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Blurred Lines

Navigating between the EMS workplace & personal life

By Steve Wirth, Esq., EMT-P

In today's high-tech world, the traditional lines between work and personal life have blurred tremendously. The two are intermixed now more than ever with the advent of smartphones that allow each of us to stay in touch with and manage our personal lives while at work and vice-versa. Technologies and applications such as Twitter, Facebook and Instagram can also give EMS employers much more information about what their employees are doing when not at work. This raises a whole host of legal issues as to the extent that an employer can use information about "off-duty conduct" or the "lifestyle" of the employee when making employment decisions.

Approximately 30 states have laws that to some extent protect employees from so-called lifestyle discrimination—such as prohibiting employers from taking adverse action against an employee who uses tobacco products or engages in other lawful activities when not at work. But even in states where

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The Problem with Rules

When policy manuals hinder instead of help

By Mike Taigman

"There are no rules here; we are trying to accomplish something."
—Thomas Edison

Twenty-five years ago I worked with a consulting team on an EMS system that was melting down. They were six weeks away from financial bankruptcy, their vehicles were breaking down so frequently that they'd added two tow trucks to their fleet, and less than half of their ALS ambulances had working heart monitor/defibrillators. As we dug into the cause of this meltdown we discovered that, among other things, 59% of their staff had turned over during the previous year. I thought, "Wow, people must really hate this place," but I turned out to be wrong. Three-fourths of the people who left were fired for policy violation. The agency's policy manual was so thick it made the New York City Yellow Pages look like a hymnal for atheists.

The uniform section of this particular policy manual was five pages long and included rules like "the tail of your uniform belt shall extend two inches" past the edge of the buckle. They rigorously enforced this, along with a host of other rules. Field supervisors actually carried rulers (I am not making this up) to measure the amount of belt sticking out of employees' buckles. The policy also listed corrective action: on first offense, the employee was to be sent home for four hours without pay to correct the deficiency; second offense was a two-day suspension; and third offense was termination. Yes, they actually fired people because their belts didn't conform to the rules.

This is an extreme example and most rules-based organizations do not slip this far off the rails. In fact, most rational people would agree

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LEGAL CONSULT

INCISIVE ANALYSIS OF EMS LEGAL TOPICS

'No Load' & Denial of EMS Immunity

A case study

By Winnie Maggiore

A recent decision from the Illinois Court of Appeals demonstrates a sophisticated analysis of EMS issues by a court that ultimately denied immunity to EMS providers in a wrongful death case.[1] Illinois law provides absolute immunity to a local public entity for failure to evaluate, diagnose and treat.[2]

Two very different sides of the story were presented at trial: one by the responding paramedics, and one by the decedent's father. The jury found in favor of the father and against the paramedics, and further found that the paramedics had acted in a "willful and wanton" manner. The jury was instructed that willful and wanton conduct is a "course of action that shows an utter indifference or conscious disregard for the safety of others." The court's 2013 opinion affirmed the jury's award after nine years of litigation.

The jury found in favor of the father and against the paramedics, and further found that the paramedics had acted in a 'willful and wanton' manner.

On Oct. 30, 2004, Larry Furio—father of the decedent, Joseph Furio—picked his son up from his mother's house and took him home at about 11:15 p.m. Joseph had finished an inpatient drug rehabilitation program two weeks earlier. Shortly after Joseph went to bed, Larry heard gasping from Joseph's room and found him cyanotic and dyspneic; he then stopped breathing and became unconscious. Larry immediately called 9-1-1 at about 1 a.m. and attempted CPR. Joseph awakened, but still had slurred speech and appeared groggy.

By the time EMS arrived, Joseph was able to communicate and denied taking any drugs; he asked why the paramedics were there. Joseph told his father in the presence of the paramedics that the "pills I'm taking make me tired." Larry later testified that one of the paramedics rolled his eyes and appeared put out that they had been called. There was a dispute of fact between Larry and the paramedics as to whether Larry told them that Joseph had a history of asthma and whether Larry told them that his son had been unconscious.

