

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

REPORT OF THE PRESIDING OFFICER

ON

PROPOSED TRADE REGULATION RULE

CONCERNING

FUNERAL INDUSTRY PRACTICES

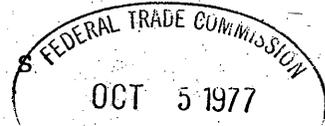
[16 C.F.R. Part 453]
[Public Record 215-46]

This report, required by Section 1.13(f) of the Commission's Rules of Practice, contains the Presiding Officer's summary of the public record and initial findings and conclusions with regard to those issues designated by the Presiding Officer and such other findings and conclusions as he sees fit. The report has not been adopted or reviewed on the merits by the Bureau of Consumer Protection or reviewed or adopted by the Commission. The Commission's final determination in this rule-making proceeding will be based upon the record taken as a whole, including this report by the Presiding Officer, the report and recommendations prepared by the staff under Section 1.13(g) of the Rules of Practice, and comments upon these reports received during the 60-day period after the staff report has been placed on the public record.

Jack E. Kahn
Presiding Officer

July 1977

C O N T E N T S



<u>Chapter</u>		<u>Page</u>
I	Introduction and General Issues Relating to the Proceeding	1
II	The Development of American Funeral Practices	16
III	Basic Issues - Circumstances of the Funeral Transaction, Consumer Knowledge of Funerals, and the Quality of State Regulation (Issues Nos. 23, 24, 27, 21 and 30)	22
IV	Exploitative Practices (Issues 1 through 6)	50
V	Misrepresentation (Issues 7 through 9)	69
VI	Merchandise and Service Selection (Issues 10 through 15)	77
VII	Disclosure (Issues 16, 28, 17 through 20)	89
VIII	Advertising and Price Competition (Issues 22, 26, 25, 29)	111
IX	Additional Findings, Conclusions and Recommendations	124
<u>Appendices</u>		
I	Presiding Officer's response to motions and credibility finding concerning Dr. Roger D. Blackwell and presentation by Management Horizons, Inc.	137
II	Arrangement of Public Record	148
III	Proposed Rule	157
IV	Final Notice	163

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BEFORE FEDERAL TRADE COMMISSION

In the Matter of)
Proposed Trade Regulation Rule Concerning)
Funeral Industry Practices)
[16 CFR Part 453])

Public Record
File No. 215-46

Findings and Conclusions with Respect to Issues
by: Jack E. Kahn, Presiding Officer

I. INTRODUCTION AND GENERAL ISSUES RELATING TO THE PROCEEDING

A. Preface

On August 29, 1975, the Commission published its initial notice of a proposed Trade Regulation Rule Concerning Funeral Industry Practices. 1/ Some years prior to the publication of that notice, the staff of the Bureau of Consumer Protection began an investigation of funeral industry practices which resulted in a staff report containing the results of the investigation and the proposal for a rulemaking proceeding. 2/ That staff report formed in large part the basis of the Commission's action in proposing the trade regulation rule for the funeral industry (hereinafter referred to as the proposed rule).

Consistent with that initial notice, the record of the proceeding was opened for comments both on the practices toward which the proposed rule was directed as well as the staff report upon which it was largely based. The response to the call for comment illustrated widely divergent attitudes toward the proposed rule. Generally, comments from industry sources were strongly opposed to the proposed rule. Some consumers were also opposed. Many consumers and consumer representative groups commented favorably upon the proposed rule. All of these comments are now a part of the record.

1/ 40 Fed. Reg. 39901, August 29, 1975.

2/ FTC Staff Memorandum, Record VI-D-41.

The initial notice also called for submission of disputed issues of material fact as called for by the Commission rules of practice. 3/ These submissions, most of which were from industry representatives, were generally not helpful in formulating the disputed issues of material fact 4/ which the proceeding was to resolve. 5/ Virtually all of the submissions by industry sources could be characterized as parsing the Commission's staff memorandum. 6/ They contained hundreds of proposed issues and had they been adopted would have been relatively useless simply because of their number.

On February 20, 1976, the final notice of rulemaking in regard to this proceeding was published in the Federal Register 7/ setting out thirty disputed issues of material fact. Appeals 8/ in accordance with the Rules of Practice of the Commission were taken from this formulation of the issues. and all of these appeals were denied by the Commission on May 17, 1976.

The final notice also called for public hearings to be held in New York City commencing April 20, 1976. Additional hearings were held in Chicago, Illinois; Seattle, Washington; Los Angeles, California; Atlanta, Georgia; and Washington, D.C. as scheduled in the notice. The purpose of having this large number of hearings was to give the public the maximum opportunity to testify and present facts and opinions to the Presiding Officer and thus to the Commission. Financial constraints within the Commission prohibited additional hearings, and, in my opinion, additional ones would not have been productive of new views or evidence.

Considerable repetitive testimony was heard, much of it opinion unsupported by fact. Nevertheless, the public was well served by a number of hearings across the country to enable citizens to express their views to their government. These hearings concluded on August 7, 1976.

3/ 16 CFR § 1.11.

4/ See § 1.13(b) of the Commission's Rules of Practice.

5/ See, e.g., the National Funeral Directors Association, Record II-D-2; the National Selected Morticians, Record II-D-1; the Order of the Golden Rule, Record II-D-3.

6/ Record VI-D-41, August, 1975.

7/ 41 Fed. Reg. 7787, February 20, 1976.

8/ National Selected Morticians, Record I-A-26; National Funeral Directors Association, Record I-A-23.

Prior to publication of the final notice, the National Selected Morticians (hereinafter referred to as NSM) and the National Funeral Directors Association (hereinafter referred to as NFDA), two of the industry's leading associations, petitioned the Commission to convert the proceeding into a guide proposal rather than one concerned with rulemaking. 9/ Because of wide public and industry interest in this subject matter, the Commission granted the motion of the trade associations for a hearing and, after accepting written comments, heard on March 12, 1976 oral argument from a number of interested parties on the guide proposal. On April 14, 1976, the Commission denied the guide petition. 10/

Trade associations had previously proposed such guidelines to the Commission. Because of some interest within the staff in the subject matter, in 1964 NSM proposed that guides be issued. 11/ At that time the Commission did not choose to issue rules or guides and the then Chairman, Paul Rand Dixon, pointed out the Commission should work with the states in developing state enforcement programs since these problems could be dealt with at the local level. 12/ For reasons unknown to me and not revealed in the record in this proceeding, no action to my knowledge was taken to implement this cooperative effort between the Commission, state regulatory bodies, and the industry. Placing fault in this area is not the purpose of this proceeding, but in fairness to all it should be pointed out that no one (apparently) took the initiative to move this project forward, all parties being content with the status quo. There were later submissions by trade associations of proposed guidelines. 13/ They either were rejected by the Commission or were not submitted to it, the record being unclear on this point. In any event, the result of the hearing before the Commission on March 12, 1976, deferred the question of whether the Commission should issue guidelines, pending the development of the record in this proceeding. The subject will be discussed subsequently in this report.

9/ "Petition to the Commissioners of the Federal Trade Commission by National Selected Morticians to Reconsider and Convert Trade Regulation Rule Proceeding to an Industry Guides Proceeding," Dec. 19, 1975, Record 215-46-1-1-1.

10/ Letters from Charles A. Tobin, secretary - to David Murchison and Thomas H. Clark, Apr. 14, 1976, Record 215-46-1-1-1.

11/ Note 9 supra, at Exhibit 1.

12/ Id. at Exhibit 3, Letter from Chairman Paul Rand Dixon to Congressman William S. Moorhead, Nov. 30, 1964.

13/ Id. at Exhibit 2.

NFDA along with Richard W. Souder, a funeral director, petitioned in the United States District Court for the District of Columbia for a temporary restraining order and an injunction to bar this proceeding. ^{14/} Among the grounds for the petition was the position of NFDA that the rulemaking proceeding was outside the authority of the Federal Trade Commission and that the Presiding Officer in denying some witnesses an opportunity to testify in person was violating the terms of the Magnuson-Moss Federal Trade Commission Improvement Act. ^{15/} Judge Aubrey E. Robinson, Jr. denied the temporary restraining order petition on April 25, 1976, on the ground that no irreparable injury would result by moving forward with the hearings. ^{16/} He also questioned his authority in this area. ^{17/} Subsequently, he denied the petition for an injunction. ^{18/}

As to the substantive question raised in the petition for a temporary restraining order and injunction, the facts on this subject are: The final notice of rulemaking required that statements or outlines along with requests to testify at the New York hearing be filed approximately 20 days prior to the first day of hearing in that city. ^{19/} Some of these filings were rejected because they were clearly insufficient. ^{20/} The test in this and other hearings is whether a participant, that is, an interested party who would be involved in examining witnesses, could, using the outline, prepare for cross-examination. In many cases, the statements submitted were so broad that such preparation was impossible. The staff of the New York Regional Office along with some of the Commission's Washington staff attempted to reach applicants to testify and in many cases their insufficient statements and the outlines were amplified

^{14/} FTC Docket No. 99-304-2.

^{15/} 15 U.S.C. 41, et seq.

^{16/} Hearing on temporary restraining order, United States District Court for the District of Columbia, Civil Action No. 76-0615, Apr. 25, 1976.

^{17/} Id.

^{18/} Note 14 supra, at Order of Judge Robinson, May 25, 1976.

^{19/} Record 215-46-1-28-1, 2, 3.

^{20/} See "Instructions for Witnesses," 41 Fed. Reg. 7787-88, February 20, 1976.

to the point that they were satisfactory. Many parties were given an opportunity to resubmit, if this were done with dispatch. Some were resubmitted after the deadlines and were returned to the participants. 21/

I had scheduled 10 days of hearings in New York City and, based on experience in other proceedings, determined that approximately 80 witnesses could be heard and examined in that period of time. An equitable distribution would have included 40 witnesses in favor of the proposed rule and 40 opposed. Those opposed desiring to testify totaled 123. Even allowing for 8 witnesses a day, a number which I subsequently found to be burdensome and which forced the hearings to last late into the night, there was still time for only approximately 40 witnesses opposed.

The nature of these 123 statements deserves some comment. Many of these statements were so similar to each other as to at least raise the question of whether they were prepared in concert. Even with that possibility aside, it was obvious to me that many of these statements were duplicative and would not have produced additional valuable testimony in this proceeding. In my judgment, charged with the duty to move the proceeding along, I would not have served the public interest by hearing many witnesses, all giving virtually the same testimony. Thus, I determined only 40 would be heard and the remaining 83 statements would be attached to the record as if given.

While dealing with this problem in regard to witnesses at the New York hearings, similar statements began to come into the Chicago Regional Office of the Commission with requests to testify. Approximately 400 of these were generally opposed to the proposed rule with a total of 600 parties requesting the opportunity to appear and be heard. Of the 400 antirule witnesses, a great many statements were substantially similar indicating once again that there was a possibility that these filings were orchestrated. Rumors began to reach me that, as we approached the Los Angeles hearings, we would have thousands of requests to testify.

Because this situation appeared to be developing, a situation which I deemed would be destructive of the hearing process and the public interest, I limited those proponents of the proposed rule to 40 witnesses in the New York hearing

21/ See "Summary of Closing Dates," 41 Fed. Reg. 7789, February 20, 1976.

and those opposed to approximately the same number. I continued this general practice throughout the series of hearings in the various locations despite objection by counsel. 22/

Counsel for NFDA objected to the limiting of the number of witnesses at all and as indicated earlier took his objection to the United States District Court for the District of Columbia. Furthermore, his objection went to the fact that the choice of those who were testifying was being made by the Presiding Officer. I felt this was the most equitable manner for making a determination as to who would testify and I continued to do this to the extent that it was necessary throughout the other hearings in this proceeding. My basis for choosing witnesses was the possibility of adducing additional factual evidence, the geographic origin of the applicant to testify, the history of the individual, and his general background. In regard to the latter, preference was shown to those who previously held positions of responsibility in trade associations or had participated in state regulatory activities.

While I received some advice from industry representatives as to who the witness should be, I take full responsibility for the selection of those witnesses who were allowed to testify. I included written statements from those who did not testify as part of the record of the hearings in New York as I did in other locations where similar situations took place. 23/

My authority for limiting witnesses is the Rules of Practice which provide the Presiding Officer with the authority to be "responsible for the orderly conduct of the rulemaking proceeding." 24/

Since the rules grant me "all powers necessary to that end" without limiting those powers, as well as the authority to "prescribe rules or issue rulings to avoid unnecessary costs or delay", I believe I have the authority to limit the number of witnesses testifying under the circumstances which I encountered in this proceeding. Those circumstances were: (1) a large number of witnesses, (2) most of whose statements were similar, (3) most of those statements expressed opinion rather than giving factual testimony.

22/ See, e.g., opening statement of Richard Grayson, general counsel, Minnesota Funeral Directors Association, Tr. 2538.

23/ See, e.g., letter of Presiding Officer to those not testifying in New York, Record VIII-2.

24/ See § 1.13(c)(1) of the Commission's Rules of Practice.

To hold otherwise in one of these proceedings would enable a group of potential witnesses to subvert the hearing process by applying to testify. Clearly, if I were faced with 5,000 applications to testify in any one site, I could not physically (or financially, given the Commission's limited resources) hear that many witnesses. I do not, however, believe as a general rule limiting the number of witnesses in a rulemaking proceeding is proper. If the statements or outlines filed prior to a hearing indicate the witnesses are acting spontaneously and are desirous of giving important factual testimony, then I believe I must find a way of hearing these witnesses.

General Legal Issues

A number of issues generally constitutional in nature have arisen in regard to this proceeding. Some of these took the form of motions to dismiss the rulemaking proceeding. I denied these motions as well as certification to the Commission. I believed at that time and do still believe that this rulemaking proceeding is itself consistent with the Constitution and follows closely the intent as well as the words of the Magnuson-Moss Act.

During the hearings, there was considerable testimony on these issues such as the legislative intent of the Magnuson-Moss Act, 25/ the authority of the Commission, 26/ the jurisdiction of the Commission, 27/ the question of interstate commerce, 28/ the constitutionality of the delegation of authority in the Magnuson-Moss Act, 29/ and the question of preemption of state law as it relates to the Magnuson-Moss Act and the Constitution.

I have not considered it within my duty under the Rules of Practice to summarize or decide these questions since they are more appropriately discussed by the staff, resolved by the

25/ See, e.g., written submission of NFDA, Record II-A-659, p. 60.

26/ See, e.g., written submission of the National Selected Morticians, Record II-A-661, p. 1.

27/ Id.

28/ NFDA, note 25 supra, at p. 65.

29/ NSM, note 26 supra, at p. 1.

Commission, and heard by the Circuit Court of Appeals. 30/
In regard to the last mentioned forum, I have been assured, on
and off the record by the various parties to this proceeding,
that whatever the decision of the Commission, judicial review
will be sought. If there is no final rule, I am told the
public interest representatives will appeal the Commission's
decision; and if there is a final rule, I have been assured
more than once that interested parties on behalf of the
industry will take the matter up.

B. General Procedural Matters

The process of selecting group representatives for the
hearings was handled on an informal basis. Rather than
ordering the selection of a group representative, I preferred
to allow the parties to arrange this on an informal basis and
found this worked reasonably well.

The various industry groups, including the national as
well as the state trade associations, among themselves, decided
who would ask questions of various witnesses. Sometimes it was
a state association, 31/ sometimes counsel for the NFDA, 32/
and where appropriate, counsel for the National Funeral Directors
and Morticians Association, hereinafter NFDMA. 33/ I found the
arrangement to be workable, with the exception of problems
arising in the Chicago hearings. It is a system which is
available to others. I do not recommend it generally. In this
case, with the multiplicity of state and national trade
associations, given the cooperation of counsel, I found it to
be productive of harmony. In regard to the problems alluded to
in the previous paragraph, during the Chicago hearings, counsel
for the Funeral Directors Services Association of Greater Chicago
(hereinafter, FDSAGC) made objection. 34/

30/ 15 U.S.C. 57(a) Sec. 18(e)(1)(A).

31/ E.g., Scott Calkins, counsel for the Pennsylvania
Funeral Directors Association.

32/ E.g., Thomas H. Clark, general counsel.

33/ E.g., Larry Williams, general counsel.

34/ Tr. 389 and 2668.

Counsel for FDSAGC has indicated that he will base an appeal on the Presiding Officer's restrictions on his cross-examination. He had embarked on a series of questions about issues extraneous to this proceeding. 35/ He was also attempting to attack a witness's reputation by bringing out unrelated matters in his background. The result was unnecessarily adversarial. I restricted counsel to questions about the disputed issues set out in the final notice. All further questioning of this witness by any other interested party was similarly restricted. My basis for this restriction was to promote an orderly hearing and to allow questioning which would explicate the witness's testimony. Counsel objected on the grounds that (1) the witness had not been restricted to the issues of his testimony and (2) that I had not restricted previous questioners. His first basis is irrelevant since no witness was or could be restricted to the disputed issues. As to the second basis, I had no cause to impose the restriction earlier.

As has been stated time and again, by me, other Presiding Officers, officials of the Commission, and as is inherent in the Rules of Practice of the Commission, this is not an adversary proceeding nor should it be one. The implication of this as it relates to cross-examination is that questioning should be designed to draw out the witness and determine what facts he or she has. This proceeding is, among other things, a fact-finding process and cross-examination should be a help in that respect.

Time and again, however, counsel for various parties attempted either to impeach witnesses or to argue with them. Frequently, attorneys for all parties appeared to be debating with the witness in an attempt to get the witness to change his or her mind as to a conclusion. I believe I was too liberal in allowing cross-examination, and in the future, it will not be allowed to the same extent. 36/

35/ Tr. 4386-87.

36/ I do not wish by this discussion to imply that counsel for FDSAGC was alone in his adversarial approach to cross-examination. The incident was most pointed with respect to his examination and his objection to my attempting to restrain him most forceful. Thus, I have used this particular incident as an example. I might have picked other examples with almost any representative of interested parties who participated in this proceeding.

From time to time I imposed time limits on counsel for the Commission, the public, and the industry. All objected to being restricted, but I believe the record will reflect all parties received generous treatment in this respect.

Even if cross-examination had been restricted further, this proceeding would not have been shortened materially. The time was consumed before and after the hearings, with relatively little to be gained by shortening cross-examination or otherwise restricting the hearings themselves. The number of hearings could, however, be fewer with no great harm to the record.

C. Oaths

Early on in the hearings industry representatives moved to have all witnesses placed under oath. 37/ This motion was denied on the grounds that it would unnecessarily judicialize the proceeding. 38/ The swearing of witnesses is optional under the Rules of Practice and within the discretion of the Presiding Officer. 39/ Former Chairman William Hungate of the Subcommittee on Activities of Regulatory Agencies of the House Small Business Committee took issue with this decision when he testified at our hearing. 40/ Further, the minutes of the House Subcommittee and its report submitted in rebuttal as part of this record bring forth the position not only of Chairman Hungate but of the subcommittee as a whole in regard to the taking of oaths. 41/ Generally, the basis for this position was that unsworn testimony would encourage untruths about funeral practices. I did not find this to be the case. I had no difficulty determining credibility. Swearing witnesses would have inhibited some consumer witnesses, not from telling the truth, but rather, from testifying at all. Since the process of cross-examination was unnecessarily antagonistic anyway, this formalization would have been counterproductive.

37/ Opening statement of Thomas H. Clark, NFDA, Tr. 20; objection of A. Everette MacIntyre, NFDA, Tr. 33-34; questioning by Thomas H. Clark, NFDA, Tr. 78-79.

38/ Tr. 34.

39/ Section 1.13(c)(1)(vii) of the Commission's Rules of Practice.

40/ Tr. 10,578-81.

41/ Subcommittee hearing transcripts, Sept. 27, 1976, Record X-2, p. 8 and H.R. Rep. No. 94-1761, 94th Cong., 2d Sess. (1976), Record X-2, p. 32.

D. Witness Intimidation

The question of witness intimidation arose during the hearing in New York in regard to witness Mr. David Boyd. ^{42/} He indicated he felt threatened and I instructed all parties that any threats made to witnesses, threats of reprisal in business or coercion of any kind, I would refer to the General Counsel for consideration as to whether there was a violation of Title 18 of the U.S. Code. ^{43/} The record at this time does not reveal any evidence of threats or intimidation. The witness may have received some phone calls or other communications, but there is no basis for any referral to law enforcement officials in this regard.

During the hearings in Los Angeles, compulsory process had to issue for Monsignor Richard O'Keefe because he indicated he had been threatened in the form of phone calls and other communications and he refused to testify unless he was served with a subpoena. ^{44/} The fact that process had to issue seems to be indicative of the pressure under which citizen representatives such as Monsignor O'Keefe must undergo in order to serve on state regulatory boards. This is the first, and so far, only subpoena issued in a FTC proceeding. These have been and should continue to be used sparingly.

E. References to the Record

References to the record are made in the footnotes in this document using the following form: Record - written record consists of written comments and materials submitted, pursuant to Initial and Final Notices, material placed on the public record by the Commission's Secretary, its Presiding Officer, or its staff and rebuttal submissions.

Most citations are to document numbers. These will show the section of the record in which the document may be found and the number of that document. For example, "II-D-32" would indicate a reference to document number 32 found in section II-D of the record under 215-46. A few citations, instead of reporting the record section number, report the actual binder of the record where the document may be located. Two types of documents are

^{42/} Tr. 1694, 1716.

^{43/} 18 U.S.C. § 1505 (1970), "Obstruction of Proceedings Before Departments, Agencies, and Committees."

^{44/} Tr. 7059-60.

normally reported by binder number: documents transmitted by the Secretary and statements of persons who requested to testify but were not able to do so. The latter group citation is always prefaced by the label "Statement of," and is made a part of the hearing record for the city where the request was made. For example, "215-46-1-28-9" indicates a reference to a specific binder of the record.

Tr. - Transcript of the informal hearings.

HX - Exhibits presented and directed to be placed in record at the informal hearings. Two forms of citations are used in this section. For the New York City informal hearings, hearing exhibits are labeled with "HX" and the person's name and number of the exhibits. For example, "HX-Jones 1" is hearing exhibit 1 of Mr. or Mrs. Jones in New York City. For all other cities where hearings were held, hearing exhibits are labeled "HX" and the city and exhibit number. For example, "HX-Atlanta 22," is hearing exhibit 22 of the Atlanta, Georgia informal hearings.

See Appendix II for an index to the arrangement of the public record, which enumerates the binders that contain the various documents of the public record.

F. Nature of This Report

As the Rules of Practice direct, this report of the findings and conclusions of the Presiding Officer deals directly with the disputed issues as finally designated by the Commission. It also, as the Rules of Practice direct, deals with a number of other issues which I have seen fit to cover because they relate so closely to one or more of the issues or because they are necessary to any sort of intelligent discussion of the problems involved.

There are a number of things this report does not undertake to do. First, it is not and does not pretend to be a complete analysis of the record. That is, I have not undertaken to examine and set forth all the arguments and evidence submitted by the different parties who have commented on this proposed rule. That is the staff's job and I have left it up to them. I have analyzed the record only to the extent it seemed necessary to resolve the issues confronted. Thus, the citations in the footnotes for each proposition advanced are almost always illustrative only. There is scarcely one which could not have been multiplied many times over where appropriate. I regret not

being able specifically to deal with the testimony of every witness since I listened attentively to them all and carefully read the documentary submissions, but space simply does not permit what under other circumstances would be considered a common courtesy.

Second, no attempt had been made here to draft a final rule. That, also, I do not consider to be the Presiding Officer's task. Draftsmanship has only been considered to the extent it seems to have created a substantive problem.

Any motions, petitions, requests, or proposals not heretofore or herein specifically ruled upon, either directly or by necessary effect of these findings and conclusions, are hereby denied.

Each finding herein is supported by substantial evidence on the record of this proceeding.

G. Participants in the Proceeding

There are several professional associations, organizations, and societies to which funeral directors belong, the largest and perhaps most influential being the National Funeral Directors Association (NFDA). In each state, there is a funeral director's association which may belong to the national organization, ^{45/} and within each state, there may be smaller funeral director's associations such as city or county. These may be affiliated with state associations which, in turn, form the national association.

There are a number of other trade associations such as the Jewish Funeral Directors of America, The National Funeral Directors and Morticians Association, which is composed mostly of black members, and there is the National Selected Morticians (NSM), to which membership is on an invitation only basis. This last organization is made up mostly of the larger and more affluent funeral homes, usually one per city or trade area.

There is one other national organization which participated in this proceeding; namely, the Order of the Golden Rule, which, in addition to being a membership organization, also provides advertising and accounting services.

^{45/} While the hearings were in progress, the California Funeral Director's Association withdrew from the NFDA in part because of NFDA's strategy in this proceeding.

Other trade associations participating in the proceeding were the Pre-Arrangement Interment Association of America which concentrates its activities on sales of funeral goods and services in advance of need (pre-need) and the Cremation Association of North America.

In each of the hearings of this proceeding there were representatives of the public, paid out of a special fund appropriated by the Congress. Applications by these groups were processed in accordance with the criteria and procedures set forth in Section 1.17 of the Rules of Practice. They were:

The New York Public Interest Research Group

The Consumer Affairs Committee, Americans
for Democratic Action

The National Council of Senior Citizens

The Central Area Motivation Program (Seattle)

California Citizens Action Group

Arkansas Consumer Research

Continental Association of Funeral
and Memorial Societies

These groups performed in a creditable manner.

One publicly funded group was the subject of considerable testimony during the proceeding: the memorial societies. The memorial societies are non-profit membership associations which assist members in obtaining and making arrangements for funerals, cremations, or other methods of dispositions (\$453.1(p)). Memorial societies represent a very small portion of the population. The largest of these societies, that in the Seattle area, ^{46/} is still relatively small considering the number of funerals handled outside their aegis. Yet the antagonism between the memorial societies and the funeral service industry is almost tangible. This is an ideological rather than an economic adversary relationship. The ideology of the memorial societies goes to freedom of choice and generally holds that

^{46/} See, e.g., testimony of Friend A. Deahl, board member, Peoples Memorial Association, Tr. 5625. Mr. Deahl reported that there are 46,000 enrolled adult members in Seattle's Peoples Memorial Association.

economical funeral services are appropriate. 47/ Many memorial societies, particularly in the northwest, show an expressed favoritism toward cremation possibly followed by a memorial service. 48/ Despite this, ground burial and other services are usually available through the good offices of the memorial society. 49/

H. Preface to Findings of Fact

The Commission's proposed rule is contained in the initial notice published on August 29, 1975, 50/ and is attached to this report as Appendix III. It contains a definition section, a section on what is termed in the proposal "exploitative practices," a section on misrepresentations which contains within it disclosures which would be required of funeral directors if the proposed rule is made final. Following that is a section on price disclosures which is also a mandatory disclosure section. The last two sections of the proposed rule deal with interference with the operations of the market and with retention of documents as an aid to compliance verification.

In the Final Notice 51/ attached hereto as Appendix IV are set out various disputed issues of material fact. Documentary submissions and some of the testimony during the hearings dealt with these issues. The proceeding dealt with many other matters such as legal issues, public policy problems, and some matters perhaps unrelated to the proceeding itself. My findings will not be concerned with legal conclusions and will to a limited extent deal with issues of policy and enforcement. I have re-arranged the order of the questions in the interest of clarity and logic. In some cases, I have combined questions that deal generally with the same subject matter.

47/ Id. at 5624-27.

48/ Id. at 5629-32. This is evidenced by the number of people using the cremation plan, not by the philosophy of the particular memorial society.

49/ Id. and testimony of Rebecca Cohen, Continental Association of Funeral and Memorial Societies, Tr. 14209, 14285-86.

50/ 40 Fed. Reg. 39901.

51/ 71 Fed. Reg. 7787.

II. THE DEVELOPMENT OF AMERICAN FUNERAL PRACTICES. 1/

In early America, the community itself performed the necessary functions associated with proper disposition of the dead. Members of the congregation or of the community would cleanse and lay out the body. A cabinet maker or perhaps even members of the family would prepare a coffin. There might be viewing and a period of prefuneral mourning in the home, then a church service, followed by a burial in the church cemetery.

As American cities grew, particularly during the nineteenth century, tradesmen began taking over some of the functions previously performed by the family, the congregation, the community, and friends. The furniture manufacturer or cabinet maker began to produce coffins for sale. Members of the community who had become expert at "laying out" the dead began to do it for a living and were known as undertakers. Functions previously performed by the church or community began to be performed by tradesmen partly because of the urbanization of the nation and partly perhaps because of the church's unwillingness or inability to perform many of the functions which fell to it naturally in a rural setting.

Among the principal reasons for the growth in funeral directing was the institution of embalming, particularly during the Civil War. During that holocaust, large numbers of soldiers died far from their homes and families. Not unnaturally these families wanted bodies of their relatives brought to their own burial grounds and medical embalmers began performing their functions on the battle fields of the Civil War. The art of embalming became highly developed and widespread during this period.

"At the end of the nineteenth century the states began to pass licensing legislation to regulate the practice of embalming. State boards of health began to be concerned about such things as burial and cremation permits and the filing of death certificates increasingly became required by state law." Such requirements fitted with increased knowledge of criminology and in terms of the police powers and duties of the state became a necessity in the urban setting.

1/ Except where indicated by the first person pronoun, the following discussion of the American funeral is taken largely but not exclusively from Vanderlyn R. Pine, Caretaker of the Dead (New York, N.Y., Irvington Publishers, Inc., 1975), pp. 15-28. Quotes are used where appropriate. His discussion and this one comport generally with other documentary submissions and testimony during the hearings.

Even during this post-Civil War era "funeral services normally were conducted in the deceased's home" or in the church. The undertaker would display the body in the living room or the parlor; thus, the term parlor was transferred ultimately to the area in the funeral home where the body was viewed and the family received friends during the mourning period.

During this period also, "funeral establishments began to appear in urban areas" and to some extent in the smaller towns of the United States. The operation of laying out the dead and embalming could better be performed outside the home; thus, the undertaker began to supply the coffin, livery (carriages), mourning materials, memorial cards, flowers, chairs, robes, pillows, and religious paraphernalia. He also assumed general responsibility for the direction of the funeral services, arranging for music, flowers, and the religious service.

Homes occupied by undertakers began to be converted to use for the general public. Some were built exclusively for the purpose of conducting funerals. This trend, begun in the late nineteenth and early twentieth centuries, has grown.

Today's funeral home has one or several large parlors, a special laboratory in which embalming is carried on, a chapel-like facility in which a religious or nondenominational service may be held, along with garages, parking lots, etc. In addition to providing merchandise and equipment, the funeral director became the general manager of the process of disposition of the dead from the first call in which he is notified that a death has occurred until the family has been returned from the burial site to the home.

There are today approximately twenty-two thousand funeral establishments in the United States and approximately fifty thousand people licensed to practice funeral directing. In a society as mobile as ours, the likelihood of dying within the context of a large family has diminished markedly. "Each year proportionally more people die in institutions instead of their own homes and almost all of the dead are cared for by funeral directors in funeral homes."

While there is considerable heterogeneity in the United States in various aspects of the funeral service itself, particularly among various religious and ethnic groups, the homogeneity of the overall funeral service impressed upon me as we moved across the country to hold the hearings. There were geographical and ethnic variations such as the holding of bodies in northern climates when the ground is too hard to dig a grave, the practice among Jews of not embalming and of having

funerals as rapidly as possible after death, the variations among American Indians as to tribal rites, and the process of holding convivial wakes among certain ethnic groups. 2/

Overriding this, however, are similarities fairly common to virtually all groups in all parts of the United States.

Generally, when death occurs a physician or the police are notified. "The cause of death is medically certified either by a physician, a coroner or medical examiner." At this time, the family, having been notified, chooses a funeral director. Generally the choice is ethnically oriented, but it may reflect social class, status, and geographic convenience.

The dead body is usually removed from the place of death by the funeral director and taken to a funeral home. There, it is customary to embalm or otherwise sanitize through disinfection. Embalming may include dressing the body and restoring it (applying cosmetics) in an attempt to render the deceased lifelike and presentable for viewing.

"The immediate family of the deceased generally makes the necessary arrangements for the funeral. For example, the place, time, and type of funeral service, the place of burial or cremation, and the type of casket, are a few of the choices that must be made. These and other elements of the funeral are interrelated and seem to be based on social class, ethnic, and religious attitudes."

"Viewing the dead body is widespread in the United States and occurs in all social class levels. Usually, it is done during specified hours of the funeral homes; but it may take place at the home of the deceased, or occasionally at the church where the service is to be held. During the viewing, friends and relatives spend time with the bereaved family. Religious and ethnic differences appear to be the basis for varying attitudes about the length of viewing and the attendant mourning customs. American viewing customs constitute a period of visitation for the immediate survivors, their kin, and their friends."

"Most funerals in the United States include a religious service. At times, there may be a service by a fraternal or other organization, and occasionally there is no service. The

2/ See, e.g., testimony of Richard Myers, Chairman, Utah State Board of Funeral Directors and Embalmers. He, as well as many other witnesses, were asked to name regional customs or practices with which a rule as proposed would interfere. Neither he nor any other could do so, Tr. 8289-90.

religious services are held either in the funeral home, the home of the deceased, or the church. With few exceptions, there is little active participation, other than attendance, by family or friends at the funeral. This is a uniquely American custom, and in many parts of the world the family actually carries out these final acts."

"Generally, at the cemetery there are religious committal rights. After the committal it is common for the family to leave the cemetery with the casket fully above ground. After the departure of the mourners, the funeral director supervises the lowering of the casket into the grave. As with other parts of the funeral, there is seldom active group participation at the cemetery except for the reciting of widely known prayers."

"Earth burial is the most common means of disposition chosen for over ninety-two percent of the deaths annually. Cremation is chosen for less than five percent of the deaths annually. Usually, cremations are handled like burials, with the exception that the procession to the crematory is often smaller and occasionally includes just the hearse."

"Funeral expenditure is divided among the funeral director, crematory or cemetery, clergymen, and florists. The largest portion generally goes to the funeral director. His charges usually include the casket selected by the bereaved family, his professional services, use of necessary equipment and facilities, motor equipment, and other related items. This is unlike many societies in which funeral expenditures goes to other sources such as religious or social groups or governmental agencies."

I was made aware, throughout this proceeding, that industry representatives objected to the term "industry" in reference to their occupation. The Supreme Court in recent cases ^{3/} has begun removing certain distinctions between professions and trades. There is in this occupation no underlying systematic body of theory and knowledge sufficient to distinguish it from other trades and set it apart as a profession. The preparation for the trade is relatively unintellectual; it is practical and the necessary knowledge is acquired generally on the job rather than through long training in a professional school.

^{3/} See, e.g., Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 44 U.S.L.W. 4686 (U.S. May 24, 1976).

Dr. Vanderlyn R. Pine classifies funeral directing as a profession because "professions have a higher degree of professional authority. The professional determines what is 'good or bad' for the client; not only must a client accept that judgment, but generally the client is not fully competent to judge the quality of the decision." This description fits very well the medical profession in which the patient has relatively little to say about the professional decision being made by his doctor. He may consult another professional but generally is in no way competent to make a decision on his own. 4/ Continuing, Dr. Pine stated: "This is considerably different from the business notion that 'the customer is always right'. Of course, along with professional authority is the understanding that great care must be taken not to exploit the client." Here Dr. Pine has begun to touch on the basis for the proposed rule and this proceeding. Is the customer always right? Should the customer have the right to make the choices? Is the customer competent to make the choices? If he has not made the choices and rather has had them dictated to him by the "professional," has he been exploited? I have delved into all of these questions in the discussion of the disputed issues and the findings of fact. 5/

According to Dr. Pine, "Because professionalism is highly respected in the American society, the word 'profession' tends to be used as a symbol by occupations seeking to improve or enhance the lay public's conception of that occupation, and funeral directing is no exception. To some extent, this appears to be because the funeral director hopes to overcome the stigma of 'doing death work'. Even though death is an every day occurrence, in American society it long has been a taboo subject. Most people appear to be unconcerned about death and do, indeed, have little experience with its impact. This is contrasted with funeral directors, who are deeply concerned about death, deal with it daily, and for whom it is the source of income."

I believe that the attempt to denominate funeral directing a profession is well described by Dr. Pine. However, I further believe that funeral directing fails to fall within the parameters generally describing other professions. While I attempted to refrain from the use of the term "industry" out of a sense of politeness to those who objected to it, I do not consider "industry"

4/ Testimony of Dr. Edgar Jackson, pastoral psychologist, Tr. 5333.

5/ Dr. Pine also pointed out, "The efforts to make funeral directing a profession have been seen as a form of collective status-seeking and mobility and an attempt to elevate the funeral director in the eyes of the public." His cite to this is Le Roy Bowman, The American Funeral, (Washington, D.C., Public Affairs Press, 1959), p. 77-78, note 1 supra, at p. 147 and p. 154.

to be a perjorative term and believe that it is as honorable as the word "profession." I agree with George Bernard Shaw who said that "All professions are conspiracies against the laity." 6/

6/ "The Doctor's Dilemma," Act I.

III. BASIC ISSUES - CIRCUMSTANCES OF FUNERAL TRANSACTION,
CONSUMER KNOWLEDGE OF FUNERALS AND THE QUALITY OF
STATE REGULATION

Issue No. 23

"Circumstances of the funeral transaction. Does the funeral transaction have distinctive characteristics (e.g., effects of bereavement, infrequency of purchase by the buyer, time pressure and the like) which serve to place the consumer in a disadvantaged bargaining position relative to the funeral director and leave the consumer especially vulnerable to unfair and deceptive practices?"

In its statement of reason for the proposed rule, the Commission noted, "The funeral transaction has distinctive characteristics which continue to place consumers in a peculiarly vulnerable position." 1/ This issue relates to the above statement.

In some respects the funeral transaction is different from most other consumer transactions. Differences serve to limit this transaction and distinguish it from others. What then are these distinguishing characteristics?

The funeral transaction is handled only infrequently by lay persons. One funeral arrangement in 15 years would be close to the average for most individuals. 2/ Unlike the purchase of an automobile which occurs on the average every three years or so, this is a much rarer incident. Thus, its unfamiliarity to the consumer does distinguish it from most other transactions.

Time pressures also are evident in the arrangements for a funeral. Many funeral directors testified to the importance of making arrangements quickly if, for instance, embalming is to be done properly. The amount of time available differs with conditions such as temperature and state of the corpse, but all stated that the earlier the opportunity to embalm the better job they could do. 3/

1/ 40 Fed. Reg. 39901.

2/ See testimony of Congressman Ralph H. Metcalfe, U.S. House of Rep., Tr. 2521. Although he is not an expert, his guess seems reasonable.

3/ Clarence G. Strub and L. G. Frederick, The Principles and Practice of Embalming (Dallas: Lawrence G. Frederick, 1961), p. 501.

The effects of bereavement on the consumer are particularly important to a full response to this question. In what emotional state is the survivor and does that state make the survivor vulnerable to unfair and/or deceptive practices?

Most consumer advocates and staff witnesses indicated that one of the principle characteristics of grief is disorientation. 4/ This disorientation should be most evident to anyone who has had a loss or has observed another in a grief situation. The principle description of a person in grief is disorientation. "When we get a bereaved family, sometimes they are too bereaved to discuss anything." 5/ Some witnesses pointed out that a disoriented person is neither willing nor able to comparison shop. 6/ Comparison shopping was discussed, 7/ but this certainly cannot be accomplished by someone who is disoriented. Further, witnesses have observed a reluctance on the part of the bereaved to move the body from one funeral home to another where the price is lower. 8/ This is considered undignified and inappropriate. 9/

Many industry witnesses pointed out, however, that the bereaved do not attempt to make funeral arrangements alone and these witnesses indicated that because of the presence of other people the effect of bereavement as it relates to the business aspect of this transaction is minimal.

4/ See, e.g., testimony of Dr. Robert Nelson West, clergyman, Tr. 200-01 and testimony of Dr. Charles W. Wahl, psychiatrist, Tr. 8466-68.

5/ Rabbi Sidney Applbaum, Tr. 1056.

6/ Testimony of Dr. Joseph Marcelli, educator and member, Statutory New York State Funeral Directing Advisory Board, Tr. 580. Testimony of Raymond Paavo Arvio, professor and author, Tr. 1143-44 and testimony of Dr. Samuel C. Klagsburn, psychiatrist, Tr. 1355.

