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INDEPENDENT REGULATORY  
REVIEW COMMISSION

2639.

November 24, 2009

Christopher McNally, Esquire  
State Board of Funeral Directors  
2601 N. Third Street  
Harrisburg, PA 17110

Re: 16A-4816

Dear Mr. McNally:

In response to your recent request for further input on the above referenced proposed regulation, enclosed please find the suggestions submitted on behalf of the Pennsylvania Funeral Directors Association. The primary change in this submission is that the physical presence of a licensed funeral director is required when ever an unlicensed employee is providing the general price list of the employing funeral home or interacting with a consumer regarding that general price list.

PFDA believes that this requirement of direct personal supervision is in keeping with Judge Jones' opinion which says "the Board clearly has an interest in prohibiting the actual sale of a preneed funeral by an unlicensed individual absent the direct involvement of a licensed funeral director." Walker, p. 46. Moreover, the Court explained that "the governmental interest asserted would support, in our view, an appropriate regulation which requires licensed funeral directors employing unlicensed individuals in this capacity to consult face-to-face with all preneed customers before the customers proposed contracts are signed by the funeral director." Walker, p. 52-53. Judge Jones was clear that his "analysis relates to circumstances wherein the unlicensed individuals engaged in these discussions and dissemination of information are employed and directly supervised by funeral directors." [Emphasis added.] Walker, p. 23.

There are four primary reasons why PFDA believes our suggestions provide the best possible outcome for this proposed regulation:

Christopher McNally, Esquire  
State Board of Funeral Directors  
November 24, 2009  
Page Two of Three

- 1) It protects the consumer in that no unlicensed individual will cross the line of unlicensed practice because a licensed funeral director will physically be there to take over;
- 2) It protects the licensee in that he/she is less subject to an aiding and abetting charge for unlicensed activity;
- 3) It maintains the integrity of the funeral director's license and complies with Pennsylvania law; and
- 4) It meets Judge Jones' requirements of allowing the unlicensed individual to interact with consumers in an appropriate fashion.

PFDA strongly urges the State Board to adopt the above suggestions. You may recall that back on November 28, 2007, IRRC made written comments back to the Board on the then proposed regulation. In those comments IRRC stated: "PFDA submitted extensive comments supporting the goal of the proposed regulation. It also made several suggestions for revisions and additions of new and substantive provisions. Its recommendations included proposals for new rules and procedures regulating registration and bonding, direct mail, seminars, and telemarketing. We urge the Board to carefully examine and consider PFDA's recommendations." PFDA has reiterated many of those same suggestions in the attached proposal as well as expanding them to allow unlicensed individuals further interaction with customers.

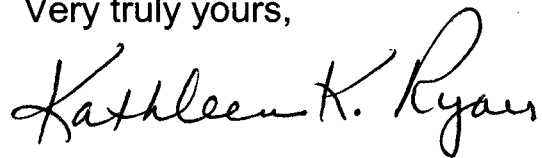
Finally, and perhaps most importantly, you indicated at the public meeting held by IRRC on this regulation that the State Board is not prosecuting any individuals for unlicensed activity, which by definition says that the State Board prosecutors are not acting in accordance with the Ferguson case and statutory law in Pennsylvania. This, in and of itself, should be ample incentive for the Board to get this regulation passed in a most expeditious fashion.

There are no other licensing authorities that allow unlicensed individuals to interact with consumers about the purchase of a good or service that we are aware of. Examples would include real estate agents, insurance agents, car salesmen, investment advisors and/or brokers.

Christopher McNally, Esquire  
State Board of Funeral Directors  
November 24, 2009  
Page Three of Three

Thank you for your attention to this matter. We are available for any further discussion or input regarding this proposed regulation.

Very truly yours,

A handwritten signature in black ink that reads "Kathleen K. Ryan". The signature is written in a cursive style with a large, looping initial 'K'.

Kathleen K. Ryan, Esquire  
General Counsel, PFDA

cc: John Jewett, Regulatory Analyst  
State Board Members  
IRRC Commissioners

### 13.1. Definitions.

Direct personal supervision – the licensed funeral director must be physically present with the unlicensed person when the latter is interacting with consumers regarding the general price list.

Final expense policy – an insurance policy that is not tied directly or indirectly with the general price list of any given funeral home and is sold in round amounts such as \$5,000, \$10,000 or \$15,000 and can include such items as cemetery plots, caskets, headstones, legal fees, hospital or doctor bills, debt funeral services and ministers.

Unlicensed employee – a person not currently licensed as a funeral director that is employed by a licensed funeral director or funeral entity.

