

## Opinion No. 50-5298

May 31, 1950

**BY:** Joe L. Martinez, Attorney General

**TO:** Honorable Paul Tackett District Attorney, 2nd Judicial District Bernalillo County Courthouse Albuquerque, New Mexico

{\*153} I am in receipt of your recent letter requesting an opinion whether or not an embalmer or funeral director may carry on any other business than that of embalming or funeral directing business.

You further specifically request an opinion as to whether any embalming or funeral directing concern acting as an agent for a life insurance company can be considered in any manner or means as soliciting business for the funeral establishment under rule 26 of the Embalmers' Board.

Section 51-2319 through 2351, N.M.S.A. 1941, as amended 1947, covers the pertinent provisions of the law regarding embalmers and funeral directors, and from the facts above stated it would seem that § 51-2345, Items 5, 11, and 14, would seem to be the pertinent provisions covering disciplinary action by board - grounds:

"(a) The board shall have power to take disciplinary action against any embalmer or funeral director charged with the commission of any of the following acts."

"5. Paying or causing to be paid to any person, money or other valuable consideration to secure business from or through such person."

"11. Employing or otherwise engaging agents to solicit business."

"14. Issuing a burial contract or certificate in anticipation of the death of a person."

Rule No. 26, designated as "Incompatible Occupation" is as follows:

"It is hereby declared to be improper and subject to disciplinary action, as provided by Rule No. 25, for any Funeral Director, Assistant Funeral Director or licensed Embalmer to participate or engage in any profession, occupation or business which directly, or indirectly, is tantamount to soliciting business for the funeral establishment which is being operated or managed by such licensed Funeral Director, Assistant Funeral Director or the Licensed Embalmer employed by such Funeral Director."

After carefully reading the above statutory provisions, it is evident from the Act that its purpose is to prohibit solicitation for business through another person or through an agent and does not necessarily prevent the embalmer or funeral director from personally soliciting business. This is made evident by § 51-2345 (a), subsection 12:

"Knowingly engaging in advertising which is **misleading** or **inaccurate** in any material particular."

Had the act been intended to prevent the embalmers or funeral directors from personally soliciting business it would not permit said embalmer to engage in advertising which is not misleading or inaccurate in any material particular, but would prohibit such advertising altogether, as do the medical and legal professions in their codes of ethics.

We therefore must examine Rule No. 26 entitled "Incompatible Occupation" and determine if such a rule is inconsistent with the law or so loosely written as *{\*154}* may be interpreted as inconsistent with the said law. It is my opinion that Rule No. 26 goes beyond the provisions of § 51-2345 (a) and is therefore invalid.

From the above state of facts, it is my understanding that a funeral director intends to become an agent for a life insurance company and the inference is whether that agent by selling life insurance to persons, would in effect be soliciting business for his funeral establishment in violation of the above embalmers' law and the proper rules or regulations made pursuant thereto.

Recently this office advised the President of the State Board of Embalmers, by letter, a copy of which is enclosed, as to the right to revoke a license for any of the violations set forth in the above act. The letter specifically stated, however, that a statement of facts should be submitted in order that there be no ambiguity about the opinion which was to be submitted.

When a person's right or privilege to do business or to engage in a profession is being attacked, the courts will give serious thought to the construction of the law and the rules and regulations made pursuant thereto before depriving said person of his right or privilege to engage in a business or profession, or to the right or privilege of making his livelihood.

It is, therefore, my opinion that, from the facts as I understand them, a person who becomes an agent for a life insurance company will not be violating any of the provisions of § 51-2345 (1 through 15) and, therefore, could not be subject to disciplinary action by the Embalming Board.