

Hospitals, HIPAA, and Impaired Driving Cases -

A Guide for Law Enforcement
and Prosecutors



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Disclaimer

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National Traffic Law Center

The National District Attorneys Association's National Traffic Law Center (NTLC) is a resource designed to benefit prosecutors, law enforcement, judges, and criminal justice professionals. The mission of the NTLC is to improve the quality of justice in traffic safety adjudications by increasing the awareness of highway safety issues through the compilation, creation and dissemination of legal and technical information and by providing training and reference services.

When prosecutors deal with challenges to the use of breath test instruments, blood tests, horizontal gaze nystagmus, crash reconstruction, and other evidence, the NTLC can assist with technical and case law research. Likewise, when faced with inquiries from traffic safety professionals about getting impaired drivers off the road, the NTLC can provide research concerning the effectiveness of administrative license revocation, ignition interlock systems, sobriety checkpoints, and much more.

The NTLC has a clearinghouse of resources including case law, research studies, training materials, trial documents, and a directory of expert professionals who work in the fields of crash reconstruction, toxicology, drug recognition, and many others. The information catalogued by the NTLC covers a wide range of topics with emphasis on impaired driving and vehicular homicide issues.

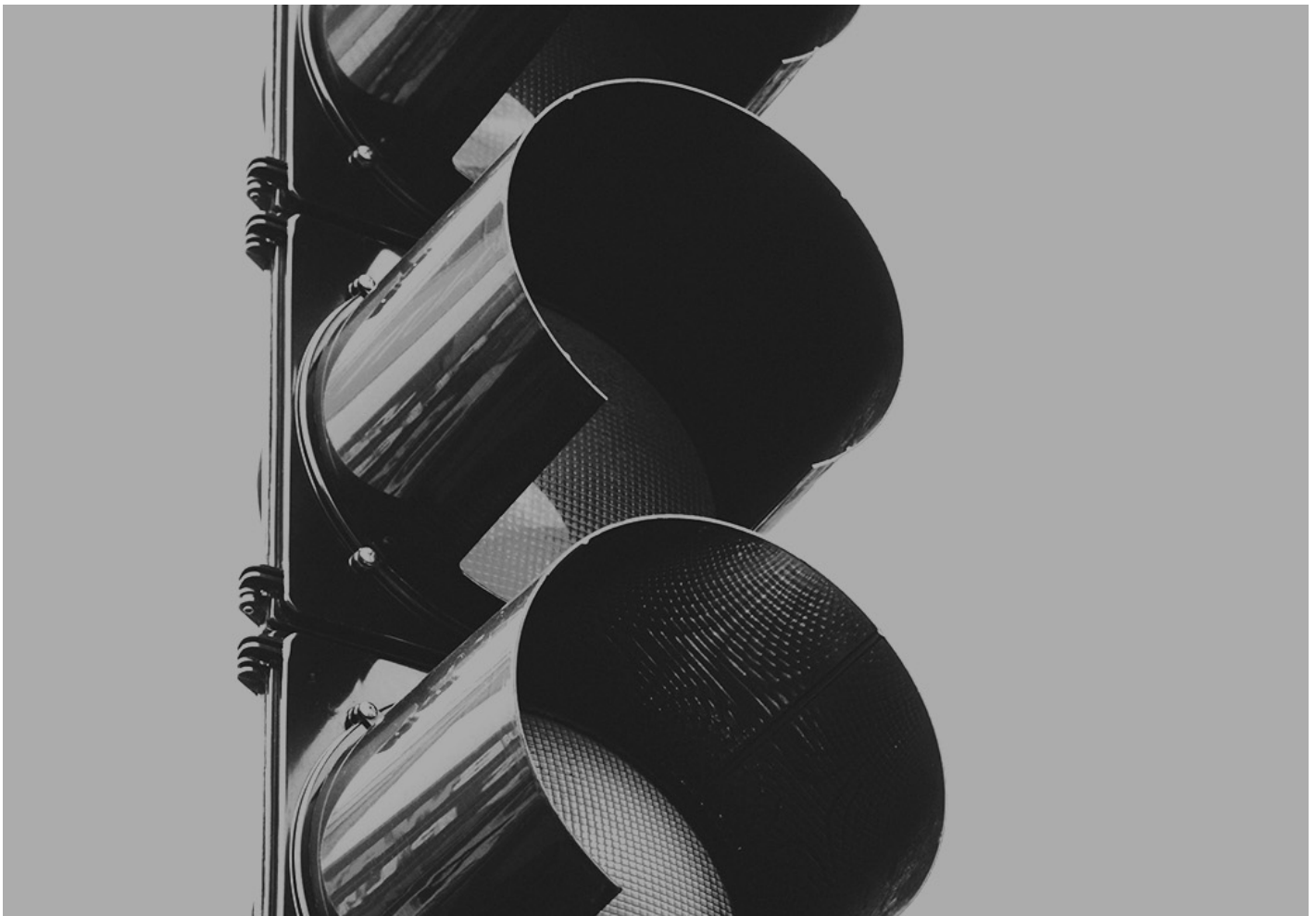
The NTLC is a program of the National District Attorneys Association (NDAA). NDAA's mission is to be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people.

For additional information, contact NDAA or NTLC, 1400 Crystal Drive, Suite 330, Arlington, Virginia 22202, (phone) 703-549-9222, (fax) 703-836-3195, or visit www.ndaa.org.



Foundation for Advancing Alcohol Responsibility

Responsibility.org is a national not-for-profit that aims to eliminate drunk driving and works with others to end all impaired driving, eliminate underage drinking, and empower adults to make a lifetime of responsible alcohol choices as part of a balanced lifestyle. Responsibility.org is funded by the following distillers: Bacardi USA, Inc.; Beam Suntory Inc.; Brown-Forman; Campari Group; Constellation Brands; DIAGEO; Edrington, Mast-Jägermeister US, Inc.; Moët Hennessy USA; Ole Smoky, LLC; Pernod Ricard USA; and William Grant & Sons. For more than 30 years, Responsibility.org has transformed countless lives through programs that bring individuals, families, and communities together to inspire a lifetime of responsible alcohol choices. To learn more, please visit www.Responsibility.org.



Preface

A law enforcement officer or prosecutor may need to secure a suspected impaired driver's medical records or blood sample from a hospital in an impaired driving case for a variety of reasons. It could be due to the suspicion of drug(s) causing a driver's impairment, a collision resulting in medical attention for the suspected impaired driver, or a suspect refusing a breath test, leading to a search warrant for blood. The relationship between the hospital, law enforcement, and prosecutor is frequently complicated by confusion over patient privacy and hospital liability issues. Matters are made only more complex if the suspect is taken to a hospital outside the jurisdiction of the investigating law enforcement agency. When dealing with a hospital, law enforcement officers and prosecutors are frequently confused by the legal implications of the Health Insurance Portability and Accountability Act of 1996 (also known as HIPAA). For this reason, the National Traffic Law Center, with funding from Responsibility.org, created this monograph, *Hospitals, HIPAA, and Impaired Driving Cases—A Guide for Law Enforcement and Prosecutors*. This guide provides the general legal principles behind HIPAA, as well as the specific provisions relating to criminal law, and the exceptions it provides for law enforcement and prosecutors conducting investigations into criminal matters, including impaired driving cases. This guide will also provide helpful suggestions for law enforcement and prosecutors to develop cooperative relationships with hospital personnel to positively impact investigations while minimizing the need for hospital personnel to testify in court, including how to sidestep a hospital blood draw with a law enforcement phlebotomy program.



Introduction

Ideally, all evidence necessary for the successful prosecution of an impaired driving case is contemporaneously collected at the time of the impaired driver's arrest, either on the side of the road or shortly thereafter at the police station or jail facility. This not only allows for a streamlined investigation, but also results in prompt criminal charges and prosecution of the suspect when necessary. However, in the case of an officer responding to a suspected impaired driving crash, an officer often faces managing chaos at the scene requiring attention to a severely injured victim and the suspected impaired driver. The officer typically renders first-aid and tends to the suspect and victim alike until additional medical resources arrive on scene. Necessarily, the officer puts people's medical needs above investigative needs; evidence collection is a secondary consideration in cases involving injury. The evidence, however, is not lost. Despite the suspect leaving the scene to obtain further medical attention, evidence of impairment contained in their blood can still be obtained.

While time is certainly of the essence for those in need of lifesaving medical attention, time is also critical to obtain the constantly and quickly dissipating impairment evidence from within a suspect's body. Unquestionably, lifesaving measures must take precedent. While challenges may arise in an impaired driving investigation once a suspect or victim is taken to a hospital for medical treatment, it should not end or even hamper a criminal investigation. Whether dealing with the crash scenario, as described, or any other number of situations involving law enforcement interaction with a suspected impaired driver and a hospital, there are tools and mechanisms for obtaining the needed evidence. By building relationships, educating the partners, and continuing communication, hospital personnel can maintain cooperative and professional encounters with law enforcement, so they can complete their investigations.

Potential Challenges to Securing Evidence

When a suspected impaired driver is taken to a hospital, the initial challenge faced by a law enforcement officer (LEO) or prosecutor is deciding what evidence is needed for the investigation. In impaired driving cases, blood evidence is important, because it shows past and current use of drugs and/or alcohol. Thus, obtaining this information is paramount. If law enforcement is not able to secure a sample of the driver's blood, the law enforcement officer or prosecutor may be able to obtain the suspect's medical records with a subpoena. Those records should indicate if any evidence was found by the hospital lab of drugs or alcohol in the suspect's system.

Once an officer or prosecutor establishes what evidence they need from the suspect or the hospital, the next challenge faced is how best to legally obtain it. The nature of the evidence sought largely determines the legal process by which it should be secured. Can the evidence be obtained via the patient's informed consent or a state's implied consent law? Will it require a search warrant? A subpoena? And who will be responsible for executing the legal process? Does the answer change if the hospital is in a neighboring jurisdiction?

