

February 23, 2011

Robert J. Wasko, President
Board of Embalmers and Funeral Directors
77 South High Street, 16th Floor
Columbus, Ohio 43215-6108

SYLLABUS:

2011-005

1. R.C. 4717.31(H) authorizes the Board of Embalmers and Funeral Directors to investigate how a trustee invests moneys deposited in a preneed funeral contract trust fund. If the investigation discloses that the trustee of the fund has violated R.C. 4717.36(C) and R.C. 4717.31(E), R.C. 4717.03(I) authorizes the Board of Embalmers and Funeral Directors to bring a civil action to enjoin the violation. In addition, the Board of Embalmers and Funeral Directors may refer suspected violations of R.C. 4717.36(C) and R.C. 4717.31(E) by the trustee of the fund to local law enforcement officials and the Division of Financial Institutions for further investigation and legal action. (1983 Op. Att’y Gen. No. 83-056, syllabus, paragraph 1, overruled, in part, on the basis of statutory amendment.)
2. R.C. 4717.31(H) does not authorize the Board of Embalmers and Funeral Directors to investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently.
3. Pursuant to R.C. 4717.03(F) and R.C. 4717.14(A)(4), the Board of Embalmers and Funeral Directors may investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently even though neither the Division of Financial Institutions nor the Department of Insurance has investigated the allegations set forth in the complaint.
4. A licensed insurance agent who is not licensed as a funeral director violates R.C. 4717.13(A)(1) and R.C. 4717.31(A) when the agent (1) sells an insurance policy or annuity to fund a preneed funeral contract that includes funeral services, (2) prepares the contract for a licensed funeral director, and (3) presents the contract to the licensed funeral director for signing.



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OPINION NO. 2011-005

Robert J. Wasko, President
Board of Embalmers and Funeral Directors
77 South High Street, 16th Floor
Columbus, Ohio 43215-6108

Dear President Wasko:

You have requested an opinion regarding the authority of the Board of Embalmers and Funeral Directors (Board) to enforce various provisions of R.C. 4717.31-.38 governing preneed funeral contracts.¹ Your specific questions may be summarized as follows:²

¹ For purposes of R.C. 4717.31-.38, a “preneed funeral contract” is “a written agreement, contract, or series of contracts to sell or otherwise provide funeral services, funeral goods, or any combination thereof to be used in connection with the funeral or final disposition of a dead human body, where payment for the goods or services is made either outright or on an installment basis, prior to the death of the person purchasing the goods or services or for whom the goods or services are purchased.” R.C. 4717.01(T).

² Your letter requesting a formal opinion of the Attorney General includes questions concerning the application of R.C. 4717.31-.38 to preneed funeral contracts sold before July 6, 2009, which is the date on which R.C. 4717.31-.38 became effective. *See* Sub. S.B. 196, 127th Gen. A. (2008) (eff. April 7, 2009, with certain sections effective on other dates) (section 3, uncodified) (requiring R.C. 4717.31-.38 to take effect 90 days after April 7, 2009. This resulted in R.C. 4717.31-.38 taking effect on July 6, 2009). Resolution of these questions turns on whether R.C. 4717.31-.38 may constitutionally be applied to such contracts under Article II, § 28 of the Ohio Constitution. This constitutional provision reads, in relevant part: “The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts.”

The Attorney General is unable to use the formal opinions process to determine whether Article II, § 28 of the Ohio Constitution prohibits the application of R.C. 4717.31-.38 to preneed funeral contracts sold before July 6, 2009, since the Attorney General is not empowered to make

1. Does R.C. 4717.31(H) authorize the Board to investigate how a trustee invests moneys deposited in a preneed funeral contract trust fund, and, if so, how far does the Board's investigatory authority extend?
2. Does R.C. 4717.31(H) authorize the Board to investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently?
3. If R.C. 4717.31(H) authorizes the Board to investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently and the Board finds evidence that the funeral director has committed fraud, may the Board take disciplinary action against the funeral director when neither the Division of Financial Institutions nor the Department of Insurance has determined the funeral director has received the moneys fraudulently?
4. If R.C. 4717.31(H) does not authorize the Board to investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently and neither the Division of Financial Institutions nor the Department of Insurance has investigated the allegations set forth in the complaint, may the Board conduct its own investigation of the matter pursuant to R.C. 4717.03?
5. Does a licensed insurance agent who is not licensed as a funeral director violate R.C. 4717.31 when the agent (1) sells an insurance policy or annuity to fund a preneed funeral contract that includes funeral services, (2) prepares the contract for a licensed funeral director, and (3) presents the contract to the licensed funeral director for signing?

