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Office of the Attorney General

State of South Carolina
September 8, 1982

***1** Ms. Barbara Waugh
Secretary
Occupational Therapy Board
4633 Fernwood Road
Columbia, South Carolina 29206

Dear Ms. Waugh:
You have recently asked the opinion of this office based upon the following factual situation. You note that a corporation plans to offer various paramedical services, including but not limited to occupational therapy. To achieve this goal the corporation intends to employ a South Carolina licensed occupational therapist.

Your specific question is 'whether or not the corporation needs any license or approval from the Board of Occupational Therapists.'

It is well settled that, in the absence of express statutory authority, a corporation cannot lawfully engage in the practice of a learned profession. Parker v. Panama City, (Fla.) 151 So.2d 469, 15 A.L.R.3d 725 (1963). An examination of § 40-36-10 et seq. (Code of Laws of South Carolina, 1976, as amended) reveals that the South Carolina Board of Occupational Therapy possesses no statutory authority to issue a license to practice occupational therapy to a corporation. In fact, the authority is otherwise.

For example, § 40-36-20(4) defines an 'occupational therapist assistant' as a 'person licensed to assist in the practice of occupational therapy under the supervision of or with the consultation of an occupational therapist.' (emphasis added). Moreover, § 40-36-30 provides that 'no person' may practice occupational therapy or hold 'himself' out as a therapist or assistant unless 'he' is licensed by the Board. In addition, § 40-36-120 requires that an 'applicant for a license' as a therapist or assistant must file a written application 'showing to the satisfaction of the board that he' has completed the necessary academic requirements and supervised field research as specified in the provision and that 'he [h]as passed an examination conducted by the Board.' (emphasis added). See also, §§ 40-36-130 and 40-36-140.

It is clear that nowhere in the South Carolina Occupational Therapy Practice Act is there any provision either expressly or implicitly authorizing the licensing of corporations to practice occupational therapy. It is equally evident that the language employed throughout the Act by the General Assembly indicates that no such licenses may be issued by the Board. Compare, § 40-43-10 et seq., § 40-43-370 (pharmacists); § 40-6-110 (licensing as 'licensed auctioneer corporation' authorized).

This conclusion is fully in accord with existing case law.

While a corporation is in some sense a person and for many purposes is so considered, [1] yet as regards the learned professions which can only be practiced by persons who have received a license to do so after an examination as to their knowledge on the subject, it is recognized that a corporation cannot be licensed to practice such a profession. For example, as a general rule, a corporation cannot lawfully engage in the practice of law, nor in the practice of medicine, surgery or dentistry.

***2** 19 Am.Jur.2d, Corporations, § 1052 at 507-508 (1965). The courts reason that since the right to practice a profession is generally 'conditioned upon pursuit of a course of specialized training, the acquiring of a diploma, the passing of an examination

and the furnishing of a certificate of good moral character . . .' it is virtually impossible for a corporation to comply with the licensing requirements. Id. at n. 13, p. 508. See also, 19 C.J.S., Corporations, § 956 at 400 (1940); State v. National Optical Stores Co., (Tenn.), 225 S.W.2d 263 (1949) [word 'person', used in licensing statute, does not include a corporation]; State ex rel. Daniel v. Wells, 191 S.C. 468, 480, 5 S.E.2d 181 (1939) [a corporation 'cannot practice law'] Worlton v. Davis, (Idaho), 249 P.2d 810 (1952). This general and well settled rule is subject to alteration only by explicit statutory authority, Parket v. Panama City, supra; and, as noted above, no such authority is here present.

Likewise, it is well understood that 'a corporation may not engage in the practice of . . . [a learned profession] even through licensed employees.' Wadsworth v. McRae Drug Co., 203 S.C. 543, 548, 28 S.E.2d 417 (1943); Ezell v. Ritholtz, 188 S.C. 30, 198 S.E. 419 103 A.L.R. 1240. Courts have concluded that the right to practice a learned profession, such as medicine, is personal and 'cannot be delegated'

. . . and a corporation, or other unlicensed person, may not engage in the practice of medicine by employing one who is licensed to do the things which constitute practicing the profession.

