June 15, 2011

Michael R. Everhart, Executive Director
State Board of Optometry
77 South High Street, 16th Floor
Columbus, Ohio 43215-6108

SYLLABUS: 2011-022

1. The State Board of Optometry may regulate the business or management aspects of the practice of optometry through the adoption and promulgation of administrative rules, but only to the extent that any rule or part thereof relates to activities or decisions that have a direct and significant effect on an optometric patient's care or treatment. The reasonableness and validity of any rule or part thereof is subject to judicial review.

2. For the purpose of this opinion, it is presumed that the General Assembly has properly delegated rulemaking authority to the State Board of Optometry, including the authority to promulgate rules relating to activities or decisions that have a direct and significant effect on an optometric patient's care or treatment. (1998 Op. Att'y Gen. No. 98-035 (syllabus, paragraph 3), approved and followed.)

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OPINION NO. 2011-022

Michael R. Everhart, Executive Director
State Board of Optometry
77 South High Street, 16th Floor
Columbus, Ohio 43215-6108

Dear Executive Director Everhart:

I am in receipt of your request for an opinion on the rulemaking authority of the State Board of Optometry (the "Board"). Your request explains that many licensed optometrists, as part of their practice, enter into lease agreements with corporate entities such as Sears, Target, WalMart, LensCrafters, and Pearle Vision (hereinafter "optical companies"). The business model for such optical companies is to make optometric and optical services available in a co-located setting, offering "one-stop" convenience to patients and customers. You have represented that the lease agreements between optometrists and optical companies often contain terms that relate to the economic aspects of managing an optometric practice—for example, establishing specific business hours for the optometrist and requiring the optometrist to participate in certain third-party payer agreements.

Administrative rule currently provides:

> The performance of optometric services for the public while *in the employ of or while under the direct or indirect control* of any person or entity of any kind other than a holder of a certificate of licensure, a corporation of holders of certificates of licensure, a not for profit charitable corporation or foundation, or a professional corporation as defined in [R.C. Chapter 1785], of holders of certificates of licensure constitutes "dishonesty and unprofessional conduct" as that phrase is used in [R.C. 4725.19]. (Emphasis added.)

11A Ohio Admin. Code 4725-5-10. According to your opinion request, the Board proposes to amend rule 4725-5-10 to define "direct or indirect control" to include an unlicensed entity controlling or having the ability to control (for example, through a lease agreement) specific decisions related to the management of an optometric practice. A violation of the amended rule would constitute "dishonesty or unprofessional conduct in the practice of optometry" under R.C. 4725.19(B)(3). In this context, you have asked us to advise generally on whether the Board's rulemaking authority is limited to regulating the clinical aspects of the practice of optometry, or whether it also extends to regulating the business or management aspects of the practice of optometry.

The basic principles for analyzing the rulemaking authority of a state licensing board are well established:

> It is generally understood that "[t]he purpose of administrative rulemaking is to facilitate the administrative agency's placing into effect the policy declared by the General Assembly in the statutes to be administered by the agency." The standard for the promulgation of rules is that an administrative body with rulemaking authority may adopt such rules as it deems appropriate to carry out its powers and duties, provided that the rules are not unreasonable or in clear conflict with statutory enactments and do not add to statutorily-delegated powers. Further, the rulemaking body may not make rules that are discriminatory or contrary to constitutional rights. (Citations omitted.)

1998 Op. Att'y Gen. No. 98-035, at 2-208 (analyzing the rulemaking authority of the Board of Nursing); *see also Hoffman v. State Med. Bd.*, 113 Ohio St. 3d 376, 2007-Ohio-2201, 865 N.E. 2d 1259, at ¶17 ("[r]ules promulgated by administrative agencies are valid and enforceable unless unreasonable or in conflict with statutory enactments covering the same subject matter…. [A]n administrative rule may not add to or subtract from a legislative enactment. If it does, it creates a clear conflict with the statute, and the rule is invalid" (citations omitted)); 2005 Op. Att'y Gen. No. 2005-010, at 2-105 ("[a]s an administrative agency, the [State Board of Cosmetology] may exercise only those powers that are granted by statute, and may not expand its statutory authority through rule-making or otherwise").