Your particular questions have arisen because of recent amendments to the provisions of law governing preneed funeral contracts. *See* Sub. S.B. 196, 127th Gen. A. (2008) (eff. April 7, 2009, with certain sections effective on other dates). Prior to Sub. S.B. 196, these provisions were set forth in R.C. 1111.19 and R.C. 1111.99. With the enactment of Sub. S.B. 196, the General Assembly repealed R.C. 1111.19 and R.C. 1111.99, and relocated and reorganized the principal provisions of law governing preneed funeral contracts in R.C. 4717.31-.38.

definitive determinations regarding the constitutionality of statutory provisions, either facially or as applied. *See* 2004 Op. Att'y Gen. No. 2004-003 at 2-19; 2002 Op. Att'y Gen. No. 2002-032 at 2-210 n.1; 2002 Op. Att'y Gen. No. 2002-006 at 2-32 n.10. Instead, this authority rests exclusively with the judiciary. *See* 2004 Op. Att'y Gen. No. 2004-003 at 2-20. Accordingly, we are unable to address your questions concerning the retroactive application of R.C. 4717.31-.38 to preneed funeral contracts sold before July 6, 2009.

Let us now turn to your first question, which asks whether R.C. 4717.31(H) authorizes the Board to investigate how a trustee invests moneys deposited in a preneed funeral contract trust fund, and, if so, how far does the Board's investigatory authority extend. R.C. 4717.31(H) provides, in part, that the Board "shall administer and enforce the provisions of [R.C. 4717.31-.38] concerning the requirements for and sale of preneed funeral contracts." The plain and unequivocal language of R.C. 4717.31(H) thus requires the Board to administer and enforce any provision of R.C. 4717.31-.38 that establishes a requirement for a preneed funeral contract.

R.C. 4717.36(A) states that, except as provided in R.C. 4717.34(A), 100% of all payments for funeral goods and funeral services made under a preneed funeral contract that is funded by any means other than an insurance policy or policies or an annuity or annuities "shall remain intact and held in trust in accordance with this section for the benefit of the contract beneficiary." In order to safeguard such payments, the seller of a preneed funeral contract is required to (1) establish a preneed funeral contract trust fund at a trust company licensed under R.C. Chapter 1111; a national bank, federal savings bank, or federal savings association that pledges securities in accordance with R.C. 1111.04; or a credit union authorized to conduct business in this state pursuant to R.C. Chapter 1733, and (2) deposit any payments made under the contract with the trustee of the fund. R.C. 4717.36(A)-(B); *see* 11A Ohio Admin. Code 4717-1-25.

Pursuant to R.C. 4717.36(C), moneys deposited in a preneed funeral contract trust fund are to be "held and invested in the manner in which trust funds are permitted to be held and invested pursuant to [R.C. Chapter 1111]." In addition, R.C. 4717.31(E) states that no trustee of such a trust shall fail to comply with R.C. 4717.36. R.C. 4717.36(C) and R.C. 4717.31(E) thus require the trustee of a preneed funeral contract trust fund to hold and invest the moneys deposited in the fund only in the investments specifically authorized by R.C. Chapter 1111. *See* R.C. 4717.36(A) (moneys held in a preneed funeral contract trust fund must be held in accordance with the provisions of R.C. 4717.36).

If moneys in a preneed funeral contract trust fund are not held and invested by the trustee of the fund in investments authorized by R.C. Chapter 1111, a requirement of a preneed funeral contract has not been satisfied. In such a situation, the trustee has failed to comply with R.C. 4717.36(C) and R.C. 4717.31(E). A trustee's failure to comply with R.C. 4717.36(C) and R.C. 4717.31(E) may result in criminal or civil proceedings against the trustee. *See* R.C. 4717.03(I); R.C. 4717.99.

Because R.C. 4717.31(H) requires the Board to administer and enforce every provision of R.C. 4717.31-.38 that establishes a requirement for a preneed funeral contract, the Board is obligated to administer and enforce the language of R.C. 4717.36(C) and R.C. 4717.31(E) requiring the trustee of a preneed funeral contract trust fund to hold and invest the moneys deposited in the fund in the investments specifically authorized by R.C. Chapter 1111. *See* R.C. 4717.36(A); rule 4717-1-25(A). In order to accomplish this task, the Board has the implied authority to perform acts that will aid the Board in administering and enforcing R.C. 4717.36(C) and R.C. 4717.31(E). *See Waliga v. Bd. of Trustees of Kent State Univ.*, 22 Ohio St. 3d 55, 57,

488 N.E.2d 850 (1986); 1966 Op. Att’y Gen. No. 66-088 at 2-161. In addition, insofar as the General Assembly requires the Board to perform this task, but does not specify the manner of performance, the Board has the “implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method of doing the thing commanded.” *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 12, 112 N.E. 138 (1915), *aff’d*, 241 U.S. 565 (1916).

