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# Assessing Information and Best Practices for Public Health Emergency Legal Preparedness

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## Introduction

Information is the fourth core element of public health legal preparedness and of legal preparedness for public health emergencies specifically. Clearly, the creation, transmittal, and application of information are vital to all public health endeavors. The critical significance of information grows exponentially as the complexity and scale of public threats increase.

Only a small body of organized information on public health law existed before the 21st century: a series of landmark books published beginning in 1926 by Tobey,<sup>1</sup> Grad (1965),<sup>2</sup> and Wing (1974);<sup>3</sup> model public health laws published as early as 1907;<sup>4</sup> systematic reviews of original research studies published in the 1990s;<sup>5</sup> and a small but growing number of articles published in public health journals and law reviews.

With the new century came new public health law programs and activities at the Centers for Disease Control and Prevention (CDC), in public health professional associations, and in numerous non-profit and academic organizations. Many of these have developed valuable, new information resources for practitioners and policymakers, undergirded by comprehensive new texts that position public health law in the Constitutional framework<sup>6</sup> and that articulate the close relationship between public health law as a discipline and as a tool for practitioners and policymakers.<sup>7</sup>

This paper assesses the status of information resources about public health emergency legal preparedness, identifies gaps in information on law that may detract from the ability of public health practitioners and policymakers – along with their counterparts in other agencies and private-sector organizations – to perform public health emergency roles, and suggests opportunities for improving information resources for public health legal preparedness.

## Assessment

This section is organized around the first two phases of all-hazards emergency preparedness: the pre-event phase where work focuses on maximizing preparedness; and the event phase where efforts are mounted to minimize the health consequences of an actual, unfolding emergency. We address the information needs of users of information across some of the sectors and disciplines that have key roles in public health emergency preparedness and response. These include, for example: local, state, and federal public health officials; their colleagues in emergency management, law enforcement, and other agencies; elected officials; local and state boards of health; health care providers; non-profit emergency response organizations; and legal counsel to all of these. Also important are counterparts in other countries and in international agencies such as the World Health Organization and INTERPOL.

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*Information during the Pre-Event Phase*

Information critical to legal preparedness for the pre-event phase can be sorted into at least four categories, three of which are treated here. A fourth – basic information about the U.S. legal system (e.g., the Constitution, federalism, and the police powers) – is better gained through formal education as encompassed by the “Competencies” core element of public legal preparedness.

**A. EXISTING LEGAL POWERS AND CURRENT DEVELOPMENTS IN PUBLIC HEALTH EMERGENCY LEGAL PREPAREDNESS**

Members of all the sectors, organizations, and disciplines key to effective public health emergency preparedness need to know their relevant legal powers and responsibilities and, importantly, those of their partner organizations. This information is foundational to their exercise of those powers. Further, because the relevant laws evolve in response to legislative changes and court rulings, among other factors, these parties also need ongoing access to information about emerging issues and current developments in public health law.

Although systematic assessments have not been conducted of the availability of this type of information, it is widely accepted that most practitioners and policymakers active in public health emergency preparedness have limited access to it. This limitation, in turn, constrains the sound, coordinated application of legal powers.

Recent innovations in public health legal preparedness are beginning to address this gap. Among these are a guide to communicable disease laws prepared for use by California public health officials, their legal counsel, and the courts;<sup>8</sup> the Community Public Health Emergency Legal Preparedness Initiative co-sponsored by CDC and the American Bar Association;<sup>9</sup> and the 2005 Public Health Law Bench Book for Indiana Courts.<sup>10</sup> Also new are Web-based resources such as the CDC Public Health Emergency Legal Preparedness Clearinghouse (a growing library of training curricula, legal documents, and related publications) and the weekly *CDC Public Health Law News*, the only periodical that reports regularly on developments in public health law.<sup>11</sup>

While these new resources are valuable, they only address a small fraction of the need for information on existing laws and current developments in public health emergency legal preparedness. Most, for example, are oriented largely to public health practitioners and legal counsel. Their reach could usefully expand to serve additional sectors – including those in other

countries and in relevant international bodies – and their content might be expanded accordingly.

