

Disaster Planning for California Hospitals



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H. Dwight Douglas is general counsel for Freeman Health System in Joplin, Missouri. Mr. Douglas handled the legal issues associated with the tornado in 2011, including hospital emergency licensing, FEMA, hospital expansion and construction, hospital regulatory, employment, mutual aid, insurance claims and leased facility issues. In 2012, Dwight was appointed as a member of the Interim Commission on Disaster Preparedness, Response and Recovery by the Speaker of the Missouri House. He is a past president of the Missouri Society of Health Care Attorneys and has practiced law in the health field since 2001. Dwight serves as president of Joplin Tomorrow, a non-profit corporation established to provide low-interest loans to business rebuilding in Joplin.





Hospital Emergency Response Legal Issues – Lessons from Joplin

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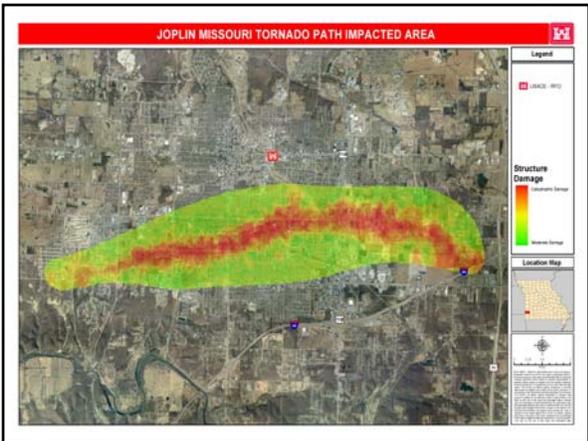
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Joplin, MO hit by EF-5 Tornado on May 22, 2011

- Joplin population approximately 51,000
- Daytime population approximately 240,000
- Located in southwest Missouri





22 mile long path



3/4 mile wide

Two primary hospitals five blocks apart
St. John's Hospital on the right and Freeman West Hospital on the left



200+ mph winds



Wind Power



9

161 Deaths



13 die at Greenbriar Nursing Home 83 residents at the time; 70 survive, some with injuries



Over 7,500 homes destroyed or damaged



26th Street residents wiped out



18,000 vehicles destroyed
11,000 uninsured



Flying debris is a hazard to property and people
1,400 persons injured



St. John's Hospital destroyed
300 hospital beds lost – including 40 acute psych beds
6 die, several were on vents



150 medical offices lost
Freeman owned this building for 29 days
Purchased for Actual Cash Value and insured for Replacement Cost



Example – Replacement Cost Settlement

- Insurance paid 2.5 times purchase price at FMV.
- Was under blanket policy coverage for system.
- Carrier allowed proceeds to be spent anywhere in the covered system.
- So took proceeds from a medical office building and used it to double the size of the adult psych unit, which was our most urgent need.

18

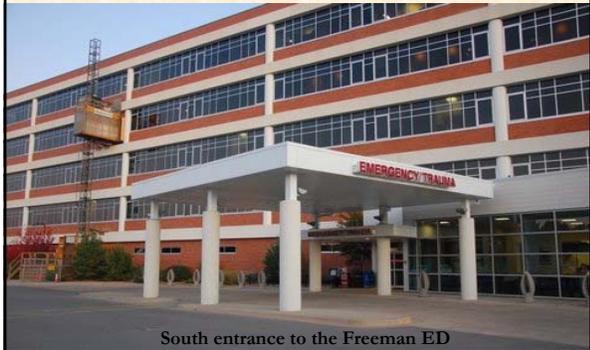
Freeman West Hospital is spared by a few blocks But loses 17,000 square feet of roof



Dozens of St. John's patients are transferred to Freeman St. John's had 182 inpatients – Freeman had 220 when the storm hit

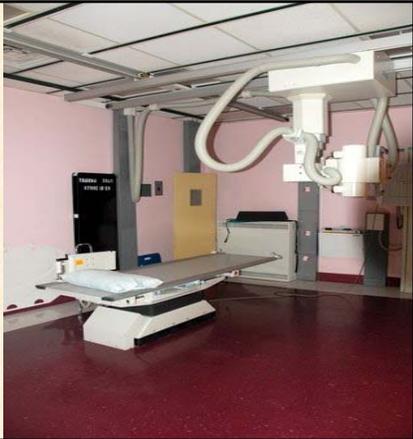


135 physicians answered the call for emergency care;
supported by 3,500 Freeman dedicated employees