7/ See, e.g., testimony of Robert W. Ninker, executive director, Illinois Funeral Directors Association, Tr. 2699.

8/ See, e.g., testimony of the Rev. Mr. Frederick A. Fenton, Tr. 6419-20; and written submission of FTC Staff Interview Report with R. DiPippo, Association for Consumer Protection, Record III-F-17.

9/ Id.

Testimony indicates that in funeral arrangements for black people, frequently the ones who make the arrangements are other family members of the consumer who might be similarly though not as intensely bereaved. 10/ Others testified that friends of the deceased sometimes make the arrangements. 11/ This is also sometimes true of funeral arrangements for deceased white people. 12/ Are these persons then at a disadvantage? Certainly the emotional state of the parties will diminish as distance from the deceased increases, but an element of grief, as well as a proper showing of "respect," distinguishes this transaction from other marketplace activities. 13/

Furthermore, more frequently than not, the principle bereaved party or parties, that is, the spouse and children, are involved in the selection and arrangement process. This being the case, even the presence of other people will not serve to protect the survivors from unfair and deceptive practices. One is reluctant to create a hassle while a relative or close friend is disturbed. Such a disagreement can only increase the disturbance and would serve as an inhibiting factor to anyone who might wish to object to suggestions by the funeral director.

Many survivors make arrangements alone. This is a mobile society in which the nuclear family is prevalent. 14/ Frequently, particularly among the elderly, the survivor is alone and must make decisions which have profound economic impact for the survivor. 15/

10/ See, e.g., testimony of James Couch, funeral director and member, Illinois State Board of Examiners, Tr. 2927-28 and testimony of A. R. Leak, Sr., funeral director, Tr. 3874.

11/ Couch, id.

12/ See John H. Kerr, Jr., funeral director and secretary-treasurer, The Funeral Directors Association of Kentucky, Tr. 3028.

13/ See, e.g., Fenton, note 8 supra, at 6419-20 and Benoliel, note 19 infra, at 5295-97.

14/ Howard C. Raether, Successful Funeral Service Practice, (Englewood Cliffs, N.J., Prentice-Hall, Inc., 1971), pp. 129, 231.

15/ See, e.g., written submission of National Retired Teachers Association/American Association of Retired Persons, Record II-C-1516, p. 2.

Another emotion that also operates in this area is the feeling of guilt and the necessity of expiation of such guilt. A number of persons commented upon this characteristic of the bereaved in the funeral transaction. 16/ Observation of the situation as described leads one to the conclusion that elaborate funerals serve to ameliorate feelings of guilt which a survivor might have in regard to his/her relationship with the deceased during life.

A number of persons testified that funeral directors made statements to the effect that this is the last gift one can give or the last loving act one can perform for the deceased. 17/ The fact that the deceased cannot enjoy or appreciate the gift is usually ignored. But such a statement itself plays upon the grief and guilt of a consumer and leads to a purchase of higher priced goods and services than would have been chosen otherwise. 18/

A number of funeral industry members testified that there are other transactions which are similar in which there is no regulation proposed. They pointed to the employment of a doctor

16/ See, e.g., testimony of Dr. John G. Wallace, psychiatrist, Tr. 5505, testimony of Dr. Milton Blum, director, Consumer Affairs Institute, Miami, Florida, Tr. 11561-62 and Research Report of Dr. Blum, HX-Washington II, testimony of Dr. Myra Bluebond-Langer, professor, Tr. 2380. Vanderlyn R. Pine, Caretaker of the Dead, (N.Y., N.Y. Irvington Publishers, Inc. 1975), p. 148.

17/ See, e.g., written submission of Mrs. Roy H. Murray (on behalf of herself and her husband), consumers and clergyman, Record II-C-26. For a further discussion of the misuse of these types of expressions, see testimony of Michael Hirsh and Peter Hawley, WTTW-TV, Tr. 2762-64.

18/ See Wahl, note 4 supra, at 8467-68, who states "most persons, after the experiencing of a loss, go through definite stages of bereavement which have come to be well understood and there is a numbing, an incapacity to use one's higher mental functions in the solution of one's problems; an over-reliance upon suggestions by others; a wish and a need for comfort, hope, solace, and understanding. Consequently the ability to make objective plans during that period without some measure of loving or kindly help is greatly abridged in the average person's circumstances."

"It is at these times, too, because of mixed and conflictual feelings that persons have about their relationship to the decedent or their own concern about death or dying that they are especially vulnerable to misrepresentation or to other circumstances that often prevent them from having the kind of funeral service or practices that they might otherwise have elected"

or choosing of a hospital. 19/ While price information is generally not available as to these services, one must ask if it should be available and if this unavailability in any way diminishes the basis and purpose of this proposed rule. I believe not. Industry testimony only pointed to other areas in which consumers are inadequately informed and does not by such testimony diminish the need for information and protection in these situations.

The state of mind of survivors was described by an expert in the field as follows:

The majority of experts in the field would, I believe, say that the survivor's psychological state of mind during the early post-death period is one of shock and disbelief interspersed with bursts of unexpected feelings, including those of sadness, guilt, and anger. This period is one in which loss (whether anticipated or not) suddenly becomes reality, and it is a usual experience for the surviving individual to be flooded with all kinds of feelings and unexpected reactions.

On the matter of grief, it is important to distinguish between internal reactions of grief not observable to other people and external expressions of grief giving evidence to others that a person is mourning. There is, I believe, a tendency for people in general to think of grief as being present only when individuals demonstrate strong emotional reactions such as public weeping or loud crying and wailing. The reality is that grief is an internally experienced response to the loss of a significant relationship, but it may or may not be expressed in ways that other people can see and identify. Bereavement behavior is a socially learned pattern of conduct in response to loss through death and is rooted in the fundamental values and beliefs of a society including its religious traditions and customs. Greatly influenced by Northern European traditions, our society is one in which people in general attach high value to the maintenance of self-control over the expression of strong feelings. People who have been socialized in this way do not present the appearance of grief-stricken

19/ See, e.g., testimony of Vincent E. Polli, secretary-treasurer, Vermont Funeral Directors Assn., Tr. 2177 and Statement of Clifton W. Anderson, executive director, Washington State Funeral Directors Assn., Record 215-46-1-29-13, #2, p. 2.

person according to the stereotyped image. I make this point because a fair number of persons who are acutely caught up in the pangs of grief may not be recognized as such by ordinary, untrained observers.

The strong emotional reactions associated with the early stages of grief, i.e., the immediate post-death period, also often function in ways that blur or blunt the environment as well as the thinking process itself. Not uncommonly, for example, the newly bereaved person may not appear to hear comments that are made directly to him. Alternately, he may remember and report them quite differently than they were stated to him by another person. My point here is that emotional distress is part of a total body response to acute loss, and these reactions impinge on the individual's cognitive processes in ways that inhibit the ability to think clearly and concisely. Some people will even experience great difficulty in making decisions at this time simply because they are caught up in strong and ambivalent emotions.

The interaction between emotional responses and usual thinking processes observed during the early post-death period is an important one for it increases the tendency for people to depend on other people for helping with decisions. We know from the studies of Glick, Weiss, and Parkes that the bereaved person during the immediate post-death period often looked to other people for direction and guidance in making decisions about the funeral transaction. Widows in particular were prone to look to the men in their immediate families for assistance in this matter as well as to the funeral director from whom the purchase was made. 20/

In regard to the condition of the bereaved as it relates to the paucity of complaints about the arrangements and the cost of funerals, I believe the emotional condition of the bereaved is such that it renders unlikely a clear memory of what transpired and furthermore, subsequent emotional developments as part of

20/ Testimony of Dr. Jeanne Benoliel, professional nurse, Tr. 5295-97.

the grieving process also inhibit an individual who might in other circumstances file a formal complaint. ^{21/} A number of therapists testified that there is sufficient desire on the part of the survivors to put this experience behind them so that a reviving of the despair felt at death (which might result from the filing of a complaint) is looked upon as too costly for any possible benefit it might derive. ^{22/}

Summary: The funeral transaction has several distinctive characteristics which serve to place the consumer in a disadvantaged bargaining position relative to the funeral director and leave the consumer especially vulnerable to unfair and deceptive practices. These characteristics are:

1. The disorienting effect of bereavement.
2. The feeling of guilt or other emotional consequences of death.
3. The minimum time available to make arrangements.

* * *

The finding gives rise to a paradox. If the consumer is disoriented and he or she is the one who is making the arrangement or the decisions relative thereto, then will a series of written disclosures be meaningful? How much written (or for that matter, oral) information can be absorbed, given the short time available and the necessity to deal with emotional consequences of death such as guilt.

On the other hand, if the arrangements and decisions are being made by someone not in deep grief, a friend of the family or a distant relative, are extraordinary measures, such as some of those contemplated by this proposed rule, justified?

In dealing with this problem one must keep in mind that most consumers are not knowledgeable about funeral laws, alternatives and prices. (See discussion of Issue No. 24 immediately following.) This lack of knowledge would apply equally to the grief-stricken as well as the more objective friend of the family. To the latter written disclosures could be most helpful.

The information disclosed could also serve an educational function to the extent it is read by the recipient. Although most people arrange few funerals in a lifetime, the information so distributed could be of some later use, just as Truth in Lending disclosures sometimes make a consumer aware of annual percentage rates and serve as an aid in later transactions rather than in the one giving rise to the disclosure.

^{21/} See, e.g., Wahl, note 4 supra, at 8511-12 and Wallace, note 16 supra, at 5526-27.

^{22/} See, e.g., Klagsbrun, note 6 supra, at 1357-58 and Wahl, id.

An additional benefit could accrue from disclosures: --in retrospect consumers could determine whether they had been fairly treated. This would help in subsequent decision making as to which funeral home and what type disposition to use if the occasion next arises.

The disclosures will thus be an aid to those charged with regulating funeral home compliance with state law. With documents in hand, a consumer will be able to point out where a violation may have occurred.

For the reputable funeral home this will be a protection also. There will be no accusation of non-disclosure, for the evidence will be at hand that no violation had taken place.

Issue No. 24

"Consumer knowledge of relevant considerations. Have consumers purchased funeral services and products with incomplete or inaccurate prior knowledge of: legal requirements and prohibitions; available alternatives respecting disposition of the dead and commemorative services; funeral homes' offerings and prices; and other material information?"

Virtually all consumer witnesses indicated that consumers have very little if any knowledge of legal requirements and prohibitions. 23/ Only infrequently does a consumer handle a funeral transaction. 24/ This experience is insufficient to development of any "street wisdom" on the part of consumers. A number of witnesses testified as to the degree of consumer ignorance of funeral requirements. 25/ Several witnesses

23/ See, e.g., testimony of Staunton O. Flanders, consumer and Temple Burial Group member, Tr. 4649-51 and testimony of Malcolm Siegel, consumer, Tr. 2961-62.

24/ See, e.g., Raether, Note 14 supra, at p. 127.

25/ Testimony of Beatrice Heveran, Assistant Chief, Consumer Fraud and Protection Division, Office of the Attorney General, State of Illinois, Tr. 4446-47. Testimony of Howard R. Kaufman, Chief, Consumer Fraud and Protection Division, Office of the Attorney General, State of Illinois, Tr. 4476. Testimony of Professor Byron D. Sher, Professor of Law, Tr. 7525-26. Testimony of Dr. Peter W. Sperlich, Professor and Consultant to California Citizens Action Group, Tr. 7411-13. Also see survey by Dr. Sperlich. HX-Los Angeles 17.

testified as to the ignorance of elderly 26/ concerning funerals in general and legal requirements in particular. Several other witnesses, including the president of a large industry trade association, testified as to the degree of ignorance of consumers in general. 27/

In regard to the availability of alternative methods of disposition most of the same witnesses testified that there is relatively little knowledge about such alternative methods. 28/ To the extent that knowledge today is based on advertising, the findings in this document in regard to Issues 22 and 26 are relevant. There is virtually no advertising about the availability of alternatives and relatively little consumer knowledge thereof.

In regard to funeral home offerings and prices as well as other material information, consumer ignorance is typical. 29/ The lack of advertising and the unavailability of prices and price information over the telephone serve to keep the consumer in ignorance. Even when a consumer goes into the funeral home, he still cannot determine just what the alternatives are since some of the offerings, particularly the low cost casket, may not be on display. 30/ Some funeral directors testified that should a consumer ask for a low cost or, as many industry members call it, a "welfare" casket, he/she would be told about its availability and its cost: nevertheless, time and again, consumers and consumer group representatives testified as to

26/ Testimony of Louis MacDonald, American Association of Retired Persons and The National Retired Teachers' Association, Tr. 2637-39. Testimony of William R. Hutton, Executive Director, National Council of Senior Citizens, Tr. 13145.

27/ Testimony of Fred Sweeton, East Tennessee Memorial Society, Tr. 9579. Testimony of Jane Flannagan, Pittsburgh Memorial Society, Tr. 9283-85. Testimony of Lawrence Jones, president, National Funeral Directors and Morticians Association, Tr. 9814-15.

28/ See, e.g., hearing exhibit of Rebecca Cohen, Continental Association of Funeral and Memorial Societies. HX-Washington 39, pp. 33-34 (Examples of consumer ignorance of alternative methods of disposition).

29/ See testimony of Dr. Hans B. Thorelli, professor, Tr. 10992-95. See also discussion of Issues 16, 21, and 26.

30/ See discussion of Issue 10(a).

their ignorance 31/ and the other findings in regard to information on alternatives and prices support the finding that such ignorance is widespread.

What results in many instances contributes to a situation termed by economists monopolistic competition. 32/ The consumer surrenders the body of the deceased to a funeral home without knowing all the relevant facts about costs, products and services. 33/ The differences may be in the name of the home (brand identification) without significant price competition.

The industry representatives pointed to a number of efforts on their part to disseminate information about legal requirements, alternative methods of disposition, and funeral home offerings. 34/ They are particularly proud of an array of pamphlets which are available in a funeral home which describe many of these points although remarkably they have almost no information in regard to price. 35/ While these pamphlets are available passively, they are not available at a time or a place when a consumer can use such information. What is that time and place one might ask? When making funeral arrangements is one time when knowledge and information about legal requirements, alternative methods and prices would be extremely helpful. Reluctance to give specific information in written form was marked, based on testimony by funeral directors. 36/ Many felt it would interfere with their

31/ See, e.g., written submission of Congressman Floyd Fithian, containing letter of Edgar Wirt, Greater Lafayette Memorial Society, Record II-C-1830 and Cohen, note 28 supra, at 33-34.

32/ Testimony of Professor Steven Shavell, economist, Tr. 11871-73.

33/ Id.

34/ See, e.g., HX-Chicago 1 and testimony of Robert W. Ninker, executive director, Illinois Funeral Directors Association, Tr. 2674-78 and hearing exhibit of C. Stewart Hausmann, executive director, New Jersey State Funeral Directors Association, HX-Hausmann 1.

35/ Id.

36/ See, e.g., testimony of Burton L. Hirsch, funeral director and vice chairman, Pennsylvania State Board of Funeral Directors, Tr. 12499-12502, 12509-14 and testimony of Henry M. Gutterman, funeral director, Tr. 1931-32.

relationship with the survivors if certain information had to be written and most preferred to give information orally. 37/ Written information as contemplated by the proposed rule would be most helpful in the at-need situation. 38/

Other methods are also used by funeral directors to disseminate nonprice information about funeral services. Such information, based on my viewing of that which was available in this record, is generally biased toward the "traditional" funeral. 39/ Discussions of alternatives is limited or non-existent, while the benefits of the "traditional" funeral are stressed.

Information is frequently available in lectures to schools and service clubs. 40/ This is a commendable but an inefficient means of delivering information to the portion of the public needing it. It is insufficient information since it is biased and omits price information.

As eminent an expert as Dr. Edgar Jackson, a well-known pastoral psychologist, writer and lecturer on the subject of this proceeding, was asked "....I would ask you if you wouldn't believe that people do know what the law is with respect to funeral practices in the various states?" The witness: "There are probably many who don't." 41/ Dr. Robert Fulton of the Department of Sociology of the University of Minnesota was asked: "Well, would you say most people are knowledgeable?" Answer, "No, I wouldn't say most people." 42/

37/ Id.

38/ At-need refers to the time at which funerals are arranged, in this case immediately after death. It is distinguished from pre-need in which the party arranges for his/her own funeral. The latter can be at a fixed or at a flexible price.

39/ See, e.g., hearing exhibit containing pamphlets and testimony of Noranel Nely, Florida Consumer Information Bureau, Florida Funeral Directors Association, Tr. 10023-25 and HX-Atlanta 17, and Ninker, note 34 supra, at HX-Chicago 1.

40/ See, e.g., testimony of Arnold Hornberg, funeral director and President, Funeral Directors Services Association of Greater Chicago, Tr. 4770-71 and testimony of C. Stewart Hausmann, executive director, New Jersey Funeral Directors Association, Tr. 505-06.

41/ Tr. 5355.

42/ Tr. 7007.

Summary: Consumers have purchased funeral services and products with little knowledge of legal requirements and prohibitions, available alternatives respecting disposition of the dead, and funeral homes' offerings and prices. This consumer ignorance is pervasive.

Issue No. 27

"State regulation of unfair and deceptive funeral practices. Have state regulations or enforcement actions adequately regulated funeral practices such as those described in Issues 1-22 above?"

and

Issue No. 21

"In what way, if any, have funeral service industry members or other individuals or entities restrained, harassed or interfered with the marketing (including advertising) and sales of funeral merchandise and services and alternative methods of disposition, including pre-need arrangements, cremation services and contracts with memorial societies?"

The question of the adequacy of state regulations and enforcement action is central to the basis and purpose of the proposed rule, for if in fact states are protecting their respective citizens, then an additional layer of regulations should not be necessary. There are costs to all regulations and this must be borne in mind since generally such costs are passed on to the public in one form or another. We must take care not to "protect (them) out of all (they) own." 43/

The Issue refers in its body to Issues 1-22 in the Final Notice 44/ in regard to the proposed rule. To the extent that the practices such as failure to release bodies 45/ and requiring a casket for cremation 46/ exist at all one might

43/ Rodgers and Hammerstein, "The King and I."

44/ 41 Fed. Reg. 7787.

45/ See discussion of Issue 3.

46/ See discussion of Issues 4, 5.

conclude that a federal regulation with its additional layer of penalties would be a healthy deterrent to those who would consider violating these generally accepted principles of good conduct, principles which are sanctioned by law and regulations. 47/

To the extent that other practices are found to be prevalent practices, such as embalming without express permission, then it follows that Issue 27 must be answered in the negative.

Nevertheless, I believe it would be helpful to discuss the considerable amount of testimony elicited during this proceeding in regard to the quality and quantity of state regulation.

State regulation of the funeral industry arose out of the need for policing of various sanitary and health requirements. 48/ Such requirements, while not uniform, are of a pattern and I have no reason to believe they are not enforced throughout the nation. Some of these, such as the requirement that each branch of a funeral establishment have an embalming room, are anticompetitive in a metropolitan area. There is no reason central embalming facilities could not be used to the benefit of consumers. The concept of the full service facility is outmoded and today has the effect of restricting entry into this market. 49/

Typical of the makeup of virtually all state regulatory boards is one overriding characteristic: these boards consist of funeral directors, active or retired, though generally the former. 50/ Only rarely is a consumer included as a member of

47/ See testimony of David C. Murchison, counsel to NSM, Tr. 12378-85.

48/ See written submission of John J. Curran, president, New York Funeral Directors Association, Record II-A-185, p. 2.

49/ See Dr. Roger D. Blackwell, "Price Levels in the Funeral Industry," Quarterly Review of Economics and Business, vol. 7, winter '76, No. 4, p. 80, Record VI-2.

50/ See, e.g., Final corrected copy, Analysis of State Statutes, Rules, and Regulations Affecting Funeral Practices Industry, HX-Atlanta 7, pp. 2, 3, 12-14 and testimony of Kathleen F. O'Reilly, Consumer Federation of America, Tr. 9209-12.

a state board. 51/ Recently the Governor of California appointed a well-known consumer representative to the regulatory board. His entry into this area was viewed with something less than glee by industry sources. 52/

As examples of the "revolving door," Carlton J. Lorberg, Chairman of the Missouri State Board of Embalmers and Funeral Directors was formerly a director of his state funeral director's association. 53/ Richard Myers, Chairman of the Utah State Funeral Directors and Embalmers Examining Board has been an officer or director of his state association for 15-17 years as well as an officer of NFDA. 54/ F. James Wylie, Jr. in 1971 was appointed to the Florida state regulatory board and was reappointed in 1975. In 1974-75 he was President of the Florida Funeral Directors Association. He resigned from the state board on October 1, 1975 to become Executive Secretary of the Florida Funeral Directors Association. 55/ None of these practitioners perceived any conflict of interest. Indeed, this is the standard modus operandi in virtually every state.

The funeral industry membership maintains close relationships with the regulatory boards in the states. The General Counsel for the National Funeral Directors Association, Thomas Clark, is also Legal Counsel for the Conference of Funeral Service Examining Boards. 56/ The Conference of Funeral Service Examining Boards is the trade association representing all of the state regulatory boards.

51/ Id. and see testimony of Rep. H. Lynn Jondall, Michigan House of Representatives and Minister, United Church of Christ, Tr. 4079-80.

52/ See, e.g., Charles Kates, editorial, American Funeral Director, December 1976, p. 30.

53/ Tr. 4677.

54/ Tr. 8336-37.

55/ Tr. 9705. In 1975 the Florida legislature passed a statute prohibiting membership on both boards at the same time.

56/ See, e.g., testimony of H. Don Devol, funeral director and member, Licensing Board for the Funeral Directors and Embalmers of the District of Columbia, Tr. 14138-39 and written submission of letter from Thomas H. Clark, legal counsel, to state licensing authorities, Members of the Conference of Funeral Service Examining Boards, dated Oct. 31, 1975, Record II-C-1519. This reference to Mr. Clark's functions is not intended to imply nor should anyone infer that Mr. Clark behaved in any manner unethically. In this proceeding, he represented only the National Funeral Directors Association.

California, which is reputed to be an example of how well a state can regulate for the benefit of consumers, is a particularly interesting case in point. The testimony to be given by various officials of the California State Board was forwarded to the Commission in envelopes of the counsel of a trade association. 57/ While this is not in itself in any way illegal, it does point to the closeness of the relationship.

A member of the board regulating the funeral industry in one state could not, under questioning, distinguish between his role as state official and his role as funeral director. 58/ This confusion of the public and the private interest is typical of the quality of state regulation. It is related to the previous observation in regard to the makeup of these boards.

Since the boards are made up largely of practitioners, a great deal was said about the merits of peer review throughout this proceeding. 59/ Consumer advocates opposed such peer review. 60/ while funeral industry members were in favor of it. 61/ While it would be relatively difficult to regulate any industry without the advice of practitioners, it is asking for a largeness of view and spirit not generally prevalent to hope

57/ See testimony of Robert G. Webster, president, California State Board of Funeral Directors and Embalmers, Tr. 6545-56.

58/ See testimony of Robert D. Beach, Secretary and treasurer of the Indiana State Board of Embalmers and Funeral Directors, Tr. 5026-32.

59/ See, e.g., O'Reilly, note 50 supra, at 9209, testimony of Sanford Waxer, Consumer Federation of America, Consumer Alliance of Michigan, Greater Detroit Memorial Society, Tr. 4233-34, testimony of Richard G. Fathy, consumer representative. Unit, Dept. of Consumer Affairs, State of California, Tr. 8113-14, 8122, testimony of Bruce M. Hotchkiss, funeral director, Tr. 8529-30, and statement of Earl Quattlebaum, funeral director, Record 215-46-1-29-20, #78, pp. 7-8.

60/ See, e.g., O'Reilly, id. and Waxer, id.

61/ See, e.g., Hotchkiss, note 59 supra, at 8529-30 and Quattlebaum, note 59 supra, at 7-8.

that practitioners would act in the public interest rather than in their private interest on a long-term basis. 62/ The states would be well advised to have a minority of funeral director members with the balance being public members of one sort or another. 63/ Were this to have been the general practice throughout the nation, I do not believe this proposed rule would have seemed necessary to have issued from the Federal Trade Commission. 64/

Most state boards have functioned as complaint resolution entities. While this has some virtue for the complaining party, the simple resolution of complaints may serve to obfuscate real problems and ignore others. The obfuscation takes place when the party complaining is satisfied, withdraws the complaint, and nothing else is done. 65/

A particularly egregious example of this occurred in California when a party, a child of the deceased, complained to the state board and the complaint was referred to the affected industry member for comment. It appears pressure was placed on the widow in the form of a threat that certain veterans' burial benefits previously granted might be withdrawn. The widow then induced the complaining party to withdraw the complaint. 66/

Since California is reputed to be one of the best states in regard to consumer protection regulations of the funeral service industry, this example, while it may not be typical of the practice in California, is typical of those cited by consumer advocates as well as some consumers who testified in this proceeding.

62/ For a clearer discussion of conflicts, see or hear the discussion by Sir William Schwenk Gilbert's chancellor in "Iolanthe".

63/ This is gratuitous advice and obvious as well. Nevertheless, the pervasiveness of domination of state boards by funeral directors makes this unavoidable.

64/ There is no record basis for this speculation, but, based on my observation of citizen members of state boards, I believe they would have served the public interest better than those presently sitting on these boards.

65/ See, e.g., rebuttal submission of FTC staff containing written submission of Mrs. William Hutt, consumer, Record X-1-128.

66/ Testimony of David Buck, executive secretary, California State Board of Funeral Directors and Embalmers, Tr. 8412-16.

Along this same line is the view of the attorney general of one state who testified he is against the rule because he had received no complaints in regard to certain practices. ^{67/} The mail bag approach to consumer protection is far from the only measure, and perhaps not the best, of the efficacy of laws and their enforcement.

That attorney general testified that in his state violation of statutes or of the rules of the State Board of Embalmers and Funeral Directors may result in disciplinary action by means of suspension or revocation of a license where such action is warranted. This power vested in regulatory boards in most states is awesome. It is much more compelling than the Commission's power to issue an order to desist or for that matter to levy heavy fines. In the funeral industry, the license is all important.

In his state, one of the statutory actions which may result in license revocation is unprofessional conduct. The state board, for instance, could decide that price advertising is unprofessional; then a price advertiser could have his license challenged and possibly revoked thus putting him out of business. Interestingly, the attorney general could recall no disciplinary actions of funeral directors ever by his state.

As to the adequacy of regulation, he seemed to rely heavily on a letter he received from the Better Business Bureau in which it was pointed out that within the last 3 years that office had received only two funeral related complaints. During that period almost 30,000 deaths had occurred in that area. In the Office of the Governor of the state, there is an Office of Consumer Protection established in 1972. Between 1972 and 1975, that office received a total of 14,429 complaints of which only five were filed against funeral directors. He testified that during the period of 1970 to 1975, the State Board of Embalmers and Funeral Directors had received a total of ten complaints. Except for referrals, his office had received no complaints on funeral service industry members in his state and he returned to this theme constantly during cross-examination. He indicated his office had not undertaken any investigations on its own nor was he aware of any other investigations of funeral service industry practices. Thus he must rely on consumer perceptions of deception, unfairness, and abuses. It is readily apparent there

^{67/} Testimony of the Honorable William J. Guste, Jr., attorney general, State of Louisiana, Tr. 8841-42.

are many areas of consumer protection in which the consumer is totally unaware of practices which may be deceptive or unfair. The attorney general, joined by many other state regulators, has adopted the mailbag view. It has been, in fact, the primary defense of the funeral service industry throughout this proceeding. If complaints are minimal and these are resolved satisfactorily, then all is well.

The situation in North Carolina is much the same. There the attorney general perceives himself as an ardent consumer protectionist. He pointed out that he can and does enforce laws against unfair trade practices. For instance, in regard to the automobile industry, he has received two complaints a day. 68/ In funerals he receives few with most complaints coming from businessmen rather than consumers. 69/ Nor has he had occasion to send out investigators to determine what the practices are and whether the funeral directors are in compliance with state law. "We don't inspect them. There is an investigator assigned to the Mortuary Science Board. We don't inspect facilities." "We investigate violations of law, and I have not had an occasion to yet get to that stage where we will send a person out. If that's necessary, they'll be out there." 70/

The state board is selected largely by election by licensees, 71/ with two other members, one ex-officio and one appointed by the governor. 72/

The other side of such insufficient regulation which should be cited here are the examples of the States of New Jersey and Missouri. In New Jersey, the then regulator charged with this responsibility, the Honorable Millicent Fenwick, upon taking office perceived problems with the regulation of the funeral service industry despite the fact that she had received virtually no complaints. 73/ She stated that when she became Director of the Division of Consumer Affairs in the Office of the Attorney General in New Jersey, she began to get "about two, sometimes five complaints a week regarding funerals from consumers. Now,

68/ Honorable Rufus Edmisten, Attorney General of North Carolina, Tr. 10075.

69/ Ibid. Tr. 10075-76.

70/ Ibid. Tr. 10120.

71/ Ibid. Tr. 10077.

72/ Ibid. Tr. 10139.

73/ Richard Myers, Chairman, Utah State Board of Funeral Directors and Embalmers, also testified as to numerous changes in state law and regulation without the incentive of consumer complaints, Tr. 8295-96.

these were probably the smallest of a number of categories of complaints that come into the Consumer Director's office." "I proceeded on the basis of the complaints I received, and working with the lawyers available to me from the Attorney General's office. I had a staff of 16, and we worked with the Board of Mortuary Sciences to devise a set of rules for the funeral industry." 74/ She and her staff in a cooperative effort with funeral service industry members revamped the laws and regulations of New Jersey and implemented one of the first itemization disclosure laws and other protections for the benefit of the consumers in that state.

Similarly, in the State of Missouri, the Honorable Harvey M. Tettlebaum also perceived problems or had them brought to his attention by various parties. Rather than wait for a body of complaints to accumulate, Mr. Tettlebaum and his forward looking regulatory board devised new legislation and regulations to encompass a number of areas previously untouched and to enact protection for the benefit of consumers in the state. 75/ Rarely has this been accomplished in other states.

Were Mr. Tettlebaum's experience general, I would find adequacy of state regulation; however, that is not the conclusion to be drawn from the evidence presented in this proceeding. In fact, funeral service industry members have used the state board to restrain, harass, or interfere with the marketing and sales of funeral merchandise and services as well as alternative methods of disposition including pre-need arrangements, cremation services, and contracts with memorial societies. The restraint, harassment, and interference takes a number of different forms.

In Tennessee, the state board attempted to stop a funeral service industry member who owned a cemetery from building a funeral home on that property. As a result of litigation the

74/ Testimony of the Honorable Millicent Fenwick, congresswoman from New Jersey and former director of the Division of Consumer Affairs, Office of the Attorney General of New Jersey, Tr. 10655-56.

75/ Testimony of the Honorable Harvey M. Tettlebaum, Chief Counsel, Consumer Protection Division, Office of the Attorney General, State of Missouri, Tr. 4720-30.

funeral home had to be separated from the cemetery. 76/ That one stop dying 77/ is more economical than multi-stop is self-evident. This litigation should serve to deter anyone else in the state who should be of a mind to devise methods of bringing this service to the public at lower cost. 78/

In Florida, the state board and state agencies were used to harass and restrain a marketer of immediate disposition services similar to those that are flourishing in California. 79/ Immediate disposition services are generally crematories which accept bodies in containers, cremate them without ceremony, viewing or services, and return the cremains(sic!) upon completion of the process. While immediate disposition may be available in a number of places, exclusive disposition services are presently in operation in California. A group of business people attempted to establish such a service in the State of Florida. That Florida has a large population of older people similar to the demography of California made the

76/ Frank Long, "The Oak Ridge-Knoxville Way of Death," The Oak Ridger, Knoxville, Tennessee, August 1973, Record III-J-13. In addition, Robert T. Shackelford, Jr., a funeral director from Tennessee, referred in his testimony to the "Greenwood Case" in which a cemetery was sued by the State Board of Embalmers for selling a crypt or a vault without obtaining a license as a funeral director. Mr. Shackelford indicated that the Appeals Court has ruled that "it is legal for that cemetery to sell what they were selling." This is another example of state regulation interfering with the marketing, in this case pre-need of a vault or grave liner, Tr. 9081.

77/ I use the term "one stop dying" to refer to combination mortuary, cemetery establishments. The savings which would accrue would result from better utilization of human resources; that is, workers could be employed either in the funeral home or in the cemetery operation with proper scheduling to achieve greater efficiency. Additionally, there is considerable time saved in avoiding the necessity for a funeral cortege.

78/ Michigan law forbids such combinations. See testimony of Rep. H. Lynn Jondall, Michigan House of Representatives, Tr. 4086.

79/ Testimony of Charles Jordan, president, National Cremation Society and Michael Hastings, attorney, Tr. 9937-73.

marketing of this low cost service feasible. The litigation, which apparently resulted from a perceived threat to marketers of "traditional" funeral services, interferes with the marketing of alternative methods of disposition. 80/

Memorial societies which are cooperative groups of people who have joined together at a minimal cost, usually five to fifteen dollars for a life membership, to attempt to secure low cost funeral services for their members, have been harassed, intimidated, and reviled by industry members. 81/

While the society in Seattle has had a long standing and healthy relationship with a funeral director, 82/ a number of other witnesses testified to the difficulty a memorial society has in securing a cooperating funeral director. 83/ It is understood in the American competitive enterprise system no one should be compelled to contract with another against his will except by statute or regulation. However, that is not the case which we are discussing here. What has occurred is that parties wishing to contract have been prevented from doing so by peer pressure. 84/

Typical is the experience of the Memorial Society of Georgia whose representative testified, "It has been our experience that interference occurs here in Georgia, just as the staff has pointed out in the memorandum, and runs the gamut from the most subtle kind of peer group pressure to actual legislative restrictions."

80/ Id.

81/ See, e.g., Cohen, note 28 supra, at 25-30, testimony of Linda Lamirand, Northeastern Indiana Memorial Society, Tr. 4945-46, Waxer, note 59 supra, at 4201-02, and testimony of William C. Klein, Rochester Memorial Society, Tr. 1616-17.

82/ Testimony of Friend A. Deahl, board member, Peoples Memorial Association and Continental Association of Funeral and Memorial Societies, Tr. 5628-32.

83/ See, e.g., Cohen, note 28 supra, at 25-30, Lamirand, note 81 supra, at 4945-46, and Klein, note 81, supra, at 1616-17.

84/ See, e.g., Cohen, id.

"Because of our experience here, and the first was our initial attempt to find a cooperative funeral director, we found many directors approached indicated a willingness to honor an informal price arrangement but refusal [sic] to sign a written contract which could be made public."

"In the course of these approaches, we were told more than once the funeral director was afraid of encouraging the displeasure if not actual retaliation by colleagues, all the way to legislative restriction." 85/

In Michigan the Mortuary Science Law, according to a representative of the Greater Detroit Memorial Society, has forced the society to "become merely an advisory organization without the power to enter into contracts with funeral directors, contrary to the majority of other members of the Continental Association of Memorial Societies." 86/

"Not only have we had difficulty getting any information from funeral directors, but we have found it impossible to be put on the mailing list of the State Board of Examiners in Mortuary Science to receive copies of meeting agendas or minutes of meetings, or to be advised of the dates of meeting so that we might observe them. It has even been difficult at times to secure copies of laws and rules under which the Board operates." 87/

While I have observed that the growth of memorial societies has been modest, one must wonder what it might have been had it not been for restraints upon the availability of contractual arrangements with cooperating funeral directors. The memorial societies themselves make no great claims to potential growth and this modesty is justified by the facts. In the Northwest, despite the relatively unrestricted atmosphere, the growth has been, as pointed out previously, healthy but still not a threat to the industry.

Restraint of pre-need arrangements is discussed under the response to question 30(b).

85/ Cynthia Beattie, representative of the Memorial Society of Georgia, Tr. 8937.

86/ Sanford Waxer, Tr. 4200.

87/ Id. at Tr. 4202 and Tr. 4208.

In some fields, occupational licensure has been used to restrict entry. Many states require only a high school education plus some subsequent study and work in a school of Mortuary Science and experience as an apprentice or intern in granting licensure as an embalmer or funeral director. 88/ The trend in the industry, however, is to "upgrade" the requirements for licensure. 89/ Twenty-one states now require 2 years of college. 90/ The University of Minnesota has established a 4-year program of Mortuary Science. 91/

Testimony, however, has indicated it is not that difficult to embalm a body. 92/ Funeral directing requires other skills but these can be acquired on the job over the years. The best demonstration of this is the lack of formal training of many excellent practitioners today, the apprentice system having been in place for a number of years. The increased requirements for licensure may operate to restrict entry into this market and may be interfering, thereby, with its operation. Parties, such as those mentioned in Florida, who seek to establish alternative methods of disposition must in that state and in other states comply with the board requirement that they be licensed as funeral directors. The increased requirements for education inhibit (or prevent) such business people from entering this field.

Summary: State regulation against unfair or deceptive funeral industry practices has been dominated by industry interests to the detriment of consumers.

Funeral service industry interests have utilized state regulatory boards to restrain, harass, or otherwise interfere with the sales of funeral merchandise and services and alternative methods of disposition including cremation services and contracts with memorial societies.

88/ See, e.g., B. Crouch, Professionalism in Funeral Service, A Study of Work Orientations (August 1977) (unpublished doctoral thesis available in FTC library), p. 28.

89/ See, e.g., "Conference Approves Curricula Revision," Casket and Sunnyside, December 1976 - January 1977.

90/ See, e.g., Hausmann, "Funeral Service-Meeting Needs . . . Serving People," HX-Hausmann 1.

91/ Testimony of Dr. Robert Fulton, sociology professor, Tr. 6979-80.

92/ Testimony of James R. Scannell, administrative coroner, San Francisco, California, Tr. 7614.

State regulatory boards have increased educational requirements as a prerequisite to licensure with the result that entry into this market is restricted, particularly the immediate disposal services whose owners or operators may not be able to pass the increased qualifications for a license.

Issue No. 30

"Pre-need sales. (a) Can funeral consumers obtain lower prices and avoid problems associated with at-need sales by making funeral arrangements in advance of need?"

"(b) Has the availability of before-need arrangements been restricted in ways which injure rather than protect consumer interests, by State laws or regulations, or by actions of funeral service industry members of trade associations?"

In its Statement of Reason for the proposed rule, the Commission stated that it has reason to believe that "Actions by funeral industry members to inhibit economical funeral offerings, pre-need arrangements, immediate disposition services, or memorial societies disadvantage consumers by restricting their choice of funeral arrangements and may suppress competition in that industry." 93/

The question of pre-need planning of one's own funeral as opposed to at-need sales to the survivors received considerable attention during this proceeding.

Consistently raised was the question of who should make the determination as to type of funeral, the subject of the ceremony (obviously) before demise or the survivors after demise. While the legal right to enforce such arrangements may vary with the jurisdiction, 94/ pre-arrangement provides the consumer with peace of mind in that the final arrangements have been made to one's satisfaction at satisfactory prices. Eliminated is any guess as to what the deceased desired.

93/ 40 Fed. Reg. 39905.

94/ See, e.g., testimony of Byron D. Sher, professor of law, Tr. 7530-31.

A number of objections have been raised to pre-need planning and firm pre-arrangement of funerals. One argument is the mobility of people in our society which has been commented on previously. 95/ Some purchasers do not move a great distance and thus could obtain the benefits of the pre-need contract by remaining in the vicinity. Additionally, pre-need contracts have been drawn to allow for refunds or for reciprocal honoring of contracts at convenient locations. 96/

An argument was raised that some people would make bizarre arrangements to spite the survivors. 97/ This may be one of the risks of a free society. Furthermore, pre-arranged funerals may be made by families together after consideration of all the alternatives. 98/ Pre-arrangement for many people affords the opportunity to face death and plan for it without leaving this task to survivors.

Some people change their minds about the type of funeral they want after entering into a pre-need arrangement. 99/ If that is the case such contracts may be changed by mutual agreement.

