

The Writer's Standard of Care

tips for avoiding liability in the documents we write

a special publication from Firebelle Productions

The Writer's "Standard of Care"

The "standard of care" that applies in the book publishing industry regarding an author's representations and warranties provides a model of behavior we would be wise to apply to any writing we do. The four items below are of particular importance if we wish to avoid liability for copyright infringement, libel, negligence, or breach of contract.

Author's Representations and Warranties

The following is an excerpt from a model book publishing agreement in *Kirsch's Handbook of Publishing Law* by Jonathan Kirsch.

Author represents and warrants to Publisher that:

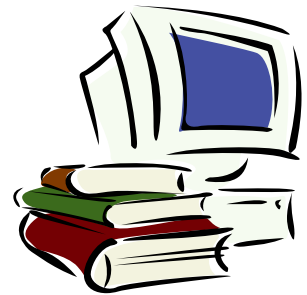
- the Work does not, and if published will not, infringe upon any copyright or any proprietary right at common law
- the Work contains no matter whatsoever that is obscene, libelous, or violative of any third party's right of privacy or publicity
- all statements of fact in the Work are true and are based on diligent research
- all advice and instruction in the Work is safe and sound, and is not negligent or defective in any manner

We'll look at the copyright aspects shortly. First, however, let's look at the far more compelling concerns of making sure our writing is accurate and clear. Lives may be at stake.

Accuracy and Clarity ... Because Lives May Be at Stake

Anyone who develops training materials and SOPs has a large burden because lives may be at stake. Documents must be accurate. They must be clearly written. And they must convey the information such that readers "get the message" in the proper context. The following story exemplifies how information not conveyed in the proper context—even though it was accurate as written—contributed to the deaths of six firefighters.

The "standard of care" that applies in the book publishing industry provides a model we would be wise to apply to any writing that we do.



Accuracy and clarity is of utmost importance because lives may be at stake.

Failure to Adequately Convey the Message Can Have Fatal Consequences

On November 29, 1988, six firefighters in Kansas City, Missouri, were killed fighting a fire involving ANFO (ammonium nitrate and fuel oil mixture)—the same substance used in the Oklahoma City bombing. There had been at least three radio transmissions indicating the possible presence of explosives on site. Four of the six firefighters, including both company officers, had received prior hazardous materials training and should have recognized the danger. Yet all six continued to fight the fire, and all six were killed.

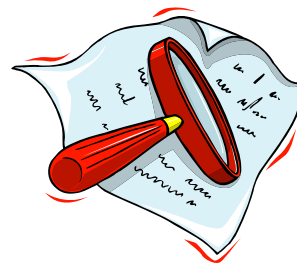
A subsequent study conducted by the U.S. Fire Administration revealed that several factors contributed to their deaths. Among other things, it was determined that the training these firefighters had received failed to adequately convey the degree of risk when relatively insensitive blasting agents, such as ANFO, are involved in a fire. For example, in the National Fire Academy course “Recognizing and Identifying Hazardous Materials” that four of the six firefighters had previously attended, blasting agents were described as being “so stable that there is little chance of an accidental explosion.” This description was based on Department of Transportation (DOT) classifications and was geared to reflect the risks from physical handling. It didn’t reflect the risks from exposure to fire.

When you’re developing training materials, SOPs, or field guides about emergency response activities, you must do your best to ensure that vital safety information is presented in such a way that readers “get the message.” You must also make sure that the information is accurate and complete. Again, several factors contributed to the deaths of these firefighters in Kansas City. Don’t be misled to think that it was only a training or documentation issue. But remember our fallen brothers when you’re developing training materials or SOPs. If you fail to adequately convey your message, it can have fatal consequences.

Details Aid Accuracy and Clarity

Accuracy and clarity is often tied to being specific. Being specific may require taking some of the decision making away from the reader. Let’s say, for instance, that you’re faced with a fire involving explosives. You’re told to evacuate to a safe distance and let the fire burn. But what constitutes a “safe distance”? And what if your best guess turns out not to be enough? It’s far better for the writer to give a specific distance and to cite the source from which that distance is taken (e.g., 2000 feet per the *NFPA Fire Protection Handbook* or up to a mile per the *Emergency Response Guidebook*). Then the reader doesn’t have to guess. The distances have some validity. And if there’s ever a problem in which someone was hurt, the writer can fall back on citing sources considered to be the standard of care in our industry.

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Being specific also requires paying attention to little details—things that may be clear in the writer’s mind but not in the reader’s. Read the sentence below, and see if you can identify what one very important word is missing.

