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House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

CHAIRMAN
PROFESSIONAL LICENSURE COMMITTEE

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March 31, 2005

John R. McGinley, Jr., Chairman
Independent Regulatory Review Commission
14th Floor, Harrisburg 2
333 Market Street
Harrisburg, PA 17101

Dear Chairman McGinley:

The House Professional Licensure Committee held a meeting on March 30, 2005, to consider the following:

Regulation 16A-4615 – Final rulemaking of the State Board of Dentistry relating to biennial renewal fees – dentists and restricted anesthesia permit II. The committee voted to approve the regulation.

Regulation 16A-4614 – Final rulemaking of the State Board of Dentistry relating to the administration of general anesthesia, deep sedation, conscious sedation and nitrous oxide/oxygen analgesia. The committee voted to approve the regulation.

Regulation 16A-675 – Final rulemaking (proposed omitted) of the State Board of Occupational Therapy relating to oral orders. The committee voted to approve the regulation.

Regulation 16A-5313 – Final rulemaking of the State Board of Osteopathic Medicine relating to continuing medical education. The committee voted to approve the regulation.

Regulation 16A-489 – Final rulemaking of the State Board of Funeral Directors relating to continuing education. The board withdrew the regulation on March 21, 2005. Hence, the committee did not vote on this regulation.

Regulation 16A-4814 – Proposed rulemaking of the State Board of Funeral Directors relating to unprofessional conduct. The committee voted to take no formal action until final regulations are promulgated. The committee submits the following comments:

1. With respect to the amendment the board proposes to add to Section 13.202(11), the committee notes that the Federal Trade Commission has promulgated regulations on

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REVIEW COMMISSION

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the topic of embalming a human body without prior authorization and then charging a fee. Specifically, 16 C.F.R. 453.5, entitled Services Provided Without Prior Approval, states that it is an unfair or deceptive practice for any provider to embalm a deceased human body for a fee unless: (1) the provider is unable to contact a family member after exercising due diligence; (2) the provider has no reason to believe the family does not want the embalming performed, and (3) the provider obtains subsequent approval for embalming already performed.

The committee notes that the board's proposal speaks to embalming and other services, while the federal regulation deals solely with embalming. Further, the committee notes the board's proposal adds another condition, that of a legitimate need to provide the embalming, that a funeral director must fulfill in order to charge for embalming.

The committee notes that the federal regulation provides a procedure for obtaining a state exemption from 16 C.F.R. 453.5 when the state rule is more protective. Consequently, the committee asks the board whether it is appropriate to seek an exemption or whether the board has or intends to apply for an exemption.

With respect to the drafting of paragraph (11) of Section 13.202, the committee recommends that paragraph (11) be re-written, perhaps in two or three paragraphs, with paragraph (11) stating that, except as provided in another paragraph, written permission is necessary before a funeral director may furnish embalming or other services. A subsequent paragraph or paragraphs can list the exception and the conditions under which a funeral director may obtain payment for embalming or other services not previously authorized.

The committee also asks the board to consider whether the two concepts embodied in paragraph (11), that of embalming without prior authorization and providing funeral services other than embalming without prior authorization, should be dealt with separately for reasons of clarity. Similarly, the committee asks the board to consider whether, with respect to embalming, the regulations should provide a citation to 16 C.F.R. 453.5, if the board intends to treat embalming without prior approval in the same manner in which the Code of Federal Regulations treats that practice.

2. With respect to paragraph (13) of Section 13.202, the committee notes that the first and second sentences in that paragraph seem to conflict with one another. The first sentence states that a funeral director may not retain funds from a customer where no services have been provided. The second sentence states that, "A funeral director

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may preserve the funds for a reasonable time for a person to demonstrate a legal entitlement to receive funds or to receive payment of funds owed to the decedent."

