

5th Annual

2007 Medical Reserve Corps National Leadership and Training Conference



FORGING POWERFUL PARTNERSHIPS



April 17–20, 2007

Providence, Rhode Island



Volunteers' Liability Issues

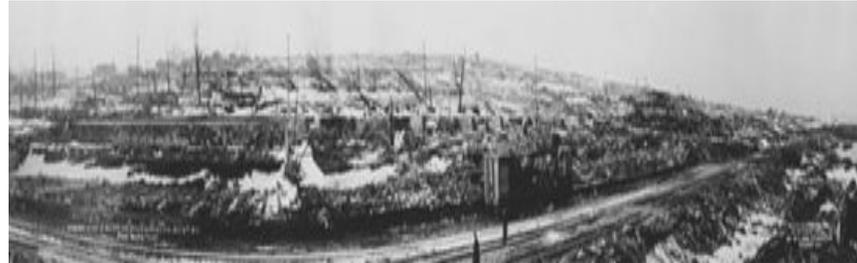


John R. Wible, General Counsel
Alabama Department of Public Health
Medical Reserve Corps National Leadership
and Training Conference
April 17-20, 2007

Phenomenon of Volunteers



- 1917 Halifax Shipping Explosion
- 1985 Mexico City Earthquake – 2 million volunteers
- 1989 California 'Quakes – 60% of San Francisco and 70% of Santa Cruz volunteered
- 2004 Indian Ocean Tsunami
- 9/11 – 40,000 unsolicited volunteers
- And then there was Katrina/Rita



Mexico City , 1985

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Katrina Stories



- Mark Morice. For video see - <http://www.nola.com/hurricane/video/?/hurricane/video/content.ssf/morice.wmv>
- Kim Deserio
For article see handout



OBJECTIVES - OUTLINE



Volunteers will be made aware of:

- Potential types of Liability
 - Civil, Criminal and Administrative
- Constitutional Protections
- Federal Protections
- State statutory protections
 - In a declared emergency
 - When volunteering generally
 - Credentialing issues
- Gaps in coverage and proposed “fixes”

Types of Civil Liability



- Malpractice and professional liability
- General tort liability – negligence or an act or omission
 - Economic loss
 - Non-economic loss
- Gross negligence, wanton misconduct, bad faith
- Vicarious liability/Respondeat superior
- Negligent recruitment/training/supervision
- Premises liability

Criminal Complaints



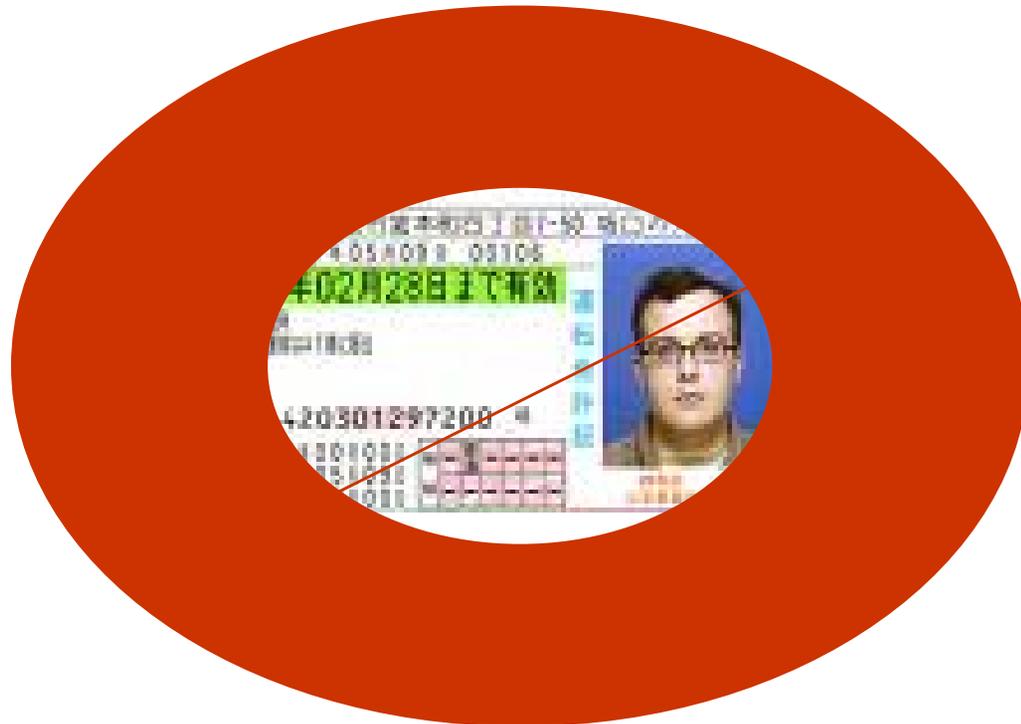
- Trespass
- Assaults
- Theft of property
- Conversion
- Offenses involving sexual misconduct



