

12

Original: 2459

# John Flynn

## FUNERAL HOME & CREMATORY, Inc.

2630 East State Street, Hermitage, Pennsylvania, 16148  
(724) 347-5000

John R. Flynn, Funeral Director/ Supervisor  
Fax: (724)346-3820

March 9, 2005

RECEIVED  
05 MAR 14 AM 9:17  
BUSINESS  
LICENSING DIVISION

Michelle Smey  
Administrator, State Board of Funeral Directors  
P.O. Box 2649  
Harrisburg, Pa 17105-2649

RE: Proposed rulemaking in the Pennsylvania Bulletin. Reference No. 16-1-4814

Dear Administrator Smey:

I am writing this letter to express my opposition to the proposed regulation changes.

At this time, I don't feel that any changes are necessary, and am totally opposed to Proposed Paragraph 13, 16, & 17.

If these regulations are not denied, I would like to request a public hearing so I can hear the board's explanation on the need for the changes.

Sincerely,



John R. Flynn  
President

Funeral Director / Supervisor

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2005 MAR 21 AM 9:28  
FUNERAL HOME & CREMATORY  
REVIEW/ COMMISSION



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2005 MAR 21 AM 9:28

March 11, 2005

REGULATORY  
REVIEW COMMISSION

Michelle Smey  
Administrator  
State Board of Funeral Directors  
Penn Center  
2601 N. Third Street  
P. O. Box 2649  
Harrisburg, PA 17105-2649

REGULATORY  
LICENSING DIVISION

05 MAR 15 AM 9:57

RECEIVED

Dear Ms. Smey:

It has come to my attention that the State Board of Funeral Directors ("the Board") is considering the adoption of regulations pertaining to 49 PA Code Chapter 13, namely Section 13.202 thereof relating to unprofessional conduct of funeral directors. As the President and CEO of a Trust Company that has been engaged in the pre-need line of business for a number of years, I feel that it is imperative that I provide you my thoughts and obligations relative to this matter.

For the past ten years I and my staff have worked with funeral directors to provide recordkeeping and investment management services for their pre-need accounts. We have come to know the industry well and have had direct and personal contact with funeral directors across the Commonwealth. Based on my Company's involvement with numerous funeral directors in the pre-need line of business and our understanding of the funeral industry in general, I submit the following for your consideration:

After reviewing the proposal it is apparent that the Board is attempting to circumvent the provisions of 63 P.S. Section 479.13 [c], the Funeral Director Law. In addition, the Board's intent to do so is clearly an attempt to navigate around the decision rendered by the Commonwealth Court in *Kevin M. Bean, Licensed Funeral Director v. State Board of Funeral Directors*.

The Board's earlier attempt to fashion the method by which pre need contracts were handled and construed failed when the Commonwealth Court supported Kevin Bean in the above-captioned matter. Having lost its battle in the courtroom, the Board now appears to be advancing its campaign by virtue of the amendment cited above.

Page 1 of 3

It appears that the Board would like its position to be considered pro-consumer when it advocates the revocability of pre need contracts and the return of pre-paid funds for services that might not be rendered or for services that were provided at a cost less than the amount that was paid at the time the contract was created. To the contrary, that position is anti-consumer. It would enable a surviving relative to controvert the planning and wishes of a decedent by directing a less expensive means of burial or even cremation for personal gain represented by the difference between the contract price and the less expensive services provided.

The proposed regulation would deter funeral directors from entering into pre-need contracts which would be a severe disservice to the consumer. If pre need contracts were no longer offered, consumers would be left to arrange funerals only at the death of a loved one when there would not be sufficient time for price comparisons and at a time when due to bereavement, a decedent's family might not be thinking as clearly as they might at other, less stressful times.

Irrevocable pre need contracts are beneficial to the consuming public and definitely serve a purpose in our society. The funeral director is not without risk when a contract for future goods and services with an individual is created. The funeral director is then contractually obligated to provide the goods and services agreed upon regardless of their costs at the time they are provided. Granted, the funeral director has the funds paid into the contract and the earnings thereon to offset such costs, but there is no guarantee that the total value of the fund will be sufficient when the goods and services are provided.

Because of the risk taken by the funeral director, equity would require a reward as well. The offset to the risk should therefore be that the funeral director would be permitted to retain any funds that remain after the goods and services are provided whether they are as contracted for or as altered by the survivor.

Another very serious concern is raised by the proposed regulation and the attitude of the Board. As many of us who deal daily with elderly clients are aware, prepaid funeral contracts are excluded from an individual's assets for Medicaid and DPW purposes. If the contracts are no longer offered or are allowed to be revocable, the individual's ability to plan for a suitable funeral and sequester those funds outside the grasp of creditors and government agencies will no longer be available.

The Board's position that pre-need contracts are revocable is contrary to all the basic tenets of contract law and trust law. Also, if the contract is revocable, it must be considered revocable by both parties, the individual and the funeral director. Although the individual might have more flexibility under the revocable trust, the risks to that individual far outweigh the benefits. The risks could be damaging from the aspect cited above, in that Medicaid or DPW Assistance would not recognize the burial fund and any assets held therein would be considered available to the individual thereby reducing or eliminating the individual's benefits.

If the contract is revocable, the individual and his family would have no guarantee that the funeral director would provide the goods and services that were referred to in the contract since it could be revoked by the funeral director. This could not only cause significant financial hardship on the survivors, but also severe emotional and psychological harm at a time when their lives are under tremendous stress and bereavement.

Based on the foregoing, I stand opposed to the proposed regulation cited above and strongly believe that its enactment would produce damaging results for the individual consumer, the survivors of a decedent who would have to deal with funeral arrangements at a very difficult time in their lives and the funeral industry in general. Notwithstanding the foregoing, I am also concerned regarding the effect of the regulation on current contracts and the violation of contract and trust law that might result if it is enacted.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ronald W. Virag".

Ronald W. Virag  
President and CEO



Audubon III, Suite 220  
1895 Preston White Drive  
Reston, VA 20191  
Telephone: 703.391.8400  
Toll free: 1.800.645.7700  
Fax: 703.391.8416  
www.icfa.org  
email: gen4@icfa.org

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2005 MAR 21 AM 9: 28

REVIEW COMMISSION

March 11, 2005

Michelle Smey  
Administrator  
State Board of Funeral Directors  
P.O. Box 2649  
Harrisburg, PA 17105-2649

RECEIVED  
05 MAR 15 AM 9:57  
PENNSYLVANIA  
LICENSING DIVISION

Re: Proposed Rulemaking to Amend §13.202, 49 Pa. Code Ch. 13

Dear Ms. Smey:

In response to Chairperson Fluehr's invitation for public comment, the International Cemetery and Funeral Association ("ICFA") is pleased to submit this statement. The ICFA represents over 6,500 members including nonprofit and for-profit cemeteries, funeral homes, crematories, and related businesses in the United States and in 24 foreign countries. Founded in 1887, the ICFA promotes open competition, consumer choices, and prearrangement.

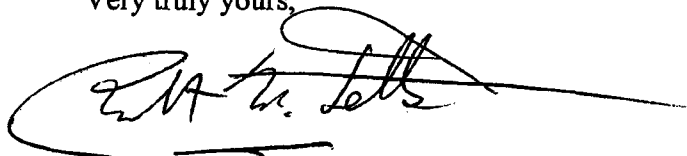
The ICFA shares the concerns expressed by the Pennsylvania Cemetery and Funeral Association in its letter to you, dated March 9, 2005, by PCFA Specially Retained Counsel James J. Kutz, Esq. We note that the purpose of the proposed Rulemaking is to define acts of misconduct that will subject board licensees to disciplinary action. However, the language is so vaguely worded and overbroad that the practical application of these proposals is problematic. For example, proposed § 13.202 (13) discussing "Retaining funds intended to pay for funeral goods and services..." is quite cryptic in its meaning and intent. We are concerned that neither board licensees nor the general public will be able to decipher the subsection's actual purpose based on its current wording. Other proposed subsections present similar concerns.

Among the descriptive remarks contained in Chairperson Fluehr's invitation to comment, reference is made to proposed subsection § 13.202 (11), regarding permission to embalm, as being "consistent with the Federal Trade Commission's Amended Funeral Rule (15 CFR 453.5 [sic])." For clarification, let us point out that the correct citation to the FTC Funeral Rule is Title 16 of the Code of Federal Regulations; there is apparently no Title 15, Chapter 453. More to the point, the ICFA is concerned whether the board has conferred with FTC staff to ascertain whether the Commission in fact will consider the requirements of the proposed subsection as being consistent with the requirements of the Funeral Rule. Otherwise, licensees may risk liability for violation of the Funeral Rule by complying with the proposed subsection, or vice versa.

Ms. Michelle Smey  
March 11, 2005  
Page Two

The ICFA Government and Legal Affairs Committee is scheduled to convene its semi-annual meeting on Tuesday, March 29, 2005. At that time, the committee members will discuss the board's proposed Rulemaking and may vote to submit additional comments as soon as possible subsequent to the meeting. Although we realize that this action would occur after the board's March 14, 2005 deadline for comments, due to the significant impact that the proposed Rulemaking would have on licensees and on the general public, we respectfully request the board to consider any additional comments that the ICFA may submit on behalf of its members in the Commonwealth of Pennsylvania and elsewhere. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. M. Fells", with a long horizontal flourish extending to the right.

Robert M. Fells  
External Chief Operating Officer  
and General Counsel



March 11, 2005

Copy Via Facsimile to (717) 705-5540

Mr. Joseph Fluehr, III, Chairperson  
 State Board of Funeral Directors  
 P.O. Box 2649  
 Harrisburg, PA 17105-2649

RECEIVED  
 2005 MAR 21 PM 9:28  
 REVIEW COMMISSION

Dear Mr. Fluehr:

As the owner and operator of 6 funeral homes in the State of Pennsylvania, we write with respect to the proposed Funeral Rules and Regulations Pa. B. Doc. No. 05-278 which was filed for public inspection February 11, 2005.

Alderwoods always takes a keen interest in reviewing proposed legislative changes in order that we can provide the benefit of our experience as an owner and operator of approximately 800 funeral homes and cemeteries across North America. We strive to take a fair and reasonable approach that is designed to provide the requisite amount of protection to consumers, while establishing a framework that can be easily administered by regulators and adopted by the industry. Where we have comments to make in the matter of these proposed Rules and Regulations, they are appended after the respective regulation article.

### 13.20 Unprofessional Conduct

(i) A funeral director who has made reasonable attempts, without success, to locate family members or other persons authorized by law to make funeral arrangements for a deceased may provide embalming or other services without having obtained permission when there is a legitimate need to provide that service at that time and no facts known to the funeral director suggest that any authorized person, if requested, would refuse to give permission.

**Alderwoods Comment – The Funeral Rule clearly prevents embalming without permission and funeral directors should not be given any encouragement to believe that they can ignore Federal Regulations and subject themselves to legal action by both the Federal Trade Commission and/or consumers. In addition, the proposed change flies in the face of an excellent article entitled “Permission to Embalm” written by then Board Chairman, James O. Pinkerton in the State Board of Funeral Directors Newsletter of Spring 2003. Mr. Pinkerton ably connected the points of “religious and cultural implications”, the “effort to “secure” business and to generate income.... and some other questionable practices” and “successful litigation against funeral homes for performing these unauthorized procedures”.**

(ii) A funeral director who has provided funeral service without obtaining prior permission may not charge for the service unless:

1029-4710 Kingsway  
 Burnaby, B.C.  
 V5H 4M2

Telephone: 604.419.5700  
 Facsimile: 604.419.9797  
 www.alderwoods.com

Mr. Joseph Fluehr, III  
 March 11, 2005

(A) The provision of services without prior permission is authorized by this paragraph.

**Alderwoods Comment – There should be no circumstance wherein a funeral director may charge for services that have not been authorized.**

(B) The person paying for funeral goods and services agrees to pay for the previously unauthorized service.

(iii) A funeral director who has embalmed without obtaining prior permission may not charge or accept payment for the embalming unless:

(A) The embalming without prior permission is authorized by this paragraph.

(B) Embalming is necessary and appropriate for other services, such as a public viewing, subsequently selected by the person paying for funeral goods and services.

**Alderwoods Comment – There should be no circumstance wherein a funeral director may charge for services that have not been authorized, nor can any argument be made in our opinion that the necessity of embalming overcomes the need for a proper authorization.**

(13) Retaining funds intended to pay for funeral goods and services when the funeral director and establishment have not provided any funeral goods and services or when the amount of funds retained is in excess of the value of funeral goods and services actually provided by the funeral director or establishment. A funeral director may preserve the funds for a reasonable amount of time for a person to demonstrate a legal entitlement to receive the funds or to receive payment of funds owed to the decedent.

