



regulations if not adopted by BDE or approved by the Director.

Existing law requires BDE to license as a registered dental hygienist any person who satisfies certain requirements, including completion of an educational program approved by the Board and satisfactory performance on an examination required by BDE. This bill would require that the educational program, as prescribed, consist of a minimum of two academic years of dental hygiene curriculum provided in a college or institution of higher education. The bill would require satisfactory performance on a clinical examination required by BDE, and would require the certification of successful completion of a national standard written examination.

Existing law makes it a misdemeanor for any unlicensed person to hold himself/herself out as certain specified dental auxiliaries. This bill would include in this misdemeanor any unlicensed person who holds himself/herself out as a registered dental hygienist in alternative practice.

This bill would require a registered dental hygienist in alternative practice to provide to each patient a written referral to a licensed dentist for dental diagnosis and dental treatment. It would also require a registered dental hygienist in alternative practice to provide a written disclosure statement to all patients that indicates that only dental hygiene services are provided, and to provide BDE with documentation of at least one existing relationship with a dentist for referral, consultation, and emergency services.

Existing law specifies benefits provided under the Medi-Cal program, including, but not limited to, certain emergency and essential dental services. This bill would permit the services provided by a registered dental hygienist in alternative practice to be covered under certain circumstances. [S. B&P]

RECENT MEETINGS

At its August meeting in San Francisco, BDE noted that a \$200,000 budget change proposal augmenting its 1995-96 budget had been approved, enabling it to contract for the completion of an occupational analysis of dentistry in California. An occupational analysis generally involves a survey of active practitioners to determine the actual tasks performed in today's practice, and identify the knowledge, skills, and abilities (KSAs) needed to perform them competently. After the tasks and KSAs are identified, the existing licensing examinations are scrutinized to ensure that they are job-related, test the appropriate KSAs, and are otherwise valid and legally defensible. BDE hopes to

choose a contractor through the competitive bidding process by February 1996, and that the contractor will be able to make a presentation to the full Board on its findings by July or August 1996.

Also in August, BDE agreed to establish a working relationship with the Department of Corporations (DOC), which regulates health care service plans and managed care plans providing dental care. Although BDE sends DOC a copy of every accusation it files pursuant to Business and Professions Code section 1618.5, DOC has only sent information about one case involving a dentist.

At its November meeting, BDE considered suggested changes to its dental licensure examination. For example, staff noted that the periodontics section of the exam is sometimes unfair to the candidate in that it is difficult to grade and errors can easily be made by the graders; staff suggested that if a candidate is required to probe two quadrants of the mouth, on either the left or the right side, rather than the entire mouth, the test would be easier to grade and less strenuous to the candidate, while still accomplishing the requirements of validity, reliability, and relevance. Following discussion, BDE tabled this matter until its January meeting.

Also in November, BDE elected its 1996 officers. The Board selected Joel Strom, DDS, as its new president; Peter Hartmann, DDS, as vice-president; and public member Victoria Camilli as secretary.

FUTURE MEETINGS

January 25-26 in San Francisco.

March 7-8 in Los Angeles.

May 16-17 in San Francisco.

August 2-3 in San Diego.

November 7-8 in San Francisco.

BOARD OF FUNERAL DIRECTORS AND EMBALMERS

(916) 263-3180

California law establishes the Board of Funeral Directors and Embalmers (BFDE) in Business and Professions Code section 7600 *et seq.* The Board's regulations are codified in Division 12, Title 16 of the California Code of Regulations (CCR).

The Board is responsible for licensing funeral establishments and embalmers; registering apprentice embalmers and approving funeral establishments for apprenticeship training; accrediting embalming schools; and administering licensing ex-

aminations. State law also charges BFDE with inspecting the physical and sanitary conditions in funeral establishments; enforcing price disclosure laws; approving changes in business name or location; auditing preneed funeral trust accounts maintained by its licensees; and investigating, mediating, and resolving consumer complaints.

Although California law establishes BFDE and such a board has functioned since 1939, the legislature recently defunded the Board and passed a bill directing the Department of Consumer Affairs to assume the duties of the Board effective January 1, 1996 (*see below*).

MAJOR PROJECTS

Legislature Defunds Board Again and Directs DCA to Take Over. Finally accomplishing in 1995 what it failed to do in 1994, the legislature has succeeded in transferring the responsibilities of BFDE and the Cemetery Board to the Department of Consumer Affairs (DCA) effective January 1, 1996.