Iterman v. Baker, (Ind.), 15 N.E.2d 365, 369-70, (1938). See also, State Bd. of Optometry v. Sears, Roebuck and Company, (Ariz.), 427 P.2d 126 (1967) ['an unlicensed corporation (cannot) practice optometry through employing a licensed optometrist . . .']. The South Carolina Supreme Court has stated in part the underlying rationale of the rule. Without such a rule,

. . . corporations and business partnerships might practice law, medicine, dentistry or any other profession by the simple expedient of employing licensed agents. And if this were permitted, professional standards would be practically destroyed and professions requiring special training would be commercialized, to the public detriment.

Ezell v. Ritholtz, 188 S.C., id. at 51.

The real question thus becomes whether these general principles are indeed applicable to the specific factual situation, i.e. whether or not the corporation which cannot itself be licensed is nevertheless unlawfully practicing occupational therapy through the utilization of individuals who are licensed. The critical test for such a determination is whether the licensed individual is subject to the corporation's direction and control. State Bd. of Optometry v. Sears, Roebuck and Co., id. If the corporation occupies the relation f master or employer and the licensed practitioner occupies the relation of servant or employee, the corporation is unlawfully engaged in the practice of the particular profession, State v. Boston System Dentists, etc., (Ind.), 19 N.E.2d 949 (1939), so long as the acts constituting the practice are performed for others, rather than being incidental to the corporation's own authorized business. State Bar Assn. v. Connecticuit Bank and Trust Co., (Conn.), 131 A.2d 646 (1957); 19 Am.Jur.2d, Corporations, § 1052. The relationship must, however, be that of employee, agent or servant rather than that of independent contractor. Woodson v. Scott and White Hosp., (Tex.), 186 S.W.2d 720 (1945).

***3** In making this determination as to whether the corporation is in reality engaged in the practice of a profession, courts utilize the normal principles of agency, such as the following:

Acts of officers of a corporation who are regular, salaried employees, performed in the course of their employment, are acts of the corporation as affecting the determination as to whether the corporation is engaged in the practice of [a learned profession].

19 C.J.S. Corporations, § 956 at 404-405. Particularly, have the courts in various jurisdictions examined factors such as whether the corporation maintains the office of the practitioner, owns the equipment utilized, pays the operating expenses of the licensed practitioner, receives the fees or a major portion thereof which are submitted to the practitioner, and especially whether the practitioner receives a salary paid by the corporation. State v. Boston System Dentists, etc., supra; Iterman v. Baker, supra. Other factors which often demonstrate actual practice by the corporation through its licensed agents are whether the corporation advertises the practice under the corporate name and has posted the names of its employees-practitioners. State v. Williams, (Ind.), 5 N.W.2d 961 (1937), relying upon State v. Bailey Dental Co., (Iowa), 234 N.W. 260 (1931). Usually, in such unlawful practices, unlicensed corporate officials necessarily determine the corporate policies which govern the particular

practice involved. Id.; Iterman v. Baker, supra [a licensed physician may not accept directions and instructions in diagnosing and treating ailments from a corporation]. As the Court put it in State v. Williams, 5 N.E.2d, id. at 966, with respect to the practice of dentistry by a corporation,

The purpose of the dental statute is to prevent anyone from practicing dentistry who is not duly licensed and qualified and anyone who is not so qualified can neither directly or indirectly practice dentistry. If one who is not qualified and licensed to practice is permitted to select and rent an office, and then employ licensed dentists to do the actual work, either upon a commission or salary basis he would certainly be doing a dental business and would be doing indirectly what he could not do directly.

In this same regard, courts have often faced situations involving various types of contracts between corporations or partnerships and practitioners, and have had to determine whether such a contract authorized the corporation to unlawfully practice. Often such contracts have involved lease or rental arrangements, and the courts have found it necessary to look beyond the face of the agreement to determine whether in reality the corporation was practicing without a license. Each situation turns on the particular facts present.

For example, in Taber v. State Bd. of Reg. and Exam., (N.J.), 63 A.2d 535 (1949), an unlicensed manager, proprietor and operator of a business contracted with a licensed dentist ostensibly for the sale of dental material and equipment. The Court concluded that the contract was not for a bona fide sale, but was really an agreement by which the unlicensed person could own, operate and control a dental practice. Stated the Court,

***4** The dentist in whose name the business was conducted was little more than an office manager with a drawing account somewhat in excess of the salary of an employed dentist.

Id. at 537. The business was thus practicing dentistry without a license.