Administrative Issues



- Licensure issues in a new state
- Issues in your state
- Temporary licenses – are they needed?



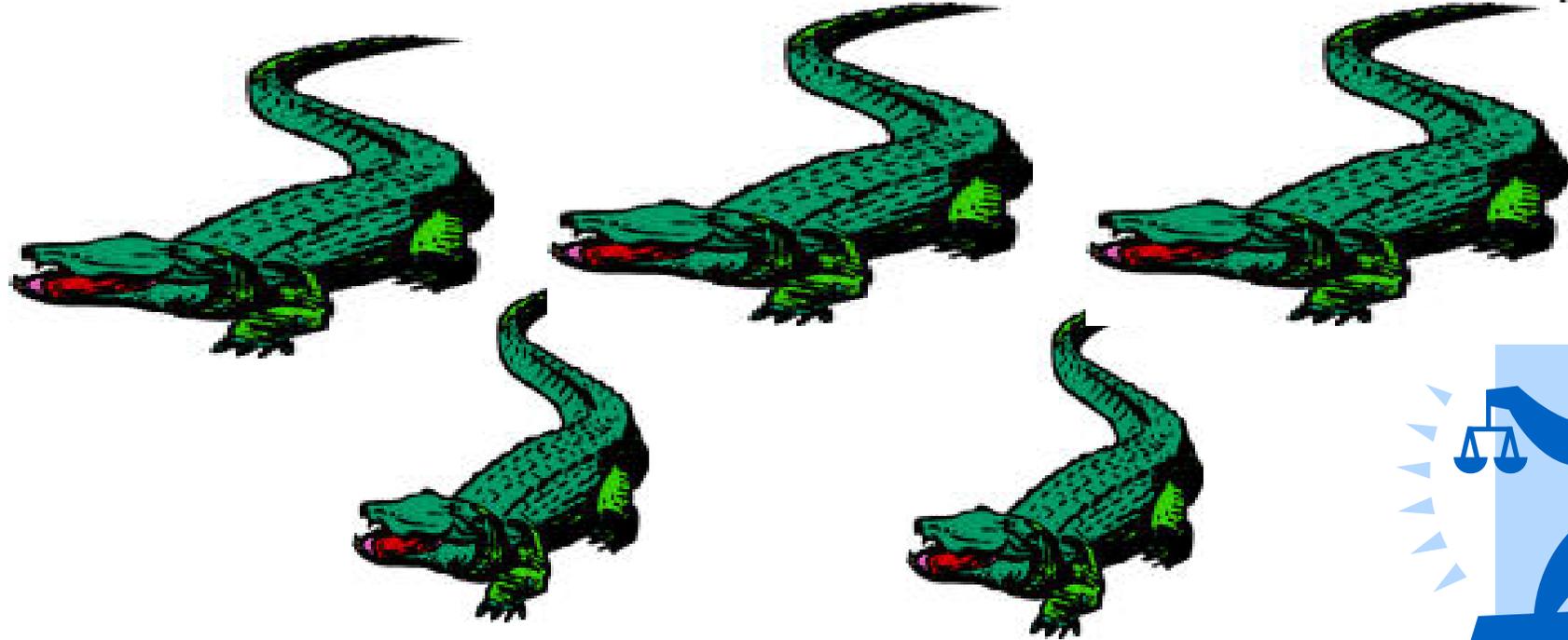
An Additional Worry – A lawyer to Defend You



Atticus Finch worked cheap –
Dewey, Cheatam and Howe won't

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Who are the Potential Plaintiffs?



And who will represent them?