The events leading to the shutdown of the Board began years ago, when many legislators became increasingly dissatisfied with the performance of both boards in regulating the death services industry. In 1993, then-DCA Director Jim Conran joined forces with Assemblymember Jackie Speier and compelled the executive officers of both boards to resign; later that year, Conran convened the so-called "Death Summit" to expose the problems of both boards and seek their resolution. [13:4 CRLR 38-39, 48-49; 13:2&3 CRLR 57, 68-69]

In 1994, the legislature—unhappy with the boards' failure to implement the recommendations emerging from the Death Summit—appropriated only six months' worth of funding to BFDE and the Cemetery Board (with funding to expire on January 1, 1995), and separately considered SB 2037 (McCorquodale), a budget trailer bill to merge the boards and allocate the merged board funds to operate between January 1-June 30, 1995. After the Assembly deleted the merger provision from the bill, the Senate refused to concur in the amendments and Senator McCorquodale dropped the bill. Thus, both boards began 1995 without funding. The Cemetery Board temporarily closed its doors, but BFDE survived by operating on a skeleton crew until March. At that time, both boards secured temporary funding through June under section 27 of the 1994-95 Budget Act, subject to the condition that they submit monthly reports to the legislature on a variety of issues. [15:2&3 CRLR 57; 15:1 CRLR 55; 14:4 CRLR 4, 55]

Between May 21 and June 30, BFDE submitted four reports to the legislature:



• On May 26, BFDE explored the feasibility of further limiting the annual management fees which may be recovered by Board licensees for administering preneed trusts. Currently, preneed trust management fees are limited in two ways: (1) to 4% of the corpus plus prior years' accumulated income, and (2) such fees may only be taken from current year income. After analyzing the history of the current limitation and opining that the current limit on fees does not allow for full recovery of administrative costs, BFDE concluded that a further limitation is not advisable.

• On May 31, BFDE discussed the restoration of its operations after it was given section 27 funding in March. Virtually all Board staff had left the Board's employment by mid-March; a few were able to return, providing limited continuity in certain areas. However, "the recruitment of new staff has been severely hampered by the conditions attached to the Section 27 funding; specifically, that the funding is on a month-to-month basis and the new employees can only be hired on a limited-term basis" with no benefits. At the time the report was filed, six of BFDE's nine staff positions were filled; the Board was processing a backlog of 130 cases, 45 of which were over six months old.

• On June 14, BFDE and the Cemetery Board filed a joint report addressing the feasibility of contracting with DCA's Consumer Information Center to open a single, possibly computerized, consumer complaint line to serve both boards. The boards concluded that maintaining the current telephone system is the better alternative. They rejected the single computerized line option because most of their calls are from "consumers in crisis due to the loss of a loved one requiring an immediate resolution....Herd-ing bereaved consumers through a complaint line with hundreds of other callers will only add to their distress and frustration."

• Finally, on June 15, BFDE reported on its licensing and enforcement statistics based on performance measures developed by DCA. The report concluded that, despite setbacks, all funeral director and embalmer licenses have been processed within the required statutory time limits. The Board stated that it has not received any complaints regarding its licensing process, but is developing a survey to be distributed to its licensees in an effort to get more input on the issue. Regarding enforcement, BFDE says it started the 1994-95 fiscal year with 312 complaints, received an additional 195, and closed 258. The Board asserted that, even with the backlog, it completes all investigations within statutory limits. BFDE stated that it filed three accusations in 1994-95.

Once the Board's section 27 funding expired in June, the legislature passed the 1995-96 budget bill—again appropriating each board only six months' worth of operating funds in hopes that Assembly-member Speier's AB 597 (another merger bill) would pass. This year, however, the legislature also passed a budget trailer bill, AB 910 (Speier), in the event that the boards and the industry somehow succeeded in killing the merger bill (as they did last year). AB 910 provides that if BFDE and the Cemetery Board are not consolidated or otherwise restructured by January 1, 1996, DCA will assume all the duties, powers, responsibilities, and jurisdiction of the two boards. AB 910 was signed by the Governor on August 3; Assemblymember Speier withdrew AB 597 from consideration in mid-September, declaring it a two-year bill eligible for reconsideration in 1996 (see LEGISLATION).

Thus, under the terms of AB 910, the Board has ceased to function and DCA assumed all BFDE operations on January 1. The Board's offices have closed and all operations are being handled from DCA headquarters. Former BFDE Executive Officer Richard Yanes has become a policy chief in DCA; former BFDE staff members will perform their same functions under DCA; and DCA Director Marjorie Berte is responsible for all Board functions. Absent a legislative extension, DCA's authority to exercise the Board's powers expires on June 30, 1996.

