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LED BULLETIN

Legal Guidance for Massachusetts Law Enforcement — September 7, 2022

Police-directed BAC Test Requires Consent

A defendant must consent to an analysis of his blood alcohol content (BAC) in order for it to be used as evidence of operating under the influence (OUI). Two cases established this rule:

- **Independent search warrant not an option to draw blood.** *Comm. v. Bohigian*, 486 Mass. 209 (2020): Charles Bohigian smashed into a driver while she stood outside her stalled vehicle. The victim was badly hurt. At the hospital under arrest, Bohigian refused to authorize the extraction of his blood. Troopers obtained a search warrant and seized and tested his blood. Bohigian's BAC proved he was OUI.

The SJC overturned his conviction. Under 90, § 24(1)(e), a blood test that occurs “by or at the direction of a police officer” must be consented to by the defendant or its results cannot be used as evidence of OUI. This “implied consent” procedure — where a defendant must consent to a blood draw (or breathalyzer) or lose his license administratively — is the only way for police to draw blood in an OUI investigation. Police cannot, as they did with Bohigian, circumvent “implied consent” by independently obtaining a search warrant.

- **Independent search warrant also not an option to test blood drawn by a third party.** *Comm. v. Moreau*, ___ Mass. ___ (2022) began when a pickup truck smashed into a tree. An officer found Eric Moreau in the driver's seat. His breath smelled of alcohol, and he had glassy eyes, slurred speech, and was unsteady on his feet.

The officer did not arrest Moreau. Instead, an ambulance transported him to the hospital. The officer gave the clinical staff a letter instructing them to preserve any blood they might draw to treat the injured Moreau. Police later obtained a search warrant to recover Moreau's blood from the hospital and test it. His BAC proved Moreau had driven under the influence.

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In *Moreau*, the prosecutor argued that, since the hospital independently decided to draw blood, investigators did not need Moreau's consent in order to seize and test it. The SJC disagreed. Under 90, § 24(1)(e), a blood test that occurs "by or at the direction of a police officer" must be consented to by the defendant. It is irrelevant if a third party — in this case, the hospital — draws the blood. As long as the police submit a sample to the crime laboratory to gain evidence of a defendant's BAC, the defendant must consent.

- **Bottom line: Before blood is seized and/or tested at the direction of police during an OUI investigation, the defendant must consent.** The only consequence if he refuses is license suspension for a specified period.
- **All alcohol OUI-related offenses covered.** The *Bohigian/Moreau* rule applies to any crime that incorporates proof of operating under the influence of alcohol because the "implied consent" procedure, in addition to simple OUI, is made expressly applicable to OUI alcohol causing serious bodily injury (90, § 24L); motor vehicle homicide incorporating proof of OUI alcohol (90, § 24G); and manslaughter by motor vehicle (265, § 13½).¹
- **OUI drugs not covered.** "Implied consent" only applies to a breathalyzer or blood test designed to learn a defendant's blood *alcohol* content (BAC). 90, § 24(f)(1). That means police are free to ask a defendant for consent and/or to seek a search warrant to take and test his blood for narcotics. 90, § 24(1)(a)(1) (aside from alcohol, OUI includes "marijuana, narcotic drugs, depressants or stimulant substances [defined in 94C, § 1], or [inhalants defined in 270, § 18]").

A step-by-step approach is critical. When an OUI alcohol defendant gets transported to a hospital and becomes eligible for a blood test, a crash probably occurred with victims. These cases are serious.

- **Preferred approach: Arrest before or at the hospital.** "Implied consent" has to be triggered by the defendant motorist's arrest for OUI alcohol and/or a more serious crime requiring proof of OUI alcohol.

Police usually have probable cause to arrest by the time the defendant is placed in the ambulance. Probable cause for OUI alcohol only requires proof that the defendant drove a vehicle on a public way while exhibiting slurred speech, red and glassy eyes, and the strong odor of alcohol. *Comm. v. Blais*, 428 Mass. 294 (1998).²

¹ 90, § 24(f)(1) states that, following their refusal of the breathalyzer or blood test, defendants charged with any form of OUI alcohol — including OUI causing serious injury, motor vehicle homicide, or manslaughter by motor vehicle — will not have their pre-trial suspension period reduced. Specifically mentioning these charges squarely places them under the umbrella of "implied consent." Also see 90, § 24N.

² The SJC's *Blais* sets out the odor, speech, eyes foundation. Remember it! Of course, officers typically rely on other indicators to fortify their probable cause and, by extension, proof beyond a reasonable doubt for conviction — e.g., erratic operation, other vehicle infractions, admissions from the motorist ("I only had two, I mean three, beers"), witness statements, and standardized field sobriety tests (SFSTs).

