

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3970

October 14, 1986

Theron C. Smith, III, O. D.
President, South Carolina Board
of Examiners in Optometry
Post Office Box 8725
Columbia, South Carolina 29202

C. Douglas Chavous, Executive Secretary
South Carolina Board of Pharmacy
Post Office Box 11927
Columbia, South Carolina 29211

Gentlemen:

By your separate letters to Attorney General Medlock, you have both requested an opinion as to the legality of a licensed pharmacist dispensing contact lenses based upon a prescription written by a licensed physician (ophthalmologist). Dr. Smith's particular concern is whether a pharmacist performing such an act would be violating any statute or regulation pertaining to the practice of optometry. 1/

The contact lenses in question are dispensed individually in factory-sealed vials which are marked with the prescription of the lens contained in the particular vial. The vial is labelled "Caution: Federal law prohibits dispensing without a prescription." At one time, contact lenses were considered to

1/ It is acknowledged by Mr. Chavous that a pharmacist would be prohibited from filling such a prescription for contact lenses written by an optometrist rather than an ophthalmologist.

Dr. Smith
Mr. Chavous
Page 2
October 14, 1986

be drugs. Winograd v. Johnson, 38 Colo. App. 432, 561 P.2d 1274 (1976). Soft contact lenses such as Bausch and Lomb's "Soflens" are now classified as "devices" under the Medical Device Amendments of 1976, P. L. No. 94-295, § 2.

The South Carolina Pharmacy Act, Section 40-43-10 et seq., Code of Laws of South Carolina (1976, as amended), prohibits, among other things, the dispensing in this State of items classified as "dangerous drugs," except upon a prescription of a duly licensed physician, medical or osteopathic, podiatrist, dentist, or veterinarian. See Section 40-43-150. "Dangerous drugs" are defined as those substances bearing the legend "Caution: Federal law prohibits dispensing without a prescription." See Regulation 99-38. Medical devices such as diaphragms and contact lenses have accordingly been construed as being "dangerous drugs" requiring a prescription. Therefore, the Pharmacy Act does not appear to prohibit pharmacists from dispensing items such as contact lenses upon the lawful prescription of a duly authorized medical practitioner.

Your question, however, further inquires as to the applicability of the provisions of the South Carolina Optometry Act to pharmaceutical practice. Section 40-37-10 of the Code provides:

Any person shall be deemed to be practicing optometry within the meaning of this chapter who shall:

- (1) Display a sign or in any way advertise as an optometrist;
- (2) Employ any means, other than the use of drugs except as provided in this chapter, for the measurement of the powers of vision or the adaptation of lenses for the aid of vision;
- (3) In the sale of spectacles, eye-glasses, or lenses, use lenses in the testing of the eye therefor other than lenses actually sold;

Dr. Smith
Mr. Chavous
Page 3
October 14, 1986

- (4) Examine the human eye by the employment of any subjective or objective physical means, without the use of drugs except as provided in this chapter, to ascertain the presence of defects or abnormal conditions for the purpose of relieving them by the use of lenses, prisms, or other physical or mechanical means; or
- (5) Practice orthoptics 2/ or prescribe or fit contact lenses.

By dispensing factory-sealed vials of contact lenses labelled with the prescription of the particular lens in a given vial, a pharmacist is not advertising himself to be an optometrist or displaying such a sign, measuring vision, adapting lenses, using or placing lenses in a person's eye, examining the eye by any means, prescribing or fitting contact lenses, or practicing orthoptics. Unless a particular pharmacist does more than provide a sealed and labelled vial containing a contact lens upon the proper prescription of an ophthalmologist, it would appear that such act does not come within the practices described in Section 40-37-10 of the Code.

Section 40-37-200 of the Code provides that no optometric licensee shall permit his license to be used by an unlicensed person. It further covers delegation of tasks to assistants of an optometrist and provides that "[n]o contact lenses shall be dispensed during his absence." The term "his" refers back to the licensed optometrist. Because this statute deals specifically with actions of assistants under the direct supervision of an optometrist, it would not appear to apply to other sources of obtaining contact lenses such as ophthalmologists' offices or pharmacies. See Home Building and Loan Assn. v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1938) (express mention of certain thing in statute implies exclusion of all other

2/ "Orthoptics" may be defined as "the treatment or the art of treating defective visual habits, defects of binocular vision, and muscle imbalance (as strabismus) by reeducation of visual habits, exercise, and visual training." Webster's Third New International Dictionary 1595.

Dr. Smith
Mr. Chavous
Page 4
October 14, 1986

things). Thus, Section 40-37-200 would not apply to a pharmacist who is merely filling a prescription.

Finally, Section 40-37-260 of the Code states that "[i]t shall be unlawful for any person to engage in the practice of optometry in this State unless such person shall be licensed by the South Carolina Board of Examiners in Optometry." As noted above, the activities of a pharmacist in merely filling a prescription do not appear to fit within the definition of the practice of optometry in Section 40-37-10. The exemptions from the provisions of the Optometry Act would most probably be construed by a court as applicable to persons such as pharmacists who are merely selling as merchandise from a regularly-established place of business ready-made devices without aiding the customer in the fitting thereof.

Our research has disclosed several cases dealing with similar questions in other jurisdictions. Those cases will be made available upon request made to the Assistant Attorney General assigned to assist your board. Essentially, the distinction to be recognized is that pharmacists are merely filling the lawful order of a medical practitioner who has made the necessary professional examinations and judgments concerning the appropriateness of the particular device being purchased. The pharmacist makes no judgment concerning the customer's prescription and is merely providing what the physician has lawfully ordered.

This Office has been advised that in those jurisdictions in which this practice has been permitted to date, it has become the standard procedure for pharmacists to include a clear instruction on the packaged device that the patient should see his or her physician concerning any difficulties or medical problems encountered in using the device. Such a procedure makes it clear that the pharmacist is merely selling the lens upon prescription of the physician and that the physician, not the pharmacist, is to be consulted if problems should arise.

In conclusion, we would advise that the Optometry Act, Section 40-37-10 et seq. of the Code, does not appear to preclude pharmacists from dispensing contact lenses in factory-sealed and labelled vials upon the lawful prescription of a duly licensed medical practitioner such as an ophthalmologist. For further assistance with this question or other materials, each

Dr. Smith
Mr. Chavous
Page 5
October 14, 1986

of the respective boards should consult with the Assistant Attorney General assigned to it.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions

cc: Richard P. Wilson, Assistant Attorney General
C. Richard Kelly, Assistant Attorney General