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STATE OF WISCONSIN  
BEFORE THE FUNERAL DIRECTORS BOARD

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IN THE MATTER OF DISCIPLINARY

PROCEEDINGS AGAINST:

ALAN JENSEN, JENSEN-JINSKY

FINAL DECISION AND ORDER

FUNERAL HOME, and PETER N. VAN

WAGENEN,

RESPONDENTS

LS0102161FDR

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The State of Wisconsin, Funeral Directors Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Funeral Directors Board.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 19<sup>th</sup> day of September, 2001.

W. Robert Cress

A Member of the Board

STATE OF WISCONSIN  
BEFORE THE FUNERAL DIRECTORS BOARD

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IN THE MATTER OF

DISCIPLINARY PROCEEDINGS AGAINST

ALAN JENSEN, JENSEN-JINSKY

PROPOSED DECISION

FUNERAL HOME, and PETER N. VAN

WAGENEN,

Respondents

LS0102161FDR

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The parties to this proceeding for the purposes of sec. 227.53, Stats., are:

Alan Jensen  
Jensen-Jinsky Funeral Home  
2400 Plover Road  
Plover, WI 54467

Jensen-Jinsky Funeral Home  
2400 Plover Road  
Plover, WI 54467

Peter N. Van Wagenen  
2608 Simonis Street  
Stevens Point, WI 54481

Department of Regulation & Licensing  
Division of Enforcement  
1400 East Washington Avenue  
P.O. Box 8935  
Madison, WI 53708

State of Wisconsin  
Funeral Directors Examining Board  
1400 East Washington Avenue  
P.O. Box 8935  
Madison, WI 53708

A Class II hearing was held in the above-captioned matter on April 24, 2001, at 1400 East Washington Avenue, Madison, Wisconsin. Respondents Alan Jensen and Peter N. Van Wagenen appeared personally and by Attorney Rhea A. Myers, who also represented respondent Jensen-Jinsky Funeral Home. Complainant appeared by Attorney Henry E. Sanders.

Based upon the entire record in this case, the administrative law judge recommends that the Funeral Directors Examining Board adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

#### FINDINGS OF FACT

1. Respondent Alan Jensen (Mr. Jensen), residing at 2400 Plover Road, Plover, Wisconsin, was at all times material to this action licensed as a funeral director by license #3310, granted on April 18, 1979. He is the owner/manager and funeral director in charge of the Respondent Jensen-Jinsky Funeral Home.
2. Respondent Jensky-Jinsky Funeral Home, located at 2400 Plover Road, Plover, Wisconsin, was at all times material to this action licensed as a funeral establishment by license #1857, granted on July 18, 1989.
3. Respondent Nick Van Wagenen (Mr. Van Wagenen) residing at 2608 Simonis Street, Stevens point, Wisconsin, was at all times material to this action licensed as a funeral director by license #3177, granted on October 30, 1996.

