

Welcome to the MHI Webinar

Federal and State Laws Related to Blood Draws and Requests from Law Enforcement

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- If you have questions, please contact the speakers directly. Their contact information will be provided on the last screen of this presentation.

FEDERAL AND STATE LAWS RELATED TO BLOOD DRAWS AND REQUESTS BY LAW ENFORCEMENT

MHA Health Institute

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BACKGROUND

- On July 26, 2017, Alex Wubbels, a nurse in the burn unit at University Hospital in Salt Lake City, Utah, is arrested by a Salt Lake City police officer for refusing to perform a blood draw on an unconscious patient who was brought into the hospital after a fatal automobile accident. Wubbels advised the police officer that she could not perform the blood draw, unless the patient consented to the blood draw or the police officer produced a search warrant signed by a judge ordering the blood draw. Wubbels actions were consistent with hospital policies.
- On November 1, 2017, Wubbels settled all claims resulting from her arrest with the Salt Lake City Police Department and the University of Utah (Wubbels' employer) for \$500,000. Both the Salt Lake City Police Department and the University are paying part of the settlement.

WHAT WENT WRONG?

- The police officer believed he had an absolute right to have the blood draw performed under Utah law under an “implied consent” theory (i.e., by accepting a driver’s license issued by the State of Utah, the driver impliedly consents to having his/her blood drawn if needed to determine if the driver was driving while “under the influence”).
- University Hospital policy specifically stated that hospital personnel would not perform a blood draw at the request of law enforcement, unless the patient consented to such blood draw or law enforcement produced a search warrant signed by a judge ordering the blood draw. (The policy was based on the hospital’s understanding of federal and state law.)

WHO WAS RIGHT?

- Not the police officer. The patient was not the suspected of driving “under the influence”. The patient was hit “head-on” by another driver who crossed the centerline while fleeing from the police. Utah’s implied consent doctrine only applies if the driver in question is suspected of driving “under the influence”. In this case, the patient was not suspected of driving under the influence. Therefore, Utah’s “implied consent” doctrine was inapplicable.
- Not the nurse. Although the nurse was following hospital policy, hospital policy did not take into account the fact that exigent circumstances might exist which justify the request by a police officer for a blood draw. As a result, the nurse’s refusal to perform the blood draw could, in fact, impede the police officers ability to obtain a permissible blood draw.

WHAT REALLY WENT WRONG?

- University Hospital policy placed front-line nursing staff in direct conflict with law enforcement officers by requiring them to impose Constitutionally-mandated limitations on searches and seizures under the 4th Amendment of the U.S. Constitution.
- These Constitutionally-mandated limitations are neither clear nor well-understood by judges and lawyers, let alone law enforcement officers and nurses.
- Imposing such obligations on front-line nursing staff completely ignores the statutory immunity provided under most state laws (including Utah's state laws) for medical personnel and facilities engaged in performing blood draws at the request of law enforcement officers.

The background of the slide is a solid orange color with a pattern of lighter orange leaf silhouettes scattered across it. The leaves vary in shape and size, some resembling maple leaves and others more like simple ovals.

**HOW CAN WE AVOID
THIS SAME THING
FROM HAPPENING
AT OUR HOSPITAL?**

TOPICS OF DISCUSSION

- The Constitutional requirements for lawful blood draws under the 4th Amendment of the U.S. Constitution
- The applicable directives and immunities for health care personnel performing blood draws at the direction of law enforcement officers under Missouri and Kansas law
- Best practices for health care providers/hospitals in Missouri and Kansas when requested to perform a blood draw by law enforcement officers

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**4th AMENDMENT
OF
THE U.S. CONSTITUTION**

4TH AMENDMENT

The 4th Amendment of the U.S. Constitution provides as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

4TH AMENDMENT APPLIED TO BLOOD DRAWS

- Prior to the 1966 decision of the U.S. Supreme Court in Schmerber v. California, the 4th Amendment limited the right of law enforcement officers to obtain a blood draw from a person suspected of driving under the influence to the following two (2) circumstances:
 - The suspect consents to the blood draw; or
 - A judge issues a search warrant authorizing the performance of the blood draw on the suspect. (To obtain the search warrant, the law enforcement officer was required to demonstrate to the judge that there was probable cause to believe that the suspect was driving under the influence of alcohol or drugs.)

