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ICCFA Magazine author spotlight

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CREMATION LIABILITY

Cremation dates back thousands of years, but that’s no excuse for using an ancient cremation authorization process. If you haven’t reviewed and updated yours recently, do it now, before a lawsuit brings its shortcomings to your attention.

The five components every cremation authorization needs

In my book, “What Every Funeral Director and Cemetery Must Know about Cremation,” I cover the history of cremation. For the past 5,000 years of humanity’s measurable civilized lifetime, we have used cremation to deal with dead human bodies. For the past 140 years we have had commercially functioning crematories. Since 1910, we have seen an increase in businesses buying and marketing their services as public crematories.

Even with all of this momentum and subsequent progress, every week I learn of crematory operators and funeral homes that are still in the Bronze Age when it comes to a cremation authorization. I hope to provide some motivation and education, and at worst maybe intimidation, to influence you to make certain you have a 21st century cremation authorization procedure.

In order to be protected by a cremation authorization in today’s litigious world, you need to meet five simple conditions. Some of these are procedural and some are contractual. All five are important in the operation of your business. Nothing contained in this essay is intended to demonstrate how to increase your profit from cremation services. This article’s purpose is solely to help you keep your assets as sound as possible.

Understand one simple concept: I perceive there is a greater chance of a lawsuit from a cremation service than there is from a burial service. Cremation, unlike burial, is not reversible. You can bury a body, find that a mistake occurred, and then cremate that body. However, you cannot cremate a body, learn of an error, and reconstitute it somehow for burial.

Cremation, as a means of disposition, is not tolerant of mistakes. Since cremation is

unforgiving and its use is increasing, you are more likely to be sued for a cremation service than for a burial service—especially if your procedures and contracts are inadequate.

You cannot assume that the price someone is willing to pay is equal to the love they had for their deceased loved one. We have not conditioned the consumer properly when it comes to cremation. We have treated the pricing of this service offering in such a way that the consumer doesn’t see the scope of our professionalism.

As a profession, we charge less for our cremation services than we do for equivalent burial services. If we do not hold the sanctity of service high, why are we surprised when consumers are “dialing for dollars” and calling cremation providers looking for the cheapest provider?

If cremation is high risk, yet we charge less per task, how can you not comprehend the necessity of protecting your business by having the right authorization process?

The crucial five components

The five components needed to protect yourself and your business assets in your cremation operations are:

1. Identification
2. Understanding of key points
3. Due diligence
4. Return of cremated remains
5. Named parties within the agreement

Allow me to explain each of these points. In case you are wondering, the numbers do not indicate their relative importance; each is equally important. Do not think, “this is too much work” and only take care of 1. and 2., assuming they’re the most important. Even taking care of all five items will not protect you from litigation. Remember, anyone can

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sue anyone for anything at any time. The objective is not to avoid being sued but to prevail if you are sued.

1. Identification. There is a great old movie called “The Pink Panther” that features Peter Sellers as a wacky French police detective. At one point the bumbling detective is about to talk to a suspect and a small dog starts to growl at him. The detective looks at the interviewee and says, “Does your dog bite?” The interviewee says, “No, my dog does not bite!”

Upon hearing this, Sellers reaches down nicely to pet the dog. As he suddenly starts to raise his hand, the camera shows us a dog latched onto Seller’s hand, biting it severely. Sellers says calmly, “I thought you said your dog does not bite?” The interviewee says, “I did. That’s not my dog!”

I recount this scene because if you have people signing a cremation authorization without a proper identification of the body, you are prone to being bitten.

The very concept of a contract between a cremation consumer that gives the funeral home or crematory the right to cremate their loved one assumes one fact—that the body the family is authorizing you to cremate is indeed their loved one’s. Without a proper or formal identification, you have no idea if the cremation authorization is giving you permission to cremate that particular body. Therefore, the contract itself is potentially flawed.

Almost all buried bodies are identified; a family member (and often multiple family members) sees the deceased’s body before burial. Even if there is an error in the identification process, a burial is reversible. I am not making light of such an error, but bodies can be disinterred and reburied. A cremation error, on the other hand, is forever.

Making the identification process as foolproof as possible is the first step to eliminating errors. Someone who cannot hold you or your staff accountable for a flawed ID should identify the body.

You or a member of your staff should not serve as the identifying party. Rather, someone who represents the family and

who is noted in the cremation authorization should make the ID. If that person errs, the funeral home may have a cause of action against that identifying party.

