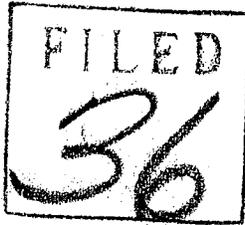


PHYSICIANS & SURGEONS:

Unlicensed physicians may not engage in practice of medicine, regardless of nature of employer or character of supervision.

PRACTICE OF MEDICINE:

DEFINITION OF "PRACTICE OF MEDICINE" :



March 29, 1955

Mr. John A. Hailey
Executive Secretary
State Board of Medical Examiners
Jefferson City, Missouri

Dear Sir:

This is in response to your request for opinion dated July 20, 1954, which reads as follows:

"The Missouri State Board of Medical Examiners hereby requests your opinion on the following points:

"1. A legal definition of the practice of medicine in the State of Missouri;

"2. Whether physicians who may be graduates of medical schools and licensed in some other state or country, but not licensed in the State of Missouri, may engage in the activities which fall within the definition of the practice of medicine;

"3. Whether such persons may engage in such activities under the supervision of a licensed physician; and

"4. Whether such unlicensed physicians may engage in the practice of medicine as will have been previously defined while in the employ of a medical school, private or state hospitals, or other institutions; * * * "

1. The law governing the subject of the practice of medicine and surgery in this state is found in Chapter 334, RSMo 1949. The following sections are particularly pertinent to your inquiry:

Section 334.010. "It shall be unlawful for any person not now a registered physician within the meaning of the law to practice

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medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of midwifery in the state of Missouri, except as herein provided."

Section 334.030. "1. Any person practicing medicine or surgery in this state, and any person attempting to treat the sick or other afflicted with bodily or mental infirmities, and any person representing or advertising himself by any means or through any medium whatsoever, or in any manner whatsoever, so as to indicate that he is authorized to or does practice medicine or surgery in this state, or that he is authorized to or does treat, the sick or others afflicted with bodily or mental infirmities, without a license from the state board of medical examiners shall, upon conviction, be adjudged guilty of a misdemeanor for each and every offense; and treating each patient shall be regarded as a separate offense; provided, that physicians registered on or prior to March 1, 1901, shall be regarded for every purpose herein as licensees and registered physicians under the provisions of this law.

"2. Any person filing or attempting to file as his own, a license of another or a forged affidavit of identification, shall be guilty of a felony and upon conviction thereof, shall be subjected to such fine and imprisonment as are made and provided by the statutes of this state for the crime of forgery in the second degree.

"3. Upon receiving information that any provision of this section has been or is being violated, the secretary of the state board of medical examiners shall investigate the matter and upon probable cause appearing, shall, under the direction of the board, file a complaint with the prosecuting or circuit attorney of the county or city where the alleged offense occurred."

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Section 334.150. "It is not intended by sections 334.010 to 334.180 to prohibit gratuitous service to and treatment of the afflicted, and sections 334.010 to 334.180 shall not apply to commissioned surgeons of the United States army, navy, and United States public health service while in the performance of their official duties, nor to any licensed practitioner of medicine and surgery in a border state attending the sick in this state; provided, he does not maintain an office or appointed place to meet patients or receive calls within the limits of this state; and provided, that such practitioner comply with the statutes of Missouri and the rules and regulations of the department of public health and welfare relating to the reports of births, deaths and contagious diseases, nor shall said section apply to the provisions of chapter 337, RSMo 1949. And sections 334.010 to 334.180 shall not apply to persons who endeavor to cure or prevent disease or suffering by spiritual means or prayer; provided, that quarantine regulations relating to contagious disease are not infringed upon; provided further, that no provision of this section shall be construed or held to in any way with the enforcement of the rules and regulations adopted and approved by the division of health of the state department of public health and welfare or any municipality under the laws of this state for the control of infectious or contagious diseases."

The term "practice of medicine," under statutes prohibiting the practice of medicine without a license, has been held in some states to be used in its technical sense. However, in Missouri the term "practice of medicine," under the above-quoted statutes, has been construed as being used in its ordinary, common and popular sense. *Kansas City v. Baird*, 92 Mo. App. 204; 70 C. J. S., Physicians and Surgeons, Section 10a, page 832. In fact, it is to be noted that under the above statutes the prohibition goes beyond the practice of medicine as it may be understood generally and extends to the treatment of "the sick

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and others afflicted with bodily or mental infirmities," which may or may not fall within the generally understood and accepted definition of the practice of medicine.

