

1961

MEDICINE—PRACTICE OF—GRADUATE PHYSICIANS—EMPLOYED AS INTERNS OR RESIDENTS BY HOSPITAL—MEDICAL AND SURGICAL TREATMENT TO CHARITY PATIENTS—SUPERVISION, HOSPITAL STAFF PHYSICIANS—MEDICAL AND SURGICAL TREATMENT TO PATIENT IN ABSENCE OF ATTENDING PHYSICIAN—IN PARTIAL COMPENSATION, INSTRUCTION IS GIVEN BY HOSPITAL STAFF PHYSICIANS—EMPLOYEES ASSIST PHYSICIANS IN TREATMENT OF PATIENTS—HOSPITAL EMPLOYER NOT ENGAGED IN PRACTICE OF MEDICINE—SECTIONS 1286, 1287, HOSPITAL—EMPLOYEES G.C.

SYLLABUS:

Where graduate physicians are employed as interns or residents by a hospital under an arrangement whereby such employes (1) give medical and surgical treatment to charity patients under the supervision of hospital staff physicians, (2) give emergency medical and surgical treatment to any patient requiring it, even in the absence of the attending physician, and (3) in partial compensation for such services, such employes are permitted to receive instruction in medical and surgical practice from the several hospital staff physicians, during the course of which instruction they assist such staff physicians in the treatment of all types of patients, the hospital-employer is not engaged in the practice of medicine as defined in Sections 1286 and 1287, General Code.

Columbus, Ohio, October 14, 1952

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

Dear Sir:

Your request for my opinion reads as follows:

“On August 20, 1952, you forwarded to me an opinion (No. 1751) with reference to the practice of medicine by hospitals.

“Since then, we are advised that there is a feeling in some quarters that the principle of that opinion would prevent the employment by hospitals of residents and interns. We had not so construed the opinion but this is of such importance that it is necessary to have the point clarified.

“Many hospitals employ residents and interns. Residents and interns are doctors who have graduated from medical school and

are in process of completing their general education, in the case of interns or receiving training in a specialty in the case of residents.

“Normally, the hospitals furnish room and board to residents and interns and pay them a stipend. These expenditures are, of course, recovered by the hospital through its charges to patients for room, board and the like, or from endowment funds or from whatever source they receive funds for operating expenditures.

“The interns and residents, for the purpose of training, assist the doctors of the staff of the hospital on all types of patients. They frequently perform actual operations and the like on charity patients under the supervision of the staff and, in emergencies in the absence of the attending physician, may perform services for any patient in the hospital. All of these activities, however, are to enable them to complete their education. Of course, in addition to the foregoing, they may receive from the doctors of the staff formal instructions.

“It is possible that an institution may employ doctors under the guise of residents for the purpose of actually providing medical services to patients for compensation. I know of no such instance, however.

“I would appreciate receiving your opinion whether, under these circumstances, it is lawful for hospitals to employ residents and interns.”

The practice of medicine is defined in Section 1286, General Code, which reads as follows :

“A person shall be regarded as practicing medicine, surgery or midwifery, within the meaning of this chapter who uses the words or letters, ‘Dr.,’ ‘Doctor,’ ‘Professor,’ ‘M.D.,’ ‘M.B.,’ or any other title in connection with his name which in any way represents him as engaged in the practice of medicine, surgery or midwifery, in any of its branches, or who examines or diagnosis for a fee or compensation of any kind, or prescribes, advises, recommends, administers or dispenses for a fee or compensation of any kind, direct or indirect, a drug or medicine, appliance, application, operation or treatment of whatever nature for the cure or relief of a wound, fracture or bodily injury, infirmity or disease, provided, however, that the treatment of human ills through prayer alone by a practitioner of the Christian Science Church, in accordance with the tenets and creed of such church, shall not be regarded as the practice of medicine; and provided further that sanitary and public health laws shall be complied with, and that no practices shall be used which may be dangerous or detrimental to life or health and that no person shall be denied the benefits of accepted medical and surgical practices.

“The use of any such words, letters or titles in such connection or under such circumstances as to induce the belief that the person who uses them is engaged in the practice of medicine, surgery or midwifery, shall be prima facie evidence of the intent of such person to represent himself as engaged in the practice of medicine, surgery or midwifery.”

It could possibly be contended that an uncompromisingly strict and literal construction of this language might result in the conclusion that where interns and residents are employed by a hospital, and where they give medical treatment to non-charity patients, the hospital itself would be engaged in the practice of medicine. It is very seriously to be doubted, however, whether any such strict and literal interpretation can be justified in any circumstances.

In the first place, it is to be remembered that the statutory definition of the practice of medicine must necessarily be applied in the interpretation of Section 12964, General Code, a criminal statute denouncing the offense of practice without a license; and penal statutes must be strictly construed against the sovereign.

Moreover, the employment of interns and residents by hospitals has been an accepted feature of the system of medical education for nearly fifty years. This fact can scarcely have failed to come to the attention of the General Assembly during this period, and the fact that no legislative action has been taken to restrict or prohibit the practice must be taken as a persuasive indication of legislative approval of it. It appears from your inquiry that your own board has entertained identical views during such period, and this administrative interpretation, thus long continued, is “to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative so to do.” *Industrial Commission v. Brown*, 92 Ohio St., 309, 311.

