

Promoting healthy people and healthy communities through dialogue, partnerships, education and research in public health law.

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Diversifying the Dialogue on the Intersection of Public Health and the Law

Rene Cabral-Daniels

In the last issue of the *Reporter*, Jean C. O'Connor proposed an insightful framework for analyzing the relationship between the fields of public health and law. Her article, *Advancing the Dialogue on the Intersection of the Public's Health and the Law*, suggests that the questions framing the nexus between public health and the law should reflect a greater acceptance by public health officials of the law's importance and relevance, as well as a better understanding of public health goals by lawyers. It advances the dialogue about this nexus beyond the relevant, although mundane, questions about how law serves as a tool to promote the public's health and whether civil liberties or administrative law is the better adapted tool for such promotion, to a framework in which law is both the authoritative infrastructure of public health practice and one source of "discrete and systematic public health intervention" that will improve the public's health.

O'Connor asserts that the law as infrastructure dialogue should concern how public health authority is carried out, while the law as intervention dialogue should focus on greater "incorporation of law" into models for disease prevention. In this article, I accept O'Connor's proposition and recommend advancing her creative approach by advocating that such creativity guide an analysis of how best to engage in that dialogue. O'Connor's article did not identify which parties should be invited to this dialogue. In this article, I predict the limitations of both legal principles and public health practices in identifying criteria for assessing which parties must be engaged in the dialogue in order for it to be meaningful. I explore the limitations in restricting the dialogue to only those with degrees in both public health and/or law and offer alternative, practical paradigms to consider so as to ensure these dialogues are as robust as possible.

To achieve the overall goal of advancing the dialogue on the intersection of public health and the law by expanding consideration to include the relationship of law to public health authority and disease prevention models, care must be given to the dialogue invitation process. Exposure to a wide array of ideas to make a good decision has been analogized to being as necessary as having a wide selection of goods to make the best economic choices. Similarly, diversification of those who are invited to supply the ideas and thoughts will likewise directly impact the quality of this dialogue. As Justice Holmes stated in his dissent in *Abrams v. US*,¹ men "have come to believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in
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President's Column



Lori H. Spencer



Dear Colleague:

This is a bad news/good news story. The bad news is that, late last year, we learned PHLA would not receive any funding from CDC for the next government fiscal year. The reason: Katrina caused a completely unanticipated diversion of CDC resources, forcing a change in funding priorities. If you like irony, this is a good example. As I said in an earlier President's column, Katrina offered about

the best possible evidence of the need for "preparedness" of all types, including legal preparedness to respond to a public health emergency. So it is ironic that an event that illustrated clearly the vital importance and relevance of PHLA's work, is the same event that swept away much of our expected future financial resources. Resilient and determined, the PHLA Board has responded by belt tightening coupled with efforts I mentioned last time to work collaboratively with the Milbank Memorial Fund to enhance our membership structure in a way that will produce a sustainable funding stream in the future, if we succeed. We have also made several appeals to CDC already and we are in the process of taking that appeal directly to Dr. Julie Gerberding, who has been a great champion of public health law initiatives for many years. We are stretching our resources and ourselves to keep things going, but I have to deliver the bad news that PHLA's future is uncertain.

So, what is the good news? The good news is that we are doing remarkable things, with less, and thanks to the commitment of the Board members and other volunteers—the true believers. We will soon produce another newsletter. We are planning a teleconference for early April where we will address the legislative response to employers like Wal-Mart, whose employees make disproportionate use of governmental health care programs. We are developing a signature "Year in Review" session for the upcoming 5th Annual Partnership Conference on the Public's Health and the Law in the 21st Century; organizing a track for the conference on Partners in Public Health; planning a reception, and seeking nominations for our annual PHLA awards. We are also sponsoring a student poster session at the conference at which we expect to have received 12 posters, three from international students. The rest of the good news is that PHLA has offered and continues to offer for those who are actively engaged in its work, incomparable opportunities to do things and meet people and lead the charge in public health law matters.