In State v. Smith. 233 Mo. 242, 135 S. W. 465, 33 L. R. A., N.S., 179, it is pointed out that the original bill passed in 1877 merely sought "to regulate the practice of medicine and surgery." In 1901 the law was amended so as to provide that "all persons desiring to practice medicine or surgery in this state, or to treat the sick or afflicted" should apply to the State Board of Health for examination. The court said, Mo. l.c. 257:

"It is obvious that the Legislature, by this amendment, intended to include those who practice neither medicine nor surgery in any of its departments, but who profess to cure, and who treat or attempt to treat, the sick by means other than medicine or surgery. Evidently the Legislature, in order to guard the overcredulous against injury that might result from yielding to the solicitations and professions of men who ignorantly undertake to diagnose and treat human ailments, deemed it proper, in the exercise of its police power, to require all persons, who undertake to so treat the sick, to show that they possess the qualifications which the lawmakers prescribe as essential."

It is well to bear in mind that Section 334.030, supra, provides for three separate and distinct offenses. Discussing this point in State v. Young, 215 S. W. 499, 500, the St. Louis Court of Appeals said:

"Section 8315 provides that any person practicing medicine or surgery in this state and any person attempting to treat the sick, etc., and any person advertising himself so as to indicate that he is authorized to or does practice medicine or surgery, or that he is authorized to or does treat the sick or others afflicted with bodily or mental infirmities, without a license from the state board of health, shall be deemed guilty of a misdemeanor.

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"This statute provides for three separate and distinct offenses, and, the defendant in this case being charged with all three of the offenses, the verdict should have been specific as to whether he was guilty of one or the other or all of them. As the matter was submitted to the jury, some of the jury may have believed him guilty of one of the offenses, and some of the other. The defendant is entitled to have twelve men believe him guilty of either one or all of the stated violations of the statute."

Section 8315 of the 1909 Revision, in the above quotation, is the present Section 334.030 of the 1949 Revision.

The term "practice of medicine" has been construed on several occasions by the courts of this state. Most of the cases and apt quotations therefrom are found in the following opinions of this office, copies of which we enclose:

Dr. H. S. Gove, January 14, 1937;
Dr. Harry F. Parker, July 29, 1938.

Supplementing those opinions, we herewith quote the following from 70 C.J.S., Physicians and Surgeons:

Section 1, page 815.

"One practicing medicine practices the art of preventing, curing, or alleviating diseases, and remedying as far as possible the results of violence and accident. 'Practice medicine' is a term of frequent occurrence in the statutes, has frequently been the subject of statutory definition, and includes diagnosis.

"The practice of medicine, as ordinarily or popularly understood, has relation to the art of preventing, curing, or alleviating disease or pain; popularly it consists in the discovery of the cause and nature of disease, and the administration of remedies or the prescribing of treatment therefor. It includes the application and use of medicines and drugs for the

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purpose of curing, mitigating, or alleviating bodily diseases; but it does not wholly depend on the administration of drugs. It may be said to consist in three things: (1) In judging the nature, character, and symptoms of the disease. (2) In determining the proper remedy for the disease. (3) In giving or prescribing the application of the remedy to the disease. "

Section 10b, page 834:

"Under the broad and comprehensive terms of some statutes requiring a license or certificate, and the construction placed thereon, the practice of medicine consists in judging the nature, character and symptoms of disease, in determining the proper remedy for the disease, and in giving or prescribing the application of the remedy to the disease. More specifically, these statutes apply to the offer to treat or the treatment of any human ailment, disease, disorder, pain, injury, infirmity, or deformity by any system or method, or in any manner, or without any system, and by the employment or application of any curative or therapeutic agency, whether administered internally or applied externally, provided the giving or administration of the treatment is pursued as a business, calling, or profession, discussed supra subdivision a of this section, and for compensation, discussed infra subdivision n of this section. Also, under the statutes a license or certificate is necessary to enable a person lawfully to engage in the business or practice, for fee or reward, of prescribing, or prescribing and furnishing, drugs, medicines, or other agencies or remedies for the treatment, cure, or relief of any bodily disease.

"While a person without a license or certificate undoubtedly violates the statutes when he not only diagnoses, but also prescribes, recommends, furnishes, or applies a remedy,

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he may also violate the statutes by diagnosing without prescribing any drug or administering any treatment, or by treating, prescribing, or prescribing and furnishing, medicine, without making any diagnosis. That the patient treated or prescribed for does not in fact have any ailment or disease does not prevent the application of the statutes; nor is the efficacy of the remedy administered a material factor. The guarding and protection of patients suffering from mental disease is not a medical act rendering it necessary to have a license to practice medicine to perform such an act."

Difficulty may arise in determining whether any specific act or series of acts constitutes "practicing medicine" or "attempting to treat the sick" within the prohibition of the statute. Basically, however, if it involves diagnosis of an ailment, the prescribing of a remedy or treatment as these terms are generally and popularly understood, it would constitute the practice of medicine within the meaning of Section 334.030, RSMo 1949.

