

PENNSYLVANIA GENERAL ASSEMBLY
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
APRIL 27, 1989

Hearing on Pending and Proposed
Legislation Concerning
Acquired Immune Deficiency Syndrome

Statement on Behalf of the
Pennsylvania Bar Association
presented by
J. Thomas Menaker, Esq.

MR. CHAIRMAN, and Members of the Committee:

My name is Tom Menaker. I am a partner in the Harrisburg law firm of McNeese, Wallace & Nurick. I have been an active member of the Pennsylvania Bar for 26 years, and I concentrate my practice in the field of employment relations, representing industrial clients and charitable institutions. I am a former Chairman of the Pennsylvania Bar Association's House of Delegates, and I have served as a member of the Association's Task Force on AIDS since its inception two years ago. Our Task Force is comprised of attorneys, research scientists, chief legal counsel from Commonwealth administrative agencies, and prominent representatives of the Pennsylvania Medical Society.

Nearly a year ago, our Task Force issued a comprehensive Report analyzing AIDS problems from a legal, epidemiological, social, and medical perspective. That Report has been acclaimed nation-wide by lawyers, doctors, and government agencies. Copies have been provided to the members of this Committee, and we urge

you to study it in order to more fully comprehend the enormity and complexity of the legal problems being created as this epidemic impacts the citizens of our Commonwealth.

We are here today to discuss our views concerning a variety of bills proposed to deal with certain aspects of the AIDS crisis:

1. H.B. No. 436 (P.N. 478)

Our Task Force members refer to this as the "Rock Hudson's lover's bill." It would establish a new civil cause of action for all persons who engage in sexual intercourse with a partner who knows but fails to disclose that he is infected with the Human Immunodeficiency Virus (HIV). You may recall that a male partner of Rock Hudson's sued his estate claiming that Hudson had, without disclosure, exposed him to the possible risk of HIV infection even though the plaintiff partner tested negative for the virus. Although he was not infected, the California trial court jury awarded in excess of \$10,000,000 as damages for emotional trauma and anxiety. That award has recently been cut in half by an appellate court.

House Bill 436 would guarantee that an uninfected sexual partner could recover under similar circumstances in Pennsylvania. Our Task Force opposes this bill because it rewards those who voluntarily expose themselves to the risk of HIV infection. Since there is no preventive vaccine or cure for

this disease, the only way the epidemic can be curtailed is by public education and personal avoidance of risky behavior. The argument that the plaintiff wasn't aware of his lover's infection goes contrary to the public policy the law should foster. That policy is to make every individual responsible for his own behavior.

AIDS is not a disease that someone gives to you, like a cold or the flu. You must do something to take it from an infected person. Since 90 percent of infected people don't know it, we must all assume that every unprotected act of sexual intercourse or needle sharing puts us at risk of infection.

We need to discourage promiscuous and unprotected sexual behavior. House Bill 436 would have the opposite result.

2. H.B. 437 (P.N. 479)

This bill would make it a third degree misdemeanor, punishable by a \$3,000 fine and three years imprisonment for a known HIV carrier to engage in sexual intercourse without warning his partner that he is infected with the virus. It is our position that this bill is unnecessary. The conduct described clearly violates the existing and more serious criminal statute prohibiting "recklessly endangering another person":

"A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury."
Act of December 6, 1972, P.L. 1482, No. 334,
§1; 18 Pa.C.S.A. §2705.

There has been no indication that HIV positive persons or AID patients are knowingly exposing others through unprotected sex and without disclosure. The bill implies that with prior disclosure of infection there is no criminal act, that the partner then "assumes the risk." The burden should always be placed upon the individual to protect himself from a possibly infected partner.

An additional problem could be created by such specific legislation. It may actually discourage prostitutes and the sexually promiscuous persons from seeking voluntary testing even though they may feel the need for it. Ignorance would, in this case, be a defense to criminal prosecution.

3. H.B. 624 (P.N. 692)

This bill would amend the current criminal prohibitions against prostitution. We will comment only upon that portion of the bill dealing with mandatory testing of defendants convicted of prostitution.

We oppose such legislation for two reasons. First, we oppose all forms of mandatory testing for the AIDS virus, with the exception of blood, body parts, body fluids, and semen donors. The United States Supreme Court has recently held in two separate cases that urine testing for drugs constitutes a "search" that must comply with the constitutional safeguards of the Fourth Amendment and its "probable cause" requirements.

Surely a taking of one's blood would be subject to the same or higher requirements. The mere conviction of prostitution is not likely to justify a probable cause finding authorizing such an invasive body search. Most prostitutes infected with the virus have contracted it from sharing intravenous drug needles rather than from male partners. Male partners of female prostitutes are not considered to be a high risk group for HIV infection.

A second reason for our opposition to the testing proposal is that it will provide those prostitutes who test negative with an "official cleanliness" imprimatur they will likely use in competing for paying partners. As a matter of public policy we should be educating all citizens to think of all such sexual encounters as inherently dangerous. Why give a substantial portion of prostitutes an excuse to proclaim their "AIDS free" condition?

4. H.B. 824 (P.N. 915)

This bill would criminalize an assault by an HIV positive individual, if that assault would likely transmit the virus to the victim. The crime would be a first degree felony. It is our position that this legislation is unnecessary for the same reasons expressed in our previous comments concerning House Bill No. 624.

5. Oregon House Bill 2471 (1989 Regular Session)

This bill would require judges to inform defendants and victims in criminal cases involving possible transmission of body fluids of the availability of AIDS testing and counseling. We would support that proposal, because it encourages voluntary testing accompanied by counseling.

The bill goes further, however, by permitting court mandated AIDS testing of convicted defendants. We oppose that proposal for similar reasons as we oppose the mandatory testing provision in House Bill No. 624. If the victim or the court have legitimate concern that the victim may have been infected with the AIDS virus, the best way to determine that is to test the victim. By the time the defendant is convicted, any HIV transmission would certainly have produced antibodies in the blood of the victim, because that seroconversion process normally takes between two weeks and two months, with a maximum time of six months.

CONCLUSION

Only a well-executed education policy and continuing pressure for avoidance of high risk behavior will curtail the AIDS epidemic. We are seeing only the "tip of the iceberg."

Ninety percent of infected persons are not even aware of the virus they carry and transmit. We must encourage voluntary, confidential testing of persons engaged in high risk behavior.

The Pennsylvania Bar Association urges the General Assembly to develop a positive approach to this catastrophic health threat. It is believed that well over two million Americans are already infected, and more than 100,000 of them are Pennsylvanians. Nearly all of them will be dead in ten years. We cannot even scratch the surface of this problem by enacting criminal legislation or repressive testing schemes.

The Pennsylvania Bar Association, through its AIDS Task Force, and with the invaluable participation of the Pennsylvania Medical Society, is in the process of drafting a proposed bill that would encourage voluntary testing and counseling, while closely safeguarding confidentiality. Only when confidentiality is assured, will the public feel secure in volunteering for HIV tests. We will submit this proposed legislation to you in the very near future, and will again be available to discuss it with you at that time.