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ADMINISTRATIVE LAW:  
STATE BOARD OF EMBALMING:

The so-called "Pre-Need Arrangement For Memorial Services" is not a pre-need burial plan within the meaning of Section 333.035-1(12)(d), RSMo 1959, but is only a discount certificate. Licensed embalmers who directly or indirectly enter into Articles of Agreement for the sale of such plans are guilty of unprofessional conduct as defined in Section 333.035-1(12)(d). However, neither subparagraphs (c) nor (d) of this section prohibit embalmers from entering into contracts providing for the sale of genuine pre-need burial plans.

Opinion No. 403 (1963)  
Opinion No. 21 (1964)

June 5, 1964

Mr. Charles L. Zaring, President  
Missouri State Board of Embalming  
Tenth and Walnut  
Columbia, Missouri



Dear Mr. Zaring:

This is in answer to your request for an opinion of this office as to whether it would be conduct violative of Missouri law for an embalmer licensed under the laws of this state to enter into a contract to furnish burial services to persons purchasing a so-called "Pre-Need Arrangement for Memorial Services" sold by National Association Funeral Home Inc., herein called "Associated".

This contract or certificate is an agreement between the purchaser, called the plan owner, and the seller, called "Associated", which acts as agent of a funeral home named on the face of the agreement. It provides that the plan owner, by the payment of \$95.00, will receive at plan owner's death a credit of \$95.00 plus a 20% reduction from the retail price of the memorial service selected from the named funeral home. The services which the funeral home agrees to provide at a discount are listed in the contract. The purchase price may be paid in installments, but if the plan owner defaults in his payments, Associated may terminate the contract and retain all money previously paid.

To provide these certificates, Associated has entered into other contracts called Articles of Agreement with funeral homes throughout the state. Funeral homes entering into these agreements are referred to as "approved" funeral homes. The Articles provide that each "approved" funeral home agrees to make Associated its exclusive agent for the purpose of soliciting and acquiring new parties to the agreement and also for the purpose of securing funeral

contracts from the public. When the entire fee of \$95.00 is collected from the plan purchaser, Associated agrees to pay \$25.00 to the funeral home named on the contract and may retain the remaining \$70.00. Each "approved" funeral home agrees to honor all such contracts issued by Associated as agent for all other funeral homes which are or may become part of the agreement. However, neither the Articles of Agreement nor the certificate for burial services contain any provision for return of the money to a plan purchaser who moves into another state or into an area with no approved funeral homes.

Chapter 333, RSMo, relates to the regulation, practice, and licensing of embalmers. Many funeral homes are owned or operated by licensed embalmers. These embalmers may be held responsible by the Board for acts done in the name of the funeral home.

Section 333.035 authorizes the State Board of Embalming to suspend or revoke the license of any licensed embalmer for several causes which include:

"(12) Unprofessional conduct which is hereby defined to include:

\* \* \* \* \*

"(d) The buying of business by the licensee, his agents, assistants or employees or the direct or indirect payment or offer of payment of a commission by the licensee, his agents, assistants and employees for the purpose of securing dead human bodies, but this provision does not prohibit the selling of pre-need burial contracts or insurance."

The burial certificate provides that Associated is acting as the agent of the approved funeral home named on the face thereof. Even without this statement, it is apparent that Associated is acting as the agent not only of the named funeral home but also as agent of all "approved" funeral homes. As the agent of the "approved" funeral homes and on their behalf, Associated, in accordance with its contractual obligation, calls upon members of the public to solicit the purchase of a burial certificate, and thus induce such purchasers at time of need to use the services of the funeral home named on the certificate or another funeral home affiliated with Associated. Each funeral home which has signed the Articles of Agreement has employed Associated for the purpose and paid it \$70.00 for each successful

solicitation. The fact that the fee is retained from the contract price rather than paid directly does not make it any less a commission. The payment is made indirectly by the funeral home as it must refund the entire \$95.00 at the time of need.

The payment of a commission or fee to Associated to induce persons to use the services of a particular funeral home and the embalmer or embalmers connected therewith constitutes the buying of business and the direct or indirect payment of fees for the purpose of securing dead human bodies within the meaning of Section 333.035-1(12)(d). A licensed embalmer who directly or indirectly enters into such an agreement is guilty of conduct in violation of the statute unless the agreement is a pre-need burial contract or insurance.

