EVIDENCE: A person who is in a condition capable of giving
ADMISSIBILITY: consent to the taking of a sample of his blood for the purpose of testing it for alcoholic content, where a sample of blood is taken and is duly tested by an accredited chemist, chemist may testify in court regarding his findings with respect to alcoholic content in blood tested.

May 9, 1949

FILED
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Honorable W. Don Kennedy
Prosecuting Attorney
Nevada, Missouri

Dear Sir:

This office is in receipt of your recent request for an official opinion upon the following state of facts:

> "A man is injured in an auto accident in which his wife is killed. The man is taken to the hospital and given emergency treatment, including a hypodermic, by a Dr. Allen Shortly thereafter, the Highway Patrolmen arrive and question him about the accident. He is somewhat confused about the details of the accident, and his speech somewhat incoherent and hesitant. The patrolmen ask him if he will consent to a blood test to determine alcoholic content, and advise him of his right to refuse. He consents; Dr. Allen who has left the hospital and has gone home, is called back by the patrolmen, and draws the blood in the presence of the patrolmen and hands the tube to them. They mail it to the laboratories in Jefferson City, where it is analyzed and it is determined the blood shows a high percent of alcoholic concentration. Subsequently, the injured man is arrested on charges of manslaughter. May the chemist who analyzed the blood testify as to the results of the test on the trial?
>
> "The questions involved, I think are these:
>
> "(1) Assuming his ability to consent or refuse consent at the time the test was taken, can he object on the ground of self-incrimination?
>
> "(2) Even assuming inability to consent, is there valid objection on the ground of self-incrimination--as if he had been unconscious?

> "(3) Does it make any difference that the blood was drawn by the same Doctor who had treated him a few minutes before? Is the physician's privilege involved?"

It is our opinion that the chemist who analyzed the blood may testify regarding the alcoholic content which he found therein.

According to the statement this subject was told by the patrolmen that a sample of his blood was wanted for the purpose of being tested for alcoholic content, with the plain implication that if alcohol was found therein this fact would be used in evidence against him. You state that he was told further that he could refuse to give his consent to this blood test if he desired to do so but that he did so consent.

You assume in (1) that at the time when he gave his consent he was in such physical and mental condition as to be fully capable of consenting or refusing to consent; that he was fully at himself, was capable of judgment, and was capable of rationalizing upon this matter. At this time he could have refused consent, on the legal ground that he could not be compelled to incriminate himself. The original basis of this right is to be found in the fifth amendment to the Federal Constitution which states:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

The Constitution (1945) of Missouri reaffirms the same right in Article I, Section 19, which states:

> "That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; but if the jury fail to

> render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court; and if judgment be arrested after a verdict of guilty on a defective indictment or information, or if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law."

This legal principle finds further expression in Section 4082, R. S. Mo. 1939, which states:

> "If the accused shall not avail himself or herself of his or her right to testify, or of the testimony of the wife or husband, on the trial in the case, it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place."

There are numerous Missouri cases substantiating this legal principle. We call your attention to, In re West, 348 Mo. 30, in which the court held: (l.c. 31)

> "* * *it is well established in this state that the immunity afforded a witness by the Constitutional provisions is broad enough to protect him against self-incrimination before any tribunal in any proceeding; it is not merely to shield a witness at his final trial but extends its protection in preliminary proceedings.* * *"

The case of State v. Conway, 348 Mo. 580, l.c. 588, holds that:

> "* * *the privilege against self-incrimination is a part of the Bill of Rights, a personal privilege, guaranteed by the Constitution in unambiguous language, and, the statutory protection against comment, by court or counsel, is a plain legislative mandate, the underlying policy of which is and was for the draftsman of the acts and not the courts. Secondly,

> since it is a right and a privilege granted the citizen he should be permitted to exercise it with complete freedom and not at the peril of being impeached by it in the event that he should ever attempt to assert his innocence. * * *"

However, defendant may waive this right by taking the witness stand and testifying, or as in the instant case, by consenting that a sample of his blood be taken for the purpose of testing it for alcoholic content. In regard to this we again call your attention to State v. Conway, quoted above, which, upon this point of waiver, states:

> "The limitation on the protection as to preliminary or collateral proceedings being that if a defendant voluntarily testifies at a coroner's inquest, or other proceedings, he thereby waives the privilege against self-incrimination."

In State v. Graves, 352 Mo. 1102, the court said: (l.c. 1144)

> "Looking now to the constitutionality of these statutes, it is to be noted the Clinton case pointed out that the accused testifies, or not, at his own option; and that the statute, now Sec. 4081, is an enabling Act, since the accused would have been disqualified as a witness under the common law. The decision further quoted from a New York case that the defendant's becoming a witness (italics ours): 'was a voluntary act, and when he made himself a witness, under the privileges of the Act, he waived the constitutional protection in his favor and subjected himself to the peril of being examined as to any and every matter pertinent to the issue.' * * *"

This view is sustained in State v. Tyler, 349 Mo. 167, and many others.

When, in the instant case, by consenting that a sample of his blood be taken for testing, this subject waived his right to refuse to consent on the ground of self-incrimination, and a chemist who tested the blood thus taken could testify as to its alcoholic content.

In respect to (2) it follows from our reasoning in the above, (1), that if the subject was not in a condition (because of his injury) to give consent, the chemist could not testify if the defendant objected to the introduction of his evidence on the theory that it was self-incrimination without consent.

In respect to (3) there is here no element involved in confidential or privileged communication between the doctor and patient. And even if there had been such a relationship after the subject was treated for his injury and before the sample of blood was taken for testing, it was waived by the consent of the subject that his blood be taken for the purpose aforesaid.

Although not embraced in your questions we may call attention to the fact that at the trial of his case the defendant may object to the introduction of any testimony by the chemist on the ground that he, the defendant, at the time he consented that his blood be taken, was in such condition, as a result of his injury, that he was not capable of giving consent. In that case, which you should anticipate by endorsing on your information and by subpoening all of the persons who were present before, at the time of, and after the giving of consent by this subject, you would put these witnesses on the stand and have them testify regarding the condition of this subject before, at the time of, and immediately after he gave his consent, as to his general condition, the apparent coherence of his thought and mental clarity and regarding all of those matters touching upon his capacity to give consent.

## CONCLUSION

It is the conclusion of this department: first, that in a situation in which a person is in a condition capable of giving consent to the taking of a sample of his blood for the purpose of testing it for alcoholic content, and where a sample of blood is taken and is duly tested by an accredited chemist, that this chemist may testify in court regarding his findings with respect to alcoholic content in the blood tested. Second, it is the conclusion of this department that if the above mentioned person is in such a condition by reason of injuries as not to be able to give consent, that the taking of his blood and the testing of it for alcoholic content would be a violation of his right against self-incrimination, and that a chemist making a test of his blood under such circumstances would not be permitted to testify regarding alcoholic content. Third, it is the conclusion of this department that in the above fact situation there is no element involved of confidential or privileges communication between the doctor and the patient, but that even if there had been such a relationship established after the patient was treated for his injury and before the sample of blood was taken for testing, assuming that he gave

consent and was in a condition capable of giving consent, he waived the privileged communication by giving consent that a sample of his blood be taken for the purpose aforesaid.

Respectfully submitted,

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APPROVED:

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