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# AIDS AND FUNERAL HOMES: COMMON LEGAL ISSUES FACING FUNERAL DIRECTORS

MARK E. WOJCIK\*

## INTRODUCTION

Funeral services represent the final stage in the spectrum of care provided to persons with HIV. Access to funeral services commonly involves such legal issues as discrimination, privacy, and disclosure. These issues are similar to those that arise when a person with HIV seeks access to health care. For example, the same laws that guarantee access to medical services also guarantee access to funeral services. One critical issue affecting access to funeral services is discrimination. Unfortunately, actual practices in the funeral industry do not reflect what anti-discrimination laws require for the handling of persons who die of illnesses related to HIV. In fact, many funeral directors and embalmers are oblivious to the potential liabilities they face when they discriminate against a person who died of an illness related to HIV.

Discrimination against persons with HIV-related illnesses who seek access to funeral services varies in form. In some cases, discrimination may be blatant, as when a funeral director outright refuses to handle a person who has died of an HIV-related illness.<sup>1</sup> In other cases, the discrimination may be subtle, as when an embalmer charges an extra fee to handle a person who died of an HIV-related illness, and the funeral director passes the additional

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1. A claim to lack knowledge or experience in handling HIV cases should not justify a refusal to handle a person with HIV. Because of the large numbers of persons infected with HIV, funeral homes must plan for the inevitable case of handling someone who dies of an illness related to HIV.

charge on to the family.<sup>2</sup> In either case, these blatant and subtle forms of discrimination are unlawful and unworthy of the funeral service profession.

Other common legal issues facing funeral home directors concern issues of disclosure and privacy. Rights to privacy concerning an individual's HIV status arise in a number of different contexts. These situations include death certificates,<sup>3</sup> obituaries,<sup>4</sup> and memorial services.<sup>5</sup> Moreover, a discussion of privacy issues also includes the perceived rights of funeral directors to learn from a hospital that a person died of an illness related to HIV.<sup>6</sup>

This essay surveys common legal issues confronting funeral directors and those who utilize their professional services. This essay seeks to apprise funeral directors and members of the public of rights and obligations that may arise in seeking access to funeral services.<sup>7</sup> First, this essay discusses discrimination issues involved

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2. Since the embalmer should be using "universal precautions" in all cases where there is a potential for contact with bodily fluids, there should be no extra equipment necessary for a person who has died of an HIV-related illness, as compared to a person who dies, for example, of cancer. There should be no additional fee for additional equipment. Moreover, it is also discriminatory to charge an extra fee for cleaning a hearse when a person has died of an illness related to HIV because cleaning should be done in all cases and because the body, once in the casket, does not come into contact with the hearse.

3. See *infra* notes 88-95 and accompanying text for a discussion of problems which arise regarding death certificates.

4. A family may sometimes fear that an obituary will disclose HIV or AIDS as the cause of death and thus stigmatize both the deceased person and the surviving family members.

5. Disputes among competing family members may create tensions as to who may learn that a person died of an HIV-related illness. Because AIDS has affected so many non-traditional families, funeral directors will need special sensitivity in accommodating the needs of both traditional and non-traditional families. See generally NATIONAL FUNERAL DIRECTORS ASSOC., INC., *A Caring Response to an AIDS-Related Death* (1991).

6. Many funeral directors view it as a moral obligation on the part of the hospitals to disclose a biohazard with the use of a red toe tag or other means of identification. See 29 C.F.R. § 1910.1030(g) (1993). When funeral directors begin to treat all cases as potentially infectious, as they must under the requirement to use universal precautions, there will be less perceived need to know results of individual cases when persons die of illnesses related to HIV.

7. This essay focuses on issues peculiar to the provision of funeral services, rather than the full range of legal issues affecting funeral homes. There is already sufficient scholarship to describe general business, insurance, and employment issues related to HIV that apply to a broad range of service businesses, including funeral homes.

For example, a funeral home may have employment law issues related to the employment of HIV-positive individuals in the funeral home. Although HIV is covered as a disability under the Americans With Disabilities Act (ADA), the employment provisions of the ADA apply only to employers with 25 or more workers until July 26, 1994, when it will apply to employers with 15 or more workers. Americans With Disabilities Act, 42 U.S.C. § 12111(5) (1993). For a discussion of employment issues concerning HIV-positive individuals, see ALLAN H. TERL, *AIDS AND THE LAW* 156 (1992); Laura Pincus, *The Americans with Disabilities Act: Employers' New Responsibilities to HIV-Positive Employees*, 21 HOFSTRA L. REV. 561 (1993).

in access to funeral services. Second, this essay discusses issues involved in privacy rights and duties specific to the funeral industry. This essay concludes with a summary of specific recommendations for funeral home directors.

## I. ACCESS TO FUNERAL SERVICES

Discrimination with regard to access to funeral services arises in a variety of situations. Both federal and state law provide protection against discrimination to persons with HIV who seek access to funeral services. This section first discusses the disability laws that apply to funeral homes. Next, this section recognizes some of the most common discriminatory practices of funeral homes. In addition, this section discusses issues that arise when traditional and non-traditional families disagree on funeral arrangements.

### A. Disability and Human Rights Laws Apply to Funeral Homes

Federal law, namely the Americans With Disabilities Act (ADA)<sup>8</sup> and the Rehabilitation Act of 1973, as amended,<sup>9</sup> prohibit certain forms of discrimination against persons with disabilities or persons perceived to have disabilities. Section 302 of Title III of the ADA provides that:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.<sup>10</sup>

Because funeral homes provide a service to the public, they are listed among the private entities considered to be "public accommodations" for purposes of the ADA.<sup>11</sup>

Many funeral homes have fewer than 15 workers and would not fall under the employment provisions of the federal law. They would, however, still fall under the public accommodation provisions of the ADA. See 42 U.S.C. § 12181(7)(F) (1993). In these instances, state and local prohibitions against discrimination on the basis of a perceived disability would still apply where those statutes or ordinances exist. See, e.g., ROBERT M. JARVIS ET AL., AIDS LAW IN A NUTSHELL 57-65 (1991) [hereinafter AIDS LAW]. These local laws may create an enforcement mechanism that may also facilitate settlement of HIV discrimination claims. *Id.* at 64.

8. 42 U.S.C. §§ 12101-12213 (1993). The Civil Rights Act of 1991, Pub. L. No. 102-166 (1991), extended coverage of the ADA to U.S. citizens employed in foreign countries by U.S. employers. Jay W. Waks, *Workers' Rights Now Extend Overseas*, NAT'L L.J., Dec. 23, 1991, at 16.

9. 29 U.S.C. § 794 (1988). In order to fall under the amended Rehabilitation Act of 1973, the funeral home must receive federal funds. *Id.*

10. 42 U.S.C. § 12182(a) (1993).

11. "The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce:

a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, *funeral parlor*, gas station, office of an accountant or

As with all types of public accommodations covered under the ADA, the operations of the funeral home must "affect commerce."<sup>12</sup> This ADA requirement stems from the Commerce Clause of the United States Constitution, which purports to limit Congressional legislative power.<sup>13</sup> The ADA broadly defines the term "commerce" as "travel, trade, commerce, transportation or communication — (A) among the several States; (B) between any foreign country or any territory or possession and any State; or (C) between points in the same State but through another State or foreign country."<sup>14</sup> Thus, funeral home directors may rightly wonder whether their operations affect interstate commerce.

Although the question has not specifically arisen under the ADA, it is essentially settled that activities of funeral homes do affect interstate commerce and would, thus, be covered under the ADA for at least three reasons. First, funeral homes charge for services they provide to persons who die in other states and other countries. Second, funeral industry pricing practices have long been subject to federal regulation by the Federal Trade Commis-

lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment; . . . ."

42 U.S.C. § 12181(7)(F) (1993) (emphasis added). In addition to this explicit statutory definition, testimony before the U.S. Senate also shows that funeral homes are places of public accommodation and that the failure to provide services would violate the ADA. Mrs. Betty Corey, a foster parent who cared for a child with AIDS, testified about her own difficulties in finding funeral services for the child:

About a week before Kedra died, we decided to begin making arrangements for her funeral and burial. I was a member of the Baltimore County Task Force on AIDS, and at one of our meetings, the president of the Funeral Directors' Association was there, and I realized at the time we were going to face a lot of discrimination. We began to make phone calls, and we were turned down. They either would not take her, or they would not offer the full services they offered anyone else.

