

**OPINION NO. 83-013****Syllabus:**

Under the facts provided, an individual who serves as a medical or psychological consultant for the Bureau of Disability Determination of the Rehabilitation Services Commission does not render medical, psychiatric, or psychological services within the meaning of R.C. 109.36(A) and is not entitled to representation by the Attorney General under R.C. 109.361.

**To: Cooper Sontag, Administrator, Rehabilitation Services Commission, Columbus, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, March 25, 1983**

I have before me your request for an opinion on the question whether this office would provide representation under R.C. 109.361 to a medical consultant who has contracted to provide services to the Bureau of Disability Determination of the Rehabilitation Services Commission if such person were sued for an action arising out of his contract with the Bureau.

R.C. 109.361 and 109.362 describe the circumstances under which the Attorney General will provide representation for an officer or employee of the state against whom a suit has been brought. R.C. 109.361 states, in pertinent part:

Upon the receipt of a written request by any officer or employee, the attorney general shall, except as provided in section 109.362 of the Revised Code and except for civil actions in which the state is the plaintiff, represent and defend the officer or employee in any civil action instituted against the officer or employee. All expenses and court costs, including the reasonable compensation of special counsel, incurred by the attorney general in the defense of an officer or employee of the state shall be paid by the employer that employed the officer or employee at the time the alleged act or omission occurred.

R.C. 109.362 sets forth limitations on the Attorney General's duty to represent state officers and employees. R.C. 109.362(A) provides that the Attorney General shall not represent an officer or employee who was "acting manifestly outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner," and R.C. 109.362(B) provides that the Attorney General shall not represent an officer or employee who is covered by a policy of insurance purchased by the state.

The term "[o]fficer or employee," as used in R.C. 109.361, R.C. 109.362, and related sections, is defined as follows:

"Officer or employee" means any person who, at the time a cause of action against him arises, is serving in an elected or appointed office or position with the state; is employed by the state; or is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract with a department, agency, or institution of the state. Officer or employee does not include any person elected, appointed, or employed by any political subdivision of the state. (Emphasis added.)

R.C. 109.36(A).<sup>1</sup> Your question is whether medical consultants who contract to provide services to the Bureau of Disability Determination of the Rehabilitation Services Commission come within this definition.

According to the information you have provided, the consultants in question are physicians, psychiatrists, and psychologists who assist claims examiners in evaluating medical information submitted by individuals filing claims for disability. You have described the functions of those individuals as follows:

The main duty of these in-house medical consultants is to determine whether the medical information submitted about a claimant evidences a condition which would entitle the individual to disability benefits under the Social Security regulations. To make this determination the consultants do not examine claimants. They review medical reports submitted by examining physicians. The consultants work from six (6) to twenty-five (25) hours a week and are paid on an hourly basis. No deductions are made from their pay for income taxes, public employees' retirement, or other contributions. Also no allowance for the accrual of or payment for vacation, sick leave, or legal holidays is allowed.

It is clear that such individuals do not hold "an elected or appointed office or position with the state" and are not "employed" by the state, as those terms are ordinarily used. See generally Scofield v. Strain, 142 Ohio St. 290, 51 N.E.2d 1012 (1943); R.C. 124.01(F); 1981 Op. Att'y Gen. No. 81-046; 1980 Op. Att'y Gen. No. 80-065. It is equally clear that they do not provide nursing, dental, podiatric, optometric, or physical therapeutic services. They are, therefore, subject to R.C. 109.361 and related sections only if they are "rendering medical, . . . psychiatric, or psychological services pursuant to a personal services contract with a department, agency, or institution of the state."

You have provided sample copies of the agreements pursuant to which the individuals in question serve. These appear to be personal services contracts entered into with the Rehabilitation Services Commission. See generally R.C. 127.16, 3304.15, 3304.16; 1980 Op. Att'y Gen. No. 80-067. There is, however, serious question as to whether the services provided pursuant to these contracts may accurately be categorized as "medical, . . . psychiatric, or psychological services" under R.C. 109.36(A).

The sample agreements which you have provided indicate that each of the individuals in question:

agrees to act in the capacity of Medical [or Psychological] Consultant to the Bureau and, as such, he is responsible for giving technical advice and consultation in all medical [or psychological] aspects of disability to claims examiners and supervisors, and acts as liaison between the Bureau and the [medical] community, in accordance with accepted medical [or professional] practice, State and Federal laws, rules, regulations and administrative memoranda.

