EMS Subspecialty Certification Review Course

Legal Issues

2.1.2

The lecturer is a non-attorney spokesperson and can not provide legal advice!

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Learning Objectives

Upon the completion of this program participants will be able to:

• Describe the difference between capacity and competence
• Describe the elements of informed consent, definition of a patient, and ethical rights of a patient
• Describe the legal supervisory role of the EMS Medical Director
• Describe issues surrounding determination of death/cessation of resuscitation
• Understand the federal regulations that impact EMS

Question 1

An EMT on your service has exceeded his scope of practice by giving an unauthorized medication. The patient has had a severe reaction to the medication and has suffered permanent injury. A law suit is threatened. Your training and protocols are clear on this and the EMT was acting outside of protocol and training. You are the EMS medical director but do not own the service. Regarding your responsibility for the actions of the EMT:

1. Since the EMT is your "agent" your are liable for his actions
2. Respondeat Superior is a legal term that describes your supervisory responsibility
3. In most states, your are responsible for competent training and supervision
4. Delegated practice describes your responsibility and liability as a medical director
Regarding Federal Good Samaritan Statutes:

1. Federal Good Samaritan laws protect medical directors from vicarious liability except in cases of gross negligence and willful acts
2. Most Good Samaritan legislation typically varies from state to state
3. The Aviation Medical Assistance Act is a federal Good Samaritan act that immunizes qualified individuals from liability for response to in-flight emergencies
4. 2 and 3 only

Overview of Legal Aspects of EMS Medical Direction

- The birth of EMS was tied to federal highway grants
- States passed enabling legislation to qualify for these funds
- Many of these laws are still in effect unchanged three decades later
- Liability of the rescuer was a later consideration
- Immunity laws rarely recognized the physician medical director as a component

Legal Standing of the EMS Physician

- Medical oversight of EMS not uniformly recognized as a necessary component in legislation
- Currently, for example, some non paramedic rural services do not require medical director
- Medical oversight will become increasingly recognized legally as a fundamental component of EMS care
- Basic understanding of pertinent legal principals is required of the EMS Physician
Physician-EMT Relationship

- Myth: “The EMT practices under the license of the physician”*
  - Difference of “Supervision” vs “Agency”
  - Agent: person authorized by another to act for him, person is an agent or representative of an entity
  - Supervision: in a supervisory relationship duty is to properly oversee an employee

*Except for “delegated practice” states such as TX

Assessment of Provider Competence and Fitness for Duty

- Legally correct term for the EMS provider is that they are licensed.
- By definition, a license allows an individual to perform an act or acts that in the absence of government sanction would be illegal
- States may refer to a credential or registration, but in the eyes of the court, EMS personnel are licensed

Assessment of Provider Competence and Fitness for Duty

- In 1971, Supreme Court ruled in Bell v Burson that a license is a property right subject to due process protection
- Thus, in all assessments of a provider, the medical director is held to due process standards
- Due process simply means the provider has a fair and full opportunity to challenge the basis for the action and to present their own evidence
Assessment of Provider Competence and Fitness for Duty

- Role is generally to:
  - Ensure the public is protected from incompetent practitioners
  - Offer reasonable assurance to the public regarding skills and capabilities
  - Provide a means by which failing practitioners can be rehabilitated or removed from practice

Federal Regulations that Impact EMS

- Sexual Harassment: “creation of perpetuation of a hostile work environment” can be harassment
- Medicare/CMS
  - Necessity for ALS — must have demonstrated need, such as altered vital signs or need for medications
  - Medical necessity for ambulance transport — liable for signing forms when other modes of transport were available

Determination of Medical Necessity

- CMS definition:
  - No Medical Payment shall be made for items or services that are not reasonable and necessary for the diagnosis or treatment of an illness or to improve the functioning of a malformed body member
  - From Social Security Act
Determination of Medical Necessity

• Two concepts of this term:
  – CMS “medical necessity” as it relates to need for ambulance transport
  – “Medically necessary transport” in the clinical sense:
    • Implied consent for transport against a patient’s will rests upon the EMS provider’s assessment of medical necessity
    • Alternative destination/no-loads – published evidence suggests EMS providers lack sufficient sensitivity in their examinations to safely determine medical necessity in this sense.

