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HIV and AIDS Test Results and the Duty to Warn Third Parties: A Proposal for Uniform Guidelines for Texas Professionals Comment.

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HIV AND AIDS TEST RESULTS AND THE DUTY TO WARN THIRD PARTIES: A PROPOSAL FOR UNIFORM GUIDELINES FOR TEXAS PROFESSIONALS

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Salus populi suprema lex.
(The welfare of the people is the supreme law.)

I. Introduction

A social worker represents a client who lives with a man who physically abuses the client unless she has sex with him. The social worker knows that the man has tested positive for the Human Immunodeficiency Virus

(HIV), but she cannot tell her client.[1] Another client, after leaving her husband, is living with her boyfriend and is informed through a partner notification program that she may have been exposed to HIV.[2] She tests negative.[3] She suspects that the boyfriend has HIV and returns to her husband.[4] The social worker knows that it is actually her husband who is HIV positive.[5] Can the social worker tell the woman?[6] If so, can the social worker be held liable for *failing* to tell the woman?[7]

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1. *See* Michael Lollar, *'HIV Positive with the Aids Virus': Knowledge Is Sword, Lives Are on the Edge*, COMMERCIAL APPEAL (Memphis), Mar. 7, 1996, at C1 (discussing scenarios facing professionals dealing with HIV-positive clients and clients with AIDS); *see also* TEX. HEALTH & SAFETY CODE ANN. § 81.046 (Vernon 1992) (mandating penalty for unlawful disclosure of HIV status to persons other than those individuals specifically set out in statute). The Center for Disease Control recognized Acquired Immune Deficiency Syndrome (AIDS) as a disease in 1981. Stephen A. Skiver & James Hickey, *AIDS: Legal Issues 1992*, 19 OHIO N.U. L. REV. 839, 839 (1993). AIDS is a blood-borne disease that almost always proves to be fatal. *Id.* The disease is caused by the Human Immunodeficiency Virus (HIV) which disables the body's infection shield by destroying white blood cells. *Id.*; David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 441 (1990). As the HIV virus multiplies, it destroys the immune system, allowing infections to occur that eventually kill the human host. *See* Alan R. Lifson, *Transmission of the Human Immunodeficiency Virus* (discussing epidemiology of AIDS virus), *in* AIDS: EPIDEMIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION 116 (Vincent T. DeVita, Jr. et al. eds., 3d ed. 1992). The virus is transmitted through direct contact with bodily fluids. *Id.* The most common routes of transfer are blood transfusion or contact with blood or other bodily fluids, sexual contact, and perinatal contact from mother to newborn. *Id.* The virus has also been detected in the saliva, tears, and urine of HIV-infected individuals. *Id.* However, researchers believe that the concentrations in these fluids are not high enough to cause transmission of the virus. *Id.* The virus has also been successfully retrieved from insects such as bedbugs that have engorged on blood contaminated with the HIV virus. *Id.* However, there is no suggestion that transmission can occur from insect to human. *Id.*

2. Michael Lollar, *'HIV Positive with the Aids Virus': Knowledge Is Sword, Lives Are on the Edge*, COMMERCIAL APPEAL (Memphis), Mar. 7, 1996, at C1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Cf.* TEX. HEALTH & SAFETY CODE ANN. § 81.103 (Vernon 1992) (stating that test results must remain confidential and may be disclosed only to certain specified persons). This statute applies to everyone, expressly stating that no "person" shall disclose test results except to certain third persons. *Id.* Among those who may be notified are wives, persons who have been exposed to another's blood or bodily fluids, and the Texas Department of Health. *Id.*

7. *See* Kerrville State Hosp. v. Clark, 900 S.W.2d 425, 435 (Tex. App.—Austin 1995), *rev'd on other grounds*, 923 S.W.2d 582 (Tex. 1996) (Abbott, J., dissenting) (stating that social worker had duty to protect wife of patient from patient whom he knew to be dangerous); Williams v. Sun Valley Hosp., 723 S.W.2d 783, 785 (Tex. App.—El Paso 1987, writ ref'd n.r.e.) (citing *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976), which held that psychotherapist had duty to warn identifiable third parties of danger presented to

What about a blood bank that fails to tell a donee that he has received blood from a donor who has tested HIV positive? When the donee's wife learns that she is also HIV positive, is the blood bank liable to her for failure to warn?[8] Similarly, does an attorney preparing a will for a woman who is dying of HIV have a duty to disclose the client's HIV status to third parties? Suppose the woman the attorney represents leaves her child, who is also HIV positive, with the grandmother, instructing the at-

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them by his patient). The Supreme Court of Texas, in reviewing *Kerrville,* did not address the issue of a duty to warn because it found that governmental immunity protected the hospital from suit. *See* Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 586 (Tex. 1996) (determining sovereign immunity barred claim against state hospital). The dissenting opinion, however, found no governmental immunity and responded to the issue of a duty to warn. *Id.* at 586-90 (Abbott, J., dissenting). Adopting the reasoning in *Williams*, Justice Abbott reasoned that because the social worker recognized that the patient was potentially dangerous and posed a threat to his wife if he did not take his medication properly, the social worker had a duty to use reasonable care in the patient's medical treatment, such as advising a physician so that the physician might prescribe an injection drug rather than pills taken orally, which the patient may neglect to take. *Id.*

8. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.103 (Vernon 1992) (mandating disclosure only to certain specifically delineated persons); Garcia v. Santa Rosa Health Care Corp., 925 S.W.2d 372, 377 (Tex. App.—Corpus Christi 1996, writ requested) (construing Texas law to require blood bank to warn identifiable third parties of HIV status unless there is physician-patient relationship or test result); Sten L. Gustafson, Comment, *No Longer the Last to Know: A Proposal for Mandatory Notification of Spouses of HIV Infected Individuals*, 29 HOUS. L. REV. 991, 1016 (1992) (arguing for mandatory disclosure of HIV test results to spouses). It should be noted that there may not always be a "test result." For example, in *Garcia*, the blood donee had not received a test result; the evidence that supported the donee's exposure to the AIDS virus was that the blood *donor* had received a positive test result. *Id.* In other jurisdictions, there have been other scenarios where a "test result" was not found within the meaning of the HIV or AIDS statutes. *See* Urbaniak v. Newton, 19 Cal. App. 4th 1837, 1136 (Cal. Ct. App. 1991) (holding that doctor's disclosure that patient stated that he had previously tested positive for HIV was not privileged under California Health and Safety Code). Under the analogous Texas Code, a "test result" expressly includes a "statement or assertion that the individual is positive, negative, at risk, or does not have a certain level of antigen or antibody." TEX. HEALTH & SAFETY CODE ANN. § 81.101 (Vernon 1992).

torney not to disclose the child's condition to the grandmother.[9] Does the attorney have a duty to inform the grandmother?[10]

Professionals in Texas are increasingly faced with these types of issues every day, yet they must deal with conflicting guidance from the courts and legislature.[11] The source of the confusion is the conflict between the well-established common-law duty to warn identifiable third parties of dangers posed to them and the Texas statute governing confidentiality of test results for Acquired Immune Deficiency Syndrome (AIDS), the Communicable Disease Prevention and Control Act (CDPCA).[12] This

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9. *See* Michael Lollar, *'HIV Positive with the AIDS Virus': Knowledge Is Sword, Lives Are on the Edge*, COMMERCIAL APPEAL (Memphis), Mar. 7, 1996, at C1 (describing situations professionals face in dealing with AIDS); *cf.* Plunkett v. State, 883 S.W.2d 349, 353 (Tex. App.—Waco 1994, writ ref'd) (quoting Texas Disciplinary Rule of Professional Conduct 1.05). Rule 1.05 states:

> A lawyer may reveal confidential information:
>
> (7) when the lawyer has reason to believe it is necessary to do so in order to prevent the client from communicating a criminal or fraudulent act.
>
> (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(c) (7)-(8) (1991), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 1996) (State Bar Rules art. X, § 9).

10. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.103 (Vernon 1992) (stating that no "person" may release or disclose test result); Laurie S. Kohn, *Infecting Attorney-Client Confidentiality: The Ethics of HIV Disclosure*, 9 GEO. J. LEGAL ETHICS 547, 547 (1996) (discussing attorney's duty to warn third parties of HIV status); *cf.* David R. Katner, *The Ethical Dilemma Awaiting Counsel Who Represent Adolescents with HIV/AIDS: Criminal Law and Tort Suits Pressure Counsel to Breach the Confidentiality of the Client's Medical Status*, 70 TUL. L. REV. 2311, 2311 (1996) (discussing attorney's duty to warn third parties of adolescent client's HIV status). In Texas this poses the question of whether the confidentiality provisions of the CDPCA extend past death. The Attorney General has held that they do not. *See* Op. Tex. Att'y Gen. No. DM-61 (1991) (construing statute as inapplicable to autopsy reports because confidentiality addressed by CDPCA does not extend past death).

11. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.103 (Vernon 1992) (stating that test results are confidential and any disclosure by any person other than to specified persons is illegal); *Garcia*, 925 S.W.2d at 377 (holding that health care professionals have duty to warn third persons); Casarez v. NME Hosps. Inc., 883 S.W.2d 360, 363 (Tex. App.—El Paso 1994, writ dism'd by agr.) (stating that although doctor had duty to warn hospital personnel of patient's HIV status, duty only extended to notifying hospital's disease control department); *see also* John Michelena, Jr., *Why the Opposition to AIDS Contact Tracing?*, USA TODAY, Jan. 1, 1995 (Magazine), at 79 (comparing health codes dealing with HIV disclosure to interviews with respective state health officials and stating that only way to describe situation is one of confusion and despair).

12. TEX. HEALTH & SAFETY CODE ANN. § 81.103 (Vernon 1992). This statute provides that test results are to remain confidential and mandates a criminal penalty for unauthorized disclosure. *Id.* It also provides for voluntary partner notification and reporting to the state health authorities, and it allows mandatory testing in situations where health care

Act mandates disclosure of positive test results in only a few specifically delineated circumstances.[13] In contrast, the common-law exceptions to the statute are clear in their mandate that some professionals must warn a third party in danger due to an act of a client.[14]

Since the onset of the HIV crisis and the development of the theory of a duty to warn third parties that they have been exposed to HIV, only a few jurisdictions have addressed the conflicts between the common law duty to warn and statutes and rules that protect a patient's confidentiality.[15] For example, in the 1994 case of *Casarez v. N.M.E. Hospitals,*

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workers, firefighters, or paramedics have been exposed to blood or bodily fluids. *Id.* For a complete discussion of the Act, see *infra* notes 169-200 and accompanying text.

13. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.103 (Vernon 1992) (allowing disclosure of test results only to spouses, health care professionals, and certain other persons exposed to blood or bodily fluids of another person). This provision applies to any person who receives information about a test result. *Id.*

14. *See Kerrville*, 900 S.W.2d at 436 (imposing on hospital duty to protect third parties in danger from patient); Gooden v. Tips, 651 S.W.2d 364, 370 (Tex. App.—Tyler 1983, no writ) (establishing duty to warn in favor of general public); *see also* David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 457 n.155 (1990) (noting that despite existence of statutes that preserve confidentiality of medical information, courts have nonetheless imposed duty to warn on certain professionals, requiring disclosure when identifiable third party is in danger); Pamela D. Armstrong, Comment, *Confidentiality, Warning, and AIDS: A Proposal to Protect Patients, Third Parties, and Physicians*, 4 TOURO L. REV. 301, 306 (1988) (arguing that common law duty to warn supersedes statutory duty of confidentiality).

15. *See* Richard DeNatale & Shawn D. Parrish, *Health Care Workers' Ability to Recover in Tort for Transmission or Fear of Transmission of HIV from a Patient*, 36 SANTA CLARA L. REV. 751, 751 (1996) (reporting that no court decision has yet dealt with issue of patient's duty to disclose his or her HIV status to health care provider); Laurie S. Kohn, *Infecting Attorney-Client Confidentiality: The Ethics of HIV Disclosure*, 9 GEO. J. LEGAL ETHICS 547, 549 (1996) (stating that no court has confronted issue of attorney's duty to warn third parties of client's HIV status); Charles D. Weiss, Comment, *AIDS: Balancing the Physician's Duty to Warn and Confidentiality Concerns*, 38 EMORY L.J. 279, 279 (1989) (noting that because AIDS is recent phenomenon, there are few decisions on duty to warn in AIDS context). Jurisdictions that have addressed the duty to warn include Texas, Florida, West Virginia, New York, Mississippi, Maryland, the District of Columbia, Puerto Rico, and California. *See* Deramus v. Jackson Nat'l Life Ins. Co., 92 F.3d 274, 282 (5th Cir. 1996) (holding that insurance company owed no duty to spouse to warn of HIV status); *In re* Sealed Case, 67 F.3d 965, 971 (D.C. Cir. 1995) (stating that consultant only owed duty of reasonable care under similar circumstances and thus finding no duty to warn patient's spouse of patient's positive test result); Diaz Reyes v. United States, 770 F. Supp. 58, 63 (D.P.R. 1991) (noting that because of strong doctor-patient privilege in Puerto Rico, doctor had no duty to warn patient's spouse that patient had been exposed to AIDS virus through transfusion); Reisner v. Regents of Univ. of Cal., 31 Cal. App. 4th 1195, 1201 (Cal. Ct. App. 1995) (imposing duty on physician to warn patient of AIDS status); Lemon v. Stewart, 682 A.2d 1177, 1181-82 (Md. Ct. Spec. App. 1996) (holding that physician had no duty to warn patient's extended family that patient had AIDS); Doe v. Roe, 588 N.Y.S.2d

Inc.,[16] Texas became the fifth state to judicially address whether professionals have a duty to warn third parties of an HIV-positive status.[17] However, *Casarez* is of little relevance to most Texas professionals because it dealt only with a physician's duty to warn other health care professionals of a patient's HIV status.[18] Furthermore, the decision did not mention the provisions in the CDPCA that prohibit disclosure. Since *Casarez*, *Garcia v. Santa Rosa Health Care Corp.*[19] is the only other case in Texas that has dealt with this issue. However, *Garcia* has left Texas professionals with even less guidance.[20] In this unprecedented case, the Thirteenth Court of Appeals held that a blood bank had a duty to warn a donee's wife that the donee had received blood from a donor found to be HIV positive.[21] The court was only able to reach this result, however, by narrowly defining "test result," holding that it was not the result of the patient's test but the tainted condition of the blood supply that created the risk.[22] Unfortunately, this narrow reading of the CDPCA[23] left professionals in Texas with almost no instruction regarding when they should

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236, 243-44 (N.Y. Sup. Ct. 1992) (finding that doctor owed no duty to warn spouse of wife's HIV status); *Casarez*, 883 S.W.2d at 363-64 (holding that hospital had duty to warn personnel that patient had AIDS); Johnson v. West Virginia Univ. Hosp., 413 S.E.2d 889, 895 (W. Va. 1991) (holding that hospital had duty to tell security guard that he was restraining AIDS patient).

16. 883 S.W.2d 360, 363 (Tex. App.—El Paso 1994, writ dism'd by agr.).

17. *See Casarez*, 883 S.W.2d at 363 (holding that where doctor followed hospital procedures of notifying hospital's disease control and quality assurance committees, doctor had no duty to order nurse to use precautions known to her in treating an AIDS patient); *see also* J.B. v. Sacred Heart, 27 F.3d 506, 507 (11th Cir. 1994) (reversing motion to dismiss because action brought for failure to warn was barred by statute of limitations); *Diaz Reyes*, 770 F. Supp. at 63 (holding that Puerto Rican law does not recognize physician's duty to warn family members that patient has contracted HIV); *Roe*, 588 N.Y.S.2d at 243 (stating that patient had duty to warn physician of his HIV-positive status); *Johnson*, 413 S.E.2d at 895 (remanding on grounds that public policy concerning confidentiality did not preclude recovery based on hospital's failure to warn police officer that patient he was asked to subdue had AIDS).

18. *Casarez*, 883 S.W.2d *passim*. Among persons facing exposure to HIV, health care workers have the least risk of infection and are the most trained in protective measures. *See* Richard DeNatale & Shawn D. Parrish, *Health Care Workers' Ability to Recover in Tort for Transmission or Fear of Transmission of HIV from a Patient*, 36 SANTA CLARA L. REV. 751, 753–54 (1996) (reporting that risk of transmission between health care worker and patient is extremely low). As of 1991, there were only 24 documented cases of health care workers contracting HIV from exposure to patients' blood. *Id.*

19. 925 S.W.2d 372 (Tex. App.—Corpus Christi 1996, writ requested).

20. *See Garcia*, 925 S.W.2d at 378 (holding that blood bank could be liable for failure to warn of patient's exposure to AIDS virus).

21. *Id.*

22. *Id.* at 375.

