



Help COVO Help Homeless Vets!

Testimony In Support of HB 4027

**Charles W. Hemingway
Executive Director, Central Oregon Veterans Outreach**

Chair Thompson, Chair Greenlick and Members of the Committee:

Thank you for the opportunity to appear today and testify in support of HB 4027. I know your time is invaluable this session and the fact that you are devoting such precious time to hear our modest proposal is most appreciated.

I have attached a copy of additional remarks for your consideration. I have included some Expanded Remarks at the bottom of my spoken remarks and I have prepared a Position Paper that I have titled, appropriately, I believe: “The Gap-Filled Federal Volunteer Protection Act - A Key Reason Why HB 4027 Should Be Enacted” Time permitting I hope to cover some of the reasons why the Federal Volunteer Protection Act is not the panacea it is claimed nor is it a reason why this legislation is not needed – in fact it is the very reason why this legislation is needed.

My statement has these key points, summarized here, in case I don’t have time to address them fully in my spoken remarks:

1. First, this legislation is broader than just doctors and dentists – it covers all volunteers - don’t lose sight of that fact.
2. Second, it is not a matter of educating the doctors about ORS 676.340 and 676.345. They KNOW about these provisions and IN SPITE OF THEM, they don’t think the protections are adequate. See Dr. Jacobs’ letters on this point.
3. The thousands of dollars spent by doctors in purchasing liability insurance to ride along on our medical van and provide services for free speaks volumes to the inadequacy of ORS 676.340 and 676.345, as does the fact that of the hundreds of doctors in Central Oregon, we’ve only found 8 willing, in spite of ORS 676.340 and 676.345, to join us – and those doctors are paying out of their own pocket to help us.

Also, in Section 2B, (line 10) as part of our effort to create a holistic approach to addressing liability protection for the volunteers, including medical providers, who go out into the camps, etc., we would like to see that Section amended to delete the words "does not" and change the word "include" to "includes" so that doctors and other medical providers are covered by the act's protections, or in the alternative, eliminate (B) altogether.

Now you've already heard or probably will hear testimony that the problem with HB 4027 is that it deals with "liability in general". That's not right. It deals with liability in specific. HB 4027 is tailored narrowly – it deals only with the provision of narrowly defined "outreach services". Thus, a bus driver driving a homeless kid from a Boys and Girls Club to a place where his parents are couch surfing would not come within the ambit HB 4027 – that is too attenuated a circumstance. In fact, the Federal Volunteer Protection Act, at Section 4(a)(4) (found at 42 USC 14503) expressly excludes bus drivers from protections of the Act – that's one of the big gaps HB 4027 would fill.

This is no debate or choice between a 2-tier system of justice versus expanding immunity in general! HB 4027 is a bill that brings justice to a system that has no tiers at all – the people we serve die out there, unattended, or lose limbs or eat up precious limited hospital resources with repeated ER visits and ambulance calls. Where is the justice in that, especially when you have a willing doctor who is scared to, despite the purported protections of ORS 676.340 and ORS 376.345, and can't afford the liability insurance. Where is the 2-tiered justice in that? When you balance the ability to take medical care for free to a population that rarely gets any care at all against a limited, narrow provision of immunity only provided under very tailored circumstances, I believe the balance falls in favor of HB 2027.

Please, I implore you – read my expanded remarks and read my entertaining Position Paper, "The Gap-Filled Federal Volunteer Protection Act - A Key Reason Why HB 4027 Should Be Enacted".

Thank you, I will be happy to answer your questions

Expanded Remarks

When the predecessor bill to HB 4027 was being considered in the last legislative session, one of the things that got lost, because all the focus was on medical providers, was that the aim of the effort was to provide protections for all volunteers, not just (but certainly including) doctors and other medical providers. Thus, the drivers of our medical van, the mental health counselors, the support personnel and all other non-medical volunteers who go to the camps, shelters, soup kitchens and other locales where homeless veterans and others can be found, were overlooked in the emphasis that got placed only on the ORS provisions regarding limitations on liability of health practitioners in ORS 676.340 and 676.345. Please don't forget that this time around.

