

Hospital & Law Enforcement Guidance for Conducting Forensic Blood Draws

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Introduction & Purpose

A hospital's first obligation to all patients is caring for their medical needs. When a patient is also involved in a criminal investigation, either as a suspect, witness or victim, that obligation remains the priority. Law enforcement officials, however, also have an important job to do that often involves seeking access to patients, their medical information or other evidence held by the hospital. These guidelines are established to help hospitals, their health care practitioners, and law enforcement officials understand the dynamics of interaction when an individual is suspected of driving under the influence of intoxicants and brought to an acute care hospital.

This guidance document will cover disclosure of information, considerations for law enforcement regarding hospital emergency departments, and the law enforcement authorities under which hospital assistance may be requested.

This document provides general guidance only and does not imply agreement on all points, does not create any legal obligations not otherwise existing at law, and is not legal advice. Hospitals should implement policies and procedures as necessary to meet their unique circumstances. Hospitals should communicate their policies and procedures to staff as well as local law enforcement.

This document reflects state and federal laws existing as of March 2016, which may change from time to time.

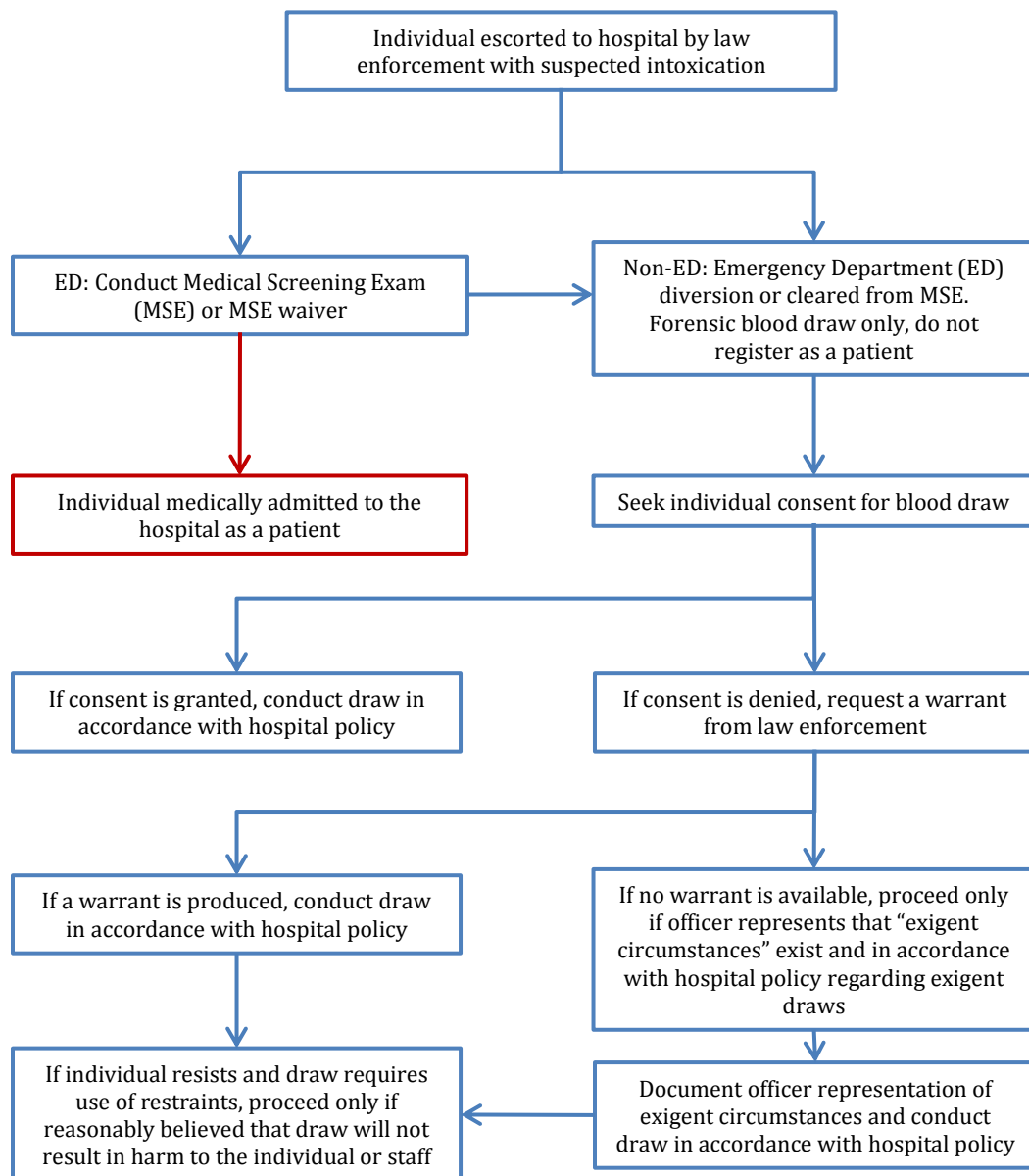
Code of Cooperation

As a first step to establishing a productive relationship, hospitals should meet with local law enforcement and collectively agree to the following key principles encompassing the ideas of shared responsibility, cooperation, communication, and awareness of broader context. Both hospital and law enforcement policies regarding forensic blood draws should reflect the principles outlined here. Importantly, both parties should acknowledge shared responsibility to be open and respectful of the important role each play in caring for and protecting the community.

1. Driving under the influence of intoxicants is a public safety issue in which both law enforcement and health care providers have a vested interest.
2. No acute hospital should have a policy of blanket refusal for forensic blood draws in the absence of a specific arrangement.
3. Law enforcement should not have a sole policy of obtaining blood draws from the local hospital in the absence of a specific arrangement.
4. Hospitals should clearly communicate to local law enforcement their policies and expectations for forensic blood draws.
5. Law enforcement should be educated in the local hospital(s) policies regarding forensic blood draws.
6. Hospitals and health care professionals' first duty of responsibility is to patients.
7. If an individual provider has a personal belief that conflicts with the forensic request, there should be a good faith effort to identify a willing provider.
8. Both parties should acknowledge shared responsibility in protecting and caring for the community.

Decision Tree

The following decision tree is an illustrative guide designed to help hospitals in crafting their own policies for working with law enforcement and conducting forensic blood draws. The approach below is only one example. Individual hospitals may be more or less expansive. Additionally, individual providers may always opt to not assist in a forensic blood draw at any point if doing so creates safety concerns or would violate a deeply held personal belief.



Forensic & Medical Draws

