



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

September 21, 2001

Ms. Jo Ann Bones, Executive Director
Board of Dentistry
1515 SW 5th Avenue
Suite 602
Portland, OR 97201-5451

Re: Opinion Request OP-2001-1

Dear Ms. Bones:

The Board of Dentistry (board) requested advice regarding the practice of dentistry within the state of Oregon. The board's questions and our short answers are set forth below, followed by a discussion.

1. May a licensed dentist practice dentistry as an employee of a non-dentist employer?

Yes, in three instances. First, under ORS 679.020(3), a dental clinic owned and operated by a labor organization, or a nonprofit organization formed by or on the behalf of a labor organization for the purpose of providing dental services, may employ licensed dentists under conditions specified in statute.^{1/} Second, a dental clinic operated by a local public health authority or the Oregon Health Sciences University (OHSU), to which the legislature has given authority to provide clinical health care to the public, may employ licensed dentists. Third, a dentist may practice dentistry as an employee of a business entity that, while not itself a licensed dentist, is wholly owned by one or more persons licensed to practice dentistry in Oregon. See answer to question two below.

2. What forms of business may a licensed dentist use for the purposes of owning and operating a dental office, employing other dentists or engaging in the clinical practice of dentistry?

Licensed dentists are the only persons who may engage in the clinical practice of dentistry and who may, either individually or as a group, engage, operate, conduct or maintain a dental office. With the exception of labor organizations that are exempt from the licensing requirements of ORS 679.020(1) and (2) as they relate to owning and operating a dental clinic and certain government entities to which those licensing requirements do not apply, only a licensed dentist (or a group of licensed dentists) may employ dentists to engage in the practice of dentistry. Dentists may use any of the following forms of business for the purpose of owning

and operating a dental office, employing other dentists or engaging in the clinical practice of dentistry: sole proprietorships, professional corporations, general, limited liability and limited partnerships, and limited liability companies.

3. May a licensed dentist use the services of a practice management business?

Yes, a licensed dentist may use services offered by a practice management business for the business operations of a dental office so long as the practice management business limits its activities to clerical and administrative functions that do not involve the exercise of discretionary decision-making that would rise to the level of engaging, conducting, operating or maintaining a dental office.

Discussion

Because each of the board's questions is impacted by the licensing provisions in ORS 679.020, interpreting that statute is a key part of our analysis. In interpreting a statute, our goal is to discern the intent of the legislature. ORS 174.020; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). We first look at the text and context of the statute, which includes other provisions of the same statute and related statutes. In so doing, we consider dictionary definitions, rules of grammar and statutory and judicially developed rules of construction that bear directly on how to read the text, such as "words of common usage typically should be given their plain, natural, and ordinary meaning." *Id.* at 611. If the legislative intent is clear from the text and context, the search ends there. Only if the legislative intent is not clear from the text and context of the statute, will we look to the legislative history to attempt to discern that intent.ⁱⁱⁱ *Id.* at 611-612. If, after considering text, context and legislative history, the intent of the legislature remains unclear, we may resort to general maxims of statutory construction to resolve any remaining uncertainty as to the meaning of the statute. *Id.* at 612.

1. Practicing Dentistry as an Employee of a Non-Dentist Employer

a. Private Dental Offices

We advised the board in 1984 that a licensed dentist may not practice dentistry as an employee of a non-dentist employer. Letter of Advice dated December 28, 1984, to Nicholas Marineau, DMD, President, Oregon Board of Dentistry (OP-5689). Our conclusion regarding the prohibition against a licensed dentist working for a non-licensed employer has a basis reaching back to the Supreme Court's decision in *State ex rel. Sisemore v. Standard Optical Co.*, 182 Or 452, 188 P2d 309 (1947): "The prohibition of the practice of optometry by unlicensed persons would be rendered ineffective if corporations were permitted to furnish optometrical services through salaried employees who are licensed optometrists." *Id.* at 458 (citations omitted). We reiterated our conclusion that "a dentist cannot be an employee of a lay person, including a lay corporation, nor can the lay person practice dentistry" in a supplement to OP-5689, issued on January 17, 1985. OP-5689 Supplement, at 1. When OP-5689 and OP-5689

Supplement were issued, ORS 679.020 consisted of two sections. Today, ORS 679.020(1) and (2) are substantively identical to the two provisions that existed in 1984.^{iii/}

ORS 679.020(1) prohibits the practice of dentistry without a license issued by the board, while ORS 679.020(2) requires that an individual obtain such a license before “engaging, conducting, operating or maintaining any dental office in any way.” The restriction in ORS 679.020(1) relates to the clinical practice of dentistry. Under generally accepted rules of statutory construction, the restriction stated in ORS 679.020(2) may not be interpreted as merely duplicating the restriction found in section one of the statute. *See, e.g., State v. Adams*, 315 Or 359, 366, 847 P2d 397 (1993) (“We are not free to ignore the fact that the legislature used different terms in related portions of the statute.”) We conclude, therefore, that the legislature intended for the phrase “engaging, conducting, operating or maintaining any dental office” to refer to activities other than those that comprise the clinical practice of dentistry. This conclusion is supported by case law.^{iv/}

Oregon Laws 1919, chapter 120, a precursor of the current ORS 679.020(2), required a person to obtain a license to practice dentistry before “engaging, conducting, operating or maintaining any dental office or parlor, in any way.”^{v/} *State v. State Board of Dental Examiners*, 96 Or 529, 533, 188 P 960, *reh’g denied* 96 Or 536, 190 P 338 (1920). The statute contained a grandfather clause for “any individual, firm, association or corporation engaged in the actual business of conducting, operating or maintaining any dental office or parlor in the state of Oregon, on January 1, 1919.” *Id.* So long as the person conducting, operating or maintaining a dental office on January 1, 1919, submitted the required documentation and paid the annual fee, the statute mandated that the person “be issued a license by the state board of dental examiners, to conduct, manage and maintain a dental office or parlor.” *Id.* at 534. The Oregon Supreme Court was called on to decide the scope of activities in which a person with such an alternative license could engage.

