

Opinion No. 37-1814

November 12, 1937

BY: FRANK H. PATTON, Attorney General

TO: State Department of Public Health Santa Fe, New Mexico. Attention: Miss Billy Tober, State Registrar and Bookkeeper.

{*180} This opinion is in response to your written request dated October 28, inquiring about the apparent conflict between the rules and regulations of the State Department of Public Health and the rules and regulations of the New Mexico Board of Embalmers pertaining to the transportation of dead human bodies.

The rule making power of the State Department of Public Health in such matters is derived from Chapter 39, Laws of 1937, whereas the New Mexico Board of Embalmers derives its rule making power from Chapter 101, Laws of 1937.

Section 4 of Chapter 39, Laws of 1937, dealing with the State Department of Public Health, provides as follows:

"Section 4. Activities of State Departments. The State Department shall be responsible for the administration of the **public health activities of the state** as hereinafter provided, and in that respect shall:

{*181} * * *

"(12) Regulate the disposal, **transportation**, interment and disinterment **of the dead**, to such extent as may be reasonable and necessary **for the protection of the public health and safety**.

* * *

"(19) Establish, maintain and enforce such **rules and regulations** as may be necessary to carry out the intent of this act and to publish same." (Underscoring ours)

Section 3 of Chapter 101 of the Laws of 1937, dealing with the New Mexico Board of Embalmers, provides in part as follows:

"Section 3. That for the purpose of carrying out the objects and purposes of this act, to provide for the better protection of life and health, to prevent the spread of infectious and contagious diseases, and to protect the public from untrained and unskilled embalmers, by regulating the practice of embalming and funeral directing as it has to do with the care, preparation, disposition and **transportation** of the human dead, said Board shall have the power, and it shall be its duty, to prescribe a standard of efficiency as to the qualifications of those engaged in and who may engage in the practice of

embalming and funeral directing as it has to do with the care, preparation, disposition and **transportation** of dead human bodies in the State of New Mexico. Said Board shall, from time to time, adopt **rules, regulations and bylaws**, not inconsistent with the laws of the State of New Mexico or the United States of America, whereby the operation and the performance of the duties of said Board and the practicing of embalming and funeral directing as pertaining to the care, preparation, disposition and **transportation** of the human dead shall be regulated."

(Underscoring ours)

It appears in the inception, therefore, that there is a grave inconsistency between Chapter 39 and Chapter 101 in so far as the two acts purport to delegate to entirely different administrative departments apparently identical powers to make rules and regulations pertaining to the transportation of dead human bodies. Which of these acts should prevail over the other is a matter difficult of determination. On the one hand, Chapter 39 deals primarily and almost entirely with matters pertaining to public health, whereas Chapter 101 deals primarily with the embalmers' profession. Both acts purport to be police power regulations and their purpose is declared to be to promote the public health. Chapter 39 being specifically a health measure, and Chapter 101 being primarily for the benefit of the members of the embalmers' profession, any conflict between the two acts in the question at hand should be resolved in favor of the public health act.

On the other hand, the embalmers' law is the later enactment and the possible question might arise as to whether, by implication, it did not repeal the public health law in so far as the rule-making power respecting the transportation of dead human bodies is concerned.

Furthermore irrespective of rule, the embalmers' law, Section 6, Chapter 101, expressly provides as follows:

"Section 6. After this Act becomes a law, it shall be unlawful for any person, not an embalmer holding a valid New Mexico license as now or hereafter provided by law, to advertise, practice, or pretend to practice the science of embalming, either by arterial cavity, or any other treatment, or to prepare for ^{*182} transportation by railroad, express, airplane, automobile or by any licensed common carrier any dead human body. It shall be unlawful for any railroad, express or airplane company or any licensed common carrier to receive for transportation any dead human body unless said body has been prepared by an embalmer holding a valid New Mexico license, or for any individual, firm or corporation operating either a public or private conveyance upon the public highways in the State of New Mexico to accept for removal, or remove from the State of New Mexico, any dead human body unless said body has been prepared and encased by an embalmer holding a valid New Mexico license as now required by law. The provisions of this section shall not apply to any person, firm or corporation engaged only in the selling of coffins or caskets, nor to any person caring for or burying the dead without compensation or remuneration, or not embalming or preparing bodies for

removal from the state, or not holding themselves out as funeral directors and embalmers."