South entrance to the Freeman ED

**Freeman West
took x-rays of
670 trauma
patients and
did 270 CT
scans within
36 hours after
the storm, all
on emergency
power**



22 life saving surgeries within 12 hours
The first patient to the OR had been eviscerated



**Young girl, impaled by a steel rod,
undergoes life saving surgery at Freeman**





124 patients transferred to 10 different cities



Issues Presented: Who is sent where? How to notify families?
Multiple landing pads needed. A good patient log is essential.
\$300k worth of equipment goes out the door.

PLAN BEFORE THE EMERGENCY

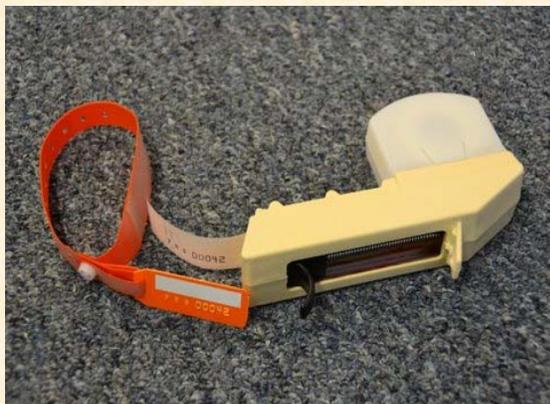


30

Identity of Patients – Multiple John/Jane Does

- Have a way to identify patients who cannot tell you their name and who have no ID on them.
- You may have no computers and the patient has to go to x-ray, ICU or have labs, etc.
- Typical John Doe system failed; Had 50+ John/Jane Does.
- One solution is a mechanical numbering system that needs no computers or electric power:
 - Label Printer No. 51288
 - Bio-Logics/The St. John Companies, Inc.
 - Valencia, CA

31



Reunited after days in the ICU



33

Handling Families

Set up a method for dealing with families, who will come by the hundreds to find love ones.

- How will the list of patients be made and posted or made available for review if you are overwhelmed and your systems are down?
- A Section 1135 waiver can waive HIPAA for 72 hours (more on this later).

34

Finding the Missing

- Be ready to devote resources to this.
- Calls will come from persons across the country looking for loved ones.
- Person in ICU that cannot be identified.

35

Staff Access to the Hospital Zone

- Staff will be responding, however, may be stopped at checkpoints.
- Need an ID system for health care workers to cross police checkpoints quickly.
- An experienced RN was delayed at a checkpoint for 30 minutes because of no ID.

36

Volunteers – Have a Plan to Use Them

- Lifting teams, watching pets, traffic control, passing out blankets, moving wheelchairs, cleaning, delivering water, etc.
- Have a consent and waiver ready for them to sign or have them register with AmeriCorps; record names and addresses.
- Agree to confidentiality of patients.

37

83,000 volunteers come to help within 90 days
... and help they do



The Insurance Coverage Issues

- Have replacement cost coverage, however, be sure you have enough total coverage for a major loss to your facilities. (Earthquakes are a special problem, since insurance is not available, however, there are other risks.)
- Blanket policies for all of your corporate entities:
 - Pros
 - Can apply depreciation hold-backs to about any building repair.
 - Have one adjusting team or loss manager to deal with.
 - More opportunities to negotiate on issues.
 - Easy to get cash draw-downs to maintain cash flow.
 - Easier to set policy limits for covered items.
 - Cons
 - May have more than one profit center, so may be more difficult to get lost income or business interruption recovery.
 - May have different accounting methods to deal with in your organization.

39

Review Coverage: Lost Income, Extra Expenses and ACV vs. RCC

Lost Income Coverage

- This is the big unknown that can exceed policy limits quickly.

Extra Expense Coverage

- Will cover specialty items such as generator trucks and fuel, water tankers, light towers, etc.

Replacement Cost Coverage

- Actual Cash Value vs. Replacement Cost Coverage.

