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Opinion No. 92

COUNTY CORONERS—Funeral directors and morticians, conflict of interest; FUNERALS—Directors, county coroners, conflict of interest; OFFICES AND OFFICERS—County coroners, conflict of interest. Article XIII, section 4, Montana Constitution, 1972; sections 16-2403, 16-3402, 59-501, 66-2701, 66-2708, 94-7-401 and 95-801, R.C.M. 1947.

- HELD:**
1. Section 59-501, R.C.M. 1947, does prohibit a county coroner who is also a licensed funeral director from assigning coroner cases to a mortuary in which he has an interest.
 2. Section 59-501, R.C.M. 1947, does not prohibit a county coroner who is also a licensed mortician from assigning coroner cases to a mortuary in which he has an interest.
 3. A county coroner who is a licensed funeral director may be liable for the offense of official misconduct defined in section 94-7-401, R.C.M. 1947, if he knowingly assigns coroner cases to his own mortuary in violation of section 59-501, supra.

July 25, 1974

Mr. Robert L. Deschamps III
 Missoula County Attorney
 County Courthouse
 Missoula, Montana 59801

Dear Mr. Deschamps:

You have requested my opinion on the following questions:

1. Whether county coroners who are also funeral directors are prohibited from the practice of assigning coroner cases to their own mortuaries by section 59-501, R.C.M. 1947.
2. Whether any other prohibitions or sanctions exist which forbid coroners from engaging in the above practice.

A county coroner is a county officer, section 16-2403, Revised Codes of Montana, 1947, with powers and duties as enumerated in sections 16-3401, et seq., and 95-801, et seq., R.C.M. 1947. Section 16-3402, supra, specifically provides:

When ... no other person takes charge of the body of the deceased, he must cause it to be decently interred; ...

Section 66-2701 (2), R.C.M. 1947, defines the practice of funeral directing as:

- (a) supervising funerals
- (b) preparing dead bodies for burial other than by embalming

- (c) maintaining a mortuary for the preparation, disposition or care of dead human bodies, and
- (d) the holding out to the public that one is a funeral director or undertaker.

From the foregoing it is apparent that a county coroner has a duty to cause an unclaimed dead body to be properly buried and that a funeral director may prepare such bodies for burial. However, the issue is whether a county coroner, who is also a funeral director, may refer such a dead body to his own mortuary for burial preparation.

Article XIII, section 4, Montana Constitution, 1972, directs the legislature to provide a code of ethics for all state and local officers prohibiting conflicts between such officer's public duty and his private interests. As of this date, the legislature has not enacted any such code of ethics. Nor has it reaffirmed by resolution any existing statutes dealing with the subject.

However, section 59-501, *supra*, provides:

... [C]ounty ... officers ... must not be interested in any contract made by them in their official capacity, ... In this section:

- (1) The term "be interested in" does not include holding a minority interest in a corporation.
- (2) The term "contract" does not include:
 - a. contracts awarded to the lowest responsible bidder based on competitive bidding procedures, or
 - d. **contracts for professional services.** (Emphasis supplied)

From the language of section 59-501, *supra*, I conclude that a county coroner would violate the prohibitions contained therein if he owned or had a majority interest in an incorporated mortuary or funeral home to which he referred a dead body. However, there are three pertinent exclusions contained in section 59-501, *supra*. These are: (1) where the coroner holds only a minority interest in an incorporated mortuary or funeral home; (2) where the contract was let to the lowest responsible bidder after competitive bidding procedures had been complied with; or (3) where professional services are being contracted for.

Whether a coroner has a minority interest in an incorporated mortuary or funeral home is a factual question as is the competitive bidding issue. Both of these factual questions would first have to be resolved before determining if a violation of section 59-501, *supra*, had occurred. But the third exclusion does present a question which may be resolved in this opinion: Does a funeral director render professional services?

The terms "profession" and "professional" have generally been construed by courts to be an occupation or service requiring more than mere employment. The term implies the exercise of specialized skill and knowledge derived from study and training. **Cummins v. Pennsylvania Fire Insurance Company**, 134 N.W. 79, 153 Iowa 579 (1912). The Supreme Court of Iowa held in **Cummins** that:

The word [professional] implies professed attainments in special knowledge, as distinguished from mere skill; a practical dealing with affairs as distinguished from mere study or investigation; ... it is apparent from these definitions that, to constitute a profession, something more than a mere employment or vocation is essential; the employment or vocation must be such as exacts the use or application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for one's own purposes. 134 N.W. at 82.