After determining the best way to obtain the necessary evidence, the last challenge is working with the hospital personnel to navigate HIPAA. What privacy rights does a suspect / patient maintain? Does HIPAA allow hospital personnel to share the protected health information with law enforcement, even when faced with a search warrant or subpoena? All parties involved, hospital personnel, law enforcement, and prosecutors, must understand what HIPAA protects and what allowances it makes for turning over evidence in criminal investigations.

Blood Draw for Medical Purposes vs. Law Enforcement Purposes

Blood drawn for medical purposes and blood drawn at the direction of law enforcement provide valuable information in an impaired driving case. Blood draws in hospitals, however, differ from those drawn strictly for law enforcement purposes. Blood drawn from a hospital patient during the course of medical treatment is tested in the hospital lab. The doctor uses that information to determine the patient's course of treatment and care options.



On the other hand, when blood is drawn for law enforcement purposes, blood is tested in a forensic laboratory. The results are used to determine the content of alcohol or drugs in a suspected impaired driver's blood. Those results are typically used as evidence in a criminal case. "Forensic toxicology is the application of toxicology to issues and cases where those adverse effects may have medico-legal consequences, with results used in court."¹

Blood evidence may be obtained by law enforcement in several ways. The patient/suspect can consent to the blood draw. Consent is the simplest way for law enforcement to legally obtain blood samples. If possible, consent given orally should also be reduced to a written document and signed by the suspect. In the alternative, an LEO may obtain a search warrant that legally authorizes the search and seizure of the blood sample. This blood sample may be from the suspect's body or it may be from the hospital lab. If a blood sample is no longer available from the hospital lab,² police may obtain copies of the hospital/ medical records as described below.

Informed Consent vs. Implied Consent for Blood Sample

Informed consent is the process by which a health care provider educates a patient about the nature of a procedure, its risks and benefits, alternatives to the given procedure or intervention, and an assessment of the patient's understanding of the

¹ See the Society of Forensic Toxicologists, Inc. website, "What is Forensic Toxicology?," at www.soft-tox.org, accessed May 30, 2023.

² For example, the standard operating procedure of the hospital may provide for discarding of such samples after a certain passage of time and may occur prior to the investigation's progression seeking the sample.

circumstances and options. With this information, the patient can weigh the pros and cons of the procedure and make an informed decision about how to proceed.

Typically, in a medical setting, a patient will provide this consent expressly in writing. The patient signs a medical authorization form that allows the medical professional to conduct a specific procedure. This type of consent may also be expressed verbally.

Informed consent differs from implied consent which occurs in a law enforcement setting. In all states, driver licensing laws provide that a licensed driver has given implied consent to chemical testing, if a law enforcement officer has reasonable grounds to believe the driver was operating the vehicle while intoxicated or under the influence of alcohol or drugs. Usually, once a driver is arrested for an impaired driving offense, they are taken to a police station for arrest processing. There, the law enforcement officer reads the driver their rights under the state's implied consent statute. The suspect may consent to providing a chemical sample of their breath, blood, urine, and in some states more recently, oral fluids, or they may refuse to provide any sample do so. Technically, the reading of the implied consent provision seeks a driver's express consent to conduct a blood test. If the driver refuses to voluntarily submit to the chemical test, however, or refuses or is unable to give their express consent (e.g., due to the nature of injuries or the degree of impairment), the law enforcement officer may still collect a sample from them.³ Law enforcement is authorized to do this because of the suspect's implied consent; the driver has already consented simply by driving. The law enforcement officer and prosecutor, however, must be aware of the laws in their jurisdiction governing the ability to secure a search warrant.⁴

When a driver refuses, or revokes their previously given implied consent, the driver faces a consequence. Their refusal will subject them to administrative consequences, such as revocation of their driver's license. They may also face criminal consequences, like enhanced criminal charges or a jury instruction permitting the fact finder to accept their refusal to submit to testing as consciousness of guilt evidence.

³ Subject to recent decisions of the United States Supreme Court, including *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552 (2013), *Birchfield v. North Dakota*, 579 U.S. 438, 136 S.Ct. 2160 (2016), and *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019), among others, and also subject to state law. For example, in general, Florida does not provide for search warrants for misdemeanor cases and in New York, compulsory chemical tests in impaired driving cases may be authorized only when an impaired driving crash results in a death or serious injury. See Fla. Stat. Ann. § 933.02 and N.Y. Veh. & Traf. Law § 1194 paragraph 3, respectively.

⁴ See supra discussion note 2.

A law enforcement officer and a prosecutor should be familiar with the laws in their jurisdiction as well as the policies of the office / department and the customs / practices of their court. If unsure, officers and prosecutors are encouraged to contact the state Traffic Safety Resource Prosecutor (TSRP) or the National Traffic Law Center (NTLC) for additional assistance.

Search Warrant (or Warrant Exceptions) for Blood from Suspect

If a suspected impaired driver is in a hospital, express consent may not be an available option due to their injuries or the degree of impairment. Securing an evidential blood sample may, therefore, require a search warrant.⁵ The warrant may seek to search the body and seize a sample of blood, or to search the hospital and seize a specific vial of blood previously taken by hospital staff for medical purposes.

When an impaired person is brought to the hospital for medical treatment, often medical staff collect specimens from the patient prior to providing treatment. These specimens are often the most valuable to the investigation for two reasons. First, the sample collected closest to the proximal time of driving or operating a motor vehicle best reflects the conditions of the suspect while driving and, second, the samples are usually obtained prior to the administration of narcotics or other drugs used in the course of treatment. Typically, more vials of blood than are necessary are drawn for a variety of reasons, not the least of which is to allow the hospital to run as many extra tests as are needed for treatment purposes. The investigating officer may apply for a search warrant to secure a sample of the blood drawn by the hospital.

In some jurisdictions, the officer may work with a prosecutor to complete the warrant process. As soon as possible, the police officer should provide the subject's name, date of birth, date of treatment, and hospital to a prosecutor. The prosecutor can contact the hospital lab and request that the specimens be preserved pending a search warrant. Hospitals routinely discard specimens within one week of collection, so this should be done quickly to ensure preservation.

Once the specimen is preserved, the law enforcement officer applies for a search warrant. If the judge issues the search warrant, the officer should execute the warrant by presenting the warrant to the hospital lab, or other hospital personnel identified to

⁵ *Id.*

accept service of legal process and in the manner described by the hospital.⁶ The lab personnel should comply with the warrant by turning over the specimens identified in the search warrant and the officer should properly identify the lab personnel to preserve the chain of custody of the specimen (see below section on Relationship Building / Task Force Development for additional information). The officer then ensures those specimens, identified as having been collected from the driver subject, are provided to the state toxicology lab for testing. The results of the tests may be used in the criminal prosecution. Maintaining points of contact at each area hospital will help to facilitate the preservation of the specimens. Understand, each hospital might have its own policies and procedures and they may differ from each other. It is recommended that law enforcement agencies, prosecutors, hospitals, or local medical personnel have these policies in place and proactively train on the policies to ensure a smooth process when these situations arise.



Hospital Records

A law enforcement officer or prosecutor, on occasion, may begin investigating a suspect or patient, after they are released from the hospital's care. In those cases, it is not until much later in an investigation that evidence of the suspect's blood content is sought, and patient medical records are the best source for this information. A patient may consent to the release of their own medical records, but do not always do so.⁷

⁶ A hospital may, for instance, only accept legal process during normal business hours.

⁷ Included in the resources listed in the Appendix is a sample Authorization for Disclosure of Protected Health Information.

Depending on the circumstances, obtaining medical records may require a search warrant or a subpoena.

The Sixth Amendment to the United States Constitution provides, “[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him....” When a witness appears at trial and is subjected to cross-examination, the right to confront witnesses is guaranteed. The United States Supreme Court has guaranteed this right to confront witnesses “who ‘bear testimony’ against him[.]”,⁸ including documents that are testimonial in nature.⁹ Medical reports, however, are created for treatment purposes and are not testimonial in nature so the Confrontation Clause is not an obstacle to obtaining medical records or introducing them as evidence.¹⁰ Is HIPAA or state law an obstacle to retrieving those records?

The procedures for retrieving medical records from a hospital will vary from state to state. Some states have statutes or procedures whereby the medical records of an offender are readily accessible by the use of a search warrant or court order.¹¹ Prosecutors can request the health care information by means of a court order, with notice to the defendant. The records should be accessed through a search warrant, with the documents to be delivered under seal to the Clerk of Court for in camera review by the judge. The judge can make the decision as to what information complies with the HIPAA law enforcement exceptions (see below for more information), then deliver the documents to the prosecutor and the defendant. This procedure protects any irrelevant health care information while still providing the documentation to the state that the law allows.

Out-of-Jurisdiction Hospital

Often times a driver is injured in a crash in one jurisdiction and transported to a hospital in a different jurisdiction, whether it is another county or another state. This creates a new set of challenges. While many officers and prosecutors are familiar with the laws of their own counties and states, the laws and practices of the neighboring jurisdictions are less familiar. Law enforcement and prosecutors are encouraged to

⁸ See *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), in which the Court held out of court statements by a witness that is testimonial in nature is barred by the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.

⁹ See *Melendez-Diaz v. Mass.*, 557 U.S. 305; 129 S. Ct. 2527 (2009).

¹⁰ *Id.* at fn 2: (stating “...Others are simply irrelevant, since they involved medical reports created for treatment purposes, which would not be testimonial under our decision today.”) (citation omitted).

¹¹ Included in the resources listed in the Appendix is a sample Request from Law Enforcement for Release of Protected Health Information.

know the state laws, department rules, and court practices for reaching out to the neighboring jurisdiction's law enforcement agency and/ or prosecutor's office when this situation occurs.

When a suspect is taken to a neighboring county in the same state, executing a search warrant may not be difficult. Depending on the state's laws, rules, and practices, it may be as easy as making a phone call to the law enforcement agency of the jurisdiction in which the search warrant is to be executed. The agency can obtain and execute the search warrant using information gleaned from the officer in the original jurisdiction. However, when an injured person is taken to a hospital in a different state, the laws of the state where the hospital is located apply. In this situation, the investigating officer and/or prosecutor need to coordinate with law enforcement in the hospital's jurisdiction to determine what is required to obtain the evidence. It is common for the investigating officer to prepare the search warrant affidavit and provide it to the assisting agency to serve as the basis for its own warrant application. When an interstate issue, such as this, arises, law enforcement and prosecutors are encouraged to contact their Traffic Safety Resource Prosecutor who can coordinate with the neighboring state's TSRP to help streamline the process and minimize confusion.



