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ATTORNEY GENERAL OPINION NO. 89- 116

Tom C. Hitchcock, Executive Secretary  
Kansas State Board of Pharmacy  
Landon State Office Bldg., Room 513  
Topeka, Kansas 66612

Re: Public Health -- Regulation of Pharmacists --  
Definitions; Prescription Order

Public Health -- Examination, Licensure and  
Regulation of Nursing -- Advanced Registered Nurse  
Practitioners; Transmitting Prescription Orders

Public Health -- Healing Arts; Physicians'  
Assistants -- Transmitting Prescription Orders

Synopsis: Physicians' assistants and advanced registered  
nurse practitioners may not originate a  
prescription order, as they are not practitioners  
within the meaning of the pharmacy act. However,  
these health care providers may transmit  
prescription orders pursuant to written protocols.  
The transmitted order is a prescription order as  
defined by the pharmacy act. An order may be  
transmitted through a note written by the health  
care provider, and the signature of that person is  
neither required nor prohibited by the pharmacy  
act. The pharmacist may refuse to fill the  
prescription if, in the pharmacist's professional  
judgment and discretion, it is believed that the  
prescription should not be filled. Cited herein:  
K.S.A. 65-1129; 65-1130 (Ensley 1985); K.S.A.  
65-1130, as amended by L. 1989, ch. 192, § 1;  
K.S.A. 65-1626 (Ensley 1985); K.S.A. 1988 Supp.

65-1626, as amended by L. 1989, ch. 192, § 2;  
K.S.A. 1988 Supp. 65-1637(a), 65-2896e; K.S.A.  
65-4101; L. 1989, ch. 192, § 1; L. 1986, ch.  
236, § 1; K.A.R. 60-11-104; 60-11-104a; 68-20-18;  
21 C.F.R. § 1306.05.

\* \* \*

Dear Mr. Hitchcock:

As Executive Secretary for the Kansas State Board of Pharmacy, you have requested our opinion regarding a pharmacist's obligation to fill a prescription when an order has been transmitted in written form and signed by an advanced registered nurse practitioner (ARNP) or a physicians' assistant (PA). Your question arises from the uncertainty of these health care providers' authority which attended an amendment to the pharmacy act in 1986. Subsequent legislation clarifies this authority.

Only a "practitioner" may prescribe drugs. See Kansas Attorney General Opinion No. 86-125. Prior to the effective date of L. 1986, ch. 236, § 1, a practitioner was defined as follows:

"'Practitioner' means a person licensed to practice medicine and surgery, dentist, podiatrist, veterinarian, scientific investigator or other person licensed, registered or otherwise authorized by law to administer, prescribe and use prescription-only drugs in the course of professional practice or research."  
K.S.A. 65-1626(t) (Ensley 1985).

The statute was amended to read:

"'Practitioner' means a person licensed to practice medicine and surgery, dentist, podiatrist, veterinarian, scientific investigator or other person ~~licensed,~~ **registered or otherwise authorized by law expressly licensed or registered** to administer, prescribe and use prescription-only drugs in the course of professional practice or research."  
K.S.A. 65-1626(t) (L. 1986, ch. 236, § 1).

Based on the amended language of the above-noted statute, and based upon the practice acts for the ARNP's and PA's, we stated that ARNP's

"may not issue prescription orders pursuant to a physician's standing orders or protocol because they have not been granted such authority by the statutes and regulations under which they are licensed. Physicians' assistants, however, are expressly authorized by statute to practice medicine under the direction and supervision of a physician. Since the practice of medicine includes the act of prescribing medicine, we conclude that physicians' assistants may issue prescription orders under the direction and supervision of a physician." Attorney General Opinion No. 86-125, at page 8.

Following our 1986 opinion, the physicians' assistants act was amended to clarify the nature of a PA's authority to prescribe. It now states in part:

"A physician's assistant may not prescribe drugs but may transmit a prescription order for drugs pursuant to a written protocol as authorized by the responsible physician. " K.S.A. 1988 Supp. 65-2896e (emphasis added).

The underscored terms were not defined by the legislature.

Regarding ARNP's, the Kansas state board of nursing clarified the nurse practitioners' expanded role by promulgating K.A.R. 60-11-104a. The existing nursing regulations had included in the scope of expanded practice the authority to "manage the medical plan of care prescribed for the client, based on protocols or guidelines" which the attending physician and nurse practitioner had adopted. K.A.R. 60-11-104(f). Since the language of this regulation did not expressly license an ARNP to administer, prescribe or use prescription-only drugs, ARNP's were not practitioners within the meaning of the pharmacy act. The new regulation gives the express authority, but only to the extent the prescription order originates from a written protocol. The authority cited for the regulation is K.S.A. 65-1129 (general rule-making authority) and K.S.A. 65-1130 (Ensley

1985) (specific rule-making authority regarding ARNP's). The legislature expressed concern that the nursing regulation exceeded the agency's authority. See Minutes, Joint Committee on Administrative Rules and Regulations, December 9, 1988, page 13. The Legislature subsequently amended K.S.A. 65-1130, adding language nearly identical to that used for the physicians' assistants (provider may transmit order pursuant to protocol, but may not prescribe). See L. 1989, ch. 192, § 1. Once again, the terms "transmit" and "prescribe" are not defined by statute. See K.S.A. 65-1130, as amended by L. 1989, ch. 192, § 1.

