

COUNTY HOSPITAL: A regularly licensed and qualified physician  
PHYSICIAN: who has been a member of the staff of the  
Callaway County Hospital and who has voluntarily  
resigned from said staff, may nevertheless continue to  
practice in the hospital  
PATIENT IN  
COUNTY HOSPITAL: when acting for his patient in the hospital.

July 19, 1961



Honorable T. E. Lauer  
Prosecuting Attorney  
Callaway County  
Fulton, Missouri

Dear Sir:

We are in receipt of your letter requesting an opinion from this office, which request is as follows:

"Mr. Joseph Perou, Administrator of the Callaway County Hospital, has requested that I furnish him with an answer to the following question:

May a licensed physician who has been a member of the staff of a county hospital continue to practice in the hospital after his voluntary resignation from the hospital staff?"

Further inquiry has indicated that the Callaway County Hospital has, among others, the following requirements:

"A physician must be a member of the staff in order to have the privilege of practicing in the county hospital. A physician, prior to becoming a member of the staff, must be accepted as a member of the county medical society. Appointment of new members of the staff is made only if recommended by the present staff."

As an introduction to the general law on this subject, the following quotation indicates the general law in most states:

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26 Am. Jur., Hospitals and Asylums, Sec. 9.  
Regulations as to Use or Practice by Physi-  
cians and Surgeons--

"It is generally agreed that the managing authorities of a hospital, under the power to adopt reasonable rules and regulations for the government and operation thereof, may, in the absence of any statutory restriction, prescribe the qualifications of physicians or surgeons for admission to practice therein. This rule has been held or declared applicable in the case of both public and private institutions. And the decisions are generally to the effect that the managing authorities of a hospital, in the absence of any inhibiting statute or bylaw, may adopt and enforce reasonable regulations in respect of the qualifications of practitioners to engage in particular kinds of practice or to perform particular kinds of operations, and also in respect of the conditions under which operations or particular kinds of operations or other services may be performed. Rules and regulations which operate to exclude practitioners of various particular schools or systems of medicine or treatment, such as osteopathy and chiropractic, have been upheld, as against various objections, in the case of both public and private institutions. The failure or refusal of a practitioner to comply with a rule or regulation of a hospital may be a sufficient ground for the revocation or suspension of the privilege of practicing therein.

"It seems to be the practically unanimous opinion that private hospitals have the right to exclude licensed physicians from the use of the hospital, and that such exclusion rests within the sound discretion of the managing authorities. This is not, however, the rule applied to public hospitals, since a regularly licensed physician and surgeon has a right to practice in the public hospitals of the state so long as he stays within the law and conforms to all reasonable rules and regulations of the

institutions. It has, however, been stated that a physician or surgeon, although duly licensed under general laws, has no constitutional or statutory right, or right per se to practice his profession in a public hospital. And it is generally recognized that a practitioner cannot complain of his exclusion from a public hospital by the operation of reasonable rules and regulations adopted for the government thereof. But one cannot be deprived of the right or privilege to practice in a public hospital by rules, regulations, or acts of its governing authorities which are unreasonable, arbitrary, capricious, or discriminatory. And in some jurisdictions, the rule is that a regularly licensed physician or surgeon has a right to practice in the public hospitals of the state so long as he stays within the law, and conforms to all reasonable rules and regulations of the institutions. Neither a city nor the authorities of a public hospital can prescribe rules or regulations for the conduct of physicians and surgeons practicing in such hospital that contravene or conflict with state laws, and a regularly licensed physician and surgeon, although soliciting practice from other physicians and offering to divide his fees with them, cannot be debarred therefor from practice in the public hospitals of the state, where he has not been guilty of unprofessional or dishonorable conduct as defined by the statutes for the licensing and conduct of physicians and has not divided any fee with a physician who brought a patient to him without the consent of the patient."  
(Emphasis supplied.)

In 24 ALR 2d 851 the following rules are stated:

"It has been stated that a physician or surgeon, although duly licensed under general laws, has no constitutional or statutory right, or right per se, to practice his profession in a public hospital.

"And it is generally recognized that a practitioner cannot complain of his exclusion from a public hospital by the operation

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of reasonable rules and regulations adopted for the government thereof.

"But one cannot be deprived of the right or privilege to practice in a public hospital by rules, regulations, or acts of its governing authorities which are unreasonable, arbitrary, capricious, or discriminatory."