With these principles in mind, we turn to the statutory scheme governing the practice of optometry, R.C. 4725.01-.34, and the authority bestowed upon the Board by the General Assembly. The phrase, "performance of optometric services," contained in rule 4725-5-10 is not found in R.C. 4725.01-.34. Nor do these statutory provisions grant the Board express authority to regulate the terms of a contract between an optometrist and an unlicensed third party.

The Board, however, is given broad authority over the "practice of optometry," which is defined, in relevant part, as "the application of optical principles, through technical methods and devices, in the examination of human eyes for the purpose of ascertaining departures from the normal, measuring their functional powers, adapting optical accessories for the aid thereof, and detecting ocular abnormalities that may be evidence of disease, pathology, or injury." R.C. 4725.01(A)(1). Subject to limited exceptions not relevant to the present opinion, only persons licensed by the Board may engage in the "practice of optometry." R.C. 4725.02(A). The Board is also empowered to sanction optometrists for misconduct. *See* R.C. 4725.19(A)(1)-(5) (setting forth possible sanctions). Sanctions may be imposed for the reasons enumerated in R.C. 4725.19(B), including "[b]eing guilty of dishonesty or unprofessional conduct in the practice of optometry." R.C. 4725.19(B)(3). In addition, R.C. 4725.09 states the Board "shall adopt rules as it considers necessary to govern the practice of optometry and to administer and enforce [R.C. 4725.01-.34]."

The Attorney General has previously concluded that rule 4725-5-10 was "promulgated pursuant to R.C. 4725.02's prohibition against the unlicensed practice of optometry." 1981 Op. Att'y

Gen. No. 81-047, at 2-187. In other words, a person who is not licensed to practice optometry but who exercises direct or indirect control of the performance of optometric services is engaged in the unauthorized practice of optometry, and a licensed optometrist that cedes such control to the unlicensed person is complicit in the unauthorized practice of optometry. Statutory authority for the current version of rule 4725-5-10 also is found in R.C. 4725.19 and R.C. 4725.09. R.C. 4725.19 does not define the phrase "dishonesty or unprofessional conduct in the practice of optometry." However, because R.C. 4725.09 directs the Board to adopt rules it considers necessary both to govern the practice of optometry and to administer and enforce R.C. 4725.01-.34, the Board has the authority, consistent with the limitations on the administrative rulemaking process outlined above, to define what constitutes dishonesty or unprofessional conduct in the practice of optometry. *See, e.g.*, *Fehrman v. Ohio Dep't of Commerce*, 141 Ohio App. 3d 503, 507, 751 N.E.2d 1089 (Franklin County 2001) ("[a]lthough the definition of 'good business repute' is not provided in the Ohio Revised Code, R.C. 1707.20(A) authorizes the Division of Securities to adopt rules defining terms, as long as the definitions are not inconsistent with R.C. 1707.01 to 1707.45"); 2003 Op. Att'y Gen. No. 2003-003, at 2-15 ("[i]t appears that the authority of [the Ohio Department of Job and Family Services] to adopt rules to implement the [Ohio Works First Program] would permit it to adopt rules to define and direct the implementation of time limit hardship exemptions authorized by R.C. 5107.18(E)").[1]

In sum, the Board's licensing and rulemaking authority is tied to the term, "practice of optometry," as defined in R.C. 4725.01. Only an individual engaged in the practice of optometry needs to be licensed by the Board. R.C. 4725.02(A). Similarly, a licensed optometrist is subject to sanctions under R.C. 4725.19(B)(3) for being guilty of dishonesty or unprofessional conduct *in the practice of optometry*, and the Board is delegated authority to adopt rules it considers necessary to govern the "practice of optometry" and to enforce R.C. 4725.01-.34. R.C. 4725.09.