This guide is intended to provide clarification and guidance in the case of forensic blood draws. This section explains the difference between a medical and forensic blood draw and provides guidance regarding how a hospital may proceed in the event that a DUII suspect is medically admitted to the hospital.

At times, an individual brought to the hospital for a DUII-related blood draw may be found by hospital personnel to be in need of medical treatment, and subsequently medically treated in the ED and/or admitted to the facility. Individuals not in need of medical treatment are forensic requests only. The following sections of this guidance document outline relevant law in detail.

Best practice for forensic requests is for law enforcement to bypass the ED and make the forensic request elsewhere at the hospital such as going directly to the lab facility, if available.

Blood Draws for Patients in Need of Medical Treatment

An individual in need of medical treatment in the ED, whether or not medically admitted to the hospital becomes a patient, and may be subject to a different process than a forensic patient.

If a patient in need of medical treatment is brought to the hospital, they may or may not have blood drawn as part of their care. Regardless of whether blood is drawn for medical purposes, law enforcement may request a forensic blood draw for evidentiary purposes. In such case, hospitals may proceed with a forensic draw according to their organization's policy once the patient's underlying emergency medical condition has been appropriately stabilized. The forensic draw should follow the same standards outlined in the Best Practices section.

Laboratory results of blood draws performed for medical purposes are entered into the patient's medical record and become protected health information (PHI) subject to the provisions and protections of the Health Insurance Portability and Accountability Act (HIPAA). However, HIPAA regulations contain clear exceptions for disclosure of protected health information without patient authorization when formally requested in the course of a judicial proceeding or by law enforcement.¹ Hospitals may disclose PHI, including results of a laboratory sample or test, in response to a court order, subpoena, discovery request, other lawful process, or mandatory reporting pursuant to ORS 676.260 as discussed further on page 19 so long as the disclosure is limited to the information expressly authorized by the order or as required by law.

¹ See 45 CFR 164.512(e)-(f).

Health Information Privacy: HIPAA

The Health Insurance Portability and Accountability Act (HIPAA) is a federal law that governs the use and disclosure of protected health information (PHI) by hospitals and other covered entities. While HIPAA and its associated regulations have the overarching goal of patient privacy, the rules balance the need for privacy with other public safety and law enforcement concerns.

Protected health information is any information about health status, the provision of health care, or payment for health care that can be linked to a specific individual. Often, this term is interpreted broadly to include any part of a patient's medical record. Laboratory results from blood drawn in the course of treatment and noted in the medical record are therefore considered PHI. However, exceptions exist to allow for the disclosure of PHI when requested for law enforcement purposes which should apply to the vast majority of DUII situations.

In the case of a purely forensic draw, hospitals may put protocols in place to prevent the blood draw from being considered health information as discussed later in this section. In such circumstances, there should be absolutely no HIPAA concern with the hospital providing law enforcement with the blood draw sample so long as it is not, in and of itself, identifiable to the patient.

