Amended Open Agenda
Missouri State Board of Embalmers
and Funeral Directors

October 20, 2009
Division of Professional Registration
3605 Missouri Blvd.
Jefferson City, Missouri

Tuesday, October 20, 2009 – 8:00 a.m. OPEN MEETING
Tuesday, October 20, 2009 – 8:01a.m. CLOSED MEETING

Call to Order
Roll Call

1. **Approval of Agenda**

Closed Meeting. The Board will move into closed session pursuant to Section 610.021 Subsection (14) and 324.001.8 RSMo for discussing educational transcripts and/or test scores and/or complaints and/or audits and/or investigative reports and/or other information pertaining to the licensee or applicant for licensure; Section 610.021 Subsection (1) RSMo for discussing general legal actions, causes of action or litigation and any confidential or privileged communications between this agency and its attorney; Section 610.021 Subsection (1) RSMo and 324.001.9 RSMo for deliberation on discipline; Section 610.021 Subsection (3) RSMo discussing hiring, firing, disciplining or promoting an employee of this agency; Section 610.021 Subsection (13) RSMo for making performance ratings pertaining to individual employees; Section 610.021 Subsection (7) RSMo for reviewing testing and examination materials; Section 610.021 Subsection (14) and Section 620.010.14 Subsection (5) RSMo for proceedings required pursuant to a disciplinary order concerning medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment of specific licensees; and Subsection of 610.021 RSMo for the purpose of reviewing and approving the closed minutes of previous meetings.

Tuesday, October 20, 2009 – 11:00 a.m.
OPEN MEETING

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2. **Buescher Memorial Home & Barbara Buescher Disciplinary Hearing- 11:00am**

Closed Meeting. The Board will move into closed session pursuant to Section 610.021 Subsection (14) and 324.001.8 RSMo for discussing educational transcripts and/or test scores and/or complaints and/or audits and/or investigative reports and/or other information pertaining to the licensee or applicant for licensure; Section 610.021

Subsection (1) RSMo for discussing general legal actions, causes of action or litigation and any confidential or privileged communications between this agency and its attorney; Section 610.021 Subsection (1) RSMo and 324.001.9 RSMo for deliberation on discipline; Section 610.021 Subsection (3) RSMo discussing hiring, firing, disciplining or promoting an employee of this agency; Section 610.021 Subsection (13) RSMo for making performance ratings pertaining to individual employees; Section 610.021 Subsection (7) RSMo for reviewing testing and examination materials; Section 610.021 Subsection (14) and Section 620.010.14 Subsection (5) RSMo for proceedings required pursuant to a disciplinary order concerning medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment of specific licensees; and Subsection of 610.021 RSMo for the purpose of reviewing and approving the closed minutes of previous meetings.

12:00 Adjourn for lunch

Tuesday, October 20, 2009 – 1:00 p.m.
OPEN MEETING

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3. **Future Meeting Dates**

4. **SB 1 Implementation**
   Potential Non-Emergency Rule Discussion

5. **Electronic Death Certificate – Update**

6. **Special Deputy Receiver – Update**

7. **MFDEA/Don Otto - Update**

8. **Robert Cowherd Letter/Consumer Funeral Assurance (CFA)**

9. **Open Discussion – Dialogue with General Public Attending Open Session**
   Continuation and/or Completion of any Unfinished Open Session Business

10. **Other**

Closed Meeting. The Board may move into closed session pursuant to Section 610.021 Subsection (14) and 324.001.8 RSMo for discussing educational transcripts and/or test scores and/or complaints and/or audits and/or investigative reports and/or other information pertaining to the licensee or applicant for licensure; Section 610.021 Subsection (1) RSMo for discussing general legal actions, causes of action or litigation and any confidential or privileged communications between this agency and its attorney; Section 610.021 Subsection (1) RSMo and 324.001.9 RSMo for deliberation on discipline; Section 610.021 Subsection (3) RSMo discussing hiring, firing, disciplining or promoting an employee of this agency; Section 610.021 Subsection (13) RSMo for

making performance ratings pertaining to individual employees; Section 610.021 Subsection (7) RSMo for reviewing testing and examination materials; Section 610.021 Subsection (14) and Section 620.010.14 Subsection (5) RSMo for proceedings required pursuant to a disciplinary order concerning medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment of specific licensees; and Subsection of 610.021 RSMo for the purpose of reviewing and approving the closed minutes of previous meetings.

Adjournment

Revised and Reposted October 19, 2009
9:30 a.m.
Revised and Re-Posted October 14, 2009
7:57a.m.
Posted September 25, 2009
8:00 a.m.

Jeremiah W. (Jay) Nixon
Governor
State of Missouri

Jane A. Rackers, Division Director
DIVISION OF PROFESSIONAL REGISTRATION

Department of Insurance
Financial Institutions
and Professional Registration
John M. Huff, Director

STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS
3605 Missouri Boulevard
P.O. Box 423
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Becky Dunn
Executive Director

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BEFORE THE MISSOURI STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS

STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS,	)	
Petitioner,	)	
v.	)	**No. 08-1328 EM**
BUESCHER MEMORIAL HOME &	)	
BARBARA BUESCHER	)	
Respondents.	)	

CERTIFIED MAIL 7004 1350 0003 1344 5394

NOTICE OF DISCIPLINARY HEARING

PLEASE TAKE NOTICE that the Missouri State Board of Embalmers and Funeral Directors, is in receipt of the July 28, 2009 decision of the Administrative Hearing Commission, State of Missouri, in the case of *State Board of Embalmers and Funeral Directors vs. Buescher Memorial Home & Barbara Buescher, Case Number,* Case No. 08-1328 EM, wherein the Administrative Hearing Commission found that cause to take disciplinary action against your funeral establishment and funeral director licenses under Sections 333.061.5, 333.121.2(5), (6), (13) and (15), and 436.063, RSMo and pursuant to which the State Board of Embalmers and Funeral Directors has authority to revoke, suspend, or probate licenses pursuant to Section 333.121, RSMo.

NOW THEREFORE, the State Board of Embalmers and Funeral Directors shall, pursuant to Section 621.110, RSMo 2000, hold a hearing for the purpose of determining the appropriate disciplinary action on **October 20 , 2009, at 11:00 a.m. at the Division of Professional Registration, 3605 Missouri Blvd., Jefferson City, Missouri.**

All parties will have the right to appear and be represented by legal counsel, and to a full, fair and open hearing as provided for in Chapter 536, RSMo 2000 and Section 621.110, RSMo 2000. Separate legal entities such as corporations must be represented by legal counsel.

Dated this 28 day of August, 2009.

Becky Dunn

State Board of Embalmers and Funeral Directors
Becky Dunn, Executive Director

cc: Margaret Landwehr, Assistant Attorney General
Earl Kraus, Senior Legal Counsel, Division of Professional Registration

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Buescher Memorial Home
429 E Capitol Ave
Jefferson City, MO 65101

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

☐ Agent
☐ Addressee

B. Received by *(Printed Name)*

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number
(Transfer from service label) 7004 1350 0003 1344 5394

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

Before the
Administrative Hearing Commission
State of Missouri

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ATTORNEY GENERAL

STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS,	)	
Petitioner,	)	
vs.	)	No. 08-1328 EM
BUESCHER MEMORIAL HOME & BARBARA BUESCHER,	)	
Respondents.	)	

ORDER

We grant part of the second motion for summary decision filed by the State Board of Embalmers and Funeral Directors ("the Board") as follows:

Count I

1. Barbara Buescher's and Buescher Memorial Home's ("Respondents") failure to forward Virginia L. Vossen's final payment of $1,816.03 to Vossen's preneed contract trust fund is cause to discipline Buescher's funeral director license and Buescher Memorial Home's funeral establishment license ("the Home's license") for incompetence and gross negligence under § 333.121.2(5)[1] and a violation of professional trust or confidence under § 333.121.2(13).

[1]Statutory references are to RSMo 2000, unless otherwise noted.

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2. Respondents' retention of an amount greater than 20 percent of the total of Vossen's preneed contract[2] violates § 436.027 and is cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence under § 333.121.2(5) and for a violation of professional trust or confidence under § 333.121.2(13).

3. The violation of § 436.027 is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(15).

4. The violation of § 436.027 is cause to discipline the Home's preneed provider and seller registrations ("the Home's registrations") under § 436.063.

Count II

1. Respondents' conduct regarding the preneed and at-need contracts[3] for Kenneth G. Bolten's funeral is cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence and a violation of professional trust or confidence under § 333.121.2(5) and (13).

2. Respondents' conduct regarding the at-need contract for Bolten's funeral violates § 436.011.2, which is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(15).

3. Respondents' violation of § 436.011.2 is cause to discipline the Home's registrations under § 436.063 and the Home's license under § 333.061.5.[4]

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[2]Section 436.005(5) defines a "preneed contract" as one made to arrange a funeral for a death that has not yet occurred.

[3]Although the term "at-need" is used in the Board's Regulations 20 CSR 2120-2.060(14), (19) and (20) and 2.080(2), it is not defined. We infer from the Board's use of the term in these proceedings that, in contrast to the term "preneed," "at-need" refers to making funeral arrangements for one who has already died.

[4]RSMo Supp. 2008.

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Count III

1. Respondents' conduct regarding Helen L. Dooley's preneed contract violated §§ 436.035.1 and 436.053.1. Respondents' failure to place Dooley's payment in an account with joint control by Dooley is cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence under § 333.121.2(5)[5] and for a violation of professional trust or confidence under § 333.121.2 (13).[6]
2. Respondents' failure to cancel Dooley's contract and refund her deposits is cause to discipline Buescher's funeral director license and the Home's license and for a violation of professional trust or confidence under § 333.121.2 (13).[7]
3. Respondents' failure to refund Dooley's payment of $8,563.68 and to cancel Dooley's contract when asked in writing violated §§ 436.035.1 and 436.053.1(4) and is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(15).[8]
4. The Home's violations of §§ 436.035 and 436.053 are cause to discipline its registrations under § 436.063.

Count IV

1. Respondents' failure to itemize on certain preneed contracts and their mathematical errors that resulted in erroneous payments is cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence

[5]RSMo Supp. 2008. The conduct in Count III occurred after the August 28, 2007, effective date of the 2007 amendment to § 333.121. Laws 2007, S.B. 272 § A (94th Gen. Assembly., 1st Reg. Sess'n). However, the amendment did not affect any of the provisions in § 333.121.2 upon which the Board relies in its second motion for summary decision.

[6]RSMo Supp. 2008.

[7]RSMo Supp. 2008.

[8]RSMo Supp. 2008.

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under § 333.121.2(5) and a violation of professional trust or confidence under § 333.121.2(13).

2. Respondents' failure to itemize on certain preneed contracts violated § 436.007.1(3) and is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(15).

3. The conduct described in the "ten summaries of conduct"[9] is cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence under § 333.121.2(5) and for violation of professional trust or confidence under § 333.121.2(13).

4. The discrepancies in the services listed and paid regarding the preneed contracts of Louise I. Gaertner and Margaret Caroline Pauline Wolken and the resulting charges identified in Finding of Fact 68 violated § 436.011.2. This is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 436.063, § 333.061.5[10] and § 333.121.2(15).

Count V

1. Respondents violated §§ 436.015.2(3) and 436.021.2(1), (2), and (5) when they failed to provide an investigator for the Board with copies of requested documents and failed to meet with the Board's inspector when requested. These violations are cause to discipline the Home's registrations under § 436.063.

2. Respondents violated §§ 333.101 and 436.021.2(5) when they failed to meet with the Board inspectors as requested and did not answer their door when the inspector

[9]Conclusions of law, Count IV.
[10]RSMo Supp. 2008.

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was present. The violation of § 333.101 is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(6).[11]

3. Each of the violations of Chapter 436 established under Count V are cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(15).[12]

We deny parts of the Board's second motion for summary decision as follows:

Count I

1. There is no cause to discipline Buescher's embalmer license under § 333.121.2(5) and (13) because the alleged conduct relating to Vossen's preneed contract does not relate to the functions and duties of the practice of embalming.
2. We find no cause to discipline under § 436.061.2 because it does not address the disciplinary proceedings brought before us.

Count II

1. There is no cause to discipline Buescher's embalmer license under § 333.121.2(5) and (13) because the alleged conduct regarding the preneed and at-need contracts for Bolten's funeral does not relate to the functions or duties of the practice of embalming.
2. There is no cause to discipline Buescher's funeral director license or the Home's license for misconduct, fraud, misrepresentation, or dishonesty under § 333.121.2(5) regarding the preneed and at-need contracts for Bolten's funeral because the Board failed to prove fraudulent or willful intent.

[11]RSMo Supp. 2008. Respondents' conduct in Count V occurred before and after the amendment to § 333.121 in 2007.

[12]RSMo Supp. 2008.

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3. We find no cause to discipline Respondents under § 333.121.2(4), (14), and (20) because the Board failed to prove any fraudulent or willful intent relating to Bolton's preneed and at-need contracts.

4. We find no cause for discipline under § 436.061.2 because it does not address the disciplinary proceedings brought before us.

5. We find no cause for discipline under § 436.015.4 because it only provides civil remedies for those having a cause of action against a licensee for the licensee's liabilities under a preneed contract.

Count III

1. We find no cause for discipline regarding Respondents' alleged false promise regarding the Dooley preneed contract because the Board made no such allegation in its first amended complaint.

2. There is no cause to discipline Buescher's embalmer license under § 333.121.2(5) and (13)[13] because the alleged conduct regarding the Dooley contract does not relate to the functions or duties of the practice of embalming.

3. There are no violations of Chapter 436 and no cause to discipline Respondents under § 333.121.2(15)[14] for any failure to set out in detail the final disposition of the dead body and funeral services, facilities, and merchandise to be provided and to identify the preneed trust to which contract payments were to be deposited because the parties opted for the alternative procedure that § 436.053 allows.

4. We find no cause for discipline under § 436.061.2.

[13]RSMo Supp. 2008.
[14]RSMo Supp. 2008.

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Count IV

1. There is no cause to discipline Buescher's embalmer license under § 333.121.2(5) and (13) because the conduct does not relate to the functions or duties of the practice of embalming.
2. There is no cause to discipline Respondents under § 333.121.2(4) for failing to itemize in preneed contracts or for the conduct described in the "ten summaries of conduct"[15] because there is no evidence of fraudulent or willful intent.
3. Except for one instance of Respondents withholding a service for which Louise I. Gaertner and Margaret Caroline Pauline Wolken were charged, the Board failed to show violations of § 436.011.2 regarding their preneed contracts and the embalming costs in Floyd Black's preneed contract.
4. We find no cause for discipline under § 436.015.4.

Count V

1. We reject the Board's reliance upon § 436.061.2 because it does not address disciplinary proceedings brought before us. Section 436.061.2 sets forth the remedies available to the attorney general when he files a judicial proceeding to enforce Chapter 436.
2. We find no cause for discipline under § 436.015.4.

The Board shall notify us by August 11, 2009, whether it wants to proceed to hearing on those portions of the first amended complaint for which we did not grant its second motion for summary decision.

[15]Conclusions of law, Count IV.

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Procedure

On July 18, 2008, the Board filed a complaint to establish cause to discipline Respondents. On December 24, 2008, the Board filed a motion for summary determination. On January 26, 2009, we denied the motion because there had been no service obtained on Respondents. On February 11, 2009, the Board filed a first amended complaint. On February 24, 2009, the original complaint, our notice of complaint/notice of hearing, the Board's motion for summary determination, our order of January 26, 2009, the first amended complaint, and our notice setting the hearing for July 14, 2009, were personally served upon Respondents. Respondents have not responded to the original or the first amended complaint. The Board filed its second motion for summary decision on June 1, 2009.[16] We gave Respondents until June 15, 2009, to respond, but they did not respond.

Findings of Fact

1. Buescher holds an embalmer license and a funeral director license, which are current and active and were so during the events set out below.

2. Buescher operates Buescher Memorial Home, located at 429 East Capitol Avenue, Jefferson City, Missouri.

3. The Home holds a funeral establishment license, a preneed seller registration, and a preneed provider registration, which are current and active and were so during the events set out below.

