DENTISTRY: Unlawful advertising.

February 6, 1945

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Missouri Dental Board
Albany, Missouri

Attention: Hon. H. C. McCoy,
Secretary.

Gentlemen:

This will acknowledge your letter of January 2, 1945, directed to General McKittrick, and your letter of January 22, directed to the writer, in which you make correction of the Section of the Statutes referred to in the second paragraph of your letter. It is observed that you gave the Section of 1929, Revised Statutes, instead of the current Section covering the matter referred to in the Revised Statutes of 1939. With that correction, the number of Section 10071 will be substituted, by your permission, in the last line of the second paragraph of your letter of January 2, for the number of Section 13566.

Your letter then, of January 2, 1945, states:

"The Missouri Dental Board will appreciate your opinion as to whether or not the enclosed advertisement of the New York-Eastern Dental Laboratory violates Section 10088a of the Missouri Dental Law enacted in 1943.

"Also whether or not the advertisement of Dr. James B. Inscho violates Section 10071 of the Missouri Dental Law."

Your first request for the opinion of this department is, whether the advertisement of the New York-Eastern Laboratory, a copy of which you enclose with your letter, violates the terms of Section 10088a, Laws of 1943, page 971.

That part of Section 10088a covering the matter in question is as follows:

> "It shall be unlawful for any person or persons not duly registered and licensed to practice dentistry, or for any association, corporation, or other entity to solicit or advertise, directly or indirectly, by mail, card, newspaper, magazine, periodical, pamphlet, radio, sign, display, or in any other manner to the general public, to construct, supply, reproduce, or repair prosthetic dentures, bridges, plates, or other appliances to be used or worn as substitutes for natural teeth or for the regulation of natural teeth. * * *"

Further reading said Section, it is made a misdemeanor for "Any person, * * * association, * * * or other entity, * * *" to violate the terms of said Section hereinabove quoted. The offense created by Section 10088a is for

> "* * * any association, corporation, or other entity to solicit or advertise, directly or indirectly, by mail, card, newspaper, magazine, periodical, pamphlet, radio, sign, display, or in any other manner to the general public, to construct, supply, reproduce, or repair prosthetic dentures, bridges, plates, or other appliances to be used or worn as substitutes for natural teeth or for the regulation of natural teeth. * * *"

The specific violation would be to "solicit or advertise" to perform those acts mentioned in the above quotation.

This advertisement exhibited with your letter gives the name of this Association or Company as the "New York-Eastern Dental Laboratory and Optical Co." It gives its location and street number, and has a drawing of a dental plate with the name of the company printed or stamped thereon. But nowhere does the advertisement state that the company "solicits" or "advertises" to the general public that it will construct, supply, reproduce, or repair prosthetic dentures, bridges, plates or other appliances to be used or worn as substitutes for natural teeth or for the regulation

of natural teeth. The mere existence and the address of this concern being stated in the advertisement is not of itself any positive advertisement that it will do or request that it may do anything prohibited by the Statutes. The advertisement, to violate the Statute named, would have to offer to do or make a request to do the kind of business which this Statute prohibits. It does not do this. The words "advertise" and "solicit" are of such frequent and ordinary use that it is easily understood that advertise means to announce publicly by notice of some kind, and that solicit means to request or ask for the right to perform some act. This advertisement we think, neither advertises nor solicits to do or that it desires to do the kind of dental work prohibited to be advertised or solicited by this Statute.

This is a penal Statute, and sets out that the violation of its terms shall constitute a misdemeanor. Section 10097, R.S. Mo. 1939, prescribes the punishment for the violation of the terms of Section 10088a at a fine of not more than $200 or imprisonment in jail for not exceeding one year, or by both such fine and imprisonment. Our Courts uniformly hold that penal Statutes must be strictly construed in their enforcement.

An indictment or information must set out in particular the violation and the acts which constitute the commission of a crime in the language of the Statute creating the offense. The proof and evidence must show that the accused committed the offense as it is charged in the indictment or information. Nothing can be left to intendment or implication.

