



117th Annual Meeting

The International Conference of Funeral Service Examining Boards

Legal 2021

Wednesday February 24, 2021

10:30am-11:30am CT

Speaker: Dale Atkinson, Esq.

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what are other
words for
dearth?



lack, shortage, paucity, famine,
deficiency, absence, scarcity,
want, inadequacy, insufficiency



 Thesaurus.plus

Where are all the cases?

Legal Trends

Litigation

- Antitrust
- Good Moral Character
- Deference to agencies
- Permanent revocation
- Conflict/Recusal
- Conduct vs. speech

Legislation

- De-regulation
- Criminal backgrounds
- 2nd Chance legislation
- Board composition
- Rules moratorium

What Causes These Trends?

- Political climate
- Evolving case law
- External pressures on government
- Economic perspectives
- Conflicting roles of board members

Conflicting roles....

- Is the funeral industry self-regulated?



Conflicting role....

- Is the funeral industry self-regulated?

NO

Conflicting role....

• Legal issues...

- Conflict of interest
- Due process
- Bias
- Discrimination

Separate regulation from trade



Conflicting role....

- In addition to the legal issues...
- **Self-regulation approaches/perceptions incentivizes government to step aside!**

Conflicting role....

- Respect and differentiate between regulation and trade.
- Remember, policy makers likely assume you are promoting the profession as a licensee/regulator.

Conflicting role....



Board composition

Speech vs. Conduct

Full Circle of Living & Dying v. Sanchez, **2020 U.S. Dist. LEXIS 243980**

United States District Court for the Eastern District of California
December 28, 2020, Decided; December 29, 2020, Filed
No. 2:20-CV-01306 KJM KJN

Speech vs. Conduct

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Speech vs. Conduct

First Amendment

First Amendment arguments related to regulation of the actions of licensed professions have been historically relatively rare.

Now they seem to be commonplace....

Speech vs. Conduct

First Amendment

Ask: Is state based regulation of a profession subject to First Amendment scrutiny?

Ask: If so, what is the standard/test to measure compliance?

Speech vs. Conduct

First Amendment

Ask: Is state based regulation of a profession subject to First Amendment scrutiny?

YES

Ask: If so, what is the standard/test to measure compliance? **Strict Scrutiny?**

Lawful activity, not misleading, substantial government interest, directly advance the interest, and least restrictive means

End of life doulas: Sanchez

- End of life doulas, help families perform “home funerals”
- Provide advice, counseling (before and after death), organizing end of life plan, serve as an extra pair of hands in preparing for home funeral, including bathing, dressing, and repositioning the body.
- Perform such services since 2013.
- Expressly note on website that they are not licensed funeral directors

California Cemetery and Funeral Bureau

- A **funeral director** (1) prepares for the transportation, burial, or disposal of human remains; (2) directs and supervises others who perform those functions; (3) maintains an establishment for the transportation, disposition, or care of human remains; (4) may use, in connection with his or her name, the words "funeral director," "undertaker," "mortician," or similar title; and (5) must be employed by, or be the proprietor of, a licensed funeral establishment.

California Cemetery and Funeral Bureau

7615.

A funeral director is a person engaged in or conducting, or holding himself or herself out as engaged in any of the following:

- (a) Preparing for the transportation or burial or disposal, or directing and supervising for transportation or burial or disposal of human remains.
- (b) Maintaining an establishment for the preparation for the transportation or disposition or for the care of human remains.
- (c) Using, in connection with his or her name, the words "funeral director," or "undertaker," or "mortician," or any other title implying that he or she is engaged as a funeral director.

(Amended by Stats. 1996, Ch. 1151, Sec. 1. Effective January 1, 1997.)

BUSINESS AND PROFESSIONS CODE - BPC

DIVISION 3. PROFESSIONS AND VOCATIONS GENERALLY [5000 - 9998.11]

(Heading of Division 3 added by Stats. 1939, Ch. 30.)

CHAPTER 12. Cemetery and Funeral Act [7600 - 7746]

(Heading of Chapter 12 amended by Stats. 2015, Ch. 395, Sec. 3.)

ARTICLE 2. Funeral Establishments and Directors [7615 - 7636]

(Heading of Article 2 amended by Stats. 1998, Ch. 970, Sec. 31.)

California Bureau Action: Sanchez

- California Cemetery and Funeral Bureau issued a notice of citation and fine in November 2019.
- Claimed Full Circle was improperly holding themselves out as a funeral director and thus, required licensure.
- Threatened fines of up to \$5K per day for non-compliance.
- After informal negotiations, Full Circle requested a formal administrative hearing.
- Before hearing, Full Circle withdrew its request for a hearing and initiated litigation in federal court.

Allegations in Complaint: Sanchez

- Full Circle alleged First and Fourteenth Amendment violations.
- Specifically, alleged that the Bureau is violating Plaintiffs First Amendment right of free speech.
- FYI, the Plaintiffs also included multiple families that were the recipients of Full Circle services.
- Plaintiffs sought a preliminary injunction preventing the Bureau from enforcing the practice act against them pending the outcome of the trial.
- Preliminary injunction is an extraordinary remedy

Judicial Ruling: Sanchez

- Plaintiffs sought a preliminary injunction, Defendants filed a motion to dismiss
- ***No ruling on the merits, procedural ruling.***
- Court held that
 - Plaintiffs NOT required to exhaust administrative remedies
 - Plaintiffs had standing to sue
 - The matter was ripe for adjudication
 - That the court had subject matter jurisdiction over the dispute
 - Defendants/Bureau NOT entitled to dismissal

Judicial Ruling: Sanchez

- Turning its attention to the elements of preliminary injunction
 - Likelihood of success on the merits
 - Irreparable harm
 - Public interest and balance of equities

Judicial Ruling: Sanchez

- Court found in favor of the Plaintiffs and enjoined the Bureau from enforcing the act on the Plaintiffs pending the outcome of the trial.
- Found that the Bureau ***did not identify any government interest or explain why the admin action does not burden more speech than necessary to further an important interest.***

Arizona Board of Funeral Directors and Embalmers

Performance Audit and Sunset Review

Purpose of audit: *To determine whether the Board issued licenses to individuals and businesses in the funeral industry in accordance with statute and rule requirements, conducted funeral establishment and crematory inspections as required, and provide responses to the statutory sunset factors.*

Dated: November 2020

Arizona Board of Funeral Directors and Embalmers

Performance Audit and Sunset Review

Key findings.....

Key recommendations.....

COVID

- Executive Orders & litigation
- Literally, thousands of executive orders
- Seemingly thousands of lawsuits challenging such orders

COVID

- Executive Orders-litigation
- ***Midwest Institute of Health, PLLC v. Whitmer***: On October 2, 2020, the [Michigan Supreme Court](#) issued an [opinion](#) stating that Gov. [Gretchen Whitmer](#) did not have authority to issue pandemic-related executive orders that were in effect past April 30, 2020—the date past which the legislature denied extending emergency and disaster declarations. Justice [Stephen Markman](#) wrote the majority opinion.

