

2639



John A. Zurik
Supervisor

301 Curry Hollow Road • Pittsburgh, Pennsylvania 15236 • 412/655-4501

October 26, 2007

Michelle T. Smey, Administrative Officer
State Board of Funeral Directors
P.O. Box 2649
Harrisburg, Pa. 17105-2649

Via email: st-funeral@state.pa.us and msmey@state.pa.us

Re: No. 16A-4816 - Preneed activities of unlicensed employees

Dear Ms. Smey,

I am writing you in **opposition** to the proposed rulemaking no. 16A-4816 - Preneed activities of unlicensed employees. These regulations should not be approved for three reasons. First they exceed the statutory authority granted in the Funeral Director Law. Second this Board has not shown that Pennsylvania consumers are being harmed by unlicensed employee or agents selling preneed. Therefore there is no compelling reason to issue these regulations. Third these regulations directly conflict with and contradict the Federal Decision of Walker V. Flitton.¹

Board has exceeded its Statuary Authority

A plain language reading of the statute clearly shows that 13(c) allows 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.

These proposed regulations are so overly restrictive that they totally override and negate the privileges granted in 13(c). Thirteen C currently permits the funeral entity to employ sales representative to meet with the family, engage in discussions regarding the pricing and actual selection of services and merchandise, prepare worksheets, proposals and

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

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. .

These regulations overturn the law by only permitting a funeral employee to perform two minor functions (13.206a (b) (1) (2)) and prohibit him from performing the seven functions (13.206a (c) (1) thru (6)) that would in any other industry be the items you would expect your sales representative to perform. I can only conclude these regulations have been intentionally designed to force funeral directors 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.*"

Board has failed to show a compelling need for these regulations

The second reason these regulations should not be approved is 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 pre-need. Therefore pre-need contracts currently being sold by funeral directors 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 when the activates the proposed regulations restrict have caused no consumer harm.

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 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 for your self and draw your own conclusions. (A Copy is attached)

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."*

As we can see by Judge Jones comments above the Judge:

1. Acknowledges that 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,
4. The employee or agent may prepare the contract and submit it to his employing funeral director for 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 arraign 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.

It is clear that the Judge recognizes that 13(c) authorizes a preneed sales person 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.

Yet proposed regulations 13.206a 9 (c) (1) through (6) and 13.206a (d) **prohibit** the very conduct authorized in 13 (c) and which has been confirmed by Judge Jones as conduct that may be legally performed by unlicensed employees or agents. One can only assume that the Board in presenting these regulations is intentionally attempting to negate the legislative intent of 13(c) and to overturn the Federal Walker v. Flitton decision.

In the spirit of co-operation with the regulatory process here are my detailed comments regarding the regulation as proposed:

13.1 Definitions

Preneed Activity This definition is unnecessary and "Any activity" is overly broad and should be defined. This also conflicts with the proposed 13.206a (d).

Preneed funeral contract: The definition in the existing regulations of a "Prepaid burial contract" seems more than adequate rendering this new definition unnecessary. In addition the final portion, "whether or not the funeral entity receives preneed funds", is very problematic. First if the funeral director does not receive any funds there is no contract. Second this would seem to imply the Board would consider a funeral insurance policy a contract with the funeral home- when in fact it is a contract with an insurance carrier. This appears to conflict the exemption given licensed insurance agents proposed in 13.206a (d)

13.206a Utilization of unlicensed employees by a funeral entity.

13.206a (1) requiring the funeral entity to be responsible for the conduct of its employees is the only reasonable proposed regulation in this proposal and should be retained.

- However I question who will be held responsible. This indicates the establishment (entity) will be held responsible as opposed to the funeral director or supervisor. I suggest the language be revised to hold the funeral supervisor responsible.

13.206a (2) should be deleted. Requiring the funeral supervisor to be responsible for the conduct of his employee adequately protects the public. If the requirement of close supervision is retained it must be defined. What is reasonable (close) supervision to one may be loose supervision to another. Left undefined this section will surely lead to prosecutorial excess.

