

MAINE STATE LEGISLATURE

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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

August 12, 1977

Honorable Nancy Randall Clark
RFD 2, Box 156
Lambert Road
Freeport, Maine 04032

Dear Representative Clark:

This responds to your request for an opinion regarding the relationship of the Maine Memorial Society and the funeral directors.

FACTS:

The Maine Memorial Society, a non-profit organization, is attempting to enter into contractual agreements with various funeral directors throughout the state of Maine. These agreements would provide that a particular funeral home, for a fixed price, would handle the remains of Society members who wish to be cremated. Several funeral directors are apparently reluctant to enter into such contracts because they feel they would be in violation of 32 M.R.S.A. § 1402, i.e., the prohibition against solicitation of prearranged funeral services or plans by funeral homes, funeral establishments or persons holding funeral directors licenses.

QUESTION:

If a licensed funeral director were to contract with the Maine Memorial Society to handle the remains of Society members who wish to be cremated, would this be deemed solicitation of prearranged funeral services or plans on the part of the funeral director?

ANSWER:

No. Funeral directors can contract with the Maine Memorial Society without violating 32 M.R.S.A. § 1402, the prohibition against solicitation of prearranged funeral services or plans.*

* In discussing the applicability of § 1402 to the recited facts, we should not be deemed to have considered or ruled upon the question of whether solicitation in general by funeral directors is now considered to be constitutionally protected. In view of recent decisions by the U.S. Supreme Court, it may well be that § 1402 is now constitutionally suspect."

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REASONING:

The statute in question, 32 M.R.S.A. § 1402, reads in part as follows:

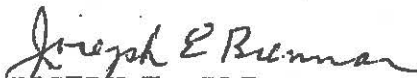
"No funeral home, funeral establishment or person holding a license under this chapter shall as, or through, an agent or principal solicit a pre-arranged funeral service or plan for any person or persons. 'Prearranged funeral service or plan' shall mean any funeral service or plan which is arranged, planned or determined prior to the demise of a person or persons for whom the funeral service is to be performed. Funeral homes, funeral establishments and licensees under this chapter may enter into contracts or agreements for prearranged funeral services or plans provided that they do not in any manner either as, or through, principals or agents solicit such contract or agreement. . . ."

By agreeing to handle the remains of Society members at a fixed price, the funeral director would not be personally soliciting pre-arranged funerals because it is the Society which would be seeking out the services of the funeral establishment. Further, the Society would not be acting as an agent of the funeral director in such a contractual arrangement. In Desfosses v. Notic, Me., 333 A.2d 83 at 86, the Court, in defining the agency relationship, stated:

"Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other."

The Society would be acting merely as an intermediary between its members and the funeral director. There would be no fiduciary relation between the Society and the funeral director because neither party would be acting on the others behalf or exerting any control over the other.

Very truly yours,


JOSEPH E. BRENNAN
Attorney General

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