Practical tips and pitfalls
Working With the Law & Legal Counsel

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Objectives

• Describe the key differences in the scope of legal authority at the local, state, federal, and tribal levels

• List three steps that a public health practitioner can take to prepare for an effective discussion with legal counsel
When you think about public health law…

A. I’m excited by its power and potential to benefit the public

B. I’m comfortable working with lawyers on routine matters

C. I worry about its complexity and risks

D. I break into a cold sweat and try to avoid legal issues and lawyers
Arlington, Virginia

Salem, Oregon

Oregon sleuth solves E. coli mystery

An expert in food-borne disease traces an outbreak to spinach while doing phone surveys

Spinach safety
What should I do with the spinach in my fridge?
This advice will bring peace of mind to anyone who has ever heard a spinach-related story.

1. Wash your hands after handling spinach.
2. Keep the spinach in the refrigerator.
3. Avoid cross-contamination.

E. coli outbreak
Oregon was the first state to report a large outbreak of E. coli O157:H7. The outbreak was confirmed by the Centers for Disease Control and Prevention.

Spinach is the culprit
Spinach is a popular food and is often part of a healthy diet. However, it can also be a source of E. coli.

What can I substitute for spinach?
Spinach is a good source of vitamins and minerals. It can be replaced with other leafy greens such as kale, collard greens, or romaine lettuce.

Oregon's public health division
The Oregon Public Health Division is responsible for investigating food-borne illnesses and outbreak investigations.

Salem, Oregon

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A cautionary tale

- Vietnamese immigrant tests positive for TB.
- Stops taking her medicine, starts missing appointments.
- Japanese translator, who speaks a little Vietnamese, has explained the importance of treatment.
- Culture shows multi-drug resistance. You think she should be isolated, but no TB isolation facilities.
You decide to

A. Continue to coach and encourage Trang to follow the treatment
B. Put Trang under house arrest
C. Detain Trang in jail
D. Send Trang to an isolation facility a few counties away
What happened

Officials left her in jail for 11 months before their legal counsel got involved and the court held a hearing.

The county had to pay the Laotian woman and her family $1.2 million.
Why engage with “the law”

• Law as a powerful public health tool

• Role/opportunity/obligation unique to government
Failing to use “the law” effectively

• Missed opportunity to protect the public
• Can be costly
• Can undermine credibility of agency
• Can lead to unplanned job transitions!
History of public health law
Public health began with sanitary movement
Jacobson v. Massachusetts

“There are manifold restraints to which every person is necessarily subject for the common good.”

—US Supreme Court, Feb 1905
What you can legally do
Know your authorities

- Direct (local and state)
- Indirect (invoke or invite federal or state)

Public health
Says what is supposed to happen

Enforcement
“Enforcer”: makes it happen
## Where is the law?

<table>
<thead>
<tr>
<th>Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitutions</td>
<td>Federal and state</td>
</tr>
<tr>
<td>Cases</td>
<td>Binding decisions by appellate courts</td>
</tr>
<tr>
<td>Statutes</td>
<td>Enacted by legislative bodies or initiative</td>
</tr>
<tr>
<td>Regulations</td>
<td>Promulgated by agencies</td>
</tr>
</tbody>
</table>
The US Constitution and public health

- “Public health” not mentioned
- Federal health-related activities
  - Interstate commerce
  - Taxation and spending
- Primary responsibility for public health left to states (10th Amendment)
14th Amendment and Due Process

“… nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

—The 14th Amendment

• States must meet US Constitutional protections

• Many state constitutions
  • Stronger protections of individual rights
  • Greater limits on governmental power
When federal laws apply

- International borders
- Interstate issues
- "Primacy"—federal agency steps in if state agency not effective (Dept of Ag, EPA, quarantine?)
- Military
- Tribal—legal status of each tribe is unique
State/local public health

Federal Law

Regulatory activities (FDA, EPA)

Non-regulatory activities (CDC)

Funding

How federal law affects local public health
# State and local authority

| Centralized Authority with state | Combination Authority shared between state and local | Decentralized Authority with local health departments |
Police powers

The authority of a state to safeguard the health and welfare of its population

• Investigate and control hazards (medical records, confiscate illegal or unsafe food)

• Override confidentiality (if in interest of public safety)

• Make laws that require reporting of conditions that may affect the public

• Initiate quarantine, isolation

• Initiate other disease or hazard control measures
Special exercise of police powers

- Emergencies: protect public health at expense of individual liberties
  - Social distancing
  - Isolation and quarantine
  - Vaccination
  - “Taking” of private property
- Man-made emergencies: role of FBI or other law enforcement
When action affects liberty or property

• Substantive Due Process
  • Governmental justification is appropriate

• Procedural Due Process
  • Notice, hearings, etc.

