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From: Harry C. Neel [hcneel@verizon.net]
Sent: Sunday, November 15, 2009 7:41 PM
To: Jewett, John H.; IRRC
Cc: ST-FUNERAL@state.pa.us
Subject: Re: Neel Comments on 16A-4816 (IRRC# 2639)
Attachments: 2009-11-15 PDF HCN to IRRC Unlicensed Emp.pdf

2009 NOV 16 AM 9:28

INDEPENDENT REGULATORY
REVIEW COMMISSION

Dear Mr. Jewett,

Attached are my comments on the above referenced proposed regulation.

Please acknowledge receipt of this email.

Harry C. Neel
Jefferson Memorial Cemetery & Funeral Home
401 Curry Hollow Road, Pittsburgh, Pa. 15236
412-655-4500 Fax 412-655-7758
www.jeffersonmemorial.biz

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Jefferson
Memorial
Cemetery and Funeral Home



November 15, 2009

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

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INDEPENDENT REGULATORY
REVIEW COMMISSION

Via email: irrc@irrc.state.pa.us
CC: st-funeral@state.pa.us

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 voice my **opposition** to proposed regulation 16A-4816 (IRRC 2639).

I am a 3rd 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. 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.

My firm and my colleague Michael Walker (the 'Walker' of Walker v. Flitton.¹) were two of the four plaintiffs who received judicial relief in that case. This board purports that the purpose of this rulemaking is to codify Judge Jones ruling into regulations. As you will see in the below comments this board has so distorted the plain language of the ruling so as to, in effect, overturn the ruling itself.

If these overreaching regulations are enacted the continued employment of 3 to 5 of my customer service employees, including Mr. Walker, will be in jeopardy.

¹ 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

This proposed rulemaking should not be approved for four reasons: First, this Board has not shown that Pennsylvania consumers are being harmed by unlicensed employee or agents of funeral directors selling preneed—therefore there is no compelling reason to issue these regulations. Second, they exceed the statutory authority granted in the Funeral Director Law. Third, these regulations directly conflict with and contradict the Federal Decision of Walker v. Flitton. Fourth, the consumer will be harmed by increased prices as competition is reduced. In the paragraphs below I will detail why I believe IRRC should refuse to endorse these proposed regulations.

The Board has failed to show a compelling need for these regulations

These regulations should not be approved because the State Board has failed to meet its burden in showing there is a compelling need to issue said regulations. The Board has submitted no factual evidence to establish that there are any problems with funeral home employees conduct that needs rectified. Therefore the thousands of pre-need contracts currently being sold by funeral entities are NOT causing harm to the consumers of the Commonwealth regardless of whether sold by licensed or unlicensed employees or agents. Without documented consumer harm what compelling reason does the Commonwealth have in restricting the activities of its licensee's? There is no problem with the current funeral directors use of unlicensed employees or agents in Pennsylvania that needs fixed.

Judge Jones also noted in Walker v. Flitton that the Board failed to show any compelling need for such broad restrictions on licensee's rights:

- Page 15: *"There is no evidence in the Record, however, disclosing the nature of this "festering problem" other than this one unsubstantiated opinion of Pinkerton."* (emphasis added)
- Page 26: *"There is no evidence that the Defendants (the Board) fully analyzed the relevant issues in order to test their assumptions about preneed solicitation by unlicensed individuals by conducting research, nor did they complete studies or take testimony in an effort to create a carefully crafted response to the exigencies of the growing preneed industry."*
- Page 37: *"... the record is devoid of evidence supporting the proposition that consumers in Pennsylvania have experienced difficulties at the hands of unlicensed individuals employed by funeral directors who attempt to disseminate truthful information regarding preneed funerals and life insurance policies to fund them."*

The Board has exceeded its Statutory Authority

Section 13 is titled ***"Practice without a license; exceptions"*** (emphasis added). A plain language reading of the statute clearly shows that 13(c) allows only a funeral director to enter into preneed contracts directly (himself) or indirectly (his employees), or through an agent (his agent). Section 13(c) of the act states, *"No person other than a licensed funeral director shall, directly or indirectly, or through an agent, offer to enter into a contract with a living person to render funeral services to such person when needed."* The intent of the legislature is clear and unambiguous. The legislature by this "exception" granted the funeral director the ability to utilize unlicensed employees or agents at the funeral directors discretion.