. . . It took 26 phone calls to 26 different funeral directors before we finally found one who was willing to take our baby and bury her.

We were given all kinds of stories. They would not embalm her. They would take her only to the crematorium. It would have to be a closed casket; there would be no viewing. I even had one who told me he would not accept her because we had her at home, and we would not properly bag her to protect his employees.

. . . .

One who was willing to take her wanted an extra \$500 because of her diagnosis and told us if we allowed an autopsy, it would be significantly higher.

. . . .

It was horrible. We had fought discrimination while she was alive, and I did not expect to face that kind of discrimination at death, too.

*Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 102-03 (1989) (statement of Betty and Emory Corey).

12. 42 U.S.C. § 12181(7)(F) (1993).

13. U.S. CONST. art. I, § 8.

14. 42 U.S.C. § 12181(1) (1993).

sion.<sup>15</sup> Third and finally, funeral homes purchase caskets and other funeral materials from other states and countries.<sup>16</sup> Any one of these reasons would satisfy the minimal Commerce Clause requirement. Therefore, federal law includes funeral homes under the ADA.

In addition to the federal law, forty-nine states,<sup>17</sup> the District of Columbia, and Puerto Rico<sup>18</sup> afford statutory protection for disabled and human rights. These disability and human rights laws prohibit certain forms of discrimination in areas such as employment,<sup>19</sup> real estate transactions,<sup>20</sup> financial credit,<sup>21</sup> and access to places of public accommodation.<sup>22</sup> Moreover, these laws provide administrative and judicial remedies for persons who suffer discrimination by places of public accommodation.<sup>23</sup>

Similar in scope to federal law, funeral homes are places of public accommodation under state disabilities laws. This is true even though funeral homes may not be expressly listed in the state statutes. For example, the definition of a "place of public accommodation" in the Illinois Human Rights Act is "a business, accommodation, . . . or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public."<sup>24</sup> As illustrations of this definition, the Illinois statute lists "funeral hearses, crematories, [and] cemeteries."<sup>25</sup> However, this list is not meant to be exhaustive.<sup>26</sup> Funeral homes are also places of public accommodation because they provide a ser-

15. 16 C.F.R. § 453 (1993).

16. *See, e.g., Granges Metallverken AB v. United States*, 716 F. Supp. 17, 20 (Ct. Int'l Trade 1989) (discussing Swedish sales of casket brass in the United States).

17. Arizona is the only exception among the fifty states. *See* Kenneth E. Labowitz, *Refusal to Treat HIV-AIDS Patients: What Are the Legal Obligations?*, TRIAL 58, 61 n.10 (1992).

18. P.R. LAWS ANN. tit. 1, § 505 (Supp. 1988); *see also* Luis A. Lavin & William B. Rubenstein, *The HIV Epidemic in Puerto Rico*, in AIDS AGENDA: EMERGING ISSUES IN CIVIL RIGHTS 203 (Nan D. Hunter & William B. Rubenstein eds., 1992).

19. *See, e.g., Ill. Human Rights Act*, 725 ILCS 5/2-101 (1992); Vermont Fair Employment Practices Act, VT. STAT. ANN. tit. 21, §§ 495-495e (1987 & Supp. 1992); Mancini v. General Elec. Co., 820 F. Supp. 141, 145-48 (D. Vt. 1993).

20. *See, e.g., 725 ILCS 5/3-101* (1992). *See also* 42 U.S.C. § 12901 (1993) (incentives to devise long-term comprehensive strategies for meeting the housing needs of persons with AIDS and their families).

21. *See, e.g., 725 ILCS 5/4-101* (1992).

22. *See, e.g., 725 ILCS 5/5-101* (1992); MASS. GEN. L. ch. 272, § 98 (1991).

23. Labowitz, *supra* note 17, at 59. The ADA does not, preempt these state and local laws. 42 U.S.C. § 12201(b) (1993); H.R. REP. NO. 485, 101st Cong., 2d Sess. 48, 135 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 418.

24. 725 ILCS 5/5-101(A)(1) (1992).

25. *Id.* § 5-101(A)(2) (1992) (stating that the list of the different types of public accommodation is "by way of example, but not limitation").

26. *Id.*

vice to the public.<sup>27</sup> Therefore, the services provided by a funeral home should fall under dominion of both federal and state law.<sup>28</sup>

As places of public accommodation, funeral homes may not discriminate on the basis of a disability or *perceived* disability.<sup>29</sup> It is undisputed that AIDS, HIV, and the perception that someone has been infected with HIV are all covered under anti-discrimination laws.<sup>30</sup> A person who dies of an illness related to HIV is, thus, a person who dies of an illness related to a perceived disability. Therefore, a refusal to handle a person who has died of an illness related to HIV is discrimination against a person with a perceived disability. The refusal would constitute discrimination even though a funeral home may argue that someone who has died has no longer a disability after death.<sup>31</sup>

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27. *See id.*; *see also* Board of Trustees of S. Ill. Univ. v. Department of Human Rights, 591 N.E.2d 973, 976-77 (Ill. App. Ct. 1992), *appeal granted*, 602 N.E.2d 447 (Ill. 1992).

28. The definition of a place of public accommodation for purposes of disability laws may be controversial in selected jurisdictions where other civil rights laws provide relatively less protection for discrimination in places of public accommodation. Improved drafting of recent statutes and ordinances, however, generally obviates disagreement as to the nature of public accommodations covered. *See, e.g.,* Board of Trustees of S. Ill. Univ., 591 N.E.2d at 979-81 (Welch, J., dissenting); Human Rights Comm'n of N.M. v. Board of Regents, 624 P.2d 518, 518-20 (N.M. 1981); Labowitz, *supra* note 17, at 59 (noting that the ADA's definition of "public accommodation" extends "far beyond the scope of traditional civil rights laws").

29. Remedies for discrimination include court actions and administrative proceedings, including the possible awards of attorneys' fees, litigation expenses and the costs of trial. H.R. REP. No. 485(II), 101st Cong., 2d Sess. 140 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 423. Where there is an issue of general public importance in discrimination issues arising in entities such as funeral homes, the Attorney General of the United States may also initiate civil actions to collect penalties of up to \$50,000 for a first violation and \$100,000 for any subsequent violation. 42 U.S.C. § 12188(b). The legislative history encourages active enforcement by the Attorney General. H.R. REP. No. 485(III), 101st Cong., 2d Sess. 67 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 490.

30. *See, e.g.,* Doe v. Attorney Gen., 941 F.2d 780, 797 (9th Cir. 1991) (finding doctor with AIDS "handicapped" under section 504 of the Rehabilitation Act); Severino v. North Fort Myers Fire Control Dist., 935 F.2d 1179, 1182 n.4 (11th Cir. 1991) (finding fire fighter with HIV "handicapped" under section 504 of Rehabilitation Act); Glanz v. Vernick, 756 F. Supp. 632, 634 (D. Mass. 1991) (finding patient with HIV was "handicapped" under section 504 of the Rehabilitation Act); Cain v. Hyatt, 734 F. Supp. 671, 678 (E.D. Pa. 1990) (finding attorney with HIV "handicapped" under Pennsylvania Human Rights Act); Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 714 F. Supp. 1377, 1385 n.4 (E.D. La. 1989), *aff'd*, 909 F.2d 820 (5th Cir. 1990); H.R. REP. No. 485(II), 101st Cong., 2d Sess. 48, 51-52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 330, 333-34; H.R. REP. No. 485(III), 101st Cong., 2d Sess. 28, 39 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451, 461.

