When Patients Say No

Legal Liabilities with Patient Refusals

INTRODUCTION

- English/Journalism – Texas A&M (1995)
- JD – University of Houston Law Center (1998)
- MBA – Texas A&M (2012)
- SPHR (2013)
- VP of Administration (2007-2013 - Harris County Emergency Corps)
- Of Counsel, Radcliffe Bobbitt Adams Polley, PLLC
- Adolphus Consulting Group, LLC

OVERVIEW

- Liability
- Informed Consent
- Elements of Informed Consent
  - Legal Capacity
  - Mental Capacity
  - Information to Make Choice
- Involuntary Transport
- Documentation
- Transport Decisions
- Non-Transport of Patients
  - General Guidelines
- Case Review
- What Would You Do?

"I don't feel quite as fulfilled when I've saved a lawyer."

CNN Health » Food | Fitness | Wellness | Parenting | Live Longer Live TV U.S. Edition +

Mom says medics didn't take daughter to hospital, saying she couldn't afford it

By Jen Christensen, CNN

Updated 10:05 AM ET, Tue July 31, 2018

Mom: Medics wouldn't take my child to hospital 03:20

(CNN) — A Florida woman claims an ambulance wouldn't take her 30-year-old daughter to the hospital, because, she said, fire rescue personnel assumed the family couldn't afford it.

The Hillsborough County fire rescue personnel were put on immediate administrative leave with pay

More from CNN

Ross from 'Friends' lookalike caught, and police thank David...

The case for fake meat on Thanksgiving

WHAT HAPPENED?

- Mom calls 911 for daughter who just gave birth via c-section (July 4, 2018)
- Patient "responded affirmatively" when asked about going to hospital
- Patient is relatively coherent and ambulatory; walked to stair chair
- Crew puts her in mom's car – "you can't afford an ambulance"
- No vitals taken and no assessment done
- Patient went into coma; died 5 days later
- Outcome?

Paramedics fired, suspended for failing to help new mom who died of stroke

By JOYEETA BISWAS Sep 26, 2018, 8:20 PM ET

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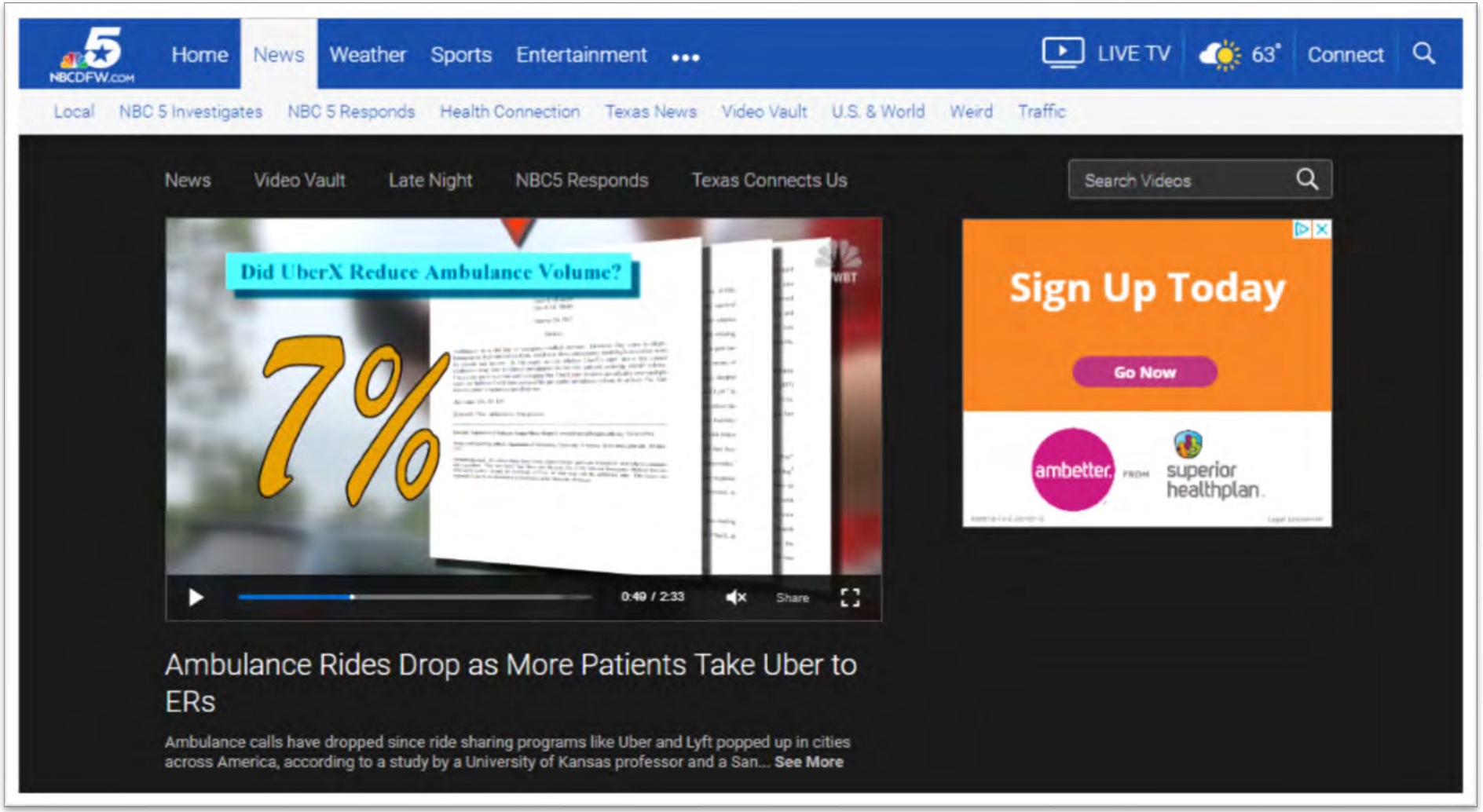
AFTER THE INVESTIGATION