If the defendant's condition requires that he be transported to the hospital, and if officers have probable cause that he drove under the influence, officers should arrest him before transport or upon arrival to activate "implied consent."³

- **Allow emergency medical treatment.** It goes without saying that the first priority is to treat the defendant.
- **At the same time, decide which of the following strategies you should use.**
 - ***Strategy 1: Hospital intends to draw blood for treatment purposes.*** If the staff draws, or plans to draw, the defendant's blood to treat him:
 - 1) ***Prepare two copies of a preservation order and submit one to the clinical staff and one to the hospital laboratory.***⁴ See Attachment A.
 - 2) ***Find an appropriate time that does not interfere with treatment and inform the defendant of his right to consent to a blood test or lose his license.*** Since the hospital will have already drawn blood, time is not an important factor. When the defendant is available, you should inform him that the hospital has already drawn his blood and you need his permission to test it.
 - Use the standard statutory rights and consent form. See Attachment B.
 - Add the recommended statement from *Comm. v. Dennis*, 96 Mass. App. 528 (2019), which held that the statutory rights and consent form provides insufficient notice for a blood test. As a result, next to the YES box on the form, you should handwrite: "I consent to the hospital staff providing⁵ a sample of my blood for the police to take as evidence. The blood sample will be tested by a laboratory for alcohol and/or drugs." This statement should also be read to the defendant.
 - 3) ***If the defendant consents to the blood test:***

³ In fact, the SJC pointed out that the officer in *Moreau* had probable cause to arrest the defendant and could have done so before Eric Moreau was transported to the hospital.

⁴ This is a good move. Sometimes the clinical staff forgets to notify the laboratory and vice versa. By filing the form with both groups, police prevent blood samples from being discarded before police have an opportunity to get a warrant to seize and the test the blood.

⁵ In the original *Dennis* decision, the word "drawing" was used. In this situation, where the hospital has already drawn blood for treatment, the defendant would only need to consent to their "providing" the sample to police for analysis. This was the situation in *Moreau*.

- File an affidavit for a search warrant in which you outline the facts in support of probable cause to arrest and note the defendant's consent to a blood test (attach the completed statutory rights and consent form with the added *Dennis* statement).⁶
- Serve the warrant at the hospital. This will enable you to take the preserved blood sample from the hospital and bring it to the crime laboratory for BAC testing.
- If the crime laboratory reports the defendant's BAC was .08 or above,⁷ communicate this result to the registry for administrative suspension.

4) ***If the defendant refuses to authorize blood testing:***

- Process him as a refusal at the station on the breathalyzer (BT). This is essential to trigger the registry's administrative license suspension.
- Request that the District Attorney subpoena the hospital record. While "implied consent" is the only way for police to gain evidence of a defendant's BAC, it does not affect the District Attorney's authority to subpoena certified medical records and present them in a criminal case. See 233, § 79.⁸

5) ***Notify the bail commissioner and arrange for the defendant's release.*** There is no reason, in most cases, for the defendant to be held. Once the bail commissioner authorizes release on recognizance, the defendant is no longer in police custody and becomes a patient of the hospital, who may be discharged in the ordinary course of treatment. This prevents the police from having to divert officers to watch the defendant at the hospital.

- ***Strategy 2: Hospital is not going to draw blood for treatment.*** If the staff is not going to draw blood for treatment:

1) ***Find an appropriate time and inform the defendant of his right to consent to a blood test or lose his license.***

⁶ Depending on your department's relationship with the hospital, you may be able to show the consent form and obtain the blood sample on this basis alone. Typically, with a preservation order, the hospital will expect a warrant to release the blood. The affidavit in support of the warrant will not be difficult to write.

⁷ You should also report, in the case of a defendant under age 21, any BAC of .02 or above for administrative sanctions. See 90, §§ 24(1)(e) and 24P.

⁸ *Comm. v. Ackerman*, 476 Mass. 1033 (2017) (defendant's hospital blood test and staff observations in her record admissible at OUI trial). *Comm. v. Palacios*, 90 Mass. App. Ct. 722 (2016) (ambulance records also admissible).

- Use the standard statutory rights and consent form. See Attachment B.
- Add the recommended statement from *Comm. v. Dennis*, 96 Mass. App. 528 (2019). Next to the YES box on the statutory form, you should handwrite: “I consent to the hospital staff drawing a sample of my blood for the police to take as evidence. The blood sample will be tested by a laboratory for alcohol and/or drugs.” This statement should also be read to the defendant.

