Legal Issues Related to Drug Testing in the Clinical Laboratory

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As has been reported many times by the lay press, urine drug testing may pose some unique challenges. The clinical laboratory interested in industrial drug testing (typically known as employee drug testing) should be aware of the many challenges that may be brought on by the fact that the result may be contested in an adversarial proceeding. This is what makes the urine drug test a forensic test. It may be one piece of evidence or the only piece of evidence used in an adversarial proceeding that may decide on punitive or rehabilitative action against an employee. As a result, unique standards for governmental contract laboratories have been proposed from the National Institute on Drug Abuse, and special proficiency testing and accreditation procedures have been promoted by professional societies. These standards illustrate the sensitive nature of the results. Because the results are subject to adversarial proceedings, all parties concerned in the testing process should be aware of the legal issues surrounding urine drug testing. There are constitutional and statutory issues as well as tort issues such as negligence, defamation, invasion of privacy, battery, infliction of emotional distress, and others. Laboratories should be especially aware of these issues, since they may be brought in as a third-party defendant to a suit or brought in as a participant in gathering the evidence. The laboratory should also be aware of other legal ramifications such as chain of custody, expert testimony, and the acceptability of scientific evidence.

When considering drug-abuse testing, different legal issues may come into play depending upon whether the individual being tested is employed by the public sector or the private sector. Constitutional issues must be addressed when dealing with public employees (1). "Public employees" in this case will be those working for the federal government or contracted by the federal government. Also, if the government compels testing of private employees, this is considered sufficient state action to trigger addressing constitutional issues. The applicable constitutional issues would be related to the U.S. Constitution and its amendments. Although state constitutions will not be addressed here, they may be applicable only to the public employees or all residents of that particular state. Other liability issues, in addition to being applicable to federal employees, will also be applicable to private employees. When dealing with legal issues, private employees should be separated into two groups: union and non-union. Besides the particular liability issues associated with drug-abuse testing, the laboratory must be aware of the need to control who has access to the specimen and the results. This requires elaborate chain-of-custody procedures and security measures, both on the specimen and the results.

Constitutional Issues

The four major constitutional issues addressed will be the right to privacy, search and seizure, due process, and equal protection. It should be noted that there are other constitutional issues not addressed here.

The privacy interest interpreted to be guaranteed by the Constitution is not an absolute interest and must be balanced against a legitimate interest of the state in securing information (2). For example, police officers have less expectation for a right to privacy. This is not to say that police officers do not have a right to privacy, but that the level of right to privacy is less than is the case for the usual population. In the case of drug-abuse testing, the state has a legitimate interest in protecting the public by not allowing police officers who are under the influence of drugs to be on duty. Therefore, the constitutional right to privacy does not require security of drug-abuse testing results with exceptions based on this legitimate interest of the government. Several states such as California (3), Florida (4), and Hawaii (5) have state constitutional provisions protecting the privacy of their citizens.

The Fourth Amendment of the Constitution gives us "The right of the people to be secure in their personal houses, papers and effects against unreasonable searches and seizures, but upon probable cause" (6). A urinalysis for drugs does constitute a Fourth-Amendment search (7). This one constitutional amendment dealing with search and seizure and probable cause is what many employees have attempted to use to prevent random drug testing. In the true sense, random drug testing would be applied when employees are being tested for whom there was no specific cause for testing. Procedures for getting around this probable-cause requirement (or reasonable-suspicion requirement as some have referred to it) would be noting clinical symptoms of drug use or abuse. Symptoms or a lack of performance in a particular job that may be ascribable to drug use could constitute the "reasonable suspicion" necessary to satisfy the Fourth Amendment (8).

It was noted at a recent Federal Bar Association meeting (9) that in the past two years several appellate courts have upheld random drug testing when the federal employees involved were those with jobs relating directly to the safety and health of the public. Examples of such cases were those associated with random testing of air-traffic controllers who are FAA employees (10) and a more recent decision involving customs officers subject to promotion (11). In the case of the air-traffic controller the court said that we cannot wait for a mid-air collision involving the death of several hundred people until we have probable cause for doing the urine drug test. Other types of positions illustrative of this point of view can be taken from a recommendation of the International Association of Police Chiefs. They have allowed
random drug tests as part of the promotion process for a pilot or a bomb squad, vice, or narcotics-evidence officer. This illustrates the courts upholding random testing when the public safety is at risk.

"Due process" guaranteed by the Fifth Amendment (12) is not synonymous with a requirement of scientific exactitude. That is, courts have required 95% confidence limits in the use of confirmatory results in some cases, and in other situations have allowed nonconfirmed results—but only when dealing with individuals who have limited rights, such as those on probation and those who are already prisoners (13). In particular, it is not required that the government prove guilt beyond all possible doubt but beyond all reasonable doubt. One of the most famous cases relating to due-process issues was that involving Willie Shoemaker, who claimed that he and his fellow jockeys' due-process rights were abridged by the New Jersey Racing Commission because of the requirement of urine tests (14). However, in this case the court said their due-process rights were not abridged, since a hearing was provided after the test to allow a challenge to the results. The confirmatory results in this case are construed by the court as a technical hearing or a technical appellate process. Due process could arguably be the justification for retaining positive specimens so that an employee could request a retest.

