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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

TROY KING
ATTORNEY GENERAL

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, AL 36130
(334) 242-7300
WWW.AGO.STATE.AL.US

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Honorable Donald E. Williamson
State Health Officer
Department of Public Health
Post Office Box 303017
Montgomery, Alabama 36130-3017

Tobacco Products – Minors – Public Health,
Department of – Crimes and Offenses

The Department of Public Health may legally disseminate nicotine replacement therapy patches to individuals under age 19 who have called the Quitline.

With or without the patch, the Department of Public Health may legally provide telephone counseling services to a person under age 19 calling the Quitline without permission from his or her parent or legal guardian.

Dear Dr. Williamson:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

1. May the Department of Public Health (“Department”) disseminate nicotine replacement therapy patches to individuals under age 19 who have called the Quitline?

2. With or without the patch, may the Department provide telephone counseling services to a person under age 19 calling the Quitline without permission from his or her parent or legal guardian?

FACTS AND ANALYSIS

According to your letter, the Alabama Department of Public Health manages a toll-free tobacco cessation line that provides individual counseling, educational materials, and referrals to local programs and, if eligible, a four-week supply of the nicotine replacement therapy patch (the "patch") to tobacco users who want to quit smoking or otherwise using tobacco and tobacco products. As you further stated, the nicotine-containing patch is available as an over-the-counter medication. The purpose of the patch is to assist tobacco users to stop using tobacco by replacing nicotine, the addictive substance found in tobacco, in their systems, thereby reducing cravings brought on by withdrawal. Use of the patch has been found to double the chances of a successful quit attempt over quitting with behavior modification alone. The nicotine replacement therapy patch was approved by the FDA in 1991. The patch became available over-the-counter in 1996. The Department has funded a new initiative to assist youth to quit using tobacco. The fact that the target audience of the new initiative is minors has raised legal questions that require an interpretation of certain laws of the State of Alabama.

The legal age to "purchase, possess or transport" "tobacco or tobacco products" in Alabama is 19. See ALA. CODE § 28-11-13 (2003). Further, section 28-11-2(8) defines "tobacco or tobacco products" as a "[t]obacco or any product containing tobacco, including, but not limited to, the following: a. [c]igarettes[;] b. [c]igars[;] c. [c]hewing tobacco[;] d. [s]nuff[;] e. [p]ipe tobacco[;] [or] f. [s]mokeless tobacco." ALA. CODE § 28-11-2(8) (2003).

A recent case, *S.A.N. v. S.E.N.*, ___ So. 2d ___, 2008 WL 2154099 (Ala. Civ. App. May 23, 2008), recites a standard rule of statutory interpretation as follows:

"[W]hen 'the language of a statute is plain and unambiguous, . . . courts must enforce the statute as written by giving the words of the statute their ordinary plain meaning- they must interpret that language to mean exactly what it says and thus give effect to the apparent intent of the Legislature.'"

Id. at 2, citing *Univ. of S. Ala. Hosps. v. Blackmon*, ___ So. 2d ___, 2007 WL 4463955 (Ala. Civ. App., Dec. 21, 2007).

In *Harper v. Coats*, ___ So. 2d ___, 2008 WL 162595 (Ala. Jan. 18, 2008), the Court states that the "canon of statutory construction" is an "expression unius est exclusion alterius"- the expression of one thing implies the exclusion of the other. It is interesting to note in the fact situation before us that the definition does *not* include the phrase "or substitute therefor" or any such wording found in other tobacco-related statutes. Taking the definition at its

plain meaning and applying this canon of interpretation, "tobacco or tobacco products" does not include the nicotine replacement patch. Thus, section 28-11-1, *et seq.*, of the Code provides no impediment to the implementation of the new initiative to assist youth to quit using tobacco and tobacco products.

Section 13A-12-3 of the Code sets out, as follows, the offense of selling cigarettes to minors:

Any person who sells, barter, exchanges or gives to any minor any cigarettes, cigarette tobacco or cigarette paper, or any substitute for either of them shall, on conviction, be fined not less than \$10.00 nor more than \$50.00 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than 30 days.

ALA. CODE § 13A-12-3 (2006).

