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Can We—and Must We—Hold In-Person Meetings?

As we all know, all "meetings of a governing body must be open and public and all citizens must be permitted to "attend" these meetings. RCW 42.30.030. But must those meetings be in-person, or may they be all-virtual? Under Proclamation 20-28 ("20-28"), Governor Inslee specifically removed the words "room" and "site" from different provisions of the Open Public Meetings Act ("OPMA"), and also removed any language prohibiting "conditions precedent" to attendance at meetings of the governing body.[1] 20-28 and its prohibitions and allowances remain in effect today, despite the state "reopening" and going into "Phase 4." Put another way, your governing body may continue to hold virtual meetings at your option.

So that begs the question: When 20-28 is rescinded or the State of Emergency is terminated, does your agency's governing body *have to* hold in-person meetings? This is a nuanced question, but the *intent* of the OPMA would likely be violated if members of the public are not able to go to a physical location for a meeting—after 20-28 is no

[1] https://www.governor.wa.gov/sites/default/files/proclamations/20-28%20-%20COVID-19%20Open%20Govt%20Laws%20Waivers%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery.

longer the law of the land. In other words, we do not find that the governing body could *ever* hold all-virtual meetings—those meetings that occur entirely in the "cloud" and do not take place at a physical meeting site.

Let us assume for the moment that 20-28 is no longer the law. The terms "room," "site" and "attend" are not defined in the OPMA. When terms are not defined in a statute, we look to their ordinary/dictionary meaning.

The word "room" means "an extent of space occupied by or sufficient or available for something", but also means "a partitioned part of the inside of a building."[2] A "site" is "the spatial location of an actual or planned structure or set of structures (such as a building, town, or monuments)" but is also defined in more recent times as "one or more Internet addresses at which an individual or organization provides information to others."[3] Finally, the word "attend" means "to be present at: to go to."[4]

In other words, it can logically be argued that under the OPMA, citizens can "attend" meetings by clicking on a Zoom link, calling a teleconference number, *or* going to a physical location.

However, once 20-28 is no longer the law of the land, there may be no "conditions precedent" to attendance at meetings. *See* RCW 42.30.040. Put another way, if a citizen must have an internet connection or a telephone to attend a meeting that is not otherwise being held at a physical location, that is arguably a "condition precedent" to attendance. Or so the open-government advocates would argue. And they may well be correct.

We at the *Firehouse Lawyer* continue to counsel our clients that when 20-28 is no longer law, the agency should resume in-person meetings, but adopt policies that would permit any staff member, board member or individual to participate remotely if they so desire. That is the safest way around an argument that your agency adopted a "condition precedent" to attendance at meetings by holding "virtual only" meetings—i.e. requiring attendees to have a phone or other electronic device to permit remote attendance.

For many years now, we have created resolutions or policies that allow for such virtual participation, upon condition that all persons participating can hear the remote participant(s). Without that, there would be a question of whether the meeting is truly open and transparent.

Attorney General Opinion on Duties to Provide Fire Protection and EMS

The Washington State Attorney General (AG) recently issued an opinion (AGO) of significance. We want to be clear that no Washington Court has issued a ruling on the question below, and therefore the AGO may be used as persuasive secondary authority in

[2] https://www.merriam-webster.com/dictionary/room

[3] https://www.merriam-webster.com/dictionary/site

[4] https://www.merriam-webster.com/dictionary/attend

the event of litigation. Among four questions referenced in the AGO—linked hereto[5]--the first question and the answer thereto stuck out the most:

[Question] "May a fire protection district refuse to provide fire and emergency services to persons or property within the reservation of a federally recognized Indian tribe within Washington State?"

[Answer] "No. Under current law, including RCW 52.02.020(1), once a fire protection district establishes its boundaries, it must provide fire and emergency services to persons and property within those boundaries. This is the case regardless of whether the persons benefitted are residents within the district or visitors, and regardless of whether the property is within the borders of a federally recognized tribe's reservation."

On its face, this opinion seems to indicate that a fire district (or RFA, presumably) must provide its services to all persons within its boundaries, with no exception.

The logical corollary to this AGO is that fire departments have *no duty to respond* to areas outside of their boundaries—unless a duty has been taken on by the department, see below.

This AGO does not address the ability of a governing body of a fire department to set its own level of service to areas within department boundaries.[6]

Another Law Enforcement Bill that Impacts Fire and EMS Agencies

We previously discussed Engrossed Second Substitute House Bill 1310 which applies to "Permissible Uses of Force" by law enforcement agencies ("LEAs"), and how 1310 impacts Fire and EMS Agencies ("FEAs").[7]

Today we consider a companion bill that pertains to the "tactics and equipment" of LEAs when responding to scenes that potentially involve the active commission of crimes. That is Engrossed Second Substitute House Bill 1054 ("1054"), which goes into effect July 25, 2021—at the same time as 1310—and which is now a Session Law.[8] We then discuss what impacts 1054 may have on FEAs.

[5] https://www.atg.wa.gov/ago-opinions/provision-fire-and-emergency-services-persons-and-property-within-reservation-federally

[6] *See Also* RCW 52.08.020 and RCW 52.26.110 on withdrawal of territories from either a fire district or a regional fire authority.

[7] https://www.firehouselawyer.com/Newsletters/MayJune2021FINAL.pdf

[8] http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/House/1054-S.SL.pdf?q=20210629104408

A series of other "police reform" bills that have impact on FEAs[9] have also been passed, but we will not discuss them herein.

Again, 1054 applies to the "tactics and equipment" of LEAs when responding to scenes that may involve the active commission of crimes. Here are the provisions of 1054, Section-by-Section:

Section 1 sets forth self-explanatory definitions. 1054 applies to "peace officers" and employees of FEAs are not "peace officers." Consequently, and much like 1310, 1054 does not apply to FEAs—but has certain indirect impacts that we will discuss below.