The agreement does not purport to be an insurance contract and specifically states that "This certificate is not a membership in a burial association, or an insurance company and is non-assessable." Nor has Associated attempted to qualify as an insurance company under the laws of this state. The question then remains: Is the self-styled "Pre-Need Agreement for Memorial Services" in fact a pre-need burial contract.

The term "Pre-Need burial contract" has not been defined in Missouri either by the legislature or by the courts. However, inherent in the meaning of the term is the idea that a pre-need burial contract is a contract for the payment of funeral or burial services or merchandise at a future time determined by the death of the person within the coverage of the contract. The pre-payment may be made in a lump sum or by installments but must be in payment for funeral or burial expenses that will be needed at a future date.

The contract in question contains none of these elements. There is no pre-payment of burial expenses as the plan purchaser does not pay any part of his future burial expenses. He receives only a discount on such expenses if he uses an approved funeral home.

The contract is called a Pre-Need Agreement for Memorial Services. The Articles of Agreement between Associated and the various funeral homes refer to the contract as a pre-need plan. Notwithstanding the attached labels, it is our opinion that the agreement in question is a discount certificate and is not a pre-need burial contract as that term is used in Section 333.035-1(12)(d). It is also our opinion that a licensed embalmer, acting by himself or through a funeral home who enters into such a contract is guilty of conduct which violates this section.

Your letter also requests our opinion as to the authority of the Board to revoke or suspend the license of an embalmer who participates in the sale of other burial plans being sold throughout the state.

Our office has obtained copies of most of these plans, which are all quite similar. They are not sold by funeral homes but through independent corporations. Each corporation is affiliated with one funeral home. Its name is quite similar to the funeral home and it is our understanding that in most cases the owners of the funeral home also own and operate the affiliated corporation.

Pre-need burial contracts are authorized by the law in Missouri. However, judging by the complaints received by the Board and by this office, this privilege may sometimes be abused and the public misled. Among these abuses are:

1. These plans are sometimes sold by a "hard-sell" house to house solicitation by salesmen employed by the selling corporation. Some people are repeatedly solicited for possibly unwanted services.

2. The selling corporation usually retains 25% of the contract price and the remaining 75% is to be placed in trust to be given to the funeral home which is to provide the service at the time of need. Some of these plans do not protect the plan owner against mismanagement or misuse of trust funds. Some plans do not require that the trust funds be placed in a reputable bank or trust company. Nor do they make provisions as to identity of the trustees or limit or prescribe the investment powers of the trustees.

3. The public is persuaded to purchase pre-need burial contracts upon a representation that they are receiving a large discount on their burial contract. The funeral homes usually receive 75% of the contract price, hence, it is difficult to see how funeral services can be provided at substantial discounts. The Board of Embalming has received complaints that shortly after a contract purchaser has received funeral services for the "discount" price, others have received the same services for approximately the same price.

4. Contracts are sometimes sold to persons who are not able to meet the payments. Sometimes they have moved away from the area and are not able to utilize the particular funeral home designated in the contract. If the plan owner defaults or after making all of his payments does not use the funeral home, the selling corporation retains 25% of the entire contract price.

Thus, if a contract purchaser agrees to buy a plan for \$1000 and defaults after paying \$260.00, the selling corporation may retain \$250.00 and is obligated to return \$10.00. Complaints from purchasers indicate they have difficulty obtaining return of payments in excess of 25%.

Some states have enacted laws regulating the sale of pre-need plans and the manner in which the proceeds must be handled. Perhaps this is a subject that might be considered by the Legislature.

Possibly most licensed embalmers will not feel it necessary to participate in such plans in order to compete successfully with those now doing so. There may be plans which are honestly conceived, sold, and administered; but, abuses and inequities which have characterized many such plans should be adequate warning to any licensed embalmer to approach such plans with caution lest the public, whom he is licensed to serve, be defrauded in time of greatest sorrow and susceptibility.

#### CONCLUSION

The so-called "Pre-Need Arrangement For Memorial Services" (which provides that the owner of a certificate costing \$95.00 will receive at his death a credit of \$95.00 plus a 20% reduction from the retail price of a funeral from a named funeral home), is not a pre-need burial plan within the meaning of Section 333.035-1(12)(d), RSMo 1959, but is a discount certificate. Licensed embalmers who directly or indirectly enter into the Articles of Agreement for the sale of such plans are guilty of unprofessional conduct as defined in Section 333.035-1(12)(d).

However, neither subparagraphs (c) or (d) of this section prohibits licensed embalmers from entering into contracts providing for the sale of genuine pre-need burial plans.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

  
THOMAS F. EAGLETON  
Attorney General