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 Lorena Vollrath-Bueno

### THE NATIONAL TRAFFIC LAW CENTER

**Director**  
 Erin Inman      einman@ndaajustice.org

**Senior Attorneys**  
 M. Kimberly Brown      mkbrown@ndaajustice.org  
 Jim Camp      jcamp@ndaajustice.org

**Staff Attorney**  
 Bella Truong      btruong@ndaajustice.org

**Coordinator, Education & Engagement**  
 Hannah Dickmyer      hdickmyer@ndaajustice.org

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## LAW ENFORCEMENT PHLEBOTOMY TOOLKIT:

A Guide to Assist Law Enforcement Agencies With Planning and Implementing a Phlebotomy Program



# Law Enforcement Phlebotomy Programs

Erica J. Dobbs

*Editor's note: This article is the first of a two-part series on Law Enforcement Phlebotomy Programs (LEPP). This month, the author describes what an LEPP is and the steps the National Highway Traffic Safety Administration suggests a jurisdiction follow if considering implementing such a program. A future article will describe the experience of Indiana's implementation of its LEPP.*

[H]ighway safety is a vital public interest. For decades, we have strained our vocal chords to give adequate expression to the stakes. We have called highway safety a 'compelling interest;' we have called it 'paramount.' Twice we have referred to the effects of irresponsible driving as 'slaughter' comparable to the ravages of war. We have spoken of 'carnage,' and even 'frightful carnage.' The frequency of preventable collisions, we have said, is 'tragic,' and 'astounding.' And behind this fervent language lie chilling figures, all captured in the fact that from 1982 to 2016, alcohol-related accidents took roughly 10,000 to 20,000 lives in this nation *every single year*. In the best years, that would add up to more than one fatality per hour.

—United States Supreme Court, *Mitchell v. Wisconsin* (2019)<sup>1</sup>

<sup>1</sup> *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2535–2536 (internal citations omitted).

Given the overwhelming importance of preventing the hazards of drug and alcohol impaired driving, the Supreme Court of the United States (SCOTUS) has repeatedly supported blood alcohol concentration per se laws as well as the corresponding chemical tests necessary for enforcement. In doing so, SCOTUS recognizes that enforcing impaired driving laws requires “prompt testing” with “a test that is accurate enough to stand up in court.”<sup>2</sup> Often, especially with ever increasing drug-impaired driving and polydrug impairment, “blood tests are essential for achieving the compelling interests described above.”<sup>3</sup>

Despite the essentiality of blood testing to combat impaired driving, it is not always readily attainable. In rural areas, a hospital may be located a great distance from the scene of the DUI<sup>4</sup> stop or crash—often well outside of the officer’s jurisdiction. Traveling to a distant hospital for a blood draw not only consumes valuable time needed to secure evidence of the individual’s drug or alcohol content at the time of driving, but it also removes the officer from active duty and delays their return to patrol. Even in metropolitan areas which may have multiple hospitals in a relatively small geographical area, emergency rooms can be overwhelmed and understaffed, resulting in increased wait times for a blood draw.

Once at the hospital, nurses and other medical staff may be reticent to assist with an evidentiary blood draw for a legal case.<sup>5</sup> The reasons why an officer could be in the hospital with an impaired driving suspect are numerous: the suspect is injured as a result of a crash, the suspect caused a death or serious injury in a crash, the suspect refused to submit to a breath test, or the breath test result is inconsistent with the suspect’s observed impairment and drugs are suspected as the cause of impairment. As drug-impaired driving becomes more prevalent and the number of blood draws correspondingly increases, hospitals are growing wary of the time hospital staff spend working with DUI suspects rather than treating medical patients and, worse, the amount of time spent in court testifying about the draws in criminal trials.