The court did not define the terms “conduct,” “operate,” and “maintain,” but concluded that “a license merely to conduct an office does not carry with it the right to practice dentistry. They are separate and distinct, and the one does not include the other.” *Id.* at 535. In response to a petition for rehearing, the court expanded on its prior conclusion:

The distinction between maintaining a dental parlor and engaging in the practice of dentistry seems to us plain. The person conducting a dental parlor furnishes the place and the appliances, by means of which persons actually licensed to practice dentistry can carry on that business; but unless such person, in addition to being licensed [under the statute’s grandfather clause] to conduct such parlor, is also licensed to practice dentistry, he cannot personally do a single act toward the relief of persons who resort to his parlors for treatment.

State v. State Board of Dental Examiners, 96 Or 536, 537, 190 P 338 (1920). As the quoted portion of the opinion makes clear, the court drew a definite distinction between the clinical practice of dentistry and the activities pertinent to conducting, maintaining, engaging or operating a dental office. The grandfather clause was dropped from the statute in 1977.^{vi/} Since

that time, all persons who wish to conduct, maintain, engage or operate a dental office have been required to be licensed to practice dentistry.

The court's analysis in *State Board of Dental Examiners* confirms that to engage, conduct, operate, or maintain a dental office involves activities distinct from the clinical practice of dentistry. To determine the "plain, natural and ordinary meaning" of the terms used in ORS 679.020(2), we referred to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1993) (WEBSTER'S). WEBSTER'S provides the following germane definitions:

"engage" which means "to begin and carry on an enterprise, esp. a business or profession";

"conduct" which means "to have the direction of: RUN, MANAGE, DIRECT";

"operate" which means "to manage and put or keep in operation whether with personal effort or not"; or

"maintain" which means "to persevere in: carry on : keep up : CONTINUE."

WEBSTER'S at 751, 474, 1581 and 1362. Each of these definitions connotes active involvement in a dental office, although the definition of "operate" anticipates that a person may participate through the use of intermediaries. It is also possible to draw from these definitions the conclusion that a person who engages, conducts, operates or maintains a dental office is responsible for, and therefore exercises control over, the functioning of the office. In other words, the person has a leadership role rather than solely performing tasks assigned by others.

WEBSTER'S does not contain a definition of the term "dental office." The meaning applied to the terms "engage," "conduct," "operate" and "maintain," however, only takes on significance when "dental office" is defined. Given that a person is required to have a license to practice dentistry (as opposed to dental hygiene or denture technology) in order to engage, operate, conduct or maintain a dental office, we conclude that the term "dental office" in ORS 679.020(2) is representative of a professional practice, the scope of which is more extensive than that portion of dentistry authorized by a license to practice dental hygiene or denture technology.^{viii} *PGE* demands that we look not only at the text of ORS 679.020(1) and (2) in discerning the legislative intent behind that text, but that we also look at the context of those provisions. Context includes other provisions of the same statute. *PGE*, 317 Or at 611.

OP-5689 specifically advised that two non-profit corporations operated by the Teamsters were not authorized to practice dentistry through employees who were licensed dentists. *Id.* at 5. After that opinion was issued, the Teamsters sought to amend ORS 679.020 to permit the continued operation of their dental clinics. In 1985, the legislature added provisions, currently codified as ORS 679.020(3), (4) and (6), to permit the "owning and operating" of dental clinics by a labor organization that meets certain criteria.^{viii} See Or Laws 1985, ch 323, § 3. These provisions constitute part of the context within which we must interpret ORS 679.020(1) and (2).

ORS 679.020(6) defines “owning and operating a dental clinic” to mean:

relating to the business aspects of the dental practice, which includes, but is not limited to, the ownership and management of a dental clinic. “Management” includes, but is not limited to, prices, credit, refunds, warranties, advertising, office personnel and hours of practice, but does not include the clinical practice of dentistry.

The fact that ORS 679.020(6) specifically excludes the clinical practice of dentistry from management activities makes clear that labor organizations, while authorized to own and operate dental clinics, may not themselves engage in the clinical practice of dentistry. Only a natural person licensed by the board may engage in the clinical practice of dentistry.

The legislature expressly exempted labor organizations from ORS 679.020(1) and (2) to allow them to “own and operate” dental clinics without a license to practice dentistry. From this exemption we infer that owning and operating a dental office are encompassed by the activities that require licensure under ORS 679.020(2), namely engaging, conducting, operating or maintaining a dental office. That the legislature did not make a labor organization’s owning and operating a dental clinic synonymous with engaging, conducting, operating and maintaining a dental office suggests that there may be activities encompassed by the terms used in ORS 679.020(2) that are outside of the scope of the authorization granted to a labor organization to own and operate dental clinics.^{ix/}

Analyzing the provisions of ORS 679.020, as amended since we issued OP-5689 and OP-5689 Supplement, we conclude that a dentist may practice dentistry as an employee of a dental clinic owned and operated by a labor organization, so long as the labor organization and the dental clinic comply with the requirements specified in ORS 679.020(3) and (4). We have found no evidence, however, to suggest that the legislature intended for the requirements of ORS 679.020(2) to not apply to private, nonprofit entities. The contrary conclusion is supported by the fact that the legislature specifically exempted labor organizations from the licensing requirements. A review of the federal statutes addressing grants for provision of medical services to medically underserved populations suggests no inconsistency between health care facilities both receiving federal funds and being held to state licensing requirements.^{x/} See 42 USC §§254b – 254k. Therefore, we conclude that, except for limited access permit dental hygienists referenced in ORS 679.020(5), no private person other than a labor organization is exempt from the requirements of ORS 679.020(1) and (2). A private non-profit entity, as well as a private for-profit entity, must comply with the licensing requirements of ORS 679.020(2) to own and operate a dental office.^{xi/}

b. Governmental Dental Offices

The legislature has authorized at least two government entities to provide health care services to the public – OHSU and local public health authorities.^{xiii/} It is necessary to analyze the enabling statutes for these government entities to determine whether the licensing requirements of ORS 679.020(2) apply to them.

