

OPINION NO. 80-004**Syllabus:**

1. The licensing requirements of R.C. Chapter 4755 do not operate to require that a physical therapist practice independent of an employment relationship. Employment of a physical therapist by a corporate entity constitutes neither the unlawful practice of a profession by a corporation nor the practice of physical therapy by the corporation.
2. A corporation may advertise, provide, and bill for physical therapy services, provided that such services are provided by licensed physical therapists and physical therapist assistants in accordance with the requirements of R.C. Chapter 4755.
3. A corporation for the purpose of providing physical therapy services may be formed pursuant to R.C. 1701.03; such a corporation may provide physical therapy services only through individuals licensed under the provisions of R.C. Chapter 4755 and in compliance with the requirements thereof.
4. A corporation for the purpose of providing physical therapy services may not be organized under R.C. Chapter 1785.

To: Frank M. Pierson, L.P.T., Chairman, Physical Therapy Section, Ohio Occupational Therapy and Physical Therapy Board, Columbus, Ohio

By: William J. Brown, Attorney General, February 11, 1980

I have before me your request for my opinion which poses the following questions:

1. Can a non-licensed entity legally have a master-servant relationship between a physical therapist or a physical therapist assistant for the purpose of providing physical therapy services on behalf of or for the benefit of the non-licensed entity?
2. Do any of the following elements, factors or conditions either alone or collectively constitute or be evidence of the practice of physical therapy: a sign indicating physical therapy is available

or provided; billing for physical therapy services; stating physical therapy is available in an advertisement; employment of a physical therapist.

3. May hospitals, nursing homes, home health agencies, physician clinics, corporations, etc., legally bill for and collect reimbursement for physical therapy services?
4. May persons who are not licensed as physical therapists form corporations or other business entities and legally offer to provide physical therapy services to or in hospitals or other similar health care facilities?
5. May a person licensed as a physical therapist in Ohio pursuant to Sections 4755.40 to 4755.99 of the Ohio Revised Code incorporate under the provisions in Section 1785 of the Ohio Revised Code?

It is a long-settled principle of both the common and the statutory law of Ohio that the practice of a profession involves a personal relationship between the professional and his client which cannot be fulfilled by a corporation. State ex rel. Green v. Brown, 173 Ohio St. 114, 180 N.E. 2d 157 (1962); Land Title Abstract and Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934); 1961 Op. Att'y Gen. No. 2495, p. 557; 1952 Op. Att'y Gen. No. 1751, p. 608. Moreover, it has long been settled that a corporation may not, in effect, practice a profession by the employment of a professional. Rowe v. The Standard Drug Co., 132 Ohio St. 629, 9 N.E. 2d 609 (1937); State ex rel. Bricker v. Buhl, 131 Ohio St. 217, 2 N.E. 2d 601 (1936).

However, the issue of what occupations or callings fall within the boundaries of these principles is far from settled. In one of the earliest cases on the subject, the Supreme Court of Ohio, in State ex rel. Harris v. Myers, 128 Ohio St. 366, 191 N.E. 99 (1934), concluded that optometry was a profession which could not be practiced by a corporation. The Court's reasoning centered upon the existence of statutory requirements for the practice of optometry, including a minimum age, a preliminary course of study, a specialized course of study, successful completion of an examination and proof of good moral character. The decision in Harris v. Myers was clarified, however, in 1936 in State ex rel. Bricker v. Buhl, 131 Ohio St. at 221-224, by the lengthy excerpt which follows:

What this court meant in holding that optometry is a profession was not that it was a learned profession, but that it was a limited statutory profession and one within the meaning of that word as used in Section 8623-3, General Code, which denies the right to incorporate for the purpose of engaging in the practice of a profession.