**Alderwoods Comment – This provision appears to be contrary to the provisions of the Commonwealth Court Panel Opinion of July 22, 2004.**

(14) Performing funeral services on behalf of a funeral entity that the funeral director knew, or should have known, was not in compliance with section 8 of the act (63 P. S. § 479.8), regarding conduct of business.

(15) Refusing to release remains until consideration, whether earned or not, has been paid.

**Alderwoods Comment – For services that have been authorized by a consumer and “earned”, the funeral director has a right to be paid, provided the consumer is informed at the time of signing the contract that the remains may not be released if payment has not been provided. The funeral director should have no right to refuse release for services that were not earned.**



Mr. Joseph Fluehr, III  
March 11, 2005

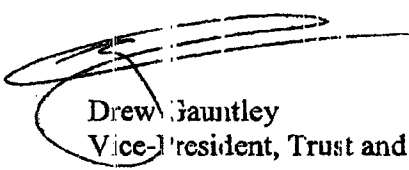
- (16) Refusing the reasonable request of any known member of a decedent's immediate family the opportunity to pay final respects, regardless of who is paying for funeral services or merchandise. For purposes of this paragraph, the immediate family includes spouse, sibling, parent, grandparent, child and grandchild.

**Alderwoods Comment – If the written intent of the deceased was that paying final respects through a viewing was not permitted, it should not be anyone's prerogative to supercede such instructions. Rather than merely determining that it is unprofessional conduct to prevent someone other than the deceased from preventing such a viewing, the Board should establish it as law that the funeral director is permitted to provide such an opportunity for members of the immediate family.**

- (17) Aiding any person or entity that the funeral director has reason to believe is attempting through unlicensed persons or entities to engage in the sale of funeral services for a person then living.

We thank you for the opportunity to provide this submission.

Yours sincerely,



Drew Gauntley  
Vice-President, Trust and Regulatory Compliance

Telephone (604) 419-9698  
Facsimile (604) 456-6176  
E-Mail [drew.gauntley@alderwoods.com](mailto:drew.gauntley@alderwoods.com)

RECEIVED

# Pre-Need

Administrative Offices  
1119 East King Street

2005 MAR 21 AM 8:29 P.O. Box 10391 Lancaster, PA 17605-0391

1-800-893-4455  
1-717-394-2326

March 14, 2005

UNIVERSITY OF PENNSYLVANIA  
REVIEW COMMISSION

faxed this day to: (717) 705-5540

Michelle Smey, Administrator  
State Board of Funeral Directors  
Department of State  
P.O. Box 2649  
Harrisburg, PA 17105-2649

RECEIVED  
05 MAR 15 11:11:59  
DEPARTMENT OF STATE  
LICENSING DIVISION

RE: Proposed Rulemaking, Reference No. 16A - 4814

Dear Ms. Smey:

As an interested person, please allow this letter to serve as my response to the recently proposed rulemaking from the State Board of Funeral Directors.

I found some of the proposed regulations dubious in nature promoting an anti-competitive agenda rather than truly addressing issues of compelling public interest. Other proposed regulations seemed well meaning but conflict with existing laws and real life circumstances.

I have limited my comments to criticisms and concerns within the proposed regulations.

Proposed 13.202 (11):

- (i): "Reasonable attempts" should be operationally defined by way of specific actions and timelines. One might argue that simply making a phone call to a disconnected phone number is a "reasonable attempt." I certainly hope it isn't.
- (i): If a funeral director cannot locate family members or other persons authorized by law to make funeral arrangements, why is the funeral director performing "embalming or other services" at all? If no one is claiming the body, doesn't it become an issue for the coroner to decide? In the rare and isolated circumstance that a person with no know community ties or family membership passes away, wouldn't it be better for the law to allow funeral directors the ability to gain permission from another authorized individual or party such as a social worker or clergy?
- (i): "Legitimate need" should be removed from these proposed regulations. Using the term would give legislative endorsement that embalming is a legitimate need. According to the U.S. Center for Disease Control, there is no "legitimate need" to embalm a dead human body. There are Pennsylvania citizens that find the act of embalming repulsive or in conflict with religious or philosophical beliefs or simply unnecessary. Under current law, after the 24 hour period has elapsed, without appropriate permission funeral directors should refrigerate or place the body in a hermetically sealed container.
- (iii): Funeral directors should not embalm dead human bodies without permission from an authorized individual or party.

- (A): Embalming without permission should not be a statutory requirement under Pennsylvania law. Embalming should not be authorized without permission. Under the Federal Trade Commission's Funeral Rule, a funeral provider may not provide embalming services without permission. One must assume the FTC felt that permission should come from the next-of-kin or other authorized individual, not the state government.
- (B): Under what circumstances - and particularly under this paragraph - could embalming be considered "necessary and appropriate?" It isn't!

Proposed 13.202 (13):

While this proposal encroaches on contract law, moreover, this proposal smacks as a blatant attempt to reverse a recent Commonwealth Court decision regarding Irrevocable contracts (Kevin M. Bean v. State Board of Funeral Directors) and, for that reason alone, should be stricken.

Proposed 13.202 (14):

"Funeral Services" should be operationally defined. What constitutes a "funeral service?"

"Funeral entity" should be operationally defined. Is it meant to say "funeral establishment" as defined in the Pennsylvania Code?

"Or should have known" should be operationally defined. Under what conditions does the funeral director should have known? By way of legal notice, letter, newspaper article, television newscast, radio broadcast, rumor mill, intuition or osmosis?

This proposal unreasonably restricts potential trade with out-of-state companies, shipping services, cremation companies and other funeral homes that are not licensed in Pennsylvania.

Proposed 13.202 (16):

This proposed regulation seems admirable and righteous but is fraught with problems.

"Reasonable request" should be operationally defined.

"Opportunity to pay final respects" should be operationally defined.

What are "final respects?" What is considered as an "opportunity?" Both terms should be operationally defined.

Does the opportunity to pay final respects come with a specific timeline or time constraint? Does the action of paying final respects last five minutes or five hours?

Does the "opportunity to pay final respects" mean any known member of the decedent's immediate family can view the deceased before a funeral service? Or after the funeral service? Although the proposed

regulation doesn't say it, the explanation by the Funeral Board says the provision does not require the funeral director to permit these persons to participate in the funeral service. However, it is quite reasonable for the known member of the decedent's family to consider *attending* the funeral service the only correct opportunity to pay final respects.

If a person invokes their right for an "opportunity to pay final respects" but must fly back from Europe, must the funeral director (and other family member who has paid for the funeral service) wait until this person returns? For how long? One day, two days, three days, a week?

What if the decedent has left specific written instruction that they want certain immediate family excluded from paying "final respects?"

Proposed 13.202 (17):

This is another proposal that smacks as a blatant attempt to perform an end run around issues currently being argued in the United States District Court, Docket No. 4:01-02252. I understand the compelling profit interest of certain segments of the funeral director industry that would like to eliminate competition, but where is the compelling public interest to prohibit a funeral director from selling his product "directly, or indirectly, or through an agent" as the statute permits? This proposed regulation should be stricken.

Thank you for allowing me to comment on the proposed regulations.

Most sincerely,

PRE-NEED FAMILY SERVICES

A handwritten signature in black ink, appearing to read 'DAH', followed by a horizontal line extending to the right.

David A. Heisterkamp  
C.E.O.

c: Mary S. Wyatte, General Counsel  
Independent Regulatory Review Commission  
333 Market Street  
Harrisburg, PA 17101

DAH/es



# HEFFNER

Funeral Chapel & Crematory, Inc

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2005 MAR 21 AM 9:29

PHONE 717-767-1551  
Fax 717-764-9919  
Toll Free 888-767-1551  
C. Frederick Koller, Supervisor  
Ernie Heffner, President  
John Katora, Vice-President  
Scott Mahkovec, CPA, Controller

INDEPENDENT REGULATORY  
REVIEW COMMISSION

March 9<sup>th</sup>, 2005

**PENNSYLVANIA**  
**AFFILIATES**

**RED LION**  
Olewiler & Heffner

**YORK**  
Everhart-Jackson-Heffner

**LEWISBERRY**  
Beaver Urich

**POTTSVILLE**  
Schlitzer-Allen-Pugh

**MANSFIELD**  
Scureman

**TROY**  
Vickery

**LOCK HAVEN**  
Helt Chapel

**RENOVO**  
Maxwell

**WILLIAMSPORT**  
Allen & Redmond

**WILKES-BARRE**  
Kniffen O'Malley

**AVOCA**  
Kniffen O'Malley

**MILTON**  
Ranck

Independent Regulatory Review Commission  
Mary S. Wyatte, General Counsel and Acting Executive Director  
14th Floor, Harristown 2  
333 Market Street  
Harrisburg, PA 17101

Michelle Smey, Administrator  
State Board of Funeral Directors  
P. O. Box 2649,  
Harrisburg, PA 17105-2649

RE: Proposed Funeral Rules & Regulations Pa.B. Doc. No. 05-278

Dear General Counsel Wyatte and Administrator Smey,

My name is Ernie Heffner. I am a second generation, licensed funeral director and the president of our family owned funeral business. More than twenty licensed funeral directors are affiliated with our firm. I am submitting one set of comments rather than inundate you with a barrage of duplicate concerns.

In the event that the proposed Rules and Regulations are not denied, I hereby request a public hearing at which time I will be obliged to offer substantial testimony from numerous parties as further evidence in support of my comments.

In addition to my enclosed comments and the websites referenced therein, you will also find the following three exhibits in further support of my comments.

1. Commonwealth Court - Opinion of seven Judge panel July 22, 2004 in Kevin M. Bean V State Board of Funeral Directors
2. Federal Complaint filed November 27, 2001 for Constitutional Violations by the Funeral Board
3. January 13, 2005 Memorandum and Order from Federal Court

As named defendants, the Funeral Board and/or its members already have this information. In light of this, it is all the more outrageous that they have presented the proposed Rules and Regulations which I believe to be unconstitutional and violate my civil rights and the civil rights of those like me. This Board's erroneous actions and ill conceived judgments in the past appear to continue.

Please do not hesitate to call or write if you need any further information.

Sincerely,

Ernie Heffner

Cc: James J. Kutz, Esquire  
Bc:

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05 MAR 15 AM 9:57  
INDEPENDENT REGULATORY  
REVIEW COMMISSION

**Proposed Funeral Rules & Regulations Pa.B. Doc. No. 05-278**

**March 9<sup>th</sup>, 2005 Comments from Ernie Heffner with three exhibits**

1. Commonwealth Court Opinion, Seven Judge panel July 22, 2004, Bean V State Board of Funeral Directors
2. Federal Complaint filed November 27, 2001 Board's Violation of Constitution
3. January 13, 2005 Memorandum and Order from Federal Court

**Annex A**

**TITLE 49. PROFESSIONAL AND  
VOCATIONAL STANDARDS**

**PART I. DEPARTMENT OF STATE**

**Subpart A. PROFESSIONAL AND  
OCCUPATIONAL AFFAIRS**

**CHAPTER 13. STATE BOARD OF  
FUNERAL DIRECTORS**

**STANDARDS OF PRACTICE AND CONDUCT**

**§ 13.202. Unprofessional conduct.**

Unprofessional conduct includes the following:

\* \* \* \* \*

(11) Furnishing embalming, other services or merchandise without having obtained written permission from a family member or other person authorized by law to make funeral arrangements for the deceased. Oral permission to embalm, followed by a confirmatory e-mail, fax, telex, telegram, mailgram or other written confirmation will be acceptable.

**COMMENTS**

The following proposals regarding embalming are anti-consumer and if passed will stand to give unscrupulous licensees an opportunity to charge for unnecessary and/or unwanted services under the guise of being "the law." (Please see additional website information in support of this statement and further comments below.)

(i) A funeral director who has made reasonable attempts, without success, to locate family members or other persons authorized by law to make funeral arrangements for a deceased may provide embalming or other services without having obtained permission when there is a legitimate need to provide that service at that time and no facts known to the funeral director suggest that any authorized person, if requested, would refuse to give permission.

**COMMENTS**

- √ The failure to exactly define "reasonable attempts" puts consumers at a distinct disadvantage.

