

D R A F T
FOR DISCUSSION ONLY

UNIFORM EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

DRAFT FOR CONSIDERATION CONCERNING RESERVED SECTIONS 11 AND 12

For the October 2006 Drafting Committee Meeting

Without Prefatory Note and With Comments

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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September 25, 2006

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2

3 **SECTION 11. CIVIL LIABILITY FOR VOLUNTEER HEALTH**
4 **PRACTITIONERS; VICARIOUS LIABILITY.**

5 (a) In this section:

6 (1) “Coordinating entity” means an entity that acts as a liaison to facilitate
7 communication and cooperation between source and host entities but does not provide health or
8 veterinary services in the ordinary course of its activities as liaison.

9 (2) “Source entity” means a health facility, disaster relief organization, or other
10 person located in this or another state that employs or uses the services of health practitioners
11 who volunteer to provide healthcare or veterinary services in response to an emergency.

12 **OPTION A**

13 (b) Subject to subsection (c), volunteer health practitioners authorized to provide health
14 or veterinary services pursuant to this [act] are not liable for civil damages for acts or omissions
15 within the scope of their responsibilities as volunteer health practitioners.

16 (c) Notwithstanding subsection (b), this section does not apply to:

17 (1) willful, wanton, grossly negligent, reckless, or criminal conduct of, or an
18 intentional tort committed by, a volunteer health practitioner;

19 (2) an action brought against a volunteer health practitioner:

20 (A) for damages for breach of contract,

21 (B) by a source or host entity, or

22 (C) relating to the operation of a motor vehicle, vessel, aircraft, or other
23 vehicle by a volunteer health practitioner for which this state requires the operator to have a valid

operator's license or to maintain liability insurance, other than an ambulance or other emergency response vehicle, vessel, or aircraft used within the scope of responsibilities as a volunteer health practitioner.

(d) Source, coordinating, and host entities are not vicariously liable for the acts or omissions of volunteer health practitioners undertaken pursuant to this [act] and within the scope of their responsibilities as volunteer health practitioners.

(e) Source, coordinating, and host entities are not liable for civil damages for acts or omissions relating to the operation or use of, or reliance upon information provided by, a registration system unless the acts or omissions constitute an intentional tort or are willful, wanton, grossly negligent, reckless, or criminal in nature.

[(f) Notwithstanding subsection (b), for purposes of recovering damages from the state, volunteer health practitioners shall be considered state employees under the *[cite to state tort claims act]*.]

Legislative Note: *This subsection should be revised as necessary based upon the provisions of the state's tort claims act to provide for the award of damages by the state to individuals injured as a result of the negligent actions of volunteer health practitioners and to ensure that volunteer health practitioners will not be personally liable for civil damages to the extent provided by subsections (b) and (c).*

OPTION B

(b) Volunteer health practitioners providing health or veterinary services in this state or another state in response to an emergency and in a manner consistent with this [act] shall be considered officers or employees of this state entitled to the immunity from tort liability provided by the Emergency Management Assistance Compact.

(c) Source, coordinating, and host entities engaged in activities relating to the provision of health or veterinary services pursuant to this [act] shall be considered agents of this state

entitled to immunity from tort liability in the manner provided to this state by the Emergency Management Assistance Compact.

(d) A volunteer health practitioner, acting as a volunteer as that term is defined by the federal Volunteer Protection Act, 42 USC § 14501 *et seq.* and associated with a source entity that is a nonprofit organization or governmental entity, who provides health or veterinary services for a host entity shall be deemed to be acting within the scope of the volunteer's responsibilities and properly licensed, certified, or authorized to provide health or veterinary services in this state for purposes of qualifying for the limitations on liability provided by the federal act.

Comment

A “coordinating entity” facilitates the deployment of volunteer health practitioners during an emergency. Its function(s) may entail coordination, referral, or transportation of volunteer health practitioners between the source and host entities, or it may simply deal with host entities. For example, a state ESAR-VHP program may serve as a coordinating entity during an emergency by helping to deploy volunteer health practitioners to a host entity. As well, entities such as charities, churches, or other nonprofits may help facilitate the use of volunteer health practitioners, without actually hosting the volunteers to provide health or veterinary services. The purpose for defining this term is to recognize the important role of coordinating entities in helping to provide registered volunteers during emergencies (thus limiting the potential for spontaneous voluntarism) and extend to these entities liability protections pursuant to Section 11.

