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author spotlight

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MANAGEMENT/LEGAL

We live in a litigious society where anyone can file a lawsuit. There are steps you can take to decrease your chances of being sued over what happens at the funeral home or cemetery.

Protecting yourself against professional liability lawsuits

They say there are two certainties in life: death and taxes. At some point, everyone will die, and their loved ones will require the services of a cemetery and/or funeral professional, often during one of the most emotionally difficult and vulnerable times in their lives. The competency and manner in which these services are delivered is critical to avoiding potential professional liability claims.

Prior to the 19th century, the process of preparing a deceased person's body for burial was a private family matter. In fact, there was a time when embalming a family member's body often took place inside the deceased's home. This evolved as family members began dying in hospitals, and a need developed for paid professionals to assist with the care of the deceased, giving rise to the funeral industry.

Interestingly, it took until 2002 for every state (except Colorado) to require a license for funeral directors to perform their work. Until then, there were *multiple* states in which funeral directors—often the people responsible for performing some of the most important pre-burial processes involving dangerous chemicals, legal documents and emotional individuals—were not licensed or significantly regulated.

Today, funeral and cemetery professionals continue to be regulated differently, depending on the state in which they practice. In fact, Colorado still does not have any licensing requirements for either funeral directors or embalmers.

The enforcement of such regulations also varies widely among states. Thus, it is imperative that professionals are educated on their particular state's requirements to remain compliant and avoid regulatory issues and potential lawsuits.

While it is important for professionals to know their state-specific licensing and regulatory requirements, it is even more essential that they remain vigilant in their

practices to prevent potential civil liability.

As with any public service profession, a career as a cemetery or funeral professional comes with its risks and challenges. One of those risks is the possibility of a lawsuit for allegedly failing to perform or deliver one's professional services properly, or to the level of satisfaction a particular customer expects.

We live in a litigious society. Anyone can *file* a lawsuit seeking damages caused by another's conduct. Being sued can be overwhelming, especially since it can lead to significant financial obligations (in terms of a damage award and legal fees or costs) or professional licensing problems.

Exercising diligence and complying with industry best practices help to minimize the possibility of such claims. Highlighted below are some examples of claims brought against cemetery and funeral professionals, along with some tips to prevent them.

Claims under consumer protection laws

Every state in the country has a consumer protection law meant to shield consumers from deceptive and unfair practices by professionals. While these laws widely vary between states, each consumer protection law's basic premise is that unfair and deceptive practices are unacceptable and can create statutory liability.

Because they offer services and goods to consumers, cemetery and funeral professionals may be subject to liability under these statutes. A finding of liability could mean the potential for significant financial exposure for professionals who are found to have used questionable and deceptive business practices. Indeed, many states permit consumers to recover attorneys' fees incurred for bringing their claims, as well as treble damages, which are primarily meant to punish the wrongdoer.

For example, in Pennsylvania, the consumer protection law under which a claim

could be alleged is the Unfair Trade Practices and Consumer Protection Law (UTCPL). This law recognizes a private right of action to consumers harmed by deceptive business practices.

If a consumer successfully proves that a professional has violated the UTCPL, the consumer could potentially recover attorneys' fees, actual losses and up to three times the actual losses incurred, depending on how reprehensible the alleged wrongdoer's conduct is determined to be.

In one such case, a father purchased a casket for his son to be buried in with the understanding that it was going to be made entirely of bronze. (See *Baynes v. George Mason Funeral Home Inc.*, 2011 U.S. Dist. LEXIS 59220 [W.D. Pa. June 2, 2011].)

While being stored in a temporary mausoleum, the casket began to deteriorate, rust and leak a horrendously unpleasant fluid. Upon being informed of the failing casket, the father learned that the casket was not made of bronze, but instead had been constructed of a low-grade steel.

The father sued the funeral director under the UTCPL, alleging that he had intentionally misrepresented the quality of the casket and, in fact, had sold him something other than the agreed-upon product.

Ultimately, the court decided that the funeral director's misrepresentations caused the father's losses and required the funeral director to pay for a new bronze casket in which to re-bury his deceased son. Additionally, because the funeral director's conduct was found to be intentionally fraudulent, the court awarded the father treble damages, permitting him to recover three times his actual losses, resulting in an award of \$18,000.

