INTRODUCTION

Numerous medical organizations and even the federal government itself now recommend that injection drug users employ a new, sterile syringe each time they inject.¹ Unfortunately, the number of sterile syringes required to follow this standard -- approximately one billion² -- exceeds the available supply by many millions. The continuing shortage of syringes contributes to the spread of HIV, and is thus a major health problem. Many commentators have suggested


that the health care system can help increase access to safe injection equipment through
prescription, pharmacy sales and other measures such as hospital or clinic-based needle exchange
programs (NEPs).  

This Memorandum assesses the legality, under Maryland law, of physician prescription
and pharmacy sale of injection equipment to patients who are known to be injecting illegal drugs.
It assumes that ensuring a patient’s access to sterile injection equipment is clinically effective and
conducive to public health, is ethical, and constitutes only one facet of the care the patient is
receiving from the physician. These assumptions are justified and discussed in two companion
reports: Zita Lazzarini, Ethical Issues in Prescribing and Dispensing Syringes to Injection Drug
Users, and Josiah Rich, Syringe Prescription in Rhode Island: A Case Study. The risk of
malpractice liability is discussed in a third companion piece, Professional Liability in the
Prescription and Dispensing of Sterile Injection Equipment to IDU Patients, by Maxwell
Mehlman.

We conclude that a physician may legally prescribe injection equipment to injecting
drug users (IDUs) in order to prevent disease transmission to or by a drug-injecting patient.
Pharmacists who have no reason to know that the purchaser is going to use the syringe to inject
illegal drugs do not violate any law in filling the prescription. Pharmacists dispensing these
syringes with knowledge of the intended use would probably violate Maryland law, although the
contrary conclusion is also reasonable.

This Memorandum addresses the following specific questions:

1) May a physician legally prescribe sterile injection equipment to an IDU patient?
2) May a pharmacist legally fill such a prescription?
3) How might Maryland law be changed or clarified to promote access to sterile injection
equipment for IDUs through the health care system?

I. May a Physician Legally Prescribe Sterile Injection Equipment to an IDU Patient?

Answering this question requires a two-step analysis. We determine first whether
prescription of sterile injection equipment is consistent with the general law governing medical
practice. If so, we then ask whether any other law, such as a drug paraphernalia provision,

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3 Id.; Scott Burris, Peter Lurie, Daniel Abrahamson, and Josiah Rich, Physician
Prescribing of Safe Injection Equipment to Prevent HIV Infection: Time for Action, __ Annals of
Internal Medicine __ (2000); T. Stephen Jones, Should Pharmacists Sell Sterile Syringes to
Injection Drug Users? 39 J Am Pharm Assoc 1 (1999); Alvin Novick, A Duty to Care: Sterile
prohibits prescription of syringes to an IDU patient. We begin with an overview of the regulatory environment.

A. The Regulatory Scheme

Medical Licensure Law

The practice of medicine in Maryland is governed by the Medical Practice Act, Md. Code Ann., Health Occ. §§ 14-101 to 14-702, with regulations found in subtitle 32 of title 10 of the Code of Maryland Regulations. The Act vests in the State Board of Physician Quality Assurance power to adopt rules and regulations to carry out the provisions of this title. Md. Code Ann., Health Occ. § 14-205. The Board, after consulting with the State Board of Pharmacy, may adopt rules and regulations regarding the dispensing of prescription drugs by a licensed physician. Id.

Maryland medical licensure law is silent on the physician’s general authority to write prescriptions for or dispense drugs and devices. Leaving aside any limitations imposed by other laws, a physician is free to prescribe any drug or device she believes will benefit the patient and the prescription of which is consistent with proper professional conduct. Professional conduct is evaluated and enforced by the State Board of Physician Quality Assurance (“the Board”). According to the Medical Practice Act, the Board may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee:

... (3) Is guilty of immoral or unprofessional conduct in the practice of medicine;

(4) Is professionally, physically, or mentally incompetent;

... (10) Promotes the sale of drugs, devices, appliances, or goods to a patient so as to exploit the patient for financial gain;