On page 12 of *Walker* Judge Jones clearly recognized this as well: ***"Id. Additionally, 479.13 prescribes when it is permissible for individuals to practice funeral directing without a license,..."*** then listing the (a), (b), and (c) subsections of Section 13. Practice without license; exceptions.

These proposed regulations are so overly restrictive that they totally negate the privileges granted in 13(c) permitting the funeral entity to employ non funeral director employees to meet with the family, engage in discussions regarding the pricing and actual selection of services and merchandise, prepare worksheets, proposals and initiate contracts for the funeral directors final review, acceptance and signature. These regulations propose to remove from the funeral provider the rights the legislature has granted. These many years' preneed oriented funeral firms across this Commonwealth have operated under the existing law without harm to the consumer.

This regulations only permits a funeral employee to perform two minor functions (13.206a (b) (1) (2)) and prohibit him from performing the six functions that are precisely the things I employ a preneed customer service representative to perform (13.206a (c) (1) thru (6)). **I can only conclude these regulations have been intentionally designed to force funeral entities not to use unlicensed employees to sell pre-need.**

Judge Jones recognized the mind set of this Board in creating unnecessary restrictions to preneed sales in the Walker v. Flitton decision:

- Page 48: *"Therefore, the Board member's interpretation of the Law and the resulting prohibitions are more extensive than necessary and are not narrowly tailored to meet the asserted interest."*

The proposed regulations violate the essence of Walker V. Flitton

I note that in "Background and Need for the Amendment" preamble to these proposed regulations the Board quoted extensively from Judge Jones in the Walker v. Flitton decision. I further note that the quotes given often were selective and tended to ignore other comments in and around the selected quote. The effect was to deflect the full impact of Judge Jones decision. I encourage you to read the full decision and draw your own conclusions. (A copy will be provided upon request)

The most comprehensive statement by Judge Jones that summarized the thrust of his decision is found on page 35:

- *We fail to see, on the record before us, what governmental interest exists relating to allowing only licensed funeral directors, rather than non-licensed insurance salespeople who are employed by, or agents of those funeral directors, to interact with customers and disseminate price and other information regarding preneed services. Here, as the unlicensed Plaintiffs are trained², supervised, employed, and directly controlled by a licensed funeral director, it appears that many of the Defendants (the Boards) consumer concerns are overstated and thus misplaced. Further, because the Law requires all preneed contracts to be signed by a funeral director, the funeral director must review his employees' work each time they submit a contract for his signature."*

² Trained pre-need sales employees can be equally effective as any licensed employee in assisting consumers in making their pre-need arrangements. It is not complex to train funeral sales people in the proper procedures to arrange a preneed funeral. In fact mortuary schools have little in the way of class room training on sales, merchandizing or the procedures and paperwork involved with the actual Preneed (or at-need) arrangements. The real training in at-need and preneed arrangements and merchandizing is fundamentally learned on the job. Therefore the funeral directors who desire to have unlicensed salespeople or agents will train them in precisely the same manor he trains his licensed staff. Each Supervisor or owner is currently responsible for the conduct of all his employees and will not permit any action by his licensed or unlicensed employees or agents that might risk the firm's reputation in the community or sanctions by the State Board against his license.

As we can see by the comment above Judge Jones:

1. Acknowledges that the exception granted in 13(c) of the Law allows a funeral director to utilize unlicensed employees or agents to make preneed sales.
2. Those employees or agents may disseminate price and other information,
3. Those employees or agents must be supervised by the funeral director,
4. The employee or agent may prepare the contract and submit it to his employing funeral director for signature.

It is clear that the Judge recognizes that 13(c) authorizes a funeral entity employee or agent to act as a legal extension of the funeral director with the ability to work with a family from introduction through the preparation of the contract for his employers. The Judge further acknowledges that only the funeral director can sign the contract thereby consummating the agreement.

To justify these regulations the Board also relies extensively on the Ferguson³ prosecution. Judge Jones noted the difference between Ferguson and the plaintiffs in *Walker* on page 18 of his decision: "*However, we note that the unlicensed Plaintiffs here, unlike the unaffiliated parties in Ferguson, are employed by a licensed funeral director.*"

The Consumer And Employees Are Harmed By This Regulation

In the end the consumer, this regulation purports to protect, will in fact be harmed. Preneed oriented firms will be unable to financially support the higher cost of licensed funeral directors to perform only preneed sales and will restrict or terminate their preneed marketing programs. This will reduce consumer options and limit competition. Less competition always translates into higher prices.