State Methods of Protecting Volunteers



- General Immunity – 43 States have some charitable immunity statutes
 - 38 states protect the volunteer in his/her own personal practice
 - 35 states single out healthcare providers by profession
- Change in the standard of care from negligence to willful and wanton
- Volunteers as “public employees” (10)
- “Caps” on damages at \$250,000.
- There are a variety of combinations
- See: <http://www.state.hi.us/lrb/rpts96/vol/volchp3.html>

Constitutional Immunities



Sovereign Immunity protects the State.

- Many states have abolished sovereign immunity as to the state or counties and municipalities.
See Montana Constitution, Art. II, § 18 and 5 ILCS 350/1 (Illinois)
- Many states have modified it. See South Carolina Code (1962) § 21-111 and *Graham v. Charleston County School Bd.* 262 S.C. 384, 204 S.E. 2d 384 (1974)
- Some states have retained it
See Alabama Constitution, Article 1, § 14 which provides:
- “the State shall NEVER be a defendant in a suit at law or in equity.”



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Constitutional Immunities



This means provisions for:

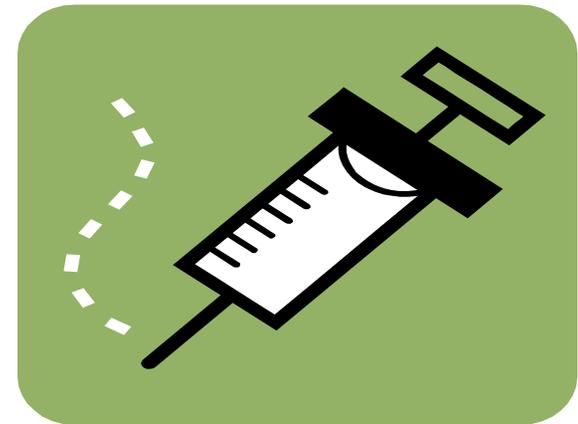
- Sovereign Immunity for the State,
- Immunity for State Agencies,
- Qualified Immunity for state employees,
- Qualified Immunity for volunteers performing a state function.
- Does not protect against simple negligence



Qualified Immunity



- Available for agents of most states in state and federal civil actions
- Sometimes known as discretionary function immunity.
- Protects the Decision Making Process.
- Could be available for volunteers if exercising state functions
- Does not protect against simple negligence.



Statutes of Use to Volunteers

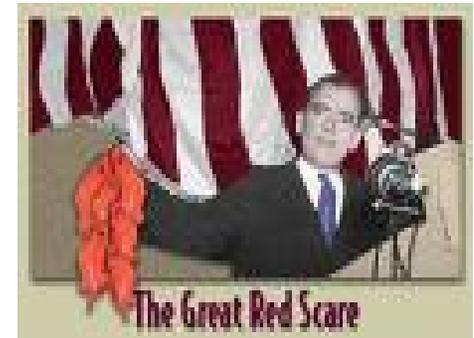


- Emergency Management Acts
- EMAC
- Federal Volunteer Protection Act
- Volunteer Service Acts
- Good Samaritan Acts

Emergency Management



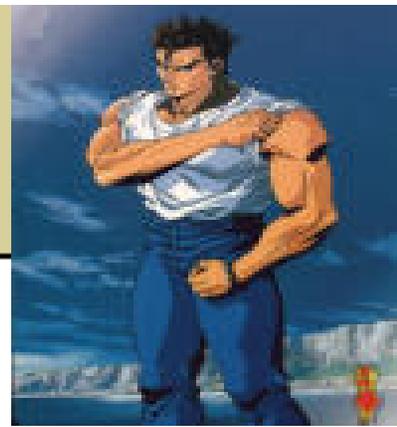
- *Red Scare* – Genesis of Emergency management
- Many states passed emergency laws
 - See Alaska Disaster Act. Sec. 26.23.071
 - See Arizona Rev. St. Tit.26 Chapter 2
 - See 61 C.G.S.A § 28-1(Connecticut)
 - See West's F.S.A. § 252.36 (Florida)
- Governor proclaims an “emergency:”
 - Enemy attack, sabotage
 - or “other hostile action;”
 - Fire, flood and “other natural causes.”
- Definition is usually broad enough to cover B/T incidents or naturally occurring events like floods, hurricanes, tsunamis and tornadoes.



Sen. Joe McCarthy (R) Wis.



Governor's Powers



Governor Bob Riley (R) Alabama

Typically, the Governor has authority to:

- Make orders, rules and regulations;
- To utilize all state employees;
- To utilize any state or local officers or agencies, granting state officer immunity to such, including volunteers.

