

# 2639

Jefferson  
Memorial  
Cemetery and Funeral Home



January 16, 2010

The Honorable Arthur Coccodrilli, Chairman  
Independent Regulatory Review Commission  
333 Market Street, 14<sup>th</sup> Floor  
Harrisburg, Pa. 17101

INDEPENDENT REGULATORY  
REVIEW COMMISSION

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**RE: Comments in Opposition to Proposed State Board of Funeral Directors Regulation No. 16A-4816 (IRRC # 2639) 'Preneed Activities of Unlicensed Employees'**

Dear Chairman Coccodrilli and Members of the Commission,

Thank you for this opportunity to again voice my **opposition** to the 'final' proposed regulation 16A-4816 (IRRC 2639).

As you may recall from my prior written comments and verbal testimony before you on November 19, 2009 I am a 3<sup>rd</sup> generation death care provider. For 80 years my family has owned and operates one of the largest cemeteries in the country and for 16 years one of the largest funeral homes in Pittsburgh<sup>1</sup>. My firm and my colleague Michael Walker (the 'Walker' of Walker v. Flitton.<sup>2</sup>) were two of the four plaintiffs who received judicial relief in that case. Though this board purports that the purpose of this

<sup>1</sup> In 2008 the funeral home performed 456 funerals and the cemetery 1,406 burials. Of those 30% of our funerals were pre-need, generally 5-7 years before needed and in the cemetery 92% of those buried already owned their lots generally for 20-30 years before needed.

<sup>2</sup> United States District Court for the Middle District of Pennsylvania in the matter captioned Michael Walker, et al. v. Jodi Flitton, et al., No. 4: CV-01-02252

rulemaking is to codify Judge Jones ruling into regulations; nearly every part of this regulation is counter to Judge Jones ruling.

The most important reason for IRRC to disapprove this regulation a second time is that there is simply no compelling need to promulgate such a restrictive regulation. This lack of documented need has been repeatedly pointed out to this board by many commenters' including the IRRC in its initial comments and again in its disapproval notice of November 30<sup>th</sup>, 2009. Yet even to this day the board only seems able to reiterate the Law to establish its justification for this regulation. Why is the Board unable to justify its regulation? Simply because there is no problem that needs fixed. Funeral homes that choose to use unlicensed employees obviously supervise their employees properly and the employees perform their duties well while serving their employers families. Therefore there have been no recorded complaints about unlicensed employees conduct.

The harm the Board purports to convey to those outside its own table is speculative and not real.

In addition there is a significant conflict with other statutes. This regulation does not recognize that any person may legally sell merchandise under the future interment law. Yet here the Board wishes to 'outlaw' employees of a funeral home from selling merchandise for their employer. It makes no sense.

One of the few things the Board did revise in this final draft is their attempt to make it clear that the regulation will not restrain licensed insurance producers from receiving a commission; but only if paid directly by the insurance company. There are many licensed insurance entities that receive the commission directly, and then pay the employee all or part of that commission. This point was raised with the board and they stated that this type of commission payment is prohibited because it did not come directly from the insurance carrier. This approach by the Board (that only an insurance carrier may pay a commission to an employee) is discriminatory to those of us that use monetary trusts instead of insurance, even though trusting 100%; many still compensate employees on a commission basis.

At the public IRRC meeting on November 19, 2009 date the Board's Council, Christopher McNally, indicated that it was the Board's intent to allow unlicensed employees to go beyond just handing out General Price Lists and printed material. That the unlicensed employees actions could include discussing and answering questions about prices for various services or various combinations of those services, selling merchandise, handing out unsigned contracts, and arranging for alternative forms of payment including insurance. I participated in the special public meeting/workshop the Board held on December 2<sup>nd</sup> and 3<sup>rd</sup>, 2009 pertaining to these regulations. I can categorically state that this Board has no intention of allowing unlicensed employees to perform the functions that Board Council McNally publically relayed to IRRC. The final form regulations here presented attest to that fact by prohibiting most or all of those functions-unless you are an insurance producer.

After lunch on the second day of the special Board meeting/workshop the conversations that transpired, if not so serious in their implications, became almost comical. There was much discussion about "changing hats". Mostly this revolved around what an insurance producer would be permitted to do. Various members of the Board admitted that to write an insurance policy the insurance producer would have to add up numbers from the funeral home General Price List to establish the amount of insurance funding required. They also admitted that they had no legal authority over what type of 'worksheet' and insurance producer used to get to that number. There were a number of examples given

on what would be legal and what would not. At one point I asked if I had understood their intent correctly and asked if: wearing my funeral home "employee hat" I could meet with the family, hand out the GPL and other printed material, explain my employer's pre-need program, answer any general questions, add up the services and merchandise the consumer desired, then switch to my "insurance hat" and write an insurance policy to fund the consumers funeral. I then asked if I did everything right and would be legal under this regulation? Board Member Pinkerton responded "No" I was illegal. That I didn't switch "hats" quick enough. I needed to switch to my insurance producer "hat" BEFORE I added up the numbers. By switching "hats" after I had added up the numbers I was acting like a funeral director and was therefore illegal under this regulation.

