



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

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JOHN C. DANFORTH  
ATTORNEY GENERAL

OPINION LETTER NO. 173

Mr. Charles L. Arnold, Sr.  
Secretary, State Board of  
Embalmers & Funeral Directors  
West White Street  
Canton, Missouri 63435

Dear Mr. Arnold:

This letter is in response to your request for this office's opinion and ruling on the following:

"Is it within the jurisdiction of this office to make an inquiry or to undertake an investigation in an attempt to determine if any individual or organization is in compliance with Sections 436.020, 436.030, 436.040, 436.050, or 436.060 RSMo.?"

You state that several complaints have been received by your office from funeral establishments which are servicing pre-need contracts that some companies are failing to pay sums owing on contracts. You ask whether some agency has the power to determine whether the moneys being paid by the purchasers of pre-need contracts have been deposited according to law.

Chapter 436, RSMo 1969, provides that any agreement, requiring the payment of money to an individual who, in consideration therefor, agrees to provide for the final disposition of a dead body or for funeral or burial services to be rendered which is not immediately required, is declared to be void unless the money paid in installments thereunder is handled in accordance with the chapter's provisions. Generally, Chapter 436 requires that the funds collected are to be deposited in a trust account in order to assure that the funds which the purchaser has been paying will be available upon his death to pay for the funeral.

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The chapter specifically provides certain remedies for its violation. Section 436.070, RSMo, states that a violation by the seller of the act is a misdemeanor and is subject to either or both a fine and imprisonment. Section 436.080, RSMo 1969, states that in addition to any other remedies the state of Missouri may maintain an injunction suit to enjoin violations of the chapter. It is clear then that, in addition to any private right of action which an individual purchaser might have to seek to declare a contract void if the money has not been held in trust as is required, the legislature has specifically provided two remedies.

There is no provision in Chapter 436, RSMo 1969, which purports to confer authority or jurisdiction on the State Board of Embalmers and Funeral Directors to enforce its provisions. If there is any authority vested in the State Board of Embalmers and Funeral Directors to investigate for violations of Chapter 436, it must come from the statute creating that agency. First, it is to be noted that the seller of such a pre-need burial contract does not have to be a licensed embalmer and funeral director. Section 436.010, RSMo 1969, reads in pertinent part:

" . . . The negotiation and administration of such agreements, contracts or plans shall be governed exclusively by the provisions of sections 436.010 to 436.080, and shall not be subject to the laws pertaining to insurance, embalmers or funeral directors." (Emphasis added)

Chapter 333, RSMo 1969, establishing the State Board of Embalmers and Funeral Directors, limits the jurisdiction of that agency to those individuals and establishments which are licensed by it. Generally, we do not believe that the State Board of Embalmers and Funeral Directors or its secretary then has the authority to investigate the business activities of individuals or establishments who are not licensed by it.<sup>1</sup>

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<sup>1</sup>Section 333.261, RSMo 1969, provides that it is a misdemeanor for any person to violate the provisions of Chapter 333. Section 333.241, RSMo 1969, authorizes the Attorney General or the prosecuting attorney to seek to enjoin individuals from engaging in the practice of embalming or funeral directing without first being licensed. We believe that the Board does have the power to conduct an investigation to determine whether unlicensed individuals are violating the provisions of Chapter 333 in order that the information may be referred to the proper authority.

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The second question then is whether the secretary of the Board or the Board of Embalmers and Funeral Directors has the powers to investigate alleged violations of Chapter 436 by its licensees. The selling of pre-need burial contracts is closely related to that of being an embalmer and/or funeral director. We note that many licensed embalmers and funeral directors also undertake to sell pre-arranged funeral contracts as part of their business activities. A threshold inquiry then is to determine whether a violation of Chapter 436 by a licensed embalmer and/or funeral director would be sufficient grounds for the Board of Embalmers and Funeral Directors to initiate disciplinary proceedings to suspend or revoke his license.

Section 333.121, RSMo 1969, provides in part as follows:

"The board may refuse to issue or may suspend or revoke any license of a funeral director or embalmer or may place the holder thereof on a term of probation after proper hearing upon finding the holder of the license to be guilty of any following acts or omissions:

\* \* \*

(3) Willful violation of any professional trust or confidence;

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(13) Unprofessional conduct which means:

(a) Misrepresentation or fraud in the conduct of the business or profession of embalming or funeral directing;"

If an individual is required to place money received in the course of one's business in trust and one does not do so, we believe that individual would be guilty of fraud in the conduct of his business. Since the activity of selling or arranging pre-need funeral arrangements is so closely interrelated with the business of embalming or funeral directing, it is the opinion of this office that a licensed embalmer and/or funeral director who violates Chapter 436 is subject to having his license suspended or revoked.

Section 333.201(1), RSMo 1969, provides:

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"The secretary of the board shall have complete supervision over the field of inspection and enforcement of the provisions of this chapter and shall be responsible to the board."

Clearly, the secretary of the Board of Embalmers and Funeral Directors has the power to make an investigation on behalf of the Board into the business activities of licensed embalmers and/or funeral directors to determine whether a formal complaint should be filed with the Administrative Hearing Commission pursuant to Section 161.272, RSMo 1969, in an attempt to suspend or revoke an individual's license for violating Chapter 436 and Section 333.121(3), (13)(a). We also believe that once the Board makes a decision to initiate proceedings with the Administrative Hearing Commission against a licensee, the secretary of the Board also has authority to conduct an investigation in order to help prepare a prima facie case.

In summary, it is the view of this office that neither the secretary of the Board nor the Board of Embalmers and Funeral Directors has the authority to investigate or to determine whether individuals who are not licensed by it are complying with the provisions of Chapter 436. We believe that the authority of the secretary and the Board of Embalmers and Funeral Directors to investigate for violations of Chapter 436 is limited to only those cases where the Board needs to determine whether a licensee who is selling pre-need funeral contracts as part of his business is complying with the provisions of Chapter 436.

Yours very truly,



JOHN C. DANFORTH  
Attorney General