



and in order to conform the Board's regulations to the actual practice of auxiliaries in California, COMDA presented the following recommendations to BDE regarding the permissible duties of dental assistants (DAs) and RDAs: allow RDAs to obtain bite registrations under direct supervision; allow only RDAs to place and remove rubber dams under direct supervision; allow DAs and RDAs to cure restorative or orthodontic materials in an operative site with a light-curing device under direct supervision; allow only RDAs to place, wedge, and remove matrices, under direct supervision; allow RDAs to take intra-oral impressions for orthodontic appliances, under direct supervision; allow only RDAs to place orthodontic separators, under direct supervision; reflect current practice by allowing DAs and RDAs to check for loose bands or damaged orthodontic appliances; and reflect current practice by allowing RDAs to perform the temporary cementation and removal of temporary crowns and removal of fixed orthodontic bands appliances. At this writing, the Board has not taken any action on these recommendations, all of which require regulatory changes; the Board has tentatively scheduled an informational hearing on this matter on July 16 in Millbrae.

■ FUTURE MEETINGS

July 15-16 in Millbrae.
September 22-23 in Los Angeles.

BOARD OF FUNERAL DIRECTORS AND EMBALMERS

Executive Officer:
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The Board of Funeral Directors and Embalmers (BFDE) licenses funeral establishments and embalmers. It registers apprentice embalmers and approves funeral establishments for apprenticeship training. The Board annually accredits embalming schools and administers licensing examinations. BFDE inspects the physical and sanitary conditions in funeral establishments, enforces price disclosure laws, and approves changes in business name or location. The Board also audits preneed funeral trust accounts maintained by its licensees, which is statutorily mandated prior to transfer or cancellation of a license. Finally, the Board investigates, mediates, and resolves consumer complaints.

BFDE is authorized under Business and Professions Code section 7600 *et seq.* The Board consists of five members: two Board licensees and three public members. In carrying out its primary responsibilities, the Board is empowered to adopt and enforce reasonably necessary rules and regulations; these regulations are codified in Division 12, Title 16 of the California Code of Regulations (CCR).

■ MAJOR PROJECTS

Board Faces Possible Abolition. As amended April 5, SB 2037 (McCorquodale) would abolish BFDE and the Cemetery Board and create in their place a single Bureau of Funeral and Cemetery Services under the supervision of the Department of Consumer Affairs (DCA) Director; the proposal is based on the results of interim hearings held last October by the Senate Subcommittee on Efficiency and Effectiveness in State Board and Commissions. [14:1 CRLR 44]

Senator McCorquodale's bill adopted the recommendation of the Senate Subcommittee in its final report released on April 11. In that report, the Subcommittee found that the boards' investigation and enforcement activities are "ineffective and non-existent," neither board ensures the competence of its licensees in preneed/endowment care trust fund investment and management, and the boards are "very weak" in the area of setting standards for the industry. The Subcommittee's final report also indicated that it does not recommend a simple combination of two ineffective boards; it suggested that the new entity be required to adopt education, training, and testing standards to ensure licensee competence in their actual areas of practice; establish stringent disclosure requirements for preneed and endowment care contracts; and possibly impose a bond requirement to ensure that there is a fund from which injured consumers may be compensated should the licensee declare bankruptcy or otherwise leave the jurisdiction.

At BFDE's April 28 meeting, Executive Officer Richard Yanes expressed hope that the legislation could be amended to merge the two boards into a single board instead of a bureau. Although it generally opposes a merger, the Board agreed that merger into an autonomous board would be preferable to the proposed bureau structure. Yanes informed the Board that in order to prevent "bureau-ization," BFDE must demonstrate to the legislature that it has made significant improvements in its enforcement, education, and administrative activities. Yanes indicated that BFDE would have this opportunity at a legislative hearing scheduled for May 9.