**B. BEST PRACTICES GUIDELINES AND BENCHMARKS**

Practitioners in many disciplines increasingly follow “best practices” guidelines promulgated, in many cases, by professional societies and government agencies. This is true, for example, of public health (e.g., the Guide to Community Preventive Services<sup>12</sup> and CDC’s “Interim Pan Flu Guidance”<sup>13</sup>), emergency management (e.g., the National Incident Management System),<sup>14</sup> and law enforcement (e.g., the Council on Accreditation of Law Enforcement Agencies).<sup>15</sup> But few such guidelines exist for the multi-sector domain of legal preparedness for public health legal preparedness. A prominent exception is the “Lessons Learned from the Gulf Coast Hurricanes” report published by the American Health Lawyers Association.<sup>16</sup>

Best practices guidelines typically are based on information derived from practical experience and outcomes that is evaluated through a systematic methodology. At least two kinds of activities can be sources of such information relevant to legal preparedness for public health emergencies. The first is public health emergency exercises conducted by state, federal, and other agencies. Although some such exercises have generated valuable findings about laws and legal issues relevant to the responses mounted by all the involved sectors, the value of this information as an experiential basis for public health emergency legal preparedness is largely untapped. The second source should be a sustained program of applied research on the effectiveness of legal authorities, competencies, and methods of coordination, with findings synthesized, and ultimately translated into practitioner-relevant guidelines and disseminated to users throughout the critical sectors and disciplines.

Legal preparedness best practices should meet at least two standards. First, they should be demonstrated to result in improved protection of the public’s health. Second, they need to meet accepted legal standards of practice. For example, they should be consistent with federal case law and with the Tenth Amendment’s reservation of the police powers to the states. They also should conform, to the greatest extent possible, to existing state public health laws and systems. For example, in California, local health departments must be headed by physicians who hold relatively comprehensive and purposefully general legal powers while, in contrast, New Mexico has a more centralized public health system in which the state Department of Health is responsible for nearly all local public health functions.

Benchmarks describe a targeted level of performance and are used to steer developmental efforts. Benchmarks, in this sense, have not been widely established to guide progress toward what could be termed full, multi-sector, cross-jurisdiction legal preparedness for public health emergencies. While elements of legal preparedness benchmarks have appeared in CDC's emergency preparedness grant guidance, they address only a small part of full legal preparedness.

#### C. INFORMATION FOR ASSESSING PUBLIC HEALTH EMERGENCY LEGAL PREPAREDNESS

A critical type of pre-event information is diagnostic information about the adequacy of legal preparedness for public health emergencies. Ideally, such information can be gathered operationally to assess coordinated implementation of existing legal preparedness on a regular basis for a given state, tribe, locality, or territory, and should reflect all relevant sectors and disciplines. Development of a standard template for evaluation of legal preparedness during exercises and drills could assist in identifying gaps, as well as strengths, and provide a basis for needed corrective action by law-makers or practitioners.

A number of useful tools have been developed to aid such assessments. Examples include the 2001 draft Model State Emergency Health Powers Act (Draft Model Act)<sup>17</sup> – commissioned by CDC specifically as an assessment tool for states' voluntary use – the Turning Point Model State Public Health Act,<sup>18</sup> checklists prepared by the Center for Law and the Public's Health,<sup>19</sup> and the AHLA's "Emergency Preparedness, Response, and Recovery Checklist: Beyond the Emergency Management Plan."<sup>20</sup> The Social Distancing Law Project, co-sponsored by the Association of State and Territorial Health Officials (ASTHO) and CDC, is a new assessment tool currently in development.

While these and other tools have been used widely (e.g., an estimated 38 states and the District of Columbia have enacted provisions of the Draft Model Act),<sup>21</sup> they do not address the full need. Importantly, they do not speak directly to the legal preparedness of tribes, counties, cities, or territories. Also, each focuses largely on a single sector; none addresses comprehensive legal preparedness. Further, none addresses the international dimension of legal preparedness.

#### *Information during the Event Phase*

All jurisdictions and sectors should achieve full legal preparedness for public health emergencies before emergencies occur and attention turns to response and recovery. Two types of legal information resources, however, are essential during the event phase: ready-to-use legal tools, and a unified system to communi-

cate legal situational awareness. While work to develop these types of information – and systems to support them – takes place during the pre-event phase, they make up part of the critical response armamentarium for the event phase.