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### 30 Years of Law Enforcement Phlebotomy

Faced with these problems in 1995, two Arizona Highway Patrol officers—one of whom was also a paramedic—began exploring options to allow police officers to draw blood from drivers suspected of impaired driving. The Arizona chemical test statute established that blood may be drawn by a “physician, a registered nurse or *another qualified person*”<sup>6</sup> (emphasis added). At the time, what constituted “another qualified person” was not defined in code or otherwise. Consulting with prosecutors and police departments’ legal counsel, the Arizona Department of Public Safety (DPS), interpreted “qualified person” to mean, simply, “a person trained in phlebotomy,” and allowed the two officers to train to be phlebotomists. DPS then began sending select officers to a phlebotomy course offered by a local community college. Once trained, those officers began collecting blood evidence in impaired driving cases.

Over time, case law developed, and the Arizona Court of Appeals ultimately affirmed DPS’s interpretation of who was a “qualified person” to draw blood. In short, under Arizona law, “a person is ‘qualified’ to draw blood for DUI purposes if he or she is competent, by reason of training or experience, in that procedure.”<sup>7</sup> At any given time in Arizona, 500–600 active officers are qualified to draw blood. Arizona officers have successfully completed tens of thousands of evidentiary blood draws in the nearly 30 years since beginning its program.

<sup>2</sup> *Id.* at 2536.

<sup>3</sup> *Id.* at 2537.

<sup>4</sup> DUI and DWI refer to impaired driving, whether by alcohol or drugs or a combination of both and are used interchangeably in this article.

<sup>5</sup> See, e.g., Mark Martin, “Hospital Nurses Rebel / Some refuse to test DUI suspects in S.F.” *San Francisco Chronicle*, Jan. 24, 2001, available at [www.sfgate.com/news/article/hospital-nurses-rebel-some-refuse-to-test-dui-2960068.php](http://www.sfgate.com/news/article/hospital-nurses-rebel-some-refuse-to-test-dui-2960068.php) (accessed 5/14/24).

<sup>6</sup> See A.R.S. § 28-1388.

<sup>7</sup> *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, 588 (2001).

Seeing Arizona's Law Enforcement Phlebotomy Program (LEPP) successfully overcome universal chemical test difficulties, several other states followed suit. Since 2005, Utah, Idaho, Minnesota, Maine, Washington State, Illinois, Georgia, Indiana, and Missouri have each established LEPPs. Mississippi and Montana recently implemented single-jurisdiction pilot programs; and Kentucky, Wisconsin, and Pennsylvania each have LEPPs starting in 2024–2025. Additionally, several states that do not currently have an official LEPP have officers who are trained to draw blood and, thus, permitted to do so under state statutes with "qualified person" language similar to Arizona's.

### Starting a Program

To assist states with establishing a LEPP, the National Highway Traffic Safety Administration (NHTSA) published the *Law Enforcement Phlebotomy Toolkit: A Guide to Assist Law Enforcement Agencies with Planning and Implementing a Phlebotomy Program*.<sup>8</sup> This Toolkit is an invaluable resource, pulling together the experiences, insights, and best practices of the earliest LEPP-adopting states: Arizona, Minnesota, Utah, Idaho, and Washington. The Toolkit is primarily dedicated to the pertinent considerations to address when starting a program, including identifying the appropriate stakeholders, ensuring appropriate legislation, establishing standards, training, liability considerations and other hurdles, funding sources, and program management. Each is discussed below.

### Stakeholders

The first step in developing an LEPP is to identify all potential stakeholders and interested parties and invite their participation when developing and perpetuating an LEPP. NHTSA suggests: "law enforcement agency management, traffic unit leadership, State attorneys general, county prosecutors or district attorneys, traffic safety resource prosecutors [TSRPs], drug recognition experts, State Highway Safety Offices, crime laboratories, departments of health, educational institutions, medical labs, hospitals/medical clinics, community groups, and elected officials."<sup>9</sup>

### State Law

The next step in developing an LEPP is to determine if existing state law supports officers drawing blood in impaired driving cases. This requires exploring the state's statutes, administrative code, and case law. Likely present as part of the LEPP development team, the state TSRP and/or attorney general may serve as wonderful resources for locating and deciphering this information.