4. On Wednesday, October 27, 1999, at about 7:35 p.m., patient D.P. died at St. Joseph Hospice Hospital in Marshfield, Wisconsin.
5. The family of D.P. requested that hospital personnel make arrangements to have the body released to a funeral home for the provision of funeral services. The family expected that the body would be released to Pisarski-Dzikoski Funeral Home in Stevens Point, and the name of the Pisarski-Dzikoski Funeral Home was provided to hospital personnel by the family. However, due to circumstances not entirely clear from the record, the nursing staff called the Jensen-Jinsky Funeral Home of Plover in error.
6. The call to the Jensen-Jinsky Funeral Home was made at approximately 11:30 p.m. on Wednesday, October 27, 1999, by staff nurse Judy Steinhoff, who spoke with Mr. Jensen. Ms. Steinhoff told Mr. Jensen that she was calling on behalf of the family of D.P., and she told Mr. Jensen that the family of D.P. wished that his funeral home provide funeral services for D.P.
7. Mr. Jensen and Peter Van Wagenen had worked together in the past in situations where Alan Jensen had requested that Van Wagenen take cases he could not immediately handle. Upon receiving the request to provide funeral services for D.P., Mr. Jensen telephoned Mr. Van Wagenen at approximately 11:28 p.m., and requested that he take care of the case for him.
8. The Marshfield Hospital is approximately an hour's drive from the home of Mr. Van Wagenen, who first had to come to the funeral home to pick up the hearse. Mr. Van Wagenen arrived at the Marshfield Hospital at approximately 1:00 a.m.
9. Mr. Van Wagenen went to the Marshfield Hospital emergency room where he was told by the security guard to sign the usual removal papers. He signed one set of papers, asked if there were any more to sign, and was told that there were no further papers to sign. He was then told by the security guard to proceed to the hospital morgue. He went to the hospital morgue where he discovered that D.P. was not there. Upon a subsequent call to the desk, he was informed that D.P. had passed away under the care of the hospice section and he was directed to the hospice wing where personnel would meet him. When he arrived at the hospice wing, a nurse met him and took him to the third floor. He signed his name to a clipboard at the nurse's station and then made the removal.
10. At the time he was given removal papers to sign, Van Wagenen was informed that there were no family members of the deceased available at the hospital, and he was not shown any papers which conflicted with his instructions to take the body to the Respondent funeral home.
11. After moving the body of D.P. to the Jensen-Jinsky Funeral Home, Mr. Van Wagenen commenced the embalming at approximately 2:30 a.m. He undertook the embalming at that time because he felt the embalming was a difficult case due to the cause of death and because of the extended period of time that had passed since the time of death. It was his opinion that had he waited until the morning of October 28 to begin the embalming, it was probable that unacceptable and irreversible deterioration would have occurred to the body. He did the arterial embalming, but chose to wait until the next morning to do the cavity work in order to let the embalming fluid fully permeate the tissues.
12. Neither Mr. Van Wagenen nor Mr. Jensen spoke with the family of D.P. prior to beginning the embalming procedure.
13. Following a contact from the family of D.P. on the morning of Thursday, October 28, 1999, David A. Pisarski, owner and funeral director of Pisarski-Dzikoski Funeral Home, called the Jensen-Jinsky Funeral Home at 10 a.m. that morning, and spoke with Alan Jensen. At that time, neither Mr. Jensen nor Mr. Van Wagenen had contacted the family, though Mr. Jensen was contemplating a call to the family at the time of Pisarski's call.
14. In their telephone conversation, Mr. Pisarski notified Mr. Jensen that the family of D.P. had neither granted permission to the Jensen-Jinsky Funeral Home to pick up the body from the hospital nor granted permission to embalm the body. Mr. Jensen told Mr. Pisarski that if, in fact, permission had not been granted to Jensen-Jinsky Funeral Home for the removal and to begin the embalming, he, Alan Jensen, would not charge the family for the embalming that had been done to that point. He also informed Mr. Pisarski that, due to the apparent mistake by the hospital, Pisarski could pick up the body as soon as possible and complete the required embalming.
15. Mr. Pisarski picked up the body a short time later, and brought it to the Pisarski-Dzikoski Funeral Home. After receiving permission from the family of D.P. to re-embalm the body, that process was satisfactorily completed.
16. Neither Alan Jensen, Jensen-Jinsky Funeral Home nor Peter Van Wagenen charged a fee for the removal services or the embalming performed on D.P. in the early morning hours of October 28, 1999, and the Respondents made no further charges to the family of D.P.

#### CONCLUSIONS OF LAW

1. The funeral Directors Examining Board has jurisdiction in this matter pursuant to sec. 445.13, Stats.

2. Because no charge was made to the family of P.D. for embalming procedures undertaken by peter Van Wagenen in the early morning hours of October 28, 1999, failure to gain permission from the family of P.D. to undertake the embalming of P.D. prior to beginning the procedure does not constitute a violation of Code of Federal Regulations section 453(a), and does not constitute a violation of sec. FD 3.02(8), Code.

3. There is insufficient evidence to establish that the embalming procedures undertaken by peter Van Wagenen on P.D. constitutes the provision or performance of funeral directing or embalming services in a manner which falls below minimum standards established by the statutes, rules or practices of the profession, as prohibited by sec. FD 3.02(6), Code.

