Firehouse Lawyer

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Inside This Issue

Report Writing – Doctors and Lawyers Agree!

The April issue of the Journal of Emergency Medical Services included an article by Keith Wesley, M.D. who is the Minnesota State EMS Medical Director. In the article, he illustrated by using a realistic crime scene scenario that medics need to be clinical and factual in writing their reports, as opposed to letting their emotions or prejudices show in their report writing. While caring for angry, violent and intoxicated patients is definitely part of the job of emergency medicine service providers, unfortunately sometimes another part of that job is defending or explaining an EMS report in court or in some other setting, such as a quality assurance process.

This writer teaches a class to EMS responders for many of my client departments. I call it the "Legal Aspects of the Fire Service" class. It includes a 30-40 minute segment on this precise issue: how best to write those reports so that you can defend them in court if ever called upon to testify about the incident. While Dr. Wesley's article was written from the standpoint of the medical profession, and my teaching and this article is written from the lawyer's perspective, in this instance the resulting advice is about the same. (Will wonders never cease—big news: doctor and lawyer agree!)

I agree totally with Doctor Wesley that the emergency medical report is not the place to vent your anger or frustration with these difficult or abusing patients. As he said, stick to the SOAP or other format you have learned in school for writing the reports, and keep the personal comments out of it. Avoid including what I call "forensic details" and stick to facts or observations related to the medical treatment plan or assessment. By that term, I mean information that is only relevant in the legal or criminal sense and has nothing to do with patient care. Sometimes I have found that facts relating to the "mechanism of injury" may also look like forensic details, but since mechanism of injury may be important to know in treatment planning, it is all right to include comments about that.

Dr. Wesley made a second point that I agree to, but I would modify his recommendation somewhat. He said the emergency service agency should have a second report, such as a department incident report in

which to include details separate from the medical records. That is the place, he said, to include information that might be helpful to legal counsel. These reports are often simply narratives of eye witnesses and include observations about the behavior of the patient that might be forensic details. As Dr. Wesley noted, however, such narratives or incident reports are discoverable in litigation, even if they are not part of the patient's medical record. Now for my modification: If you find that your department was involved with an incident that obviously could become a legal problem for the agency or the responder personally, you might consider what I call the "work product protocol". Under that protocol, the Fire Chief or Medical Services Officer works closely with the fire department's contracted legal counsel. Counsel gives standing advice that he wants to interview promptly all personnel involved in any sensitive responses, such as those in which the agency suspects the care provided was less than the department standards would require or expect. If the supervising personnel feel that malpractice or gross negligence may have occurred, give standing orders to all personnel that all responders on scene shall immediately write up a narrative, as complete as possible, and place it in a sealed envelope marked "Attorney Work Product", sending it directly to counsel without keeping a copy. Provide counsel's address to all involved. These papers then become part of the attorney's work product prepared in anticipation of litigation; appellate court precedents hold that these products of attorney investigation are ordinarily not discoverable unless the requesting party has no other reasonable means of acquiring the equivalent information. We sometimes even provide a list of questions for the responders to answer or address in these "work product" narrative reports. You might think that you cannot recognize every call/response that might lead to litigation. True, you cannot. But you can anticipate a lot of them, due to the results obtained, and your periodic "run reviews" or other quality assurance work.

It was a good article, and it was good to see that doctors and lawyers do agree about the need for objective, unemotional reports even in sometimes emotional and dangerous circumstances

ANNOUNCEMENT OF ASSOCIATION OF LAW FIRMS – TWO FIRE SERVICE LAW FIRMS TO ASSOCIATE

Effective May 1, 2008, Snure Law Office, PSC and Joseph F. Quinn have associated their law practices. Joe Quinn will now serve as *Of Counsel* to Snure Law Office, PSC and Brian Snure will now serve as *Of Counsel* to Joseph F. Quinn, P.S. Both law firms primarily focus their law practices on serving fire service clients. Together the firms currently

provide legal counsel to the majority of fire protection districts in the State of Washington and the only two regional fire authorities in our state.

Snure Law Office, PSC, founded by Clark Snure more than 40 years ago, has vast experience in representing fire departments. Clark, while still a partner in the firm, is semi-retired from active practice, Brian has been practicing with his father for approximately 15 years, and in that time has advised countless fire districts in every corner of the State of Washington.