Part of OHSU's statutory mission is to "[e]ngage in the provision of inpatient and outpatient clinical care and health care delivery systems throughout the state." ORS 353.030(3)(c). Moreover, the legislature has designated OHSU, on behalf of the state, to "[c]ontinue a commitment to provide health care to the underserved patient population of Oregon." ORS 353.030(3)(f). OHSU may exercise not only those powers expressly conferred on it by the legislature but also those powers that are implied by law or incidental to those expressly given. ORS 353.020. Thus, OHSU has the authority to engage in activities implied by its statutory mission to provide clinical care and health care delivery systems throughout Oregon and to provide health care to underserved patients. The clinical practice of dentistry is taught at OHSU and dental care is provided to the public at dental clinics on the OHSU campus. That the legislature has recognized and condoned OHSU's exercise of its incidental and implied powers to operate facilities in which patients receive dental care is seen through a review of the statutes relating to the Oregon Tort Claims Act, which address the state's tort liability for "patient care" provided by dentists employed or affiliated with OHSU and by dental students or trainees. *See* ORS 30.267.

Turning from OHSU to local governments, ORS 431.375(1) mandates that the state and the various counties "maintain and improve public health services through county or district administered public health programs." This mandate derives from the legislature's stated policy that "each citizen of this state is entitled to basic public health services which promote and preserve the health of the people of Oregon." ORS 431.375(1). Unless a health district is formed by contiguous counties, each county is responsible for managing public health programs within its jurisdiction, unless it chooses to contract out to private persons.^{xiii/} ORS 431.375(2). The managing county or health district is known as the "local public health authority." *Id.*

In managing public health programs, the local public health authority is responsible for assuring the performance of "activities necessary for the preservation of health or prevention of disease * * * as provided in [its] annual plan." ORS 431.416(2). The legislature does not define the scope of this responsibility, but instead provides a list of minimally required services, which includes parent and child health services. *Id.* The administrator for a local public health authority is required to appoint employees as needed to carry out the authority's responsibilities. ORS 431.418(3)(b). Reviewing the statutory scheme in ORS chapter 431, we conclude that it authorizes, but does not mandate, a local public health authority to provide dental care in complying with its obligation to assure the performance of "activities necessary for the preservation of health or prevention of disease."^{xiv/}

This interpretation of the authority provided to OHSU and local public health authorities poses a potential conflict with ORS 679.020(2). While their enabling statutes authorize OHSU and local public health authorities to provide health care to the public, it is a legal impossibility for either government entity to qualify for a license to practice dentistry in order to operate a dental clinic under ORS 679.020(2). If ORS 679.020(2) applies to these entities and they cannot provide dental care, their authority to provide health care to the public is curtailed in a manner that appears inconsistent with the broad language of their enabling statutes.

The Oregon Supreme Court has stated that the following is a “cardinal rule” of statutory construction:

[W]hen it is contended that two statutes are in conflict the statutes must, whenever possible, be construed together and in such a manner as to be consistent, rather than in conflict, thus giving effect to both statutes.

McLain v. Lafferty, 257 Or 553, 558, 480 P2d 430 (1971). If ORS 679.020(2) is interpreted as not applying to government bodies to which the legislature has granted authority to provide health care services to the public, i.e., OHSU and local public health authorities, that statute does not conflict with the enabling statutes for OHSU and the local public health authorities. Whether this interpretation of the statutes is correct depends upon whether it is consistent with the legislature’s intent in enacting them.

It is highly doubtful that the legislature contemplated the application of ORS 679.020(2) when considering its enactment or amendment. For example, when considering amendments to ORS 679.020 to provide for the operation of dental clinics by labor unions, hearings held by the relevant legislative committees in 1984 and 1985 addressed the impact of ORS 679.020(2) on not only labor unions but also on the widows of dentists who had operated their own dental offices. They did not, however, discuss the impact of the statute on clinics operated by OHSU or local public health authorities.

In testimony before legislative committees, both during the 1984 hearings and in 1997 hearings regarding a bill to amend the composition of professional business entities, e.g., professional corporations, the board and the Oregon Dental Association (ODA) stated justifications for ORS 679.020(2) related to protecting the public. The board spoke of protecting the public from “unscrupulous business practices,” including fraud, and the ODA referred to protecting a dentist’s professional judgment from the “corporate bottom line.”^{xv} While the purpose of the statute as prescribed by either the board or ODA is not definitive, we can assume that at least part of the reason the legislature enacted ORS 679.020(2) was to protect members of the public seeking dental care. Another possible purpose in enacting ORS 679.020(2) could have been to protect the interests of dentists in maintaining control over their profession. The question is whether the legislature would have considered licensing of those responsible for operating or maintaining a dental office necessary to protect these public and professional interests so as to preclude a governmental entity authorized to provide such care to the public from doing so.