#### A. READY-TO-USE LEGAL INSTRUMENTS

Officials in all three branches of government need to have legal instruments at hand for immediate use during public health emergencies. These include, for example, draft emergency declarations, orders for issuance by health and other officials (e.g., for student dismissal, *cordon sanitaire*, and mass dispensation of prophylactic medicines), requests for court orders, activation of mutual aid agreements, and procedures for legislatures' consideration of executive requests to extend an emergency declaration. All these tools – plus copies of relevant legal memoranda, case law, statutes, rules and regulations, and other, related information – could be stored in multiple media (e.g., as paper copies, on line, and on flashdrives) for ready access during the event phase.

Many states and local jurisdictions have prepared such instruments but it is essential that all have them and keep them updated. In that vein, a state health commissioner recently called for creation of "a compilation of resources" including "a selection of model public health orders for state and local jurisdictions" and noted that "[o]n a practical level, whether it is a major disaster, or a serious pertussis outbreak in a community requiring restrictions on public gatherings or possibly closure of schools...these are the tools we need on a state and local level" for use by health officials and also as references for courts.<sup>22</sup> These instruments, moreover, should encompass response actions across all the concerned agencies and jurisdictions, local, state, tribal, federal, and, where relevant, international.

#### B. INFORMATION FOR LEGAL SITUATIONAL AWARENESS

Maintaining situational awareness of unfolding events is vital to successful response to public health emergencies. The nation's public health, emergency response, and homeland security agencies, among others, have made this a major focus of their efforts to strengthen response capability.

Equally important is situational awareness of legal issues and developments that may surface rapidly in the event phase. An example was issuance of executive orders by the governors of Wisconsin and Illinois, and by the President, to restrict domestic and international commerce in designated pets during the 2003 monkeypox outbreak. Also in 2003, the President's Executive Order 13295 added SARS to the federal

government's list of "quarantinable communicable diseases."<sup>23</sup> Because a court ruling denying a medically justified quarantine order in one city could have serious implications for the success of efforts to slow the spread of a pandemic, to give one example, it is critical that officials and their legal counsel in many agencies, the courts, and affected private sector entities learn about such legal developments rapidly.

A useful beginning has been made in this respect. During the monkeypox outbreak, the Public Health Law Association and the CDC Public Health Law Program co-sponsored teleconferences in which public health officials and legal counsel from across the U.S. (joined by Canadian counterparts) exchanged information on relevant legal issues. The CDC Public Health Law Program brings such issues and developments to the attention of the 6,500 multi-sector subscribers to its weekly *CDC Public Health Law News* and can communicate electronically with the legal counsel to all state (and selected local) public health agencies. The Association of State and Territorial Health Officials, the National Association of County and City Health Officials, and a number of professional societies and academically based programs also have the ability to communicate such situational awareness information widely.

While these steps and resources help begin to address information needs, further systems development should meet the public health law-related situational awareness needs of all the agencies and sectors that have roles in responding to all-hazards public health emergencies.

## Summary

Against the background of recent expansion in information resources on public health law in general and on public health emergency legal preparedness in particular, it is clear that the nation has significant work yet to do to achieve the goal of full legal preparedness for public health emergencies. Examples of key opportunities include:

- Conduct of a systematic baseline assessment of the law-related information required by the many public- and private-sector actors who are central to effective public health emergency preparedness and response;
- Implementation of a sustained program of applied research to evaluate the effectiveness of public health emergency laws and to assess important legal and ethical issues – e.g., how best to protect civil liberties during the application of law-based emergency response and how to

develop guidelines for ethical allocation of scarce vaccines and medical care.

- Mining of the legal "lessons learned" from public health emergency exercises for data to use in developing benchmarks and best practices as well as in developing laws and related information, training materials, and coordination mechanisms;
- Development of benchmarks and best practices for legal preparedness as a backbone on which the operational elements of legal preparedness can be shaped and evaluated. Benchmarks and best practices should be articulated within larger frameworks – such as the National Response Plan, the National Incident Management System, federal preparedness programs, and the comprehensive plans of states, tribes, localities, and territories – and should be made available to all concerned practitioners and policy makers.

There is a clear and compelling need for improved and more complete information about public health emergency legal preparedness in the pre-event and event phases. Three guiding principles for work toward that goal are that its scope should encompass all the relevant jurisdictions, sectors, and disciplines; that it must be aligned with the larger, accepted framework of public health emergency response; and that all the information resources created should be continually tested, evaluated and updated as needed. Adhering to these principles will raise legal preparedness for public health emergencies to a much-elevated level of readiness and effectiveness.

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21. See *supra* note 19.
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