Another important administrative interpretation of Section 1286, General Code, as relating to the practice of interns and residents as hospital employes is found in Opinion No. 377, Opinions of the Attorney General for 1917, p. 1021. The question there under scrutiny, as stated by the writer, p. 1023, was as follows :

“Your question resolves itself into this, can the receipt of board, lodging, laundry, uniform, instruments, and allowance for incidental expenses from a hospital by holders of interne appointments be considered as a practice of medicine within the meaning of Section 1286 G. C.”

The conclusions reached by my predecessor on this question were stated as follows, p. 1024 :

“Do any of the items mentioned in your communication come within these definitions of the words ‘compensation’ or ‘fee’? Are any of these items furnished to the interne given to him to compensate him for his labor, or as a recompense for his services? I think not. There is a different reason, it seems to me, why the hospitals furnish these items to their internes; for instance, board and lodging is furnished, not as compensation, but is given so that the interne will be at the hospital at all times. *The very nature of his duties requires this so that he may be there to attend to any emergency that may arise.* Other items are given him to save him from the extraordinary expense he would be put to by reason of his employment. A fee or compensation, to my mind, implies something more than merely repaying one for the expense he has been put to in the service of another, or given to him with a view of saving him from expense while in the service of another. A fee or compensation implies a net gain of something of value, money, over and above such expense.

“Answering your question specifically, I am of the opinion that board, lodging, laundry, instruments, uniforms and allowance for incidental expenses, given to holders of interne appointments, cannot be construed to be salary under the resolution of the state medical board, herein quoted, or *the receipt of the above mentioned items cannot be considered as a practice of medicine within the meaning of section 1286 G. C.*” (Emphasis added.)

The reference in the quotation above to emergency medical treatment is of some significance in view of the statement in your inquiry descriptive of the duties of interns and residents. It appears that such appointees (1) perform surgical operations on charity patients under the supervision of the hospital staff physicians, (2) render emergency treatment to any hospital patient, even in the absence of the attending physician, and (3) in partial compensation for these services, such appointees receive instruction in medical practice from the several staff physicians during the course of which they “assist the doctors of the staff of the hospital on all types of patients.”

As to the first category of services above listed, it is clear that no question of impropriety can be raised since the statutory definition of “practicing medicine” includes the requirement of a “fee or compensation,” an element wholly lacking in charity cases.

As to emergency treatment of other patients, we find the following provision in Section 1287, General Code:

“Nothing in this chapter shall prohibit service in case of emergency, or domestic administration of family remedies. * * *”

This statutory provision appears to me to dispose completely of any question which could possibly be raised with reference to emergency medical treatment, even of so-called “pay patients,” administered by interns or residents.

As to the assistance rendered to staff physicians in the treatment of “pay patients,” I am unable to perceive that this presents any particular difficulty. It is to be kept in mind that the intern in such cases is acting as *assistant* to and under the *supervision* of the physician who is being compensated for the medical services which are thus being jointly rendered. None of this compensation accrues either to the intern or to the hospital. In such case the intern must be regarded as the “borrowed” or “temporary servant” of the attending physician, even though the intern is technically the employe of the hospital. Although the decisions on the subject are not uniform, there is considerable judicial authority in recognition of the “temporary servant” concept in the case of hospital employes, and the supervising physician, rather than the hospital, has been held responsible for the temporary servant’s negligent performance of duty. 41 American Jurisprudence, 223, 224, Section 112; 31 Ohio Jurisprudence, 467, Section 207.

There is a much more cogent reason, however, why the work of interns and residents in assisting staff physicians in the treatment of “pay patients” cannot be supposed to constitute medical practice on the part of the hospital-employer. Such employes in the usual case are paid only a nominal compensation and in no case, I am informed, is the compensation sufficient to induce the appointee to remain in such employment beyond the period required to master the general or special subjects and techniques in the study and practice of which he is engaged during the period of his appointment. In this situation it is clear that the privilege of learning by the process of assisting staff physicians is the principal inducement for interns and residents to seek such employment, and that instead of such employes being paid by the hospital to perform these services, the privilege of so serving is itself the principal compensation *for the rendition by interns and residents of other services to the hospital.*

Accordingly, since no "fee or compensation of any kind" is paid either to the hospital or to its employes for the assistance thus rendered to staff physicians, it is abundantly clear that the activities of interns and residents in this regard do not constitute the practice of medicine on the part of the hospital which employs them.

For these reasons it is my opinion, in specific answer to your inquiry, that where graduate physicians are employed as interns or residents by a hospital under an arrangement whereby such employes (1) give medical and surgical treatment to charity patients under the supervision of hospital staff physicians, (2) give emergency medical and surgical treatment to any patient requiring it, even in the absence of the attending physician, and (3) in partial compensation for such services, such employes are permitted to receive instruction in medical and surgical practice from the several hospital staff physicians, during the course of which instruction they assist such staff physicians in the treatment of all types of patients, the hospital-employer is not engaged in the practice of medicine as defined in Sections 1286 and 1287, General Code.

Respectfully,

C. WILLIAM O'NEILL
Attorney General.