

OPINION NO. 82-043

Syllabus:

An Ohio pharmacist may dispense drugs pursuant to a prescription issued by a nonresident practitioner who is licensed and otherwise authorized to issue prescriptions for drugs in a state other than Ohio, and, if the prescription is for controlled substances, who is registered

under the Federal Controlled Substances Act, even though the nonresident practitioner is a person, such as a midwife or physician assistant; who would not be permitted to issue prescriptions if practicing in Ohio.

**To: Franklin Z. Wickham, Executive Director, Ohio State Board of Pharmacy,
Columbus, Ohio**
By: William J. Brown, Attorney General, June 17, 1982

I have before me your request for my opinion concerning the authority of an Ohio pharmacy to dispense drugs pursuant to prescriptions issued by nonresident practitioners who are not licensed to practice in Ohio. According to your request, there are several "mail order" pharmacies operating in Ohio, which are apparently filling prescriptions written by practitioners who are licensed to practice their profession in other states, and who are otherwise authorized in such states to issue prescriptions for drugs, but who are not licensed or otherwise authorized in Ohio to issue prescriptions.

Your specific questions concerning this situation may be restated as follows:

- (1) May an Ohio pharmacist fill prescriptions issued by a nonresident practitioner who is licensed and otherwise authorized to issue prescriptions for drugs in a state other than Ohio, or is an Ohio pharmacist restricted to dispensing drugs pursuant to prescriptions issued by practitioners licensed and otherwise authorized in Ohio to issue prescriptions?
- (2) If the answer to the first question is that Ohio pharmacists may fill prescriptions issued by nonresident practitioners, may an Ohio pharmacist fill prescriptions issued by persons practicing in other states, such as midwives and physician assistants, who are permitted to issue prescriptions in the jurisdiction in which they practice, but who may not do so in Ohio?

I turn first to a general discussion of Ohio law with regard to the dispensing of drugs. Pursuant to R.C. Chapter 4729, which regulates the practice of pharmacy, and R.C. Chapter 3719, which regulates controlled substances, only a "practitioner" or his agent may issue a valid prescription. See R.C. 4729.02(G) (defining "prescription" as "an order for drugs. . .written or signed by a practitioner or transmitted by a practitioner to a pharmacist. . ."); R.C. 3719.01(CC) (defining "prescription" as "a written or oral order for a controlled substance. . .given by a practitioner in the course of professional practice. . ."). Similarly, [1981-1982 Monthly Record] Ohio Admin. Code 4729-5-30 at 580, which sets out the manner in which a prescription must be issued, reads in part:

(A) A prescription, to be effective, must be issued for a legitimate medical purpose by a practitioner acting in the usual course of his professional practice.

. . . .

(C) All written prescriptions issued by a practitioner shall bear the full name and address of the practitioner and shall be manually signed by the practitioner in the same manner as he/she would sign a check or legal document.

See R.C. 3719.05(A) ("[a] pharmacist may dispense schedule II controlled substances to any person upon a written prescription given by a practitioner and schedule III or IV controlled substances to any person upon a written or oral prescription given by a practitioner"); R.C. 3719.06 (regulations for practitioners who prescribe controlled substances); R.C. 3719.09 (possessing a controlled substance is authorized if obtained pursuant to a practitioner's prescription, and if the drug is in the original container in which it was dispensed).

As stated in your letter of request, "practitioner" is defined in two provisions of the Revised Code. For purposes of R.C. Chapter 4729, a "practitioner" is "a

person licensed pursuant to Chapter 4731. [a doctor of medicine, doctor of osteopathic medicine, or doctor of podiatry], 4715. [a dentist], or 4741. [a doctor of veterinary medicine] of the Revised Code and authorized by law to write prescriptions for drugs or dangerous drugs." R.C. 4729.02(H). See 6 Ohio Admin. Code 4729-5-15. In order to be a "practitioner" a person's license to practice must be current and in good standing. Rule 4729-5-15. The identical definition to that set out in R.C. 4729.02(H) is used for purposes of R.C. Chapter 3719 and may be found at R.C. 3719.01(BB). Thus, R.C. Chapters 4729 and 3719 permit Ohio pharmacists to dispense drugs only on orders issued by persons licensed pursuant to Ohio law to practice one of the specified professions. Accordingly, it may be implied from these provisions that an Ohio pharmacist may not dispense drugs pursuant to an order issued by a person who is not licensed or otherwise authorized in Ohio to practice one of the specified professions. Your questions raise the issue of whether R.C. Chapters 4729 and 3719 should be construed so as to prohibit Ohio pharmacists from filling prescriptions presented by nonresident patients and written by nonresident persons who are licensed and otherwise authorized to issue orders for drugs in the jurisdiction in which they practice, but who do not hold any type of Ohio license which would permit them to prescribe pursuant to R.C. Chapter 4729 or R.C. Chapter 3719.

