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January 26, 2010

VIA E-MAIL IRRC@IRRC.STATE.PA.US AND JJEWETT@IRRC.STATE.PA.US

The Honorable Arthur Coccodrilli, Chairman
The Honorable George D. Bedwick, Vice Chairman
The Honorable Silvan B. Lutkewitte, III, Commissioner
The Honorable John Mizner, Commissioner
The Honorable S. David Fineman, Commissioner
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

John H. Jewett, Regulatory Analyst
Independent Regulatory Review Commission
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INDEPENDENT REGULATORY
REVIEW COMMISSION

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RECEIVED

**RE: Comments in Opposition to Final-Form Regulation No. 16A-4816 (IRRC # 2639)
Prened Activities of Unlicensed Employee, State Board of Funeral Directors -
Opposition Comments of the Pennsylvania Cemetery Cremation and Funeral
Association ("PCCFA") and Attorney James J. Kutz, Individually as Counsel of
Record in Walker v. Flitton**

Dear Chairman, Vice Chairman, Commissioners, and Mr. Jewett:

Allow this letter to serve as comments on behalf of the Pennsylvania Cemetery Cremation and Funeral Association ("PCCFA") in opposition to the final-form proposal of the State Board of Funeral Directors for Regulation No. 16A-4816 (IRRC # 2639). Also, kindly allow these opposition comments to serve as my personal comments, in my capacity as the prevailing attorney in the federal court matter of Walker, et al. v. Flitton, et al.

Without intending to sound pejorative or argumentative, it is indeed disappointing that a state regulatory body would remain so rigid and intractable in the face of overwhelming opposition, not to mention the repeat efforts of this Honorable Commission to secure a regulatory scheme

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that is (a) consumer friendly and (b) governmentally necessary. Simply stated, despite several cosmetic revisions, the bottom line fact remains that this administrative Board, comprised mostly of licensed funeral directors, can proffer no bona fide reason or need for the excessive restrictions which continue to attach to these regulations. These regulations need to be seen for what they are – *i.e.*, an attempt to blunt the rationale, logic, and common sense set forth by the federal court in its detailed decision of Walker v. Flitton.

Despite numerous requests by IRRC and others, this Board remains unable to demonstrate any reasonable need for this regulation; it has been unable to point to any consumer injury or consumer complaint; and it certainly has not justified any legitimate government need for a scheme which essentially makes preneed planning opportunities difficult, if not fiscally impossible.

Virtually every other licensed profession and business seeks to advance the companion laudable goals of (1) increased consumer access and (2) reduced costs. By way of example, physicians seek to utilize physician assistants and nurse practitioners; physical therapists utilize physical therapy assistants; veterinarians utilize veterinary technicians; lawyers utilize paralegals. In each instance, the primary licensee remains captain of the ship and responsible for the acts of its auxiliary personnel. Delegation works; consumer access is expanded, and it is generally expanded at reduced costs to the Pennsylvania consumer. In stark contrast to this broad-based trend, this particular regulatory Board and the profession it seeks to protect, remains rigidly attached to the notion that the consumer is somehow harmed by (a) the dissemination of information, (b) the free exchange of truthful discussion, and (c) reduced consumer costs associated with pre-planning (as opposed to at-need decision-making).

PCCFA and the undersigned respectfully submit that, in the four-plus years that have followed since Walker v. Flitton, this Board has been unable to present any need for this restrictive regulatory scheme; it has continued to fail to address issues raised by IRRC, the House Professional Licensure Committee and others; and this latest draft is, with all due respect, substantively unchanged from previously-disapproved drafts.

Rather than tendering a multi-page, *seriatim* attack on this latest draft, the undersigned respectfully asks the Honorable Members of this Commission to review previously-submitted comments by the undersigned on behalf of PCCFA, requesting that those opposition comments be incorporated by reference herein.

On behalf of PCCFA, we thank the Commission Members for their zealous effort in reviewing this most important proposal, and we urge the Commission to continue to do the statutorily appropriate thing in this instance; that being, to disapprove this regulation because it simply does

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not meet, in any manner, the necessary need or justification for yet more restrictions on the free-flow of commercial speech. Indeed, this latest regulation remains unnecessarily restrictive and most likely violative of the commerce clause of the United States Constitution as well. Market share protectionism is not a legitimate reason for impairing the free flow of information or the free flow of commerce.

Very truly yours,



James J. Kutz

On Behalf of Pennsylvania Cemetery Cremation and Funeral Association
and Individually

JJK/dlh

cc: David Heisterkamp