Correspondence &

Practitioner Liability Protections Approved

Correspondent: Nellie Bristol, BA

Civil liability protection provisions approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in August 2007 could spur further state enactment of a comprehensive Uniform Emergency Volunteer Health Practitioners Act (UEVHPA), experts say.

Donna Folkemer, director of the Forum for State Health Policy Leadership for the National Conference of State Legislatures (NCSL) said that despite the failure of several other emergency liability bills in states, she thought the work of the conference would be well regarded. "There's a lot of respect in states for that group," she said.

James Hodge, an associate professor at Johns Hopkins Bloomberg School of Public Health and executive director of the Center for Law and the Public's Health agreed. "What you're going to now see I think is very significant increased attention on this," he said. He noted that some states have considered earlier versions of the act and several have approved it. Hodge was involved in both researching and drafting the act for NCCUSL.

The liability provisions were among the last pieces of the act to be approved by the conference and also some of the most important for medical practitioners. Two alternative liability protection provisions were adopted for consideration by states passing the UEVHPA. Both options would exempt from damages volunteer health practitioners providing health or veterinary services during emergencies "for an act or omission of the practitioner in providing those services." However, alternative A would also limit vicarious liability of those entities that send or host volunteers. In both alternatives, the exemption has several exceptions including acts of criminal, wanton, or negligent conduct and an "act or omission relating to the operation of a motor vehicle, vessel aircraft or other vehicle." Also included in both alternatives is a limited exemption from liability for those who operate, use, or rely upon information provided by a volunteer health practitioner registration system. A provision providing workers' compensation benefits for practitioners volunteering during emergencies was also approved in August.

The bulk of the UEVHPA was approved in 2006. Its purpose is to facilitate interstate use of licensed practitioners to provide health and veterinary services during declared emergencies. The 2 recently approved additions are subject to final editing and will officially be included as part of the act later this year.

The NCCUSL develops nonpartisan legislation for states. Conference members include lawyers, judges, legislators, and law professors appointed by states. NCCUSL's work in emergency liability reform has been supported by a number of health-related organizations including the American Medical Association (AMA), the American Nurses Association (ANA), and the American Society for the Prevention of Cruelty to Animals. Also involved in the effort is the Association of State and Territorial Health Officials, the National Funeral Directors Association and the American Red Cross.

Although federal liability protection and registration is facilitated through the Medical Reserve Corps or a state Emergency Systems for Advance Registration of Volunteer Health Professionals, those systems do not result in "the interstate recognition of licenses issued to volunteer health professionals," according to NCCUSL documents.

"When the Gulf Coast hurricanes struck during 2005, the deficiencies in federal and state programs to facilitate the interstate use of volunteer health practitioners not employed by state or federal agencies became evident," the group writes. "Despite clear recognition in federal and state law and interstate compacts that the interstate recognition of licenses issued to health practitioners was critical to emergency response efforts, no uniform well-understood system existed to link the various public and private sector programs together effectively and to make practitioners available to the large array of non-governmental organizations essential to all disaster relief organizations."

NCCUSL's UEVHPA addresses those deficiencies, supporters say. The act would link a system of registries and provide liability protections to practitioners who are properly licensed and documented. The act would be activated when a state or local official authorizes an emergency. It would apply to a range of practitioners including dentists, psychologists, mortuary service providers, and veterinarians. Volunteers would be required to operate within a host entity such as a health facility or disaster relief organization to receive protection.

"We're after fully registered, fully vetted volunteers that are approved though some registration system, not spontaneous volunteers that just tend to show up at scenes of emergencies," Hodge said.

NCSL's Folkemer said previous legislative efforts at expand-

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ing liability involved protections for a number of different types of entities in a single bill, including health care practitioners and private corporations such as Wal-Mart, that could be involved in emergency activities. The proposals also raised objections from some legislators and from lawyers' groups concerned about moves toward tort reform. The NCCUSL act is more narrowly focused, separating health care practitioners from other entities that need protections in emergency situations.

Gene Matthews, director of the University of North Carolina Public/Private Legal Preparedness Initiative and a national leader in emergency liability protection efforts, said his group broke down liability issues into 3 separate acts: one for health workers, a second that applies to other volunteers, such as Red Cross workers, and a third for private entities that are involved in the distribution of supplies or housing of victims. The health practitioner act is the only proposal taken up by NCCUSL so far, Matthews said, adding that many groups support all 3 measures.

