

Industry Standards Help Tame Liability

Government and its employees considered immune if written policies are followed

By Nathan D. McClure III

Liability is a term that frequently strikes fear in the minds of public safety telecommunicators and agency administrators, especially in today's litigious society. Black's Law Dictionary defines liability as "the condition of being actually or potentially subject to an obligation; condition of being responsible for a possible or actual loss, penalty, evil expense or burden; condition which creates a duty to perform an act immediately or in the future". For public safety communications purposes there are two kinds of liability: personal and institutional. Personal liability is when an individual is found to be responsible. Conversely, an institutional liability is when an organization is found to be responsible. Financial and legal obligations stem from the liability ruling.

Throughout history, sovereign immunity ("The King can do no wrong!") was the general rule. Gradually, that immunity has been reduced at the state and federal level. In general, courts have held that government employees are immune from liability when performing discretionary functions, but not immune when performing ministerial duties. *Discretionary functions* are interpreted as judgmental or policy decisions rather than operational decisions. Operational decisions, generally implementing or executing policy decisions, are known as ministerial duties and are not immune from liability. The courts have further found that if government employees act within the scope of their duties and follow established policies and procedures, the employees are also immune from liability. Laws vary by state, but in general there are six exceptions to the rule:

- Claims brought against a governmental entity for the negligent operation of an automobile
- Claims arising out of the operation of any public hospital, correctional facility or jail
- Claims arising out of a dangerous condition of any public building
- Injuries caused by a dangerous condition of a public highway, road or street that physically interferes with the movement of traffic on the paved portion of the roadway

- Injuries caused by a dangerous condition of any public hospital, jail, public facility located in a park or recreation area, or any public water, gas, sanitation, electrical, power or swimming facility
- Claims arising out of the operation and maintenance of any public water facility, gas facility, sanitation facility, electrical facility, power facility or swimming facility

The facts, in specific cases, may result in a different decision, but the general interpretation of immunity may be summarized as the following: If a governmental agency has a policy on a specific issue and the governmental employee is following that policy, then both are immune from liability. The policy must be in writing to be considered to exist.

Industry standards can have a significant impact on both. With some exceptions, standards are voluntary and represent the best practices for the particular topic. Accredited standards are created in an open, consensus-based environment and ensure review and comment from all stakeholders in the industry. Agency administrators need to be aware of the various standards that are available. For example, APCO's *Minimum Training Standard for Public Safety Telecommunicators* identifies the minimum training requirements for both new and veteran public safety telecommunicators. One type of liability is negligence, and more specifically, negligent training, or essentially failure to train. Managers must be prepared to either provide documentation of compliance with the standard or defend why the agency chose not to follow the standard.

In addition to being aware of and following the appropriate standards, communications centers should develop and use comprehensive policies and procedures. These policies and procedures must be maintained so that they are current with actual practices. Communications centers need to be able to document that each employee has received the current policies and procedures

and is aware of the contents. From a liability standpoint, if it's not written, it doesn't exist.

From an individual telecommunicator's perspective, in general, if there is a written policy and the telecommunicator follows it, he or she is not liable. The issue arises when there either is not a documented policy or the telecommunicator doesn't follow the policy. Then the courts have held that the individual telecommunicator may be liable for damages. As we all know, many calls fall outside the "normal" or "usual" type. Policies and procedures need to provide for those unusual calls.

There are frequent advertisements on television and other media for personal injury lawyers. In addition, the news media frequently sensationalize actual or perceived errors by 9-1-1 centers. Emergency personnel should ensure compliance with the appropriate standards to diffuse the sensationalism.

The governmental immunity standard varies widely from state to state. In addition to the state court system, liability cases are frequently filed in federal court. While anyone can be sued, the goal for both agency personnel and public safety telecommunicators is to not be found liable. The immunity standard is constantly changing. Think of it as pendulum constantly moving back and forth between greater and lesser liability. Knowledge of the applicable standards and having well documented policies and procedures can be important first lines of defense. Ignorance of a standard's existence is not a defense.

A comprehensive list and downloadable versions of all APCO American National Standards Institute (ANSI) accredited standards is at: <https://www.apcointl.org/standards/apco-standards-for-download.html>. ●

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