The Funeral and Cemetery Boards in Well-Deserved Limbo

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In a relatively unusual move, the legislature recently defunded the Department of Consumer Affairs' (DCA) Board of Funeral Directors and Embalmers (BFDE) and the Cemetery Board (CB), effective January 1, 1995. The statutes creating both boards still exist, as do the licensing requirements for funeral directors, embalmers, crematories, and cemeteries. But, as of January 1, no agency will exist to accept applications, license new entrants, adopt professional standards and ethics codes binding on the death services industry, or police violations of those standards through an enforcement system. Why? Because the legislature failed to appropriate funds to finance the operations of either board after January 1, and it also failed to authorize either board to spend any money it may secure.

The last time the legislature did this, we cried foul. But that was in 1992, when the legislature defunded the Auctioneer Commission in retaliation for a lawsuit filed by the Commission challenging the legislature's theft of auctioneer licensing fees from the Commission's special fund. Then, as now, the legislature simply defunded an agency and left the licensing requirement intact.[1]

In 1992, the legislature was bullying a helpless agency which had the temerity to file a meritorious suit against it. The defendant essentially destroyed the plaintiff in order to prevent a court from forcing it to obey its own laws. In 1994, however, the legislature is finally refusing to kowtow to the bullying of a powerful industry which has been allowed to run amok in California for decades, causing injury and grief to California consumers at times when they least deserve either.

The Center for Public Interest Law (CPIL) has monitored the activities of both of these boards for 14 years. And for 14 years, the *California Regulatory Law Reporter* has documented their failure to do anything substantial about well-known abuses within the death services industry. These abuses range from standard embezzlement of preneed arrangement funds (which these licensees are authorized to accept and invest), to deceptive marketing practices through the use of jargon-laden adhesive contracts, to macabre incidents such as the commingling of bodies for burial or cremation and the theft of gold and jewelry from dead bodies. These abuses have victimized California consumers for decades, and the boards' failure to police the death services industry has now resulted in:

- an excessive but necessary level of oversight by both the executive and legislative branches;
- an increased number of class actions and other lawsuits against both boards' licensees—this litigation is now clogging and burdening our courts with disputes these agencies should have either prevented or addressed through their regulatory programs; and
- dozens of revealing and embarrassing newspaper exposés.[2]

Legislative Oversight. As these abuses and their documentation mounted, the legislature took a number of steps which should have served as fair warning to both boards. In 1987, Senator Dan Boatwright introduced a bill to merge the boards;[3] Assemblymember Jackie Speier introduced legislation to abolish them in 1992.[4] On three occasions since 1987, the Legislative Analyst has called for the elimination or merger of both boards.[5] Over the past few years, the legislature has been forced to hold several investigative hearings into the performance of both of them. Between 1991 and 1993, the Assembly Consumer Protection Committee and the Senate Business and Professions Committee held at least two public hearings on them,[6] and Assembly Consumer Protection Committee Chair Jackie Speier joined with then-DCA Director Jim Conran in a successful effort to compel the long-overdue resignations of both boards' executive officers in 1993.[7]

Executive Branch Oversight. Led by former DCA Director Jim Conran, the Wilson administration has consistently expressed its dissatisfaction with the performance of both boards.[8] Following the forced resignation of their respective executive officers in 1993, Director Conran convened a Summit on Funeral and Cemetery Services (aka "the Death Summit") on September 22, 1993, to examine problems within the death services industry and changes to the existing regulatory structure which would address them.[9] In no uncertain terms, Conran warned both boards that unless each implemented swift and sweeping reforms, he would support their abolition or transformation into bureaus which would function under his direct supervision.[10]

Marketplace Flaws Justifying Regulation. As the state's senior public interest organization covering the regulation of trades and professions, CPIL was invited to represent consumers at the Death Summit. We noted several marketplace flaws which theoretically justify some type of regulation of the death services industry. The first is "external costs" or "irreparable harm"—under our current statutes, we allow these licensees to take, invest, and administer millions of dollars in preneed trusts and endowment care funds, and there might be irreparable harm in the form of permanent loss of money if a funeral director or cemetery licensee is dishonest or incompetent in investing or managing these funds. A regulatory system tailored to addressing that flaw might require these licensees to have training or education to ensure that they have knowledge of their fiduciary duty, as well as investment practices and accounting. The regulatory mechanism might also include some sort of fund or bond to ensure that consumers who are injured due to dishonesty or incompetence could be compensated where the licensee is insolvent.

