



## BOARD OF FUNERAL DIRECTORS AND EMBALMERS

*Executive Officer: James B. Allen  
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The Board of Funeral Directors and Embalmers 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. The Board 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.

The Board 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).

At the Board's June 2 meeting, Executive Officer James Allen announced the Senate Rules Committee's appointment of Michael B. Bennett to fill the vacancy created by the resignation of Herbert McRoy. Bennett will serve on the Board as a public member until June 1, 1995; prior to his appointment, the position was vacant for approximately a year and a half. On September 10, Assembly Speaker Willie Brown appointed Barbara K. Repa to serve out the term of public member Wesley Sanders, Jr., who passed away on May 30. Repa's term expires on June 2, 1994; because she is serving out the term of a past member, Repa is eligible to be reappointed for two full terms.

### MAJOR PROJECTS

**Proposed Regulations.** In late September, the Board submitted the rulemaking file on its proposed adoption of section 1240 *et seq.*, Title 16 of the CCR, to the Department of Consumer Affairs (DCA) for approval. The regulations would establish a system for the issuance of citations to licensees who violate the provisions of the Funeral Directors and Embalmers Law and the regulations adopted by the Board,

and to nonlicensees who illegally engage in activity for which a license is required. [12:2&3 CRLR 86] Specifically, the proposed regulations would authorize the Board to issue citations, including orders of abatement and/or assessments of administrative fines. The regulations specify the form and content of a citation, establish three classifications of violations (Class A, Class B, and Class C), and set forth a range of fines for each classification. The proposed regulations also specify factors to be considered in assessing fines and issuing orders of abatement. DCA has thirty days to make a decision on the proposed regulatory changes; if DCA approves the regulations, the Board will submit the file to the Office of Administrative Law for approval.

### LEGISLATION

**SB 1657 (Killea)**, an urgency measure, authorizes the State Registrar to incorporate, at his/her discretion, computer or telephone facsimile technology, or both, in the statewide program of death and fetal death registration, including but not limited to the issuance of permits for the disposition of human remains. The Governor signed SB 1657 on July 29 (Chapter 383, Statutes of 1992).

The following is a status update on bills reported in detail in CRLR Vol. 12, Nos. 2 & 3 (Spring/Summer 1992) at pages 86-87:

**AB 3746 (Speier).** Existing law requires funeral directors to provide persons with a written or printed list of specified prices and fees before entering into an agreement or contract for funeral services. Funeral directors are also required to conspicuously mark the price on each casket. This bill requires those price lists to be provided at the beginning of any discussion of prices or of the funeral goods and services offered, and requires a funeral director to provide a written statement or list which, at minimum, specifically identifies particular caskets by thickness of metal, type of wood, or other construction, interior and color, in addition to other information required under a specified federal regulation, when requested in person. The bill requires similar information to be provided over the telephone, if requested. The bill also requires individual price tags on caskets to include information on the thickness of metal, type of wood, or other construction, as applicable, in addition to interior and color information. The bill prohibits a funeral director from charging the survivor of the deceased who is handling the funeral or burial arrangements or the responsible party a handling fee for a casket supplied by the sur-

vivor or responsible party. The bill also prohibits a funeral director or embalmer from charging any additional fee for handling or embalming a body when death was due to a contagious or infectious disease.

AB 3746 also requires a funeral director to present to the survivor of the deceased who is handling the funeral, burial, or cremation arrangements or the responsible party a copy of the deceased's preneed agreement, if applicable; a funeral director who knowingly fails to present the agreement as required shall be liable for a civil fine equal to three times the cost of the preneed agreement, or \$1,000, whichever is greater. This bill also subjects all commingled preneed trust funds held by funeral directors to an annual, independent certified financial audit, as specified. This bill was signed by the Governor on September 20 (Chapter 797, Statutes of 1992).

**SB 2044 (Boatwright)** declares legislative findings regarding unlicensed activity and authorizes all DCA boards, bureaus, and commissions to establish, by regulation, a system for the issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee or registrant under the jurisdiction of that board, bureau, or commission. This bill also provides that acting as a funeral director or embalmer without a license may be classified as an infraction punishable by a fine not less than \$250 and not more than \$1,000. SB 2044 also provides that if, upon investigation, the Board of Funeral Directors and Embalmers has probable cause to believe that a person is advertising in a telephone directory with respect to the offering or performance of services without being properly licensed by the Board to offer or perform those services, the Board may issue a citation containing an order of correction which requires the violator to cease the unlawful advertising and notify the telephone company furnishing services to the violator to disconnect the telephone service furnished to any telephone number contained in the unlawful advertising. This bill was signed by the Governor on September 28 (Chapter 1135, Statutes of 1992).

**SB 637 (Roberti)** would have required, on and after July 1, 1995, that an applicant for licensure as an embalmer submit evidence to the Board that he/she has attained an associate of arts degree, an associate of science degree, or an equivalent level of higher education; required that such applicants complete a course of instruction of not less than one academic year in a Board-approved em-



## REGULATORY AGENCY ACTION

balming school; authorized the Board to require such applicants to pass the National Board exam; and required the Board to adopt regulations requiring continuing education of licensed embalmers. This bill died in committee.

