

Opinion No. 37-1660

June 3, 1937

BY: FRANK H. PATTON, Attorney General

TO: Mr. H. E. Henry, Secretary New Mexico State Board of Pharmacy Albuquerque, New Mexico

{*109} This is to acknowledge receipt of your inquiry of May 27 in which you request an opinion on the application of Sections 53-201 and 53-202, New Mexico Statutes Annotated, 1929 Compilation. You state that a number of complaints have been filed with the Board, stating that merchants, who are not pharmacists and do not employ pharmacists, in towns and cities where there are stores operated by pharmacists, are selling or offering for sale drugs and medicines. You wish to know if prosecutions may be instituted under the sections above quoted.

This question must be answered in the negative. It is our opinion that the sections above referred to are not criminal statutes. In the first place, they do not carry any penalty clause whatsoever. In the second place, they do not prohibit anything, but merely authorize certain merchants to sell specified patent medicines under conditions therein enumerated. The statutes might be made a predicate for a civil suit to prevent such operations. However, it is our opinion that no criminal prosecutions can be had thereunder.

However, I wish to refer you to certain other sections in the food and drugs and pharmacy acts. Your particular attention is directed to Article 1 of Chapter 53, New Mexico Statutes Annotated, 1929 Compilation. Section 53-115 makes it unlawful for any person not a registered pharmacist to sell any poison enumerated in Sections 53-119 and 53-120. Section 53-116 makes it unlawful for any person to sell or dispense any article enumerated therein or in Section 53-121. If these merchants are selling any compounds or preparations prohibited by the sections above quoted, doubtless some criminal prosecution could be instituted under the provisions of that article.

Your attention is likewise directed to Chapter 103, New Mexico Statutes Annotated, 1929 Compilation, relating to pharmacy. Chapter 103-101 makes it unlawful for any person or persons not registered pharmacist to conduct a drug store, apothecary shop, etc., or any store for the purpose of retailing, compounding or dispensing medicines, physicians' prescriptions or poisons in the state. Under this section there is some likelihood that the store or place of business would have to be conducted solely for that purpose. We are not passing upon this at the present time as no request has been made therefor, your attention merely being directed thereto.

Section 103-110 makes it unlawful for any person not a registered pharmacist to conduct a store or pharmacy or store for retailing, compounding {*110} or dispensing drugs, medicines, poisons or chemicals for medical use, and provides a penalty

therefor. It likewise contains a prohibition against itinerant vendors of any drug, medicine, lotion, etc., unless a license is obtained therefor. Perhaps some relief could be obtained under this section.

Trusting that this answers your questions, I am

By: RICHARD E. MANSON,

Asst. Atty. Gen.