40

Next Lesson: Your Hospital Mass Trauma Emergency Plan

Have a well thought out emergency plan for mass trauma that will work when you have been hit and:

- Your facility has been damaged.
- You have no power, communications, electronic systems or water, yet you have no choice but to deliver care to mass casualty victims.
- You are overwhelmed with victims with major injuries.

As planners, be sure that you are ready for legal issues which may arise and where to go for help.

- Have counsel available to help the ICS, if needed.
- Joplin examples: EMTALA, ambulances, vendors.

41

Statewide – Emergency Management Assistance Compact (EMAC)

- California ratified the EMAC to allow reciprocity during disasters.
- EMAC is established by law and gives legal protection.
- A Governor's Declaration of a State or Local Emergency triggers the following EMAC benefits:
 - A state-to-state disaster response system to assist the affected state by deploying personnel, equipment and medical resources to the disaster site.
 - Reimbursement for expenses and workers' comp for disaster workers.
 - Liability protections similar to state Good Samaritan protections.
 - Honoring of out-of-state credentialing across state lines.

42

Next Lesson: Review Lease Casualty Provisions for Properties You Lease:

- Have current copies of leases for the facilities you lease immediately available and review them NOW! Look for disaster issues, etc.
- How do you give **notice** when the Landlord has no office left? (Consider using an e-mail address.)
- Do you, as the Tenant, have the **right to cancel** the lease when there is major damage?
- Do you have **time to examine and remove contents** from a damaged or destroyed building or can you abandon your contents to the Landlord for disposal?

43

Leases and Tenant Built Improvements

- TBI are improvements added by the Tenant. The lease governs who, whether the Landlord or the Tenant, has the risk of loss on TBI. These can involve a lot of money.
- If you are the Tenant on a lease with TBI, be sure to schedule the leased property on your insurance policy or see that the Landlord has that obligation.
- Add newly acquired property and improvement to the insurance policy on an ongoing basis.
- Do an inventory of all leases to make sure all property is scheduled on the insurance policy.

44

Next Lesson: 3,000 “legal hold” boxes of records were stored in this building.



45

Documents Subject to Legal Holds

- You will have documents subject to legal holds because of litigation or investigations. Know where these documents are stored. They may be electronic or paper.
- Contact your remediation contractors immediately after a loss to make them aware of any legal hold issues.
- If documents are damaged, get your attorneys involved to contact all the parties to work out any legal issues presented.
- Take photos to make a record of the damage.
- Do not destroy records on legal hold until issues are resolved. (Freeze drying or other restoration methods may be options, however, they are expensive.)

46

Next Lesson: Contract Forms and FEMA

- In California, will have to rebuild to existing (current) codes so your construction contract will need to cover this as well as many other issues.
- FEMA regulations specify that certain provisions must be in a rebuilding construction contract in order to make a FEMA claim. (See 44 CFR 13.36 covering procurement)
- Competitive bidding or competitive procurement will be an issue with FEMA so be ready.
- FEMA compliant contracts can be complex so get legal help with them.

47

44 CFR 13.36(i) Requires:

- (3) Compliance with **Executive Order 11246** entitled "Equal Employment Opportunity"...
- (4) Compliance with the **Copeland "Anti-Kickback" Act** (18 U.S.C. 874)....
- (5) Compliance with the **Davis-Bacon Act** (40 U.S.C. 276a to 276a-7)...
- (6) Compliance with Sections 103 and 107 of the Contract **Work Hours and Safety Standards Act** (40 U.S.C. 327-330)...
- (8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.
- (10) Access by... the Federal grantor agency... to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit...
- (12) Compliance with... section 306 of the **Clean Air Act** (42 U.S.C. 1857(h)), section 508 of the **Clean Water Act** (33 U.S.C. 1368)...
- (13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the **Energy Policy and Conservation Act** (Pub.L. 94-163, 89 Stat. 871).

Designate a FEMA Officer and Team

- Know who you will designate to lead the dealings with FEMA.
- Consider having the same officer and team be responsible for handling all insurance claims, since the issues will overlap.
- This team should consist of persons who can work well together and who can be decisive.
- The team should be small enough to meet on short notice and whose members are aware of system wide issues.

