

Regulatory Analysis Form

This space for use by IRRC

RECEIVED
2005 FEB -2 PM 1:54
INDUSTRY REGULATION
REVIEW COMMISSION

(1) Agency

Department of State, Bureau of Professional and Occupational Affairs, State Board of Funeral Directors

(2) I.D. Number (Governor's Office Use)

16A-4814

IRRC Number: 2459

(3) Short Title

Unprofessional conduct

(4) PA Code Cite

49 Pa. Code § 13.202

(5) Agency Contacts & Telephone Numbers

Primary Contact: **Thomas A. Blackburn, Counsel,
State Board of Funeral Directors (717) 783-7200**
Secondary Contact: **Joyce McKeever, Deputy Chief,
Counsel, Department of State (717) 783-7200**

(6) Type of Rulemaking (check one)

Proposed Rulemaking
 Final Order Adopting Regulation
 Policy Statement

(7) Is a 120-Day Emergency Certification Attached?

No
 Yes: By the Attorney General
 Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

The proposed amendment to the Board's unprofessional conduct regulation would provide for additional grounds of misconduct in the profession. The regulation at 49 Pa. Code § 13.202 would be amended to define misconduct to include retaining funds without providing goods or services, performing funeral services on behalf of an unlicensed entity, refusing to release remains until paid, refusing to permit a family member to pay final respects, and aiding someone using unlicensed persons to sell preneed funeral services. Additionally, the amendment would provide that the inability to find a family member to authorize the provision of funeral goods or services is an exception to the requirement that a funeral director must always have written authorization prior to providing any goods or services.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

The regulatory amendments are adopted under Sections 11(a)(5) and 16(a) of the Funeral Director Law (63 P.S. §§ 479.11(a)(5), 479.16(a)).

Regulatory Analysis Form

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

No. However, Section 11(a)(5) of the Funeral Director Law authorizes the Board to discipline licensees for “misconduct in the carrying on of the profession” of funeral director. This amendment would provide additional grounds of misconduct for discipline.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

Section 11(a)(5) of the Funeral Director Law authorizes the Board to discipline licensees for “misconduct in the carrying on of the profession” of funeral director. Although this provisions tends to be very general, the Board has the authority under case law to apply it to the circumstances of a given case. The Board is not attempting to impose additional regulatory requirements, but to codify various disciplinary holdings of the Board. The proposed amendment clarifies licensee prohibitions under Section 11(a)(5).

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

Without regulation, licensees may be unaware that certain conduct constitutes misconduct, despite the Board’s holding in various licensure disciplinary matters.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

Licensees and their customers will benefit from this regulation, because it more clearly defines what is prohibited of licensees. Currently, there are approximately 7640 licensed funeral directors, of who approximately 3870 are active.

Regulatory Analysis Form

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

The proposed regulation will apply to all licensed funeral directors, as identified in the prior question. The Board has identified no other group of individuals or entities that will be adversely affected by the regulation.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

All persons holding licenses to practice funeral directing will be required to comply with the regulation. Currently, there are approximately 7640 licensed funeral directors, of whom the licenses of approximately 3870 are active.

(16) Describe the communications with and input from the public in the development and drafting of the regulation: List the persons and/or groups who were involved, if applicable.

In July, 2000, the Board solicited exposure draft comments from the Pennsylvania Funeral Directors Association and all individuals who had attended any Board meeting during the preceding year. The Board received pre-draft comments only from Pennsylvania Pre-Need Association (PPNA).

PPNA commented that § 13.202(13) would endorse the view that pre-need accounts are freely revocable and suggested that this issue be left to the General Assembly. PPNA also commented that § 13.202(17) raised the complex issue of sale of pre-need funeral goods and services through unlicensed individuals, that should be deferred until completion of appellate review of the Board's disciplinary adjudication in *BPOA v. Andrew D. Ferguson, III, FD* (docket no. 0103-48-1998). The Board was subsequently affirmed on appeal, *Ferguson v. Pa. State Bd. of Funeral Directors*, 768 A.2d 393 (Pa. Cmwlth. Ct. 2001), *application for allowance of appeal denied*, ___ Pa. ___, 782 A.2d 549.

Although the Board extensively discussed the pre-draft comments received from PPNA, the Board did not revise its proposed regulation in response to those comments. Section 13.202(13) applies only to the use of pre-need funds after death, and not to any revocation of the pre-need contract. Moreover, the Board's position in *Ferguson* has been affirmed.