- Lieutenant (supervisor) was terminated
- 3 others suspended and/or demoted
- Confirmed paramedics did not follow protocol or even check vital signs
- Terminated paramedic said he would do the same thing over again and **that he doesn't need to check the vitals of patients because he can gauge them just by looking**
- Fire union president said, "We're not in the business of talking people out of going to the hospital."

AN ALTERNATIVE?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FROM
superior healthplan.
Ambulance Rides Drop as More Patients Take Uber to ERs
Ambulance calls have dropped since ride sharing programs like Uber and Lyft popped up in cities across America, according to a study by a University of Kansas professor and a San... See More

WHEN IS THERE LIABILITY?

- Traditional
  - Battery
  - Touching without consent
  - Exceeding scope of consent
- Medical Negligence
  - Lack of Informed Consent

MEDICAL CARE LIABILITY - TEXAS

- [N]egligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent."
- Negligence –
  - Duty
  - Breach
  - Harm

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INFORMED CONSENT

- Informed Consent
  - Integral to the concept of informed refusal
  - Protects the medical decision-making autonomy of the individual
  - Allows for information exchange between patient and provider
- History
  - 1982 - Making Health Care Decisions (Presidents Commission for the Study of Ethical Problems in Medicine)
    - "shared decision making" would be "the ideal for patient-professional relationships that a sound doctrine of informed consent should support."

INFORMED CONSENT

- History of Law
- 1215 Magna Carta
  - right of personal security
- 1767 *Slater v. Baker & Stapleton*
  - Required that physicians gain consent from patients prior to surgery
- 1912 *Schloendorff v. Society of New York Hospital*
  - "Every human being of adult years and sound mind has a right to determine what shall be done with his own body and a surgeon who performs an operation without…consent commits an assault"

INFORMED CONSENT

- 1957 *Salgo v. Leland Stanford Jr. University Board of Trustees*
  - Provider's duty to disclose procedure's nature, purpose, risks and alternatives
- 1960 *Natanson v. Kline*
  - Disclosure of what a reasonable medical practitioner would do under similar circumstances

INFORMED CONSENT

"The very foundation of the doctrine of [informed consent] is every man's right to forego treatment or even cure if it entails what *for him* are intolerable consequences or risks, however warped or perverted his sense of values may be in the eyes of the medical profession, or even of the community, so long as any distortion falls short of what the law regards as incompetency. Individual freedom here is guaranteed only if people are given the right to make choices which would generally be regarded as foolish."

2 F. Harper & F. James, Jr., *The Law of Torts* 61 (1968 Supp.) (emphasis in original).

INFORMED REFUSAL

- *Cruzan v. Director, Missouri Department of Health (1990)*
  - Case involved woman in persistent vegetative state
  - Parents requested removal of life-sustaining measures
  - Hospital refused
  - Supreme Court recognized competent person's right to refuse medical treatment
  - Also recognized state's interest in showing of incompetent's wishes by clear and convincing evidence before withdrawal of life-sustaining measures

INFORMED CONSENT

- Criteria For Informed Consent/Refusal:
  - Patient is given complete/accurate information about risks for refusal and benefit of treatment
  - Patient is able to understand and communicate these risks and benefits
  - Patient is able to make a decision consistent with their beliefs and life goals

ELEMENTS OF INFORMED CONSENT

- ACDC
  - Autonomous decision
  - Capable individual
    - Legal capacity
    - Mental capacity
  - Disclosure of adequate information by provider
  - Comprehension of the information by individual
- Determining comprehension
  - "Sliding Scale" standard
    - The more serious the risk posed by the patient's decision the more stringent the standard of comprehension (capacity) required.
    - Refusal of EMS transport to hospital typically considered "high risk".

LEGAL CAPACITY

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LEGAL CAPACITY

- Adults (over age 18) have legal capacity to make own decisions
- Implied Consent
  - Individual who is:
    - Injured and unable to communicate or unconscious; AND
    - Suffering serious or life-threatening injury
  - Court order
  - Minor who is suffering serious or life-threatening injury and no adult available for consent

WHAT ABOUT MINORS?

