

Note from the Attorney General's Office:

1983 Op. Att'y Gen. No. 83-056 was overruled in part by
2011 Op. Att'y Gen. No. 2011-005.

OPINION NO. 83-056**Syllabus:**

1. The Board of Embalmers and Funeral Directors has no authority to investigate and enforce R.C. 1107.33. It may, however, consider convictions for, or possible violations of, R.C. 1107.33 in determining whether it has a basis for denying, suspending, or revoking a license under R.C. 4717.08.
2. A determination as to when merchandise is "delivered" for purposes of R.C. 1107.33 will depend upon the facts of the particular situation.
3. As used in R.C. 1107.33, "bank" has the definition set forth in R.C. 1101.01(B).
4. As used in R.C. 1107.33, "accumulated interest" means all interest which may accumulate during the time that funds are on deposit pursuant to that section. Whether such total will include all interest earned on the funds will depend upon whether any interest is lawfully paid out pursuant to agreement, statute, or otherwise, rather than being accumulated.

To: Gordon E. Tatman, Secretary-Treasurer, Board of Embalmers and Funeral Directors of Ohio, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 11, 1983

I have before me your request, made on behalf of the Board of Embalmers and Funeral Directors of Ohio, for a formal opinion on several questions involving R.C. 1107.33, which deals with written agreements providing for the final disposition of dead human bodies. Your questions are as follows:

Does this Board have the jurisdiction to investigate and enforce Section 1107.33 of the Revised Code? If not, who is responsible?

Are cemetery associations covered under Section 1107.33, Revised Code, with reference to the sale of merchandise and service prior to the delivery of such merchandise or service?

Must a corporation doing business as a cemetery or sales organization for profit comply with Section 1107.33, Revised Code?

What does Section 1107.33, Revised Code, mean with reference to the word "Delivered" such as:

- A. Must a vault be placed in the ground to make delivery?
- B. Must a marker be placed in the ground to make delivery?
- C. When does the delivery of merchandise take place-- on the first payment or on the final payment of an installment contract?

Does a "Bank" refer to any federally insured banking institution under Section 1107.33, Revised Code?

Does "Accumulated interest" mean all interest earned on the account from the first day of deposit under Section 1107.33, Revised Code?

I note first that the Board of Embalmers and Funeral Directors of Ohio is a creature of statute, see R.C. 4717.02, and, as such, it has only such powers as are delegated by statute. See State ex rel. Homan v. Board of Embalmers and Funeral Directors, 135 Ohio St. 321, 21 N.E.2d 102 (1939); 1950 Op. Att'y Gen. No. 1946, p. 427. The powers and duties of the Board are set forth in R.C. Chapter 4717. Perhaps the most important duties of the Board are to issue embalmer's licenses, funeral director's licenses, and funeral home licenses. See R.C. 4717.06-.062; R.C. 4717.18.¹ Along with these duties, the Board is responsible for giving examinations to test qualifications for embalmer's licenses and funeral director's licenses, R.C. 4717.07, and for requiring licensed embalmers and funeral directors to meet continuing education requirements, R.C. 4717.071. R.C. 4717.08 and 4717.081 authorize the Board to refuse to grant, to suspend, or to revoke licenses, in accordance with R.C. Chapter 119, in certain instances, or to reprimand licensees or apprentices. R.C. 4717.04 provides generally:

Such board. . . may adopt, promulgate, and enforce such rules for the transaction of its business and the management of its affairs, the betterment and promotion of the educational standards of the profession of embalming and the standards of service and practice to be followed in the profession of embalming and funeral directing and in the operation of funeral homes in the state as it may deem expedient.

R.C. 4717.04 also authorizes the Board to appoint an "inspector of the board of embalmers and funeral directors of the state of Ohio," who may enter the place of business of any embalmer or funeral director in the state, or any premises where

¹ R.C. 4717.18, authorizing the Board to issue funeral home licenses, was recently enacted by Am. Sub. H.B. 291, 115th Gen. A. (1983) (eff. July 1, 1983). Such licenses are not required until after December 31, 1983. R.C. 4717.17.

embalming or funeral directing is carried out or where a funeral home is operated, for inspection purposes, and may serve and execute any process issued by the Board or by a court under R.C. 4717.01 to 4717.19.

