



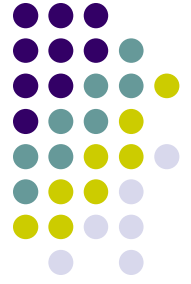
Liability Protections for Massachusetts Nurses who Volunteer during Disasters

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Massachusetts Department of Public Health

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Disclaimer



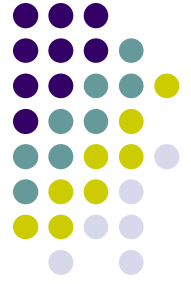
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Introduction: Basic Principles



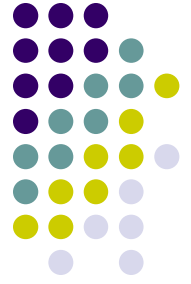
- There can be no liability unless you have committed a negligent act (or omission).
- Anyone can file a lawsuit. If you are sued, the questions will be:
 - Were you negligent?
 - If so, do you have a defense?

Patchwork of Legal Protection for Volunteers in Mass.



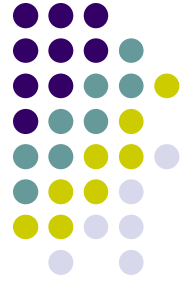
- Existence of liability protection depends on:
 - Whom you were working for at the time you were negligent
 - Were you a volunteer?
 - Were you considered an employee?
 - What you were doing at the time
 - Were you acting within the scope of your responsibilities?
 - Extent of your negligence
 - Simple or gross negligence

Outline



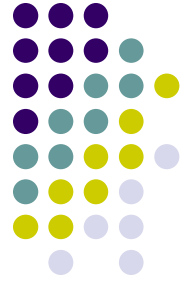
- Ways to Volunteer
- Sources of Liability Protection
 - I. Immunity for Nurses working in Public Health Programs
 - II. Good Samaritan Law
 - III. Federal Volunteer Protection Act
 - IV. Your own malpractice insurance
- Pending Legislation
- “Altered Standards of Care”
- Hypothetical scenarios

Ways to Volunteer

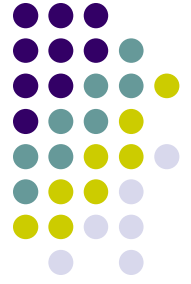


- Official Programs
 - MRC – Medical Reserve Corps
 - Locally recruited, locally based
 - Can assist in emergencies **and** in **routine** health-related events (e.g. vaccination clinics)
 - MSAR – Mass. System for Advance Registration
 - Statewide database of pre-credentialed volunteers
 - Must be activated by Commissioner of Public Health

Ways to Volunteer



- DMAT teams (federal)
- Sent or released by your employer
 - Paid or unpaid
- “Spontaneous” volunteering
 - Example: car accident



SOURCES OF LIABILITY PROTECTION

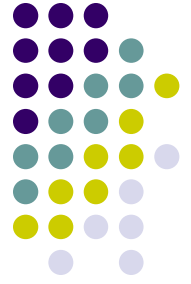
I. MG.L. c. 112, § 12C: Immunity of Physician or Nurse



“No physician or **nurse** administering immunization or other protective programs **under public health programs** shall be liable in a civil suit for damages as a result of any act or omission on his part in carrying out his duties.”

(Government Programs)

MG.L. c. 112, § 12C



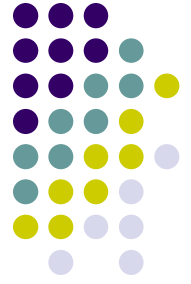
- Recent case upholds this immunity with respect to treatment for TB at DPH-funded clinic. *Headley v. Berman (SJC 1995)*
- Covers routine work as well as emergencies
 - Paid or unpaid
- Would apply to emergency dispensing sites
- Bottom line: If you are working in a government-funded protective public health program, you have this immunity.

II. Good Samaritan Law (Applies ONLY in Emergencies)



- M.G.L. c. 112, § 12B
 - Protects doctors, **nurses**, and physician assistants who give “emergency care or treatment other than in the ordinary course of practice,” from liability in a suit for damages.
 - Care must be given in good faith
 - As a volunteer and without fee

Good Samaritan Law con't



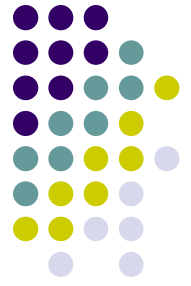
- M.G.L. c. 112, § 12B protects you:
 - From liability for damages as result of acts or omissions
 - From liability for hospital expenses for ordering or causing hospitalization
- Emergency need **not** be declared, but protection may not extend beyond an immediate, urgent need.

III. Federal Volunteer Protection Act



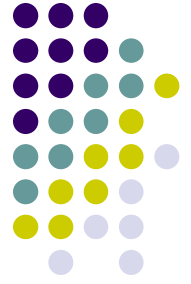
- 42 U.S. Code § 14501 *et seq.*
 - Preempts (overrides) state laws that are inconsistent with the Act
 - Does **not** preempt state laws providing **additional** protection from liability
- Provides immunity from liability for negligence (harm caused by their acts or omissions) for **unpaid** volunteers serving
 - nonprofit organizations or
 - governmental entities, **IF:**

Federal Volunteer Protection Act cont.



