

1-1-2006

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Recommended Citation

Sophia Rowlands, *Chapter 417: Contraceptives and Conscience Find Compromise in California*, 37 MCGEORGE L. REV. 166 (2006).
Available at: <https://scholarlycommons.pacific.edu/mlr/vol37/iss2/4>

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Chapter 417: Contraceptives and Conscience Find Compromise in California

Sophia Rowlands

Code Sections Affected

Business and Professions Code § 733 (new), §§ 4314, 4315 (amended).
SB 644 (Ortiz); 2005 STAT. Ch. 417.

I. INTRODUCTION

Across the nation, over 130 million Americans take some form of prescription medication.¹ Approximately 47.5% of American women will utilize some form of prescription birth control during their lives for a variety of reasons.² The most common reason, of course, is to prevent an unwanted or unplanned pregnancy.³ Other reasons range from hormone management to acne treatment to post-miscarriage medical care.⁴ Emergency contraception is often sought by rape victims.⁵ Regardless of the reasons behind its utilization, prescription contraception has been legal in every state since the landmark decision of *Griswold v. Connecticut* in 1965.⁶

According to United States Representative Carolyn Maloney (D-NY) however, “[a]round the country, women are walking into pharmacies with legal prescriptions to be filled, and walking out with nothing.”⁷ Pharmacists are objecting to prescriptions for contraceptives on moral or religious grounds and refusing to fill

1. See Randolph E. Schmid, Associated Press, *Over 40% of Americans Take Prescription Drugs*, PITTSBURGH POST-GAZETTE, Dec. 3, 2004, available at <http://www.post-gazette.com/pg/04338/421119.stm> (last visited May 27, 2005) (on file with the *McGeorge Law Review*) (stating that over forty percent of Americans take at least one form of prescription medication).

2. DEBORAH FRIEDMAN, PLANNED PARENTHOOD, INC., REFUSAL CLAUSES: A THREAT TO REPRODUCTIVE RIGHTS, <http://www.plannedparenthood.org/pp2> (follow “media & research,” “fact sheets & reports;” then follow “birth control;” then follow “refusal clauses”) (last visited May 27, 2005) (on file with the *McGeorge Law Review*) (stating that ninety-five percent of women will utilize some form of birth control during their lives, and of those women, more than fifty percent will use a form of prescription contraceptive).

3. See Guttmacher Institute, Facts in Brief: Contraceptive Use, http://www.guttmacher.org/pubs/fb_contr_use.html (last visited May 27, 2005) (on file with the *McGeorge Law Review*) (listing sexual activity and the risk of pregnancy as the leading reason for taking contraceptives).

4. See Letter from Robert Black, Chair, Am. Acad. of Pediatrics, to Assembly Member Llyod Levine, Cal. State Assembly (May 4, 2005) (on file with the *McGeorge Law Review*) (stating that legal contraceptives are used to treat dysfunctional menstrual bleeding and acne); see also Treatment Options, Endometriosis Association, <http://www.endometriosisassn.org/treatment.html>, (last visited June 6, 2005) (on file with the *McGeorge Law Review*) (listing oral contraceptives as one of the treatment options for the medical condition endometriosis).

5. Friedman, *supra* note 2.

6. 381 U.S. 479, 486 (1965) (holding that the right to use birth control is protected under a couple’s constitutional right to privacy).

7. Press Release, Planned Parenthood Fed’n of Am., Inc., *Lawmakers Introduce Legislation: Pharmacies Must Fill Prescriptions*, (Apr. 14, 2005), <http://www.plannedparenthood.org/pp2/portal/files/portal/media/pressreleases/pr-050414-ALPhA.xml> [hereinafter Planned Parenthood Fed’n] (on file with the *McGeorge Law Review*).

them, sometimes even refusing to return the prescription or transfer it.⁸ “More and more pharmacists are becoming aware of their right to conscientiously refuse to pass [what they consider to be morally] objectionable medications across the counter.”⁹ Incidents of pharmacists refusing to fill contraceptive prescriptions have been reported in California, Georgia, Illinois, Massachusetts, Minnesota, New Hampshire, New York, Ohio, Texas, West Virginia, and Wisconsin.¹⁰

In one incident, a pharmacist refused to fill medication prescribed to a West Los Angeles attorney to help her body expel dead fetal tissue following a miscarriage.¹¹ According to the patient, Karen Romano, the pharmacist called her doctor to find out why the medication had been prescribed.¹² When the doctor refused to divulge such privileged information, the pharmacist refused to fill the prescription.¹³