Count I – Virginia L. Vossen Contract

4. On or about October 23, 1990, Respondents entered into a preneed contract for funeral services with Virginia L. Vossen.

[16]The type of relief sought with a motion for summary determination is now sought by a motion for summary decision. 1 CSR 15-3.446(5), effective January 1, 2009.

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5. The total amount of the preneed contract for funeral services was $4,949.

6. On or about October 23, 1990, Vossen paid Respondents the initial deposit of $500 that was due on the preneed contract.

7. Vossen continued to make regular payments on the preneed contract to Respondents.

8. Vossen's daughter, Barbara Germann, contacted the Home to inquire whether an outstanding amount existed on Vossen's preneed contract.

9. Buescher contacted Germann and notified her that Vossen's preneed contract had an outstanding balance of $1,816.03.

10. On or about August 29, 2003, Respondents received a check from Germann for the outstanding balance of $1,816.03.

11. On or about September 29, 2003, the check amount of $1,816.03 was paid to Buescher by Central Bank.

12. Buescher did not pay the $1,816.03 into the trust fund for Vossen's preneed contract, which was being handled by American Prearranged Services, Inc. ("APS").

13. On or about November 12, 2005, Vossen died.

14. On or about November 14, 2005, Germann and her family made numerous attempts to contact Buescher. Buescher acknowledged receiving their check, but refused to meet with them to discuss the outstanding amount due on Vossen's contract.

15. On or about November 14, 2005, John McCulloch, the president of APS, contacted Buescher on behalf of the Germann family. Buescher told McCulloch that she would pay the remaining balance to APS if McCulloch would personally pick up the check, but she refused to meet with the Germann family.

16. On or about November 14, 2005, McCulloch again contacted Buescher and explained to Buescher that the family wanted the funds directly from her. Buescher told McCulloch to inform the family that she would have the check, payable to APS, ready for pickup by McCulloch only.

17. On or about November 14, 2005, McCulloch picked up the check from Buescher, payable to APS, for $1,816.03.

18. As of June 1, 2009, APS no longer conducts business with either Respondent.

Count II – Kenneth O. Bolten Contract

19. On or about September 5, 1995, Kenneth O. Bolten entered into a preneed contract with Respondents for $5,275 to cover all funeral expenses upon his death.

20. Included in the preneed contract were the cost of a casket ($2,285), the cost of an outer burial container ($995), and the cost of funeral services ($1,995).

21. Pursuant to the preneed contract, Bolten paid $3,100, with the remaining $2,175 to be paid out of an irrevocable trust that Bolten held with Exchange National Bank.

22. On or about October 5, 2005, Bolten died.

23. At the time of his death, Bolten held $3,100 in an irrevocable trust with Exchange National Bank and two insurance policies in the amount of $1,000 through Business Men's Assurance Company of America, both of which had been earmarked to cover the remainder of Bolten's funeral expenses through the preneed contract.

24. After Bolten's death, Jeffrey Thomas, the personal representative of Bolten's estate, contacted the Home to finalize Bolten's funeral arrangements.

25. When Thomas made contact with Respondents, Buescher represented to Thomas that certain items were not included in Bolten's preneed contract and would cost extra.

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26. Thomas requested a copy of Bolten's preneed funeral plan, but Buescher never provided Thomas with a copy.

27. On or about October 5, 2005, Thomas, on behalf of Bolten, entered into an at-need contract with Respondents in the amount of $857.47 to cover additional costs for Bolten's funeral, including, but not limited to:

a. the cost of printing a newspaper obituary ($86.00),

b. the cost of flowers ($212.45),

c. the cost of an American War Veteran's grave marker ("V.A. grave marker") ($125.00),

d. the cost of certified copies of the death certificate ($43.00),

e. the cost of a "memorial package" ($125.00), and

f. taxes ($391.72).

28. The actual cost of printing the newspaper obituary was $66.

29. Respondents overcharged Bolten's estate $20 for the cost of printing the newspaper obituary.

30. The actual cost of flowers was $177.

31. Respondents overcharged Bolten's estate $35.45 for the cost of flowers.

32. On or about October 7, 2005, Bolten was interred at Hawthorn Memorial Gardens in Jefferson City, Missouri.

33. On or about October 7, 2005, Respondents completed and held the form requesting a V.A. grave marker and its delivery to Hawthorn Memorial Gardens.

34. Following Bolten's interment, Hawthorn Memorial Gardens attempted to contact Buescher numerous times regarding the V.A. grave marker, but Buescher did not respond to these requests.

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35. Hawthorn Memorial Gardens was eventually forced to make the final arrangements for obtaining the V.A. grave marker, which it finally received on or about March 17, 2006.

36. Numerous times Thomas requested an itemized statement of the total of $857.47 in charges paid for the at-need contract from Buescher, but Buescher never sent Thomas the statement.

37. On or about November 21, 2005, December 8, 2005, and February 14, 2005, R. Max Humphreys, attorney for Thomas, made unsuccessful attempts to contact Buescher to request a copy of Bolten's prepaid funeral contract and an accounting of the additional $857.47 that Thomas paid for Bolten's funeral arrangements. Buescher did not provide Humphreys the contract or accounting documents.

38. The newspaper obituary, death certificates, memorial package, and flowers, all included in the total additional cost of $857.47 charged to Thomas, were optional items that Bolten never requested that Respondents provide.

Count III – Helen L. Dooley Contract

39. On October 28, 2002, Respondents and Carl D. Dooley, as representative for Helen L. Dooley, entered into a preneed contract for funeral services ("Dooley contract").

40. The Dooley contract provides:

> FUNERAL PRE-ARRANGED CONTRACT
> IRREVOCABLE TRUST ACCOUNT
>
> The undersigned provider and the purchaser or beneficiary of the trust (or agent for the purchaser/beneficiary) enter into this contract for the purpose of having available funds to be used at the time of death of the beneficiary.
>
> The agreement provides that all funds held in the account shall be applied at the beneficiary's death toward the purchase of the funeral or burial services or facilities, or funeral merchandise,

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> selected by the beneficiary or the responsible party after the beneficiary's death as the beneficiary has designed to be used.
>
> This agreement provides that all payment [sic] made for the above mentioned purpose are to be deposited in an account by the provider and the beneficiary with a financial institution chartered and regulated by the federal or state government authorized to do business in Missouri.
>
> For the purpose of allowing or qualifying the beneficiary, if the beneficiary is eligible, becomes eligible, or desires to become eligible to qualify or to receive old age assistance, welfare, Social Security, state or federal aid, or other public assistance under state or federal law, the beneficiary hereby elects to make this trust to which these funds are placed irrevocable and irrevocably waive the right to cancel this agreement. If the death of the beneficiary occurs outside the general area served by the provider, then the provider shall make arrangements to provide services according to the location of the death of the beneficiary.
>
> After the services for the beneficiary have been provided and rendered, the provider shall withdraw the funds so stated and apply them to the services as selected by the beneficiary.
>
> The amount of $ 8563.68 to fund the selected services as by this contract shall be deposited in the Central Bank (Authorized Bank) located at Jefferson City, Missouri.
>
> IRREVOCABLE OPTION: For the purpose of qualifying myself for or maintaining my eligibility for public assistance under state or federal law, I hereby elect to make the trust to which these funds are placed irrevocable and waive my right to cancel this Agreement.[[17]]

41. The Dooley contract did not set out in detail the final disposition of the dead body and funeral services, facilities, and merchandise to be provided.

42. On or about October 28, 2002, Dooley paid the amount due on the preneed contract to Respondents.

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[17]Ex. H-1.

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43. On or about November 7, 2002, a check in the amount of $8,563.68 was paid to Central Bank by Buescher, and a certificate of deposit ("CD") was purchased in the name of "Buescher Memorial Home for Helen L. Dooley."

44. This CD was neither placed in an account jointly with the purchaser's name (Carl D. Dooley) nor placed in an account under joint control with Dooley.

45. On or about August 1, 2007, a representative of Dooley contacted Buescher and requested that her funds be transferred from the Home to another local funeral home.

46. Leesa Wimberley, Dooley's daughter, made numerous attempts to contact Buescher and met with her on or about August 31, 2007.

47. On August 31, 2007, Buescher photocopied the documents that Wimberley provided.

48. Dooley had a stroke in September 2007, but was still alive on June 1, 2009.

49. Pete Fleischmann is an investigator for the Division of Professional Services. On or about October 19, 2007, Fleischmann met with Buescher on behalf of the Board. In that meeting, Buescher recalled the family of Dooley and that they wanted to transfer funds used to purchase an irrevocable preneed funeral agreement. She also stated that she had told the family that this could not be done until another provider was selected to transfer the funds to.

50. Fleischmann asked Buescher if he could obtain a copy of the preneed file maintained by Respondents. Buescher said that if Fleischmann could send her a copy of the documents he had received from the family, she would review them and send him what he did not have. Fleischman reiterated that he needed a copy of the preneed file listing Helen Dooley as the beneficiary.

51. Buescher stated that the family just wanted the money out of the fund and then said that she would just send them the money and be "done with it." Fleischmann stated that he still

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needed a copy of the file for his report, and she again stated that she would just send the family the money.

52. Buescher did not provide the requested documentation at the time of Fleischmann's request. Buescher finally agreed to fax a copy of her file to Fleischmann, but stated that it would be the following week.

53. On October 23, 2007, Fleischmann had not received the documents from Buescher. Fleischmann got no answer when he attempted to call her at approximately 8:45 a.m.

54. On October 25, 2007, Fleischmann again attempted to call Buescher at the Home. The first two attempts resulted in busy signals and in the third attempt there was no answer, answering service or voice mail.

55. On October 26, 2007, Fleischmann successfully contacted Buescher by telephone. She indicated surprise that he had not received the documents and said that she had faxed them to him. Buescher stated that she would again fax the documents to Fleischmann.

56. To date, Buescher has not provided the requested documentation to Fleischmann.

57. On November 20, 2008, Wimberley sent a written letter, certified mail, return receipt requested, on her mother's behalf, requesting a full refund of the $8,563.58 payment made to Respondents. The letter states:

> According to Chapter 436.035 of the Revised Statutes of Missouri, the purchaser of a contract may cancel that contract without reason anytime [sic] before use of the contract and receive full refund of all payments made on that contract within 15 days of the request for a refund.
>
> As a representative of my mother, Helen L. Dooley, having Durable Power of Attorney for her affairs (a copy of which is enclosed), and on her behalf I am requesting today that a full refund be made of the $8,563.68 payment made to Buescher Memorial Home on October 28, 2002.[[18]]

[18]Ex. H-2.

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58. Wimberley's letter was delivered to Respondents on November 25, 2008.

59. To date, Buescher has not provided Wimberley with the funds or transferred them to another funeral establishment.

Count IV – Preneed and At-Need Contracts
Containing Similar or Identical Violations of Law

60. In 2006, the Board conducted two investigations of Respondents. Pursuant to these investigations, Buescher was required to produce various at-need and preneed contracts for the Board's inspection.

61. The preneed contracts of Herbert Raithel, Winona Wagner, and Edna L. Phillips failed to itemize what was purchased.

62. The preneed and at-need contracts of Mildred Raithel, Herbert Raithel, James I. Miller, and Mary Hilgert contained mathematical errors resulting in underpayments.

63. The preneed and at-need contracts of Stephanie C. Novy, Erma H. Stuart, Louise I. Gaertner, Maxine J. Pullam, and Ralph L. Coshow contained mathematical errors resulting in overpayments.

64. The preneed and at-need contracts of Mildred Raithel, Herbert Raithel, Alva F. Engelbrecht, Eileen A. Fisher, Carl R. Evans, Irene Kiso, Winona Wagner, Georgia A. Stark, Erma H. Stuart, Clarence F. Phillips, Drucella O. Durham, Maxine J. Pullam, James I. Miller, Edna L. Phillips, Mary Hilgert, Carol E. Borron, and Earl Hodges overcharged the purchasers of said contracts in that sales tax was assessed on services in addition to merchandise sold.

65. The preneed and at-need contracts of Irene Kiso overcharged the purchaser in that sales tax was assessed on previously computed sales tax.

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66. The preneed and at-need contracts of Georgia A. Stark and Maxine J. Pullam overcharged the purchasers in that the same sales tax was added to the total contract amount more than once.

67. The preneed and at-need contracts of Helen White and Carol E. Borron contained discrepancies in that the at-need contract services and merchandise amounts listed were less than the preneed payments, but the preneed amounts were charged.

68. The preneed and at-need contracts of Louise I. Gaertner and Margaret Caroline Pauline Wolken contained discrepancies in that services listed and paid for on the preneed contract were not included on the at-need contract, and/or additional fees were charged on the at-need contract.

69. With regard to the preneed contract of Mary St. George, a higher price was charged than what had been previously agreed to in the original preneed contract.

70. With regard to the preneed contract of Louise I. Gaertner, although Gaertner had contracted for transportation costs as part of her preneed contract, Respondents charged a transportation fee of $187.50 after she died.

71. With regard to the preneed contract of Floyd Black, although Black had contracted for embalming costs as part of his preneed contract, Respondents charged his next of kin, Mary McGowan, for embalming after he died.

72. With regard to the preneed contract of Amy Creed, the total contract was in the amount of $3,500, and the total amount still owed by Respondents to the trustee, APS, is $3,500.

73. With regard to the preneed contract of Annandeane Steinmetz, the total contract was in the amount of $3,500, and the total amount still owed by Respondents to the trustee, APS, is $3,500.

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74. With regard to the preneed contract of Oda Scott, the total contract was in the amount of $5,000, and the total amount still owed by Respondents to the trustee, APS, is $5,000.

75. With regard to the preneed contract of Tillie Brown, the total contract was in the amount of $4,100, and the total amount still owed by Respondents to the trustee, APS, is $4,100.

76. With regard to the preneed contract of Anton Wolken, the total contract was in the amount of $4,030, and the total amount still owed by Respondents to the trustee, APS, is $4,030.

77. With regard to the preneed contract of June Nienhueser, the total contract was in the amount of $4,103, and the total amount still owed by Respondents to the trustee, APS, is $2,000.

78. With regard to the preneed contract of Emerson Nienhueser, the total contract was in the amount of $4,103, and the total amount still owed by Respondents to the trustee, APS, is $2,000.

79. With regard to the preneed contract of Roy Brown, the total contract was in the amount of $4,100, and the total amount still owed by Respondents to the trustee, APS, is $4,100.

80. With regard to the preneed contract of Margaret Pauline, the total contract was in the amount of $4,030, and the total amount still owed by Respondents to the trustee, APS, is $4,030.

81. With regard to the preneed contract of Warren West, the total contract was in the amount of $3,500, and the total amount still owed by Respondents to the trustee, APS, is $3,500.

82. With regard to the preneed contract of Bessie Licklider, the total contract was in the amount of $5,223, and the total amount still owed by Respondents to the trustee, APS, is $5,223.

83. With regard to the preneed contract of Joe Putnam, the total contract was in the amount of $4,000, and the total amount still owed by Respondents to the trustee, APS, is $2,000.

84. With regard to the preneed contract of Margaret Province, the total contract was in the amount of $600, and the total amount still owed by Respondents to the trustee, APS, is $300.

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85. With regard to the preneed contract of Anna Bushman, the total contract was in the amount of $5,000, and the total amount still owed by Respondents to the trustee, APS, is $5,000.

86. With regard to the preneed contract of Leona Johnston, the total contract was in the amount of $2,000, and the total amount still owed by Respondents to the trustee, APS, is $2,000.

87. With regard to the preneed contract of Eleanor Weavers, the total contract was in the amount of $5,000, and the total amount still owed by Respondents to the trustee, APS, is $5,000.

88. With regard to the preneed contract of Augusta Black, the total contract was in the amount of $545, and the total amount still owed by Respondents to the trustee, APS, is $45.41.

89. With regard to the preneed contract of Floyd Black, the total contract was in the amount of $1,145, and the total amount still owed by Respondents to the trustee, APS, is $580.32.