I find it significant that the contracts designate each of the individuals in question as Medical or Psychological Consultant, for it seems that the basic nature of the services rendered under those contracts is that of consulting, rather than of undertaking medical, psychiatric, or psychological activity. See generally Op. No. 80-067. The individuals in question do not see patients and do not provide medical or psychological treatment. Their functions are to serve as consultants, providing advice in their areas of expertise, and to act as liaisons.

<sup>1</sup> The definition of "[o]fficer or employee" appearing in R.C. 109.36 is, by R.C. 9.85, also made applicable to R.C. 9.86, which provides certain immunity from civil liability, and R.C. 9.87, which provides for certain indemnification from liability incurred in the performance of duties. Section 3 (uncodified) of Am. Sub. S.B. 76, 113th Gen. A. (1980) provides for the repeal of R.C. 9.86, R.C. 9.87, and certain other provisions, effective December 31, 1985, unless reenacted by subsequent legislation.

The term "medical, . . . psychiatric, or psychological services" is not defined for purposes of R.C. 109.36(A). That language was recently adopted and has not yet been construed by the courts. Sub. S.B. 204, 114th Gen. A. (1982) (eff. July 26, 1982).

In the absence of a statutory definition or judicial guidance, I turn to the ordinary meanings of the words used. R.C. 1.42 ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"). The words "medical," "psychiatric," and "psychological" clearly connote matters pertaining to the respective fields of expertise. Random House Dictionary of the English Language 890, 1160, 1161 (1973). The word "service" is defined as follows: "Often, services. the performance of any duties or work for another; helpful or professional activity: medical services." Id. at 1304 (meaning 13). The ordinary meaning of the phrase "medical services," "psychiatric services," or "psychological services" is, thus, professional activity of a medical, psychiatric, or psychological nature. See generally R.C. 2305.11(D)(3) ("'[m]edical claim' means any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person"); R.C. 4732.01(C) ("'[p]sychological procedures' include but are not restricted to application of principles, methods, or procedures of understanding, predicting, or influencing behavior, such as the principles pertaining to learning, conditioning, perception, motivation, thinking, emotions, or interpersonal relationships; the methods or procedures of verbal interaction, interviewing, counseling, behavior modification, environmental manipulation, group process, psychological psychotherapy, or hypnosis; and the methods or procedures of administering or interpreting tests of mental abilities, aptitudes, interests, attitudes, personality characteristics, emotions, or motivation").

It is my opinion that the individuals you have described, who merely give technical advice and consultation based on medical reports, without having contact with or responsibility for the diagnosis or treatment of any person, are not "rendering medical, . . . psychiatric, or psychological services" within the meaning of R.C. 109.36(A). The services rendered by such individuals may appropriately be described as consulting services (which may relate to medical, psychiatric, or psychological subject matter), rather than as medical, psychiatric, or psychological services. See generally R.C. 4731.34 (indicating that a person is regarded as practicing medicine if he "examines or diagnoses for compensation of any kind, or prescribes, advises, recommends, administers, or dispenses for compensation of any kind, direct or indirect, a drug or medicine, appliance, mold or cast, application, operation, or treatment, of whatever nature, for the cure or relief of a wound, fracture or bodily injury, infirmity, or disease"); R.C. 4731.82(F) (defining "[e]mergency medical services training" as study and training "relating to the provision of emergency medical care"); R.C. 4732.01(B) (defining the "practice of psychology" and distinguishing between teaching or research which deals with psychological subject matter and professional practice in which patient or client welfare is directly affected); Op. No. 80-067. The provision of consulting services pursuant to a personal services contract is not included within the definition of R.C. 109.36(A). See, e.g., Kroger Co. v. Powers, 3 Ohio St. 2d 76, 209 N.E.2d 209 (1965) (under rule of expressio unius est exclusio alterius, mention of a particular class in a statute excludes those classes not named).

It is, therefore, my opinion, and you are accordingly advised, that, under the facts provided, an individual who serves as a medical or psychological consultant for the Bureau of Disability Determination of the Rehabilitation Services Commission does not render medical, psychiatric, or psychological services within the meaning of R.C. 109.36(A) and is not entitled to representation by the Attorney General under R.C. 109.361.