I would rather that you not dwell on the bad news. Leave that task to the Board leadership. Instead, I am issuing an invitation to you to step up and offer your time and talent to support PHLA's work. We have always relied on the good graces of volunteers and it is pretty clear that we will continue to do that for the foreseeable future. My message is that this not a one-way street—working with PHLA gives back at least as much as you give. I can prove that to you. Be in touch with me and I will give you something remarkable to do. Katrina has hit us pretty hard, but, like New Orleans, we can weather the storm.

Cabral-Daniels article continued from page 1

ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." This free trade in ideas will only result if the scope of parties invited to participate in the dialogue is expanded. It is only when additional parties are invited to the conversation that the dialogue will pass Holmes' "best test of truth."

One important limitation of restricting the dialogue to only those with degrees in both public health and/or law is that both professions have similar approaches for identifying necessary parties to the discussion. Adopting these traditional approaches assures the inclusion of predictable parties and therefore a predictable dialogue. The conventional public health approach to identifying relevant parties to participate in an activity is to identify stakeholders. While there are many different definitions of this term, the California Environmental Health Tracking Program's definition is a reasonably representative one. It defines stakeholders as "individuals and organizations which may affect or be affected by the issues addressed by the program. In other words, they have a vested interest in the goals, activities, and outcomes of the program." The threshold for inclusion as a stakeholder ranges from the potential to be affected by the activity to be undertaken at the least to being actually affected. The vested interest example suggests one must prove a special concern or stake in the issue.

It is interesting that the field of public health with its broad scope of authority has embraced an equally broad concept of stakeholder in defining the relevance of parties to an issue. Applying this view means literally everyone might qualify if the issue is one of air quality, yet fewer people may be defined as a stakeholder if the issue involves testing genetically susceptible people for an extremely rare condition. The breadth of the stakeholder criteria is both its strength and its weakness. Its strength is that the definition allows for considerable flexibility. The stakeholder criteria can be expanded or even manipulated by the definition of the problem at hand or activity to be undertaken. At the same time, such breadth may serve to frustrate the objective of

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screening out those whose input may not be perceived as valuable. Because the stakeholder criteria are capable of limitless expansion, they may prove useless in accurately identifying the segment of the population most capable of providing free trade in relevant ideas. The reasons for stakeholder involvement are likewise well stated by the California Environmental Health Tracking Program:

- It facilitates better decisions and better implementation of decisions.
- It facilitates their buy-in and support for the program.
- It allows greater ownership of the program.
- It guards against the program becoming too inwardly focused and aids decentralized decision making.
- Stakeholders help to identify issues not addressed by the program staff.²

These reasons suggest the purpose of stakeholder involvement is to provide further support for the effort and to assure greater quality in process and product. Once again these reasons emphasize the importance of being affected by an issue or outcome. If one is not able to demonstrate she is affected or if she is only affected in a slight manner, she will not likely be identified as a stakeholder.

Generally, public health authorities define stakeholders. Public health stakeholders are often community leaders, business leaders, practitioners, and hospital personnel, among others. It is not unusual for some individuals and groups to be identified as stakeholders for multiple public health issues. As noted above, they will likely be identified as stakeholders because they have or will be affected by a proposed activity. The strength of limiting public health activities to stakeholder involvement appears to be its deference to those who are affected, so as to assure quality public input.

Applying the marketplace of ideas analogy to the stakeholder model illustrates its obvious drawbacks. Limiting involvement to those who are or may possibly be affected by an issue, whether positively or negatively, may at the very least preclude objectivity and at the most stifle diverse approaches to resolution. Those who are affected may be in the best position to advocate a perspective regarding actual or future harm or benefit, but there other perspectives that are not considered. For example, the historical, philosophical, theological, and anthropological perspectives are silenced in the stakeholder model.

