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STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
LANSING

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DIRECTOR

## Written Comments Received for Rule Set 2023-17 LR (Mortuary Science)

### TABLE OF CONTENTS

Jared Rozycki.....	2
Steve McCowen.....	13
Rodney Wakeman.....	16
Thomas Macksoud.....	21
Jennifer Simsack.....	28
Arthur McNabb.....	30
Spencer Skorupski.....	31
Lee Karelse.....	34
Tate Goodwin.....	38
Mark Sayles.....	40
Benjamin Joffe.....	42
Mark Bucchi.....	51
Timothy Gagern.....	61
Paul Buchanan.....	67
Nicole Crist.....	73
Matthew Varga.....	79
Scott Shepard.....	85
Sally Bazan.....	91
“Melissa H”.....	97
Morgan Minger-Szyniszewski.....	103
Shane Wright.....	109

**From:** [Jared Rozycki](#)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Mortuary Science Rules - MFDA Comments  
**Date:** Thursday, July 18, 2024 1:01:40 PM  
**Attachments:** [Mortuary Science Rules Public Hearing MFDA Testimony.docx](#)  
[MFDA Mortuary Science Rules Suggested Amendments.docx](#)

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abuse@michigan.gov**

Mitchell,

Thanks again for providing MFDA the opportunity to testify on the proposed mortuary science rules. Attached are our formal comments and suggested revisions to be submitted into the record.

Best,

**Jared Rozycki**

Director of Government Relations  
Michigan Funeral Directors Association  
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# MFDA

MICHIGAN FUNERAL DIRECTORS ASSOCIATION

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## Addendum

### R 339.18901 Definitions (Rule 1)

(1)(d) “Continuing education” means an instructional course or activity that meets the requirements under 1806b of the code, MCL 339.1806b. ~~is designed to bring licensees up to date on a particular area of knowledge or skills relevant to the licensee’s area of professional practice and covers a topic under section 1806b(2)(a) of the code, MCL 339.1806b.~~

(1)(g) “Course” means any qualifying activity or approved program with a clear purpose and objective that maintains, improves, or expands the skills and knowledge of the practice of mortuary science under section 1806b of the code, MCL 339.1806b. ~~related to the topics under section 1806b(2)(a) of the code, MCL 339.1806b.~~ Regular duties for compensation are not considered activities, except for employer compensated continuing education activities.

~~(1) “Supervision” means the physical presence at the establishment of the holder of a license for the practice of mortuary science, while an individual on behalf of the funeral establishment engages in the practice of funeral directing, including arranging for mortuary science services.~~

### R 339.18921 Mortuary Science License (Rule 21)

(1) ~~An applicant for a mortuary science license shall satisfy all of the following: the requirements of the code. In addition to the requirements of the code, an applicant shall satisfy all of the following:~~

(a) ~~Completion of not less than 9060 semester or 90 the equivalent quarter hours with not less than a 2.00 grade point average of nonremedial college level courses at an accredited college or university, including graduation from an accredited mortuary science program. with not less than a 2.00 grade point average. The hours in this subdivision may not count toward the requirements outlined in subdivision (b) of this rule.~~

~~b) Graduation from an accredited mortuary science program pursuant to R 339.18922(1) with not less than 30 semester or 45 quarter hours and not less than a 2.00 grade point~~

average. The hours in this subdivision may not count toward the requirements outlined in subdivision (a) of this rule.

(d) Passing all required parts of the national board examination developed by the International Conference of Funeral Service Examining Boards. The passing score for each part of the examination is the passing score as determined by the conference.

#### R 339.18923 Mortuary Science License (Rule 23)

(1) Before commencing resident training, an applicant shall obtain a resident trainee license as provided in section 1808 of the code, MCL 339.1808. An individual shall not be issued more than 1 resident trainee license. Except as provided in (2), the resident trainee license may not be renewed more than once.

(8) A resident trainee performing embalming or assisting in the preparation of dead human bodies under Rule 25(a) shall be personally supervised by a mortuary science licensee. The mortuary science licensee shall remain physically present in the embalming or preparation room during the entire embalming process and be able to visually observe the resident trainee.

#### R 339.18928 Continuing education; license renewal; requirements (Rule 28)

(1)(a) Obtain a total of 4 hours in the topics detailed in section 1806b(2)(a) of the code, MCL 339.1806b.

#### R 339.18928a Continuing education; requirements for licensees (Rule 28a)

Rule 28a(1)(b) Attending a board of examiners in mortuary science meeting. To receive credit, the licensee shall obtain a form provided by the department from a department employee present at the meeting and have that employee complete, sign, and date the form. The licensee shall present a valid government-issued photo identification to the department employee for verification.

#### R 339.18929 Approved providers of continuing education (Rule 29)

(2)(a) If applicable, the subject offered consistent with section 1806b(2)(a) of the code, MCL 339.1806b.

#### R 339.18932 Care and Storage of Remains (Rule 32)

(1)(h)(iii) Name(s), license number(s), and signature of licensee(s) that supervised the handling of the decedent.

(2)(c) The licensee funeral establishment shall maintain a record for not less than 7 years that identifies the release, disposition, or location of cremated remains.

#### R 339.18935 Transportation of remains to crematory (Rule 35)

- (a) The body is encased in a rigid container for cremation. The container must be:
- (i) composed of readily combustible and consumable materials suitable for cremation;
  - (ii) able to be closed in order to provide a complete covering for the dignity of a dead human body;
  - (iii) resistant to leakage or spillage;
  - (iv) rigid enough for handling with ease; and
  - (v) able to provide protection for the health and safety of crematory personnel.

#### R 339.18937 Identification before final disposition (Rule 37)

(1) In accordance with section 3206(1) of the estates and protected individuals code, 1998 PA 386, MCL 700.3206, the licensee arranging the final disposition shall require the authorizing agent or the agent's appointed representative to visually identify the decedent's remains unless waived by the authorizing agent. ~~or effect positive identification through a photograph or other visual image of the remains.~~ If visual identification is not feasible due to the condition of the decedent, other positive identification of the decedent may be used including, but not limited to, reliance upon an identification made through a medical examiner. ~~or identification of photographs or other visual images of scars, tattoos, or physical deformities taken from the decedent's remains.~~

#### R 339.18942 Unlicensed funeral arrangement centers (Rule 42)

- ~~Rule 42. (1) No person may own or manage a funeral establishment or other place of business for the express purposes of arranging for mortuary science services from any physical location, except from a licensed funeral establishment at a fixed location, consistent with sections 1806(3) and 1809 of the code, MCL 339.1806 and 339.1809.~~
- ~~(2) Each physical location owned or managed for the express purposes of engaging in the practice of embalming or in the practice of funeral directing, including arranging for mortuary science services, is a funeral establishment, regardless of common ownership or management with another funeral establishment at a different, fixed location.~~
- ~~(3) No individual on behalf of a funeral establishment may engage in the practice of arranging for mortuary science services, except under the supervision of a holder of a license for the practice of mortuary science.~~
- ~~(4) Arranging for mortuary science services includes, but is not limited to, offering to do 1 or more of the following:~~
- ~~(a) Schedule at-need funerals, memorial services, or viewings of dead human bodies.~~

- ~~—(b) Sell at-need mortuary science services.~~
- ~~—(c) Complete or sign an at-need mortuary science service contract.~~
- ~~—(d) Obtain authorization to possess or embalm a dead human body from their next of kin or designated funeral representative.~~
- ~~—(e) Obtain information necessary to accurately complete and file a death certificate.~~
- ~~—(5) A mortuary science licensee shall review and sign the statement of funeral goods and services selected before final disposition. The statement must be retained for not less than 7 years.~~

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 statute 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.

**From:** [Steve McCowen](#)  
**To:** [Page, Mitchell \(LARA\)](#); [sensmccann@senate.michigan.gov](mailto:sensmccann@senate.michigan.gov); [smuchmore@senate.michigan.gov](mailto:smuchmore@senate.michigan.gov)  
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**Subject:** Proposed Mortuary Code Changes  
**Date:** Thursday, July 25, 2024 4:23:58 PM

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Mitchell Page...

Hello, my name is Steve McCowen. I am the owner of Avink, McCowen & Secord Funeral Home and Cremation Society. We have four locations in the communities of Plainwell, Portage, Schoolcraft and Vicksburg. Recently I spent some time reviewing the proposed changes to our mortuary code, and for the most part many of the changes seem reasonable. There are a couple however, that I would like to draw your attention too:

**1. Identifying a decease:** This code seems unreasonable when you take into account, not everyone passes away pleasantly. I plan to spare you the details of the many ways someone can tragically die. It seems inhumane to me that a next of kin would be subject to seeing their loved one that died tragically in a car accident, fire, suicide, and other means not consistent with a peaceful death. Many times in these cases, the person has already been identified by the medical examiner and released into the funeral home's care. So is duplicating that process necessary? Or making a family view a body that was tragically killed, even by photo? Why do that to the family? This also potentially creates additional revenue to the funeral home in embalming and restoration of a body, and not meeting the needs of the client family that may be trying to keep costs lower. In Kalamazoo County cremation is at a 70% rate. Many of those families are trying to save costs and this rule, although seem good for the business, is not good to the consumer emotionally or financially.

**2. Arrangements in a licensed establishment:** I feel this new rule fails to represent the mobile times we currently are in. Requiring a family to come to the funeral home is not always an option. Many times throughout the year, families need to meet via Zoom, over the phone, at the home of the family, or nursing home/assisted living. Meeting the needs of the client family should seem to be the goal instead of creating value for the license of the director and establishment. If they have the proper skillset, the value is already there. And online many people can get cremation society memberships from global brands to save money...would those now be illegal and if so is this a state regulation or federal government? This seems to be an overreach in my opinion and possibly presented by funeral directors that are trying to bring things back to the earlier years of my license. Again overreach and not consumer friendly.

**3. Arrangements with a licensee in the establishment:** Currently for the most part this won't be an issue for our business. However, I have been a licensed funeral director for 31 years. Our industry is stretched and in need of quality workers. The talent pool coming out of mortuary schools is rather poor. However, in many funeral homes we have qualified individuals that carry the compassion necessary to sit down with a grieving family and assist them. I would use my wife and our pre-arrangement counselor as a great example. If I was

away from the office working a funeral at a church and a family walked into our building to make us aware of a death in their family, I currently would have no issue with my wife or our pre-arrangement counselor sitting down with them and gathering information on the businesses behalf. I would of course review when I got back. When I go to a doctor's appointment I tend to see the nurse more than the doctor, and I have no problem with that. Seems if the State of Michigan is concerned about licensing, maybe look to our friends south of us in Ohio and establish a funeral directors license and an embalmer license. Or even a funeral arranger license. There are many qualified people working in funeral homes across the state that carry more compassion and skillset to meet with a family better than some licensed funeral directors that I know. Our margins are extremely tight and this rule isn't business friendly, and I fail to see the consumer advocacy in this rule change.

**4. Anatomical Donation:** I am very curious about the mortuary code's position with anatomical donations, and the current state of it in Michigan. It doesn't seem to be addressed in these codes. Currently in Kalamazoo, WMed advertises "free cremation" and has for years, for those that choose anatomical donation without the use of a funeral home. This is contrary to how the University of Michigan Anatomical Department operates, and the reason many funeral homes support UofM. WMed houses the largest medical examiner's office in the State of Michigan overseeing more than a dozen counties throughout the state. On more than one occasion, a medical examiner investigator has encouraged a family that was going to use our services to instead use WMed's anatomical donation due to the "free cremation". Let's keep in mind there is no such thing as free, and I would refer to their funding sources that allow them to do things as "free". After I purchased a death certificate so I could see how WMed was handling these cases, I noticed a licensed funeral director from Wayne State University Mortuary School was signing WMed's death certificates. I'd like some clarification on which new proposed rule will cause this to stop or can be tweaked to address that issue. I'd be happy to review these issues in more detail.

**5. Cremation permit and authorization prior to transporting to crematory:** In theory this seems to make sense. But let me tell you the reality. Funeral Homes don't control the timeliness of doctors offices. In most cases we submit death certificates to these offices immediately. And for the very few that use the EDRS system the timeline is fairly quick in the doctor's response. However, many nursing homes have a mobile doctor and even if we press them three times a day, the doctor may take several "days" to sign the death certificate. We already have a burial transit permit that allows a body to be transported. And many crematory's have large refrigeration capabilities, where it is fiscally impossible for a funeral home or many funeral homes to own privately. It would seem more reasonable to allow for the body to be transported with a simple transit permit and the authorization to cremate. This would allow funeral homes to be transported to the crematory and housed until the cremation permit is issued by the medical examiner. This would allow us to respectfully care for the body. Without this change the consumer will face additional costs in caring for the body.

Thank you for taking the time to review my comments on this issue. I fully support the need for a full review of our codes. In the future I would appreciate the opportunity to be more involved in this process and present 31 years of knowledge and common sense approach to our industry. In my opinion the items I have listed above, serve the funeral home with more revenue streams than objectively looking at the needs of the client family. And taking care of the client family should be our main concern, not providing additional revenue and value to the funeral home. These rules seem less proactive and more reactive.

I look forward to seeing your final review.

--

**Steve McCowen**

*Funeral Director/Owner*



**Locations: Schoolcraft, Portage, Plainwell & Vicksburg**

Phone: 269-649-1697

Website: [www.amsfuneralhomes.com](http://www.amsfuneralhomes.com)

-----



*Owner*

*Avink Pet Memorial*

Phone: 269-679-5622

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**From:** [rodney.wakeman@charter.net](mailto:rodney.wakeman@charter.net)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** RE: RE: Mortuary Science Ruleset 2023-17LR  
**Date:** Friday, July 26, 2024 9:55:27 AM  
**Attachments:** [LARA\\_WAKEMAN Testimony on CE Rules.docx](#)

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Michael:

I have attached my testimony for the MS Ruleset.

Thank you for your help.

Rodney Wakeman  
Former State Representative  
94th District  
Saginaw County

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From: "Page, Mitchell (LARA)" <[PageM6@michigan.gov](mailto:PageM6@michigan.gov)>  
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Sent: July 22, 2024 at 12:01 PM MDT  
Subject: RE: Mortuary Science Ruleset 2023-17LR

Mr. Wakeman, I also just wanted to make you are aware that the public comment period is closing this **Friday, July 26<sup>th</sup> at 5PM**, so just be sure to send your comments to me prior to that time.

Thank you!

**Mitchell Page (he/him)**

Legislative Analyst

Corporations, Securities & Commercial Licensing Bureau

Michigan Department of Licensing and Regulatory Affairs

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**From:** Page, Mitchell (LARA)  
**Sent:** Friday, July 19, 2024 9:21 AM  
**To:** rodney.wakeman@charter.net  
**Subject:** RE: Mortuary Science Ruleset 2023-17LR

Good morning, Mr. Wakeman! You may send it to me at this email and I will add it to the record.

Thank you,

**Mitchell Page (he/him)**

Legislative Analyst

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**Subject:** Mortuary Science Ruleset 2023-17LR

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Dear Mr. Page:

As the author of HB 4437, PA 265 of 2020, I will be submitting my own testimony regarding the proposed ruleset 2023-17LR, which a hearing was conducted yesterday. Unfortunately, my schedule did not allow me to attend where I could deliver my remarks in person.

To whom may I formally address and submit my testimony?

Thank you.

Rodney Wakeman

Michigan Department of Licensing and Regulatory Affairs  
Division of Corporations, Securities and Commercial Licensing

RE: Testimony on Administrative Rules for Mortuary Science  
Ruleset 2023-17LR

To whom it may concern:

I come to you today to provide testimony on the promulgation of Administrative Ruleset for Mortuary Science.

The primary portion of my testimony is focused on the proposed rules language regarding Section 339.1806b(2)(a) of the Occupational Code on Continuing Education requirements found in proposed R339.18928 Rule 28(1)(b).

As author of HB 4437, PA 265 of 2020, I am confirming that the proposed language found in R339.18928 Rule 28(1)(b) is incorrect. The proposed rule, which reads, “*obtain **all 4 hours** of continuing education credit in activities that satisfy the requirements under R 339.18928a*” (emphasis added) changes the statute.

Section 1806b(2)(a) reads, “(a) Not less than 2 of the 4 hours of the courses required in each year of a license cycle shall involve 1 or more of the following subjects:...” and the statute goes on to list the eight prescribed topics. I purposely wrote this section into the law in such a way for clear understanding that the statute is to allow other relevant continuing education topics beyond the eight prescribed topics listed. If I intended to require that **all 4 hours** are to be comprised of only these eight topics, I would have included “all 4 hours” in the language.

The statute already allows the practitioner to obtain all 4 hours of continuing education credit from the eight prescribed topics as outlined if he or she wishes. But limiting the hours to just these eight topics closes opportunities for other timely and important topics to be discussed, which is contradictory to the purpose of adopting continuing education. Those of us in the profession understand that changes in the business happen. The language was purposely open ended to allow for new, emerging topics to be made available. The eight prescribed topics merely serve as the foundation of our continuing education instruction. Therefore, the department’s proposed language wrongly amends the statute.

Therefore, I recommend that the department deletes the “all 4 hours” reference in R339.18928 Rule 28(1)(b) so it conforms to the statute.

Finally, I have also reviewed testimony provided to the department by the Michigan Funeral Directors Association on other areas of concern, and I concur with each of their statements and recommend each of these changes to the proposed rules.

Thank you.

Sincerely,

Rodney C. Wakeman  
Former State Representative, 94<sup>th</sup> District, Saginaw County

Sponsor of HB 4437, PA 265 of 2020

**From:** [SIMPLE FUNERALS](#)  
**To:** [Page, Mitchell \(LARA\); Simple Funerals](#)  
**Subject:** Macksoud - Re: Public Hearing 7/18/2024 - Rule Set 2023-17 LR  
**Date:** Thursday, July 18, 2024 1:07:08 AM  
**Attachments:** [SF-LARA - Rule set 2023-17 LR - 7-17-2024.docx](#)

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07/18/2024

Hi Mr. Page,

Please find attached my comments regarding the public hearing on Rule Set 2023-17 LR to be held today at 10 AM in Lansing.

I did not address the complete document. I only addressed the things that I would like to be heard on.

If you would like to discuss further or have any questions, please feel free to contact me.

Thank you,

Thomas Macksoud, Director  
SIMPLE FUNERALS  
248-227-1954

---

July 18, 2024

To: Department of Licensing and Regulatory Affairs  
Corporations, Securities, & Commercial Licensing  
P.O. Box 30018  
Lansing, MI 48909

From: Thomas A. Macksoud  
28990 Willow Creek Street  
Farmington Hills, MI 48331

248-227-1954

Re: Administrative Rules for Mortuary Science  
Rule Set 2023-17 LR

Dear Mitchell Page,

I would like to introduce myself as a licensed funeral director with the State of Michigan.

Mortuary Science License Number: 4501006396

I own a licensed funeral home establishment named, SIMPLE FUNERALS.

Funeral Home License Number: 4502003792

I use the same name, SIMPLE FUNERALS and have a current Pre-Paid Funeral & Cemetery Sales Seller/Provider Registration Number: 3401001064

All 3 Licenses are in good standing. As the licensed funeral director since 1986, I have learned funeral service from the bottom up.

I offer for the most part, "funerals without a funeral home visitation".

All decedents are taken to the licensed funeral establishment and never to the pre-paid offices. Because my license is with the State of Michigan, it has always been my understanding that my licenses are good anywhere in the State of Michigan.

I am bringing up issues that I have with the following changes being introduced into the Rule Set 2023-17 LR.

Section R 339.18935 Transportation of remains to crematory.

Rule 35. Transportation of a dead human body to a crematory for cremation must only occur if all the following requirements pertaining to the dead human body are met:

<!--[if !supportLists]-->(a) <!--[endif]-->The body is encased in a ridged container for cremation.

My Thoughts:

This should have added to it, a requirement for the container not to be leaking bodily fluids. A plastic liner should be required to prevent this. I have witnessed several container leaking fluids brought over to crematories and this should be addressed.

<!--[if !supportLists]-->(b) <!--[endif]-->The body is accompanied by authorization from ....

My Thoughts:

This is fine and I agree.

<!--[if !supportLists]-->(c) <!--[endif]-->The body is accompanied by a cremation permit endorsed by the county medical examiner.

My Thoughts:

While this is almost always possible there are instances where this process has been delayed while the medical examiner acquires medical records pertaining to the deceased in order to fill out a death certificate even though the body has been released to the funeral home. In the case of decomposed bodies this is going to be a problem in the case of certain religious beliefs that do not allow for embalming or chemical treatment of the deceased.

Not all funeral homes are large and have multiple stories.

Not having refrigeration or freezers on site would make holding a visitation offensive for other families being served by the same facility. This should be eliminated or amended to require paperwork to be forwarded to the crematory within 5 days of delivery to the crematory facility.

(also some funeral establishments, such as Michigan Memorial Park Funeral Home, Flat Rock Michigan, have a crematory in their facility, so how would that pertain to establishment like that?)

The crematory that I use has a large walk-in cooler that is better equipped to hold un-embalmed bodies than my licensed funeral home without refrigeration, until county medical examiners issue the cremation permit.

R 339.18937

Rule 37

<!--[if !supportLists]-->(1) <!--[endif]-->

My thoughts:

Medical facilities tag the deceased and often times they have an arm band on as well as a toe tag. This should be added as adequate to identify a deceased. Bodies brought in from a residence should be marked by the person making the removal as soon as being brought to the funeral home.

Without requiring and subjecting loved ones to view an un-prepared body. Many people do not have scars, tattoos or physical deformities to take a photo of for ID purposes. (requiring the seeing a deceased person un-embalmed would pose a health risk to the public.)