But a key reason that the predecessor bill to HB 4027 stalled was the argument that the provisions of ORS 676.340 and 676.345 adequately covered medical providers and that it was just a matter of educating them. Last session we were initially naïve to those provisions. After the session ended, we took this information back to medical providers in Central Oregon. It turns out that education is not the issue. Every medical practitioner we canvassed was abundantly aware of these provisions, but they uniformly said they want something more - an omnibus provision like that in HB 4027 that covers the provision of outreach services beyond the locales where they routinely conduct their practices. The Medical Director of our Mobile Medical Van, Dr. Randy Jacobs, was already providing every interested physician with a copy of the information from the Oregon Medical Board and having them sign up, if they were not already.

They tell us that their medical liability insurance covers where they practice in the “ordinary course of business” and that their liability insurance providers tell them that volunteering to go out to provide services in a homeless camp is not covered by their insurance. In fact, Dr. Jacobs, buys out of his own pocket a rider to his medical liability coverage that costs him \$1,200 a year – just so he can come and volunteer on our van.

Now I don’t think Dr. Jacobs is a dumb guy or one who is inclined to spend his money needlessly. He is, after all, the Director of Urgent Care for Bend Memorial Clinic. But he’s spending \$1,200 a year out of his own pocket just so he can ride along on our van and provide medical services for free. In fact, we must have recruited the 8 dumbest doctors in Central Oregon to be a part of our program because collectively they are paying thousands of dollars in needless liability insurance premiums because the provisions of ORS 676.340 and 676.345 cover them adequately. Go figure.

Second, what the doctors tell us is that while ORS 676.340 provides protection for enumerated health care professionals who register with their licensing board for “injuries, death or other losses arising out of their provision of services for which they are not compensated,” they say this is not specific enough, and they would like to see, for this particular kind of volunteer activity, an express statutory provision that provides protection from liability for working with homeless populations. Dr. Jacobs sent out a letter to virtually every physician in Bend recruiting them to volunteer for the medical van and we provided the form that these doctors could use to register with their licensing authorities and a fact sheet on the provisions of ORS 676.340 and 676.345. Only 7 out of hundreds of doctors in Central Oregon responded. While he couldn’t canvass all of the non-responders, the feedback he did get was that notwithstanding ORS 676.340 and 676.345, they wanted a clearer, more specific articulation in the tort liability section of the law (Chapter 30, Actions and Suits in Particular Cases) – not the sections on the practice of medicine, (Chapter 676, Health Professions Generally).

Third, given the paucity of medical providers volunteers who came forward (8 for our medical van project, including Dr. Jacobs), we are in danger of burning these few out. If we do not have a ready volunteer pool from which to draw and we overuse and overwhelm the ones we have, once they get burned out the whole effort dies. We are living on borrowed time.

The Gap-Filled Federal Volunteer Protection Act - A Key Reason Why HB 4027 Should Be Enacted

Charles W. Hemingway, J.D., LL.M.
Executive Director, Central Oregon Veterans Outreach
117 NW LaFayette Avenue
Bend, OR 97701.

There are huge gaps in the Federal Volunteer Protection Act of 1997 (42 USC 14501 - 14505) that leave Oregon volunteers who would be prone to rely on the protections of the Act virtually naked, and which make the need for a specific Oregon statute even more imperative. To wit:

a. Gap 1 - Is the Act Constitutionally Defective? One overarching critical issue is the constitutionality of the act. The federal act purports to pre-empt what has long been a province of state and local practice and purports to shoehorn state and local volunteer service in as form of interstate commerce. That is a stretch – read the Findings and Purpose Section of the Federal Volunteer Act to see what I mean. Some legal commentators who take a strict constructionist view of the US Constitution would argue that the Congress overstepped its authority and has stripped from states the authority regulate some of the most important aspects of local volunteerism. Thus, it is within the realm of possibility that a plaintiff who is suing a volunteer in a tort case where Federal Volunteer Act is interposed as a defense could lose, and then file suit asserting that the act is unconstitutional. And it is within the realm of possibility that a federal court could find the act unconstitutional and Congress exceeded its authority.

