

**Chapter 30 Board Review**

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**Board of Funeral  
Service Examiners**

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**The Board of Funeral Service Examiners  
Is Necessary to Protect the Public**

**The Attorney General's Office Has Not  
Conflicted With Code in Its Handling of  
Preneed Funeral Contract Violations**



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**Aaron Allred**  
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*Director*

**Brian Armentrout**  
*Research Manager*

**Derek Thomas**  
*Research Analyst*

**Performance Evaluation and Research Division**  
*Building 1, Room W-314*  
*State Capitol Complex*  
*Charleston, West Virginia 25305*  
*(304) 347-4890*

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**WEST VIRGINIA LEGISLATURE**  
*Performance Evaluation and Research Division*

Building 1, Room W-314  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0610  
(304) 347-4890  
(304) 347-4939 FAX



John Sylvia  
Director

October 15, 2006

The Honorable Edwin J. Bowman  
State Senate  
129 West Circle Drive  
Weirton, West Virginia 26062

The Honorable J.D. Beane  
House of Delegates  
Building 1, Room E-213  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting a Chapter 30 Board Review, which will be presented to the Joint Committee on Government Operations on Sunday, October 15, 2006. The issues covered herein are "The Board of Funeral Service Examiners Is Necessary to Protect the Public," and "The Attorney General's Office Has Not Conflicted With Code in Its Handling of Preneed Funeral Contract Violations."

We transmitted a draft copy of the report to the West Virginia Board of Funeral Service Examiners on September 28, 2006. The West Virginia Board of Funeral Service Examiners opted not to have an exit conference. We received the agency response on October 6, 2006.

Let me know if you have any questions.

Sincerely,

Handwritten signature of John Sylvia in cursive script.  
John Sylvia

JS/tlc

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*Joint Committee on Government and Finance*

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# Executive Summary

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*Regulation of funeral services is necessary in West Virginia to prevent the spread of disease, ensure fair trade practices to vulnerable consumers, and to preserve the dignity of the deceased.*

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*The Board feels that preneed funeral contract violations should be dealt with through an administrative process as stated in WVC §47-14-11. This process would require an administrative hearing and allow for a maximum fine of \$1,000 for each county in which a violation has occurred.*

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*Title 142 §8-1.6 of the Legislative Rules states that a violation of the preneed funeral act is an “unfair or deceptive act.” This gives the Attorney General’s Office statutory authority to pursue a civil remedy through the court system of any preneed funeral contract violation. This would not require an administrative hearing and allow for fines of up to \$5,000 for any unfair or deceptive act under WVC §46A-7-111.*

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## **Issue 1: The Board of Funeral Service Examiners Is Necessary to Protect the Public**

The practice of funeral services is licensed in all 50 states and Washington, D.C. The process of preparing and disposing of dead human bodies poses serious health concerns to the public. A wide variety of diseases can be spread through the improper storage and handling of dead human remains and waste. Practitioners of funeral directing, embalming, and cremation must have the proper training and education to ensure public safety. Licensure serves the public interest with assurance that funeral service professionals are competent and qualified to perform the intricate procedures of human burial and cremation services. Funeral homes and crematoriums must have all of the proper facilities and follow strict procedures to ensure the safe disposition of bodies. The process of funeral and cremation services are high-cost transactions. The Board regulates the trade of funeral services and goods to prevent fraud and deception against the public. Regulation of funeral services is necessary in West Virginia to prevent the spread of disease, ensure fair trade practices to vulnerable consumers, and to preserve the dignity of the deceased. **The Legislative Auditor recognizes that licensure of this profession protects the public interest and should be continued.**

## **Issue 2: The Attorney General’s Office Has Not Conflicted With Code in Its Handling of Preneed Funeral Contract Violations**

The Board of Funeral Service Examiners expressed concern that, by not allowing for administrative hearings for preneed funeral contract violations, the Attorney General’s Office is not following West Virginia Code. The Board feels that preneed funeral contract violations should be dealt with through an administrative process as stated in WVC §47-14-11. This process would require an administrative hearing and allow for a maximum fine of \$1,000 for each county in which a violation has occurred.