Avoiding liability under the various state consumer protection laws should be an objective of all professionals. In order to accomplish that goal, it is best to avoid any business practices that *may* be deemed unfair or deceptive or that *could* create confusion or misunderstanding by the consumer.

Accurate recordkeeping of all sales transactions, including disclosures made to a consumer about the particular service or product being sold, is an excellent way to protect a business from unsubstantiated consumer protection law claims.

This documentation also should include appropriate disclosure language about the products and a disclaimer that the products were agreed to after various options were

discussed.

However, consumer protection laws are not the only source of potential claims. Given the nature of the end-of-life process, claims for emotional distress are also a possibility.

Emotional distress claims

In addition to permitting recovery of actual monetary losses, many states recognize a next-of-kin's right to recover for emotional damages caused by another's improper treatment of their relative's deceased body. (See *Massaro v. Charles J. O'Shea Funeral Home, Inc.*, 738 N.Y.S.2d 384 [App. Div. 2d Dept 2002]; *Stephens v. Waits*, 184 S.E. 781 [Ga. App. 1936]; *Brownlee v. Pratt*, 68 N.E.2d 798 [Ohio App. 1946]; *Sanford v. Ware*, 60 S.E.2d 10 (Va. 1950); *Weingast v. State*, 254 N.Y.S.2d 952 (1964); *Lott v. State*, 225 N.Y.S.2d 434 [1962]; *Papieves v. Kelly*, 263 A.2d 118 [Pa. 1970].)

While accidents happen, these claims usually arise in situations where cemetery or funeral professionals fail to take basic precautions when handling a deceased person's body.

For instance, in Pennsylvania, a cemetery was sued for the emotional distress its employees caused by failing to properly bury and then relocate the body of their customer's mother. (*Palmer v. White Chapel Gardens*, 38 Pa. D. & C.3d 608 [Bucks Cnty. 1983])

After receiving instructions from the son of the deceased to disinter his mother's body to be reburied in a family grave plot, the cemetery employees began searching for the deceased's body. According to the cemetery's records, the deceased's body was located in section P-300. However, upon searching that location, it was discovered that the records were inaccurate.

The cemetery professionals continued searching, digging up 160 square feet with a backhoe—in the presence of the deceased's son. The haphazard nature of the search and failure to maintain accurate records allegedly caused the son to be left "saddened, depressed, angry and humiliated."

Ultimately, a jury found in favor of the son, awarding him damages for the emotional distress he sustained as a result of his mother's body being lost and mishandled by the cemetery. These cases have a built-in sympathy factor, and the potential for a damage award cannot be underestimated.

In another case, the children of a deceased woman brought a claim seeking to recover for their mental and emotional

distress allegedly caused by a funeral home's mistreatment of their mother's deceased body. (*Moffatt v. Baird Funeral Home Inc.*, 69 Pa. D. & C.4th 532 [Mercer Cnty. 2004])

Specifically, the children claimed that the funeral home professionals had failed to properly embalm their mother's body, causing severe burns, bruises and discoloration all over her body. The children also alleged that the funeral director refused to move their mother's remains to a new location, thereby intentionally withholding her body without the right to do so.

Based on the children's allegations, the court permitted their claim for intentional infliction of emotional distress to proceed, concluding that, if the children could come forward with evidence to support their claims against the funeral home, they would be entitled to compensation for the distress they incurred.

Clearly, in the examples illustrated above, the emotional distress sustained by the customers was almost entirely preventable through proper recordkeeping and employee supervision by the cemetery and funeral professionals.

Additionally, having a protocol in place to ensure that a deceased's family member is *not* present for any potential exposure to such haphazard treatment of their relative's body is also a way to prevent a potential emotional distress claim.

Why? Because almost every scenario in which a cemetery or funeral professional can be held liable for causing emotional injuries to a customer requires the customer to be present and view the mishandling of their loved one's body.

Conclusion

Cemetery and funeral professionals are subject to liability in the normal course and scope of their employment, particularly since their services are delivered to customers during emotionally vulnerable times.

Best practices in risk management indicate that accuracy in recordkeeping, adherence to state regulatory laws, proper employee training and conducting one's business with honesty, integrity and professionalism are keys to avoiding liabilities and exposures.

Purchasing professional liability insurance and consulting with experienced legal counsel are also effective ways to ensure proper protocols are in place and to protect one's business should a potential liability-causing situation arise. 