

BEFORE THE BOARD OF FUNERAL SERVICE  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF AMENDMENT,
ARM 24.147.402 mortician	)	ADOPTION, AND REPEAL
application, 24.147.403 inspections,	)	
24.147.405 examination, 24.147.406	)	
federal trade commission regulations,	)	
24.147.501, 24.147.502, 24.147.504,	)	
and 24.147.505 licensing, 24.147.901	)	
sanitary standards, 24.147.902	)	
disclosure statement on embalming,	)	
24.147.903 transfer or sale of	)	
mortuary license, 24.147.2101	)	
continuing education requirements,	)	
24.147.2102 sponsors, 24.147.2301	)	
unprofessional conduct, the adoption	)	
of NEW RULE I mortuary branch	)	
establishment, and the repeal of ARM	)	
24.147.301 continuing education	)	
definitions, 24.147.503 conditional	)	
permission to practice, 24.147.506	)	
renewal of cemetery license,	)	
24.147.1501 branch facility,	)	
24.147.2108 and 24.147.2109	)	
continuing education, 24.147.2302	)	
through 24.147.2305 unprofessional	)	
conduct, and 24.147.2401 complaint	)	
filing	)	

TO: All Concerned Persons

1. On March 28, 2013, the Board of Funeral Service (board) published MAR notice no. 24-147-33 regarding the public hearing on the proposed amendment, adoption, and repeal of the above-stated rules, at page 382 of the 2013 Montana Administrative Register, issue no. 6.

2. On April 18, 2013, a public hearing was held on the proposed amendment, adoption, and repeal of the above-stated rules in Helena. Several comments were received by the April 25, 2013, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments received and the board's responses are as follows:

COMMENT 1: One commenter suggested the board amend ARM 24.147.402 to read "in accordance with department policy" instead of "three days," since the

department is establishing a divisionwide policy to employ best practices regarding the processing of applications, which will incorporate a deadline earlier than three days.

RESPONSE 1: The board appreciates all comments made during the rulemaking process and will amend the rule accordingly.

COMMENT 2: One commenter noted that proposed amendments to ARM 24.147.405 would clarify that the exam is only for morticians and not crematory operators, technicians, or cemetery permit holders, and that elsewhere it is clarified that the FTC applies to a crematory that sells urns. The commenter expressed concern about direct cremation and burial services being provided by crematories and cemeteries without the aid of mortuaries, and asked the board to reinforce the limited nature of the scope of practice of crematory operators, technicians, and cemetery permit holders to ensure the intent of the law is protected.

RESPONSE 2: The board decided to make no changes in response to this comment. Regarding the sale of funeral goods such as caskets and urns, the board has no jurisdiction to limit or regulate their sale, unless the seller of such goods also provides funeral services. Thus, in the case of a crematory selling urns or combustible containers, the FTC "funeral rule" applies, subjecting the provider to various disclosure requirements. The application of the funeral rule in no way extends or broadens the limited scope of practice of an independent crematory, particularly because this rule must be read with current law that describes the extremely limited scope of practice of an independent crematory through the definition of terms "cremation" and "crematory operator," and specific procedures expressed in Title 37, chapter 19, part 7.

COMMENT 3: One commenter asserted that the requirement in ARM 24.147.502 that licensees on inactive status for more than five years must retake the jurisprudence examination before reactivating their licenses has a disparate impact on older license holders. Likewise, the commenter stated that the requirement to take additional CE to reactivate a license would not allow an inactive practitioner to reactivate his or her license in a timely manner to address an emergency in a rural community where a single active licensee serves the community.

RESPONSE 3: The board notes that this comment addresses requirements in current rule that were not included in the proposal notice and are therefore outside of the scope of this rule proposal.

COMMENT 4: Regarding ARM 24.147.901(1)(e), a commenter stated that the board will have difficulty enforcing the formaldehyde standard, without a device to measure airborne concentration of formaldehyde.

RESPONSE 4: The proposed rule references the federal OSHA formaldehyde standard, under which licensees have to meet existing obligations. The board is statutorily mandated to set "ventilation standards." The board believes that adoption

of federal standards is the best practice and will devise appropriate methods to determine compliance with this rule.

COMMENT 5: Regarding ARM 24.147.901(1)(g), one commenter stated there are provisions of Title 75, chapter 10, part 10 that may allow for disposal of infectious wastes other than through a commercial disposal entity, and suggested the board further clarify the standard to avoid an overly strict application of the law.

RESPONSE 5: The board agrees with the comment and is amending the rule to remove "through a commercial disposal entity" to ensure that any allowable method of disposal of infectious wastes available under the cited reference may be used by a funeral provider.