The administration and enforcement of R.C. 4717.36(C) and R.C. 4717.31(E) necessarily entail at a minimum the authority to investigate whether a trustee has violated these statutes. *See* 1997 Op. Att’y Gen. No. 97-028 at 2-165. If it were determined that the Board does not have this power, the Board would be unable to administer and enforce R.C. 4717.36(C) and R.C. 4717.31(E). Insofar as the General Assembly “is not presumed to do a vain or useless thing,” it reasonably follows that the Board’s statutory authority to administer and enforce R.C. 4717.36(C) and R.C. 4717.31(E) necessarily includes the power to investigate how a trustee invests moneys deposited in a preneed funeral contract trust fund.³ *State ex rel. Cleveland Elec. Illuminating Co. v. City of Euclid*, 169 Ohio St. 476, 479, 159 N.E.2d 756 (1959).

This conclusion is further buttressed by the language of R.C. 4717.38 requiring R.C. 4717.31(H) to be construed in a manner that advances “all possible safeguards” to ensure that moneys held in preneed funeral contract trust funds remain intact and available for funeral services and funeral goods. Because Board oversight in how moneys deposited in preneed funeral contract trust funds are invested provides a reasonable safeguard for ensuring that moneys held in those funds remain intact and available for funeral services and funeral goods, R.C. 4717.38 supports a construction of R.C. 4717.31(H) authorizing the Board to investigate how a trustee invests such moneys. Accordingly, for the foregoing reasons, R.C. 4717.31(H) authorizes the Board to investigate how a trustee invests moneys deposited in a preneed funeral contract trust fund.

Nothing in the Revised Code, however, prescribes the precise manner in which the Board is to exercise this authority. Absent such legislation, it is within the official discretion of the Board to determine when and how the Board will exercise its authority to investigate the investment activities of trustees of preneed funeral contract trust funds. *See State ex rel. Hunt v. Hildebrant*, 93 Ohio St. at 12; 1988 Op. Att’y Gen. No. 88-035 (syllabus, paragraph 8). In other

³ The first syllabus paragraph of 1983 Op. Att’y Gen. No. 83-056 declares, in part, that the Board “has no authority to investigate and enforce R.C. 1107.33” (now R.C. 4717.31-.38). In reaching this conclusion, the opinion at 2-227 stated that “the Board has statutory authority to implement and enforce a system of licensing for embalmers, funeral directors and funeral homes. The Board has no express authority to investigate or enforce R.C. 1107.33.” (Citation omitted.)

However, with the enactment of R.C. 4717.31(H), the General Assembly has authorized the Board to administer and enforce the provisions of R.C. 4717.31-.38 establishing requirements for preneed funeral contracts. We therefore overrule, in part, the first syllabus paragraph of 1983 Op. Att’y Gen. No. 83-056 on the basis of statutory amendment.

words, the Board is free to select appropriate procedures for initiating and conducting such investigations.

Although R.C. 4717.31(H) authorizes the Board to investigate the investment activities of trustees of preneed funeral contract trust funds, the Board may not undertake activities in conjunction with the investigations that expand the Board's authority under R.C. 4717.31(H). *See* 2001 Op. Att'y Gen. No. 2001-029 at 2-171 n.2. Pursuant to R.C. Chapter 4717, the Board has the authority to (1) regulate embalming, funeral directing, cremation, funeral homes, embalming facilities, and cremation facilities and (2) administer and enforce the provisions of R.C. 4717.31-38 concerning the requirements for and sale of preneed funeral contracts. No provision in this chapter or elsewhere in the Revised Code authorizes the Board to regulate the actions or investment decisions of trustees of preneed funeral contract trust funds, determine the propriety or reasonableness of investments made by trustees,⁴ or compel trustees to disclose confidential financial information to the Board.⁵ The authority to regulate the investment activities of such trustees is instead vested in the Division of Financial Institutions.⁶ *See* R.C.