R.C. 1107.33,² the statutory provision about which you have inquired, states:

Subject to the limitations and restrictions contained in Chapters 1101., 1103., 1105., 1107., 1109., 1111., 1113., 1115., 1117., 1119., 1121., 1123., 1125., 1127., and 1129. of the Revised Code, a bank shall have the power to receive and hold on deposit moneys under a written agreement providing for the final disposition of a dead human body.

All payments made under a written agreement providing for the final disposition of a dead human body, as consideration for the purchase of personal property or services which are only to be delivered or performed subsequent to the death of the person for whose benefit the agreement is made, shall remain intact as a fund until the death of the person for whose benefit the agreement is made. However, any deposit made pursuant to this section shall be released upon demand of the person for whose benefit such deposit was made.

All such funds shall be deposited within thirty days after receipt with a bank in this state insured with the federal deposit insurance corporation and shall be held in an account for the person for whose benefit such fund was established as a prearranged funeral plan account.

A certified copy of the certificate of death or other evidence of death satisfactory to the bank shall be furnished to the bank and it shall forthwith pay the funds and accumulated interest, if any, to the person entitled thereto under the written agreement. The payment of such funds and accumulated interest pursuant to this section shall relieve the bank of any further liability on such funds or accumulated interest.

R.C. 1107.99 imposes a fine of not more than one thousand dollars or a term of imprisonment of not more than one year, or both, for a willful violation of R.C. 1107.33.

Your first question is whether the Board of Embalmers and Funeral Directors has the jurisdiction to investigate and enforce R.C. 1107.33. As discussed above, the Board has statutory authority to implement and enforce a system of licensing for embalmers, funeral directors and funeral homes. See generally Meyer v. Parr, 69 Ohio App. 344, 37 N.E.2d 637 (Hamilton County 1941). The Board has no express authority to investigate or enforce R.C. 1107.33. The only context of which I am aware in which the application of R.C. 1107.33 might be relevant to the duties of the Board is in connection with its authority to refuse to grant, to suspend, or to revoke licenses. R.C. 4717.08 states:

In accordance with Chapter 119. of the Revised Code, the board of embalmers and funeral directors may refuse to grant, may suspend, or may revoke any license granted under this chapter, for any of the following reasons:

(A) If the applicant or holder obtained said license by fraud or misrepresentation either in the application or in passing the examination;

(B) If the applicant or holder has been convicted of a felony or crime involving moral turpitude;

(C) If the applicant or holder has been guilty of willfully violating sections 4717.01 to 4717.19 of the Revised Code, or any rule

² I am aware of proposed legislation, S.B. 98, currently being considered by the General Assembly, which would amend R.C. 1107.33 and related sections and affect the analysis contained herein.

of the state, district, or local board of health governing the disposition of dead human bodies or any other rule applicable to the applicant or holder;

(D) If the applicant or holder has been guilty of immoral or unprofessional conduct;

(E) If the applicant or holder knowingly permits an unlicensed person to engage in the profession or business of embalming or funeral directing under his supervision;

(F) If the applicant or holder has been guilty of habitual drunkenness or is addicted to the use of morphine, cocaine, or other habit-forming drugs;

(G) If the applicant or holder has been guilty of refusing to promptly submit the custody of a dead human body upon the expressed order of the person legally entitled to such body;

(H) If the applicant or holder loans, borrows, or uses the license of another or knowingly aids or abets the granting of an improper license.

(I) If the applicant or holder has used or been responsible for false, misleading, or deceptive advertising.

No person whose license has been suspended or revoked pursuant to this section or section 4717.081 of the Revised Code shall practice embalming or funeral directing or operate a funeral home until the license has been reinstated. (Emphasis added.)

