# CHAPTER 26
# Drugs and Cosmetics

# ARTICLE 1
# General Provisions

## 26-1-1. Short title.

Chapter 26, Article 1 NMSA 1978 may be cited as the "New Mexico Drug, Device and Cosmetic Act".

**History:** 1953 Comp., § 54-6-26, enacted by Laws 1967, ch. 23, § 1; 1987, ch. 270, § 1.

**ANNOTATIONS**

**Cross references.** — As to drug product selection, see Article 3 of this chapter.

For provisions of the Controlled Substances Act, see 30-31-1 NMSA 1978 et seq.

**The 1987 amendment,** effective June 19, 1987, substituted the present catchline for the former catchline, which read "Title of act"; substituted "Chapter 26, Article 1 NMSA 1978" for "This act"; and inserted "Device."

**Temporary provisions.** — Laws 1987, ch. 270, § 8 provides that any references in NMSA 1978 to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Objective of article,** in general, is to help establish a closed regulatory system for the legitimate handlers of controlled drugs. Pharmaceutical Mfrs. Ass'n v. New Mexico Bd. of Pharmacy, 86 N.M. 571, 525 P.2d 931 (Ct. App. 1974).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 25 Am. Jur. 2d Drugs, Narcotics, and Poisons §§ 1, 2, 8, 9, 10, 14, 15, 17, 19, 33, 69, 72, 75, 76, 98, 100, 130, 141, 191, 206.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning food, drugs, and other products intended for ingestion, 58 A.L.R.4th 7.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning cosmetics and other personal care products, 58 A.L.R.4th 40.

Products liability: mascara and other eye cosmetics, 63 A.L.R.4th 105.

Products liability of endorser, trade association, certifier, or similar party who expresses approval of product, 1 A.L.R.5th 431.

28 C.J.S. Supp. Drugs and Narcotics §§ 1 to 9.

## 26-1-2. Definitions.

As used in the New Mexico Drug, Device and Cosmetic Act [26-1-1 NMSA 1978]:

A. "board" means the board of pharmacy or its duly authorized agent;

B. "person" includes an individual, partnership, corporation, association, institution or establishment;

C. "biological product" means a virus, therapeutic serum, toxin, antitoxin or analogous product applicable to the prevention, treatment or cure of diseases or injuries of man and domestic animals and, as used within the meaning of this definition:

(1) a "virus" is interpreted to be a product containing the minute living cause of an infectious disease and includes filterable viruses, bacteria, rickettsia, fungi and protozoa;

(2) a "therapeutic serum" is a product obtained from blood by removing the clot or clot components and the blood cells;

(3) a "toxin" is a product containing a soluble substance poisonous to laboratory animals or man in doses of one milliliter or less of the product and having the property, following the injection of nonfatal doses into an animal, or causing to be produced therein another soluble substance that specifically neutralizes the poisonous substance and that is demonstrable in the serum of the animal thus immunized; and

(4) an "antitoxin" is a product containing the soluble substance in serum or other body fluid of an immunized animal that specifically neutralizes the toxin against which the animal is immune;

D. "controlled substance" means a drug, substance or immediate precursor enumerated in Schedules I through V of the Controlled Substances Act [30-31-1 NMSA 1978];

E. "drug" means articles:

(1) recognized in an official compendium;

(2) intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals and includes the domestic animal biological products regulated under the federal Virus-Serum-Toxin Act, 37 Stat 832-833, 21 U.S.C. 151-158, and the biological products applicable to man regulated under Federal 58 Stat 690, as amended, 42 U.S.C. 216, Section 351, 58 Stat 702, as amended, and 42 U.S.C. 262;

(3) other than food that affect the structure or any function of the body of man or other animals; and

(4) intended for use as a component of Paragraph (1), (2) or (3) of this subsection, but does not include devices or their component parts or accessories;

F. "dangerous drug" means a drug, other than a controlled substance enumerated in Schedule I of the Controlled Substances Act, that because of a potentiality for harmful effect or the method of its use or the collateral measures necessary to its use is not safe except under the supervision of a practitioner licensed by law to direct the use of such drug and hence for which adequate directions for use cannot be prepared. "Adequate directions for use" means directions under which the layman can use a drug or device safely and for the purposes for which it is intended. A drug shall be dispensed only upon the prescription of a practitioner licensed by law to administer or prescribe the drug if it:

(1) is a habit-forming drug and contains any quantity of a narcotic or hypnotic substance or a chemical derivative of such substance that has been found under the federal act and the board to be habit forming;

(2) because of its toxicity or other potential for harmful effect or the method of its use or the collateral measures necessary to its use is not safe for use except under the supervision of a practitioner licensed by law to administer or prescribe the drug;

(3) is limited by an approved application by Section 505 of the federal act to the use under the professional supervision of a practitioner licensed by law to administer or prescribe the drug;

(4) bears the legend: "Caution: federal law prohibits dispensing without prescription.";

(5) bears the legend: "Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian."; or

(6) bears the legend "RX only";

G. "counterfeit drug" means a drug that is deliberately and fraudulently mislabeled with respect to its identity, ingredients or sources. Types of such pharmaceutical counterfeits may include:

(1) "identical copies", which are counterfeits made with the same ingredients, formulas and packaging as the originals but not made by the original manufacturer;

(2) "look-alikes", which feature high-quality packaging and convincing appearances but contain little or no active ingredients and may contain harmful substances;

(3) "rejects", which are drugs that have been rejected by the manufacturer for not meeting quality standards; and

(4) "re-labels", which have passed their expiration dates or have been distributed by unauthorized foreign sources and may include placebos created for late-phase clinical trials;

H. "device", except when used in Subsection P of this section and in Subsection G of Section 26-1-3, Subsection L and Paragraph (4) of Subsection A of Section 26-1-11 and Subsection C of Section 26-1-24 NMSA 1978, means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent or other similar or related article, including any component, part or accessory, that is:

(1) recognized in an official compendium;

(2) intended for use in the diagnosis of disease or other conditions or in the cure, mitigation, treatment or prevention of disease in man or other animals; or

(3) intended to affect the structure or a function of the body of man or other animals and that does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and that is not dependent on being metabolized for achievement of any of its principal intended purposes;

I. "prescription" means an order given individually for the person for whom prescribed, either directly from a licensed practitioner or the practitioner's agent to the pharmacist, including by means of electronic transmission, or indirectly by means of a written order signed by the prescriber, and bearing the name and address of the prescriber, his license classification, the name and address of the patient, the name and quantity of the drug prescribed, directions for use and the date of issue;

J. "practitioner" means a physician, doctor of oriental medicine, dentist, veterinarian, certified nurse practitioner, clinical nurse specialist, pharmacist, pharmacist clinician, certified nurse-midwife, physician assistant, prescribing psychologist or other person licensed or certified to prescribe and administer drugs that are subject to the New Mexico Drug, Device and Cosmetic Act [26-1-1 NMSA 1978];

K. "cosmetic" means:

(1) articles intended to be rubbed, poured, sprinkled or sprayed on, introduced into or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness or altering the appearance; and

(2) articles intended for use as a component of any articles enumerated in Paragraph (1) of this subsection, except that the term shall not include soap;

L. "official compendium" means the official United States pharmacopoeia national formulary or the official homeopathic pharmacopoeia of the United States or any supplement to either of them;

M. "label" means a display of written, printed or graphic matter upon the immediate container of an article. A requirement made by or under the authority of the New Mexico Drug, Device and Cosmetic Act that any word, statement or other information appear on the label shall not be considered to be complied with unless the word, statement or other information also appears on the outside container or wrapper, if any, of the retail package of the article or is easily legible through the outside container or wrapper;

N. "immediate container" does not include package liners;

O. "labeling" means all labels and other written, printed or graphic matter:

(1) on an article or its containers or wrappers; or

(2) accompanying an article;

P. "misbranded" means a label to an article that is misleading. In determining whether the label is misleading, there shall be taken into account, among other things, not only representations made or suggested by statement, word, design, device or any combination of the foregoing, but also the extent to which the label fails to reveal facts material in the light of such representations or material with respect to consequences that may result from the use of the article to which the label relates under the conditions of use prescribed in the label or under such conditions of use as are customary or usual;

Q. "advertisement" means all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or that are likely to induce, directly or indirectly, the purchase of drugs, devices or cosmetics;

R. "antiseptic", when used in the labeling or advertisement of an antiseptic, shall be considered to be a representation that it is a germicide, except in the case of a drug purporting to be or represented as an antiseptic for inhibitory use as a wet dressing, ointment, dusting powder or such other use as involves prolonged contact with the body;

S. "new drug" means a drug:

(1) the composition of which is such that the drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and efficacy of drugs, as safe and effective for use under the conditions prescribed, recommended or suggested in the labeling thereof; or

(2) the composition of which is such that the drug, as a result of investigation to determine its safety and efficacy for use under such conditions, has become so recognized, but that has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions;

T. "contaminated with filth" applies to a drug, device or cosmetic not securely protected from dirt, dust and, as far as may be necessary by all reasonable means, from all foreign or injurious contaminations, or a drug, device or cosmetic found to contain dirt, dust, foreign or injurious contamination or infestation;

U. "selling of drugs, devices or cosmetics" shall be considered to include the manufacture, production, processing, packing, exposure, offer, possession and holding of any such article for sale and the sale and the supplying or applying of any such article in the conduct of a drug or cosmetic establishment;

V. "color additive" means a material that:

(1) is a dye, pigment or other substance made by a process of synthesis or similar artifice or extracted, isolated or otherwise derived, with or without intermediate or final change of identity, from a vegetable, mineral, animal or other source; or

(2) when added or applied to a drug or cosmetic or to the human body or a part thereof, is capable, alone or through reaction with other substances, of imparting color thereto; except that such term does not include any material that has been or hereafter is exempted under the federal act;

W. "federal act" means the Federal Food, Drug and Cosmetic Act;

X. "restricted device" means a device for which the sale, distribution or use is lawful only upon the written or oral authorization of a practitioner licensed by law to administer, prescribe or use the device and for which the federal food and drug administration requires special training or skills of the practitioner to use or prescribe. This definition does not include custom devices defined in the federal act and exempt from performance standards or premarket approval requirements under Section 520(b) of the federal act;

Y. "prescription device" means a device that, because of its potential for harm, the method of its use or the collateral measures necessary to its use, is not safe except under the supervision of a practitioner licensed in this state to direct the use of such device and for which "adequate directions for use" cannot be prepared, but that bears the label: "Caution: federal law restricts this device to sale by or on the order of a _____", the blank to be filled with the word "physician", "doctor of oriental medicine", "dentist", "veterinarian", "certified nurse practitioner", "clinical nurse specialist", "pharmacist", "pharmacist clinician", "certified nurse-midwife" or with the descriptive designation of any other practitioner licensed in this state to use or order the use of the device;

Z. "valid practitioner-patient relationship" means a professional relationship, as defined by the practitioner's licensing board, between the practitioner and the patient; and

AA. "pedigree" means the recorded history of a drug.

