

I'm writing this memo to share some concerns that have arisen following a question posted on a legal forum by a city attorney. This inquiry relates to whether our officers participating in the Arizona Governor's Office of Highway Safety's Law Enforcement Phlebotomy Program and their agencies are required to carry medical malpractice insurance.

Arizona Revised Statute § 28-1388(F) establishes that individuals drawing blood pursuant to implied consent for DUI investigations are protected from civil liability for damages unless their actions constitute gross negligence.

Police officers who draw blood as qualified phlebotomists are not medical practitioners. They lack medical licenses or certifications. Arizona Revised Statute § 28-1388(A) dictates that if blood is drawn pursuant to the implied consent statute for DUI investigations, only a physician, registered nurse, or another qualified person may perform the withdrawal for blood alcohol concentration determinations. Our officers are classified under this "other qualified person" element, rather than as a physician or nurse. As established by case law such as *State ex rel. Pennartz v. Olcavage*, a qualified person is defined as someone competent in the procedure due to their training or experience.

Drawing blood is a minimally invasive procedure a point underscored by the United States Supreme Court in *Winston v. Lee*, which stated that "blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." The following excerpt from *State v. May* further clarifies the necessary qualifications for law enforcement phlebotomists: "May also contends the trial court should have granted his motion to suppress because Curtin was not a trained phlebotomist. But in Arizona, a physician, registered nurse, or other 'qualified person' may withdraw blood from the operator of a vehicle to determine his or her alcohol concentration. A.R.S. § 28-1388(A). A phlebotomist is a 'qualified person' under the statute. *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, 21, 30 P.3d 649, 655 (App. 2001) (phlebotomist is 'a person who, through training or experience, is competent to draw blood').

A phlebotomist need not be certified, but rather, 'only demonstrate competence through training or experience.' *State v. Carrasco*, 203 Ariz. 44, 9, 49 P.3d 1140, 1141 (App. 2002). Deputy Curtin attended a one-week course in phlebotomy. As of November 2002, he had drawn blood 150 to 200 times. That training and experience sufficiently

qualified Curtin as a person competent to draw blood. See *Esayian*, 5 Cal.Rptr. 3d at 549. We find no statutory or constitutional violation relating to Curtin's qualifications. Accordingly, the trial court did not err in denying May's motion to suppress."

The statute governing medical malpractice claims in Arizona, Arizona Revised Statute § 12-561, defines a "medical malpractice action" as a claim for injury or death specifically against a "licensed health care provider." This statute further clarifies the definition of a "licensed health care provider." I am not your legal adviser, but I read this and relevant case law to indicate our officers are not licensed health care providers

For clarity, Arizona Revised Statute § 12-561(1) defines "licensed health care provider" as encompassing either of the following:

(a) An individual, company, or organization licensed or certified by the state to deliver healthcare, medical services, nursing care, or other health-related services. This definition also includes the officers, employees, and agents of these entities when they are working under supervision to provide these services.

(b) A blood bank, blood center, or plasma center that is federally licensed, regulated, or registered and is involved in collecting, processing, or distributing whole blood, blood components, plasma, blood fractions, or blood derivatives for use by a licensed healthcare provider. This also includes the officers, employees, and agents of these facilities when they are working under supervision.

Relevant case law interpreting A.R.S. § 12-561 includes: *Sahf v. Lake Havasu City Ass'n for the Handicapped*, 150 Ariz. 50 (App. 1986); *Kenyon v. Hammer*, 142 Ariz. 69; 688 P.2d 961 (1984); and *Bailey-Null v. Value Options*, 221 Ariz. 63, 209 P.2d 1059 (App. 2009). This list is not all-inclusive.

The specific statute governing medical malpractice claims, Arizona Revised Statute § 12-561, defines a "medical malpractice action" as one for injury or death against a licensed healthcare provider. Case law indicates the same. The statute and medical malpractice claims would only apply to our officers and law enforcement agencies if they were licensed health care providers. If you or your legal advisors want input on

why we feel this statute and relevant case law indicate our officers and their agencies are not “licensed health care providers,” we are happy to discuss it with you.

While liability insurance typically covers property damage and bodily injury, it remains unclear why a potential lawsuit stemming from a phlebotomy incident would not be covered under the bodily injury provision of a general liability policy, especially if concerns revolve around officer error or negligence potentially leading to a claimant's physical injury; in such a scenario, the necessity for medical malpractice insurance is questionable. Although it's been indicated that clients have already applied for medical malpractice coverage and agencies may be comfortable with this additional expense of taxpayer dollars for perceived safety, it seems potentially wasteful to allocate funds for what may be unnecessary insurance. Based on our legal analysis of Arizona statutes and relevant case law, medical malpractice insurance appears to be unnecessary for police officers who are qualified phlebotomists within the scope of their duties related to DUI investigations. But that is for you and your legal advisors to decide the issue.

The Governor's Office of Highway Safety does not have the authority to mandate which insurance policies agencies, cities, towns, or counties must purchase, nor is it responsible for handling personal injury claims. Should any agency, upon further review, choose to obtain medical malpractice insurance, that decision lies solely within its discretion. GOHS is not your legal advisor and this letter should not be taken as legal advice. Your department's legal advisors should be consulted if issues such as this arise in your department.

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