An important consideration, perhaps above many others, is the concept of freedom of choice. While this can mean the freedom to choose a "traditional" at-need funeral, it should also include the freedom to arrange prior to death one's own services without having the availability of such services restricted by law, regulation or peer pressure, provided such arrangements do not offend public policy or sensibilities.

95/ See, e.g., testimony of Mildred Damiano, funeral director, Tr. 1305-06.

96/ See testimony of John Lawton, president, Sierra Memorial Services, Inc., Tr. 6489-92.

97/ Testimony of Robert P. Shackelford, Jr., funeral director, Tr. 9058-60.

98/ Rebuttal submission of Prearrangement Interment Association of America, Record X-6, Part II, p. 5.

99/ See, e.g., testimony of H. E. Burton, president, Palm Memorial Estate Plans, Tr. 6643 and testimony of Patrick J. Farmer, funeral director, Tr. 2301-02.

Those who sell funerals on a pre-need basis feel that the funeral industry as a whole today does not advocate and does not actively engage in pre-need sales. 100/ In fact, the industry actively supports legislation to restrict pre-need sales. Representative H. Lynn Jondall, Michigan House of Representatives, discussed techniques used by the Michigan Funeral Directors Association to prohibit the development of pre-need programs. 101/

There is little evidence in the record of the proceeding to support a finding as to whether consumers can obtain lower prices by making funeral arrangements in advance. There are, however, benefits, albeit noneconomic, as previously discussed: the exercise of freedom of choice without the time pressures and disorientation which are usually present in a sale at-need.

The record contains numerous statements from witnesses in regard to the sales tactics and pressures employed by pre-need arrangement salespersons. 102/ As a result, the at-need funeral industry has sponsored and supported state laws which prevent the solicitation of consumers for the purchase of funeral service merchandise before death. 103/ While there may be some evidence of improper sales tactics and pressures, it taxes credibility to insist that such pressures cannot be handled better before-need than in the at-need situation. The opening of this market would protect consumers from any possibility of pressure at a trying moment in their lives. The consumer, making a purchase with a great deal of time, with opportunity to investigate alternatives and comparison shop and to become acquainted with what may be unfamiliar products and services, is more capable of dealing with this problem. Since most pre-need sales are made in the home, the cooling-off period is available and, in fact, many practitioners offer from 10 to 30 days in order to rescind the entire transaction. 104/ The record indicates that only 30 percent of prospective pre-need purchasers actually sign contracts at the time they are visited by a salesperson. 105/ The opportunity to decline is not available in the at-need situation.

100/ See, e.g., Prearrangement Interment Association of America, note 98 supra, at Part II, p. 7.

101/ Tr. 4079.

102/ See, e.g., testimony of Roger I. Dyer, funeral director, Tr. 1556.

103/ See, e.g., written submission of Prearrangement Interment Association of America, at volumes I-III and testimony of Robert W. Ninker, executive director, Illinois Funeral Directors Association, Tr. 2711-13.

104/ See Burton, note 99 supra, at 6670.

105/ Id.

Among the devices used by the funeral industry to restrict pre-need sales are state laws and regulations that require a 100 percent burial trust fund deposit of pre-need funds. 106/ The at-need funeral industry position was virtually unanimous: that a 100 percent deposit requirement is necessary and the consumer must have an unlimited right to a refund of the entire amount. 107/ The reasons for this are to protect the consumer and insure the seller's ability to deliver at a future time. 108/

If a seller must deposit 100 percent of the sales price of a pre-need contract, he will have no funds to pay overhead, particularly salaries and commissions until a distant future date, when a demise occurs, the contract is performed and the funds released from trust. Without funds to pay overhead, prospective sellers of pre-need funerals will not enter this market.

If a seller must refund the total sales price (plus interest in some cases) upon request of the contracting consumer, then he has only the possibility of that future income. Direct home sellers of pre-need funeral merchandise cannot subsidize sales for many years, particularly when the contract can be rescinded unconditionally. 109/ As a consequence, if a seller will not sell, the consumer is deprived of the opportunity to choose freely among alternatives which should be available to him.

As to protecting the consumer by virtue of the 100 percent depository requirement, one funeral industry argument is that such a requirement protects the consumer from fraud. 110/ A number of frauds have taken place in pre-need sales. In each

106/ See, e.g., Prearrangement Interment Association of America, note 98 supra, at volumes I-III and testimony of Robert Coats, funeral director and president, Michigan Funeral Directors Association, Tr. 3785-86.

107/ See, e.g., testimony of Edward J. Fitzgerald, Funeral Director and past President, NFDA, and testimony of Mark Waterston, funeral director, Tr. 3746-47.

108/ See, e.g., Fitzgerald, id.

109/ See, e.g., statement of D. W. Newcomer, IV, D.W. Newcomer's Sons, Record 215-46-1-29-9, #92, p. 3, testimony of Roger C. Nauert, executive assistant to the comptroller of the State of Illinois, Tr. 3680, Lawton, note 96 supra, at 6510, Burton, note 99, supra, at 6643-48, testimony of Paul Butler, Funeral Security Plans, Inc., Tr. 12818, and testimony of Richard Myers, Chairman of the Utah State Board of Funeral Directors and Embalmers who stated, "If there had been a 100 percent law, the [pre-need] firm never would have been selling the program." Tr. 8327.

110/ See, e.g., Fitzgerald, note 107 supra, at 6295 and testimony of Myers, note 109 supra, at 8326-27.

instance of fraud or non-performance the cause of defalcation was not the percentage deposited under state law, but rather that funds were never deposited at all, a risk not anticipated by the 100 percent trust fund law. In states that require a 100 percent deposit and a 100 percent refund upon the changing of the mind of the consumer, there are few administrative procedures in operation such as licensing or auditing which would insure compliance with this law. As a result, the state laws as presently written inhibit the honest vendor and do not control the dishonest.

If a 100 percent requirement is excessive, what then is an appropriate actuarially based requirement? An official of the Comptroller of the State of Illinois made a study of the burial trust law in Illinois with a view toward new legislation in this area. 111/ As a part of that study, an actuarial analysis was prepared for the Illinois Cemetery Association by Risk Management Consultants, a technical service of Marsh & McLennan. 112/

The study indicates that the deposit of the current cost (not the sales price) of merchandise or services, assuming a 6 percent return and 6 percent inflation rate, would provide adequate funds to deliver such goods and services at any given time in the future. Results will vary as assumptions vary. The study, however, substantiates the position that a 100 percent deposit is not necessary as a requirement to guarantee delivery of promised funeral goods and services at a later date. Some states have already enacted laws requiring less than 100 percent with no apparent problems resulting from that aspect of these laws. 113/

Summary: The funeral consumer can avoid problems associated with at-need sales by making funeral arrangements in advance of need. His opportunity to do so is presently restricted by the 100 percent trust fund laws as well as the antisolicitation statutes. These restrictive laws have been sponsored by traditional (at-need) funeral industry members.

111/ See Prearrangement Interment Association of America, note 100 supra, at Part II, p. 15-17.

112/ Id. at Part II, Exhibit A.

113/ See Lawton, note 96 supra, at 6456-60, 6511.

IV. EXPLOITATIVE PRACTICES.

Issue No. 1

"Have funeral service industry members performed embalming without obtaining prior authorization when such authorization could have been obtained from an individual responsible for making funeral arrangements and when the embalming was not legally required?"

The proposed rule would forbid embalming without the funeral director's having first obtained written or oral permission from a family member or other person authorized by law to make funeral arrangements for the deceased (Section 453.2(a)).

The resolution of this issue depends largely upon the meaning of the term "authorization"; does it mean explicit, either written or oral, or does it mean implicit authorization? A few funeral directors receive explicit written authorization 1/ to embalm but the record indicates that this is not a prevalent practice in the industry. One funeral director stated that written explicit permission to embalm is granted by the hospital release form signed by the next-of-kin. 2/ No state laws or regulations require such authorization. 3/ In regard to explicit oral authorization a few funeral directors stated that they secured such authorization. 4/

State regulations are unclear in this area. Some states require permission to embalm, but the type permission required is often unclear and the penalties for violation of the rule are often minimal. 5/

1/ See written submission of Gary Buell, funeral director, Record II-A-765. Also, it should be noted NFDA has standardized authorization forms for its membership who are interested in securing explicit written permission to embalm. See testimony of Sumner J. Waring, Jr., funeral director and treasurer, NFDA, Tr. 663-64.

2/ Testimony of A. A. Rayner, Jr., funeral director, Tr. 4296.

3/ Hearing Exhibit, Final Corrected Copy, Analysis of State Statutes, Rules, and Regulations Affecting the Funeral Practices Industry submitted by Consumer Federation of America, HX-Atlanta 7, pp. 4, 18-22 and Appendix pp. 1, 2.

4/ See, e.g., testimony of Patrick J. Farmer, funeral director, Tr. 2315-16, and testimony of Mildred Damiano, funeral director, Tr. 1309.

5/ Consumer Federation of America, note 2 supra, at p. 4 and Appendix pp. 1, 2.

Funeral directors, almost unanimously, indicated that they did receive implicit authorization when it was possible to secure it. 6/ The question usually posed to the family or survivors was: "shall we prepare the body?" 7/ To funeral directors this apparently means: "shall we clean, embalm, apply cosmetics, and dress the body?" 8/ To consumers, the meaning of the word "prepare" may be something less than embalming. Certainly, most cultures include a ritual of cleansing, and some, including our own, either do not discourage or positively encourage viewing so that dressing and otherwise making the corpse more attractive would be considered a part of "preparation." A number of funeral directors are reluctant to use the word "embalm," feeling it is too harsh and would disturb the family. 9/ How consumers perceive this term is debatable. 10/

Other forms of implied permission are utilized. For instance, one funeral director stated that permission is implied if he has done business with the deceased's family previously and there was embalming in that instance. 11/ Frequently, families use the same funeral home over several generations. The arrangements for the funeral quite often follow the pattern of previous funerals arranged by and for that family. Thus, the funeral director, absent instructions to the contrary, assumes that he has implicit permission to embalm based on his experience with the family.

Related to the concept of implied permission is the use of the negative option. If embalming is not to be performed in most funeral establishments, other than Orthodox Jewish ones, the survivor must assert affirmatively that he or she

6/ Testimony of Kermit Edison, funeral director and member, Wisconsin State Board of Funeral Directors, Tr. 4261 and testimony of John Curran, funeral director and president, New York State Funeral Directors Association, Tr. 90.

7/ See, e.g., testimony of Alan S. Anderson, funeral director and president, Utah Funeral Directors Association, Tr. 6144; testimony of H. Joseph Watts, funeral director, Tr. 10566.

8/ Vanderlyn R. Pine, Caretaker of the Dead, (New York, New York, Irvington Publishers, Inc., 1975), pp. 21-22.

9/ See, e.g., testimony of John J. Curran, note 6 supra, at Tr. 90 and Howard Raether and Robert Slater. The Funeral Director and His Role as Counselor (NFDA, 1975), p. 26.

10/ Testimony of James R. Scannell, Administrative Coroner of San Francisco, Tr. 7613-14.

11/ Testimony of John Proko, funeral director, Tr. 4148.

does not want embalming. 12/ The negative option posture is supported by funeral directors who have had very few requests to omit embalming. 13/ Virtually all funeral directors testified that they know of no cases of embalming when the family had forbidden embalming except when required by law. Some consumers did object to embalming without explicit permission. 14/

Implied permission to embalm arises in another situation, this one with particularly high frequency. When a family indicates that a funeral is to be some days after death, awaiting the arrival of out-of-town relatives, it becomes necessary to embalm the body for aesthetic and legal reasons.

Aesthetically, it is important that embalming be done as soon as possible after death. Decomposition begins immediately upon death and the speed with which it occurs depends on a number of variables such as the age of the deceased, the cause of death, and climatic conditions. Bodies can be embalmed after a lapse of a day or two but with less than satisfactory results.

Because of the odor of a decomposing body, embalming must be done swiftly if it is to be done at all. Thus, when a family requests that a funeral take place some days after death, as few as two, the funeral director assumes he has authority to embalm, this being implicit in the request for delay.

Legally, embalming must be performed if a body is to be held for a time period usually specified in state law or regulations. Such embalming would be exempted under the proposed Rule (Section 453.2(a)). The basis for these state laws and regulations was not made clear in this proceeding; however, they probably arose from the aesthetic reason discussed

12/ See, e.g., statement of Glenn W. Beatty, funeral director, Record 215-46-1-29-13, #4, p. 2; testimony of Rep. J. J. Kaster, Jr., ex-funeral director, Tr. 6117, 6119; testimony of Edward J. Fitzgerald, funeral director and past president of NFDA, Tr. 6260-62.

13/ See, e.g., testimony of Alan S. Anderson, who has had only two bodies not embalmed in the past 10 years, note 7 supra, at 6174 and testimony of Robert P. Shackelford, Jr., funeral director, Tr. 8987.

14/ See, e.g., written submission of Mrs. Nancy Krawitz, consumer, Record II-B-1662; testimony of David Boyd, consumer, Tr. 1690.

hereinabove, to avoid offense to the employees and patrons of the funeral home as well as the neighborhood. Additionally, there may have been a reaction to a widespread belief that an unembalmed corpse presents a health hazard. 15/ There is no evidence in this record of the spread of the disease as a result of corpses not being embalmed and since the proposed rule does not take issue with state law and regulation relative thereto, no finding is necessary in this regard.

There are alternatives to embalming such as icing in a container and the use of refrigeration equipment such as is used in most morgues.

There were varying estimates of the cost of such equipment from as low as \$1200-\$1400 for a two or three body refrigeration unit according to one funeral director, to as much as \$11,500 per body unit based on the estimate of another. 16/ A minority of funeral directors believe that refrigeration is an alternative to embalming, but the majority indicated that the expense of it compared to the cost of embalming made the latter the more practical alternative. Since cost was not established in regard to refrigeration, I make no finding in this respect.

There was some evidence presented by funeral directors about the difficulty of obtaining permission to embalm when the person in authority could not be located. Examples given were deaths in remote mountainous areas where the body was embalmed on the spot and then removed to a funeral home. This would ususally take place in the event of accidental death, say from mountain climbing or skiing. Also, death sometimes occurs when an authorized relative is traveling, perhaps out of the country. These circumstances seem to be covered by the proposed rule which only requires authorization when it "could have been obtained" (Section 453.2(a)). Obviously, in the examples given, the authorization could not have been obtained. It is also possible that some state or local official would authorize the embalming, thus relieving the funeral director of the burden of making a decision in this regard. In any event, the proposed rule anticipates emergency situations by its terms.

15/ See, e.g., written submission of NFDA, Record II-A-659, p. 50; testimony of Dr. Charles W. Wahl, psychiatrist, Tr. 8695.

16/ See, e.g., testimony of Andrew Mamary, funeral director and president of the Pennsylvania Funeral Directors Association, Tr. 12880; testimony of W. W. Chambers, funeral director, Tr. 11374; testimony of Ellsworth D. Purdy, funeral director, Tr. 5424.

The industry is also concerned about the difficulty of determining who has the authority to make a decision in regard to embalming. What would happen, for instance, if family members, such as siblings, disagreed? This is, it seems to me, a problem regardless of whether the proposed rule is made final. State statutes, regulations, or cases should be the guides in this respect, although the record does not reflect the way in which this is handled by the states.

The funeral directors are concerned about the additional penalties to which they would be subject if they relied on an unauthorized person. At present they have only to deal with the state; under the proposed rule, additional and ominous penalties come into the picture. This threat and possible reactions to it recurred throughout the proceeding.

Funeral directors are concerned that, because of penalties, they might have to get written permission to embalm, even though the proposed rule specifies written or (emphasis supplied) oral permission. Fearing they might be accused unjustly, they might, in an excess of caution, begin to protect themselves from liability by using forms which must be signed by an authorized person.

This would create some problems. There would be a delay in beginning the embalming process while such permission is secured. Frequently death occurs at night and the authorized party can be located by telephone, but getting the signature would be difficult. Delay and poor embalming quality would result.

The person authorized would likely be a close relative and asking for a signature would be impolitic. Also, as indicated earlier herein, the use of the word "embalm" is thought to be disturbing to the survivors.

Costs would increase to the extent that this proposed rule would promote additional time-consuming procedures. These costs would be passed on to consumers in the form of higher prices, although no evidence was offered as to what these costs would be.

Summary: Funeral service industry members perform embalming usually without obtaining prior explicit authorization from responsible parties when such authorization could have been obtained.

Issue No. 2

"Have funeral service industry members taken possession of deceased human remains without prior authorization from an individual responsible for making funeral arrangements?"

The proposed rule prohibits the picking up and obtaining custody of a corpse without first receiving written or oral authorization from an authorized family member or other legally authorized person unless such is done to comply with state or local laws (Section 453.2(b)(1)).

Historically, there have been problems, particularly in coroners' offices, with what have been termed "cappers," "steerers" and "runners"; that is, parties who take or refer business to a particular funeral establishment for a fee. The practice of obtaining possession of a human body without permission has been generally frowned upon by the funeral industry. It has diminished markedly over the years and it is not that sort of steering to which the question is directed.

To the extent that "capping," "steering," or "runners" are a problem, this is dealt with under state law or regulation. There is no evidence in this record that state enforcement has been ineffective in dealing with this practice.

This question is concerned with whether the funeral home that gets the body is the one actually chosen by the family and whether there is evidence that a choice has been made consciously by a "responsible person." If funeral homes are obtaining possession of bodies without prior authorization, consumers are being exploited since they are denied a choice. This is particularly significant in the light of consumer reluctance to request the removal of a body to another establishment (see discussion in Issue No. 3).

As in the previous question, we need to determine what is "authorization." Direct written authorization from the client to the funeral director is very rarely obtained before the remains are actually picked up. ^{17/} Usually the funeral director receives a call either from a member of the family or from an institution such as a hospital or nursing home to pick up the remains. ^{18/} The record reveals relatively little effort by

^{17/} I can find no evidence indicating direct written permission is obtained as a matter of course. I believe it may be obtained in a few instances because NFDA has a standard authorization form for this purpose and makes it available to its members. See Waring, note 1 supra, at Tr. 663-64. See also testimony of Frank Galante, funeral director and former president of NFDA, Tr. 1725-29, who explains the situation in New Jersey where written permission is required but is obtained after receipt of the remains on many occasions.

^{18/} See testimony of Fred Noland, funeral director and president, Idaho Funeral Service Association, Tr. 5836.

funeral directors to determine whether the caller is authorized to make this decision; that is, if such a person is the "individual responsible."

Making this determination, given the time constraints in the funeral situation, is difficult. A decision has to be made and it must be made quickly, for if embalming is to be done effectively, it must be done within a relatively short time after death, depending upon body conditions; ^{19/} thus, to impose upon a funeral director the responsibility for determining whether this party or perhaps others are in fact responsible may be imposing too great a burden than can reasonably be expected.

In many hospitals and nursing home deaths, the family may sign a release prior to the death designating a particular funeral director to handle the remains of the deceased. ^{20/}

In deaths which occur suddenly away from the hospital or nursing home, written authorization has not been given generally. ^{21/} In those cases, a call is made to the funeral home. In accident cases, the police may place such a call to the funeral home named by a family member if one is present. If none are available, one can only speculate as to which home would be called; however, since accidental deaths are only a small proportion of total deaths, this was not felt to be a significant problem and it was only mentioned in passing.

Other noninstitution deaths, that is, those at home or in the family situation usually result in a call to a local funeral director. Presumably this call is made by or at the behest of a party responsible for making funeral arrangements. Funeral directors generally rely on this call and rarely do any investigating as to the authority of the calling party.

As with Issue No. 1, funeral directors were concerned with determining who is "responsible" under the terms of the proposed rule. The problem exists even under state law and regulation, but a failure to make the determination will, if the rule is made final, expose the funeral service industry member to the additional layer of federal penalties for violation.

^{19/} Clarence G. Strub and L. G. Frederick, The Principles and Practices of Embalming (Dallas: Lawrence G. Frederick, 1961), pp. 494-97. See also NFDA, note 15 supra, at p. 50.

^{20/} See testimony of John D. Altmeyer, II, funeral director and president, West Virginia Funeral Directors Association, Tr. 11735.

^{21/} See testimony of Roger I. Dyer, funeral director, Tr. 1549.

As a result, funeral directors may become more cautious and might question more closely the caller as to what authority he or she has to make the call. Some may even go so far as to require written authorization to pick up the body, though the proposed rule would permit oral authorization.

Summary: Most deaths occur within the context of the family either in the hospital or at home. Even with accidental deaths a family member is frequently present. In these cases, the funeral home designated is usually the one named by a family member. Such designation constitutes permission to pick up the remains. Thus, I find that funeral service industry members usually have prior authorization to pick up the remains. I conclude that this portion of the rule is not warranted by the record.

Issue No. 3

"Have funeral service industry members refused requests to release deceased human remains to the custody of a family member or other individual responsible for making funeral arrangements?"

The proposed rule (Section 453.2(b)(2)) would prohibit a funeral director's refusing to release a deceased human body to a family or other authorized person. This is prohibited regardless of whether money is owed for services rendered. There is once again a proviso excepting any valid state or local laws with regard to transportation of bodies.

The record in regard to this practice is limited. There are on the record a small number of instances in which a refusal to release a body is said to have taken place. 22/

22/ See, e.g., rebuttal submission of FTC staff containing written submission of Magnus E. Burney, consumer, Record X-1-30, p. 2; rebuttal submission of FTC staff containing written submission of Alex H. Dolnick, attorney, Record X-1-4; testimony of Katherine H. Puccio, consumer, Tr. 6305-06; testimony of Dr. Charles H. Denning, Jr., Neptune Society, Tr. 7772-74; testimony of William C. Klein, Rochester Memorial Society, Tr. 1613-14; testimony of Joan Lippke, Memorial Society of Long Island, Tr. 407; written submission of Elizabeth Oschwald, Minnesota Memorial Society, containing letter of Milton Chabot, funeral director, Record II-C-66; and testimony and hearing exhibit of Robert Nesoff, former director of investigation, New York State Temporary Commission of Living Costs and the Economy, Tr. 342 and HX-Nesoff 1.

The problem is much broader, however, than a refusal to release deceased remains. Perhaps the question should have been phrased: Are survivors or other persons responsible for making funeral arrangements reluctant to ask for the release of a body? A number of parties testifying in this proceeding have witnessed the reluctance of survivors to move a body from one place to another. 23/ Somehow it seems to indicate little respect for the deceased party to haul the body from place to place depending on the price of the funeral or other considerations. To the extent that such a reluctance does obtain, the funeral director is now in a position to demand whatever price he wishes and in effect to control the service. His suggestions, which in other mercantile circumstances would not have to be taken, must of needs be considered much more seriously.

This question should also be considered in the light of the answer to Issue No. 1: that is, given that a funeral director has possession of and further that he has "prepared" the body, the funeral director is now far along the way toward consummating a transaction with very little contact with the survivors and without a determination as to their wishes. This puts the consumer at a decided disadvantage vis-a-vis the funeral director. The limited instances of refusal to release remains reported in this proceeding should be viewed in light of the fact that situations in which the family requests that remains be removed are very rare.

Some consumers reported that release of remains was conditional upon immediate payment of charges incurred. This was sufficient to discourage the family from carrying out its wishes. 24/

The practice of failing to release a body on request is generally viewed throughout the industry and by virtually all parties to this proceeding as a morally reprehensible one. 25/ Many state laws penalize such conduct by license revocation.

The revocation of a license is a relatively rare occurrence. It takes place only under extreme circumstances. The suspension of a license is a strong deterrent in the funeral industry.

23/ See, e.g., testimony of the Reverend Mr. Frederick A. Fenton, Tr. 6417 and written submission of FTC staff interview report with R. DiPippo, Association for Consumer Protection, Record III-F-17.

24/ See, e.g., statement of Philip Jackson, consumer, Record 215-46-1-28-9, #35; FTC staff rebuttal submission containing letter of Alex H. Dolnick, Record X-1-14; written submission of Mrs. Archie Weeks, consumer, Record II-B-1150.

25/ Howard C. Raether, Successful Funeral Service Practice, (Englewood Cliffs, N.J., Prentice-Hall, Inc. 1971), p. 157.

Since the failure of one funeral home to release a body would work to the detriment of another, the receiving funeral home, the industry itself has been assiduous in enforcing this aspect of state regulation.

The industry in opposing this section of the proposed rule pointed to its record of compliance. The record of this proceeding supports this industry position.

On the other hand, those who support the proposed rule point out that most consumers are making choices in ignorance of prices, practices, and alternatives. This subject is developed in response to Issue No. 24 dealing with consumer knowledge of relevant considerations.

Relevant to this issue also is the finding in response to Issue No. 23, that this transaction does have distinctive characteristics. Among those are the infrequency of purchase, the extreme time constraints, and the emotional condition of the buyer of funerals.

Given these:

- (a) the reluctance of the consumer to move a body from one funeral home to another;
- (b) the ignorance of consumers in choosing a funeral home;
- (c) the time constraints and the emotional condition of the buyer;
- (d) the possibility that the funeral home may have begun the funeral process by embalming the body.

Then it would probably take some compelling or extreme situation to motivate a consumer to request the removal of a body from one establishment to another.

For these reasons the industry's relatively good record of enforcement of this portion of "good" funeral service practice does not justify omitting this section of the proposed rule. The additional layer of penalty will serve as a further deterrent to those who would violate this section of the proposed rule.

Summary: Funeral service industry members rarely fail to release a body at the request of a person authorized to make funeral arrangements. Despite its rarity, I conclude that the practice is so serious that it should be discouraged further by the promulgation of this section in a final rule.

"4(a) Have funeral service industry members and/or crematories required customers desiring immediate cremations to purchase a casket?"

"(b) Have such requirements imposed on some customers merchandise they did not want and additional cost which could have been avoided but for the requirements."

"5. Have funeral service industry members failed to provide containers or inform customers as to the availability of containers which are less expensive than caskets and which could be used practically for an immediate cremation?"

The proposed rule would prohibit any funeral service industry member or anyone who arranges cremations from requiring customers to purchase a casket or to claim directly or by implication that a casket is required for a cremation; further, it would require such party make a suitable container (Section 453.2(c)(1) & (2)) available to customers interested in cremation. A suitable container is defined as "any receptacle or enclosure other than a casket which is of sufficient strength to be used to hold and transport human remains including, but not limited to, cardboard, pressed-wood or composition containers and canvas or opaque polyethylene pouches" (Section 453.1(i)).

This proceeding produced consensus that cremations are relatively infrequent with estimates of the frequency ranging between 5 and 8 percent of all dispositions. ^{26/} It was generally conceded by most of those testifying that cremations are increasing except in the black community. Among black people, cremations are rare. ^{27/}

To put this in context more fully, it is pointed out that cremations can occur immediately after death with a memorial service to follow should the family choose this form of ceremony. Quite frequently, however, a traditional form of funeral is held. In such an instance, the body is embalmed to preserve it for a sufficient length of time to prepare for a service. It is as usual made cosmetically attractive, dressed, and otherwise prepared for viewing. It is placed in a casket and during the period between death and disposition of the body the family receives visitors and the body is viewed. A service is then held either in the funeral home or in the church following which the body is taken to the crematory, cremated, and the ashes returned to the family or otherwise disposed of in accordance with instructions.

^{26/} Testimony of Reg. T. Morrisson, past president, Cremation Association of North America, Tr. 6733.

^{27/} Testimony of Lawrence A. Jones, Sr., president, National Funeral Directors and Morticians Assn., Inc., Tr. 9796.

In the case of the immediate disposition, it seems clear the purchase of an expensive casket and other goods such as clothing, etc., is unnecessary. Obviously the casket will be totally destroyed in the process of cremation. To purchase an expensive casket which will then be burned converts this otherwise simple disposition to something approaching a potlatch, a ceremony of material destruction held by some northeast American Indian tribes. The participants destroy part of their wealth in order to enhance their prestige among their peers. 28/

In the traditional funeral followed by cremation, the survivors may wish to choose a casket rather than a cremation container. The reason for this should be obvious; many friends will see the casket and it would seem inappropriate to have a cardboard or fiberboard box on display in the funeral home during the mourning period.

Likewise the embalming of a body when an immediate cremation is to take place is unnecessary. The purpose of embalming is at the very least to preserve the body during the period after death and before disposition. Frequently disposition takes place several days after death to allow time for viewing, visiting, and for relatives to arrive from distant points. Since few funeral homes have refrigeration equipment at the present time, embalming is necessary for aesthetic as well as legal reasons. With immediate cremation, the time period is so short that embalming is not needed.

As to cosmetic work and dressing of the body, in an immediate disposition, this is clearly an unnecessary expense. It occurs only infrequently. In the full funeral with viewing, most families would expect the body to be made attractive and dressed in an appropriate manner.

State law generally requires only a suitable container when cremation is to take place. Some state laws are, however, silent on the subject. 29/ A number of funeral directors testifying during this proceeding said that they have made available on request minimum cost containers consistent with the definition stated herein. 30/ In many cases, however, the customers are unaware

28/ David Reisman, The Lonely Crowd, (New Haven, Conn., Yale University Press, 1961), p. 226-227.

29/ Note 3 supra, at p. 6. An exception is the Commonwealth of Massachusetts, note 3 supra, at p. 26, which requires a casket for cremation.

30/ See, e.g., testimony of Roy M. Thompson, funeral director and member of the Connecticut State Board of Examiners of Embalmers and Funeral Directors, Tr. 1938; testimony of David Daly, vice president of Evergreen-Washelli Memorial Parks and Funeral Homes, Tr. 5933-34.

that such containers are available since the casket selection room frequently has only the more elaborate caskets and no minimum containers in view. 31/ Thus, in some cases, consumers have no knowledge of the availability of such minimum containers. As a consequence some funeral directors have taken advantage of this lack of knowledge and the record reveals a number of instances in which consumers purchased caskets for immediate disposition when a much simpler container would have been satisfactory. 32/

Another facet of this situation is the ignorance of consumers with regard to the law, a subject developed in Issue No. 24. As indicated, generally state law requires only a suitable container. 33/ Some funeral directors have taken advantage of the ignorance of consumers as to the law and the record reveals a number of instances in which state law was represented to the consumer to mean that a casket must be purchased even though the family desired immediate cremation. 34/ Some funeral directors required caskets as a rule of their establishments. 35/ Crematories generally do not require caskets at all, preferring some sort of rigid box either of fiberboard,

31/ See testimony of Charles L. Wigham, funeral director, Tr. 765 and testimony of Patrick J. Farmer, funeral director, Tr. 2347-49. See also testimony of Walter F. Kinder, funeral director, Tr. 3303. Mr. Kinder was one of the few funeral directors who testified that he affirmatively made containers available before request by the consumer. In his funeral home, he displayed a corrugated waxed container in his display room; see, e.g., testimony of the Rev. Mr. Robert Nelson West, Tr. 7348 for examples of not displaying containers and discouraging their use.

32/ See, e.g., written submission of Mrs. Jerome Greyson, consumer, Record II-B-1436, p. 1, testimony of Louis MacDonald, NRTA/AARP, Tr. 2641-42.

33/ Note 3 supra.

34/ See, e.g., statement of Donald S. Nugent, Chicago Memorial Association, Record 215-46-1-29-8, #12, p. 1; testimony of Dr. Harry Weirnerman, NRTA/AARP, Tr. 233-34; and written submission of Mr. and Mrs. Edward Rosenberry, consumers, Record II-B-271.

35/ See, e.g., written submission of Mr. and Mrs. Roy H. Murray, consumers, Record II-B-280 and written submission of Mrs. C. N. Crosher, consumer, Record II-B-24.

cardboard or any other material which will allow the employees of the crematory to handle the body with a minimum of difficulty and without aesthetic offense. 36/

The record reflects a number of instances in which consumers have been required to purchase merchandise which they did not want. While there has been some purchase of clothing, the principle cost of unneeded merchandise is the casket. The cost varied between \$65, the approximate average of a minimum container, 37/ and \$695, the highest cost to which testimony was given for a casket when an immediate cremation was planned. 38/

Many funeral directors testified that minimum containers are available if requested by survivors. In those instances where the minimum containers are not on display, the explanation offered was that the merchandise was requested so infrequently that it did not seem an efficient use of limited space to display these containers.

The relatively low proportion of cremations to ground burials reinforces the funeral directors' predisposition to display more attractive and perhaps more profitable caskets. Among black people, cremation is a rarity. 39/ Thus, funeral homes dealing with a black clientele would have almost no reason to display minimum containers.

Some funeral directors have failed to inform customers as to the availability of minimum containers because there are caskets available at only a few dollars more than the container. Since there was such a modest price difference, some funeral directors used the lowest price casket rather than the container.

36/ Testimony of Reg T. Morrisson, former president, Cremation Association of North America, Tr. 6718.

37/ See, e.g., testimony of Amos Dunn, funeral director and past president, NFDA, Tr. 8924.

38/ Written submission of National Retired Teachers Association/American Association of Retired Persons, Record II-C-1516, Sample #5.

39/ Testimony of Maynard Heitner, funeral director and member, Committee of Examiners in Mortuary Science of the Minnesota Department of Health, Tr. 3337. See also Jones, note 27 supra, in reference to funeral homes dealing mainly with black families.

Horror stories about the burning of caskets costing thousands of dollars may have been anticipated but were not cited in this proceeding. One supposes that these are products of a fertile mind with a facility for fiction, though it may actually occur in some instances. Supposing, arguendo, that it had, it seems no more a waste to burn an expensive container than to bury it, a practice which takes place on a regular basis. At issue is the inalienable right of members of a free society to dispose of their disposable income in any form of disposition they desire, even to the extent of being buried in an expensive sports automobile.

As with some of the issues to follow, particularly Issue Nos. 10-15 dealing with merchandise and service selection, the real issue here is the duty of a merchant to inform a consumer about the availability of less expensive and less profitable (to him) alternatives. In the case of what had in the past been called the "professions," it was generally considered unethical to push higher priced goods or services. Doctors who perform unnecessary surgery are subject to disciplinary proceedings and may be subjected to same (if caught). But the department store that does not display its slow moving merchandise does not suffer a penalty.

What then is the responsibility of this vendor of goods and services to inform consumers about cheaper alternatives and to display less expensive merchandise?

The only justification lies in the responses to Issue Nos. 23 and 24. Issue No. 23 deals with the distinctive characteristics of the funeral transaction and Issue No. 24 with consumer knowledge of relevant considerations.

This is a policy issue, however, which I feel obliged to point out but not necessarily resolve.

Summary: In some instances funeral service industry members (not crematories) have required customers desiring immediate cremations for their dead to purchase caskets. The practice is not prevalent, however this requirement when imposed has placed on the customer the extra cost of a casket (over a container) which could have been avoided.

Funeral service industry members have frequently failed to provide containers or inform customers as to the availability of containers which were less expensive than caskets and which could have been used for immediate cremation.

"Have funeral service industry members misrepresented on customer billing statements the amounts actually advanced, paid, or owed on behalf of customers for items such as those listed below?"

Crematory charges
Cemetery charges
Flowers
Obituary notices
Limousines
Pallbearers
Clergy honoraria
Charges of another undertaker

The proposed rule in Section 453.2(d)(1), (2), (3) & (4) would prohibit the funeral director from making a profit on a cash advance; that is, monies paid to third parties for cemetery or crematory charges, pallbearers, public transportation charges for shipping a body, flowers, clergy honoraria, musicians, nurses, obituary notices in newspapers, and gratuities to various workers involved in the funeral process.

The proposed rule also would prohibit funeral service industry members from failing to pass on to customers the benefit of any rebates, commissions or volume discounts received on any of these items. It also would prohibit the misrepresentation of any amount advanced, paid or owed to third parties on behalf of the customer for services or merchandise.

In the "traditional" funeral, a number of items of goods and services are generally not provided directly by the undertaker. Only infrequently does the funeral home, for instance, own a crematory or a cemetery. ^{40/} Nevertheless, charges for the crematory or cemetery must be paid promptly and generally are paid by the funeral service industry member on behalf of the family. The cemetery will rarely open the grave until funds have been advanced. Likewise in some cases flowers are ordered by the funeral service industry member on behalf of the family. In a few cases, a funeral director owns a flower shop but this is rare.

^{40/} In fact, in some states this ownership is prohibited by statute. See discussion in Issue No. 27.

Obituary notices are placed in newspapers and contrary, perhaps, to general belief, this is not free; the charges are usually billed to the funeral home monthly. There is frequently a volume discount to funeral directors which will vary with the number of notices placed in the paper. The proposed rule anticipates the difficulty of computing the net costs after discounts to the funeral director. The proposed rule would allow the funeral director to bill the net cost based on his retrospective discounts during the preceding accounting year.

In some parts of the country, pallbearers are sometimes hired rather than being friends of the family. It is my understanding that in New York there is a pallbearer's union. This service must be paid for promptly and cash is advanced by the funeral director.

Clergy honoraria are frequently selected and paid by the funeral director. While many families select their own clergymen, in this mobile society persons may be buried far from their homes and their home churches. A clergyman must be called in and generally a modest fee of \$25 to \$75 is paid for his participation in the ceremony at the funeral home and subsequently at the graveside. When the family clergyman is involved, frequently the family will handle payment directly with the clergyman.

Likewise, many families choose to have music at the funeral service. When this takes place in the funeral home "chapel," an organist is usually employed and, at some point, paid, usually by the funeral home, subject to subsequent reimbursement by the family.

In regard to charges of another undertaker when a party dies in one city and is to be buried in another, the body must be picked up, prepared (embalmed), placed in a container, taken to the shipping point and placed on board a train or plane. On arrival in the city in which burial is to take place, the home funeral director takes over and generally will pay the shipping funeral director for his charges.

The question to be decided here is whether funeral directors in billing what are generally called cash advances for all of the services enumerated above, bill the customer the same amount they actually pay or add additional amounts to the bill or fail to deduct discounts they have received from the bill.

The record reflects that there have been misrepresentations of amounts actually advanced, paid, or owed on behalf of customers in the cases of all of the above services with the exception of

pallbearers. 41/ No testimony as to this item was received. As to the others, a number of witnesses testified that these charges were misstated at figures higher than those paid by the funeral director. 42/

A few witnesses testified that they felt it would be appropriate to have a funeral director charge amounts in excess of what was actually advanced or paid but that it would be deceptive to list these under "cash advances"; rather, these witnesses indicated that they felt these items could be listed as "services" or goods provided and billed at any amount the seller, that is, the funeral director, chose. 43/ These parties felt that the funeral director was providing a service by making arrangements for the various items listed: the crematory charges, the cemetery charges, the flowers, etc. Certainly he extends some effort in doing all of these things but is he entitled to be compensated for his effort. The question is: should he be compensated by allowing him to misstate the cash advance or should he be compensated by allowing him to state this as a service rendered? One prominent consumer advocate felt that this was fair since the deception was eliminated by removing the nomenclature "cash advance" and substituting "services rendered." 44/

That is, I believe, begging the question. In truth and in fact, these are amounts paid to outside parties for and on behalf of the family of the deceased. They are cash advances no matter

41/ See the following for examples of markups on cash advances for various items. Crematory charges - see, e.g., written submission and attached correspondence of Dora Ruth Bailey, consumer, Record II-B-358; flowers - see, e.g., testimony of James Broussard, funeral director and counsel of the Texas Funeral Directors Association, Tr. 9376-78; obituary notices - see, e.g., above written submission and attached correspondence of Dora Ruth Bailey and written submission of Sherry Chenoweth, Director, State of Minnesota Office of Consumer Services, Record II-C-51, p. 4; clergy honoraria - see, e.g., testimony of the Rev. Mr. Stephen Fritchman, Tr. 6515 and testimony of the Rev. Mr. George N. Marshall, Tr. 1194.

42/ Id.

43/ See testimony of Sherry Chenoweth, note 41 supra, Tr. 3135-36, who pointed out that as long as there is disclosure of the additional cost to the consumer, the problem may be alleviated.

44/ Id.

what name is applied to them and if the consumer is billed for an amount in excess of the amount actually advanced, paid or owed, then he is being deceived. The use of any other term is a deceptive practice since they are cash advances. 45/

One rationale offered for billing amounts in excess of the actual charge is to compensate the funeral director for the use of his funds. 46/ Large funeral establishments have considerable amounts of money tied up in receivables, part of which represents cash advances. It is pointed out, however, that these vendors can impose a finance charge provided they comply with state and federal law relative thereto.

