

OPINION NO. 88-008**Syllabus:**

R.C. Chapter 4741 does not prevent a veterinarian from operating a sales truck service, either as part of his veterinary practice or as a separate operation, provided that there is compliance with provisions governing the operation of such service, such as those relating to the possession and sale of drugs and those governing the activities of unlicensed personnel, and provided that the service is not used to solicit patients in violation of R.C. 4741.21 or R.C. 4741.22.

To: W.L. Jones, D.V.M., Acting Executive Secretary, Ohio Veterinary Medical Board, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, March 29, 1988

I have before me your request for an opinion concerning the proposed operation of a sales truck service by a licensed veterinarian. The veterinarian has described his proposal as follows:

I am writing to inform the Ohio Veterinary Medical Board of my intent to have a route sales truck service my clients for their animal health products, supplies, and equipment needs. From this truck we will sell antibiotics, pharmaceuticals, biologics, feed supplements, growth promotants, and veterinary equipment, in addition to other products not traditionally sold by veterinarians.

It is my attempt to operate [the sales truck service] as professionally and ethically as possible. This is why I am informing the Ohio Veterinary Medical Board, and I am requesting your suggestions on the ethics of this type of retail sales. Many other truck routes are servicing my clients, and these are operating with no regard for legality, ethics, and without veterinary supervision. It is these other sales outlets that I feel are my competition. I am well aware of the problems of selling [veterinary-labeled] drugs, and I have emphasized to my non-veterinarian driver that he cannot diagnose or prescribe. My intent is to start only servicing my established clients with which I already have a veterinary-client-patient relationship; but, in the future, this business may be expanded to other non-clients. Of course, it is my hope that some of these new clients which do not have a regular veterinarian will become new clients of [my veterinary practice] because of [the sales truck service].

You have asked whether this proposal would be in conflict with Ohio statutes.

I note, initially, that my authority to advise the Ohio Veterinary Medical Board extends, under R.C. 109.12, only to matters that relate to the official duties of the Board. The Board has duties with regard to the licensing of veterinarians and the supervision of the practice of veterinary medicine. *See* R.C. Chapter 4741. Neither the Attorney General nor the Ohio Veterinary Medical Board is authorized to provide an individual with advice concerning the possible impact of all Ohio statutory provisions upon a particular business operation. This opinion is, accordingly, addressed to those aspects of the proposed operation that are governed by the Ohio Veterinary Medical Board, and does not attempt to analyze all the statutes that might be applicable to the arrangement. *See generally, e.g.*, R.C. Chapter 1701 (general corporation law); R.C. Chapter 1785 (incorporation of professional associations).

As is noted in the statement of the proposed operation, there are provisions of law regulating the sale of drugs. R.C. Chapter 3719 governs controlled substances and includes among "practitioners" persons who are licensed pursuant to R.C. Chapter 4741 and "authorized by law to write prescriptions for drugs or dangerous drugs." R.C. 3719.01(BB). R.C. 3719.06(B) authorizes a "practitioner licensed to prescribe, dispense, and administer controlled substances to an animal in the course of his professional practice and not for use by a human being" to prescribe, administer, and dispense certain controlled substances or to "cause them to be administered by an assistant or orderly under his direction and supervision." R.C. 3719.09 authorizes the possession of controlled substances "in the course of business by a...practitioner...or other person authorized to administer, dispense, or possess controlled substances under Chapter 3719. or 4729. of the Revised Code." R.C. 3719.14 authorizes the possession of controlled substances by common carriers or warehousemen engaged in lawfully transporting or storing them and permits "[e]mployees or agents of persons entitled to possession of controlled substances" to temporarily possess controlled substances. R.C. 3719.14(C). Other provisions of R.C. Chapter 3719 govern certain medicines and medical equipment. *See, e.g.*, R.C. 3719.15-.16; R.C. 3719.172. Further, R.C. Chapter 4729, which governs the practice of pharmacy, also contains provisions governing the sale of drugs, dangerous drugs, and poisons. R.C. 4729.28 prohibits the sale of such items by a person who is not a registered pharmacist or pharmacy intern. R.C. 4729.29 provides an exception for a practitioner (including, under R.C. 4729.02(H)(1), a licensed veterinarian), permitting him to "personally [supply] his patients with such drugs as to him seem proper." R.C. 4729.51 governs the sale, purchase, distribution and delivery of dangerous drugs. While I am not attempting to provide a definitive statement of the provisions governing the sale and administration of drugs, I note that this is an area that should be examined with care to assure that the proposed operation complies with all applicable provisions.

