Public Health Emergency Law: What to Expect (and Not to Expect)

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Roadmap

• This is an overview of general legal principles of health emergency/disaster law.

• Along the way, we’ll examine a few common pitfalls and also some unexpected “bumps” in the road
Disclaimers

• Nothing in this presentation is the official position of the Tenet Health System, or any Tenet Hospital.
• Nothing in this presentation constitutes legal advice. Need legal advice? Hire a lawyer.
• Everything herein in the opinion of the presenter.
• Your mileage may vary. Priced higher in Hawaii and Alaska. Our drivers carry less than $20 in cash…
Basic Emergency Preparedness and Public Health Law

– States have primary responsibility for public health law, under police powers and parens patriae

– Local governments have responsibility as delegated by the state (with some substantial [and often surprising] *per se* powers)

– Tribal governments have some responsibility, but there are conflicts in federal law

– Federal government has limited primary public health responsibility
  • Interstate quarantine and intervention
  • Inspection, quarantine and intervention of international vessels
  • War, terrorism
Basic Emergency Preparedness and Public Health Law

• Disasters Do Not Observe Geographic Boundaries (they may be local, regional or national):
  – A Level I disaster is one in which local emergency response personnel and organizations are able to contain and deal effectively with the disaster and its aftermath.
  – A Level II disaster requires regional efforts and mutual aid from surrounding communities.
  – A Level III disaster is of such a magnitude that local and regional assets are overwhelmed, requiring statewide or federal assistance.

• Why is this important? It’s all about the competition for resources, assistance, and attention (the latter often directs the allocation of the former), and an awareness that there are substantial multi-jurisdictional issues to navigate in connection with most disaster relief efforts.
Basic Emergency Preparedness and Public Health Law

• State and Local Government Authority:
  – Local Chief Executive Officer (mayor, etc) is responsible for coordination of local resources and requesting state aid.
    • May have some extraordinary powers under law
  – Governor of state is charged with coordinating disaster response and requesting federal assistance.
    • Typically has extraordinary powers for duration of declared emergency
What Hospitals May Not Have Considered

• State laws may provide for the public commandeering of private property during emergencies

• What if the commandeering official is not reasonable?
  – What if they commandeer all or part of your hospital (or your hospital’s property) for other than patient care purposes?
What Hospitals May Not Have Considered

• If part of your hospital is commandeered (out of your control) pursuant to STATE LAW, are your FEDERAL LAW EMTALA duties concomitantly modified?

• Are you entitled to compensation for the value taken during commandeering?

• If vital services are commandeered for non-patient care purposes, can you count on a hearing for relief?
Who’s On First?

• FEMA’s Strategic Plan provides:
• “While the Agency’s mission is squarely focused on protecting and preparing the Nation as a whole, primary responsibility for disaster response rests with State and local authorities. This means **FEMA does not respond to all disasters that occur in the United States**. Instead, when State and local capacity to respond is threatened or overwhelmed, a Governor may **ask** the President for Federal assistance.” and;
• **“Improving the Nation’s capability to respond to disaster is not just the responsibility of government entities.** Each individual, family, and community must be aware of the risks they face, and make intelligent decisions to deal with those risks, both before and after disasters strike. Individually and collectively, we are all responsible for making good decisions, whether we are preparing our homes to better survive a hurricane, fire, flood or earthquake, or deciding how to repair and rebuild after disaster strikes.”
What NOT to expect from FEMA

• “FEMA provides free training, education, assistance and respond in case of an emergency, but the local and state officials run their own emergency management program.” Craig Martell, the Strategic Outlook Institute

• Can’t we all just get along?
What is the Role of the Federal Government?

• Federal Government
  – Department of Homeland Security
    • Undersecretary for Preparedness
    • Emergency Preparedness and Response Directorate
      – FEMA
      – Strategic National Stockpile (HHS)
      – National Disaster Medical System (HHS)
      – Nuclear Incident Response Team (DOE)
      – Domestic Emergency Support Teams (DOJ)
      – National Domestic Preparedness Office (FBI)
  – Office of Planning and Emergency Response Coordination
    • Secretary's Command Center
  – Office of Research and Development Coordination
  – Office of State and Local Preparedness
  – Talk About Your Political Minefields!!!!!!!!!!!!!!!
Federal Authority

• Federal Laws
  – Robert T. Stafford Disaster Relief and Emergency Assistance Act, amended by the Disaster Mitigation Act of 2000 (PL 100-707, signed into law November 23, 1988; amended the Disaster Relief Act of 1974, PL 93-288. This Act constitutes the statutory authority for most Federal disaster response activities especially as they pertain to FEMA and FEMA programs.)
  – Homeland Security Act of 2002
  – Public Health Threats and Emergencies Act of 2000
  – Public Health Security and Bioterrorism Response Act of 2001
  – Public Health Improvement Act of 2000
Federal Disaster Response Components

• National Response Plan
  – Revised December 2004
  – Intended to "align federal coordination structures, capabilities, and resources into a unified, all-discipline, and all-hazards approach to domestic incident management."
  – Provides a framework for response activities
  – Base Plan with Appendixes and Annexes
  – Based on NIMS (National Incident Management System
  – More than 60 pages just to explain the National Response Goals!
Federal Disaster Response Components

• NIMS
  – Not an operational incident management or resource allocation plan.
  – A collection of doctrines, concepts, principles, terminology, and organizational processes
  – Focus is interoperability and compatibility among federal, state and local capabilities
  – Required to be adopted by federal agencies
  – Adoption by state and local organizations is a requirement for federal preparedness assistance beginning FY 2005
Why is NIMS Important?

