

# The Center for Law & the Public's Health at Georgetown & Johns Hopkins Universities

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## MEMORANDUM 1

### **Responses to Issues Concerning Definitions, Scope of Practice, Workers' Compensation, and Civil Claims as relates to the UEVHSA**

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May 23, 2006

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### **Summary**

On April 28-29, 2006, the Drafting Committee held its first meeting in Washington, D.C. in which it and other participants raised a number of issues pertaining to the initial draft of the Uniform Emergency Volunteer Healthcare Service Act (UEVHSA). Particular attention was given to the following issues, including (1) whether the term "volunteer health practitioners" may be defined by reference to membership in the National Voluntary Organizations Active in Disasters, Inc., (2) whether the "scope of practice" during an emergency should be based on the laws of the host state, the source state, or the most restrictive provisions of either state, (3) how alternatives for providing workers' compensation coverage to volunteers differed under existing state laws, and (4) whether civil claims filed against volunteer health practitioners posed significant threats to their performance during emergencies. This memorandum elaborates on these issues for the purposes of facilitating discussion as relates to the further development of the UEVHSA.

## I. Volunteer Health Practitioners and NVOAD

In Sections 2 (Definitions) and 4 (VHP Registration Systems), specific suggestions were made to reference inclusion in the National Voluntary Organizations Active in Disaster, Inc. (NVOAD) as a way to establish legitimacy of entities that register volunteers. The reporter was asked to examine whether NVOAD membership may be a suitable criteria for recognizing these entities. For many reasons, membership in NVOAD may not be a suitable factor in considering the legitimacy of registration systems.

NVOAD was established to foster more effective service to people affected by disasters through communication, coordination, cooperation, collaboration, convening mechanisms and outreach.<sup>1</sup> It is not a service delivery organization, but acts as a network to facilitate cooperation among its members so they may independently provide relief and recovery services.<sup>2</sup> The conditions for membership are broad and inclusive, requiring compliance with the Principles of Membership, and a willingness to participate in committing resources to carry out its functions. Any voluntary organization established under the Internal Revenue Service regulation 501(c)(3) and that is national in scope and purpose, and active in disaster responses, is eligible for membership.

NVOAD allows virtually *any* qualified organization to become a member of its organization. Its “policy on inclusivity” does not specify recruiting a particular type of service organization or volunteer. Rather, “the greater the number of organizations which adopt the principles of NVOAD and work to fulfill its mission, the more effective and comprehensive will be the services delivered by each.”<sup>3</sup> Their membership consists of a wide array of national health- and non-health related organizations, including: Mercy Medical Airlift, Northwest Medical Teams International, National Emergency Response Teams, Southern Baptist Convention, United Jewish Communities, America’s Second Harvest, Church World Service, and the Humane Society of the United States. A comprehensive list of current members is available on the NVOAD website.<sup>4</sup>

Since the breadth of NVOAD membership policy extends beyond volunteer healthcare practitioners, it is probably not a suitable reference in the language of the UEVHSA, although it may be worthy to note in the Official Comments.

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<sup>1</sup> Article 1, National Voluntary Organizations Active in Disaster, Inc. By Laws *available at* <http://www.nvoad.org/NVOADBylawsAmended5-2003.pdf> (last accessed May 14, 2006).

<sup>2</sup> See NVOAD Organization *available at* <http://www.nvoad.org/about.php#organization> (last accessed May 14, 2006).

<sup>3</sup> NVOAD Policy on Inclusivity *available at* <http://www.nvoad.org/include.php> (last accessed May 14, 2006).

<sup>4</sup> NVOAD National Members *available at* <http://www.nvoad.org/membersdb.php?members=National>; *see also* State Members *available at* <http://www.nvoad.org/membersdb.php?members=State> (last accessed May 16, 2006).