It is clear from your request that the major issues of concern are those related to ethics and the nature of professional practice. Provisions governing those matters appear in R.C. 4741.22, which sets forth circumstances in which a veterinarian may be disciplined. R.C. 4741.22 states, in part:

The state veterinary medical board may refuse to issue a license or a temporary permit to any applicant, may issue a reprimand, or suspend or revoke the license or the temporary permit of any person licensed to practice veterinary medicine who:

...
(D) Directly or indirectly employs or lends his services to a solicitor for the purpose of obtaining patients;

...
(F) Advertises in a manner which violates section 4741.21 of the Revised Code;

(G) Has professional association with or lends his name to any unlicensed person, association, or organization for the purpose of obtaining patients;

(H) Divides fees or charges or has any arrangement to share fees or charges with any other person, except on the basis of services performed;

(I) Sells any biologic containing living, dead, or sensitized organisms or products of such organisms, except in a manner which the board by rule has prescribed;

...

(L) Is convicted of a felony drug abuse offense;

...

(Q) Permits a person not a licensed veterinarian, a veterinary student extern, or a graduate animal technician to engage in work or perform duties in violation of sections 4741.01 to 4741.29 of the Revised Code....

R.C. 4741.21 contains related provisions governing advertising by or for a licensed veterinarian. It states:

No advertising shall be done by a licensed veterinarian or any person under his control or employ which:

(A) Is false or misleads any person to act to his detriment in the care or treatment of any animal;

(B) Is done with a purpose to deceive or defraud, or tends to deceive or defraud, any person;

(C) *Promotes or tends to promote the business of a veterinarian through second or third party solicitation which is contrary to good public policy as determined by rule of the board;*

(D) Violates the rules set forth by the state veterinarian medical board in compliance with section 4741.05 of the Revised Code. (Emphasis added.)

R.C. 4741.05 authorizes the State Veterinary Medical Board to "make and prescribe all rules necessary for its government and such rules as are necessary to carry out the provisions of sections 4741.01 to 4741.29 of the Revised Code." Rules adopted by the Board appear in 7 Ohio Admin. Code Chapter 4741-1. Existing rules do not address the matter of solicitation or advertising by or on behalf of a licensed veterinarian. Rule 4741-1-05 does address the sale of biologics and, pursuant to R.C. 4741.22(I), sales made in violation of this rule could provide a basis for disciplinary proceedings. Thus, the veterinarian should structure his professional and business arrangements to assure compliance with this rule.

R.C. 4741.22(Q) provides for disciplinary action against a veterinarian who permits an unlicensed person to perform veterinary duties in excess of those authorized by statute. R.C. 4741.19 prohibits the practice of veterinary medicine by a person who does not hold a license or temporary permit under R.C. 4741.11-14. R.C. 4741.20 contains exemptions to R.C. 4741.19 and related provisions, including an exemption for a person who administers to his own animals and an exemption for "[a] person who advises with respect to or performs acts which the state veterinary medical board by rule has prescribed as accepted management practices in connection with livestock production." R.C. 4741.20(D). R.C. 4741.01(F) defines the "practice of veterinary medicine" as follows:

The "practice of veterinary medicine" means the practice of any person who:

(1) *For hire, fee, compensation, or reward promised, offered, expected, received, or accepted, either directly or indirectly, diagnoses, prognoses, treats, administers to, prescribes for, operates on, manipulates, or applies any apparatus or appliance for any disease, pain, deformity, defect, injury, wound, or physical condition of any animal, or for the prevention of or to test for the presence of any disease of any animal, or who holds himself out as being able or legally authorized to act in such manner, or who holds himself out as being a veterinarian involved in environmental health, public health, food hygiene, preventive medicine, space medicine, or other special areas;*

(2) Practices dentistry or surgery on any animal;

(3) Represents himself as engaged in the practice of veterinary medicine as defined in divisions (F)(1) and (2) of this section;

(4) Uses any words, letters, or titles in such connection and under such circumstances as to induce the belief that the person using them is engaged in the practice of veterinary medicine. (Emphasis added.)