In a recent article in the January, 1960, issue of Cleveland-Marshall Law Review, it is stated:

"Licensing of a physician by a state gives him no absolute right to membership on the medical staff of a public hospital. . . ."

And, in the case of *Jacobs v. Martin*, 90 A. 2d 151 (N.J.), the court said:

"While the issuance of a license to practice medicine and surgery by the State Board of Examiners evidences the qualifications and the right of the holder thereof to practice within the State, it does not give him the right per se to practice in a municipal institution."

In the case of *Hayman v. Galveston*, 273 US 414, 47 S. Ct. 364, the United States Supreme Court said:

" \* \* \* it cannot, we think, be said that all licensed physicians have a constitutional right to practice their profession in a hospital maintained by a state or a political subdivision, the use of which is reserved for purposes of medical instruction. It is not incumbent on the state to maintain a hospital for the private practice of medicine."

The foregoing constitutes the general law announced in most states, that is, the managing authority of a public hospital has the power and authority to operate, govern and manage the institution and may adopt reasonable rules and regulations to carry out that purpose, provided such rules and regulations are not in conflict with state statutes or state law.

We must then turn to an examination of the applicable Missouri statutes. The following statutes appear to affect the matter:

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Section 205.190, Subsection 4, RSMo 1959.

"4. The board of hospital trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, not inconsistent with sections 205.160 to 205.340 and the ordinances of the city or town wherein such public hospital is located. They shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of site or sites, the purchase or construction of any hospital buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose; provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board."

(Emphasis supplied.)

Section 205.270, RSMo 1959.

"Every hospital established under sections 205.160 to 205.340 shall be for the benefit of the inhabitants of such county and of any person falling sick or being injured or maimed within its limits, but every such inhabitant or person who is not a pauper shall pay to such board of hospital trustees or such officer as it shall designate for such county public hospital, a reasonable compensation for occupancy, nursing, care, medicine, or attendants, according to the rules and regulations prescribed by said board, such hospital always being subject to such reasonable rules and regulations as said board may adopt in order to render the use of said hospital of the greatest benefit to the greatest number; and said board may exclude from the use of such hospital any and all inhabitants and persons who shall wilfully violate such rules and regulations. And said board may extend the privileges and use of

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such hospital to persons residing outside of such county, upon such terms and conditions as said board may from time to time by its rules and regulations prescribe."

(Emphasis supplied.)

Section 205.280, RSMo 1959.

"When such hospital is established the physician, nurses, attendants, the persons sick therein and all persons approaching or coming within the limits of same, and all furniture and other articles used or brought there shall be subject to such rules and regulations as said board may prescribe." (Emphasis supplied.)

Section 205.300, RSMo 1959.

"1. In the management of such public hospital no discrimination shall be made against practitioners of any school of medicine recognized by the laws of Missouri, and all such legal practitioners shall have equal privileges in treating patients in said hospital.

"2. The patient shall have the absolute right to employ at his or her own expense his or her own physician, and when acting for any patient in such hospital the physician employed by such patient shall have exclusive charge of the care and treatment of such patient, and nurses therein shall as to such patient be subject to the directions of such physician; subject always to such general rules and regulations as shall be established by the board of trustees under the provisions of sections 205.160 to 205.340." (Emphasis supplied.)

It is therefore apparent that, under the provisions of Section 205.190, supra, the board of hospital trustees, not the staff, has the power and authority generally to manage, operate and control the hospital and its affairs and, further, may make appropriate rules and regulations. The power to make appropriate rules and regulations is reinforced by the provisions of Section 205.270, RSMo 1959.

The broad power granted to the board is, however, somewhat circumscribed by the provisions of Section 205.300, supra. The

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extent of this circumscription or limitation appears to be the crux of the problem here presented. The only case construing Section 205.300 is *Stribbling v. Jolley*, 253 SW2d 519 (St. Louis Court of Appeals - 1952). In that case, it appeared that the board of trustees of a county hospital had established a rule excluding osteopaths from practicing in the county hospital. The court held this rule to be illegal under Section 205.300, stating in part at page 524 of its opinion:

"From this it seems obvious that the Legislature, in prohibiting the boards of county hospitals from discriminating against any school of medicine, used language that included osteopathic physicians.