HIPAA and Application to Criminal Investigations

When a prosecutor or law enforcement officer seeks to obtain a blood result or medical information in an impaired driving case, they are often stymied by hospital staff citing the federal protections afforded patients by the Health Insurance Portability and Accountability Act (HIPAA). This is a common misconception. HIPAA protections do not apply to criminal investigations, including impaired driving cases. Nonetheless, without the cooperation of hospital staff, progress toward prosecution is hindered.

HIPAA was signed into law by President Bill Clinton in 1996, and codified in Federal Law pursuant to 42 U.S.C. Section 1320 et seq. Created by Congress out of concern for privacy, health, and insurance-related matters, it seeks to prevent the use and publication of private medical information without the consent of the protected patient. HIPAA provides patients the control over the use and dissemination of their health care information. It defines the boundaries for the use and/or disclosure of health records by covered entities (see the next section below) and establishes national standards with which healthcare providers must comply to limit the use of personal health information (PHI) and minimize the chances of its inappropriate disclosure.¹²

Generally, HIPAA establishes the rule that “healthcare providers” may not disclose a patient’s protected health information. “Healthcare providers” are people who bill or are paid for health care, including doctors, nurses, and paramedics.¹³ While privacy concerns are central to this act, HIPAA is not intended to prevent or obstruct legitimate police or prosecutorial investigations and, therefore, also includes exceptions allowing for healthcare providers to disclose protected health information to law enforcement. Since its enactment, federal courts have recognized that HIPAA serves to protect, but it is not a shield against criminal prosecution.¹⁴ HIPAA governs the conduct of healthcare providers, not law enforcement, and it provides a civil remedy for healthcare providers who violate the statute. Thus, even if HIPAA is violated, medical records obtained by law enforcement with a search warrant or

¹² For additional information, readers may visit the U.S. Department of Health and Human Services webpage to access its publication on HIPAA, Summary of the HIPAA Privacy Rule.

¹³ See 42 § U.S.C.A. 1320d(3).

¹⁴ For example, as the US District Court for the Southern District of Texas has explained, “... HIPAA was passed to ensure an individual’s right to privacy over medical records, it was not intended to be a means for evading prosecution in criminal proceedings.” U.S. v. Zamora, 408 F. Supp. 2d 295, 298 (S.D. Texas 2006).

through other legal means are admissible in criminal proceedings.¹⁵

Prior to an attempt to secure blood results or medical information (aka personal health information) from a hospital, it is crucial for law enforcement officers and prosecutors to understand the general principles and applicability of HIPAA.

HIPAA Only Applies to “Covered Entities”

Although HIPAA provides protection to patients, it only prohibits certain individuals or organizations deemed to be “covered entities” from disclosing personal health information. A “covered entity” includes only the following:

- 1) A health plan.
- 2) A health care clearinghouse.
- 3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.¹⁶

HIPAA, therefore, only prohibits disclosure by a small subset of individuals and organizations. It is important to note what is not included in the definition of “covered entity” – employers, government agencies, and law enforcement organizations. Despite what many may think, HIPAA has very limited implication to law enforcement officers and prosecutors handling impaired driving cases.¹⁷

If the actions of law enforcement and prosecutors are not governed by HIPAA, why then is the issue raised so frequently by medical professionals when faced with a request for protected information? In part, it may be due to the unique interplay between law enforcement and medical staff occurring in an impaired driving investigation. While law enforcement and prosecutors may not be subject to legal action pursuant to HIPAA, medical professionals could be and may be the cause for reluctance to provide crucial information (like blood test results or other medical information) in an impaired driving case. Regardless, HIPAA contains a number of exceptions allowing for the disclosure of information to law enforcement in the course of a criminal investigation.

¹⁵ The primary purpose of evidence suppression is to deter unlawful police conduct, not that of private individuals.

¹⁶ 45 C.F.R. § 160.103.

¹⁷ See, e.g., U.S. v. Elliott, 676 F. Supp. 2d 431 (D. Md. 2009).

Who is “Law Enforcement” under HIPAA?

Before understanding the various HIPAA exceptions for law enforcement, one must understand how HIPAA defines “law enforcement.” “The HIPAA privacy rule defines a law enforcement official as an officer or employee of any agency or authority of the United States, or a State, territory, political subdivision, or Indian tribe who is empowered to (1) investigate or conduct an official inquiry into a potential violation of law; or (2) prosecute or otherwise conduct a criminal, civil, or administrative proceeding arising from an alleged violation of law.”¹⁸ Both law enforcement officers investigating an impaired driving case as well as the prosecutor handling the case in court are therefore covered by HIPAA’s broad definition of law enforcement. Various HIPAA exceptions **allow** for medical professionals to **disclose** personal health information to law enforcement. The following exceptions are relevant to law enforcement investigations.

HIPAA Authorized Disclosures to Law Enforcement

HIPAA provides exceptions for disclosures to law enforcement.¹⁹ Specifically, healthcare providers may disclose protected health information for a law enforcement purpose to a law enforcement official when certain conditions are met. The following is a summary of the disclosures permitted by HIPAA for a law enforcement purpose.



¹⁸ Guidelines for Releasing Patient Information to Law Enforcement, American Hospital Association and National Association of Police Organizations, 03-2018 (AHA Item #166854).

¹⁹ 45 C.F.R. §164.512(f).

As Permitted by a Judicial Officer – 45 C.F.R. §164.512(f)(1)(ii):

- A. A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;
- B. A grand jury subpoena;

A judicially authorized search warrant, or other judicially approved legal process, allows a law enforcement officer or prosecutor to obtain access to personal health information under HIPAA. The evidentiary standard and judicial (or grand jury) review ensures the privacy of a patient/suspect. Although the language of this exception provides medical professionals “may” disclose personal health information, the medical professional must provide the requested information since these documents are specific orders issued by a judicial officer or grand jury. Medical professionals may be permitted to ignore the request as improper if the warrant or subpoena is not issued by a “judicial officer.”²⁰

Restricted Access for Administrative Requests – 45 C.F.R. §164.512(f)(1)(ii)(C):

If a warrant or other judicially-issued document is not obtained, law enforcement may also utilize administrative subpoenas²¹ to obtain access to PHI. In order to use an administrative subpoena, however, strict guidelines must be met. Pursuant to this exception, the following criteria are required:

- 1) The information sought must be relevant and material to a legitimate investigation,
- 2) The request must be specific and limited in scope to meet its intended purpose, and
- 3) Information that does not reveal the individual’s identity could not reasonably be substituted for the information sought.

Under these specific requirements, medical professionals may release PHI. Similar to the judicially authorized exception, although the language of this exception indicates medical professionals “may” disclose PHI, the medical professional must comply with the administrative subpoena since it is a specific legal order.

²⁰ See, e.g., U.S. v. Elliott, 676 F. Supp. 2d 431 (D. Md. 2009) (exception did not apply where document was issued by a Clerk of the Court, which was not a “judicial officer” under the law enforcement exception).

²¹ An administrative subpoena is a judicially enforceable subpoena issued by an administrative or government agency compelling an individual or entity to provide information to the agency.

Decedents – 45 C.F.R. §164.512(f)(4):

A covered entity may disclose protected health information about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct.

Medical professionals may release PHI related to an individual's death, but only if they believe that such a death was the result of criminal conduct. For example, if the decedent died in a vehicle struck by a suspected impaired driver, it is imperative to determine whether the decedent died as a result of the injuries sustained in the crash or as a result of another intervening medical event. The language of this exception explicitly indicates a covered entity "may" disclose the information, meaning medical professionals are not required to make such disclosures since it is not pursuant to a court order.

Restricted Access to Identify a Suspect – 45 C.F.R. §164.512(f)(2)(ii):

Medical professionals may also disclose information to a law enforcement officer for the purpose of identifying or locating a suspect, fugitive, material witness. Unless this disclosure is required pursuant to a mandatory reporting law,²² however, the disclosure is limited to the following:

- 1) name and address,
- 2) date and place of birth,
- 3) social security number,
- 4) blood type,
- 5) type of injury,
- 6) date and time of treatment,
- 7) date and time of death if applicable and
- 8) description of distinguishing physical characteristics.

Similar to the decedent exception above, the language of this exception explicitly states a covered entity "may" disclose, again meaning medical professionals are not required to make the disclosure since the request is not pursuant to a court order.

²² Disclosures required by law as permitted by HIPAA include the reporting of child abuse or neglect; on the victim of abuse, neglect, or domestic violence; and certain types of wounds and other physical injuries. See 45 C.F.R. §164.512(f)(1)(i).

Victim of a Crime – 45 C.F.R. §164.512(f)(3):

Medical professionals may also provide a law enforcement officer with an individual's protected health information if the individual is a suspected crime victim. A disclosure is permitted only if:

- 1) the individual agrees to disclosure, or
- 2) the covered entity cannot obtain the individual's agreement because of incapacity or an emergency.

Additionally, if a medical professional is relying upon the incapacity or emergency clause of this exception, the following circumstances must be met:

- 1) the law enforcement officer represents that such information is needed to determine whether a crime was committed by someone other than the individual and will not be used against the victim,
- 2) the law enforcement officer represents that law enforcement activity depends on disclosure and would be materially affected by waiting for the individual's consent, and
- 3) the covered entity, while exercising professional judgment, determines that disclosure is in the best interest of the individual.

The crime victim exception is a limited exception and, similar to the above-described permissible disclosures, medical professionals are not required to make the requested disclosure in this situation.



Crime on Premises – 45 C.F.R. §164.512(f)(5):

If a covered entity believes in good faith that protected health information is evidence of criminal conduct that occurred on the premises of the covered entity, it may disclose the information to a law enforcement officer. This exception is typically applicable in a situation where an intoxicated suspect poses a danger to self or hospital personnel or damages hospital property. This is a permissible disclosure and within the covered entity's discretion.

