Opinion No. 58-167

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BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr., Assistant Attorney General

TO: R. C. Derbyshire, M. D., Secretary-Treasurer, New Mexico Board of Medical Examiners, Santa Fe, New Mexico

QUESTION

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If a hospital's medical staff renders certain pathological and radiological services and the hospital receives payment for said services, does such action constitute the illegal practice of medicine by the hospital?

CONCLUSION

Yes, but only if diagnosis or treatment are undertaken.

OPINION

ANALYSIS

This opinion request is prompted by virtue of the hospitalization contract offered to the public by a non-profit insurance company. The policy of the said company, in part, offers to its subscribers full payment for:

"The following services when rendered by a hospital as a regular Hospital Service customarily provided by the hospital in which the Subscriber is confined, and when the service is billed by, and payable to, the Hospital:

(a) Laboratory examinations (Pathological and Clinical)

(b) Electrocardiograms

(c) Electroencephalograms

(d) Basal metabolism tests or Iodine Uptake Tests

(e) Physiotherapy

(f) Oxygen and helium and administration thereof

(g) Anesthetics and administration thereof

(h) X-ray examinations

(i) Administration of blood, (but not including the cost of blood or blood plasma)

(j) Intravenous injections and solutions

(k) X-ray therapy and radiation therapy, insulin shock and electric shock."

The New Mexico Association of Radiologists and Pathologists takes the position that the above contract implies that X-ray and pathological procedures are hospital services rather than professional medical services since the hospitalization contract offers subscribers payment in full for X-ray and laboratory examination when rendered by a hospital and where services are billed by and payable to the hospital.

The foregoing presents the question for our determination, to-wit: Whether a hospital is engaged in the illegal practice of medicine if in fact it purveys to a patient in said hospital medical services in the form of pathological and X-ray procedures for compensation. The "practice of medicine" is defined in Section 67-5-10, N.M.S.A., 1953 Compilation, 1957 Supplement, in part as follows:

". . . to open an office for such purpose or to announce to the public or any individual in any way a desire or willingness or readiness to treat the sick or afflicted, or to investigate or to diagnose or, offer to investigate or diagnose any physical or mental ailment or disease of any person, or to suggest, recommend, prescribe or direct, for the use of any person any drug, medicine, appliance or other agency, whether material or not material, for the cure, relief or palliation of any ailment, or disease of the mind or body, or for the cure or relief of any wound, fracture or bodily injury or deformity, after having received, or, with the intent of receiving therefor, either directly or indirectly, any bonus, gift or compensation. . ."

Our Supreme Court has not interpreted the foregoing section or defined the term "practice of medicine." The section does prohibit the willingness or readiness to investigate or to diagnose or offer to investigate or diagnose any physical or mental ailment or disease by any person other than a licensed physician with the exception of those persons expressly excluded in the proviso to the section which does not include hospitals.

In construing a similar act, the Supreme Court of Iowa, in the case of State vs. Hughey, 208 Iowa 842, 226 N.W. 371, at page 846 of the State Reporter, held:

"The term 'practice of medicine' is defined by Section 2538. It is not confined to the administering of drugs. Under this statute, one who publicly professes to be a physician and induces others to seek his aid as such is practicing medicine. Nor is it requisite that he shall profess in terms to be a physician. It is enough, under the statute, if he

publically profess to assume the duties incident to the practice. What are 'duties incident to the practice of medicine'? Manifestly the first duty of a physician to his patient is to diagnose his ailment. Manifestly, also, a duty follows to prescribe the proper treatment therefor. If, therefore, one publicly profess to be able to diagnose human ailments and to prescribe proper treatment therefore, then he is engaged in the practice of medicine, within the definition of Section 2538."

From the foregoing, we believe, if one diagnoses a disease or ailment, such action certainly constitutes the practice of medicine.

The next question raised is whether laboratory and X-ray procedures are "treatment" or the "diagnosis of an ailment or disease." In Williams vs. Scudder, (Ohio) 113 N.E. 481, it was stated:

"Pathology relates to the nature, cause, progress, and symptoms of a disease. It deals with the objective analysis, a survey of the human body and its ailments or diseased organs and parts."

The Court at page 483, further stated:

"Every business and science has a language all its own. One of the first terms confronting us in the art of healing is the scientific term 'pathology,' which relates to the nature, cause, progress and symptoms of a disease. Surely no argument is needed to convince one that such knowledge is highly essential to a proper diagnosis; that is, the determination of the particular disease or ailment from which the patient is suffering. After determining such disease, then comes the application of the appropriate remedy.

"As to pathology there should be no substantial dispute between any of the different schools of the healing arts. It deals with the objective analysis, a survey of the human body and its ailments or diseased organs and parts. Likewise as to the diagnosis of the signs or symptoms, internal or external, connected with the diseased condition. These also are largely objective and the result of scientific survey."

In Granger vs. Adson, et al., 250 N.W. 722, a layman, who for a fee performed urinalysis and recommended treatment upon his findings, was held to be engaged in the practice of medicine.

We conclude that laboratory pathology consists of the diagnosis of human ailments and thus is the "practice of medicine."

We have found no legal definition of "radiology" or "X-ray therapy". The American College of Radiology defines the term as that branch of medicine which deals with the diagnostic and therapeutic application of radium energy, chiefly in the form of roentgen rays, radium and radioactive isotopes. It is the opinion of the Association that Radiology is a type of medical practice. We concur in this opinion.

