1751

1. CORPORATION — MAY NOT LAWFULLY ENGAGE IN PRACTICE OF MEDICINE IN THIS STATE—WHETHER OR NOT ORGANIZED FOR PROFIT.

2. PROVISION OF SECTION 8623-3 G.C. SHOULD BE STRICTLY CONSTRUED — SANITARIUMS — INSTITUTIONS DESIGNED PRIMARILY TO PROVIDE ACCOMMODATIONS WHICH AFFORD BENEFITS OF CLIMATE, LOCAL CONDITIONS AND NATURAL THERAPEUTIC AGENTS.

3. INSTITUTIONS—ACCOMMODATIONS ON COMMERCIAL BASIS FOR PROFIT—LICENSED PHYSICIAN—MAY BE PERMITTED TO PRACTICE—INSTITUTION MAY NOT SHARE IN FEES CHARGED BY PHYSICIAN FOR PROFESSIONAL SERVICES.

4. HOSPIAL CORPORATION — FAIR COMPENSATION — EQUIPMENT — NON-PROFESSIONAL SERVICES SUPPLIED TO PHYSICIAN—COMPENSATION MANIFESTLY IN EXCESS OF FAIR VALUE—HOSPITAL UNLAWFULLY ENGAGED IN PRACTICE OF MEDICINE — PHYSICIAN GUILTY OF GROSSLY UNPROFESSIONAL CONDUCT—SECTION 1275 G.C.

5. STATE MEDICAL BOARD—AUTHORITY TO DETERMINE WHETHER COMPENSATION IS IN EXCESS OF FAIR VALUE — NON-PROFESSIONAL SERVICES — QUESTION OF FACT.

SYLLABUS:

1. A corporation, whether or not organized for profit, may not lawfully engage in the practice of medicine in this state.

2. The provision in Section 8623-3, General Code, relative to "corporations for the erection, owning and conducting of sanitariums for receiving and caring for patients, their medical and hygienic treatment" should be strictly construed. Such provision is limited to those institutions designed primarily to provide accommodations which afford the benefits of climate, local conditions and natural therapeutic agents.

3. Such institutions may lawfully supply such accommodations on a commercial basis for profit, but may supply medical treatment only as an incident thereto by permitting the practice therein of licensed physicians; but such institution may not share in the fees charged by such physician for his professional services.

4. A hospital corporation, whether or not organized for profit, is entitled to a fair compensation (a) for the use of technical equipment owned by it and used by a physician in the performance of professional services, and (b) for non-professional services supplied to such physician; but where such corporation enters into an arrangement with a physician whereby it receives compensation for such use and such services which is manifestly in excess of the fair value thereof, the hospital is unlawfully engaged in the practice of medicine and the physician concerned is guilty of grossly unprofessional conduct under the provisions of Section 1275, General Code.

5. The determination of whether such compensation so received by a hospital is manifestly in excess of the fair value of such use and such non-professional services, is one of fact to be made in the first instance by the State Medical Board.

Columbus, Ohio, August 20, 1952

Hon. H. M. Platter, Secretary, The State Medical Board
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"A physician who specializes in diagnostic radiology, which consists of the diagnosis of disease and injury by the use of X-ray photographs, has entered into an agreement with an Ohio corporation not for profit operating a general hospital as follows:

"The physician has agreed to supervise the operation of the X-ray equipment owned by the corporation and the technicians employed by it in its X-ray Department and as to all X-rays taken at the hospital to give his opinion as the condition of the patient based upon the X-ray photographs of the patient's body. The photographs are taken with the hospital equipment by the technicians or in some cases by the physician himself. The patients may be in-patients in the hospital whose attending physician has requested consultation with the radiologist or persons who come to the hospital with or without the advice of another physician for the sole purpose of securing X-ray diagnosis.

"For the services of the physician and the use of its equipment and personnel as above outlined the hospital bills and collects a fee from the patient according to a set scale of charges. The hospital pays to the physician for his services a fixed percentage of the net income of the X-ray department. The hospital service association known as Blue Cross in the city in which the hospital

in question is located provides as one of the benefits to its subscribers technical X-ray service, With respect to Blue Cross patients the hospital is reimbursed by Blue Cross for its expenses relating to X-ray other than for professional services. In such cases it bills and collects a fee from the patient for the professional services of the physician according to a set scale of charges. Such fees are treated by the hospital as a part of the gross income of the X-ray Department.

