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May 4, 2012

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

RE: House Bill 753 and Senate Bill 895

Dear Governor O'Malley:

We have reviewed House Bill 753 and Senate Bill 895, identical bills entitled "Maryland State Board of Morticians and Funeral Directors - Permits and Registration Required to Remove and Transport Human Remains." In reviewing the bills, we have considered whether the limitation on personal solicitation would violate the First Amendment and have concluded that it would not.

House Bill 753 and Senate Bill 895 require that a mortuary transport service have a permit issued by the Board of Morticians and Funeral Directors ("the Board") before it may provide mortuary transport services. It also requires that an individual employed by a mortuary transport service register with the Board before the individual may remove or transport human remains. The bills permit denial of a permit or registration, or suspension or revocation of a permit or registration for a number of offenses, including:

> solicit[ing] to remove and transport human remains, either personally or by an agent, from a dying individual or the relatives of a dead or dying individual, other than through general advertising.

Solicitation of business is commercial speech that is protected by the First Amendment, and regulations limiting such speech are subject to the analysis set out in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980). Under that analysis, limitations on in person and directed solicitation are not inherently unconstitutional, but may be upheld or not depending on 1) whether the speech at issue involves lawful activity and is not misleading; 2) whether the asserted governmental interest is substantial; 3) whether the regulation directly advances the governmental interest asserted; and 4) whether it is more or less extensive than necessary to serve that interest.

In *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 449 (1978), the Supreme Court held that a State may constitutionally discipline an attorney for soliciting clients in person, for pecuniary gain, "under circumstances likely to pose dangers that the State has a right to prevent." The specific facts before the court involved an attorney who had visited accident victims in the hospital in attempt to sign them up as clients. The Court found that the state interests involved were "particularly strong," in that in addition to "its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions." *Id.* at 460. The Court further found that the perception of potential harm in such cases was "well founded," because "the very plight of that person not only makes him more vulnerable to influence but also may make advice all the more intrusive." *Id.* at 465. Finally, they found that the prohibition was necessary to the efforts of the state to protect its citizens.

The Supreme Court has also upheld limitations on written solicitations addressed by attorneys to persons who have been in accidents within a certain period of time after the accident. In *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the court held that states "have a compelling interest in "the practice of professions within their boundaries, and ... as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions," as well as in protecting the well-being, tranquility and privacy of the home. *Id.* at 625. Because the state had a two year study showing that public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession, as well as a voluminous anecdotal record, the Court held it had met the burden of showing that the restriction directly advanced the government interest. *Id.* at 626-628. Finally, the Court found that the 30 day limit was narrow both in scope and duration. *Id.* at 634.[1]

In *Edenfield v. Fane*, 507 U.S. 761 (1993), the Supreme Court found a ban on in person solicitation by CPAs to be unconstitutional as applied in the business context. The Court found that the ban "threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to

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[1] Courts have also upheld prohibitions on in person solicitation of accident victims by chiropractors, *Walraven v. NC Bd. of Chiropractic Examiners*, 273 Fed. Appx. 220, 2008 U.S. App. LEXIS 7684 (4th Cir. 2008); in person solicitation of prospective purchasers of preneed funeral services in nursing homes, hospitals and private residences, as well as the solicitation of the relatives of persons near death, *National Funeral Services v. Rockefeller*, 870 F.2d 136 (4th Cir. 1989); and direct solicitation of elderly Medicare recipients by physicians. *Desnick v. Department of Professional Regulation*, 665 N.E.2d 1346 (Ill. 1996).

safeguard." *Id.* at 766, Moreover, while it found that the state's asserted interests in protecting consumers from fraud or overreaching by CPAs and maintaining the fact and appearance of CPA independence in auditing and attesting to financial statements was substantial, *id.* at 768, the Court found that the first interest could be served by banning fraudulent communications, *id.* at 768-9, and that the state had failed to show that the ban on solicitation advanced its asserted interests in any direct and material way, noting that it had presented no studies and no anecdotal evidence and only three other states had a similar ban, *id.* at 771.

If the restriction on direct solicitation in House Bill 753 and Senate Bill 895 applied to solicitation of the persons who generally use the services of mortuary transport services, that is, funeral homes and the Office of the Chief Medical Examiner,[2] the provision would most likely be found invalid under the ruling in *Edenfield v. Fane*. Instead, the restriction is limited to solicitation of vulnerable persons, namely dying individuals and their relatives. Although the record is devoid of evidence that this type of solicitation has occurred, it is our view that a court could easily conclude that direct solicitation of this population could lead to exploitation. *See Tennessee Secondary School Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291 (2007) ("We need no empirical data to credit [association's] common sense conclusion that hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics."). Thus, it is our view that the restriction, as limited, does not violate the First Amendment.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable John P. McDonough
Joseph Bryce
Karl Aro

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2. *See* Fiscal and Policy Note on House Bill 753 and Senate Bill 895.