We are aware of the fact that hospitals employ doctors and other professional personnel to supervise their laboratories. Further, that these laboratory procedures are essential to the proper operation of a modern hospital. Most hospitals, we understand, are nonprofit corporations. The question which, therefore arises is whether a corporation practices medicine when it employs licensed doctors to perform medical services as services of the corporation offered to the public. This question has been before a number of courts in the United States. In some cases, the courts have made a distinction between the practice of medicine and the furnishing of medical services by a corporation, and hold that a corporation, being incapable of practicing medicine, may supply the services of a licensed physician and, in so doing, is not practicing medicine in violation of law, State ex rel. Sager vs. Lewin, 128 Mo. App. 149, 106 S.W. 581; state Electro-Medical Institute vs. State, 74 Neb. 40, 103 N.W. 1078 State Electro-Medical Institute vs. Platner, 74 Neb. 23, 103 N.W. 1079. The courts of two states, New York and Virginia, have construed their statutes relating to the incorporation of hospitals as expressly allowing such hospital corporation under certain conditions to provide medical services through employed licensed physicians.

A review of the cases on the subject convinces us, however, that the views expressed by the courts referred to above are in the minority. The majority view throughout the United States is exemplified by the Colorado case of People vs. Painless Parker, 85 Colo. 304, which is often cited in other states as a leading case expressing the majority view. In that case at page 310, the Colorado Supreme Court said:

"But it may be said that this is a mere technicality because, in the nature of things, a private corporation, which is only an artificial person created by statute, cannot itself do dental work, and, therefore, if it has the right or possesses the power to practice dentistry at all, it must do so through the agency of its employees who are licensed dentists; which is based upon the false assumption that, since it is competent to engage in any ordinary calling or business just as fully and completely as a natural person may, therefore, it may engage in the practice of dentistry by employing licensed dentists to do the actual work which only dentists may do. We are not concerned now with an ordinary trade or calling. Law, medicine and dentistry are generally considered as learned professions. Neither is an ordinary trade or calling which all citizens alike may pursue. The state in its sovereign capacity is vested with the indefinable police power which includes the power to conserve and protect the public health. Only those who are qualified by statute and experience to practice dentistry may do so, if the legislature sees fit so to ordain. That body may lawfully provide, as it has done in Colorado, that only those who by study of the science and art of dentistry show that they are properly qualified, may practice dentistry."

The general rule regarding the practice of medicine by a corporation is stated at page 838 of 13 Am. Jur. as follows:

"While a corporation is in some sense a person and for many purposes is so considered, yet, as regards the learned professions which can only be practiced by persons who have received a license to do so after an examination as to their

knowledge of the subject, it is recognized that a corporation cannot be licensed to practice such a profession. For example, there is no judicial dissent from the proposition that a corporation cannot lawfully engage in the practice of law.

A corporation cannot be licensed to carry on the practice of medicine. **Nor, as a general rule, can it engage in the practice of medicine, surgery, or dentistry through licensed employees.** It is generally held that in the absence of express statutory authority, a corporation may not engage in the practice of optometry either directly or indirectly through the employment of duly registered optometrists." (Emphasis added)

We know of no statute in New Mexico which authorizes the corporate practice of medicine and hence we conclude that a corporation may not engage in the practice of medicine even through licensed employees. Since the relationship between a doctor and patient is a personal one, a hospital cannot and should not practice medicine and surgery. (See Rosare vs. Senger, Colo. 149 P. 2d 372.)

It has been suggested that the offering by a hospital corporation of the professional services of a radiologist and pathologist are traditional services of the hospital which have existed over such a long period of time as to allow an exception in favor of the employment of such licensed doctors by nonprofit corporations under our Medical Practices Act. With this, we cannot agree.

At 82 C.J.S. 760, the following language appears:

"Moreover, no matter how long the usage has been established, or how general the acquiescence in the customary construction, it will not be permitted to override the plain meaning of the statute; nor will the rule of practical construction apply where the ambiguity is merely captious and not serious enough to raise any reasonable doubt in a fair mind, reflecting honestly on the subject."

The Medical Practices Act of the State of New Mexico does not authorize, as we have previously indicated, the corporate practice of medicine. The Act refers to "persons" and places the practice of medicine on a personal basis. We realize that the hospitals of this state have and are rendering invaluable services to their patients. Without so concluding, conceivably a patient in a hospital receives better treatment from doctors employed by a hospital since the hospital's facilities are immediately available, but such practice is not authorized by the New Mexico Medical Practices Act. Such practice must be authorized by the Legislature. We know of no law, however, which would prevent a doctor from presently practicing medicine in a hospital as an independent contractor under an arrangement which expressly excludes any possibility of control by the hospital or any other unlicensed person over the professional activities of the doctor. Leasing of the hospital's laboratory and x-ray equipment is suggested as a possible solution to the problems raised herein.

By way of conclusion, we wish to make it clear, however, that the mere performance of mechanical or chemical tests or procedures do not, in our opinion, constitute the practice of medicine. If, therefore, an x-ray technician takes an x-ray photograph or if an employee of the hospital performs a test to ascertain chemical analysis, such would not be the practice of medicine. The legal authorities which we have examined clearly indicate that the practice of medicine is not reached until diagnosis or treatment is undertaken. To phrase it another way, so long as neither diagnosis or treatment are engaged in, we do not believe that the practice of medicine is involved.

This office realizes the gravity of the problem raised in the question originating this opinion. We have arrived at our conclusion after exhaustive research. The Attorneys General of four states have held that the conduct of laboratory and x-ray departments by nonprofit hospitals are the illegal practice of medicine.

As previously suggested, remedial legislation allowing hospitals to maintain laboratory and x-ray departments may be desirable, but requires legislative authorization and consent.