Similar to Arizona, many states have laws naturally conducive to police officers serving as phlebotomists. Statutes using language like "other qualified persons," or statutes allowing paramedics to draw blood in impaired driving cases, could permit cross-trained officers to complete draws. Some states, however, have laws specifically prohibiting law enforcement from performing evidentiary blood draws. In Vermont, for example, officers are prohibited from drawing blood, even if they are otherwise licensed to do so and acting in their official capacity as an officer at the time of the draw.<sup>10</sup> Other states may not prohibit law enforcement phlebotomy this explicitly, but still effectively prohibit it by declining to provide law enforcement officers the same immunities as health care professionals (e.g., Alabama<sup>11</sup>), or by requiring the person drawing the blood be

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<sup>8</sup> National Highway Traffic Safety Administration (March 2019). *Law Enforcement Phlebotomy Toolkit: A Guide to Assist Law Enforcement Agencies with Planning and Implementing a Phlebotomy Program*. U.S. Department of Transportation, Washington, D.C. (DOT HS 812 705), available at [www.nhtsa.gov/sites/nhtsa.gov/files/documents/14222-phlebotomy\\_toolkit\\_final-032819-v1a\\_tag\\_0.pdf](http://www.nhtsa.gov/sites/nhtsa.gov/files/documents/14222-phlebotomy_toolkit_final-032819-v1a_tag_0.pdf).

<sup>9</sup> *Id.* at 5.

<sup>10</sup> See 23 VSA § 1203(b)(1).

<sup>11</sup> See AL ST §32 -5A-194.

directly supervised by a physician and/or complete the draw in a medical facility (e.g., Michigan<sup>12</sup>). In California, Washington, Louisiana, and Nevada, a phlebotomist must be licensed, though these are the only four states where that is required.<sup>13</sup>

### Standards

NHTSA recommends the implementation of both program-level and departmental standards and offers samples of both kinds of policies in its LEPP Toolkit.<sup>14</sup> Program standards address issues such as who may attend the training, what training and continued qualification look like, regulations for when and where a law enforcement phlebotomist (LEP) may draw blood, and how LEPP supplies will be provided to the LEP. On the other hand, departmental standards address matters like how an arresting officer should contact a LEP, who at the department is responsible for handling the collected evidence and submitting it to the laboratory for testing, and if the department's LEPs may assist other agencies.

### Training

"The key to success is developing a program that produces a qualified, professional phlebotomist who understands and follows the standards of care."<sup>15</sup> Drawing blood is not a terribly difficult or invasive procedure, but it is a medical procedure requiring a high level of proficiency to perform. The importance of a quality training program to a successful LEPP—including relevant curriculum, effective instructors, and experiential learning—cannot be overstated.

In shaping program development, including representatives from partnering educational institutions is crucial when identifying the appropriate stakeholders. Arizona has long partnered with Phoenix College to provide the state's LEPP training; Idaho partners with the College of Western Idaho; and Illinois partners with Richmond Community College. Running the LEPP training through an educational institution adds legitimacy to the program—LEPs are trained the same way and develop the same skills as any medical phlebotomist. Logistically, an educational institution can provide a training space, instructors, books, supplies, etc.

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### Liability

Perhaps the most common concern and the strongest pushback to the LEPP comes from the perceived liability risks of officers interacting with suspects as phlebotomists. What if they hurt the person? What if the officer is stuck by the needle or otherwise gets hurt while drawing the blood?

Generally, officers have qualified immunity for actions taken as part of the law enforcement duties. Ultimately, however, the question of liability and the assumption of the perceived risk must be answered by a department's legal counsel.

NHTSA recommends new programs follow existing programs, comport with state law, follow standardized policies and procedures, have a quality training program in place, and comply with CLSI guidelines, and be transparent.<sup>16</sup>

<sup>12</sup> See MCLA §257.625a.

<sup>13</sup> Lindsey Gram, R.N. "Phlebotomist Licensure & Certification Guide." *Trusted Health Blog*, February 8, 2024, available at [www.trustedhealth.com/blog/phlebotomist-certification-guide](http://www.trustedhealth.com/blog/phlebotomist-certification-guide) (accessed 5/20/24).

<sup>14</sup> NHTSA *Law Enforcement Phlebotomy Toolkit*, supra n8, at 7–8 and Appendix B.

<sup>15</sup> *Id.* at 5.