Pursuant to the foregoing acts, the Department of Public Health adopted Section 9 of their regulations governing the interment, disinterment and transportation of the dead, and the Board of Embalmers adopted their Rule No. 2. These rules are identical and provide for the preparation by arterial and cavity injection with an approved disinfecting fluid, etc., of any human body dead of certain enumerated communicable or contagious diseases preparatory to transportation upon either a public or private conveyance upon the public highways of the State of New Mexico or by steam railroad. There is no conflict in these two rules and both are undoubtedly proper police power regulations in view particularly of the cause of death.

Section 10 of the Public Health rules provides for embalming and disinfecting of any body preparatory to shipment by means of a transportation company. Rule 3 of the Embalmers' Board provides the same as Section 10 of the rule of the Health Department except that it goes further and states:

"Each body removed from the State of New Mexico shall be prepared and encased as set forth in this rule."

Herein we strike the first conflict in the rules and regulations of the two Departments. According to the regulations of the Department of Public Health (Section 10), where a human body died of a noncommunicable or noncontagious disease the same must be embalmed and disinfected only when removed from the State by a transportation company or common carrier; whereas under the Embalmers' regulation (Rule No. 3), the body must be embalmed and disinfected regardless of how or by whom the body is removed from the State.

Furthermore, Section 11 of the regulations of the Health Department provides as follows:

"No transportation company shall accept for shipment from a point within the State of New Mexico any dead human body unless said body has been embalmed by an embalmer holding a valid license by authority of the New Mexico State Board of Embalmers."

Whereas Rule 4 of the Embalmers' regulations provides:

"No transportation company shall accept for shipment from a point within the State of New Mexico any dead human body unless said body has been embalmed by an embalmer holding a valid license by authority of the New Mexico State Board of {**183*} Embalmers. **This rule shall apply to each body removed from the State of New Mexico regardless of the mode of transportation.**"

Under the Embalmers' rule, no dead body may be taken across the State line unless the same has been embalmed by an embalmer holding a valid New Mexico Embalmers' license, irrespective of who transports the body or how, and irrespective of the cause of death. The latter portions of Embalmers' Rules 3 and 4 may be a little too broad and far reaching. In other words, there are bound to arise certain fact situations where the application of such rules as adopted might result in an unreasonable and unwarranted hardship upon the relatives of the deceased and others.

The law in such cases is well stated in *Miller vs. Johnson* (Kan.), 202 P. 619. We quote from the syllabus:

"Where an official board like the state board of embalmers is authorized to make and enforce rules concerning the embalming of dead human bodies, and for the examining and licensing of embalmers, such rules must be reasonable, and any rule clearly unreasonable or one given an unreasonable interpretation or application is void."

Again, in *State vs. Redmon* (Wis.), 114 N. W. 137, we quote from the syllabus:

"A legislative declaration respecting the character of a law, as that its purpose is to promote public health, is not absolutely binding on the courts. It is their function to determine the real intent of the law and if its ostensible is not the real purpose, to give effect to the Constitution by condemning the enactment."

In 12 R. C. L. 1273, 1274, it is said:

"But if the Legislature, in the interests of the public health, enacts a law interfering with the personal rights of an individual, destroying or impairing his liberty or property, it then, under such circumstances, is deemed to become the duty of the courts to review such legislation, and determine whether it in reality related to and is appropriate to secure the object in view. And in such an examination the court will look to the substance of the thing involved, and will not be controlled by mere forms. When the acts of health authorities, though apparently in the interest of the public health, in no material respect subserve such an end and are actually injurious to individuals, the courts have no hesitancy in declaring that they have exceeded their powers. It is not to be doubted that the courts have the right to inquire into any alleged abuse of their powers and to restrain them when they transcend the limits of their authority; and the courts will, accordingly, declare invalid any rule or by-law which is to conflict with the state's organic law or antagonistic to the general law of the state, or is unreasonable or opposed to the fundamental principles of justice or inconsistent with the powers conferred upon the boards."