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2005 MAR 21 AM 9:29  
DEPARTMENT OF STATE  
PROFESSIONAL COMMISSION

**Proposed Funeral Rules & Regulations Pa.B. Doc. No. 05-278**

**March 9<sup>th</sup>, 2005 Comments from Ernie Heffner with three exhibits**

1. Commonwealth Court Opinion, Seven Judge panel July 22, 2004, Bean V State Board of Funeral Directors
2. Federal Complaint filed November 27, 2001 Board's Violation of Constitution
3. January 13, 2005 Memorandum and Order from Federal Court

- √ There is no "legitimate need" according to U.S. Centers for Disease Control. (see Funeral Consumers Alliance at <http://www.funerals.org/faq/embalm.htm>)
- √ "No facts known to the funeral director" is a loophole that can lead to an unwanted, unnecessary and inappropriate charge for unauthorized services in violation of a consumer's religious beliefs. It is unreasonable to imagine that a licensee could possibly possess "facts known" without having talked with a consumer. Therefore, a licensee would know whether or not a consumer would choose to decline embalming due to religious reasons for example Orthodox Jewish and Muslim consumers. This proposed regulation gives the licensee an inappropriate excuse to charge fees and then hide behind an unnecessary, inappropriate and anti-consumer regulation.

**(ii) A funeral director who has provided funeral service without obtaining prior permission may not charge for the service unless:**

**(A) The provision of services without prior permission is authorized by this paragraph.**

**(B) The person paying for funeral goods and services agrees to pay for the previously unauthorized service.**

**(iii) A funeral director who has embalmed without obtaining prior permission may not charge or accept payment for the embalming unless:**

**(A) The embalming without prior permission is authorized by this paragraph.**

**(B) Embalming is necessary and appropriate for other services, such as a public viewing, subsequently selected by the person paying for funeral goods and services.**

**COMMENTS**

- √ "Necessary and appropriate" is a vague and untruthful description that implies a need that the U.S. Centers for Disease Control has proclaimed simply does not exist! It is outrageously deceptive and ant-consumer to state or imply otherwise. (see Funeral Consumers Alliance at <http://www.funerals.org/faq/embalm.htm> )
- √ "Other services, such as a public viewing" could only occur if indeed a family member or other person authorized by law to make funeral arrangements for a deceased person had been found and would have authorized such a service and therefore the consumer would have and should have the opportunity to elect or decline embalming and the associated cost.
- √ The Federal Trade Commission has been very clear about embalming. FTC website <http://www.ftc.gov/bcp/online/pubs/services/funeral.htm>

**Proposed Funeral Rules & Regulations Pa.B. Doc. No. 05-278**

**March 9<sup>th</sup>, 2005 Comments from Ernie Heffner with three exhibits**

1. Commonwealth Court Opinion, Seven Judge panel July 22, 2004, Bean V State Board of Funeral Directors
2. Federal Complaint filed November 27, 2001 Board's Violation of Constitution
3. January 13, 2005 Memorandum and Order from Federal Court

**Embalming**

Many funeral homes require embalming if you're planning a viewing or visitation. But embalming generally is not necessary or legally required if the body is buried or cremated shortly after death. Eliminating this service can save you hundreds of dollars. Under the Funeral Rule, a funeral provider:

- √ May not provide embalming services without permission.
- √ May not falsely state that embalming is required by law.
- √ Must disclose in writing that embalming is not required by law, except in certain special cases.
- √ May not charge a fee for unauthorized embalming unless embalming is required by state law.
- √ Must disclose in writing that you usually have the right to choose a disposition, such as direct cremation or immediate burial, that does not require embalming if you do not want this service.
- √ Must disclose in writing that some funeral arrangements, such as a funeral with viewing, may make embalming a practical necessity and, if so, a required purchase.

\* \* \* \* \*

**(13) Retaining funds intended to pay for funeral goods and services when the funeral director and establishment have not provided any funeral goods and services or when the amount of funds retained is in excess of the value of funeral goods and services actually provided by the funeral director or establishment. A funeral director may preserve the funds for a reasonable amount of time for a person to demonstrate a legal entitlement to receive the funds or to receive payment of funds owed to the decedent.**

**COMMENTS**

- √ The Funeral Board's past erroneous attempt to tortuously interfere with Irrevocable, Non-Cancelable contracts between consumers and licensees has recently been reversed by a seven Judge Commonwealth Court panel. (See attached exhibit of Commonwealth Court Opinion of seven Judge panel July 22, 2004 in Kevin M. Bean V State Board of Funeral Directors)
- √ On page 15 of the exhibit, the Courts Opinion, Judge Pellegrini wrote, "not only is there nothing in the Funeral Director Law or the implementing regulations that allows the Board to change irrevocable contracts to revocable ones when it has



**Proposed Funeral Rules & Regulations Pa.B. Doc. No. 05-278**

**March 9<sup>th</sup>, 2005 Comments from Ernie Heffner with three exhibits**

1. Commonwealth Court Opinion, Seven Judge panel July 22, 2004, Bean V State Board of Funeral Directors
2. Federal Complaint filed November 27, 2001 Board's Violation of Constitution
3. January 13, 2005 Memorandum and Order from Federal Court

approved the contracts, but that is not a rationale for making all contracts revocable." (see page 15 of the exhibit), " , "

- √ This proposed regulation appears to be an outrageous backdoor attempt to circumvent the ruling of the Court and ignore existing laws passed by the legislature. I perceive this proposed Rule and Regulation to be a dubious effort to slip through a regulation that would be contradictory to existing law and the recent validation of current law by the seven Judge Court.

- (14) Performing funeral services on behalf of a funeral entity that the funeral director knew, or should have known, was not in compliance with section 8 of the act (63 P. S. § 479.8), regarding conduct of business.**

**COMMENTS**

- √ This is an unreasonable restraint of trade that precludes a licensee from dealing with out-of-state companies, including funeral homes, cremation companies and shipping services, some of which are national publicly owned firms, who would not be licensed in the Commonwealth.
- √ This proposed regulation is anti-competitive and anti- consumer.

- (15) Refusing to release remains until consideration, whether earned or not, has been paid.**

**COMMENTS**

- √ This proposed regulation is too broad in that it overreaches by denying a licensee the right to expect and receive consideration for services that have been authorized by the consumer.

- (16) Refusing the reasonable request of any known member of a decedent's immediate family the opportunity to pay final respects, regardless of who is paying for funeral services or merchandise. For purposes of this paragraph, the immediate family includes spouse, sibling, parent, grandparent, child and grandchild.**

**COMMENTS**

- √ Ironically, the Funeral Board has historically taken the exact opposite position! When a mother complained to the Board of being denied the right to see her child prior to cremation, the Funeral Board did not consider this inhumanity to be unprofessional conduct. Does the Board now believe they need an unnecessary regulation in order to treat consumers with basic dignity?
- √ More egregiously, this proposed regulation flies in the face of existing statute, specifically, the PA Probate, Estates & Fiduciaries Code, 20 Pa. C.S.A. Section

**Proposed Funeral Rules & Regulations Pa.B. Doc. No. 05-278**

**March 9<sup>th</sup>, 2005 Comments from Ernie Heffner with three exhibits**

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305, which allows for an individual to make a designation for the express purpose of insuring that their wishes are carried out. Such a document, duly executed, is "an allegation of Contrary Intent" as set forth in the Statute.

- (17) Aiding any person or entity that the funeral director has reason to believe is attempting through unlicensed persons or entities to engage in the sale of funeral services for a person then living.**

**COMMENTS**

- √ This Board is currently charged in Federal Court for constitutional violations of commercial free speech due to its inappropriate restrictive actions and statements in the past via an adopted Resolution, now rescinded.
- √ The Federal Court has noted that, "Moreover we would be remiss if we did not admonish Defendants (the Funeral Board) that in our view their pos hoc attempt to eliminate Plaintiffs' claim, by withdrawing the Resolution, gave the appearance of being both clumsy and disingenuous." (see page 13 and 14 of the copy of Memorandum and Order, January 13, 2005 attached)
- √ The Federal Court went on to state, "While we believe that the Board could promulgate clearly drafted guidelines or resolutions which might serve to obviate the necessity of our deciding this challenge of on the merits, its actions to this point have not demonstrated either clarity or continuity, nor have they indicated a willingness by the Board to speak in a more cogent fashion on this issue."
- √ In spite of the January 13, 2005 Memorandum and Order of the Federal Court, this Board has chosen to submitted proposed regulations that again restrict commercial free speech. (A copy of the Federal Complaint dated November 27, 2001 is attached.)
- √ A final ruling from the Federal Court is pending.

**SUMMARY OF COMMENTS**

- √ The proposed Rules & Regulations are vexatious, anti-consumer, anti-competitive, contrary to existing law and contrary to the intent of the legislature.
- √ Portions of the proposed Rules & Regulations are unnecessary as documented by U.S. Centers for Disease Control and the Federal Trade Commission.
- √ The proposed Rules & Regulations are shamefully crafted to restrict competition and American free enterprise all to the detriment of Commonwealth consumers.

**Proposed Funeral Rules & Regulations Pa.B. Doc. No. 05-278**

**March 9<sup>th</sup>, 2005 Comments from Ernie Heffner with three exhibits**

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√ As a licensee, I perceive the proposed Rules & Regulations to be unconstitutional and an absolute targeted effort to violate my civil rights and the civil rights of those like me.

**EXHIBITS TO COMMENTS AND WEBSITES REFERENCED**

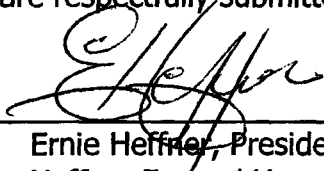
1. Commonwealth Court - Opinion of seven Judge panel July 22, 2004 in Kevin M. Bean V State Board of Funeral Directors
2. Federal Complaint filed November 27, 2001
3. January 13, 2005 Memorandum and Order from Federal Court
4. Funeral Consumers Alliance at <http://www.funerals.org/faq/embalm.htm>
5. Federal Trade Commission at <http://www.ftc.gov/bcp/online/pubs/services/funeral.htm>

[Pa.B. Doc. No. 05-278. Filed for public inspection February 11, 2005, 9:00 a.m.]

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Comments are respectfully submitted

By: \_\_\_\_\_



Ernie Heffner, President  
Heffner Funeral Homes & Crematory  
1551 Kenneth Road,  
York, PA 17404  
Phone 717-767-1551

Cc: James J. Kutz, Esquire

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kevin M. Bean, :  
Petitioner :  
 :  
v. : No. 1088 C.D. 2003  
 : Argued: June 9, 2004  
Department of State, State Board of :  
Funeral Directors, :  
Respondent :

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge  
HONORABLE BERNARD L. MCGINLEY, Judge  
HONORABLE DORIS A. SMITH-RIBNER, Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Judge  
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge  
HONORABLE RENÉE L. COHN, Judge

OPINION BY JUDGE PELLEGRINI FILED: July 22, 2004

Kevin M. Bean (Bean), a licensed funeral director, appeals from a decision and order of the Department of State, State Board of Funeral Directors (Board) that irrevocable pre-need agreements are subject to rescission at the request of a customer who has previously agreed to the terms of that agreement and are transferable to another funeral director.

At issue in this case are two pre-paid burial contracts or "pre-need agreement" forms as they are referred to herein which are used by Bean in his business. They allow a customer to purchase merchandise, services or other benefits that are rendered at the time of death. Both forms have been approved by the Board as required by the Board's regulations at 34 Pa. Code §13.224 which provide that "prepaid burial contracts or preneed contracts to be used by a funeral director shall be reviewed and approved by the Board..." One form clearly states

that it is irrevocable and only allows the customer of Bean's services to cancel the transaction within three business days of signing the agreement. The other form, which was endorsed by SecurChoice, an affiliate of the Pennsylvania Funeral Directors Association, not only allows for the three-business day cancellation, but also gives the customer of Bean's services the option to revoke the agreement by checking a specified box marked "revocable."<sup>1</sup> If that box is checked, then the agreement may be terminated by either the buyer or the funeral home at any time prior to the customer's death. This does not mean that the customer can revoke the nature of the contract, i.e., the funeral or burial services, but he or she may transfer the services for another funeral director to carry out upon his or her death. If the "irrevocable" box is checked, the agreement cannot be terminated unless done so within the first three days after signing.