However, Title 142 §8-1.6 of the Legislative Rules states that a violation of the preneed funeral act is an “unfair or deceptive act.” This gives the Attorney General’s Office statutory authority to pursue a civil remedy through the court system of any preneed funeral contract violation. This would not require an administrative hearing and allow for fines of up to \$5,000 for any unfair or deceptive act under WVC §46A-7-111. **According to a legal opinion from the Office of Legislative Services, the Attorney General’s Office may elect to pursue either a civil**

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**or administrative action when dealing with preneed funeral contract violations.**

**Recommendation**

1. *The Legislative Auditor recommends that the Legislature continue the Board of Funeral Service Examiners.*



# Review Objective, Scope and Methodology

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## **Objective**

This Regulatory Board Evaluation is required and authorized by West Virginia Sunset Law, Chapter 4, Article 10, of the West Virginia Code, as amended. The objective of this evaluation was to monitor the Board of Funeral Service Examiners' compliance with Chapter 30 regulations. This includes assessing that the Board is financially self-sufficient and whether public accessibility and complaint resolution are in compliance with Chapter 30 requirements. This regulatory review will also determine in what ways the Board protects the public interest and if it should be continued.

## **Scope**

The scope of this report is from calendar year 2003 to June 2006.

## **Methodology**

The methodology of this evaluation included reviewing Chapter 30 provisions and other applicable statutes, Board documents and records, interviews with the Board's Executive Director, legal opinions and internet research. Every aspect of this review complied with Generally Accepted Government Auditing Standards (GAGAS).



## **The Board of Funeral Service Examiners Is Necessary to Protect the Public Interest.**

As of July 1, 2002, the West Virginia Board of Embalmers and Funeral Directors became known as the West Virginia Board of Funeral Service Examiners in West Virginia Code §30-6-4. In addition to funeral directors, embalmers and funeral homes, this Act required crematory operators to register and become certified through the Board. The Board consists of seven members: five licensed embalmers and funeral directors, one lay member, and one crematory operator. Pursuant to WV Code §30-6-11, crematory operators had until January 1, 2003 to register with the Board and until July 1, 2003 to obtain a certificate to operate a crematory.

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*The practice of disposing of dead human bodies and the administration of funeral ceremonies is regulated in all 50 states and the District of Columbia.*

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The practice of disposing of dead human bodies and the administration of funeral ceremonies is regulated in all 50 states and the District of Columbia. In West Virginia, the Board of Funeral Service Examiners is the state agency that regulates funeral directors and embalmers as well as crematory operators. This includes regulations on the sale of most funeral goods and services.

The Board has a staff of five paid positions that includes an executive director, a supervisor, an investigator, and two inspectors. As of January 2006, the Board regulated 687 funeral service licensees and certified 41 crematory operators. The Board is also responsible for the inspection and licensing of funeral homes and crematoriums. The Board has licensed 211 main funeral establishments and 74 branch funeral establishments. The Board has registered 10 crematoriums. Each main funeral establishment, branch establishment and crematorium is inspected at least once a year. Re-inspections are required if problems are found or if a facility is sold to a new owner.

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*Without regulations of this practice the public can be harmed through the spread of disease through the improper disposition of human remains and waste.*

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Without regulations of this practice the public can be harmed through the spread of disease through the improper disposition of human remains and waste. Extensive training and knowledge are required to perform the technical procedures of human body disposition. Continuing education is required to ensure competency in the field of funeral service. Regulation and inspection of funeral establishments are also necessary to ensure proper disposal methods are maintained. The public can also be harmed through unfair or deceptive trade practices. Consumers are often in a distraught emotional state when purchasing the high cost transactions of funeral services and goods. There is potential for deceptive business practices by unprofessional funeral service providers without regula-

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tion. **The Legislative Auditor finds that the Board of Funeral Service Examiners is necessary to protect the interest of the public and should be continued.**

### **Recommendation**

1. *The Legislative Auditor recommends that the Legislature continue the Board of Funeral Service Examiners.*

### **The Attorney General's Office Has Not Conflicted With Code in Its Handling of Preneed Funeral Contract Violations.**

#### **Issue Summary**

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*The Board of Funeral Service Examiners is concerned that the Attorney General's Office is assessing unreasonable fines for minor preneed funeral contract violations.*

