

1976 S.C. Op. Atty. Gen. 253 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4408, 1976 WL 25250

Office of the Attorney General

State of South Carolina

Opinion No. 4408

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*1 The substitution of drugs constitutes “prescribing” of drugs, and unless it is carried on by a licensed physician, it is prohibited by Section 56–1354.

Executive Director and Chief Drug Inspector
South Carolina Board of Pharmacy

A question has been raised as to whether revised Regulation No. 22 of the State Board of Pharmaceutical Examiners is violative of the following language of Section 56–1354, CODE OF LAWS OF SOUTH CAROLINA, 1962, as amended:

Any person shall be regarded as practicing medicine within the meaning of this chapter who (a) shall as a business ... prescribe for any physical ailment of another, ... or (c) shall diagnose, cure, relieve in any degree or profess or attempt to diagnose, cure, or relieve any human disease, ailment, defect, abnormality or complaint, whether ... by prescribing, ... any drug, appliance, manipulation, adjustment or method or by any therapeutic agent whatsoever. [Emphasis added.]

Section 56–1355 of the Code, after proscribing the practice of medicine by anyone not so authorized, then states in part: ... nothing in this chapter shall be construed:

(3) To prohibit licensed druggists from selling, using and dispensing drugs in their places of business, respectively.

Regulation No. 22 authorizes drug substitution by a pharmacist, when a prescribing physician does not indicate that a prescription is to be dispensed as written, under the following conditions:

(1) The brand selected must be a drug product with the same generic name in the same strength, quantity, dose and dosage form as the prescribed drug which is, in the pharmacist's professional judgment, therapeutically equivalent.

The question is whether or not the substitution of a different brand of the same generic drug product amounts to the prescription of a drug and, thus, the practice of medicine. In my opinion, it does.

Although our research reveals that the term “prescribe” has not yet been defined by the South Carolina Supreme Court, other state and federal courts have defined it, to wit:

... in a medical sense ‘prescribe’ means to direct, designate, or order the use of a remedy. [State v. Whipple, 173 N.W. 801 at 802.](#) [Emphasis added.]

... a ‘prescription’ is the direction of a remedy or remedies for a disease and the manner of using them; a formula for the preparation of a drug and medicine. [People v. Cohen](#), 157 N.Y.S. 591 at 593.

A prescription by strict definition, is a physician's written order to a pharmacist for medicinal substances for a patient. It includes directions to the pharmacist regarding the preparation and to the patient regarding the use of the medicine.

In reality, however, a prescription is infinitely more than can be simply defined. It is a summary of the physician's diagnosis, prognosis, and treatment of the patient's illness. It brings to a focus on one slip of paper the diagnostic acumen and therapeutic proficiency of the physician. The prescription is an important practical phase in the application of pharmacology to clinical medicine, and combines the knowledge of the absorption, fate, excretion, action, toxicology, and dosage of drugs with the requirements for restoration of the patient's health. [DeFreese v. United States](#), 270 F.2d 730 at 733, ftnote 5. (5th Cir.1959).

*2 The term ‘prescribe’ is given the following definition Webster: ‘Med. To direct, designate, or order the use of, as a remedy.’ [Footnote omitted.] The word, ‘designate,’ in turn, is defined as ‘to work out and make known; to point out; to indicate.’ ... The word ‘prescribe’ of course includes recommending and suggesting. [Colgrove v. United States](#), 176 F.2d 614 at 617. (9th Cir.1949.) [Emphasis added.]

As hereinabove noted, Section 56–1355 of the Code excludes from its prohibition against the unauthorized practice of medicine only the “selling, using and dispensing” of drugs by a licensed pharmacist. The meaning of the “selling” of drugs is clear and the “using” of drugs relates primarily to the compounding thereof. In my opinion, the “dispensing” of drugs is a ministerial duty, i.e., it does not involve a discretionary act on the part of the pharmacist.

To ‘dispense’ may be defined as meaning to weigh out, pay out, distribute, regulate, manage or control. [Hall v. Florida Board of Pharmacy](#), 177 So.2d 833 at 836.

‘Dispense’ etymologically means to weigh out, pay out, distribute, regulate, manage, control, etc., and the term is particularly appropriate as applied to drugs. [Palmer v. U.S.](#), 340 F.2d 48 at 50.

On the other hand, the substitution of drugs, albeit consisting of merely the exchange of one brand for another, involves a discretionary, judgmental act on the part of the pharmacist.

The term ‘substitute’ connotes replacement of one thing for another and in its ordinary sense designates something placed in a position previously occupied by another thing, and implies the removal or elimination of the thing replaced, since something cannot be substituted for something else unless that for which substitution is made is taken out and that which is substituted is inserted in its place. [Fullilove v. U.S. Cas. Co. of N.Y.](#), 125 So.2d 389 at 393.

The word ‘substitution’ means putting in place of another thing, change of one thing for another, serving in lieu of another, having some of its parts replaced; and word ‘substituted’ refers to something placed in a position previously occupied by another thing. [In re Cooke's Estate](#), 264 N.Y.S. 336.

As can readily be seen, a regulation conferring upon a pharmacist the authority to substitute one drug for another necessarily broadens his powers in that it enables him to designate, i.e., prescribe a drug and, in effect, to replace the physician's judgment with his own.

Based upon the foregoing reasoning, my opinion is that the substitution of drugs as authorized by Regulation No. 22 constitutes the designation thereof and, thus, is included in the term "prescribing" of drugs, which practice, unless carried on by a licensed physician, is proscribed by Section 56-1354 of the South Carolina Code.

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