(2)

This is fine and I agree.

(3)

This is fine and I agree.

R 339.18941 Advertising.

Rule 41.



<!--[if !supportLists]-->(1) <!--[endif]-->A mortuary science license or funeral establishment shall not use false or misleading or deceptive advertising, including, but not limited to, on signs and billboards, or using digital, radio, television, online or print media....

This is fine and I agree.

<!--[if !supportLists]-->(2) <!--[endif]-->A person shall not engage in the practice of mortuary science or do business in a location that is not licensed as a funeral establishment, except as provided for in section 1806(3) of the code, MCL 339/2806, and shall not advertise a service as available from an unlicensed location.

My thoughts:

My mortuary licenses are within the State of Michigan and when I provide funeral services at a church, homes, cemetery chapels or any other public building, these areas are not licensed as a funeral establishment. We all conduct funeral business outside of our licensed funeral establishments.

This should be eliminated or rewritten to clarify what you are trying to say.

R.339.18942 Unlicensed funeral arrangement centers and unsupervised arrangement staff prohibited; supervision defined.

Rule 42. (1) No person may own or manage a funeral establishment or other place of business for the express purpose of arranging for mortuary services from any physical location, except from a licensed funeral establishment at a fixed location consistent with sections 1806(3) and 1809 of the code, MCL 339.1806 and 339.1809.

My thoughts:

This is a protectionist rule put in place to eliminate fair competition amongst other licensed funeral establishments from doing business nearby. I would not necessarily need a licensed funeral establishment to arrange for funeral services that do not require funeral home visitation. I own my buildings and have extended offices for use as a Pre-Paid Funeral Sales Seller/Provider. As stated on my license issued by the State of Michigan, I PROVIDE FUNERAL SERVICES.

As long as the deceased persons are not taken to the unlicensed office; then I don't

understand the harm being done. Deceased should be taken to a Licensed Funeral Home within the State of Michigan. Transparency in making the arrangers aware of where their loved ones are being kept until such time as they are transported to a cemetery, crematory or airport should be required. There is no harm done in signing contracts and arranging for funeral services in an area that is not a Licensed Funeral Home.

Several Funeral Establishments within the State of Michigan have central embalming locations and families are not made aware of the location the person is transported to and kept until services. Although, licensed funeral homes have prep rooms, some are rarely ever used for embalming.

As an analogy, doctors will use an office to see patients and not require them to be in the hospital for procedures that do not require that type of atmosphere and funeral arrangements that can be made in offices that do not require a funeral home setting should be allowed for the same reasons.

(3) Each physical location owned or managed for the express purposes of engaging in the practice of embalming or in the practice of funeral directing, including arranging for mortuary science services, is a funeral establishment, regardless of common ownership or management with another funeral establishment at a different, fixed location.

My thoughts:

Arranging for mortuary science services does not make the office used a funeral establishment.

This should have "Including arranging for mortuary science services" eliminated.

What is the purpose of not allowing funeral purchase contracts and release forms to be signed in offices that are not licensed funeral homes? A prep room is not required for this, nor is a 50 person assembly area.

Where can these papers be signed? (somebody's home, a coffee shop, a library, "on line") a "funeral establishment" should not be mandated to sign "at need funeral documents".

Licensed Funeral Homes that offer catering and food services are not required to have restaurant establishments licenses. Even though they offer food services.

Where a document is signed does not constitute a Funeral Establishment. Where the deceased are taken and cared for would.

<!--[if !supportLists]-->(4) <!--[endif]-->No individual on behalf of...

This is fine and I agree.

<!--[if !supportLists]-->(5) <!--[endif]-->Arranging for mortuary science services...

This is fine and I agree. However, It **should** be able to be done anywhere, not exclusively in Licensed Funeral Home.

R 339.18943 Posting and possession of licenses.

Rule 43.

(1)

This is fine and I agree.

(2)

This is fine and I agree.

Please feel free to call me for further comments and clarification.

Repectfully,

Thomas Macksoud, Director

---

**From:** [MLS](#)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Administrative Rules for Mortuary Science, Rule Set 2023-17LR  
**Date:** Wednesday, July 24, 2024 5:36:17 PM

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To Whom It May Concern,

In regards to recent new proposed rules from LARA for mortuary science, I have a few concerns. I have been a licensed funeral director in Michigan for 36 years. My main concerns are the proposed requirements of funeral arrangements being completed in the funeral home establishment, identification of bodies prior to disposition and only arrangements by licensed funeral directors. With today's technology and the public's embracement of technology since COVID, many times our customers appreciate the convenience of making funeral arrangements via zoom/email and signing necessary paperwork via DocuSign. We often need to complete arrangements in this format due to the next of kin being out of town or physically unable to travel, as well. Often times, we help the grieving by going to them in their home or nursing home for arrangements.

Regarding identifying the bodies prior to disposition: at our firm, we do obtain the toe tags and hospital release paperwork to prove the identity of the deceased. Many times the deceased is transported from a nursing home with the family present or oftentimes death occurs in their own home, which would not make the identification necessary. Asking grieving people to be forced to view a deceased is often something they absolutely do not want to do. I would not be comfortable emailing photographs of the deceased for identification as this could be a risk of photographs being spread too easily or sent/opened by the wrong person; this presents too much liability and risk for the funeral director. Cremation without embalming needs to occur within a short time line and most people requesting cremation service do not want embalming or preparation of the body. Requiring an identification would cause a strain on the urgent timeline, as well.

Lastly is the requirement of only a licensed funeral director making arrangements. We employ a prearrangement counselor that has years of experience. If the licensed funeral directors are out of the building at a church service, at a out of town cemetery or transporting a person from their place of death, our prearrangement counselor assists with atneed funeral arrangements. Many times, grieving people walk in to the funeral home without an appointment and she can assist if a licensed funeral director is not available.

My goal is, and always has been, giving the grieving customer a sense of comfort at a time when it is nearly unobtainable. These few proposed rules seem to increase stress for our customers and lessen the quality service I hope to provide. Thank you for considering my concerns.

Respectfully,

Jennifer M. Simsack

MI Licensed Funeral Director-1988/ President

Lewis E. Wint & Son Funeral Home, Inc.

5929 S. Main

Clarkston, MI 48346

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**From:** [Arthur Alan](#)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Proposed Rule change  
**Date:** Tuesday, July 23, 2024 8:19:49 PM

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Thank you for allowing this opportunity to address the proposed Rule changes. I have been a funeral director 36 years and have always said that we need to make our licences worth something. We went to college to learn how to embalm and most importantly serve the public. I strongly agree with these rule changes set forth to catch up to other states standards such as Indiana and Ohio. If these states can deal with them so can Michigan. It is very important for a licensed person to be in the prep room not only to observe but to teach, especially with so many going to on-line mortuary programs they will need more guidance. As for the licensed person in the building yes we need this, who better to over see state laws and make sure rules and regulations are being followed not just state regulations but FTC. Having the deceased in a dignified cooling facility and looked after is highly important. Thank you for bringing forth these changes many of my colleagues have agreed with me it is a positive step in the right direction for our industry. Sincerely Arthur McNabb #6555. Adams-Redmond Funeral Home Kalamazoo MI

[Yahoo Mail: Search, Organize, Conquer](#)

**From:** [Spencer A. Skorupski, CFSP](#)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Proposed LARA/Mortuary Science Rule Changes  
**Date:** Friday, July 26, 2024 8:27:54 AM

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Good Morning,

Having been involved in the funeral industry since the age of 14, working my way up from washing cars and dusting caskets in the casket selection room, to now owning my own funeral home, my perspective is different from other owners. First, many funeral homes, mine included, do not even utilize selection rooms with full caskets on display anymore; we've embraced technology and utilize a combination of digital and hi-res. graphic resources, to better accommodate the consumer's wide range of preferences, and their emotional needs. Not many people want to walk around a sea of caskets during the worst time in their life. Second, the quality of mortuary science students just isn't what it used to be. When I knew being a funeral director was my life's purpose (after my grandfather's funeral/by the age of 12), I had no clue what embalming was. I thought you placed make-up on the deceased, closed their eyes, closed their mouth, dressed them, and placed them in a casket. I certainly found out there was way more involved, but my intentions of entering funeral service were pure; my intention has always been to help grieving families. The majority of mortuary school graduates now-a-days tend to feed their morbid curiosities by selecting this field as a career, often with no previous exposure or experience, leading to them entering/exiting the field rather quickly. There are three funeral directors, me included, out of my graduating class of 20+; and that's only from 2011 until now. Many of these macabre individuals, who tend to often be social misfits/freaks of society, are not ones to be placed in front of grieving families to guide them in their hour of need. Just this week a lady at a funeral I was directing approached me and indicated she "wanted to go into mortuary science to put skulls back together." She certainly was unaware there is so much more that goes into being a funeral director, and that very task that she thought would define her daily duties, may take place only a handful of times (if that) in a licensee's entire career.

Many funeral homes have long-standing, dedicated, compassionate, educated, professional employees who do not have a license, yet are very capable of assisting in the operations of the firm, particularly in making funeral arrangements. In addition, many of these individuals who are not mortuary science licensees hold a limited life insurance license (pre-need license), meaning they already assist clients with their

advance planning needs; a mirror to what is occurring during at-need/at time-of-death arrangements. With the advance of technology, supervising funeral directors are readily available to be of assistance via phone, zoom, etc. Recently, I had an appointment for my annual physical. I saw, via a Zoom-type software, the nurse practitioner on my phone screen. I had never seen the NP before, but this time I did, and she certainly works under the direction of the doctor. I had already gone the week prior to have my bloodwork done, so she and the doctor had time to review all of that. She was kind, knowledgeable, and everything went just fine, and was convenient for all involved. Other professions/industries have embraced technology as well - including lawyers/the court system. Many times, we must also go off-site to accommodate a client's mobility issues, such as making arrangements bedside at a skilled nursing facility or at the family's kitchen table.

As far as identifying the deceased is concerned, many families wish to not physically view their loved one, and if cremation is selected to occur first with no embalming, we're working a quick timeline. Funeral homes should be allowed to verify identity via a photo of the deceased, via verification of a family member or medical representative who has known the deceased and is present at the transfer, or other alternative means.

Lastly, I'd like to offer comments regarding apprentices/resident trainees. As mentioned previously, quality candidates for this field are few and far between. As LARA is undoubtedly aware, resident trainees may serve their apprenticeship before or after mortuary school. Most choose after mortuary school, as most are entering this field with no previous experiences/for reasons contrary to the public's well-being (i.e., to feed their morbid fascinations/curiosities/etc.). With that being said, for those hireable candidates left, since most have had the formal embalming education already at their accredited program (and those who have not), the supervising funeral director will work with them, for as long as needed, until they are proficient. No funeral director worth their weight in salt would let an apprentice fail; not only do they not want them to fail, but they don't want the results to fail the family, or the firm. However, such strict supervision requirements that the apprentice can never be left alone will only serve to hurt the industry; an industry already hurting for quality candidates. If the supervising funeral director can never leave the apprentice alone, what will happen is funeral homes simply won't hire apprentices. If the supervising funeral director has to be in there the entire time, they will adopt the mindset of they can just do it themselves (and quicker), so they can get on to their other required duties. No reputable funeral home is going to just throw an apprentice to the wolves.

Thank you for considering my comments and perspective.



With All My Respect,  
Spencer

Spencer A. Skorupski, CFSP  
Founder & Owner  
[www.skorupskis.com](http://www.skorupskis.com)

**Bay County Facility**

821 N. Pine Rd., Essexville, MI 48732  
(989) 893-7334

**Saginaw County Facility**

1550 Midland Rd., Saginaw, MI 48638  
(989) 790-7334

**From:** [Lee Karelse](#)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Mortuary Science Rules  
**Date:** Friday, July 26, 2024 9:43:36 AM  
**Attachments:** [Rules comments.pdf](#)

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July 25, 2024

Mitchell Page  
Department of Licensing and Regulatory Affairs  
Corporations, Securities and Commercial Licensing Bureau  
PO Box 30018  
Lansing, Michigan 48909

Dear Mr. Page,

I am writing in response to the proposed rules for Mortuary Science. I believe that most of the new rules will add protection for the public and clarity for funeral establishments and funeral directors.

However, I do have a couple of concerns.

One is regarding the identification of remains. Has the department of licensing observed instances that warrant this new rule? The current language requires visual presentation and uses the phrase "if not feasible" without defining "feasible". While since seems like a good idea in principle, it is not always appropriate. Sometimes the deceased may be disformed or discolored. Sometimes the authorizing agent has not seen the now deceased in many years, or perhaps they don't want to see them again in person or by photograph. It is certainly in a funeral establishments best interest to require positive identification, but there should be allowances for funeral directors to use their experience and knowledge to make a determination as to how to identify the person. The rule does make some provisions, but funeral directors should be able to go directly to items in subsection 2 if it seems more appropriate. Also, instead of visual identification, a family should be able to tell us verbally about physical deformities, characteristics, tattoos etc and in writing, attest to the positive identification without the need for photographs. Funeral homes should be allowed to accept the risk of identification in the manner they deem reasonable.

In regards to rule 42: (4)

I don't believe that scheduling a memorial service requires a license. There are many churches that plan and organize memorial services without a funeral director. There is no body present – it is like a graduation, wedding, honorary ceremony. As a funeral director, I wish we could limit memorial service planning to our guidance, but I don't believe that is enforceable. Also, many families meet with a church staff member to plan a funeral, sometimes simply telling us when to arrive with the body. They in essence are scheduling the service and perhaps even viewing. I think this language needs to be deleted or further clarified

so that it will be enforceable

The same is true for selling at-need mortuary science services. I believe that needs clarification, such as selling “embalming, restorative art and cosmetic services”, and some language that encompasses burial of the body, cremation of the body. I don’t think we can lump funeral/ memorial services into this because those can be done without the body and therefore do not need funeral director oversight based on the statute that references supervising the disposition of a dead human body.

I know this has been a lot of work and the discussions sometimes seem circular. But please consider my comments.

Sincerely,

R. Lee Karelse Jr  
President and Licensed Funeral Director (7024)  
Heritage Life Story Funeral Homes





**Alt & Shawmut Hills Chapel**

2120 Lake Michigan Dr NW  
Grand Rapids, MI 49504  
(616) 453-8263

**Van Strien-Creston Chapel**

1833 Plainfield Ave NE  
Grand Rapids, MI 49505  
(616) 361-2613

July 25, 2024

Mitchell Page  
Department of Licensing and Regulatory Affairs  
Corporations, Securities and Commercial Licensing Bureau  
PO Box 30018  
Lansing, Michigan 48909

Dear Mr. Page,

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However, I do have a couple of concerns.

One is regarding the identification of remains. Has the department of licensing observed instances that warrant this new rule? The current language requires visual presentation and uses the phrase "if not feasible" without defining "feasible". While since seems like a good idea in principle, it is not always appropriate. Sometimes the deceased may be disformed or discolored. Sometimes the authorizing agent has not seen the now deceased in many years, or perhaps they don't want to see them again in person or by photograph. It is certainly in a funeral establishments best interest to require positive identification, but there should be allowances for funeral directors to use their experience and knowledge to make a determination as to how to identify the person. The rule does make some provisions, but funeral directors should be able to go directly to items in subsection 2 if it seems more appropriate. Also, instead of visual identification, a family should be able to tell us verbally about physical deformities, characteristics, tattoos etc and in writing, attest to the positive identification without the need for photographs. Funeral homes should be allowed to accept the risk of identification in the manner they deem reasonable.

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The same is true for selling at-need mortuary science services. I believe that needs clarification, such as selling “embalming, restorative art and cosmetic services”, and some language that encompasses burial of the body, cremation of the body. I don’t think we can lump funeral/ memorial services into this because those can be done without the body and therefore do not need funeral director oversight based on the statute that references supervising the disposition of a dead human body.

I know this has been a lot of work and the discussions sometimes seem circular. But please consider my comments.

Sincerely,

R. Lee Karelse Jr  
President and Licensed Funeral Director (7024)  
Heritage Life Story Funeral Homes

**From:** [Megan Catanzaro](#)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Re: 2023-17 LR Rules Public Comment  
**Date:** Tuesday, July 23, 2024 12:38:50 PM  
**Attachments:** [image001.png](#)

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Good morning Mitchell,  
I appreciate the above information, we appreciate you. Below is the a public comment from one of our funeral home owner partners, Tate Goodwin.

Please see my comments in RED.

- Elimination of the four specific courses required for initial mortuary science licensure. **Do we have a list of which courses?**
- Requiring a mortuary science license to be physically present in the prep room when a resident trainee is performing embalming. **Doesn't the current law already require that?**
- Allowing resident trainees to "assist in embalming," and have that count towards the required 25 embalmings. **We like this idea because we know that some funeral homes do very little embalming.**
- Updating the tasks required to be completed during resident training. **I am sure there are some items on the list that seem outdated. Will we see an updated list that is being proposed?**
- Establishing 50 minutes of instruction for one credit of continuing education. **I think the requirement for continuing education just makes the cost of our services cost more. The Free market dictates which funeral directors are the best. Good professionals always read up and improve their skills.**
- Allowing any course approved by the Academy of Funeral Service Practice to automatically qualify as continuing education. **Again, I disagree with requiring credits.**
- Empowering LARA to audit licensees for meeting continuing education requirements. **The people at LARA rarely do their job. I don't see a point to adding more to their plate.**
- Establishing new standards for the sheltering of human remains. **We agree that third parties that hold decedents in refrigeration should have some oversight.**
- Requiring the preparation of embalming case reports. **This seems unnecessary in cases where the body is not being shipped. Adding this requirement will just add more time to the process and intern, add more cost to the consumer.**
- Requiring a completed cremation authorization form and burial transit permit prior to transporting to a crematory. **We generally agree with this, and we almost always operate this way at our funeral. However, in cases of extreme**

- decomposition, it may be in the funeral home's best interest to cease to a refrigeration unit outside of the funeral home because of the foul smell. This would be when you would use a third-party company to refrigerate the body.
- Requiring visual identification, including by photograph, prior to final disposition. I totally disagree with this. In a small town, where you know the identification of most of the decedents, it is not necessary. If a company operating in a larger city has issues with identification, that should be a private requirement of the company. Is always placed on the body before they are placed on a preparation table in the cooler. Many removals are done at homes by the same staff that will be meeting with the family.
  - Prohibiting the use of unlicensed "arrangement centers". We totally disagree with this. We have rental halls that we lease out for all types of events in several adjacent towns. Many of our arrangements are done inside of the family home. Our clients ask us if they can just meet us at one of our rental halls, there is no reason a family can't meet with the Funeral Director at any location agreed-upon. I have personally made funeral arrangements in a coffee shop because that is what the widower preferred. Does the coffee shop need a funeral license. If you don't faults represent the situation, there should be no issue. I have never told anyone that we embalm at the rental hall. In a free market, clients choose Funeral Home they wish and meet them wherever they want.
  - Requiring that at-need funeral arrangements be done from a licensed funeral establishment. See above comments. I totally disagree with this. Many arrangements have been made in a hospital room following an accident. If I call them on the phone, do I need to call from the funeral home.
  - Requiring that a mortuary science licensee be present in the funeral home when at-need funeral arrangements are being made, and requiring that a licensee sign the Statement of Funeral Goods and Services Selected. I totally disagree. Funeral home staffing shortages are already a problem. This will make it much worse. Quality employees can be trained to do arrangements as good or better in some cases. This will again, add more costs to pass along to families that are paying our bill. Look at all other trades. Unlicensed staff does much of the work under the supervision of the licensee. (My father is a master plumber).

Please pass my comments along to Jon and LARA. Thanks!

Tate Goodwin  
Lighthouse Funeral & Cremation  
"Guiding You in Your Time of Need"  
PH 517-741-4555  
Serving all of south central Michigan.  
[www.lighthousefuneral.com](http://www.lighthousefuneral.com)

Warm Regards,

**From:** [Mark Sayles](#)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Proposed Mortuary Science Changes  
**Date:** Friday, July 26, 2024 1:53:28 PM

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**CAUTION: This is an External email. Please send suspicious emails to  
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Hi,

Just sending a few thoughts for consideration:

Identification of deceased individuals is done at the facility in which they reside (they are billing Medicare/Medicaid/Insurance) so we are confident in their identification as they would otherwise be committing insurance fraud, so we should not have to have family identify.

Deceased individuals under the Medical Examiner's direction would have been identified to him by those at the place of death (EMS/Law Enforcement) by family members who find them dead.... inside, outside, or hanging, so we should not have to identify that person by someone else.

Deceased individuals who die in their home under hospice are identified by hospice who also have been billing insurances and have spoken to the individual themselves prior to death, so we should not have to identify that person by someone else.

Deceased individuals who die without hospice and in another location, by law require notification of the medical examiner and that law enforcement be called to the scene, so again, we should not have to identify that person by someone else.

When an individual has been in a traumatic situation - decomposed with maggots / bugs or head/face cut to shreds....why would I want the potential for litigation and for a family member to have that picture in their head that they cannot now erase?

Requirements for GPA of 2.0 is quite low.... why would we at the very least, require 2.5?

With Michigan being one of the highest states for cremation, why would we continue to require 25 bodies to be embalmed by an apprentice...perhaps 10 or 12 that would be more reasonable, for small businesses, it may be difficult to have 25? In addition, why would we not require the school / Wayne State University, to teach embalming by having a student team embalm a body each week during their educational program being taught by an accomplished embalmer? Why would we abdicate that responsibility to only the sponsor of an apprentice.... there is no consistency, no



learning "tricks of the embalming" for special situations, the best embalmer is only as good as their teacher sponsor... again, not a best practice not to learn at school.