**AB 3745 (Speier)** was substantially amended and is no longer specifically relevant to the Board.

### ■ LITIGATION

In *Funeral Security Plans, Inc. v. Board of Funeral Directors and Embalmers*, No. 3CIV0011460 (Third District Court of Appeal), Funeral Security Plans, Inc., (FSP) is challenging the trial court's rejection of its allegations that the Board repeatedly violated the Bagley-Keene Open Meeting Act, Government Code section 11120 *et seq.* [11:3 CRLR 77] FSP, a seller of preneed funeral contracts, contends that the Board, its regulator, has routinely ignored requirements of the Act by conducting portions of its factfinding, deliberation, and actions on public business in closed session.

FSP's opening brief contends that the trial court erred when it ruled that (1) the scope of the communications allowed between a state body and its attorney in a closed session convened under the pending litigation exception to the Act is expanded by "traditional concepts" of the attorney-client privilege; (2) the Board may hear new evidence from its lawyers and staff, deliberate, and take actions in a closed meeting; (3) certain closed meetings purportedly convened under the Act were proper even though the necessary prerequisites of notice and a legal memorandum were not satisfied; (4) the Board as a whole may receive new factual information and take actions on public business by mail, outside a public meeting or a proper closed meeting; and (5) the Board's committees may meet in closed sessions where staff salaries and the per diem and travel expenses of the staff and Board members are paid from public funds.

In May, the Board filed its respondent's and cross-appellant's opening brief, in which it made the following arguments:

(1) The scope of the confidential communication between a state body and its attorney under the pending litigation exception is defined by the traditional concepts of the attorney-client privilege. Noting that Government Code section 11126(q) provides an exception to Bagley-Keene Open Meeting Act requirements in order to allow a state body to discuss pending litigation in closed session, the Board asserted that, "[w]hile the Act provisions must be narrowly construed, this provision must be given a

reasonable interpretation to allow for the effective assistance of counsel to public entities....Under appellant's interpretation, only the legal advice may be conferred to the Board in closed session. Also, the facts that form the basis for the legal advice must be disclosed to the public. This construction puts the public client at a disadvantage when entering the ring of litigation with the private sector."

(2) The Act authorizes the Board to confer and receive advice from its attorney during a closed meeting under the pending litigation exception which includes previously undisclosed facts from the attorney or staff; deliberate and discuss previously undisclosed facts with the attorney, staff, and among themselves; and take action in closed session. Among other things, the Board argued that the Act allows a public body to meet privately "to confer with or receive advice from its legal counsel regarding pending litigation," and that "[d]ebating the merits of the advice and voting on the action to be taken are all part of the process of conferring with counsel."

(3) The Board's notices and legal memoranda justifying its closed session meetings were proper and in substantial compliance with the Act. According to the Board, section 11126 provides that when a public body meets in private under the pending litigation exception, its attorney must prepare and submit a memorandum stating the reasons and legal authority for the closed meeting; however, the statute does not require the memorandum to specifically state that the Board would be prejudiced if forced to discuss the matter openly, as is contended by FSP.

(4) The Act permits Board members to receive privileged legal memoranda from counsel and to receive information from staff in advance of a meeting, and expressly permits the Board to vote on administrative disciplinary matters by mail.

(5) Section 11121.8 of the Act exempts two-member advisory committees from the Act's provisions. Although acknowledging that Executive Officer James Allen attends most two-member advisory committee meetings, the Board contended that he is not a committee member, he has no authority to vote, and he does not participate in the deliberations of the committee; according to the Board, "[t]he attendance of Executive Officer Allen to answer questions of the advisory committees and to assist in the handling of whatever matters are before the committee does not convert the committee into a state body [subject to the Act]."

Finally, in its cross-appellant's opening brief, the Board presented the issue

whether the trial court abused its discretion in ruling that FSP's action was not frivolous, thereby denying the Board attorneys' fees and costs. According to the Board, in determining whether an issue or case is frivolous, the test is whether any reasonable person would agree that the point is totally and completely devoid of merit; an appeal is frivolous when it is prosecuted for an improper motive or when it indisputably has no merit. The Board contended that FSP's actions satisfy that test and that the trial court's holding regarding this issue should be reversed.

At this writing, the Third District has not yet scheduled oral argument in this proceeding.

In *People v. Funeral Security Plans, Inc., et al.*, No. 205308, a separate action involving the Board and FSP, the Board is seeking a permanent injunction against FSP and requesting that the court order the appointment of a receiver to take custody of preneed funeral arrangement trust funds administered by FSP. According to the Board, approximately 90 licensed funeral homes and nearly 14,000 California consumers are potentially affected by FSP's improper administration of the trust funds; for example, the Board contends that FSP invested approximately \$16 million in trust funds into annuities issued by Individual Assurance Company, which thereupon entered into a reinsurance agreement with Funeral Security Life Insurance (FSLife), a wholly-owned subsidiary of FSP. Defendant David W. Newcomer, one of the individual trustees of the preneed funeral arrangement trust fund, is also president and one-third owner of both FSP and FSLife. A decision in this proceeding, which was filed in May 1990 on behalf of the Board by the state Attorney General and the Riverside County District Attorney, is expected by early October.

