THE FUNERAL RULE: WHERE IT CAME FROM, WHY IT MATTERS, AND HOW TO BRING IT TO THE 21ST CENTURY

JOSHUA L. SLOCUM†

It is difficult to describe the American attitude toward death and the funeral transaction without resorting to clichéd descriptions. Nevertheless, Americans have been, and remain, a nation of death-deniers. The subject is taboo to discuss candidly; Americans avoid the very word itself. One may open the obituary page of any major newspaper and find dozens of entries, but no one who died. Margaret passed away, John was lost, Sonia passed, and Hector went home. It is just this side of satire to say Americans treat death as though it is an optional lifestyle choice that just might not be right for their families.

In her bestselling 1963 exposé, The American Way of Death, celebrated muckraker Jessica Mitford noted that the American funeral industry (then comprising more than 20,000 funeral homes) operated on the same principles as any other major commercial sector:

Gradually, almost imperceptibly, over the years the funeral men have constructed their own grotesque cloud-cuckoo-land where the trappings of Gracious Living are transformed, as in a nightmare, into the trappings of Gracious Dying. The same familiar Madison Avenue language, with its peculiar adjectival range designed to anesthetize sales resistance to all sorts of products, has seeped into the funeral industry in a new and bizarre guise. The emphasis is on the same desirable qualities that we have all been schooled

†. Executive Director, Funeral Consumers Alliance; Co-author of Final Rights Reclaiming the American Way of Death (Upper Access Publishers 2012).
to look for in our daily search for excellence: comfort, durability, beauty, craftsmanship.\textsuperscript{1}

What of the customer, the grieving family member, to whom these trappings were offered for sale? In the foreword to the same work, Mitford noted, “Another point often made by critics of the modern American funeral is that, if there are excesses in funerary matters, the public is to blame. I am unwilling on the basis of present evidence to find the public guilty; this defendant has only recently begun to present his case.”\textsuperscript{2}

The same year The American Way of Death was published, ordinary Americans turned “funeral reformers” founded the Continental Association of Funeral and Memorial Societies (“CAFMS”), an organization now known as Funeral Consumers Alliance (“FCA”).\textsuperscript{3} Fed up with the difficulty of finding accurate prices on funerals and the difficulty of finding an undertaker willing to sell a basic funeral at moderate cost, these citizens organized collective buying groups that bargained with funeral homes for set prices on simple send-offs.\textsuperscript{4} Overall, education and advocacy for grieving consumers was the primary mission of CAFMS, and that remains true for FCA.\textsuperscript{5}

Less has changed in the American funeral transaction than one might expect in the intervening fifty-four years. The same problems that beset the bereaved in 1963 confound them today, and leave them vulnerable to unscrupulous sales practices. Consumer ignorance of their legal rights when arranging funerals, industry resistance to transparent pricing, and the emotional pressure of dealing with a dead body in a limited time frame still characterize most funeral purchases. They are seldom planned ahead and they are purchased under emotional duress. Unlike those shopping for a car, a new set of kitchen appliances, or any other major purchase, the funeral consumer has almost no accurate knowledge of what she is buying, or whether she “needs” embalming, a sealing casket, or a concrete grave liner.

\begin{itemize}
\item[2.] Id. at 9.
\item[4.] Id.
\item[5.] Spring 2013 Newsletter, FCA NEWSL. (Funeral Consumers All., South Burlington, VT), Spring 2013.
\end{itemize}
Indeed, the enactment of the Funeral Rule, a regulation promulgated and enforced by the Federal Trade Commission (“FTC”)\(^6\) was a major victory for consumer advocates and concerned policymakers.\(^7\) The Rule requires all U.S. funeral homes to offer prices by phone, to affirmatively hand a paper price list to consumers at the beginning of any funeral arrangements discussion, to offer itemized pricing instead of all-inclusive packaged funerals, and to refrain from misrepresenting legal claims to consumers (like falsely claiming state law requires bodies to be embalmed before public viewing).\(^8\)

Yet thirty-three years after the Rule’s enactment, the majority of Americans remain uninformed about their rights, and substantial portions of the adult public incorrectly believe they are legally required to buy items and services that are not mandated by law, but highly profitable to funeral homes.\(^9\) Those purchasing funerals or cremations remain uniquely vulnerable in a way that they are not when buying other “big ticket” items such as automobiles, electronics, or even wedding services.