No Ohio court has addressed this issue. The Iowa Supreme Court, however, has addressed the precise issue you have presented. The facts in State v. Rasmussen, 213 N.W.2d 661 (Iowa 1973) also involved a "mail order" pharmacy, which received prescriptions by mail, filled them, and returned them by mail to the patients. Some of these prescriptions were written by nonresident physicians who were not licensed in Iowa to prescribe controlled substances. Iowa had a controlled substances act (similar to R.C. Chapter 3719) which the state contended prohibited Iowa pharmacists from filling prescriptions issued by nonresident physicians who were not licensed in Iowa. The court disagreed, holding that the state controlled substances act did not apply to transactions involving prescriptions issued by nonresident physicians.

The Iowa court found that the filling in one state of prescriptions issued by practitioners licensed in another state constituted interstate commerce. The court concluded that the Federal Controlled Substances Act, which permits pharmacists to fill prescriptions issued by any practitioner licensed to dispense controlled substances in the jurisdiction in which he practices, preempted the state controlled substances act with regard to interstate transactions. The court also found that, even assuming there were no preemption problem, a state law requiring out-of-state practitioners to register in Iowa before they could have their prescriptions filled would constitute an undue burden on interstate commerce. Thus, in order to preserve the constitutionality of the state controlled substances act, the court found it to be applicable only to intrastate transactions, while the activities of out-of-state practitioners affecting Iowa were governed solely by the federal act.

¹R.C. 4731.36 states that those provisions regulating the practice of medicine in Ohio shall not apply

to a physician or surgeon residing on the border of a neighboring state and authorized under the laws thereof to practice medicine and surgery therein, whose practice extends within the limits of this state; provided equal rights and privileges are accorded by such neighboring state to the physicians and surgeons residing on the border of this state contiguous to such neighboring state. Such practitioner shall not open an office or appoint a place to see patients or receive calls within the limits of this state.

In 1978 Op. Atty Gen. No. 78-062, I stated that an Ohio pharmacist may fill an order for drugs issued by a person who falls within the exemptions set forth in R.C. 4731.36, since those persons are permitted to practice medicine in Ohio, and thus, are "licensed" as that term is used in R.C. 3719.01(BB) and R.C. 4729.02(H) defining "practitioner." Thus, a person who is duly licensed to practice medicine in a state bordering Ohio, which offers reciprocal rights to Ohio practitioners, may have his prescriptions filled by Ohio pharmacists.

I find the analysis and conclusions of Rasmussen to be persuasive. In dispensing drugs pursuant to prescriptions issued by out-of-state practitioners, an Ohio "mail order" pharmacy is engaged in interstate commerce. See 1982 Op. Att'y Gen. No. 82-032 (concluding that retail pharmaceutical distributors which sell drugs through the mail are engaged in interstate commerce). Of course, an Ohio pharmacy which is engaged in interstate commerce, is still subject to state regulation concerning its intrastate activities. See Eli Lilly & Co. v. Sav-on-Drugs Inc., 366 U.S. 276 (1961). However, the state's power to regulate a pharmacy's interstate business is subject to certain constitutional restrictions, discussed below, which must be recognized in interpreting the scope of R.C. Chapters 4729 and 3719. See R.C. 1.47(A) (in enacting a statute, it is presumed that compliance with the United States and Ohio constitutions is intended).

First, a state may not regulate local aspects of interstate commerce when Congress has acted with regard to those matters in such a way as to preempt further state regulation. U.S. Const. art. I, §8 (the Commerce Clause); U.S. Const. art. VI, cl. 2 (the Supremacy Clause). See Southern Pacific Co. v. State of Arizona, 325 U.S. 761 (1945); California v. Thompson, 313 U.S. 109 (1941). As explained more fully in Op. No. 82-032, it is arguable that, in enacting the Federal Controlled Substances Act of 1970, tit. II, 84 Stat. 1242 (codified in scattered sections of 18, 21, 42 U.S.C.), a comprehensive scheme regulating the manufacture and distribution of controlled substances, Congress has preempted the states from regulating interstate transactions involving controlled substances.

For purposes of the federal act, "practitioner" means:

a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research. (Emphasis added.)

21 U.S.C. §802(20). Practitioners who dispense or prescribe controlled substances must register with the United States Attorney General. 21 U.S.C. §822(a). See 21 U.S.C. §802(10). Although, if a practitioner is authorized to dispense under the laws of the state in which he practices, he shall be registered to prescribe controlled substances under the federal act. 21 U.S.C. §823(f). Practitioners are subject to the various requirements imposed by the federal act and the Attorney General's regulations. 21 U.S.C. §822(a). However, the Federal Controlled Substances Act does not restrict the jurisdiction in which a practitioner's prescriptions may be filled, nor does the federal act restrict the type of professional who may prescribe, as long as he is permitted to prescribe in the jurisdiction in which he practices.

