

# Funeral Ethics Organization

Fall Newsletter 2005



Hinesburg, Vermont

## State Licensure & Regulatory Board Standards: How To Be Effective

by Mack Smith, Executive Secretary  
Kansas State Board of Mortuary Arts

An effective regulatory agency, regardless of the profession being regulated, begins with an effective *Agency Mission*, such as: To ensure that licensees perform their professional services in a manner providing maximum protection of the health, safety and welfare of consumers and to inform the public of the laws and options available to them when dealing with the profession being regulated.

An example of an *Agency Philosophy* is that the agency will act in accordance with the highest standards of ethics, accountability, efficiency and openness and to affirm the activities of the funeral profession that involve public and private trust. The regulatory agency will approach its activities with a deep sense of purpose and responsibility so that the public and regulated profession alike can be assured of a balanced, sensible and fair approach to regulation.

Government should provide only the minimum level of regulation. . . . The regulatory structure should promote accountability and public confidence.

from "Questions a Legislator Should Ask," CLEAR, 1994

As with any successful business, there is a need to establish *Program Goals*. While these goals may vary with the type of regulatory agency (autonomous, semiautonomous, umbrella), an example of three main

goals for an agency that regulates and licenses the funeral profession could be:

- 1) To ensure that all funeral homes, crematories, licensees, apprentices and student embalmers/ apprentices operate according to state laws.
- 2) To ensure that all funeral homes, crematories, licensees, apprentices and student embalmers/ apprentices operate to serve in the best interest of the consumer by meeting and maintaining licensing and regulatory requirements, and
- 3) To educate and inform the public of their options when conducting business with licensees of the regulatory/licensing agency.

Objectives and strategies of the agency need to relate to the established goals. Strategies should relate to Objectives, and might include items such as:

- To inspect all facilities no less than once annually (more often if necessary or if violations are discovered.) Inspections should be unannounced with data reported to the board no less than quarterly, so necessary adjustments can be made.
- To investigate all complaints and to present information to the *Investigative Committee* of the Board so that appropriate action can be taken.
- To establish licensure requirements that coincide with the *Agency Mission, Philosophy* and *Program Goals*—requirements that should make sense and be fair to all stakeholders (consumers, applicants for licensure and licensees alike.)
- To provide understandable information that explains options and laws that consumers need to know when dealing with death and prior to death.

I'm a believer in *preventive maintenance* for consumers and licensees. The more information a regulatory agency can provide, the better off all parties will be. Examples include an **informative and regularly updated Web site** containing information for both consumers and licensees; **informational brochures**, and **public speaking**—explaining laws and options to consumers and updates/reminders/ clarification of laws to licensees.

If an occupation or profession is to be licensed, its scope of practice should be coordinated with existing statutes to avoid fragmentation and inefficiency in the delivery of services.

*from "Questions a Legislator Should Ask," CLEAR, 1994*

**Laws need to be regularly reviewed** and changed as necessary to meet with *Agency Goals* and trends in the profession. With the cremation rate increasing and with well-documented crematory horror stories, regulatory agencies are now licensing and regulating crematories, something not done in years past. Pre-need funerals are being financed with insurance, annuity, and trust products that continue to change. Regulatory agencies have to make the necessary adjustments when industry trends change.

Other important factors include having a **well-informed administrative staff**, people who know and understand their responsibilities and duties. A brief summary of the responsibility of the administrative staff is to put together the information necessary to allow the Board to make decisions. It all begins with the appointment of board members, who need to be provided with information about their responsibilities. Ways of doing this include providing an information booklet to each new board member or having an experienced board member serve as a mentor.

Financing is an issue with regulatory agencies. There is generally some kind of a split (such as 80%–20%) where the agency would keep 80% of all revenue with 20% going to the state's general fund. There has been a trend of states dealing with financial shortcomings to randomly transfer monies from agency fee funds to the state general fund, resulting in the agency having to increase licensure fees.

**Regulatory agencies need to keep the lines of communication open**—with consumer groups, associa-

tions, legislators, other state agencies (Attorneys General, Insurance Departments, Secretaries of State), and the Federal Trade Commission—in order to have as many options as possible to deal with related regulatory issues.

Requirements and evaluation procedures for licensure should be clearly related to safe and effective practice. Regulatory laws often appear exclusionary.