## II. Scope of Practice

In Section 5 of the previous draft of the UEVHSA (now Section 6. Provision of Volunteer Healthcare Services), it is stated: “A volunteer healthcare practitioner, including a practitioner licensed in another state and authorized to provide healthcare services in this state pursuant to this [act], shall adhere to the normal *scope of practice* and standard of care established by the licensing provisions or other laws or policies of this state.” During the first Drafting Committee meeting, questions arose as to whether requiring VHPs to adhere to the scope of practice standards during emergencies in the host state is the best policy as concerns volunteers who cross state lines to participate. Alternatives include requiring adherence to scope of practice provisions in the interstate volunteers source state, or perhaps requiring adherence to the stricter of the two states standards. The reporter was asked to clarify whether and how existing states’ laws may resolve this issue.

From the outset, it is important to distinguish between the meanings of “scope of practice.” In some contexts, it refers to the standards that separate one health profession from another. A nurse is restricted from performing the services of a physician, as such conduct would constitute acting outside his or her scope of practice; some state laws adopt this language when referring to the general scope of practice. Idaho, for example, precludes a health practitioner providing charitable medical care from acting outside the scope of practice “authorized by the provider’s licensure, certification or registration.”<sup>5</sup>

This meaning of scope of practice is distinguishable from states that refer to the general services being provided *for* the specific entity that the volunteer is serving. Alabama, for example, requires all volunteers to act “within the scope of such volunteer’s official functions and duties *for* a nonprofit organization, ...hospital, or a governmental entity....”<sup>6</sup> Here, the scope of practice (i.e. functions and duties) do not stem from the explicit licensure requirements under state law. Rather, the types of services stem from the privileging requirements set forth by the organization in which the volunteer is serving. It is unclear, in such cases, whether an interstate volunteer organization would be subject to the laws of the host or source state. Thus, a physician may exceed the scope of practice boundaries by performing a type of service that was not authorized by her provider even though it constitutes a “physician service.”

Some state attorneys general have issued opinions concerning the breadth of the types of services authorized under existing state law. Indiana, for example, declared that a licensed physician may not delegate authority to perform acts within the scope of practice of the physician or within the scope of practice of another licensed professional (e.g., a nurse), which require the exercise of professional judgment.<sup>7</sup> The overriding issue is whether the licensed health care practitioner was acting pursuant to the scope of practice requirements set forth by the licensing standards of her profession, and not the privileging requirements of a particular organization.

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<sup>5</sup> Idaho Code § 39-7703 (2006).

<sup>6</sup> Ala. Code §6-5-336(d)(1) ) (emphasis added).

<sup>7</sup> Att’y Gen. Opinion No. 82-6, p.133 pursuant to Burns Ind. Code Ann. § 16-21-2-13 (2006).

Other states recognize the possible overlap of the scope of practice between professions while declaring that the governing law is that of the host state. Kansas' Attorney General issued an opinion concerning whether chiropractic manual manipulation was a procedure within the scope of practice of medicine and surgery. Although chiropractic manipulation may involve methods of practice "authorized to one or the other profession or both," it is not within the scope of practice of medicine and surgery as defined by Kansas state law even though it may be within the scope of practice under standards which such practitioners are generally held to as members of the chiropractic profession.<sup>8</sup>

Some states draw volunteer health practitioners within the rubric of state employees. Iowa, for example, considers health care providers who render free care pursuant to its volunteer health care provider program as employees "of the state."<sup>9</sup> The state shall also defend these persons against any claim arising under the Constitution, statutes, or rules of "any state."<sup>10</sup> The host state assumes responsibility to afford liability protections to volunteers irrespective of which state the claim may arise. As an employee, however, the volunteer is expected "to cooperate in the investigation or defense of the claim" and the state is entitled to restitution when his or her conduct amounts to a willful and wanton act or omission.<sup>11</sup>

