

2639

From: Jewett, John H.
Sent: Monday, November 30, 2009 11:51 AM
To: Gelnett, Wanda B.; Wilmarth, Fiona E.; Johnson, Leslie A. Lewis
Subject: FW: Stakeholder Letter of November 20, 2009 Re: Final Rulemaking 16A-4815 and Final Rulemaking 16A-4816
Attachments: Scan_Attachment.PDF
Importance: High

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From: Huber, Denise [mailto:dhuber@postschell.com] **On Behalf Of** Kutz, James
Sent: Monday, November 30, 2009 11:46 AM
To: Christopher McNally Esquire (chrmcnally@state.pa.us)
Cc: Heidy Weirich (hweirich@state.pa.us); IRR; Jewett, John H.; Dave Heisterkamp (DVDHeister@aol.com)
Subject: Stakeholder Letter of November 20, 2009 Re: Final Rulemaking 16A-4815 and Final Rulemaking 16A-4816
Importance: High



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Please see attached correspondence.

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November 30, 2009

VIA E-MAIL CHRMCNALLY@STATE.PA.US & REGULAR MAIL

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Harrisburg, PA 17105-2649

RE: Stakeholder Letter of November 20, 2009 Re: Final Rulemaking 16A-4815 and Final Rulemaking 16A-4816

Dear Mr. McNally:

We write in response to your Stakeholder Letter of November 20, 2009. As more fully discussed below, we would be honored to sit down and meaningfully vet with you and your client the respective issues and needs facing our Pennsylvania consumer. As you know, I have served at various times as outside counsel to the Pennsylvania Cemetery Cremation and Funeral Association ("PCCFA") and, on behalf of that statewide association, I have tendered written comments in opposition to both Final Rulemaking 16A-4815 and 16A-4816 (relating, of course, to pre-need accounts and permissible sales activities of employees and agents of licensees).

In addition to communicating with you in my capacity as legal counsel for PCCFA, I also ask that you accept that which follows below as the comments and suggestions of the attorney of record who successfully litigated both the Bean decision before the *en banc* Commonwealth Court and the Walker v. Flitton decision, adjudicated by the Honorable John E. Jones III of the United States District Court for the Middle District of Pennsylvania. In this second regard, I respectfully ask that your client take into account the many reasons why those two lawsuits were filed and, perhaps more importantly, the conclusions reached by the judiciary in those two cases.

On numerous previous occasions, I have penned detailed position letters for consideration by your Board and the gravamen of our position has been "in opposition to" the regulatory schema as ultimately drafted and presented for final approval. PCCFA respectfully submits that the

comments and critique which the Board has received from both the Independent Regulatory Review Commission ("IRRC") and the House Professional Licensure Committee signal an overwhelming concern as relates to both the alleged "need" for these regulations as drafted and the overly restrictive, anti-competitive results which will flow if these two regulatory proposals are, in fact, promulgated.

PCCFA and/or some of its affiliates have already tendered alternative language for the Board's consideration as relates to Rulemaking 16A-4816; unfortunately, the Board has paid no heed to that suggested language. Moreover, as recently as Thursday a week ago (November 19), when we appeared and spoke to IRRC in opposition to Rulemaking 16A-4816, I offered, on behalf of myself and my multi-headed client, a willingness to sit down with the Board (or a committee of the Board) for the purpose of attempting to structure a more reasonable regulatory scheme that would (1) protect the consumer, yet (2) allow for reasonable competition and more accessibility to information for the consumer. That offer remains, and we respectfully submit that such would be a much better approach – an approach that would allow for inclusion of not only licensed funeral directors, but also cemeterians, owners of crematories, those involved in pre-need, those involved in the insurance industry that have, for decades, played a significant role in the death care industry, those suppliers and sellers of merchandise and other death care industry products, those who work in financial institutions where pre-need monies are held and invested, and perhaps, even those who have litigated recent test case issues, such as myself. Our only goal is to allow for (1) the free flow of commerce, (2) the free flow of information, (3) fair and spirited competition, and (4) the largest panoply of options for the Pennsylvania consumer.

In this regard, our primary, threshold recommendation as relates to Rulemaking 16A-4816 is to impose upon the licensee the ultimate, non-delegable responsibility for his or her insurance agents or other trained employees. In the Commonwealth Court case of Geisel v. Pennsylvania State Board of Funeral Directors, 755 A.2d 750 (Pa. Cmwlth. 2000), the Commonwealth Court held that the supervisor of a funeral home is ultimately responsible for assuring compliance with the Funeral Director Law, and, therefore, is professionally responsible for his failure to supervise properly any funeral home employee. In short, Pennsylvania law is already clear: there is accountability and legal responsibility which resides with the licensee for any and all acts of those who work for or on behalf of the licensed funeral director or licensed funeral home.