A “source entity” deploys volunteer health practitioners directly, or via a coordinating entity, to a host entity during an emergency. Source entities are not typically engaged in the oversight or management of volunteer health practitioners during a declared emergency and does not retain the responsibility to verify the licensure status and good standing of the volunteers who provide health or veterinary services. A source entity may include, for example, the public or private sector employer of health practitioners who subsequently choose to volunteer in response to an emergency declaration.

Option A

Subsection (b) provides that volunteer health practitioners are generally not liable for acts or omissions within the scope of their responsibilities during an emergency. As used in this section, “responsibilities” encompasses the provision of services that provide a direct health benefit to individuals or human populations or to animals or animal populations. Responsibilities may also include health-related activities that allow for the efficient provision of health or veterinary services. Examples include assistance in patient care where support staff are

1 unavailable (e.g., transporting a patient in the immediate vicinity where health services are being
2 provided), and other activities that may be outside the typical scope of health or veterinary
3 services, but are still conducive to the provision of patient care. Health-related services are
4 distinguishable from services that are of a nonhealth-related nature and afford no direct health
5 benefit to individuals or populations (e.g., the operation of a non-emergency motor vehicle,
6 administrative services, etc.). Whether a service is health-related or nonhealth-related will
7 depend largely on the circumstances and consideration for whether the acts or omissions are
8 integral to the provision of direct health benefits.

9
10 Subsection (c) provides exceptions to the protections from liability provided to volunteer
11 health practitioners under subsection (b). A volunteer health practitioner may be liable (1) for
12 engaging in willful, wanton, grossly negligent, reckless, or criminal conduct, or for committing
13 an intentional tort; (2) in an action for damages for breach of contract or an action brought by a
14 source or host entity; and (3) for the operation of a motor vehicle or other craft for which the
15 state requires the volunteer to hold a valid license or maintain liability insurance. These
16 exceptions may include situations in which a volunteer health practitioner exceeds the scope of
17 practice requirements in the course of providing health or veterinary services. For example, a lab
18 technician will be deemed to have exceeded the scope of practice of a similarly situated
19 practitioner by performing surgery on an individual. A lack of education, training, and licensure
20 will often be sufficient to constitute, at the very least, grossly negligent conduct pursuant to
21 Subsection (c)(1). The fact that a volunteer practitioner exceeds the scope of practice, however,
22 does not of itself constitute conduct for which liability protection is not available.

23
24 Subsection (c)(2)(A) exempts breaches of contract from the protection provided by
25 subsection (b). At its core, subsection (b) provides protection for malpractice. If a volunteer
26 health practitioner has executed a valid contract to provide health services, the obligations
27 imposed by that contract may only be avoided if there is a valid excuse under the law governing
28 the contract. For example, in *Sullivan v. O'Connor*, 363 Mass. 579, 296 N.E. 2d 183 (Mass.
29 1973), a doctor was found by a jury to have promised a particular result and was held liable for
30 breach of contract even though the jury determined that he had not committed malpractice.
31 Subsection (d)(2)(A) would not provide protection to the doctor for the contract claim.

32
33 Subsection (c)(2)(B) provides that a volunteer health practitioner is not afforded civil
34 liability protection for an action brought by a source or host entity. This section is not intended to
35 be an avenue for third-party claims that might indirectly expose the practitioner to the type of
36 liability for which subsection (b) is intended to provide protection. For example, a plaintiff
37 might file a claim against a hospital (as a host entity) for negligent supervision of a volunteer
38 health practitioner. In response, the hospital might file a third-party claim against the
39 practitioner. If the practitioner's conduct was not within subsection (c), the practitioner would
40 not be liable to the hospital. Rather, the purpose of Section (c)(2)(B) is to provide an avenue for
41 source and host entities to seek redress against a volunteer health practitioner for blatant
42 misconduct that may not necessarily have a direct health effect on individuals or populations.
43 Examples may include mismanagement of materials during a response effort or conversion of
44 property or goods provided for the sole purpose of distribution to affected individuals or
45 populations of an emergency. Such claims by the source or host entity against the volunteer

1 health practitioner are allowed pursuant to this Section (c)(2)(b) (and Section (c)(1) if the
2 volunteer's actions constitute a crime or other willful misconduct).