2. The answer to your second question is found in State v. Davis, 194 Mo. 485, 92 S. W. 484, 4 L.R.A., N.S., 1023. There the defendant was a practicing physician of the state of Illinois but was not licensed in the state of Missouri. He had a room at a hotel in Memphis, Missouri, professed to be a physician and held himself out as such. A patient applied to him for treatment at the hotel and the defendant diagnosed his case in the usual and ordinary way of practicing physicians and prescribed remedies. However, his prescription for medicine was in the form of a blank which was required to be sent to the state of Illinois and then the defendant would send the medicine to the patient from Illinois. The patient took the medicine according to directions and made payments to defendant. The court held that defendant clearly was practicing medicine in this state without a license and sustained a conviction under the statute.

Subject to the exceptions contained in Section 334.150, supra, we believe it clear from the Davis case that it is of no moment that a physician may be licensed to practice medicine in some other state or country. Unless he holds a license from the State Board of Medical Examiners of the State of Missouri he may not practice medicine within this state. (See also the en-

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closed opinion of this office issued to Dr. H. S. Gove, January 14, 1937.)

3. In answer to your third question we direct your attention to the case of State v. Young, supra. This was a prosecution for practicing medicine without a license. As a matter of defense the appellant contended that he was engaged as an assistant to a regularly licensed physician, Dr. Tarlton, and offered evidence to that effect, which the court excluded. The appellate court said, 215 S. W., 1. c. 501:

"* * * This was not error, as the defendant could not escape the effect of the statute by showing that in practicing his profession he was employed by another and acted under another's direction."

See also 70 C.J.S., Physicians and Surgeons, Section 10k, page 845, where it is said:

"Generally, where a person without a license or certificate performs acts constituting the practice of dentistry, medicine, or surgery, he is not relieved from liability therefor by the fact that he performs the acts as an assistant to, or under the direction and supervision of, a duly authorized practitioner unless he is within an express statutory exemption, as discussed supra Sec. 9. However, the services of an ordinary nurse performed under the direction of a duly qualified surgeon are not within the statute; nor does it constitute the practice of medicine for an X-ray specialist to use an X-ray machine in giving treatment as advised by a duly licensed medical practitioner. The performance of such duties as are usually and ordinarily performed by internes does not constitute the practice of medicine or a representation that the interne is authorized to practice medicine. A layman who was merely present at an examination and assisted a licensed physician in making a diagnosis has been held not guilty of unlawfully practicing medicine."

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Therefore, it seems clear that one who does not have a license from the Missouri State Board of Medical Examiners, unless he falls within the exemptions of Section 334.150, supra, may not engage in activities constituting the practice of medicine, and the fact that he does so under the supervision of a regularly licensed physician will constitute no defense to a prosecution for practicing medicine without a license.

In passing, we should like to call your attention also to the case of *In re Hughes v. State Board of Health*, 348 Mo. 1236, 159 S. W. (2d) 277, which was a proceeding before the Board for the revocation of a license. In discussing one of the charges made against the appellant the court said, Mo., l. c. 1242:

"The evidence was sufficient to support the charge. Steinmeyer was employed full time by respondent. At first he kept books, then became a technician. Respondent specialized in the treatment of venereal diseases in men. At the instigation and with the knowledge of respondent, Steinmeyer, though not a physician, received and examined patients in respondent's office, made diagnoses, determined the treatment, treated them and accepted fees from them for respondent. He would do this without any immediate supervision of respondent and at times when respondent was away from the office. Such acts of Steinmeyer constitute the practice of medicine. Practicing without a license is unlawful. When done at the command and with knowledge and aid of a physician, the latter is guilty of unprofessional conduct. The very purpose of the act in protecting the public from untrained and incompetent persons is thereby violated by one who should be foremost in upholding it. See *Dillard v. State Board of Medical Examiners*, 69 Colo. 575, 196 Pac. 866. Some of the states by statutes have declared such conduct to be unprofessional."

4. Your fourth question may be answered very simply. Subject to the exceptions contained in Section 334.150, supra, no one, regardless of who his employer may be, may engage in activities constituting the practice of medicine in the state of Missouri unless he is the holder of a license from the State Board of Medical Examiners.

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CONCLUSION

It is the opinion of this office that, subject to the exceptions contained in Section 334.150, RSMo 1949, a physician who is not licensed in the state of Missouri may not engage in activities constituting the practice of medicine within the state of Missouri, regardless of who his employer may be or under whose supervision he may do so.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

Encs: Opns: H.S.Gove, Jan. 14, 1937;
Harry F. Parker, July 29, 1938.

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