In 2002, Bean received a demand from a customer who wanted money returned that had been paid pursuant to an irrevocable agreement. Bean was aware of communications between the Board and a state representative regarding the licensing of another funeral director, the gist of the communications being that the Board believed that all pre-need funds belonged to the customer and not to the funeral director.<sup>2</sup> As a result of his dispute with the customer and the

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<sup>1</sup> The revocable form further provides that the agreement could be terminated by either the customer or the funeral home at any time prior to the beneficiary's death if any of the following conditions are met: "(1) You checked the "Revocable box" on the front of this agreement and; (2) You or the beneficiary move and reside outside the Commonwealth of Pennsylvania."

<sup>2</sup> More specifically, Thomas Blackburn (Blackburn), counsel to the Board, received an e-mail from the Honorable Michael K. Hanna, State Representative (Representative Hanna), who stated that a constituent funeral director had been approached by a potential client who had **(Footnote continued on next page...)**

communications between the Board and the state representative, on January 10, 2003, Bean filed a petition for review in the nature of a declaratory judgment<sup>3</sup> action in this Court's original jurisdiction seeking a declaration that the Board could not interfere and direct that irrevocable pre-need agreements were subject to rescission at the request of the customer who had agreed to the terms of the agreement. In response, the Board filed preliminary objections alleging that this Court did not have original jurisdiction and that the case was not ripe for review as there was no case or controversy.

Because we had jurisdiction over the declaratory judgment action but believed that this was an area within the Board's expertise, with the agreement of the parties, we invoked the doctrine of primary jurisdiction and referred the

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**(continued...)**

previously entered into a pre-need contract with another funeral director but now wanted to transfer the funds to the constituent funeral director and the originating funeral director refused to transfer the funds. Representative Hanna requested the Board's opinion regarding the refusal. Blackburn advised him that "the Board believes that all pre-need funds belong to the customer, and not to the funeral director, until the time of death and services are provided. Also, despite any contrary language...[in] the contract, while the contract may be irrevocable as to the use of the funds, it is revocable as to which funeral director or funeral home is to provide services. Accordingly, a pre-need customer may rescind a pre-need contract and demand the funeral director to forward the entire principal and all earnings to date to a subsequent funeral home for a pre-need contract with that subsequent funeral director. With the exception of any reasonable arrangement fees which may not be finally collected until after the customer's death, a funeral director may not retain pre-need funds after the customer has rescinded the pre-need contract..." Blackburn stated the Board's conclusions were based on Section 13(c) of the Funeral Director Law, Act of January 14, 1952, P.L. (1951), 1898, *as amended*, 63 P.S. §479.13(c), and the Board's regulations at 49 Pa. Code §13.224(a) and 13.226.

<sup>3</sup> See the Declaratory Judgments Act, 42 Pa. C.S. §§7531-7541.

primary legal question involved to the Board. As part of that order, we directed the Board to hold an administrative hearing for the purpose of addressing whether a customer could rescind an irrevocable pre-need agreement and to issue an adjudication within 30 days. More specifically, the order required the Board to address:

Whether, under the current law, a pre-need customer may, for any reason, rescind an irrevocable pre-need agreement and demand the funeral director to forward the entire principal and the earnings to date to a subsequent funeral director for a pre-need contract with the subsequent director, even if the initial pre-need contract expressly provides that it shall be irrevocable and non-cancelable except for the three-day right-of-rescission provided for under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201-7?

The Board held a timely hearing on the matter. Then, relying on Section 13(c) of the Funeral Director Law, 63 P.S. §479.13(c), and its regulations found at 49 Pa. Code §§13.224(a) and 13.226, the Board concluded that a customer could rescind an irrevocable pre-need agreement reasoning that because a funeral director who entered into a pre-need contract with a customer and received funds in advance acted as a fiduciary or a trustee of the funds received, the funds remained the property of the consumer until the services were provided. It also reasoned that neither the Funeral Director Law nor the Board's regulations prohibited the transfer of those funds to another funeral director by the customer to provide those services. Bean then filed a petition for review with this Court appealing that determination and arguing that the Board erred in holding that a customer could rescind an irrevocable pre-need agreement. The Board, reneging on the agreement

and representation it made to the Court, maintained that there was no controversy and this Court lacked subject matter jurisdiction to hear the matter. This appeal by Bean followed.<sup>4</sup>

## I.

Initially, we must address the Board's position that our order referring the matter to the Board was in error because no actual controversy existed, and the doctrine of primary jurisdiction remanding the matter to the Board for consideration was improperly invoked.

This matter originally came before the Court as a request for declaratory action<sup>5</sup> in which Bean alleged that there was a controversy because the Board had indicated to a state representative that the pre-need agreements were rescindable, and because Bean had been contacted by a client to rescind an irrevocable pre-need agreement which he believed was irrevocable under the contract which the Board had previously approved. Preliminary objections were filed and the Board agreed to an order by this Court that the matter be referred to the Board, which, by doing so, essentially conceded that there was a controversy to

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<sup>4</sup> Our scope of review of the Board's decision is limited to determining whether constitutional rights have been violated, whether findings of fact are supported by substantial evidence and whether errors of law have been committed. *Firman v. Department of State, State Board of Medicine*, 697 A.2d 291 (Pa. Cmwlth. 1997), *petition for allowance of appeal denied*, 550 Pa. 722, 706 A.2d 1215 (1998).

<sup>5</sup> Declaratory relief may be granted for the purpose of affording relief from uncertainty and insecurity regarding legal rights, status and other relations. *Faldowski v. Eighty Four Mining Co.*, 725 A.2d 843 (Pa. Cmwlth. 1998).



be resolved. By acquiescing to this Court's order to hold a hearing on the issue of the revocability of the pre-need agreement rather than appealing that order, the Board agreed that there was a controversy and waived the argument it now makes. Not only did the Board waive that argument, but by its letter to the state representative indicating that the irrevocable pre-need agreements were rescindable, it created doubt in an area that it was charged to administer, and neither funeral directors nor customers know how to conduct their affairs. All of this is confirmed by the adjudication it issued under the consent order.<sup>6</sup>

As to the Board's argument that we improperly invoked the doctrine of "primary jurisdiction," "primary jurisdiction" is a judicially created doctrine that allows courts to make a workable allocation of business between themselves and

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<sup>6</sup> If Bean had not returned the money, he could have been subject to discipline under Sections 11 and 17 of the Funeral Director Law, 63 P.S. §§479.11 and 479.17 (pertaining to suspension/revocation of license and penalties, respectively.) Although Bean has yet to be disciplined, the record is clear that Bean has already received at least one demand from a customer that money paid pursuant to an irrevocable pre-need agreement be returned and the same demand has been made of another funeral director as evidenced by the inquiry of Representative Hanna. This Court has previously determined that:

If differences between the parties concerned, as to their legal rights, have reached the state of antagonistic claims, which are being actively pressed on one side and opposed on the other, an actual controversy appears; where, however, the claims of the several parties in interest, while not having reached the active stage, are nevertheless present, and indicative of threatened litigation in the immediate future, which seems unavoidable, the ripening seeds of a controversy appear.

*Mid-Centre County Authority v. Boggs*, 384 A.2d 1008, 1011 (Pa. Cmwlth. 1978). Because litigation for the return of the pre-paid funds is a distinct possibility as the next logical step for dissatisfied customers, a controversy does, in fact, exist.

agencies responsible for the regulation of certain industries, and arises where the original jurisdiction of the court is being invoked to decide the merits of the controversy. Rather than exercising its own jurisdiction, the Court declines jurisdiction because it is proper to defer to the administrative agency's jurisdiction. Primary jurisdiction is exclusive jurisdiction because the agency has jurisdiction over the cause of action to which a decision of the court is relevant, and the jurisdiction of the court will extend to the remaining issues and the relief to be granted. Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964).

Although the primary jurisdiction doctrine was originally a federal doctrine that was established by the United States Supreme Court in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, (1907), our Supreme Court adopted it in *Weston v. Reading Co.*, 445 Pa. 182, 282 A.2d 714 (1977), and further explained it in *Elkin v. Bell Telephone of Pa.*, 491 Pa. 123, 132-133, 420 A.2d 371-376 (1980), as follows:

The principles of the doctrine of primary jurisdiction are well settled. The United States Supreme Court "...recognized early in the development of administrative agencies that coordination between traditional judicial machinery and these agencies was necessary if consistent and coherent policy were to emerge. The doctrine of primary jurisdiction has become one of the key judicial switches through which this current has passed." The doctrine "...requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." (Citations omitted.)

Our Supreme Court went on to explain its effect, stating:

It is equally important to realize what the doctrine is not—it is not simply a polite gesture of deference to the agency seeking an advisory opinion wherein the court is free to ignore the agency's determination. Rather, once the court properly refers a matter or a specific issue to the agency, that agency's determination is binding upon the court and the parties (subject, of course, to appellate review through normal channels), and is not subject to collateral attack in the pending court proceeding. "The common law doctrine of res judicata, including the subsidiary doctrine of collateral estoppel, is designed to prevent the relitigation by the same parties of the same claim or issues." K.C. Davis, *Administrative Law*, §181.10 (1972). Once the administrative (155 Pa. Cmwlth. 93) tribunal has determined the issues within its jurisdiction, then the temporarily suspended civil litigation may continue, guided in scope and direction by the nature and outcome of the agency determination. *Feingold v. Bell of Pennsylvania*, supra [477 Pa. 1] at 22, 383 A.2d [791] at 801 (1977) (Pomeroy, J., dissenting).

In *Poorbaugh v. Pennsylvania Public Utility Commission*, 666 A.2d 744 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, 544 Pa. 678, 678 A.2d 367 (1996), we further explained the doctrine as follows:

Essentially, the doctrine creates a workable relationship between the courts and administrative agencies wherein, in appropriate circumstances, the courts can have the benefit of the agency's view on issues within the agency's competence. (Citations omitted.)

The doctrine of primary jurisdiction requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme. (Citations omitted.) Our Supreme Court stated in *Elkin* that the doctrine serves several purposes, chief of which are the benefits to be derived by making use of the agency's special experience and expertise in complex areas with

which judges and injuries have little familiarity. *Id.* Another important consideration is the need to promote consistency and uniformity in certain areas of administrative policy. *Id.* at 133, 420 A.2d 376. Once the administrative tribunal has determined the issues within its jurisdiction, then the temporarily suspended civil litigation may continue, guided in scope and direction by the nature and outcome of the agency determination. *Elkin*, 491 Pa. at 133-34, 420 A.2d at 377.

*Id.*, 666 A.2d at 749. Therefore, when primary jurisdiction is conferred on an administrative agency, usually the following elements are present:

1. The industry is a heavily regulated industry;
2. To resolve the matter at issue requires a special expertise that resides within the agency;
3. The issue is fact specific and ordinarily requires voluminous and conflicting testimony to resolve it;
4. The administrative agency was created to address and focus on problems similar to the one for which its primary jurisdiction is being advanced;
5. It has jurisdiction to issue the relief requested;
6. Overriding all other factors, the regulatory system will work better if the administrative agency hears the matter rather than the courts.

Because the issue of the pre-need contracts was given to the Board to regulate and would better balance the interests involved, the doctrine of primary jurisdiction permitted this Court to send the matter to the Board for a determination on that specific issue. This Court's order requiring an administrative hearing *and* an

adjudication gave the Board jurisdiction to hear the matter and now gives this Court jurisdiction to review the final adjudication of the Board. *See* Pa. R.A.P. 1551 (review of quasi-judicial orders shall be heard by the court on the record).

## II.

As to the merits, whether the Board erred in finding that irrevocable pre-need agreements may be revoked by a customer at any time prior to death, Bean argues that determination is not supported by the Funeral Director Law or the Board's regulations. The Board argues that both the Funeral Director Law and its regulations create a trustee relationship between the customer and the funeral director, thereby allowing the customer to terminate its relationship with the funeral director at any time regardless of whether the contract is "irrevocable."

The only section in the Funeral Director Law pertaining to pre-need agreements<sup>7</sup> is Section 13(c) which does not address whether irrevocable pre-need agreements may be rescinded. That section provides, in relevant part, the following:

No person other than a licensed funeral director shall, directly or indirectly, or through an agent, offer to or enter into a contract with a living person to render funeral services to such person when needed. If any such licensed funeral director shall accept any money for such contracts, he shall, forthwith, either deposit the same in an escrow account in, or transfer the same in trust *to a*

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<sup>7</sup> There is also a section addressing pre-need agreements relative to future interment, but that also does not address whether an irrevocable pre-need agreement may be rescinded at any time. *See* Section of 1 of the Funeral Director Law, 63 P.S. §480.1.

*banking institution in this Commonwealth, conditioned upon its withdrawal or disbursement only for the purposes for which such money was accepted.* (Emphasis added.)