31. The logic of this statement may be easier to understand in other contexts. For example, a woman who dies is still a woman; her estate could pursue any claims of gender discrimination. An African-American who dies is still an African-American; an estate could pursue any claims of discrimination based on race. A Jewish man who dies is still a Jewish man; his estate could pursue any claims of discrimination based on religious belief. A blind woman who dies has

The view that funeral homes are places of public accommodation that are prohibited from discriminating against persons with HIV under disability and human rights laws was confirmed in *DiMiceli & Sons Funeral Home v. New York City Commission on Human Rights*.<sup>32</sup> The Human Rights Commission issued a complaint against a funeral home that not only charged inflated fees when persons died of causes related to AIDS, but also insisted that family members purchase costly extras such as glass-sealed caskets.<sup>33</sup> The funeral home argued that discrimination against the "physically handicapped" did not extend to those who have died of causes related to HIV.<sup>34</sup> The funeral home also argued that funeral homes were not places of public accommodation under the human rights code.<sup>35</sup>

The *DiMiceli* court rejected both arguments. The court found that the term "physically handicapped" extended "to those individuals who have died due to complications associated with the AIDS virus and to their family members who have been stigmatized by their association with the deceased."<sup>36</sup> The court also found that

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not lost her disability; her estate could pursue any claims of discrimination based on that handicap. A woman with HIV who dies likewise has not lost her perceived disability; her estate could pursue any claims of discrimination based on that perceived disability.

32. 1987 WL 19527/86 (N.Y. Sup. Ct. Jan. 9, 1987), reprinted in MICHAEL L. CLOSEN ET AL., AIDS: CASES & MATERIALS 490-93 (Supp. 1992) (hereinafter AIDS CASEBOOK) and N.Y.L.J., Jan. 14, 1987, at 12.

33. AIDS CASEBOOK, *supra* note 32, at 491.

34. *Id.* at 491-92.

35. *Id.*

36. *Id.* at 492. The court reasoned that:

The phrase "substantially limits one or more major life activities" serves only to define "physical or mental impairment" and does not imply that statutory protection is afforded only to those who are discriminated against while alive. There is adequate precedent for affording the individual dignity and freedom from discrimination not only in those activities and services performed during one's life, but also in those activities and services performed at one's death. The moral precepts and public policy that dictates the elimination of discrimination based solely upon one's color, creed, race, nationality or handicap, are not extinguished with the end of a life, but continue through the final services administered in death. There is statutory precedent for extending protection from discriminatory practices by facilities that provide services for the dead. Additionally, the party aggrieved in the situation is the family or life partner of the individual who has died from AIDS. It is the remaining life partner or family members who suffer discrimination. Traditionally, family members have received compensation where they have sued for the negligent handling of a body. The legal theory incorporated is based upon the family's quasi-property right in the body. The Court of Appeals has advised that "such a property right is little more than a fiction, in reality the personal feelings of the survivors are being protected." Thus, the courts have extended legal protections to remaining family members when improper services are rendered to the deceased. Different treatment should not be afforded family members where discrimination is extended from the victim of the disease to family members who are already suffering from the loss of a loved one.

*Id.*



the human rights laws covered funeral homes as places of public accommodation. The court noted that the human rights code did not expressly cover or exclude funeral homes from coverage.<sup>37</sup> Moreover, the *DiMiceli* court followed the reasoning of the Supreme Court of Pennsylvania in which it held that nonsectarian cemeteries were places of public accommodation under the Pennsylvania Human Relations Act. That court reasoned that the "[P]ublic need for the services made available by cemeteries is irrefutably all inclusive — all of us, at one time or another, will be entrusted unto their care. All of those factors bring cemeteries squarely into the public domain and give them a special status."<sup>38</sup> Following this reasoning, the *DiMiceli* court held the basic premise of "special status" to be "equally applicable to funeral homes because of the similarity in the care and services provided."<sup>39</sup> Thus, the court held that funeral homes were places of public accommodation.<sup>40</sup>

Although federal and state law provide anti-discrimination protection for HIV individuals who seek access to funeral homes, the actual filing of a discrimination claim against funeral homes may prove more complicated because of problems relating to standing. The deceased individuals themselves are unable to bring discrimination claims. Furthermore, the representatives of the estate are often too emotionally distraught to pursue litigation or administrative remedies<sup>41</sup> that would challenge discriminatory practices so wide spread that they appear to define industry practice. As a result, many acts of discrimination have gone unchallenged.

### B. Forms of Discrimination

Funeral homes discriminate against persons with HIV in many ways. The most common discriminatory practices of funeral homes

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37. *Id.* at 493.

38. Pennsylvania Human Relations Comm'n v. Alto-Reste Park Cemetery Ass'n, 306 A.2d 881, 886-87 (Pa. 1973).

39. *DiMiceli & Sons Funeral Home v. New York City Comm'n on Human Rights*, 1987 WL 19527/86 (N.Y. Sup. Ct. Jan. 9, 1987), reprinted in AIDS CASEBOOK, *supra* note 32, at 490, 493. The court could additionally have found that funeral homes are places of public accommodation because funeral homes are specifically empowered by state statutes to provide funeral services to the public. Persons who die of illness related to HIV are thus entitled to be protected from discrimination in funeral services. This protection extends to the provision of or securing of the life partners and families of those who die of illnesses related to HIV.

40. *Id.*; see also *Sattler v. City of N.Y. Comm'n on Human Rights*, 554 N.Y.S.2d 763, 767 (N.Y. Sup. Ct. 1990), *aff'd*, 580 N.Y.S.2d 35 (N.Y. App. Div.), *appeal denied*, 610 N.E.2d 388 (N.Y. 1992); *Hurwitz v. New York City Comm'n on Human Rights*, 535 N.Y.S.2d 1007, 1013 (N.Y. Sup. Ct. 1988), *aff'd*, 553 N.Y.S.2d 323 (N.Y. App. Div.), *appeal denied*, 557 N.E.2d 1187 (N.Y. 1990).

41. In Chicago, for example, administrative remedies may be available from the Chicago Commission on Human Relations, the Cook County Commission on Human Rights, and the Illinois Department of Human Rights.

include refusals to handle the body, overcharging, and improper demands. The most blatant form of discrimination occurs when a funeral home simply refuses to provide services to a person who has died of an illness related to HIV. A refusal to provide services to a person who dies of an illness related to HIV likely arises from the "unwarranted fear of transmission of AIDS or from a concern that other customers will be disinclined to use the services of a funeral home that caters to people with AIDS."<sup>42</sup>

Other forms of discrimination against persons who die of HIV-AIDS may be more subtle, such as overcharging. Some funeral homes have insisted on costly extras such as glass-sealed caskets.<sup>43</sup> Additionally, many funeral homes hire embalmers for only those cases where they know (or suspect) that a person has died of an illness related to HIV.<sup>44</sup> Similarly, the embalmer may charge an extra fee for handling the person, and the funeral director would then pass on the extra fee as part of the total bill for the funeral service.<sup>45</sup> Moreover, the funeral home itself may attempt to charge extra for alleged extra services or extra precautions.<sup>46</sup> However, additional charges to handle cases where a person died of causes related to HIV violate anti-discrimination laws.<sup>47</sup>

Likewise, funeral directors should not charge special fees, such as one to clean out hearses after the funeral of a person who died of an illness related to HIV. This additional charge is discriminatory because it is levied only in the case where a person died of causes related to HIV. The body is not exposed to the hearse; thus it

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42. AIDS Law, *supra* note 7, at 127.

43. DiMiceli & Sons Funeral Home v. N. Y. City Comm'n on Human Rights, 1987 WL 19527/86 (N.Y. Sup. Ct. Jan. 9, 1987), *reprinted in* AIDS CASEBOOK, *supra* note 32, at 490, 491; Mark Barnes, *Discrimination in Places of Public Accommodation: Access to Health Care, Education, and Other Services*, in AIDS PRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE § 11.4, at 11-16 (Paul Albert et al. eds., 3d ed. 1992).

44. *See, e.g.*, Funeral Services by Gregory, Inc. v. Bluefield Community Hosp. 413 S.E.2d 79, 81 (W. Va. 1991), *overruled on other grounds*, Courtney v. Courtney 437 S.E.2d 436 (W. Va. 1993). ("If the family had insisted on embalming, Gregory [claims he] would have taken additional steps to minimize his exposure, such as [by] . . . sending the body to an embalming service").

45. *See* 16 C.F.R. §§ 453.2(b)(4)(ii)(F),(G) (1993) (requiring disclosure on price lists for "embalming" and "other preparation of the body"); *see also id.* § 453.3(a)(2) (requiring preventive measures against misrepresentations in embalming practices).

