



American Professional Agency



RISK MANAGEMENT



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Risk Management in Disaster Response

Unfortunately, we have witnessed an increase in man-made and natural disasters. Many of you may have been directly affected, both personally and professionally, from national and international events such as the terrorist attacks of 2001, the Newtown, CT shooting, the Boston Marathon bombings, as well as devastating storms (like Hurricane Irma and Harvey). These types of national/local events may require voluntary psychiatric support for victims and first responders within the community who may be impacted by the event.

Major disasters are often remembered because of their toll on the physical well-being of populations. However, major disasters can also significantly impact the emotional well-being of members of the community. Emergency or disaster situations may exacerbate existing mental health conditions, trigger new problems in persons without previous conditions, and could also impact the mental health of emergency responders.

Regulatory Overview

The promotion and protection of public health is one of government's most fundamental functions and it occurs at the federal, state and local levels. Public health laws may focus not only on preventing illness, but they can also be designed to provide an infrastructure to assist in these recent types of emergencies/disasters. Numerous federal and state laws now exist to help plan for and respond to emergency and/or disaster conditions, and when these occur, volunteers are an integral part of the disaster response system. Behavioral health providers, as health professionals, may be involved in some way and are often referred to as volunteer health professionals (VHPs). The distinction between VHPs and non-health professional volunteers is important because federal and state law may apply to one group but not the other.

Generally and preferably, disaster response volunteers are recruited, trained, and mobilized ahead of time through a registration and verification system. These systems can vary among states, localities, and organizations. Some systems that may be more familiar include, "The Emergency System for Advance Registration of Volunteer Health Professionals" (ESAR-VHP), State Emergency Response Teams, Disaster Medical Assistance Teams, Medical Reserve Corps and private sector efforts (examples include American Red Cross, Orthopedic Trauma Association Mass Casualty Teams, and Salvation Army).¹

Among others, the Oklahoma City bombing in 1995 and the terrorist attacks of September 11, 2001 demonstrated that public officials can expect an outpouring of citizen volunteer support to assist with emergency/disaster response. After September 11, more than 8,000 physicians across the country responded to New York State's call for assistance. Hospitals were simply overwhelmed with the number of VHPs who arrived to lend support. In addition, the influx of firefighters resulted in a back-up of fire equipment and firefighters actually impeded efforts to get resources to and from Ground Zero.

As a result of the outpouring of volunteers experienced in the 9/11 response, Congress authorized the Department of Health and Human Services (DHHS) to assist states in, among other things, developing emergency systems designed for the advance registration of volunteer health professionals, establishing procedures in each state for declaring emergencies and disasters, and providing immunity protections to volunteer responders. Through advance registration at the state level, VHPs can be vetted, counseled, trained, and mobilized when needed for the benefit of individual and community health.²

In order to ensure that there are adequate numbers of VHPs available, immunity from liability is often provided through federal and state laws. The immunity protection afforded depends upon a number of factors including applicable regulations, the nature of services provided, as well as the disaster response program that the volunteer is registered with (or not, if they are acting independently). It is important to remember that none of these programs provide immunity due to willful or wanton acts, gross negligence, or criminal acts.

At the federal level some of the resulting laws granting immunity to VHPs in emergencies and disasters include:³

- Uniform Emergency Volunteer Health Practitioners Act (UEVHPA) (triggered by state/local declaration of emergency)⁴
- Federal Volunteer Protection Act of 1997 (VPA)
- Model State Emergency Health Powers Act (MSEHPA) and
- Emergency Management Assistance Compact (EMAC) (adopted by all 50 states).

In addition to federal immunity protections provided to VHPs, there may be additional immunity protections provided on the local levels, including Good Samaritan laws and volunteer protection statutes. Good Samaritan laws generally protect VHPs from liability when volunteering in good faith and without compensation at the scene of an emergency. Good Samaritan protections may also apply to care by a VHP in a hospital if the VHP is not on duty and does not charge a fee. Good Samaritan statutes do not need an official declaration of emergency in order to be applicable. Similarly, volunteer protection statutes do not require an emergency declaration and may protect volunteers working on behalf of nonprofit and governmental entities from liability when responding to an emergency/disaster situation.⁵

These laws are intended to lessen bystanders' hesitation to assist, for fear of being sued or prosecuted. As each state's approach is different, it is important to identify what volunteer type, actions, and liability protections are covered under a specific state's statute and what are not. As indicated, state laws do not generally offer immunity from criminal liability.

As an aside, VHPs also must typically satisfy credentialing and privileging requirements to provide care in hospitals and other health facilities. The Joint Commission requires that health facilities have systems in place for granting disaster privileges to VHPs from other institutions. These standards and policies help hospitals meet the increased need in mass

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casualty situations. Further, since states may have additional regulations, it is important to be aware of state specific protections.