Allowable Disclosures of Protected Health Information

HIPAA allows providers to disclose PHI when authorized by the patient or if the disclosure falls into an enumerated exception.² One of those exceptions is when PHI is requested for law enforcement purposes.³ Some providers may wish to request patient authorization prior to disclosing PHI, however, when a valid request comes from a law enforcement official, authorization is permitted and the disclosure should be made regardless of the patient's agreement.

Specifically, a covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official, in compliance with and as limited by the relevant requirements of:

- A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;
- A grand jury subpoena; or
- An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law.⁴

The information must be relevant and material to a legitimate law enforcement inquiry; limited in scope; and PHI for which de-identified information could not reasonably be used. For the purpose of a DUII investigation in which law enforcement seeks only the blood sample, these conditions should be considered to be met.

² 45 CFR 164.502(a).

³ 45 CFR 164.512(f).

⁴ 45 CFR 164.512(f)(1)(ii).

Avoiding HIPAA: De-Identified Information

HIPAA does not apply to health information that does not identify an individual and for which there is no reasonable basis to believe that the information could be used to identify an individual.⁵ Ideally, in conducting a forensic blood draw, hospitals should never attach patient identifying indicators to the blood sample. Without patient identifiers, the hospital does not create PHI subject to HIPAA.

Health information is not considered to be individually identifiable health information if it does not contain any of the following information regarding the patient, patient's family, or employer:

- Names;
- Addresses;
- Dates including birth date, admission date, discharge date, date of death;
- Telephone numbers;
- Fax numbers;
- Email addresses;
- Social security numbers;
- Medical record numbers;
- Health plan beneficiary numbers;
- Account numbers;
- Certificate/license numbers;
- Vehicle identifiers and serial numbers, including license plate numbers;
- Device identifiers and serial numbers;
- Web Universal Resource Locators (URLs);
- Internet Protocol (IP) address numbers;
- Biometric identifiers, including finger and voice prints;
- Full face photographic images and any comparable images; and
- Any other unique identifying number, characteristic, or code.⁶

The best way to accomplish this is to conduct the draw and immediately hand the sample tube over to law enforcement, without attaching any sort of label or indicator. Taken alone, a blood sample does not identify an individual, even if law enforcement is present to witness the draw.

Verification of Law Enforcement Identity and Authority

Prior to making any disclosure of health information, hospitals must verify the identity and authority of such person prior to disclosing the information, if that person is not known to the hospital.⁷ Hospitals may opt to always conduct such verification, even when the law enforcement official is known.

Staff must always obtain relevant documentation, statements, or representations, whether oral or written, from the requester whenever that statement or representation is a condition of disclosure.⁸ For forensic draws, it is always recommended that hospitals log the authority under which law

⁵ 45 CFR 164.514(a).

⁶ 45 CFR 164.514(b)(2).

⁷ 45 CFR 164.514(h)(1)(i).

⁸ 45 CFR 164.514(h)(1)(ii).

enforcement are provided with requested information. This may be done through the use of a Forensic Blood Draw form or other record-keeping system.

Hospitals may rely upon reasonable statements or representations in determining that there is authority for disclosure. Reliance is reasonable under the following circumstances:

- If the request is made in person, presentation of an agency identification badge, other official credentials, or other proof of government status;
- If the request is in writing, the request is on the appropriate government letterhead; or
- If the disclosure is to a person acting on behalf of a public official, a written statement on appropriate government letterhead that the person is acting under the government's authority or other evidence or documentation of agency, such as a contract for services, memorandum of understanding, or purchase order, that establishes that the person is acting on behalf of the public official.⁹

Information disclosed in response to a subpoena or warrant may be also considered by the hospital as verification of identity and authority for the disclosure. In the absence of a formal document, a written or oral statement by law enforcement of the legal authority under which the disclosure request is being made is sufficient to provide the information.¹⁰

In all verification decisions, hospitals must exercise professional judgment in making the decision to disclose information. So long as the disclosure is made under a good faith reliance of the stated authority, the hospital is compliant with HIPAA and federal privacy law.¹¹

⁹ 45 CFR 164.514(h)(2)(ii).

¹⁰ 45 CFR 164.514(h)(2)(iii).

¹¹ 45 CFR 164.514(h)(2)(iv).

Use of the Emergency Department: EMTALA

Hospitals and law enforcement should be aware that the hospital emergency department (ED) is not an ideal location for conducting forensic blood draws because of the legal and regulatory requirements which attach to all individuals entering the ED. For that reason, law enforcement should make all efforts to divert forensic requests away from the hospital ED when there is no reason to believe that the individual requires or has requested medical examination or treatment.

