALTH CARE
PROFESSIONALS: WHOSE PRIVACY IS IT ANYWAY?

INTRODUCTION

ARTHUR S. LEONARD*

The *New York Law School Law Review's* Symposium on *Job Restrictions and Disclosure Requirements for HIV-Infected Health Care Professionals: Whose Privacy Is It Anyway?* was held on March 22, 1996, at a time when recent federal court decisions emphasized the importance of this recurring question. As a precursor to the Symposium, the Ad Hoc Committee on AIDS of the Association of the Bar of the City of New York, of which I was a member, conducted a thorough discussion of the issue and prepared a formal report, which was published shortly after the Symposium was held and is reprinted as part of this Symposium issue with the permission of the Association of the Bar.¹

The purpose of the Symposium was to bring together a panel of experts whose professional roles gave them contrasting perspectives, to confront them with a hypothetical scenario, and to stimulate an exchange of views in the hope that some light could be cast upon the problem. The participants included Michael Closen,² a law professor and attorney who has represented the patients of an HIV-infected health care worker; Marc Elovitz,³ a civil rights attorney who represents and counsels HIV-infected health care workers; Norton Spritz,⁴ a physician and attorney who serves

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1. Ad Hoc Comm. on AIDS, Association of the Bar of the City of N.Y., *HIV-Infected Health Care Workers and Employment Discrimination Law*, reprinted in 41 N.Y.L. SCH. L. REV. 151 (1996).

2. Michael Closen is a Professor of Law at John Marshall Law School where he has been a member of the faculty since 1976.

3. Marc Elovitz was Staff Counsel for the American Civil Liberties Union's AIDS Project, 1993-1996. He has been a member of the AIDS Committee of the Association of the Bar of the City of New York since 1993.

4. Dr. Spritz is Chief of the Medical Service at the New York Veterans Administration Medical Center and Professor of Medicine at New York University Medical Center. He is also presently Attending Physician at Tisch Hospital, New York, Visiting Physician in Medicine at Bellevue Hospital, New York, and an Adjunct

as Chief of Medical Services at a large government hospital with a heavy AIDS caseload; and Kathryn Meyer,⁵ an attorney who serves as chief in-house legal counsel for a large private hospital with a heavy AIDS caseload. The discussion was spirited and well-informed; it generated an additional lengthy article from Professor Closen⁶ and a pointed rebuttal from Mr. Elovitz.⁷ Also included in this Symposium package is a bibliography of recent law review articles on the topic.⁸

In light of the tenor of Mr. Elovitz's response to Professor Closen's article, a few words are in order concerning the value of this Symposium. Mr. Elovitz argues that "the issue of restrictions on health care workers with HIV" is not "a legitimate subject of debate" because "there is no evidence to support a significant risk of transmission of HIV to patients."⁹ Professor Closen argues at some length that a knowledge of the nature of HIV and the risks inherent in surgical practice provide sufficient basis for the decisions reached by appellate courts that have considered the issue, and which have upheld restrictions on practice by HIV-infected health care workers who perform invasive procedures.¹⁰

The history of litigation on this subject shows that active discussion is needed. Either the courts are getting it wrong or the courts are getting it right. If the courts are getting it wrong, then any discussion that serves to point out their errors is useful. But, a truly pointed discussion is unlikely to occur unless the participants include at least one well-informed individual who believes that the courts are getting it right and is prepared to articulate and argue a rationale for that belief. If the courts are getting it right, while an overwhelming majority of the commentators are insisting that the courts are getting it wrong, an active discussion is needed to illuminate the reasons why the courts are taking a particular course and to

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5. Kathryn Meyer is Senior Vice President for Legal Affairs at Beth Israel Medical Center, New York, Adjunct Professor, Brooklyn Law School, and Assistant Clinical Professor, Albert Einstein College of Medicine. She is also Chair of the Committee on Health Law of the Association of the Bar of the City of New York and a member of the New York State Task Force on Life and the Law.

6. Michael L. Closen, *HIV-AIDS, Infected Surgeons and Dentists, and the Medical Profession's Betrayal of Its Responsibility to Patients*, 41 N.Y.L. SCH. L. REV. 57 (1996).

7. Marc E. Elovitz, *Why the Debate on Restricting Health Care Workers with HIV Should End: A Response to Professor Closen*, 41 N.Y.L. SCH. L. REV. 141 (1996).

8. Symposium, *Job Restrictions and Disclosure Requirements for HIV-Infected Health Care Professionals: Whose Privacy Is It Anyway?*, 41 N.Y.L. SCH. L. REV. 5 (1996).

9. Elovitz, *supra* note 7, at 141.

10. Closen, *supra* note 6, at 57.

answer the arguments of the commentators in an open forum where the courts' arguments can be met in robust debate.

As the edited transcript of the discussion makes clear, the different perspectives of the panelists produce starkly different visions of where the responsibility lies for dealing with the risk of HIV-transmission in the context of invasive health care procedures. Moreover, the current data on HIV-transmission has generated sharply contrasting views about the nature of that risk. As chair of the drafting subcommittee for the Bar Association Report included in this Symposium issue,¹¹ I cannot pretend to be impartial. But as part of a community of scholars, we must acknowledge the necessity of understanding the diverse viewpoints that have led to the particular combination of statutes, regulations, judicial decisions, and administrative actions that make up the present situation for HIV-infected health care workers.

Some may find Professor Closen's call for restrictions unduly strident. Others may find the views of the Bar Association Report and the other panelists, especially Mr. Elovitz's forceful arguments against restrictions, inadequately protective of patient rights. However, the debate itself does not necessarily suggest that the truth must lie somewhere between these two viewpoints; on some issues, compromise is not feasible. On the other hand, it appears that some of the panelists may endorse neither a total ban on HIV-infected health care workers' performance of all invasive procedures nor a requirement of disclosure concerning their HIV-status to patients, but, instead, a solution that involves *some* restrictions on HIV-infected health care workers who perform *some* invasive procedures. Readers are encouraged to consider the entire Symposium package before reaching their own conclusions.

11. Ad Hoc Comm. on AIDS, *supra* note 1.

