

Opinion No. 88-49

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OPINION OF: HAL STRATTON, Attorney General

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TO: James Daily, Acting Executive Director, New Mexico Board of Pharmacy, 4125 Carlisle NE, Albuquerque, New Mexico 87107

QUESTIONS

May physicians keep large stocks of drugs to sell to their patients, either as a separate charge for medication or by including the charge for the drugs in the office call fee, without obtaining a pharmacy license?

CONCLUSIONS

Yes, but see analysis.

ANALYSIS

Section 61-11-22(A) of the Pharmacy Act, Sections 61-11-1, 61-11-2, and 61-11-4 to 61-11-28 NMSA 1978 (Repl. 1986), provides: "The Pharmacy Act does not apply to licensed practitioners in this state in supplying to their patients any drug if the licensed practitioner is practicing his profession and does not keep a pharmacy, advertised or otherwise, for the retailing of dangerous drugs." A physician is a "licensed practitioner," as defined by Section 61-11-2(K): "[A] person engaged in a profession licensed by the state who, within the limits of his license, may lawfully prescribe, dispense or administer drugs for the treatment of a patient's condition, and includes doctors of medicine." See also Section 26-1-16(B) NMSA 1978 (Repl. 1987) (physician may prescribe, provide samples of and dispense drugs to his patients). The question thus is whether a physician who supplies drugs to his patients and keeps on hand a quantity of drugs for this purpose is "keeping a pharmacy" for the "retailing" of drugs. If he is, the conduct is not exempted by Section 61-11-22(A).

The Pharmacy Act defines "pharmacy" as: "[A]ny store, laboratory or place of business where drugs are sold at retail or where physicians' prescriptions are compounded or dispensed, or both." Section 61-11-2(N). A "pharmacy" means a "drug store." Webster's Third New International Dictionary at 1694 (1961). See also *State v. Schiffler*, 93 O.L.A. 513, 515, 199 N.E.2d 902, 904 (Toledo, Ohio Mun. Ct. 1964) ("Under normal day to day relationships, a retail drug store would be considered as a store which sells drugs for profit, in small quantities.") Therefore, under these authorities a physician may supply drugs to his patients, but he otherwise may not maintain a business establishment or drug store for the retail sale of drugs. This prohibition is reinforced by Sections 61-11-

21(A) (unless exempted, no person shall sell drugs at retail) and 61-11-21(B) ("No person shall conduct or operate a place used for the retail sale ... of drugs" except pursuant to the Act).

The few cases from other jurisdictions that address a physician's exemption from a state's pharmacy act support this conclusion by disallowing physician drug sales to persons who are not the physician's patients, but allowing sales to patients in connection with the physician's treatment of them. In *Ye Old Apothecary v. McClellan*, 163 W. Va. 19, 253 S.E.2d 545 (1979), the court upheld an injunction against a physician who sold drugs to people who were not his patients. The pharmacy law exempted a physician when "supplying to his patients such medicines as he may deem proper, if the supply is not made as a sale." The court construed the term "sale" to mean "retail sale," stating:

To supply is to furnish, and the dictionaries indicate that some volume or number is contemplated.... The statutory permission to physicians to supply patients with medicines, but not sell them, would seem to be nonsense because physicians, as the pharmacists argue, could only provide patients with supplies of free sample medicines. We doubt this to be the legislative intent.

Id. at 21-22, 253 S.E.2d at 546-47. As so construed, the court held that this exemption meant:

[P]hysicians may supply drugs to their own patients but not fill prescriptions written by other physicians; nor sell at retail such drugs as they supply to their own patients. They may make reasonable charges for their services, including any medications they supply, and may dispense amounts of drugs as they deem sufficient to the patients' course of treatment.

Id. at 23, 253 S.E.2d at 547. See also *People v. Moorman*, 86 Mich. 433, 49 N.W. 263 (1891) (upholding a physician's conviction for violating the pharmacy law by selling drugs to persons who were not his patients; physician has no right greater than any other person to sell drugs to persons not his patients); *Parr v. Spires*, 41 So.2d 336 (Fla. 1949) (hospital drug room operated by a physician was not a "drug store" where the physician did not fill other physicians' prescriptions); *Commonwealth v. Hovious*, 66 S.W. 3 (Ky. App. 1902) (physician could be charged with violating the pharmacy law by engaging in the retail drug business; the statutory physician exemption allowed only physician drug sales to the physician's patients).

Based on this authority, we conclude that a physician may keep a supply of drugs, but only to provide to his patients. The physician may provide drugs to his patients only in connection with his treatment of them. A physician may assess a reasonable charge for his services, including a charge for the drugs he supplies to his patients.

ATTORNEY GENERAL

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