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Emergency Response: Civil Liability of Volunteer Health Professionals

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Summary

The devastation wrought on the Gulf Region by Hurricane Katrina has triggered a massive relief effort by local, state, and federal government agencies, as well as private organizations and individuals. Much of the relief effort will be carried out by unpaid volunteers, and some have questioned whether such volunteers — particularly medical personnel, so-called “volunteer health professionals” (VHPs) — will be protected from potential civil liability in carrying out their duties. This report sketches the various federal and state liability protections available to VHPs responding to disasters generally, with a focus on the protections applicable to the Hurricane Katrina response.

Introduction. As volunteers pour into the region devastated by Hurricane Katrina, some have raised questions as to the potential civil liability of those volunteer health professionals (VHPs) — individual licensed medical professionals who gratuitously provide medical services — who respond to the Gulf Region’s clear need for medical skills and services. The concern is that the specter of medical malpractice liability, in particular, may give pause to these VHPs.

What follows is a discussion of the patchwork of federal and state laws¹ that operate to protect VHPs in certain situations — with a focus on the Gulf Region, which was hardest hit by Hurricane Katrina. Whether a VHP is protected from civil liability depends on a number of factors, including under whose control the VHP operates and whether or not a state of emergency has been declared. The liability protections discussed in this report generally shield volunteers from *civil* liability for negligent conduct, i.e., actions, or failures to act, that result in injuries or losses to others. Criminal conduct — or willful, intentional, or grossly negligent conduct — is not protected, unless otherwise noted.

¹ Various commentators have offered suggestions for creating an across-the board standard governing VHP liability in disaster situations. See, e.g., James J. Hodge, Jr., Lance A. Gable, and Stephanie H. Calves, *Volunteer Health Professionals and Emergencies: Assessing and Transforming the Legal Environment*, 3 *Biosecurity and Bioterrorism* 216 (2005), available at [<http://www.biosecurityjournal.com/BSBT33.pdf>].

Sovereign Immunity. The federal and state governments generally enjoy sovereign immunity from suit,² and this immunity extends to individual government employees. While the federal government and many state governments have waived this immunity with the passage of the Federal Tort Claims Act³ and similar state tort claims acts, these acts generally preclude suits in tort against individual government employees.⁴ One of the easiest ways to shield VHPs from individual civil liability, therefore, is to make them temporary non-paid employees of the federal government⁵ or a state government. As noted below, state governors generally have the authority — under their emergency powers — to declare VHPs to be temporary state employees.

Emergency Statutes and Powers. Every state has a regime for declaring a state of emergency, and such a declaration can explicitly trigger liability protections or allow the governor to do so.⁶ Mississippi’s emergency management statute, for example, provides civil liability protection to state government employees and agents during a declared emergency.⁷ Alabama protects a much broader group of “emergency management workers,” which includes all of those working for an entity responding to Alabama’s call for assistance during a declared emergency.⁸

Some states have — in addition to the general emergency procedures described above — additional regimes for so-called “public health emergencies” (PHEs). The declaration of such an emergency triggers special protections for medical personnel, often including liability protection for VHPs.⁹ Florida’s PHE statute, for example, extends state

² Federal sovereign immunity traces to the English common law dictum that the sovereign can do no wrong. State sovereign immunity appears to derive from the same source, and the Supreme Court has held that the states did not lose this essential power upon ratification of the federal Constitution. See *Alden v. Maine*, 527 U.S. 706 (1999).

³ 28 U.S.C. §§ 1346(b), 2671-2680. See CRS Report 95-717A, *Federal Tort Claims Act: Current Legislative and Judicial Issues*, by Henry Cohen.

⁴ See, e.g., Fla. Stat. Ann. § 381.00315.