In addition to having their prescriptions refused, women seeking contraceptives are often chastised or lectured by the pharmacist.¹⁴ In May 2005, the Associated Press reported that a mother of six in Milwaukee, Wisconsin was berated as a “baby-killer” when she attempted to fill a prescription for emergency contraception.¹⁵ The incident traumatized the woman so badly that she did not try to fill the prescription elsewhere and, reportedly, ended up having an abortion.¹⁶

In February and March 2005, volunteers from Planned Parenthood and other organizations conducted a survey of California pharmacies to determine the nature and frequency of pharmacists’ refusals to fill prescriptions for Plan B, a brand name emergency contraceptive¹⁷ also commonly referred to as “the morning after pill.”¹⁸ The survey covered 243 California pharmacies in twenty-

8. See Carry Hamilton, *Utah Pharmacies Shun the Plan B Contraception*, SALT LAKE TRIB., Apr. 29, 2005, at A1 (stating that Utah’s pharmacy licensing board has received informal complaints of pharmacists refusing to return contraceptive prescriptions).

9. Rob Stein, *Pharmacists’ Rights at Front of New Debate*, WASH. POST, Mar. 28, 2005, at A1 (quoting Steven H. Aden of the Christian Legal Society’s Center for Law and Religious Freedom).

10. *Refusal Laws at a Glance*, FILLMYPILLSNOW.COM, <http://www.saveroe.com/filmypillsnow/glance.php> (last visited June 12, 2005) (on file with the *McGeorge Law Review*).

11. Timm Herdt, *‘Morning-after’ Pill Bill Clears Assembly Panel*, VENTURA COUNTY STAR, Apr. 6, 2005, at 4.

12. *Id.*

13. *Id.*

14. National Journal Group, Inc., *Rx Drugs: Boxer Bill Would Require Pharmacies to Fill All Prescriptions*, AM. HEALTH LINE (Apr. 19, 2005).

15. Associated Press, *Milwaukee Woman Says Pharmacist Refused to Fill Prescription*, DULUTH NEWS TRIB. (Duluth, Minn.), May 11, 2005.

16. *Id.*

17. *Emergency Contraception Access Project Reveals California Cases of Refusal*, PLANNED PARENTHOOD AFFILIATES OF CALIFORNIA, Apr. 11, 2005, available at [http://www.ppacca.org/atf/cf/\[EFB50FD8-3121-4382-99F6-0195A71A78D\]/EC%20project%20release%204.11.05.pdf](http://www.ppacca.org/atf/cf/[EFB50FD8-3121-4382-99F6-0195A71A78D]/EC%20project%20release%204.11.05.pdf) [hereinafter *Access Project*] (on file with the *McGeorge Law Review*).

18. Kathleen O’Dell, *Plan B Isn’t Always an Option*, SPRINGFIELD NEWS-LEADER, May 24, 2005, at B1.

nine different counties.¹⁹ Volunteers first called the pharmacies to find out whether they carried Plan B²⁰ and had it in stock, then visited those that did with prescriptions in hand.²¹ Although most pharmacists were extremely helpful, pharmacists at four locations known to have the drug in stock refused to dispense Plan B.²² Approximately fourteen percent of the volunteers experienced what they characterized as either “subtle disapproval,” “overt disapproval,” or “strong condescension and open disdain” in their interactions with pharmacists.²³

II. EXISTING LAW

Recently, in response to incidents of pharmacists’ refusals and the ensuing public outcry, several states have enacted laws referred to as “conscience clauses,” which pertain specifically to pharmacists.²⁴ The Random House Unabridged Dictionary defines “conscience clause” as “a clause or article in act or law that exempt persons whose conscientious or religious scruples forbid their compliance.”²⁵

A. Conscience Clauses and the Right to Refuse

According to the Planned Parenthood Federation of America, conscience clauses initially surfaced in the wake of *Roe v. Wade* in the early 1970s.²⁶ California’s conscience clause allows physicians, nurses, hospital employees, and certain hospitals to refuse to provide or participate in abortions on moral or religious grounds.²⁷ Almost every state has enacted some version of a conscience clause pertaining to physicians or hospital personnel that protects their right not to participate in abortions.²⁸

19. Associated Press, *supra* note 15.

20. Individual pharmacies and chains may decide whether to carry contraception and emergency contraception as a management policy. Cynthia Dailard, *Beyond the Issue of Pharmacist Refusals: Pharmacies That Won’t Sell Emergency Contraception*, GUTTMACHER REPORT ON PUBLIC POLICY, Aug. 2005.

