



Fourth Amendment Rights of Fire Victims

By Fred Herrera



Out of necessity, the Fire Department has the authority to enter the private properties and residences of the citizens it protects. This entry is performed without consent or search warrants. The reason for this is simple: lives and property may be lost while waiting for the required permission to enter the property.

This exception to the Fourth Amendment right against unreasonable search and seizure is known as an *exigent circumstance*.

Exigent circumstances exist in an “emergency situation requiring swift action to prevent imminent danger to life or serious damage to property or to forestall...the destruction of evidence” (*People v. Ramey*, 1976). All emergency responses fall under the Fourth Amendment exception of exigent circumstances. This includes origin and cause fire investigations. The courts have held there is a duty to determine the origin and cause and to protect evidence from destruction.

Warrantless Entry is a Tremendous Responsibility

Since the evidence would most likely be destroyed during overhaul operations, which are performed while there is still an exigent circumstance, the fire investigation is also within the emergency time frame. In short, the legal obligation of the fire department with respect to the fire scene includes:

- Extinguishing the fire,
- Determining the origin and cause of the fire,
- Preserving the integrity of the fire scene and,
- Preserving evidence from imminent destruction.

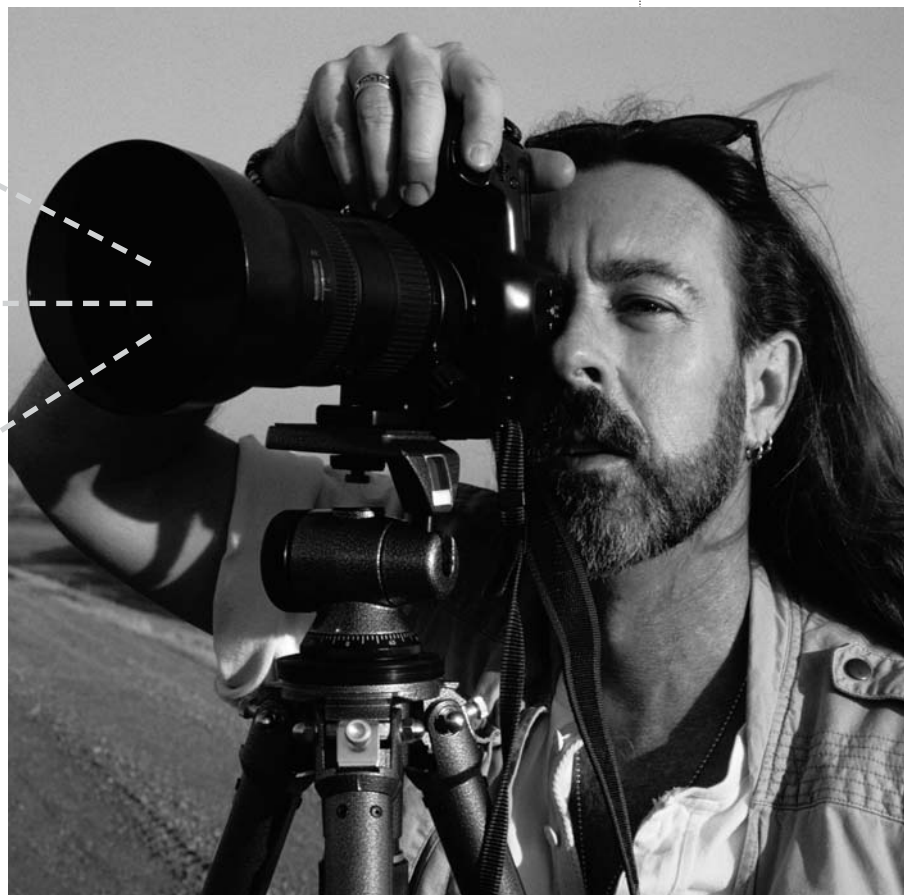
Warrantless entry under exigent circumstances presents a tremendous responsibility to the fire department personnel at the fire scene.

Standard operating procedures normally include the physical delineation of the emergency scene. This barrier may be created by yellow fire line tape, or fire or police personnel. This physical barrier is often disregarded by the curious, the media, or persons related to the exigent circumstance, such as the residents or relatives. Off-duty police or fire personnel, disaster relief volunteers, medical personnel and other professionals peripherally related to the emergency may also need to enter the scene.