Under these regulations any funeral director who continues to use their unlicensed employees will clearly be sanctioned by this board. Therefore those employees who previously serviced the public for their funeral entity will have their employment placed in jeopardy or more likely terminated. At my firm alone 3-5 preneed employees will be affected immediately. In the long run the reduction of preneed sales means inventories of current preneed accounts of record will decline as they are delivered and not replaced by new preneed sales. Over time a number of other clerical or other employees employment would be affected as revenues decrease. It is a vicious downward cycle. It will presumably stabilize somewhere but at a much lower level. No provider can 'assume' a family will use his firm just because his parents did. Across the Commonwealth this severe restriction on preneed may well cost hundreds of honest hardworking individuals their livelihood.

THE BOARD DID NOT ACCEPT SUGGESTIONS BY INDUSTRY, IRRC OR HRRC

Contrary to the boards statements in question 22 of the Regulatory Analysis Form about considering the regulated communities comments; they have only provided lip service to that obligation. In fact this board has not accepted even one of the suggestions made by the pre-need side of the industry. In question 23 the board admits that "*No alternative regulatory schemes were considered.*" Many of us in the industry have attempted to work with the board as these regulations were being developed. We have attended the public hearings, board meetings, participated in workshops and made written comments and suggestions. Yet not even one of our suggestions was accepted. It is very distressing that after all this time and all our effort and input the final regulation is so close to the first draft regulation as to be indistinguishable on the major points. IRRC and HRRC asked many pertinent questions and made numerous suggestions. Though a number of the minor suggestions were given lip service by rewording-the end effect was unchanged in every case. Further it appears that the more serious questions or objections by IRRC and HRRC were not addressed at all.

³ Ferguson v. Pennsylvania State Board of Funeral Directors, 768 A2d 393 (Pa. Commw. Ct. 2001)

In a letter of October 26, 2007 I suggested the below regulations. During my testimony before the Board on May 6, 2009 Mr. Murphy asked for my input that would help the Board improve the regulation. As requested I sent Chairman Yoesock a letter on May 20, 2009. Again I recommended that the 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). At that time I 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.⁴
- 2) All contracts executed 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.⁵
- 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.”*⁶

WHY WAS THE WALKER V. FLITTON LITIGATION INITIATED

On September 1, 1999 the board issued the following board 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 preneed 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.”

On page 16 of *Walker* Judge Jones states: *“After passage of the resolution, the Board initiated two adjudications. In the first, they cited a funeral director for assisting an unlicensed individual in distributing price lists. (Faye Morey, Bd. Doc. No. 0103-58-1999 (2000)). In the second adjudication, the Board held that an unlicensed individual who distributes these price lists had engaged in the unlicensed practice of funeral directing. (Andrew D. Ferguson, III, Bd. Docket No. 0582-48-1999 (2000)).”*

⁴ 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.

⁵ 13(d) of the statute permits unlicensed employees to make tentative funeral arraignments 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.

⁶ 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 of an employee, whether by salary or commission, for securing legitimate honest pre-need business.

The passage of the "resolution" and the immediate adjudications against Ferguson and Morey created, in the Board's opinion, a legal "precedent"⁷ that had overturned the exception authorized in 13(c) of the law.

Many believe that Ferguson and Morey were staged prosecutions. This opinion would seem sustained by the extreme penalty levied on both defendants. Morey, a licensed insurance agent, had only sold 2-3 consumers insurance policies and Ferguson had communicated or personally met with all of the consumers about their funeral insurance purchases. Yet Morey was fined \$4000.00. Ferguson had his license suspended for two (2) years and was also fined \$4000.00 for "*gross incompetency, negligence, or misconduct in the carrying on of the [funeral directing] profession.*" Ferguson's malfeasance, according to the Board, was that he aided and abetted Morey in her unlicensed practice of funeral directing. For a situation that had no motive to cause consumer harm, had in fact caused no consumer harm and with only 2-3 occurrences, these penalties were way out of line (cut off the hand when a hand slap would do).

Ferguson stated that each consumer was satisfied with their decisions and their insurance purchases. It is believed that the complaints filed with the State Board against Ferguson and Morey was not filed by a consumer but by an officer, employee or local competitor member of The Pennsylvania Funeral Directors Association (PFDA) trade organization.

With the publication of the "Resolution" and the immediate prosecutions using that resolution as the basis for the prosecution; the plaintiffs in *Walker* felt that, to avoid being the next firms prosecuted by this board, we had absolutely no alternative other than litigation.