⁴ The Board's authority with regard to the investment authority of a trustee of a preneed funeral contract trust fund is limited to ensuring that investments made by the trustee are authorized under R.C. Chapter 1111. *See* R.C. 4717.36(C) (“[m]oneys deposited in a preneed funeral contract trust fund shall be held and invested in the manner in which trust funds are permitted to be held and invested pursuant to [R.C. Chapter 1111]”); *see also* R.C. 4717.36(A) (moneys held in a preneed funeral contract trust fund must be held in accordance with the provisions of R.C. 4717.36). R.C. Chapter 1111 authorizes a trustee of a preneed funeral contract trust fund to invest the moneys of the fund in, among other things, forms of investments enumerated in the Ohio Uniform Prudent Investor Act, which is set forth in R.C. Chapter 5809. *See* R.C. 1111.13(A)(1)(a) (providing for the investment of trust funds in accordance with the Ohio Uniform Prudent Investor Act). Under the Ohio Uniform Prudent Investor Act, it appears that a trustee of a preneed funeral contract trust fund may invest the moneys of the fund in any reasonably prudent investment. *See* R.C. 5809.02-.03. *See generally* R.C. 5809.05 (“[c]ompliance with the Ohio Uniform Prudent Investor Act shall be determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight”).

⁵ Rather than obtaining information pertaining to investments made by a trustee of a preneed funeral contract trust fund from the trustee, the Board may obtain such information from other sources, *i.e.*, the seller, purchaser, or contract beneficiary of the contract. *See* 11A Ohio Admin. Code 4717-1-25(A); 11A Ohio Admin. Code 4717-1-31.

⁶ Pursuant to R.C. 121.04, the office of the Superintendent of Financial Institutions is created within the Department of Commerce. The Superintendent of Financial Institutions is the chief executive officer of the Division of Financial Institutions. R.C. 1181.01. In this role, the

1111.26; R.C. 1121.02; R.C. 1733.32. Thus, absent legislative authority to participate in the regulation of trustees of preneed funeral contract trust funds, the Board may not do so. *See generally* 2001 Op. Att’y Gen. No. 2001-029 at 2-171 n.2 (as a creature of statute, the Board “has only such authority as is expressly conferred upon it by statute, or as may be necessarily implied in order to effect the exercise of an express power”).

Nevertheless, the Board is explicitly empowered by R.C. 4717.03(I) to bring a civil action against the trustee of a preneed funeral contract trust fund to enjoin a violation of R.C. 4717.31(E) when a Board investigation indicates that the trustee has invested the moneys in the fund in investments not authorized under R.C. Chapter 1111 or has otherwise failed to comply with a requirement of R.C. 4717.36(C) governing the investment of moneys in preneed funeral contract trust funds.⁷ The Board also may refer suspected violations of R.C. 4717.36(C) and R.C. 4717.31(E) by the trustee of the fund to local law enforcement officials and the Division of Financial Institutions for further investigation and legal action. *See* R.C. 1111.26; R.C. 1121.02; R.C. 1733.32; R.C. 4717.99; 1983 Op. Att’y Gen. No. 83-056 at 2-228 and 2-229.

Therefore, in response to your first question, R.C. 4717.31(H) authorizes the Board to investigate how a trustee invests moneys deposited in a preneed funeral contract trust fund. If the investigation discloses that the trustee of the fund has violated R.C. 4717.36(C) and R.C. 4717.31(E), R.C. 4717.03(I) authorizes the Board to bring a civil action to enjoin the violation. In addition, the Board may refer suspected violations of R.C. 4717.36(C) and R.C. 4717.31(E) by the trustee of the fund to local law enforcement officials and the Division of Financial Institutions for further investigation and legal action.

Your second question asks whether R.C. 4717.31(H) authorizes the Board to investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently. As explained previously, R.C. 4717.31(H) requires the Board to “administer and enforce the provisions of [R.C. 4717.31-.38] concerning the requirements for and sale of preneed funeral contracts.” Nothing in the language of this mandate expressly empowers the Board to investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently. The Board also does not have implied authority under this mandate to conduct such an investigation since such an investigation is not needed in order for the Board to perform its duties under R.C. 4717.31-.38. *See* 2001 Op. Att’y Gen. No. 2001-029 at 2-171 n.2. Further,

Superintendent of Financial Institutions is responsible for ensuring that the laws relating to banks are executed and enforced. *See* R.C. 1111.26; R.C. 1121.02; R.C. 1733.32.