Section 2 bans the use of "chokeholds" and "neck restraints" by peace officers in the course of their duties "as peace officers." No reasonable person would conclude that 1054 nullifies a peace officer's constitutional right of self-defense. But Section 2 strips a peace officer of the ability to choke or otherwise restrain the neck of an individual who is or is potentially committing a crime for purposes of effectuating an arrest or other seizure.

Section 3 creates a "criminal justice training commission" for the training and use of canine teams. This section has no true impact on FEAs.

Section 4 prohibits the use of tear gas by LEAs "unless necessary to alleviate a present risk of serious harm" due to a riot, barricaded subject or hostage situation. And even if the use of tear gas is authorized under the circumstances, the peace officer still must exhaust other alternatives prior to that—which may be difficult to determine in the field. This means that if LEAs and FEAs are called to the scene of a riot, barricaded subject, or hostage situation, tear gas is a last resort. And even if an LEA wishes to use tear gas outside of a correctional institution (a jail), they cannot do so without approval from the "highest elected official"—the mayor in cities, the county executive in counties, or the governor in the case of the Washington State Patrol.

Section 5 indicates that LEAs may not acquire or use "military equipment," and LEAs must return any "military equipment" they already own to the federal agency that provided it. This law prevents LEAs from using such weapons as armored or armed drones, and grenades.

Section 6 states that all peace officers at a scene must be "reasonably identifiable." Because FEAs generally have an understanding of who and who does not

[9] SB 5476 (prosecution of drug offenses and alternatives to arrest of individuals suffering from mental health and substance-abuse disorders): https://app.leg.wa.gov/billsummary?BillNumber=5476&Initiative=false&Year=2021

SB 5066: Duty of "peace officers" to intervene to mitigate the "wrongdoing" of other "peace officers": http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5066-S.SL.pdf?q=20210629113222

SB 5051: Establishment of a criminal justice training commission: http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5051-S2.SL.pdf?q=20210629113459

constitute a "peace officer" at a particular scene, this section has no true impact on FEAs.

Section 7 prohibits "vehicular pursuits" by LEAs except in the event that a peace officer has (1) *probable cause* to believe that a person has engaged or is engaged in particular violent or sex offenses, or (2) reasonable suspicion of a DUI offense. Peace officers are also precluded from firing weapons at moving vehicles unless the driver and/or a passenger presents an "imminent threat of serious physical harm" from use of a "deadly weapon"[10] and the officer has no other means of avoiding serious physical harm. In other words, if a bank robber is driving away from the scene of the crime and is not driving toward another person, this law may indeed prohibit the officer from shooting at the vehicle. This could mean that the driver can simply elude officers and drive recklessly away from the scene.

Section 8 prohibits the use of no-knock warrants. Because FEAs never—and cannot—execute search warrants, this section has no true impact on FEAs.

Impacts on FEAs

Ultimately, only Sections 2, 4 and 7 of 1054 may have impacts on FEAs. But those impacts may be substantial.

As to Section 2, peace officers will now have less discretion to subdue potentially dangerous offenders, and this may have implications for public and responder safety. Consequently, your FEA should adopt policies for the conduct of responders in the event of a fleeing suspect—we are of the opinion that the responders should leave the scene or stage at a safer location, if the applicable LEA has not cleared the scene and *especially* if no member of the LEA restrains the offender.

Because of Section 4, LEAs will have less of a "nuclear option"—the use of tear gas—in the event a scene involves a riot, barricaded subject and/or hostage situation. The last line of defense for a FEA at a particular scene is the LEA. Without that line of defense in the above situations—especially riots—your FEA should adopt a policy relating to how it will respond to such incidents. As in the past, if possible the FEA personnel should stage and not arrive at the scene until it is cleared by the LEAs.

Because of 1054 and 1310, FEAs—in conjunction with their local medical program directors—should consider shifting their primary focus from patient care to responder safety during scenes involving mental health crises. Taken as a whole, it is evident that these statutes will indirectly impact FEAs and their personnel, while responding to many types of calls, and not just mental health crises. We are in the process of drafting model policies, with input from various jurisdictions, to address the impacts of 1054 and 1310.

But that brings us to the next question to which we devote the majority of this issue…

[10] *See* RCW 9A.04.110 (6) for the definition of "deadly weapon": https://app.leg.wa.gov/rcw/default.aspx?cite=9A.04.110

Do First Responders Have a "Duty to Act" at Emergency and (Non-Emergency) Scenes??

Historically, fire departments did not face liability for the time and manner of response to a fire, unless an exception to the "public duty doctrine" (PDD) applied. *See Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 30 P.3d 126 (2001).[11]

If firefighters (or police officers) simply responding to a call constituted an affirmative act which imposes a legal duty to everyone and anyone, exceptions to the PDD would "swallow the rule." *See Torres v. City of Anacortes*, 97 Wn.App. 64, 981 P.2d 891 (1999) (finding that "the relationship of police officer to citizen is too general to create an actionable duty…Courts generally agree that responding to a citizen's call for assistance is basic to police work and not special to a particular individual.")

But the PDD has fundamentally changed in the last two years, and most recently, has been practically eviscerated by the Washington Court of Appeals, Division One, in *City of Seattle v. Norg*, No. 80836-2-I.[12] The Court found that "the public duty doctrine applies only when the duty at issue arises out of a statute or ordinance *mandating action* by the government entity." (emphasis added). In other words, under *Norg*, FEAs will be held to a common-law standard of reasonable care when responding to scenes involving a myriad of emergencies (and non-emergencies).

The *Norg* case arose out of the failure of City of Seattle firefighters to timely respond to a cardiac arrest, because the firefighters initially went to the *wrong address*. The Court found that the City of Seattle cited to "no statute or ordinance mandating that municipal fire departments provide emergency medical services." The Court found further that "private ambulance service providers, providing emergency medical services, have historically been subjected to civil suit for negligence", and governing agencies should be found liable when performing functions that may be performed by such private parties. In other words, the Court lumped private and public ambulance services together, as though they perform the same function.