4. There is insufficient evidence to establish that failure of Alan Jensen or peter Van Wagenen to contact the family of P.D. prior to 10:00 a.m. on October 28, 1999, constitutes a failure to demonstrate respect for the sanctity of human remains or the feelings of individuals involved in the grieving process, in violation of sec. FD 3.02(10), Code; and insufficient evidence to establish that such failure to contact the family of P.D. constitutes the provision or performance of funeral directing or embalming services in a manner which falls below minimum standards established by the statutes, rules or practices of the profession, as prohibited by sec. FD 3.02(6), Code.

5. Absent any violation of CFR sec. 453(a), or of secs. FD 3.02 (6), (8) and (10), Code, the respondents herein have not violated or aided and abetted the violation of any state or federal law related to the practice of funeral directing, and have therefore not violated sec. FD 3.02(1), Code.

#### ORDER

NOW, THEREFORE, IT IS ORDERED that this matter be, and hereby is, dismissed.

#### OPINION

The principal allegation in this matter is that in having undertaken the embalming of P.D. at 2:30 a.m. on October 28, 1999, Peter Van Wagenen, Alan Jensen and, by extension, Jensen-Jinsky Funeral Home, violated both federal and state law. The federal law alleged to be violated is CFR sec. 453.2(b)(4)ii(F), which is read by complainant to require that a funeral establishment notify the family of the deceased of the price charged for embalming, and CFR sec. 453.05(a), which is read to require that the funeral provider receive permission from the family to embalm prior to beginning that procedure.

CFR sec. 453.02, captioned "Price disclosures," defines as unfair or deceptive practice a failure to furnish to customers accurate price information or to disclose in writing the price of goods and services. It sets forth requirements to avoid these deceptive practices, including a requirement that funeral directors respond to telephone inquiries regarding the costs of good and services, a requirement that the funeral provider maintain casket and outer container price lists to be provided to customers prior to showing caskets or outer containers, and a requirement that funeral providers maintain a general price list disclosing the prices of other goods and services, including embalming. There is no allegation that respondents failed to maintain the required price lists, and the federal regulations in question do not contain any affirmative requirement that the funeral director provide to the customer the price of embalming prior to undertaking that procedure. CFR sec. 453.02(b)(4)(i)(B) implies just the opposite, stating in part:

The requirement in paragraph (b)(4)(I)(A) of this section [requiring that the funeral provider disclose prices] applies whether the discussion takes place in the funeral home or elsewhere. Provided, however, that when the deceased is removed for transportation to the funeral home, an in-person request at that time for authorization to embalm . . . does not, by itself, trigger the requirement to offer the general price list . . .

Nor does CFR sec. 453.05(a) establish any absolute prohibition against embalming without the customer's specific permission. That section states in material part as follows:

#### **Section 453.5 Services provided without prior approval.**

(a) Unfair or deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for any provider to embalm a deceased body for a fee unless:

(i) State or local law or regulation requires embalming in the particular circumstances regardless of any funeral choice which the family might make; . . . (emphasis provided)

Exhibit 4, which is Federal Trade Commission Funeral Rule Compliance Summary, states as follows:

#### **IX Prior Permission to Embalm**

It is a violation of the amended Funeral Rule to charge for embalming unless:

- o State or local law requires embalming;
- o The family gives you express permission to embalm prior to embalming; or
- o The exigent circumstances exception applies (emphasis provided).

The Summary goes on to note:

[I]t is important to note that embalming without permission is not a violation of the amended Funeral Rule. The violation occurs only when a charge is made for the unauthorized embalming. Therefore, if an embalming has taken place without prior permission being obtained, the Rule will not be violated unless you make a charge for that embalming. Of course, the act of embalming without permission may still constitute a tort under state law which would leave a funeral director civilly liable.

Nor does the board's rule at sec. FD 3.02(8), Code, prohibit what occurred in this case. Like the federal rule, the board's rule states that permission to provide services is required only for services for which charges are made. That section states,

**FD 3.02 Unprofessional conduct** Any occurrence of the following shall constitute unprofessional conduct by a licensed funeral director, registered apprentice funeral director or owner of a funeral establishment:

\* \* \* \*

(8) Performing services or providing merchandise not authorized for which charges are made, . . . .