46. DiMiceli & Sons Funeral Home v. New York City Comm'n on Human Rights, 1987 WL 19527/86 (N.Y. Sup. Ct. Jan. 9, 1987), *reprinted in* AIDS CASEBOOK, *supra* note 32, at 490-91; Barnes, *supra* note 43, at 11-16.

47. *But see* Doe v. Kahala Dental Group, 808 P.2d 1276 (Haw. 1991). The Doe case found no violation of the Hawaii anti-discrimination law because additional precautions would be needed to treat a dental patient with HIV. The case "ignored the CDC guidelines on universal precautions and is not in line with current medical opinion." Kathleen M. Flaherty, *Insurance for People with AIDS Remains Problematic Despite ADA*, 21 J.L. MED. & ETHICS 397, 397 (1993).

makes no difference if the person died of simple pneumonia or a pneumonia related to HIV.<sup>48</sup> Another way funeral homes discriminate against persons who die of HIV is when they make improper demands or wrongly suggest to families that persons with HIV must be cremated or buried in a closed casket in order to avoid embalming.<sup>49</sup>

Regardless of form, these acts constitute discrimination for which the funeral home may be liable under disability and human rights laws. Each of these acts constitutes discrimination against a person who has died of an illness related to HIV, and against their surviving life partners and families, because in each instance the treatment is significantly different from that afforded to individuals who die of other causes.

Additionally, these acts of discrimination are based on the knowledge (or suspicion) that someone had AIDS. Funeral workers wrongly assume that it is possible to identify visually the bodies of those who die of causes related to HIV. As a result, funeral workers may thus make inappropriate decisions about when it is necessary to use universal precautions.

Funeral workers who assume that it is not necessary to wear protective clothing in all instances do so at their peril where there is potential exposure to bodily fluids. First, privacy considerations may lead to secrecy about the cause of death. Second, stereotypes about persons who die of causes related to HIV are usually false. Priests, for example, have died of causes related to HIV. Married men have died of causes related to HIV, often without the previous knowledge of their spouses. A woman of eighty years who is raped by an HIV-positive employee of the nursing home may well carry the virus.

In each of these examples, unfounded assumptions that a person did not have HIV would place funeral workers in danger unless those workers were using the protective gear recommended for the universal precautions for the funeral industry.<sup>50</sup> Furthermore, use

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48. *Pneumocystis carinii* pneumonia (PCP) was a common cause of death in the early years of the first decade of AIDS. Aerosolized pentamidine and other medications have reduced (but not eliminated) the incidence of PCP as a cause of death related to HIV.

49. See, e.g., *Funeral Services by Gregory, Inc. v. Bluefield Community Hosp.*, 413 S.E.2d 79, 81 (W. Va. 1991) (finding that the statute of limitations for certain claims raised in the *Gregory* case should be two years rather than one year); *Jury Awards [Pennsylvania] Woman \$175,000 On Empty Casket Funeral Charges*, AIDS POL'Y & LAW, Jan. 21, 1994, at 3; see also *Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 102-03 (1989) (statement of Betty and Emory Corey).

50. Centers for Disease Control, *Recommendations for the Prevention of HIV Transmission in Health-Care Settings*, 36 MORBIDITY & MORTALITY WKLY. REP. (Supp. 2) 3S (Aug. 21, 1987), reprinted in AIDS CASEBOOK, *supra* note 32,

of the universal precautions will protect workers (and independent contractor embalmers) from other dangers, such as hepatitis. Given the embalming and body preparation services afforded to all persons, one should assume the potential exists for contact with bio-hazardous materials where there is contact with bodily fluids.<sup>51</sup> The use of special protective clothing in only "suspicious" cases would be unjustifiable and discriminatory. The practice would also violate the regulations of the Occupational Safety and Health Administration (OSHA).<sup>52</sup> Because the protective clothing mandated by the universal precautions should be universal, additional charges for special protective clothing in suspicious (or even known) cases would likewise be unjustifiable and discriminatory.<sup>53</sup>

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at 490. "In addition to the universal blood and body-fluid precautions listed above, the following precautions should be used by persons performing post-mortem procedures:

- [a] All persons performing or assisting in postmortem procedures should wear gloves, masks, protective eyewear, gowns, and waterproof aprons.
- [b] Instruments and surfaces contaminated during postmortem procedures should be decontaminated with appropriate chemical germicide."

*Id.*; see also Centers for Disease Control, *Guidelines for Prevention of Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Health-Care and Public Safety Workers*, 38 MORBIDITY & MORTALITY WKLY. REP. S6 (1989); Centers for Disease Control, *Update: Universal Precautions for Prevention of Transmission of Human Immunodeficiency Virus, Hepatitis B Virus, and Other Bloodborne Pathogens in Health Care Settings*, 37 MORBIDITY & MORTALITY WKLY REP. 377, 377-82, 387-88 (1988); Centers for Disease Control, *Recommendations for Preventing Transmission with HTLV-III/LAV in the Workplace*, 34 MORBIDITY & MORTALITY WKLY. REP. 681 (1985).

51. See, e.g., Matthew J. Bankowski et al., *Postmortem Recovery of Human Immunodeficiency Virus Type 1 from Plasma and Mononuclear Cells*; 116 ARCHIVES OF PATHOLOGY & LABORATORY MED. 1124, 1127 (1192). Dr. Bankowski and his colleagues concluded that HIV can remain viable in postmortem blood for up to 21.25 hours after death. Because the study did not address the more important issue of HIV survival in postmortem tissues, embalmers should use universal precautions before and after that period of 21.25 hours. None of the conclusions in the study would support a refusal to handle a person who died of an illness related to HIV. Because universal precautions must always be worn, there is also no justification to delay embalming. When a hairdresser or cosmetologist does final preparations to a body before an open casket viewing, there would be no contact with the bodily fluids.

52. 29 C.F.R. § 1910.1030 (1993).

53. Professor Mark Barnes has observed that:

[F]uneral homes may charge more to handle the remains of a person identified as HIV-infected, or may require that the family of an HIV-infected deceased person purchase additional services, such as the use of glass screens, that are allegedly necessary for infection control. Such procedures and extra charges are unnecessary, since all funeral homes and embalmers should, like health care workers, be using universal barrier precautions in dealing with all human remains. Many state and local health departments have also issued universal barrier precaution recommendations for morticians and embalmers, and the attorney should obtain any such formal memoranda or recommendations for use as evidence of applicable standards of care.

Barnes, *supra* note 43, at 11-16.

In all of these cases of additional charges for persons who die of causes related to HIV, attorneys should recall that funeral directors and embalmers "are usually licensed by a state authority, and complaints of inflated prices or of denials of service based on HIV infection should be reported to the proper [state] authorities."<sup>54</sup> Reports may also be made to the Federal Trade Commission when a funeral provider represents that "Federal, State, or local laws, or particular cemeteries or crematories, require the purchase of any funeral goods or funeral services when such is not the case."<sup>55</sup> A lawsuit may also be brought for a deceptive act or practice that violates federal or state law.<sup>56</sup> There may also be state statutes that prohibit any additional charges to embalm persons who die of causes related to HIV or AIDS.<sup>57</sup> This includes additional charges for blood and body fluid precautions.<sup>58</sup>

Furthermore, in developing discrimination cases for persons who died of causes related to HIV, evidence may also suggest discrimination against the survivors of the person who died of an illness related to HIV. The funeral service director may perceive (correctly or not) that the surviving spouse or life partner also has HIV. The funeral service director may fear that persons with HIV may attend the memorial service. A refusal to handle a case because of fears of an HIV-seropositive spouse, life partner, or friends would constitute unlawful discrimination on the basis of a perceived disability. Each of these persons would have individual claims of discrimination (or, alternatively, a small class action) beyond any claim that may be brought on behalf of the estate.

### C. Who Has the Right to Make Funeral Arrangements?

Given the number of persons dying from causes related to HIV, funeral home directors may sometimes face the unenviable task of mediating difficult and emotional confrontations that surface only after a person has died. For example, traditional and non-traditional family members may suppress confrontations that will surface only after a death. The traditional family may want a religious ceremony with family members only. The life partner in a non-traditional family, on the other hand, may want a service that is

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54. Barnes, *supra* note 43, at 11-17. In Illinois, for example, a complaint can be made to the Illinois Department of Professional Regulation.