In so far as Chapter 101 and the rules adopted by the Embalmers' Board actually attempt to promote and do promote the public health and welfare of the State, they are valid, but if they go further, and the public health phase is a mere remote purpose, and their primary objective or purpose is other than the promotion of public health, then such law or regulations may be invalid. The mere assertion that a subject relates in a remote

degree {^{*184}} to the public health does not render an enactment valid, but the act must have a more direct relation as a means to an end, and the end itself must be appropriate and legitimate. *Wyeth vs. Thomas* (Mass.,) 86 N. E. 925.

To quote the language of the Supreme Court of the United States in the case of *Lochner vs. New York*, 198 U.S. 45, 49 L. ed. 937, it is "Impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are in reality passed from other motives. We are justified in saying so when, from the character of the law and the subject on which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law."

Again, in *People vs. Ringe* (N. Y.) 90 N. E. 451, the Court of Appeals of New York said:

"A statute passed pursuant to the police power should be reasonable. Its real purpose must be to protect the public health, morals, or general welfare. A statute cannot, under the guise of the police power, but really to affect some purpose not within such power, arbitrarily interfere with a person or a property right."

And, again, the New York court said:

"We cannot refrain from the thought that the act in question was conceived and promulgated in the interests of those then engaged in the undertaking business, and that the relation which the business bears to the general health, morals, and welfare of the state had much less influence upon its originators than the prospective monopoly that could be exercised with the aid of its provisions."

What, therefore, may be said about the Embalmers' rules and law requiring a dead human body to be embalmed and encased before it may be removed from the State, irrespective of the mode of transportation and irrespective of the cause of death?

The rules are so all inclusive, as adopted, that they can and must be discriminatory and unreasonable in some instances. For example, it is a matter of common knowledge that farms often times extend beyond state lines. Suppose a farmer farming land between Texline and Clayton has his home on the Texas side and most of his farm land on the New Mexico side; While out on his field on the New Mexico side, he suffers a sudden heart attack and dies. Under the Embalmers' rules the dead man's wife and child cannot load him into a wagon and take him to his home and let him lie on his own bed without violating the rules of the Embalmers' Board. He must first be embalmed in New Mexico by a New Mexico licensed embalmer and be encased, regardless of the financial circumstances of the bereaved relatives, and they must further obtain the necessary transportation permits from the State Board of Embalmers and see that the same are approved by the State Board of Health.

Can such be the intent of Chapter 101? Yet that is what is required by the Embalmers' rules and regulations, if they are to be applied as adopted without reservation.

So much in point is the case of Miller vs. Johnson (Kan.), 202 P. 619, that at the risk of being somewhat verbose, I shall quote at length from that case.

The Board of Embalmers of Kansas, pursuant to legislative authority, adopted the following rule:

"No person, agent or owner of any railway company, express company, electric railways, coaches, public or private conveyances, {**185*} shall transport, receive or offer for transportation any dead human body (except disinterred body), unless said body has been embalmed twelve (12) hours and is accompanied by a yellow paster, properly filled out and signed by a Kansas licensed embalmer in accordance with this rule."

The circumstances were these: One Robert Archibald, a resident of Geneseo, in Rice county, died in a hospital at Little River, in the same county; and the relatives of the deceased directed the local undertaker to go to Little River and bring home the body of Mr. Archibald. The local undertaker complied; he brought the body home in an automobile hearse, through an ordinary rural district, a distance of 15 miles. The local embalmer at Little River filed a complaint against the Geneseo undertaker for breach of the foregoing rule of the Board.