The Court found that under RCW 4.96.010—the statute waiving sovereign immunity of local governments—"if the City *chooses to provide* emergency medical services, and it is not statutorily mandated to do so, it should be treated no differently than private parties providing the same services under similar circumstances." (emphasis added).

The Court's analysis hinged on whether providing EMS is solely a government function. The Court found that "[P]roviding *police* assistance to reported crimes is an inherent government function; providing emergency medical assistance is *not*." (emphasis added). In other words, the Court

[11] See this link to all of our public duty doctrine articles:

https://www.firehouselawyer.com/NewsletterResults.aspx?Topic=Civil+Actions&Subtopic=Public+Duty+Doctrine

[12] https://www.courts.wa.gov/opinions/pdf/808362.pdf

seems to say that *police* departments still enjoy the protection of the PDD—if we ignore 1310, which we have discussed at length—but FEAs do not.

The *Norg* Court ultimately concluded that the firefighters owed a duty of reasonable care, once they were dispatched, to timely respond—because there was no statute that *mandated* that they respond. This conclusion seems to conflict with the AGO we referenced above, where the AG found as follows: "Under current law, including RCW 52.02.020(1), once a fire protection district establishes its boundaries, it must provide fire and emergency services to persons and property within those boundaries."

The *Norg* court remanded the case to the trial court to determine whether the firefighters *breached* that non-statutory duty to provide EMS, and whether that breach was the proximate cause of the plaintiff's damages.

It is important to note that the *Norg* case is a decision of a lower court than the Washington Supreme Court. Thus, while *Norg* is presently the "law of the land," this case may be appealed and the result may be different.

We have been tasked with answering a myriad of questions with respect to the aforementioned police-reform bills, but one question that has presented itself with more frequency: Do first responders have a duty to act at the scene of an emergency (or non-emergency) to which they responded? With the *Norg* case above in mind, we wanted to discuss this question at length—and our conclusions are set forth at Pages 21-22 herein:

I. Background & Introduction

The Summer of our Discontent…2020-21

Maybe it was the coronavirus pandemic. Or maybe it was the polarized politics of the age. Or maybe it was systemic racism. Who knows, but it seemed that during the summer of 2020 and on into 2021, there has been an increasing problem or just awareness that interactions with American police often result in what appear to be preventable deaths and injuries, especially to African American men. This phenomenon and maybe some related issues such as the prevalence of guns in our society and the scourges of homelessness, drugs and mental illness (sometimes all three in the same person) have resulted in a re-examination of the role of law enforcement in our society. This memorandum or article explores the ramifications of that re-examination to the fire service, including the provision of emergency medical services.

Black Lives Matter

One "movement" that brings these issues to the fore is the Black Lives Matter movement. In the last couple of years, increased media coverage has led to the awareness in more than African American people, that there are an inordinate number of police shootings occurring to persons of color. We think that the presence and frequent usage of cell phones and even bodycams on the police personnel also makes us more aware, through social

media and regular media, that these interactions have been occurring for years.

U.S. questions the role of police

Just since the beginning of 2021, there has been a desire on the part of some people to "defund the police". More moderate voices have stressed that what may really be worth pursuing, rather than "defunding" the police, is some sort of police reform. Therefore, all over the nation, statutes are being enacted or at least considered, to address some of the tactics, training, and equipment (including weapons) used by police to deal with civil disturbances and crimes in progress (or not). This memo deals with some of those laws, particularly in Washington State, that will be going into effect soon.

Police interactions with African Americans

Many of the unfortunate incidents that have led to the enactment of these reform laws have involved the relationship of the police to racial minorities. However, these reform laws are in no way limited to such interactions.

Police interactions with the mentally ill and homeless

Some of the interactions of concern have been between law enforcement and persons in crisis due to mental illness and what is sometimes referred to as "decompensation". About two years ago, this author was intimately involved in dealing with an attempt to deal with this issue in a more collaborative and effective way in Pierce County, in my role as legal counsel to one particular fire district that wanted to improve the way police and fire were collaborating (or not) on such cases in the field. There is no question in my mind that there are better ways to improve the response to mentally ill persons in crisis than the traditional methods used by police and fire department personnel. These methods are emerging, but usually include mental health professionals on the scene, usually along with police and/or fire, as such personnel are trained to deal with such persons; it is their job 100% of the time, instead of 5% of the time.

New Washington Laws 1310 and 1054

In recent articles in the *Firehouse Lawyer*, we have discussed the provisions and the impacts of ESHB 1310 (hereinafter "1310) and now ESSHB 1054 on both law enforcement and fire service personnel. 1310 applies only to peace officers (law enforcement/police) and not to fire service personnel but it will have impacts on the fire service. This law repeals RCW 10.31.050, which now gives some discretion to the police to deal with persons forcibly resisting arrest or fleeing. The intent of the legislature is clear: to mandate the exercise of reasonable care in policing, including the use of de-escalation tactics and alternatives to deadly force. The law circumscribes the use of deadly force, limiting it to situations where there is an *imminent* threat of serious physical injury or death to the officer or another person. Essentially, the law

requires police to use reasonable care when using any physical force against another person. The law requires use of de-escalation techniques—**including leaving the area—**if there is no threat of imminent harm, and no crime has been committed, is now being committed, or is about to be committed. Another de-escalation technique cited in the law is the deployment of additional or other resources such as a "crisis intervention team". While not specifically called out in the definitions, we wonder if the police will consider the fire service responders to be part of a crisis intervention team.

A companion bill to 1310 is ESSHB 1054, which also takes effect on July 25, 2021, but is a lot more specific and may have fewer implications for the fire service. Nonetheless, a few sections may indirectly impact the fire and EMS responders so we will discuss them here. Section 2 of the bill bans chokeholds and neck restraints so generally circumscribes the way police may defend themselves. Section 4 limits the use of tear gas in connection with riots or a barricaded subject or hostage situation. Section 7 seems to markedly curtail vehicular pursuits (police car chases) as it states that they are prohibited unless (1) the officer has *probable cause* to believe that the fleeing suspect has engaged or is engaging in particular violent or sex offenses, or (2) the officer has reasonable suspicion of a DUI offense. It also precludes firing weapons at moving vehicles absent an imminent threat of serious physical harm from a deadly weapon and the officer has no other means of avoiding serious physical harm.