⁵ Under 42 U.S.C. § 300hh-11(d)(1), the Secretary of HHS may appoint volunteer health professionals as intermittent personnel of the National Disaster Medical System (NDMS), which provides medical services when a disaster overwhelms local emergency services. In March 2003 NDMS was transferred to the Department of Homeland Security. NDMS volunteers benefit from the same immunity from civil liability as employees of the Public Health Service. The Secretary may also accept the assistance of VHPs as temporary volunteers under 42 U.S.C. § 217b. These volunteers must enter into a formal agreement with the Public Health Service to provide specified volunteer services without compensation. Under applicable regulations (see, e.g., 42 C.F.R. § 57.5) such volunteers may receive legal protections including protection from civil liability claims under the Federal Tort Claims Act. See [<https://volunteer.ccrf.hhs.gov>].

⁶ For a discussion of the federal government’s public health emergency procedures, see CRS Report RL31719, *An Overview of the U.S. Public Health System in the Context of Emergency Preparedness*, by Sarah A. Lister.

⁷ Miss. Code Ann. § 33-15-21(a).

⁸ Ala. Code § 31-9-16.

⁹ The terrorist attacks of September 11, 2001, and the subsequent anthrax scare, spurred some states to draft legislation to facilitate rapid response to widespread health emergencies. At the
(continued...)

employee status to all volunteers who respond to a PHE declaration;¹⁰ as such, these volunteers enjoy the liability protection that state employees enjoy by statute.¹¹ Louisiana’s PHE statute declares that, “during a state of public health emergency, any health care providers shall not be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of gross negligence or willful misconduct.”¹²

Even where emergency or public health emergency statutes do not explicitly grant liability protections to VHPs, these statutes generally allow governors to impose such protections where appropriate. For example, Louisiana Governor Kathleen Blanco, pursuant to her public health emergency powers, issued an executive order temporarily suspending all licensure requirements for medical volunteers (so long as they are licensed in other states) and declaring such volunteers to be state employees shielded from civil liability.¹³

Volunteer Protection Acts and Good Samaritan Statutes. Nearly every state has enacted some sort of Volunteer Protection Act, the protections of which vary. The federal Volunteer Protection Act (VPA),¹⁴ passed in 1997, provides a baseline of liability protection, in that the act preempts state standards that provide less protection than the act. The VPA protects from liability government and non-profit volunteers where: (1) the volunteers were acting within the scope of their responsibilities; (2) the volunteers were licensed or certified, *if licensure or certification was required*; (3) the harm was not the result of willful action, grossly negligent behavior, etc.; and (4) the harm was not caused by a volunteer’s operation of a vehicle.¹⁵ The VPA does not affect the liability of the non-profit or governmental entity for the action of its volunteers, nor does it affect such an entity’s ability to file any action against a volunteer.¹⁶

⁹ (...continued)

request of the Centers for Disease Control and Prevention, Georgetown Professor Lawrence Gostin spearheaded the effort to draft the Model State Emergency Health Powers Act (MSEHPA). Under the Model Act VHPs “shall not be held liable for any civil damages as a result of medical care or treatment related to the response to the public health emergency.” For an analysis of the MSEHPA, *see* Daniel S. Reich, *Modernizing Public Responses to Public Health Emergencies: Bioterrorism, Epidemics, and the Model State Emergency Health Powers Act*, 19 J. Contemp. Health L. & Pol’y 379 (2003).

¹⁰ Fla. Stat. Ann. § 381.00315.

¹¹ *Id.* at § 768.28(9)(a).

¹² La. Rev. Stat. Ann. § 29:771(c).

¹³ State of Louisiana Executive Department, Executive Order No. KBB 2005-26 (September 2, 2005). It is noted that the licensure of medical professionals is a state matter. There is not a national licensure system. See the discussion, *supra*, of ESAR-VHP which is being developed to assist states in verifying the credentials of out-of-state VHPs.

¹⁴ P.L. 105-19 (codified, as amended, at 42 U.S.C. § 14501 et seq.).

¹⁵ 42 U.S.C. § 14503(a).

¹⁶ *Id.* at § 14503(b) - (c).

