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ICCFA Magazine author spotlight

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► Poul also provides, to ICCFA members in good standing, free GPL reviews to check for Funeral Rule compliance.

More from this author



► Go to www.iccfa.com to the Cremation Coaching Center, where you can post a question for Lemasters to answer.

CREMATION

What would a jury think?

That's what lawyers and others who lecture about cremation liability tell you to keep in mind anytime you consider taking a shortcut instead of following best practices. Well, what *would* a jury think? We decided to find out.

Behind the eyes of a jury

An in-depth case study of a cremation gone wrong

We constantly hear about the risks involved in handling cremations. We talk about what to do to reduce our liability exposure. We speculate about all the things that could go wrong and the damage that could be inflicted on our businesses and our reputations.

But all of these discussions among death-care professionals and the lawyers who advise them are missing an important ingredient: the views of the people who decide our fate. In other words, jurors.

We read about jury verdicts in cremation lawsuits, but we never get a chance to talk to the jurors involved and find out what they hear, what they talk about in the jury room, what they speculate about and how they react to the evidence they hear.

We decided to do something about that.

At the 2012 ICCFA Convention & Expo in March, I decided to forego my usual lecture and instead recruit a group of death-care professionals to present a mock cremation trial. What made this session unique was not the people involved or the facts of the "case," but the fact that there was a jury.

We could have asked some convention attendees to act as the jury, but we wanted to use "real people," the type of people who would be eligible to serve on such a jury. Using Craigslist (believe it or not!), we found qualified people living in the Las Vegas area who were willing and able and even eager to listen to us present our case and then to deliberate and reach a verdict.

The jurors were all outside the death-care profession. They had no information about cremation other than general knowledge and no prior knowledge of the facts of the case they would be judging. Our jury was truly a blank slate, and we

were interested to hear the jury members' unbiased opinions about our case.

We decided to make the case simple and straightforward, since the jury would not have hours to deliberate. We also avoided making it an outrageous case, a case of wrongful cremation or a deliberate wrongful act.

Instead, the case focused on a simple mistake, a mistake anyone could make. It also involved everyone who might be involved in the cremation process: a funeral home, a crematory and a cemetery.

The facts of the case

In 2010, the husband of the plaintiff (played by Christine Toson Hentges, CCE) was killed in a tragic car accident. The plaintiff chose cremation for her husband and completed all the paperwork. Through the defendant funeral home (Gary Freytag played the owner of the fictional Freytag Funeral Home), the plaintiff had arranged for the cremated remains to be placed into a simple white marble urn at the crematory and then transferred directly to the cemetery.

Freytag Funeral Home transferred the remains of Hentges' husband and of one other decedent to the crematory on the same day. Both decedents were to be placed in identical white marble urns. The Oakhaven Crematory (Corey Gaffney played the owner of the fictional crematory) conducted both cremations and placed both decedents' cremated remains into white marble urns.

The correct cremated remains went into each urn, as indicated by the ID discs with the cremated remains and the labels on the bottom of the urns, which matched. So far, so good. But when the two identical (except, of course, for their contents)



The defense: expert witness (played by Jim Starks), funeral home owner (played by Gary Freytag), crematory owner (played by Corey Gaffney), cemetery manager (played by April Remedies) and defense attorney (played by Don Ferfolia, Esq.).

urns were delivered by the crematory to the Freytag Funeral Home in one case and Oakhaven Cemetery in the other, the accompanying paperwork was somehow switched.

The urn that held the remains of the plaintiff's husband was delivered to the funeral home, along with the paperwork indicating it was the urn containing Mr. Smith's remains. Smith's urn, along with the paperwork for Hentges' husband, was delivered to Memorial Cemetery, where Hentges had chosen permanent memorialization for her husband.

At Memorial Cemetery (the manager of which was played by April Remedies), staff checked the paperwork and saw that it was for Hentges' husband and that the urn was a white marble urn. They did not look at the label on the bottom of the urn or otherwise verify its contents beyond looking at the (wrong) paperwork.

Memorial Cemetery accepted the urn from the crematory driver and placed it in the selected niche in preparation for the memorial service, held under the supervision of Freytag Funeral Home staff.

The driver took the second urn to Freytag Funeral Home, where staff also checked the paperwork without examining the urn beyond noting that it was a white marble urn. Freytag staff accepted the urn from the crematorium's driver and placed it in the funeral home's holding room.

A year later, Freytag Funeral Home staff was going through inventory and realized the cremated remains in the white marble urn were still unclaimed. This time, someone looked at the label on the urn and realized it belonged to Hentges. The

funeral home immediately sent her a letter informing her that she needed to pick up her husband's cremated remains.

Upon receiving this letter, Hentges called the funeral home and reminded them that someone from Freytag had been at the memorial service held at the cemetery and had seen the urn in the niche. An investigation involving the funeral home, cemetery and crematory ensued and it was finally determined that the wrong urns had been delivered to the funeral home and cemetery.