Next Lesson: A Need to Finance Improvements or Repairs



General Bond and Financial Covenants Apply to Emergency Financing

- California has state mandated bond covenants so be sure your finance people are up to date on those.
- Have a plan if emergency financing is needed.
- Freeman Health prepared and took to market a \$25m bond issue to build-out two floors by December 4, 2011.
 - Construction began with cash on hand prior to the bond sale. So never forget that emergency cash is king!

51

Next Lesson: Good Samaritan Laws

- Good Samaritan laws protect professionals who render aid at the “site of an emergency” and who do not charge for it from legal liability.
- In **Missouri**, the Good Samaritan Law applies at the “site of an emergency,” however, the law does not state whether a hospital can be a “site of an emergency.” These laws differ from state to state.
 - Freeman took the position that the hospital was the “site of an emergency” so that the **Good Samaritan Law** would protect volunteers (Missouri Section 537.037 RSMo). Fortunately, we have not had to test this in court.

52

What About California’s Good Samaritan Law?

- **Disaster Service Worker Protections** to volunteers and clinicians who provide emergency care at the site of a disaster, including a hospital, if declared a “medical disaster” (H&SC 1799.102 *et seq.*; B&P 2395; Gov. C. §8659)
- **Specific Good Samaritan Protections** for Licensed Health Care Professionals:
 - Nurses and nursing services (B&P 2861; 2721(d))
 - Physicians and advance practice health care professionals (B&P 2395 *et seq.*)

53

What About the California Hospital?

The ED may qualify as a site of an emergency for Good Samaritan purposes if the event is declared a **“medical disaster.”**

- A medical disaster is defined as “a duly proclaimed state of emergency or local emergency declared pursuant to the California Emergency Services Act...”. (B&P 2395)
- Only the Governor or authorized local public official can declare a medical disaster (Gov. C. §8550 et seq.; see also §8659)

54

So if the “Professional” is Protected from Suit by Good Samaritan laws, What About the Hospital?

- 28 states, including California, recognize a legal cause of action called **“Negligent Credentialing.”**
- This legal claim is made when a plaintiff claims that the Hospital was negligent in granting privileges to a licensed professional who practices at the hospital.
- Professionals may be admitted to a facility in an emergency without a credentialing process being followed. (Note: Hospitals are not required to let anyone have access to their facilities.)
- The individual practitioner may be a Good Samaritan under the law, but what if his/her history is a problem?
- I have not been able to find a case on negligent credentialing that has arisen in a Good Samaritan situation.

55

So How Can You Protect the Hospital During an Emergency?

- Get basic information and make an informed decision. (Have your legal staff weigh in on this.)
- Have professionals arriving during an emergency, who do not have privileges at your facility, fill out a short application providing the following information: State and type of license; places where the professional holds privileges and the type of privileges held; whether the license and privileges are current and not under suspension; whether the professional is under investigation by any entity; whether the professional has ever been suspended or listed on any debarment list; the number of medical malpractice claims filed against the professional; etc.
- Then have them sign this under oath and review their answers before allowing them to go to work and then, only approve them for access while acting as a Good Samaritan under the law.

56

Next Lesson:

Identify Private MOU's Needed

- If you will be relying on cooperating hospitals to provide personnel to assist, consider a direct MOU with them to cover who will be furnished and when, prior notice, time limits, compensation, etc.
- Have agreements to quickly obtain:
 - Laundry
 - Fuel
 - Supplies of all types

**AFTER
THE
EMERGENCY**

**Section 1135 Waivers Under the
Social Security Act**

- There are **two kinds** of Section 1135 waivers:
 - A short term waiver good for 72 hours, and
 - A 60-day renewal waiver.
- Both depend on the declaration of a Public Health Emergency (PHE) by the Secretary of Health and Human Services at the Federal level.
- This declaration will need to be requested by the Governor.

Public Health Emergency

- Determine if PHE will be declared by the Secretary of HHS (42 USC §247d).
 - (See also www2a.cdc.gov/phlp)
- A PHE declaration is good for 90-days and can be extended.
- If a PHE, you will be eligible for Section 1135 waivers (42 USC 1320b-5).
- In Joplin, a PHE was in effect for 9 months until February 2012.

