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MEMORANDUM

To: Commissioners, National Conference of Commissioners on Uniform State Laws

From: Francine A. Hochberg, Associate Litigation Counsel, Center for Constitutional Litigation P.C.,
Counsel to Association of Trial Lawyers of America

Re: Comments on the Draft Uniform Emergency Volunteer Healthcare Services Act

Date: July 7, 2006

The Association of Trial Lawyers of America appreciates the goals behind the Uniform Emergency Volunteer Healthcare Services Act (“the Act”), but believes that the broad protections from civil liability and other disciplinary sanctions conferred by the Act on volunteer healthcare practitioners and source, coordinating, and host entities are unnecessary and, in many instances, unconstitutional. Encouraging healthcare practitioners to volunteer is a laudable goal, but doing so at the expense of civil and constitutional rights is inadvisable. Moreover, ATLA asserts that the Act’s protections are overly broad, especially considering that volunteer healthcare practitioners rendering healthcare services under the Act as volunteers for a nonprofit or government entity would be protected by the Volunteer Protection Act of 1997, 42 U.S.C. § 14503, and other statutory and policy regimes.

ATLA urges the Commissioners to reconsider the immunity provisions contained in Section 7 and either remove them or amend them to ensure that individuals who are injured by volunteer healthcare practitioners’ negligence have some form of substantial redress. ATLA also urges the Commissioners to refine the definition of healthcare services, 13(b), so that it does not include the provision of medical devices or products, effectively abrogating express and implied warranties and product liability causes of action. Such revisions will improve the Act’s current draft which provides extensive protections to volunteer healthcare practitioners and source, coordinating, and host entities, while giving none to patients.¹

¹ ATLA also urges the Commissioners to include language requiring that a licensed volunteer healthcare practitioner must be “in good standing” in each and every jurisdiction in which she is licensed. *See, e.g.*, Natalie White, *Hospital Liable for \$4.1 Million – Defendant Failed to Tell Future Employer of Doctor’s Drug Problems* (July 3, 2006) at <http://www.lawyersusaonline.com/subscriber/archives.cfm?page=usa/06/7030678.html> (jury found a New Orleans hospital and two doctors liable for \$4.1 million to Washington state hospital, for failing to tell the Washington hospital about the drug problems of a doctor the New Orleans hospital had fired).

The Act

Section 7 provides immunity from civil liability for volunteer healthcare practitioners who are negligent and from vicarious liability for entities which host, coordinate, or deploy such practitioners. The Act, however, offers no protections to individuals who receive health services from volunteer healthcare practitioners, and even fails to provide any alternative remedies for individuals who are injured by a volunteer healthcare practitioner's negligence, in contrast to the limited remedies available to individuals who are treated by volunteer healthcare practitioners deployed under MRCs or EMAC.² Section 7's broad grant of immunity to volunteer healthcare practitioners and to source, host, and coordinating entities, conflicts with protections afforded to injured individuals by many state constitutions, especially right to remedy and open courts provisions, among others.³

Section 7's immunity provisions are premised largely on the false assumption that because "[i]n some jurisdictions, volunteer health personnel were not adequately protected against exposure to tort claims[,] healthcare practitioners were – or are – less likely to volunteer in a declared emergency."⁴ (Prefatory Note at 1.) The Act, in its current draft, however, does not provide any empirical evidence to justify Section 7's broad immunity for volunteer health care professionals and source, coordinating, or host entities, or to substantiate its claims that protections from liability are necessary to encourage healthcare practitioners to volunteer. Likely, this is because individuals volunteer despite potential liability⁵ and much-feared tort claims generally are not – and have not been – brought against volunteer healthcare practitioners. As one commentator using U.S. government data concluded, "no factual basis [exists] for the commonly asserted belief that malpractice suits are likely to stem from rendering emergency care at the scene of accidents."⁶ If claims resulting from medical care during accidents are rare,

² The EMAC model legislation Article VI – Liability provides: "Officers or employees of a party state rendering aid in another state pursuant to this compact shall be considered agents of the requesting state for tort liability and immunity purposes." Accordingly, an injured individual would be able to bring a claim under the requesting state's tort claims act to obtain a remedy for her injury. Many state MRCs, such as Maryland's, provide that any volunteer healthcare practitioner registered with the state is considered a state employee or agent for purposes of the state tort claims act while deployed.