- Minors
  - Parents
  - Non-parents (Grandparent, adult sibling, adult aunt/uncle, etc.)
  - Pregnant, but only for pregnancy related treatment (Texas)
  - Emancipated?

MENTAL CAPACITY

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MENTAL CAPACITY

- Capacity
  - Presumptive determination of competence
    - If a patient refuses and evidence exists indicating an impairment of the patient's capacities, it is appropriate to conclude the patient may be found incompetent in a court of law.
    - Impairment may be determined by;
      - Patients own actions
      - Information from caregivers and/or relatives

MENTAL CAPACITY

- Examples of altered capacity
  - Intoxication (EtOH or other drugs)
  - Psychiatric Illness
  - Dementia
  - Mentally Disabled
  - Certain Neurologic Disease

ASSESSMENT OF MENTAL CAPACITY

- Absence of deficits in
  - Cognition
  - Judgment
  - Understanding
  - Choice
  - Expression of choice
  - Stability

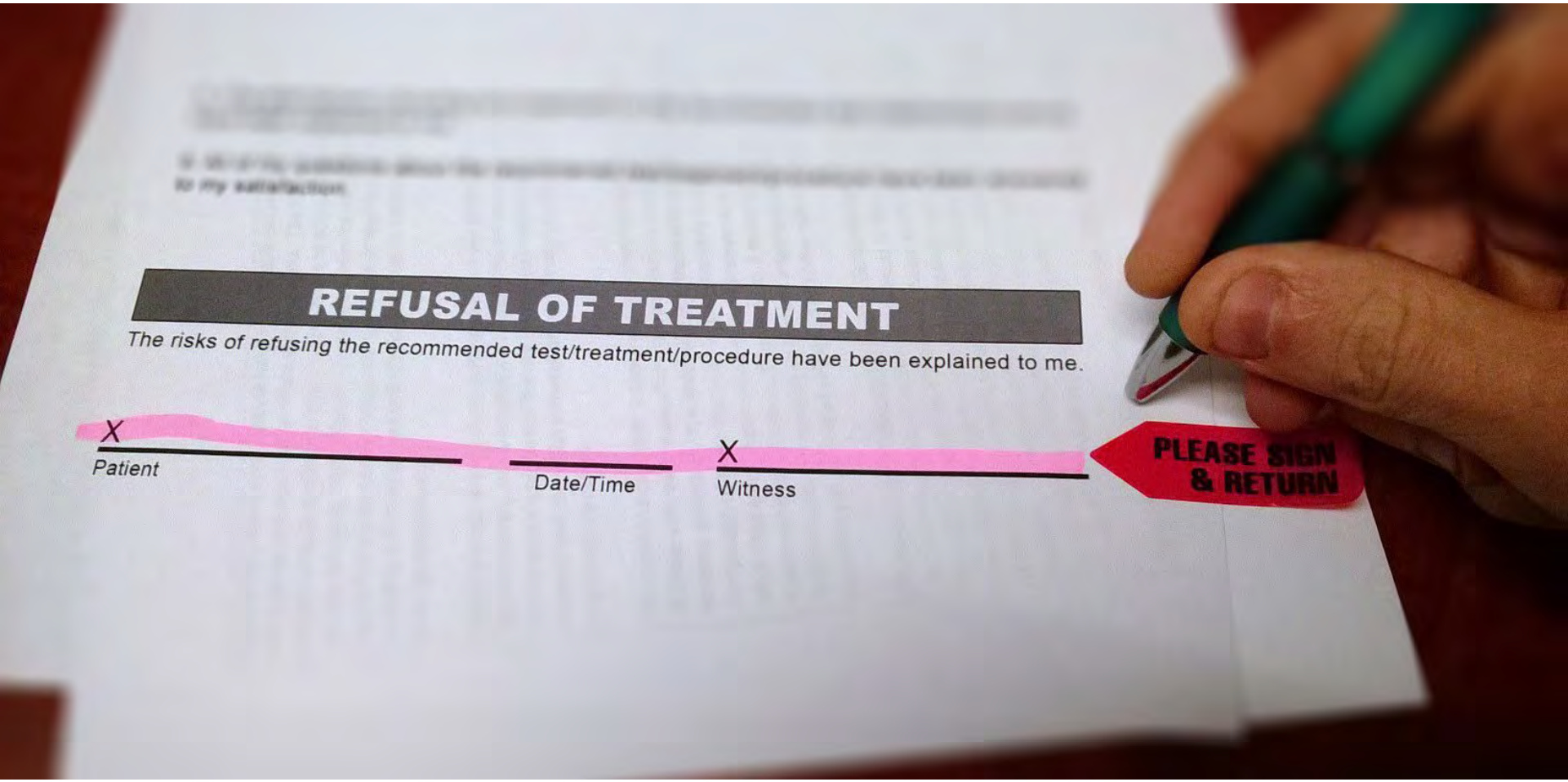
ASSESSMENT OF MENTAL CAPACITY

- Does the patient understand all the information about the intervention?
- Does the patient appreciate how that information applies to his or her situation?
- Can the patient evaluate the information, comparing risks and benefits?
- Can the patient make a rational and consistent choice and communicate that choice?