90. With regard to the preneed contract of Emil Sosa, the total contract was in the amount of $4,859.61, and the total amount still owed by Respondents to the trustee, APS, is $4,859.61.

91. With regard to the preneed contract o Alva Smith, the total contract was in the amount of $3,000, and the total amount still owed by Respondents to the trustee, APS, is $3,000.

92. With regard to the preneed contract of Barbara Wolfe, the total contract was in the amount of $600, and the total amount still owed by Respondents to the trustee, APS, is $600.

93. With regard to the preneed contract of Bessie Gilmore, the total contract was in the amount of $2,992, and the total amount still owed by Respondents to the trustee, APS, is $2,992.

94. With regard to the preneed contract of Sadie Stone, the total contract was in the amount of $3,500, and the total amount still owed by Respondents to the trustee, APS, is $3,500.

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95. With regard to the preneed contract of Roberta Couchman, the total contract was in the amount of $3,600, and the total amount still owed by Respondents to the trustee, APS, is $3,600.

96. With regard to the preneed contracts that were the subject of Findings of Fact 72 to 95, the total amount of outstanding balances that the Respondents owe to the trustee, APS, is $74,460.34.

Count V – Respondents' Non-Compliance with Board Investigations

97. Pursuant to the Board's investigations, and beginning on or around August 16, 2006, Board Investigator Fleischmann made numerous attempts to contact Buescher to schedule an interview.

98. After leaving several messages and receiving two requests from Buescher to reschedule already-scheduled interviews, Fleischmann was finally able to arrange an interview with Buescher on or about September 5, 2006.

99. At the September 5, 2006, interview, Fleischmann asked Buescher to describe the Home's procedure to sell a preneed contract and the procedure to deposit trust finds under a preneed contract and requested a written list of these procedures.

100. Buescher did not provide an answer to Fleischman regarding these procedures and did not provide a written list describing the procedures.

101. In the September 5, 2006, interview, Fleischmann requested copies of the Home's preneed contracts for the preceding five years, a list of the Home's preneed contracts written in the last five years that had not become at-need, and a copy of the insurance policies for Kenneth G. Bolten (hereinafter collectively referred to as "requested documentation").

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102. Buescher was unable to provide the requested documentation at the time of Fleischmann's request.

103. By September 27, 2006, Buescher still had not provided the requested documentation to Fleischmann. Fleischmann mailed Buescher a certified letter requesting that the information be forwarded to him within 10 days of receipt of the letter. Buescher received Fleischmann's letter on or about September 28, 2006.

104. As of October 13, 2006, Buescher still had not provided the requested documentation to Fleischmann.

105. On or about January 6, 2007, Buescher received a letter from the Board dated January 5, 2007. The letter notified Respondents of the Board's investigation into the practices of the Home and offered Buescher the opportunity to respond to the allegations by attending the Board's meeting on March 28, 2007.

106. Buescher did not respond to the Board's January 5, 2007 letter and did not attend the March 28, 2007, meeting.

107. On April 15, 2008, the Board sent a certified letter to Buescher that she received on or about April 16, 2008. The letter notified Respondents of the Board's additional investigation into the practices of the Home and offered Buescher the opportunity to respond to the allegations by attending the Board's meeting on April 22, 2008.

108. Buescher did not respond to the Board's April 15, 2008, letter and did not attend the April 22, 2008, meeting.

109. On October 7, 2008, Inspector Lori Hayes contacted Buescher to schedule an inspection of the Home. Buescher stated that she would be able to do the inspection on October 8, 2008, at 2 p.m.

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110. Later in the day on October 7, 2008, Buescher contacted the Board's office and asked that Hayes contact her before inspecting on October 8.

111. On October 8, 2008, Hayes contacted Buescher and Buescher stated that she would not be able to meet Hayes at 2 p.m. Hayes asked if she could come to her establishment in the morning. Buescher stated that she had a family coming in at 10 a.m. and that she would not be able to meet her.

112. No family was scheduled to meet with Buescher at 10 a.m. on October 8, 2008. The only automobiles around the funeral establishment at that time were Buescher's two vans.

113. On October 14, 2008, Hayes and Becky Dunn, Executive Director, went to the Home at approximately 2:30 p.m. and rang the doorbell a couple of times. Buescher failed to open the door.

Conclusions of Law

We have jurisdiction to hear this case.[19] The Board has the burden to prove facts for which the law allows discipline by a preponderance of credible evidence.[20]

I. Second Motion for Summary Decision

We may grant the Board's second motion for summary decision if the Board establishes facts that entitle it to a favorable decision and Respondents fail to genuinely dispute such facts.[21] The Board has submitted admissible evidence in the form of affidavits, business records, and the second request for admissions to which Respondents never responded.[22]

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[19]Section 621.045, RSMo Supp. 2008; § 436.063.

[20]***Missouri Real Estate Comm'n v. Berger***, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989); ***State Board of Nursing v. Berry***, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000).

[21]1 CSR 15-3.446(5)(A).

[22]1 CSR 15-3.446(5)(B).

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Respondents' failure to answer the second request for admissions establishes the matters asserted in the request, and no further proof is required.[23] That rule applies to all parties, including those acting without an attorney.[24]

Such deemed admissions can also establish "application of the facts to the law, or the truth of the ultimate issue, opinion or conclusion, so long as the opinion called for is not an abstract proposition of law."[25] Nevertheless, the General Assembly and the courts have instructed that we must:[26]

> make an independent assessment of the facts to determine whether cause for disciplining a licensee exists. . . . But this impartiality would be compromised if the determination of cause was not a separately and independently arrived at determination by the Hearing Commission.

We therefore independently apply the law to the facts that Respondents are deemed to have admitted.

II. Disciplinary Statutes

Section 333.061[27] provides for the suspension or revocation of funeral establishment licenses as follows:

> 5. The board . . . may suspend or revoke any license issued pursuant to this section if it finds, after hearing, that the funeral establishment does not meet any of the requirements set forth in this section as conditions for the issuance of a license, or for the violation by the owner of the funeral establishment of any of the provisions of section 333.121. . . .

Section 333.121 authorizes discipline for funeral directors, embalmers, and funeral establishments. Section 333.121.2 authorizes discipline for:

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[23]Supreme Court Rule 59.01, as applied to our proceedings by § 536.073 and 1 CSR 15-3.420(1); ***Killian Constr. Co. v. Tri-City Constr. Co.***, 693 S.W.2d 819, 827 (Mo. App., W.D. 1985).

[24]***Research Hosp. v. Williams***, 651 S.W.2d 667, 669 (Mo. App., W.D. 1983).

[25]***Briggs v. King***, 714 S.W.2d 694, 697 (Mo. App., W.D. 1986).

[26]***Kennedy v. Missouri Real Estate Comm'n***, 762 S.W.2d 454, 456-57 (Mo. App., E.D. 1988).

[27]RSMo Supp. 2008.

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> (4) Obtaining or attempting to obtain any fee, charge, tuition or other compensation by fraud, deception or misrepresentation;
>
> (5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by this chapter;
>
> (6) Violation of, or assisting or enabling any person to violate, any provision of this chapter, or of any lawful rule or regulation adopted pursuant to this chapter;
>
> * * *
>
> (13) Violation of any professional trust or confidence;
>
> (14) Use of any advertisement or solicitation which is false, misleading or deceptive to the general public or persons to whom the advertisement or solicitation is primarily directed;
>
> (15) Violation of any of the provisions of chapter 193, RSMo, chapter 194, RSMo, or chapter 436, RSMo;
>
> * * *
>
> (20) Willfully and through undue influence selling a funeral[.[28]]

Section 436.011.2 provides:

> Any person who knowingly permits a seller to sell a preneed contract designating him as the provider or as one of two or more providers who will furnish the funeral merchandise and services described in the preneed contract shall provide the funeral merchandise and services described in the preneed contract for the beneficiary. Failure of any such person to do so shall be a violation of the provisions of sections 436.005 to 436.071 and shall be cause for suspension or revocation of that person's license under the provisions of section 333.061, RSMo.

Section 436.063 allows discipline of preneed seller and provider registrations as follows:

> Whenever the state board determines that a registered seller or provider has violated or is about to violate any provision of sections 436.005 to 436.071 following a meeting at which the

[28]The subdivisions of § 333.121.2 that the Board relies upon are identical in RSMo 2000 and RSMo Supp. 2008.

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> registrant is given a reasonable opportunity to respond to charges of violations or prospective violations, it may request the attorney general to apply for the revocation or suspension of the seller's or provider's registration or the imposition of probation upon terms and conditions deemed appropriate by the state board in accordance with the procedure set forth in sections 621.100 to 621.205, RSMo. Use of the procedures set out in this section shall not preclude the application of the provisions of subsection 2 of section 436.061.

Count I – Virginia L. Vossen Preneed Contract

Respondents failed to forward Vossen's final payment of $1,816.03 to Vossen's preneed contract trust fund with APS. After Vossen died, § 436.051 governed:

> Upon the death or legal incapacity of a purchaser, all rights and remedies granted to the purchaser pursuant to the provisions of sections 436.005 to 436.071 shall be enforceable by and accrue to the benefit of the purchaser's legal representative or his successor designated in such contract, and all payments otherwise payable to the purchaser shall be paid to that person.

Respondents forwarded the payment over two years later, only when pressured to do so by APS and Vossen's daughter.

1. Professional Functions or Duties

The Board contends that this conduct is cause for discipline under § 333.121.2(5) as incompetence, misconduct or gross negligence in the performance of the functions or duties of the professions of a funeral director, embalmer, and funeral establishment.

Incompetence is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation.[29] Misconduct is the commission of wrongful behavior, intending the result that actually comes to pass or being indifferent to the natural consequences.[30] Gross negligence is a deviation from the standard of

[29] ***Tendai v. Missouri Bd. of Registration for Healing Arts***, 161 S.W.3d 358, 369 (Mo. banc 2005).
[30] ***Grace v. Missouri Gaming Commission,*** 51 S.W.3d 891, 900 (Mo. App., W.D. 2001).

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care so egregious as to demonstrate a conscious indifference to a professional duty.[31] We may infer the requisite mental state from the conduct of the licensee "in light of all surrounding circumstances."[32] A licensee cannot be found guilty of both misconduct and gross negligence because the requisite intent of each is exclusive of the other.

We deduce the functions or duties of embalmers and funeral directors from the definitions of their practices set forth in § 333.011:

> (6) **"Practice of embalming"**, the work of preserving, disinfecting and preparing by arterial embalming, or otherwise, of dead human bodies for funeral services, transportation, burial or cremation, or the holding of oneself out as being engaged in such work;
>
> (7) **"Practice of funeral directing"**, engaging by an individual in the business of preparing, otherwise than by embalming, for the burial, disposal or transportation out of this state of, and the directing and supervising of the burial or disposal of, dead human bodies or engaging in the general control, supervision or management of the operations of a funeral establishment.

The functions or duties of embalming relate to the physical preparation of the dead human body for funeral services, transportation, and burial. The mishandling of Buescher's obligations under Vossen's preneed contract has nothing to do with the functions or duties of an embalmer. Therefore, we find no cause to discipline Buescher as a licensed embalmer under § 333.121.2(5).

On the other hand, § 333.042.1 requires that an applicant for a funeral director license be tested on the "legal and practical knowledge of . . . preneed funeral contracts[.]" Therefore, § 333.121.2(5) applies to Buescher's funeral director license as well as the Home's license.

The Board contends that the failure to forward Vossen's final payment of $1,816.03 to Vossen's preneed contract trust fund constitutes incompetence, misconduct, or gross negligence.

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[31] ***Duncan v. Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs***, 744 S.W.2d 524, 533 (Mo. App., E.D. 1988).

[32] *Id.*

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By not responding to the second request for admissions, Respondents admitted their failure, but there is no evidence of willfulness. Therefore, we conclude that Respondents are guilty of incompetence and gross negligence, but not misconduct. There is cause for discipline under § 333.121.2(5). We find no cause to discipline Buescher as a licensed embalmer under § 333.121.2(5).

2. Professional Trust or Confidence

Professional trust is the reliance on the special knowledge and skills that professional licensure evidences.[33] Respondents' conduct violated the professional trust between Respondents and Vossen. There is cause to discipline Buescher's funeral director license and the Home's license under § 333.121.2(13). We find no cause to discipline Buescher as a licensed embalmer under § 333.121.2(13).

3. Violations of Chapter 436

Section 436.027 provides:

> The seller may retain as his own money, for the purpose of covering his selling expenses, servicing costs, and general overhead, the initial funds so collected or paid until he has received for his use and benefit an amount not to exceed twenty percent of the total amount agreed to be paid by the purchaser of such prepaid funeral benefits as such total amount is reflected in the contract.

The Board contends that Respondents violated § 436.027 when Buescher retained an amount in excess of 20 percent of the total agreed amount of $4,949. Respondents admit by their failure to respond to the second request for admissions that their conduct violated § 436.027, but there is no evidence of willfulness. The Board argues that this violation is cause for discipline under § 333.121.2(5) and (13). We conclude that Respondents are guilty of incompetence and gross negligence, but not misconduct. There is cause for discipline under § 333.121.2(5).

[33] ***Trieseler v. Helmbacher***, 168 S.W.2d 1030, 1036 (Mo. 1943).

Respondents' conduct violated the professional trust between Respondents and Vossen. There is cause for discipline under § 333.121.2(13). We find no cause to discipline Buescher as a licensed embalmer under § 333.121.2(5) and (13).

The Board also contends that the violation of § 436.027 is cause for discipline under § 333.121.2(15). The introductory paragraph in § 333.121.2 authorizes discipline for "any holder of any . . . license required by this chapter." "Any" is an all-inclusive term meaning "EVERY: --used to indicate one selected without restriction[.]"[34] Unlike subdivision (5), subdivision (15) does not contain language limiting its applicability to conduct in the course of the functions or duties peculiar to a particular license. Accordingly, § 333.121.2(15) authorizes the discipline of the holder of an embalmer license as well as a funeral director license for violations of Chapter 436. Therefore, the violation of § 436.027 also is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(15).

The Home's violation of § 436.027 also is cause to discipline its registrations under § 436.063.

The Board alleges that this violation also subjects the Home to discipline under § 436.061.2, which provides:

> Any violation of the provisions of sections 436.005 to 436.071 shall constitute a violation of the provisions of section 407.020, RSMo. In any proceeding brought by the attorney general for a violation of the provisions of sections 436.005 to 436.071, the court may, in addition to imposing the penalties provided for in sections 436.005 to 436.071, order the revocation or suspension of the registration of a defendant seller.

We find that the Board's reliance upon § 436.061.2 is misplaced because it does not address disciplinary proceedings brought before us. Instead, § 436.061.2 sets forth the remedies available to the attorney general when he files a judicial proceeding to enforce Chapter 436.

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[34]MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 56 (11th ed. 2004).

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Count II – Kenneth O. Bolten Contracts

The Board contends that the following conduct, undisputed by Respondents, is cause for discipline under § 331.121.2(4), (5), (13), (14), and (20):

a. Respondents required Thomas to enter into an at-need contract on behalf of Bolten and thereby charged Thomas an additional $857.47 for Bolten's funeral services, when the $857.47 was charged for optional items and services that Bolten never requested.

b. Respondents overcharged Thomas for the cost of printing the newspaper obituary and the cost of the flowers as part of the $85.47 at-need contract for funeral services.

c. Respondents failed to provide the V.A. grave marker paid for as part of the $857.47 at-need contract for Bolten's funeral services, and instead Hawthorn Memorial Gardens finalized the arrangements for and provided the V.A. grave marker.

When Respondents entered into the preneed contract, they formed a relationship of professional trust or confidence with Bolten, his personal representative, and his heirs. Respondents also formed a relationship of professional trust or confidence with Thomas when it entered into the at-need contract.

As with Count I, we find no cause to discipline Buescher's embalmer license under § 333.121.2(5) and (13) because the conduct does not fall within the practice of embalming. However, we do find cause to discipline Buescher's funeral director license and the Home's license for being guilty of incompetence and gross negligence, but not misconduct, under subdivision (5) and for violating a professional trust or confidence under subdivision (13).