Paramedic William Peterson testified at trial that he did not think they had a patient. He testified that Larry told him he thought that he had overreacted to whatever happened, and that Joseph was fine. He did not know that there had been an attempt at CPR, did not know of Joseph's history of drug abuse, and stated that they left thinking there was no patient to treat. Peterson did not ask questions of Larry as to what had precipitated the 9-1-1 call, and did not take Joseph's vital signs because he saw no evidence of dyspnea.

Paramedic Howard Franzen testified that the call came in for an unconscious child, possibly asthma. He recalled that Joseph denied having an asthma attack. He did a visual assessment, observed that Joseph was alert and answering questions appropriately, and his skin tone was normal. Joseph said he was fine, and Franzen did not ask any further questions of Larry. He recalled Larry apologizing for the call, and telling Larry that if he needed 9-1-1 to call them back. He also did not know that Larry had attempted CPR, or that Joseph had a history of substance abuse.

Joseph was not transported. Larry continued to check on his son until about 3:15 a.m., and then went to sleep. The next morning he found Joseph unconscious and called 9-1-1 again. Joseph was transported to the hospital, but later died.

Plaintiff called an expert witness, Dr. David Tan, who testified that, to a reasonable degree of medical certainty, Joseph was suffering from an opiate overdose. He further testified

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that if an appropriate EMS assessment had been done, that a history of a life-threatening situation would have been elicited. Plaintiff also called expert witness Guy Haskell, who testified that the statement Joseph made about the pills making him tired was sufficient to trigger an EMS assessment and further investigation into what the pills were and how many of them had been taken.

The defendants called Dr. Max Koenigsberg, who testified that the paramedics had complied with the standard of care because they determined that the subject of the original call had no complaints, was not in any distress, did not appear disoriented and was not a patient. Koenigsberg stated that Peterson and Franzen made their determination of Joseph's status by observing him, seeing that he had an airway, was breathing and had adequate circulation. He testified that further evaluation was not needed because Joseph was not a patient.

The court engaged in a detailed analysis of the immunity issues applicable to this factual scenario, relying primarily on a 2002 case.[3] The court in the Antonacci case had held that absolute immunity applied if there was no examination, or a failure to diagnose or treat. However, immunity would not apply if there was negligent treatment, or if there was willful or wanton conduct that took the paramedics outside of the immunity.

A great deal of the analysis focused on the conflicting testimony of witnesses and court documents as to whether any medical care was provided to Joseph. Ultimately, the court held that immunity turned on whether the paramedics had made a diagnosis and begun to treat, or whether they had not made a diagnosis at all. The defendants in this case affirmatively asserted that there had been no medical care of any kind rendered in this case, and that they were entitled to absolute immunity. They asserted that absent knowledge of Joseph's history of substance abuse, they could not be found guilty of willful and wanton conduct.

The jury disagreed, finding willful and wanton conduct, and returning a verdict in excess of $8 million. The verdict, though challenged by the defense, was upheld by the court.

This case illustrates a number of important points. First, EMS must make every effort to determine why a 9-1-1 call was made and what happened before they arrived. Second, an apparent life-threatening event, or ALTE, requires a full patient assessment and transport to an appropriate facility even if the patient appears to have fully recovered. We are trained to transport the near-drowning patient; this was a similar type of event in which it appears that Joseph had a near miss respiratory arrest that was interrupted by his father's intervention. Third, even absolute immunity is not absolute and when a jury finds willful and wanton conduct, that immunity does not apply. Fourth, lawsuits against EMS are becoming increasingly sophisticated and the public will not tolerate what it feels is complacency on the part of EMS providers. ☐

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fyi DCFEMS Establishes Social Media Policy

The Washington, D.C., Fire and Emergency Medical Services Department (DCFEMS) has established a social media policy to minimize the publishing of inappropriate, confidential or privileged information on the Internet by its employees. The new guidelines are meant to assist employees in making responsible decisions when posting on the Internet.

Inappropriate postings identified in the policy include discriminatory remarks, harassment, retaliation, sexual innuendo, threats of violence, or similarly unlawful content. The policy states that "behavior of this type will not be tolerated and may result in disciplinary action up to and including termination."