• NIMS Requires Use of the Incident Command System (ICS)
  • ICS defines structure and operations of multidisciplinary, inter-jurisdictional emergency management and response
  • Permits different agencies to work together under a common, understood set of principles and processes

• Almost Every Local Emergency Preparedness/Management Official is (or shortly will be) Trained in the ICS Method.

• Watch the “C” …
What Hospitals May Not Have Considered

• Hospitals (and physicians, nurses, bandages and even bad cafeteria food) are “resources” within ICS.
• The Incident Commander (there’s that “C”) is in charge of allocating resources.
• The Incident Commander in your area may very well end up being the volunteer fire chief.
• Expect to hear strange things from unusual places during emergencies subject to ICS, and be prepared to be legally required to comply!
Federal Disaster Response Components

- **Strategic National Stockpile**
  - Maintains stock of pharmaceuticals, vaccines, medical supplies and equipment for large-scale response efforts.
  - Administered through FEMA; located in various states under auspices of State Emergency Management Office
  - "Push Packs": pre-packed cargo containers with pharmaceuticals, antibiotics, anti-toxins, nerve agent antidotes, IVs, airways, etc.
    - Theoretically, Push Packs can be delivered anywhere in US in 12 hours
  - “Chem Packs” Forward placement of nerve agent antidotes (may be forward-deployed on basis of intelligence; Use limited to large-scale attacks)
Federal Disaster Response Components

• National Disaster Medical System (NDMS)
  – NDMS, through the U.S. Public Health Service (PHS), fosters the development of volunteer teams, composed of “professional and paraprofessional medical personnel ([and] logistical and administrative staff) designed to provide emergency medical care during a disaster or other event.”

• Disaster Mortuary Operational Teams
• Veterinary Medical Assistance Teams
• National Pharmacy Response Teams
• National Nursing Response Teams
What Hospitals May Not Have Considered About Relying Upon The Services of Volunteer Health Professionals

• The key here is “volunteer”. Volunteer-driven systems can be unpredictable (who is and who is not an “authorized” volunteer is almost ALWAYS a problem in disaster management).

• State deployment of VHPs under the Emergency Management Assistance Compact (EMAC). Legal questions arose regarding the inclusion of non-state employees in a state EMAC response. EMAC responses typically only allow the participation of health professionals who are already "state officials or employees."

• Lesson from Hurricane Katrina: “VHPs encountered conflicting messages about who had the legal authority to deploy them to the disaster-affected areas. Federal and state mechanisms were invoked to authorize deployments of VHPs, but confusion about who actually had the legal authority to deploy volunteers ultimately led to delays. Legal authorities [and prioritization] for volunteer deployment should be clarified for future response efforts.”
General Emergency Preparedness Laws

• Declaring an Emergency/Public Health Threat
  – A legal determination by an authorized official which triggers special emergency powers
  – Who Declares?
    • Usually Governor (state level)
    • Some jurisdictions permit declaration of local emergencies by
      – Mayor
      – Public Health Officials

• There can be political pressure BOTH to declare and NOT to declare a threat/emergency.
Emergency Preparedness Laws

– Public health officials may act without declaring an Emergency/Public Health Threat
  • Public Health officials have broad powers even without a declaration
    – Quarantine
    – Isolation
    – Travel Restrictions
    – Contact Tracing
    – Medical Examinations
    – Vaccinations
Emergency Preparedness Laws

• Some Federal Assistance Requires a Declaration of an Emergency
  – Stafford Act assistance
    • "Emergency" – "any occasion" where assistance is required to decrease or avert "catastrophe"
    • "Major Disaster" – natural catastrophe, or any fire, flood or explosion
      – Triggers special grant programs
      – Note that this definition may preclude "Major Disaster" declaration for some public health threats.
Emergency Preparedness Laws

• Stafford Act: Major Disaster vs. Emergency
  – President must be asked to declare major disaster
  – President may unilaterally declare emergency but only if "primary responsibility rests with the United States because the emergency involves a subject area for which…the United States exercises exclusive of preeminent authority."