23. *See id.* at 376 (interpreting CDPCA to apply only to "test results" and "physician-patient relationship").

or should not disclose the HIV status of a client to a third party.[24] Health care workers and other professionals thus face the paradoxical possibility of being held liable for breaching confidentiality by warning third parties or for *failing* to warn, in order to maintain confidentiality.[25]

In the struggle to create guidelines for determining when damages are recoverable for injuries related to HIV, courts and legislatures often fail to realize the magnitude of the AIDS crisis.[26] Furthermore, for more than a decade, the Texas legislature and the health care industry have ignored the traditional central tenets of disease control: routine testing,

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24. *See* Sten L. Gustafson, Comment, *No Longer the Last to Know: A Proposal for Mandatory Notification of Spouses of HIV Infected Individuals*, 29 HOUS. L. REV. 991, 1003–06 (1992) (stating that physicians face "Catch-22"—they may be faced with lawsuit for warning or for failing to warn); *cf.* David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 457–63 (1990) (discussing lack of guidance for physicians); Amy L. Hansen, Note, *Establishing Uniformity in HIV-Fear Cases: A Modification of the Distinct Event Approach*, 29 VAL. U. L. REV. 1251, 1260 (1996) (noting that lack of uniformity among jurisdictions in duty to disclose AIDS status leaves physicians without guidance).

25. *See* David R. Katner, *The Ethical Dilemma Awaiting Counsel Who Represent Adolescents with HIV/AIDS: Criminal Law and Tort Suits Pressure Counsel to Breach the Confidentiality of the Clients' Medical Status*, 70 TUL. L. REV. 2311, 2311 (1996) (noting that attorneys may face potential liability for breach of confidentiality and for failure to warn); Michael Lollar, *'HIV Positive with the AIDS Virus': Knowledge Is Sword, Lives Are on the Edge*, COMMERCIAL APPEAL (Memphis), Mar. 7, 1996, at C1 (discussing liabilities professionals face in dealing with clients who have AIDS); Siobhan Spillane, *AIDS: Establishing a Physician's Duty to Warn*, 21 RUTGERS L.J. 645, 647 (1990) (noting that physicians face potential liability for warning or for failing to warn); Pamela D. Armstrong, Comment, *Confidentiality, Warning, and AIDS: A Proposal to Protect Patients, Third Parties, and Physicians*, 4 TOURO L. REV. 301, 312 (1988) (noting that failure to warn can implicate physician in wrongful death suits).

26. *See infra* text accompanying notes 36-44; *see also* John Michelena, Jr., *Why the Opposition to AIDS Contact Tracing?*, USA TODAY, Jan. 1, 1995 (Magazine), at 79 (arguing that rationale behind dealing with crisis should be to prevent further spread of disease, not to treat disease). The magnitude of the disease is even more striking among urban minority groups. *See* J. Michael McGinnis & Phillip R. Lee, *'Healthy People 2000' at Mid-Decade*, 273 JAMA 1123, 1123 (1995) (noting that in 1993, 30% of AIDS deaths were among blacks, even though blacks comprise less than 12% of total population and that Hispanics accounted for 17% of all AIDS deaths, even though they comprise only 9% of population). Between 1992 and 1993, the proportion of new HIV cases among blacks rose from 25% to 38%; among Hispanics, the proportion rose from 14% to 18%. *Half-Million U.S. AIDS Cases Show Wide Variation: Most New Cases Not Among Gay or Bisexual Men*, AIDS ALERT, Jan. 1, 1996, at 8. The per capita rate of HIV infection among whites is 17 per 100,000, while for blacks it is 101 per 100,000. *Id.* In 1994, the death rate for AIDS cases in the 24-to-44 age group was four times as high for black women as for white women. *See* Jeff Stryker et al., *Prevention of HIV Infections: Looking Back, Looking Ahead*, 273 JAMA 1143, 1143 (1995) (asserting that much evidence exists to document HIV's disproportionate impact on communities of color).

tracking, and warning those at risk.[27] These tenets have been applied by health care professionals and legislatures across the nation to combat diseases such as smallpox, tuberculosis, and syphilis.[28] However, there can be no legitimate comparison between AIDS and other communicable diseases.[29] AIDS almost certainly results in death.[30] Because death is certain for those who contract AIDS, each state should extend the common law duty to warn to professionals who know that a third party has been exposed to the HIV virus. Consider the consequences of not imposing this duty. An individual's life could be saved in one jurisdiction because of a judicial imposition of a duty to warn that would prevent that individual from contracting the disease in the first place. In another jurisdiction

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27. *See* Helen Matthews Smith, *The Deadly Politics of AIDS*, WALL ST. J., Oct. 25, 1995 (Magazine), at A1 (asserting that government is ignoring central tenets of disease control); *cf.* John Michelena, Jr., *Why the Opposition to AIDS Contact Tracing?*, USA TODAY, Jan. 1, 1995 (Magazine), at 79 (noting that government spends more on treatment of AIDS than on preventing further spread of HIV through contact tracing, which has proven effective with other sexually-transmitted communicable diseases such as syphilis and gonorrhea); *Report Seeks Prevention As Anti-Infection Weapon*, AM. MED. NEWS, May 13, 1996, at 71, 71 (reporting that government is "reacting to epidemics, not preventing them, paying more for treatment than pennies for prevention").

28. *See* Simonsen v. Swenson, 177 N.W. 831, 831 (Neb. 1920) (holding that physician disclosed only that information that was reasonably necessary to warn third parties of patient's syphilis); Wojcik v. Aluminum Co. of America, 183 N.Y.S.2d 351, 358 (N.Y. Sup. Ct. 1959) (recognizing duty of physician to use care in advising and warning family members at risk of contracting tuberculosis); Jones v. Stanko, 160 N.E. 456, 458 (Ohio 1928) (holding that ordinary care of physician includes giving notice of contagious nature of smallpox to those at risk); *see also* Skillings v. Allen, 173 N.W. 663, 664 (Minn. 1919) (stating that doctor could be held liable for failing to warn patients that scarlet fever was infectious).

29. *See* David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 450 (1990) (stating that "AIDS cannot easily and simply be considered just another contagious disease"). *But see* Amy L. Hansen, Note, *Establishing Uniformity in HIV-Fear Cases: A Modification of the Distinct Event Approach*, 29 VAL. U. L. REV. 1251, 1257 (1995) (noting that courts attempt to compare HIV with other curable, sexually-transmitted diseases); Charles D. Weiss, Comment, *AIDS: Balancing the Physician's Duty to Warn and Confidentiality Concerns*, 38 EMORY L.J., 279, 279 (1989) (stating that because AIDS is recent problem, medical and legal community will look to case law addressing other sexually-transmitted diseases that are curable for guidance in dealing with AIDS).

30. *See* David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 439 (1990); Sylvia Mayer Baker, Comment, *HIV: Reasons to Apply Traditional Methods of Disease Control to the Spread of HIV*, 29 HOUS. L. REV. 891, 892 (1992) (noting that vaccine does not exist for lethal virus). The average time between HIV infection and the development of AIDS is 10.3 years, and the average survival time once an individual contracts AIDS is 25 months. AIDS POL'Y & L. (BNA), Aug. 6, 1993, at 3.

where there is no duty to warn, that same individual might become exposed to AIDS and in turn expose others to the deadly disease.[31]

This Comment addresses the foregoing issues and proposes a Texas legislative solution to the problem, focusing on how these issues relate to three classes of professionals: health care professionals, insurance agents, and attorneys. However, similar procedures and policies advocated by this Comment may be applied to other professionals as well. Part II of this Comment discusses the background of the AIDS epidemic, focusing on recent AIDS and HIV statistics as they relate to a third party's contraction of HIV. Part III analyzes precedents in other jurisdictions and the policy reasons that support a duty to warn. These policies predict how Texas law will develop if its legislature fails to enact legislation similar to the legislation proposed in this Comment. Part IV discusses the development of Texas law on the duty to warn, specifically the duty within several professions to warn third parties, how the duty to warn relates to HIV and AIDS, and the current state of the law in each area. This discussion includes an examination of Texas case law, statutes and common law doctrines, and the conflicts that exist among them. Finally, Part V advocates legislation requiring contact notification through local health officials pursuant to a uniform standard for all professionals that, with some modification, fits into the current regulatory framework within each profession. Because this proposal is consistent with existing statutory provisions and common law doctrines regarding confidentiality and duties to third parties, it is the most logical and reasonable alternative for resolving the conflicts failed by Texas professionals while providing a means to fight the spread of AIDS.

II. AIDS: THE DEADLY DISEASE

A. *Origins and Magnitude of the Disease*

AIDS is a disease caused by a virus known as HIV.[32] HIV slowly destroys the body's immune system by attacking the T-4 cells, essential

31. *See* Martha Swartz, *Is There a Duty to Warn?*, 17 HUM. RTS., Spring 1990, at 41, 55 (noting that Oklahoma, Mississippi, and Wisconsin require AIDS-disclosure to funeral directors or other persons handling dead bodies and that Oklahoma, Louisiana, Illinois, Wisconsin, Texas, and Mississippi require disclosure to emergency health care persons who may have been exposed to HIV); Amy L. Hansen, Note, *Establishing Uniformity in HIV-Fear Cases: A Modification of the Distinct Event Approach*, 29 VAL. U. L. REV. 1251, 1254–55 n.17 (1995) (noting that duty to warn differs from jurisdiction to jurisdiction); John Michelena, Jr., *Why the Opposition to AIDS Contact Tracing?*, USA TODAY, Jan. 1, 1995 (Magazine), at 79, 79 (noting that duty to warn is not uniform among jurisdictions).

32. *See supra* note 1.

white blood cells produced in the body to ward off infection.[33] Consequently, victims of AIDS often die from infections that are normally not

33. *See* Dale J. Hu et al., *The Emerging Genetic Diversity of HIV: The Importance of Global Surveillance for Diagnostics, Research, and Prevention*, 275 JAMA 210, 210 (1996) (stating that HIV belongs to group of retroviruses that progressively damage host's immune system); Joseph Kovacs et al., *Controlled Trial of Interleukin-2 Infusions in Patients Infected with the Human Immunodeficiency Virus*, NEW ENG. J. MED., Oct. 31, 1995, at 1350, 1353 (stating that AIDS results from destruction of CD4 lymphocytes, which renders patient susceptible to opportunistic infections); David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 441 (1990) (stating that HIV attacks T-helper cells, which results in lytic infection). "T-4 cells are the beat cops of the immune system," calling in "reinforcements whenever they encounter cells infected by any type of virus." Sarah Richardson, *The Race Against AIDS*, DISCOVER, May 1995, at 28, 28. The origin of the AIDS virus is still largely unknown. *See* J. Decosas et al., *Migration and AIDS*, THE LANCET, Sept. 23, 1995, at 826, 826 (reporting that public health community has all but abandoned useless discussion of where AIDS came from and who was responsible for its spread). Although scientists are unsure, most agree that the earliest known case in the United States was in 1981. *See* Sten L. Gustafson, Comment, *No Longer the Last to Know: A Proposal for Mandatory Notification of Spouses of HIV Infected Individuals*, 29 HOUS. L. REV. 991, 1001-02 (1992) (detailing history of AIDS); Robert C. Bollinger et al., *The Human Immunodeficiency Virus Epidemic in India: Current Magnitude and Future Projections*, MEDICINE, Mar. 1, 1995, at 97, 97 (noting that since original finding of AIDS in 1981, HIV has been reported in 173 countries). Researchers have concluded that only a handful of people, possibly one, introduced HIV to the United States and its first vast group of victims, homosexual men. *See* William A. Henry II, *The Appalling Saga of Patient Zero*, TIME, Oct. 19, 1987, at 40, 40 (detailing background of AIDS epidemic). Through tracing contacts, researchers have identified one man who is a likely candidate, responsible for at least 40 of the first 248 cases in the United States. *Id.* This individual has been dubbed "patient zero." *Id.* As a homosexual male airline flight attendant for Air Canada, he transferred the disease from San Francisco to Los Angeles, New York, and Chicago. *See* Shannon Brownlee et al., *Science and Society*, U.S. NEWS & WORLD REP., May 22, 1995, *available in* 1995 WL 3113829 (describing disease's human starting point).

It is unlikely, however, that this person alone created the epidemic. Peter J. Nanula, Comment, *Protecting Confidentiality in the Effort to Control AIDS*, 24 HARV. J. ON LEGIS. 315, 315 (1987). It is clear that other factors, especially the latent nature of the disease, played a role in the rapid spread of HIV. Because the disease remains undetected for so long, scientists and educators did not detect the nature and seriousness of the disease until it was too late. *See* Sten L. Gustafson, Comment, *No Longer the Last to Know: A Proposal for Mandatory Notification of Spouses of HIV Infected Individuals*, 29 HOUS. L. REV. 991, 997–98 (1992) (citing Centers for Disease Control, Update on Acquired Immune Deficiency Syndrome (AIDS)—United States, 31 MORBIDITY & MORTALITY WKLY REP. 507, 507 (1982) and noting that latent nature of disease makes it "particularly diabolic"). The result of not being able to halt the spread of the disease early is probably what contributed most to one of the world's worst pandemics ever. *Cf. id.* (noting that mutation of disease severely reduces likelihood of formulating vaccine and that latent nature of disease allows those infected to spread disease more easily).

deadly to humans.[34] The virus is particularly vexatious because it remains dormant for several years, while multiplying and mutating at an alarming rate.[35] Because victims have no symptoms during this dormant period, individuals may infect numerous persons before realizing that they have contracted the HIV virus.[36]

To date, AIDS has killed over 300,000 Americans and is now the leading cause of death among persons twenty-four to forty-four years old.[37] An estimated 630,000 to 900,000 Americans were infected with HIV in the United States as of January 1993.[38] As a result, the average therapist

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34. *See* Helen Brett-Smith, M.D. & Gerald H. Friedland, M.D., *Transmission and Treatment* (discussing pathology of AIDS), *in* AIDS AND THE LAW 18, 21-23 (Harlon L. Dalton et al. eds., 1993); Sarah Richardson, *The Race Against AIDS*, DISCOVER, May 1995, at 28, 28 (describing how as immune system fails, patient falls prey to "opportunistic" infections that ultimately kill). The most common opportunistic infections are karposi's sarcoma and pneumocystis carinii. *The Acquired Immunodeficiency Syndrome: Commentary*, 252 JAMA 2037, 2038 (1984); *see* David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 441–42 (1990) (stating that pneumocystis carinii is most common of all opportunistic infections and that one-third of all AIDS patients die of cancer, frequently karposi's sarcoma).

35. *See* Dale J. Hu et al., *The Emerging Genetic Diversity of HIV: The Importance of Global Surveillance for Diagnostics, Research, and Prevention*, 275 JAMA 210, 211 (1996) (reporting that virus replicates very rapidly); Christine Gorman, *The Exorcists: Applying a Potent Combination of New Treatments, Medical Researchers Are Determined to Expel the Terrible Specter of AIDS As an Invincible Disease*, TIME, Sept. 18, 1996, at 64, 64 (reporting that in 1995, scientists discovered that virus produces one billion copies of itself daily); Sarah Richardson, *The Race Against AIDS*, DISCOVER, May 1995, at 28, 28 (stating that virus and T-4 cells replicate at extremely fast rate).

36. Charles D. Weiss, Comment, *AIDS: Balancing the Physician's Duty to Warn and Confidentiality Concerns*, 38 EMORY L.J. 279, 279 (1989) (recognizing that uniqueness of HIV virus means that individuals may transmit virus to others without ever realizing it).

37. *See Update: Mortality Attributable to HIV Infection Among Persons Aged 25-44 Years—United States, 1994*, 45 MORB. & MORT. WKLY REP. 121, 121 (1996) (reporting that HIV was leading cause of death for age group 24 to 44, accounting for 19% of all deaths). AIDS is the third leading cause of death for women in this age group. *Id.* The disease is responsible for 32% of all deaths among black males and is the leading cause of death for black women. *Id.*

38. *Revised HIV Estimates Lower Than One Million: Study Finds Sobering Trend Among Youth*, 11 AIDS ALERT, Jan. 1996, at 9, 9. From 1993 to 1995, cases among Hispanics rose from 14% to 18%; cases among blacks rose from 25% to 38%. *Half-Million U.S. AIDS Cases Show Wide Variation: Most New Cases Not Among Gay or Bisexual Men*, 11 AIDS ALERT, Jan. 1, 1996, at 8, 8. Per capita, there are 101 cases of HIV per 100,000 blacks and 17 cases per 100,000 whites. *Id.* These statistics are especially interesting in light of recent findings of a genetic mutation that can confer resistance to HIV in one out of 100 white males. *See* Christine Gorman, *The Exorcists: Applying a Potent Combination of New Treatments, Medical Researchers Are Determined to Expel the Terrible Specter of AIDS As an Invincible Disease*, TIME, Sept. 18, 1996, at 64, 64 (reporting that certain men have defective copies of CKR-5 gene and that this defect creates natural immunity, be-

who sees 300 to 400 clients a year can expect to see at least one HIV-positive and one AIDS-infected client a year.[39] In light of these statistics, professionals must be aware of seriousness of this issue and of their role in stopping the spread of this disease.[40]

These statistics, and the issues that arise from their analysis, are especially compelling in Texas.[41] Texas has one of the highest incidences of HIV in the United States.[42] As of 1992, Texas ranked fourth in the number of AIDS cases.[43] Moderate estimates suggest that approximately 73,000-102,000 Texans are infected with HIV.[44] This number roughly equates to one-tenth of all HIV cases in the United States.[45] The Texas

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cause HIV cannot gain entry to cell); Jennifer Greenstein et al., *Notebook*, TIME, Oct. 7, 1996, at 15, 15 (describing good news in medical field due to discovery of defective gene).