A review of sections 66-2701, et seq., supra, indicates that the practice of funeral directing, standing alone, does not possess the characteristics of a profession. According to section 66-2707, supra, the only qualification required of a funeral director is the holding of a funeral director's license which may be obtained upon the payment of a fee not exceeding the sum of five dollars. Indeed, no specialized training, education or examination is a statutory prerequisite to the acquisition of a funeral director's license. Therefore, it is apparent that services offered by a coroner-funeral director do not come within the exempt classification of professional service, and an assignment of a coroner case to the coroner's own mortuary would be prohibited by the terms of section 59-501, supra.

Frizen v. Poppy, 17 N.J. Super. 390, 86 A.2d 134 (1952), reached a similar conclusion wherein the court held:

The occupation of undertaking or funeral director is a business, not a profession; ... 86 A.2d at 135.

However, in order to fully discuss your question I feel it is necessary to address my opinion to the situation of a coroner who is also a licensed mortician. It is evident that Title 66, chapter 27, R.C.M. 1947, creates a distinction between a funeral director holding only a funeral director's license, and a licensed mortician. There is no question that the law imposes greater duties and qualifications on a licensed mortician than upon a funeral director even though funeral directing is an essential element of the practice of mortuary science. Section 66-2701, supra, provides in pertinent part:

As used in this act

- (4) "Mortuary science" is the **profession** or practice of funeral direction and embalming.
- (5) A "mortician" is a person licensed under the laws of the state of Montana to practice mortuary science. (Emphasis supplied)

Moreover, in order to obtain a mortician's license from the board of morticians, it is necessary to acquire specialized training as well as post-high school formal education. These requirements are set forth in section 66-2708, R.C.M. 1947, which provides in part:

To qualify for a mortician's license a person must

- (2) Have graduated from an accredited college of mortuary science, and have satisfactorily completed two (2) academic years at an accredited college or university. ...
- (3) Pass an examination prescribed by the board.
- (4) Serve a one (1) year internship under the supervision of a mortician in a licensed mortuary in Montana.

It is clear that a mortician does exercise more than mere employment or occupation, and that he renders professional services to others which require special knowledge attained through formal education. Therefore, it is my opinion that the education, examination, and internship required of a licensed mortician does qualify his services as "professional" within the meaning of section 59-501 (2) (d), R.C.M. 1947, as amended, and that such services are exempt from the prohibition against an interest in contracts for public officers while acting in their official capacities.

At this juncture, one further authority deserves comment. In **42 Attorney General Opinions**, No. 63-11 (Cal. 1963), the then-attorney general for the state of California addressed himself to a similar question and reached a different conclusion. That opinion was based on a California statute very similar to section 59-501, *supra*, but which did not contain the exemption provisions mentioned above.

In your second question you asked whether other sanctions might exist to prohibit a coroner-funeral director from assigning coroner cases to his own mortuary. As previously mentioned, Article XIII, section 4, Constitution of Montana, 1972, provides a mandate to the legislature to draft a code of ethics for all state and local officers and employees. However, since this mandatory code of ethics has not yet been enacted by the legislature, the only conflict of interest statute relating to the issues raised herein is section 59-501, *supra*.

But a violation of section 59-501, *supra*, could result in a public officer's being prosecuted for official misconduct under the provisions of section 94-7-401, R.C.M. 1947, which provides that a public servant may be fined or imprisoned or both if he "knowingly performs an act in his official capacity which he knows is forbidden by law."

Another sanction for a violation of section 59-501, *supra*, could possibly include a civil action for injunction.

THEREFORE, IT IS MY OPINION, based upon the above considerations:

1. Section 59-501, R.C.M. 1947, does prohibit a county coroner who is also a licensed funeral director from assigning coroner cases to a mortuary in which he has an interest.
2. Section 59-501, R.C.M. 1947, does not prohibit a county coroner who is also a licensed mortician from assigning coroner cases to a mortuary in which he has an interest.

3. A county coroner who is a licensed funeral director may be liable for the offense of official misconduct defined in section 94-7-401, R.C.M. 1947, if he knowingly assigns coroner cases to his own mortuary in violation of section 59-501, supra.

Very truly yours,

ROBERT L. WOODAHL
Attorney General