55. 16 C.F.R. § 453.3(d)(1) (1993).

56. See, e.g., 15 U.S.C. § 576 (1988); 815 ILCS 505/2 (1992).

57. "No embalmer or funeral director shall charge more for embalming the remains of a person with a communicable disease which requires blood and body fluid precautions than the price for embalming services listed on the price list funeral providers are required to maintain and provide to consumers pursuant to 16 C.F.R. § 453.2 (1988)." KY. REV. STAT. ANN. § 213.076(8) (Michie/Bobbs-Merrill 1991).

58. *Id.*

non-religious and includes lovers and friends (perhaps even excluding family who neglected the deceased because of objections to a "chosen lifestyle").<sup>59</sup> It has been observed that:

A surprising number of disputes can arise in connection with the arrangements and conduct of a funeral after the death of someone with AIDS. These problems can include a wide range of matters. What funeral home should be retained to conduct the services? Will the decedent be cremated or buried in the more usual fashion? Who will be allowed to attend the funeral services? How will the services be paid for?

Especially where a non-traditional relationship is involved, the funeral may be the time that is ripe for a major confrontation with the blood family. The natural family may wish to exclude the non-traditional partner or vice versa. The wishes of the decedent may not be honored, especially if they have not been written down or otherwise recorded. Because time is short, there are serious practical difficulties in attempting to resolve a dispute by means of protracted legal proceedings. It therefore is important for the decedent either to have left clear instructions with regard to such matters as the conduct of the funeral or to have made a clear designation regarding who has the authority to make decisions about funeral arrangements. Where funeral arrangements have been made with a particular funeral home and have been pre-paid, there may be some reluctance on the part of both traditional and non-traditional family members to object.<sup>60</sup>

In making funeral arrangements for persons who die of illnesses related to HIV, funeral directors should anticipate potential conflicts that may arise in making the arrangements and in who has the right to make decisions about the arrangements. There is often no clear answer as to who has the right to make funeral arrangements, because there is no agreement as to who owns a body

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59. As an additional example, where both members of a gay couple have HIV, they may decide to be cremated after their deaths, so that their ashes can be commingled and spread over a favorite area. The traditional family may want a traditional burial for one of the partners, however. Disputes of this nature are often difficult to resolve. Funeral directors, however, are regularly called upon as mediators.

60. AIDS LAW, *supra* note 7, at 126-27. Professor Rhonda R. Rivera offers additional observations on the benefits of written funeral arrangements and pre-paid funeral plans for persons with HIV:

I suggest that the PWA [person with AIDS] write detailed directions about his wishes and distribute them to his attorney-in-fact, his executor, and his family. For some biological families, an expression of wishes is sufficient. However, if the PWA truly believes that his biological family will ignore his wishes, I suggest that he purchase in advance a funeral plan with a reputable mortuary. His doctor and the hospital should be informed of his plans. Quite often upon death, the hospital personnel will notify the funeral home immediately, and the funeral home will then collect the body and proceed with the plans as directed before counter orders arise. To be blunt, I have found that families who wish to impose their wishes as to funeral arrangements are often unwilling to overturn prepaid plans and thus become financially liable for new plans. In other words, the biological family is presented with a *fait accompli*.

Rhonda R. Rivera, *Lawyers, Clients and AIDS: Some Notes From the Trenches*, 49 OHIO ST. L.J. 883, 901 (1989).

after death, or indeed whether the body may be owned. Cases have held that the wishes of the deceased person as to the disposition of the body are entirely ineffective,<sup>61</sup> or entirely effective,<sup>62</sup> or simply evidence to be used to balance “the interests of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association.”<sup>63</sup>

In some states, the durable power of attorney for health care will survive the principal's death and empower the named agent to make necessary funeral arrangements, unless specifically excluded from doing so in the document.<sup>64</sup> The named agent may thus have the legal right to make funeral arrangements in jurisdictions where the health care power of attorney survives the death. In a dispute with estranged family members, the named agent would have the right to decide upon the disposition of the body.<sup>65</sup> This is only true, however, in jurisdictions where the health care power of attorney survives the death of the principal. In many jurisdictions the durable powers of attorney — for both health care and for property — cease at the time of death.<sup>66</sup>

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61. See *Enos v. Snyder*, 63 P. 170, 171 (Cal. 1900) (holding that a person has no property right in his own corpse such that he could dispose of it by will).

62. See *Wood v. E.R. Butterworth & Sons*, 118 P. 212, 214 (Wash. 1911) (holding that the wishes of the deceased should be respected if they can be ascertained).

63. *Pettigrew v. Pettigrew*, 56 A. 878, 880 (Pa. 1904). “How far the desires of the decedent should prevail against those of a surviving husband or wife is an open question, but as against remoter connections, such wishes, especially if strongly and recently expressed, should usually prevail.” *Id.*; see also AIDS CASEBOOK, *supra* note 32, at 486 (surmising that a “life partner is a ‘remoter connection’”).

64. See, e.g., Illinois Durable Power of Attorney, 755 ILCS 45/2-1 (1992).

65. The members of the traditional family may, however, have the money needed for appropriate burial services. Funeral home directors are often called upon to mediate disputes in these circumstances where a person with the legal right to make the arrangements lacks the money to do so. Compromises are common, yet funeral home directors are seldom trained to mediate these disputes effectively.

66. See, e.g., NEB. REV. STAT. § 30-3410 (1992) (providing that the health care power of an attorney expires at death). A funeral director in Silver Spring, Maryland, observed that:

A lot of people don't realize their durable powers of attorney cease at time of death, says Paul Lee. A lot of attorneys don't know that. And technically, that means the lover can't sign a required authorization to cremate. Only the next of kin is authorized to sign it. And a lot of times, as soon as someone dies, you'll see a complete 180-degree turn in some family attitudes. That happens quite a bit.

That ‘turn’ in the family's attitude, he explains, is often a hostile one, against the surviving lover. Even if there is no family, there can be additional problems for Gays.

If there's no next of kin, says Lee, the medical examiner won't let us pick up the body for as much as 30 days. That, of course, delays any ceremonies for burial or cremation and prolongs the grieving of the lost person's lover and friends.

## II. PRIVACY RIGHTS AND DUTIES

Privacy in the context of a funeral raises unique questions of the right to know when a person has died of an illness related to HIV. Sadly, years of governmental neglect and denial of AIDS produced a society that does not always understand how HIV is transmitted. Euphemistic, if not cryptic, slogans purported to educate the public about the dangers of "body fluids." This term was considered to be preferable to the words "blood, semen, vaginal fluids, and breast milk." Unfortunately, the term "body fluids" left many unsure as to whether HIV could be transmitted by tears, saliva, or sweat. Harmful discrimination eventually resulted from the public debate over the scope of the term "body fluids."

Embalmers, for example, come into contact with all of the person's body fluids. Embalmers would thus claim a specific right (if not a need) to know if those fluids carried HIV. In addition, embalmers would claim a specific obligation for a hospital to inform the funeral director directly of the deceased's HIV status (by telephone or in person when a body is collected from the hospital) or to identify HIV or AIDS as a cause of death on the death certificate, or by the use of red toe tags.<sup>67</sup> This duty to warn may also arise by statute, though the failure to warn that a person died of causes related to HIV would not excuse the failure to use the recommended universal precautions. Privacy issues may also arise for funeral directors in connection with death certificates, death notices, and rental caskets.<sup>68</sup>

### A. *Can Funeral Home Directors Sue Hospitals That Do Not Disclose That a Person Died of an Illness Related to HIV?*

Funeral directors expect hospitals to inform them when a person has died of an illness related to HIV.<sup>69</sup> Some states require explicit notice to funeral directors and embalmers that an individual has died of a "contagious disease."<sup>70</sup> The legislatures intended that this notice would enable funeral home workers and embalmers to protect themselves in dangerous situations. Providing only spe-

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AIDS CASEBOOK, *supra* note 32, at 70-71 (Supp. 1992) (summary of Lisa M. Keen, *Preparing for the Final Goodbye*, WASHINGTON BLADE, Apr. 10, 1992, at 1).

