



INSTITUTE FOR JUSTICE

August 2, 2007

Mr. Stephen Dirksen
General Counsel
North Carolina Board of Funeral Service
1033 Wade Avenue, Suite 108
Raleigh, NC 27605

RE: Letter to Mary Brack, Funeral Consumers Alliance of Central Carolinas

Dear Mr. Dirksen,

I am in receipt of your letter of June 1, 2007, regarding whether citizens of North Carolina would violate North Carolina law if they (1) make “arrangements” with family members, (2) obtain obituary and death certificate information, or (3) publish obituaries to the media.

On behalf of the Institute for Justice, I certainly appreciate your clarification that the Board has no objection to local FCA chapters (or others) providing assistance to families in dealing with funeral directors. I also want to thank you for your assurance that your office has routinely advised individuals that North Carolinians may sell caskets at-need without a license and conduct private burials for family members without hiring a licensed funeral director. Both items are good to hear.

The remainder of your letter, however, raises as many questions as it answers. Since the Board may seek legal injunctions and further governmental investigations against individuals (who, unlike Ms. Brack, may engage in the activities noted in the first paragraph of this letter), a fuller understanding of what the Board considers to be the practice of funeral service needs to be clearly articulated. Thus, I am requesting additional “instructional and educational” information from your office.

You note that N.C. Gen. Stat. § 90-210.25(f) prohibits the unlicensed practice of funeral services. You go on to state that, “[P]reparation 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 follows, you suggest, that only licensed funeral directors may prepare and publish obituaries and, further, that this restriction of speech is subject only to rational basis review.

We respectfully disagree. 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. Indeed, if § 90-210.25(f) operates as you claim, and one must obtain a state license before preparing or publishing obituary information, then it is a classic prior restraint and “bear[s] a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). We cannot imagine that the North Carolina Board of Funeral Services

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could demonstrate the sort of overriding governmental interest necessary to sustain such a regulation, given this presumption.

This analysis is not changed by the inclusion of an obituary "byline." The presence of a byline does not convert an obituary from fully protected speech into commercial speech subject to the *Central Hudson* test. For one thing, the "byline" at issue does not propose a commercial transaction between the speaker and its audience. Language thanking an organization for assistance 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 thanking 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. Thus, even if FCA had 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. I don't know of any cases that hold otherwise, but please let me know if you do.

Finally, while I appreciate your offer to address our concerns administratively, your letter provides no assurance or even suggestion that the Board actually intends to do so. ("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.") Now is the time to articulate the Board's position—so that the citizens of North Carolina have full and fair notice what activities the Board considers to be illegal. Accordingly, I would appreciate it if you would advise me at your earliest convenience whether your office continues to take the position that preparing and publishing obituaries is something that requires a license from the state.

Enclosed you will find our check for your copying fees.

Sincerely,



Valerie Bayham*
Staff Attorney

Direct e-mail: vbayham@ij.org

Enclosure

Cc: Paul Harris, Executive Director
Joshua Slocum, Funeral Consumers Alliance

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