

2639



RECEIVED

2009 DEC 24 AM 9:30

INDEPENDENT REGULATORY  
REVIEW COMMISSION

December 21, 2009

Michael Yeosock, Chairman  
State Board of Funeral Directors  
2601 N. Third Street  
Harrisburg, PA 17110

Re: Regulation 16A – 4816

Dear Mr. Yeosock:

The Pennsylvania Funeral Directors Association has reviewed the December 8, 2009 version of 16A-4816. We are extremely disappointed with the currently proposed language and we intend to oppose it unless major changes are made with this proposed regulation.

I will begin with the over-riding general problems and go to the specifics of our objections.

### GENERAL

- 1) The change in definition and use throughout the proposed regulation from “unlicensed agent/employees” of a funeral home to “unlicensed individuals.”

This change is inconsistent and far exceeds the scope of the broad guidelines of Walker. There is no need for the Board to go further particularly when the result is not consistent with Ferguson.

The Court in Walker used the fact that the unlicensed individuals in that lawsuit were employees (See pages 18, 20, 22, 23, 29, 35, 46, 51, 52 and 53 )of the funeral home as one of the distinguishing factors from the Ferguson opinion. The Court further stated that it is not determining the legality of conduct of unlicensed persons unconnected to the funeral homes.

This version of the regulation makes it virtually impossible for any regulation/prosecution of these unlicensed persons or their principals (such as a third party insurance agency) particularly when you consider

the problem of the definition of close supervision. It will be difficult to impossible to know what is said by the unlicensed person beyond handing out the general price list.

- 2) The Board currently defines “close supervision” as: “The exercise of complete direction and control of a subordinate including over the manner and method of work performed by the subordinate with an awareness and authorization of the subordinate’s activities, without intermediary supervision.” This language makes no sense when applying it to an individual who is not an employee of the principal funeral home. Legal principals of employment law define an employee as one over whom the employer exercises complete direction and control over the method and details of the employee’s work. Moreover, under the current scheme, how can such an unlicensed individual be a “subordinate”? To whom? The Court in Walker made several references to the unlicensed employee being tied to the training, licensure and control of the licensed funeral director.

This definition creates a legal fiction by imposing strict liability on the funeral director for such unlicensed person when they have no employee or agency relationship to the funeral director. If this individual is not an employee or agent of the funeral home, then they are an employee or agent of some other principal and thus cannot take direction and control of their work from another. The definition should include direct supervision as noted by the Walker Court on pages 23 and 53.

- 3) The current version of this proposed regulation defines “direct personal contact” as “includ[ing] a face-to-face meeting, a teleconference, or an exchange of e-mails, faxes or postal service or private courier mail. This term does not include communication through an intermediary, such as an unlicensed individual.”

First, the Walker Court was clear that it would “support . . . 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, Slip Opinion, p. 52-53.

Second, as pointed out more than once during the two-day Board meeting held on this matter, to allow anything other than face-to-face meetings between the funeral director and the customer is catering to the overwhelming minority of situations. Funeral directors have been going to consumers’ homes and nursing homes for decades to

accommodate consumers' pre-arrangement needs. If the consumer is outside the market area of the funeral director, or indeed out of state, those scenarios could be made exceptions.

Third, without the face-to-face requirement, there is no guarantee in any transaction that anything coming from the funeral home is coming from the licensed funeral director.

### SPECIFIC

- 4) 13.206a (a) uses the terms "may permit" in the first line. This term is unclear. There have been situations in the marketplace where individuals representing one business will go to funeral homes in the area and collect their general price list and then use those price lists (without the permission of the funeral director) to market their products (life insurance). This section does not provide for lack of permission before use.
- 5) 13.206a (a)(1) uses the word "utilizing". Does this mean the same as may permit? In this same section, the word "professionally" should be changed to "legally" responsible as the goal seems to be to impose strict legal liability on the licensed funeral director.
- 6) 13.206 a (a)(3) includes a clause that indicates the section shall not prohibit "payment or receipt of a commission from an insurance company "... The insurance statutes of Pennsylvania clearly set forth who can and cannot receive a commission.

