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Client Profiles Continued

This month I have decided to profile a new client, who I started representing in January of this year: the Valley Regional Fire Authority. The first fire authority to be formed in the state, pursuant to RCW 52.26, the VRFA serves the participating cities of Auburn, Pacific and Algona. The population within the jurisdictional boundaries is approximately 75,000. The VRFA, consisting of 37 square miles, has an assessed valuation of about $8.4 billion and an annual budget of $16.9 million. They finance the VRFA with a property tax of $1.00 per thousand of AV, supplemented by the fire benefit charge authorized by RCW 52.18. Of their 104 full time employees, 97 are operational folks. Needless to say, I am enjoying representing this new client, partly because a lot that they do is "groundbreaking" as the VRFA is the first municipal corporation of its type in our state. So far, I have been impressed with the efficient nature of their monthly meetings, particularly because the governing board meeting is immediately preceded by the Finance Committee meetings, so most issues are thoroughly "vetted" in committee before coming before the full board.

CHILD ABUSE PROTOCOLS AND EMS

Emergency medical services providers and their employees and volunteers who serve as firefighters, emergency medical technicians (EMTs) and/or paramedics should be familiar with chapter 26.44 of the Revised Code of Washington. It pertains to child abuse and neglect. RCW 26.44.030 creates a duty to report suspected child abuse, but only for mandatory reporters who are listed in RCW 26.44.030(1)(a). This long list includes many types of professionals such as a medical examiner, law enforcement officer, professional school personnel, psychologist, etc. but does not expressly include EMS professionals. Previously, I had heard and therefore accepted, the notion that EMS professionals are not mandatory reporters of suspected child abuse they may encounter in their professional work. Recently, through talks with other attorneys and other professionals working in the field of child abuse prevention, as well as my own research of various statutes and case law, I have begun to question that assumption.

In fact, my opinion now has evolved to a firm belief that EMS

personnel should be considered mandatory reporters of child abuse, notwithstanding the strictures applicable to disclosure of health care information. I will discuss the implications of HIPAA and the Washington State Health Care Information Act (RCW 70.02) later in this article, but first let us discuss the analysis that leads to my current conclusion about "mandatory reporters". RCW 26.44.030(1)(a) actually imposes a duty on "any practitioner" to report suspected child abuse whenever they have "reasonable cause to believe that a child has suffered abuse or neglect." The word "practitioner" is defined in RCW 26.44.020. It means a person "licensed" by this state to practice in one of various listed health care fields such as podiatric medicine and surgery, optometry, chiropractic, nursing, dentistry, etc. But then the definition continues: "…or to provide other health services." Thus, the question becomes, "Are EMS professionals practitioners because they are 'licensed' by the state to provide other health services?" I think no one could reasonably argue that emergency medical services are not health services. But we might question whether EMTs and paramedics are "licensed" by the state, as we often say they practice pursuant to the license of the medical program director.

Arguably, from that point on the analysis gets a bit confusing. RCW 18.130.20, which is part of the Uniform Disciplinary Act applicable to all of the regulated health professions defines "license" as equivalent to "certificate". So that might seem to override arguments that under the statutory scheme pertaining to EMS personnel (RCW 18.73 and related WACs), these personnel do not receive licenses, but are certificated by state action. If, as RCW 18.130.020 seems to say, a license is basically equivalent to a certificate, or the terms are interchangeable, then that means we should not be too concerned about the word "licensed" in the definition of "practitioner". See RCW 26.44.020. The problem is that the "equivalency" language referred to in RCW 18.130.020 is limited to that chapter on discipline. And it refers to the definitions in RCW 18.120.020. Those definitions make a clear distinction between "license" and "certificate". There, a "certificate" is defined as a voluntary process by which an individual who has met certain prerequisites is granted recognition or in other words "certified" by the agency with jurisdiction. By contrast, a "license" is defined there as "permission to engage in a health profession which would otherwise be unlawful in the state in the absence of the permission."

Applying that definition of license to EMTs and paramedics, I would say that, at least for purposes of the word "license" in RCW 26.44.020 and therefore RCW 26.44.030, these EMS professionals should be considered to be practitioners, because in effect they are licensed by the state, acting through the State Department of Health and the various

regional medical program directors. They are authorized, within the scope of their particular certificate or re-certification, to practice in their chosen profession of emergency medical technician, or the variant thereof applicable to paramedics. If an EMT went beyond their scope of practice, and began performing intubations or other invasive procedures, can there be any doubt that DOH would say they have exceeded their permission to engage in that health profession and are acting unlawfully, i.e. beyond the scope of their license? In other words, "certificate" or "certification" is a process but license or licensure is the result of that process—i.e. the right to practice lawfully.

(I know this statutory analysis may seem tedious, but we feel it is necessary because the legislature did not explicitly list each and every health care profession in the RCW 26.44 provisions.)