Complainant called Rick Unbehaun, licensed funeral director, member of the Funeral Directors Board, and board advisor on this case, as an expert witness. Mr. Unbehaun's testimony on direct examination was limited primarily to his opinion that failure to receive permission to undertake the embalming and to make necessary price disclosures to the family was a violation of the FTC regulations and the board's administrative code. On cross examination, however, Mr. Unbehaun ultimately conceded that he was unable to find any specific provision of the federal or state regulations which established such a violation in the circumstances of this case.

The preferred procedure would obviously have been to receive permission from D.P.'s family prior to carrying out the embalming. There were a number of factors which prevented that from occurring, including the lateness of the hour when the pickup was made, and an apparent misunderstanding between Jensen and Van Wagenen as to the division of responsibilities. Regardless of all that, however, it is clear that failure to receive permission prior to embalming is not a violation of either the federal regulations or the board's rules unless respondents charged for that service, and it is equally clear that no such charge was made.

It is next alleged that the embalming services provided by Van Wagenen fell below the minimum standards established by the profession. David and Frank Pisarski, brothers and co-owners of Pisarski-Dzikoski Funeral Home in Stevens Point, testified to what they considered to be shortcomings in the manner in which Van Wagenen carried out the embalming of D.P. First it was testified that the embalming formula utilized was too weak. Second they criticized Van Wagenen for utilizing cotton and Kalon cream to fill in D.P.'s mouth when he discovered that D.P.'s upper denture was missing, rather than utilizing a plastic mouth former. Next, they considered Van Wagenen's procedure of waiting until the next morning to do the cavity work unacceptable. Finally, Frank Pisarski, who did the second embalming, implied in his testimony that the quality of the embalming work done by Van Wagenen was inferior.

David Pisarski testified as follows on these points:

Q. (by Mr. Sanders) Now, you were testifying earlier regarding embalming and the proper protocol and standards. Now, on the bottom of that page, the last full paragraph, Mr. Van Wagenen mentioned the procedure he follows. Now, please review that and tell me that in your professional opinion, is that the correct embalming protocol?

A. (by David Pisarski) Well, there's a few things that could have been done a little bit differently that -- that would have made the body condition to turn out better, if I could use that word. Starting out with the closing of the mouth, the setting of the features, okay. We have things in -- in today's profession, what we call mouth formers. If a person does not have dentures to close the mouth, we have a thing in our industry where they call mouth formers that kind of takes the place of the dentures, okay. Now, that's very simple to use. It's a plastic mouth former. And that usually does a pretty good job in our profession. The idea of using cotton and Kalon cream is rarely used anymore. It really doesn't do a good job. And the results of that was -- was -- the turnout was awful because the mouth was still half open, so we had to redo that, the setting of the mouth features. As far as say the condition of the fluid that he used, 16 ounces of Plasdopake with 16 ounces of Metaflow mixed with two gallons, okay. In our industry, that's kind of considered more of what they called a watered-down embalming, which -- which means that it's not a lot of formaldehyde with the amount of solution, which means that if -- if your -- if a body's going to be in a rough condition and if you had a difficult body that he had stated, you'd want to use more formaldehyde so you get more preservation with the

body, okay. In this condition, he used -- well -- well, he used a watered-down condition of embalming, okay. A third idea was -- was the cavity work. There was no cavity work done on -- on the -- on the body. Cavity work is very important to do. The first thing is it stops any type of what they call tissue gas, any type of spreading of -- of gasses in the abdomens -- abdomen. So you -- you want to do the aspiration immediately. Some people might wait to put the -- put the cavity in, but they usually do the aspiration right away and the cavity right away. And then this way, sometimes they'll come back the next day and re-aspirate the body. But that should be done immediately, too. (Tr., pp. 46-48)

On cross-examination, Mr. pisarski was somewhat less adamant about his conclusions:

Q. And now specifically, you had -- you had three criticisms, that you felt that the fluid was watered down.

A. That's right.

Q. Is there any -- in your opinion, is there any discussion among embalmers as to whether this is too watered down or whether it's acceptable under some circumstances to use the formula that Mr. Van Wagenen did?