The second flaw justifying some sort of regulation is consumers' lack of information about this industry—wherein decisions are compelled in an adhesive setting and market comparisons may be problematical. More likely than not, we "shop" for after-death services when we are emotionally vulnerable, and the "repeat business" dynamic which serves to excise incompetent or dishonest practitioners from other industries doesn't really apply as readily to death services. When we purchase goods and services from this industry, we are presented with boilerplate legalese documents filled with jargon we don't understand, and those documents do not change from entrepreneur to entrepreneur. The number of entrepreneurs in the industry is soaring in California, while the number of

deaths in the state remains relatively static. The high fixed costs inherent in a funeral or cemetery business, coupled with a finite amount of business and very little competitive price advertising, results in extraordinary overpricing by the industry in general and possible abuse of consumers because of lack of information.[11] To address this flaw, our regulatory system should include stringent "plain English" disclosure requirements to ensure that consumers know what they're purchasing and how much it's costing them. No hidden costs, no hidden disclaimers.

The question we asked at the Death Summit: Does the current regulatory system address these flaws in any meaningful way? Our answer: Absolutely not. Our regulatory system includes two costly and fragmented licensing boards to regulate different (and competing) segments of the same industry. And both boards have utterly failed to address the reasons for their existence.

The Boards' Records. In the area of licensing standards, our system allows funeral director and cemetery licensees to take hundreds of thousands of dollars in preneed arrangement money from consumers and invest it, administer it, account for it, and audit it. But our statutes require nothing of these licensees to ensure that they have the slightest idea how to do any of this. Our system requires them to be 18 years old, pay a fee, and take a test which asks them nothing about trusts, fiduciary duty, contracts, or investments. There are no minimum educational requirements; licensees don't even need a high school diploma.

Further, both boards—at the behest of the industry—have repeatedly avoided the adoption and enforcement of strong disclosure requirements. The minimal standards which have been adopted by either board are riddled with loopholes, and—as discussed below—noncompliance is routine and tolerated. For example, we have watched the Funeral Board attempt to adopt regulations to define and prohibit the practice of "constructive delivery" (whereby funeral directors divert preneed trust funds from the trust by delivering—not merchandise—but a warehouse receipt for merchandise allegedly paid for with trust funds and put in storage). BFDE is fully aware of this practice and knows how it operates to swindle consumers. On at least two occasions (1990 and 1993), it has talked about adopting rules to eliminate this practice,[12] and has only just adopted them in July 1994—under threat of abolition.

Another example: Funeral directors are known to advertise that they "arrange cremation services" under the heading "cremations" in the telephone directory, although they are not authorized to perform cremations. The Attorney General says this is deceptive advertising.[13] However, the boards disagree about the proper interpretation of the Attorney General's opinion; for seven years, they have simply "agreed to disagree" and ignored the opinion—leaving funeral directors free to engage in deceptive advertising.[14]

And the Cemetery Board is even worse. Since 1975, its statute has required it to occasionally review and amend its regulations regarding "standards of knowledge and experience and financial responsibility" for cemetery brokers.[15] However, the Board has never complied; it has no regulations whatsoever regarding appropriate knowledge and experience for trust fund administration and investment.