As mentioned above, many states have enacted their own VPAs, which are not preempted by federal law so long as they provide greater liability protections. Mississippi provides broad civil liability protection to any volunteer who provides services or goods to a nonprofit, unless the injury complained of was the result of (a) conduct that was intentional, grossly negligent, etc.; or (b) the operation of a motor vehicle.¹⁷

A growing number of states have enacted additional VPAs specifically geared toward volunteer medical personnel.¹⁸ Oklahoma's Volunteer Medical Professional Services Immunity Act,¹⁹ for example, protects Oklahoma-licensed VHPs from civil liability where, among other things, such VHPs receive no compensation and patients sign consent forms. Mississippi similarly protects Mississippi-licensed medical personnel, as well as other medical personnel who receive special volunteer licenses to practice in the state.²⁰ Alabama also provides civil liability protections to VHPs — as long as they are licensed in any state — who gratuitously provide non-serious medical services as part of an “established free medical clinic.”²¹ Louisiana protects VHPs operating as part of nonprofit medical clinics, with no reference to whether the VHPs must be licensed in Louisiana.²²

In addition to — or in place of — VPAs, every state has enacted its own “Good Samaritan” statute, which protects from civil liability those who gratuitously provide emergency assistance.²³ Generally, Good Samaritan statutes lower the applicable standard of care owed by the person providing assistance.²⁴ These statutes were first enacted to protect the person who — although under no duty to help — provides emergency assistance to another but fails to adhere to the otherwise applicable standard of care when doing so. “Emergency” in this context refers to medical emergencies, the classic example being a person trapped in a car that is teetering on the edge of a bridge. As it is a situation like this one that Good Samaritan statutes were enacted to address, their protections are often limited in some way — for example, to care provided at the scene of an accident — and sometimes exclude physicians from the statute's coverage altogether.

Some Good Samaritan statutes, however, provide very broad civil liability protections. The Illinois statute, for example, provides such protection to physicians licensed in any American state or territory who provide emergency care, so long as the

¹⁷ Miss. Code Ann. § 95-9-1(3).

¹⁸ See Paul A. Hattis, *Overcoming Barriers to Physician Volunteerism: Summary of State Laws Providing Reduced Malpractice Liability Exposure for Clinician Volunteers*, 2004 U. Ill. L. Rev. 167 (2004).

¹⁹ *Id.* at § 32.

²⁰ Miss. Code Ann. § 73-25-38.

²¹ *Id.* at § 6-5-663.

²² La. Rev. Stat. § 9:2799.5.

²³ See, e.g., Wash. Rev. Code § 4.24.300.

²⁴ See Stewart R. Reuter, *Physicians As Good Samaritans*, 20 J. Legal Med. 157 (1999).

resulting harm was not the result of willful or wanton conduct.²⁵ Again, however, the term “emergency” is used in the medical context, and courts are left to determine on a case-by-case basis what constitutes an emergency that triggers the act’s protections.²⁶

Louisiana’s Good Samaritan statute provides liability protection to medical personnel licensed in Louisiana who provide medical services “at the scene of an emergency.”²⁷ Medical personnel licensed to practice in another state do not enjoy such protection under Louisiana’s Good Samaritan statute, although they cannot be prosecuted for practicing without a license when they offer gratuitous assistance in an emergency situation.²⁸ Alabama’s Good Samaritan statute protects from *all* civil liability medical personnel who gratuitously and in good faith provide emergency care “at the scene of an accident, casualty, *or disaster*” (emphasis added).²⁹ Mississippi’s law protects “duly licensed” medical personnel who, using reasonable care and in good faith, provide gratuitous emergency medical services or transport.³⁰

Mutual Assistance Compacts. Several states have entered into agreements under which they agree to provide assistance to each other in the face of certain disasters (e.g., forest fires). The most far-reaching agreement — and the one most relevant to Hurricane Katrina relief — is the Emergency Management Assistance Compact (EMAC).³¹ Approved by Congress in 1996,³² EMAC represents an attempt by the signatories — who now include 48 states and the District of Columbia — to remove the legal obstacles that can impede the flow of aid from sister states in times of emergency.³³ Article VI of EMAC provides:

Officers or employees of a party state rendering aid in another state pursuant to this compact shall be considered agents of the requesting state for tort liability and immunity purposes; and no party state or its officers or employees rendering aid in another state pursuant to this compact shall be liable on account of any act or omission in good faith on the part of such forces while so engaged or on account of the maintenance or use of any equipment or supplies in connection therewith. Good faith in this article shall not include willful misconduct, gross negligence, or recklessness.

