POLICE IN THE
EMERGENCY DEPARTMENT

A **MEDICAL PROVIDER TOOLKIT** FOR **PROTECTING PATIENT PRIVACY**

AUTHORED BY

Working Group on Policing and Patient Rights

ABOUT THE AUTHORS

We are a working group of physicians, lawyers, clinical social workers, and law and medical students. We study law enforcement presence in emergency departments and support hospitals in developing policies to ensure patient rights are respected in interactions with law enforcement.[1] We are committed to educating healthcare providers and hospitals on how they can interact with law enforcement officers to safeguard patient rights, promote safety, and improve health outcomes. While the ongoing national conversation around police violence and accountability raises broad questions about police activity in many settings, we are sharing this document with the more limited goal of providing practical guidance that can be immediately implemented by healthcare workers given the laws and resources that currently exist.

We are grateful to the Georgetown University Health Justice Alliance (HJA), an academic medical-legal partnership (MLP) working to train the next generation of leaders in health justice, for connecting this group of researchers and students and supporting publication of this toolkit. HJA recognizes that MLPs increase health equity not only by addressing individuals' legal needs but also by creating institutional and systemic level change and empowering medical professionals to be advocates for their patients. For more information about the Georgetown University Health Justice Alliance, visit: www.law.georgetown.edu/health-justice-alliance. For more information about the MLP approach and movement visit the National Center for MLP at medical-legalpartnership.org

[1] Police can be present in a variety of other medical settings outside the emergency department, including inpatient hospital wards and outpatient medical clinics. Police presence in those other contexts can raise similar concerns, and information in this toolkit may apply generally. However, our recommendations are specifically designed to address police interactions in the emergency department.

EXECUTIVE SUMMARY

Lack of thoughtful hospital policies and provider education regarding patient and staff interactions with law enforcement can lead to violations of patient privacy, confidentiality, and autonomy. Law enforcement activity in the emergency department (ED) may also negatively impact patient-provider relationships and patient health outcomes. Members of law enforcement are not experts on patient privacy, just as medical providers are not experts on constitutional law. This toolkit provides guidance to ED providers on the laws and legal consequences related to their interactions with police. This information will equip providers and other healthcare workers to safeguard their patients' rights, comply with privacy laws, and navigate law enforcement interactions in a way that protects patients.

Like all visitors, law enforcement officers do not have a right to unrestricted ED access. In hospitals or EDs where police officers have routine or largely unrestricted access, it is usually because that facility, either through policy or practice, does not restrict law enforcement access to patient care areas.

As is true in daily life, patients and providers have the right to refuse to speak with the police and to withhold their consent from searches of their person or property in the absence of a valid court order or warrant. ED practices that casually expose protected health information (PHI) to law enforcement or provide unrestricted police access to patient care areas violate patients' rights, expand law enforcement intrusion into their care, and may result in serious legal consequences for patients.

There are steps that every ED provider can take today to ensure patients' rights are protected. In interactions with law enforcement, ED providers should:

- Approach and identify officers who are present in patient care areas
- Refuse to consent to police questioning of patients, information disclosures, access, and searches and seizures without patient authorization or legal authority such as judicial warrants, court orders, and specified probable cause
- Use formal processes to refer warrants, court orders, or other requests regarding patient access or PHI to authorized parties such as an administrative supervisor, legal department, or medical records department

ED providers should also advocate to change their hospital's policies regarding law enforcement activity, including:

- Visitor access
- Sharing of information with police
- Security, storage and searches of patient property
- Police requests for the performance of tests or procedures
- Family visitation when law enforcement is present
- Use of handcuffs, forensic restraints, and shackling

BACKGROUND

Emergency department (ED) healthcare providers are responsible for addressing patients' emergent medical needs while simultaneously protecting patient privacy and public health. These complex demands frequently require interacting with law enforcement personnel who may already be in the facility as security, arrive with injured patients, or come to the ED seeking access to patients, patient care areas, protected health information, or the performance of specific medical tests or procedures on particular patients.

When hospitals and healthcare providers grant law enforcement access to the ED or fulfill police requests without adhering to clear policies for evaluating these requests, they may inadvertently undermine patient privacy and autonomy rights. This can have serious consequences, including compounding the biases and racial disparities that already exist in healthcare and law enforcement. With national attention focused on reexamining police presence in a variety of settings, hospitals and medical providers have a unique opportunity to do the same in their healthcare facilities.