Accordingly, we must examine how broadly the term, practice of optometry, should be defined. If the practice of optometry is limited to the purely clinical aspects of the profession, then the Board's rulemaking authority will be so limited. *Cf.* 2005 Op. Att'y Gen. No. 2005-010, at 2-106 ("courts have found to be invalid rules imposing on applicants qualifications or requirements that are not imposed by statute—in other words, rules that would disqualify for licensure an applicant who meets all statutory requirements"). By contrast, if the practice of optometry also encompasses actions and decisions that pertain to the management of an optometric practice, then the Board's rulemaking authority will encompass those aspects as well.

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[1] R.C. 4725.19(B)(3) is phrased in the disjunctive. Thus, a licensed optometrist may be subject to sanctions for either dishonesty *or* unprofessional conduct. *See East Ohio Gas Co. v. Pub. Util. Comm'n*, 39 Ohio St. 3d 295, 299, 530 N.E.2d 875 (1988) ("words in statutes should not be construed to be redundant, nor should any words be ignored"); *Pizza v. Sunset Fireworks Co.*, 25 Ohio St. 3d 1, 4-5, 494 N.E.2d 1115 (1986) (the word "or" is used to indicate "an alternative between different or unlike things").

We begin our examination with the decision of the Ohio Supreme Court in *State ex rel. Bricker v. Buhl Optical Co.*, 131 Ohio St. 217, 2 N.E.2d 601 (1936). That case involved a *quo warranto* action by the Attorney General against Buhl Optical, a Delaware optical company. The ultimate issue was whether Buhl Optical was unlawfully engaged in the practice of optometry as a result of the contractual arrangements it maintained with various Ohio optometrists.[2] The Ohio Supreme Court described the contractual relationship between Buhl Optical and the licensed optometrists as follows:

> Prior to April, 1935, licensed optometrists were employed by the respondent corporation to act as managers for the company in its optical business, and in connection therewith to practice optometry, and for all such services, whether as managers or optometrists, they receive a salary and commission from the respondent corporation. Subsequent to the above named date the arrangement was changed by a written contract which provides in substance that the employment shall be from week to week, and that in consideration of the optometrist referring to the respondent corporation patients desiring glasses on prescription, and of respondent corporation referring to the optometrist all of its patrons desiring an examination of the eyes, respondent leases to the optometrist certain office space in its place of business, and also the use of respondent's equipment for the examination of eyes. For testing eyes, the optometrist agrees not to charge exceeding one dollar, no part of which shall belong to the respondent, and further agrees that he will sell to respondent after the termination of the contract all his prescription files for one dollar.

State ex rel. Bricker, 131 Ohio St. at 220-21.

The court ultimately concluded that an optical company *may*:

> (a) employ an optometrist *in its optical business*, (b) *rent* equipment or a part of its quarters for an office to an optometrist *not so employed* and *receive prescriptions* from him, (c) *advertise* an optometrist, as such, who has an office in its quarters but has no connection with it, by employment, by contract or otherwise except as indicated

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[2] The statutory definition of the practice of optometry in 1936 was similar to the current language in R.C. 4725.01(A)(1):

> [G.C. 1295-21] reads as follows: "The practice of optometry is defined to be the application of optical principles, through technical methods and devices in the examination of human eyes for the purpose of ascertaining departures from the normal, measuring their functional powers and adapting optical accessories for the aid thereof."

State ex rel. Bricker v. Buhl Optical Co., 131 Ohio St. 217, 219, 2 N.E.2d 601 (1936).

> herein, (d) fit eye-glasses to the face by frame bending after they are ground according to prescription, mounted and otherwise ready for use, and (e) do all kinds of work in preparing and furnishing eye-glasses except those enumerated in [G.C. 1295-21]. (Emphasis added.)

Id. (syllabus, paragraph 2). The court further held, however, that an optical company may *not*:

> (a) employ an optometrist to do optometrical work in connection with its business, (b) fill a prescription issued by an optometrist who is employed in its business to do optical or other legitimate work, (c) *exercise any control* over such an optometrist, as such, *in regard to his prices or charges or over the records of his office or any part of his optometrical work*, (d) advertise so as to lead the public to believe it is practicing optometry, nor (e) *practice optometry directly or indirectly*. (Emphasis added.)