<sup>16</sup> NHTSA *Law Enforcement Phlebotomy Toolkit*, supra n8, at 11–14.

### Hurdles

Once the initial barriers—legislation, creating standards, etc.—are overcome and the program gets underway, additional hurdles may arise. Often, this is due to bias and misunderstanding of what an LEPP is and how it functions. With a solid team of stakeholders working together, these can be successfully overcome.

Members of the public, and even the legal and law enforcement communities, may have an initial bias against the idea of officers drawing blood. One need only run a google search of “can police officers draw blood?” to see many social media discussions, and even defense attorney webpages, based on misunderstandings and offering misinformation about law enforcement phlebotomy.

Many people instinctively recoil at the thought of LEPs, because they envision officers pinning people onto the hoods of police cars and jabbing them with needles against their will. Overcoming this belief is as simple as correcting the misperception of LEPP procedures and rules. Once it is made clear that officers may only draw blood in a clean and controlled setting, with the person’s consent or a warrant, the fear tends to ease.

Similarly, people may think officers cannot be trained to draw blood. Nearly everyone has either experienced or heard a horror story about a career nurse or phlebotomist not being able to successfully draw blood or causing significant pain while doing so. From this they extrapolate to “if a nurse couldn’t do it, how could a cop?!” Combating this fear requires explaining how the training works and the restrictions of the protocols an LEP must follow. Difficulties and complications arise from the circumstances of the individual person at the time they are having their blood drawn. It must be emphasized that LEPs are trained to assess the person prior to beginning venipuncture, determine if there is a suitable draw site, and confirm there are no medical conditions that pose risks or set the stage for problems.

The alcohol or drug content of a suspected impaired driver is critical evidence in a criminal prosecution and having the ability to safely and promptly secure it will help prosecutors’ efforts to hold these drivers accountable.

### Funding Sources

There are multiple federal grant opportunities available for funding a LEPP. NHTSA has periodically offered several different LEPP-specific grants and mini-grants, and funding may also be able to be built into other impaired driving enforcement grants and programs. State-based grants and Highway Safety Office funding may also be available in some jurisdictions.

### Looking to the Future

In 2020, 56% of drivers involved in a serious injury or fatal crash tested positive for at least one drug.<sup>17</sup> The alcohol or drug content of a suspected impaired driver is critical evidence in a criminal prosecution and having the ability to safely and promptly secure it will help prosecutors’ efforts to hold these drivers accountable. NHTSA continues to promote the Law Enforcement Phlebotomy Program as “a proven strategy to mitigate the time and cost issues associated with drawing blood from suspected of driving while impaired (DWI) and therefore obtain the evidence necessary to prosecute impaired drivers.”<sup>18</sup> Successful prosecution of impaired drivers helps keep our roadways safe and law enforcement phlebotomy helps in this effort. It is the hope of traffic safety experts nationwide that LEPP will become more prevalent around the country.

<sup>17</sup> Office of Behavioral Safety Research. (2021, June). *Update to special reports on traffic safety during the COVID-19 public health emergency: Fourth quarter data* (Report No. DOT HS 813 135). National Highway Traffic Safety Administration.

<sup>18</sup> NHTSA Enforcement & Justice Services webpage, available at [www.nhtsa.gov/enforcement-justice-services](http://www.nhtsa.gov/enforcement-justice-services) (accessed 5/23/24).

### About the Author

Erica J. Dobbs joined the Indiana Prosecuting Attorneys Council as Indiana's second Traffic Safety Resource Prosecutor in December, 2019. She received her undergraduate degrees in Criminal Justice and Political Science from Indiana University in 2005. Ms. Dobbs then worked for four years as a paralegal in the Boone County Prosecutor's Office (BCPO) in Lebanon, Indiana before returning to law school at the Indiana University McKinney School of Law in Indianapolis. Upon graduating in 2012, she returned to the BCPO, ultimately becoming the Fatal Alcohol Crash Team prosecutor, in which role she was solely responsible for vertical prosecution of all Operating While Intoxicated and Habitual Traffic Violator cases in Boone County. She lives in the greater Indianapolis area with her husband and two wonderful children.