This toolkit is designed to educate medical providers on the laws and legal consequences that inform their contact with police. Although healthcare workers are often best-positioned to safeguard patient privacy, they may not have the legal training, expertise, or time to best defend patient rights. Providers may be unaware of how even minimal interactions with police can adversely affect their patients. Our goal is to inform ED healthcare providers and other workers about the risks of police presence in the ED, provide guidance on how to protect patient rights in interactions with law enforcement, and offer advice on how to advocate for institutional policy changes in a hospital or healthcare network.

The information included in this toolkit will equip providers to safeguard patient rights, comply with privacy laws, and navigate law enforcement interactions. Ultimately, patients' well-being should be at the center of all policies and practices governing interactions between law enforcement and health care workers.

This toolkit begins by answering general questions about policing in the ED, then provides practical guidance in the form of model scripts for common interactions with police, and concludes with action items for advocacy. It is a working document that will evolve as we learn more about patient and provider needs. We welcome comments and suggestions from readers with experience in commonly encountered scenarios and other interactions with law enforcement.

Particular circumstances and individual states and jurisdictions may impose specific legal obligations; thus, this document does not constitute legal advice.

GENERAL QUESTIONS

Why should I care about police activity in my ED?

Law enforcement activity in the ED can threaten fundamental rights that protect patient privacy, confidentiality, and autonomy. In addition to the legal and ethical principles that require healthcare professionals to ensure patient privacy and dignity in the healthcare setting, the U.S. Constitution also outlines rights that protect all individuals, including ED patients, from unlawful police activity. Allowing police unregulated access to patient care areas can undermine both sets of safeguards. At the very least, granting unregulated ED access to anyone, including police, allows patients' protected health information to be seen and heard by third parties. The unique position of law enforcement officers may also allow them, knowingly or unknowingly, to take advantage of this access and apparent authority to pressure patients, visitors, and healthcare workers into eroding patients' constitutional rights.

ED staff and hospital policymakers who understand their patients' rights are uniquely situated to safeguard them in interactions with law enforcement. The professional, ethical, and legal obligations that mandate healthcare professionals and hospitals to protect patient privacy rights provide a strong foundation for patient advocacy with law enforcement.[2, 3, 4, 5] Because courts often defer to hospital policy and healthcare professionals' decisions when determining the scope of patient rights in healthcare settings, healthcare workers' actions can profoundly alter the course of patient interactions with law enforcement.

Do police have a right to be in my ED?

The short answer is no. There is no legal basis that grants police unrestricted access to the ED or other hospital areas. As in any other business, police have the same rights to access a hospital as any member of the public.[6] If a hospital area is closed to the public, it can be closed to the police. Like all hospital visitors, police can freely enter the premises only to the extent that they are permitted to do so by the hospital or hospital employees. In the narrow circumstances where law enforcement officers do have a legal right to enter without permission, their entry does not legally grant them wholesale access to an entire ED or hospital. For instance, when a judge issues a search warrant or in the presence of an imminent safety threat, police access

[2] "Confidentiality of Patient Information." ACEP, www.acep.org/patient-care/policystatements/confidentiality-of-patient-information/.
[3] "Confidentiality." American Medical Association, 14 Nov. 2016, www.ama-assn.org/delivering-care/ethics/confidentiality.
[4] "Law Enforcement Information Gathering in the Emergency Department." ACEP, www.acep.org/patient-care/policy-statements/law-enforcement-information-gathering-in-the-emergency-department/.
[5] "Privacy and Confidentiality - ANA Position Statement." ANA, www.nursingworld.org/practice-policy/nursing-excellence/official-position-statements/id/privacy-and-confidentiality/.
[6] Moskop, John C., et al. "From Hippocrates to HIPAA: Privacy and Confidentiality in Emergency Medicine—Part II: Challenges in the Emergency Department." Annals of Emergency Medicine, vol. 45, no. 1, 2005, pp. 60–67. doi:10.1016/j.annemergmed.2004.08.011.

is legally restricted to the purposes justifying their entry. Consequently, when police officers have routine or largely unrestricted access to a hospital or ED in the United States, it is usually because that hospital, either through policy or practice, does not restrict law enforcement access to patient care areas.

How do police enter my ED?

In the absence of hospital policy governing law enforcement entry into patient care areas, police often end up informally accessing the ED without a clear purpose or legal justification. Police can enter the ED by arriving with patients in the trauma bay, following hospital staff through key card secured doors, or simply walking into patient care areas when access is uncontrolled. Without thoughtful hospital policies, police officers can linger in the ED without having a clear reason for being present and may inappropriately seek information or physical property from patients, healthcare workers, or other visitors.

Hospital administrators and staff should be united in their commitment to protecting patient privacy and safety.