Hentges contacted her attorney (played by me) and I filed a lawsuit against Freytag Funeral Home, Oakhaven Crematory and Memorial Cemetery. Defendants retained an attorney (played by Don Ferfolia, Esq.) and the case proceeded to court (presided over by Judge Julie A. Burn, CCRÉ, CSE).

The case is argued

The case itself played out quickly and focused on one main issue: identification. The plaintiff's argument was based on a duty to identify the deceased at every step of the process, before, during and after cremation.

As plaintiff's counsel, I argued that the defendants' failure to practice identification had caused severe emotional damage to the plaintiff, Hentges. Hentges testified first, sharing her emotional devastation upon learning that she had spent a year visiting the cemetery to view an urn that did not contain her husband's remains. She testified that she finds herself doubting the correct urn is now in the niche and wondering if she ever will be able to believe her husband's remains are in the place she chose.

The plaintiff's case continued with testimony by an expert witness (played by Paul Elvig), who testified about professional standards and norms. Elvig focused on verification as well as identification. Not only did all of the defendants have poor identification procedures in place, none of them had verification procedures, Elvig said.

In his cross-examination, the defendants' counsel focused on the fact that there were enough records to show that the correct bodies had been cremated and placed in the correct urns. While there was a delivery issue, the bodies were properly identified, Ferfolia said.

With the plaintiff's case concluded, the defense presented its case.

The defense counsel quickly took each defendant through the facts of the case, focusing primarily on the fact that the correct body had been cremated and placed in the properly labeled urn. This was not only a mistake simply involving paperwork, it was a mistake that was easily and quickly corrected by the defendants as soon as they found out about the mixup.

In cross-examining the defendants, plaintiff's counsel focused on the fact that none of them had written procedures in place, nor did they have any verification of signed paperwork.

The defense concluded with its own expert witness (played by Jim Starks, CCFE, CCRÉ). Starks verified that there was enough evidence to show that the correct bodies were cremated and that the two white marble urns did in fact hold the correct cremated remains, as indicated by their labels.

CREMATION

JURY A: \$150,000 verdict for the plaintiff

Issue 1: Negligence

Juror	Liability			Total amount
	Funeral home	Crematory	Cemetery	
1	33%	33%	33%	Services & legal fees
2	100%	0%	0%	Services & legal fees
3	33%	33%	33%	Services & legal fees
4	33%	33%	33%	Services & legal fees
5	33%	33%	33%	\$225,000

Issue 2: Emotional distress

Juror	Liability			Total amount
	Funeral home	Crematory	Cemetery	
1	33%	33%	33%	\$150,000
2	33%	33%	33%	\$150,000
3	33%	33%	33%	\$150,000
4	33%	33%	33%	\$150,000
5	33%	33%	33%	\$225,000

JURY B: \$1,000,000 verdict for the plaintiff

Issue 1: Negligence

Juror	Liability			Total amount
	Funeral home	Crematory	Cemetery	
1	33%	33%	33%	\$500,000
2	33%	33%	33%	\$500,000
3	25%	50%	25%	\$1,000,000
4	33%	33%	33%	Services & legal fees
5	40%	20%	40%	\$500,000

Issue 2: Emotional distress

Juror	Liability			Total amount
	Funeral home	Crematory	Cemetery	
1	33%	33%	33%	\$500,000
2	33%	33%	33%	\$500,000
3	25%	50%	25%	\$500,000
4	33%	33%	33%	\$150,000
5	33%	33%	33%	\$500,000

Starks also testified that this was a simple paperwork error in which the wrong urn was delivered with the wrong paperwork. Upon cross-examination, he also agreed that if proper verification had been performed by any one of the defendants, this mistake could have been prevented.

After brief closing arguments, Judge Burn dismissed the jury for deliberations.

The juries make their decisions

We had enough people volunteer for jury duty that we decided to split them into two juries, Jury A and Jury B, each comprised of five members. You never know what will happen with a jury, and we thought having two separate juries might better illustrate that fact.

And, in fact, what this session demonstrated is that whether you are in the right or

in the wrong, it is what the jury understands and believes that matters.

The jury was asked to make decisions about two causes of actions. The first cause was negligence and the second was for emotional damages. Though the defendants' cases were argued together for the sake of simplicity, the juries were asked to determine whether each party (funeral home, crematory, cemetery) was liable and if so, to what extent. They also were asked to determine how much the plaintiff should receive in damages from each party held liable.

Both juries came back with a unanimous decision in favor of the plaintiff for both causes. However, Jury A granted the plaintiff \$150,000 in damages, while Jury B awarded the plaintiff \$1 million—a significant difference.

Examining the jurors' reasoning

An important byproduct of this unusual convention session was that, through correspondence with the jury members, we were able to ask them follow-up questions about the case and about their views of the cemetery, cremation and funeral profession as a whole. And the jurors were able to ask us follow-up questions, as well.