The case of *Tillman v. R.J. Reynolds Tobacco Co.*, 871 So.2d 28 (Ala. 2003) holds that "Alabama outlawed selling cigarettes to minors 107 years ago. That law is now embodied in § 13A-12-3, Ala. Code 1975." *Id.* at 38. The question before us is whether that law was intended to apply to tobacco-cessation products that contain nicotine as an ingredient.

Webster's New Collegiate Dictionary defines a "substitute" as "a person or thing that takes the place of another." WEBSTER'S NEW COLLEGIATE DICTIONARY 1162 (1974). With cigarettes or other tobacco products, the heart of the product is tobacco. Tobacco is used because the user intends to derive the sensation from the use of the product. His or her intent is to continue to use the product and thus continue to derive pleased effect. His intent is *not* to quit.

The nicotine replacement patch contains nicotine; however, it does *not* contain tobacco. It is not intended as a substitute for the purposes of tobacco. To the contrary, it is intended to help the individual *quit* using tobacco. If the State of Alabama intended to consider the nicotine replacement patch as a substitute for tobacco or tobacco products, it would be subject to the use tax placed on such products. The Department of Revenue, however, makes no such interpretation.

Section 40-25-2 of the Code is the principal statute declaring the tax on tobacco and tobacco products. That statute lists cigars, cheroots, stogies, cigarettes, smoking tobacco, chewing tobacco, snuff, or "any substitute therefor" as subject to the excise tax. ALA. CODE § 40-25-2 (Supp. 2007). Further, section 40-25-2(f) provides as follows:

The tax herein levied shall be paid to the state through the use of stamps as herein provided. . . . Stamps in denominations to the amount of the tax or in denominations specified pursuant to subsection (g) of this section shall be affixed to the box or other container from or in which tobacco products taxed by this section are normally sold at retail. . . . All taxable tobaccos herein enumerated, when offered for sale, either at wholesale or retail, without having stamps affixed in the manner set out by this article, shall be subject to confiscation, in the manner provided for contraband goods as set out in this article.

ALA. CODE § 40-25-2(f) (Supp. 2007).

This Office has confirmed that the Revenue Department does not consider the nicotine replacement patch as a "substitute therefor" [for tobacco or tobacco products] and thus does not impose the tax on the product nor require it to be stamped. This Office accepts that interpretation as the interpretation for the State of Alabama. It is fully appropriate to apply that interpretation in this instance. This leads to the conclusion that section 13A-12-3 provides no impediment to the implementation of the new initiative to assist youth to quit using tobacco and tobacco products.

Your letter also informs this Office that, in addition to the patch provided to qualified callers, representatives of the Department also provide counseling services to callers to assist them to quit using tobacco products. You also state that you do not consider this to be medical advice or treatment because no physician/patient relationship is established.

Section § 34-24-50 of the Code provides, as follows, that the "practice of medicine or osteopathy" is:

(1) To diagnose, treat, correct, advise or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, by any means or instrumentality;

(2) To maintain an office or place of business for the purpose of doing acts described in subdivision (1), whether for compensation or not; . . .

ALA. CODE § 34-24-50 (2002).

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Physicians rendering opinions during diagnosis or treatment would constitute the giving of "medical advice" and physicians do counsel patients on the dangers of and methods to quit smoking, and in that setting, such advice would likewise be "medical advice." Under the facts presented, however, telephone counseling by nonmedical trained individuals with specific instructions and narrow parameters of operation aimed at aiding the caller to quit smoking does not equate with rendering "medical advice." Even if it did, we note that section 22-8-6 provides that "[a]ny minor may give effective consent for any legally authorized medical, health or mental health services to determine the presence of, or to treat, pregnancy, venereal disease, drug dependency, alcohol toxicity or any reportable disease, and the consent of no other person shall be deemed necessary." ALA. CODE § 22-8-6 (2006). Thus, no statutory violation would take place in either regard.

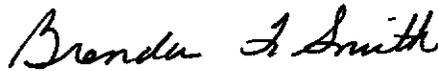
CONCLUSION

The Department of Public Health may legally disseminate nicotine replacement therapy patches to individuals under age 19 who have called the Quitline. Further, with or without the patch, the Department of Public Health may legally provide telephone counseling services to a person under age 19 calling the Quitline without permission from his or her parent or legal guardian.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact me.

Sincerely,

TROY KING
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

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