"Inasmuch as we are charged with the responsibility of enforcing the Medical Practice Act of Ohio, your opinion is requested on the following points:

"1. Is the corporation which operates the hospital practicing medicine in violation of the law?

"2. Is the physician guilty of 'grossly unprofessional conduct' within the meaning of Section 1275 of the Ohio General Code which defines as grossly unprofessional conduct the division by a physician of his fee with any other physician or surgeon or with any other person?"

We may first examine the question of whether in general a corporation is permitted in Ohio to practice any of the professions. On this point, under the chapter on "Physicians and Surgeons" in 31 Ohio Jurisprudence, 375, Section 42, we find the following statement:

"While a corporation is in some sense a 'person,' and for many purposes is so considered, yet as regards the learned professions, which can only be practiced by persons who have received licenses to do so after examinations as to their knowledge of the subject, it is recognized that a corporation cannot be licensed to practice such a profession. In Ohio, the General Corporation Act expressly forbids the formation of corporations for the purpose of practicing professions, providing that corporations may be formed for any purpose or purposes 'other than for carrying on the practice of any profession.' Nor has a corporation any right to engage in such business. Therefore, an Ohio corporation, it has been held, cannot legally do professional dental work." * * *

The prohibition in the corporation act to which reference is made above is found in Section 8623-3, General Code, which reads as follows:

"A corporation for profit may be formed hereunder for any purpose or purposes, other than for carrying on the practice of any profession, for which natural persons lawfully may associate themselves, provided that where the General Code makes special provision for the filing of articles of incorporation of

designated classes of corporations, such corporations shall be formed under such provisions and not hereunder. Corporations for the erection, owning and conducting of sanitariums for receiving and caring for patients, their medical and hygienic treatment and the instruction of nurses in the treatment of disease and of hygiene shall not be deemed to be forbidden hereby."

In State ex rel Harris v. Myers, 128 Ohio St., 366, the court had under consideration the legality, under this section, of a proposal to organize a corporation for the purpose of engaging in the practice of optometry. After noting the prohibition mentioned above in Section 8623-3, supra, the court, in a per curiam opinion, said:

"Whatever refinements of reasoning may be brought to bear upon the question of whether optometry is a business to be carried on, or engaged in, or a profession to be practiced, the Legislature of this state has quite definitely placed it in the category of professions. The statute (Section 1295-21 et seq., General Code) makes it unlawful for any person to practice optometry who is not more than twenty one years of age and who has not met the requirements therein prescribed. Evidence of preliminary education specified must be furnished, and a two year course in optometry completed, and then the qualifications of the applicant are to be tested by an examination conducted by a board appointed as therein provided. Not only is good moral character made one of the prerequisites to admission to the examination for a certificate authorizing the applicant to practice optometry, but the board is authorized to revoke such certificate for any of the causes enumerated, among which are 'gross immorality, grossly unprofessional or dishonest conduct,' etc. Specifically exempt from the requirements of the act are physicians and surgeons practicing under authority of license issued under the laws of this state for the practice of medicine and surgery, and also persons selling spectacles or eye-glasses, but who do not assume directly or indirectly to adapt them to the eye, and who do not practice or profess to practice optometry. Throughout these statutory provisions the Legislature of this state has recognized optometry as a profession. The statutes of many states specifically characterize it as such.

"It thus appears that the Secretary of State has not refused to perform a duty enjoined upon him by law for which mandamus would lie, but on the contrary, that in his refusal to accept and file the proposed articles of incorporation he has acted in obedience to the requirements of Section 8623-3, General Code."

A question involving the practice of optometry by a corporation was again before the court in State ex rel Bricker v. Buhl Optical Company, 131 Ohio St., 217. The syllabus in that case reads as follows:

> "1. A foreign corporation lawfully authorized to do an optical business in Ohio may not engage in the practice of optometry in this state. * * *
>
> "3. Such corporation may not (a) employ an optometrist to do optometrical work in connection with its business, * * *."

In Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, the court in considering the question of the right of a corporation to engage in the practice of law said: (Syllabus)

> "3. The practice of law involves a personal relation which cannot be fulfilled by a corporation, and the practice of law is confined to those who have met the prescribed requirements and have been regularly admitted to the bar."

Accordingly, since medicine is conededly a profession, we must conclude that the rules stated in the decisions noted above are applicable as well to professional practice in this field.

It is proper at this point to examine the effect, if any, in the case at hand of the exception as to sanitariums found in the final sentence of Section 8623-3, supra. This provision, as it now appears in the statute, was enacted in the codification of the general corporation laws in 1927. It is identical with a provision formerly found in Section 8624, General Code, originally enacted in 1900 as Section 3235, Revised Statutes, except that the earlier statute used the work "sanitoriums." It appears, however, that the General Assembly actually intended to use the word "sanatorium" since the dictionaries do not contain a word with the spelling employed in Section 3235, Revised Statutes. Such apparently was the tacit assumption of one of my predecessors in Opinion No. 67, Opinions of the Attorney General for 1912, p. 20, in which he refers to a dictionary definition of the word "sanatorium" in discussing this language. In any event it seems that the words "sanitarium" and "sanatorium" are synonymous. They are defined in Webster's New International Dictionary, Second Edition, as follows:

Sanitarium—

> "A health station or retreat; an institution for the recuperation and treatment of persons suffering from physical or mental disorders; a sanatorium."

Sanatorium—

"1. A health resort; a locality selected as a retreat because of its salubrity; specif., a high-altitude summer station in a tropical country for European troops, officials, or residents, as Darjeeling in India.

"2. An establishment for the treatment of the sick, esp. one that makes much use of natural therapeutic agents or local conditions, or that employs some specific treatment, or that treats a particular disease (as tuberculosis); a sanitarium."

In Dorland's American Illustrated Medical Dictionary, 22nd Edition, these two words are defined as follows:

Sanitarium—

"An incorrect spelling or form of the word sanatorium."

Sanatorium—

"1. An establishment for the treatment of sick persons, especially a private hospital for convalescents or those who are not extremely ill. The term is now applied particularly to an establishment for the open-air treatment of tuberculous patients.

"2. A health station; a health resort in a hot region."

The mention of the treatment of the disease of tuberculosis in the definitions above becomes significant when it is recalled that when this word was first employed by the General Assembly in 1900 the principal treatment for this disease was removal to a dry climate with generous provision for fresh air. All of these definitions quite clearly suggest an institution to which patients are attracted primarily to enjoy the supposed benefits of climate, local conditions, and natural therapeutic agents which are not elsewhere obtainable. Such a definition could not, therefore, comprehend hospitals generally, especially those commonly known as modern institutions in which the advanced techniques of medicine are regularly practiced.

It must be observed, however, that under the provisions of Section 8623-3, supra, a sanitarium, organized as a corporation for profit, is authorized to conduct an installation "for receiving and caring for patients, (and for) their medical and hygienic treatment." Here two questions arise. First, does this language authorize a corporation to provide medical

treatment to patients on such a basis that a profit will accrue to such corporation by reason of such treatment? Second, if the answer is in the affirmative, why should not any corporation, whether or not organized for profit, be permitted to engage in the medical practice on a similar basis?

At this point we may properly observe that it is the basic policy of the state, as set out in Section 8623-3, supra, that corporations are not permitted to practice a profession. As clearly indicated in the Harris case, supra, this prohibition is not limited to the so-called learned professions, but is applicable as well to those callings which "the Legislature * * * has quite definitely placed * * * in the category of professions." Moreover, the decision in the Harris case clearly indicates that one of the attributes of a profession is the requirement of "good moral character" on the part of practitioners therein, and acts of "gross immorality, grossly unprofessional or dishonest conduct" are cause for expulsion of licensees from the profession to which they have been admitted. Moreover, in Dworken v. Apartment House Owners Association of Cleveland, 28 N.P. (N.S.) 115, (affirmed, 38 O. App., 265, motion to certify overruled June 10, 1931) it is said p. 117:

> "The right to practice law is a special franchise, *limited in Ohio to persons of good moral character* * * *."
>
> (Emphasis added.)

