

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 are 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 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. In fairness, the training included information about a similar incident in which firefighters were killed when blasting agents exposed to fire exploded. However, there was greater emphasis on the DOT classifications that students would later be tested on.

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 are 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*). This way, readers don’t have to guess, and they have the reassurance of knowing that the distances come from credible sources. The writer, meanwhile, has protection from liability should something go wrong; the distances are based on industry standards.

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

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

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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 new to hazmat might not realize that.

Guidelines Taken as Gospel

Be careful that guidelines are clearly presented as guidelines 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 1999 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 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 (*The First Responder's Field Guide to Hazmat & Terrorism Emergency Response*) in 2000, 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.

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. So I continued to cite the study, but I modified my summary to include a disclaimer that encompassed the red flags raised by critics of the study. And each time I've updated my book, I've been careful to present the pros and cons, along with the limitations cited in the report itself.

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



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

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 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.

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.

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.

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.

The Price of Careless Errors

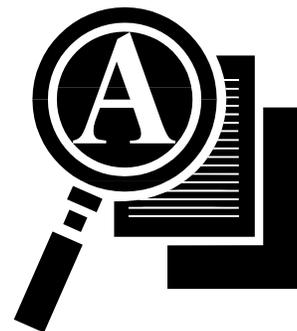
In 2006, I was injured in the line of duty as a volunteer firefighter. What should have been a minor knee injury turned into a nightmare, due partly to a doctor's poor writing skills. He cost me my Workers' Comp coverage.

Background on the Injury

A week or two before the fire, I was carrying a compound miter saw up the stairs at home when I felt a sharp pain in a pinpoint location on the left kneecap. It was one of those "Oh shit" moments. "Oh shit, what did I do? Is this an injury?" But within 24 hours, the pain was gone. So I figured that whatever happened, it wasn't serious and I had dodged a bullet.

There were no "Oh shit" moments at the fire a week or two later, but there were plenty of opportunities to get hurt. We were doing strenuous work early in the morning, before I was really warmed up and ready for that level of activity. At least once, I lost my balance while walking over shingles and other debris that blanketed the floor. After about an hour, my crew was pulled out for a break. As I squatted to put my breathing apparatus down on the driveway, I felt a diffuse, achy pain ranging from mid-thigh to mid-calf. The quality and location of the pain were entirely different from what I felt with the first event.

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.

I don't have the medical expertise to determine whether or not the two events were related. However, being the honest person that I am, I disclosed the two events to my fire department supervisors and to every medical professional who treated me. Two doctors and two physical therapists agreed that without objective data (e.g., an MRI) to the contrary, we had to assume that the two events were unrelated and that the fireground injury was indeed industrial. So imagine my surprise when the claims adjuster denied my claim, insisting that my doctor had deemed the injury nonindustrial.

The Doctor's Letter

The following is an excerpt from the doctor's letter to the claims adjuster:

I am in receipt of the material you sent me regarding Jill Levy. In the left knee, she did have a strain carrying a 40 pound saw upstairs. It was non-industrial. It looks from the description as though it was probably more of a strain of the patellar tendon. On 1/27 she did have a fire she was at and afterwards she had some aching up and down the left leg and some pain with squatting.

The doctor ran both events together without a clear distinction between the two. He also failed to explicitly state that the fireground injury was industrial. So the claims adjuster found the one word he was looking for—nonindustrial—and used it to deny the claim.

In fairness to the doctor, the County (unbeknownst to me at the time) had already been engaging in illegal conduct for the purpose of denying the claim. So the doctor is not entirely to blame. However, the doctor's letter gave the claims adjuster the ammunition he had been looking for.

The Consequences

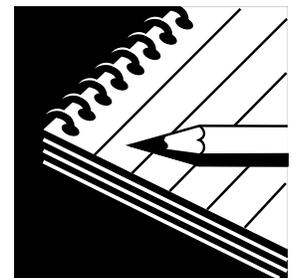
I was eventually able to restore my Workers' Comp coverage, but I paid a steep price for the doctor's mistake. No attorney I spoke with wanted to help a volunteer firefighter with a minor knee injury, because there's not enough money in it. So I had to divert hundreds of hours from my business as a self-employed person to learn the law and fight back. And this was just the first of many problems I encountered—some caused by the same doctor and some just a fallout from this triggering event.

