

**OPINION NO. 89-065****Syllabus:**

1. Pharmacy is a profession for purposes of R.C. 1701.03. (1937 Op. Att'y Gen. No. 225, vol. I, p. 379, syllabus, paragraph one, followed.)
2. A corporation that has as its purpose the practice of pharmacy may not be formed and organized as a general corporation for profit under R.C. Chapter 1701.
3. A general corporation for profit may be formed and organized pursuant to the terms of R.C. Chapter 1701 for the purpose of owning, managing, or conducting a pharmacy as defined in R.C. 4729.02(A). In accordance with the directive set forth in R.C. 4729.27, such a corporation shall have in its employ, in full and actual charge of each such pharmacy it owns, manages, or conducts, a pharmacist registered under the laws of the State of Ohio. (1937 Op. Att'y Gen. No. 225, vol. I, p. 379, syllabus, paragraph two, followed.)

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**To: Sherrod Brown, Secretary of State, Columbus, Ohio**

**By: Anthony J. Celebrezze, Jr., Attorney General, August 23, 1989**

You have requested my opinion regarding the formation and organization of a corporation that has as its purpose the practice of pharmacy. You have asked that I address the following question: "Where a corporation is organized to practice pharmacy, must it be organized pursuant to Chapter 1785 of the Revised Code as a

professional association or may it also be organized pursuant to Chapter 1701 as a general corporation?" You note in your letter that resolution of this question "may have an effect on the practice of pharmacy as it relates to the large drugstore chains." In that regard, the operation of drugstores or pharmacies by corporations whose stock is either publicly or privately owned, and whose shareholders include persons who are not otherwise licensed to practice pharmacy, is a business practice that is quite commonplace. To the extent that pharmaceutical services are offered through such drugstores, the question has been raised whether those corporations must organize pursuant to, and comply with the requirements set forth in, R.C. Chapter 1785, the professional associations law, or whether they may organize pursuant to R.C. Chapter 1701, the general corporation law.

In addressing the issues raised by your request, I find it helpful to review briefly the pertinent provisions of the statutory schemes set forth in R.C. Chapters 1701 and 1785 respectively for the formation and organization of general corporations for profit and professional associations. R.C. Chapter 1701 provides for the creation, R.C. 1701.04-.11, merger or consolidation, R.C. 1701.78-.85, and dissolution, R.C. 1701.86-.911, of a general corporation for profit. Other provisions within R.C. Chapter 1701 address many other aspects of a general corporation for profit, including the sale, issuance, and redemption of shares of the corporation's stock, R.C. 1701.14-.28; financial organization of the corporation, R.C. 1701.29-.38; shareholders' meetings, R.C. 1701.39-.43, and voting, R.C. 1701.44-.53; authority and actions of the corporation's directors, R.C. 1701.55-.63, and officers. R.C. 1701.64; amendment of the corporation's articles of incorporation, R.C. 1701.69-.74; and sale of the corporation's assets, R.C. 1701.76 and R.C. 1701.77.

The authority that may be exercised by a general corporation for profit, and the functions such corporation may perform, are described in R.C. 1701.13(A)-(H). R.C. 1701.03 further states the purposes for which a general corporation may be formed: imposes a prohibition with respect to the practice of any profession by a corporation; and notes the relationship between the general corporation provisions of R.C. Chapter 1701 and special provisions elsewhere in the Revised Code that govern particular classes of corporations. Thus, R.C. 1701.03 reads, in part, as follows:

A corporation may be formed for any purpose or purposes, other than for carrying on the practice of any profession except as provided in this section,<sup>1</sup> for which natural persons lawfully may associate themselves, provided that when there is a special provision in the Revised Code for the formation thereunder of a designated class of corporations, a corporation of such class shall be formed thereunder. (Footnote added.)

R.C. 1701.98 also describes the applicability of R.C. Chapter 1701, *see* R.C. 1701.98(A), and subdivision (B) of that section states the effect, *vis-a-vis* R.C. Chapter 1701, to be accorded those provisions of the Revised Code that pertain to specific types of corporations:

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<sup>1</sup> The exceptions provided for in R.C. 1701.03 are as follows:

A corporation for the erection, owning, and conducting of a sanitarium for receiving and caring for patients, medical and hygienic treatment of patients, and instruction of nurses in the treatment of disease and in hygiene is not forbidden by this section. A corporation providing architectural, landscape architectural, professional engineering, or surveying services, or any combination thereof, is not forbidden by this section.

*See also* R.C. 4733.16(C) (a corporation may be organized under R.C. Chapter 1701 or a professional association may be organized under R.C. Chapter 1785 for the purpose of providing professional engineering, surveying, architectural or landscape architectural services, or any combination thereof; a corporation organized under R.C. Chapter 1701 for the purpose of providing such service may also be organized for any other purpose in accordance with that chapter).

