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SPECIAL CONTRIBUTION

Ethics

Law enforcement information gathering in the emergency department: Legal and ethical background and practical approaches

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Abstract

In the course of legal investigations, law enforcement officers may enlist emergency department (ED) personnel to gather information or forensic evidence, often with the intent of building cases against a patient. These situations create ethical conflicts between the emergency physician's obligations to the patient and society. This paper provides an overview of the ethical and legal considerations in ED forensic evidence collection and the general principles that emergency physicians should apply in these situations.

KEYWORDS
emergency medicine, ethics, evidence collection, law, law enforcement, physician-patient relationship, police

1 | INTRODUCTION

In the course of legal investigations, law enforcement officers may request assistance from emergency department staff to provide clinical information about or to gather forensic evidence from a patient undergoing emergency care. These requests may create a dilemma for the emergency physician, pitting the physician's fiduciary duty to patient against legal requirements. The American College of Emergency Physicians (ACEP) Policy Statement "Law Enforcement Information Gathering in the Emergency Department"[1] addresses the obligations of the emergency physician, indicating that physicians can provide clinical information to law enforcement in three situations: (1) the patient consents to the release of the information, (2) the law mandates that physicians report such information, or (3) law enforcement

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officers provide a subpoena or court order. In some cases, the law or subpoena may authorize the law enforcement officer to go further and ask the physician to physically obtain evidence from the patient, such as via blood draw or invasive examination. In these cases, the policy recommends that physicians make "considered judgments" as to how to balance the competing demands of medical and civic responsibility.

This paper summarizes important considerations in physician-mandated collection of law enforcement information, including the relevant ethical principles, laws, and court cases, as well as the potential consequences of the various decisions.

1.1 | Ethics of physician–patient relationships

The duty of the physician to act in the patient's best interests extends beyond medical decision-making.[2] Protection of privacy has always been part of the physician's mandate as well. One of the clauses of the Hippocratic Oath states: "Whatever I see or hear in the lives of my patients, whether in connection with my professional practice or not, which ought not to be spoken of outside, I will keep secret, as considering all such things to be private."[3] This obligation to protect patient privacy is further underscored by federal and state laws, including the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[4] The Oath and HIPAA require the protection of all clinical information, even in cases where release will not cause the patient immediate and direct harm. Although there are some exceptions, such as for reporting child or elder abuse, the principle of patient privacy is particularly important with information that could potentially harm the patient, such as by leading to arrest for or conviction of a crime.

The mandate to protect patient information serves not only to protect the patient from the consequences of the release of information but also to ensure that patients receive the best possible medical care. If patients cannot entrust physicians with confidential information, they may not be forthcoming during medical evaluations, leading to suboptimal or harmful treatment.

Physicians also have a duty to respect patient autonomy. Even when in law enforcement custody, patients generally have the right to refuse treatment, invasive procedures (eg, blood draws or bullet removal) or even physical examination.

1.2 | The relationship between law and ethics

The relationships between physicians' ethical obligations and the requirements of the law are intricate and often conflicting. Physicians are members of society and thus have an ethical obligation to their fellow citizens to follow society's laws. However, in certain situations the obligations to society must be weighed against other factors. One ethically can, and sometimes must, violate a law, whether through civil disobedience or conscientious objection, when that law conflicts with more important ethical principles. Physicians also have a legitimate interest in avoiding personal repercussions, as the duty to patients does not mandate personal sacrifice without limits. Although it may be morally praiseworthy in certain circumstances to stand with the courage of one's conviction, potentially facing arrest or criminal charges, doing so is not morally obligatory.

A physician's refusal to comply with a legal request for evidence collection may be viewed as a form of conscientious objection. The notion of conscientious objection in medicine was inspired by citizen objection to participation in the Vietnam War. The practice of conscientious objection by physicians has since evolved to be legally protected in many jurisdictions but has remained focused on abortion and other controversial aspects of medical care, including physician aid-in-dying and the care of lesbian/gay/bisexual/transgender patients.

Conscientious objection by physicians has been criticized as an unethical means to resolve tensions between patient and physician rights, as it conflicts with a physician's duty to place patient interests first.[5] ACEP has lobbied against the inclusion of stronger conscientious objection protections in federal regulations as conflicting with the Emergency Medical Treatment and Active Labor Act and the fundamental ethical principles of emergency medicine.[6] This position is entirely reasonable when applied to cases where a physician's conscientious objection results in the withholding of appropriate care, such as with abortion or pregnancy prophylaxis. In these cases, a physician is not acting in their patient's best interests, and this does indeed conflict with their obligation to their patient. However, in the context of law enforcement interactions, an alternate perspective may be justified, as then the physician is acting to protect the patient. Therefore, in these cases an emergency physician's refusal to cooperate can be in the service of the patient's interests and is thus not subject to the objections raised regarding conscientious objection resulting in the withholding of care.