How much are consumers paying for funerals? According to the trade group the National Funeral Directors Association (“NFDA”), the median cost of a full-service funeral (embalming, viewing of the body, casket, ceremony following the viewing and at the graveside) in 2014 was $7181.\(^10\) That figure rises to $8508 when the cost of a concrete grave liner, required by most cemeteries, is factored in.\(^11\)

Today most Americans turn first to an Internet search when considering buying particular goods or services for the first time.\(^12\) The average American will arrange a funeral for another person only once in his or her life; “my wife’s funeral” is very likely to be the first, often the only, time most Americans arrange a

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\(^7\) WATCHDOGS AND WHISTLEBLOWERS, supra note 4.

\(^8\) 16 C.F.R. §§ 453.2–3.


\(^11\) Id.

\(^12\) Aaron Smith & Monica Anderson, Online Shopping and E-Commerce, PEW RES. CTR. (Dec. 19, 2016), http://www.pewinternet.org/2016/12/19/onlineshoppingandecommerce.
funeral for someone else. Yet the majority of funeral homes—unlike every other major consumer service vendor—refuse to post their prices online. The Funeral Rule requires mortuaries to hand a *paper* price list to the consumer who visits a funeral home *in-person*, but not to post it online, email it, or even to fax it. The majority of funeral homes have deliberately refused to put their prices on their websites; the very thing that could most benefit grieving families facing a costly decision in a short amount of time.

The Federal Trade Commission and the Consumer Federation of America petitioned the FTC in 2016 to amend the Funeral Rule to require that funeral homes with websites post their General Price Lists (those already required to be handed out on paper in person) on those sites. More than any other provision of the Funeral Rule, such an amendment would empower grieving consumers to effectively compare prices even under great time pressure. It is not an exaggeration to say this update could have a more powerful effect on consumer knowledge and control of funeral costs than the entire Rule with all its particular provisions.

**I. Uniquely Vulnerable: The Genesis of the Funeral Rule**

In the 1970s, the FTC launched a major investigation into the sales and pricing practices of the funeral industry. Using volunteers as undercover “shoppers,” Commission staff visited funeral homes around the U.S. for a first-hand look at the average consumer’s experience. In addition, the Commission polled funeral homes by phone and by mail, and solicited input from the major trade lobbying groups and consumer advocacy

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14. See *id.*


18. See *id.* at 351.
organizations. The evidentiary record comprises 6500 letters from individual consumers, 1000 more from clergy, 885 comments from funeral directors, and hundreds of submissions from state regulatory boards and state and local funeral trade groups. This comprehensive project resulted in a 526-page report, Funeral Industry Practices.

Taking account of the psychological research and literature on grieving and decision-making, the reports of consumers, and the first-hand experience of Commission secret shoppers, Funeral Industry Practices confirmed that individuals buying funerals constitute a class of uniquely vulnerable consumers:

As detailed throughout this report, the recommended rule stems from several underlying conditions that permeate the funeral transaction. From the standpoint of consumer protection, perhaps the most significant is the extreme vulnerability of funeral purchasers—a condition nurtured by their widespread ignorance of relevant information and by the disabling effects of grief and bereavement. Grief-stricken survivors enter the immediate post-death period in a dependent, disoriented state accompanied by a profound sense of loss, and, frequently, by guilt. Bracketed by severe time constraints, funeral arrangements must be made by persons with little prior knowledge of death-related legal requirements, funeral prices, or available options. The result, as expressed in the Presiding Officer’s Report, is “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.”

Echoing writers and activists like Mitford and Ruth Harmer, Funeral Industry Practices pointed out that scandals such

20. Id.
21. Id.
22. Id. at 1.
23. Harmer’s investigation into the funeral industry noted many of the same systemic problems Mitford discussed. Harmer’s book, written in a more staid tone, was eclipsed in the popular imagination by Mitford’s more stylishly written The American Way.
as body-snatching or desecrated graves might grab headlines but were the smallest portion of the difficulties faced by the average grieving consumer.\textsuperscript{24}