60

Emergency Short Term Section 1135(b) Waivers

- Issued by HHS. 42 USC 1320b-5
 - In Joplin, the waiver was issued May 23, 2011, effective May 22, 2011 — the day of the tornado
- These may waive, among other things:
 - Certain CoPs
 - Limitations on professional practice across state lines
 - EMTALA restrictions
 - HIPAA limitations to allow talking to family members
- Effective for 72 hours

61

Section 1135 Waivers Based on PHE (60 day waivers)

- Waivers are for 60 days and may be extended.
- Identify waivers needed, e.g., exceeding 25 beds for a CAH, allowing sub-acute facility to be used as an acute facility without an ED, allowing licensed personnel to cross state lines, etc.
- Identify the person(s) in the regional CMS office who will handle these waivers and get acquainted with them.
- A waiver can usually be requested by a letter or e-mail setting out the facts and there will be a very prompt response to the request.

62

Consider what your State Hospital Association can provide

- This should be an ongoing dialogue.
- It may be best for the State Hospital Association to take over task of contacting the Governor, CMS, etc. as to needs.
- Contacting the Governor’s Office for needed Executive Orders, e.g. refilling prescriptions, allowing out-of-state physicians to prescribe, disaster declarations, including requests to the Feds for Section 1135 waivers.

Example of Missouri Executive Orders Issued by Governor Nixon for Joplin

- Executive Orders may be issued for matters covered by state regulations that can be waived.
- EO 11-10 (MO) authorized Missouri Department of Health and State Board of Pharmacy to waive or suspend any rule or regulation to serve the interest of the public.
- Out-of-state practitioners needed to be able to write prescriptions
- Victims needed to be able to get “scrips” refilled for destroyed meds.
- This waiver was in effect for just under 30 days.

Temporary Repairs

- Make temporary repairs to preserve property, e.g., roof repairs
- Notify OSHPD and do not enter into any contract beyond that until you have approval and can talk to your insurance carrier.

Notify Your Insurance Carrier

- Give the extent of damage and ask for authority to make repairs and to do remediation.
- Approval of the insurance carrier is not regulatory approval, so have to consider both.

Remediation Contractors

- Your insurance carrier will most likely have a nationally approved remediation contractor, so don't sign a contract with a remediation company until you find this out.
- With an approved contractor, rates and responses will be pre-approved.

66

Locating Replacement Facilities

- See if you have insurance coverage to obtain replacement facilities.
- Get your insurance company involved in this process – they may be paying part or all of the cost.
- Move quickly to nail down space.
- Get a lease signed or someone else will.

67

Consider special needs such as...



Water intake by tanker truck for days – quality patient care goes on at Freeman East.

Extra Expense Items Under Insurance

- If you need a large generator(s), water tanker truck(s) or other operational support, talk to your insurance company – they have amazing resources and contacts.
- Insurance companies may have a pre-approved consultant to handle these issues.

69

FEMA

- Designate a FEMA officer for your organization now. Review Stafford Act and FEMA regs. (42 USC 5121-5207).
- Meet with the insurance company first and get an idea of the extent of your coverage or lack thereof. Identify the areas of loss that will not be covered by insurance and see if you can cut to the chase with FEMA on these areas.
- FEMA will want to have a kick-off meeting very quickly, but do not hold it until you are ready to do so, since it starts certain time limits running.

70

FEMA (cont.)

There may be many subprojects that FEMA will want to work up, however, if they start working up subprojects that are 100% covered by insurance, this may lead to differences with the insurance company as to the scope of the project and the methods of repair. This will slow work and be difficult to work out, so consider meeting with FEMA management to try to get a clear process for the areas that are covered by insurance and then get the work approved by the insurance carrier so you can get it done.

71

**From the *Wall Street Journal*
April 13, 2012**

- “Tornado Recovery: How Joplin Is Beating Tuscaloosa.”
- “One city is letting local business lead the revival, the other is imposing top-down rules and waiting for FEMA. Guess which one is rebuilding faster?”

A Parting Thought

- The emergency planning process for legal issues is like the overall planning process – expect the unexpected and have a good working relationship with your legal staff.
- Engage competent legal counsel.
- Emergency response requires focus, preparation and thought about what might happen.
- This presentation is just a sample of possible issues, but it is based on the lessons learned from Joplin.
- If you can’t get your head in the game, get out of the way.

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