On the foregoing facts, the Kansas Court stated as follows, and we quote from the opinion:

"Recurring to the acts confessed by plaintiff: At the request of the dead man's relatives the plaintiff went to Little River and brought home the body of Mr. Archibald. The body was not embalmed; it was not tagged with a yellow paster furnished by the local embalmer at Little River. The plaintiff did not procure a removal permit from the registrar of embalmers. The country between Little River and the dead man's home at Geneseo in the same county is an ordinary rural community. There were no districts of congested population en route. He brought the dead man home along the rural highways, in an automobile hearse, a vehicle adapted to the dignified and careful conveyance of the dead. The journey, 15 miles, may have taken an hour's time or less. **Mr. Archibald had not died of any communicable disease. And yet it seems that this simple, natural, and not unusual mode of bringing home a dead man's body is a violation of a rule promulgated by the state board of embalmers.** Thus interpreted, can such a rule be reasonable? Literally construed, as the board has construed it, the plaintiff, as a licensed embalmer and familiar with the rules, should have replied to the request of the dead man's family:

"My Dear Friends: I sympathize with your natural desires to have Mr. Archibald's body brought home from the hospital at once, but it can't be done. He must first be embalmed on the spot where he died. He can be carried nowhere until that is done. Then 12 hours must elapse before I can bring him to you. Furthermore, I must obtain a yellow paster to be tagged on the body. I shall also have some preliminary clerical work to do; there are embalmer's certificates Nos. 1 and 2 to be prepared and forwarded to the state board of embalmers. Moreover, I must hunt up the local registrar at Little River and get a removal

permit, from him, before these natural and urgent desires of yours to bring home your dead kinsman can be gratified.'

"Such cannot be the law in a free state. Casually read, the oppressive exactions of the rule are not readily discernible; but as interpreted by the board and applied to the facts of this case, they are altogether unreasonable. Why all this red tape to bring a dead man home from a hospital 15 miles away, over the rural highways of an agricultural community? Thus interpreted, the dead man's father, brothers, or sons would likewise have violated {**186*} the law and incurred a fine of \$ 50 to \$ 200 if they had dispensed with the services of the local undertaker and had brought the dead man home themselves. Thus interpreted, if a farmer died out in the pasture of his own farm, his sons could not carry him to the house and let him lie on his own bed, while they went to town for a coffin, until he had been embalmed 12 hours -- out in the pasture -- and labeled and tagged with a yellow paster!"

(Underscoring ours)

The Kansas Court concluded as follows:

"For the purposes of respectful treatment and decent interment there is vested in the relatives of a dead person, primarily in his next of kin, **a quasi-property interest** in the body of the deceased (*Bogart v. City of Indianapolis*, 13 Ind. 134; *Snyder v. Snyder*, 60 How. Prac. (N.Y.) 368; *The Law of Burial*, 4 Bradford's Surrogate Rep. (N. Y.) 503 et seq.; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667; *Griffith v. Railroad Company*, 23 S. C. 25, 55 Am. Rep. 1), and what the relatives might do themselves they might lawfully authorize the plaintiff to do for them. While the transportation of dead bodies for considerable distances, or by rail, or through populous centers where there is danger of infection or contagion, and the like, wherever the public health or safety may demand it, may be properly subjected to reasonable rules of some official body like the state board of health or the state board of embalmers, yet **the rule applied here -- requiring Mr. Archibald's body to be embalmed for twelve hours, and to be tagged with a yellow paster, and that a permit for its removal be obtained, etc., before it could be brought home -- was clearly unreasonable and was an undue interference with the rights of the relatives of the deceased and of the plaintiff, their employe.**" (Underscoring ours).

In your letter you give the hypothetical example of the Texline farmer, working on a WPA project, who had several small children to feed and clothe on a very small allowance. His wife became ill with some form of articular rheumatism, which is neither a contagious nor communicable disease. You say there is no hospital in Texline and no practicing physician, and the farmer therefore called on a Clayton doctor 10 miles away to attend her. Clayton is in New Mexico and Texline is in Texas. The Clayton doctor advised that it was absolutely necessary that his wife be taken to the hospital in Clayton so that she could receive the necessary medical and hospital care. The patient was taken to the hospital and a few days later died. The farmer could not afford embalming and knew no one in Clayton who would sell him a coffin on credit, yet he wanted to bury

his wife in Texline. He returned to Texline, purchased on credit or made a casket, borrowed a neighbor's truck, and went to Clayton and removed the body from the State unembalmed and buried her the following day in Texline.

On the foregoing state of fact you inquire whether or not the farmer violated any part of Chapter 101 or any part of the Embalmers' rules.