Several of the more egregious and attention-grabbing abuses addressed here, such as “body snatching” or refusing to release remains, are limited to a small number of morticians and are generally condemned by most members of the trade . . . . It should also be emphasized, however, that in general the practices addressed by the rule are not isolated occurrences confined to an unethical few. In fact, the most significant funeral problems which consumers face are practices which are widely used and even condoned by a large percentage of the nation’s 20,000 plus funeral homes.\textsuperscript{25}

What were these common practices? Refusing to disclose specific itemized prices to consumers, and instead presenting all-inclusive packages with embalming, caskets, and other services; misrepresenting legal requirements (including blatant lies about non-existent “state laws” that “required” embalming for public health purposes); requiring the purchase of a casket prior to having it burned in a cremation; claiming or implying that certain caskets or in-ground vaults would preserve or “protect” the remains, and much more.\textsuperscript{26}

For the seasoned advocate who is knowledgeable about the common experience of funeral consumers, it is difficult to convey to the reader the extent to which Americans were, and still are, ignorant of the most basic facts about funerals. Funeral Industry Practices cites three surveys that asked the public whether they believed caskets and burial vaults were required by law, whether caskets were required by law for cremation, whether an in-ground

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\textsuperscript{24} \textit{of Death}. See \textsc{Ruth Harmer, The High Cost of Dying} (First Crowell/Collier Press 1st ed. 1963); see also MITFORD, supra note 1.

\textsuperscript{25} \textsc{Bureau of Consumer Prot.}, supra note 19, at 2.

\textsuperscript{26} \textit{Id. at} 220-37 (This report details these practices in \textit{Part Two-Analysis of Record Evidence} and \textit{Recommended Trade Regulation Rule}. The specific topics cited above are addressed in, respectively, Sections VIII, VI, IV, and VII).
vault and/or embalming preserves the body. Though the surveys varied somewhat in their questions, “totally unaware” was the most common answer. In short, the greatest number of respondents said they had no idea whether these statements were true. A substantial minority of respondents incorrectly answered the questions, indicating they believed untrue claims about legal requirements. For example, seventy-five percent in one survey, twenty-one percent in another, and thirty-eight percent in the third answered “yes” to the question of whether a casket was required by law. This has never been true in any U.S. state and is not true today, in 2017.

In 1987, consumer activist and author Lisa Carlson published a first-of-its kind book outlining how ordinary citizens could perform the funeral themselves without hiring an undertaker (the fact that even highly educated Americans routinely believe it is illegal not to hire a funeral home underscores the vulnerability of funeral consumers). Caring for Your Own Dead was followed in 1998 by Carlson’s second, expanded edition of the book, Caring for the Dead: Your Final Act of Love. At that time, Carlson had been executive director of the Funeral and Memorial Societies of America (“FAMSA”) for two years, and had previously served on the organization’s board of directors.

27. Id. at 265-68.
28. Id. at 267.
29. Id.
30. Id.
31. JOSHUA SLOCUM & LISA CARLSON, FINAL RIGHTS: RECLAIMING THE AMERICAN WAY OF DEATH 74 (2011) (Final Rights includes 51 chapters examining the funeral and burial laws in the U.S. states and the District of Columbia. Though a book of its own with contemporary information, Final Rights is in many ways a third edition of Carlson’s two earlier volumes.)
32. LISA CARLSON, CARING FOR YOUR OWN DEAD (1987).
34. The organization for which I serve as executive director, Funeral Consumers Alliance, has had several names since its founding in 1963 as the Continental Association of Funeral and Memorial Societies (“CAFMS”). CAFMS worked with the FTC in the 1970s prior to the publication of Funeral Industry Practices. In 1990, the organization changed its name to Funeral and Memorial Societies of America. In 1999, after commercial cremation businesses began incorporating the term “society” into their name to trade on the good reputation of legitimate nonprofit consumer groups, the organization adopted the name Funeral Consumers Alliance. The Funeral Consumer Movement: From One Local Society to a National Voice, FUNERAL INFO. SOCY, http://www.funealinformationsociety.org/assets/funeralconsumermovement.pdf (last visited Oct. 23, 2017).
Carlson’s *Caring for the Dead* recounted numerous stories of consumers who contacted FAMSA after having been told embalming was required by state law, that sealing caskets preserved the body in a pristine state for decades, and much more.\(^35\) During my tenure as executive director of Funeral Consumers Alliance, I have spoken to and corresponded with thousands of consumer families facing difficult and costly funeral decisions. Despite decades of activist work, and the existence of the Funeral Rule since 1984, the majority of consumers know little about the legal requirements (or, as often, the lack thereof) that govern the funeral transaction. This is the impetus behind FCA’s current public policy priority; convincing the FTC to expand the Funeral Rule to require that all information and disclosures required to be provided on paper also be published on funeral home websites.