Today there are plenty of people who promote using pictures, fingerprints, dental records and other means to confirm the ID. Unfortunately, there are problems with each of these methods for you, the funeral home/crematory.

For starters, you are not licensed to confirm dental records, nor have you been trained in reading fingerprints. A photo is a static image that requires you to make a judgment about whether the person in the photo is the person on your table. I do not like these tools. If the FBI can screw up a fingerprint assessment, then you can, too.

Nothing clears your name more definitively than a family member or representative saying, “I guarantee this is the named deceased and I will hold all parties harmless if I am wrong.”

Recently, the Federal Trade Commission has been involved in the matter of a funeral home “charging” for an ID viewing. The FTC is a third party that does not understand the funeral business and as a result it has made a misinformed decision.

I do not have the space in this essay to focus fully on this matter, but I invite you to see my full response at www.youtube.com/watch?v=hDI-fx3EFOg (or do a search on YouTube for “Foresight Companies FTC” to find “Dan Isard reacts to controversial FTC opinion letter”).

Suffice it to say, the FTC is trying to be a friend to consumers, but in doing so its naiveté promotes a position that could put all funeral homes out of business.

In summary, a good cremation authorization process insists that every body must be properly identified before it can be cremated. The person who identifies the body must be a party to the cremation contract and must be prepared to hold the funeral home/crematory harmless.

2. Understanding of key points.

There was a time when people operated with handshakes in lieu of contracts. In instances where contracts existed, they

tended to be more focused on securing payment than on performance.

When we enter a contract, we sign it to show that parties agree. To demonstrate that the parties understand key points, contracts frequently require individuals to initial next to specific points.

I cannot check into a hotel without signing for my room, initialing my departure date and signing off on other key points. If we do this simply to rent a room, then certainly we need this level of understanding documented in writing for cremating a human body.

There are several dynamics to cremation that those of us involved in the profession may comprehend but that most consumers do not. Therefore, we should get these points initialed within the body of the contract. The following parts of the process should be emphasized and should be initialed by the parties authorizing the cremation:

- The process is irreversible. Once the cremation process has begun, it is not something that can be stopped without effect on the body.

- The temperature of the retort should be spelled out. Cremation is an extreme reaction to heat. Most people do not understand that. If someone is uncomfortable with this kind of heat, that person can choose burial.

- We do not return 100 percent of the cremated remains. Most people think, “One body in, one cremated body out.” They probably do not know that some cremated matter is impossible to remove from the bricking, meaning that we might only return 99 percent of the remains.

- The bone fragment still needs to be processed after the body is burned. In an ideal world, cremated remains would be removed from the chamber in a fully processed state. However, we know that we must break down bones not broken down by the heat of the chamber. Laypeople do not know this; they think cremation results in a fine ash.

- A possible minor amount of commingling of body residue is unavoidable. Just as families do not get back 100 percent of their loved ones, they may be getting some

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minute amount of another person.

I picked the above points because over the past 30 years there has been substantial litigation related to these points, all of which had serious financial implications for cremation providers. Given this history, it stands to reason that these points should be clearly explained and understood before a consumer signs off on cremation.

In summary, identify the points consumers need to be told about to fully understand the cremation process, and document that they agree to the terms.

3. Due diligence. There are two types of cremation providers: those who own their own retort and those who use a third-party crematory. There is also a hybrid provider, since those who possess a retort might at some point have it out of service for repairs and need to use another provider’s during that time. Regardless of which of these categories describe you, you need to demonstrate your due diligence.

If you use a third party, you should perform announced and unannounced inspections of the provider. Unannounced visits are important to perform and to document. You need to see what the facility looks like at various hours of the day. You are entrusting this contractor with your reputation. Need I remind you of any of the high profile cases in Georgia, New Hampshire or California?

If you are sued as the result of the work performed by a contractor, you want to demonstrate that you took proper precautions to make sure your contractor was performing in accordance with your agreement. While some people are worried that an unannounced visit might be “unfriendly,” this is not about friendship. This is about business. If you cannot bring yourself to do this, hire someone to do it for you.

Announced visits are equally important. You should have an agenda when you conduct an announced visit:

- Ask to review the control for the identification of bodies given to the provider.
- Ask for copies of their insurance and make sure there is proof the insurance is

in place. Have the contractor give you permission to be notified by the insurer if the coverage is canceled by either party or if it lapses.

- Inspect to see any OSHA or environmental certificates. If operators have gone through a personal certification, get copies of those forms. This is an important matter.

