

Public Health Law 101



A CDC Foundational Course for
Public Health Practitioners



Public Health Law Program

<http://www.cdc.gov/phlp>



PUBLIC HEALTH LAW 101

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- Unit 1: Key Concepts of U.S. Law in Public Health Practice
- Unit 2: Ethics and the Law
- Unit 3: Administrative Law
- Unit 4: Role of the Legal Counsel
- Unit 5: Law of Public Health Surveillance, Investigations, and Emergencies
- Unit 6: Privacy and Confidentiality
- Unit 7: Infectious Diseases
- Unit 8: Environmental Public Health, Occupational Health, and Injury
- Unit 9: Chronic Diseases and Birth Defects



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Unit 4
Role of the Legal Counsel



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Discussion Hypotheticals

- You, as agency director, need to seize a private building for a shelter, but you do not know if you have legal authority:
 - Should you ask for a formal legal opinion?
- You, as an agency employee, are accused of improperly using agency funds:
 - Should you talk to the health department's lawyer?



Optional slide to stimulate discussion at the beginning of the class. Potential discussion points for the hypo (legal authority for seizure of a private building):

- Since time is of the essence, requesting a formal legal opinion likely would be ineffective.
- A discussion between the director and counsel concerning the legal authority to seize private property optimally should have occurred long before the day of potential seizure.
- If it is determined that legal authority exists, an equally important consideration is the factual justification for the seizure.
- Every consideration must be given to seeking the property owner's cooperation.

Unit 4 Objectives

By the end of this unit, you should be able to:

1. Understand the basic organization of public health agencies' legal services.
2. Work more effectively with legal counsel.
3. Understand the role of counsel in representing the agency in the court.



•Instructor: this is an essential slide, as the objectives frame the order of content included in this unit.

Objective 4.1

Understand the basic organization of public health agencies' legal services.



Federal Government Legal Resources

- Executive Branch agency lawyers
 - Health and Human Services (HHS)
 - United State Department of Agriculture (USDA)
- Independent agency lawyers
 - Consumer Product Safety Commission (CPSC)
 - Securities and Exchange Commission (SEC)
- Department of Justice



Federal Executive Branch Agency Lawyers

- Act as legal advisors to the agency
- Bring administrative and regulatory enforcement actions
- Cooperate with the Department of Justice on civil and criminal actions brought on behalf of, and against, the agency



Federal Independent Agencies

- Are not under the direct control of the executive branch
- Can bring court actions without permission from the Department of Justice



Department of Justice

- Represents the federal government when it is sued or brings legal actions
- Reports to the President through the Attorney General
- Brings federal criminal prosecutions



State Government Agencies

- In some states, agencies may have their own attorneys and set their own legal policy, under the direction of the governor or health commissioner
- In other states, all legal representation is provided by the attorney general's office
 - The attorney general may provide attorneys to the agency, but they remain under the control of attorney general
 - The attorney general may have a role in deciding which public health cases can be pursued
- Regardless of the attorney's organizational location, there generally is sensitivity to interests of the client agency occasioned by the attorney-client relationship



•AG authority varies among the states. Some AGs may have authority to make the decision. Others may be required to defer to the wishes of the client agency.

Discussion Hypothetical: Who is in Charge?

- Problem:
 - The State Attorney General wants to bring a product liability action against pharmaceutical manufacturers on behalf of persons with alleged severe adverse reactions.
 - The governor, in consultation with the health department, believes that such claims are unfounded and will interfere with the state's disease control programs.
- What are considerations concerning whether the governor can prevent the Attorney General from bringing the lawsuit?



•Note for discussion purposes: One important consideration is the dependence of the answer and discussion upon a given state's applicable laws. For example, for states in which the attorney general has common law powers, the attorney general may be empowered to move forward. In other states, however, the attorney general may be dependent on statutory authority and may lack the authority to proceed in the absence of gubernatorial approval.

Local Government

- Role of state lawyers
 - The state health department and attorney general can provide expertise to local departments
 - The state may handle legal matters for small departments
- City/county attorneys
 - Large city/county health departments may have their own legal counsel
 - Small cities/counties usually hire local attorneys part-time
- Private counsel may be hired for specialized proceedings



Note: Many smaller cities and counties are represented by private attorneys who do government work part-time.

Interagency Cooperation

- Public health threats may require action from several state agencies:
 - For example, a toxic spill may involve the local fire department, the state emergency management agency, and both the state and local health departments
- Many public health enforcement actions require cooperation between the health department and the attorney general or district attorney
- Counsel from the cooperating agencies must resolve jurisdictional issues so that health and safety professionals can work together



Inter-Governmental Cooperation

- Some public health problems cross state lines and trigger federal action, for example:
 - Contaminated food from companies that distribute products widely
 - Epidemic influenza
- These require assistance to assure cooperation at all levels of government
 - Counsel helps assure that each department acts within its authority
 - Counsel may be involved in briefing politicians and the press



Objective 4.2

Work more effectively with legal counsel.



