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ALAN WILSON
ATTORNEY GENERAL

December 17, 2014

The Honorable Peter M. McCoy, Jr.
Representative, District No. 115
135 King Street
Charleston, SC 29401

Dear Representative McCoy,

We are in receipt of your letter dated October 8, 2014 requesting an opinion of this Office related to preneed funeral contracts. Specifically, you state the following:

I am requesting a legal inquiry into a scenario that has played out locally in the District that I represent. The scenario is a funeral home and a consumer enter[] into a guaranteed price pre-need contract for funeral and burial. The consumer changes her mind and wanted to be cremated so she executed a pre-need contract for cremation. Since it was beyond 30 days of the original contract and the price was guaranteed, the funeral home takes the position that the consumer is not entitled to a refund. I am writing to request that you issue an official opinion on the inconsistencies between South Carolina Department of Consumer Affairs, the forms they provide to the funeral homes, and Section 32-7-20 of the South Carolina Code of Laws (1976) as amended.

You also provide documentation with your letter summarizing your opinion on the "issue" and the "scenario" as follows:

Issue

Funeral homes in South Carolina are authorized to enter into guaranteed pre-need contracts.

Contract forms are provided by the South Carolina Department of Consumer Affairs (SCDCA).

The form indicates that the consumer has 30 days to cancel otherwise the contract is irrevocable.

The form also indicates that at the time of death the consumer is entitled to services and the funeral home is entitled to all the money.

This is also supported by South Carolina Code § 32-7-20(b), which seems to indicate that it does not matter what price you use because the funeral home is entitled to all the funds in the account at the time of death.

The scenario is this:

In 2008 a funeral home and a consumer enter into a guaranteed price pre-need

contract for funeral and burial.

In 2010 the consumer changes her mind and wanted to be cremated so she executed a pre-need authorization for cremation.

Since it was beyond the 30 days and the original contract was a guaranteed price pre-need contract, the funeral home takes the position that the consumer was not entitled to a refund.

SCDCA, despite the language in the contract and the statute, believes the consumer would be entitled to a refund (the difference between the original 2008 contract and the subsequent 2010 contract) at the time of death.

Law/Analysis

I. Overview of Preneed Funeral Contracts

We will begin by addressing the basic principles of preneed funeral contracts, which have been described as a “pay now – die later” concept. Judith A. Frank, Preneed Funeral Plans: The Case for Uniformity, 4 Elder L.J. 1, 5 (1996) (footnote omitted). A preneed funeral contract involves an agreement to presently pay for funeral-related goods and services which will be delivered upon the death of the person designated within the contract. Id. The practice of preneed funeral planning dates back to approximately the 1930s when burial associations began the sale of what were referred to as burial certificate plans. Op. Md. Att’y Gen., 2013 WL 1558025 (March 1, 2013) (citing Sandra B. Eskin, AARP Pub. Policy Inst., Preneed Funeral and Burial Agreements: A Summary of State Statutes 3 (1999)). Thereafter, the concept spread to the funeral industry in the 1950s. Id. at *2. As preneed funeral contract sales have increased in popularity with the growing age of the population, inadequacies of consumer protection in the preneed funeral contract arena have been unveiled and state regulation of preneed funeral contracts has increased in attempt to better protect the consumer. Id. Because of the high risk of fraud resulting from the often significant period of time between bargaining and performance, all fifty states currently regulate preneed funeral contracts in some manner. Id. (citing Eskin at 3).

Many preneed funeral contract providers offer the option of a “guaranteed price” or “inflation proof” contract to the purchaser. Judith A. Frank, Preneed Funeral Plans: The Case for Uniformity, 4 Elder L.J. 1, 6 (1996). A guaranteed price contract sets a specified price for certain goods and services and requires the seller to provide those goods and services at the price established at the time of contract execution. Id. In other words, the price of the goods and services are set regardless of any price increases that may occur between the date the contract was entered into and future delivery. Id.