There are a number of callings in which one may not engage until he has passed an examination and received a license or certificate, for instance, barbering (Section 1081-1 et seq., General Code), embalming (Section 1335-1 et seq., General Code), cosmetology (Section 1082-1 et seq., General Code), surveying (Section 1083-1 et seq., General Code), inspection of steam boilers (Section 1058-1 et seq., General Code), steam engineers (Section 1040 et seq., General Code), aircraft piloting (Section 6310-38 et seq., General Code), pharmacy (Section 1296 et seq., General Code), real estate brokerage (Section 6373-25 et seq., General Code), and nursing (Section 1295-et seq., General Code). To hold that in none of these, a corporation organized for legitimate purposes could employ persons so licensed would be going too far. A trade, business or ordinary calling is not changed by the requirement of licensing. In our judgment the rule is well stated in 6 Fletcher's Cyclopedia of Law of Corporations (Permanent Edition), 241:

"Laws regulating a particular trade, business or calling, other than a learned profession, and requiring those desiring to engage therein to first procure a license or certificate from the proper authorities do not prevent a corporation from conducting such trade, business or calling through the instrumentality of employees or agents who are duly licensed or certificated, even though such laws may in terms prohibit the licensing of corporations. Thus, the plumbing trade or business may be carried on by a corporation, though the law requires plumbers to be licensed, and, notwithstanding the law requires persons practicing architecture to take out a certificate, a corporation may engage in architectural work, provided the actual architectural work be done by regularly licensed architects or under the supervision of regularly licensed architects, particularly where the statute authorizes corporations to employ licensed architects."

The foregoing analysis makes it clear that the existence of a statutory requirement of licensure does not, of itself, bring a particular calling within the boundaries of those professions which may be practiced only by an individual acting independent of any employment relationship. Certain language in Bricker v. Buhl might suggest that the need for, and use of, some "understanding of the human body" might place a licensed calling into the realm of a learned profession. However, I believe it is worthy of note that nursing and pharmacy—callings also involving knowledge of the human body and its reaction to drugs—are included by the Buhl court as being among the callings wherein a corporation may properly employ licensed persons.

The number of fields subject to occupational licensing requirements has increased quite dramatically since the court's decision in Bricker v. Buhl. Health-related occupations in particular appear to have become increasingly subject to statutory requirements designed to ensure that the practitioners thereof are qualified. See, e.g., R.C. 4730.06 (physician's assistants); R.C. 4731.92 (emergency medical technicians); R.C. 4747.02 (hearing aid dealers and fitters); R.C. 4753.02 (speech pathology and audiology); R.C. 4755.02 (occupational therapy); R.C. 4755.48 (physical therapy).

I am unwilling, in the absence of express statutory provision, to conclude that the legislature, merely by enacting licensing requirements in an increasing number of fields, intended in all cases to abolish all of the employment relationships existing therein. I am of the opinion that the principles enunciated in the judicial decisions discussed above hinge primarily on the notion that the professionals precluded from an employment relationship are limited to those who must be free to serve their patient's or client's interest through the exercise of a wholly independent professional judgment. The overriding concept in these judicial pronouncements is that the professional is not able to independently serve his client's interests if his overriding obligation to an employer influences his decisions as to whether his professional services are needed at all and as to exactly what services are needed by the client.

A review of the provisions of R.C. Chapter 4755 applicable to the practice of physical therapy indicates that the function of the licensed physical therapist is as described by the Supreme Court of Ohio in Bricker v. Buhl, to wit: any health care actions they take are pursuant to the direction of a physician, dentist, or podiatrist. The provisions of R.C. 4755.48(F) specify:

No person shall practice physical therapy other than upon the prescription of, or the referral of a patient by, a person who is licensed and registered in this state to practice medicine and surgery, dentistry, or podiatry, and whose license is in good standing.

The decision as to whether the services of a physical therapist are needed is reserved to practitioners licensed in medicine and surgery, dentistry and podiatry. Moreover, the express terms of R.C. 4755.48(F) specify that these licensed

practitioners may prescribe the services to be rendered by the physical therapist. The degree of independent judgment exercised by the physical therapist may be entirely determined by the prescribing or referring practitioner. The prescribing practitioner might specify that particular procedures are to be performed in a particular manner over a fixed period of time. Unlike physicians, lawyers, dentists, psychologists, etc., the physical therapist does not practice in a wholly independent mode such that he or she must be free of the possibility of being influenced by an employment relationship.

