

Subject

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STATE OF KANSAS

Office of the Attorney General

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Opinion No. 74- 45

Honorable Wesley H. Sowers
Senator 31st District
Senate Chamber
State Capitol
Topeka, Kansas 66612

Dear Senator Sowers:

As chairman of the Senate Committee on Public Health and Welfare, and on behalf of the committee, you inquire concerning K.A.R. 68-2-17, which states in pertinent part thus:

"(a) No pharmacy nor pharmacist, shall advertise in any manner, the name of any drug, medicine, or other item, which may not otherwise be dispensed except upon prescription issued by a duly licensed practitioner. . . ." (b) No pharmacy nor pharmacist shall advertise either directly or indirectly, or by inference, or implication, to purport professional superiority in any manner. (c) No pharmacy or pharmacist shall advertise directly or indirectly in such a way or manner as to cause or suggest that the patient purchase drugs in excess of the quantity prescribed or authorized." [Emphasis supplied.]

Your inquiry concerns only the underscored portion of the above, which operates to prohibit advertising of prescription drugs and prices thereof, including you indicate, the posting of prices of prescription drugs. Your inquiry is twofold, whether the regulation is within the statutory authority of the State Board of Pharmacy, and whether the regulation conflicts with Kansas statutes, or with the Constitution of the United States or of the State of Kansas.

The regulation was adopted by the State Board of Pharmacy pursuant to K.S.A. 65-1630:

"The board may adopt and promulgate such reasonable rules and regulations, not inconsistent with law, as may be necessary to carry out the purposes and enforce the provisions of this act"

The purpose of the Kansas Pharmacy Act is stated at K.S.A. 65-1624:

"The legislature hereby finds that it is essential to the public health and safety to regulate and control the manufacture, sale and distribution of drugs and poisons as defined in this act. Therefore, it is hereby declared to be the policy and purpose of this act to vest in an administrative board composed of specially trained, competent and skilled persons the power and authority to administer and enforce the provisions of this act, to the end that the manufacture and distribution of drugs and poisons, and the compounding and dispensing of prescriptions may be properly regulated and supervised in the interest of public health and safety."

No regulation is within the authority of the Board unless it can properly be deemed "necessary to carry out the purposes, and [to] enforce the provisions of" the State Pharmacy Act. The judgment of the Board is entitled to great deference, because of its acknowledged professional expertise and training. However, regulation of the sale and distribution of drugs is not an entirely arcane and mysterious art before which the layman must be completely credulous. Stated otherwise, any regulation adopted by the Board to enforce the purpose and provisions of the act must not be unreasonable or patently beyond the necessities of the case. The regulation must stand the test of reasonableness. This is not to say that any given regulation is to be deemed beyond the statutory authority of the Board merely because a different regulation, or indeed, no regulation at all, might seem more expedient or desirable to achieve the same end. It is to say, however, that any given regulation must bear some reasonably justifiable and demonstrable relationship to the purposes of the act which the Board is called upon to administer.

It has been urged that advertising of the names and prices of prescription drugs would operate to increase demand for such drugs, and lead to an atmosphere conducive to drug abuse. In the decision of the trial court in Pennsylvania State Board of Pharmacy v. Pastor, 85 Daup. 174 (1966), the court agreed with this argument: "[T]he promotion and advertising of dangerous drugs and narcotics would certainly to a degree titillate an aberrant person and create an atmosphere of easy availability."

The Pennsylvania Supreme Court found this rationale unpersuasive:

"No one can quarrel with this goal [diminishing the demand for, and use of, dangerous drugs], but closer examination does not demonstrate that the advertising prohibition bears a substantial relation to it.