One can readily speculate that these changes could increase the safety issues on scenes at which both police and fire personnel are present. Insofar as the changes make the scene less safe for the police officers, there may be a smaller but still significant loss of safety for fire responders on scene.

As discussed below, these changes and the passage of 1310 should lead to policy and protocol changes in the fire service as there will be increased risks to firefighter safety and a potential shifting of some duties traditionally performed by police to the fire service personnel, who must either be prepared and trained for such added duties or liability may be increased. As a matter of law and policy, we examine herein whether and to what extent the fire service should assume these additional responsibilities, and even whether the agencies have the power and authority to take on some of these duties.

Changes are coming July 25—protocols

Since these laws go into effect on July 25 of 2021 and since some police agencies in Washington are already communicating with the fire service about their intentions to de-escalate (in some cases by not even responding to scenes of 911 calls) the time is now to address the need for policy and

protocol changes. The fire districts and regional fire authorities should engage with their medical program directors to explore any changes in protocols or patient care procedures (which are not the same thing) that are needed.

Effect on Fire and EMS?

The effect on fire and EMS procedures are really not fully known at this time but as it becomes more clear how the police will respond (or not, so to speak) to these changes in the law, we will be developing model policies and questions to be addressed by our clients. Stay tuned.

II. Questions Presented:

Discussion of role of police and fire in our society

Before we dive deeply into the issues caused by these "police reform" laws it might be beneficial to discuss more generally the differing roles of police and fire agencies in our society. As you will see by the following discussion, we think the duties, powers and responsibilities of the police are far different than those of the fire responders.

Although we sometimes joke about it, the reality is that the job of the police officer is quite unlike that of the firefighter/EMT or paramedic. While both of these professions relate to public service, one of the public servants enforces the laws while the other exists solely to help with emergencies of many types. While both are dispatched through the 911 system, what they do (and cannot do) upon arrival at a scene is markedly different.

Duties:

Duty to Keep the Peace

In its most basic form, the duty of a law enforcement agency is to preserve the peace and arrest those who disturb it. RCW 36.28.010. See *Munich v. Skagit Emergency Communications Center,* 175 Wn. 2d 871 (2012). We note that fire personnel simply do not have the power to arrest or detain an individual against their will.

Duty to Respond?

We believe that both police and fire have a duty to respond,[13] if and when they are properly dispatched to an emergency, due to a 911 call. Since both police and fire agencies have the ability and we believe the authority[14] to prescribe to the dispatching agency the kinds of 911 calls to which they are allowed to be dispatched, it follows that such agencies can proscribe the dispatch agency from

[13] See the position of the American Civil Liberties Union on whether law enforcement has a "duty to respond": https://www.aclu-wa.org/story/new-law-demands-de-escalation-not-abandoning-people-crisis

[14] See the position of the Washington Coalition for Police Accountability on this issue: https://www.washingtonfirechiefs.com//Files/7-22-21%20WCPA%20statement%20on%201310%20and%201054.pdf

dispatching them to 911 calls that they deem to be not emergent or not requiring, for example, a police response. Consequently, there may be a duty, but that duty may be circumscribed.

In the past, fire agencies would provide "run cards" to the dispatch agency so that the dispatchers would know what apparatus and station would be responding to appropriate calls, both on a "first due" basis and then including other apparatus to respond in addition to, or in replacement of the first due responders if for example that unit is out of service or on an existing call. Nowadays, such "run cards" have been replaced with a computer aided dispatch (CAD) system, but the result is basically the same—the fire agency specifies how and whether a dispatch will occur. It is true that the dispatch agency will "code" the responses to specify a priority, but the dispatchers are still to a degree controlled by the responding agency's rules. There are actually laws calling for a remedy when a person improperly makes a 911 call in the absence of a true emergency. Although these laws are seldom strictly enforced, this merely illustrates our point that there is no absolute duty to respond just because a person makes a call to the 911 call center. We do think, however, that once dispatched the agency –police or fire---really does need to respond, since basically the system is intended to guarantee to the public that an emergency will not be ignored by the government agencies designed to deal with them. I believe it was the famous judge, Benjamin Cardozo, who once said "Danger invites rescue."

Duty to Act?

These new laws also have caused many to begin asking, "Do we have a duty to act in all situations?" Since the above-mentioned statutes seem to prescribe "de-escalation" and finding alternative resources instead of perceived drastic police use of force, among other pacification ideas, one might well ask, "when do we have the duty to act?" The topic discussed in this memo includes the question whether police refusal to act and maybe even law enforcement policies that call for not responding at all to certain kinds of calls, mean that somehow now fire personnel have inherited the duty to act? It also opens up the possibility of litigation and liability claims against police agencies that opt not to respond at all, but then an untoward result such as death or serious bodily injury occurs in the absence of a police response. If statutes like RCW 36.28.010 are mandatory statutes that provide the police "shall" maintain the peace and arrest those who disturb it, how can they fulfill that mandatory duty if they are not there and the peace is shattered?

Limits to these duties

But the duties to respond or to act, and to act reasonably once an official decides action is needed, must have some limits. We believe,

for example, that firefighter safety and police officer safety must always be considered. On balance, the 1310 provisions and the tactics outlined in 1054 would seem to enhance police officer safety. After all, if they leave the "emergency" scene and deem it non-emergent, or if they back off a safe distance, that would seem to be more safe for the police. However, in some situations, that may be detrimental to the safety of the public and to firefighters, for example, who might also be on the scene.