The Emergency Medical Treatment and Active Labor Act (EMTALA) is a federal law designed to ensure treatment for all patients entering the hospital through the ED. The law states that for any individual that comes to the ED and for which a request is made on the individual's behalf for examination or treatment, the hospital must provide for an appropriate medical screening examination (MSE).¹²

The law is somewhat ambiguous regarding whether an individual escorted by law enforcement for forensic testing falls within EMTALA's MSE requirement. Some commenters note that individuals brought to the ED suspected of intoxication above legal limits are by definition exhibiting aberrant behavior that warrants medical examination. However, CMS interpretative guidelines indicate that at times, a hospital may not be required to provide the MSE to a suspected DUI individual.¹³

The standards by which hospitals should determine whether an MSE is required under EMTALA are laid out below. Alternatively, hospitals may ask the escorted individual to waive the MSE. Hospitals should maintain documentation of why the MSE was not performed or the waiver of MSE.

Medical Screening Exam & Prudent Lay Person Standard

Under EMTALA's statutory standard, the MSE is required if two prongs are met, namely:

1. The individual comes to the ED, and
2. There is a request for examination or treatment of a medical condition.

An individual escorted to the ED by law enforcement meets the legal definition of "coming to the ED." Therefore, providers should consider the second prong in drafting their policies, and when a request for forensic blood draw constitutes a "request for examination or treatment" that trigger the duty to provide the MSE. Note that the request need only be for examination or treatment of a *medical condition*; the law does not say for an *emergency medical condition*—which is the trigger for the hospital's duty to provide stabilizing treatment.

CMS documents state that the request may be made either by the individual or on their behalf, by the patient, a family member, a medic, or a law enforcement officer. The request may also be expressed or implied by word or by deed. Additionally, in the absence of an actual request, CMS will presume a request exists if a prudent layperson observer would believe the individual needs examination or treatment for a medical condition.¹⁴ The prudent layperson (PLP) standard should be based on an assessment of the individual's appearance or behavior.

¹² 42 USC 1395dd(a).

¹³ CMS Interpretive Guidelines for EMTALA, July 2010, available at http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/som107ap_v_emerg.pdf.

¹⁴ 42 CFR 489.24(b).

With respect to forensic requests, CMS regulations note that if an individual comes to the hospital ED and a request is made on his or her behalf for examination or treatment for a medical condition, but the nature of the request makes it clear that the medical condition is not of an emergency nature, the hospital is required only to perform such screening as would be appropriate for any individual presenting in that manner, to determine that the individual does not have an emergency medical condition.¹⁵ Unfortunately, this language is somewhat circular and often leads hospitals back to the PLP standard.

The PLP standard for a “request” can be particularly confusing for intoxicated individuals, as their behavior, appearance, or obvious intoxication could easily lead a PLP to believe the person needs examination or treatment for a medical condition. CMS interprets the PLP standard to be an implied request for an MSE and that the hospital is on notice that a request for an MSE existed. Therefore, the only way the hospital can avoid its duty to provide an MSE is if the individual refuses the MSE offered by the hospital. The refusal would need to be an informed refusal, after the emergency physician has determined that the patient was medically competent to refuse examination and treatment.

CMS guidance does speak specifically to blood draw requests and the PLP standard. The manual notes:

“If an individual is brought to the ED and law enforcement personnel request that emergency department personnel draw blood for a BAT [blood alcohol test] only and does not request examination or treatment for a medical condition, such as intoxication and a prudent layperson observer would not believe that the individual needed such examination or treatment, then the EMTALA’s screening requirement is not applicable to this situation because the only request made on behalf of the individual was for evidence.”¹⁶

CMS goes on to state that providers should pay close attention to detail in evaluating whether or not the MSE should be conducted. The document notes specifically if the individual was involved in a motor vehicle crash or other incident in which he/she may have sustained injury.¹⁷ CMS surveyors may retrospectively review details from police reports, nursing notes, EMS run sheets, triage information, and interaction/interview of the patient to determine whether there was an actual or implied PLP request for an MSE.

The ambiguity surrounding screening and treatment of an individual suspected of intoxication speaks to the need for hospitals to have clear policies on this subject, as well as the importance of educating local law enforcement on diversion options to the extent the ED is not the only available resource for conducting a blood draw.

With respect to when to conduct the MSE for a forensic request, hospitals should consult with their own legal counsel as well as clinical staff to establish internal policies.

Waiving the Medical Screening Exam

¹⁵ 42 CFR 489.24(c).

¹⁶ CMS Interpretive Guidelines for EMTALA, July 2010, available at http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/som107ap_v_emerg.pdf.