In addition, employees are prohibited from posting statements, photographs, video or audio that could be viewed as malicious, obscene or bullying. Posting confidential, private or any information obtained as a result of employment with the department is also prohibited.

When referencing their employment with the department in personal activities, employees must include a disclaimer stating that the opinions expressed are personal and do not reflect the views of the department or D.C. government.

LEGAL CONSULT

INCISIVE ANALYSIS OF EMS LEGAL TOPICS

BLURRED

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there are lifestyle protection laws, there are usually exceptions that limit those protections for the employee.

Typical of these exceptions is Colorado's lawful activities law, which makes it "a discriminatory or unfair practice for an employer to terminate the employment of an employee due to that employee engaging in any lawful activity off the premises of the employer during non-working hours . . ." (C.R.S. Sec. 24-34-402.5). Those protections do not apply if the employer can show that the conduct either 1) relates to a bona fide occupational requirement for the job or is reasonably and rationally related to the employment activities and responsibilities of the employee, or 2) is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

The gist of these broad exceptions is that if the employee's off-duty behavior can be shown to legitimately interfere with the employer's business, then it is less likely that these laws will protect an employee who engages in otherwise lawful conduct. But EMS employers must tread lightly here. The public sentiment is leaning toward the attitude that what employees do off duty rightly should be "none of the business" of the employer—unless the employee is actually violating a relevant law or engaging in conduct that clearly harms the organization. And even in the states that offer limited statutory protection for employees, there may be other invasion of privacy or "intrusion upon seclusion" claims that could be brought by the employee against the employer if information about off-duty conduct is improperly obtained or misused.

'Smoking & Toking' & the EMS Workplace

Federal law prohibits the recreational use of marijuana nationwide, which gives employers a strong basis for continuing the status quo of enforcement of drug policies that prohibit the use of illegal drugs. But now a new Colorado law (known as Amendment 64), and a similar law in Washington (known as Initiative 502), legalizes the possession of small amounts of marijuana for personal use. These laws are clearly "out of joint" with federal law, but the Obama administration has directed federal agents not to interfere with state laws that make recreational marijuana use legal.

So can an EMS provider in Colorado or Washington be disciplined or terminated for legally using marijuana off duty? The answer is yes. Colorado's Amendment 64 has a specific carve-out for employers. The law states that it is not intended to require an employer to permit marijuana in the workplace, "or to affect the ability of employers to have policies restricting the use of marijuana by employees." The Washington law is silent on employer rights, but the Washington Supreme Court has upheld the termination of an employee who legally

An EMS provider who lives and works in a state other than Colorado or Washington goes on a ski trip to one of those states and legally smokes some pot. The employer learns about it when the employee returns to work. Can the employee be disciplined or terminated? Yes.

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used marijuana for medicinal purposes, so it is unlikely that employees would prevail against employers who terminate them for recreational marijuana use off duty.

The bottom line is that these new state laws really only protect the legal pot smoker from criminal sanctions. EMS employers in Colorado and Washington—and around the nation—are still free to continue to enforce lawful drug testing policies for both applicants and employees who test positive for marijuana and other illegal substances.

Scenario: The Pot Smoking EMT Who Vacations in Colorado or Washington

An EMS provider who lives and works in a state other than Colorado or Washington goes on a ski trip to one of those states and legally smokes some pot. The employer learns about it when the employee returns to work. Can the employee be disciplined or terminated? Yes. These new state laws have no bearing on any other state, and even if the state in which the EMS agency resides has a lawful activities law, the recreational use of marijuana is not a lawful activity in that state. Thus, absent an employment contract or labor agreement provision to the contrary, the employee could be disciplined for violation of the EMS agency's drug free workplace policy.