A person who does not hold a license or temporary permit under R.C. 4741.11-.14 may not perform these activities unless he comes within the exemptions set forth in R.C. 4741.26. To the extent that the proposed sales truck service employs drivers or other persons who are not licensed to practice veterinary medicine, such persons must refrain from performing activities that would constitute the practice of veterinary medicine. Further, if such persons are to act as graduate animal technicians, they must be registered pursuant to R.C. 4741.19(C) and 7 Ohio Admin. Code 4741-1-01. See R.C. 4741.01(J); R.C. 4741.22(Q).

Various portions of R.C. 4741.21 and R.C. 4741.22 prohibit a veterinarian from using other persons to solicit patients. The prohibition against a veterinarian's using a solicitor for the purpose of obtaining patients was considered by my predecessor in 1974 Op. No. 74-064. That opinion states, at 2-267: "The evident purpose of R.C. 4741.22(D) is to prevent veterinarians from demeaning their profession by employing another person to obtain business for them." See generally *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (discussing state interest in maintaining standards among members of the licensed professions and, in particular, the regulation of the solicitation of clients by attorneys). Op. No. 74-064 concluded that the prohibition against solicitation did not operate to prevent an arrangement under which a nonprofit corporation referred owners of dogs and cats to veterinarians who agreed to perform spaying and neutering operations at reduced rates, where the corporation advertised for the purpose of obtaining members who paid a nominal annual fee and were eligible for such referral services. When Op. No. 74-064 was issued, R.C. 4741.22(D) applied to a veterinarian who "[e]mploys directly or indirectly a solicitor for the purpose of obtaining patients." Existing language in R.C. 4741.22(D) also applies to one who "lends his services to a solicitor for the purpose of obtaining patients." See 1975-1976 Ohio Laws, Part II, 2529, 2536 (Am. H.B. 435, eff. Oct. 17, 1975) (amending, *inter alia*, R.C. 4741.22(D)). But see *Sternfels v. Board of Regents of University of State of New York*, 20 A.D.2d 840, 248 N.Y.S.2d 173 (1964), *cert. denied*, 382 U.S. 901 (1965) (upholding a six-month suspension of a veterinarian who agreed with the owner of a pet shop to have purchasers of puppies referred to him for free examinations where a sign in front of the store advertised the examinations; the board found that the arrangement was intended to induce prospective clients to the veterinarian's office, in violation of a statute prohibiting advertising for patronage).

Whether a particular arrangement runs afoul of the solicitation and advertising provisions contained in R.C. 4741.21 and R.C. 4741.22 depends upon the facts surrounding the arrangement and upon the judgment of the State Veterinary Medical Board concerning matters of public policy. See generally, e.g., R.C. 4741.21(C); *In re R.M.J.*, 455 U.S. 191 (1982) (discussing constitutional limitations on the regulation of advertising for professional services); *Lies v. Ohio Veterinary Medical Board*, 2 Ohio App. 3d 204, 441 N.E.2d 584 (Hamilton County 1981). Such a determination cannot be made by means of an opinion of the Attorney General. Factors influencing such a determination may include the purpose for which an individual is employed and the extent of his duties. See generally *Walker v. Corwin*, 210 Minn. 337, 300 N.W. 800 (1941).