Id. (syllabus, paragraph 3).

Pursuant to *State ex rel. Bricker*, an optical company may share office space with, rent equipment to, and receive prescriptions from a licensed optometrist, but an optical company may not employ an optometrist to perform optometrical work, exercise any control over an optometrist's optometrical work, or practice optometry directly or indirectly. *Id.* (syllabus, paragraphs 2 and 3). Thus, an unlicensed entity may not engage in activity that affects, or exercises control over, patient care and treatment decisions, and a licensed optometrist must retain her independent, professional judgment with regard to such decisions. *See id.* at 223 ("[t]he practice of the optometrist must be wholly separate from and independent of the business of the optical company"). *State ex rel. Bricker* also concluded that an unlicensed entity cannot exercise control over the prices an optometrist charges or her records. *Id.* (syllabus, paragraph 3). In other words, although the prices an optometrist charges and her records are not patient care or treatment issues *per se*, they are so inextricably related to the practice of optometry that control over these matters is tantamount to the practice of optometry. We believe this is what the Ohio Supreme Court meant when it concluded an optical company may not practice optometry indirectly. *See id.* (syllabus, paragraph 3).

Apart from forbidding an unlicensed entity from controlling the prices on optometrist charges and her records, *State ex rel. Bricker* does not provide any overarching standard or test for determining what constitutes the indirect practice of optometry, and no Ohio case or Attorney General opinion has expounded upon this aspect of *State ex rel. Bricker*. To a large extent, therefore, the Board will need to determine what qualifies as indirectly practicing optometry. In doing so, the Board should be mindful that the practice of optometry, like other statutory professions, has evolved in terms of both treatment modalities and how an optometric practice may be managed. *See, e.g.*, R.C. 4725.01(A)(2)-(3) (if a licensed optometrist is certified to do so, practice of optometry now includes the application and prescribing of topical ocular pharmaceutical agents and therapeutic pharmaceutical agents); R.C. 4725.33(A) (a licensed optometrist may now render professional services through a corporation formed under R.C. 1701.03, a limited liability company formed under R.C. Chapter 1705, or a professional association formed under R.C. Chapter 1785).

Additional guidance can also be found in 1995 Op. Att'y Gen. No. 95-045. While that opinion did not analyze administrative rulemaking authority, it involved the ability of an unlicensed third party to assume control of business decisions that otherwise would be controlled by a licensed professional. Specifically, 1995 Op. Att'y Gen. No. 95-045 addressed whether the provision of certain business services by unlicensed "management companies" constitutes the practice of dentistry.[3]

The resolution of the questions posed to the Attorney General in 1995 Op. Att'y Gen. No. 95-045 turned on the definition of the term, practice of dentistry, which includes within its scope "[a]ny person … who is a manager, proprietor, operator, or conductor of a place for performing dental operations." R.C. 4715.01. Construing this language, the Attorney General cited the rule of statutory construction in R.C. 1.49(A) that, if a statute is ambiguous, the intention of the legislature may be ascertained by considering the "object sought to be attained." *See* 1995 Op. Att'y Gen. No. 95-045, at 2-246 to 2-247. Examining the General Assembly's intent in providing for comprehensive regulation of the practice of dentistry, the Attorney General noted:

> In R.C. Chapter 4715 the General Assembly has enacted a comprehensive scheme for the licensure, supervision, and discipline of dental practitioners, and has delegated to the State Dental Board the responsibility of administering and enforcing the provisions of that chapter. *Similar licensing and disciplinary schemes exist* for a host of other healing professions that minister to the needs of the human body. *See,*

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[3] The business arrangements identified by the State Dental Board as potentially constituting the practice of dentistry included:

> computing the management company's fees for its services upon the volume of dental services provided by the dental practice, or as a percentage of the gross or net profit of the dental practice; leasing to the licensed dentist office space or dental equipment that is owned exclusively by the management company, or requiring that specific equipment be used or a specific size or location of office be selected; authorizing a management company to hire and set the compensation of dental practice personnel other than licensed dentists, dental hygienists, and dental radiographers, establish the business hours for the dental office or require that the dental office be open a specific number of hours each week, set the fees that will be charged for particular dental procedures, determine when and by what amount those fees shall be reduced or increased, or set quotas for the number of patients that must be served or the number of dental procedures that must be performed within a given timespan; assigning to a management company the responsibility to collect, deposit, and disburse all funds generated by the dental practice; and management agreements between a licensed dentist and management company that are of a lengthy duration (e.g., twenty years or more) or contain automatic renewal provisions.