Liability Issues

When providing care, generally the legal standard of care is based on what a reasonable provider of the same specialty would do in like circumstances. During a disaster, providers' actions are judged by evaluating whether the provider acted consistently with how a reasonable provider in a similar situation would have acted. In addition, in a disaster, "when traditional levels of care cannot be maintained, and when resources are scarce, moving to a 'crisis standard of care' may become necessary, shifting priority to those individuals with greatest needs to receive care first."⁶

During a disaster, a volunteer is legally responsible for his or her own actions or failures to act, and can face civil liability for claims including negligence, breach of privacy, intentional or negligent infliction of emotional distress or even a criminal penalty. As a review, negligence occurs when a volunteer:

- (1) has a duty to another;
- (2) breaches that duty through an act or omission to act; and
- (3) directly causes harm or damages.

A few examples of liability situations that could potentially occur when responding to a disaster include:

Example #1: In a multiple casualty situation, a psychiatrist does not have time to take a complete medical history and prescribes medication which results in the patient suffering an adverse reaction.

Example #2: A psychiatrist applies a tourniquet to a patient's badly damaged limb without the patient's consent. The patient later loses that limb and sues the psychiatrist.

Example #3: A behavioral health provider gives an interview to a local news station and describes a particular patient's situation, including PHI, but did not have patient's authorization.

Note: Disaster events as we have recently seen can become large media events. It is advisable not to discuss specific cases with the news media.

Doctor-Patient Relationship

When a physician takes an affirmative step to provide care to an individual, it may create a doctor-patient relationship and a duty on behalf of the doctor to practice within the applicable standard of care. In emergency or disaster conditions, the customary parameters and expectations connected with the doctor-patient relationship can change. For instance, a psychiatrist's role may involve performing some form of psychiatric screening, necessitating that he/she triage individuals into priority care groups based on their need for mental health care (this is not a typical doctor-patient relationship).⁷ Also, he/she may have to take a short personal history prior to rendering care which may differ from typical practice in a non-emergency circumstance, or he/she may also have to address general medical conditions typically treated by primary care physicians.⁸

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VHPs' legal obligations to their patients, such as obtaining informed consent or protecting patient confidentiality, may remain in place during emergency or disaster conditions, but they also may be affected by temporary changes in the standard of care or scope of practice. For example, during the hurricanes, Harvey and Irma, the Secretary of Health and Human Services exercised the authority to waive sanctions and penalties pertaining to certain provisions of HIPAA's Privacy Rule for up to 72 hours following President Trump's public health emergency declaration. For more information, see HHS: "Limited Waiver of HIPAA Sanctions and Penalties During a Declared Emergency." Measures should be taken to ensure that these legal protections are preserved.⁹

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Informed Consent

During an emergency/disaster, informed consent standards remain in place, however the requirements may be adjusted. For example, oral consents may supplant the written consent processes.

Note: Differences exist among the states regarding the age at which a minor can consent to mental health care.¹⁰

Prescribing

The authority to prescribe medications is granted by the state where the provider is licensed. In an emergency/ disaster, if providing care in a different state, it is important to be clear about which state's prescribing regulations apply. Remember that prescribing laws remain in effect unless they are temporarily suspended/altered by a federal/state emergency declaration. Numerous states have enacted emergency laws authorizing out of state healthcare providers to practice and prescribe. Federal law defines certain "emergency" conditions when particular medications can be dispensed with an oral prescription. Again, it is important to be aware of your specific state's regulations.¹¹

Duty to Warn

There may be times where a person makes threats towards third parties that could potentially result in harm. However, it is important to note that not every state recognizes a duty to warn third parties of potential harm. If there is a duty to warn, it may include the use of certain measures, such as notifying an intended victim or reporting a dangerous person to the police. In emergency or disaster conditions, psychiatrists may find it difficult to meet this duty due to difficulty assessing an individual's "dangerousness," due to lack of prior information/medical history, unavailability of law enforcement officials, and inability to locate the intended victim. It is important to understand local state's laws as they may differ, and consult with your risk management professional.¹²

Scope of Practice

VHPs must follow scope of practice regulations in the state where he/she is practicing, even in emergency/ disaster conditions. The scope of practice can vary between states. Should a practitioner exceed the lawful scope of practice, he/she could potentially be held liable for violation of the state's professional practice laws, as well as face a potential malpractice claim.¹³ However, the scope of practice is often modified during emergency/disaster conditions to allow providers to deliver types of care not normally permitted, or to alter the conditions he/she practices under; i.e. adjusting supervision policies or collaborative practice agreements.¹⁴

In addition to potential legal issues, numerous ethical issues may also arise for VHPs when delivering care in emergency or disaster situations. As such, it is important to be aware of the applicable rules of professional conduct and ethical obligations.