In addition to an inadequate licensing system which fails to ensure competence in the one area in which irreparable harm can be caused, and little or no standard-setting by either board to clarify to the industry what is and is not acceptable, neither board has an adequate enforcement system to police and deter violations. During the past three fiscal years for which statistics are available, the Cemetery Board received a total of 339 complaints. It opened only 11 investigations and took only 2 disciplinary action.[16] During those same years, BFDE received a total of 506 complaints. It opened 329 investigations, but took only 15 disciplinary actions.[17]

In 1993, the Department of Consumer Affairs finally dispatched its auditors to evaluate the required audits of the preneed trust funds at four funeral homes which had been "performed" by BFDE staff. The results were frightening. DCA found that the Board's audits of these funeral homes' preneed trust funds were "seriously deficient"—the Board's auditors failed to adhere to professional standards in the preparation of these audits and DCA's review of the audits was hampered by the poor quality of the workpapers.[18] Even worse, the DCA audit revealed that the death services industry pays no attention to BFDE. In these audits, the Board told the homes to take anywhere from 15–20 corrective actions, including restitution of trust fund money to consumers from 1990–1992, but the homes completely ignored the Board's orders.[19] The Board is perceived as a toothless paper tiger by the very industry it purports to regulate, perhaps because it illustrates the most pernicious corruption of our system: the takeover of a public agency by private profit-stake interests.

Recommendations for Reform... At the Death Summit, we urged both boards to consider sponsoring legislation or adopting regulations requiring education, training, and testing which guarantees competence in the administration of preneed trusts; stronger "plain English" disclosure requirements for preneed and endowment care contracts, so the average consumer understands what he or she is getting into; and the posting of an appropriate bond to ensure that there is a fund from which injured consumers may be compensated. BFDE requires no bond whatsoever; the Cemetery Board requires a minimal $10,000 bond for brokers,20 and a $50,000 bond for cemeteries which maintain endowment care funds.21 Sounds good, but even this bond has failed to deter wrongdoing. We argued that the $50,000 bond requirement should be applied to all funeral directors and cemetery licensees which accept preneed or endowment care funds, and that the amount of the bond should be increased as the amount of money in the trust fund increases. The Health and Safety Code makes provisions for a less-than-$50,000 bond for small cemeteries whose fund is small[22]—why not require a larger bond when the licensee has substantially more than $50,000 in its fund?

We also argued that the two boards were prime candidates for merger. There is no reason to have two boards regulating competing segments of the same industry; our governmental structure need not and should not reflect turf battles in the industry. Many licensees in this industry are licensed by both boards anyway—the boards should combine their resources and take advantage of the economies of scale inherent in a merger.

...Ignored by the Boards. Although DCA Director Conran directed both boards to present him with 30-, 60-, and 90-day reports on their progress in implementing the reforms suggested at the Death Summit, both boards ignored him.[23] Neither board submitted any report whatsoever until mid-February 1994—that is, until well after both boards had been informed that Senator Dan McCorquodale would soon introduce yet another bill to abolish both boards and create a new regulatory structure.

SB 2037 (McCorquodale). Following on the heels of the Death Summit, the Senate Subcommittee on Efficiency and Effectiveness in State Boards and Com-

missions held another oversight hearing on the performance of both boards in October 1993. In its final report issued in April 1994, the Senate Subcommittee recommended that both boards be abolished and that their regulatory programs be merged into a bureau, finding 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.[24]

The Subcommittee's final report also indicated that it did not favor a simple combination of two ineffective boards. It suggested instead that the new entity be required to (1) adopt education, training, and testing standards to ensure licensee competence in their actual areas of practice; (2) establish stringent disclosure requirements for preneed and endowment care contracts; and (3) look into the possibility of imposing 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.[25] To implement the Subcommittee's findings, Senator McCorquodale introduced SB 2037, which would have merged both boards into a bureau functioning directly under the supervision of the DCA Director. At the behest of the boards and the industry trade associations, the Senate Business and Professions Committee amended SB 2037 on May 18, 1994, to merge the two boards into one board (instead of a bureau) and directed the new entity to engage in rulemaking to adopt strong consumer protection standards as recommended by the Senate Subcommittee.[26]