The common mechanisms recognized under state statutes to fund preneed funeral contracts are by trust or by a funeral insurance or annuity policy. Id. at 7. The most common form of funding is by trust which serves the purpose of safeguarding funds from abuse. Id. at 7-8. In instances where payments for a preneed funeral contract are placed in trust, the revocability of the trust is an important consideration to make prior to entering into the contract. Id. at 9. Many state statutes specifically permit the purchaser the option to declare the preneed funeral contract irrevocable. Id. at 9. This designation is particularly relevant for eligibility to qualify for Medicaid or Supplemental Security Income (SSI) being that funds to pay for preneed funeral

contracts held in an irrevocable trust are not counted as assets for Medicaid or SSI qualification. Id.; see 42 U.S.C. 1381-1383(c).

As previously mentioned, the alternative option for funding a preneed funeral contract is through an insurance policy or annuity plan. Judith A. Frank, Preneed Funeral Plans: The Case for Uniformity, 4 Elder L.J. 1, 9 (1996). Under an insurance policy, the consumer purchases by lump sum or by installments, a funeral or burial policy. Id. The consumer names the seller or the funeral provider as the beneficiary of the insurance or annuity policy and the benefit is paid at the death of the consumer or decedent. Id. An annuity plan works in the same manner except the consumer pays the seller or provider in installments over a specified period of time. Id. at 9-10. While some states regulate both trust and insurance or annuity funded preneed funeral contracts, others expressly exempt insurance policy funding, fall silent on the issue, or recognize that their state's insurance law is the appropriate regulating authority. Id. at 10.

II. South Carolina Authority Governing Preneed Funeral Contracts

In South Carolina, Chapter 7 of Title 32 of the S.C. Code establishes the requirements for licensure for the sale of preneed funeral contracts and the rules related to those sales. See S.C. Code Ann. § 32-7-10 et seq. (collectively referred to as "the statute"). As defined by S.C. Code Ann. § 32-7-10(8) (Supp. 2014), a preneed funeral contracts is a:

contract which has for its purpose the furnishing or performance of funeral services or the furnishing or delivery of personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed of but does not mean the furnishing of a cemetery lot, crypt, niche, mausoleum, grave marker, or monument.

The statute also names and defines the parties to a preneed funeral, which include the beneficiary,¹ provider,² purchaser,³ and seller.⁴ We will use these terms, as defined within S.C. Code Ann. § 32-7-10, throughout this opinion. Also as a preliminary matter, we note that S.C. Code Ann. § 32-7-20(E) distinguishes that insurance policy funded preneed funeral contracts are not regulated by S.C. Code Ann. § 32-7-20(A)-(D); alternatively, § 32-7-20(E) recognizes that such contracts "are otherwise regulated by law." S.C. Code Ann. § 32-7-20(E) (Supp. 2014).

You state in your correspondence that the purchaser to whom this opinion relates signed a cremation authorization form subsequent to the execution of the guaranteed price preneed contract. As this is the case, we note that cremation authorizations and procedures are statutorily regulated by S.C. Code Ann. § 32-8-300 et seq. S.C. Code Ann. § 32-8-315 (2007) discusses

¹ Beneficiary is defined as: "the person who is to be the subject of the disposition, services, facilities, or merchandise described in a preneed funeral contract." S.C. Code Ann. § 32-7-10(3) (Supp. 2014).

² Provider is defined as "a funeral home licensed in this State which is the entity providing services and merchandise pursuant to a preneed funeral contract and is designated trustee of all funds." S.C. Code Ann. § 32-7-10(9) (Supp. 2014).

³ Purchaser is defined as "the person who is obligated to make payments under a preneed funeral contract." S.C. Code Ann. § 32-7-10(10) (Supp. 2014).