In response to your first question, I am of the opinion that the licensing requirements of R.C. Chapter 4755 do not operate to require that a physical therapist practice independent of an employment relationship. Consequently, I am of the opinion that employment of a physical therapist by a corporate entity such as a hospital constitutes neither the unlawful practice of a profession by a corporation nor the practice of physical therapy by the corporation.

My conclusion with respect to your first question makes detailed analyses of your remaining questions unnecessary. Your second and third questions focus on issues discussed at length by the Supreme Court of Ohio in Rowe v. Standard Drug. In that decision, the Court dealt with several issues arising from its holdings in Harris v. Myers and Bricker v. Buhl, that an optometrist could not be employed by a corporation to practice optometry. The Rowe decision considered situations where an optometrist was associated with a retail optical department. The court first affirmed its previous holding that a corporation may not practice a profession through the employment of a professional. The court then considered the issues of whether the corporation, in such situations, was in effect holding itself out as practicing optometry by implying that the optometrist was its employee through its advertising and billing practice. Because I have concluded that a master/servant relationship between a physical therapist and a corporate entity is not precluded by Ohio law, the issue of what practices must be avoided in order to avoid implying such a relationship does not arise. I am of the opinion that a corporation may advertise, provide, and bill for physical therapy services, provided that such services are performed by licensed physical therapists and physical therapist assistants in accordance with the requirements of R.C. Chapter 4755.

Your fourth and fifth questions arise from the fact that R.C. 1701.03 and its predecessors, the former R.C. 1701.04 and G.C. 8623-3, specifically preclude the formation of a corporation for the purpose of carrying on the practice of a profession subject to the principles discussed above. However, in light of my conclusion that physical therapy is not a profession which may be practiced only by an independent practitioner, I am of the opinion that the terms of R.C. 1701.03 do not operate to prevent the formation of a corporation for the purpose of providing physical therapy services. As discussed in 1979 Op. Att'y Gen. No. 79-009 and 1977 Op. Att'y Gen. No. 77-018, the provisions of R.C. Chapter 1785 carve out an exception to the prohibition of R.C. 1701.03 by allowing an individual or group of individuals, each of whom is licensed to render the same professional service, to organize and become shareholders of a professional corporation. Thus, corporations organized pursuant to R.C. Chapter 1785 are corporations which may not be formed under R.C. 1701.03. Physical therapy is not included among the callings carefully enumerated in R.C. Chapter 1785. Hence, I cannot conclude that authority to incorporate under R.C. Chapter 1785 may be implied. However, the opportunity for incorporation is not wholly denied to physical therapists because a corporation to provide physical therapy services may be formed under R.C. Chapter 1701. In so concluding, however, I would emphasize that, once formed, such a corporation may provide physical therapy services only through individuals licensed under R.C. Chapter 4755 and in compliance with all of the requirements thereof.

In specific answer to your questions, I am of the opinion, and you are advised, that:

1. The licensing requirements of R.C. Chapter 4735 do not operate to require that a physical therapist practice independent of an

employment relationship. Employment of a physical therapist by a corporate entity constitutes neither the unlawful practice of a profession by a corporation nor the practice of physical therapy by the corporation.

2. A corporation may advertise, provide, and bill for physical therapy services, provided that such services are provided by licensed physical therapists and physical therapist assistants in accordance with the requirements of R.C. Chapter 4755.
3. A corporation for the purpose of providing physical therapy services may be formed pursuant to R.C. 1701.03; such a corporation may provide physical therapy services only through individuals licensed under the provisions of R.C. Chapter 4755 and in compliance with the requirements thereof.
4. A corporation for the purpose of providing physical therapy services may not be organized under R.C. Chapter 1785.