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GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 80-110
of	:	<u>September 11, 1980</u>
GEORGE DEUKMEJIAN	:	
Attorney General	:	
Jack R. Winkler	:	
Assistant Attorney General	:	

SUBJECT: EMPLOYING OF LICENSED NURSES BY PERSONNEL SERVICE—A personnel service may employ licensed nurses and contract to provide their services to health facilities or others if it is licensed as an employment agency/labor contractor under the Employment Agency Act, unless it is exempt therefrom by virtue of Business and Professions Code section 9902, subdivision (c) (4).

The, Honorable Paul B. Carpenter, Senator, Thirty-Seventh District, has requested an opinion on the following question:

May a personnel service employ licensed nurses and hire them out to provide nursing services to health facilities or others?

CONCLUSION

A personnel service may employ licensed nurses and contract to provide their services to health facilities or others if it is licensed as an employment agency/labor contractor under the Employment Agency Act, unless it is exempt therefrom by virtue of Business and Professions Code section 9902, subdivision (c) (4).

ANALYSIS

We are informed by the requester that certain personnel services, which call themselves “nurses registries” or “temporary help services” are contracting with health facilities to provide the services of licensed nurses. In their operation, the nurse is not paid directly by the facility or person to whom she renders professional services. Instead, it is the business that is paid by the facility for providing the nursing services and it in turn pays the nurse either on a salary basis or for the specific services performed for the facility. Our opinion is sought on the legality of this practice.

The business arrangement described in the request posits two “givens”: One, that the nurse is employed by the service and is paid by it and two, that the service contracts with others to provide nursing services to them.

At first it might appear that the business thus described would be a nurses registry permitted by the Nurses Registry Act (i.e., Bus. & Prof. Code, ch. 20.5, div. 3, § 9890 *et seq.*)¹ Section 9890.6 defines a nurses registry as “a person² who engages in the business of obtaining and filling commitments for *nursing services* and who may incidentally make referrals, not to exceed one-tenth of the total annual nursing assignments, for nursing employment other than private duty nursing.” But since “nursing service” as used in the Nurses Registry Act is defined to mean “the assignment of a nurse as a private duty, *self-employed*, licensed registered nurse, licensed vocational nurse, or practical nurse to render service to a patient under the direction or supervision of a physician or surgeon registered to practice in this state” (§ 9890.2), the situation presented, in which the nurse is not self-employed but is rather salaried or paid by the personnel service, would not fall within its embrace. (Cf. Section 9890.7 which defines the private duty nurse as “a *self-employed* nurse rendering service in the care of the patient either physically or mentally ill, under the direction of a physician or surgeon, *but who it paid by either the patient or the designated agent of the patient and who accepts the responsibilities of a self-employed private contractor.*”)

Rather than being a nurses registry, the business arrangement described in the request appears to be a “labor contractor” within the meaning of subdivision (c) (1) of section 9902 and would thus be covered by the Employment Agency Act (Bus. & Prof. Code, ch. 21, div. 3. §§ 9900–9997) as an employment agency,³ unless it is exempt from

¹ Hereinafter all unidentified statutory references will be to the Business and Professions Code.

² Person means “an individual, company, partnership, corporation, society, association, manager, or their agents or employees.” (§ 9890.1)

³ Section 9902 defines “employment agency” as

“(a) The business of conducting, in any capacity, an intelligence office,

being so considered by subdivision (c) (4) of that section.

Section 9902 (c) (I) defines a labor contractor as “any person,⁴ who, for a fee or other compensation, employs an individual to render personal services to, for or under the direction of a third person.” (§ 9902(c) (1).) That appears to be the business arrangement described in the opinion request. Subdivision (c) (4) of section 9902 however, provides that certain employers of individuals to render personal services to, for or under the direction of third persons are not to be considered labor contractors. It reads in full as follows:

“A person employing individuals to render part-time or temporary personal services to, for or under the direction of a third person is not a labor contractor within the meaning of [the Employment Agency Act] if the person employing the individuals, in addition to wages or salaries, pays federal social security taxes, state and federal unemployment insurance, carriers workers’ compensation insurance as required by state law, and sustains responsibility for the acts of his employees while rendering services to, for or under the direction of a third person, and has no applicant-paid liquidated damage clause. The person employing individuals to render part-time or temporary personal services shall not send the employees to any place where a strike, lockout or *labor dispute exists*. ”