Other alternative remedies include one adopted by Washington State, in which a state malpractice fund has been established for individuals who receive care from doctors who volunteer in low income clinics and are injured. To date, no claims have been filed. The fund has been operating for 15 years.

³ The state constitutions of forty states either expressly or impliedly provide a right of access to the courts to obtain a remedy for injury to either person or property. This is one of the oldest rights and one which has been adopted by the Supreme Court: "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 1 Cranch 137, 147 (1803) (citing 3 Blackstone Commentaries 109).

⁴ In fact, evidence contradicts this presumption. A recent report of the National Nonprofit Risk Management Center determined that fear of liability does not dissuade large groups of people from volunteering. See Nonprofit Risk Management Center, *State Liability Laws for Charitable Organizations and Volunteers* (Aug. 2005).

⁵ See *infra* n. 11, describing surplus of volunteers after the 2005 hurricane season.

⁶ Nathan Hershey, *Looking at Accountability 40 Years after Darling*, 14 *Annals of Health Law* 437, 443 n. 19 (2005) (citing the U.S. Dep't of Health, Educ., & Welfare, Report of the Sec'y's Commission on Medical Malpractice (1973)); see also 5/21/05 Pulse 34 available at 2005 WLNR 8250152 ("Although Good Samaritan acts may be common, being sued as a result of them is thankfully rarer than a first-class upgrade. The MDU is not aware of any UK cases of doctors being sued after acting as a Good Samaritan.")

if not completely non-existent, so too are claims resulting from volunteer medical care provided during a disaster or emergency situation.⁷ Tort claims are rare in natural disaster and other such situations precisely because of their emergency nature, with the exception of certain human-caused disasters.⁸

The Act assumes that healthcare practitioners will not volunteer without external incentives but, again, this is not true and is not borne out by evidence or experience: healthcare professionals *do* volunteer without external incentives. For example, in the aftermath of the Gulf Coast Hurricanes in 2005 “thousands of healthcare professionals immediately volunteered to provide assistance.” (Prefatory Note at 1.) The volunteer response was large and immediate, without any external incentives.⁹

Section 7’s immunity provisions also are premised on the presumptions that healthcare practitioners will not be covered by insurance policies, either individual or carried by employers or entities deploying them, or will not otherwise be protected from liability, when providing volunteer healthcare services. Section 7’s protections, however, are unnecessary because these presumptions are false. During the Gulf Coast hurricane recovery efforts, many volunteers were covered under their employers’ liability insurance policies or their own,¹⁰ and many more volunteered through state MRC systems, through which they were covered under State Tort Claims Acts, or through agencies such that they were covered under the Federal Tort Claims Act.¹¹ Volunteers of nonprofit organizations, such as the Red Cross, or governmental entities were protected from liability for conduct within the scope of their responsibilities by the federal Volunteer Protection Act of 1997, 42 U.S.C. § 14503(a). Section 7’s immunity provisions, thus, are unnecessary because if the Act is otherwise enacted, almost all volunteer healthcare

⁷ See *supra* n.2, describing Washington State experience.

⁸ Robert S. Peck, *The Victims Compensation Fund: Born From A Unique Confluence of Events Not Likely To Be Duplicated*, 53 DePaul L. Rev. 209, 215, 217-25 (2003) (discussing initial suits filed by an insurer seeking to limit exposure for losses and by individuals seeking damages from Osama bin Laden and other terrorists, and the eventual creation of the Victim Compensations’ Fund which provided *full* compensation to victims and survivors).

⁹ As of June 22, 2006, the United States Department of Health and Human Services reported that “[m]ore than 33,000 health care professionals and relief personnel have registered with the Department of Health and Human Services for possible deployment in affected areas.” <https://volunteer.ccrf.hhs.gov/> HHS is no longer accepting applications from volunteer healthcare practitioners.

William Causey, Assistant General Counsel to the Red Cross acknowledged that the Red Cross had thousands of volunteers and even more expressed interest. “From mental health counselors, nurses, policemen and firefighters, to truck drivers and retirees, volunteers are stepping up to the plate in record numbers, donating their time and professional skills to help their fellow Americans.” American Red Cross Press Release, Business Wire (Sept. 2, 2005).