Reporting Crime in Emergencies – 45 C.F.R. §164.512(f)(6):

A health care provider rendering emergency medical care off the premises may disclose protected health information to a law enforcement officer if the disclosure is needed to alert law officer to the following:

- 1) The commission and nature of a crime,
- 2) The location or victims of such crime, and
- 3) The identity, description and location of the perpetrator.

This exception does not apply, however, if the covered health care provider believes the emergency is a result of abuse, neglect or domestic violence.²³ An officer or prosecutor should be familiar with their jurisdiction's mandatory reporting requirements.

Averting a Serious Threat – 45 C.F.R. §164.512(j):

A covered entity may disclose protected health information if it believes:

- 1) the disclosure is needed to prevent or lessen a serious and imminent threat to the health or safety of a person or the public, and the recipient is able to lessen the threat; or
- 2) the disclosure is critical to law enforcement's ability to identify or apprehend an individual who either appears to have escaped from the custody of law enforcement or made a statement admitting participation in a violent crime.

²³ See 45 C.F.R. § 160.203(c).

A medical professional may not, however, disclose protected health information based on an individual’s admitted participation in a violent crime if the statement was made either during therapy, counseling, or treatment aimed at lessening the individual’s propensity towards violence, or through a request for such therapy, counseling, or treatment. This exception permits medical professionals to make this disclosure, but it does not require them to do so.

As described, the HIPAA exceptions for law enforcement and prosecutors are very narrowly tailored. Additionally, in all but the “judicial officer” exceptions, medical professionals may, but are not required, to provide personal health information. As such, it is crucial that law enforcement and prosecutors not only know the specifics of these exceptions but also build and develop good working relationships and policies with the medical professionals so that they will be willing to avail themselves of these permissive exceptions.

Finally, while HIPAA may not apply to law enforcement and prosecutors, a state may have enacted other state-specific privacy laws related to the release of personal health information. Such state-specific laws are too voluminous to discuss in this work. Law enforcement officers and prosecutors should be aware of state-specific laws and are encouraged to collaborate with the state TSRP for additional assistance. Additionally, if a state has enacted a law contrary to the provisions of HIPAA, HIPAA will generally preempt the state law, unless for example, the state law provides for the reporting of disease, injury, child abuse, death, or for public health surveillance purposes.²⁴



²⁴ See 45 C.F.R. § 160.203(c).

Relationship Building / Task Force Development

Prosecutors and law enforcement officers should proactively build relationships with hospital personnel to facilitate the transfer of information when the future need arises. Ideally, the three entities—the law enforcement agency, the prosecutor’s office, and the hospital personnel—should develop a task force or working group. This will benefit all involved by anticipating and working through roadblocks unique to each entity without the pressure of a looming criminal investigation. It is recommended that local leaders from the prosecutor and law enforcement offices meet with hospital administrators and hospital attorneys and discuss their needs with regard to criminal cases. This meeting should include conversations about when and how HIPAA allows for the release of information.

The meeting is also an opportunity to better understand the practical concerns hospitals may have about assisting in criminal investigations. For example, law enforcement presence in the hospital may deter some patients from seeking care. The hospital may have its own policy regarding the release of patient information. These are just some examples of topics that will arise during these meetings. Working through the obstacles together will forge better working relationships and more appreciation for the needs of all parties involved. The group may meet several times before coming to an understanding of how best to address everyone’s needs and concerns. Ultimately, the parties should, if possible, create a memorandum of understanding (MOU), so the agreed-upon process is memorialized. This MOU should then be revisited regularly by all parties to ensure it continues to be effective.²⁵

The MOU should also guide the training of the law enforcement, prosecutor, and hospital personnel who will ultimately facilitate the exchange of evidence. This MOU should be signed by medical professionals, law enforcement, prosecutors, and others who this MOU would impact and should be conspicuously placed in all locations where needed (i.e., the hospital’s emergency department). In the absence of a formal MOU, an informal agreement between the parties can also prove successful in this regard. An email exchange, personal phone calls, or faxed requests may be all that is necessary to achieve this goal.

²⁵ Included in the resources listed in the Appendix are the following sample documents: Blood Draw Agreement for ambulance service; Memo Regarding Law Enforcement in the ER; and Law Enforcement Request to Speak with DUI Suspect.



Previous studies have found that DUI conviction rates for injured drivers who are treated in hospitals are markedly lower than the DUI conviction rates for non-injured drivers.²⁶ The cause of this discrepancy was not attributed to any one factor. Anecdotally, law enforcement agencies have reported multiple barriers to obtaining DUI blood kit specimen evidence from injured drivers who are suspected of driving under the influence. Each state has obstacles unique to its own laws, physical environments, and a variety of other circumstances. For example, a rural jurisdiction and / or an area with severe weather may impact the ability of responders to timely obtain the necessary blood evidence. Other jurisdictions may not have the necessary budgetary resources to provide the necessary quantity of blood kits to law enforcement. Some other commonly cited barriers include unclear implied consent blood draw protocols in hospital emergency departments, lack of understanding by hospital personnel about the legal ramifications for participating in a blood draw for law enforcement, and lack of onsite blood testing kits and implied consent forms. Likewise, hospitals face staffing shortages, time constraints, and the penultimate priority of their profession: treating the sick and injured, not investigating crimes.

²⁶ Holmes, J., Adams, C., Rogers, P., & Vu, P. "Successful Conviction of Intoxicated Drivers at a Level I Trauma Center." *Western Journal of Emergency Medicine*, (July 2014), 15(4), 480-485.

An effective way for a state to evaluate its law enforcement's ability to efficiently, respectfully, and legally collect blood evidence is to create a task force to study this issue and develop strategies to address barriers. The goal of any such task force is to aid law enforcement, medical professionals, and prosecutors in effectively collecting blood from suspected impaired drivers. Like any task force, begin by identifying the stakeholders most impacted by this issue. Make sure to include prosecutors, law enforcement, state departments of health, medical professionals, including folks who collect blood as well as security personnel who might assist, leadership from hospital associations, the medical examiner's officer and toxicologist. Next, survey law enforcement and medical professionals to identify barriers that prevent the collection of blood evidence. Some barriers might require statutory or regulatory changes to existing laws to address, for example, patient health insurance, or immunity for criminal or civil liability for medical professionals. Additionally, hospitals may not have law enforcement blood collection kits or the implied consent forms readily available.

Establishing the relationship between the parties with a formal memorandum outlining the policies and procedures will assist all with a clear understanding of the roles and responsibilities of each party. This will help to avoid a situation like the Utah nurse in the cautionary tale following the Conclusion and may help to minimize unnecessary and unpleasant litigation over disagreements. A clear understanding of the HIPAA, as well as the professional needs and practices of all parties involved, will ultimately benefit both law enforcement and medical professionals. The following sections identify some areas to address.

Train, Communicate, Relationship Build, Repeat

HIPAA requires covered entities to comply with the privacy rule. Because law enforcement is not a covered entity, a HIPAA-covered entity may disclose protected health information to law enforcement in certain incidents, including when complying with a court order or a court-ordered warrant, subpoena, summons, or an administrative request from law enforcement. When all parties understand the laws governing hospital staff behavior, as well as those governing law enforcement behavior, the process for collecting relevant evidence is smoother. Therefore, ongoing training should take place for both the hospital staff and law enforcement with respect to HIPAA, and the legal means of releasing patient information. Hospital staff, law enforcement officers, and prosecutors involved in impaired driving cases should learn

about HIPAA and the law enforcement exceptions as well as the practices and policies unique to their hospital(s) and local courts. This training should be ongoing, updated as necessary, and will help ensure the effort put forth by everyone results in the evidence being legally obtained and ultimately admitted in court.

Similarly, communication and relationship building between the hospital staff and law enforcement is important. Though both professions focus on serving their communities, their approach and priorities are very different. Hospitals' missions involve caring for their patients no matter the underlying circumstance. Law enforcement also cares for people, but the underlying circumstances matter; accountability for injuring and/ or endangering others is also a priority. Because the two professions view the suspect/ patient through different lenses, conflict may arise when the time comes to gather evidence from the hospital. As with any relationship, communication paves the way for a trouble-free working exchange of information.



Avoiding the Need for Hospital Personnel in Court

Most medical professionals wish to avoid the requirement of a court appearance as a result of work performed during the execution of their job duties. There are two ways to accomplish this: one is simple and the other is more complex.

Chain of Custody

Chain of custody demonstrates to the court that the evidence presented at trial is the same evidence collected from the defendant. To preserve the “chain” of custody, the prosecutor must call each person in the “chain” as a witness at trial. The Sixth Amendment to the U.S. Constitution requires specific witnesses, including the medical professional who collected the blood, to testify at trial. State specific caselaw might also require other witnesses to testify. However, one commonality amongst medical professionals is the desire to avoid testifying in court. This can be accomplished simply by the law enforcement officer observing the collection of the specimen from the suspect. The law enforcement officer must observe the entirety of the blood draw or observe the defendant provide a urine sample. The officer can then testify in court about each of the steps taken to secure the evidence, thus describing the chain of custody, and ensuring the integrity and reliability of the evidence presented.

As a back-up plan, law enforcement officers should provide enough detail in their report to provide prosecutors with the necessary information to call the medical professional, who collected the sample, as a witness at trial. Necessary details include the full name, and professional title of the hospital employee performing the work, the location where the work was performed, and procedure performed. This information is needed for the prosecutor to issue a subpoena for the appearance of the hospital employee in court.

Law Enforcement Phlebotomy Program

Another way to avoid the need to subpoena hospital personnel to court for an impaired driving trial is to establish a law enforcement phlebotomy program.