Summary: Funeral service industry members have misrepresented on customer billing statements the amount actually advanced or owed on behalf of customers for crematory charges, cemetery charges, flowers, obituary notices, limousines, clergy honoraria, and charges of another undertaker.

The record will not sustain a finding as to prevalence.

45/ It should also be noted that most funeral directors charge consumers a service charge. Presumably this should cover any services rendered in connection with cash advances.

46/ See, e.g., Dr. Edgar Jackson, ⁴pastoral psychologist, Tr. 5334-35.

V. MISREPRESENTATION

Issue No. 7

"Have funeral service industry members misrepresented legal, public health, and/or religious requirements to customers or potential customers?"

The proposed rule would prohibit any funeral service industry member from making any statements or claims which are false, misleading, or unsubstantiated in regard to the legal necessity for a casket or for an outer interment receptacle, that misstates public health hazards associated with failure to utilize embalming, a casket, or an outer interment receptacle or that misstates religious requirements or customs (Section 453.3(a)(1)). Further, the proposed rule would require the funeral service industry member to furnish to each customer who inquires in person about the arrangement, purchase, or prices of funeral merchandise or services, the relevant law as to embalming, caskets for cremation, the price of a suitable container for cremation, the law as to the purchase of a sealed casket or an outer interment receptacle. It would require that the funeral director inform the consumer that he will make available on request a brief written or printed explanation of legal requirements including public health regulations (Section 453.3(a)(2)). The proposed rule defines outer interment receptacle as "any container or enclosure which is placed in the grave around the casket to protect the casket and/or prevent the collapse of the grave including, but not limited to, receptacles, commonly known as burial vaults, grave boxes, or grave liners." (Section 453.1(g)).

Vaults are fairly elaborate devices which are generally waterproof. They also may be airtight. Grave liners, on the other hand, are usually six slabs of some material such as concrete which encase the casket but do not inhibit the flow of water into the casket area.

Underlying the import of this question and the relevant section of the proposed rule is the high degree of consumer ignorance discussed under Issue No. 24. If consumers were knowledgeable about legal, public health or religious requirements, misrepresentation would be exceedingly difficult. But, they are relatively ignorant and misrepresentation can take so simple a form as failing to disabuse a consumer of erroneous notions which may inure to the benefit of the funeral director.

Has there been outright misrepresentations of legal, public health, and/or religious requirements to customers or potential customers? The record reveals some overt misrepresentations

in regard to embalming and legal requirements therefor. 1/ A number of witnesses testified that some funeral directors stated that embalming was required by state law. 2/ Such outright misrepresentation was not pervasive; rather, it occurred in isolated cases.

Generally, funeral directors determine what type funeral is desired and in the vast majority of cases this would be the so called "traditional" 3/ funeral with viewing and a service followed by ground burial. In such cases, the time between death and ground burial is long enough so that state law, in many cases, would in fact require embalming. 4/

What was not disclosed to the family by the funeral service industry member was that there are alternatives; that is, from relatively speedy disposition of remains either by cremation or ground burial to a memorial service with certain commonly accepted components omitted. There was considerable funeral service industry discussion of the psychological disadvantages to the bereaved of having a service without the body present. 5/ Many rationales were offered for this including the therapeutic affect of a service with the body present. 6/ I found none of these arguments

1/ See, e.g., testimony of Monsignor Richard O'Keefe, member of Arizona State Board of Funeral Directors and Embalmers, Tr. 7065 and testimony and hearing exhibit of Fred Sweeton, East Tennessee Memorial Society, Tr. 9577 and HX-Atlanta 12.

2/ See, e.g., testimony of Robert Nesoff, former director of investigation for the New York State Temporary Commission on Living Costs and the Economy, Tr. 332. Sweeton, id.; testimony and hearing exhibit of Sherry Chenoweth, director, State of Minnesota, Office of Consumer Services, Tr. 3121 and HX-Chicago 43 (Supplement) and testimony and hearing exhibit of Johnny Mack, investigator, Central Area Motivation Programs, Tr. 5998 and HX-Seattle 14.

3/ For a complete definition of a "traditional" funeral, see, e.g., testimony of the Rev. Mr. George N. Marshall, clergyman Tr. 1185-86.

4/ See, e.g., 49 Pa. Code § 13.191 (1973), which requires embalming 48 hours after death if not disposed of or unless a sealer casket is used.

5/ See, e.g., testimony of Charles F. Swartz, Jr., funeral director, Tr. 13941-44; hearing exhibit of Stewart Hausmann, HX-Hausmann 1 ("Should the Body Be Present?"); and Raether and Slater, Successful Funeral Service Practice (Englewood Cliffs, N. J.: Prentice-Hall, 1971), p. 249.

6/ See, e.g., written submission of NFDA, Record II-A-659, pp. 17-19 and testimony of Dr. Edgar Jackson, pastoral psychologist, Tr. 5344-45.

persuasive. They failed to account for individual differences which the proposed rule would accomodate; they failed to show how the proposed rule, if made final and enforced, would disturb whatever therapeutic effect might be attributable to the holding of a "traditional" funeral. This subject is discussed more fully under Section IX "Grief Counseling."

Some funeral directors failed to explain legal and public health requirements perhaps because to do so would open up the possibility of alternative selections by customers. They appeared to be sincere in their widely held belief that the "traditional" funeral is best for most people, but the funeral director, by not disclosing the law and raising the possibility of alternative forms of disposition, substitutes his judgment for that of the customer, the bereaved. Were he not also the vendor of goods and services, this would not be a deceptive non-disclosure. That it is to his economic advantage to sell the "traditional" funeral raises questions about his motives for advocating this form of funeral.

Among the reasons given by the industry for its failure to disclose legal or public health requirements is the notion that the family and the funeral director are in agreement, each knows what is expected of the other, and the arrangements are in conformity with legal and public health requirements. Consequently, any discussion of such requirements would be superfluous.

Additionally, there was some feeling that any discussion of a technical or legal nature would not be meaningful to the bereaved. "When we get a bereaved family, sometimes they are too bereaved to discuss anything." 7/

As to religious requirements, there may have been some misleading of Roman Catholics as to the Church's position on cremation. It is my understanding, as a result of evidence adduced in this proceeding, that there is no prohibition by the Church of Rome in regard to cremation. There was not, however, sufficient testimony on the Church's position to warrant a finding.

7/ Testimony of Rabbi Sidney Applbaum, Tr. 1056.

Most Jews are informed as to the requirements of their religion. The Tripartite "Accord," 8/ as it was generally called in this proceeding, specifies the disclosures to be made to Jews and, with one exception, the kind of casket to be used, the disclosures to Jews are exemplary.

As to the caskets to be used for Jews, the "Accord" may lead Jews into believing any wooden casket without nails is satisfactory including rather extravagant ones of high cost. A number of experts who testified about Jewish burial traditions and law indicated that the simplest, cheapest box is the appropriate container to be used for Jews. 9/ Several testified if a box with nails is substantially cheaper, then it is appropriate also despite a general belief to the contrary in regard to metal in Jewish burial containers. 10/ The Jewish funeral directors have slightly modified the interpretation of the Accord to enable them to sell higher priced caskets instead of the lower priced ones which some believe to be more in conformity with Jewish law and tradition. 11/

8/ Id. at Tr. 1046-52 and HX Applbaum 1 and 2. The "Accord" is an agreement between the Rabbinical Council of America (the largest Orthodox Rabbinic body in the United States), the Union of Orthodox Jewish Congregations of America (the synogogue arm of the Rabbinical Council) and the Jewish Funeral Directors of America under which Rules and Regulations were set up with regard to the implementation of the religious requirements of a Jewish funeral.

9/ See, e.g., testimony of Rabbi M. D. Tendler, Tr. 855, 859 and testimony of Rabbi Sholom A. Singer, Tr. 4619.

10/ See, e.g., Rabbi Applbaum, note 7 supra, at 1088-89.

11/ See, e.g., Rabbi Applbaum id., at 1079, who discussed the "Accord's" mention of wooden caskets with no discussion of expensive versus inexpensive. The former rule concerning uniform caskets was changed to a recommendation after pressure was brought by the Jewish funeral directors according to testimony of Rabbi Richard Yellin, Tr. 13829-30. For a further illustration of the problem, see testimony of Burton L. Hirsch, funeral director and member of the Pennsylvania State Board of Funeral Directors, Tr. 12523-25.

Summary: Generally, I do not find outright misrepresentation of legal, public health, and/or religious requirements to customers or potential customers. There is, however, some material nondisclosure of legal and public health requirements by funeral service industry members, and some confusion about the casket requirements and the disclosure thereof in Jewish funerals.

Issue No. 8

"Have funeral service industry members claimed, suggested, or encouraged a belief by customers or potential customers that embalming; a casket, sealed or unsealed; or a burial vault, sealed or unsealed; would prevent natural decomposition of deceased human remains when such was untrue or misleading?"

and

Issue No. 9

"Have funeral service industry members claimed or suggested to customers or potential customers that particular caskets or burial vaults were or would remain airtight or watertight when such was not the case?"

The relevant section of the proposed rule, Section 453.3(b), would prohibit preservative value claims as to decomposition or decay resulting from the use or purchase of embalming, a casket, sealed or unsealed, or a burial vault. It would prohibit the making of false, misleading, or unsubstantiated claims of watertightness or airtightness as to the caskets or vaults, whether sealed or unsealed, and further would prohibit misrepresentation of the preservative or protective utility of the caskets, burial vaults, or embalming.

The two issues are considered together and are directly related. Taking them in reverse order, Issue No. 9 asks if funeral service industry members have claimed to customers that particular caskets or burial vaults would remain airtight or watertight. Issue No. 8 then asks if funeral service industry members have claimed that a casket (which may be understood to have these attributes), burial vault or embalming would prevent natural decomposition of deceased human remains when such was not true or was misleading.

Throughout this proceeding funeral directors testified that they did not pass on to consumers claims as to airtightness or watertightness. ^{12/} For instance, Roger Dyer, a funeral director in New York State, stated: "As far as sealer type caskets, the manufacturer warrants these to the consumer. I do not warrant any sealer type caskets or any sealer type vaults." When asked if he passed on the warranty to the customer from the manufacturer, he stated that he did not. ^{13/} He further stated, "If the manufacturer wants to give it (the warranty) to the family on an individual basis, this is fine. However, I am not implying any warranty for any merchandise that I sell." ^{14/}

These warranties and the advertising that is consistent with such warranties are disseminated widely by casket manufacturers ^{15/} as are preservative claims by manufacturers and sellers of embalming fluid. One advertisement in an industry trade magazine showed a picture of the Sphinx and a pyramid and claimed that its embalming fluid would preserve human remains "indefinitely." ^{16/} The meaning of "indefinitely" could be for a short period of time or a long period of time, that is, an indefinite period. Another and equally widely held construction of the word "indefinitely" is that it means for an infinitely long time into the future. This latter construction must be intended when the claim is combined with the depiction of the Sphinx and a pyramid. It is misleading and deceptive. Very few (if any) witnesses in this proceeding claimed that contemporary embalming techniques, caskets or burial vaults could preserve human remains for an indefinitely long

^{12/} For example, see testimony of Mildred Damiano, funeral director, Tr. 1318 and Norman G. Heard, funeral director, Tr. 13183-84.

^{13/} See rebuttal submission of FTC staff containing advertisements, promotional materials and warranties of various casket and burial vault manufacturers. Wilbert Burial Vaults, Record X-1-93-a; Belmont Casket Manufacturing Company, 93b; National Casket Company, 93c; Elgin Metal Casket Company, 93d; Boyertown (1) and Lake Shore Burial Vault Company, 93e; 103 Batesville Casket Company.

^{14/} Tr. 1582.

^{15/} Note 13 supra.

^{16/} Esco Embalming Supply Company Advertisement Mortuary Management, June 1976, back cover. See also rebuttal submission of FTC staff containing Esco Advertisement, The American Funeral Director, May 1976, Record X-1-26.

period into the future. 17/ This advertising of embalming fluid and the warranties of airtightness and watertightness are widespread.

Why do the manufacturers engage in these advertising and warranty claims if these attributes of airtightness and watertightness do not relate to preservative values? I can find no rationale justifying the warranties and the advertising except to impress upon funeral directors that the advertised products have these qualities. What then is the purpose of impressing these attributes upon funeral directors if not for them in turn directly or indirectly to pass them on to consumers?

Rabbi Richard M. Yellin testified, "Just the display and words such as 'sealer', 'airtight', 'waterproof', etc., foster the thought 'preservative'.... if you are allowed to talk about preservation, people should also talk about anaerobic (sic) bacteria, which function better in a vacuum than bacteria that function in an oxygen environment." 18/

In search for logic, I can only conclude that trade advertising in regard to airtight and watertight qualities carries over in the minds of funeral directors and encourages in them a belief that these qualities create preservative values. 19/ The trade advertising is misleading and deceptive and the funeral director (albeit innocently in some cases) leads people to believe or fails to disabuse them of the notion that remains will be preserved by the use of these devices and through embalming, perhaps unto eternity.

There has been testimony as to the possibility of outright misrepresentation of the preservative values of containers and embalming by funeral directors. 20/ Though the record does not indicate extensive use of this deception, it does take place. 21/

17/ "It is common knowledge that no process nor caskets nor vaults can completely prevent decomposition of deceased human remains and, as a result any Funeral Director who suggested this would be flying in the face of established fact." Arnold Hornberg, President, Funeral Director's Services Association of Greater Chicago, Tr. 4776.

18/ Tr. 13824.

19/ See, e.g., testimony of Vincent E. Polli, funeral director and secretary-treasurer of the Vermont Funeral Directors and Embalmers Association, Tr. 2191 and testimony of John Curran, funeral director and president, New York State Funeral Directors Association, Tr. 94-95.

20/ For one of the few instances described in the proceeding, see testimony of Pastor John H. Niles, Tr. 3226-27.

21/ See, e.g., testimony of Joe T. Todd, funeral director, Tr. 8791-92, newspaper article, "Can You Afford to Die?", Pittsburgh Post Gazette and testimony of the Rev. Mr. David Haun, Tr. 9935.

It may be out of kindness that funeral directors do not "level" with survivors about decomposition. It may bring comfort to the bereaved to think that the human remains will stay intact. This may be a very kindly deception and an illusion which does relatively little harm and perhaps a great deal of good during a period of emotional strain. "Importunate truth-telling, which brings only bewilderment and discomfort to the hearers, is, in my opinion, a mistake..." 22/

This is not an attempt to promote deception nor to justify it in many of the other aspects of the funeral transaction. In this situation, if there is deception as to whether the casket or vault is waterproof or airtight, the law is violated and there should be an appropriate remedy. If a funeral service industry member claims that embalming will preserve indefinitely, then a deception has occurred and there should be a remedy. Industry spokesmen suggest, however, that the implication of preservative value claims may be a comfort and that no affirmative disclosure be required. 23/

Summary: The casket manufacturer's claims of airtight and watertight qualities are widespread. Consumers are not disabused of a belief that these qualities as well as embalming will prevent natural decomposition of human remains.

22/ E. M. Forster, (New York, New York, The Modern Library, The Collected Tales of E. M. Forster, 1968), p. 19.

23/ The proposed rule does not expressly require such a disclosure, except that § 453.3(b)(1) and (2) could be interpreted to require affirmative disclosure.

VI. MERCHANDISE AND SERVICE SELECTION

The proposed rule under Section 453.4 would forbid the failure to display the three least expensive caskets offered for sale in the same manner as other caskets are displayed. This section contains an exception when there are fewer than twelve caskets displayed in which case only one of the three least expensive must be displayed. It would compel funeral directors to inform customers in writing that displayed caskets can be obtained in other colors or, in the alternative, to provide caskets in other colors to customers who request them. There is a proviso in this section which makes it effective only when other colors can be obtained from regular commercial suppliers upon 12 hours notice. It would forbid the representation that merchandise is offered for sale when such is not the case. It would forbid the making of representations in order to obtain leads or prospects for the sale of other funeral merchandise. The proposed rule in this section forbids the discouraging of the purchase of funeral merchandise by disparaging the quality, appearance, or tastefulness of merchandise, by suggesting that such merchandise is not readily available, by defacing any merchandise or by using any sales policy or method of compensation which has the effect of penalizing salespersons for selling merchandise which is advertised for sale. It also forbids the disparagement of expressed concern about price as indicative of a lack of respect or affection for the deceased.

Issue No. 10

"Have funeral service industry members prevented or discouraged customers from purchasing less expensive caskets by not displaying such caskets, defacing or disparaging them, placing them in different rooms or in inaccessible locations or displaying them in surroundings which are markedly inferior to the way other caskets are displayed?"

(A) Displaying less or least expensive caskets - A number of consumers 1/ and even a few funeral directors 2/ testified that less or least expensive caskets were not displayed in the

1/ See, e.g., testimony of Rosemary Blakemore, social worker and consumer, Tr. 5452-53 and testimony of Donald J. Brundage, consumer, Tr. 9555.

2/ See, e.g., written submission of Harry G. Senison, trade embalmer and funeral director, Record II-A-145 and testimony of Mildred P. Damiano, funeral director, Tr. 1314-15.

regular showroom, that is, the casket selection room of the funeral director or the wholesale casket warehouse showroom used by some funeral directors. (Some cannot afford a casket selection room on their premises.) Even when the lower priced casket is in the selection room, one way used to hide it is to place it under the display counter holding a more expensive casket. 3/ This counter is draped so that the less or least expensive casket is sometimes not visible. 4/ In other instances, the least expensive caskets were in smaller side rooms, hallways, garages, basements, and other less exposed parts of the establishment. 5/ This is almost the same as not displaying such caskets since they were only available when the customer asked to see them. I find, based on the record in this proceeding, that the practice of not displaying less expensive caskets is extensive.

(B) Defacing less expensive caskets - In this proceeding, very few instances of actual defacing of less expensive caskets were adduced; 6/ thus, while it has happened from time to time I can make no finding as to the practice of defacing.

3/ See testimony of Staunton O. Flanders, consumer and Temple Burial Society representative, Tr. 4658-59, 4674-75.

4/ Id.

5/ See, e.g., written submission of Mrs. W. A. Kanifer, consumer, Record II-B-1971; written submission of John A. Buchanan, president, Los Angeles Funeral Society, Record II-C-155; 1972 Funeral Study submitted by Sherry Chenoweth, director, Minnesota Office of Consumer Services, HX-Chicago 43 (Supplemental), testimony of Richard J. Stevens, attorney and president, Chicago Memorial Association, Tr. 3618-21.

6/ For examples of the few instances of defacement, see written submission of consumer complaint (name deleted), September 1974, Record VII-176 and testimony of John Mack, investigator, CAMP Consumer Action Project, Tr. 6012. The former instance dealt with dirt in the casket and the latter dealt with a casket which appeared dirty with spots.

(C) Disparaging less expensive caskets - A number of witnesses and those supplying written submissions gave examples of instances where lower priced caskets were frequently referred to by funeral service industry members as "welfare caskets". 7/ It is generally accepted that "welfare" has a pejorative connotation. This form of disparagement is widespread to the point of pervasiveness. That such caskets are used for "welfare funerals", as they are known in the industry, does not make this less disparaging. Other instances of disparagement included laughing at the least expensive casket by the funeral director 8/ and telling the client that the least expensive casket was too small for the deceased to fit in. 9/

Rabbi Sholom A. Singer of Chicago, under cross-examination, stated, "And then another situation, the same man said to me, he said, and the Director had the audacity to say to me, 'I am not going to allow you to put your father in that box. You are going to get a more expensive one'." 10/

As in other areas where disparagement is at issue such as "bait and switch" schemes, proving that it has occurred and with what frequency is difficult since in many cases subjective reactions are involved. I can only find from this record there is some disparagement of low cost caskets, and that the principal methods are to use the pejorative term "welfare" in conjunction with low cost caskets and funerals and to imply lack of concern evidenced by the low cost "box".

(D) Placing less expensive caskets in different rooms or in inaccessible locations or displaying them in surroundings which are markedly inferior to the way other caskets are displayed - (See (A) above and Issue 14 for substantive discussion and findings.)

7/ See, e.g., testimony of Christina Skeels, investigator, CAMP Consumer Action Project, Tr. 6015; written submission of Mrs. Jerome Greyson, consumer, Record II-B-1436; written submission of Stephen H. Oleskey, attorney, Record II-B-2239, pp. 2-3.

8/ Testimony of Bill Hughey, consumer, Tr. 10368.

9/ Testimony of the Rev. Mr. Frederick A. Fenton, Tr. 6416-18.

10/ Tr. 4631.

"Have funeral service industry members displayed less expensive caskets in colors known to be unattractive to many customers for the purpose and with the effect of dissuading customers from purchasing such caskets or encouraging customers to purchase the higher priced casket?"

Much testimony as to which colors were generally known to be unattractive was adduced at this proceeding. 11/ This testimony is conflicting since, for instance, various parties considered gray attractive, 12/ while others found it unattractive. 13/ Time and again witnesses, almost in counterpoint, testified that a color was attractive when a previous witness had just said it was unattractive.

A number of funeral directors testified that they did not make a conscious effort to select the unattractively colored caskets; 14/ rather, industry members testified that caskets were unavailable in what they themselves considered to be attractive colors and they blamed the casket manufacturers for the situation. 15/ This reasoning is somewhat specious. The casket manufacturers are in large part at the mercy of their

11/ See, e.g., testimony of the Rev. Mr. Grant M. Gallup, Tr. 4130-31 and testimony of the Rev. Mr. Frederick Fenton, Tr. 6420.

12/ See, e.g., testimony of William M. Holman, funeral director, Tr. 13127-28. See also testimony of Richard Myers, funeral director and chairman, Utah State Funeral Directors and Embalmers Examining Board, Tr. 8270-71, who stated that his third highest priced casket, of solid bronze, is gray colored.

13/ See, e.g., testimony of Dr. C. C. Crawford, management consultant, Tr. 6606 and testimony of George Primm, funeral director and president, Empire State Funeral Directors Association, Tr. 268.

14/ See, e.g., testimony of John Proko, funeral director and past president of the Wisconsin Funeral Directors Association, Tr. 4167-68 and testimony of George F. Kileen, funeral director and Wayne County, Michigan commissioner, Tr. 3808. This viewpoint was refuted, though, by testimony of Rep. James J. Kaster, Jr., former casket manufacturer, state legislator, and funeral director, Tr. 6113-14, who stated that funeral directors have requested that he make the least expensive casket look as bad as he could.

15/ See, e.g., Primm, note 13 *supra*, at Tr. 268 and testimony of David C. Murchison, counsel to NSM, Tr. 12611.

customers and are readily capable, especially in the case of cloth-covered wood caskets, of producing whatever their customers order. 16/

Summary: I find that funeral service industry members generally make little effort to apply pressure to manufacturers to see that lower priced caskets are produced and subsequently displayed in colors known to be attractive to many customers 17/ and in some instances actually encourage the production of unattractively colored caskets. 18/ This finding applies to both the interior and exterior of the caskets.

I do not find that funeral service industry members displayed less expensive caskets in colors known to be unattractive to many customers for the purpose and with the effect of dissuading customers from purchasing such caskets or encouraging customers to purchase the higher priced caskets.

Issue No. 12

"Have funeral service industry members used sales commissions and other employee compensation plans to encourage sales of higher priced products and services to customers and to discourage and penalize sales of lower price ones?"

While there was some testimony in the record that indicated that the funeral service industry members did pay

16/ See, e.g., Kaster, note 14 supra, at Tr. 6113-14.

17/ For an example of a casket manufacturer's suggested color sales techniques to funeral directors, see rebuttal submission of FTC staff containing "How to Sell More Profitably - The Role of Color in Merchandising" by Ray T. Hudson, sales manager, Marcellus Casket Co., Record X-1-124, p. 8.

18/ Kaster, note 14 supra, at Tr. 6113-14. See also testimony of Peter Hawley, associate producer, WTTW-TV, Chicago, Tr. 2780-81 and Halvorson/Slade, Inc., "A National Motion Study - A Study in Depth of Consumer Motivations and Their Applications to the Funeral Directors Services - For The National Association of Approved Morticians" (undated), Record III-F-10, p. 14 and Supplement, which discusses national studies of interior and exterior casket color preference of consumers. The results of these studies might easily be misused to discourage the purchase of less expensive caskets.

sales commissions, 19/ I can find little in this record to justify a finding that such sales commission plans were used to encourage the sale of higher priced products and services, nor is there substantial evidence that such sales commission plans were used to discourage or penalize sales of lower priced ones. 20/

Admittedly, any sales commission plan would have the tendency and the capacity to encourage an employee to sell higher priced products, but I have found nothing in this record to indicate that the percentage commission on the higher priced products was higher than the percentage on the lower priced product. It would take this variation (employed by some vendors) to give rise even to speculation that such plans were improperly employed. There is no evidence in this record that such variations were used and I make no finding as to these commissions. In fact, most funeral homes are one-or two-person owner/operator small businesses. The owner/operator(s) is the salesperson(s) also. 21/

19/ The written submission of International Funeral Services, Inc., states: "IFS provides a deferred profit sharing plan and an employee incentive bonus plan that are designed to reward all employees, and employees of specific local operations that generate profits above pre-determined levels. To the extent that such plans indirectly reward employees, for high-priced, and therefore, theoretically more profitable, sales--IFS and its Board plead guilty. Pre-need funeral trust (where such sales are permitted) salespersons are also compensated on a 'benefit' for selling a 'high-priced' funeral" (Record II-A-488).

20/ One alleged example of potentially indirectly discouraging and penalizing sales of lower priced products and services is discussed by Robert Nesoff, director of investigation for the New York State Temporary Commission on Living Costs and the Economy, Tr. 364-65. He alleged that his informants discovered that at Walter B. Cooke Funeral Home, "if an individual was not right up there on the top of the sales force, he found himself doing things like cleaning bodies and working in the morgue room, which were very, very distasteful jobs and something that they would like to be moved out." This alleged practice was denied by the president of Walter B. Cooke during the New York State Commission's hearings.

21/ See statement of Rhene B. (Si) Law, funeral director and president, Illinois Funeral Directors Association, Record 215-46-1-29-11, #509, p. 5.

Issue No. 13

"Have funeral service industry members utilized other sales and merchandising policies and practices to prevent, impede or obstruct the purchase by customers of certain funeral merchandise, particularly less expensive merchandise which is available?"

I find little in the record in regard to sales and other merchandising policies and practices which would impede or obstruct the purchase by customers of lower priced merchandise. Isolated instances of these policies and practices, however, were described throughout the proceeding. 22/ I can make no finding as to their degree of occurrence.

Issue No. 14

"Have funeral service industry members sought to prevent price-value comparisons by customers or potential customers by displaying merchandise in ways which make such comparisons difficult?"

There was considerable testimony and there are a number of submissions on the record relative to the casket arrangement

22/ Changing price cards on caskets for different customers - testimony of the Rev. Mr. George N. Marshall, Tr. 1192 and testimony of Robert A. Ebeling, former managing editor, Mortuary Management Magazine, Tr. 6841-42, 6874-75; price card placed under the pillow in the casket - testimony of Flora Cunha, consumer, Tr. 1423; bugging of the casket selection room - testimony of Michael Hirsh and Peter Hawley, WTTW-TV, Tr. 2812-13, 2843-44, and Transcript of "Since the American Way of Death", Record VI-D-25; the use of delay in encouraging embalming and viewing - testimony of Dr. C. C. Crawford, management consultant, Tr. 6609-10; the encouragement of looking at the casket as the deceased's "house" or "bedroom" - testimony of Professor Ruth Mulvey Harmer, professor and vice president, Continental Association of Funeral and Memorial Societies, Tr. 11103-04, 11113-14; use of potentially deceptive consumer information pamphlets prepared by industry associations to encourage embalming - see, e.g., testimony of Alan S. Anderson, funeral director and president, Utah Funeral Directors Association, Tr. 6166-69; floral industry information and pressure on funeral directors to discourage the "please omit flowers" statement in obituary notices and elsewhere and the potential result of such action - rebuttal submission of FTC staff containing written submission of Anne Burdic, consumer, Record X-1-88 and "News on the National Scene," Mid America Mortician, April 1976, p. 6, Record X-1-27.

in the selection room. 23/ Critics of the funeral industry maintained that the arrangement of the selection room is cleverly contrived to make price comparison difficult. Frequently cited was a textbook by Wilber M. Krieger, 24/ that sets out at least one method of showroom arrangement for shifting purchases to higher priced goods. 25/ There was some testimony that this and other similar methods were taught in schools of mortuary science and funeral management. 26/

23/ See, e.g., putting least expensive caskets next to most expensive caskets - testimony of Malcolm Siegel, consumer, Tr. 2956; use of "Aisles of Resistance" and lighting to encourage the purchase of higher priced caskets - see testimony of Kaster, note 14 supra, at 6086-89, 6112; Different lighting and decorations for certain parts of the casket selection room - testimony of Dr. Charles W. Wahl, psychiatrist, Tr. 8484-85; Defense of certain merchandising techniques - testimony of Edward J. Fitzgerald, funeral director and past president, NFDA, Tr. 6236-38 and testimony of John Browning, executive director, California Funeral Directors Association, Tr. 8213-15, and International Funeral Services, Inc., note 19 supra, at 5.

24/ A Complete Guide to Funeral Service Management (Englewood Cliffs, N.J.: Prentice-Hall, 1962).

25/ Id. at 53-61. This method deals with the caution against displaying too many caskets in the lower spectrum of price against displaying caskets in order of price. The former caution impedes customers from purchasing too many cheaper caskets and the latter deals with prevention of direct price-value comparisons. Krieger developed a precise formula for determining the percentage of caskets displayed from each of four price quartiles, 10% in the cheapest quartile, 27% in the second, 40% in the third, and 23% in the most expensive quartile. Krieger's method also deals with the theory that most people are right-handed and therefore, look to the right first. Thus, the more expensive (3d and 4th quartile) caskets should be displayed to the right when the customer enters the casket selection room. In addition, Krieger developed the "Resistance Lane" theory. This deals with the use of wider aisles for display of 3d and 4th quartile units and more narrow aisles for the less expensive ones. This offers easier access to the aisles containing the more expensive caskets to the right. Krieger labelled the narrower aisles to the left the "Resistance Lane".

26/ Putting higher priced caskets to the right when entering casket selection room because people tend to turn that way - testimony of Joe T. Todd, funeral director, Tr. 8751-52, 8757-60; The various methods of casket room arrangement - prehearing filing of Dale W. Sly, San Francisco College of Mortuary Science, containing "Mortuary Merchandising", Record 215-46-1-29-7, pp. 39-50; emphasis on contrast between lower and higher priced caskets by placing them next to each other rather than in ascending order of (footnote cont'd)

Though pervasiveness of the use of various techniques to prevent or hinder price-value comparisons cannot be determined because of a lack of evidence on the record, 27/ information concerning such techniques (whether deceptive or not) is available and disseminated to funeral directors through casket manufacturers' "how to" booklets and articles, 28/ industry seminars, 29/ and industry publications. 30/

On balance, there is little evidence on this record to justify a finding of prevention of price-value comparisons by means of the arrangement of the casket selection room. Furthermore, I am troubled by the policy issue posed by any restriction on merchandise arrangement. This may be appropriate based on the distinctive characteristics of this transaction

(26/ cont'd) price and the use of lighting and color to encourage the purchase of higher priced caskets- testimony of Hirsh and Hawley, note 22 supra, at 2779-80.

27/ See, e.g., Todd id. at 8758-60. This is one of the few documented examples of funeral director testimony confirming the use of potentially deceptive casket display room techniques. Mr. Todd described his visits to 15 to 20 (other than his own) funeral homes in the State of Arkansas. He states that the vast majority use the technique where the most expensive units are placed on the right where people generally look first. See also testimony of Keith Marsh, former funeral director and attorney, who discusses placing of cheaper caskets in obscure locations in the display room and "squashed" together to make viewing them difficult, Tr. 6772-78, and HX-Los Angeles 7.

28/ See, e.g., FTC staff rebuttal submission containing Boyertown Casket Company publication, "Your Selection Room Display Work Kit," Record X-1-125 and "Adjust your Showroom and Better your Ledger," by John C. Beck, president, Casket Manufacturers Association of America, Record X-1-126.

29/ See, e.g., Ebeling, note 22 supra, at 6866-70.

30/ See, e.g., Griffin and Slater, Chapter on "Casket Selection Room Evaluation" in Raether's Successful Funeral Service Practice (Englewood Cliffs, N.J.: Prentice-Hall, 1971).

(Issue No. 23), but, if we treat the funeral director as a businessman, then he, like others, should be entitled to arrange his goods in a manner conducive to increasing his sales and profits. The proposed rule, if made final, may strip him of any pretension to professionalism, leaving him with the role of merchant. Other merchants are allowed to display goods in the way their judgement and experience indicates. Absent a demonstration of serious and widespread abuse, 31/ the funeral director should be allowed, this same right.

Issue No. 15

"Have funeral service industry members disparaged or otherwise sought to discourage or prevent a customer's consideration of or concern about prices?"

A number of consumers and other parties testified or corresponded that funeral directors disparaged concern about price. Examples of expressions used to accomplish this task are "You want the best, don't you?", 32/ "Consider what the neighbors will think when they see the casket at the church," 33/ "Honor your loved one," 34/ and this is the "last loving act you can ever perform for him." 35/ References are repeated here to

31/ Such abuse is not evident on the record except for the pervasiveness of not displaying or displaying in a inferior manner least or less expensive caskets (see Issue No.10). Failure to display will hinder price-value comparisons.

32/ Written submission of Edward J. Sartori, adjutant and service officer, Veterans of World War I of the U.S.A., Record II-B-224.

33/ Testimony of Eleanor Sheehan, consumer, Tr. 14669.

34/ Written submission of Mrs. Roy H. Murray (on behalf of herself and her husband), consumers and clergyman, Record II-C-26.

35/ Id. For a further discussion of the misuse of this type of expression, see Hirsh and Hawley, note 22 supra, at Tr. 2762-64. Also see Singer, note 10 supra.

the nomenclature applied to low cost funerals which disparages concern about price, i.e., the references to "welfare funerals" and "welfare caskets." 36/

The use of the term "welfare" as it relates to funerals or caskets is one example of the use of nomenclature in order to achieve an end. Many funeral directors used enhancing terms for that which they sought to promote. For instance, the use of "remains" instead of "corpse," "funeral director" instead of "undertaker," "casket" instead of "coffin," and, as indicated previously herein, funeral service "profession" instead of "industry". The use of enhancing terms would not, of course, be violative of the proposed rule. But the use of perjorative terms which could discourage low profit sales would be disparaging and thus violative.

The use of the word "welfare" is only one example. Another is "disposal". 37/ The term refers generally to immediate cremation or immediate ground burial, both of which are quick, efficient, and moderately priced methods of funeralization. The term "disposal" conjures up a vision of getting rid of garbage as with a kitchen appliance. In one case, I recall a funeral director's placing the accent on the last syllable as if the word were "disposall". This was not

36/ See, e.g., written submission of Mrs. C. N. Crosher, consumer, Record II-B-24, who testified that a funeral director stated, "If you want a less expensive casket, I can show you what people on welfare get." Another example of such disparagement is one cited by the written submission of Sarah Sheets Cook, president, Council Memorial Society, Record II-C-248. A person reported to her that the funeral director told the person that "she didn't want to be a welfare case, did she" This was after a request for a simple cremation and memorial service. Reference should also be made to Issue No. 10(c) for a further discussion of the perjorative use of "welfare".

37/ The Embalmers Supply Company, "Basic Ideas, Subjects and Suggested Talks for the Funeral Director to Help with Public and Community Relations" (ESCO, Westport, Conn.), testimony of James Broussard, funeral director and president, Texas Funeral Directors Ass'n., Tr. 9351 and testimony of John Lutten, funeral director and Chairman, Pennsylvania State Board of Funeral Directors, Tr. 12956-57.

noted in the record so I cannot give a reference. But, even this aside, I believe that the choice of the term "disposal" rather than "disposition" disparages (albeit unconsciously) concern about price. "Disposition is a better word". 38/

In this question, I have treated price concern as concern about low price. A number of funeral service industry members indicated that they frequently discouraged customers from purchasing funerals and goods which were too high priced. 39/ I believe this occurs in a significant number of cases for two reasons: 1) there is a concern on the part of the funeral director that a higher amount of money may be difficult to collect 40/ and 2) even if this is not a problem, a director is personally concerned that a survivor spend as much as but not more than one can afford (in his judgement). 41/ I cannot find that funeral directors as a rule discourage a person from purchasing more than one can afford, but it does occur with some frequency.

Summary: Disparagement of concern about price has occurred in a significant number of cases.

38/ Testimony of Rabbi Richard Yellin, Tr. 13,843. For other examples of discouraging concern about price, see discussion under Issue No. 19(c) Disparaging less expensive caskets.

39/ See, e.g., testimony of Frank H. Walterman, funeral director and president, Indiana Funeral Directors Association, Tr. 4984.

40/ See, e.g., testimony of Arnold Hornberg, funeral director and president, Funeral Directors Services Association of Greater Chicago, Tr. 4780-81.

41/ See testimony of A. A. Rayner, Jr., funeral director, Tr. 4280-82.

VII. DISCLOSURE

The proposed rule would require a number of disclosures to consumers. Among them are disclosure of price information over the telephone, the giving of a casket price list to a customer when he proceeds to make his selection, with this list in ascending order of price and with identifying information on the caskets listed. It would forbid the representation of a casket on the list as not available when it is in fact available. It would require the prominent display of prices in or on the casket by card, sign, or other means and it would require that casket photographs shown to customers have the price prominently displayed. It would require that funeral directors furnish customers a written notice that informs the customer that some cemeteries require an outer enclosure and that a grave liner is usually less expensive than a burial vault with both items fulfilling cemetery requirements. The notice must also inform consumers that outer interment receptacles are sold by cemeteries as well as funeral homes. It would require that this disclosure contain the price for each outer interment receptacle available from the funeral home together with a brief description of the enclosure.

This Section (453.5) would require that an itemized price list of nine different items be furnished to consumers in writing before selection. These items are:

1. The transfer of remains to the funeral home
2. Embalming
3. Use of facilities for viewing
4. Use of facilities for funeral services
5. Casket price
6. The hearse
7. Limousine
8. The service charge of the funeral director and his staff
9. The price of the outer interment receptacle

This section contains a proviso that a total or unit price may be given for a standard adult funeral (Defined in 453.1(n)) under an unspecified price level with the items not separately priced. It provides, however, that, if a customer wishes to

decline one or more of the items in the unit price, the price shall be reduced by the amount of saving accruing to the funeral home as a result of the declination.

The price list must include the name, address, and telephone number of the funeral home, the effective date of the prices, and a statement informing the consumer that he is free to select only those items which he desires and will be charged only for those which he selects. It contains a proviso that certain items may become necessary because of the type of service or circumstances of death. In this case, that is, where the customer must pay for certain services he has not selected, he is to be given an explanation in writing.

This section also would require a memorandum of the service after selection. This memorandum must contain a listing of the services and merchandise selected by the customer with the price for each item including but not limited to the following:

1. Embalming
2. Other preparation of the body
3. Use of facilities for viewing
4. Use of facilities for funeral service
5. Other services of the funeral director and his staff
6. The casket selected
7. Other specifically itemized merchandise
8. Specifically itemized transportation charges
9. Specifically itemized charges for any special services required
10. Specifically itemized cash advances or expenditures.

There is once again a proviso for a unit priced adult funeral service below an unspecified price level.

The memorandum of services must contain the name, address, and telephone number of the funeral home, the notice that the customer is free to select the items he desires and will be charged for only the items he selects, the statement that no

substitution shall be made unless agreed to in advance by both parties, a statement that the customer has read and understood the statement and has received the written information regarding the prices of caskets and other merchandise. Immediately below these statements is a space for the signatures of the customer and the funeral service industry member or authorized representative as well as the date (Section 453.5).

The above is referred to as the itemization section of the proposed rule. The following questions deal with the issues underlying this section.

Issue No. 16

"Have funeral service industry members failed to disclose or make available prior to selection by customers by means of price lists, signs, cards and telephone disclosures information on the price and availability of individual items of service and merchandise commonly selected such as embalming use of facility for services, caskets, and burial vaults?"