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The Board of Funeral Service Examiners is concerned that the Attorney General's Office is assessing unreasonable fines for minor preneed funeral contract violations. The Board also feels these violations should be dealt with through administrative hearings as opposed to the court system. The Board cites WVC §47-14-11 which calls for an administrative hearing and a maximum fine of \$1,000 for each county in which a preneed violation has occurred. The Attorney General's Office cites WVC §47-14-12 which does allow for civil action in preneed funeral contract violations. The amounts of fines assessed are also within the maximum limits set for an unfair or deceptive act (WVC §46A-6-104). Title 142 §8-1.6 of the Legislative Rules states that any preneed contract violation is an unfair or deceptive act which allows for a maximum fine of \$5,000. The Legislative Auditor requested a legal opinion from Legislative Services regarding the Board's concerns. The legal opinion found that the Attorney General's Office has acted within its statutory authority in its handling of preneed funeral contract violations.

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*The Board feels that preneed funeral contract violations are often minor and should be dealt with through an administrative manner as stated in WVC §47-14-11. This process would require an administrative hearing and allow for a maximum fine of \$1,000 for each county in which a violation has occurred.*

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### **The Board of Funeral Service Examiners Has Concerns That Funeral Homes Are Assessed Unreasonable Fines for Minor Preneed Violations**

Preneed funeral contracts are the arrangement and payment of funeral services and goods made while the beneficiary is still living. This payment is to be put in a trust which will accrue interest or a life insurance policy until the beneficiary's death. The Board of Funeral Service Examiners expressed concern that by not allowing for administrative hearings for preneed funeral contract violations, the Attorney General's Office is not following West Virginia Code. The Board also feels that fines assessed are too high in relation to most violations. The Board feels that preneed funeral contract violations are often minor and should be dealt with through an administrative manner as stated in WVC §47-14-11. This process would require an administrative hearing and allow for a maximum fine of \$1,000 for each county in which a violation has occurred. WVC §47-14-11 states:

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- ...(c) When the division finds that any person has violated the provisions of subsection (a) of this section after an administrative hearing or finds that any funeral services or funeral or burial goods are offered for sale when the offer is not a bona fide offer to sell such services or goods, it may enter an order imposing one or more of the following penalties:
- (1) Denial of an application for a certificate of authority or license, including a renewal;
  - (2) Revocation or suspension of a certificate of authority or license;
  - (3) Imposition of an administrative fine not to exceed one thousand dollars for each county where there are separate violations;
  - (4) Issuance of a reprimand; or
  - (5) Placement of the licensee or certificate holder on probation for a period of time and subject to such conditions as the division may specify.

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*Title 142 §8-1.6 of the Legislative Rules states that a violation of the preneed act is an “unfair or deceptive act.” This gives the Attorney General’s Office statutory authority to pursue a civil remedy for any preneed violation through the court system. This would not require an administrative hearing and allow for fines of up to \$5,000.*

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The Board of Funeral Service Examiners has stated its concern as follows:

*Very specifically, a significant number of funeral directors have contacted our office relating to fines they have been assessed by the Attorney General’s Office for what appear to be minor violations or just plain “human error.” These fines are assessed through “assurances of discontinuances” which a funeral director feels compelled to sign or face litigation in his home county which would be devastating to the funeral home.*

*It is the feeling of the funeral directors that the Attorney General’s Office has turned the preneed division into a “Money Maker” for the purpose of supplementing salary increases for some attorneys.*

### **The Attorney General’s Office Has Authority To Pursue Civil or Administrative Remedies of Preneed Funeral Contract Violations**

Title 142 §8-1.6 of the Legislative Rules states that a violation of the preneed act is an “unfair or deceptive act.” This gives the Attorney General’s Office statutory authority to pursue a civil remedy for any preneed violation through the court system. This would not require an administrative hearing and allow for fines of up to \$5,000 for any unfair or deceptive act under WVC §46A-7-111. The Attorney General’s Office may elect to pursue either a civil or administrative action when dealing

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with preneed violations.