The decision to allow entry into the emergency scene is often posed to the person maintaining scene security. Who should be allowed in the emergency scene? Who can be kept out? The answers to these questions are becoming more of an issue as our society continues to

become more litigious and as a result, emergency personnel are increasingly facing personal civil repercussions for violating the rights of others.

The courts vigorously protect a person’s reasonable expectation of privacy, especially in the home. If a person has exhibited a subjective expectation of privacy, such as from walls, doors and a roof to keep the public out, and society is prepared to recognize that expectation as reasonable, then the space is protected by the Fourth Amendment. In *Michigan v. Tyler* (1978) and *Michigan v. Clifford* (1984), the Supreme Court further clarified the reasonable expectation of privacy, specifically involving fire scenes.



Fire Scene Entry by the Media

The first area of concern regarding the Fourth Amendment is the media. There are court decisions that may change the way emergency personnel control scenes. The Florida Supreme Court noted in *Florida Publishing Co. v. Fletcher*, (1976) that a photographer who accompanied a fire marshal into a fire scene did not illegally enter the residence based on common custom and practice of the

media. However, in a U. S. Supreme Court opinion rendered by Justice Stevens on *Wilson v. Layne* (1999), *Florida Publishing Co.* was referenced. The judge pointed out that the fire was a “disaster of great public interest” and it had been a longstanding practice throughout the country for representatives of the news media to enter private property where a “disaster of great public interest” has occurred.

So the question can be raised, when allowing the media to enter a fire scene, as to whether the fire is a “disaster” and “of great public interest.” The Wisconsin State-court decision of *Prahl v. Brosamle* (1980) further distinguished the issue with the following: “We will not imply a consent as a matter of law. It is of course well known that news representatives want to enter a private building after or even during a newsworthy event within the building. That knowledge is no basis for an implied consent by the possessor of the building to the entry... We conclude that custom and usage have not been shown in fact or law to confer an implied consent upon news representatives to enter a building under circumstances presented by this case.”

As the controlling authority at the scene under exigent circumstances, it stands to reason that the fire department, and also the employee who allows the entry of unauthorized people, may be held responsible and liable for allowing an illegal entry. It must be determined whether the Fourth Amendment protects the emergency scene, or some part of the scene. If it is an area in which someone holds a reasonable expectation of privacy, the event must be a *disaster of great public interest* sufficient to forego the right to privacy, with the exception of personnel eliminating the exigent circumstance.

Opinions

The courts have not defined a clear-cut answer covering all of the contingencies involved. Opinions at all judicial levels differ and vary widely from state to state. A wiser course is to stay on the conservative side and protect the scene until emergency personnel alleviate the exigent circumstance or require non-emergency personnel to gain consent from the property owner.

Keep in mind, while on the

scene under exigent circumstances, emergency personnel safety and evidence preservation and collection override the property owner’s rights. So, even if a member of the media is given consent from the owner of the property to enter the structure at a fire scene, emergency personnel are able, and required, to prevent access in order to protect the potential of undiscovered evidence.

In *Wilson v. Layne*, where a media ride-along accompanied federal marshals on an arrest warrant, it was held that a media ride-along in a home during the execution of an arrest warrant violates the Fourth Amendment. This clearly is a wake-up call to emergency services regarding the protection of the scene from unlawful entry.

In *Bivens v. Six Unknown Fed. Narcotics Agents* (1971), the petitioners sued the law enforcement officials as individuals for money damages because the media was included in the execution of an arrest warrant. As with *Wilson*, the motion for summary judgment was denied on the basis of qualified immunity. Justice Stevens disagreed and said that an officer should have sufficient knowledge of the law to know that bringing reporters into the home during the execution of an arrest warrant was not lawful.

Although it is not clear where the line will ultimately be drawn, it appears the court has determined that allowing the entry of the media into the scene can be a violation of the homeowner’s Fourth Amendment rights.

These cases represent media involvement in law enforcement activities during the execution of a warrant, but the core issue is the violation of the Fourth Amendment. If fire service personnel on scene during exigent circumstances allow the media into a residence, which is clearly not related to the objectives of eliminating the exigent circumstance, they may be allowing a violation

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of the Fourth Amendment. Further, fire investigators, who have more law enforcement training than fire suppression personnel, may be held to a higher level of accountability.

Balancing the Press & the People

The media performs a crucial role in our society, and is also protected to some degree by the First Amendment. "In a society in which each individual has but limited time and resources with which to observe first hand the operations of government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations" (*Cox Broadcasting Corp v. Cohn*, 1975).