And yet, these perspectives are important for a number of reasons. First, as discussed earlier they assure a wide array of ideas necessary to make a quality decision. Included in that array are paradigms likely unfamiliar to public health leaders that may prove instrumental to finding creative solutions. Second, these perspectives may identify populations that should be identified as stakeholders but who are not. For example, identifying migrants from Mexico as stakeholders and sending them brochures translated in Spanish excludes Mexican migrants who speak Mixtec or other

indigenous languages. If anthropologists were invited to the discussion, such problems could be avoided. Yet another reason to include a greater diversity in stakeholder perspectives is that often these groups can assist in partnering with an identified stakeholder group. For example, theologians can offer helpful suggestions on how best to communicate with and understand members of the faith based community. One last but very important reason to broaden the definition of stakeholder is that very often many of the problems Americans face today have been successfully mitigated by leaders in other countries. This is particularly true in the area of public health. Often another country's public health solutions have greater transferability than appear at first blush. At the very least the definition of stakeholders should include those with particular expertise in an area and the participatory role of these stakeholders—like the role of stakeholders listed above—should not be limited to one of mere consultation.

The definition of stakeholder in the public health arena has similarities to the definition of legal standing which is the test that is used to determine whether litigants may have a voice in influencing the court toward a desired legal outcome. Jurists believe the role of the courts is properly limited by requiring a potential litigant to prove he or she has suffered or imminently will suffer an injury that is causally connected to the conduct complained of, and which can be redressed by a favorable court decision. This requirement of standing is contrary to the marketplace of ideas approach because its focus is on limiting the voices and therefore the ideas to be considered.

Like the test to define stakeholder, the test for legal standing precludes objectivity and stifles diverse approaches. If the test for legal standing were used to identify parties invited to the dialogue, again, the historical, philosophical, theological, and anthropological perspectives, among others, would be silenced. While these parties may not be affected or have an injury and therefore would not be viewed as a necessary dialogue participant under conventional legal approaches, they certainly will provide relevant input to the marketplace of ideas.

The criterion that requires the demonstration of an injury is very similar to the public health stakeholder requirement that one must “affect or be affected by the issues addressed by the program.” The requirement of being affected precludes one from being a stakeholder based upon mere abstraction. It is possible that the reason stakeholder status requires being affected by a program is to likewise ensure a quality outcome.

However, while these approaches may ensure a quality outcome for a public health program or a legal proceeding, they are likely to frustrate the objective of advancing any dialogue, particularly ones with global implications like public health and law. The stakeholder and standing criteria are tests which those with degrees in public health and law are most likely to be familiar. Although they serve

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somewhat related purposes and have similar components, those interested in advancing the dialogue on the intersection of public health and the law should refrain from embracing these comfortable approaches in favor of adopting one better suited to ensuring a robust, comprehensive dialogue. In considering the alternative approaches to identifying dialogue participants, let us return to the two dialogues identified by O'Connor. The law as infrastructure dialogue involves how public health authority is carried out. One approach in expanding dialogue participants might be to adopt the goal of enhancing diversity that has been adopted by the business community. In an attempt to improve work products and services the business community has diversified its workforce so as to promote differing perspectives, backgrounds, ideas, and skills. Members of the business community might offer other skill sets that will be invaluable to this effort. If public health authority is viewed as a service, business tycoons can identify organizational behavior models that might be best adapted to communities. Dialogue participants with an expertise in history can provide insight regarding the historical challenges faced by others in identifying how best to carry out their authority.

O'Connor states that the law as intervention dialogue should focus on greater incorporation of law into models of disease prevention. She notes that others have suggested that law should be incorporated into chronic disease prevention models based on scientific knowledge. O'Connor recognizes the role of lawyers, healthcare providers, and biological, social and environmental scientists in this effort. Her list represents a good start in identifying dialogue participants but it should be expanded. Members of the faith based community, especially those with ecclesiastical training, would be particularly well suited to offer insightful suggestions on how this could be best accomplished. Their training in the law of their faith and community outreach efforts (which may have included disease prevention) positions them as favorable dialogue participants.

O'Connor's article was likely welcomed by public health law professors, health policy analysts, and many others. She has invited readers to question the historical approach to this effort by offering an alternative framework. In inviting others to participate in that dialogue, readers must likewise question the conventional approach to identifying participants if they are to give O'Connor's creative approach any justice. Perhaps the test to be utilized in defining dialogue participants should be who or which groups are most likely to be excluded from the conventional stakeholder and standing tests and what possible value might they offer in passing Holmes' marketplace of ideas' "best test of truth."

¹250 U.S. 616 (1919).

