



IAHA Quarterly Lecture  
Responding to Pandemics: Legal and Clinical Issues  
Presented March 26, 2020

Additional Audience Questions from Webcast with answers provided:

1. Has IDPH issued any emergency rule to formally add COVID-19 disease to the communicable/infectious disease list of mandatory reports. Or has IDPH issued a formal order under 77 ILL.Admin code 690.100 (d). Legally is it the gubernatorial proclamation? I am just looking for the legal authority adding it as mandatory report.

As the question points out, Coronavirus is not specifically called out in the Communicable Diseases Code. The key provision is the first listed reportable disease at 77 Ill. Adm. Code 690.100(a)(1) which states that “any unusual case of a disease or condition cause by an infectious agent not listed in this Part that is of urgent public health significance.” Coronavirus fits neatly into this box and there is no need for a further order.

2. There are stories in the papers about hospitals which are considering the implementation of DNR orders for COVID-19 patients without considering the patient's or family decision or wishes and that Governor Pritzker is being approached about legally permitting this practice. Please comment.

[See recording for answer.](#)

3. This isn't a "legal" question, but if there's time: I haven't heard a clear explanation of why the US is so far behind other countries in terms of the capacity to test large numbers of people.

[See recording for answer.](#)

4. Anonymously:
  - For Stephen Murphy: Can organizations require their vendors to disclose if any of the vendor's employees have tested positive? Are there any CDPH orders or guidance that organizations can point to when vendors cite confidentiality as a reason to not disclose positive Covid tests? These would be vendors who are on site at a health care provider.

This is a tricky one. With privacy questions generally, the details matter: what data is involved, who has the data, who owns the data and which privacy laws or other restrictions is that entity subject to, with respect to the confidentiality of that data. In the case of CDPH, for example, these would include public-health-related laws. The situation would be different for other entities.

I don't know of any COVID19 orders that would force a vendor to disclose this kind of information, even if they had the information. When there is a question about performance or expectations of a vendor, we would typically turn to the contract provisions.

5. Is there any movement on the local or federal level to implement a public health requirement to require the reporting of health information as well as some freedom to use health information in research to facilitate discovery of a vaccine?

Providers are [required to report](#) positive cases of COVID-19 patients to IDPH and/or local health departments. IDPH reports to information to CDC which is one of the agencies/organizations researching possible vaccines.

6. Although the 1135 waiver HFS sought from CMS applies to a variety of providers, can other providers such as behavioral health providers seek 1135 waivers on their own or through a trade association similar to the one you mentioned hospitals have sought for issues that are unique to mental health and substance use disorder facilities treating patients?

Any provider can apply for a Section 1135 waiver. For more information about Section 1135 waivers visit: <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/1135-Waivers>

7. For **Stephen Murphy**: Over the weekend the Cook County Medical Examiner released the names, ages, residence locations, and co-morbidities of 4 people who expired due to COVID-19 to the news media. Which HIPAA exception/emergency exception specifically applies to this release of information?

IHA responded -- HIPAA does not apply to all data and all entities. Only HIPAA covered entities are subject to HIPAA. There are three types of covered entities as set forth in [45 CFR 160.103](#) and are: (i) health plans, (ii) health care clearing houses, and (iii) health care providers who transmit electronic health information in connection to standard transactions.

8. Hello,  
If a retired physician temporarily restores their license and goes to work in a long-term care facility, hospital, or FQHC, will they be afforded immunity? Section 10(k) of the IL Emergency Management Agency Act mentions immunity for volunteers working under direction of IEMA, but not those other entities (LTCFs, hospitals, etc) that were mentioned in the IDFPF's statement on restoring physician licenses.

The Illinois Health and Hospital Association, the Illinois State Medical Society and others have made recommendations to the administration and agencies to expand the liability protections for returning healthcare provider licensees and licensees from other states in the Illinois Emergency Management Agency Act, Good Samaritan and other acts during the emergency period. We are hopeful that additional guidance will be provided shortly.

9. Can you speak to the ability to provide group therapy by telehealth while clients are under stay at home orders and how to manage privacy concerns?

Pursuant to [89 Ill. Adm. Code 140.403](#) a "patient's place of residence" can qualify as an originating site for Medicaid purposes. The [Governor's Executive Order on Telehealth](#) (p.3) includes a statement that an insurance issuer's requirements and parameters may not be more restrictive or less favorable towards providers, insureds, enrollees or members than those contained in the emergency rulemaking undertaken by the Department of Healthcare and Family Services at 89 Ill. Adm. Code 140.403(e). Reading the Executive Order together with the Emergency Rules suggests that insurers must similarly consider a patient's residence to be a valid "originating site" during this emergency. The Illinois Department of Insurance has issued a detailed [guidance memorandum](#) on the telehealth.