Special provisions in the Revised Code for the organization, conduct, or government of designated classes of corporations shall govern to the exclusion of sections 1701.01 to 1701.98, inclusive, of the Revised Code, on the same subject, except where it clearly appears that a special provision is cumulative, in which case it and the provisions of said sections on the same subject shall apply.

R.C. Chapter 1785 provides for the organization as a professional association of an individual or group of individuals who are licensed or otherwise legally authorized to render the same kind of professional service within Ohio. R.C. 1785.02. R.C. 1785.01 defines "[p]rofessional service" and "[p]rofessional association" in the following manner:

As used in sections 1785.01 to 1785.08 of the Revised Code:

(A) "Professional service" means any type of professional service which may be performed only pursuant to a license, certificate, or other legal authorization, as provided by Chapters 4701., 4703., 4705., 4715., 4725., 4729., 4731., 4732., 4733., 4734., and 4741. of the Revised Code, to certified public accountants, licensed public accountants, architects, attorneys, chiropractors, dentists, pharmacists, optometrists, physicians and surgeons, and practitioners of limited branches of medicine or surgery as defined in section 4731.15 of the Revised Code, psychologists, professional engineers, and veterinarians.

(B) "Professional association" means an association organized under section 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.<sup>2</sup> (Footnote added.)

A professional association may render professional services only through officers, employees, and agents who are themselves duly licensed or otherwise legally authorized to render professional services within Ohio. R.C. 1785.03. A professional association, however, is not prohibited from employing clerical and technical employees to render services of a nonprofessional nature. *Id.* To prevent nonprofessionals from using professional corporations to render professional services, every professional association, within thirty days after the thirtieth day of June in each year, must furnish a statement to the Secretary of State showing the names and post office addresses of all shareholders in the association and certify that all the shareholders are duly licensed or otherwise legally authorized to render professional service in Ohio. R.C. 1785.06. Ownership of shares in a professional association is restricted to persons who are duly licensed or otherwise legally authorized to render the same professional service as that for which the association was organized. R.C. 1785.05. A subsequent transfer of those shares may be to another licensed professional only. R.C. 1785.07.

R.C. 1785.08 makes the general corporation law, R.C. Chapter 1701, applicable to professional associations, including their organization and the manner of filing articles of incorporation, and provides that if any provision of R.C. Chapter 1785 conflicts with any provision of R.C. Chapter 1701, the provisions of R.C. Chapter 1785 "shall take precedence." Thus, the practical effect of R.C. 1785.08 is

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<sup>2</sup> Although R.C. Chapter 1785 employs the term, "professional association," court decisions in this area have generally stated that a professional association organized thereunder is to be deemed a corporation. *O'Neill v. United States*, 410 F.2d 888 (6th Cir. 1969) (syllabus, paragraph seven) (a professional association organized under R.C. Chapter 1785 is a corporation for federal income tax purposes); *Lenhart v. Toledo Urology Associates, Inc.*, 48 Ohio App. 2d 249, 250, 356 N.E.2d 749, 750 (Lucas County 1975) ("[i]n Ohio, the professional association organized under R.C. Chapter 1785 should be regarded as a corporation").

to provide for the incorporation and organization of professional practices in accordance with the procedural framework that appears in R.C. Chapter 1701.<sup>3</sup>

Prior to the enactment of R.C. Chapter 1785,<sup>4</sup> most professionals were prohibited from incorporating by the express terms of R.C. 1701.03, which provides, in part, that, "[a] corporation may be formed for any purpose or purposes, other than for carrying on the practice of any profession except as provided in this section." *South High Development, Ltd. v. Weiner, Lippe & Cromley Co., L.P.A.*, 4 Ohio St. 3d 1, 3, 445 N.E.2d 1106, 1108 (1983) ("[t]here was no legal authorization in Ohio for a corporation to practice a profession until the passage of R.C. Chapter 1785,...which authorized the creation of professional associations"). The reason traditionally offered in support of this prohibition has been that the practice of a profession involves a uniquely personal relationship between the professional and his client or patient that cannot be duplicated or fulfilled by a corporation. *Judd v. City Trust & Savings Bank*, 133 Ohio St. 81, 12 N.E.2d 288 (1937); *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N.E. 650 (1934); *State ex rel. Harris v. Myers*, 128 Ohio St. 366, 191 N.E. 99 (1934); 1980 Op. Att'y Gen. No. 80-004; 1952 Op. Att'y Gen. No. 1751, p. 608. In this regard, decisions have emphasized as one of the attributes of a profession the requirement of good moral character on the part of the members of that profession, and the obligation of such members to adhere to and abide by the ethical standards that govern their profession. See, e.g., *State ex rel. Harris v. Myers*, 128 Ohio St. at 368, 191 N.E. at 100; *Dworken v. Apartment House Owners Association of Cleveland*, 28 Ohio N.P. (n.s.) 115, 117, 118 (C.P. Cuyahoga County 1930), *affirmed*, 38 Ohio App. 265, 176 N.E. 577 (Cuyahoga County 1931). 1952 Op. No. 1751 provides the following elaboration on this point:

In view of the emphasis in the Ohio decisions on good moral character as a requirement of practitioners of a profession, we must conclude that the courts regard the preservation of such requirement as the principal legislative objective of the prohibition in Section 8623-3 [R.C. 1701.03], supra, of the corporate practice of a profession. In this view of the matter it would appear that the General Assembly entertained the notion that corporations, as impersonal entities, are amoral in character, and could not be relied upon to adhere to the canons of ethics which obtain in the several professions, especially in instances where control of the activities of the corporation is vested in individuals not licensed in the profession concerned. (Emphasis added.)

1952 Op. No. 1751 at 614. See, e.g., R.C. 4715.10(A) (each person who desires to practice dentistry shall furnish to the secretary of the State Dental Board proof that he is, *inter alia*, of good moral character); R.C. 4729.08(B) (every applicant for examination and registration as a pharmacist shall be of good moral character and habits); R.C. 4731.08 (each person who desires to practice medicine or surgery or osteopathic medicine and surgery shall furnish to the secretary of the State Medical Board proof that he is, *inter alia*, of good moral character). Specific provisions in R.C. Chapter 1785, however, have since alleviated the more significant ethical concerns that had previously been voiced against professional individuals incorporating. See, e.g., R.C. 1785.02 (limiting the organization and shareholding of a professional association to an individual or group of individuals each of whom is licensed or otherwise legally authorized to render the same kind of professional service); R.C. 1785.03 (providing that a professional association may render services

<sup>3</sup> One commentator, examining the various provisions of R.C. 1785.01-.08 shortly after their enactment by the General Assembly, has stated that R.C. Chapter 1785 "provides for the incorporation of professional practice under the General Corporation Law subject to the limitations found in the new act [i.e., R.C. Chapter 1785]." Dunkel, *Professional Corporations*, 22 Ohio S.L.J. 703, 705 (1961) (emphasis added).

<sup>4</sup> As originally enacted, the provisions of R.C. Chapter 1785 may be found in 1961 Ohio Laws 563 (Am. S.B. 550, eff. Oct. 17, 1961).

only through officers, employees, and agents licensed or otherwise legally authorized to render professional service within Ohio); R.C. 1785.05; R.C. 1785.07 (restricting the issuance, sale, or transfer of the stock of a professional association to persons licensed or otherwise legally authorized to render the same kind of professional service as that for which the association was organized). See also R.C. 1785.06 (requiring an annual report to the Secretary of State certifying the qualifications of the shareholders of a professional association). Thus, R.C. Chapter 1785 now permits individuals who are licensed or otherwise legally authorized to render the same kind of professional service, as defined in R.C. 1785.01(A), to organize as, and become shareholders of, a professional association. R.C. 1785.02; R.C. 1785.08.

Among the professional callings enumerated in R.C. 1785.01 that an individual or group of individuals may undertake as a professional association, pursuant to the terms of R.C. 1785.02, is pharmacy. The practice of pharmacy in Ohio is regulated by certain provisions of R.C. Chapter 4729. R.C. 4729.01 establishes the State Board of Pharmacy as the governmental body responsible for overseeing the practice of pharmacy in Ohio, and for enforcing the provisions pertaining thereto that are set forth in R.C. Chapter 4729. R.C. 4729.25(A) ("[t]he state board of pharmacy shall enforce, or cause to be enforced, [R.C. Chapter 4729]"). An individual who wishes to engage in the practice of pharmacy in Ohio must apply to the Board for registration as a pharmacist, and thereafter appear before the Board to take an examination to determine his fitness to practice pharmacy. R.C. 4729.07. R.C. 4729.08 further describes the personal and educational qualifications that must be satisfied by an applicant who wishes to be registered as a pharmacist. If the Board is satisfied that the applicant meets those requirements, and if the applicant passes the examination prescribed by R.C. 4729.07, then the Board "shall issue to the applicant a certificate of registration and an identification card authorizing him to practice pharmacy." R.C. 4729.08(D). As used in R.C. Chapter 4729, R.C. 4729.02(B) defines the practice of pharmacy as follows:

To "practice pharmacy" means to interpret prescriptions, to compound or dispense drugs, dangerous drugs, and poisons, and related devices that under the federal "Food, Drug and Cosmetic Act" must be labeled for sale only on the order of a practitioner; to participate in drug selection pursuant to Chapter 3715, and section 4729.38 of the Revised Code; and to participate with practitioners in reviews of drug utilization.