In view of the emphasis in the Ohio decisions on good moral character as a requirement of practitioners of a profession, we must conclude that the courts regard the preservation of such requirement as the principal legislative objective of the prohibition in Section 8623-3, supra, of the corporate practice of a profession. In this view of the matter it would appear that the General Assembly entertained the notion that corporations, as impersonal entities, are amoral in character, and could not be relied upon to adhere to the canons of ethics which obtain in the several professions, especially in instances where control of the activities of the corporation is vested in individuals not licensed in the profession concerned. Accordingly, such being the legislative purpose and policy, I am wholly unable to perceive the logic of any interpretation of the "sanitarium provision" in Section 8623-3, supra, which would permit corporations generally to engage in the practice of medicine, while at the same time all of the other professions are strictly guarded against invasion by corporate practitioners. I am the more inclined to this view for the reason, commonly recognized

in both lay and professional circles, that in no profession recognized by the law as such is there a greater need for professional ethical standards of the highest sort than in the field of medicine.

For these reasons I am impelled to conclude, in harmony with the conclusion expressed in Opinion No. 67, Opinions of the Attorney General for 1912, p. 20, that the statutory exception as to sanitariums must be strictly construed. The syllabus in that opinion is as follows:

> "Articles of Incorporation disclosing the purpose of conducting a 'Sanitorium' where medical services can be contracted for, shall not be filed.
>
> "If it is the intention of the Incorporators to conduct a 'Sanitorium' in the statutory sense of the term i.e. a place where patients are to be received and cared for, such a business might be conducted if the purpose was clearly expressed.
>
> "If, on the other hand, the intention was that of arranging for medical and surgical treatment to all persons in general, such business could not be conducted."

In considering the application of Section 8624, General Code, a prior provision analogous to Section 8623-3, supra, the writer of the 1912 opinion said, pp. 21, 22:

> "In my opinion, Section 8624 does not relate to several different kinds of corporations, but to one kind of corporation only, namely, those corporations engaged in the conduct of sanatoriums.
>
> "The meaning of the word 'sanatorium' as used in this connection is well understood. The term is defined by the Century Dictionary as follows:
>
> "'1. A place to which people go for the sake of health; * * * also a house, hotel, or medical institution * * * designed to accommodate invalids * * *.
>
> "'2. A hospital * * *.'
>
> "Thus, it appears that a sanatorium is in every sense of the word a place where patients are received and cared for. The name could not properly be applied to a mere office where persons desiring medical attention may come to enter into contracts entitling them to the services of medical men. The phrase, 'their medical, surgical and hygienic treatment' as used in the statute refers to the word 'patient' immediately preceding, and must be read in connection with what goes before it. Therefore, Section 8624 does not authorize the formation of corporations for the purpose of the medical, surgical and hygienic treatment of any

> patients, but does authorize a corporation engaged in the business of conducting a sanatorium to provide the medical, surgical and hygenic treatment of the patients to be received and cared for therein."

This opinion of forty years ago is representative of a long continued administrative interpretation which is to be reckoned with most seriously and which is not to be disregarded and set aside unless judicial construction makes it necessary to do so. Industrial Commission v. Brown, 92 Ohio St., 309, 311, 1915.

I perceive nothing in the present statutory language relative to sanitariums which makes it imperative to abandon the rule thus announced in the 1912 opinion. I am impelled to conclude, therefore, that although the present statute permits a corporation for profit to operate a sanitarium on a commercial basis, such corporation may provide medical treatment only as an incident to such commercial operation, and may not provide such treatment on a commercial basis.

In other words, a profit may be realized from charges made by an incorporated sanitarium on the basis of accommodations which afford the benefits of climate, local conditions, and natural therapeutic agents, but a profit may not be realized by such corporation from charges made for purely medical treatment. I conclude, therefore, that the proviso as to sanitariums in Section 8623-3, General Code, is not applicable to the situation here under scrutiny.