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The Board's evidence is insufficient to prove cause for discipline under subdivisions (4), (14), and (20) because they all require a showing of fraudulent intent or willfulness. Fraudulent intent involves purposeful conduct in which a party misrepresents or falsifies facts to obtain a benefit or advantage.[35] Willful means acting deliberately.[36] The Board's evidence, though undisputed, is insufficient for any finding of fraudulent intent or willfulness.

The Board contends that the following conduct is cause to discipline Respondents for incompetence, misconduct, gross negligence, fraud, misrepresentation, and dishonesty under § 331.121.2(5) and violation of professional trust or confidence under § 333.121.2(13): Respondents failed to provide a statement of accounting of the additional $857.47 charges, as well as a copy of Bolten's preneed contract, when both were requested on numerous occasions by both Thomas and Thomas' attorney.

Again, we find no cause to discipline Buescher's embalmer license under subdivisions (5) and (13). As for Buescher's funeral director license and the Home's license, we find cause to discipline for incompetency and gross negligence pursuant to § 333.121.2(5) and for violating professional trust or confidence pursuant to subdivision (13). There is insufficient evidence to prove the requisite intent to establish misconduct, fraud, misrepresentation, and dishonesty.

The Board contends that the following conduct violates § 436.011.2: Respondents entered into a preneed contract with Bolten and subsequently required Thomas to pay an additional $857.47 as part of an at-need contract for Bolten that included optional items and services never requested by Bolten.

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[35] ***Hernandez v. State Bd. of Regis'n for Healing Arts***, 936 S.W.2d 894, 899 ns.2 and 3 (Mo. App., W.D. 1997).

[36] ***Grace v. Missouri Gaming Commission,*** 51 S.W.3d 891, 900 (Mo. App., W.D. 2001).

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Respondents' conduct violated § 436.011.2. Such violation is cause to discipline the Home's registrations under § 436.063 and the Home's license under § 333.061.5.[37] We find no cause for discipline under § 436.061.2 for reasons already stated.

The violation of § 436.011.2 also subjects Buescher's embalmer and funeral director licenses and the Home's license to discipline under § 333.121.2(15).

The Board contends that the violation of § 436.011.2 is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 436.015.4, which provides:

> If any licensed embalmer, funeral director or licensed funeral establishment shall knowingly allow such licensee's name to be designated as the provider under, or used in conjunction with the sale of, any preneed contract, such licensee shall be liable for the provider's obligations under such contract.

This provision only provides a civil remedy for those having a cause of action against a licensee for the licensee's civil liabilities under the contract. It does not authorize discipline before this Commission or the Board. Therefore, we find no cause for discipline under § 436.015.4.

Count III – Helen L. Dooley Contract

In the first amended complaint, the Board alleges that the following conduct relating to the Dooley preneed contract is cause for discipline under §333.121.2(5), (13), and (15):

> Buescher and the Home's failure
>
> 1. to refund Dooley's payment of $8,563.68 when asked,
> 2. to place the $8,563.68 in an account with joint control by Dooley and Buescher,
> 3. to cancel Dooley's preneed contract and refund her money, and

[37]RSMo Supp. 2008.

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4. to provide the paperwork regarding the Dooley preneed contract to the Board's investigator.

The Board argues that Buescher violated statutes pertaining to preneed contracts. Section 436.035 provides:

> 1. At any time before the final disposition of the dead body, or before funeral services, facilities, or merchandise described in a preneed contract are provided by the provider designated in the preneed contract, the purchase may cancel the contract without cause by delivering written notice thereof to the seller and the provider. Within fifteen days after its receipt of such notice, the seller shall pay to the purchaser a net amount equal to all payments made into trust under the contract. Upon delivery of the purchaser's receipt for such payment to the trustee, the trustee shall distribute to the seller from the trust an amount equal to all deposits made into the trust for the contract.

The parties did not enter into a contract for the money to be put into a preneed trust, but chose the alternative provided for in § 436.053:

> 1. Notwithstanding the provisions of sections 436.021 to 436.048, the provider and the purchaser may agree that all funds paid the provider by the purchaser shall be deposited with financial institutions chartered and regulated by the federal or state government authorized to do business in Missouri in an account in the joint names and under the joint control of the provider and purchaser. If the purchaser has irrevocably waived and renounced his right to cancel the agreement between the provider and the purchaser pursuant to subdivision (5) of this subsection, such agreement may provide that all funds held in the account at the beneficiary's death shall be applied toward the purchase of funeral or burial services or facilities, or funeral merchandise, selected by the purchaser or the responsible party after the beneficiary's death, in lieu of the detailed identification of such items required by subdivision (3) of subsection 1 of section 436.007. The agreement between the provider and purchaser shall provide that:
>
> * * *
>
> (2) The financial institution shall hold, invest, and reinvest the deposited funds in savings accounts, certificates of deposit or other accounts offered to depositors by the financial institutions, as the agreement shall provide;

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* * *

> (4) At any time before the final disposition, or before funeral services, facilities, and merchandise described in a preneed contract are furnished, the purchaser may cancel the contract without cause by delivering written notice thereof to the provider and the financial institution, and within fifteen days after its receipt of the notice, the financial institution shall distribute the deposited funds to the purchaser;
>
> (5) Notwithstanding the provisions of subdivision (4) of this subsection, if a purchaser is eligible, becomes eligible, or desires to become eligible to receive public assistance under chapter 208, RSMo, or any other applicable state or federal law, the purchaser may irrevocably waive and renounce his right to cancel such agreement. The waiver and renunciation must be in writing and must be delivered to the provider and the financial institution;
>
> * * *
>
> 2. There shall be a separate joint account as described in subsection 1 of this section for each preneed contract sold or arranged under this section.

Respondents failed to place Dooley's payment in an account with joint control by Dooley and Buescher and failed to refund Dooley's payment of $8,563.68 when asked and failed to cancel Dooley's contract and refund her money when asked in writing. This conduct violated §§ 436.035.1 and 436.053.1

The Board contends that these failures to comply with the Dooley preneed contract and §§ 436.035.1 and 436.053.1 are cause to discipline Buescher's funeral director license, Buescher's embalmer license, and the Home's license for incompetence, misconduct or gross negligence under § 333.121.2(5)[38] and for violating professional trust or confidence under § 333.121.2(13).[39]

Buescher's conduct displayed incompetence as a funeral director.

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[38]RSMo Supp. 2008.
[39]RSMo Supp. 2008.

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The Board failed to provide sufficient evidence of Buescher's intentions for us to find that she intentionally refused to comply with § 436.053.1 regarding the bank account. Instead, we find that she was grossly negligent. Nevertheless, in regard to Respondents' duty to cancel Dooley's contract upon written request and refund the $8,563.68, the facts show that Buescher was aware of her duty and that her refusal to comply was purposeful. Accordingly, Respondents' conduct constituted misconduct.

Therefore, we find cause to discipline Buescher's funeral director license and the Home's license for incompetence, misconduct, and gross negligence under § 333.121.2(5).[40]

Because the Dooley contract created a relationship of professional trust or confidence in the skills of Buescher as a funeral director and in the Home as a funeral establishment, the conduct in violation of that contract and associated statutes violated that professional relationship. We find cause to discipline Buescher's funeral director license and the Home's license under § 333.121.2(13).[41]

We find no cause to discipline Buescher's embalmer license under § 333.121.2(5) and (13)[42] for reasons stated in Counts I and II.

The Dooley contract did not contain terms that set out in detail the final disposition of the dead body and funeral services, facilities, and merchandise to be provided and did not identify the preneed trust in which contract payments were to be deposited. The Board contends that this is cause for discipline under § 333.121.2(15)[43] because the failure of Respondents to include those terms violated the following provisions of § 436.007:

> 1. Each preneed contract made after August 13, 1982, shall be voidable and unenforceable unless:

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[40]RSMo Supp. 2008.
[41]RSMo Supp. 2008.
[42]RSMo Supp. 2008.
[43]RSMo Supp. 2008.

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* * *

> (3) It identifies the contract beneficiary and sets out in detail the final disposition of the dead body and funeral services, facilities, and merchandise to be provided;
>
> (4) It identifies the preneed trust into which contract payments shall be deposited, including the name and address of the trustee thereof[.]

The Board's contention ignores the fact that the Dooley contract was drafted pursuant to the alternative provisions of § 436.053, which exempts such a contract from the requirements of § 436.007.1(3) and (4). Section 436.053.1 provides:

> the provider and the purchaser may agree that all funds paid the provider by the purchaser shall be deposited with financial institutions chartered and regulated by the federal or state government authorized to do business in Missouri in an account in the joint names and under the joint control of the provider and purchaser. . . . [S]uch agreement may provide that all funds held in the account at the beneficiary's death shall be applied toward the purchase of funeral or burial services or facilities, or funeral merchandise, selected by the purchaser or the responsible party after the beneficiary's death, in lieu of the detailed identification of such items required by subdivision (3) of subsection 1 of section 436.007. The agreement between the provider and purchaser shall provide that:
>
> (1) The total consideration to be paid by the purchaser under the contract shall be made in one or more payments into the joint account at the time the agreement is executed or, thereafter within five days of receipt, respectively[.]

Therefore, we conclude that the terms of the Dooley contract do not violate chapter 436 and, accordingly, are not cause for discipline under § 333.121.2(15).[44]

The Board contends that Respondents' failure to refund Dooley's payment of $8,563.68 and cancel Dooley's contract when asked in writing is cause for discipline under

[44]RSMo Supp. 2008.

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§ 333.121.2(15).[45] This conduct violated §§ 436.035.1 and 436.053.1(4). Therefore, § 333.121.2(15)[46] authorizes discipline of Buescher's embalmer and funeral director licenses and the Home's license.

The Home's violations of §§ 436.035 and 436.053 are cause to discipline its registrations under § 436.063. We find no cause for discipline under § 436.061.2 for reasons already stated.

In the Board's second motion for summary decision, it adds the grounds that "Buescher and Buescher Memorial Home induced Dooley to buy preneed services with the false promise that the money would go into an irrevocable trust." [47] Both due process and our regulations require that the grounds for discipline be set forth in the complaint.[48] We cannot find cause to discipline based on facts not pled in the complaint.[49]

Although the Board charges Respondents' lack of cooperation with the Board's investigator regarding the Dooley contract as grounds for discipline under both Counts III and V, the Board did not cite in Count III the statutes that create the obligation for Respondents to cooperate. Therefore, we dispose of those contentions in Court V, wherein the appropriate statutes are cited.

Count IV – Preneed and At-Need Contracts
Containing Similar or Identical Violations of Law

Respondents entered into incomplete preneed contracts with Herbert Raithel, Winona Wagner, and Edna L. Phillips by failing to itemize what had been purchased. The Board contends that this is sufficient for us to conclude that Respondents "obtained a fee, charge, and compensation by fraud, deception, and misrepresentation; displayed incompetency, misconduct,

[45]RSMo Supp. 2008.
[46]RSMo Supp. 2008.
[47]Second motion for summary decision, pp. 69-71.
[48]***Duncan v. Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs,*** 744 S.W.2d 524, 538-39 (Mo. App., E.D. 1988); 1 CSR 15-3.350(2)(A)3.
[49]***Missouri Dental Bd. v. Cohen***, 867 S.W.2d 295, 297 (Mo. App., W.D. 1993).

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gross negligence, fraud, misrepresentation, and dishonesty in the performance of the functions or duties of any profession licensed or regulated by Chapter 333, RSMo; violated the professional confidence and trust with Raithel, Wagner, and Phillips; and violated § 436.007.1(3), RSMo, providing cause to discipline Buescher's funeral director license, Buescher's embalmer license, and Buescher Memorial Home's funeral establishment license, pursuant to § 331.121.2(4), (5), (13), and (15)[.]"[50]

Section 436.007 provides:

> 1. Each preneed contract made after August 13, 1982, shall be voidable and unenforceable unless:
>
> * * *
>
> (3) It identifies the contract beneficiary and sets out in detail the final disposition of the dead body and funeral services, facilities, and merchandise to be provided;
>
> (4) It identifies the preneed trust into which contract payments shall be deposited, including the name and address of the trustee thereof;
>
> (5) The terms of such trust and related agreements among two or more of the contract seller, the contract provider, and the trustee of such trust are in compliance with the provisions of sections 436.005 to 436.071[.]

The only evidence presented by the Board is that there was a failure to itemize. There is no evidence to prove the requisite fraudulent or willful intent in order to establish cause for discipline under § 333.121.2(4) or for misconduct under subdivision (5). Nevertheless, we find that because of the many and repeated failures to properly complete the contracts, there is cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence under § 333.121.2(5) and violation of professional trust or confidence under

[50]Second motion for summary decision, at ¶ 181.

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§ 333.121.2(13). We find no cause to discipline Buescher's embalmer license for reasons already stated.

Further, this conduct violated § 436.007.1(3), which is cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(15).[51]

Respondents' mathematical errors resulted in underpayments on the preneed and/or at-need contracts between the Home and Mildred Raithel, Herbert Raithel, James I. Miller, and Mary Hilgert. Respondents' mathematical errors resulted in overpayments on the preneed and/or at-need contracts between the Home and Stephanie C. Novy, Erma H. Stuart, Louise I. Gaertner, Maxine J. Pullam, and Ralph C. Coshow. The Board contends that Respondents displayed "incompetency, misconduct, gross negligence, fraud, misrepresentation, and dishonesty in the performance of the functions or duties of any profession licensed or regulated by Chapter 333, RSMo, and violated the professional confidence and trust with M. Raithel, H. Raithel, Miller, and Hilgert, providing cause to discipline Buescher' s funeral director license, Buescher' s embalmer license, and Buescher Memorial Home's funeral establishment license, pursuant to § 331.121.2(5) and (13)[.]"[52]

The only evidence is of mathematical errors. There is no evidence to establish the requisite fraudulent or willful intent needed to establish misconduct, fraud, misrepresentation, and dishonesty. Nevertheless, because of the many and repeated failures to properly complete the contracts, we find cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence under § 333.121.2(5) and violation of professional trust or confidence under § 333.121.2(13). We find no cause to discipline Buescher's embalmer license for reasons already stated.

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[51]RSMo Supp. 2008.
[52]Second motion for summary decision at ¶¶ 182-83.

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For the "ten summaries of conduct" set forth below, the Board contends that Respondents "obtained a fee, charge, and compensation by fraud, deception, and misrepresentation; displayed incompetency, misconduct, gross negligence, fraud, misrepresentation, and dishonesty in the performance of the functions or duties of any profession licensed or regulated by Chapter 333, RSMo; and violated the professional confidence and trust ..., providing cause to discipline Buescher' s funeral director license, Buescher's embalmer license, and Buescher Memorial Home's funeral establishment license, pursuant to § 331.121.2(4), (5), and (13)[.]"[53] The following ten summaries are of Respondents' conduct, as further detailed in our findings of fact:

1. assessed sales tax on services in addition to merchandise sold on the preneed and/or at-need contracts between the Home and Mildred Raithel, Herbert Raithel, Alva F. Engelbrecht, Eileen A. Fisher, Carl R. Evans, Irene Kiso, Winona Wagner, Georgia A. Stark, Erma H. Stuart, Clarence F. Phillips, Drucella O. Durham, Maxine J. Pullam, James I. Miller, Edna L. Phillips, Mary Hilgert, Carol E. Borron, and Earl Hodges;

2. assessed sales tax on previously computed sales tax on the at-need and/or preneed contracts between the Home and Irene Kiso;

3. overcharged Georgia A. Stark and Maxine J. Pullam as purchasers of preneed and at-need contracts in that the same sales tax was added to the total contract amount more than once;

4. made discrepancies on the at-need and/or preneed contracts between the Home and Helen White and Carol B. Borron, where at-need contract services and merchandise amounts listed were less than preneed payments, but preneed amounts were charged;

5. made discrepancies on the at-need and/or preneed contracts between the Home and Louise I. Gaertner and Margaret Caroline Pauline Wolken, where services listed and paid for on preneed contracts were not included on the at-need contract, or additional fees were charged;

6. charged a higher price than what was previously guaranteed on the preneed contract between the Home and Mary St. George;

7. contracted for transportation costs as part of Gaertner's preneed contract and then, upon her death, charged a transportation fee of $187.50;

[53]Second motion for summary decision at ¶¶ 184-92.