"All of these are liability issues that are of concern in emergency response situations and for which there are gaps in state laws everywhere," Matthews said.

The ultimate goal is to have a uniform nationwide volunteer mobilization and liability protection act. After several failed attempts to pass federal legislation on the issue, however, supporters of the effort are now working through individual states. "I just don't think it's realistic to expect that this Congress and this administration are going to agree on issues pertaining to liability and emergencies in the current environment," said Matthews. "While this is an issue of public health importance it can be spun as tort reform and then old reactions start kicking in." Hopkins' Hodge added: "Congress basically has 'punted' on this issue."

Liability protections included in the Pandemic and All-Hazards Preparedness Act (PAHPA), signed into law in 2006, were dropped from the bill, according to Cheryl Peterson of the ANA. In addition to the specter of tort reform, federal efforts also were hampered by jurisdictional divisions between states and the federal government. For example, states control medical licensure and this is a key component to ensuring liability protections apply to the appropriate people. Also, emergencies often are declared first by local and state officials, making state control over emergency resources crucial.

Peterson added that because Congress passed PAHPA just last year another bill addressing similar issues is unlikely in the near future. "Our focus now is on the states," she said, and building coalitions to support legislation there.

Matthews said his hope is that a critical mass of states will pass the UEVHPA and that it will then be enacted at the federal level. Hodge also hopes the public health message inherent in the act will outweigh jurisdictional and legal concerns: "What you see here is a recognition that the benefits of having volunteers provide these services during emergencies, helping to meet surge capacity in health care and veterinary services, is so essential to public health outcome in an emergency event that we want to do what's necessary to encourage their participation."

Although momentum may be building for civil liability protection legislation, some medical groups remain concerned about the potential for criminal prosecution of practitioners, as reflected in the case of Dr Anna Pou and her alleged actions during Hurricane Katrina. Pou and 2 nurses were charged in the deaths of 4 patients stranded in a flooded New Orleans hospital. The Louisiana Attorney General's office said that the practitioners injected the patients with lethal amounts of morphine and midazolam. The charges against the nurses were dropped, and in July, a grand jury failed to indict Pou.

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The AMA and the ANA released a joint statement on the case: "The American Nurses Association and the American Medical Association continue to be very concerned about criminalizing decisions about patient care especially those made during the chaotic aftermath of a disaster when medical personnel and supplies are severely compromised," the groups said. They continued: "Judgments regarding these decisions and subsequent action would be more properly considered by the respective licensing boards. The criminal prosecution will chill future responses of health practitioners during a major disaster for fear of having their best judgments second guessed."[1]

Peterson commented: "We can't afford to have these decisions criminalized. Otherwise people won't respond."

Model legislation developed by the AMA specifies that "any physician licensed to provide health care services in the state who, in the absence of reckless conduct, willful misconduct or criminal intent, renders or fails to render health care services shall not be subject to criminal liability resulting from any act or omission related to such rendering of or failure to render health care services."

Dr James Moises was involved in patient care during Hurricane Katrina at the Tulane University Hospital and Clinic emergency department. He said that although he applauds

efforts to protect clinicians from legal actions resulting from care during catastrophes, he believes that health care facilities rather than practitioners should be held accountable for poor outcomes.

"It's the responsibility of the hospital administration, not the doctors, to make sure patients are evacuated or cared for in times of a disaster," Moises said. "We can treat the patients but we need to have the infrastructure to be able to do it and we need electricity, we need supplies, we need water. I mean that's not the responsibility of the doctors and nurses and health care providers. That absolutely is the responsibility of the owners of the hospital."

Moises called for greater responsibility on the part of facilities and greater protections for practitioners. Without both, he said, "The next disaster, it will be difficult to get health care providers to stay."

About the Author

Ms Bristol is a freelance journalist in Falls Church, VA.

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REFERENCE

1. Langston EL. AMA and ANA speak out against criminalizing medical decisions. Published July 17, 2007. *http://www.ama-assn.org/ama/pub/category/17830.html*. Accessed September 13, 2007.