¹⁷ CMS Interpretive Guidelines for EMTALA, July 2010, available at http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/som107ap_v_emerg.pdf.

As discussed above, some commenters believe that EMTALA does not pertain to patients brought to the ED for a non-medical reason. Documentation of such a policy is essential, and to ensure the hospital is complying with EMTALA, hospital may also consider seeking an explicit waiver of the MSE from the individual.

Hospitals should conspicuously document when an escorted individual did not request an MSE for examination or treatment of a medical condition. To the extent a hospital requires all individuals to sign a general ED consent form, that form should include a checkbox indicating the individual's informed waiver of MSE. Some federal courts have found that signing a standard hospital consent form is substantial evidence that the individual seeks treatment for a medical condition.¹⁸

The hospital should save documentation of MSE waiver for at least five years in case it becomes necessary to prove to CMS or a court that the individual did not request examination or treatment.

Regardless of whether a waiver is sought, clinical staff should generally have some level of interaction with the individual during which a basic assessment can be made for emergency medical conditions or trauma. CMS allows hospitals to tailor the MSE to one appropriate for the individual's medical condition, meaning a forensic request may be given a more streamlined exam focused on emergency conditions related to suspected intoxication.

Additional Considerations

In developing a hospital ED policy for forensic blood draws which meets the goals of EMTALA, hospitals should carefully consider the unique factors associated with intoxicated individuals and whether the hospital is appropriately handling this class of persons.

Regarding individuals suspected of DUII, hospitals should be aware that CMS in the past has considered alcohol intoxication to be a medical symptom warranting the label "emergency medical condition" unless the hospital demonstrates otherwise.¹⁹ Some state surveyors and regional offices also question whether an intoxicated patient can make an informed refusal of care. Intoxication is also unique as several serious conditions mimic the effects of alcohol – hypoglycemia, cerebral hypoxia, head injury, metabolic abnormalities, and ingestion of toxins – which may warrant screening and stabilizing treatment.

Finally, hospitals must ensure that their process for diverting patients or securing a waiver of MSE does not violate the intent of EMTALA by introducing disparate standards. The process should be integrated with other triage protocols such as those which direct certain categories of patients to an urgent care center attached to the ED or high acuity patients directly back to the treatment area. Hospitals have discretion to establish different screening processes for different types of patients entering the ED based upon the presenting complaint and medical triage criteria.

The critical element is that all individuals who meet the established medical criteria go through the same process and that the criteria are not discriminatory. As long as all persons brought by law enforcement for a forensic blood draw are put through the same process, the hospital is in compliance with EMTALA, even if the process accelerates the individual's care through the ED.

¹⁸ *Evans v Montgomery Hospital Medical Center*, Case No CIV A 95-5039, 1996 US Dist LEXIS 5785, (ED Pa May 1, 1996).

¹⁹ 59 Fed Reg 32107-32108 (1994).

Law Enforcement Search & Seizure Authorities

When law enforcement present with an individual suspected of DUII, hospitals should endeavor to be of assistance in conducting the blood draw. However, any forensic blood draw must be done subject to proper authority. This section discusses the three types of authority under which law enforcement may request a valid blood draw.

Note this section does not address a subpoena of blood specimens or blood test results contained in the medical record of an admitted patient.

Legal Authority

The United States Constitution protects individuals against “unreasonable searches and seizures” by the government. A search warrant is a court order giving law enforcement authority to search and seize evidence of a crime. An individual’s blood is potentially evidence of the crime of driving under the influence of intoxicants (DUII) as well as any crime that is associated with a DUII such as manslaughter or assault if an individual is injured or killed as a result of a person who is driving impaired. When law enforcement requests that blood be taken from someone suspected of DUII, it is considered a search.

In order for law enforcement to conduct a search, they must either have a search warrant or a legally and constitutionally recognized exception to the search warrant requirement. There are generally two relevant exceptions to the search warrant requirement in the case of blood draws. The first exception to the search warrant requirement is when a person consents to a blood draw. The second, and separate exception exists when an officer has probable cause (meaning a reasonable person would find more likely than not) to believe a crime has been committed and there are exigent circumstances that require the blood to be drawn quickly in order to prevent the destruction of evidence.

Search Warrants

Search warrants are documents, written by law enforcement, that outline the facts that support an officer’s belief that a person has committed a crime involving driving under the influence of intoxicants. In addition, the officer will articulate why the officer has reason to believe that evidence of the person’s intoxication can be found in the person’s blood. After a search warrant has been written and sworn to by an officer, it is reviewed by a neutral judge to determine if the warrant should be granted. Law enforcement may obtain a written or telephonic warrant, but should always be able to present providers with written documentation. At minimum, the warrant should contain a statement of the officer’s training and experience, facts demonstrating probable cause that a crime was committed, a description of the person or place to be searched, and a description of the evidence to be seized.