As written, he violated both the rules and the law, but I seriously doubt if the courts of this State would entertain a prosecution in such a case or sustain a conviction under such facts and circumstances.

It should be noted, however, that Section 6 of Chapter 101, although not as far reaching as the Embalmers' rules, nevertheless in and of itself seems to go a long ways; and if {*187} it goes too far, the law just as the rules, if arbitrarily or unreasonably applied, may likewise be invalid in part.

The first part of Section 6 provides as follows:

"After this Act becomes a law, it shall be unlawful for any person, not an embalmer holding a valid New Mexico license as now or hereafter provided by law, to advertise, practice, or pretend to practice the science of embalming, either by arterial cavity, or any other treatment, or to prepare for transportation by railroad, express, airplane, automobile or by any licensed common carrier any dead human body."

Undoubtedly the foregoing is proper police power legislation providing in substance that bodies may be embalmed in this State only by an embalmer holding a valid New Mexico license. The foregoing does not purport to require embalming for any particular purpose. Such legislation is undoubtedly valid.

Section 6 then provides as follows:

"It shall be unlawful for any railroad, express or airplane company or any licensed common carrier to receive for transportation any dead human body unless said body has been prepared by an embalmer holding a valid New Mexico license,".

On its face, the foregoing portion of Section 6 attempts to require embalming before a body may be transported by common carrier. Such legislation should be valid because a common carrier may carry passengers or other objects of merchandise in the same conveyance and legislation requiring embalming in such cases is undoubtedly proper.

Section 6 then provides as follows:

"It shall be unlawful * * * for any individual, firm or corporation operating either a public or **private conveyance** upon the **public highways** in the State of New Mexico to accept for removal, or remove from the State of New Mexico, any dead human body

unless said body has been prepared and **encased** by an embalmer holding a valid New Mexico license as now required by law." (Underscoring ours)

There may be some doubt as to the validity of the last quoted portion of Section 6 in so far as the same might apply to the transportation by **private conveyance** of a human body that died from a non-communicable or non-contagious disease. In other words, in so far as I am informed, no law or rule of either the Health Department or the Embalmers requires embalming of a body before burial in this State unless said body be first shipped by a transportation company. The relatives of a deceased Clayton resident may bury him in Clayton without the necessity of the body being embalmed and encased by a New Mexico Embalmer, but the relatives of a deceased Texline resident who died in Clayton cannot bury him in Texline, 10 miles away, unless such body be embalmed and encased by a New Mexico Embalmer, irrespective of the cause of death or mode of transportation of the body from Clayton to Texline. Does this not discriminate against the relatives of the Texline resident, and does it not require that they undergo an expense not demanded of the relatives of the New Mexico resident? It may be, therefore, that under some circumstances the foregoing portion of Section 6 may be invalid as being unreasonable and discriminatory, and may even be a burden on interstate commerce. Be that as it may, I am merely suggesting the questions that might arise in any prosecution based on some purported violation of Chapter 101 or the Embalmers' rules, as inquired by you.

Of course, Section 6 does have a qualifying or excepting clause which attempts or seems to qualify the whole of Section 6. In so far as this {*188} qualifying clause might apply to the matters herein, the same provides as follows:

"The provisions of this section shall not apply * * * * to any person caring for or burying the dead without compensation or remuneration,".

The foregoing qualifying clause might be construed as meaning that where a Texline resident dies in Clayton of a non-communicable or non-contagious disease, the relatives or a friend using a private conveyance, **not for hire**, may transport the body back to Texline without the necessity of embalming and encasing. If this be the proper construction of said qualifying clause, then the most flagrant objections to the act would be removed. This is a matter for the courts to decide, although such a construction is possible and reasonable.

I shall state my general conclusions on this matter as follows:

1. Clearly, either the rules of the Department of Public Health or the Board of Embalmers may require embalming and disinfecting of a dead human body prior to shipment by a common carrier, irrespective of the point of destination.
2. Clearly, either the rules of the Department of Public Health or the Board of Embalmers could require the embalming and disinfecting of a human body that died from a communicable or contagious disease prior to transportation upon the highways

of New Mexico by private or public conveyance, or by railroad, regardless of point of destination.