“A law enforcement phlebotomy program has numerous benefits, but perhaps most importantly it allows for the collection of chemical testing evidence in a timely and efficient manner.”²⁷ In addition to cost savings, “[t]he chain of custody is simplified when an officer draws blood and then secures it, rather than obtaining it from a civilian technician prior to booking.”²⁸

“In the simplest terms, a law enforcement phlebotomy program allows law enforcement officers with specialized training to draw blood for investigative purposes. While a warrant is still required to draw blood in most cases, such a program eliminates the need for a suspect to be transported to a hospital or other facility to obtain a blood sample. To implement a law enforcement phlebotomy program, State statutes must allow for officers to draw blood (typically through terminology such as ‘qualified personnel can draw blood’), officers must complete specialized training, and a department must have protocols and procedures in place for drawing blood.”^{29,30}

Deciding to implement a law enforcement phlebotomy program requires specific resourcing, planning, and training. The short-term costs associated with setting up a program may be worth the long-term benefits a jurisdiction may realize by relying on law enforcement officers as witnesses instead of hospital personnel. NHTSA’s publication, *Law Enforcement Phlebotomy Toolkit: A Guide to Assist Law Enforcement Agencies With Planning and Implementing a Phlebotomy Program*, provides additional excellent information on this topic.



²⁷ Law Enforcement Phlebotomy Toolkit: A Guide to Assist Law Enforcement Agencies With Planning and Implementing a Phlebotomy Program; National Highway Traffic Safety Administration, DOT HS 812 705, March 2019, pg. 3.

²⁸ *Id.* at 4.

²⁹ *Id.* at 1.

³⁰ Some states, including California, Louisiana, Washington, and Nevada have included language indicating a “certified” person may draw blood.

Conclusion

The medical records or blood samples taken from a person injured in a suspected impaired driving crash can be relevant and necessary evidence in the criminal case. Whether evidence of a suspected driver's intoxication or the extent and severity of a victim's injuries, there are several reasons why a law enforcement officer or prosecutor may need to secure this evidence from a hospital. The best way to ensure the successful path to this is proper and prior preparation. It is important for the concerned parties—law enforcement, prosecutors, and hospital personnel—to team together for a full understanding of what HIPAA allows to be shared and how. By building and maintaining the relationship in advance of the need will help to minimize future problems. With training and communication, law enforcement and prosecutors can also assist the medical professionals avoid the need for court testimony. Preparing in advance for the requirements following an impaired driving crash help to improve overall public safety. The National Traffic Law Center and state Traffic Safety Resource Prosecutors remain available to provide the necessary assistance to achieve this goal.



Utah, A Cautionary Tale

The following scenario is included in this monograph, not because it perfectly demonstrates law enforcement's effort to obtain the blood of a suspected impaired driver, but because it illustrates the critical importance of training, communication, and planning required on the part of all parties—hospital personnel, prosecutors, and law enforcement—intersecting in the hospital emergency room.

In the summer of 2017, an incident at a Utah hospital made national news³¹ when a police officer placed a nurse in handcuffs after refusing to draw blood from a patient involved in a serious crash. Police body cameras captured the entire interaction. What ensued likely resulted from a lack of proper police training, poor communication, and imperfect professionalism. It put hospitals and other health care agencies across the country on alert and made many health care workers hesitant to work cooperatively with police officers.

In this situation, an impaired driving suspect was fleeing from police when, according to dash camera footage, he appeared to purposefully swerve into oncoming traffic and crash head-on into an innocent driver. The suspect who veered into oncoming traffic died at the crash scene. The struck victim was transported in critical condition for emergency medical care to hospital in a different jurisdiction. An officer from the crash scene investigating agency requested assistance from the police department in the hospital's jurisdiction to get blood from the victim as a part of its investigation. An officer from the second agency responded to the treating hospital and made the request for the hospital to draw blood. The officer did not have a search warrant to collect a blood sample. Given his critical medical condition, the victim-patient from whom the blood was sought was unable to consent to the draw. He was also not suspected of any wrongdoing and was not under arrest. The request for the blood draw quickly escalated into a demand that hospital staff resisted.

What should an investigating officer do to secure the necessary evidence once an individual is stabilized and in the care of the hospital? In an ideal situation, both the officer and the hospital personnel will have the same understanding of the procedures and protocols to be used to gain medical records, blood, or biological samples and will work in a respectful and professional manner with each other. A lack of clear

³¹ This situation appeared on multiple news outlets; for one sample news story, see National Public Radio website, "Nurse Roughly Arrested For Following Hospital Protocol, Body Camera Shows," September 1, 2017, at <https://www.npr.org/sections/thetwo-way/2017/09/01/547840028/somebody-help-me-utah-nurse-cried-as-police-detective-roughly-arrested-her>, accessed June 26, 2023.

protocols, however, can lead to frustration and acrimonious interactions between officers and hospital staff. Such was the result in this example from the Utah hospital.

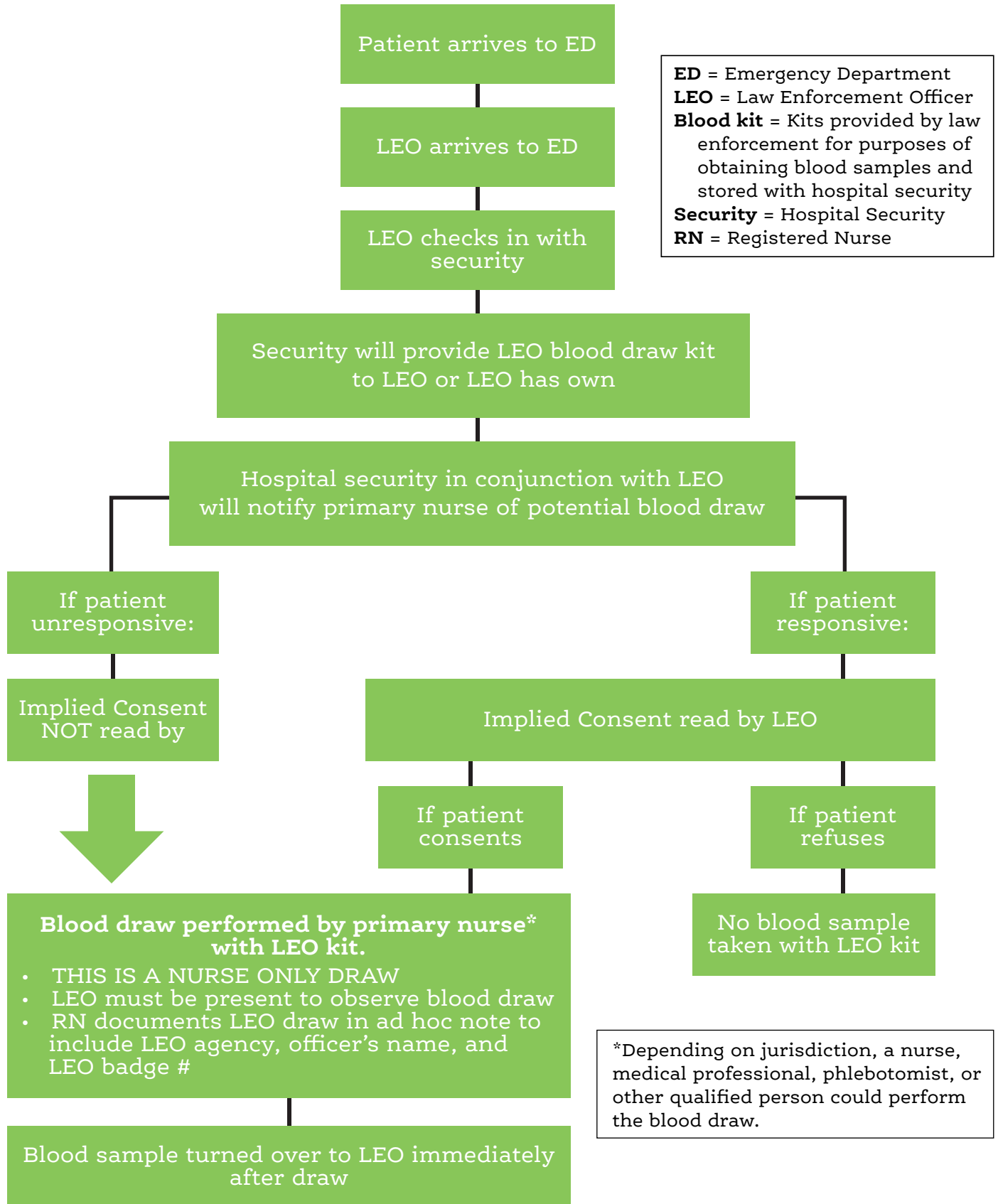
While a signed memorandum of understanding between the Utah hospital and the police department existed and outlined the circumstances in which the hospital would draw blood for law enforcement, the involved nurse did not believe any of the conditions were met to require the blood draw (i.e., there was no consent, no search warrant, no suspicion of impaired driving, etc.). A lack of training and clearly established protocols led the officer to drag the nurse out of the emergency room to the patrol car and place them under arrest. Body camera footage shows officers discussing the possibility of arresting the nurse if they did not allow the blood to be drawn instead of other potential solutions. Footage also shows discussions about a history of perceived negative interactions between this hospital and the police department. This perceived history likely led to frustration and the unprofessional behavior by the officer in this case.

This altercation made national and international news, resulted in a large civil settlement in favor of the nurse, and caused the Utah legislature to quickly clarify the law outlining the specifics of when an officer may obtain a blood sample (i.e., only with the person's consent, after obtaining a search warrant for the blood sample, or presenting a judicially recognized exception to a warrant, see Utah Code § 77-23-213). The hospital also amended its policies for employees interfacing with law enforcement; other hospitals made similar adjustments preventing staff from directly assisting police officers at the hospital.

This “cautionary tale” well illustrates the importance of foundational preparation, including training, communication, and relationship building, prior to seeking to obtain blood as evidence. Encounters between hospital personnel and law enforcement should never escalate into a volatile and confrontational situation as demonstrated in this example and, with the proper relationship cultivation, will likely be avoided. Whether formally memorialized with a signed document or with an informal understanding, law enforcement officers, prosecutors, and hospitals can work together to achieve the needs of each party.