"The sale of 'dangerous drugs' is a closely supervised business. All dangerous drugs must be dispensed, if at all, by a prescription, and a prescription, by definition, may only be issued by a duly licensed medical practitioner Thus it is the physician, not the consumer, who determines what 'dangerous drugs' may be purchased. Further, the sale of a dangerous drug without a prescription is a prohibited act . . . which can subject the pharmacist to criminal penalties . . . as well as the loss of his pharmacy license

"Therefore, to urge that allowing price advertisements of prescription drugs would increase the use of such drugs, one must assume either a) patients are able to pressure doctors into prescribing drugs for them, or b) that pharmacists are willing to risk selling such drugs without a prescription. We think neither assumption valid. As the Supreme Court of Florida stated in a case striking down as unconstitutional a rule prohibiting price advertising of prescription drugs:

"The rule proceeds on the notion that the advertisement of a prescription drug will subject the physicians to some sort of irresistible pressures that will force them to prescribe drugs for their patients simply on the basis of patient demand and without regard to the physical well-being of the patient. This concept disregards completely the professional and ethical integrity of the medical profession in prescribing remedies for patients. Furthermore, it actually suggests the probability of unethical conduct.'

* * *

"We must therefore conclude that because of the highly regulated structure of the pharmaceutical profession, and the fact that the consumer cannot choose his purchases, it would appear most unlikely that advertising the prices of retail prescription drugs

would, or could, have any impact on the demand or consumption of such drugs." Pennsylvania State Board of Pharmacy v. Pastor, 272 A.2d 487 at 492-493.

The question presented on this score is whether the Board may justifiably have concluded that the prohibition against advertising was necessary, or indeed, even reasonably calculated, to inhibit drug abuse, notwithstanding no prescription drug is in the nature of the case available to any consumer without a prescription from a physician. The availability of prescription drugs is governed not by the pharmacist, but by the prescribing physician. The impact of advertising upon the consumer is simply irrelevant to the exercise of judgment by the prescribing physician. The judgment of the Board in this instance is to be respected if there exists, or may be believed to exist, some factual basis upon which it may be predicated that the restriction may inhibit drug abuse, or at least tend to do so.

Deference to the judgment of the Board does not, however, require that we credit that which is implausible, improbable, and indeed, virtually inconceivable. Given the patent fact that, advertising or no, prescription drugs are no less and no more available from a pharmacist except upon the order of a physician, we cannot but concur with the judgments of the courts quoted above addressing this issue, and conclude that this proffered justification is as a matter of law inadequate to support the Board's assertion of authority in the enactment of the restriction in question. See Maryland Board of Pharmacy v. Sav-a-Lot, 311 A.2d 242 (Md. 1973) and Stadnik v. Shell's City, Inc., 140 So.2d 871 (Fla. 1962).

A second factor which has regularly been urged to support such restrictions was described thus in Maryland Board of Pharmacy v. Sav-a-Lot, supra, at 246:

"By encouraging consumers to 'shop around,' the advertising of drug prices will make it unlikely that they will patronize only one pharmacy. Thus, the pharmacist will no longer be in a position to 'monitor' prescriptions to determine whether the consumer is using antagonistic drugs."

Nowhere in the regulations of the Board is there provided any institutionalized and regularized monitoring procedure. In at least two cases, this ground has been expressly cited as a supportable basis for an advertising restriction. In Patterson Drug Company v. Kingery, 305 F.Supp. 821 (W.D.Va. 1969), the court stated thus:

"Some pharmacists, probably a minority, systematically monitor prescriptions by family records to avoid allergic reactions or the simultaneous use of antagonistic drugs, of which the patient's doctor may not be aware. Although monitoring is not completely effective because of the mobility of customers and the availability of nonprescription drugs which may be antagonistic, it is a benefit to the public." 305 F.Supp. at 824.

Similarly, in Supermarkets Gen. Corp. v. Sills, 93 N.J.Super. 326, 225 A.2d 728 (1966), the court observed:

"Thus, if the customer frequents one pharmacy for all of his prescription needs, that pharmacist is in a position to check his records and thereby determine if a prescription is in any way antagonistic or contra-indicated by his previous prescription record. The Legislature may have concluded that this important function of pharmacists would be impaired if they were permitted to advertise. The Legislature may have determined that . . . promotional advertising . . . would encourage the patient to seek the pharmacy offering the drug at the cheapest price. As a result of 'price shopping' the pharmacist presumably would not be in a position to effectively determine, by reference to his prescription records, if a particular drug is antagonistic to one previously prescribed, possibly by another physician.