⁴ Seller means "a licensed funeral director in this State who is directly employed by the provider." S.C. Code Ann. § 32-7-10(11) (Supp. 2014).

cremation authorization forms, stating that: “[a] person may authorize his or her own cremation and the final disposition of his or her cremated remains by executing a cremation authorization form.” From your letter, we presume that the cost for goods and services for funeral and cremation would be less than the goods and services for funeral and burial established in the guaranteed price preneed contract. We also presume from your correspondence that a request has been made for a refund for the price difference. You provide that the issue has not been resolved due to what you indicate are “inconsistencies between [the] South Carolina Department of Consumer Affairs, the forms they provide to the funeral homes, and Section 32-7-20 of the South Carolina Code of Laws (1976) as amended.” Against this background, we will attempt to clarify your questions.

a. Statutory Construction

As statute governs guaranteed price preneed contracts, it is necessary to look to the rules of statutory construction for guidance. “All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and the language must be construed in light of the intended purpose of the statute.” State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quoting Broadhurst v. City of Myrtle Beach Election Comm’n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000)). A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Sloan v. S.C. Bd. of Physical Therapy Exam’rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006) (citing Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992); Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 341, 47 S.E.2d 788, 789 (1948)). A statute should not be construed by concentrating on an isolated section or provision. Laurens County Sch. Dists. 55 & 56 v. Cox, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992).

When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction, and courts must apply the literal meaning of the statute’s terms. Sloan, 370 S.C. at 486-87, 636 S.E.2d at 616 (citing Carolina Power & Light Co. v. Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994)). In other words, “if the intent of the legislature be clearly apparent from its language, the court may not embark upon a search for it dehors the statute.” Abell v. Bell, 229 S.C. 1, 4, 91 S.E.2d 548, 550 (1956). Like a court, this Office must apply the plain meaning of the words contained in a statute when such terms are clear. Rejection of the plain meaning of statutory terms should be done only to escape absurdity that could not have possibly been the intent of the Legislature. Kiriakides v. United Artists Commc’n, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

Because it is our opinion that the plain language of the statutes speaking to preneed funeral contracts is clear and unambiguous, we must apply the plain and ordinary meaning of the statutes’ terms. A discussion of our opinion of the plain meaning of the statutes’ terms follows.

i. Non-Guaranteed Price Preneed Contracts

S.C. Code Ann. § 32-7-20(A)(1) speaks to what are referred to as non-guaranteed price preneed contracts and specifies that all payments made on such a contract “are held to be trust funds.” S.C. Code Ann. § 32-7-20(A)(1) (Supp. 2014). In addition, the statute specifies that for

non-guaranteed price preneed contracts “[a]fter the death of the beneficiary, the principal and all accrued earnings must be applied to the *cost in effect at the time of death* of the services and merchandise specified in the contract.” S.C. Code Ann. § 32-7-20(A)(3) (Supp. 2014) (emphasis added). It is also established that if the price of the contract is not guaranteed, “[a] shortfall in the funds must be paid by the next of kin or the estate of the beneficiary and any excess must be refunded to the estate of the beneficiary.” S.C. Code Ann. § 32-7-20(A)(3) (Supp. 2014). Thus, the statute makes clear that non-guaranteed price preneed contracts apply the cost of goods and services at the time of death and any expenses not covered by the trust principal and earnings must be paid by the next of kin or the estate of the beneficiary of the contract. However, if funds remain in the trust after payments are rendered, the statute directs that they are to be paid to the estate of the beneficiary of the agreement.

ii. Guaranteed Price Preened Contracts

What are referred to as guaranteed price preneed contracts are governed in part by S.C. Code Ann. § 32-7-20(B) which states: “[t]he provider may enter into a contract and guarantee to provide services and merchandise in accordance with a preneed funeral contract in the future *at no additional cost to the purchaser when the full contract price amount is paid to the provider.*” S.C. Code Ann. § 32-7-20(B) (Supp. 2014) (emphasis added). Payments made on the guaranteed price preneed contract must also be held in trust⁵, and those payments along with all earnings accrued, are to be paid to the provider to cover the costs of goods and services upon death of the beneficiary. S.C. Code Ann. § 32-7-20(B) (“After the death of the beneficiary of a guaranteed-price contract the principal and all accrued earnings must be paid to the provider to cover the costs in effect at the time of death of the services and merchandise specified in the contract”). Thus, allowance of a guaranteed price preneed contract permits the provider to offer the purchaser goods and services at the current rate to avoid payment of possible price increases on the same goods and services at the future date that they are provided. The principal and earnings in trust at the time of death “cover” the costs of goods and services, even if they are actually marketed at a higher price than the time of contract execution. The statute also directs that if a balance remains in the fund after the payment for the merchandise and services as provided in the agreement, contract, or plan under “a contract pursuant to subsection (B)” (i.e. a guaranteed price preneed contract) it must be “paid to the provider.” S.C. Code Ann. § 32-7-20(D) (Supp. 2014).