COMMENT 6: Regarding ARM 24.147.901(7), a commenter pointed out that the current inspection standard is to request whether the mortuary uses "red bags" and how they dispose of the contents. Mortuaries respond that they use "commercial bio-medical waste providers" or they "treat the waste chemically and dispose via landfill." The commenter asserted that new (7) may conflict with the earlier (1)(g) on requiring a commercial disposal entity to handle all hazardous waste.

RESPONSE 6: The board believes there is no longer such a conflict with the amendment to ARM 24.147.901(1)(g) described above.

COMMENT 7: One commenter stated that the phrase in ARM 24.147.901(3) "unless requested by a consumer making the initial contact," is vague and should be clarified to restrict that the consumer may only make a request to a licensed mortician. The commenter asserted this change will prevent independent crematories from interpreting the rule to allow direct cremation, without involvement of a mortician, on the grounds that the consumer made the initial request to the crematory. The commenter further suggested the board add "or cremation" after "funeral" in ARM 24.147.2301(1)(p), to ensure there is no debate that the prohibition against allowing unlicensed personnel to make funeral arrangements may be construed to allow unlicensed persons to perform "cremations." The same comment applies to the definition of "funeral directing" at 37-19-101(20), MCA.

RESPONSE 7: The board declines to make the proposed suggestions for the following reasons: first, the proposed language "unless requested by a consumer making the initial request," is intended to ensure that "funeral arranging," as that term encompasses acts exclusively within the scope of practice of a licensed mortician, is done in licensed mortuaries. The exception, as requested by a consumer who has not been solicited by the mortician, allows a mortician to make funeral arrangements outside of the mortuary.

Under current laws, an independent crematory may only perform cremations of deceased persons presented to the crematory by a mortician. The board will propose in future rulemaking to provide an exception for private persons having the statutory "right of disposition" in 37-19-904, MCA, to carry out funeral arrangements on their own accord, i.e., without assistance from anyone other than a mortician or a

coroner. Such arrangements would include the ability to prepare the body, ensure the authorized removal of potentially hazardous implants, make disposition arrangements, hold viewings, obtain authorizations for removal, transportation, and cremation, execute and file death certificates, and transport human remains in a combustible container to a cemetery or crematory facility.

The "initial request" of a consumer in the instances of "home funerals," will be limited to constitute only contacting a crematory, whether it is independent or attached to a mortuary, to schedule a time for the cremation and to determine the cost of the service, or, in the case of a cemetery, to schedule a time for burial and to determine the cost of burial-related services and goods. Unless the crematory operator or cemetery manager is also a licensed mortician, the crematory operator or cemetery manager may not discuss, offer, or negotiate prepaid or any funeral arrangements, or, in any other manner, infringe upon the scope of practice of a mortician as expressed in Title 37, chapter 19. Such recognition of a family's desire to self-execute funerary duties will not be construed to expand the scope of practice of an independent crematory or that of a cemetery manager.

Second, with respect to adding "cremation" to modify the term "funeral", the comment exceeds the scope of the proposed rulemaking, because the change is grammatical only. In responding to the substantive comment however, the board notes that the definition of "funeral arrangements" (and by extension the phrase "arrangements for a funeral") pertains only to the scope of practice of a licensed mortician and concluded that it is not necessary to further distinguish it.

COMMENT 8: Several commenters urged the board to allow a person to be cared for by loved ones at home for a short time after death as a comfort for grief, and asked that the board protect a family's ability to care for their deceased loved ones personally. Another commenter referred to an intrinsic right of individuals to be cared for after death by their loved ones, whether family or friend, that should not be infringed by the government. The commenters also expressed concern that ARM 24.147.901(2) and (3), (i.e., requiring preparation of human remains and funeral arrangements to be done in a licensed mortuary, respectively) could be construed against the ability of authorized individuals to arrange for disposition of a decedent's remains without using the services of a licensed mortician, and asserted that the rules should not be construed to foreclose this less expensive option.

The commenters further opined that the rule would forbid discussion of a funeral arrangement at a place other than a mortuary, despite that existing law permits a consumer to choose to make disposition arrangements other than with a mortuary. The commenters proposed adding a rule stating that "Nothing in these rules shall be construed to apply to funeral and disposition arrangements of deceased individuals carried out privately by authorized persons pursuant to § 37-19-901 *et seq.*, MCA, and § 50-15-403, MCA."

RESPONSE 8: The board notes that both ARM 24.147.901(2) and (3) are intended to prohibit "mobile" preparation rooms and inappropriate solicitation of funeral arrangements and to emphasize that a mortician must perform funeral-related services in a licensed facility. The board also intends these subsections to underscore that an independent crematory may not prepare human remains, make

funeral arrangements, provide funeral services, or sell preneed funeral contracts since, under current law, these matters are solely within a licensed mortician's scope of practice.