Also at the April meeting, Yanes suggested that two members of BFDE meet with representatives of the California Funeral Directors Association (CFDA), to identify what testimony and information CFDA and the Board would be submitting at the hearing; Board members Barbara Repa and Lottie Jackson volunteered to meet with CFDA members to coordinate their presentations. Jackson and Repa indicated that they might also contact various consumer groups for input.

At the May 9 hearing, CFDA representative Aaron Read testified that CFDA would like to support SB 2037, but does not believe that a bureau structure would adequately protect the public. CFDA argued against the merger, and offered several amendments aimed at improving the performance of BFDE, including pleasure appointments for Board members (instead of term appointments), DCA Director concurrence in the Board's selection of an executive officer, and a provision permitting Board members to expel a member "who is just not acting in the public interest." CFDA also protested that it was "powerless" to force a change in executive officers during the past several years or do anything else to enhance the performance of the Board. BFDE Executive Officer Richard Yanes testified that the Board opposes the bureau concept and prefers the amendments offered by CFDA.

Also at the May 9 hearing, Center for Public Interest Law Supervising Attorney Julianne D'Angelo argued that regardless of whether the boards are merged into a single board or bureau, they should be merged and required to address industry abuses which victimize vulnerable consumers. According to D'Angelo, BFDE is not committed to consumer protection in any meaningful way; the Board has been repeatedly warned by both the legislative and executive branches to clean up its act or face the consequences; and the funeral industry is plagued by common and routine abuses ranging from the embezzlement of preneed trust funds to deceptive marketing practices to the reprehensible treatment of human remains. Because BFDE and the Cemetery Board have failed to police these abuses in the industry, D'Angelo noted that aggrieved consumers are increasingly turning to the courts in major class actions across the state. She also characterized CFDA's protestations as "too little, too late," and questioned why CFDA, if it was truly concerned about the conduct of BFDE's previous executive officer and the well-documented abuses in the industry, had not petitioned the Board to adopt rules or sponsored legislation to resolve the problems.



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According to D'Angelo, SB 2037 should also require the merged entity to adopt regulations governing the following areas:

- The legislation should require the merged board to adopt appropriate educational, experience, and examination requirements to ensure that licensees who are permitted to receive, invest, and account for preneed trust funds have some knowledge of and competence in those areas; currently, BFDE's enabling act does not require any minimum educational level or coursework in accounting, investments, fiduciary duties, or ethics.

- The legislation should impose a bond requirement on licensees who receive and invest preneed trust funds; a minimum level should be established in statute, and the amount of the required bond should increase as the amount in any particular licensee's trust fund increases.

- The merged board should be required to adopt regulations requiring clear price and other disclosures in contracts for all sales of services and goods; for important terms and prices, this could be done in the form of bold-print disclosure statements near the signature line on any contract. D'Angelo suggested that legislation require the new agency to publish a *Consumer's Guide to Death Services* brochure which all licensees must give to consumers and which educates them as to the various goods and services involved in a funeral or cremation.

- The agency should be required to adopt regulations mandating the use of "plain English" contract terms and language and clear bold-print disclosures in all preneed trust and endowment care agreements.

- If a board structure is chosen, it should have a clear public member majority, and Business and Professions Code section 450 *et seq.* should be amended to tighten up the criteria for the appointment of public members; currently, spouses, close family relatives, and business associates of licensees are considered "public members."

Following considerable testimony, Senator McCorquodale agreed to amend the bill to merge the two boards into a single board instead of a bureau. Committee Chair Senator Dan Boatwright also appeared interested in D'Angelo's recommendations for required rulemaking by the new agency, and instructed staff to prepare legislative amendments to SB 2037 accordingly. At this writing, the Committee's agreement has not yet been incorporated into the language of SB 2037.