ASSESSMENT OF MENTAL CAPACITY

- Must consider patient's capacity on every call
- If patient deemed to have capacity, must respect wishes…

EVEN IF CONTRARY TO MEDICAL OPINION


REFUSAL OF TREATMENT
The risks of refusing the recommended test/treatment/procedure have been explained to me.
X
Patient
Date/Time
X
Witness
PLEASE SIGN & RETURN

TEXAS REQUIRES DOCUMENTATION OF REFUSALS

Texas Administrative Code Title 25 Section 157.11:

(n) Responsibilities of the EMS provider. During the license period, the EMS provider's responsibilities shall include:

...

(8) assuring that Informed Treatment/Transport Refusal forms are signed by all persons refusing service, or documenting incidents when a signed Informed Treatment/Transport Refusal form cannot be obtained;

REFUSAL OF CARE

- Disagreement with provider does NOT by itself constitute lack of capacity
  - *Lane v. Candura* – Court ruling supporting patient right to determine treatment
    - Patient refusing treatment despite physician advice
    - Court ruled the irrationality of the decision did not justify a conclusion of incompetence.

REASONS FOR NON-TRANSPORT

- What are reasons for patient refusal of transport?
  - “I feel fine.”
  - “I didn’t call you.”
  - “I can’t afford the bill.”
- Signed Refusal
- DOA
- No patient found at scene

NON-TRANSPORT

- Patients Refusing Care/Transport Defined:
  - No medical need
  - Normal decision-making capacity
    - Voluntarily declines after being informed
- Impaired Decision-Making Capacity
  - Inability to understand nature of illness/injury
  - Inability to understand risks or consequences of refusing

WHAT TO DISCLOSE

- The risks and consequences of refusing treatment and transport.
- Enough information that a reasonable person would find necessary and relevant to medical decision-making.
- Educate them about what could be going on, inform them of the consequences of not going to the hospital, and always offer patients treatment and transport.
- Inquire about concerns over transport; remain with the patient long enough to discuss their concerns.
- If a patient doesn't know what to do, give them a reason for transport.
- If they won't go to the hospital, assure them they can call 9-1-1 again.
- When appropriate, encourage the option of going to the emergency room independently.

A GOOD ACRONYM

- CASECLOSED
  - C – Condition, Capacity, and Competence
  - A – Assessment
  - S – Statements
  - E – Educate
  - C – Consequences
  - L – Limitations of EMS
  - O – Offer Transport
  - S – Signature
  - E – Educational Material
  - D – Dial 9-1-1

https://www.emsworld.com/article/1222817/documenting-patient-refusal-case-closed

INVOLUNTARY TRANSPORT

WHAT IF THEY REFUSE, BUT LACK CAPACITY

- Is detention of the patient justified?
- False imprisonment
- Good faith for law enforcement may grant immunity

THINGS TO LOOK FOR …

- Behaviors: rapid speech, flight of thought, no eye contact, quick movements, disconnected speech patterns, constant movement, cannot concentrate, swift and frequent mood changes, disorganized thoughts, disoriented to time and place, acts of violence, cutting self, combative/aggressive behavior, inappropriate dress, nudity.
- Hallucinations: sees people who are not there, hears voices telling them to hurt themselves or others, reports that the television is suggesting harm to others, turning the head as if listening to an unseen person.
- Self-Care Issues: insomnia or excessive sleep, has not eaten for days, not taking prescribed medications, home is in disarray, neglects household, neglects personal hygiene to the point of putting self/others at risk.
- Feelings: low self-esteem with feelings of hopelessness or helplessness, flat affect (not reacting with much feeling or interest), extreme, excessive and unwarranted guilt/shame.

THINGS TO LOOK FOR ...

- Suicidal Risks: has weapons or access to weapons, speaks about previous attempts, makes direct comments about dying or hurting self, evidence of previous attempts such as scars on the wrists.
- Elderly Issues: wandering at night, leaving things on stove unattended, not eating or sleeping or caring for personal needs, unrealistic fears, uncontrollable anxiety, confusion, quantity and age of unused foods in the home.
- Substance Abuse: abuse of prescribed medications, use of alcohol or illegal substances, especially if while taking medications.

Responding to the Mentally Ill: A Guide for Texas Peace Officers, Houston Police Department

ARREST WITHOUT A WARRANT - TEXAS

- Sec. 573.001. APPREHENSION BY PEACE OFFICER WITHOUT WARRANT. (a) A peace officer, without a warrant, may take a person into custody if the officer:
  - (1) has reason to believe and does believe that:
    - (A) the person is a person with mental illness; and
    - (B) because of that mental illness there is a substantial risk of serious harm to the person or to others unless the person is immediately restrained; and
  - (2) believes that there is not sufficient time to obtain a warrant before taking the person into custody.
- (b) A substantial risk of serious harm to the person or others under Subsection (a)(1)(B) may be demonstrated by:
  - (1) the person's behavior; or
  - (2) evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty.