63 P.S. §479.13(c). Similarly, nothing in the Board's regulations provide any direction or comment on pre-need agreements regarding rescission.

While the Board acknowledges that nothing in the Act or implementing regulations makes irrevocable pre-need agreements revocable, the Board argues that a trustee relationship allows for the rescission of an irrevocable agreement. It relies on the following regulations which it has issued which govern the sale and safeguard of funds for pre-arranged burial needs. 49 Pa. Code §13.224, titled "Funding and reporting of prepaid burial contracts," provides in relevant part:

(a) A funeral director shall deposit in escrow or transfer in trust *to a banking institution in this Commonwealth*, the entire amount of monies received by the funeral director under a prepaid contract for funeral services or merchandise, including additional service fees or arrangement fees.

\* \* \*

(f) *Prepaid burial contracts or preneed contracts to be used by a funeral director shall be reviewed and approved by the Board and should reflect whether or not an additional service fee or arrangement fee is charged.* Prepaid burial contracts or preneed contracts used by a funeral director may not incorporate a contract for funeral merchandise entered into by a person or entity other than a funeral director. (Emphasis added.)

49 Pa. Code §13.226, titled "Nature and description of escrow or trust accounts for prepaid burial contracts," provides the following:

(a) Funds received for prepaid burial contracts shall be placed in an escrow or trust fund account which shall be separate and distinct from the business and personal accounts of the funeral director.

(b) If funds received by a funeral director for preneed burial contracts are deposited in a banking account which bears interest, or are invested by the trustee bank and produce earnings, the interest or earnings shall be retained in the account with the principal and shall be held, accounted for and transferred in the same manner as the principal amount, to assure delivery of the same quality of service and merchandise for which the contract was made.

(c) In the event of a sale or transfer of the business of a funeral director, pre-paid burial contracts and prepaid burial accounts shall immediately be transferred to the control of the licensee who will assume responsibility for completion of the prepaid burial contracts. The licensee-transferee shall notify the Board in writing of the licensee's willingness to accept responsibility for completion of the prepaid burial contracts.

Contrary to the Board's argument, under the Board's regulations at 49 Pa. Code §13.1, the pre-need agreements are defined as "a contract executed between a consumer and a licensed funeral director which provides that the funeral director will provide funeral merchandise and render services to the consumer upon the consumer's death." Because pre-need agreements are defined as contracts, contract principles apply. In *Empire Sanitary Landfill, Inc. v. Riverside*

*School District*, 739 A.2d 651 (Pa. Cmwlth. 1999), we stated that a contract had to be construed according to the meaning of its language, and:

"The fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties." *Sun Co., Inc. (R & M) v. Pennsylvania Turnpike Commission*, 708 A.2d 875, 878 (Pa. Cmwlth. 1998). "The intention of the parties must be ascertained from the document itself, if its terms are clear and unambiguous." *Id.* The Court's inquiry should focus on what the agreement itself expressed and not on what the parties may have silently intended. *Delaware County v. Delaware County Prison Employees Independent Union*, 552 Pa. 184, 713 A.2d 1135 (1998). "It is not proper, under the guise of construction, to alter the terms to which the parties, whether in wisdom or folly, expressly agreed." *Id.* at 190, 713 A.2d at 1138. The law assumes that the parties chose the language of their contract carefully. *Liazis v. Kosta, Inc.*, 421 Pa. Super. 502, 618 A.2d 450 (1992).

*Id.*, 739 A.2d at 654. While the Board contends that contract law<sup>8</sup> recognizes a distinction between a purely commercial contract and one for professional services,

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<sup>8</sup> The Board relies on Section 367 of the Restatement (Second) of Contracts which provides:

- (1) A promise to render personal service will not be specifically enforced.
- (2) A promise to render personal service exclusively for one employer will not be enforced by an injunction against serving another if its probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living.



whereby the latter will not be specifically enforced, this argument ignores that the significant portion of the pre-need agreement is not for professional services but for the merchandise to be provided, i.e., a casket, urn, vault, etc. In this case, both the revocable and irrevocable pre-need agreements are unambiguous and, specifically, on the form endorsed by SecurChoice, the customer is able to choose whether he or she wishes to enter into a revocable or irrevocable agreement by signing the appropriate box.

Even if we were to agree with the Board that trust laws apply, they would not apply in this case to create a trustee relationship between Bean and the customer. The regulations specify that the money given by the customer to Bean must be placed in escrow or trust in a banking institution, thereby making the banking institution the trustee, not Bean, and the trust is both for the benefit of Bean and the customer. Again, assuming that a trust existed, in *In re: Estate of Agostini*, 457 A.2d 861 (Pa. Super. 1983), our Superior Court held that where property of any kind is placed in the name of the donor or settler in trust for a named beneficiary, *unless a power of revocation is expressly or impliedly reserved*, the general principle of law is that such facts create a trust which is *prima facie irrevocable*. Therefore, a customer's funds for pre-need arrangements accepted in trust does not give the customer the right to rescind that agreement at any time.<sup>9</sup>

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<sup>9</sup> Because a customer may not rescind an irrevocable pre-need agreement even if a trust is created, the Board's argument comparing the funeral director/customer relationship to an attorney/client relationship where the client can discharge an attorney at any time is non-persuasive.

While we agree with the Board that by not allowing contracts to be revoked there would sometimes be serious problems created, i.e., if he or she dies in another location in Pennsylvania far away from where the first funeral director is located, not only is there is nothing in the Funeral Director Law or the implementing regulations that allows the Board to change irrevocable contracts to revocable ones when it has approved the contracts, but that is not a rationale for making all contracts revocable.<sup>10</sup> Consequently, the Board erred in determining that the Funeral Director Law and its regulations allow customers to rescind irrevocable pre-need agreements.

Accordingly, the decision of the Board is reversed.

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DAN PELLEGRINI, JUDGE

President Judge Colins concurs in result only.

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<sup>10</sup> See Section 5 of the Funeral Director Law, 63 P.S. §480.5, which allows for the revocation of a pre-need agreement if the customer moves out of state prior to his or her death.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kevin M. Bean,	:
Petitioner	:
	:
v.	: No. 1088 C.D. 2003
	:
Department of State, State Board of	:
Funeral Directors,	:
Respondent	:

**ORDER**

AND NOW, this 22<sup>nd</sup> day of July, 2004, the order of the Department of State, State Board of Funeral Directors, dated May 7, 2003, is reversed.

\_\_\_\_\_  
DAN PELLEGRINI, JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL WALKER, ERNIE HEFFNER, :  
JEFFERSON MEMORIAL FUNERAL :  
HOME and BETTY FREY, :  
Plaintiffs :  
v. : Docket No.  
JODI FLITTON, JOSEPH A. FLUEHR, III, :  
ANDREW MAMARY, JANICE :  
MANNAL, GARY L. MORRISON, :  
MICHAEL D. MORRISON, DONALD J. :  
MURPHY and JAMES O. PINKERTON, :  
Defendants :

**COMPLAINT**

1. INTRODUCTION

1. Plaintiffs' claims arise out of a dispute over the role that persons not licensed as funeral directors can play in selling financial packages that cover the funeral expenses of the insured. The crux of that dispute involves the issue of whether persons who are not licensed as funeral directors may provide potential customers accurate information regarding funeral services and merchandise. Plaintiffs claim that by prohibiting anyone who is not licensed as a funeral director from providing information to others regarding funeral services and merchandise, Defendants, members of the State Board of Funeral Directors, and, in most cases, direct competitors of Plaintiffs, have violated Plaintiffs' right to freedom of speech under the First Amendment. Plaintiffs also claim that Defendants have violated their First Amendment

right to freedom of speech by limiting the right of licensed funeral directors to share accurate information about the funeral services and merchandise which they provide. Defendants' restraints apply to price information which is required by federal law to be provided to anyone who seeks it. Those restraints also apply to price and other information which is already available to the public from a number of different sources. Plaintiffs believe that Defendants, who are competitors of Plaintiffs, took these actions based solely on their own self interest in limiting their competition. Plaintiffs bring this action pursuant to 42 U.S.C. §1983 to enjoin the continued violation of their Constitutional Rights.

2. THE PARTIES.

2. Plaintiff Michael Walker is an individual who resides at 488 Lois Drive, Pittsburgh, PA 15236.

3. Plaintiff Ernie Heffner is an individual who resides at 435 Melrie Drive, York, PA 17403.

4. Plaintiff Jefferson Memorial Funeral Home ("Jefferson") is a licensed funeral home located at 301 Curry Hollow Road, Pittsburgh, PA 15236.

5. Plaintiff Betty Frey is an individual who resides at 2064 Aslan Drive York, PA 17404.

6. Defendant Jodi Flitton, Esq., is a member of the Pennsylvania State Board of Funeral Directors with her principal place of business at 132 Kline Plaza, Harrisburg, PA 17104.

7. Joseph A. Fluehr, III, is a member of the Pennsylvania State Board of Funeral Directors with his principal place of business at 800 Newtown-Richboro

Road, Richboro, PA 18954.

8. Andrew Mamary is a member of the Pennsylvania State Board of Funeral Directors with his principal place of business at 59 Parrish Street, Wilkes-Barre, PA.18702.

9. Janice Mannal is a member of the Pennsylvania State Board of Funeral Directors with her principal place of business at 6925 Frankford Avenue, Philadelphia, PA 19135.

10. Gary L. Morrison is a member of the Pennsylvania State Board of Funeral Directors with his principal place of business at 825 Stockbridge Drive,Erie, PA 16505.

11. Michael D. Morrison is a member of the Pennsylvania State Board of Funeral Directors with his principal place of business at 110 Petroleum Street, Oil City, PA 16301.

12. Donald J. Murphy is a member of the Pennsylvania State Board of Funeral Directors with his principal place of business at 348 N. 24<sup>th</sup> Street, Camp Hill, PA 17011.

13. James O. Pinkerton is a member of the Pennsylvania State Board of Funeral Directors with his principal place of business at 1014 California Avenue., Pittsburgh, PA 15202.

14. Defendants are sued in their individual capacities.

### 3. JURISDICTION AND VENUE

15. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§1331 and 1343(3) because Plaintiffs seek to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States.

16. Venue is proper in this Court pursuant to 28 U.S.C. §1391(b) because the events giving rise to the claim occurred in Harrisburg, Pennsylvania.

### 4. FACTUAL BACKGROUND

17. Plaintiff Walker is a licensed insurance agent who sells life insurance policies that cover the funeral expenses of the insured (“funeral insurance”). He is not licensed as a funeral director by the Commonwealth of Pennsylvania.

18. Funeral insurance policies are those which are purchased by living people for the purpose of funding their own funeral.

19. Plaintiff Betty Frey is an employee of Preneed Associates Inc. whose duty is to sell merchandise and financial packages intended to finance funeral services sold by Heffner Funeral Home.

20. Plaintiff Heffner is a licensed funeral director who sells pre-need funeral services which are to be funded through irrevocable trusts sold by Plaintiff Frey.

21. Pre-need funeral services and merchandise (“pre-need plans”) are funeral services and goods which are purchased by or on behalf of a person still living.

22. Plaintiff Jefferson is a licensed funeral home that sells pre-need funeral services and merchandise which are to be funded by funeral insurance policies sold by Plaintiff Walker.

23. Defendants, acting under color of state law, have enacted the following resolution (the “Resolution”):

The State Board of Funeral Directors believes that the showing, distribution or summarization of any price list of a specific funeral home or any explanation of the funeral services or merchandise available from any specific funeral home for any commercial purpose whatsoever, except as may be specifically necessary to comply with regulations of the Federal Trade Commission, for funeral services needed for a person then living, constitutes the practice of funeral directing by engaging in pre-need sales. Section 13(a) of the [Law] limits this practice to licensed funeral directors. The Board may consider it to be unprofessional conduct for any funeral director to authorize or permit any such activity constituting the practice of funeral directing.

24. In addition, Defendants, acting under color of state law, have issued two adjudications (the “Adjudications”) finding that the distribution or summarization of any price list of a specific funeral home or any explanation of the funeral services or merchandise available from any specific funeral home for any commercial purpose whatsoever (except as may be



specifically necessary to comply with regulations of the Federal Trade Commission), for funeral services needed for a person then living, constitutes the practice of funeral directing.