Board to Rescind Internal Audit Office Contract. At its July 1993 meeting,

BFDE approved a proposed contract with DCA's Internal Audit Office (IAO); under the agreement, IAO was to develop a preneed trust audit plan and policy for the Board, and to perform direct audits of BFDE licensees' preneed trust funds. Although the Board was not to be charged a fee for the preparation of the audit plan, it was to be charged for the direct audit work; IAO estimated that fifty audits would cost \$45,000. Prior to this agreement, BFDE had no formal audit plan, and its own audits of licensees' trust funds had been criticized for their poor quality and failure to follow generally accepted auditing practices. [13:4 CRLR 48; 13:2&3 CRLR 68-69]

At BFDE's February meeting, Executive Officer Richard Yanes announced that the final Comprehensive Audit Plan had been drafted by IAO, but was still subject to revision; Yanes also indicated that IAO was requesting an additional \$10,000 for travel and per diem expenses. BFDE approved this revision to the contract.

At BFDE's April meeting, however, Yanes told the Board that he intended to suspend the contract with IAO; according to Yanes, a shift in IAO staffing has resulted in questionable quality, and BFDE funds should not be used "to train people at IAO." Yanes did not indicate how remaining and future audits would be performed if the contract is rescinded, or if IAO would receive compensation for developing the Comprehensive Audit Plan.

Also in April, BFDE discussed its failure to comply with Business and Professions Code section 7630 (which requires the Board to audit the preneed trust fund of a licensee prior to approving the assignment of that license to another funeral director) and section 7627 (which requires BFDE to approve or deny applications for a funeral director's license within 90 days from the date of filing). DCA legal counsel Robert Miller noted that the Board has not had the resources or ability to conduct the required audit within the 90-day time period. Further, Miller stated his awareness that some assignee firms have taken over the assigned business before BFDE has officially approved the license assignment; although the Board realizes this is illegal, it has been approving license assignments notwithstanding its knowledge of a prior period of unlicensed activity by new owners.

Executive Officer Richard Yanes stated his hope that the Board could begin to comply with section 7630 by auditing preneed trust funds before approving assignment of a license, but that the Board's two auditors are presently assisting in the investigation of complaints. If the auditors

were to focus on auditing preneed trust funds to comply with section 7630, complaint investigation would slow to a halt unless the Board adds new staff. Yanes also indicated that he will be looking into ways to reduce the amount of time it takes to conduct audits, noting that he believes the time can be reduced to thirty days. Finally, he noted his plan to research a bonding requirement for license assignments involving preneed trust assets. The Board took no action on this matter, and requested that Yanes present his findings and recommendations at its next meeting.

Board Assigns All Death Summit Proposals to Staff. At its February 11 meeting, BFDE discussed some of the proposals made at the September 1993 "Death Summit," at which industry leaders, consumer advocates, and state officials discussed the poor records of both BFDE and the Cemetery Board in policing abuses within the death services industry. [14:1 CRLR 43-44; 13:4 CRLR 48-49] In particular, BFDE discussed a draft response to the Summit prepared by Executive Officer Richard Yanes. The Board decided that most of the concerns discussed at the Summit need to be researched before it could take any regulatory action, and approved a "priority work plan" under which staff will present recommendations on specified issues by the following dates.

- At the Board's June 1994 meeting, staff is to present the results of the Board's annual preneed trust report and its recommendations on the feasibility of establishing a consumer advisory council.

- By October 1994, staff is to survey other state agencies for effective methods of determining consumer satisfaction.

- At the Board's January 1995 meeting, staff is to recommend proposals for the individual licensing of funeral directors, funeral counselors, and transportation services; present the results of its survey of the codes of professional ethics adopted by other states and national associations and make recommendations to BFDE; review and make recommendations for changes to the Board's preneed trust statutes and regulations; and draft amendments to the Board's regulations regarding constructive delivery and cremation containers.

- By June 1995, staff must recommend whether funeral directors who administer preneed trusts should be bonded; develop risk assessment factors to assist in prioritizing the Board's routine field inspections; and investigate the potential of the inheritance tax as an additional source of funding for the Board.