The ODA’s concerns about the “corporate bottom line” relate largely to private for-profit entities. As governmental entities, revenues received from providing care should not be the primary “bottom line” concern of either OHSU or local public health authorities. The board saw ORS 679.020(2) as allowing it to oversee the operators of dental offices so as to combat unscrupulous business practices such as fraud. While the interpretation of ORS 679.020(2) proposed here would result in OHSU and local public health authorities not being within the board’s jurisdiction, unlike private dental practices, both government entities are answerable to the legislature. The legislature can amend or revoke the authority provided to these entities if it concludes that they are not executing their missions. Of course, under the proposed

interpretation of ORS 679.020(2), as in private dental offices and excepting the exemptions stated in ORS 679.025, only an individual licensed by the board could engage in the clinical practice of dentistry within a facility operated by OHSU or managed by a local public health authority. ORS 679.020(1). Therefore, it appears that the interests of the public can be protected without applying ORS 679.020(2) to OHSU or local public health authorities. With respect to the professional interests of dentists, the legislature has authorized the government entities in question to provide health care largely to fill a need that is being left unaddressed by the private sector.

Interpreting ORS 679.020(2) as not applying to OHSU and local public health authorities allows that statute and the enabling statutes for the government entities to be construed together in a consistent manner that gives effect to all of them. We believe that this interpretation of the statutes at issue most fully preserves the legislature's intent, as provided in the mission and policy statements regarding OHSU and the local public health authorities and the reported and probable purposes for enactment of ORS 679.020(2). Therefore, we conclude that ORS 679.020(2) does not apply to health care clinics providing dental care services that are operated by OHSU or managed by local public health authorities.

In addition to health facilities operated or managed by state or local governments, at least one segment of the federal government, the Indian Health Service, also operates facilities that may provide dental services to eligible individuals.^{xvi/} 42 USC § 1661; 42 CFR 36.11. It is a legal impossibility for the Indian Health Service, an agency within the U.S. Department of Health and Human Services, to comply with the licensing requirements of ORS 679.020(2). Therefore, under the doctrine of federal supremacy, the federal statutes and regulations governing the Indian Health Service's provision of dental care to eligible persons preempt the requirements of ORS 679.020(2). *See Sperry v. State of Florida*, 373 US 379, 385, 83 S Ct 1322, 10 L Ed 2d 428 (1963) (citations omitted) ("A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions").

c. Summary

No private person other than a labor organization may own and operate a dental office unless licensed by the board to practice dentistry, and a licensed dentist may not practice dentistry as an employee of a private, non-dentist employer other than a dental clinic owned and operated by a labor organization.^{xvii/} Any private person, other than a labor organization or a business entity described in part two below, that owns or operates a dental office without a license to practice dentistry violates the prohibition in ORS 679.020. There are both criminal and civil penalties for violations of ORS 679.020.^{xviii/}

OHSU and local public health authorities, to which the legislature has given authority to provide clinical health care to the public, are not subject to the licensing requirements of ORS 679.020(2) in fulfilling their statutory mission. The same conclusion applies to the federal

Indian Health Service. There is no prohibition against a licensed dentist practicing dentistry as an employee of these governmental entities.

2. Business Entities and the Practice of Dentistry

With the exception of labor organizations and authorized government entities, only a licensed dentist may own and operate a dental office. It follows from this conclusion that, apart from a dental clinic owned and operated by a labor organization or an authorized government entity, only a licensed dentist (or a group of licensed dentists) may employ a licensed dentist to engage in the practice of dentistry. Therefore, a licensed dentist in his or her personal capacity may own and operate a dental office and, pursuant to that operation, employ other dentists and otherwise engage in the practice of dentistry. From a review of the restrictions contained in ORS 679.020 and the state statutes pertaining to forms of doing business, we have identified four forms of business pursuant to which a dentist may engage in these activities: sole proprietorship, professional corporations, partnerships and limited liability companies.^{xix/}

a. Sole Proprietorship

A sole proprietorship is a form of doing business in which one person owns all the assets of the business and is solely liable for all of the business' debts. BLACK'S LAW DICTIONARY at 1392 (1990 ed). A licensed dentist may operate his or her practice as a sole proprietorship. Although the sole proprietor may choose to employ other dentists, and may choose to leave the treatment of patients to those employed dentists, the licensed dentist acting as a sole proprietor is the single owner of the dental practice.

b. Professional Corporation

A "professional corporation" is "a corporation organized under [ORS chapter 58] for the specific purpose of rendering professional service or services and for such other purposes provided under this chapter." ORS 58.015(6). A dentist may conduct his or her practice in the form of a professional corporation, or practice as a non-shareholder employee thereof, if each shareholder in that corporation is a dentist licensed to practice in this state.

In 1947, the Oregon Supreme Court held that a corporation was prohibited from practicing optometry through the work of its licensed employees. *Sisemore*, 182 Or 452. In so holding the court stated:

Where the right to practice a profession is conditioned upon pursuit of a course of specialized training, the acquiring of a diploma, the passing of an examination, and the furnishing of a certificate of good moral character, it is obvious that a corporation cannot comply with such requirements.

Id. at 455.

In 1969, the Oregon legislature effectively narrowed the holding in *Sisemore* by authorizing the formation of professional corporations pursuant to which professional services, such as dentistry, could be rendered so long as each shareholder of the corporation was licensed to provide the professional service in question. 1969 Or Laws, ch 592, § 2(4).^{xxv} In 1985, the legislature amended ORS 58.015(4) to require that only a majority of the shareholders of a professional corporation be licensed professionals. Or Laws 1985, ch 764, § 3(4). In 1993, an amendment required that a majority of each class of shareholders entitled to vote be licensed professionals. Or Laws 1993, ch 235, § 29(1).^{xxi}

In 1995, the Oregon Court of Appeals, in the course of resolving a breach of contract issue between opticians, addressed the reasoning enunciated in *Sisemore* as follows:

[W]e do not read [*Sisemore*] as precluding *any* ownership share, including a noncontrolling minority interest, by *any* unlicensed entity. The vice in *Sisemore* was that the corporation, not the licensed employee, predominated over and controlled the practice and the employee's professional services. Although we do not now decide whether *all* interests that fall short of majority or controlling ones are necessarily beyond the rationale of *Sisemore*, we do hold that not all one-third interests, regardless of the business structure and the role of the unlicensed party, are within the *Sisemore* rationale.