- Volunteer was acting **within the scope of his or her responsibilities** in the organization
- Volunteer was properly **licensed, certified or authorized** to act
- Harm was not caused by willful, criminal or reckless misconduct or gross negligence
- Harm was not caused by volunteer operating a motor vehicle, vessel, or aircraft
- The volunteer's misconduct was not a crime of violence, hate crime, sexual offense, or violation of civil rights
- Volunteer not under influence of alcohol or drugs

IV. Your own malpractice insurance

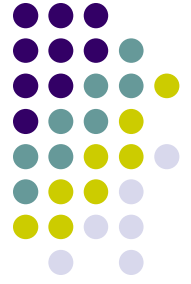


If you carry your own insurance, check to see if your coverage extends to practice during a disaster



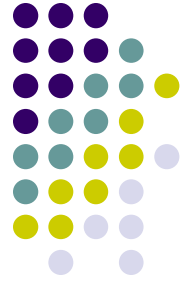
PENDING LEGISLATION

History



- Senator Moore has sponsored emergency powers legislation for many years
- Latest versions: S. 18 and H. 108:
 - “An Act Relative to Pandemic and Disaster Preparation and Response in the Commonwealth”
 - Virtually identical Senate and House versions
- Hearing held March 26, 2009

S. 18 and H. 108



- Liability protections have been negotiated and agreed to among DPH, local health agencies, private organizations
- Under section 10 of the bill, MRC and MSAR volunteers would be treated as state employees with the protections of the Massachusetts Tort Claims Act when serving as described below.

Massachusetts Tort Claims Act



- **M.G.L. Chapter 258, § 2: Public employers** (state or local) are liable for harm caused by the negligent or wrongful act or omission of any **public employee** who **acted within the scope of his/her employment.**
- If a state employee is sued, he or she is defended by the Attorney General's office.

Liability Protections in S. 18 and H. 108: MRCs



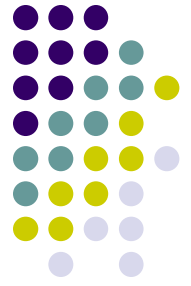
- MRC Volunteers could be activated:
 - During a Governor-declared state of emergency
 - During a Governor-declared public health emergency
 - During a public health incident that demands an urgent response
 - Under a request from a local public health authority when local resources have been or are expected to be exhausted during a public health incident that demands an urgent response
- They would be treated as state employees for liability protection under the Tort Claims Act when this activation was authorized by the DPH Commissioner.

Liability Protections in S. 18 and H. 108: MSAR



- MSAR Volunteers could be activated by the DPH Commissioner:
 - Under any of the 4 circumstances listed above, or
 - Based on an official request from another state or Canadian province
- They would be treated as state employees for liability protection under the Tort Claims Act when so activated

Liability Protections in S. 18 and H. 108: DMATs

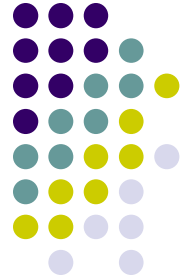


- If not needed as federal assets, DMAT and similar federal teams could be activated by the DPH Commissioner under the same circumstances as MRCs.
 - They would be treated as state employees for liability protection under the Tort Claims Act when so activated.
- [NOTE: When activated by the federal government, members of these teams have liability protection under the **federal** Tort Claims Act.]

Liability Protections in S. 18 and H. 108

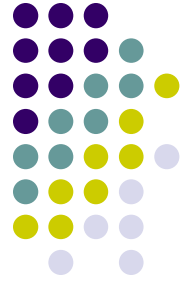


- Under section 22 of the bill, **any person** rendering assistance or advice:
 - during a Governor-declared state of emergency or public health emergency **and**
 - **at the request or order of a government employee,**
- would be treated as a state employee for liability protection under the Tort Claims Act



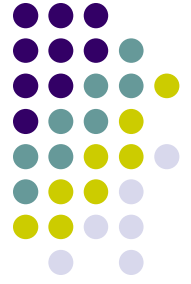
“ALTERED STANDARDS OF CARE”

Influenza Pandemic



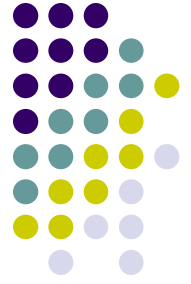
- Possibly 30% population ill
- Demand for resources will exceed supply: medical staff, hospital beds, anti-virals, ventilators
- Delivery of care will not meet the customary, usual community standard of care that health care providers routinely provide

MDPH Efforts



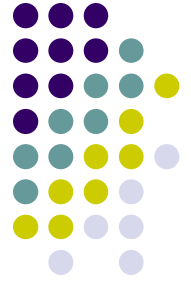
- Phase I: Joint Advisory Group developed Guidelines and Principles in 2006 - 07
 - Guiding philosophy is based upon allocation of scarce resources to **maximize number of lives saved**
 - The responsibility of health care providers is to protect the public's health by adhering to the principles and ASC protocols developed for a pandemic situation