Steps to Consider When Dealing with Off-Duty Conduct

- Don't overreact. It's easy for a supervisor to react emotionally to incriminating images viewed or information obtained about an employee's off-duty conduct—especially if the images or conduct do not comport with the supervisor's sense of morality. Supervisors must be careful not to impose their own personal beliefs into the equation for determining disciplinary action.
- Don't rely on rumor or third-party information. It's easy to get sucked into the drama of it all and to assume things are true just because it was reportedly seen on a social media page. Whenever a supervisor becomes aware of possible off-duty misconduct that could relate to the job, a methodical and objective workplace investigation must be conducted. That includes gathering facts, interviewing witnesses who may have observed the misconduct, and interviewing the employee alleged to have engaged in it.
- Don't single people out. Treat all information about alleged off-duty misconduct the same way for all employees: objectively and without any appearance of retaliation or ill motive against the individual. The employer should be able to point to unbiased, clear and explainable reasons that are related to the job as the basis for initiating an investigation and implementing disciplinary action.
- Make sure there is a connection between the conduct and the job. Generally, when off-duty conduct conflicts with the EMS agency's legitimate business interests, the agency may take appropriate action against the employee. For example, if the agency becomes aware of unlawful harassment of an employee by another employee while off duty, this conduct could easily carry into the workplace and, if not appropriately deal with, could adversely impact the workforce and the agency's interests.
- Don't invade an employee's privacy. Be careful about obtaining information about an employee through improper means. Do not monitor employees without their knowledge or misrepresent who you are or your motives when obtaining information. For example, "friending" employees on Facebook using a false identify or improperly accessing social networking accounts could potentially violate employee privacy rights.
- Carefully assess arrests & convictions. If you learn an employee has been arrested, investigate and verify the arrest. Then evaluate the impact of the arrest on the qualifications for the job. If the arrest is for behavior such as drunk driving, adverse action may be appropriate, as that conduct would relate to the job duty of safely operating an emergency vehicle. Often the best course is to immediately suspend the employee pending an investigation. State laws vary as to the extent an employer may rely on arrests and convictions in employment decisions, with greater employee protections if the conduct results only in an arrest and not a conviction. In all cases, employers should conduct an individualized assessment of the specific situation before taking adverse action against the employee.
- Watch out for union-related activity. Federal and state labor laws protect employees who engage in union organizing activity, or who act in a concerted manner with other employees for "mutual aid or protection" concerning key workplace issues. This includes the right to engage in discussions (including on social media) about improving wages, benefits and other terms and conditions of employment. Employees also have the right to meet and openly support (or not support) a labor union in the workplace without threats, interrogation or surveillance of these activities by the employer. These rights apply to the already unionized and the non-unionized workforce.

We will definitely see more blurred lines between the EMS workplace and the personal lives of EMS employees as the two become more intertwined in the coming years.

We will definitely see more blurred lines between the EMS workplace and the personal lives of EMS employees as the two become more intertwined in the coming years. In the face of this evolving trend, EMS leaders must remain objective, calm and fair in all actions when navigating between these lines to reduce the risk of employment-related litigation and to maintain positive workplace morale.

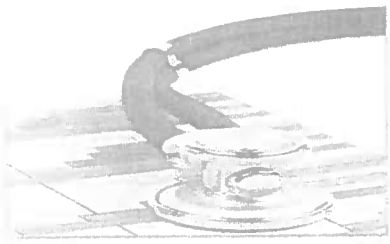
This column is for informational purposes only and should not be relied on as legal advice or as a definitive statement of the law. ☐

HEALTHCARE REFORM

Where Should We Start?

Using evidenced-based practice to move EMS forward

By David M. Williams, PhD



The Institute for Healthcare Improvement (IHI) Breakthrough Collaborative Series Model is a method used to bring organizations together to learn and collaborate to make significant improvements in a specific topic area.[1] This process was used in ambulance service in Massachusetts from 2009–2013 to improve prehospital stroke care.[2] A key element of the method is to begin with existing evidence that helps guide developing aims, measures and change ideas.

A core tenet of improvement, research and established professions is to start somewhere—preferably to begin with what's known and stand on the shoulders of others. In research, we're asked to present a review of the literature; in business it's part of the market analysis of the business plan. This ensures your approach is based on the best-known evidence, and your local learning (if published and shared) may help further collective efforts to enhance ambulance service.