In at least one state (Illinois), a bill has been introduced concerning volunteer health practitioners that supports the host states' authority to modify the existing scope of practice restrictions to facilitate the efficient and unrestricted use of VHPs during an emergency. Illinois House Bill 3871 authorizes the Governor during an emergency to "modify the scope of practice restrictions under the Emergency Medical Services (EMS) Systems Act for any persons who are licensed under that Act" or the Nursing Home Care Act "for any person working under the direction of the Illinois Emergency Management Agency and the Illinois Department of Public Health."<sup>12</sup>

### III. Workers' Compensation

Under Section 8, Workers' Compensation Coverage, of the existing version of the UEVHSA, two options are set forth to provide workers' compensation protections for VHPs: (1) **Option A** – to be provided by the source state, including whenever it is also the host state; and **Option B** - to be provided by the host state. Some members of the drafting committee queried as to how other states address workers' compensation protections for volunteers.

Some states that currently afford workers' compensation coverage to volunteer health practitioners consider such volunteers as employees of the state. Michigan, for

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<sup>8</sup> Att'y Gen. Opinion No. 96-12, 1996 Kan. AG LEXIS 12.

<sup>9</sup> Iowa Code §135.24 (3).

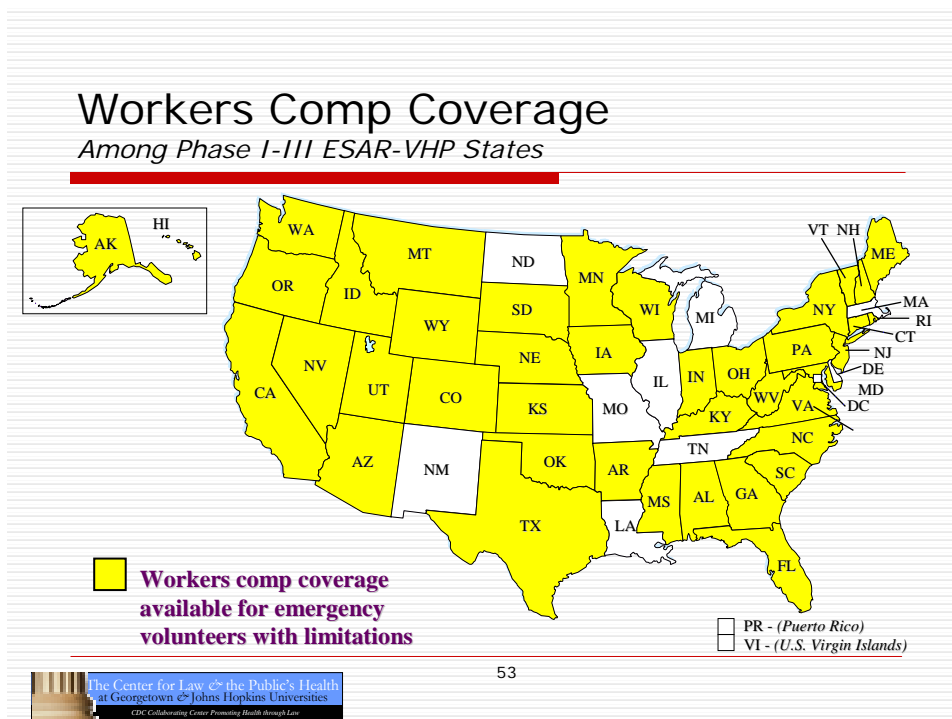
<sup>10</sup> Iowa Code §669.21 (emphasis added).

<sup>11</sup> Id.

<sup>12</sup> Illinois House Bill 3871; 20 ILCS 2310-625(a)(2)-(3).

example, considers volunteer civil defense workers as employees of the state when they are “engaged in the performance of duty” as a member of the civil defense force.<sup>13</sup> Volunteers who are members of an emergency rescue team and injured in the normal scope of duties, whether or not they are employed by the state, are considered “employee[s] of the team” and will be covered unless the members were afforded coverage in writing by their employers. Although volunteers are subject to the “operational control of the authority . . . in the area in which they are serving,”<sup>14</sup> they are entitled to the same rights and immunities as state employees “regardless of where serving.”<sup>15</sup> Thus, Michigan adheres to Option A under the current draft of the UEVHSA.

