



## Lincoln County District Attorney

225 West Olive Street, Room 100, Newport, Oregon 97365  
541-265-4145, FAX 541-265-3461, [www.co.lincoln.or.us/da/](http://www.co.lincoln.or.us/da/)

**Rob Bovett**  
District Attorney

**Marcia Buckley**  
Chief Deputy

### MEMORANDUM

TO: Councilman Guy Midkiff, City of Washington, Missouri

FROM: Rob Bovett, Chair, Oregon Meth Task Force

DATE: July 17, 2009

SUBJECT: City of Washington ordinance returning pseudoephedrine products to prescription only

First, thank you for the phone call. As I mentioned over the phone, I strongly applaud the Washington City Council for taking bold action to address the growing public safety threat of local toxic meth labs fueled by the smurfing of pseudoephedrine products.

Second, thank you for sharing a copy of the letter your Council has received from the American Civil Liberties Union of Eastern Missouri. I would like take this opportunity to comment on some of the points made in the ACLU's letter.

Before I begin those comments, I mentioned in our phone conversation earlier today that many of the points made in the ACLU letter were recently hot topics of debate in California over Senate Bill 484 (proposing to return pseudoephedrine to a prescription drug). That bill has now passed the California Senate, but has been delayed in the California Assembly until early next year. However, much data and information was gathered in that process that I believe might be very helpful to the issues currently before your Council. Much of that information is posted at [www.oregondec.org](http://www.oregondec.org).

So here are my brief comments to some of the point made in the ACLU letter to your Council:

(1) *"[T]he rights of citizens to access OTC drugs should not be unreasonably restricted."*

I agree with the ACLU. But this restriction is more than reasonable, in light of the overwhelming evidence. Again, I refer you to the information posted at [www.oregondec.org](http://www.oregondec.org).

(2) *"There are already significant safeguards to ensure that ephedrine and pseudoephedrine are not obtained for improper purposes."*

Yes, but those safeguards are failing. Again, I refer you to the information posted at [www.oregondec.org](http://www.oregondec.org).

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(3) *“Unfortunately, not every citizen has access to insurance or money to pay for a visit to a doctor to obtain a prescription for drugs that are otherwise available over the counter. In addition, prescription medications are generally more expensive than OTC medications, especially if there is no insurance coverage available.”*

These concerns are legitimate. But, as it turns out, unfounded. In particular, I would call your attention to the following documents:

- Letter from the Oregon emergency room physicians:  
<http://www.oregondec.org/CASB484/ACEP.pdf>
- Letter from Alex Stahlcup, MD:  
<http://www.oregondec.org/CASB484/Stalcup.pdf>
- Letter from Oregon State Pharmacy Association:  
<http://www.oregondec.org/CASB484/OSPA.pdf>
- Memo regarding pseudoephedrine prices:  
<http://www.oregondec.org/CASB484/Prices.pdf>
- Letter regarding Medicaid costs impacts:  
<http://www.oregondec.org/CASB484/DHS.pdf>
- Memo to California Assembly committee staff (see page 3 in particular):  
<http://www.oregondec.org/CASB484/Memo.pdf>

In addition, please keep in mind that pseudoephedrine is not a cure for colds or allergies, and is not the only OTC product for cold and allergy symptoms.

(4) *“[R]equiring a prescription for a drug that the federal government has determined does not require a prescription is beyond the authority of state or local governments.”*

The ACLU letter cites to federal law that would appear to support that conclusion. *See* ACLU letter at page 3, citing and quoting 21 USC § 379r(a). Unfortunately, the ACLU letter fails to quote from a later part of that same statute, which provides that “[t]his section shall not apply to . . . any State or political subdivision requirement that a drug be dispensed only upon the prescription of a practitioner licensed by law to administer such drug.” 21 USC § 379r(c)(1)(B). Furthermore, Section 711(g) of the Combat Methamphetamine Epidemic Act (CMEA), Public Law 109-177, specifically provides for no preemption through federal regulation of pseudoephedrine.

(5) The ACLU’s last argument concerns the power of a Missouri city to enact such an ordinance under state law. I have no comment on that argument, as I have no absolutely experience with Missouri municipal or home rule law.

Finally, what baffles me the most is why the ACLU has chosen to become involved in this matter in the first place. As I am sure they already know, the pharmaceutical industry’s alternative proposal to returning pseudoephedrine to a prescription drug is a fully integrated electronic pseudoephedrine sales monitoring system. Not only are those systems expensive, burdensome, complicated, and failing to stop smurfing, but it is my understanding that the ACLU has long opposed fully integrated electronic databases that contain personal and private individually identifiable health information. By opposing the simple solution to smurfing (*i.e.*, returning pseudoephedrine to a prescription drug) the ACLU is effectively promoting the industry alternative, which appears to pose a direct risk to personal privacy. So it goes.