Because police do not have an unrestricted legal right to enter patient care areas, hospitals and EDs can take important steps to control their access. Organizational policies should clearly outline the limited circumstances in which police may be allowed to enter the ED. At a minimum, law enforcement officers should be required to register as visitors by providing their name, badge number, and a valid reason for entry. Officers should be required to wear temporary hospital visitor identification whenever they enter. Hospital administrators and staff should be united in their commitment to protecting patient privacy and safety.

Hospital security officers are another source of policing in the ED. Hospitals may hire on-site security personnel by contracting with local police departments or employing private security services. These arrangements can result in increased policing of patients. Most directly, police officers hired by the hospital and off-duty police officers working as private security staff have the authority to make arrests and may share information and physical evidence with police investigators, ultimately harming patients' legal rights. On-site police officers and private security staff may also be called on to handle interpersonal conflicts and may be involved in conducting patient room searches and restraining patients, even without receiving training on de-escalation, conflict resolution, and patient rights. Because hospital police are hospital employees, their actions should always be held to hospital patient privacy standards, including protecting patient information and autonomy and safeguarding patient belongings.

How can police presence in the ED harm patients?

POLICE PRESENCE CAN UNDERMINE PATIENT PRIVACY

Patients in the hospital and ED have an expectation of privacy grounded in medical ethics and state and federal laws. Nationally, the privacy rules outlined in the Health Insurance Portability and Accountability Act (HIPAA) legally establish the confidentiality of protected health information (PHI). Although police may seek the disclosure of PHI from healthcare workers while present in the ED, patients have the right to keep information about their medical care confidential from all third parties, including law enforcement officers.

Disclosures of PHI to law enforcement officers may be unlawful if they fail to satisfy HIPAA's complex legal standards governing release of information to law enforcement. Beyond limited mandatory reporting requirements that vary by state—for example, for situations involving child or elder abuse—HIPAA only allows for disclosure of PHI in very narrow circumstances.

Sharing PHI is only legally required in specific situations, such as when state-mandated reporting laws apply or when a judicial warrant or court order is presented.[7] Given the technical nature of HIPAA compliance and the enhanced privacy protections that exist for patients who may be victims of crime, it is easy for healthcare workers, especially in the trauma setting, to inadvertently disclose more information to police officers than is lawful. Because HIPAA exceptions are so tightly-regulated by law, disclosure may ultimately expose healthcare workers and their hospital systems to legal liability. Formal processes to evaluate law enforcement requests for information should be in place. Frontline healthcare workers are rarely equipped to analyze the HIPAA implications of any given request for information or the legality of judicial warrants or court orders. Law enforcement officers who are seeking patient information (including name, injuries, or condition) should be referred to the hospital's legal or medical records department.

In addition to risking PHI disclosures in violation of HIPAA, police activity in patient care areas can threaten patient privacy in other ways. Law enforcement officers can and do use passing comments made by medical providers as evidence in legal proceedings. For instance, police may ask medical staff in the ED for a patient's name, injuries, or status. Medical providers' responses can have serious consequences for patients, such as being used to run a warrant search, initiate deportation proceedings, or provide law enforcement with the grounds to conduct interrogations of vulnerable patients unable to provide consent. Similarly, mentioning to law enforcement that a patient is coherent or giving law enforcement permission to question a patient can later be used to demonstrate that a patient had the capability, capacity, and mental state needed to give consent to police interrogation or searches, even if the patient did not.

Police presence can also violate the privacy of every patient in a care area, even those who never interact with law enforcement officers. These diffuse risks to privacy range from police body cams that can record images or audio of many patients at a time to the intentional or accidental disclosure of PHI to law enforcement officers.[8] Police may overhear sensitive information or private conversations, including PHI related to patients who are not under police investigation. Police may see private personal belongings in patient care areas, including the trauma or resuscitation bay, and police may seek information or property from anyone they encounter. Healthcare providers should understand that it is possible for law enforcement officers to use any information or property that they gather as evidence against patients, visitors, hospital staff, or other parties.

POLICE PRESENCE CAN UNDERMINE PATIENTS' CONSTITUTIONAL RIGHTS

Patients—like all individuals—have constitutional rights that protect them from illegal police activity. Whether by explicitly inviting police into patient care areas or by passively allowing their entry, hospitals and healthcare workers that allow unregulated law enforcement access to the ED or that share patient information or property with law enforcement can create situations that exempt the police from several important legal safeguards that would otherwise protect patient rights.