First, if there is a commission to be paid to the licensed insurance producer, the commission should flow from the insurance company or the insurance agency. If this section is intended to permit insurance commissions to flow from an insurance company or agency through the funeral home (who may or may not receive a portion thereof) to the producing agent, then we object. Funeral homes in Pennsylvania are restricted in the sense that they can engage in the practice of funeral directing only (not the sale of insurance). Therefore, under the general rule, it cannot receive a commission. See 40 P.S. 310.72 of the insurance statutes. Section (b)(2) of that statute contains an exception which allows payment to an unlicensed person. However, such payment may be "... no more than a one-time, nominal fee of a fixed dollar amount for each referral that does not depend on whether the referral results in a sale."

Second, since the State Board will have no jurisdiction over these unlicensed persons (other than to prosecute for unlicensed activity) there should be an affirmative statement in this regulation that indicates funeral directors who receive such monies shall be in violation of the law, including funeral directors that are not licensed insurance producers.

- 7) 13.206a (a)(4) uses the word "employing". This is inconsistent with the rest of the regulation which uses other words such as "utilize". Given our prior objection (#1) we would prefer employing throughout the regulation.

13.206a (a)(4) also references "preneed funeral contract". We fail to see why there is a need to use a new term when the name mandated by the Federal Trade Commission and used in the marketplace refers to this document as a Statement of Funeral Goods and Services.

- 8) 13.206a (a)(5) discussed a disclosure form to be developed and utilized by a funeral entity. In order to best serve all parties involved, this form should either be created and mandated by the State Board or, as is done with the Statement of Goods and Services, approval should be mandated by the State Board prior to use. This disclosure should expressly inform the consumer that the individual with whom they are meeting is also a licensed insurance producer (if that is true) to prevent the consumer from being misled or deceived as to the real intent of the meeting which is to sell an insurance policy. Further, this disclosure should be mandated to be given to and read to the consumer first thing in the meeting.

- 9) 13.206a (a)(5)(III) lists one of the prohibited activities of the unlicensed person as negotiating the sale of funeral services. "Negotiate" should be changed to "estimate", "counsel", "advise" or "help" consumers regarding the selection or sale of funeral services.

- 10) 13.206a (a)(5)(IV) With respect to alternative funding language should say expressly that there are alternatives available. Regardless of what a funeral director may offer through his funeral home, there is always a local bank that has burial reserve option, pay on death account, escrow and/or trust accounts. To represent otherwise would be misleading and deceptive.

- 11) 13.206a (a)(5)(V). A similar disclosure with contact information should be made regarding the Office of Consumer Protection of the Attorney General's Office.

- 12) 13.206a (a)(5)(VI) seems to direct the unlicensed individual with respect to asking for a consumer signature. The Board has no jurisdiction over the unlicensed person to do anything other than if he or she practiced funeral direction without a license. In addition, this disclosure should be signed and dated by the unlicensed individual regardless of whether or not the consumer signs.
- 13) 13.206a (b). Once again, we see the word “interact”. Webster’s Ninth New Collegiate Dictionary defines the term “interaction” as “mutual or reciprocal action or influence”. This term is particularly bothersome since if the unlicensed individual is now, by common definition, permitted to exert influence over the consumer, they have, by definition, violated the funeral law as interpreted by Ferguson.
- 14) 13.206a (b)(1) The word “employing” appears. We prefer it stay there and be incorporated throughout the regulation.
- 15) 13.106a (b)(2) would be better worded if reference was made to “general information” or require that the General Price List of the funeral home as well as the Casket Price List and the Outer Burial Price List be provided since those are the documents required to be presented by the Federal Trade Commission. Once those documents are distributed to the consumer, in order for speech (of the unlicensed person) to be protected, it cannot overlap into the practice of funeral directing.
- 16) 13.206a (b)(3) – Replace “the act or chapter” with “law” as there may be laws other than the funeral law under which individuals could be prosecuted.
- 17) 13.206a (b)(3)(1) – The word “control” should be removed. In addition this entire section could be viewed as the Board attempting to regulate unlicensed persons which they cannot do unless they engage in unlicensed activity. This problem could be solved by including language in “(b) that states something to the effect that the licensed funeral director employing such unlicensed person shall permit the unlicensed individual to . . . .”
- 18) 13.206a (c) – Again, the introductory language would be more clear if it said that if a licensed funeral director permits the unlicensed person to do these things, the unlicensed individual will be deemed to be engaged in the practice of funeral directing.