One of the jurors' most common questions to us was about the defendants' lack of written policies and procedures, as cited during the trial. Why didn't the crematory, funeral home and cemetery have written policies and procedures to prevent the sort of mixup involved in this case?

Many of the jurors commented that without any written policies and procedures it seemed inevitable that the defendants would make a mistake like the one in the trial sooner or later.

Sad to say, a lack of written policies and procedures is far too common in our profession.

The jurors also asked about the fact that one of the urns had been stored in the funeral home for a year. The case didn't go into the details about how the urn was stored, and some of the jury members pictured it having spent a year sitting on the floor in a closet (or worse, a broom closet). They felt that was unprofessional and very disrespectful.

Some jurors made comments about the defendants' manner, which they termed "unprofessional." They perceived a lack of concern for the family, a business mentality

CREMATION

Seven out of the 10 jurors classified it as a frivolous lawsuit. Yet not one of them found for the defendants, and all of them awarded the plaintiff damages.



Members of one of the juries listen to testimony and take notes.

and a lack of attention to detail, all of which made them view the defendants as more liable.

The jurors initially had a lot to say about who they felt was most liable. The tables on page 28 reflect their feelings on the day of the trial. Since then, some of them have changed their feelings a bit, according to our email correspondence.

Most of the jurors still believe the three defendants were equally liable, but those who believe otherwise have made some really interesting arguments:

- A couple of jurors argued that the funeral home was more liable—one said the mixup was entirely the funeral home's fault. Their argument was that the funeral home was in charge and had a duty to make sure everything happened correctly.

- A few jurors decided the crematory was entirely at fault because it was responsible for delivering the wrong urns to the cemetery and the funeral home. Their argument was that if the crematory had better procedures in place, that would not have happened.

Several jurors mentioned that they would have liked more information about the driver who delivered the urns. They would have liked to see that person testify so they could judge his or her credibility for themselves.

- And a few jurors felt the cemetery was entirely at fault. As one said, "If they would have just checked the urn, then this never would have happened."

That quote reminded me of something the judge said in the Noble, Georgia, cremation scandal trial, to the effect that

if anyone had bothered to check out the crematory, it never would have happened.

As far as what influenced the jury to rule in favor of the plaintiff, jurors cited the plaintiff and her attorney. Many jurors were convinced the plaintiff was truly hurt by the defendants' actions. They felt they had to help her, since no one else had done so.

They also said they were influenced by the plaintiff's attorney. One juror commented on the plaintiff's attorney asking the funeral home manager if they had changed their procedures since this incident. The defendants' counsel objected to the question, but the message got through: The funeral home knew there was a better way to do things.

One interesting thing most of the jurors said is that they don't believe in frivolous lawsuits. Many of them felt this was simply a case where a mistake had been made. In fact, seven out of the 10 jurors classified it as a frivolous lawsuit. Yet not one of them found for the defendants, and all of them awarded the plaintiff damages.

What does it all mean?

No one plans on making a mistake, but mistakes happen, and in today's world, mistakes can and often do lead to lawsuits. What this case should teach us is people can and do react differently to the same set of facts. A provider can see a situation one way while the person being served sees it another, and if it goes to court, the jurors will see things their own way.

In any dispute, including a lawsuit, the parties involved see and interpret

things differently. The important thing to remember is that when you argue in front of a jury, the jurors' understanding, beliefs and interpretations will decide the matter. In this case, there were jurors who wanted to award the plaintiff a lesser amount in damages but went along with the majority in agreeing to a higher amount.

It's that unknown that is so scary when you go to trial.

(An aside: Even though this was just a demonstration, I barely slept the night before the session, having realized that I had placed the success of the presentation in the hands of 10 people I didn't know. My goal was to for this "trial" to make it clear why having written policies and procedures is so important. If the juries found for the defendants, what was I going to say?)

One common misconception people involved in a lawsuit have is that if they did the right thing they will be vindicated. Our legal system may be constructed on a framework of determining right from wrong, but it's a subjective standard. Both juries found for the plaintiff, but one granted almost seven times as much money in damages.

What should you take away from this experiment?

The jurors thought this was a frivolous lawsuit, but they also felt the family had been mistreated. Part of that mistreatment involved poor communication. Make sure you have in place procedures to communicate properly with the families you serve.

The jury wanted to see something tangible that would tell them the correct way to handle these matters so they could judge whether the funeral home, crematory and cemetery had acted properly. Take the time to establish and document your policies and procedures. And then make sure you enforce them!

Mistakes will happen, and it's how you handle them that may determine how well your organization recovers. As one juror said, "Mistakes will always happen, and sometimes people should be punished, but it's what people do to correct those mistakes that determine the punishment."

If you convey a true belief in what you do and an appreciation for those you serve, it will help you. □