Police Prosecutor Update

SPECIAL UPDATE ON PENDING BLOOD DRAW LEGISLATION

Many of you may be aware that the Indiana Court of Appeals in *Brown v. State* , 911 N.E.2d 558 (Ind. Ct. App. 2009) issued a ruling interpreting IC 9-30-6-6 to require that all blood draws be conducted by a "certified phlebotomist" regardless of whether or not they are in a hospital setting. This case changed what had been settled Indiana law for at least the last twenty years, and undermined our local expedited blood draw procedure at Bloomington Hospital that we adopted in June of 2007. Although the Indiana Supreme Court has accepted transfer of *Brown* on appeal, and thus the Court of Appeals decision has been vacated for the time being, the confusion in the statute still has to be cleared up. To that end, I have been working with the Indiana Prosecuting Attorneys Council (IPAC) and our local legislators Rep. Matt Pierce, Rep. Peggy Welch, and Sen. Vi Simpson to develop an amendment to fix the problem in the statute. Sen. Lanane agreed to present an amendment in the Senate. This Wednesday a Senate Committee held a hearing on the proposed legislation. Below is a transcript of my testimony on behalf of Indiana prosecutors to that committee. The good news is that the committee voted in favor the amendment. There is still more work ahead to ensure that this legislation is passed. But based on the initial support it received in the Senate committee hearing I am hopeful that the amendment will be adopted this Spring.

Chris Gaal
Monroe County Prosecuting Attorney

Testimony to Senate Committee Hearing
Senate Bill 342, as amended.
January 27, 2010

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Monroe County Prosecuting Attorney

Good Morning Senators. My name is Chris Gaal and I am the Monroe County Prosecuting Attorney. I would like to thank you for the opportunity to address this issue, and in particular thank Senator Lanane for moving this legislation forward. This amendment is of great interest to prosecutors and law enforcement throughout Indiana, and also of great interest to hospitals, because it is a resource issue for them.

The proposed amendment clarifies confusion with regard to IC 9-30-6-6. It clears up a technical issue and clarifies the original intent in that statute. This comes up in the context of blood draws in drunk driving cases pursuant to a search warrant approved by a judge. The statute requires that such a blood draw be conducted (a) according to a protocol approved by a physician, and (i) in a medically acceptable manner.

Then we get to section (j), which contains a restrictive list. This section applies to situations where "…law enforcement transport a suspect to a place where a sample may

be obtained…" It does not say hospital. It says a "place." It is clear from this language that the original intent of this section was to provide an opportunity for law enforcement to contract with medical service providers to conduct a blood draw at some other facility than a hospital. For instance, law enforcement may transport a suspect to a doctor's office, or may want to arrange for a nurse or EMT to come to the jail. This kind of a contract might be beneficial for the convenience, increased efficiency, time-savings, or reduced costs. Again, it is clear that section (j) contemplates some other place than a hospital. In that case, the restrictive list ensures some degree of medical competence of the person doing the blood draw – who should do it. And that is fine.

Then the Court of Appeals in *Brown v. State* applied that restrictive list to the entire statute. The problem is that the list contains the term "certified phlebotomist." I don't know where that language came from. But there is no such thing in Indiana. It is not a job classification used at Bloomington Hospital, nor at Clarian, nor at other hospitals around Indiana insofar as I am aware. I have had extensive conversations with the lab director at Bloomington Hospital regarding this issue. They do not increase pay for a "certified" phlebotomist, so that category is not reflected in their pay schedule. In practice, hospitals use phlebotomists – not "certified" phlebotomists. At Bloomington Hospital they have two scheduled on weeknights, and one scheduled on weekends. They don't use doctors or nurses for routine blood draws – that is not what they do in real practice. It would be unreasonably burdensome to apply that restriction to hospitals. If only doctors or nurses can do blood draws in drunk driving cases, and not a phlebotomist, then the practical effect is that they cannot do it. It is impracticable.

The amendment clarifies that section (j) applies to blood draws NOT in a licensed hospital setting. The restrictive list in section (j) still provides an assurance of medical competence in those other settings – and that is as it should be. As for the rest of the statute, the burden remains on the state to show that the blood draw was conducted 1) in a licensed hospital setting, 2) according to a protocol approved by a physician, and 3) in a medically acceptable manner.

This technical amendment corrects confusion in the statute, clarifies the original intent, reflects the reality of practice in a hospital setting and the resources available – the use of phlebotomists not "certified" phlebotomists, and does not unfairly prejudice anyone's rights.

Therefore, I ask you to support this amendment. Thank you.