... (21) Is disciplined by a licensing or disciplinary authority or convicted or disciplined by a court of any state or country or disciplined by any branch of the United States uniformed services or the Veterans' Administration for an act that would be grounds for disciplinary action under this section;

... (27) Sells, prescribes, gives away, or administers drugs for illegal or illegitimate medical purposes;

(28) Fails to comply with the provisions of § 12-102 (Pharmacy Act) of this article;

Md. Code Ann., Health Occ. § 14-404. Conviction of a crime involving moral turpitude is also
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grounds for discipline. *Id.* The Medical Board's regulations do not specify additional forms of unprofessional conduct.

**Controlled Dangerous Substances Law Generally**

Prescribing powers and prohibitions with respect to certain drugs *are* defined under the Crimes and Punishments Article of the Code of Maryland. The Maryland General Assembly intended in the act to "establish a uniform law controlling the manufacture, distribution, possession, and administration of controlled dangerous substances and related paraphernalia in order to insure their availability for legitimate medical and scientific purposes, but to prevent their abuse which results in a serious health problem to the individual and represents a serious danger to the welfare of the people of the State of Maryland." Md. Ann. Code art. 27, § 276. The controlled substances and paraphernalia laws “subheading shall be liberally interpreted and construed so as to effectuate” these purposes. *Id.*

The Department of Health and Mental Hygiene’s regulations set out the standard for validly issuing a prescription for controlled substances.

A prescription for a controlled dangerous substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled dangerous substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription.

Md. Regs. Code tit. 10, § 19.03.07(D). This provision, however, does not explicitly govern syringes, which are not within the definition of controlled dangerous substance. Md. Ann. Code art. 27, § 277.

**Drug Paraphernalia Law**

The state has a drug paraphernalia law, under the Controlled Dangerous Substances section of the Crimes and Punishments Article, Md. Ann. Code art. 27, § 287A, based on the Justice Department’s model act, *reprinted in Annotation, Validity, under Federal Constitution, of So-called "Head Shop" Ordinances or Statutes, Prohibiting Manufacture and Sale of Drug Use Related Paraphernalia*, 69 A.L.R. FED. 15 (1984 & Supp. 1998). The statute defines drug paraphernalia generally as "all equipment, products and materials of any kind which are used, intended for use, or designed for use in ... injecting, ... or otherwise introducing into the human body a controlled dangerous substance in violation of this subheading." Md. Ann. Code art. 27, § 287A(a). It lists twelve types of items as examples of drug paraphernalia, including “[h]ypodermic syringes, needles, and other objects used, intended for use, or designed for use in
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parenterally injecting controlled dangerous substances into the body.” Md. Ann. Code art. 27, § 287A(a)(11). It also offers thirteen factors to be considered when determining whether an item is drug paraphernalia.4

The offense of delivery of drug paraphernalia is stated in Md. Ann. Code, art. 27, § 287A(d):

(1) It is unlawful for any person to deliver or sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to

4 These factors are:
   (1) Statements by an owner or by anyone in control of the object concerning its use;
   (2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or federal law relating to any controlled dangerous substance;
   (3) The proximity of the object, in time and space, to a direct violation of this section or to a controlled dangerous substance;
   (4) The existence of any residue of controlled dangerous substances on the object;
   (5) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this section; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this section shall not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia;
   (6) Instructions, oral or written, provided with the object concerning its use;
   (7) Descriptive materials accompanying the object which explain or depict its use;
   (8) National and local advertising concerning its use;
   (9) The manner in which the object is displayed for sale;
   (10) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
   (11) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise;
   (12) The existence and scope of legitimate uses for the object in the community;
   (13) Expert testimony concerning its use.

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... inject, ... or otherwise introduce into the human body a controlled dangerous substance in violation of this subheading. Any person who violates this subsection is guilty of a misdemeanor and upon conviction for a first offense may be fined not more than $500. A person who is convicted of a subsequent violation of this subsection may be imprisoned for not more than 2 years or fined not more than $2,000 or both. Any person convicted of violating this subsection who previously has been convicted of violating paragraph (2) of this subsection shall be subject to the same penalties specified for subsequent violations of this subsection.