4th AMENDMENT AFTER SCHMERBER V. CALIFORNIA

- In *Schmerber v. California*, the U.S. Supreme Court concluded that it was consistent with the requirements of the Fourth Amendment for law enforcement officers to obtain a blood sample from a person suspected of a DUI without that person's consent and without a search warrant, but only if "exigent" circumstances existed.
- In discussing the "exigent circumstances" that would justify a warrantless blood draw, the Supreme Court focused on whether the officer might reasonably believe that he/she was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence."
- In making such determination, however, the Supreme Court indicated that it would look at the totality of the facts.

4TH AMENDMENT AFTER MISSOURI V. MCNEELY

- In *Missouri v. McNeely*, the State of Missouri argued that the mere fact the amount of alcohol in a person's blood naturally dissipates with the passage of time, in and of itself, constitutes an exigent circumstance justifying the taking of a blood sample without a person's consent and without a search warrant. As a result, no search warrant was necessary for a blood draw under such circumstances.
- The U.S. Supreme Court rejected this argument and reaffirmed that a blood draw may not be performed with the suspect's consent, with a search warrant signed by a judge, or with exigent circumstances (as determined from the totality of the facts). This represents the most recent articulation of the U.S. Supreme Court on the application of 4th Amendment to blood draws.

PENALTY FOR VIOLATING THE 4TH AMENDMENT

- Evidence obtained through a search or seizure that violates the requirements of the 4th Amendment is inadmissible in court to prove the guilt of the suspect.
- In at least one case, the U.S. Supreme Court held that a government hospital violated the 4th Amendment when it initiated a program in which pregnant women were alcohol/drug tested and turned over to law enforcement to coerce them to enter alcohol/drug treatment.



**MISSOURI LAWS RELATING
TO HEALTH CARE PROVIDERS
PERFORMING BLOOD DRAWS
AT THE REQUEST OF LAW
ENFORCEMENT OFFICERS**

TWO KEY PROVISIONS OF MISSOURI LAW

- **R.S.Mo. 577.029** – directing health care providers to perform a blood draw at the request of a law enforcement officer
- **R.S.Mo. 577.031** – granting health care providers and facilities immunity for any claims relating to such blood draws

R.S.Mo. 577.029

A licensed physician, registered nurse, phlebotomist, or trained medical technician, acting at the request and direction of the law enforcement officer, **shall** withdraw blood for the purpose of determining the alcohol content of the blood, unless such medical personnel, in his or her good faith medical judgment, believes such procedure would endanger the life or health of the person in custody.

IMPACT OF R.S.Mo. 577.029

Physicians, registered nurses, phlebotomists, or trained medical technicians practicing in the State of Missouri **are required to** perform a blood draw on a suspect if requested to do so by a law enforcement officer, unless he/she believes, in his/her good faith medical judgment, that the performance of such blood draw would threaten the life or health of the suspect.

R.S.Mo. 577.031

No person who administers any test pursuant to the provisions of sections 577.020 to 577.041 upon the request of a law enforcement officer, no hospital in or with which such person is employed or is otherwise associated or in which such test is administered, and no other person, firm, or corporation by whom or with which such person is employed or is in any way associated, shall be civilly liable in damages to the person tested unless for gross negligence, willful or wanton act, or omission.

IMPACT OF R.S.Mo. 577.031

Neither a health care provider performing a blood draw at the request of a law enforcement officer nor the hospital at which he/she works nor his/her employer is civilly liable in connection with such blood draw, unless he/she is grossly negligent or acts in a willful or wanton manner.*

*To avoid liability for willful or wanton acts, we recommend that health care providers in Missouri not physically restrain a suspect to obtain a blood draw and not to perform a blood draw on a suspect who is physically restrained.

BEST PRACTICES FOR HEALTH CARE PROVIDERS AND HOSPITALS IN MISSOURI

- If a health care provider is requested by a law enforcement officer to perform a blood draw on a suspect, he/she
 - Should not concern himself/herself with the basis upon which the law enforcement officer believes he/she is entitled to the blood draw
 - Should perform the blood draw, unless:
 - He/she believes, in his/her good faith medical judgment, that doing so would risk the life or health of the suspect;
 - He/she is asked to restrain the suspect in order to perform the blood draw; or
 - The suspect is being restrained at the time he/she is asked to perform the blood draw
 - Document encounter including all circumstances surrounding blood draw and name of law enforcement officer
- Confirm that the health care provider's/hospital's policies are consistent with the approach set forth above.