² California Environmental Health Tracking Program, Stakeholder Involvement (on the Internet at <http://www.catracking.com/sub/stakeholder.htm>).

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PHLA Events at the 5th Annual Partnership Conference

The Public Health Law Association has a number of activities planned for this year's conference, The Public's Health and the Law in the 21st Century, which will be held June 12-14 in Atlanta. Key events include:

- **Annual Membership Meeting** – Tuesday, June 13, from 7:30-8:30 a.m.
- **Student Poster Presentations** – Tuesday, June 13, from 1:30-2:00 p.m. PHLA is proud to sponsor its second annual student poster session, featuring original research on topics at the intersection of law and public health. The posters will be on display throughout the conference.
- **PHLA Reception** - Tuesday, June 13, from 6:00 to 7:00 p.m. Don't miss this annual opportunity to network with your colleagues in public health law. Awards for student posters will be presented during the reception.
- **PHLA Awards Luncheon** - Wednesday, June 14, 12:00-1:30 p.m. The PHLA Awards for Excellence in Public Health Law will be presented. For information on how to nominate someone for an award, see page 7.

PHLA is also sponsoring a "Public Health Law Year in Review" plenary session and several of the conference's concurrent sessions. The PHLA president will introduce the conference's final plenary session on Wednesday, June 14, at 1:30.

PHLA members are eligible for a discount on conference registration. Contact PHLA for the discount code. For more conference information and on-line registration, visit <http://www2a.cdc.gov/phlp/conference2-006.asp>.

Contact PHLA

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Membership Spotlight: Richard Goodman



Interview by Kyle Kingsley



Dr. Richard A. Goodman has been a distinguished leader in public health for many years. Before becoming co-director of the CDC's Public Health Law Program, Dr. Goodman edited the CDC's *Morbidity and Mortality Weekly Report*. In addition to his current duties at the CDC, Dr. Goodman is Adjunct Professor at the Rollins School of

Public Health-Emory University and the College of Law at Georgia State University. Dr. Goodman has authored numerous articles regarding public health law, epidemiology, and bioterrorism, and he was the lead editor for *Law in Public Health Practice*, initially published in 2003 by the Oxford University Press (the second edition is now in press). Dr. Goodman received his medical degree from the University of Michigan, his law degree from Emory University, and a Master of Public Health degree from the University of California, Los Angeles.

You are one of the leading—and most visible—advocates and educators for forensic epidemiology. Briefly, what should public health lawyers understand about forensic epidemiology?

First, the CDC has some great resources for any lawyer desiring to learn about forensic epidemiology. I would suggest everyone check out the CDC's website at <http://www2a.cdc.gov/phlp/training.asp#train>. Maybe the most important aspect about forensic epidemiology that lawyers must understand is the core issues arising from the interaction of law enforcement, epidemiology, and criminal investigation. However, lawyers must acquire a limited background on the science of forensics and epidemiology in order to understand why certain issues arise. That is, public health lawyers must develop familiarity with and understanding of the limitations of each field.

Please understand, I am not suggesting that public health lawyers enroll in an epidemiology degree program; there are plenty of available materials for quickly bringing lawyers up to speed regarding each field. Again, I would suggest starting with the CDC's website. Turning specifically to legal counsel for state and local health departments, lawyers should focus on understanding the appropriate public health statutes and regulations. Lawyers need to understand the mandates, powers, and limitations imposed by their local public health laws.

As the anthrax events in 2001 demonstrated, public health lawyers must periodically review the relevant authorities for public health investigations involving law enforcement. An example of a tool is the recently published agreement between the FBI, the New York City Department of Health and Mental Hygiene, and the New York City Police Department. The relevant documents are available at <http://www2a.cdc.gov/phlp/docs/Investigations.PDF>. Lawyers must also be acutely attuned to the privacy laws and regulations relevant to sharing health information among the health departments and other agencies. Finally, public health lawyers must develop an understanding regarding the explicit and implicit restrictions on due process in order to properly counsel their clients during a forensic epidemiological investigation.

Your unique background gives you a great perspective on public health law. What major challenges do you see for public health law and lawyers?