The map below depicts the number of states that have statutorily made workers' compensation coverage available to emergency volunteers, largely through emergency or public health emergency laws. Whether this coverage extends to volunteer health practitioners in all cases is less clear.<sup>16</sup>



<sup>13</sup> MCL § 418.161(g).

<sup>14</sup> MCL § 30.411 Sec. 11 (1)(c)

<sup>15</sup> *Id.* at Sec. 11 (1)(b).

<sup>16</sup> See Emergency System for Advance Registration of Volunteer Health Professionals (ESAR-VHP) – Legal and Regulatory Issues, Presentation prepared by the *Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities* for the Department of Health and Human Services, Health Resources and Services Administration.

However, other states, such as Iowa<sup>17</sup> and Mississippi,<sup>18</sup> do not recognize certified service volunteers of disaster relief organizations (e.g., the American Red Cross) as employees of the state for purposes of workers' compensation. In states that afford volunteers workers' compensation coverage, residence has not appeared to be a dispositive factor. There is no mention of residence within such statutes that afford coverage pursuant to state workers' compensation programs.

#### **IV. Civil Claims and Public Health Preparedness**

Whether there have been civil claims filed to warrant civil immunity protections afforded under the UEVHSA must be contextualized in the current environment of health care services and the purpose of the Act. Numerous Congressional bills have recently been introduced to afford core liability protections for VHPs. Senate Bills 1638 and 2319 establish databases of VHPs for use in response to federal emergencies, and afford them liability and reemployment protections during an emergency. Senate Bill 1747 also provides additional protections to employers of disaster relief volunteers and entities that enable them to render disaster relief services. House Bill 3746 provides qualified immunity from liability to volunteers who assisted in the response to Hurricane Katrina. House Bill 3962 amends the Public Health Service Act to shield physicians and other volunteer health practitioners from civil liability actions that may arise due to services provided during an emergency.

While these broad federal proposals have yet to pass, most states provide some immunity for disaster relief or health volunteers. Coverage, however, is sketchy. Utah, however, only covers volunteers if they are uncompensated. State officials have claimed that health care practitioners would be more willing to volunteer if they were granted immunity, regardless of whether they received payment or reimbursement.<sup>19</sup> In many states, these efforts stem from the recognition of a large uninsured population and the desire to encourage physicians to serve this vulnerable population. The gravity of this predicament is compounded during an emergency when a large population is affected and the need for a rapid and efficient response is imperative.

After Hurricane Katrina, many VHPs flocked to Louisiana to deliver aid. Among them were the California Nurses Association, whose spokeswoman claimed that the "federal response was so slow and inadequate," that they began contacting local health officials to determine where they could send their nurses.<sup>20</sup> Although this may have been well intentioned, it also opened them to potential liability if subsequent determinations were made that questioned their competency to deliver services. Determining the extent of actual claims brought against volunteers (beyond anecdotal accounts) is not possible through existing legal or other research methods.

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<sup>17</sup> Iowa Code § 70A.26

<sup>18</sup> Minn. Stat. § 176.011

<sup>19</sup> Carey Hamilton, *Liability-law changes sought*, THE SALT LAKE TRIBUNE B1 (December 29, 2005)

<sup>20</sup> Cinda Becker and Joseph Mantone, *Eager to Help; Healthcare volunteers charge into afflicted areas*, MODERN HEALTHCARE, September 12, 2005.

If a stated purpose of the UEVHSA is to encourage VHPs to deliver health care services without fear of liability, perhaps it is not the number of claims filed, but the number of lives saved that warrants affording VHPs liability protections during a declared emergency. Public health preparedness after-the-fact would defeat the purpose of the Act in protecting those individuals whose services are vital to response efforts.