(2) Any person 18 years of age or over who violates paragraph (1) of this subsection by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a separate offense and upon conviction may be imprisoned for not more than 8 years, fined not more than $15,000, or both.

Needle Exchange Pilot Programs

In 1994, the legislature created a “pilot” NEP for Baltimore. It authorized a second

The Program shall:

(1) Be designed and maintained to provide maximum security of exchange locations and equipment, including security measures that may be required to control the use and dispersal of hypodermic needles and syringes and security measures that allow for a full accounting of the number of hypodermic needles and syringes in circulation and the number of hypodermic needles and syringes in storage;

(2) Be operated to allow participants to exchange used hypodermic needles and syringes at any exchange location, if more than one location is available;

(3) Include appropriate levels of staff expertise in working with injecting drug users and adequate staff training in providing community referrals, counseling, and preventive education;

(4) Provide for the dissemination of other preventive means for curtailing the spread of the HIV infection;

(5) Provide a linkage for referrals to drug counseling and treatment services, and follow-up to those referrals to assure that participants receive the treatment they desire;

(6) Educate injecting drug users on the dangers of contracting the HIV infection or the Hepatitis B virus through needle-sharing practices and unsafe sexual behaviors;

(7) Include policies and procedures for the screening of applicants to the
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Program in essentially identical 1998 legislation for Prince George’s County. The enabling legislation includes an immunity provision.

(a) Immunity from crime of distributing controlled paraphernalia. -- No Program staff member or Program participant may be found guilty of violating Article 27, § 287, § 287A, or § 288 of the Code for possessing or distributing controlled paraphernalia or drug paraphernalia whenever the possession or distribution of the controlled paraphernalia or drug paraphernalia is a direct result of the employee's or participant's activities in connection with the work of the Program authorized under this subtitle.


B. Analysis

The only articulated standard of any kind for a prescription under Maryland law is the standard used in regulations for the Controlled Dangerous Substances Act, which states that a prescription is only valid if it is issued (1) for a legitimate medical purpose by an individual practitioner (2) acting in the usual course of his professional practice. Md. Regs. Code tit. 10, § 19.03.07(D). This is a somewhat narrow formulation of controlled substances prescription standard that applies in one form or other in nearly all states. Generally these hold that a prescription for a controlled substance is legal if it is written by a practitioner in good faith, in the usual course of practice, for a legitimate medical purpose. See, e.g., Tex. Health & Safety Code Ann. § 481.071; S.D. Codified Laws §22-42-4.2,5; Commonwealth v. West, 270 Pa.Super. 301, 411 A.2d 537 (1979). This is a standard that covers the essential logical elements of validity for any prescription, and is consistent with the standards of professional conduct set out in Maryland medical licensure law. We therefore assume that it would be the standard, or equivalent to the standard, that a court would apply in assessing the propriety of a syringe prescription. A prescription for sterile injection equipment, issued to a patient who cannot or will not enter drug treatment, for the purpose of preventing the transmission of a serious communicable disease during injection, would seem to be well within the parameters of allowable discretion set by this standard.

Program in order to preclude noninjecting drug users from participating in the Program;

(8) Establish procedures for identifying Program participants that are consistent with the confidentiality provisions of this subtitle; and

(9) Establish a method of identification and authorization for Program staff members who have access to hypodermic needles, syringes, or Program records.

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In normal usage, “good faith” entails a genuine concern for the well-being of the patient and others who might be infected through sharing injection equipment with the patient, and conduct devoid of malice or deception. See, e.g., In the Matter of DiLeo, 661 So.2d 162, 168 (La. Ct. App. 1995)(finding that a physician was acting in good faith when prescribing medications to patients experiencing pain symptoms); see also Commonwealth v. Larsen, 452 Pa.Super. 508, 682 A.2d 783 (1996). A physician who is providing injection equipment to IDU patients out of a sincere desire to prevent disease transmission, without pecuniary motive, and who does so openly under a reasonable claim of legality, should have no difficulty meeting this prong of the standard.

