

PUBLIC HEALTH LEGAL PREPAREDNESS WORKSHOP

SUMMARY

Anthony D. Moulton and James G. Hodge, Jr.

As of January 13, 2003

Overview

On December 11, 2002, the CDC Public Health Law Program, the Association of State and Territorial Health Officials and the National Association of County and City Health Officials sponsored a peer consultation workshop on selected legal and policy issues related to public health legal preparedness for bioterrorism. The *Center for Law and the Public's Health* at Georgetown and Johns Hopkins Universities hosted the workshop.

The workshop was attended by state, local, federal officials, public health practitioners, attorneys, emergency management and law enforcement officials.

The workshop was designed for peer-to-peer consultation and technical assistance on issues central to the legal preparedness of the Nation's public health system for bioterrorism and emerging disease threats. A primary goal was to generate and exchange information that states, localities, tribes, and territories can use to address the legal preparedness goals of the CDC grant program for public health preparedness and response for bioterrorism.

The workshop commenced with brief updates on the newly-authorized Department of Homeland Security, smallpox policy, and the May 2003 TOPOFF 2 exercise. Participants then discussed five issues central to public health legal preparedness.

Update: Department of Homeland Security, Gene Matthews, CDC OGC

- \$ Implementation of the Homeland Security Act has begun. Some of the provisions have effective dates in the near future. CDC will provide technical assistance to health departments re implementation.
- \$ The Act provides that the CDC public health bioterrorism preparedness grant program (currently funded at \$918 million) will remain at CDC.
- \$ The Act retains management of the National Pharmaceutical Stockpile at CDC and assigns deployment decision-making to the Department of Homeland Security.

Update: Smallpox Countermeasures, Jim Misrahi, CDC OGC

- \$ On January 24, 2003, the liability provisions of the Homeland Security Act [Sec. 304] take effect.
- \$ CDC has posted a Q & A section on its website highlighting some of the issues relating to smallpox and Section 304 of the Act <<http://www.bt.cdc.gov/agent/smallpox/vaccination/section-304-qa.asp>>.

- \$ The Federal Tort Claims Act is the mechanism used to assign liability for smallpox vaccinations. The FTCA does not allow for punitive damages or jury trials.
- \$ There are four entities covered under the liability provisions. These include:
 - \$ manufacturers of smallpox countermeasures and distributors,
 - \$ designated health care entities administering smallpox countermeasures,
 - \$ qualified administrators, and
 - \$ employees of the first three.
- \$ How does the smallpox countermeasure liability section comport with worker=s compensation liability through existing state laws? Preliminary CDC review suggests that liability against covered entities is contingent upon state worker=s compensation laws in many jurisdictions.

Update: TOPOFF 2, Anne Murphy, Illinois Dept. of Health

- \$ TOPOFF 2 (co-sponsored by DOJ and the State Department) is a terrorism exercise planned for May 2003 in 2 sites:
 - \$ Northeastern Illinois in response to a plague outbreak at the United Center, O'Hare Airport, and a train station; and
 - \$ Seattle in response to a dirty bomb release.
- \$ A broad range of participants, including officials from:
 - \$ Federal agencies including the DOJ, CDC, FEMA, HHS, DOD;
 - \$ The Canadian government;
 - \$ Illinois state government, including the Governor's office, departments of health, emergency management, and law enforcement;
 - \$ City of Chicago government and surrounding counties; and
 - \$ Private sector entities, such as hospitals.
- \$ The Illinois exercise will escalate quickly, involve a disaster declaration by the Governor, and feature intense media scrutiny.
- \$ As part of the exercise, Illinois health officials have formed a legal review team of approximately 40 legal professionals from diverse settings to identify legal issues and develop coordinated approaches to addressing them. The legal review team members contribute diverse vantage points toward building a common understanding of the relevant legal issues. Select legal issues will be introduced into the exercise, including:
 - \$ The efficacy of requirements that providers report appropriate medical conditions;
 - \$ Issues concerning emergency certification of health workers; and
 - \$ Law enforcement access to counsel.