• “Equal protection”
  • People in similar situations are treated similarly
  • Must have a reason for treating some groups differently
Many overlapping jurisdictions

- County government
- Potomac river and bridges
- State highways
- State parkland
- Federal parkland
- Federal enclave (federal agencies)
- Military (Ft. Myer)
- Pentagon
- National Airport
- Arlington
Working with legal counsel
Roles

Public Health Officials
• To protect the public’s health, using the authority and tools available.

Legal Counsel
• To keep the public health official out of legal trouble
• To think of the potential legal landmines
• To provide legal representation to you or your agency if litigated
Where do you usually get legal advice?

A. Local governmental attorney
B. State attorney
C. Law firm or private attorney
D. Other
### Who advises on the law?

<table>
<thead>
<tr>
<th>State lawyers</th>
<th>City/county attorneys</th>
<th>Private counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Provide expertise</td>
<td>- Large HDs may have own counsel</td>
<td>- Hired for specialized needs</td>
</tr>
<tr>
<td>- May handle legal matters for small LHDs</td>
<td>- Small HDs hire local attorneys part-time or share</td>
<td></td>
</tr>
</tbody>
</table>
How frequently do you talk with legal counsel (on average)?

A. Often (weekly to monthly)
B. Occasionally (5-10 times/year)
C. Rarely (1-4 times/year)
D. Almost never
Working with legal counsel

• Establish a strong professional *relationship*, based on trust, communication

• **Educate** counsel about your business and significant challenges

• **Anticipate** legal issues

• **Contact** your legal counsel as soon as you can about any significant legal questions
Attorney-Client Privilege

• Traditional legal right
• Allows you to talk to attorney without fear
  • Information cannot be “discovered” in litigation
  • Attorney cannot share it with others unless necessary to prevent an imminent danger
• Does not allow attorneys to hide physical evidence (e.g., laboratory samples)
Seeking legal counsel
When seeking legal counsel, consider:

• Is there possible threat to the public’s health?
• Is your authority to address the situation clear?
• Could the situation expose your agency to potential liability, media attention, or political pressure?
Consequences of not taking legal action

• Can create additional risk to the public’s health
• Can jeopardize your effectiveness as a public health official or agency
Framing legal questions

• Do **not** ask your attorney what you should do!
  • He or she will tell you!
  • May promote a legally-desirable outcome rather than a public health outcome

• Do **not** ask a “yes or no” question!
Framing legal questions: steps

1. Review the applicable law
2. Determine desired public health outcome
3. Determine the preferred pathway to the outcome
What are my options to accomplish [desired public health outcome] by [preferred pathway] given my authority under the law?

“What are the potential risks and advantages of each option?”
Making your decision
Making your decision

- Considering all the information available to you, including legal advice and options, *make your best decision on behalf of the public’s health.*

- Remember: Your responsibility is to protect the public’s health.
  - Work with counsel to minimize legal or political risk
Framework for analysis

• What **must** I do?
• What **can** I do?
• What **should** I do?
What must I do?

Consequences for failure to take action
What can I do?

Consequences: action

INFORMATIONAL TOWNHALL MEETING
Wednesday
December 16, 2005
7:00 pm
First Floor Auditorium

CANCELLED
What should I do?

- Consequences: action that is legally correct but politically/socially tone deaf
Caveats

• Legal issues are rarely black and white. **When in doubt, consult.**

• A lawsuit that could have been mitigated by timely legal consultation is **far more expensive** than the cost of a legal consultation that may not have been necessary.
Other pitfalls

• Basic rules of conducting business
  • Contracts, human resources
• Political aspects of “law”
  • Local governing board may have its own ideas about what is allowed or appropriate
Questions?

Thanks to the Robert Wood Johnson Foundation for the grant to support training in public health law.
Helpful Resources

• Network for Public Health Law
  www.networkforphl.org
  • Technical assistance
  • Library of legal assistance questions and answers
  • Fact sheets, tables of state laws, legal briefs, newsletters
  • Monthly webinars
  • Public health lawyer directory

• Practical Law for Public Health Officials module
  www.nwcphp.org/training/courses/practical-law