

PHARMACY BOARD:
ADMINISTRATIVE AGENCIES:
REGULATIONS:

Board of Pharmacy may not pass a regulation prohibiting the truthful advertising of prescription drugs in pharmacies.

August 7, 1961



Mr. Lloyd W. Tracy, Secretary
Missouri Board of Pharmacy
Room 130
State Capitol Building
Jefferson City, Missouri

Dear Mr. Tracy:

This will acknowledge receipt of your request for an opinion which reads as follows:

"The Board of Pharmacy request an official opinion of whether it is within our power to promulgate a regulation like that as set out in the third paragraph of the resolution received today from the Kansas City Retail Druggists' Association, of which a copy is enclosed."

The resolution referred to in your letter and attached thereto provides:

"Whereas, it is the unanimous opinion of the Board of Directors that price advertising of legend drugs in any media is undesirable from the standpoint of eventually demoralizing prescription prices, contributing to public confusion and misconceptions concerning the availability of such drugs, and is therefore not in the public interest, and

"Whereas, it is the unanimous opinion of the Board of Directors that price advertising of legend drugs is not in keeping with the ethics of the profession of Pharmacy, therefore

"Be it Resolved that the Board of Pharmacy of the State of Missouri be requested, and hereby is, to issue and enforce regulations to the effect that 'no pharmacy, nor pharmacist shall advertise in any manner the name of any drug, medicine, or other item, which may not otherwise be dispensed except upon prescription issued by a duly

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licensed practitioner. Provided; that nothing in this regulation shall prohibit the furnishing of professional information to qualified practitioners.' "

Also enclosed with your letter is a resolution of the Greater Kansas City Chapter of the American Pharmaceutical Association which contains further background data on this question and is set out below:

"Whereas, the advertising of legend drugs by any media of public communication is a practice in direct contradiction to the vitally important restrictions and safeguards dealing with drug traffic, and

"Whereas, such promiscuous advertising inevitably fosters and promotes the dangerous practice of self-medication with potentially hazardous drugs, and

"Whereas, the same irresponsible advertising necessarily inflicts an intimidation on the prescribing prerogatives of Physicians, and

"Whereas, it is a malicious violation of his professional obligations for any Pharmacist to contribute to public confusion and misconceptions concerning the availability and characteristics of potent drugs, therefore,

"Be it resolved, that the Greater Kansas City Chapter of the American Pharmaceutical Association in the public interest condemns the practice of advertising legend drugs, and denounces Pharmacists who thereby foresake their responsibilities to the public. Further, the Chapter calls upon the Missouri State Board of Pharmacy to issue regulations forbidding such advertising, and to vigorously and courageously enforce the same regulations, for the greater protection of the public we serve."

The resolution which embodies the suggested wording for the regulation denounces "price advertising" yet the regulation would prohibit any advertising of prescription drugs. However, as explained below, the conclusion herein would not be altered by

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the inclusion of a prohibition against price advertising in the regulation.

At the outset, we should note that in Missouri an administrative agency has only those rule making powers as are given to it by statute. As was said in *State ex rel. Springfield Warehouse & Transfer Co. v. Public Service Commission* (Mo. App. 1949) 225 S.W. 2d 792, 794:

" . . . the adoption of such a rule by respondent can only be legally authorized upon the grounds that the Legislature has directly, or by necessary or reasonable implication, authorized the same. Respondent has no power except that granted by its creator."

The Missouri Board of Pharmacy has been authorized by statute to make rules and regulations directed at carrying out the duties with which the Board is charged.

Section 338.140 RSMo. 1959 provides in part:

"1. The board of pharmacy shall have a common seal, and shall have power to adopt such rules and bylaws not inconsistent with law as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under sections 338.010 to 338.190, and shall have power to employ an attorney to conduct prosecutions or to assist in the conduct of prosecutions under sections 338.010 to 338.190."

The statutes cited in the above quoted section relate primarily to the legislative requirement of a license to practice pharmacy and the qualifications necessary to obtain such a license:

Under the heading "regulation of Pharmacies", the Board is similarly authorized to "make such rules and regulations, not inconsistent with law, as may be necessary to carry out the purposes and enforce the provisions of sections 338.210 to 338.300", Section 338.280, RSMo 1959. Those sections generally require the licensing of pharmacies, set the standards for issuance of such licenses by the Board, and provide the procedural steps for obtaining and renewing such licenses.

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Section 338.240 provides as follows:

"Upon evidence satisfactory to the said Missouri board of pharmacy:

"(1) That the pharmacy for which a permit, or renewal thereof, is sought, will be conducted in full compliance with sections 338.210 to 338.300, with existing laws, and with the rules and regulations as established hereunder by said board;

"(2) That the equipment and facilities of such pharmacy are such that it can be operated in a manner not to endanger the public health or safety;

"(3) That such pharmacy is equipped with proper pharmaceutical and sanitary appliances and kept in a clean, sanitary and orderly manner;

"(4) That the management of said pharmacy is under the supervision of either a registered pharmacist, or an owner or employee of the owner, who has at his place of business a registered pharmacist employed for the purpose of compounding physician's prescriptions in the event any such prescriptions are compounded or sold;

"(5) That said pharmacy is operated in compliance with the rules and regulations legally prescribed with respect thereto by the Missouri board of pharmacy, a permit or renewal thereof shall be issued to such persons as the said board of pharmacy shall deem qualified to conduct such pharmacy."

