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1. DENTAL OPERATIONS—COMPANY WHICH MAINTAINS ON PREMISES, PLACE OPERATED OR CONDUCTED BY LICENSED DENTIST, SALARIED EMPLOYE, WHERE DENTAL SERVICES PERFORMED GRATUITOUSLY FOR COMPANY EMPLOYES, NOT ENGAGED IN PRACTICE OF DENTISTRY.

2. DENTAL OPERATIONS—WHERE LICENSED DENTIST IS SALARIED EMPLOYE OF THE COMPANY, FEES ARE CHARGED EMPLOYES AND PAID TO COMPANY, THE COMPANY IS ENGAGED IN PRACTICE OF DENTISTRY AS MANAGER, PROPRIETOR, OPERATOR OR CONDUCTOR OF PLACE TO PERFORM "DENTAL OPERATIONS"—SECTION 1329 G. C.

SYLLABUS:

1. A company which maintains on its premises a place for performing dental operations which is operated or conducted by a licensed dentist as a salaried employe of said company, but wherein dental services are performed gratuitously for company employes, is not engaged in the practice of dentistry within the meaning of Section 1329, General Code.

2. A company which maintains on its premises a place for dental operations which is operated or conducted by a licensed dentist as a salaried employe of said company, and wherein dental operations are performed for fees which are charged employes and paid to said company, is engaged in the practice of dentistry as a manager, proprietor, operator or conductor of a place for performing dental operations within the meaning of Section 1329, General Code.

Columbus, Ohio, September 10, 1947

Ohio State Dental Board
Columbus, Ohio

Gentlemen:

Your request for my opinion reads:

"The Ohio State Dental Board has instructed me, as Secretary of the Board, to request your formal opinion on a question of law now confronting us concerning so-called Industrial Dentistry, i. e., the ownership of dental offices and the employment of dentists by manufacturing concerns, stores, private clinics, etc.

Section 1329, General Code of Ohio, states in part that 'Any person shall be regarded as practicing dentistry, within the meaning of this act, who is manager, proprietor, operator or conductor of a place for performing dental operations * * *. The term manager, proprietor, operator or conductor as herein used shall be deemed to include any person (1) Who employs licensed operators. (3) Who makes any other arrangements whereby he derives profit, compensation or advantage through retaining the ownership or control of dental offices by making the same avail-

able in any manner whatsoever for the use of licensed operators; provided, however, that the above shall not apply to bona fide sales of dental equipment secured by chattel mortgage.'

Specifically, the facts motivating this request are as follows: A manufacturing concern, identified herein as 'Company A', has set up and equipped a dental office in its factory building. The company employs a licensed dentist on a part-time basis, for which he receives a salary from the company, to practice in this office. His practice consists of emergency dental treatments, oral examinations, x-ray and prophylaxes, all of which are usually rendered without cost to the employee-patient.

Company B also has established and equipped a dental office on its premises, and employs licensed dentists on a full time basis. The dentists employed by the Company conduct, in addition to certain emergency cases, a general practice consisting of extractions, fillings, bridges, plate work, etc. With the exception of certain types of examinations and emergency work, the prevailing dental fees are charged the employee-patient, which fees are paid to the company—not to the dentist.

In each of these cases all equipment, materials and supplies are purchased and paid for by the Company. The dentists and their assistants are on the payroll of the company the same as any other employee, and enjoy the same benefits as to insurance, retirement, etc. In certain companies, where a hospital is maintained under the supervision of a Medical Director, the dental clinic is an integral part of the hospital, and the dentists technically are under the supervision of the medical director.

Based upon these facts, we would like to know whether, in your opinion, Company A and Company B are in fact engaged in the practice of dentistry contrary to law."

The practice of dentistry in this state has long been the subject of statutory control. The present regulatory act is now contained in Sections 1314 to 1333-1, General Code, both inclusive.