67. See 29 C.F.R. § 1910.1030(g) (1993) (Bloodborne pathogen rule).

68. Specifically, privacy questions may arise as to whether a funeral home must disclose the cause of death to subsequent families arranging cremation services involving a rental casket.

69. See 29 C.F.R. §§ 1910.1030(b),(g) (1993) (Bloodborne pathogen rule).

70. See, e.g., KY. REV. STAT. ANN. § 213.076(8) (Michie/Bobbs-Merrill 1991); Mandatory Identification of Infected Corpses § 1099.1, 1988 La. Acts 1070 (Act No. 668), reprinted in AIDS CASEBOOK, *supra* note 32, at 494-95; AIDS LAW, *supra* note 7, at 276-77 (discussing state requirements for reporting deaths).



cial notice, however, may encourage a pattern where protective clothing will be worn only in these special situations.

The Centers for Disease Control and Prevention<sup>71</sup> does not recommend tagging bodies of HIV-infected persons to enable special precautions with such a body, but instead recommends that morticians and others handling bodies follow universal precautions to protect against infection.<sup>72</sup> The Kentucky statute, for example, also provides that the failure to warn "shall not relieve any embalmer or funeral director from taking universal blood and body fluid precautions as are recommended by the United States Department of Health and Human Services, Centers for Disease Control for Morticians' Services."<sup>73</sup>

Funeral directors have sued hospitals for failing to fulfill the perceived duty to warn when a person has died of an illness related to HIV.<sup>74</sup> Many of these suits have not been successful because there has been no instance of HIV transmission brought about by the failure to inform. Some courts have held that the fear of contracting HIV is insufficient to justify recovery for funeral directors who believe they are exposed to HIV.<sup>75</sup> This result is similar to

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71. The Centers for Disease Control and Prevention was previously entitled the Centers for Disease Control. Professor Philipson and Judge Posner correctly note that the new name is redundant and unfamiliar. THOMAS J. PHILIPSON & RICHARD A. POSNER, *PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE* 11 n.8 (1993).

72. AIDS LAW, *supra* note 7, at 276-77. "Universal precautions" is "an approach to infection control" that requires persons to treat all blood and certain body fluids "as if known to be infectious for HIV, HBV and other bloodborne pathogens." 29 C.F.R. § 1910.1030(b) (1993).

73. KY. REV. STAT. ANN. § 213.076(8) (Michie/Bobbs-Merrill 1991).

74. One suit was even instituted for failing to notify the funeral home when the hospital learned that an HIV-antibody test was negative. *Gilkes v. Warren Gen. Hosp.*, No. 93-T-4828, 1993 WL 407305 (Ohio Ct. App. Sept. 30, 1993). The suit was dismissed. Even a negative antibody test result would not necessarily indicate that a body did not carry HIV antigen; the person could have been in the beginning stage, before antibodies developed, or in the end stage, when antibodies no longer appear. Because the person died, the end stage of AIDS is a more likely hypothesis.

75. *Funeral Services by Gregory, Inc. v. Bluefield Community Hosp.*, 413 S.E.2d 79, 81-84 (W. Va. 1991), *overruled on other grounds*, *Courtney v. Courtney*, 437 S.E.2d 436 (W. Va. 1993) (statute of limitations for intentional infliction of emotional distress should have been two years rather than one year); *accord* *Burk v. Sage Prods. Inc.*, 747 F. Supp. 285, 286-88 (E.D. Pa. 1990) (recovery denied for needle stick); *Neal v. Neal*, No. 19086, 1993 WL 228394 (Idaho Ct. App. June 29, 1993) (no recovery for a wife who claimed she would not have had sex with her husband had she known that her husband was having intercourse with another woman); *Ordway v. County of Suffolk*, 583 N.Y.S.2d 1014 (N.Y. Sup. Ct. 1992) (surgeon could not sue patient who did not disclose HIV); *Petri v. Bank of N.Y.*, 582 N.Y.S.2d 608 (N.Y. Sup. Ct. 1992) (no recovery against a sexual partner who did not disclose HIV status because plaintiff did not test positive for HIV); *Doe v. Doe*, 519 N.Y.S.2d 595 (N.Y. Sup. Ct. 1987) (recovery denied to wife whose husband failed to disclose that he had homosexual relations); *Hare v. State*, 539 N.Y.S.2d 1018 (N.Y. Ct. Cl. 1989) (no recovery for X-ray technician bitten by inmate); *Carroll v. Sisters of St. Francis*

cases that have denied recovery for fear of developing cancer<sup>76</sup> or a disease related to asbestos exposure where the plaintiff has not manifested any signs of illness.<sup>77</sup> The result may also be compared to cases that deny recovery for mental injuries, except where some trauma accompanies the mental illness or where someone sees a close relative injured by another's negligence.<sup>78</sup>

Yet courts have also found that an individual's fear of contracting HIV may sometimes justify recovery, even without proof of HIV transmission.<sup>79</sup> A flurry of litigation in this area means that the likelihood of recovery for funeral directors may be an open proposition. Much of the debate, however, appears to be ill-informed as to how HIV is actually transmitted.<sup>80</sup>

When these suits arise in funeral homes, courts should note that the use of protective clothing and other universal precautions to prevent HIV transmission is now mandatory for workers in funeral homes where there is a potential for exposure to any body fluid, without regard to whether there are specific concerns only

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Health Servs., Inc., 868 S.W.2d 585 (Tenn. 1993) (reversing appellate court case, which other courts have relied on, to find that a hospital visitor could not recover for fear of contracting AIDS from a needle stick). See also *Poole v. Alpha Therapeutic Corp.*, 698 F. Supp. 1367 (N.D. Ill. 1988) (requiring that the plaintiff must prove that he or she has tested positive for HIV antibody); *Transamerica Ins. Co. v. Doe*, 840 P.2d 288 (Ariz. Ct. App. 1992). Both *Poole* and *Transamerica* have been criticized as imposing too great a burden of proof. *Carroll*, 868 S.W.2d at 591.

76. See, e.g., *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315 (5th Cir. 1986); *Coffin v. Board of Supervisors*, 620 So. 2d 1354, 1363 (La. Ct. App. 1993); *Vallery v. Southern Baptist Hosp.*, 630 So. 2d 861 (La. Ct. App. 1993) (Ward, J., dissenting).

77. See, e.g., Mark E. Wojcik, *Tracing the Fibers of Asbestos Litigation: When Do an Insurer's Duties of Defense and Indemnity Arise?*, 36 FED'N INS. & CORP. COUNS. Q. 283 (1986); Lori J. Khan, Comment, *Untangling the Insurance Fibers in Asbestos Litigation: Toward a National Solution to the Asbestos Injury Crisis*, 68 TULANE L. REV. 195, 207 (1993).

78. *Vallery v. Southern Baptist Hosp.*, 630 So. 2d 861 (Ward, J., dissenting).

79. *Marchica v. Long Island R.R.*, 810 F. Supp. 445 (E.D.N.Y. 1993); *Marrriott v. Sedco Forex Int'l Resources, Ltd.*, 827 F. Supp. 59 (D. Mass. 1993) (allowing cause of action under Jones Act and general maritime law for inoculation with vaccine contaminated with HIV); *Kerins v. Hartley*, 21 Cal. Rptr. 2d 621 (Cal. Ct. App. 1993) (patient could sue surgeon who did not disclose seropositive status), review granted, 860 P.2d 1182 (Cal. 1993); *Faya v. Almaraz*, 620 A.2d 327 (Md. App. Ct. 1993) (patients could sue seropositive surgeon for not disclosing that he had AIDS); *Castro v. New York Life Ins. Co.*, 588 N.Y.S.2d 695 (N.Y. Sup. Ct. 1991) (needle stick); *Johnson v. West Virginia Univ. Hosps.*, 413 S.E.2d 889 (W. Va. 1991) (allowing cause of action for a security guard bitten by patient with HIV).