b. Gap 2 – Federal Causes of Action Not Covered. Another point to note is that the Federal Volunteer Act purports to regulate only state causes of action, not possible federal causes of action. Thus, while a particular claim by a plaintiff injured by the tort committed by a volunteer might be barred by the Federal Volunteer Act, if the plaintiff can find a federal claim on which to base a lawsuit, that action would be permissible. For example, consider this hypothetical. We, at COVO, are given surplus federal property, which we pass out in homeless camps, shelters, etc. Suppose that one of our volunteers issues a piece of equipment we obtained from the Dept. of Defense to a homeless person and he is injured by it. While a state claim might fail as one prohibited by the Federal Volunteer Act, I fairly confident that a good lawyer can craft a claim under federal law, there is a potential that the volunteer could be found liable on the basis of a federal cause of action.

c. Gap 3 – The “Properly Licensed, Certified or Authorized” Limitation. Another huge hole in the Federal Volunteer Act is a provision at Sec. 4(a)(2) that provides protection from liability to a volunteer only if the volunteer “was properly licensed, certified or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred...” This has 2 aspects: First, COVO, nor any other

volunteer organization that engages homeless outreach is an “appropriate authority” to license, certify or authorize anybody under the statute. That sounds like a governmental function. And there is no provision in Oregon law that licenses, certifies or authorizes this type of activity (going out into homeless camps, to shelters, soup kitchens, etc. – but an Oregon statute, like HB 4027 would. Second (and this gets to the point that the doctors make about specificity in a statute), it is unclear under ORS 676.340 and 676.345 whether going out into a homeless camp and rendering medical services is a specific “activity” (as that term is meant in the statute) that would enable the doctors to protection under the Federal Volunteer Act. The argument is that (given the “for the activities” language), if there is no specific authorization for the particular type of activity engaged in (going out to a homeless camp) which is provided by the “appropriate authority” that licenses, certifies or authorizes. If so, then the protections of the Federal Volunteer Act (the argument would go) do not apply.

d. Gap 4 – “Void for Vagueness”: The “Conscious and Flagrant Indifference” Standard. Another gap is a provision that states that there is no protection for a volunteer where the harm caused by a volunteer is due to the “conscious, flagrant indifference to the rights or safety of the individual”. This is particularly dangerous language for volunteers because this is a jury call. In a particular course of conduct, what to a volunteer might have seemed prudent conduct, might seem to a jury “conscious, flagrant indifference” depending on how well a clever counsel argues it. How do you define, “conscious, flagrant indifference”? That is subject to a broad range of interpretation. Use of the word “safety” is another risky provision for volunteers. What is or is not “safe” is a decision that would be left up to a jury as well.

e. Gap 5 – No Federal Immunity for Drivers. Perhaps one of the biggest gaps concerns drivers. The Federal Volunteer Act makes volunteer drivers expressly liable for the harm they might cause in a driving accident. Our medical van depends entirely on volunteer drivers. Consider this as well – when we send out our medical van, the doctor on board, as the senior person, is in charge. If the doctor directs the driver to go down a particular road and there is an accident (or, if the doctor is placed in the position of having to drive the bus him/herself), arguably the doctor might be liable. The volunteer driver would likely say he/she was only operating the vehicle under the direction, dominion and control of the doctor – or – a clever plaintiff’s lawyer reaching for the deep pockets of the doctor, might well try to make such a claim. And, in a crunch, it might need be that the doctor or nurse might have to be the driver.

f. Gap 6 – Nonprofits Are Not Covered by the Act. Another huge gap concerns the interplay of two sections of the statute. Sec. 4(c) says that nonprofits are not covered by the Federal Volunteer Act and can be sued.

g. Gap 7 – And Nonprofits, If Sued, Can Turn Around and Sue Their Volunteers. Sec. 4(b) gives nonprofit organizations the right to sue their volunteers. So, consider this: An individual is harmed by the actions of the volunteer and sues the nonprofit and the nonprofit is found liable and has to pay. The nonprofit turns around and sues the volunteer for the liability it incurred and seeks subrogation. This is permitted by the

Federal Volunteer Act, and in fact, given the interplay between these two provisions – one following right after the other – was even arguably expressly considered by the Congress as exactly the way the law should work – you can't sue the volunteer, but you can sue the nonprofit and the nonprofit can turn around and make the volunteer liable. This essentially guts the statute. Obviously the plaintiff is always going to sue the nonprofit. And if the nonprofit can turn around and sue the volunteer, what is the point of the statute?

