

A DNA sample left with surviving family members can provide important genetic information they may need today, tomorrow or decades hence. DNA cannot be obtained at all from cremated remains, blood samples for DNA testing cannot be taken after embalming and the quality of DNA available from tissue begins declining after death.

Should funeral directors inform families of these facts ahead of time?

One noted legal expert believes they not only **should** do so, but **must** do so.

The Legal Obligation to Disclose DNA Sample Requirements to Families

by Harvey I. Lapin, Esq.

On January 21, the Wall Street Journal featured an article titled "DNA Matching Helps Track Tainted Meat." The story outlined how public health detectives at the Centers for Disease Control and Prevention discovered that the death of a woman in Ohio was caused by a strain of E. coli bacteria with a DNA fingerprint that matched a strain from a meat plant located in Colorado, over 1,300 miles away. According to the article, the DNA sample was taken after the woman died. The article then discusses the implications for a lawsuit that has been filed against the meat plant.

This incident is one of the increasing number of situations where it is important to be able to obtain a DNA sample. Cemetery and funeral professionals are of course aware of the tremendous identification problems that resulted from the deaths on 9/11. Researchers are still attempting to identify victims' remains, and one of the tools used is DNA fingerprinting. The difficulties the



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researchers have encountered illustrate the problems involved when something has occurred that prevents taking a DNA sample in the usual manner.

Considering the increasing usefulness of DNA samples and the problems in getting them under some conditions, do those who work in the death care profession have any legal obligation to disclose to families in at-need or preneed situations how a suitable DNA sample can be obtained from human remains?

Before dealing with this issue, let us review some background about DNA, its uses, sample techniques and the problems

that occur in taking samples. The information presented here was obtained through consultation with DNA experts, review of DNA information Web sites and research into federal, state and local laws and regulations.

What is DNA?

"DNA" is short for deoxyribonucleic acid. DNA is the genetic material that determines a person's inherited features such as sex, eye color and blood type. DNA is a long molecule made up of building blocks called nucleotides, which are grouped together to form genes. Each person's DNA contains over 40,000 genes. One or more genes determine each inherited feature. The order of nucleotides in the DNA is extremely important, as each person's DNA has a unique order.

What is DNA fingerprinting?

The first DNA identity test to achieve prominence in the forensic community was DNA fingerprinting, invented by Alec Jeffries of the U.K., the subject of Joseph Wambaugh's book, "The Bloodline." Dr. Jeffries' ingenious test relies on DNA probes that recognize many different areas in the genome, or genetic material, of an individual. The technical name for this test is multilocus probe testing. The term and process of DNA fingerprinting is a patented technology and should be used only to describe this very specific type of DNA testing.

What are the current uses for DNA fingerprints?

Typically DNA fingerprints are used in civil proceedings to establish paternity. Questions of paternity can arise in estate contests,

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divorce proceedings and other disputes involving the ownership of assets. DNA fingerprints are now being used in product liability disputes, as indicated by the Wall Street Journal article mentioned above. DNA fingerprints also are used for criminal investigations and to study inherited diseases in a family or closely related ethnic group. It is probable that the use of DNA fingerprints will continue to expand.

What type of sample is required for DNA fingerprinting?

DNA makes up the thin strands (called chromosomes) found in the center, or nucleus, of all body cells except red blood cells and platelets. Therefore, DNA fingerprinting can be done using a sample from any body tissue. If a blood sample is used, DNA is usually obtained from white blood cells. Only a small sample is needed for DNA fingerprinting—a drop of blood or a hair bulb contains enough DNA for testing. A person who has DNA fingerprinting done voluntarily usually provides a sample of blood taken from a vein. DNA testing

also can be done on cells obtained by a simple process with a special mouth swab.

How is a sample processed?

Cells containing DNA are collected and purified. The cells are broken open and their DNA is separated. If only a tiny amount of DNA is available, it may be duplicated by a process called amplification before the analysis proceeds. The DNA is then treated with proteins (called restriction enzymes) that cut it at specific locations, producing DNA fragments of different lengths. Because each person's DNA sequence is unique, the pattern of DNA fragments varies among individuals.

Using an electrical current, the DNA pieces are separated by size on a thin slab of material similar to gelatin. The DNA on the gel is transferred to a nylon membrane, which is sturdier than the gel. The nylon membrane is then soaked with a solution containing radioactive chemicals called probes that specifically bind to certain types of DNA fragments. The probes will bind to only a few (up to about 20) of the hundreds

of DNA fragments. A photo is taken that shows the location of the probes. The pattern of the visible DNA fragments is called the DNA fingerprint. The fingerprint looks similar to bar codes that are read by a store checkout scanner.

What is the source for the best DNA samples?

According to the authorities, the very best DNA samples are collected from a living person. When a person is deceased, the best samples are collected as soon as possible after the death. Suitable samples can be obtained from the remains at the hospital, nursing home, morgue or funeral home. Thereafter, the quality of the sample obtained will be affected by how long ago the death took place and what has happened to the body since death.

Are DNA samples affected by other factors?

All of the authorities indicate that one of the main limitations of DNA testing and comparison is that the DNA must be in very good condition and available in reasonably large

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quantities to achieve an interpretable result. Obviously, this requires that a sample be taken at the appropriate time.