3
4 Section (c)(2)(C) exempts civil liability protections for injuries resulting from the
5 operation of a non-emergency vehicle for which the host state requires the operator to hold a
6 valid operator's license or maintain liability insurance. This provision is consistent with other
7 federal statutes that provide certain exceptions to civil liability protections afforded to volunteers
8 (e.g., the federal Volunteer Protection Act, 42 U.S.C.S. § 14503(a)(4)). The intent is to preclude
9 liability protections for actions of volunteer health practitioners that are outside their scope of
10 responsibilities as volunteers. Thus, a volunteer health practitioner driving an ambulance or other
11 emergency vehicle transporting patients to a triage site is acting within the scope of his
12 responsibilities, and may not be found liable for injuries resulting from a vehicular accident
13 (provided he did not act willfully or engage in other misconduct). The same practitioner who
14 finishes a shift as a volunteer at a host entity and has a vehicular accident driving across town
15 later that evening to eat out at a restaurant is liable for damages caused by the negligent
16 operation of the vehicle.

17
18 Subsection (d) provides vicarious liability protection for source, coordinating, and host
19 entities for acts or omissions of their volunteer health practitioners. These entities are often
20 concerned about their potential liability in the deployment or use of volunteer health practitioners
21 during emergencies. To alleviate these concerns and thereby facilitate the full use of volunteer
22 health practitioners, the act provides protection from vicarious liability. As discussed below,
23 such protections are consistent with the legal nature of vicarious liability.

24
25 Vicarious civil liability applies when an employer is responsible for the torts of its
26 employees or agents, despite the fact that the employer itself may not have engaged in any
27 negligent activities. Liability under this doctrine can attach pursuant to the theories of respondeat
28 superior and ostensible agency.

29
30 Respondeat superior provides for vicarious liability when a negligent health provider is
31 an employee or an agent of an entity and has acted in the course of the employment. The theory
32 presumes that the employer has control over, and is therefore responsible for the acts of, its
33 employees. The extent of civil liability in such circumstances depends on the level of control
34 exerted by the employer over the actions of the employee. In most jurisdictions, the employer
35 will only be liable for acts of the employee undertaken within the scope of employment.
36 Hospitals, for example, may be held liable for the acts of nurses, residents, interns, and certain
37 behavioral health professionals since these health practitioners are often considered employees.
38 Similarly, a physician who exercises control and authority over other health practitioners (e.g.,
39 nurses, supporting staff, etc.) can be held liable for their negligence. In one case, a surgeon was
40 vicariously liable for an error in a sponge count performed by the nursing staff after surgery,
41 although the surgeon did not participate in the count. *Johnson v. Southwest Louisiana Ass'n*, 693
42 So.2d 1195 (La.App.1997) (holding that the surgeon had a nondelegable duty to remove
43 sponges from the patient's body).

44
45 The primary issue in applying respondeat superior is whether an individual is a servant

(e.g., employee) subject to the control of the master (e.g., employer), or an independent contractor. The employer's right to control is what distinguishes an employee from an independent contractor. Typically, entities are not held liable for the negligent actions of independent contractors. Therefore, during an emergency, a hospital would not be vicariously liable for the acts or omissions of a volunteer health practitioner that provides health services to individuals or populations within the hospital provided that the volunteers were looked upon as independent contractors (and not as agents) of the hospital.

The theory of ostensible (or apparent) agency imputes liability to entities where (1) the patient looks to the entity rather than the individual health practitioner to provide care, and (2) the entity holds the health practitioner out as its employee. Civil liability under the theory of ostensible agency is particularly relevant in emergency situations. When a patient enters the emergency room, he generally looks to the institution to provide him with care and has no knowledge of the nature of the employment relationship between the physician and the hospital. Moreover, by permitting the physician to practice in the emergency room, the hospital is holding out that individual as its employee. This scenario may not be applicable during an emergency for a number of reasons. First, the host entity is not expected to exert the same degree of control over the health practitioner tantamount to the normal operations of an emergency room. Also, volunteer health practitioners are not agents of an entity where no employment relationship exists between the entity and the practitioners, and where they are not presented as providing health services pursuant to a legal obligation (e.g., a duty to perform under a contract).