We understand that many of the businesses that have been employing salaried nurses and contracting to provide their services to health facilities, do assume the additional

employment agency, registry other than a nurses’ registry as defined in Section 9890.6, or any agency business or office which procures, offers, promises or attempts to procure employment or engagements for others or employees for employers, or for the registration of persons seeking to procure or retain unemployment or engagement, or for giving information as to where and from whom such help, employment or engagement may be procured, or for providing employment or engagements where a fee or other valuable consideration is exacted, or attempted to be collected, directly or indirectly, for such services, regardless of where such business is conducted.

“(b) Any person, service, bureau, organization, club, resume service, or employment counseling service, which by advertisement or otherwise offers, as one of its main objects or purposes, to procure employment for any person who will pay for its services, or that collects dues, tuition, or membership or registration fees of any sort, where the main object of the person paying the same is to secure employment.

“(c) *Any person who acts as a labor contractor.* ”

⁴ “Person” means “any individual, company, society, firm, partnership, association, corporation, manager, contractor, subcontractor, or their agents or employees.” (§ 9901.)

responsibilities set forth in subdivision (c) (4) with respect to that employment. They therefore would not be considered a “labor contractor” within the meaning of the Employment Agency Act.

It would thus appear that the answer to the question of whether a personnel service may employ licensed nurses to contract to hire them out to provide nursing services to health facilities or others is to be in the affirmative, if the service is licensed under the Employment Agency Act (§§ 9905, 9940) as an employment agency as a labor contractor (§ 9902 (c) (1)), or if it operates without such licensure should it come within subdivision (c) (4) ‘s exemption-unless such an arrangement would be precluded by some other law.

Section 2795 of the Code immediately comes to mind. That Section makes it illegal for any person “to practice or to offer to practice nursing in this state without an active license to do so.” (See also § 2885 prohibiting the unlicensed practice of vocational nursing.) The question thus arises whether a personnel service which contracts to provide nursing services to others, and employs licensed nurses toward that end, violates section 2795.

In interpreting similar restrictions on the unlicensed practice of medicine and dentistry (i.e., Bus. & Prof. Code, §§ 2141 and 1627, respectively), courts have consistently held that a lay commercial entity may not engage licensees to perform professional services for third parties with whom the entity contracts to furnish those services, for it would then be practicing the profession without a license in contravention of the particular section. (*Pacific Employers Insurance Company v. Carpenter* (1935) 10 Cal. App. 2d 592, 595 (medicine and dentistry); *Benjamin Franklin Life Assurance Co. v. Mitchell* (1936) 14 Cal. App. 2d 654, 656–657 (medicine); *Masters v. Board of Dental Examiners* (1936) 15 Cal. App. 2d 506, 509; *Painless Parker v. Board of Dental Examiners* (1932) 216 Cal. 285, 296–298; *People v. Pacific Health Corporation* (1938) 12 Cal. 2d 156, 158 (medicine); *Garvai v. Board of Chiropractic Examiners* (1963) 216 Cal. App. 2d 374, 378.) Opinions of this office reached similar conclusions. (62 Ops. Cal. Atty. Gen. 317 (1979) (psychology); 57 Ops. Cal. Atty. Gen. 231 (1974) (medicine); 55 Ops. Cal. Atty. Gen. 324 (1972) (optometry); 55 Ops. Cal. Atty. Gen. 39 (1972) (medicine); 54 Ops. Cal. Atty. Gen. 126 (1971) (medicine); 11 Ops. Cal. Atty. Gen. 236 (1948) (medicine).)

Two reasons have underlain the uniform hesitancy to sanction commercial entities indirectly practicing those health care professions by their hiring out their licensed employees. As we said in a former opinion:

“The first is that professional persons are licensed by the state to practice their profession. This licensing results only after an examination by the state insures professional competence. Professional responsibility is also

maintained in that the privilege of practice may be suspended or revoked as a sanction for illegal or improper conduct. Inherent in this system is personal qualification, personal responsibility and personal sanction. Certification of persons to practice in a corporate or other business form does not carry out the objective sought by regulation and is not permitted for those professional persons who must have a special license in all cases to practice their profession. (*Bank of California v. San Francisco*, 142 Cal. 276, *People v. Merchants Protective Corporation*, 189 Cal. 531, *Pacific Employers Insurance Company v. Carpenter*, 10 Cal. App. 2d 592.)