You specify that one of your concerns is: “South Carolina Code § 32-7-20(B) [] seems to indicate that it does not matter what price you use because the funeral home is entitled to all the funds in the account at the time of death.” While the provider is entitled to, as you put it, “all the funds in the account at the time of death,” or more accurately the principal and all accrued earnings in the trust, we believe the above analysis of the plain meaning of the statute clarifies a possible misunderstanding of what the statute requires. Again, the plain language of § 32-7-20(B) indicates that guaranteed price preneed contracts that are paid in full require no further payment at the time of the beneficiary’s death: “[t]he provider may enter into a contract and guarantee to provide services and merchandise in accordance with a preneed funeral contract in

⁵ S.C. Code Ann. § 32-7-20(H) (Supp. 2014) clarifies that “all funds received by the provider pursuant to the provisions of a contract governed by this chapter must be placed in trust in a federally insured account.”

the future *at no additional cost to the purchaser when the full contract price amount is paid to the provider.*" S.C. Code Ann. § 32-7-20(B) (Supp. 2014). As clarified by S.C. Code § 32-7-20(H) (Supp. 2014), the payments made on a guaranteed price preneed contract must be placed in trust in a federally insured account. Overtime, the funds initially placed in trust (i.e. principal) will accumulate "accrued earnings" (i.e. income). With this in mind, the second sentence of S.C. Code Ann. § 32-7-20(B) instructs on payment after the beneficiary's death, stating that: "[a]fter death of the beneficiary of a guaranteed-price contract, *the principal and all accrued earnings* must be paid to the provider to cover the costs in effect at the time of death of the services and merchandise specified in the contract." Therefore, a plain reading of this provision reflects that the provider is to receive the contract price that has been paid by the purchaser and any accrued earnings on the principal. The next of kin or the estate of the beneficiary are not obligated to pay any additional funds provided the full contract price amount was paid in full by the purchaser to the provider.

iii. Revocability

South Carolina statute permits that both guaranteed and non-guaranteed price preneed contracts can be made revocable or irrevocable at the option of the purchaser. See S.C. Code Ann. § 32-7-25 (Supp. 2014) ("The contracts governed by this provisions of this chapter may be made irrevocable at the opinion of the purchaser"); S.C. Code Ann. § 32-7-30 (Supp. 2014) (allowing for revocation of a preneed funeral contract, directing a refund, less ten percent of earnings in the final year before termination, within thirty days of a written demand for refund from the purchaser). Should the purchaser choose to make the contract irrevocable, the statute requires that "he must be allowed thirty days to examine the contract. . . . [and] [w]ithin that period, the purchaser may revoke his decision to enter this contract and all monies paid by the purchaser must be refunded." S.C. Code Ann. § 32-7-25 (Supp. 2014). This section also clarifies that "[a]n irrevocable trust-funded preneed funeral contract executed under this chapter must not be converted to an insurance-funded preneed funeral contract." Id.

If the purchaser of either a guaranteed or non-guaranteed price preneed contract chooses to make the contract *revocable*, he or she must be issued a refund upon written demand. See S.C. Code Ann. § 32-7-30(A) (Supp. 2014). The statute specifies that:

[w]ithin thirty days of receipt of a written demand for refund by the purchaser who has paid funds for a preneed funeral contract pursuant to Section 32-7-20(A) [i.e non-guaranteed price preneed contract] or (B) [i.e. guaranteed price preneed contract] the trustee shall refund to the purchaser the entire amount paid together with all interest dividends, increases, or accretions earned on the fund except that the provider may retain ten percent of the earnings in the portion of the final year before termination.

