Note from the Attorney General's Office:

1962 Op. Att'y Gen. No. 62-3197 was overruled by
1970 Op. Att'y Gen. No. 1970-153.

3197

A HOSPITAL ESTABLISHMENT PURSUANT TO 339.01, R.C. MAY NOT PRACTICE MEDICINE—A HOSPITAL ENGAGED IN THE UNLAWFUL PRACTICE OF MEDICINE—A PHYSICIAN WORKING FOR SUCH A HOSPITAL WOULD BE GUILTY OF GROSSLY UNPROFESSIONAL CONDUCT AND HIS LICENSE SUBJECT TO REVOCATION—OPINION 1751, OAG, 1952, OPINION 3031, OAG, 1962, §339.01, REVISED CODE.

SYLLABUS:

1. A hospital, including a county hospital established pursuant to Section 339.01, *et seq.*, Revised Code, may not practice medicine.

2. A hospital may maintain an emergency room and may, as a charity, make available in connection with such room the services of a licensed physician; however, when a hospital, in connection with the operation of an emergency room, charges a fee for the professional services of a licensed physician and said physician is paid a salary by the hospital for his services, such hospital is engaged in the unlawful practice of medicine.

3. Said physician, when employed by such hospital under such arrangement, because of the division of professional fees charged for his services, would be guilty of grossly unprofessional and dishonest conduct as described in Section 4731.22, Revised Code, and his medical certificate would be subject to revocation.

Columbus, Ohio, August 10, 1962

Hon. John G. Peterson, Prosecuting Attorney
Greene County, Xenia, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

> "I am enclosing herewith the original of the letter received this date from Greene Memorial Hospital, in which they request me to obtain an opinion from you as to the legality of placing a physician on the hospital's payroll.
>
> "I am familiar with O.A.G. numbered 3031, dated May 29, 1962, and have reviewed that opinion with the hospital administrator."

The letter enclosed in your request from Greene Memorial Hospital reads as follows:

"The Board of Trustees of Greene Memorial Hospital would like to request you to request an opinion from the Attorney General of the State of Ohio as to the legality of placing a physician on the Hospital's payroll. Briefly, this is the information: We have employed a young physician from Wright Patterson Air Force Base who is licensed in the State of Ohio and completed his studies at Western Reserve in July of 1961.

"This individual cannot go into private practice as long as he is with the Air Force but due to the fact that he is not in the clinical aspect of medicine, he applied for a position at Greene Memorial to take call in the Emergency Room and also to treat those patients under the supervision of the admitting physician.

"When he treats these patients, the Hospital makes a charge to the patient of $5.00 in addition to the Emergency Room rate and this is called a professional fee. Hence, the opinion needed is may the hospital legally charge an additional fee over the Emergency Room rate for professional services rendered by the Doctor, which we collect and deposit in our Operating Fund, and, if so, are we engaging in the practice of medicine.

"This physician receives a salary of $110 per month for his services from the Hospital's payroll. He is not a member of the Medical Staff but is considered, in our opinion, an employee taking medical directives for the services performed from the Active Staff and Administrative directive from the Hospital.

"The primary purpose of placing this physician on the payroll is to render better Emergency Room coverage for the Community. A $5.00 fee is charged and put in the Hospital's Operating Fund out of which his salary is paid. There is no motive for profit or gain involved.

"An early reply to this request would be appreciated."

The law in Ohio is well settled that a corporation, whether organized for profit or not for profit, may not engage in the practice of medicine. Opinion No. 1751, Opinions of the Attorney General for 1952, page 608; Opinion No. 3031, Opinions of the Attorney General for 1962, issued May 29, 1962; 41 American Jurisprudence 148, Physicians and Surgeons, Section 20. While this maxim may be somewhat tempered by the provisions of Chapter 1785., Revised Code, such provisions are not in question in this opinion.

I presume that Green Memorial Hospital is a county hospital established pursuant to the provisions of Section 339.10, *et seq.*, Revised Code. As such, said hospital is not in a true sense a corporation; however, I do

not believe that authority is needed in order to conclude that such hospital, as hospitals organized as corporations, could not lawfully practice medicine in the State of Ohio.

A hospital is defined in 26 American Jurisprudence 588, Hospitals and Asylums, Section 2, as follows:

> "In its widest sense, a hospital is a place appropriated to the reception of persons sick or infirmed in body or in mind. In Great Britain the word 'hospital' has been used in some instances to denote institutions in which poor children are fed and educated. But this is not its ordinary meaning. More commonly, the word is applied to a *building* founded through charity, where the sick and disabled may be treated solely at their own expense, or at the expense of the corporation. * * *" (Emphasis added)

No research is needed in order to be aware of the fact that medical science in the last fifty years has taken long strides in advancing the technique of treating diseases and illnesses, which advances have benefited society by prolonging and saving lives which theretofore were doomed to be lost. Similarly, it is generally understood that such advances have required the expenditures of large sums of money for maintaining up-to-date equipment and facilities and that these items are usually found in larger hospitals in a community. Such changes, however, have in no way affected the legal character of the practice of medicine in Ohio. It remains a profession which can be served only by a natural person duly licensed by the State of Ohio.