Sometimes the best option when dealing with an acid or alkali spill is to neutralize the corrosive with a product of the opposite pH.

Did you catch it? The word is *weak*. You must use a *weak* product of the opposite pH when attempting neutralization. Someone who didn’t know that might unknowingly use the wrong thing. It’s easy for someone to mistakenly think that if the spill involves a strong acid or alkali, we would need to neutralize with a strong product on the other end of the pH scale. After all, it’s logical to think that would balance the scales. However, mixing two strong corrosives will produce a violent exothermic reaction. A person brand new to hazmat might not recognize that.

Guidelines Taken As Gospel

Be careful that guidelines are clearly presented as such so that they’re not mistaken for rules. Let’s examine the “3/30 Rule” as our example.

The “3/30 Rule” is not a rule at all. Rather, it is more of a caption the emergency response community applied to results of a study by the U.S. Army SBCCOM (Soldier and Biological Chemical Command) Domestic Preparedness Chemical Team. This study was undertaken to determine if firefighters wearing turnouts and SCBA could safely effect a rescue of injured civilians after a terrorist attack with a chemical warfare agent.

In a nutshell, the “3/30 Rule” implied that firefighters who had duct-taped openings in their protective gear could take three minutes to search for survivors and up to thirty minutes to rescue known live victims. It was an oversimplification of the results of the study, which many experts considered flawed to begin with.

Firefighters need some kind of guidance should they ever be faced with this situation. Otherwise, they’re likely to either rush in to save lives when it’s not safe for them to do so or unnecessarily delay rescue efforts, losing lives that might otherwise have been saved. The SBCCOM report doesn’t tell firefighters what they *should* do, but it gives them some data with which to make a more informed decision.

When I wrote the second edition of my hazmat field guide (now retitled *The First Responder’s Field Guide to Hazmat & Terrorism Emergency Response*), I could find no other document that even *asked* the question of whether it was safe to attempt rescue with standard firefighting clothing, let alone tried to answer it. So I summarized the SBCCOM study in my book.

Sometimes a single word can change the meaning of a sentence.



Be careful that guidelines are clearly presented as such so that they’re not mistaken for rules.

By the time I was updating my book for the third edition, the SBCCOM study had come under enough criticism that citing it raised liability concerns. However, I felt the information was too important to omit it entirely. So I continued to cite the study, but I modified my summary to include a disclaimer that encompasses the red flags raised by critics of the study. The following pages illustrate how I chose to handle the situation.

Plan Your Initial Response (continued)

Rescue Considerations (continued)

Author's Commentary

While the ERG doesn't expressly state whether you can safely attempt a rescue, the health hazards identified in the guide pages reflect the degree of risk you might face in trying to rescue someone. If a guide says "may be fatal if inhaled or absorbed through the skin" or "inhalation or contact (skin, eyes) with vapors, dusts, or substance may cause severe injury, burns or death," any openings in your protective equipment put you at greater risk of injury. This doesn't mean you can't do a rescue if the odds are in your favor. However, it does mean the risks are higher.



The U.S. Army SBCCOM Domestic Preparedness Chemical Team released a report in August 1999 to address whether firefighters can safely effect a rescue after a terrorist attack with a chemical warfare agent. Guidelines in this report are based on testing with materials that simulate chemical agents, primarily sarin. The report should not be considered a blanket recommendation by the army or protective equipment manufacturers to attempt rescue. In fact, many people criticize the report as giving a false sense of security. Critics cite that the tests were not done according to recognized testing standards, such as those outlined by NFPA, that the fire service was not adequately represented during those tests, and that turnouts are clearly not designed or certified to protect against chemical agents. However, it's one more tool at our disposal in making the "risk versus gain" analysis. The report provides the following general guidelines:

Standard turnout gear [PBI or Nomex®] with [properly fitted pressure demand or positive pressure] SCBA provides a first responder with sufficient protection from nerve agent vapor hazards inside interior or downwind areas of the hot zone to allow 30 minutes rescue time for known live victims.

Self-taped [with duct tape] turnout gear with SCBA provides sufficient protection in an unknown nerve agent environment for a 3-minute reconnaissance to search for living victims (or a 2-minute reconnaissance if HD [distilled mustard] is suspected).

When including information that not everyone agrees with, it may be wise to cite known concerns and limitations.



Readers can then weigh the pros and cons to make an informed decision.