When we are pushing to be "green" and are trying to reduce exposure to toxic/teratogenic solutions, we will have increasingly fewer embalmings than ever before.

Thank you for your consideration.

Mary A. Ewald Sayles, RN, BSN, BA, MBA, Licensed Funeral Director (over 40 years)  
Hyatt Ewald Funeral Home  
989-892-3923

**From:** [Ben Joffe](#)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Comments on Proposed Rule Amendments - Rule Set 2023-17 LR  
**Date:** Friday, July 26, 2024 12:17:51 PM  
**Attachments:** [BDJ PLLC - Comments on Proposed Rule Amendments -Rule Set 2023-17 LR .pdf](#)

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Hello Mr. Page,

Please see the attached comments to the proposed rule package mentioned in the subject line.  
Please confirm receipt.

Regards,

Ben

---

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July 24, 2024  
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Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial  
Licensing Bureau  
Legal Section  
P.O. Box 30018  
Lansing, MI 48909

Re: Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR

To Whom It May Concern,

We are writing to offer comments on the Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau (the “Department”) and Board of Examiners in Mortuary Science’s (the “Board”) proposed amendments to the current Administrative Rules, Mich Admin Code R 339.18901 *et seq.* (the “Proposed Amendments”) being promulgated under the Michigan Occupational Code’s (MCL 339.101 *et seq.*) Article 18, Mortuary Sciences Act (MCL 339.1801 *et seq.*) (together the “Act”).

Our firm has served clients in the mortuary science industry for almost a decade, including during investigations and appeals brought by an overzealous Department and Board that many times does not understand the very statute and rules that it purports to enforce. Our comments are based on our collective experience. Pursuant to the rulemaking process and the request for public comments, please find below our comments and recommendations on the proposed rules. These comments are not all-inclusive.

The Department and Board have proposed many rules that find no basis in the language or intent of the supposed enabling statute, commonly known as the Mortuary Science Act (MSA) MCLA 339.1801, *et. seq.*, or purview of the Board’s and Department’s responsibilities as defined by the MSA and its underlying legislative history. Most notably, the “Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public.” *Michigan House of Representatives, Session 1977-78, Final Report of the Comm. to Investigate the Dept. of Lic. and Reg.* at C-3 at pg. 52). However, proposed rule R 339.18942 purports to limit free speech and consumer choice on the basis of protecting the finances of licensed industry participants (*See RIS Form 2023-17-LR Question 4(C)*). This proposed rule is not related to protecting the public, or protecting the professional integrity of the licensed occupation. It is expressly proposed to limit competition for services and protect the finances of certain industry participants. In its published information on the rules, the Department states the purpose of this rule is to “maintain a fair playing field for all licensees and funeral establishments in a given region.” (*See RIS Form 2023-17-LR Question 4(C)*). This rule does not protect consumers in any way, shape or form.

In addition, no provision of the MSA states or even implies that the Legislature's purpose is to space out licensees, or assure any of them any share of industry revenues. No provision of the MSA directs the Board or Department to pursue these goals. In the language of agency law, by pursuing this stated objective, the Board and Department are engaged in "a frolic and detour" of their own. More specifically, no provisions of the MSA requires licensed morticians to maintain any number of "offices", nor limits how many a mortician can maintain, or where they may be. As such, the proposed regulations are *sui generis* initiatives of the Board, not the implementation of legislative policy.

It is therefore useful to consider the following:

## 1. History of the Act

“The Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public. Secondary to that responsibility are all efforts required to meet that charge, including assisting the professions, trades, and occupations in rendering better service.”

(Michigan House of Representatives, Session 1977-78, Final Report of the Comm. to Investigate the Dept. of Lic. and Reg. at C-3 at pg. 52).

The above is the first guideline used when the Legislature enacted the Michigan Occupational Code in 1980. The Occupational Code was enacted in furtherance of the above objective and other findings of the 1977 Final Report of the Special Committee to Investigate the Department of Licensing and Regulation which was conducted pursuant to Michigan House Resolution No. 103 of 1975 to investigate “reported irregularities within the Michigan Department of Licensing and Regulation and the 34 boards, commission and agencies under it.” (*Id.* at pg. 1).

The Resolution and Occupational Code were sponsored by Gary Owen, who also chaired the Special Committee tasked to gather input as to the prospective new Code, and form recommendations to the House as a whole. (*Id.* at pg. C-3). The Final Report is broad and encompassing, but its focus can be summarized as follows: licensing “must always be predicated on its service of a general public interest.” (*Id.* at pg. B-8).

This reading of public policy is paramount to an understanding and construction of the Occupational Code, as the contemporary Legislature was aware of. It is coupled with the stated concern that the “licensing power of boards . . . could be similar to that of a private cartel” more inclined to protect itself than the public. (*Id.* at pg. B-5) More explicitly, where a board is made up of members of an occupation they may be tempted “to obtain and maintain a monopolistic control of the supply of a product, which in turn, enhances the economic compensation of its member. . . . To do this the cartel must control . . . the behavior of its members to ensure that one person does not deviate, while others observe the rules.” (*Id.* at pg. B-6). When this happens, the Legislature warned, “[t]he end result is . . . [the] perpetuation of the oligopolistic or monopolistic position” of the Board and its members interests, not that of consumer protection. (*Id.* at pg. B-6). Accordingly,

the Final Report found “[i]t is improper for a state to license a profession for the benefit of the profession.” (*Id.* at pg. B-6).

Although it can be argued that licensing can have a two-fold goal: “that of serving the public and that of serving the profession”, the Final Report found when there is a conflict that arises between the two-fold goal, boards “often promote that which best serves their interest, though it may be contrary to the public good.” (*Id.* at pg. C-10;11). In fact, by allowing boards and LARA to promulgate rules and regulations, the Report warned that “legislature provides an opportunity for boards to misuse the police power of the state.” (*Id.* at pg. B-11). The Final Report summarizes these basic points concluding that “[e]ffects of licensing tend to evolve... to control of competition” which “perpetuates any implied discrimination policies of an association.” (*Id.* at pg. B-16). “Boards tend to protect livelihoods, when goals for protection of public and the profession are in conflict.” (*Id.* at pg. C-16).

The Final Report concludes that “[t]he activity of licensing should be limited to what is expressly necessary for the protection of the public. It is not intended that licensing and regulation be utilized to limit competition for jobs and services or to enhance professional prestige.” (*Id.* at pg. C-3). “Peer regulation is riddled with bias, favoritism, arbitrary decisions, and conflicts of interest.” (*Id.* at pg. C-3). Because of this, a guideline was proposed that the “Department assume clear authority and responsibilities for administration in the field of occupational licensing and regulation, including the authority to issue and enforce such rules, policy guidelines and procedures as it deems necessary to carry out its public responsibilities.” (*Id.* at pg. C-4;5).

In the same time period, at the federal level, the now-familiar FTC Funeral Rule was promulgated which, to synopsise, prohibited states from allowing funeral directors to misuse the public by requiring consumers to purchase funeral-related merchandise from the funeral director. Thus, at both the state and federal level, the public policy is and has been that funeral-related rulemaking must demonstrably benefit the consuming public, both in terms of the professional quality of the services provided and in terms of the economic interest of the public to obtain the goods and services in question on as economical a basis as feasible. The idea of guarding the "bottom line" of any particular funeral director, or the industry as a whole, has not been a legitimate priority since then. It still is not a legitimate concern of this Board or Department.

## 2. General Global Comments

The MSA, like the Occupational Code as a whole, tasks the Department and Board with protecting the public engaged with those licensed occupations addressed. Neither invite the Department and Board to protect, or allocate, the profit margins enjoyed by practitioners of the licensed profession(s). The Department and Board now, though many of the proposed rules, look to protect the industry, with no demonstrated or claimed benefit to the consuming public, by limiting speech (advertising is speech), consumer choice, and competition among licensed mortuary scientists.

A few specific examples are appropriate.

### 3. R. 339.18901 Definitions:

#### “Supervision”

The proposed definition would require a licensee to be physically present to oversee a wide range of activities related to funerals, whether central, or peripheral. Our clients fully endorse some. Others are quite problematic. On the one hand, it is clearly sound to require a supervising licensee to be physically present for embalming. It is, as has long been held, the core function of this profession.<sup>1</sup> On the other hand, any number of functions, and most particularly conversing with prospect clients to discuss their various options in goods and services (“arranging”), clearly do not require the physical presence of a licensed embalmer of dead human bodies. Moreover, given the recently discovered efficacy of Zoom, etc., not to mention the ubiquitous availability of cellular communication devices, it is often unnecessary for a licensed mortuary scientist to be physically present in the room where various non-embalming functions take place. To the extent this definition, and related rules, could be taken literally, they could be misused to, in essence, deprive every licensee (and, more importantly, the consuming public) of conveniences as old as the telephone and as current as videoconferencing and the Internet. In all, this is a deeply flawed, ill-considered measure, when applied beyond context of the actual handling, sanitizing and preparation of dead human bodies, the actual focus of the MSA.

### 4. R 339.18921 License Requirements

If the goal of the Department is to increase the quality of the profession through education, a higher graduating GPA would seem to meet this goal more reliably than simply adding additional hours and subjects that a potential licensee must take classes on. As such, a mediocre prospective mortician may still “pass” these courses at a barely above failing grade, but have a very limited competency. Instead of expanding the required curriculum the Department should consider addressing the competence issue more directly, by “raising the bar” of demonstrated competence.

Rather than using a standardized national board examination, Michigan should develop its own examination based on the Michigan statute. Michigan is governed by the FTC funeral rule and state statutes, not national norms, a national board examination is not needed.

### 5. R 229.18922 Standards

Educational Standards should reflect Michigan and not national standards. Michigan has specific and unique laws regarding mortuary science and standards should reflect such.

### 6. R 229.18925 Practical Experience

Many of the proposed requirements have no basis in the language of the MSA or its underlying history. For example, Michigan courts have found in published opinions that the MSA focuses on “what is to be done and not done with a dead human body” *Ansell v. DOC 222 Mich.App. 347*. The publishing of obituaries is not focused on the above. Any reasonably literate

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<sup>1</sup> See *Ansell v. DOC 222 Mich.App. 347* (1997)

non-licensee can compose an obituary, just as countless relatives and friends of decedents regularly compose and deliver eulogies. There is no statutory or public policy basis to arbitrarily deem such writings as subsumed into the “Practice of Funeral Directing”. See MCLA 339.1801(e).

Additionally, the proposed requirement that a trainee must “secure[] information for a death certificate, death notice, or obituary” is without clear predicate in the MSA and, again, partakes more of a peripheral and even clerical nature than the far more significant activities of handling, sanitizing, embalming or otherwise preparing dead human bodies, the actual focus of the MSA. This particular information gathering requirement is more analogous to taking new patient biographical and medical background information than it is to actual mortuary science. Virtually every medical doctor assigns such clerical functions to medically untrained intake personnel. There is no good reason for licensed morticians to be required to perform these functions, or receive formal training in them, and no apparent value to the consumer.

#### 7. R 339.18931 Funeral establishment requirements

This rule adds in additional requirements not found in the MSA, but clearly mentioned in the current litigation the Board and Department has been a party to for over two years. There has never been a requirement of having an office space in a licensed funeral home. In fact, there has never been any statutory prescriptions as to where such an office, or offices, may be located, how many a licensee can maintain, and the like. When taken with other proposed rules, the Board and Department are merely making it harder for consumers to get information about and procure services related to funeral, cremation and cemetery services and merchandise. The Board provides no evidence of how a "one office, in the parlor" requirement would better protect or serve the public.

MSA licensees, like many other professionals (lawyers and accountants come readily to mind) meet with consumers at all types of locations; suggesting that meetings to arrange funerals or cremations need not happen solely at an office in a funeral home. This proposed rule, combined with others, has the express purpose, and effect, of forcing consumers (often at moments of great anguish and vulnerability) to only have conversations about funeral and cemetery services and merchandise at a licensed funeral home, or anywhere else in the world (including any number of fast food emporia), other than an office controlled by a licensee that is simply not in a funeral home.

These proposed rules do not protect the public from the industry, but protect the industry from a price-conscious public who are more easily able to weigh their options for funeral and cemetery merchandise at additional arranging locations. All this rule would do is enable the industry to economize by not providing this convenience to the public, thus turning the policy underlying the FTC Funeral Rule on its ear.

Additionally, subset (2)(g) must be further defined about what the only “articles and instruments necessary for embalming” may be in a preparation and embalming room. Unnecessary instruments and articles could cover everyday items such as radios, speakers, computers, and other not strictly necessary, but reasonable, useable and otherwise harmless items that may also be in a preparation and embalming room. This rule is thus vague, and susceptible to abuse.

**8. R 339.18932 Care and Storage of Remains**

This proposed rule is outside the scope of the MSA as the disposition of a dead human body has happened upon the cremation of such. Adding cremation storage requirements does not relate to the disposition, as the cremation is the disposition of the dead human body. If the State would like to add additional rules for cremated remains, it should make changes to the Agreements for Dispositions of Dead Human Bodies Act (MCL 328.201 *et seq.*)

This rule adds additional requirements to Funeral Homes that do not exist under the MSA. If there is an issue with the current state of the storage of cremains, it is that, sadly, consumers sometimes do not collect them. A statute is needed to allow for funeral homes to dispose of these cremains after a reasonable time without incurring the costs of interment.

Additionally, subpart (1)(f) seems to target maintenance of a funeral home grounds. The MSA is an act to regulate actions performed on deceased human bodies, not to regulate landscaping. There are already rules that state an establishment must be free from pests and insects. If an establishment wants to have wildflowers throughout its outdoor areas, the Department should abrogate the role of exterior decorator to itself.

**9. R 339.18935 Transportation of remains to crematory**

The logistics of this proposed rule do not comport with those other rules covering the activities of medical doctors or county medical examiners. MSA licensee activities and thereby compliance with this proposed rule is subject to how medical doctors and county medical examiners perform their jobs and associated documentation. If doctors and medical examiners do not act promptly, this rule will result in dead human bodies being kept at funeral homes longer than what is needed and in violation of this proposed rule.

This Rule does not relate to the protection of consumers and will add costs and delays to consumers and licensees alike.

**10. R 339.18937**

Mandating that licensees take pictures of dead human bodies is a recipe for lawsuits against licensees. This proposed rule should include several safe harbor provisions in order to ensure that licensees, mandated to take photos of dead human bodies that relatives and friends might find objectionable or invasive of privacy, do not find themselves in constant litigation involving such disputes. There have been numerous lawsuits across the country involving the taking and dissemination of pictures of dead human bodies that have resulted in substantial legal awards. Mandating these pictures will surely lead to additional lawsuits, including but not limited to negligent infliction of emotional distress, against licensees. This will lead to increases in insurance and other costs that will be passed on to consumers.

Furthermore, in order to avoid lawsuits alluded to above, licensees would have to clean and make a body more presentable before taking a picture whose sole purpose is to confirm positive identification. This includes the setting of features and removing of medical equipment such as vent tubes. These added costs will likely be passed on to consumers.



This entire proposed rule should be struck.

#### 11. R 339.18491

This proposed rule does nothing to alleviate the ambiguities in the current rule, but does more directly impinge on Free Speech rights. That being what is “engaging in the practice of mortuary science.” The Department and Board have been litigating this issue for over two (2) years, and knows full well that absolutely no one has ever been "deceived" or "misled" into believing that dead human bodies are embalmed or cremated at offices solely dedicated to arranging for such activities to occur elsewhere. In fact, when challenged the Department and Board have never been able to produce an example of such.

This rule also fails to define “doing business”, in any meaningful way, as also revealed in the current litigation. Absent a rational, concrete definition, "doing business" could be misused to prohibit a licensed mortician from shopping for items (suits, funeral merchandise, caskets, flowers, etc.) as well as meeting with families and other professionals. Which of these are to be “business” that must be conducted only inside a licensed funeral establishment? The proposed and current rule’s use of the term “doing business” is too vague and open ended and will continue to result in arbitrary interpretations of what is prohibited conduct. For an example, advertising on a billboard can be argued as doing business in the billboard’s location.

#### 12. R 339.18942

This proposed rule is, perhaps, the most indefensible. It falls outside the scope of the MSA and the legitimate scope of Department and Board, impinges on the free speech of licensees, and the right of consumers to gain valuable information wherever they find convenient. Additionally, it adds “arranging” for funeral services to the definition of “engaging in the practice of mortuary science”, something the MSA does not do, and does not authorize the Board and Department to do. This is unlawful statutory amendment masquerading as regulatory implementation of existing law. The Act and Legislature did and does not use this language. This expansion of the Act through rulemaking violates the Act and the Michigan Constitution. If such an initiative is to be pursued, it must be done by the Legislature.

Additionally, this proposed rule, by including “arranging for mortuary science services” impinges on and contradicts the Michigan Prepaid Funerals and Cemetery Sales Act, a separate and distinct Act from the MSA, with its own licensing scheme under which mortuary science services are "arranged for" and sold.

All of these defects are compounded by the rule’s stated purpose: to control competition in the industry. The MSA is an Act to control the actual doing of the occupation, not to allocate revenue within the industry. The main tenet of the Occupational Code is consumer protection. The Board and Department turn this tenet on its head to protect industry participants through geographic controls that have no basis in the MSA. This is the purview of the Legislature and not the Board and Department which is tasked with controlling the occupation, not the industry.

The accompanying explanation of the rule makes clear that there is no consumer-related concern, only a financial concern for industry participants who would rather not offer this convenience to the public. Please see the above legislative history on how this rule is designed to

protect only the industry at the expense of competition throughout the industry and therefore the consumer.

We challenge this Board and Department to give examples of the consumer harms this rule is designed to prevent. The Board and Department have been given two years of litigation to come up with such harm, and as of this writing have failed to do so. Now, in the middle of litigation regarding the activities that this rule seeks to prohibit, that the Department and Board have claimed that these Offices are already prohibited in the name of consumer protection, yet propose this rule and lists industry protection as its sole basis for promulgating such.

However, this rule allows for these activities and communications to take place anywhere other than a non-funeral home owned or controlled by a licensee. This includes Comerica Park, a Bob Evans, or the local "gentlemen's club", but not at an office a licensee may own or lease. This is not consumer protection. It is merely industry protection to limit competition. This is outside the purview of the MSA. If the Legislature was worried about the competitive balance, or spacing of funeral homes, it could have added protections into the statute. It did not.

We incorporate all arguments regarding of harm regarding arrangement offices included in the filings and record in the case Paul E. Buchanan and Generations Funeral and Cremation Services, Inc. v. Department of Licensing and Regulatory Affairs, Corporations Securitas & Commercial Licensing and the Bureau/Board of Examiners in Mortuary Science, Court of Appeals Docket no. 369913.

This proposed rule reeks of industry protection and is not supported by the MSA or the underlying history. It does nothing to protect consumers, limits free speech for consumers and licensees alike and is outside the subject matter of the Board and Department.

## **Conclusion**

The Board and Department after flailing in their litigation efforts to shut down competition in the industry now proposes rules unbound to consumer protection, but to protect their individual interests in plain violation of the Occupational Code, Mortuary Sciences Act and their underlying legislative history.

These rules should not be adopted.

Regards,

BENJAMIN D JOFFE, PLLC

Benjamin D Joffe

**From:** [mark bucchi](#)  
**To:** ["Ben Joffe"; Page, Mitchell \(LARA\)](#)  
**Subject:** RE: Comments on Proposed Rule Amendments - Rule Set 2023-17 LR  
**Date:** Friday, July 26, 2024 12:38:14 PM  
**Attachments:** [2024.07.26 mailing to LARA..pdf](#)

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Mr. Page, Attached is my endorsement of Mr. Joffe's mailing. Please acknowledge receipt. Hard copy to follow.  
Thanks, MPB

MARK BUCCHI, ESQ.  
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**From:** Ben Joffe <[bdj@benjamindjoffe.com](mailto:bdj@benjamindjoffe.com)>  
**Sent:** Friday, July 26, 2024 12:14 PM  
**To:** [pagem6@michigan.gov](mailto:pagem6@michigan.gov)  
**Subject:** Comments on Proposed Rule Amendments - Rule Set 2023-17 LR

Hello Mr. Page,

Please see the attached comments to the proposed rule package mentioned in the subject line.  
Please confirm receipt.

Regards,

Ben

**Mark Bucchi, Esq.**  
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July 26, 2024

Mitchell Page  
Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial  
Licensing Bureau  
Legal Section  
P.O. Box 30018  
Lansing, MI 48909

**Re: Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR**

Good People,

I represent Paul Buchanan, of Generations Funeral and Cremation Services, Inc..  
I send you this mailing to endorse the attached mailing of Mr. Joffe.

Please confirm timely receipt.

Very truly yours,

  
MARK BUCCHI, ESQ.



BENJAMIN D. JOFFE PLLC

*Attorney & Counselor*

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July 24, 2024

Mitchell Page

Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial  
Licensing Bureau

Legal Section

P.O. Box 30018

Lansing, MI 48909

Re: Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR

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This reading of public policy is paramount to an understanding and construction of the Occupational Code, as the contemporary Legislature was aware of. It is coupled with the stated concern that the "licensing power of boards . . . could be similar to that of a private cartel" more inclined to protect itself than the public. (*Id.* at pg. B-5) More explicitly, where a board is made up of members of an occupation they may be tempted "to obtain and maintain a monopolistic control of the supply of a product, which in turn, enhances the economic compensation of its member. . . . To do this the cartel must control . . . the behavior of its members to ensure that one person does not deviate, while others observe the rules." (*Id.* at pg. B-6). When this happens, the Legislature warned, "[t]he end result is . . . [the] perpetuation of the oligopolistic or monopolistic position" of the Board and its members interests, not that of consumer protection. (*Id.* at pg. B-6). Accordingly,

the Final Report found “[i]t is improper for a state to license a profession for the benefit of the profession.” (*Id.* at pg. B-6).