There was a similar "hat" discussion about the revisions to 13.206(c) (1) which originally prohibited an unlicensed individual from being associated with any other funeral entity. The final language was crafted around the new wording "*In the course of a presentation with a consumer ....*" It was stated that the Board could not prohibit an insurance producer from representing more than one establishment because that producer was regulated under the insurance laws. So "a presentation" meant one presentation for one establishment at one moment. Therefore the insurance producer COULD NOT present the consumer with multiple funeral homes General Price Lists (to allegedly avoid confusing the consumer) he must go out to his car "change hats" and come back in representing a different establishment. It was apparent to me that this Board has no confidence that any consumer has any intellect or common sense whatsoever. Can you think of anything more in the consumer's interest that being able to 'shop' numerous funeral homes prices at one sitting?

I know this "hat switching" discussion seems almost unbelievable. But it happened; the transcript and those who sat at the table with me, Mr. Heffner and Mr. Rae, will verify it.

### ***SUMMARY***

This revised final regulation is substantially the same regulation the IRRC previously rejected. Other than the change for insurance producers; most changes were cosmetic (i.e. unlicensed employee to unlicensed individual, etc.) and did not change the essence of the regulation. Therefore this board has once again ignored the questions, comments and suggestions made by this commission (IRRC), the HRRC and those of us who actually work in the pre-need segment of the industry.

The list of things the funeral directors employee MAY NOT do still has the effect of rendering that persons employment unnecessary.

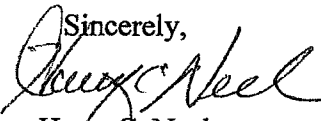
Though Judge Jones clearly saw the difference between Ferguson (not an employee) and Walker (is an employee) this board ignores that guidance. This regulation removes the legal avenues funeral directors had previously enjoyed in utilizing unlicensed employees which was granted by the legislature in the "exceptions" paragraph 13(c) of the law. Funeral directors will fear sanctions by this board if they continue current (previously legal) practices of using employees or agents. Therefore those individuals employment will be in jeopardy.

The board has not proven that consumers are being harmed by the current practices of pre-need providers. The regulation will stifle competition, reduce consumer choices and thereby increase costs to the consumer. This regulation exceeds the statutory authority and violates the federal decision of *Walker v. Flitton*.

This Board need only promulgate three (3) regulations: two to clarify the responsibilities of licensed funeral directors in regards to the funeral directors use of unlicensed employees or agents and one to clarify the original intent Section 11(a)(8). I again suggested the following:

- 1) The Funeral Director or Funeral Supervisor of each funeral home is responsible for the actions of all licensed and unlicensed employees or agents.<sup>3</sup>
- 2) All contracts initiated by other than a licensed funeral director shall be reviewed, approved and signed by a funeral director within 48 hours and said contract shall not be binding upon the consumer until so ratified.<sup>4</sup>
- 3) Section 11 (a)(8) of the law should be interpreted in the regulations as follows: *"To secure business at the time of a death a funeral director may not pay or agree to pay any commission or gratuity to any person for soliciting, securing or the intent thereof of said at-need business. However, this prohibition does not apply to pre-need sales by the employees or agents of the funeral director when such business is solicited by legitimate methods or advertisement."*<sup>5</sup>

For these reasons I respectfully urge the IRRC to again reject this regulation.

Sincerely,  
  
Harry C. Neel  
President

<sup>3</sup> In truth I believe that the existing statute and regulations already, by definition, place this responsibility on the funeral director however a regulation such as this would provide clarity as to the funeral directors responsibility and clearly hold him or her accountable to the Board thus adequately protecting the public.

<sup>4</sup> 13(d) of the statute permits unlicensed employees to make tentative funeral arrangements to grieving families which must be ratified by the funeral director within 48 hours. It seems logical to allow the same amount of time for the funeral director to ratify a pre-need sale that the statute allows for an at-need sale.

<sup>5</sup> Fifty-Seven years ago when this statute was enacted preneed sales as we know them now did not exist. There was an occasional "Prepaid Burial Account" but little more in the way of preneed. The clear and obvious intent of the legislature was to prevent a funeral director from paying morgue employees or hospital employees for "steering" a grieving family to a certain funeral director. Or even worse for that person to release the body to the funeral director, without the family's informed consent, thereby forcing the family to use that funeral director or face the aggravation of having the body moved to another establishment. Though honest funeral directors did not participate in such shabby conduct it was common enough (especially among corners who were also funeral directors) that the legislature wanted to prohibit the practice. This section was not intended to prohibit payment to an employee, whether by salary or commission, for securing legitimate honest pre-need business.