



NORTH CAROLINA BOARD OF FUNERAL SERVICE

June 1, 2007

Ms. Valerie Bayham
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203

Dear Ms. Bayham:

Thank you for your letter to Paul Harris on May 16, 2007. The Board staff has considered the issues referenced in the March 19, 2007 letter to Mary Brack and Funeral Consumers Alliance of the Central Carolinas ("FCA") closed for quite some time. As professional courtesy, I will correct the unsupportable assumptions and mischaracterizations in your letter and in the letter presented to Paul Harris by Joshua Slocum of the Funeral Consumers Alliance.

It is undisputed FCA is a non-profit group engaging in both advocacy and commercial activities for its members. Upon receipt of the advertisement in question, an instructional and educational letter was issued by the staff. Ms. Brack replied with a reasonable and credible explanation, which was taken on her word in good faith. Thus, no referral to the Board's Disciplinary Committee or for independent investigation to other government agencies, such as the district attorney, the F.T.C., or N.C. Attorney General, appeared warranted by the staff.¹ This is consistent with almost all letters to unlicensed individuals written to explain what could happen in the future if a problem persists, not what would happen in the instant case. Multiple letters may be written to the same individual before civil action is taken unless it is clear that more aggressive action is needed to protect the public or that such efforts would be futile. As the only remedies available to the Board against unlicensed individuals are civil injunctions and requests for investigations by other government agencies, to leave this information out of any letter would be grossly unfair to the recipient. Certainly our office never intended to intimidate Ms. Brack or any member of FCA, and we regret she misinterpreted the letter as such. Anyone would agree, however, letters are far less "intimidating" and more "appropriate"

¹ In most cases, action beyond a staff instructional letter would be approved by the Board except as required by N.C. Gen. Stat. § 90-210.70 (mandatory referral of preneed embezzlement cases to district attorney) or otherwise appropriate (referral to state agency with appropriate jurisdiction). Ultimate decision-making authority rests with the Board on the facts and circumstances of each case.

than having an individual's first contact with the Board to be service of process by local law enforcement and other remedies the Board is legally entitled to exercise without notice.

N. C. Gen. Stat. § 90-210.25(f) prohibits both the unlicensed practice of funeral service and holding out that an unlicensed person may provide services. The practice of funeral service and funeral directing itself is defined under N.C. Gen. Stat. § 90-210.20(k), which includes the "practice of funeral directing or embalming as presently known." As part of your records request, I enclose an interpretative statement comparing what activities may be performed by unlicensed employees of a funeral establishment and what must be performed by a person licensed as funeral director, embalmer, or funeral service. It is a logical extension that activities requiring a license could not be conducted by a person not employed by a funeral home and that some activities performed by an unlicensed person under supervision could constitute unlicensed practice when no licensee is present. The statement is a non-exhaustive, non-binding guideline predominantly to adjudicating contested cases against licensees but also considered for requesting other government agencies to conduct an independent investigation or filing a civil action.² Although I cannot find the exact date this interpretation was issued, it substantially predates recent federal constitutional precedent on funeral licensing issues, such as Powers and Craigmiles. I am unsure whether any of the current members ever voted on this proposal or whether more than one current member even knows of its existence. Our staff has discussed asking the Board to revise these guidelines in accordance with these precedents long before your inquiry, but no proposals have been created for a study committee.

The letters our office has received from your firm and Mr. Slocum citing "serious" and "grave" unspecified constitutional concerns are largely hypothetical and unsupported by fact and law. First, you shift the focus of your letter outside its obvious context relating to funeral arrangements made by an unrelated party to the deceased. Nowhere in my letter does it state that a family may not ask a "consumer advocacy group...for assistance in dealing with a funeral director." Neither a referral to a "FCA-approved" funeral home, as Ms. Brack explained, nor provision of local price information to consumers would fall under the scope of your characterization or constitute unlicensed practice. These have long been understood to constitute an accepted practice by FCA. Furthermore, it is not disputed that North Carolinians may make funeral arrangements for their own deceased and may sell caskets at-need without a license. Our office has routinely advised individuals on the permissibility of such issues in North Carolina predating my representation of the Board four years ago. I cannot address other vague examples provided in your and Mr. Slocum's correspondence without more information but, upon receipt of more detail, would be happy to do so.

Second, your incorrect assertion that this statute is limited to practice within funeral homes is refuted both by the text of N.C. Gen. Stat. § 90-210.25(f) and by N.C.

² The Board has no statutory mandate to promulgate rules on what constitute licensed practice under N. C. Gen. Stat. § 90-210.18A *et seq.* Consequently, there are no rules on the subject. Such interpretative guidelines are issued under the exceptions enumerated N. C. Gen. Stat. §§ 150B-2(8a).

Gen. Stat. § 90-210.25(a2) (allowing licensed individuals to practice outside the ownership or employ of a funeral home upon meeting certain requirements). This statute applies to all individuals who practice funeral service regardless of the location of the arrangements and does not differ from the regulation imposed on persons acting as lawyers, realtors, physicians, and other licensed professionals in every state.³

Third, the practice of funeral directing is dependent on the totality of the circumstances in each case. The examples that were provided to Ms. Brack may not necessarily constitute unlicensed practice under every factual scenario. Preparation and filing of death certificates, preparation and publication of obituaries, and making funeral arrangements on behalf of an unrelated party are generally known by national licensing examination boards, mortuary curricula, and mortuary textbooks as the present practice of funeral service.⁴ In addition, a licensed funeral director on our staff opined these would be known as the present practice of funeral service based on the published obituary. As noted above, Ms. Brack's explanation was sufficient to rebut any potential concerns about the instant case.

Fourth, I believe your other unnamed "constitutional concerns" are also resolved by the simple fact that the obituary byline published in the Charlotte Observer is in language widely known and used by funeral homes to advertise their services to the public, a fact Mr. Slocum readily admits. Ms. Brack's explanation that FCA did not publish the language was sufficient, but use of this language by FCA can only be construed as commercial in nature. It is, at a very minimum, misleading to the consuming public, who would not be able to distinguish FCA from a licensed funeral establishment or funeral director from the context of the obituary. As I'm sure you know, false, misleading, and illegal activity speech are not entitled to First Amendment protection under Central Hudson, all of which could apply in the obituary byline context. Contrary to Mr. Slocum's implication, there has never been any action or thought to imposing a total ban on speech by FCA in an obituary byline or solicitation by FCA members to publish same. Our office would gladly suggest unambiguous obituary bylines beneficial to FCA's mission that would not imply a violation of N.C. Gen. Stat. § 90-210.25(f) in this context.

In conclusion, I would emphasize our office has always been willing to discuss any issue pertaining to North Carolina mortuary law with any interested party, an opportunity I offered Mr. Slocum in conjunction with Mr. Harris but was refused by Mr. Slocum. The Board has further enjoyed a long-standing, cooperative working relationship with local FCA chapters, and the staff recognized that relationship when handling this matter. I believe any residual or further concerns by the Institute of Justice and Mr. Slocum can and should be addressed administratively rather than through unnecessary litigation.

³ The authority of the Board to inspect facilities under N.C. Gen. Stat. § 90-210.23(e) is immaterial to the ability of an individual to practice funeral service contrary to Mr. Slocum's arguments.

⁴ I am unaware of any legal precedent that has struck down state regulation of these activities as unconstitutional using the proper rational basis review.

Our office is happy to discuss this or any other matter further with you at (919) 733-9380.

Sincerely,

A handwritten signature in cursive script that reads "Stephen Dirksen". The signature is written in black ink and is positioned above the printed name.

Stephen Dirksen
General Counsel