**History:** 1953 Comp., § 54-6-27, enacted by Laws 1967, ch. 23, § 2; 1971, ch. 245, § 2; 1972, ch. 84, § 43; 1977, ch. 117, § 1; 1987, ch. 270, § 2; 1997, ch. 240, § 1; 1997, ch. 244, § 1; 1997, ch. 253, § 2; 1999, ch. 298, § 1; 2001, ch. 50, § 1; 2002, ch. 100, § 1; 2005, ch. 152, § 1.

## ANNOTATIONS

**Bracketed material.** — The bracketed material in Subsection E(2) was added by the compiler. It was not enacted by the legislature and it is not part of the law.

**The 1987 amendment,** effective June 19, 1987, substituted "New Mexico Drug, Device and Cosmetic Act" for "New Mexico Drug and Cosmetic Act" in the introductory language and in Subsection J; in Subsection E deleted "Title 21 Part 600" from the end; in the third sentence in Subsections F(2) and F(3) inserted "or prescribe" following "administer"; in Subsection F(1) deleted "of pharmacy" following "board"; rewrote Subsection H; in Subsection K(2) inserted "enumerated in Paragraph (1) of this subsection"; in Subsection L inserted "national formulary or the" and deleted "official national formulary" preceding "or any supplement"; in Subsections S(1) and (2) inserted "and efficacy"; in Subsection S(1) inserted "and effective"; added Subsections X and Y; and made minor stylistic changes throughout the section.

**1997 amendments.** — Laws 1997, ch. 240, § 1, amending this section by inserting "doctor of oriental medicine" in Subsections J and Y and making stylistic changes throughout the section, was approved April 11, 1997. Laws 1997, ch. 244, § 1, amending this section by inserting "certified nurse practitioner, clinical nurse specialist" in Subsections J and Y and making stylistic changes throughout the section, was also approved April 11, 1997. However, Laws 1997, ch. 253, § 2, amending this section by inserting "certified nurse-midwife" in Subsections J and Y and "or certified" following "licensed" in Subsection J, and making stylistic changes throughout the section, but not giving effect to the changes made by the other 1997 amendments, was also approved April 11, 1997. This section is set out as amended by Laws 1997, ch. 253, § 2. See 12-1-8 NMSA 1978. Laws 1997, chs. 240, 244 and 253 do not contain effective date provisions, but, pursuant to N.M. Const., art. IV, § 23, are effective June 20, 1997, 90 days after adjournment of the legislature. See Volume 14 NMSA 1978 for "Adjournment Dates of Sessions of Legislature" table.

**The 1999 amendment,** effective June 18, 1999, deleted "but is not limited to" before "filterable viruses" in Subsection C(1), added Subsection F(6), added doctors of oriental medicine, certified nurse practitioners, clinical nurse specialists, and pharmacist

clinicians to the definition of "practitioner" in Subsection J and to the list of practitioners allowed to use or order the use of prescription devices in Subsection Y.

**The 2001 amendment,** effective June 15, 2001, inserted "pharmacist" in the definition of "practitioner" in Subsection J and inserted "'pharmacist'" near the end of Subsection Y.

**The 2002 amendment,** effective July 1, 2002, inserted "physician assistant, prescribing psychologist" in Subsection J.

**The 2005 amendment,** effective June 17, 2005, redefines "counterfeit drug" in Subsection G to mean a drug that is deliberately and fraudulently mislabeled with respect to its identity, ingredients or sources and gives examples of counterfeits included in the definition; replaces "prescriber" with "a licensed practitioner or practitioner's agent" and provides that a prescription may include an order given by means of electronic transmission in the definition of "prescription" in Subsection I; adds the definition of "valid practitioner-patient relationship" in Subsection Z to mean the relationship defined by the practitioner's licensing board; and adds the definition of "pedigree" in Subsection AA to mean the recorded history of a drug.

**Federal Food, Drug and Cosmetic Act.** — The Federal Food, Drug and Cosmetic Act, referred to in Subsection W, appears as 21 U.S.C.S. §§ 301 to 393. Section 505 of the act, referred to in Subsection F(3), appears as 21 U.S.C.S. § 355. Section 520(b) of the act, referred to in the second sentence in Subsection X, appears as 21 U.S.C.S. § 360j(b).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Products liability: liability of manufacturer or seller as affected by failure of subsequent party in distribution chain to remedy or warn against defect of which he knew, 45 A.L.R.4th 777.

Products liability: perfumes, colognes, or deodorants, 46 A.L.R.4th 1197.

Liability of manufacturer of oral live polio (Sabin) vaccine for injury or death from its administration, 66 A.L.R.4th 83.

What is "device" within the meaning of § 201(h) of Federal Food, Drug and Cosmetic Act (21 U.S.C.S. § 321(h)), 129 A.L.R. Fed. 343.

What is "new drug" within meaning of § 201(p) of Federal Food, Drug, and Cosmetic Act (21 U.S.C.S. § 321(p)), 133 A.L.R. Fed. 229.

## 26-1-3. Prohibited acts.

The following acts are prohibited:

A. the sale of any drug or device that is adulterated, misbranded or a counterfeit drug which is not a controlled substance;

B. the adulteration or misbranding of any drug or device;

C. the receipt or delivery in commerce of any drug or device that is adulterated, misbranded or a counterfeit drug which is not a controlled substance;

D. the dissemination of any false advertisement;

E. the giving of a false guaranty or undertaking, except by a person who relied on a guaranty or undertaking as attested by label or labeling from whom he received in good faith the drug or device for sale;

F. any act with respect to a drug or device when the act is done while the drug or device is held for sale and results in the drug or device being misbranded or adulterated;

G. the creation, sale, disposition, possession or concealment of any punch, die, plate, stone or other thing designed to print, imprint or reproduce the trademark, trade name or other identifying mark, imprint, device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render the drug a counterfeit drug;

H. concealment, disposition or possession with intent to sell or preparation with intent to defraud of a counterfeit drug;

I. in the case of a dangerous drug distributed or offered for sale in this state, the failure of the manufacturer or repackager to transmit, to any practitioner licensed to administer the drug who makes a written request for information, true and correct copies of all printed matter which is required to be included in any package in which that drug is distributed or sold or such other printed matter as is approved under the federal act. Nothing in this subsection shall be construed to exempt any person from any labeling requirement imposed under other provisions of the New Mexico Drug, Device and Cosmetic Act [Chapter 26, Article 1 NMSA 1978] and the Controlled Substances Act [30-31-1 NMSA 1978]; and

J. except as provided in Sections 26-3-1 through 26-3-3 NMSA 1978, dispensing or causing to be dispensed a different drug or brand of drug in place of the drug or brand of drug ordered or prescribed without the express permission in each case of the person ordering or prescribing.

**History:** 1953 Comp., § 54-6-28, enacted by Laws 1967, ch. 23, § 3; 1972, ch. 84, § 44; 1976, ch. 60, § 1; 1987, ch. 270, § 3.

## ANNOTATIONS

**Cross references.** — For definitions, see 26-1-2 NMSA 1978.

For adulteration of drug or device, see 26-1-10 NMSA 1978.

For adulteration of cosmetics, see 26-1-25 NMSA 1978.

For penalties, see 26-1-26 NMSA 1978.

**The 1987 amendment,** effective June 19, 1987, deleted "or cosmetic" following "drug or device" throughout the section; in the last sentence in Subsection I inserted "Device"; in Subsection J substituted "Sections 26-3-1 through 26-3-3 NMSA 1978" for "Sections 54-6-28.1 through 54-6-28.3 NMSA 1953"; and made minor stylistic changes throughout the section.

**Federal act.** — See 26-1-2W NMSA 1978 and notes thereto.

## 26-1-3.1. Repealed.

History: 1978 Comp., § 26-1-3.1, enacted by Laws 1987, ch. 270, § 4; repealed Laws 2005, ch. 152, § 11.

**ANNOTATIONS**

**Repeals.** — Laws 2005, ch. 152, § 11, repeals 26-1-3.1 NMSA 1978, relating to other prohibited acts, effective June 30, 2007. For provisions of former section, see 1999 Replacement Pamphlet.

## 26-1-4. Power to enjoin violations.

In addition to the remedies provided the board is authorized to apply to the district court for, and the court shall have jurisdiction upon hearing and for cause shown, to grant a temporary or permanent injunction restraining any other person from violating any provision of Section 3 [26-1-3 NMSA 1978] of the New Mexico Drug [, Device] and Cosmetic Act, irrespective of whether or not there exists an adequate remedy at law.

**History:** 1953 Comp., § 54-6-29, enacted by Laws 1967, ch. 23, § 4.

**ANNOTATIONS**

**Cross references.** — For warnings for minor violations, see 26-1-8 NMSA 1978.

For penalties generally, see 26-1-26 NMSA 1978.

**Bracketed material.** — The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not part of the law.

**No authority to charge at board meeting and then collect fine.** — The pharmacy board has no authority to charge druggists or wholesalers at a meeting of the board and then set out and collect a fine for any violation or violations of the pharmacy laws at said meeting from said druggists or wholesalers. 1953-54 Op. Att'y Gen. No. 5865 (opinion rendered under former law).

## 26-1-5. Penalty; exemptions.

No publisher, radio-broadcast licensee, or agency or medium for the dissemination of an advertisement, except the manufacturer, packer, distributor or seller of the article to which a false advertisement relates, shall be liable under this section [act] by reason of dissemination by him of such false advertisement, unless he has refused, on the request of the board, to furnish the board the name and post-office address of the manufacturer, packer, distributor, seller or advertising agency, who caused him to disseminate such advertisement.

**History:** 1953 Comp., § 54-6-30, enacted by Laws 1967, ch. 23, § 5.

**ANNOTATIONS**

**Cross references.** — For definition of "advertisement," see 26-1-2Q NMSA 1978.

**Compiler's notes.** — The words "this section" apparently refer to "this act," the New Mexico Drug, Device and Cosmetic Act," which is compiled as this article.