13.206a (3) should be deleted. The Board has referred to section 11(a) (8) of the act as justification. The purpose of 11(a) (8) when the law was drafted was to prohibit a funeral director from paying a commission or gratuity to the employees of hospitals, morgues, old folk's homes or cemeteries for the "steering" of a deceased family to a specific funeral director at the time of a death. This was written to prevent the potential (and often real) abuse of families immediately after a death when they are vulnerable. There was no preneed when the statute was enacted. Section 11(a) (8) was never intended to apply to employees of the funeral in furtherance of their employment.

- The Board further justified this regulation by stating "this provision is intended to reduce the employee's incentive to persuade a customer to select funeral services and merchandise whether or not that selection would be in the customer's best interest." It is obvious that this board only has experience with dealing with grieving families in an at-need situation.
- In a preneed situation, when the customer's is in full control of his emotions, no such 'overselling' is possible. In addition the Board overlooks two other realities of preneed: 1) no funeral employer will tolerate such actions by an employee for fear of damaging his reputation, 2) salespeople success requires complete satisfaction of not only the immediate customer but on future generations of customers that the immediate customer may talk too.
- It does not protect the consumer one iota to regulate how a funeral business pays its employees; whether that be commission, salary or hourly (should the board then require all funeral staff be salary so the hourly employee does not take 3 hours to make an arraignment when it should have been done in 1 ½).
- Once again holding the funeral supervisor responsible for the actions of his employees adequately protects the public in this area.

13.206a (4) should be deleted. Requiring the funeral director to meet face to face with each customer before entering or offering to enter into a preneed contract is overly restrictive and unnecessary. If the funeral supervisor is responsible for the conduct of his employee that supervisor will ensure they are trained to the funeral homes standard. The states need to protect the consumer is thereby satisfied.

- Why does the state wish to unjustifiably handcuff the funeral provider. It should be that funeral entities decision as to whether it feels its reputation in the community is safe by allowing his unlicensed employees make preneed arraignments without the funeral director personally present.
- As the size of a firm increases it is harder and harder for the funeral supervisor to do all things. He or she must be able to delegate to trained and responsible employees various functions. Preneed is a function many funeral homes wish to have handled by trained customer service salespeople.
- There are actually fair numbers of families who do not wish to meet with a funeral director or even come to the funeral home to select merchandise

(superstition). They request we come to their home to make the preneed arrangement using catalogs and brochures for the selection of merchandise.

- Factually it is not that difficult to learn how to arrange a funeral (though each funeral director you talk too will try to convince you it verges on brain surgery-it is not). Most families have a firm idea or know precisely what type of service they want when they walk in the door, merchandise is simply a selection process based on appearance and cost, the balance and the bulk of time is spent on the myriad of details which are all laid out in fill in the blank pre-arrangement forms.³

13.206a (5) should be deleted. What possible consumer protection does the state see in this proposal? Surly this is the most ridiculous section of all. First-on the face of it this is overly restrictive. What other industry is so "hog-tied" by its own regulatory board that its employees are required to have such a disclosure. Second-These proposed regulations contradict themselves since 13.206a (e) (4) and (5) prohibit the employee from making financial arrangements or entering into contracts. What possible documents would the employee be asking the customer to sign that would require this disclosure.

- **What should be substituted here is that any contract executed with the consumer by an unlicensed employee or agent must be reviewed, accepted and signed by a funeral director within 48 hours and said contract shall not be binding on the consumer until so ratified.** This practice is currently done in Pennsylvania and other areas of the country (Iowa for example) whether by regulation or good business practice without any consumer harm. This also mimics 13(d) of the statute which 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.

13.206a (b) (1) and (2) allow the employee to distribute the general price lists of the employing entity (*only) and to provide general assistance "including communications with customers, not otherwise prohibited by this chapter (emphasis added). This relegates the employee to little more than a clerical position.

- * 13 (c) permits the funeral director to have an agent. There is nothing wrong with that agent working for more than one funeral home. In a small establishment there may not be enough preneed "work" for one individual. It is incumbent upon the funeral director to establish the boundaries of the agency relationship. In the past decade there has been more than one of these types of insurance agent "sharing" arraignments successfully offering preneed to the mutual benefit of multiple funeral homes and the general public.⁴

³ I would be honored to host any member or group of members of the Professional Licensure Committee, IRRC or any other agency at Jefferson Memorial Funeral Home to demonstrate how a preneed sales conference is done.

⁴ "The Catholic Funeral Plan" of the Dioceses of Pittsburgh was one such program.