Throughout the United States a majority of funeral directors use a system of pricing called unit pricing. 1/ This system would under other circumstances be called a "package" price. Included in the single price are the goods and services generally included in what the industry prefers to call a "traditional" funeral. These services include, but are not limited to, transporting the remains to the funeral home, embalming, cleaning, and dressing it, applying cosmetic techniques to make it appear lifelike, conducting the visiting, conducting the service in the assembly room (which the industry prefers to call the "chapel",) and conducting the body and the family to the cemetery, placing death notices in newspapers, obtaining a death certificate and other related services.

Goods included in the unit price are the casket, stands for flowers, etc. Use of a "funeral coach" (hearse) and car for the family would also be included in this unit. 2/

Some states, such as New York 3/ and New Jersey, 4/ require itemization of the prices of the goods and services to be provided. Funeral directors in these states generally provide price

1/ Hearings before the Subcommittee on Activities of Regulatory Agencies, Committee on Small Business, U.S. House of Rep., 94th Cong., 2d Session, p. 215, Part III, Attachment to Testimony of Howard C. Raether, executive director, NFDA.

2/ See Hearing Exhibit of David C. Murchison, counsel to NSM, HX-Washington 21, #21, p. 5.

3/ Hearing Exhibit of Kathleen F. O'Reilly, Final Corrected Copy, Analysis of State Statutes, Rules and Regulations Affecting the Funeral Practices Industry, Submitted by Consumer Federation of America, HX-Atlanta 7, pp. 43-46.

4/ Id.

information on an itemized basis, 5/ An important distinction must be drawn, though, between itemization required before and after final arrangements are made. - 6/ When disclosed before, the customer can decline parts of the service. When disclosure is made after selection, the customer may have some reluctance to go back and renegotiate. The proposed rule would require both.

Aside from the states that require itemization, only a few funeral directors make available any information on an itemized basis. 7/ This was made clear time and again by almost every submission and witness on that subject.

Some funeral directors use a form of pricing known as "functional pricing." 8/ Functional pricing denotes any fragmenting, breaking down or itemizing of a unit price into two or more prices, with the price of the casket being the one most frequently quoted separately. 9/

As to the availability of prices, either unit or functional, most funeral directors testified that they post the prices on the casket, which, given the prevalence of unit pricing, is the

5/ See, e.g., testimony of Thomas E. Sheehan, funeral director and president, New Jersey State Funeral Directors Association, Tr. 454-55, testimony of Nicholas R. Panepinto, Director, Bureau of Funeral Directing, New York State Department of Health, Tr. 282-83 and testimony of Mildred P. Damiano, funeral director and past president, New Jersey State Funeral Directors Association, Tr. 1311.

6/ See O'Reilly, note 3 supra, at 43-46.

7/ See, i.e., testimony of Robert Coats, funeral director and president, Michigan Funeral Directors Association, Tr. 3765-66 and testimony of John D. Altmeyer, II, funeral director and Immediate past president, West Virginia Funeral Directors Association, Tr. 11742.

8/ Coats, id. and Raether Attachment, note 1 supra, at 215. Bi- and tri-unit pricing are forms of functional pricing.

9/ Testimony of David C. Murchison, counsel to NSM, Tr. 12431.

price of the "traditional" funeral. 10/ Generally price lists are not available 11/ but the price cards on the caskets are usually visible to the customers as they make their way around the casket selection room. One consumer reported that a funeral director placed the price card under the pillow within the casket, 12/ but this sort of deception is very rare.

Most funeral directors who testified at this proceeding and most of those who placed statements on the documentary record expressed a strong aversion to telephone disclosure of information as to price and availability of individual items or of unit prices for funerals. 13/ While a few indicated a willingness to give such information over the telephone 14/,

10/ See, e.g., testimony of John H. Kerr, funeral director and Secretary-Treasurer, The Funeral Directors Association of Kentucky, Tr. 3053-54 and testimony of Mark Waterston, funeral director, Tr. 3723-24. There was some testimony and some submissions though, indicating that no prices were posted on caskets, requiring consumers to ask for individual prices. See, e.g., testimony of Malcolm Siegel, consumer, Tr. 2955 and statement of Mrs. Gail Derrick, consumer, Record 215-46-1-29-8, #13, p. 1 (casket company display room).

11/ Even in states that require itemization, written or printed price lists are not normally available. See, e.g., testimony of Frank R. Galante, funeral director and past president NFDA, Tr. 1732.

12/ Testimony of Flora Cunha, consumer, Tr. 1423.

13/ See, e.g., testimony of Hoyt P. Mayes, funeral director and immediate past president, Oklahoma Funeral Directors Association, Tr. 8895 and testimony of Nelson E. Greene, Sr., funeral director and member, Virginia Board of Funeral Directors and Embalmers, Tr. 14195-97.

14/ See, e.g., testimony of Ernest E. Wight, funeral director and president, South Dakota State Board of Funeral Service, Tr. 4711-12 and Richard Myers, funeral director and Chairman, Utah State Funeral Directors and Embalmers Board, Tr. 8302. See also testimony of Richard Perry, McFarlane and Co., Management Consultants, Tr. 9152. In a survey of Atlanta funeral directors conducted by McFarlane and Co. for the FTC, Mr. Perry reported "Relating to price disclosures, the rule on price confirmation over the telephone, we found that 20 percent of the respondents opposed the rule requiring price disclosure over the telephone, however, we found that 80 percent indicate that while it may be bothersome, price itemization over the telephone would not place a significant natural burden on their practices."

others gave a variety of reasons for not doing so. Among the reasons given were:

(1) the problems involved with having competent personnel available to answer such inquiries; 15/

(2) the confusion which might result since all funerals are individual transactions with individual variations which would not lend themselves to telephone disclosure; 16/

(3) the possibility that a competitor might be calling and an unwillingness for the competitor to know his prices; 17/

(4) the potential for an unethical funeral director to take advantage of telephone disclosure, quoting a low price to get possession of the corpse. 18/

In response to these points, those favoring telephone disclosure pointed out that:

(1) Personnel have to be at the funeral home or on call at all hours; thus, personnel will usually be available to answer questions. While it may be unreasonable to expect 24 hour service, the quoting of prices during normal business hours should not be difficult. The proposed rule could be reworded to reflect this modification.

(2) While funerals are individual transactions, most funerals, according to industry spokespersons, are of the "traditional" type. If disclosure is difficult over the telephone, it is similarly difficult in person. The record does not reflect any difficulty on the part of consumers in understanding what is included in the "traditional" funeral.

It will be more difficult to make telephone disclosure of prices if this must be done on an itemized basis. With eight to ten categories to be disclosed, those giving the

15/ See, e.g., testimony of Dr. Vanderlyn R. Pine, research consultant for NFDA, Tr. 10827.

16/ See, e.g., Mayes, note 13 *supra*, at 8895 and written submission of the International Order of the Golden Rule, Record II-A-666.

17/ See, e.g., testimony of A. R. Leak, Sr., funeral director, Tr. 3876.

18/ See, e.g., testimony of A. R. Rayner, Jr., funeral director, Tr. 4276.

information will have to take more time and care in giving out the information. This will, however, be a problem in or out of the funeral home.

The information about prices is almost always given to those who come into the funeral establishment. If there are substantial variations in individual funerals, and I am not persuaded that there are, this is a problem with which personnel now cope. They can also do so over the telephone.

Clearly, the variation in the price of the casket, the major item purchased (other than service in some cases), will prove a problem in telephone disclosure. Other prices could be quoted and a range of casket prices given. From time to time the analogy of auto pricing was used. "How much is a car?" Automobile dealers can give a base price for models and an accessory price list. They also use illustrative examples. The same technique could be used here.

(3) That competitors will know prices seems to be a positive benefit. It is possible a competitor will raise a price if he finds he is underselling his neighbor, but this is unlikely. More likely is the possibility that he will lower prices to meet the competition.

(4) The problem of bait and switch flies in the face of many assertions of ethical behavior on the part of funeral service industry members. Those so inclined could be doing this presently. The few complaints about this practice, either using media advertisements or in response to telephone inquiries, puts to rest this possibility.

On balance, the benefits to be derived from telephone disclosure are similar to those to be gained from increased price advertising in the media.

(1) The public will be better informed about prices. The level of consumer knowledge about relevant considerations is low (Issue No. 24). This one requirement should have a considerable effect in transmitting information directly to those in need of it at the time they need it.

(2) Given the unusual circumstance of the funeral transaction (Issue No. 23), the pain of handling the arrangements should be lessened considerably by making relevant information readily available on the telephone.

(3) Given the low level of price competition (Issue No. 25), it would serve the public interest to have consumers made more aware of prices so that they could shop effectively for the optimum situation. Certainly there are important considerations beyond price, but that does not diminish the need for price information to be made available to those who consider this a significant factor in making a choice.

(4) Because of the low level of price competition, it would also serve the public interest for competitors to be aware of the general price level against which they must compete. Both sellers and buyers should have this information.

(5) The alternative of going in person to each funeral home is absurd given the unusual circumstances of the transaction (Issue No. 23) and it is a relatively inefficient way of transmitting information (Issue No. 25). The economic and emotional cost of the alternative to telephone and media access to information is far too high a cost for the public to bear.

Summary: Funeral service industry members disclose the unit price of funerals generally by placing price cards on or in caskets in the casket selection room. This price includes all of the elements in what is called the "traditional" funeral. I also find, however that funeral service industry members do not disclose or make available, prior to selection by customers, price lists or information other than the cards on or in the caskets. For those who use functional (rather than unit pricing) the price of the casket is disclosed by means of a card on or in the casket and other prices are disclosed orally.

Telephone disclosure of prices and availability of the individual items of service and merchandise is rarely made. Except in those states that require itemization, very few funeral directors make available, prior to selection, the price and availability of individual items of service and merchandise commonly selected.

Issue No. 28

"Exception to itemization requirement for low price packaged funerals. (a) Will mandatory itemization as required by §453.5(e) and (f) of the proposed rule force funeral service industry members to increase the prices of funerals, especially the least expensive funerals? (b) If it is determined that mandatory itemization will result in price increases, should there be an exception to the itemization requirement in order to prevent price increases for the least expensive funerals? (c) To meet the objective of avoiding increases in the prices of the least expensive funerals and of preventing any exception from serving as a loophole which defeats the remedial purposes of the itemization requirement, what dollar cutoff should be used for the exception in §453.5(e) and (f) for 'lower-priced' package funerals?"

(a) and (b). Testimony by funeral industry representatives was virtually unanimous in the belief that the rule as proposed

would force price increases if the itemization requirement is maintained. 19/ That there will be some price increase was not denied generally by consumers and their representatives. The more significant question, however, is the degree to which there would be price increases.

There will be some cost of compliance with the rule. Funeral homes would have to compute their costs, something which surprisingly few have done over the years. 20/ Additionally, there would be some modest printing expense and additional time which must be spent with customers to explain itemization. 21/ These certainly represent additional, although minimal, costs.

The position of consumers and their representatives is basically that itemization will give options to consumers as to which of the various services offered by funeral homes they may wish to purchase; that is, if no viewing is desired there would be no charge for that service. 22/ Similarly, consumers could use their own automobiles and not be charged for livery. Thus, consumers would have a greater flexibility in the choice of funerals than is presently the case with unit pricing or even the slightly more flexible functional pricing method.

The concern of funeral directors is that consumers will in fact decline many services presently offered and included in unit prices in the "traditional" funeral. 23/ Since not all funeral

19/ See, e.g., testimony of Wendall W. Hahn, president, Federated Funeral Directors of America, Tr. 3530-31, 3538-41, written submission of NFDA, Record II-A-659, pp. 28, 29 and testimony of Roger I. Dyer, funeral director, Tr. 1557-58, 1580-81.

20/ See, e.g., testimony of Don Clements, executive secretary, South Dakota Funeral Directors Association, Tr. 4416-17 and Dyer, id. at 1580.

21/ See, e.g., testimony of Frank Galante, funeral director and past president, NFDA, Tr. 1750-51, 1735-36.

22/ See, e.g., testimony of Malcolm Siegel, consumer, Tr. 2967 and Michael E. Lawson, Assistant Professor of Economics, Boston University, Tr. 13239.

23/ See, e.g., testimony of Edward J. Fitzgerald, funeral director and past president, NFDA, Tr. 6242-45 and testimony of F. James Wylie, Jr., funeral director and executive director, Florida Funeral Directors Association, Tr. 9714-18.

directors give discounts for declined services and, even where given, there is some doubt as to whether the discount is fair to the consumer, consumers would obviously benefit to the extent that services are presently accepted which would in the future be declined. Additional benefit would derive from the flexibility consumers would receive.

The consequences of such behavior (declination of goods or services) on the part of consumers could be enormous. If consumers decide to exercise free choice and customize the funeral arrangements, as many are presently doing in other societal rituals such as weddings, then funeral homes, set up to handle "traditional" funerals, would be faced with less utilization of resources. 24/ While some of the impact would be minimized to the extent that costs are variable, such costs as gasoline, part-time help, etc., most costs in funeral homes are fixed. 25/ These establishments are increasingly spacious, comfortable and expensive to build and maintain. 26/ The cost of livery is also very high. For example, a new hearse can cost in the neighborhood of \$25,000.00 27/ and limousines are similarly expensive. To the extent that these resources are underutilized, the funeral homes' return on investment would be seriously diminished.

Funeral industry representatives maintain consistently that there is a high, if not overwhelming, degree of consumer satisfaction with services presently offered. 28/ While there are many questions as to the manner in which these studies were carried on, it is still clear that expressed dissatisfaction is not great. To that extent, I agree with those funeral industry representatives who give weight to the absence of complaints. Such absence does, to some extent, indicate satisfaction although I do not agree that the percentages given in this proceeding have the meaning funeral industry representatives would apply to them. Specifically, the percentage of complaints relative to the number of funerals is less than 1 percent? Does that then mean that over 99 percent of all users are satisfied? That is not the case since rarely, if ever, could one maintain that all the

24/ There is some evidence that this change is already occurring. See, e.g., Howard C. Raether, Successful Funeral Service Practice (Englewood Cliffs, N.J., Prentice-Hall, Inc., 1971), p. 223. Also p. 232 for some of the reasons for this change.

25/ See, e.g., Lawson, note 22 supra, at 13241-42.

26/ See Walter Chasen, The American Funeral Director, May 1974, p. 20.

27/ See Funeral Service Insider, Jan. 10, 1977, p. 2.

28/ See, e.g., testimony of Fred Danforth, Iowa Central Surveys, Tr. 1790-91 and HX-Danforth 4 and Hahn, note 19 supra, at 3529-30.

dissatisfied parties expressed their dissatisfaction in the form of complaints. There is considerable reluctance among individuals compounded by consumer ignorance of relevant considerations 29/ to express complaints about funerals as distinguished from, say, automobile servicing. This is not the same kind of transaction and, as indicated previously, I have found that this transaction does have distinguishing characteristics. 30/ There is a desire to place the transaction behind one and obliterate a painful memory. "Furthermore, it is true that often times a family that may have a grievance will say to the Rabbi, look, let the dead lie, we don't want to start up." 31/

While I find that there is substantial degree of satisfaction and the degree of expressed dissatisfaction is minimal, suppressed, unexpressed, as well as expressed dissatisfaction may be increased as a result of the promulgation of this proposed rule in final form. This increase in dissatisfaction will probably lead to an increase in the rate of declination of unwanted funeral components, particularly if the Commission or the states mandate itemization. 32/ Increased information, advertising, and telephone disclosure should increase consumer knowledge (Issue No. 24) and may result in a higher level of complaints.

The option of choosing the kind of funeral an individual may want for a relative is important. As a reason for opposing itemization, industry representatives maintained time and again that the "traditional" funeral is best for most people. 33/ I find little basis for this conclusion and will discuss this further in a finding on what is termed by the industry "grief counseling". 34/

29/ See Issue No. 24 for a detailed discussion of the low level of consumer knowledge of relevant considerations.

30/ See Issue No. 23 for a detailed discussion of the distinct characteristics of the funeral transaction.

31/ Rabbi Sidney Applbaum, Tr. 1071-72.

32/ See, e.g., Raether, note 24 supra, at p. 234.

33/ See, e.g., testimony of Dr. Jeannette Folta, sociology professor, Tr. 11954-58 and testimony of Dr. Edgar Jackson, pastoral psychologist, Tr. 5344-45.

34/ The relationship of this position to itemization is unclear. The industry seems to be saying, "Don't give people a choice. We know what is best for them."

The consequences of the cost of compliance with an itemization requirement along with possible price increases (to the extent that the declination rate may rise) must be balanced against another cost factor. ^{35/} To the extent that consumers have accepted services in the past they did not want, this is a cost. In the future to the extent that consumers can decline services that they do not want and that prices may rise for those who do choose these services, we have an increase in price as to those who choose those services but not an increase in aggregate cost on an economic basis. There will be a shift in incidence, but not an increase in cost as a result of declination of unwanted goods and services.

There is nothing in the proposed rule that would mandate fairness in pricing the various items which go into the total funeral; thus, if a funeral director wishes to encourage the use of his fixed assets, he can price these relatively low and increase the prices of certain highly desired items such as the casket and the embalming service. ^{36/} The question of "loading" the casket price was commented upon during this proceeding. ^{37/} Unit pricing puts the overwhelming load on the casket price. Functional pricing less so. Nevertheless, it is possible to continue marking up caskets 200% or 300% on the basis that most funerals include a casket.

Because of the highly desired practice of public viewing of the body, embalming will in many cases be necessary. Under itemization this cost of preparation can be increased while the use of livery and other services decreased so that the total panoply of services chosen by a consumer may end with exactly the same aggregate price it would be at present.

There is an additional cost factor that allows for a flexibility similar to that described in the previous paragraph: that is, the charge for professional services. Many components could be priced low with a substantial charge for professional services ^{38/} without which the funeral home may refuse to perform any services. Devices such as these would serve to defeat the purpose of itemization.

^{35/} Here I am distinguishing between price and cost.

^{36/} Lawson, note 22 *supra*, at 13,248.

^{37/} See, e.g., written submission of NFDA, Record II-A-659, p. 29, and Arthur Angel and Paul Daw, "The Impact of Mandatory Itemization on Funeral Prices: A Theoretical and Empirical Analysis," Record III-I-1.

^{38/} See, e.g., testimony of John Lutton, funeral director, chairman, Pennsylvania State Board of Funeral Directors, and District Governor, NFDA, Tr. 12953-55.

Finally, there is one other factor that may result in price increases. The experience in New Jersey indicates that many funeral homes which had not analyzed their costs did so when itemization was mandated as a result of state action. Costs previously not realized were revealed to the funeral directors and an overall price increase resulted from this analysis. I think it is unfair to blame the price increase on itemization; rather, the increase came partly as a result of continuing inflationary trends and partly from the analysis of costs. Since most businessmen should from time to time make such an analysis, I do not attribute this type of cost increase to expenses of itemization.

Ellsworth D. Purdy, president of Uniservice Corporation, one of the larger multi-unit operations, testified that price compression may result from itemization. 39/ Price compression is the bringing down of the price of the higher bracket funerals and raising the price of lower priced funerals.

NSM in its rebuttal statement indicated that prices will rise and cites Dr. Lawson. NSM did not, however, deal with Dr. Lawson's full statement. He agreed that prices would rise "in the short run". 40/ His implication is that prices will not increase in the long run. 41/

NSM also cites the Staff Memorandum, pp. 116-117, as to the possible increase in the price of lower priced funerals. Once again, NSM did not deal with the corollary; the possible decline in the price of higher priced funerals under itemization. Many funeral directors in the past have made available low cost funerals to welfare clients. 42/ Because of high fixed costs, these funerals are believed by the funeral directors to be below their costs. 43/ Testimony reveals that variable costs are covered by these funerals and a contribution to fixed cost is made. 44/ The funeral home would not benefit by rejecting these lower cost funerals. Most directors continue to sell them at what they believe to be a below cost figure.

The consequence of handling such funerals as well as the occasional "free" funeral performed by virtually every funeral home is that the higher priced funerals bear a greater than

39/ Tr. 5402-04.

40/ Rebuttal Document A., N.S.M., p. 2.

41/ Tr. 13,248.

42/ See, e.g., Clements, note 20 supra, at 4411-23 and testimony of Ernest E. Wight, funeral director and president, South Dakota State Board of Funeral Service, Tr. 4705-09.

43/ Id.

44/ See, e.g., Wight, id., Lawson, note 22 supra, at Tr. 13,245.

proportional share of the fixed cost of the establishment. ^{45/} One pricing method used applies multiples to a casket price in order to come up with the price of a funeral. ^{46/} The implications of this in regard to high priced funerals can be readily seen. Clearly they are much more profitable to the establishment.

If itemization is mandated and if the funeral home fairly attributes its costs and attempts no juggling of the items as described above, there should be some compression with the higher priced funerals coming down and the lower cost ones increasing to bear their proportional share of the fixed cost of the establishment.

(c) Whether there should be an exception to this itemization requirement is not a decision based on fact but rather a policy and social decision as to what sector of the economy should bear the cost of funerals for those who are generally unable or unwilling to do so. If publicly funded funerals should be higher in price, then the public sector should take another look at the manner in which this activity is funded.

In the cases of individuals who are not eligible for public funds for funerals, fairness would indicate to me that such individuals choose what they can afford or what they are willing to spend. While this may not include the full "traditional" funeral, that may be simply consistent with their economic position in life.

Presently, alternative methods of disposition are not usually available to consumers as a result of the ineffectiveness of state regulation and the interference with the market of various regulatory practices. ^{47/} Should this ineffectiveness and interference be diminished, alternative methods of disposition should become more available in this market. Less luxurious establishments, more modest livery, rental caskets, and a number of alternatives may become available. Competition may in the long run remedy the problem of the unavailability of low cost alternatives for those who cannot afford the "traditional" funeral.

A review of the record indicates a paucity of evidence in support of any exception to the itemization requirement. Furthermore, the record fails to provide sufficient information which would serve as a "dollar cutoff" guide for such an exception.

^{45/} Alfred Rappaport, Ph.D., "An Analysis of Funeral Pricing and Quotation Methods," Record III-I-2, pp. 13-16.

^{46/} Wilber M. Krieger, A Complete Guide to Funeral Service Management (Englewood Cliffs, N.J.: Prentice-Hall, 1962), pp. 99-103.

^{47/} See relevant Issue No. 27.

Summary: Mandatory itemization will give consumers the option of declining parts of the funeral service presently included in the unit price. As the rate of declination rises, utilization of fixed assets will diminish. This may force some funeral directors to raise prices of various components of the "traditional" funeral. To the extent that higher priced funerals today subsidize the least expensive funerals, the price of the upper bracket services may decline and the price of the lower bracket funerals will probably increase. Even though mandatory itemization will probably result in price increases of lower bracket funerals, there should not be an exception to the itemization requirement in order to prevent price increases for the least expensive funerals. To do so would perpetuate a system under which income redistribution is a responsibility of the funeral service industry. The method of paying for the burial of the poor is not the function of the industry or of the Federal Trade Commission. I find no record justification for an exception to itemization and little evidence as to what the level of such an exception should be.

Issue No. 17

"Have funeral service industry members failed to disclose or misrepresented to customers any applicable cemetery outer enclosure requirements or other material information concerning the availability, prices and selection of outer interment receptacles?"

No states require outer interment receptacles as a matter of law or regulation. 48/ Generally such requirements, if they exist, are placed by the cemetery, 49/ the reason usually given being the need for such an enclosure to prevent the grave from sinking or caving in, 50/ thus causing subsequent expense of filling in and the possibility of injury from falls to the public 51/ and personnel of the cemetery. 52/

48/ Testimony of Mack Arnold, vice president, National Concrete Burial Vault Association, Tr. 11527. Outer interment receptacles normally consist of two types - a grave liner and burial vault. A grave liner is usually a six piece sectional enclosure surrounding the casket to help reduce the possibility of grave collapse. Burial vaults normally are two piece enclosures made of concrete, steel, fiberglass, or solid copper to help provide protection to a casket from water and grave collapse.

49/ Id. at 11528. See also FTC Staff Memorandum, Record VI-D41, p. 7.

50/ See, e.g., testimony of Byron Reeves, legislative chairman, Georgia Cemetery Association, and cemetery owner, Tr. 10207-08,

51/ Id.

52/ Id.

There are some statements in the written record and others were given at the oral hearings by consumers who indicated that they were told by funeral service industry members that these were required by law. 53/ Generally, funeral directors testified that they explained that fact to consumers: that this was a requirement of the cemetery, not of the state or of the funeral home. 54/ In a few instances, consumers pointed out non-disclosure and misrepresentations of cemetery requirements by funeral directors 55/ presumably to sell higher priced vaults. Some funeral directors did not have the inexpensive liners available, selling only the vaults, rather expensive items on a comparative basis. 56/ Many times this would leave consumers without the knowledge that a less expensive grave liner could be purchased at the cemetery. 57/ This can lead to the deceptive situation where the funeral director shows the vault to a consumer in fulfillment of a cemetery or legal requirement. The consumer may believe this is the only item available to satisfy the cemetery requirement.

53/ See, e.g., testimony of Malcolm Siegel, consumer, Tr. 2966, written submission of consumer (name deleted), September 1974, Record VII-176, and written submission of A. Sullivan, consumer, II-B-771.

54/ See, e.g., testimony of Roger I. Dyer, funeral director, Tr. 1565-66 and written submission of Gary A. Buell, funeral director, Record II-A-765, p. 2.

55/ See, e.g., rebuttal submission of FTC staff containing written submission of Mrs. William G. Heller, consumer, Record X-1-74 and Reeves, note 50 supra, at 10209.

56/ See, e.g., written submission of Mrs. Adelaide L. Gee, consumer, Record II-B-290, p. 4 and testimony of Sanford Waxer, Consumer Federation of America, Consumer Alliance of Michigan, and Greater Detroit Memorial Society, Tr. 4229.

57/ See, e.g., Reeves, note 50 supra, at 10209. See also Prehearing filing of Rebecca Cohen, Continental Association of Funeral and Memorial Societies, p. 21. Ms. Cohen stated, "I personally have no evidence of failure to disclose the availability or selection of outer enclosures by funeral directors who sell only vaults and not grave liners. However, logic leads me to believe that if the consumer is told that an outer enclosure for the casket is required by the cemetery, and the customer sees only vaults on display, the customer is likely to conclude that these are the only outer interment receptacles marketed." HX-Washington 39.

Generally, funeral service industry members disclosed their requirements and material information concerning availability, prices and selection of outer enclosures with the exception of the availability of vaults and liners at the cemetery. 58/

The funeral industry spokespersons almost unanimously expressed strong opposition to any type of requirement forcing funeral directors to inform consumers that cemeteries may also sell outer enclosures. The required notice suggests to consumers that they check the prices of enclosures, burial liners or vaults at the cemetery and compare with the price at the funeral home. While this might result in some savings to consumers, the amount of savings could not be adduced from the record of this proceeding. Even if the savings are substantial, it is unusual to have a party refer a customer to a competitor. I know of no basis or precedent for this in general business practice and, despite the unique circumstances of this transaction, 59/ as well as the low level of consumer knowledge of relevant considerations, 60/ I find no justification in this proceeding for this requirement. On the one hand the funeral director is stripped of his assumed professional status and on the other is not allowed the general privileges of a businessman, requiring of him a standard of conduct which could only be expected (if at all) in the professions.

Some funeral service industry members misrepresented the outer enclosure requirement as being one of law or regulation rather than a requirement of the cemetery, 61/ while others misrepresented cemetery requirements or did not disclose them 62/ to the detriment of the consumer.

Summary: Based generally upon my impressions in and during this proceeding the requirement of cemeteries that outer enclosures be used is widespread and is gaining. I find misrepresentation (when it appears) to be in the form of non-disclosure of cemetery

58/ See, e.g., written submission of the International Order of the Golden Rule, Record II-A-666, p. 24 and written submission of NFDA, Record II-A-659, pp. 44-45.

59/ See discussion under Issue No. 23.

60/ See discussion under Issue No. 24.

61/ Siegel, note 53 supra, at 2957, 2966, consumer (name deleted), note 53 supra, at VII-176 and Sullivan, note 52 supra, at II-B-771.

62/ See, e.g., Reeves, note 50 supra, at 10209 and Heller, note 55 supra, at X-1-74.

requirements on the part of funeral service industry members. I find further that funeral directors disclose the availability, prices, and selection of outer interment receptacles available from them but do not disclose what is available from the competition. I find no pervasiveness of any unfair or deceptive practice in this regard.

Issue No. 18

"Have funeral service industry members failed to provide customers with a written accounting of the products and services used in the funeral service selected and an itemization of their individual prices?"

Reference is made here to the finding in Issue No. 16 in regard to pricing of individual items of service and merchandise before selection. This question refers to an accounting after selection. Since unit pricing is prevalent, itemization of individual prices is generally not available except where required by law or regulation. ^{63/} As pointed out in Issue No. 16, even in instances where itemization is required by law or regulation, a distinction must be drawn between disclosure before and after final arrangements are made.

Most funeral directors indicated that they provided a written accounting of the products and services used in the funeral service selected along with a listing of cash advances relative to the transaction. ^{64/} This accounting, however, was not on an itemized basis. In those establishments using unit pricing, the services and goods were listed along with a single price. In those using functional pricing there would be a similar listing with groups of goods or services and prices for each group. In both types of pricing cash advances were individually itemized.

The giving of an itemized accounting is consistent with the requirement that prices disclosed in advance be itemized. They go in tandem. It would be confusing for a final rule to have one without the other. The post-selection accounting will serve as a check on the pre-selection price quoted. Any variation would be obvious to the consumer and, if an item were not selected but he or she was charged for it, an explanation would have to be given.

^{63/} See, e.g., Coats, note 7 supra, at 3765-66, Altmeyer, note 7 supra, at 11742, and O'Reilly, note 3 supra, at 43-46.

^{64/} See, e.g., hearing exhibit, A. R. Leak, Sr., HX-Chicago 25; hearing exhibit of Randolph Coble, funeral director and president North Carolina Funeral Directors Association, HX-Atlanta 21 (funeral service agreement forms).

The industry position in opposition to this section is the same as the argument made against itemization generally: -

- (1) It will increase costs.
- (2) It is unnecessary since consumers are satisfied with the present accounting.
- (3) It will disturb the trust relationship between the family and the funeral director.

The responses from the proponents are similar also:

- (1) The cost increase will be slight.
- (2) Consumers are not as satisfied as they may appear. This ignorance of relevant considerations makes them unable to complain. The circumstances of the transaction makes them reluctant to complain.
- (3) The trust relationship will not be disturbed by an itemized list any more than it is by the present billing system.

The use of an itemized list will serve as a compliance device if itemization is adopted by the Commission. Consumers, made aware of a discrepancy, will have the evidence to file a complaint even though they may still be reluctant to do so. Consumers indicated that they did receive a written accounting. ^{65/}

Summary: A written accounting without itemization of individual prices is generally given after selection which includes the products and services used in the funeral service selected. There is no evidence of substitution of goods without authorization.

Issue No. 19

"Have funeral service industry members tied the purchase of some goods and services to the purchase of other goods and services?"

and

Issue No. 20

"(a) Have funeral service industry members failed to provide to customers or to inform customers in advance of the availability of discounts or adjustments to the price of funerals for items which were not used or not desired by the customers?"

^{65/} See, e.g., written submission of Ms. Nancy Krawitz, consumer, Record II-B-1662, and written submission of Mrs. Louise Sions, consumer, Record II-B-5140.

"(b) Have funeral purchasers paid for services they did not need or want because of an unwillingness by a funeral service industry member to provide price reductions or adjustments for declined items?"

Because these issues are related they will be treated together.

As noted in the response to Issue No. 16, unit pricing is prevalent throughout the funeral service industry. ^{66/} Whether this constitutes a tying arrangement within the standard set in Fortner v. U.S. Steel ^{67/} is a question of law better left to the staff, the industry and the Commission. Goods and services are generally sold as a package and can be bought separately only when the customer indicates affirmatively and with some force that he does not intend to buy the entire package.

A number of funeral directors testified that discounts or adjustments for declined goods and/or services are available and are regularly given. ^{68/} A number of consumers and consumer representatives testified or submitted information to the contrary. ^{69/} Whether the adjustments or discounts are given is not at the heart of this question. The principal question is whether the information as to discounts or adjustments for declined goods and/or services along with the relevant amounts of money to be saved is available in advance of the making of funeral arrangements. Generally, testimony and submissions of both funeral directors and consumer groups results in a finding that such information is not given in advance of the arrangement for the funeral unless a consumer specifically asks for information on credits and adjustments for unwanted or unneeded goods or services. ^{70/}

^{66/} Raether, note 1 supra, at 215.

^{67/} 394 U.S. 495 (1968).

^{68/} See, e.g., Dyer, note 53 supra, at 1555 and testimony of Theodore Kimche, funeral home and cemetery owner, Tr. 5382A-83.

^{69/} See, e.g., Hearing Exhibit of Leesa Speer, California Citizens Action Group and testimony HX-Los Angeles 18, pp. 5,6 and Hearing Exhibit of Michael Stilwell, director of the Central Area Motivation Programs, Consumer Action Project, HX-Seattle 14, and Tr. 6034-35, written submission of Mrs. W.E. Ambrose, consumer, Record II-B-496, and written submission of Sherry Chenoweth, director, Minnesota Office of Consumer Services Record II-C-11, p. 3.

^{70/} See, e.g., testimony of Kermit Edison, funeral director and chairman of the Board of Examiners for Funeral Directors
(footnote cont'd)

The import of disputed issue 20(a) is to determine whether the funeral director volunteers this information prior to the making of arrangements.

Some consumers, consumer representatives and others indicated that as part of the unit price purchasers have paid for services that they did not need or want because of an unwillingness by funeral directors to provide price reductions or adjustments or the declined items 71/ Even more significantly some consumers indicated that they accepted the items because they were under the impression that had they declined the items they would have had to pay for them anyway. 72/

Of interest and relevance to this issue is the position of funeral directors that they regularly give discounts although they do not so inform consumers prior to making of arrangements. 73/ Where consumers to be informed of this, the question arises as to what choices of goods and services would be made. One could only conclude that some consumers would not have purchased the entire unit if they were aware of the availability of adjustments or discounts for declined goods or services. This relinquishing of part of the unit funeral is known as the "declination rate."

Also of interest and relevance is the position of funeral directors in regard to itemization which virtually all consider a costly computation on their part. 74/ This position is at odds with substantial testimony by other funeral directors that they do give discounts or adjustments. 75/ The question naturally

70/ cont'd) and Embalmers, State of Wisconsin, Tr. 4256-57, Cohen, note 57 supra, at 23-25, testimony of Kathleen O'Reilly, Consumer Federation of America, Tr. 9249-50, testimony of Edward J. Fitzgerald, funeral director and past president, NFDA, Tr. 245-46, and Chenoweth, id.

71/ See, e.g., Speer, note 69 supra, at 5,6, Ambrose, note 69 supra, at 1, 2 and written submission of Arkansas Attorney General Funeral Survey, Record VI-D-12 pp. 4,5.

72/ See, e.g., Cohen, note 57 supra, at 25.

73/ See, e.g., Fitzgerald, note 70 supra, at 6245-46, and testimony of Nelson E. Greene, Sr., note 13 supra, at 14188-89.

74/ See, e.g., Altmeyer, note 7 supra, at 11770-79, and Kerr, note 10 supra, at 3045-49. Also see, discussion of Issue No. 16 and Issue No. 28.

75/ See, e.g., Kerr, id. Dyer, note 54 supra, at 1555 and Kimche, note 68 supra, at 5382-83.

arises as to how these discounts or adjustments are computed if not on a basis similar to that which would be used in itemization; thus, the next question is: - If the computation must be made, wherein lies the added expense were itemization to be mandated? In a number of instances this question was put to funeral service industry members and a satisfactory answer was not reached. ^{76/} Such discounts or adjustments may be made on an ad hoc basis and depend upon the judgment or the largesse of the funeral director. This is an arbitrary and unfair way of dealing with a consumer. Some funeral directors have computed these discounts and adjustments and these funeral directors would have little difficulty in switching to itemization from unit pricing should such be mandated. ^{77/}

An alternative to mandated itemization prior to the making of funeral arrangements is optional itemization. A customer could be asked if he wanted an itemized price list or a unit price list or both. This would avoid troubling those who want a "traditional" funeral with unneeded and unwanted documents. Those who were interested in alternatives could so indicate. There is some merit in this plan and it should be considered as an additional method of making price disclosures.

The subject matter of this Section is also discussed in Issue No. 28. That discussion is incorporated herein by reference.

Summary: Because of the prevalence of unit and functional pricing, it is difficult for purchasers of funerals to select the service they want. Funeral service industry members have failed to inform customers of the availability of discounts or adjustments to the price of funerals on items declined by the customer. As a result either of the policy of the funeral home not to give adjustments or discounts or because of a lack of knowledge that discounts or adjustments are available, funeral purchasers have paid for services they did not need or want. The failure to disclose information about discounts or adjustments is widespread to the point of pervasiveness.

^{76/} See, e.g., Kerr, id., and testimony of John Wright, funeral director and president, Mississippi Funeral Directors Association, Tr. 9440-44.

^{77/} See, e.g., Kerr, id. and Kimche, note ⁶⁷ supra, at 5382-83.

VIII. ADVERTISING AND COMPETITION

Issue No. 22

"In what ways, if any, has price advertising by funeral service industry members been prohibited, restricted or obstructed?"

and

Issue No. 26

"To what extent have funeral service industry members advertised the prices of their products and services in print or broadcast media and to what extent have funeral homes utilized non-price advertising in such media?"

The proposed rule would prohibit any funeral service industry member from hindering or restricting advertising of price information regarding funeral merchandise or services regardless of the medium used (Section 453.6(b)).

The proposed rule also would prohibit any funeral service industry member from complying with any nonfederal legislative, executive, regulatory, or licensing authority rule or regulation which restricts price advertising (Section 453.6(c)).

In the past many states had regulations or statutes prohibiting price advertising of funerals. 1/ The origin of such regulations or statutes was an attempt by funeral directors to raise the standard of their business to that of a profession. 2/ Practitioners of the healing arts, pharmacists, attorneys, and others have for years been prohibited by state law or regulation from advertising the prices of their goods and/or services. 3/ It had come to be the hallmark of a profession that such advertising was prohibited. It was considered demeaning and beneath the standards of a profession to advertise or in any way publicize fees and other costs. 4/

1/ See, e.g., FTC Staff Memorandum, August 1975, Record VI-D-41, pp. 85-90, and Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, July 7, 8, 9, 1964, 88th Cong., 2d Sess., Opening Statement of Wilber M. Krieger, managing director, NSM, Evanston, Illinois, contained in Record at VI-D-20.

2/ See testimony of W. W. Chambers, funeral director, Tr. 11379.

3/ See, e.g., FTC Staff Report, "Prescription Drug Price Disclosures," Jan. 28, 1975, p. 33.

4/ Id. at 422-23.

In regard to the generally recognized professions this situation is changing rapidly. Beginning with Goldfarb v. Virginia State Bar 5/ and Virginia Board of Pharmacy 6/ the courts have diminished any distinction between professions and trades; thus, the rationale underlying restrictions on price advertising has thereby diminished. Even before these decisions many state legislatures or regulatory boards had eliminated restrictions on price advertising.

Today, only Massachusetts and Nebraska prohibit funeral price advertising by statute. 7/ In addition West Virginia and Utah have regulations under the authority of their licensing boards which may restrict price advertising substantially. 8/ Furthermore, a question remains as to the use of other rules to discourage price advertising. 9/

5/ 421 U.S. 773 (1975).

6/ Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council 44 U.S.L.W. 4686 (U.S. May 24, 1976).

7/ 112 Mass. Gen. Laws § 84, Neb. Stats. 71-333 (2) (c).

8/ See, e.g., testimony of John D. Altmeyer, II, funeral director and immediate past president, West Virginia Funeral Directors Association, Tr. 1143 - restrictions as to size of advertisement; testimony of Floyd W. McGinn, director of the Department of Business Regulation for the State of Utah, Tr. 7036-41 - Rule 4, restriction on advertising below reasonable economic cost. See also, West Virginia State Board, Rule 20(c) that deals with time periods in which advertised merchandise must be offered at specified prices.