**No authority to charge at board meeting and then collect fine.** — The pharmacy board has no authority to charge druggist or wholesalers at a meeting of the board and then set out and collect a fine for any violation or violations of the pharmacy laws at said meeting from said druggists or wholesalers. 1953-54 Op. Att'y Gen. No. 5865 (opinion rendered under former law).

## 26-1-6. Detection of drugs, devices or cosmetic believed adulterated, misbranded or counterfeit; condemnation; destruction or correction of defect; forfeiture and sale.

A. Whenever an authorized agent of the board has probable cause to believe that any drug, device or cosmetic is adulterated, misbranded or counterfeit, he shall affix to such article appropriate marking, giving notice that the article is suspected of being adulterated, misbranded or counterfeit and has been detained or embargoed, and warning all persons not to remove or dispose of such article until permission for removal or disposal is given by the agent or the court. It is unlawful for any person to remove or dispose of such detained or embargoed article without such permission.

B. When an article detained or embargoed has been found by the agent to be adulterated, misbranded or counterfeit he shall petition the judge of the district court in

whose jurisdiction the article is detained or embargoed for a libel for condemnation of such article. When the agent has found that an article so detained or embargoed is not adulterated, misbranded or counterfeit he shall remove the marking.

C. If the court finds that a detained or embargoed article is adulterated or misbranded or counterfeit, the article shall, after entry of the decree, be destroyed at the expense of the claimant under the supervision of the agent, and all court costs and fees, and storage and other proper expenses shall be taxed against the claimant of the article or his agent. However, when the adulteration or misbranding can be corrected by proper labeling or processing of the article, the court, after entry of the decree and after costs, fees and expenses have been paid and a sufficient bond has been executed, conditioned that the article shall be so labeled or processed, may by order direct that the article be delivered to the claimant for labeling or processing under the supervision of an agent of the board. The expense of the supervision shall be paid by the claimant. The bond shall be returned to the claimant of the article on representation to the court by the board that the article is no longer in violation of the New Mexico Drug [, Device] and Cosmetic Act [this article] and that the expenses of the supervision have been paid.

D. The following may be seized by a duly authorized law enforcement official of the state whenever he has reasonable grounds to believe they are:

(1) a drug other than a controlled substance, that is counterfeit;

(2) a container of a counterfeit drug;

(3) any punch, die, plate, stone, labeling, container or other thing used or designed for use in making a counterfeit drug or drugs.

E. When an article, equipment or other thing is seized under Section 6D [26-1-6D NMSA 1978] of the New Mexico Drug [, Device] and Cosmetic Act, the proceedings shall be brought in the name of the state by the prosecuting attorney of the county in which the article was seized, and the libel shall be verified by a duly authorized agent of the state in a manner required by the law of this state. The libel shall describe the merchandise, state its location, state the name of the person in actual possession, state the name of the owner, if known to the duly authorized agent of the state, allege the essential elements of the violation which is claimed to exist and shall conclude with a prayer of due process to enforce the forfeiture. Upon the filing of libel the court shall properly cause process to issue to the authorized law enforcement official commanding him to seize the goods described in the libel and to hold the same for further order of the court. The authorized law enforcement official shall at the time of seizure serve a copy of said process upon the owner of said merchandise. Such service may be made personally, by mail or by publication according to the rules governing the service of civil process in this state. At the expiration of twenty days after such seizure, if no claimant has appeared to defend the libel, the court shall order the authorized law enforcement official to dispose of said merchandise.

F. Any person having an interest in the alleged article, equipment or other thing proceeded against, or any person against whom a civil or criminal liability would exist if said merchandise is in violation of Section 3 [26-1-3 NMSA 1978] of the New Mexico Drug [, Device] and Cosmetic Act may, within twenty days following the authorized law enforcement official's seizure, appear and file answer or demurrer to the libel. The answer or demurrer shall allege the interest or liability of the party filing it. In all other respects the issue shall be made up as in other civil actions.

G. Any article, equipment or other thing condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds, if sold, less the legal costs and charges, shall be paid to the general fund; but such article, equipment or other thing shall not be sold under such decree contrary to provisions of the New Mexico Drug [, Device] and Cosmetic Act. Whenever in any proceedings under this section the condemnation of any equipment or other thing, other than a drug, is decreed, the court shall allow the claim of any claimant, to the extent of such claimant's interest, for remission or mitigation of such forfeiture if such claimant proves to the satisfaction of the court that he has not committed or caused to be committed any prohibited act referred to in this section and has no interest in any drug referred to therein; that he has an interest in such equipment or other thing as owner or lienor or otherwise, acquired by him in good faith; and that he at no time had any knowledge or reason to believe that such equipment or other thing was being or would be used in, or to facilitate, the violation of the laws of this state relating to counterfeit drugs.

H. When a decree of condemnation is entered against the article, equipment or other thing, court costs and fees and storage and other proper expenses may be awarded against the person, if any, intervening as claimant of the article.

**History:** 1953 Comp., § 54-6-31, enacted by Laws 1967, ch. 23, § 6; 1971, ch. 241, § 1; 1972, ch. 84, § 45.

**ANNOTATIONS**

**Cross references.** — For definition of "counterfeit drug," see 26-1-2G NMSA 1978.

For definition of "misbranded," see 26-1-2P NMSA 1978.

As to adulteration, see 26-1-10 and 26-1-25 NMSA 1978.

**Bracketed material.** — The bracketed material in this section was added by the compiler. It was not enacted by the compiler and is not part of the law.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 2 C.J.S. Adulteration §§ 3 to 5.

## 26-1-7. Attorney general or district attorney to institute prosecutions.

It is the duty of the attorney general or the various district attorneys of this state to whom the board reports any violation of the New Mexico Drug, Device and Cosmetic Act [26-1-1 NMSA 1978] to cause appropriate proceedings to be instituted in the proper courts without delay and to be prosecuted in the manner required by law.

**History:** 1953 Comp., § 54-6-32, enacted by Laws 1967, ch. 23, § 7; 2005, ch. 152, § 2.

**ANNOTATIONS**

**Cross references.** — As to duties generally of attorney general, see 8-5-2 NMSA 1978.

**Bracketed material.** — The bracketed material in this section was added by the compiler. It was not enacted by the compiler and is not part of the law.

**Meaning of "this act".** — The term "this act," referred to in this section, apparently means the New Mexico Drug, Device, and Cosmetic Act, i.e., this article.

**No authority to charge at board meeting and then collect fine.** — See same catchline in notes to 26-1-4 and 26-1-5 NMSA 1978.

**The 2005 amendment,** effective June 17, 2005, deletes the provision that requires the board to permit the person against whom criminal proceedings are contemplated to present his or her views to the board before a violation is reported to the district attorney.

## 26-1-8. Minor violations of act; warnings authorized.

Nothing in the New Mexico Drug [, Device] and Cosmetic Act [this article] shall be construed as requiring the board to report for the institution of proceedings, minor violations of the New Mexico Drug [, Device] and Cosmetic Act, whenever the board believes that the public interest will be adequately served in the circumstances by a suitable written notice or warning.

**History:** 1953 Comp., § 54-6-33, enacted by Laws 1967, ch. 23, § 8.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material in this section was added by the compiler. It was not enacted by the compiler and is not part of the law.

## 26-1-9. Addition of poisonous or deleterious substances; color additives.

A. The board may adopt regulations authorizing color additives.

B. Any added poisonous or deleterious substance or any color additive, shall with respect to any particular use or intended use be deemed unsafe for the purpose of application of Section 10 A [26-1-10 A NMSA 1978] of the New Mexico Drug [, Device] and Cosmetic Act with respect to any drug or device or Section 25 A [26-1-25 A NMSA 1978] of the New Mexico Drug [, Device] and Cosmetic Act with respect to any cosmetic unless there is in effect a regulation pursuant to Subsection C of this section limiting the quantity of such substance, and the use or intended use of such substance conform [conforms] to the terms prescribed by such regulation. While such regulation relating to such substance is in effect, drug or cosmetic shall not, by reason of bearing or containing such substance in accordance with the regulation be considered adulterated within the meaning of Section 10 or Section 25 of the New Mexico Drug [, Device] and Cosmetic Act.

C. The board, whenever public health or other considerations in the state so require, is authorized to adopt, amend or repeal regulations whether or not in accordance with regulations promulgated under the federal act, prescribing the conditions under which a color additive may be safely used and exemptions where such color additive is to be used solely for investigational or experimental purposes, upon its own motion or upon the petition of any interested party requesting that such a regulation be established, and it shall be incumbent upon the petitioner to establish by data submitted to the board of pharmacy that a necessity exists for such regulation, and that its effect will not be detrimental to public health. If the data furnished by the petitioner is not sufficient to allow the board to determine whether such regulation should be promulgated, the board may require additional data to be submitted and failure to comply with the request shall be sufficient grounds to deny the request. In adopting, amending or repealing regulations relating to such substances, the board shall consider among other relevant factors, the following which the petitioner, if any, shall furnish:

(1) the name and all pertinent information concerning such substance including where available, its chemical identity and composition, a statement of conditions of the proposed use, including directions, recommendations and suggestions and including specimens of proposed labeling, all relevant data bearing on the physical or other technical effect and the quantity required to produce such effect;

(2) the probable composition of, or the relevant exposure from the article and of any substance formed in or on a drug or cosmetic resulting from the use of such substance;

(3) safety factors which, in the opinion of experts qualified by scientific training and experience to evaluate the safety of such substances for the use or uses for which they are proposed to be used, are generally recognized as appropriate for the use of animal experimentation data;

(4) the availability of any needed practicable methods of analysis for determining the identity and quantity of:

(a) such substance in or on an article;

(b) any substance formed in or on such article because of the use of such substance; and

(c) the pure substance and all intermediates and impurities; and

(5) facts supporting a contention that the proposed use of such substance will serve a useful purpose.

**History:** 1953 Comp., § 54-6-34, enacted by Laws 1967, ch. 23, § 9.

**ANNOTATIONS**

**Bracketed material. —** The bracketed material in this section was added by the compiler. It was not enacted by the compiler and is not part of the law.