Thus, an individual or group of individuals each of whom is licensed or otherwise legally authorized to render the professional services described in R.C. Chapter 4729 may, pursuant to R.C. 1785.02, organize and become shareholders of a professional association for the sole purpose of rendering such professional services, R.C. 1785.01(B). In this particular context, such professional services include interpreting prescriptions and compounding or dispensing drugs, which, *inter alia*, constitute the practice of pharmacy, as defined in R.C. 4729.02(B).

I now direct my attention to your particular inquiry. You have asked whether a corporation that is organized to practice pharmacy must organize pursuant to the provisions of R.C. Chapter 1785 as a professional association, or whether such corporation may organize pursuant to R.C. Chapter 1701 as a general corporation. The discussion just concluded furnishes the answer to this particular question. R.C. 1701.03 provides, in pertinent part, that a general corporation for profit "may be formed for any purpose or purposes, other than for carrying on the practice of any profession." Pharmacy has been determined to be a "profession" for purposes of the foregoing limitation. 1937 Op. Att'y Gen. No. 225, vol. I, p. 379 (syllabus, paragraph one) (the practice of pharmacy is a statutory profession within the meaning of G.C. 8623-3, the statutory predecessor of R.C. 1701.03). Thus, a corporation that has as its purpose the practice of pharmacy may not be formed and organized as a general corporation for profit under R.C. Chapter 1701. On the other hand, R.C. Chapter 1785 does permit the formation and organization of a corporate entity, namely, the professional association, that has as its sole purpose the rendition of the pharmaceutical services described in R.C. Chapter 4729, which, in turn, constitutes the practice of pharmacy as defined in R.C. 4729.02(B).

According to your letter, it has been suggested recently that a corporation that has as one of its purposes the ownership and operation of drugstores should be required to organize as a professional association under R.C. Chapter 1785 insofar as the pharmaceutical services rendered through those drugstores are among the purposes enumerated in R.C. 1785.01 for which a professional association may be organized. Such a corporation would, accordingly, be subject to the specific conditions and requirements that are imposed upon a professional association by R.C. Chapter 1785. Thus, shares of such corporation's capital stock would presumably be issued only to persons who are duly licensed or otherwise legally authorized to render professional pharmaceutical services, R.C. 1785.02; R.C. 1785.05, and the same qualification would apply with respect to a subsequent sale or transfer of those shares of stock, R.C. 1785.07. The requirement set forth in R.C. 1785.06 that a professional association furnish to the Secretary of State an annual statement listing the names and addresses of the professional association's shareholders, and certifying that all those shareholders are duly licensed or otherwise legally authorized to render professional service in Ohio, would also apply to such corporation. Additionally, to the extent that the ownership and operation of drugstores constitute the practice of pharmacy, it has been argued that R.C. 1701.03 prohibits the formation and organization of such corporation under R.C. Chapter 1701 as a general corporation for profit.

There are, accordingly, two issues that must be considered on this point: whether a general corporation for profit could be organized, prior to the enactment of R.C. Chapter 1785, for the purpose of owning or operating drugstores or pharmacies, and, if so, whether the enactment of R.C. Chapter 1785 may be interpreted as affecting in any way the filing and organizational status of those corporations, or corporations organized thereafter for such a purpose. Resolution of the first issue requires that I examine the state of the law as it existed prior to the enactment of R.C. Chapter 1785 in 1961. In that regard, the statutory evidence suggests that the General Assembly has long recognized that the ownership or operation of drugstores is a business enterprise that is not confined to the ranks of licensed, registered pharmacists. I commence my analysis on this point with R.C. 4729.27, which currently provides as follows:

A person not a registered pharmacist, who owns, manages, or conducts a pharmacy as defined in section 4729.02 of the Revised Code, shall have in his employ, in full and actual charge of such pharmacy, a pharmacist registered under the laws of this state. Any registered pharmacist, who owns, manages, or conducts a pharmacy shall be personally in full and actual charge of such pharmacy, or shall have in his employ in full and actual charge of such pharmacy, a pharmacist registered under the laws of this state.

As used in R.C. Chapter 4729, R.C. 4729.02(A) defines the term, "[p]armacy," as "any area, room, rooms, place of business, department, or portion of any of the foregoing, where prescriptions are filled or where drugs, dangerous drugs, or poisons are compounded, sold, offered, or displayed for sale, dispensed, or distributed to the public," and R.C. 4729.02(S) states that the term, "[p]erson," includes "any individual, partnership, association, or corporation, the state, or any political or civil subdivision, district, department, or agency of the state or its political subdivisions."<sup>5</sup> (Emphasis added.) Thus, the logical inference to be drawn from the language of R.C. 4729.27 is that a person who is not a registered pharmacist may, in fact, own, manage, or conduct a pharmacy, provided that person employs a registered pharmacist who is to have full and actual charge of such pharmacy. R.C. 4729.02(S) includes within its definition of "[p]erson," as used in R.C. Chapter 4729, a "corporation." Accordingly, under R.C. 4729.27, a corporation may own, manage, or conduct a pharmacy, as defined in R.C. 4729.02(A), so long as it also employs a