Regulatory Changes Approved. On July 10, the Office of Administrative Law approved a package of regulatory changes adopted by BFDE in May 1994. This regulatory action amends sections 1258 and 1241, and adds new sections 1258.1, 1258.2, 1258.3, and 1262 to Title 16 of the CCR; among other things, these changes clarify disclosure requirements for the sale of caskets, define and prohibit the practice of "constructive delivery," and add new grounds for the issuance of a citation. [15:1 CRLR 56; 14:4 CRLR 55-56; 14:2&3 CRLR 57-58]

LEGISLATION

AB 910 (Speier), as amended July 29, is an urgency bill providing that if BFDE and the Cemetery Board are not consolidated or otherwise restructured by January 1, 1996, DCA will succeed to and be vested with all the duties, powers, purposes, responsibilities, and jurisdiction of the boards; further, the bill authorizes the Controller to transfer the necessary amount of funds from the 1995-96 Budget Act, originally allocated to the merged board proposed in AB 597 (see below), to DCA for expenditure in accordance with the proper perfor-

mance of its assumed duties. This bill was signed by the Governor on August 3 (Chapter 381, Statutes of 1995), and expires on July 1, 1996 or upon the creation of a merged board.

AB 597 (Speier), as September 1, would abolish BFDE and the Cemetery Board, create the Board of Funeral and Cemetery Services (BFCS), and transfer all power, authorities, and funds previously vested with BFDE and the Cemetery Board to BFCS. [15:2&3 CRLR 48] As the bill was approaching its third reading in the Senate on its way to passage, Assemblymember Speier withdrew it and made it a two-year bill; Speier was concerned that, due to the June 1995 revelations of serious problems at cemeteries around the state (see agency report on CEMETERY BOARD for related discussion), even a merged board would not have the resources to adequately investigate and prosecute violations. With the passage of AB 910, DCA—with its greater resources—would assume the responsibilities of both boards and give policymakers an opportunity to further research the best structure for death services industry regulation in California. [S. Inactive File]

SB 769 (Lockyer), as amended May 11, would establish the Comprehensive Criminal Justice Act of 1995. Among other things, this bill would impose criminal penalties for a violation of Business and Professions Code Article 9 relating to preneed funeral trusts, impose liability on any violating party whether or not he/she is a BFDE licensee, and subject licensees to possible additional disciplinary action under Business and Professions Code section 7686. [A. PubS]

LITIGATION

The legal maneuvering in *Funeral Security Plans, Inc. v. State Board of Funeral Directors and Embalmers* continues. In this matter, the Third District Court of Appeal found in October 1994 that the Board violated the Bagley-Keene Open Meeting Act in a variety of ways; in January 1995, the California Supreme Court declined to review the matter and depublished the Third District's decision, thus negating the precedential effect of the ruling. [15:1 CRLR 56]

In February 1995, plaintiff FSP filed a motion in Sacramento County Superior Court (No. 512564) to recover approximately \$50,000 in costs and \$290,000 in attorneys' fees. FSP relies primarily on two provisions of law for its motion. First, Government Code section 11130.5, a provision of the Bagley-Keene Act, authorizes a court to award costs and reasonable attorneys' fees to the plaintiff in an action



where the court has found that a state body has violated the provisions of the Act. FSP argues that the Third District's decision constitutes a "finding" that BFDE violated Bagley-Keene. Accordingly, FSP contends that it should recover costs and fees against BFDE because section 11130.5 was designed to encourage private enforcement of Bagley-Keene for public benefit. BFDE notes that section 11130.5 is discretionary, and argues that two special circumstances exist which render an award of costs and fees unjust. First, any monetary award against the Board would divert funding from its enforcement budget and harm the public by crippling its already diminished enforcement efforts. Second, BFDE argues there is no reason to award costs and fees because the public was not harmed by its conduct in this case.

Second, FSP relies upon Code of Civil Procedure (CCP) section 1021.5, which provides that plaintiffs may recover attorneys' fees in an action which has resulted in the enforcement of an important right affecting the public interest if (1) a significant benefit has been conferred on a large class of persons, or (2) the necessity of private enforcement makes the award appropriate. FSP makes three arguments under this provision: (1) its action has resulted in the enforcement of one of the state's major "sunshine" laws; (2) its action benefits the large class of funeral directors and consumers; and (3) private enforcement was necessary because no governmental agency would challenge BFDE's conduct. BFDE makes three arguments in opposition to FSP's claim under CCP section 1021.5: (1) section 1021.5 should not be used when a specific statute (such as Bagley-Keene) authorizes attorneys' fees; (2) the appellate court decision was depublished and may not be used as precedent in future cases—accordingly, the decision does not confer a benefit on a large class of people; and (3) FSP should not recover attorney's fees under this provision because its suit was brought to protect FSP's interests in the matter, and not the interests of the public.