**Federal act.** — See 26-1-2W NMSA 1978 and notes thereto.

## 26-1-10. Drug or device adulteration.

A drug or device shall be deemed to be adulterated:

A. if it consists in whole or in part of any filthy, putrid or decomposed substance; or if it has been produced, prepared, packed or held under insanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered injurious to health; or if it is a drug and the methods used in, or the facilities of controls used for, its manufacture, processing, packing or holding do not conform to or are not operated or administered in conformity with current good manufacturing practice to assure that such drug meets the requirements of the New Mexico Drug [, Device] and Cosmetic Act [this article] as to safety and has the identity and strength, and meets the quality and purity characteristics which it purports or is represented to possess; or if it is a drug and its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or if it is a drug and it bears or contains for purposes of coloring only a color additive which is unsafe within the meaning of the federal act or it is a color additive the intended use of which in drugs is for the purposes of coloring only, and is unsafe within the meaning of the federal act;

B. if it purports to be or is represented as a drug the name of which is recognized in an official compendium, and its strength differs from, or its quality or purity falls below, the standard set forth in such compendium. Such determination as to strength, quality and purity shall be made in accordance with the tests or methods of assay set forth in such compendium or in the absence of or inadequacy of such tests or methods of assay, those prescribed under the authority of the federal act. No drug defined in an official compendium shall be deemed to be adulterated under this

paragraph because it differs from the standard of strength, quality or purity therefor set forth if such standard is plainly stated on its label. Whenever a drug is recognized both in the United States Pharmacopoeia and the Homeopathic Pharmacopoeia of the United States it shall be subject to the requirements of the United States Pharmacopoeia unless it is labeled and offered for sale as a homeopathic drug, in which case it shall be subject to the provisions of the Homeopathic Pharmacopoeia of the United States and not those of the United States Pharmacopoeia;

C. if it is not subject to the provisions of Subsection B of this section and its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess; or

D. if it is a drug and any substance has been mixed or packed therewith so as to reduce its quality or strength; or substituted wholly or in part therefor.

**History:** 1953 Comp., § 54-6-35, enacted by Laws 1967, ch. 23, § 10.

**ANNOTATIONS**

**Cross references.** — For definition of "contaminated with filth," see 26-1-2T NMSA 1978.

For definition of "color additive," 26-1-2V NMSA 1978.

**Bracketed material.** — The bracketed material in this section was added by the compiler. It was not enacted by the compiler and is not part of the law.

**Federal act.** — See 26-1-2W NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 2 C.J.S. Adulteration § 2; 28 C.J.S. Drugs and Narcotics § 9.

## 26-1-11. Drug or device; misbranding.

A. A drug or device shall be deemed to be misbranded:

(1) if its labeling is false or misleading in any particular;

(2) if in package form, unless it bears a label containing the name and place of the business of the manufacturer, packer or distributor and an accurate statement of the quantity of the contents in terms of weight, measure or numerical count; provided that reasonable variations shall be permitted and exemptions as to small packages shall be allowed in accordance with regulations prescribed by the board or issued under the federal act [26-1-2W NMSA 1978];

(3) if it is a drug subject to the restrictions on sale contained in Subparagraph 1 of Subsection (b) of 21 U.S.C. Section 353, which provisions describe those substances commonly referred to as "legend drugs", and if the drug is in package form, unless it bears a label on its immediate container, and on any outer container if such there be, including the name and place of the business of the manufacturer of the finished dosage form and the name and place of business of the packer or distributor and an accurate statement of the quantity of the contents in terms of weight, measure or numerical count;

(4) if any word, statement or other information required by or under authority of the New Mexico Drug, Device and Cosmetic Act [this article] to appear on the label or labeling is not prominently placed with such conspicuousness, as compared with other words, statements, designs or devices in the labeling, and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

(5) if it is for use by man and contains any quantity of a narcotic or hypnotic substance or any chemical derivative of such substance, which derivative after investigation has been found to be and designated as habit-forming by regulations issued pursuant to Section 502(d) or 511 of the federal act [26-1-2W NMSA 1978], unless its label bears the name and quantity or proportion of such substance or derivative and in juxtaposition therewith the statement "Warning - May be habit-forming" and meets labeling requirements of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970; or

(6) if it is a drug, unless the label bears, to the exclusion of any other nonproprietary name except the applicable systematic chemical name or the chemical formula, the established name, as defined in this section, of the drug, and in case it is fabricated from two or more active ingredients, the established name and quantity of each active ingredient, including the kind and quantity or proportion of any alcohol and also including the established name and quantity or proportion of any bromides, ether, chloroform, acetanilid, acetphenetidin, antipyrine, amidropyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, digitalis glycosides, mercury, ouabain, strophanthin, strychnine, thyroid or any derivative or preparation of any such substances contained therein; provided that the requirements for stating the quantity of the active ingredients, other than the quantity of those specifically named in this section, shall apply only to prescription drugs; provided, further, that to the extent that compliance with the requirements of this section is impracticable, exemptions shall be allowed under regulations promulgated by the board or under the federal act [26-1-2W NMSA 1978].

B. As used in this section, the term "established name" with respect to a drug or ingredient means:

(1) the applicable official name designated pursuant to Section 508 of the federal act [26-1-2W NMSA 1978]; or

(2) if there is no such name and such drug or such ingredient is an article recognized in an official compendium, then the official title in such compendium or if neither applies, then the common or usual name, if any, of such drug or of such ingredient; provided that where an article is recognized in the United States pharmacopoeia and in the homeopathic pharmacopoeia under different official titles, the official title used in the United States pharmacopoeia shall apply unless it is labeled and offered for sale as a homeopathic drug, in which case the official title used in the homeopathic pharmacopoeia shall apply.

C. A drug or device shall be deemed to be misbranded unless its labeling bears adequate directions for use and such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health or against unsafe dosage or methods or duration of administration or application, in such manner and form as are necessary for the protection of users; provided that where adequate directions for use as applied to any drug or device are not necessary for the protection of the public health, the board shall promulgate regulations exempting such drug or device from such requirements; provided, further, that articles exempted under regulations issued under Section 502(f) of the federal act [26-1-2W NMSA 1978] may also be exempt.

D. A drug or device shall be deemed to be misbranded if it purports to be a drug the name of which is recognized in an official compendium unless it is packed and labeled as prescribed therein; provided that the method of packing may be modified with the consent of the board. Whenever a drug is recognized in both the United States pharmacopoeia and the homeopathic pharmacopoeia of the United States, it shall be subject to the requirements of the United States pharmacopoeia with respect to packaging and labeling unless it is labeled and offered for sale as a homeopathic drug, in which case it shall be subject to the provisions of the homeopathic pharmacopoeia of the United States and not those of the United States pharmacopoeia; provided, further, that in the event of inconsistency between the requirements of this subsection and those of Paragraph (6) of Subsection A of this section as to the name by which the drug or its ingredients shall be designated, the requirements of Paragraph (6) of Subsection A of this section shall prevail.

E. A drug or device shall be deemed to be misbranded if it has been found by the board or under the federal act [26-1-2W NMSA 1978] to be a drug liable to deterioration unless it is packaged in such form and manner and its label bears the statement of such precautions as the regulations issued by the board or under the federal act [26-1-2W NMSA 1978] require as necessary for the protection of public health. No regulation shall be established for any drug recognized in an official compendium until the board has informed the appropriate body charged with the revision of such compendium of the need for such packaging or labeling requirements and such body has failed within a reasonable time to prescribe such requirements.

F. A drug or device shall be deemed to be misbranded if it is a drug and its container is so made, formed or filled as to be misleading or if it is an imitation of

another drug or if it is offered for sale under the name of another drug or if it bears a copy, counterfeit or colorable imitation of a trademark, label, container or identifying name or design of another drug.

G. A drug or device shall be deemed to be misbranded if it is dangerous to health when used in the dosage or with the frequency or duration prescribed, recommended or suggested in the labeling.

H. A drug or device shall be deemed to be misbranded if it is or purports to be or is represented as a drug composed wholly or partly of insulin unless it is from a batch with respect to which a certificate or release has been issued pursuant to Section 506 of the federal act [26-1-2W NMSA 1978] and such certificate or release is in effect with respect to such drug.

I. A drug or device shall be deemed to be misbranded if it is or purports to be or is represented as a drug composed wholly or partly of any kind of penicillin, streptomycin, chlortetracycline, chloramphenicol, bacitracin or any other antibiotic drug or any derivative thereof unless it is from a batch with respect to which a certificate or release has been issued pursuant to Section 507 of the federal act [26-1-2W NMSA 1978] and such certificate or release is in effect with respect to such drug; provided that this subsection shall not apply to any drug or class of drugs exempted by regulations promulgated under Section 507(c) or (d) of the federal act [26-1-2W NMSA 1978]. For the purpose of this subsection, the term "antibiotic drug" means any drug intended for use by man containing any quantity of any chemical substance which is produced by a microorganism and which has the capacity to inhibit or destroy microorganisms in dilute solution, including the chemically synthesized equivalent of any such substance.

J. A drug or device shall be deemed to be misbranded if it is a color additive, the intended use of which in or on drugs is for the purpose of coloring only, unless its packaging and labeling are in conformity with such packaging and labeling requirements applicable to such color additive, prescribed under the provisions of Subsection C of Section 26-1-9 NMSA 1978 or of the federal act [26-1-2W NMSA 1978].

K. A drug or device shall be deemed to be misbranded, in the case of any dangerous drug distributed or offered for sale in this state, unless the manufacturer, packer, distributor or retailer thereof includes in all advertisements and other descriptive printed matter issued or caused to be issued by the manufacturer, packer or distributor or retailer with respect to that drug a true statement of:

(1) the established name as defined in Paragraph (6) of Subsection A of this section;

(2) the formula showing quantitatively each ingredient of the drug to the extent required for labels under Section 502(e) of the federal act [26-1-2W NMSA 1978]; and

(3) such other information in brief summary relating to side effects and contraindications as are required in regulations issued under the federal act [26-1-2W NMSA 1978].

L. A drug or device shall be deemed to be misbranded if a trademark, trade name or other identifying mark, imprint or device of another or any likeness of the foregoing has been placed thereon or upon its container with intent to defraud.

M. Drugs and devices which are, in accordance with the practice of the trade, to be processed, labeled or repacked in substantial quantities at establishments other than those where originally packaged in accordance with requirements of the New Mexico Drug, Device and Cosmetic Act shall be deemed to be misbranded unless such drugs or devices are being delivered, manufactured, processed, labeled, repacked or otherwise held in compliance with regulations issued by the board or under the federal act [26-1-2W NMSA 1978].

N. A dangerous drug, except for drugs declared dangerous pursuant to Subsection B of Section 26-1-18 NMSA 1978, shall be deemed to be misbranded if, at any time prior to dispensing, its label fails to bear either of the following legends:

(1) "Caution: federal law prohibits dispensing without prescription."; or

(2) "RX only".

**History:** 1953 Comp., § 54-6-36, enacted by Laws 1967, ch. 23, § 11; 1972, ch. 84, § 46; 1975, ch. 103, § 1; 1999, ch. 298, § 2.