Additionally, on an ongoing basis, BFDE instructed staff to monitor licensees' vol-



untary efforts at continuing education; monitor and report on the origins and kinds of complaints received by the Board; conduct an annual review of the Board's statutes and regulations, and recommend a procedure enabling the Board to receive public input on needed changes (*see below*); monitor and enforce existing enforcement mechanisms regarding memorial societies; establish systems to monitor complaints, citations, audits, and formal disciplinary actions prosecuted by the Attorney General's Office; and review and revise existing consumer publications and develop additional outreach methods, as needed.

At the Board's April 28 meeting, staff recommended a procedure to solicit public input as part of the Board's annual review of its statutes and regulations. Specifically, staff recommended that BFDE provide notice to interested parties and allow for written suggestions; Board staff would then review these suggestions and report their recommendations to BFDE. The Board noted that it will review its current list of interested parties prior to making any decision on this recommendation by staff; BFDE indicated that it would re-examine this issue at its next meeting.

Proposed Rulemaking. On May 6, BFDE once again published notice of its intent to amend section 1258 and adopt sections 1258.1, 1258.2, and 1258.3, Title 16 of the CCR, to clarify disclosure requirements for the sale of caskets; adopt section 1262, to more clearly define and prohibit the practice of "constructive delivery" with regard to items paid for with preneed trust money; and revise section 1241, which currently sets forth grounds for the issuance of citations and fines. The Board has published these proposed regulations on several occasions in the past few years [*13:2&3 CRLR 69-70; 11:1 CRLR 61; 10:1 CRLR 69*], but has dropped them without taking action.

Currently, section 1258 requires licensees to "prominently display" an informational and educational notice regarding the preservative effects of sealed caskets on every casket having or represented as having a sealing device of any kind; the notice must read as follows: "There is no scientific or other evidence that any casket with a sealing device will preserve human remains." Among other things, BFDE's amendments would require the notice to be prominently displayed in or on the subject caskets and to be clearly visible to the public; specify that the statement must be printed in at least ten-point, bold-face type on a card of no less than 3"x5"; provide that the print shall be in a color which contrasts with the background; and spec-

ify that no other notice, statement, price, information, picture, or other printing shall appear on the card. The proposed amendments also provide that the notice requirement is applicable to sealer-type caskets displayed in and/or sold by catalog or photograph; where so displayed, the notice must be printed on the face of the photograph or page or on an opaque label or sticker affixed to the face of the photograph or page. The notice must be printed in a type size no smaller than the type size used for the price and description of the casket.

Business and Professions Code section 7606 requires funeral directors to provide to any person, upon beginning discussion of prices of funeral goods and services offered, a written or printed price list containing, among other things, the price range for all caskets offered for sale. Proposed new section 1258.1 would define the term "provide" as meaning "give for retention." Section 1258.1 would also require casket descriptions on price tags to be sufficiently descriptive so as to provide a reasonably accurate impression of the casket being described, including its color (which may be expressed as either the manufacturer's color or the generic color); require that price tags be placed on pictures of caskets displayed by catalog or photographically; and require that all caskets offered for sale or readily available for use and/or purchase be displayed either physically or photographically.

Business and Professions Code section 7702 provides that reusing any casket or part of a casket as a receptacle for, or in connection with the burial or other disposition of, a dead human body is a ground for disciplinary action. Proposed new section 1258.2 would define the terms "casket," "alternative container," and "rental casket"; establish specific conditions for the use of such caskets, including disclosure to, and written authorization from the purchaser/renter; and exempt rental caskets and the use/reuse thereof from the provisions of Business and Professions Code section 7702.

Business and Professions Code section 9662 provides that, when a cemetery authority or crematory presents a sales contract to any person, such contract shall, on its first page, contain a statement informing the purchaser that information regarding cemetery and cremation matters is available from the Cemetery Board. Proposed new section 1258.3 would require that the information specified in Business and Professions Code section 9662, regarding the Cemetery Board, also be supplied when a funeral director presents a contract for funeral goods or services

which also contains charges for cemetery or crematory goods or services. Proposed section 1258.3 would also provide for an interim period during which the information shall be supplied in writing when presenting a contract; thereafter, the statement shall be printed on the first page of the contract.