3. Before a body is removed from the State by private conveyance, or transported by private conveyance to some point within the State, the Department of Public Health or the Board of Embalmers or both could require an examination of the body for the purpose of determining the cause of death, and require a transportation or removal permit. The object of such a regulation would be to determine whether or not the body died of some communicable disease and, if so, embalming could be required before transportation.

4. Under Chapter 101 it does definitely appear that a human body that died of a non-communicable or non-contagious disease cannot be required to be embalmed and encased before removal from the State by private conveyance over a route other than a public highway. To this extent, the rules of the New Mexico Board of Embalmers clearly exceed the statutory authority under Section 6.

5. Whether the Department of Public Health or the Board of Embalmers may require the embalming and encasing of a human body that died of no communicable or contagious disease, as a condition precedent to its removal from the State by private conveyance upon the public highways, presents a doubtful proposition. This is so, particularly in view of the fact that no such requirement is apparently made for the transportation of such a body by private conveyance upon the public highways to a point within New Mexico. In other words, as I interpret the present rules of the Board of Embalmers and the Department of Public Health, such a body may be taken the length of the State by private conveyance upon the public highway from Raton to Las Cruces without embalming, but such a body may not be taken from Clayton to Texline, a distance of 10 miles, without being first embalmed by a licensed New Mexico embalmer and encased. In some cases, as already pointed out, such a law or rule would be unreasonable and discriminatory. In other cases the same might apply. It depends entirely upon the interpretation given and the application made of the law and the rules to a particular fact situation.

In view of the apparent conflict between Chapter 39 and Chapter 101 in the delegation by the Legislature {*189} of the power to regulate the transportation of dead human bodies, and in view of the conflict between the rules of the Department of Public Health and the New Mexico Board of Embalmers, and in view of the doubtful constitutionality of portions of Section 6 of Chapter 101, as well as portions of Rules 1, 3 and 4 of the Board of Embalmers as applied to certain fact situations, I would suggest that the two Departments, the Department of Public Health and the New Mexico Board of Embalmers, attempt to adopt harmonious and cooperative rules that may be constitutionally applied until such time as the Legislature may more accurately define the respective powers of the two Departments.

In your request you also made several other inquiries which we shall answer chronologically.

(a) If some person violates any part of Chapter 101 or transportation rules 1 and 4 of the Board of Embalmers, who should prosecute him?

Answer: Undoubtedly the District Attorney of the District where the offense was committed would be willing to prosecute such a case upon proper complaint being made to him by any person interested.

(b) May any licensed embalmer issue a transportation permit, regardless of whether he embalmed or encased the body?

Answer: Preferably, the embalmer who prepared and encased the body should issue the transportation permit, but, as I construe the rules of the Board of Embalmers, apparently any licensed embalmer in the State who is satisfied in the matter may issue a transportation permit.

(c) May there be a charge for the issuing of a transportation permit or paster by a licensed embalmer?

Answer: No, the Board in adopting rules and regulations cannot exceed the strict authorization of the statute. The Legislature did not delegate to the Board of Embalmers the power to make a charge for issuing such a permit. *Reins vs. State (Ala.)*, 82 So. 576; *State vs. Heffernan (N. M.)*, 67 P. (2) 241.

(d) Is the Health Department and its agents (Health officers and subregistrars) responsible for enforcing Chapter 101 and the transportation rules of the State Board of Embalmers?

Answer: No, not unless by regulation adopted by the Department of Public Health they undertake or assume such responsibility. The agents of the Health Department may, however, just as any citizen may, complain of any individual to the proper officers with respect to the violation of any portion of Chapter 101 or rules of the Board of Embalmers.

(e) What can be done when an undertaker in charge of a body refuses to sign the death certificate when requested so to do by the Health Department?

Answer: If he is actually the undertaker in charge and refuses to sign the death certificate, apparently the only recourse is that he be prosecuted under Section 14 (1), Chapter 39, Laws of 1937, for violation of Section 5 of your regulations governing the reporting of deaths and births.

Trusting the foregoing will be of some information to you, I am

By: FRED J. FEDERICI,

Asst. Atty. Gen.