



## NORTH CAROLINA BOARD OF FUNERAL SERVICE

September 21, 2007

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

Dear Ms. Bayham:

Thank you for your letter of August 2, 2007. I believe my previous letter sufficiently covers most of the issues involved, and I recommend you review it in conjunction with this letter.

I will first address the demand made in your recent letter. The Board remains committed to considering viewpoints from all interested parties on improving the practice of funeral service for the public and any other issues within the scope of its jurisdiction. Your letter of May 16, 2007 asked for no more than a response to the information provided to you by Joshua Slocum and made no request for administrative action.

At its August 8, 2007 meeting, and without consideration of your August 2 letter, the Board directed the Laws, Rules, & Legislation Committee ("Committee") to review the interpretive statement I provided in the original public records request. Given the nature of defining the profession, this will not be an instantaneous process. The Committee was unable to propose consensus guidelines before the Board's September meeting, but a draft should be presented to the Board at its October 3, 2007 meeting. The draft may be remanded to the Committee back for further consideration, adopted as a final interpretative guideline, or the Board may exercise its discretion to seek public comment.<sup>1</sup> Thus, the content herein represents only staff opinion and may not represent the actual decision of the Board.

I first turn to your new arguments concerning the regulation of the practice of funeral service regarding the regulation of obituary publication. In such context, you argue that requiring a license for obituary preparation is a "classical prior restraint" in violation of the First Amendment because it "grants licensed funeral directors a monopoly on [preparing obituaries]." Your arguments represent a substantial expansion from FCA-related commercial activities to the consideration of all North Carolinians.

---

<sup>1</sup> Under the NCAPA, public comment would not be required unless a rule were promulgated.

The prerequisite assumption in support of this expansion—that the Board interprets publication of all news activity to require a funeral director license—is not supported by any previous correspondence. It is settled in North Carolina statutory interpretation that constructions that violate the Constitution are disfavored, and the Board has not interpreted North Carolina General Statute section 90-210.20(k) to prohibit individuals from publishing news information. It is also settled that the First Amendment does not remove the State’s power to “regulate commercial activity...whenever speech is a component.” Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978) (citing numerous cases).<sup>2</sup> The past interpretative statement only was intended to reach underlying economic conduct as part of the practice of funeral directing.

My previous correspondence provides examples supporting this distinction. A person arranging their own funeral may provide the corresponding obituary information to the press without engaging in the practice of funeral directing. The past interpretive statement allows unlicensed funeral home employees to publish prepared obituaries for their employer. Furthermore, I do not believe an obituary that is purely news information, prepared and published without compensation or gratuity of any kind, or solicitation thereof, and isolated from any other activity of funeral directing, would be considered unlicensed practice by the Board. These are examples only and do not constitute an exhaustive list of non-economic activities that would not require a funeral director license. If you have specific facts and circumstances in question, our office would be happy to offer further opinion.<sup>3</sup> Whether the Board will continue to interpret North Carolina General Statute section 90-210.20(k) to include the commercial publication of obituaries and under what circumstances, if any, such regulation remains appropriate is part of the guideline revisions.

Finally, I turn to new concerns you raise concerning the language in the Charlotte Observer obituary. With respect to your specific concerns to the FCA obituary, review of the obituary language contradicts your characterization of the language in question. At issue is the following language, which is enclosed by photocopy: “**Funeral Consumers Alliance of the Central Carolinas has assisted the family.**” The literal language at question contains not one word expressing gratitude, thanks, appreciation, or emotion of any kind. The entire obituary is further void of similar language, and no reasonable person could infer any expression of gratitude from context. To suggest this is “language thanking an organization for assistance” is *post hoc* rationalization.

---

<sup>2</sup> Two Supreme Court cases negate your selection of strict scrutiny as the applicable constitutional standard. First, prior restraints are not applicable to commercial speech. See Va. Pharmacy Bd. at FN24. Second, even if the speech in question was held to be non-commercial, when conduct is mixed with speech in the case of an injunction, strict scrutiny does not apply. See Madsen v. Women’s Health Center, 512 U.S. 753 (1994) (applying a form of intermediate scrutiny). Since economic activity is at question according to Ohralik, rational basis review is the appropriate standard of that economic activity.