A. We have different trade shows and different things, and we have meetings and we discuss the way certain conditions of the body should be and things like that. And our understanding, if -- if it's going to be a normal body, that there's not going to be any difficulties, that maybe his procedure would work, if -- if the -- if the --

Q. It's kind of a judgment call in -- in your industry?

A. Right.

Q. And it is possible that the judgment call Mr. Van Wagenen made was consistent with practice? It is possible?

A. It is possible if --

Q. It's not what you would do --

A. Right.

Q. -- but it -- it is possible that it's consistent with practice in the industry?

A. If it wasn't a difficult case, as he stated.

Q. Okay. And now, you indicated your second criticism was that Mr. Van Wagenen did not undertake the cavity work?

A. That's right.

Q. Now, you understand Mr. Van Wagenen had not finished the embalming, correct, when -- that evening when he obtained the body?

A. That may be his -- I don't know why or if didn't if -- it's not a standard practice not to finish it within the time frame.

Q. Okay. Well, what -- what time frame do you put in -- do you place on finishing the embalming process?

A. Well, it's all done in one procedure, okay. It's -- the time frame might be longer than others. It might be two hours, it might be four hours, it might be five hours. But the -- the -- the complete embalming is done in one setting. You don't come back and -- and do -- redo another procedure later on like the cavity work.

Q. That's never done --

A. Aspiration.

Q. -- in your practice?

A. As far as the aspiration, the initial aspiration usually is never done a second -- a second time on a second day.

Q. Now, and you had criticism about the -- the work that Mr. Van Wagenen did on the deceased's

mouth.

A. That's right.

Q. And again, he didn't use the procedure that you would use, correct?

A. In our practice, right.

Q. But the procedure he used is something that is used in the funeral practice, correct?

A. I guess it's an old standard that you can use. Whether it gives you results, but -- I don't know what he'd use it if it didn't give him results. (Tr., pp. 50-53)

As previously noted, Mr. Unbehaun's direct testimony did not address any of these issues. On cross examination, however, Mr. Unbehaun was critical of the decision to wait until the next day to do the cavity work and he speculated concerning the possibility that the arterial work was not done correctly.

Q. (by Mr. Myers) Now, have you been asked to review the embalming work Mr. Van Wagenen did on Mr. Pliska?

A. (by Mr. Unbehaun) No.

Q. Okay. So you have no opinion as to whether that -- the work that he did was within the standards of the industry or not?

A. Well, the only thing I -- I found out during testimony that the body had to be re-embalmed the following day and -- because the condition of the body was not -- a full complete embalming process was not completed at whatever time the embalming was done in the middle of the night.

Q. Okay. Yes, well, so -- but you are not offering an opinion to this court that Mr. Van Wagenen's services were below the standards of the industry in what he did, understanding that he didn't finish -- that he wasn't allowed to finish his work?

A. Well, it's very unusual, very rare to have to re-embalm a body that's been embalmed.

\* \* \* \*

Q. So in that case, you are not critical that Mr. Van Wagenen didn't finish the work when in fact the body was taken from -- from him?

A. But if the body was in a difficult . . . was in a -- such a condition, especially with the time element and so forth, the embalming, to complete the embalming process, it should have been completed at time of embalming rather than wait till the following morning. It's my understanding, what I've read, that the -- what was not done was the -- what we call the aspiration of the body, which is normally done at the time of the arterial injection of the body, especially if there was problems in the embalming of the body at that time or with the condition of the body there were problems. Aspiration is -- is common practice to be done immediately after the arterial injection, not the following day. Some directors may do that at that time, and they may re or do it again the following morning, but not to wait entire -- until the next morning to do the initial aspiration when there's been problems with the embalming process with the condition of the body.

Q. Okay. Your understanding that the body was success -- the embalming was successfully completed?

A. Not if you have to embalm the body a second time, I would not conclude to that.

Q. What -- do you know what they -- what the Pisarski Funeral Home did to the body. When you say they embalmed it a second time, do you know what procedures they employed?