Proposed section 1262 would finally address the problem posed by the practice of "constructive delivery" of funeral merchandise by some licensees. Business and Professions Code section 7735 *et seq.* provides that no funeral director shall enter into or solicit any preneed arrangement, contract, or plan, requiring the payment of money or the delivery of securities to pay for the final disposition of a dead human body, funeral services, or the furnishing of personal property or funeral merchandise, unless the contract requires that all money paid directly or indirectly and all securities delivered under the agreement will be held in trust for the purpose for which it was paid or delivered until the contract is fulfilled according to its terms. However, Business and Professions Code section 7741 exempts from the "held in trust" requirement payment for merchandise that is "delivered as soon as it is paid for." Some funeral directors engage in constructive delivery of funeral or crematory merchandise by taking a considerable amount of money for a casket, urn, or other expensive item and deliver—"as soon as it is paid for"—not the merchandise but a warehouse receipt for the storage of that item. The item may or may not be actually stored, the merchandise has not been "delivered" to the customer, and the money for that item may be diverted from the preneed trust into other accounts of the funeral director.

Proposed section 1262, Title 16 of the CCR, would state that the delivery of merchandise, within the meaning of Business and Professions Code section 7741, means actual personal delivery to a purchaser, trustor, or beneficiary of merchandise that is used or is intended to be used in connection with a preneed arrangement. Any payment received for merchandise, where actual personal delivery of the merchandise will be delayed, shall be held in trust as provided in Business and Professions Code section 7735 *et seq.* until the merchandise is actually and personally delivered to, and is in the immediate possession of, the purchaser. Section 1262 would also provide that neither the delivery of a warehouse receipt nor any other form of constructive delivery shall constitute delivery of merchandise within the meaning of Business and Professions Code section 7741.

BFDE's proposed amendments to section 1241 would add as cause for the issu-



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ance of a citation any violation of section 1258.2 or 1262, Title 16 of the CCR; a violation of one of these sections would be grounds for the issuance of a citation accompanied by an administrative fine ranging from \$1,001 to \$2,500. The proposed amendments would also add as cause for issuance of a citation any violation of Business and Professions Code section 7685.3 or section 1258.1 or 1258.3, Title 16 of the CCR; a violation of one of these sections would be grounds for the issuance of a citation accompanied by an administrative fine ranging from \$501 to \$1,000.

At this writing, BFDE is scheduled to hold a public hearing on these proposed regulatory changes on June 23 in Anaheim.

LEGISLATION

SB 2037 (McCorquodale), as amended May 18, would (among other things) abolish BFDE and the Cemetery Board, and create in their place a single Bureau of Funeral and Cemetery Services under the supervision of the DCA Director (*see MAJOR PROJECTS*). At a May 9 hearing of the Senate Business and Professions Committee, Senator McCorquodale tentatively agreed to amend SB 2037 to merge the two boards into one board (not a bureau); at this writing, this language is expected to be amended into SB 2037 when it reaches the Assembly. [*S. Appr*]

SB 2036 (McCorquodale), as amended May 18, would create a "sunset" review process for occupational licensing agencies within DCA, requiring each to be comprehensively reviewed every four years. In the event that SB 2037 (*see above*) is not enacted, SB 2036 would impose an initial "sunset" date of July 1, 1997 on BFDE; create a Joint Legislative Sunset Review Committee within the legislature, which would review the Board's performance approximately one year prior to its sunset date; and specify 11 categories of criteria under which BFDE's performance will be evaluated. Following review of the agency and a public hearing, the Committee would make recommendations to the legislature on whether BFDE should be abolished, restructured, or redirected in terms of its statutory authority and priorities. The legislature may then either allow the sunset date to pass (in which case BFDE would cease to exist and its powers and duties would transfer to DCA) or pass legislation extending the sunset date for another four years. (*See agency report on DCA for related discussion of the "sunset" concept.*) [*S. Appr*]