39. *See* James P. Sizemore, *Alabama's Confidentiality Quagmire: Psychotherapists, AIDS, Mandatory Reporting, and* Tarasoff, 19 LAW & PSYCHOL. REV. 241, 244 (1995) (emphasizing need for psychotherapists to be aware of duty to warn and of situations in which duty exists to warn third party of client's HIV status).

40. *See* David R. Katner, *The Ethical Dilemma Awaiting Counsel Who Represent Adolescents with HIV/AIDS: Criminal Law and Tort Suits Pressure Counsel to Breach the Confidentiality of the Client's Medical Status*, 70 TUL. L. REV. 2311, 2328 (1996) (noting that physicians face lability in tort for failing to disclose client's HIV status); Siobhan Spillane, *AIDS: Establishing a Physician's Duty to Warn*, 21 RUTGERS L.J. 645, 647 (1990) (noting that doctors may face liability for warning or failing to warn); Pamela D. Armstrong, Comment, *Confidentiality, Warning, and AIDS: A Proposal to Protect Patients, Third Parties, and Physicians*, 4 TOURO L. REV. 301, 312 (1988) (stating that failure to warn can open physician to wrongful death or wrongful life suits).

41. *See* Ruth F. Stewart & David R. Smith, HIV ANNUAL REPORT 5 (1994) (Tex. Dep't of Health Bureau of HIV and STD Prevention) (reporting that in 1993, 8,000 new AIDS cases were reported in Texas, more than twice that of previous three years); PARTNERS IN CARING ANNUAL REPORT 16 (Dec. 1994) (Texas Dep't of Health HIV/AIDS Interagency Counsel) (reporting that during first ten years of epidemic there were 12,792 cases of HIV in Texas, while it took less than four years to reach second 12,792 cases).

42. *See* Helen Brett-Smith & Gerald H. Friedland, *The AIDS Epidemic and Local Government Liability* (stating that highest number of AIDS cases have been reported in New York, Texas, Florida, New Jersey, Puerto Rico, Illinois, Georgia, Pennsylvania, and Maryland), *in* AIDS AND THE LAW 1, 3 (Harlon L. Dalton et al. eds., 1993); RUTH F. STEWART & DAVID R. SMITH, HIV ANNUAL REPORT 5 (1994) (Tex. Dep't of Health Bureau of HIV and STD Prevention) (recognizing increasing AIDS crisis in Texas).

43. Sten L. Gustafson, Comment, *No Longer the Last to Know: A Proposal for Mandatory Notification of Spouses of HIV Infected Individuals*, 29 HOUS. L. REV. 991, 1001 (1992). In 1990, the rate of AIDS in Texas was 19.2 incidences per 100,000 individuals, the fifth-highest incidence rate of any state. Susan Y. Chu et al., *Epidemiology of HIV in United States*, *in* AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION (Vincent T. DeVita, Jr. et al. eds., 3d ed. 1992).

44. Ruth F. Stewart & David R. Smith, HIV ANNUAL REPORT 5 (1994) (Tex. Dep't of Health Bureau of HIV and STD Prevention).

45. *Revised HIV Estimates Lower Than One Million: Study Finds Sobering Trend Among Youth*, 11 AIDS ALERT, Jan. 1996, at 9, 9.

epidemic is growing fastest among women and minorities.[46] Between 1992 and 1993, the rate of infection among women increased 173%, and the number of cases among Hispanics and blacks increased 59% to 70%, respectively.[47] These statistics demonstrate the severity of the epidemic. This severity, coupled with the high cost of treatment and the rapid spread of the disease, has prompted the Texas legislature to declare that HIV prevention is one of its top priorities.[48]

Prevention is the key to fighting the AIDS epidemic because researchers have not yet discovered a cure.[49] Because there is no cure or vaccine for the virus, something must be done immediately to reduce the spread of AIDS.[50] Education has helped, but it has done no more than maintain the HIV-infection rate at a still unacceptably high level.[51] This failure to

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46. PARTNERS IN CARING, ANNUAL REPORT, DECEMBER 1994 (Texas Dep't of Health HIV/AIDS Interagency Coordinating Counsel) at 18, 18. Incidents of HIV among blacks increased by 70%, and the rate of incidence among Hispanics increased by 59%. *Id.*

47. *Id.*

48. *See* Tex. S.B. 799, 74th Leg., R.S. (1995) (stating that every HIV case costs $119,000 to treat and that future cost of treating all 73,000 Texans infected with AIDS will be $6,687,000,000).

49. *Revised HIV Estimates Lower Than One Million: Study Finds Sobering Trend Among Youth*, 11 AIDS ALERT, Jan. 1996, at 9, 9; *see* John Benditt, *AIDS: The Unanswered Questions*, SCIENCE, May 28, 1993, at 1253, 1253 (stating that as scientists learn more about disease, previous year's assumptions become obsolete).

50. *See* Vallery v. Southern Baptist Hosp., 630 So.2d 861, 868-69 (La. App. 1994) (stating that "AIDS is both incurable and fatal and extraordinary efforts to prevent its spread should be the rule"); Carol Levine, *AIDS Prevention and Services: Community Based Research*, 20 J. HEALTH & POL. POL'Y & L. 230, 230 (1995) (asserting that expectations that cure or vaccine would be available in near future have been dashed); Josie Glausiusz, *Broadening the Search: Bernard Fields*, DISCOVER, Jan. 1995, at 86, 86; (reporting that scientists are not likely to invent vaccine soon); Christine Gorman, *The Exorcists: Applying a Potent Combination of New Treatments, Medical Researchers Are Determined to Expel the Terrible Specter of AIDS As an Invincible Disease*, TIME, Sept. 18, 1996, at 64, 64 (stating that "researchers have little more than a string of failures to report from the vaccine front"); Sherwin B. Nuland, *An Epidemic of Discovery: An Extraordinary Wave of Advances in Medical Science Raises, New Hopes, but Also New Expectations, New Problems*, TIME, Sept. 18, 1996, at 8, 8 (stating that ultimate goals of prevention and cure still appear to be long way off). AIDS researchers were surveyed in 1993 by *Science* magazine and asked about their predictions for a vaccine or cure in the future. *Id.* The common response was that the more learned about the disease, the faster the assumptions made in previous years seem obsolete. John Benditt, *AIDS: The Unanswered Questions*, SCIENCE, May 28, 1993, at 1253, 1253. However, there has been remarkable progress in the treatment of AIDS. *See* Christine Gorman, *What, I'm Gonna Live? Powerful New Drugs Bring Welcome Reprieves—and Some Unexpected Complications—to AIDS Patients.*, TIME, Sept. 18, 1996, at 64, 64 (describing use of protease inhibitors which are used with "cocktail" of older medications to hold AIDS in check).

51. *See* Jeff Stryker et al., *Prevention of HIV Infection: Looking Back, Looking Ahead*, 273 JAMA 1143, 1143 (1995) (discussing why some believe AIDS education has failed); *AIDS Associated with Injecting Drug Use—United States, 1995*, 45 MORB. & MORT.

reverse infection rates is largely due to the difficulty or near impossibility of sustaining behavioral changes over a long period of time.[52] In addition to education, preventative measures are needed to allow notification to a third party that he or she has been exposed to the virus. Without such measures, further education is futile. However, the law in many states does not require such notification. The onus for changing the law is on the legislatures of our states to implement effective infection control procedures.[53]

B. *The Need for State Legislatures to Act*

AIDS already has greatly impacted our legal system.[54] Courts across the country have decided thousands of cases dealing with AIDS and HIV.[55] At least three jurisdictions have expressly held that there is a

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WKLY 392, 392 (1996) (noting that from 1993 to 1996, HIV infection rate among homosexuals decreased, while rate increased among heterosexuals); *Groups Push for Specific Discussion of HIV Risk: AMA & MDs Conduct More Risk Assessment*; 11 AIDS ALERT Sept. 1996, at 105, 105 (reporting that number of HIV cases has stabilized at level that is too high).

52. *See Groups Push for Specific Discussion of HIV Risk: AMA & MDs Conduct More Risk Assessments*, 11 AIDS ALERT Sept. 1996, at 105, 105 (discussing difficulties that arise in prevention of AIDS).

53. *See* Pamela D. Armstrong, Comment, *Confidentiality, Warning, and AIDS: A Proposal to Protect Patients, Third Parties, and Physicians*, 4 TOURO L. REV. 301, 312 (1988) (asserting that only legislature can offer clear guidelines to protect society's interest in spread of HIV, confidentiality of patients, and health of third parties, while simultaneously eliminating conflict between physician's duty to warn and duty of confidentiality); Carol Levine, *AIDS Prevention and Services: Community Based Research*, 20 J. HEALTH & POL. POL'Y & L. 230, 230 (1995) (stating that public apathy and government timidity have made AIDS progress difficult, and it is paramount that government address underlying inequities that increase disease transmission); *cf.* Jeff Stryker et al., *Prevention of HIV Infection: Looking Back, Looking Ahead*, 273 JAMA 1143, 1143 (1995) (noting that current HIV control measures remain halfway at best, and between 40,000 and 80,000 new cases are discovered each year despite clear understanding of methods of transmission).

54. *See* Brenda T. Strama, *The AIDS Epidemic and Local Government Liability* (discussing state AIDS confidentiality laws), *in* AIDS AND GOVERNMENTAL LIABILITY (Brenda T. Strama ed., ABA 1993), 1, 1 n.26 (noting that 35 states have confidentiality laws); Michael D. Weisenhaus, *The Shaping of AIDS Law*, NAT'L L.J., Aug. 1988, at 1, 4.

55. *See, e.g.*, Reisner v. Regents of the Univ. of Cal., 31 Cal. App. 4th 1195, 1201 (Cal. Ct. App. 1995) (imposing duty on physician to warn patient of HIV status); Faya v. Almaraz, 620 A.2d 327, 328 (Md. Ct. App. 1993) (discussing whether surgeon infected with HIV has legal duty to warn patients before surgery); Johnson v. West Virginia Univ. Hosp., Inc., 413 S.E.2d 889, 894 (W. Va. 1991) (holding hospital liable for failing to warn third party of patient's HIV status); *see also* Helen Brett-Smith & Gerald H. Friedland, *Transmission and Treatment* (stating that AIDS has become one of most litigated issues in American courts today), *in* AIDS AND THE LAW 18, 21 (Harlon L. Dalton et al. eds., 1993).

duty to warn in the AIDS context.[56] Other jurisdictions that have addressed this issue either found no duty to warn or simply presumed that a duty to warn a third person of an AIDS status exists without ever engaging in an analysis of the duty issue.[57] While the judicial extension of a duty to warn third parties to professionals dealing with AIDS would help prevent the spread of AIDS and save countless lives, the potential for conflicting decisions is simply too great for the judicial system to resolve this issue.[58] Moreover, the courts are not responsible for stopping the spread of communicable diseases. Rather, the primary responsibility for such action lies with the state legislatures.[59] To date, the Texas legislature has done little to control the spread of AIDS within its borders, despite the fact that Texas has one of the highest incidences of AIDS in the United States.[60] Therefore, the Texas legislature must recognize the fact

56. *See Reisner*, 31 Cal. App. 4th at 1201 (imposing duty on physician to warn of patient's AIDS status to boyfriend); Casarez v. NME Hosps., Inc., 883 S.W.2d 360, 364 (Tex. App.—El Paso 1994, writ dism'd by agr.) (holding that Texas hospital had duty to warn health care workers that patient had AIDS); *Johnson*, 413 S.E.2d at 895 (holding that hospital had duty to tell security guard that he was restraining patient with AIDS).

57. *See* Deramus v. Jackson Nat'l Life Ins. Co., 92 F.3d 274, 281 (5th Cir. 1996) (holding that Mississippi does not recognize duty of insurance company to warn third person of applicant's HIV-positive test result); *In re* Sealed Case, 67 F.3d 965 (D.C. Cir. 1995) (holding that hospital owed no duty to warn spouse of husband's HIV status); Diaz Reyes v. United States, 770 F. Supp. 58, 63 (D.P.R. 1991) (finding that Puerto Rican law favored patient confidentiality and thus finding no duty to warn spouse of husband's HIV status); Lemon v. Stewart, 682 A.2d 1177, 1181–82 (Md. Ct. Spec. App. 1996) (stating that physician had no duty to warn members of patient's extended family, who were to care for him in his illness, that patient had AIDS).

58. *See* W. Eugene Basanta et. al., *Recent Developments in Medicine and Law*, 31 TORT & INS. L.J. 357, 358 (1996) (noting that recent cases consider extent of physician's duty to non-patient in HIV context).

59. Clearly, the states have the power and duty to protect the welfare of the people. *See* Barsky v. Board of Regents of Univ. of New York, 347 U.S. 442, 449–50 (1954) (holding that state has "broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there"); Stephens v. Dennis, 293 F.2d 589, 595 (5th Cir. 1968) (commenting that state legislatures are entitled to create their own standard of public health and welfare and that "statutory articulation of that standard is a particular legislative function").

60. *See* Julia Edwards, *Controlling the Epidemic: The Texas AIDS Reporting Statute*, 41 BAYLOR L. REV. 399, 403 (1989) (advocating that legislature enact more coercive measures for containment of AIDS than education and mere suggestion of safe practice); Sten L. Gustafson, Comment, *No Longer the Last to Know: A Proposal for Mandatory Notification of Spouses of HIV Infected Individuals*, 29 HOUS. L. REV. 991, 1001 (1992) (arguing that Texas needs to enact mandatory spousal notification because of high incidence of AIDS in state).

that AIDS is a permanent and growing problem and take measures to *prevent* the spread of HIV within its borders.[61]

III. Precedent: Conflicting Approaches to the Duty to Warn

Although two Texas appellate courts have imposed a duty to warn in the AIDS context, it is still questionable whether other Texas courts or the Texas Supreme Court would impose such a duty. Several other jurisdictions have ruled against such a duty for persuasive reasons. A discussion of the reasoning of other jurisdictions in rejecting a duty to warn facilitates a full understanding of the conflicts and inconsistencies in the law as well as the dilemma faced by professionals in Texas and throughout the United States.

A. *The Conflict*

All states impose a general common law duty to warn third persons of peril.[62] A breach of this duty is essentially a negligence claim.[63] Accordingly, in order to bring a cause of action for failure to warn, a plaintiff must first establish the elements of negligence: duty, breach of duty, injury, and proximate cause.[64]

The first element, duty, is the threshold issue in imposing a duty to warn a third party.[65] Whether a legal duty exists is a question of law.[66]

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61. *See Morals, Disease Control Measures As Important As Education*, Sun Sentinel (Ft. Lauderdale), Oct. 15, 1995, at 4H (arguing for more preventative measures rather than curative measures); *Report Seeks Prevention As Anti-Infection Weapon*, Am. Med. News, May 13, 1996, at 71, 71 (quoting report which states that "governments are reacting to epidemics, not preventing them"); cf. Sherwin B. Nuland, *An Epidemic of Discovery: An Extraordinary Wave of Advances in Medical Science Raises New Hopes, but Also New Expectations, New Problems*, Time, Sept. 18, 1996, at 8, 8 (stating that goal of cure appears to be long way off).

62. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53, at 356 (5th ed. 1984) (discussing general duty to warn).

63. Kehler v. Eudaly, 933 S.W.2d 321, 329–30 (Tex. App.—Fort Worth 1996, n.w.h.); Williams v. Sun Valley Hosp., 723 S.W.2d 783, 785 (Tex. App.—El Paso 1987, writ ref'd n.r.e.); Gooden v. Tips, 651 S.W.2d 364, 366 (Tex. App.—Tyler 1983, no writ); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53, at 356 (5th ed. 1984).

64. *See Kehler*, 933 S.W.2d at 330 (stating that "any claim based on negligence in Texas requires proof of three elements: a legal duty owed by one to another; breach of that duty; and damages that proximately result from that breach"); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 54, at 384–85 (5th ed. 1984) (citing four elements of negligence: duty, breach of duty, reasonable causal connection, and actual loss or damage).