First, when police are permitted into the ED by hospitals or healthcare workers, they may be considered "lawfully present" and, therefore, able to seize items that are within their "plain view" without a warrant. By allowing police activity in the ED, hospitals and healthcare providers place any patients, patient property, PHI, and sensitive conversations that are visible to or within earshot of the police in the police's "plain view." The police can and do use information or physical evidence that they

[7] 45 C.F.R. § 164.512.; (OCR), Office for Civil Rights. "505-When Does the Privacy Rule Allow Covered Entities to Disclose Information to Law Enforcement." HHS.gov, 18 July 2017, www.hhs.gov/hipaa/for-professionals/faq/505/what-does-the-privacy-rule-allow-covered-entities-to-disclose-to-law-enforcement-officials/index.html.

[8] "Audiovisual Recording in the Emergency Department." ACEP, June 2019, https://www.acep.org/globalassets/new-pdfs/policy-statements/audiovisual-recording-in-the-emergency-department.pdf "Recording ED staff or patients should be a deliberate decision. Use of always-on recording devices, whether by hospital personnel, law enforcement officers, or other persons, should be regulated and restricted to areas in which patient care is not occurring and there is no reasonable expectations of privacy and confidentiality."

encounter, observe, or overhear in the ED. This information and evidence can be used against patients in legal proceedings.

Second, when hospitals, including hospital security, turn over information or physical property to law enforcement, the police can avoid constitutional scrutiny entirely through the legal principle known as the "third-party doctrine." The legal requirements spelled out in the U.S. Constitution—including Fourth Amendment rights against unlawful searches or seizures of persons or property—are rules about how the government can treat individuals and other private parties. They generally do not apply to how citizens or private organizations treat one another.[9] If the police receive property or information from a "third-party," such as a hospital or medical provider, they do not need a warrant. By turning patient property or information over to the police or conducting procedures at the request of police, hospitals facilitate the erosion of patients' constitutional rights. These types of "third-party" actions can insulate the police from legal liability, preventing patients from successfully defending their rights in future legal proceedings.[10]

Third, hospitals that routinely allow law enforcement to visit ED patients who are not in custody make it more difficult for patients to exercise their right to refuse to speak with the police. Choosing to speak with the police is always voluntary. Allowing police into patient care areas without securing informed patient consent can undermine patients' ability to decline police interactions. Patients in the ED, especially trauma victims, are frequently uncomfortable, distressed, medicated, or disoriented and may not be well positioned to advocate for themselves. Additionally, because patients cannot easily leave the ED while they are receiving care, police questioning in a hospital setting can allow the side-stepping of legal rules that ordinarily govern interrogations of individuals who are detained, in police custody, or otherwise not free to leave.

Choosing to speak with the police is always voluntary.

POLICE PRESENCE CAN INFRINGE ON PATIENT AUTONOMY

Without thoughtful hospital policies, police in the ED may inappropriately linger around or follow patients and may actively or passively restrict patients' autonomy. When police are present, hospital staff may falsely believe that patients are under arrest or being detained and feel pressured to comply with police requests, even in the absence of patient consent. Additionally, patients may not feel free to share important PHI with their providers nor make autonomous decisions about their care.[11] Police may also infringe on patients' physical autonomy by using handcuffs or shackles to restrain patients who are in custody. These restraints can violate medical ethics and have disastrous effects on a patient's health and psyche when not medically necessary, particularly when patients are pregnant or have been victims of physical trauma.[12]

Patients have the right to deny consent in police interactions and should be able to make important decisions free from the implied authority of police presence. Respect for patient autonomy is one of the core principles of medical ethics. The principle should extend to patient interactions with law enforcement, such as questioning or surrendering of property in the absence of a valid court order or warrant.

[9] Public hospital employees may be considered state actors when they act as a third-party agent of law enforcement, potentially exposing individual healthcare workers to liability for constitutional rights violations.
[10] Although police are not legally responsible for the actions of third-parties who provide information to law enforcement, those third-parties can be independently liable for wrongdoing. Making unauthorized discretionary disclosures to law enforcement officers may expose hospitals and healthcare workers to litigation and legal liability for violating patient privacy laws or other tort and statutory actions.
[11] Jacoby, Sara F., et al. "A Safe Haven for the Injured? Urban Trauma Care at the Intersection of Healthcare, Law Enforcement, and Race." Social Science & Medicine, vol. 199, Feb. 2018, pp. 115–122. doi:10.1016/j.socscimed.2017.05.037.
[12] Fettig, Amy. "$4.1 Million Settlement Puts Jails on Notice: Shackling Pregnant Women Is Unlawful." American Civil Liberties Union, American Civil Liberties Union, 26 Apr. 2015, www.aclu.org/blog/prisoners-rights/women-prison/41-million-settlement-puts-jails-notice-shackling-pregnant-women#:~:text=In%201999%20Illinois%20became%20the,to%20severely%20restrict%20the%20practice.