ARREST WITHOUT A WARRANT - TEXAS

- Sec. 573.001. APPREHENSION BY PEACE OFFICER WITHOUT WARRANT. ...
- (c) The peace officer may form the belief that the person meets the criteria for apprehension:
  - (1) from a representation of a credible person; or
  - (2) on the basis of the conduct of the apprehended person or the circumstances under which the apprehended person is found.
- (d) A peace officer who takes a person into custody under Subsection (a) shall immediately:
  - (1) transport the apprehended person to:
    - (A) the nearest appropriate inpatient mental health facility; or
    - (B) a mental health facility deemed suitable by the local mental health authority, if an appropriate inpatient mental health facility is not available; or
  - (2) transfer the apprehended person to emergency medical services personnel of an emergency medical services provider in accordance with a memorandum of understanding executed under Section 573.005 for transport to a facility described by Subdivision (1)(A) or (B).

ARREST WITHOUT A WARRANT - TEXAS

- Sec. 573.001. APPREHENSION BY PEACE OFFICER WITHOUT WARRANT. ...
- (e) A jail or similar detention facility may not be deemed suitable except in an extreme emergency.
- (f) A person detained in a jail or a nonmedical facility shall be kept separate from any person who is charged with or convicted of a crime.
- (g) A peace officer who takes a person into custody under Subsection (a) shall immediately inform the person orally in simple, nontechnical terms:
  - (1) of the reason for the detention; and
  - (2) that a staff member of the facility will inform the person of the person's rights within 24 hours after the time the person is admitted to a facility, as provided by Section 573.025(b).
- (h) A peace officer who takes a person into custody under Subsection (a) may immediately seize any firearm found in possession of the person. After seizing a firearm under this subsection, the peace officer shall comply with the requirements of Article 18.191, Code of Criminal Procedure.

DETAINEE TRANSPORT BY EMS

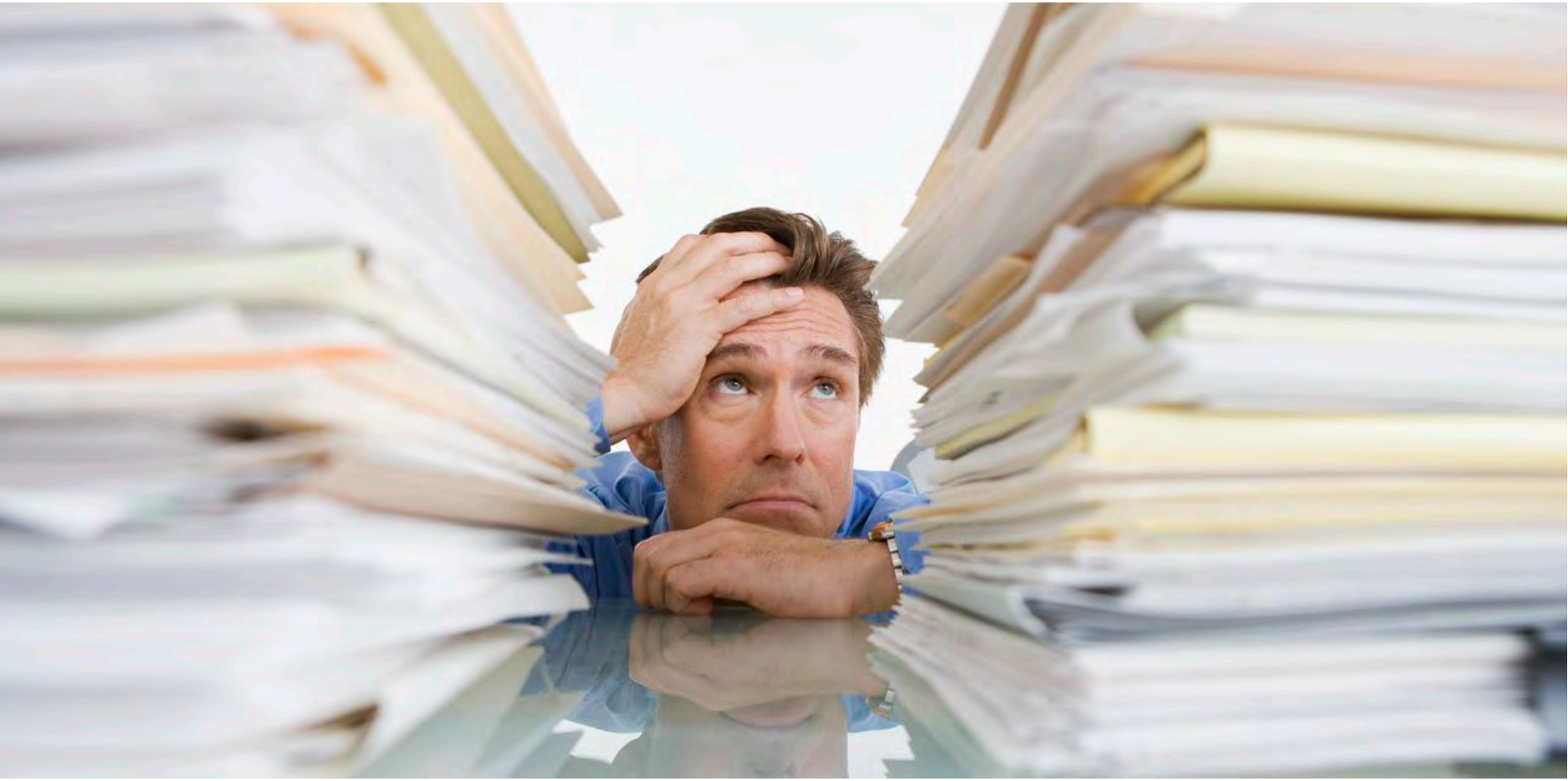
- Sec. 573.005. TRANSPORTATION FOR EMERGENCY DETENTION BY EMERGENCY MEDICAL SERVICES PROVIDER; MEMORANDUM OF UNDERSTANDING. (a) A law enforcement agency and an emergency medical services provider may execute a memorandum of understanding under which emergency medical services personnel employed by the provider may transport a person taken into custody under Section 573.001 by a peace officer employed by the law enforcement agency.
- (b) A memorandum of understanding must:
  - (1) address responsibility for the cost of transporting the person taken into custody; and
  - (2) be approved by the county in which the law enforcement agency is located and the local mental health authority that provides services in that county with respect to provisions of the memorandum that address the responsibility for the cost of transporting the person.
- (c) A peace officer may request that emergency medical services personnel transport a person taken into custody by the officer under Section 573.001 only if:
  - (1) the law enforcement agency that employs the officer and the emergency medical services provider that employs the personnel have executed a memorandum of understanding under this section; and
  - (2) the officer determines that transferring the person for transport is safe for both the person and the personnel.

