Public Comments of the Michigan Funeral Directors Association on Administrative Rules for Mortuary Science (Ruleset 2023-17LR)

On behalf of over 1,110 licensed funeral directors serving in over 400 funeral homes across Michigan, the Michigan Funeral Directors Association offers the following comments on Administrative Rules for Mortuary Science.

In general, we found most of the proposed rules will advance the mortuary science profession in Michigan – making much-needed improvements to funeral establishment and resident trainee requirements, establishing the regulatory framework for upcoming continuing education, and enhancing industry standards for the identification, care and storage of human remains.

Just as we identified revisions contained in the proposed ruleset that will advance the mortuary science profession, we also detected areas of concern, specifically several proposed rules that exceed statutory authority and proposed rules that need more clarification to prevent enforcement and implementation issues. Our testimony today will be focused on these areas of concern. These proposed revisions are attached hereto as an "Addendum."

Proposed Rule 1(1)(d) and (g), which define "Continuing Education" and "Course," exceed statutory authority by limiting both definitions to continuing education and courses covering the topics listed in section 1806b(2)(a) of the Code. The Code clearly states, however, that only two of the four hours of continuing education required each year must cover subjects under 1806b(2)(a). As such, these regulatory definitions would amend the statute by requiring that *all* continuing education and courses, not just the minimum 2 hours per year, cover the listed subjects under section 1806b(2)(a). For this reason, MFDA strongly urges the department to broaden the definitions by deleting reference to 1806b(2)(a).

Proposed Rule 1(1)(L) adds a definition for the term "Supervision," which poses a number of problems. First, it includes arranging for mortuary science services within the "practice of funeral directing." The Code defines "practice of funeral directing" and makes no mention of arranging for mortuary science services. MFDA will discuss this issue more fully when commenting on proposed Rule 42, but an administrative rule promulgated under a statue cannot amend the statutory definition. Furthermore, the Code makes clear that the practice of funeral directing is a part of the practice of mortuary science, and therefore requires a mortuary science license. The proposed rule, however, contemplates that it could be done by a non-licensee, albeit under "supervision."

Finally, proposed Rule 23(8) uses the phrase "supervised by a mortuary science licensee," but then states that the mortuary science licensee must be physically present in the same room as the individual being supervised. This is wholly different from the definition of "Supervision," which only goes so far as stating the mortuary science licensee be physically present at the funeral establishment. This would undoubtedly create substantial confusion. For these reasons, MFDA urges that the definition of "Supervision" be deleted. Please note, however, MFDA supports proposed Rule 23(8) with a clarification, which we will address shortly.

Proposed Rule 21 begins: "An applicant for a mortuary science license shall satisfy the requirements of the Code. In addition to the requirements of the Code, an applicant shall satisfy all of the following:". MFDA notes that administrative rules may not add licensing requirements to the statute. Consequently, MFDA advocates that Rule 21 simply begin with "An applicant for a mortuary science license shall satisfy all of the following:".

Furthermore, the last sentences of Rules 21(a) and (b) are designed to ensure the 60 hours of general education and the 30 hours of mortuary science education are separate. But in practice these sentences taken together could result in requiring a total of four years of post-secondary education – not the three years prescribed by the Code. For example, at a two-year mortuary science program, a student who graduates with an Associate's Degree upon completion could, under the proposed rules, be required to obtain an *additional* 60 hours of general education.

To address this concern, MFDA recommends that proposed Rules 21(a) and (b) be deleted, and replaced with a new Rule 21(a) requiring completion of not less than 90 semester (or its equivalent quarter) hours, with not less than a 2.00 grade point average, of non-remedial college level courses at an accredited college or university, including graduation from an accredited mortuary science program pursuant to R 339.18922(1). In this way, the proposed rule can correctly delineate the Code's 3-year education requirement, while still accommodating the varying durations of mortuary science education programs across the country.

Proposed Rule 23(1) and (2) conflict with one another as currently drafted. The third sentence of Rule 23(1) states that a resident trainee license may not be renewed more than once, and (2) provides a process for an exception to that restriction. To resolve this conflict, MFDA suggests that the third sentence of Rule 23(1) be amended by adding "Except as provided in (2), the resident trainee license may not be renewed more than once."

Proposed Rule 23(8) states a resident trainee performing an embalming be personally supervised by a mortuary science licensee, however, the proposed rule fails to acknowledge that the minimum embalming requirement for a resident trainee can be fulfilled by a resident trainee "assisting a licensee in the preparation of dead human bodies." This proposed rule should be amended to include the act of assisting in the preparation of dead human bodies under Rule 25(a).

Proposed Rule 28(1)(a) and (b) appear to be redundant. MFDA suggests that the two subsections be merged by stating that an applicant obtain a total of 4 hours (2 per year) of continuing education covering the topics detailed in section 1806b(2)(a) of the Code.

Proposed Rule 28a(1)(b) provides one continuing education credit hour for licensees that attend a board meeting. That subsection should be clarified by stating that a continuing education credit be granted to licensees that attend a State Board of Examiners in Mortuary Science meeting, not a board meeting of another entity.

Proposed Rule 29(2)(a), which outlines the department's approval process for continuing education courses, once again seeks to amend the Code by limiting continuing education subject matter to topics described in section 1806b(2)(a). This proposed rule exceeds statutory authority by requiring that continuing education courses only cover the topics listed under section 1806b(2)(a), when the Code specifically provides that only two of the required 4 hours of continuing education each year cover those specific topic areas. Consequently, this requirement should add the qualifier, "if applicable" to (2)(a).