The Controlled Dangerous Substances Act does not define "legitimate medical purpose." Courts in other jurisdictions have described a legitimate medicinal or therapeutic purpose as one that is "recognized’ or ‘accepted’" by the medical profession. Hurwitz v. Board of Medicine, 1998 WL 972259, *1 (Va. Cir. Ct. 1998). Such acceptance or recognition must be shown by competent medical evidence. Id. One measure of legitimacy is whether a physician "render[s] proper medical care to his patients." Greenspan v. Osherhoff, 232 Va. 388, 398, 351 S.E.2d 28, 35 (1986). It is often said to be the burden of the prosecution to prove not simply that some physicians disagree with the practice at issue, but that "no" responsible segment of the medical profession exists which accepts appellant's methods.” See, e.g., Commonwealth v. Salameh, 421 Pa.Super. 320, 324, 617 A.2d 1314, 1316 (1992), appeal denied, 536 Pa. 641, 639 A.2d 26 (1994). Unanimity of medical opinion is not required. See, e.g., Glover v. Board of Medical Quality Assurance, 231 Cal.App.3d 203, 282 Cal.Rptr. 137 (1991). See generally S.E. Stone, The Investigation and Prosecution of Professional Practice Cases under the Controlled Substances Act: Introduction to Professional Practice Case Law. 21 Drug Enforcement 23 (1983). There is ample support for the position that prescribing sterile injection equipment comports with treatment principles accepted by a responsible segment of the medical profession. See Zita Lazzarini, Ethical Issues in Prescribing and Dispensing Syringes to Injection Drug Users, and Josiah Rich, Syringe Prescription in Rhode Island: A Case Study. Given this medical evidence, it would also be difficult to argue that providing sterile injection equipment falls beneath the minimal standards of professional practice set forth in the laws governing the practice of medicine.

In determining whether a prescription arises within the usual course of professional

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* In Pennsylvania, for example, courts have recognized that ‘‘(i)n making a medical judgment concerning the right treatment for an individual patient, physicians require a certain latitude of available options.’’ ... Hence, ‘‘(w)hat constitutes bona fide medical practice must be determined upon consideration of evidence and attending circumstances.’’ Commonwealth v. Possinger, 264 Pa.Super. 332, 339, 399 A.2d 1077, 1080 (citations omitted).
practice, courts may consider such matters as whether a bona fide physician-patient relationship existed, whether other care was provided, whether proper records were kept of the encounter, whether the prescription was based on a proper history or individualized assessment of the patient’s risk factors, efforts to provide other harm reducing services, follow up and so on. See generally United States v. Moore, 423 U.S. 122, 142-43, 96 S.Ct. 335, 345 (“The evidence presented at trial was sufficient for the jury to find that respondent's conduct exceeded the bounds of "professional practice." ... [H]e gave inadequate physical examinations or none at all. He ignored the results of the tests he did make.... He did not regulate the dosage at all, prescribing as much and as frequently as the patient demanded. He did not charge for medical services rendered, but graduated his fee according to the number of tablets desired. In practical effect, he acted as a large-scale "pusher" not as a physician.”) A physician prescribing syringes to bona fide patients in his regular office or in a clinic, keeping records and providing other treatment services, would not be at risk of failing this prong of the test. It would be difficult to argue that providing sterile injection equipment falls beneath the minimal standards of professional practice set forth in the Medical Practice Act.

Conclusion: A prescription for sterile injection equipment to an IDU patient is consistent with the standard for a valid prescription under the Medical Practice Act and the prescription provision of the Controlled Dangerous Substances Act.

We turn now to the second question: Do any other laws prohibit physicians from prescribing sterile injection equipment to IDU patients?

The principal concern is the paraphernalia law, which governs the distribution and possession of syringes that qualify as drug paraphernalia. This statute presents two questions: are syringes prescribed to IDU patients by physicians as a health care intervention “paraphernalia”? And, if so, does prescribing drug paraphernalia violate the statute?