*from "Questions a Legislator Should Ask," CLEAR, 1994*

There is a wide range and difference of laws from state to state. You have to be a funeral director to sell caskets in Oklahoma, while you don't have to hold a license of any kind to provide funeral services or embalm in Colorado. Some states license cemeteries and preneed providers, while many do not. Some states require continuing education, while others do not. The one constant is the Federal Trade Commission's Funeral Rule, which may or may not

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**Hinesburg, VT 05461**  
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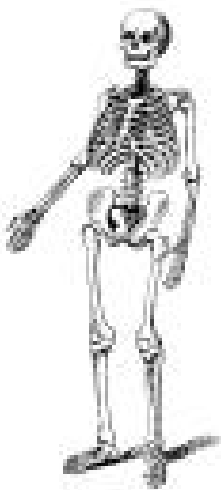
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be revised next year, or who knows when?! What's right? What's wrong? What's fair? The debate is never-ending.

For practical purposes, funeral regulatory boards serve as the funeral police. They don't exist to represent licensees. They exist to ensure that licensees perform their professional services in a manner providing maximum protection of the health, safety and welfare of consumers and to inform the public of the laws and options available to them when dealing with the profession being regulated. Licensees are represented by associations. It's important to keep the line drawn—or there's simply no need for their existence. Show me an agency with a good *Mission* and *Philosophy*, with well defined *Objectives* and *Strategies* related to thought-out *Program Goals*, and you've probably found an agency on the right track to regulating and licensing a profession whose customers are dealing with the hardest situation of their lives: the death of a loved one.

*Mack Smith has been the executive secretary to the Kansas State Board of Mortuary Arts for over 25 years. He is a past president of the International Conference of Funeral Service Examining Boards (ICFSEB) and the Council of Licensure, Enforcement and Regulation (CLEAR.) He has served on the board of directors for the Federal Association of Regulatory Boards (FARB) and the American Board of Funeral Service Education (ABFSE) and is currently serving a second term as Mayor of Silver Lake, Kansas.*

**CLEAR website — <http://www.clearhq.org>**



The public should be involved in the regulatory process.

*from "Questions a Legislator Should Ask," CLEAR, 1994*

## Recruiting Public Members

*by Ben Shimberg, Ph.D.*

*The following was condensed from a paper prepared for presentation at a 1994 conference in Warrenton, VA.*

What conditions gave rise to public members in the first place?

Until the late sixties and early seventies, most people accepted occupational regulatory boards as institutions designed to protect the public against incompetents and charlatans. There was very little discussion about the topic. As far as most people were concerned, the folks on licensing boards were all "good guys."

It was the anti-competitive aspects of licensure that attracted most of the attention. . . . We turned up lots of evidence that boards were using their regulatory powers to limit entry into skilled trades and professions and that this in turn tended to restrict competition and lead to higher prices.

The cumulative impact of these disclosures suggested strongly that far from protecting consumers, many boards were using their legal powers to further the interest of their own occupational groups. At the same time many boards were being derelict in their responsibility to the public by failing to discipline incompetent or dishonest licensees.

It was in this climate of board-bashing that the suggestion emerged that the make-up of boards was, at least partially, at fault because boards were made up exclusively of members of the regulated occupations or professions. Thus, it was easy for board members to look after the economic interest of themselves and their colleagues without anyone there to stop them. Ergo, put some public members on boards and this would force them to behave more responsibly in the future.

In retrospect, it is now clear that those who were concerned with the self-serving activities of boards had seized on a simplistic solution. We were all being rather naive, to say the least, in believing that *any* member of the public — as long as he or she did not have direct ties to the regulated occupation—could serve as an effective protector of the public interest. It is now clear that insufficient attention had been paid to defining clearly the role of the public member or the characteristics he or she would need

in order to be effective. There was almost no mention of qualifications. About all that was needed was a willingness to attend meetings and speak up for the consumer when the situation required.

- What role or roles do we expect public members to play?
- What types of individuals are best equipped to play these roles?
- What sort of orientation and training do they need in order to fulfill their role expectations? Who can provide such training?
- What type of support system is needed to sustain them?
- To whom should public members be accountable? How can such accountability be implemented in practice?

I see the public member as much more than a watchdog or as a reactor to board initiatives. He or she must be pro-active in all areas where consumers interface with the board. Is the board's telephone number listed in a way that consumers can find it readily? Are consumer inquiries and complaints being dealt with promptly and courteously? Board staffs sometimes lose sight of the fact that they are there to serve the consumer, and it is a public member's job to see to it that they are constantly reminded of this responsibility.

The key to filling board vacancies rests with a person on the Governor's staff, usually called his "Appointments Secretary." Because it is such a monumental task, most appointments secretaries welcome input from the professional associations. These groups are only too glad to provide names of individuals they consider to be suitable candidates for boards and commissions related to their occupational interests.

