



“Best Practices:” A legal disclaimer

BY STEVEN A. ADELMAN, ESQ.

Second stage at Rock In Rio in Las Vegas, May 2015. General admission events have to be planned to accommodate an audience with a diversity of abilities—including people in wheelchairs.

AS A LAWYER WHOSE PRACTICE focuses on live events, I strongly favor people creating and attending shows and not dying. I advocate for training, education, and mentoring so industry professionals learn to work safely and effectively. By creating standards of safe practice in live event spaces, organizations like PLASA are quite literally saving lives.

For several reasons, however, it is a terrible misnomer to call the published materials they create “best practices.” From a legal standpoint, that term overstates and confuses the correct duty of care. From an

operational perspective, “best practices” carries an implication of completed analysis that is contrary to the creative problem-solving in which readers of this article are constantly engaged. And on a philosophical level, the idea that one set of practices are “best” underestimates both the importance of context on even routine tasks, and the experience and judgment that distinguishes the craftsmen in charge of most live event sites.

If this article were just a lawyer’s rant about wording, even I would advise you to move on. Life is too short for other people’s

Is the term just another way of saying “do the right thing?”

linguistic battles. Instead, my purpose is to unpack this overplayed term in order to discuss how live event professionals can identify the most effective ways to do your job under your particular circumstances, and in so doing, meet your legal duty of care.



Author Steve Adelman is a frequent presenter regarding event safety.

Straining for a definition of "best practice"

I have found no authoritative definition for "best practice." This is amazing for a term as widely used as this one, and ironic since the essence of the words suggests the existence of one distinct body of knowledge that rises above all others. Our first task, therefore,

is to define our words enough to have a meaningful discussion. Here is a definition I have cobbled together from a survey of my own bookcase:

A best practice is a technique or methodology that, through experience and/or research, has proven to reliably lead to a desired result. Published best practices guides are often vetted through a rigorous standard-setting process with the constituent groups, resulting in an agreed-upon framework and preferred approach for particular circumstances.

Although this working definition is accurate as far as it goes, it still leaves important questions unanswered, such as:

- To be a "best" practice, does there have to have been some competition with other practices? If so, what is the standard for identifying the best one? Fewest failures or injuries? What if there is no quantifiable measure?
- Are best practices minimum standards that everyone must meet?

- Or, one well-regarded way of performing a task among other permissible options?
- Can management decide what is the "best" practice for its employees and contractors? Does that stand up in court?
- Are best practices guides useful when defending against claims because they can justify even an action that went wrong?

Everyone shall behave as a "reasonable person under the same or similar circumstances."

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The crew setting up for the next act at Rock In Rio in Las Vegas on the main stage.



Rock In Rio's main stage speaker hang.

- Or, are they more useful to plaintiffs' lawyers to show what industry experts say should be done, even if that is rarely done in the field?
- If the best practices are constantly evolving, are best practices guides hopelessly outdated by the time they are published?
- Is the term just another way of saying "do the right thing?"

As I go through lists like this, my frustration rises as it becomes more apparent that the answer in each case is some variation on "it depends." That suggests that the term "best practices" is not very helpful. Fortunately, the law provides an alternative way of thinking about the right way to work.

The duty to behave reasonably

As a matter of law, the term "best practice" raises the bar too high. Happily, you are not expected to identify and do only the single best thing in any given circumstance. Perhaps this is in recognition that only sometimes is there one best way to do something, and even more rarely is there a recognized authoritative body to say what that way is.

Instead, the most basic principle in modern tort law, as practiced in the approximately 80 nations that apply some variety of English common law, is that everyone shall behave as a *reasonable person under the same or similar circumstances*. There are two elements to this, each of which is important.

First, the duty of care is to behave *reasonably*, the root of which is to have a reason for what you are doing. Tort law is based on an understanding that much of life is subjective, with more than one acceptable answer. When contributing your technical expertise to an event emergency plan, for example, you are not engaged in a math problem which yields a single solution. Instead, when spending time in the myriad shades of gray which color our decisions, it is legally sufficient to have a reason that

reflects thought and effort leading to a choice that you can defend.

The second element of the legal duty of care is what helps your decisions make sense: *under the same or similar circumstances*. When examining whether one has behaved reasonably, context matters. Throughout a tour, you may erect the same outdoor roof system that complies with *ANSI E1.21-2013, Entertainment Technology – Temporary Structures Used for Technical Production of Outdoor Entertainment Events* and use the same weather prediction and decision-making consulting, but if your severe weather action plan does not accommodate variations in the site, including access to shelter, foreseeable audience demographics such as mobility, and the time necessary to safely evacuate the anticipated number of people, then the