I believe that there are two substantial challenges for public health lawyers. First, lawyers must master the complex mix of federal statutory law for recognizing and responding to large-scale emergencies and the necessary authorities relating to the health department's actions. In essence, lawyers must push their self-education on these authorities. The second challenge involves externalizing the lawyer's knowledge by educating others. It is essential that lawyers take an active role in educating their clients about the laws necessary for the client's operations.

There are several good resources for assisting lawyers in their educational efforts. For example, the CDC developed the *Public Health Emergency Law* course materials and guide aimed at aiding lawyers who want to educate their non-lawyer clients but who themselves do not have the time for developing the teaching materials. The materials are available on the CDC's website at <http://www2a.cdc.gov/phlp/pHEL.asp>. Additionally, the CDC is developing a nine-unit PowerPoint course titled "Public Health Law 101." The units include: administrative law, ethics, privacy, the role of legal counsel, infectious diseases, and environmental concerns. Interested lawyers need to watch the CDC's website where information about the course will be posted after we complete editing the units.

What activities keep you involved in the public health law community?

I find that two annual events keep me connected to public health law and, more broadly, health law: the annual CDC Public Health Law Conference, and the annual ABA Health Law Section conference. Both are great and the enthusiasm and diversity exhibited by the ABA conference attendees is really notable.

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Public Health Emergency Law: Implementation of the CDC Foundational Course at the University of North Carolina at Chapel Hill

Jennifer Horney

In 2005, the Centers for Disease Control and Prevention developed a foundational course titled Public Health Emergency Law. The North Carolina Center for Public Health Preparedness (NCCPHP) at the University of North Carolina School of Public Health worked with partners at the University's Institute of Government, North Carolina Division of Public Health, and the North Carolina Attorney General's Office to adapt the course to state-specific public health emergency law and develop case studies based on local events to test participant understanding and application of these laws to specific situations.

The one-day course was offered on March 8, 2006, to nearly 100 participants at the William and Ida Friday Center for Continuing Education in Chapel Hill. The course included practice-based examples of isolation and quarantine during the 2003 SARS outbreak and management of property during a recent mercury contamination at a North Carolina high school. In addition, small groups made up of local public health directors, epidemiologists, attorneys, physicians, nurses, laboratorians, veterinarians, environmental health specialists, and National Guard and law enforcement officials completed two case study scenarios of a public health emergency to apply materials. Case studies included an outbreak of avian influenza on a North Carolina poultry farm and public health abatement of an industrial site causing chronic disease.

Participants found the course particularly useful because it offered information specific to new North Carolina statutes, as well as an opportunity to network with colleagues at other organizations involved in public health emergency response. Michael Costello, bioterrorism coordinator for the Onslow County Health Department and an attendee at the meeting said, "The partnership between public health and the county attorneys can not be understated. Familiarity with each other and the public health laws reviewed in this course need to be in place prior to an event."

The Public Health Emergency Law course was developed by the CDC Public Health Law Program and has been or is planned to be offered in 29 states. NCCPHP presented the course at two sites in West Virginia in October 2005, and is planning to offer the course at three sites in Tennessee in May 2006. Additional information about the Public Health Emergency Law course can be accessed at: <http://www2a.cdc.gov/phlp/Phel.asp>.

Jennifer Horney, MA, MPH, is Director of Education and Training for the North Carolina Center for Public Health Preparedness. The Center is located at the North Carolina Institute for Public Health, the service and outreach arm of the University of North Carolina at Chapel Hill School of Public Health.

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How did you initially become involved in public health law?

What suggestions do you have for individuals (students/young careerists) starting their careers in public health law?

Well, my interest in public health law is an unusual—and in some ways unexpected—story. Although I already had a broad interest in the intersection of medicine and law during medical school, I decided at that time to exclusively pursue the medical path. After encountering numerous legal issues during my many years of editing the CDC's *Morbidity and Mortality Weekly Report* and my near-daily interactions with CDC's general counsel, I became increasingly aware of and interested in the legal authorities underpinning medical and public health daily practice.

