N.D.A.G. Letter to Mathieson (July 16, 1986)

July 16, 1986

Chief Christian V. Mathieson
Chief of Police
Devils Lake Police Department
222 West Walnut Street
Devils Lake, ND 58301

Dear Chief Mathieson:

Thank you for your letter of June 9, 1986, concerning the authority of an emergency medical technician (EMT-l) to withdraw blood from a person arrested for DUI for analysis under N.D.C.C. Ch. 39-20. The Devils Lake City Attorney has called this office to ask that your inquiry be considered as an inquiry by the City Attorney's Office.

However, because opinions of the Attorney General are not binding on the judiciary of our state, no purpose would be served by the rendering of opinions for the judiciary in any form and those opinions are thus not issued. Nonetheless, I will informally give you the benefit of our research and thoughts on the subject in this letter for your use and information.

When the implied consent law was adopted in North Dakota in 1959, N.D.C.C. § 39-20-02 provided for the administration of a blood-alcohol test by withdrawing blood and it used the same language that it contains today with respect to those persons authorized to actually take the blood. Those persons are "a physician, or a qualified technician, chemist, or registered nurse."

In 1983, N.D.C.C. §39-20-07 was amended to provide for the use of a signed statement from a "nurse or medical technician" who drew the blood as being prima facie evidence that the blood sample was properly drawn. The 1983 amendment to N.D.C.C. §39-20-07 was made after the evolution of the implied consent law for a period of some 23 years, but when the authorization for the use of the signed statement was adopted, the reference to a physician and chemist in N.D.C.C. § 39-20-02 was omitted. This, on the surface, would seem to indicate that only a nurse or medical technician may use the signed statement, whereas, if the blood is drawn by a physician or a chemist, they must personally appear and testify concerning the procedures used to draw the blood. This does not seem to be a logical requirement, but one can see over the years that it has been nurses or medical technicians that draw blood for DUI cases.

The rules of statutory construction require that words used in any statute are to be understood in their ordinary sense and that words explained in the statute are to be understood as they are explained (N.D.C.C. § 1-02-02).

There is no explanation provided in N.D.C.C. Ch. 39-20 concerning the intended sense of the words "physician," "qualified technician," "chemist," or "registered nurse." Nor is there any explanation as to how the term "medical technician" differs from the term "qualified technician." Therefore, the use of the terms must be explained and used in their ordinary sense.

It is not clear from your letter exactly what the training of an EMT-I is, nor how that training and capability in drawing blood compares to that possessed by a physician, qualified technician, medical technician, chemist, or registered nurse. It would appear that there needs to be some interpretation of the use of the words by the court or other forum that receives the statement of the person drawing the blood or hears the testimony of that person as to how the blood was drawn. Unfortunately, for your cases in Devils Lake, it appears your municipal judge has determined contrary to your desires.

Other states which have considered language similar to our statute have interpreted phrases such as "qualified technician" or "other qualified person" to include emergency medical technicians trained in phlebotomy, as well as persons described as blood technicians. As an example, the Louisiana Appellate Court in the case of State v. Taylor, 483 So.2d 250 (La.App.Ct. 1986), interpreted the Louisiana statute, La.R.S. 32:664, providing for the withdrawing of blood by "only a physician, registered nurse, qualified technician or chemist." The court in the Taylor case decided that a law enforcement officer who had undergone training in drawing blood samples from the New Orleans Police Department Emergency Medical Technicians Unit and had attended five weeks of classes in phlebotomy at a vocational technical institute was a "qualified technician" under the Louisiana statute.

Similarly, the Court of Appeals of North Carolina, in the case of State v. Watts, 325 S.E.2d 505 (N.C.App. 1985), determined that a "blood technician" at a hospital who drew the blood sample in question was qualified to do so under North Carolina statute G.S. 10-139.1(c). That statute provided for blood samples to be drawn by "a physician, registered nurse, or other qualified person." At the trial, the arresting officer testified that the individual, described as a blood technician, drew the blood. The court determined that this testimony concerning the person who drew the blood was sufficient under the North Carolina statute.

Finally, the Court of Appeals of Georgia, in the case of Thurman v. State, 321 S.E.2d 780 (Ga.App. 1984), held that one described as a "medical technician phlebotomist" could properly draw blood under the Georgia statute. That statute, O.C.G.A. § 40-6-392(a)(2), provided for the drawing of blood by a "physician, registered nurse, laboratory technician, or other qualified person." The court held the individual involved was a full-time hospital employee whose job it was to take blood samples. The person was therefore permitted to draw the blood as a qualified person.

From the above discussion it seems apparent that the Legislative Assembly in North Dakota is concerned with having a properly trained individual draw blood under the appropriate circumstances for submitting a sample to the state toxicologist for

blood-alcohol testing. Whether that person be described as a physician, qualified technician, chemist, registered nurse, medical technician, medical technologist, or other form of qualified person seems to be of lesser importance than whether or not the individual is actually qualified to perform the service needed. In the absence of a reported appellate court decision describing an EMT and qualifying the person under North Dakota law, that determination will be made by courts based on the facts before them. It would appear reasonable to include an EMT under the classification of "qualified technician" if that designation requires training comparable to that for a medical technician trained in phlebotomy.

Sincerely,

Nicholas J. Spaeth

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