

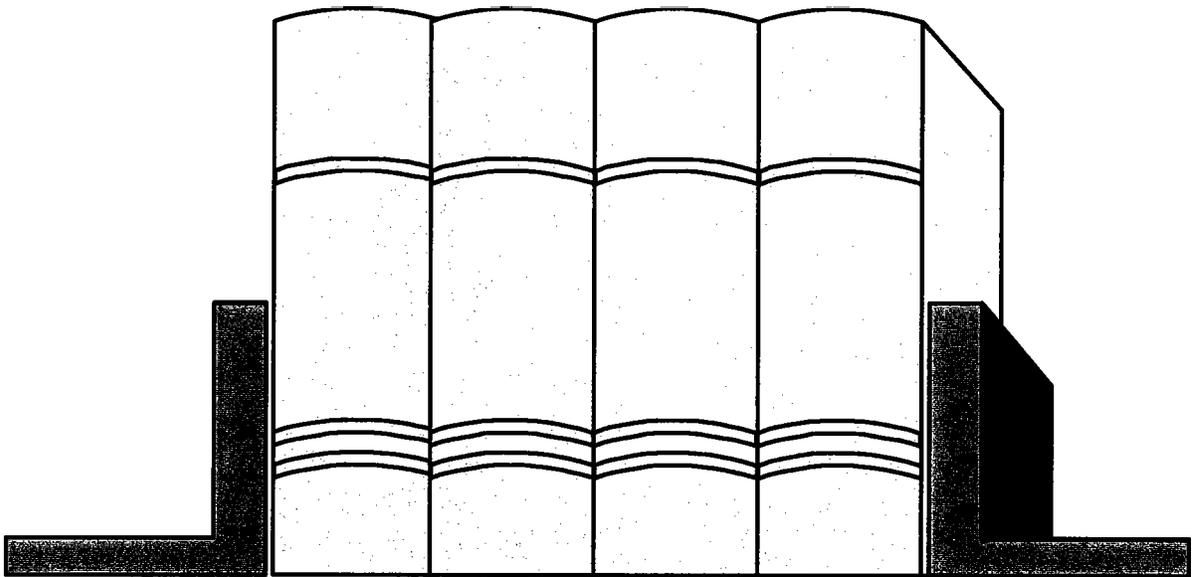
AAOS

American Association of Orthopaedic Surgeons

American
Association of
Orthopaedic
Surgeons

Resource Guide On

Volunteer Physician Immunity





DEPARTMENT OF SOCIOECONOMIC AND STATE SOCIETY AFFAIRS

Department Fax Number: 847/823-1309

For More Information On Volunteer Physician Immunity
Please Contact:

Robert C. Fine, JD, CAE

Department Director

Phone: 847/384-4322

[E-mail: fuse@aaos.org](mailto:fuse@aaos.org)

Susan A. Koshy, JD, MPH

Manager - State Society & Legislative Affairs

Phone: 847/384-4332

[E-mail: koshy@aaos.org](mailto:koshy@aaos.org)

John J. (Jay) Fisher, Jr., JD

Legislative Analyst

Phone: 847/384-4336

[E-mail: fisher@aaos.org](mailto:fisher@aaos.org)

Joyce R. Knauss

Administrative Assistant

Phone: 847/384-4334

[E-mail: knauss@aaos.org](mailto:knauss@aaos.org)

Table of Contents

Tab 1 **MODEL BILLS
AND TALKING
POINTS**

Tab 2 **STATE LAW
ANALYSIS**

Tab 3 **STATE
STATUTES**

Tab 4 **BACKGROUND
MATERIAL**

TAB ONE

MODEL BILLS AND TALKING POINTS

- I. Model Bill
AAOS
- II. Model Bill
AMA
- III. Sample Talking Points on Civil Immunity Bill
AAOS

AAOS MODEL BILL ON VOLUNTEER PHYSICIAN CIVIL IMMUNITY

Section 1. Title

This act shall be known as the "Volunteer Physician Immunity Act."

Section 2. Purpose

The Legislature finds that the willingness of physicians to volunteer their services has been increasingly deterred by a perception that they are at risk from damages arising from their activities as volunteers.

Furthermore, the Legislature finds that volunteer physicians provide an extremely valuable service that increases the health and welfare of the people of this state. It is, therefore, in the state's best interest to encourage physicians to volunteer their services for the good of the community.

Section 3. Definition

- A. Physician- When used in this Act physician refers to a person possessing an active license under _____ to practice medicine in this state or a person possessing an active license to practice medicine in any other state or territory of the United States which is accepted by this state.
- B. Medical Services- Medical services include the utilization of the physician's medical education, training and experience in examining the patient, diagnosing the patient, treating the patient's condition and advising the patient.

Section 4. Immunity from Civil Damages

A physician performing voluntary medical services within their scope of license without expectation of compensation on the part of the physician shall not be liable for civil damages on the basis of any act or omission in providing the medical services if:

- A. The physician was acting in good faith and within the scope of their license, and;
- B. The acts or omissions were not caused by gross negligence or willful and wanton misconduct, and;
- C. The acts or omissions were allegedly committed in the course of providing medical services.

Section 5. Location of Medical Services

The voluntary medical services provided without expectation of compensation on the part of the physician may be provided at any location.

Section 6. Informed Consent

American Association of Orthopaedic Surgeons

The civil immunity for the physician provided for in Section 4 does not apply unless the person receiving the volunteer medical services, or that person's guardian, provides their informed consent that:

- A. the medical services are being provided with no expectation of compensation on the part of the physician, and;
- B. the medical services are governed by this statute providing immunity from civil damages for the physician.

Section 7. Immunity Limited to Medical Acts

The civil immunity provided for in Section 4 applies only to the actions taken by the physician during the provision of the medical services and does not confer any immunity to actions taken prior to or subsequent to the provision of medical services.

Section 8. Attorneys Fees

In any civil action in which a physician prevails based upon the civil immunity provided for in Section 4, the court shall award all reasonable attorney fees incurred by the physician in defending the action.

AMA MODEL BILL

IN THE GENERAL ASSEMBLY
STATE OF _____

An Act

**To Provide Publicly Funded Professional
Liability Coverage for Volunteer Physicians**

1 Be it enacted by the People of the State of, represented in the General
2 Assembly:

3 **Section 1. Title.** This Act shall be known and may be cited as the “Publicly
4 Funded Professional Liability Coverage for Volunteer Physicians Act.”

5 **Section 2. Purpose.** The Legislature hereby finds and declares that:

6 (a) It is in the interests of this State and its citizens to encourage physicians to
7 voluntarily provide health care services without compensation at medical
8 clinics or health care facilities that provide care for free or for a nominal
9 charge.

10 (b) The costs of professional liability and the potential exposure to the costs of
11 professional liability claims acts as a deterrent to physicians who wish to
12 voluntarily provide health care services without compensation.

13 (c) It is therefore the purpose of this Act to provide for publicly funded
14 professional liability insurance coverage for physicians voluntarily providing
15 health care services without compensation at medical clinics or health care
16 facilities that provide care for free or for a nominal charge.

1 **Section 3. Requirements for Publicly Funded Professional Liability**

2 **Insurance Coverage.**

3 (a) The State shall arrange for or purchase professional liability insurance
4 coverage with limits of \$ _____ per individual claim and \$ _____ per
5 total claims that arise from the same occurrence for a physician who meets the
6 criteria in subsection (b). Any premiums for such professional liability
7 insurance coverage shall be paid for by the State from the [insert appropriate
8 state fund source], upon an application by the physician, which application
9 shall include acknowledgment and documentation that the physician meets the
10 criteria set forth in subsection (b). Such professional liability insurance
11 coverage shall cover medical malpractice claims arising out of any act or
12 omission resulting from the rendering of health care services provided
13 voluntarily without compensation at any medical clinic or health care facility
14 that provides health care services for free or for a nominal charge in this State
15 and that is registered as set forth in subsection (d). Such professional liability
16 insurance coverage shall be obtained from a medical liability insurer
17 authorized to provide such insurance in this State or shall be provided directly
18 by the State under a state-sponsored liability insurance program.

19 (b) In order to qualify for professional liability insurance coverage described in
20 subsection (a), a physician must:

- 21 (1) Have an active medical license in this State to provide health care
22 services;

American Association of Orthopaedic Surgeons

American Medical Association - Department of State Legislation, April 1997

1 (2) Voluntarily provide, without compensation, health care services within
2 the scope of the physician's license; and

3 (3) Voluntarily provide such health care services at a medical clinic or
4 health care facility in this State that provides health care services free
5 or for a nominal charge and that is registered as set forth in subsection
6 (d).