**KANSAS LAWS RELATING TO
HEALTH CARE PROVIDERS
PERFORMING BLOOD DRAWS
AT THE REQUEST OF LAW
ENFORCEMENT OFFICERS**

KANSAS LAW ON BLOOD DRAWS

- Kansas requires medical professionals to perform blood draws at the direction of law enforcement officers (LEO) in 2 circumstances
- LEOs may direct medical professionals to draw a blood sample from a person
 - Driving Under the Influence (DUIs)
 - K.S.A. § 8-1001
 - Possession of Firearm Under the Influence
 - K.S.A. § 21-6332

DUIs (K.S.A. § 8-1001)

(a) Any person who operates or attempts to operate a vehicle is considered to have given implied consent to submit to a blood test to determine the presence of alcohol or drugs.

- Testing includes all quantitative and qualitative test for alcohol and drugs
- The dead or unconscious have not withdrawn consent to blood tests

A person can revoke or withdraw their implied consent. *State v. Ryce*, 368 P.3d 342 (Kan. 2016).

DUIs (K.S.A. § 8-1001)

(b) LEO shall request a person to submit to a blood test:

(1) If at the time of test the LEO has reasonable grounds to believe the person was:

- Operating/ attempting to operate vehicle under influence of alcohol, drugs, or both; or
- Driving a commercial motor vehicle with alcohol/drugs in their system; or
- Under the age of 21 and operating/attempting to operate a vehicle with alcohol/drugs in their system

AND one of the following exists:

- Arrested/in custody for any violation of any state statute, county resolution, or city ordinance; or
- Involved in an accident resulting in property damage or non-serious personal injury

(2) The person was operating/attempting to operate a vehicle and involved in an accident resulting in serious injury/death and the person could be cited for any traffic offense

- The LEO directing administration of the test may act on personal knowledge or on the basis of the collective information available to the LEOs involved in the accident investigation or arrest

DUIs (K.S.A. § 8-1001)

(c) The withdrawal of blood at the direction of a LEO may only be performed by a medical professional:

- Physician (or a person acting under the direction of such licensed person), PA, RN, LPN, EMT/paramedic, phlebotomist

DUIs (K.S.A. § 8-1001)

(d) LEO may direct a medical professional to draw a sample of blood from a person if:

(1) Person consents and LEO has reasonable grounds to believe the person was:

- Operating/ attempting to operate vehicle under influence of alcohol, drugs, or both; or
- Driving a commercial motor vehicle with alcohol/drugs in their system; or
- Under the age of 21 and operating/attempting to operate a vehicle with alcohol/drugs in their system

AND one of the following exists

- Arrested/in custody for any violation of any state statute, county resolution, or city ordinance; or
- Involved in an accident resulting in property damage or non-serious personal injury; or

(2) Person consents and was operating/attempting to operate a vehicle and involved in an accident resulting in serious injury/death and the person could be cited for any traffic offense; or

DUIs (K.S.A. § 8-1001)

(d) Law enforcement officer may direct a medical professional to draw a sample of blood from a person if:

(3) The person is medically unable to consent, if the person was operating/attempting to operate a vehicle and involved in an accident resulting in serious injury/death and the person could be cited for any traffic offense; or

(4) The person refuses the test , if the person was operating/attempting to operate a vehicle and involved in an accident resulting in serious injury/death and the person could be cited for any traffic offense

DUIs (K.S.A. § 8-1001)

(e) Medical professional will be directed by LEO to withdraw a sample of blood through a written statement

- Medical professional shall take the sample as soon as practical and deliver the sample to the LEO (provided the collection of the sample does not jeopardize life, cause serious injury, or seriously impede medical assessment, care, or treatment)
- Once presented with the written statement, the medical professional and medical facility can act on good faith that the requirements have been met for the withdrawal of blood

DUIs (K.S.A. § 8-1001)

(e) Medical professional will be directed by LEO to withdraw a sample of blood through a written statement (continued)

- Medical professional shall not require person to sign any additional consent/waiver forms
- Medical professional and medical facility shall not be liable in any action alleging lack of consent or lack of informed consent

DUIs (K.S.A. § 8-1001)

(f) The sample shall be an independent sample and not part of a sample collected for medical purposes.