With this background, we address the issue of whether a pharmacist may fill a prescription order which is transmitted in writing and signed by a PA or an ARNP. To simplify the issue, we assume that the prescription order does not involve a controlled substance, as defined by K.S.A. 65-4101(e).

Generally, pharmacists are under a duty to fill a prescription in strict compliance with a prescription order. See K.S.A. 1988 Supp. 65-1637(a). A prescription order is defined as:

"(1) An order to be filled by a pharmacist for prescription medication issued and signed by a practitioner in the authorized course of professional practice; or (2) an order transmitted to a pharmacist through word of mouth, note, telephone or other means of communication directed by such practitioner." K.S.A. 1988 Supp. 65-1626(y), as amended by L. 1989, ch. 192, § 2 (emphasis added).

From the language employed by the legislature in amending the PA statute in 1987 and the ARNP statute this last session, it is clear that those categories of health care providers are not to be considered "practitioners" within the meaning of the pharmacy act. Therefore, subsection (y)(1) of the above-quoted definition does not apply. However, subsection (y)(2) uses language which corresponds to the language of the specific practice acts. As with the PA and ARNP practice acts, the term "transmit" is not defined in the pharmacy act. We believe that subsections (y)(1) and (y)(2) of the definition and the practice acts distinguish between the origination of a prescription order by a practitioner and the conveyance of such order. The definition also makes clear that the order may be conveyed through a variety of media.

In summary, a physician's order for prescription medication which is transmitted to a pharmacist is a prescription order. The practice acts regulating PA's and ARNP's authorize those health care providers to receive their direction regarding a practitioner's order from the written protocol. In relaying an order from a protocol to a pharmacist, whether by verbal or written message, a prescription order is created, and a pharmacist is authorized to fill the prescription. By transmitting the physician's order in this manner, the ARNP or PA is not prescribing, as prohibited by statute.

The form of the written note does not appear to be regulated by the pharmacy act or by regulations of the pharmacy board. In comparison, state and federal law both dictate the elements of a prescription order for controlled substances. See K.A.R. 68-20-18 and 21 C.F.R. § 1306.05. For controlled substance prescriptions, a practitioner must sign the order when an oral order is not permitted. In effect, this is a mandated verification that the order was given by a person entitled to issue the prescription order. Our review of the federal and state pharmacy laws reveals no similar requirement for non-controlled prescription medications. Therefore, from the pharmacists perspective, the presence or absence of a PA's or ARNP's signature is of no legal consequence. The licensing board of either of the classes of health care providers may make requirements regarding the form of transmitting the prescription order. Such requirements should be perceived as regulating the PA or ARNP, and not the pharmacist.

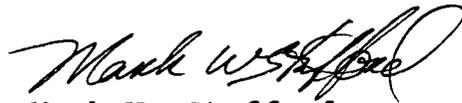
Having determined that a pharmacist is authorized to fill a prescription order transmitted, in writing, by an ARNP or PA, we next look at the degree to which the pharmacist is required to fill such prescription. We need not reach the question of whether a pharmacist, without cause, may decline to fill a prescription. A pharmacist may decline to fill a prescription if, in the pharmacist's professional discretion, such prescription should not be filled. See, e.g., K.S.A. 1988 Supp. 65-1637. It appears that the refusal must arise out of professional judgment and discretion. One writer notes that a pharmacist may refuse to fill or refill a prescription because the pharmacist may "(1) not have the prescribed drug in stock; (2) suspect that the prescription is forged or is fictitious writing; (3) distrust his or her ability to fill the prescription; (4) believe that the prescription will be harmful to the patient due to error on [the] part of the prescriber; and (5) (in the case of a refill) know that the refilling of the prescription violates the law." Pharmacy Law Digest (Facts and Comparisons) Looseleaf Service, at

CL-57 (July, 1988). The writer goes on to say that, in refusing to fill the prescription, the pharmacist should avoid commenting on the professional ability of the prescriber, as civil liability may arise out of defamatory remarks. Id.

In conclusion, the statutes upon which Attorney General Opinion No. 86-125 was based have been amended. In light of those amendments, it is our opinion that physicians' assistants and advanced registered nurse practitioners may not originate a prescription order, as they are not practitioners within the meaning of the pharmacy act. However, these health care providers may transmit a prescription order pursuant to written protocols. A prescription order may be transmitted through a note written by the health care provider, and a signature of that person is neither required nor prohibited by the pharmacy act. The pharmacist may refuse to fill the prescription if, in the pharmacist's professional judgment and discretion, it is believe that the prescription should not be filled.

Very truly yours,

  
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