7 (c) A physician who meets the criteria in subsection (b) shall be immune from
8 civil liability for any amount in excess of the applicable limits of insurance
9 coverage set forth in subsection (a) in any suit for civil damages for any act or
10 omission resulting from the rendering of such services unless the act or
11 omission constitutes:

12 (1) willful or wanton misconduct; or

13 (2) gross negligence.

14 (d) The Board of Health [or other appropriate state agency] of this State is
15 empowered to adopt such rules and regulations as it may determine to be
16 necessary to provide for registration of medical clinics or health care facilities
17 that provide health care services for free or for a nominal charge under this
18 Act, provided such rules and regulations shall require that such medical clinics
19 or health care facilities post in a conspicuous place on their premises an
20 explanation of the immunity from civil liability for physicians for amounts in
21 excess of applicable limits of insurance coverage set forth in subsection (a) in

American Medical Association - Department of State Legislation, April 1997

1 any suit for civil damages for any act or omission resulting from the rendering
2 of health care services unless the act or omission constitutes:

3 (1) willful or wanton misconduct; or

4 (2) gross negligence.

5 **Section 4. Effective Date.** This Act shall become effective immediately upon
6 being enacted into law.

7 **Section 5. Severability.** If any provision of this Act is held by a court to be
8 invalid, such invalidity shall not affect the remaining provisions of this Act, and to this
9 end the provisions of this Act are hereby declared severable.

Sample Talking Points on Civil Immunity for Volunteer Physicians

- Volunteer medical care is extremely important to the American public. According to an article in the March 24/31, 1999 issue of the *Journal of the American Medical Association* physicians' charity care is valued at \$11 billion a year. The average amount of charity care per physician is eleven hours a month.
- An August 2001 study by the Center for Studying Health System Change entitled *Physicians Pulling Back from Charity Care* concluded that from 1997 to 1999 the number of physicians providing charity care declined by four percent from 76% to 72%.
- Combine this with the projected decrease in the growth of physicians and increase in the uninsured and care to the poor will suffer.
- Physicians employed by hospitals or retired physicians may not have malpractice coverage that covers volunteer care.
- The number of million dollar jury verdicts in medical malpractice cases increased by 9% from 36% to 45% from 1996-97 to 1998-99 according to Jury Verdict Research. Most physicians who have malpractice coverage have a \$1,000,000 limit per occurrence. This rise in verdicts increases the physician's personal liability risk. Additionally, malpractice suits arising from voluntary care will raise the physician's premium.
- The proposed legislation protects indigent patients from acts of gross negligence or intentional acts that lead to injury.
- Thirty-five states and the District of Columbia have recognized physicians' rational liability concerns and enacted some variant of legislation to protect volunteer physicians from civil liability.

TAB TWO

STATE LAW ANALYSIS

I. State by State Analysis of Volunteer Physician Laws AAOS



American Academy of
Orthopaedic Surgeons

AAOS American Association of
Orthopaedic Surgeons

PHYSICIAN VOLUNTEERISM – MEDICAL MALPRACTICE LIABILITY

Issue

Statutory immunity for volunteer physicians is rapidly gaining the attention of state legislatures. In many cases, it is easier for physicians to volunteer overseas than at home. As a result, legislation has been introduced to amend medical malpractice liability rules that prevent physicians from serving their own communities.

Definitions

Legislation creating statutory immunity for physician volunteers states that physicians are not liable for civil damages arising as a result of care provided in not-for-profit medical clinics or for providing indigent care. In other words, health care professionals seeking to donate time and medical care services in most situations cannot be sued by the patients they serve. However, many states identify specific criteria and clear rules that must be met in order for physicians to qualify for this protection.

Common Principles

Several commonalties can be identified in current state legislation. These similarities include: 1) a requirement that physicians be licensed in the state in which they volunteer; 2) a requirement that health care professionals have no expectation of nor receive compensation for services; 3) a requirement that the services be rendered in a not-for-profit organization or an agency of the State; 4) and a requirement that care must be performed without gross negligence or willful and wanton disregard (statutory immunity covers civil liability, not criminal liability). This may require a health care professional to practice only within the scope of his/her training and experience and to observe the standard of care for the state or region. A final principle requires that the patient receiving the volunteer services be notified that civil liability has been waived.

Current Statutes

Forty states and the **District of Columbia** have enacted legislation to provide statutory immunity for volunteer physicians: **Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, DC, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.** Listed below is a brief synopsis of the states that have enacted legislation.

Alabama- Section 6-5-339

This Act provides immunity from civil liability to medical professionals who volunteer their services at free medical clinics without compensation or who accept referrals from a free clinic. It requires the posting of a notice at the free medical clinic advising patrons of the immunity. It provides that acceptance by a free medical clinic of a contribution made by a person receiving services at the clinic does not constitute a waiver of the immunity. It also directs that an established act or omission of a volunteer medical professional shall be the responsibility of the free medical clinic under the doctrine of “respondeat superior.”

Medical professional includes physicians with licenses from Alabama or any other state.

Alaska- Section 09.65.300

States that a health care provider is immune if they are licensed in Alaska, act within the scope of their license, the services were provided at a medical clinic, medical facility, nonprofit facility, temporary emergency site, or other facility owned or operated by a governmental entity or nonprofit organization, and the services were provided voluntarily and without pay to the health care provider. The provider must give the patient written notice of the immunity before treatment occurs. The immunity does not apply to cases of gross negligence or reckless or intentional misconduct. A provider can be reimbursed for expenses, including room and board.

Arizona- Section 12-571

Provides that a health professional that provides medical or dental treatment at a non-profit clinic, where neither the professional nor the clinic receives compensation for the treatment provided, is not liable in a medical malpractice action. This immunity does not extend to gross negligence.

The law applies to licensed physicians.

Arkansas- Section 16-6-201

Provides that health care professionals licensed under the law of Arkansas who render medical services voluntarily and without compensation to any person at a free or low-cost medical clinic registered by the State Board of Health, shall not be liable for any civil damages for any act or omission resulting from the rendering of those services. Requires that patrons be informed and acknowledge (by filling out a form) before any treatment or service that the physician is immune from civil suit participation.

Colorado- Section 13-21-115.5

Grants immunity to licensed physicians from civil liability while performing volunteer work for a non-profit organization, non-profit corporation, or hospital. The organization, corporation, or hospital must annually verify that the volunteer physician holds an unrestricted Colorado license to practice medicine. A physician's volunteer status must be declared prior to the medical procedure and the patient receiving the care must agree in writing beforehand. Does not include liability for "willful and wanton misconduct or gross negligence."

Connecticut- Section 19a-17m and 19a-17n

The law allows the state government to purchase malpractice liability insurance for physicians who provide primary health care services at community health centers. Physicians must provide over 150 hours of service a year. The physicians cannot accept compensation beyond reasonable expenses.

The program only covers primary care services. Primary care is defined as excluding invasive care and all specialized care.

Delaware- Title 10-Section 8135

Volunteer physicians at any "facility other than a hospital or doctor's office which offers medical services, which is run by a nonprofit entity under § 501(c)(3) of the Internal Revenue and which is staffed entirely or in part by licensed physicians or nurses who serve without compensation" are immune from suits. However, if the physician has insurance coverage for such acts then he can be sued for up to the limit of that coverage. This immunity covers any licensed physician, it does not state that they must be from Delaware.

District of Columbia- Section 7-402

Immunizes licensed physicians, registered nurses, and certified nurse midwives who, in "good faith" and without "expectation" of compensation, provide health care or treatment on behalf of a free health clinic. The physician is not immunized for intentional wrongs or for the "willful or wanton disregard for the health and safety of others."

Florida- Sections 768.1355, 766.1115

Provides that any person who volunteers to perform any service for any nonprofit organization without compensation, except reimbursement for actual expenses, shall be considered an agent of such nonprofit organization when acting within the scope of any official duties performed under such volunteer services. Immunity applies if the volunteer was acting as an ordinary reasonably prudent person would have acted under the same or similar circumstances. Immunity does not apply to wanton or willful misconduct. Non-profit organization means ones exempt from taxation pursuant to 26 U.S.C. s. 501, or any federal, state, or local governmental entity.

