MFDA Testifies on Proposed New Regulations

In last Winter's Journal I reported that officials with the state Department of Licensing and Regulatory Affairs (LARA) were using the need to write regulations governing continuing education in funeral service as an opportunity to revise and update all of the state's mortuary science rules. I mentioned that a committee of the State Board of Examiners in Mortuary Science was formed to advise LARA officials as they went through this review, and a draft was presented to the full state Board last October.

While I summarized that draft, I also mentioned that we wouldn't know for certain what would be proposed until they were formally published and a public hearing was announced. That publication occurred on July 1, and the public hearing was held on July 18. In anticipation, the MFDA Board formed a committee of its own to develop and fashion MFDA's response, which was approved by the full MFDA Board. At the hearing, MFDA President Gregory McClary and Government Relations Director Jared Rozycki offered this detailed response. At six pages, plus a four-page addendum, the complete response is too extensive to fully detail here, but MFDA's comments on some of the most significant proposals are outlined below. In general, MFDA stated that most of the proposed rules, although sometimes needing technical corrections for the sake of clarity, advanced the practice of mortuary science profession in Michigan. These proposed rules include:

- Elimination of the four specific courses required for initial mortuary science licensure;
- Requiring a mortuary science license to be physically present in the prep room when a resident trainee is performing embalming;
- Allowing resident trainees to "assist in embalming," and have that count towards the required 25 embalmings;
- Updating the tasks required to be completed during resident training;
- Establishing 50 minutes of instruction for one credit of continuing education;
- Allowing any course approved by the Academy of Funeral Service Practice to automatically qualify as continuing education;
- Empowering LARA to audit licensees for meeting continuing education requirements;
- Establishing new standards for the sheltering of human remains;
- Requiring the preparation of embalming case reports;
- Requiring a completed cremation authorization form and burial transit permit prior to transporting to a crematory;

Regarding the last proposal, the existing statute governing medical examiners currently prohibits removing a body to a crematory without a signed permit of the medical examiner.

Other proposed rules drew significant objections or concerns, especially several proposed rules that go beyond statutory authority, have other legal concerns, or represent policy detrimental to funeral service.

For example, several of the proposed new rules governing continuing education limit courses and continuing education to covering eight prescribed topic areas. The statute, however, clearly only requires that two of the required four hours of continuing education each year cover these topics.

This clearly amounts to a proposed administrative rule seeking to amend what the legislature passed and the governor signed. Administrative regulations may not go beyond the statute, and MFDA highlighted this problem.

Another new proposal would require identification of all decedents, either visually or through photograph or other visual images. MFDA pointed out, however, that a identification accomplished through photography poses significant exposure to civil liability for the funeral home, whether arising from the possibility of misidentification due to a poor or outdated photograph provided by the family or the further dissemination or reproduction of photographs taken by the funeral home. Because of these concerns, MFDA advocated that the reference to photography or other visual images be deleted. MFDA also urged that the visual identification requirement be waived if the family wishes.

MFDA also voiced concern with proposed additions to the current advertising rules. MFDA said 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.

Of the proposed new rules, the most discussed was proposed Rule 42, which would:

- prohibit the use of unlicensed "arrangement centers,"
- require that at-need funeral arrangements be conducted from a licensed funeral home,
- require that a licensed funeral director be present in the funeral home when at-need funeral arrangements are being made, and
- require that a mortuary science licensee sign the Statement of Funeral Goods and Services Selected.

MFDA responded that many of these issues are currently being litigated, with an application for appeal pending before the Michigan Court of Appeals. MFDA strongly advocated 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 statute'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 stated,

therefore, that 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 given that the current advertising rule prohibits doing business out of an unlicensed facility. That rule, MFDA said, is sufficient to prohibit a licensed funeral establishment from owning and operating unlicensed arrangement centers. So again, MFDA urged proposed Rule 42 be withdrawn to prevent the widespread confusion that would ensue.

If, however, despite these concerns, the Department proceeds, MFDA stated that it must be clarified to assure that funeral arrangements can be conducted outside of the funeral establishment itself. MFDA said that 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.

It remains to be seen what, if anything, of MFDA's comments will result in amendments before these proposed rules are finalized later this year. Please stay tuned.