Research conducted since the enactment of the Funeral Rule in 1984 confirms the anecdotal experiences consumer advocates report about the consumer’s knowledge base. American Association of Retired Person’s (“AARP”) 1999 report on public awareness of the Funeral Rule and the protections it affords consumers is illustrative. The organization polled 916 Americans aged fifty or older, and the results indicate a striking lack of knowledge among that population.\(^36\) For example: eight percent of respondents believed funeral homes are required to give their customers a list of the prices for all funeral goods and services; seven percent believed funeral homes must give customers a list of casket prices and descriptions before they begin looking at them; twenty percent believed funeral directors must get permission from an authorized person before embalming a body; twelve percent believed funeral homes must give buyers an itemized, written statement of costs for the funeral goods and services they

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35. *Carlson, supra* note 32.

36. **Public Awareness of the Funeral Rule: Findings from an AARP Survey** (2000). Note that two of AARP’s questions slightly mischaracterize the Funeral Rule, though this would not likely affect the answers given by respondents. Contrary to the survey’s implication, the Funeral Rule requires permission prior to embalming only if the funeral home charges for the embalming. The Rule does not contain a blanket prohibition against embalming without permission. Similarly, the Rule imposes on funeral directors an *affirmative duty* to provide a paper price list to every person who enters a conversation about arranging a funeral, not merely to those consumers who “request” a price list. See generally *Funeral Industry Practices*, 59 Fed. Reg. 1611-13 (amended Jan. 11, 1994) (codified at 16 C.F.R. pt. 453).
have purchased; and only four percent believed funeral homes must tell callers over the telephone the prices for specific goods and services about which they have inquired.37

The correct answer to all the above questions is “yes.” Such a low level of consumer knowledge is abysmal. It is obvious how easy it would be for an unscrupulous or highly sales-motivated funeral home to increase the cost of a family’s arrangements under the pretense of legal or other requirements. The fact that most people do not actively seek out information on funeral planning before a death occurs, and because most people will only arrange a funeral for someone once, makes the funeral consumer the quintessential “easy mark.” Motorists shopping for an automobile are able to consult a variety of sources—the Kelley Blue Book, Edmunds Motor News,38 for example—before purchasing a car. Indeed, auto dealers have for years posted their entire inventory, prices, and options, on their websites. Many Americans have at least a basic knowledge of the extra features car dealers are likely to push, and consumers have the wherewithal to say “no,” or walk away, options not available to the funeral purchaser.

A 2007 study published in the Journal of Consumer Affairs further demonstrates the problem.39 Though the sample size of 212 non-student adults was smaller than the previously cited studies, the same patterns held true.40 That survey did not measure respondents’ knowledge of the existence of the Funeral Rule itself (that is, whether they knew the FTC had a specific regulation).41 Instead, it tested the respondents’ knowledge of the actual provisions of the Rule, and whether respondents understood that federal regulations of any kind required or prohibited certain funeral home practices.42

For example, only sixteen percent of respondents knew that funeral homes are required to give prices by telephone.43

37. Id. at 9.
40. Id. at 330.
41. Id.
42. Id.
43. Id. at 332.
Furthermore, only fifty-five percent of respondents knew that funeral homes must disclose prices during in-person meetings, only eleven percent knew it was illegal for funeral homes to compel families to buy an all-inclusive package, and only thirteen percent were aware that it is illegal for funeral homes to charge a “handling fee” if the family brings a casket purchased outside the funeral home.44

Most importantly, both the AARP survey and the Journal of Consumer Affairs study found that even respondents who reported having experience arranging funerals in the past were no more likely to correctly identify their legal rights than those who had never done so.45 The authors noted that consumer reluctance to research the topic, and a lack of knowledge about appropriate sources of objective information, likely explain the survey results.46

The most common reasons Americans cite for choosing a funeral home bear little resemblance to the criteria they use for nearly every other significant or costly purchase.47 If we shopped