You have directed particular attention to Section 1329, General Code, wherein are enumerated certain operations and treatments that constitute the practice of dentistry for which a license is required and your request contains an excerpt therefrom. It is important, however, that the full text of said Section 1329, General Code, be noted. Hence the same is now set forth, to-wit:

"Any person shall be regarded as practicing dentistry, within the meaning of this act, who is a manager, proprietor, *operator* or

conductor of a place for performing dental operations or who, for a fee, salary or other reward paid or to be paid either to himself or to another person, performs, or advertises to perform, dental operations of any kind, or who diagnoses or treats diseases or lesions of human teeth or jaws, or attempts to correct malpositions thereof, or who takes impressions of the human teeth or jaws, or who shall construct, supply, reproduce or repair any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except upon the order or prescription of a licensed dentist and constructed upon or by the use of casts or models made from an impression taken by a licensed dentist, or who shall advertise, offer, sell or deliver any such substitute or the services rendered in the construction, reproduction, supply or repair thereof to any person other than a licensed dentist, or who places or adjusts such substitute in the oral cavity of another, or who uses the words 'dentist,' 'dental surgeon,' the letters 'D. D. S.,' or other letters or title in connection with his name, which in any way represents him as being engaged in the practice of dentistry.

The term manager, proprietor, *operator* or conductor as herein used shall be deemed to include any person

1. Who employs *licensed operators*;

2. Who places in the possession of licensed *operators* dental offices or dental equipment necessary for the handling of dental offices on the basis of a lease or any other agreement for compensation or profit for the use of such office or equipment; when such compensation is manifestly in excess of the reasonable rental value of such premises and equipment.

3. Who makes any other arrangements whereby he derives profit, compensation or advantage through retaining the ownership or control of dental offices or necessary dental equipment by making the same available in any manner whatsoever for the use of *licensed operators*; provided, however, that the above shall not apply to bona fide sales of dental equipment secured by chattel mortgage.

Whoever having a license to practice dentistry or dental hygiene shall enter the employment of, or shall enter into any of the above described arrangements with, an unlicensed manager, proprietor, operator or conductor may have his license suspended or revoked by the state dental board therefor."

(Emphasis added.)

In connection with your inquiry it is also pertinent that reference be made to Section 1329-1, General Code, which provides:

"It shall be unlawful for any person or persons to practice

or offer to practice dentistry or dental surgery, under the name of any company, association, or corporation, and any person or persons practicing or offering to practice dentistry or dental surgery shall do so under his name only and he shall not conduct a dental office in his name nor advertise his name in connection with any dental office or offices unless he is himself personally present in said office operating as a dentist or personally overseeing such operations as are performed in said office or each of said offices during a majority of the time said office or each of said offices is being operated by him; any person convicted of a violation of the provisions of this section shall be fined for the first offense not less than one hundred dollars, nor more than five hundred dollars, and upon a second conviction therefor, his license may be suspended or revoked, as provided in Section 1325 of this act."

An earlier version in this last quoted section was declared unconstitutional in Ex Parte Craycroft (1916), 24 N. P. (N. S.) 513. However, in Taylor v. The New System Prosthetic Dental Laboratory, Inc. (1932), 29 N. P. (N. S.) 451, the court stated that it was not impressed by the reasoning in the Craycroft case and held that the then state dental code was constitutional. It might also be added that within a few months after the decision in the Taylor case the constitutionality of Section 1329, General Code, was again upheld. See Noble v. The State of Ohio, 44 O. App. 10. However, Section 1329-1, General Code, is above set forth as amended effective July 12, 1935 (116 O. L. 82) and whatever defect, if any, may have existed in the predecessor section is now of no concern.

Attention is now called to Section 1320, General Code, which reads:

"Unless previously qualified as provided by law, no person shall practice dentistry in this state unless he has obtained a license from the state dental board as hereinafter provided."

Section 1329, General Code, unlike the next succeeding section, does not contain any penalty provisions. Therefore, a person who violates the provisions of said Section 1329 can be fined for engaging in the practice of dentistry illegally but must be charged with such offense under Section 12714, General Code, which reads:

"Whoever violates any provision of law relating to the practice of dentistry, or the application for examination and licensing of dentists, for which no specific penalty has been prescribed, shall be fined not less than fifty dollars nor more than five hundred dollars."

An examination of Section 1329 discloses that at the outset thereof no reference whatever is made to a person who is a manager, proprietor, operator or conductor of a place for performing dental operations being so engaged *for profit.* Later therein (paragraph numbered 1.) reference is made to a person who employs licensed operators being included within the definition of the term manager, proprietor, etc. at neither place is mention made of such employment being with a view to profit. While paragraph numbered 1. *does not* read "Who employs licensed operators *with a view to profit*" it is apparent that, although not expressly so providing, the element of profit can not be ignored. This is made evident by reference to the two paragraphs that immediately follow wherein there is mentioned specifically the matter of compensation, profit or financial advantage. If the section is not interpreted as making profit an indispensable element then there would be brought within its operative effect any person who owned a place for performing dental operations and employed a licensed dentist to operate the same even though such operation thereof was not for profit. Under such construction a charitable organization that owned a place for performing dental operations which was being operated by a licensed dentist as its employe, and supplying free dental services to needy persons, would be engaged in the practice of dentistry. It is difficult for me to believe it was the legislative intent for such to be the situation. I feel, therefore, that in interpreting the provisions of said section we are required to start with the proposition that, unless the arrangement is one which contemplates profit or gain, a person who employs a licensed operator to conduct a place for performing dental operations is not within the definition of the term manager, proprietor, operator or conductor.