To underscore and reinforce its support for the long-overdue structural changes to these two boards then pending in SB 2037, the legislature included in the 1994–95 budget bill—which Governor Wilson signed on July 8, 1994—a provision appropriating only six months' worth of funding for each board.[27] SB 2037 was to be the budget trailer bill carrying the remainder of the 1994–95 funding for merged board, and the continuation funding was very clearly tied to and conditioned upon the merger provision.[28] When SB 2037 reached the Assembly, however, that house appeared to wilt under the strong pressure exerted by the death services industry to maintain the status quo, and removed the merger provision. Although Senator McCorquodale could have simply dropped the bill to achieve defunding of both boards, he sought and received the strong support of his colleagues; by a 28–2 vote on August 31, the full Senate refused to concur in the Assembly's removal of the merger provision and the bill died. As a result, both boards will run out of funds by January 1, 1995.

Thus, the Department of Consumer Affairs, whose sworn peace officers are authorized to enforce the provisions of the Business and Professions Code, has offered to take over both boards' enforcement programs and to work with the legislature on creating a new entity which is authorized to license cemetery brokers, crematories, funeral directors, and embalmers. At this writing, neither board has accepted DCA's offer, instead demanding loans which will enable them to exist beyond January 1—loans which the legislature will surely refuse to approve. After twenty years of complete nonfeasance, both boards continue to demand separate and continued existence.

Why These Boards Should Be Merged. Several compelling reasons justify the merger of these two boards. First, contrary to the positions of the boards and the industry, the death services industry is one industry which seeks accomplishment of one goal: the preparation, care, and disposal of a dead human body in the manner desired by a decedent or his/her survivors. The two boards, which represent two competing components of the death services industry, merely reflect two different approaches toward that same goal: funeral and burial, or cremation. Simply put, each board's licensees are authorized to provide a service which the other board's licensees are not—but frequently, the services of both types of licensees are required in order to achieve the desired result. As noted above, the existence of two separate boards reflects only the industry's turf struggle—an inappropriate basis upon which to structure government in the public interest. Merger of these two boards would enable a single board to regulate an entire industry—as opposed to the current structure where two separate boards regulate parts of the same industry, each often vying for competitive advantage vis-a-vis the other and using the police power offices of the state in the struggle. The fragmented nature of the state's current regulation of the death services industry has resulted in long-unchecked abuses which victimize consumers.

Second, merger of the two boards would eliminate consumer confusion which results from the existence of two boards. When consumers feel victimized by a member of the death services industry, they are frequently unable to determine which board to complain to and—historically—have been given the "runaround" by both boards, as indicated by the almost moribund enforcement numbers listed above.

Third, a merger would create efficiencies in the boards' enforcement systems. Currently, if a BFDE inspector goes to a dual-licensed premises, he/she is permitted to inspect only the funeral director/embalming aspects of the operation. That inspector is not authorized to inspect the cemetery/crematory aspect; that requires a visit from a CB inspector (if it has one). Additionally, a merged board with one fund could establish an auditing unit which could audit both preneed trust funds of funeral directors and endowment care funds of cemetery licensees.

The Protests of the Boards and the Industry Are Too Little, Too Late. Both boards have consistently opposed a merger or restructuring, and so does the death services industry. Their arguments should be rejected once and for all.