Appendix / Resources

- Useful case law relevant to hospitals and HIPAA:
 - *Schmerber v. California*, 384 U.S. 757 (1966).
 - *Missouri v. McNeely*, 569 U.S. 141 (2013).
 - *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019).
 - *United States v. Bek*, 493 F.3d 790 (7th Cir., 2007).
 - *U.S. v. Elliott*, 676 F. Supp. 2d 431 (D. Md. 2009).
 - *State v. Jewell*, 2013 WL 387800 (Tex. App. 1-31-2013).
- NHTSA's Law Enforcement Phlebotomy Toolkit: A Guide to Assist Law Enforcement Agencies With Planning and Implementing a Phlebotomy Program, DOT HS 812 705, March 2019.
- Responsibility.org's eWarrants webpage.
- Responsibility.org's Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants
- U.S. Department of Health and Human Services, Summary of the HIPAA Privacy Rule
- Sample binder of materials that stays with the hospital charge nurse. Binder should include items such as relevant laws, regulations, police general orders/ government blood draw for impaired drivers, and an easy to follow, step-by-step flow chart for how the hospital and law enforcement can work together on a blood draw. (See next page)
- Blood Draw Agreement for Ambulance Service
- Memo Regarding Law Enforcement in the ER
- Law Enforcement Request to Speak with DUI Suspect



Sample Authorization for Disclosure of Protected Health Information

Authorization for Disclosure of Protected Health Information

I authorize _____
(name/address of provider) to release the health information of the individual named below:

Patient Name _____
Address _____
Phone Number _____ DOB _____

I authorize the information to be disclosed to and discussed with the following individual(s) or organization(s):

Name _____ Organization _____
Address _____

For the purpose of investigation and/or prosecution within The First Judicial District Attorney's Office.

The type and amount of information to be disclosed is as follows: *(specify dates where appropriate)*

- Entire Medical Record, from date _____ to date _____
- Radiological Reports and films, from date _____ to date _____
- Laboratory Results, from date _____ to date _____
- Ambulance trip sheet in your possession, from date _____ to date _____
- Other: _____ (you must specifically indicate the release of records relating to drug or alcohol abuse, child abuse, HIV status, genetic testing, sickle cell anemia, or mental health records. A separate authorization is required for release of psychotherapy notes.)

I understand this authorization will expire, without my express revocation, one year from the date of signing, or if I am a minor, on the date I become an adult according to state law. I understand that I may revoke this authorization in writing at any time except to the extent that action has been taken based on this authorization. I understand that I have a right to a copy of this authorization.

I understand that authorization for the disclosure of this health information is voluntary and I can refuse to sign this authorization. Treatment, payment, enrollment in the health plan or eligibility for benefits may not be conditioned on obtaining the individual's authorization. I understand that any disclosure of information carries with it the potential for re-disclosure and the information may not be protected by federal confidentiality rules.

Signature of Patient or Authorized Personal Representative

Date

Personal Representative's Name (print) and Relationship

Date

This authorization reflects the requirements of HIPAA, 45 C.F.R. § 164.508.

Sample Request from Law Enforcement for Release of Protected Health Information

Request from Law Enforcement for Release of Protected Health Information

Patient's Name (if known): _____	Date: _____
Requestor's Name: _____	Requestor's Title: _____
Agency Name: _____	Phone Number: _____
Agency Address: _____	
Agency Assigned Number: _____ (assigned agency case #, warrant #, or related incident report #)	
Requested Information Related to an Active Law Enforcement Investigation: _____	
Signature of Requestor/Officer: _____	

Please check the appropriate legal exception that will allow the requested information to be released:

- Suspect, Fugitive, Material Witness, or Missing Person.** I certify that the information about the above named patient is needed to assist in attempting to identify or locate a suspect, fugitive, material witness, or missing person. I understand that the information I can obtain is limited under federal law. (45 CFR §§ 164.512(f)(2).)
- Injury by Violence.** The information sought concerns a person suffering from a wound or injury inflicted by means of violence that must be reported to law enforcement under Tennessee law, and is limited to the name, residence and employer of the person, the person's whereabouts, the place the injury occurred, and the character and extent of the injuries.
- Child or Elder Abuse.** The information is sought pursuant to an investigation of suspected child brutality, abuse, neglect or child sexual abuse, or abuse, neglect or exploitation of an adult who is unable to protect themselves without assistance from others because of a mental or physical dysfunction or advanced age (as set forth in TCA §§ 71-6-102 et seq.).
- Victim of a Crime.** The information sought concerns a possible victim of a crime in a situation not otherwise covered by other categories on this form. Either the suspected victim's written agreement to the disclosure is attached to this form, or I request that appropriate personnel seek the victim's agreement to the disclosure. If the victim's agreement cannot be obtained due to incapacity or other emergency circumstance, I certify that the information is needed to determine whether a violation of law by someone other than the victim has occurred, that the information is not intended to be used against the victim, and that the investigation would be materially and adversely affected by waiting until the patient is able to agree to the disclosure. I understand that the disclosure is subject to a determination of what is in the best interests of the patient in the exercise of professional judgment by medical professionals.
- Legal Process.** A court order, judicial subpoena, warrant, summons, grand jury subpoena or other legal process seeking the requested information has been issued and is attached to this form. (45 CFR §§ 164.512(f)(1)(ii)(A) and (B).)
- Crime on Premises.** The information sought constitutes evidence of possible criminal conduct occurring on the premises of Vanderbilt University.
- Patient Authorization.** I have received written authorization from the patient for the release of medical information. A copy of the dated release with patient signature is attached.
- Patient in Custody.** I certify that the above named patient is in lawful custody of the correctional facility or agency listed above, and the requested information is needed for the healthcare of the patient, the safety of the patient, other inmates, officers of the facility or transporting the patient, or for the administration of the safety, security, and order of the facility as allowed under 45 CFR §§ 164.512(k)(5)(i).
- Motor Vehicle Accident Injury or Death.** I certify I have probable cause to believe that the driver of a motor vehicle involved in an accident resulting in the death or injury of another has committed a violation of TCA 55-10-401, 39-13-213(a)(2), or 39-13-218. Therefore, in accordance with TCA 55-10-406, I shall cause the driver to be tested for the purpose of determining the alcohol and/or drug content of such driver's blood.
- Other:** If no category on this form describes your request, please describe here:

PD IR#:	PD OFFICER:	PD OFFICER ID:
MRN#	PATIENT NAME:	DATE OF BIRTH:
REQUESTER IDENTITY VERIFIED? <input type="checkbox"/> Yes <input type="checkbox"/> No DATE INFORMATION RELEASED: _____		
INFO RELEASED VIA PHONE (Exigent Circumstance), UNABLE TO OBTAIN SIGNATURE. <input type="checkbox"/> Yes <input type="checkbox"/> No		
Protected Health Info Released:		

VPD 03-05 (8/2009)

Blood Draw Agreement for Ambulance Service

PROFESSIONAL SERVICES AGREEMENT

THIS IS AN AGREEMENT made as of the ___ day of _____, 20XX (the "Effective Date"), between [Ambulance Company] ("AC") and THE CITY OF [JURISDICTION], a Municipal Corporation, [Jurisdiction], [State of XXX] ("City").

Whereas, the work and services described in this Agreement are essential to the safety, health and well-being of the City of [Jurisdiction]; and

Whereas, Police Officers of the City have a need to obtain blood specimens related to the arrest and criminal prosecution of subjects suspected of Driving While Under the Influence of Alcohol and/or Drugs; and

Whereas, City is currently obtaining these blood specimens through phlebotomy services at [Name] Hospital ([HOSPITAL]); and

Whereas, City is incurring considerable extra time in transporting suspected offenders and potential for safety risks in monitoring a person during both transport and waiting times at [HOSPITAL]; and

Whereas, reducing time spent during arrest procedures of suspected impaired driving allows a police officer to return to proactive law enforcement efforts or helps to control potential costs related to financial compensation for an officer forced to remain in an overtime status; and

Whereas, [AC] provides emergency medical services and other related services including collecting blood samples; and

Whereas, [AC] personnel at all times while providing such services have on-call access to a physician duly qualified to provide services to [AC] as a Medical Director pursuant to the Emergency Medical Service (EMS) licensing requirements of the [State of XXX]; and

Whereas, the City desires to obtain [AC]'s services to collect blood samples and [AC] is willing to provide such services to the City.

Therefore, in consideration of the foregoing recitals and the mutual covenants and conditions contained herein, the parties agree as follows:

1. Performance/Responsibilities

a. [AC] will provide phlebotomy services for the City upon request 24 hours a day, seven days a week, using qualified medical personnel, who shall be [AC]'s employees.

b. [AC] medical personnel providing blood draw services under this Agreement shall do so under the supervision and direction of a physician as required by [Citation to specific state law provision]. [AC] will also provide the City, on request, supporting documentation showing the [AC] medical personnel drawing blood is competent to do so under [Citation to specific state law provision].

b. [AC] will respond to the [Jurisdiction] [County Detention Center or Police Department] located at [Address], [Jurisdiction], [State] within 30 minutes of each request for service. If a situation arises where [AC] is unable to respond within 30 minutes, they will notify the City at the time they are being requested. Upon [AC]'s arrival at the [Jurisdiction] [County Detention Center or Police Department], the City will provide [AC] with a written request of a peace officer or officer of the court authorizing the blood specimen draw.

c. A blood draw specimen kit will be provided by the City for each blood specimen request. The skin at the area of puncture must be thoroughly cleansed and disinfected with an aqueous solution of a nonvolatile antiseptic, i.e. betadine, etc. Alcohol phenolic solution may not be used. All blood samples must be of sufficient volume to provide accurate and repeatable analysis.

d. The Vacutainer tubes containing the blood specimens will be capped or stoppered, sealed, and the following information provided: (1) name of the subject; (2) date of the collection; (3) time of the collection; and (4) evidence seal to be signed and dated. The tube shall be placed into the specimen kit container provided by the City and the City will retain the specimens. The original documentation will be provided to the City and [AC] will retain a copy.

e. [AC] medical personnel providing blood draw services under this Agreement will testify at the request of the [Jurisdiction] City Attorney's Office or the [Jurisdiction] County Attorney's Office, as to the services provided by [AC], for up to four (4) hours per case at no additional fee. Cases requiring more than four (4) hours of testimony will be billed at the rate of \$XX.00 per hour, starting at hour five (5).

g. The total fee for [AC]'s phlebotomy services shall be \$XXX.00 per response.

