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ATTORNEY GENERAL

OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

February 24, 1976

OPINION LETTER NO. 37

Honorable John W. Reid, II
Prosecuting Attorney
Madison County
148 East Main Street
Fredericktown, Missouri 63645

Dear Mr. Reid:

This letter is in response to your opinion request in which you ask:

> "Whether a County Hospital Board's by-laws pursuant to 1971 R.S. Mo, Section 205.195 may require that all physicians, podiatrists and dentists be required to carry and keep in force a minimum of $100,000.00 malpractice insurance before being permitted to practice in a County Hospital established under 1969 R.S. Mo., Section 205.160."

You also state that:

> "I have been contacted by the Madison Memorial Hospital Administrator inquiring whether the County Hospital Board has the authority to pass a by-law requiring all physicians to carry and keep in force a minimum of $100,000.00 malpractice insurance."

Our research has disclosed two cases of note both dealing with hospitals which are subject to suit by individuals. That is, in Pollock v. Methodist Hospital, 392 F.Supp. 393 (E.D. La. 1975), the District Court held that a requirement that a physician carry malpractice insurance as a condition of his employment at a private hospital is not per se unreasonable and does not violate the physician's civil rights. The sole issue presented in that case was

the legal right of a hospital to suspend a staff physician for failure to comply with his insurance requirements. There was no issue concerning sufficiency of notice, hardship, or other aspects of due process. The plaintiff did not contend that the amount of insurance, one million dollars in that instance, was unreasonable or that it imposed a financial burden upon him. The court found that the test is one of reasonableness of the regulations and that since the physicians were free to choose any insurance company the question of a violation of the anti-trust laws was not properly indicated.

A second noteworthy case in the area is Rosner v. Peninsula Hospital District, 224 Cal.App.2d 115, 36 Cal.Rptr. 332 (1964), which was distinguished by the court in the Pollock case on the basis that the California case turned solely on the interpretation of a state statute and had little relevance in determining whether plaintiff's civil rights were violated. Notably in the Rosner case, the appellants contended that, since the removal of the rule of sovereign immunity from district hospitals because of California court decisions, the requirement that malpractice insurance be carried by each member of a medical staff was a most reasonable requirement and necessary for the proper administration of a public hospital. While the California court did largely rest its determination upon the apparently limiting language of the California law, it also noted that the nature of a public hospital imposes an actual although implied limitation upon the authority of the hospital to restrict arbitrarily the use of the hospital by the public whether physician or patient. Notably, the court also held that, under the facts before it, whether any doctor could ever become a member of the medical staff depended upon conditions beyond the control of the district because by the adoption of the resolution the hospital unlawfully delegated to the insurance companies a determination as to what physicians may use its facilities. It was the court's view that such a power to determine who has the authority to engage in an otherwise lawful enterprise may not be delegated to a private body unless the power is accompanied by adequate safeguards which afford the applicant protection against arbitrary or self-motivated action.

We wish to point out, of course, that in Missouri the county hospitals still retain their immunity despite the rule of the Supreme Court in Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599 (Mo.Banc 1969) and Garnier v. St. Andrew Presbyterian Church of St. Louis, 446 S.W.2d 607 (Mo.Banc 1969). See our Opinion No. 15 dated May 10, 1971, to Millan (copy enclosed).

We also call your attention to Opinion No. 29 dated March 11, 1975, which was addressed to you, concerning whether the county hospital may contract to limit a physician's practice to emergency room

duties. In that opinion we quoted and discussed the effect of statutes which, in our view under the facts then presented, did not justify the trustees in denying the doctor the right to treat patients in the hospital other than in the emergency room.

We have found no case where such a malpractice requirement has been sought to be imposed by a hospital which enjoys sovereign immunity. We understand from you that the reason for such a bylaw would be to protect any patient who was a victim of malpractice.

Bearing in mind that we are not conversant with the particular circumstances surrounding the operation of the hospital or the physicians subject to such bylaws, it is our view that there is a serious question as to the reasonableness of such rule.

It is our view that our courts would most likely view such a bylaw as being beyond the authority of the county hospital board of trustees.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 15
5-10-71, Millan