"The matter need not, however, rest upon that alone, for it will be noted that there is a further provision in the second paragraph of the statute providing that the patient in the hospital has the absolute right to the 'physician' of his choice. There is no qualification as to the school of medicine to which the physician may belong and the Legislature has considered and called doctors of osteopathy 'physicians' in the act regulating their practice. \* \* \*"

The *Stribbling* case, of course, does not determine the law under the facts as presently presented. However, this case does more clearly enunciate the meaning of Section 205.300. Section 205.300 does two things:

(1) It prohibits the board or other management of a public hospital from discriminating against any legally recognized practitioner in that hospital. In other words, it authorizes any person to practice who is by law recognized to practice in a public hospital on the same basis that every other practitioner is authorized in that hospital;

(2) It vouchsafes to the patient the absolute right to employ his own physician to attend him in such a public hospital and puts that physician in exclusive charge of his care, subject only to reasonable rules and regulations established by the board.

This statute, by prohibiting discrimination among physicians and by granting to patients the absolute right to select their own physician, has undoubtedly placed a greater limitation upon the rules and regulations that may be promulgated by the board of

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trustees than is true in most other states. The most analogous situation to the instant question is found in Indiana. That state has a statute similar to ours here in Missouri, i.e., "the patient shall have the absolute right to employ, at his or her own expense, his or her own physician . . ." A county hospital in Indiana set up various requirements before a physician could practice in the hospital including requirements similar to those of the instant Callaway County Hospital which require that the physician belong to the local medical society and place the power to appoint staff members in the hands of the present staff. The Supreme Court of Indiana held that such rules were invalid and in conflict with the "absolute right" statute as quoted before. See Hamilton County Hospital v. Andrews, 84 NE2d 469.

In Rutgers Law Review, Winter 1961, at page 341, referring to the case of Ware v. Benedikt, 255 Ark. 185, 280 SW2d 234, the Law Review article says:

"The plaintiff was a licensed physician who was excluded without reasons by the local medical society. A hospital bylaw required membership in the society as a condition precedent to hospital use. Following the institution of suit, the hospital bylaw was amended to require only the 'approval' of the county medical society. The court held the bylaw unreasonable in either form. The 'membership' requirement was regarded as an invalid delegation to the medical society of the power to determine who may use the hospital. It was noted that membership in the society is entirely beyond the control of the plaintiff. Nor did the 'approval' rule bear any relation to the public safety and welfare since the society might withhold its approval for a valid reason, an invalid reason, or no reason at all."

Thus, under Section 205.300 we make the following observations:

(1) The present rule of the Callaway County Hospital is invalid. The board of trustees of a county hospital cannot require membership in a private medical society as a prerequisite to practice in the hospital. Further, the board of trustees cannot delegate to the present staff the right to determine who shall or shall not practice in the hospital.

(2) A county hospital, through its board of trustees, has the right to establish reasonable and nondiscriminatory rules and

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regulations regarding the practice of medicine within the hospital. Such rules can pertain to the practice of medicine within the hospital, the training, background and qualifications of the physician, his physical disabilities, etc. If a physician satisfies all the requirements of such reasonable and nondiscriminatory rules and thereby obtains the label "staff member," all well and good. Obviously, he can practice in the hospital. Likewise, if a physician satisfies all the requirements of such reasonable and nondiscriminatory rules, but for some reason does not receive or does not desire the label of "staff member," he still can practice in the hospital. There is no magic in the words "staff member."

Admission to the facilities of a public hospital depends on but two things: (a) The absolute right of the patient to select his doctor and (b) that the doctor selected be qualified to practice by and under the laws of Missouri and the reasonable rules of the hospital.

Rules concerning the right of a physician to practice in a public hospital which are not related to the physical, technical and medical competence of the physician are unreasonable.

(3) We must emphasize that in Missouri a patient in a public hospital is given greater rights with respect to selecting his doctor and the use of the public medical facilities than is the case in other states. The patient's "absolute right" can be qualified only by reasonable rules as established by the board of trustees of the hospital.

This ruling must be considered applicable only to the facts as presented in this inquiry. The validity of other rules as established by the board of trustees of a public hospital is expressly not ruled upon as to their reasonableness.

#### CONCLUSION

It is therefore our conclusion that a regularly licensed and qualified physician who has been a member of the staff of the Callaway County Hospital and who has voluntarily resigned

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from said staff may nevertheless continue to practice in the hospital when acting for his patient in the hospital.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Clyde Burch.

Yours very truly,

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THOMAS F. EAGLETON  
Attorney General