A violation of R.C. 1107.33 is a misdemeanor. See R.C. 1107.99, 2901.02(F). Thus, conviction for a violation of R.C. 1107.33 would provide a basis for license denial, suspension, or revocation under R.C. 4717.08(B) only if the violation were found to constitute a crime involving moral turpitude. It does not appear that all violations of R.C. 1107.33 would necessarily involve moral turpitude, though it is certainly possible that moral turpitude might be found in some factual situations. See generally Toledo Bar Ass'n v. Lichota, 15 Ohio St. 2d 217, 219, 239 N.E.2d 45, 46 (1968) ("[t]here may be cases in which it will be unclear whether moral turpitude is inherent in the act defined as a crime so that it will be necessary to inquire into the precise conduct of a particular respondent"); In re Jacoby, 74 Ohio App. 147, 57 N.E.2d 932 (Marion County 1943). In any event, R.C. 4717.08(B) authorizes the Board to act, in accordance with R.C. Chapter 119, only after a conviction has been made by a court. It does not purport to leave to the Board a determination of whether a crime has been committed.

The only other context in which a possible violation of R.C. 1107.33 might be relevant to the duties of the Board is if the Board determines that such action constitutes immoral or unprofessional conduct under R.C. 4717.08(D) and, thus, constitutes a basis for denial, suspension, or revocation of a license. See generally Pierstorff v. Board of Embalmers and Funeral Directors, 68 Ohio App. 453, 41 N.E.2d 889 (Lucas County 1941), appeal dismissed, 138 Ohio St. 626, 37 N.E.2d 545 (1941) (upholding the authority of the Board to revoke the license of a funeral director on the ground of unprofessional conduct, although that term was not defined by statute or rule, on facts which included an incident in which the funeral director induced a woman to pay for a prearranged funeral on the representation that he would assist her in securing a pension and refused to return the full amount of the payment after she did not receive the pension and had nothing on which to live). In such instances, the Board is authorized to act in accordance with R.C. Chapter 119 to deny, suspend, or revoke the license. There is, however, no requirement that the Board limit its findings of immoral or unprofessional conduct to instances in which criminal statutes have been violated. Further, the Board has no authority to enforce the criminal penalties for violations of R.C. 1107.33.

In response to your first question, I conclude that the Board of Embalmers and Funeral Directors has no authority to investigate and enforce R.C. 1107.33. It may, however, consider convictions for, or possible violations of, R.C. 1107.33 in determining whether it has a basis for denying, suspending or revoking a license under R.C. 4717.08. In addition, if members of the board should become aware of possible violations of R.C. 1107.33, they may, as citizens, file affidavits under R.C.

2935.09³ to bring about the arrest or prosecution of the alleged violators. See generally 1919 Op. Att'y Gen. No. 217, vol. I, p. 380 (discussing procedure followed when a complaint charging a violation of the statute governing the embalming of dead human bodies was filed by the Secretary-Treasurer of the State Board of Embalming Examiners before a justice of the peace).

I note that you have also asked, if the Board is not responsible for investigating and enforcing R.C. 1107.33, who has that responsibility. My authority under R.C. 109.12 to give legal advice to a state board extends only to "matters relating to [its] official duties." I am, thus, unable to provide you with an analysis of the specific duties which other state or local officials may have with respect to the investigation and enforcement of R.C. 1107.33. I note, generally, however, that local law enforcement officers, county prosecuting attorneys, and municipal law directors have certain authority relating to the enforcement of offenses against the state. See, e.g., R.C. 309.08 ("prosecuting attorney may inquire into the commission of crimes within the county and shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, and such other suits, matters, and controversies as he is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals"); R.C. 1901.34 (except as otherwise provided, "village solicitor, city director of law, or similar chief legal officer for each municipal corporation within the territory of a municipal court shall prosecute all criminal cases brought before the municipal court. . .for violation of state statutes or other criminal offenses occurring within the municipal corporation for which he is the solicitor, director of law, or similar chief legal officer"); R.C. 2935.09; R.C. 2938.13 (prosecution for violation of a statute in a magistrate court by the village solicitor, city director of law, or prosecuting attorney); R.C. 2941.35 (institution of prosecution for misdemeanor by prosecuting attorney); 1970 Op. Att'y Gen. No. 70-053 (syllabus, paragraph 1) ("[e]ither a peace officer, or a private citizen having knowledge of the facts, may file an affidavit charging a person with committing an offense in this state"). Further, the Superintendent of Banks has been given the responsibility of seeing "that all laws relating to the business of banking are administered and applied in accordance with the purpose of Chapters 1101. to 1129. of the Revised Code." R.C. 1125.06(A). See R.C. 1101.06; R.C. 1125.08(A) ("If, in the opinion of the superintendent of banks, any bank. . .is violating or has violated, or the superintendent has reasonable cause to believe that the bank is about to violate, a law. . .the superintendent may issue and serve upon the bank a notice of charges in respect thereof"). See also R.C. 1129.99.