In determining whether Congress has preempted the regulation of interstate transactions involving controlled substances, it is essential to consider 21 U.S.C. §903, which reads:

No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any state law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together. (Emphasis added.)

As discussed above, the court in Rasmussen held that, "[t]o require all non-resident physicians to register in Iowa would be in practical effect negating the operation of the federal Act in this state." 213 N.E.2d at 666. The court noted that the application of state law to nonresident physicians "would bring about a positive conflict in policy so that the two statutes could not consistently stand together." Id. Thus, the court concluded that the state was preempted by 21 U.S.C. §903 and the Supremacy Clause of the United States Constitution, from requiring the registration of out-of-state prescribers of controlled substances.

Even if a court of this state were to determine that the state was not preempted from regulating the interstate movement of controlled substances, and also in cases where drugs other than controlled substances are being prescribed, a court would still have to consider whether the Commerce Clause of the United States Constitution would otherwise prohibit state regulation of nonresident prescribers. As I stated in Op. No. 82-032:

In considering whether a state regulation is inconsistent with the Commerce Clause, it must be determined: whether the regulation serves a legitimate local purpose; whether the statute regulates evenhandedly with only incidental effects on interstate commerce; whether the local purpose justifies the regulation's impact on interstate commerce; and whether the regulation affects an area which requires a uniform national policy. (Citations omitted.)

Addressing the first criterion, I fail to see how a requirement that nonresident practitioners be licensed under Ohio law in order to have their prescriptions honored in this state would serve a legitimate local purpose. In the case of an Ohio "mail order" pharmacy, the patients who send in out-of-state prescriptions will likely be out-of-state residents. Thus, a licensure requirement such as the one described in your letter would not be effective in protecting the life, health, or safety of Ohio citizens.

State licensure of nonresident practitioners who write prescriptions to be filled in Ohio appears to be evenhanded in its application, since Ohio residents must be appropriately licensed in order to issue prescriptions. However, it appears that the burden which a licensure requirement for nonresident practitioners would impose on interstate commerce would be prohibitive to the conducting of such business by an Ohio pharmacy. A state regulation may not seriously interfere with or substantially impede interstate commerce. Panhandle Eastern Pipe Line Co. v. P.U.C., 56 Ohio St. 2d 334, 383 N.E.2d 1163 (1978). To require foreign practitioners to be licensed in Ohio in order for their prescriptions to be honored would virtually foreclose any interstate activity on the part of an Ohio pharmacy. Although only a court may declare a law unconstitutional, I would be remiss if I failed to note that a state statute which imposes such a heavy burden on interstate commerce would be constitutionally suspect, especially when such impact is balanced against the tenuous local benefit to be served by the statute. See Pike v. Bruce Church Inc., 397 U.S. 137 (1970). However, this is not to say that other state regulations, which have a less substantial burden on interstate commerce would also be impermissible as applied to nonresident practitioners.

The final criterion set out in Op. No. 82-032 is also relevant, although only to transactions involving controlled substances. A state may not act where uniformity of regulation is necessary to the efficient functioning of interstate commerce. As explained more fully in Op. No. 82-032, the passage of the Federal Controlled Substances Act indicates the need for a uniform and consistent scheme for the interstate regulation of controlled substances. See 21 U.S.C. §801 (Congressional findings and declarations). The federal act, taken together with R.C. Chapters 4729 and 3719, which regulate intrastate transactions of controlled substances, effectively controls the manufacture and distribution of such drugs, while permitting the free flow of goods in interstate commerce. As pointed out in Rasmussen, to permit the various states to impose their own regulations on the interstate movement of controlled substances would arguably destroy the effectiveness of the federal act. It may be found that the need for uniformity of regulation in this area outweighs whatever the state's local interest might be in this instance in regulating the interstate dispensing of controlled substances.

It is my duty to construe statutes which are capable of conflicting interpretations in such a way as to preserve their constitutionality, rather than in a way which subjects them to constitutional doubts. See R.C. 1.47(A); 1981 Op. Att'y Gen. No. 81-100. Therefore, in light of the constitutional principles discussed above, I must conclude that the provisions of R.C. Chapters 4729 and 3719 which require practitioners who issue prescriptions to be licensed under Ohio law as one of the specified professionals apply only to the dispensing of drugs by Ohio pharmacists pursuant to prescriptions issued in Ohio.

Therefore, it is my opinion, and you are advised, that an Ohio pharmacist may dispense drugs pursuant to a prescription issued by a nonresident practitioner who is licensed and otherwise authorized to issue prescriptions for drugs in a state other than Ohio, and, if the prescription is for controlled substances, who is registered under the Federal Controlled Substances Act, even though the nonresident practitioner is a person, such as a midwife or physician assistant, who would not be permitted to issue prescriptions if practicing in Ohio.