2) *If the defendant consents to the blood test:*

- Request that a doctor, nurse, or certified medical technician draw blood as required by 90, § 24(1)(e) and 24(1)(f)(1) based on the defendant’s consent.⁹ A person afflicted with hemophilia, diabetes, or another condition requiring treatment with anti-coagulants is, for obvious health reasons, ineligible.
 - Call the Office of Alcohol Testing (OAT) 857-377-3030 with any questions. It is helpful if you provide the hospital with a forensic test kit. Kits are available to police departments at no charge from OAT.
- Transport the blood sample to the crime laboratory for BAC analysis.
- If the crime laboratory reports the defendant’s BAC was .08 or above,¹⁰ communicate this result to the registry for administrative suspension.

3) *If the defendant refuses to authorize blood testing:* Process him as a refusal on the station BT. This triggers the administrative license suspension.

4) *Notify the bail commissioner and arrange for the defendant's release.*

- **Other option: Request blood test at hospital.** In the rare case where police officers lack probable cause to arrest for OUI alcohol, but do have a reasonable suspicion that the motorist committed this crime, they may ask for consent to draw blood at the hospital. Officers need only present the suspect with the *Dennis* statement — “I consent to the hospital staff drawing a sample of my blood for the police to take as evidence. The blood sample will be tested by a laboratory for alcohol and/or drugs.” Make sure the suspect signs and dates this written

⁹ Hopefully, you have had hospital staff cooperate with your department before. If staff refuses to perform the blood draw based on the defendant’s consent, explain that you are authorized to direct this under 90, § 24(1)(f)(1). If they still refuse, you may need to call the on-call judge and see if she will direct them over the phone or, worst case scenario, you may need to apply for a search warrant directing the hospital to draw the blood. Be sure to attach the defendant’s signed consent form (with the *Dennis* statement) to the warrant affidavit.

¹⁰ You should also report, in the case of a defendant *under age 21*, any BAC of .02 or above for administrative sanctions. See 90, § 24P.

statement at the bottom of the page. An officer should also sign as a witness. Have the hospital staff draw blood in the same way they do under “implied consent.”

Regardless of whether the suspect agrees *or* refuses to consent to a blood draw, the administrative consequences mandated by “implied consent” are inapplicable because he is not under arrest.¹¹ If the laboratory results from a consensual blood draw provide police with probable cause, officers must immediately issue a citation as a criminal complaint application for OUI. See 90C, § 2.

OUI Drugs: Since “implied consent” does not apply to arrests for OUI drugs, police may ask for consent and/or obtain a search warrant.

- **Arrest preferred but not essential.** Probable cause for OUI drugs does not require that officers specify a particular drug. See, for example, *Comm. v. Carpinto*, 93 Mass. App. Ct. 1115 (2018) (defendant had driven on a flat tire, his eyes were pinpointed, and he fell asleep during sobriety test instructions; this established probable cause for OUI drugs even though the officer did not know the drug that caused this reaction). However, for conviction, there must be evidence of the substance — marijuana, narcotic, stimulant, depressant, or inhalant — that caused the defendant’s impairment.
 - **Strategy 1: Hospital intends to draw blood for treatment purposes.** If the staff draws, or plans to draw, the defendant’s blood to treat him:
 - 1) **Prepare two copies of a preservation order and submit one to the clinical staff and one to the hospital laboratory.** See Attachment A.
 - 2) **Find an appropriate time that does not interfere with treatment and inform the defendant of his right to consent to a blood test.** Since the hospital will have already drawn blood, time is less important. Inform the defendant that the hospital has already drawn his blood. Use the statement from *Comm. v. Dennis*, 96 Mass. App. 528 (2019) as your consent form: “I consent to the hospital staff providing¹² a sample of my blood for the police to take as evidence. The blood sample will be tested by a laboratory for drugs.”¹³ Make sure the suspect signs and dates this written statement at the bottom of the page. An officer should also sign as a witness.

¹¹ In this situation, using the “immediate threat complaint” as a license suspension work-around is not an option. The clear implication of *Bohigian/Moreau* is that “implied consent” is the sole vehicle for blood testing and license suspension in OUI alcohol investigations.

¹² In the original *Dennis* decision, the word “drawing” was used. In this situation, where the hospital has already drawn blood for treatment, the defendant would only need to consent to their “providing” the sample to police.

¹³ This version of the *Dennis* consent statement only mentions drug testing. The reason is that BAC testing, by virtue of *Bohigian/Moreau*, may only occur under the authority of the “implied consent” procedure.