Alternatively, the Institute of Medicine's (IOM) 2006 report on EMS challenged that "EMS professionals and policy makers at all levels should work to establish a culture of science-based decision making ..." and "... scientific evidence should be used to support system level decisions ..." including clinical and operational practices.[4] In order for the EMS profession to meet the demands of the transforming healthcare environment and the constraints of local communities, we have to stretch to understand existing evidence and continually apply it to our practice.

"There is not enough high quality EMS-related research to drive improvements in patient outcome, and vast amounts of money are being spent for patient care with little rigorous evaluation of the effectiveness of that care."

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Evidence Base of Ambulance Service

In ambulance service, the evidence base is light. This is simultaneously part of the problem, a key to our challenge and a driver for change. In 2001, the National EMS Research Agenda stated it bluntly: "There is not enough high quality EMS-related research to drive improvements in patient outcome, and vast amounts of money are being spent for patient care with little rigorous evaluation of the effectiveness of that care. Methodologically sound research must be incorporated into all facets of the EMS system."[3] For many EMS leaders, the absence of definitive evidence leads them to either pick and choose procedures to implement or, worse, ignore the evidence all together. This does not

Where Do I Find this Evidence Base?

A good place to begin your team's journey is with free industry reports and papers that are publicly available. These include reports and projects from the National Highway Traffic Safety Administration (NHTSA), National EMS Advisory Council (NEMSAC), and the websites of associations such as the National Association of EMS Physicians (NAEMSP) and National Association of State EMS Officials (NASEMSO), which also publish papers and position statements. These documents are frequently rooted in existing evidence and compiled by committees of EMS stakeholders.

Peer-reviewed EMS research appears in a number of journals. One worthy of a subscription is *Prehospital Emergency Care* (PEC), which is dedicated to ambulance service and is the official journal of the NAEMSP, NASEMO, the National Association of EMS Educators (NAEMSE) and National Association of EMTs (NAEMT). A subscription provides you access to the full online archive going back to 1997.

Another way to access peer-reviewed research is by searching the database at www.pubmed.gov. Access is limited to abstracts, but that can be enough to help you find out what's out there. *Note:* It's always advisable to read the actual paper and not just an abstract, so if you find an abstract of interest, please obtain the original paper.

Google remains a powerful resource as well. I often find myself researching a topic online and then following the references authors include in presentations and articles online. Trade journals such as *JEMS* and *EMS World* can also be helpful, but be aware that these articles are not held to the rigor of peer-reviewed journals when it comes to referencing ideas and presenting data.

These resources will start you at the front of the pack of EMS leaders and put you on good footing to ignite a culture of science-based decision making in your organization.

Science-Based Decision Making

Developing a culture of science-based decision making in your system is not instantaneous. If there was a known approach that worked out of the box, we'd all be doing it. Here are some thoughts for how you can start:

1. At the initiation of any effort to change, clarify with your team what you are trying to accomplish. The more specific you are, the easier it is to design and execute.
2. Begin with some prep work. This may include searching PubMed and Google for position papers, reports and peer-reviewed papers on the topic. Also, take the time to learn about what you are currently doing. What are the existing processes and policies? What is the organizational history of how you got there? What data do you track or can you pull about the current state? Compile what you've found and share it with your team to review and digest before meeting.
3. When you do meet, discuss what you've all discovered from the prep work. Is there a gap between what the evidence says and what your current practice is? Are there any missing areas in the existing evidence available to help you? What questions do you have?
4. Make a list of changes to help you close the gap between existing evidence and current practice. What changes can you make that you believe will result in improvement? How will you measure that improvement?
5. Use rapid, small-scale tests of change (e.g., the Plan, Do, Study, Act tool) that follow the scientific method and display your data over time in run charts to learn deeply and efficiently. You can even annotate the changes you are testing.
6. Regularly meet as a team to share learning, exchange ideas and plan for further improvement.

When it's all said and done, I encourage you to share your learning and results (even failures). Peer-reviewed abstracts and papers are preferred to add to the evidence, but other avenues are helpful too.