Giving patients the unpressured opportunity to make decisions about their interactions with the police is important for protecting patient autonomy.

Unregulated police presence in patient care settings can erode patient trust in medical providers.

POLICE PRESENCE CAN UNDERMINE THE PATIENT-PROVIDER RELATIONSHIP

Unregulated police presence in patient care settings can erode patient trust in medical providers. While healthcare providers have legal and ethical obligations to protect patient privacy, the same standards do not apply to law enforcement. It is reasonable for patients to assume that police officers may use incriminating information against them, even when disclosed for the purposes of medical treatment. As a result, patients may be unwilling to share important medical information with their providers when law enforcement is present or when healthcare providers appear to be working with law enforcement.

Patients, especially those who are most vulnerable, marginalized, or have been subject to police mistreatment in the past, are likely to feel uncomfortable, intimidated, or unwelcome when confronted by law enforcement in a healthcare setting.[13, 14] The full spectrum of negative health outcomes associated with over-policing, especially as it impacts Black patients, is beginning to be acknowledged nationally. Redesigning policies to protect patient rights is consistent with the American Medical Association's recent call for hospitals, clinics, and healthcare workers to "review and reconsider their policies and relationships with law enforcement that may increase harm to patients and patient communities."[15]

How can police presence in the ED threaten my or my hospital's commitment to racial justice?

Members of law enforcement carry into the ED the same individual and systemic racial biases that are present in other aspects of policing. Although research is very limited in this area, studies have demonstrated that Black trauma patients report many negative experiences when law enforcement is present before, during, or after treatment in the ED.[16] The continuing legacies of racism and medical experimentation on vulnerable populations in American history contribute to patient mistrust of healthcare providers and police.[17] Hospitals that contribute to inappropriate policing can exacerbate the racism that Black, Indigenous, and other people of color experience in the healthcare system. This racism is particularly evident in the way many survivors of violent crime, who are disproportionately nonwhite, are treated as suspects by police and healthcare workers while receiving care.

There is an urgent need for healthcare workers to provide trauma-informed care to all patients, especially victims of violent crime. Consciously crafting hospital policies and practices that explicitly protect patient rights and support healthcare workers in advocating for their patients' rights in interactions with law enforcement is an important part of this effort and can send a powerful message that demonstrates a commitment to racial justice.

[13] Jacoby, Sara F., et al. "A Safe Haven for the Injured? Urban Trauma Care at the Intersection of Healthcare, Law Enforcement, and Race." Social Science & Medicine, vol. 199, 2018, pp. 115–122. doi:10.1016/j.socscimed.2017.05.037.
[14] Alang, Sirry, et al. "Police Brutality and Mistrust in Medical Institutions." Journal of Racial & Ethnic Health Disparities, vo. 7, no. 4, 2020 Aug, pp. 760-768. doi: 10.1007/s40615-020-00706-w.
[15] Police Brutality Must Stop." American Medical Association, 29 May 2020, https://www.ama-assn.org/about/leadership/police-brutality-must-stop.
[16] Liebschutz, Jane, et al. "A Chasm Between Injury and Care: Experiences of Black Male Victims of Violence." The Journal of Trauma: Injury, Infection, and Critical Care, vol. 69, no. 6, 2010, pp. 1372–1378. doi:10.1097/ta.0b013e3181e74fcf.
[17] Kerrison, Erin M., and Alyasah A. Sewell. "Negative Illness Feedbacks: High-Frisk Policing Reduces Civilian Reliance on ED Services." Health Services Research, vol. 55, no. S2, 2020, pp. 787–796. doi:10.1111/1475-6773.13554.

WHAT CAN I DO?

How can I be a better advocate for my patients' rights?

The first step to advocating for your patients is understanding their rights. Individuals have the right to refuse to speak with the police. They have the right to withhold their consent from searches of their person or property unless there is a specific and valid court order or warrant. As a healthcare provider, you should understand that your patients often have little to gain and much to lose from speaking with law enforcement officers, consenting to searches, or voluntarily turning over information or belongings.

When the police request something from you or your patient, you should not provide consent on your patient's behalf. When police make a request, they either: (1) already have a valid warrant or other legal reason that they can get what they want, in which case you should refer the matter to your legal department,[18, 19] or (2) do not have such a justification, in which case your consent only serves to give the police access to information or property that the patient had the legal right to keep private. The best way to safeguard your patients' legal rights against unlawful police action is to not give any indication that you are providing consent for your patient to police actions.