65. *See* Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990) (citing El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex. 1987)).

The court must consider the risk, foreseeability, and likelihood of injury weighed against the social utility of the conduct, the extent of the burden placed on the professional in having to warn, and the consequences of placing the burden on the actor.[67] While the duty to warn generally does not include a duty to protect another person,[68] the common law has recognized a duty to intervene or protect in three situations: (1) when a special relationship, such as those between a husband and wife or physician and patient, exists;[69] (2) when the actor has at least partially created the danger;[70] and (3) when the claim implicates a duty to protect the general driving public.[71]

Conflict arises, however, when statutes and case law alter this duty within the various jurisdictions. For example, several states have statutes that directly contradict the duty to warn, such as the physician-patient privilege or confidentiality statutes pertaining to AIDS test results.[72] Some states interpret these statutes very strictly, prohibiting disclosure despite any common law duty.[73] Other states have created statutory or common law exceptions to the physician-patient privilege or confidentiality statutes, requiring notification when a third person is in physical danger.[74]

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66. Kerrville State Hosp. v. Clark, 900 S.W.2d 425, 435 (Tex. App.—Austin 1995), *rev'd on other grounds*, 923 S.W.2d 582 (Tex. 1996); *Gooden*, 651 S.W.2d at 364.

67. *Kerrville*, 900 S.W.2d at 435; *Gooden*, 651 S.W.2d at 364; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 359 & n.23 (5th ed. 1984).

68. *Gooden*, 651 S.W.2d at 370.

69. *Kerrville*, 900 S.W.2d at 435; Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983); *Gooden*, 651 S.W.2d at 371.

70. Garcia v. Santa Rosa Health Care Corp., 925 S.W.2d 372, 376–77 (Tex. App.—Corpus Christi 1996, writ requested).

71. *See Kehler*, 933 S.W.2d at 329–30 (noting that Texas law recognizes duty to warn when imposed to protect general driving public); Praesel v. Johnson, 925 S.W.2d 255, 257 (Tex. App.—Corpus Christi 1996, n.w.h.) (determining that doctor was negligent by failing to warn epileptic patient not to drive); *Gooden*, 651 S.W.2d at 370 (holding that it is duty of physician to protect general driving public by warning patient of side effects of medication).

72. *See* P.R. LAWS ANN. tit. 24, § 575 (1991) (governing disclosure of HIV test results in Puerto Rico); TEX. HEALTH & SAFETY CODE ANN. § 81.103 (Vernon 1992) (mandating complete confidentiality of AIDS test results).

73. *See* Diaz Reyes v. United States, 770 F. Supp. 58, 63 (D.P.R. 1991) (holding that doctor-patient privilege is strong in Puerto Rico and precludes disclosure to families of exposure to HIV).

74. *See* TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.08 (Vernon Supp. 1997) (stating that doctor may disclose confidential patient information when necessary to warn third parties at risk of physical injury from acts of their patients); TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(c)(7) (1991), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Sup. 1996) (State Bar Rules art. 9) (stating that attorneys have duty to warn third party when client intends to commit crime).

B. *The Approaches*

A handful of jurisdictions, including Texas, have dealt with conflicts involving AIDS and have disagreed on the proper result.[75] Some mandate that there is no duty to warn the third party or prevent the disease,[76] while others hold that there is such a duty.[77] However, recent decisions reveal a trend toward extending the duty to require professionals to warn third persons who may have been exposed to HIV.[78] The "no-duty" decisions will be analyzed first, followed by the decisions which bolster the trend of extending the duty to warn.

1. No Duty

Several courts in various jurisdictions have addressed the issue of whether there is a duty to warn third parties of a client's HIV status and have held that there is no such duty.[79] These cases can be divided into two categories. First, there are cases involving a physician or health care worker that rely primarily on the physician-patient privilege or confidentiality provisions relating to AIDS in the state codes to preclude such a duty.[80] Second, there are cases addressing whether an insurance com-

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75. Harold Edgar & Hazel Sandomire, *Medical Privacy Issues in the Age of AIDS: Legislative Options*, 16 JAMA 155, 194 (1990); *see* Christine E. Stenger, Note and Comment, *Taking* Tarasoff *Where No One Has Gone Before: Looking at "Duty to Warn" Under the AIDS Crisis*, 15 ST. LOUIS U. PUB. L. REV. 471, 473 (1996) (noting that although few cases have addressed issue of physicians' duty to warn third parties of HIV status, jurisdictions are divided).

76. *See infra* notes 79–116 and accompanying text.

77. *See infra* notes 117–146 and accompanying text.

78. *See, e.g.*, Reisner v. Regents of the Univ. of Cal., 31 Cal. App. 4th 1195, 1201 (Cal. Ct. App. 1995) (imposing duty in favor of third person to warn patient of HIV status); Vallery v. Southern Baptist Hosp., 630 So. 2d 861, 868 (La. Ct. App. 1993) (stating that it was foreseeable that hospital security guard would resume sexual relations with wife if not warned of exposure to HIV and that wife would contract HIV); *see also* Sonia M. Suter, *Whose Genes Are These, Anyway? Familial Conflicts over Access to Genetic Information*, 91 MICH. L. REV. 1854, 1877 (1993) (stating that most jurisdictions today would find duty to warn where physician has special relationship with HIV-infected person, if victim is both foreseeable and identifiable); *cf. Casarez*, 883 S.W.2d at 376-77 (holding that hospital had duty to warn health care personnel that patient had AIDS).

79. *See, e.g.* Deramus v. Jackson Nat'l Life Ins. Co., 92 F.3d 274, 282 (5th Cir. 1996) (holding that insurance company was under no duty to warn applicant or spouse that applicant had tested positive for AIDS); Diaz Reyes v. United States, 770 F. Supp. 58, 63 (D.P.R. 1991) (holding that there was no duty to warn third parties of patient's HIV status in Puerto Rico due to strong doctor-patient privilege and confidentiality provisions in state code); Doe v. Roe, 588 N.Y.S.2d 236, 243 (N.Y. Sup. Ct. 1992) (finding that doctor owed no duty to warn spouse that husband had tested positive for AIDS virus).

80. *See, e.g.*, *In re* Sealed Case, 67 F.3d at 965 (holding that hospital had no duty to warn patient's spouse that patient tested positive for HIV); *Diaz Reyes*, 770 F. Supp. at 63 (holding that physician had no duty to warn patient's spouse that patient had contracted

pany has a duty to warn a third party of an HIV-positive status. These cases rely on the lack of privity between the insurer and the third party, as well as respect for the privacy of the individual who is HIV positive, to hold that there is no duty to warn a third person of an AIDS-positive client.[81]

The earliest case relying on the physician-patient privilege that denied a duty to warn third parties was *Diaz Reyes v. United States*,[82] a 1991 case from Puerto Rico that involved a patient who tested positive for AIDS after receiving a blood transfusion at a veterans' hospital.[83] The patient's wife brought an action against the hospital for negligence when it was discovered that her husband had contracted AIDS, claiming that the hospital had a duty to inform either the plaintiff or her husband that her husband had received tainted blood.[84] The court rejected this argument, holding that the stringent doctor-patient privilege in Puerto Rico[85] and a statute requiring doctors to report HIV test results to the Department of Health, but not to third parties,[86] precluded recognizing a physician's duty to violate the doctor/patient privilege, even to give information to the patient's spouse.[87]

AIDS); *Lemon*, 682 A.2d at 1181-82 (holding that hospital had no duty to warn members of patient's extended family that patient had AIDS).

81. *See Deramus*, 92 F.3d at 279 (holding that there was no relationship between insurer and applicant upon which duty could be established).

82. *Diaz Reyes*, 770 F. Supp. at 58.

83. *Id.* at 63.

84. *Id.*

85. *Id.* The court cited Rule 26 of the Puerto Rican Rules of Evidence in support of the contention that there is a strong doctor-patient privilege in Puerto Rico. *Id.*; *see* P.R. LAWS ANN. tit. 32, App. IV, R. 26 (1983) (providing patient with privilege concerning confidential communications with doctor).

86. *See* P.R. LAWS ANN. tit. 24, § 575 (1991) (stating that test results shall be deemed confidential and sexual contacts may not be notified).

87. *Diaz Reyes*, 770 F. Supp. at 58. The court also noted that at the federal level, recent Veterans Administration requirements allow some types of disclosure to a spouse, but that these regulations do not require disclosure of HIV. *Id.* The court noted that when states create tort liability requiring absolute disclosure to a spouse, they may raise a Supremacy Clause problem. *Id.*

The physician-patient privilege was used once again in 1995 to preclude the finding of a duty to warn a spouse of an HIV-positive status. In *In re Sealed Case*, the District of Columbia held that there was no duty on the part of a physician or consultant to disclose the results of an HIV-positive status to a spouse. 67 F.3d 965, 971 (D.C. Cir. 1995). This case involved a consultant, rather than a physician, who was hired to review a doctor's medical records for accuracy. *Id.* at 967. The patient had received a positive test result at the physician's office. *Id.* A retest yielded a negative test result. The doctor assured the patient that he did not have the virus and that he could not transmit it to anyone. *Id.*

The patient's wife claimed that the consultant owed her a duty to disclose arising out of the doctor-patient relationship with her spouse. *Id.* The court, however, held that even if a

Most recently, a Maryland court of appeals refused to impose a duty to disclose an HIV-positive status to a third party in *Lemon v. Stewart*.[88] In *Lemon*, members of a patient's extended family sued a physician, hospital, and laboratory for failing to notify them of the patient's HIV-positive status.[89] The plaintiffs were either related to or had personal contact with the patient during his illness.[90] They all claimed that they came into contact with the patient's bodily secretions, including sputum and blood, on a daily or frequent basis.[91]

In *Lemon*, the Maryland Court of Appeals determined that the hospital owed no duty to these persons for two reasons.[92] First, the court noted that the family members could not demonstrate that they were identifiable potential victims of nondisclosure, because they were not part of the class intended to be protected, and they were not at significant and foreseeable risk of acquiring the virus through contact with the patient.[93] The court distinguished an earlier Maryland decision that permitted recovery when an AIDS-positive physician performed surgery on a patient by first noting that a duty was recognized in that case only because of the

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physician-patient relationship was established, the relationship could only extend to "the degree of care and skill reasonably expected of other medical professionals . . . acting under similar circumstances." *Id.* at 969. Thus, the consultant only had the duty to use that level of skill expected of a part-time consultant whose sole task was to review a set of test results ordered by the primary physician. *Id.* The physician-patient relationship did not create a duty to warn because the relationship did not extend as far as this circumstance. *Id.*

Two months later, the United States Court of Appeals for the District of Columbia held that a hospital owed no duty to disclose an HIV-positive status to a husband, in *N.O.L. v District of Columbia*, 674 A.2d 498, 499 (D.C. 1995). *N.O.L.* involved a patient at a mental hospital who was separated from her husband at the time she tested positive for HIV. *Id.* at 499. Approximately one week after taking the test, without waiting for her test results, the patient told her husband that she had tested negative for HIV. *Id.* at 498–99. She was released from the hospital after receiving notice of her test results, and the plaintiff and her husband continued living together and resumed sexual relations. *Id.* A year later, the husband learned that his wife's test had been positive. *Id.* at 499. After he learned of her condition when they were reunited, N.O.L. sued the District of Columbia for its failure to inform him of his wife's test results. *Id.* The court relied solely on the District of Columbia's confidentiality statute in holding that the hospital staff owed no duty to the patient's husband to disclose his wife's HIV-positive status. *Id.* Rather, the court held that according to state law, the hospital owed a duty to the *patient* to refrain from disclosing information regarding an HIV test result to anyone without the patient's written consent. *Id.* at 499. In finding that there was a duty not to disclose such information, the court relied upon the confidentiality provisions of the District of Columbia's HIV statute. *Id.*

88. 682 A.2d 1177 (Md. Ct. Spec. App. 1996).

89. *Lemon*, 682 A.2d at 1179.

90. *Id.*

91. *Id.*

92. *Id.* at 1180–81.

93. *Id.*

medically documented risk of transmission during invasive procedures.[94] In *Lemon*, however, this was not the case: the contact was casual, and such contact is not known to cause transmission.[95]

Second, the court noted that not only would it be impractical to identify each person with whom the patient had this type of casual contact, but also that there was a compelling policy reason not to impose such a duty—the privacy rights of the patient.[96] The relationship between the health care provider and patient is one of trust, and absent the existence of a statute permitting otherwise, the court determined that such a condition should not be disclosed without the patient's consent.[97]

The plaintiffs also tried to recover under the theory that the physician had a duty to inform the patient that he had tested positive for AIDS, which the doctor had failed to do for almost a year.[98] While noting that such a duty would extend to certain third persons, the court limited this class to sexual partners and those who had shared needles, excluding those persons who, like the plaintiffs, had only casual contact with the HIV-positive individual.[99]

The decisions in the second class of cases, those relying on the lack of a special relationship to deny a duty, thus far pertain only to insurance companies. In *Deramus v. Jackson National Life Insurance Co.*,[100] the United States Court of Appeals for Fifth Circuit held that a Mississippi insurance company had no duty to disclose an HIV-positive test result to

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94. Faya v. Almaraz, 620 A.2d 327 (Md. 1993). In *Faya*, the doctor did not disclose his HIV status to his patients and performed two separate surgeries on the patients. *Id.* at 330. The crux of the patients' claim against the doctor was that the doctor negligently failed to disclose his HIV status to the patients, and they were exposed to a hazard they otherwise would have avoided by withholding their consent to treatment. *Id.* The Maryland Court of Appeals held that the doctor had a duty to disclose his HIV status to the patients, stating that a legal duty flows from the responsibility to exercise due care to avoid risk to others. *Id.* at 333. The court reasoned that foreseeability is an important precursor to imposing a duty. *Id.* Here, even though the risk of transmission was low, the potential harm was high and thus a duty was imposed. *Id.*

95. *Lemon*, 682 A.2d at 1180-81; *see* Alan R. Lifson, *Transmission of the Human Immunodeficiency Virus* (stating that, in casual contact, concentrations of virus are not high enough to cause transmission), *in* AIDS: EPIDEMIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION 116 (Vincent T. DeVita, Jr. et al. eds, 3d ed. 1992).

96. *See Lemon*, 682 A.2d at 1183 (stating that "relationship between health care provider and its patient is one of trust and confidence" and that, "absent a statute permitting otherwise, the patient has right to assume that his medical condition will not voluntarily be disclosed by the provider to other persons without the patient's consent").

97. *Id.*

98. *Id.*

99. *Id.*

100. 92 F.3d 274 (5th Cir. 1996).

an applicant or his wife.[101] The plaintiff's husband had applied for an increase in the couple's life insurance policy, which required a blood test as part of the application process.[102] Although the test result was positive, the insurance company had failed to inform either the patient or his wife of the result.[103] The plaintiff offered several theories to the court in an effort to impose a duty to disclose on the insurance company.[104]

First, the plaintiff argued that the insurance company's duty arose out of a confidential relationship between her and her husband.[105] Second, the plaintiff contended that by requiring the plaintiff's husband to take a medical examination and to disclose his confidential medical history, the insurance company undertook a course of action that required it to act reasonably and with due care.[106] Third, the plaintiff claimed that by requiring her husband to submit to a medical examination the insurance company had entered a contractual relationship with her husband, which required the insurance company to act in good faith.[107] Finally, the plaintiff argued that a duty should have been imposed because it was foreseeable that harm would ensue from the insurance company's failure to inform the plaintiff and her husband of his HIV-positive status.[108]

The court rejected each of the plaintiff's claims.[109] First, the court held that because the insurance company was not the force that set the harm into motion, it was under no duty to "protect life and limb."[110] Second,

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101. *See Deramus*, 92 F.3d at 282 (stating that Mississippi law does not recognize duty to warn third parties of HIV status); *cf.* Doe v. Prudential Ins. Co. of America, 860 F. Supp. 243, 247 (D. Md. 1993) (holding that insurance company's failure to warn applicant personally that applicant was infected with HIV did not give rise to strict liability claim pursuant to abnormally dangerous activity doctrine).

102. *Deramus*, 92 F.3d at 276.

103. *Id.*

104. *Id.* at 277–82.

105. *Id.* at 277–78.

106. *Id.* at 279–80.

107. *Deramus*, 92 F.3d at 281.

108. *See id.* at 281–82 (noting that factors considered in foreseeability analysis of communicable diseases are rarity of disease and lack of physical symptoms).

109. *See id.* (concluding that theories advanced by plaintiff "missed the mark," and that insurance company had no duty to warn third party of HIV status under Mississippi law).