- 19) 13.206a (c)(1) - We have a concern about the term "presentation". If this means that one unlicensed individual, armed with the price lists of multiple funeral homes can, after making one "presentation" with a consumer, immediately shift into a second presentation with that same consumer, then we object. There are unfair trade practices issues surrounding this interpretation since the entry into the home will have been under the banner of one funeral home. The unlicensed individual will already be shifting from his/her capacity as the unlicensed person to a licensed insurance agent, which may or may not have yet to be revealed to the consumer and pursuant to this interpretation, they would again be shifting to now representing another funeral home. This is, at the very least, confusing to the consumer.
- 20) 13.206a (c)(2) – This section as currently drafted is unacceptable. The crossed out language should be returned. The word "proposal" is not defined and we cannot discern whether that means worksheets, lists, compilations or any other total or summary of the consumer's interest.
- 21) 13.206a (c)(4) – The last sentence should be either removed or include the words "final expense" contract. Final expense should be defined as stated in our November 24th correspondence to Mr. McNally. This is because if a contract of insurance is sold that is close to or precisely in line with the price lists of the supervising funeral home, it will be apparent that the unlicensed person has violated (c)(3) as it is not reasonable to presume ". . . that the insureds blindly selected the desired services and merchandise with no discussion as to the benefits and drawbacks of the available options." Ferguson, p. 10. This presumption is further solidified by the fact that in most cases, the unlicensed individual/insurance agent will have also made an irrevocable assignment of such policy to the supervising funeral home which the Ferguson court found to constitute "'making financial arrangements' for funeral services and merchandise." Ferguson, p. 11.
- 22) 13.206a (d) We object to the phrase ". . . preparing documents relating to the sale or solicitation of a contract of insurance." The State Board of Funeral Directors cannot dictate what documents a licensed producer completes. It can, however regulate documents, that if completed by the unlicensed person or licensed insurance producer would constitute the practice of funeral direction. This language appears to allow such individuals to complete paperwork that if done while the individual is acting in their capacity of an unlicensed individual would be prohibited but allow the very same activity, once the individual acts in his/her capacity as a licensed insurance agent. We submit that regardless of

what capacity the individual is acting in, the completion of documents related to the sale or solicitation of insurance leaves the door open for individuals to complete estimates, proposals, summaries, etc. of the consumers' choice and that would constitute the practice of funeral directing.

- 23) 13.206a (e) Close supervision – See paragraph # 2, above.
- 24) 13.206a (e) Direct personal contact – See paragraph #3, above.
- 25) 13.206a (e) Preneed Funeral Contract – See paragraph #7, above.
- 26) 13.206a (e) Unlicensed individual – See paragraph #1, above.

It is the position of PFDA that there was no confusion in Pennsylvania regarding what unlicensed persons could do regarding preneed until the Walker court weaved out a caveat for the provision of the general price list and information not otherwise protected. Despite the Court's representation that it was ". . . not sitting as an appellate court reviewing the holding of Ferguson. . ." <sup>1</sup> to the extent that the Board drafts a regulation that permits commercial free speech that is reserved solely for licensed practitioners of funeral directing, it is going beyond the scope of Walker and allowing unlicensed individuals to perform tasks that are reserved to licensed practitioners. This premise is supported by language in the Preamble of the current version of the proposed regulation which states, ". . . the Board is reinterpreting provisions of the act to now permit certain informational activity." Preamble to 4816, p. 3. It is PFDA's position that there is no need to "re-interpret" the statute for any reason. Unlicensed employees/agents still cannot practice funeral direction in Pennsylvania.


Just this year, the Fourth Circuit, in upholding a Maryland statute restricting corporate ownership of funeral homes stated that the Plaintiffs' ". . . complaints about the regulation center around either the inconveniences presented to them personally or the restrictions on how they would prefer to run their businesses . . ." <sup>2</sup> That is precisely what has occurred here in Pennsylvania with respect to Messrs. Heffner, Rae and Neel. Unfortunately for them, the law does not support their position and the State Board should not pander to their needs in drafting this regulation.

---

<sup>1</sup> Walker, p. 19 Slip Opinion

<sup>2</sup> Brown v. Hovatter, U.S. Court of Appeals for the Fourth Circuit, Slip Opinion, p.13.

Very truly yours,

  
Kathleen K. Ryan, Esquire  
General Counsel, PFDA

cc: Alexis Barbieri, Esquire, Office of Attorney General  
Linda J. Williams, Esquire, Office of Attorney General  
IRRC  
Senate Professional Licensure Committee  
House Professional Licensure Committee

Correspondence to State Board for 4816