Accordingly, while the trustees of a hospital are in a position to render great service to the public, it is not the function nor the duty of the hospital trustees to render medical service. As can be seen by the definition of the word hospital quoted above, a hospital is the place where such service can be rendered. The hospital in a sense renders service to medicine, as opposed to medical service.

The hospital is, of course, entitled to compensation for the use of its equipment, and in this respect, attention is called to the fourth paragraph of the syllabus of Opinion No. 1751, Opinions of the Attorney General for 1952, *supra,* which reads as follows:

> "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-profes-

sional 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."

Also on this point, attention is directed to the third paragraph of the syllabus of Opinion No. 3031, Opinions of the Attorney General for 1962, *supra,* which reads as follows:

"3. The determination of whether the employment of a licensed dentist by a hospital corporation causes such corporation to be practicing dentistry as defined in Section 4715.01, Revised Code, is based upon whether the arrangement is one in which a profit or gain is a moving factor causing such employment. (Opinion No. 2235, Opinions of the Attorney General for 1947, page 468, approved and followed.)"

In the course of Opinion No. 3031, *supra,* and in connection with the above quoted paragraph of the syllabus, I said:

"There is, of course, a myriad of possible varying fact situations involving the hospital employment of a licensed dentist, and the lawfulness of each would rest upon the true purpose and the desired results which caused such situation to arise. Generally speaking, hospitals are considered as charities, 26 American Jurisprudence, 588, Hospitals, Sections 2 through 8. A licensed dentist could be employed by a hospital to render dental treatment for the poor and indigent and would not thereby be in violation of Section 4715.01, *supra,* while the same dentist at the same hospital could violate said statute if the hospital collected a fee for *the professional services of the* dentist. In the latter instance the hospital would be considered an 'operator' within the purview of Section 4715.01, *supra,* while in the former it would not.

"In Opinion No. 1751, Opinions of the Attorney General for 1952, page 608, one of my predecessors considered a question dealing with the unlawful practice of medicine by a hospital, and after concluding that no corporation, whether for profit or not for profit, could practice medicine in Ohio, my predecessor said, at page 620 of said opinion:

'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 medicical 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.

"* * * * * * * * *"

The emergency room of a hospital is perhaps the most dramatic example of the charitable nature of a hospital. There can be no question that the services of the emergency room are provided in order that the public, indigent or otherwise, may have available to it in times of emergency the facilities and equipment of such hospital. An emergency room, as such, does not violate the basic principle that a hospital may not practice medicine.

It may be considered necessary to the maintenance of an emergency room that a trained physician be available to render service to the persons who find it necessary to seek emergency aid. As can be seen by the above quoted matter, the prohibition against the unlicensed practice of medicine does not exclude the performance of an act of charity. Accordingly, where the hospital is providing as a charity, medical service in connection with the operation of its emergency room, there is no unlawful practice of medicine.

Applying this theory to the facts set forth in the letter of Greene Memorial Hospital, I am unable to conclude that the medical services

given in connection with the operation of such emergency room can be considered a charity in light of the fact that the hospital levies a fee of $5.00 for such services. The charging of such a fee is totally inconsistent with the theory of charity.

It should also be noted that the State Medical Board may revoke the license of any physician who is found to be guilty of grossly unprofessional or dishonest conduct, and such conduct is defined by Section 4731.22, Revised Code, as including any division of fees or charges or any agreement or arrangement to share fees or charges made by any physician with any other person. An arrangement whereby the hospital charges a professional fee for the services rendered by a doctor who is paid a fixed salary by the hospital would, in my opinion, cause the doctor to be guilty of grossly unprofessional or dishonest conduct and therefore subject to the loss of his medical certificate.

It should also be pointed out that the practice of medicine without a certificate of the State Medical Board is, pursuant to Section 4731.41 and 4731.99, Revised Code, a crime. One who commits the crime of practicing medicine without a license, is, as a general rule, precluded from recovering compensation from his "patient" for his services, 42 Ohio Jurisprudence 691, Physicians and Surgeons, Section 168. It would, therefore appear that Green Memorial Hospital would not be entitled to recover the $5.00 fee charged to the patient for professional services as a result of the use of the emergency room.

In accordance with the foregoing, I am of the opinion and you are advised:

1. A hospital, including a county hospital established pursuant to Section 339.01, *et seq.*, Revised Code, may not practice medicine.

2. A hospital may maintain an emergency room and may, as a charity, make available in connection with such room the services of a licensed physician; however, when a hospital, in connection with the operation of an emergency room, charges a fee for the professional services of a licensed physician and said physician is paid a salary by the hospital for his services, such hospital is engaged in the unlawful practice of medicine.

3. Said physician, when employed by such hospital under such arrangement, because of the division of professional fees charged for his

services, would be guilty of grossly unprofessional and dishonest conduct as described in Section 4731.22, Revised Code, and his medical certificate would be subject to revocation.

Respectfully,
MARK MCELROY
Attorney General