Contamination of the blood or tissue sample can make DNA fingerprinting results inaccurate. Decay of a sample used for DNA fingerprinting may cause inaccurate results. Accordingly, DNA samples obtained after human remains have been interred for several years will not be as suitable for comparison purposes as samples taken at the time of death. In addition, embalming makes use of a blood sample impossible. Cremation makes it impossible to obtain any DNA samples at all.

With all of this in mind, what obligation do funeral providers have to give consumers information about DNA sampling?

On the basis of the factual and legal research, I conclude that industry members should disclose to consumers that a DNA sample cannot be taken from cremated remains. Additionally, they should disclose that a blood sample cannot be taken from an embalmed body and that the quality of a

sample may be seriously affected after the remains are interred. Failure to disclose this information might be deemed a violation of certain federal, state and local laws and regulations.

This conclusion is based on review of the applicable federal and state consumer protection laws and regulations as well as state funeral licensing laws. The FTC Funeral Rule, state consumer protection laws and state funeral licensing laws and regulations all cover the funeral transaction.

The primary federal law applicable is the Federal Trade Commission Act (“Enabling Act”). Section 5 of the act gives the FTC the authority to challenge “unfair and deceptive trade practices” harmful to consumers. The FTC, as part of its jurisdiction, has issued the FTC Funeral Practices Trade Regulation Rule, 16 CFR s 453. (Funeral Rule). The Funeral Rule does not directly require the disclosure of DNA information, but it does require that price and other important information be disclosed to consumers. Additionally, §453.3

of the Funeral Rule specifically deals with the subject of “misrepresentations by funeral providers” and requires that certain affirmative disclosures be made to consumers, including the following:

- Subsection (a) (ii) of that section provides that it is a violation of the Funeral Rule to fail to disclose that embalming is not required by law, except in certain cases, if any;

- Subsection (c) (ii) of that section provides that it is a violation of the Funeral Rule to fail to disclose to persons arranging funerals that state law does not require the purchase of an outer burial container.

- Subsection (d) (ii) of that section provides that it is a violation of the Funeral Rule to represent that federal, state or local laws, or particular cemeteries or crematories, require the purchase of any funeral goods or funeral services when such is not the case.

While the Funeral Rule does not directly require the disclosure of DNA information, it does require that important information be disclosed to a consumer. Accordingly, I

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On the basis of the factual and legal research, I conclude that industry members should disclose to consumers that a DNA sample cannot be taken from cremated remains.

believe that the spirit and intent of the Funeral Rule require that DNA information be disclosed. In addition, other rules and opinions issued by the FTC indicate that it is a misrepresentation not to disclose important information to a consumer. See, for example, the FTC “Negative Option Plans Rule” that requires catalog sellers of merchandise to disclose to consumers that the merchandise will be delivered unless the consumer indicates he or she does not want it.

Every state has consumer protection laws. Most are similar to the FTC Regulation Act and by reference adopt the FTC rules, federal consumer protection cases under the FTC Regulation Act, opinions by the FTC staff and decisions by the FTC commissioners.

The FTC Funeral Rule has been adopted in those states by implication, through reference in the law. State consumer protection laws also might require members of the cemetery and funeral industry to disclose DNA information to consumers. There also

are disclosure requirements in many preneed trust laws requiring sellers to disclose important information to consumers in contracts and during sales presentations.

Almost every state has funeral director licensing laws. Typically, these laws provide that a funeral director can lose his or her license for engaging in certain types of practices and suffer a license revocation or suspension for violating other laws and making misrepresentations. For example, the Illinois Funeral Directors and Embalmers Code provides in section 15-75 that the following violations would be grounds for discipline and penalties:

- (b)(12) Making or causing to be made any false or misleading statements about laws concerning the disposal of human remains, including, but not limited to, the need to embalm, the need for a casket for cremation or the need for an outer burial container.

- (b)(17) Performing any act or practice that is in violation of this code or any federal, state or local laws, rules or regulations governing the practice of funeral directing or embalming.

- b)(18) Performing any act or practice that is in violation of section 2 of the Consumer Fraud and Deceptive Business Practices Act.

A licensee in any state with a law similar to the Illinois statute may be in violation for failing to disclose DNA sample information to at-need and preneed customers.

Could a funeral director face civil litigation for failing to disclose information about DNA sampling?

Because this is a new issue, I am not aware of any such litigation against an industry member. However, it is not hard to imagine what steps the attorney in the meat packing product liability litigation would take if the condition of the remains adversely affected the quality of the DNA sample and the family members had not been given pertinent information about this possibility by the funeral service professionals.

How Should This Information Be Disclosed?

Industry members should prepare a written disclosure for their clients indicating the current uses for DNA samples. The disclosure should indicate:

- the appropriate times for taking samples,
- that samples may be affected by delay and other factors,
- that it is impossible to take a blood sample after embalming, and
- that it is impossible to obtain a DNA sample from cremated remains.

It probably would be a good idea to have the consumer confirm receipt of the information. If the customer does not want to arrange for this service, it would be prudent to ask him or her to sign a form releasing the funeral home from any liability for claims that a DNA sample should have been taken. This release should also provide the company with an indemnification and hold-harmless agreement against such claims by the customer, members of his or her family and third parties.

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