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The MSA, like the Occupational Code as a whole, tasks the Department and Board with protecting the public engaged with those licensed occupations addressed. Neither invite the Department and Board to protect, or allocate, the profit margins enjoyed by practitioners of the licensed profession(s). The Department and Board now, though many of the proposed rules, look to protect the industry, with no demonstrated or claimed benefit to the consuming public, by limiting speech (advertising is speech), consumer choice, and competition among licensed mortuary scientists.

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The proposed definition would require a licensee to be physically present to oversee a wide range of activities related to funerals, whether central, or peripheral. Our clients fully endorse some. Others are quite problematic. On the one hand, it is clearly sound to require a supervising licensee to be physically present for embalming. It is, as has long been held, the core function of this profession.<sup>1</sup> On the other hand, any number of functions, and most particularly conversing with prospect clients to discuss their various options in goods and services (“arranging”), clearly do not require the physical presence of a licensed embalmer of dead human bodies. Moreover, given the recently discovered efficacy of Zoom, etc., not to mention the ubiquitous availability of cellular communication devices, it is often unnecessary for a licensed mortuary scientist to be physically present in the room where various non-embalming functions take place. To the extent this definition, and related rules, could be taken literally, they could be misused to, in essence, deprive every licensee (and, more importantly, the consuming public) of conveniences as old as the telephone and as current as videoconferencing and the Internet. In all, this is a deeply flawed, ill-considered measure, when applied beyond context of the actual handling, sanitizing and preparation of dead human bodies, the actual focus of the MSA.

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Rather than using a standardized national board examination, Michigan should develop its own examination based on the Michigan statute. Michigan is governed by the FTC funeral rule and state statutes, not national norms, a national board examination is not needed.

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Educational Standards should reflect Michigan and not national standards. Michigan has specific and unique laws regarding mortuary science and standards should reflect such.

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Many of the proposed requirements have no basis in the language of the MSA or its underlying history. For example, Michigan courts have found in published opinions that the MSA focuses on “what is to be done and not done with a dead human body” *Ansell v. DOC 222 Mich.App. 347*. The publishing of obituaries is not focused on the above. Any reasonably literate

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non-licensee can compose an obituary, just as countless relatives and friends of decedents regularly compose and deliver eulogies. There is no statutory or public policy basis to arbitrarily deem such writings as subsumed into the "Practice of Funeral Directing". See MCLA 339.1801(e).

Additionally, the proposed requirement that a trainee must "secure[] information for a death certificate, death notice, or obituary" is without clear predicate in the MSA and, again, partakes more of a peripheral and even clerical nature than the far more significant activities of handling, sanitizing, embalming or otherwise preparing dead human bodies, the actual focus of the MSA. This particular information gathering requirement is more analogous to taking new patient biographical and medical background information than it is to actual mortuary science. Virtually every medical doctor assigns such clerical functions to medically untrained intake personnel. There is no good reason for licensed morticians to be required to perform these functions, or receive formal training in them, and no apparent value to the consumer.

#### 7. R 339.18931 Funeral establishment requirements

This rule adds in additional requirements not found in the MSA, but clearly mentioned in the current litigation the Board and Department has been a party to for over two years. There has never been a requirement of having an office space in a licensed funeral home. In fact, there has never been any statutory prescriptions as to where such an office, or offices, may be located, how many a licensee can maintain, and the like. When taken with other proposed rules, the Board and Department are merely making it harder for consumers to get information about and procure services related to funeral, cremation and cemetery services and merchandise. The Board provides no evidence of how a "one office, in the parlor" requirement would better protect or serve the public.

MSA licensees, like many other professionals (lawyers and accountants come readily to mind) meet with consumers at all types of locations; suggesting that meetings to arrange funerals or cremations need not happen solely at an office in a funeral home. This proposed rule, combined with others, has the express purpose, and effect, of forcing consumers (often at moments of great anguish and vulnerability) to only have conversations about funeral and cemetery services and merchandise at a licensed funeral home, or anywhere else in the world (including any number of fast food emporia), other than an office controlled by a licensee that is simply not in a funeral home.

These proposed rules do not protect the public from the industry, but protect the industry from a price-conscious public who are more easily able to weigh their options for funeral and cemetery merchandise at additional arranging locations. All this rule would do is enable the industry to economize by not providing this convenience to the public, thus turning the policy underlying the FTC Funeral Rule on its ear.

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This proposed rule is outside the scope of the MSA as the disposition of a dead human body has happened upon the cremation of such. Adding cremation storage requirements does not relate to the disposition, as the cremation is the disposition of the dead human body. If the State would like to add additional rules for cremated remains, it should make changes to the Agreements for Dispositions of Dead Human Bodies Act (MCL 328.201 *et seq.*)

This rule adds additional requirements to Funeral Homes that do not exist under the MSA. If there is an issue with the current state of the storage of cremains, it is that, sadly, consumers sometimes do not collect them. A statute is needed to allow for funeral homes to dispose of these cremains after a reasonable time without incurring the costs of internment.

Additionally, subpart (1)(f) seems to target maintenance of a funeral home grounds. The MSA is an act to regulate actions performed on deceased human bodies, not to regulate landscaping. There are already rules that state an establishment must be free from pests and insects. If an establishment wants to have wildflowers throughout its outdoor areas, the Department should abrogate the role of exterior decorator to itself.

**9. R 339.18935 Transportation of remains to crematory**

The logistics of this proposed rule do not comport with those other rules covering the activities of medical doctors or county medical examiners. MSA licensee activities and thereby compliance with this proposed rule is subject to how medical doctors and county medical examiners perform their jobs and associated documentation. If doctors and medical examiners do not act promptly, this rule will result in dead human bodies being kept at funeral homes longer than what is needed and in violation of this proposed rule.

This Rule does not relate to the protection of consumers and will add costs and delays to consumers and licensees alike.

**10. R 339.18937**

Mandating that licensees take pictures of dead human bodies is a recipe for lawsuits against licensees. This proposed rule should include several safe harbor provisions in order to ensure that licensees, mandated to take photos of dead human bodies that relatives and friends might find objectionable or invasive of privacy, do not find themselves in constant litigation involving such disputes. There have been numerous lawsuits across the country involving the taking and dissemination of pictures of dead human bodies that have resulted in substantial legal awards. Mandating these pictures will surely lead to additional lawsuits, including but not limited to negligent infliction of emotional distress, against licensees. This will lead to increases in insurance and other costs that will be passed on to consumers.

Furthermore, in order to avoid lawsuits alluded to above, licensees would have to clean and make a body more presentable before taking a picture whose sole purpose is to confirm positive identification. This includes the setting of features and removing of medical equipment such as vent tubes. These added costs will likely be passed on to consumers.

This entire proposed rule should be struck.

#### 11. R 339.18491

This proposed rule does nothing to alleviate the ambiguities in the current rule, but does more directly impinge on Free Speech rights. That being what is “engaging in the practice of mortuary science.” The Department and Board have been litigating this issue for over two (2) years, and knows full well that absolutely no one has ever been “deceived” or “misled” into believing that dead human bodies are embalmed or cremated at offices solely dedicated to arranging for such activities to occur elsewhere. In fact, when challenged the Department and Board have never been able to produce an example of such.

This rule also fails to define “doing business”, in any meaningful way, as also revealed in the current litigation. Absent a rational, concrete definition, “doing business” could be misused to prohibit a licensed mortician from shopping for items (suits, funeral merchandise, caskets, flowers, etc.) as well as meeting with families and other professionals. Which of these are to be “business” that must be conducted only inside a licensed funeral establishment? The proposed and current rule’s use of the term “doing business” is too vague and open ended and will continue to result in arbitrary interpretations of what is prohibited conduct. For an example, advertising on a billboard can be argued as doing business in the billboard’s location.

#### 12. R 339.18942

This proposed rule is, perhaps, the most indefensible. It falls outside the scope of the MSA and the legitimate scope of Department and Board, impinges on the free speech of licensees, and the right of consumers to gain valuable information wherever they find convenient. Additionally, it adds “arranging” for funeral services to the definition of “engaging in the practice of mortuary science”, something the MSA does not do, and does not authorize the Board and Department to do. This is unlawful statutory amendment masquerading as regulatory implementation of existing law. The Act and Legislature did and does not use this language. This expansion of the Act through rulemaking violates the Act and the Michigan Constitution. If such an initiative is to be pursued, it must be done by the Legislature.

Additionally, this proposed rule, by including “arranging for mortuary science services” impinges on and contradicts the Michigan Prepaid Funerals and Cemetery Sales Act, a separate and distinct Act from the MSA, with its own licensing scheme under which mortuary science services are “arranged for” and sold.

All of these defects are compounded by the rule’s stated purpose: to control competition in the industry. The MSA is an Act to control the actual doing of the occupation, not to allocate revenue within the industry. The main tenet of the Occupational Code is consumer protection. The Board and Department turn this tenet on its head to protect industry participants through geographic controls that have no basis in the MSA. This is the purview of the Legislature and not the Board and Department which is tasked with controlling the occupation, not the industry.

The accompanying explanation of the rule makes clear that there is no consumer-related concern, ~~only a financial concern for industry participants who would rather not offer this convenience to the public.~~ Please see the above legislative history on how this rule is designed to

protect only the industry at the expense of competition throughout the industry and therefore the consumer.

We challenge this Board and Department to give examples of the consumer harms this rule is designed to prevent. The Board and Department have been given two years of litigation to come up with such harm, and as of this writing have failed to do so. Now, in the middle of litigation regarding the activities that this rule seeks to prohibit, that the Department and Board have claimed that these Offices are already prohibited in the name of consumer protection, yet propose this rule and lists industry protection as its sole basis for promulgating such.

However, this rule allows for these activities and communications to take place anywhere other than a non-funeral home owned or controlled by a licensee. This includes Comerica Park, a Bob Evans, or the local "gentlemen's club", but not at an office a licensee may own or lease. This is not consumer protection. It is merely industry protection to limit competition. This is outside the purview of the MSA. If the Legislature was worried about the competitive balance, or spacing of funeral homes, it could have added protections into the statute. It did not.

We incorporate all arguments regarding of harm regarding arrangement offices included in the filings and record in the case Paul E. Buchanan and Generations Funeral and Cremation Services, Inc. v. Department of Licensing and Regulatory Affairs, Corporations Securitas & Commercial Licensing and the Bureau/Board of Examiners in Mortuary Science, Court of Appeals Docket no. 369913.

This proposed rule reeks of industry protection and is not supported by the MSA or the underlying history. It does nothing to protect consumers, limits free speech for consumers and licensees alike and is outside the subject matter of the Board and Department.

### **Conclusion**

The Board and Department after flailing in their litigation efforts to shut down competition in the industry now proposes rules unbound to consumer protection, but to protect their individual interests in plain violation of the Occupational Code, Mortuary Sciences Act and their underlying legislative history.

These rules should not be adopted.

Regards,

BENJAMIN D JOFFE, PLLC

Benjamin D Joffe

**From:** [Timothy Gagern](#)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Rule Set 2023-17 LR Public Comment  
**Date:** Friday, July 26, 2024 3:26:44 PM  
**Attachments:** [Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR.pdf](#)

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Mr. Page,

Please find attached public comments for the above referenced Rule Set.

Please confirm receipt and acknowledge that the file format is to that of your liking and or accessibility.

Thanks in advance.

July 24, 2024  
Mitchell Page  
Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau  
Legal Section  
P.O. Box 30018  
Lansing, MI 48909

Re: Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR  
To Whom It May Concern,

We are writing to offer comments on the Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau (the "Department") and Board of Examiners in Mortuary Science's (the "Board") proposed amendments to the current Administrative Rules, Mich Admin Code R 339.18901 *et seq.* (the "Proposed Amendments") being promulgated under the Michigan Occupational Code's (MCL 339.101 *et seq.*) Article 18, Mortuary Sciences Act (MCL 339.1801 *et seq.*) (together the "Act").

Our firm has served clients in the mortuary science industry for almost a decade, including during investigations and appeals brought by an overzealous Department and Board that many times does not understand the very statute and rules that it purports to enforce. Our comments are based on our collective experience. Pursuant to the rulemaking process and the request for public comments, please find below our comments and recommendations on the proposed rules. These comments are not all-inclusive.

The Department and Board have proposed many rules that find no basis in the language or intent of the supposed enabling statute, commonly known as the Mortuary Science Act (MSA) MCLA 339.1801, *et. seq.*, or purview of the Board's and Department's responsibilities as defined by the MSA and its underlying legislative history. Most notably, the "Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public." *Michigan House of Representatives, Session 1977-78, Final Report of the Comm. to Investigate the Dept. of Lic. and Reg.* at C-3 at pg. 52). However, proposed rule R 339.18942 purports to limit free speech and consumer choice on the basis of protecting the finances of licensed industry participants (*See RIS Form 2023-17-LR Question 4(C)*). This proposed rule is not related to protecting the public, or protecting the professional integrity of the licensed occupation. It is expressly proposed to limit competition for services and protect the finances of certain industry participants. In its published information on the rules, the Department states the purpose of this rule is to "maintain a fair playing field for all licensees and funeral establishments in a given region." (*See RIS Form 2023-17-LR Question 4(C)*). This rule does not protect consumers in any way, shape or form.

In addition, no provision of the MSA states or even implies that the Legislature's purpose is to space out licensees, or assure any of them any share of industry revenues. No provision of the MSA directs the Board or Department to pursue these goals. In the language of agency law, by pursuing this stated objective, the Board and Department are engaged in "a frolic and detour" of their own. More specifically, no provisions of the MSA requires licensed morticians to maintain any number of "offices", nor limits how many a mortician can maintain, or where they may be. As such, the proposed regulations are *sui generis* initiatives of the Board, not the implementation of legislative policy.

It is therefore useful to consider the following:

1. History of the Act

"The Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public. Secondary to that responsibility are all efforts required to meet that charge, including assisting the professions, trades, and occupations in rendering better service."

(Michigan House of Representatives, Session 1977-78, Final Report of the Comm. to Investigate the Dept. of Lic. and Reg. at C-3 at pg. 52).

The above is the first guideline used when the Legislature enacted the Michigan Occupational Code in 1980. The Occupational Code was enacted in furtherance of the above objective and other findings of the 1977 Final Report of the Special Committee to Investigate the Department of Licensing and Regulation which was conducted pursuant to Michigan House Resolution No. 103 of 1975 to investigate "reported irregularities within the Michigan Department of Licensing and Regulation and the 34 boards, commission and agencies under it." (*Id.* at pg. 1).

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There is legislation that has been signed into order by the Governor that aims to regulate transportation companies, which are to be separate licensed entities. This rule makes no mention of such, the rules should dovetail, however none exist yet for the above mentioned, therefore this is a premature rule and should be struck entirely until someone, somewhere, can make sure all of the rules coincide with one another.

The logistics of this proposed rule do not comport with those other rules covering the activities of medical doctors or county medical examiners. MSA licensee activities and thereby compliance with this proposed rule is subject to how medical doctors and county medical examiners perform their jobs and associated documentation. If doctors and medical examiners do not act promptly, this rule will result in dead human bodies being kept at funeral homes longer than what is needed and in violation of this proposed rule.

This Rule does not relate to the protection of consumers and will add costs and delays to consumers and licensees alike.

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Mandating that licensees take pictures of dead human bodies is a recipe for lawsuits against licensees. Cultural preference and certain religions will find this RULE a violation of their beliefs and practices.

This proposed rule should include several safe harbor provisions in order to ensure that licensees, mandated to take photos of dead human bodies that relatives and friends might find objectionable or invasive of privacy, do not find themselves in constant litigation involving such disputes. There have been numerous lawsuits across the country involving the taking and dissemination of pictures of dead human bodies that have resulted in substantial legal awards. Mandating these pictures will surely lead to additional lawsuits, including but not limited to negligent infliction of emotional distress, against licensees. This will lead to increases in insurance and other costs that will be passed on to consumers.

Furthermore, in order to avoid lawsuits alluded to above, licensees would have to clean and make a body more presentable before taking a picture whose sole purpose is to confirm positive identification. This includes the setting of features and removing of medical equipment such as vent tubes. These added costs will likely be passed on to consumers.

This entire proposed rule should be struck.

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This proposed rule does nothing to alleviate the ambiguities in the current rule, but does more directly impinge on Free Speech rights. That being what is “engaging in the practice of mortuary science.” The Department and Board have been litigating this issue for over two (2) years, and knows full well that absolutely no one has ever been "deceived" or "misled" into believing that dead human bodies are embalmed or cremated at offices solely dedicated to arranging for such activities to occur elsewhere. In fact, when challenged the Department and Board have never been able to produce an example of such.

This rule also fails to define “doing business”, in any meaningful way, as also revealed in the current litigation. Absent a rational, concrete definition, "doing business" could be misused to prohibit a licensed mortician from shopping for items (suits, funeral merchandise, caskets, flowers, etc.) as well as meeting with families and other professionals. Which of these are to be “business” that must be conducted only inside a licensed funeral establishment? The proposed and current rule’s use of the term “doing business” is too vague and open ended and will continue to result in arbitrary interpretations of what is prohibited conduct. For example, advertising on a billboard can be argued as doing business in the billboard’s location.

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Additionally, this proposed rule, by including “arranging for mortuary science services” impinges on and contradicts the Michigan Prepaid Funerals and Cemetery Sales Act, a separate and distinct Act from the MSA, with its own licensing scheme under which mortuary science services are "arranged for" and sold.

All of these defects are compounded by the rule’s stated purpose: to control competition in the industry. The MSA is an Act to control the actual doing of the occupation, not to allocate revenue within the industry. The main tenet of the Occupational Code is consumer protection. The Board and Department turn this tenet on its head to protect industry participants through geographic controls that have no basis in the MSA. This is the purview of the Legislature and not the Board and Department which is tasked with controlling the occupation, not the industry.

The accompanying explanation of the rule makes clear that there is no consumer-related concern, only a financial concern for industry participants who would rather not offer this convenience to the public. Please see the above legislative history on how this rule is designed to protect only the industry at the expense of competition throughout the industry and therefore the consumer.

We challenge this Board and Department to give examples of the consumer harms this rule is designed to prevent. The Board and Department have been given two years of litigation to come up with such harm, and as of this writing have failed to do so. Now, in the middle of litigation regarding the activities that this rule seeks to prohibit, that the Department and Board have claimed that these Offices are already prohibited in the name of consumer protection, yet propose this rule and lists industry protection as its sole basis for promulgating such.

However, this rule allows for these activities and communications to take place anywhere other than a non-funeral home owned or controlled by a licensee. This includes Comerica Park, a Bob Evans, or the local "gentlemen’s club", but not at an office a licensee may own or lease. This is not consumer protection. It is merely industry protection to limit competition. This is outside the purview of the MSA. If the Legislature was worried about the competitive balance, or spacing of funeral homes, it could have added protections into the statute. It did not.

We incorporate all arguments regarding of harm regarding arrangement offices included in the filings and record in the case Paul E. Buchanan and Generations Funeral and Cremation Services, Inc. v. Department of Licensing and Regulatory Affairs, Corporations Securitax & Commercial Licensing and the Bureau/Board of Examiners in Mortuary Science, Court of Appeals Docket no. 369913.

This proposed rule reeks of industry protection and is not supported by the MSA or the underlying history. It does nothing to protect consumers, limits free speech for consumers and licensees alike and is outside the subject matter of the Board and Department.

**Conclusion**

The Board and Department after flailing in their litigation efforts to shut down competition in the industry now proposes rules unbound to consumer protection, but to protect their individual interests in plain violation of the Occupational Code, Mortuary Sciences Act and their underlying legislative history.

These rules should not be adopted.

Timothy Gager  
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**From:** [pbuchanan@generationsfuneralservice.com](mailto:pbuchanan@generationsfuneralservice.com)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Public Comments for proposed rule set  
**Date:** Friday, July 26, 2024 3:37:43 PM  
**Attachments:** [Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR.pdf](#)

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Good afternoon Mr. Page

Please see the attached document in response to the call for public comment.

Please confirm receipt.

July 24, 2024  
Mitchell Page  
Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau  
Legal Section  
P.O. Box 30018  
Lansing, MI 48909

Re: Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR  
To Whom It May Concern,

We are writing to offer comments on the Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau (the "Department") and Board of Examiners in Mortuary Science's (the "Board") proposed amendments to the current Administrative Rules, Mich Admin Code R 339.18901 *et seq.* (the "Proposed Amendments") being promulgated under the Michigan Occupational Code's (MCL 339.101 *et seq.*) Article 18, Mortuary Sciences Act (MCL 339.1801 *et seq.*) (together the "Act").

Our firm has served clients in the mortuary science industry for almost a decade, including during investigations and appeals brought by an overzealous Department and Board that many times does not understand the very statute and rules that it purports to enforce. Our comments are based on our collective experience. Pursuant to the rulemaking process and the request for public comments, please find below our comments and recommendations on the proposed rules. These comments are not all-inclusive.

The Department and Board have proposed many rules that find no basis in the language or intent of the supposed enabling statute, commonly known as the Mortuary Science Act (MSA) MCLA 339.1801, *et. seq.*, or purview of the Board's and Department's responsibilities as defined by the MSA and its underlying legislative history. Most notably, the "Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public." *Michigan House of Representatives, Session 1977-78, Final Report of the Comm. to Investigate the Dept. of Lic. and Reg.* at C-3 at pg. 52). However, proposed rule R 339.18942 purports to limit free speech and consumer choice on the basis of protecting the finances of licensed industry participants (*See RIS Form 2023-17-LR Question 4(C)*). This proposed rule is not related to protecting the public, or protecting the professional integrity of the licensed occupation. It is expressly proposed to limit competition for services and protect the finances of certain industry participants. In its published information on the rules, the Department states the purpose of this rule is to "maintain a fair playing field for all licensees and funeral establishments in a given region." (*See RIS Form 2023-17-LR Question 4(C)*). This rule does not protect consumers in any way, shape or form.