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8. contracted for embalming costs as part of Black's preneed contract and then, upon his death, charged an embalming fee;

9. induced the following clients to purchase preneed services with false promises that the money would go to a trust account with APS and that they would retain no more than specified amounts and Respondents failed to pay remaining balances owed to APS on the following preneed contracts: Amy Creed, Annandeane Steinmetz, Oda Scott, Tillie Brown, Anton Wolken, June Nienhueser, Emerson Nienhueser, Roy Brown, Margaret Pauline, Warren West, Bessie Licidider, Joe Putnam, Margaret Province, Anna Bushman, Leona Johnston, Eleanor Weavers, Augusta Black, Floyd Black, Emil Sosa, Alva Smith, Barbara Wolfe, Bessie Gilmore, Sadie Stone, and Roberta Couchman;

10. made discrepancies on the at-need and/or preneed contracts between the Home and Louise I. Gaertner and Margaret Caroline Pauline Wolken, where services listed and paid for on preneed contracts were not included on the at-need contract, or additional fees were charged[.]

There is no evidence to prove the requisite fraudulent or willful intent to establish cause to discipline under § 333.121.2(4) or for misconduct, fraud, misrepresentation, and dishonesty under subdivision (5). Nevertheless, we find that because of the many and repeated failures regarding the contracts, there is cause to discipline Buescher's funeral director license and the Home's license for incompetence and gross negligence under § 333.121.2(5) and violation of professional trust or confidence under § 333.121.2(13). We find no cause to discipline Buescher's embalmer license for reasons already stated.

For the following conduct, the Board contends that Respondents "violated § 436.011.2, RSMo, providing cause to discipline Buescher Memorial Home's preneed seller and provider registrations, pursuant to § 436.063, RSMo, and Buescher Memorial Home's funeral establishment license, pursuant to § 333.061.5, RSMo."[54] We found that Respondents:

1. made discrepancies on the at-need and/or preneed contract with Louise I. Gaertner and Margaret Caroline Pauline Wolken, where services listed and

[54]Second motion for summary decision ¶¶ 193-95.

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paid for on preneed contracts were not included on the at-need contract, or additional fees were charged;

2. contracted for transportation costs as part of Gaertner's preneed contract and then, upon her death, charged a transportation fee of $187.50; and

3. contracted for embalming costs as part of Black's preneed contract and then, upon his death, charged an embalming fee.

Section 436.011.2 prohibits the withholding of items or services that the provider has contracted to provide. It does not prohibit mathematical errors or charging more than once for a service provided. We found only one instance of Louise I. Gaertner and Margaret Caroline Pauline Wolken being charged for a service not provided. Section 436.063 and § 333.061.5[55] authorize discipline for this conduct. Because the conduct violates a provision of Chapter 436, § 333.121.2(15) also authorizes discipline. However, the rest of the conduct, for which we have found cause to discipline for other reasons, does not fall within the proscriptions of § 436.011.2.

Finally, the Board contends that the violation of § 436.011.2 is cause for discipline under § 436.015.4. As we have explained above, § 436.015.4 does not apply to administrative proceedings.

Count V – Respondents' Non-Compliance with Board Investigations

Section 436.015 provides:

> 2. Each provider under one or more preneed contracts shall:
>
> * * *
>
> (3) Cooperate with the state board, the office of the attorney general of Missouri, and the division in any investigation, examination or audit brought under the provisions of sections 436.005 to 436.071[.]

[55]RSMo Supp. 2008.

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Section 436.021 provides:

> 2. Each seller under one or more preneed contracts shall:
>
> (1) Maintain adequate records of all such contracts and related agreements with providers and the trustee of preneed trusts regarding such contracts, including copies of all such agreements;
>
> (2) Notify the state board in writing of the name and address of each provider who has authorized the seller to sell one or more preneed contracts under which the provider is designated or obligated as the contract' "provider";
>
> * * *
>
> (5) Cooperate with the state board, the office of the attorney general, and the division in any investigation, examination or audit brought under the provisions of sections 436.005 to 436.071.

Respondents violated §§ 436.015.2(3) and 436.021.2(1), (2), and (5) when they failed to provide Investigator Fleischmann with copies of the Home's preneed contracts for the preceding five years, a list of the Home's preneed contracts written in the last five years that had not yet become at-need, a copy of the insurance policies for Kenneth G. Bolten, copies of the preneed documents for Helen L. Dooley, and the failure to meet with the Board's inspector when requested. These violations are cause to discipline the Home's registrations under § 436.063. We find no cause for discipline under § 436.061.2 because it does not apply to administrative proceedings.

Section 333.101 provides:

> The board or any member thereof or any agent duly authorized by it may enter the office, premises, establishment or place of business of any funeral service licensee in this state or any office, premises, establishment or place where the practice of funeral directing or embalming is carried on, or where such practice is advertised as being carried on for the purpose of inspecting said office, premises or establishment and for the purpose of inspecting the license and registration of any licensee[.]

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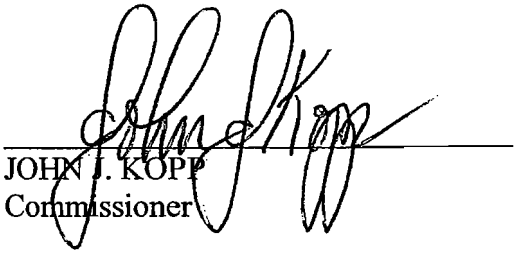
Respondents violated this provision and § 436.021.2(5) when they failed to meet with the Board's inspectors when requested and did not answer the the Home's door when the inspector was present.

The violation of Chapter 333 are cause to discipline Buescher's embalmer and funeral director licenses and the Home's license under § 333.121.2(6).[56] Each of the violations of Chapter 436 established under Count V is cause for discipline under § 333.121.2(15).[57] We do not find that § 436.015.4 authorizes discipline because it relates only to civil remedies for those having a cause of action against a licensee for the licensee's liabilities under the contract.

SO ORDERED on July 28, 2009.



JOHN J. KOPP
Commissioner

[56]RSMo Supp. 2008.
[57]RSMo Supp. 2008.

Internal Process

Rule Number	Rule Name	Priorty	Emergency	Sent to DIFP for Approval	DIFP Approval Received	Courtesy Copy Sent to SOS/JCAR	Pre-Approval Received from SOS	SBS Completed	Fiscal Notes Completed	Letters & Transmittal(s) Completed	Affidavit completed (rule only)	Filed w/ SB, JCAR & SOS	Emergency Rule Effective Date	Emergency Rule Expires	Appear in Missouri Register	End of Comment
20 CSR 2120-2.100	Fees	2	X	8/31/2009	9/4/2009	9/14/2009	9/23/2009					9/24/2009	10/4/2009	4/1/2010	11/2/2009	
				8/31/2009	9/4/2009			9/15/2009	9/15/2009			9/24/2009			11/2/2009	12/2/2009
20 CSR 2120-2.130	Final Disposition as Defined in Chapter 193	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009			10/6/2009								
20 CSR 2120-2.140	Final Welfare cause for Injunction	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009			10/7/2009								
20 CSR 2120-2.150	Payment not determining factor of practice of funeral directing	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009			10/12/2009								
20 CSR 2120-2.160	Cemetery exception	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009			10/14/2009								
20 CSR 2120-3.100	Notice of Intent to Apply	1	X	8/27/2009	8/27/2009			None Needed				8/28/2009	9/7/2009	3/5/2010	10/1/2009	NA
20 CSR 2120-3.105	Filing of Annual Report	2	X	8/31/2009	9/23/2009	9/11/09 (retracted on 9/14/09) NEED 9/23/09 SOS reviewed with the other, no separate review is needed.	9/23/2009			9/3/2009	Need	9/24/2009	10/4/2009	4/1/2010	11/2/2009	
				8/31/2009	9/4/2009			9/5/2009	9/14/2009			9/24/2009			11/2/2009	12/2/2009
20 CSR 2120-3.110	Providers and Sellers Licensed, Agents	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009											
20 CSR 2120-3.115	Contact Information Up to Date	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009			10/12/2009								
20 CSR 2120-3.120	Display of License	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009			10/12/2009								
20 CSR 2120-3.125	Corporate Ownership of License	2	X	8/31/2009	9/4/2009	9/14/2009	9/23/2009					9/24/2009	10/4/2009		11/2/2009	
				8/31/2009	9/4/2009			9/15/2009	none needed			9/24/2009			11/2/2009	12/2/2009
20 CSR 2120-3.205	Mandatory Consumer Disclosure	3		9/14/2009												
				9/14/2009												
20 CSR 2120-3.210	Seller Requirements Upon Change of Provider	3		9/14/2009												
				9/14/2009												
20 CSR 2120-3.215	Seller Ceasing Business	3		9/14/2009												
				9/14/2009												
20 CSR 2120-3.220	Seller Cancellation of Contracts	3		9/14/2009												
				9/14/2009												
20 CSR 2120-3.225	Seller Annual Report Requirements	3		9/14/2009												
				9/14/2009												
20 CSR 2120-3.230	Disposition of Funds: Cancellation by Purchaser	3		9/14/2009												
				9/14/2009												

20 CSR 2120-3.235	Seller Obligations Regarding Payments	3		9/14/2009												
				9/14/2009				10/14/2009								
20 CSR 2120-3.240	Record Retention	4		9/14/2009												
				9/14/2009												
20 CSR 2120-3.300	Provider include funeral establishments	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009			10/12/2009								
20 CSR 2120-3.305	Licensed Funeral Director Must Report Sellers	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009											
20 CSR 2120-3.310	Change in Seller Afflication	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009											
20 CSR 2120-3.315	Provider Ceasing Business	3	X	9/14/2009												
				9/14/2009												
20 CSR 2120-3.400	Preneed Agent; Requirement of Agent's Seller	3	X	9/14/2009												
				9/14/2009				10/6/2009	none needed							
20 CSR 2120-3.405	Preneed Agents Must Take Missouri Law Examination	2	X	8/31/2009	9/4/2009	9/14/2009	9/23/2009	9/14/2009	9/14/09 (private) 9-15-09 (public)			9/24/2009	10/4/2009	4/1/2010	11/2/2009	
				8/31/2009	9/4/2009							9/24/2009			11/2/2009	12/2/2009
20 CSR 2120-3.500	Activities that do not constitute preneed	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009			10/12/2009								
20 CSR 2120-3.503	Irrevocable Contracts	3	X	9/14/2009												
				9/14/2009												
20 CSR 2120-3.505	Types of Financing; other financing still preneed	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009											
20 CSR 2120-3.510	Requirements of preneed contracts	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009											
20 CSR 2120-3.515	Single Premium Annuity Contracts	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009			10/12/2009								
20 CSR 2120-3.520	Trustee Investment Restrictions	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009											
20 CSR 2120-3.525	Independent Financial Advisor is agent of	3	X	8/31/2009	9/4/2009											
				8/31/2009	9/4/2009											

Rules Filed and In Process

Rules Being Processed for Filing

MISSOURI STATE BOARD OF EMBALMER AND FUNERAL DIRECTOR RULES

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**** Rules still need approval of the Department**

APPROVED

Emergency Rule for Notice of Intent to Apply

Title: Filing of Notice of Intent to Apply

Purpose: This emergency rule describes the Board's procedure for filing a Notice of Intent to Apply for Licensure/Registration under the new requirements contained in Chapters 333 and 436 which will become effective on August 28, 2009 and the result of filing the Notice.

(1) Any person wishing to conduct business as a preneed seller or preneed provider or wishing to register as a preneed sales agent (the "Applicant") must fully complete and file with the State Board a "Notice of Intent to Apply for Licensure/Registration" ("Notice of Intent") prior to engaging in any conduct for which a preneed seller license, a preneed provider license or a preneed sales agent registration is required. The Board shall provide the Notice of Intent as an electronic document on its website. No fee shall be required to accompany the Notice of Intent. Only the official Notice of Intent form shall be accepted by the Board.

(2) Applicants may file the Notice of Intent with the Board by hand delivery, by mail, by fax or by other electronic means such as e-mail. If the Notice of Intent is filed by fax or other electronic means, the Applicant shall also provide the original signed document to the Board by mail or other delivery method.

(3) All Applicants must meet the requirements for licensure as set forth in Chapter 333, RSMo, and must certify that, to the best of their knowledge, they are eligible for licensure/registration.

(4) If the Board determines that the Applicant lacks the statutory qualifications for licensure/registration, the Board may terminate the temporary authorization to practice under the Notice of Intent by notifying the Applicant in writing of the termination and the reason for the termination. An Applicant may apply for full licensure or registration even if the Board has terminated his/her authority to practice pursuant to the Notice of Intent.

(5) Any Applicant who has filed a Notice of Intent must file their completed Application for licensure or registration with the Board no later than October 31, 2009.

(6) The Applicant shall keep a copy of the Notice of Intent and shall prominently display this Notice of Intent as if it were a license or registration issued pursuant to Chapter 333, RSMo.

(7) Any person with a filed Notice of Intent shall be authorized to engage in the practice of preneed selling, providing or as a sales agent, as so indicated on the Notice of Intent, provided that the Applicant has timely filed his/her Application for Licensure and/or Registration. This authorization to practice shall be effective from the date the Board receives the Notice of Intent and shall end on the date the Board either issues a license or registration or denies the application for licensure/registration or until midnight on December 31, 2009, whichever comes first. The Board shall promptly notify the Applicant of its decision to issue a license/registration or its denial of same.

(8) Any conduct that may be cause for discipline that occurs between August 28, 2009 and December 31, 2009 shall be considered by the Board in its decision to issue or deny any Application for licensure and/or registration. In addition, if the Board issues a license or registration and later discovers conduct that would be cause for discipline occurred between August 28, 2009 and December 31, 2009, the Board shall have authority to seek discipline against the licensee or registree for that conduct as if the person were fully licensed or registered while operating under the authority of the Notice of Intent.

Authority: 333.011, 333.315, 333.320, 333.325 and 333.340

APPROVED

REVISED Emergency Rule Regarding Filing of Annual Reports

Title: Filing of Annual Reports

Purpose: This emergency rule prescribes the Board's process for the filing of annual reports under the revised sections of Chapter 333 and Sections 436.400 to 436.520, RSMo.

(1) For sellers:

a) For the annual report due on October 31, 2009, sellers registered with the Board prior to August 28, 2009, in lieu of filing the annual report required by Section 436.460, RSMo, may file an annual report, on the form provided by the Board, containing all the information required by Section 436.021.2, RSMo (2000). This report shall report all preneed contracts executed since the reporting period the seller reported in its report due on October 31, 2008 through August 27, 2009. This annual report shall be accompanied by a fee of $2 per preneed contract sold for the reporting period;

b) For the annual report due on October 31, 2010, sellers shall report all contracts executed from August 28, 2009 through August 31, 2010. Thereafter, the annual report shall report all contracts sold between September 1 of the year preceding the annual report through August 31 of the reporting year. Each annual report filed for reporting years ending October 31, 2010 and thereafter shall also be accompanied by the annual fee as established in 20 CSR 2120-2.100;

(2) For providers:

a) For the annual report due as set out below, providers shall file an annual report as provided by Section 333.315.3(4), RSMo (Cum. Supp. 2009) covering the reporting period as set out below.

i. For report due October 31, 2009, the reporting period shall be from the date of the provider's last annual report though August 27, 2009. No annual fee shall be required for this reporting period;

ii. For report due October 31, 2010, the reporting period shall be August 28, 2009 through August 31, 2010 and accompanied by the renewal fee in 20 CSR 2120-2.100

iii. For reports due successive years, reporting period shall be September 1 through August 31 and shall be accompanied by the renewal fee established in 20 CSR 2120-2.100.

Authority: 333.315, 333.320, 333.340, 436.460 and 436.520

APPROVED

Emergency rule: Pre-need agents must take Missouri law exam.

Title: Certifying pre-need agents to take the Missouri law exam.