⁷ R.C. 4717.03(I) states, in part, that the Board “may bring a civil action to enjoin any violation or threatened violation of [R.C. 4717.01-.15] or a rule adopted under any of those sections; division (A) or (B) of [R.C. 4717.23]; division (B)(1) or (2), (C)(1) or (2), (D), (E), or (F)(1) or (2), or divisions (H) to (K) of [R.C. 4717.26]; division (D)(1) of [R.C. 4717.27]; divisions (A) to (C) of [R.C. 4717.28]; or division (D) or (E) of [R.C. 4717.31].”

while R.C. 4717.38 requires R.C. 4717.31(H) to be construed in a manner that advances “all possible safeguards” to ensure the protection of moneys held in a preneed funeral contract trust fund, nothing in this statute sanctions a construction of R.C. 4717.31(H) that unreasonably expands the authority granted to the Board under R.C. 4717.31(H). *See id.*

Moreover, language in R.C. 4717.31(H) and R.C. 4717.36(D) confers upon other governmental entities the authority to administer and enforce the provisions of law governing the distribution of moneys from preneed funeral contract trust funds, insurance policies, and annuities. R.C. 4717.31(H) states that “[p]ayments from a [preneed funeral contract] trust, insurance policy, or annuity, including any fraudulent activities in which a person engages to obtain payments from a trust, insurance policy, or annuity, *shall be regulated in accordance with [R.C. Chapter 1111] or [R.C. Title 39], as applicable.*” (Emphasis added.) R.C. 4717.36(D) declares further that, except as otherwise provided in R.C. 4717.36, payments from a preneed funeral contract trust fund are governed by R.C. Chapter 1111. *See* R.C. 4717.36(A). Accordingly, pursuant to R.C. 4717.31(H) and R.C. 4717.36(D), payments from preneed funeral contract trust funds, insurance policies, and annuities are governed and regulated in accordance with R.C. Chapter 1111, R.C. Title 39, and R.C. 4717.36.

R.C. Chapter 1111 and R.C. Title 39 require the Division of Financial Institutions and the Department of Insurance to enforce the laws relating to trust business and insurance, respectively. *See* R.C. 1111.26; R.C. 3901.011; R.C. 3901.04; *see also* R.C. 1121.02; R.C. 1733.32; R.C. 4717.31(F), (H). R.C. 4717.36 sets forth the provisions of law governing the establishment, transfer, and cancellation of preneed funeral contract trust funds and the payment of certain fees from such funds. No provision in R.C. Chapter 1111, R.C. Title 39, or R.C. 4717.36, however, empowers the Board to investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently. Thus, pursuant to R.C. 4717.31(H) and R.C. 4717.36(D), the authority to enforce the laws of R.C. Chapter 1111 and R.C. Title 39 governing payments from preneed funeral contract trust funds, insurance policies, and annuities is conferred upon the Division of Financial Institutions and the Department of Insurance, rather than the Board.

Our review of R.C. 4717.31-.38, R.C. Chapter 1111, and R.C. Title 39 persuades us that R.C. 4717.31(H) may not be construed as authorizing the Board to enforce any of the provisions of law governing payments from preneed funeral contract trust funds, insurance policies, and annuities. Absent such authority in R.C. 4717.31(H), we conclude that R.C. 4717.31(H) does not authorize the Board to investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently.

Your third question asks, if R.C. 4717.31(H) authorizes the Board to investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently and the Board finds evidence that the funeral director has committed fraud, whether the Board may take disciplinary action against the funeral director when neither the Division of Financial Institutions nor the Department of Insurance has determined the funeral director has received the moneys fraudulently. Because we have

determined that R.C. 4717.31(H) does not authorize the Board to investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently, it is unnecessary for us to consider your third question.

Your fourth question asks, if R.C. 4717.31(H) does not authorize the Board to investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently and neither the Division of Financial Institutions nor the Department of Insurance has investigated the allegations set forth in the complaint, whether the Board may conduct its own investigation of the matter pursuant to R.C. 4717.03. Division (F) of R.C. 4717.03 provides, in part: “On its own initiative or on receiving a written complaint from any person whose identity is made known to the [Board], the [B]oard shall investigate the acts or practices of any person holding or claiming to hold a license or registration under this chapter that, if proven to have occurred, would violate this chapter or any rules adopted under it.”

In connection with the investigatory authority granted to the Board under R.C. 4717.03(F), the General Assembly has set forth specific reasons for suspending or revoking a license issued by the Board. *See, e.g.*, R.C. 4717.13; R.C. 4717.14. Under R.C. 4717.14(A)(4), the Board may suspend or revoke a license issued by the Board when the “licensee has committed immoral or unprofessional conduct.” Reading R.C. 4717.03(F) and R.C. 4717.14(A)(4) together, it is apparent that the Board has the authority to investigate whether a funeral director has “committed immoral or unprofessional conduct.”