Neiss v. Ehlers, 135 Or App 218, 231, 899 P2d 700 (1995).^{xxii}

In 1997, the legislature repealed those provisions of ORS chapter 58 regulating the number of shareholders of a professional corporation who had to be licensed to practice the profession. Or Laws 1997, ch 774, § 31. Provisions governing who may be a shareholder were then enacted with respect to only the practice of medicine.^{xxiii} *Id.* § 17. With respect to dentistry, ORS 58.369 was added, which provided: "Nothing in this chapter is intended to supersede the provisions of ORS 679.020." Or Laws 1997, ch 774, § 27.^{xxiv} When read in light of ORS 679.020's restrictions upon "engaging, conducting, operating or maintaining a dental office without a license" and our conclusion that these restrictions encompass ownership and management of a dental office, we interpret ORS 58.369 as requiring licensure by the board as a prerequisite to becoming a shareholder in a professional corporation that renders dental services to the public.^{xxv} See 17 Op Atty Gen 491, 492 (1935) (Each shareholder of a corporation with a declared purpose of maintaining and conducting a dental parlor and renting, buying, maintaining, owning and operating offices for such purpose must be licensed to practice dentistry.).

To summarize, in 1969 the legislature narrowed the common law holding in *Sisemore* by permitting the creation of professional corporations wholly owned by licensed professionals. In 1997, two years after *Neiss*, the legislature dropped all licensing requirements related to the ownership of most professional corporations. The legislature, however, prevented the application of this relaxation of standards to the ownership of dental practices through the enactment of ORS 58.369. Thus, a dentist may conduct his or her practice in the form of a professional corporation, or practice as a non-shareholder employee thereof, only so long as each shareholder in that corporation is a dentist licensed to practice in this state.^{xxvi}

c. Partnerships

Three types of partnerships are available to licensed dentists who wish to practice within the partnership framework: a “general” partnership, a limited liability partnership and a limited partnership.^{xxvii/}

i. “General” Partnerships^{xxviii/}

A “partnership” is “an association of two or more persons to carry on as co-owners a business for profit created under ORS 67.055, predecessor law, or comparable law of another jurisdiction. A partnership includes a limited liability partnership.” ORS 67.005(7). In interpreting ORS 679.020 above, we concluded that only dentists licensed in this state may engage in the clinical practice of dentistry, and, apart from labor organizations, are the only persons that may own and operate a dental office and employ other dentists. Because a partnership signifies co-ownership, we conclude that a dentist may utilize a general partnership to conduct these activities only if all of the partners are licensed to practice dentistry in Oregon.^{xxix/}

ii. Limited Liability Partnerships

A general partnership may register as a limited liability partnership if it either renders professional services or is affiliated with a limited liability partnership or a foreign limited liability partnership and either renders services that are related or complementary to the professional services rendered by the affiliated partnership or provides services or facilities to the affiliated partnership. ORS 67.500(1). Thus, limited liability partnerships are specifically available to professionals such as dentists. Because a partnership as defined by ORS 67.005(7) includes a limited liability partnership, we reach the same conclusions for limited liability partnerships as for general partnerships, namely that a dentist may practice dentistry as a partner or employee of a limited liability partnership only if all of the partners are licensed to practice dentistry in Oregon.

iii. Limited Partnerships

A limited partnership, by definition, is composed of both general and limited partners. *See* ORS 70.005(7). One description of a limited partnership is that “[g]eneral partners manage the limited partnership business and are personally liable for limited partnership obligations. Limited partners, on the other hand, do not participate in the management of the limited partnership business, and their liability for limited partnership obligations is limited to their capital contributions.”^{xxx/} ORS chapter 70, governing the establishment of limited partnerships, is silent with respect to the chapter’s applicability to professionals. Because all owners of a dental office must be licensed dentists, both the limited and general partners of a limited partnership would have to be licensed dentists for a limited partnership to own and operate a dental office and employ other dentists.

d. Limited Liability Company

A limited liability company (LLC) is “an entity that is an unincorporated association having one or more members that is organized under * * * chapter [63].” ORS 63.001(13). A licensed dentist may own and operate a dental practice in the form of an LLC pursuant to the terms of ORS chapter 63. *See* ORS 63.074. As with professional corporations, ORS 63.960 provides that “[n]othing in this chapter is intended to supersede the provisions of ORS 679.020.” We interpret this restriction to mean that no one may be a member of an LLC organized under ORS chapter 63 to provide dental services to the public unless he or she is licensed by the board to practice dentistry in this state. Likewise, an LLC is not authorized to employ practicing dentists unless all members of the LLC are themselves licensed by the board to practice dentistry.

3. Use of a Practice Management Business

The board’s final question asks whether a dentist may use the services of a practice management business. We are advised by board staff that the board’s use of the term “practice management business” refers to an enterprise that provides varying levels of assistance to the business operations of an office of the type run by a dentist or another professional. Under the restrictions of ORS 679.020, a dentist may not transfer responsibilities to a practice management business if to do so would result in the practice management business “engaging, conducting, operating or maintaining” the dentist’s office.

In the 1985 supplement to OP-5689, we stated that “we see no reasonable basis to conclude that a dentist or other professional could not contract with a lay person, including a corporation, to manage the professionals’ accounting, collection, advertising or other business matters.” OP-5689 Supp. at 1-2. The legislature’s 1985 amendments to ORS 679.020, exempting labor organizations from licensure requirements to own and operate a dental clinic, permit us to offer more specific advice than we could provide in January 1985 regarding a dentist’s authority to contract with a lay person in relation to the business operations of a dental practice. In particular, the use of the term “management” in ORS 679.020(6), a section added by the legislature in 1985, causes us to narrow the conclusion stated in OP-5689 Supplement.