80. Additionally, much of the debate may stem from recent (and unfortunate) trends to create special laws that effectively criminalize persons with HIV. See *Illinois v. Russell*, Nos. 73721 & 74443, 1994 WL 12502 (Ill. Jan. 20, 1994) (reversing findings that the Illinois HIV exposure statute was unconstitutionally vague). But see THOMAS J. PHILIPSON & RICHARD A. POSNER, *PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE* (1993) (supporting criminalization).

about HIV.<sup>81</sup> In practice, however, funeral home workers may not wear cumbersome or uncomfortable protective clothing, even during embalming procedures. The failure to wear protective clothing in these extreme procedures may bar recovery for breach of any perceived duty to inform.

When the hospital does not inform the funeral home that a person died of an illness related to HIV, the funeral home should not assume that the person does not have HIV or that the use of mandatory protective clothing is unwarranted. The hospital may itself not know that the person had HIV. The person may have been only recently infected and may not yet have developed antibodies against the virus.<sup>82</sup> Funeral home workers should always use the universal precautions recommended for procedures involving any potential exposure to HIV (or another bloodborne pathogen).

The only reported court decision to date has found that a hospital was not liable to a funeral home for failing to disclose that a person died of an HIV-related illness.<sup>83</sup> The decision considered only a claim of battery, however, because the court found that the statute of limitations had expired on other claims for negligent and intentional infliction of emotional distress and for negligent and intentional misrepresentation. Because there was no liability for battery,<sup>84</sup> and because no other claims were pending or available, there was no liability for failing to disclose that a person had AIDS. Although this particular claim was unsuccessful, it will not preclude timely claims against hospitals for failing to disclose that a person died of an illness related to HIV.<sup>85</sup>

Even in cases of active concealment of HIV, other court cases have found that there should be no recovery for individuals who do not themselves contract HIV. In *J.B. v. Bohonovsky*,<sup>86</sup> the court

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81. See 29 C.F.R. § 1910.1030(d) (1993).

82. In this "window period," a person may carry the virus (antigen) for a time before the body will develop HIV antibodies. Current HIV testing is for antibodies, not the virus itself, although it is possible to test directly for the virus with a p24 antigen test. Individuals infected with HIV will usually develop antibodies within six months. See, e.g., *Burk v. Sage Prods., Inc.*, 747 F. Supp. 285, 288 (E.D. Pa. 1990).

83. *Funeral Services by Gregory v. Bluefield Community Hosp.*, 413 S.E.2d 79, 84-85 (W. Va. 1991), *overruled in* *Courtney v. Courtney*, 437 S.E.2d 436 (W. Va. 1993) (holding that the statute of limitations should have been two years).

84. *Id.* at 81 (holding that exposing a mortician to physical contact with an AIDS infected corpse without his knowledge or consent was not an "offensive touching" sufficient to support a claim of battery).

85. For example, a lawsuit filed in Tennessee by John Jarvis claimed \$1 million against the LeBonheur Children's Medical Center and Dr. Landon B. Pendergrass for not disclosing that a child whose body they gave him for burial in 1991 had died of complications related to AIDS. AIDS CASEBOOK, *supra* note 32, at 71 (Supp. 1992) (quoting THE ADVOCATE, Mar. 10, 1992, at 23); *Civil Lawsuit Filed by Mortician Charges Hospital Non-Disclosure*, AIDS POL'Y & L. Mar. 5, 1992, at 4.

86. 835 F. Supp. 796 (D. N.J. 1993).

dismissed a man's claims of intentional exposure and intentional infliction of emotional distress against his former lover who concealed the fact that he had HIV. Although a period of intense anxiety might be expected after learning of a potential exposure to HIV, the court found that intense anxiety is not enough to sustain a cause of action in the absence of actual HIV transmission.<sup>87</sup>

Funeral home directors, facing a burden of proof similar to that in *J.B. v. Bohonovsky*, would likewise fail in actions where there is nothing more than anxiety from not being told that a person died of causes related to HIV. Furthermore, because of the mandate to use universal precautions in all instances, there is less likelihood that a funeral home director could recover for a hospital's failure to provide notice that a person died of causes related to HIV.

### B. Death Certificates and Death Notices

All deaths in the United States are reported on medical certificates which list the cause of death. Two major categories of privacy questions arise in connection with death certificates and death notices. An initial category of questions exists as to whether death certificates and death notices should list AIDS or HIV as a cause of death. "Since people do not die of AIDS itself, but rather from one of the opportunistic diseases that can more freely invade the body of a person whose immune system is depressed, both death certificates and obituaries can readily be written without any reference to AIDS."<sup>88</sup> Many death certificates and death notices avoid references to AIDS by reporting the cause of death as pneumonia, cancer, or some other general cause.<sup>89</sup> This is often true with the obituaries for prominent people, especially when their names are linked to commercial enterprises.<sup>90</sup> Obituaries also avoid reference to AIDS to circumvent the "surviving spouse syndrome" which may attach to surviving life partners of those who die of illnesses related to HIV:

Because there has been so much hysteria and unwarranted discrimination associated with AIDS, even the preparation of death certificates and obituaries has been a cause of concern for both the surviving family and friends of the decedent. If the death certificate or obituary identifies the cause of death as complications from AIDS, family and friends of the decedent may well suffer from their association with the

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87. *Id.*; see also 'Severe Emotional Distress' Ruled Necessary for HIV Case Recovery, AIDS POL'Y & L. Nov. 26, 1993, at 2 (discussing requirement of severe emotional distress in cases where plaintiff seeks to recover from estate of former lover who did not inform that he had AIDS); *Embalmers Said Unlikely to Get HIV During Procedures*, AIDS POL'Y & L. Oct. 4, 1989, at 10-11 (describing low risk of occupational exposure to HIV).

88. AIDS LAW, *supra* note 7, at 128.

89. *Id.* at 127-28.

90. See, e.g., AIDS CASEBOOK, *supra* note 32, at 500-01 (obituary of Perry Ellis).

decedent. Other people may assume that the family and friends have AIDS or are at increased risk for AIDS.<sup>91</sup>

The question about whether AIDS is listed as a contributing cause of death is of special concern to some funeral directors and embalmers, who may rely on the document to determine whether to use the universal precautions to avoid contract HIV. Funeral directors may in fact rely upon the death certificate as an alternative to oral communication from a hospital that a person died of an illness related to HIV. The expectation that HIV or AIDS will appear on the death certificate relates to the perceived right of funeral home directors and embalmers to know in all possible instances that a certain person died of an illness related to HIV.

As with instances of oral communications that a person died of an illness related to HIV, funeral directors and embalmers should *not* rely upon the death certificate to decide whether to use universal precautions. The universal precautions should be used universally, even though they may be uncomfortable for some funeral home employees or embalmers. Death certificates should not be relied upon as a source to learn that a person died of AIDS. There is great variation in the preparation of death certificates because of stigma and discrimination and because of the nature of HIV disease and the resulting opportunistic infections.

Other questions arise as to whether the public has a general right of access to death certificates that list HIV or AIDS as a contributing cause of death. Some state statutes make death certificates public records, and some courts have found that confidentiality laws do not extend to death certificates.<sup>92</sup> In *Tri-State Publishing Co. v. City of Port Jervis*,<sup>93</sup> for example, a newspaper was able to obtain a copy of a death certificate from a hospital patient who was believed to have died from causes related to HIV. Although state statutes mandated privacy disclosure for HIV testing results, the court found that the death certificate was not privileged under state law nor exempt from access for privacy considerations. Courts have not always ordered disclosure, however. In *Flynn v. Doe*,<sup>94</sup> for example, the court granted anonymity in perpetuity and sealed a death certificate that stipulated that AIDS was the cause

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91. AIDS LAW, *supra* note 7, at 127-28. See also *Snipes v. Mack*, 381 S.E.2d 318 (Ga. Ct. App. 1989) (woman libeled by former boyfriend who erected signs falsely stating that she had AIDS); *McCune v. Neitzel*, 457 N.W.2d 803 (Neb. 1990) (plaintiff sued defendant for slander for a rumor that he had AIDS); William Robbins, *A Rumor of AIDS, a Slander Award*, N.Y. TIMES, July 23, 1990, at A8 (discussing *McCune*).