9/ Such rules could be ones prohibiting "gross misconduct," "unethical behavior," "false and misleading advertising," and "solicitation." Interpretation of these prohibitions could lead the state boards to discourage price advertising by funeral directors.

Virginia has a regulation of its State Board of Funeral Directors and Embalmers, 10/ which states that the public interest would be best served if members would refrain from advertising in any form. 11/ This and other similar regulations have had the effect of discouraging virtually all funeral price advertising.

Very little price advertising is done by funeral directors. A number of witnesses indicated that here and there a funeral director would advertise price for a short period of time and would abandon it after a while. There is a small amount of price advertising in Oregon. 12/ Only one funeral firm price advertises in the District of Columbia area. 13/ A few Minnesota funeral directors advertise prices. 14/ Some funeral directors employ non-price advertising for purposes of name recognition. 15/ Black funeral directors do not engage in price advertising. 16/ In New York State, a small amount of

10/ Article 18, Section II, p. 15.

11/ Id. and testimony of Nelson E. Greene, Sr., funeral director and member of the Virginia Board of Funeral Directors and Embalmers, Tr. 14183-94.

12/ Testimony of Leslie Peake, funeral director and immediate past president, Oregon Funeral Directors Association, Tr. 5711-13.

13/ Chambers, note 2 supra, at 11356-57, 11378-79.

14/ Testimony of Mark Waterston, funeral director, Tr. 3726-31. Testimony of Sherry Chenoweth, director, Minnesota Office of Consumer Services, Tr. 3137-38, 3160.

15/ Testimony of George F. Kileen, funeral director and Wayne County, Michigan, Commissioner, Tr. 3809.

16/ Testimony of A. R. Leak, Sr., funeral director, Tr. 3881.

price advertising is done, and it may be increasing. 17/
Witness after witness described the situation in regard to
price advertising as minimal. 18/

Several witnesses testified that funeral directors
utilized non-price advertising to a considerable extent, 19/
that is, advertising of an institutional nature pointing
out the integrity, honesty, and capability of the funeral
director, 20/ consistent with the "professional" attitude
of funeral directors.

The codes of ethics of various trade associations (NFDA
and its state affiliates) in the past years contained sections
condemning price advertising. 21/

In a 1968 consent decree, NFDA settled the antitrust suit
brought by the Department of Justice by agreeing not to keep
anyone from advertising the prices of funerals. 22/ Prior
to the entry of the decree, NFDA disciplined and expelled
price advertisers. The consent agreement required the
Association not only to drop this practice but also to
exclude any affiliated group which limits or restricts
price advertising. 23/

17/ Testimony of Nicholas R. Panepinto, director of the
Bureau of Funeral Directing, New York State Department of
Health, Tr. 309.

18/ See, e.g., Chenoweth, note 14 supra, at 3137-38, 3160.
See also testimony of Robert A. Ebeling, former managing editor,
Mortuary Management Magazine, Tr. 6838-40. Mr. Ebeling
discussed why price advertising is minimal.

19/ See, e.g., testimony of Arnold Hornberg, funeral
director and president, Funeral Directors Services Association
of Greater Chicago, Tr. 4790-91 and hearing exhibit of David
Murchison, counsel, NSM, HX-Washington 21 (advertisements).

20/ Id.

21/ These sections were legally challenged successfully
and struck down in Wisconsin v. Wisconsin Funeral Directors
Association and National Funeral Directors Association, 1967
Trade Cas. ¶ 72,289 (Wis. Cir. Ct.) and United States v.
National Funeral Directors Association, 1968 Trade Cas. ¶ 72,529
(D. Wis.).

22/ Id.

23/ FTC Staff Memorandum, August 1975 (Record VI-D-41, p. 89)

The Delaware and Colorado 24/ state affiliates of NFDA have codes of ethics which contain sections pledging to "refrain from price advertising." 25/ NFDA submitted these codes and I have relied on them to be the most current and accurate compendium of state codes of ethics. The two codes in question may cause NFDA to be in violation of the Department of Justice consent decree noted above. There is little question that these codes would have a chilling effect on price advertising in Delaware and Colorado. In addition, an Iowa funeral director testified in Chicago that he had received materials of the Iowa Funeral Directors Association (an NFDA affiliate) containing a section on refraining from price advertising. 26/

The general feeling throughout the industry is that price advertising is not only unprofessional 27/ but also unprofitable. 28/ In regard to the profitability of advertising funeral prices, there were a few funeral directors who apparently did considerable advertising. One indicated that he believed that his price advertising lowered the cost of funerals in his geographical area. 29/ This advertising cost was one hundred

24/ Id.

25/ During this proceeding, I requested a compendium of NFDA affiliated state association codes of ethics from the general counsel of NFDA. I received a number of state association codes of ethics and was informed by NFDA's general counsel's office that all codes of ethics not submitted subscribe to the National Association's (NFDA's) code of ethics. See transmittal memo, documents relative to the document request, and the compendium of state codes of ethics, Record I-A-126, Dec. 28, 1976.

26/ Testimony of Tracy McCurdy, funeral director, Tr. 3405 and hearing exhibit of the Iowa Funeral Directors Association, submitted by Tracy McCurdy, HX-Chicago II. This incident was corroborated by the fact that NFDA's general counsel submitted to FTC staff a resolution by the Board of Directors of the Iowa Funeral Directors Association abolishing its existing code of ethics a short time after the testimony of Mr. McCurdy at the FTC hearings, Record III-J-50. In addition, there was evidence that publications by certain state boards contained a reprint of the old NFDA Code of Ethics which included the ban on price advertising. See hearing exhibit of John Wright, pres., Mississippi State Funeral Directors Association, HX-Atlanta 11 (Laws, Rules, and Regulations Pertaining to Embalming).

27/ Testimony of A. A. Rayner, Jr., funeral director, Tr. 4297.

28/ Testimony of Dave Daly, Evergreen-Washelli Funeral Home and Memorial Park, Tr. 5937-38 and Ebeling, note 18 supra, at 6838-40.

29/ McCurdy, note 26 supra, at 3413-14.

dollars per funeral, 30/ a figure which raises questions about the ability of a funeral director to recapture this cost through increased volume. The demand for funerals being relatively inelastic, a funeral director can only hope, through his advertising, to wean customers away from other establishments. In the instance cited, volume had increased somewhat through advertising, but probably not enough to recapture the amount invested in the program. 31/

Another advertiser in Washington, D.C. relies on his program to a great extent. In his situation, there is apparently sufficient volume to absorb the cost of the advertising program. 32/

The result of the attitude of funeral directors is considerable peer pressure directed toward those who advertise prices. It appears that such advertisers are the outsiders in this industry and are generally scorned by their peers. The extent to which such peer disapproval inhibits others is questionable, but that it exists is not questionable. 33/

A number of funeral directors believe that it is difficult if not impossible to describe adequately a funeral in an advertisement. 34/ While recognizing the difficulty of listing all of the goods and services included in the unit price, the experience of a Washington, D.C. funeral director refutes

30/ Id. at 3412, 3448.

31/ Id. at 3447-48.

32/ Chambers, note 2 supra, at 11357.

33/ See, e.g., McCurdy, note 26 supra, at 3433, 3445-46. Mr. McCurdy discussed the loss of his trade embalming business which may be attributable to his price advertising. He also discussed adverse reactions of fellow funeral directors to his price advertisements including nasty telephone calls and counter advertising campaigns. The record contains other examples of peer pressure. One example is from FTC staff interview report of Jessica Mitford and Robert Treuhart, Record VI-A-17. This report deals with the alleged expulsion of Nicholas Daphne from the California Funeral Directors Association for price advertising. It also deals with the alleged pressure put on the San Francisco Examiner by funeral directors not to accept Daphne's price advertisements.

34/ See, e.g., Daly, note 28 supra, at 5937-38 and testimony of Hoyt P. Mayes, funeral director and immediate past president, Oklahoma Funeral Directors Association, Tr. 8895.

otally that concept. 35/ His advertisements seem clear and
nformative. 36/ Likewise those ads of the immediate disposi-
ion services in California are clear and should be very
elpful to those who are interested in their services.
here is sufficient technical competence within the funeral
ndustry and the advertising industry to resolve any difficulties
potential advertiser might have in describing his goods and
ervices and the prices therefor.

A number of funeral service industry members indicated at
east by inference that they do not believe that consumers
hoose a funeral director on the basis of price. 37/ Clearly,
his is so since the price information is not available and a
hoice must be made on the basis of available information.
any funeral directors are chosen because of previous experience
f the family with the firm, 38/ particularly in more stable
ommunities.

This nation is extremely mobile and people are now more
han ever leaving their home bases and moving to other parts
f the country where they have had no previous experience
ith a funeral director. Word of mouth is one means of
etermining which funeral director to use; 39/ however, the
nique circumstances of the funeral transaction, particularly
he short time available, may make this method useless. What
hen are the considerations a consumer employs in determining
hich funeral director to use at time of need?

While a number of considerations are important such as
ocation and prestige of the establishment, clearly price is

35/ Chambers, note 2 *supra*, at Tr. 11310 and hearing exhibit
ontaining advertisements of W. W. Chambers, HX-Washington 9.

36/ *Id.*

37/ See, e.g., testimony of Sumner J. Waring, funeral
irector and treasurer, NFDA, Tr. 652 and Dr. Vanderlyn R. Pine,
esearch and analysis consultant for NFDA, Tr. 10809-11.

38/ See, e.g., testimony of Sally Ann Ross, consumer,
r. 5276 and Thomas N. Sampson, funeral director and president,
assachusetts Funeral Directors Association, Tr. 989-90.

39/ Sampson, *id.* and testimony of the Rev. Mr. Stephen
ritchman, Tr. 6531.

an important consideration today. 40/ The experiences of those selecting immediate disposition services and their increasing volume leads one to the conclusion that, for a number of consumers, price information would be extremely helpful and would move such consumers to choose the service offering the best price, particularly when the service conforms to their desires. 41/

For the aged, price advertising and the resultant price information would be particularly helpful. A witness for the National Retired Teachers Association and the American Association of Retired Persons referred to an unnamed survey which concluded that 78 percent of the people did not know the average price of a funeral in their community; and, further, people had very little particular knowledge of how this industry did business. 42/ As a result of letters he received and information provided him by his organizations, as well as his own private investigation, being an experienced attorney (retired), he concluded his members were not making an informed decision of any kind with respect to the arrangements for funerals. He also concluded funeral directors "hold most of the trump cards in whatever bargaining may take place." 43/ As it relates to the elderly, particularly those who have moved away from home to warmer climates such as Florida or California, the surviving spouse, living perhaps on Social Security, must have price information for, at that time in one's life, price will head the hierarchy of factors determining which funeral service industry member to use. This information is not presently available in part because of restrictions on advertising.

SUMMARY: Price advertising has in the past often been prohibited or restricted by law or regulation. It is presently still prohibited or restricted in a few instances and chilled by the

40/ See, e.g., Chambers, note 2 supra, at 11378-79 and testimony of Louis MacDonald, American Association of Retired Persons and the National Retired Teachers Association, Tr. 2649.

41/ See testimony of Tom Sherrard, co-founder and general counsel, Telophase Society, Tr. 7965-67. Immediate disposition services pick up the corpse, cremate it and return the ashes to the family. Price, about \$300.

42/ Statement of Julian B. Rosenthal, retired attorney, Tr. 8853. While I do not rely on this survey, the observation conforms to my general impressions resulting from consumer testimony throughout this proceeding. See discussion under Issue No. 24 in regard to consumer knowledge of relevant considerations.

43/ Id. at 8855.

attitude of funeral directors toward those who do price advertise. Very few funeral directors advertise the prices of their products and services in any of the media, utilizing instead institutional advertising. Consumers would benefit from price advertising, particularly that which could be carried on by the larger firms with the cost of such advertising covered by a large number of funerals.

Issue No. 25

"Level of price competition in funeral industry. To what extent has competition operated in the funeral service industry to avoid excess capacity, eliminate inefficiencies and to produce prices at competitive levels?"

The Commission in its initial notice of this rulemaking proceeding stated, "For the purposes of this trade regulation rule proceeding, the Commission is proceeding upon the theory that nondisclosure of funeral prices is unfair if it creates substantial harm (i.e., its economic and social utility to the public is substantially less than its economic and social disutility). . . ." ^{44/} Because of the importance to the Commission of having a factual basis for whatever action it may take, the above question as to the state of price competition in the funeral industry has relevance.

Particularly impressive and concise in its description of the state of competition is the testimony of Dr. Stephen Shavell, Assistant Professor of Economics at Harvard University, testifying on behalf of the Continental Association of Funeral and Memorial Societies. ^{45/} In his testimony and speaking as an economic theorist, Dr. Shavell generally concluded: (1) before making a funeral purchase most individuals have only limited information about cost and alternatives. ^{46/} He found that there are generally three ways that an individual may acquire such information: (a) by advertising, ^{47/} (b) by direct inquiry, and (c) by word of mouth. (2) There is little time and little desire on the part of survivors to extend much effort in selecting a funeral home after a person's death. ^{48/} (3) Survivors surrender the body of the deceased to a funeral home without knowing all the

^{44/} 40 Fed. Reg. 39906.

^{45/} Tr. 11870, et seq.

^{46/} See discussion under Issue No. 24 in regard to consumer knowledge of costs and alternatives.

^{47/} See discussion under Issue No. 22 and Issue No. 26 in regard to price advertising.

^{48/} See discussion under Issue No. 23 in regard to the distinctive characteristics of this transaction.

relevant facts about cost, products, and services. 49/ (4) Once a body has been delivered to a particular funeral home, it is difficult for a variety of psychological reasons to have it moved to another. 50/ (5) Having given the body of the deceased to a particular funeral home, an individual will purchase services there except under unusual circumstances. (6) This gives the funeral home obvious monopoly power over individuals who have surrendered bodies to it. (7) Because individuals who feel exploited will tell other prospective customers about the fact, a funeral home may have a number of motives for refraining from monopolistic practices. (8) There are few significant economic barriers to entry into the funeral industry. 51/ (9) Because entry is relatively easy and because of the lack of consumer information about prices and products sold by a particular home, it is difficult for a funeral home to generate enough business to operate at an efficient volume level. (10) The result is too many funeral homes each serving too few customers. (11) Economists usually refer to this as a situation of "monopolistic competition." Profits may not be exorbitant in such a situation; indeed, except for homes with special advantages over the typical one, profits should not be excessive.

The state of price competition was described in the testimony of Dr. Michael E. Lawson, Assistant Professor of Economics, Boston University. 52/ In regard to market structure, Dr. Lawson stated, "Although estimates vary, there are approximately 25,000 funeral homes in the United States. A description of the industry's market structure attempts to portray the degree of control firms have over price and, hence, the degree of competition in the industry. For the funeral industry, this task is relatively straightforward. This industry can be characterized as monopolistically competitive. This form of market structure exists when firms produce goods or services which are heterogeneous in fact or in the minds of consumers.

49/ Note 46 supra.

50/ See discussion under Issue No. 3 in reference to consumer reluctance to move a body from one establishment to another.

51/ Here Dr. Shavell ignores licensing and other legal barriers to entry such as educational requirements and zoning restrictions.

52/ Tr. 13232 et seq.

"But, whereas the services are heterogeneous there still are close substitutes. This heterogeneity is termed product differentiation and characterizes most American markets. When product differentiation exists, each funeral home has some degree of monopoly power which can be exploited. Some firms in the industry, those which are geographically isolated, can be characterized as monopolists. Yet, these firms and those characterized as monopolistically competitive cannot, except in the short run, act as monopolists. In the longer run, firms will enter the industry where extra-normal profits are being earned.

"The essential market feature which separates monopolistic competition from perfect competition is that individual firms can adjust price or attempt other strategies to increase the volume of business conducted.

"The nature of the demand for funeral services dictates, however, that an increase in the firm's business activities will be at the expense of another firm's rather than an overall increase in industry demand.

"Each firm in the industry has an incentive to lower prices to increase sales. But, this incentive exists for all firms in the industry; and then as prices are reduced by all firms, each firm gains an increase in sales attributable to the general price reduction alone.

"Market shares will not be realigned. Hence, it is unlikely that serious price competition will exist in this monopolistically competitive industry. A short-run equilibrium in a monopolistically competitive industry is little different from that of a strict monopoly.

"Since price competition does not exist to discipline the market and drive marginal or inefficient firms out of the industry, extra-normal profits will be earned by the more efficient, presumably larger, firms.

"Extra-normal profits would be earned by these firms since the costs of more efficient firms would determine price; and the firms with lower costs would thereby profit."

"The funeral industry is characterized by firms whose costs structures have high fixed components relative to total costs. The only major variable costs the funeral home encounters is the casket.

"This general cost structure is common to a large part of that economy. Public utilities, railroads, and airlines are examples of industries with high fixed operating costs. And

there is no doubt that these high fixed costs reduce the flexibility of funeral homes to deal, in the short run, with major changes in their method of doing business.

"These high fixed costs are partially made necessary by certain laws requiring on-sight [sic] embalming facilities and the funeral homes' tendency to have their own rolling stock and chapel.

"This is so despite the fact that these facilities, in all but the larger mortuaries, are idle a large percentage of the time. This duplication of underused capacity represents an inefficient allocation of resources.

"And, of course, this duplication and inefficiency is costly to the consumer. Except for embalming, individual rolling stock, on-sight [sic] chapels--we might also add flower shops and even emergency ambulance companies--all are manifestations of nonprice competition which epitomizes monopolistic competition.

"And to the extent that these facilities enhance the attractiveness of individual funeral homes from the consumers' perspective, they represent important competitive strategies.

"They are duplicative, add to fixed costs, and are passed on to consumers in the form of higher prices. The structure of the market is unable to stem and, in fact, encourages this type of expenditure." 53/

To make a determination as to the level of price competition, one must first make a determination as to the level of price information available to the market. Without this information, competition as to price generally cannot operate. As indicated in response to Issues No. 22 and No. 26, price advertising has been restricted by funeral service industry members and extraordinarily little price information is available. Furthermore, as indicated in response to Issue No. 16, funeral service industry members have failed to disclose or make available price lists and telephone disclosure information on the price and availability of individual items.

Other methods of achieving or acquiring this information, such as going from one establishment to another or the use of word-of-mouth communication, are relatively inefficient and particularly inappropriate considering the time and emotional constraints of the funeral situation.

53/ Tr. 13243.

SUMMARY: This industry is monopolistically competitive because of inadequate price information. Competition has not operated in the funeral service industry to avoid excess capacity, eliminate inefficiencies, and to produce prices at a competitive level.

Issue No. 29

"Special funerals. (a) Do funeral service industry members offer special funerals whose availability is restricted to certain groups of consumers? (b) If it is determined that special funerals are offered, are there provisions of the proposed rule whose application to such funerals would be impractical or unwise?"

There are a few special funerals such as those for veterans which received comment. It was anticipated that there would be lodges, churches and other organizations such as cooperatives whose non-profit nature would make application of the proposed rule impractical, if indeed the Commission had authority over such entities. No evidence was developed as to these organizations.

I make no finding as to this issue since the record is negligible and, further, the question is not now deemed to be of such import as to merit further consideration.

IX. ADDITIONAL FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

A. Grief Counseling

There was considerable testimony by funeral industry practitioners as well as ministers and academics about the role of the funeral director in the grief process. 1/ Grief counseling can be broadly defined as the process by which the bereaved is brought to accept the death of a loved one and accomodate to the changes resulting from the loss.

Funeral directors placed much emphasis upon the importance of viewing the remains as a part of the acceptance of death. 2/ This stands in conflict with the attempt by funeral directors to beautify the remains and make it look life-like. Cosmetic devices are used to peel away the years so that frequently one hears the remark "How well he looks". 3/ Furthermore, the casket itself is made to appear like a bed with a mattress and a pillow. 4/ Given this attempt to portray the deceased as sleeping rather than dead, it is hard to comprehend just how acceptance of death is accomplished through the viewing of cosmetized remains. This part of the "traditional" funeral process appears to be inconsistent with the goal of acceptance of death.

The custom of having friends and neighbors visit and express their concern for the survivors and their affection for the deceased is also stressed as a part of the accomodation to grief. While this is typically done in the funeral home, specifically in the parlor, it can be done as easily in the home and in some ethnic groups, particularly among Jews, it is done during a formal period of mourning. Once again a funeral home may be useful in this, but it is far from essential.

The consideration and care shown by the funeral director himself was also noted. 5/ His concern for the family of the deceased and his understanding accomodation to the family's

1/ See, e.g., testimony of Dr. Edgar Jackson, pastoral psychologist, Tr. 5344-47; testimony of Robert Slater, professor and director, Dept. of Mortuary Education, Univ. of Minnesota, Tr. 9485, and Dr. Paul Irion, Pastoral psychologist, Tr. 10229.

2/ See, e.g., id. and written submission of NFDA, Record II-A 659, pp. 17-19.

3/ See Jessica Mitford, The American Way of Death (Greenwich, Connecticut: Fawcett Publications, 1963), p. 59.

4/ See testimony of Professor Ruth Mulvey Harmer, vice president, Continental Association of Funeral and Memorial Societies, Tr. 11103-04, 11113-14.

5/ See, e.g., Jackson, Note 1, supra, at 5340-47 and see generally Raether and Slater, The Funeral Director and His Role As Counselor (NFDA, 1975).

needs was considered an important part of the therapeutic process. 6/ While one can see readily that an antagonistic or hostile funeral director would be disturbing, one certainly does not expect to encounter that attitude in dealing with a person selling goods and services in general and in particular one would hardly expect a funeral director to behave in this manner. But to call this "counseling" is perhaps elevating courtesy to therapy. 7/

Since most nonindustry grief counseling experts feel that the major counseling needs of the bereaved may continue for some time after the disposition of the deceased, 8/ it is hard to envision the role of the funeral director in this respect. There have been a few efforts to involve the funeral director in post-funeral activities 9/ but these have been at best token.

6/ Id.

7/ "Nor should he practice psychiatry. Some of his care-taking comes about by doing what he can and then recognizing when the advice of a professional in another field is needed." Howard C. Raether, Successful Funeral Service Practice (Englewood Cliffs, N. J., Prentice Hall, Inc. 1971), p. 123.

"In reality, however, the funeral director does not actually carry out therapy in a traditional psychotherapeutic sense. The funeral service version of therapy consists of advice concerning funeral practices, the creation of a suitable atmosphere for bereavement, and the providing of counseling services aimed at helping the bereaved understand loss through death. Thus, it bears only a resemblance to traditional therapy." Vanderlyn R. Pine, Caretaker of the Dead (N.Y., N.Y., Irvington Publishers, Inc., 1975), p. 142.

8/ Colin Murray Parks, M.D., Bereavement (New York: International Universities Press, 1972), pp. 24, 169; Geoffrey Gorer, Death, Grief, and Mourning (Garden City, N.Y.: Doubleday & Co.), pp. 75-90; and Erich Lindemann, "Symptomatology in Management of Acute Grief," American Journal of Psychiatry, 1944, Issue 101, pp. 141-148.

9/ See, e.g., testimony of Henry M. Gutterman, funeral director, Tr. 1933-34 and NFDA, note 2 supra, at 13. —

The industry position that the "traditional" funeral is the best therapy may be true in many cases, but to assume prescience on the part of funeral directors in structuring this funeral arrangement prior to the development of grief counseling, particularly the work of Kubler-Ross and others, would be attributing to funeral directors a great deal of foreknowledge. Furthermore, to attempt to fit the bereaved into a preconceived mold does not allow for individual differences, whereas the proposed rule does, at least in some respect, create flexibility which may be helpful to the bereaved. 10/

There is, however, some considerable basis for the industry position. To the extent that it has successfully promoted and has had acceptance by the public the idea of a "traditional" funeral, some substantial benefit may derive from holding a "traditional" service. The family, particularly those which are either "other directed" or "traditional directed", to use David Reisman's terms, 11/ "will have their own needs satisfied and will receive the approval of their peers in the community." Still using Reisman, those who are "inner directed", responding to voices within themselves, would probably choose an unusual service, such as the body of the woman that was placed in her sports car and buried. For some people the "traditional" funeral might be counter-therapeutic.

The "traditional" funeral has the merit of achieving closure in the sense a gestalt psychologist would approve. As a widely known and recognizable societal ritual, it would signify to many that a life had ended and do it in a way no other form of disposition could. In a society with few rituals, this one is of great value to those who are accustomed to it. Many people derive comfort from its familiarity.

There is also a therapeutic benefit to be gained from being "forced" to go through certain motions. The various motions expected of the bereaved in the "traditional" funeral may bring structure to a temporarily disorganized family, perhaps helping all through a difficult time.

Throughout this proceeding funeral directors and their representatives focused on the trust relationship which exists between funeral directors and their clientele. 12/ That it

10/ See Raether, note 7 supra, at 234.

11/ David Reisman, The Lonely Crowd (New Haven, Conn., Yale University Press, 1961), p. 8.

12/ See, e.g., testimony of Robert C. Slater, note 1 supra, at 9486-87 and testimony of Dr. Vanderlyn R. Pine, research and analysis consultant, NFDA, Tr. 10810.

exists is not rebutted despite many witnesses to the contrary. ^{13/} This trust relationship may and probably should exist, but to use this relationship as a basis for opposing regulation is inconsistent. In other areas of activity such as banks and insurance companies where there is a trust relationship, duties exist beyond the obligations of a businessman in the market place to see that the consumer is fully informed and aware of all of his options and alternatives.

Some comments in this proceeding are interesting, relevant, and deserving of quotation, particularly as they relate to the role of the funeral director, the grief therapy function, and the trust relationship. In the cross-examination of Dr. Clara Collette-Pratt, a gerontology specialist from Oregon State University, she was asked by counsel for the National Funeral Directors Association: "Do you feel that the state of mind, so to speak, an emotional state of an individual when they go in to arrange a funeral would make it so that a person-to-person conversation involving all the alternatives and requirements would be more meaningful to them than simply having somebody lay a piece of paper in front of them and say 'read it'?" Answer: "Well, my experience with funeral directors is that most of them are very sensitive to the people that they're working with and I can't imagine the ones I've met, for the most part--there are a couple I'm sure would--handing a piece of paper saying, 'Here, read this and I'll be back in a few minutes', in a very cold way. I would anticipate that there would be the kind of, as you were talking about, if there is any professionalism in the organization, that the director would want to be present to answer questions, to elucidate for them, to make sure that a person understood what they were reading or that they could read it. That they were capable of reading it." ^{14/}

This testimony reflects what I believe to be the role of the funeral director and his general conduct in his dealings with the bereaved. I was impressed with their sensitivity and do not believe that documentation which might be required by the proposed rule would present a serious problem to a skilled and experienced funeral director.

Dr. Edgar Jackson, theologian and thanatologist, testified at some length about grief therapy and the funeral process. Under cross-examination he was asked: "There's another dis-

^{13/} See, e.g., testimony of Jessica Mitford, author, Tr. 7265-66 and testimony of the Rev. Mr. Frederick A. Fenton, Tr. 6424.

^{14/} Tr. 5248-49.

closure of itemized prices which would be available to the customers both before the transaction was finalized and afterwards. Do you see any problem there?" Answer: "I think many states already have that and if the state feels that that would be a wise procedure, I should think it could very well be done within the state framework without having to have federal control extended."

Here Dr. Jackson seems to express the idea that if a rule is promulgated by the state it would not interfere with grief therapy, but if it were done under "federal control" it would be a problem. 15/

He was asked, "But the required disclosures, which you feel is a concentration on price, don't you think that's valid information for people to have?" Answer: "Yes, and they would probably get it from the funeral director anyway, that's what he's there for." After being instructed to be more responsive, the witness said, "I think that they should have that available but I think it should be available through a state process rather than federal rule." 16/

Dr. Jackson made what I believed to be a significant observation concerning the nature of the funeral transaction. Question: "And how many funeral directors are involved over a period of time with their bereaved?" Dr. Jackson's answer: "I think you have to realize here the difference between chronological time and psychological time. When a person is in a highly vulnerable state, the emotional movement may be very rapid and the funeral director being with these people for a period of 3 or 4 days may be able to have more influence on the way their psychological movement proceeds than a person who spends a lot more time in a much more casual relationship." 17/

In commenting on Jewish funerals he stated: "The Orthodox have immediate disposition according to the old Jewish tradition. Now, this, I think, may illustrate what I've been talking about because I was asked to give a paper and I went to a number of Rabbis and Jewish scholars to ask whether they felt that this had any bearing on a stance that has been evidenced among Jewish people at various times in history, and they agreed that they thought this was probably a traditionally unwise practice that was rooted in the past and that it was continuing to have an

15/ Tr. 5335-36.

16/ Tr. 5337.

17/ Tr. 5340-41. This illustrates one of the instances in which industry positions were inconsistent. Some denied there was vulnerability, and here Dr. Jackson concedes it.

effect on the emotional life of Jewish people that was unhealthy. Now, I don't know myself, not being of that tradition, but this is what some of the Rabbis I consulted felt. They were mostly conservative and liberal Rabbis, not Orthodox. 18/

Another witness, Dr. Jeannette R. Folta, an expert in the area of death and dying, medical sociology and criminal justice 19/ felt that any required written disclosure would make it difficult for many people to deal with their grief. 20/ But if regulation were necessary it should be done by the state. 21/ She was disturbed at the potentiality of change which might be engendered by a final rule. 22/ While not opposed to change, she believes this should result from individuals making individual decisions. 23/ I found her testimony generally evasive, particularly when she maintained that itemization would lessen consumer choices. 24/ She did acknowledge that under itemization, consumers might make different choices than at present. 25/

Dr. Robert C. Slater, professor and director of the Dept. of Mortuary Education at the University of Minnesota, also expressed concern about the destruction of the trust relationship. He was asked on cross-examination, "There seems to be some sort of destructive effect on this trust relationship which you say the funeral director has when making arrangements, when he says: 'I would like to present you with these materials, which explain what the law is, and what my prices are for a casket, what my prices are for services. I am trying to do this to help along the discussion of arrangements.' Would that destroy the trust

18/ Many experts have tried to discover the source of the emotional life of the Jewish people. This observation of Dr. Jackson's may be a breakthrough, although I readily concede general unfamiliarity with the vast amount of literature on the subject.

19/ Tr. 11,960.

20/ Tr. 11,989.

21/ Tr. 11,990.

22/ Tr. 12,008.

23/ Tr. 12,017.

24/ Tr. 12,017.

25/ Tr. 12,016.

relationship?" Answer: "I think it would inhibit it, yes."
Question: "Can you elaborate on that a little bit further?"
Answer: "Yes. In my experience of working with people as they sit in the arrangement conference room they are not very subject to reading anything that is given to them. Many times it is a real challenge to keep their thoughts directed to the decisions they should be making. 26/

"If I suddenly substituted for my presence and my verbalization with them what I knew about the law, or that they might be asking for things that were not according to the law, a page or two of a written summary of the law, I think that this would mitigate against the kind of relationship I was developing with that group of persons." Question: "In general, would it be a fair capsulization of your view that oral discussion with the family about the funeral is essential, and that our disclosure requirements destroy it?" Answer: "It is fairly accurate."
Question: "If that does not depict what your view is, I would like you to correct the record." Answer: "It is fairly accurate". Question: "We have had some funeral directors who have testified, and I think that you were in the room when some have shown, as part of their written testimony, the various written materials that they use when they discuss with families the price alternatives available in the funeral home. Would you say that this could destroy their trust relationship?"
Answer: "No." 27/

At this point, Dr. Slater seemed to reach the outer bounds of logic. On the one hand, the documentation presently supplied by funeral directors is either in response to state law or their own policies within their institutions. Documents such as a memorandum of service or a contract would not interfere with the relationship or the therapy in progress. On the other hand, if the documentation were required by the federal government, no matter how skillfully presented, it would interfere with the trust relationship and would have a counter-therapeutic affect.

I can only speculate as to the reason for this particular rationale put forward in opposition to the proposed rule. Since I cannot find the rationale, I can only conclude that it is made of whole cloth and has no relationship to reality. It was apparently developed for use in this proceeding.

26/ This observation of Dr. Slater's ^{is} relevant to Issue No. 23, the effects of bereavement. In this instance the bereaved, not a distant relative or family friend, is making the arrangements under some difficulties. Industry positions on this point were inconsistent.

27/ Tr. 9507-08.

The funeral directors maintained that their role in the life and death process would be diminished to the extent that this proposed rule, if final, would place upon the funeral directors the obligation to make disclosures in writing to consumers. 28/ I find no basis for this contention; rather, the giving of disclosure in writing, the allowing of freedom of choice, the informing of the consumer, all would combine to enhance rather than diminish the trust which a consumer places in a funeral director and in no way is in conflict with his role as a trusted friend of the bereaved.

Summary: I find that grief counseling is a new name for what funeral directors have always done: treat the family with consideration and the remains with respect.

The funeral industry rigidly promotes "traditional" funerals. This may not be conducive to the emotional well being of some survivors.

While the documentation resulting from the promulgation of the proposed rule in its initial form could be streamlined, documentation and documents in and of themselves do not destroy secure trust relationships nor would they interfere with grief therapy and counseling.

B. Funeral Industry Research and Consumer Education

Throughout this proceeding the paucity of data was apparent. While a plethora of statistics is available from industry sources, 29/ these statistics were in many ways questionable. A principal source of them is an academic, but one with a long history of involvement in the funeral industry who is directly involved in an existing funeral establishment. 30/ What is missing is objective research which would be helpful to state as well as federal authorities and to industry representatives and practitioners themselves. This research can also be an aid to consumer education. 31/ The funeral industry

28/ See, e.g., testimony of the Rev. Mr. John M. Infanger, Tr. 2292-94 and testimony of Robert Shackelford, funeral director, Tr. 9046-51.

29/ See testimony and hearing exhibit of Dr. Vanderlyn R. Pine, research and analysis consultant for NFDA, Tr. 10799, et seq. and HX-Washington 4.

30/ Dr. Vanderlyn R. Pine.

31/ See, e.g., testimony of Arnold Hornberg, funeral director and president, Funeral Directors Service Association of Greater Chicago, Tr. 4770-71 and testimony of Robert W. Ninker, executive director, Illinois Funeral Directors Association, Tr. 2690-94.

presented a number of academics in order to bolster its position in regard to many of the disputed issues as well as other matters with which this proceeding is concerned. Principal among these was Dr. Roger D. Blackwell and the concern with which he worked, Management Horizons, Inc. (See findings as to Dr. Blackwell and Management Horizons, Inc., presentation under Appendix I). While I have not found other academics to have engaged in conduct similar to Dr. Blackwell's, I do note that a number of these have been associated with the funeral industry on a compensated basis for a substantial period of time. Though this fact was disclosed by them, this does raise the question of the objectivity of such witnesses. None admitted any bias.

These experts have been paid substantial amounts of money to appear at industry seminars and have for some time engaged in this activity. I can only assume that they expect to do so in the future and their testimony is colored by this expectation. To the extent that industry representatives see the need for original research, credibility would be enhanced were it performed by parties whose objectivity cannot be questioned.

C. Conclusions

1. I have abstained generally from recommending specific sections of the proposed rule. In some cases, my findings clearly indicate a need for some changes in this form of the rule and perhaps in the format of the disclosure. In general, I believe that a trade regulation rule is supported by this record and by these findings.

One observation I have to a final rule which has concerned me throughout this proceeding continues to affect any recommendations which I might make; that is, my concern for the enforceability and the enforcement mechanisms to be applied to any final rule.

There are as noted in this record, about 22,500 funeral establishments in the United States.^{32/} While the number may change because of economic forces as well as the possible effect of a final rule, there are and will continue to be a large number of relatively small firms. The degree to which the Commission is willing to allocate resources to the enforcement of this rule is not the concern of this proceeding, but it will be a concern of the Commission in making a decision. Thus, I feel justified in sharing with the Commission and the public my thoughts in this regard.

^{32/} Written submission of "Funeral Industry Fact Sheet", Record VI-A-33, p. 1.

In the finding under Issue No. 27, I expressed my view of the quality of state regulation. At no point did I feel confident that the states in general through their regulatory entities were concerned with consumer problems as they relate to the funeral industry. In one or two states at any given time, there is active consumer protection, but this tends to be short run and inconsistent.

Throughout this proceeding I asked witnesses, both consumer and industry, how they would feel about a program of state exemptions if a state would pass laws or regulations substantially similar to a trade regulation rule promulgated by the Commission. This is a plan used in the enforcement of the Truth-in-Lending Act 33/ and one which has been relatively effective. I discern no support for such a plan.

A number of industry representatives in a petition and in testimony suggested guides rather than rules. 34/ Particular emphasis was placed on guides by the National Selected Morticians and a number of industry groups participated in the hearing held by the Commission on March 12, 1976, in which the industry proposed that the Commission issue guidelines which the states could then adopt. The Commission denied this petition and I believe it is appropriate to reconsider that suggestion in the light of these findings.

I asked a number of industry witnesses how they would feel about federal guidelines, with a waiting period to give states time to bring their laws into substantial conformity with the guidelines. This is the position of National Selected Morticians, although there are significant parts of the proposed rule with which NSM takes issue. It is also supported by other industry representatives.

My findings as to state regulation and the earlier rejection of guidelines by the Commission and the rejection of state exemptions by a number of industry representatives all to the contrary notwithstanding, I still believe that the states have a substantial role to play in the enforcement of fair standards of conduct in this area. My principal reason for this is the existence of a regulatory infra-structure which would lend

33/ In addition, the FTC has liaison agreements with several states providing for cooperative enforcement.

34/ See, e.g., "Petition to the Commissioners of the Federal Trade Commission by National Selected Morticians to Reconsider and Convert Trade Regulation Rule Proceeding to an Industry Guides Proceeding," Dec. 19, 1975, Record 215-46-1-1-1, testimony of David C. Murchison, counsel to NSM, Tr. 12389-90, and Informal Hearing before the Federal Trade Commission on "Whether the Commission should adopt an Industry Guide for the Funeral Industry," March 12, 1976, Record 215-46-1-1-1.

itself to a greater degree of compliance in a shorter time than the Federal Trade Commission could hope to obtain. This rule would not preempt much state activity in the regulation of the funeral industry. Concerns for sanitation and health are the province of the state and would continue to be even if this rule is finally promulgated. Since states are already inspecting funeral homes and a complaint resolution mechanism already exists in all states, it would seem folly not to attempt in some way to utilize this resource.

This would require changes in state policy, law, and regulation. The policy would have to change in that it should become consumer oriented rather than having a board promote industry interests to the exclusion of consumer interests as is presently the case. Laws would have to be changed where statutes have created boards and imposed duties inconsistent with the rule. Particular emphasis should be placed on an effort to have consumer or other independent representation, preferably a majority, on regulatory boards. The continued domination of these boards by industry representatives is the largest single deterrent to effective state consumer protection. And lastly the state regulations would have to be changed so that they became substantially in agreement with any finally promulgated trade regulation rule or guide.

Based on my acquaintance with funeral directors and industry representatives throughout this proceeding, I am convinced that basically these are people of good will who are deeply concerned about the welfare of their customers. Their views of that welfare is, however, different from that of the consumer representatives who participated in this proceeding. That industry view is not monolithic; there is a large body of thought within the funeral industry which would not find repugnant a somewhat modified guide. These representatives are prepared to support progressive regulation and would, I believe, take the lead in modifying state law if the Commission gave some encouragement to this effort.

That encouragement could take the form of immediate promulgation of guides generally based on the proposed rule and modified consistent with these findings. This action would be taken in addition to, not in lieu of, the promulgation of the final rule. It would serve as a challenge for the states to take action immediately. The Commission could then contemplate its subsequent course not in haste. If it decides to promulgate a final rule, the ensuing period while the matter is on appeal could be productive of substantial changes on the state level, minimizing the Commission's ultimate compliance obligation. It could be done at little cost with great potential benefits. This suggestion is predicated on the assumption that the promulgation of a guide would not be construed as prejudicial in the event the Commission, disappointed by state response, should decide to promulgate a final rule.