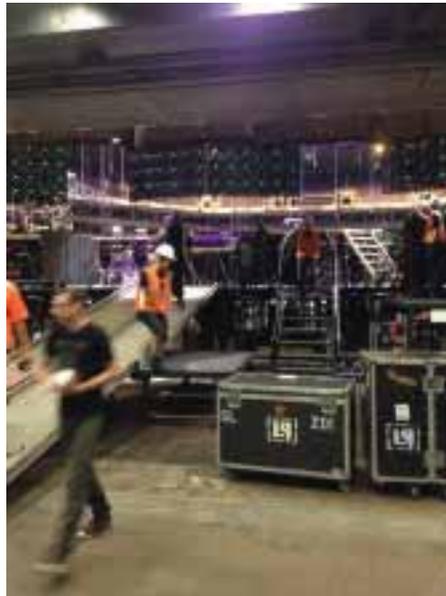
... a craftsman recognizes that each show or set-up raises some new challenge which makes past performance an imperfect guide to future performance.



A site map and legend on a guest services person's lanyard at the 2015 Super Bowl.

answer to whether the plan is reasonable may be different too.

Put another way, the law does not require you to engage in only the "best" practices. Reasonable practices under the



Linkin Park's crew setting up for their show at US Airways Center in Phoenix last September.

circumstances will suffice. But that still leaves the question how one knows what "reasonable" means in any given situation.

Industry-approved treatises are very important

We are building a puzzle called Reasonableness. Often people say they chose a particular action because that's the way they had always done it, but that is part of a different puzzle called Negligence. The pieces around the edge of our puzzle include the familiar codes, standards, and treatises, participation in industry associations such as the Event Safety Alliance or PLASA Advisory Groups, all of the products of "subject matter experts from around the world" whose work "facilitate[s] the use of new and existing equipment and promote[s] safe working conditions in the industry." (<http://www.plasa.org/standards/>) These form the framework for reasonable decision-making in the countless situations that they cover, from overall life safety to highly technical standards. The whole idea of "best practices" is that the more smart

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people you can line up who would say you did something that made sense, even if it didn't work out on a particular occasion, the more likely you are to meet the reasonable person standard and therefore avoid liability for someone's damages.

But there are still those pesky pieces in the middle of the puzzle. One look at the notices and disclaimers inside the front cover of a PLASA Technical Standard or *NFPA Code* reminds us that the rules are only a starting point of a reasonableness analysis. (E.g., *NFPA 101, Life Safety Code, 2015 Edition* states, "Anyone using this document should rely on his or her own independent judgment or, as appropriate, seek the advice of a competent professional in determining the exercise of reasonable care in any given circumstances.") For the rest of the analysis, context matters, because what is generally reasonable may not be reasonable for you. Even carefully written industry-approved material may not apply to "the same or similar circumstances" that you face.

It may be that based on your knowledge of the particular circumstances of your show, venue, crowd, or some other significant fact, it may make more sense to take a different action than what appears in an industry publication. The fact that you choose to take an action contrary to a code doesn't necessarily make

your action wrong—it simply makes your action suspect, and therefore requires that you be extra careful to document the basis for your reasoning in advance.

Checklists and craftsmanship

For the purpose of this discussion, there are two types of work: routine and complex. Because the practices that make routine work reasonably safe can be different than for more complex tasks, it is worth discussing them in turn.

For routine work, a reasonable person will create systems and reminders so each step is addressed, in the right order, every time. In this situation, the danger is not that something is too difficult to be done correctly, even for a part-time hourly worker or someone early in their industry career. The danger is that something easy, but important will slip through the cracks. Therefore, a reasonably safe work site will ensure that every worker is trained for his or her task, possesses appropriate certification, and is supervised by someone who can spot mistakes and teach correct methods. It is hard to keep a lot of balls in the air. When there is a long series of tasks, even a humble checklist can save you from a disastrous

missed step. (See Atul Gawande, *The Checklist Manifesto*, 2009.)

For more complex tasks, a reasonable person will not only be trained, credentialed, and knowledgeable about the applicable codes, standards, and treatises in the field, they will also possess the experience and professional judgment to apply all of this information to particular circumstances. In some golden age in the past, this was called "craftsmanship."

A true craftsman recognizes that each situation has some nuance or complication that distinguishes it from all others. Therefore, they make judgments. Those judgments have to be based on good reasons, which often make reference to industry peer-reviewed codes or standards. A craftsman does not suffer from the normalcy bias that plagues most of us most of the time, the belief that because there has been no obvious problem before there will be no problem this time either. Instead, a craftsman recognizes that each show or set-up raises some new challenge which makes past performance an imperfect guide to future performance.

A "best practice" is only as good as its practitioner. When something goes wrong at an event, as sometimes happens even when everyone does their job, I have a much easier time representing my client when they can show that they thought through a problem, applied good and logical reasoning, and implemented a plan. Following the letter of a code or standard is a fine start—but in the end, the mark of a reasonable person is their application of those materials to the circumstances before them. Although some best practices can be found in a book, many of the most reasonable ones are in a skilled craftsman's own head.



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