25. In one of those Adjudications, Defendants held that one not licensed as a funeral director by the Commonwealth of Pennsylvania is guilty of the unlicensed practice of funeral directing if, for a commercial purpose, he or she participates in the distribution or summarization of any price list of a specific funeral home or any explanation of the funeral services or merchandise available from any specific funeral home for funeral services needed for a person then living. Based on that holding, Defendants imposed a substantial fine.

26. In the other adjudication, Defendants held that a funeral director who, for a commercial purpose, assisted a person not licensed as a funeral director to distribute or summarize any price list of a specific funeral home or explain the funeral services or merchandise available from any specific funeral home whatsoever for funeral services needed for a person then living was guilty of aiding and abetting the unlicensed practice of funeral directing.

27. In neither of the Adjudications did Defendants make an inquiry into whether the information conveyed by the unlicensed insurance agent or the funeral director was true or false.

28. But for the adoption of the aforesaid Resolution and the issuance of the Adjudications described above, Plaintiffs Walker and Frey would meet with potential customers and show them price lists for funeral services and merchandise from specific funeral homes and also describe and explain those services and merchandise to those potential customers.

29. But for the adoption of the aforesaid Resolution and the issuance of the Adjudications described above, it is likely that at the conclusion of the discussions described

Paragraph Twenty-eight (28) above, many potential customers would decide which funeral services and merchandise they required and arrange a method of payment for those services and merchandise with Plaintiffs Walker and Frey in the form of funeral insurance or some other method of payment sufficient to pay for the services and merchandise selected.

30. But for the adoption of the aforesaid Resolution and the issuance of the Adjudications described above, after the method of financing had been purchased, Plaintiff Frey would then arranged with Plaintiff Heffner, or another funeral home selected by the customer, a contract to provide the selected services and merchandise for an amount equal to or less than the amount of the financing purchased.

31. But for the adoption of the aforesaid Resolution and the issuance of the Adjudications described above, after the method of financing had been purchased, Plaintiff Walker would then arrange with Plaintiff Jefferson or another funeral home selected by the customer, a contract to provide the selected services and merchandise for an amount equal to or less than the amount of the insurance.

32. Under the Resolution and the Adjudications, the acts described in Paragraphs Twenty-eight (28) through Thirty-one (31) above would constitute the unlicensed practice of funeral directing by Plaintiffs Walker and Frey and aiding and abetting the unlicensed practice of funeral directing by Plaintiffs Heffner and Jefferson.

33. In light of the Resolution and the Adjudications, Plaintiffs Walker and Frey are afraid to engage in the showing, distribution or summarization of any price list of a specific funeral home or any explanation of the funeral services and merchandise available from

any specific funeral home. They assume that if they do so they will be prosecuted and found guilty by Defendants of the unlicensed practice of funeral directing.

34. In light of the Resolution and the Adjudications, Plaintiffs Heffner and Jefferson are afraid to share any information with Plaintiffs Walker or Frey or other persons who are not licensed as funeral directors regarding the funeral services and merchandise which Plaintiff Heffner provides. They are afraid that he will be prosecuted and found guilty by Defendants of aiding and abetting the unlicensed practice of funeral directing by Plaintiffs Walker and Frey.

35. Federal Trade Commission's Funeral Rule, 16 C.F.R. §453.2, requires funeral directors to disclose their prices whenever asked without regard to who makes the request and the purpose of the request. A failure to do so is deemed an unfair or deceptive trade practice.

36. Defendants' Adjudications that it is illegal for a funeral director to provide accurate price information to an insurance agent who then uses that accurate information to sell insurance is inconsistent with that Rule.

37. Defendants' restraints appear to apply to accurate information which many funeral homes make available to the general public, including Plaintiffs Walker and Frey, by publishing that information on the internet and in other media.

38. Defendants Fluehr, Mamary, Mannal, Michael Morrison and Pinkerton are all owners and/or operators of licensed funeral homes and all are licensed in Pennsylvania as funeral directors.

39. Defendants Fluehr, Mamary, Mannal, Michael Morrison and Pinkerton are all members of the Pennsylvania Funeral Directors Association ("PFDA").

40. As members of PFDA, they share in any revenues generated by PFDA's wholly owned for-profit subsidiary, Pennsylvania Funeral Services Corporation.

41. PFDA is an organization which exists to inform and educate the funeral director, public and government about the value of funeral service and licensed funeral directors on a pre-need, at need and post-need basis.

42. To this end, the PFDA markets and sells pre-need plans to the public through several entities, including the Pennsylvania Funeral Services Corporation.

43. The pre-need plans marketed and sold by the PFDA through the Pennsylvania Funeral Services Corporation include SecurChoice and Unichoice.

44. As part of the process of selling pre-need plans, PFDA also sells life insurance intended to fund those plans.

45. PFDA uses licensed funeral directors who are also licensed insurance agents to sell those policies.

46. PFDA is a direct competitor of Heffner and Jefferson via its agents and members.

47. Defendant Mamary is a direct competitor of Heffner.

48. By enacting resolutions and issuing adjudications which punish those who are not licensed as funeral directors for discussing pre-need plans with the public, Defendants Fluehr, Mamary, Mannal, Michael Morrison and Pinkerton have acted solely on the basis of their own self interest in limiting their competition.

49. By enacting resolutions and issuing adjudications which punish those funeral directors who share information about the funeral services and merchandise which they

offer with persons, such as Plaintiffs Frey and Walker, who are not licensed as funeral directors, Defendants Fluehr, Mamary, Mannal, Michael Morrison and Pinkerton have acted solely on the basis of their own self interest in limiting their competition.

## **V. LEGAL CLAIMS**

50. The showing, distribution or summarization of any price list of a specific funeral home or any explanation of the funeral services or merchandise available from any specific funeral home is speech which concerns lawful activity, the purchase of insurance and the purchase of funeral services and merchandise.

51. The showing, distribution or summarization of any price list of a specific funeral home or any explanation of the funeral services or merchandise available from any specific funeral home is speech protected by the First Amendment.

52. Defendants have acted to bar such speech without regard to whether it is true or misleading.

53. Defendants have no substantial interest in regulating such speech.

54. Defendants' limitation on such speech serves no valid governmental interest.

55. To the extent that their purpose is to prevent false and misleading speech, Defendants have failed to tailor their action to accomplish that goal.

56. Defendants' limitation on such speech is more extensive than is necessary to serve any valid governmental interest.

57. In taking the actions complained of above, Defendants have acted solely on the basis of their own self interest in limiting their competition.

58. By prohibiting Plaintiffs Walker and Frey from showing, distributing or summarizing any price list of a specific funeral home or explaining of the funeral services or merchandise available from any specific funeral home, Defendants, acting under color of state law, have chilled Plaintiffs Walker and Frey from exercising their right to free speech under the First Amendment and, therefore, have violated the First Amendment to the United States Constitution.

59. By prohibiting Plaintiffs Heffner and Jefferson from sharing any information with Plaintiffs Frey and Walker and other persons who are not licensed as funeral directors regarding the funeral services and merchandise which Plaintiffs Heffner and Jefferson provides, Defendants, acting under color of state law, have chilled Plaintiffs Heffner and Jefferson from exercising their right to free speech under the First Amendment and, therefore, have violated the First Amendment to the United States Constitution.

60. In taking the actions complained of above, Defendants have acted solely on the basis of their own self interest in limiting their competition.

61. Plaintiffs bring this action under 42 U.S.C. §1983 to enjoin the continuing violation of their rights under the First Amendment.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants from taking any action that would limit their right to disseminate accurate information regarding funeral services and merchandise, including the cost thereof.

Respectfully submitted,

Allen C. Warshaw, Esq.

Attorney I.D. No. 17145  
James J. Kutz, Esq.  
Attorney I.D. No. 21589  
DUANE, MORRIS & HECKSCHER      LLP  
305 North Front Street, 5<sup>th</sup> Floor  
P.O. Box 1003  
Harrisburg, PA 17108-1003  
(717) 237-5500

Dated:

Attorneys for Plaintiffs

HBG\83110.3

**CERTIFICATE OF SERVICE**

On this 27<sup>th</sup> day of November, 2001, I, Patricia Z. Glusko, a secretary in the law offices of Duane, Morris & Heckscher LLP, hereby certify that I have served this day true and correct copies of the attached document in the above-captioned case, by depositing same in the United States First Class Mail, postage prepaid, in Harrisburg, Pennsylvania, to those persons and addresses indicated below, along with two copies of a Waiver of Service of Summons:

Jodi Flitton, Esq.  
Pennsylvania State Board Of Funeral Directors  
132 Kline Plaza  
Harrisburg, PA 17104

Joseph A. Fluehr, III  
Pennsylvania State Board Of Funeral Directors  
800 Newtown-Richboro Road  
Richboro, PA 18954

Andrew Mamary  
Pennsylvania State Board Of Funeral Directors  
59 Parrish Street  
Wilkes-Barre, PA 18702

Janice Mannal  
Pennsylvania State Board Of Funeral Directors  
6925 Frankford Avenue  
Philadelphia, PA 19135

Gary L. Morrison  
Pennsylvania State Board Of Funeral Directors  
825 Stockbridge Drive  
Erie, PA 16505

Michael D. Morrison  
Pennsylvania State Board Of Funeral Directors  
110 Petroleum Street  
Oil City, PA 16301



Donald J. Murphy  
Pennsylvania State Board Of Funeral Directors  
348 N. 24<sup>th</sup> Street  
Camp Hill, PA 17011

James O. Pinkerton  
Pennsylvania State Board Of Funeral Directors  
1014 California Avenue  
Pittsburgh, PA 15202

Office of the Attorney General  
Commonwealth of Pennsylvania  
Strawberry Square  
Harrisburg, PA 17120

Patricia Z. Glusko

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL WALKER, ERNIE :  
HEFFNER, JEFFERSON MEMORIAL : Docket No. 4:01-02252  
FUNERAL HOME and BETTY FREY, : (Judge Jones)  
Plaintiffs, :  
 :  
 :  
v. :  
JODI FLITTON, JOSEPH A. FLUEHR, III :  
MICHAEL J. YEOSOCK, JANICE :  
MANNAL, ANTHONY SCARANTINO, :  
MICHAEL D. MORRISON, DONALD J. :  
MURPHY, and JAMES O. PINKERTON, :  
Defendants, :

**MEMORANDUM AND ORDER**

January 13, 2005

Before us is a Motion for Summary Judgment filed by the Defendants, Jodi Flitton, Joseph A. Fluehr, III, Andrew Mamary, Janice Mannal, Gary L. Morrison, Michael D. Morrison, Donald J. Murphy, James O. Pinkerton, (“Defendants”) seeking dismissal of the case as moot (doc. 34).<sup>1</sup> Plaintiffs Michael Walker, Ernie Heffner, Jefferson Memorial Funeral Home, and Betty Frey (“Plaintiffs”), have also filed a Motion for Summary Judgment (doc. 30).

This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

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<sup>1</sup>These Defendants either are or were members of the Pennsylvania Board of Funeral Directors and are named parties in their capacity as members of this Board.

In an Order dated October 28, 2004 we granted Plaintiffs' Motion to substitute as Defendants the individuals who were no longer members of the Pennsylvania State Board of Funeral Directors (the "Board") with the new members of the Board. Thus, Andrew Mamary and Gary L. Morrison have been replaced as named defendants by their successors, Michael J. Yeosock and Anthony Scarantino.

For the reasons stated herein, we will deny the Defendants' Motion for Summary Judgment insofar as we hold that this case is not moot, because it is a facial challenge to a state statute, as interpreted by the Board. We will defer judgment on the merits of the case as argued within the parties' motions for summary judgment and the submissions of the parties related thereto.

**PROCEDURAL HISTORY:**

On November 27, 2001, Plaintiffs filed a Complaint against the Defendants, who are all present or former members of the Board. The Defendants filed a Motion to Dismiss, which this Court granted on September 24, 2002. Following a reversal by our Third Circuit Court of Appeals, this Court denied Defendants' Motion to Dismiss on October 7, 2003. Discovery followed, which included depositions of certain Board members. The Defendants filed their Motion for Summary Judgment on July 30, 2004. The Plaintiffs responded with a Brief in

Opposition on August 31, 2004. The Defendants filed a Reply Brief on September 2, 2004. The Plaintiffs filed a Motion for Summary Judgment on July 29, 2004. The Defendants filed a Brief in Opposition on August 16, 2003. The Plaintiffs filed their Reply Brief on September 15, 2004. We requested oral argument on the mootness issue raised in Defendants' Motion for Summary Judgment, and this was held on December 23, 2004.<sup>2</sup>

**STANDARD OF REVIEW:**

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED .R. CIV. P. 56(c); see also Turner v. Schering-Plough Corp., 901 F.2d 335, 340 (3d Cir. 1990). The party moving for summary judgment bears the burden of showing "there is no genuine issue for trial." Young v. Quinlan, 960 F.2d 351, 357 (3d Cir. 1992). Summary judgment should not be granted when there is a disagreement about the facts or the proper inferences which a fact finder could draw from them. Peterson v. Lehigh Valley Dist. Council, 676 F.2d 81, 84 (3d Cir. 1982).