The fear is that this third-party provider or a rogue employee may make errors that expose you to liability. If you discover anything that leads you to believe you are at risk, notify your insurer immediately. If your insurer feels you may have committed some degree of fraud, they may serve you with a “reservation of rights” letter informing you they are denying you coverage.

To review, just imagine you are sitting in the witness box in a courtroom. Imagine a defense attorney (who is getting 30 percent of his fee based on a verdict in his client’s favor) is asking you questions. Imagine admitting you didn’t do any due diligence. Imagine admitting you only made announced visits every two or three years. Imagine what can happen if your insurance company decides you were negligent.

4. Return of cremated remains.

About four times a year I consult with a client about building a new funeral home. Recently, while examining the final drawings, the clients thought we had overlooked something. He said, “We need one more closet.” I asked, “What for?” He said, “I need a closet to hold my unclaimed cremated remains.”

No, you don’t need that closet. You need to have your families accept the responsibility for claiming these personal assets.

I have found that people can be motivated to perform in uncomfortable situations by giving them rewards or penalties. Actually, B.F. Skinner discovered this; I am simply applying his results to this situation.

Many people do not want the cremated remains and therefore they object to having to claim them. Others don’t know what they are going to do with the remains and so they do not claim them. Neither of these situations are your problem unless

you let them become your problem.

I recommend that your cremation authorization includes a date when the cremated remains will be returned to you for distribution to the family. Allow a one-week, or at most two-week, window for the family to collect the remains.

Make sure the contract states who is going to claim the remains and that only those people are allowed to claim them. Make sure the remains are claimed in the period of time stated in the contract. Often, the trick is getting a family to retrieve these cremated remains, but luckily for you, there are some tactics that will encourage families to do so.

First, determine how much it would cost to have a third-party delivery service return these cremated remains to a family. Require a deposit large enough to cover what the delivery company will charge you, as well as what it will cost you to pay your staff to coordinate the transaction.

If a family does not pick up the cremated remains by the date specified, use the deposit to cover delivery costs. If they do retrieve the remains within that period, return the deposit.

I urge you to return the cremated remains only to the named party. Require they show their ID to claim the remains. Copy the ID and have a representative from the family sign a receipt. You might think this is not a big deal, but this could be a \$100,000 transfer. If you don’t believe me, lose the cremated remains and see how much you are sued for. Yes, this is a big deal.

In short, have a responsible relationship with your families. Enforce your rights to return the cremated remains. Remember, this is a contract that cannot be modified verbally. Matlock might have resolved complex litigation in 60 minutes, but litigation about a cremation error could last for years.

5. Named parties to the agreement.

Can you fathom that today, by my estimate, about 30 percent of all cremations are arranged without a contract? Perhaps what I should say is that in these cases, there is a contract, but the funeral home is not named in it.

CREMATION LIABILITY

As established earlier, funeral homes often use third-party crematories. The third-party crematory will have a cremation form for a family to sign. The funeral home may not be named in this contract at all, or at worse, is named, but without limitations. Allow me to explain further.

If there is no contract that names the funeral home specifically, that funeral home could be facing unlimited exposure. A contract states who is expected to perform what services or duties. If you have a family sign the crematorium's contract and nothing specifies your duties, how can you prove you did what you were allegedly contracted to do?

In the famous Tri-Cities case, the funeral homes that did not have a cremation contract could not demonstrate that they did what was expected of them.

Assume there is a contract between Retorts R Us and the Jones family. Assume the contract allows RRU to cremate a body and names the funeral home as a party, but the funeral home's responsibilities and actions are not spelled out, because this is RRU's contract. This contract might not limit the funeral home's liability. If the funeral home has its own contract, in addition to RRU's contract, it would state that the funeral home is not liable if:

- The ID is wrong
- The family did not properly identify the body
- The authorizing agent was incorrectly making this arrangement
- The representations made by the family (such as no implantable devices) was not accurate

Many funeral homes in this situation are aware that they do not have a contract directly with the family. Many think, "Oh, it is one more contract to make a family sign" and do not want to add to the confusion. The problem with this logic is that if an error takes place, you need as much protection as possible.

To sum things up, let's go back to that courtroom scene and imagine your contract with the family of the deceased has been blown up on 5-by-4-foot piece of cardboard so the jury can see it. You may be held up for ridicule by well-educated and well-motivated lawyers.

There are many ways you can be sued over a cremation. Anticipate as many of them as possible and take precautions to protect your reputation and net worth. 