If presented with a warrant related to an individual at the hospital, the facility should accept the document as verification of the law enforcement officer’s identity as well as authority to conduct the requested blood draw. Staff should ensure that any information provided to law enforcement matches the information authorized in the warrant.

Although the vast majority of forensic draws occur without resistance, search warrants in most cases authorize the reasonable use of force to obtain evidence should the situation arise which

allows the hospital and law enforcement to use restraints if necessary and allowed under hospital policy.

Consent

The simplest and preferred means for conducting a forensic blood draw is to obtain patient consent. Consent is a legally recognized exception to the search warrant requirement. Patient consent given while law enforcement is present is sufficient to allow the draw to be performed and the unlabeled blood specimen to be handed over to law enforcement in the event there are any privacy concerns.

As with other forms of consent in the health care setting, the consent must be informed. Providers are required to notify the individual of any applicable medical risks if any. An individual's lack of consent does not prevent law enforcement from securing other valid forms of authority for the forensic draw.²⁰ The two most common methods are obtaining a search warrant (discussed above) or citing probable cause and exigent circumstances (see below).

Implied Consent Law

When a person operates a motor vehicle in Oregon that person impliedly consents to provide a breath, blood, or urine sample, depending on the circumstances, if the person is arrested for driving under the influence of intoxicants. If applicable in the situation, law enforcement may inform the person of their rights and the consequences, as it relates to potential license suspension, of taking or refusing a blood draw under ORS 813.130.²¹ While Oregon has an implied consent law for all persons operating a motor vehicle, *implied consent law* does not allow for the collection of DUII evidence when the person has refused law enforcement's request to submit to testing.²² However, implied consent law does not limit the otherwise lawful collection of evidence as described above.²³

However, law enforcement may cite the implied consent law in the event the patient is incapable of providing informed consent, either as a result of incapacity or unconsciousness. While it would be rare for this to occur when the hospital did not also medically admit the individual for treatment, it would be a valid use of implied consent law to authorize the blood draw.²⁴

Probable Cause & Exigent Circumstances

If law enforcement has probable cause to believe a crime has occurred, such as DUII or a related crime such as assault or manslaughter, an officer may seek a blood draw without a warrant when the officer is presented with exigent circumstances. An exigent circumstance is a situation that requires police to act swiftly to prevent danger to life or serious damage to property or to forestall a suspect's escape or, as relevant here, the destruction of evidence.²⁵

²⁰ ORS 813.100(5) and ORS 813.320(2).

²¹ ORS 813.100(1).

²² ORS 813.100(2).

²³ ORS 813.100(5) and ORS 813.320 (2).

²⁴ ORS 813.140.

²⁵ *State v. Snow*, 337 Or 219, 94 P3d 872 (2004).

The transitory nature of intoxicants in the blood is one factor to be considered by law enforcement when determining whether exigent circumstances exist. Law enforcement will consider factors which include: the transitory nature of alcohol and drugs in the body, the fact that they do not know what substance or combination of substances were consumed by the individual, the fact that they do not know when the substance(s) were consumed, and the amount of time that has passed since the driving occurred. In addition to the above factors, law enforcement will also consider the length of time and process involved in obtaining a warrant. Law enforcement will ultimately weigh the potential destruction of evidence inherent with the presence of alcohol and drugs in the body with the timeliness involved in obtaining a warrant.

In a recent U.S. Supreme Court case, *McNeely v Missouri*, the Supreme Court held that the fact that alcohol dissipates over time does not constitute exigency in and of itself (drugs were not discussed in this opinion). Exigent circumstances may exist however, given the totality of the facts present to the officer, the time it would take to get a warrant, and the potential loss of evidence as time passes.²⁶ When law enforcement articulate that they have probable cause to believe a crime has occurred and that under the circumstances there is exigent circumstances, it may be sufficient for a law enforcement officer to request a blood draw on the basis of exigency.

Where hospitals accept exigent circumstances as justification for a forensic draw, hospital forms may require law enforcement to provide a signature regarding their judgment of exigency. It is not the role of the hospital to evaluate the quality of the justification, but simply to ensure the officer is able to substantiate the stated authority.

It is important to note that regardless of whether a person consents to provide a blood draw, an officer may also have probable cause to believe a crime has occurred and that exigent circumstances exist therefore, in effect, two exceptions to the warrant requirement may exist at the same time. It is not unusual for a person to refuse to provide a blood draw and have law enforcement articulate probable cause and exigent circumstances if applicable in the situation.

²⁶ *McNeely v. Missouri*, 133 S. Ct. 1552 (2013).