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<sup>5</sup> The term, "person," as used in these statutes, was first defined by the General Assembly in 1945-1946 Ohio Laws 681, 682 (H.B. 92, passed June 28, 1945). At that time, G.C. 1296-1(5) provided that the term, "person," "shall be held to mean and include person, co-partnership, association or corporation."

registered pharmacist who is placed in full and actual charge of such pharmacy. A violation of R.C. 4729.27 constitutes a misdemeanor of the third degree. R.C. 4729.99(B).

Provisions substantially identical to R.C. 4729.27 have been included as part of the Ohio pharmacy laws since before the turn of this century. In 1884 Ohio Laws 61 (S.B. 6, eff. March 20, 1884) the General Assembly enacted amendments to sections 4405 through 4412 of the Revised Statutes of 1880 for the purpose of regulating, at the state level, the practice of pharmacy in Ohio. Prior thereto it appears that such regulation and oversight authority had been left to the province of certain government officials and individual practitioners at the municipal and county level. *Cf., e.g.*, 1873 Ohio Laws 287 (an act "[t]o regulate the practice of Pharmacy in certain cities of the first class, and for other purposes," eff. May 5, 1873); 1874 Ohio Laws, Second Session 16 (an act amending the preceding legislation, eff. Jan. 13, 1875). Thus, as amended, those statutes provided for the appointment of an "Ohio Board of Pharmacy," R.S. 4406, which was given the responsibility of examining the competency and qualifications of each person who wished to "carry on or engage in the business of a apothecary, or of retailing any drugs, medicines, chemicals, poisons, or pharmaceutical preparations" as a pharmacist or assistant pharmacist, and registering and issuing a certificate to practice pharmacy to each such person, R.S. 4408.

Of particular relevance to the present inquiry, however, are the provisions of R.S. 4405, which, *inter alia*, imposed a special obligation upon a person who, though not a registered pharmacist, served as proprietor of a retail drug or chemical store. R.S. 4405 stated, in pertinent part, as follows:

It shall be unlawful for any person not a registered pharmacist to open or conduct any pharmacy or retail drug or chemical store, as proprietor thereof, *unless he shall have in his employ and place in charge of such pharmacy, or store, a registered pharmacist* within the meaning of this chapter, who shall have the supervision and management of that part of the business requiring pharmaceutical skill and knowledge. (Emphasis added.)

Thus, under R.S. 4405, it was lawful for a person who was not a registered pharmacist to serve as the proprietor of a retail drug or chemical store so long as he employed and placed in charge of such pharmacy a registered pharmacist.

R.S. 4405-4412, which appear to be the earliest predecessors of many of the provisions that would eventually appear in R.C. Chapter 4729, were subsequently amended several times between 1887 and 1908. *See* 1887 Ohio Laws 220 (S.B. 312, eff. March 21, 1887) (amending, *inter alia*, R.S. 4412 for the purpose of imposing a criminal penalty for a violation of R.S. 4405); 1898 Ohio Laws 181 (H.B. 420, eff. Apr. 21, 1898) (consolidating and reorganizing the substantive provisions of R.S. 4405-4412); 1900 Ohio Laws 84 (H.B. 281, eff. March 29, 1900) (amending R.S. 4405 for the purpose of adding thereto another exception to the general prohibition set forth therein); 1902 Ohio Laws, Regular Session 470 (H.B. 1061, eff. May 9, 1902) (amending R.S. 4408 for the purpose, *inter alia*, of enumerating the specific subjects to be included on the examination administered by the Ohio Board of Pharmacy to persons applying for Board registration as pharmacists); 1906 Ohio Laws 207 (H.B. 344, passed Apr. 2, 1906) (amending R.S. 4407-4411). Thereafter, in 1910, the Revised Statutes underwent a complete reorganization by the General Assembly, which culminated in their formal reenactment and recodification as the General Code. The provisions of former R.S. 4405-4412 were recodified at G.C. 1296-1313 and G.C. 12705-12707. In particular, R.S. 4405 was recodified as G.C. 12705, and read as follows:

Whoever, not being a legally registered pharmacist, opens or conducts a pharmacy or retail drug or chemical store, either as proprietor or manager thereof, unless he has in his employ and places in charge of such pharmacy or store a pharmacist legally registered under the laws of this state, shall be fined not less than twenty dollars nor more than one hundred dollars. Each day's violation of this section shall constitute a separate offense.