92. AIDS LAW, *supra* note 7, at 277 (discussing state policy toward making death certificates public records); see also *Death Certificates Ruled Exception To Texas Ban on Test Result Release*, AIDS POL'Y & L. Dec. 12, 1991, at 6 (discussing Texas Attorney General Opinion No. DM-61).

93. 523 N.Y.S.2d 954 (N.Y. Sup. Ct. 1988).

94. 553 N.Y.S.2d 288 (N.Y. Sup. Ct. 1990).

of death.<sup>95</sup>

This schism in court cases has led some jurisdictions to adopt specific rules concerning the question of whether HIV or AIDS may be disclosed on a death certificate, given that members of the public may obtain copies of the death certificate. In Chicago, Illinois, for example, the cause of death is blocked out from copies of the death certificate if the cause of death is described as AIDS, HIV-disease, or an illness commonly associated with HIV-disease. Funeral directors, who are given copies of death certificates with blocked out boxes, report that they reasonably suspect that the person died of an illness related to HIV, because the black box on the death certificate is used only in cases where a person had AIDS. Members of the public, without similar experience, have not yet made this connection, although this may change as the blacked-out certificates appear more often.

Funeral directors are also involved in the writing of death notices for publication. They usually collect relevant information from the traditional or non-traditional family and draft the death notices. Newspapers generally respect family wishes and print solely the cause of death as announced.<sup>96</sup>

Some families may wish to avoid any mention of AIDS to avoid the surviving spouse syndrome or to maintain the privacy of the person who died. To satisfy the concerns of these families, the funeral director may want to type out a draft of the death notice and show it to the family. This practice will subtly assure the family that AIDS will not be listed as a cause of death.

Other families, especially non-traditional families, may want the death notice or obituary to identify AIDS as the cause of death. AIDS often appears in obituaries where the person was an AIDS activist or where the surviving life partner has HIV. AIDS appears in these obituaries to document the toll of this plague upon our country, and to educate those who continue to wallow in complacency and denial in the face of tragedy. Some weekly newspapers for the gay and lesbian community now carry obituaries that mention at least one AIDS death in almost every issue. Major daily newspapers now regularly carry obituaries that mention AIDS as the cause of death.

Another issue that still sometimes arises is when a newspaper refuses to carry a death notice that identifies the surviving life partner of a gay man or lesbian. In the early years of the epidemic, mainstream newspapers premised their refusals to print the names

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95. The holding in *Flynn* is criticized in *Doe v. New York*, 579 N.Y.S.2d 822, 823-24 (N.Y. Ct. Cl. 1991).

96. AIDS CASEBOOK, *supra* note 32, at 500 (finding that newspapers tend to respect family wishes as regards obituaries).

of the life partners or "long time companions" on the basis that "such persons had no legitimate relationship to the deceased."<sup>97</sup> Pressure from gay activists brought a change in the refusals to publish names of surviving partners; it is now common for major daily newspapers to publish the names of life partners when that information is submitted for publication.<sup>98</sup>

#### D. Rental Caskets

Because only an unfinished wooden box is required for direct cremation,<sup>99</sup> a small number of funeral homes offer families the opportunity to rent more elaborate caskets for viewing. Questions have arisen as to whether a funeral home must disclose to potential renters that a previous user of the rental casket died of causes related to HIV. Arguments that there is a duty to disclose that a person died of causes related to AIDS may be based on decisions setting aside real estate transactions where a buyer was not informed about a fact that "psychologically impacted" the real estate.<sup>100</sup> Funeral home directors have speculated that they may be liable to the manufacturer of the casket if they do not disclose the cause of death.

There are at least five reasons why there should be no liability for failing to disclose that a rental casket had been used for a person who died of complications related to HIV. First, the rental casket will be cleaned between uses. Second, families using rental caskets will also necessarily understand that others have used the casket. Third, there is no danger that the body to be placed in the

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97. AIDS CASEBOOK, *supra* note 32, at 501.

98. *See id.*

99. *See* 16 C.F.R. § 453.4(a)(1) (1993) ("In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider, or a crematory, to require that a casket other than an unfinished wood box be purchased for direct cremation.")

100. *See, e.g.,* Reed v. King, 193 Cal. Rptr. 130 (Cal. Ct. App. 1983) (broker did not disclose that a house was a murder site); Stambovsky v. Ackley, 572 N.Y.S.2d 672 (N.Y. App. Div. 1991) (buyer was not informed that the house was represented to be a haunted house); Van Camp v. Bradford, 623 N.E.2d 731 (Ct. C.P. Ohio 1993) (failure to disclose previous rapes at the property).

These real estate cases should not mandate disclosure that a previous home owner had HIV or died of causes related to AIDS, and much less so to rental caskets used on persons who have died of causes related to AIDS. Professor Warner observes that: "Even though AIDS may affect property values, the law refuses to accept AIDS-based real estate evaluation. These negative evaluations are deemed invalid, not because they are not real to the buyer, but because they are irrational and harmful to society. Psychologically impacted real estate evaluation is irrational and harmful, and it should be legally unacceptable." Daniel M. Warner, *Caveat Spiritus: A Jurisprudential Reflection Upon the Law of Haunted Houses and Ghosts*, 28 VAL. U. L. REV. 207, 240 (1993) (also praising legislative responses against court rulings that have allowed cases for not disclosing psychological facts about real estate). *See also* John H. Scheid, Jr., Note, *Mandatory Disclosure Law: A Statute for Illinois*, 27 J. MARSHALL L. REV. 155 (1993).

rental casket could contract HIV from the previous body. Fourth, informing others that a previous body had HIV may violate state HIV confidentiality or privacy protections for the deceased person or members of the family. Fifth and finally, informing others only in the context of HIV may be construed as an act of discrimination in the provision of public accommodations.

Funeral homes would also violate the ADA if they refused to allow a person who died of causes related to HIV to use a rental casket if rental caskets are allowed for others.<sup>101</sup> It may also violate the ADA to have a separate rental casket used only for persons who die of causes related to HIV.<sup>102</sup> In sum, if a funeral home offers rental caskets, it should do so on equal terms and without regard to the cause of death.

### CONCLUSION

Several conclusions can thus be drawn to advise funeral directors of their legal obligations regarding access to funeral services and how to avoid discrimination. First, because it is unlawful to discriminate against persons with HIV, and because funeral services are places of public accommodation, it is unlawful to refuse to handle the body of a person who dies of an illness related to HIV. Funeral homes that charge more to handle a person who died of HIV will violate the human rights laws and, in some jurisdictions, specific statutes that make it illegal to charge more to embalm the remains of a person with a communicable disease.

Second, as the number of deaths related to HIV continues to increase, all funeral homes must educate their employees as to proper infection control procedures and must also ensure that appropriate protective measures are available to comply with the universal precautions. It should not be a future defense to a charge of discrimination that the funeral home simply did not know how to handle a person who died of an illness related to HIV. It should also not be a defense that other funeral homes may be better suited,

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101. 42 U.S.C. § 12182(b)(1)(A)(ii) (1993) ("It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.").

102. *Id.* § 12182(b)(1)(A)(iii) ("It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.").



or have more experience, in providing services to persons who die of illnesses related to HIV.

Third, the appropriate protective gear should also be made available to all embalmers called to work at the funeral home, whether or not the funeral home considers the embalmer to be an independent contractor. If the funeral home provides the work space and work materials for an embalmer working as an independent contractor, the funeral home may still face lawsuits for failing to provide appropriate materials.

Fourth, it is discriminatory to suggest to families that a person who died of an illness related to HIV must be cremated or that the memorial service must be held with a closed casket by reason of decedent's cause of death.<sup>103</sup> Thousands of funerals across the country (and in other countries) have proven that the full range of options should be offered to the families. Fifth, it is likewise discriminatory to charge more simply because a person died of an illness related to HIV. The universal precautions to be used in all instances should not be used only when a funeral home director knows (or suspects) that a person died of an illness related to HIV. In sum, funeral home directors must provide a full range of services to persons who die of illnesses related to HIV, they must unilaterally implement the universal precautions to safeguard themselves and their employees in all instances, and they cannot discriminate in the services offered or the fees charged when a person dies of an illness related to HIV.

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103. Exceptions may arise when the closed casket is recommended for religious reasons or when there is no tradition in the family or community of open casket ceremonies.