Law plays such a large role in what public health officials can and cannot do and an even larger role in agencies' daily operations. I noticed a large gap in public health practitioners' knowledge about public health law, including major gaps in my own knowledge. I believed that understanding the law would lead to more effective and efficient public health operation. At that point I decided I needed to bridge this knowledge gap by pursuing my burgeoning legal interest. This intellectual shift, I would not really call it a change of direction, coincided with my desire to step away from

my long relationship with the MMWR. So far, my new role at the CDC and in law has been a wonderful and fulfilling experience.

Regarding lawyers interested in public health law I would first have to comment about how excited I am at the increasing interest in public health law shown by lawyers. I am hearing from more and more law students about their interest in public health law and the CDC recently received twenty-five applications for our public health law internship—a record!

I guess my advice for students would be to arrange an internship in either a local or state health department. If an internship is impossible, the person should extensively read public health and public health law materials. For anybody with the resources (that is, time and money) I would recommend obtaining a Master of Public Health degree, or any other formal public health education. And, of course, I would recommend that students—or anyone else interested—regularly read the CDC's weekly Public Health News available at <http://www2a.cdc.gov/phlp/cphln.asp>.

Kyle Kingsley, J.D., M.H.A. is a student member of the PHLA. He is finishing his Master of Laws studies in Health Law at the Beazley Institute for Health Law and Policy, Loyola University-Chicago School of Law. Kyle can be contacted at kakamack@hotmail.com.

PHLA Seeks Nominees for Awards for Excellence in Public Health Law

The PHLA Board of Directors is seeking nominations for its Excellence in Public Health Law program. The purpose of the Excellence in Public Health Law awards is to give national recognition to people, programs, activities, or initiatives that support the Association's mission: "To promote healthy people in healthy communities through dialogues, partnerships, education and research in public health law." The 2006 awards will be presented Wednesday, June 14th in Atlanta, Georgia at the fifth annual public health law partnership conference, "The Public's Health and the Law in the 21st Century."

There are two categories of awards. The award for "Distinguished Achievement in Public Health Law" is given annually to an individual, organization, or group to acknowledge outstanding achievement during the preceding year in the development, use or application of the law as a means to promote healthy people in healthy communities. Each year, one award is given for notable achievement through service (including employment-related service), advocacy, research, teaching, or legislative affairs. Past recipients of this award have been the Turning Point Public Health Statute Modernization Collaborative (2004), and Arkansas Governor Mike Huckabee (2005).

The "Distinguished Career" award is given to individuals whose careers have been devoted to using, creating, or encouraging the use of law to improve the public's health. It is given only to those who have made long-term, significant contributions in public health law. Recipients must be recognized by their peers as leaders in the field. This award is given only when merited and may not be given annually. Past recipients have been Gene Matthews, retired CDC Chief Counsel (2004), and Frank Grad, Professor Emeritus, Columbia University School of Law (2005).

Award recipients need not be members of PHLA and nominations may recognize individuals or entities working in public health law in any nation. Nominators are not required to be members of PHLA. Self-nominations will not be accepted.

Nominations must describe the accomplishments that support receipt of the award. Nominations must be submitted electronically to awards@phla.info and must not exceed two double-spaced pages, using a 12-point font. The deadline for nominations is April 15, 2006.

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Calendar of Events



June 1, 2006

Health Law Teachers Conference, Baltimore, MD
<http://www.aslme.org>

June 12-14, 2006

The Public's Health and the Law in the 21st Century: Fifth Annual Partnership Conference, Atlanta, GA
For information about Public Health Law Association events at the conference, please see page 4.
http://www2a.cdc.gov/phlp/conference/Annualconf_2.asp

June 25-28, 2006

American Health Lawyers Association Annual Meeting, Philadelphia, PA
<http://www.healthlawyers.org/>

July 26-28, 2006

NACCHO Annual Meeting, San Antonio, TX
<http://www.naccho.org>

September 12-15, 2006

ASTHO Annual Meeting, Atlanta, GA
<http://www.astho.org>

November 4-8, 2006

American Public Health Association's 134th Meeting, Public Health and Human Rights, Boston, MA
<http://www.apha.org>

Newsletter Contributions Wanted

Would you like to write for the PHLA Reporter? We are seeking articles on public health law issues and news items on events that are of interest. For further information, contact editor@phla.info.



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