ORS 679.020 does not define the commonly used terms “engaging, conducting, operating or maintaining,” leaving us to consult WEBSTER’S. As discussed above, our analysis of the WEBSTER’S definitions leads us to conclude that to engage, conduct, operate or maintain a dental office may be equated with undertaking activities that demonstrate responsibility for, and control over, the dental practice. ORS 679.020(6) tells us that “owning and operating” a dental clinic relates to “the business aspects of the dental practice, which includes, but is not limited to, the ownership and management of a dental clinic.” The provision continues with a non-exclusive list of responsibilities that constitute “management” of a clinic: “prices, credit, refunds, warranties, advertising, office personnel and hours of practice.”^{xxxii}

The management activities described in ORS 679.020(6) are most accurately characterized as decision-making responsibilities germane to the operation of a business, e.g., setting prices for services and establishing hours of operation. The statutory provision does not

encompass clerical or administrative duties that do not involve the exercise of discretionary decision-making, e.g., billing patients and collection activities, maintaining financial records, scheduling appointments or filing insurance forms. This distinction fits with our understanding of the WEBSTER'S definitions of "engaging, conducting, operating or maintaining," as indicating ultimate responsibility for, and control over, office operations. So long as a dentist does not delegate decision-making responsibilities of the type illustrated in ORS 679.020(6) to a practice management business, we conclude that using the services of a practice management business would not violate the licensure requirements of ORS 679.020(2).

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

KCB/mwc/GEN96587

^{i/} For purposes of owning and operating a dental clinic, "labor organization" is defined in ORS 243.650 and 663.005(6). ORS 679.020(3). For ease of reference, we use the term "labor organization" to refer to both a labor organization and a nonprofit organization formed by or on behalf of a labor organization for the purpose of providing dental services.

^{ii/} We do not consider Oregon Laws 2001, chapter 438, to alter the treatment of legislative history required under *PGE*.

^{iii/} ORS 679.020, in its entirety, provides:

- (1) No person shall practice dentistry without a license.
- (2) Before engaging, conducting, operating or maintaining any dental office in any way, every individual shall obtain a license to practice dentistry in this state.
- (3) The provisions of subsections (1) and (2) of this section as they relate to owning and operating a dental clinic do not apply to a labor organization as defined in ORS 243.650 and 663.005(6), or to any nonprofit organization formed by or on behalf of such labor organization for the purpose of providing dental services. Such labor organization shall have had an active existence for at least three years, have a constitution and bylaws, and be maintained in good faith for purposes other than providing dental services.
- (4) Any labor organization that owns or operates a dental clinic pursuant to subsection (3) of this section shall appoint an actively licensed dentist as its dental director who shall be subject to the provisions of ORS 679.140 in the capacity as dental director. The dental director shall have responsibility for

all matters affecting the clinical practice of dentistry, which includes, but is not limited to:

- (a) Diagnosis of conditions within the human oral cavity and its adjacent tissues and structures.
 - (b) Prescribing drugs which are administered to patients in the practice of dentistry.
 - (c) Treatment plan of any dental patient.
 - (d) Overall quality of patient care which is rendered or performed in the practice of dentistry.
 - (e) Supervision of dental hygienists or dental assistants and the authorization for procedures performed by them as provided by the rules of the Oregon Board of Dentistry.
 - (f) Other specific services within the scope of clinical dental practice.
- (5) Subsections (1) and (2) of this section do not apply to a limited access permit dental hygienist who renders services authorized by a limited access permit issued by the board pursuant to ORS 680.200.
- (6) As used in this section “owning and operating a dental clinic” means relating to the business aspects of the dental practice, which includes, but is not limited to, the ownership and management of a dental clinic. “Management” includes, but is not limited to, prices, credit, refunds, warranties, advertising, office personnel and hours of practice, but does not include the clinical practice of dentistry.

^{iv/} The text and context of a statute includes prior Supreme Court decisions interpreting the statute in question. *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 596, 943 P2d 197 (1997).

^{v/} ORS 679.020 can be traced back to Oregon Laws 1919, chapter 120, section 1, through Olson Oregon Laws 1920, section 8577, Oregon Code 1930, section 68-1017 and Oregon Code 1939, section 54-421. When the Oregon Code was revised, section 54-421 was renumbered to ORS 679.020.

^{vi/} The grandfather clause was deleted from the ORS 679.020 by Oregon Laws 1977, chapter 192, section 1.

^{vii/} Neither the text or context of ORS 679.020(2) nor its legislative history provides a clear picture of the legislature’s intent in using the term “dental office.” We propose a definition that equates a “dental office” with the concept of a dental practice, rather than emphasizing the material aspects of the place where dentistry is practiced, for the following reasons. It appears clear to us that a person who owns a building that houses a number of dentists’ offices, or leases equipment to those offices, does not necessarily have responsibility or control over the way in which the dentists’ businesses are run. On the other hand, a person who rents a dentist’s office, leases the equipment and has responsibility for activities germane to the dental practice, such as setting the hours of operation of the office and the fees to be charged for the offered services, or creating rules governing employment of staff, appears to squarely fall within the category of those who engage, operate, conduct or maintain a dental office. In addition, we conclude that a person who has an ownership interest in the dental practice itself, as opposed to just the real or personal property used by the practice, also is one who engages, operates, conducts or maintains a dental office by virtue of the opportunity for control over aspects of the practice that is a normal aspect of ownership. This conclusion is consistent with the understanding expressed by Senator Peg Jolin, member

of the Joint Committee on Sunset Review, in explaining the reason for exempting labor organization dental clinics from ORS 679.020(2). Joint Committee on Sunset Review, April 24, 1985, tape 55, side A at 040.