The conservative answer to the first question is “yes.” There is no question that syringes distributed or possessed for drug abuse are paraphernalia in the absence of a prescription. See Doswell v. State, 53 Md. App. 647, 653, 455 A.2d 995, 999 (1983) (“The clear thrust and purpose of the statute is to prohibit the possession of devices that are usable for administering controlled substances by hypodermic injection when the circumstances indicate an intent to use them for that purpose.”). The current drug paraphernalia law plainly embraces illicit syringes, and even before adopting the model statute, Maryland prohibited possession of syringes as drug paraphernalia. See, e.g., Boyd v. State, 15 Md. App. 275, 289 A.2d 834 (1972). Although the controlled substances law states an intent not to interfere with the availability of drugs and paraphernalia for “legitimate medical and scientific purposes,” the inclusion in two recent NEP enabling statutes of provisions conferring immunity upon NEP participants and providers is unmistakable evidence of the legislature’s belief that even injection equipment provided for
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It should be noted that courts interpreting controlled substances laws have sometimes interpreted terms like "sell," "dispense," "furnish" or "distribute" to embrace the writing of a prescription for a controlled substance. See, e.g., Jin Fuey Moy v. United States, 254 U.S. 189, 41 S.Ct. 98, 65 L.Ed. 214 (1920); United States v. Thompson, 624 F.2d 740 (C.A.5, 1980); Commonwealth v. Comins, 371 Mass. 222, 356 N.E.2d 241 (1976), certiorari denied (1977), 430 U.S. 946, 97 S.Ct. 1582, 51 L.Ed.2d 793; State v. Moody, 393 So.2d 1212 (La. 1981). See generally Christopher Vaeth, State Law Criminal Liability of Licensed Physician for Prescribing or Dispensing Drug or Similar Controlled Substance, 13 A.L.R.5th 1, 73-84 (1993). This interpretation, however, is not supported by Maryland law.

Although a physician who prescribes a syringe does not physically provide a needle to the patient, and therefore could not be said to engage in conduct potentially covered by the paraphernalia statute, there is a risk that prescribing a syringe could be prosecuted as aiding and abetting a violation of the paraphernalia statute that would occur when the pharmacist dispensed the syringe, or for conspiracy to violate the paraphernalia statute. A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner.

These charges are available to a motivated prosecutor. The risk to the physician is slight,
Some state and federal courts interpreting controlled substances laws have interpreted the word “sell” to include the writing of a prescription. See, e.g., Jin Fuey Moy v. United States 254 U.S. 189, 41 S.Ct. 98, 65 L.Ed. 214 (1920); United States v. Thompson, 624 F.2d 740 (C.A.5, 1980); Commonwealth v. Comins, 371 Mass. 222, 356 N.E.2d 241 (1976), certiorari denied (1977), 430 U.S. 946, 97 S.Ct. 1582, 51 L.Ed.2d 793; State v. Moody, 393 So.2d 1212 (La.1981). See generally Christopher Vaeth, State Law Criminal Liability of Licensed Physician for Prescribing or Dispensing Drug or Similar Controlled Substance, 13 A.L.R.5th 1, 73-84 (1993). This interpretation, however, has been rejected by other state courts, id., and is not supported by Maryland law, which in any event hews to the rule of lenity in the interpretation of criminal statutes. See, e.g., Gardner v. State, 344 Md. 642, 651, 689 A.2d 610, 614 (1997) (describing interpretive rule “which requires that such statutes be strictly construed against the State and in favor of the defendant”).

Conclusion: Writing a prescription for a syringe does not violate any Maryland law. A physician may therefore legally prescribe injection equipment to an IDU patient.

II. May a Pharmacist Legally Fill a Such a Prescription?

A. The Regulatory Environment

Pharmacy Licensure Law

The practice of pharmacy in Maryland is governed by the Pharmacy Act, Md. Code Ann., Health Occ. §§ 12-101 to 12-802, with regulations found in subtitle 34 of title 10. The Act vests in the State Board of Pharmacy power to adopt rules and regulations that are necessary to protect the public health, safety, and welfare and that establish standards for practicing pharmacy and operating pharmacies, including rules and regulations that govern standards for filling and refilling prescriptions. Md. Code Ann., Health Occ. § 12-205.

