

OPINION NO. 81-047**Syllabus:**

1. A physician or surgeon licensed under R.C. Chapter 4731 may employ an optometrist licensed under R.C. Chapter 4725 for the purpose of practicing optometry.
2. Where a physician or surgeon licensed under R.C. Chapter 4731 has formed a professional association under R.C. Chapter 1785 for the purpose of practicing optometry, the professional association may employ optometrists licensed under R.C. Chapter 4725 for the purpose of practicing optometry.
3. Physicians or surgeons licensed under R.C. Chapter 4731 and optometrists licensed under R.C. Chapter 4725 are both legally authorized to practice optometry and may jointly form a professional association pursuant to R.C. Chapter 1785 for the purpose of practicing optometry.
4. A professional association formed pursuant to R.C. Chapter 1785 for the practice of optometry may employ optometrists licensed under R.C. Chapter 4725 for the purpose of engaging in optometry.

To: David M. Stuebaker, O.D., President, Ohio State Board of Optometry, Columbus, Ohio
By: William J. Brown, Attorney General, August 31, 1981

I have before me your letter in which you request my opinion on the following questions:

1. Can a physician or surgeon licensed under Chapter 4731, Ohio Revised Code, hire or employ an optometrist licensed under Chapter 4725, Ohio Revised Code, for the purposes of practicing optometry?
2. Can a physician or surgeon licensed under Chapter 4731, Ohio Revised Code, who has incorporated himself under Chapter 1785, Ohio Revised Code, hire or employ an optometrist licensed under Chapter 4725, Ohio Revised Code, for the purposes of practicing optometry?
3. Can a physician or surgeon licensed under Chapter 4731, Ohio Revised Code, and an optometrist licensed under Chapter 4725, Ohio Revised Code, incorporate together under Chapter 1785, Ohio Revised Code, for the purposes of engaging in the practice of optometry?
4. If the answer to the third question above is in the affirmative, then may such a corporation hire additional optometrists licensed under Chapter 4725, Ohio Revised Code, for the purpose of engaging in optometry?

In answering your questions, it is first necessary to ascertain whether it is permissible for a physician or surgeon licensed pursuant to R.C. Chapter 4731 to employ an optometrist licensed pursuant to R.C. Chapter 4725 to practice optometry.

Pursuant to R.C. 4725.02, no unlicensed person may engage in the practice of optometry. Courts have interpreted this section to prohibit a person not licensed to practice optometry from hiring licensed optometrists in order to use their professional services. 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). Thus, the general rule is that a person not licensed to practice optometry may not do so indirectly by employing a licensed optometrist to do so. However, R.C. 4725.02 has within it an exception to the general prohibition:

No person shall engage in the practice of optometry or hold himself out as a practitioner of optometry, or attempt to determine the kind of glasses needed by any person, or hold himself out as a licensed optometrist when not so licensed, or hold himself out as able to examine the eyes of any person for the purpose of fitting the same with glasses, excepting those exempt under Section 4725.14 of the Revised Code unless he has first fulfilled the requirements of Sections 4725.01 to 4725.14, inclusive, of the Revised Code, and has received a certificate of licensure from the state board of optometry, nor shall any person represent that he is the lawful holder of a certificate of licensure such as is provided for in such sections, when in fact he is not such lawful holder, or impersonate any licensed practitioner of optometry. (Emphasis added.)

And R.C. 4725.14 states in pertinent part:

This chapter does not apply:

(A) To physicians or surgeons practicing under authority of licenses issued under the laws of this state for the practice of medicine or surgery;

. . . .