110. *See id.* (citing Dr. Pepper Bottling Co. v. Bruner, 148 So. 2d 199 (Miss. 1962)). In *Dr. Pepper Bottling Co. v. Bruner*, the court explained the law as imposing "upon every person who undertakes the performance of an act—which, it is apparent, if not done carefully, will be dangerous to other persons—the duty to exercise his senses and intelligence to avoid injury, and he may be held accountable . . . for an injury to person . . . which is directly attributable to a breach of such duty." 148 So. 2d 199, 201 (Miss. 1962). The *Deramus* court distinguished this case from *Dr. Pepper* by stating that there was no evidence that the insurance company's act or failure to act in a certain manner caused the applicant to contract AIDS. *Deramus*, 92 F.3d at 281.

and perhaps most instructive, the court distinguished the insurer-insured relationship from a physician-patient relationship, stating that in a physician-patient relationship, persons would reasonably expect a certain degree of care and disclosure on health matters.[111] This is particularly instructive in determining which professionals would be subject to a duty to warn third parties in the context of HIV. It may indicate that absent a special relationship, such a high degree of care would not be expected.

Third, the court held that there was no contractual relationship between the parties (the applicant and the insurer) because there was only an application for insurance, not an actual insurance contract.[112] Any contractual duty to act in good faith was based on the policy already in existence.[113] Accordingly, the plaintiff's claim that the insurer had a duty to act in good faith failed.[114] As to the foreseeability of harm, the court stated that there was no evidence to show that the insurance company proximately caused applicant's damages.[115] Not only was the applicant HIV positive before he applied, but once he received the rejection letter from the insurance company, he was on notice that the insurance company may have detected some ailment in his blood or urine.[116]

These cases demonstrate potential problems plaintiffs may face in attempting to impose common-law liability for a professional's failure to warn a third party. Roadblocks encountered by those plaintiffs include: (1) absence of, or limitation on a special relationship; (2) a strong physician-patient relationship; (3) confidentiality statutes mandating that a professional not disclose an HIV status or giving immunity for failure to

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111. *Id.* at 277–78 (rejecting plaintiff's argument that insurance company created confidential relationship when it demanded access to confidential medical information and exercised exclusive control over those test results). The court distinguished the situation on appeal from a confidential relationship because the insurance company never misled plaintiffs into inaction or promised to warn them of test results, nor was there any evidence of reliance by the plaintiff. *Id.* at 277. To impose liability because of a confidential relationship, "there must be something about the relationship between the parties which would justifiably create an expectation on the part of one party that the other was protecting the first party from the occurrence of a particular risk; and, moreover, such justifiable reliance must have necessarily caused the first party to be lulled into a false sense of security so that the first party did not protect his own interest as he might have ordinarily." *Id.* at 278.

112. *See Deramus*, 92 F.3d at 281 (stating that no contractual relationship existed because plaintiff had only applied for insurance). Although the plaintiff already had an insurance contract, unlike her husband, the court stated that there was no indication that the defendant, by not disclosing the spouse's HIV-positive status, interfered with plaintiff's rights to receive the benefits of the agreement between the plaintiff and defendant. *Id.*

113. *Id.*

114. *See id.* (noting that, absent contractual relationship, no bad faith claim could arise).

115. *Id.*

116. *Id.*

warn; and (4) lack of foreseeability of harm. These cases illustrate the uncertainty surrounding judicial analysis when considering the duty to warn; no two cases rely on the same legal theory to reject a duty to warn a third party of a client's HIV status.

2. Duty

The courts' traditional reluctance to impose on professionals a duty to warn third parties may be giving way to a willingness to acknowledge such a duty. The trend toward such an acknowledgement began in California, with the landmark case of *Tarasoff v. Regents of the University of California*,[117] which laid the groundwork for the imposition of a duty to warn third parties of a threat of serious harm in Texas[118] and throughout the United States. Under general common-law principles, there is no duty to control the actions of another person, nor to protect a third party from the actions of another person. The Supreme Court of California acknowledged an exception to this rule in *Tarasoff* and found that a special relationship exists between two persons such as a doctor and patient, parent and child, or attorney and client.[119]

In *Tarasoff*, the Supreme Court of California held that when a psychotherapist determines, or should have determined, that a patient poses a serious threat of violence to a third person, the psychotherapist bears a duty to exercise reasonable care to protect the foreseeable third person from danger.[120] The case arose when a psychotherapist at the University of California determined that his patient was dangerous and posed a threat to a certain woman.[121] The psychotherapist notified campus police, who investigated the incident and later released the patient.[122] The patient later killed the woman.[123] The woman's parents sued the university, claiming that it had a duty to protect their daughter from the known and dangerous patient.[124] The Supreme Court of California held that a psychotherapist had a duty to take appropriate action to protect readily-

117. 551 P.2d 334 (Cal. 1976).

118. *See* Kehler v. Eudaly, 933 S.W.2d 321, 328–29 (Tex. App.—Fort Worth 1996, n.w.h.) (discussing Texas cases that have used *Tarasoff*); Garcia v. Santa Rosa Health Care Corp., 925 S.W.2d 372, 377 (Tex. App.—Corpus Christi 1996, writ requested) (citing *Tarasoff* in case dealing with duty to warn third parties of HIV status); Kerrville State Hosp. v. Clark, 900 S.W.2d 425, 436 (Tex. App.—Austin 1995) (using *Tarasoff* to impart duty to warn third parties of client's dangerous conduct), *rev'd on other grounds*, 923 S.W.2d 582 (Tex. 1996).

119. *Tarasoff*, 551 P.2d at 343.

120. *Id.*

121. *Id.* at 339-40.

122. *Id.*

123. *Id.*

124. *Tarasoff*, 551 P.2d at 341.

identifiable third parties from danger posed to them by their patients.[125] The court later restricted *Tarasoff* in *Thompson v. Alameda*[126] by rejecting any duty to warn the general public and limiting *Tarasoff* to situations where there is a foreseeable and readily identifiable potential victim.[127]

Several jurisdictions have relied on the principles set forth in *Tarasoff* to find a duty to warn third persons who have been exposed to HIV. These jurisdictions have found a duty in two sets of circumstances: (1) where a patient with AIDS is under custodial care, such as a patient in a hospital or a client's ward,[128] and (2) where liability to a third person arises from failure to warn a patient rather than from the third party himself.[129]

The class of cases that involve a patient under custodial care have almost uniformly recognized a duty to supervise or warn. For example, the Supreme Court of Appeals of West Virginia ruled in favor of the plaintiff, a security guard bitten by an AIDS patient, in *Johnson v. West Virginia University Hospitals, Inc.*.[130] The court relied on the theory that the confidentiality provisions in West Virginia's statute on AIDS testing did not preclude warning the third party of an HIV status.[131] The circumstances did not involve a situation where a patient was tested for HIV. Rather, the hospital failed to warn an "unsuspecting person of an AIDS-infected patient's condition."[132]

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125. *Id.*

126. 614 P.2d 728 (Cal. 1980).

127. *Thompson*, 614 P.2d at 737-38.

128. *See* Laurie S. Kohn, *Infecting Attorney-Client Confidentiality: The Ethics of HIV Disclosure*, 9 GEO. J. LEGAL ETHICS 547, 557 (1996) (citing Fickett v. Superior Court, 558 P.2d 988 (Ariz. Ct. App. 1976), under section discussing various theories upon which duty to warn third party would stand). The court in *Fickett* found that an attorney adopts a standard of care toward his client's ward and therefore must act in the best interests of the ward. *Id.* Further, because attorneys are in a position to protect wards against adverse legal outcomes, public policy overcomes the presumption that an attorney owes no duty to persons who are not clients. *Id.*

129. *See Reisner*, 31 Cal. App. 4th at 1200-01 (holding that physician was liable to third party who contracted HIV from patient, because physician failed to warn patient that she had been exposed to AIDS virus).

130. 413 S.E.2d 889 (W. Va. 1991).

131. *Johnson*, 413 S.E.2d at 895.

132. *See id.* (noting that statute was directed at AIDS testing and distinguishing case as not one involving an AIDS test). Similarly, at least one court has indicated that an institution that places an AIDS-infected patient in the care of another person can be liable for failing to notify the caregiver of the patient's AIDS status. In *J.B. v. Sacred Heart Hospital*, the United States Court of Appeals for the Eleventh Circuit presumed there was a duty owed to a third person and that a hospital could be liable for failing to warn him that the plaintiff's brother, whom he transported to another treatment facility, had AIDS.

The second class of cases to impose liability where third parties are injured imposes a duty on physicians to warn their *patients* that they are HIV positive. This distinction between duty to the patient and actual duty to a third party is relevant, because there is no violation of confidentiality provisions when the only duty is to warn the patient.[133] In almost every instance, liability can be found with no interference from the statutes dealing with physician-patient confidentiality or HIV-confidentiality statutes.

California's case law illustrates this line of precedent and is probably the most consistent with Texas law on the issue of liability to a non-patient when a professional failed to warn an HIV-positive patient. These cases avoid the limitation set out in *Tarasoff* and *Thompson*, which had limited the duty to third parties to instances where there was a foreseeable and identifiable victim. For example, in *Reisner v. Regents of the University of California,*[134] a California court of appeals held that an identifiable third party was not necessary to hold a physician liable for injuries to that third party resulting from the doctor's failure to warn a patient that he or she tested positive or was exposed to the AIDS virus.[135]

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996 F.2d 276, 278 (11th Cir. 1993), *certifying question to* 635 So. 2d 945 (Fla. 1994), *and conformed answer*, 27 F.3d 506 (11th Cir. 1994). While being transported, his brother began thrashing about, dislodging his heparin lock. *Id.* at 278. As a result, the plaintiff came into contact with the brother's blood through a cut on his own hand. *Id.* at 277. Subsequently, the plaintiff tested positive for HIV. *Id.* The court, however, never reached the issue of liability, because it granted summary judgment on the defendant's statute of limitations claim. *Id.*

133. Richard DeNatale & Shawn D. Parrish, *Health Care Workers' Ability to Recover in Tort for Transmission or Fear of Transmission of HIV from a Patient*, 36 SANTA CLARA L. REV. 751, 752 (1996) (describing cases that imposed duty to warn).

134. 31 Cal. App. 4th 1195 (Cal. Ct. App. 1995).

135. *Reisner*, 31 Cal. App. 4th at 1200-01; *see also Vallery*, 630 So. 2d at 868-69 (holding that hospital owed duty to third party to warn employee that he was exposed to AIDS by patient). In *Vallery*, a Louisiana appellate court held that the wife of a man exposed to HIV on the job could recover for emotional distress for possible exposure to HIV through her husband. *Id.* While working as a security guard, the plaintiff was asked to help restrain a patient at the hospital where he worked. *Id.* In the process, the patient bled on the security guard after the patient's intravenous needle became dislodged. *Id.* The hospital employees failed to tell him that the patient suffered from AIDS. *Id.* As a result of the hospital's failure to inform him that the patient had AIDS, the security guard did not don protective garments prior to restraining the patient. *Id.* Moreover, the guard was not informed that the patient was HIV positive until the next day—after he and his wife already engaged in sexual relations. *Id.* at 862–83.

The court noted that, in Louisiana, the test for imposition of a duty was whether the harm that befell the plaintiff could easily be associated with the type of conduct engaged in by the defendant. *Id.* at 868. The court then determined that because it was highly foreseeable that a security guard negligently exposed to HIV will be married and have unprotected sexual relations with his wife unless warned of HIV exposure, a duty did exist to

In *Reisner*, a twelve-year-old patient received a blood transfusion during surgery.[136] The day after the surgery, the doctor discovered that the blood given to his patient was contaminated with HIV.[137] Although he continued to treat her, the doctor failed to notify her or her parents of the contamination.[138] Three years later, the patient had sexual relations with her boyfriend.[139] Five years after her surgery, the patient was diagnosed with AIDS and died a month later.[140] Upon being notified of the diagnosis, the patient told her boyfriend, who subsequently tested positive for HIV.[141] The court expanded the standard of when a duty to warn exists to include foreseeable third parties.[142]

The court articulated three reasons for finding the identity of the third party immaterial in this case.[143] First, the court noted that it was not recognizing a duty to warn a third party, but a duty to warn the patient.[144] Second, because warning the actor was a reasonable step to take in the exercise of the standard of care applicable to a physician, liability in such a situation was not conditioned on potential victims being readily identifiable.[145] Finally, the court pointed out that a high standard of care is required for communicable diseases, and that a duty on the doctor in this case would support this standard of care.[146]

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warn the security guard of his exposure. *Id.* Moreover, the court held that policy considerations also favored finding a duty flowing from the hospital to the wife, stating that "AIDS is both incurable and fatal and extraordinary efforts to prevent its spread should be the rule." *Id.*

136. *Reisner*, 31 Cal. App. 4th at 1197.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Reisner*, 31 Cal. App. 4th at 1200-01.

142. *Id.* at 1200-01; *see* W. Eugene Basanta et al., *Recent Developments in Medicine and Law*, 31 TORT & INS. L.J. 357, 358–59 (1996) (discussing recent holdings that have addressed duty to warn third parties).

143. *Reisner*, 31 Cal. App. 4th at 1200-01.

144. *Id.* at 1200. The court also included the patient's parents as parties in the general class of persons to whom the HIV status could be revealed to avoid liability. *Id.* The court described this general class of persons as those "who are likely to apprise him" of the harm. *Id.* This holding is significant because it does not mention confidentiality requirements, seemingly holding that any person who was likely to appraise a third party of the harm might be warned. *Id.* Actually, such a position would be in direct contradiction to the somewhat broad provisions of the confidentiality statute in California, which only allow disclosure to anyone suspected to be at risk of contracting the disease from the individual. *Id*; *see* CAL. HEALTH & SAFETY CODE § 121015 (West Supp. 1996) (listing spouse, sexual partner, needle partner, and county health official as only persons eligible to receive knowledge of patient's test result).

145. *Reisner*, 31 Cal. App. 4th at 1201.

146. *Id.* at 1202.

IV. Texas Law: Guidance or Confusion?

The discussion above presents arguments that Texas courts might find persuasive in determining whether a professional will be held liable for failure to warn a third party of a client's HIV status. These arguments are particularly relevant in light of the scarcity of Texas courts that have addressed the duty to warn in the AIDS context. Although two courts of appeals have recognized such a duty, the contradictory law discussed below may cause other Texas courts to support a strong physician-patient privilege or confidentiality rule and rule in favor of nondisclosure of test results.

A. *Texas Case Law*

In defining a duty to warn under Texas law, courts have taken cognizance of *Tarasoff v. Regents of the University of California*,[147] state common law, statutes, and rules. Although the Supreme Court of Texas has not considered the applicability of *Tarasoff* in Texas, five appellate courts have indicated that a duty to warn third parties does exist in certain situations.[148] Two principles can to be derived from these cases: in Texas, liability must either be imposed under a threat to a readily identifiable third party, or a duty to the general public to use a certain degree of care.

A Texas court first applied *Tarasoff* in *Williams v. Sun Valley Hospital*,[149] but specifically limited liability to third parties to situations where patients have made specific threats to identifiable individuals.[150] *Williams* involved a patient who had voluntarily admitted himself to the hospital for mental problems, but later climbed over the hospital wall and jumped in front of the plaintiff's moving vehicle.[151] The Eighth Court of Appeals discussed *Tarasoff* and its progeny, but the court commented that it was "unwilling to impose blanket liability upon all hospitals and therapists for the unpredictable conduct of their patients with mental disorders where there was no allegation of threat or danger to a readily identifiable third party."[152]

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147. 551 P.2d 334 (Cal. 1976).

148. Limon v. Gonzaba, No. 04-96-00007-CV, 1997 WL 13217 (Tex. App.—San Antonio Jan. 15, 1997, n.w.h.); Zezulka v. Thapar, No. 01-94-01195-CV, 1996 WL 37994 (Tex. App.—Houston [1st Dist.] Jan. 29, 1996, n.w.h.); Kehler v. Eudaly, 933 S.W.2d 321 (Tex. App.—Fort Worth 1996, n.w.h.); Kerrville State Hosp. v. Clark, 900 S.W.2d 425 (Tex. App.—Austin 1995), *rev'd on other grounds*, 923 S.W.2d 582 (Tex. 1996); Williams v. Sun Valley Hosp., 723 S.W.2d 783 (Tex. App.—El Paso 1987, writ ref'd n.r.e.).

149. 723 S.W.2d 783 (Tex. App.—El Paso 1987, writ ref'd n.r.e.).

150. *Williams*, 723 S.W.2d at 785–86.

151. *Id.* at 784.

152. *Id.* at 787; *see also Kehler*, 933 S.W.2d at 331 (citing Williams v. Sun Valley Hosp., 723 S.W.2d 783 (Tex. App.—El Paso 1987, writ ref'd n.r.e.)).