Joseph F. Quinn was admitted to practice in Washington in 1976 and has emphasized the fire service practice since 1986. Currently, he represents at least 35 fire districts and two regional fire authorities, in Pierce, King, and several other counties. For many years, he has published this free monthly newsletter, the *Firehouse Lawyer.*

Brian, Clark and Joe are excited about this new relationship. We believe our fire department clients will have available to them the considerable combined municipal law expertise of Brian, Clark and Joe. When either Joe or Brian is not available for consultation and legal advice, chances are the other will be. We have also agreed to consult together on significant legal issues in the fire service community, so we anticipate an even greater sharing of ideas, opinions, and forms than has existed up to now.

We view this development as a win-win situation not only for the law firms, but also for the clients we serve.

AUDIT FINDINGS – WE CAN LEARN FROM OTHERS' MISTAKES

Approximately ten years ago I wrote a paper to be delivered at a Retreat for a Board of Commissioners of a fire district. It was entitled, "The Ten Cardinal Sins That Lead to Audit Findings". Based on about a three-year survey on the findings in fire district audits statewide, I listed the top ten most common findings on audits by the State Auditor's Office. Violations of the Open Public Meetings Act topped the list, in order of frequency of violations/findings. Violations of the public bid laws garnered second place, and lack of internal controls was in the top five, as I recall.

Now, a Fire Chief friend of mine gave me the results of a recent informal survey he did of audit findings within the last ten years or so, and limited to just a part of the State of Washington. I reviewed and tabulated the copies of the findings he gave me and discovered, at least with this small sample, that (1) districts may be learning about the OPMA, as that finding is less frequent than in my survey ten years ago; (2) bid law violations continue unabated and were most frequent; and (3) tied for first was "lack of internal controls", or phrased another way—"misappropriation of public funds".

So what can we learn from the mistakes of others? I will just focus in this article on the bid law violations and the lack of internal controls. First, the bid law violations were many and varied. More than one finding was the result of apparent splitting or dividing the project into several parts with an apparent intent of getting below the $2,500 bid threshold. Beware of that appearance, as clearly the auditors are on to that trick! Also not uncommon is the belief that just getting three price quotes will suffice. Absent a small works roster, the bid law requires formal bids and mere price quotations over the telephone, or faxed to your station, will invite trouble. In one instance, the district rejected two price quotes of over $2,500 and then contracted with one of the companies, which just happened to be owned by the Assistant Chief. Does anyone wonder why that finding was entered? In at least two cases, the SAO questioned the District "acting as its own general contractor" when there were at least three specialty contractors. While we have expressed our legal opinion that a municipal corporation in Washington can legally so act without violating the contractor registration statute (due to specific exemptions for landowners and for municipals) there is a statute providing that you must

hire a general contractor when using three or more specialty contractors on a public works project.

In several audits, the State Auditor's Office made findings of misappropriation of public funds, caused at least in part by a lack of internal controls. Proper segregation of duties is necessary to provide checks and balances that may prevent misuse of funds. An individual not involved with processing the expenditures (vouchering) should be assigned to monitor district expenditures. In one case, an Assistant Chief extensively used district facilities such as telephones and email for his own private business. The SAO recommended that the district improve its monitoring of the use of facilities. Policies and procedures should be adopted to prohibit or regulate personal use of telephones, computers, and the email system of the district. Many districts allow de minimis use of such facilities for personal purposes, but such use is regulated and controlled. In more than one audit, the SAO noted deficiencies in cash handling procedures. For example, deposits were not reconciled to the district receipts. And deposits were not made in a timely manner. Moreover, in one instance there were no valid receipts in writing. Best accounting practices and state law do require receipts to be issued for all money received by a district. Unused receipts in a receipt book should be voided, so that all receipts can be accounted for. Weak or nonexistent internal controls can increase the risk of theft and loss of public funds. In one audit, the SAO found that the district had paid overtime to one or more employees based on working more than an 8-hour day, and paid overtime when the employee had not worked over 40 hours in a week. The same district paid some volunteers in advance of their service! The importance of adequate record keeping and some awareness of the payroll laws cannot be overemphasized.

BALLOT TITLES CAN BE PROBLEMS THAT COUNT!

