



# funeral service **insider**

independent news & guidance for funeral home owners and operators

## Auditors: West Virginia Funeral Board Needs to Get a Significant Overhaul

A West Virginia legislative audit report issued Sept. 17 says the state should consider placing the funeral service board under the oversight of a different agency because it failed to sufficiently and timely punish a funeral director who collected almost \$1 million after filing false death claims for individuals with preneed life insurance policies.

Chad R. Harding, co-owner and licensee-in-charge of the Harding Family Group, which operates Gatens-Harding Funeral Home in Poca, Haven of Rest Memory Gardens & Crematorium in Red House, and Harding Funerals & Cremations in Charleston, filed 108 false death claims over a 10-year period and illegally collected \$919,000, according to a lawsuit filed by Homesteaders Life Company.

While Harding and the funeral home have denied those allegations, in August 2016, a federal judge ordered Harding and his wife, Billie, the firm's co-owner and vice president, to pay Homesteaders \$2.8 million, citing the Racketeer Influenced



Chad R. Harding, co-owner and licensee-in-charge of The Harding Family Group, was found to have falsely filed almost \$1 million in death claims, but his license was only suspended for six months and his funeral home kept its license.

and Corrupt Organizations Act in tripling the amount that the firm allegedly bilked from the insurance company.

Despite the judge's findings, on July 14 the West Virginia Board of Funeral Service Examiners, which was largely composed of newly appointed (but not confirmed) members voted 3-2 in favor of a plea deal that suspended Harding's license for six months followed by six months' probation. The funeral

## Cremation Innovators to Gather In Atlantic City for Summit

With more families choosing cremation, funeral homes and cemeteries would be well-advised to change the way they do business – and that means thinking about it differently, says Doug Gober, owner of Gober Strategic Capital.

“The consumer thinks about cremation one way and businesses think about it another, and part of the reason for that is we have equated cremation with burial,” he says. “In our heads, there is an alternative, but the more correct way to think about it is not cremation or burial but cremation or embalming. That's because cremation is not disposition – even though some state laws say that it is. Cremation is preparation.”

At the Cremation Innovations Summit, Dec. 15 in Atlantic City, New Jersey, Gober will be one of the experts sharing how to boost customer satisfaction and revenues in one fell swoop by changing your approach to cremation families.

He'll be joined by Dan Isard, founder and president of The Foresight Companies; Welton Hong of Ring Ring Marketing; Brent Taylor, owner of Brentwood Funeral Services; and Coleen Ellis, owner of Two Hearts Pet Loss Center and co-founder of The Pet Loss Center.

Sign up by Nov. 1 to save \$100. Visit [www.katesboylston.com/summit](http://www.katesboylston.com/summit) to learn more.



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home was allowed to keep its license.

The punishment – perceived by many as insufficient – created a firestorm of controversy and led three board members, Ira Handley, John H. Taylor and Bill Davis, to resign in protest.

“The gentleman embezzled close to \$1 million and received a six-month suspension of his license,” said Handley, who abstained from the vote (though he did not have to), when contacted by phone. “It should have been revoked permanently.”

Poul Lemasters, owner of Lemasters Consulting in Cincinnati and the cremation counsel for the International Cemetery, Cremation and Funeral Association, agrees the punishment should have been harsher. “To me, this is egregious,” he says. “There was theft of money, breach of fiduciary duties, breach of trust ... it’s a shame that all that happened was a six-month suspension and that it took so long to do it.”

Sally Attili, the board president, told the Charleston Gazette Mail that while the previous board had considered revoking Harding’s license, the board decided that it was not necessary after the state attorney general took away Harding’s ability to sell prearranged funerals and implemented special procedures to audit preneed contracts.

After the board accepted the plea agreement with Harding, the

Legislature’s Joint Committee on Government Organization asked the Performance Evaluation and Research Division to get to the bottom of what happened – namely, how could a funeral director illegally collect almost \$1 million, violating the West Virginia Consumer Credit and Protection Act and the West Virginia Preneed Funeral Contracts Act in the process, and only have his license suspended for six months?

## Audit Report Findings

The audit report suggested that not only was the punishment against Harding too light, but it took too long: More than a year passed from when the board learned of the allegations against Harding to the time it agreed to the settlement.

John Sylvia, director of the Performance Evaluation and Research Division, concluded in the audit report that “the board acted to protect the interest of one of its licensees more than the safety of the public throughout the Harding case.” He noted that West Virginia licensing boards are allowed by law to suspend someone’s license prior to a hearing “if the licensee constitutes an immediate threat to the public” and that “in the case of Mr. Harding, the board did not exercise that authority.”

