TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 79-702
of	:	December 20, 1979
GEORGE DEUKMEJIAN Attorney General	:	
Cecilia H. Johnson Deputy Attorney General	:	

SUBJECT: ASSISTANCE WITH NONPRESCRIPTION PREGNANCY TESTING—An organization which provides counseling services to pregnant women may not offer pregnancy testing where counselors are not licensed to practice the medical arts in California.

The Honorable Patrick J. Nolan, Assemblyman for the Forty-First District, has requested an opinion on the following question:

May an organization which provides counseling services to pregnant women, offer pregnancy testing, by means of tests similar to those sold without prescription in California pharmacies, where counselors who are not licensed to practice the medical arts in California will assist the woman in taking the test and will report the test results to her?

CONCLUSION

An organization which provides counseling services to pregnant women may not offer pregnancy testing, by means of tests similar to those sold without a prescription in California pharmacies, where counselors who are not licensed to practice the medical arts in California will assist the woman in taking the test and will report the test results to her.

ANALYSIS

We are advised that an organization which counsels women regarding pregnancy wishes to offer pregnancy testing to women who seek its services. The test to be used will be similar to those sold without a prescription in California pharmacies. Counselors, nor licensed to practice the healing arts, would assist the woman in taking the test and report the test results to her.

The pregnancy tests referred to utilize a urine test which detects the hormone human chotionic gonadorropin (HCG) which is present in the urine of pregnant woman. The test is performed by mixing a specified amount of urine with chemicals provided in the test kit. The solution is then left undisturbed for a prescribed period. When the time period has elapsed, the test results are observed. A specific reaction described in the test instructions (e.g., a dark ring) indicates a positive test result while lack of such reaction indicates a negative test result. We assume this type of test would be utilized by the organization providing the assistance.

The question presented is whether the assistance in administering such a test and reading the test results by counselors not having a license to practice the healing arts is proscribed in California.

The procedure described is the kind of service normally provided by a clinical laboratory. Since clinical laboratories are governed by Chapter 3, Division 1 of the Business and Professions Code, we should first determine whether that law applies to the procedures described for testing pregnancy. Business and Professions Code section 1206[1] provides:

> "As used in this chapter, 'clinical laboratory' means any place, establishment, or institution organized and operated for the practical application of one or more of the fundamental sciences by the use of specialized apparatus, equipment, and methods for the purpose of obtaining scientific data which may be used as an aid to ascertain the presence, progress, and source of disease in human beings."

Section 1240 provides, "This chapter does not prohibit the performance of tests not covered in Section 1206." Thus, the clinical laboratories law is applicable only to tests "which may be used as an aid to ascertain the presence, progress, and source of disease in human beings." Since pregnancy is not a disease (*Bowland v. Municipal Court* (1976) 18 Cal. 3d 479, 487), we conclude that the clinical laboratories law is not applicable to, and

[1] Unless otherwise indicated, all section references are to the Business and Professions Code.

does not prohibit tests for, pregnancy.

We must next consider whether the procedures described for pregnancy testing constitute the practice of the healing arts which requires licensing under California law. Section 2141 provides:

> "Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law, is guilty of a misdemeanor."

This section proscribes not only the practice of a mode of treating the sick, but also prohibits unlicensed persons from diagnosing, treating or prescribing for any ailment, disease "or other mental or physical condition." Pregnancy is a "physical condition" within the meaning of Section 2141. (*Bowland v. Municipal Court, supra*, at pp. 486, 488–489.) Thus, diagnosing pregnancy is one of the acts governed by Section 2141.

This brings us to the question of what a diagnosis is and who may diagnose under the medical practice act. The legal definition of diagnosis has a long history and is somewhat more complex than the cases have indicated.

> "The word 'diagnosis' has an established legal meaning. It is the recognition of a disease from its symptoms; it is a part of the practice of the healing art. Diagnoses may only be made by proficient persons, authorized by the state. (*People v. Jordan* (1916) 172 Cal. 391.)" (*Maranville v. State Board of Equalization* (1950) 99 Cal. App. 2d 841, 844; *People v. Cantor* (1961)198 Cal. App. 2d Supp. 843, 847.)