Starting with the published evidence to date, building on and testing those ideas using the rigor of the scientific method, and sharing our results will go a long way toward meeting the aims of the National EMS Research Agenda and the IOM report. It will also help us accelerate the enhancement of ambulance service and engage our peers in the healthcare environment. Don't feel you have to be a pro on your first try. The best way to learn and improve is through action. So, what's your next action? ◻

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RULES
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that some rules make good sense—drive on the right-hand side of the road; if you intubate the patient, put them on capnography; don't drop the baby, and so on.

Excessive Rulemaking

There are several problems that can occur within a rules-centered EMS organization. Many rules are written in response to one specific incident. There may as well be a photo of the person who inspired the rule right next to it in the policy manual. For example, I know of one fire/EMS department with a printed rule that says, "There will be no masturbation while on duty in the firehouse." You know that the human resources manager did not make this one up out of thin air. Some people still have a copy of the infamous "no slouching" policy implemented by a certain private ambulance service.

Some rule-based managers and supervisors think that an issue cannot be addressed unless there is a rule for it, and employees can be quick to take note of this seeming weakness. Back when it was common for paramedics to place nasotracheal tubes, one crew (in a city I will leave unnamed) responded to a young man who had overdosed on heroin. The EMS crew had a difficulty finding a vein. The patient was barely breathing and was nasally intubated just as an IV was secured. A gentle dose of Narcan improved the patient's respiration and woke him up. He tolerated the tube without gag or discomfort, so the paramedic talked the patient into playing a little joke on the emergency department staff. You can imagine the surprised reaction when the patient walked into the department on his own two feet, intubated, bagging himself. When the offending paramedic was brought before administration in this rules-based organization he defiantly said, "Show me in the policy manual where it says that patients are not allowed to assist with their own ventilation."

Some managers believe that if they have a rule then it's iron clad, everyone understands it, and it will be easy to enforce. We would all do well to remember Franklin Roosevelt's take on the highest set of rules we have: our national laws. In a March 1930 address as governor of New York, he said, "The United States Constitution has proved itself the most marvelously elastic compilation of rules of government ever created." If laws were easy and straightforward, we would not need lawyers and courts to interpret them.

In most organizations the rulebook is only pulled off the shelf when something goes wrong and there is an urgent need to fix the blame on someone. When Mrs. Dawson brings a tray of cookies to thank the crew that resuscitated her husband, the supervisor doesn't reach for the policy manual to figure out what to do with the cookies.

Many EMS organizations spend endless time writing, rewriting, and enforcing rules that are not needed by the majority of the workforce. The former chief talent officer of Netflix Patty McCord, who is often credited with turning traditional HR model upside-down, has said, "Over the years we learned that if we asked people to rely on logic and common sense instead of on formal policies, most of the time we would get better results, and at a lower cost. If you're careful to hire people who will put the company's interests first, who understand and support the desire for a high performance workplace, 97% of your employees will do the right thing."

So what's the alternative to rules?

Values

In a values-centric organization the belief is that, since every situation and interaction is different, it's more effective to have some guiding principles to help people make sound and ethical decisions than it is to write a rule for everything. It's easier to remember and have a deep understanding of a handful of values than it is to memorize and be able to act on a long set of rules. Values live in the culture and the actions, conversations and thoughts of the people working in the system.

The most widely published set of EMS values, written by Thom Dick in 1990, are abbreviated as the STAR CARE guidelines—Safe, Team-based, Attentive to human needs, Respectful, Customer accountable, Appropriate, Reasonable, Ethical.

My mentor, Frank Staggers Sr., MD, passed away in late 2013 at the age of 86. I always keep with me a list of the values he taught, and they have served as a rock solid leadership framework for my personal and professional life:

- Always be yourself.
- Treat everyone with respect.
- Help others whenever you can.
- Whatever people are under, help them get over.
- Don't worry about who gets the credit.
- Be patriotic without being blind.
- You can find knowledge anywhere.
- Take time to enjoy life.

Now, Dr. Staggers didn't hand me this list on glossy paper with his hospital logo and a photo of a happy puppy bounding through a field of poppies. He showed me these by living them every moment of every day. What would people say are the values you've shown them? ☐

Mike Taigman is general manager of AMR Ventura County and Gold Coast Ambulance. He has worked with EMS organizations world wide, helping them improve what they do.