h. Gap 8 – Award of Punitive Damages Possible Under the Act. Another provision of the Federal Volunteer Act concerns punitive damages. Although the statute purports to limit punitive damages, in actuality the statute expressly provides for the award of punitive damages against a volunteer if the plaintiff can establish by clear and convincing evidence that the harm caused by the volunteer was proximately caused by the volunteer and the volunteer was acting with a “conscious, flagrant indifference to the rights and safety of the individual harmed.” The bottom line is that a clever trial lawyer may well be able to tag the volunteer with punitive damages and the statute expressly provides for it.

i. Gap 9 – The Act Does Not Prevent the Award of Non-Economic Loss Damages. Another gap concerns the potential that a volunteer can be hit with huge “non-economic loss” awards. The Federal Volunteer Act expressly provides that a volunteer can be held liable for non-economic damages but says simply that the “trier of fact” (the judge or the jury, as the case may be) will determine the percentage of responsibility that the defendant (volunteer) had for the harm caused. It is the potential for non-economic damages that are the real killer here for getting our medical providers on board with signing up to volunteer. Non-economic damages are for “pain and suffering”, mental anguish, loss of enjoyment of life”, etc.

j. Gap 10 – Claims of Civil Rights Violations Are Exempt From the Act. Finally, an easy way for a plaintiff to get into federal court, where the costs really get expensive, is to claim that the volunteer violated his/her civil rights. Volunteers are not protected against claims made under federal or state civil rights laws. Having to defend a claim in federal court versus a state court can easily bankrupt a volunteer. An astute trial lawyer could well craft a claim for an action in federal court and using the potential costs of litigation as a hammer hanging over the head of a poor volunteer defendant, wrangle a settlement from the volunteer's insurance company for a hefty amount.

Date: February 10, 2012



February 10, 2012

Chuck Hemingway
Executive Director
Central Oregon Veterans Outreach
Bend, OR 97701

Dear Chuck,

I have the pleasure of serving with Central Oregon Veterans Outreach as volunteer medical director of the Mobile Medical Unit serving the homeless in shelters and camps in Deschutes County. I appreciate your efforts supporting HB 4027 with its provisions to provide immunity for volunteers providing services without compensation to the homeless.

Please make record of my support for this bill, as long as it is approved with your proposed amendment to SECTION 2 of HB 4027, which will allow volunteer Oregon licensed health care professionals to be included in the text, but with liability limitation provided through the statutes ORS 676.340 and 676.345. Without the amendment, I am concerned that the proposed legislation may mislead potential volunteers, not realizing that a limited liability waiver may be obtained through their professional licensing board.

Sincerely,

Randall Jacobs MD
Director, Bend Memorial Clinic Urgent Care
1501 NE Medical Center Drive
Bend, OR 97702
541 408 4298

February 2, 2012

Chuck Hemingway
Director, Central Oregon Veterans Outreach
117 NW LaFayette
Bend, OR 97701

RE: HB 4027

Dear Chuck,

Please convey my strong support for passage of HB 4027 which includes the liability waiver for Oregon health care professionals who have stepped up to the need in their communities by providing care to the needy without compensation. These volunteers are a critical healthcare component in attempting to meet needs for those in the 'gap' – without insurance or ability to pay.

As you know, it has been a challenge to recruit new volunteers given the liability risk. Passage of this bill is an important step in assuring volunteers of state of Oregon support in the event of a suit, as well as including health care providers with other volunteers in the proposed legislation and its protection.

The COVO Mobile Medical Unit (MMU) is currently providing medical outreach services to the most needy of individuals who are without insurance or financial resources. The COVO MMU goes out 1 ½ days per week with 24 nurses, 6 physicians, 2 physicians assistants, a nurse practitioner, among active volunteers. We could recruit more medical practitioners easily if only we had this legislation.

We all know about the registration procedures under ORS 676.340 and 676.345 – there is no need to educate us. These statutory sections are inadequate. We need the express protections that HB 4027 can provide, if Section 2B is amended to delete the words “does not” in Line 10 of Section 2.

Sincerely,

Randall Jacobs MD
Volunteer Medical Director
Central Oregon Veterans Outreach Mobile Medical Unit
19412 Charleswood Lane
Bend, OR 97702
541 408 4298
rjacobsmd@gmail.com