Initially, the moving party has a burden of demonstrating the absence of a

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<sup>2</sup>We will note that as a result of counsels' professionalism and high degree of preparation, oral argument was expanded and covered a number of issues beyond the mootness question. This exercise was most helpful, and therefore greatly appreciated by the Court.

genuine issue of material fact. Celotex Corporation v. Catrett, 477 U.S. 317, 323 (1986). This may be met by the moving party pointing out to the court that there is an absence of evidence to support an essential element as to which the non-moving party will bear the burden of proof at trial. Id. at 325.

Federal Rule of Civil Procedure 56 provides that, where such a motion is made and properly supported, the non-moving party must then show by affidavits, pleadings, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue for trial. FED. R. CIV. P. 56(e). The United States Supreme Court has commented that this requirement is tantamount to the non-moving party making a sufficient showing as to the essential elements of their case that a reasonable jury could find in its favor. Celotex Corp., 477 U.S. at 322-23.

It is important to note that "the non-moving party cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact." Pastore v. Bell Tel. Co. of Pa., 24 F.3d 508, 511 (3d Cir. 1994) (citation omitted). However, all inferences "should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993)(internal citations omitted).

Still, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)(emphasis in original). "As to materiality, the substantive law will identify which facts are material." Id. at 248. A dispute is considered to be genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

#### **STATEMENT OF RELEVANT FACTS:**

This case involves the extent to which non-licensed employees or agents of a licensed funeral director in Pennsylvania can show, distribute, or summarize price information regarding funeral services or merchandise. Plaintiff Ernie Heffner is a licensed funeral director. Plaintiff Michel Walker is a licensed insurance salesman who sells life insurance policies that cover funeral expenses. Finally, Betty Frey is a non-licensed employee of Heffner. Together, they are requesting declaratory relief in order to prevent the Board from taking any actions that limit Plaintiffs' rights to disseminate information about funeral services and merchandise.

Defendants now argue that because Plaintiffs' action is based upon a certain resolution passed by the Board, and since that resolution has been rescinded, the claim has been rendered moot. Plaintiffs counter that their dispute is predicated on

something more than the now withdrawn resolution.

The Board's primary responsibilities include forming the necessary rules and regulations of funeral directing in Pennsylvania, pursuant to the Pennsylvania Funeral Director Law. See 63 P.S. § 479. On September 1, 1999 the Board passed a non-binding resolution that stated:

The State Board of Funeral Directors believes that the showing, distribution or summarization of any price list of a specific funeral home or any explanation of the funeral services or merchandise available from any specific funeral home for any commercial purpose whatsoever, except as may be specifically necessary to comply with Regulations of the Federal Trade Commission, for funeral services needed for a person then living, constitutes the practice of funeral directing by engaging in pre-need sales. Section 13(a) of the [Funeral Director] Law limits this practice to licensed funeral directors. The Board may consider it to be unprofessional conduct for any funeral director to authorize or permit any such activity constituting the practice of funeral directing.

Def. St. of Material Facts at 8 (the "Resolution"). The application by the Board of this Resolution is at the heart of Plaintiffs' challenge. In their Complaint, the Plaintiffs allege that the Resolution impermissibly violates the First Amendment to the U.S. Constitution (in particular, the Central Hudson test for commercial speech). See Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557 (1980)(holding that the First Amendment protects commercial speech from unwarranted governmental regulation, albeit with lesser protections than other

speech).

During discovery and as noted, the Board repealed the Resolution, leading to the mootness argument Defendants now interpose. The Plaintiffs' response to this argument is twofold. First, they argue that a case or controversy exists because individuals similar to the Plaintiffs could argue that there still exists a threat of prosecution from the Board, despite the fact that the Resolution has been repealed. Second, they argue that the Resolution's rescission did not moot the litigation because many Board members believe that the Resolution remains an accurate statement of the law. Thus, even though the Resolution no longer exists, the Plaintiffs fear that it remains the Board's actual interpretation of the law, and thus the First Amendment conduct of individuals such as the Plaintiffs will remain chilled for fear of being cited for the same activities.

According to Pennsylvania law, "[n]o person other than a licensed [funeral] director shall, directly or through an agent, offer to enter into a contract with a living person to render funeral services to such a person..." 63 P.S. § 479.13(c). It is clear to us that the Resolution was an attempt by the Board to interpret this statute as it relates to conduct engaged in by the Plaintiffs. It now devolves to us to determine whether Plaintiffs' claim is obliterated by the repeal of the Resolution. For the reasons set forth, we find that it is not.



## DISCUSSION

We will resolve in this opinion the question of whether the Plaintiffs do in fact have standing, and thus will not pass judgment on whether they have brought a successful First Amendment challenge. See National Council for Improved Health v. Shalala, 122 F.3d 878, 881 (10th Cir. 1997)(holding that when there is a First Amendment challenge, standing is a separate inquiry from whether there exists a constitutional violation). As noted, that analysis will be deferred.

The parties clearly disagree as to what conduct would be prohibited by the Board under its current interpretation of Pennsylvania law. The Plaintiffs fear that if they or others similarly situated were to go forward with the same conduct as engaged in by them prior to the passage of the Resolution, the funeral director for whom they were selling could face serious disciplinary action from the Board.<sup>3</sup> Thus, they seek a court ruling as to whether the Board can constitutionally restrict their conduct. As noted, the Defendants respond by arguing that there is no dispute pending for the Court to resolve and that the case has accordingly been rendered moot. The Defendants' inability to agree on what conduct by Plaintiffs

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<sup>3</sup>From the record before us and based on the admissions by the parties, it is clear that the Board has no jurisdiction to sanction individuals who are not licensed funeral directors. The Plaintiffs in this action include individuals who are not licensed funeral directors but who intend to disseminate information on behalf of Plaintiff Heffner, who is a licensed funeral director in Pennsylvania, as noted.

might trigger disciplinary action by the Board is telling as it relates to the issue of mootness.

Neither party disputes that the U.S. Constitution allows this Court to resolve only live “cases and controversies.” U.S. CONST. art. III, § 2. Specifically, to satisfy this requirement, a case must present: “a legal controversy that (1) is real and not hypothetical, (2) [] that affects an individual in a concrete manner so as to provide the factual predicate for reasoned adjudication, and (3) [that] sharpen[s] the issues for judicial resolution.” Armstrong World Indus. by Wolfson v. Adams, 961 F.2d 405, 410 (3d Cir. 1992).<sup>4</sup> In Armstrong, the court was asked to invalidate a Pennsylvania anti-takeover statute that was not applicable to the Plaintiffs, as a takeover had not yet been attempted. The Third Circuit held that this challenge was improper because the repealed statute was on longer pending. Id.

A defendant has the burden of showing that a particular case is moot. Sutton v. Rasheed, 322 F.3d 236, 248 (3d Cir. 2003). Since this litigation began in 2001, two events occurred that the Defendants argue render the case moot. The first was the Commonwealth Court’s decision in Ferguson v. Pennsylvania State Board of Funeral Directors, 768 A.2d 393 (Pa. Commw. Ct. 2001), which

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<sup>4</sup>These requirements continue throughout the entirety of the litigation, from pre-trial proceedings through the final appeals. See Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990).

Defendants argue makes any resolution of the Board irrelevant because it mandates the Board's conduct in similar situations.<sup>5</sup> The second was the repeal of the Resolution. As a result of the repeal by the Board, the Defendants argue that its legality can no longer be contested, as it has ceased to exist.

The Plaintiffs have raised, inter alia, a challenge pursuant to the First Amendment under the Central Hudson test. There are two types of First Amendment challenges: facial and as applied challenges. An as applied challenge contends that a statute is unconstitutional as applied to a particular factual circumstance. See e.g. Belitskus v. Pizzigrilli 343 F.3d 632, 648 (3d Cir 2003). A facial challenge involves conduct that a statute is unconstitutionally overbroad regardless of how the statute is applied. An overbroad statute is one that is designed to burden or punish activities that are not constitutionally protected but the statute includes within its scope activities that are protected by the First Amendment. See e.g. Hill v. City of Houston, 764 F.2d 1156, 1161 & n.16 (5th Cir. 1995). A facial challenge is permitted following a

showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' Broadrick v. Oklahoma, 413 U. S. 601, 615 (1973)[. A successful

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<sup>5</sup>Because Ferguson did not deal with the constitutional issues raised in the case sub judice, and based on the Third Circuit's mandate in reversing our prior determination, this argument by Defendants is without merit.

facial challenge] suffices to invalidate all enforcement of that law, “until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression ...

Virginia v. Hicks, 539 U.S. 113, 118-19, 123 S. Ct. 2191 (2003)(Scalia, J.)(internal citations omitted). Facial challenges are used by courts when the intended law will chill constitutionally protected speech even if evidence of conduct violating the statute is not before the court. Id. A facial challenge is particularly useful when there is a significant possibility of criminal or other punishments if the law is violated.

The purpose of a facial challenge is to prevent legal conduct from being chilled by an unconstitutional statute. Id. (“Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending all enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.”(internal citations omitted)).

As Justice Scalia explained in Hicks, an overbroad challenge is not to be used if the chilling effect of the law is overwhelmed by the need to enforce that law.

Id. (“there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law”). In Hicks, the plaintiff challenged a local housing authority’s ability to prosecute him for trespassing, after he had been evicted due to his drug convictions. The Court held that the statute allowing the housing authority to prosecute the plaintiff for trespassing was not unconstitutionally overbroad because to invalidate it under a facial challenge would result in significant social costs in exchange for a limited protection of speech.

In contrast with Hicks, we have before us a facial challenge to the Funeral Director Law as interpreted by the Board which, if the Plaintiffs’ allegations are true, would significantly restrict commercial speech by eliminating their ability to solicit a large avenue of potential business. Based on their analysis of the Board’s public expressions, as well as statements by certain individual members of the Board made during discovery in this litigation, Plaintiffs contend that it is unclear to them whether Heffner would be sanctioned by the Board if Walker and Frey, who as noted are his non-licensed employees or agents, attempted to disseminate certain information regarding funeral services or merchandise. Thus, as it currently stands, their speech is being chilled due to an articulated fear of the Board’s possible actions.

The statements made by various Board members during depositions regarding how they currently interpret the Funeral Director Law certainly provide a basis for Plaintiffs' apprehension. For example, Board member Janice H. Mannal stated, "I concluded that [the Funeral Director Law] was pretty clear ... that only a licensed funeral director should be presenting material." (Mannal Dep. at 11 (doc. 48)). Mannal also stated that the now-repealed Resolution was nonetheless a proper statement of the law. (Id.). Another Board member, Joseph A. Fluehr, III, stated that he primarily voted to rescind the Resolution so that we would render this action moot. (Fluehr Dep. at 17 (doc. 48)). It is clear to us that there is every reason to believe that the Board, despite having rescinded the Resolution, still considers the Plaintiffs' conduct in question to be prohibited by the Pennsylvania Funeral Director Law. Unquestionably then, Plaintiffs' conduct is chilled because Heffner faces a direct threat to his livelihood in the event of Board action.

Were we to rule that this action is moot, we would place Plaintiffs in an untenable circumstance. Their choices would be to either continue to refrain from engaging in the conduct in question to the detriment of their business for fear of being prosecuted by the Board, or to proceed to disseminate the information and thus face the risk of a Board prosecution. Among the purposes of a facial challenge is to remove Hobbsian choices of this type. Moreover, we would be

remiss if we did not admonish Defendants that in our view their post hoc attempt to eliminate Plaintiffs' claim, by withdrawing the Resolution, gave the appearance of being both clumsy and disingenuous.

While we believe that the Board could promulgate clearly drafted guidelines or other resolutions which might serve to obviate the necessity of our deciding this challenge on the merits, its actions to this point have not demonstrated either clarity or continuity, nor have they indicated a willingness by the Board to speak in a more cogent fashion on this issue. In the absence of any formal action by the Board in the interim, which we assume the parties will bring to our attention, we will fulfill our mandate and render a timely decision on the merits.