There have been indications in meetings and in presentations made recently by police agencies to fire agencies, that suggest the police in some jurisdictions will not be responding at all to certain kinds of calls. If dispatched, fire responders must respond. But what if they find a violent, out-of-control scene upon arrival? What if there are weapons evident or it appears a crime such as domestic violence has already occurred or is currently occurring? We suggest that firefighter safety is of paramount importance. Firefighters, EMTs and paramedics are no use to the public if they are injured or killed while responding to an emergency scene. Thus, it is evident that the scope of the duties taken on by both police and fire personnel are not unlimited:

The fire department employer is subject to a *statutory duty to provide a safe workplace,* pursuant to RCW 49.17.060 and WAC 296-305-01509 (1). To put it another way, whether an EMS responder at an emergency scene has assumed a duty of care to a particular person *always* depends on the facts, but whether an EMS employer has a statutory obligation to provide a safe workplace *never* depends on the facts.

III. Powers/Authority v. Duties

Article XI, Section 11 agencies

This section of our Washington Constitution simply states that any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws. Our courts have interpreted that to mean, among other things, that only such municipal corporations have the police power. Due to that power residing in their local governments, the county sheriff and his/her deputies, and the city police chief in incorporated areas, and his/her employees, have the power to arrest or detain persons lawfully, and to search under many circumstances those persons' homes, vehicles, and their property and person.

Special Purpose Districts and Implied Powers

Special purpose districts and regional fire service protection authorities (RFAs) have no such power as they are not Article XI, Section 11 entities. They basically provide a service. Neither the express powers, or the implied powers derived therefrom, allow such entities or their agents to arrest, detain or search

persons or premises. **This is a fundamental difference between police and fire.**

Statutes – The Police Power

RCW 36.28.010 is an important statute as it provides that the county sheriff and his/her deputies shall keep the peace. This is a mandatory duty. Thus, law enforcement not only has the power (see above) but also has the duty to use it when appropriate. And there of course is the rub. When is it appropriate to use that heavy police power and when is there actually a duty to "back off" or de-escalate? These new laws are an attempt to answer that question. However, when the police decide to not exercise their police power, does the duty somehow devolve by default to the fire responders who may also be on scene? We think not. Fire departments do not have the power or duty to intervene to preserve civil order, especially when it may endanger firefighter safety.

A good example of the power vacuum is presented by some mental health crisis scenarios. RCW 71.05.153 sets forth a means of dealing with a crisis related to a behavioral health disorder. It provides a role for the "designated crisis responder" and for the "peace officer" when a person with a behavioral health disorder presents an imminent likelihood of serious harm or is imminent danger due to being "gravely disabled." The statute gives no authority and in fact does not even mention emergency medical services providers. It states unequivocally that it is the peace officer who has the power to take the person into custody and then deliver them to the various types of evaluation and/or treatment facilities listed.

Common Law Duties?

In addition to statutes like RCW 71.05.153, and some others, are there common law doctrines that may bestow a duty upon police or fire? Case law in Washington seems to recognize that the police at least have some common law duties. In his often-cited concurring opinion, Justice Thomas Chambers pointed out in *Munich, supra* that the court has never held that a government does not have a common law duty solely because of the "public duty doctrine." He noted that the state legislature abolished sovereign immunity many years ago, so municipal entities may be liable in tort to the same extent as private persons or entities, no more and no less. See chapters 4.96 (state) and 4.92 (local governments) of the Revised Code of Washington. The judge noted that the distinction between "mandated duties" (statutory) and common law duties is important, because under the common law a municipal entity may be liable for all foreseeable harms. Assuming a government entity or its agent is negligent, for example, we look for duty, breach of duty, proximate cause and damages. Clearly, if a local government actor does act, there can be liability for the failure to exercise reasonable

care. That will be illustrated by a case we discuss below, *Beltran-Serrano v. City of Tacoma,* 193 Wn. 2d 537 (2019).

Important Constitutional Principles

Fourth Amendment – Search and Seizure

The Fourth Amendment to the U.S. Constitution, and Article I, Section 7 of the Washington Constitution both relate to the lawfulness of searches and seizures. The State Constitution cited above simply states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Washington laws give the power and authority to peace officers to engage in searches and seizures; they give no such power to fire officials or EMS providers.

RCW 71.05 and role of police

As discussed above, RCW 71.05 deals with the mentally ill. Both the police and mental health professionals have a role to play in such crises, but fire officials have no role in determining the dangerousness of the person or whether they present a likelihood of serious harm. See RCW 71.05.153.

Compare role of fire

In 2018, one our clients revised, in conjunction with its county MPD, the "patient care procedure" for dealing with mentally ill persons who were decompensating or in crisis. Based on the procedure adopted in 2016 under the authority of the medical program director for the county, and with the collaboration of all police and fire agencies in the county, the parties had agreed that some persons presenting with mental health crises issues were in fact "patients" that the EMTs needed to assess and treat, and sometimes transport to a facility. In other words, they decided that fire and EMS officials had a role to play in these situations, regardless of the points made above about the RCWs.

After many weeks or months of discussions, the upshot of that re-examination was a memorandum of agreement, with the attached transport guideline for individuals with mental health disorders. The MOA and guideline were eventually approved by both the Pierce County Fire Chiefs and the Pierce County chiefs of police. Suffice it to say here that the result was that those situations would continue to involve both police and fire personnel, and sometimes both would be involved in the transport. We will include them in an appendix to this memorandum, but not in the *Firehouse Lawyer* article.

The question then becomes: To the extent that fire personnel engage with a patient in a mental health crisis, what liabilities might arise?

IV. Municipal Liability – Waiver of sovereign immunity

As noted above, many years ago statutes were enacted to cause a waiver of sovereign

immunity so that police and fire agencies could be held liable in tort to the same extent as a private person or entity.