^{viii/} ORS 679.020(2) refers to a “dental office,” while ORS 679.020(3) and (4), relating to the labor organization exemption, refer to a “dental clinic.” Although the rules of statutory construction require that substantive meaning be attributed to the legislature’s use of different terms in the same statute, i.e., the legislature intended “dental office” and “dental clinic” to mean two distinct entities, we have found no evidence to suggest any distinction that the legislature could have intended between the two terms. Our review of the legislative history of the 1985 amendments to ORS 679.020 further suggests that the legislature used the terms synonymously. *See*, Testimony, Joint Committee on Sunset Review, May 1, 1985, tape 61, side B at 234. (In requesting that the Joint Committee delete reference to a “dental office” in what is now ORS 679.020(6) in favor of a “dental clinic,” Theodore Kulongski, attorney for the Teamsters, stated that he was seeking consistency with what was codified as ORS 679.020(3), which referred to the Teamsters’ operation as a “dental clinic.” Kulongski explained that he was not seeking to change the reference to a “dental office” in ORS 679.020(2) because that was the existing statutory language. Neither Kulongski nor any members of the Joint Committee gave any indication that the amendment sought by Kulongski had any substantive effect. In fact, immediately following his request to insert “dental clinic” in ORS 679.020(6) in lieu of “dental office” Kulongski prefaced his next request for amendment by saying that “[t]he substantive change occurs * * *,” indicating that Kulongski did not consider the “office” to “clinic” change to be substantive.) An example of legislators using the terms “dental office” and “dental clinic” interchangeably is seen in Senator Cub Houck’s explanation of his proposal to delete ORS 679.020(2) in its entirety so that persons other than licensed dentists could “own an operate dental clinics * * *.” Joint Interim Task Force on Sunset Review, November 30, 1984, tape 80, side A at 158. The Senator’s explanation referred to “dental clinics,” while ORS 679.020(2) refers to a “dental office.”

^{ix/} There is little indication in the statute or its legislative history as to what those activities may be. We have not analyzed this issue further because it is not germane to the questions posed by the board.

^{x/} The fact that a member of the National Health Service Corps may serve in a private, non-profit facility without being licensed to practice dentistry in Oregon does not result in the operators of the facility being exempt from the licensing requirements of ORS 679.020(2). *See* 42 USC § 254f(e) and ORS 679.025(d).

^{xi/} *See* discussion of question 2, beginning at page 8.

^{xii/} “Health” is “the state of being sound in body or mind.” WEBSTER’S at 1043. Dentistry is the “healing art which is concerned with * * * the human oral cavity and maxillofacial region and conditions of adjacent or related tissues and structures.” ORS 679.010(2). In the context of the statutes providing authority to OHSU and local public health authorities, we construe caring for a person’s “health” to encompass providing dental services. ORS 679.010(2). To the extent that the board has questions regarding governmental programs other than those discussed in the text, it should consult with its contact counsel within the General Counsel Division.

^{xiii/} The state must act if a county relinquishes its authority. ORS 431.375.

^{xiv/} A county or health district could contract with a private entity to manage dental services rather than doing so itself. ORS 431.375. In such a situation, a government entity may not be operating the dental clinic. With assistance from this office, the board would need to assess the particular factors in such a situation to determine the applicability of ORS 679.020(2) to the party with whom the county or health district contracted.

^{xv/} In discussing amendments to ORS 679.020 to accommodate the labor union clinics, Edward McGlone, then the board's deputy administrator, spoke of the statute's requirements enabling the board to regulate the practice of dentistry and "dentistry itself" and to "protect the public from unscrupulous business practices." Testimony, Joint Committee on Sunset Review, November 16, 1984, tape 70, side A at 40. Several years later, in relation to a bill affecting certain types of corporations, a representative of the ODA testified that "the record that the reasoning behind requiring people to have a dental license to operate a dental clinic is to make sure that the dentists' professional judgment is not intruded upon by the corporate bottom line." Testimony of Jane Meyers, House Committee on the Judiciary, Subcommittee on Civil Law (SB 267A), May 21, 1997, tape 91, side A at 417.

^{xvi/} If questions arise for the board regarding facilities operated by an agency of the federal government other than the Indian Health Service, we recommend that the board seek advice from its contact counsel within the General Counsel Division.

^{xvii/} On behalf of the board, Edward McGlone testified that a Teamsters clinic could operate within the restrictions of ORS 679.020, with persons other than licensed dentists owning and operating the facility, so long as the dentists practicing at the clinic were independent contractors rather than clinic employees. Testimony, Joint Committee on Sunset Review, April 24, 1985, tape 55, side A at 051. McGlone looked to OP-5689 Supplement to support this position. But our review of the legislative history of Oregon Laws 1985, chapter 323, indicates that the legislators considering the issue did not embrace this conclusion but instead considered ORS 679.020(2) as a bar to anyone other than licensed dentists owning or operating a dental office. For example, in response to the Teamsters' situation, Senator Cub Houck proposed deleting ORS 679.020(2) in its entirety. The Senator explained his proposal in this way: "the effect of the motion would allow parties other than licensed dentists to own and operate dental clinics and require them to use licensed dentists to do the dental work." Joint Interim Task Force on Sunset Review, November 30, 1984, tape 80, side A at 158. Representative Peg Jolin's comments during a committee hearing made clear that she considered the Teamsters' issue to arise because under ORS 679.020(2) a Teamsters clinic could not exist unless a dentist owned it. Joint Committee on Sunset Review, April 24, 1985, tape 55, side A at 040.

^{xviii/} Either the Attorney General, a county prosecuting attorney or the board may maintain an action to enjoin a person violating ORS 679.020. ORS 679.027. Under ORS 679.140(11), added by Oregon Laws 1999, chapter 253, section 1, the board may impose a civil penalty of up to \$5,000 on any person who violates ORS chapter 679, including ORS 679.020. Finally, any violation of ORS 679.020 is a Class A misdemeanor. ORS 679.991.