44. Id.
45. Id. at 335; PUBLIC AWARENESS OF THE FUNERAL RULE: FINDINGS FROM AN AARP SURVEY, supra note 36.
46. Kopp & Kemp, supra note 39, at 335 (noting that the “findings suggest that consumer knowledge about the Funeral Rule is not related to previous experience with planning funerals, level of education, or income. Although those who had planned a funeral recently felt they were more knowledgeable, they actually were not. The respondents’ confidence may have related to the practical and ritual decisions for a funeral, rather than their consumer rights”).
47. Most of the surveys of consumers who have purchased funerals have been conducted by funeral industry trade groups, See generally Deana Gillespie & Edward J. Defort, The Survey Says . . . NFDA Consumer Awareness and Preferences Study Helps Funeral Directors Give People What They Want, MEMORIAL BUS., July 2014, at 1–9. Such surveys are infrequent, but, over time, they point to the same buying patterns. See generally id. These patterns support the experiences consumers report to FCA. See Ann Carrns, Funeral Prices Are Hard to Get and Vary Widely, Survey Finds, N.Y. TIMES (Oct. 21, 2015), https://www.nytimes.com/2015/10/22/your-money/funeral-prices-are-hard-to-get-and-vary-widely-survey-finds.html?r=0. In addition, the industry surveys do not ask consistent questions in subsequent versions of their surveys, making some items impossible to compare. See generally Gillespie & Defort, supra note 47, at 1–9. Nevertheless, the 1995 study by the Wirthlin Group is instructive. SLOCUM & CARLSON, supra note 31, at 35. The top three reasons respondents chose a particular funeral home were that the respondent had used the funeral home before (forty-five percent), the respondent simply called the nearest funeral home (thirty-three percent), and eleven percent picked a funeral home because of a perception of an ethnic or religious affiliation. Id. Note how strikingly different these answers are to what the average consumer would say if asked how they choose a college or university, an auto dealer, or any other major service provider. See generally Katy Hopkins, 10 Steps to Picking the Right College, U.S. NEWS (Apr. 4, 2011, 9:30 AM), https://www.usnews.com/education/best-colleges/articles/2011/04/04/10-steps-to-picking-the-right-college.
for automobiles the way we shop for funerals, we would refrain from comparing prices among different dealers, we would automatically buy each vehicle throughout our life from the same dealership our grandparents first used, we would walk in with no clear idea of what we could afford, and we would ask the car dealer—and no one else—what kind of car we needed, what we were “required” to buy, and how much it would cost. Afterward, we would fret about the bill and wonder why cars always had to be so unaffordable. The idea of the economic “rational actor” is laughably inoperative in this context.

II. How Effective Is the Funeral Rule?

This question is usually raised by policymakers inclined to look for examples of regulations they believe are wasteful or burdensome. To be sure, the research performed—sparse as it may be—indicates little progress over time in the level of consumer knowledge regarding their legal rights and options when buying funerals.48 This is not, however, a valid argument for doing away with the basic provisions of the Funeral Rule, which include: telephone and paper price disclosures, the right to select goods à la carte, and the right to accurate information about legal requirements. One might also predict that industry lobbyists would suggest that if the government were to require online price disclosures, then funeral directors should no longer be required to hand consumers price lists when they visit in person. This would also be a mistake. The Funeral Rule is not and will not be perfect. Instead, the Funeral Rule is a floor, a minimum bulwark against the but-for world where no such regulations exist.

Regulations do have limited utility when they stand alone, and they work best in the presence of an informed and engaged consumer marketplace. People have to know that they have rights before they think to complain when those rights are abridged. Governments can mandate any disclosures they wish, but consumers are not obliged to read them, even if it is in their economic best interests to do so. The taboo nature of discussing funerals, and the widespread superstition that doing so ahead of

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death may bring the dread day closer, confound the average person’s ability or willingness to seek out information already available. The existence of Funeral Consumers Alliance, and its highly visible and highly ranked site, www.funerals.org,\(^{49}\) is an illustration. In the years of heaviest correspondence from consumers, FCA staff have fielded ten to fifteen thousand calls and emails a year. This may sound like a large number, but one must remember that there are 2.6 million deaths a year in the U.S.\(^{50}\) Only the smallest percentage of such families reach out to the most widely recognized consumer organization in the field.