Therefore, physicians or surgeons licensed pursuant to R.C. Chapter 4731 are

exempt from the prohibitions against the unlicensed practice of optometry. These exemption provisions appear to mean that the prohibition imposed against the employment of optometrists does not apply to physicians or surgeons. State v. DeMido, 37 Ohio St. 2d 125, 308 N.E.2d 749 (1974), held that the exemption from the optometry licensing provisions of R.C. Chapter 4725 set forth in R.C. 4725.14 applies to those persons with the degree of doctor of medicine or doctor of osteopathy, but not to those persons licensed to practice a limited branch of medicine. This case concerned the actual examination of the eyes by a physician, but it may be inferred that employment of optometrists would also be within the exemption, since such employment has also been held to constitute the practice of optometry. 6 Ohio Admin. Code 4725-5-10 does provide that the performance of optometric services by an optometrist "while in the employ of or under the direct or indirect control of any person or entity of any kind other than a holder of a certificate of licensure, an association of holders of certificates of licensure, or a professional association as defined in Chapter 1785, Revised Code, of holders of certificates of licensure constitutes 'grossly unprofessional or dishonest conduct' as that phrase is used in section 4725.11, Revised Code." This rule was obviously promulgated pursuant to R.C. 4725.02's prohibition against the unlicensed practice of optometry. However, this administrative rule must be read together with R.C. 4725.02 and R.C. 4725.14, which exclude physicians and surgeons from R.C. 4725.02's prohibition. Because a statutory provision prevails over a conflicting administrative rule, see Kroger Grocery and Baking Co. v. Glander, 149 Ohio St. 120, 77 N.E.2d 921 (1948), 6 Ohio Admin. Code 4725-5-10 must be interpreted as applying to performance of optometric services by an optometrist while in the employ of a person other than a licensed optometrist or a person otherwise authorized to practice optometry. Accordingly, in answer to the first question, a physician or surgeon may hire a licensed optometrist for the purpose of practicing optometry.

With respect to the second question, it is an established principle of both statutory and common law of Ohio that the practice of a profession involves a personal relationship between the professional and the client which cannot be effectuated by a corporation. See Land Title Abstract and Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934); 1977 Op. Atty Gen. No. 77-018. See also State ex rel. Green v. Brown, 173 Ohio St. 114, 180 N.E.2d 157 (1962). In State ex rel. Harris v. Myers, 128 Ohio St. 366, 191 N.E. 99 (1934), and State ex rel. Bricker v. Buhl, *supra*, the court held that the profession of optometry may not be practiced by a corporation. See R.C. 1701.03. However, R.C. Chapter 1785 now provides certain exceptions to the prohibition against the corporate practice of a profession. See O'Neill v. United States, 410 F.2d 888 (6th Cir. 1969); Lenhart v. Toledo Urology Associates Inc., 48 Ohio App. 2d 249, 356 N.E.2d 749 (Lucas County 1975). Certain professionals who may not incorporate under General Ohio Corporation Law, R.C. Chapter 1701, are allowed to incorporate pursuant to R.C. Chapter 1785.

R.C. 1785.01 provides in pertinent part:

(B) "Professional association" means an association organized under sections 1785.01 to 1785.08 of the Revised Code, for the sole purpose of rendering one of the professional services authorized under Chapter 4701., 4703., 4705., 4715., 4725., 4729., 4731., 4732., 4733., or 4741. of the Revised Code, or a combination of the professional services authorized under Chapters 4703. and 4733. of the Revised Code.

¹ Although I have concluded that a physician may hire an optometrist to practice optometry, I must note that both physicians and optometrists are subject to disciplinary proceedings for dividing or splitting fees. R.C. 4731.22(B)(14); 6 Ohio Admin. Code 4725-5-06. Thus, any employment arrangement between a physician and optometrist must be so designed as to avoid fee splitting.

R.C. 1785.01(B) states that the sole purpose of the professional association must be the rendering of one of the professional services authorized under certain sections of the code enumerated above. Therefore, a professional association organized pursuant to R.C. 1785.01 may practice only medicine or optometry, not both medicine and optometry. If a physician or surgeon licensed under R.C. Chapter 4731 has incorporated a professional association under R.C. Chapter 1785 for the purpose of practicing medicine under R.C. Chapter 4731, then the professional association may not employ a licensed optometrist for the practice of optometry as the association may render only one professional service, viz, medicine. However, a physician or surgeon may, by virtue of the exemption provided in R.C. 4725.14 and the authorization provided in R.C. 1785.02, incorporate a professional association under R.C. Chapter 1785 for the purpose of practicing optometry under R.C. Chapter 4725.