Remaining under Rule 29, MFDA seeks clarification on subsection (4), which states courses approved by the department are valid for two years. Does this subsection also include courses approved by the Academy of Professional Funeral Service Practice? Or is it strictly limited to courses approved by the department under (2)? Courses approved by the Academy are approved courses under proposed Rule 29(1). Whether (4) applies to (1) should be clarified.

In regard to Part 4 of the proposed rules: Care and Storage of Remains, there are two separate subsections pertaining to recordkeeping that need to be addressed. The first being proposed Rule 32(1)(h)(iii). It is common for multiple licensees to be in contact with a decedent throughout the duration of the decedent's care at the funeral establishment. This subsection should be made plural, thus ensuring that every

licensee at the funeral establishment that cared for the decedent is included on the case report.

Secondly, proposed Rule 32(2)(c) should be amended requiring that a funeral establishment, rather than a licensee, retain recordkeeping of cremated remains. In practice, it would be the funeral establishment maintaining a database for all records of cremated remains stored in the facility. Additionally, this provision implies a licensee would remain employed at the same funeral home for the 7 years a cremated remains report is required to be maintained, which may not be the case.

Under proposed Rule 35, which covers transportation of remains to a crematory, subsection (a) is imprecise in stating a container for cremation be "rigid." This rule should be amended by including language from the International Conference of Funeral Service Examining Boards' model law for disposition standards. Specifically, the International Conference includes language requiring containers for cremation to be leakage or spillage resistant. MFDA's view is that any container for cremation showing signs of leakage should never be transported to a crematory as it presents a significant public health, sanitation and safety hazard for all of those involved, including crematory personnel.

Proposed Rule 37(1) requires identification of a decedent by the authorizing agent, either visually, or through a photograph. The proposed Rule is unclear, however, as to whether the photograph is to be provided by the authorizing agent or taken of the decedent by the funeral establishment and provided to the authorizing agent. Either way, photography, even though sanctioned by rule, poses significant exposure to civil liability for the funeral establishment arising from the possibility of misidentification due to a poor or outdated photo provided by the family or the further dissemination or reproduction of the images taken by funeral establishment personnel. MFDA strongly urges that proposed Rule 37(1) be amended by deleting references to positive identification through photograph or other visual images of the remains, and that any photographic requirement be accomplished by working with legislators to amend the Code to add this requirement in a way that provides protections from liability exposure. In addition, the requirement for visual identification should be amended to allow the authorizing agent to waive this requirement.

Furthermore, the proposed rule's next sentence provides alternative means of identification if visual identification is not "feasible." MFDA advocates that feasibility be clarified by adding the words, "due to the decedent's condition," to define when visual identification is not feasible.

MFDA seeks clarification on proposed Rule 41, regulating advertising. For example, does a logo count as a trademark? And does proposed Rule 41 cover a logo that includes part of a licensed name? MFDA advocates that it should, and also that branches of funeral establishments be able to be advertised simply by locations rather than their formal, licensed name.

It is an onerous burden to place on funeral establishments the requirement to include the full, licensed name of each establishment when advertising multiple funeral homes. MFDA maintains that there has been far too much confusion resulting in enforcement actions regarding the current advertising rule, and the proposed revisions do not sufficiently clarify it. Because of potential First Amendment speech implications, any rule regulating advertising should be clearly and specifically tied to preventing consumer confusion.

The issues raised by proposed Rule 42 prohibiting funeral homes from owning and operating unlicensed arrangement centers and regulating the arranging of mortuary science services are currently being litigated, with an application for appeal pending before the Michigan Court of Appeals. MFDA strongly advocates that prudence and clarity dictate that proposed Rule 42 be withdrawn, at least until judicial appellate review is concluded.

If the Court of Appeals accepts the case, it is possible that the Court may overrule or modify all or portions of any proposed rule. Specifically, the Court may opine on the question of whether the Code's definition of "the practice of funeral directing," which includes "representing oneself as engaging in the supervising of the burial and disposal of a dead human body," encompasses arranging for mortuary science services on an at-need basis. In the pending case, the Administrative Law Judge found that it does, and the Oakland County Circuit Court agreed.

The Court of Appeals, however, may disagree on this question. Indeed, it is MFDA's position that this conclusion is wrong. Nowhere does the statute mention arranging for or selling funeral or cemetery merchandise or services at-need, and there is no legal basis to shoehorn those activities into engaging in the supervising of the burial and disposal of a dead human body. MFDA therefore believes there are ample grounds for the Court of Appeals to at least partially reverse the ALJ and Oakland Circuit Court on this point. Such a decision would render proposed Rule 42 moot, or at best create substantial confusion about what – if anything – remains.

Alternatively, if the Court of Appeals does not accept the appeal, proposed Rule 42 is still unnecessary as existing Rule 41(2), and sections of 1806(3) and 1809(7) of the Code, are sufficient to prohibit a licensed funeral establishment from owning and operating unlicensed arrangement centers. So again, MFDA urges proposed Rule 42 be withdrawn to prevent the widespread confusion that would ensue.

If, however, despite these concerns, the Department proceeds, proposed Rule 42(1) must be clarified to assure that funeral arrangements can be conducted outside of the funeral establishment itself. Funeral arrangements are often conducted in private residences, hospitals, nursing homes and the like to accommodate the needs of grieving family members – many of whom are elderly or disabled. Should the Department go ahead with promulgating this proposed rule, these grieving families must be taken into account, and funeral arrangements must be allowed to be made in locations outside the licensed funeral establishment.