Subsection (e) clarifies that source, coordinating, and host entities are not liable for civil damages for acts or omissions relating to the operation or use of, or reliance upon information provided by, a registration system. This provision supports the essential roles of these entities in the operation and use of registration systems and the critical need for these systems to effectively respond to emergencies. Provided that the acts or omissions that may lead to liability do not constitute an intentional tort or are not willful, wanton, grossly negligent, reckless, or criminal in nature, entities shall not be civilly liable.

Subsection (f) provides protections for disaster victims injured by acts or omissions of volunteer health practitioners by providing that the state will compensate the disaster victims for injuries suffered to the same extent that the state would be liable for the actions of state employees under state tort claims acts. This subsection is intended to authorize an action to recover damages solely against the state and not to authorize a right of indemnification by the state against the volunteer health practitioner or the filing of any action directly against the volunteer practitioner to the extent otherwise prohibited or restricted by this section.

Option B

Option B provides that volunteer health practitioners and coordinating, host and source entities will qualify for protections from liability as otherwise provided by the Emergency Management Assistance Compact and the Federal Volunteer Protection Act. The limitations on liability are intended to apply even if volunteer health practitioners or their activities as authorized by this act would not otherwise qualify them as eligible for protections under these

1 state laws.

2
3 Article VI of the Emergency Management Assistance Compact provides that officers or
4 employees of a party state rendering aid in another state pursuant to the compact are considered
5 “agents of the requesting state” for tort liability and immunity purposes and provides that “no
6 party state or its officers or employees rendering aid in another state pursuant to [the] compact
7 shall be liable on account of any act or omission in good faith on the part of such forces while so
8 engaged or on account of the maintenance or use of any equipment or supplies in connection
9 therewith.” The compact defines “good faith” to not include “willful misconduct, gross
10 negligence, or recklessness.” Subsections (b) and (c) provide volunteer health practitioners and
11 coordinating, host and source entities engaged in disaster relief activities the same protections as
12 otherwise provided to the state and its employees and agents under the compact. The rationale
13 for these provisions is that volunteers and other organizations supplementing and supporting the
14 actions of the state in responding to emergencies should be entitled to the same protection as the
15 state and its employees and agents.

16
17 The Federal Volunteer Protection Act provides that “no volunteer of a nonprofit
18 organization or governmental entity shall be liable for harm caused by an act or omission of the
19 volunteer on behalf of the organization or entity.” 42 U.S.C. § 14503(a). These protections do
20 not apply to civil actions brought by nonprofit organizations or governmental entities against
21 volunteers and do not provide immunity from liability for willful or criminal misconduct; gross
22 negligence; reckless misconduct; any “conscious, flagrant indifference to the rights or safety of
23 the individual harmed by the volunteer;” or for any harm caused by a volunteer operating a
24 motor vehicle, vessel, aircraft, or other vehicle for which the state requires the operator to be
25 licensed or to maintain insurance. 42 U.S.C. § 14503(a)(3) & (4). The protections provided by
26 the Federal Volunteer Protection Act also apply to punitive damages and limit any liability that
27 may arise for non-economic losses based upon comparative negligence. 42 U.S.C. §§ 14503(e)
28 and 14504. The Federal Volunteer Protection Act generally preempts inconsistent state laws
29 other than those providing for greater protection from liability to volunteers, except to the extent
30 a state establishes alternative rules applicable only to intrastate proceedings or conditions
31 immunity upon the compliance by nonprofit organizations or governmental entities with risk
32 management procedures or the establishment of “financially secure source[s] of recovery for
33 individuals who suffer harm.” 42 U.S.C. §§ 14502 and 14503(d). In order to qualify for the
34 immunities provided by the Federal Volunteer Protection Act, however, a volunteer must be
35 “acting within the scope of the volunteer’s responsibilities in the nonprofit organization or
36 governmental entity at the time of the act or omission” and “if appropriate or required ... [be]
37 properly licensed, certified, or authorized by the appropriate authorities for the activities or
38 practice in the State in which the harm occurred.” 42 U.S.C. § 14503(a).

