



Sample Legal Guidance Letter – Liability for Mental Health Care Providers

As of August 22, 2011

Introduction. While national or regional emergencies or disasters are well-known for causing an array of harms to physical health, they can also have a significant impact on individuals' mental and behavioral health. Existing mental health conditions, such as schizophrenia and depression, may be exacerbated by an emergency. New conditions, such as post-traumatic stress disorder, may emerge in some persons as a result of the emergency. Large-scale emergencies may affect the mental and behavioral health of first responders, public health officials, health care workers, and others involved in response efforts. The mental health of certain vulnerable populations, including children, the elderly, individuals in group facilities, and persons from socially or economically disadvantaged groups, may also be impacted. Depending on the particular mental and behavioral health issues that arise, individuals may need to access mental health services during and/or after a declared emergency.

In September 2008, the Centers for Disease Control and Prevention (CDC) established a Preparedness and Emergency Response Research Center (PERRC) at the Johns Hopkins Bloomberg School of Public Health. One of the Center's goals is to identify, research, and analyze the legal and ethical issues that arise during emergencies relative to mental and behavioral health. As part of this effort, scholars and researchers at the Johns Hopkins PERRC and the ASU Sandra Day O'Connor College of Law have created a series of translational tools on relevant legal and ethical issues.

Purpose. This tool is intended as a resource for lawyers who are asked to provide guidance about potential liability of mental health care providers during emergencies. This tool is structured as a sample legal guidance letter that applicable legal counsel may tailor according to their circumstances and jurisdiction to advise administrators, mental health care providers, emergency planners, or clergy on liability risks and protections for mental health care providers during an emergency. *As different jurisdictions may or may not have passed versions of the model laws described, legal counsel should check whether their own jurisdictions have passed similar laws and tailor the letter accordingly.*

Acknowledgment. This document, prepared by **Erin C. Fuse Brown, JD, MPH**, and **James G. Hodge, Jr., JD, LLM**, is supported by CDC through a project entitled "Legal and Ethical Assessments Concerning Mental and Behavioral Health Preparedness" at ASU Sandra Day O'Connor College of Law. The authors acknowledge **Lainie Rutkow, JD, PhD, MPH**, and **Jon Vernick, JD, MPH**, at the Johns Hopkins Bloomberg School of Public Health for their contributions to this document, and **Lexi C. White, JD/PhD Candidate**, ASU Sandra Day O'Connor College of Law for her research assistance.

Disclaimer. While this document is prepared with support from CDC (5P01TP000288-02), its contents do not represent the official legal position of CDC or other project partners. *This document does not provide specific legal advice.* Practitioners should consult with their legal counsel for an analysis of federal and state laws applicable to the practitioner's specific circumstances.

Sample Legal Guidance Letter – Liability for Mental Health Care Providers

Re: Legal Liability of Mental Health Providers During Declared Emergencies

Dear Sir or Madam:

In an emergency, mental health providers (e.g., psychiatrists, psychologists, counselors, or others licensed to provide mental health services) may be called upon to respond to mental and behavioral health needs of vulnerable or affected populations. Like other health practitioners, risks of liability can greatly deter mental health providers from offering or volunteering their services. This letter provides clarification regarding questions of liability and liability protections for mental health providers during declared emergencies.

While liability risks exist, there are also a number of legal protections limiting civil liability for mental health providers and other health practitioners during a declared emergency. These liability protections vary across jurisdictions and are dependent on the setting and role of the provider. In general, liability protections may be available for mental health providers who volunteer in an emergency pursuant to a government-organized response, providers who are local, state, or federal employees, and other providers depending on their assigned roles and responsibilities. Select examples of potential legal liability protections include:

- **Uniform Emergency Volunteer Health Practitioners Act (UEVHPA) § 11** provides two alternative avenues for liability protections for emergency volunteer health practitioners (VHPs) (including mental health providers) who register with a volunteer registration system (e.g., Medical Reserve Corps): (1) a VHP who provides services through a local host agency is not liable for damages resulting from the provision of those services; or (2) VHPs who receive no more than nominal compensation are immunized from liability.
- **Federal Volunteer Protection Act of 1997 (VPA) § 4** shields volunteers of nonprofits or governmental entities from liability if the volunteer was acting within the scope of the volunteer’s activities for the nonprofit or governmental entity and, if applicable to the volunteer’s activities, is duly licensed or certified in the state where the volunteer’s activity occurred. The VPA defines “volunteer” as someone performing services for a nonprofit or government entity that does not receive any compensation (other than reasonable expense reimbursement) or any other item of value in excess of \$500 per year.
- **Model State Emergency Health Powers Act (MSEHPA) § 608(b)(3)** covers out-of-state emergency health care providers appointed by a public health authority to respond to the emergency. Under this clause, mental health providers are protected from liability resulting from medical care or treatment related to the public health emergency. Multiple states have passed similar laws based on this model provision.
- **Emergency Management Assistance Compact (EMAC) Article VI** offers liability protections to state or local employees who are sent by one state to render aid and assistance for a disaster or emergency in another state via EMAC. Some states may “deputize” private sector health care practitioners as state agents for the limited duration of an emergency to garner EMAC liability protections for the practitioners.
- **Model Interstate Mutual Aid Legislation (MIMAL) Article X** immunizes in-state government employees responding to a declared emergency. A “government employee” includes all persons,

including mental health personnel, responding under the operational control of the requesting governmental subdivision.

- **Principles of sovereign immunity** protect most local, state, and federal employees acting within the scope of employment from tort liability. Some states statutorily extend these protections to mental health providers and other volunteers by treating them as state employees with respect to their volunteer response efforts.

While these and other protections may offer immunity for specific mental health providers delivering mental or behavioral health care services in declared emergencies, none of these provisions protect against liability for gross negligence, reckless or willful misconduct, or criminal acts. Moreover, while every state has “Good Samaritan” laws to immunize those who render aid at the scene of an emergency, these laws typically do not cover mental health professionals providing care as part of an organized emergency response effort. Mental health providers who are not covered by these or other applicable liability protections may be liable, but only if their treatment or services falls below the applicable crisis standard of care, which varies with the specific circumstances of any emergency event.

I hope this brief explanation of liability protections for mental health providers in declared emergencies is helpful. Please let me know if you have additional questions.

Sincerely,

[Legal Counsel]