In connection with the limitations on my statutory authority to provide you with advice, I note, also, that I have been unable to determine, from the relevant statutes and rules, any respect in which the Board has statutory duties concerning the operation or regulation of cemetery associations or sale organizations for profit. I am, therefore, unable to relate your next two questions to the Board's official duties and, for that reason, am not able to consider them in the context of this opinion.

³ R.C. 2935.09 states:

In all cases not provided by sections 2935.02 to 2935.08, inclusive, of the Revised Code, in order to cause the arrest or prosecution of a person charged with committing an offense in this state, a peace officer, or a private citizen having knowledge of the facts, shall file with the judge or clerk of a court of record, or with a magistrate, an affidavit charging the offense committed, or shall file such affidavit with the prosecuting attorney or attorney charged by law with the prosecution of offenses in court or before such magistrate, for the purpose of having a complaint filed by such prosecuting or other authorized attorney.

See also R.C. 2935.10.

Your final questions concern the construction of R.C. 1107.33. As noted above, I have concluded that the Board has no authority to investigate or enforce R.C. 1107.33, but that the Board may consider that section in determining whether to deny, suspend, or revoke a license under R.C. 4717.08. In addition, the Board has, by adoption of 6 Ohio Admin. Code. 4717-1-15(D)(3)(g), indicated that Ohio laws governing funds for the final disposition of dead human bodies will be a subject covered in its examinations for funeral director's licenses. See also 6 Ohio Admin. Code 4717-1-16(B)(4)(a)(i) and (iv) ("no person other than a licensed Ohio funeral director shall make, or be permitted to make funeral arrangements with the person or persons having the right to control the incidents of burial or final disposition, or . . . (iv) For the sale or rental of funeral services, merchandise or paraphernalia"); 6 Ohio Admin. Code 4717-1-18(H) (prohibiting certain types of solicitation in connection with the sale of items involved in the final disposition of a dead human body). Further, the Board's authority under R.C. 4717.04 to adopt, promulgate and enforce rules for "the betterment and promotion of the educational standards of the profession of embalming and the standards of service and practice to be followed in the profession of embalming and funeral directing and in the operation of funeral homes" would seem to authorize it to educate its licensees on matters of law which may directly affect them in their professional capacities. Thus, the Board does appear to have an official interest in questions concerning the application of R.C. 1107.33 to its licensees. For this reason, I am able to address your questions concerning the interpretation of particular words used in R.C. 1107.33.

You have asked about the meaning of the word "delivered," as it is used in R.C. 1107.33. I am aware of no statutory definition of that word which is applicable to its usage in R.C. 1107.33. But see R.C. 130L.01(N) ("Delivery with respect to instruments, documents of title, chattel paper, or securities means voluntary transfer of possession"). I turn, therefore, to the ordinary meaning of the word. See R.C. 1.42. Webster's New World Dictionary 373 (2d college ed. 1976) defines "deliver" to mean "4. to give or hand over; transfer" and, at 374, defines "delivery" to mean "1. a giving or handing over; transfer. . . 8. Law a) the irrevocable transfer of a deed or instrument of conveyance b) the transfer of goods or interest in goods from one person to another." Thus, goods are delivered when they are transferred from one person to another. A determination as to when delivery takes place will depend upon the particular arrangement involved. See Hunt v. Bode, 66 Ohio St. 255, 269, 64 N.E. 126, 128 (1902) (delivery is necessary to make a valid sale, but actual or physical delivery need not always accompany the sale; "the transfer is complete and delivery made, when the owner has done all that he can do in the premises, and has given such possession to the pledgee or transferee as the nature of the property and its situation will permit"). I cannot, therefore, conclude, as a matter of law, that a vault must be placed in the ground to make delivery, that a marker must be placed in the ground to make delivery, or that delivery necessarily takes place on the first or final payment of an installment contract.