As a result, the First Amendment right of the press

sometimes conflicts with the Fourth Amendment rights of citizens. It would seem the mission of emergency services, to protect the lives and property of our citizens, would be more in line with also protecting their right to privacy. This is not to suggest the media not be included in fire operations, but perhaps the extent of their involvement, in a physical sense, should be given a closer look.

A further consideration is the protection of the fire scene as a possible crime scene. As a general rule, the request for an origin and cause investigation is the result of observations by the first-in officer, who determines an investigation is warranted.

The arrival of fire investigators may be after the fire is controlled, and, if the scene is preserved properly, before



the overhaul operations are conducted. It is often at this point when fire personnel allow the media into the scene to take video or still photos, pending the arrival of fire investigators. Any physical evidence later discovered by fire investigators is compromised by the presence of non-emergency personnel.

The television reality shows that illustrate the work of fire and police departments play an important role in bringing the work of emergency personnel to the public. The established means, however, to enter a residence without a warrant requires exigent circumstances, consent, or abandonment. The emergency personnel are clearly on the scene due to exigent circumstances, but what about the TV crew? The non-emergency personnel are not satisfying the criteria for legal entry onto the scene, unless they acquire consent from the person(s) who maintain a legitimate expectation of privacy in the property. Some courts have held that the silence of a homeowner is the same as consent.

Another consideration is, unlike the majority of police operations, the fire department responds to many emergencies that are accidental and not crime-related. In these situations, an infringement of the Fourth Amendment rights of the victims may cause more pain and suffering to an already traumatized victim.

The Media Perspective

An interview with Leon Gilchrist, Assignment/Editor for San Diego's KUSI News, revealed media personnel at KUSI are guided by policies instituted by their insurance carrier. The insurance carrier meets with employees annually to review existing practices and implement new guidelines set forth by industry standards and case law.

Media personnel at KUSI will not enter an emergency scene without authorization from fire or police officials who are maintaining custody of the scene. Once allowed onto the scene, the media personnel will not enter a residence without further permission from emergency personnel.

Regardless of consent to enter from emergency personnel, KUSI employees will not enter the scene against the wishes of the property owner or tenant. If the media personnel, however, have been allowed to enter the

scene and residence by emergency personnel, and the homeowner or tenant later objects, the recorded footage obtained with the consent of emergency personnel may still be used at the discretion of KUSI.

Of course, any portions of the property that is viewable from public areas, such as the street or sidewalk may be filmed without consent from emergency personnel or the owner or tenant of the property. This includes the interior of a residence. It is the belief of KUSI News that these policies are consistent with the Fourth Amendment rights of fire victims while providing the media the First Amendment right to free speech.



A representative of the television series *COPS*, which is in its fifteenth season of production, commented that having a good understanding of Fourth Amendment rights and respecting the right to privacy has allowed the show to flourish without difficulty before and after *Wilson vs. Layne*.

The producers of the show operate with signed consents from the departments providing the ride-alongs and adhere to individual department policies. Also, no footage is aired without the written consent of the person filmed.

Unlike television news, *COPS* is in a documentary format and rarely is involved in the service of a search warrant or entry into a residence without consent. The majority of filming is conducted on public property. In all cases, show producers consider the rights of the individuals filmed extremely important and, in their opinion, common sense and professionalism has been key to preventing litigation.

Civilian Ride-Alongs

The second area of concern regarding the Fourth Amendment is ride-along programs. The most common ride-along, the media, has already been discussed.