A. They -- they did the complete arterial injection again.

Q. But as you sit here today, you don't know whether that was necessary or not because you never saw this body, correct?

A. No. I -- I personally -- no, of course not. (Tr., pp. 170-174)

Mr. Van Wagenen, who has embalmed an estimated 2500 bodies, testified at length as to his rationale for not doing the cavity work immediately following completion of the arterial embalming.

Q. (by Mr. Myers) Okay. So you would disagree with the -- the testimony from the Pisarskis this



morning that the . . . aspiration should have been done that evening?

A. Correct. And not knowing what the condit --

Q. Okay. Now, explain why . . . in your opinion it was better to wait with that process than do it that evening.

A. The arterial solution that's injected into a body doesn't always penetrate to all parts of the body that fast. When you do the cavity work, again, not to be graphic, but it's called a trocar, which is a long pointed instrument that is inserted into the abdomen to drain the hollow organs and treat them topically basically. When you're having poor circulation, you don't want to do damage to the central circ -- circulatory system, because then you're basically sucking all that solution back out, and then rendering basically the work that you spent null and void. So by waiting, there actually more -- was more penetration, and also the fact then to see if at that point -- they keep talking about re-embalming the body. The body was not fully embalmed, and that was my intention.

Q. Yeah. Why -- why was -- why did you do it that way?

A. Because of the condition of -- of him, it was my belief that by taking my time I would get better results. And I guess that's been proven, because since they did finish the injections, and if they had to go down another point, which I would have done, everything turned out fine. Had I not done that, I don't think they would have had the same results.

Q. Okay. So basically, your experience is that had you done the aspiration that the Pisarskis believe should have been done that evening, the result ultimately would have been a poorer result?

A. Exactly. (Tr., pp. 211-212)

As to his use of Kalon cream and cotton to form the mouth, Mr. Van Wagenen testified in part as follows:

[T]hey do have mouth formers that are used in the industry and I frequently do use them; however, one size does not always fit all, and trimming them down does not always make a natural fit, especially when there's a partial. And families like you to use what's with the individual out of respect, so sometimes you have to use other means. The use of cotton with the Kalon cream, the Kalon cream is applied and mixed in with the cotton so the cotton doesn't dehydrate the mouth. This is another problem with using mouth formers is you can get dehydration in the mouth. It takes longer and it takes more expertise, and a lot of people don't like to take the time with that. His mouth was closed properly. I didn't have any problems doing that, other than the time it takes to -- to -- to secure that. (Tr., p. 208)

Respondents' expert, Alan Vangen, testified that these and other aspects of Mr. Van Wagenen's embalming procedure were consistent with the standards of practice in the industry.

Q. (by Mr. Myers) [Mr. Van Wagenen] discovered that the body did not have an upper denture, so he used cotton and Kalon cream to fill in his mouth. There's been some testimony that it would have been better practice to use a mouth guard -- mouth form, rather than to use the Kalon cream and the cotton. Do you have any comments on whether either of those practices are below the standards employed by the industry?

A. Those are perfectly acceptable. It's whatever gets the job done best and what the practitioner is most comfortable with. There's also another -- there's a very creamy substance that is sometimes used, and I use it myself, that's inserted, and very pliable, that can be used to fill in for features. So there isn't just one way of doing it. There are a number of ways of doing it, and they all achieve the same goal.

Q. Okay. And so that -- one -- the -- not using a mouth form in itself is not below the practices of the -- a reasonable funeral director in this state?

A. No, no.

Q. Okay. The second issue which has been raised is that Mr. Van Wagenen attempted to -- he raised the carotid artery and jugular vein and injected a fluid of sixteen ounces of Plasdopake with sixteen ounces of Metaflow mixed with two gallons of water. Now, the testimony this morning was that this was too weak a formula for the circumstances. And again, I guess my question is, is that formula that Mr. Van Wagenen used within the standards of the industry, knowing that certain practices may vary from funeral director to funeral director?

A. No, that's not necessarily a wrong formula or an inappropriate one. He was -- as time progresses, he would have had to use a stronger formula, but given the circumstances, that would have gotten

the job done, in my estimation.

Q. Okay.

A. I probably maybe would have been using a little bit stronger, but that doesn't mean that it doesn't do the job adequately well. I believe he did a good job in that respect.

