



Charitable immunity statutes shield



surgeon volunteers



by Howard B. Shapiro, PhD,
and
Andrew L. Warshaw, MD, FACS

The Giving Back Program of the American College of Surgeons seeks to stimulate awareness about and opportunities for surgeons to voluntarily contribute their services both domestically and abroad. Supported by the ACS Board of Governors' (B/G) Committee on Socioeconomic Issues and the Institute for Health Policy of the Massachusetts General Hospital in Boston, MA, the effort both catalogues existing charitable programs and facilitates the development of new organizations to deliver surgical care to underserved populations.

Through this project, we have made a number of interesting discoveries about surgeons and the factors that drive them to or discourage them from volunteering their time and skills. One deterrent to volunteerism appears to be the possibility of being sued.

This article summarizes why surgeons so often do contribute their skills without the expectation of financial gain. It also reviews some of the ways the Committee on Socioeconomic Issues plans to stimulate interest in volunteerism and shows that concerns about liability lawsuits should be minimal due to the existence of state and federal statutes designed to protect volunteers.

Why surgeons volunteer

As part of the Giving Back Program, we have convened focus groups of the Fellows during the last two Annual Clinical Congresses. These discus-

sions have unearthed a wealth of charitable projects to which surgeons provide their skills in clinical care or surgical education. Some surgeons pursue these activities on a regular and continuing basis, some provide basic surgical care, and some focus on assisting people with specific problems such as children with pediatric anomalies or battered women who need facial reconstruction. These surgeon volunteers may receive support from church groups, community organizations, surgical specialty societies, or motivated, public-spirited individuals such as retired surgeons who want an opportunity to continue to be useful. A linking theme across the spectrum of participants has been the satisfaction and fulfillment in being able to give a part of themselves back to society.

Encouraging volunteerism

More than 600 Fellows responded to an invitation in the January 2002 issue of the *Bulletin* to participate in a more comprehensive study of volunteerism by surgeons and to express their interest in becoming involved. The Board of Governors is considering a proposal that the College recognize outstanding examples of "giving back" by surgeons with an award, which would be presented annually at the Clinical Congress, perhaps in conjunction with an illustrative presentation by the recipient individual or group.

The Giving Back Program will eventually include a Web site that will encompass a clearinghouse that can link potential participants with opportunities. The Web site also will identify other relevant medical and surgical organizations and

Opposite page: A few scenes from *Bulletin* articles by ACS Fellows who have done volunteer work.

Left to right, top row: Volunteers from the African Medical Education and Research Foundation, as reported by Thomas D. Rees, MD, FACS, and colleagues (*ACS Bulletin*, (79[10])); a Kyrgyzstan hospital scene, as described by Bernard J. Leininger, MD, FACS (82[9]); and Harold P. Adolph, MD, FACS, in surgery in Galmi, Niger, West Africa (82[6]).

Second row: William R. Greene, MD, FACS, in surgery at Hôpital Lumière in Bonne Fin, Haiti (86[8]); Glenn M. Gordon, MD, FACS (center), with Dr. Swai and Dr. Mariwa in Dar es Salaam, Tanzania (74[3]); and Sylvia Campbell, MD, FACS, with "Baby Wadlin" Bernoit, in Mombin Crochu, Haiti (84[10]).

Third row: H. C. John Chiang, MD, FACS (back row, center) with fellow volunteers preparing to supply post-earthquake aid in Gih-gih, Taiwan (85[1]); Wilma Conger Perrill, MD, and Charles V. Perrill, MSc, MD, FACS, en route to India in 1940 (82[10]); and Donald C. Mullen, MD, MDiv, FACS, and patient in Fangok, Sudan (84[9,10]).

Fourth row: Glenn W. Geelhoed, MD, FACS, during one of his many trips to Africa (83[9]); Robert K. Finley, Jr., MD, FACS, in surgery in Jamaica (81[6,7]); and Walter J. Kahn, MD, FACS, with a patient in front of the ORBIS aircraft (87[2]).

Dr. Shapiro is a consultant for *Volunteers in Health Care*, Bethesda, MD.



suppliers and provide a “tool kit” for building a program. The tool kit—currently being developed based on interviews being conducted with experienced volunteer organizations, such as Volunteers in Health Care (VIH)—will discuss the necessary elements and resources for success. It also will suggest the means for gathering the necessary components and possible roadblocks.

Liability as a roadblock

Liability exposure is usually one of the first concerns raised by physicians who are interested in volunteering to care for the uninsured. However, few liability claims actually arise from these charitable efforts, and surgeons who volunteer in free clinics or as part of other local initiatives have some liability protection under state laws and a federal statute. These laws are summarized in a VIH publication entitled *Charitable Immunity Manual: A Review of U.S. Charitable Immunity Legislation for Volunteer Health Care Providers*. The manual, which includes a state-by-state table summarizing statutory provisions, may ease the concerns of many surgeons who want to volunteer and provides guidance to those seeking passage of similar laws where there are none—notably in New York, Massachusetts, and California.

VIH is a not-for-profit, national resource center providing one-on-one technical assistance, how-to manuals, software programs, and seed funding to promote organized volunteer efforts by physicians and other professionals to care for uninsured and underserved patients. With support from the Robert Wood Johnson Foundation, the manual and other VIH products and services are provided at no charge.

