

RULES AND REGULATIONS

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE BOARD OF FUNERAL DIRECTORS [49 PA. CODE CH. 13] Unprofessional Conduct

The State Board of Funeral Directors (Board) amends §§ 13.1 and 13.202 (relating to definitions; and unprofessional conduct) to read as set forth in Annex A.

Description and Need for the Rulemaking

Section 11(a)(5) of the Funeral Director Law (act) (63 P. S. § 479.11(a)(5)) authorizes the Board to discipline licensees for “misconduct in the carrying on of the profession” of funeral director. Although the act does not define “misconduct,” the Board, in its disciplinary actions, applied prior court interpretation of the term. See, for example, *Toms v. State Board of Funeral Directors*, 800 A.2d 342, 349 (Pa. Cmwlth. 2002) (misconduct is a breach of the generally accepted canons of ethics and propriety governing the reverential and respectful burial of the dead). Acting under its statutory authority, the Board has listed in § 13.202 various acts that the Board considers to be misconduct. Recent disciplinary cases before the Board concerning professional misconduct inspired the Board to expand that list. Including acts of misconduct in the regulation serves to put licensees on notice of what the Board considers to be misconduct.

Summary of Comments and Responses to Proposed Rulemaking

The Board published notice of proposed rulemaking at 35 Pa.B. 1208 (February 12, 2005) with a 30-day public comment period. The Board received written comments from the following members of the public: Kevin M. Bean, FD; Patrick J. Connell, FD; Robert M. Fells of the International Cemetery and Funeral Association; John R. Flynn, FD; Drew Gauntley of Alderwoods Group; Ernie Heffner, FD; David A. Heisterkamp of Pre-Need; Paul L. Henney, Jr., FD; James J. Kutz, Esquire, on behalf of the Pennsylvania Cemetery and Funeral Association; Harry C. Neel, FD; Michele Pirro; Kathleen K. Ryan, Esquire, on behalf of the Pennsylvania Funeral Directors Association (PFDA); State Representative Stephen H. Stetler; Ronald W. Virag of AmeriServe Trust and Financial Services Company; and Sam Cummings, Jr., FD, of PFDA.

The Board also received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC) as part of their review of proposed rulemaking under the Regulatory Review Act (71 P. S. §§ 745.1—745.12). The Board did not receive comments from the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) as part of its review of proposed rulemaking under the Regulatory Review Act.

In response to questions from various commentators, the Board has provided a definition of “funeral entity” used in § 13.202(13) and (14). This term is intended to encompass any of the various organizational forms that, under sections 8(a), (b) and (d) and 9(a) of the act (63

P. S. §§ 479.8(a), (b) and (d) and 9(a)), may be licensed by the Board to operate a funeral establishment. The term is defined to include a restricted business corporation, professional corporation, pre-1935 corporation, partnership, sole proprietorship, widow, widower or estate authorized by the Board to practice the profession of funeral directing.

The Board proposed amending § 13.202(11), which states that unprofessional conduct includes providing embalming or other services or merchandise without receiving written permission from the family, to provide an exception when a person authorized to give that permission is not available and there is a need to provide that service or merchandise in a timely manner. Various commentators pointed out that the Federal Trade Commission’s (FTC) Amended Funeral Rule addresses these situations. Accordingly, the Board deleted this proposed amendment. In its place, the Board added § 13.202(16) to provide that unprofessional conduct includes failing to comply with the regulations of the FTC in 16 CFR Part 453 (relating to funeral industry practices).

As proposed, new § 13.202(13) would have prohibited a funeral director from retaining funds for goods or services that the funeral director has not provided, or that exceeded the value of funeral goods and services that the funeral director has provided. Various commentators, including the HPLC and IRRC, were concerned about how this proposed amendment would impact preneed funeral arrangements. When the funeral director has received those funds under a preneed agreement, the Board concludes that issues concerning entitlement to payment should be addressed through comprehensive rulemaking specific to preneed funeral arrangements. Accordingly, in this final-form rulemaking the Board has specifically excluded preneed funeral arrangements. Also as proposed, paragraph (13) would have permitted a funeral director to preserve the funds for a reasonable time to permit a person to demonstrate his right to receive the funds. In response to comments expressing confusion as to this provision, the Board deleted this additional provision.

Because section 8 of the act sets forth various forms of organization that may engage in the practice of funeral directing, including a sole proprietor or partnership and certain corporations, and imposes certain restrictions on these entities, the Board proposed adding § 13.202(14) to prohibit a funeral director from performing funeral director services on behalf of an entity that the funeral director knew or should have known was not in compliance with section 8 of the act. The HPLC commented that, because the statutory grounds for disciplinary action includes no required mental state, the Board should not inject this requirement by regulation. Proposed § 13.202(14) extends beyond existing § 13.202(1) to address the specific requirements for these funeral entities in section 8 of the act, such as employing a supervisor and having appropriately qualified shareholders and officers. Because the Board concludes that the licensee’s knowledge of those facts beyond the mere fact of licensure is critical to determining the propriety of the licensee’s conduct, the Board will retain the required mental state standard.

The Board proposed adding § 13.202(16) to prohibit a funeral director from refusing a reasonable request of a member of the decedent’s immediate family to pay final respects. In response to various comments, the Board decided not to adopt this provision.

The Board proposed adding § 13.202(17) to prohibit a funeral director from aiding a person or entity that the funeral director has reason to believe is attempting through unlicensed persons or entities to engage in preneed sales. Subsequent to the publication of the proposed rulemaking, the Federal District Court for the Middle District of Pennsylvania noted in *Walker v. Flitton*, 364 F. Supp. 2d 503 (M.D. Pa. 2005), that the Board has not set forth by regulation what unlicensed employees and agents may lawfully do in the realm of preneed sales. Accordingly, the Board decided not to adopt this paragraph as part of its misconduct regulation and instead will address this issue through separate rulemaking.