This is why an expansion of the Funeral Rule to require online price disclosures at funeral homes with websites is necessary. Technology unavailable in the 1980s has the potential to normalize the notion of seeing funeral prices advertised online, just as every other product we research online has been since the early days of the Internet. I will discuss this further below.

Enforcement of the Funeral Rule, and consumer outreach programs by the FTC, have been woefully insufficient. Recall that the Funeral Rule’s basic provisions—the mandate to provide a price list and to disclose information by phone—have been in effect since 1984.\(^{51}\) One is hard pressed to think of a less onerous regulation. Waiters in restaurants, for example, hand out menus to diners the moment they are seated, and take telephone calls about the menu and reservations as a matter of course. That the funeral arrangements discussion regards a more serious and sensitive matter does not change this fact, despite industry protests that it is “rude” or “inappropriate” to “shove prices in a grieving person’s face.” For those who style themselves as professionals assisting with grief, it cannot be difficult to tactfully give the customer a clear list of services and prices—to their benefit—before the bereaved make a weighty decision.

Despite the almost mindless ease of fulfilling the Rule’s basic requirements, FTC investigations over the years have shown a high level of non-compliance among funeral homes.\(^{52}\) The trend

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\(^{52}\) See, e.g., FTC Undercover Inspections of Funeral Homes in Nine States Prompt Compliance with Funeral Rule Disclosure Requirements, Fed. Trade Comm’n (Feb. 15, 2017).
does not improve over time. Every year, the FTC and its field offices conduct what they call “sweeps” of funeral homes in certain markets to sample the level of Funeral Rule compliance. Secret shoppers visit these funeral homes posing as customers to note whether the funeral directors hand out price lists at an appropriate time. Below are the results the FTC compiled from 2000 through 2017.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number swept</th>
<th>Number in violation</th>
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<td>2000</td>
<td>76</td>
<td>4</td>
<td>5</td>
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<td>2005</td>
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53. See infra note 56.


It is impossible to know what confounding factors or changes in methodology over time may account for these numbers. The FTC has been resistant to Freedom of Information Act ("FOIA") requests from FCA to determine their exact method and which factors they measure. Staff at FCA have found even greater levels of violation when we examine the actual price lists from funeral homes for substantive content, instead of merely testing whether a price list was given at the appropriate time. We have reviewed at least 3000 general price lists, and at least fifty percent have major violations of the Funeral Rule.57 These violations include failing to disclose to consumers that they have the right to shop à la carte, failing to list legally required simple services such as direct cremation, illegal casket handling fees, and many others.58

In short, a consumer who receives the price list at the appropriate time—the beginning of the funeral arrangements discussion—is not receiving the full protection of the Funeral Rule if the price list provided itself contains Rule violations that harm consumers.

III. THE FUNERAL RULE’S DIGITAL FUTURE

Claims that the Internet will “revolutionize” certain aspects of the human experience are so commonly thrown around it is difficult to posit such an instance and to be taken seriously. But the digitalization of the Funeral Rule59 is an example of how that will likely occur for funeral consumers. Internet users expect as a matter of course that they will find the prices, selections, options, and most other relevant information about a prospective purchase when they open their web browsers. What was a rarity twenty years ago is now considered standard and expected for nearly all retail vendors.

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57. Specific studies of funeral home price lists by city and region are available from FCA on request.
This expectation is illustrated by the frustrating experience of Ed Howard, senior counsel for the Center for Public Interest Law at the University of San Diego.\textsuperscript{60} Howard, who contacted FCA when he discovered this difficulty, recounted his story to National Public Radio in a February 2017 interview.\textsuperscript{61}

Shortly after Ed Howard’s father was diagnosed with an advanced form of cancer and given six months to live, Howard and his sister Kathy Howard-Almagor sat down and talked about what to do.

One worry was their dad’s funeral arrangements. They decided Kathy would call around to some funeral homes to figure out how much their father’s arrangements would cost.

“I’d say, about three weeks later over the weekend I got a call from her nearly in tears,” Howard recalls. “And she said that she had spent pretty much all day on the phone and on the Internet, simply trying to price funeral services, and she couldn’t do it. She actually just couldn’t get a straight answer about what products and services were being offered and how much they cost.”

That’s not supposed to happen.