¹⁰ See generally *American Physicians to Waive Liability Premiums for Katrina Volunteers*, Ins. J. (Sept. 13, 2005), available at <http://www.insurancejournal.com/news/national/2005/09/13/59440.htm> (American Physicians Assurance Corp. waived liability insurance premiums for the company’s insured physicians who volunteer with the relief effort for victims of Hurricane Katrina; the company will provide 30 days of free medical professional liability coverage between August 29 and December 31, 2005 to physician volunteers).

¹¹ Volunteers who register to volunteer through the U.S Department of Health and Human Services (HHS) will be nonpaid temporary federal employees and be eligible for coverage under the Federal Tort Claims Act for liability coverage and workmen’s compensation insurance when functioning as HHS employees. Although there will not be any salary, travel and per diem will be paid.

practitioners who provide healthcare services either will be covered by insurance policies or will receive wide protections from liability under other legal regimes.

If the Commissioners believe that the Act should explicitly address liability, the Act could adopt a system similar to certain MRC systems or the EMAC, which protect volunteer healthcare practitioners who are without professional liability insurance by considering them to be state employees during their volunteer activities, while providing some form of redress through state tort claims processes to individuals who are injured by volunteer healthcare practitioners' negligent acts.¹² This would be preferable to the Act's current draft which provides extensive protections to volunteer healthcare practitioners while giving *none* to patients.

Limits on damages and the complete elimination of tort causes of action – such as Section 7's bar on civil damages suits – are highly disfavored and have been held unconstitutional by many state courts.¹³ In invalidating legislation that limited or fully deprived an injured plaintiff of a remedy for her injury, courts have emphasized the importance of providing a full and adequate remedy to injured individuals: “[W]here a right of access to the courts for redress for a particular injury has been provided . . . , the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries”¹⁴

¹² The Act, also, could place some responsibility on insurance carriers to extend coverage during declared emergencies to those volunteer healthcare practitioners who otherwise would be uninsured for their volunteer activities. This would ensure that volunteer healthcare practitioners are insured while providing volunteer services, and that individuals who are injured by volunteer healthcare practitioners' negligence have available remedies. *See supra* n. 2.

¹³ Legislative limits on damages awards have been held unconstitutional under separation of powers, equal protection, right to jury trial, and special legislation provisions, as well as open courts and right to remedy provisions. *See, e.g., Ferndon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005) (holding statutory cap on noneconomic damages unconstitutional violation of equal protection); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999) (omnibus tort reform statute that, inter alia, included caps on noneconomic damages and punitive damages and abrogation of the collateral source rule held unconstitutional as violation of separation of powers and single-subject rule); *Lakin v. Senco Prods., Inc.*, 329 Or. 62 (1999) (holding that Oregon statute that capped non-economic damages was an unconstitutional violation of the right to trial by jury because the determination of noneconomic damages available in a personal injury action, is a question of fact, to be assessed by the jury and with which the legislature may not interfere in civil cases in which the right to a jury trial was customary at common law); *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (Ill. 1997) (holding that \$500,000 cap on non-economic damages constituted impermissible special legislation and declaring that a statutory limitation on damages was unconstitutional because it interfered with the court's inherent power to remit damages); *Brannigan v. Usitalo*, 587 A.2d 1232, 1237 (N.H. 1991) (\$875,000 limitation on noneconomic damages recoverable in actions for personal injury violates equal protection); *Waldon v. Housing Auth.*, 854 S.W.2d 777, 778 (Ky. Ct. App. 1991) (holding immunity from damages when injury results from intervening criminal act to be violation of constitutional guarantee of right to a remedy); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991) (declaring § 6-5-544(b), Ala. Code 1975, unconstitutional, holding that the cap violated Article I, section 11 of the Alabama Constitution, “That the right of trial by jury shall remain inviolate.”); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989) (declaring cap on noneconomic damages unconstitutional).

¹⁴ *Smith v. Department of Ins.*, 507 So.2d 1080, 1088 (Fla. 1987) (holding limit on noneconomic damages unconstitutional violation of Art. I § 21 of Florida Constitution guaranteeing open courts).