Discussion Hypotheticals: What Type of Advice Do You Request?

- The health director is worried that a law the department enforces will be declared unconstitutional.
- The health director is contemplating impounding the mayor's sister's vicious dog.
- The health director is accused of improperly using the department's funds.



Types of Lawyers

- General Counsel
 - Represents the agency on general agency business
 - In small agencies there may only be one general counsel
- Public Health Lawyer
 - Specialized knowledge in public health
 - On-the-job training and/or MPH degree
- Prosecutor
 - Works for the district attorney or the Attorney General
 - Cooperates with the agency on public health-related criminal matters
 - Final authority on which cases are prosecuted



Key Concept: Attorney-Client Privilege

- Attorney-client privilege is a traditional legal right in U.S. and English law
- It allows the client to talk to the attorney without fear
 - The information cannot be discovered in litigation
 - The attorney cannot share it with others unless it is necessary to prevent an imminent danger
- It does not allow attorneys to hide physical evidence (e.g., laboratory samples)



Who Is Entitled to Attorney-Client Privilege?

- Privilege only extends to the client, such as:
 - The government itself
 - The board of health
 - The agency
 - Agency personnel in their official capacity
- Employees accused of personal misconduct are not clients
 - No attorney-client privilege
 - The agency attorney can share the employee's communications with others, such as the prosecutor



Who Gets Attorney-Client Privilege? -- The government agencies are often represented by attorneys from other governmental legal departments, such as the attorney general or the city attorney. These lawyers will be supervised by the legal department, which may have different objectives than the health department. It is important to work with outside counsel to educate them and their supervisors on the special issues in public health law.

The Board of Health -- If there is a board of health, the legal counsel may owe its loyalty to the board of health rather than to the agency as represented by the health director.

The Agency -- Agency personnel in their official capacity: The agency counsel can represent the agency personnel when they are sued in their official capacity, meaning that they are being sued for their official acts. The agency, however, not the individual, sets the terms of this representation, including how the case is handled. If there are potential conflicts between the agency and official, the official may need private counsel in addition to the agency counsel.

Not individual agency employees

Governmental lawyers do not represent employees individually. For example, if an employee seeks advice from counsel about potentially illegal behavior, there is no attorney client relationship between the employee and the attorney. The attorney must protect the interests of the agency and not the rights of the employee. It is very important that agency counsel makes sure that employees understand this if the attorney is conducting an investigation of improper behavior.

Attorney-Client Privilege for Lawsuits Against Employees?

- Privilege may apply if the employee is doing his/her job:
 - The government is substituted as the defendant and the agency defends the case
 - The government pays if damages are awarded
- Privilege may not apply if the employee is acting outside the scope of his/her job
 - The employee may be personally liable
 - The agency may not defend the case
 - The employee should have his/her own attorney



Informal Legal Advice

- Most agency advice is informal
 - The client needs the lawyer's advice on how to solve a problem or on the legal consequences of an action
 - Often given orally and not comprehensive
- It is a valuable role of the lawyer in preventing problems
 - Agency personnel should be encouraged to consult counsel before there are problems
 - Counsel should try to support agency actions



Informal Advice -- Informal advice is critical when there is legal uncertainty. Most attorneys are very conservative when issuing a formal written legal opinion. When the agency has to act in an uncertain legal situation, counsel may be unwilling to suggest innovative solutions if asked for a formal opinion.

Formal Legal Opinions

- Types of formal opinions
 - Advisory opinions: requests for advice
 - Mandatory opinions: required by statute or by regulation before taking some actions
- Generally more conservative than informal advice because formal opinion can be evidence in some types of legal cases
 - Example: A formal legal opinion that a law is valid can show good faith if the law is declared unconstitutional and the department is sued for enforcing it.
- Takes more time and resources than informal advice



Advisory Opinions: These are opinions that the agency requests to better inform itself on legal issues and options.

Mandatory Opinions: In some situations the law requires a formal legal opinion before the agency can act. For example, bond issues usually require a legal opinion that the issue has been done properly.

Drafting Regulatory Documents

- Counsel should review and assist with documents that express agency policy
 - Statutes and ordinances
 - Regulations
 - Policies and guidelines
- Public health staff provide the substantive content
- Counsel assures that the documents meet the necessary legal standards and that statutes are not misinterpreted



Compliance

- Agency counsel must advise on the agency's compliance with all relevant laws, such as:
 - Open records and meetings laws
 - Privacy laws and HIPAA
 - Research regulations and IRBs
- Assuring compliance is addressed through training
 - Compliance depends on all employees understanding their duties
 - An important role of counsel is training others



Counsel must also review health department activities to assure that the agency complies with the relevant laws.