Plan Your Initial Response (continued)

Rescue Considerations (continued)



The SBCCOM report further specifies that the following assumptions should be clearly understood and are key to protecting the rescuer:

- Rescue entry occurs after vapor concentration has peaked, assumed approximately 10 minutes after release of the agent. (The report provides estimations of residual vapor hazard potentially faced by first responders. It does not address aerosol or liquid hazards.)
- Positive pressure fans used to ventilate the structure can significantly reduce the chemical agent vapor concentration.
- The firefighter performing reconnaissance will exhibit no more than threshold symptoms of nerve agent exposure (dim vision, headache, eye pain).
- Responders and victims exiting the rescue scene will immediately undergo a water decontamination (with high volume and low pressure).



In essence, the victims become our atmospheric monitors. The percentage of live victims versus dead ones gives us an approximation of vapor concentration. The report states that if at least one victim remains alive 15 minutes after the incident (after the release), a rescuer can assist that victim with little or no risk (threshold symptoms at worst) while wearing turnout gear with SCBA or while using more protective configurations (e.g., taping openings with duct tape or wearing a Tyvek suit under turnouts). The 30-minute time frame given for rescue of known live victims is a default based on the limited air supply available to responders using SCBA. Longer time frames were not studied.

Again, these tests (conducted at the Edgewood Chemical Biological Center, Aberdeen Proving Ground in Maryland) were done specifically to assess the risk of dealing with chemical warfare agents. However, the results also give us some idea of what we can expect when dealing with other hazardous materials.

You can download Guidelines for Incident Commander's Use of Firefighter Protective Ensemble (FFPE) with Self-Contained Breathing Apparatus (SCBA) for Rescue Operations During a Terrorist Chemical Agent Incident and other valuable reports from the homeland defense site at <http://hld.sbccom.army.mil/>.

Include key points that are vital to understanding how to safely apply any guidelines.



The SBCCOM study was updated in 2003. If you want to see how I incorporated the new material into the 2006 edition of *The First Responder's Field Guide to Hazmat & Terrorism Emergency Response*, check out the PDF sample of my book available as a free download from my web site: www.firebelleproductions.com.

Other Accuracy Concerns

Misleading or Confusing English Descriptions

Some problems come from using words that have misleading or confusing English descriptions. Earlier we looked at how describing blasting agents as “relatively insensitive” may have contributed to the death of six firefighters in Kansas City, Missouri. It’s a powerful example of how words can be misleading. The description is *accurate* when taken in context of how these materials behave under ordinary conditions of transport. No one can be faulted for making an error. And yet it’s a problem ... and an area of potential liability ... that needs to be addressed.

Here’s another simple example: What does the word *inflammable* mean? Does it mean *flammable* or *nonflammable*? Both *flammable* and *inflammable* refer to something that is easily ignitable and capable of burning rapidly. But because the prefix *in-* most often signals “the opposite of” (e.g., *inaccurate* versus *accurate*, *incorrect* versus *correct*), it would be very easy for someone to assume *inflammable* means *nonflammable*, with potentially fatal consequences. Your goal should be accuracy *and* clarity.

One of my favorite examples is the description of sarin as a *volatile* nerve agent. Volatility is a reflection of vapor pressure. While sarin (with a vapor pressure of 2.1 mmHg at 68°F) is the most volatile of all the nerve agents, it is far less volatile than water (with a vapor pressure of 17.5 mmHg at the same temperature). That English description of *volatile* creates the impression that sarin will jump out and attack responders at a distance. Although it’s very deadly, sarin isn’t “volatile” in the English sense of the word.

Outdated Information

It’s very important, particularly in the emergency response field, that material be current and up to date. It’s a disservice to your audience and to the public they serve if readers are given information that is no longer valid. In some cases, it can even be dangerous.

Spelling Errors and Typos

Many inaccuracies are due to simple spelling errors and typos, errors that may not be found by spell-checkers and grammar checkers. The following are a few simple guidelines for avoiding these problems:

- Spell-check your documents.
- Double-check dates, times, names, numbers, etc.
- Proofread your documents carefully. Often it helps to put the documents aside for a day or two, then look at them again with fresh eyes.
- Have someone else proofread important documents also.

Avoid misleading or confusing English descriptions. Your goal must be accuracy and clarity.



Many inaccuracies are due to simple spelling errors and typos. Spell-check and proofread your documents carefully.

Spelling errors and typos can do more than embarrass the writer and hurt his or her credibility. In a worst-case scenario, these errors can have fatal consequences, such as when firefighters mistakenly believe they're dealing with one chemical when in fact they're dealing with another one whose name is just one or two letters different.