### ■ RECENT MEETINGS

At its June 2 meeting, the Board discussed AB 3745 (Speier), which at that time proposed to create a Division of Compliance within DCA; the Division would have absorbed most enforcement functions of DCA agencies. The Board argued that removing its enforcement capabilities is illogical, and opined that the Division is unnecessary and would create excessive bureaucracy. Subsequent amendments to AB 3745 deleted the language regarding the Division of Compliance (*see supra* LEGISLATION). The Board also objected to a provision in AB 3746 (Speier) which would have required annual certified audits for all preneed trusts; according to the Board, such a re-



quirement is unnecessary and, in some cases, overly burdensome and a financial detriment to licensees. The bill was subsequently amended to provide that only commingled preneed trust funds are subject to an annual certified audit (*see supra* LEGISLATION).

Also at its June meeting, the Board discussed a request from DCA Director Jim Conran for copies of any evaluation forms or other interview formats used by DCA boards to conduct an evaluation of their executive officers; Conran also encouraged DCA boards to periodically evaluate their executive officers. James Allen, the Board's executive officer, stated that he has no objection to performance evaluations, but suggested that in his case they might be a bit unnecessary as he attempts to make himself available to anyone who wants to comment on his performance. The Board moved to create a Personnel Committee to research the matter further.

The Board's July meeting was canceled.

## ■ FUTURE MEETINGS

January 28 in northern California.

## BOARD OF REGISTRATION FOR GEOLOGISTS AND GEOPHYSICISTS

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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).

The Board licenses geologists and geophysicists and certifies engineering geologists. 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.

The Board has the power 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 Practices, Legislative, and Examination Committees. BRGG is funded by the fees it generates. Currently, two public member positions on BRGG are vacant.

## ■ MAJOR PROJECTS

**Hydrogeology Specialty Update.** BRGG's proposal to implement a specialty certification for hydrogeologists was delayed by the state's budget crisis. The Board plans to sponsor legislation enabling it to certify hydrogeologists and to permit—through a "grandparent" clause—certain qualified geologists presently practicing hydrogeology to be certified without having to pass the specialty examination. Following that, the Board intends to adopt regulations which would—among other things—require an applicant to first meet all of the requirements for geologist registration before being eligible to take the hydrogeologist specialty examination; require that the specialty examination test applicants' knowledge of geologic factors relating to the water resources of the state, principles of groundwater hydraulics and groundwater quality, interpretation of borehole logs as they relate to porosity, permeability, or fluid character, and other relevant issues; and provide that civil engineers and soil scientists are exempt from hydrogeology certification requirements, insofar as they are regulated by the Board of Registration for Professional Engineers

and Land Surveyors. [12:2&3 CRLR 88]

However, because the legislature devoted a substantial portion of the final months of the 1991-92 session to negotiating the 1992-93 state budget, BRGG was unable to locate a legislator willing to carry the grandparenting provision, and thus postponed its legislative amendment until the 1992-93 session. In conjunction with the introduction of that legislation, the Board intends to publish notice of its intent to adopt the regulatory package creating the new hydrogeology certification.

**BRGG Administers Exam to Record Number of Applicants.** During BRGG's most recent examination, the Board administered the test to approximately 2,000 applicants; 1,500 of those applicants successfully passed the exam, 300 more than even applied to take the examination the previous year. According to BRGG Executive Officer Frank Dellechiaie, the Board's new automated application tracking system and testing data bank allow for the expeditious processing of applications. [12:2&3 CRLR 89] Despite the substantial increase in its applicant base, a 10% reduction in the Board's 1992-93 budget will force BRGG to delay the introduction of semi-annual testing until 1994 and to consider consolidating examination sites.

**Automated Enforcement Tracking System Update.** BRGG recently received access to the state's mainframe computers, which utilize the Teale Data Center and enable BRGG to compile information necessary for the efficient monitoring and discipline of practitioners requiring enforcement activity. [12:2&3 CRLR 89] After a brief delay, during which BRGG staff familiarized itself with the new system, the Board began opening more concurrent investigations than ever before. In an effort to reduce a backlog of consumer complaints, staff has processed complaints on a number of licensees and expects to forward that information to the Department of Consumer Affairs' Division of Investigation by the end of the year.

**Examination Development and Validation Process Update.** According to BRGG, the development and validation of its examination by Donnoe & Associates is proceeding on schedule, and is expected to be completed by the scheduled deadline of January 1993. The validation process requires a group of experts in the fields of geology and geophysics to determine the "state of the industry" and ensure that the Board's examination properly tests the knowledge, skills, and abilities necessary to function within that industry. [12:2&3 CRLR 89]