## ANNOTATIONS

**Cross references.** — For definition of "misbranded," see 26-1-2P NMSA 1978.

**The 1999 amendment,** effective June 18, 1999, substituted "New Mexico Drug, Device and Cosmetic Act" for "New Mexico Drug and Cosmetic Act" in Subsections A(4) and M, added "A drug or device shall be deemed to be misbranded" to the beginning of Subsections C to L, substituted "Section 507 of" for "Section 507 or" in Subsection I, substituted "Subsection C of Section 26-1-9 NMSA 1978" for "Section 9C of the New Mexico Drug and Cosmetic Act" in Subsection J, substituted "shall be deemed to be misbranded unless such" for "provided, that such" in Subsection M, and inserted "except for drugs declared dangerous pursuant to Subsection B of Section 26-1-18 NMSA 1978," and rewrote Subsection N, adding the exception near the beginning of the subsection and adding the legend, "RX only".

**Comprehensive Drug Abuse Prevention and Control Act.** — The federal Comprehensive Drug Abuse Prevention and Control Act of 1970 appears as 21 U.S.C. § 801 et seq.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 28 C.J.S. Drugs and Narcotics § 9.

## 26-1-12. False advertising.

A. An advertisement of a drug, device or cosmetic shall be deemed to be false if it is false or misleading in any particular.

B. For the purpose of the New Mexico Drug [, Device] and Cosmetic Act [this article] the advertisement of a drug or device representing it to have any effect in albuminuria, appendicitis, arteriosclerosis, blood poison, bone disease, Bright's disease, cancer, carbuncles, cholecystitis, diabetes, diphtheria, dropsy, erysipelas, gallstones, heart and vascular diseases, high blood pressure, mastoiditis, measles, meningitis, mumps, nephritis, otitis media, paralysis, pneumonia, poliomyelitis (infantile paralysis), prostate gland disorders, pyelitis, scarlet fever, sexual impotence, sinus infection, smallpox, tuberculosis, tumors, typhoid, uremia, venereal disease, shall also be deemed to be false, except that no advertisement not in violation of Subsection A shall be deemed to be false under this subsection if it is disseminated only to members of the pharmacy, medical, dental or veterinary profession or appears only in the scientific periodicals of those professions or is disseminated only for the purpose of public health education by persons not commercially interested, directly or indirectly, in the sale of such drugs or devices; provided, that whenever the board determines that an advance in medical science has made any type of self-medication safe as to any of the diseases named above, [the] board shall by regulation authorize the advertisement of drugs having curative or therapeutic effect for such disease, subject to such conditions and restrictions as the board may deem necessary in the interests of public health; provided, that this subsection shall not be construed as indicating that self-medication for diseases other than those named herein is safe or efficacious.

C. In the case of any dangerous drug distributed or offered for sale in this state by a manufacturer, packer, distributor or retailer, all advertisement with respect to that drug shall contain a true statement of the established or official name, together with any trade or brand name; the formula as represented on the label, in the same order of listing and with all listed warnings and cautions; the dosage form and strength; such other information in brief summary relating to its use, side effects, contraindications and the name of the manufacturer, packer or distributor; provided, that no advertisement prepared in accordance with Section 502(n) of the federal act and disseminated only to practitioners and dispensers shall be in violation of this subsection.

**History:** 1953 Comp., § 54-6-37, enacted by Laws 1967, ch. 23, § 12.

**ANNOTATIONS**

**Cross references.** — For definition of "advertisement," see 26-1-2 Q NMSA 1978.

**Bracketed material.** — The bracketed material in this section was added by the compiler. It was not enacted by the compiler and is not part of the law.

**Federal act.** — See 26-1-2W NMSA 1978 and notes thereto.

## 26-1-13. Packaging and labeling requirements; proprietary preparations.

A. The principal display panel of an over-the-counter packaged drug or device shall bear as one of its principal features a statement of the identity of the commodity. The statement shall include the established name of the drug or the common name of the device and an accurate statement of the general pharmacological category of the drug or the principal intended action of the drug or device in terms meaningful to the layman.

B. In the case of an over-the-counter drug that is a mixture with no established name, a conspicuous enumeration of each active ingredient that is a mixture with no established name and a conspicuous enumeration of each active ingredient immediately followed by an accurate statement of the general pharmacological category of the ingredients or of its principal intended action in terms that are meaningful to the layman.

C. This section shall not apply to any drug or class of drugs exempted by regulations promulgated under the federal Fair Packaging and Labeling Act.

D. The label of an over-the-counter packaged drug or device shall bear a declaration of the net quantity of its contents.

E. Dangerous drugs or over-the-counter preparations subject to the federal Poison Prevention Packaging Act of 1970 shall meet the safety closure standards and regulations promulgated pursuant to the federal Poison Prevention Packaging Act of 1970.

**History:** 1953 Comp., § 54-6-38, enacted by Laws 1972, ch. 84, § 47.

**ANNOTATIONS**

**Repeals and reenactments.** — Laws 1972, ch. 84, § 47 repeals 54-6-38, 1953 Comp., relating to depressant, stimulant and hallucinogenic drugs, and enacts the above section.

**Fair Packaging and Labeling Act.** — The federal Fair Packaging and Labeling Act appears as 15 U.S.C. § 1451 et seq.

**Poison Prevention Packaging Act.** — The federal Poison Prevention Packaging Act of 1970 appears as 15 U.S.C. § 1471.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Liability of manufacturer or seller for injury or death allegedly caused by failure to warn regarding danger in use of vaccine or prescription drug, 94 A.L.R.3d 748.

Promotional efforts directed toward prescribing physician as affecting prescription drug manufacturer's liability for product-caused injury, 94 A.L.R.3d 1080.

Strict products liability: liability for failure to warn as dependent on defendant's knowledge of danger, 33 A.L.R.4th 368.

## 26-1-14. New drugs; prerequisites to sale, delivery or giving away; exceptions.

A. No person shall sell, deliver, offer for sale, hold for sale or give away any new drug or device unless:

(1) an application has been approved for the drug and approval has not been withdrawn under Section 505 of the federal act;

(2) when the drug is not subject to the federal act, the drug has been tested and has been found to be safe for use under the conditions prescribed, recommended or suggested in the labeling, and, prior to selling or offering for sale, there has been filed with the board an application setting forth full reports of investigations which have been made to show whether or not the drug is safe for use; a full list of the articles used as components of the drug; a full statement of the composition of the drug; a full description of the methods used in and the facilities and controls used for the manufacturer, processing and packing of the drug; such samples of the drug and of the articles used as components of the drug as the board may require; and specimens of the labeling proposed to be used for the drug; or

(3) the device has met the requirements of classification, performance standards and premarket approval, where applicable, under Sections 513 through 520 of the federal act.

B. An application provided for in Paragraph (2) of Subsection A of this section shall become effective on the one hundred eightieth day after filing except that if the board finds, after due notice to the applicant and giving him an opportunity for a hearing, that the drug is not safe for the use under the conditions prescribed, recommended or suggested in the proposed labeling, it shall, prior to the effective date of application, issue an order refusing to permit the application to become effective.

C. An order refusing to permit an application under this section to become effective may be revoked by the board.

D. This section shall not apply:

(1) to a drug intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety of drugs, provided the drug is plainly labeled in compliance with the regulations issued by the board or pursuant to Section 505(i) or 507(d) of the federal act;

(2) to any drug which is subject to Subsection I of Section 26-1-11 NMSA 1978;

(3) to any device for use pursuant to the order of an individual practitioner qualified by law in this state to use or prescribe the device, which device:

(a) is not generally available in finished form for purchase or for dispensing upon prescription and is not offered through labeling or advertising by the manufacturer for commercial distribution;

(b) is intended for use by an individual patient named in the order of the prescribing practitioner and is to be made in a specific form for the patient or is intended to meet the special needs of the practitioner in the course of the practitioner's professional practice; and

(c) is not generally available to or generally used by other practitioners; or

(4) is exempt under Section 520(g) of the federal act for investigational use by experts qualified by scientific training and experience to test the safety and effectiveness of the device by controlled investigation and evaluation.

**History:** 1953 Comp., § 54-6-39, enacted by Laws 1967, ch. 23, § 14; 1977, ch. 117, § 2; 1987, ch. 270, § 5.

**ANNOTATIONS**

**Cross references.** — For definition of "new drug," see 26-1-25 NMSA 1978.

**The 1987 amendment,** effective June 19, 1987, inserted "or device" near the beginning of Subsection A; in Subsection A(1) deleted "with respect thereto" following "an application" and inserted "for the drug"; added Subsection A(3); in Subsection B inserted "Paragraph (2) of" near the beginning; in Subsection D(2) substituted "is subject to Subsection I of Section 26-1-11 NMSA 1978" for "is subject to Section 11I of the New Mexico Drug and Cosmetic Act"; added Subsections D(3) and (4); and made minor stylistic changes throughout the section.

**Federal act.** — See 26-1-2W NMSA 1978 and notes thereto. Sections 505, 507 and 513 through 520, referred to throughout this section, appear as 21 U.S.C. §§ 355, 357 and 360c to 360j.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** What is "new drug" within meaning of § 201(p) of Federal Food, Drug, and Cosmetic Act (21 USCS § 321(p)), 133 A.L.R. Fed. 229.

## 26-1-15. Dangerous drugs; veterinary use; limitations.

A. A dangerous drug intended for veterinary use which is not safe for animal use except under the direct supervision of a licensed veterinarian and for which adequate directions for use cannot be prepared, shall bear the legend "CAUTION: federal law restricts this drug to use by or on the order of a licensed veterinarian" and the label shall meet the requirements of the federal act. Such drugs may be sold or distributed by a person possessing a limited license issued by the board under Subsection B of Section 61-11-14 NMSA 1978, on the order of a licensed veterinarian, provided adequate records of receipt and distribution are kept as required in the New Mexico Drug [, Device] and Cosmetic Act [this article].

B. Drugs which are exempted by the federal act for veterinary use without a prescription shall be labeled to indicate that the drug is for veterinary use and the label shall meet the requirements of the federal act.

**History:** 1953 Comp., § 54-6-40, enacted by Laws 1972, ch. 84, § 48; 1973, ch. 217, § 1.

**ANNOTATIONS**

**Cross references.** — For definition of dangerous drugs under the New Mexico Drug, Device and Cosmetic Act, see 26-1-2F NMSA 1978.

For definition of federal act, see 26-1-2W NMSA 1978 and notes thereto.

**Repeals and reenactments.** — Laws 1972, ch. 84, § 48, repealed 54-6-40, 1953 Comp., relating to enumeration of dangerous drugs, and enacted a new 26-1-15 NMSA 1978.