However, in a more recent case, *Kerrville State Hospital v. Clark*,[153] the Third Court of Appeals went beyond the reasoning set forth in *Tarasoff* and its progeny, suggesting that it is not necessary to have a readily-identifiable victim to find liability for a failure to warn.[154] In *Kerrville*, a murdered woman's parents sued the hospital for wrongful death after the woman was murdered by her husband, who had just been released from the hospital.[155] In upholding the trial court's finding that the hospital owed a duty to third parties injured by their patients when they know or have reason to know that the patient is dangerous, the court quoted with approval an Arizona Supreme Court case dealing with the duty to warn:

> We agree with those cases interpreting *Tarasoff* which state that a psychiatrist should not be relieved of his duty merely because his patient never verbalized any threat. . . . When a psychiatrist determines, or under applicable professional standards, reasonably should have determined, that a patient poses a serious danger of violence to others, the psychiatrist has a duty to exercise reasonable care to protect the foreseeable victim of that danger. The foreseeable victim is one who is said to be within the zone of danger. . . .[156]

Reversing on grounds of sovereign immunity, the Supreme Court of Texas, like the appellate court, did not reach the issue of the duty of the hospital to confine or control the patient.[157] The dissent, however, did agree with the court of appeals' holding that the hospital owed a duty to the general public to use reasonable care in releasing its patients.[158] It is clear that the court of appeals' holding remains undisturbed to the extent that it discusses the duty of the hospital.[159]

Thus, while *Kerrville* suggests that there need not be a specific threat to a readily identifiable person to find liability, Texas precedent on this issue remains unclear. Those courts following *Williams* will require a specific threat to a specific individual.[160] Thus, for these courts, a strict applica-

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153. 900 S.W.2d 425, 435 (Tex. App.—Austin 1995), *rev'd on other grounds*, 923 S.W.2d 582 (Tex. 1996).

154. *Kerrville*, 900 S.W.2d at 436–37.

155. *Id.* at 429.

156. *Id.* at 436-37 n.13 (quoting Hamman v. County of Maricopa, 775 P.2d 1122, 1127–28 (1989)).

157. *See id. passim* (holding that sovereign immunity was not waived and therefore reversing court of appeals).

158. *Id.* at 587–88 (Abbott, J., dissenting).

159. *See Kehler*, 933 S.W.2d at 331 (stating that aspect of *Kerrville* addressing duty of hospital to confine or control patient "remains undisturbed and indicates at least a recognition of a *Tarasoff/Thompson* analysis").

160. *See Williams*, 723 S.W.2d at 787 (stating that "[w]here there is no allegation of a threat or danger to a readily identifiable person, we, like those courts whose logic we fol-

tion in the AIDS context might require an individual actually to tell the professional that he or she plans to expose a certain person to the virus in order to implicate a duty to warn. Courts following the logic set out in *Kerrville,* on the other hand, will note that a specific threat need not be made against a specific victim in order for the duty to warn to be imposed.[161] Rather, the protection extends to all foreseeable victims in the "zone of danger;" that is, at risk from the patient's conduct.[162]

Where liability might be prevented for lack of a readily identifiable third party, it seems clear that Texas law would support the imposition of liability to a third person for failure to warn the *patient* of his or her own exposure to HIV or of a HIV-positive test result, as was the situation in *Reisner v. Regents of the University of California.*[163] In *Gooden v. Tips*,[164] the Twelfth Court of Appeals placed a duty on a physician to warn a patient of the dangers of a particular conduct.[165] In Texas, this duty extends beyond the readily identifiable third party to the general public.[166] Accordingly, a third party would be protected. Furthermore, warning a patient does not violate the confidentiality provisions of Texas law governing the control of communicable diseases:[167] the information is only released to the person who was tested or exposed to the virus.[168] Thus, when a professional in Texas is faced with the situation of warning a client who has been exposed to the AIDS virus, the professional should disclose that information to the patient to avoid the risk of liability for failing to disclose.

B. *Texas Modifications of the Common Law: Statutes and Rules*

The Texas legislature has, through statutes and professional rules, modified and elaborated upon the common law duty to warn. Relevant to the

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low, are unwilling to impose a blanket liability for the unpredictable conduct of their patients").

161. *See Kerrville*, 900 S.W.2d at 437 n.13 (rejecting defendant's argument that because there was no specific threat against plaintiff, there was no duty to warn).

162. *See id.* (quoting Hamman v. County of Maricopa, 775 P.2d 1122, 1127–28 (Ariz. 1989)). In *Hamman*, the Supreme Court of Arizona stated, "[W]e agree with those cases interpreting *Tarasoff* which state that a psychiatrist should not be relieved of this duty merely because his patient never verbalized any specific threat." *Id.*

163. 31 Cal. App. 4th 1195 (Cal. Ct. App. 1995).

164. 651 S.W.2d 364 (Tex. App.—Tyler 1983, no writ).

165. *See Gooden*, 651 S.W.2d at 370 (creating duty to warn patient of side effects of taking certain medication).

166. *Id.*

167. *See infra* text accompanying notes 169–204.

168. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.103 (Vernon 1992) (stating that person *may* disclose test results to person who took test).

issue of a professional's duty to warn are the CDPCA,[169] which governs disclosure of AIDS test results; the physician-patient privilege,[170] which governs communications between doctors and patients; and the Texas Disciplinary Rules of Professional Conduct,[171] which provide guidelines for disclosure of communications between an attorney and client.

1. The Communicable Disease Prevention and Control Act

The Texas legislature enacted the Communicable Disease Prevention and Control Act (CDPCA) in 1983 to govern the control, reporting, and prevention of certain communicable diseases.[172] In 1987, the Act was amended to include HIV and AIDS as communicable diseases.[173] However, the inclusion of HIV and AIDS within the Act did not end legislation addressing HIV and AIDS.[174] The Act was amended in 1989, 1991, and 1993.[175] In 1989, the legislature passed the Human Immunodeficiency Virus Service Act of 1989, implementing the recommendations of a special legislatively-appointed task force.[176] Numerous additional changes have been made to the statute, including the deletion of a physician's immunity from liability for failing to disclose an HIV-positive status to a patient's spouse.[177]

As a result of these amendments and revisions, the CDPCA now prevents the disclosure of HIV test results except under very limited circumstances.[178] A "test result" is defined in the statute as "any statement that indicates an identifiable individual has or has not been tested for AIDS or HIV infection . . . including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level of

169. TEX. HEALTH & SAFETY CODE ANN. §§ 81.051-81.052 (Vernon 1992 & Supp. 1997).

170. TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.08 (Vernon Supp. 1997).

171. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 1.05 (1991), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 1992) (State Bar Rules art. X, § 9).

172. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 81.001-81.209 (Vernon 1992).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*; *see* Sten L. Gustafson, Comment, *No Longer the Last to Know: A Proposal for Mandatory Notification of Spouses of HIV Infected Individuals*, 29 HOUS. L. REV. 991, 1003–06 (1992) (detailing evolution of AIDS reporting statute).

177. *See* Sten L. Gustafson, Comment, *No Longer the Last to Know: A Proposal for Mandatory Notification of Spouses of HIV Infected Individuals*, 29 HOUS. L. REV. 991, 1003–06 (1992) (describing practical effects of allowing test results to be released to spouses).

178. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.103 (Vernon 1992) (delineating persons to whom disclosure is allowed).

antigen or antibody."[179] Thus, on its face, the statute would appear broad enough to cover almost all instances where a professional learns that a client is HIV positive.

Section 81.103 of the statute sets out several clearly delineated instances where disclosure of HIV-related information is permitted.[180] First, disclosure is permitted when expressly authorized in writing by the person taking the HIV test.[181] Second, the statute allows disclosure to health care professionals who have a legitimate reason to require such information in order to protect themselves or their patients.[182] Third, certain categories of persons who have been exposed to HIV, such as firefighters, EMS workers or paramedics, correctional officers, or law enforcement personnel, may be notified.[183] Fourth, the statute contains a provision that allows spouses to be notified of a test result.[184] Finally, the statute contains a general provision allowing disclosure to local health authorities for surveillance and disease control purposes.[185] In 1991, the statute was amended to permit physicians to undertake voluntary partner notification efforts.[186] Finally, in 1993, the legislature enacted a provision which made testing of all unborn and newborn babies mandatory.[187]

To date, only a few courts have interpreted the Texas confidentiality provisions of the CDPCA.[188] These courts have allowed recovery despite the seemingly absolute confidentiality and immunity provided by the statute.[189] They have done so by taking a very narrow reading of the statute, suggesting that the statute may offer less protection for HIV-patient con-

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179. *Id.* § 81.046.

180. *Id.* § 81.103.

181. *Id.*

182. *Id.*

183. TEX. HEALTH & SAFETY CODE ANN. § 81.048 (Vernon 1992).

184. *Id.* § 81.103.

185. *Id.*

186. *See id.* § 81.090 (Vernon 1992 & Supp. 1997) (detailing process by which contacts will be notified of exposure to HIV).

187. *Id.*

188. *See* Buchanan v. Mayfield, 925 S.W.2d 135, 139–40 (Tex. App.—Waco 1996, n.w.h.) (addressing section 81.102(a)(5)(D) of CDPCA that requires person to undergo mandatory testing after a person has been exposed to another's bodily fluids); Garcia v. Santa Rosa Health Care Corp., Inc., 925 S.W.2d 372, 376 (Tex. App.—Corpus Christi 1996, writ requested) (holding that confidentiality provision of CDPCA only applies if person is tested for HIV).

189. *See Buchanan*, 925 S.W.2d at 140 (holding that CDPCA does not protect identity of patient where patient in dentist's office was accidentally exposed to another patient's bodily fluids when she drank out of spit cup used by other patient); *Garcia*, 925 S.W.2d at 376 (holding that CDPCA did not preclude disclosure to donor that he had tested positive for AIDS and thus blood bank was liable for failure to warn).

fidentiality than it appears.[190] In *Garcia v. Santa Rosa Health Care Corp*,[191] for example, a blood bank found out that a donor had tested positive for HIV, but yet failed to notify donees of the diseased blood.[192] In holding that the Act did not preclude the blood bank from disclosing this information to the spouse of the donee, the Thirteenth Court of Appeals held that outside factors, such as the condition of the bank's blood supply at the time the donee received blood, were not protected under the scope of a "test result."[193] The court called this mere "common-sense advice" that does not fall under the ambit of the confidentiality provisions.[194] Likewise, in *Buchanan v. Mayfield*,[195] the Tenth Court of Appeals held that the provision of the Act that requires a person to undergo mandatory testing after another individual has been accidentally exposed to his or her blood or bodily fluids does not protect the identity of the person undergoing testing.[196] The court determined that situations where there was no "particularized suspicion" that a testee has HIV, that individual is not protected under the confidentiality provisions.[197]

In addition to mandating confidentiality, recent amendments to the CDPCA establish a program and guidelines for partner-notification and referral services.[198] This program provides services to HIV-positive patients who wish to have a partner notified that he or she has been exposed to the AIDS virus.[199] This notification is entirely voluntary and dependent on the patient's permission.[200] When an employee of the partner-notification program receives the name of a partner to notify, he or

190. *Buchanan*, 925 S.W.2d at 140 (holding that reporting requirements of CDPCA only apply when there is "particularized suspicion" that the person has AIDS); *Garcia*, 925 S.W.2d at 376 (holding that in order for confidentiality provisions of CDPCA to apply, information of AIDS status must have derived from patient/doctor relationship or actual testing for AIDS).

191. 925 S.W.2d 372 (Tex. App.—Corpus Christi 1996, writ requested).

192. *See Garcia*, 925 S.W.2d at 377 (determining whether blood bank has duty to warn third persons of donor's HIV status); *see also infra* text accompanying notes 251–66.

193. *Garcia*, 925 S.W.2d at 376.

194. *Id.* at 376 n.2.

195. 925 S.W.2d 135 (Tex. App.—Waco 1996, n.w.h.).

196. *Buchanan*, 925 S.W.2d at 139-40.

197. *Id.* at 140.

198. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.051 (Vernon 1992 & Supp. 1997) (stating that voluntary partner notification and referral program should be made available to all persons who are HIV positive).

199. *Id.* § 81.051(b). This section states that "the partner notification services offered by health care providers participating in a program should be made available and easily accessible to all persons with clinically validated HIV seropositive status." *Id.*

200. *See id.* § 81.051(c) (stating that if person voluntarily discloses name of partner, partner will be notified).

she must keep this information confidential.[201] Furthermore, the employee is not allowed to disclose to the partner any identifying information about the person or the date or period of exposure.[202] The employee is required to disclose the methods of transmission and prevention of HIV, telephone numbers and addresses of HIV testing sites, and local HIV support groups, mental health services and medical facilities.[203] Finally, the provision allows a physician to notify a local health official of a possible exposure to a third person without the consent of the patient. However, this provision also provides immunity to physicians for *failing* to warn a third person of possible exposure, thus giving the provision little practical effect towards preventing the spread of AIDS in Texas.[204]

2. Physician-Patient Privilege

Another source of mandated confidentiality in Texas is the statutory physician-patient privilege.[205] Under this privilege, information discussed between the physician and the patient may not be discussed with third parties.[206] The statute creating the privilege in Texas also provides several exceptions to this privilege, including a provision that states that a communication may be disclosed when a physician determines that there is a possibility of imminent physical injury to a third party.[207] A situation where a patient may transmit HIV to a third person would pose a danger of "imminent physical injury" to a third party. Although it seems that this interpretation supports a physician's duty to warn, there have been no cases interpreting this statutory exception in Texas.

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201. *Id.* This section states: "[i]f a person with HIV infection voluntarily discloses the name of a partner, that information is confidential." *Id.*

202. *Id.* § 81.051.

203. TEX. HEALTH & SAFETY CODE ANN. § 85.051 (Vernon 1992 & Supp. 1997).

204. *See id.* (stating that although physician may gain consent from patient and notify local health official of possible exposure third person, consent is not mandatory).

205. *See* TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.08 (Vernon Supp. 1996) (governing relations between doctor and patient). This statute governs disclosure or breaches of confidentiality that occur in judicial and administrative proceedings, as well as those made prior to any court or administrative proceeding. *See* Crocker v. Snypol, Inc., 732 S.W.2d 429, 435 (Tex. App.—Beaumont 1987, no writ) (discussing breach of confidentiality made prior to judicial and administrative proceedings). *But see* TEX. R. CIV. EVID. 509 (repealing some provisions governing disclosure of confidential information); *Crocker*, 732 S.W.2d at 435 (discussing uncertainty as to whether section 5.08 has been repealed or only limited to nonjudicial disclosure).

206. *See* TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.08(a) (Vernon 1996) (regarding physician-patient communications as "confidential and privileged").

207. *Id.* § 5.08(h)(2). This section states that an exception to confidentiality exists when "medical personnel . . . determine[s] that there is a probability of imminent physical injury to the patient, to himself, or to others." *Id.*

3. Attorneys

Like physicians, attorneys may also face the dilemma of deciding whether to warn a third party that a client is HIV positive. For example, a client may approach an attorney to draft a living will and, during the course of the attorney's representation, inform the attorney that it is imperative that the client's spouse not find out that he or she has AIDS.[208] The client may also tell the attorney that he or she has engaged in, and plans to continue engaging in, unprotected sex with his or her spouse.[209] An attorney in these situations is faced with a dilemma: deciding whether to warn the client's spouse in a situation that seems to demand disclosure despite statutory provisions that mandate the client's confidentiality. For example, an attorney is subject to the confidentiality provisions set out in the CDPCA[210] and therefore is instructed to maintain confidentiality in all but a few instances.[211] However, attorneys also have their own rules of conduct, the Texas Disciplinary Rules of Conduct, which mandate that clients who seek legal representation are entitled to the utmost confidentiality in their communications with their attorney.[212] Furthermore, a common law duty to warn a third party may override the effects of these statutes.[213] Likewise, statutory provisions set out in the Texas Disciplinary Rules may also create an affirmative duty to warn a third party in certain situations.[214]

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208. *See* Laurie S. Kohn, *Infecting Attorney-Client Confidentiality: The Ethics of HIV Disclosure*, 9 GEO. J. LEGAL ETHICS 547, 547 (1996) (discussing scenarios where attorney might be faced with duty to warn that client is HIV positive).

209. *Id.*

210. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.103(a) (Vernon 1992) (describing those restricted from disclosing test results as "any person that possesses or has knowledge of a test result"). The accompanying note further comments that a person is any legal entity or individual. *Id.* Thus, it is clear that an attorney falls within the scope of the CDPCA.

211. *Id.* For a discussion of instances where disclosure is allowed, see *supra* notes 178–187 and accompanying text.

212. TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(b)(1) (1991).

213. *See* Pamela D. Armstrong, Comment, *Confidentiality, Warning, and AIDS: A Proposal to Protect Patients, Third Parties, and Physicians*, 4 TOURO L. REV. 301, 306 (1988) (arguing that statutory duty of confidentiality is superseded by common law duty to warn).

214. TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(e) (1991) (mandating disclosure when attorney reasonably believes client will engage in criminal behavior likely to result in death or substantial bodily harm of another).

a. Common Law Provisions Unique to Attorneys

Although addressed in some jurisdictions,[215] no Texas court has addressed the issue of imposing a duty on an attorney to warn third parties of a danger posed to them by the attorney's client. However, such a duty could be imposed under the general common-law principles underlying the *Tarasoff* line of cases through analogy between the physician-patient privilege and the attorney-client privilege.

Courts traditionally impose a duty on a professional to warn or protect a third party for two reasons: (1) the existence of a special relationship between the professional and either the client or the third party at risk,[216] and (2) public policy reasons.[217] Because there is no Texas case finding a special relationship between an attorney and client, a duty to warn, if imposed, would most likely be based on public policy considerations. Several states have imposed a duty to warn a third party when there is a threat of actual violence.[218] Others require no such threat, reasoning that public policy favors protection of innocent third parties.[219] Policy reasons

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215. *See* State v. Hansen, 862 P.2d 117, 122 (Wash. 1993) (holding that attorney had duty to warn judge of credible threats made against judge); State v. Fentress, 425 N.Y.S.2d 485, 496 (Dutchess County Ct. 1980) (suggesting that attorney has duty to warn third party of violent propensities of his client); Hawkins v. King County, 602 P.2d 361, 366 (Wash. Ct. App. 1979) (creating attorney duty to warn third parties of client's violent intentions if attorney is certain of client's intentions).

216. *See* Kehler v. Eudaly, 933 S.W.2d 321, 329–30 (Tex. App.—Fort Worth 1996, n.w.h.) (finding duty where special relationship exists); Laurie S. Kohn, *Infecting Attorney-Client Confidentiality, the Ethics of HIV Disclosure*, 9 GEO. J. LEGAL ETHICS 547, 550 (1996) (examining exceptions to general rule that there is no affirmative duty to act for protection of third person).

217. *See* Laurie S. Kohn, *Infecting Attorney-Client Confidentiality: The Ethics of HIV Disclosure*, 9 GEO. J. LEGAL ETHICS 547, 550–51 (1996) (noting that courts allow policy considerations to weigh heavily in determining duty to warn third parties).

218. *See id.* at 547-49 (drawing comparison between attorney's duty to warn and physician's duty to warn); *see also Fentress*, 425 N.Y.S.2d at 496 (suggesting that policy reasons support finding that attorney has duty to warn third party of violent propensities of client); *Hansen*, 862 P.2d at 122 (imposing on attorney duty to warn third parties of threats made by client for reasons of public policy); *Hawkins*, 602 P.2d at 366 (reasoning that public policy favors creating attorney duty to warn third parties of client's violent intentions if attorney is certain of client's intentions).

219. *See* Fickett v. Superior Court, 558 P.2d 988, 989 (Ariz. Ct. App. 1976) (finding attorney liable to clients for failure to discover that client planned to liquidate guardianship); Laurie S. Kohn, *Infecting Attorney-Client Confidentiality: The Ethics of HIV Disclosure*, 9 GEO. J. LEGAL ETHICS 547, 557 (1996) (discussing various theories upon which court may impose duty to warn on attorneys). In *Fickett*, the Arizona court of appeals listed several factors to balance in determining whether an attorney will be held liable to a third party not in privity with the attorney: (1) "the extent to which the transaction was intended to affect the plaintiff," (2) "the foreseeability of harm," (3) "the degree of certainty that plaintiff suffered injury," (4) "the closeness of the connection between the de-

that have been cited in Texas cases favoring a duty to warn include the policy of preventing further injuries, the policy in favor of protecting innocent persons, and the policy in favor of public safety and health.[220] There is some indication that Texas courts would look to similar policy reasons in the context of an attorney-client relationship, because Texas courts have expressly relied upon these policy considerations when addressing a psychotherapist's, physician's, employer's, or blood bank's duty to warn a third party.[221] However, as is the case with other professionals, Texas lawyers must look also to the CDPCA and their own disciplinary rules to determine how any common law duty to third persons meshes with their duty of client confidentiality.

b. The Texas Disciplinary Rules and the CDPCA

The CDPCA requires that an attorney who receives knowledge of a test result keep the information confidential.[222] Even though an attorney is unlikely to receive an actual test result like a doctor or insurance company would, he or she would still be subject to the confidentiality provisions in most situations.[223] The statute includes in the definition of "test result" any assertion that a person is positive, negative, or at risk for HIV or AIDS.[224] Therefore, if a client tells the attorney that he or she is HIV positive, it probably comes within the ambit of a test result. Likewise, if an attorney is told by another person that the client is HIV positive, it is likely that the information is protected under the CDPCA. However, under the recent ruling in *Garcia v. Santa Rosa Health Care Corp.*,[225] it is not clear if the definition of "test result" would include an attorney learning that a client's spouse, sexual partner, or needle partner is HIV posi-

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fendant's conduct and the injuries suffered," (5) "the moral blame attached to the defendant's conduct," and (6) "the policy of preventing future harm." *Fickett*, 558 P.2d at 990.

220. *See* Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. 1983) (stating that employer may have duty to protect innocent third parties from employee's incapacity); Garcia v. Santa Rosa Health Care Corp., 925 S.W.2d 372, 377 (Tex. App.—Corpus Christi 1996, writ requested) (opining that public policy supports finding duty to warn); Gooden v. Tips, 651 S.W.2d 364, 371 (Tex. App.—Tyler 1983, no writ) (stating that one factor to consider in imposing duty to warn third parties is policy regarding prevention of future injuries).

221. *See Otis*, 668 S.W.2d at 307 (holding that public policy may require employer to prevent employee from injuring innocent third parties); Kehler v. Eudaly, 933 S.W.2d 321, 332 (Tex. App.—Fort Worth 1996, n.w.h.) (stating that it is likely that *Tarasoff* duty would be recognized by Texas Supreme Court when there is foreseeable third party).

222. TEX. HEALTH & SAFETY CODE ANN. § 81.103(a) (Vernon 1992).

223. *Id.*

224. *Id.* § 81.103.

225. 925 S.W.2d 372 (Tex. App.—Corpus Christi 1996, writ requested).

tive.[226] This circumstance might fall under the "situational conditions" exception created in *Garcia*.[227]

In addition to the CDPCA, Texas attorneys are also bound to confidentiality by the Texas Disciplinary Rules.[228] Specifically, Rule 1.05 states that a lawyer "shall not knowingly reveal confidential information of a client or former client."[229] Confidential information includes both privileged and unprivileged information, thus covering virtually all information acquired by an attorney in the course of representing the client.[230] So, to the extent that the lawyer is required to keep all information confidential, the Rules are consistent with the CDPCA. The exceptions to the CDPCA are permissive and thus do not create a conflict.[231]

The Rules, however, create an exception to confidentiality and allow an attorney to disclose information when the attorney "has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act."[232] The Rules make it clear that this disclosure is discretionary, based on the attorney's subjective perspective that a crime will occur.[233] The comment to Rule 1.05 informs attorneys contemplating disclosure to consider a number of factors. Included among them are the "magnitude, proximity, and likelihood of the contemplated wrong [and] the nature of the lawyer's relationship with the client."[234] Thus, factors an attorney would consider in the context of an

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226. *See Garcia*, 925 S.W.2d at 376 (holding that knowledge of donee's exposure to HIV from positive test result blood bank received was not confidential under CDPCA).

227. *See id.* (interpreting CDPCA as not protecting confidentiality in situation where blood bank receives notice that donor tested positive for HIV). The "situational conditions" exception the court effectively created states that "environmental and situational factors [such as the condition of the blood supply] are not covered by statute and do not carry the same guarantee of confidentiality as formal testing." *Id.*

228. TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(b) (1991).

229. *Id.*

230. *Id.*

231. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.103(b) (Vernon 1992) (allowing, but not requiring, information to be released to spouse or physician).

232. TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(c)(7) (1991).

233. TEX. DISCIPLINARY R. PROF. CONDUCT 1.05(c) (7) & cmt. 13 (1991); *see* Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 92 (1990) (noting that Rule 1.05(c)(7) "gives professional discretion, based on reasonable appearances, to reveal privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act"). The "reasonable appearances" terminology was also located in the former disciplinary rules and serves as a check on harmful disclosures which are based on an attorney's "unfounded suspicion or conjecture." *Id.*

234. TEX. DISCIPLINARY R. PROF. CONDUCT 1.05 & cmt. 14 (1991); *see* Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 92 (1990) (discussing factors to consider in determining whether to reveal confidential information).

HIV-positive client might include the great magnitude of the risk, the likelihood of transmission, how soon the transmission is going to occur, and the length of time it takes for AIDS to develop. The comment also states that a failure to take action does not violate these provisions. Specifically, the comment states that "these rules do not define standards of civil liability of lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure."[235]

There is, however, mandatory disclosure under Rule 1.05(e), which states that a lawyer *shall* reveal such information when he or she "has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person."[236] Thus, this section would override the discretionary disclosure provisions of Rule 1.05 and require disclosure. The attorney's dilemma in this situation is quite apparent: he or she faces discipline for failing to disclose under the Texas Disciplinary Rules of Professional Conduct and liability for disclosure under the CDPCA which mandates confidentiality.

In sum, there is less guidance for attorneys facing the question of whether to warn a third party than in any other profession. The legislature itself has adopted conflicting statutes while offering no guidance as to which statute must prevail. Not only is this unfair to attorneys who face potential liability, it is also unfair to third parties who may become exposed to the AIDS virus in the future and who might have been able to avoid such a death sentence had there been an attorney's warning.

C. *AIDS Cases: The Texas Approach to the Conflict*

In attempting to interpret these statutes and rules in accordance with common-law tort principles, Texas courts so far have held that a duty to warn third parties does exist.[237] In so finding, however, Texas courts have had to reconcile the general negligence principles set forth in *Tarasoff* and its progeny with the confidentiality provisions set forth in the Texas Health and Safety Code.[238] This reconciliation, however, leaves unsettled

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235. TEX. DISCIPLINARY R. PROF. CONDUCT 1.05 & cmt. 14 (1991).

236. *Id.* at R. 1.05(e).

237. *See* Garcia v. Santa Rosa Health Care Corp., 925 S.W.2d 372, 377-78 (Tex. App.—Corpus Christi 1996, writ requested) (holding that under *Tarasoff* reasoning, blood bank had duty to warn donee's wife that donor had tested positive for HIV); Casarez v. NME Hosps. Inc., 883 S.W.2d 360, 364 (Tex. App.—El Paso 1994, writ dism'd by agr.) (holding that hospital had duty to warn health care workers that patient had AIDS).

238. TEX. HEALTH & SAFETY CODE ANN. §§ 81.049–81.209 (Vernon 1992 & Supp. 1997).

the question of whether professionals will be shielded from liability if they do disclose a client's or patient's HIV-positive status.

The first case to confront the issue of a professional's duty to warn third parties of a client's positive-HIV status, *Casarez v. N.M.E. Hospitals, Inc.*,[239] dealt with a physician's duty to warn other members of hospital personnel that they were treating an AIDS patient. The plaintiff was a nurse hired by the patient's family to give the patient the extra care needed because he had AIDS.[240] The plaintiff knew the patient had AIDS, and the plaintiff was highly skilled in the care of AIDS patients.[241] The day before the patient died of AIDS, the patient spewed blood and mucus over the nurse's mouth, eyes, and arm while the nurse was treating a sore on the patient's mouth.[242] The nurse-plaintiff subsequently tested positive for HIV and sued the hospital and physician for failing to warn him and others of the dangers of working with an AIDS patient when not adequately and properly protected.[243] The Eighth Court of Appeals held that the physician only had a duty to inform the hospital and its health care workers that his patient had AIDS, which he fulfilled by informing the hospital's disease committee.[244]

The court rejected the plaintiff's reliance on *Gooden v. Tips*[245] to impose a duty upon the doctor.[246] *Gooden*, the court explained, involved a harm that was the reasonably foreseeable consequence of the physician's failure to warn his patient of the dangers of taking medicine.[247] In this case, however, the plaintiff was well-skilled in the methods by which HIV was transmitted as well as isolation techniques when treating an AIDS patient.[248] Furthermore, the hospital, not the doctor, had the duty to warn third persons involved in treating and visiting AIDS patients.[249] Therefore, the harm that resulted from the doctor's failure to order health care professionals to use precautions of which they were already well-aware was not a foreseeable consequence.[250]

The most recent Texas case to deal with a duty to warn third persons of their exposure to the AIDS virus, *Garcia v. Santa Rosa Health Care*

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239. 883 S.W.2d 360 (Tex. App.—El Paso 1994, writ dism'd by agr.).
240. *Casarez*, 883 S.W.2d at 362.
241. *Id.*
242. *Id.* at 362–63.
243. *Id.* at 363.
244. *Id.* at 364.
245. 651 S.W.2d 364 (Tex. App.—Tyler 1983, no writ); *see supra* notes 164–68 and accompanying text.
246. *Casarez*, 883 S.W.2d at 363-64.
247. *Id.*
248. *Id.*
249. *Id.* at 364.
250. *Id.*

Corp.,[251] involved a blood bank that discovered that it had knowledge of a donor's probable HIV infection.[252] The blood bank scheduled the donee for yearly physical examinations, but never informed him that its blood products had been infected with the AIDS virus.[253] The donee did not keep his yearly appointments and thus did not learn of his infection until he became ill.[254] In the meantime, the donee had met and married the plaintiff.[255] The donee's wife brought suit, claiming that the hospital breached its duty to warn her of her husband's HIV status.[256] Thus, the court was faced with the issue of whether a duty exists on the part of a health care provider to notify a third party that he or she may have been exposed to HIV through the use of the health care worker's services or products.[257] As a threshold issue, the court determined that the CDPCA did not prohibit disclosure of the HIV status.[258] This reasoning was based on a narrow reading of the definition of "test result" in the CDPCA.[259] The court noted that the blood bank did not learn that the donee had been exposed to AIDS through a test, but rather from other sources, such as the condition of the blood supply at the time of transfusion.[260]

The court next analyzed the imposition of a duty to warn third persons.[261] Specifically, it relied on *Gooden*, which involved a duty to warn the patient of the dangers of taking medicine.[262] Although *Garcia* did not deal with a duty to warn a patient, but rather a duty to warn a foreseeable third party, the court cited *Casarez* in determining that there was some indication in Texas law that a physician owes a duty to warn third parties of an HIV status.[263] Not only did the court look to *Casarez*, but it also looked to policies and laws of other states.[264] The court cited *Tarasoff* and *Williams* as consistent with the requirement that a health care professional protect or warn a foreseeable third party of the danger

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251. 925 S.W.2d 372 (Tex. App.—Corpus Christi 1996, writ requested).
252. *Garcia*, 925 S.W.2d at 375.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Garcia*, 925 S.W.2d at 376.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.* at 376–77.
262. *Garcia*, 925 S.W.2d at 377.
263. *Id.* (citing Casarez v. N.M.E. Hosps., Inc., 883 S.W.2d 360 (Tex. App.—El Paso 1994, writ dismissed by agr.)).
264. *Id.*

an infected person poses to them.[265] Consistent with the *Tarasoff* and *Gooden* line of cases in Texas, the court of appeals held that health care professionals who discover some disease or medical condition that their services or products have likely caused to a particular recipient and that may endanger a readily identifiable third party, owe a duty to reasonably warn the third party to the extent that such warning may be given without violating any duty of confidentiality to the patient.[266]

Thus, it is clear that Texas law supports a duty to warn third parties of an HIV status in certain professions. What remains uncertain is whether this duty will shield a professional from liability for disclosure, in light of statutes and rules mandating confidentiality to the client. Professionals should not be forced to guess what the risks of disclosure will be. Furthermore, the life of an individual should not hinge on the professional's fear of liability for disclosure. More and more cases are surfacing regarding a physician's duty to warn a third party of a client's HIV status.[267] The legislature now owes it to the professionals facing this dilemma and the individuals at risk of exposure to resolve the conflicts. The Texas legislature should take the next step toward protecting these individuals and enact a provision mandating disclosure when the client refuses to do so.

V. Recommendation: Enact State Legislation to Require Warning

To fight the AIDS epidemic, Texas must have a statute that requires professionals to notify third parties at risk of contracting HIV because of exposure to clients or patients. Such a statute must contain three essential elements: (1) mandatory warnings to third parties whom the professional knows are likely to be or have been exposed to the virus, (2) guaranteed confidentiality of the client's identity, and (3) guaranteed immunity from liability for the professional who makes the notification. In every instance, the proposed statute should require professionals to *attempt* to obtain voluntary consent to the notification.[268] Where consent is

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265. *Id.*

266. *Id.*

267. *See Deramus*, 92 F.3d at 280 (holding that insurance company had no duty to warn applicant's spouse that applicant had tested positive for HIV); Lemon v. Stewart, 682 A.2d 1177, 1184-85 (Md. Ct. Spec. App. 1996) (holding hospital had no duty to warn patient's extended family that patient had AIDS); Reisner v. Regents of Univ. of Cal., 31 Cal. App. 4th 1195, 1201 (Cal. Ct. App. 1995) (finding that physician owed duty to patient's boyfriend to warn of patient's HIV status); *Garcia*, 925 S.W.2d at 377 (holding blood bank had duty to warn donee's spouse that donor had tested positive for HIV).