Inaccuracies Due to Sloppiness or Inattention to Details

Some inaccuracies come from sloppiness or inattention to details. We've already addressed the fact that some of these inaccuracies can have fatal consequences or expose the writer to liability. However, there are two more important reasons to be diligent in ensuring accuracy. First, errors hurt your credibility in the eyes of the reader. Second, errors distract from your message because they divert the reader's attention.

Compare the two paragraphs below. Both describe the same book. The first contains sloppy inaccuracies caused by the writer's desire to condense the information. The second is technically correct. Both convey the same information, but the first paragraph also conveys the impression that the writer is careless and inattentive and that he or she may have made many other more significant errors in the document.

Sloppy: The *DOT Guidebook* was developed for use by firefighters who may be the first to arrive on the scene of a transportation incident involving hazardous materials. It contains information to help first responders during the first 30 minutes of an incident.

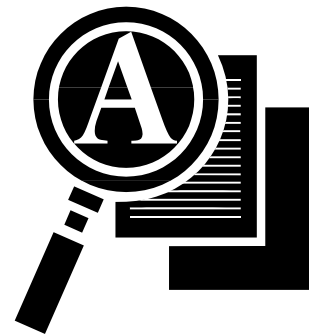
Correct: The *Emergency Response Guidebook* was developed for use by firefighters, police, and other emergency service personnel who may be the first to arrive on the scene of a transportation incident involving hazardous materials. It contains basic, generic information to help first responders during the initial response phase (generally defined as the first 30 minutes) of an incident.

Consistency with Performance Expectations

It's particularly important that training materials reflect the performance expectations you have for the intended audience. Don't take the easy way out if you expect more from people. "Cheating your audience" is another form of inaccuracy.

It won't always be possible to give people the "gold standard" in handouts or training manuals. Developing comprehensive, well-written documents takes a lot of time. Budget may also be a limiting factor in duplicating or purchasing materials. However, at least be sure that what you give your audience is something of value they won't be tempted to put in the recycle bin as soon as they leave class.

Inaccuracies due to sloppiness or inattention to details hurt your credibility as a writer.



In addition, errors distract from your message because they divert the reader's attention.

Writing Appropriate Test Questions

I like to illustrate the concept of performance expectations by using test questions as examples because it's so easy to see the problem. However, the concepts that apply to writing test questions apply equally to handouts and training manuals.

My favorite example of a bad test question comes from an EMT exam I took years ago.

Bad: A bluish color of the skin is called:

- a. Pallor
- b. Cyanosis
- c. Jaundice
- d. Discoloration

A vocabulary question like this would be acceptable if the most we require of EMTs is to recognize cyanosis in the field. But that's not the case. We expect them to know what cyanosis indicates and how to respond when they observe cyanosis in a patient. To ask a mere vocabulary question is cheating both the students and the people whose lives may be in their hands. The questions below are better because they push students to know more.

Better: Cyanosis is characteristic of:

- a. Heat stroke
- b. High blood pressure
- c. Carbon monoxide poisoning
- d. Insufficient oxygen in the blood

Best: If a patient is cyanotic, the first thing you should do is:

- a. Reassess the airway
- b. Elevate the patient's legs
- c. Monitor and record vital signs
- d. Loosen constrictive clothing

You need to test (and teach) to the level that is appropriate to the audience. Don't test to a basic awareness level if you expect emergency responders to demonstrate competency or proficiency in the field.

Training materials must reflect the performance expectations you have for the intended audience.



Don't provide training materials written at a basic awareness level if you expect emergency responders to be competent and proficient in the field.

Avoiding Trivia Questions

Trivia questions are distressing. My favorite example of trivia is a *proposed* question submitted for the final exam in a hazmat class.

Trivia: Pipeline safety regulations are the result of the Pipeline Safety Act of:

- a. 1966
- b. 1967
- c. 1968
- d. 1969

When you're faced with a spill or fire from broken pipeline, who cares about when the regulations were written? You should be worried about how to assess and mitigate the incident. Not only does the question reflect something emergency responders don't need to know, it reflects information students would never think to study for the final exam. Including it would have been an extreme disservice to students. Needless to say, the question was eliminated from consideration.

Avoiding Trick Questions

Along the same lines, it's vital to avoid trick questions. Here's an example from a book designed to help people prepare for the National Registry EMT test.