In addition, no provision of the MSA states or even implies that the Legislature's purpose is to space out licensees, or assure any of them any share of industry revenues. No provision of the MSA directs the Board or Department to pursue these goals. In the language of agency law, by pursuing this stated objective, the Board and Department are engaged in "a frolic and detour" of their own. More specifically, no provisions of the MSA requires licensed morticians to maintain any number of "offices", nor limits how many a mortician can maintain, or where they may be. As such, the proposed regulations are *sui generis* initiatives of the Board, not the implementation of legislative policy.

It is therefore useful to consider the following:

1. History of the Act

"The Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public. Secondary to that responsibility are all efforts required to meet that charge, including assisting the professions, trades, and occupations in rendering better service."

(Michigan House of Representatives, Session 1977-78, Final Report of the Comm. to Investigate the Dept. of Lic. and Reg. at C-3 at pg. 52).

The above is the first guideline used when the Legislature enacted the Michigan Occupational Code in 1980. The Occupational Code was enacted in furtherance of the above objective and other findings of the 1977 Final Report of the Special Committee to Investigate the Department of Licensing and Regulation which was conducted pursuant to Michigan House Resolution No. 103 of 1975 to investigate "reported irregularities within the Michigan Department of Licensing and Regulation and the 34 boards, commission and agencies under it." (*Id.* at pg. 1).

The Resolution and Occupational Code were sponsored by Gary Owen, who also chaired the Special Committee tasked to gather input as to the prospective new Code, and form recommendations to the House as a whole. (*Id.* at pg. C-3). The Final Report is broad and encompassing, but its focus can be summarized as follows: licensing "must always be predicated on its service of a general public interest." (*Id.* at pg. B-8).

This reading of public policy is paramount to an understanding and construction of the Occupational Code, as the contemporary Legislature was aware of. It is coupled with the stated concern that the “licensing power of boards . . . could be similar to that of a private cartel” more inclined to protect itself than the public. (*Id.* at pg. B-5) More explicitly, where a board is made up of members of an occupation they may be tempted “to obtain and maintain a monopolistic control of the supply of a product, which in turn, enhances the economic compensation of its member. . . . To do this the cartel must control . . . the behavior of its members to ensure that one person does not deviate, while others observe the rules.” (*Id.* at pg. B-6). When this happens, the Legislature warned, “[t]he end result is . . . [the] perpetuation of the oligopolistic or monopolistic position” of the Board and its members interests, not that of consumer protection. (*Id.* at pg. B-6). Accordingly, the Final Report found “[i]t is improper for a state to license a profession for the benefit of the profession.” (*Id.* at pg. B-6).

Although it can be argued that licensing can have a two-fold goal: “that of serving the public and that of serving the profession”, the Final Report found when there is a conflict that arises between the two-fold goal, boards “often promote that which best serves their interest, though it may be contrary to the public good.” (*Id.* at pg. C-10;11). In fact, by allowing boards and LARA to promulgate rules and regulations, the Report warned that “legislature provides an opportunity for boards to misuse the police power of the state.” (*Id.* at pg. B-11). The Final Report summarizes these basic points concluding that “[e]ffects of licensing tend to evolve... to control of competition” which “perpetuates any implied discrimination policies of an association.” (*Id.* at pg. B-16). “Boards tend to protect livelihoods, when goals for protection of public and the profession are in conflict.” (*Id.* at pg. C-16).

The Final Report concludes that “[t]he activity of licensing should be limited to what is expressly necessary for the protection of the public. It is not intended that licensing and regulation be utilized to limit competition for jobs and services or to enhance professional prestige.” (*Id.* at pg. C-3). “Peer regulation is riddled with bias, favoritism, arbitrary decisions, and conflicts of interest.” (*Id.* at pg. C-3). Because of this, a guideline was proposed that the “Department assume clear authority and responsibilities for administration in the field of occupational licensing and regulation, including the authority to issue and enforce such rules, policy guidelines and procedures as it deems necessary to carry out its public responsibilities.” (*Id.* at pg. C-4;5).

In the same time period, at the federal level, the now-familiar FTC Funeral Rule was promulgated which, to synopsise, prohibited states from allowing funeral directors to misuse the public by requiring consumers to purchase funeral-related merchandise from the funeral director. Thus, at both the state and federal level, the public policy is and has been that funeral-related rulemaking must demonstrably benefit the consuming public, both in terms of the professional quality of the services provided and in terms of the economic interest of the public to obtain the goods and services in question on as economical a basis as feasible. The idea of guarding the “bottom line” of any particular funeral director, or the industry as a whole, has not been a legitimate priority since then. It still is not a legitimate concern of this Board or Department.

#### 1. General Global Comments

The MSA, like the Occupational Code as a whole, tasks the Department and Board with protecting the public engaged with those licensed occupations addressed. Neither invite the Department and Board to protect, or allocate, the profit margins enjoyed by practitioners of the licensed profession(s). The Department and Board now, though many of the proposed rules, look to protect the industry, with no demonstrated or claimed benefit to the consuming public, by limiting speech (advertising is speech), consumer choice, and competition among licensed mortuary scientists.

A few specific examples are appropriate.

#### 1. R. 339.18901 Definitions:

##### “Supervision”

The proposed definition would require a licensee to be physically present to oversee a wide range of activities related to funerals, whether central, or peripheral. Our clients fully endorse some. Others are quite problematic. On the one hand, it is clearly sound to require a supervising licensee to be physically present for embalming. It is, as has long been held, the core function of this profession. On the other hand, any number of functions, and most particularly conversing with prospect clients to discuss their various options in goods and services (“arranging”), clearly do not require the physical presence of a licensed embalmer of dead human bodies. Moreover, given the recently discovered efficacy of Zoom, etc., not to mention the ubiquitous availability of cellular communication devices, it is often unnecessary for a licensed mortuary scientist to be physically present in the room where various non-embalming functions take place. To the extent this definition, and related rules, could be taken literally, they could be misused to, in essence, deprive every licensee (and, more importantly, the consuming public) of conveniences as old as the telephone and as current as videoconferencing and the Internet. In all, this is a deeply flawed,

ill-considered measure, when applied beyond the context of the actual handling, sanitizing and preparation of dead human bodies, the actual focus of the MSA.

1. R 339.18921 License Requirements

If the goal of the Department is to increase the quality of the profession through education, a higher graduating GPA would seem to meet this goal more reliably than simply adding additional hours and subjects that a potential licensee must take classes on. As such, a mediocre prospective mortician may still "pass" these courses at a barely above failing grade, but have a very limited competency. Instead of expanding the required curriculum the Department should consider addressing the competence issue more directly, by "raising the bar" of demonstrated competence.

Rather than using a standardized national board examination, Michigan should develop its own examination based on the Michigan statute. Michigan is governed by the FTC funeral rule and state statutes, not national norms, a national board examination is not needed.

1. R 229.18922 Standards

Educational Standards should reflect Michigan and not national standards. Michigan has specific and unique laws regarding mortuary science and standards should reflect such.

1. R 229.18925 Practical Experience

Many of the proposed requirements have no basis in the language of the MSA or its underlying history. For example, Michigan courts have found in published opinions that the MSA focuses on "what is to be done and not done with a dead human body" *Ansell v. DOC* 222 Mich.App. 347. The publishing of obituaries is not focused on the above. Any reasonably literate non-licensee can compose an obituary, just as countless relatives and friends of decedents regularly compose and deliver eulogies. There is no statutory or public policy basis to arbitrarily deem such writings as subsumed into the "Practice of Funeral Directing". See MCLA 339.1801(e).

Additionally, the proposed requirement that a trainee must "secure[] information for a death certificate, death notice, or obituary" is without clear predicate in the MSA and, again, partakes more of a peripheral and even clerical nature than the far more significant activities of handling, sanitizing, embalming or otherwise preparing dead human bodies, the actual focus of the MSA. This particular information gathering requirement is more analogous to taking new patient biographical and medical background information than it is to actual mortuary science. Virtually every medical doctor assigns such clerical functions to medically untrained intake personnel. There is no good reason for licensed morticians to be required to perform these functions, or receive formal training in them, and no apparent value to the consumer.

1. R 339.18931 Funeral establishment requirements

This rule adds in additional requirements not found in the MSA, but clearly mentioned in the current litigation the Board and Department has been a party to for over two years. There has never been a requirement of having an office space in a licensed funeral home. In fact, there has never been any statutory prescriptions as to where such an office, or offices, may be located, how many a licensee can maintain, and the like. When taken with other proposed rules, the Board and Department are merely making it harder for consumers to get information about and procure services related to funeral, cremation and cemetery services and merchandise. The Board provides no evidence of how a "one office, in the parlor" requirement would better protect or serve the public.

MSA licensees, like many other professionals (lawyers and accountants come readily to mind) meet with consumers at all types of locations; suggesting that meetings to arrange funerals or cremations at-need not happen solely at an office in a funeral home. This proposed rule, combined with others, has the express purpose, and effect, of forcing consumers (often at moments of great anguish and vulnerability) to only have conversations about funeral and cemetery services and merchandise at a licensed funeral home, or anywhere else in the world (including any number of fast food emporia), other than an office controlled by a licensee that is simply not in a funeral home.

These proposed rules do not protect the public from the industry, but protect the industry from a price-conscious public who are more easily able to weigh their options for funeral and cemetery merchandise at additional arranging locations. All this rule would do is enable the industry to economize by not providing this convenience to the public, thus turning the policy underlying the FTC Funeral Rule on its ear.

Additionally, subset (2)(g) must be further defined about what the only “articles and instruments necessary for embalming” may be in a preparation and embalming room. Unnecessary instruments and articles could cover everyday items such as radios, speakers, computers, and other not strictly necessary, but reasonable, usable and otherwise harmless items that may also be in a preparation and embalming room. This rule is thus vague, and susceptible to abuse.

1. R 339.18932 Care and Storage of Remains

This proposed rule is outside the scope of the MSA as the disposition of a dead human body has happened upon the cremation of such. Adding cremation storage requirements does not relate to the disposition, as the cremation is the disposition of the dead human body. If the State would like to add additional rules for cremated remains, it should make changes to the Agreements for Dispositions of Dead Human Bodies Act (MCL 328.201 *et seq.*)

This rule adds additional requirements to Funeral Homes that do not exist under the MSA. If there is an issue with the current state of the storage of cremains, it is that, sadly, consumers sometimes do not collect them. A statute is needed to allow for funeral homes to dispose of these cremains after a reasonable time without incurring the costs of internment or liability of prosecution by this Board.

Additionally, subpart (1)(f) seems to target maintenance of a funeral home grounds. The MSA is an act to regulate actions performed on deceased human bodies, not to regulate landscaping. There are already rules that state an establishment must be free from pests and insects. If an establishment wants to have wildflowers throughout its outdoor areas, the Department should abrogate the role of exterior decorator to itself.

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Generations Funeral and Cremation Service Inc.  
29550 Grand River Ave.  
Farmington Hills, MI 48336



**From:** [Nicole Crist](#)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Comments on Proposed Rule Amendments - Rule Set 2023-17 LR  
**Date:** Friday, July 26, 2024 3:45:28 PM  
**Attachments:** [Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR.pdf](#)

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Mitchell Page  
Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau  
Legal Section  
P.O. Box 30018  
Lansing, MI 48909

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1. R 339.18935 Transportation of remains to crematory

There is legislation that has been signed into order by the Governor that aims to regulate transportation companies, which are to be separate licensed entities. This rule makes no mention of such, the rules should dovetail, however none exist yet for the above mentioned, therefore this is a premature rule and should be struck entirely until someone, somewhere, can make sure all of the rules coincide with one another.

The logistics of this proposed rule do not comport with those other rules covering the activities of medical doctors or county medical examiners. MSA licensee activities and thereby compliance with this proposed rule is subject to how medical doctors and county medical examiners perform their jobs and associated documentation. If doctors and medical examiners do not act promptly, this rule will result in dead human bodies being kept at funeral homes longer than what is needed and in violation of this proposed rule.

This Rule does not relate to the protection of consumers and will add costs and delays to consumers and licensees alike.

1. R 339.18937

Mandating that licensees take pictures of dead human bodies is a recipe for lawsuits against licensees. Cultural preference and certain religions will find this RULE a violation of their beliefs and practices.

This proposed rule should include several safe harbor provisions in order to ensure that licensees, mandated to take photos of dead human bodies that relatives and friends might find objectionable or invasive of privacy, do not find themselves in constant litigation involving such disputes. There have been numerous lawsuits across the country involving the taking and dissemination of pictures of dead human bodies that have resulted in substantial legal awards. Mandating these pictures will surely lead to additional lawsuits, including but not limited to negligent infliction of emotional distress, against licensees. This will lead to increases in insurance and other costs that will be passed on to consumers.

Furthermore, in order to avoid lawsuits alluded to above, licensees would have to clean and make a body more presentable before taking a picture whose sole purpose is to confirm positive identification. This includes the setting of features and removing of medical equipment such as vent tubes. These added costs will likely be passed on to consumers.

This entire proposed rule should be struck.

1. R 339.18491

This proposed rule does nothing to alleviate the ambiguities in the current rule, but does more directly impinge on Free Speech rights. That being what is “engaging in the practice of mortuary science.” The Department and Board have been litigating this issue for over two (2) years, and knows full well that absolutely no one has ever been "deceived" or "misled" into believing that dead human bodies are embalmed or cremated at offices solely dedicated to arranging for such activities to occur elsewhere. In fact, when challenged the Department and Board have never been able to produce an example of such.

This rule also fails to define “doing business”, in any meaningful way, as also revealed in the current litigation. Absent a rational, concrete definition, "doing business" could be misused to prohibit a licensed mortician from shopping for items (suits, funeral merchandise, caskets, flowers, etc.) as well as meeting with families and other professionals. Which of these are to be “business” that must be conducted only inside a licensed funeral establishment? The proposed and current rule’s use of the term “doing business” is too vague and open ended and will continue to result in arbitrary interpretations of what is prohibited conduct. For example, advertising on a billboard can be argued as doing business in the billboard’s location.

1. R 339.18942

This proposed rule is, perhaps, the most indefensible. It falls outside the scope of the MSA and the legitimate scope of Department and Board, impinges on the free speech of licensees, and the right of consumers to gain valuable information wherever they find convenient. Additionally, it adds “arranging” for funeral services to the definition of “engaging in the practice of mortuary science”, something the MSA does not do, and does not authorize the Board and Department to do. This is unlawful statutory amendment masquerading as regulatory implementation of existing law. The Act and Legislature did and does not use this language. This expansion of the Act through rulemaking violates the Act and the Michigan Constitution. If such an initiative is to be pursued, it must be done by the Legislature.

Additionally, this proposed rule, by including “arranging for mortuary science services” impinges on and contradicts the Michigan Prepaid Funerals and Cemetery Sales Act, a separate and distinct Act from the MSA, with its own licensing scheme under which mortuary science services are "arranged for" and sold.

All of these defects are compounded by the rule’s stated purpose: to control competition in the industry. The MSA is an Act to control the actual doing of the occupation, not to allocate revenue within the industry. The main tenet of the Occupational Code is consumer protection. The Board and Department turn this tenet on its head to protect industry participants through geographic controls that have no basis in the MSA. This is the purview of the Legislature and not the Board and Department which is tasked with controlling the occupation, not the industry.

The accompanying explanation of the rule makes clear that there is no consumer-related concern, only a financial concern for industry participants who would rather not offer this convenience to the public. Please see the above legislative history on how this rule is designed to protect only the industry at the expense of competition throughout the industry and therefore the consumer.

We challenge this Board and Department to give examples of the consumer harms this rule is designed to prevent. The Board and Department have been given two years of litigation to come up with such harm, and as of this writing have failed to do so. Now, in the middle of litigation regarding the activities that this rule seeks to prohibit, that the Department and Board have claimed that these Offices are already prohibited in the name of consumer protection, yet propose this rule and lists industry protection as its sole basis for promulgating such.

However, this rule allows for these activities and communications to take place anywhere other than a non-funeral home owned or controlled by a licensee. This includes Comerica Park, a Bob Evans, or the local "gentlemen’s club", but not at an office a licensee may own or lease. This is not consumer protection. It is merely industry protection to limit competition. This is outside the purview of the MSA. If the Legislature was worried about the competitive balance, or spacing of funeral homes, it could have added protections into the statute. It did not.

We incorporate all arguments regarding of harm regarding arrangement offices included in the filings and record in the case Paul E. Buchanan and Generations Funeral and Cremation Services, Inc. v. Department of Licensing and Regulatory Affairs, Corporations Securitax & Commercial Licensing and the Bureau/Board of Examiners in Mortuary Science, Court of Appeals Docket no. 369913.

This proposed rule reeks of industry protection and is not supported by the MSA or the underlying history. It does nothing to protect consumers, limits free speech for consumers and licensees alike and is outside the subject matter of the Board and Department.

**Conclusion**

The Board and Department after flailing in their litigation efforts to shut down competition in the industry now proposes rules unbound to consumer protection, but to protect their individual interests in plain violation of the Occupational Code, Mortuary Sciences Act and their underlying legislative history.

These rules should not be adopted.

Nicole Crist  
Generations Funeral and Cremation Service Inc.  
29550 Grand River Ave.  
Farmington Hills, MI 48336

**From:** [Matthew Varga](#)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Public Comment for Mortuary Sciene  
**Date:** Friday, July 26, 2024 4:10:03 PM  
**Attachments:** [Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR.pdf](#)

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To Whom it May concern,

Matthew Varga

July 24, 2024  
Mitchell Page  
Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau  
Legal Section  
P.O. Box 30018  
Lansing, MI 48909

**"Matthew Varga" attachment**

Re: Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR  
To Whom It May Concern,

We are writing to offer comments on the Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau (the "Department") and Board of Examiners in Mortuary Science's (the "Board") proposed amendments to the current Administrative Rules, Mich Admin Code R 339.18901 *et seq.* (the "Proposed Amendments") being promulgated under the Michigan Occupational Code's (MCL 339.101 *et seq.*) Article 18, Mortuary Sciences Act (MCL 339.1801 *et seq.*) (together the "Act").

Our firm has served clients in the mortuary science industry for almost a decade, including during investigations and appeals brought by an overzealous Department and Board that many times does not understand the very statute and rules that it purports to enforce. Our comments are based on our collective experience. Pursuant to the rulemaking process and the request for public comments, please find below our comments and recommendations on the proposed rules. These comments are not all-inclusive.

The Department and Board have proposed many rules that find no basis in the language or intent of the supposed enabling statute, commonly known as the Mortuary Science Act (MSA) MCLA 339.1801, *et. seq.*, or purview of the Board's and Department's responsibilities as defined by the MSA and its underlying legislative history. Most notably, the "Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public." *Michigan House of Representatives, Session 1977-78, Final Report of the Comm. to Investigate the Dept. of Lic. and Reg.* at C-3 at pg. 52). However, proposed rule R 339.18942 purports to limit free speech and consumer choice on the basis of protecting the finances of licensed industry participants (*See RIS Form 2023-17-LR Question 4(C)*). This proposed rule is not related to protecting the public, or protecting the professional integrity of the licensed occupation. It is expressly proposed to limit competition for services and protect the finances of certain industry participants. In its published information on the rules, the Department states the purpose of this rule is to "maintain a fair playing field for all licensees and funeral establishments in a given region." (*See RIS Form 2023-17-LR Question 4(C)*). This rule does not protect consumers in any way, shape or form.

In addition, no provision of the MSA states or even implies that the Legislature's purpose is to space out licensees, or assure any of them any share of industry revenues. No provision of the MSA directs the Board or Department to pursue these goals. In the language of agency law, by pursuing this stated objective, the Board and Department are engaged in "a frolic and detour" of their own. More specifically, no provisions of the MSA requires licensed morticians to maintain any number of "offices", nor limits how many a mortician can maintain, or where they may be. As such, the proposed regulations are *sui generis* initiatives of the Board, not the implementation of legislative policy.

It is therefore useful to consider the following:

1. History of the Act

"The Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public. Secondary to that responsibility are all efforts required to meet that charge, including assisting the professions, trades, and occupations in rendering better service."

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There is legislation that has been signed into order by the Governor that aims to regulate transportation companies, which are to be separate licensed entities. This rule makes no mention of such, the rules should dovetail, however none exist yet for the above mentioned, therefore this is a premature rule and should be struck entirely until someone, somewhere, can make sure all of the rules coincide with one another.

The logistics of this proposed rule do not comport with those other rules covering the activities of medical doctors or county medical examiners. MSA licensee activities and thereby compliance with this proposed rule is subject to how medical doctors and county medical examiners perform their jobs and associated documentation. If doctors and medical examiners do not act promptly, this rule will result in dead human bodies being kept at funeral homes longer than what is needed and in violation of this proposed rule.

This Rule does not relate to the protection of consumers and will add costs and delays to consumers and licensees alike.

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Mandating that licensees take pictures of dead human bodies is a recipe for lawsuits against licensees. Cultural preference and certain religions will find this RULE a violation of their beliefs and practices.