2. Financial Arrangements

[AC] shall be compensated for all services at the rates indicated in Section 1 of this agreement. Payment shall be due to [AC] following receipt of invoices submitted by [AC]. Invoices shall be submitted no more frequently than monthly.

3. Duration of Agreement/Termination

This term of this Agreement shall be three (3) years unless sooner terminated. The Agreement may be extended by mutual written agreement of the parties.

4. Employment/Independent Contractor

The parties agree that [AC] is an independent contractor for purposes of this Agreement and is not to be considered an employee of the City for any purpose. [AC] is not subject to the terms and provisions of the City's personnel policies handbook and may not be considered a City employee for workers' compensation or any other purpose. [AC] is not authorized to represent the City or otherwise bind the City in any dealings between [AC] and any third parties. [AC] shall be responsible for paying or withholding wages, taxes, unemployment compensation contributions, license fees, benefits and all other expenses related to [AC]'s employees. [AC] shall have the sole

responsibility for determining the qualifications and employment terms of its employees. The City may not interfere with the employment relationship.

[AC] shall comply with the applicable requirements of the Workers' Compensation Act, [Citation to specific state law provision]. [AC] shall maintain workers' compensation coverage for all members and employees of [AC]'s business, except for those members who are exempted by law.

[AC] shall furnish the City with copies showing one of the following: (1) a binder for workers' compensation coverage by an insurer licensed and authorized to provide workers' compensation insurance in the State of XXX; or (2) proof of exemption from workers' compensation granted by law for independent contractors.

5. Indemnity/Waiver of Claims/Insurance:

For other than professional services rendered, to the fullest extent permitted by law, [AC] agrees to defend, indemnify, and hold the hold harmless the City, its agents, representatives, employees, and officers (collectively referred to for purpose of this Section as the City) from and against any and all claims, demands, suits, damages, losses, expenses, fees (including attorney's fees and the costs and fees of an expert witness and consultants), losses, liabilities (including liability where activity is inherently or intrinsically dangerous) or damages of whatever kind or nature connected therewith and without limit and without regard to the cause or causes thereof or the negligence of any party or parties that may be asserted against, recovered from or suffered by the City, occasioned by, growing or arising out of resulting from or in any way related to: (i) the negligent, reckless, or intentional misconduct of [AC]; or (ii) any negligent, reckless, or intentional misconduct of any of [AC]'s agents.

Such obligations shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist. The indemnification obligations of this Section must not be construed to negate, abridge, or reduce any common-law or statutory rights of the indemnities(s) which would otherwise exist as to such indemnities(s).

[AC]'s indemnity under this Section shall be without regard to and without any right to contribution from any insurance maintained by City. In the event of an action filed against City resulting from the City's performance under this Agreement, the City may elect to represent itself and incur all costs and expenses of suit.

For the professional services rendered, to the fullest extent permitted by law, [AC] agrees to indemnify and hold the City harmless against claims, demands, suits, damages, losses, and expenses, including reasonable defense attorney fees, to the extent caused by the negligence or willful misconduct of [AC] or [AC]'s agents or employees.

[AC] also waives any and all claims and recourse against the City or its officers, agents or employees, including the right of contribution for loss or damage to person or property arising from, growing out of, or in any way connected with or incident to the performance of this Agreement except "responsibility for his own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent" as per [Citation to specific state law provision].

Should the City be required to bring an action against [AC] to assert its right to defense or indemnification under this Agreement or under [AC]'s applicable insurance policies required below, the City shall be entitled to recover reasonable costs and attorney fees incurred in asserting its right to indemnification or defense, but only if a court of competent jurisdiction determines [AC] was obligated to defend the claim(s) or was obligated to indemnify the City for a claim(s) or any portion(s) thereof.

These obligations shall survive termination of this Agreement and the services performed hereunder.

In addition to and independent from the above, [AC] shall at [AC]'s expense secure insurance coverage through an insurance company or companies duly licensed and authorized to conduct insurance business in State of XXX which insures the liabilities and obligations specifically assumed by [AC] in this Section and shall not contain any exclusion for liabilities specifically assumed by [AC] in this Section.

The insurance shall cover and apply to all claims, demands, suits, damages, losses, and expenses that may be asserted or claimed against, recovered from, or suffered by the City without limit and without regard to the cause therefore and which is acceptable to the City and [AC] shall furnish to the City an accompanying certificate of insurance and accompanying endorsements in amounts not less than as follows:

Type of Coverage	Limits
Workers' Compensation	Statutory
Employer's Liability	\$100,000 per occurrence; \$2,000,000 annual aggregate
Commercial General Liability:	\$1,000,000 per occurrence; \$2,000,000 annual aggregate
Automobile	\$1,000,000 property damage/bodily injury; \$2,000,000 annual aggregate

The above amounts shall be exclusive of defense costs. The City of [Jurisdiction], its officers, agents, and employees, shall be endorsed as an additional or named insured on a primary non-contributory basis on both the Commercial General and Automobile Liability policies. The insurance and required endorsements must be in a form suitable to City and shall include no less than a sixty (60) day notice of cancellation or non-renewal. The City must approve all insurance coverage and endorsements prior to the Contractor commencing work. [AC] shall notify City within two (2) business days of [AC]'s receipt of notice that any required insurance coverage will be terminated or [AC]'s decision to terminate any required insurance coverage for any reason.

6. Compliance with Laws

[AC] agrees to comply with all federal, state and local laws, ordinances, rules and regulations, including the safety rules, codes, and provisions of the State of XXX Safety Act in [Citation to specific state law provision]. [AC] agrees to purchase a City business license.

7. Nondiscrimination

[AC] agrees not to discriminate either in employment or in the delivery of services or benefits in the fulfillment of this agreement on the basis of actual or perceived race, color, religion, national origin, sex, gender identity (as defined in paragraph 249(c)(4) of title 18, United States Code), actual or perceived sexual orientation, or disability. [AC] agrees to take reasonable steps to ensure that persons with limited English proficiency or hearing impairment have meaningful access to a translator.

8. Notices

All notices required under this Agreement shall be deemed properly served if delivered in writing, personally, or sent by certified or registered mail to the address given below. Unless and until changed by either party by notice in writing, notices shall be sent to:

[Name] Chief of Police City of [Jurisdiction] PO Box [Jurisdiction], State of XXX (Zip Code)	[Name] [AC] Operations Manager Address [Jurisdiction], State of XXX (Zip Code)
--	---

The date of mailing shall be deemed the date of such notice and service thereof.

9. Termination for Breach:

a. If [AC] refuses or fails to timely do the work, or any part thereof, or fails to perform any of its obligations under this Agreement, or otherwise breaches any terms or conditions of this Agreement, which default has not been cured after 30-days' written notice by the City to [AC], the City may, by written notice, terminate this Agreement and [AC]'s right to proceed with all or any part of the work. The City may then take over the work and complete it, either with its own resources or by re-letting the contract to any other third party.

b. If the City fails to perform any of its obligations under this Agreement, or otherwise breaches any terms or conditions of this Agreement, which default has not been cured after 30-days' written notice by [AC] to the City, [AC] may, by written notice, terminate this Agreement.

c. In the event of a termination pursuant to this Section, [AC] shall be entitled to payment only for those services [AC] actually rendered.

d. Any termination provided for by this Section shall be in addition to any other remedies to which the non-breaching Party may be entitled under the law or at equity.

e. In the event of termination under this Section, the Parties shall, under no circumstances, be entitled to claim or recover consequential, special, punitive, lost business opportunity, lost productivity, field office overhead, general conditions costs, or lost profits damages of any nature arising, or claimed to have arisen, as a result of the termination.

10. Termination for Convenience:

a. Should conditions arise which, in the sole opinion and discretion of either party, make it advisable to that party to cease performance under this Agreement, such party may terminate this Agreement by 60 days' written notice to the other party ("Notice of Termination for Convenience"). The termination shall be effective in the manner specified in the Notice of Termination for Convenience and shall be without prejudice to any claims that the terminating party may otherwise have against the other party.

b. Upon receipt of the Notice of Termination for Convenience, unless otherwise directed in the Notice, [AC] shall immediately cease performance under this Agreement and make every reasonable effort to refrain from continuing work, incurring additional expenses or costs under this Agreement and shall immediately cancel all existing orders or contracts upon terms satisfactory to the City. [AC] shall do only such work as may be necessary to preserve, protect, and maintain work already completed or immediately in progress.

c. In the event of a termination pursuant to this Section, [AC] is entitled to payment only for those services [AC] actually rendered on or before the receipt of the Notice of Termination for City's Convenience.

d. The compensation described in this Agreement is the sole compensation due to [AC] for its performance of this Agreement. [AC] shall, under no circumstances, be entitled to claim or recover consequential, special, punitive, lost business opportunity, lost productivity, field office overhead, general conditions costs, or lost profits damages of any nature arising, or claimed to have arisen, as a result of the termination.

11. Limitation on [AC]'s Damages; Time for Asserting Claim:

a. In the event of a claim for damages by [AC] under this Agreement, [AC]'s damages shall be limited to contract damages and [AC] hereby expressly waives any right to claim or recover consequential, special, punitive, lost business opportunity, lost productivity, field office overhead, general conditions costs, or lost profits damages of any nature or kind.

b. In the event [AC] wants to assert a claim for damages of any kind or nature, [AC] shall provide City with written notice of its claim, the facts and circumstances surrounding and giving rise to the claim, and the total amount of damages sought by the claim, within thirty (30) days of the facts and circumstances giving rise to the claim. In the event [AC] fails to provide such notice, [AC] shall waive all rights to assert such claim.