“ . . .

“The second rationale is the relationship between the practitioner and those whom he serves. (*People v. Allied Architects Association*, 201 Cal. 428, 432.) In the normal profession, the practitioner serves a client or patient. The relationship is said to be that of trust and confidence. The interposition of a corporate entity between them is said to destroy this relationship. (*People v. Merchants Protective Corporation*, 189 Cal. 531, 537; *Pacific Employers Insurance Company v. Carpenter*, 10 Cal. App. 2d 592, 595; 13 Cal. Jur. 2d, Corporations, section 369.)” (39 Ops. Cal. Atty. Gen. 155, 156–157 (1962).)

As noted, these rationales have been applied to the professions of medicine and dentistry. Dicta in the cases have also mentioned the legal profession (e.g., *Pacific Employers Insurance Company v. Carpenter*, *supra*, at p. 595). We have neither found nor been referred to any California decision, or indeed one from any other jurisdiction, which has similarly applied this reasoning to the profession of nursing⁵, so as to declare as impermissible the unlicensed practice of that profession by a business entity employing licensed nurses and contracting in turn to provide their services to health facilities or others. The question thus resolves into whether the reasoning behind the medical and dental cases may be appropriately so applied.

We do not hesitate to state that the first rationale may be aptly applied to the nursing profession. The licensing of nurses, whether under the Nursing Practice Act (div. 2, ch. 6, § 2700 *et seq.*) or the Vocational Nursing Practice Act (div. 2, ch. 6.5, § 2840 *et seq.*) is designed as a “salutary [enactment] in the exercise of the police power of the state to

⁵ The Legislature has recognized that registered nursing is “a dynamic field, the practice of which is continually evolving to include more sophisticated patient care activities” (§ 2725) and has referred to as a profession (§ 2700). The practice of vocational nursing is likewise declared to be a profession. (§ 2840.5(a).)

legislate for the safety, health and welfare of the people.” (*Cf. Ex Parte Whitley* (1904) 144 Cal. 167, 180.) Nurses receive specialized training (§§ 2785–2788, 2811.5 and §§ 2880–2883, 2892.5; see also 16 Cal. Admin. Code, § 1420 *et seq.*, and 16 Cal. Admin. Code, § 2550 *et seq.*), and their proficiency in their field must be demonstrated in examination before licensure (*Cf.* §§ 2736–2741, and §§ 2866–2873.5) enabling them to practice (§§ 2732, 2795, 2796 and §§ 2860.5, 2864, 2877, 2885). Standards of practice are maintained and the violation of them makes a licensee amenable to disciplinary action. (§§ 2750, 2761 and §§ 2875, 2878.) Clearly personal qualification, personal responsibility and personal sanction is as “inherent in this system” as it is with the licensure of physicians and surgeons and dentists, or with certified shorthand reporters with whom we were concerned in our former opinion (39 Ops. Cal. Atty. Gen. 155, *supra*).

Applying the second rationale—i.e., that of not interposing a business entity into the “relationship” between the healing arts practitioner and those whom he serves, gives us greater pause. The rationale does not nearly fit the nursing context because the latter does not involve a simple one-to-one relationship of practitioner to patient as does medicine and dentistry. While at one time nurses may have practiced and delivered their services as independently as doctors and dentists do today, this is no longer the case. With limited exceptions nursing has become a “dependent” profession. While maintaining many of the accoutrements of professional status (i.e., intensive specialized training, a holding out to the public of credentials and qualifications distinct from other practitioners of the healing arts, and a generally accepted standard of practice) it no longer functions independently. With limited exception nurses operate through institutions and/or under the employ and immediate supervision and direction of a physician who remains primary responsible for patient care. (E.g., § 2725 and §§ 2860.5, 2860.7; *Cf.* 56 Ops. Cal. Atty. Gen. 1 (1972), 57 Ops. Cal. Atty. Gen. 93 (1974), 62 Ops. Cal. Atty. Gen. 193 (1979), I.L. 76–186 (September 14, 1976) and SO Ops. Cal. Atty. Gen. 125 (1967), 56 Ops. Cal. Atty. Gen. 11 (1973), 59 Ops. Cal. Atty. Gen. 112 (1976).)