HHS issued a [limited waiver](#) of HIPAA sanctions and penalties. Additionally, the Office of Civil Rights [has published notification](#) that it will exercise its enforcement discretion and will not impose penalties for noncompliance with the regulatory requirements under the HIPAA Rules against covered health care providers in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency.

10. Based on previous emergency responses, what legal challenges/litigation tends to arise in the aftermath? I'm thinking there's a risk when medical practitioners work outside their typical field of expertise, even with top cover order from the state.

Yes it is anticipated that there will be lawsuits, including suits alleging practicing outside scope of practice and/or not meeting standards of care.

11. Dr. Arwady mentioned that we don't have the capacity of NY at this point to get test results back more quickly? What are the technical, legal or political barriers that are slowing this process of getting the capacity to turn tests around quickly and to get the testing capacity we need.

See recording for answer.

12. When a person is confirmed to have covid-19 and is at home is that person permitted to go to the store to get food and medicine?

See recording for answer.

13. Does soap break down the virus? If so, given the shortages of masks, etc., would it be effective as an interim back-stop to use cloth masks and launder them with soap for re-use.

See recording for answer.

14. Until when will the shelter or at least social distancing be needed? How about for children?

See recording for answer. The current order expires April 7<sup>th</sup>, however, the administration has indicated that it will consider whether or not it will be extended based on the circumstance at that time.

15. Which waivers allow flexibility in hospital bed use such as using med surg beds for ICU beds?

There is an [existing section of the CON regulations](#) (not a waiver) that allows a healthcare care facility to increase bed capacity to accommodate extraordinary needs in the service population due to pandemic events and other disasters. The Illinois Health and Hospital Association is having ongoing discussions with IDPH regarding this issue and seeking increased flexibility. We are hopeful that additional guidance will be provided shortly.

16. Is there a waiver that allows transfer of current inpatients to another facility to allow more acute care beds in a hospital?

Shortly after the national emergency declaration, [CMS issued blanket waivers](#) and [HHS Secretary Azar issued blanket waivers and modifications](#), both under [Section 1135](#). The federal blanket waivers include a waiver of EMTALA sanctions regarding medical screening exam and transfers. Also, [IHA applied for additional Section 1135](#) waivers on behalf of all Illinois hospitals, and [CMS has partially approved this request](#) including flexibility regarding providing care in alternative settings.

17. Any consideration of expanding Good Samaritan or similar limitation of liability relating to claims of negligent care.

See recording for answer. The Illinois Health and Hospital Association, the Illinois State Medical Society and others have made recommendations to the administration and agencies to expand the liability protections for returning healthcare provider licensees and licensees from other states in the Illinois

Emergency Management Agency Act, Good Samaritan and other acts during the emergency period. We are hopeful that additional guidance will be provided shortly.

18. Do we have an idea what percent of spread is because of "asymptomatic" spread versus "symptomatic" spread? Dr. Slade can you answer this?

We do not have hard numbers on this. What we do know is that the majority of COVID-19 patients have mild symptoms, and it is most likely that spread is from those with very mild symptoms, rather than completely asymptomatic. Overall, patients with greater severity of disease are much more likely to transmit infection. The complete absence of a cough would make it much more difficult to spread the virus, although transmission through contaminated surfaces is still possible. For this reason, hand washing and avoiding touching your face remain important precautions. For symptomatic patients, there is a 0.45% risk of transmission to a close contact and a 10% risk of transmission to a family member. We can probably safely assume that transmission rates are lower than this for those completely asymptomatic.

19. Illinois law addresses relaxed standards for allowing physicians and health care professionals to exercise privileges at hospitals when there is a Disaster declaration. This statute also has a Good Samaritan liability waiver provision. Are we there yet? Is it being considered?

See recording for answer. The Illinois Health and Hospital Association, the Illinois State Medical Society and others have made recommendations to the administration and agencies to expand the liability protections for returning healthcare provider licensees and licensees from other states in the Illinois Emergency Management Agency Act, Good Samaritan and other acts during the emergency period. We are hopeful that additional guidance will be provided shortly.

20. CMS issued a Guidance on March 9th indicating that they will be limiting inspections relating to hospital compliance with quality and related standards to significant issues where there is truly an immediate jeopardy situation. Is the IDPH following the same guidance?

The Illinois Health and Hospital Association has made similar recommendations to IDPH and other agencies and is having ongoing discussions with IDPH regarding this issue. We are hopeful that additional guidance will be provided shortly.