Section 766.1115 provides that physicians can contract with a government agency to provide free care to low-income patients. The physician may not accept any money from the agency and must accept all referrals. The physician is considered an agent of the state and not liable in civil lawsuits.

Georgia- Sections 51-1-29.1, 51-1-29.15

Any Georgia licensed health care provider who, “voluntarily and without the expectation or receipt of compensation” provides services for a “hospital, public school, non-profit organization, or an agency of the state or one of its political subdivisions” or a free health clinic shall not be liable for “damages or injuries alleged to have been sustained by the person.” Provided, however that 1) the injuries were not caused by “gross negligence or willful or wanton misconduct” and 2) that the organization itself does not receive financial compensation for the services provided.

Idaho- Title 39 Chapter 77

States that any “health care provider who voluntarily provides needed medical or health care services to any person at a free medical clinic without compensation or the expectation of compensation shall be immune from liability for any civil action.” Does not provide immunity for grossly negligent acts or for health care providers acting outside the scope of practice authorized by his/her license, certificate or registration. Requires the health care provider and patient to “execute a written waiver” in advance of medical services.

The act provides that a physician who is insured for liability for negligent acts or omissions arising from providing health care services at a free clinic, the immunity is waived, provided however, the amount recovered shall not exceed the limits of such applicable insurance coverage.

The statute also provides that a physician who is sued and prevails is entitled to full costs and reasonable attorney's fees expended in connection with the defendant's defense of the action

Lastly, the statute states that compensation does not include actual and necessary expenses that are incurred by a volunteer health care provider in connection with the services provided.

Illinois- 745 ILCS 49/30

Any person licensed pursuant to the Illinois Medical Practice Act of 1987, or in any other state, except for midwives, is not “liable for civil damages,” if the person “in good faith, provides medical treatment...as a part of the services of an established free medical clinic providing care to medically indigent patients.” The restrictions are as follows: 1) The care provided must be “limited to care which does not require the services of a licensed hospital or ambulatory surgical treatment center.” 2) “Such care shall not include general anesthesia or require an overnight stay in a health-care facility.” 3) The free medical clinic must post “in a conspicuous place on its premises” an explanation of the civil immunity herein provided. 4) “Willful or wanton misconduct” is not exempt from liability.

The immunity from civil damages also applies to physicians that provide further medical treatment, diagnosis, or advice to a patient upon referral from an established free medical clinic without fee or compensation

Indiana- Section 34-30-13

Licensed Indiana physicians are immune if they are licensed and provide volunteer care at clinics or facilities that receive money from the state to provide free health care. This immunity does not apply to acts of gross negligence or willful misconduct.

Iowa- Section 135.24

Iowa has set up a government program whereby a licensed Iowa physician interested in volunteering registers with the Department of Public Health and is given a list of eligible participating health care institutions. Registered volunteer physicians are considered government employees during their volunteer service and if there is a suit will be defended by the state.

Kansas- Section 75-6102 et seq.

The law provides indemnity to charitable health care providers who have entered into an agreement with the Secretary of Health and Environment and who provide free professional services to medically indigent patients. These volunteer health care providers are considered to be state employees and covered by the state tort immunity act. Charitable health care provider is defined to include a person licensed by the state board of healing arts as an exempt licensee or a federally active licensee and a person issued a limited permit by the state board of healing arts.

Kentucky- Section 304.40-075

Under this act a charitable health care provider is any person, agency, facility or clinic that provides primary care, specifically excluding surgical procedures, without compensation and without expectation of compensation. This includes licensed physicians from any state. Before performing charitable health care services a provider must register with the state, but the previous \$50.00 fee has been waived. Insurers offering malpractice insurance must offer coverage to charitable providers and the providers can apply to have the state pay the premiums.

Louisiana- Section RS 9-2799.5

The law states "no health care provider who in good faith gratuitously renders health care services in a community health care clinic shall be liable for any civil damages." Prior notice of the limitation of liability must be given to the person receiving services. The law also limits the liability of community pharmacies that gratuitously render medication. Protection does not extend to damages caused by gross negligence or willful or wanton misconduct. The statute does not delineate who is covered beyond "physician."

Maine- Section 24-2904

Ensures that no licensed health care practitioner who voluntarily, without the expectation or receipt of monetary or other compensation, provides professional services within the scope of their licensure to a non-profit organization, to an agency of the State, or to members or recipients of services of a nonprofit organization or state or local agency may be liable for damages or injuries, unless the damages were caused willfully, wantonly, recklessly or by gross negligence.

The next section specifically includes retired physicians in the immunity and concludes by stating that it applies "only if the licensed physician retired from practice, possessed an unrestricted license in the relevant profession and had not been disciplined by the licensing board in the previous 5 years at the time of the act or omission causing the injury."

Maryland- Courts and Judicial Proceedings Code Section 5-606

The statute provides that a volunteer physician "is not liable, for any amount in excess of any applicable limit of insurance coverage, in any suit for civil damages for any act or omission" performed without compensation for a "charitable organization." This immunity does not apply to

willful or wanton misconduct, gross negligence, or intentionally tortious conduct. Charitable organization is defined as either a medical society or any organization, except licensed hospitals, exempt under Section 501(C)(6) of the Internal Revenue Code. Physicians must be licensed in Maryland. Lastly, compensation does not include "actual and necessary expenses that are incurred by a volunteer or physician in connection with the services provided or the duties performed by the volunteer or physician on behalf of a charitable organization, and that are reimbursed to the volunteer or physician or otherwise paid."

Michigan- Section 333.16277

The section states that a physician "who receives no compensation for providing the nonemergency health care, is not liable in a civil action for damages for acts or omissions in providing the nonemergency health care, unless the acts or omissions were the result of gross negligence or willful and wanton misconduct or were intended to injure the patient." The liability immunity only applies if the care was provided a free clinic or upon a referral from a free clinic. The immunity does not apply to "surgery that customarily requires more than a local anesthetic."

Mississippi- Section 73-25-38

Any licensed physician or certified nurse practitioner who voluntarily provides needed medical or health services to any person without the expectation of payment due to the inability of such person to pay for said services shall be immune from liability for any civil action. This immunity does not apply to willful or gross negligence. The immunity also only applies if the patient and physician execute a written waiver of payment and immunity.

Additionally there is a special volunteer medical license for physicians who are retired from active practice and wish to donate their expertise for the medical care and treatment of indigent and needy persons or persons in medically underserved areas of the state. The special volunteer medical license shall be issued by the State Board of Medical Licensure to eligible physicians without the payment of any application fee, examination fee, license fee or renewal fee, shall be issued for a fiscal year or part thereof, and shall be renewable annually upon approval of the board. To qualify the physician must show that they were previously issued an unrestricted license to practice medicine in Mississippi or in another state of the United States and that he or she has never been the subject of any medical disciplinary action in any jurisdiction

Missouri- Sections 105.711 and 537.118

The statute sets up a legal defense fund to pay claims arising from actions of a physician licensed to practice in Missouri who provides medical treatment within the scope of his license at a city or county health department or a nonprofit community health center if such treatment is restricted to primary care and preventive health services without compensation. The aggregate of payments from the state legal expense fund shall be limited to a maximum of five hundred thousand dollars, for all claims arising out of the same act or acts alleged in a single cause and shall not exceed five hundred thousand dollars for any one claimant.

Section 537.118 states that any volunteer of a nonprofit organization or governmental entity shall be immune from personal liability for any act or omission resulting in damage or injury to any person intended to receive benefit from such volunteer's service if:

(1) The volunteer acted in good faith and within the scope of his official functions and duties with the organization or entity; and

(2) The damage or injury was not caused by the intentional or malicious conduct or by the negligence of such volunteer.

Montana- Section 27-1-736

The law provides that a physician who renders, at any site, any health care within the scope of the provider's license, voluntarily and without compensation, to a patient of a clinic or to a patient referred by a clinic is not liable for civil damages unless the acts were done with gross negligence or willful and wanton misconduct. The physician can be reimbursed for supplies. The law only applies to physicians who do not have malpractice insurance because they are retired or have insurance that does not cover voluntary care.

Nebraska- Legislative Bill 146, approved May 28, 2003

A physician who provides care “without the expectation or receipt of monetary or other compensation either directly or indirectly . . . of a kind which [is] eligible for reimbursement under the medical assistance program . . . , as a volunteer in a free clinic or other facility operated by a not-for-profit organization . . . , by an agency of the state, or by any political subdivision shall be immune from civil liability for any act or omission which results in damage or injury unless such damage or injury was caused by the willful or wanton act or omission of such practitioner.” This protection does not apply if the free clinic or facility is operated by a licensed hospital.

