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HEALTH LAW

Liability Considerations for Physician Volunteers in the U.S.

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Physicians are often asked to provide free or reduced-cost care to uninsured and underinsured community members. Most physicians are willing to help. Participation can take many forms, including seeing patients with Medicaid or other coverage where payment may not cover the cost of services; seeing patients without charge in the physician's usual clinic; volunteering time at a clinic that provides free or reduced-cost care; treating those in homeless shelters, temporary clinics, or on the streets; and volunteering in disaster relief situations without a formal structure. Under these circumstances, the physician is often unfamiliar with patients and their histories and may be treating them for conditions or stages of disease that are not within the doctor's regular scope of practice. Supplies and diagnostic capabilities may be limited or rudimentary, and, when treating patients with mental illness or substance abuse issues, the physician may not have access to behavioral health workers to help with treatment decisions.

Liability Questions

Delivering care under these circumstances often presents liability concerns for physicians. If no fee is charged, does the responsibility of the malpractice carrier change? Do Good Samaritan laws provide protection from legal action, especially in the case of street work or in temporary situations?

The practice of medicine may be different in volunteer situations than in a traditional clinical setting. Physicians often rely on diagnostic algorithms when laboratory and other diagnostic tests are not available to the patient for financial or practical reasons. What kind of liability (if any) does the physician incur by diagnosing a patient and recommending treatment in the absence of the usual diagnostic tests? Physicians may also be concerned about issues related to incomplete treatment when they care for indigent populations. If treatment will be unavailable because the patient is uninsured, what is the use of diagnostic testing?

State Law Protections for Physician Volunteers

Physicians who volunteer in free clinics and community settings and for charitable organizations may be eligible for liability protection under both state and federal law. Most states have some form of limited liability or immunity for physicians who volunteer their professional services, and some subsidize the purchase of malpractice insurance [1]. These protections, and the circumstances under which they apply, vary widely by state. Although state immunity laws provide some protections for

physicians who provide volunteer medical services, they do not guarantee that physicians will not be sued as a result of volunteering their professional services.

It is important to distinguish these state immunity laws from Good Samaritan laws. Good Samaritan laws protect health professionals only when they are providing care in emergency situations.

Federal Law Protections for Physician Volunteers

The Volunteer Protection Act of 1997: Volunteers of a Nonprofit or Governmental Entity. The Volunteer Protection Act of 1997 (VPA) was enacted to provide minimum protections for volunteers [2]. Testimony in support of the legislation indicated that concern and uncertainty about the potential for personal liability acted as a significant deterrent to volunteering [3].

The VPA establishes a minimum level of protection for volunteers and preempts inconsistent state law unless the state law provides greater protection [4]. A "volunteer" is defined as an individual performing services for a nonprofit organization or government entity who does not receive compensation (other than reasonable reimbursement or allowance for expenses incurred) or any other thing of value in lieu of compensation in excess of $500 per year [5].

The VPA provides immunity for harm caused by the acts or omissions of volunteers serving nonprofit organizations or governmental entities if:

- The volunteer was acting within the scope of his or her responsibilities at the time of the alleged act or omission;
- The volunteer was properly licensed, certified, or authorized to act, if such license or authorization is needed;
- The harm was not caused by willful, criminal, or reckless misconduct; gross negligence; or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and
- The harm was not caused by the volunteer's operating a motor vehicle, vessel, aircraft, or other vehicle for which the state requires an operator's license or insurance [6].

Volunteers protected by the VPA are, however, still subject to state laws of the following types, which the VPA does not preempt:

- A state law requiring the nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers;
- A state law making the organization or entity liable for the acts or omissions of its volunteers to the same extent an employer is liable for the acts or omissions of its employees;
- A state law making limitation of liability inapplicable if the action is brought by an officer of a state or local government pursuant to state or local law; or

- A state law making limitation of liability applicable only if the organization or entity provides a financially secure source of recovery for harmed individuals (e.g., an insurance policy within specified limits) [7].

If a volunteer is held liable under these conditions, the VPA limits the award of punitive damages to those cases in which there is clear and convincing evidence of willful or criminal misconduct or a conscious, flagrant indifference to the rights or safety of the individual harmed [8]. The VPA does not apply to volunteers' misconduct that constitutes a crime of violence or act of international terrorism, a hate crime, a sexual offense, a violation of state or federal civil rights law, or misconduct where the volunteer was under the influence of intoxicating alcohol or drugs [9].

The Federal Tort Claims Act: Volunteer Services Provided by Health Professionals. The Free Clinic Federal Tort Claims Act (FTCA) Medical Malpractice Program is another source of federal protection for physician volunteers [10]. If all the requirements of the program are met, a health care professional volunteering for a qualifying free clinic will be "deemed" a public health service employee eligible for medical malpractice coverage under the FTCA [10, 11]. This provides the volunteer with immunity from medical malpractice lawsuits resulting from performance of medical, surgical, dental or related functions within the scope of the health care professional's activity at the free clinic.