The Pharmacy Board regulations limit the selling of needles and syringes by pharmacists.

The sale of needles and syringes or other paraphernalia shall be made by the pharmacist only in good faith to patients showing proper identification and indication of need.

However, for several reasons. Such a prosecution would be unusual: there is no reported case in Maryland of a charge of aiding and abetting a paraphernalia violation against a practitioner in the course of practice, nor are either conspiracy or accomplice charges commonly deployed where the core offense is a misdemeanor.
In its July, 1999 news letter, the Maryland Board of Pharmacy offered the following item:

Clarification has been requested from the Board and the Division of Drug Control by the Community Relations Commission of the City of Baltimore on the regulations on the Sale of Needles and Syringes or Other Paraphernalia, Health General §2-104 (b) Chapter 8. It has come to the attention of the Board that insulin syringe sales in inner city Baltimore neighborhoods may be handled differently than in suburban neighborhoods.

The regulation is clear and allows pharmacists to use their professional judgment regarding proper identification and indication of need for syringes. ... The regulation allows the pharmacist to exercise professional judgment when determining indication of need. The Division of Drug Control reviews paraphernalia in registry books when regular pharmacy inspections are conducted.

Pharmacists practicing in Baltimore City are aware of the City Health Department’s policy and practice to distribute clean syringes and needles in certain neighborhoods in an attempt to reduce the transmission of HIV and other diseases. Customers may request the purchase of syringes and needles for numerous reasons. Pharmacists take many factors into consideration when determining what constitutes the need for syringes and needles prior to dispensing them. Such factors may include chronic illness, prevention of disease transmission, self-administration of intravenous medication, and other factors.

Pharmacists may want to document in the registry the reason syringes were dispensed or why the pharmacist denied the request to dispense them. Pharmacists are responsible for monitoring syringe sales. This monitoring is not done to limit access to needed medical supplies, but rather to ensure that a potentially dangerous item does not pose a hazard for small children or other vulnerable persons.

The disciplinary provisions of the Pharmacy Act authorize action, upon the affirmative vote of a majority of its members, against the license of a pharmacist who:

... (14) Dispenses any drug, device, or diagnostic for which a prescription is required without a written, oral, or electronically transmitted prescription from an authorized prescriber;
(15) Except as provided in § 12-506 of this title, unless an authorized prescriber authorizes the refill, refills a prescription for any drug, device, or diagnostic for which a prescription is required; ...
(21) Is convicted of or pleads guilty or nolo contendere to a felony or to a crime involving moral turpitude, whether or not any appeal or other proceeding is pending to have the conviction or plea set aside;
(22) Is convicted of a violation of this title;
(23) Is disciplined by a licensing or disciplinary authority of any state or country or convicted or disciplined by a court of any state or country for an act that would be grounds for disciplinary action under the Board's disciplinary statutes;
(24) Violates any rule or regulation adopted by the Board;
(25) Refuses, withholds from, denies, or discriminates against an individual with regard to the provision of professional services for which the licensee is licensed and qualified to render because the individual is HIV positive;
(26) Violates any provision of § 12-507 of this title;


Controlled Dangerous Substance and Drug Paraphernalia Laws

The controlled dangerous substances and paraphernalia discussed in I.A. above are also applicable to pharmacists. The Controlled Dangerous Substances Act makes it clear that a pharmacist has an independent responsibility to ensure that controlled substances are properly prescribed. "The responsibility for the proper prescribing and dispensing of controlled dangerous substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription." Md. Regs. Code tit. 10, § 19.03.07(D). In addition, "a prescription for controlled dangerous substances may only be filled by a pharmacist acting in the usual course of his professional practice and either registered individually or employed in a registered pharmacy or registered institutional practitioner." Md. Regs. Code tit. 10, § 19.03.07(F).