1.3 | Legal considerations

1.3.1 | Federal law

In the United States, federal law supersedes state laws. For interactions with law enforcement, several US Supreme Court cases have set limits on what evidence may be obtained from a patient and may be admissible in court. Surgery for the mere purpose of obtaining evidence, such as retrieving a bullet from a suspect for evidence, is not permitted.[7] The Supreme Court determined that evidence obtained by gastric lavage from a patient who objected to the procedure was inadmissible as a violation of due process.[8] When patients objected to the drawing of a specimen without a warrant, the US Supreme Court determined obtaining the specimen in those circumstances violated the patients' Fourth Amendment constitutional protection against unreasonable search and seizure.[9,10] The mere fact that alcohol may be metabolized before a warrant might be issued does not justify drawing without consent. However, when the patient is unconscious, the boundaries are not as clear. The Supreme Court in 1957 determined that a blood draw on an unconscious patient without consent by a skilled technician does not violate the Fourteenth Amendment.[11] In 2019, in *Mitchell v. Wisconsin*, the court ruled that a blood specimen drawn to obtain an alcohol level

from an unconscious patient was admissible as evidence, because the phlebotomy was justified under the state's law of implied consent.[12,13]

If the patient has decision-making capacity, the emergency physician should respect the patient's wishes, including their refusal of blood testing. If the patient is conscious but lacksdecision-making capacity, the emergency physician should consider forgoing the test if it is not medically necessary. Procurement of a specimen for law enforcement may be appropriate if there is a warrant or court order. If a patient is unconscious and the cause is unknown, it may be reasonable to conduct blood alcohol and drug testing; the admission of these findings to court will vary by state law.

In all cases of evidence collection, the emergency physician should avoid highly invasive procedures that can harm the patient. The Supreme Court determined that physician performance of a gastric lavage over a patient's objection was grossly inappropriate, characterizing the action as one that "shocks the conscience."[8] A federal appeals court made a similar assessment when a physician — over the objection of the patient, and without a warrant or court order — sedated, paralyzed, and intubated a patient to perform a rectal exam in the search for illicit drugs.[14]

Although HIPAA regulations do not mandate the release of information in response to an oral request by law enforcement, they do allow hospital or physician compliance with a court order or warrant. Such requests must include a written statement that the information requested is relevant and material, specific and limited in scope, and that de-identified information cannot be used.[15]

1.3.2 | State laws

Based on its own constitution and interpretation of statutory law, each state may give defendants more rights and disallow more evidence than permitted by federal law. All 50 states have statutes that permit breath or chemical tests when there is probable cause to suspect intoxicated driving based on implied consent.[9,16] There are some state exceptions to the doctrine of implied consent for blood draws for intoxicants. For example, New Jersey does not provide for implied consent to a blood draw.[17] Several states, including Wyoming and Wisconsin, provide for implied consent to a blood draw when a person has been arrested. Under the doctrine of implied consent, most states allow blood draws from unconscious ED patients involved in a motor vehicle accident with suspected intoxication. At least 3 states require physicians to disclose upon request (North Carolina)[18] or promptly report (Vermont, Oregon)[19,20] elevated blood alcohol levels detected in motor vehicle crash patients.

Many states also have statutes protecting physicians or others working in the ED from liability if they draw blood from an individual upon the request from a law enforcement officer. Wisconsin provides protection to physicians and other qualified clinicians who choose to comply with written requests for body cavity search by sheriffs, police chiefs, or law enforcement officer administrators.[21]

All states have laws requiring physicians to report certain types of abuse or mistreatment to state and local authorities.[22] Select states mandate reporting substance abuse during pregnancy.[23] Most states also have requirements to report non-accidental wounds and injuries, including gunshot wounds, knife wounds, and burns that may be the result of abuse or arson. The timing of the report of these injuries is usually specified by the law. Although most states specify that report should be made "immediately" or "as soon as possible," the definitions for these time frames vary or remain vague. For example, Iowa specifies that injury reports must be made within 12 h of patient examination. Alabama specifies that injury reports must be completed before the patient leaves the hospital.[24,25]

1.4 | General principles

The ACEP Policy Statement "Law Enforcement Information Gathering in the Emergency Department" largely defers to individual physicians to decide how to respond to conflicts with law enforcement. The statement identifies circumstances where physicians may choose to provide information about patients or perform invasive procedures or examinations in response to a warrant or court order, but leaves it to physicians' "considered judgment" as to whether to do so.[1] In addition to the background presented here, there are also some general principles that emergency physicians should follow when dealing with law enforcement:

1. **Become familiar with the ACEP Policy Statement on Law Enforcement Information Gathering in the Emergency Department** (Appendix 1). Policies of national professional bodies can be legally relevant both in determining what a physician may do as well as what a physician may refuse to do.
2. **Patient care takes priority**. According to the ACEP Code of Ethics, emergency physicians should provide care and obtain the tests needed for accurate diagnosis and treatment. Law enforcement action or directives cannot interfere with patient care or health.[1,26] However, physicians should be aware that law enforcement may be able to access those tests or have others done, depending upon the court orders, warrants, summons, or administrative requests.
3. **Discuss options with the patient**. The patient may prefer to have the physician perform the test, especially if it can be done with no added burden to the patient, for example, by drawing 1 more tube during an ongoing venipuncture. If the patient consents to the procedure, it would be acceptable, and perhaps even appropriate, to assist the police with information gathering.
4. **Be aware of local and state laws regarding mandatory reporting or assistance**. This is important both to avoid inadvertently violating the law but also to recognize requests that do not need to be addressed by the ED. How quickly a mandatory report must be made and what information it must include are matters of law, and knowledge of these laws may allow one to effectively balance patient rights and public safety. Likewise, knowledge of the law and applicable policies can help a physician to effectively decide about when to refuse a request to do blood tests or invasive exams.[27]

Pennsylvania is currently the only state that legally obligates a physician to assist police with obtaining blood alcohol levels.[28]

5. **Be aware of the actual legal risks and know how to get into contact with hospital and/or their own practice's legal counsel**. Although emergency physicians may be protected from liability for obtaining tests without consent from an unconscious patient,[29] it is in fact uncommon for physicians or health care workers to be required to obtain specimens for law enforcement. Physicians should contact hospital and (when applicable) their own legal counsel whenever there are potentially problematic interactions with law enforcement. Legal counsel can provide information about relevant laws. Furthermore, the earlier they know about such cases, the more effectively they can support physician decisions. Under all circumstances, clinicians should develop a solid understanding of the relevant laws, as legal counsel may not be available in all situations.
6. **Advocate for hospital policies regarding interactions with law enforcement**. Hospitals should establish a policy delineating when police may enter the ED and where they may go. Such policies can also protect patients more directly, as courts usually consider the ED to be an extension of the public street, an open space allowing police to use whatever they observe in the ED as evidence or basis or further investigation or to engage in highly intrusive questioning or searches.[30]
7. **In cases with potential legal involvement, turn over patient belongings to hospital security**. Because the ED is considered a public space, any belongings the patient does not have direct control over, such as clothing on the floor or in a bag on the side, may be considered by courts as abandoned and thus available for police inspection. If security possesses the items on behalf of the patient, courts likely would not consider them abandoned, requiring a warrant or order for law enforcement to seize them.[30] The same principles apply to illicit drugs or other contraband.

2 | CONCLUSION

The process of law enforcement collection of forensic specimens from ED patients is complex and ethically challenging. Emergency physicians must be aware of the range of legal and ethical issues and the most ethically appropriate actions.

AUTHOR CONTRIBUTIONS

All authors contributed to all stages of manuscript preparation and had the approval of final version.

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APPENDIX

ACEP Policy

Law Enforcement Information Gathering in the Emergency Department

Revised June 2017 and April 2010

Originally approved September 2003

The American College of Emergency Physicians (ACEP) believes that emergency physicians have a fundamental professional responsibility to protect the confidentiality of their patients' personal health information. Federal and state laws, including the federal health information privacy regulations implemented under the Health Insurance Portability and Accountability Act (HIPAA), articulate and reinforce this responsibility.

ACEP recognizes that law enforcement officials perform valuable functions in the emergency department (ED), and that one of these functions is investigation of criminal acts. As part of these investigations, law enforcement officials may request personal health information gathered in the ED. Emergency physicians may honor these requests only under the following circumstances:

1. The patient consents to release of the requested personal health information to law enforcement officers, or
2. Applicable laws or regulations mandate the reporting of the requested personal health information to law enforcement officers, or
3. Law enforcement officers produce a subpoena or other court order requiring release of the requested information to them.

Law enforcement officers may, in some situations, present search warrants or other court orders as grounds for requesting or directing that emergency physicians perform physical examinations, collect physical evidence, perform diagnostic tests, or conduct body cavity searches on ED patients who refuse these interventions. These situations present emergency physicians with difficult conflicts between obligations to respect patients' refusals of treatment, to promote trust in the therapeutic relationship, and to protect patients from harm, on the one hand, and obligations to obey legal authorities and to carry out socially imposed mandates to promote public health and public safety, on the other hand. ACEP believes that emergency physicians must make considered judgments regarding which set of obligations is more compelling in these specific situations. Emergency physicians may conscientiously refuse to carry out or comply with legal orders that violate the rights or jeopardize the welfare of their patients, recognizing that there may be legal repercussions for these decisions. These repercussions may include contempt of court or malpractice claims.

In their interactions with ED patients, law enforcement officers may use video or audio recording devices. These recordings may include interaction or communication between ED patients and physicians or other ED staff only with the consent of all parties.

Law enforcement information gathering activities in the ED should not interfere with essential patient care.