- Person collecting sample shall complete the collection portion of the document provided by the LEO

DUIs (K.S.A. § 8-1001)

g) If person must be restrained to collect the blood sample, LEOs are responsible for applying such restraint in accordance with acceptable law enforcement restraint practices

- Restraint shall not jeopardize person's safety or that of the medical professional during the drawing of the sample and should not interfere with medical treatment

DUIs (K.S.A. § 8-1001)

k) Before the blood test is administered, the person shall be given oral and written notice that:

- KS law requires person to submit to blood (breath, or urine) test to determine if person is under the influence of alcohol, drugs, or both;
- Opportunity to consent to or refuse a test is not a constitutional right; . . .
- If they refuse they may be charged with a separate crime of refusing to submit to a test; . . .

Possession of Firearm Under the Influence (K.S.A. § 21-6332)

(a) Possession of a firearm under the influence is knowingly possessing or carrying a loaded firearm on or about such person, or within such person's immediate access and control while in a vehicle, while under the influence of alcohol or drugs, or both, to such a degree as to render such person incapable of safely operating a firearm

Possession of Firearm Under the Influence (K.S.A. § 21-6332)

(d) LEO shall request a person to submit to a blood test to determine the presence of alcohol or drugs if the LEO has probable cause to believe the person is in possession of a firearm and under the influence

(e)(1) The withdrawal of blood at the direction of a LEO may only be performed by a medical professional

- Physician (or a person acting under the direction of such licensed person), PA, RN, LPN, EMT/paramedic, phlebotomist

Possession of Firearm Under the Influence (K.S.A. § 21-6332)

(e)(2) LEO may direct a medical professional to draw a sample of blood if the person has consented or probable cause exists for a LEO to believe the person is in possession of a firearm under the influence of alcohol, drugs, or both

Possession of Firearm Under the Influence (K.S.A. § 21-6332)

(e)(3) Medical professional will be directed by LEO to withdraw a sample of blood through a written statement

- Medical professional shall take the sample as soon as practical and deliver the sample to the LEO (provided the collection of the sample does not jeopardize the person's life, cause serious injury, or seriously impede medical assessment, care, or treatment)
- Once presented with the written statement, the medical professional and medical facility can act on good faith that the requirements have been met for the withdrawal of blood

Possession of Firearm Under the Influence (K.S.A. § 21-6332)

(e)(3) Medical professional will be directed by LEO to withdraw a sample of blood through a written statement (continued)

- Medical professional shall not require person to sign any additional consent/waiver forms
- Medical professional and medical facility shall not be liable in any action alleging lack of consent or lack of informed consent

Possession of Firearm Under the Influence (K.S.A. § 21-6332)

(e)(4) The sample shall be an independent sample and not part of a sample collected for medical purposes.

- Person collecting sample shall complete the collection portion of the document provided by the LEO

Possession of Firearm Under the Influence (K.S.A. § 21-6332)

e)(5) If the sample is taken under the authority of a search warrant and the person must be restrained to collect the sample, LEOs are responsible for applying such restraint in accordance with acceptable law enforcement restraint practices

- Restraint shall not jeopardize person's safety or that of the medical professional during the drawing of the sample and should not interfere with medical treatment

Kansas Healing Arts Act

K.S.A. § 65-2837(b): Defines unprofessional conduct to include “assisting in the care or treatment of a patient without the consent of the patient . . .” and “performing unnecessary tests . . . which have no legitimate medical purpose.”

BEST PRACTICES FOR HEALTH CARE PROVIDERS AND HOSPITALS IN KANSAS

- If a health care provider is requested by LEO to perform a blood draw on a patient
 - Obtain written statement from LEO
 - Take sample, unless the collection of the sample would jeopardize life, cause serious injury, or seriously impede medical assessment, care, or treatment
- If patient refuses, consider whether court order required
- LEO responsible for restraint, if required (but restraint may not jeopardize person's safety or that of the medical professional during the drawing of the sample and should not interfere with medical treatment)
- KHA offers resources for hospital policies to address chemical testing situations

QUESTIONS?

KANSAS

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MISSOURI

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