The other amendment to be addressed is the Equal Protection Amendment, the 14th Amendment (15). This arguably might require that all members of a class be included in the testing process, such as all people or employees with similar job functions regardless of their title. This originally came into play when it was decided that athletes would be checked rather than all students of a university (16). The question was whether athletes should be singled out, because there was no a priori reason to believe that they would abuse the substance any more than the student body as a whole. However, this argument did not stand up: this class of individuals was separated out because the drugs for which the tests were to be done were those that would give the athletes an unfair advantage on the field and might in fact cause harm to the athletes because of the already stressful situation on their cardiovascular system. In the general population that is not supported by federal funding, the 14th Amendment may not come into play; however, one must be aware of Title VII of the Civil Rights Act, which prevents discrimination based on sex, race, and religion. Therefore, in the private sector one must be cautious in requiring drug tests of a group of people who mainly fall under this statute without a policy describing a justifiable intent for doing the drug screen. Such an intent would be protecting the safety of fellow workers or the population they serve (17).

Drug Use and Private Employees

For years the release of employees who were not under contract or not involved with a union could be by termination at will, a common legal doctrine. This doctrine was broadly interpreted by the courts. Those jurisdictions utilizing this doctrine could discharge people based on a drug test, among other things, and the employee would have no recourse. However, a more recent public policy exception, fundamental fairness, is being applied by the courts, which allows good faith and fair dealing when an employee is discharged (18). Also, many implied contracts or guarantees are being interpreted by the courts as eroding this termination-at-will doctrine (19).

The National Labor Relations Act requires bargaining with the union when drug-abuse testing is instituted, because this would be considered a change in policy that is subject to bargaining (20). Therefore, those laboratories involved in advising firms on drug testing should include the union on the front end of negotiations. The unions many times will also bring in constitutional issues within the union contract through the bargaining process. In pre-employment drug screening, employee rights may not come into play, because the individual is not an employee at that time. However, for economic reasons one usually should use pre-employment drug screening only in the final stages of selection—and then fully inform the potential employee that the contract is contingent on results of the drug test.

Nonconstitutional Issues

Relevant nonconstitutional issues include discrimination, tortious invasion of privacy, defamation, assault and battery, negligence, chain of custody, and scientific evidence. These issues would apply regardless of whether you are a federal employee, state employee, or a private employee, union or nonunion. The laboratory personnel must be aware of these issues if they are to get involved with drug-abuse testing.

All laboratories in the hospital and private laboratories are well aware of the need for privacy for patients' records (21). When one enters a hospital, one gives a certain amount of consent to communicate clinical information and results or to transport results among the different departments of the hospital or to outside consultants. However, we know that the release of patient information outside this limited consent requires further consent by the patient. These same criteria would be applicable to employee records (22). There are limited exceptions to this, such as where grand-jury investigations are protected by state law (23) as to certain private information and cannot be introduced as evidence in a typical courtroom proceeding. A 1986 case (24) illustrates the point of defamation and invasion of privacy. This case involved the dismissal of an individual based on use of cocaine and on other false claims and an unreasonable intrusion upon the plaintiff's privacy. If the result (e.g., cocaine identification) is a negligent result by the laboratory, the laboratory may become the party indemnifying the company that dismissed the employee. When information about the alleged use of cocaine reaches a third party—that is, the employer tells someone other than the employee—a defamation suit could ensue. An employee may then be unable to earn for several years, so the damages can be in the several hundred thousand dollars range. This illustrates the need to:

1. not produce negligent results and,
2. not communicate the results to parties who have no need to know.

But a mistake is not necessarily negligence. For someone to be negligent, four legal elements must be proven. The first element would be for the laboratory to owe a duty to the employee. This may be an explicit or an implied duty. Obviously if the laboratory accepts a specimen, there is an implied responsibility that the sample will be handled correctly. The second element is that a proper standard of care was followed in analyzing the specimen. This would mean that reasonable procedures were carried out, based on the experience, skill, and knowledge of the individual doing the procedure. The standard of care can be modified by statutes and regulation, laboratory procedures and policies,
and professional standards. Therefore, if the scientific and technical guidelines for drug-testing programs of the National Institute on Drug Abuse become regulations, this could set the standard of care for forensic testing of urine specimens for federal employees or federal contract employees. As published (25), the scientific and technical guidelines have specific requirements as to: initial testing, with confirmation; storage of the specimens; specific reporting procedures; and quality-assurance guidelines, plus a requirement of specific facilities and qualified personnel. In addition they require a qualified individual privacy, appropriate procedures to ensure proper specimen collection, and a documented chain of custody. Additional requirements include the minimum of testing for marijuana and cocaine, with specific cutoff values for identifying five different drugs or drug groups (marijuana, cocaine, opiates, phencyclidine, and amphetamines). Since professional standards may help establish the standard of care, subscribing to such programs as the AACC/CAP forensic drug-testing program could also help establish the standard of care for the laboratory.