This proposed rule should include several safe harbor provisions in order to ensure that licensees, mandated to take photos of dead human bodies that relatives and friends might find objectionable or invasive of privacy, do not find themselves in constant litigation involving such disputes. There have been numerous lawsuits across the country involving the taking and dissemination of pictures of dead human bodies that have resulted in substantial legal awards. Mandating these pictures will surely lead to additional lawsuits, including but not limited to negligent infliction of emotional distress, against licensees. This will lead to increases in insurance and other costs that will be passed on to consumers.

Furthermore, in order to avoid lawsuits alluded to above, licensees would have to clean and make a body more presentable before taking a picture whose sole purpose is to confirm positive identification. This includes the setting of features and removing of medical equipment such as vent tubes. These added costs will likely be passed on to consumers.

This entire proposed rule should be struck.

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This proposed rule does nothing to alleviate the ambiguities in the current rule, but does more directly impinge on Free Speech rights. That being what is “engaging in the practice of mortuary science.” The Department and Board have been litigating this issue for over two (2) years, and knows full well that absolutely no one has ever been "deceived" or "misled" into believing that dead human bodies are embalmed or cremated at offices solely dedicated to arranging for such activities to occur elsewhere. In fact, when challenged the Department and Board have never been able to produce an example of such.

This rule also fails to define “doing business”, in any meaningful way, as also revealed in the current litigation. Absent a rational, concrete definition, "doing business" could be misused to prohibit a licensed mortician from shopping for items (suits, funeral merchandise, caskets, flowers, etc.) as well as meeting with families and other professionals. Which of these are to be “business” that must be conducted only inside a licensed funeral establishment? The proposed and current rule’s use of the term “doing business” is too vague and open ended and will continue to result in arbitrary interpretations of what is prohibited conduct. For example, advertising on a billboard can be argued as doing business in the billboard’s location.

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This proposed rule is, perhaps, the most indefensible. It falls outside the scope of the MSA and the legitimate scope of Department and Board, impinges on the free speech of licensees, and the right of consumers to gain valuable information wherever they find convenient. Additionally, it adds “arranging” for funeral services to the definition of “engaging in the practice of mortuary science”, something the MSA does not do, and does not authorize the Board and Department to do. This is unlawful statutory amendment masquerading as regulatory implementation of existing law. The Act and Legislature did and does not use this language. This expansion of the Act through rulemaking violates the Act and the Michigan Constitution. If such an initiative is to be pursued, it must be done by the Legislature.

Additionally, this proposed rule, by including “arranging for mortuary science services” impinges on and contradicts the Michigan Prepaid Funerals and Cemetery Sales Act, a separate and distinct Act from the MSA, with its own licensing scheme under which mortuary science services are "arranged for" and sold.

All of these defects are compounded by the rule’s stated purpose: to control competition in the industry. The MSA is an Act to control the actual doing of the occupation, not to allocate revenue within the industry. The main tenet of the Occupational Code is consumer protection. The Board and Department turn this tenet on its head to protect industry participants through geographic controls that have no basis in the MSA. This is the purview of the Legislature and not the Board and Department which is tasked with controlling the occupation, not the industry.

The accompanying explanation of the rule makes clear that there is no consumer-related concern, only a financial concern for industry participants who would rather not offer this convenience to the public. Please see the above legislative history on how this rule is designed to protect only the industry at the expense of competition throughout the industry and therefore the consumer.

We challenge this Board and Department to give examples of the consumer harms this rule is designed to prevent. The Board and Department have been given two years of litigation to come up with such harm, and as of this writing have failed to do so. Now, in the middle of litigation regarding the activities that this rule seeks to prohibit, that the Department and Board have claimed that these Offices are already prohibited in the name of consumer protection, yet propose this rule and lists industry protection as its sole basis for promulgating such.

However, this rule allows for these activities and communications to take place anywhere other than a non-funeral home owned or controlled by a licensee. This includes Comerica Park, a Bob Evans, or the local "gentlemen’s club", but not at an office a licensee may own or lease. This is not consumer protection. It is merely industry protection to limit competition. This is outside the purview of the MSA. If the Legislature was worried about the competitive balance, or spacing of funeral homes, it could have added protections into the statute. It did not.

We incorporate all arguments regarding of harm regarding arrangement offices included in the filings and record in the case Paul E. Buchanan and Generations Funeral and Cremation Services, Inc. v. Department of Licensing and Regulatory Affairs, Corporations Securititas & Commercial Licensing and the Bureau/Board of Examiners in Mortuary Science, Court of Appeals Docket no. 369913.

This proposed rule reeks of industry protection and is not supported by the MSA or the underlying history. It does nothing to protect consumers, limits free speech for consumers and licensees alike and is outside the subject matter of the Board and Department.

**Conclusion**

The Board and Department after flailing in their litigation efforts to shut down competition in the industry now proposes rules unbound to consumer protection, but to protect their individual interests in plain violation of the Occupational Code, Mortuary Sciences Act and their underlying legislative history.

These rules should not be adopted.

**From:** [Scott Shepard](#)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR  
**Date:** Friday, July 26, 2024 4:13:21 PM  
**Attachments:** [Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR.pdf](#)

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Please see attached letter. Thank you.

July 24, 2024  
Mitchell Page  
Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau  
Legal Section  
P.O. Box 30018  
Lansing, MI 48909

**"Scott Shepard" attachment**

Re: Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR  
To Whom It May Concern,

We are writing to offer comments on the Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau (the "Department") and Board of Examiners in Mortuary Science's (the "Board") proposed amendments to the current Administrative Rules, Mich Admin Code R 339.18901 *et seq.* (the "Proposed Amendments") being promulgated under the Michigan Occupational Code's (MCL 339.101 *et seq.*) Article 18, Mortuary Sciences Act (MCL 339.1801 *et seq.*) (together the "Act").

Our firm has served clients in the mortuary science industry for almost a decade, including during investigations and appeals brought by an overzealous Department and Board that many times does not understand the very statute and rules that it purports to enforce. Our comments are based on our collective experience. Pursuant to the rulemaking process and the request for public comments, please find below our comments and recommendations on the proposed rules. These comments are not all-inclusive.

The Department and Board have proposed many rules that find no basis in the language or intent of the supposed enabling statute, commonly known as the Mortuary Science Act (MSA) MCLA 339.1801, *et. seq.*, or purview of the Board's and Department's responsibilities as defined by the MSA and its underlying legislative history. Most notably, the "Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public." *Michigan House of Representatives, Session 1977-78, Final Report of the Comm. to Investigate the Dept. of Lic. and Reg.* at C-3 at pg. 52). However, proposed rule R 339.18942 purports to limit free speech and consumer choice on the basis of protecting the finances of licensed industry participants (*See RIS Form 2023-17-LR Question 4(C)*). This proposed rule is not related to protecting the public, or protecting the professional integrity of the licensed occupation. It is expressly proposed to limit competition for services and protect the finances of certain industry participants. In its published information on the rules, the Department states the purpose of this rule is to "maintain a fair playing field for all licensees and funeral establishments in a given region." (*See RIS Form 2023-17-LR Question 4(C)*). This rule does not protect consumers in any way, shape or form.

In addition, no provision of the MSA states or even implies that the Legislature's purpose is to space out licensees, or assure any of them any share of industry revenues. No provision of the MSA directs the Board or Department to pursue these goals. In the language of agency law, by pursuing this stated objective, the Board and Department are engaged in "a frolic and detour" of their own. More specifically, no provisions of the MSA requires licensed morticians to maintain any number of "offices", nor limits how many a mortician can maintain, or where they may be. As such, the proposed regulations are *sui generis* initiatives of the Board, not the implementation of legislative policy.

It is therefore useful to consider the following:

1. History of the Act

"The Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public. Secondary to that responsibility are all efforts required to meet that charge, including assisting the professions, trades, and occupations in rendering better service."

(Michigan House of Representatives, Session 1977-78, Final Report of the Comm. to Investigate the Dept. of Lic. and Reg. at C-3 at pg. 52).

The above is the first guideline used when the Legislature enacted the Michigan Occupational Code in 1980. The Occupational Code was enacted in furtherance of the above objective and other findings of the 1977 Final Report of the Special Committee to Investigate the Department of Licensing and Regulation which was conducted pursuant to Michigan House Resolution No. 103 of 1975 to investigate "reported irregularities within the Michigan Department of Licensing and Regulation and the 34 boards, commission and agencies under it." (*Id.* at pg. 1).

The Resolution and Occupational Code were sponsored by Gary Owen, who also chaired the Special Committee tasked to gather input as to the prospective new Code, and form recommendations to the House as a whole. (*Id.* at pg. C-3). The Final Report is broad and encompassing, but its focus can be summarized as follows: licensing "must always be predicated on its service of a general public interest." (*Id.* at pg. B-8).

This reading of public policy is paramount to an understanding and construction of the Occupational Code, as the contemporary Legislature was aware of. It is coupled with the stated concern that the “licensing power of boards . . . could be similar to that of a private cartel” more inclined to protect itself than the public. (*Id.* at pg. B-5) More explicitly, where a board is made up of members of an occupation they may be tempted “to obtain and maintain a monopolistic control of the supply of a product, which in turn, enhances the economic compensation of its member. . . . To do this the cartel must control . . . the behavior of its members to ensure that one person does not deviate, while others observe the rules.” (*Id.* at pg. B-6). When this happens, the Legislature warned, “[t]he end result is . . . [the] perpetuation of the oligopolistic or monopolistic position” of the Board and its members interests, not that of consumer protection. (*Id.* at pg. B-6). Accordingly, the Final Report found “[i]t is improper for a state to license a profession for the benefit of the profession.” (*Id.* at pg. B-6).

Although it can be argued that licensing can have a two-fold goal: “that of serving the public and that of serving the profession”, the Final Report found when there is a conflict that arises between the two-fold goal, boards “often promote that which best serves their interest, though it may be contrary to the public good.” (*Id.* at pg. C-10;11). In fact, by allowing boards and LARA to promulgate rules and regulations, the Report warned that “legislature provides an opportunity for boards to misuse the police power of the state.” (*Id.* at pg. B-11). The Final Report summarizes these basic points concluding that “[e]ffects of licensing tend to evolve... to control of competition” which “perpetuates any implied discrimination policies of an association.” (*Id.* at pg. B-16). “Boards tend to protect livelihoods, when goals for protection of public and the profession are in conflict.” (*Id.* at pg. C-16).

The Final Report concludes that “[t]he activity of licensing should be limited to what is expressly necessary for the protection of the public. It is not intended that licensing and regulation be utilized to limit competition for jobs and services or to enhance professional prestige.” (*Id.* at pg. C-3). “Peer regulation is riddled with bias, favoritism, arbitrary decisions, and conflicts of interest.” (*Id.* at pg. C-3). Because of this, a guideline was proposed that the “Department assume clear authority and responsibilities for administration in the field of occupational licensing and regulation, including the authority to issue and enforce such rules, policy guidelines and procedures as it deems necessary to carry out its public responsibilities.” (*Id.* at pg. C-4;5).

In the same time period, at the federal level, the now-familiar FTC Funeral Rule was promulgated which, to synopsise, prohibited states from allowing funeral directors to misuse the public by requiring consumers to purchase funeral-related merchandise from the funeral director. Thus, at both the state and federal level, the public policy is and has been that funeral-related rulemaking must demonstrably benefit the consuming public, both in terms of the professional quality of the services provided and in terms of the economic interest of the public to obtain the goods and services in question on as economical a basis as feasible. The idea of guarding the “bottom line” of any particular funeral director, or the industry as a whole, has not been a legitimate priority since then. It still is not a legitimate concern of this Board or Department.

#### 1. General Global Comments

The MSA, like the Occupational Code as a whole, tasks the Department and Board with protecting the public engaged with those licensed occupations addressed. Neither invite the Department and Board to protect, or allocate, the profit margins enjoyed by practitioners of the licensed profession(s). The Department and Board now, though many of the proposed rules, look to protect the industry, with no demonstrated or claimed benefit to the consuming public, by limiting speech (advertising is speech), consumer choice, and competition among licensed mortuary scientists.

A few specific examples are appropriate.

#### 1. R. 339.18901 Definitions:

##### “Supervision”

The proposed definition would require a licensee to be physically present to oversee a wide range of activities related to funerals, whether central, or peripheral. Our clients fully endorse some. Others are quite problematic. On the one hand, it is clearly sound to require a supervising licensee to be physically present for embalming. It is, as has long been held, the core function of this profession. On the other hand, any number of functions, and most particularly conversing with prospect clients to discuss their various options in goods and services (“arranging”), clearly do not require the physical presence of a licensed embalmer of dead human bodies. Moreover, given the recently discovered efficacy of Zoom, etc., not to mention the ubiquitous availability of cellular communication devices, it is often unnecessary for a licensed mortuary scientist to be physically present in the room where various non-embalming functions take place. To the extent this definition, and related rules, could be taken literally, they could be misused to, in essence, deprive every licensee (and, more importantly, the consuming public) of conveniences as old as the telephone and as current as videoconferencing and the Internet. In all, this is a deeply flawed,

ill-considered measure, when applied beyond the context of the actual handling, sanitizing and preparation of dead human bodies, the actual focus of the MSA.

#### 1. R 339.18921 License Requirements

If the goal of the Department is to increase the quality of the profession through education, a higher graduating GPA would seem to meet this goal more reliably than simply adding additional hours and subjects that a potential licensee must take classes on. As such, a mediocre prospective mortician may still "pass" these courses at a barely above failing grade, but have a very limited competency. Instead of expanding the required curriculum the Department should consider addressing the competence issue more directly, by "raising the bar" of demonstrated competence.

Rather than using a standardized national board examination, Michigan should develop its own examination based on the Michigan statute. Michigan is governed by the FTC funeral rule and state statutes, not national norms, a national board examination is not needed.

#### 1. R 229.18922 Standards

Educational Standards should reflect Michigan and not national standards. Michigan has specific and unique laws regarding mortuary science and standards should reflect such.

#### 1. R 229.18925 Practical Experience

Many of the proposed requirements have no basis in the language of the MSA or its underlying history. For example, Michigan courts have found in published opinions that the MSA focuses on "what is to be done and not done with a dead human body" *Ansell v. DOC* 222 Mich.App. 347. The publishing of obituaries is not focused on the above. Any reasonably literate non-licensee can compose an obituary, just as countless relatives and friends of decedents regularly compose and deliver eulogies. There is no statutory or public policy basis to arbitrarily deem such writings as subsumed into the "Practice of Funeral Directing". See MCLA 339.1801(e).

Additionally, the proposed requirement that a trainee must "secure[] information for a death certificate, death notice, or obituary" is without clear predicate in the MSA and, again, partakes more of a peripheral and even clerical nature than the far more significant activities of handling, sanitizing, embalming or otherwise preparing dead human bodies, the actual focus of the MSA. This particular information gathering requirement is more analogous to taking new patient biographical and medical background information than it is to actual mortuary science. Virtually every medical doctor assigns such clerical functions to medically untrained intake personnel. There is no good reason for licensed morticians to be required to perform these functions, or receive formal training in them, and no apparent value to the consumer.

#### 1. R 339.18931 Funeral establishment requirements

This rule adds in additional requirements not found in the MSA, but clearly mentioned in the current litigation the Board and Department has been a party to for over two years. There has never been a requirement of having an office space in a licensed funeral home. In fact, there has never been any statutory prescriptions as to where such an office, or offices, may be located, how many a licensee can maintain, and the like. When taken with other proposed rules, the Board and Department are merely making it harder for consumers to get information about and procure services related to funeral, cremation and cemetery services and merchandise. The Board provides no evidence of how a "one office, in the parlor" requirement would better protect or serve the public.

MSA licensees, like many other professionals (lawyers and accountants come readily to mind) meet with consumers at all types of locations; suggesting that meetings to arrange funerals or cremations at-need not happen solely at an office in a funeral home. This proposed rule, combined with others, has the express purpose, and effect, of forcing consumers (often at moments of great anguish and vulnerability) to only have conversations about funeral and cemetery services and merchandise at a licensed funeral home, or anywhere else in the world (including any number of fast food emporia), other than an office controlled by a licensee that is simply not in a funeral home.

These proposed rules do not protect the public from the industry, but protect the industry from a price-conscious public who are more easily able to weigh their options for funeral and cemetery merchandise at additional arranging locations. All this rule would do is enable the industry to economize by not providing this convenience to the public, thus turning the policy underlying the FTC Funeral Rule on its ear.



Additionally, subset (2)(g) must be further defined about what the only “articles and instruments necessary for embalming” may be in a preparation and embalming room. Unnecessary instruments and articles could cover everyday items such as radios, speakers, computers, and other not strictly necessary, but reasonable, usable and otherwise harmless items that may also be in a preparation and embalming room. This rule is thus vague, and susceptible to abuse.

1. R 339.18932 Care and Storage of Remains

This proposed rule is outside the scope of the MSA as the disposition of a dead human body has happened upon the cremation of such. Adding cremation storage requirements does not relate to the disposition, as the cremation is the disposition of the dead human body. If the State would like to add additional rules for cremated remains, it should make changes to the Agreements for Dispositions of Dead Human Bodies Act (MCL 328.201 *et seq.*)

This rule adds additional requirements to Funeral Homes that do not exist under the MSA. If there is an issue with the current state of the storage of cremains, it is that, sadly, consumers sometimes do not collect them. A statute is needed to allow for funeral homes to dispose of these cremains after a reasonable time without incurring the costs of internment or liability of prosecution by this Board.

Additionally, subpart (1)(f) seems to target maintenance of a funeral home grounds. The MSA is an act to regulate actions performed on deceased human bodies, not to regulate landscaping. There are already rules that state an establishment must be free from pests and insects. If an establishment wants to have wildflowers throughout its outdoor areas, the Department should abrogate the role of exterior decorator to itself.

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**From:** [sallyb@generationsfuneralservice.com](mailto:sallyb@generationsfuneralservice.com)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** MSR Amendments  
**Date:** Friday, July 26, 2024 4:21:26 PM  
**Attachments:** [Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR.pdf](#)

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Sally A. Bazan  
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July 24, 2024  
Mitchell Page  
Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau  
Legal Section  
P.O. Box 30018  
Lansing, MI 48909

**"Sally Bazan" attachment**

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It is therefore useful to consider the following:

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"The Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public. Secondary to that responsibility are all efforts required to meet that charge, including assisting the professions, trades, and occupations in rendering better service."

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The above is the first guideline used when the Legislature enacted the Michigan Occupational Code in 1980. The Occupational Code was enacted in furtherance of the above objective and other findings of the 1977 Final Report of the Special Committee to Investigate the Department of Licensing and Regulation which was conducted pursuant to Michigan House Resolution No. 103 of 1975 to investigate "reported irregularities within the Michigan Department of Licensing and Regulation and the 34 boards, commission and agencies under it." (*Id.* at pg. 1).

The Resolution and Occupational Code were sponsored by Gary Owen, who also chaired the Special Committee tasked to gather input as to the prospective new Code, and form recommendations to the House as a whole. (*Id.* at pg. C-3). The Final Report is broad and encompassing, but its focus can be summarized as follows: licensing "must always be predicated on its service of a general public interest." (*Id.* at pg. B-8).

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This rule adds in additional requirements not found in the MSA, but clearly mentioned in the current litigation the Board and Department has been a party to for over two years. There has never been a requirement of having an office space in a licensed funeral home. In fact, there has never been any statutory prescriptions as to where such an office, or offices, may be located, how many a licensee can maintain, and the like. When taken with other proposed rules, the Board and Department are merely making it harder for consumers to get information about and procure services related to funeral, cremation and cemetery services and merchandise. The Board provides no evidence of how a "one office, in the parlor" requirement would better protect or serve the public.

MSA licensees, like many other professionals (lawyers and accountants come readily to mind) meet with consumers at all types of locations; suggesting that meetings to arrange funerals or cremations at-need not happen solely at an office in a funeral home. This proposed rule, combined with others, has the express purpose, and effect, of forcing consumers (often at moments of great anguish and vulnerability) to only have conversations about funeral and cemetery services and merchandise at a licensed funeral home, or anywhere else in the world (including any number of fast food emporia), other than an office controlled by a licensee that is simply not in a funeral home.

These proposed rules do not protect the public from the industry, but protect the industry from a price-conscious public who are more easily able to weigh their options for funeral and cemetery merchandise at additional arranging locations. All this rule would do is enable the industry to economize by not providing this convenience to the public, thus turning the policy underlying the FTC Funeral Rule on its ear.

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This rule adds additional requirements to Funeral Homes that do not exist under the MSA. If there is an issue with the current state of the storage of cremains, it is that, sadly, consumers sometimes do not collect them. A statute is needed to allow for funeral homes to dispose of these cremains after a reasonable time without incurring the costs of internment or liability of prosecution by this Board.

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1. R 339.18935 Transportation of remains to crematory

There is legislation that has been signed into order by the Governor that aims to regulate transportation companies, which are to be separate licensed entities. This rule makes no mention of such, the rules should dovetail, however none exist yet for the above mentioned, therefore this is a premature rule and should be struck entirely until someone, somewhere, can make sure all of the rules coincide with one another.

The logistics of this proposed rule do not comport with those other rules covering the activities of medical doctors or county medical examiners. MSA licensee activities and thereby compliance with this proposed rule is subject to how medical doctors and county medical examiners perform their jobs and associated documentation. If doctors and medical examiners do not act promptly, this rule will result in dead human bodies being kept at funeral homes longer than what is needed and in violation of this proposed rule.

This Rule does not relate to the protection of consumers and will add costs and delays to consumers and licensees alike.

1. R 339.18937

Mandating that licensees take pictures of dead human bodies is a recipe for lawsuits against licensees. Cultural preference and certain religions will find this RULE a violation of their beliefs and practices.