In looking at the paragraph generally, the committee seeks clarification from the board regarding its policy about payment and retention of consumer funds. The committee also recommends that the rule be re-written so that the prohibition is stated clearly. Generally, the committee is concerned that, as written, the provision does not clearly provide guidance to members of the public and funeral directors as to the conduct that is prohibited.

To look at the paragraph specifically, the committee seeks clarification from the board regarding whether the language "the amount of funds retained is in excess of the value of funeral goods and services actually provided" can, in any circumstance, apply to a pre-need contract. Additionally, the committee asks the board to consider whether the language in this paragraph conflicts with existing regulations regarding pre-need contracts.

Further, the committee is concerned that the term "reasonable amount of time" with respect to retention of funds does not give specific guidance to funeral directors or the public regarding how long funds may be retained. The committee asks the board to review the public policy embodied in the term "reasonable time."

Additionally, in terms of drafting, it is not clear to whom the word "person" refers. If the rule applies to a "funeral director" holding onto money, then the rule should substitute the term "funeral director" for "person." If the board intends something else, then the policy should be clearly articulated. Further, if the term "person" refers only to a natural person and not a corporation or other entity, then the term "individual" should be substituted.

Finally, the committee seeks an explanation of the circumstances, other than the one of retaining funds pursuant to a pre-need contract, under which a funeral director would receive and retain funds.

3. With respect to paragraph (14) of Section 13.202, (Unprofessional conduct includes 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..."), the committee questions whether this provision should include a mental state on the part of the funeral director in order to find culpability. The committee notes that including a mental state creates a defense for a funeral director, which is arguably in

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contravention with many of the statutory provisions which state that licensure is required in order to engage in the profession of a funeral director. In other words, the statute does not inquire into the mental state of the actor, but imposes strict liability. Given the statutory language, the committee asks the board to consider whether including a mental state is consistent with the statute and appropriate in terms of public policy.

4. With respect to paragraph (17) of Section 13.202, (Unprofessional conduct includes 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"), the committee questions whether the mental state "has reason to believe" is consistent with the language of Section 13(c) of the Funeral Director Law or appropriate in terms of public policy.

Section 13(c) states, "No person other than a licensed funeral director shall, directly or indirectly, or through an agent, offer to or enter into a contract with a living person to render funeral services to such person when needed." Since the statutory language does not include a mental state but imposes strict liability, the committee asks the board to consider whether the board's proposal is consistent with the statute and appropriate in terms of public policy. As with paragraph (14), the mental state of "has reason to believe" creates a defense for a funeral director when no such defense exists in the statute.

Further, the committee questions whether paragraph (17) conflicts with existing regulatory language, specifically Section 13.202(1). The committee notes that Section 13.202(1) does not include a mental state.

5. With respect to paragraph (16), the committee asks the board to consider the circumstances in which a decedent's will conflicts with the provisions of this paragraph and, consequently, asks the board to consider whether an exception should be included. Further, the committee recommends a definition of "final respects" be included. Finally, the term "reasonable request" does not give a licensee guidance as to what conduct is prohibited.
6. The committee notes the body of law which applies to funeral directors contained in 16 CFR 453.1 et seq., the rules promulgated by the Federal Trade Commission. The committee asks the board to consider including a provision which states that violating such a rule is unprofessional conduct and will subject the licensee to disciplinary action.

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Please feel free to contact my office if any questions should arise.

Sincerely,

A handwritten signature in black ink that reads "Thomas P. Gannon".

Thomas P. Gannon
Chairman
Professional Licensure Committee

cc: The Honorable Pedro A. Cortes, Secretary of the Commonwealth
Department of State
The Honorable Kenneth A. Rapp, Deputy Secretary
Regulatory Programs, Department of State
The Honorable Basil L. Merenda, Commissioner
Bureau of Professional and Occupational Affairs
The Honorable Peter V. Marks, Sr., Deputy Commissioner
Bureau of Professional and Occupational Affairs
Albert H. Masland, Chief Counsel
Department of State
Cynthia K. Montgomery, Regulatory Counsel
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State Board of Funeral Directors