In order to test this hypothesis, we have looked to see if there are judicial interpretations of the breadth or scope of the "mandatory reporter" statute, RCW 26.44.030. In fact, there is at least one case that may to some degree reveal the appellate courts' likely interpretation of the statute, should this question ever be litigated. In the recent Court of Appeals, Division I case of *Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 2007 WACA 57416-7 – 091707* the Court analyzed whether an LDS Church bishop was a "social service counselor" as that term is used in RCW 26.44.030, so as to become a mandatory reporter of child abuse. Ultimately, the Court of Appeals concluded that the bishop was not a mandatory reporter, because he was not acting as a professional in the ordinary course of his employment. Nonetheless, the Court did acknowledge that in the child abuse statute the legislature made it clear that prevention of child abuse is an issue of the highest priority, citing a State Supreme Court case, *C.J.C.,* 138 Wn. 2d at 727. In the *Doe* decision, the Court also pointed out that the majority of the listed mandated reporters are professionals that require "licensing" by the state or are government employees. The *Doe* Court also found it telling that only in one instance does the statute (RCW 26.44.030) mention volunteers and in that reference it provides that volunteers in the ombudsman's office are mandatory reporters. The Court said that implied or means generally volunteers, as opposed to professionals, are not mandatory reporters. However, since volunteer firefighters and EMTs also work under the direct supervision of the medical program director in their region, and since they are certified in the same fashion as the paid/career EMTs, for purposes of the child abuse statutes, I would argue they too are mandatory reporters. If they encounter probable child abuse in the course of their official duties on behalf of the fire department, as for example, in response to a 911 call, I think they should report it. Volunteer firefighters and EMTs, unlike volunteer church members, generally do get paid something and are trained and supervised closely; they respond to 911 calls because of their affiliation with the fire department, and are clearly different from "Good Samaritan" volunteers.

Based on the Court of Appeals discussion of the statutory intent, the obviously strong public policy on child abuse, and the statutory definitions discussed above, I have to conclude that a paid first responder, EMT, or paramedic is a "practitioner"

and therefore a mandatory reporter of child abuse. While arguably that may not be true of a volunteer firefighter or EMT, it is probably true for the professionals. I would prefer not to rely on the fine distinction between a "certificate" and a "license" suggested by RCW 18.120.020, when faced with explaining to a judge why my client did not report child abuse. It appears to me that the court would consider that EMT's permission to practice as the equivalent of a license as that word is used in the mandatory reporter statute. Besides, we should not forget that RCW 26.44.060 provides immunity from civil liability for those who report child abuse in a good faith manner.

But what about the duty of a health care provider and its agents, including EMTs, to protect the privacy of health care information of its patients, stemming from state or federal law? RCW 70.02.020(2)(b) requires disclosure to law enforcement of such information to the extent required by law. And in this case, it is required by law—RCW 26.44.030! So actually in most child abuse cases, cooperation with law enforcement, which includes prosecutors, is mandated because a statute requires the disclosure. There is also RCW 70.02.020(1)(d) that permissively allows disclosure of health care information to avoid or minimize imminent danger to the health or safety of the child or another person. Thus, if the child patient or another child were to remain in imminent danger in the home of the abuser, in the opinion of the EMT, he/she could disclose even if not a mandatory reporter. My conclusion is that in this instance protection of vulnerable children overrides the privacy concerns, as a matter of public policy.

Currently, county prosecutors and others are working together to carry out the mandate of RCW 26.44.185, which was recently amended by the legislature. The law as amended requires an update to the protocols affecting child abuse investigations. The protocols must address coordination of child fatality, child physical abuse, and criminal child neglect investigations between the various agencies involved including EMS. The guidelines include some guidance to emergency medical professionals responding to sudden unexpected child death or serious injury. Each fire department in the state employing EMTs or paramedics should obtain a copy of this guidance, which is obtainable from the Criminal Justice Training Commission.

WHO COUNTS AS AN EMPLOYEE UNDER FEDERAL EMPLOYMENT LAWS?

A recent Ninth Circuit Court of Appeals case may be helpful in dealing with the occasional question that arises under various federal employment statutes: "Do volunteers and directors count toward the number of employee thresholds of the ADEA, the ADA, and Title VII of the Civil Rights Act of 1964?"

In *Fichman v. The Media Center,* Case No. 05-16653 (9th Cir., January 14, 2008), the federal appeals court for our region held that directors and volunteers do not count as employees, in an ADEA case. That statute, prohibiting age discrimination in employment, does not apply unless the employer employs at least 20 employees. And Fichman alleged violation of the ADA, but that statute is triggered at 15 employees. The Media Center generally had fewer than 15 employees.

Fichman had argued, however, that one should also count the directors and the volunteer producers associated with this company, which apparently operates community access cable channels in Nevada. The court set forth six factors for determining the issue:

1. whether the organization can hire or fire the individual or set the rules and regulations of her work;
2. whether and to what extent the organization supervises the individual;
3. whether the individual reports to someone higher in the organization;
4. whether and to what extent the individual is able to influence the organization;

5. whether the parties intended the individual to be an employee, as expressed in agreements or contracts; and
6. whether the individual shared in the profits, losses and liabilities.

Applying that test, the court held that volunteers and directors should not be counted for these laws. Employers could argue the case is helpful for deciding the same issue that could arise under the FLSA or the FMLA. I would say that in the fire service, the elected fire commissioners are the "directors" and volunteer firefighters should not count. While some of the criteria in each case might apply, most of them do not.

ANOTHER SUCCESSFUL CLASS COMPLETED

On March 11, 2008, 28 "students" from 14 fire departments completed a three-hour class on HIPAA, patient privacy issues, and the Washington Health Care Information Act here at Station 32 in University Place. I felt the class, which was open only to client organizations, was a very successful way to impart more knowledge and understanding of these laws and the current developments in this area. Feedback thus far indicates that the students agreed. It was nice to see the different fire district and fire authority personnel relate to each other, especially because we had a good mixture of folks from three different counties, and some new friends were undoubtedly made. We will continue to offer these "client only" classes, which tend to be very economical for the clients when so many students attend. Currently, I am thinking about a Public Records Act and Open Public Meetings Act class in the month of June 2008, and would welcome any showing of interest in such a proposal. Sorry, clients only. (Of course, your district may need some legal advice soon too, so you could become a client first.)

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