"It was urged that the patient's records are reviewed by the pharmacist only for the purpose of checking prices on prescriptions previously filled for the customer. Perhaps that may be the practice of many pharmacists, but there may be infrequent instances where a pharmacist does 'monitor' the prescription for the purpose of possibly detecting the prescription of an antagonistic drug. Infrequent as such occasions may be, they may justify the enactment of [the statute]."

As stated above, nothing in the regulations of the Board suggests that so-called "monitoring" is an institutionalized or regularized practice in the profession in this state. Indeed, it may be argued with equal, if not greater,

persuasiveness that a customer attracted to a given pharmacy by "price shopping" will devote his custom to that pharmacy on a more regular basis than he would otherwise do, and thus enhance the opportunity of the pharmacist to monitor his prescriptions. Moreover, as the courts have consistently pointed out when rejecting this offered justification, it is primarily the responsibility of the prescribing physician to assure that he prescribes drugs fully compatible with those already being taken by his patient. Finally, at no time during recent months during which this regulation has been intermittently discussed in this office has it been suggested by the Board or any other representative of the profession that the regulation was adopted in order to enhance pharmacists' opportunities to monitor patients' dosages or possibly antagonistic drugs. Indeed, there is no facially obvious connection whatever between a prohibition against advertising of prescription drug names and prices, and the reinforcement of consumers' habits to regularize their utilization of individual pharmacists.

Before the Maryland Court, it was further urged that since pharmacy is a profession which affects the public health and welfare, and that the state, in the exercise of its police power, may prohibit such advertising to prevent rivalry demeaning to the profession. Testimony received in that case indicated that only about 10 percent of prescription drugs sold are compounded, that about 90 percent of such drugs sold are pre-compounded. Indeed, as the court found in Supermarkets Gen. Corp. v. Sills, 93 N.J. Super. 326, 225 A.2d 728 (1966), which upheld such a prohibition:

"[T]he pharmacist's function is to count the tablets called for by the prescription and transfer them from the container furnished by the manufacturer into the bottle ultimately dispensed to the purchaser." 225 A.2d at 735.

Thus, in the dispensing of prescription drugs, the pharmacist is engaged principally in the retail sale of a commodity. The court continued thus:

"The field of pharmacy is an admixture of both professional and commercial functions. The pharmacist, while practicing a profession by compounding drugs and rendering the incidental services to which reference has already been made, also is engaged in a commercial venture requiring merchandising and marketing techniques.

This dichotomy has been recognized in other professions, with the result that legislation regulating the commercial aspects thereof has not been sustained." 225 A.2d at 737.

Moreover, as the Maryland court pointed out, in its "Posting Requirements for Retailers of Prescription Drugs," the Internal Revenue Service dealt with the sale of prescription drugs not as a professional service, but as a retail activity:

"The dispensing of prescription drugs is considered to be a retail activity, and therefore, it is covered by Price Commission regulations requiring that base prices be posted. The fact that a professional pharmacist is employed to dispense drugs is incidental to the sale of those drugs and does not alter the retail nature of the transaction." United States Treasury, Internal Revenue Service, Economic Stabilization Program, Publication S-3010 (Rev. 9-72) Washington, D.C.

Thus, a pharmacist, while engaged in the practice of his profession, is likewise engaged oftentimes in a commercial business of retail sales. We deal here not with advertising of the cost of a professional service, but of the cost of a retail commodity, that of prescription drugs.