DETAINEE TRANSPORT BY EMS

- Sec. 573.005. TRANSPORTATION FOR EMERGENCY DETENTION BY EMERGENCY MEDICAL SERVICES PROVIDER; MEMORANDUM OF UNDERSTANDING. ...
- (d) Emergency medical services personnel may, at the request of a peace officer, transport a person taken into custody by the officer under Section 573.001 to the appropriate facility, as provided by that section, if the law enforcement agency that employs the officer and the emergency medical services provider that employs the personnel have executed a memorandum of understanding under this section.
- (e) A peace officer who transfers a person to emergency medical services personnel under a memorandum of understanding executed under this section for transport to the appropriate facility must provide:
  - (1) to the person the notice described by Section 573.001(g); and
  - (2) to the personnel a completed notification of detention about the person on the form provided by Section 573.002(d).

LIMITATION OF LIABILITY FOR TRANSPORT OF DETAINEE

- Sec. 571.019. LIMITATION OF LIABILITY. (a) A person who participates in the examination, certification, apprehension, custody, transportation, detention, treatment, or discharge of any person or in the performance of any other act required or authorized by this subtitle and who acts in good faith, reasonably, and without negligence is not criminally or civilly liable for that action.



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DOCUMENTATION

- describe the intervention offered;
- identify the reasons the intervention was offered;
- identify the potential benefits and risks of the intervention;
- note that the patient has been told of the risks — including possible jeopardy to life or health — in not accepting the intervention;
- clearly document that the patient has unequivocally and without condition refused the intervention; and
- identify why the patient refused, particularly if the patient's decision was rational and one that could not be overcome.

WHY A SIGNED REFUSAL ISN'T ENOUGH

- Releases are construed against party writing them
- Any ambiguity in the release may void it

BOTTOM LINE

- Documentation should show enough assessment was made for informed refusal


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TRANSPORT DECISION MATRIX

	EMS Wants Transport	EMS Wants No-Transport
Patient Wants Transport	• Easy decision • No liability for transport	• Dangerous situation • Huge liability should patient deteriorate • Safer to transport
Patient Wants No-Transport	• Must ensure informed consent - patient understands risks of refusal • If patient has capacity, must thoroughly document refusal	• Easy decision, but… • Still take risk for patient deterioration • Must still assess for capacity

WHAT ABOUT A DNR?

- Out-of-hospital DNRs are easily revoked:

Sec. 166.092. REVOCATION OF OUT-OF-HOSPITAL DNR ORDER. (a) A declarant may revoke an out-of-hospital DNR order at any time without regard to the declarant's mental state or competency. An order may be revoked by:

(1) the declarant or someone in the declarant's presence and at the declarant's direction destroying the order form and removing the DNR identification device, if any;

(2) a person who identifies himself or herself as the legal guardian, as a qualified relative, or as the agent of the declarant having a medical power of attorney who executed the out-of-hospital DNR order or another person in the person's presence and at the person's direction destroying the order form and removing the DNR identification device, if any;

(3) the declarant communicating the declarant's intent to revoke the order; or

(4) a person who identifies himself or herself as the legal guardian, a qualified relative, or the agent of the declarant having a medical power of attorney who executed the out-of-hospital DNR order orally stating the person's intent to revoke the order.