#### 13.206a. Utilization of unlicensed employees by a funeral entity.

- a) A funeral entity may permit an unlicensed employee of the funeral entity to furnish information to consumers on behalf of only one funeral entity per appointment concerning the availability of funeral services and merchandise incidental thereto for a living person when needed, only in accordance with this section.
  1. The licensed funeral director and/or the funeral entity employing such unlicensed person shall be professionally liable for the actions of the unlicensed employee;
  2. Any funeral home wishing to use unlicensed employees must be authorized by the Department of State to market pre-need. Such authorization will be given only after a thorough inspection/audit of the current pre-need program which must be 100% compliant with the law prior to authorization. This inspection/audit shall include Board approval of all documents, including the master trust, the individual trust, the Statement of Funeral Goods and Services and express verification with the bank or insurance company that 100% of the monies paid by consumers was timely deposited and remains in the account until the time of need.
  3. Unlicensed persons will be registered with the Board and include the name of the unlicensed person, address, telephone number

- and the name of the funeral home which they are employed by as well as the licensed funeral director that is supervising them.
4. There must be a written employment contract between the employing funeral director or funeral entity and the unlicensed person. Such contract will include the unlicensed person's name, address, telephone number, funeral home name, supervisor's name, and express job description of the unlicensed individual. Such contract must also have the following express provision: No person other than a licensed funeral director shall offer to sell or sell preneed funeral arrangements. Any violation of this policy based upon Pennsylvania Funeral Director Law will result in immediate termination.
  5. If the unlicensed person handles currency, checks, money orders or any type of payment, the funeral home employing unlicensed persons shall bond that individual or insure such individual for not less than \$50,000.
  6. Unlicensed persons may develop, control, distribute and/or design direct mail marketing programs and arrange the appointment for funding of a preneed contract, only after the licensed funeral director from the supervising funeral home has made specific arrangements and determined the amount of the funeral goods and services to be funded. This section does not prohibit unlicensed persons from making an appointment to sell a final expense policy.
  7. All direct mail used by a funeral home for purposes of soliciting preneed must contain the full name of the funeral home, the supervisor or owner, and the name of the banking institution or insurance company where consumers' funds will be placed.
  8. All leads generated by any direct mail shall be recorded in a log book kept at the employing funeral home and shall contain the following information: the name of the licensed funeral director who made the arrangements and the name of the unlicensed person who provided the funding for the funeral services and merchandise incidental thereto.
  9. Unlicensed employees may telemarket to solicit consumers for the employing licensed funeral director to make preneed arrangements.
  10. Unlicensed employees who engage in telemarketing must use a prepared script, approved by the employing funeral director. The script must include a statement that only a licensed funeral director can sell or offer to sell funeral services and merchandise incidental thereto. Such scripts must be dated and kept by the employing funeral home for a period of five years from the date of use.

11. Unlicensed persons may promote or conduct educational seminars for the purpose of providing accurate information regarding such things as the history of the funeral home, biographical information regarding the licensed funeral directors, fraternal, religious and community affiliations of the licensed funeral director[s], historical, sociological and cultural trends with respect to death care, prices from the general price list of the employing funeral home, all under the direct personal supervision of the employing licensed funeral director.
12. The unlicensed employee may sell a final expense policy.
13. The unlicensed employee may hand out a general price list of the employing funeral home and interact with consumers regarding that general price list. However, when interacting with consumers regarding the general price list, the unlicensed employee must be under the direct personal supervision of the licensed funeral director employing such unlicensed person;
14. The unlicensed employee may make post-funeral contacts with consumers no sooner than one year after the death of a family member;
15. The unlicensed employee may use register books for post-funeral contacts with consumers no sooner than one year after the date of the death of the person for whom the register book was provided;
16. The employing funeral director or funeral entity may not pay or agree to pay a commission to the unlicensed person for soliciting business or for business secured by the unlicensed person;
17. The licensed funeral director or employing funeral entity and the unlicensed employee may not engage in any act that would be a violation of the Unfair Trade Practices and Consumer Protection Law;
18. The unlicensed employee shall comply with the regulations of the Federal Trade Commission at 16 CFR Part 453.

b) When interacting with a consumer an unlicensed employee may not:

1. Act on behalf of any other than the employing funeral entity when meeting with one consumer;
2. Prepare worksheets, lists, totals or any other compilation of costs chosen by the consumer with respect to funeral services and merchandise incidental thereto;
3. Engage in discussions or other communications with consumers regarding the consumers' actual selection of funeral services and merchandise incidental thereto;

4. Make financial arrangements for the rendering of funeral services and merchandise incidental thereto;
  5. Offer to or enter into a preneed funeral contract with any consumer;
  6. Engage in any activity that would cause a consumer to believe that the unlicensed employee is skilled in the knowledge, science or practice of funeral directing;
  7. Engage in any activity that constitutes the practice of funeral directing under the act.
- c) Nothing in this section shall be construed to alter the scope of the sale of merchandise only by unlicensed individuals.

Redraft of 4816