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A CORP. EMPLOYING LICENSED DENTIST UNDER ARRANGEMENT WHICH CONTEMPLATES GAIN AS OPPOSED TO CHARITY IS UNLAWFUL—DENTIST OPERATING UNDER SUCH ARRANGEMENT IS SUBJECT TO REVOCATION OF LICENSE—DETERMINATION OF SUCH LEGALITY OR ILLEGALITY IS CENTERED ON PROFIT-MOTIVATION—NON-PROFIT ORGANIZATION MAY PRACTICE DENTISTRY—§4715.01, R.C., OPINION 2235 OAG 1947, OPINION 1751 OAG 1952.

SYLLABUS:

1. Except as provided in Chapter 1785., Revised Code, dealing with professional associations, a corporation whether organized for profit or not for profit, which employs a licensed dentist under an arrangement which contemplates profit or gain, as opposed to charity, is a "manager, proprietor, operator, or conductor" within the meaning of said terms as defined in Section 4715.01, Revised Code, and since such corporation could not be licensed to practice dentistry, its operation would be unlawful.

2. Under Section 4715.01, Revised Code, the license of a licensed dentist who is employed by such a corporation is subject to revocation.

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.)

4. Where a non-profit corporation is operated in a fashion where its members or employees practice dentistry for which fees are charged by or through such corporation, and if such corporation makes distribution of such fees as salaries and bonuses, such corporation is practicing dentistry as defined by Section 4715.01, Revised Code.

Columbus, Ohio, May 29, 1962

Donald E. Bowers, D.D.S., Secretary Ohio State Dental Board
322 East State Street, Columbus 15, Ohio

Dear Sir:

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

"The Ohio State Dental Board respectfully requests your opinion to aid it in determining whether certain clinics and the dentists operating therein are carrying on their activities in com-

pliance with the provisions of the Revised Code of Ohio, and more particularly Chapter 4715 together with Am. S. B. No. 550 recently enacted by the General Assembly of Ohio.

"The structure and methods of operation of two such clinics, as reported to us, are here presented for your consideration.

"The E Clinic Foundation is incorporated 'not for profit' under the laws of Ohio.

"On April 21, 1952, we were informed that, 'the E Clinic is now established on the basis of a Foundation. There are 22 stockholders, (mostly medical men) including one dentist, and each paid in $10,000 less the appraisal value of any equipment they might have previously owned. Each of these individuals then receives a salary from the Clinic. The Clinic owns all equipment.' On October 14, 1957, one of the dentists employed by the Clinic informed us that the Clinic is no longer a Foundation, thereby losing some of their tax exemption privileges. The dentist further stated that so far as he and the other dentists are concerned their status is the same as previously reported.

"So far as we know now the operation of the Clinic has not changed. The directing head of the Clinic is a physician. The dentists are employed by the Clinic on a salary basis plus bonuses and other fringe benefits. The Clinic owns all equipment, purchases all supplies, and pays all bills. The Clinic bills patients and collects all fees for services rendered. The statement form contains the following language: 'Please detach and mail this stub with your remittance payable to E Clinic Foundation.' We are not certain at this time whether fees for dental services are fixed by the Clinic or by the dentists.

"The names of the dentists and other professional persons are displayed about the premises.

"The D Clinic Foundation is incorporated 'not for profit' under the laws of Ohio.

"This Foundation operates three separate clinics. As late as September, 1961, we were informed that a dentist is located at the H Clinic. It was learned that the dentist is on a salary basis plus bonus paid by the Clinic. The Clinic owns all equipment, purchases all supplies, pays the salary of the dental assistant, and pays all other bills in connection with the dental offices. The Clinic bills patients and collects all fees for services rendered. The statement forms are imprinted 'D Clinic' and contains the following: 'Professional Services by..... D.D.S., Make checks payable to D Clinic.'

"The dentist sets his own fees and selects his own assistant. He has the authority to select any other licensed dentist to oper-

ate within the Clinic which he has done. The names of the dentists are listed on the building directory, along with the other professional persons under the heading, 'H Clinic, D Clinic Foundation.'

"There are no licensed dentists among the stockholders. The present dentists have no written agreement or contract with the Clinic.

"In the event it is determined that the practice of the clinics and/or dentists therein is in violation of existing laws, what effect, if any, would such determination have upon the operation of hospitals and other institutions which maintain a dental department staffed by licensed dentists or dental interns?"

It is apparent that your question in no way deals with corporations organized under Chapter 1785., Revised Code, dealing with professional associations, and the operation of such corporations will not be considered herein.

The practice of dentistry in Ohio is defined by Section 4715.01, Revised Code, which reads in part as follows:

"Any person shall be regarded as practicing dentistry, 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,
* * *

"Manager, proprietor, operator, or conductor as used in this section includes any person:

"(A) Who employs licensed operators;

"(B) 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;

"(C) 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 for the use of licensed operators; provided 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."

Statutory language nearly identical to that found in Section 4715.01, *supra* was considered by one of my predecessors in Opinion No. 2235, Opinions of the Attorney General for 1947, page 468, wherein it is said, beginning at page 472:

"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 I.) reference is made to a person who employs licensed operators being included within the definition of the term manager, etc. at neither place is mention made of such employment being with a view to profit. While paragraph numbered I. *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.