  • Federal property
  • Military bases
  • D.C.
  • Tribal land
  • Radiation emergency
  • WMD, bioterror
General Emergency Preparedness Laws

• Some federal assistance is available without an Emergency/Disaster Declaration
  – Strategic National Stockpile Push Packs/ChemPack
  – CDC Lab services
  – Public Health Service support
  – National Disaster Medical System

• State emergency declarations
  – The state may suspend its licensure requirements through an emergency declaration or other provision (e.g., a ruling by the state licensing board).
  – BUT-The applicability of licensure waivers depends on how state disaster declaration laws are written. As well, it should be noted that VHPs outside of official federal or state response efforts (including most volunteers with charitable organizations like the Red Cross) may only be exempted from licensure requirements under a state-initiated suspension of licensure requirements.
Security?

• The Military is NOT usually “here to protect you.”
• Posse Comitatus Act of 1878 bans the Army, Navy, Air Force and Marines from participating in arrests, searches, seizure of evidence and other police-type activity on U.S. soil. 18 USC 1385
  – The Coast Guard and National Guard troops under the control of state governors are excluded from the act; BUT, see Patriot Act “Federal Override” provisions
  – The Insurrection Act allows the president to use U.S. military personnel at the request of a state legislature or governor to suppress insurrections.
  – 18 USC 831 and 10 USC 382 permits DoD personnel to assist the Justice Department in enforcing prohibitions regarding nuclear materials, and biological or chemical weapons of mass destruction, but only in an “emergency situation”.
• Do you keep guns IN or OUT of your hospital during an emergency? How do you enforce your policy? Can you even operate if the security of your personnel/facility are not secured?
Quarantine/Isolation Laws

• **Who Can Authorize Quarantine/Isolation?**
  – Federal: Centers for Disease Control and Prevention
    • International
    • Interstate
    • Intrastate
      – If state/local disease control measures are inadequate to control the spread of disease

• Division of Global Migration and Quarantine
  – Surgeon General, with approval of Secretary of HHS
    – Only for diseases listed in Presidential Executive Order

• Indian Health Service
Quarantine/Isolation Laws

• **What procedures need to be followed?**
  – Significant variation among states.
  – Most experts anticipate voluntary compliance in event of major communicable disease incident.
  – Some due process is needed.

• **For How Long?**
  – Typically, isolation and quarantine are based on disease control principles.
    • Isolation: Until patient is no longer contagious.
    • Quarantine: Until patient is no longer at risk, or no longer contagious.
Quarantine/Isolation Laws

- **Where?**
  - Shelter in place.
  - Work quarantine.
  - Voluntary versus mandatory placement.
    - Mandatory placement requires more due process.
    - Is the facility required to accept the patient?
  - Look for less restrictive alternatives
    - Infection control procedures

- ** Enforcement**
  - Court orders, contempt of court
    - Police
    - Military may be used to enforce quarantine.
Quarantine/Isolation Laws

• Restrictions on Travel
  – Federal: "A person who has a communicable disease in the communicable period...shall not travel from one state or possession to another...without a permit from the health officer of the state, possession, or locality of destination state, if such permit is required under that state's law." 42 C.F.R. § 70.
  – Only the Director of the CDC can issue a permit for travel on interstate conveyances for:
    - Cholera
    - Plague
    - Typhus
    - Yellow fever
    - Smallpox
Quarantine/Isolation Laws

• Travel Limitations:
  – State/Local health authorities can restrict movement into and out of infected areas
    • "Cordon Sanitaire"
  • Evacuations
    – Voluntary
    – Mandatory: how mandatory is mandatory?
      » "A person who refuses to leave an area in which a written order of evacuation has been issued in accordance with a written declaration of emergency or a disaster may be forcibly removed to a place of safety…or may, if this is resisted, be arrested…"
      KRS 39A.100.
Quarantine/Isolation Laws

• Courts have traditionally upheld broad public health powers, but there are limits
  – If quarantine/isolation is used as a means of discrimination, it will be rejected.  
    Jew Ho v. Williamson
  – If the patient objects to quarantine/isolation, there is a right to be heard.  Ex parte Gilbert,
    135 SW 2d 718 (Tex. Crim. 1940).
More Change?

- **Chertoff: Changes Coming to FEMA**  
  *CQ Homeland Security (12/20/05); Yoest, Patrick*

Department of Homeland Security Secretary Michael Chertoff has announced imminent plans for a revamped Federal Emergency Management Agency (FEMA). Chertoff told an audience at George Washington University that DHS would overhaul FEMA, "maybe even radically," .... organizational changes would allow FEMA to respond to catastrophic events more quickly .... DHS spokesman Brian Doyle said that the department's newly confirmed undersecretary for preparedness, George W. Foresman, is heading up efforts on FEMA's reorganization, along with DHS Deputy Secretary Michael P. Jackson. **Chertoff acknowledged that Hurricane Katrina "stretched our existing capabilities beyond the breaking point," and said that he would give employees the tools to properly perform their jobs.**
Thanks

• Thank you for your kind attention!
• Questions?
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