While the definition of the term manager, proprietor, operator or conductor is most comprehensive, the words *"licensed operators"* are not defined in the dental act. It would appear that at no place, other than in said Section 1329, General Code, are those just quoted words to be found. That a person who is a *licensed* operator must of necessity be a licensed dentist can not be very seriously questioned. However, the General Assembly in enacting Section 1329, General Code, obviously had some reason for using the words "licensed operators" in paragraph numbered 1. thereof. Some light is thrown on the matter by reference to Section 1329-1, General Code. It is patent that under the provisions thereof a licensed dentist may employ another licensed dentist or dentists in connection with his operation of a place for performing dental operations. The relationship

between the employer dentist and an employe dentist would be that of master and servant. Under such circumstances the employing dentist, as the operator of the place where dental operations are performed, would be a licensed operator. Therefore, as I see it, the General Assembly had in mind, in the use of the words "licensed operators", licensed dentists who are *employed* by unlicensed persons to operate dental offices wherein the relationship to the employer would be that of master and servant.

I come now to the matter of whether Company A mentioned in the first example set forth in your inquiry is engaged in the practice of dentistry contrary to the dental act since it is, of course, not a licensee thereunder. Such company is obviously the owner of a place wherein dental operations are to be performed. Furthermore, it is employing a licensed operator. The relationship between the company and the employe-dentist is that of master and servant notwithstanding employment is on a part-time basis. All of the conditions necessary to bring Company A within the operative effect of Section 1329 appear to be present with one exception, viz., the element of profit. In the face of the fact that dental services are being rendered to said company's employes without any charge, can it reasonably be concluded that it was the legislative intent to bring it within the purview of said section?

Let us explore the matter further. It is not unreasonable to conclude that Company A is supplying a limited amount of dental services to its employes. As I view it, it would have the right to fix some limitation with respect to the extent of such gratuitous dental service. You have stated in your request that the dental services "are usually rendered without cost to the employee-patient." Inasmuch as there is no suggestion in your inquiry that Company A is making any charge against an employe it is also not unreasonable to conclude that under certain circumstances the employe-dentist is charging a fee for certain services. If the dentist is rendering services beyond those which the company is willing to supply gratuitously I can see nothing wrong in this.

No one could seriously dispute the proposition that Company A would have the right to furnish its employes with the name of a dentist and pay the latter for services performed for said employes. Instead of doing that the company is making a dentist more readily available. The employe would be under no compulsion to accept dental services whether the dentist maintained an office of his own or on company premises. If he does so,

then he obviously does so voluntarily. The relationship in either instance between the dentist and the employe would be just the same, namely, a professional one. As I see it the relationship between dentist and patient is fundamentally no different than that of physician and patient. The fact that services are rendered gratuitously does not impair that relationship. Touching on this matter is the following statement in 41 Am. Jur., Physicians and Surgeons, Section 71, to-wit:

> "* * * A physician may accept a patient and thereby incur the consequent duties although his services *are performed gratuitously or at the solicitation and on the guarantee of a third person.* The fact, even, that a third person sends a physician to examine a patient for the purpose of benefiting the third person only, and the patient not at all, may not affect the case, for the patient always has a right to refuse treatment; and when professional assistance is accepted, such acceptance creates the practitioner the physician of the patient and subjects him to the resultant liabilities." (Emphasis added.)

It may be suggested that by having a dentist available in an office on company property the company is realizing some financial advantage or gain. Assuming that to be the situation I cannot bring myself to the belief that this is of any importance since the gain or advantage is, to say the least, remote or indirect. This certainly was not the evil aimed at by said Section 1329, General Code, and to extend the scope of the same to include an indirect financial advantage could hardly be said to be within the legislative intent. Since the element of financial advantage or profit is not involved, I have concluded that the acts of Company A. do not come within the spirit or intent of said section. Therefore, in specific answer to your first question, it is my opinion that a company which maintains on its premises a place for performing dental operations which is operated or conducted by a licensed dentist as a salaried employe of said company, but wherein dental services are performed gratuitously for company employes, is not engaged in the practice of dentistry within the meaning of Section 1329, General Code.