As described in Response 7, the board will propose future rulemaking that will recognize persons having a right of disposition to handle the funeral arrangements for and transport the decedent's remains without using the services of a licensed mortician or mortuary. In these instances of "home funerals," the family will be solely responsible for duties that, if contracted or assumed by a party other than a person having the right of disposition, would fall within the scope of practice of a licensed mortician.

To address steps in the process other than just transportation, the board is amending ARM 24.147.901(2) to add "except that washing, dressing, and casketing may be provided by a person with the right of disposition in 37-19-904, MCA."

COMMENT 9: One commenter asserted that current law allows for direct cremation.

RESPONSE 9: The board notes that current law provides that only a mortician may make funeral arrangements, transport, prepare, and supervise final disposition of a dead human body. A mortuary may offer "direct cremation," which is generally understood to be a cremation without any related memorial services or funeral goods.

Montana law does not authorize a crematory facility that is independent of a mortuary to offer "direct cremation," that is, to transport or prepare bodies, execute authorizations, collect information for the death certificate, or other activities that are contained within the scope of practice of a mortician. Under current law, an independent crematory may only accept a closed combustible container from a mortuary, along with appropriate documentation and identification of the body.

In the case of "home funerals" described above, a person may enter a preneed cremation authorization with a crematory under 37-19-708, MCA, and execute an at-need contract to cremate a body. Because the law cannot prohibit the sales of goods, an independent crematory may sell urns or combustible containers for transporting a body.

However, in no case may the independent crematory, without aid of a licensed mortician, actually transport or handle the body. The law and rules may not be read, nor in particular may the provisions of 37-19-708, MCA, be read to authorize an independent crematory to engage in preneed sales or make funeral arrangements, other than scheduling the cremation and collecting payment at need for the cremation. The board is attempting in its rulemaking to recognize a common law duty of persons who do not wish to contract with a mortuary for the care of their loved ones. The board stresses that neither an independent crematory nor a cemetery is obligated to accept human remains without the assistance of a mortician and mortuary.

COMMENT 10: A commenter stated that a new rule to be proposed for adoption in a future rules notice only addresses transportation and does not adequately protect the full range of rights of individuals to direct and conduct after-death care and disposition of loved ones.

RESPONSE 10: The board points out that the new rule described by the commenter is not a part of this rulemaking notice, but is included in draft board rules that have not yet been filed with the Secretary of State.

COMMENT 11: Numerous commenters stated that other states do not impose such restrictions, and have laws that specifically allow "direct cremation."

RESPONSE 11: While the duty to carry out funerary duties for a loved one belongs to the family, if the duty is to be delegated or contracted away, it may only be to a licensed entity or individual. A minority of states have carved out, from the mortician's scope of practice, a "direct disposer" license, e.g., FLA Rev. Stat. 497.601 or a registration as a "surface transportation and removal service," e.g., Code of VA Section 54.1-2819. Such statutes provide express authority and specific acts that may be performed by persons other than funeral directors or morticians and embalmers. In Montana, that authority and specificity are expressed only with regard to morticians. Montana's current statutes do not allow the board to make rules that conflict with the statutes.

COMMENT 12: A commenter stated that the proposed amendments to ARM 24.147.901(2) would render illegal the basic preparation of human bodies by direct cremation businesses and direct burial businesses that do not offer embalming, and thus have no need of an embalming room. The commenter further opined that this rule would bar crematories from touching a decedent in any way for preparation, including the removal of pacemakers. The commenter further stated that this provision serves no rational purpose to protect consumers or the public and gives funeral homes a legal monopoly by outlawing these basic preparations by entities other than full-service funeral homes.

RESPONSE 12: See Response 13 below. Additionally, the board is constrained in its rulemaking and interpretation by the current statutes, which require all mortuary facilities to have preparation rooms. The board may not make or interpret rules in a way that conflicts with the statutes. Unless or until the statutes are changed to expressly allow a crematory operator to remove a pacemaker, the board has no choice in its interpretation. The current law is assumed to be constitutional, i.e., to have a rational relationship to a legitimate governmental interest, and the board and administratively attached department is obligated to enforce it as written and reasonably interpreted.

COMMENT 13: A commenter stated that the proposed amendment to ARM 24.147.901(3) is ambiguous, and suggested that if the goal is to prohibit predatory sales pitches at nursing homes, then direct language should be drafted that does not allow interpretation against an operator such as Central Montana Crematorium.

RESPONSE 13: The board notes that under current law, an independent crematory may not make a "funeral arrangement," and that an independent crematory may

only perform cremations of deceased persons presented to the crematory by a mortician in a closed combustible container.

Future rulemaking will expressly acknowledge that a crematory may, but will not be required to, accept human remains in closed containers, along with appropriate authorizations, from persons having the right of disposition giving their deceased friend or family member a "home funeral." Such acknowledgement will in no way expand the current scope of practice of an independent crematory operator to allow that operator to prepare or handle a body, remove pacemakers, allow "viewings," file death certificates, or other services contained within the scope of a mortician.