In jurisdictions in which limits on damages have been upheld, “the fact that alternative remedies were provided weighed heavily in the decisions.”¹⁵ As the Utah Supreme Court stated, if a “Legislature were to abolish *all* causes of action for injuries to one’s person or property . . . and provide *no substitute equivalent remedy*, we have little doubt that that would violate” the constitution.¹⁶ Legislation that fails to “provide[] an injured person an effective and reasonable *alternative remedy*[.]” is unacceptable and presumptively unconstitutional.¹⁷

The proposed Act completely immunizes volunteer healthcare practitioners, and source, host, and coordinating entities, from liability for negligence, and abrogates entirely an injured individual’s right to seek redress for her injuries. The Act’s limits on civil liability far exceed those contained in state legislation which has been invalidated, never mind legislation which has been upheld, such as that containing limits on damages or providing alternate remedies through either state tort claims acts or patient compensation funds.¹⁸ These cases – and the legislation they address – uniformly stress the constitutional necessity of providing adequate, if not full, compensation to injured parties. The proposed Act ignores this: it forecloses any redress and does so arbitrarily, without supplying evidence or a reasonable rationale to justify why such a severe measure is needed.

We urge the Commissioners to delete Section 7’s immunity provisions. If the Commissioners will not delete Sections 7(a) and 7(b), we urge the Commissioners to provide an alternate remedy which conforms with constitutional standards and which, at a minimum, guarantees adequate compensation to individuals who are injured while being treated by or receiving medical care or other healthcare services from volunteer healthcare practitioners. A provision similar to that contained in the model EMAC statute or one which parallels Section 8 of the Act could be inserted. The substitute 7(a) would allow a person to be liable for civil damages provided that they have professional liability insurance and that their insurance covers their volunteer activities; if it does not they would be treated as an employee of the requesting

¹⁵ *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1998).

¹⁶ *Berry ex. rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 679 (Utah 1985) (emphasis added).

¹⁷ *Tindley v. Salt Lake City School District*, 116 P.3d 295, 299, 300 (Utah 2005) (upholding the constitutionality of Government Immunity Act which limited recoverable damages and reaffirming that “the open courts clause provides citizens of Utah the ‘right to a remedy for an injury’”). Historically, many states construed their open courts and right to remedy provisions to strictly limit the legislature’s authority to abrogate a remedy entirely. *See, e.g., Mattson v. City of Astoria*, 39 Or. 577, 65 P. 1066, 1067 (Or. 1901) (“While the legislature may change the remedy or the form of procedure, attach conditions precedent to its exercise, and perhaps abolish old and substitute new remedies . . . it *cannot deny* a remedy *entirely*.”) (emphasis added, citations omitted); *see also Rhyne v. K-Mart Corp.*, 358 N.C. 160, 177 (N.C. 2004) (affirming constitutionality of limits on punitive damages but stating that because compensatory damages constitute property restricted “the recovery of actual or compensatory damages, it would have been unconstitutional”).

¹⁸ Just as complete bars to civil liability are disfavored with respect to personal injury suits against individual tortfeasors, so too are such bars disfavored with respect to the tortfeasor’s employer or host entity, unless a limited or substitute remedy is provided. *See, e.g., Sontay v. Avis Rent-A-Car Systems, Inc.*, 872 So.2d 316 (Fla. App. Ct. 2004) (holding that statute limiting vicarious liability by capping damages is not unconstitutional and does not constitute a denial of access to courts because it does not preclude the injured party from obtaining a remedy from the tortfeasor or a reduced or limited remedy). “[T]o insure due process, the legislature is *required* to provide an *adequate, substitute remedy* when a common-law remedy, . . . against a hospital [or other entity] is modified or abolished.” *Lemuz By & Through Lemuz v. Fieser*, 261 Kan. 936, 948 (1997).

state for liability purposes.¹⁹ Such a provision would provide, at a minimum, a remedy to an individual injured by a volunteer healthcare practitioner's negligent conduct. Section 7(c)'s limitation would still apply, exempting a volunteer healthcare practitioner who committed "willful, wanton, grossly negligent, reckless, or criminal, or intentionally tortious conduct" from protections under the Act.

¹⁹ This is one approach to this problem, however, it likely conflicts with equal protection principles. Section 7, in its original form and as revised, creates an equal protection problem between individuals who are treated by volunteer healthcare practitioners under the Act, and thus are denied all remedies for injuries caused by negligence, and those who are treated by healthcare practitioners resident and licensed in the state in which the emergency has been declared who are delivering healthcare services in the normal course of their employment, or healthcare practitioners who are delivering healthcare services under a regime such as EMAC or MRC, who can obtain compensation through a state tort claims action.