In response to the Board's concern, the Attorney General's Office has stated:

*The Prenneed Act authorizes the Attorney General to either institute an administrative hearing under W. Va. Code § 47-14-11, or, file a lawsuit, pursuant to W. Va. Code § 47-14-12. The Division usually elects to resolve alleged violations of the Act in court.*

*Naturally, prior to filing a lawsuit under W. Va. Code § 47-14-12, we attempt to settle the case with the funeral home, by having the funeral home sign an Assurance of Discontinuance.*

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*There is under the Attorney General's Office a Prenneed Funeral Unit. It is responsible for recording and regulating the sale, management and execution of preneed funeral contracts.*

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*Assurances of Discontinuance are similar to consent orders.*

WVC §47-14-12 states:

*...(a) The failure of a certificate holder, a licensee or of any other person engaged in the sale of preneed funeral contracts without a certificate of authority or license required pursuant to the provisions of this article to comply with the provisions of this article gives rise to a civil cause of action in favor of the division, any aggrieved consumer, contract guarantor or contract purchaser. Upon entry of a judgment for damages in favor of the plaintiff, the trial court shall award punitive damages in the amount of three times the actual damages awarded in the judgment.*

There is under the Attorney General's Office a Prenneed Funeral Unit. It is responsible for recording and regulating the sale, management and execution of preneed funeral contracts. The Prenneed Funeral Unit consists of an auditor, an administrative assistant, a part-time clerk and a part-time lawyer. It has two funded accounts. One is the West Virginia Prenneed Regulation Fund which is to pay for the administration of the Prenneed Funeral Unit. It consists of fees paid by consumers and funeral homes. The West Virginia Prenneed Guarantee Fund is to serve as an insurance account to protect consumers if a funeral home is financially unable to fulfill its preneed contractual obligations. As of October 2005, the Regulation Fund had a balance of \$263,523.26 and the Guarantee Fund had a balance of \$716,990.40.

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The Preneed Funeral Unit identifies violations through random audits of funeral establishments and consumer complaints. Some preneed complaints have been made to the Board of Funeral Service Examiners, which must then refer them to the Attorney General's Office. At the conclusion of every audit the funeral director is advised of the results by letter. This letter gives the funeral director at least 10 days to dispute the findings and extensions are liberally granted.

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*From 2003 to 2005, the Attorney General's Office has reported eight instances of litigation and 32 Assurances of Discontinuance or settlements of preneed violations.*

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From 2003 to 2005, the Attorney General's Office has reported eight instances of litigation and 32 Assurances of Discontinuance or settlements of preneed violations. The most common violation, according to the Attorney General's Office, is the failure of funeral homes or other certificate of authority holders to register preneed contracts with the Attorney General's Office as required by WVC §47-14-8. Another common violation is a funeral home's failure to submit a Report of Death Beneficiary to the Attorney General as required by Title 142 §8-8.2 of the legislative rules. The Attorney General's Office has stated that if certificate of authority holders fail to register preneed contracts, it cannot monitor that the funds are properly maintained or misappropriated. If there is no Report of Death Beneficiary, it cannot be determined if the licensee has provided the goods and services purchased. However, violations can be much more serious such as preneed embezzlement. A recent Preneed Funeral Unit litigation found one funeral director had absconded with \$170,000 of the consumer's money.

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*A legal opinion from the Office of the Legislative Services states, "There doesn't appear to be a code conflict or impropriety in the AG's Office choosing to enforce the preneed act by civil action rather than pursuing an administrative action under §47-14-11."*

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The Legislative Auditor requested a legal opinion from the Office of Legislative Services regarding the Board of Funeral Examiners' concerns with the Attorney General's Office's handling of preneed funeral contract violations. The legal opinion reads as follows:

*There doesn't appear to be a code conflict or impropriety in the AG's Office choosing to enforce the preneed act by civil action rather than pursuing an administrative action under §47-14-11. The AG's Office has statutory authority to pursue a civil remedy under §47-14-12; and additionally under §46A-7-108 and §46A-111, since a violation of the preneed act is an "unfair or deceptive act" prohibited by §46A-6-104 (see 142 C.S.R. §8-1.6). Further, the Assurances of Discontinuance, which are generally executed in the settlement agreements, are authorized by §46A-7-107.*



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*Since a violation of the preneed act is an “unfair or deceptive act” under §46A-6-104, a civil penalty of up (to) \$5000 may be assessed under §46A-7-111 for each violation of §46-6-104. The \$1000 limit referenced in 142 C.S.R. §8-13.2.3 pertains to an administrative fine assessed pursuant to §47-14-11. Again, the AG’s Office may elect to pursue a civil remedy instead of an administrative remedy to enforce the preneed act.*