Former R.S. 4410, which required that each certificate of registration be "conspicuously exposed in the pharmacy or drug store of which the pharmacist or assistant pharmacist to whom it is issued is the owner or manager, or in charge of or in which he is employed," see 1908 Ohio Laws 492, 506 (H.B. 1268, eff. July 1, 1908), was also recodified at G.C. 1310. Finally, G.C. 12706 provided for the imposition of a monetary fine upon anyone who, though not a legally registered pharmacist or a legally registered assistant pharmacist employed in a pharmacy or drugstore under the management or control of a legally registered pharmacist, "compounds, dispenses, or sells a drug, chemical, poison, or pharmaceutical preparation."

In 1953 the provisions of the entire General Code were thoroughly consolidated and formally reenacted as the Revised Code. See 1953 Ohio Laws 1 (Am. H.B. 1, eff. Oct. 1, 1953). As a result, G.C. 1296-1313 and G.C. 12705-12707 were recodified and renumbered as R.C. 4729.01-.29, with the provisions of G.C. 12705 and G.C. 12706 appearing respectively at R.C. 4729.27 and R.C. 4729.28.<sup>6</sup>

In 1937 Op. No. 225, one of my predecessors placed particular emphasis upon G.C. 1310, G.C. 12705, and G.C. 12706 in addressing the question whether a general corporation for profit could be formed for the purpose of operating drugstores or pharmacies in view of the fact that G.C. 8623-3, the provisions of which now appear at R.C. 1701.03, prohibited the formation of a corporation for the purpose of carrying on the practice of any profession. Answering that question in the affirmative, 1937 Op. No. 225 first determined that pharmacy is, in fact, a "profession" for purposes of the prohibition set forth in G.C. 8623-3, *id.* at 380 and 381. The opinion noted, however, that the express terms of G.C. 1310, G.C. 12705, and G.C. 12706 reflected a judgment on the part of the General Assembly that the operation of drugstores or pharmacies was a business activity that could be pursued by a person who was not otherwise licensed to practice pharmacy, and that such a person could be a corporation, 1937 Op. No. 225 at 383 ("[r]eading all of the Pharmacy laws together and considering these last quoted three sections in pari materia with the rest of the provisions, it seems clear that the legislature did not intend to restrict the conducting and operating of drug stores and pharmacies to licensed pharmacists"). Thus, one may logically and reasonably infer that the General Assembly, in enacting these particular statutory provisions, was of the opinion that the ownership, operation, or management of a drugstore did not, per se, constitute the practice of pharmacy. The opinion also noted that the conclusion reached therein was compatible with the earlier 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), in which the court held that a general corporation for profit engaged in the business of manufacturing eyeglasses could not, *inter alia*, employ an optometrist to do optometrical work in connection with such business and fill a prescription issued by that optometrist because in such a circumstance the corporation would be deemed practicing a profession in violation of the prohibition in G.C. 8623-3. On this point my predecessor emphasized the fact that nowhere within the statutes governing the practice of optometry did the General Assembly recognize "the employment of optometrists by laymen to render services to the public," whereas G.C. 1310, G.C. 12705, and G.C. 12706 made it clear that the General Assembly "not only did not intend to restrict the operation of drug stores or pharmacies to licensed pharmacists,

<sup>6</sup> At that time, R.C. 4729.27 stated as follows:

A person not a registered pharmacist, who owns, manages, or conducts a retail drug store as defined in section 4729.02 of the Revised Code, shall have in his employ, in full and actual charge of such retail drug store, a pharmacist registered under the laws of this state. Any registered pharmacist, who owns, manages, or conducts a retail drug store shall be personally in full and actual charge of such retail drug store, or shall have in his employ in full and actual charge of such retail drug store, a pharmacist registered under the laws of this state.

The definition of "person" that had appeared in G.C. 1296-1(5), see note five, *supra*, was also recodified at R.C. 4729.02(E) (now R.C. 4729.02(S)).



but actually contemplated the contrary and recognized the right of an individual, other than a pharmacist to operate and conduct such a place of business." 1937 Op. No. 225 at 384.<sup>7</sup> Accordingly, 1937 Op. No. 225 concluded that a general corporation for profit may be formed for the purpose of operating and conducting drugstores or pharmacies, provided such corporation complies with those provisions of the pharmacy laws requiring the employment of a registered pharmacist who shall be in full and actual charge of the pharmaceutical department of each such drugstore or pharmacy.

I concur in the reasoning and conclusions set forth in 1937 Op. No. 225, and am of the opinion that it represents an accurate statement of the law on this point

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<sup>7</sup> In *State ex rel. Bricker v. Buhl Optical Co.*, 131 Ohio St. 217, 2 N.E.2d 601 (1936) the court cautioned against an overly broad interpretation of the prohibition in G.C. 8623-3 that would effectively prevent a general corporation for profit from ever employing any individual who practices a profession or pursues an occupation that is subject to licensure and regulation by a branch of state government:

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 1295-1 *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 Cyclopaedia 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 engaged 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." (Emphasis added.)

