

# 2639

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November 16, 2009

Mr. Arthur Coccodrilli  
Independent Regulatory Review Commission  
333 Market Street, 14<sup>th</sup> Floor  
Harrisburg, Pennsylvania 17101

Re: Regulation #16A-4816 (IRRC #2639)  
State Board of Funeral Directors  
Pre-Need Activities of Unlicensed Employees

Chairman Coccodrilli:

I am writing to request that the Commission disapprove the final-form regulations submitted by the State Board of Funeral Directors (the "Board") regarding Pre-Need Activities of Unlicensed Employees. The regulations are to be voted on by the Commission on November 19, 2009.

As I previously stated in my opposition to the regulations regarding Pre-Need Funeral Arrangements (IRRC #2627), I believe that Pennsylvanians are greatly benefiting from the availability of pre-need funeral arrangements. The current final-form submission will not only inhibit the free speech rights of unlicensed agents, but also will unnecessarily limit the availability of, and increase the cost of, this desirable alternative.

The Board has proposed these regulations in response to the order of Judge Jones in *Walker v. Flitton*, 364 F.Supp.2d 503 (M.D. Pa. 2005). The court in *Walker* held that the Board's interpreting the law as prohibiting unlicensed individuals from distributing accurate information regarding the availability of and cost of pre-need funeral arrangements was more extensive than necessary. In suggesting revision of the statute by the legislature or regulation by the Board, Judge Jones cautioned that any restrictions on commercial free speech should be "narrowly tailored" to meet the asserted government interest.

Noting that thirty-four states and the District of Columbia currently allow unlicensed agents to sell pre-need, the Future Internment Law provides for the sale of funeral merchandise by non funeral directors, and the Funeral Director Law permits

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unlicensed individuals to make temporary funeral arrangements in the absence of a funeral director, I fail to see how regulations that prohibit unlicensed agents of a funeral home from having discussions or other communications with consumers, making financial arrangements with consumers, and offering to enter into a contract with consumers regarding funeral services and merchandise are "narrowly tailored" to meet the asserted governmental interest.

In contemplating alternatives, I believe that a regulatory scheme that provides for the free exercise of commercial speech by allowing unlicensed individuals to distribute information to consumers and assist them in making financial or other arrangements for funeral services and/or merchandise would be a more prudent response to Judge Jones' concerns. In an effort to ensure the rights of consumers in the Commonwealth are protected, I would support a regulation that required consumers to sign a disclosure indicating that they are aware that the individual who is assisting them is not a licensed funeral director, and required any contracts entered into that provide for funeral services be reviewed and ratified by a licensed funeral director.

The Board has failed in their attempt to promulgate regulations that adequately address the concerns raised by Judge Jones in *Walker*. In doing so, they have unreasonably restricted the rights of funeral directors and their unlicensed employees, while likely reducing the availability of an increasing the cost of pre-need funeral arrangements to the consumers of the Commonwealth. Therefore, I respectfully request that the Commission disapprove Regulation 16A-4816 (IRRC # 2639).

Sincerely,

A handwritten signature in black ink, appearing to read "Tony Payton, Jr.", written in a cursive style.

Rep. Tony Payton, Jr.