Conducting the Forensic Draw

Oregon law provides civil immunity to providers that assist with forensic draws, so long as the draw is conducted in a medically acceptable manner. There is no immunity for negligent acts or omissions in performing the draw, as health care professionals always remain liable for their professional malpractice.

Non-Participation in Forensic Blood Draws

Despite immunity, some health care professionals will remain uncomfortable with aiding in forensic draws due to deeply held personal beliefs. Importantly, individual health care professionals always retain the right to refuse to conduct a forensic blood draw regardless of hospital policy or law enforcement authority.²⁷

Accordingly, law enforcement does not have the right to force a physician, or hospital staff acting under the direction of the physician, to conduct a forensic draw. This is true irrespective of whether or not probable cause exists or if an officer presents with a search warrant. While the original intent of the law is unknown, it is an important protection for health care providers that feel uncomfortable with requests exclusively for law enforcement purposes.

However, refusal by a hospital employee should be based upon a personal belief system or hospital policy, and not a misunderstanding of legal authorities or federal privacy law, which present no barriers to performing forensic blood draws. Organizationally, the goal should always be to cooperate and aid in the identification of a willing provider. Just as law enforcement depend upon health care professionals in this aspect of public safety; hospitals too depend upon law enforcement for public safety and security; and have a vested interest in fostering open and honest relationships with state and local police.

In the event of refusal on the part of hospital staff to participate, law enforcement should request to speak to a charge nurse or hospital administrative supervisor to find a willing individual or to better understand the hospital's policy (i.e. such as if use of restraints never authorized for forensic purposes). In addition, law enforcement should respect the decision by hospital staff in situations where staff deem it too dangerous to staff for the patient to perform the draw safely. Law enforcement should be prepared to supply the personnel necessary to perform a forcible draw in such circumstances.

To expedite identifying willing providers, hospitals may consider keeping records regarding those employees that are not willing to assist in forensic requests due to personal beliefs. All hospital employees should be educated that HIPAA is not an appropriate basis for refusing and that honesty regarding discomfort or safety concerns is the best policy.

²⁷ Specifically, Oregon law states: "A duly licensed physician, or a person acting under the direction or control of a duly licensed physician, may withdraw bodily substances, pierce human tissue, perform medical tests and procedures and otherwise use medical procedures to gather evidence in a criminal investigation. A duly licensed physician, or a person acting under the direction or control of a duly licensed physician, shall not be held civilly liable for gathering potential evidence in a criminal investigation in a medically acceptable manner at the request of a peace officer....**Nothing in this section shall be interpreted as requiring a duly licensed physician to act at the request of a peace officer.**" ORS 133.621. Emphasis added.

Oregon Nurse Practice Act

At times, nurses have expressed discomfort with conducting forensic blood draws given their responsibilities under the Oregon Nurse Practice Act.²⁸ While the Nurse Practice Act imposes responsibilities on nurses related to client advocacy, nothing in the Act precludes a nurse with the appropriate level of skill from conducting a blood draw pursuant to a lawful request. In fact, representatives from the Oregon State Board of Nursing emphasized the public safety component of the Act as an indication that typical forensic requests (i.e. non-forcible) should be assisted to the extent that providing the draw is safe for the nurse and individual and within the scope of practice.²⁹

Rules for the Nurse Practice Act outline nursing responsibilities and provide the framework for nurses to assist in forensic requests without conflicting with their scope of practice standards. Specifically, nurses are accountable for their professional understanding regarding statutes and regulations and the legal boundaries of licensed nursing practice.³⁰ This includes understanding when sharing of health information is appropriate, such as upon legal request or in response to a valid warrant or similar law enforcement authority.³¹

Importantly, taking an advocacy position that implicates legal responsibilities falls outside the scope of client advocacy cited in the Nurse Practice Act.³² Nursing rules note that nurses are responsible for notifying an employer if an aspect of their nursing work raises an ethical objection.³³ Nurses that have an ethical objection to assisting in legal blood draws are therefore responsible for making their position known to a manager so another willing provider may be identified.

Use of Restraint

In rare cases, an individual may prove so uncooperative in conducting a blood draw that the only option to proceed is to use restraints. The vast majority of search warrants authorize the reasonable use of force to obtain evidence, thereby allowing for the use of restraints if necessary. Note that while a search warrant may authorize use of restraint, it does not require the hospital or staff to use restraints if individuals are concerned with personal safety or if restraint for forensic requests is not allowed under organizational policy.

It is important to note that if hospital staff feels that their safety or the safety of the patient would be jeopardized by proceeding, they may decline to conduct the blood draw. Additionally, individual providers may notify their supervisor if they feel uncomfortable performing a forensic draw that requires restraint. Hospitals should use discretion in deciding whether and when the use of restraints for a forensic blood draw is appropriate as an overall policy standard.