Personal Liability Protections



Statutes typically provides that:

- Except for willful misconduct, gross negligence or bad faith, any “emergency management worker” is granted state officer immunity.
- Requirements for licenses to practice do NOT apply
- “Emergency worker” is anyone helping out whether paid or not

Premises Liability Protections



Sometimes, statutes provide similar liability protections apply to those permitting the state to use their real property.



New Orleans Superdome

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Emergency Management Mutual Assistance Compact



- P.L.104-321 (1996), authorized mutual aid among the states
- Requires states to pass consistent statutes to:
 - Facilitate licensure (deemed status) and immunities of other state's workers;
 - Permit condemnation, seizure and compensation of facilities and property;
 - Coordinate evacuation; and
 - Direct all civilian officers.



EMAC Workers – Paid or Not



- They remain employees (volunteers) of their sending (home) jurisdiction
- They look to home jurisdiction for:
 - Worker's compensation, if any
 - Death benefits
 - Reparations for injury to themselves
 - Insurance, if any.



Status with Receiving State



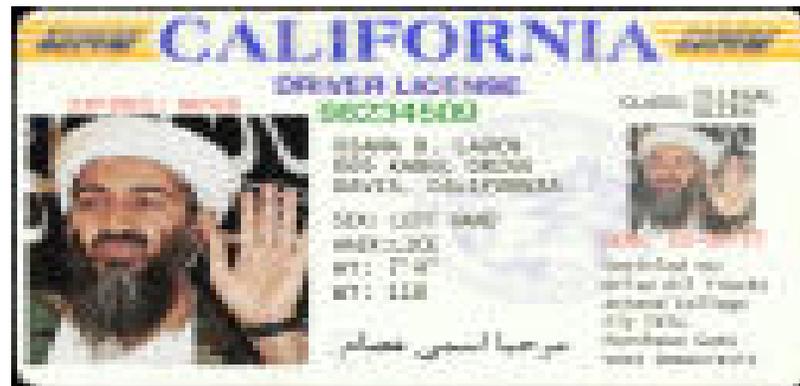
- Out of state Officers functioning in a site state are considered “officers” of the receiving state for liability purposes.
- They work under the supervision of the receiving state officers.



Licenses and Permits



- Professionals of one state are “deemed” licensed in the site state to the extent they would be licensed in their home state.
- We prefer to work with state licensing boards
- Governors may limit these powers by order.



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In-House Credentialing



- May be a matter for the internal governance of the receiving facility;
- JCAHO rules allow emergency credentialing;
- ADPH would allow emergency credentialing;
- EMTALA would not be an issue;
- State Medical or other professional licensure acts could be an issue, however
- Could be done on an *ad hoc* basis according to guidelines using pre-approved professionals of various disciplines;
- All tied to the facility disaster plan.

Federal Volunteer Protection Act - 42 *USC* § 14501



- Designed to give minimum protections to volunteers even in state law functions.
- Does not supercede state acts giving greater protections to volunteers.
- Limited in protections to:
 - Economic loss and
 - Simple negligence.
 - No protection against punitive damages.
 - Does not cover driving a car or boat.
- States may “opt out.”



Federal Volunteer Protection Act - 42 USC § 14501



- Volunteer must be in service to:
 - Non-profit organizations or
 - Governmental entities.
 - Functioning within scope and line.
- Volunteers must be properly licensed and credentialed.
- Must not fall below standards of conduct
- Does not immunize the organization.
- Does not extend the old doctrine of *charitable immunity*.

Federal Protections



- Protection does not apply to:
- Misconduct that constitutes a crime of violence
- Terrorism
- Hate crime (whether or not convicted)
- Allegations of sexual offenses (for which the volunteer is criminally convicted)
- Civil rights violations
- Actions under the influence of alcohol or drugs
- Does not preclude an organization from suing its own volunteers for damages to the nonprofit.



Federal Protections

- The Organization



- Nonprofits entities will continue to be sued as well as the "deep pocket."
- Nonprofits will still be liable for acts of their volunteer agents, even if the volunteers are not personally liable.
- Where the nonprofit has insurance which covers the volunteer as well as the organization, the outcome will probably not be much different under the Act.
- If the nonprofit is without insurance, however, the volunteer may have a defense to personal liability not available to the organization.