"* * * * * * * * *"

(Emphasis added)

I concur with the above conclusions and, therefore, the determination of whether the "clinics" in question are "operators" under Section 4715.01, Revised Code, must be based upon whether their operation is one which contemplates profit or gain. Both clinics referred to in your request are

incorporated as non-profit corporations under the general corporation laws of Ohio. As shown by the articles of incorporation on file in the office of the secretary of state, Clinic E was so incorporated in 1949, and Clinic D in 1947. The purpose clauses of the two corporations, although they are worded somewhat differently, reveal that the clinics were organized for the establishment and conduct of hospitals, to carry on scientific and medical research, and to do all things that hospitals ordinarily do, or may do. The purpose clause of Clinic E also contains the following language:

> "* * * but if any person is financially unable to pay for said services, care, treatment and accommodations, he shall receive the same free of charge; * * *"

The purpose clause of Clinic D, on the other hand, differs from that of Clinic E in that it is stated therein:

> "* * * conducting a training school for nurses and granting diplomas to nurses on graduating therefrom; conducting a post-graduate and pre-graduate medical school for doctors, and granting diplomas to doctors graduating therefrom; * * *"

Section 4715.01, *supra,* applies to "any person." Since a corporation, under division (B) of Section 1.02, Revised Code, is considered as being a "person," the corporations in question are subject to the provisions of said Section 4715.01. Nor can it be said that the above purpose clauses are dispositive of the nature of the corporations. In *The State ex rel Russell, Jr. et al.* v. *Sweeney, Secretary of State,* 153 Ohio St. 66, with reference to a purpose clause of a non-profit corporation, the court said at page 69:

> "Are these self-designating statements conclusive as to the character of the proposed corporation?
>
> "This court has followed the general rule by answering this question in the negative. In his opinion in the case of *Celina & Mercer County Telephone Co. v. Union-Center Mutual Telephone Association,* 102 Ohio St., 487, 133 N.E., 540, 21 A.L.R., 1145, Hough, J., said: 'How may it be determined whether a corporation or association is one for profit or not for profit? Does the filing of articles of incorporation, in which the declaration is made that it is not for profit, and on which the charter is issued, govern or determine this question? Is the issuance or nonissuance of capital stock controlling, or is it whether a business is to be engaged in, and operated with consideration of the character of

that business and the method of conducting it, that is the true test? We think the latter.'

"To the same effect is the following restatement of the rule in the case of *Read v. Tidewater Coal Exchange, Inc.,* 13 Del. Ch., 195, 116 A., 898:

" 'Nor would a mere declaration in its certificate of incorporation that it was organized not for profit, be sufficient to stamp upon it a nonprofit character. In each case, when the corporation is examined, the true facts must be ascertained and the corporation judged accordingly, no matter what its scheme of operation, or its pretensions may be.' "

Looking to the facts as stated in your request it appears that the business operation of the clinics in question is strictly one in which the members of the corporation engage in the practice of a profession through the corporation. The corporation is apparently being used as a convenient device for the collection and distribution of fees, including fees for professional dental care, and such appears to be its actual purpose. Thus, based upon the interpretation of Section 4715.01, aforementioned, I must conclude that the clinics involved are "operators" within the meaning of the word used in said statute; but I wish to emphasize that this conclusion is reached based upon the facts stated in your request.

Since the corporations in question are not licensed, and such corporations obviously could not take the examination for a license described in Section 4715.11, Revised Code, it must follow that the operation of each is and must continue to be unlawful. Similarly, under the express provisions of Section 4715.01, *supra,* the license of any licensed dentist employed by said corporations is subject to revocation.

The second part of your inquiry deals with the lawfulness of the activities of licensed dentists and interns who are members of a staff of a hospital or similar institution. With respect to dental interns, Section 4715.16, Revised Code, which permits the practice of dentistry in a hospital or institution, is dispositive of your question. Said section reads in part as follows:

"* * * Any person receiving such dental intern certificate may practice dentistry only in the hospital or other institution designated on his certificate and only under the direction of a registered dentist who is a member of the dental staff thereof and only on bona fide patients of said hospital or institution and for only one year. Dental intern certificates may be revoked at any time by the board."

It will be noted that the above language, by reference to licensed dentists on the staff of hospitals, indicates a recognition that such persons may have a connection with such institutions. As has been pointed out earlier herein, under the provisions of the last paragraph of Section 4715.01, *supra,* a licensed dentist may not enter the employment of an unlicensed manager, proprietor, operator or conductor. However, as in the case of the clinics herein, the determination of whether such a professional person is violating the terms of said statutory prohibition lies in whether the business organization for which he is employed is a manager, proprietor, operator or conductor within the definition of said statute. In concurring with the statement found in Opinion No. 2235, Opinions of the Attorney General for 1949, *supra,* I have concluded that the determination of such latter question when raised as a result of the employment of a licensed operator, must rest upon whether, through the employment of such licensed dentist, the organization is providing dental care for profit or gain.

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 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.

"* * * * * * * * *"

(Emphasis added)

Your attention is also called to Opinion No. 4081, Opinions of the Attorney General for 1947, page 467.

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

1. Except as provided in Chapter 1785., Revised Code, dealing with professional associations, a corporation, whether organized for profit or not for profit, which employs a licensed dentist under an arrangement which contemplates profit or gain, as opposed to charity, is a "manager, proprietor, operator, or conductor" within the meaning of said terms as defined in Section 4715.01, Revised Code, and since such corporation could not be licensed to practice dentistry, its operation would be unlawful.

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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.)

4. Where a non-profit corporation is operated in a fashion where its members or employees practice dentistry for which fees are charged by or through such corporation, and if such corporation makes distribution of such fees as salaries and bonuses, such corporation is practicing dentistry as defined by Section 4715.01, Revised Code.

Respectfully,
MARK MCELROY
Attorney General