This rule is announced in 31 C.J., page 703, Section 257, as follows:

> "An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the pleader must either charge the offense in the language of the act, or specifically set forth the facts constituting the same. The general rule is that the charge must be so laid in the indictment or information as to bring the case precisely within the description of the offense as given in the statute, alleging distinctly all the essential requisites that constitute it. Either the letter

> or the substance of the statute must be followed, and nothing is to be left to implication or intendment, or to conclusion. The want of direct averments of material facts cannot be supplied by argument or inference, nor by the conclusion 'contrary to the form of the statute.' * * *"

The Supreme Court of Missouri in the case of State vs. Wade, 267 Mo. 249, had this principle of law before it and at page 256, said:

> "* * * The organic law entitles every person charged with crime to be informed of the nature and cause of the accusation against him, and, in keeping with the spirit of this salutary and fundamental principle of justice, courts have evolved an inflexible rule that in criminal pleading nothing material can be left to intendment or implication. Where a crime is created by statute, the charge must be such as to specifically bring the accused within the material words thereof. * * *"

Likewise, our Supreme Court in the case of State v. Rosenblatt, 185 Mo. 114, l.c. 121, on the same rule, said:

> "The offense being a statutory crime, it was and is essential that the indictment should use the material words or their legal equivalents in charging the crime. * * *"

59 C.J. has this to say on page 1113, Section 660, on the necessity of strictly construing penal Statutes, to-wit:

> "Except in those jurisdictions where abrogated by statute, it is a fundamental rule in the construction of statutes that penal statutes must be construed strictly. * * *"

On the same subject the Supreme Court of Missouri in the case of State vs. Bartley, 304 Mo. 58, l.c. 62, announced the same doctrine as follows:

> "* * *Criminal statutes are to be construed strictly; liberally in favor of the defendant and strictly against the State, both as to the charge and the proof. No one is to be made subject to such statutes by implication. * **"

The burden and duty always rests upon the State to prove a criminal case as charged in the indictment or information. Our Supreme Court has held this in many cases. An apt example of the Court's holding on this point is in the case of State vs. Langley, 248 Mo. 545, l.c. 552, where the Court said:

> "The burden is upon the State to establish every constituent element of the offense charged, and this burden remains with the State throughout the trial. (State v. Hardelein, 169 Mo. 579.) After a careful review of the authorities, we have come to the conclusion that in proving a charge under the statute in question, it was incumbent upon the State to show facts and circumstances which would tend to prove that the refusal or neglect with which defendant is charged was 'without lawful excuse.' * * *"

Our Courts have uniformly held that the proof and evidence in a criminal case must follow the charge set up in the indictment or information. This principle is well stated by the Kansas City Court of Appeals in the case of State vs. Young et al., 163 Mo. App. Reports, 88, l.c. 98, where the Court said:

> "* * * When the state charges a violation in a particular way, it must be bound by the position it takes and is not entitled to a verdict in its favor unless it makes proof of the particular charge which it has made. (cases cited). * * * "

The example of the advertisement accompanying your letter wherein it fails to affirmatively advertise or solicit for the doing of such dental practice as is prohibited by the Statute under the authorities and decisions above quoted,

makes it appear reasonably certain that this advertisement does not constitute a violation of said Statute.

Your next question is, does the advertisement of Dr. James B. Inscho violate Section 10071, R.S. Mo. 1939? This section is very lengthy and only that part of it will be quoted here which directly refers to the problem. The first paragraph of sub-section 3 of Section 10071 prohibits certain kinds of advertising by dentists.

The second paragraph of said sub-section 3 permits certain advertising, and is as follows:

> "Any dentist licensed under this law may announce by way of professional card containing only the name, title, degree, office location, office hours, phone number, and residence address and phone number, if desired, and, if he limits his practice to a specialty, he may announce it, but such cards shall not be greater in size than three and one-half (3½) inches by two (2) inches, and such information may be inserted in public print when not more than one column in width and two inches in depth; * * *"

It will be noted that in the next to the last line of that part of said section just previously quoted, the advertisement to be inserted in the public print shall not be more than one column in width. As it is generally understood, one column, or a single newspaper column is two (2) inches in width. This advertisement of the person named, is four (4) inches in width, or what would properly be called a double column. We would not be aware of any method or manner to determine this matter except by the simple measurement of the advertisement. The section itself fixes the standard of width of such an advertisement permitted to be made by a dentist, at one column in width. This advertisement comprises two columns in width.

CONCLUSION.

It is, therefore, the opinion of this Department considering the terms of Section 10088a, Laws of Missouri,

1943, page 971, and considering the facts disclosed by the advertisement itself, that the advertisement of the New York - Eastern Dental Laboratory and Optical Co. is not a violation of said Statute.

2) That under the facts disclosed by the measurement of the advertisement of Dr. James B. Inscho which is demonstrated by measurement to be a two column advertisement instead of a one column advertisement, it is the opinion of this Department that said advertisement is in violation of that part of Section 10071, Chapter 64, R.S. Mo. 1939, hereinabove quoted.

Respectfully submitted,

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APPROVED:

HARRY H. KAY
(Acting) Attorney General

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