When it comes to public members, there is usually no organized group waiting, lists in hand, to help the appointments secretary fill vacancies. Well, that's not altogether true. There are county chairpersons waiting in the ante chamber with names of party workers and contributors. These folks, they argue, deserve consideration for such slots as may be open for "the faithful."

Public members appointed in this way are likely to be disappointed when they find that board meetings are dull and the discussions are often dry and technical. Since the professional members are such friendly, well-informed people, the public member may trust their judgment and vote as they do on various proposals. Without realizing it, such public members have been co-opted.

Several years ago, AARP undertook a well-intentioned effort to help with the recruitment of public members by soliciting volunteers from among the AARP membership . . . primarily members of local chapters. Members were given a general description of what boards do and were asked to indicate their interest in serving in such a capacity. This effort relied mainly on the expressed interest of the members rather than on an objective evaluation of the volunteer's qualifications. These names were then made available to the governor's appointments secretary. Those who were selected to serve on boards received a brief orientation but were otherwise left to sink or swim on their own.

As far as I am aware, no evaluation was ever conducted to determine how these appointees made out as board members. Did they find the meetings interesting? Did they continue to attend on a regular basis? Did they get really involved with the work of the board? What, if anything, did they feel that they had contributed? AARP has since terminated its Citizen Representation Program.

At present, public members are not accountable to anyone. In theory, all board members are accountable to the governor who appointed them, but this is fiction. The governor pays no attention to boards or board members unless they do something that causes embarrassment to the administration. In states with centralized agencies, board members may be nominally accountable to the agency director, but, in practice, he, too, is not likely to pay them much heed unless they cause problems.

Although professional members are supposed to be there to serve the public the same as the public member, too often they view themselves . . . consciously or unconsciously . . . as having an obligation to their profession . . . an obligation to uphold high standards of practice and conduct and to protect the image of the group. While no one will say it out loud, there is also an implicit commitment to safeguard the economic interest of the professional group. Since the professional member belongs to an association and, indeed, was probably nominated by the association, he or she is likely to feel somewhat accountable to the association.

The public member has no comparable constituency. He or she represents no group, even if some group like AARP submitted the nomination. In the real world, there is no group to which a public member can turn for advice or guidance. How does a public member decide whether a

proposed rule or regulation is in the public interest? He or she may discuss it with a spouse or with members of a social group, but these views would probably not resemble those of pensioners in the inner city who are consumers of the goods or services offered by the regulated profession.

If a public member does an outstanding job, there is no one to voice approval. And if he or she does a poor job . . . or no job at all . . . there is no one to point a finger and say, "You let us down."§

*Reprinted with the permission of David Swankin, Esq.,  
President of the Citizen Advocacy Center, Washington,  
DC. Website: [www.cacenter.org](http://www.cacenter.org)*

## Licensing Laws – The Colorado Experience

*by John J. Horan, MSP/CFSP  
Horan & McConaty Funeral Service/Cremation  
Denver, Colorado*

I received my license as a funeral director and embalmer in 1981, and then, in 1982, Colorado became and continues to be the only state without a licensing requirement. This made it possible for anyone in Colorado to set up a business as a funeral director, embalmer, or cremationist. At the time I was shocked and dismayed that the legislature would do something so shortsighted.

Most funeral directors predicted dire consequences when deregulation took place. Today, with over 20 years of hindsight, there is not a strong mandate for re-licensure in Colorado – though I personally believe that licensing of funeral directors and embalmers is of value to consumers and our profession.

Though complaints to our state association, the Better Business Bureau, or District Attorney are relatively rare, I often wonder if things would be different with licensure. For example, what would unannounced inspections reveal? Are deceased individuals being embalmed and/or refrigerated properly in accordance with our "24 Hours Rule"? Is potentially hazardous bio-waste being properly disposed of? Are the FTC consumer protection regulations being carefully heeded? Are consumers with complaints being helped? Are cremations being conducted in an appropriate manner? Are minimum standards of cleanliness and sanitation being observed? I'm convinced that what the public doesn't know DOES hurt them in this case. And I'm concerned that there is much that the public does not know in Colorado.

