

1983 WL 181794 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 15, 1983

**\*1 SUBJECT: Highway, DUI**

(1) Under certain circumstances, a law enforcement officer or county coroner may request a health care professional to draw a blood sample for the purpose of obtaining a blood/alcohol analysis.

(2) Health care professionals are under no legal duty to take a blood sample when so requested by law enforcement officers; they are under such a duty when lawfully requested by the county coroner.

(3) The liability, if any, of health care professionals in performing these tests depends on the circumstances of the particular test.

The Honorable Virginia L. Crocker  
District 15  
South Carolina House of Representatives

QUESTIONS:

1. The authority, if any, of law enforcement officers requesting health care professionals to draw blood from an individual arrested for DUI for the purpose of obtaining a blood/alcohol sample.
2. The authority, if any, of the county coroner to make similar requests.
3. Whether a physician, nurse or health care technician must extract a blood sample for blood/alcohol analysis if requested to do so by a law enforcement officer or coroner.
4. What liability, if any, health care professionals might incur in drawing a blood sample at the request of a law enforcement officer or coroner.

OPINION:

The questions you have raised are complex and present a number of difficult issues. This Opinion will address each of these questions separately, pointing out various factors relevant to legal analysis. While this Opinion does not purport to address every contingency, it will attempt to discuss various factual circumstances affecting our conclusion.

Initially, it is well settled that law enforcement officers, under certain circumstances, have a constitutional right to have a blood sample taken from an individual who has been arrested for driving under the influence. In [Schmerber vs. California, 384 U.S. 757, 86 S.Ct. 1826 \(1966\)](#), the United States Supreme Court held that a police officer may require a blood test without a search warrant and without consent following an individual's arrest for driving under the influence. The key question in that case was the legality of the taking of blood without consent and absent a search warrant. The Supreme Court held in [Schmerber, supra](#), that police may lawfully request a blood test without an arrestee's consent if five (5) conditions are satisfied:

1. The suspect has been formally arrested.

2. The blood test is reasonably likely to produce evidence in the forthcoming criminal prosecution.
3. The delay involved in obtaining a search warrant would lead to destruction of the evidence.
4. The test is a reasonable one.
5. The test is performed in a reasonable manner.

If these five conditions are met, police may constitutionally require an arrestee to have his blood sample taken without his consent. Therefore, it follows that if these conditions are satisfied, there is no constitutional bar to a law enforcement officer requesting a health care professional to take a blood sample for purposes of a blood/alcohol analysis. (See Attorney General's Opinions of January 16, 1979 and August 13, 1971 which reach the same conclusion.)

\*2 While there is no constitutional prohibition, it is not clear under [Section 56-5-2950, CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as amended, ('The Implied Consent' statute), whether a law enforcement officer may compel an arrestee to have a blood sample taken. There is no case law in this State directly on point. Moreover, the case law is divided in other jurisdictions with implied consent statutes regarding the admissibility of a blood sample taken from an arrestee who has not consented. See Annotation, '[Admissibility of Blood Alcohol Test](#),' 14 A.L.R. 4th 690.

The [Schmerber, supra](#), case involved a non-consensual blood sampling. There are occasions when law enforcement officers will ask the health care professional to take a blood sample from an arrestee who has requested this test. Such a request by a law enforcement officer is lawful. Indeed, under [Section 56-5-2950, CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as amended, and [State vs. Lewis](#), 266 S.C. 45, 221 S.E.2d 524 (1976), an arresting officer has a duty to assist his arrestee in contacting a qualified individual to conduct a blood test. See Attorney General's Opinion of October 20, 1978. While there is no duty for an arresting officer to specifically ask a health care professional to draw the blood of an arrestee who has requested a blood test, the officer would be acting lawfully in making such a request.