Additional standards of care may be established by state law. Already this year, six states have passed laws regulating employee substance-abuse testing: Connecticut, Iowa, Minnesota, Montana, Oregon, and Vermont. A representative from the state of Oklahoma introduced legislation (26) in the U.S. Congress mandating the NIDA standards for all employers. Therefore, if this bill were enacted, the NIDA guidelines would be the minimum standard of care for all laboratories doing drug-use testing on any employee.

Additional requirements for negligence would be that damages had to be proven and that there was a causal relationship (proximate cause) between the damages and the lack of standard of care. Obviously, damages could be easily proven if an individual loses his or her position because of the drug-use test. Moreover, assault and battery can be claimed when an employee is compelled under force to give a urine specimen. This is less likely when employer policy cautions against force in obtaining a specimen and consent is obtained before the specimen is obtained.

Chain of Custody

The initial questions one should ask are: "Why is the chain of custody so tight?" or "Why is a specific chain-of-custody document required when substance-use testing in this context involves civil litigation and not criminal litigation?" In civil litigation the standard of proof is by a preponderance of evidence, which means 51% vs 49%, and the chain of custody may require only that the sample was processed in the normal business manner and that samples ordinarily are not lost in the hospital laboratory setting. However, in most cases when the identity of a substance is a material element such as a criminal case where the standard of proof is "beyond a reasonable doubt," a strict chain of custody is required, including documented chains of custody. As indicated, the major reason for requiring this in substance-use testing, even though it is a civil matter, relates to the evidence of the case, which usually is only the result for the urine sample. The consequences of a positive result from that specimen—which can include loss of rights and loss of potential employment by that individual—mandates the documentation.

A chain of custody should show that there was no adulteration that could affect the chemical test. One must prove where and by whom the specimens were kept. Moreover, you need not eliminate all possibility that evidence has been altered, but there should be evidence beyond a reasonable doubt. Typical requirements for things that should appear on a chain-of-custody document are the time, date, and condition of receipt; identification of those handling the specimen; the analysis(es) to be performed; time and date of completion of analysis; and other pertinent information relating to the condition and the disposition of the specimen. Other items that may be required besides the chain-of-custody document include appropriate containers, which may be sealed by evidence tape that tends to prove that the sample has not been tampered with.

Scientific Evidence

Attorneys are well aware that a urine drug test is a technically difficult chemical process, which must be done by trained individuals in a competent laboratory. As a result, certain rules may be applicable as to whether that scientific evidence is admissible and whether it can be interpreted by expert testimony. Scientific evidence is usually admissible if the method and instrument are highly reliable scientifically and the test is performed by a qualified expert. The age-honored rule applied by jurisdictions is known as the "Frye Rule" (27), a rule based on a 1923 case involving lie detectors. The commentary from this case that would allow the evidence to be introduced was the requirement that the scientific evidence was reliable and used by a consensus of scientists. From a legal point of view, this means the scientific evidence is competent. As we have been told many times, especially for confirmatory tests, gas chromatography/mass spectrometry is an acceptable instrument for determining the presence of an abused substance in a urine specimen. In addition to competency, the results of the scientific tests must be relevant. "Relevancy" means that the results are applicable and logically influence the issue—e.g., were drugs present in the urine?

Summary

Laboratorians considering drug-use testing on employees or potential employees should be aware of the legal issues surrounding testing. Generally the laboratory should only check for a preselected list of potentially abused drugs, which would not invade the medical privacy of an individual. The laboratory should screen all individuals in a group so as to prevent discrimination and unequal treatment of employees. The results should be protected in a secure manner and those reported should only be those required by policies and procedures established by statute or professional standards. Proper chain of custody must be used and positives should be appropriately confirmed. Laboratorians should be familiar with other, additional, related issues which involve applicable laws, waivers, and use of results so that they do not abridge the rights of those that are being tested and those that are requiring the testing.

References

3. California Constitution, Article I, Section 1.
4. Florida Constitution, Article I, Section 23.
15. U.S. Constitution, 14th Amendment.
19. Toursaint v Blue Cross and Blue Shield, 292 N.W. 2d. 880 (MI 1980).
20. Medicenter, Mid-South Hospital, 221 NCRB 670 (1975).
21. Oliver v Harborview Medical Center, 94 Wash. 2d. 559, 618 P. 2d. 76 (1980).
27. Frye v U.S. 293 F. 1013 (1923).