1995 Op. Att'y Gen. No. 95-045, at 2-245 n.2.

> *e.g.*, R.C. Chapters 4725 (optometry and optical dispensing); 4729 (pharmacy); 4731 (medicine and surgery); 4734 (chiropractic); 4761 (respiratory therapy).
>
> The *ultimate goal*, or intent, of such regulation by the state *is the preservation of the health, safety, and general welfare* of every person who is served by a practitioner of the profession in question. *See Springfield v. Hurst*, 144 Ohio St. 49, 56 N.E.2d 185 (1944); *State ex rel. Copeland v. State Medical Bd.*, 107 Ohio St. 20, 140 N.E. 660 (1923); *Williams v. Scudder*, 102 Ohio St. 305, 131 N.E. 481 (1921); *State v. Gravett*, 65 Ohio St. 289, 62 N.E. 325 (1901). (Emphasis added.)

Id. at 2-247. Thus, the "provisions of R.C. Chapter 4715 … have as their essential, underlying purpose the protection of the health and welfare of every person who seeks care and treatment from an Ohio dental practitioner," and the language of R.C. 4715.01 should be "construed in a manner that relates to that specific purpose." *Id.* at 2-248.

Applying these principles, the Attorney General concluded that the practice of dentistry is limited to "those activities or functions that … have a direct, immediate, and tangible effect upon the actual care and treatment received by an individual patient of that practice." *Id.* The Attorney General further explained that many of the activities and services identified in the State Dental Board's opinion request "are more closely related to the proper and efficient management of the economics of a dental practice, and any connection they may have to patient care and treatment is simply too attenuated." *Id.* at 2-249. Accordingly, with the exception of the authority to set and enforce quotas requiring a licensed dentist to examine a certain number of patients or perform a certain number of treatments, the activities and services identified in the State Dental Board's opinion request did "not affect a dental patient's health and well-being in any direct or significant way" and did not constitute the practice of dentistry. *Id.* at 2-249. By contrast, the authority to set and enforce quotas could compromise the quality of care received by a patient, influence the professional judgment of the dentist, and affect treatment decisions. *Id.* at 2-251. Thus, someone who retains such authority is engaged in the practice of dentistry. *Id.*

We find the reasoning of 1995 Op. Att'y Gen. No. 95-045 persuasive. Like dentistry, optometry is one of the statutory professions that have long been subject to regulation by the state, with the ultimate goal being the protection of the health and welfare of people seeking treatment from an optometrist. *See* 1971 Op. Att'y Gen. No. 71-014, at 2-30 ("the General Assembly has enacted legislation to insure the health and safety of the individual citizens who seek eye treatment and care"); *cf.* 2002 Op. Att'y Gen. No. 2002-035, at 2-224 (the "ultimate goal, or intent, of [R.C. 4725.40-.59, governing the practice of 'optical dispensing,'] is the preservation of the health, safety, and general welfare of every patient who wears contact lenses to correct a vision problem"). Thus, we should interpret the term, practice of optometry, with that specific intent in mind.