At this writing, no decision has been made on FSP's motion for attorneys' fees.

■ RECENT MEETINGS

At its June 22, September 22, and December 8 meetings, BFDE discussed the use of the word "society" in the name of a licensee. After conducting a survey on the matter, the Board found that the public tends to associate the word "society" with a nonprofit organization. At the December meeting, one Board member opined that no licensee should be permitted to use the word in the name of his/her business, and

that existing businesses should have to phase out the use of that name. Another board member agreed that no new licensees should be permitted to use the word, but argued that existing licensees should be able to continue to use it because it would be too great a financial burden on them to have to change their name. As only two members were present at the December meeting, the Board lacked a quorum and could take no action; Executive Officer Yanes agreed to present the comments made at the meeting to DCA once it assumes responsibility for BFDE's functions.

■ FUTURE MEETINGS

To be announced.

BOARD OF REGISTRATION FOR GEOLOGISTS AND GEOPHYSICISTS

Executive Officer: Dalton Pollard (916) 263-2113

The Board of Registration for Geologists and Geophysicists (BRGG) is mandated by the Geologist and Geophysicist Act, Business and Professions Code section 7800 *et seq.* The Board was created by AB 600 (Ketchum) in 1969; its jurisdiction was extended to include geophysicists in 1972. The Board's regulations are found in Division 29, Title 16 of the California Code of Regulations (CCR).

BRGG licenses geologists and geophysicists, and certifies engineering geologists and hydrogeologists. In addition to successfully passing the Board's written examination, an applicant must have fulfilled specified undergraduate educational requirements and have the equivalent of seven years of relevant professional experience. The experience requirement may be satisfied by a combination of academic work at a school with a Board-approved program in geology or geophysics, and qualifying professional experience. However, credit for undergraduate study, graduate study, and teaching, whether taken individually or in combination, cannot exceed a total of four years toward meeting the requirement of seven years of professional geological or geophysical work.

The Board may issue a certificate of registration as a geologist or geophysicist without a written examination to any person holding an equivalent registration issued by any state or country, provided that the applicant's qualifications meet all other requirements and rules established by the Board.

BRGG is authorized to investigate and discipline licensees who act in violation of the Board's licensing statutes. The Board may issue a citation to licensees or unlicensed persons for violations of Board rules. These citations may be accompanied by an administrative fine of up to \$2,500.

The eight-member Board is composed of five public members, two geologists, and one geophysicist. BRGG's staff consists of five full-time employees. The Board's committees include the Professional Affairs, Legislative, and Examination Committees. BRGG is funded by the fees it generates.

■ MAJOR PROJECTS

BRGG Undergoes Sunset Review.

On November 28, the necessity and performance of BRGG and its licensing and certification programs were reviewed by the Joint Legislative Sunset Review Committee (JLSRC), created pursuant to the terms of SB 2036 (McCorquodale) (Chapter 908, Statutes of 1994). [15:2&3 CRLR 59; 14:4 CRLR 20, 58] If the Board fails to convince the legislature and the Department of Consumer Affairs (DCA) that its licensing requirement is justified and that its performance has been effective and protective of consumers, BRGG will cease to exist on July 1, 1997.

Throughout the summer and fall, BRGG members and staff worked to complete a comprehensive sunset report required by the JLSRC. The Board delivered the completed report to the JLSRC on October 5, and subsequently approved it at its October 20 meeting. The 174-page report set forth the history of the Board, described its two licensing (geologists and geophysicists) and two certification (engineering geologists and hydrogeologists) programs, provided detailed budget information, and set forth statistical information on its examination and enforcement programs.

BRGG's report also addressed the justification for licensure of geologists and geophysicists. In response to assertions that the "consumers" of the services of geologists and geophysicists are sophisticated corporations and government agencies who are capable of judging competence without the assistance of the state, BRGG argued that it protects "a variety of consumers, most of whom are not the immediate client of the geologist or geophysicist. Who are these non-paying or indirect consumers of the geologist's or geophysicist's services? First, they are the future owners of the property being investigated, and the present and future neighbors of the property. Second, they are the agencies (city, county, and state) administering