S.C. Code Ann. § 32-7-30(A) (Supp. 2014). But, the statute clarifies that a refund upon a written demand "does not apply if the contract is irrevocable." S.C. Code Ann. § 32-7-30(C) (Supp. 2014).

Addressing your concern that "[s]ince it was beyond the 30 days and the original contract was a guaranteed price preneed contract, the funeral home takes the position that the consumer

was not entitled to a refund,” it is our opinion that revocability depends on whether, at the opinion of the purchaser, the contract was made irrevocable or revocable, not whether the contract establishes a guaranteed price or non-guaranteed price. The plain language of the statute permits the purchaser the option to revoke a revocable guaranteed price or non-guaranteed price preneed funeral contract in writing and be given a refund, minus ten percent of earnings on the principal made in the year prior to execution. S.C. Code Ann. § 32-7-30 (Supp. 2014). An irrevocable contract can be revoked after thirty days of contract execution but not subsequent to that thirty day period. See S.C. Code Ann. § 32-7-30(C) (Supp. 2014); § 32-7-25.

b. DOCA Contract Forms

The statute directs that the South Carolina Department of Consumer Affairs (“the DOCA”) is to provide licensing for and regulation of preneed funeral contracts. See generally S.C. Code Ann. § 32-7-10(5) (Supp. 2014); § 32-7-45(B); § 32-7-50; § 32-7-110. As you referenced in your correspondence, the DOCA approves all forms to be used by providers of preneed contracts as directed by statute: “[t]he department shall approve forms for preneed funeral contracts. All contracts must be in writing, and a contract form must not be used without prior approval of the department.” S.C. Code Ann. § 32-7-20(F) (Supp. 2014). It is our understanding that the DOCA has approved two forms for preneed funeral contracts, one titled “Guaranteed Price Preneed Contract” and the other titled “Non-Guaranteed Price Preneed Contract.” The contract forms we have reviewed for purposes of this opinion indicate that they were last revised in August of 2012 and were obtained by our Office from the DOCA’s website.

You note in your opinion request that the DOCA guaranteed price preneed contract form “indicates that at the time of death the consumer is entitled to services and the funeral home is entitled to all the money” and also that “[t]he form indicates that the consumer has 30 days to cancel otherwise the contract is irrevocable.” In response to these observations, it is our opinion that the actual language used on the DOCA guaranteed price preneed contract form is consistent with the statutes governing preneed funeral contracts. In regards to your first concern, the pertinent portion of the form reads as follows: “[f]or the purchase price below Provider, its successors and assigns, agrees to furnish services, merchandise and facilities described *regardless of future price changes*. The Provider will be entitled to all *trust funds on deposit including income*, or all insurance proceeds, *even though in excess* of the costs of services at the time of death” S.C. Dep’t of Consumer Affairs, Guaranteed Price Preneed Contract, available at http://www.consumer.sc.gov/business/licensing_registration/pnfc/Pages/default.aspx (link to Guaranteed Price Contract under Approved Contracts heading) (emphasis added). This contract provision, in our opinion, is consistent to the statutory terms to which it relates, S.C. Code Ann. § 32-7-20(B) (Supp. 2014) and S.C. Code Ann. § 32-7-20(D) (Supp. 2014), by setting the price of goods and services to the price agreed upon at contract execution “regardless of future price changes” and establishing that the provider is entitled to the principal and accrued earnings in the trust account, even if in excess of the cost of goods and services at the time of the beneficiary’s death.