Interestingly this "Resolution" is the sum and substance of all the current proposed regulations.

IS THIS A CAPTURED BOARD

The January, 1994 Performance Audit conducted by the Legislative Budget and Finance Committee (a joint committee of the PA General Assembly) stated:

"Regulatory bodies, whether state or federal, are sometimes "captured" by the industry they are intended to regulate. There are indications that this may be the case with the Funeral Directors Board. The Board's former chief prosecutor believes the Board exercises little or no control over the industry and serves to advance the interests of the profession, often at the expense of the public." Volume I Part A, page 37

It is well known in the industry that the PFDA has been the "gatekeeper" as to who is appointed the State Board. Thusly many believe that this State Board has become a "captured board" following the whims of PFDA which is the association of the at-need side of the industry---as is readily apparent by the board's recent positions and rulemaking. There certainly recent facts to support the above opinion that the Funeral Director Board is a captured Board. For example: the "Resolution" passed by the Board in 1999 was drafted by staff of PFDA and given to members of the Board to implement. In addition Donald Murphy was appointed as a consumer member of the board- yet Donald Murphy was previously the PFDA's lawyer.

The egregious conduct of this Board has caused it to be litigated at least four (4) times; losing two, one still in progress and one buy out of a board member. Of the litigations (*Walker*) was a civil rights claim so the

⁷ Judge Jones noted the difference between Ferguson and the plaintiffs in *Walker* on page 18 of his decision: "*However, we note that the unlicensed Plaintiffs here, unlike the unaffiliated parties in Ferguson, are employed by a licensed funeral director.*"

winning plaintiffs were reimbursed their attorney fees in the amount of \$70,000 (negotiated to \$55,000) and the state reputedly spent \$150,000 to 'buy' one of its members out of another litigation. And let us not overlook the terrible cost to the taxpayer of the unnecessary and wasted time by state attorneys and employees necessary to defend these actions. Passage of these regulations, without significant modification, will no doubt force the pre-need providers to go to the courts once again for relief for nothing else seems to get through to this Board.

I have observed this board for 16 years. At each turn they have done everything they can to make preneed so difficult as to render it very nearly impossible for a provider to offer preneed to the public. The 1999 'resolution' and the regulations proposed in 4815 or 4816 do nothing in reality protect the consumer, but serve only to protect the at-need segment of the industry from the pre-need segment and create such road blocks that funeral directors, who have offered preneed legally for years through employees or agents, will fear sanction by this board if they continue.

AT-NEED VS. PRE-NEED PROVIDERS

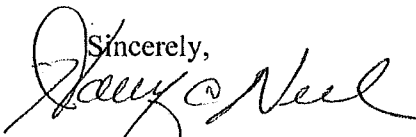
In the funeral Industry there are two distinct groups of providers; those who prefer at-need clients and those who actively market preneed. The providers who prefer at-need far outnumber those who market pre-need. The rift is so severe between the two groups that most if not all of the pre-need oriented providers have abandoned their traditional state organization, The Pennsylvania Funeral Directors Association (PFDA), and have joined with others who share their preneed philosophy by becoming members of the Pennsylvania Cemetery, Cremation and Funeral Association (PCCFA). For the past decade the Funeral Board, by its 'resolution', adjudications and proposed rulemaking, has created nothing short of turf wars on who can sell what to whom.

Why is this rift so severe between at-need and pre-need oriented providers who both desire to serve the public responsibility? The answer is simple---economics and market share. Active pre-need funeral homes are taking market share away from at-need funeral homes. The client of today's market are not willing to simply use the prior traditional demographic funeral providers their parents always used (i.e. catholic providers, Italian providers, Irish Providers etc.). When today's consumer perform family estate planning, i.e. pre-need, they demand higher service, a fixed price and the emotional and financial benefits pre-need offers. Active pre-need providers are growing their inventory of future services as traditional at-need providers see their case volume slowly declining. None of this is about protecting the consumer; **ultimately it is about who gets to talk to the consumer first**; the at-need firm once a death has occurred or the pre-need firm before a death occurs.

SUMMARY

The legal avenues of preneed granted in 13(c) of the law, currently enjoyed by funeral entities, will be made illegal by this regulation. Funeral directors will fear sanctions by this board if they continue current 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*.

For these reasons I respectfully urge the IRRC to reject this regulatory proposal.

Sincerely,

Harry C. Neel
President