To recapitulate, the authority of the Board to adopt administrative regulations is limited by K.S.A. 65-1030, to "such reasonable rules and regulations, not inconsistent with law, as may be necessary to carry out the purposes and enforce the provisions of this act" K.S.A. 65-1637 sets forth precise conditions which must be met in the filling of any prescription and the sale of any prescription drug. It is silent as to advertising. There is simply no basis for any suggestion that the prohibition against price advertising serves to implement or facilitate the enforcement of any of the statutory restrictions fixed in K.S.A. 65-1637 by the Legislature governing sales of prescription drugs. Indeed, there appears to be no other provision of the Kansas Pharmacy Act, K.S.A. 65-1624, et seq., which the restriction can reasonably be deemed to enforce. Likewise, the Legislature did not enunciate any public policy or general purpose in the act to which the prohibition bears any necessary or even incidental relation. We cannot but conclude that the regulation is beyond the statutory authority of the Board, for the reasons stated above.

You inquire, secondly, whether the prohibition violates either the United States or the Kansas constitutions. In Maryland Board of Pharmacy v. Sav-A-Lot, Inc., 311 A.2d 242 (1973), Pennsylvania State Board of Pharmacy v. Paster, 441 Pa. 186, 272 A.2d 487 (1971), also discussed at 44 A.L.R.3d 1290, and Florida Board of Pharmacy v. Webb's City, Inc., 219 So.2d 681 (Fla. 1969), the courts held state statutes imposing such restrictions to be unconstitutional. Having concluded that the prohibition is beyond the statutory authority of the Board, it is not strictly necessary to reach any constitutional question. However, the reasons set forth above for concluding the prohibition exceeds the present statutory authority are equally applicable to the question of its constitutionality. In Gilbert v. Mathews, 186 Kan. 672, 352 P.2d 58 (1960), the court stated thus:

"The controlling principle is that if legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for the government to effect, the legislature transcends the limits of its power in interfering with the rights of persons affected by the legislation, but if there is a reasonable relation to an object within governmental authority, the exercise of the legislative discretion is not subject to judicial review." [Emphasis supplied.]

We have concluded that the regulation exceeds the statutory authority of the Board for the reason that it bears no reasonable relation whatever to the stated authority for its regulatory power, i.e., to enforce the Kansas Pharmacy Act and to supervise sales of prescription drugs in compliance with the statutory restrictions thereon.

It is certainly within the acknowledged province of the Legislature to enact laws to discourage drug abuse, to assure the integrity of prescription drug delivery and marketing systems, and to protect the public health and welfare from harmful practices and abuses. However, a growing number of courts have found no reasonable and substantial relation between these objectives and statutory prohibitions against advertising of names and prices of drugs available only upon prescription of a licensed physician. Any legislative action to implement such a prohibition should be supported by an expressly articulated statement of legislative findings of grounds therefor upon which any such restriction is predicated. Necessarily, in our opinion, such grounds must be other than those considered and rejected by the courts in the decisions cited above. Whether any other, even


plausible grounds exist upon which to find a reasonable relationship between a prohibition against prescription drug price advertising and the permissible objectives of state regulation enumerated above, is highly questionable. It is only upon the basis of explicit legislative findings that the question of reasonableness may be determined under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (It may be helpful, and indeed pertinent, to point out that in none of the cases considered in the preparation of this opinion did any medical society or drug abuse agency or organization file any brief or pleading as amicus curiae in support of advertising prohibitions.)

In the 1953 enactment of the Kansas Pharmacy Act, K.S.A. 65-1630 stated thus in pertinent part:

"Provided, That all valid rules and regulations of the state board of pharmacy existing on the date of this act takes effect and on file in the office of the revisor of statutes shall constitute and be the rules and regulations of the board created by this act and shall continue in force and effect until revoked, suspended or amended by the board created by this act."

K.A.R. 68-2-17 is stated to have become effective January 1, 1966. Whether this regulation was in force prior to 1966, and the 1966 date reflects its filing pursuant to the 1965 act governing agency rules and regulations is unclear, but also immaterial. The regulation was not valid at the time of its promulgation because it exceeded the statutory authority of the Board, bearing no reasonable relation to its statutory charge. Any approval which may have been given heretofore by this office is hereby withdrawn.

Very truly yours,



VERN MILLER
Attorney General

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