Nevada- Sections 41.485 and 428.095

Section 41.485 states that a volunteer for a charitable organization is immune from liability for acts performed for the charitable organization unless those acts are intentional, willful, wanton or malicious. Charitable organization includes a licensed medical facility or facility for the dependent.

Section 428.095 states that counties in which physicians, dentists, their respective assistants and county hospitals render treatment to indigents or needy persons without charge or at cost or below cost may procure, carry and maintain liability insurance protecting such members of the healing arts and hospitals and indemnifying them against any claim or action by or on behalf of any such indigent or needy person or contribute to the cost of such insurance

New Hampshire- Sections 329:25a and 508:17

Makes certain that retired physicians are immune from civil liability for volunteer health education services only. Requires retired physicians to notify the State Medical Board of any participation in programs for the education of the public. Education does not include, “advice given to individual members of the public which is in the nature of diagnosis or treatment.”

Section 508:17 states that any person who is a volunteer of a nonprofit organization or government entity shall be immune from civil liability in any action brought on the basis of any act or omission resulting in damage or injury to any person if:

(a) The nonprofit organization or government entity has a record indicating that the person claiming to be a volunteer is a volunteer for such organization or entity; and

(b) The volunteer was acting in good faith and within the scope of his official functions and duties with the organization; and

(c) The damage or injury was not caused by willful, wanton, or grossly negligent misconduct by the volunteer.

Compensation is defined as money other than reimbursement for expenses actually incurred for such services.

North Carolina- Sections 90-21.14 (a1) and 90-12

Any volunteer medical or health care provider at a facility of a local health department or at a nonprofit community health center and any volunteer medical or health care provider rendering services to a patient referred by a local health department or nonprofit community health center at the provider's place of employment is immune from liability. This immunity does not extend to acts committed with gross negligence, wanton conduct, or intentional wrongdoing.

Provides for a limited license for retired physicians from any state to allow them to treat only at facilities that specialize in care of the indigent patient. This limited license for retired physicians costs nothing. The statute also provides immunity for physicians who treat indigent patients at the local public health facility, non-profit health center, or at their place of practice if the patient was referred to them by the local health department or non-profit center. This immunity does not apply to acts of gross negligence, wanton conduct, or intentional wrongdoing. Holders of this limited volunteer license must comply with the CME requirements set by the Board.

North Dakota- Section 32.03.1-02.2

The law states that a licensed North Dakota health care provider...who renders medical care on a voluntary basis at a free clinic is not liable in any personal injury civil suit." Intentional misconduct or gross negligence is not immunized.

Ohio- Sections 2305.234 and 4731.295

Provides that a licensed Ohio health care professional who is a volunteer is not liable in damages to "any person or government entity in a tort or other civil action, for injury, death, or loss to person or property that allegedly arises from an action or omission of the volunteer in the provision to an indigent and uninsured person of medical diagnosis, care, or treatment unless the action or omission constitutes willful or wanton misconduct." This immunity does not apply to operations or delivery of babies. Additionally, the patient must be informed of the immunity and sign a waiver. Indigent persons are defined as those having income less than 200% of the federal poverty level.

The state medical board may issue, without examination, a volunteer's certificate to a person who is retired from practice so that the person may provide medical services to indigent and uninsured persons at nonprofit shelters or health care facilities. The board shall deny issuance of a volunteer's certificate to a person who is not qualified under this section to hold a volunteer's certificate.

The physician may have been licensed in any state. The applicant must show that they have maintained for at least ten years prior to retirement full licensure in good standing in any jurisdiction in the United States that licenses persons to practice medicine and surgery or

osteopathic medicine and surgery.

Oklahoma- Title 76, Section 32

A volunteer physician is immune from damages for care provided at a free clinic if neither the physician nor the clinic accepts any compensation. The injury must not be caused by gross negligence or willful or wanton misconduct. The patient must sign a statement acknowledging that the physician is covered by the volunteer physician immunity. The immunity also applies to any provider to which the patient is referred.

Oregon- Section 30.792

Limits civil liability of health practitioner who provides medical services without compensation to a charitable organization. Compensation does not include reimbursement for expenses incurred. Requires notification be given to patients and requires a signed statement prior to the rendering of medical services. Immunity does not apply to conduct that is grossly negligent or to misconduct that is reckless, wanton or intentional.

Pennsylvania- 49 PA Code Section 16.18 Unconsolidated Act Title 35 Section 449.47

Establishes procedures by which retired Pennsylvania physicians can provide volunteer services in approved clinics without compensation. To qualify the physician must hold a currently renewed, active, unrestricted license in Pennsylvania and retire from active practice at the time the applicant applies for a volunteer license or retire from active practice in Pennsylvania in possession of an unrestricted license which was allowed to lapse by not renewing it.

Retired physicians providing volunteer services are not liable for civil damages arising as a result of care. Exempts retired volunteer physicians from maintaining liability insurance coverage. This law does not grant immunity to professionals whose conduct “falls substantially below professional standards” and where the physician knows that his or her services create a “substantial risk of actual harm to the patient.” Requires the clinic to post in a conspicuous place a notice to patients that the volunteer license is exempt from civil liability. The law does not affect vicarious liability of institutions that provide the facilities for volunteer health services.

South Carolina- Sections 38-79-30 and 40-47-95

The law states that a licensed health care provider who renders medical services voluntarily and without compensation is not "liable for any civil damage for any act or omission resulting from the rendering of the services unless the act or omission was the result of the licensed health care provider's gross negligence or wilful misconduct." The agreement to provide the voluntary care must be made before the "rendering of the service by the licensed health care provider."

The Board of Medicine is to create a special class of license for physicians who are retired from active practice and wish to donate their expertise for the care and treatment of needy patients or patients in underserved areas. The licensee is limited to practice at a specific site and practice setting. There will be no licensure or other fees associated with this Special Volunteer License. The applicant must show documentation that they have been previously issued an unrestricted license to practice medicine in a state of the United States and that applicant has never been the subject of any disciplinary action in any jurisdiction.

South Dakota- Section 47-23-29

South Dakota law provides that any volunteer at "a nonprofit organization, a nonprofit corporation, a free clinic, any hospital organized pursuant to chapters 34-8, 34-9 or 34-10 [county hospital, municipal hospital and public hospital district], or a governmental entity shall be immune from civil liability in any action brought in any court in this state on the basis of any act or omission resulting in damage or injury." The immunity applies if the individual was acting within the scope of their duties and the injury was not caused by gross negligence or willful and wanton misconduct.

Texas- Civil Practice and Remedies Code Section 84.004

Provides that a volunteer health care provider who is serving as a direct service volunteer of a charitable organization is immune from civil liability for any act or omission resulting in death, damage, or injury to a patient if:

- (1) the volunteer was acting in good faith and in the course and scope of the volunteer's duties or functions within the organization;
- (2) the volunteer commits the act or omission in the course of providing health care services to the patient;
- (3) the services provided are within the scope of the license of the volunteer.

Additionally the patient must sign a consent form.

A volunteer includes a licensed Texas physician and a retired physician who is eligible to provide health care services, including a retired physician who is licensed but exempt from paying the required annual registration fee.

Utah- Section 58-13-3

Licensed Utah physicians who volunteer at any clinic or hospital, church, or organization whose primary purpose is to sponsor, promote, or organize uncompensated health care services for people unable to pay for health care services is immune from liability. This immunity applies if the treatment was within the scope of the health care professional's license, neither the health care professional nor the health care facility received compensation or remuneration for the treatment, the acts or omissions of the health care professional were not grossly negligent or willful and wanton, and prior to rendering services, the health care professional disclosed in writing to the patient that the health care professional is providing the services without receiving remuneration or compensation and that in exchange for receiving uncompensated health care, the patient consents to waive any right to sue for professional negligence except for acts or omissions which are grossly negligent or are willful and wanton. Immunity from liability does not extend to the use of general anesthesia or care that requires an overnight stay in a general acute or specialty hospital.