Q. Okay. Now, I guess -- and I hadn't told you that after that initial injection, then he later mixed and injected more fluid.

A. Oh, okay. If he injected more fluid, well, yeah, by all means, he was using the right formulation then.

Q. . . . Now, the third thing that he's being criticized for is he held off doing the cavity work until the morning, in -- in Nick's words, to keep vascular pressure in the system. The criticism from the -- from the witnesses this morning was that -- that vascular -- excuse me -- that the cavity work should have been done immediately, that he should not have waited until a later point to begin the cavity work. Is -- is the decision to begin that and let more fluid infuse through versus doing the cavity work immediately something that's within the -- within the standards of funeral practice as you know them?

A. Again, that's an option for the embalmer to exercise. Many embalmers, including myself, usually wait till the next morning and then do the cavity work because of the reason that was cited, so that you can let the tissues be fully permeated with -- with the fluid. Otherwise, you -- with the cavity work done immediately, you're going to be removing a lot of that embalming fluid that's needed to preserve the body.

Q. Okay. Now, the -- the witnesses this morning testified that taking a break -- that -- that once you've started embalming, you -- you need to finish the entire thing and that it -- it would be less than standard or acceptable practice to quit for an hour or two or perhaps more between starting and completing the process. And I take it you would disagree with that assessment.

A. Correct. When it comes to the cavity work, there you -- you do have the option of waiting a number of hours or till the following morning to -- to complete that work. I do the arterial embalming, that you have to continue till it's completed, but the cavity work, there you have an option.

The ALJ accepts the expert testimony of Mr. Vangen as to the basis and justification for the procedures followed by Mr. Van Wagenen in embalming the body. While that testimony was at variance with the testimony of the Pisarski brothers, those witnesses' animosity toward Mr. Jensen and, to a somewhat lesser extent, toward Mr. Van Wagenen was obvious from their testimony. Moreover, their opinions regarding the relative merits of one technique or practice over another were conclusory rather than reasoned. Conversely, Mr. Vangen's testimony, as well as that of Mr. Van Wagenen, was logical and reasoned in terms of the basis for concluding that Mr. Van Wagenen's procedures and practice did not fall below the standards of the profession.

Mr. Vangen's testimony was also at odds with the testimony of Mr. Unbehaun on the question of the delay in performing the cavity work. What is obvious from this and the other testimony is that there is no universal agreement among competent embalmers as to whether there is or is not merit to delaying the cavity work when embalming a body, and there is therefore insufficient evidence that the procedure followed by Mr. Wagenen fell below the standards of the profession.

Finally, there is the issue regarding the failure of either Mr. Jensen or Mr. Van Wagenen to contact the family of the deceased prior to 10:00 a.m. on the morning following removal of the body. There are two aspects to this issue: first, the allegation that the resulting failure to receive authorization to embalm demonstrates the performance of services falling below the minimum standards of the profession; and second, the allegation that failure to contact the family constituted a failure to demonstrate respect for the feelings of individuals involved in the grieving process.

The first of these, the question of authorization, was largely dealt with previously in this opinion, where it was concluded that no specific provision of the Code of Federal Regulations or the board's Administrative Code was violated by failure to receive authorization to embalm. There remains the question, however, whether such failure may nonetheless constitute conduct falling below the standards of the profession, in violation of sec. FD 3.02(6), Code. Mr. Unbehaun was quite adamant in his position that it was such a violation; but that position was completely dominated by his belief that permission to embalm is legally required. Even after conceding that he could point to no provision of the federal or state code that created such a requirement, he persisted in his belief that a funeral director is required by law to contact the family for authorization prior to embalming. That is simply not the case. Mr. Vangen's testimony was that usual and accepted practice in the profession often permits embalming without specific authorization except where there is some factor that would militate against it. He testified in part as follows:

Q. (by Mr. Myers) Now, in this case the testimony has been that, for a number of reasons, neither Nick

nor Al attempted to contact the family after the deceased had been brought back to the funeral home at approximately 2:30 or so in the morning. The testimony this morning was that in every single circumstance, even if the family has told you not -- that it's unnecessary to call, that the funeral director in good practice must call, no matter what the hours are, before starting embalming. Is that consistent with your understanding of the practice in Wisconsin?