State Volunteer Service Acts



Many states chart their own course.

- See *Code* § 6-5-336 (Alabama)
- See A.C.A. § 16-6-102, *et seq.* (Ark.);
Code § 662D-2 (Hawaii);
V.A.M.S. 537.118 (Missouri)
- Immunity provided for a person performing services gratuitously for:
 - a nonprofit organization or corporation,
 - a hospital (public, private or nonprofit),
 - a governmental entity,



“Minuteman”

Volunteer Service Acts



The volunteer is immune from civil liability

- in any action,
- on the basis of any act or omission,
- resulting in damage or injury if:
 - acting in good faith;
 - within the scope of duties;
 - for a covered organization; and
 - damage or injury was not caused by:
 - willful misconduct;
 - or wanton misconduct by the volunteer.

Volunteer Service Acts



- The immunity may not apply to the organization which may be held liable on a theory of "respondeat superior"
- Even though immunity is granted to the volunteer
- That's why *Risk Management* practices for the organization are so important



"Typically does not apply"

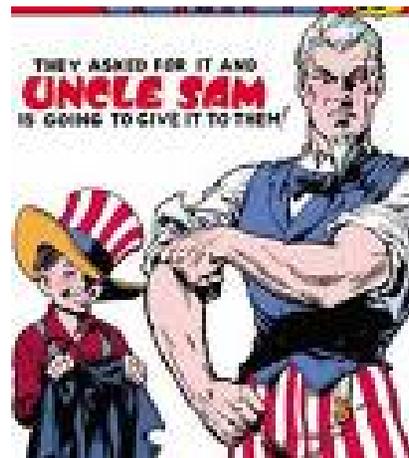
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Other State Volunteer Acts



Some follow and rely on the Federal Act

- See Colorado - C.R.S.A. § 13-21-115.5
- Nebraska Rev. St. § 43-3716



The Good Samaritan Act



May apply to:

- Doctor or dentist
- Medical intern
- Nurse
- Member of rescue squad
- Police, State Trooper
- Member of fire department
- Volunteer fire department
- EMT or Medical corpsman
- Chiropractor, or
- Public education employee



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Good Samaritan - Elements



- Gratuitously and in good faith;
- Renders first aid or emergency care
- At the scene of:
 - an accident,
 - casualty, or
 - disaster;
- Is not liable for any civil damages.

Periodic Table of the Elements

Legend:

- Alkali Metals (Red)
- Alkaline Earth Metals (Orange)
- Transition Metals (Yellow)
- Other Metals (Light Green)
- Nonmetals (Green)
- Noble Gases (Blue)
- Inner Transition Metals (Purple)
- Gaseous State (EI)
- Liquid State (EII)
- Solid State (EIII)
- Synthetically Prepared (EIV)

1 H 1.0079																	2 He 4.0026														
3 Li 6.941	4 Be 9.0122											5 B 10.81	6 C 12.011	7 N 14.007	8 O 15.999	9 F 18.998	10 Ne 20.179														
11 Na 22.990	12 Mg 24.305											13 Al 26.982	14 Si 28.086	15 P 30.974	16 S 32.06	17 Cl 35.453	18 Ar 39.948														
19 K 39.098	20 Ca 40.08	21 Sc 44.956	22 Ti 47.90	23 V 50.941	24 Cr 51.996	25 Mn 54.938	26 Fe 55.847	27 Co 58.933	28 Ni 58.71	29 Cu 63.546	30 Zn 65.38	31 Ga 69.72	32 Ge 72.59	33 As 74.922	34 Se 78.96	35 Br 79.904	36 Kr 83.80														
37 Rb 85.468	38 Sr 87.62	39 Y 88.906	40 Zr 91.22	41 Nb 92.906	42 Mo 95.94	43 Tc (98)	44 Ru 101.07	45 Rh 102.91	46 Pd 106.4	47 Ag 107.87	48 Cd 112.41	49 In 114.82	50 Sn 118.69	51 Sb 121.75	52 Te 127.60	53 I 126.90	54 Xe 131.30														
55 Cs 132.91	56 Ba 137.33	57-70 Lanthanide Series La Ce Pr Nd Pm Sm Eu Gd Tb Dy Ho Er Tm Yb	71 Lu 174.97	72 Hf 178.49	73 Ta 180.95	74 W 183.85	75 Re 186.21	76 Os 190.2	77 Ir 192.22	78 Pt 195.09	79 Au 196.97	80 Hg 200.59	81 Tl 204.37	82 Pb 207.2	83 Bi 208.98	84 Po (209)	85 At (210)	86 Rn (222)													
87 Fr (223)	88 Ra (226.03)																	89 Ac (227)	90 Th 232.04	91 Pa 231.04	92 U 238.03	93 Np 237.05	94 Pu (244)	95 Am (243)	96 Cm (247)	97 Bk (247)	98 Cf (251)	99 Es (254)	100 Fm (257)	101 Md (258)	102 No (259)