ISSUE 1: PUBLIC HEALTH SURVEILLANCE

**Moderator: Daniel O'Brien, Principal Counsel/Asst. Attorney General
Maryland Department of Health and Mental Hygiene**

State public health reporting provisions have changed since 9/11/01 to focus on syndromic reporting. Some state laws specifically authorize this type of reporting, but how do privacy and other legal issues impede these reporting mechanisms? What about trade secrets or other intellectual property? What is the impact of HIPAA on syndromic data systems? As the amount of data collected exceeds conventional reporting requirements, has the balance of privacy and public health value been appropriately made? Concerns were also raised that surveillance may not produce timely information.

The DHHS=Office of Civil Rights has issued guidance on HIPAA compliance for public health authorities, among others, as of 12/4/02. Copies are available at <http://www.hhs.gov/ocr/hipaa/privacy.html>.

Several workshop participants reported on surveillance issues:

Maryland

- \$ Developed a legal memorandum to instruct hospitals and others as to the best way to comply with public health reporting requirements.
- \$ Johns Hopkins Applied Physics Lab has been working on a computerized surveillance system that highlights potential events premised on behavior in communities.
- \$ Questions include:
 - \$ Who owns the systems?
 - \$ Who can expect to get information from it?
 - \$ What happens if it is put up for sale?

Los Angeles

- \$ Building electronic records to facilitate sharing of information;
- \$ Attempting to get county coroner on board so causes of death can be more quickly reported;
- \$ Getting hospitals to report electronically.

North Carolina

- \$ Hired a retired Air Force general as BT counsel;
- \$ Divided state into 7 regions served by regional response team.

Ohio

- \$ Developed online, secure system for reporting.;
- \$ Goal is to get reports submitted in real-time.;
- \$ The authorizing statute creating the system is open-ended, thus allowing for evolution based in practice.

How can public health information be used by law enforcement? Early notification of potential BT threats is key and establishing relationships through public health departments is important. When public health departments have initial concern about unusual health reports they should be reported to law enforcement immediately. A legal provision requiring law enforcement to be notified could help, but is often missing from state law.

ISSUE 2: INTERJURISDICTIONAL COOPERATION

Moderator: Susan Steeg, General Counsel, Texas Department of Health

The Emergency Management Assistance Compact (EMAC) is a useful model for resolving many of the interjurisdictional issues that states have been dealing with re: international, intertribal, and interstate issues when the Governor evokes emergency status under existing state laws. Federal laws, like the Federal

Volunteer Protection Act, may also address some gaps. The DMAT structure in New Mexico is a good model for examining state interjurisdictional issues in public health emergency settings.

Collaboration across state and tribal boundaries raises many additional issues:

- \$ When are volunteers or private sector health care providers covered for tort liability? Are volunteers covered under the federal Volunteer Protection Act of 1997?
- \$ How can state authorities identify health care workers or others from other states who may be beneficial during an emergency?
- \$ Ohio and Massachusetts are working on a model to recruit a volunteer medical corps. What is the best way to ensure they are appropriately trained?
- \$ Is there a model mutual aid agreement that could be used among jurisdictions within states or between states? CDC consultant **Judy Munson** may be developing a prototype. Maryland has a model emergency management agreement developed with the assistance of **Dan O'Brien**.
- \$ How likely are border states to send workers under EMAC if the emergency disease threat is also at their door?
- \$ Would FEMA be authorized to respond to man-made events like anthrax exposure? FEMA's statutory authority limits its response to natural disasters. It does not extend to induced or "manmade" disasters like bioterrorist attacks. FEMA generally also requires a governor to declare an emergency before the federal government can act, except if the matter is closely related to national interests. Also, FEMA cannot extend aid to private entities.
- \$ All states except CA and WY have enacted EMAC legislation. Gaps in the structure of EMAC to address public health emergencies raise concerns. It would be useful to have an EMAC gap analysis, including a discussion of its relationship to FEMA requirements. Texas is conducting a gap analysis.
- \$ State liability laws for volunteers have been compiled by the Nonprofit Risk Management Center, available at <http://www94311.temp.w1.com/pubs/sll.htm>.