It will be observed that all that has thus far been said is applicable in the strict sense only to corporations organized for profit. In that portion of the general corporation act relating to non-profit corporations, Section 8623-97, et seq., General Code, we find nothing relative to the practice of professions such as the provision already noted in Section 8623-3, supra. The purposes for which such corporations may be organized are stated in Section 8623-97, General Code, which reads:

> "A corporation not for profit may be formed hereunder for any purpose or purposes not involving pecuniary gain or profit for which natural persons may lawfully associate themselves, provided that where the General Code makes special provision for the filing of articles of incorporation of designated classes of corporations not for profit, such corporation shall be formed under such provisions and not hereunder."

The question at this point thus becomes one of whether "natural persons may lawfully associate themselves" in a non-profit corporation to practice a profession. This precise question was under consideration in the Dworken case, supra. The first two paragraphs of the headnotes of the reported nisi prius decision in this case are as follows:

> "1. Admission to the bar is in the nature of an exclusive franchise to one of a class to practice law, a right which can be granted only by the Supreme Court of the state, and only to men and women possessing the prescribed educational and moral qualifications.
>
> "2. Manifestly a corporation does not fulfill this condition, and cannot be authorized directly to practice law in Ohio, and for a corporation to undertake to practice indirectly, by employing lawyers to do the work for them, is an evasion which the law will not tolerate."

In the opinion in this case by Overmyer, J., on the point of the corporation there involved being organized not for profit, it is said p. 118:

> "Section 8623-3, General Code provides, 'A corporation for profit may be formed hereunder for any purpose or purposes *other than for carrying on the practice of any profession*,' etc.
>
> "Section 8623-97 provides for the incorporation of corporations not for profit, and the italicized inhibition above does not appear in this section, and the defendant argues that there is no inhibition against forming a corporation not for profit with a purpose clause authorizing the practice of law. This argument answers itself. Under what conceivable conditions or circumstances would a band of men or women associate themselves together into a corporation *not for profit* for the purpose of practicing law? *It is the opinion of this court that in Ohio no corporation can practice law*, and that only natural persons, men and women who have complied with the rules and regulations prescribed by the Supreme Court and have been duly admitted to practice by that court after an examination, can practice law in this state." (Emphasis added.)

It has been said that when the Supreme Court of Ohio overrules a motion to certify no greater weight is thereby lent to the decision of the lower courts in establishing a rule of decision on the legal questions involved. If an exception to this rule should ever be justified it would appear to be so in the Dworken case, especially in view of the positive statement in the nisi prius opinion last above quoted to the effect that

"no corporation can practice law," and in view of the fact that the question of the right of a corporation not for profit to practice a profession does not appear previously to have been brought to the Supreme Court for consideration. There is, therefore, substantial reason to regard the rule in the Dworken case as settled law in Ohio.

It would appear that the decision in the Dworken case is based primarily on the proposition that only a natural person, possessed of good moral character, who demonstrates satisfactory educational and technical attainments can qualify by examination for the franchise or license to practice law; and that a corporation, however organized, manifestly could not meet these qualifications. Similar qualifications are, of course, required in the case of a license to practice medicine. In this respect, therefore, it is difficult to perceive why the rule forbidding the practice of a profession by corporations not for profit should not be applicable in the field of medicine as well as in the field of law.

Some doubt has been expressed, however, as to the scope of the Dworken decision as applicable to corporations which are organized not for profit and which in fact conduct their affairs without the object of pecuniary gain. On the question of the legality of the operations of certain dental clinics organized as non-profit corporations, we find the following statements in Opinion No. 4081, Opinions of the Attorney General for 1948, p. 559, at pp. 562, 563:

> "A corporation not for profit does not, as is the situation in the case of a corporation for profit, have shareholders in the sense that dividends are anticipated out of corporate operations for profit. Instead it has members and its governing officers are trustees. See Sections 8623-102 and 8623-106 of the General Code. As earlier suggested, the internal structure of a corporation for profit differs in various respects from that of a corporation not for profit. It may be pertinent at this point to refer again to the case of Dworken v. Apartment House Owners Assn., supra, wherein the court discussed Section 8623-97, General Code, which is the provision of law setting forth the purposes for which a corporation not for profit may be organized. At page 118 of its opinion the court said:
>
> "'Section 8623-97 provides for the incorporation of corporations not for profit, and the italicized inhibition above does not appear in this section, and the defendant argues that there is no inhibition against forming a corporation not for profit with a purpose clause authorizing the practice of law. This argument answers itself. Under what conceivable conditions or circum-

stances would a band of men or women associate themselves together into a corporation not for profit for the purpose of practicing law?'