13.206a (c) (1) through (6) lists what an employee may not do. These 'prohibited' acts are precisely the things I want my preneed salespeople to do for my firm.

- **This regulation should be revised to move these six items up to the 'permitted acts' of section (b)** The legitimate interest of the state of protecting the consumer is adequately covered by holding the funeral director professionally responsible for the actions of his employee's.
- In all business employers "delegate" various aspects and responsibilities of the business to trained and trustworthy employees. Yet the employer is held professionally accountable (by their governing body) and publicly accountable (their reputation in the community) for the acts of each of their employees. In this regard even making financial arraignments for a funeral is currently and should remain a function the funeral director can delegate [as authorized in 13(c) directly, indirectly or through an agent]
- In this regard delegating the function of Preneed sales in funeral service is no different than sales in any other industry. In reality sales made at the time of a death have a far greater potential of funeral director abuse or indirect pressure to high end the merchandise sale ('up-selling'). In fact the average preneed sale is a lower gross sale than the average At-Need sale (consumers make more frugal decisions without tears in their eyes).

13.206a (c) (7) is unnecessarily duplicative of the statute.

13.206a (d) needs substantially revised. On its face this seems to exempt licensed insurance agents. However in actual practice it does not. The only insurance agents working in the funeral industry as those offering specialized insurance policies designed specifically to fund preneed funerals. These 'funeral' insurance agents are licensed funeral directors, employees of the funeral home or independent agents employed by the funeral home to further their establishments preneed activities (your general insurance agent who sells you a \$50,000 or \$100,000 life insurance policy does not generally deal in the relatively small policies involved in funding a single funeral).

To provide Pennsylvania consumers with more preneed options the Board should consider expanding the ability of licensee's to offer preneed through unlicensed employees and agents while protecting consumers by holding the funeral supervisor responsible for their conduct. No funeral supervisor or funeral home owner will allow his unlicensed employee or agent to do anything that would affect his reputation. When you come right down to it to that consumer that salesperson is the representative of the funeral home. A funeral establishment will not risk the negative publicity of a dissatisfied preneed client let alone the potential a potential enforcement action by this State Board.

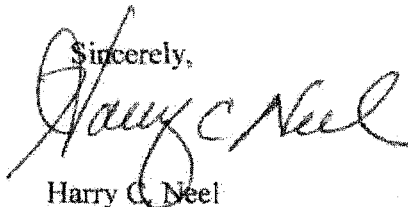
The Board should take comfort in the fact that thousands of preneed contracts are consummated with Pennsylvania consumers each year and that the Board has had virtually a statistical zero of consumer complaints regarding preneed contracts. This alone speaks volumes as to the consumer care and professionalism exhibited by funeral directors making preneed sales with unlicensed employees or agents. **There is simply not a problem in funeral preneed that requires additional regulation.**

However if the Board feels compelled to issue new regulations I suggest they need only promulgate two (2) regulations to protect Pennsylvania consumers and to clarify the responsibilities of licensed funeral directors in regards to pre-need sales.

- 1) That the Supervisor of each funeral home is responsible for the actions of all licensed or unlicensed employees and agents.
- 2) All contracts executed by other than a licensed funeral director by confirmed and approved by a funeral director within 48 hours and said contract shall not be binding upon the consumer until so ratified.

Again I wish to state my adamant opposition to these proposed regulations based upon the grounds that they 1) exceed the authority granted under the statute and 2) the Board has shown no compelling need to issue these regulation as there is no documented pattern of consumer harm, and 3) the regulations violate the Federal Decision of Walker v. Flitton.

Sincerely,



Harry C. Neel
President

CC: via Email:

Arthur Coccodrilli, Chairman IRRC

John H. Jewett, Regulatory Analyst, IRRC

Fiona E. Wilmarth, Director of Regulatory Review, IRRC

Heather Wimbush Emery, Assistant Counsel, IRRC

Representative P. Michael Sutra, Chairman, House Professional Licensure Committee

Marlene Trammel, Executive Director, House Professional Licensure Committee

Christine Line, Counsel, House Professional Licensure Committee

Donald Fl Morabitio, D. Ed, Office of Public Liaison

Representative Stanley Saylor, House Professional Licensure Committee

Representative Susan Helm, House Professional Licensure Committee

James J. Kutz, Esquire