- 3) ***If the defendant consents:***
 - File an affidavit for a search warrant in which you outline the facts in support of probable cause to arrest and note the defendant's consent to a blood test (attach the *Dennis* consent form).¹⁴
 - Serve the warrant at the hospital. This will enable you to take the preserved blood sample from the hospital and bring it to the laboratory for testing.
 - 4) ***If the defendant refuses consent, apply for a search warrant.*** The *Bohigian/Moreau* rule does not apply! Have your search warrant affidavit outline facts showing that the defendant drove a vehicle while under the influence of drugs; that he was transported to the hospital where medical staff drew his blood for treatment; and that obtaining (from the hospital) and testing (at the crime laboratory) the blood sample will likely provide evidence of OUI drugs.
- ***Strategy 2: Hospital is not going to draw blood for treatment.*** If the staff is not going to draw blood for treatment:
 - 1) ***Find an appropriate time and inform the defendant of his right to consent to a blood test.*** Use the *Dennis* consent form: "I consent to the hospital staff drawing a sample of my blood for the police to take as evidence. The blood sample will be tested by a laboratory for drugs." Make sure the suspect signs and dates this written statement at the bottom of the page. An officer should also sign as a witness.
 - 2) ***If the defendant consents, show his consent form to the hospital staff and have them draw blood for you to take to the crime laboratory.***
 - 3) ***If the defendant refuses consent, apply for a search warrant.*** Your search warrant affidavit must outline facts showing that the defendant drove a vehicle while under the influence of drugs; that obtaining a blood sample (at the hospital) and testing it (at the crime laboratory) will likely provide evidence of OUI drugs.

Also be sure to include in your affidavit and the proposed warrant language directing the hospital staff to immediately draw blood and authorizing the police to use reasonable force if the defendant resists. See *Comm. v. Bohigian*, 486 Mass. 209 (2020) (under authority of a search warrant, troopers used force and held Bohigian

¹⁴ Depending on your department's relationship with the hospital, you may be able to show the consent form and obtain the blood sample on this basis alone. Typically, with a preservation order, the hospital will expect a warrant to release the blood. The affidavit in support of the warrant will not be difficult to write.

down so that the nurse could extract a blood sample; this procedure was not criticized by the SJC).

- **Immediate threat for refusal.** While a Massachusetts court has yet to rule on the practice, some officers, when faced with an OUI drugs defendant who refuses to consent to a blood test and/or DRE evaluation, will file an “immediate threat complaint” with the registry. This causes the defendant to lose his license immediately. See 90, § 22(a).

The legal basis for taking this action is that, unlike OUI alcohol and “implied consent” rules under 90, § 24(1)(e), OUI drugs offers no comparable procedure directed at the motorist who refuses blood or DRE testing. Therefore, officers are free to use the “immediate threat” procedure to deal with this significant safety concern.

Until a court or the legislature prohibits this approach, officers may continue to use it.

Gender-affirming and Reproductive Health Care

Gender-affirming and reproductive health care services are protected civil rights in Massachusetts. 12, § 11I½ now defines and protects:¹⁵

- **Gender-affirming care**, which concerns all forms of treatment of gender dysphoria — i.e., consultation and medical assistance for people who are already transgender or contemplating whether to become transgender.
- **Reproductive health care**, which concerns all forms of treatment relating to pregnancy, contraception, assisted reproduction, miscarriage management, or pregnancy termination.

Whether you are a public official or private citizen, interfering with these rights is prohibited in Massachusetts.¹⁶

Equally important, Massachusetts police officers shall not investigate this type of protected health care activity. Under 147, § 63, law enforcement officers in the Commonwealth are forbidden from providing information or assisting in any investigation or inquiry — by any government official or private citizen — regarding out-of-state health services that would be lawful if they occurred in Massachusetts.¹⁷

¹⁵ These changes took effect on July 29, 2022 by emergency declaration. See Chapter 127 of the Acts of 2022.

¹⁶ Civil rights violations become criminal offenses when they involve force, or the threat of force, with the intent to intimidate. 265, § 63. Aside from potential criminal prosecution, a civil rights violation may be the subject of a civil lawsuit.

¹⁷ The only exception is if a federal law explicitly requires that state or local officers provide assistance.

This law stems from the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022), which authorized states to outlaw or otherwise restrict abortion. Our legislature wanted to prevent Massachusetts law enforcement from participating in investigations by other states that might restrict reproductive or gender rights. Of course, the vast majority of interstate law enforcement cooperation concerns fugitives engaged in violence, narcotics trafficking, human trafficking, and a host of property crimes. Continue to wholeheartedly participate in these efforts.