Good Samaritan–The Scene



What is “at the scene”

- Georgia’s view – includes at the hospital
Willingham v. Hudson
- Illinois agrees - *Neal v. Yang*
- California does not - *Colby v. Schwartz*



What may not be covered by *Anything*



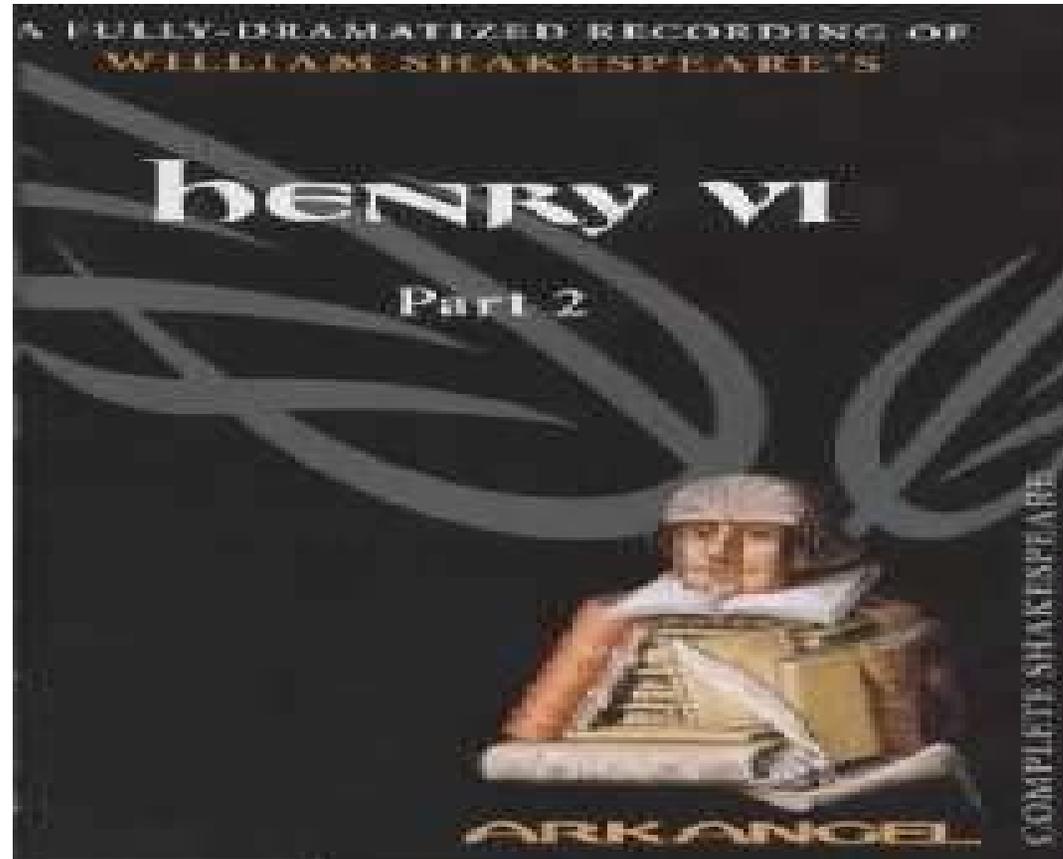
What may not be covered by anything

- Volunteer's own personal injuries
- Volunteer's lost wages
- Worker's compensation type benefits
- Volunteer's death benefits
- **How to fix it**
- "Emergency Management Worker" statute
- Make them a state employee
- Require their sending agency to cover them
- Require existing employer to cover them
- See proposed Alabama volunteer bill

Shakespeare Said:



"The first thing we do, let's kill all the lawyers"



Well, maybe not. But let's not let the lawyers get in the way of good volunteer services.

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