Even passively allowing police to access patients or patient care areas can be interpreted as functionally consenting to law enforcement activity on behalf of your patients. This passivity is likely to reduce your patients' rights and expand police intrusion into their care. Instead of surrendering patients' rights, you should inform patients that they can refuse to consent to police activity,[20] and then you should leave the choice with your patient.

Also, you should not consent to police activity on behalf of an incapacitated patient. If your patient is incapacitated and cannot give consent, you should not give consent for them, either directly or functionally through inaction or lack of hospital policy. Just as you would not perform a non-emergent procedure on an incapacitated patient without consent, you should not provide law enforcement with access to an incapacitated patient without consent. Similarly, patient consent should be obtained before performing any police requested procedure.

[18] "Search Warrant Handbook." American Civil Liberties Union, 9 Apr. 2013, www.aclu.org/legal-document/search-warrant-handbook.
[19] "Protecting Immigrant Community Members Accessing Health Care." American Civil Liberties Union Northern California, July 2018, www.aclunc.org/docs/kyr-accessing_health_care.pdf.
[20] Withholding consent is especially important in situations when police go beyond the scope of a valid judicial warrant, conduct a search with a false or invalid warrant, or otherwise act overbroadly. Any information gathered in such an unlawful police action can be challenged as inadmissible evidence in court if a patient or provider did not consent. It cannot be challenged, however, if the police secured consent.

How should I interact with the police to better protect patient rights?

Empower yourself to approach police in the ED when they are present and advocate for your patients' rights when police approach you or your patients. In general, follow a three-step approach to protecting your patients' rights in interactions with law enforcement:

- **First**, approach and identify officers who are present in patient care areas.
- **Second**, preserve patients' right to withhold consent from police searches, seizures, information disclosures, or physical access.
- **Third**, refer warrants, court orders, or requests from law enforcement to authorized parties in your hospital, such as your administrative supervisor, legal department, or department of medical records.

FIRST: APPROACH LAW ENFORCEMENT OFFICERS

If you see law enforcement officers in patient care areas, ask for their names and badge numbers, ask questions about their presence, and ask them to leave if it is appropriate. Ideally this information will be collected and recorded systematically upon entry to the ED and noted in patient medical records. However, even the act of asking for the information can help create accountability for law enforcement officers.

SCENARIO

If you see an unidentified police officer, you can approach them and say:

"Hello, can I get your name and badge number?" [Record name and badge number]

"This area is restricted to patients, medical staff, and approved visitors, and we do not consent to law enforcement being present here without a valid warrant that has been reviewed by an appropriate hospital authority. To protect patient privacy, people who are not patients, staff, or registered visitors are required to wait outside the emergency department. Follow me and I can escort you outside. Thank you."

SECOND: PRESERVE PATIENTS' RIGHT TO WITHHOLD CONSENT

Refusing to Speak with Police

If a member of law enforcement approaches you seeking access to a particular patient, ask if that patient is being detained or placed under arrest. Like anyone walking on the street, patients who are not in custody can always refuse to speak with the police, and patients who are in custody can exercise their constitutional right to remain silent.

SCENARIO

If the police are asking to speak with patient X, you can say:

"Hello, is patient X being detained or placed under arrest?"

[If No] "Thank you. I will go see if patient X is being cared for here. If he is, I will inform him that you are asking to speak with him, and I will let you know if he would like to speak with you. In the meantime, to protect patient privacy, we ask that people who are not patients, staff, or registered visitors wait outside the emergency department. Follow me and I can escort you outside. Thank you."

[If Yes] "Please move away from the patient's room. To protect patient privacy, we ask that all nonmedical staff stand out of ear shot from patients and their families. You may maintain a line of sight since this patient is in custody, but we cannot permit you to overhear sensitive private health information. Thank you for understanding."

The hospital should not consent on behalf of your patient.

Responding to Requests for Searches and Seizures

If the police want to search your patient or property that arrived with your patient, the hospital should not consent on behalf of your patient.

SCENARIO

If the police want to search or take property that arrived at the hospital with patient X without a warrant, you can say:

"Patient X has not consented to your search or seizure of her body or property. This hospital also does not consent to police searches or seizures of any other property here without a valid warrant. We do not consent to you searching patient X or removing any property from the premises. To protect patient privacy, people who are not patients, staff, or registered visitors are required to wait outside the emergency department. Follow me and I can escort you outside. Thank you."

