

073-361—September 25, 1973

DRIVERS' LICENSING

ADMINISTRATION OF BLOOD TEST TO
INCAPACITATED DRIVER

To: Phillip S. Shailer, State Attorney, Fort Lauderdale

Prepared by: Michael M. Corin, Assistant Attorney General

QUESTIONS:

1. May an approved blood test to determine intoxication be administered to an incapacitated driver without first determining if said driver is licensed as such under the laws of Florida?
2. May an approved blood test be administered to an incapacitated driver who is licensed as such under the laws of a sister state?

SUMMARY:

Under §322.261, F. S., an approved blood test may be administered to a person who is incapacitated and who is admitted to a hospital as a result of his involvement as a driver in a motor vehicle accident, but before it is conclusively determined that such person is a licensed driver under the laws of Florida or under the laws of a sister state.

In response to your first question, §322.261(1)(a), F. S., provides:

Any person who shall accept the privilege extended by the laws of this state of operating a motor vehicle within this state shall by so operating such vehicle be deemed to have given his consent to submit to an approved chemical test of his breath for the purpose of determining the alcoholic content of his blood if he is lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of alcoholic beverages. The test shall be incidental to a lawful arrest and administered at the request of a peace officer having reasonable cause to believe such person was driving a motor vehicle within this state while under the influence of alcoholic beverages. Such person shall be told that his failure to submit to such a chemical test will result in the suspension of his privilege to operate a motor vehicle for a period of three months.

Summarizing §322.261(1)(a), *supra*, as pertinent: A person who is licensed under the laws of Florida to operate a motor vehicle impliedly consents to submit to an approved chemical test of his breath; such test must be incidental to a lawful arrest and be administered at the request of a peace officer "having reasonable cause to believe such person was driving a motor vehicle within this state while under the influence of alcoholic beverages."

Section 322.261(1)(b), F. S., deals specifically with the incapacitated driver, and states:

Any such person who is incapable of refusal by reason of unconsciousness or other mental or physical condition shall be deemed not to have withdrawn his consent to such test. Any such person whose consent is implied as hereinabove provided and who, during the period within which a test prescribed herein can be reasonably administered, or who, being admitted to a hospital as a result of his involvement as a driver in a motor vehicle accident, is so incapacitated as to render impractical or impossible the administration of the aforesaid test of his breath shall be deemed to have consented also to an approved blood test given as provided for herein and shall be deemed not to have withdrawn his

consent therefor. Under the foregoing circumstances, a blood test may be administered whether or not such person is told that his failure to submit to such blood test will result in the suspension of his privilege to operate a motor vehicle upon the public highways of this state.

A reading of §322.261(1)(b), *supra*, shows not only that it is to be read *in pari materia* with §322.261(1)(a), *supra*, but that its provisions become operational only when the incapacitated driver is "admitted to a hospital as a result of his involvement as a driver in a motor vehicle accident."

The United States Supreme Court in *Schmerber v. California*, 384 U.S. 757 (1966), and the Florida Supreme Court in *State v. Mitchell*, 245 So.2d 618 (Fla. 1971), in rendering opinions concerning related questions, found that the compulsory taking of a blood sample from an individual suspected of being intoxicated did not violate any of the following constitutional rights: the right to due process of law; the privilege against self-incrimination; the right to counsel; or the right against unreasonable searches and seizures. In *Mitchell*, the court dealt specifically with the requirements of §322.261(1)(b), *supra*:

Florida Statutes §322.261(1)(b), F.S.A., allows the taking of a blood test if the physical condition of one who was the driver in a motor vehicle accident is such as to render it "impractical" or "impossible" to administer a breath, urine or saliva test within the time period that such test can be administered. Subsection (2)(b), provides that the blood test, unlike the breath, urine or saliva tests, can only be given by a physician, nurse or technologist acting at the request of a peace officer and that the blood can only be withdrawn at a hospital, clinic, or other medical facility.

The blood test provided for in Florida Statutes §322.261(1)(b), F.S.A., is intended to be used as a substitute for the breath, urine or saliva test in the event the condition of the driver of a vehicle involved in an accident is such as to render the other tests impractical or impossible to administer. The Legislature has also pointedly omitted any requirement of an arrest in connection with the administration of a blood test under subsection (1)(b). There are other safeguards applicable to this particular test. Further, the circumstances under which a blood test is allowed to be given render arrest prior to its administration difficult, and often impossible.

We are of the opinion that the Legislature foresaw the difficulty and inutility of attempting to arrest an unconscious person or one in shock or on the operating table of a hospital. It should be pointed out that the blood test, as provided for use in these particular situations, can exonerate the person tested. It will often be to the benefit of the unconscious or otherwise incapacitated person to be tested as soon after the accident as possible.

[1] We hold, therefore, that it is unnecessary either under the Federal or Florida Constitutions or under Florida Statutes §322.261 to place a person under arrest prior to administering a blood test as authorized under subsection (1)(b) of the Act. [*Mitchell, supra*, pp. 622 and 623.]

Since §322.261(1)(b), F. S., does not require that the person be arrested prior to the administration of a blood test, and since there are no constitutional barriers in this regard, I must conclude that a blood test may be administered to a person who is incapacitated and who is admitted to a hospital as a result of his involvement as a driver in a motor vehicle accident, but before it is conclusively determined that such person is a licensed driver under the laws of Florida. Any other conclusion would not comport with common sense and would not be consistent with the logic and wisdom as detailed in *Mitchell, supra*. A determination that a person involved

as a driver in a motor vehicle accident is licensed as a driver under the laws of Florida may take an appreciable length of time even in the most optimum situation; and a requirement that the determination be made prior to the administration of a blood test pursuant to §322.261(1)(b) might, in fact, negate the very purposes of the test. Your first question is answered in the affirmative.

As applicable to your second question, §322.261(1)(j), F. S., provides:

A nonresident or any other person driving in a status exempt from the requirements of the driver's license law shall by his act of driving in such exempt status be deemed to have expressed his consent to the provisions of this section.

Clearly, the legislature intended that the provisions of §322.261, F. S., should apply to drivers licensed by our sister states, who, by their act of driving within this state, become subject to the operation of §322.261. Thus, assuming that drivers licensed by a sister state otherwise fall within the ambit of the facts and law as discussed above in response to your first question, your second question is answered in the affirmative.

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STANDARDS OF CONDUCT

APPLICABILITY TO MEMBERS OF COUNTY PLANNING COMMISSION

To: County Planning Commission

Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General

QUESTIONS:

1. Are members of a county planning commission subject to the Standards of Conduct Law, §§112.311-112.318, F. S.?
2. May persons whose professions and occupations relate to the development and sale of property within a county or the rendering of services and the selling of materials to developers actively carrying on development operations within the county serve as members of a county planning commission under the Standards of Conduct Law?

SUMMARY:

Members of an advisory body such as a county planning commission are subject to the Standards of Conduct Law, §§112.311-112.318, F. S. Persons whose professions and occupations relate to the development and sale of property within the county or the rendering of services and the selling of materials to developers actively carrying on development operations within the county are not disqualified under the law from serving as members of the commission. However, they should abstain from voting upon a matter before the commission if, by reason of their profession or occupation, they would benefit substantially from the commission's action, either directly or indirectly. A sworn statement disclosing an interest in a business entity which is subject to the regulations of or which has substantial commitments from a public agency should be filed with the circuit court clerk by the commissioners, as required by §112.313 (2).

AS TO QUESTION 1:

The Standards of Conduct Law applies to all officers and employees of a state