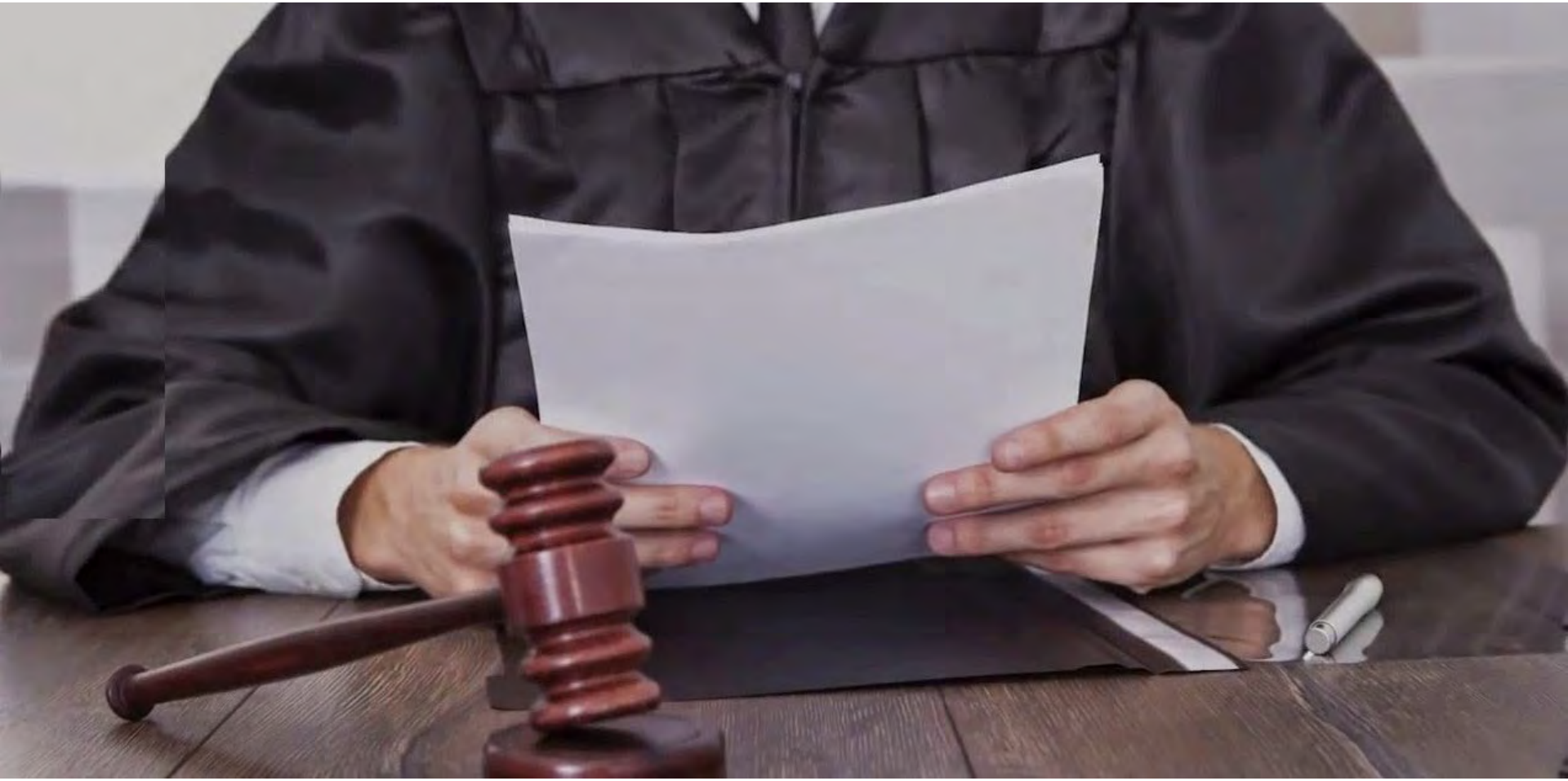
WHAT ABOUT A DNR?

(b) An oral revocation under Subsection (a)(3) or (a)(4) takes effect only when the declarant or a person who identifies himself or herself as the legal guardian, a qualified relative, or the agent of the declarant having a medical power of attorney who executed the out-of-hospital DNR order communicates the intent to revoke the order to the responding health care professionals or the attending physician at the scene. The responding health care professionals shall record the time, date, and place of the revocation in accordance with the statewide out-of-hospital DNR protocol and rules adopted by the executive commissioner and any applicable local out-of-hospital DNR protocol. The attending physician or the physician's designee shall record in the person's medical record the time, date, and place of the revocation and, if different, the time, date, and place that the physician received notice of the revocation. The attending physician or the physician's designee shall also enter the word "VOID" on each page of the copy of the order in the person's medical record.

(c) Except as otherwise provided by this subchapter, a person is not civilly or criminally liable for failure to act on a revocation made under this section unless the person has actual knowledge of the revocation.

DO ALL 911 PATIENTS REQUIRE TRANSPORT?