Thus, unlike the physician-patient or the dentist-patient situation, the nursing context more often than not sees others besides the nurse involved in providing patient care, to wit, the physician and/or the medical care facility. And, unlike the physician and the dentist who usually function as independent business entitles, the nurse more often than not, is employed by someone other than the individual patient to whom her services are rendered.

The Legislature has recognized and has accepted this situation. When it amended section 2725, redefining the practice and function of registered nursing, the Legislature stated:

“In amending this section at the 1973–74 session, the Legislature recognizes that nursing is a dynamic field, the practice of which is continually evolving to include more sophisticated patient care activities. It is the intent of the Legislature in amending this section at the 1973–74 session to provide clear legal authority for functions and procedures which have common acceptance and usage. It is the legislative intent also to recognize the existence of overlapping functions between physicians and registered nurses and to permit additional sharing of functions within organized health care systems which provide for collaboration between physicians and registered nurses. Such organized health care systems include, but are not limited to, health facilities licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2 of the Health and Safety Code, clinics, home health agencies, physicians’ offices, and public or community health services.” (§ 2725, Stats. 1974, ch. 355, p. 686, § 1.)

Elsewhere too, the Legislature has acknowledged that nurses may be employed by others than the patient to whom nursing services are provided. In this regard, section 2732.05 provides:

“Every employer of a registered nurse, and every person acting as an agent for such a nurse in obtaining employment, shall ascertain that such nurse is currently authorized to practice as a registered professional nurse within the provisions of this chapter. As used in this section, the term “agent” includes, but is not limited to, a nurses registry.

“Examination by an employer or agent of evidence satisfactory to the board showing the nurse’s current authority to practice under this chapter, prior to employment, shall constitute a determination of authority to so practice.

“Nothing in this section shall apply to a patient, or other person acting for a specific patient, who engages the services of a registered nurse to provide nursing care to a single patient.”

But the question of whom that employer may be still remains, and in answering it we must now determine whether the second rationale undergirding the common law” prohibitions against the employment of physicians and dentists by lay commercial entities may properly be applied to the nursing profession, and if so, to what extent.

Certainly nurses may be employed by hospitals and other organized health care systems. The Legislature has recognized as much in its preamble to section 2725 quoted

above, and with respect to the hospital setting, the courts have done likewise. (*Rice v. California Lutheran Hospital* (1945) 27 Cal. 2d 296, 303–304; *Guillams v. Hollywood Hospital* (1941) 18 Cal. 2d 97, 103; see generally 36 Cal. Jur. 3d, *Healing Arts and Institutions*, § 139, pp. 322–326; and compare Bus. & Prof. Code, § 2008 which prohibits physicians from being so employed, except in limited circumstances.) Given that recognition, involving as it does a context where the nurse more often than not is employed by someone other than the patient to whom her services are rendered, we are most hesitant to apply the second rationale noted above to the situation described in the request. Those cases which have not countenanced the interposition of a commercial entity into the physician-patient or dentist-patient relationship for fear of destroying it have stated it to be against public policy to permit a “middleman” to intervene for profit in establishing the professional relationships between the members of said professions and the members of the public. (*Pacific Employers Insurance Company v. Carpenter*, *supra*, 10 Cal. App. 2d at p. 595; accord, *Complete Service Bureau v. San Diego Medical Society* (1954) 43 Cal. 2d 201, 208; see also 58 Ops. Cal. Atty. Gen. 755, 759, fn. 6 (1975).) But with the nursing profession, there is not the same patient relationship, and a commercial entity, to wit, the health facility is already involved in it. We therefore find the second rationale of the cases interpreting sections 2141 (medicine), and 1627 (dentistry) to be inapposite to the situation before us, and we cannot apply their prohibitions to the profession of nursing.

We therefore conclude that a personnel service may employ nurses and contract and provide their services to health facilities or others if it is licensed as an employment agency/labor contractor under the Employment Agency Act, unless it is exempt therefrom by virtue of Business and Professions Code section 9902, subdivision (c) (4).