131 Ohio St. at 221 and 222, 2 N.E.2d at 603. See also 1980 Op. Att'y Gen. No. 80-004 at 2-30 (noting that the foregoing quoted excerpt from *State ex rel. Bricker v. Buhl Optical Co.* "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," and 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"). (Emphasis in original.)

as it then existed. In particular, I am persuaded that my predecessor correctly interpreted the pharmacy statutes discussed therein and drew therefrom the intended inference with respect to the operation of drugstores or pharmacies by a general corporation for profit. Moreover, the essential terms of those General Code provisions, which were eventually reenacted in R.C. Chapter 4729, remained unchanged throughout the years that followed the issuance of 1937 Op. No. 225, and that preceded the enactment of R.C. Chapter 1785. Accordingly, I find it reasonable to conclude that, prior to the enactment of R.C. Chapter 1785, a general corporation for profit could be organized for the purpose of owning, operating, or managing a drugstore or pharmacy.

The question remains whether the enactment of R.C. Chapter 1785 may be viewed as altering in any way the prior law in this area, such that a corporation formed for the purpose of owning or operating drugstores or pharmacies must organize under and comply with the specific terms of R.C. Chapter 1785. Resolution of that question requires that I review the particular circumstances that prompted the enactment of R.C. Chapter 1785 in an effort to identify as accurately as possible the likely intent of the General Assembly in proceeding with such enactment. As I have already noted, many licensed professionals had, historically, been prevented from incorporating their individual practices as a result of the prohibition against the formation of a corporation for carrying on the practice of any profession set forth in R.C. 1701.03 and its statutory predecessor, G.C. 8623-3. That prohibition had consistently been interpreted as barring the rendition of any professional services through a corporate entity. *South High Development, Ltd. v. Weiner, Lippe & Cromley Co., L.P.A.*; *Judd v. City Trust & Savings Bank*; *State ex rel. Harris v. Myers*; 1952 Op. No. 1751. Such prohibition was principally justified on the grounds that an impersonal corporate entity neither could be relied upon to adhere to the various ethical standards that govern the behavior of individual practitioners of particular professions, nor could those ethical standards, as a practical matter, be readily imposed upon and enforced against such an entity. *Id.*

Many self-employed professionals eventually discovered, however, that the foregoing prohibition effectively denied them the receipt of certain favorable tax benefits under the Internal Revenue Code that had otherwise become available to employers that carried on their businesses in the corporate form, and to their employees. In that regard, progressive amendments to the Internal Revenue Code in the corporate tax and employee benefits areas resulted in a situation in which corporate employers were permitted income tax deductions for monetary contributions they made to certain employee pension and profit sharing plans, and employee health, accident, and life insurance policies; at the same time, those employer contributions were not to be included as part of the employees' gross income. See, e.g., Dunkel, *Professional Corporations*, 22 Ohio S.L.J. 703, 703, 704 (1961) (summarizing the exact extent of the mutual tax benefits provided to employers and employees under the pertinent Internal Revenue Code provisions in effect at the time R.C. Chapter 1785 was enacted; for example, I.R.C. §404(a)(7) permitted an employer to make contributions to employee pension and profit sharing plans in an amount equal to 25% of each employee's annual compensation, which, in turn, represented a deduction for the employer and tax-deferred income for the employee). Their status as self-employed individuals in independent professional practices, however, meant that most professionals could not receive the same favorable tax treatment with respect to contributions they made to retirement, profit sharing, and other benefit plans that they had established on their own behalf. *Id.*

One alternative by which professional people hoped to remedy this disparity of treatment was to incorporate their individual professional practices. By so doing, they could create a separate corporate entity that would be the "employer" of the individual practitioner, which, in turn, would place the individual practitioner on the same footing, for tax purposes, as all other nonprofessional employees. See, e.g., Briner, *Federal Income Tax Developments: 1977*, 11 Akron L. Rev. 225, 268 (1977) ("[b]y incorporating and becoming employees of their own corporations, professionals have been able to gain numerous fringe benefits that are deductible to the corporation and non-income to the individual. Incorporated professionals have also been able to provide themselves with greater pension and profit-sharing plans") (footnote omitted).