Liability for Negligence- Duty, Breach of Duty, Proximate Cause and Damages-- and the duty of reasonable care

The state Supreme Court made it clear once and for all, if it was not clear already, that claims of negligence against police and fire agencies are not foreclosed by the public duty doctrine. Washington courts have long recognized the potential for tort liability based on negligent performance of law enforcement activities. See, e.g. *Washburn v. City of Federal Way,* 178 Wn. 2d 732 (2013) (negligent service of protective order); *Chambers-Castanes v. King County,* 100 Wn. 2d 275 (1983) (negligent failure to respond with police in a timely manner); *Mason v. Bitton,* 85 Wn. 2d 321 (1975) (negligent police vehicle chase); *Garnett v. City of Bellevue,* 59 Wn. App. 281 (1990) (negligent infliction of emotional distress due to officers' statements).

Thus, it should have been no surprise that in *Beltran-Serrano* the court ruled that an intentional tort claim (such as battery) did not bar a negligence claim as well, looking at the totality of the circumstances—i.e. all of the police officer's handling of her interaction with a homeless person. Indeed, the facts of this case demonstrate vividly why the legislature felt it necessary to impose strict legislative restrictions on police use of force and also tactics. We discussed the case extensively in the *Firehouse Lawyer,* Volume 17, Number 6, so it might be worthwhile for the readers to review that June 2019 article.[15] However, in this memo we wish to highlight the case because it demonstrates the concepts we have explored above. The court held that the common law duty of reasonable care, that is applicable to the police and its officers, was breached and that the officer can be held negligent and its employer may be held liable under the concept of *respondeat superior.* Therefore, the high court reversed the trial court's partial summary judgment and remanded for further proceedings.

We have no doubt that a similar result would be reached for a fire or EMS responder, and its agency employer, in a proper case alleging negligence, unless the public duty doctrine or a qualified immunity statute prevented that result. Speaking of qualified immunity, this seems to be a good place to discuss the provisions of RCW 18.71.210.

This statute is included in the chapter of the RCW on physicians because all EMTs and paramedics in Washington operate under the supervision and control of a physician—the medical program director (MPD) of the county or his/her designee. RCW

[15] https://www.firehouselawyer.com/Newsletters/June2019FINAL.pdf

18.71.210(1) provides that no act or omission of an EMT or first responder, as defined in RCW 18.73.030, done or omitted in good faith while rendering emergency medical service under the responsible supervision and control of a licensed physician or an approved MPD or delegee to a person who has suffered illness or bodily injury will lead to liability for the responder or the "licensed ambulance service" among others.

One caveat in the statute, however, is that the EMT or responder must be operating within their proper scope of expertise. We have always stressed that it is important to stay within one's certified skills for that reason. For example, an EMT that is not a paramedic should not be doing intubations or providing medications to a patient, if only a paramedic is certified to do that. Subsection (2) of the statute specifically provides that the immunity applies to EMTs and paramedics operating under a community assistance referral and education services program (CARES), which is becoming an increasingly effective way of dealing with non-emergent "EMS" calls that are really generated due to social problems such as alcoholism, drug abuse, homelessness and mental illness, among other causes. So it is excellent that such actors and agencies have qualified immunity.

Subsection (4) of RCW 18.71.210 may be even more relevant to our discussion herein of the response to mental health crises. That is because it explicitly provides qualified immunity to the same entities and personnel when transporting patients to mental health facilities or chemical dependency programs in accordance with RCW 70.168.100, which relates to the development of plans to bring those suffering from mental health disorders to alternative facilities. Subsection (5) makes it clear that this qualified immunity is inapplicable if there is gross negligence or willful or wanton misconduct (hence the word "qualified" is in there).

The Public Duty Doctrine – Four exceptions-Distinguish actionable from non-actionable: a duty to all is a duty to no one in particular

A doctrine of non-liability for municipal entities that has developed in Washington since the 1980's is referred to as the "public duty doctrine." When a duty is created for such entities by a statute in Washington, the doctrine may be applied to distinguish between a non-actionable duty owed to the public generally and an actionable duty owed to a specific person or class of persons. One of the clearest explications of the doctrine was contained in the Justice Chambers concurring opinion in *Munich, supra.* As stated therein, and as explained further by the Court in *Beltran-Serrano,* the doctrine is sort of a focusing tool to aid the court's analysis. It is not an absolute shield in any way, but more of a recognition that not every governmental function is subject to liability actions. The doctrine is riddled with at least four recognized exceptions, each of which is

discussed briefly below. The four exceptions are (1) legislative intent; (2) failure to enforce; (3) the rescue doctrine; and (4) special relationship.

Special Relationship

In *Chambers-Castanes v. King County,* 100 Wn. 2d 275 (1983) the Supreme Court of Washington carved out an exception to the rule of non-liability (due to lack of duty owed) because the 911 dispatcher of King County repeatedly told the reporting party that help was on the way. These kinds of assurances of governmental aid, in the presence of an emergency, were sufficient for the court to hold that there is in fact a duty to respond to such 911 calls because a "special relationship" is created. Since then, a special relationship has been found in various similar contexts. Synthesizing these holdings, we find that there are three prongs that must be shown for this exception to apply: (1) there must be direct contact or "privity" between the plaintiff and the local government person that sets the plaintiff apart from the general public; (2) an express assurance must be given; and (3) the plaintiff justifiably relied on that assurance.

Failure to enforce

An even older exception to the doctrine is exemplified by *Halvorson v. Dahl,* 89 Wn. 2d 673 (1978). In that case, the court held the statute created a circumscribed class of persons entitled to a cause of action for the breach or violation of the statute. An unenforced building code was held to be intended to protect a class of people and much less than the general public, so the doctrine was inapplicable. Another example is *Mason v. Bitton*, 85 Wn. 2d 321 (1975). In that case, the high Court held that RCW 46.61.035, which applied to the operation of emergency vehicles, required the operator of such a vehicle to drive with due regard to the safety of others. Since that law is intended to provide protection to the motoring public and properties adjacent to roadways, it is a circumscribed class of benefitted persons and the doctrine is inapplicable. In effect, the law of negligence applies and such drivers of emergency vehicles must use reasonable care even though the statute allows them to exceed the posted speed limits and disregard signals in an emergency. But this kind of case is the reason we recommend and many fire departments institute policies limiting their drivers to some stated limit while driving, such as no faster than 10 miles per hour in excess of the posted limit.