Subsection (5), supra, as well as Sections 338.140 and 338.280, can be read to imply that the Board has the authority to regulate the operation of Missouri pharmacies. Such control, however, must be exercised in relation to the ultimate purpose of the Board, i.e., the protection of the health and welfare of the public in its dealings with pharmacists and pharmacies.

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Courts are quick to strike down rules of administrative agencies which have no direct relationship to the duties imposed on the agency by the legislature. A recent example of this is provided by *Portwood v. Falls City Brewing Co.* (Ky. 1958) 318 SW2d 535 wherein the Kentucky Alcoholic Beverage Control Board attempted to outlaw illuminated advertising signs in premises licensed for retail sales. In holding the regulation invalid for lack of such relationship, the Court said: "As a general rule administrative agencies are vested with a great deal of discretion in exercising their authority. However, there are standards and limits which must be observed. * * * A succinct statement of the rule is found in 42 Am. Jur. Public Administrative Law, Sec., 100, p. 430, where it is said: "'Rules and regulations must be reasonably adapted to secure the end in view, and are invalid if shown to bear no reasonable relation to the purposes for which they are authorized to be made.'" *Portwood v. Falls City Brewing Co.*, supra, 536.

Another case in point is *Medical Properties, Inc. v. North Dakota Board of Pharmacy* (N.D. Sup. 1956) 80 N.W.2d 87 which arose when the Board refused to issue a pharmacy license to a corporation. The refusal was grounded on the failure of the corporation to meet two regulatory prerequisites laid down by the Board: that a corporation, to hold a pharmacy license, must be owned and controlled by pharmacists, and that no pharmacy would be licensed unless it occupied 400 square feet of floor space with direct public access to the street.

The North Dakota Court held the regulation concerning the ownership of the corporation invalid because it amounted to an unauthorized limitation of the applicable statute which permitted the licensing of a corporation if it "is qualified to conduct the pharmacy." The 400 square feet requirement was held invalid because, l.c. 91, "Such a regulation is discriminatory and has no reasonable relationship to public health and safety."

With relation to the direct access to the street requirement, the Court said that it was "on its face unreasonable. Certainly if the pharmacy is in other respects a proper place for dispensing drugs, the fact that its entrance is from an arcade, a hotel lobby or a corridor in a railroad station does not in any respect affect its character as a proper place to sell drugs or prescriptions. The regulation is therefore invalid." Id. 91.

The above cases clearly require a reasonable relationship between that portion of the police power delegated to the administrative body and the objective of the regulation. However, it is difficult to understand how the public welfare can be prejudiced by the dissemination of truthful information concerning the name, nature, and price of drugs which can be

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purchased only upon proper prescription.

An administrative regulation directed at keeping the public ignorant of some truth, whatever it may be, is always difficult to justify. Nevertheless, experience tells us that for valid reasons such as national security, prevention of riots or public panic, this may be done. The reasons given for the proposed regulation are:

1. The "demoralizing" of prescription prices.
2. The possibility of "public confusion and misconception concerning the availability of such drugs."
3. The danger of self-medication.
4. "Intimidation on the prescribing prerogatives of physicians."

If, by the "demoralizing" of prescription prices, the agencies suggesting the regulation mean the "lowering" of prescription prices, let us say only that this type of control is not within the scope of the Board's duties or powers. The argument that such advertising will confuse the public and foster misconceptions as to the availability of the drugs not only is a contingency inherent in any advertising, but seems to contradict the other reasons given on behalf of the proposed regulation. If the advertised drugs are not available, no damage can be done and there is no danger to be avoided.

Another contradiction is presented by the third argument in favor of the regulation. By the terms of the regulation, it is addressed to drugs available only by prescription. Inasmuch as "self medication" imports purchase and use without prescription, this reason fails to provide any basis for action by the Board.

The contention that physicians will be intimidated by the advertising, or by patients who have seen the advertising, is likewise rejected. Aside from the fact that the professional skill and integrity of Missouri physicians is more than enough protection against the feared mesmerization of those who behold the advertising, it is not the function of the Board to control the sources of information of physicians or the general public.

Without further analyzing the arguments propounded on behalf of the regulation, let it be said that there is no threat to the health or safety of the community which would

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warrant a regulation of the type proposed. On the contrary, the suggested regulation would encroach upon the valuable right of merchants to proclaim their wares in a truthful manner and that of the public to be informed. Curtailment of these rights by the State is justified only by substantial and compelling reasons. None exists here.

CONCLUSION

It is the opinion of this office that the Missouri Board of Pharmacy may not by regulation prohibit the truthful advertising of prescription drugs in pharmacies.

This opinion, which I hereby approve, was prepared by my assistant, Mr. Albert J. Stephan, Jr.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:gm