**Bracketed material.** — The bracketed material in this section was added by the compiler. It was not enacted by the compiler and is not part of the law.

## 26-1-16. Dangerous drugs; conditions for sale; prescription refilling; limitations.

A. it is unlawful for any person to sell, dispose of or possess any dangerous drugs, except:

(1) manufacturers, wholesalers or distributors, their agents or employees licensed by the board to ship dangerous drugs into the state; or

(2) distributors, wholesalers, hospitals, nursing homes, clinics or pharmacies and other authorized retailers of dangerous drugs in this state licensed by the board, and appropriate records of dangerous drugs receipt and disposition are kept. These records shall be open to inspection by any enforcement officer of this state.

B. Practitioners licensed in this state may prescribe, provide samples of and dispense any dangerous drug to a patient where there is a valid practitioner-patient relationship. A record of all such dispensing shall be kept showing the date the drug was dispensed and bearing the name and address of the patient to whom dispensed. It is the duty of every licensed physician, dentist, veterinarian, pharmacist or person holding a limited license issued under Subsection B of Section 61-11-14 NMSA 1978, when dispensing any dangerous drug, to mark on the dispensing container the name of the patient, the date dispensed, the name and address of the person dispensing the drug, the name and strength of the drug, expiration date where applicable, adequate directions for use and the prescription number when applicable. All official compendium requirements for the preservation, packaging, labeling and storage of dangerous drugs are applicable where drugs are held for dispensing to the public, whether by a pharmacy, clinic, hospital or practitioner.

C. Pharmacists are prohibited from selling or disposing of any dangerous drug except on prescription of a practitioner and except as such sale or possession is authorized under Subsection A of this section. It is the duty of all pharmacists to keep an accurate record of all disposals, which record shall be open to inspection by any enforcement officer of this state.

D. No enforcement officer having knowledge by virtue of his office of any prescription, order or record shall divulge such knowledge except in connection with a prosecution or proceeding in court or before a licensing or registration board or officer, to which prosecution or proceeding the person to whom such prescriptions, orders or records relate is a party.

E. It is unlawful, except as otherwise authorized under Subsection A of this section or the Controlled Substances Act and except for the college of pharmacy of the university of New Mexico or a public health laboratory, for any person to possess any dangerous drug unless such substance has been dispensed to him either directly by a practitioner or on a prescription.

F. All records required to be kept under the provisions of the New Mexico Drug, Device and Cosmetic Act [26-1-1 NMSA 1978] shall be preserved for a period of three years, provided that records requirements do not apply to the administration of a drug to a patient upon whom the practitioner personally attends, and provided that records of controlled substances shall be kept in accordance with the provisions of the Controlled Substances Act.

G. No prescription may be lawfully refilled:

(1) if it is marked by the issuing practitioner as not to be refilled;

(2) when the practitioner indicates a specific number of refills or a specific period of time, on the original prescription calling for a dangerous drug, it may be refilled the number of times or for the period of time indicated; provided, the date of refill, the

initials of the pharmacist refilling the prescription and the amount of drug dispensed, if it differs from the amount called for on the original prescription, is recorded on the original prescription; provided, a prescription issued for drugs controlled by the Controlled Substances Act [30-31-1 NMSA 1978] shall comply with that act;

(3) when the practitioner does not indicate refill instructions on the original prescription calling for a dangerous drug, unless:

(a) the practitioner is contacted orally, by telephone, telegraph or other means of communication for instruction; and

(b) if authorization to refill is given the pharmacist, the following information will be immediately transferred to the original prescription: 1) date; 2) name of person authorizing the refill; 3) pharmacist's initials; and 4) amount dispensed if different than the amount indicated on the original prescription;

(4) when the practitioner indicates on the original prescription calling for dangerous drugs that it may be refilled "prn" the pharmacist may refill it within the limits of the dosage directions for a period of twelve months, provided the date of refilling and the initials of the pharmacist are recorded on the original prescription. At the expiration of the twelve-month period, the practitioner must be contacted for a new prescription; provided that this is not to be construed to apply to those drugs regulated by the Controlled Substances Act; and

(5) the board may adopt and promulgate regulations to permit the use of computer systems for the storage and retrieval of prescriptions, records for the purpose of refilling prescriptions, receipt records, drug distribution records, drug withdrawals from stock, drug compounding records, drug disposition records and drug disposal records.

H. Nothing in this section shall prevent the owner of livestock or his consignee or their employees to be in possession of drugs for their use in performing routine, accepted livestock management practices in the care of livestock belonging to the owner, and the drugs are labeled as being restricted to animal use only; provided, that if such drugs bear the legend: "CAUTION: federal law restricts this drug to use by or on the order of a licensed veterinarian", the drugs may be used or distributed only as provided in Subsection A of Section 26-1-15 NMSA 1978.

**History:** 1953 Comp., § 54-6-41, enacted by Laws 1967, ch. 23, § 16; 1972, ch. 84, § 49; 1973, ch. 217, § 2; 1979, ch. 41, § 1; 1987, ch. 270, § 6; 2005, ch. 152, § 3.

## ANNOTATIONS

**Cross references.** — For definition of "dangerous drugs," see 26-1-2F NMSA 1978.

**The 1987 amendment,** effective June 19, 1987, rewrote Subsection B; deleted former Subsection F, relating to the duty of persons dispensing dangerous drugs to mark certain information on the dispensing container; redesignated subsequent subsections accordingly; in Subsection F inserted "Device" near the beginning and added the proviso at the end of the subsection; and made minor stylistic changes throughout the section.

**The 2005 amendment,** effective June 17, 2005, adds wholesalers to the list of persons who may lawfully sell, dispose of or possess dangerous drugs in Subsections A(1) and (2); changes "physician" to "practitioner" in Subsection B; and authorizes the board to adopt rules and regulations to permit the use of computers for the storage and retrieval of receipt records, drug distribution records drug withdrawals from stock, drug compounding records drug disposition records and drug disposal records Subsection G(5).

**Denial of equal protection not substantiated.** — Since there are no New Mexico drug manufacturers, there is no factual basis for the claim that Subsection A(1) denies state residents equal protection. Pharmaceutical Mfrs. Ass'n v. New Mexico Bd. of Pharmacy, 86 N.M. 571, 525 P.2d 931 (Ct. App. 1974).

**Applicability of article.** — This article applies to legitimate handlers of controlled drugs, but also to others similarly situated who are not involved in the authorized use of such substances. State v. Reams, 98 N.M. 372, 648 P.2d 1185 (Ct. App. 1981), aff'd in part, rev'd in part, 98 N.M. 215, 647 P.2d 417 (1982).

**Licensing of detailmen allowed.** — Reviewing courts overturn the administrative interpretation of statute by appropriate agencies only if they are clearly incorrect. Since detailmen handle controlled drugs and are part of the interstate drug shipment operation, even though they do not ship drugs themselves, the interpretation by the board of pharmacy of this section to allow licensing of detailmen is not clearly erroneous and will not be overturned by a reviewing court. Pharmaceutical Mfrs. Ass'n v. New Mexico Bd. of Pharmacy, 86 N.M. 571, 525 P.2d 931 (Ct. App. 1974).

**Methaqualone.** — The legislature has not specifically designated methaqualone (the generic name for quaalude) as a "controlled substance" or "dangerous drug" under either the Controlled Substances Act or this article, but has authorized the board of pharmacy to add this substance by administrative regulation to the list of substances controlled under these acts. State v. Reams, 98 N.M. 372, 648 P.2d 1185 (Ct. App. 1981), aff'd in part, rev'd in part, 98 N.M. 215, 647 P.2d 417 (1982).

Section 30-31-22 NMSA 1978, and not this section, is the appropriate legislation under which defendants are to be prosecuted for allegedly unauthorized distribution of quaalude. State v. Reams, 98 N.M. 215, 647 P.2d 417 (1982).

**Requirements applicable to providing drug "samples".** — This section should not be construed as allowing a physician to provide a drug "sample" without complying with

the recordkeeping and labeling requirements that apply to "dispensing". 1988 Op. Att'y Gen. No. 88-50.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Right of medical patient to obtain, or physician to prescribe, laetrile for treatment of illness - State cases, 5 A.L.R.4th 219.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

## 26-1-17. Testing laboratory.

The college of pharmacy of the university of New Mexico shall serve as the testing laboratory for samples collected for examination pursuant to the provisions of the New Mexico Drug [, Device] and Cosmetic Act [this article].

**History:** 1953 Comp., § 54-6-42, enacted by Laws 1967, ch. 23, § 17.

### ANNOTATIONS

**Bracketed material. —** The bracketed material in this section was added by the compiler. It was not enacted by the compiler and is not part of the law.

## 26-1-18. Promulgating regulations; procedure.

A. The board may promulgate regulations for the efficient enforcement of the New Mexico Drug, Device and Cosmetic Act [26-1-1 NMSA 1978]. The board shall conform the regulations promulgated under the New Mexico Drug, Device and Cosmetic Act, insofar as practical, with regulations promulgated under the federal act as defined in Section 26-1-2 NMSA 1978.

B. The board shall, by regulation, declare a substance a "dangerous drug" when necessary, and notification shall be sent to all registered pharmacies in the state within sixty days of the adoption of the regulation.

C. The board shall promulgate the requirements for a pedigree.

D. All regulations promulgated by the board shall be in accordance with the Uniform Licensing Act.

**History:** 1953 Comp., § 54-6-43, enacted by Laws 1972, ch. 84, § 50; 2005, ch. 152, § 6.

### ANNOTATIONS

**Cross references. —** As to definition of federal act, see 26-1-2W NMSA 1978 and notes thereto.

**Repeals and reenactments.** — Laws 1972, ch. 84, § 50, repeals 54-6-43, 1953 Comp., relating to procedure for promulgating regulations, and enacts the above section.

**Bracketed material.** — The bracketed material in this section was added by the compiler. It was not enacted by the compiler and is not part of the law.

**The 2005 amendment,** effective June 17, 2005, adds Subsection C to require the board to promulgate requirement for pedigree as defined in Section 26-1-2AA NMSA 1978.

**Due process not violated.** — The regulations propounded under this section and 30-31-11 NMSA 1978 of the Controlled Substances Act do not violate due process since New Mexico has a legitimate interest in the control of dangerous drugs sold or distributed in the state and New Mexico has not brought within the orbit of state power matters unrelated to any local interests. Pharmaceutical Mfrs. Ass'n v. New Mexico Bd. of Pharmacy, 86 N.M. 571, 525 P.2d 931 (Ct. App. 1974).