21. *Access Project*, *supra* note 17.

22. *Id.*

23. *Id.* Other results from the study showed that seventy-one percent of pharmacies that did not carry emergency contraception nevertheless provided referrals to stores that do. Thirteen percent of stores refused to provide referrals when asked. *Id.*

24. See Tresa Baldas, *Attorneys Fear Repercussions of Refusal-to-Treat Trend*, RECORDER, Feb. 8, 2005 (on file with the *McGeorge Law Review*) (stating that there is a “wave of proposed legislation” in state governments to protect the rights of medical providers to refuse drugs or services on religious and moral grounds).

25. RANDOM HOUSE UNABRIDGED DICTIONARY 432 (2d ed. 1993).

26. Friedman, *supra* note 2.

27. CAL. HEALTH & SAFETY CODE § 123420(a), (c) (West 2005).

28. See Testimony Re: Abortion Non-Discrimination Act: Hearing on SB 644 Before H. Comm. On Energy & Commerce, Subcommittee on Health, 2002-2003 Leg., Reg. Sess., (Cal. July 11, 2002) (Attachment to the Statement of Lynn D. Wardle, Testimony Re: Abortion Non-Discrimination Act, Comm. On Energy and Commerce, Subcommittee on Health) available at <http://www.consciencelaws.org/Examining-Conscience->

The new clauses pertaining to pharmacists seek to protect a pharmacist's right to refuse to dispense medication on religious or moral grounds.²⁹ Arkansas, Georgia, Mississippi, and South Dakota have already enacted conscience clauses protecting a pharmacist's right to refuse and, during the 2005 legislative session, sixteen other states considered enacting such laws.³⁰ South Dakota's conscience clause, enacted in 1998, is the most broad-reaching law and allows pharmacists to refuse to dispense medication if they "have reason to believe" it would be used to stimulate an abortion or cause the death of an "unborn child."³¹ South Dakota defines an unborn child as existing from the moment of "fertilization until live birth."³²

The new refusal clauses are troubling to some because they often contain no requirement that the pharmacist transfer the prescription or provide information about alternatives to the patient.³³ This distinguishes pharmacist conscience clauses from those pertaining to physicians.³⁴ When physicians object to a given treatment or procedure on moral or religious grounds, they are not free to simply abandon the patient.³⁵ Instead, physicians are required to affirmatively assist with the transfer of the patient to another physician and to ensure the patient receives continuity of care throughout the transfer.³⁶

B. California Law

Existing California law is silent on the subject of a pharmacist's right to refuse to dispense lawfully prescribed medication.³⁷ Pharmacists, of course, must comply with a professional standard of conduct set forth by the California Board of Pharmacy, but these guidelines are relatively silent on the matter as well.³⁸ Two organizations, the California Pharmacists Association and the American Pharmacists Association, have adopted a "dispense or refer" policy that they encourage their members to follow.³⁹

Issues/Legal/Articles/Legal06.htm (last visited June 13, 2005) (on file with the *McGeorge Law Review*) (listing statutory versions of conscience clauses for forty-nine states and the text of each statute).

29. See Baldas, *supra* note 24.

30. Planned Parenthood Federation of America, Inc., State By State Actions: Summary of State Actions Related to Pharmacist Refusals, <http://www.plannedparenthood.org/pp2/portal/files/portal/media/factsreports/fact-050418-pharmacist-refusals.xml> (last visited May 29, 2005) (on file with the *McGeorge Law Review*).

31. S.D. CODIFIED LAWS § 36-11-70 (West 2005).

32. *Id.* § 22-1-2(50A).

33. Baldas, *supra* note 24.

34. Letter from Syrus Devers, Assoc. Dir., Cal. Med. Ass'n., to Assembly Member Wilma Chan, Cal. State Assembly (Mar. 30, 2005) (on file with the *McGeorge Law Review*).

35. *Id.* (stating that physicians are subject to their own referral requirements in place under "established medical ethics and civil law").