"Moreover, as will be indicated later herein, Section 1329, General Code, clearly contemplates that before a person can be regarded as performing acts which constitute the practice of dentistry, such acts must be with a view to pecuniary gain.

"On considerations aforementioned I have reached the conclusion that the purpose clause of each of the nonprofit corporations here under review, does not contemplate a chartering to engage in the practice of any profession and more particularly dentistry. Moreover that *on the facts recited*, said corporations are not engaged in the practice of dentistry as defined by law."
(Emphasis by the writer of the 1948 opinion.)

While the reason for the reference in the 1948 opinion to the Dworken case is not immediately clear, it can fairly be inferred that the writer of that opinion assumed that the corporation there involved, although ostensibly organized not for profit, actually was created and operated with a view to pecuniary gain. We may infer further that the writer believed that on the facts recited such was not the case with respect to the dental clinics then under consideration and that the Dworken case was distinguishable on this point.

There is an implication in the 1948 opinion, supra, to the effect that the corporations may lawfully contract with patients to supply medical services generally and may contract with physicians to furnish treatment to such patients. This implication is found in the fact that the writer quotes with approval from State ex rel. Sager v. Lewin, 1907, 128 Mo. App., 149, 106 S. W. 581, the following passage:

"* * * In all the larger cities, and connected with most of the medical colleges in the country, hospitals are maintained by private corporations, incorporated for the purpose of furnishing medical and surgical treatment to the sick and wounded. *These corporations do not practice medicine, but they receive patients and employ physicians and surgeons to give them treatment.* No one has ever charged that these corporations were practicing medicine. The respondents are chartered to do, in the main, what these hospitals are doing every day—that is, *contracting with persons for medical treatment and contracting with physicians to furnish treatment,*—and the fact that Dr. W. A. Lewin is the principal stockholder and the manager of respondent corporation, and is employed by it to furnish medical and surgical

> treatment to the patients who may contract with it for such treatment, does not alter the legal status of the corporation, or show it has violated the terms of its charter."

The decision in this case is probably representative of the minority American rule, but however this may be it can hardly be said to be the rule followed in this state. In the Buhl Optical Company case, supra, the court says in the syllabus that "a corporation may not * * * employ an optometrist to do optometrical work in connection with its business * * *." In the opinion by Williams, J., in the same case we find this statement:

> "This court has never held and does not hold in the instant case that companies incorporated to engage in the business of an optician may not employ optometrists in connection therewith. They may; but since they cannot incorporate to engage in optometry they can not do indirectly what they are forbidden to do directly. They cannot employ optometrists to engage in the practice of optometry. The optometrists employed can as employees do only the work the employers are authorized by law to do."

In the opinion in the Dworken case, supra, it is said (p. 119):

> "Now if a corporation cannot be formed in Ohio for the purpose of practicing law directly, *it cannot practice law indirectly by employing lawyers to practice for it*, as that would be an evasion which the law would not tolerate." (Emphasis added.)

In the Land Title Abstract & Trust Company case, supra, the court said in paragraph 3 of the syllabus:

> "3. The practice of law involves a personal relation which cannot be fulfilled by a corporation, * * *."

In view of these clear expressions of the law, I am bound to conclude that in this state corporations, whether or not organized and operated for profit, may not practice a profession indirectly by hiring licensed members of such profession to do the actual professional work involved.

In order to prevent any possibility of misunderstanding, I deem it proper here to emphasize the point that this conclusion would not be applicable in the case of a purely charitable corporation which employs physicians to furnish medical treatment to indigent patients without charge therefor; nor, indeed, in the case of any person, natural or corporate, who undertakes, without compensation from the patient, to hire

a physician to furnish medical treatment to another. This is true for the reason that the definition of the practice of medicine as set out in Section 1286, General Code, clearly designates such compensation as an indispensable element therein.