Legislative Intent

The *Halvorson* case may be seen as an example of the legislative intent exception. It goes without saying that the legislature may carve out exceptions in liability situations, either to provide for exposure to liability for a governmental actor, or to provide immunity to such persons. The qualified immunity statute discussed above (RCW 18.71.210) is an

example of the *latter* exercise of legislative power.

Rescue doctrine

The rescue doctrine exception applies when a person undertakes "to render aid to or warn a person in danger" as was done in *Brown v. MacPherson's Inc.,* 86 Wn. 2d 293 (1975). A duty to exercise reasonable care arises in that situation. In fact, in *Beltran-Serrano*, in a footnote, the court said that when the police officer initiated contact with the plaintiff to try to educate him about panhandling laws she unreasonably allowed the situation to escalate and then used deadly force, so there could be both negligence and an intentional tort occurring in the same incident. Elsewhere in the various cases we discuss, the courts have pointed out that usually when there is a duty to act, and a government actor **does act**, they must act with reasonable care. See, e.g. *Robb v. City of Seattle,* 176 Wn. 2d 427 (2013) and *Coffel v. Clallam County,* 47 Wn. App. 397 (1987) (recognizing that "if the officers do act, they have a duty to act with reasonable care").

Liability with no exception- is the doctrine dead?

The doctrine may not be dead yet, but we think a serious if not mortal wound was inflicted by the holding in *Beltran-Serrrano* in 2019 and *Norg* in 2021.

Essentially, both of the above courts ruled that the public duty doctrine applies to cases against the government only when a statute or ordinance creates the duty owed either to the general public or to individuals. An enumerated exception is not necessary the court said, because the doctrine is simply a "focusing tool", to ensure that the government is not held liable in tort for duties only owed to the public in general and not to a particular person or class of persons.

We *used to* theorize that the duty of police and fire to respond to 911 calls is not absolute and that generically speaking that duty is owed to the public at large. But the *Norg* court disagreed with that: "Providing emergency life-saving medical help…is not a function unique to government."

Recognizing that, under *Norg*, the duty to provide EMS is *not absolute*, would explain that there is no duty to respond when the 911 system is misused as a prank or due to lack of understanding what constitutes a true emergency. The dispatch agency may even make a decision not to dispatch any resources (police or fire), and it would be anomalous then to hold a police or fire agency liable, or to say they have a duty to respond to calls of which they were not apprised.

We suspect that the *Beltran* and *Norg* courts were pointing out that common law duties still need to be analyzed without invocation of the public duty doctrine, and the laws of negligence and intentional tort must coexist with the doctrine.

V. Discussion of Case Law since 1998

Dispatch Agency Cases

To the extent that the foregoing has not included discussion of all of the dispatch cases, or 911 cases, we would like to add a few more to show that there is a considerable body of case law in Washington with that recurring fact pattern involving cases originating with a 911 call to dispatch centers. In addition to *Munich,* we take note of *Beal v. City of Seattle,* 134 Wn. 2d 769 (1998) a wrongful death action based on a delayed response to a 911 caller who was murdered by her estranged husband. It was stressed that an express assurance should be followed by a timely response by responders. The court in *Munich* discussed *Beal* and stated that the holding implies that a person should be able to rely on such a promise that is negligently fulfilled. A contrasting case is found in *Harvey v Snohomish County,* 157 Wn. 2d 33 (2006) where the plaintiff alleged negligent failure to rescue persons from a deranged intruder within eight minutes after placing the call to 911. The court there held there were no express assurances as the 911 operator was merely updating the callers even as the police dispatcher was being informed of the situation. The allegation was that the call receiver stayed on the phone with the caller. Perhaps the caller did not realize that the call receiver was interacting with the dispatcher or maybe they did not know that call receiving and dispatching were separate functions carried out by separate people at the center. Nonetheless, the court there found no exception to the public duty doctrine.

Another 911 case is *Bratton v. Welp,* 145 Wn. 2d 572 (2002). There the express assurances were that the operator told the caller if she or her family was threatened again the police would be sent. Having reviewed the dispatch cases, we find that the special relationship exception will probably apply if assurances of any specific action are given, whether accurate or not, especially if such assurances would create justifiable reliance in the caller that help is on the way. Having found a duty, however, that does not necessarily mean the government or its agent will be liable since there must be not only duty, but also breach of duty, proximate cause and damages, at least in an action for negligence.

VI. Scenarios: Sometimes we think learning is enhanced by using specific examples or scenarios, and then applying our legal concepts and precedents to those hypothetical (or very real) fact situations.

The Welfare Check: Suppose you have a neighbor who is about 90 years old and lives alone. She only emerges from her home about 2-3 times per week. When she drives it is usually not very far and not very fast. Typically in fact she drives about 15 miles per hour regardless of the speed limit. All her neighbors worry about her and they worry about their children when she drives down the street as one day she even drove up on a lawn

and into some utility boxes on the ground. One day you notice that she has not emerged for about 5 days so you call 911 and ask if someone can check on her. The reality is that these kinds of calls do happen fairly often. We call this a "welfare check" call and in fact both police and fire officials are occasionally called upon to check on someone's welfare even though there is no firm knowledge that an emergency exists. It even occurs when a person is observed just lying down on the sidewalk and is unresponsive. Bystanders and passersby call, thinking the person is either sick, intoxicated or even deceased. These calls may call for a response to a building or structure, more often than not.

Given what we now know after reading this memo and considering the police power, the Fourth Amendment and the state Constitution, do the police and fire personnel have the requisite authority or power to do what they need to do? The police certainly do as they have the police power to search buildings under exigent circumstances. But what if they no longer respond to these kinds of calls? Fire officials cannot enter homes unless there is a demonstrated emergency. Of course, that could either be a fire in the building or a medical emergency. Thus, if a fire official observed an inert body, through a window, we believe that would be enough to justify the forced entry to see if the person (who you know lives alone and no one else is responding) needs help. We believe there would be good faith immunity from liability as well. But do the fire officials have a duty to do so? Probably not.