Approaches to charitable immunity

In contrast to “Good Samaritan” laws that protect health care professionals responding to an emergent situation, charitable immunity laws in 42 states and the District of Columbia apply to routine care provided by clinician volunteers. According to the manual’s author, Paul Hattis, MD, JD, MPH, most states choose one of two routes to provide protection. Some states change the negligence standard of care; that is, they raise the standard from simple negligence to gross negligence. Often called a “willful or wanton” or “reckless” standard, this approach makes it more difficult to

prove negligence. It also is the approach used in the federal statute.

Other states extend to volunteer clinicians the same protections they grant to government employees. Under this model, referred to as the “state tort claims act,” the state establishes a legal defense fund to cover monetary damages and legal defense costs. Often these statutes cap the total compensation that may be paid for claims. Certain conditions may be specified, such as the setting in which the care is delivered or the existence of a formal agreement between the clinician provider and the state.

The State of Florida, for example, appears to have found a successful formula through its Volunteer Health Care Provider Program. Under a law enacted in 1992, physicians enter into an agreement with the state to care for uninsured patients and are granted the states’ sovereign immunity protection. Writing in the *Archives of Internal Medicine* (October 18, 2001), a Florida Department of Health official indicates that 18,000 volunteer practitioners provided services valued at \$66 million in fiscal year 1999-2000.

Neither of the two major approaches completely limits a patient’s right to initiate a liability action against a volunteer nor ensures that a lawsuit will be easily dismissed. But changing the negligence standard raises the bar for plaintiffs, and indemnity under a state tort claims act protects against financial loss. Several states combine aspects of both models.

Other approaches are summarized in the VIH
continued on page 35

Dr. Warshaw is Chair, ACS Board of Governors’ Committee on Socioeconomic Issues, and surgeon-in-chief and chair, department of surgery, Massachusetts General Hospital, Boston, MA.



CHARITABLE IMMUNITY, from page 10

manual as well. For example, rather than enacting legislation that extends immunity to volunteer clinicians, a few states provide a mechanism for subsidizing the purchase of malpractice insurance. Twelve states have statutory provisions designed to encourage retired physicians to volunteer.

Federal legislation


Reacting to an environment in which individuals were reluctant to volunteer for fear of liability suits, Congress passed the Volunteer Protection Act (VPA) of 1997. According to the VIH manual, a volunteer clinician acting within his or her scope of duties in a not-for-profit organization is protected from liability for simple negligence. (There are exceptions for misconduct related to crimes of violence, sexual offenses, civil rights violations, and other offenses.) Even when the volunteer is held liable for gross negligence, the VPA limits the award of punitive damages to those cases in which there is clear and convincing evidence of willful or criminal misconduct or conscious, flagrant indifference to the rights or safety of the individual harmed. The VPA also limits awards for noneconomic damages (pain and suffering) to the proportion of harm caused by the volunteer.

The VPA preempts state laws that are inconsistent with the federal statute but does not preempt any state law that provides additional protection.

Like most state statutes, it does not limit the liability of the not-for-profit organization through which the volunteer provides services. Also, like state laws, the VPA does not limit a plaintiff's right to bring suit. Critics say the law's weakness is that plaintiffs will simply claim gross negligence. (A claim that might have tested the VPA—*Momans, et al vs. St. Johns Northwestern Military Academy, Inc., et al*—did not move forward in court.) However, in those states that have weaker or nonexistent protections, the federal law affords at least some measure of protection to the volunteer clinician.

Conclusion

The VIH manual on charitable immunity laws is available at no charge at <http://www.volunteersinhealthcare.org/Manuals/charit.imm.man.pdf>. Printed copies may be requested by calling 1-877/844-8442 (toll-free). As the manual demonstrates, a variety of liability protections are available to surgeons who want to volunteer their services. Hence, surgeons should not allow fear of lawsuits to stand in the way of giving back to society.

The B/G Committee on Socioeconomic Issues intends to continue to develop and suggest new ways to stimulate interest in volunteerism among Fellows of the College. 

FELLOWSHIP PROGRAMS, from page 15

Lure, NC, was one of the first surgeons to participate in the RWJ Fellowship in 1980 (see photo, p. 15). While he enjoyed the concentrated orientation to the way things work in Washington, he found he missed patient care tremendously. For him, the Fellowship experience confirmed that he had made the right decision devoting his energies to patient care. As Dr. Hoopes put it, he “realized there were no greener pastures.”

Dr. Hoopes left the experience somewhat disillusioned about the dealmaking and narrow agendas offered by many policymakers and their staff members. Nonetheless, he notes that there is a need for surgeons to help expand those agendas to reflect what is best for patients and practice.

How to apply

Applications to the White House Fellows program must be postmarked by February 1 each year and are available on the following Web site: <http://www.whitehouse.gov/fellows/>.

For the RWJ Fellowships, applications are due at the Institute of Medicine by November 15 of each year and must include references, a description of a proposed project, and institutional endorsements. Those individuals who are accepted begin Fellowships the following fall. A complete program guide and description of the program are available at www.nas.edu/rwj. For more information, contact Barbara Cebuhar at bcebuhar@facs.org. 