Almost every local government or municipal corporation in Washington will have an election proposition on the ballot at some point. And that means someone has to write the all important "ballot title", which is critical because that is about all some voters will look at or study prior to voting. Based on legislation enacted in the year 2000, the rules on local government ballot titles are a bit complex and frankly, somewhat arcane. Even those of us who deal with ballot titles often are not always in clear agreement about how to write the ballot title! For special purpose districts such as fire protection districts, regional fire authorities, school districts, and the like the responsibility for writing ballot titles falls to the county prosecuting attorney. However, your district counsel or bond counsel will first draft a resolution calling for the election, that includes a suggested ballot title form. More often than not, your suggested ballot title form will be the starting point (and often the "finishing point") for the prosecutor's efforts.

So…what are the rules applicable to these ballot titles, pursuant to the statutes of our State? First, RCW 29A.36.071 requires the ballot title to have three elements: (1) an identification of the enacting legislative body and a "statement of the subject matter"; (2) a "concise description" of the measure; and (3) a question. Second, it is relatively clear that the ballot title should take the form of a referendum bill submitted to the people. Respected municipal attorneys believe the "referendum" rather than the "initiative" is the most appropriate form, and apparently prosecutors and the Office of the Washington State Attorney General agree with that view. That form is included in RCW 29A.72.050(4).

This is where the counting comes in. RCW 29A.72.050 and RCW 29A.36.071 both have relevant limitations on the number of words to be contained in certain parts of the ballot title. There is a 10-word limit for the statement of the subject matter. RCW 29A.72.050 (1). See below for example of how that counting process works in actual practice. Moreover, there is a 75-word limit for the "concise description". RCW 29A.36.071(1). Again, see below. There is no word limit for the question at the end of the ballot title. Thus, even with these limitations, the total of the ballot title can easily exceed 100 words and still be

lawful, so long as you stay within these complex parameters for the various parts. We would hasten to add one caveat: certain statutes prescribe, by state law, the precise ballot title to be used for certain types of measures. A good example relevant to fire districts is the excess levy statute, RCW 84.52.052. When the title is prescribed by law, that would pre-empt or "trump" the foregoing general laws on ballot titles.

Now let us illustrate these rules by an example. The bracketed materials delimit the extent of the 10-word "subject matter" and the 75-word "concise description" limits, respectively. If not within the brackets, the words of the ballot title do not "count" as against any statutory limit at all.

SAMPLE BALLOT TITLE
_____ COUNTY FIRE PROTECTION DISTRICT NO. ____
FIRE STATION CONSTRUCTION BONDS-$12,000,000

The Board of Fire Commissioners of ____ Fire Protection District No. ___ adopted Resolution No. ____, concerning [a proposition to finance and construct a fire station.] This proposition would [authorize the district to construct and equip a new fire station; issue no more than $12,000,000 of general obligation bonds maturing within 20 years; and levy annual excess property taxes to repay the bonds, all as provided in Resolution No. ____.] Should this proposition be:

Approved……..☐
Rejected……..☐

As you can see, the statement of the subject matter is only nine words and the concise description is less than 75 words. That whole paragraph is actually only about 75 words, but you can see that, with those two elements alone adding up to (potentially) 85 words, the whole ballot title might exceed 100 words and still be "legal".

The purpose of this article is to give fire protection districts and regional fire authorities something to show their local prosecutor or the district's attorney to assist in drafting ballot titles. Never try to write your own ballot title without advice from bond counsel or general counsel experienced in such matters. In fact, for bonds, you should rely upon bond counsel to prepare the resolution that submits the ballot title to the voters. UNDER NO CIRCUMSTANCES SHOULD OLD BALLOT TITLES SUBMITTED AT ELECTIONS OCCURRING PRIOR TO SEPTEMBER 2000 BE USED AS MODELS. Credit for this article and information contained herein must be gratefully given to Hugh Spitzer and Jim McNeill, attorneys at Foster Pepper in Seattle, who explained the arcane workings of these statutes, once again, to this humble practitioner.

DISCLAIMER

The Firehouse Lawyer newsletter is published for educational purposes only. Nothing herein shall create an attorney-client relationship between Joseph F. Quinn and the reader. Those needing legal advice are urged to contact an attorney licensed to practice in their jurisdiction of residence.