Responding to Requests for Information Disclosures

HIPAA generally prohibits hospitals and medical providers from sharing PHI with third parties. Legal and ethical standards obligate healthcare workers to safeguard their patients' PHI, and HIPAA disclosure exceptions are governed by complex and highly specific statutory rules. If you are not equipped to make rapid determinations about the legality of every disclosure you are asked to make, you should refer law enforcement officers who are seeking information about patients—including a patient's name, injuries, or status—to normal hospital processes such as the medical records department, hospital directory system, or, if available, advisors able to make an educated determination on the legality of the requested HIPAA disclosure.

SCENARIO

If the police ask you for specific information about patient X, you can say:

"Patient X has not consented to disclosing their protected health information to any third parties, including law enforcement. If you do not have a warrant for the information you are asking for, we will not share any information about this patient. If you have a subpoena or search warrant for this information, you can submit it to our hospital legal department or medical records department. To protect patient privacy, people who are not patients, staff, or registered visitors are required to wait outside the emergency department. Follow me and I can escort you outside. Thank you."

Refusing to Conduct Requested Procedures or Searches

Conducting a procedure that is medically unnecessary or without a patient's informed consent is a violation of medical ethics and laws governing medical practice. In many jurisdictions, it can constitute medical battery. Although law enforcement officers may ask that you perform evidentiary blood alcohol testing for patients suspected of driving under the influence or that you search individuals suspected of having ingested or otherwise stored drugs or other illegal objects in their bodies, you do not have to comply with these or other similar requests. Note that if you perform procedures or searches and/or provide tests results to law enforcement officers, your actions may be interpreted as a "medical search" and not a law enforcement search, insulating police from Fourth Amendment requirements that protect your patients from illegal police activity.

Even if police have a warrant for a procedure, your ethical obligations to provide care and not harm your patient still stand.[21] You can refuse to participate while still conveying law enforcement requests to your patients, so they can make choices about their care.

Refusing to Limit Visitation or Access to Information

Law enforcement officers may wish to limit friends and family from visiting with a particular patient or may seek to delay sharing medical information with a patients' family during an investigation. Generally, there is no legal basis for law enforcement officers interfering with ordinary hospital visitation for patients who are not in custody, nor is there generally a legal basis to prevent you from sharing medical information with a patients' next-of-kin. Any restrictions you encounter in this area may be the result of specific state or local guidance, or explicit policies or agreements between your hospital and the local law enforcement or corrections agency. If you believe or are told such policies exist, it is important to understand the precise language and reach of those rules and policies and to make sure they are applied correctly.

THIRD: REFER REQUESTS AND WARRANTS

Medical professionals are rarely equipped to properly review the legality of police requests. If police officers present a warrant or court order or if they claim to have another legal right to access PHI or search or seize a patient or patient property, you should refer them to your supervisors, your legal department, general counsel's office, department of medical records or other department in your organization that is authorized to review and respond to police requests. You should do the same for repeated requests to receive access to patient care areas, a particular patient who is not in custody, PHI, or patient property.

SCENARIO

If the police claim to have a warrant or other legal right to search or photograph a patient, access a patient's records, or receive information about a patient, you can say:

"I understand you have a warrant to search this patient, access their health information, or take their property. As an ED medical provider, I am not authorized to review your claim on my patient's behalf. We do not consent to unreviewed searches or seizures on this property. I will refer you to someone who is authorized and equipped to review your claim. You will need to speak with: [my supervisor], or [the hospital legal department], or [the hospital department of medical records]"

How can I help my patient get an attorney?

When confronted with police activity or investigation, it is often a good idea for your patients to seek legal counsel. Aside from hiring a private attorney, there are lower-cost options that they may want to pursue. Most major public defender offices have 24/7 helplines that your patient can call if they or you believe they need legal assistance.[22] If your jurisdiction does not have a public defender office, your patient may contact your local chapter of the National Lawyers Guild.[23] Familiarize yourself with your local public defender's helpline number, and advocate for your hospital to establish procedures by which patients can engage with an attorney when they want or need one.

One way to help meet the disparate and evolving legal needs of vulnerable patients and victims of violence is for your hospital to establish a Medical Legal Partnership (MLP). The MLP model embeds lawyers within a health care team to seek civil legal remedies

[21] Law Enforcement Information Gathering in the Emergency Department." ACEP, www.acep.org/patient-care/policy-statements/lawenforcement-information-gathering-in-the-emergency-department/.
[22] See Cook County Public Defender (Chicago, IL), https://www.cookcountypublicdefender.org/public-defender-faq; Brooklyn Defender Services (Brooklyn, NY), http://bds.org/; The Public Defender Service for the District of Columbia (Washington, DC), https://www.pdsdc.org/contact-us; Greater Boston Legal Services (Boston, MA), https://www.gbls.org/coronavirus-information; and Los Angeles County Public Defender (Los Angeles, CA), https://pubdef.lacounty.gov/get-in-touch/.
[23] See National Lawyers Guild Chapter List: www.nlg.org/chapters.

to address health-harming social and economic circumstances.[24] This approach can guard patients' rights while allowing medical providers to focus on treating their patients.

