

OPINION NO. 74-064

Syllabus:

A nonprofit corporation which refers owners of dogs and cats to veterinarians who agree to perform spaying and neutering operations at a reduced rate, and which advertises for the purpose of obtaining "members" who are eligible for such referral services, who pay a nominal annual fee for such membership, is not "soliciting" for purposes of the prohibition in R.C. 4741.22(D).

To: Harry E. Goldstein, D.V.M., Director, Veterinary Medical Board, Reynoldsburg, Ohio

By: William J. Brown, Attorney General, August 9, 1974

I have before me your request for my opinion as to whether a veterinarian who avails himself of the services of a non-profit corporation which refers owners of dogs and cats for spaying or neutering operations, is guilty of employing a solicitor for the purpose of obtaining patients, and is thereby subject to license revocation or suspension pursuant to R.C. 4741.22(D). The corporation in question, which is named United Humanitarians, Inc., enters into an agreement with cooperating veterinarians to charge a reduced rate for certain operations, for which pet owners are referred by the corporation to the veterinarian. The corporation provides this service to those who have paid a \$4.00 annual "membership fee" and who request referral. They are given a list of cooperating veterinarians from which to choose. At this point the corporation's involvement ends, except that persons are referred only if they agree to pay the veterinarian in full at the completion of the operation.

R.C. 4741.22 reads as follows:

"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) Employs directly or indirectly a solicitor for the purpose of obtaining patients;

" * * * * * " * * * * "

I invite your attention to the General Assembly's use of the term "employs". Generally speaking, there is no employer-employee relationship unless there is a contract of hire, and valuable compensation is paid to the employee by the employer. See Opinion No. 73-092, Opinions of the Attorney General for 1973,

and the cases cited therein. In the instant fact situation, the veterinarian is obviously not directly employing the corporation for any purpose, because the former pays the latter no compensation. This fact does not, however, preclude the existence of the conduct prohibited by the statute, which refers to indirect as well as direct employment.

There is little relevant case law to provide guidance here. In In re Stocker, 16 Ohio App. 2d 66 (1968), the court held that a physician's advertising in a newspaper did not constitute the employment of a solicitor. The court rejected the theory that the newspaper acted as a solicitor; instead, it was merely a communicator. There is no prohibition of advertising in R.C. Chapter 4741.; therefore, the holding of In re Stocker, supra, applies by analogy to veterinarians.

Also relevant is the New York case of State v. Abortion Information Agency, Inc., 69 N.Y. Misc. 2d 825 (1971), affirmed 37 N.Y. App. Div. 2d 142 (1971), affirmed 30 N.Y. Supp. 2d 174 (1972). All three courts agreed that the defendant was guilty of contracting with physicians to act as a "broker", equivalent to a solicitor, for the purpose of obtaining patronage for them. The defendant contracted with applicants to obtain abortions for them at an agreed fee, and received the fee, out of which it paid the doctor and hospital. Not only was the defendant in State v. Abortion Information Agency, supra, guilty of acting as a solicitor, it was splitting fees with the physicians. In addition, because of other aspects of its operation, it was found to be practicing medicine without a license, insuring without proper authority, exceeding its stated corporate powers, and generally engaging in fraud and deceit.

The Appellate Division distinguished Railroad Trainmen v. Virginia Bar, 377 U.S. 1 (1963), wherein a union was permitted to seek out relatives of killed and injured members, recommend that they obtain an attorney's services, and recommend particular attorneys whom the union leadership thought competent. At 37 N.Y. App. Div. 2d 142, the court distinguished that case by the fact that the relatives contracted directly with the attorneys, not with a middleman. However, the Supreme Court had previously approved the employment of attorneys directly by an organization to provide legal services to its members and others. NAACP v. Button, 371 U.S. 415 (1963).

It can be readily seen that this area of law is not a simple one, and that the facts of each case are most important. While I do not have access to detailed facts, nevertheless certain legal conclusions become apparent. Although there need not be direct payment of an agent by a doctor or other professional in order for an employer-employee relationship to exist, it would stretch credibility to find such a relationship in the instant case. Unlike the situation in State v. Abortion Information Agency, supra, the corporation here does not collect the doctor's fees or retain a certain percentage for its own use. The pet owner contracts directly with the veterinarian for the operations. Having paid a nominal annual fee to the corporation, a "member" is entitled to subsequent referrals without additional charges, which would probably be extracted if the corporation were seeking indirect compensation for referring business to certain veterinarians.

Moreover, there is nothing in R.C. Chapter 4741. which makes referral fees illegal. R.C. 4741.22(H) does prohibit fee-splitting, and provides that the board may discipline any veterinarian who "[d]ivides fees or charges or has any arrangement to share fees or charges with any other person, except on the basis of services performed." Referral fees can be used as an indirect way to split fees, as they were in State v. Abortion Information Agency, supra, where the amount of the referral fee exactly equalled the amount of the discount. The effect of that arrangement was exactly the same as if the doctor had collected the full fee from the patient and paid part of it to the referring agency. Clearly, that agency was indirectly compensated by the physician. However, no such subterfuge is evident in the instant fact situation.

As long as referral fees are designed to cover expenses and the service is in the public interest, they are unobjectionable, unless the ethical code or statutes covering a profession prohibit them. However, when referral fees become a source of profit, and the service is designed for the financial gain of those who operate it, as in the case of State v. Abortion Information Agency, supra, it works against the public interest. I have no indication that such is the case here, or that the corporation in question has any purpose other than the humane one of reducing the unwanted dog and cat population.

I take note of the publicity regarding the expanding population of dogs and cats in the United States, and the resultant problems created in the areas of public health, disposal of stray animals, and traffic hazards, as well as cruelty to the animals themselves. Because of these problems, a construction of the statutes which will aid pet owners in controlling the reproduction of their dogs and cats should be favored, as sound public policy. R.C. 1.49(E) provides that, in construing a statute, "[t]he consequences of a particular construction" may be considered. R.C. 1.47 provides that, "[i]n enacting a statute, it is presumed that: * * * (C) A just and reasonable result is intended; * * *"

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. It would be anomalous to apply this prohibition to the nonprofit corporation in question, which makes its services available to any veterinarian who agrees to perform neutering and spaying operations at a reduced rate, and which advertises for the sole purpose of encouraging and facilitating such operations.

In specific answer to your question, it is my opinion and you are so advised that a nonprofit corporation which refers owners of dogs and cats to veterinarians who agree to perform spaying and neutering operations at a reduced rate, and which advertises for the purpose of obtaining "members" who are eligible for such referral services, who pay a nominal annual fee for such membership, is not "soliciting" for purposes of the prohibition in R.C. 4741.22(D).