Virginia- Section 32.1-127.3

A hospital employee who voluntarily and without compensation "renders at any site any health care services within the limits of his license or certification" shall not be liable for any civil damages arising from such services. The delivery of such health care services can include a reasonable minimum fee to cover administrative costs without foreclosing civil immunity. If such services are provided at sites that are organized only in part to provide free medical care, the licensed professional is still immunized from civil liability. The law does provide for civil suits

resulting from “gross negligence or willful misconduct.”

Washington- Section 4.24.300

The law provides that a physician who provides care without compensation at a “community health care setting” is not liable for damages except in cases of gross negligence or willful or wanton misconduct.

West Virginia- Section 30-3-10a

Creates a special volunteer license for retired physicians. Physicians must work at clinics organized in whole or in part to provide free care. The licenses may be issued to physicians licensed or otherwise eligible for licensure in West Virginia and they must meet yearly CME requirements.

Immunity does not extend to acts of the physician that constitute gross negligence or willful misconduct. For the immunity to apply there must be a written agreement between the physician and the clinic. Any clinic entering into such written agreement shall be required to maintain liability coverage of not less than one million dollars per occurrence.

Wisconsin- Section 146.89

The state has a program for volunteer licensed Wisconsin health care providers who receive no income from the practice of the health care profession or who receive no income from the practice of that health care profession when providing services at a nonprofit agency. To be involved the physician must submit a joint application with a nonprofit agency to the department of administration for approval. The nonprofit agency may not provide emergency medical services, hospitalization or surgery. Physicians become state agents and covered by the tort immunity act.

Wyoming- Section 1-1-129

The law provides immunity for physicians who provide free care at a nonprofit health care facility to a low income uninsured person unless the action or omission constitutes willful or wanton misconduct. The physician must notify the patient of the immunity and obtain a written acknowledgement. The immunity does not apply to operations or child delivery.

Updated 07/2004

TAB THREE

STATE STATUTES

- I. Idaho Statute on Volunteer Physician Immunity
- II. Mississippi Statute on Volunteer Physician Immunity
- III. Iowa Statute Treating Volunteer Physician as State Employee

Idaho Statutes

TITLE 39
HEALTH AND SAFETY
CHAPTER 77
VOLUNTEER HEALTH CARE PROVIDER IMMUNITY
39-7701. LEGISLATIVE FINDINGS.

The legislature of the state of Idaho finds that access to high quality health care services is a concern of all persons. However, access to such services is severely limited for some residents of the state, particularly those who reside in remote, rural areas or in the urban areas. Physicians and other health care professionals have traditionally worked to assure broad access to health care services and many are willing to volunteer their services to address the health care needs of Idahoans who may otherwise not be able to obtain such services. The public policy of this state is to encourage and facilitate voluntary provision of health care services.

The Idaho Code is made available on the Internet by the Idaho Legislature as a public service. This Internet version of the Idaho Code may not be used for commercial purposes, nor may this database be published or repackaged for commercial sale without express written permission.

[Search the Idaho Statutes](#)

Available Reference: [Search Instructions](#).

The Idaho Code is the property of the state of Idaho, and is copyrighted by Idaho law, I. C. § 9-350. According to Idaho law, any person who reproduces or distributes the Idaho Code for commercial purposes in violation of the provisions of this statute shall be deemed to be an infringer of the state of Idaho's copyright.

Idaho Statutes

TITLE 39
HEALTH AND SAFETY
CHAPTER 77
VOLUNTEER HEALTH CARE PROVIDER IMMUNITY
39-7702. DEFINITIONS.

As used in this chapter

(1) "Compensation" is any remuneration, whether by way of salary, fee or otherwise, for health care services rendered. Compensation does not include actual and necessary expenses that are incurred by a volunteer health care provider in connection with the services provided or the duties performed by the health care provider on behalf of a free clinic, and that are reimbursed to the volunteer health care provider.

(2) "Free medical clinic" means a facility other than a hospital or health care provider's office which is an organized community-based program, registered with the department of health and welfare, at which primary medical care is provided without charge to individuals unable to pay for it, and at which the care provided does not include the use of general anesthesia or require an overnight stay in a health care facility.

(3) "Health care provider" means any physician, dentist, optometrist, physician assistant or nurse who is licensed, certified, registered or otherwise authorized to practice in Idaho.

(4) "Voluntary provision of health care services" means providing professional services by a health care provider without compensation.

The Idaho Code is made available on the Internet by the Idaho Legislature as a public service. This Internet version of the Idaho Code may not be used for commercial purposes, nor may this database be published or repackaged for commercial sale without express written permission.

[Search the Idaho Statutes](#)

Available Reference: [Search Instructions](#).

The Idaho Code is the property of the state of Idaho, and is copyrighted by Idaho law, I. C. § 9-350. According to Idaho law, any person who reproduces or distributes the Idaho Code for commercial purposes in violation of the provisions of this statute shall be deemed to be an infringer of the state of Idaho's copyright.

Idaho Statutes

TITLE 39

HEALTH AND SAFETY

CHAPTER 77

VOLUNTEER HEALTH CARE PROVIDER IMMUNITY

39-7703. IMMUNITY FROM LIABILITY FOR HEALTH CARE PROVIDERS PROVIDING CHARITABLE MEDICAL CARE.

(1) Any health care provider who voluntarily provides needed medical or health care services to any person at a free medical clinic without compensation or the expectation of compensation due to the inability of such person to pay for the services shall be immune from liability for any civil action arising out of the provision of such medical or health services. This section shall not extend immunity to the health care provider for any acts constituting intentional, willful or grossly negligent conduct or to acts by a health care provider which are outside the scope of practice authorized by the provider's licensure, certification or registration.

(2) Immunity pursuant to subsection (1) of this section shall apply only if the health care provider and the patient execute a written waiver in advance of the rendering of such medical services specifying that such services are provided without the expectation of compensation and that the health care provider shall be immune as specified herein.

(3) Nothing in this section shall prohibit a free medical clinic from accepting voluntary contributions for health care services provided to a patient who has acknowledged his or her ability and willingness to pay a portion of the value of the health care services provided. Any voluntary contribution collected for providing care at a free medical clinic shall be used only to pay overhead expenses of operating the clinic. No portion of any moneys collected shall be used to provide compensation to any health care provider.

(4) If a health care provider is insured for liability for negligent acts or omissions arising from providing health care services at a free clinic, the immunity provided in subsection (1) of this section is waived, provided however, the amount recovered shall not exceed the limits of such applicable insurance coverage.

The Idaho Code is made available on the Internet by the Idaho Legislature as a public service. This Internet version of the Idaho Code may not be used for commercial purposes, nor may this database be published or repackaged for commercial sale without express written permission.

[Search the Idaho Statutes](#)

Available Reference: [Search Instructions](#).

The Idaho Code is the property of the state of Idaho, and is copyrighted by Idaho law, I. C. § 9-350. According to Idaho law, any person who reproduces or distributes the Idaho Code for commercial purposes in violation of the provisions of this statute shall be deemed to be an infringer of the state of Idaho's copyright.

Idaho Statutes

TITLE 39
HEALTH AND SAFETY
CHAPTER 77
VOLUNTEER HEALTH CARE PROVIDER IMMUNITY
39-7705. COSTS AND FEES.

Notwithstanding any other provision of law to the contrary, if a party names as a defendant a health care provider who has immunity pursuant to section 39-7703, Idaho Code, in a suit alleging willful or intentional misconduct or gross negligence arising out of treatment at a free clinic which qualifies for immunity pursuant to section 39-7703, Idaho Code, and the trial judge dismisses the complaint or grants a defendant's motion for judgment on the pleadings, or directs a verdict for a defendant, or grants a defendant's motion for judgment notwithstanding the verdict, or at any point in the proceedings grants a plaintiff's motion to discontinue the action against the defendant, the defendant shall be entitled to full costs and reasonable attorney's fees expended in connection with the defendant's defense of the action. If good reason is shown, the trial judge may suspend the operation of this section.

The Idaho Code is made available on the Internet by the Idaho Legislature as a public service. This Internet version of the Idaho Code may not be used for commercial purposes, nor may this database be published or repackaged for commercial sale without express written permission.

[Search the Idaho Statutes](#)

Available Reference: [Search Instructions](#).

The Idaho Code is the property of the state of Idaho, and is copyrighted by Idaho law, I. C. § 9-350. According to Idaho law, any person who reproduces or distributes the Idaho Code for commercial purposes in violation of the provisions of this statute shall be deemed to be an infringer of the state of Idaho's copyright.