With this accountability in place, it is simply unnecessary to relegate the licensed insurance agent or trained employee to the sole robotic activity of physically handing over documents to potential pre-need customers which contain only the price list of the applicable funeral home, along with perhaps a few other written materials, if they exist, yet restricting that employee from speaking a single word for fear that he or she shall then have engaged in the unlicensed practice of funeral directing. As Judge Jones aptly noted in his Walker v. Flitton decision, there are at least 34 states and the District of Columbia, "all of which allow unlicensed agents of funeral directors or third parties to sell pre-need plans..." and a "search of case law in these [34] states uncovered no examples of consumers being harmed from being solicited by unlicensed individuals." See Walker, 364 F. Supp. 2d at 523-24. Economic protectionism, however, is not a valid legal basis for this set of proposed restrictions.

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There is no greater incentive to a licensee than having ultimate responsibility placed upon him in terms of ensuring that those who work for him will, in fact, be properly trained, competent, moral, and accountable. As IRRC suggested, this Board could promulgate a regulation that requires the licensee to adequately train his or her affiliated insurance agents or employees, yet the subject regulation never touches upon that logical consideration. This regulatory scheme should not be used, as I fear it is, for the purpose of "cutting the legs out" from the rationale of Judge Jones in Walker. Instead, this Board, having been advised four years ago that the Constitution irrefutably permits agents and employees of funeral directors to solicit pre-need business with the Pennsylvania consumer, should instead work to promulgate a regulatory scheme that fosters this constitutional entitlement, yet indisputably makes clear that the funeral director is responsible if that agent or employee acts unprofessionally or incompetently. Do not, however, attempt to adopt a regulatory scheme that prohibits meaningful communication with the Pennsylvania consumer by this affiliated agent or employee, and please do not impose a prohibition against this employee sharing with the Pennsylvania consumer the prices of other funeral homes, for that is the quintessential foundation of competition and freedom of commercial decision-making. With all due respect, the prohibition against sharing with the Pennsylvania consumer another funeral home's price list is a disguised effort to have the Pennsylvania consumer make "decision-making" in the dark. Such a will is not consumer oriented, and it evidences a terrible example of anti-competitive behavior.

In short, make the licensee ultimately responsible for his agents and employees; ensure that the licensee's employees and agents are trained by the licensee; and allow the Pennsylvania consumer the greatest opportunity to receive relevant information and make informed decisions at a time when grief and tragedy are not permeating the day.

As to Rulemaking 16A-4815, we respectfully submit that this regulation is completely unnecessary and simply an attempt to negate the value which was achieved in the *en banc* Commonwealth Court decision of Bean v. State Board of Funeral Directors. As with 4816, this Board and its staff have been unable to point to any studies, data or body of evidence which supports any need, let alone a compelling need, for the complete evisceration of binding pre-need contracts, knowingly and intelligently entered into between Pennsylvania consumers and licensed funeral directors. The Bean decision was correct; it was logical; and both before and since that decision, there has been a total absence of any "problem" associated with that ruling. It is difficult to suggest a "middle of the road" resolution when this regulation is admittedly an attempt to respond to the Commonwealth Court decision in Bean. To be fair and candid, however, 4815 is not a "response to", but rather, "an attack upon" the Bean decision. If pre-need agreements are to become illusory arrangements, it is for the General Assembly, and not this Board, to so decide. We have no quarrel with the consumer being given options, but removing the viable and beneficial option of "irrevocability" under the creative guise of portability is simply anti-competitive and an unnecessary restriction of consumer options. Similarly, the Board's proposed restriction on funeral director's having an ownership interest in a merchandise company and further precluding the incorporation of a funeral merchandise contract into a funeral service contract makes little sense; it unreasonably restricts the licensee from engaging in

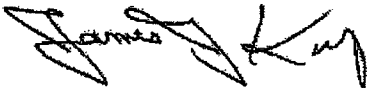
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a business enterprise lawfully being funded by others; and it again "cuts off" a viable option to our Pennsylvania consumer.

Accordingly, when the members of this Honorable Board meet to consider the vigorous and multiple bases for rejection by IRRC, I urge the respective Board members to be governed by their duty to act in the best interests of the Pennsylvania consumer and to act in conformance with law (law which includes judicial decisions from our Commonwealth Court and our Federal Court). The Board members are, therefore, respectfully requested to act based upon the "rule of law", rather than any pressure from the Administration or any other source. To do otherwise, would not be to serve in this very, very important capacity. If there appears to be one overriding axiom that surfaces time and again with regard to these regulatory proposals and their rejection, it is "it ain't broke, so what are you trying to fix!"

I very much appreciate the opportunity to present these viewpoints as counsel for stakeholder PCCFA and on behalf of myself. I trust that my candor and forthrightness will be accepted in the manner intended; *i.e.*, not to be argumentative but rather, to be direct so that there is no question as to our vehement opposition and our conjunctive intent to ensure competition and the flow of free commerce within this Commonwealth for the benefit of all. In closing, PCCFA incorporates by reference all comments and suggestions previously tendered, understanding that this letter sought to focus on the largest points of contention and possible resolution or compromise thereon. Many thanks.

Very truly yours,



James J. Kutz

JJK/dlh

cc: Heidi Weirich, Board Administrator (via email: hweirich@state.pa.us and U.S. Mail)
Via Email: 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
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PCCFA President, David Heisterkamp (via email)