Purpose: This rule prescribes the process for certifying pre-need seller agents to take the Missouri law exam and a requirement for registration.

> All pre-need agents registering with the board shall achieve a grade of seventy-five percent (75%) or greater on the Missouri Law exam. Successful completion of the Law exam shall be a prerequisite to registration. This exam may be taken any time after filing the Notice of Intent to Apply. Pre-need agent applicants must successfully complete the Missouri Law exam on or before December 31, 2009, prior to the expiration of the Notice of Intent to Apply. The Missouri Law exam covers knowledge of Chapter 333, RSMo and the rules governing the practice of embalming, funeral directing and funeral home licensing, along with government benefits, statutes and rules governing the care, custody, shelter, disposition and transportation of dead human bodies. The Missouri Law section also contains questions regarding Sections 436.400 to 436.520, RSMo relating to pre-need statutes and Chapters 193 and 194, RSMo relating to the Missouri Department of Health and Senior Services statutes, as well as questions regarding Federal Trade Commission rules and regulations and Occupational Safety and Health Administration (OSHA) requirements as they apply to Missouri licensees. Notification of intent to take this examination shall be received by the board at least fifteen (15) working days prior to the date the candidate plans to sit for the examination.

Authority: 333.340 and 333.325.5

APPROVED

REVISED Emergency rule: Corporate ownership of a corporate licensee

Title: Corporate ownership of a corporation holding a pre-need provider license.

Purpose: This rule prescribes the requirements regarding corporation application for a pre-need provider or seller's license.

(1) A corporate applicant for either a seller or provider license shall certify to the Board that each of its officers, directors, managers and controlling shareholders would be eligible for licensure under § 333.330, RSMo if he or she applied for licensure as an individual.
(2) In any proceeding, the applicant shall have the burden to demonstrate to the Board that its officers, directors, managers and controlling shareholders would be eligible for licensure under § 333.330, RSMo.

Authority: 333.340, 333.320, 333.315, 436.456 and 436.520

APPROVED

Emergency Rule re: Fees

Title: Fees pursuant to Chapter 333 and Sections 436.400 to 436.520

Purpose: This rule sets out all fees contained in Chapter 333 and Sections 436.400 to 436.520.

(1) The following fees hereby are established by the State Board of Embalmers and Funeral Directors:

(A) Embalmer Practicum Student Registration Fee	$25
(B) Embalmer Application Fee	$200
(C) Embalmer Oral Examination Fee	$125
(D) Embalmer Reciprocity Application Fee	$300
(E) Embalmer Biennial Renewal Fee	$200
(F) Funeral Director Application Fee	$200
(G) Funeral Director Limited License Application Fee	$200
(H) Funeral Director Reciprocity Application Fee	$300
(I) Funeral Director Biennial Renewal Fee	$200
(J) Reactivation Fee (up to one year lapse)	$100
(K) Reactivation Fee (up to two year lapse)	$200
(L) Establishment Application Fee	$300
(M) Amended Establishment Application Fee	$25
(N) Establishment Biennial Renewal Fee	$250
(O) Reciprocity Certification Fee	$10
(P) Duplicate Wallhanging Fee	$10
(Q) Collection Fee for Bad Checks	$25
(R) Law Book Requests (after initial request)	$5
(S) Examination Review Fee	$25
(T) Background Check Fee	
(This fee determined by Missouri State Highway Patrol)	$ N/A
(U) Provider License Application Fee	
(If no funeral establishment license)	$100
(V) Provider License Application Fee	
(If also Funeral Establishment license)	$10
(W) Provider Biennial Renewal Fee	$ **
(X) Seller License Application Fee	$200
(Y) Seller Biennial Renewal Fee	$ **
(Z) Seller Agent Registration Fee	$50
(AA) Seller Agent Biennial Registration Renewal Fee	$ **
(BB) Seller Annual Report Fee	$ **
(CC) Seller Annual Report Late Fee	$ **

(DD) Seller Agent Law Examination Fee	$ **
(EE) Seller per Contract Annual Reporting Fee (For contracts executed on or after August 28, 2009)	$36
(FF) Amended Provider Application Fee	$25
(GG) Amended Seller Application Fee	$25

(2) All fees are nonrefundable.

(3) The provisions of this rule hereby are declared severable. If any fee fixed by this rule is held invalid by a court of competent jurisdiction or by the Administrative Hearing Commission, the remaining provisions of this rule shall remain in full force, unless otherwise determined by a court of competent jurisdiction or by the Administrative Hearing Commission

Authority: 333.340 and 436.520

** This fee not yet determined by the Board.

RESCIND 20 CSR 2120-2.100

APPROVED

Emergency rule: Preneed sellers and providers must be licensed and preneed seller agents must be registered in the State of Missouri to do business.

Title: Pre-need agent; requirements of the agent's seller

Purpose: This rule explains that any licensed pre-need agent in the State of Missouri must be selling pre-need contracts on behalf of a seller who is licensed in the state of Missouri.

(1) Any pre-need agent registered by the Missouri State Board of Embalmers and Funeral Directors to sell a pre-need contract for or on behalf of a seller must be the agent of a seller who is licensed to sell pre-need contracts by the Missouri State Board of Embalmers and Funeral Directors.

Authorized by: 333.340, 333.011(9), 333.320 and 333.325

APPROVED

Emergency rule: "Final Disposition" as defined in Chapter 193

Title: Use of term "final disposition" consistent with Chapter 193, RSMo

Purpose: This rule explains that use of the term "final disposition" in Chapters 333 and Sections 436.400 to 436.520, RSMo shall be consistent with the definition of the term in Chapter 193, RSMo.

(1) For purposes of Chapter 333 and Sections 436.400 to 436.520, RSMo, final disposition shall be defined in accordance with the definition contained in Section 193.015(3), RSMo.
(2) Use of the term final disposition in Chapter 333 and Sections 436.400 to 436.520 shall be consistent with its use in Chapter 193, RSMo.

Authorized by: 333.340, 333.011(10), 193.015, 436.405 and 436.520

APPROVED

Emergency rule: "Provider" includes funeral establishment that has agreed to undertake obligations of pre-need contracts pursuant to Chapter 436

Title: Provider to include funeral establishments engaged in pre-need

Purpose: This rule explains that a provider in a pre-need contract includes, but is not limited to, a funeral establishment that has agreed to undertake the obligations of a pre-need contract under Sections 436.400 through 436.520, RSMo.

(1) As defined by Section 333.011(10), the provider of services under any pre-need contract pursuant to Sections 436.400 to 436.520, RSMo shall include any licensed funeral establishment that has agreed to undertake the obligations of a pre-need contract pursuant to Sections 436.400 to 436.520, RSMo.
(2) Any provider who is a licensed funeral establishment who has agreed to undertake the obligations of a pre-need contract pursuant to Sections 436.400 to 436.520, RSMo, must meet all requirements of both a licensed funeral establishment and a pre-need provider pursuant to Chapter 333 and Sections 436.400 to 436.520, RSMo.

Authorized by 333.340 and 333.011(10), RSMo

APPROVED

Emergency rule: Licensed funeral director must report each seller for whom he or she is an agent.

Title: Funeral Director agent registration

Purpose: This rule establishes the reporting requirement for any funeral directors serving as sellers' agents.

(1) Any funeral director acting as a pre-need agent shall report the name and address of each pre-need seller for whom the funeral director is authorized to sell, negotiate, or solicit pre-need contracts to the Board on a form prescribed by the Board.
(2) Any funeral director shall also identify him or herself as acting as a pre-need agent on his or her biennial report form to the board by checking the appropriate box on the form prescribed by the board.

Authority: Section 333.340 and 333.325.4

APPROVED

Emergency rule: Financial welfare cause for injunction

Title: Danger to financial welfare is cause for injunction.

Purpose: This rule states that serious danger to an individual's financial welfare is cause for the State Board of Embalmers and Funeral Directors to seek an injunction pursuant to Section 333.335.1(2), RSMo.

(1) For purposes of Section 333.335, RSMo, the Missouri State Board of Embalmers and Funeral Directors shall be entitled to seek injunctive relief against any person from engaging in any business or practice authorized by a registration or authority, permit, or license issued under this chapter that presents a substantial probability of serious danger to the health, safety or welfare of any resident of this state or client or customer of the licensee or registrant.
(2) For purposes of Section 333.335, RSMo, serious danger to the welfare of any resident or client or customer shall include, but is not limited to, the financial welfare of the resident, client or customer.

Authority: Section 333.340 and 333.335.

APPROVED

REVISED Emergency Rule: Change in contact information

Title: Licensees shall be required to provide up to date contact information.

Purpose: This rule details the requirements for providers, sellers, and seller's agents for providing the Board with current contact information.

(1) Providers, sellers and seller's agents shall keep the Board notified of their current address, telephone number, facsimile number and e-mail address, as applicable, at all times.
(2) Providers, sellers, and seller's agents shall notify the Board within 30 days of any such change by submitting written notice with the new information. The written notice shall comply with the Board's rules regarding written notice.

Authority: 333.340 and 333.320

APPROVED

Emergency rule: Display of License

Title: Licenses issued by the Missouri State Board of Embalmers and Funeral Directors must be displayed.

Purpose: This rule states that pre-need sellers, providers and seller's agents must prominently display their license or registration to practice issued by the Missouri State Board of Embalmers and Funeral Directors.

(1) All licenses or registrations, and any and all duplicate copies thereof, issued by the Missouri State Board of Embalmers and Funeral Directors shall be prominently displayed at all times in a conspicuous location or manner easily accessible to the public for each office or place of business of the licensee or registrant.
(2) All licenses or registrations shall be available at all times for inspection by any duly authorized agent of the Missouri State Board of Embalmers and Funeral Directors.

The Missouri State Board of Embalmers and Funeral Directors may cause a complaint to be filed with the Administrative Hearing Commission pursuant to Section 333.330, RSMo, for the failure of a licensee or registrant to display his or her license or registration as required by Section 333.091 and this regulation.

Authorized by 333.340, 333.091 and 333.330

APPROVED

Emergency Rule: Payment is not determining factor of "practice of funeral directing"

Title: Practice of funeral directing; payment not determining factor

Purpose: This rule explains that the receiving of payment for providing funeral services is not the determining factor in identifying the practice of funeral directing.

(1) In determining whether a person, pursuant to 333.011(6), is engaging in the practice of funeral directing pursuant to 333.011(8), the Board shall consider all activities listed in 333.011(8).
(2) Receipt of payment by any person for any or all services provided pursuant to this Chapter or Chapter 436, RSMo shall not be the determining factor in determining whether the person is engaging in the practice of funeral directing.

Authorized by: 333.340 and 333.011(8)

APPROVED

Emergency Rule re: Single Premium Annuity Contracts

Title: Replacement single premium annuity contracts

Purpose: This rule states that while only single premium annuity contracts can fund an insurance-funded preneed contract, purchasers may purchase replacement single premium annuity contracts during the contract period.

(1) An insurance-funded preneed contract may be funded by an insurance policy or a single premium annuity contract.
(2) An insurance-funded preneed contract may not be funded by an annuity other than a single premium annuity contract.
(3) If a purchaser funds an insurance-funded preneed contract with a single premium annuity contract, the purchaser may replace the single premium annuity contract with another single premium annuity contract at any time in the duration of the preneed contract.
(4) Any replacement single premium annuity contract must meet all the requirements of the initial annuity contract, Chapter 333, Sections 436.400 to 436.520, RSMo and any other requirements under state or federal law.

Authority: 333.340, 436.405 and 436.520

~~APPROVED~~

~~*Emergency Rule re: Activities that do not constitute preneed under Sections 436.400 to 436.520, RSMo*~~

~~Title: Activities that do not constitute preneed under Sections 436.400 to 436.520, RSMo~~

~~Purpose: This rule identifies activities that do not constitute preneed under Chapter 436 and do not require regulation for preneed under Sections 436.400 to 436.520, RSMo.~~

~~The following activities do not constitute a preneed contract under the terms and conditions of Sections 436.400 to 436.520, RSMo:~~

~~(1) Sale of funeral merchandise where the purchaser takes immediate possession of the funeral merchandise;~~
~~(2) The preplanning of funeral arrangements with a licensed funeral director where there is no exchange of payment or anything of value for the future services; and~~
~~(3) Naming a funeral establishment as the beneficiary to a life insurance policy outside a preneed contract as defined by Section 436.405.1(7).~~

~~Authority: 333.340, 436.405 and 436.520~~

APPROVED

Emergency Rule re: types of financing available; other financing still preneed

Title: Preneed contracts with non-compliant financing mechanisms are still subject to the provisions in Sections 436.400 to 436.520, RSMo.

Purpose: This rule identifies the acceptable funding mechanisms for preneed contracts.

(1) Preneed contracts shall only be funded by:

(a) A preneed trust as defined by 436.405.1(8);
(b) An insurance policy or single premium annuity contract as defined by § 436.405.1(3); or
(c) A joint account as defined by § 436.405.1(4).

(2) Preneed contracts funded by any other mechanism shall be non-compliant with the requirements of Sections 436.400 to 436.520, RSMo. All non-compliant preneed contracts shall still be subject to regulation by the Board under Sections 436.400 to 436.520, RSMo.

Authority: 333.340, 436.405 and 436.520

APPROVED

Emergency Rule re: Cemetery exception

Title: Endowed care cemetery exception.

Purpose: This rule describes the exception to preneed contract requirements under Sections 436.400 to 436.520, RSMo for endowed care cemeteries.

Pursuant to § 333.310, RSMo, a cemetery shall be exempt from the licensure requirements of §§ 333.315 and 333.320, RSMo when all of the following conditions are satisfied:

(1) The cemetery has a current and valid licensed issued pursuant to § 214.275, RSMo;
(2) All sales of merchandise made by the cemetery that would otherwise be defined as a preneed contract for funeral merchandise are made pursuant to a contract whereby such merchandise is either
    a. Purchased in conjunction with an interment right or grave space subject to § 214.320, RSMo or
    b. Is made to be delivered to an interment right or grave subject to § 214.320, RSMo that is owned by the purchaser and identified in the contract.
(3) The cemetery has not been found to be in non-compliance with §§ 214.385 or 214.387, RSMo by the Office of Endowed Care Cemeteries pursuant to a completed examination or audit; and
(4) The cemetery does not offer for sale caskets or services that may only be provided by a Missouri licensed funeral director or embalmer.

Authority: 333.340, 436.410 and 436.520

APPROVED

Emergency Rule re: seller obligations

Title: Provider and seller obligations under Sections 436.400 to 436.520, RSMo

Purpose: This rule clarifies the duties of the seller of a preneed contract.

Except as otherwise provided in Sections 436.400 to 436.520 and any rules validly promulgated pursuant to those sections:

(1) The seller shall be obligated to collect and properly deposit and disburse all payments made by, or on behalf of, a purchaser of a preneed contract;
(2) A purchaser may make payments on any preneed contract by making the payment directly to the trustee, the insurance company, or the financial institution where the joint account is held, as applicable, in lieu of paying the seller;
(3) All sellers shall designate an individual to serve as manager in charge of the seller's business. This individual shall either reside or work within the State of Missouri. The seller shall designate the manager in charge in its initial application for licensure. If the manager in charge changes, the seller shall provide written notice to the Board within 30 days of the change.

Authority: 333.340, 436.415 and 436.520

APPROVED

Emergency Rule re: Change in Seller Affiliation

Title: Change in seller affiliation

Purpose: This rule explains the process for a change in seller affiliation under a preneed contract.

(1) After initial application, if there is a change in seller affiliation, the provider shall provide written notice to the Board, pursuant to § 436.420.3, RSMo, that the provider has authorized a new seller to designate the provider on the seller's preneed contracts. This notice shall be provided to the Board within 15 days after the provider authorizes the seller to act and the notice shall contain, at least:
   a. Name and address of the provider;
   b. License number of the provider;
   c. Name and Address of the seller; and
   d. Effective date of the authorization or agreement.

(2) This notice may be provided to the Board electronically, but the original signed document shall be provided to the Board by mail or hand delivery.