Fiscal Impact and Paperwork Requirements

The final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions and will impose no additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

Effective Date

The final-form rulemaking will become effective upon publication in the *Pennsylvania Bulletin*.

Statutory Authority

The final-form rulemaking is authorized under sections 11(a)(5) and 16(a) of the act.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 12, 2005, the Board submitted a copy of the notice of proposed rulemaking, published at 35 Pa.B. 1208 (February 12, 2005), to IRRC and the Chairpersons of the HPLC and the SCP/PLC for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the HPLC and the SCP/PLC were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the HPLC, the SCP/PLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on March 21, 2007, the final-form rulemaking was approved by the HPLC. On April 4, 2007, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on April 5, 2007, and approved the final-form rulemaking.

Additional Information

Persons who require additional information about the final-form rulemaking should submit inquiries to Michelle T. Smey, Administrator, State Board of Funeral Directors, P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-3397, st-funeral@state.pa.us.

Findings

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) The amendments to this final-form rulemaking do not enlarge the scope of proposed rulemaking published at 35 Pa.B. 1208.

(4) The final-form rulemaking adopted by this order is necessary and appropriate for the administration of the act.

Order

The Board, acting under its authorizing statute, orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 13, are amended by amending §§ 13.1 and 13.202 to read as set forth in Annex A with ellipses referring to the existing text of the regulations.

(Editor's Note: The amendment to § 13.1 was not included in the proposed rulemaking published at 35 Pa.B. 1208.)

(b) The Board shall submit this order and Annex A to the Office of Attorney General and the Office of General Counsel for approval as required by law.

(c) The Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) The final-form rulemaking shall take effect upon publication in the *Pennsylvania Bulletin*.

ANTHONY SCARANTINO,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 37 Pa.B. 1940 (April 21, 2007).)

Fiscal Note: Fiscal Note 16A-4814 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 13. STATE BOARD OF FUNERAL DIRECTORS

GENERAL PROVISIONS

§ 13.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Funeral entity—A restricted business corporation, professional corporation, pre-1935 corporation, partnership, sole proprietorship, widow, widower or estate authorized by the Board to practice the profession of funeral director.

* * * * *

STANDARDS OF PRACTICE AND CONDUCT

§ 13.202. Unprofessional conduct.

Unprofessional conduct includes the following:

(1) Aiding or assisting a funeral director whose license has been suspended or revoked or an unlicensed person to engage in an act or practice for which a license is required.

(2) Demonstrating disrespect toward or mutilating the remains of the deceased person.

(3) Making a comment or public announcement in defamation of another funeral director. This does not prohibit one licensee from testifying against another licensee or from filing a bona fide complaint with the Board.

(4) Participating in the establishment of a business or professional relationship with or in the operation of a burial association, mutual assessment association, burial certificate plan, insurance company, lodge company, society or religious or other organization whose plan or scheme of organization or operation limits or interferes with the rights of a person entitled by law to dispose of the body of a deceased member, policyholder or certificateholder.

(5) Paying or extending an offer to pay or give to a person, agency or group a commission or a valuable consideration for the solicitation or procurement of clientele.

(6) Offering, directly or indirectly, or giving money or an item of value to an employee of the Commonwealth to directly or indirectly influence the administration or enforcement of the act or this chapter, except for the payment of fees required by the act and this chapter.

(7) Failing to notify the Bureau, in writing, of a demand, solicitation or attempted extortion of money or an item of value, by or on behalf of an employee assigned to the administrative jurisdiction of the Commissioner, and failing to furnish additional information reasonably requested.

(8) Attempting to influence the judgment of the family in the selection of a funeral director, funeral arrangements or funeral merchandise when a family group is divided on these issues.

(9) Aiding or abetting another licensed funeral director to violate the act or this chapter.

(10) Failure to fulfill the professional responsibilities of a funeral director as described in the act or this chapter.

(11) Furnishing embalming, other services or merchandise without having obtained written permission from a family member or other person authorized by law to make funeral arrangements for the deceased. Oral permission to embalm, followed by a confirmatory e-mail, fax, telex, telegram, mailgram or other written confirmation will be acceptable.

(12) Renting or exchanging funeral establishments by one or more funeral directors for the purpose of creating a secondary location for funeral services. Renting of an establishment for funeral services by a funeral director over 10 times a year shall be evidence of attempting to create a secondary location.

(13) Retaining funds intended to pay for funeral goods and services when the funeral director and funeral entity have not provided any funeral goods and services or when the amount of funds retained is in excess of the value of funeral goods and services actually provided by the funeral director or funeral entity, as set forth on the general price list in effect at the time the funeral goods and services are actually provided. This paragraph does not apply to funds received under an agreement entered into by the funeral director, or the funeral entity employing that funeral director, while the decedent was still living to provide funeral goods or services on behalf of the decedent when needed.

(14) Performing funeral services on behalf of a funeral entity that the funeral director knew, or should have known, was not in compliance with section 8 of the act (63 P. S. § 479.8), regarding conduct of business.

(15) Refusing to release remains until consideration, whether earned or not, has been paid.

(16) Failing to comply with the regulations of the Federal Trade Commission in 16 CFR Part 453 (relating to funeral industry practices).

[Pa.B. Doc. No. 07-932. Filed for public inspection May 25, 2007, 9:00 a.m.]