In *Pierstorff v. Bd. of Embalmers and Funeral Directors*, 68 Ohio App. 453, 41 N.E.2d 889 (Lucas County 1941), the court construed the meaning of the language of G.C. 1335-7 (now R.C. 4717.14) concerning “immoral or unprofessional conduct.” As explained in *Pierstorff*, 68 Ohio App. at 456-58, this phrase includes, among other things, conduct that violates the common standards of ethics and fair dealing:

Not only from the viewpoint of sanitation but from other considerations, there are few fields of business enterprise, profession or occupation into which the police power of the state may more appropriately extend its controlling and regulatory authority than that of the burial of the dead. From earliest times and among all peoples, this ceremony or rite has been attended with considerations of special dignity, decency and honor. Appellant is not here charged with “immoral” conduct, as that term is generally understood and used in legal parlance, but there are many of the finer “moral” requirements inherently associated with the professional conduct of any business or profession, and particularly in this field, which control the actions of a morally and intellectually honest man without suggestion from others and without printed rule. To define, by a set of rules and regulations, the manner in which these delicate requirements shall be met, would appear quite difficult of accomplishment, though it might be done. But these requirements are easily recognized when met, and their absence is glaring to the trained eye and mind and shocking to all the finer sensibilities of men.

....

In the statute under consideration, the Legislature has declared that a license may be revoked by the board which granted it, for “immoral or unprofessional conduct.” The power thus vested in a board goes not only to the qualifications of the licensee but the protection of the public with whom he deals. When his conduct in his business or profession is such that by the common standards of professional conduct and fair dealing he has brought himself within the inhibitions of law, he can not well claim in defense that he did not know in advance that his conduct was unprofessional[.]

The Board’s administrative rules state, “[u]nprofessional conduct” includes, but is not limited to, “[t]he misappropriation of any amount of money, paid by a consumer in order to fund their funeral service, by a funeral director, funeral home or funeral home’s employee.” 11A Ohio Admin. Code 4717-1-18(F); *see also* R.C. 4717.04(B); 1998 Op. Att’y Gen. No. 98-035 at 2-208. Rule 4717-1-18(F) and *Pierstorff* indicate that, for purposes of R.C. 4717.14(A)(4), “immoral or unprofessional conduct” by a funeral director includes, but is not limited to, conduct that violates the common standards of ethics and fair dealing or constitutes the misappropriation of moneys. Accordingly, pursuant to R.C. 4717.03(F) and R.C. 4717.14(A)(4), the Board may investigate a complaint that alleges a funeral director has committed an act that violates the common standards of ethics and fair dealing or constitutes the misappropriation of moneys paid to him under a preneed funeral contract trust fund, insurance policy, or annuity.

In your fourth question, you have presented a situation in which a complaint alleges that a funeral director has committed fraud or misappropriated moneys from a preneed funeral contract trust fund, insurance policy, or annuity. In such a situation, the funeral director may have violated rule 4717-1-18(F) by misappropriating moneys paid to him under a preneed funeral contract trust fund, insurance policy, or annuity. Also, the funeral director may have committed a crime or, at a minimum, violated the common standards of ethics and fair dealing by engaging in deceit in order to receive moneys from a preneed funeral contract trust fund, insurance policy, or annuity. *See* R.C. 2913.47; *State ex rel. Corron v. Wisner*, 23 Ohio App. 2d 1, 4, 260 N.E.2d 608 (Hancock County 1970), *aff’d*, 25 Ohio St. 2d 160, 267 N.E.2d 281 (1971). Because the complaint described in your fourth question alleges conduct by a funeral director that, if proven, violates the common standards of ethics and fair dealing or constitutes the misappropriation of moneys from a preneed funeral contract trust fund, insurance policy, or annuity, the Board has the authority under R.C. 4717.03(F) and R.C. 4717.14(A)(4) to investigate the allegations set forth in the complaint.

The Board’s authority in this regard exists even though neither the Division of Financial Institutions nor the Department of Insurance has investigated the allegations set forth in the complaint. As explained previously, R.C. 4717.31(H) and R.C. 4717.36(D) require payments from a preneed funeral contract trust, insurance policy, or annuity, including any fraudulent activities in which a person engages to obtain payments from a trust, insurance policy, or annuity, to be regulated in accordance with R.C. Chapter 1111 and R.C. Title 39. Pursuant to these provisions of law, the Division of Financial Institutions and the Department of Insurance

are authorized to enforce the laws of R.C. Chapter 1111 and R.C. Title 39, respectively, governing payments from a preneed funeral contract trust fund, insurance policy, or annuity. *See* R.C. 1111.26; R.C. 1121.02; R.C. 1733.32; R.C. 3901.011; R.C. 3901.04.