This definition relates only to the diagnosis of disease and does not purport to define the diagnosis of a physical condition such as pregnancy.

The Legislature added to the established legal meaning of "diagnose" by the enactment of Section 2013 in chapter 788, statutes of 1951, which reads as follows:

> "Whenever the words 'diagnose' or 'diagnosis' are used in this chapter, they shall include any undertaking by any method, device or

> procedure whatsoever, and whether gratuitous or not, to ascertain or establish whether or not a person is suffering from any physical, mental or nervous disorder. Without in any manner limiting the generality of the foregoing, 'diagnose' and 'diagnosis' shall specifically include the taking of a person s blood pressure and the use of mechanical devices or machines, for the purpose of representing to any person any conclusion with respect to such person's physical, mental or nervous condition. Machines or mechanical devices for measuring or ascertaining height or weight are excluded from this section. Nothing in this section shall be construed as limiting or enlarging the practice of licensed clinical laboratory technologists and other persons licensed under any provision of law relating to the healing arts. The performance of psychological services on referral from a person licensed under this chapter is not a violation of this chapter. Testing and guidance programs in schools, colleges and universities and physical fitness tests given by public or private agencies in connection with employment or issuance or renewal of licenses or permits do not constitute diagnoses within the meaning or intent of this section."

The first sentence of section 2013 restated the meaning of diagnosis derived from the cases in somewhat broader terms which still did not embrace the diagnosis of a physical condition. It should be noted, however, that the first sentence does not purport to be a comprehensive definition but expressly states that is is one of the meanings *included* in the term 'diagnosis."

The second sentence of section 2013 expressly defines the diagnosis of a physical, mental or nervous condition to include the taking of a person's blood pressure for the purpose of presenting to others any conclusion with respect to such condition. Again this definition is inclusive rather than comprehensive. It does not purport to address other procedures which may be included within the meaning of diagnosis of a physical condition as those words are used in section 2141. By way of analogy to the definitions of 'diagnosis" in other contexts as set forth in the cases and section 2013, we believe that diagnosis of a physical condition includes any chemical test to ascertain the existence or nature of a physical condition.

We conclude that the determination of pregnancy or nonpregnancy by the use of a chemical test to detect the presence or absence of HCG in a woman's urine is a diagnosis within the meaning of section 2141 as that term has been defined by the cases and section 2013.

When a woman determines whether she is pregnant on the basis of a self administered chemical test to detect the presence of HCG in her urine without assistance

or consultation, she is making a diagnosis of a physical condition on herself. We must therefore consider whether Section 2141 proscribes self diagnosis. This question is significant because if her actions violate the statute, any person who aids and abets her also violates the statute. (Pen. Code, § 31; *Magit v. Board of Medical Examiners* (1961) 57 Cal. 2d 74.)

We have not found any cases which address the question of the legality of self diagnosis or treatment. A literal reading of Section 2141 would seem to include self diagnosis. The significant words in Section 2141 state:

> "*Any* person . . . who diagnoses, treats, operates for, or prescribes for any ailment . . . or physical condition of any person [without the required license] is guilty of a misdemeanor." (Emphasis added.)

In our opinion, however, the Legislature did not intend to proscribe self diagnosis.

The first medical practice acts (Stats. 1876, ch. 518; Stats. 1877–1878, ch. 576; Stats. 1901, ch. 51; Stats. 1907, ch. 212) simply proscribed the "practice" of medicine without a license and, in separate provisions, defined what constitutes such practice and the exceptions thereto.

In construing the medical practice act in 1908, the Supreme Court in *Ex parte Greenall* (1908) 153 Cal. 767, 769 stated:

> "When we say that one is practicing medicine or surgery or osteopathy, we ordinarily mean that he is engaged in that line of work as a business, holding himself our as being so engaged, or for a consideration treating those who will accept his professional services, and we would not apply the term to one who incidentally and gratuitously suggests or puts into operation some method of treatment in the case of one who is 'sick or afflicted'."