A federal regulation called the Funeral Rule is supposed to protect consumers who have lost loved ones. Among other things, it requires funeral businesses to provide potential customers with clear price information.

But an NPR investigation found that the rule goes only so far in protecting consumers, and that its promise of transparency often goes unfulfilled.

61. Id.}
After hearing his sister's story, Howard confidently told her that he would take care of the price inquiries. After all, he wasn't just any consumer. He's a lawyer specializing in consumer issues for the Center for Public Interest Law at the University of San Diego. He's also the group's head litigator and lobbyist. Getting the information, he thought, would be pretty easy.

It wasn’t.

“It took me as a longtime lawyer and a professional consumer advocate literally an eight-hour day just to get a solid list of what funeral services were offered by nearby funeral establishments and how much they cost. Eight hours,” he says.62

The FTC’s original staff report from 1978, Funeral Industry Practices, recognized the limits of its proposed rule, and made clear that the proposal was simply the best that could be done to help ameliorate this consumer difficulty:

At the time of death, because of the time pressures inherent this transaction and the bereaved state of the consumer, the consumer cannot realistically visit a number of funeral homes to learn their prices through a series of one-hour discussions. For price-comparison shopping to really be feasible, the consumer must be able to obtain some price information over the telephone to narrow their search.63

But even with the current requirement for funeral homes to answer price questions by phone, this method of shopping is of limited utility. As discussed above, most Americans do not know what specific questions to ask.64 Countless callers to FCA begin their query asking, “How much does a basic funeral cost?” When FCA staff asks what the consumer means by a “basic” funeral,

62. Id.
63. BUREAU OF CONSUMER PROT., supra note 19, at 345.
64. Benincasa, supra note 60.
nearly every caller describes a full-service funeral with embalming, viewing, a casket, and ceremonies. Consumers believe they are asking the price of a Chevrolet, but they are asking the price of a Cadillac. Furthermore, they sound unaware that there are other, simpler options.

The undertaker who is asked this question is aware of this slip, and will often oblige and describe the $7000 to $8000 top-of-the-line funeral. Telephone conversations do not give the bereaved consumer the information that the FTC’s required General Price List would. The consumer’s right to select à la carte, the right to decline embalming, the right to a written statement of costs before the transaction is completed are not and cannot be practically and usefully conveyed by phone.

By contrast, if funeral homes were required to place their price lists prominently on their websites, a significant number of site visitors would come across this information even if they had never heard of the term “General Price List” before. Over time, this would create a consumer expectation that it is normal and proper for funeral homes to explicitly disclose this information just as all other retailers do. For many of these site visitors, it would be the first time they are made aware that they have specific legal rights, conferred by the FTC, that give them control over their choices and how much the arrangements will cost.

In 2015, FCA partnered with Consumer Federation of America (“CFA”) to research the digital landscape for funeral consumers. We selected ten metropolitan areas around the nation, and randomly chose fifteen funeral homes in each. Researchers visited the funeral home’s website to determine if the business posted its General Price List on its website, and, if not, if it posted any price information at all. If the business did not, researchers sent requests by email, and then if necessary, called on the phone, to request a copy of the funeral home’s price list (recall that the Funeral Rule does not require funeral homes to mail, email, or fax these price lists. Any cooperation is at the discretion of the funeral home).67

65. Slocum, supra note 58, at 3.


The results confirmed what FCA staff have long known: The majority of funeral homes do not post their prices, and a significant minority are resistant to providing their price lists in any mail, fax, or digital format.\textsuperscript{68}

<table>
<thead>
<tr>
<th>Total Funeral Homes Surveyed=150</th>
<th>Percentage of total surveyed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of funeral homes who posted their complete General Price List online</td>
<td>38</td>
</tr>
<tr>
<td>Number who provided General Price List by email after an email request</td>
<td>44</td>
</tr>
<tr>
<td>Number who provided General Price List after a phone request</td>
<td>44</td>
</tr>
<tr>
<td>Number who refused to provide price list or ignored communications</td>
<td>24</td>
</tr>
</tbody>
</table>