A. No, it's not. As far as myself is concerned, I do not call a family in the middle of the night and ask them or request permission for embalming. It's usually an item that they're going to want a viewing anyhow, so this is a necessary procedure, so I don't wake them up in the middle of the night to ask them something that's already a foregone conclusion. I know a number of funeral directors that do that. That's up to their discretion. I feel it's better to call them in the morning and that they will eventually sign a permission for preparation of the remains at one point in time anyhow. If they choose that they don't want embalming, we simply don't charge them for it. But we feel it's best to be prepared because you can't go back and then prepare the body after the fact. We always advance on this notion.

Q. Yeah. Okay. Thank you. Thank you very much. Now, the reason that your practice is not necessarily to call in the middle of the night, is that founded upon respect for the grieving process of the family?

A. Well, just a overall courtesy that you're not waking them up and bothering them with a question that's not comfortable to begin with. Also, we're in an area, and -- and I'm sure Al's in the same area, where there is only a couple religions where embalming is prohibited, and that would be Jewish and Christian Scientist. In my area, there aren't any, and I believe in Al's area there is very limited population.

Q. Yeah. I want to -- I just want to stop you there, Mr. Vangen, in that the information available to Mr. Jensen and Mr. Van Wagenen was that Mr. Pliska, the deceased, was Roman Catholic, had been anointed by a friar upon death, so -

MR. JENSEN: Father.

Q. Father, excuse me, on death, so that he did have that information that -- you know, that this family was not of either Christian Scientist or Jewish religion in their background.

A. Right. So that would signal to me that you better go along and do the necessary preparations and - and get your work taken care of. That's how I would have approached it. (Tr., pp. 260-262)

As stated previously, the preferred procedure, all things being equal, would be to contact a family for permission to embalm before undertaking that procedure. But there is a clear division of opinion among competent practitioners whether awaking a family in the middle of the night to get that permission is required or even advisable. Had the drafters of the Code of Federal Regulations deemed it appropriate to require that permission be granted prior to embalming, they could easily have incorporated that requirement. Similarly, if the Wisconsin Funeral Directors Examining Board had decided that authorization to embalm should be legally required except in particular circumstances, they could also have easily done so by drafting sec. sec. FD 3.02(8), Code, to create that requirement. The fact that neither the federal nor the state regulations were drafted to require authorization is powerful evidence that failure to get authorization in the circumstances presented by this case does not fall below the standards of the profession.

Nor does failure to call the family of the deceased prior to 10:00 on the following morning necessarily demonstrate lack of respect for them. An equally convincing case may be made for the proposition that to have called them in the middle of the night would have demonstrated lack of respect. P.D. died at 7:30 p.m. The hospital did not call Mr. Jensen until 11:30 p.m., and the body did not arrive at the funeral home until approximately 2:30 a.m. To have called the grieving family at that time of the night for no reason other than to receive authorization to embalm seems more an exercise in guaranteeing the receipt of an embalming fee than an exercise in compassion. As testified by Mr. Vangen,

Q. Okay. And it is consistent with your understanding of the practice of other funeral directors in the State of Wisconsin that the practice of calling in the middle of the night no matter what is not a universal practice?

A. No. It's -- I don't do it as a general rule unless there is circumstances that indicate to me that it should be done, but as a rule of thumb, no, I don't. And most of the colleagues in this area here follow suit, as far as my knowledge is concerned.

Q. Okay. And secondly, that it is within the industry norms, as you understand them, to -- in certain circumstances out of respect for the family, to obtain permission to embalm after the embalming has been undertaken?

A. Right, right.

Q. And that is not necessarily in conflict with the rules and regulations and practice of funeral directors in Wisconsin?

A. Correct. Yeah, that's correct. (Tr., pp. 263-264)

There is insufficient evidence of any violation by any of the respondents in this case, and the matter must therefore be dismissed.

Dated this 2nd day of July, 2001.

Respectfully submitted,

Wayne R. Austin

Administrative Law Judge