B. Analysis

We have concluded above that a physician’s prescription for sterile injection equipment, written under the factual conditions assumed for purposes of this Memorandum, is valid under Maryland law. Ordinarily, the pharmacist is required to fill a valid prescription. The next question is whether filling the prescription would be prohibited under any other provision of law.
Here the issue is, again, the paraphernalia law. The pharmacist is undoubtedly selling or transferring the syringe, so if a syringe is drug paraphernalia in this situation, then the sale or transfer is illegal. We thus come to the fundamental question of whether a syringe dispensed by a valid prescription, for legitimate medical reasons, falls within the definition of “drug paraphernalia” under Maryland law.

Whether something is drug paraphernalia depends, in narrowest terms, upon whether the seller knows or has reason to know that it will be used for illegal drug use. Md. Ann. Code art. 27, §287A(d). In all cases in which the pharmacist does not in fact know or have reason to know that the patient intends to use the syringe to inject illegal drugs, the pharmacist does not violate the paraphernalia law even if in fact the item will be used for drug abuse. Compliance with the Pharmacy Board’s rules on dispensing injection equipment, and reliance on the physician’s prescriptions, would not be legally decisive in a paraphernalia prosecution, but would likely provide strong support for the claim that the pharmacist was not acting with the intent required to violate the paraphernalia law.

**Conclusion:** Dispensing sterile injection equipment to an IDU does not violate Maryland law where the pharmacist does not and reasonably should not know that the patient intends to use the equipment to illegally inject drugs.

Many pharmacists will have occasion to learn or reasonably suspect that a patient presenting a valid syringe prescription is an IDU likely to use the syringes for illegal drug injection. The most cautious view is that dispensing under these circumstances would violate the paraphernalia law. As discussed above, the legislature has a long history of treating syringes as paraphernalia when used for illegal drug injection, even when distributed by health workers with the primary purpose of preventing disease transmission.

It does not follow that this cautious reading is the correct one. It may be argued that the legislature did not intend to limit the discretion of licensed health practitioners, including physicians and pharmacists, in prescribing and dispensing syringes for legitimate medical purposes. On this view, the paraphernalia and medical practice laws should be seen as parallel but independent. This view finds some support in the statements of the state board of pharmacy, which at the very least indicate that the Board would not be initiating professional discipline in such a case.

**Conclusion:** Dispensing sterile injection equipment to known IDUs probably violates Maryland law, though a contrary position is also reasonable.

**III. How Might Maryland Law Be Changed or Clarified to Promote Access to Sterile**
Injection Equipment for IDUs Through the Health Care System?

This Memorandum has concluded that physicians may prescribe sterile injection equipment to IDUS as a health-care intervention to prevent the transmission of blood-borne pathogens, but that pharmacists are quite limited in their ability to legally dispense the syringes. Several legal measures would add clarity to the legal situation or otherwise protect public health by enhancing access to safe injection equipment.

A. Changes in Statutes or Regulations

1. The legislature should amend the Controlled Dangerous Substances Act to unambiguously deregulate the over-the-counter sale of injection equipment under all circumstances, and should eliminate record-keeping rules that might discourage IDUs from purchasing sterile syringes.

2. The Medical and Pharmacy Boards have the power to and should issue regulations explicitly stating that providing sterile injection equipment to IDU patients in order to prevent transmission of a serious communicable disease is an acceptable medical practice. Md. Code Ann., Health Occ. § 14-205 (Medical), Md. Code Ann., Health Occ. § 12-205 (Pharmacy).


B. Consultation with Local Law Enforcement Officials

In an environment of legal uncertainty, a reasonable interpretation of the law supporting the legality of pharmacy sales to known IDUs by prescription may be enough to allow action. In any given community, direct contact with health and law enforcement officials may establish that they do not believe the practice to be illegal, or are not interested in prosecuting pharmacists. Many needle exchange programs operate successfully for long periods under such informal dispensations. See Scott Burris, Heather Gallagher, Joseph Grace and David Finucane, *The Legal Strategies Used in Operating Syringe Exchange in the United States*, 86 *Am. J. Pub. Health* 1161 (1996).