

Answers and an update on "no refusal" law

Prosecutor's Page

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if the suspect is unconscious or is incapable of rendering consent, Ohio Law holds that consent is implied and a blood sample may be drawn for analysis.

My Office has pocket-sized laminated copies of the new law that include arresting language to be read to offenders. If you would like one, please call Melanie Hart at 330-643-8674.

On September 30, 2008, the "No Refusal" law for repeat drunk drivers went into effect. Drunk drivers who have a previous felony DUI conviction, two DUI convictions in the last six years, or five DUI convictions in the last 20 years, are now required to submit to a mandatory breathalyzer test. If they refuse, the law authorizes law enforcement officers to obtain a blood sample.

Q: What happens if the three-hour time limit has expired before we request a blood draw?

A: This will still be a good arrest, however, it will void the Administrative License Suspension (ALS) portion of the arrest.

Q: If an officer has to obtain the suspect's blood because they refused the breath test, does that count as a refusal?

A: YES. In that instance, mark the 2255 as a refusal and send it to the BMV.

Q: If an officer tells a suspect that they intend to take them to the hospital to obtain a blood sample and the suspect decides to blow, is that still considered a refusal?

A: NO. Take the breath sample and record it as such. Do not use the authority to forcibly obtain a blood sample as a threat or as coercion. Officers should advise the suspect that, if they refuse the test, they will take them to the hospital to obtain a blood sample. If the suspect then changes their mind and offers to blow, allow them to do so and do not write a search warrant.

Q: What happens if a suspect refuses to give blood at the hospital?

A: The new DUI law authorizes law enforcement officers to use reasonable force to obtain a suspect's blood, so an officer technically can hold a suspect down while their blood is drawn. If the suspect refuses the breath test, the officer needs to advise the suspect that they have the authority to take them to a hospital to have their blood drawn against their will. If the suspect refuses the blood draw at the hospital, the officer should advise them that the refusal will not only get them a license suspension but they will also be charged with Tampering with Evidence (O.R.C. 2921.12(A)(1)), a felony of the 3rd degree, because they are withholding evidence. Tampering with Evidence carries a potential sentence of 1 to 5 years in prison and a \$10,000 fine. Please note that it is the policy of Summa Health System that they *will not* perform forcible blood draws. However,

After several months of the "No Refusal" law for repeat drunk drivers being in effect our office has had the opportunity to successfully prosecute a woman for Aggravated Vehicular Homicide with a blood test that was a direct result of the implementation of the "No Refusal" law. Without this forced test she may have walked away with Justice shaking its head.

From the emails and phone calls our office has received from around the state, it appears that not all jurisdictions are having success with medical professionals agreeing to take a "forced" draw. One of the main obstacles with health care professionals is the issue of liability. In the litigious society we live in, doctors, nurses, phlebotomists and hospitals (and more importantly their law departments and attorneys) are concerned about liability.

Some other medical professionals have even suggested that a forced draw to help "prosecute" their patient would be an act contrary to their oath to help their patient. These concerns need to be addressed in order for us to be able to benefit by our new tool against repeat drunk driving offenders.

I would like to point out the "immunity" laws that many health professionals are unaware of and that may calm their fears (as well as the fears of their lawyers) and allow them to assist us in doing our job. On a short note, when one health care provider was advised that the mandatory draw had a lesser penalty than the refusal's 1 to 5 years in prison for Tampering with Evidence, he agreed that he would be of more help to his patient by assisting with the forced draw!

IMMUNITY FOR HEALTH CARE PERSONNEL AND HOSPITALS/OMVI
Ohio Revised Code Section 4511.19(F) states:

Except as otherwise provided in this division, any **physician, registered nurse, or qualified technician, chemist, or phle-**

botomist who withdraws blood from a person pursuant to this section of section 4511.191 or 4511.192 of the Revised Code, and any **hospital, first-aid station, or clinic** at which blood is withdrawn from a person pursuant to this section or section 4511.191 or 4511.192 of the Revised Code, is **immune** from **criminal liability** and **civil liability** based upon a claim of assault and battery or any other claim that is not a claim of malpractice, **for any act performed in withdrawing blood from the person.** The immunity provided in this division is not available to a person who withdraws blood if the person engages in willful or wanton misconduct.

IMMUNITY FOR LAW ENFORCEMENT OFFICERS/OMVI

Ohio Revised Code Section 4511.191(5) (b) states:

If a person refuses to submit to a chemical test upon a request made pursuant to division (A)(5)(a) of this section, the law enforcement officer who made the request may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma. A **law enforcement officer** who act pursuant to this division to ensure that a person submits to a chemical test of the person's whole blood or blood serum or plasma is **immune** from **criminal and civil liability** based upon a claim for assault and battery or any other claim for the act, unless the officer so acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

As we continue to work out the wrinkles in using this new law, both Law Enforcement and their Police Legal Advisors need to work with their local health care providers and hospitals to develop policies that will not only be consistent with the laws that have been enacted, but that will help protect our communities from repeat drunk drivers. Our office has discussed these laws with our local chiefs and fellow prosecutors in the cities within our jurisdiction and jointly we have had discussions with our local hospitals. Through this cooperative effort we hope to continue to define and redefine the hospital's policies and levels of assistance that are consistent with the intent of the law. I will keep you updated!