**Nor commerce clause.** — Although the regulations adopted pursuant to this section and 30-31-11 NMSA 1978 of the Controlled Substances Act include a license fee to cover administrative costs, their primary purpose is the protection of the public from dangerous drugs, a purpose within the traditional definition of police power; and where the burden of a small fee does not outweigh the substantial state benefit derived from the control, and the regulations do not discriminate against interstate commerce since there are no drug manufacturers within the state, there is no violation of the commerce clause. Pharmaceutical Mfrs. Ass'n v. New Mexico Bd. of Pharmacy, 86 N.M. 571, 525 P.2d 931 (Ct. App. 1974).

**Licensing of detailmen allowed.** — Reviewing courts overturn the administrative interpretation of statute by appropriate agencies only if they are clearly incorrect. Since detailmen handle controlled drugs and are part of the interstate drug shipment operation, even though they do not ship drugs themselves, the interpretation by the board of pharmacy of 26-1-16 NMSA 1978 to allow licensing of detailmen is not clearly erroneous and will not be overturned by a reviewing court. Pharmaceutical Mfrs. Ass'n v. New Mexico Bd. of Pharmacy, 86 N.M. 571, 525 P.2d 931 (Ct. App. 1974).

**In propounding regulations board of pharmacy need not make formal findings.** The only requirements which it must meet are that the public and the reviewing courts are informed as to the reasoning behind the regulation. The comments of the one board member suffice in this regard. Pharmaceutical Mfrs. Ass'n v. New Mexico Bd. of Pharmacy, 86 N.M. 571, 525 P.2d 931 (Ct. App. 1974).

**Methaqualone.** — The legislature has not specifically designated methaqualone as a "controlled substance" or "dangerous drug" under either the Controlled Substances Act or this article, but has authorized the board of pharmacy to add this substance by administrative regulation to the list of substances controlled under these acts. State v.

Reams, 98 N.M. 372, 648 P.2d 1185 (Ct. App. 1981), aff'd in part, rev'd in part, 98 N.M. 215, 647 P.2d 417 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Right of medical patient to obtain, or physician to prescribe, laetrile for treatment of illness - State cases, 5 A.L.R.4th 219.

## 26-1-19. Power to make inspections and secure samples.

The board or its duly authorized agent shall have free access at all reasonable hours to any factory, warehouse or establishment in which drugs, devices or cosmetics are manufactured, processed, packed or held for introduction into commerce, or to enter any vehicle being used to transport or hold such drugs, devices or cosmetics in commerce, for the purpose of inspecting such factory, warehouse, establishment or vehicle to determine if any of the provisions of the New Mexico Drug [, Device] and Cosmetic Act [this article] are being violated, and to secure samples or specimens of any drug, device or cosmetic after paying or offering to pay for such sample. It shall be the duty of the board to make or cause to be made examinations of samples secured under the provisions of this section to determine whether or not any provision of the New Mexico Drug [, Device] and Cosmetic Act is being violated.

**History:** 1953 Comp., § 54-6-44, enacted by Laws 1967, ch. 23, § 19.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material in this section was added by the compiler. It was not enacted by the compiler and is not part of the law.

## 26-1-20. Personnel.

The board shall employ such personnel for the administration and enforcement of the provisions of the New Mexico Drug [, Device] and Cosmetic Act [this article] as may be necessary.

**History:** 1953 Comp., § 54-6-45, enacted by Laws 1967, ch. 23, § 20.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material in this section was added by the compiler. It was not enacted by the compiler and is not part of the law.

## 26-1-21. Power of board to publish reports and disseminate information.

A. The board may cause to be published from time to time reports summarizing all judgments, decrees and court orders which have been rendered, including the nature of the charge and the disposition thereof.

B. The board may also cause to be disseminated such information regarding drugs, devices and cosmetics as the board deems necessary in the interest of the public health and the protection of the consumer against fraud. Nothing in this section shall be construed to prohibit the board from collecting, reporting and illustrating the results of the investigations of the board.

**History:** 1953 Comp., § 54-6-46, enacted by Laws 1967, ch. 23, § 21.

**ANNOTATIONS**

**Generally.** — A statute such as this one authorizes or permits the pharmacy board to make public, through the pharmaceutical association drug store "El Boticario," an item pertaining to the sale of a legendary drug to a nondrug store, if a conviction or convictions have been obtained in the courts of the state of New Mexico, but not otherwise. 1953-54 Op. Att'y Gen. No. 5865 (opinion rendered under former law).

The board is permitted and authorized to disseminate all reports and other information, and the fact that the firms, persons or agencies named in said item are published in an outside publication would not incriminate the board or agency mentioned in all cases where conviction or convictions have been obtained in the courts of this state, but not otherwise. 1953-54 Op. Att'y Gen. No. 5865 (opinion rendered under former law).

## 26-1-22. Unlawful means of obtaining dangerous drugs enumerated.

It shall be unlawful for any person to obtain or attempt to obtain any dangerous drug or to procure or attempt to procure the administration of any dangerous drugs other than a controlled substance:

A. by fraud, deceit, misrepresentation or subterfuge; or

B. by forgery or alteration of a prescription or of any written order; or

C. by the concealment of a material fact; or

D. by the use of a false name or the giving of a false name or the giving of a false address.

**History:** 1953 Comp., § 54-6-47, enacted by Laws 1967, ch. 23, § 22; 1972, ch. 84, § 51.

**ANNOTATIONS**

**Cross references.** — For definition of "dangerous drugs," see 26-1-2F NMSA 1978.

## 26-1-23. False statements; false pretenses; forgery of labels or prescriptions prohibited.

It shall be unlawful for any person to:

A. willfully make a false statement in any prescription, order, report or record required by the New Mexico Drug [, Device] and Cosmetic Act [this article];

B. falsely assume the title of or represent himself to be a manufacturer, wholesaler, pharmacist, physician, dentist, veterinarian or other authorized person for the purpose of obtaining any of the dangerous drugs;

C. make or utter any false or forged label to a package containing any of the dangerous drugs; or

D. make or utter any false or forged prescription or false or forged written order for dangerous drugs other than controlled substances.

**History:** 1953 Comp., § 54-6-48, enacted by Laws 1967, ch. 23, § 23; 1972, ch. 84, § 52.

**ANNOTATIONS**

**Cross references.** — For definition of "prescription," see 26-1-2I NMSA 1978.

For definition of "label," see 26-1-2M NMSA 1978.

**Bracketed material.** — The bracketed material in this section was added by the compiler. It was not enacted by the compiler and is not part of the law.

## 26-1-24. Cosmetics; misbranding.

A cosmetic shall be deemed to be misbranded:

A. if its labeling is false or misleading in any particular;

B. if in package form unless it bears a label containing:

(1) the name and place of business of the manufacturer, packer or distributor; and

(2) an accurate statement of the quantity of the contents in terms of weight, measure or numerical count; provided, that reasonable variations shall be permitted,

and exemptions made for information pertaining to weight, measure or numerical count as to small packages, shall be established by regulations prescribed by the board;

C. if any word, statement or other information required by or under the authority of the New Mexico Drug [, Device] and Cosmetic Act [this article] to appear on the label or labeling is not prominently placed thereon with such conspicuousness as compared with other words, statements, designs or devices, in the labeling, and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of the purchase and use;

D. if its container is so made, formed or filled as to be misleading; or

E. if it is a color additive, unless its packaging and labeling are in conformity with such packaging and labeling requirements applicable to such color additive prescribed under the provisions of the federal act. This section shall not apply to packages of color additives which, with respect to their use for cosmetics, are marketed and intended for use only in or on hair dyes bearing required label.

**History:** 1953 Comp., § 54-6-49, enacted by Laws 1967, ch. 23, § 24.

**ANNOTATIONS**

**Cross references.** — For definition of "misbranded," see 26-1-2P NMSA 1978.

**Bracketed material.** — The bracketed material in this section was added by the compiler. It was not enacted by the compiler and is not part of the law.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Products liability: perfumes, colognes, or deodorants, 46 A.L.R.4th 1197.

## 26-1-25. Cosmetics; adulteration.

A cosmetic shall be deemed to be adulterated:

A. if it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling or advertisements thereof, or under such conditions of use as are customary or usual; provided, that this provision shall not apply to coal-tar dye, the label of which bears the following legend conspicuously displayed thereon: "CAUTION: This product contains ingredients which may cause skin irritations on certain individuals and a preliminary test according to accompanying directions should first be made. This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness," and the labeling of which bears adequate directions for such preliminary testing. For the purpose of this paragraph and Subsection E the term "hair dye" shall not include eyelash dyes or eyebrow dyes;

B. if it consists in whole or in part of any filthy, putrid or decomposed substance;

C. if it had been produced, prepared, packed or held under unsanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;

D. if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or

E. if it is not a hair dye, and it bears or contains a color additive which is unsafe within the meaning of the federal act.

**History:** 1953 Comp., § 54-6-50, enacted by Laws 1967, ch. 23, § 25.

**ANNOTATIONS**

**Cross references.** — For definition of "contaminated with filth," see 26-1-2 T NMSA 1978.

As to definition of "color additive," see 26-1-2 V NMSA 1978.

**Federal act.** — See 26-1-2W NSMA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Products liability: perfumes, colognes, or deodorants, 46 A.L.R.4th 1197.

2 C.J.S. Adulteration § 2.

## 26-1-26. Penalties.

A. Any person who knowingly violates any of the provisions of Subsection A, B, C, F, G or H of Section 26-1-3, Section 26-1-14, 26-1-16, 26-1-22 or 26-1-23 NMSA 1978 is guilty of a fourth degree felony and shall be punished by a fine of not less than one thousand dollars ($1,000) or more than five thousand dollars ($5,000) or by imprisonment for not less than one year or both.

B. Except as provided in Subsection A of this section, any person violating any of the provisions of the New Mexico Drug, Device and Cosmetic Act [this article] is guilty of a misdemeanor for the first offense and for second and subsequent offenses is guilty of a fourth degree felony.

**History:** 1953 Comp., § 54-6-51, enacted by Laws 1967, ch. 23, § 26; 1971, ch. 245, § 4; 1972, ch. 84, § 53; 1987, ch. 270, § 7.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, in Subsection A, updated the statutory references, deleted "a misdemeanor and shall be punished by a fine of not more than one thousand dollars ($1,000) or by imprisonment for not more than one year for the first offense and for second and subsequent offenses is guilty of" following "is guilty of," and added the language at the end of the subsection following "fourth degree felony"; and, in Subsection B, inserted "Device," deleted "petty" preceding "misdemeanor," and made a minor stylistic change.