MISSISSIPPI CODE OF 1972

As Amended

SEC. 73-25-38. Immunity from liability for physicians and certified nurse practitioners providing charitable medical care.

(1) Any licensed physician or certified nurse practitioner who voluntarily provides needed medical or health services to any person without the expectation of payment due to the inability of such person to pay for said services shall be immune from liability for any civil action arising out of the provision of such medical or health services provided in good faith on a charitable basis. This section shall not extend immunity to acts of willful or gross negligence. Except in cases of rendering emergency care wherein the provisions of Section 73-25-37, Mississippi Code of 1972, apply, immunity under this section shall be extended only if the physician or certified nurse practitioner and patient execute a written waiver in advance of the rendering of such medical services specifying that such services are provided without the expectation of payment and that the licensed physician or certified nurse practitioner shall be immune as provided herein.

(2) Any physician who voluntarily renders any medical service under a special volunteer medical license authorized under Section 73-25-18 without any payment or compensation or the expectation or promise of any payment or compensation shall be immune from liability for any civil action arising out of any act or omission resulting from the rendering of the medical service unless the act or omission was the result of the physician's gross negligence or willful misconduct. In order for the immunity under this subsection to apply, there must be a written or oral agreement for the physician to provide a voluntary noncompensated medical service before the rendering of the service by the physician.

SOURCES: Laws, 1993, ch. 601, Sec. 1; 1995, ch. 332, Sec. 4, eff from and after July 1, 1995

Chapter Index I Table of Contents

<http://www.legis.state.ia.us/cgi-bin/IACODE/Code2001.pl> 1/8/01, 1 of 2

135.24 Volunteer health care provider program established-immunity from civil liability.

1. The director shall establish within the department a program to provide to eligible hospitals, clinics, or other health care facilities, health care referral programs, or charitable organizations, free medical and dental services given on a voluntary basis by health care providers. A participating health care provider shall register with the department and obtain from the department a list of eligible, participating hospitals, clinics, or other health care facilities, health care referral programs, or charitable organizations.
2. The department, in consultation with the department of human services, shall adopt rules to implement the volunteer health care provider program, which shall include the following:
 - a. Procedures for registration of health care providers deemed qualified by the board of medical examiners, the board of physician assistant examiners, the board of dental examiners, and the board of nursing.
 - b. Criteria for and identification of hospitals, clinics, or other health care facilities, health care referral programs, or charitable organizations, eligible to participate in the provision of free medical or dental services through the volunteer health care provider program. A health care facility, a health care referral program, a charitable organization, or a health care provider participating in the program shall not bill or charge a patient for any health care provider service provided under the volunteer health care provider program.
 - c. Identification of the medical services to be provided under the program. The medical services provided shall include obstetrical and gynecological medical services.
3. A health care provider providing free care under this section shall be considered an employee of the state under chapter 669 and shall be afforded protection as an employee of the state under section 669.21, provided that the health care provider has done all of the following:
 - a. Registered with the department pursuant to subsection 1.
 - b. Provided medical or dental services through a hospital, clinic, or other health care facility, health care referral program, or charitable organization listed as eligible and participating by the department pursuant to subsection 1.
4. For the purposes of this section, "*charitable organization*" means a charitable organization within the meaning of section 501(c)(3) of the Internal Revenue Code which has as its primary purpose the sponsorship or support of programs designed to improve the quality, awareness, and availability of medical or dental services to children and to serve as a funding mechanism for provision of medical or dental services, including but not limited to immunizations, to children in this state.
5. For the purposes of this section, "*health care provider*" means a physician licensed under chapter 148, 150, or 150A, a physician assistant licensed and practicing under a supervising physician pursuant to chapter 148C, a licensed practical nurse, a registered nurse, or a dentist licensed to practice under chapter 153.

Section History: Recent form

93 Acts, ch 65, § 1; 95 Acts, ch 121, § 1; 98 Acts, ch 1027, §1-6

Previous Section 135.23

Next Section 135.25

TAB FOUR

BACKGROUND MATERIALS

- I. Background Information on Volunteer Physician Immunity *Volunteers in Health Care*

I. Introduction

Tens of thousands of physicians, dentists, and other health care providers volunteer their time and skills to provide primary and specialty care to patients who lack public or private health insurance and cannot afford their care. They volunteer their time in their private offices, free clinics, and through organized networks started by medical societies, health departments, hospitals, religious groups, and other community organizations.

One of the challenges to these volunteer efforts is addressing the concern of practitioners regarding the risk of malpractice liability. Either clinicians are reluctant to volunteer without adequate coverage or non-profit organizations operating on extremely limited budgets must purchase malpractice insurance, which is often incomplete or very expensive.¹

Policymakers across the country have attempted to address this barrier to volunteerism. While state laws have historically controlled liability issues in malpractice, the desire to prevent the fear of lawsuits from chilling volunteer charitable activities stimulated Congress to decide to legislate in this area. As summarized in the last section of this manual, the 1997 Congressional passage of the Volunteer Protection Act (VPA) resulted in the creation of some liability protection for all volunteers carrying out charitable duties throughout the United States.

In passing the federal legislation, Congress chose not to pre-empt states from affording additional protections, especially in this area of tort law where state laws have traditionally governed. Accordingly, it is important to review the current state laws affecting volunteer clinician liability in order to ascertain the extent of liability protection that is afforded in any particular jurisdiction. At present, as well as prior to enactment of the VPA, most states have chosen to enact laws that provide some protections from malpractice liability for volunteer clinicians.² These measures are distinct from those covering emergency situations, where state laws (usually called "Good Samaritan" laws) have been enacted to encourage people-especially trained health care professionals-to offer assistance to people in need of emergent care.

- ¹ *In this document when we use the term clinician and describe state approaches, in all cases the term always includes physicians. In addition, depending on the specific laws of a state, other categories of licensed health care workers may also be included in the grant of limited immunity. We have also highlighted in the attached table the nine states that specifically reference dentists in their statutory efforts.*
- ² *A few states, such as Illinois, use a single piece of legislation to address the liability of clinicians volunteering in emergent and non-emergent contexts.*

American Association of Orthopaedic Surgeons

This manual examines those state laws, in effect as of October 1, 2000, tied to the **non-emergent volunteer context**. In addition to a discussion of the various state approaches to "charitable immunity legislation" it includes a summary table describing key aspects of each state's legislation and a brief summary and description of federal legislation designed to provide protection from malpractice liability.

Please note that this manual does not constitute formal legal advice with respect to the current law of any particular state. In addition, it is important to keep in mind that new legislation or interpretive court decisions within a state can affect the status of the law. The best way to ensure that there has been no legislative or legal activity affecting a particular state law and/or to receive an interpretation of a specific piece of legislation is to seek legal advice from a knowledgeable attorney.

Volunteers in Health Care has on file legislation from all states with charitable immunity laws, current as of October 1, 2000. Generally the most up-to-date versions of state laws can be obtained via a paid search using a commercial database such as Loislaw, Westlaw or Lexis (although often expensive). The Internet provides access to free on-line texts of state laws, although the comprehensiveness of information may be inconsistent from jurisdiction to jurisdiction. (One useful site to find links to legislation in all 50 states is: <http://www.prairienet.org-scruffy/f.htm>) Finally, local libraries often have copies of their state code, but there will be variability as to how often it is updated or whether it includes addenda for recent amendments. Community and law librarians often can provide information on how best to obtain copies of the current state law.

III. Malpractice

When a patient seeks medical care from a clinician and appears to be harmed by the treatment (or lack of it), the law provides a remedy for patients to seek damages from that clinician. While a bad medical result does not necessarily indicate negligent practice on the clinician's part (as even with the best of care things can go wrong), patients sometimes sue in state court for monetary damages in such circumstances. Determining whether a clinician's actions caused the injury and were the result of negligent care is a question that may be put to a jury or judge after preliminary evidence is presented in court. Generally, for the injured patient to win a medical malpractice case, the judge or jury must accept expert medical testimony that no reasonable health care provider would have done what the clinician allegedly did. 'Reasonableness' is generally determined by looking at what is reasonable care in view of the available knowledge and the state of medical practices at the time of the illness or injury. There must also be proof through expert testimony that the negligence of the clinician was also the cause of the injury. A clinician can be negligent for example, and still not be liable if the injury was caused by some other factor.