2. In this report I have made a number of findings but I feel it is incumbent upon me to point out that these are not all of equal weight. Primary among my findings are three: the vulnerability of consumers in this unique transaction, their lack of knowledge of relevant considerations, and the present execrable state of state regulation. Given these three findings I believe it is incumbent on the Federal Trade Commission to take corrective action.

At the second level of importance in my findings, I would place the lack of competitiveness in the market particularly as to alternative means of disposition and in the sale of pre-need goods and services. While the Commission's legal position in regard to state regulatory bodies which are inhibiting competition is unclear, I would urge that whatever appropriate action can be taken be done at the earliest possible time. If this market were free to operate competitively, if alternative means of disposition could be offered without harassment from funeral directors or their puppets, the regulatory boards, then it is possible that the competitive economy, coupled with the freedom to advertise services and prices, would serve to correct some of the problems that presently exist.

Those problems are found in the third level of my findings which are the various deceptions, exploitative practices, and misrepresentations. These were the hardest questions to resolve because most of the evidence was anecdotal rather than statistical. Nevertheless, I believe that substantial misrepresentations do occur and that consumers are disadvantaged economically and in some cases emotionally by these practices. Particularly significant here also is the virtual absence of consumer knowledge about funeral laws, regulations, practices, alternatives, prices, and pricing policies.

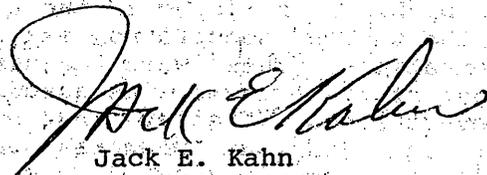
Recommendation:

Because of this hierarchy of findings, I recommend that the Commission consider the following courses of action:

1. promulgate a final Trade Regulation Rule which is, I believe, supported by this record with specific provisions modified to take account of my findings, the staff's report and recommendations, and the Commission's own examination of the record.

2. promulgate a final Guide, in addition to the Rule, in order to encourage immediate corrective measures by state regulatory entities; immediate action by states -- although partial -- could be helpful to consumers. This Guide should be a slightly modified form of the proposed Rule and could precede ultimate resolution of the Rule question.
3. take additional appropriate action to encourage price advertising and otherwise open up the funeral market to new entrants offering alternative means of disposition. This action could include intervention in certain state proceedings.

I further recommend that the Commission consider any future indications that there have been significant improvements in state regulation and in competitive conditions within the industry. Such evidence may warrant re-evaluation of the rule and possible modifications or exemptions.



Jack E. Kahn
Presiding Officer

July 28, 1977

APPENDIX I

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In re)	
)	
FUNERAL INDUSTRY PRACTICES)	DOCKET NO.
PROPOSED TRADE REGULATION RULE)	R611001
)	
)	

PRESIDING OFFICER'S RESPONSE TO MOTIONS
AND CREDIBILITY FINDING CONCERNING DR. ROGER D.
BLACKWELL AND PRESENTATION BY
MANAGEMENT HORIZONS, INC.

Several of the interested parties in this proceeding filed motions concerning alleged distortions in the testimony and examination of Dr. Roger D. Blackwell during the August 2, 1976 hearings on the proposed funeral rule. Dr. Blackwell testified as project director and chief consultant for a presentation by the consulting firm of Management Horizons, Inc., on behalf of National Funeral Directors Association.

I have carefully reviewed the various motions filed 1/ and the response submitted by NFDA 2/ and Dr. Blackwell

1/ Motion for Finding filed by David A. Swankin, Continental Association of Funeral and Memorial Societies, September 1, 1976, Record I-A-109; Response to the Motion of Continental Association of Funeral and Memorial Societies Concerning the Testimony of Dr. Roger D. Blackwell and Motion to Reopen the Hearings filed by Bruce J. Terris and Lonnie C. Von Renner, Consumer Affairs Committee, Americans for Democratic Action and National Council of Senior Citizens, September 22, 1976, Record I-A-107; Motion to Strike or Limit the Testimony of Dr. Roger D. Blackwell, filed by Federal Trade Commission staff, September 27, 1976, Record I-A-106.

2/ Letter of September 10, 1976, Record I-A-109; Motion to Strike Motions filed October 6, 1976, Record I-A-108; Responses to Motions filed November 12, 1976, Record I-A-129.

himself. 3/ I have also reviewed the relevant portions of the transcript, the written statements pre-filed and my own observations of the testimony and examination, before reaching a decision on all of the motions before me.

I have decided not to reopen the hearings for any further questioning of Dr. Blackwell. Based on all that has gone before, I am convinced that further questioning of Dr. Blackwell would not be productive and would not justify the further disruption and delay of the proceeding that would be involved.

I am likewise convinced that further written responses or submissions by Dr. Blackwell would also be unproductive and an adequate remedy exists to the problems raised by the various motions filed.

Also the motion to have Dr. Blackwell's presentation stricken from the record is denied. Though I believe that if good cause was ever shown for striking a witness' testimony, such grounds exist in this instance, I have refrained throughout this proceeding from using my authority to strike material physically from the record and I prefer to use corrective measures other than eradication.

Under the Magnuson-Moss Act and the Commission's rules of practice, I as the Presiding Officer have the duty of conducting the hearings which seek a "full and true" disclosure of the facts relevant to any Commission decision on the proposed rules. Under §1.13(f) of the Commission's Rules I am charged with making findings on the designated issues, and other findings and conclusions as appropriate.

I am using this authority to enter into the record this finding with respect to the credibility of Dr. Blackwell and his presentation on behalf of Management Horizons, Inc., and

3/ Letter to Presiding Officer, October 22, 1976, from Roger D. Blackwell, Record I-A-115 and response of Roger D. Blackwell to FTC Funeral Staff Motion and to similar motion by Mr. Von Renner, undated and unsigned, filed by NFDA, November 12, 1976, Record I-A-129.

NFDA. 4/ I believe that this action is the most efficacious way of taking account of the information submitted and accommodating the interests of the parties while at the same time preventing distortion to the record as it exists and possible future misuses of Dr. Blackwell's presentation and the objections to it that have been raised.

Specific Finding on Credibility

Based upon his behavior on the witness stand and the content of his written submissions and responses to the motions filed I am constrained to find that Dr. Blackwell's presentation is so lacking in credibility that it is of highly dubious usefulness to the fact-finding process.

Dr. Blackwell's testimony and written submissions contain a variety of one-sided and distorted presentations of facts, data and opinions. 5/ Unlike some other expert witnesses

4/ Since the Commissioners are not present during the testimony of witnesses I have the responsibility of observing and taking account of demeanor and related circumstances which bear on the credibility of the testimony that appears on the printed pages of transcript. In administrative proceedings just as in federal courts, the trier of facts has the right and the duty to weigh demeanor and other credibility factors when deciding on the weight which should be given to particular testimony. See, e.g., Indiana Metal Products v. NLRB, 422 F.2d 46 (7th Cir. 1971); Norfolk & Western Ry. Co. v. U.S., 27 Ad. L.2d 70 (E.D. Mo. 1970); Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970).

5/ One can search in vain through the statements and testimony of Dr. Blackwell or his Management Horizon colleagues, Messrs. Kollatt and Beever, for a single positive statement about the proposed rule or the need for reform of particular funeral practices. The substance and tone of Mr. Beever's presentation which was approved and embraced by Dr. Blackwell (Tr. 11,423, 13,586) is also revealing. Another example of the misleading nature of much of Dr. Blackwell's presentation concerned the National Family Opinion survey. Dr. Blackwell went to great lengths to highlight the expertise and reputation of the firm (see Tr. 13,472). Yet, when NFO's representative, Stanford Odesky, was cross-examined, it was revealed that Dr. Blackwell wrote all of the questions and designed the analysis. Despite its expertise in survey works, NFO was only used by Dr. Blackwell to do the layout, reproduction, distribution and tallying of the questionnaire and results. (See Tr. 13,474-505).

who testified during the hearings, Dr. Blackwell refused to acknowledge any possible biases, 6/ uncertainties 7/ or contrary facts or research. 8/ Instead, he went to great lengths to make his assertions appear weighty by portraying

6/ One illustrative example was Dr. Blackwell's response to questions about his prior involvement with and income from the funeral industry. When asked about fees received from NFDA he mentioned a single honorarium. Further probing was required to reveal that fees for Dr. Blackwell's services are paid to Management Horizons, Inc. (which I would surmise, takes them into account when figuring Dr. Blackwell's retainer). Dr. Blackwell was likewise less than forthright in disclosing how much work he has done for the Casket Manufacturers Association and individual manufacturers.

Intellectual candor demanded a more open disclosure of his funeral industry association than Dr. Blackwell was willing to volunteer.

I must emphasize that I am not referring to Dr. Blackwell's industry ties per se as a reason for finding his testimony incredible (though such ties have obvious relevance to credibility) but to his lack of candor on the subject. Other expert witnesses frankly admitted their prior associations and many openly acknowledged their possible biasing influence.

7/ Dr. Blackwell failed to label clearly those elements in his own testimony that were speculative rather than observed or based on empirical data. His testimony included the finding that itemization could result in a \$194 increase in the charges to the consumer per funeral. Dr. Blackwell's calculations were based on a declination rate of 20%. Upon questioning by the staff it became clear that the figure of a 20% declination rate was speculative and not based on any type of research. However, Dr. Blackwell failed to note the hypothetical nature of this figure and the fact that his calculation of \$194 per funeral increase because of itemization was equally hypothetical and uncertain.

8/ Dr. Blackwell failed to call attention to even those portions of his own research which might be subject to interpretations contrary to his opposition to the rule. The Casket Manufacturers Association survey which Dr. Blackwell conducted and included in his pre-hearing submission contained findings on consumer preference for various pricing methods. One can only conclude that Dr. Blackwell's failure to focus on this aspect of his research is attributable to the fact that the research found a significant consumer preference for itemization which Dr. Blackwell opposes. Similarly, Dr. Blackwell did not deal, except when forced to by being questioned, with those portions of his doctoral dissertation which were at odds with his prepared testimony despite the fact that his earlier research was highly germane to the issues under examination.

them as the result of an expert, objective, comprehensive scholarly, study, 9/ a portrayal belied by the substance (or lack thereof) of what he and Management Horizons submitted.

Dr. Blackwell's (and the entire Management Horizons') presentation was laced with a variety of assertions without supporting documentation and without any other information that would allow others to check the validity of the assertions. Moreover, when one examines the underlying material cited in the few instances where Dr. Blackwell provided specific references, one typically finds the cited material to be of tangential relevance and dubious support for the proposition cited.

9/ See Tr. 13,556, 13-560-63, 13,583, 13,584, 13,588.

The absence of hard data, referenced and factual analysis in the Management Horizons presentations speaks eloquently of the scholarliness, quality and comprehensiveness of the research. The lack of comprehensiveness of the research was further revealed by what was admittedly not studied. Cross-examination disclosed that Dr. Blackwell had not studied the existence of the abuses alleged to exist (Tr. 13,635-38) though he was able to state the rule was unnecessary. He did not study the present level of price competition (or the effects disclosures might have on it) in the industry (Tr. 13,588-89), or the level of consumer ignorance about legal requirements, prices and available alternatives.

Dr. Blackwell attempted to demonstrate the mortuary profit margins are low and that itemization would increase prices, not with hard data from interviews, surveys, or actual funeral home records, but with his own estimated expenses for what he describes as a typical firm. He did not even reveal how the typical figures were derived.

In short, neither the materials submitted by Dr. Blackwell and his Management Horizons team nor the answers to questions about the research gave any evidence that there had been a "comprehensive" "objective" study.

On the witness stand, Dr. Blackwell was more unresponsive than any other witness in the proceeding. 10/ He was frequently evasive and dilatory and persistently failed to supply the specifics lacking in his affirmative presentation, when asked to do so. He would not concede facts or information which undermined his expressed opposition to the proposed rule. 11/

When asked for specific facts or references he would not admit that he had none nor offer to supply them subsequently for the record as scores of other previous witnesses, non-experts and experts alike, have done. Instead, he often attempted to muddle the record by adding to the end of his

10/ The unresponsiveness of Dr. Blackwell to the three non-NFDA counsel who attempted to cross-examine him is amply documented in the motions of the FTC staff, National Council of Senior Citizens and Continental Association of Funeral and Memorial Societies. (See, e.g., references cited in FTC Staff Motion, note 30, and Continental Association of Funeral and Memorial Societies, note 2.) I felt compelled to tell Dr. Blackwell that he was being unresponsive on at least 40 occasions.

I also tried several other ways to secure more responsive answers -- rephrasing questions, changing topics, calling recesses and changing questioners. None of these actions was successful and I finally terminated the unproductive questioning.

11/ For example, Dr. Blackwell was asked about interstate shipment of caskets and about casket manufacturers' promotional materials displayed in funeral home casket display rooms (Tr. 13,621-622 and 13,630), and he claimed not to know about these subjects. This professed ignorance undermines either Dr. Blackwell's claimed expertise or his veracity. Considering Dr. Blackwell's years of research in the funeral industry and the common knowledge about interstate casket shipments and the presence of casket manufacturers' promotional materials in thousands of funeral homes across the country, it would appear that it is Dr. Blackwell's veracity that is suspect.

non-responsive answers vague references to "consumer research, data" or his expertise, without any more specific citations. In a few instances when questioners persisted in their requests to him for the specific evidentiary support relied upon, Dr. Blackwell ultimately admitted that there was no actual evidence. 12/

Since Dr. Blackwell had attended several sessions of the hearings and had previously testified in other court and agency proceedings, by his own admission, he should have been prepared to answer questions responsively. His failure to answer responsively was not simply lack of verbal facility, for I have observed that with dozens of previous witnesses. What I witnessed with Dr. Blackwell was something else entirely.

Taken together, Dr. Blackwell's testimony, answers to questions and written submissions evidence a lack of intellectual honesty.

RESPONSES BY DR. BLACKWELL AND NFDA

A few words need to be said regarding the responses to the motions filed by Dr. Blackwell and NFDA.

Both Dr. Blackwell himself and counsel for NFDA seek to explain the unresponsiveness of Dr. Blackwell that is apparent from the transcript by alleging that Dr. Blackwell was the victim of a planned program of intimidation and harassment that were the result of conspiracy involving the FTC staff, 13/ the counsel for the consumer groups and for PIAA 14/ and even myself (though as an "unwitting" participant).

12/ See, e.g., Tr. 13,635-41; 13,660-64; 13,700-02; 13,771-73; 13,776-78; 13,797-99.

13/ The responses of both Dr. Blackwell and NFDA contain a number of statements impugning the motives, integrity, and professionalism of FTC staff members. These ad hominem attacks are inappropriate.

14/ All referred to in NFDA's response as "the attorneys who were working in consort [sic] with the staff."

I find these allegations unfounded. To one who was not present, these allegations so strongly voiced might seem a plausible explanation for behavior that is otherwise hard to understand.

Since I was present and presiding during the entire examination of Dr. Blackwell ^{15/} I know, however, that his behavior was not due to harassment and intimidation but to his own motives or shortcomings.

Before Dr. Blackwell gave testimony I had listened to testimony from some 300 witnesses including dozens of experts under a variety of conditions. From that experience I know that the questions asked of Dr. Blackwell could have been answered and answered much more forthrightly than he did answer.

The probative value and relevance of much of Dr. Blackwell's affirmative presentation (and the presentations of his Management Horizons colleagues as well) compare unfavorably with those of other experts. The contrast is even more pronounced in his responses to questions. Moreover, having heard so much testimony before Dr. Blackwell's, I am quite convinced that Dr. Blackwell's lack of specificity and unresponsiveness were not caused by his having been intimidated by the hearing process or his question's. ^{16/}

I truly regret having to note specifically Dr. Blackwell's conduct so explicitly. I believe I must, however, because his response and NFDA's evidenced a willingness to distort the record and what actually transpired in connection with his testimony to those not present.

Management Horizons Presentation

Dr. Blackwell testified not only for himself, but as the "lynchpin" of the overall presentation by Management Horizons, Inc. He was the "team leader" and the chief substantive expert and the principal architect of the research and presentation.

^{15/} I note without comment that since I was present and observed the examination, it would appear that these allegations in the responses (which are recited more as facts than as argument) are addressed less to me than to those who may review the record who were not present.

^{16/} I have no way of knowing whether Dr. Blackwell really had been preparing "night and day" as he alleged (Response, 12). I note, however, that he did not appear fatigued when he gave his affirmative presentation, which was little more specific or documented than his later replies to questions.

When the other members of the Management Horizons team testified (Messrs. Kollat, Beever, Hunt and Odesky), they continually referred to Dr. Blackwell as the repository of the substantive expertise behind the survey. These other witnesses referred to Dr. Blackwell not only as the substantive expert but as the research designer and the principal person in a position to answer questions about Management Horizons' research and findings. In fact, when Mr. Kollat testified he was not prepared to answer substantive questions about the economic conditions and structure of the industry (supposedly what his presentation was about) and the first half of his statement had to be treated as Dr. Blackwell's with questions on it reserved for him. Such questions never were answered because of Dr. Blackwell's behavior on the stand. Thus, I must note that Dr. Blackwell's lack of credibility is not simply his own but Management Horizons' as well.

The problem is summarized as follows:

- 1) The Management Horizons' and Dr. Blackwell's written presentations were insufficiently documented.
- 2) Upon cross-examination the group in general and Dr. Blackwell in particular were unresponsive.
- 3) Many questions were left unasked because of Dr. Blackwell's recalcitrance.

The consequence of this is that this important presentation was not subjected to the examination process contemplated by the Magnuson-Moss Act and the Commission's Rules of Practice. Its value to this proceeding is thereby markedly diminished.

Conclusion

In resolution of the various motions filed and to avoid potential confusion or distortion, I am taking the following actions. I am placing this finding together with the motions and responses concerning Dr. Blackwell's testimony, on the public record (Sec. I). I am also affixing the attached notations to the transcript of testimony of Dr. Blackwell and Messrs. Kollat, Beever, Hunt and Odesky.

It should be noted that I am entering this finding regarding the credibility of Dr. Blackwell and the Management Horizons' presentation as part of my responsibility to weigh the evidence and make findings of fact on the designated issues. The finding does not mean that I have completely ignored the testimony and submissions. Rather, I have taken note of these credibility problems in my evaluation of all the record evidence in my findings on the designated issues.

Entered *July 28, 1977*

Jack E. Kahn
Jack E. Kahn
Presiding Officer

NOTATION TO THE TESTIMONY OF
DR. ROGER D. BLACKWELL

The testimony to which this notation is attached was offered by the National Funeral Directors Association as the principle component of the multi-part presentation by the consulting firm, Management Horizons, Inc., which presentation was designed, directed and concluded by Dr. Roger D. Blackwell. Because of the difficulties with Dr. Blackwell's own statement and examination which are more fully set out in the motions filed by the interested parties on the issue and my response thereto, I have entered a finding on Dr. Blackwell's credibility and the weight to be given his comments. I believe that any citations to assertions or conclusions in Dr. Blackwell's presentation in subsequent reports, comments or briefs would be incomplete without a cross-reference to that finding.

Entered *July 28, 1977*

Jack E. Kahn
Jack E. Kahn
Presiding Officer

NOTATION TO THE TESTIMONY OF
DR. DAVID KOLLAT, MR. DAVID BEEVER,
DR. KEITH HUNT, AND MR. STANFORD ODESKY

The testimony to which this notation is attached was offered by the National Funeral Directors Association as one component of the multi-part presentation by the consulting firm of Management Horizons, Inc., which was designed, directed and concluded by Dr. Roger D. Blackwell. Because of the difficulties with Dr. Blackwell's own statement and examination which are more fully set out in the motions filed by the interested parties on the issue and my response thereto, I have entered a finding on Dr. Blackwell's credibility and the weight to be given his comments. Since the attached testimony was based on and often referred to the work of Dr. Blackwell, I believe that any citations to assertions or conclusions contained herein in subsequent reports, comments, or briefs would be incomplete without a cross-reference to that finding.

Entered

July 28, 1977

Jack E. Kahn

Jack E. Kahn
Presiding Officer

APPENDIX II

Arrangement of Public Record for the Funeral Industry Practices Proceeding

Binders under No. 215 - 46 (Funeral Industry Practices):

1.1.1	-	Documents Relating to Industry Petition and Meeting on Guide		
1.1.2	-	Transmittal Memos - 9/17/75	-	2/27/76
1.1.2.2	-	Transmittal Memos - 2/16/76	-	8/31/76
1.1.3.1	-	I-A-1	-	I-A-98
				Notices, Motions, and Staff Responses
1.1.3.2	-	I-A-99	-	I-A-127
1.2	-	I-B		Staff Memoranda
1.3.1	-	II-A-1	-	II-A-130
				Industry Comments
1.3.2	-	II-A-131	-	II-A-205
1.3.3	-	II-A-206	-	II-A-323
1.3.4	-	II-A-324	-	II-A-469
1.3.5	-	II-A-470	-	II-A-471
1.3.6	-	II-A-472	-	II-A-483
1.3.7	-	II-A-484	-	II-A-499
1.3.8	-	II-A-500	-	II-A-572
1.3.9	-	II-A-573	-	II-A-629
1.3.10	-	II-A-630	-	II-A-666
1.3.11	-	II-A-667		
1.3.12	-	II-A-667		
1.3.13	-	II-A-668	-	II-A-700
1.3.14	-	II-A-701	-	II-A-744

1.3.15	-	II-A-745	-	II-A-770	
1.3.16	-	II-A-771	-	II-A-809	
1.13.17	-	II-A-810	-	II-A-860	
1.4.1	-	II-B-1	-	II-B-249	Consumer Comments
1.4.2	-	II-B-250	-	II-B-510	
1.4.3	-	II-B-511	-	II-B-675	
1.4.4	-	II-B-676	-	II-B-919	
1.4.5	-	II-B-920	-	II-B-1299	
1.4.6	-	II-B-1300	-	II-B-1700	
1.4.7	-	II-B-1701	-	II-B-2028	
1.4.8	-	II-B-2040	-	II-B-2236	
1.4.9	-	II-B-2466	-	II-B-2919	
1.4.10	-	II-B-2920	-	II-B-3075	
1.4.11	-	II-B-3076	-	II-B-3299	
1.4.12	-	II-B-3300	-	II-B-3465	
1.4.13	-	II-B-3466	-	II-B-3840	
1.4.14	-	II-B-3841	-	II-B-4165	
1.4.15	-	II-B-4166	-	II-B-4455	
1.4.16	-	II-B-4456	-	II-B-4885	
1.4.17	-	II-B-4886	-	II-B-5107	
1.4.18	-	II-B-5108	-	II-B-5339	
1.4.19	-	II-B-5340	-	II-B-5699	
1.4.20	-	II-B-5700	-	II-B-6029	
1.4.21	-	II-B-6030	-	II-B-6099	
1.5.1	-	II-C-1	-	II-C-249	Academic and Other Non-Industry Comments
1.5.2	-	II-C-250	-	II-C-599	

1.5.3	-	II-C-600	-	II-C-769	
1.5.4	-	II-C-770	-	II-C-999	
1.5.5	-	II-C-1000	-	II-C-1209	
1.5.6	-	II-C-1210	-	II-C-1515	
1.5.7	-	II-C-1516	-	II-C-1638	
1.5.8	-	II-C-1639	-	II-C-1758	
1.5.9	-	II-C-1759	-	II-C-1846	
1.6	-	III-D-1	-	III-D-10	Proposed Disputed Issues of Fact
1.7	-	III-A			Unauthorized Embalming, Pick-up and Release of Corpse
1.8	-	III-B			Casket-for-Cremation Requirements
1.9	-	III-C			Profit on Cash Advances
1.10	-	III-D			Misrepresentation of Legal, Religious, or Public Health Requirements
1.11	-	III-E			Misrepresentation of Preservative Utility
1.12	-	III-F			Casket, Merchandise & Service Selection
1.13	-	III-G			Disparagement of Price Considerations
1.14	-	III-H			Price Disclosures
1.15	-	III-I			Mandatory Price Itemization
1.16	-	III-J			Private Marketing & Advertising Restraints
1.17	-	III-K			State Advertising Restrictions
1.18	-	III-L			Mandatory Price Availability Notice
1.19	-	III-M			Price Reductions
1.20	-	IV			Additional Practices & Related Industries
1.21	-	V-A			Impact of Rule on Consumers

.22	-	V-B	Economic Effects of Rule on Funeral Service Industry Members
.23	-	VI-A	Industry Market Structure & Merchandising Techniques
.24	-	VI-B	Characteristics of the Funeral Purchase
.25	-	VI-C	State/Other Regulations
.26.1	-	VI-D-1	- VI-D-3
.26.2	-	VI-D-4	- VI-D-22
.26.3	-	VI-D-23	- VI-D-29
.26.4	-	VI-D-30	- VI-D-64
.26.5	-	VI-D-65	- VI-D-104
.27.1	-	VII-1	- VII-104
.27.2	-	VII-105	- VII-1492
.28.1	-	VIII-1	- Statements of New York Witnesses
.28.2	-	VIII-1	- Statements of New York Witnesses
.28.3	-	VIII-1	- Statements of New York Witnesses
			Statements of New York alternates of cancellations
		VIII-2	- Letter to T. Clark on procedures for limiting witnesses
		VIII-2	- Form Letter to Persons Not Selected as Witnesses
.28.4	-	VIII-3	- Statements of Chicago Witnesses
.28.5	-	VIII-3	- Statements of Chicago Witnesses
.28.6	-	VIII-3	- Statements of Chicago Witnesses

			Statements of Chicago alternates and cancellations
1.28.7	-	VIII-4	- Statements of Seattle Witnesses
			Statements of Seattle alternates and cancellations
1.28.8	-	VIII-7	- Atlanta Witness list
			Statements filed by Atlanta Witnesses
1.28.9	-	VIII-6	- Statements of Atlanta Witnesses
			Statement of Atlanta alternates and cancellations
1.28.10	-	VIII-8	- Statements of Consumer Federation of America
		VIII-5	- Statements of Los Angeles Witnesses
			Statements of Los Angeles cancellations
		VIII-9	- Statements of D.C. Witnesses
1.28.12	-	VIII-9	- Statements of D.C. Witnesses
1.28.13	-	VIII-9	- Statements of D.C. Witnesses
1.28.14	-	VIII-9	- Statements of D.C. Witnesses
1.28.15	-	VIII-9	- Statements of D.C. Witnesses
			Statements of D.C. alternates and cancellations
1.29.1	-	New York Hearings Transcript April 20, 21, 22	

- 1.29.2 - New York Hearings Transcript April 23, 26, ~~27~~
- 1.29.3 - New York Hearings Transcript April 28, 29, 30;
May 3
- 1.29.4 - Statements of those not selected as witnesses
at New York, numbers 1-84
- 1.29.5 - Chicago Hearings Transcript May 10, 11, 12
- 1.29.6 - Chicago Hearings Transcript May 13, 14, 17
- 1.29.7 - Chicago Hearings Transcript May 18, 19, 20
- 1.29.8 - Chicago Hearings Transcript May 21

Statements of those not selected as witnesses
at Chicago, numbers 1-34
- 1.29.9 - Statements of those not selected as witnesses
at Chicago, numbers 35-156
- 1.29.10 - Statements of those not selected as witnesses
at Chicago, numbers 157-330
- 1.29.11 - Statements of those not selected as witnesses
at Chicago, numbers 331-524
- 1.29.12 - Seattle Hearings Transcript June 1, 2, 3
- 1.29.13 - Seattle Hearings Transcript June 4

Statements of those not selected as witnesses
at Seattle, numbers 1-62
- 1.29.14 - Los Angeles Hearings Transcript June 9, 10
- 1.29.15 - Los Angeles Hearings Transcript June 11, 14
- 1.29.16 - Los Angeles Hearings Transcript June 15, 16
- 1.29.17 - Los Angeles Hearings Transcript June 17, 18

Statements of those not selected as witnesses
at Los Angeles, numbers 9-21
- 1.29.18 - Atlanta Hearings Transcript June 28, ~~29~~
- 1.29.28 - Atlanta Hearings Transcript June 30
- 1.29.19 - Atlanta Hearings Transcript July 1, 2

1.29.20	-	Statements of those not selected as witnesses at Atlanta, numbers 1-127.	
1.29.21	-	D. C. Hearings Transcript July 19, 20	
1.29.22	-	D. C. Hearings Transcript July 21, 22	
1.29.23	-	D. C. Hearings Transcript July 23, 26	
1.29.24	-	D. C. Hearings Transcript July 27, 29	
1.29.25	-	D. C. Hearings Transcript July 29, 30	
1.29.26	-	D. C. Hearings Transcript August 2, 3	
1.29.27	-	D. C. Hearings Transcript August 4, 5, 6	
1.29.28	-	D. C. Hearings Transcript June 30	
1.29/1.1	-	New York Hearings Exhibits Hausman 1-Richardson 2	
1.29/1.2	-	New York Hearings Exhibits Cushman 1-Brandt 1	
1.29/1.3	-	Chicago Hearings Exhibits	1 - 7
1.29/1.4	-	Chicago Hearings Exhibits	8 - 35
1.29/1.5	-	Seattle Hearings Exhibits	1 - 14
1.29/1.6	-	Los Angeles Hearings Exhibits	1 - 17
1.29/1.7	-	Los Angeles Hearings Exhibits	18 - 26
		Statements Rejected (Unnumbered) for Insufficiency of Those Requesting to Testify at Los Angeles	
		Atlanta Hearings Exhibits	1 - 11
1.29/1.8	-	Atlanta Hearings Exhibits	12 - 25
		Statements Rejected (Unnumbered) for Insufficiency of Those Requesting to Testify at Atlanta	
1.29/1.9	-	D. C. Hearings Exhibits	1 - 15
1.29/1.10	-	D. C. Hearings Exhibits	16 - 21
1.29/1.11	-	D. C. Hearings Exhibits	22 - 35
1.29/1.12	-	D. C. Hearings Exhibits	36 - 38

1.29/1.13	-	D. C. Hearings Exhibits	39 - 41
1.30.1	-	Rebuttal Submission	X-1
1.30.2	-	Rebuttal Submission	X-1
1.30.3	-	Rebuttal Submission	X-2
1.30.4	-	Rebuttal Submission	X-3 - X-8
1.30.5	-	Rebuttal Submission	X-9
1.30.6	-	Rebuttal Submission	X-9 - X-47

APPENDIX III
FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

(The following has been reprinted from the
Federal Register of August 29, 1975 - 40 F. R. 39901)

FEDERAL TRADE COMMISSION
[16 CFR Part 453]
FUNERAL INDUSTRY PRACTICES
Trade Regulation Proceeding

Notice of Proceeding, Proposed Trade Regulation Rule, Statement of Reason for Proposed Rule, Invitation to Propose Issues of Fact for Consideration in Public Hearings, and Invitation to Comment on Proposed Rule.

Notice is hereby given that the Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended 15 U.S.C. 41, et seq., the provisions of Part I, Subpart B of the Commission's procedures and rules of practice, 16 CFR 1.7, et seq., and 553 of Subchapter II, Chapter 5, Title 5 of the U.S. Code (Administrative Procedure), has initiated a proceeding for the promulgation of a Trade Regulation Rule concerning Funeral Industry Practices.

Accordingly, the Commission proposes the following Trade Regulation Rule and to amend subchapter D, Trade Regulation Rules, Chapter 1 of 16 CFR by adding a new Part 453 as follows:

PART 453—FUNERAL INDUSTRY PRACTICES

- Sec.
453.1 Definitions.
453.2 Exploitative practices.
453.3 Misrepresentations.
453.4 Merchandise and service selection.
453.5 Price disclosures.
453.6 Interference with the market.
453.7 Retention of documents.

AUTHORITY: The provision of this Part 453 are issued under 38 Stat. 717, as amended (15 U.S.C. 41, et seq.).

§ 453.1 Definitions.

For the purpose of this part, the following terms and definitions shall apply:

(a) *Funeral service industry member.*

A "funeral service industry member" is any person, partnership or corporation, or any employee or agent thereof, engaged in the business of selling or offering for sale, directly to the public, funeral services and merchandise; or preparing deceased human bodies for burial, cremation or other final disposition; or of conducting or arranging funerals.

(b) *Funeral services.* "Funeral services" consist of services performed incident to: (1) the care and preparation of deceased human bodies for burial, cremation or other final disposition; (2) the arrangement, supervision or conducting of the funeral ceremony and the final disposition of the deceased including, but not limited to, transporting the remains, securing necessary permits, embalming, arranging for death notices and other funeral-related items.

(c) *Funeral merchandise.* "Funeral merchandise" consists of articles and supplies sold or offered for sale, directly to the public, or used by funeral directors incident to: (1) the care and preparation of deceased human bodies for burial, cremation or other final disposition; (2) the arrangement, supervision or conducting of the funeral ceremony.

(d) *Person, partnership or corporation.* The term "person, partnership or corporation" refers to any party, other than a state, over which the Federal Trade Commission has jurisdiction, and may include in appropriate circumstances, but is not limited to, individuals, groups, organizations, trade associations, and professional societies.

(e) *Customer.* A "customer" is any person, association, or other entity who purchases, attempts to purchase or seeks information regarding possible future purchase of funeral services and/or merchandise, without intention of resale.

(f) *Immediate cremation.* An "immediate cremation" is a disposition of human remains which includes reduction of the remains by a heating process and which does not involve formal viewing or a prior funeral ceremony with the body present.

(g) *Outer interment receptacle.* An "outer interment receptacle" is any container or enclosure which is placed in the grave around the casket to protect the casket and/or to prevent the collapse of the grave including, but not limited to, receptacles commonly known as burial vaults, grave boxes or grave liners.

(h) *Casket.* A "casket" is a rigid container which is designed for the encasement and burial of human remains and which is usually constructed of wood or metal, ornamented, and lined with fabric.

(i) *Suitable container.* A "suitable container" is any receptacle or enclosure other than a casket which is of sufficient strength to be used to hold and transport human remains including, but not limited to, cardboard, pressed-wood or composition containers and canvas or opaque polyethylene pouches.

(j) *Crematory.* "Crematory" refers to an establishment which reduces human remains by a heating process.

(k) *Defacing.* "Defacing" consists of deliberate efforts to make merchandise

appear unattractive to customers including, but not limited to, displaying broken, soiled or defective merchandise.

(1) *Accounting year.* "Accounting year" refers to the particular one year period, which may but need not necessarily correspond to the calendar year, utilized by a funeral home in keeping financial records for tax or accounting purposes.

(m) *Adult funeral services.* "Adult funeral services" refers to funeral services which are provided, at retail prices, for adults, and does not include services provided for infants or small children.

(n) *Standard funeral service package.* A "standard funeral service package" is defined to include at least the following: removal of remains to funeral home; preservation, restoration, and dressing of remains; use of funeral home facilities and equipment for viewing and the funeral service; arranging for obituary notices, church services, burial permits, and transcripts of death certificates; arranging and care of flowers; use of hearse; arranging for veteran, social security, fraternal, labor union, and/or life insurance burial benefits, arranging for pallbearers; other services of funeral director and staff; and casket.

(o) *Offered for sale.* "Offered for sale" refers to making available for purchase or suggesting the availability of merchandise or services for purchase by use of any of the following: media advertising; promotional materials, including brochures, handbills or calendars; the display or stocking for sale of merchandise; or expressions, direct or indirect, of a willingness to furnish services and/or merchandise to the public for a retail price.

(p) *Memorial society.* A "memorial society" is a non-public membership association which assists members in obtaining and making arrangements for funerals, cremations, or other methods of disposition.

§ 453.2 Exploitative practices.

In connection with the sale or offering for sale of funeral services and/or merchandise to the public, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice for any funeral services industry member:

(a) *Embalming without permission.* To furnish embalming, other services or merchandise without having first obtained written or oral permission from a family member or other person authorized by law to make funeral arrangements for the deceased. *Provided*, That embalming without permission to satisfy requirements of state or local laws shall not be considered a violation of this provision.

(b) *Pick-up and release of corpses.* (1) To obtain custody of a deceased human body without having first received written or oral authorization from a family member or other person authorized by law to make funeral arrangements for the deceased. *Provided*, That obtaining custody of human remains without authorization from a family member or

other person authorized by law to make funeral arrangements to satisfy requirements of state or local laws shall not be considered a violation of this provision.

(2) To refuse to release a deceased human body to a family member or other person authorized by law to arrange disposition of the body, including any funeral director acting on directions of a family member or other authorized person, when requested to do so, whether or not money is owed for services already rendered. *Provided, however*, That this provision shall be subject to any valid state or local laws respecting release or transportation of deceased bodies.

(c) *Casket for cremation.* Who arranges cremation services, (1) or any crematory to require customers who express interest in immediate cremation of deceased human remains to purchase a casket or to claim directly or by implication that a casket is required;

(2) To fail to make available to any customer expressing an interest in immediate cremation of deceased human remains a suitable container, as defined by this part.

(d) *Profit on cash advances.* (1) To charge in excess of the amount advanced, paid or owed to third parties on behalf of customers for any items of service or merchandise described as "cash advances", "accommodations" or words of similar import on the contract, final bill, or other written evidence of agreement or obligation furnished to customers.

(2) To charge customers more than the amount advanced, paid or owed to third parties on behalf of customers for:

- (i) Cemetery or crematory charges.
- (ii) Pallbearers.
- (iii) Public transportation charges.
- (iv) Flowers.
- (v) Clergy honoraria.
- (vi) Musicians or singers.
- (vii) Nurses.
- (viii) Obituary notices.
- (ix) Gratuities.

(3) To pass on to customers the benefit of any rebates, commissions or trade or volume discounts received on any items enumerated in paragraph (d)(2) of this section. If the net cost to the funeral director for an item cannot be ascertained at the time of a particular sale, determination of the charges to the customer (the net charges paid by the funeral director) may be based on the adjustments, discounts, or rebate figures for the preceding accounting year.

(4) To misrepresent to a customer in any respect the amount advanced, paid or owed to third parties on behalf of the customer for services or merchandise to be furnished to such customer.

§ 453.3 Misrepresentations.

In connection with the sale or offering for sale of funeral services and/or merchandise to the public, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice for any funeral services industry member:

(a) *Misrepresentation of law, public health necessity, and religious custom.*

(1) To make any statements or claim written or oral, which expressly or implicitly contradict, mitigate or detract from the printed disclosures which are required by paragraph (a)(2) of this section or which are false, misleading or unsubstantiated, regarding (i) the legal necessity for embalming, a casket, or an outer interment receptacle; (ii) public health hazards associated with the failure to utilize embalming, a casket, or an outer interment receptacle; or (iii) religious requirements or customs.

(2) To fail to furnish, to each customer who inquires in person about the arrangement, purchase and/or prices of funeral merchandise or services, the following printed or typewritten statement, in clearly legible type:

NAME OF FUNERAL HOME

To avoid purchase decisions based on misconceptions about legal or public health requirements, the following statements are provided for your information. Please ask for an explanation of any statement which is not clear.

(i) Embalming is not required by law except in limited circumstances. It is not to be performed without authorization from a legally responsible individual except in those instances where it is required by law.

(ii) A casket is not required for immediate cremation. In lieu of caskets, this funeral home has available containers suitable for cremation for \$_____.

(iii) Purchase of a casket or of a special form of casket, such as a "sealer casket" not required by law except in limited circumstances, but may be required by cemetery rule.

(iv) Outer interment receptacles (caskets or grave liners) are not required by law except in limited circumstances, but are required by cemetery rule.

Upon request, your funeral director provide a brief written or printed explanation of legal requirements, including health regulations, which necessitate the use of any services or merchandise.

(3) To fail to furnish, upon customer request, a brief written, typewritten or printed explanation of legal requirements, including public health regulations, which necessitate the use of any services or merchandise.

(b) *Preservative value claims.* claim, directly or by implication decomposition or decay of a deceased human body can be prevented by treatment or purchase of:

- (i) Embalming; or
- (ii) A casket, unsealed or sealed
- (iii) A burial vault or other outer interment receptacle, unsealed or sealed.

(2) To make false, misleading or unsubstantiated claims, directly or by implication, of watertightness or airtightness for caskets or vaults, whether sealed or unsealed;

(3) To misrepresent the preservative or protective utility of caskets, vaults or embalming.

§ 453.4 Merchandise and service claims.