All use of restraints, including use for a blood draw at law enforcement request, must comply with CMS Conditions of Participation regarding patient rights. An individual should be placed restrained

²⁸ The Oregon Nurse Practice Act may be found at ORS ch. 678.

²⁹ Phone conversation with Oregon State Board of Nursing Executive Director, December 8, 2015.

³⁰ OAR 851-045-0040(3)(a).

³¹ OAR 851-045-0040(3)(l).

³² Phone conversation with Oregon State Board of Nursing Executive Director, December 8, 2015.

³³ OAR 851-045-0040(3)(e).

only to ensure the immediate physical safety of the patient, a staff member, or others and must be discontinued at the earliest possible time.³⁴ This is applicable to both manual and chemical restraints. When restraints are used hospitals should ensure it is the least restrictive intervention available that will be effective to protect the patient, a staff member, or others from harm. All use of restraints must be ordered by a physician or other licensed independent practitioner responsible for the individual.

If it is not possible to conduct the draw or restrain the individual without a risk of harm, the hospital should decline the blood draw request.

³⁴ 42 CFR 482.13(e).

Mandatory Reporting of Blood Alcohol Content or Controlled Substances in the Blood

In addition to voluntary work with law enforcement for forensic blood draw requests, Oregon law imposes a requirement for providers to report elevated blood alcohol levels to law enforcement. Specifically, health care facilities must provide notice if in the course of treating a patient involved in a motor vehicle accident, the facility becomes aware that the individual's blood alcohol level meets or exceeds 0.08 percent or the person's blood contains a controlled substance (Schedule I-V).³⁵

The report should be made to any law enforcement officer who is at the health facility and is acting in an official capacity in relation to the motor vehicle accident. If no law enforcement officer is present, the health care facility must notify a law enforcement agency in the county in which the accident occurred or an Oregon State Police dispatch center within 72 hours of becoming aware of the results of the blood test.³⁶

The report must include the name of the person being treated; the blood alcohol level, name, and level of any controlled substance disclosed by the test; and the date and time of the administration of the test.³⁷ As this is required by law, the disclosure is not a violation of HIPAA and does not require the individual's authorization so long as the report is limited to the elements required under law.³⁸

³⁵ ORS 676.260(1).

³⁶ ORS 676.260(2).

³⁷ ORS 676.260(3).

³⁸ 45 CFR § 164.512(a)(1); 45 CFR § 164.512(f)(1)(i).

Summary of Best Practices

The following best practices summarize the applicable legal standards as well as best practices identified by the Hospital-Law Enforcement work group.

1. Identify the individuals in the local community that need to be involved in a regular working group, including local law enforcement, district attorney's office, and hospital administration.
2. Hospital and local law enforcement meet periodically to discuss organizational policies and any changes to such policies impacting the other. This includes forensic blood draws requested by law enforcement and performed by the hospital.
3. Law enforcement is informed regarding appropriate use of hospital facilities for requesting forensic blood draws. This includes knowing about appropriate diversion options and the hours in which individuals suspected of DUII should be routed to a location other than the hospital ED for more immediate attention.
4. When routing through the ED is unavoidable, forensic requests are triaged according to hospital protocol which may include a specialized MSE for medical conditions related or symptomatically similar to intoxication. If the individual has no medical complaint; does not request an MSE for examination or treatment of a medical condition; does not appear to need medical attention for a medical condition; and in the professional judgment of the health care professional does not require medical attention then staff may proceed with the blood draw in accordance with hospital policy.
5. Law enforcement should state their request for a blood draw, and ask for a willing provider or nurse manager to assist in identifying a willing provider.
6. Hospital staff works with law enforcement officer to complete a hospital forensic blood draw form. The form indicates the authority under which the forensic blood draw is conducted and officer name.
7. Law enforcement provides a blood kit for all forensic requests. All kits are up-to-date and checked for expiration on a regular basis. Law enforcement is knowledgeable regarding the process for the blood draw and applicable forms. The officer is responsible for recording relevant information about the draw including the name of the hospital staff and draw prep used.
8. Hospital staff conducts the blood draw while the law enforcement officer observes. Hospital staff should generally not be subpoenaed or asked to testify regarding chain of custody or blood draw prep.
9. Hospital staff does not label the blood sample with any patient information. Law enforcement may label the tube as appropriate for their needs.
10. If no provision exists for payment for blood draw services, the hospital writes off the cost of all forensic draws as part of its community benefit activities. If staff are asked to testify regarding a forensic draw, time away from work should be recorded as community benefit.