Clinicians may be fearful of increasing their liability exposure by offering their services to patients through organized volunteer programs. This may be especially true for clinicians whose malpractice coverage (for negligence acts) does not apply to their volunteer activities. For example, for clinicians employed by an institution such as a hospital or medical center, malpractice coverage may be limited to patients seen in the scope of their employment. These clinicians may need explicit permission to include their free clinic practice under their insurance umbrella. This is generally more restrictive than the situation of clinicians in private practice, whose insurance coverage usually follows them no matter where within the state they are practicing their approved specialty.

IV. State Approaches

CHANGING THE NEGLIGENCE STANDARD OF CARE

Usual elements

Standard of care at which a clinician can be held liable is raised from simple negligence to gross negligence

The most common approach to charitable immunity legislation is changing the standard of care owed by the volunteer clinician to the patient. The standard is raised from simple negligence to one of a higher order—the latter being much more difficult to prove.

As of October 1, 2000, 35 states and the District of Columbia have enacted legislation with the intention of changing the standard from negligence to a higher standard usually referred to as "gross negligence" (sometimes also called a "willful or wanton" or "reckless" standard).³ Under this higher standard of care, an injured person must often show that the volunteer had a conscious indifference to the consequences of his or her actions. In theory, this is not an easy standard to prove.

When states enact such standard of care changes, they can do so through a law that applies to all volunteers—not strictly limited to the medical care context—or pass specific laws that are targeted towards physicians and other health care providers providing charitable health care services. The recent trend has been to pass laws specific to health care providers as a way to encourage more charitable health care delivery. In those states that have statutes both for volunteers generally and health care providers specifically, the operative statute for determining the volunteer clinician liability is the one focused on health care providers.

³ While it is beyond the scope of this manual to provide legal advice, please note that depending on the specific wording of each state law, whether or not and to what extent a state has successfully changed its standard of care may be subject to legal debate. For example, while most states require the volunteer to 'act in good faith, and within the scope of the "practitioners license" or 'volunteer program, the specific facts of a case could lead to an argument that either one or both of these provisions were violated in a particular instance. Also, what is often left unclear is whether a gross negligence standard includes liability protection against intentional torts (tort is a legal term for a wrong or injury for which one can seek redress). In the medical context, performing a procedure without adequate consent would be an intentional tort as would violating a patient's right to privacy.

V. State Approaches

INDEMNIFYING THE VOLUNTEER AS A PUBLIC EMPLOYEE

Usual elements

- **Volunteer clinician treated as though a governmental employee while providing free care**
- **State creates fund to cover defense costs and monetary damages**
- **Formal agreement exists between volunteer and specified state entity**
- **Amount that can be paid in claims is limited**

The next most common approach is for states to indemnify volunteer clinicians by providing liability protection through governmental/sovereign immunity. (The legal term for this protection is "state tort claims act") Such immunity historically has been available for most public employees, including publicly employed physicians working within their scope of employment. Some states have chosen to create charitable immunity statutes that extend such coverage to clinicians who are not public employees, but are providing volunteer health care services.

As of October 1, 2000, ten states - Florida, Iowa, Kansas, Louisiana, Missouri, Nevada, Oregon, Tennessee, Virginia, and Wisconsin - have adopted some aspect of this approach for their clinician volunteers. In some of these states, either through general volunteer statutes or through legislation aimed specifically at health care volunteers, the standard of care is also raised to a higher level - gross negligence standard.⁴

Usually there are certain conditions specified in the legislation-such as the setting in which the care is delivered or a formal agreement between the clinician provider and the state-that must be met for coverage to be extended to the volunteer clinician. As long as these conditions are met, the state tort claims act affords protection for the volunteer clinician by indemnifying that individual as if s/he were a state employee. In most of these indemnity' states, a legal defense fund has been created to cover monetary damages as well as legal defense costs. Often statutes of this type will cap the total compensation that can be paid for claims; the range for the above noted seven states varies from \$100,000 to \$1,000,000. These statutes also exempt the state from punitive damages (that is, damages

4 In Oregon, state university physician employees who volunteer their medical services at sites outside of their normal scope of employment are extended state tort claims act protection as are retired physicians who care for patients that are referred to them by county health officers. Oregon legislation also raises the standard of care to gross negligence for other clinician volunteers.

American Association of Orthopaedic Surgeons

awarded in excess of normal compensation to punish a defendant for a serious wrong). Wisconsin is an example of an indemnity approach. Under state law § 146.89 volunteer clinicians working under the auspices of a nonprofit agency are designated "state agents of the department of health and family services" and as such are covered under the state tort claims act. This requires the state government (or other appropriate political subdivision) to pay damages for any valid malpractice claim against a volunteer clinician that arose in the volunteer practice context and was a service covered under the act (see Section VIIb) as well as legal defense costs.

Each of the relevant statutes for these seven states provides a specific procedure for filing a claim against the state. In some states, specified limits on payment of claims may be waived by legislative or judicial action in particular cases to help compensate injured patients.

VI. State Approaches

OTHER OPTIONS

A few states, rather than enacting legislation that extends some degree of immunity to volunteer clinicians, provide a mechanism for purchasing malpractice insurance. Connecticut legislation authorizes its Department of Public Health to purchase liability insurance for free clinics. Nevada permits its counties to do likewise for individual physicians and dentists. Kentucky legislation makes monies available to its free clinics so that they may purchase insurance for providers who work at their facilities. In both cases providers must not receive compensation for any of the health care services. In addition, Kentucky requires insurers writing medical malpractice insurance to make such insurance available, with the same limits of coverage as for private practice, to charitable health care facilities in their state; the state covers the cost of the premium within certain dollar limits.

Tennessee mandates that malpractice insurance sold in the state cannot exclude coverage to any provider who engages in the voluntary provision of health care services. Under this legislation, local governments also have the option to indemnify volunteers providing care under their auspices. In Washington, state legislation grants the Department of Health the right to establish a program to purchase malpractice insurance for retired primary care clinicians who volunteer at community clinics, although there is no legislation pertaining to non-retired physician volunteers.

VII. Qualifying the Granting of Immunity

Whether states use an approach that changes the operative standard of care, offers state tort claim act coverage to clinician volunteers, or provides payment for liability insurance, they usually do not do so without creating some limitations or qualifications to their efforts. As detailed below, among the most common are constraints on the setting in which care is delivered or the services that are covered, and there may be specific requirements regarding notice to patients on liability limitations.⁵ These limitations are discussed below.

(A) RESTRICTION TO CERTAIN SETTINGS

Twenty-five states have explicitly limited the settings where volunteer care is delivered in order to qualify for charitable immunity protection. While states differ in the settings they specify, some of the more common are: (1) free clinics; (2) community health centers or other nonprofit clinics; or (3) other special care sites designated or established by "sponsoring organizations" to help facilitate the provision of volunteer care to persons who cannot afford to pay. It appears that such limitations are added so that physicians in private practice as well as entities such as hospitals or ambulatory surgical centers are excluded from protection—even when care is provided without any expectation of payment. The reasoning here is either an assumption that providers in these settings or their employers purchase malpractice insurance or a desire to exclude from protection providers who designate patients whom they injure through their care as "charitable cases" after the fact. (Georgia and Florida are exceptions: in Georgia, protection extends to hospitals as well to care provided in other nonprofit organizational sites; in Florida, hospitals can be included as practice sites if there is a formal agreement with providers in such settings to participate in designated volunteer care programs.)

(B) RESTRICTION TO SPECIFIC MEDICAL CARE SERVICES

A few states limit the scope of services that are covered under volunteer medical care practice. Often there appears to be a clear intent that the sort of services considered for charitable immunity is preventive and primary care. Some states, such as Connecticut, limit the scope of practice to primary care. In the District of Columbia, the limitation on liability applies only to the activities of physicians and nurses working in obstetrics and gynecology in free clinic settings. A few other states specifically enumerate what health services are (or are not) covered under their reduced liability scheme. For example, in Wisconsin, the non-profit agency using clinician volunteers may only provide diagnostic tests, health education, and information about available health care resources, office visits, patient advocacy, prescriptions, dental services and referrals to health care specialists. In Missouri, abortion services are specifically excluded from coverage under their charitable immunity legislation.

5. There may be additional limitations as well, for example, by specifying income limits of patients receiving care.

Services that states often exclude are surgical treatment, general anesthesia or other more complex or invasive kinds of medical care. The concern is that this sort of medical care often has greater risks to the patient, and if injury results from negligent care, patients need to be compensated. In a few states, however, although services such as hospital or ambulatory surgery are excluded from charitable immunity legislation, protection is afforded to providers who deliver follow-up care to a patient (including in a hospital) upon referral from the free clinic. This is the case, for example, in Illinois.