Mental Health Issues- Decompensation

The applicable statutes seem to suggest that the primary interaction with persons experiencing a mental health crisis should be with the police, because the mental health law (RCW 71.05.153) so provides as mentioned above. On the other hand, it became evident to this author in dealing with the patient care procedures currently in place, under the supervision of the county's Medical Program Director, that some departments do currently send responders to these kinds of calls and do in fact transport these patients to certain facilities, whether under RCW 70.168 or otherwise.

A review of the medical and legal literature on the subject convinces me that these are patients with a medical problem, as the brain is a bodily organ just like the heart that is capable of malfunctioning. So the question becomes, if the police discontinue responding to mental health calls, in the absence of any evidence that a crime is being or could be committed, shall the fire department personnel continue to respond? There does not really seem to be any statute that mandates a response by fire agencies, so it is a discretionary decision to be made by the elected and appointed officials of the agency. Is that a level of service that the fire department will provide? Should it be? If not

the fire department, then who will society provide to respond to such emergencies? Are there are enough mental health professionals employed by hospitals to sustain a meaningful level of response? If the fire departments do respond, the law suggests that they need to exercise reasonable care. Are the EMTs and Paramedics trained to provide that level of care? Not usually.

The Homeless and Drug Affected

As noted already, the homeless population overlaps strongly with the mentally ill, with occasionally (or more often) a dash of drug addiction added to that toxic mix. If the police take a hands-off attitude toward the homeless due to 1310 and/or the other statutes, will the fire department step into the breach and what are the liability implications of that? The considerations are not much different than those stated above.

The Active Shooter/School Shootings

There is existing precedent for the proposition that, regardless of what the police do or do not do, firefighter safety dictates that the fire department should not respond or at the very least should not enter the danger zone, if there is an active shooter, a school shooting incident or a hostage or barricaded, armed suspect situation. That precedent is the current use of "staging" prior to entering a situation deemed to be dangerous for firefighters and other responders. We recommend using that concept even more. If police are not on scene and fire responders encounter a dangerous, unforeseen situation, they should either depart the scene after alerting dispatch of their withdrawal, or at least remove themselves to a safe distance. Typical examples of such risks might be the presence of lethal weapons, continuing riot or an ongoing fight even without deadly weapons, a bomb threat or some such risk of explosion like a chemical or gas leak. Firefighters are no good as rescue providers when they themselves are injured or killed, so firefighter safety gets the top priority.

VII. Police and Fire Contrasted

No power to search but emergency exception

As discussed already, the fire responders are different than the police as they have no powers of arrest, search or seizure. Fire responders can only act without consent if there is an emergency when consent is presumed.

The meaning of informed consent – AMA

The entire provision of medical services—emergency and otherwise—rests on the idea that the patient must consent to be served. That is why we have the concept of "against medical advice" or AMA. If a person refuses recommended treatment or transport, that is their right, but we want them to sign a document to release the responder from potential liability. A patient is deemed to give consent when they are unconscious, which is

really just another example of the emergency exception.

Discussion of qualified immunity for medics

Already discussed above, unlike the police in Washington, EMTs and medics do have very specific qualified immunity but it is limited to the fact situations described in the statute. Nonetheless, it is a fairly broad protection against being sued for ordinary negligence when the acts were done as part of EMS.

The Role of Firefighter Safety and WAC 296-305

We stress firefighter safety partly because the employer owes it to their firefighter employees to provide a safe workplace. While the job is inherently dangerous, the reason for providing bunker gear and other gear to protect the workers is that fire and some EMS work can be dangerous without those protections. Placing the workers into dangerous situations more suited for police work, due to violence or weapons, would not be a good idea when considering employer obligations.

VIII. Is there a common law or statutory duty to respond to every 911 call?

No. We conclude that there is no absolute duty to respond to every 911 call. Some calls are prank calls. Some are not emergencies at all. But if you provide run cards or dispatch instructions to your PSAP, and then do not respond, and don't even advise the dispatch center that you are not responding, one might well imagine that there could be liability. That is why we find that although there may be a general duty to respond, that duty may be limited at the discretion of the governing body of your agency—by setting the level of service.

Compare police and fire – see RCW 36.28.010 for county sheriff duties, which are mandatory.

As noted in some of the case law, RCW 36.28.010 seems to be a mandatory statute, so if the county fails to keep the peace and allows crimes to be committed without any response, one might well find some duty and failure to fulfill it. There does not seem to be any similar mandatory statute applicable to fire districts or RFAs in Washington. Indeed, there is a discretionary immunity statute in **RCW 4.24.470**, that provides elected and appointed officials with immunity for discretionary decisions, while providing that the agency may still be liable for torts.

Thus, if the elected officials made the discretionary decision not to respond to certain types of calls, that statute would apply.

Based on our research, fire protection district and RFA statutes pertaining to the provision of fire and EMS are permissive, not mandatory. But that is exactly why the public duty doctrine arguably does not even apply to the time and manner of response to emergencies by FEAs, under *Norg*. Again, the

Norg court concluded as follows: "the public duty doctrine applies only when the duty at issue arises out of a statute or ordinance *mandating action* by the government entity." (emphasis added).

Of course, even with RCW 4.24.470 on the books, if a fire department official does act, they have to act with reasonable care, but may have immunity under RCW 18.71.210.

CONCLUSION

It is evident that fire departments in Washington need to reconsider their levels of service and respond to the actions or omissions of the police, insofar as that creates societal problems, which the fire department may be called upon to address or solve. Based on our opinions about duty, immunity, power or authority (or the lack thereof), we feel confident that fire departments will be able to adapt to whatever changes occur. In that process, however, we cannot emphasize enough our view that firefighter safety is absolutely critical, as without that, there can be no effective rescue or emergency medical service.

This adaptive response is a work in progress so stay tuned.