36. *Id.*

37. Herdt, *supra* note 11.

38. See California Board of Pharmacy, Frequently Asked Questions, <http://www.pharmacy.ca.gov/faqs.htm> (last visited May 29, 2005) (on file with the *McGeorge Law Review*) (stating that a pharmacist can refuse to dispense medication using his or her professional judgment).

39. See Herdt, *supra* note 11 (explaining that the California Pharmacists Association has adopted an

However, membership in these organizations and adherence to their policies is entirely voluntary.⁴⁰

III. CHAPTER 417

Chapter 417 begins with a statement of legislative intent, stating that the Legislature intends for “health care professionals” to timely dispense or refer prescriptions “despite the health care professional’s objection to dispensing the drugs or devices on ethical, moral, or religious grounds.”⁴¹ Subsection (a) explicitly prohibits any “licentiate” from deliberately obstructing a patient’s access to a legally prescribed drug or device and states that a violation of that section will be deemed “unprofessional conduct” subject to disciplinary review by the appropriate licensing agency.⁴²

Subsection (b) provides that “licentiates” shall dispense all lawful prescriptions or orders, with the following exceptions:

- 1) The pharmacist believes that the prescription is illegal, or that the drug could have harmful interactions or a harmful effect on the patient. The pharmacist must make this determination “based solely on [his or her] professional training and judgment.”⁴³
- 2) The drug requested is not in stock. If it is not in stock, the pharmacist has three options: A) he or she may arrange for it to be timely delivered to the store or directly to the patient; B) he or she may transfer the prescription to a nearby store, close enough to ensure the patient can get the drug promptly; or C) he or she can give back the prescription but make a “reasonable effort” to refer the patient to a nearby store which is known to carry the drug requested.⁴⁴
- 3) The pharmacist refuses to dispense the drug requested for moral, ethical, or religious reasons. This section allows a pharmacist to refuse only if he or she gives prior written notice to the employer, listing the drug or class of drugs the pharmacist will not dispense, so the employer can reasonably accommodate the objection without undue hardship. Chapter 417 provides that the terms “reasonable

internal policy of “dispense or refer”); *see also* Katie Fairbank, *Pharmacists’ Refusal to Fill Contraception Prescriptions a Question of Choice*, DALLAS MORNING NEWS Apr. 29, 2005 (stating the American Pharmacists Association has a policy which allows pharmacists to refuse on moral grounds so long as they make other arrangements for the patient).

40. California Pharmacists Association, <http://www.cpha.com> (last visited June 21, 2005); American Pharmacists Association, <http://www.aphanet.org> (last visited June 21, 2005).

41. 2005 Cal. Stat. Ch. 417 § 1.

42. CAL. BUS. & PROF. CODE § 733(a) (enacted by Chapter 417).

43. *Id.* § 733(b)(1).

44. *Id.* § 733(b)(2).

accommodation' and 'undue hardship' shall have the same meaning as applied to those terms pursuant to subdivision (I) of Section 12940 of the Government Code." If such a notice of objection is filed, the employer is required to establish alternative protocols that will give patients prompt access to the drugs.⁴⁵

Other subsections of section 733 clarify that nothing requires a pharmacist to dispense a drug without payment, including payment covered by insurance or any required co-pay, and that the term "prescription drug or device" is defined in Business and Professions Code section 4022.

In addition to adding section 733 to the Business and Professions Code, Chapter 417 also amends the existing sections 4314 and 4315, which govern administrative disciplinary authority and procedures.⁴⁶ The amendments effectively add section 733 to the list of authorities under which the Board of Pharmacy may pursue disciplinary action and orders of abatement.⁴⁷

IV. ANALYSIS

Chapter 417 appears to be one of the first conscience clauses enacted in the nation that strives to protect patients' rights.⁴⁸ There are those who feel, however, that Chapter 417 is a blatant violation of pharmacists' constitutional rights.⁴⁹ "The inconvenience of the patient seems to be more important to the legislature than violating the conscience of the pharmacist."⁵⁰

It is the referral clause, intended to ensure timely access when the initial pharmacist has objections, that has attracted the brunt of the law's criticism. Opponents feel that the chapter's referral requirement infringes on the pharmacists' rights just as much as if they were required to dispense the medication themselves.⁵¹ According to one critic, "[a referral requirement] is like saying, 'I don't kill people myself but let me tell you about the guy down the street who does.'"⁵²

45. *Id.* § 733(b)(3) (enacted by Chapter 417).