^{xix/} These various types of business entities are governed by different laws. Therefore, having an ownership interest in a dental practice via one type of business entity as opposed to another may impose differing obligations on a dentist with respect to issues such as liability and tax obligations, making one type of business entity more attractive than another depending on a dentist's individual circumstances. These characteristics of the business entities discussed in our advice are not germane to the board's questions and are not addressed herein.

^{xx/} ORS chapter 58 also regulated the number of officers and directors required to be professional license holders.

^{xxi/} The 1993 legislation also clarified that the terms of ORS chapter 58 would apply to any corporation formed by professionals for the purpose of providing professional services. The statute, codified as ORS 58.037, provides:

Notwithstanding any provision of ORS chapter 60 [governing private corporations] or ORS 58.035, this chapter shall apply to a corporation, and to the joint and several liability

of the shareholders of a corporation, organized by a professional under ORS chapter 60 for the purpose of rendering professional service or services unless, prior to December 1, 1992:

(a) The professional's regulating board authorized incorporation under ORS chapter 60; and

(b) The corporation was incorporated under ORS chapter 60.

ORS 58.037(1). ORS 58.037(2) currently exempts only architects from ORS 58.037(1).

^{xxii/} The court found "nothing in Oregon's applicable statutes or rules" to support defendants' argument that it was unlawful for a person who was not licensed to practice optometry to have an ownership interest in an optometry business. *Neiss*, 135 Or App at 231.

^{xxiii/} See Donald R. Laird, *Professional Corporations*, in *ADVISING OREGON BUSINESSES* § 31.4 (Oregon State Bar ed., 1989 & Supp., 1997).

^{xxiv/} Identical language appears as ORS 63.960 (pertaining to limited liability companies), which was enacted by Oregon Laws 1997, chapter 774, section 29.

^{xxv/} Our interpretation is supported by the legislative history of Oregon Laws 1997, chapter 774, sections 27 and 29 (codified as ORS 58.369 and ORS 63.960). During hearings on SB 267A, a representative of the ODA offered amendments containing the language that currently appears in ORS 58.369 and ORS 63.960. The following exchange regarding the offered amendments took place between the ODA representative and the chairman of the House Committee on the Judiciary, Subcommittee on Civil Law:

Jane Meyers: [O]ur members felt that the protection that is provided to both the public and to people in dental practices in ORS 679.020, which I have given you a copy of, which requires persons who operate dental practices or engage in the practice of dentistry and operate dental clinics to have a license in Oregon to practice dentistry, there is an exception in that for organized labor clinics such as the Teamsters operate. We just want to make sure that Senate Bill 267, because it does affect professional corporations and limited liability corporations which some dentist clinics are forming, is not, does not, supercede that statute. So it's trying to stay status quo.

Chair Shetterly: Jane, as to dental LLPs [limited liability partnerships] or LLCs [limited liability companies], whatever the case, or PCs [professional corporations], all the shareholders or partners would have to be dentists?

Meyers: That is the way I understand the law, Chair Shetterly.

Chair Shetterly: That is the effect of the -3 amendments, making sure of that.

Testimony, House Committee on the Judiciary, Subcommittee on Civil Law (SB 267A), May 21, 1997, tape 91, side A at 354.

^{xxvi/} ORS chapter 58 gives a professional regulatory agency, such as the board, broad authority over professional corporations formed to practice a profession regulated by that agency. See ORS 58.325 to 58.367. For example, "[e]xcept as otherwise provided by law, the regulatory board applicable to each professional service rendered by a professional corporation may establish rules and regulations affecting the corporation and its officers, directors and shareholders that are in addition to the provisions of this chapter." ORS 58.367.

^{xxvii/} On January 1, 1998, ORS chapter 67 became the governing law for all limited liability and foreign limited liability partnerships. With regard to other partnerships, ORS chapter 68 governs through December 31, 2002, except for partnerships created on or after January 1, 1998, that are not continuing the business of a dissolved partnership under ORS 68.630, and partnerships created before January 1, 1998, that elect to be governed by ORS chapter 67. ORS chapter 67 becomes the governing law for all partnerships effective January 1, 2003. *See* Or Laws 1997, ch 775, § 84.

^{xxviii/} We use the adjective “general” to describe what is normally simply referred to as a “partnership” in order to distinguish it from a limited liability partnership and a limited partnership.

^{xxix/} The partnership statutes define “person” to include corporations and limited liability companies. ORS 67.005(11). In 1972 we stated a qualified conclusion that a professional corporation, the shareholders of which were all licensed to practice public accounting, could form a partnership with individuals who were also licensed, so long as the professional corporation’s articles of incorporation provided for the business arrangement. 36 Op Atty Gen 94, 99 (1972). At this time, we note that it may be possible for a professional corporation or limited liability company to participate in a partnership organized for the practice of dentistry. Further research would be necessary to confirm what requirements, if any, would be peculiar to such an arrangement. We can undertake such research at your request.

^{xxx/} James M. Kennedy & Turid L. Owren, *Limited Partnerships, in* ADVISING OREGON BUSINESSES § 6.1 (Oregon State Bar ed., 1989).

^{xxxi/} It appears likely that the example of management activities cited in ORS 679.020(6) were taken from a rule proposed by the board prior to the 1985 amendment of ORS 679.020. The proposed rule would have prohibited a licensed dentist from entering into a relationship with a non-licensed person that would have allowed the latter to exercise control over the “policies and decisions relating to the business aspects of the licensee’s practice including *prices, credits, refunds, warranties, advertising, office personnel and hours of practice.*” Testimony of Theodore Kulongoski, Joint Interim Task Force on Sunset Review, November 16, 1984, tape 68, side B at 298 (emphasis supplied).