You have asked whether the word "bank," as used in R.C. 1107.33, refers to any federally insured banking institution. R.C. 1107.01 states that, where terms used in R.C. Chapter 1107 are defined in R.C. 1101.01, "they shall have the meaning set forth in that section." R.C. 1101.01(B) defines "bank" as follows:

"Bank" means any corporation soliciting, receiving, or accepting money or its equivalent on deposit as a business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, passbook, note, receipt, ledger card, or otherwise, and also includes commercial banks, savings banks, trust companies, and special plan banks, but does not include any building and loan association, credit union, or federal savings and loan association.

Thus, "bank" has this definition for purposes of R.C. 1107.33.

You have also asked whether the term "accumulated interest," as used in R.C. 1107.33, means all interest earned on the account from the first day of deposit. That term is not defined by statute and is, therefore, to be given its ordinary meaning. See R.C. 1.42; Webster's New World Dictionary 10, 734 (2d college ed. 1976) (defining "accumulate" as follows: "to pile up, collect, or gather together,

esp. over a period of time" and defining "interest" to mean "8. a) money paid for the use of money"). R.C. 1107.33 does not specify that any of the interest accumulated on the funds during any period of time is to be excluded from the total accumulated interest. I conclude, therefore, that, as used in R.C. 1107.33, "accumulated interest" means all interest which may have accumulated during the time that the funds were on deposit, beginning with the first day of deposit.

Your concern appears to be whether all interest earned on the funds, from the first day of deposit, must necessarily be accumulated. R.C. 1107.33 does not expressly set forth such a requirement, and I am aware of no authority directly addressing this question. The fact that R.C. 1107.33 speaks only of the accumulated interest, and makes no express provision for payment or distribution of interest apart from the payment of accumulated interest, suggests that all interest earned is to be accumulated. I am, however, unable to conclude that there is a statutory requirement that all interest earned on the funds be accumulated. It appears, rather, that the language of R.C. 1107.33 would permit interest to be paid out, rather than accumulated, if so required by relevant law (as, for example, by a provision of federal law which might require income tax withholding) or by the terms of the agreement.

R.C. 1107.33 requires that "[a]ll payments made. . .as consideration for the purchase of personal property or services. . .shall remain intact as a fund. . . ." Payments of interest would not be made as consideration for the purchase of property or services and, thus, would not be subject to mandatory retention pursuant to this language. Further, the final paragraph of R.C. 1107.33 speaks of paying out "the funds and accumulated interest, if any," thereby suggesting that there need not be any accumulated interest. It appears, therefore, that R.C. 1107.33 would permit, for example, an agreement for the deposit of moneys under which interest would be paid periodically to the person for whose benefit the agreement was made, rather than being accumulated. See generally R.C. 1107.06 (dealing generally with the payment of interest by a bank). The payments of money deposited as consideration for the purchase of property or services must, of course, remain intact as a fund or be released upon demand.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. The Board of Embalmers and Funeral Directors has no authority to investigate and enforce R.C. 1107.33. It may, however, consider convictions for, or possible violations of, R.C. 1107.33 in determining whether it has a basis for denying, suspending, or revoking a license under R.C. 4717.08.
2. A determination as to when merchandise is "delivered" for purposes of R.C. 1107.33 will depend upon the facts of the particular situation.
3. As used in R.C. 1107.33, "bank" has the definition set forth in R.C. 1101.01(B).
4. As used in R.C. 1107.33, "accumulated interest" means all interest which may accumulate during the time that funds are on deposit pursuant to that section. Whether such total will include all interest earned on the funds will depend upon whether any interest is lawfully paid out pursuant to agreement, statute, or otherwise, rather than being accumulated.