²⁵ 745 Ill. Comp. Stat 49/25.

²⁶ See *Rivera v. Arana*, 322 Ill. App. 3d 641, 651 (2001).

²⁷ La. Rev. Stat. Ann. § 37:1731(A).

²⁸ *Id.* at § 37:1371(B).

²⁹ Ala. Code § 6-5-332(a).

³⁰ Miss. Code Ann. § 73-25-37(a).

³¹ For background on EMAC, see CRS Report RS21227, *The Emergency Management Assistance Compact: An Overview*, by Keith Bea.

³² P.L. 104-321. Only California and Hawaii have not ratified EMAC.

³³ EMAC is intended to encourage mutual assistance in “any emergency or disaster that is duly declared by the governor of the affected state(s),” including “natural disaster, technological hazard, man-made disaster, civil emergency aspects of resources shortages, community disorders, or enemy attack.” EMAC, Article I.

Thus, when officers or employees of one state render aid to another under EMAC, they are treated as agents of the requesting state for tort and immunity purposes. Neither the officers or employees of the state providing assistance, nor that state itself, would face liability for acts or omissions in good faith while rendering aid. While EMAC clearly offers liability protections of which VHPs could avail themselves, these protections may be limited in that they appear to apply only to state officers and employees. Of course, home states can enter into agreements with VHPs extending state-employee status — and, consequently, EMAC’s liability protections — to the VHPs.

Closely related to the issue of liability protection for VHPs in emergency situations is the necessity of verifying that VHPs are properly licensed as medical professionals. Under EMAC, a state requesting assistance agrees to recognize the medical licenses of health care workers from other states providing assistance.³⁴ However, reciprocity is not automatically extended to VHPs who do not provide services pursuant to an EMAC request for assistance. Unless authorities can verify an individual’s claims, they may be reluctant to accept the individual’s professional services, particularly where VHPs arrive “spontaneously.” The Health Resources and Services Administration (HRSA) in HHS has noted:

The experiences of New York City hospitals in the aftermath of the World Trade Center destruction were instructive about the issues confronting the use of health care professional volunteers in an emergency or mass casualty event. According to reports, hospital administrators involved in responding to the World Trade Center tragedy reported that they were unable to use medical volunteers when they were unable to verify the volunteer’s basic identity, licensing, credentials (training, skills, and competencies), and employment. In effect, this precious, needed health workforce surge capacity could not be used.³⁵

Following the terrorist attacks in 2001, Congress authorized creation of the Emergency System for Advance Registration of Volunteer Health Professionals (ESAR-VHP)³⁶ in order to develop a national database of currently licensed medical professionals which could be accessed by state authorities, thus giving emergency managers and others the ability to quickly identify and use VHPs during emergencies. The ESAR-VHP program, which is based in HRSA, assists state and local authorities by developing standards for a national database, and by providing funding and technical assistance for state-based registration systems which will, when complete, link to the national database.³⁷

³⁴ EMAC, Article V.

³⁵ See HRSA, ESAR-VHP Background, at [<http://www.hrsa.gov/bioterrorism/esarvhp/>].

³⁶ Section 107 of P.L. 107-188 (42 U.S.C. § 247d-7b), the Public Health Security and Bioterrorism Preparedness and Response Act of 2002.

³⁷ This system is still in the early stages of development and so was not fully operational for use during the Hurricane Katrina emergency. For further information on implementation of ESAR-VHP see HRSA’s 2005 draft report on legal and regulatory issues at [<http://www.hrsa.gov/bioterrorism/esarvhp/legalissues.htm>].