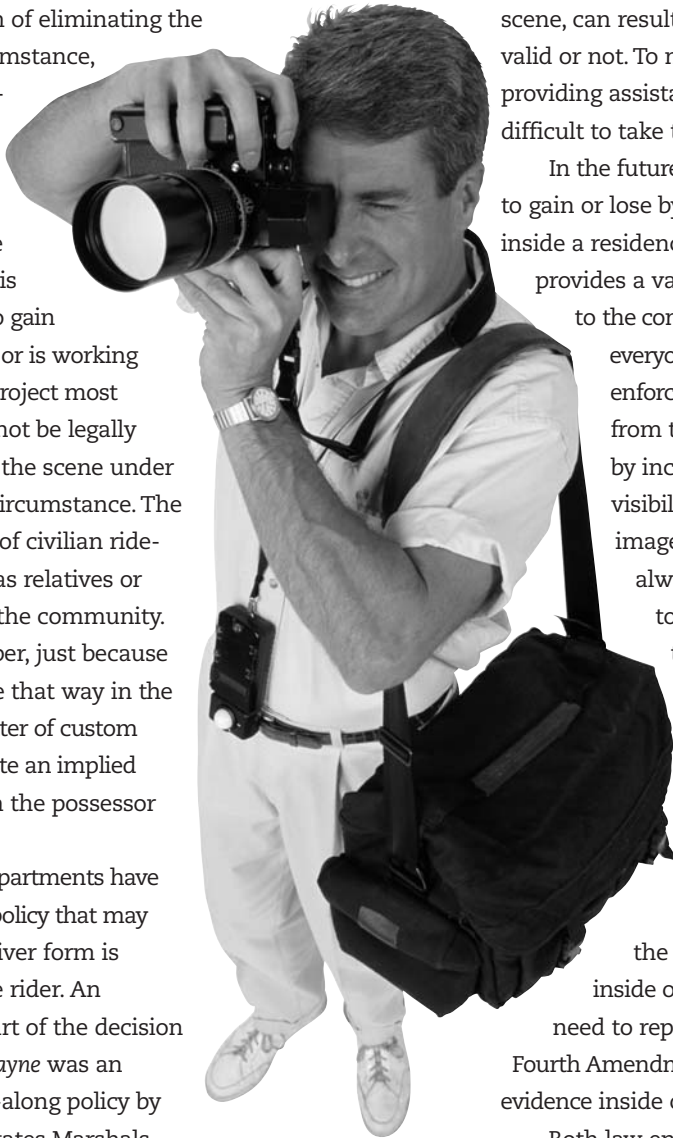
There are also civilian, intern, and emergency services related ride-alongs, such as aspiring and probationary emergency personnel. An employee on the payroll, who is not yet a fully trained member of the crew and is receiving on-the-job training related to the operation of eliminating the exigent circumstance, would appropriately be on the scene.

A college student who is attempting to gain employment or is working on a school project most likely would not be legally able to enter the scene under the exigent circumstance. The same is true of civilian ride-alongs such as relatives or members of the community.

Remember, just because it's been done that way in the past as a matter of custom does not create an implied consent from the possessor to enter.

Many departments have a ride-along policy that may include a waiver form is signed by the rider. An important part of the decision in *Wilson v. Layne* was an existing ride-along policy by the United States Marshals.

This ride-along policy also was dissented by a federal judge, who pointed out the policy was created by an employee of United States Marshals Service and was more related to the public image of the Service than the legal issues, including lawful entry. It is important to ensure department policies are in accordance with applicable laws.



Conclusion

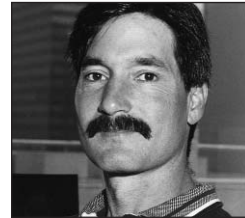
Ultimately, there can be confusion over the legal rights of the media and other non-emergency personnel entering an emergency scene and the liability of the emergency services and its employees who let others lawfully or unlawfully enter. One thing is certain, however, fire personnel are held to higher and higher levels of accountability in all aspects of their profession. Any bad turn of events, which is not uncommon on an emergency scene, can result in a search for a responsible party, valid or not. To make matters worse, as public servants providing assistance is second nature, and many find it difficult to take the hard line on scene security.

In the future, we should try to envision what there is to gain or lose by not allowing the media or a ride-along inside a residence. The media

provides a valuable service to the community and everyone in law enforcement benefits from their coverage by increasing our visibility and public image. Yet, it's not always necessary to enter the scene to get the story to the public. It often can be accomplished without invading the victim's right

to privacy. The media can document the outside of the structure, perhaps even inside of the banner tape to get the visuals they need to report the story accurately. Meanwhile, the Fourth Amendment rights of the victim and the evidence inside of the structure are kept intact.

Both law enforcement and the media should ask themselves: what level of privacy you would expect if your home burned and you weren't there? Would it be okay for non-emergency persons to be inside your "castle" just because some of your personal items were charred? As with many scenarios, imagining ourselves trading places with the victim can considerably clear up many professional quandaries.



Fred Herrera, CFI, is a 19-year veteran of the San Diego Fire Department and has been a member of the Metro Arson Strike Team for nine years. He is also a member of the San Diego County Fire and Arson Task Force.

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