In connection with the sale or offering for sale of funeral services and/or merchandise to the public, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice for any funeral services industry member:

commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice in any funeral service industry mem-

a) *Display of least expensive caskets.* If an establishment contains one or more casket selection rooms, to fail to play therein the three least expensive caskets offered for sale for use in adult funeral services, in the same general manner as other caskets are displayed. *Provided*, That if fewer than twelve caskets are displayed, only one of the three least expensive caskets must be played.

b) *Availability of other colored caskets.* To fail to inform customers, by means of a prominently displayed written notice, that displayed caskets can be obtained in other colors, or to fail to provide caskets in other colors to customers on so request, *provided*, That such caskets in other colors can be obtained from other commercial suppliers upon twelve hours notice.

c) *Interference with customer's selection of offered items.* (1) to represent, directly or indirectly, orally, visually, or in writing, that any funeral merchandise or service is offered for sale when such is a bona fide offer to sell said product or service;

(2) To make representations, directly or indirectly, orally, visually, or in writing, purporting to offer any funeral merchandise or service for sale when the purpose of the representation is not to obtain leads or prospects for the sale of other funeral merchandise and/or services at higher prices;

(3) To discourage the purchase, by customers, of any funeral merchandise or service which is advertised or offered for sale by:

i) Disparaging the quality, appearance or tastefulness of any such merchandise or service which is advertised or offered for sale;

ii) Suggesting that such merchandise or service is not readily available or can only be obtained after an appreciable delay, when such is not the case;

iii) Defacing any merchandise card for sale; or

4) To use any policy, sales plan, or method of compensation for salespersons which has the effect, in any manner, or discouraging salespersons from selling, has the effect of penalizing salespersons for selling, any funeral merchandise or service which is advertised or offered for sale.

d) *Disparagement of concern for the deceased.* To suggest, directly or by implication, to any customer in any manner that the customer's expressed concern about prices, inexpensive services or merchandise or an expressed desire to save money by the customer is improper, inappropriate or indicative of a lack of respect or affection for the deceased.

53.5 Price disclosures.

In connection with the sale or offering for sale of funeral services and/or merchandise to the public, in or affecting

commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice for any funeral service industry member:

(a) *Price information over telephone.* To fail to provide by telephone, upon customer request, accurate information regarding the funeral service industry member's retail prices of funeral products and services, including caskets, vaults, basic services and cremation services, if offered.

(b) *Casket price list.* (1) To fail to furnish to each customer, before discussion about caskets offered for sale or the customer's selection of a casket, a printed or typewritten document which lists, in ascending order of price, the prices of all caskets available for purchase without requiring special ordering by the customer, together with sufficient information about each casket to enable the customer to locate and identify a casket among the others on display. The document shall also bear an effective date for prices listed thereon.

(2) To fail to include, on the printed or written list required by paragraph (b) (1) of this section in clearly legible type, the following heading:

CASKET PRICE LIST FOR (NAME OF FUNERAL HOME)

Listed below, in order, are the prices of the caskets offered by this funeral home together with information to help you locate and identify particular caskets which are displayed. If you are interested in any of the caskets which are included on this list but are not on display, please inquire.

(3) To represent to a customer that a casket on the list is not available, when such is not the case.

(c) *Display of casket prices.* (1) to fail to display prominently in or on the caskets on display the price of such caskets by card, sign or other means.

(2) To fail to display prominently prices on any casket photographs shown to customers and on any caskets shown to customers in display rooms maintained by casket manufacturers or wholesalers.

(d) *Vault disclosure and price list.* (1) to fail to furnish to customers, at the time they are shown or informed as to the availability of outer interment receptacles, before such a customer has made his or her selection, the following printed or typewritten notice:

Some cemeteries require that an outer enclosure be placed around the casket in the grave, while others do not. Where such a requirement exists, it can usually be satisfied by either a burial vault or a grave liner, which is usually less expensive than a burial vault. Outer interment receptacles are often sold by cemeteries as well as by funeral homes. Before selecting any outer enclosure you may want to determine any applicable cemetery requirements as well as the offerings of your cemetery and funeral home.

(2) To fail to include on the printed statement required by paragraph (d) (1) of this section, in clearly legible type, the price for each outer interment receptacle available from the funeral home for purchase by the customer, together with a brief description of each enclosure, and

an effective date for the prices specified.

(e) *Price list.* (1) To fail to furnish to each customer who inquires in person about the arrangement, purchase, and/or prices of funeral goods or services, prior to any agreement on such arrangement or selection by the customer or to any customer who by telephone or letter requests written price information, a printed or typewritten price list, which the customer may retain, containing the prices (either the retail charge or the price per hour, mile or other unit of computation) for at least each of the following items:

(i) Transfer of remains to funeral home.

(ii) Embalming.

(iii) Use of facilities for viewing.

(iv) Use of facilities for funeral service.

(v) Casket (a notation that a separate casket price list will be provided before any sales presentation for caskets is made).

(vi) Hearse.

(vii) Limousine.

(viii) Services of funeral director and staff.

(ix) Outer interment receptacles (if outer interment receptacles are sold, a notation that a separate outer interment receptacle price list will be provided before any sales presentation for such items is made).

Provided, That, for that the list may include the package prices for any standard funeral service package under \$1000. The items covered by any such package shall not be separately priced. If a customer wishes to decline any items, the price shall be reduced by at least the amount of savings accruing to the funeral home from the declination.

(2) To fail to include, on the printed price list specified in paragraph (e) (1) of this section, directly above the price listings, in clearly legible type, the following:

(i) The name, address, and telephone number of the funeral home;

(ii) An effective date for the prices listed thereon;

(iii) The statement "You are free to select only those items of service and merchandise you desire. You will be charged for only those items you select. In some instances, depending on the circumstances of death and/or the type of service you select, some additional services or merchandise may become necessary. If you are required to pay for certain services or merchandise you have not selected, because they are required by other factors, an explanation shall be provided in writing by the funeral director on the memorandum of funeral services selected which you will receive."

(f) *Memorandum of funeral service selected.* (1) To fail to furnish to each customer making funeral arrangements, on a written memorandum of the funeral service selected, a list, in at least the following categories, of the services and merchandise selected by the customer together with a price for each item:

- (i) Embalming.
- (ii) Other preparation of the body.
- (iii) Use of facilities for viewing.
- (iv) Use of facilities for funeral service.
- (v) Other services of funeral director and staff.
- (vi) Casket, as selected.
- (vii) Other specifically itemized merchandise.
- (viii) Specifically itemized transportation charges.
- (ix) Specifically itemized charges for any special services required.
- (x) Specifically itemized cash advances or expenditures.

Provided, however, that there may be single prices quoted for each standard adult funeral service package whose total price is below \$-----, if the services and merchandise included for the package price are specified, and if the listed price reflects appropriate adjustments for any items declined by the customer, as set forth in paragraph (e) (1) of this section.

(2) To fail to include on the written memorandum, required by paragraph (f) (1) of this section, in clearly legible boldface type the following:

- (i) The name, address, and telephone number of the funeral home;
- (ii) The disclosure required by paragraph (e) (2) (iii) of this section;
- (iii) The statement "no substitutions of agreed-upon merchandise shall be made, unless agreed to in advance, by both parties."
- (iv) The statement "I have read and understood the above statements. I have also received written information regarding the prices of caskets and other merchandise and services."
- (v) Immediately below the statements required by paragraph (f) (2) (iii) and (iv) of this section, the signatures of the customer and the funeral service industry member, or an authorized representative, and the date signed.

§ 453.6 Interference with the market.

In connection with the sale or offering for sale of funeral services and/or merchandise to the public, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice for any funeral service industry member:

- (a) *Offering of inexpensive funerals.* Or any person, partnership, or corporation, directly or indirectly, to prohibit, hinder or restrict, or attempt to prohibit, hinder, or restrict: (1) The offering, or advertising of the availability of, low-cost funerals, immediate cremation or other forms of disposition, or arrangements for funeral services in advance of need by any funeral director, memorial society, or other person, partnership or corporation;
- (2) Contracts or arrangements between memorial societies and any funeral director or other person, partnership or corporation providing services for the disposition of deceased human bodies.
- (b) *Price advertising.* Or any other person, partnership or corporation, di-

rectly or indirectly, to prohibit, hinder or restrict, or attempt to prohibit, hinder or restrict, the disclosure of accurate price information regarding funeral merchandise or services by any funeral director, memorial society, or other person, partnership or corporation offering services for the disposition of deceased human bodies, whether such disclosure is made by means of advertisements in print media or broadcast media, or in any other manner.

(c) *Reliance on price advertising restrictions.* To change, restrict, make or fail to make any disclosure of accurate price information about any funeral merchandise or service by print media, broadcast media, telephone, leaflets, mailings, or in any other way, because of or in connection with any law, rule, regulation or code of conduct of any non-federal legislative, executive, regulatory or licensing entity or any other entity or person whatsoever, including but not limited to professional associations.

(d) *Price availability notice.* To fail to display prominently, in any advertising or promotional materials in print or broadcast media of funeral merchandise or services, the following notice:

Funeral home prices vary substantially. For information on our prices for funeral merchandise and services, call: (Telephone number).

§ 453.7 Retention of documents.

To assure compliance with the provisions of this part and prevent future use of the unfair and deceptive practices it prohibits, all funeral homes subject to the provisions of this part shall be required to retain and to make available for inspection by Federal Trade Commission officials, upon request, true and accurate copies of the written disclosures or price lists required by § 453.3(a)(2) and § 453.5 (b) (1), (d) (1), and (e) (1), and all revisions thereof, for at least three years after the date of their last distribution to customers, and a copy of each selection memorandum signed by a customer, as required by § 453.5(f) (1), for at least three years from the date on which the memorandum was signed.

STATEMENT OF REASON FOR THE PROPOSED RULE

It is the Commission's purpose in issuing this statement to set forth its reason for proposing this rule with sufficient particularity to allow informed comment. The precise format of such statements may vary from rule to rule depending upon the complexity of the issues involved. In this proceeding, we have determined that meaningful comment by the public will be facilitated by presenting (1) a brief statement describing the basic factual and legal premises upon which the Commission has determined to issue the rule, and (2) a series of questions designed to draw to the public's attention matters which the Commission deems particularly pertinent and those upon which comment is especially solicited.

The Commission emphasizes that neither this statement of factual and legal

premises nor the questions should be interpreted as designating disputed issues of material fact. Such designations shall be made by the Commission or its duly authorized presiding official pursuant to the Commission's procedures and rules of practice.

STATEMENT

The Commission has reason to believe that: (a) The funeral transaction has distinctive characteristics which combine to place consumers in a peculiarly vulnerable position. Funeral purchases—one of the largest single consumer expenditures—are made out of necessity, not by choice. Funeral arrangements typically must be made under extreme time pressures by buyers whose bereaved condition may render them unable to protect themselves by careful inquiry or to exercise their normal care and business judgment. Often, buyers have almost no knowledge of funeral procedures, legal requirements or restrictions and available choices and costs. By contrast, the funeral director is in the business of arranging disposition of the dead for profit, and he is familiar with procedures, legal issues, costs, alternatives, and is skilled at transacting business with buyers who are distraught, disoriented and dependent;

(b) Bereaved buyers are susceptible to and have been subjected to a variety of practices which exploit their disadvantaged position or which interfere with personal selection of funeral merchandise and services. Moreover, these practices frequently involve the creation of false expectations in the funeral purchaser concerning funeral requirements and choices or mislead the customer by misrepresenting the necessity or nature of the funeral merchandise and services purchased. Such practices include: obtaining custody of and embalming corpses without permission, refusing to release a decedent's remains upon request of surviving relatives, requiring use of a casket for immediate cremation services, profiting on cash advances, concealing the availability of less expensive caskets or caskets in other colors, and discouraging selection of particular merchandise and services offered for sale. In addition, the consumer's disadvantaged position has been used to impede personal selection of funeral arrangements by funeral service industry members who have disparaged the buyer's economic concerns;

(c) Sections 453.2 and 453.4 of the proposed rule are necessary to halt and prevent future use of the foregoing practices, which are unfair or deceptive within the meaning of Section Five of the Federal Trade Commission Act (15 U.S.C. Section 45, as amended).

The Commission is proceeding upon the theory that the practices prohibited by Sections 453.2 and 453.4 of the Proposed Rule are unfair if they cause substantial harm (i.e., their economic and social utility to the public is substantially less than their economic and social disutility) and they result from the inequitable use of the superior bargaining position of the funeral service industry

member relative to that of consumer buyers. In so doing, the Commission is mindful that its authority to examine and prohibit unfair practices in or affecting commerce has been analogized to the jurisdiction of an equity court.¹

The Commission has further reason to believe that: (d) Many consumers have been injured by misrepresentations concerning the use, necessity, or preservative utility of embalming, caskets or burial vaults; public health hazards resulting from failure to use embalming, a casket or a burial vault; or religious requirements or customs;

(e) The foregoing practices are deceptive within the meaning of section 5 of the Federal Trade Commission Act (15 U.S.C. 45, as amended). Section 453.3 of the proposed rule is necessary to prevent the use of such deceptive practices and to avoid purchase decisions which are premised on misconceptions.

The Commission also has reason to believe that: (f) The availability of price information for consumers has been severely restricted. A substantial number of funeral homes refuse to divulge price information by telephone or limit the amount of information obtainable at the funeral home concerning the prices of funeral merchandise and services;

(g) A widespread failure to advertise funeral prices has contributed to the lack of price information. Such failure may be attributable not only to individual reluctance to advertise prices but also to historical institutional opposition to price advertising (by industry groups and state regulatory boards) and to state laws and regulations which restrict or prohibit funeral price advertising;

(h) The inadequate availability of price data has prevented price competition from operating in the funeral industry, has severely hampered comparison of the prices and offerings of different funeral homes by consumers and has deprived consumers of material information which is essential to informed purchase decisions. Unless the Commission undertakes to require certain price disclosures and to remove all varieties of private and public restraints, consumers may continue to receive inadequate price information throughout the United States;

(i) Actions by funeral industry members to inhibit economical funeral offerings, pre-need arrangements, immediate disposition services, or memorial societies disadvantage consumers by restricting their choice of funeral arrangements and may suppress competition in the industry;

(j) Section 453.5's price disclosure requirements are necessary: (1) to prevent deception regarding funeral prices and offerings; (2) to remedy the unfair withholding of information essential for informed consumer purchase decisions; and (3) to prevent future use of various unfair and deceptive merchandising techniques which exploit consumers' lack of information;

¹ F.T.C. v. Sperry Hutchinson Co., 405 U.S. 233, 244 (1972).

Section 453.6 is necessary to cure the unfair nondisclosure of funeral prices, whether or not due to private or official restraints, and to prevent unfair activities which restrict the funeral choices available to consumers and price competition within the funeral industry.

For the purposes of this trade regulation rule proceeding, the Commission is proceeding upon the theory that nondisclosure of funeral prices is unfair if it creates substantial harm (i.e., its economic and social utility to the public is substantially less than its economic and social disutility) and it offends public policy by being basically contrary to clear national policy, as articulated by the federal antitrust statutes, and not vital to achieve important State policy goals. In light of the foregoing, the Commission has reason to believe that the widespread failure by funeral service industry members to disclose to consumers retail price information for funeral merchandise and services, whether or not due to private or official restraints, is unfair within the meaning of Section 5 of the Federal Trade Commission Act.

(15 U.S.C. section 45, as amended)

In addition, the Commission has reason to believe that: (k) The retention of documents required by § 453.7 of the proposed rule is necessary to facilitate enforcement of the rule and to effectuate its purposes;

(l) The magnitude of the economic and emotional injuries inflicted on large numbers of particularly vulnerable consumers by the abuses identified and the frequency of their use by funeral directors in different parts of the United States are sufficient to warrant issuance of this proposed rule by the Commission.

The Commission has reason to believe the above statements based on information compiled by Commission staff during a comprehensive industry-wide investigation.

In the course of the investigation the Commission staff has received extensive documentary evidence bearing upon the issues and has consulted numerous experts, industry members and consumers. In addition, the staff has conducted independent surveys and investigational hearings; evaluated consumer complaints, pertinent State statutes and judicial rulings; and examined the findings of various industry studies. The Commission has not adopted any findings or conclusions of the staff. All findings in this proceeding shall be based solely on matter in the rulemaking record.

EFFECT OF RULE ON CONTRARY STATE LAWS

Particularly with respect to §§ 453.2 (c), 453.5 and 453.6 of the proposed rule, it is the Commission's intent in issuing this proposed rule to override contrary state or local law. The rule is an interpretation of the Federal Trade Commission Act (15 U.S.C. section 41, et seq.) and constitutes a declaration of federal law. Under the supremacy clause of the United States Constitution,² the rule will

² U.S. Const., art. VI, § 2.

become the supreme law of the land on the matters it covers and within the confines of the Commission's jurisdiction, preempting all repugnant state or local laws.³

GENERAL LEGAL AUTHORITY

The Commission's legal authority to promulgate a Funeral Industry Practices Trade Regulation Rule derives principally from Sections 5 and 18 of the Federal Trade Commission Act (15 U.S.C. Sections 45 and 57, as amended). Section 5 declares unlawful the use, in or affecting commerce, of unfair or deceptive acts or practices or unfair methods of competition. In *FTC v. Sperry & Hutchinson Co.*,⁴ the Supreme Court affirmed, in broad terms, the Commission's authority to proscribe not only practices which are anticompetitive or deceptive, but also practices which are unfair.⁵ The Court analogized the Commission's role, in evaluating unfairness, to that of a court of equity.

Thus legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.⁶

The Commission's authority to define particular practices as unfair or deceptive within the meaning of Section 5 of the Federal Trade Commission Act by promulgating rules has been explicitly recognized by case⁷ as well as by the statutory authority of Section 18 of the Act, as amended.⁸ Section 18 further affirms the Commission's authority to include, within rules, requirements prescribed for the purpose of preventing future use of unfair or deceptive acts or practices.⁹

QUESTIONS

1. How prevalent are the following funeral industry practices which are addressed by the rule?

- Furnishing embalming or other services without permission.
- Obtaining remains without authorization.
- Refusing to release remains when requested to do so.
- Requiring purchase of a casket for cremation, and refusing to make an inexpensive container available.
- Misrepresenting to customers and overcharging customers on the amounts for cash advance items.
- Misrepresenting legal, public health, or religious requirements.

³ See, e.g., *Perez v. Campbell*, 402 U.S. 637 (1971); *Free v. Bland*, 369 U.S. 663 (1962); *Double-Eagle Lubricants v. Texas*, 248 F. Supp. 515 (N.D. Tex.), appeal dismissed, 384 U.S. 434 (1966); *Mobil Oil Corp. v. Attorney General*, 280 N.E.2d 406 (Mass. 1972).

⁴ 405 U.S. 233 (1972).
⁵ See also *F.T.C. v. R. F. Keppel & Bro.*, 291 U.S. 304 (1934).

⁶ 405 U.S. at 244 (footnote omitted).
⁷ See *Nat'l Petroleum Refiners Ass'n v. F.T.C.*, 482 F. 2d 672 (D.C. Cir. 1973), *rev'd* 340 F. Supp. 1848 (D.D.C. 1972).

⁸ Pub. L. 93-637, § 202 (Jan. 4, 1975).
⁹ § 18(a) (1) (B).

Misrepresenting the preservative capabilities of embalming, caskets, or outer interment receptacles.

Failing to display inexpensive caskets.
 Displaying inexpensive caskets in a manner which is calculated to discourage their selection by customers.
 Pressuring customers into purchasing high-priced merchandise and services.
 Disparagement of inexpensive merchandise.
 Sales plans or commission schemes which penalize salespersons for selling inexpensive funerals while rewarding them for high-priced sales.
 Disparaging a consumer's interest in price considerations.

Refusing to provide price information over the telephone.

Arranging the casket selection room so as to confuse customers and lead them to purchase more expensive caskets.

Displaying caskets without prices.
 Misleading customers about the necessity for burial vaults and failing to disclose the availability of less expensive grave liners.

Tying together funeral products and services and refusing to quote separate prices on component items or give discounts for declined items.

Restricting the availability of low-cost funerals, pre-need plans, alternative methods of disposition, and memorial society programs.

Limiting the availability of price information through restrictions on price advertising.

The Commission particularly desires analysis and comment based on specific data and experience.

2. Is it necessary for the Commission to specify a maximum price or formula for the cremation container required by § 453.2(c), to prevent funeral directors from charging excessive prices for such alternative containers?

3. To what extent do existing state and local laws permitting the practices otherwise declared unfair or deceptive by § 453.2(a) and § 453.2(b) of the proposed rule (i.e., embalming without permission, obtaining custody of remains without authorization, refusing to release remains to the deceased's family) protect the public health, safety or welfare or serve other legitimate state interests? Should any of these requirements of state or local law be preempted?

4. Does § 453.4(d) abridge constitutionally protected speech? If so, by what

means can the protective purposes of the provision be attained constitutionally?

5. Are the funeral price disclosure requirements of § 453.5 necessitated by inadequate availability to consumers of price information? If so, is this inadequate availability the result of funeral directors' withholding of price information? Would the price disclosures required by § 453.5 help consumers make better-informed purchase decisions?

6. Will mandatory itemization of prices of funeral merchandise and services, as required by § 453.5(e) of the proposed rule, benefit consumers in their selection of funeral merchandise and services? Will the itemized memorandum of funeral merchandise and services selected, as required by § 453.5(f) of the proposed rule, benefit consumers? Please be specific. Are the categories of items which must be enumerated by § 453.5(e) and (f) useful and appropriate? If not, what changes should be made?

7. Should the offering of low-cost package funerals be encouraged? Would itemization preclude the offering of low-cost funerals? Would exempting the least expensive funerals from the itemization requirements of § 453.5(e) and (f) prevent such a result? If so, what is a reasonable dollar cut-off point for exempting such funerals from the itemization requirements of § 453.5(e) and (f)?

8. Are there additional funeral industry practices which should be addressed by this rule?

9. Should the coverage of this rule be expanded to include unfair or deceptive practices used by funeral merchandise manufacturers, cemeteries or other allied industries? What specific practices should be addressed, and in what way are they unfair or deceptive?

10. What will be the impact of the rule on consumers?

11. What costs, economic or otherwise, to funeral homes, especially those which are small businesses, would result from implementation of the proposed rule, and how could such costs be minimized?

12. To what extent do the circumstances of the funeral transaction place the consumer in a more vulnerable posi-

tion than in other consumer transactions?

INVITATION TO PROPOSE ISSUES OF FACT FOR CONSIDERATION IN PUBLIC HEARINGS

All interested persons are hereby given notice of opportunity to propose any disputed issues of fact. The Commission or its duly authorized presiding official, shall, after reviewing submissions hereunder, identify any such issues in a Notice which will be published in the Federal Register. Such issues shall be considered in accordance with Section 18(c) of the Federal Trade Commission Act as amended by Public Law 93-637, and rules promulgated thereunder. Proposals shall be accepted until October 28, 1975, by the Special Assistant Director for Rulemaking, Federal Trade Commission, Washington, D.C. 20580. A proposal should be identified as a "Proposal Identifying Issues of Fact—Funeral Industry Practices Rule", and furnished, when feasible and not burdensome, in five copies. The times and places of public hearings will be set forth in a later Notice which will be published in the FEDERAL REGISTER.

INVITATION TO COMMENT ON THE PROPOSED RULE

All interested persons are hereby notified that they may also submit to the Special Assistant Director for Rulemaking, Federal Trade Commission, Washington, D.C. 20580, data, views or arguments on any issue of fact, law, or policy which may have some bearing upon the proposed rule. Written comments, other than proposed issues of fact, will be accepted until forty-five days before commencement of public hearings, but at least until October 28, 1975. To assure prompt consideration of a comment, it should be identified as a "Funeral Industry Practices Rule Comment", and furnished, when feasible and not burdensome, in five copies.

Issued: August 28, 1975

By direction of the Commission:

VIRGINIA M. HARDING,
 Acting Secretary

[FR Doc. 75-22962 Filed 8-28-75; 8:45 am]

APPENDIX IV

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

(The following has been reprinted from the
Federal Register of February 20, 1976 - 41 F.R. 7787)

FEDERAL TRADE COMMISSION
[16 CFR Part 453]

FUNERAL INDUSTRY PRACTICES
Proposed Trade Regulation Rule

On August 29, 1975, the Commission (published in the Federal Register (40 FR 39901) an Initial Notice of a proposed trade regulation rule for the funeral industry pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, et seq., the provisions of Part Subpart B of the Commission's Procedures and Rules of Practice, 16 CFR 1.7, et seq., and § 553 of Subchapter II, Chapter 5, Title 5 of the U.S. Code (Administrative Procedure).
Now, pursuant to the same authority (more specifically to the authority of 12 of the Commission's Procedures and Rules of Practice, the undersigned and appointed Presiding Officer for this proceeding hereby gives Final Notice of proposed rulemaking, incorporating by reference the contents of the Initial Notice described above, including the proposed rule contained therein.

WRITTEN COMMENTS

All interested persons are hereby notified that they may continue to submit written data, views or arguments on any issue of fact, law, policy or discretion which may have some bearing upon the proposed rule. Such comments should be submitted to Jack E. Kahn, Presiding Officer, Federal Trade Commission, Washington, D.C. 20580, no later than March 1976. To assure prompt consideration comments should be identified as "Final Rule Comment" and submitted, when feasible and not burdensome, in three copies. Comments previously submitted in response to the Initial Notice have been placed in the public record and need not be resubmitted.

PUBLIC HEARINGS: DATES AND PLACES

Notice is also given that public hearings on the proposed rule will be held at the locations set forth below, commencing on the dates and times specified at

each location:

1. Public hearings will commence on April 20, 1976, at 9:30 a.m. in New York, New York:

Room C-D, 2243 Federal Building, 26 Federal Plaza, New York, New York

Persons desiring to present their views orally in New York should so inform the Commission's representative listed below not later than March 30, 1976:

Ms. Ellen Zweibel [(212) 264-1938], Federal Trade Commission, 26 Federal Plaza, New York, New York 10007

2. Public hearings will commence on May 10, 1976, at 9:30 a.m. in Chicago, Illinois:

John C. Kluczynski Federal Building, Room 347 A-B, 230 South Dearborn Street, Chicago, Illinois

Persons desiring to present their views orally in Chicago should so inform the Commission's representative listed below not later than April 19, 1976:

Mr. Alan Krause [(312) 353-2183], Federal Trade Commission, Suite 1437, 55 East Monroe Street, Chicago, Illinois 60603

3. Public hearings will commence on June 1, 1976, at 9:30 a.m. in Seattle, Washington:

Room 3086, Federal Building, 915 Second Avenue, Seattle, Washington

Persons desiring to present their views orally in Seattle should so inform the Commission's representative listed below not later than May 11, 1976:

Ms. Rachel Goodisman [(206) 442-4655], Federal Trade Commission, 2840 Federal Building, 915 Second Avenue, Seattle, Washington 98174

4. Public hearings will commence on June 9, 1976, at 9:30 a.m. in Los Angeles, California:

Room 13209, Federal Building, 11000 Wilshire Boulevard, Los Angeles, California

Persons desiring to present their views orally in Los Angeles should so inform the Commission's representative listed below not later than May 19, 1976:

Kendall H. MacVey [(213) 824-7575], Federal Trade Commission, 13209 Federal Building, 11000 Wilshire Boulevard, Los Angeles, California 90024

5. Public hearings will commence on June 28, 1976, at 9:30 a.m. in Atlanta, Georgia:

Room 810, 730 Peachtree Street, NE., Atlanta, Georgia

Persons desiring to present their views orally in Atlanta should so inform the Commission's representative listed below not later than June 7, 1976:

Mr. Russell Rohde [(404) 285-5836], Federal Trade Commission, Room 800, 730 Peachtree Street, NE., Atlanta, Georgia 30308

6. Public hearings will commence on July 19, 1976, at 9:30 a.m. in Washington, D.C.:

Federal Trade Commission Building, Room 332, 6th and Pennsylvania Avenue, NW., Washington, D.C.

Persons desiring to present their views orally in Washington, D.C. should so inform the Commission's representative listed below not later than June 28, 1976:

Mr. William P. Golden [(202) 523-3578], Bureau of Consumer Protection, Room 479, Federal Trade Commission, Washington, D.C. 20580

Additional hearing sites may be designated at a later date by the Presiding Officer if it is demonstrated that such additional hearings are needed in order to permit oral presentations by interested parties in other cities.

INSTRUCTIONS FOR WITNESSES

All prospective witnesses are advised that reasonable limitations upon the length of time allotted to any person may be imposed and that these time periods may vary from witness to witness, depending upon all the circumstances, including the needs of each witness, the complexity of the expected testimony, the number of parties represented by each witness and the cumulative

tive nature of expected testimony. Witnesses will be expected to stay within the time allotted for their remarks, and the Presiding Officer may allocate additional time for questioning. To the extent that individual views are not thereby suppressed, individual members of interested groups are encouraged to make their views known through group representatives. As a general rule, witnesses are expected to confine their remarks to twenty minutes or less unless an exception has been made, and to develop their testimony at greater length through their written submissions. Each witness is entitled to testify at only one hearing site.

Persons wishing to deliver prepared statements are required to file such statements with the designated Commission's representative listed above no later than March 30, 1976, for those witnesses appearing in New York; not later than April 19, 1976, for those witnesses appearing in Chicago; no later than May 11, 1976, for those witnesses appearing in Seattle; no later than May 19, 1976, for those witnesses appearing in Los Angeles; no later than June 7, 1976, for those witnesses appearing in Atlanta; and no later than June 28, 1976, for those witnesses appearing in Washington, D.C.

If at all possible, witnesses should furnish ten copies of their statements. Any witness not intending to deliver a statement fully prepared in advance is required to file with the designated Commission's representative (by the same date set forth above for the filing of written statements at the location where he expects to appear) a written detailed and comprehensive outline explaining the nature of his expected testimony including, but not limited to, a statement of each important fact, observation, conclusion, or opinion he anticipates presenting.

Advance submittal of statements and exhibits is required to apprise other interested parties of expected testimony so they may determine the need for examination, including cross-examination, or rebuttal submissions. Such submittals will be made available for viewing by the Commission representatives designated above at the location where the witness intends to appear.

The Presiding Officer retains the discretion to require that any oral presentation be submitted in full in writing in advance of presentation and to deny the right to present oral testimony to any person who fails to file appropriate statements or comply with the advance notification requirements of this Notice.

Prospective witnesses who plan to introduce documents or other written evidence as exhibits to their statements must furnish such documents or written evidence, properly identified with the witness' name and sequential number (i.e., Jackson Exhibit-1), by the same dates set out above for the filing of expected testimony, depending on the location at which the witness intends to appear, unless for good cause shown they can demonstrate why this could not have been done at that time.

All prospective witnesses may and, indeed, are encouraged to direct their statements towards any question of fact, law, policy or discretion relevant to the proposed rule, and, in this regard, the usual rules of evidence applicable to litigated proceedings will not apply. However, all prospective witnesses are advised that to the extent their statements may bear upon any of the designated issues set forth below, or to be later designated, they may be subject to limited cross-examination as to those issues by representatives of other interested parties, as designated by the Presiding Officer, or to cross-examination by the Presiding Officer on behalf of such representatives, or to direct rebuttal submissions. All witnesses will be subject to direct examination by the Presiding Officer and, subject to his control, to examination by such interested parties as he may within his discretion permit. Oral presentations will not be under oath unless the Presiding Officer expressly so provides.

DESIGNATED ISSUES

Set forth below are the issues which the Presiding Officer has determined to designate under § 1.13(d) (1) of the Commission's Procedures and Rules of Practice as issues to be considered in accordance with § 1.13(d) (5) and (6) of said Procedures and Rules of Practice. Pursuant to statute and the Commission's rules of practice, testimony with respect to these issues may entitle designated representatives or other interested parties to conduct or have conducted such cross-examination as the Presiding Officer may determine to be appropriate and required for a full and true disclosure with respect to any issue so designated. In the alternative, the Presiding Officer may determine that full and true disclosure as to any issue may be achieved through rebuttal submissions or the presentation of additional oral or written statements.

The Presiding Officer may at any time on his own motion or pursuant to a written petition by interested persons, add to or modify any issues listed. No such petition shall be considered unless good cause is shown why such issue was not proposed during the time specified in the Initial Notice.

Interested persons who desire to avail themselves of the procedures described above with respect to designated issues must, by March 5, 1976, notify the Presiding Officer in writing of their particular interest with respect to each issue designated, including a general statement of their position with respect to such issues. In the event new issues are added interested persons must promptly notify the Presiding Officer of their particular interest with respect to each such issue in the same manner. Request to examine, including cross-examine, or to present rebuttal submissions, shall be accompanied by a specific justification therefor.

Before the hearings commence, the Presiding Officer will identify groups of

persons with the same or similar interests in the proceeding. Such groups will be required to select a single representative for the purpose of examination, including cross-examination, and, if unable to agree the Presiding Officer may select a representative of each such group. Any member of a group who is unable to agree upon group representation after a good faith effort to do so, and who seeks to present substantial and relevant issues which will not be adequately presented by the group representative, may be allowed to conduct or have conducted any examination, including cross-examination or rebuttal submissions, to which he is entitled on issues designated for consideration in accordance with this Notice.

DESIGNATED ISSUES UNDER § 1.13(d) (1)

Practices. 1. Have funeral service industry members performed embalming without obtaining prior authorization when such authorization could have been obtained from an individual responsible for making funeral arrangements and when the embalming was not legally required?

2. Have funeral service industry members taken possession of deceased human remains without prior authorization from an individual responsible for making funeral arrangements?

3. Have funeral service industry members refused requests to release deceased human remains to the custody of a family member or other individual responsible for making funeral arrangements?

4. (a) Have funeral service industry members and/or crematories required customers desiring immediate cremations to purchase a casket?

(b) Have such requirements imposed on some customers merchandise they did not want and additional costs which could have been avoided but for the requirement?

5. Have funeral service industry members failed to provide containers or inform customers as to the availability of containers which are less expensive than caskets and which could be used practically for an immediate cremation?

6. Have funeral service industry members misrepresented on customer billing statements the amounts actually advanced, paid, or owed on behalf of customers for items such as those listed below?

Crematory charges
Cemetery charges
Flowers
Obituary notices
Limousines
Fallbearers
Clergy honoraria
Charges of another undertaker

7. Have funeral service industry members misrepresented legal, public health and/or religious requirements to customers or potential customers?

8. Have funeral service industry members claimed, suggested, or encouraged a belief by customers or potential customers that embalming; a casket, sealed or unsealed; or a burial vault, sealed or

unsealed; would prevent natural decomposition of deceased human remains when such was untrue or misleading?

9. Have funeral service industry members claimed or suggested to customers or potential customers that particular caskets or burial vaults were or would remain airtight or watertight when such was not the case?

10. Have funeral service industry members prevented or discouraged customers from purchasing less expensive caskets by not displaying such caskets, defacing or disparaging them, placing them in different rooms or in inaccessible locations or displaying them in surroundings which are markedly inferior to the way other caskets are displayed?

11. Have funeral service industry members displayed less expensive caskets in colors known to be unattractive to many customers for the purpose and with the effect of dissuading customers from purchasing such caskets or encouraging customers to purchase the higher-priced caskets?

12. Have funeral service industry members used sales commissions and other employee compensation plans to encourage sales of higher-priced products and services to customers and to discourage or penalize sales of lower-priced ones?

13. Have funeral service industry members utilized other sales and merchandising policies and practices to prevent, impede or obstruct the purchase by customers of certain funeral merchandise, particularly less expensive merchandise which is available?

14. Have funeral service industry members sought to prevent price-value comparisons by customers or potential customers by displaying merchandise in ways which make such comparison difficult?

15. Have funeral service industry members disparaged or otherwise sought to discourage or prevent a customer's consideration of or concern about prices?

16. Have funeral service industry members failed to disclose or make available prior to selection by customers by means of price lists, signs or cards and telephone disclosures information on the price and availability of individual items of service and merchandise commonly selected such as embalming, use of facilities for services, caskets, and burial vaults?

17. Have funeral service industry members failed to disclose or misrepresented to customers any applicable cemetery outer enclosure requirements or other material information concerning the availability, prices and selection of outer interment receptacles?

18. Have funeral service industry members failed to provide customers with a written accounting of the products and services used in the funeral service selected and an itemization of their individual prices?

19. Have funeral service industry members tied the purchase of some goods and services to the purchase of other goods and services?

20. (a) Have funeral service industry members failed to provide to customers or to inform customers, in advance of the availability of discounts or adjustments to the price of funerals for items which were not used or not desired by the customers?

(b) Have funeral purchasers paid for services they did not need or want because of an unwillingness by a funeral service industry member to provide price reductions or adjustments for declined items?

21. In what ways, if any, have funeral service industry members or other individuals or entities restrained, harassed, or interfered with the marketing (including advertising) and sales of funeral merchandise and services and alternative methods of disposition, including pre-need arrangements, cremation services, and contracts with memorial societies?

22. In what ways, if any, has price advertising by funeral service industry members been prohibited, restricted or obstructed?

23. *Circumstances of the funeral transaction.* Does the funeral transaction have distinctive characteristics (e.g., effects of bereavement, infrequency of purchase by the buyer, time pressures and the like) which serve to place the consumer in a disadvantaged bargaining position relative to the funeral director and leave the consumer especially vulnerable to unfair and deceptive practices?

24. *Consumer knowledge of relevant considerations.* Have consumers purchased funeral services and products with incomplete or inaccurate prior knowledge of: legal requirements and prohibitions; available alternatives respecting disposition of the dead and commemorative services; funeral homes' offerings and prices; and other material information?

25. *Level of price competition in funeral industry.* To what extent has competition operated in the funeral service industry to avoid excess capacity, eliminate inefficiencies and to produce prices at competitive levels?

26. To what extent have funeral service industry members advertised the prices of their products and services in print or broadcast media and to what extent have funeral homes utilized non-price advertising in such media?

27. *State regulation of unfair and deceptive funeral practices.* Have State regulations or enforcement actions adequately regulated funeral practices such as those described in Questions 1-22 above?

28. *Exception to itemization requirement for low priced packaged funerals.* (a) Will mandatory itemization as required by § 453.5 (e) and (f) of the proposed rule force funeral service industry members to increase the prices of funerals, especially the least expensive funerals?

(b) If it is determined that mandatory itemization will result in price increases, should there be an exception to the itemization requirement in order to prevent

price increases for the least expensive funerals?

(c) To meet the objective of avoiding increases in the prices of the least expensive funerals and of preventing any exception from serving as a loophole which defeats the remedial purposes of the itemization requirement, what dollar cut-off should be used for the exception in § 453.5 (e) and (f) for "lower-priced" package funerals?

29. *Special funerals.* (a) Do funeral service industry members offer special funerals whose availability is restricted to certain groups of consumers?

(b) If it is determined that special funerals are offered, are there provisions of the proposed rule whose application to such funerals would be impractical or unwise?

30. *Pre-need sales.* (a) Can funeral consumers obtain lower prices and avoid problems associated with at-need sales by making funeral arrangements in advance of need?

(b) Has the availability of before-need arrangements been restricted in ways which injure rather than protect consumer interests, by State laws or regulations, or by actions of funeral service industry members or trade associations?

SUMMARY OF CLOSING DATES

1. Notification of interest; March 5, 1976.
2. All written comments; March 5, 1976.
3. Witnesses' prepared statements (or comprehensive summaries) and exhibits for:
 - (a) New York hearing—March 30, 1976;
 - (b) Chicago hearing—April 19, 1976;
 - (c) Seattle hearing—May 11, 1976;
 - (d) Los Angeles hearing—May 19, 1976;
 - (e) Atlanta hearing—June 7, 1976;
 - (f) Washington, D.C. hearing—June 28, 1976.

SUMMARY OF HEARING DATES

1. New York, N.Y.—April 20, 1976.
2. Chicago, Ill.—May 10, 1976.
3. Seattle, Wash.—June 1, 1976.
4. Los Angeles, Calif.—June 9, 1976.
5. Atlanta, Ga.—June 28, 1976.
6. Washington, D.C.—July 19, 1976.

Issued: February 17, 1976.

JACK E. KAHN,
Presiding Officer.

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