Hope this helps you in the field,

John Sofis Scheft, Esq.

Attachment

A

PRESERVATION NOTICE



The individual named below is the subject of an ongoing criminal investigation conducted by the

_____ [name of Police Dept.]

As part of this criminal investigation, it is hereby requested that any blood and/or urine samples taken from:

_____ [name of patient]

_____/_____/_____ [patient's DOB] who was treated on

_____ [list applicable date(s)]

at the _____ [list health care institution]

be preserved pending the issuance of a search warrant.

_____ [print investigator's name, rank & ID]

_____ [signature] _____ [date]

If you need further information, please call _____ [Dept. phone number] and ask the dispatcher to immediately contact me. A return call will be made without delay.

Important note: Failure to abide by this notice may constitute the crime of Evidence Tampering or Destruction, in violation of G.L. c. 268, § 13E, which is punishable by up to 10 years in state prison.

To the investigator: Record, in your police incident report and your search warrant affidavit, the name of the health care or administrative professional who received this notice.

Attachment

B

STATUTORY RIGHTS AND CONSENT FORM

Defendant: _____ Date: _____

Case No.: _____ Time: _____

RIGHT TO A DOCTOR

General Laws, Ch. 263, Sec. 5A: A person held in custody at a police station or other place of detention, charged with operating a motor vehicle while under the influence of intoxicating liquor, shall have the right, at his request and at his expense, to be examined immediately by a physician selected by him. The police official in charge of such station or place of detention, or his designee, shall inform him of such right immediately upon being booked, and shall afford him a reasonable opportunity to exercise it. Such person shall, immediately upon being booked, be given a copy of this section unless such a copy is posted in the police station or other place of detention in a conspicuous place which such person has access.

RIGHT TO A TELEPHONE

General Laws Ch. 276, Sec. 33A: The police official in charge of the station or other place of detention having a telephone wherein a person is held in custody, shall permit the use of the telephone, at the expense of the arrested person, for the purpose of allowing the person to communicate with his family or friends, or to arrange for release on bail, or to engage the services of an attorney. Any such person shall be informed forthwith upon his arrival at such station or place of detention, of his right to use the telephone, and such use shall be permitted within one hour thereafter.

REQUEST TO SUBMIT TO A CHEMICAL TEST

Pursuant to General Laws Ch. 90, Sec. 24:

1. I am requesting that you submit to a chemical test to determine your blood alcohol concentration.
2. **Drivers Age 21 or OVER:** If you refuse this test, your license or right to operate in Massachusetts shall be suspended for at least a period of 180 days or up to life for such refusal. The suspension if you take the test and fail it is 30 days.
Drivers UNDER Age 21: If you refuse this test, your license or right to operate in Massachusetts shall be suspended for at least a period of 3 years or up to life for such refusal. The suspension if you take the test and fail it is 30 days. Drivers under age 21 face an **additional** suspension pursuant to General Laws Chapter 90, Section 24P of 180 days to 1 year.
3. If your blood alcohol level is .08 or above, you are in violation of Massachusetts law and may face criminal penalties. Drivers under age 21 have the same legal limit for court purposes, but will face administrative penalties for any blood alcohol concentration of .02 or above.
4. If you decide to take the test and complete it, you will have the right to a comparison blood test within a reasonable time at your own expense. The results of this comparison test can be used to restore your license or right to operate at a court hearing within 10 days.
5. It is not your option which type of chemical test to take. Refusal or failure to consent to the test that I am requesting is a violation of the Implied Consent Law, and will result in your right to operate a motor vehicle being suspended as I have stated to you. Refusing to take the test, but requesting some other form of test is a refusal under the law.

NOTICE TO PERSONS HOLDING A COMMERCIAL DRIVER'S LICENSE

In addition to the above, Mass. General Laws Ch. 90F, Sec. 11 and 49 CFR Sec. 383.51 provide that any person who holds a commercial driver's license who fails to submit to a required test of blood, breath, or urine, shall be disqualified from driving a commercial motor vehicle for a period of one (1) year or up to life. **This disqualification applies whether or not the person was operating a CDL vehicle.** If the vehicle was transporting 6 or more passengers, including the driver, or hazardous materials required to be placarded, the CDL disqualification shall be for three (3) years or up to life.

Do you consent to submit to the chemical test that this officer requested to determine your blood alcohol concentration?

Yes

No

Defendant's Signature: _____

(To be signed, or indicate why not)

Signature of Officer Before Whom the Refusal or Test Was Made: _____

(Signed)