Federal Regulations that Impact EMS

• Federal Civil Rights Statute 42 USC 1983 provides that any individual who impacts another individual’s Constitutional rights “may be liable”
• For the EMS medical director, this revolves around discipline/suspension of practice privileges.
  – Must offer due process
  – Must not be discriminatory
• Unless the medical director is the employer, the medical director is not subject to American Disabilities Act

Due Process

• Cannot deprive someone of their life, liberty or property* with out due process
• Due process
  – Required under certain circumstances as required by law
  – Due process= Notice + Hearing
  – The provider has a fair and full opportunity to challenge the basis for the action and to present their own evidence
• There is no formal definition – a flexible concept
Mandatory Reporting Issues

• These rules trump confidentiality statutes.
• Considerations when one may or may not report:
  – Confidentiality
  – Patient autonomy
  – Legal mandates with possible sanctions for non-compliance
  – Medico-legal risk

Mandatory Reporting Issues

• Abuse/neglect
  – Pediatrics – mandatory reporting in nearly every state
  – Elder – mandatory reporting in many states
  – Domestic Partner – in some states
• Injury by Deadly Weapon
  – Shooting or stabbing
  – Most exempt “victimless” crimes such as drug overdose

Mandatory Reporting Issues

• Driving impairment – very unclear and varies state to state. Includes items such as seizure, Parkinson’s, substance abuse, etc.
• Infectious diseases:
  – STDs including HIV
  – Viral hepatitis
  – Lyme disease
  – Pertussis
  – Drug resistant streptococcal pneumonia
Respondeat Superior vs. Negligent Supervision

- **Respondeat Superior** “Let the Master Answer”
  - This actually applies to the EMS agency
  - This does not apply to the medical director unless he/she owns the EMS agency or has administrative oversight

- **Negligent Supervision**
  - This is a source of liability for the medical director
  - Applies when a medical director initially credentials or allows a provider to continue to practice who is incompetent

Public Duty vs Special Duty

- Courts have sometimes held that the duty of public safety is to the public at large but not to the individual patient
- This is referred to as the **public duty** of Fire/Police/EMS. In this case, individuals have very little standing to sue
- This is contrasted with **special duty** – this is to the individual

Standards of Care EMS

- Local Ordinances
  - Another layer of codifications
  - Can be very stringent (and outdated!)
  - Infractions can jeopardize ambulance license or political relationships
Standards of Care for EMS?

• Federal laws: most of EMS is under state law. Areas of Federal law:
  – Medical Directors in the employment hierarchy may be named in employment disputes
  – Sexual harassment
  – Fraud: medicare and medicaid; medical necessity
  – HIPAA violations
  – Civil Rights: case law on withdrawing oversight, termination, denial of due process

Standards of Care EMS

• State Statutes and Regulations
  – Wide variability among states regarding role of the medical director
  – Scope of practice, licensure/certification/verification and training of prehospital personnel
    • Licensure: conveys a “property interest” which requires due process to remove
    • Medical directors may sign attestations to the state that a provider is qualified to receive a state certification

Failure to Transport—“No Loads”

• Case law with many examples and claims
• Paramedic denials of transport: research shows significant undertriage, unrecognized criticality
• Patient refusal: was the decision “informed”? 
  – Was the assessment thorough?
  – Was the communication of risk to patient sufficient?
• Pitfalls: EMT dx, Determination of “competence”, capacity, truly informed consent,
Definition of a Patient

• Again, there is no uniform definition included in any texts. General concepts:
  – Duty is attached at the request for service
  – Knowledge of local laws regarding pediatrics/emancipated minors are essential
  – Rights of the patient are discussed on subsequent slides

Capacity vs. Competence

• Competence is a legal standard that is determined by the judicial system
• Capacity is a clinical determination at the time of patient encounter.
• Patients who demonstrate capacity may participate in the informed consent process

Elements of Informed Consent

• Elements of informed consent include:
  – Provision of information and the patient’s ability to understand the information
  – Communication of decision that is apparently consistent with patient’s own values
  – Freedom from undue influence from outside parties
High Risk Legal Areas

- Nontransported patients
  - An area that requires diligent medical oversight
  - Data suggests EMS skillset may not be sufficient to determine need to transport
- Discipline and Actions Upon Provider’s Ability to Practice
- Sexual Harassment (“oppressive environment”)
- Medicaid/Medicare Fraud: medical necessity of transport

Legal Concepts associated with CQI Activities

- Covered in the QI Programs lecture
- Three types of claims
  - Defamation
  - Antitrust (loss of employment)
  - Patient claim of negligent supervision
- Confidentiality
  - HIPAA – exchange of info
  - Immunity for Peer Review****
    - Check local statues
    - Clearly define CQI activities

Take Home Points (Cont)

- Respondeat Superior v Negligent Supervision
- License and property rights
- Federal regulations
  - Sexual harassment
  - CMS/Medicare
  - Due process – civil rights
- Mandatory reporting concepts
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