**Methaqualone.** — The legislature has not specifically designated methaqualone as a "controlled substance" or "dangerous drug" under either the Controlled Substances Act or this article, but has authorized the board of pharmacy to add this substance by administrative regulation to the list of substances controlled under these acts. State v. Reams, 98 N.M. 372, 648 P.2d 1185 (Ct. App. 1981), aff'd in part, rev'd in part, 98 N.M. 215, 647 P.2d 417 (1982).

# ARTICLE 2
# Drug Abuse

## 26-2-1 to 26-2-4. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1999, ch. 270, § 10 repeals 26-2-1 to 26-2-4 NMSA 1978, as enacted by Laws 1971, ch. 244, §§ 1 to 3 and as amended by Laws 1987, ch. 265, § 4, relating to the Drug Abuse Act, effective July 1, 1999. For provisions of former sections, see 1987 Replacement Pamphlet. For present comparable provisions, see 9-7-6.1 to 9-7-6.3 NMSA 1978.

## 26-2-4.1. Recompiled.

**ANNOTATIONS**

**Recompilations.** — Laws 1999, ch. 270, § 9 recompiles 26-2-4.1 NMSA 1978, relating to the substance abuse education fund, as 9-7-17 NMSA 1978, effective July 1, 1999.

## 26-2-5 to 26-2-14. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1999, ch. 270, § 10 repeals 26-2-5 to 26-2-14 NMSA 1978, as enacted by Laws 1971, ch. 244, §§ 5 to 12, Laws 1971, ch. 296, § 1 and Laws 1972, ch. 10, § 1, and as amended by Laws 1972, ch. 84, § 54, relating to drug abuse services, effective July 1, 1999. For provisions of former sections, see 1987 Replacement Pamphlet. For present comparable provisions, see 9-7-6.1 to 9-7-6.3 NMSA 1978.

# ARTICLE 2A
# Controlled Substances Therapeutic Research

## 26-2A-1. Short title.

Sections 1 through 7 [26-2A-1 to 26-2A-7 NMSA 1978] of this act may be cited as the "Controlled Substances Therapeutic Research Act."

**History:** 1953 Comp., § 54-15-1, enacted by Laws 1978, ch. 22, § 1.

## 26-2A-2. Purpose.

The legislature finds that recent research has shown that the use of marijuana may alleviate the nausea and ill-effects of cancer chemotherapy, and, additionally, may alleviate the ill-effects of glaucoma. The legislature further finds that there is a need for further research and experimentation with regards to the use of marijuana under strictly controlled circumstances. It is for this purpose that the Controlled Substances Therapeutic Research Act [26-2A-1 to 26-2A-7 NMSA 1978] is hereby enacted.

**History:** 1953 Comp., § 54-12-2, enacted by Laws 1978, ch. 22, § 2.

## 26-2A-3. Definitions.

As used in the Controlled Substances Therapeutic Research Act [26-2A-1 to 26-2A-7 NMSA 1978]:

A. "administrator" means the secretary, or his designee, of health and environment;

B. "marijuana" means marijuana, tetrahydrocannabinols or a chemical derivative of tetrahydrocannabinol; and

C. "practitioner" means a physician licensed to prescribe and administer drugs which are subject to the Controlled Substances Act [30-31-1 NMSA 1978].

**History:** 1953 Comp., § 54-12-3, enacted by Laws 1978, ch. 22, § 3.

**ANNOTATIONS**

**Secretary of health and environment.** — Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, and enacts a new 9-7-4 NMSA 1978, creating the department of health. Laws 1991, ch. 25, § 4 creates the department of environment. Under 9-7-5 NMSA 1978, the administrative head of the department of health is the secretary of health. Under 9-7A-5 NMSA 1978, the administrative head of the department of environment is the secretary of environment.

## 26-2A-4. Lynn Pierson therapeutic research program established; participation.

A. There is established in the health and environment department [department of health] the "Lynn Pierson therapeutic research program." The program shall be administered by the administrator. The department shall promulgate rules and regulations necessary for the proper administration of the Controlled Substances Therapeutic Research Act [26-2A-1 to 26-2A-7 NMSA 1978]. In such promulgation, the department shall take into consideration those pertinent rules and regulations promulgated by the drug enforcement administration, food and drug administration and the national institute on drug abuse.

B. Except as provided in Subsection C of Section 5 [26-2A-5C NMSA 1978] of the Controlled Substances Therapeutic Research Act, the Lynn Pierson therapeutic research program shall be limited to cancer chemotherapy patients and glaucoma patients, who are certified to the patient qualification review board by a physician as being involved in a life-threatening or sense-threatening situation and who are not responding to conventional controlled substances or where the conventional controlled substances administered have proven to be effective but where the patient has incurred severe side effects.

**History:** 1953 Comp., § 54-12-4, enacted by Laws 1978, ch. 22, § 4; 1979, ch. 11, § 1.

**ANNOTATIONS**

**Bracketed material.** — The bracketed reference to the department of health was inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 MNSA 1978, relating to the health and environment department, and enacts a new 9-7-4 NMSA 1978, creating the department of health. The bracketed material was not enacted by the legislature and is not part of the law.

## 26-2A-5. Patient qualification review board; composition; powers and duties.

A. The administrator, upon the recommendation of the New Mexico medical society, shall appoint a patient qualification review board to serve at his pleasure. The patient qualification review board shall be comprised of:

(1) a physician licensed to practice medicine in New Mexico and certified by the American board of ophthalmology;

(2) a physician licensed to practice medicine in New Mexico and certified by the American board of internal medicine and also certified in the subspecialty of medical oncology; and

(3) a physician licensed to practice medicine in New Mexico and certified in psychiatry by the American board of psychiatry and neurology.

Members of the board may be reimbursed for their attendance at meetings at the rate of forty dollars ($40.00) per day.

B. The patient qualification review board shall review all applicants for the Lynn Pierson therapeutic research program and their licensed physicians and certify their participation in the program.

C. The patient qualification review board may include other disease groups for participation in the Lynn Pierson therapeutic research program after pertinent medical data have been presented by a physician to both the administrator and the board and after receiving the necessary approval of the food and drug administration, the drug enforcement administration and the national institute on drug abuse.

**History:** 1953 Comp., § 54-12-5, enacted by Laws 1978, ch. 22, § 5; 1979, ch. 11, § 2.

## 26-2A-6. Lynn Pierson therapeutic research program; distribution.

A. The administrator shall obtain marijuana through whatever means he deems most appropriate, consistent with regulations promulgated by the national institute on drug abuse, the food and drug administration and the drug enforcement administration and pursuant to the provisions of the Controlled Substances Therapeutic Research Act [26-2A-1 to 26-2A-7 NMSA 1978].

B. The administrator shall cause such marijuana to be transferred to a certified state-operated licensed pharmacy for distribution to the certified patient pursuant to the Controlled Substances Therapeutic Research Act.

**History:** 1953 Comp., § 54-12-6, enacted by Laws 1978, ch. 22, § 6; 1979, ch. 11, § 3.

## 26-2A-7. Report.

The administrator, in conjunction with the patient qualification review board, shall each year report his findings and recommendations to the governor and the legislature regarding the effectiveness of the Lynn Pierson therapeutic research program.

**History:** 1953 Comp., § 54-12-7, enacted by Laws 1978, ch. 22, § 7; 1979, ch. 11, § 4.

### ANNOTATIONS

**Compiler's notes.** — Laws 1979, ch. 11, § 5, repeals Laws 1978, ch. 22, § 10, which would have repealed the Controlled Substances Therapeutic Research Act (26-2A-1 to 26-2A-7 NMSA 1978) on July 1, 1979, effective March 7, 1979.

# ARTICLE 3
# Drug Product Selection

## 26-3-1. Short title.

Sections 26-3-1 through 26-3-3 NMSA 1978 may be cited as the "Drug Product Selection Act."

**History:** 1953 Comp., § 54-6-28.1, enacted by Laws 1976, ch. 60, § 2.

## 26-3-2. Purpose.

It is the purpose of the Drug Product Selection Act [26-3-1 to 26-3-3 NMSA 1978] to assure that all New Mexico citizens continue to receive high quality drugs at a reasonable cost.

**History:** 1953 Comp., § 54-6-28.2, enacted by Laws 1976, ch. 60, § 3.

**ANNOTATIONS**

**Cross references.** — For provisions relating to the New Mexico Drug and Cosmetic Act, see Article 1 of this chapter.

## 26-3-3. Drug product selection permitted; conditions; exception for prohibition; labeling.

A. Upon receipt of a prescription written by a licensed practitioner who may prescribe drugs for a drug for which one or more multiple-source drugs are recognized, listed as final determinations and published in the federal register by the federal department of health and human services, a pharmacist may dispense any one of the drugs that satisfies the final determinations so recognized and listed by the federal department of health and human services and is sold at a lower cost than the drug listed in the prescription.

B. Upon receipt of a prescription written by a licensed practitioner for a drug that appears on the federal food and drug administration's approved prescription drug products with therapeutic equivalence evaluation list as supplemented, a pharmacist may dispense any of the therapeutically equivalent drugs that appears on that list and which is lower in cost than the drug listed in the prescription.

C. Drug product selection shall be permitted only under circumstances and conditions set forth in Subsections A and B of this section unless the licensed practitioner prescribing prohibits drug product selection. A licensed practitioner shall

prohibit drug product selection by writing with his hand the words "no substitution" or the diminution "no sub" on the face of a prescription.

D. If drug product selection occurs as permitted in Subsections A and B of this section, the pharmacist shall indicate on the label of the dispensed container the brand of drug prescribed and the name of the drug dispensed.

E. A pharmacist may not select a therapeutically equivalent drug unless he passes on to the patient all savings between the net cost of the product prescribed and the product dispensed.

F. For purposes of this section, "multiple-source drug" means a drug marketed or sold by two or more manufacturers, formulators or labelers.

G. For purposes of this section, "therapeutically equivalent" means drug products which have the same amount of the active drug in the same dosage form which when administered can be expected to provide the same therapeutic effect.

**History:** 1953 Comp., § 54-6-28.3, enacted by Laws 1976, ch. 60, § 4; 1982, ch. 26, § 1; 2005, ch. 152, § 4.

## ANNOTATIONS

**The 2005 amendment,** effective June 17, 2005, deletes Subsection E which required a pharmacist to notify the prescribing practitioner if the pharmacist changes the drug dispensed after the drug selection has occurred and reletters the subsequent subsections.