In Ohio, however, professional practitioners were prevented from pursuing such a course of action as a result of the express prohibition against the corporate practice of a profession found in R.C. 1701.03. In response, the General Assembly enacted R.C. Chapter 1785 in order to permit the professionals enumerated therein to incorporate their individual practices notwithstanding the prohibition against such in R.C. 1701.03, while including therein specific provisions that would address and resolve the ethical concerns that had traditionally been cited in support of that prohibition. R.C. 1785.02; R.C. 1785.03; R.C. 1785.05-.07. The commentators unanimously agree, therefore, that it was for this reason that the General Assembly enacted R.C. Chapter 1785, thereby affording Ohio professionals the opportunity to enjoy the same federal tax benefits already available to other nonprofessional employers and employees:

The Ohio act [R.C. Chapter 1785] cannot be approached without some knowledge of the circumstances which led to its enactment. The incorporated practice of law or medicine is a sharp departure from long standing policy. *There is but a single reason for changing this policy — to create an entity capable of employing the professional so as to allow him the same opportunity to reduce his Federal income tax presently open to the non-professional.* The stakes are large, particularly for those professionals in high income tax brackets. (Emphasis added.)

Dunkel, *Professional Corporations*, 22 Ohio S.L.J. at 703. See also *O'Neill v. United States*, 410 F.2d 888 (6th Cir. 1969); Arnold, *Incorporation of Professionals in Ohio: Past, Present, and Future*, 15 Akron L. Rev. 191, 193 (1981) ("[t]he passage of the Ohio professional association act allows Ohio professionals to obtain the benefits of the corporate form of organization. The primary benefit sought by professionals through incorporation is corporate treatment under the Internal Revenue Code"); Vesely, *The Ohio Professional Association Law*, 13 W. Res. L. Rev. 195, 195, 196 (1962) ("the legislatures of many states have enacted professional association or professional corporation laws," and the "sole purpose of these laws is to permit professional men to organize and carry on their professional practice as a corporation, or by means of a legal entity, whether or not called a corporation, which possesses the characteristics required for classification as an 'association' under the [Kintner] Regulations, and thus is treated as a corporation for tax purposes"); Annot., "Practice By Attorneys And Physicians As Corporate Entities Or Associations Under Professional Service Corporation Statutes," 4 A.L.R.3d 383, 390 (1965) ("the main purpose of the enactment of the professional service corporation statutes was to qualify professional groups for tax benefits open to employees under the qualified pension, profit-sharing, and annuity plan provisions of the Internal Revenue Code").

Given this understanding of the circumstances that led to the enactment of Ohio's professional associations law, the answer to the question whether R.C. Chapter 1785 may be interpreted as affecting in any way the filing and organizational status of corporations that are formed for the purpose of owning, operating, or managing pharmacies becomes fairly self-evident. I am persuaded that the foregoing authorities correctly analyzed and identified the legislative intent underlying the enactment of R.C. Chapter 1785, and the specific objectives that were to be accomplished thereby. Thus, R.C. Chapter 1785 was intended to permit the professional practitioners designated in R.C. 1785.01 to organize, either individually or as a group, and carry on their professions by means of a legal entity possessing the attributes of a corporation in order that those practitioners might receive the same federal tax benefits that were available to nonprofessional employers and employees. Express authority in that regard was perhaps thought necessary in order to overcome the prohibition against the corporate practice of a profession in R.C. 1701.03, or perhaps to simply emphasize the fact that such prohibition would no longer present an impediment to those professionals incorporating. In any event, the essential character of Ohio's professional associations law is permissive and discretionary, and such law does not prohibit, restrict, or otherwise limit the ownership or management of drugstores or pharmacies by a general corporation for profit. Thus, the available evidence indicates quite conclusively that the enactment of R.C. Chapter 1785 in 1961 was intended to permit a business arrangement for professional practitioners that, prior

thereto, had been denied them. On the other hand, there is nothing to suggest that R.C. Chapter 1785 was intended to alter, modify, or prohibit other long-established business practices that had already met with the General Assembly's approval. In particular, there is nothing that would reasonably suggest that R.C. Chapter 1785 was intended to affect the filing and organizational status of corporations formed for the purpose of owning, managing, or conducting pharmacies; such corporations may continue to organize as general corporations for profit pursuant to the terms of R.C. Chapter 1701.

It is, therefore, my opinion, and you are advised that:

1. Pharmacy is a profession for purposes of R.C. 1701.03. (1937 Op. Att'y Gen. No. 225, vol. I, p. 379, syllabus, paragraph one, followed.)
2. A corporation that has as its purpose the practice of pharmacy may not be formed and organized as a general corporation for profit under R.C. Chapter 1701.
3. A general corporation for profit may be formed and organized pursuant to the terms of R.C. Chapter 1701 for the purpose of owning, managing, or conducting a pharmacy as defined in R.C. 4729.02(A). In accordance with the directive set forth in R.C. 4729.27, such a corporation shall have in its employ, in full and actual charge of each such pharmacy it owns, manages, or conducts, a pharmacist registered under the laws of the State of Ohio. (1937 Op. Att'y Gen. No. 225, vol. I, p. 379, syllabus, paragraph two, followed.)