In regards to your next concern (“the form indicates that the consumer has 30 days to cancel otherwise the contract is irrevocable”), it is our opinion that the actual language used on the DOCA Guaranteed Price Preneed Contract form is consistent with statute to which the

provision relates. To specify, the actual language used the “Nature of Agreement” section provides an option to make the contract revocable and an option to make the contract irrevocable: “[b]y writing his or her initials, Purchaser chooses to make this contract revocable. That is, Purchaser has the right to revoke it.” S.C. Dep’t of Consumer Affairs, Guaranteed Price Preneed Contract, available at http://www.consumer.sc.gov/business/licensing_registration/pnfc/Pages/default.aspx (link to Guaranteed Price Contract under Approved Contracts heading). On the next line, the contract form states: “[b]y writing his or her initials, Purchaser chooses to make this contract irrevocable. That is, Purchaser does not have the right to revoke it.” S.C. Dep’t of Consumer Affairs, Guaranteed Price Preneed Contract. Id. The bottom of the contract form also states in bold capital letters that “[i]f the purchaser has chosen to make this contract irrevocable, he or she has 30 days to consider this decision and reverse it thereby making the contract revocable.” Again, these contract provisions parallel the direction given by the correlating statutes setting the rules for revocable and irrevocable preneed funeral contracts as discussed above. See S.C. Code Ann. § 32-7-25 (Supp. 2014); § 32-7-30.

Conclusion

We caution that because your questions ultimately involve a contractual dispute which may well turn upon issues of fact, they can only be adjudicated by a court and cannot be determined by an opinion of this Office. As we noted in a prior opinion of this Office:

[a] legal opinion cannot resolve such obviously critical questions as precisely what expectations the parties may have had or what reliance was placed upon any representations made. . . . Because this Office does not have the authority of a court of other fact-finders body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body. . . we do not possess the necessary fact-finding authority and resources to adequately determine the difficult factual questions present here.

Op. S.C. Att’y Gen., 2003 WL 21212007 (May 21, 2013) (citing Op. S.C. Att’y Gen., 1985 WL 259225 (May 21, 2003)).

Nevertheless, we have provided the law that we believe would apply if the issues you presented in your opinion request were before a court of law. As discussed above, it is our opinion that a Court would find that the statutes governing preneed funeral contracts are clear and unambiguous and would therefore be bound to apply the plain meaning of the statutes’ terms. The statutes governing preneed funeral contracts provide rules for guaranteed price and non-guaranteed price preneed funeral contracts. The primary differences between the two contract types are that under a guaranteed price preneed contract, the next of kin or estate of the beneficiary are not required to pay costs in addition to the fully paid contract price entered into between the purchaser and the provider. Conversely, under a non-guaranteed price preneed contract, any increase in the price of goods and services would be owed at the time of the beneficiary’s death. In addition, under a non-guaranteed price preneed contract, any excess in funds after the payment of goods and services must be paid to the estate of the beneficiary. Alternatively, the provider is entitled to any excess funds under a guaranteed price preneed contract.

December 17, 2014

Statute also provides that, at the option of the purchaser, the terms of either a guaranteed price or non-guaranteed price preneed contract can be made revocable or irrevocable. Should the contract entered into be made revocable, the purchaser can cancel the contract at any time and be refunded payment, less ten percent of earnings in the final year prior to revocation, within thirty days of written notice. On the other hand, if the contract is irrevocable, the consumer has thirty days after contract execution in which to revoke the contract. After this period, revocation is not permitted. It is also our opinion that the forms issued by the DOCA that we have reviewed for purposes of writing this opinion are consistent with the rules set by the statutes regulating preneed funeral contracts.

While we are cognizant of the push towards consumer protection in the area of preneed funeral agreements and the disadvantages that may result for the purchaser who chooses to enter into an irrevocable contract and subsequently wishes to revoke it after the thirty day period has run, we are also aware that our courts have consistently held that they are not in the business of rewriting contracts. See, e.g., Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002). The purchaser has the option of making a preneed funeral contract revocable which provides greater flexibility should the wishes regarding the goods and services related to his or her final disposition change.

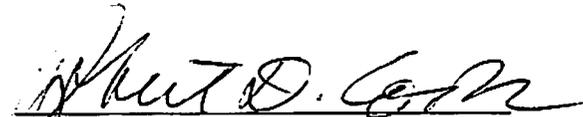
We are hopeful that the above analysis will be helpful in answering your concerns. Should you have any additional questions, please do not hesitate to contact our office.

Very truly yours,



Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General