

DNA Disclosure
And
Your Liability

By

Harvey I. Lapin, Attorney at Law

I have conducted research as to the legal obligation of a funeral director, or other appropriate member of the Death Care Industry, to disclose to an at need or pre-need customer the conditions required and appropriate time for obtaining a suitable DNA sample from human remains. During my research to respond to this request, I consulted with a DNA expert, reviewed DNA informational websites and researched federal and state laws and regulations.

I have been advised by Kent M. Haman, President of Genetic Technologies, Inc. in Glencoe, Missouri, a recognized expert in the field, that there are ideal conditions and times for collecting suitable DNA samples. Mr. Haman advised me that typically DNA samples are used in civil proceedings to establish paternity. Questions of paternity can arise in estate contests, divorce proceedings and other disputes involving the ownership of assets. DNA samples also are used for criminal investigations and to study inherited diseases in a family or closely related ethnic group.

According to Mr. Haman, the 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 and 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 the conditions and time involved. He also indicated that 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, he indicated it is impossible to obtain DNA samples from cremated remains. I have verified the information provided by Mr. Haman by reviewing other sources about DNA that are available on the internet, court cases dealing with the use of DNA evidence and articles published in legal journals. All of these sources 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 quantities to achieve an interpretable result. Obviously, this would require that a sample be taken at the appropriate time.

Various federal and state laws and regulations apply to the funeral transaction. During my research, I reviewed the FTC Funeral Rule, state consumer protection laws and state funeral licensing laws and regulations. The primary federal law applicable to this question is the Federal Trade Commission Act ("Enabling Act"). Section 5 of the Enabling Act gives the Federal Trade Commission 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. However, §453.3 deals with the subject of "Misrepresentations" by Funeral Providers and it 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?"

While the Funeral Rule does not directly require the disclosure of DNA information, it does require that important information be disclosed to a consumer. 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 sellers of merchandise by catalog to disclose to consumers that the merchandise will be delivered unless the consumer indicates they do not want it.

Every state also has consumer protection law. Most of the state laws 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. 815 ILCS 505/1.

Almost every state has a funeral directors licensing law. Typically, these laws provide that a funeral director can lose their license if they engage in certain types of practices. Typically these laws will provide that violating other laws and making misrepresentations could be the basis for revoking or suspending a license. For example, the Illinois Funeral Directors and Embalmers Code provides at 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."

"On the basis of my factual and legal research, it is my opinion that a funeral director or other appropriate industry person that did not disclose to a consumer that a DNA sample could not be taken from cremated remains or that the quality of a sample would be seriously affected after interment of the remains could be in violation of the applicable federal and state consumer protection laws and regulations and state funeral licensing laws."

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Harvey I. Lapin is an Attorney from Northbrook, Illinois. He specializes in the Mortuary, Cemetery, Tax and Corporate legal areas. He is the General Counsel to the Illinois Cemetery and Funeral Home Association and has provided legal services to numerous other state and national associations in the industry. He has been the primary draftsman or assisted in the drafting of industry related legislation in 27 states.

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