- "But we have new leadership!" Both boards argue they have new executive officers who are capable of leading the boards out of their decades-long malaise. However, neither board had anything to do with the firing of their previous executive officers. The resignations of these individuals (James Allen and John Gill) came at the behest of Assemblymember Speier and DCA Director Conran. But for the actions of Speier and Conran, Jim Allen and John Gill would still be in charge of these boards.
- "But our enforcement statistics have improved!" If in fact they have, this "improvement" has occurred only in the past six months and is directly due to the pendency of SB 2037 (many agencies threatened with abolition suddenly spring to life), the September 1993 Death Summit, the Senate Subcommittee hearing in October 1993, and the actions of Assemblymember Speier and DCA Director Conran.
- "But we were powerless to effectuate change!" At the May 9, 1994 hearing on SB 2037 before the Senate Business and Professions Committee, the trade associations of the death services industry complained that they are not to blame for the boards' poor performance, and stated that they recognized the serious problems in the industry but were "powerless" to do anything about Allen, Gill, or either board. Actually, industry opposition stalled or killed every effort (ad-

mittedly, there were few) by either board to adopt regulations to remedy common abuses. If industry representatives were so concerned about inadequate regulation, they could have petitioned the boards to adopt regulations or sponsored reform legislation; they did neither.

• "But a funeral home is completely different from a cemetery or crematory!" This argument is also unpersuasive. Several DCA boards and bureaus regulate two or more segments of an industry;[29] these agencies are completely capable of recognizing any meaningful differences between the industry components and regulating accordingly. Other DCA agencies successfully regulate two distinct—and sometimes competing—trades or professions.[30] There is no reason a merged entity could not successfully regulate the entire death services industry.

After 14 years of watching these boards *permit* consumers to be abused and victimized instead of policing abuses and regulating the death services industry in the public interest, CPIL urges the Wilson administration and the legislature to withstand the pressure now being exerted by both boards, the affected trade associations which long to maintain the status quo, and other alleged "consumer groups"—which are in reality tied to the death services industry.

Consumers have a right to a regulatory mechanism which makes sense and which attacks prevalent abuses in an industry. The current system is so bad that *no* system is preferable; it is better to have *nothing* to rely on and know it, than to rely on empty promises and unfulfilled obligations.

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ENDNOTES

1. *See* Commentary, *Indirect Taxation Through Expropriation of Regulatory Agency Special Funds: The Budget Gets Ugly and the Legislature Gets Mean*, 12:4 CAL. REG. L. REP. 1 (Fall 1992).

2. *See especially* Joe Cantlupe, David Hasemyer, and Mark T. Sullivan, *Death with Indignity: The Funeral Industry Under Attack*, SAN DIEGO UNION-TRIBUNE, Dec. 6–10, 1992, at A1. *See also* Kathleen Z. McKenna, *Burial Mix-Ups Highlight Woes of Regulatory Panels*, SACRAMENTO BEE, Feb. 2, 1993, at A1; Kathleen Z. McKenna, *Mortuaries Missing Funeral Trusts*, SACRAMENTO BEE, Mar. 21, 1993, at A1; Kathleen Z. McKenna, *State Funeral Board Still Behind on Complaints, New Audit Finds*, SACRAMENTO BEE, Apr. 14, 1993, at A3; David Hasemyer, *Audit Rips Funeral Board*, SAN DIEGO UNION-TRIBUNE, Apr. 16, 1993, at A4; *Internal Audit of Funeral Board Released*, PR NEWSWIRE, May 26, 1993; Stephen Green, *Deadline for Funeral Regulators*, SACRAMENTO BEE, May 27, 1993, at A3; Kathleen Z. McKenna, *A Time for Axing Boards?*, SACRAMENTO BEE, June 11, 1993, at A1; Elston Carr, *Complaint Alleges Mortuary Negligence; A Group Campaigns for Stricter Adherence to Industry Regulations*, LOS ANGELES TIMES, June 13, 1993, at B3; David Hasemyer, *New Direction Sought for State Funeral, Cemetery Boards*, SAN DIEGO UNION-TRIBUNE, Sept. 19, 1993, at B5; and David Hasemyer, *Funeral Boards Told They Must Get to Work*, SAN DIEGO UNION-TRIBUNE, Sept. 23, 1993, at A3.

3. *See* 7:3 CAL. REG. L. REP. 62, 70 (Summer 1987).