I estimate that I lost at least 1000 hours from my business over the next three years. (It could have been closer to 2000 hours.) Although it's not possible to accurately calculate my lost income given all of the other factors involved, I estimate my losses over three years to be in the neighborhood of \$125,000.

Other Documentation Errors

During this three-year nightmare, I was forced to defend against numerous documentation errors. For example, a year and a half before the fireground injury, I saw another doctor for a nonindustrial injury to the other (right) knee. When he asked if I had ever injured the left knee, I told him I had *twisted* it playing *basketball* in the *mid '90s*. Unbeknownst to me, he wrote in his report that I had *sprained* the left knee playing *soccer* in *high school*.

Sadly, one person's minor documentation errors can have severe consequences for other people.



Even something as simple as an error in grammar, punctuation, or composition can dramatically alter the accuracy of a sentence or the way the information is interpreted.

When the Workers' Comp claims adjuster obtained a copy of that report, he didn't ask me about the discrepancy between my declared medical history and the doctor's records. Instead, he insisted that both injuries must be true. He took the doctor's word over mine and used this to say I had "a long history of preexisting knee conditions" that further justified denying my claim.

Documentation errors are far too common in the healthcare industry. And what we don't know about our medical files can come back to haunt us. As a result of my experiences, I now practice what I call "defensive patienting." Depending on the doctor and the circumstances, I may ask for copies of my medical records so that I can spot and correct errors before they cause me problems. And if I have something important to communicate to my doctor, I do so in writing so that any concerns are documented in my own words. If a conflict arises, I can point to what I gave the doctor.

Your Image at Stake

Whether it's fair or not, people will make judgments about you based on how well you write. This is particularly true when people "meet you on paper" before they meet you in person. So if you want to be perceived as a professional, write like one.

The text below is probably the best example of poor writing that I've seen. These paragraphs were taken from a longer letter sent to me by someone in the fire service. Names and details were changed to protect his identity. But all of the errors have been reproduced exactly as they appeared in the original letter.

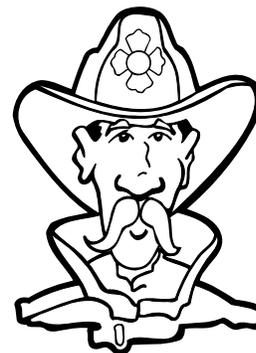
A little Back Round on the Drill: It was conceived after the Earthquake of 1989. The earthquake open my eye's on how local, state and Federal Agency's could not, and some case's would not talk to one another.

After the earthquake only a few fire agency's were using ICS, or some agency it was know as fire scope. So one day, a guy by the name of John Doe and I got together and created a Drill that would exercise the ICS system and create some networking within this County.

We consider our selves as an ALL RISK department, another words we do it all. From Haz-Mat to Floods and anything else in between. That's not to say our local guy's could not do the same, THEY CAN the problem is, that you have chiefs, who donot like to admit that they are not well verse in the SIMS program. That's the RUB!! So we get back to the drill, we take little steps holding there hands by that I mean is we train in the ICS or SIMS system year around and practices what we learn on this DRILL.

Most people who read this writing sample form an impression that the author is uneducated, unintelligent, and inattentive to detail. They perceive him as someone who can't be trusted with responsibility. And yet this person was an intelligent, well-respected fire department battalion chief at the time he wrote his letter to me. Unfortunately, his writing skills sell him short.

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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 the exclusive rights granted an author under copyright law. 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.

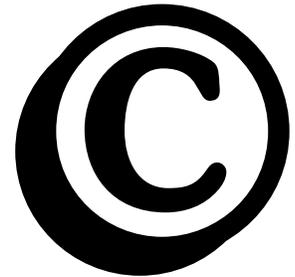
The second consideration is the nature of the copyrighted work. Many factors come into play when evaluating the nature of the work. One such factor is the availability of the copyrighted work. Copying something from a book that is out of print might be considered fair use, whereas copying something you 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.

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.

**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.**



**When in
doubt, ask for
permission to
use the material.**

One way to determine if something is protected by copyright is to call the Copyright Office in Washington, D.C. 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. However, works published by the government may contain copyrighted material used by permission from the copyright holder. So 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 won't be either.



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**Respecting
copyrights is part
of the standard
of care.**



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