Conclusion

There are many issues to consider when responding to emergencies or disasters. It is important to be aware of some of the issues you may encounter ahead of time, should you be faced with responding in times of emergency. As such, should you have questions, consult with your attorney or risk management professional before an emergency situation arises.

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Some risk management principles include:

- Prepare in advance.
- Liability protections vary by state and volunteer role. Be aware of the distinction and know ahead of time before faced with an emergency/disaster.
- Understand jurisdiction regulations regarding duty to warn, scope of practice, supervision, and confidentiality.
- Understand emergency preparedness planning provisions in your jurisdiction.
- Recognize ethical obligations when responding to emergencies/disasters.
- Consult with your carrier ahead of time to determine coverages, prerequisites, and conditions.
- Comply with license requirements for the state where you are assisting.
- Understand any emergency declarations issued and associated parameters.
- Be aware of the rules of professional conduct and ethical obligations.
- Should you have questions, consult with your attorney or risk management professional.

For additional resources see:

- APA Committee on Psychiatric Dimensions of Disaster, *"Disaster Psychiatry Handbook,"* (2004).
- APA Ethics Committee: *"The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry,"* (2013).
- APA, Resource Document on Mental Health and Climate Change, (2017), <https://www.psychiatry.org/patients-families/climate-change-and-mental-health-connections/affects-on-mental-health>.
- APA, Disaster and Trauma Resources, <https://www.psychiatry.org/psychiatrists/practice/professional-interests/disaster-and-trauma>.
- APA, Coping After Disaster, Trauma, <https://www.psychiatry.org/patients-families/coping-after-disaster-trauma>.
- APA, *"How Climate-Related Natural Disasters Affect Mental Health,"* <https://www.psychiatry.org/patients-families/climate-change-and-mental-health-connections/affects-on-mental-health>.
- American Academy of Child and Adolescent Psychiatry, Disaster Resource Center, http://www.aacap.org/aacap/families_and_youth/resource_centers/Disaster_Resource_Center/Home.aspx.

- Disaster Psychiatry Outreach, Become a Volunteer, <http://disasterpsych.org/involved/volunteer>.
- United States Department of Health and Human Services, Emergency Situations: Preparedness, Planning and Response, <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/index.html>.

End Notes

- ¹ Department of Health and Human Services, "Emergency System for Advance Registration of Volunteer Health Professionals (ESAR-VHP) – Legal and Regulatory Issues," (2006).
- ² The Center for Law and Public Health at Georgetown and Johns Hopkins Universities, "Emergency Systems for Advance Registration of Volunteer Health Professionals (ESAR-VHP) - Legal and Regulatory Issues," www.publichealthlaw.net (Last accessed 4/28/14).
- ³ The Network for Public Health Law, "Legal and Ethical Assessment Concerning Mental and Behavioral Health Preparedness," Issue Brief 2012. https://www.networkforphl.org/_asset/dgkvzh/UPDATED-Mental-and-Behavioral-Health-Preparedness-Fact-Sheet.pdf (Last accessed 4/28/14).
- ⁴ Emergency Volunteer Health Protection Act, [http://www.uniformlaws.org/Committee.aspx?title=Emergency Volunteer Health Practitioners Act](http://www.uniformlaws.org/Committee.aspx?title=Emergency%20Volunteer%20Health%20Practitioners%20Act).
- ⁵ Department of Health and Human Services.
- ⁶ Johns Hopkins Public Health Preparedness Programs, "Frequently Asked Questions about Legal Preparedness for Health Care Providers and Administrators, Public Health Officials, Emergency Planners, and Others Regarding Mental and Behavioral Health," (2011). http://www.jhsph.edu/research/centers-and-institutes/center-for-law-and-the-publics-health/research/FAQ_LegalPreparedness.pdf (Last accessed 4/28/14).
- ⁷ Id.
- ⁸ Id.
- ⁹ Id.
- ¹⁰ Id.
- ¹¹ Rutkow, Lainie, J.D., et al, "Prescribing Authority During Emergencies," *Journal of Legal Medicine*, 32:3, 249-260.
- ¹² Johns Hopkins Public Health Preparedness Programs.
- ¹³ WHO/PAHO Collaborating Center on Public Health Law and Human Rights, "Legal & Regulatory Issues Concerning Volunteer Health Professionals in Emergencies, Advanced Toolkit," (April 2007).
- ¹⁴ Association of State and Territorial Health Officials (ASTHO), "Scope of Practice Issues in Public Health Emergencies, Fact Sheet," <http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Scope-of-Practice-Toolkit/Scope-of-Practice-Issues-in-Public-Health-Emergencies--Fact-Sheet/> (Last accessed 4/28/14).

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