I conclude, therefore, that, with the *limited* exception already noted as to sanitariums, corporations, whether or not organized for profit, may not lawfully practice medicine in this state; and that any such corporation which charges and collects a fee of patients for medical treatment performed by licensed physicians as employes of such corporation is unlawfully engaged in the practice of medicine. We come now to the application of this rule to the facts in the case at hand.

It appears from your inquiry that certain technical equipment, owned by the hospital corporation, is used by the physician in the performance of certain services which are conceded to be within the field of medical practice. For such services and for such use the corporation charges and collects from the patient a single fee according to a designated scale of charges. The aggregate of such fees constitutes the gross income of the hospital X-ray department, and after the expenses of operation of the department are ascertained, the physician is paid an agreed percentage of the department's net income for his professional services. An exception to this practice is made in the case of patients who are parties to Blue Cross insurance contracts. In such cases the hospital corporation makes two separate charges, one for the use of the X-ray equipment and one for the professional services of the physician. The first such charge is billed to and paid by the Blue Cross organization. The second charge is billed to and paid by the patient. You state that the second charge is treated by the hospital corporation as a part of the gross income of the X-ray department. While you do not so state, I assume that the first charge is similarly treated. You have not indicated the percentage of the whole on the basis of which the two separate charges above mentioned are made, nor the basis on which the division of the net income is made between the hospital and the physician.

Assuming (as I do) that both charges, in the case of Blue Cross patients, are treated as gross income of the X-ray department, it will be seen that the fact that they are paid by different parties will have no bearing on the matter.

In any contractual arrangement such as we find here between the hospital and the physician, it can scarcely be contended that the hospital is not entitled to a fair compensation for the use of the facilities owned by it and for the non-professional services performed by it. I should think it would be conceded also that such non-professional services may properly include a reasonable compensation to the hospital (a) for its services in billing and collecting the charges made, (b) for the clerical duties of scheduling the use of the equipment by the physician, (c) for the services of the X-ray technicians, and (d) for any other non-professional services involved in the operation of the X-ray department. Accordingly, I conclude that the contract which you have described in the instant case must be held unlawful if it should be determined that the net income received by the hospital thereunder is manifestly in excess of the reasonable value of such use and of such other non-professional services as are supplied by the hospital.

This question, however, is one of fact which can be determined only upon a careful examination of all of the facts involved, and such examination would necessarily involve an estimate of the value of such use and such services which could only be made by experts in the field of medicine. Quite clearly it would be impossible for me to include such examination within the scope of this opinion. It does appear just as clearly, however, that the members of your board are qualified to make such examination and such determination. Accordingly you are advised that in the event your board should determine that the income received by the hospital corporation under the contract described in your inquiry is manifestly in excess of the reasonable value of the use of the equipment involved and the nonprofessional services supplied, the corporation should be regarded as being unlawfully engaged in the practice of medicine.

Your second question relates to the possible "grossly unprofessional conduct" on the part of the physician by reason of being a party to such contract. Such contract is defined in Section 1275, General Code, as follows:

> "The state medical board may refuse to grant a certificate to a person guilty of fraud in passing the examination, or at any time guilty of felony or gross immorality, grossly unprofessional or dishonest conduct, or addicted to the liquor or drug habit to such a degree as to render him unfit to practice medicine or surgery.

"The words 'grossly unprofessional or dishonest conduct' as used in this section are hereby declared to mean: * * *

"Fifth. Any division of fees or charges, or any agreement or arrangement to share fees or charges made by any physician or surgeon with any other physician or surgeon, or with any other person.

"Upon notice and hearing, the board, by a vote of not less than five members, may revoke or suspend a certificate for like cause or causes."

In the event that your board should determine, in the case of any contract such as that here under examination, that the income received by the hospital is manifestly in excess of a fair compensation for the use of the hospital-owned equipment and of the non-professional services supplied by the hospital, such determination will necessarily amount to a finding that a part of such income is attributable to the professional services of the physician. In such case it clearly follows that the physician has made an arrangement to share his fee with another person, and so is guilty of grossly unprofessional conduct.

Respectfully,

C. WILLIAM O'NEILL
Attorney General