In considering how to structure a sales truck service to minimize the possibility of ethical violations, it is instructive to examine case law in related areas. It is generally understood that a professional who is bound by prohibitions against solicitation is free to enter into businesses that do not constitute the practice of his profession. Thus, in *In re Thibodeau*, 295 Mass. 374, 3 N.E.2d 749 (1936), no impropriety was found in the fact that a practicing attorney owned and conducted a business in which, for an annual fee, subscribers were provided with various automobile-related services, including the payment of costs of certain legal advice and legal defense services. The attorney in question had a substantial sales force to promote this business. The court found, however, that the business did not constitute the practice of law and that it was separate from the attorney's law practice. The court stated:

[C]ommonly a member of the bar is free to engage in commercial pursuits of an honorable character and to advertise and extend his purely mercantile business honestly and fairly by ordinary commercial methods....

....

As the respondent's business conducted under the name of the "association" is not the practice of law it follows that the solicitation of subscribers and the presentation to the public of the advantages of the "association" are not in themselves improper.

...The association business is a genuine business. There is nothing to indicate that the precautions taken to separate the "association" from the law firm are not real or that they cover any subterfuge. Any indirect profit or advantage which the firm receives from the publicity given to the "association" is very small and incidental and apparently no greater than that which any firm of lawyers might receive through the connection of its members with substantial business enterprises such as banks or insurance companies or through its members doing business as trustees, receivers or in like capacities. It has never been thought improper for a lawyer to extend his acquaintance or to enhance his prestige in these ways, even though it has a tendency to bring him to the attention of possible clients and thus to increase his law practice.

295 Mass. at 376, 379-80, 3 N.E.2d at 750, 752. The *Thibodeau* case is not directly applicable to the questions under consideration herein, both because it is from a different jurisdiction and because it concerns a different profession. *See generally, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 n. 25 (1976). It is, however, noteworthy that even though the prohibition against solicitation was broader in that case than it is under current Ohio veterinary law - applying to the licensed professional himself, as well as to solicitation by others on his behalf, *see generally Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 449 (1978) (holding that attorneys may constitutionally be disciplined "for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent"); *In re Primus*, 436 U.S. 412 (1978) - the court found that the professional was permitted to engage in a business that did not constitute the practice of his profession but that might reflect favorably upon that practice, provided that the business was separate from the practice of the profession and was not simply a subterfuge for the solicitation of clients.

Based upon the foregoing, I conclude that R.C. 4741 does not prevent a veterinarian from operating a sales truck service. If the sales truck service is provided only to existing clients of the veterinarian, as an additional service constituting part of his veterinary practice, it is subject to such regulations as those governing the possession and sale of drugs and the activities of unlicensed personnel, but it does not appear to constitute the solicitation of clients. If, however, the service is provided as a separate operation available to the general public, then care must be taken to assure that it does not violate provisions regarding solicitation. Depending upon the facts involved, such an operation might be found to constitute the employment of a solicitor for the purpose of obtaining patients, *see* R.C. 4741.22(D); advertising which promotes or tends to promote the business of a veterinarian through second or third party solicitation, *see* R.C. 4741.21(C); R.C. 4741.22(F); or the lending of a name to an unlicensed person for the purpose of obtaining patients, *see* R.C. 4741.22(G). The risk of violating solicitation provisions is reduced if the practice of the profession is kept separate from the nonprofessional business operation and if the business operation is not used to steer clients to the professional practice.

Pursuant to R.C. 4741.05, the State Veterinary Medical Board has authority to adopt rules defining good public policy for purposes of R.C. 4741.21(C) and otherwise clarifying the application of R.C. 4741.22. *See generally, e.g.*, 1986 Op. Att'y Gen. No. 86-076. In the absence of such rules, a veterinarian is governed only by the statutory provisions. There is little case law indicating the manner in which such provisions will be applied.

In conclusion, it is my opinion, and you are hereby advised, that R.C. Chapter 4741 does not prevent a veterinarian from operating a sales truck service, either as part of his veterinary practice or as a separate operation, provided that there is compliance with provisions governing the operation of such service, such as those relating to the possession and sale of drugs and those governing the activities of unlicensed personnel, and provided that the service is not used to solicit patients in violation of R.C. 4741.21 or R.C. 4741.22.