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79-188
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AUGUSTA, MAINE 04333

October 23, 1979

Walter W. Crites, D.M.D.
Secretary, Maine Board of Dental Examiners
100 Stony Ridge
Auburn, Maine 04210

Dear Walter:

I am writing in response to your letter to me of September 18, 1979, regarding the mandatory use of lead aprons. Based upon my discussion with the Board of Dental Examiners [hereinafter sometimes referred to as the Board], I understand the question to be whether the Board may adopt a regulation requiring that dentists place a lead apron over a portion of their patient's body when taking dental x-rays. I further understand that the purpose of this regulation would be to protect the health of the patient by preventing the patient from receiving excess radiation on certain parts of his or her body.

32 M.R.S.A. §1073 states in applicable part that:

"[t]he board is authorized to:
(3.) Adopt rules and regulations to carry out and make effective this chapter [Chapter 16 of Title 32 M.R.S.A.] and to modify or repeal said rules and regulations whenever in the discretion of the board it is deemed necessary."^{1/} (emphasis added)

^{1/} 32 M.R.S.A. §1072 also authorizes the Board in general language to adopt rules for the performance of its duties. §1072 appears to refer, however, solely to the internal proceedings of the Board. There are in addition other sections of the dental statute which give the Board authority to adopt regulations dealing with specific topics, but those sections are not relevant to the issue presently under consideration. See, e.g., 32 M.R.S.A. §§1086 (permits for internship) and 1100-c (licensing of denturists).

Thus, the issue is whether by 32 M.R.S.A. §1073 the Legislature has granted the Board authority to adopt the particular regulation being considered. While the answer to the Board's question is not free from doubt, we believe that the Board may validly adopt the proposed lead apron regulation.

When a statute is ambiguous, a cardinal rule of statutory construction is that consideration must be given to the object or purpose of the legislation. Thus, in the recent case in which the Maine Supreme Court specifically had occasion to interpret the Maine dental statute, 32 M.R.S.A. §1061 et seq., the Court stated in applicable part that:

" . . . the language the Legislature employed will be construed to have such meaning as shall appear most reasonable and best suited to accomplish the objects of the legislation (citation omitted)" State v. Hussey, 381 A.2d 665, 667 (Maine, 1978).

The Maine Supreme Court went on to state that "the plain purpose" of the dental statute ". . . is to regulate dentistry and to prohibit unlicensed persons from the practice of that profession." (emphasis added) 381 A.2d at 667. The regulation of the practice of dentistry is to be done in a manner that protects the health and safety of the public. See, e.g., Commonwealth v. Finnigan, 96 N.E.2d 715 (Supreme Judicial Court of Massachusetts, 1950).

In attempting to determine more precisely the manner in which the Board may regulate the practice of dentistry, assistance is obtained by examining 32 M.R.S.A. §1091. That section provides for revocation or suspension of a dentist's license by the Administrative Court for, among other things, proof of incompetence or unskillfulness. The Administrative Court acts upon complaint of the Board of Dental Examiners. See, 4 M.R.S.A. §1151(2); 5 M.R.S.A. §10051(1). Thus, the Board may determine in a specific instance or in specific instances that the failure of a dentist to use a lead apron when taking a dental x-ray was, in its opinion, an act of incompetence or unskillfulness, for which disciplinary action should be taken by the Administrative Court. Furthermore, since the Board is composed primarily of members of the dental profession, and those Board members are aware of the standards required of practicing dentists, it is reasonable to argue that the Board may make a finding that the use of a lead apron is so important in protecting the public health, that the failure to utilize a lead apron is in every instance presumptively an act of incompetence or unskillfulness. Thus, it appears to be a reasonable exercise of the Board's regulatory power to define in advance that the failure to use a lead apron is presumptively incompetence or unskillfulness.

This reasoning was relied upon in Ketring v. Sturges, 372 S.W.2d 104 (Supreme Court of Missouri, 1963), where the Missouri Court was faced with a question similar to the one before us. In Ketring certain regulations promulgated by the Missouri State

Board of Optometry were challenged as being beyond the authority of the Optometry Board. The Missouri Optometry statute, in applicable part, stated only that "[t]he state board of optometry may adopt reasonable rules and regulations within the scope and terms of this chapter for the proper administration and enforcement thereof." Pursuant thereto, the Optometry Board adopted various regulations, including two (numbers 13 and 14) which deemed it to be dishonorable conduct for an optometrist to permit an unlicensed person to perform certain procedures in connection with the making of contact lenses. In response to the challenge that was made, the Missouri Supreme Court stated that:

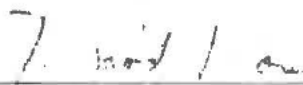
"Rules 13 and 14 define 'dishonorable conduct in optometric practice' as employed in Section 336.110, subd. 1(8), authorizing the board to suspend or revoke a license on such grounds [I]n view of the legislature's failure fully to define the term and in view of the authority conferred upon the board, these rules assume a legislative character. . . . In view of the regulatory authority conferred upon the board, they could, as they saw fit, define in advance some conduct which they would consider dishonorable. The board's judgment in such matters should be disturbed only if the rule is unreasonable. . . . Further, great deference should be paid the board's determination because they, being members of the profession, are more aware of the standards of conduct which the profession exacts of its members, and thus are in a better condition to judge what is dishonorable conduct in the practice of an optometrist. . . . (emphasis added) 372 S.W.2d at 110-111.

The Court concluded that these regulations were valid and were within the authority of the board. See also Kachian v. Optometry Examining Board, 170 N.W.2d 743 (Supreme Court of Wisconsin, 1969;

rehearing denied 1969.^{2/}

Of course, in order to be valid, the Board's regulation must be reasonably related to protecting the public health or safety. See Kachian v. Optometry Examining Board, supra, 170 N.W.2d at 746. Using its expertise, it is for the Dental Board, in the first instance, to determine this question. In that regard, we would suggest that the Board make findings on the health and safety issue in support of its proposed regulation.

Should the Board decide to adopt the lead apron regulation, I will, of course, advise the Board as to the necessary procedures to follow under the Administrative Procedure Act.



DAVID ROSEMAN
Assistant Attorney General

DR:jg

cc: Henry Pollard, D.M.D., President of the Dental Board

^{2/} But see Kee v. Baber, 303 S.W.2d 376 (Supreme Court of Texas, 1957; rehearing denied 1957). In Baber, certain regulations of the Texas Optometry Board were challenged. The Court sustained the validity of the regulations. In doing so, however, the Court specifically contrasted the rulemaking authority granted to the Texas Optometry and Dental Boards. The optometry statute stated in applicable part that "[t]he Board shall have the power to make such rules and regulations not inconsistent with this law as may be necessary for the performance of its duties, the regulation of the practice of optometry and the enforcement of this Act." (emphasis added). The Court noted that this authority ". . . differs from the narrower delegation contained in the Dental Practice Act and other similar Acts. . . ." The Dental statute stated in part that the Board could adopt regulations ". . . as the Board may deem necessary and advisable to carry out the provisions of, and not inconsistent with, . . . [the Texas dental statute], and for the enforcement of this Act. . . ." 303 S.W.2d at 378-79.