This proposed rule should include several safe harbor provisions in order to ensure that licensees, mandated to take photos of dead human bodies that relatives and friends might find objectionable or invasive of privacy, do not find themselves in constant litigation involving such disputes. There have been numerous lawsuits across the country involving the taking and dissemination of pictures of dead human bodies that have resulted in substantial legal awards. Mandating these pictures will surely lead to additional lawsuits, including but not limited to negligent infliction of emotional distress, against licensees. This will lead to increases in insurance and other costs that will be passed on to consumers.

Furthermore, in order to avoid lawsuits alluded to above, licensees would have to clean and make a body more presentable before taking a picture whose sole purpose is to confirm positive identification. This includes the setting of features and removing of medical equipment such as vent tubes. These added costs will likely be passed on to consumers.

This entire proposed rule should be struck.

1. R 339.18491

This proposed rule does nothing to alleviate the ambiguities in the current rule, but does more directly impinge on Free Speech rights. That being what is “engaging in the practice of mortuary science.” The Department and Board have been litigating this issue for over two (2) years, and knows full well that absolutely no one has ever been "deceived" or "misled" into believing that dead human bodies are embalmed or cremated at offices solely dedicated to arranging for such activities to occur elsewhere. In fact, when challenged the Department and Board have never been able to produce an example of such.

This rule also fails to define “doing business”, in any meaningful way, as also revealed in the current litigation. Absent a rational, concrete definition, "doing business" could be misused to prohibit a licensed mortician from shopping for items (suits, funeral merchandise, caskets, flowers, etc.) as well as meeting with families and other professionals. Which of these are to be “business” that must be conducted only inside a licensed funeral establishment? The proposed and current rule’s use of the term “doing business” is too vague and open ended and will continue to result in arbitrary interpretations of what is prohibited conduct. For example, advertising on a billboard can be argued as doing business in the billboard’s location.

1. R 339.18942

This proposed rule is, perhaps, the most indefensible. It falls outside the scope of the MSA and the legitimate scope of Department and Board, impinges on the free speech of licensees, and the right of consumers to gain valuable information wherever they find convenient. Additionally, it adds “arranging” for funeral services to the definition of “engaging in the practice of mortuary science”, something the MSA does not do, and does not authorize the Board and Department to do. This is unlawful statutory amendment masquerading as regulatory implementation of existing law. The Act and Legislature did and does not use this language. This expansion of the Act through rulemaking violates the Act and the Michigan Constitution. If such an initiative is to be pursued, it must be done by the Legislature.

Additionally, this proposed rule, by including “arranging for mortuary science services” impinges on and contradicts the Michigan Prepaid Funerals and Cemetery Sales Act, a separate and distinct Act from the MSA, with its own licensing scheme under which mortuary science services are "arranged for" and sold.

All of these defects are compounded by the rule’s stated purpose: to control competition in the industry. The MSA is an Act to control the actual doing of the occupation, not to allocate revenue within the industry. The main tenet of the Occupational Code is consumer protection. The Board and Department turn this tenet on its head to protect industry participants through geographic controls that have no basis in the MSA. This is the purview of the Legislature and not the Board and Department which is tasked with controlling the occupation, not the industry.

The accompanying explanation of the rule makes clear that there is no consumer-related concern, only a financial concern for industry participants who would rather not offer this convenience to the public. Please see the above legislative history on how this rule is designed to protect only the industry at the expense of competition throughout the industry and therefore the consumer.

We challenge this Board and Department to give examples of the consumer harms this rule is designed to prevent. The Board and Department have been given two years of litigation to come up with such harm, and as of this writing have failed to do so. Now, in the middle of litigation regarding the activities that this rule seeks to prohibit, that the Department and Board have claimed that these Offices are already prohibited in the name of consumer protection, yet propose this rule and lists industry protection as its sole basis for promulgating such.

However, this rule allows for these activities and communications to take place anywhere other than a non-funeral home owned or controlled by a licensee. This includes Comerica Park, a Bob Evans, or the local "gentlemen’s club", but not at an office a licensee may own or lease. This is not consumer protection. It is merely industry protection to limit competition. This is outside the purview of the MSA. If the Legislature was worried about the competitive balance, or spacing of funeral homes, it could have added protections into the statute. It did not.

We incorporate all arguments regarding of harm regarding arrangement offices included in the filings and record in the case Paul E. Buchanan and Generations Funeral and Cremation Services, Inc. v. Department of Licensing and Regulatory Affairs, Corporations Securitas & Commercial Licensing and the Bureau/Board of Examiners in Mortuary Science, Court of Appeals Docket no. 369913.

This proposed rule reeks of industry protection and is not supported by the MSA or the underlying history. It does nothing to protect consumers, limits free speech for consumers and licensees alike and is outside the subject matter of the Board and Department.

**Conclusion**

The Board and Department after flailing in their litigation efforts to shut down competition in the industry now proposes rules unbound to consumer protection, but to protect their individual interests in plain violation of the Occupational Code, Mortuary Sciences Act and their underlying legislative history.

These rules should not be adopted.



**From:** [melissah@generationsfuneralservice.com](mailto:melissah@generationsfuneralservice.com)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Proposed Mortuary Science changes  
**Date:** Friday, July 26, 2024 4:44:05 PM  
**Attachments:** [Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR.pdf](#)

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July 24, 2024  
Mitchell Page  
Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau  
Legal Section  
P.O. Box 30018  
Lansing, MI 48909

**"Melissa H" attachment**

Re: Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR  
To Whom It May Concern,

We are writing to offer comments on the Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau (the "Department") and Board of Examiners in Mortuary Science's (the "Board") proposed amendments to the current Administrative Rules, Mich Admin Code R 339.18901 *et seq.* (the "Proposed Amendments") being promulgated under the Michigan Occupational Code's (MCL 339.101 *et seq.*) Article 18, Mortuary Sciences Act (MCL 339.1801 *et seq.*) (together the "Act").

Our firm has served clients in the mortuary science industry for almost a decade, including during investigations and appeals brought by an overzealous Department and Board that many times does not understand the very statute and rules that it purports to enforce. Our comments are based on our collective experience. Pursuant to the rulemaking process and the request for public comments, please find below our comments and recommendations on the proposed rules. These comments are not all-inclusive.

The Department and Board have proposed many rules that find no basis in the language or intent of the supposed enabling statute, commonly known as the Mortuary Science Act (MSA) MCLA 339.1801, *et. seq.*, or purview of the Board's and Department's responsibilities as defined by the MSA and its underlying legislative history. Most notably, the "Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public." *Michigan House of Representatives, Session 1977-78, Final Report of the Comm. to Investigate the Dept. of Lic. and Reg.* at C-3 at pg. 52). However, proposed rule R 339.18942 purports to limit free speech and consumer choice on the basis of protecting the finances of licensed industry participants (*See RIS Form 2023-17-LR Question 4(C)*). This proposed rule is not related to protecting the public, or protecting the professional integrity of the licensed occupation. It is expressly proposed to limit competition for services and protect the finances of certain industry participants. In its published information on the rules, the Department states the purpose of this rule is to "maintain a fair playing field for all licensees and funeral establishments in a given region." (*See RIS Form 2023-17-LR Question 4(C)*). This rule does not protect consumers in any way, shape or form.

In addition, no provision of the MSA states or even implies that the Legislature's purpose is to space out licensees, or assure any of them any share of industry revenues. No provision of the MSA directs the Board or Department to pursue these goals. In the language of agency law, by pursuing this stated objective, the Board and Department are engaged in "a frolic and detour" of their own. More specifically, no provisions of the MSA requires licensed morticians to maintain any number of "offices", nor limits how many a mortician can maintain, or where they may be. As such, the proposed regulations are *sui generis* initiatives of the Board, not the implementation of legislative policy.

It is therefore useful to consider the following:

1. History of the Act

"The Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public. Secondary to that responsibility are all efforts required to meet that charge, including assisting the professions, trades, and occupations in rendering better service."

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There is legislation that has been signed into order by the Governor that aims to regulate transportation companies, which are to be separate licensed entities. This rule makes no mention of such, the rules should dovetail, however none exist yet for the above mentioned, therefore this is a premature rule and should be struck entirely until someone, somewhere, can make sure all of the rules coincide with one another.

The logistics of this proposed rule do not comport with those other rules covering the activities of medical doctors or county medical examiners. MSA licensee activities and thereby compliance with this proposed rule is subject to how medical doctors and county medical examiners perform their jobs and associated documentation. If doctors and medical examiners do not act promptly, this rule will result in dead human bodies being kept at funeral homes longer than what is needed and in violation of this proposed rule.

This Rule does not relate to the protection of consumers and will add costs and delays to consumers and licensees alike.

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Mandating that licensees take pictures of dead human bodies is a recipe for lawsuits against licensees. Cultural preference and certain religions will find this RULE a violation of their beliefs and practices.

This proposed rule should include several safe harbor provisions in order to ensure that licensees, mandated to take photos of dead human bodies that relatives and friends might find objectionable or invasive of privacy, do not find themselves in constant litigation involving such disputes. There have been numerous lawsuits across the country involving the taking and dissemination of pictures of dead human bodies that have resulted in substantial legal awards. Mandating these pictures will surely lead to additional lawsuits, including but not limited to negligent infliction of emotional distress, against licensees. This will lead to increases in insurance and other costs that will be passed on to consumers.

Furthermore, in order to avoid lawsuits alluded to above, licensees would have to clean and make a body more presentable before taking a picture whose sole purpose is to confirm positive identification. This includes the setting of features and removing of medical equipment such as vent tubes. These added costs will likely be passed on to consumers.

This entire proposed rule should be struck.

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This proposed rule does nothing to alleviate the ambiguities in the current rule, but does more directly impinge on Free Speech rights. That being what is “engaging in the practice of mortuary science.” The Department and Board have been litigating this issue for over two (2) years, and knows full well that absolutely no one has ever been "deceived" or "misled" into believing that dead human bodies are embalmed or cremated at offices solely dedicated to arranging for such activities to occur elsewhere. In fact, when challenged the Department and Board have never been able to produce an example of such.

This rule also fails to define “doing business”, in any meaningful way, as also revealed in the current litigation. Absent a rational, concrete definition, "doing business" could be misused to prohibit a licensed mortician from shopping for items (suits, funeral merchandise, caskets, flowers, etc.) as well as meeting with families and other professionals. Which of these are to be “business” that must be conducted only inside a licensed funeral establishment? The proposed and current rule’s use of the term “doing business” is too vague and open ended and will continue to result in arbitrary interpretations of what is prohibited conduct. For example, advertising on a billboard can be argued as doing business in the billboard’s location.

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This proposed rule is, perhaps, the most indefensible. It falls outside the scope of the MSA and the legitimate scope of Department and Board, impinges on the free speech of licensees, and the right of consumers to gain valuable information wherever they find convenient. Additionally, it adds “arranging” for funeral services to the definition of “engaging in the practice of mortuary science”, something the MSA does not do, and does not authorize the Board and Department to do. This is unlawful statutory amendment masquerading as regulatory implementation of existing law. The Act and Legislature did and does not use this language. This expansion of the Act through rulemaking violates the Act and the Michigan Constitution. If such an initiative is to be pursued, it must be done by the Legislature.

Additionally, this proposed rule, by including “arranging for mortuary science services” impinges on and contradicts the Michigan Prepaid Funerals and Cemetery Sales Act, a separate and distinct Act from the MSA, with its own licensing scheme under which mortuary science services are "arranged for" and sold.

All of these defects are compounded by the rule’s stated purpose: to control competition in the industry. The MSA is an Act to control the actual doing of the occupation, not to allocate revenue within the industry. The main tenet of the Occupational Code is consumer protection. The Board and Department turn this tenet on its head to protect industry participants through geographic controls that have no basis in the MSA. This is the purview of the Legislature and not the Board and Department which is tasked with controlling the occupation, not the industry.

The accompanying explanation of the rule makes clear that there is no consumer-related concern, only a financial concern for industry participants who would rather not offer this convenience to the public. Please see the above legislative history on how this rule is designed to protect only the industry at the expense of competition throughout the industry and therefore the consumer.

We challenge this Board and Department to give examples of the consumer harms this rule is designed to prevent. The Board and Department have been given two years of litigation to come up with such harm, and as of this writing have failed to do so. Now, in the middle of litigation regarding the activities that this rule seeks to prohibit, that the Department and Board have claimed that these Offices are already prohibited in the name of consumer protection, yet propose this rule and lists industry protection as its sole basis for promulgating such.

However, this rule allows for these activities and communications to take place anywhere other than a non-funeral home owned or controlled by a licensee. This includes Comerica Park, a Bob Evans, or the local "gentlemen’s club", but not at an office a licensee may own or lease. This is not consumer protection. It is merely industry protection to limit competition. This is outside the purview of the MSA. If the Legislature was worried about the competitive balance, or spacing of funeral homes, it could have added protections into the statute. It did not.

We incorporate all arguments regarding of harm regarding arrangement offices included in the filings and record in the case Paul E. Buchanan and Generations Funeral and Cremation Services, Inc. v. Department of Licensing and Regulatory Affairs, Corporations Securitas & Commercial Licensing and the Bureau/Board of Examiners in Mortuary Science, Court of Appeals Docket no. 369913.

This proposed rule reeks of industry protection and is not supported by the MSA or the underlying history. It does nothing to protect consumers, limits free speech for consumers and licensees alike and is outside the subject matter of the Board and Department.

**Conclusion**

The Board and Department after flailing in their litigation efforts to shut down competition in the industry now proposes rules unbound to consumer protection, but to protect their individual interests in plain violation of the Occupational Code, Mortuary Sciences Act and their underlying legislative history.

These rules should not be adopted.

**From:** [Morgan Minger-Szyniszewski](#)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Public comment on Proposed Rule Amendments - Rule Set 2023-17 LR  
**Date:** Friday, July 26, 2024 4:46:15 PM  
**Attachments:** [Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR.pdf](#)

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Dear Mr. Page,

Please see the document attached, and kindly confirm receipt of said document.

With kind regards,

Morgan Minger-Szyniszewski

July 24, 2024  
Mitchell Page  
Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau  
Legal Section  
P.O. Box 30018  
Lansing, MI 48909

**"Morgan Minzer-Szyniszewski" attachment**

Re: Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR  
To Whom It May Concern,

We are writing to offer comments on the Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau (the "Department") and Board of Examiners in Mortuary Science's (the "Board") proposed amendments to the current Administrative Rules, Mich Admin Code R 339.18901 *et seq.* (the "Proposed Amendments") being promulgated under the Michigan Occupational Code's (MCL 339.101 *et seq.*) Article 18, Mortuary Sciences Act (MCL 339.1801 *et seq.*) (together the "Act").

Our firm has served clients in the mortuary science industry for almost a decade, including during investigations and appeals brought by an overzealous Department and Board that many times does not understand the very statute and rules that it purports to enforce. Our comments are based on our collective experience. Pursuant to the rulemaking process and the request for public comments, please find below our comments and recommendations on the proposed rules. These comments are not all-inclusive.

The Department and Board have proposed many rules that find no basis in the language or intent of the supposed enabling statute, commonly known as the Mortuary Science Act (MSA) MCLA 339.1801, *et. seq.*, or purview of the Board's and Department's responsibilities as defined by the MSA and its underlying legislative history. Most notably, the "Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public." *Michigan House of Representatives, Session 1977-78, Final Report of the Comm. to Investigate the Dept. of Lic. and Reg.* at C-3 at pg. 52). However, proposed rule R 339.18942 purports to limit free speech and consumer choice on the basis of protecting the finances of licensed industry participants (*See RIS Form 2023-17-LR Question 4(C)*). This proposed rule is not related to protecting the public, or protecting the professional integrity of the licensed occupation. It is expressly proposed to limit competition for services and protect the finances of certain industry participants. In its published information on the rules, the Department states the purpose of this rule is to "maintain a fair playing field for all licensees and funeral establishments in a given region." (*See RIS Form 2023-17-LR Question 4(C)*). This rule does not protect consumers in any way, shape or form.

In addition, no provision of the MSA states or even implies that the Legislature's purpose is to space out licensees, or assure any of them any share of industry revenues. No provision of the MSA directs the Board or Department to pursue these goals. In the language of agency law, by pursuing this stated objective, the Board and Department are engaged in "a frolic and detour" of their own. More specifically, no provisions of the MSA requires licensed morticians to maintain any number of "offices", nor limits how many a mortician can maintain, or where they may be. As such, the proposed regulations are *sui generis* initiatives of the Board, not the implementation of legislative policy.

It is therefore useful to consider the following:

1. History of the Act

"The Primary duty of the Department [of Licensing and Regulatory Affairs] is to protect the consumer public. Secondary to that responsibility are all efforts required to meet that charge, including assisting the professions, trades, and occupations in rendering better service."

(Michigan House of Representatives, Session 1977-78, Final Report of the Comm. to Investigate the Dept. of Lic. and Reg. at C-3 at pg. 52).

The above is the first guideline used when the Legislature enacted the Michigan Occupational Code in 1980. The Occupational Code was enacted in furtherance of the above objective and other findings of the 1977 Final Report of the Special Committee to Investigate the Department of Licensing and Regulation which was conducted pursuant to Michigan House Resolution No. 103 of 1975 to investigate "reported irregularities within the Michigan Department of Licensing and Regulation and the 34 boards, commission and agencies under it." (*Id.* at pg. 1).

The Resolution and Occupational Code were sponsored by Gary Owen, who also chaired the Special Committee tasked to gather input as to the prospective new Code, and form recommendations to the House as a whole. (*Id.* at pg. C-3). The Final Report is broad and encompassing, but its focus can be summarized as follows: licensing "must always be predicated on its service of a general public interest." (*Id.* at pg. B-8).



This reading of public policy is paramount to an understanding and construction of the Occupational Code, as the contemporary Legislature was aware of. It is coupled with the stated concern that the “licensing power of boards . . . could be similar to that of a private cartel” more inclined to protect itself than the public. (*Id.* at pg. B-5) More explicitly, where a board is made up of members of an occupation they may be tempted “to obtain and maintain a monopolistic control of the supply of a product, which in turn, enhances the economic compensation of its member. . . . To do this the cartel must control . . . the behavior of its members to ensure that one person does not deviate, while others observe the rules.” (*Id.* at pg. B-6). When this happens, the Legislature warned, “[t]he end result is . . . [the] perpetuation of the oligopolistic or monopolistic position” of the Board and its members interests, not that of consumer protection. (*Id.* at pg. B-6). Accordingly, the Final Report found “[i]t is improper for a state to license a profession for the benefit of the profession.” (*Id.* at pg. B-6).

Although it can be argued that licensing can have a two-fold goal: “that of serving the public and that of serving the profession”, the Final Report found when there is a conflict that arises between the two-fold goal, boards “often promote that which best serves their interest, though it may be contrary to the public good.” (*Id.* at pg. C-10;11). In fact, by allowing boards and LARA to promulgate rules and regulations, the Report warned that “legislature provides an opportunity for boards to misuse the police power of the state.” (*Id.* at pg. B-11). The Final Report summarizes these basic points concluding that “[e]ffects of licensing tend to evolve... to control of competition” which “perpetuates any implied discrimination policies of an association.” (*Id.* at pg. B-16). “Boards tend to protect livelihoods, when goals for protection of public and the profession are in conflict.” (*Id.* at pg. C-16).

The Final Report concludes that “[t]he activity of licensing should be limited to what is expressly necessary for the protection of the public. It is not intended that licensing and regulation be utilized to limit competition for jobs and services or to enhance professional prestige.” (*Id.* at pg. C-3). “Peer regulation is riddled with bias, favoritism, arbitrary decisions, and conflicts of interest.” (*Id.* at pg. C-3). Because of this, a guideline was proposed that the “Department assume clear authority and responsibilities for administration in the field of occupational licensing and regulation, including the authority to issue and enforce such rules, policy guidelines and procedures as it deems necessary to carry out its public responsibilities.” (*Id.* at pg. C-4;5).

In the same time period, at the federal level, the now-familiar FTC Funeral Rule was promulgated which, to synopsise, prohibited states from allowing funeral directors to misuse the public by requiring consumers to purchase funeral-related merchandise from the funeral director. Thus, at both the state and federal level, the public policy is and has been that funeral-related rulemaking must demonstrably benefit the consuming public, both in terms of the professional quality of the services provided and in terms of the economic interest of the public to obtain the goods and services in question on as economical a basis as feasible. The idea of guarding the “bottom line” of any particular funeral director, or the industry as a whole, has not been a legitimate priority since then. It still is not a legitimate concern of this Board or Department.

## 1. General Global Comments

The MSA, like the Occupational Code as a whole, tasks the Department and Board with protecting the public engaged with those licensed occupations addressed. Neither invite the Department and Board to protect, or allocate, the profit margins enjoyed by practitioners of the licensed profession(s). The Department and Board now, though many of the proposed rules, look to protect the industry, with no demonstrated or claimed benefit to the consuming public, by limiting speech (advertising is speech), consumer choice, and competition among licensed mortuary scientists.

A few specific examples are appropriate.

### 1. R. 339.18901 Definitions:

#### “Supervision”

The proposed definition would require a licensee to be physically present to oversee a wide range of activities related to funerals, whether central, or peripheral. Our clients fully endorse some. Others are quite problematic. On the one hand, it is clearly sound to require a supervising licensee to be physically present for embalming. It is, as has long been held, the core function of this profession. On the other hand, any number of functions, and most particularly conversing with prospect clients to discuss their various options in goods and services (“arranging”), clearly do not require the physical presence of a licensed embalmer of dead human bodies. Moreover, given the recently discovered efficacy of Zoom, etc., not to mention the ubiquitous availability of cellular communication devices, it is often unnecessary for a licensed mortuary scientist to be physically present in the room where various non-embalming functions take place. To the extent this definition, and related rules, could be taken literally, they could be misused to, in essence, deprive every licensee (and, more importantly, the consuming public) of conveniences as old as the telephone and as current as videoconferencing and the Internet. In all, this is a deeply flawed,

ill-considered measure, when applied beyond the context of the actual handling, sanitizing and preparation of dead human bodies, the actual focus of the MSA.