- When do they become “patients?”
- How much assessment?
- How much RISK are you/your service comfortable with?



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WHEN DO PATIENTS BECOME PATIENTS?

- *Wright v. City of Los Angeles* 219 Cal. App. 3d 318 (1990)
  - EMS called to scene of a fight
  - Find patient lying on the ground
  - First crew gets to within “3 to 5 feet” of patient and determine “he’s loaded”; then leave
  - Crew found negligent for failing to perform any examination
  - The failure to perform this examination could result in death or serious injury and is negligent

ESTATE OF COREY HILL V. MIRACLE

- Facts:
  - EMTs and law enforcement respond to scene of diabetic emergency
  - Blood glucose level – 38
  - EMTs attempt IV; patient (Hill) becomes combative and rips out IV
  - Deputy Miracle used taser in “stun” mode
  - Patient complies; blood sugar restored; apologized
- The case:
  - Hill files suit for civil rights violations (excessive force) because he was not being arrested

ESTATE OF COREY HILL, CONT.

- Sixth Circuit Court (Michigan) proposes new criteria for medical emergency:
  - Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that pose an immediate threat of serious harm to himself or others?
  - Was some degree of force reasonably necessary to ameliorate the immediate threat?
  - Was the force used more than reasonably necessary under the circumstances?

MOORE V. WYOMING MEDICAL CENTER

- Disputed facts: patient suicidal or needs sleep medication?
- EMTs arrive and told by law enforcement scene is calm
- Crew calls hospital; doctors tells them to transport patient “even if against her wishes”
- Crew handcuffs naked patient and hauls her to ambulance
- Court determined no immunity

WEBER V. CITY COUNCIL

2001 WL 109196 (Ohio App. 2 Dist)

- 911 call re: patient having a stroke
- EMTs told patient he was having a "panic attack"
  - Vital signs WNL
- "Squad not needed"
  - Check box for "transport not needed"
- Next morning pt had neurodeficits, Dx stroke

KYSER V. METRO AMBULANCE

764 So.2d 215, (La. App. 2000)

- 52 year old male found by GF lying face down on living room floor – called 911
- EMS arrived, found pt conscious but still on floor
- Kyser answered all questions appropriately and refused transport but allowed evaluation
- BP and pulse rate high

- Paramedics followed refusal protocol
  - Contacted medical control
  - MD said OK to accept refusal
  - Pt signed refusal of service form
- GF insisted they take him but they told her they could not w/o his consent

- Paramedics left pt with GF
- His parents came later, pt said he did not want to go to the hospital
- GF stayed overnight
  - Pt vomited and may have had seizure
- GF called 911
- Pt transported – ruptured aneurysm

- La. Provides for EMS liability only in cases involving gross negligence
- Trial court dismissed case
- Appeals court affirmed – no gross negligence
- Disputed refusal was valid
  - EMS had documented their efforts to convince pt to be transported well

GREEN V. CITY OF NEW YORK

- Failure to determine whether pt with ALS had decision making capacity to refuse treatment formed basis for a claim under the ADA
- EMT-P failed to follow established protocols for communicating with disabled pt
- Pt could communicate by blinking and by computer

- EMT-P forced transport on patient despite family's protests
- Family claimed pt was denied system for evaluating refusals
  - Failure to follow protocols
  - Failure to contact medical control

http://abcallaccess.com/wp-content/uploads/2012/03/SHOW-ART-WWYD.jpg

SCENARIO #1 – WHAT WOULD YOU DO?

- Patient's daughter calls 9-1-1 saying her father is having chest pains and "might be having a heart attack"
- You arrive to find the patient nude and reeking of alcohol
- Patient states no complaints and visually appears intoxicated

SCENARIO #1 – CONT.

- Second crew returns 24 hours later
- Patient is now incoherent, cyanotic and incontinent
- Transport to the hospital; treated for pneumonia
- Later that day dies of acute myocardial infarction
- City held negligent because first crew failed to perform any examination

- *Hialeah v. Weatherford*

SCENARIO #2 – WHAT WOULD YOU DO?

- Find 85-year old woman lying on living room floor with generalized weakness
- No prior medical issues
- Examination:
  - clear sensorium;
  - responds appropriately to questions;
  - breathing 20 breaths/min and unlabored;
  - pulse 120
- Patient refuses to answer more questions or allow additional vitals
- As you help her to the couch, she falls over from weakness

SCENARIO #2 – CONTINUED

- You tell the patient her condition could be life-threatening and more evaluation is needed
- Patient states she doesn't care if she dies, she wants to die at home
- Attempt to take BP; patient slaps your face
- Still obtain a systolic BP of 75 mm Hg

SCENARIO #3 – WHAT WOULD YOU DO?

- Patient is 37 year old male complaining of chest pains
- You acquire vitals: pulse, heartbeat, breathing, blood pressure, skin and pupil reaction
- Patient played basketball that morning
- No history of heart problem and no medications
- Family requests transport; patient is refusing
- *Green v. City of Dallas*
  - 5 minutes after crew leaves patient suffered a heart attack and died

Questions?