The audit report suggested that the legislature terminate the board and place funeral service under the supervision of a different board or replace current board members with new ones. It also suggested boosting citizen board members

from one to two. According to the audit report, “Given the history of this Board and the most recent case of Mr. Chad Harding, the Legislative Auditor concludes that the Legislature should consider terminating the Board and placing the regulatory function under another health-related state agency such as the Department of Health and Human Resources’ Bureau for Public Health. If termination is not implemented, consideration should be given to reconstitute the current board membership by replacing them with new members. The legislature should also consider requiring two citizen members to this Board.”

The audit report concludes that the board has a history of “untimely and lenient responses to fraudulent activities of licensees,” and it details multiple examples of such cases.

The audit report also questioned the validity of the emergency meeting the board called to vote on the Harding matter. The audit report notes, “The Board may have violated the Open Governmental Meetings Act by having an emergency board meeting to settle the case with Mr. Harding 11 days prior to the scheduled disciplinary hearing. According to the West Virginia Ethics Commission, an ‘emergency’ meeting involves an unexpected situation or sudden occurrence of a serious nature, such as an event that threatens public health or safety. The Ethics Commission recommends that when in doubt as to what constitutes an

emergency, consider what consequences could occur if the governing body does not act immediately. If it can wait days without significant adverse consequences, then a special meeting should be called instead.”

The audit report goes on to state, “Since April 2017, the Board had been planning on conducting its disciplinary hearing for Mr. Harding on July 25, 2017. The Board had taken the time and effort to subpoena witnesses and appoint a Hearing Examiner for that Hearing. However, on July 11, 2017, the board chose to call for an emergency meeting for July 14, 2017, with the stated purpose being to ‘discuss proposed settlement in Harding matter.’ It is not clear what adverse consequences could have occurred by maintaining the original scheduled July 25, 2017, disciplinary hearing. The stated purpose of the Board’s emergency meeting does not appear to meet the Ethics Commission’s definition for an ‘emergency meeting.’”

The audit report notes, “It can be argued that the Board could have exercised its statutory authority to take disciplinary action against Mr. Harding, such as suspend or revoke his funeral director license, as early as August 2015 because he posed an immediate risk to the public. It is also reasonable to maintain that the Board should have taken immediate action against Harding upon the federal judge’s \$2.8 million judgment in favor of Homesteaders Life Company in August 2016.” It adds, “Moreover, the 10-month

proceedings to suspend Mr. Harding’s license for 6 months appear accommodating to Mr. Harding, and the Board imposed the disciplinary actions as dictated by the licensee. The Board improperly called for an emergency meeting 11 days prior to Mr. Harding’s scheduled disciplinary hearing to agree to a settlement that would allow Mr. Harding to eventually retain his funeral director and crematory licenses. It also appears that the Board allowed Mr. Harding to intimidate it with court costs and dictate the outcome of this case.”

Regina Anderson, executive director of the board, responded to the audit’s findings with a defiant statement that read in part, “It has been the advice of previous attorneys assigned to the board that in matters involving criminal actions that we should wait for a conviction and then proceed to suspend the license. We now find ourselves being chastised for failing to act according to the interpretations of your attorneys when our attorneys have advised to the contrary.”

But Anderson’s response also lends some credibility to the audit’s findings that the board was concerned about legal costs in agreeing to a settlement, as she states, “The Board Attorney took considerable time prior to the commencement of the negotiations to outline the fees incurred to date, which totaled approximately \$25,000. He outlined the fees that would be incurred if the hearing were to take place. Those fees

would have been in the neighborhood of \$50,000, and the final outcome of the hearing was not guaranteed, and if adverse to the respondent would in all likelihood be appealed to the Circuit Court and on up resulting in an exorbitant expense to the board.”

Robert Kimes, executive director of the West Virginia Funeral Directors Association, expressed disappointment that financial concerns played such a driving role in the board’s decision to agree to the settlement with Harding, noting that the failure to take timely action was motivated by fears of legal expenses bankrupting the board – fears that led board members “to be more concerned about legal fees than upholding the Funeral Service Act,” he says.

Robert Fells, general counsel of the ICCFA, says the response about costs cited by the board in its response was a bad move. “Nobody is impressed that the board may have saved some money in dealing with the Harding complaint the way it did,” he says. “But this is why licensees pay annual fees, and this is why professional licensing fees go up. It becomes a cost of doing business, so a board cutting corners to save on expenses will never impress anybody.”