The following is a status update on bills reported in detail in CRLR Vol. 14, No. 1 (Winter 1994) at pages 44-45:

AB 1807 (Bronshvag), as amended March 23, requires that the current address of the Cemetery Board and/or the Board of Funeral Directors and Embalmers, as appropriate, appear prominently on the first page of all contracts for specified goods and services. This bill was signed by the Governor on March 30 (Chapter 26, Statutes of 1994).

AB 1392 (Speier), as amended July 1, 1993, would—among other things—provide that the Board's executive officer is to be appointed by the Governor, subject to Senate confirmation, and that the Board's executive officer and employees are under the control of the DCA Director. [*S. B&P*]

SB 155 (Boatwright), which would have required (among other things) that a written authorization to cremate, provided to the authorizing agent by the funeral director or crematory and containing specified information, be signed, dated, and verified by the authorizing agent, died in committee.

LITIGATION

On February 24, the California Supreme Court—which had earlier granted both sides' petitions for review [*14:1 CRLR 45*—transferred *Funeral Security Plans, Inc. v. State Board of Funeral Directors and Embalmers* back to the Third District Court of Appeal, with instructions to vacate its decision in the matter and reconsider Part V thereof in light of the Supreme Court's recent decision in *Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors*, 6 Cal. 4th 821 (1993).

Funeral Security Plans is an important case interpreting several provisions of the Bagley-Keene Open Meeting Act, Government Code section 11120 *et seq.*, the statute governing meetings of state agencies. In Part V of its July 1, 1993 decision, 21 Cal. App. 4th 1444 [*13:4 CRLR 49*], the Third District considered the legality of the closed sessions of BFDE's two-member advisory committees. Although Government Code section 11121.8 appears to exempt advisory committees of state bodies from the Act's open meeting requirement so long as they consist of fewer than three persons, the Third District held that "our inquiry does not end with the language of section 11121.8." The court also looked at section 11121.7, which states that (for purposes of the Act's open meeting requirement), the term "state body" also means "any board, commission, committee, or similar multimember body on which a member of a body which is a state body...serves in his or her official capacity as a representative of

such state body and which is supported, in whole or in part, by funds provided by the state body...." The court agreed with FSP's argument that BFDE's two-member advisory committees are "state bodies" under section 11121.7, because they consist of Board members who are serving in their official capacities and paid per diem compensation for their attendance by the Board; thus, their closed sessions were illegal.

In December 1993, the California Supreme Court issued its decision in *Freedom Newspapers*, a case brought under the Ralph M. Brown Act, Government Code section 54950 *et seq.*, the open meetings statute applicable to local governments. Government Code section 54952.3 provides that the term "legislative body" (for purposes of the Brown Act's open meeting requirement) does not include "a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body." In its decision, the Supreme Court held that a less-than-a-quorum advisory committee of a local government is completely exempt from the provisions of the Brown Act (rather than merely from the relaxed procedural requirements in section 54952.3). [*14:1 CRLR 182-83*]

At this writing, the matter awaits review and reconsideration by the Third District.

RECENT MEETINGS

At its November meeting, BFDE directed staff to research the prospect of increasing revenues by raising the fee for a copy of a certified death certificate by \$1. [*14:1 CRLR 44*] At the Board's February 11 meeting, Executive Officer Richard Yanes reported that legislative amendments are necessary to effectuate this proposed increase, and that it cannot be accomplished through rulemaking. Yanes indicated that this increase should be among the Board's highest priorities; at BFDE's April 28 meeting, however, Yanes indicated that he had not yet found an author for the proposed legislation.

FUTURE MEETINGS

June 23-24 in Anaheim.
August 25 in San Francisco.
November 17 in Sacramento.