The authority of a county coroner to request such tests is somewhat different. [Section 17-7-80, CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as amended, specifically addresses this issue. [Section 17-7-80](#) provides in pertinent part: Every coroner or other official responsible for performing duties of coroner shall examine the body within eight hours of death of any driver and any pedestrian, sixteen years or older, who dies within four hours of a motor vehicle accident or any swimmer or boat occupant who dies within four hours of a boating accident, and take or cause to have taken by a qualified person such blood or other fluids of the victim as are necessary to a determination of the presence and percentages of alcohol or drugs. (emphasis added)

This statute makes a distinction between victim and survivor. A county coroner is authorized to request a blood test of a victim of certain kinds of accidents, but the coroner is not authorized to request a blood test from a survivor or other living person. See Attorney General's Opinions of January 16, 1979 and September 17, 1957, which reach the same conclusion.

The authority of law enforcement officers and county coroner to request this test does not answer the question of whether a physician, nurse or health care technician must comply with the request. With regard to a request by a law enforcement officer, our research has not found any authority requiring that a health care professional comply with such a request. See Attorney General's Opinions of January 16, 1979 and September 29, 1976 which reach the same conclusion. A leading treatise in the field of medical practice and health law states that 'the hospital or health care professional has no legal duties to obey the police request to perform the [blood] test.' Hospital Law Manual, Volume II, (Consents Section 1-10 at 25.) Therefore, it is our opinion that health care professionals are under no legal duty to perform a blood test requested by a law enforcement officer even though that request may be a lawful one.

\*3 With respect to a request by the county coroner to extract a blood sample from the victim of a motor vehicle, swimming or boating accident, the situation would appear to be somewhat different. [Section 17-7-80](#) makes the county coroner responsible for the examination of the victim in order to determine the presence and percentage of alcohol or drugs in the body. Pursuant to [Section 17-7-80](#), the coroner is mandated to ‘. . . take or cause to have taken by a qualified person such blood or other fluids . . .’ This being the coroner's legal duty, and considering the limited time period available for such an examination, it is our opinion that a health care professional would be required to perform this test when lawfully requested to do so by the county coroner. See Attorney General's Opinion of January 16, 1979, which reaches the same conclusion.

Your question regarding the liability, if any, of health care professionals performing blood tests is not easily resolved. There are a number of factors relevant to this analysis which we will highlight in our discussion.

The easiest case to resolve is when an arrestee has specifically requested a blood test. In that case, a documented consent form offers the best protection against any subsequent claim by the arrestee against the professional. A more difficult situation is where the health care professional has extracted blood at the request of a law enforcement officer, but without the consent of the patient. In *Hospital Law Manual, Volume II (Consents, Section 1-10 at 21)*, it is stated ‘[i]n theory, a hospital or health care professional might be held liable for performing a non-consensual procedure even when there was a police requested order, but no reported decisions of this nature could be found.’ In discussing possible liability of a health care professional, the *Hospital Law Manual, Volume II, (Consents, Section 1-10 at 21)*, explained that:

. . . the fact that the procedure in question was carried out under police direction would preclude a finding of intentional wrongdoing on the part of the practitioner and/or institution, and several cases have recognized ‘good faith’ as a defense where the civil rights violation was unintentional it could be argued that medical personnel are entitled to rely on a police officer's determination of how far his or her legal authority extends and need not conduct their own legal inquiry or analysis. Upon this reasoning, recovery against medical personnel, if any, would likely be limited to nominal damages, unless the procedure were patently unreasonable or unless the subject were physically harmed because the procedure had been performed negligently.

When the individual has not consented to the blood taking, the health care professional may wish to document that Schmerber, supra, has been satisfied. As discussed above, when Schmerber, supra, is satisfied, there is no constitutional bar to the taking of blood, and the patient's consent is unnecessary. Therefore, for the professional's protection, he or she may wish to ask the law enforcement officer requesting the test certify that: 1) the patient has been arrested, 2) the test is reasonably, likely to produce evidence relevant to the alleged criminal violation, and 3) that the delay incident to obtaining the search warrant would likely result in the destruction of the evidence. While nothing is absolutely certain in this area of the law, the certification of these conditions would make clear that law enforcement officers' authority to request the test, and would render meaningless the absence of consent.

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