(C) REQUIREMENT TO NOTIFY PATIENTS OF LIABILITY LIMITATION

Ten states require that the non-profit agency or clinic using clinician volunteers give notice to patients that there is a limit on the liability for health care services provided. In many states this requires written notice. In Florida, for example, each patient or his/her legal representative is given written notice concerning the terms of the treatment and the limits on liability. Some states require that all clinics post such a notice, often in a “conspicuous place.” Arkansas and Texas require that patients sign a written statement acknowledging their understanding of the health care provider’s limit on liability. The District of Columbia requires that the written statement be signed and “witnessed by two or more persons” where the “parties agree to the rendering of the health care or treatment.” In other states the requirement about notice is less clear. For example, in Montana, patients must be given notice that “under state law the medical practitioner... cannot be held legally liable for ordinary negligence if the medical practitioner does not have malpractice insurance.” It would appear that oral notice would suffice.

IX. Retired Physicians

As of October 1, 2000, ten states have passed legislation specifically to encourage retired physicians to volunteer.⁶ In some of these states, the legislatures have enacted slightly different laws affecting retired physicians as compared to active physician volunteers. For example, Mississippi requires a written or oral agreement between the retired physician and the sponsoring clinic that services are being provided for free; for volunteers still active in practice the law stipulates that they and their patients must each sign a written agreement that details not only that the service is free, but that certain limits to liability for malpractice are operative. In Maine, both retired and active volunteers can provide care under a gross negligence standard, but for retirees, protection is extended only if the volunteer possessed an unrestricted license and had not been disciplined in the previous five years.

Finally, a few states have reduced liability statutes that have special provisions for retired physicians. As noted previously, Washington provides for a state program that pays for malpractice insurance for retired physician volunteers who practice primary care at community clinics; it has no liability reduction program for non-retired volunteers. In Oregon, a retired physician caring for patients referred from a county health officer has liability limits of recovery equal to those of persons who work for a "public body." In New Hampshire, immunity for retired physicians extends only to health education in public forums or to individual educational consultations so long as they are not considered diagnostic or treatment advice. And in Pennsylvania, its Volunteer Health Services Act specifically targets for protection from liability retired physicians, dentists and other health care providers who volunteer in "approved clinics." However, such reduced liability protections are only applicable if the approved clinic posts this exemption from civil liability in a "conspicuous place."

6. Some states, as an additional incentive to promote volunteerism, have statutes that reduce the licensing fee for retired physicians who, at no charge, only care for the poor and medically needy.

X. Federal Legislation

(See attachment B for full text)

While malpractice and tort law have been used by states to extend charitable immunity to volunteers, it is not an area that Congress has completely ignored. In 1996, as part of the Health Insurance Portability and Accountability Act; Congress amended the Public Health Service Act to make certain qualified clinician volunteers working at free clinics employees of the US Public Health Service and hence covered for malpractice liability by the Federal Government. However, the law has never gone into effect because Congress has not appropriated funds to cover the costs of providing Federal coverage to these clinician volunteers.

In 1997, Congress passed the Volunteer Protection Act (VPA). The law provides all volunteers (including clinician volunteers) of nonprofit organizations and government entities with protection from liability for certain harms caused by his/her acts or omissions while serving as a volunteer. As with practically all such state laws, volunteers who qualify for the VPA's protection are shielded from harm caused by simple negligence so long as it is within the scope of the volunteer's duties. As with most state laws attempting to reduce volunteer liability, the law does not prevent people from bringing lawsuits nor does it provide for defense cost reimbursement to volunteers?

Under the VPA, a properly licensed, volunteer clinician acting within his/her scope of duties in the nonprofit or governmental organization is protected from liability for simple negligence so long as the alleged misconduct does not fall into certain categories of exclusion (e.g., a crime of violence or hate; a sexual offense or civil rights violation; or an act committed under the influence of alcohol). Even in situations in which the volunteer can be held liable (e.g., was grossly negligent), the VPA greatly limits the circumstances in which punitive damages can be awarded to those cases with clear and convincing evidence of willful or criminal conduct. It also restricts the amount of non-economic damages (pain and suffering) to the proportion of the volunteer's contributory responsibility for the resultant harm. (That is, if the volunteer is determined to be responsible for 20% of the harm done, then non-economic damages can equal no more than 20% of the awarded damages) However, the VPA does not place any limits on the amount of economic damages (e.g., medical expenses, lost wages) awarded to an injured person from a volunteer's gross negligence.

The statute allows states, if they so choose, to impose further conditions on the limitations of liability. Accordingly, state laws could: (1) require volunteer programs to adhere to risk management procedures; (2) create vicarious liability on the part of the sponsoring volunteer program (that is, makes the volunteer program to be deemed liable for a volunteer's negligent acts); (3) make the liability

7. Again, as in the state context, whether there is protection from intentional torts remains unclear from the statute and a reading of Congressional intent that is, from a reading of the written record accompanying the debate on the legislation.

American Association of Orthopaedic Surgeons

limitation inapplicable if a suit is brought by state or local government; or (4) make the liability limitation apply only if the sponsoring organization provides a financially secure source of recovery for harms caused by volunteers.

While the VPA preempts any state law that offers fewer protections, states can go beyond the protections afforded here through passage of state laws. Interestingly, there is a provision of the Volunteer Protection Act that permits individual states to pass specific legislation that would make the VPA provisions inapplicable in the specific circumstance where all parties to a lawsuit are residents of that state. If a state passes such a provision, then only its laws and not the VPA would govern. As of October 1, 2000, no state has chosen to opt out of the VPA protections.

Appendix: II

THE VOLUNTEER PROTECTION ACT

In 1997, Congress passed the Volunteer Protection Act (VPA). The law provides all volunteers (including clinician volunteers) of nonprofit organizations and government entities with protection from liability for certain harms caused by his/her acts or omissions while serving as a volunteer. As with practically all such state laws, volunteers who qualify for the VPA's protection are shielded from harm caused by simple negligence so long as it is within the scope of the volunteer's duties. As with most state laws attempting to reduce volunteer liability, the law does not prevent people from bringing lawsuits nor does it provide for defense cost reimbursement to volunteers.

Under the VPA, a properly licensed, volunteer clinician acting within his/her scope of duties in the nonprofit or governmental organization is protected from liability for simple negligence so long as the alleged misconduct does not fall into certain categories of exclusion (e.g., a crime of violence or hate; a sexual offense or civil rights violation; or an act committed under the influence of alcohol). Even in situations in which the volunteer can be held liable (e.g., was grossly negligent), the VPA greatly limits the circumstances in which punitive damages can be awarded to those cases with dear and convincing evidence of willful or criminal conduct. It also restricts the amount of non-economic damages (pain and suffering) to the proportion of the volunteer's contributory responsibility for the resultant harm. (That is, if the volunteer is determined to be responsible for 20% of the harm done, then non-economic damages can equal no more than 20% of the awarded damages.) However, the VPA does not place any limits on the amount of economic damages (e.g., medical expenses, lost wages) awarded to an injured person from a volunteer's gross negligence.

The statute allows states, if they so choose, to impose further conditions on the limitations of liability. Accordingly, state laws could: (1) require volunteer programs to adhere to risk management procedures; (2) create vicarious liability on the part of the sponsoring volunteer program (that is, makes the volunteer program to be deemed liable for a volunteer's negligent acts); (3) make the liability limitation inapplicable if a suit is brought by state or local government; or (4) make the liability limitation apply only if the sponsoring organization provides a financially secure source of recovery for harms caused by volunteers.

1. Whether there is protection from intentional torts remains unclear from the statute and a reading of Congressional intent that is, from a reading of the written record accompanying the debate on the legislation.

THE VOLUNTEER PROTECTION ACT OF 1997 -CONTINUED

While the VPA preempts any state law that offers fewer protections, states can go beyond the protections afforded here through passage of state laws. Interestingly, there is a provision of the Volunteer Protection Act that permits individual states to pass specific legislation that would make the VPA provisions inapplicable in the specific circumstance where all parties to a lawsuit are residents of that state. If a state passes such a provision, then only its laws and not the VPA would govern. As of October 1, 2000, no state has chosen to opt out of the VPA protections.