268. Such cooperation would lead to increased reliability of the data given, thus minimizing time and money spent trying to notify third parties. *See* Pamela D. Armstrong, Comment, *Confidentiality, Warning, and AIDS: A Proposal to Protect Patients, Third Par-*

not given, a feasible statutory solution must also provide immunity to the professional for any potential breach of confidentiality arising out of the professional's notification. Unlike the existing statute which is inadequate because it only protects a physician for *failing* to warn a local health official of a third party who has been or is likely to be exposed to the virus, the proposed statute would provide immunity for *warning* a third party through a local health official. Such a statute must make it clear that once the professional has notified the local health official, he or she has fulfilled his or her common law duty to warn a third party. Only then will Texas have the tool it needs to stop the spread of AIDS.

The first section of a feasible proposal must create the standards for determining when a professional is required to notify third parties at risk of contracting HIV because of exposure to a client. The most sensible approach would follow the common law principles already established in Texas for determining when a professional has a duty to warn. Texas common law requires disclosure among certain professionals when a readily-identifiable third party is in danger from an act or threat of a client.[269] In the context of AIDS, two situations might apply where the common law has found a duty to warn. The first situation would be the existence of a special relationship.[270] Such a relationship exists between a doctor and a patient, social worker and client, or attorney and client.[271] The second instance would be where disclosure was necessary to avoid danger from another's conduct that the actor has at least partially created.[272] This circumstance relates to situations where, for example, a blood bank has supplied products that might be dangerous, such as blood

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ties, and Physicians, 4 TOURO L. REV. 301, 317 (1988) (advocating patient consent for physician to warn third parties that they have been exposed to AIDS). Moreover, working with patients rather than against their wishes is likely to increase the quantity and accuracy of the information given. *See* David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 475 (1990) (stating that "working with patients and contacts, rather than against their desires, is vital" and that "contrary policy is likely to reduce the quantity and accuracy of data acquired").

269. *See* Kehler v. Eudaly, 933 S.W.2d 321, 329–30 (Tex. App.—Fort Worth 1996, n.w.h.) (explaining that Texas case law indicates existence of duty to warn of foreseeable harm); Williams v. Sun Valley Hosp., 723 S.W.2d 783, 785 (Tex. App.—El Paso 1987, writ ref'd n.r.e.) (holding that there is duty to warn readily identifiable third party of threat made by client).

270. *See Kehler*, 933 S.W.2d at 329–30 (stating that duty to warn exists when there is special relationship such as employer-employee or parent-child).

271. *Id.*

272. *See id.* at 329–30 (noting that Supreme Court of Texas has found that duty to warn exists when defendant has partially contributed to harm).

contaminated with HIV.[273] Requiring a professional to notify a local health official of a readily identifiable third person who may be exposed to the AIDS virus would fulfill the professional's common-law duty to warn under Texas law, and would resolve any conflicts between common law and statutes. Although never proposed in Texas, such a resolution is greatly needed to avoid the uncertainty professionals now face when determining whether warning a third party is required.[274]

The second section of the proposed legislation should address *who* the professional should notify when the professional believes that a third person has been exposed, or is likely to be exposed, to the AIDS virus. While the proposed statute might require the professional to notify the actual third party at risk of exposure, the better alternative is to require the professional to notify a public health official rather than the third person who has been exposed to the virus.[275] Notifying a public health official would not only increase the confidentiality of the patient's identity by not allowing the contact to know from whom the information was obtained, it would also be less burdensome to the professional.[276] Whereas a professional has limited time and resources available to notify a third party and generally has little knowledge of the disease or methods

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273. *See Garcia*, 925 S.W.2d at 375 (upholding duty to warn third parties of patient's exposure to AIDS); *Williams*, 732 S.W.2d at 785 (holding that psychotherapist has duty to warn identifiable third parties of danger posed to them by patient).

274. *See* David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 493–94 (1990) (discussing complete lack of guidance for physicians in determining when to warn third party of HIV status); Sten L. Gustafson, Comment, *No Longer the Last to Know: A Proposal for Mandatory Notification of Spouses of HIV Infected Individuals*, 29 HOUS. L. REV. 991, 1003–06 (1992) (observing dilemma faced by physicians in trying to determine their duty to third parties and to their patients).

275. *See* David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 477 (1990) (discussing various methods of notifying third parties). The American Medical Association promotes, among other things, these requirements and even goes as far as to suggest that in the situation where a local health authority does not act when given information of possible exposure, a physician must warn the endangered parties. *Id.*

276. *See id.* at 475. The results of notification by a professional could be disastrous. *See* Scott H. Isaacman, *The Conflict Between Illinois Rule 1.6(b) and the AIDS Confidentiality Act*, 25 J. MARSH. L. REV. 727, 729 (1992) (discussing dilemma attorney faces in complying with code of conduct when representing client who has AIDS and engages in sex with others); Charles D. Weiss, Comment, *AIDS: Balancing the Physician's Duty to Warn and Confidentiality Concerns*, 38 EMORY L.J. 279, 307 (1989) (discussing policy concerns that might arise if physician is required to make notification to contacts and advocating contact tracing by local health department).

of counseling available to those exposed to the virus,[277] a public health official is experienced in contact tracing through the existing voluntary partner notification program already in effect in Texas.[278]

The third section of an effective legislative solution must provide a mechanism to maintain confidentiality. Confidentiality is essential to any effective solution and increases the likelihood that individuals will come forward for the necessary testing, counseling, and treatment needed.[279] Furthermore, studies have shown a direct relation between truly anonymous testing and an increased number of individuals coming forward to be tested for AIDS.[280] However, preventative measures must also ensure that those not infected with HIV have the opportunity to avoid contracting the virus.[281] This requires warning those who may have been exposed to the virus[282] by eliminating any identifying information from the notification. Such a section could mirror the existing partner notification program, which is currently voluntary.[283] Under the existing program, the information given to the contact is limited to a warning of possible exposure to the virus and providing the location and existence of testing sites and available medical facilities.[284]

Where the proposed program would differ from the existing partner notification program is in a requirement for a mandatory warning and the maximization of confidentiality. The warning should be mandatory,

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277. *See* David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 475 (1990) (discussing potential problems with notification by physician).

278. *But see id.* (stating that public health departments are underfunded, so duty to notify should fall on physicians).

279. *See* Pamela D. Armstrong, Comment, *Confidentiality, Warning, and AIDS: A Proposal to Protect Patients, Third Parties, and Physicians*, 4 TOURO L. REV. 301, 311 (1988) (stating that "any successful effort aimed at controlling the virus and preventing its spread depends upon confidentiality of medical information").

280. *See* David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 473–74 (1990) (comparing statistics in states where identifying information is reported with statistics in states where no identifying information is given and concluding that testing rates are higher in states that do not report identifying information).

281. *See* Pamela D. Armstrong, Comment, *Confidentiality, Warning, and AIDS: A Proposal to Protect Patients, Third Parties, and Physicians*, 4 TOURO L. REV. 301, 311 (1988) (advocating statutes mandating warning to prevent further spread of AIDS).

282. *See id.* (listing requirements of preventing spread of AIDS: education, counseling, and warning third parties of possible exposure).

283. TEX. HEALTH & SAFETY CODE ANN. § 81.051 (Vernon 1992).

284. *Id.*

rather than permissive, as it is now.[285] This would mean that in every instance where a professional knows of possible exposure to a third party, he or she must notify the local health official or face liability for failure to warn. Confidentiality may be maximized by not allowing professionals to include any identifying characteristics to the local health official. The professional should only release to the health official the name of the third person at risk of exposure. By doing so, absolutely no individual would receive information identifying an HIV-positive individual.

In the context of physician-patient disclosure, the argument may arise that such disclosure would discourage testing if the individual seeking testing knows that the physician will warn a third person of the test result.[286] The primary concern for such an individual would be possible discrimination resulting from a third person realizing that he or she has AIDS.[287] However, by eliminating any identifying information from the notification, there will be no discriminatory effects toward the individual who has tested positive, unless that individual discloses such information.[288]

In the case of professionals such as a psychotherapist or attorney, the argument may arise that mandatory disclosure would discourage disclosure of facts necessary to treat or handle a client's case effectively.[289] It may also discourage clients from seeking legal advice or therapy.[290] In

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285. *See* TEX. HEALTH & SAFETY CODE ANN. § 81.046 (Vernon 1992 & Supp. 1997) (immunizing physicians from liability for failing to notify health official of possible exposure to third parties).

286. *See* Pamela D. Armstrong, Comment, *Confidentiality, Warning, and AIDS: A Proposal to Protect Patients, Third Parties, and Physicians*, 4 TOURO L. REV. 301, 316-23 (1988) (advocating keeping names of persons infected with AIDS confidential to encourage consent by patient).

287. *See* Bobbi Bernstein, *Solving the Physician's Dilemma: An HIV Partner-Notification Plan*, 6 STAN. L. & POL'Y REV. 127, 128 (1995) (noting enormous stigma and discrimination that individual with AIDS faces); David R. Katner, *The Ethical Dilemma Awaiting Counsel Who Represent Adolescents with HIV/AIDS: Criminal Law and Tort Suits Pressure Counsel to Breach the Confidentiality of the Clients' Medical Status*, 70 TUL. L. REV. 2311, 2320 (1996) (stating that AIDS victims may face social isolation and severe depression).

288. *See* Roger Doughty, Comment, *The Confidentiality of HIV-Related Information: Responding to the Resurgences of Aggressive Public Health Interventions in the AIDS Epidemic*, 82 CAL. L. REV. 111, 133 (1994) (noting that confidentiality of HIV-infected persons is needed to avoid risk of AIDS patients leaving system entirely).

289. *See id.* (noting that breaches of client confidentiality may lead individuals to avoid health care system entirely); *see also* Bobbi Bernstein, *Solving the Physician's Dilemma: An HIV Partner-Notification Plan*, 6 STAN. L. & POL'Y REV. 127, 128 (1995) (arguing that breach of confidentiality would thwart ability of counsel and also physician's ability to treat infected individuals effectively).

290. *See id.* (noting that loss of trust may lead people to avoid contact with system).

fact, states have created such privileges in order to avoid the harmful consequences of disclosure.[291] However, exceptions allowing these parties to warn third persons who are in danger due to an act or threat of their client exist because the interests at stake are so grave as to require disclosure. A professional cannot simply stand by as clients transmit a deadly disease to another person. As one court has stated,

> To exalt the oath of silence, in the face of imminent death, would, under these circumstances, be not only morally reprehensible, but ethically unsound . . . had [the attorney] acted any differently, he would have blindly and unpardonably converted a valued ethical duty into a caricature, a mockery of justice and life itself.[292]

It is imperative that the legal system accord society such justice.

The proposal advocated above would eliminate the conflicts between confidentiality statutes and common law. The requirement that a professional notify a readily identifiable third person at risk of contracting HIV fulfills a professional's common law duty to warn in Texas. Furthermore, the confidentiality provisions are still complied with if no identifying characteristics are given concerning an individual test result. The standard requires that no person shall receive knowledge of a test result. A test result is defined as any statement that an individual is positive, negative, or at risk for AIDS.[293] This standard is not violated because the third person is not told that the client is positive, negative, or at risk of AIDS; he is only told that *he* may be at risk for AIDS. There is nothing in the proposed statute that would prevent a person from informing an individual that he is at risk of AIDS. The proposed statute would only require that a third person is not told that a certain individual is positive, negative, or at risk of AIDS.

Not only is this proposal consistent with statutory framework and common law, it also has many other positive aspects. First, the proposal would be easy to implement. Because Texas already has a voluntary partner-notification program that allows a local health official to make a notification, the resources already exist to implement such a proposal. As a result, fewer funds would be spent instituting a program to warn third parties. However, what is lacking in the partner notification program in Texas is the requirement that notification be *mandatory*. Given the sim-

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291. *See* James Paul Sizemore, *Alabama's Confidentiality Quagmire: Psychotherapists, AIDS, Mandatory Reporting, and* Tarasoff, 19 LAW & PSYCHOL. REV. 241, 245-46 (1995) (noting that courts have announced several exceptions to supposedly broad scope afforded psychotherapist-patient privilege for reasons of public welfare).

292. State v. Fentress, 425 N.Y.S.2d 485, 497 (Dutchess County Ct. 1980).

293. TEX. HEALTH & SAFETY CODE ANN. § 81.101 (Vernon 1992).

plicity of implementing such a change, and the dramatic effects of the change, there is simply no reason that this solution not be enacted.

Second, although the changes would be easy to implement, they would have a tremendous impact on the AIDS crisis. In terms of human resources, a requirement to warn persons who may have been or may become exposed to AIDS would save countless lives. Furthermore, requiring notification should result in fewer individuals contracting the disease. Consequently, less money would have to be spent treating the disease. Given the expense of AIDS treatment, the impact on government financial resources would be enormous as well.

Third, the proposal does not create higher standards for professionals than those that already exist at common law. The proposal simply puts professionals on notice that they do have this duty and that it will be enforced. Furthermore, it eliminates any confusion that might exist regarding the conflict between confidentiality statutes, common law, and statutory and ethical standards in each profession. The professional would know that although the statute mandates confidentiality, this common-law duty to warn is also mandatory and overrides the statute.

The proposal is also clearly consistent with the legislative intent in enacting the CDPCA, which was to prevent further spread of disease.[294] Confidentiality was not the purpose of the Act, but rather the means chosen to effectuate the goal of limiting the spread of the disease through promoting voluntary testing.[295] In the interest of furthering public health, the Act ensures that information will be confidential.[296] However, by eliminating any identifying factors from the notification of third parties, not only is the proposal within the letter, but it is also within the spirit of, the Act.

VI. CONCLUSION

The dual expectations of professionals to keep communications confidential and to protect the public health have always created tension. Laws regarding confidentiality of AIDS victims, common law duties to warn, and statutory provisions mandating client confidentiality within each profession have increased the tension by creating a no-win situation.

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294. *See* Tex. S.B. 799, 74th Leg., R.S. (1995) ("purpose of this subchapter is to . . . combat the spread of infectious and communicable diseases"); *cf.* TEX. HEALTH & SAFETY CODE ANN. § 81.002 (Vernon 1992) (stating that state has duty to protect public health).

295. *Cf.* TEX. HEALTH & SAFETY CODE ANN. § 81.002 (Vernon 1992) (stating that purpose of act is to prevent spread of communicable disease).

296. *See id.* § 81.046 (mandating confidentiality of test results); Gulf Coast Reg'l Blood Ctr. v. Houston, 745 S.W.2d 557, 562 (Tex. App.—Fort Worth 1988, no writ) (noting intent of legislature to keep test results confidential).

At this time, professionals run a high risk of liability if they disclose that a client has tested HIV positive. On the other hand, professionals also run the risk of liability for failing to disclose a client's HIV-positive status to a third person at risk of exposure to the AIDS virus.

The lack of guidance for Texas courts in resolving these issues has resulted from different jurisdictions reaching opposite conclusions on the issue of a duty to warn in the AIDS context. Nonetheless, given the deadly nature of the disease, a duty to warn is essential. However, if left to the courts, jurisdictions will vary regarding whether a duty to warn should exist. Leaving this issue for the courts to resolve would result in a quagmire of fact-specific rules and exceptions that no lay person would be able to interpret.

This problem is magnified in Texas due to the large number of individuals in the state who are HIV positive. So far, Texas courts have upheld a duty to warn a third person of an HIV-positive status. However, leaving this issue to be resolved by our courts is still an unacceptable solution. There is no guarantee that every court in Texas will reach the same conclusion. This means that it is likely that professionals will face liability in the near future for disclosing a client's HIV status to a third person at risk of exposure.

There is no principle as deeply embedded in the law as that expressed in the maxim, '*Salus populi suprema lex*,'[297] and this Comment advocates a proposal entirely consistent with maximizing the public welfare, both on the individual and collective level, by imposing a duty to warn identifiable third persons who may be at risk of contracting AIDS. The notification provision proposed by this Comment would eliminate these conflicting duties by providing professionals with clear guidelines to enable them to warn third parties while maintaining confidentiality of client identity, a principle deeply embedded in professional ethics. Legislation that reduces the conflict currently faced by professionals may be the first effective step toward fighting the spread of AIDS in Texas.

297. The welfare of the people is the supreme law.