MDPH Efforts



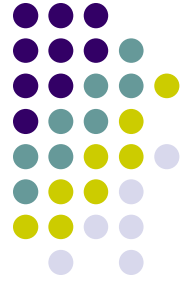
- Phase II: Altered Standards Of Care Advisory Committee (ASCAC), chaired by Harvard School of Public Health and MDPH (current work)
 - Mission: Develop specific priorities for scarce health care resources, and specific protocols for the delivery of care in austere circumstances
 - 4 subcommittees
 - Space (in hospitals)
 - Resources
 - Workforce
 - Process

Workforce Subcommittee



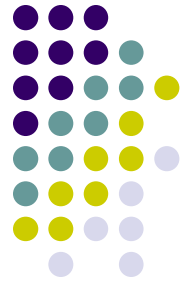
- Lower barriers that make workers unwilling or unable to respond. Examples:
 - Practical support
 - Education & training
 - Liability protection
- Expand capacity of workforce
 - Re-deploy & retrain staff
 - Temporary reassignments
 - Scopes of practice

Next Steps



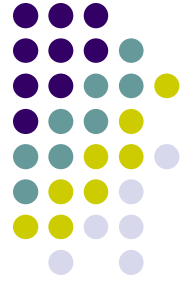
- Synthesize subcommittee drafts into single set of guidelines
 - ASCAC comments
- Stakeholder review & public engagement process
- Implementation
 - Dissemination
 - Education & training

What about liability protection if you work under ASC?



- Governor would declare public health emergency
- Commissioner of Public Health would order or allow adherence to ASC
- If health care providers deliver care in accordance with ASC, this is considered to be care that would be delivered by “average, prudent provider in community”
- No basis for malpractice claim in this case

More MDPH Efforts

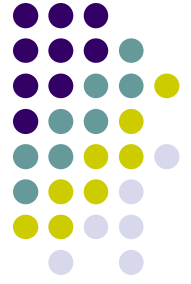


- Templates for orders that DPH Commissioner could issue during declared public health emergency. Examples:
 - Suspending hospital staffing requirements in DPH regulations
 - Allowing dispensing of meds by more people
 - Allowing practice by out-of-state nurses who have current, unencumbered license



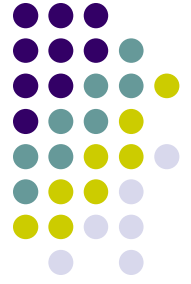
HYPOTHETICAL SCENARIOS

Scenario 1: anthrax attack



- Governor has declared public health emergency. [This allows Commissioner of Public Health to “take such action as he may deem necessary” to prevent disease.]
- Emergency dispensing sites (EDS) are being set up; call goes out for volunteers to staff these.
- A pharmacy student volunteers to help and is trained by a volunteer nurse. The student dispenses meds to a family, and a child suffers shock and is hospitalized.

Scenario 1 con't.

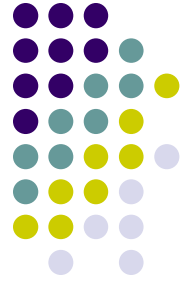


- **Question 1:** Will the nurse jeopardize her license by training a pharmacy student to dispense meds at an EDS?
 - Board of Registration in Nursing controls licensing
 - DPH has an “Emergency Dispensing Order” that would be signed by Commissioner of Public Health, waiving laws & regulations that restrict dispensing.
 - Students in accredited pharmacy school would be allowed to dispense in accordance with protocols
 - Also lay people who are trained by MD or nurse
 - If Emergency Order is in place, nurse’s license would **not** be jeopardized because no violation of Nursing Board regs.

Scenario 1 con't.



- **Question 2:** Is the nurse liable for injury to the child?
 - If the nurse is **not negligent**, there is no liability.
 - If the nurse is negligent in training the student, she is protected by:
 - M.G.L. c. 112, § 12C (immunity for nurses working in public health programs)
 - If unpaid, by Federal Volunteer Protection Act
 - If unpaid, possibly by c. 112, § 12B (Good Samaritan)



Scenario 1 con't.

- **Question 3:** Is the student liable for injury to the child?
 - If the student is **not negligent**, there is no liability.
 - If the student is negligent in dispensing the meds, she is protected by:
 - Federal Volunteer Protection Act

Scenario 2: Flu Vaccine Clinic



- Flu pandemic; shortage of nurses to staff local vaccine clinic. Board of health appeals to **retired nurses** to work in clinic.
 - **Question:** Would the retired nurses be protected from liability?



Scenario 2 con't.

- **Federal Volunteer Protection Act?**
 - Yes, so long as properly “authorized to act”
- **Chapter 112, § 12C?**
 - If still licensed, are protected
 - If not licensed, not protected
- **Good Samaritan Act?**
 - Only if licensed. Statute requires person to be “duly registered or licensed”