### **Bad Blood**

While it was unclear what would happen to the state board at press time – or if Harding’s punishment

### **Superboards: The Wave of the Future?**

While it only received cursory attention in funeral service at the time, a Feb. 25, 2015, U.S. Supreme Court decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* held implications for funeral service.

The Supreme Court affirmed the FTC’s position in recognizing that a state may not give private market participants unsupervised authority to suppress competition even if they act through a formally designated ‘state agency,’ according to a statement from FTC Commission Chairwoman Edith Ramirez.

The case was the result of the state’s dental board members – mostly dentists – barring non-dentists from offering competing teeth whitening services to consumers. “The Court’s decision makes clear that state agencies constituted in this manner are subject to federal antitrust laws “unless the state actively supervises their decisions,” Ramirez said.

Concern over the decision has led some states to create or consider creating “superboards,” which are consolidated governing boards set up in place of several lesser boards.

Such a super board system was actually considered in West Virginia in previous legislative sessions but never acted on, according to Poul Lemasters, owner of Lemasters Consulting in Cincinnati and the cremation counsel for the International Cemetery, Cremation and Funeral Association. “(Favoritism) is being challenged,” he says. “I think boards need to take note, and West Virginia is a great example to show a state challenging it. The (state funeral directors) association has really pushed this – it’s not even the public. Our own profession is not happy with how something was handled.”

While advocates for “super boards” tout their benefits, Robert Fells, general counsel for the ICCFA, says, “Be careful what you ask for.” He adds, “A superboard could end up being a conglomerate of bureaucracies with individuals sitting judgement on a licensee’s conduct that they know nothing about.”

In the case of West Virginia, instead of placing the funeral board under the authority of a larger board, Fells thinks it makes more sense to dismiss the current board members and start fresh.

*Continued on the next page ...*

might be revisited if it's newly-appointed members are not confirmed, replaced or if the board is placed under the authority of a larger board – one thing was clear: the chain of events has put pressure on an already strained relationship between the West Virginia Funeral Directors Association and the West Virginia Board of Funeral Service Examiners.

Kimes was not a fan of the board's new appointees even before the Harding vote, as he had sent a letter to the governor; Handley, the then board president; and the state attorney general asking that they reconsider the individuals that the governor had selected to serve on the board. "We felt that they were all unfit selections to serve," Kimes says.

In its response to the audit's findings, the board did not take issue with boosting the number of citizen member from one to two, and in fact, it recommended there be three such citizen appointees.

But the board did make a request: "The Board would also urge that no more than 2 funeral director members of the Board be a member of the Funeral Directors Association in order to ensure that those funeral directors who come before the Board and who are not members of that group are given a fair and impartial review and that favoritism is not shown to those who are Association members. Under the past Board makeup, that

Chris Farmer, owner of The Farmer Firm in Houston, agrees with Fells that superboards are probably not the answer. "I do think it's problematic having a board comprised of friends and competitors; you are supposed to recuse yourself if there is a conflict of interest, but we've seen cases where that doesn't happen," he says. "On the other side, because what we do is so unique – we have our own language and work in an industry that people don't want to think about – there is a lot of value of having regulators that understand what we do."

Farmer thinks it's better to have people from within the industry regulate it, but he adds, "I think there has to be some level of oversight where you are able to contest if an individual refuses to recuse themselves ... I think there has to be more checks and balances when it comes to conflicts of interest."

was not possible," it states in its response.

Kimes was taken aback by the idea that membership on the board – if it remains intact – should have such a limitation. "This is perplexing and really an ignorant statement," he says. "The WVFDA represents approximately 80 percent of the state's funeral homes and funeral directors. Our members adhere to a code of professional conduct and ethics not only to our state association but to the National Funeral Directors Association as well. Why would you want to limit or penalize the majority of the state's funeral directors that have accepted the invitation to conduct themselves in a professional and ethical manner?"

Kimes notes that Harding was not a member of the state association "and funeral directors in

recent cases of misconduct have not been members of our association." He adds that he thinks the board would benefit by having more – not fewer – association members within its ranks.

The WVFDA does not have any concerns in terminating the board in its current form and placing it under a state agency such as the Department of Health and Human Resources Bureau for Public Health. "Our only request would be that West Virginia Board of Funeral Service Examiners' current administrative team not be a part of the board regardless of what department it would be absorbed into," Kimes says.

*Visit <http://tinyurl.com/yakhl3rd> to read our earlier coverage on Chad R. Harding.*