Bad: Your patient has a gunshot wound. In order to treat the patient effectively, it would be important for you to find out:

- a. How many assailants were involved
- b. If the assailant is still in the area
- c. What type of gun was used
- d. Where the gun is located now

Of the options listed, most students will choose B because of the emphasis on scene safety throughout their EMT training. (Answers A and D are closely related and may also be important, but B is the clearest of the three.) However, according to the answer key, the correct answer is C.

In theory, the type of gun plays an important role in the type and extent of injury and thus how the patient is treated. In reality, it makes very little difference to the EMT. A doctor ... or coroner ... might change strategy based on bullet type and trajectory, but EMTs are going to treat based on presenting signs and symptoms. Who cares if it's a revolver, a semi-automatic handgun, or an assault rifle?

**Don't cheat
students with
test questions
that don't reflect
what responders
need to know.**



**Avoid vocabulary
questions, trivia
questions, and
trick questions.**

From the *test writer's* perspective, there's only one answer that relates to "treating" the patient; it's assumed scene safety has been taken care of already. From the *student's* perspective, we can't "treat" until the scene is secure, and since the question didn't indicate the scene is yet safe, that's the first priority. The net result is that students who know the proper way to approach this incident will get the answer wrong simply because they failed to recognize and outthink a trick question. That benefits no one.

Copyright Infringement

The emergency services "family" has a long history of sharing information. However, the way we give and take information so freely, we run the risk of copyright infringement, perhaps without realizing we're doing it.

The "Author's Representations and Warranties" presented on page one included an item about copyright infringement. So I'll close this newsletter with a brief overview of this complex law.

Copyright infringement is a serious offense that, if proved in a court of law, may result in injunctions against using and distributing the materials you created; impoundment and destruction of all infringing materials; awards of damages to the copyright owner; awards to cover attorney's fees and court costs; and criminal prosecution.

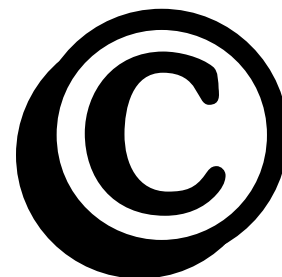
There are, of course, some limitations to copyright protection. One limitation is the doctrine of fair use, which allows copyrighted material to be used for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research.

There are four factors that determine whether a use is fair. One is the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. The more commercial the use, the more vulnerable you are.

The second consideration is the nature of the copyrighted work. Many factors come into play when evaluating the nature of the work. One such factor is the availability of the copyrighted work. Copying something from a book that is out of print might be considered fair use, whereas copying something you could have purchased instead would not be. However, this is just an example, not a legal interpretation. You should consult a qualified attorney before making any assumptions.

A third consideration is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. The more of the work that you copy, the greater risk you take.

**By sharing
information as
freely as we do in
the emergency
services "family,"
we run the risk
of copyright
infringement,
perhaps without
realizing we're
doing it.**



Last but not least is the effect of the use on the potential market for or value of the copyrighted work. If copying someone else's material results in financial losses for the copyright owner, it does not constitute fair use of the material. For example, copying software or clip art packages that you have not purchased would be copyright infringement.

Don't automatically assume that something exists in the public domain just because you don't see a copyright notice. A copyright notice is not required to appear on works created on or after March 1, 1989, in order for those works to be protected under copyright law. While most people who want to protect their creations do include the copyright notice, some may not. You also need to be concerned about the possibility that the document you want to copy from contains material that was copied illegally by someone else. When in doubt, ask.

One way to determine if something is protected by copyright is to call the Copyright Office in Washington, D.C., at (202) 707-3000. The Copyright Office will search its records for an hourly fee and furnish you with a report. However, the Copyright Office will only have records of works that have been registered. It is not necessary for the creator to register the work in order for the work to be copyrighted. Copyright protection exists from the moment the work is "fixed" in a tangible medium, for example, once it is put on paper.

Historically, works created by the U.S. government have not been copyrightable (although this author recently heard rumors of exceptions). However, works published by the government may contain copyrighted material used by permission from the copyright holder. Therefore, you should check documents carefully for copyright notices before copying them. When in doubt, ask.

If you want to use something that is protected by copyright, contact the copyright owner and ask for permission. The copyright owner may give you permission to use the material free of charge as long as you acknowledge the source. Or the copyright owner may ask you to pay a fee. You may or may not decide to use the material if you have to pay a fee for it. However, keep in mind that any usage fee will be considerably less than the penalty for copyright infringement. If the usage fee is not in your budget, you can be sure the penalty fee won't be either.

The law includes provisions for limited distribution of copyrighted materials for training purposes.



However, one can't copy so much of the material that doing so would result in financial losses for the copyright holder.