The purpose of the language of R.C. 4717.31(H) and R.C. 4717.36(D) concerning payments from preneed funeral contract trust funds, insurance policies, and annuities is to empower the Division of Financial Institutions and the Department of Insurance to regulate such payments in accordance with R.C. Chapter 1111 and R.C. Title 39, respectively. In contrast, neither R.C. 4717.03(F) nor R.C. 4717.14(A) empower the Board to investigate whether payments from preneed funeral contract trust funds, insurance policies, and annuities are made in accordance with R.C. Chapter 1111 and R.C. Title 39. Instead, R.C. 4717.03(F) and R.C. 4717.14(A) are limited to authorizing the Board to regulate the conduct and qualifications of persons licensed by the Board. The authority conferred upon the Board by R.C. 4717.03(F) and R.C. 4717.14(A) includes investigating complaints that allege a funeral director has committed an act that violates the common standards of ethics and fair dealing or constitutes the misappropriation of moneys paid by the purchaser of a preneed funeral contract, insurance policy, or annuity. If an investigation conducted by the Board under R.C. 4717.03(F) and R.C. 4717.14(A) discloses that a funeral director has received a payment in violation of R.C. Chapter 1111 or R.C. Title 39, the Board may refer the results of its investigation to the Division of Financial Institutions or the Department of Insurance, as applicable, or to local law enforcement officials for further investigation and legal action.

Thus, we find no conflict between the language of R.C. 4717.31(H) and R.C. 4717.36(D) authorizing the Division of Financial Institutions and the Department of Insurance to ensure that payments from preneed funeral contract trust funds, insurance policies, and annuities are made in accordance with R.C. Chapter 1111 and R.C. Title 39, respectively, and the language of R.C. 4717.03(F) and R.C. 4717.14(A) authorizing the Board to regulate the conduct and qualifications of persons licensed by the Board. It follows that the authority granted to the Division of Financial Institutions and the Department of Insurance under R.C. 4717.31(H) and R.C. 4717.36(D) does not foreclose the Board from exercising its investigatory authority under R.C. 4717.03(F) and R.C. 4717.14(A). *See* R.C. 4717.38; Ohio Legislative Service Comm'n, Analysis, Sub. S.B. 196, at p. 2 (as reported by the Senate Insurance, Commerce, and Labor Committee). Additionally, no language in R.C. 4717.03, R.C. 4717.14, or elsewhere in the Revised Code prohibits the Board from investigating a complaint that alleges a funeral director has committed an act that violates the common standards of ethics and fair dealing or constitutes the misappropriation of moneys paid to him under a preneed funeral contract trust fund, insurance policy, or annuity unless the Division of Financial Institutions or the Department of Insurance has also investigated the allegations set forth in the complaint. Absent such language, the authority of the Board to conduct an investigation of a complaint under R.C. 4717.03(F) and R.C. 4717.14(A)(4) is not contingent upon the Division of Financial Institutions or the Department of Insurance also investigating the matters set forth in the complaint. Hence, pursuant to R.C. 4717.03(F) and R.C. 4717.14(A)(4), the Board may investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently even though neither the Division of Financial

Institutions nor the Department of Insurance has investigated the allegations set forth in the complaint.

Your final question asks whether a licensed insurance agent who is not licensed as a funeral director violates R.C. 4717.31 when the agent (1) sells an insurance policy or annuity to fund a preneed funeral contract that includes funeral services, (2) prepares the contract for a licensed funeral director, and (3) presents the contract to the licensed funeral director for signing. R.C. 4717.31(A) states that “[o]nly a funeral director licensed pursuant to [R.C. Chapter 4717] may sell a preneed funeral contract that includes funeral services.” Additionally, R.C. 4717.31(B) authorizes a licensed insurance agent to sell an insurance policy or annuity that will be used to fund a preneed funeral contract. When selling such an insurance policy or annuity, the licensed insurance agent may provide price lists for, and discuss the cost of, funeral services and funeral goods and complete a worksheet or other record to calculate the estimated cost of a funeral. R.C. 4717.31(B). The conducting of such activities by a licensed insurance agent does “not constitute funeral directing, funeral arranging, the business of directing and supervising funerals for profit, or the sale of a preneed funeral contract.” R.C. 4717.31(C).

Although a licensed insurance agent may sell an insurance policy or annuity to fund a preneed funeral contract and offer general information regarding the cost of funeral services and funeral goods, R.C. 4717.31(A)-(B) specifically prohibit the agent from (1) selling a preneed funeral contract that includes funeral services, (2) offering advice or making recommendations about funeral services, and (3) discussing the advantages or disadvantages of any funeral service. The purpose of these prohibitions is to prevent a licensed insurance agent who is not licensed as a funeral director from selling preneed funeral contracts that include funeral services and engaging in other activities that constitute the business or profession of funeral directing. *See* R.C. 4717.31(C); *see also* R.C. 4717.13(A)(1); R.C. 4717.99.