ISSUE 3: LIABILITY

Moderator: Priscilla Fox, Legal Consultant, MA Department of Public Health

The issue of liability for public and private sector agencies and workers in response to an emergency are profound and complicated. Finding uniformity on these issues, because of variances among states, is nearly impossible. There is a wide array of laws one might consult as to whether liability protections may apply to certain persons or entities. The extent of protection ranges from absolute to not much at all. It is also important to separate issues: immunity, liability protection, indemnification **B** these are different concerns.

Some liability issues raised concerned the states=role in providing authorization cards and use of labs. Who is liable if the authorized person was not able to perform her duties? If private laboratories assist government labs, should the private lab be protected from liability? Should they be able to recoup lost profits if lab has to close?

There was discussion concerning the development of a matrix that displays the authorities and powers of government, and listing cross-cutting factors (like liability and principles of fairness and justice) that may impede, incent, or facilitate their exercise.

Ernie Abbott, FEMA Law Associates, is working on an issues checklist (through the ABA task force for emergency management and homeland security) for local government attorneys to consider in responding to a

bioterrorist emergency. **Jason Sapsin** of the *Center* will follow up as to how to incorporate public health law issues into the checklist, which is presently focused largely on law enforcement issues.

Indiana Judge **Linda Chezem** has developed bench books or field manuals for various issues, including some related to BT issues. Workshop participants discussed ways to educate judges about public health preparedness for judges. A suggestion was made to bring public health officials and judges together, and to create a bench book for the judiciary.

ISSUE 4: ISOLATION AND QUARANTINE

Moderator: Assemblymember Richard Gottfried, New York

The isolation/quarantine provisions of the draft model state emergency health powers act have been among the most controversial of the public health powers. The quarantine and isolation powers of the draft model act should be compared with existing state laws and court rulings.

New Mexico's legislation applies the "clear and convincing proof" standard to quarantine and isolation. Among the questions raised were: What are the roles of law enforcement and others in administering quarantine and isolation? What are the criteria for exercising "reasonable force", e.g., drawing weapons to protect public health? Does every state have the ability to isolate or quarantine outside of an emergency setting? When is law needed to protect persons from public health threats where they would not otherwise act to protect themselves? What about self shielding or home detention provisions [recently discussed in Virginia and elsewhere] as complementary approaches to quarantine and isolation? New Mexico law gives preference to self shielding.

Before actual declaration of a public health emergency, what authority do health departments have to detain people who may have been exposed to smallpox or other infectious agent?

How do federal and state quarantine powers interact? **Jim Misrahi** of CDC has some written analysis to share and will provide the same. Though federal authority to quarantine exists, resources are limited and the federal government may have to rely on state assistance.

Maryland is drafting pleadings for quarantine and isolation - are there other samples available? Michigan may also have some samples. The *Center* website could be helpful for circulating legal materials regarding pleadings or bench book materials.

Additional issues include:

- \$ Concerns over due process for containing people who may have been in contact with a contagious person (in a hospital setting, for example). What is the extent and depth of quarantine and isolation authority?
- \$ The importance of having an informed public, to protect people from spreading disease.
- \$ The role of the media and the responsibility of public health officials to communicate with the media well in advance of actual emergencies.

The Institute of Medicine's new report *The Future of the Public's Health in the 21st Century* has a section on the media with regard to public health, available at:

<http://books.nap.edu/books/0309086221/html/315.html#pagetop>.

ISSUE 5: PROTECTION OF SENSITIVE INFORMATION

Moderator: Cynthia Honssinger, Director, Office of Legal and Regulatory Affairs, Colorado Department of Public Health and Environment

Protecting information related to preparedness for BT or other terrorism events requires legal authorization. What legal protections should apply? Colorado has an exception for FOIA requests that relate to specialized details or investigations. Massachusetts has passed a new act to provide additional limits on the release of certain records (including plans and the names of persons who lawfully keep BT agents). Oregon has various exemptions as well: (a) those that are so secret as to be off-limits without exception; and (b) those that are secretive but may be released based on reasonably balanced judgments. New Mexico has a countervailing public policy exception. California bases some of its non-disclosure limits on potential security threats. Illinois need not release if such would violate state or federal law.