<sup>3</sup> Note, however, that the hypothetical case where a FCA member had published and prepared an obituary is distinguishable because FCA and its local members engage in commercial activity. This fact has not been challenged, was admitted by Ms. Brack in her response, and was conceded in your last letter.

Your other arguments do not consider the appropriate legal precedent for compelled disclosures even if FCA has published protected speech.<sup>4</sup> The First Amendment permits the Board to require disclosures to prevent consumer confusion and deception if they are reasonably related to preventing that consumer harm. See Zauderer v. Office of Disc. Counsel, 471 U.S. 626, 651 (1985) (citing several cases). The Board would have the authority to require FCA to publish a full disclosure in any solicited or published obituary byline that it is not a licensed funeral establishment and is not able to provide funeral services as listed in the obituary. Intentionally obfuscating what services were provided as “assistance” does not change this analysis. Thus, I believe your new arguments concerning FCA’s publication of bylines are incorrect. If FCA wishes to solicit or publish promotional language in an obituary byline, our office remains happy to suggest mutually agreeable disclosure language that would be as narrow as possible to prevent consumer confusion.

A different analysis of byline language would apply to individuals burying their own deceased who have published actionable language after consulting with FCA. The overwhelming majority of this type of language is not covered by the scope of North Carolina General Statute section 90-210.25(f) because the individual is the speaker.<sup>5</sup> Use of unsolicited ambiguous language by an individual, such as expressing gratitude to FCA providing “assistance” without further exposition of what services were provided, misleads the public into thinking FCA provided the actual funeral services in the obituary. Although the Board would not take action against a consumer for unsolicited ambiguous obituary language, investigation concerning whether unlicensed practice has occurred or whether the byline was solicited by FCA would be proper. Our office strongly prefers to work with FCA to reduce the probability and necessity of future inquiries. Abandoning the Board’s statutory obligation to protect the public from unlicensed practice and consumer confusion, whether caused by funeral establishments or consumer advocacy groups, is not an alternative.

I hope this letter resolves any lingering concerns that the Board is contemplating interpretations of its laws that you believe could infringe on constitutional rights of FCA members or other North Carolinians. It remains difficult to anticipate every potential legal issue that you create from broadening the scope of the discussion or assuming facts not at issue, but our office remains willing to answer any further questions.

---

<sup>4</sup> Please note that your reliance on Va. Pharmacy Bd. v. Va. Consumer Council for the definition of commercial speech has been overruled by Central Hudson and Bolger v. Youngs Drug Products Corp. in favor of the broader test cited in my previous letter.

<sup>5</sup> This does not include language where there is evidence of solicitation by FCA, contractual obligation to publish, consent to publication as part of a criminal conspiracy, or any other basis for legal action.

Sincerely,

A handwritten signature in cursive script that reads "Stephen Dirksen".

Stephen Dirksen  
General Counsel

Enclosure

## MELISSA ANNE WEANER

Melissa Anne Weaner

Ms. Weaner, age 25, of Stanley, formerly of Charlotte, passed away in West Chester, Pennsylvania.

She is survived by her mother, Rebecca Bellman, her father, William Weaner, sisters, Marcelle Weaner, Mandy Rohr, brothers, Billy Weaner and Brett Westbrook and her grandmother, Kathryn Rinaldi, one niece and two nephews and a host of aunts, uncles and cousins.

Melissa is very much loved and greatly missed. She will never be forgotten by her family, and many friends. Her memorial service will be held at a later date.

In lieu of flowers, contributions may be sent to BB&T, Post Office Box 189, Stanley, NC 28164, attention: Kelly Clement or at any BB&T Branch, account number 5297006314 in care of the Melissa Memorial Fund.

Funeral Consumers Alliance of Central Carolinas has assisted the family.

Published in the Charlotte Observer on 12/3/2006.

[Notice](#) • [Guest Book](#) • [Flowers](#) • [Gift Shop](#)



[View/Sign Guest Book](#)

[Today's Charlotte Observer death notices](#)

Questions about death notices or Guest Books?

[Contact Legacy.com](#)

Powered by [Legacy.com](#)

[obituaries nationwide](#)

[Back](#)