State v. National Optical Stores Co., supra produced the same result. There, the defendant corporation possessed a contractual arrangement whereby in each of its three stores, a medical doctor occupied a small space or office inside the store building. The doctors' names did not appear on the front of the store, nor in the office directory. Generally speaking, the doctors were always present, by arrangement with the corporation, when the store was open. The doctors devoted their entire time to examining the eyes of the store's customers; significantly, the customers were directed to the doctors by the corporation. The physicians were guaranteed a minimum weekly income by the corporation. A fixed fee for examination was charged, after which the patient was led into the company's sales room where the store manager proceeded to sell the customer with frames and lenses. Here, said the Court,

. . . the activity of the doctors and the sales of the defendant were so merged and combined that from the advertisement by which the customer was attracted to the defendant's store until the delivery of the glasses prescribed, the profession of the optometrist and the sale of the merchandise by the optician was a single operational enterprise.

225 S.W.2d id. at 267.

Thus, generally speaking, contracts made in the name of a corporation binding the corporation (through the use of its licensed employees) 'to diagnose or treat ailments or diseases [are] not only ultra vires, but unlawful and against public policy.' Huber v. Protestant Deaconess Hospital Assn., (Ind.), 133 N.E.2d 864 (1956); but see, State Electro-Medical Institute v. State, 74 Neb. 40, 103 N.W. 1078 (1905); State Electro-Medical Institute v. Platner, 74 Neb. 23, 103 N.W. 1079 (1905). However, as with any general rule there are recognized exceptions. For instance, where the licensed practitioner is an independent contractor and not an employee, such an arrangement is often deemed permissible. Huber v. Protestant Deaconess Hospital Assn., id.; Konoff v. Fraser, (Cal.), 145 P.2d 368 (1944). Moreover, another recognized exception is the charitable and public hospital. 19 C.J.S., Corporations, § 956, id., at 403; Rush v. Akron Genl. Hosp., (Ohio), 171 N.E.2d 378 at 380 (1957); see also, 1958-1959 Op. Atty. Gen. No. 645 at 145 [public hospitals such as State Hospital, and charitable hospitals may employ doctors and other licensed personnel, 'charge patients who are able to pay their part', and not 'be engaged in the illegal practice of medicine'].

Finally, contractual agreements which are truly rental agreements are usually deemed permissible. See, Annot., 88 A.L.R.2d 1290, § 3 at pp. 1294-1306. So long as the practitioner is in control and not the corporation, the courts will generally approve such arrangements. If the practitioner fixes and collects his own fees, keeps his own books, accepts full responsibility to his patients or clients for the nature and character of services rendered, and retains substantially the same relationship with and responsibility to the patient whether or not the contract with the corporation exists, the contract will usually be held valid. Woodson v. Scott and White Hosp., id. Other evidence of independence from the corporation is whether the practitioner controls his professional activities, conducts examinations in his own manner, or orders his supplies from whomever he pleases; in the event such independence is fully established, the fact that the rental consideration is tied to a certain percentage of total net sales does not render the agreement illegal. State Bd. of Optometry v. Sears Roebuck and Co., supra.

***5** Applying these principles to the facts presented, it would appear that the corporation in question is incapable of being licensed itself; neither may it employ licensed occupational therapists in order to practice occupational therapy in South Carolina. The factual summary, although somewhat cursory, fully indicates that the occupational therapist in question will be an employee of the corporation, and as such would, of course, be under the corporation's directions and control. Moreover, rather than merely offering occupational therapy services to members of the corporation or as incidental to the operation of the corporation, the facts presented suggest that such services will be extended to the public at large as part of 'various paramedical services' offered by the corporation. Obviously then, based upon the foregoing principles recited, the corporation would, among other things, very probably be practicing occupational therapy without a license.

The only alternative that is readily apparent is utilization of the professional association, authorized by § 33-51-10 et seq. However, § 33-51-20(b) would seemingly prohibit use of this option since this section defines a professional association as an 'unincorporated association' (emphasis added). Moreover, the professional association may render professional service in only 'one type of professional services.' See, § 33-51-30.

I hope this summarizes the law with respect to practice by a corporation and is of use to you. If you have any further questions do not hesitate to let me know.
Very truly yours,

Robert D. Cook
Assistant Attorney General

Footnotes
1 See, § 2-7-30, where 'person' is defined generally to include corporations.

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