Grants Administration and Reimbursement

- Most local public health agencies receive grants from the state and federal government
 - Some agencies also give or oversee grants or contracts to others
 - Some agencies receive Medicare/Medicaid funds and must comply with the Conditions of Participation
- All of these functions have important legal requirements that require the assistance of counsel



The Agency as Corporation

- **Government agencies face many of the same issues as private businesses:**
 - Providing health insurance for employees
 - Providing workers' compensation
 - Maintaining buildings
 - Managing information technology
 - Responding to personnel actions
- **In these areas, counsel's role is similar to private business' lawyers**



Summary: Working with Counsel

- Counsel is part of the public health team
 - Counsel should be involved as early as possible in policy development
 - Public health professionals should educate counsel about public health issues
- Public health professionals should learn about basic legal issues to know when to consult counsel



Objective 4.3

Understand the role of counsel in representing the agency in the court.



When Does Counsel Go to Court?

- Bringing enforcement actions such as injunctions
- Defending agency regulations and statutes
- Defending the agency from liability claims
- Defending agency decisions (in judicial review proceedings)



Enforcement Actions

- Public health departments must usually ask the courts to enforce their orders
 - Counsel can ask the judge for an injunction (i.e., an order for a party to stop doing something)
 - The health department may go to court to collect fines
- The court's order
 - The court will issue an order directed at an individual or business to comply with the public health regulation
 - The judge can find that failing to comply with a court order is contempt of court
 - Contempt of court can be punished by a fine or imprisonment



Protecting Agency Records

- Counsel must determine what records are covered and which are protected
- Open records laws
 - State and federal laws that allow access to agency records
- Public health records on individuals
 - These have greater protection under most state laws than programmatic records, which are subject to open records laws
 - Often sought by prosecutors and private litigants



Counsel's Defense of Agency Authority

- A key role of counsel is defending the legal authority for agency actions
 - Is the statute the agency relies on unconstitutional or in violation of federal or state law?
 - Were regulations properly promulgated?
 - Have the facts underlying the agency's action been evaluated?
 - Has the agency exceeded its legal authority?
- These cases require both legal and public health expertise



Counsel's Filing of Amicus Briefs

- Amicus briefs are filed by persons who are not parties to litigation but who may be interested parties
- Allows the agency to express its position in litigation that may affect the agency
 - For example, the FDA has filed amicus briefs in product liability cases concerning FDA-regulated products
 - Health departments have filed amicus briefs in cases affecting the use of Medicaid funds



Discussion Hypothetical: Counsel's Role in Tort Claims

Jasa By and Through Jasa v. Douglas County,
510 N.W.2d 281 (Neb. 1994)

- Bacterial meningitis was reported to the health department pursuant to a reporting regulation
- The department reported the case to the national registry, but did not investigate the case
- Plaintiff was infected in day care and alleged that she would not have been infected if the department had investigated the case and intervened at the day care center



Optional slide for discussion and is linked to the following slide.

Discussion Hypothetical (cont'd)

- Counsel must show that the department did not violate any laws or regulations:
 - Did a law or regulation require the department to investigate the case?
- Counsel must show that the department had a valid reason for not investigating:
 - Was this a decision on how best to spend limited resources?
 - Are such investigations effective in stopping the spread of disease?
- The court found no liability in this case



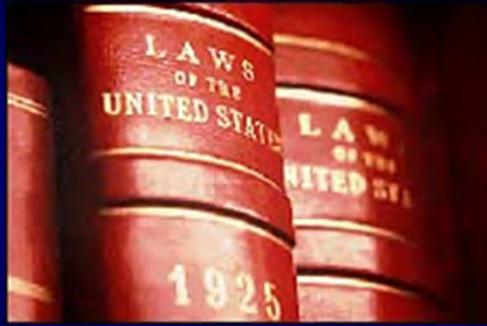
Optional, see previous slide.

Counsel's Role in Support of Litigation on the Public's Behalf

- The health department counsel may assist the state attorney general in some matters (e.g., product safety and tobacco litigation)
- The health department counsel might be able to assist private parties when they are supporting public health actions in, for example:
 - Private lawsuits to abate public nuisances
 - Defense of physicians who are sued for invasion of privacy for reporting communicable diseases



Conclusion: Unit 4



Summary

- Legal counsel is a key member of the public health team
- Counsel has an important preventive role in helping public health agencies and professionals to anticipate and resolve legal problems
- Counsel defends the agency when it must appear in court for enforcement orders or to defend its actions



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