Regulatory Analysis Form

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

Based on the Board's enforcement experience, the vast majority of licensees currently adhere to the professional standards embodied in the proscriptions of the proposed amendments. Therefore, the cost to most members of the regulated community associated with compliance with the proposed amendments would be nominal. In addition, there may be a savings to the regulated community by being better able to avoid disciplinary action through a better understanding of what constitutes misconduct.

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

There are no costs or savings to local governments associated with compliance with the proposed amendments.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

There are no costs to state government associated with implementation of the proposed amendments. There will be a small savings to the Board by no longer having to review and issue approval of licensee forms.

Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY 04-05	FY+1 05-06	FY+2 06-07	FY+3 07-08	FY+4 08-09	FY+5 09-10
SAVINGS:	N/A	N/A	N/A	N/A	N/A	N/A
Regulated Community						
Local Government						
State Government						
Total Savings						
COSTS:	N/A	N/A	N/A	N/A	N/A	N/A
Regulated Community						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:	N/A	N/A	N/A	N/A	N/A	N/A
Regulated Community		**				
Local Government						
State Government						
Total Revenue Losses						

(20a) Explain how the cost estimates listed above were derived.

Not applicable.

Regulatory Analysis Form

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY-3 (FY 00-01)	FY-2 (FY 01-02)	FY-1 (FY 02-03)	Current FY (FY 03-04)
Pa. State Board of Funeral Dir.	\$524,000	\$506,000	\$550,000	\$558,000

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

No adverse effects or costs have been associated with compliance with the regulations, though there may be a small savings. Therefore, the above-identified benefits would outweigh any adverse effects and cost.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

Because the proposed amendments would effectuate the Funeral Director Law, the Board considered no non-regulatory alternatives.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

No alternative regulatory schemes were considered, because no other regulatory schemes would effectuate the Funeral Director Law.

Regulatory Analysis Form

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

The proposed regulatory amendments do not overlap or conflict with any federal requirements.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

Funeral directors in the states of Delaware, Maryland, New York, New Jersey, Ohio and West Virginia are subject to disciplinary action for committing misconduct in the profession, as defined in each of those jurisdictions. The proposed regulation does not change the substantive law in Pennsylvania, but merely codifies prior Board interpretations of the Funeral Director Law. This regulatory amendment will not put Pennsylvania at a competitive disadvantage.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

This regulation will have no effect on other regulations of the Board or other state agencies.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

The Board reviews its regulatory proposals at regularly scheduled public meetings, generally the first Wednesday of each month. More information can be found on the Board's web-site (www.dos.state.pa.us/funeral), or by calling the Board office at (717) 783-3397.

Regulatory Analysis Form

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

No.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The Board has determined that there are no special needs of any subset of its applicants or licensees for whom special accommodations should be made.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The regulation will be effective upon publication in final form in the Pennsylvania Bulletin.

(31) Provide the schedule for continual review of the regulation.

The Board continually reviews the efficacy of its regulations, as part of its annual review process under Executive Order 1996-1.

CDL-1

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

RECEIVED

2005 FEB -2 PM 1:54

LEGISLATIVE SECRETARY
REVIEW COMMISSION

2459

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality. Attorney General

Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:

Copy below is approved as to form and legality. Executive or Independent Agencies.

BY: Amy M. Elliott
(DEPUTY ATTORNEY GENERAL)

State Board of Funeral Directors
(AGENCY)

BY: Tanya C. Gable

OCT 14 2004

DOCUMENT/FISCAL NOTE NO. 16A-4814

6/11/04
DATE OF APPROVAL

DATE OF APPROVAL

DATE OF ADOPTION:

(Deputy General Counsel
(~~Chief Counsel~~)
Independent Agency
(Strike inapplicable title)

BY: Joseph A. Fluehr, III
Joseph A. Fluehr, III, FD

[] Check if applicable
Copy not approved.
Objections attached.

TITLE: Chairperson
(EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)

[] Check if applicable.
No Attorney General approval
or objection within 30 day
after submission.

PROPOSED RULEMAKING

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF FUNERAL DIRECTORS

49 Pa. Code § 13.202
UNPROFESSIONAL CONDUCT

The State Board of Funeral Directors (Board) proposes to amend § 13.202 (relating to unprofessional conduct), to read as set forth in Annex A.

Effective date

The amendments will be effective upon publication of the final-form regulation in the *Pennsylvania Bulletin*.

Statutory Authority

The amendments are authorized under Sections 11(a)(5) and 16(a) of the Funeral Director Law (63 P.S. §§ 479.11(a)(5) and 479.16(a)).