It is clear from the Greenall case that the first medical practices acts were not directed at self diagnosis or treatment and were not construed to apply to isolated use of methods considered part of the medical arts.

The medical practice act was rewritten in 1913 and added language to state that anyone who shall "diagnose, treat, operate for, or prescribe for any disease, injury, deformity, or other mental or physical condition of any person" without the required license, as well as anyone who practices medicine without a license, is guilty of a misdemeanor. (Stats. 1913, ch. 354, § 17.)

We think it evident that the legislative purpose of the added language was to change the rule of the Greenall case by proscribing isolated use of the medical arts, as well as medical practice, by those without the required license. There is, however, no indication that the broad language used to this end was intended to proscribe self diagnosis, prescription or treatment.

The fact the Legislature did not intend to prohibit self diagnosis is apparent from the statutory exception to the licensing requirements for the "domestic administration of family remedies." Section 2144 provides in part:

> "Nothing in this chapter prohibits service in the case of an emergency, or the domestic administration of family remedies. . . ."

We have found no cases or prior opinions of this office construing the phrase "domestic administration of family remedies." In our opinion the term "family remedies" is intended to include all those preparations which may lawfully be purchased without a prescription. Certainly this would include aspirin, cold and allergy remedies, sleeping aids and the like which are lawfully sold without a prescription.

The use of family remedies is limited to "domestic administration." "Domestic" is defined as relating to the household or the family (Webster's New International Dictionary, Third Edition). The use of this word clearly limits the use of family remedies to a domestic environment, i.e., to the household or family. Without examining the limits of the domestic environment, we believe the Legislature intended to distinguish it from clinical environments such as hospitals, doctor's offices, clinics and other places where medical services are regularly provided by persons not in the family.

The domestic administration of family remedies presupposes that a diagnosis has been made to warrant the treatment taken. Devices to aid home diagnosis have long been available without prescription. The fever thermometer is a familiar example. We believe its use to aid a self diagnosis which forms the basis for the administration of a family remedy falls within the exception to the medical practice act.

By a parity of reasoning, self diagnosis of pregnancy (or nonpregnancy) by means of a chemical test to detect the presence of HCG in the woman's urine, using a test kit lawfully obtained without a prescription, is excepted from the medical practices act by Section 2144.

Next we consider whether a person not in the family who is not licensed to practice the medical arts may assist a woman in the taking of a chemical pregnancy test. Assistance may take many forms including instruction in the procedures of administering pregnancy

tests generally as well as participation in the acts of administering the test to a particular woman.

In 10 Ops. Cal. Atty. Gen. 121, we concluded that:

> "A person may use and apply a medical education without a license if he does not violate the express prohibitions of the Code, but may not, by consultation, teaching, etc., accomplish or purport to accomplish the diagnosis or recommend or direct the treatment of any individual person for any condition. Such activities must not in any way result in the diagnosis or treatment of an individual human being even though the diagnosis is based upon the observations of licensed persons or the actual treatment is carried out by licensed persons at the direction of an unlicensed person."

While state licensing is not required to provide general instruction in the procedures to be followed in conducting a chemical pregnancy test, such activity must not include the diagnosis of an individual woman for teaching or any other purpose. (10 Ops. Cal. Atty. Gen. 121, 122.)

On the other hand, state licensing is required to accomplish a diagnosis of pregnancy or nonpregnancy of a particular woman by one not within that woman's family because making such a diagnosis is governed by section 2141 and is not within the exception of section 2144. Thus an unlicensed person outside the family may not participate in the acts of administering a chemical pregnancy test to a particular woman. Observing and interpreting the test results is an integral part of the administration of the test. Such an interpretation is tantamount to a diagnosis of pregnancy or nonpregnancy. Thus section 2141 requires state licensing to make or report on such an interpretation of the test results.

*****