2001 Op. Att’y Gen. No. 2001-029 at 2-177 examined what constitutes “selling” a preneed funeral contract for purposes of R.C. Chapter 4717 and concluded that this activity includes negotiating and preparing a preneed funeral contract on behalf of a funeral director:

The word “sell” means “to have or offer regularly for sale; ... to make or try to make sales in or to ... to bring about, help in, or promote the sale of.” *Webster’s New World Dictionary* 1293 (2d college ed. 1986). In the situation presented in your fourth example, it is readily apparent that the licensed life insurance agent brings about and promotes the sale of funeral services. The licensed life insurance agent has initial contact with the person and explains all the funeral services and goods provided by the funeral home and the costs of such services and goods. The agent negotiates and prepares on behalf of the funeral home a preneed funeral contract for the sale of funeral services and goods to be used in connection with the person’s funeral. The agent also obtains the person’s signature on the preneed funeral contract. The funeral home’s licensed funeral director neither meets with the person nor participates in the negotiations or the

preparation of the preneed funeral contract. The licensed funeral director only signs the preneed funeral contract prepared by the agent.

Accordingly, the licensed life insurance agent, rather than the funeral home's licensed funeral director, brings about or promotes the sale of the funeral services that are to be used in connection with the person's funeral. (Citation omitted.)

We find no language in R.C. Chapter 4717 or elsewhere in the Revised Code refuting the analysis and conclusion reached in 2001 Op. Att'y Gen. No. 2001-029. Accordingly, when a licensed insurance agent who is not licensed as a funeral director negotiates and prepares a preneed funeral contract that includes funeral services on behalf of a funeral director, the agent sells the contract in violation of R.C. 4717.31(A).

It is also significant to note that in such a situation the licensed insurance agent engages in the business or profession of funeral directing in violation of R.C. 4717.13(A)(1), which prohibits a person not licensed as a funeral director from filling out a funeral service contract, determining what services are to be provided at a funeral, totaling the cost of the services to be provided at a funeral, and providing a written statement of price disclosures after arranging the services to be provided at a funeral. *See* R.C. 4717.01(C); 11A Ohio Admin. Code 4717-1-01(D), (I); 2001 Op. Att'y Gen. No. 2001-029 at 2-176 through 2-178. Therefore, in response to your final question, a licensed insurance agent who is not licensed as a funeral director violates R.C. 4717.13(A)(1) and R.C. 4717.31(A) when the agent (1) sells an insurance policy or annuity to fund a preneed funeral contract that includes funeral services, (2) prepares the contract for a licensed funeral director, and (3) presents the contract to the licensed funeral director for signing.

In conclusion, it is my opinion, and you are hereby advised as follows:

1. R.C. 4717.31(H) authorizes the Board of Embalmers and Funeral Directors to investigate how a trustee invests moneys deposited in a preneed funeral contract trust fund. If the investigation discloses that the trustee of the fund has violated R.C. 4717.36(C) and R.C. 4717.31(E), R.C. 4717.03(I) authorizes the Board of Embalmers and Funeral Directors to bring a civil action to enjoin the violation. In addition, the Board of Embalmers and Funeral Directors may refer suspected violations of R.C. 4717.36(C) and R.C. 4717.31(E) by the trustee of the fund to local law enforcement officials and the Division of Financial Institutions for further investigation and legal action. (1983 Op. Att'y Gen. No. 83-056, syllabus, paragraph 1, overruled, in part, on the basis of statutory amendment.)
2. R.C. 4717.31(H) does not authorize the Board of Embalmers and Funeral Directors to investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently.

3. Pursuant to R.C. 4717.03(F) and R.C. 4717.14(A)(4), the Board of Embalmers and Funeral Directors may investigate a complaint that alleges a funeral director has received moneys from a preneed funeral contract trust fund, insurance policy, or annuity fraudulently even though neither the Division of Financial Institutions nor the Department of Insurance has investigated the allegations set forth in the complaint.
4. A licensed insurance agent who is not licensed as a funeral director violates R.C. 4717.13(A)(1) and R.C. 4717.31(A) when the agent (1) sells an insurance policy or annuity to fund a preneed funeral contract that includes funeral services, (2) prepares the contract for a licensed funeral director, and (3) presents the contract to the licensed funeral director for signing.

Respectfully,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large, stylized initial "M".

MICHAEL DEWINE
Ohio Attorney General