4. *See* 12:1 CAL. REG. L. REP. 51, 62 (Winter 1992).

5. *See* 13:2&3 CAL. REG. L. REP. 57, 69 (Spring/Summer 1993); 12:2&3 CAL. REG. L. REP. 51; 7:3 CAL. REG. L. REP. 62 (Summer 1987).

6. *See* 13:2&3 CAL. REG. L. REP. 57 (Spring/Summer 1993); 12:1 CAL. REG. L. REP. 50–51, 61–62 (Winter 1992).

7. *See* 13:4 CAL. REG. L. REP. 47 (Fall 1993); 13:2&3 CAL. REG. L. REP. 57 (Spring/Summer 1993).

8. *See* 12:2&3 CAL. REG. L. REP. 72, 88 (Spring/Summer 1992).

9. *See* 13:4 CAL. REG. L. REP. 38, 48 (Fall 1993).

10. *Id.*

11. *See generally* Elizabeth A. Mulroy, *Regulating Funeral Directors and Embalmers: What to Preserve*, 2:2 CAL. REG. L. REP. 3 (Spring 1982).

12. *See* 13:2&3 CAL. REG. L. REP. 70 (Spring/Summer 1993); 13:1 CAL. REG. L. REP. 37 (Winter 1993); 11:1 CAL. REG. L. REP. 61 (Winter 1991); 10:1 CAL. REG. L. REP. 69 (Winter 1990).

13. 75 Op. Att'y Gen. 291 (1975).

14. *See* 8:2 CAL. REG. L. REP. 48 (Spring 1988); 7:3 CAL. REG. L. REP. 62–63 (Summer 1987); 7:2 CAL. REG. L. REP. 50–51 (Spring 1987).

15. CAL. BUS. & PROF. CODE § 9717.

16. Department of Consumer Affairs, *Annual Report 1990–91*; Department of Consumer Affairs, *Annual Report 1991–92*; Department of Consumer Affairs, *Annual Report 1992–93*.

17. *Id.*

18. *Final Report by the Internal Audit Office, Department of Consumer Affairs; Board of Funeral Directors and Embalmers—Special Review Regarding Inquiries from Assemblywoman Speier* (May 1993); *see also* 13:2&3 CAL. REG. L. REP. 69–69 (Spring/Summer 1993).

19. *Id.*; *see also* 13:4 CAL. REG. L. REP. 47–48 (Fall 1993).

20. CAL. BUS. & PROF. CODE § 9702.2.

21. CAL. HEALTH & SAFETY CODE § 8734(a).

22. *Id.* at § 8734(c).

23. *See* 14:1 CAL. REG. L. REP. 37, 43–44 (Winter 1994).

24. Senate Business and Professions Committee Subcommittee on Efficiency and Effectiveness in State Boards and Commissions, *Reforming and Restructuring California's Regulatory Agencies* (Summary Report) at 13–14 (Apr. 11, 1994).

25. *Id.* at 15.

26. *See* 14:2&3 CAL. REG. L. REP. 45–46, 55–56 (Spring/Summer 1994).

27. Budget Act of 1994, Ch. 139, Stats. of 1994, Items 1180-001-711 and 1330-001-750 (July 8, 1994).

28. *See* Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development, *Analysis of SB 2037 (McCorquodale) As Amended August 8, 1994* (Aug. 10, 1994) at 5.

29. For example, the Board of Barbering and Cosmetology regulates barbers, cosmetologists, aestheticians, and electrologists. BBC was the result of a merger of the former Board of Barber Examiners and the former Board of Cosmetology. *See* 12:4 CAL. REG. L. REP. 60 (Fall 1992).

30. For example, the Board of Vocational Nurse and Psychiatric Technician Examiners regulates both licensed vocational nurses and psychiatric technicians; and the Board of Behavioral Science Examiners regulates two different kinds of therapists (marriage, family and child counselors and licensed clinical social workers) with vastly differing licensing schemes.