What can I do for patients who are under arrest or in custody?

Patients who are in formal law enforcement custody may come to the ED for medical clearance or care. These patients may be under arrest, on their way to jail, or incarcerated in jail or prison. The fact that patients are in formal law enforcement custody does not alter medical providers' obligations to ethically provide care.

Law enforcement agencies should not be treated as a patient's surrogate medical decision maker.

Although law enforcement officers, including correctional guards, may be guarding or securing patients, medical providers should still take steps to ensure patient privacy and autonomy. For instance, you should take steps to ensure the confidentiality of patient health information by asking law enforcement officers to stand out of earshot during patient consultations. You should also be sure to write down follow-up care instructions and other protected health information and seal these documents in an envelope when discharging the patient to prevent accidental disclosure of PHI.

Additionally, you should act to protect the autonomy of patients who are under arrest or in custody. Even though their physical liberty may be restricted, these patients still retain the right to make decisions about their medical care, and the ordinary obligations of medical ethics always apply. Patients in custody or under arrest can always refuse care, and informed consent should always be obtained from the patient or (if a patient is incapacitated) from a designated surrogate for non-emergent procedures. Law enforcement agencies should not be treated as a patient's surrogate medical decision maker; the process for determining the proper surrogate is the same as for any other patient. If you are presented with a warrant that requires a medical procedure, your ethical obligations to ensure that the medical procedure is necessary still apply. You should also ask for the removal of handcuffs and shackles that can impede patient care.

Law enforcement officers may ask for a patient to be medically cleared for jail or prison. Your determinations in these situations should be based upon the health of the patient and not influenced by the needs or priorities of law enforcement agencies.

[24] "The Need for Medical-Legal Partnership." National Center for Medical Legal Partnerships, 13 Aug. 2018, medical-legalpartnership.org/need/.

ACTION ITEMS

How can I advocate for change in my hospital or ED?

Advocate for the implementation of new policies in your hospital system to protect patient rights! ED patients and hospital staff should be empowered to protect patient privacy from law enforcement. When it comes to police presence in the ED, patient privacy is an issue of hospital policy, and you should advocate to change those policies to regulate law enforcement access to patients and patient care areas. You should discuss these issues with your hospital's legal department, risk management department, or leadership teams in your organization or department. If your hospital or department works with social workers, victim advocates, or civil legal aid attorneys, these can be promising places to build coalitions. It is important to recognize that hospital attorneys and administrators may not be well-informed in this area of law, and you should consider seeking help from outside resources.

What specific policies should I advocate to change?

Hospital policies can be changed in several areas to help ensure protection of patient rights. Areas to target include: (1) visitor access, (2) sharing of information with police, (3) securing, storing, searching, and sharing of patient property, including contraband and weapons, (4) police requests for the performance of tests or procedures, (5) family visitation when law enforcement is present, and (6) use of handcuffs, forensic restraints, and shackles. Hospitals that lack policies in these areas or that have policies that do not safeguard patient rights make it easier for law enforcement to abuse their power and more difficult for medical staff who do not have legal expertise to protect their patients.

What can I do if police are not present in my ED?

Signal your commitment to protecting patient rights in your ED by reexamining and improving your current policies. If you work in an ED where, because of your location or the demographic you serve, there is not a large law enforcement presence, it is still important for you to adopt policies that safeguard patient rights and hold law enforcement accountable. Implementing these policies signals to patients, providers, peer institutions, and law enforcement organizations that you are committed to protecting patients' privacy and upholding patient dignity.

How can I learn more about protecting patient rights in interactions with law enforcement?

Please reach out to **Ji Seon Song** at jssong@law.stanford.edu if you want to stay informed or contribute to our efforts to hold police accountable in hospital settings. We are developing model policies that hospitals can adopt to better protect patient rights in interactions with law enforcement.

In advocating and implementing new procedures and protections for patient rights, you may meet resistance from colleagues, your institution, or law enforcement authorities. The issues involving law enforcement in the ED are complex and important for patients, yet they have received far less examination than other issues involving policing and patient care. We are available to collaborate and welcome the opportunity to discuss your individual experiences.