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*According to the legal opinion obtained through Legislative Services, the Attorney General’s Office is acting within its authority as stated in code to institute either civil or administrative remedies to preneed funeral contract violations.*

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## **Conclusion**

The Board of Funeral Service Examiners is concerned that the Attorney General’s Office is assessing unreasonable fines for minor preneed funeral contract violations. The Board also feels that the Attorney General’s Office should handle these violations through administrative hearings as opposed to the court system. Title 142 §8-1.6 of the Legislative Rules states that any preneed funeral contract violation is an unfair or deceptive act. The amounts of fines assessed are within the maximum limits set for an unfair or deceptive act in WVC §46A-7-111. According to the legal opinion obtained through Legislative Services, the Attorney General’s Office is acting within its authority as stated in code to institute either civil or administrative remedies to preneed funeral contract violations.



# Appendix A: Transmittal Letter

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## WEST VIRGINIA LEGISLATURE *Performance Evaluation and Research Division*

Building 1, Room W-314  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0610  
(304) 347-4890  
(304) 347-4939 FAX



John Sylvia  
Director

September 28, 2006

Constance Sloan, Executive Director  
West Virginia Board of Funeral Service Examiners  
179 Summers Street, Suite 305  
Charleston, WV 25301


Dear Ms. Sloan:

This is to transmit a draft copy of the Regulatory Board Evaluation of the Board of Funeral Service Examiners. This report is scheduled to be presented during the October 15-17, 2006 interim meeting of the Joint Committee on Government Operations. We will inform you of the exact time and location once the information becomes available. It is expected that a representative from your agency be present at the meeting to orally respond to the report and answer any questions the committee may have.

If you would like to schedule an exit conference to discuss any concerns you may have with the report, please notify us between September 28, 2006 and October 3, 2006. We need your written response by noon on Thursday October 5, 2006, in order for it to be included in the final report. If your agency intends to distribute additional material to committee members at the meeting, please contact the House Government Organization staff at 340-3192 by Thursday, October 12, 2006 to make arrangements.

We request that your personnel not disclose the report to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

  
Denny Rhodes  
Research Manager

\_\_\_\_\_ *Joint Committee on Government and Finance* \_\_\_\_\_



# Appendix B: Agency Response

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Ben F. Williams , President

Raymond S. Tomassene, Secretary

Constance Sloan, Executive Director



John L. Attili  
A. Craig Rotruck  
John S. Stump  
Stephen T. Varner

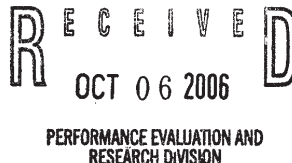
(304) 558 0302  
(304) 558 0660 Fax

STATE OF WEST VIRGINIA  
Board of Funeral Service Examiners  
179 Summers Street, Suite 305  
Charleston, WV 25301

wvfuneralboard@hotmail.com  
www.wvfuneralboard.com

October 6, 2006

Mr. Derek Thomas  
WV Legislature -PERD  
Building 1, Room W-314  
Charleston, WV 25305-0610



Re: Report to be submitted to Joint Committee on Government Operations

Dear Mr. Thomas:

As I told you in our telephone conversation last week, our Board would not be meeting until October 4, 2006 and would have little time to review your report prior to the deadline to respond. The Board has asked that I advise you that the members do want to be present at the Joint Committee meeting to answer any questions from the Committee. Because of time constraints, I would appreciate it if your office could notify me as soon as possible in order that our members can arrange to have someone on call at their facilities while they attend this meeting.

In an effort to try and resolve some of the conflicts expressed to the Board by many Funeral Directors, the Board voted to seek an audience with Darrell McGraw, in person, to try and resolve the concerns of the Funeral Directors over the State.

The Board has no material to hand out but would like to advise the Committee that although the Legislative Rules promulgated by the Attorney General's Office make violations of the preneed funeral contracts law a violation of the Consumer Protection Act, Funeral Directors across the State do not believe that the Legislature intended that the Attorney General circumvent the requirement for administrative hearings set forth in W.Va. Code § 47-14-11 which would provide due process for persons accused of violating the law.

Thank you for your courtesy and assistance to our Board in this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Constance Sloan".

Constance Sloan  
Executive Director

CS

cc: All Board Members