To qualify for the Free Clinic FTCA Medical Malpractice Program, the clinic and the volunteer health care professional must meet certain requirements. The health care clinic must qualify as a "free clinic," defined as a health care facility operated by a nonprofit private entity (i.e., a 501(c)(3) organization) that:

- Does not accept reimbursement from any third-party payor (including reimbursement from any insurance policy, health plan, or federal or state health benefits program that is individually determined);
- Does not impose charges on patients to whom service is provided or imposes charges on patients according to their ability to pay; and
- Is licensed or certified to provide health services in accordance with applicable law [12].

A volunteer physician is considered a "free clinic health professional" under the program if the following conditions are met:

- The physician provides services to patients at a free clinic or through offsite programs or events carried out by a free clinic;
- The physician is sponsored by a free clinic;
- The physician provides a qualifying health service (i.e., any medical assistance required or authorized to be provided under Title XIX of the Social Security Act [13]);
- The clinic and the physician do not receive compensation for services either from patients directly or from any third-party payor (with the exception of payment to the physician for reasonable expenses incurred or voluntary donations to the clinic);

- Before the service is provided, the physician or clinic provides the patient with written notification of the extent to which the physician's legal liability is limited; and
- At the time the services are provided, the physician is licensed or certified to provide such health care services in accordance with applicable law [14].

Practical Implications for Physician Volunteers

Physicians who volunteer typically need to obtain their own insurance to cover volunteer activities that fall outside federal or state immunity or protection. Physicians should consider the following questions when looking into volunteer opportunities.

Does your state have a statute that limits liability for physician volunteers, and if so, what type of protection does the state law provide? Listed below are the most common types of volunteer protection offered by state law. Because state laws vary widely, physicians must investigate what, if any, type of liability protection their state offers for physician volunteers. [1]

- Immunity statute where the physician volunteer is not liable for common negligence, but only for gross negligence or willful misconduct. In these states, a patient could not prevail on a malpractice suit against a physician providing volunteer services unless the patient could prove that the physician was grossly negligent in providing the services.
- Immunity statute where, under prescribed circumstances, the physician volunteer is considered a state employee when providing uncompensated care and therefore is protected under the state tort claims act. This generally means the state will indemnify the volunteer physician (pay the legal defense costs and cover any monetary damages incurred as a result of a malpractice claim) if all conditions of the statute are met.
- A state-established malpractice insurance program which either purchases insurance for physician volunteers or establishes a self-insured pool.

Is protection otherwise provided by federal law? These laws, as discussed above, provide a minimum level of protection for physician volunteers in all states.

- Is the volunteer opportunity for a free clinic that qualifies under the Free Clinic Federal Tort Claims Act Medical Malpractice Program? If so, the federal government will indemnify the volunteer physician (provided all conditions of the statute are met).
- Is protection afforded under the federal Volunteer Protection Act (e.g., providing volunteer care for a nonprofit organization or governmental entity)? If so, the physician volunteer is immune from liability for common negligence (but could still be found liable for gross or reckless misconduct).

Are there any conditions or limitations on the available liability protection? Both state and federal volunteer immunity laws typically include some conditions that must be met before the law affords any protection against liability. Most only apply

to simple negligence. Therefore, a physician volunteer will not be protected for gross or reckless misconduct. Other common conditions are highlighted below. [1]

- Is protection limited to volunteer care provided in or associated with certain settings/organizations such as free clinics, nonprofits, or charitable organizations? Physicians providing volunteer care outside of these settings would not be protected by the state law.
- Is patient notification required? Several state laws require the provider to notify the patient of the limitation on liability before providing care. [15]
- Are there limits based on a physician's existing insurance coverage? Some state laws do not provide protection if the physician's own insurance coverage extends to volunteer care.
- Are there limits based on the services provided?

Conclusion

Are physicians and students immune from malpractice claims when providing volunteer services? The answer is "it depends." State and federal laws may provide some protection, and the physician's current malpractice carrier may also include coverage. (Protection from common negligence claims is the most common.) Fears of liability should not deter physicians from volunteering. Rather, physicians should ask questions about the opportunity, including the existence of applicable state immunity statutes, clinic qualification under federal law, and policies on liability limits and patient notification.

References

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11. Health Insurance Portability and Accountability Act, 42 USC sec 233(o)(1) (1996).
12. Health Insurance Portability and Accountability Act, 42 USC sec 233(o)(3) (1996).

13. Health Insurance Portability and Accountability Act, 42 USC sec 1396 et seq. (2006).
14. Health Insurance Portability and Accountability Act, 42 USC sec 233(o)(2) (1996).
15. Idaho and Louisiana are examples of states that require the provider to notify the person receiving health services of the limitation of liability under state law. *See* Idaho Code Ann sec 39-7703 and Louisiana Rev Stat Ann 9:2799.5.

Further Reading

Shapiro HB. Providing charity care: a primer on liability risk. *Fam Pract Manage*. 2003;10(1):52-54.

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