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DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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NO. STATE OF NEBRASKA OFFICIAL MAR 23 1989 DEPT. OF JUSTICE

ROBERT M. SPIRE Attorney General A. EUGENE CRUMP Deputy Attorney General

DATE: March 20, 1989 SUBJECT: The constitutionality of LB 157, Section 4, Subsection 3, as amended by AMO 392. REQUESTED BY: Senator Don Wesely Nebraska State Legislature WRITTEN BY: Robert M. Spire, Attorney General Marilyn B. Hutchinson, Assistant Attorney General

You have asked whether LB 157, Section 4, Subsection 3, as amended by AMO 392, violates the Fourth Amendment to the United States Constitution. As discussed below, we have concluded it does not unless the operator of the facility is the state or federal government and the facts do not justify a warrantless search.

LB 157, Section 4, Subsection 3, would permit a hospital, skilled nursing facility or intermediate care facility to test the blood of one of its patients for hepatitis B or human immunodeficiency virus without the consent of that patient or his or her representative under certain circumstances:

- (1) A body fluid of such patient has entered the body of an emergency medical services provider, (2) The physician of such provider believes that such exposure could involve the transmission of hepatitis B or human immunodeficiency virus, and (3) A sample of the patient's blood is available.

Otherwise a court order must be obtained.

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures by the federal government or, through the Fourteenth Amendment, by the states. Wolf v. Colorado, 338 U.S. 25 (1949). Thus the constitutionality of the questioned section depends on whether the testing of blood is a search and seizure; if so, whether the one

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doing it is the government; and, if so, whether such search and seizure is unreasonable. A search conducted without a warrant issued upon probable cause is per se unreasonable, subject only to a few specifically established and well-delineated exceptions including a search conducted pursuant to consent, Schneckloth v. Bustamonte, 412 U.S. 218 (1973), and a search in exigent circumstances, Warden v. Hayden, 387 U.S. 294 (1967).

The Fourth Amendment protects personal privacy and dignity against unwarranted intrusion by the state. Schmerber v. California, 384 U.S. 757, 767 (1966). The compulsory administration of a blood test by the state "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment." Id. However, "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." Id. at 768. In that case the court held the blood test administered without a warrant was justified in the circumstances and was made in a proper manner so there was no violation of the Fourth Amendment by the state. The justifiable circumstances in that case included the urgency of getting a test before time had diminished the percent of alcohol in the blood.

In Glover v. Eastern Nebraska Community Office of Retardation, 686 F.Supp. 243 (D. Neb. 1988), the court reached a different conclusion. It found the mandatory testing of the blood of the employees of a governmental agency for hepatitis B and human immunodeficiency virus was not justified when there was no evidence that the agency's clients were at risk of contracting those diseases from its employees through casual contacts.

The significant exposures which are a pre-condition to mandatory testing under LB 157 are not casual contacts. However, they are contacts which have already occurred. Therefore, unless it can be shown that an immediate test is necessary for the validity of the test or for the effective treatment of the person who has been exposed, or for some other reason, there will be no exigent circumstances. Therefore, testing the blood of the patient without his or her consent or the consent of his or her representative without a search warrant may not be justified. This is particularly true if testing the blood of the provider who has been exposed would be as reliable.

The physician-patient privilege is one of the few privileges recognized by law. Neb.Rev.Stat. §27-504 (Supp. 1988). Thus a person is justified in relying on having privacy about tests conducted on a sample of his or her blood which was withdrawn by or at the direction of his or her physician.

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In conclusion, LB 157, Section 4, Subsection 3, as amended, does not violate the Fourth Amendment to the United States Constitution unless the operator of the facility is the state or federal government and the facts do not justify a warrantless search.

Sincerely yours,

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16-241-2

cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED BY:


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