



INSTITUTE FOR JUSTICE

November 6, 2007

Mr. Roy Cooper
Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

RE: North Carolina Board of Funeral Service – Prohibition on the Publishing of Obituaries by
Non-Licensed Parties

Dear Mr. Cooper,

I have been corresponding with Stephen Dirksen, General Counsel for the North Carolina Board of Funeral Service, since May. Unfortunately, we have been unable to resolve our disagreement regarding the extent of the Board's authority to regulate the right of North Carolinians to write and publish obituaries. This matter arose when the Mr. Dirksen—on behalf of the Board—sent a cease and desist letter to Mary Brack of the Funeral Consumers Alliance of the Central Carolinas, threatening future prosecution if she were to write or publish an obituary like the one enclosed (the obituary in question was actually written by the family and was published without Ms. Brack's knowledge or assistance).

The Institute for Justice is troubled by the Board's refusal to clearly state that this activity does not require a funeral director's license. Rather than moving now to resolve this matter in court—an endeavor that could result in the State incurring litigation costs and potential damages, as well as paying attorney fees—I wanted to bring this matter to your attention in the hope that you can address it with the Board.

The Institute for Justice is a public interest law firm that litigates to secure people's right to earn an honest living, own private property, and freely express themselves. We have litigated issues surrounding the funeral industry on a number of occasions. In 2002, we successfully challenged a Tennessee law that permitted only licensed funeral directors to sell caskets, and we defeated a similar attempt by the Missouri State Board of Embalmers and Funeral Directors to prevent non-morticians from selling caskets and advising people about how to conduct private burials. Following our legal challenge, the Federal Trade Commission sued the Missouri Board for improperly interfering with citizens' right to sell caskets free from illegal and unconstitutional government meddling.

The unlicensed practice of funeral services is prohibited in North Carolina under § 90-210.25(f). In various correspondence (see attached), Mr. Dirksen has represented that the “preparation and publication of obituaries . . . [is] generally known by national licensing examination boards, mortuary curricula, and mortuary textbooks as the present practice of funeral services.” It thus follows, he suggests, that only licensed funeral directors may prepare and publish obituaries. In his letter dated September 21, 2007, reiterates his position, stating that while newspaper obituaries may be exempt, the “commercial publication of obituaries” is still subject to regulation.

We respectfully disagree. We believe that the North Carolina Board of Funeral Service has not only overstepped its statutory authorization but that its position violates the First Amendment. The mere fact that licensed funeral directors routinely engage in a variety of speech does not imbue the North Carolina Board of Funeral Service with the authority to grant licensed funeral directors a monopoly on that speech. The preparation and publication of obituaries serves an important newsgathering function that is entitled to full First Amendment protection. Any regulation of this activity is subject to strict scrutiny.

Financial gain does not change this analysis. The Supreme Court has long held that just because one earns money from publishing does not make the speech commercial. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 787-88 (1988) (charitable solicitations involve a variety of speech interests, and therefore are not treated merely as commercial speech); *N.Y. Times v. Sullivan*, 376 U.S. 254, 266 (1964) (“That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.”). *See also CFTC v. Vartuli*, 228 F.3d 94, 110 n.8 (2d Cir. 2000) (resting definition of commercial speech solely on economic interests would “permit lessened First Amendment protection and increased governmental regulation for most financial journalism and much consumer journalism”).

Nor is the analysis changed by the inclusion of an obituary “byline.” The presence of an acknowledgement does not convert an obituary from fully protected speech into commercial speech subject to the *Central Hudson* test. For one thing, the acknowledgement at issue does not propose a commercial transaction between the speaker and its audience. Language noting that the Funeral Consumers Alliance has provided assistance to the family cannot be re-characterized as a proposal of a commercial transaction even if the closing line of an obituary might have the beneficial side effect of increasing the public’s awareness of FCA.

Moreover, even if this was commercial speech, there is nothing false or misleading with acknowledging FCA (or any other member of the public) for its assistance to the family as long as the obituary does not thank FCA for providing funeral service. The statement, in fact, is quite accurate. The Funeral Consumers Alliance of Central Carolina did, in fact, assist the family in finding a licensed funeral director who would work with the family. Thus, even if FCA had

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written and published an obituary to the media on behalf of a third party with a byline noting FCA's assistance, that speech is constitutionally protected.

This issue raises important First Amendment concerns that, to date, the Board has not taken action to resolve. On behalf of the Institute for Justice, I ask that you address this matter with the Board by advising them to clearly state that the writing or publishing of an obituary does not require obtaining a funeral director's license under any circumstances. Thank you for your assistance. Please free to call me to discuss this matter further.

Sincerely,



Valerie Bayham*
Staff Attorney

Direct e-mail: vbayham@ij.org

Enclosures

Cc: Paul Harris, Executive Director, North Carolina Board of Funeral Service
Stephen Dirksen, General Counsel, North Carolina Board of Funeral Service
Joshua Slocum, Executive Director, Funeral Consumers Alliance

** This attorney is not a member of the Virginia State Bar.*