4081

DENTAL CLINICS—DENTAL PRACTICE ACT—UNDER FACTS STATED, QUERY AS TO LAW VIOLATIONS—OHIO STATE DENTAL BOARD—SECTION 1314 ET SEQ., G. C.

SYLLABUS:

Discussion as to whether certain clinics are being operated in violation of the dental practice act, Section 1314 et seq., General Code, and as to whether the dentists connected therewith are violating said law.

Columbus, Ohio, December 6, 1948

Earl D. Lowry, D.D.S., Secretary, Ohio State Dental Board
Columbus, Ohio

Dear Sir:

Your request for my opinion reads:

"The Ohio State Dental Board is concerned with the existence of a number of so called clinics and respectfully requests your formal opinion concerning the legality of their operation. The facts relating to the conduct and operation of the most flagrant of these clinics is briefly as follows:

"Clinic C:

This clinic is incorporated not for profit under the laws of Ohio. The purpose as set forth in the charter is quite lengthy, but its main purpose seems to be to 'own and conduct hospitals for sick and disabled persons—and charging and receiving compensation for services, care, treatment and accommodations for the purpose of maintaining said hospitals not for profit'. This clinic, of course, employs a number of physicians and surgeons. It also employs a dentist on a salary basis. The dental equipment is owned by the clinic. The clinic purchases and pays for all the dental supplies, and any other expenses incident to the cost of operation of the Dental Department.

"Clinic Cu

This clinic is incorporated not for profit under the laws of Ohio. Its purpose as set forth in the charter is briefly 'to operate, manage and own clinics, dispensaries and hospitals for reception, medical treatment and care of patients'. This clinic is owned and operated by a number of physicians and one dentist. This clinic is admittedly a group practice. The clinic as such owns the dental

equipment, buys all supplies and pays all bills. The cash receipts, including those from the operation of the dental office, are deposited in a common fund from which all expenses are paid. The owners of the clinic are paid by means of a drawing account on some undesignated point system. The clinic employs a number of other physicians on a salary basis, and it may be observed here that the dentist is sharing in this expense, as well as in the income provided through the efforts of these physicians; likewise the dentist as sharing in the income and expenses incident to the efforts of the physicians. All other salaries are paid by the clinic. In addition to the clinic's name on the building, letterheads, etc., the name of the dentist also appears on the outside of the building.

"E Clinic

This clinic is not incorporated. A number of physicians and dentists occupy the same building, and this group is nominally titled 'The E Clinic'. Each dentist and physician has his own separate practice, but the waiting room, receptionist, bookkeeper and stenographer are shared by all and paid for by the clinic. Monthly each doctor is assessed his proportionate share of the expenses. All of this group use the same stationery, headed 'E Clinic'. Receipts for all work are given in the name of the clinic, and in some cases the services rendered by them, medical or dental, are billed in the name of the clinic. In addition to the name of the clinic appearing about the building, in directories, etc. the names of the individual dentists or physicians also appear.

"L Clinic

This clinic is incorporated not for profit under the laws of the State of Ohio. Its purpose as set forth in its charter are similar to those hereinbefore referred to. This clinic is owned by several physicians. The clinic pays for the bookkeeping and billing, and buys all dental supplies, and pays all expenses, including the salary of the dental assistant. The dentist owns the dental equipment and receives a depreciation allowance from the clinic. He then divides the net profit from the operation of the dental office with the clinic, and from his share the dentist employs another dentist. In addition to the display of the name of the clinic, the names of the dentists employed there also appear on the outside of the building.

"The question confronting the Ohio State Dental Board is whether the dentists connected with these clinics are violating the provisions of the dental law, particularly Sections 1329 and 1329-1, General Code."

At the outset of your above request it is stated that, in view of the manner in which certain clinics are being conducted, there is some con-

cern as to "the legality of their operation." In this connection it appears that three of said clinics are corporations not for profit whereas in one instance a number of physicians and dentists occupy the same building and, to use your language, "this group is nominally titled 'The E Clinic'."

As a general proposition neither a corporation nor any other unlicensed person or entity may engage in the practice of dentistry, medicine or surgery or any other professions through licensed employes. In respect of corporations it might be noted that Section 8623-3, General Code, provides inter alia:

> "A corporation *for profit* may be formed hereunder for any purpose or purposes, other than for carrying on the practice of any profession,* * *" (Emphasis added.)

Two decisions of our Supreme Court hold that a corporation *for profit* may not engage in the practice of a profession. See State, ex rel. Harris v. Myers, 128 O. S. 366 and State, ex rel. Bricker v. Buhl Optical Co., 131 O. S. 217. Cf. Youngstown Park & F. Street R. Co. v. Kessler, 84 O. S. 74. A corporation *not for profit* does not, of course, have the same internal structure as a corporation for profit. But it is felt that no valid argument can be advanced why the reasoning of the court in State, ex rel. Harris v. Myers, supra, and State, ex rel. Bricker v. Buhl Optical Co., supra, would not be equally applicable in the case of a corporation not for profit. In passing it might be pointed out that corporations of the kind last noted are, except in those instances where special provision is made, required to be organized pursuant to Section 8623-97 et seq. of the General Code.