39
40 While the liability limitations provided by the federal law apply only to volunteers who
41 receive nominal compensation (other than reasonable reimbursement or allowance for expenses
42 actually incurred) not in excess of \$500, the purpose of subsection (d) is to ensure volunteers
43 who receive only nominal compensation satisfy the requirements of § 14503(a) of the federal
44 law.

SECTION 12. WORKERS' COMPENSATION COVERAGE. A volunteer health practitioner who is providing health or veterinary services in this state pursuant to this [act] in response to an emergency, or who is traveling to or from this state to provide such services, and who is not covered by workers' compensation insurance or other insurance providing comparable benefits, shall be considered an employee of this state for purposes of workers' compensation coverage. Workers' compensation benefits for volunteer health practitioners are limited to those benefits provided to state employees under the laws of this state.

Comment

This section provides that the host state must afford workers' compensation coverage to volunteer health practitioners that are not covered by workers' compensation insurance or other comparable coverage during their deployment. Workers' compensation is a no-fault system that provides an expeditious resolution of work-related claims. Injured workers relinquish their right to bring an action against employers in exchange for fixed benefits. This welfare system is convenient to the employer by allowing for a predictable and estimable award. It is also in the interests of the workers since they are not required to demonstrate who is at fault; rather, a worker must only demonstrate that the injury suffered arose out of or in the course of employment. Workers' compensation programs thus protect employees from the harms (or deaths) they incur in the scope of their services. However, most workers' compensation systems have a major limitation: they do not typically cover the activities of volunteers.

Section 8 is necessary to provide some avenue of redress for injuries incurred by volunteer health practitioners while providing health or veterinary services during an emergency. Volunteer health practitioners are not "employees" in the traditional sense of the term. However, in the course of providing health or veterinary services during an emergency, they will be exposed to many of the same risks of harm that are faced by employees of the host entity, state or local governments, or other employers.

Under this section, a volunteer health practitioner that has no other source of insurance for work-related injuries or death is entitled to the same workers' compensation benefits as employees of the state. Accordingly, the host state's law governs the grant of any workers' compensation award to a volunteer and determines whether an employer, rather than the state, is mandated to provide workers' compensation coverage. This section is not intended to supplant the workers' compensation benefits that would otherwise be available to volunteer health practitioners provided by an entity or other person in the host state or the state from where they were deployed. Some employers, for example, may laudably choose to extend their workers' compensation benefits to their employees who choose to volunteer outside the employer workplace during an emergency. In addition, some state laws may mandate workers'

1 compensation coverage for individuals even when providing voluntary service away from their
2 regular place of employment. This section is only meant to afford workers' compensation
3 coverage when no other coverage applies.
4

5 This section is not intended to allow redress for volunteer health practitioners who may
6 attempt to circumvent the exclusive remedy provisions of workers' compensation to pursue tort
7 suits against a host entity.
8

9 The provisions of this section are based upon the laws of several states that require states
10 to provide some coverage for the actions of volunteer health practitioners. For example,
11 Wisconsin extends the definition of "employee" for workers' compensation purposes to include
12 all "emergency management workers" even if they are volunteers, provided they have registered
13 with the state's emergency management program. Wis. Stat. §§ 102.07, 166.03 & 166.215.
14 Connecticut, Illinois and Ohio provide similar protections to volunteers responding to
15 emergencies. Conn. Gen. Stat. §§ 28-1, 28-14; 20 Ill. Comp. Stat. 3305/10; Ohio Rev. Code
16 Ann. §§ 4123.01 & 4122.033. Similarly, Washington State provides workers' compensation
17 coverage to volunteer emergency workers while registered with an approved emergency
18 management organization if injured in the course of performing volunteer duties and Maryland
19 provides similar protections to civil defense workers. Wash. Admin. Code 118-04-080; Md.
20 Labor and Employment, § 9-232. Minnesota likewise provides workers' compensation coverage
21 to volunteers registered with state or local government agencies and Texas provides medical
22 benefits, but not lost wages or disability benefits, for injuries sustained by volunteers not
23 otherwise provided with workers' compensation benefits. Minn. Stat. § 12.22, subd. 2a.; Tex.
24 Lab. Code, § 501.026.