12. [AC]'s Representations: To induce City to enter into this Agreement, [AC] makes the following representations:

a. [AC] has familiarized itself with the nature and extent of this Agreement with all local conditions and federal, state and local laws, ordinances, rules, and regulations that in any manner may affect cost, progress or performance of the services provided.

b. [AC] represents and warrants to City that it has the experience and ability to perform the services required by this Agreement; that its personnel providing services under this Agreement are competent to do so under [Citation to specific state law provision]; that at all times while providing services under this Agreement [AC] personnel will be under the supervision and direction of a duly qualified physician; that it will perform said services in a professional, competent and timely manner and with diligence and skill; that it has the power to enter into and perform this Agreement and grant the rights granted in it; and that its performance of this Agreement shall not infringe upon or violate the rights of any third party, whether rights of copyright, trademark, privacy, publicity, libel, slander or any other rights of any nature whatsoever, or violate any federal, state and municipal laws. The City will not determine or exercise control as to general procedures or formats necessary to have these services meet this warranty.

13. Intoxicants; DOT Drug and Alcohol Regulations/Safety and Training: [AC] shall not permit or suffer the introduction or use of any intoxicants, including alcohol or illegal drugs, by any employee or agent engaged in services to the City under this Agreement while on City property or in the performance of any activities under this Agreement. [AC] acknowledges it is aware of and shall comply with its responsibilities and obligations under the U.S. Department of Transportation (DOT) regulations governing anti-drug and alcohol misuse prevention plans and related testing. City shall have the right to request proof of such compliance and [AC] shall be obligated to furnish such proof.

The [AC] shall be responsible for instructing and training the [AC]'s employees and agents in proper and specified work methods and procedures. The [AC] shall provide continuous supervision of the work performed. The [AC] is responsible for instructing his employees and agents in safe work practices.

14. Modification and Assignability: This Agreement may not be enlarged, modified or altered except by written agreement signed by both parties hereto. The [AC] may not subcontract or assign

[AC]'s rights, including the right to compensation or delegate its duties arising hereunder, without the prior written consent of City. Any subcontractor or assignee will be bound by all of the terms and conditions of this Agreement.

15. Reports/Accountability/Public Information: [AC] agrees to develop and/or provide documentation as reasonably requested by the City demonstrating [AC]'s compliance with the requirements of this Agreement.

16. Non-Waiver: A waiver by either party any default or breach by the other party of any terms or conditions of this Agreement does not limit the other party's right to enforce such term or conditions or to pursue any available legal or equitable rights in the event of any subsequent default or breach.

17. Attorney's Fees and Costs: That in the event it becomes necessary for either Party of this Agreement to retain an attorney to enforce any of the terms or conditions of this Agreement or to give any notice required herein, then the prevailing Party or the Party giving notice shall be entitled to reasonable attorney's fees and costs, including fees, salary, and costs of in-house counsel to include City Attorney.

18. Dispute Resolution:

a. Any claim, controversy, or dispute between the parties, their agents, employees, or representatives shall be resolved first by negotiation between senior-level personnel from each party duly authorized to execute settlement agreements. Upon mutual agreement of the parties, the parties may invite an independent, disinterested mediator to assist in the negotiated settlement discussions.

b. If the parties are unable to resolve the dispute within thirty (30) days from the date the dispute was first raised, then such dispute may only be resolved in a court of competent jurisdiction in compliance with the Applicable Law provisions of this Agreement.

19. Survival: [AC]'s indemnification obligations shall survive the termination or expiration of this Agreement for the maximum period allowed under applicable law.

20. Headings: The headings used in this Agreement are for convenience only and are not be construed as a part of the Agreement or as a limitation on the scope of the particular paragraphs to which they refer.

21. Severability: If any portion of this Agreement is held to be void or unenforceable, the balance thereof shall continue in effect.

22. Applicable Law: The parties agree that this Agreement is governed in all respects by the laws of the State of XXX.

23. Binding Effect: This Agreement is binding upon and inures to the benefit of the heirs, legal representatives, successors, and assigns of the parties.

24. No Third-Party Beneficiary: This Agreement is for the exclusive benefit of the parties, does not constitute a third-party beneficiary agreement, and may not be relied upon or enforced by a third party.

25. Counterparts: This Agreement may be executed in counterparts, which together constitute one instrument.

26. Integration: This Agreement and attached Memorandum of Understanding hereto constitute the entire agreement of the parties. Covenants or representations not contained therein or made a part thereof by reference, are not binding upon the parties. There are no understandings between the parties other than as set forth in this Agreement. All communications, either verbal or written, made prior to the date of this Agreement are hereby abrogated and withdrawn unless specifically made a part of this Agreement by reference.

******END OF AGREEMENT EXCEPT FOR SIGNATURES******

IN WITNESS WHEREOF, the parties hereto have executed this instrument the day and year indicated below.

Date: _____
Name, General Manager
[Ambulance Company]

Date: _____
Name, City Manager
City of [Jurisdiction]

Memo Regarding Law Enforcement in the ER

MEMORANDUM OF UNDERSTANDING

[Named Hospital], the [Jurisdiction] County Attorney's Office, the [Jurisdiction] City Attorney's Office, [Jurisdiction] Police Department, [Jurisdiction] County Sheriff's Department, and [State] Highway Patrol (the "Parties") agree developing a shared understanding of limits imposed on law enforcement in the health care setting can improve our service to the community. With that in mind, the Parties have developed this Memorandum of Understanding. This Memo is not intended to address every situation where there is a limit to law enforcement's authority or access. Instead, it focuses on two issues that have led to confusion and disagreement in the Emergency Department. By signing below, the Parties agree to the following principles and procedures within [Named Hospital] facilities.

Fundamentals

- I. A patient's medical condition always takes priority over law enforcement's interests. Law enforcement will respect and comply with limits imposed by [Named Hospital] providers and staff due to the patient's treatment or condition.
- II. Law enforcement's badge access is only for responding to an emergency. Law enforcement shall never use their badge access for another purpose. Law enforcement shall not use badge access to locate or speak with a patient law enforcement believes it has lawful authority to question. Any request by law enforcement to enter the patient care area must be approved by [Named Hospital].
- III. It is never acceptable for law enforcement to threaten or intimidate [Named Hospital] providers or staff. Law enforcement will refrain from threatening or harassing conduct toward [Named Hospital] staff. In the event of disagreement, law enforcement will direct its concerns to the [Named Hospital] Risk Management Department.
- IV. In the event of conflict with this Memo, applicable State or Federal law shall control. The Parties agree to comply with any changes in statute, case law, or other controlling authority.

Law Enforcement Requests to Speak with a DUI Suspect

Law enforcement is not entitled to access or speak to any patient who may assist in a criminal investigation. [Named Hospital]'s role is to provide its patients medical care and treatment regardless of their status as a suspect. However, there are some limited situations where law enforcement may access a patient after approval by appropriate [Named Hospital] staff.

Law enforcement may be permitted to speak with a patient if there is particularized suspicion that the patient was driving under the influence. Before speaking with the patient, the law enforcement officer must complete the attached "Request to Speak with DUI Suspect" form, which requires the officer verify lawful authority to speak with the patient based on particularized suspicion. If law enforcement's

presence is not precluded by patient volume, workflow or the patient's condition, [Named Hospital] staff will accompany one law enforcement officer to the patient without disclosing any protected health information or otherwise interrupting patient care. The officer may ask if the patient is willing to talk.

1. If the patient does not consent, the officer shall read any legally required statement(s), such as an implied consent advisory, and thereafter vacate the area.
2. If the patient consents, law enforcement may interview the patient until the patient withdraws consent, the privacy of other patients becomes impacted, the volume/status of the Emergency Department changes such that law enforcement must be removed, or [Named Hospital] determines law enforcement must vacate the patient care area.

Law Enforcement-Directed Blood Collection

If a patient does not consent to the collection of blood, law enforcement must have a search warrant for blood collection whether the patient is in custody or not. If a patient persists in refusing after a search warrant authorizing collection is secured, law enforcement shall be responsible for restraining the patient and will call for additional officers if necessary. [Named Hospital] staff and security are present to ensure safe and appropriate medical services and shall not be compelled by law enforcement to restrain a patient.

Law enforcement shall not purport to require the collection of blood from a non-consenting patient without a valid search warrant. If a search warrant is provided, [Named Hospital] may review and confirm the warrant's validity before blood collection occurs. Although collection of blood from an unconscious patient without a search warrant may not be an unreasonable search, [Named Hospital] will not assist with blood collection for law enforcement purposes without a search warrant.

In witness whereof, the Parties hereto have executed this Memorandum of Understanding.

[Jurisdiction] County Attorney's Office

[Jurisdiction] City Attorney's Office

Name

Name

Title

Title

Signature

Signature

Date Signed

Date Signed

[Jurisdiction] County Sheriff's Department

Name

Title

Signature

Date Signed

[Jurisdiction] Police Department

Name

Title

Signature

Date Signed

[State] Highway Patrol

Name

Title

Signature

Date Signed

[Named Hospital]

Name

Title

Signature

Date Signed

Law Enforcement Request to Speak with DUI Suspect

[Insert Law Enforcement Agency Name]

REQUEST TO SPEAK WITH DUI SUSPECT

I, _____, am a law enforcement officer with _____.
My badge number is _____.

I have particularized suspicion that _____, whom I believe to be a current patient of [Named Hospital]'s Emergency Department, has been driving or has been in actual physical control of a vehicle upon ways of this State open to the public while under the influence of alcohol, drugs, or a combination of the two.

Consistent with my obligations to investigate driving under the influence and administer tests under certain conditions pursuant to [Citation to specific state law provision], I hereby affirm that I have lawful authority to speak with the above-referenced patient.

I understand that the patient's condition and treatment needs take priority over the needs of my investigation and agree to comply with limits imposed on my access to the patient care area by [Named Hospital] providers and staff. If the above-referenced patient refuses to speak with me, I will read any required statement(s), such as the implied consent advisory, and thereafter vacate the patient care area.

Signed: _____ Date: _____

Contact telephone number: _____

Please fax or email this completed form to:

Risk Management Department

[Named Hospital]

[name@\[Hospital\].org](mailto:name@[Hospital].org)

[name@\[Hospital\].org](mailto:name@[Hospital].org)

fax: XXX-XXX-1234

