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## POLICY MEMORANDUM DUI-Drug Refusal Policy

### *Background*

There has been increased frequency of individuals refusing to comply with lawful warrants issued to obtain an evidential sample of blood relating to driving under the influence of drug offenses, in violation of 23 V.S.A. § 1201. Consequently, emergency department personnel have been placed in the position of having to decline the taking of a sample, despite the warrant's authorization. Vermont caselaw summarizes the potential liability faced by such providers:

At common law ... a medical provider who performs an unconsented-to procedure on a patient may be liable for battery. The rule for which defendants advocate represents a departure from this general rule. The policy rationales supporting a departure are substantial: specified medical personnel are the only people authorized by statute to draw evidentiary blood samples. 23 V.S.A. § 1203(b). To the extent that fear of civil liability for battery makes such medical professionals unwilling to draw blood in response to a legitimate request from law enforcement, it may compromise law enforcement and public safety. On the other hand, the consequences of interposing the state between medical providers and patients, abrogating providers' own duty to their patients to refrain from unconsented-to medical procedures, are also disagreeable.

In the face of these competing policy considerations, we would look to the Legislature to define the contours of any exceptions to the ordinary common law obligations of medical provider to patient.

We note that the Legislature has expressly limited the liability of medical providers in certain circumstances related to blood draws and individuals suspected of driving under the influence, neither of which is applicable here. See 23 V.S.A. § 1203a(f) (limiting liability of medical personnel drawing blood pursuant to request for independent blood test by person who has been tested); *id.* § 1203b(b) (immunizing from civil and criminal liability emergency room personnel who make good-faith reports pursuant to obligation to report blood alcohol concentrations in

excess of legal limit when treating individuals injured in motor vehicle accidents).

However, in contrast to some other states, our Legislature has not expressly required medical personnel to comply with law enforcement requests to draw blood, and has not immunized those providers from liability for complying.

Given that the Legislature has not indicated an intent to limit the liability of medical personnel who draw blood at the request of law enforcement, we conclude that, at least in a situation as alleged by plaintiff here in which a patient is conscious and the authority to draw blood depends upon actual, as opposed to statutorily implied, consent the police officers' request does not protect defendants from liability for drawing the blood without plaintiff's consent.

*O'Brien v. Synnott*, 193 Vt. 546, 553–55 (2013) (internal citations omitted)

Accordingly, the emergency department staff, even if desiring to cooperate with law enforcement execution of a valid search warrant for an evidential blood draw, cannot draw a sample without exposing themselves or their organization to tort liability, absent the consent of the subject.

### *Policy*

Vermont has criminal theories of liability for refusal to submit to an evidential breath test when an individual has a prior driving under the influence conviction, and a law enforcement officer has reasonable grounds to request such a sample. There are also civil consequences with respect to licensure to operate a motor vehicle based upon a refusal of a breath alcohol test. However, Vermont statutes do not expressly provide for a refusal theory with respect to an evidential blood draw.

A subject refusing to provide an evidential blood sample, where a lawful search warrant has been issued by the court, may successfully thwart the investigation into his or her suspected driving under the influence. This, of course, has the tendency to undermine the evidence available at trial and creates an incentive for non-compliance with the court order. Accordingly, in order to counter such interests, the following procedure shall be used:

1. If, upon issuance of a lawful search warrant, the subject will not provide consent to medical personnel taking an evidential sample of blood, the investigating officer shall:

a. **Misdemeanors:** Inform the subject of the following in circumstances where there suspected driving under the influence *does not support a felony offense*:

“REFUSAL TO COMPLY WITH THIS LAWFULLY ISSUED SEARCH WARRANT MAY BE SUBJECT TO CRIMINAL CONTEMPT, PROVIDED FOR UNDER VERMONT RULE OF CRIMINAL PROCEDURE 42. IF FOUND TO HAVE COMMITTED CRIMINAL CONTEMPT, YOU MAY BE SUBJECT TO 2-YEARS OF IMPRISONMENT OR A FINE, OR BOTH, AT THE DISCRETION OF THE COURT.”

b. **Felonies:** Inform the subject of the following in circumstances where the suspected driving under the influence *involves a felony offense* (e.g. serious bodily injury or death resulting, leaving the scene of an accident with such consequence, or grossly negligent operation-eluding):

“REFUSAL TO COMPLY WITH THIS LAWFULLY ISSUED SEARCH WARRANT MAY BE SUBJECT TO CRIMINAL CONTEMPT, PROVIDED FOR UNDER VERMONT RULE OF CRIMINAL PROCEDURE 42. IF FOUND TO HAVE COMMITTED CRIMINAL CONTEMPT, YOU MAY BE SUBJECT TO 2-YEARS OF IMPRISONMENT OR A FINE, OR BOTH, AT THE DISCRETION OF THE COURT. FURTHER, YOU MAY BE SUBJECT TO THE OFFENSE OF OBSTRUCTION OF JUSTICE BASED UPON ENDEAVORING TO IMPEDE THE DUE ADMINISTRATION OF JUSTICE. IF CONVICTED OF OBSTRUCTION OF JUSTICE YOU MAY BE IMPRISONED NOT MORE THAN FIVE YEARS OR FINED NOT MORE THAN \$5,000.00, OR BOTH.”

2. All refusals must be audio recorded or recorded by body worn camera. After such warning, the operator should be asked whether he or she persists in refusal.

3. Consideration of public safety factors, namely the need for more immediate imposition of conditions of release, may warrant the use of a quick cite or flash cite. This guidance should not be construed to limit office discretion to seek afterhours imposition of bail or conditions of release when there is a risk of flight or public safety consideration necessitating such action, independent of the refusal to comply with a warrant. This process is independent of screening for incapacity by a qualified person, or use of protective custody, if appropriate.

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