Normally, I'm no fan of government regulation. For the most part, my partners, our co-workers, and I set higher standards for our firm than a licensing authority in another state would require. We do so voluntarily and remain firm in the belief that our success is a direct reflection of our high standards. Still, it's sometimes frustrating. It costs us more to operate safely and professionally, and some companies, especially those who work out of homes, cars, and warehouses, operate with lower standards and a commensurately lower cost structure, which provides a competitive advantage when dealing with price-conscious consumers who assume that minimum professional standards are pervasive. I recall a conversation with a local funeral director who lacks professional qualifications—I mentioned my concerns about Creutzfeld-Jakob Disease, the training we've done in our firm, and the dangers to funeral home staff and the public if we aren't extraordinarily careful. He had never heard of CJD. God help him and his co-workers when they receive the body of someone who carried this dangerous and contagious disease.

Up to this point, there have been few compelling arguments for or against licensure in Colorado. An undercover investigation by a local television affiliate showed a local funeral home caught on camera not offering a General Price List, even when price information was requested by the shill with the hidden camera. An editorial followed, arguing for licensure. There was an implicit tone that problems like these are more common than most people think.

A crematory in a warehouse next to a neighborhood was written up in the newspaper, being blamed for smoke, ash, and a general lack of professional discretion. The city's compliance officer was somewhat vexed by the neighborhood's complaints and is inexperienced in investigating such charges. A direct disposition provider in another city was reportedly storing bodies in an unsanitary mini-warehouse and kept a dog on the premises for security. The city didn't seem to want to deal with it.

Meanwhile, the local mortuary science program at Littleton's Arapahoe Community College operates at capacity. The good firms in our region are looking for good people, people with professional qualifications. These companies realize that the most valuable thing they own is their reputation and are more careful to "take the high road" when legal and ethical issues arise. A licensing requirement wouldn't change a thing at most of these firms.

In my view, some states have gone too far with their statutes and licensing requirements. In some states, the statutes and regulations seem more oriented to the protection of funeral homes and directors than for the health, safety and welfare of the public (theoretically, the basis for

our laws and regulations). Legal prohibitions on independent casket sellers and restrictions that prevent a catered reception at the funeral home seem indefensible from my perspective. The latter is certainly within the funeral home's own prerogative to decline receptions, but to prohibit this by law? The logic for that escapes me. The public will increasingly go around these restrictions (to their churches for example) if these are examples of things they want.

Consider some states that have adopted requirements for a four-year degree. If you think it is difficult now to find good funeral directors, pass more of these laws and see how much more difficult and expensive it can become. I give kudos to the firms that voluntarily set their own higher standards, such as a bachelor's degree. However, I believe a statutory requirement for a bachelor's degree as a prerequisite to licensure goes too far.

While some funeral directors are trying to strengthen or build new walls of protection, some may come to see that they only managed to wall themselves in and kept increasing numbers of client-families out, families who will have their needs met by our unregulated competitors such as churches and private facilities often utilized for events such as a wedding that could be easily adapted for a memorial service.

In conclusion, OSHA, the FTC, and the District Attorney are poor substitutes for a reasonable and comprehensive professional licensing program that articulates legal and ethical standards, includes random surprise inspections, and holds people accountable with the key to their livelihood – a license to operate. §

## Professional Challenge

*The following question was put to a number of funeral directors, state regulators, and others. If you have a question that you would like to see discussed (including issues that involve cemeteries, monument dealers, law enforcement, hospice, etc.), please drop us a line — news@funeraethics.org*

**Should funeral and cemetery complaints be heard and dealt with in open board meetings?**

In a simple answer . . . NO! Once the complaint has become a legitimate issue and action has been recommended by the Board; the results should be made public. All too often complaints are just miscommunica-

tions or fodder for gossip. No one's good reputation should be ruined in such a situation. I've also been on public boards, such as the Board of Education. [My state's] open meeting law mandates that legal and personnel issues be discussed in closed session but the decision must be made in public. That system works well.

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Partially yes (at least the name of facility and nature of complaint when opened and, when case is settled, the findings, conclusions and actions/penalties if any). And partially no (during investigation it is important to keep it under wraps so investigation is not compromised, particularly where outcome may be significant fines/penalties and/or legal action, including possible criminal prosecution).

When I served on the State Cemetery Board, we discussed investigations in Executive Session until we had concluded what to do because we did not want the cemetery to get advance information on our investigation -- we did not want them to destroy records before we could retrieve them or intimidate possible witnesses before we could talk to them. We also did not want cemeteries to know in advance what legal actions we might be considering because we had a wide range of options from which to pick the appropriate remedy, including regulatory fines, orders to cease and desist, orders to change practices. We also had the ability to refer cases to the State Attorney General for civil or criminal prosecution, based upon the severity of the violations -- an option we took fairly frequently.

Once we had the investigation results and determined our course of action, then we went public.