Further, the analytical approach endorsed by 1995 Op. Att'y Gen. No. 95-045 is consistent with *State ex rel. Bricker*. For example, *State ex rel. Bricker* prohibits an unlicensed third party from exercising any control over the prices an optometrist charges. 131 Ohio St. 217 (syllabus, paragraph 3). Similar to the authority to set and enforce quotas, the authority to set prices, especially prices lower than a licensed professional would otherwise charge, could compromise a professional's

independent judgment and cause her to treat patients too quickly or to recommend superfluous procedures. *See* 1995 Op. Att'y Gen. No. 95-045, at 2-251. Thus, the authority to set prices could have a direct and significant effect on the care and treatment received by an optometric patient.[4] The same may be said of the power to control an optometrist's patient records or files. *See State ex rel. Bricker*, 131 Ohio St. 217 (syllabus, paragraph 3). Much of the value of an optometric practice lies in the files and records created by an optometrist in the course of examining patients. If an unlicensed third party controls or owns those files and records, then the relationship between it and the optometrist resembles one of employment or agency. Such a situation gives the unlicensed third party additional leverage over the optometrist and may undermine the optometrist's incentive to prioritize patient interests, which could negatively affect the care and treatment received by an optometric patient. *See* 1995 Op. Att'y Gen. No. 95-045, at 2-251 (authority to set and enforce quotas "has the potential to place in jeopardy the best interests of a dental patient"). Finally, if an unlicensed third party exercises control over decisions having a direct and significant effect on patient care and treatment, it could fairly be said that the third party is practicing optometry. *See State ex rel. Bricker*, 131 Ohio St. 217 (syllabus, paragraph 3).

In sum, the rulemaking authority of the Board is not strictly limited to regulating the clinical aspects of the practice of optometry, and the Board is not categorically prohibited from enacting rules regulating business or management aspects of the practice of optometry. However, any rule or part thereof adopted by the Board must, consistent with the aforementioned authority, relate to activities or decisions that have a direct and significant effect on an optometric patient's care or treatment. As we have not been asked to analyze any proposed rule, the Board will need to determine for itself the activities or decisions that satisfy this standard.[5]

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[4] 1995 Op. Att'y Gen. No. 95-045 also addressed the issue of an unlicensed third party having the power to set the prices charged by a licensed professional. *Id.* at 2-250 ("[q]uestion seven suggests that permitting a management company to set the fees that will be charged for dental procedures and to decide when or by what amount those fees shall be reduced or increased may present a situation in which the management company effectively controls the dental office and all treatment decisions made by the dental practitioners in that office"). The Attorney General concluded that the ability to set prices does not have a direct effect upon the health and welfare of individual dental patients and thus does not constitute the practice of dentistry. *Id.* at 2-251. The Attorney General recognized, however, that "[r]easonable minds may differ about the exact extent to which each of these activities and arrangements [*i.e.*, those described in the opinion request and set forth in note 3, *supra*,] ultimately may affect patient health and well-being." *Id.* at 2-250. As noted above, an argument can certainly be made that the ability to control prices has a direct and significant affect on patient care and treatment decisions. Thus, the overall approached endorsed by 1995 Op. Att'y Gen. No. 94-045 is compatible with *State ex rel. Bricker*.

[5] As already examined, the ability of an unlicensed third party to control the prices a licensed optometrist charges, to control an optometrist's records, and to set and enforce quotas requiring an optometrist to examine a certain number of patients or perform a certain number of treatments all

Turning briefly to the remaining aspects of the administrative rulemaking analysis, administrative rules must also be reasonable. 1998 Op. Att'y Gen. No. 98-035, at 2-208. "Questions of reasonableness may be raised and deliberated through the statutorily-established rulemaking process," but such determinations "ultimately are left to the courts, which give deference to the expertise of the agency that adopted the rule." 1998 Op. Att'y Gen. No. 98-035, at 2-209; *see also* 1983 Op. Att'y Gen. No. 83-012, at 2-53 ("[w]hether a particular rule or regulation is unreasonable or an abuse of discretion is, of course, a question which only a court may ultimately determine"). Should litigation arise, administrative rules not in clear conflict with statutory enactments are presumed reasonable, and the burden is on the party challenging the rule to establish by a preponderance of substantial, probative, and reliable evidence that the rule is unreasonable. *Midwestern Coll. of Massotherapy v. State Med. Bd.*, 102 Ohio App. 3d 17, 24, 656 N.E.2d 963 (Franklin County 1995); *see also* 1983 Op. Att'y Gen. No. 83-012, at 2-53 ("[i]n cases where the courts have been called upon to determine whether a particular rule or regulation is unreasonable or an abuse of discretion such determinations have been made on a case-by-case basis; the courts have required only a rational connection between the interest sought to be protected and the measures adopted to safeguard that interest").

