Question Presented

May a public practitioner or government entity operating a Point of Distribution (POD) in Arizona be held liable for failure to provide a specific referral for medical services in conjunction with the dispensing of approved medications to an individual during an emergency situation or formally declared emergency?

Brief Answer

During a declared emergency, a licensed health care provider or public entity operating the POD may not be liable for failure to provide a specific referral under state emergency laws. However, if distribution occurs in the absence of a formal declaration of emergency, the provider or local entity overseeing the POD may be liable if additional protections do not apply.

Analysis

This memorandum supplements an earlier document produced by the Network entitled Legal Issues Relevant to Private Entities Serving as Closed Points of Dispensing (Closed PODs) in Emergencies (which can be found in the resource section of the site at http://www.networkforphl.org/network-resource). As noted in this prior Memo, a POD is operated by a government, business or community organization that partners with a local health agency to dispense medication and medical supplies to a portion of the population during an emergency. Based on Arizona state law, this memo addresses potential liability for a failure to refer by public PODs that provide resources to the public during public health emergencies.

Licensed Health Care Provider Liability for Failure to Refer

In general, a health care provider has a duty to “exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider” in the same situation. Any health care provider who falls below the standard of care may be subject to liability absent immunities or other legal protections.

Among other responsibilities, a physician or other medical provider has a duty to refer a patient to another health care provider when the physician knows or should know that he or she does not possess the skill or facilities to treat the
patient's ailment. A health care provider may be liable for failing or delaying to make a referral or by referring the patient to a specialist who the provider knows or should know is unqualified.

This liability for a failure to refer may arise for a licensed health care provider working in any setting, including through a public POD. Note, however, that the duty to refer does not extend to individuals who are not licensed health care providers. An individual who provides services to a POD as either an employee or volunteer will likely not be liable for a failure to refer where a reasonable person would have acted similarly. In addition, volunteers who provide services without compensation, regardless of whether or not they are licensed health care providers, may be protected from liability under Arizona's Volunteer Protections Act. Therefore, where a volunteer physician distributes medications or medical supplies through a POD, they may be protected from liability so long as the failure to act was not willful, wanton or grossly negligent.

**Individual and Entity Protections during a Declared Emergency**

During a declared state of emergency in Arizona, entities and individuals distributing medications or medical supplies may be entitled to liability protections. Under Arizona emergency laws, an entity or an individual may be protected for services provided during a declared emergency that cause injuries or harms provided their actions were not the result of willful misconduct, gross negligence or bad faith.

Federal liability protections may also apply to entities and individuals distributing "covered countermeasures" (like medicines or vaccines) during a federally declared emergency via the Public Readiness and Emergency Preparedness (PREP) Act. As a result, a public agency may be protected from liability claims for the failure to provide a specific referral for medical services in conjunction with the dispensing of approved medication to an individual during a federal- or state-declared emergency.

**Conclusion**

While a public entity or licensed health care provider may be liable for a failure to refer through the operation of an open POD when a declaration of emergency is not in force, a public entity or provider is not likely liable for failing to provide a referral during a declared emergency due to specific liability protections.

**SUPPORTERS**

The Network for Public Health Law is a national initiative of the Robert Wood Johnson Foundation with direction and technical assistance by the Public Health Law Center at William Mitchell College of Law.

This document was developed by Jalayne J. Arias, J.D., deputy director, Network for Public Health Law – Western Region at the Sandra Day O’Connor College of Law, Arizona State University, with assistance from Andrew Sorensen, J.D. candidate and legal researcher, and reviewed by James G. Hodge, Jr., J.D., L.L.M., director, Network for Public Health Law – Western Region. The Network for Public Health Law provides information and technical assistance on issues related to public health. The legal information and assistance provided in this document does not constitute legal advice or legal representation. For legal advice, please consult specific legal counsel.

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1 A.R.S. § 12-563.
American Medical Association Code of Medical Ethics, Opinion 8.132, Referral of Patients: Disclosure of Limitations; Steven E. Pegalis, Duty to Refer to a Specialist, Physician and Surgeon Liability, American Law of Medical Malpractice 3d § 3:13 (2010); Paul Coltoff, et al., Failure to Consult or Refer; Negligent Referral, 70 C.J.S. Physicians and Surgeons § 97 (2011).


Id.

A.R.S. § 26-314(A), (C); A.R.S. § 36-790.

42 U.S.C. 247d-6d