In the case of Company B. you state that "the prevailing dental fees are charged the employee-patient, which fees are paid to the company—not to the dentist." Therein lies the distinction and compels the conclusion that Company B. is engaged in the practice of dentistry within the meaning of Section 1329, General Code. In 41 C. J., Physicians and Surgeons, Section 24, it is said:

"The operation by a corporation of a medical clinic with offices where the treatment of disease is engaged in solely by licensed and registered physicians and surgeons *employed by the corporation, which receives the fees charged the patients* constitutes the practice of medicine by the corporation within a statute prohibiting such practice except by licensed persons."
(Emphasis added.)

In support of this statement in the text the case of People by Kerner v. United Medical Service, Inc. (1936), 362 Ill. 442, 260 N. E. 157, 103 A. L. R. 1229, is cited. The mere fact that Company B. mentioned in your letter is not incorporated as a medical clinic but is a business concern is of no consequence. It is the receiving of the fees of the dentist that makes it amenable to the dental practice act.

Although there are a few cases to the contrary the overwhelming weight of authority is to the effect that neither a corporation nor any other unlicensed person or entity may engage in the practice of medicine, surgery or dentistry through licensed employes. See The Youngstown Park and Falls Street Railway Co. v. Kessler, 84 O. S. 74.

Welfare service plans have also been held to be in violation of certain medical practice acts. In People, ex rel. State Board of Medical Examiners, v. Pacific Health Corporation, Inc. (1938), 12 C. (2d) 156, 82 P. (2d) 429, 119 A. L. R. 1284, it was held that a stock company operated *for profit,* which in consideration of a premium undertakes to bear the expense of medical or surgical services rendered to a contract holder by a physician or surgeon on its approved list, is illegally engaged in the practice of medicine. (Application for certiorari to the United States Supreme Court denied, 306 U. S. 633.) The argument was made therein that a decision against the defendant would outlaw all fraternal, religious, hospital, labor and similar benevolent organizations furnishing medical services to members. Bearing on this proposition the court said:

"* * * But it should be pointed out that the fear of applying the holding of this case to such philanthropic associations as those mentioned does not exist in the minds of the directors thereof, nor has it been suggested that the public authorities contemplate any attack on them. This illusory apprehension is expressed by defendant alone, in an attempt to bolster up its case by bringing it within the general class of associations furnishing medical or health benefits which have been *tacitly approved* for generations. But a most obvious and, to us, a fundamental distinction must be made between defendant and these other institu-

> tions. In nearly all of them, the medical service is rendered to a limited and particular group as a result of cooperative association through membership in the fraternal or other association, *or as a result of employment by some corporation which has an interest in the health of its employees.* The public is not solicited to purchase the medical services of a panel of doctors; and the doctors are not employed or used to make profits for stockholders. In almost every case the institution is organized as a *non-profit corporation or association.* Such activities are not comparable to those of private corporations operated for profit and, since the principal evils attendant upon corporate practice of medicine spring from the conflict between the professional standards and obligations of the doctors and the profit motive of the corporation employer, it may well be concluded that the objections of policy do not apply to nonprofit institutions. This view almost seems implicit in the decisions of the courts and it certainly has been the assumption of the public authorities, which have, as far as we are advised, never molested these organizations."
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> (Emphasis added.)

It will be seen from the foregoing that whether profit is contemplated is of importance and, as previously pointed out, it is the furnishing of services gratuitously or without a view to profit which distinguishes the operations of Company B. from those of Company A.

I recognize that the cases above set forth deal with the medical practice act and consequently turn on the wording of the particular act that was under review. While these cases are perhaps not directly in point they do lay down the principle that it is the participation in the profits of the licensed person that constitutes one of the elements giving rise to the unlawful practice of a profession.

Therefore, in specific answer to your second question, it is my opinion that a company which maintains on its premises a place for dental operations which is operated or conducted by a licensed dentist as a salaried employe of said company, and wherein dental operations are performed for fees which are charged employes and paid to said company, is engaged in the practice of dentistry as a manager, proprietor, operator or conductor of a place for performing dental operations within the meaning of Section 1329, General Code.

Respectfully,

HUGH S. JENKINS,
Attorney General.