

## Potential Liability for Warrantless Blood Draws

Legal Alert  
August 7, 2013

*Garvey Schubert Barer Legal Update, August 7, 2013.*

In April 2013, the United States Supreme Court issued a decision regarding warrantless blood draws that may be of interest to Washington state healthcare providers. In *Missouri v. McNeely*, the Supreme Court overturned 46 years of precedent which had created a de facto exception to the warrant requirement for blood draws in DUI arrests. Prior to *McNeely*, it was acceptable to justify warrantless searches under the exigent circumstances exception to the Fourth Amendment's requirements. The government argued that the natural elimination of alcohol from the bloodstream was sufficient justification for a warrantless search. The Supreme Court rejected this argument in *McNeely* and required that warrants be obtained whenever possible, while leaving open the possibility that there may be some circumstances in which a warrantless blood draw would still be constitutional.

Washington healthcare providers may be confronted with situations in which the police request their assistance in obtaining a warrantless blood sample from a patient who is incapable of refusing due to unconsciousness or injury. Of greater concern would be situations where a conscious patient refuses to consent to a blood draw. The *McNeely* decision raises questions regarding the continued validity of Washington's Implied Consent laws, particularly RCW 46.61.508 which relieves hospitals, laboratories, and technicians who perform a blood draw at law enforcement's request from civil or criminal liability.

Washington's common law has long recognized that a procedure performed without the patient's consent constitutes battery, an intentional tort. A Washington State healthcare provider sued for battery may find that their professional liability policy does not cover such claims. This would require the healthcare provider to bear all costs associated with seeking dismissal of the battery claim. In addition, a court may decide that based on *McNeely*, Washington's Implied Consent laws do not allow police to request a warrantless blood draw. Prior to being confronted with situations that could leave the healthcare provider at legal peril, they should consider adopting new policies and procedures to deal with law enforcement requests for non-consented, warrantless blood draws.

**For legal advice tailored to your individual circumstances, please contact:**

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