Authority: 333.340, 436.420 and 436.520

APPROVED

Emergency Rule re: Requirements of Preneed Contracts

Title: Preneed Contract Requirements

Purpose: This rule details the requirements of preneed contracts

(1) All preneed contracts shall be in Times New Roman or a comparable easily read font and at least 8-point type;
(2) A preened contract may contain both guaranteed and non-guaranteed items, but the preneed contract shall clearly identify those items which are guaranteed and which are not;
(3) A preneed contract is voidable by order of court of competent jurisdiction. Upon final judgment finding a preneed contract is voidable, a purchaser may then exercise his or hr right to void the contract by providing written notice to the seller and the provider. The purchaser must exercise his or her right to void the contract within 30 days of final judgment;
(4) The purchaser must be provided a fully executed original or copy of the preneed contract within 30 days of the effective date of the contract;
(5) Preneed contracts may be either cancelled or rescinded pursuant to the provisions of Sections 436.400 to 436.520, RSMo. The process for cancellation or rescission shall be the same and the purchaser, seller and provider rights and obligations shall be the same whether the contract is cancelled or rescinded;
(6) Preneed contracts effective and valid prior to August 28, 2009 shall remain effective and valid on and after August 28, 2009; and
(7) Preneed contracts executed on or after August 28, 2009 shall comply with all requirements of Chapter 333 and Sections 436.400 to 436.520, RSMo and all regulations enacted thereunder. However, preneed contracts that were valid under the relevant portions of Chapter 436 on August 27, 2009 may be used to enter into valid preneed contracts on or after August 28, 2009 so long as any additional requirements in Sections 436.400 to 436.520, RSMo are provided to purchasers no later than December 31, 2009 by supplement addendum to the preneed contract.

Authority: 333.340, 436.412, 436.415, 436.420, 436.425 and 436.520

APPROVED

Emergency Rule re: Trustee investment restrictions

Title: Trustee investment restrictions under a trust funded preneed contract

Purpose: This rule identifies the investment restrictions of a trustee under a trust funded preneed contract.

(1) A trustee shall not make decisions to invest any trust fund under a preneed contract with those individuals or entities contained in §§ 436.445(1) through (4), who are, or may be, related to that preneed contract or trust;
(2) The trustee investment restrictions contained in §§ 436.445(1) through (4) shall not apply to those individuals or entities related to other preneed contracts or trusts.

Authority: 333.340, 436.445 and 436.520

APPROVED

Emergency Rule re: Independent financial adviser is agent of trustee

Title: Independent financial adviser is agent of trustee.

Purpose: This rule clarifies that an independent financial advisor is an agent of the trustee in a trust-funded preneed contract.

An independent financial advisor, as provided in § 436.440.6, RSMo, is an agent, as provided in § 436.440, RSMo, of the trustee.

Authority: 333.340, 436.440.6 and 436.520

APPROVED

Emergency Rule re: Seller requirements upon change of provider

Title: Seller requirements for disposition of funds if elect to terminate duties under contract upon change of provider.

Purpose: This rule describes a seller's requirements for disposition of funds if the seller elects to terminate his or her duties upon a change of provider.

(1) When a purchaser notifies the seller that a new provider has been selected, the seller shall have the option of continuing in the contract with the new provider or terminating his or her obligations under the contract.
(2) The seller shall have the right to terminate his or her duties upon a change of provider on a contract by contract basis.
(3) When the seller elects to continue his or her duties, the seller shall pay the new provider pursuant to the terms of the contract with the original provider. If the seller does not have a contract with the new provider, then the original preneed contract shall be cancelled upon the execution of a new preneed contract with the new provider.
(4) When the seller elects to terminate his or her duties, for trust and joint account funded contracts, the old seller shall direct that the transfer of funds be made by wire transfer or other secure bank to bank transfer to the new seller's trust. At no time shall those funds be in the control of the purchaser. For insurance funded contracts, the policy shall be reassigned to the new seller in accordance with the terms of the policy or relevant insurance law.
(5) In the event a new preneed contract is executed, the new seller shall not be entitled to an origination fee or any additional payments that the original seller may have been entitled to under Section 436.430.3 or .4.
(6) For trust funded contracts, all property held in the trust, principal and income, shall be transferred to the new trust.

Authority: 333.340, 436.458 and 436.520

APPROVED

Rule re: What is irrevocable in an irrevocable contract

Title: Irrevocable contracts

Purpose: This rule states what portion of an irrevocable contract is irrevocable and what is revocable.

(1) A purchaser may change providers pursuant to Section 436.458 even if the contract has been made irrevocable. However, if the contract has been made irrevocable, the purchaser shall not receive any refund of any funds paid on the contract; rather if the contract is trust or joint account funded and the new provider requires a new trust or joint account to hold the preneed funds, that transfer of funds shall be by wire transfer or other secure bank to bank transfer and at no time shall the funds be in the control of the purchaser. If the contract is insurance funded, the insurance policy shall be reassigned in the manner described in the policy or pursuant to relevant insurance law.

(2) If a contract has been made irrevocable and a purchaser desires to change to a provider that has no contract with the seller, then the original preneed contract shall be cancelled upon the execution of a new preneed contract with the new seller. For trust and joint account funded contracts, the old seller shall direct that the transfer of funds be made by wire transfer or other secure bank to bank transfer to the new seller's trust. At no time shall those funds be in the control of the purchaser. For insurance funded contracts, the insurance policy shall be reassigned in the manner described in the policy or pursuant to relevant insurance law.

Authority: 333.340, 436.456, 436.458, and 436.520

APPROVED

Rule re: Record retention

Title: Seller record retention requirements

Purpose: This rule defines the requirements for maintaining records for preneed sellers.

(1) All preneed sellers shall maintain adequate records of all preneed contracts and related agreements with providers, trustees, financial institutions and seller's agents.
(2) The records shall be maintained within the State of Missouri in a format that is readily and easily accessible to the Board and its investigators.
(3) The records shall be maintained in a manner that will prevent decay or degradation such that the records will be preserved over time.
(4) Records can be maintained in hard copy or electronically but all must be readily accessible.
(5) All records must be readily capable of being copied and provided to the State Board upon request either immediately or as otherwise requested by the Board.
(6) Sellers who maintain electronic records shall make hard copies of the records available to providers, trustees, purchasers, agents or the Board upon request.
(7) Records may be removed by the seller from the State of Missouri but only after a written request is made for such removal that includes a means to ensure that the records remain available for inspection within the State of Missouri and written approval is provided by the Board.

Authority: 333.340, 436.465 and 436.520

APPROVED

Rule re: Provider ceasing business

Title: Requirements of provider ceasing business

Purpose: This rule sets out requirements for a provider who ceases providing under preneed contracts.

(1) If a provider of a preneed contract ceases doing business, the provider shall make all reasonable good faith efforts to find a new provider to serve under all existing contracts.
(2) If a provider is unable to find any new providers to serve under the provider's existing contracts, the provider shall, no later than 30 business days before the provider winds up his business:
    a. Provide written notice to the seller, seller's agent, purchaser, and Board that despite good faith efforts replacement providers could not be found;
    b. In the case of trust-funded contracts, provide written notice to the trustee and/or corporate contact that the provider is winding up his business and no replacement provider was found;
    c. In the case of insurance contracts, provide written notice to the insurance company and/or corporate contact that the provider is winding up his business and no replacement provider was found;
    d. In the case of joint account funded contracts, provide written notice to the financial institution and/or corporate contract that the provider is winding up his business and no replacement provider was found.
    e. Provide written notice to the purchaser of their right to obtain a new provider.
(3) The provider shall provide written notice consistent with the rules promulgated pursuant to Sections 436.400 to 436.520, RSMo.

Authority: 333.340, 436.490 and 436.520

APPROVED

Rule re: Seller ceasing business

Title: Requirements of a seller ceasing business

Purpose: This rule sets out requirements for a seller ceasing business under preneed contracts.

(1) If a seller of a preneed contract ceases doing business, the seller shall make all reasonable good faith efforts to find a new seller to ensure service of all existing contracts.

(2) If a seller is unable to find any new sellers to service the seller's existing contracts, the seller shall, no later than 30 business days before the seller winds up his business:

a. Provide written notice to each provider, seller's agent, purchaser, and to the Board that despite good faith efforts replacement sellers could not be found;

b. In the case of trust-funded contracts, provide written notice to each trustee that the seller is winding up his business and no replacement seller was found;

c. In the case of insurance contracts, provide written notice to each insurance company that the seller is winding up his business and no replacement seller was found;

d. In the case of joint account funded contracts, provide written notice to each financial institution that the seller is winding up his business and no replacement seller was found.

(3) As part of its cease doing business report, the seller shall file with the Board a final annual report for a reporting period from September 1 of the previous year to the date of the seller's cease of business. This report shall be made as an attachment to the cease doing business report and shall be made on the form provided by the Board for annual reports and shall comply with all requirements of the seller's annual report.

(4) The seller shall provide the Board with a written statement showing how it will comply with the seller's contractual, fiduciary and other obligations as set forth in § 436.500.

(5) Any person with unfulfilled preneed contracts who was registered with the Board as a seller on August 27, 2009 and had not filed cease doing business

forms with the Board before August 28, 2009, shall be required to file a cease doing business report in compliance with Section 436.500 and this and any other rules if they do not seek application for a Seller's license by October 31, 2009. This cease doing business report shall be due by close of business on October 31, 2009.

Authority: 333.340, 436.500 and 436.520

APPROVED

Rule re: Seller cancellation of contracts

Title: Seller cancellation of contracts

Purpose: This rule explains the requirements of a seller upon cancellation of a preneed contract.

(1) The provisions of Section 436.457, RSMo allowing a seller to cancel a contract shall apply only to joint account and trust-funded contracts.

(2) An insurance funded preneed contract may be cancelled by the seller if the seller receives notification that the insurance policy funding the contract has been cancelled.

Authority: 333.340, 436.457 and 436.520

APPROVED

Rule re: Requirements of seller annual reports

Title: Requirements for seller's annual reports.

Purpose: This rule clarifies the requirements for a seller's annual report.

(1) Every seller of preneed contracts shall file an annual report on a form provided by the Board;

(2) The report shall identify, by a number assigned to the contract, each and every contract sold since the last annual report. Only one number shall be assigned to each contract and no number shall be used more than once.

(3) Each annual report shall be signed by an officer, director or manager in charge and the signer shall certify, under oath, that the annual report is complete and accurate and the annual report shall be notarized.

(4) If a seller fails to file its annual report on or before October 31 of each year, then the seller's license shall be suspended as of November 1 and shall remain suspended until the seller has filed its annual report, its annual renewal form and paid all fees due.

(5) Any seller who continues to engage in any activities of a preneed seller during the time that its license is suspended may be subject to all authorities and powers of the State Board, the Office of the Attorney General and the seller's local prosecutors.

Authority: 333.340, 436.460 and 436.520

APPROVED

Rule re: Disposition of funds upon cancellation by the purchaser

Title: Disposition of funds in a trust-funded contract upon cancellation by the purchaser

Purpose: This rule explains the disposition of funds in a trust-funded contract upon cancellation by the parties.

(1) When a purchaser elects to cancel a trust-funded preneed contract upon proper notice, the trustee shall distribute to the seller within 15 days of notice:
    a. The principal of the trust, including all payments received; plus
    b. The amount of funds distributed from the trust to the seller pursuant to § 436.430.4, RSMo.
(2) The trustee shall not distribute the origination fee distributed to the seller pursuant to § 436.430.3, RSMo.
(3) The seller shall within 30 days distribute the funds described in (1) above to the purchaser of the contract.

Authority: 333.340, 436.456 and 436.520

APPROVED

Rule re: Seller Obligations regarding payments

Title: Seller Obligations Regarding Payments

Purpose: This rule clarifies seller obligations regarding payments received.

(1) Answer per contract fee assessed by the Board is an obligation to be paid by the preneed seller and not by the purchaser. However, if a seller passes this fee along to the purchaser, this fee shall be clearly noted on an invoice or statement provided to the consumer the amount charged and the purpose of this charge;
(2) If the seller collects this per contract fee assessed by the Board, the seller should maintain records of this collection and be able to provide to the State Board an accounting of these funds. If the seller deposits these fees into the trust, the Trustee shall distribute those fees to the seller in September or October of each year so that the seller will have the funds available to pay those fees to the State Board.

Authority: 333.340, 436.415, 436.430, 436.450, 436.455, 436.460, 436.465 and 436.520

APPROVED

Rule re: Mandatory Consumer Disclosures

Title of Rule: Mandatory consumer disclosures

Purpose: This rule sets forth the mandatory consumer disclosures that must be provided to each purchaser of a preneed contract.

(1) Each purchaser of a preneed contract shall be provided the following written mandatory consumer disclosures at or before the time the consumer signs the contract unless otherwise provided by rule.

Mandatory Preneed Contract Disclosures to Consumer

This Contract is a Legally Binding Document

Before you sign this contract, you should read it and make sure you understand all terms and conditions. You may wish to consult with your legal counsel before you sign this contract.

Right to Receive a Copy of this Contract

You have a right to receive a copy of this contract and any accompanying documents related to this contract such as any life insurance policies or evidence of a joint account.

Right to Change Providers

The law gives you the right to change the provider named in this contract. The provider is the funeral home or other service provider who will provide the goods and services at the time of your death. If you want to change providers, you must provide both the seller and provider named in this contract with written notice that you wish to change providers and you must include the name and address of who you want to be your new provider. You may NOT be billed for any additional fees or charges to change providers. A change in providers requires the agreement of the new provider and may require a new preneed contract. Your seller and provider can help you determine whether a new contract is required or not.

Qualifying for Public Assistance

If you decide to seek qualification to receive Medicaid or other public assistance, you may sign an agreement to make this contract irrevocable at any time. Even if you have agreed to make this irrevocable as part of your qualification for public assistance, you still may change providers at any time and make changes to the goods and services at any time. However, you cannot cancel this contract and cannot receive any refund.

Your Right to Cancel this Contract

You have a right to cancel this contract at any time before your death. If you cancel this contract, you may not be entitled to receive all funds paid on this contract. If you want to cancel this contract, you must give the seller named in this contract written notice that you wish to cancel this contract.

If your contract is funded with a joint account, you must also provide written notice to the financial institution where your account is held. The financial institution must give you the principal in the account within 15 days of your request. Interest will be distributed as provided in this contract.

If your contract is funded with an insurance policy, canceling the contract will NOT cancel the insurance policy. You must follow the policies of the insurance companies to cancel the insurance policy. If you cancel the insurance policy, you will receive only the cash surrender value of the policy which may be less than what you have paid into the policy.

If your contract is funded with a trust, you must also provide written notice to the trustee. The trustee shall then distribute all funds held on your behalf in the trust within 15 days.

Seller's Right to Cancel This Contract

The seller may cancel this contract if you fail to make any installment payment within 60 days of when it is due. Before the seller can cancel the contract, the seller must provide you with written notice of the intent to cancel the contract and you may bring your account current within 30 days of notice. If you don't pay the balance within 30 days, then the seller can provide the funds to the provider at the time of death to be credited towards your funeral services or the seller can cancel the contract and will refund you 85 percent of your contract payments made.

What Happens if I Die Before My Contract is Paid in Full?

If you die before the contract is paid in full, your survivors have the option in trust funded or joint account funded contracts to pay the balance due on the contract and receive all goods and services that have been price guaranteed. If the balance is not paid, the amount paid on your contract will be applied to the price of your funeral based on the provider's current prices.

If your preneed contract is funded through an insurance policy, you should consult your insurance policy.

Authority: 333.340, 436.425, 436.456, 436.457 and 436.520

Hayes, Lori

Subject: FW: Handout for October 20 meeting

Don Otto/MFDEA/MFT Comments

I am not sure what comments to make other than those that were in the original email (and I have no problem with the original email being distributed to everyone).

I don't really have a good solution to the banking problem with joint accounts. I can think of some things we COULD have done with the legislation last year had the Banks told us they had a problem with the 436 requirements. At best, I would urge that banking people be invited to discuss the situation to see if the banks that have talked to me are off base or not. Also we can urge funeral homes to check with their local bank to make sure the bank is "ok" with the requirments as soon as possilbe if they use joint accounts. I would not want to see people waiting until Oct., 2010 to find out their bank will not sign the annual report or that they are somehow out of compliance.

