

# Client confidentiality and record-keeping



## Disclosing to prevent harm — a decision-making tree

Regulated professionals usually have laws, regulations or policies specifying when and how confidentiality may be breached. Registered professionals should, in addition to this decision making-tree, refer to these specific laws, regulations and policies.

Situations may arise in which a counsellor knows that an HIV-positive client is putting an identifiable person at risk of HIV infection and that person is unaware of the risk. Such circumstances call for a **measured, considered response**. If a counsellor does not use a measured approach, and discloses confidential client information as a first step, the counsellor and/or the organization (e.g., AIDS service organization) could face a lawsuit from the client. The organization would also run the risk of losing credibility in the community by breaching the trust between client and service provider, which could make it more difficult to reach people living with HIV (PHAs) who could potentially benefit from counselling and other services. For a discussion on service providers' and organizations' obligations and the so-called "duty to warn," see "Preventing harm to others," also in this section of this resource kit.

If the organization has a policy or guidelines regarding the disclosure of client information to prevent harm, then these **should be followed unless there is a valid reason not to do so**. A decision not to follow the policy should be approved by a supervisor or the executive director of the organization.

If the organization does not have a policy or guidelines, here is a **decision-making tree** that sets out a measured approach to making decisions about whether or not to disclose client information to prevent harm:

### STEP 1:

Seek **guidance** from a supervisor or the executive director.

### STEP 2:

Answer the following **questions**:

- Has the HIV-positive client been **informed** about HIV disclosure to sexual partners, including the legal implications of HIV non-disclosure? For more information on the law, see "Criminal law and HIV non-disclosure," also in this resource kit.

- ❑ Has the HIV-positive client been **thoroughly counselled** about the means of protecting a sexual partner from HIV transmission?
- ❑ Is **an identifiable person or group of persons** at risk?
- ❑ Is the risk a **risk of serious bodily harm or death**?
- ❑ Is the serious bodily harm or death **imminent** (i.e., the nature of the threat must be such that it creates a sense of urgency)?

**Service providers should take into consideration all factors that may increase or decrease the risk posed to a client’s partner(s)** including the type of sexual activity, the client’s viral load and/or treatment (when known) and the frequency of unprotected sexual intercourses.

The three last questions described above are part of the legal test set out by the Supreme Court of Canada in *Smith v. Jones* case authorizing service providers to breach confidentiality to protect others from harm in some limited circumstances. For more information about this test and its potential application to HIV non-disclosure, see “Preventing harm to others,” also in this section.

### **STEP 3:**

If the answer to all of the questions is “YES” then you should **consider**:

- ❑ What option would be the least intrusive? For example, service providers who are in contact with the person at risk could have, as a first step, a general discussion about HIV, how it is transmitted, and why it is important to get tested for HIV and to take precautions, in order to raise the person’s awareness about potential exposure without breaching the client’s confidentiality.  
*N.B.: However, if the person at risk is also a client of the service provider, there may be a positive duty to warn the person at risk depending on his or her relationship to that client. Especially in such circumstances, service providers should seek legal advice.*
- ❑ What is the potential harm that will result if you breach client confidentiality? This includes considering harm to the client, to the counselling relationship, and to the ability of the organization to carry out its mandate.
- ❑ What is the potential harm if you don’t breach client confidentiality? This includes considering harm to the client’s partners and to the ability of the organization to carry out its mandate.
- ❑ Does the harm of disclosing outweigh the harm of not disclosing or *vice versa*?

### **STEP 4:**

If after weighing these factors, you **decide not to breach** client confidentiality, you should continue to counsel the client about HIV prevention and inform him or her about the legal implications of HIV non-disclosure.

If after weighing these factors, you **decide to breach** client confidentiality, then you should consider the steps you will take **while continuing to protect your client’s rights and well-being to the greatest possible extent**. You should:

- ❑ Decide who you are going to contact and when and what client information you are going to disclose. Remember that the disclosure of confidential information should be as limited as possible so as to protect the client’s confidentiality.
- ❑ Give the client reasonable advance notice, and discuss the procedure you are going to follow and the information you are going to disclose — unless, in the circumstances, this is not practical (e.g., because it might put the person thought to be at risk at even greater risk of harm).
- ❑ Help the client develop a plan to deal with potential negative consequences associated with the disclosure of the confidential information (e.g., HIV-positive status).

**STEP 5:**

Once this has been done, you are in a position to undertake disclosure. When doing so, remember:

- ❑ As you attempt to prevent the harm to the other person, you have an ongoing legal obligation of confidentiality to **disclose as little information as possible** to accomplish the goal of preventing harm.
- ❑ Do not reveal the name or other identifying information of your client unless absolutely required to protect the person at risk. If you choose to contact your client’s partners directly, you don’t need to reveal your client’s name. Instead you may advise them to seek testing for sexually transmitted infections, without telling them through whom they may have been exposed, although in practice they may suspect or be able to determine the identity of your client.
- ❑ Satisfy yourself that anyone you are giving information to also knows the importance of not revealing the client’s identity.

In any cases, the organization should record the reasons for its decision and also **inform the client of any action to be taken if it breaches his or her privacy**. Note that the client should be given reasonable notice *before* action is taken, unless this is not practical in the circumstances (e.g., because it might put the person thought to be at risk at even greater risk of harm).

This decision-making tree **can also be used by organizations to develop policy, guidelines or positions on the issue** of having to turn to disclosure to prevent harm to another person.

**N.B.:** This document does not address the issue of a duty to report when a child is in “need of protection.”

This document is part of the on-line resource, *HIV Disclosure and the Law: A Resource Kit for Service Providers*, available at [www.aidslaw.ca/community-kit](http://www.aidslaw.ca/community-kit). It contains general information and does not constitute legal advice. Reproduction is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source of the information. For further information, contact the Legal Network at [info@aidslaw.ca](mailto:info@aidslaw.ca). *Ce document est également disponible en français.*

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