Finally, the delegation of rulemaking authority by the General Assembly to the Board must itself be proper. It is well established that the General Assembly may delegate administrative powers to an administrative body, but the delegation of legislative powers is unconstitutional. *Matz v. J.L. Curtis Cartage Co.*, 132 Ohio St. 271, 7 N.E.2d 220 (1937) (syllabus, paragraph 6); *Midwestern Coll. of Massotherapy*, 102 Ohio App. 3d at 23; 1998 Op. Att'y Gen. No. 98-035, at 2-211.

It is "inappropriate for the Attorney General to use the opinions function to purport to determine the constitutionality" of a statute, as that power rests solely with the judiciary. 1998 Op. Att'y Gen. No. 98-035, at 2-212 (citations omitted). Despite this prohibition, 1998 Op. Att'y Gen. No. 98-035, at 2-211, briefly addressed the delegation of authority to the Board of Nursing to promulgate rules setting the conditions under which a licensed practical nurse may administer medications through intravenous therapy:

> The General Assembly has provided a statutory framework for the regulation of the nursing profession and has authorized the Board of Nursing, acting within that framework, to exercise its discretion in adopting rules to implement the statutes. In order to provide for the training, licensing, and discipline of nurses, the Board must determine, in greater detail than is contained in R.C. 4723.02, the nature of the practice of nursing as a registered nurse or as a licensed practical nurse. The Board of Nursing is an administrative body with expertise in this area, and it appears to be entirely

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satisfy the standard set forth above. *See State ex rel. Bricker*, 131 Ohio St. 217 (syllabus, paragraph 3); 1995 Op. Att'y Gen. No. 95-045, at 2-251. The remaining services and activities identified in 1995 Op. Att'y Gen. No. 95-045, at 2-245 n.2, and note 3, *supra*, likely do not.

> appropriate for the General Assembly to delegate to the Board the authority to adopt rules that clarify the precise nature of the practice of nursing.

Moreover, because a regularly enacted statute is presumed constitutional, *id.* at 2-212, the Attorney General concluded the opinion could proceed under the assumption that the delegation of rulemaking authority was constitutional. *Id.* (syllabus, paragraph 3).

The authority delegated to the Board is similar to that delegated to the Board of Nursing and virtually every other state board assigned the responsibility of overseeing a statutory profession. *See Midwestern Coll. of Massotherapy*, 102 Ohio App. 3d at 25 (rule prohibiting massage therapists from utilizing certain techniques was a valid administrative rule that fulfills the "administrative duties the General Assembly imposes on the medical board" and that "identifies what the board has determined … a person qualified to be a practitioner of massage may safely do and not do"). Given the complexities involved in regulating the practice of optometry and the Board's substantive expertise, the General Assembly's decision to delegate rulemaking authority to the Board is both reasonable and in the best interests of the general public, and it is entirely appropriate to presume that such delegation is constitutional. *See* 1998 Op. Att'y Gen. No. 98-035 (syllabus, paragraph 3).

In conclusion, it is my opinion, and you are hereby advised as follows:

1. The State Board of Optometry may regulate the business or management aspects of the practice of optometry through the adoption and promulgation of administrative rules, but only to the extent that any rule or part thereof relates to activities or decisions that have a direct and significant effect on an optometric patient's care or treatment. The reasonableness and validity of any rule or part thereof is subject to judicial review.

2. For the purpose of this opinion, it is presumed that the General Assembly has properly delegated rulemaking authority to the State Board of Optometry, including the authority to promulgate rules relating to activities or decisions that have a direct and significant effect on an optometric patient's care or treatment. (1998 Op. Att'y Gen. No. 98-035 (syllabus, paragraph 3), approved and followed.)

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General