Background, Need and Description of the Proposed Amendment

Section 11(a)(5) of the Funeral Director Law authorizes the Board to discipline licensees for “misconduct in the carrying on of the profession” of funeral director. Although the Funeral Director Law does not define the term misconduct, the Board in its disciplinary actions has applied prior court interpretation of the term. *See, for example, Toms v. State Board of Funeral Directors*, 800 A.2d 342, 349 (Pa. Cmwlth. Ct. 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 have 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.

A funeral director might come into possession of funds of a decedent or intended for a decedent, even if the funeral director does not provide funeral goods or services for that decedent. Proposed § 13.202(13) would prohibit a funeral director from retaining funds for goods or services that the funeral director has not provided or that exceed the value of funeral goods and services that the funeral director has provided. This provision would permit the funeral director a reasonable amount of time to ascertain that any person to whom the funeral director would transfer the funds is entitled to receive them.

Section 8 of the Funeral Director Law sets forth various forms of organization that may engage in the practice of funeral directing, including as sole proprietor or partnership and certain corporations. Anyone practicing funeral directing in any of these forms must be licensed by the Board. Proposed § 13.202(14) would prohibit a funeral director from performing funeral director services on behalf of an establishment that the funeral director knows, or should know, is not properly licensed to engage in funeral directing.

A funeral director must release a decedent’s remains upon request of the family. Section 13.201(5) provides that the professional responsibility of a funeral director includes releasing remains to the funeral director chosen by the family if the remains were removed prior to contacting the family. A funeral director may not refuse to release a decedent’s remains as a means to enforce

payment for services or merchandise. *See Toms* at 349. Proposed § 13.202(15) would codify this prohibition. Enforcement of a payment obligation must be through other means, such as subsequent billing or legal process.

Because it is the last opportunity to do so, proposed § 13.202(16) would prohibit a funeral director from refusing a reasonable request of a member of the decedent's immediate family to pay final respects. The immediate family would include the decedent's spouse, parents, grandparents, siblings, children and grandchildren. The provision does not require the funeral director to permit any of these persons to participate in a funeral service. Instead, upon request, the funeral director must make available a reasonable opportunity to pay final respects, regardless of any instructions from the funeral director's customer who is paying for the funeral director's services.

Section 13(c) of the Funeral Director Law prohibits a person who is not licensed as a funeral director, either directly or through an agent, from entering into a contract with a person then living to provide funeral services at the time of the person's subsequent death. This provision prohibits any unlicensed person from engaging in preneed sales, even on behalf of a funeral director. *See Ferguson v. State Board of Funeral Directors*, 566 A.2d 670 (Pa. Cmwlth. Ct. 2001), *appeal denied*, 566 Pa. 670, 782 A.2d 549. Proposed § 13.202(17) would prohibit a funeral director from aiding any person or entity that the funeral director has reason to believe is attempting through unlicensed persons or entities to engage in preneed sales.

Additionally, the Board proposes to amend § 13.202(11) concerning the requirement that a funeral director obtain permission from the family prior to furnishing embalming or other services or merchandise. A funeral director might be unable to locate family members, despite making reasonable good-faith attempts to locate them. However, there may be very good reasons why certain service must be provided at that time. The proposed amendment would permit the funeral director to provide these necessary services, so long as the funeral director has no reason to think the family would refuse. This proposed amendment is consistent with the Federal Trade Commission's Amended Funeral Rule (15 CFR § 453.5), which provides that it is an unfair or deceptive trade practice for a provider of funeral services to embalm a deceased human body for a fee unless the law requires embalming, the family has given prior approval, or the provider is unable to contact an appropriate person to give approval for embalming after exercising due diligence, has no reason to believe the family does not want embalming, and obtains subsequent approval for embalming already performed. In general, the proposed amendment to § 13.202(11) would permit a funeral director to charge for funeral services provided prior to obtaining permission by obtaining that permission after the fact. However, the proposed amendment to § 13.202(11) would not permit a funeral director to charge for embalming provided prior to obtaining permission, unless the embalming is necessary and appropriate for other services, such as public viewing, selected by the person paying for the overall funeral goods and services.

Compliance with Executive Order 1996-1

The Board solicited input from and provided an exposure draft of this proposed amendment to funeral directors and organizations as required under the directives of Executive Order 1996-1 (February 6, 1996). In addition, the Board considered the impact the regulation would have on the

regulated community and on public health, safety and welfare. The Board finds that the proposed amendment addresses a compelling public interest as described in this Preamble and otherwise complies with Executive Order 1996-1.

Fiscal Impact and Paperwork Requirements

The proposed amendments will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The amendments will impose no additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

Sunset Date

The Board continuously monitors the cost effectiveness of its regulations. Therefore, no sunset date has been assigned.

Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on February 2, 2005, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate Consumer Protection and Professional Licensure Committee and the House Professional Licensure Committee. A copy of this material is available to the public upon request.

Under Section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly, and the Governor of comments, recommendations or objections raised.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to Michelle Smey, Administrator, State Board of Funeral Directors, P. O. Box 2649, Harrisburg, PA 17105-2649, within 30 days following publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Please reference No. 16A-4814 (Unprofessional conduct), when submitting comments.

Joseph A. Fluehr, III, FD
Chairperson

ANNEX A

PENNSYLVANIA CODE

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. Professional and Occupational Affairs

CHAPTER 13. STATE BOARD OF FUNERAL DIRECTORS

STANDARDS OF PRACTICE AND CONDUCT

* * *

§ 13.202. Unprofessional conduct.

Unprofessional conduct includes the following:

* * *

(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. A funeral director who has made reasonable attempts, without success, to locate family members or other persons authorized by law to make funeral arrangements for a deceased may provide embalming or other services without having obtained permission where there is a legitimate need to provide that service at that time and no facts known to the funeral director suggest that any authorized person, if requested, would refuse to give permission. A funeral director who has provided funeral service without obtaining prior permission may not charge for the service unless (i) the provision of services without prior permission is

authorized by this paragraph, and (ii) the person paying for funeral goods and services agrees to pay for the previously unauthorized service. A funeral director who has embalmed without obtaining prior permission may not charge or accept payment for the embalming unless (i) the embalming without prior permission is authorized by this paragraph, and (ii) embalming is necessary and appropriate for other services, such as a public viewing, subsequently selected by the person paying for funeral goods and services.

* * *

(13) Retaining funds intended to pay for funeral goods and services where the funeral director and establishment have not provided any funeral goods and services or where the amount of funds retained is in excess of the value of funeral goods and services actually provided by the funeral director or establishment. A funeral director may preserve the funds for a reasonable amount of time for a person to demonstrate a legal entitlement to receive the funds or to receive payment of funds owed to the decedent.

(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) (relating to conduct of business).

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

(16) Refusing the reasonable request of any known member of a decedent's immediate family the opportunity to pay final respects, regardless of who is paying for funeral services or merchandise. For purposes of this paragraph, the immediate family includes spouse, sibling, parent, grandparent, child, and grandchild.

(17) Aiding any person or entity that the funeral director has reason to believe is

attempting through unlicensed persons or entities to engage in the sale of funeral services for a person then living.



RECEIVED

2005 FEB -2 PM 1:53

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF FUNERAL DIRECTORS

Post Office Box 2649
Harrisburg, Pennsylvania 17105-2649
(717) 783-3397

February 2, 2005

The Honorable John R. McGinley, Jr., Chairman
INDEPENDENT REGULATORY REVIEW COMMISSION
14th Floor, Harristown 2, 333 Market Street
Harrisburg, Pennsylvania 17101

Re: Proposed Regulation
State Board of Funeral Directors
16A-4814: Unprofessional Conduct

Dear Chairman McGinley:

Enclosed is a copy of a proposed rulemaking package of the State Board of Funeral Directors pertaining to Unprofessional Conduct.

The Board will be pleased to provide whatever information the Commission may require during the course of its review of the rulemaking.

Sincerely,

Janice H. Mannel, FD, Chairperson
State Board of Funeral Directors

JAF/TAB:law

Enclosure

cc: Albert H. Masland, Chief Counsel
Department of State
Basil L. Merenda, Commissioner
Bureau of Professional and Occupational Affairs
Joyce McKeever, Deputy Chief Counsel
Department of State
Cynthia Montgomery, Regulatory Counsel
Department of State
Herbert Abramson, Senior Counsel in Charge
Department of State
Thomas A. Blackburn, Counsel
State Board of Funeral Directors
State Board of Funeral Directors

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 16A-4814
SUBJECT: State Board of Funeral Directors - Unprofessional Conduct
AGENCY: DEPARTMENT OF STATE

2459

TYPE OF REGULATION

- Proposed Regulation
- Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

RECEIVED
 2005 FEB -2 PM 1:53
 HOUSE OF REPRESENTATIVES
 REGULATORY REVIEW COMMISSION

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
2/2/05	<i>Sandra J. Hager</i>	HOUSE COMMITTEE ON PROFESSIONAL LICENSURE
2/2/05	<i>Mary Walmer</i>	SENATE COMMITTEE ON CONSUMER PROTECTION & PROFESSIONAL LICENSURE
2/2/05	<i>Kirsten M.</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL (for Final Omitted only)
2/2/05	<i>C. La. Bar</i>	LEGISLATIVE REFERENCE BUREAU (for Proposed only)