On the Family Services problem, I would ask that the Board use its good offices to try and set up a meeting with whomever can answer the question of when is a contract required and what must it consist of to meet their statutes and rules and why do we have inconsitancies thoughout the state on the issue.

On the items I mentioned that could use a rule, I do not think any are emergency situations, so maybe a group can get together to work on a few proposed rules to submit to the board at a later date.

Thank you very much for taking my thoughts and issues under consideration.

Don Otto

From: Don Otto
Subject: Some 436 isssues

Dear Becky and Sharon:

As we discussed, here are some issues that I have thought of with 436 that may need to be addressed in some way. Some are just questions that I don't have an answer for off the top of my head. Some may require more rules at some point. Some may be issues we cannot solve, but thought we should discuss at some point.

-Can Preneed Agents apply yet to take the law exam? If not yet then when? As it can take several weeks or longer to actually get though the process and schedule to take the test, will there be enough time for everyone that needs to to take the test before the end of the year? This could especially be a problem if a lot of people all apply and seek appointments at the same time. In all do you think the end of the year deadline for everything is enough?

-What happens if a Funeral Director signs up as a preneed agent but then lets his/her funeral directors license lapse?

-Going forward, I think it would be good to have separate applications for providers, sellers and agents even if one entity might have to fill out several sheets with mostly the same information. Putting all of them on one Notice of Intent form was, I thought, a good idea, but it does not seem to be working well with everyone as it causes unanticipated confusion.

-Would be nice to make it clear in a rule that a funeral director does not have to take the state law exam to sell preneed even though they do need to register as a preneed agent. I do think this is covered by the statutory exemption, but a flat-out rule that says that would be comforting to the funeral directors that got their license before you had to take the test.

-Does the exemption (and more importantly fee structure) for funeral director-preneed agents apply to limited funeral directors?

-The seller's annual report for insurance funded contracts under the statute does not really cover situations where all that is taking place is the assignment of a pre-existing insurance policy. A rule that spells out it is acceptable to put "N.A." if appropriated for those types of contracts on the report but then have, by rule, different reporting requirements covering the assignment might be a good idea. As was discussed at the board meetings, an assignment in and of itself may not trigger 436, but I am concerned about where DFS requires a contract. In that case the seller's report as set out in the statute does not really cover that as there is no insurance policy being "sold" and no money collected and no insurance company that has just sold a policy that could sign the report. I think all of this can be solved with some rules.

-While on DFS, I think it is vital that somebody gets some kind of answer on when a 436 preneed contract is going to be required or not. It seems clear that there is not uniform treatment of this situation throughout the state and that in and of itself causes problems. I realize that this is not something the Board controls, but it directly affects both licensees and the consumers the board protects so I think it is reasonable for the Board to try to get answers to these issues.

-The big issue I have been dealing with the last two weeks has been banks and joint accounts. Interestingly, almost all of the problems I am hearing have nothing to do with Senate Bill 1, they are problems with the parts of the law that have been the same for 27 years, but its just now that the banks apparently are aware of the situation. The upshot of the conversations is that the banks that I have talked with say they are required by law to follow the banking rules on who can make withdrawls and when and they cannot follow the provisions of 436. They say they must follow such laws as the Patriot Act, the Uniform Commercial Code and federal and state banking regulations and that 436 cannot override those provisions.

Here are paraphrases of actual conversations I have had with bank officials. All deal with deposit accounts and not trusts.

* If the deposit account requires two signatures to make a withdraw, the bank cannot be bound by the provision that says the bank must send the consumer the funds when it receives a written notice of cancellation. Two signatures is two signatures. If there are two signatures required on the account (consumer and funeral establishment), then even if the consumer sends in a notice of cancellation, both signatures will be required by the bank to get the money out.

* Likewise I have been told that the provision that the funeral establishment gets the funds by

presenting the certificate of completion will not work. If two signatures are required on the deposit account, the funeral home cannot get the money just by presenting a certificate of performance even though 436 says the bank MUST give the money within a certain time if the certificate is presented. The funeral home would have to go through the normal procedures to to withdraw whenever one person on a joint-account has died (for example, death certificates, etc).

*Conversely, the bank cannot (it was said to me) require a certificate of performance before giving out the money if the funeral establishment is, under the normal deposit account withdraw rules, entitled to the money. Here was the situation we talked about with this example: A joint account with right of survivorship is set up under names of Jane Doe and Smith Funeral Home. Jane Doe dies. Smith FH brings in death certificate and wants the money. Bank, I was told by banker, is required to give the funeral home the money even though the funeral home has not presented a certificate of performance per chapter 436. This of course is a big issue if, in my example, Smith FH didn't do the funeral even though Jane Doe died.

* The alternative that a lot of funeral homes use "Jane Doe p.o.d. to Smith funeral home" won't work under the law as you cannot set up an account like that that would require BOTH Jane Doe's and Smith funeral home's signature as required by 436 because, in such a p.o.d account Smith funeral home would have no signatory rights whatsoever until after Jane Doe died.

*The bank cannot and will not be bound by any "irrevocability" clause put down in any contract or other piece of paper. On a deposit account, whoever is on the signature card gets the money plain and simple. Despite the fact that the consumer has made the preneed contract irrevocable, if they are entitled to the money under the banking law on deposit accounts, they will be given the money. This will cause a huge problem with DFS I expect on excluding assets under chapter 208. Requiring both the funeral home and consumer to sign for any withdrawls may help some, but the consumer could still get the money if the funeral home agrees to sign or if there is a legal action to partition the joint account and that may be enough to make the joint account unworkable for DFS and 208 since the consumer still may be deemed to "own" the funds.

*I actually had one bank VP say something to me that I have been saying for 5 years: "how in the [heck] is some 19 year old bank teller supposed to know that somebody should or shouldn't get the money based on 436 when that is different than the banking rules?"

*After discussing the matter at length with one banker and going over the joint account requirements of 436, he said "the only way to do all of that is to set up a trust."

Interestingly NONE of the above issues were caused by SB1 -- they were there with the prior law but the banks had not read it I guess so they didn't care. They are apparently reading it now and they have problems.

One issue that IS new because of the new 436 law is the 436 requirement that the bank sign under oath part of the the seller's report. I have had two banks say they will not do this. They will be happy to give a detailed transaction printout for the account but they will not be certifying under oath as to what is required under the new 436 sellers report for joint accounts. What is a seller to do under 436 if the bank (or trust or insurance company for that matter) refuses to sign that part of the seller's report as set out by new 436?

What concerns me is that that we had no indication from the banking lobbyists or finance that these were problems even though they had been there throughout the whole process of coming up with the SB1. While we could do nothing with the Patriot Act and the UCC, we might have been able to come

up with some new funding alternatives if the banks had spoken up earlier. Frankly, if the banks are correct and can stick to these positions, I'm not sure that Joint Accounts are a viable option for preneed and that was one of the things everyone was trying to preserve as it is used by so many small funeral homes.

Provisions of the Patriot Act that may require things like the consumer going into the bank to set up the account and have drivers licenses or other alternative approved IDs make this situation with joint accounts even worse, especially for elderly consumers that are in nursing homes or are shut-ins.

I know it was everyones' intentions to preserve joint accounts as a preneed option but I have serious concerns whether this is possible from what I am hearing from the banks and some funeral homes. I have been told that some banks are saying they may not do any more joint accounts with funeral homes and consumers since they don't want to get drawn into any dispute.

Now it could be that the bankers I talked with are wrong and that 436 CAN require them to do all of these things, but since at least part of this is tied up with federal law, I'm not so sure.

I don't know what the answer here is, but needs to be thought about.

One thing that would be helpful is to have a meeting with Finance, DFS, a banking representative (not just a lobbyist, a real banker) and others to discuss these issues. If there is anything I can do to help in this regard, please let me know.

Don Otto

Hayes, Lori

Subject: FW: Upcoming Board Meeting/October 20

Sent: Monday, October 05, 2009 1:28 PM
To: Hayes, Lori
Subject: Re: Upcoming Board Meeting/October 20

Hayes, Lori wrote:
>
>
>
> Please send to open board meeting attendees next week by blind copy.
>
>
> If you have any additional rule suggestions for SB 1 for discussion at
> the October 20, 2009 meeting, please send in your draft by email, and
> we will provide as handouts at the open meeting. Thank you.
LORI,

I would like to know if the Board can give an official ruling on the following:

A person comes to the funeral home and prearranges with information and their desires, i.e. type of casket, vault and services. But no bill of goods and services are completed nor nothing is price frozen. they assign to the funeral home a life ins. policy for X amount or a CD and put survivorship to the funeral home.

Is this a 36.00 dollar preneed or No since there is no statement of goods and no price guarantee.....

Thank you,

John H. Moore

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October 13, 2009

Ms. Becky Dunn
Missouri State Board of Embalmers and Funeral Directors
3605 Missouri Boulevard
PO Box 423
Jefferson City, MO 65102-0423

Re: October 20th Agenda

Dear Becky,

By my count, the State Board has more than a dozen pending emergency rules to consider at the October 20th meeting. The industry has also been invited to suggest additional rules, and to submit draft proposals. Few within the industry appreciate how much time and effort the Board, and it's staff and attorneys, have already expended towards the proposed rules and application forms. There will be a desire to "push through" the emergency rule drafts, and to get on with other business. However, before doing so, I would suggest that the Board solicit industry input to prioritize the issues for Chapter 436 regulations and corrective legislation.

Subsequent to the Legislature's passage of SB1, there were 'discussions' regarding the Board sponsoring a forum for attorneys to discuss implementation of the law. The Governor's delay in signing the bill left little time to explore the forum approach. However, the August meetings were marked by considerable disagreements over the interpretation of crucial provisions of SB1. Accordingly, I would recommend that the Board reconsider scheduling a forum for the attorneys.

I have had some of the same experiences Don Otto describes in his comments to you and Sharon Euler. While Don's comments primarily regard the problems with the joint account, larger operators are also experiencing their own problems with fiduciaries' interpretation of SB1.

As Don suggests, the problems with joint account contracts have existed for years. SB1 did nothing to address those problems. The costs of SB1 compliance are causing many funeral directors to reassess whether to even offer preneed. But, some of those funeral directors mistakenly believe that joint account contracts can be exempt from the state fee and the licensing requirements. This combination of factors will trip up many funeral directors who have the best of intentions. This may force the State Board to decide whether its priority will be applying SB1 according to the letter of the law, or to begin seeking a solution for the small operator.

For sellers that utilize trust funded preneed, Section 436.430.2 will cause problems for funeral homes regardless of their size. This section has two distinct purposes: establish an audit trail for the purchaser's payments and preclude an NPS form of exploitation.

With regard to the direct deposit of purchaser payments, my bank clients advise that they need a transition period to accommodate the expansion of their administration. Funeral homes also have valid issues with the direct deposit requirement.

Proactive preneed sellers have been whipsawed by NPS and the economy. For the first time, Chapter 436 will make clear that the funeral home can offer the consumer a choice between guaranteed or non-guaranteed preneed. When the consumer has a choice, and the decision is a guaranteed contract, sellers may need to include finance charges or administrative charges as elements of the guaranteed contract. If the State Board is opposed to such charges, it would be best to address the Board's concerns sooner rather than later. The administration of such charges and fees represents an administrative burden to the preneed fiduciary.

To afford the Board and the industry time to assess the Section 436.430.2 issues, I would propose a regulation proposal regarding the use of clearing accounts. The proposal is not intended as the final solution, but rather an interim procedure until the respective positions can be addressed.

A final issue I would raise for consideration would be the industry discussion that will be required for the format of annual reports. It is understood that the State Board will need to determine whether existing trusts are adequately funded. Employing a trial and error approach to the reporting requirement will be costly and frustrating to the industry.

Sincerely,

William Stalter

cc: Don Otto

Requirements for sellers and the clearing account option

Seller establishes an insured account with a bank located within Missouri.

The account is used exclusively for administration of funds received by seller from purchasers that includes payments made towards a preneed contract that must be deposited to trust pursuant to 436.430.2.

The clearing account shall only be used to administer purchaser funds with regard to: 1) the accumulation of purchaser funds for deposit to trust pursuant to 436.430; 2) the application of purchaser funds to finance charges disclosed pursuant to TILA and Regulation Z; 3) the application of purchaser funds to credit life premiums; 4) the application of purchaser funds to contracts subject to Chapter 214, as well as to Chapter 436; or 5) the application of purchaser funds to administrative fees or charges.

The following information must be disclosed on the seller's license application: the bank name, address, clearing account number, the purpose(s) for the account, the name and contact information of the account's administrative agent.

The written procedures for administration of the account, including all forms and reports used to perform monthly reconciliation.

Seller's agreement to the following: production of records within 5 business days upon written request, an examination of the account by the Board's designee, seller payment of examination costs of no less than $[250?] based on the account's volume of activity, consent to an audit at seller's expense if the examination results are inconclusive or non-compliant, and _____.

RECEIVED
OCT 14 2009
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Sender's e-mail: rcowherd@ccttlaw.com

October 13, 2009

Office of Missouri Attorney General
Ms. Sharon Euler, Assistant Attorney General
Fletcher Daniels State Office Building
615 E. 13th Street, Suite 401
Kansas City, MO 64106

RE: Our file: 11273

Dear Sharon:

I have meet with my clients regarding issues that Consumer Funeral Assurance (CFA) request be addressed by the Board. CFA understands that the Board's authority is limited. However, it is clear the Board has authority to act to protect Missouri consumers of preneed contracts. CFA believes each of the following items are necessary to protect consumers and the integrity of the preneed system:

1. Timely Payment of Claims by National Prearranged Services (NPS). The understanding of CFA members was that claims would be paid within 45 days of submittal. The Special Deputy Receiver (SDR) is now reporting that the average is 45 days which means many claims are being paid over a much longer time.
It should be noted that the Approved Liquidation Plan does not provide for payment to the SDR but instead requires the Guaranty Associations to make payment directly to the funeral homes. See Sections 5.4.7, 5.4.8, and 8.4. Also Section 6.7 requires "timely payment of claims." CFA would request counsel for the Board, at the next status conference to raise this issue.

2. Orphan Contracts. Many CFA members believe that some preneed contracts which have been classified by the SDR in the NPS case as "orphan contracts" in fact have indicia of insurance. The Liquidation Plan provides no mechanism for a review of the determination that no indicia of insurance exists on these contracts. Since ultimately the coverage question is to be determined on Missouri contacts by the Missouri Guarantee Fund, CFA is requesting that the Board confer with the Missouri Guarantee Fund to create a procedure for reviewing the "orphan" determination.

3. Ongoing Consumer Payments on Contracts. One of the most egregious acts is the continued collection of payments by the SDR on contracts which have been designated as "orphan

contracts" and will not be paid by the SDR. We understand TDI recognizes the impropriety of this situation. However, to date, no one is taking any action to protect these Missouri consumers. CFA requests that the Board refer this matter to the Attorney General's Office for immediate action to cease this fraud on consumers.

4. Missouri Trust Companies. Under Chapter 436.61 RSMo., it is a crime to knowingly and willfully violate the provisions of Chapter 436. The Trust Companies conduct in handling the Missouri NPS Trusts appear to have reached that level. CFA is requesting that the Board refer this matter to the Attorney General's Office for prosecution.

5. Access to Telephone Conferences with SDR. As a representative of over 100 funeral homes in Missouri, CFA would like to have 1 or 2 representatives to be able to listen in on the telephone conferences with SDR.

6. Claim Forms from SDR. As the Board is aware, the SDR has sent to all Missouri consumers a "claim" form. Consumers are confused by the form and need direction in (i) whether or not to complete the form, and (ii) how to complete it. One of the primary functions of the Board is to protect Missouri consumers. CFA believes the Board should mail to all affected consumers (and post on the internet) information on these two issues.

Very truly yours,

CHAPMAN, COWHERD, TURNER & TSCHANNEN, P.C.

BY: Robert Cowherd

Robert Cowherd

RC/gen

cc: Brad Speaks

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