Ohio recently created an exception to the Open Records Act, where disclosure would endanger the infrastructure of public buildings and security records. Any record prepared or maintained by government to respond to terrorism may be protected from disclosure. Working with law enforcement and others in emergency management is helpful to get some feedback.

It was suggested that public health officials consult with law enforcement and emergency management agencies which may have legal frameworks to protect sensitive information and documents. The California state law enforcement agency has such a framework.

NEXT STEPS:

Following the workshop, we distilled the following, tentative listing of key legal issues for which the *Center*, CDC or other workshop participants may provide some information and consultation.

| TOPICAL AREA | ISSUE | ACTION ITEM |
|-------------------------------|---|--|
| A. Public Health Surveillance | Need to know how the HIPAA public health exemption applies to surveillance (<i>e.g.</i> , pharmacy prescriptions, hospital admissions, discharges, child care center health reports) | <i>Center</i> will analyze and report on this issue in conjunction with the development of CDC's HIPAA practitioner's guide |
| | When hospitals and pharmacies consider their prescription data to be proprietary information, are there legal protections for the proprietary nature of the data to facilitate or ensure reporting? | <i>Center</i> will seek additional input on this issue for the purposes of clarification, and then consider analysis. |
| | | In TOPOFF 2 Illinois will test the legal authority for health care institutions= reporting of disease cases to public health and law enforcement agencies. |
| B. Liability | | Ernie Abbott of FEMA Law |

| TOPICAL AREA | ISSUE | ACTION ITEM |
|--------------------------------|---|---|
| | | Associates will circulate information about a draft terrorism-related guide for government attorneys. Jason Sapsin of the <i>Center</i> will follow up as to how to incorporate public health law issues into the checklist, which is presently focused largely on law enforcement issues. |
| | | The International Emergency Management Association is reviewing all 50 states= tort claims statutes. Ernie Abbott may have access to this data through the ABA task force on emergency management and homeland security state and local govt. section. |
| | Are state/local governments liable for harms to non-recipients when it rations vaccines, drugs, or other medical goods during an emergency? | <i>Center</i> will seek additional input on this issue, and then consider analysis. |
| C. Mutual aid | Need to do a gap analysis of EMAC from the perspective of public health emergencies | Susan Steeg is working on this analysis, and will provide drafts when possible. |
| | Need a model, intrastate mutual aid agreement among municipalities (cities and counties) | Judy Munson may be developing a prototype with Anne Murphy . Maryland has a model emergency management agreement developed with the assistance of Dan O'Brien . <i>Center</i> will research to determine whether sample agreements exist, and share with others. |
| D. Certification of responders | | In TOPOFF 2, Illinois will test legal issues related to emergency certification of health care workers. |
| | The states should pre-identify their own responder personnel so other states will know what resources are available | |
| E. Quarantine and isolation | Need to compare the Q&I powers of the draft model act with judicial rulings | Cliff Rees and John Wheeler will circulate language from draft New Mexico legislation. |
| | Need to clarify the interplay of federal and state Q&I laws | Working with Jim Misrahi at CDC, <i>Center</i> personnel will develop a memo on this point. |

| | | |
|--|---|--|
| | Need information about legal issues associated with self-shielding and other alternatives and complements to Q&I | Cliff Rees and John Wheeler will circulate language from a draft New Mexico bill. |
| F. Judicial preparedness | Need continuing education for judges regarding public health authorities and responsibilities regarding bioterrorism | An approach will be considered by a group led by Judge Linda Chezem , including <i>Center</i> colleagues. |
| G. Protection of sensitive information | States are seeking information on appropriate methods to protect security-sensitive information while also recognizing the public right to know | The <i>Center</i> and CDC will prepare an informal outline of selected options, including recent state actions to protect security-sensitive information and reports |
| H. Cross-cutting | Need examples of affidavits, pleadings, or procedural rules of relevance during a public health emergency | The <i>Center</i> will research to determine what may exist, including materials from Dan O'Brien , et.al. |