The wide range of prices among funeral homes for equivalent services cannot be analyzed in detail within this essay. But a snapshot of that variation is necessary to foreground how crucial price-comparison information can be to the American household. FCA has long observed that, given five or ten funeral homes within the same city or county, the prices for exactly the same services vary so widely as to be baffling. In a properly functioning market, with open information sufficient to allow consumers to exert market pressure on funeral homes, we would not see this extraordinary variation for near-identical services. FCA-CFA’s survey of 150 funeral homes compared three common services at funeral homes, “apples to apples.”\textsuperscript{69} These were “direct cremation,” “direct/immediate burial”, and a “full-service

\textsuperscript{68} Funeral Consumers Alliance, supranote 66.

funeral.” The first two are the simplest services offered by funeral homes—no embalming, no viewing of the body, no casket, and no ceremonies—and they are required to be offered by the FTC Funeral Rule.71

We found that the cost for a direct cremation ranged from $495 to $7595.72 The cost of a direct or immediate burial ranged from $640 to $6800 (not including the cost of a casket).73 The price for a full service funeral, again without including the cost of a casket, ranged from $2580 to $13,800.74 Though it is surprising and often difficult even for economists to grasp, these variations cannot be explained by appeals to the price of real estate or the cost of living in different regions of the country. Consumer advocates have long known that funeral prices have little to no correlation with these factors. Instead, they appear to be driven by the fact that funeral home owners know that most families who patronize them once will patronize that same funeral home again and again for each death in the family, unaware of whether the funeral home’s prices are reasonable. Whatever the family pays at “our family’s funeral home” is the price they assume to be normal and in line with “what funerals cost.” The industry’s tight-fisted grip on its prices, combined with consumer reluctance and the difficulty of price shopping, account for this.

To return to the story of Ed Howard discussed above,75 what followed Howard’s experience gives a preview of what the funeral shopping landscape can, and should, look like for bereaved consumers. Working with FCA and its affiliated non-profit organizations in California, Howard and a coalition of consumer groups lobbied the California legislature to require funeral homes to post prices online if the funeral home maintained a website.76

In 2014, California lawmakers passed a compromise bill.77 Senate Bill 658 (proposed in 2011; amended, passed, and enacted

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70. Funeral Consumers Alliance, supra note 66.
72. Funeral Consumers Alliance, supra note 66.
73. FCA Releases National Funeral Cost Study supra note 13.
74. Id.
75. Benincasa, supra note 60.
76. Id.
January 1, 2013) requires funeral homes to either: (a) post their complete General Price List on their website with a prominent and intuitive link; or (b) in the absence of posting the complete price list, list the sixteen categories of goods and services required by the FTC Funeral Rule to be listed on funeral home price lists, along with a notice to consumers that a complete price list is available on request.78

This compromise, which gives an “out” to funeral homes who wish to keep their prices difficult to obtain, may eventually be phased out in favor of a no-exceptions requirement to post the price list.79 But even in its current form the law has radically expanded the online information available to California consumers. The FCA-CFA survey cited above broke down results by city and state.80 Of the fifteen funeral homes and their websites surveyed in California, thirteen posted their complete General Price Lists online.81 The remaining two complied with the “compromise” clause of the law, listing the sixteen goods and services along with a notice that complete price information is available on request.82

IV. CONCLUSION

The Funeral Rule is the most important achievement in the decades-long project of improving the bereaved consumer’s bargaining position vis-à-vis funeral directors. Setting a national standard for the basic information to which consumers should be entitled has helped change the business culture of the funeral industry, and has allowed motivated consumers to plan ahead with useful information. Indeed, it has made possible the countless cost-comparison surveys FCA and its affiliated nonprofit groups have published for decades. Yet that process is still grindingly slow for seasoned researchers and advocates. For the average grieving consumer, the hurdle is often too high to clear.

It is time for the Federal Trade Commission to recognize that the Internet can fulfill the promise of the Funeral Rule, that it

79. Id.
80. FCA Releases National Funeral Cost Study supra note 13.
81. Id.
82. Id.
can fulfill the original intent of the Rule itself in a way that paper and telephones cannot. To be effective for consumers, government regulations need to be responsive not only to the misdeeds of bad actors in industry, but also to the frame of mind and research habits of the American public. The American death trade, to put it colloquially, had to be dragged kicking and screaming into the 20th century after a ten-year battle between the FTC and the organized funeral trade. It is time for the FTC to act again and pull a culturally archaic and insular trade—that all of us will be compelled to patronize—into the digital age.