**NOW, THEREFORE, IT IS HEREBY ORDERED:**

1. Defendants' Motion for Summary Judgment (doc. 34) is DENIED to the extent that we find that Plaintiffs' claims are not moot. Judgment on the remaining aspects of the Defendants' Motion is DEFERRED.
2. A ruling on Plaintiffs' Motion for Summary Judgment (doc. 30) is DEFERRED.

s/ John E. Jones III  
John E. Jones III  
United States District Judge

Original: 2459

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Jan B. Jefferson  
Supervisor

RECEIVED

2005 MAR 17 AM 9:36



301 Curry Hollow Road • Pittsburgh, Pennsylvania 15236 • 412/655-4501

STATE OF PENNSYLVANIA  
REVIEW COMMISSION

March 7, 2005

Michelle Smey  
Administrator, State Board of Funeral Directors  
P.O. Box 2649  
Harrisburg, Pa. 17105-2649

Re: Comments regarding proposed rulemaking in the Pennsylvania  
Bulletin. Reference No. 16-A-4814

Administrator Smey,

I am deeply concerned that this board writes regulations that are not consistent with the underlying statute. These regulations far exceed the authority granted by the legislature. In fact this board seems intent on creating "new" statute through regulation.

In its 'Impact of the Proposed Rule making' the Board stated that "The Board finds that the proposed amendment addresses a *compelling* public interest..." I would ask the State Board of Funeral Directors to demonstrate through documentation how many occurrences they have encountered regarding the issues they are proposing regulations to remedy. In addition this board should publish, even in redacted form, consumer complaints and/or licensee complaints that have been received regarding the issues contained in these proposed regulations. Before we burden licensee's with more government oversight it is important to know whether they are responding to one isolated situation or complaint or one hundred.

I hereby request a public hearing regarding the merit of these proposed regulations if these regulations are not denied.



**Specific comments regarding proposed additions to 13.202:**

**Proposed Paragraph (11)**

The addition of “email” to the methods of written communication is reasonable in today’s world.

I do not see how (i) through (iii) help the consumer but may be helpful to the profession. It is exceedingly rare that a family member or other authorized person cannot be located within a reasonable time, however it happens. In general most funeral directors feel protected by the requirement to embalm or bury within 24 hours if they are compelled to embalm a body because an authorized party cannot be located.

Unfortunately the more I read (11) the more confused I become. The wording of this proposal is poorly done. I see two unfortunate outcomes of this rule if adopted. First a funeral director will not be paid when services or embalming were truly required by the 24 hour rule for embalming or the 10 day rule for burial; or the door to occasional abuse by an unscrupulous funeral director will be unlocked.

If this new rule is required, then the board needs to truly micro-manage the licensee by informing them exactly what services they can perform and exactly when in the 24 hour embalming time limit they can perform them. Otherwise the funeral director is left hanging in the preverbal wind between a potentially upset family, disciplinary action by the board or not being paid for services rendered in good faith

**Proposed Paragraph (13)**

This proposed regulation exceeds the authority of this board to regulate, as there is no basis for this proposed regulation in the underlying statute. In addition it violates common law and contract law. Most importantly the implementation of this proposal would cause great harm to the very citizens the Commonwealth wishes to protect.

***How it harms the consumer:*** When a consumer executes a contract for his or her own funeral they do so first to prevent a spouse or children from having make those decisions at the time of death; and second to alleviate the financial burden by freezing the price at the time of purchase. The consumer who executed this contract has transferred “risk” of future inflated costs is to the provider. The provider is now obligated to deliver the funeral at the agreed to price, regardless of how far in the future the services will be delivered. In exchange for assuming the “risk” of delivering the services in the future the purveyor receives 1) the assurance that he will provide the services and not a competitor, 2) any growth in the monies trusted or the insurance policy used as funding. Though infrequent, the growth on the trust occasionally outpaces inflation by a small amount. More frequently the money trusted has not grown precisely the same as inflation has increased the providers price, and a small deficit occurs. The custom and practice of the industry has been that the provider, who has assumed the “risk” of inflated costs, keeps any overgrowth in funds or absorbs any deficit in funds at the time of delivery.

The consumer only wants the funeral he pre-arranged to be delivered at the price he contractually agreed to pay (and probably paid in full many years earlier). The consumer does not care if the provider makes \$50 more or loses \$50. From experience I can tell you the consumer only cares that their family gets what they paid for without paying any more for it. In other words people want what they contracted for, nothing more but nothing less.

The reality is that if this regulation were implemented forcing funeral providers to shoulder only the down side of pre-need funding (a shortfall at delivery) because they must refund any excess growth in the funds at delivery, funeral homes will stop guaranteeing the price of pre-need funerals. The consumer would then be forced to assume the higher costs that inflation always causes.

*This is a bad regulation no matter how you look at it!*

#### **Proposed Paragraph (14)**

This regulation again exceeds the authority granted by the statute. The existing 13.202 (1) and (10) seem to more than adequately address this issue. Therefore the purpose of this proposal is not clear. Section 8 of the statute, titled “Conduct of Business”, deals with the types of licensing required by various types of funeral establishments. I believe even an apprentice funeral

director knows that he or she must work for a licensed establishment. However to insert **“or should have known”** is a loaded gun for prosecutorial misconduct. If I work for a funeral home that was properly licensed last week, and I am not informed or become aware that the licensee is rescinded this week, this paragraph puts me in violation because I **“should have known”**.

Further the term **“funeral entity”** does not exist in the statute. I infer that this board is attempting, without statutory authority, to broaden its control into other non-funeral home death care businesses. This attempt at expanding the authority of this board is transparent and more importantly serves no public purpose.

### **Proposed Paragraph (15)**

This may be the only proposal that makes any sense in protecting consumers. There have been reported repeated instances of funeral directors in small towns who happened to also be the coroner taking remains to their own funeral home, embalming them quickly, and demanding payment if the family selects another provider. This could dampen that practice. However it would be more appropriate to revise 13.201 (5) **“Professional responsibilities”** which deals with this issue already.

### **Proposed Paragraph (16)**

This regulation absolutely exceeds the authority granted by this statute as no mention of this issue exists in the statute. This regulation places the funeral provider in a legal quagmire between the legal rights of the parties who have the legal control of the deceased and being in violation of this proposed regulation. In principal it sounds fair and reasonable, in practice it is sometimes impossible. Is the funeral provider to have a **‘private’** visitation for the requesting party in violation of the stated wishes of the person in legal control of the body? It is bad enough that any provider can face this situation, it is worse that if we follow the wishes of the legal representative who has legal authority over the deceased we would be prosecuted by this board because of this regulation. If this board wishes to micro-manage the profession to this degree, then this board needs to go to the legislature and obtain legislation detailing exactly how this is to be implemented.

## Proposed Paragraph (17)

This proposed regulation makes no sense and is in direct contradiction to the clear and unambiguous meaning of the underlying statute. Section 13(c) of the funeral director law states that *“No person other than a licensed funeral director shall, directly or indirectly, or through an agent, offer to or enter into a contract with a living person to render funeral services to such person when needed.”* This is a very clear and straightforward paragraph that means exactly what it says. To paraphrase, only a funeral director may sell a funeral, directly or indirectly or using an agent. How can this board propose a regulation creating a category of “unprofessional conduct” that is clearly authorized by the statute? Yet that is exactly what the board has stated, as it’s intent in publishing this regulation. In the “Background, Need and Description of the Proposed Amendment” The board states “This provision prohibits any unlicensed person from engaging in pre-need sales, ***even on behalf of a funeral director.*** See *Ferguson v. State Board of Funeral Directors*”. However this is a gross misrepresentation of the funeral director law which clearly permits a funeral director to have agents (*“directly, or indirectly, or through an agent”*). It is also a misrepresentation of the outcome of the referenced court case. The Judge in his ruling never attempted to limit or remove the ability of a funeral director to exercise his rights to sell his product *“directly, or indirectly, or through an agent”* **in fact the Judge reaffirmed those rights.** The Judge stated “by way of contrast, the act does not prohibit insurance agents from selling life insurance to fund pre-arraigned funerals.” “Alternatively, an insurance agent could meet with a customer, using average prices for generalized funeral services and merchandise.”

For some unknown reason the board in proposing this regulation have inverted the reading of the statute. In the “Background, Need and Description of the Proposed Amendment” the explanation that the law “prohibits a person who is **not** a licensed as a funeral director, either directly (“or indirectly” was omitted) or through an agent...” is backwards reading. And as a backward reading it gives an inverse impression of the statute. The statute is straightforward and clearly authorizes a funeral director to sell his services *“directly, or indirectly, or through an agent”*. I am perplexed as to why this board is attempting to overturn the statutory authority granted to funeral directors by this regulation. For this attempt at subverting the statute

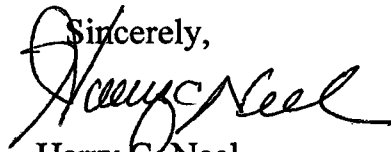
is to the detriment of the funeral directors they regulate and the consumers of the Commonwealth who choose to pre-arrange.

### **Conclusion**

It seems clear that this board has difficulty in interpreting the plain language of our funeral director law

This board needs to clearly demonstrate what complaints have prompted them to propose these regulations. Not in generalities of “festering problems” but in concrete details of the exact number and types of complaints

If these regulations are not denied, then I request a public hearing so that this board can explain the need for this further government regulation.

Sincerely,  
  
Harry C. Neel  
President

CC: IRRC

Original: 2459

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STATE BOARD OF FUNERAL DIRECTORS  
REVIEW COMMISSION

RECEIVED  
FEBRUARY 13 2005

February 14, 2005

Michelle Smey, Administrator  
State Board of Funeral Directors  
PO Box 2649  
Harrisburg, PA 17105-2649

Reference #16A-4814 (Unprofessional Conduct)

Dear Michelle,

I am writing to you in response to the article in the Altoona Mirror on Sunday, February 13, 2005. The article was about Funeral Director rules of conduct possibly being changed. I am totally in favor of this proposal because of the devastating loss of my brother, and how the rules affected us.

My brother was separated from his ex-wife for over a year. When he died, my parents made the arrangements for the viewing and funeral services. My ex-sister-in-law was at the meeting at the funeral home while the arrangements were made. She nodded in agreement to the arrangements. The next day, (Sunday) my dad received a call from our church secretary saying that the funeral had been cancelled! My dad called the Funeral Director and was told that because my brother and his ex-wife were not legally divorced, she had the right to take control of the arrangements, as long as she would pay all of the costs.

She said she would pay. The bill at this time was \$6,000.00. She has no employment. She has two children ages 15 and 13 living with her. She said my brother wanted to be cremated (we never heard him speak of this – it is not a practice in our family). She told the Funeral Director that the viewing was to be private, allowing only herself and his children to be there. My mom and dad were devastated! My brother and I couldn't believe that these are the rules that the Funeral Director must follow. We all knew that it put the Funeral Director in a difficult situation because he is a friend of the family. He felt terrible, but could do nothing. My dad told the Funeral Director that he'll most likely never receive payment from the ex-wife, but he replied that he had no choice because of these rules of conduct.

Clearly, these rules need to be changed! If we could have had a separate viewing, things would not have been so painful. But she had the authority to tell us that we could not do anything, and to cancel the plans that were already made. I am still in shock over this!

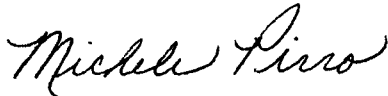
There is another issue I would like to address. As far as I know, there are no rules of conduct for the keeper of the ashes in Pennsylvania. As you have probably guessed, my brother's ashes went to his ex-wife. She can do whatever she wants with them!

We have rules and guidelines for displaying and disposing of the American flag, but no rules for keeping the ashes of a human being. She has the freedom to flush the ashes down the toilet if she chooses! Can you imagine how my family feels about this? We have had no contact with her because we don't want to know what she did with the ashes. It would be comforting if we knew that the ashes were sealed in a container and buried in a cemetery. At least we would have a place to visit to pay our respects.

Please help to change the rules of conduct so that separate viewings could be scheduled in cases like this. If this single change happens, the Funeral Directors would not be cheated out of payment for their services, and families will get the closure they need.

I hope you take my concerns to heart, and save the unnecessary heartache families are going through - especially when the grief of the death of a loved one is difficult enough to bear.

Sincerely,

A handwritten signature in cursive script that reads "Michele Pirro".

Michele Pirro  
408 S. 24<sup>th</sup> Street  
Altoona, PA 16602