Bearing directly on the proposition that a corporation not for profit may not be chartered to engage in the practice of a profession is Dworken v. Department House Owners Assn., (1930) 28 N. P. (ns) 115. In referring to the purpose clause of the defendant corporation, which clause contained among others this provision *"and to furnish such legal service to its members as the Association* may deem advisable" the court said:

> "That the Secretary of State had no authority to issue a charter for a corporation with one of its purposes and objects such as is represented in the language italicized, there can be no doubt or dispute."

With the foregoing in mind what is the situation with respect to the clinics mentioned in your inquiry so far as concerns "the legality of their

operation"? It is certainly apparent that said clinics, in the light of the language contained in their respective articles of incorporation and set out in part in your inquiry, were not created for the purpose of engaging in the practice of dentistry. Consequently it cannot be maintained that the Secretary of State had no authority to issue charters for said corporations. In other words the statement of the court in Dworken v. Department House Owners Assn., supra, which has been set out above, would have no application so far as concerns the clinics to which you have referred.

There remains for consideration, then, whether the manner in which said clinics are being operated may reasonably lead to the conclusion that these *corporations* are engaged in the practice of dentistry. Although one clinic is not incorporated my remarks will, in the main, be equally applicable thereto. It seems that some confusion has resulted by reason of the fact that said corporations have not been looked upon as entities separate and apart from the individuals who may be identified therewith whether as employes or otherwise. Perhaps the following excerpt from State, ex rel. Sager v. Lewin (1907) 128 Mo. App. 149, 106 S. W. 581, may serve to illustrate the point:

> "'* * * 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.*'" (Emphasis added.)

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. Department 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 circumstances 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, said 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.

Reference will now be made to Section 1329, General Code, which enumerates certain acts that shall be regarded as constituting the practice of dentistry. That section, while somewhat lengthy, will be quoted in full. It provides:

> "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 employes 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."

This section was under consideration in my opinion No. 2235, found in Opinions of the Attorney General for 1947, page 467, wherein it was said:

"* * * 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. * * *"

It will be noted that reference is made to charitable organizations but in that connection I do not understand that the clinics mentioned in your inquiry necessarily fall into such classification. As stated in City Hospital of Akron v. Lewis, 47 O. App. 465, 470:

> "A corporation not for profit—that is, one not engaged in conducting a business—may or may not be a public charity; but a corporation for profit cannot be a public charity, * * *."

As has been suggested, none of the clinics to which you have called attention can be regarded as engaged in the practice of dentistry. By that I mean that no clinic as a legal entity, is either a manager, proprietor, operator or conductor as those terms are defined by Section 1329, General Code. Nor may it be successfully asserted that any licensed physician is either a manager, proprietor, etc. This narrows the issue then as to whether any dentist who may be connected with any of said clinics is subject to the provisions of Section 1329-1, General Code. Said section reads:

> "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."

The recited factual situation is such that it cannot reasonably be asserted aforesaid Section 1329-1, General Code, is being violated in that a dentist is practicing or offering to practice dentistry "under the name of any company, association or corporation." Nor does it appear that a dentist is *advertising* his name with any particular office without being personally present therein a majority of his time. Nor does it appear that other prohibited acts are in fact being committed.

One further matter remains for consideration and is the subject of

comment because of what appears to be a suggestion that certain physicians and dentists are improperly dividing or sharing fees. The practice of dentistry and of medicine being separate and distinct professions, the relationship of a dentist to a physician, and conversely, would be no different from that of a dentist to an unlicensed person so far as concerns the dividing of fees. The professional status of one or the other of the parties would not serve the purpose of legitimatizing an arangement which, on other considerations, would be offensive to the law. But I am unable to conclude, *on the facts recited,* that the situation is one wherein there is in fact any division of fees between a physician and a dentist.

If it can be maintained that there is a situation involving a dividing of fees, the arrangement that exists in the case of "Clinic Cu" would probably present the strongest set of facts to support such argument. But the so-called "undesignated point system" whereby earnings are determined strikes me as merely a convenient arrangement whereby each party thereto realizes an amount approximating the amount of his earnings on account of services performed. In other words, the point system is merely a yardstick for measuring purposes. It would be difficult to visualize a situation where a dentist, in his relation to a physician, realizes by way of net earnings an amount disproportionate to the services rendered. It does not tax the imagination to think that any such arrangement would be of long duration—it would be subject to adjustment in short order.

Now take the case of "Clinic L" wherein, if there is what might be regarded as a division of net profits, it would seem that a dentist is not, if the matter is analyzed and looked at in its proper perspective, participating in any division of fees with a physician. This opinion, however, is not to be interpreted as sanctioning any arrangement whereby a dentist is authorized to divide or split fees with an unlicensed person. I am merely holding that *on the facts recited* in your inquiry I do not believe that there is in actuality any division of fees.

In specific answer to your inquiry you are therefore advised as follows:

The clinics referred to in your above request are not engaged in the practice of dentistry as defined by Section 1329, General Code, nor are the dentists connected therewith violating the provisions of Section 1329-1, General Code.

Respectfully,

HUGH S. JENKINS,
Attorney General.