R.C. 1785.02 states:

An individual or group of individuals each of whom is licensed or otherwise legally authorized to render the same kind of professional service within this state, or a group of individuals each of whom is licensed or otherwise authorized to render the professional service within this state authorized under either Chapter 4703. or 4733. of the Revised Code, may organize and become a shareholder, or shareholders, of a professional association. Any such group of individuals who may be rendering one of the professional services as an organization created otherwise than pursuant to sections 1785.01 to 1785.08, inclusive, of the Revised Code, may incorporate under and pursuant to such sections by amending the agreement establishing the organization in such a manner that such agreement as amended constitutes articles of incorporation prepared and filed in the manner prescribed in section 1785.08 of the Revised Code and by otherwise complying with the applicable requirements of sections 1785.01 to 1785.08, inclusive, of the Revised Code. (Emphasis added.)

The language of R.C. 1785.02 which permits an individual who is legally authorized to render professional service to organize a professional association would apply to physicians and surgeons since they are authorized by R.C. 4725.02 and R.C. 4725.14 to engage in the practice of optometry. Thus, a physician or surgeon may incorporate a professional association under R.C. Chapter 1785 for the purpose of practicing optometry. A professional association organized by a physician or surgeon to practice optometry may then employ a licensed optometrist for the practice of optometry. The association would be rendering one professional service—optometry—in accordance with R.C. 1785.01(B). Indeed, a professional association may render professional services only through its officers, employees, and agents who are themselves properly licensed or legally authorized to render such service. R.C. 1785.03; see 1963 Op. Att'y Gen. No. 82, p. 145.

I note, again, that 6 Ohio Admin. Code 4725-5-10 provides that a licensed optometrist who is employed by any person or entity other than a licensed optometrist, an association of licensed optometrists, or a professional association of licensed optometrists, formed pursuant to R.C. Chapter 1785, is engaged in "grossly unprofessional or dishonest conduct" under R.C. 4725.11. In accordance with R.C. 4725.02 and R.C. 4725.14, rule 4725-5-10 must be interpreted to permit the employment of optometrists by a professional association incorporated by a physician or surgeon to practice optometry, as well as by an individual physician or surgeon. Accordingly, in answer to the second question, where a physician or surgeon has formed a professional association under R.C. Chapter 1785 for the purpose of practicing optometry, the professional association may employ optometrists in order to practice optometry.

With regard to the third question you have asked, it is again necessary to look at R.C. 1785.02 which permits a "group of individuals each of whom is licensed or otherwise legally authorized to render the same kind of professional service" to

organize a professional association. Physicians and surgeons are legally authorized by R.C. 4725.02 and R.C. 4725.14 to engage in the practice of optometry. Thus, a physician or surgeon, licensed under R.C. Chapter 4731 and authorized by R.C. 4725.02 and R.C. 4725.14 to engage in the practice of optometry, and an optometrist, licensed under R.C. Chapter 4725, may jointly form a professional association under R.C. Chapter 1785 for the purpose of practicing optometry.

With respect to the fourth question, from the foregoing analysis it can be concluded that a professional association organized by a physician and optometrist to practice optometry may hire additional optometrists as employees. As discussed above, it is permissible for a physician and optometrist to form a professional organization to practice optometry, and an association formed to practice optometry may hire optometrists as employees to render professional services. See R.C. 1785.03.

Therefore, it is my opinion, and you are advised, that:

1. A physician or surgeon licensed under R.C. Chapter 4731 may employ an optometrist licensed under R.C. Chapter 4725 for the purpose of practicing optometry.
2. Where a physician or surgeon licensed under R.C. Chapter 4731 has formed a professional association under R.C. Chapter 1785 for the purpose of practicing optometry, the professional association may employ an optometrist licensed under R.C. Chapter 4725 for the purpose of practicing optometry.
3. Physicians or surgeons licensed under R.C. Chapter 4731 and optometrists licensed under R.C. Chapter 4725 are both legally authorized to practice optometry and may jointly form a professional association pursuant to R.C. Chapter 1785 for the purpose of practicing optometry.
4. A professional association formed pursuant to R.C. Chapter 1785 for the practice of optometry may employ optometrists licensed under R.C. Chapter 4725 for the purpose of engaging in optometry.