1. R 339.18921 License Requirements

If the goal of the Department is to increase the quality of the profession through education, a higher graduating GPA would seem to meet this goal more reliably than simply adding additional hours and subjects that a potential licensee must take classes on. As such, a mediocre prospective mortician may still "pass" these courses at a barely above failing grade, but have a very limited competency. Instead of expanding the required curriculum the Department should consider addressing the competence issue more directly, by "raising the bar" of demonstrated competence.

Rather than using a standardized national board examination, Michigan should develop its own examination based on the Michigan statute. Michigan is governed by the FTC funeral rule and state statutes, not national norms, a national board examination is not needed.

1. R 229.18922 Standards

Educational Standards should reflect Michigan and not national standards. Michigan has specific and unique laws regarding mortuary science and standards should reflect such.

1. R 229.18925 Practical Experience

Many of the proposed requirements have no basis in the language of the MSA or its underlying history. For example, Michigan courts have found in published opinions that the MSA focuses on "what is to be done and not done with a dead human body" *Ansell v. DOC* 222 Mich.App. 347. The publishing of obituaries is not focused on the above. Any reasonably literate non-licensee can compose an obituary, just as countless relatives and friends of decedents regularly compose and deliver eulogies. There is no statutory or public policy basis to arbitrarily deem such writings as subsumed into the "Practice of Funeral Directing". See MCLA 339.1801(e).

Additionally, the proposed requirement that a trainee must "secure[] information for a death certificate, death notice, or obituary" is without clear predicate in the MSA and, again, partakes more of a peripheral and even clerical nature than the far more significant activities of handling, sanitizing, embalming or otherwise preparing dead human bodies, the actual focus of the MSA. This particular information gathering requirement is more analogous to taking new patient biographical and medical background information than it is to actual mortuary science. Virtually every medical doctor assigns such clerical functions to medically untrained intake personnel. There is no good reason for licensed morticians to be required to perform these functions, or receive formal training in them, and no apparent value to the consumer.

1. R 339.18931 Funeral establishment requirements

This rule adds in additional requirements not found in the MSA, but clearly mentioned in the current litigation the Board and Department has been a party to for over two years. There has never been a requirement of having an office space in a licensed funeral home. In fact, there has never been any statutory prescriptions as to where such an office, or offices, may be located, how many a licensee can maintain, and the like. When taken with other proposed rules, the Board and Department are merely making it harder for consumers to get information about and procure services related to funeral, cremation and cemetery services and merchandise. The Board provides no evidence of how a "one office, in the parlor" requirement would better protect or serve the public.

MSA licensees, like many other professionals (lawyers and accountants come readily to mind) meet with consumers at all types of locations; suggesting that meetings to arrange funerals or cremations at-need not happen solely at an office in a funeral home. This proposed rule, combined with others, has the express purpose, and effect, of forcing consumers (often at moments of great anguish and vulnerability) to only have conversations about funeral and cemetery services and merchandise at a licensed funeral home, or anywhere else in the world (including any number of fast food emporia), other than an office controlled by a licensee that is simply not in a funeral home.

These proposed rules do not protect the public from the industry, but protect the industry from a price-conscious public who are more easily able to weigh their options for funeral and cemetery merchandise at additional arranging locations. All this rule would do is enable the industry to economize by not providing this convenience to the public, thus turning the policy underlying the FTC Funeral Rule on its ear.

Additionally, subset (2)(g) must be further defined about what the only “articles and instruments necessary for embalming” may be in a preparation and embalming room. Unnecessary instruments and articles could cover everyday items such as radios, speakers, computers, and other not strictly necessary, but reasonable, usable and otherwise harmless items that may also be in a preparation and embalming room. This rule is thus vague, and susceptible to abuse.

1. R 339.18932 Care and Storage of Remains

This proposed rule is outside the scope of the MSA as the disposition of a dead human body has happened upon the cremation of such. Adding cremation storage requirements does not relate to the disposition, as the cremation is the disposition of the dead human body. If the State would like to add additional rules for cremated remains, it should make changes to the Agreements for Dispositions of Dead Human Bodies Act (MCL 328.201 *et seq.*)

This rule adds additional requirements to Funeral Homes that do not exist under the MSA. If there is an issue with the current state of the storage of cremains, it is that, sadly, consumers sometimes do not collect them. A statute is needed to allow for funeral homes to dispose of these cremains after a reasonable time without incurring the costs of internment or liability of prosecution by this Board.

Additionally, subpart (1)(f) seems to target maintenance of a funeral home grounds. The MSA is an act to regulate actions performed on deceased human bodies, not to regulate landscaping. There are already rules that state an establishment must be free from pests and insects. If an establishment wants to have wildflowers throughout its outdoor areas, the Department should abrogate the role of exterior decorator to itself.

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**From:** [Shane Wright](#)  
**To:** [Page, Mitchell \(LARA\)](#)  
**Subject:** Proposed Rule Amendments - Rule Set 2023-17 LR  
**Date:** Friday, July 26, 2024 4:51:41 PM  
**Attachments:** [0\(41\).PDF](#)

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Mr. Page.

Please see the attached document for your consideration. Please also confirm, receipt

July 24, 2024  
Mitchell Page  
Department of Licensing and Regulatory Affairs, Corporations, Securities, and Commercial Licensing Bureau  
Legal Section  
P.O. Box 30018  
Lansing, MI 48909

Re: Comments on Proposed Mortuary Science Rule Amendments - Rule Set 2023-17 LR  
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(Michigan House of Representatives, Session 1977-78, Final Report of the Comm. to Investigate the Dept. of Lic. and Reg. at C-3 at pg. 52).

The above is the first guideline used when the Legislature enacted the Michigan Occupational Code in 1980. The Occupational Code was enacted in furtherance of the above objective and other findings of the 1977 Final Report of the Special Committee to Investigate the Department of Licensing and Regulation which was conducted pursuant to Michigan House Resolution No. 103 of 1975 to investigate "reported irregularities within the Michigan Department of Licensing and Regulation and the 34 boards, commission and agencies under it." (*Id.* at pg. 1).

The Resolution and Occupational Code were sponsored by Gary Owen, who also chaired the Special Committee tasked to gather input as to the prospective new Code, and form recommendations to the House as a whole. (*Id.* at pg. C-3). The Final Report is broad and encompassing, but its focus can be summarized as follows: licensing "must always be predicated on its service of a general public interest." (*Id.* at pg. B-8).

This reading of public policy is paramount to an understanding and construction of the Occupational Code, as the contemporary Legislature was aware of. It is coupled with the stated concern that the “licensing power of boards . . . could be similar to that of a private cartel” more inclined to protect itself than the public. (*Id.* at pg. B-5) More explicitly, where a board is made up of members of an occupation they may be tempted “to obtain and maintain a monopolistic control of the supply of a product, which in turn, enhances the economic compensation of its member. . . . To do this the cartel must control . . . the behavior of its members to ensure that one person does not deviate, while others observe the rules.” (*Id.* at pg. B-6). When this happens, the Legislature warned, “[t]he end result is . . . [the] perpetuation of the oligopolistic or monopolistic position” of the Board and its members interests, not that of consumer protection. (*Id.* at pg. B-6). Accordingly, the Final Report found “[i]t is improper for a state to license a profession for the benefit of the profession.” (*Id.* at pg. B-6).

Although it can be argued that licensing can have a two-fold goal: “that of serving the public and that of serving the profession”, the Final Report found when there is a conflict that arises between the two-fold goal, boards “often promote that which best serves their interest, though it may be contrary to the public good.” (*Id.* at pg. C-10;11). In fact, by allowing boards and LARA to promulgate rules and regulations, the Report warned that “legislature provides an opportunity for boards to misuse the police power of the state.” (*Id.* at pg. B-11). The Final Report summarizes these basic points concluding that “[e]ffects of licensing tend to evolve... to control of competition” which “perpetuates any implied discrimination policies of an association.” (*Id.* at pg. B-16). “Boards tend to protect livelihoods, when goals for protection of public and the profession are in conflict.” (*Id.* at pg. C-16).

The Final Report concludes that “[t]he activity of licensing should be limited to what is expressly necessary for the protection of the public. It is not intended that licensing and regulation be utilized to limit competition for jobs and services or to enhance professional prestige.” (*Id.* at pg. C-3). “Peer regulation is riddled with bias, favoritism, arbitrary decisions, and conflicts of interest.” (*Id.* at pg. C-3). Because of this, a guideline was proposed that the “Department assume clear authority and responsibilities for administration in the field of occupational licensing and regulation, including the authority to issue and enforce such rules, policy guidelines and procedures as it deems necessary to carry out its public responsibilities.” (*Id.* at pg. C-4;5).

In the same time period, at the federal level, the now-familiar FTC Funeral Rule was promulgated which, to synopsise, prohibited states from allowing funeral directors to misuse the public by requiring consumers to purchase funeral-related merchandise from the funeral director. Thus, at both the state and federal level, the public policy is and has been that funeral-related rulemaking must demonstrably benefit the consuming public, both in terms of the professional quality of the services provided and in terms of the economic interest of the public to obtain the goods and services in question on as economical a basis as feasible. The idea of guarding the “bottom line” of any particular funeral director, or the industry as a whole, has not been a legitimate priority since then. It still is not a legitimate concern of this Board or Department.

#### 1. General Global Comments

The MSA, like the Occupational Code as a whole, tasks the Department and Board with protecting the public engaged with those licensed occupations addressed. Neither invite the Department and Board to protect, or allocate, the profit margins enjoyed by practitioners of the licensed profession(s). The Department and Board now, though many of the proposed rules, look to protect the industry, with no demonstrated or claimed benefit to the consuming public, by limiting speech (advertising is speech), consumer choice, and competition among licensed mortuary scientists.

A few specific examples are appropriate.

#### 1. R. 339.18901 Definitions:

##### “Supervision”

The proposed definition would require a licensee to be physically present to oversee a wide range of activities related to funerals, whether central, or peripheral. Our clients fully endorse some. Others are quite problematic. On the one hand, it is clearly sound to require a supervising licensee to be physically present for embalming. It is, as has long been held, the core function of this profession. On the other hand, any number of functions, and most particularly conversing with prospect clients to discuss their various options in goods and services (“arranging”), clearly do not require the physical presence of a licensed embalmer of dead human bodies. Moreover, given the recently discovered efficacy of Zoom, etc., not to mention the ubiquitous availability of cellular communication devices, it is often unnecessary for a licensed mortuary scientist to be physically present in the room where various non-embalming functions take place. To the extent this definition, and related rules, could be taken literally, they could be misused to, in essence, deprive every licensee (and, more importantly, the consuming public) of conveniences as old as the telephone and as current as videoconferencing and the Internet. In all, this is a deeply flawed,

ill-considered measure, when applied beyond the context of the actual handling, sanitizing and preparation of dead human bodies, the actual focus of the MSA.

1. R 339.18921 License Requirements

If the goal of the Department is to increase the quality of the profession through education, a higher graduating GPA would seem to meet this goal more reliably than simply adding additional hours and subjects that a potential licensee must take classes on. As such, a mediocre prospective mortician may still "pass" these courses at a barely above failing grade, but have a very limited competency. Instead of expanding the required curriculum the Department should consider addressing the competence issue more directly, by "raising the bar" of demonstrated competence.

Rather than using a standardized national board examination, Michigan should develop its own examination based on the Michigan statute. Michigan is governed by the FTC funeral rule and state statutes, not national norms, a national board examination is not needed.

1. R 229.18922 Standards

Educational Standards should reflect Michigan and not national standards. Michigan has specific and unique laws regarding mortuary science and standards should reflect such.

1. R 229.18925 Practical Experience

Many of the proposed requirements have no basis in the language of the MSA or its underlying history. For example, Michigan courts have found in published opinions that the MSA focuses on "what is to be done and not done with a dead human body" *Ansell v. DOC* 222 Mich.App. 347. The publishing of obituaries is not focused on the above. Any reasonably literate non-licensee can compose an obituary, just as countless relatives and friends of decedents regularly compose and deliver eulogies. There is no statutory or public policy basis to arbitrarily deem such writings as subsumed into the "Practice of Funeral Directing". See MCLA 339.1801(e).

Additionally, the proposed requirement that a trainee must "secure[] information for a death certificate, death notice, or obituary" is without clear predicate in the MSA and, again, partakes more of a peripheral and even clerical nature than the far more significant activities of handling, sanitizing, embalming or otherwise preparing dead human bodies, the actual focus of the MSA. This particular information gathering requirement is more analogous to taking new patient biographical and medical background information than it is to actual mortuary science. Virtually every medical doctor assigns such clerical functions to medically untrained intake personnel. There is no good reason for licensed morticians to be required to perform these functions, or receive formal training in them, and no apparent value to the consumer.

1. R 339.18931 Funeral establishment requirements

This rule adds in additional requirements not found in the MSA, but clearly mentioned in the current litigation the Board and Department has been a party to for over two years. There has never been a requirement of having an office space in a licensed funeral home. In fact, there has never been any statutory prescriptions as to where such an office, or offices, may be located, how many a licensee can maintain, and the like. When taken with other proposed rules, the Board and Department are merely making it harder for consumers to get information about and procure services related to funeral, cremation and cemetery services and merchandise. The Board provides no evidence of how a "one office, in the parlor" requirement would better protect or serve the public.

MSA licensees, like many other professionals (lawyers and accountants come readily to mind) meet with consumers at all types of locations; suggesting that meetings to arrange funerals or cremations at-need not happen solely at an office in a funeral home. This proposed rule, combined with others, has the express purpose, and effect, of forcing consumers (often at moments of great anguish and vulnerability) to only have conversations about funeral and cemetery services and merchandise at a licensed funeral home, or anywhere else in the world (including any number of fast food emporia), other than an office controlled by a licensee that is simply not in a funeral home.

These proposed rules do not protect the public from the industry, but protect the industry from a price-conscious public who are more easily able to weigh their options for funeral and cemetery merchandise at additional arranging locations. All this rule would do is enable the industry to economize by not providing this convenience to the public, thus turning the policy underlying the FTC Funeral Rule on its ear.



Additionally, subset (2)(g) must be further defined about what the only “articles and instruments necessary for embalming” may be in a preparation and embalming room. Unnecessary instruments and articles could cover everyday items such as radios, speakers, computers, and other not strictly necessary, but reasonable, usable and otherwise harmless items that may also be in a preparation and embalming room. This rule is thus vague, and susceptible to abuse.

1. R 339.18932 Care and Storage of Remains

This proposed rule is outside the scope of the MSA as the disposition of a dead human body has happened upon the cremation of such. Adding cremation storage requirements does not relate to the disposition, as the cremation is the disposition of the dead human body. If the State would like to add additional rules for cremated remains, it should make changes to the Agreements for Dispositions of Dead Human Bodies Act (MCL 328.201 *et seq.*)

This rule adds additional requirements to Funeral Homes that do not exist under the MSA. If there is an issue with the current state of the storage of cremains, it is that, sadly, consumers sometimes do not collect them. A statute is needed to allow for funeral homes to dispose of these cremains after a reasonable time without incurring the costs of internment or liability of prosecution by this Board.

Additionally, subpart (1)(f) seems to target maintenance of a funeral home grounds. The MSA is an act to regulate actions performed on deceased human bodies, not to regulate landscaping. There are already rules that state an establishment must be free from pests and insects. If an establishment wants to have wildflowers throughout its outdoor areas, the Department should abrogate the role of exterior decorator to itself.

1. R 339.18935 Transportation of remains to crematory

There is legislation that has been signed into order by the Governor that aims to regulate transportation companies, which are to be separate licensed entities. This rule makes no mention of such, the rules should dovetail, however none exist yet for the above mentioned, therefore this is a premature rule and should be struck entirely until someone, somewhere, can make sure all of the rules coincide with one another.

The logistics of this proposed rule do not comport with those other rules covering the activities of medical doctors or county medical examiners. MSA licensee activities and thereby compliance with this proposed rule is subject to how medical doctors and county medical examiners perform their jobs and associated documentation. If doctors and medical examiners do not act promptly, this rule will result in dead human bodies being kept at funeral homes longer than what is needed and in violation of this proposed rule.

This Rule does not relate to the protection of consumers and will add costs and delays to consumers and licensees alike.

1. R 339.18937

Mandating that licensees take pictures of dead human bodies is a recipe for lawsuits against licensees. Cultural preference and certain religions will find this RULE a violation of their beliefs and practices.

This proposed rule should include several safe harbor provisions in order to ensure that licensees, mandated to take photos of dead human bodies that relatives and friends might find objectionable or invasive of privacy, do not find themselves in constant litigation involving such disputes. There have been numerous lawsuits across the country involving the taking and dissemination of pictures of dead human bodies that have resulted in substantial legal awards. Mandating these pictures will surely lead to additional lawsuits, including but not limited to negligent infliction of emotional distress, against licensees. This will lead to increases in insurance and other costs that will be passed on to consumers.

Furthermore, in order to avoid lawsuits alluded to above, licensees would have to clean and make a body more presentable before taking a picture whose sole purpose is to confirm positive identification. This includes the setting of features and removing of medical equipment such as vent tubes. These added costs will likely be passed on to consumers.

This entire proposed rule should be struck.

1. R 339.18491

This proposed rule does nothing to alleviate the ambiguities in the current rule, but does more directly impinge on Free Speech rights. That being what is “engaging in the practice of mortuary science.” The Department and Board have been litigating this issue for over two (2) years, and knows full well that absolutely no one has ever been "deceived" or "misled" into believing that dead human bodies are embalmed or cremated at offices solely dedicated to arranging for such activities to occur elsewhere. In fact, when challenged the Department and Board have never been able to produce an example of such.

This rule also fails to define “doing business”, in any meaningful way, as also revealed in the current litigation. Absent a rational, concrete definition, "doing business" could be misused to prohibit a licensed mortician from shopping for items (suits, funeral merchandise, caskets, flowers, etc.) as well as meeting with families and other professionals. Which of these are to be “business” that must be conducted only inside a licensed funeral establishment? The proposed and current rule’s use of the term “doing business” is too vague and open ended and will continue to result in arbitrary interpretations of what is prohibited conduct. For example, advertising on a billboard can be argued as doing business in the billboard’s location.

1. R 339.18942

This proposed rule is, perhaps, the most indefensible. It falls outside the scope of the MSA and the legitimate scope of Department and Board, impinges on the free speech of licensees, and the right of consumers to gain valuable information wherever they find convenient. Additionally, it adds “arranging” for funeral services to the definition of “engaging in the practice of mortuary science”, something the MSA does not do, and does not authorize the Board and Department to do. This is unlawful statutory amendment masquerading as regulatory implementation of existing law. The Act and Legislature did and does not use this language. This expansion of the Act through rulemaking violates the Act and the Michigan Constitution. If such an initiative is to be pursued, it must be done by the Legislature.

Additionally, this proposed rule, by including “arranging for mortuary science services” impinges on and contradicts the Michigan Prepaid Funerals and Cemetery Sales Act, a separate and distinct Act from the MSA, with its own licensing scheme under which mortuary science services are "arranged for" and sold.

All of these defects are compounded by the rule’s stated purpose: to control competition in the industry. The MSA is an Act to control the actual doing of the occupation, not to allocate revenue within the industry. The main tenet of the Occupational Code is consumer protection. The Board and Department turn this tenet on its head to protect industry participants through geographic controls that have no basis in the MSA. This is the purview of the Legislature and not the Board and Department which is tasked with controlling the occupation, not the industry.

The accompanying explanation of the rule makes clear that there is no consumer-related concern, only a financial concern for industry participants who would rather not offer this convenience to the public. Please see the above legislative history on how this rule is designed to protect only the industry at the expense of competition throughout the industry and therefore the consumer.

We challenge this Board and Department to give examples of the consumer harms this rule is designed to prevent. The Board and Department have been given two years of litigation to come up with such harm, and as of this writing have failed to do so. Now, in the middle of litigation regarding the activities that this rule seeks to prohibit, that the Department and Board have claimed that these Offices are already prohibited in the name of consumer protection, yet propose this rule and lists industry protection as its sole basis for promulgating such.

However, this rule allows for these activities and communications to take place anywhere other than a non-funeral home owned or controlled by a licensee. This includes Comerica Park, a Bob Evans, or the local "gentlemen’s club", but not at an office a licensee may own or lease. This is not consumer protection. It is merely industry protection to limit competition. This is outside the purview of the MSA. If the Legislature was worried about the competitive balance, or spacing of funeral homes, it could have added protections into the statute. It did not.

We incorporate all arguments regarding of harm regarding arrangement offices included in the filings and record in the case Paul E. Buchanan and Generations Funeral and Cremation Services, Inc. v. Department of Licensing and Regulatory Affairs, Corporations Securitax & Commercial Licensing and the Bureau/Board of Examiners in Mortuary Science, Court of Appeals Docket no. 369913.

This proposed rule reeks of industry protection and is not supported by the MSA or the underlying history. It does nothing to protect consumers, limits free speech for consumers and licensees alike and is outside the subject matter of the Board and Department.

**Conclusion**

The Board and Department after flailing in their litigation efforts to shut down competition in the industry now proposes rules unbound to consumer protection, but to protect their individual interests in plain violation of the Occupational Code, Mortuary Sciences Act and their underlying legislative history.

These rules should not be adopted.