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The policy concern that the citizens of the State of Maine have a right to observe and understand the workings of its government is given much weight. Therefore, government business is conducted in open session except when there is a more important countervailing privacy concern recognized as such in statute, e.g., information regarding sexual abuse of minors. Title 10 which governs complaint presentations attempts to strike a balance between the competing concerns by conducting complaint presentation in public session but keeping the identities of the individual involved confidential until a final disposition is reached. This allows the public to follow the business, and ultimately to know the identity of the individuals involved, but protects the Licensee's reputation from unnecessary harm in cases where the complaint is found to be without merit. The thinking is that, if the Licensee's name becomes known at the same time the merits of the complaint have been decided, there is much less potential for harm to the innocent.

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Definitely! Fundamentally, the public's ability to understand and interpret the logic behind board activity brings into greater light the issue of accountability/ ethical standards prevalent and, given this transparency, contributes to a furthering of the public trust.

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Sometimes issues are ALLEGED and pushed way-out of reason, and it would be too bad for a very ethical long standing good reputation firm to be caused public scrutiny if in that were possibly the issues.

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All should be open, and it would also show the frivolous ones and make that point clear that every hiccup does not deserve jail time or basis for lawsuits.

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All hearings, in my opinion, should be open to the public.

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[In my state] complaints are received in the board office from consumers..either by phone or in writing ...which then are transferred to an "official complaint form" designed by the state, which requires certain information.

The complaint depending upon severity and the public health and welfare is handled in a variety of ways [as determined by statute or the board]. [This is to prevent investigators from becoming over-zealous resulting in compromised investigations].

Some complaints are investigated immediately by un-announced undercover/sting operations; some are investigated by sending an un-announced investigator to gather information from the licensee-which could include a subpoena for documents or records; some are handled by sending the licensee a letter stating a complaint has been filed and asking the licensee for comment/ records/documentation regarding the claim.

The information gathered during the investigation is then reviewed by the board staff, the board, the attorney general representing the board for further action.

Complaints are not discussed in open session until some sort of resolution is achieved and/or discipline is necessary....at which time the licensee and their attorneys are invited to come before the board in open session for further discussion in a hearing type setting and the complaint is ordered for further investigation, discipline is imposed, or the case is settled or dropped.

Many, (one might argue too many) complaints come from competitors [who are usually doing worse things] just trying to cause havoc to their cross-town competitor. Some are brought on by regular, on- going inspections conducted by the state, and others truly are from the consuming public.

But even some of those are not really complaints...they are filed to avoid paying a bill, or seeking a discount, or because one of the family members got his way and the other didn't. It is incumbent upon the state, the investigator, the board to determine which complaints are truly legitimate and then with limited resources do something about them.

So the answer is this.....until the state is absolutely sure there is a complaint that measures up to the test.... the proceeding should not be held in the public.

Some complainants are only seeking revenge, news/fame, free services.

The reputation, livelihood of the licensee could be irreparably damaged from the misplaced or misguided "perceptions" of the complainant.

A good regulator knows it is true balancing act to protect the public from bad licensees..... as well as protect the good licensees from the malicious public.

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## Become a Member

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**Coming next issue ~**

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Education:  
Who Decides?  
Who has the  
expertise?  
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## **We Can Do Better**

( It would appear that the consumer seats on the funeral and cemetery boards in Florida are filled by patronage obligations only. In the not-too-distant past, one such position was held by the wife of a cemetery manager (in violation of the statute requiring no affiliation with the funeral or cemetery business). She was heard to say in one meeting, "It's not our job to protect the consumers. We're here to protect the businesses."

( In Massachusetts, the funeral board doesn't like the fact that there are consumers attending their meetings to monitor their activities. This year, they've changed their practices. They now go into closed session for most of their meeting, with no available minutes to document their actions. The board investigator reports that 70 funeral directors had their licenses suspended last year, but there's no way to find out who they were.

( The Wisconsin Funeral Service Alliance wants to see a new law passed that would outlaw funeral-arranging

companies in strip malls and would require seating for at least 50 in any funeral establishment, all in the name of "consumer protection." Why not require seating for 350 or more?

## **. . . And Some Do!**

( Arizona has a funeral consumer rights pamphlet, which the state requires each funeral home to pass out when making arrangements. Arizona mortuaries must also mail a price list on request. Consumers may be charged postage, not to exceed two dollars.

( The Vermont GPL must include an option for private family viewing without embalming. Vermont GPLs must state that funds may be available for final disposition through the Department of Social Welfare. The GPL must also list contact information for filing a complaint or requesting information from the Secretary of State's office.