46. *Id.* §§ 4314-15 (West 2005).

47. *Id.* § 4314(a) (amended by Chapter 417); *id.* § 4315(a).

48. See Dailard, *supra* note 20 (listing only five states, including California, that considered such legislation during the 2005 session; Nevada signed a measure into law in June 2005).

49. Letter from Amy J. Koons, Legis. Liaison, Capitol Res. Inst., to Bus., Prof., and Econ. Dev. Comm., Cal. State Senate, (Apr. 19, 2005) (on file with the *McGeorge Law Review*) ("[Chapter 417] is specifically targeted at religious persons . . . [and] openly discriminates against the religious convictions and moral dictates of a pharmacist.").

50. Vanessa Stumpf, *Bill Seeks Compromise on Emergency Contraception*, CALIFORNIA AGGIE (Davis, Cal.), Sept. 19, 2005, available at <http://www.californiaaggie.com/article/?id=8774> (on file with the *McGeorge Law Review*).

51. Stein, *supra* note 9.

52. *Id.* (quoting Karen L. Brauer, President of the organization Pharmacists for Life).

The referral mandate contained in Chapter 417 could prove particularly important for women seeking to fill a prescription for emergency contraception,⁵³ commonly known as the “morning-after pill.”⁵⁴ The pill is essentially a high dose of regular oral contraceptives that must be taken within 120 hours of intercourse to be effective.⁵⁵ However, it is most effective when taken within twenty-four hours, and its effectiveness decreases with each passing hour.⁵⁶ Thus, a patient who is denied access to the drug would have to scramble to find another pharmacy to fill her prescription, while facing an increased risk of pregnancy with each passing hour.⁵⁷ Because of these important considerations, Chapter 417 was drafted specifically with access to emergency contraception in mind, even though the law’s language applies to all lawful prescriptions.⁵⁸

One thing Chapter 417 does not affect, however, is the option of getting Plan B without a prescription. California law allows willing pharmacies to dispense Plan B without a doctor’s prescription, provided they first comply with state mandated protocols and training.⁵⁹ Thus, there is still a possibility that a woman could be denied the drug if she does not present a prescription.⁶⁰ However, according to the California Medical Association, it is unlikely that a pharmacist who willingly goes through the protocol training and signs up for the voluntary program would later refuse to dispense Plan B.⁶¹

Although there is much case law covering what is meant by the terms “reasonable accommodation” and “undue hardship” as they are defined in section 12940(l) of the California Government Code,⁶² none of it appears to be on point with this new issue facing pharmacists and their employers. Opponents fear that requiring pharmacists to go on record with their beliefs and burdening employers with accommodating those beliefs could foster a hostile work environment and even jeopardize jobs and employment opportunities for objecting individuals.⁶³ Additionally, it is unclear how the law will apply to pharmacists who own their own business or to stores that employ only one pharmacist.⁶⁴

53. Planned Parenthood Fed’n, *supra* note 7.

54. O’Dell, *supra* note 18.

55. *Id.*

56. Derek Stranton & Emily Evans, *Plan B: The Facts Behind the Controversy*, 30:09 U.S. PHARMACIST 41-46 (“[S]tudies have shown an almost linear inverse relationship between the time Plan B is taken after intercourse and pregnancy rates.”).

57. O’Dell, *supra* note 18.

58. Stumpf, *supra* note 50.

59. CAL. BUS. & PROF. CODE § 4052(a)(8) (West 2005).

60. Letter from Syrus Devers, Assoc. Dir., Cal. Med. Assn., to Senator Deborah Ortiz, Cal. State Senate (Apr. 22, 2005) (on file with the *McGeorge Law Review*).

61. *Id.*

62. CAL. GOV’T. CODE § 12940(l) (West’s 2005).

63. Letter from Amy Koons to Cal. State Senate, Bus., Prof., & Econ. Dev. Comm., *supra* note 49.

64. Stumpf, *supra* note 50 (stating that the California Catholic Conference worries that pharmacists may be compelled, despite their personal objections, to fill a prescription if it is in stock and no one else is available).

V. CONCLUSION

Despite the controversy and the focus on conscience rights of individual pharmacists, pharmacies as a whole are still private businesses. An individual store or chain may still choose whether to carry a particular drug or class of drugs. But the import of Chapter 417 is clear: if they stock it, they must dispense it, subject only to the law's narrowly tailored exceptions.