COMMENT 14: One commenter noted that in ARM 24.147.902, the FTC requires a particular statement regarding embalming and further provides that when a state has additional requirements regarding embalming, that statement also be included on the General Price List. The commenter suggested the board also incorporate language from a Department of Public Health and Human Services representative ("the Desonia Memo"), that at one time summarized the obligations contained in ARM 37.116.103.

RESPONSE 14: The board rejects the comment on the basis that the March 25, 1999, memo referred to in the comment, made recommendations for two paragraphs to be added to the GPL and, ultimately, only the first paragraph was required by ARM 24.147.902. The second paragraph was a verbatim recitation of ARM 37.116.103. The board continues to believe it is not necessary to add this information to the GPL. However, the board does believe that funeral providers should be aware of the travel parameters, which, if exceeded, require either refrigeration or embalming, and directs that the provider inform the consumer of the options within the context of transporting a body.

COMMENT 15: One commenter stated that ARM 24.147.902(2), is confusing and leaves practitioners open to unspecified "problems." The commenter questioned the meaning of the sentence, "Embalming may be necessary, however, if you select certain funeral arrangements such as a funeral with viewing."

RESPONSE 15: The board notes that this language is in current rule and is required by the Federal Trade Commission to be included verbatim on a funeral provider's GPL. The board suggests the sentence, stated otherwise, means "embalming is not generally required, but may be necessary if you select a funeral with viewing."

COMMENT 16: Regarding ARM 24.147.903, a commenter disagreed that the names of stockholders need not be listed, and asserted that the public should know whom they are dealing with.

RESPONSE 16: The board notes that the amendments to the rule do not eliminate the duty of a new facility to provide notice to the public of any change in more than 50 percent of ownership of a facility. The officers, principals, and owners of the

corporation will continue to be disclosed on the application form required to be completed as part of the application process with the board.

COMMENT 17: One commenter suggested clarifying the CE audit timing by adding the year "2015" to "July 1." The commenter also suggested language to add at the end of ARM 24.147.2101(1) to address CE requirements for morticians actively licensed for less than two full years on their first audit, to provide a specific beginning date on which the carryover will be eliminated, and ensure licensees understand their CE responsibilities.

RESPONSE 17: The board agrees with the suggestions and is amending the rule accordingly.

COMMENT 18: One commenter objected to ARM 24.147.2101(6), which would allow funeral service board members to receive CE credit by attending a regularly scheduled board meeting. The commenter opined that the board members individually would benefit from other CE courses. Another commenter asked if any limit would be placed on the number of credits the board members could receive under this section.

RESPONSE 18: The board decided to not amend the rule further in response to this comment, and recognizes both the time commitment involved and technical expertise gained by members serving on the board. The board is amending (6) exactly as proposed to give board members CE credit, with the only exception being the required three-credit minimum in particularized education every other year.

COMMENT 19: One commenter stated that adding (7) to ARM 24.147.2101 to allow licensees to receive CE credit by attending a regularly scheduled board meeting would create several administrative difficulties for board staff. The commenter believed that such difficulties would include requiring additional staff to track who such persons are and when they arrive and depart, whether board staff would then be required to produce CE certificates, whether screening panel attendance would count (for those licensees having to respond to complaints filed against them), and whether on each cycle a licensee could obtain all CE hours by attending a single board meeting, except the three hours of specific topics required under (1) of the proposed rule.

RESPONSE 19: The board agrees and is amending the rule to remove (7).

4. The board has amended ARM 24.147.403, 24.147.405, 24.147.406, 24.147.501, 24.147.502, 24.147.504, 24.147.505, 24.147.902, 24.147.903, 24.147.2102, and 24.147.2301 exactly as proposed.

5. The board has amended ARM 24.147.402, 24.147.901, and 24.147.2101 with the following changes, stricken matter interlined, new matter underlined:

24.147.402 ORIGINAL MORTICIAN LICENSE - APPLICATION (1) through (5) remain as proposed.

(6) Board staff may issue licenses in cases of routine applications. The board will review all complete nonroutine applications received by the board office at least three working days prior to the board meeting in accordance with department policy.

24.147.901 MORTUARY OPERATION STANDARDS (1) through (1)(f) remain as proposed.

(g) infectious wastes properly labeled and disposed of ~~through a commercial disposal entity~~, in accordance with Title 75, chapter 10, part 10, MCA;

(h) and (i) remain as proposed.

(2) The preparation of human remains for final disposition, such as washing, disinfecting, embalming, removing hazardous implants, dressing, and casketing must only be performed in a preparation room of a licensed mortuary or mortuary branch with a preparation room, except that washing, dressing, and casketing may be provided by a person with the right of disposition in 37-19-904, MCA.

(3) through (7) remain as proposed.

24.147.2101 CONTINUING EDUCATION REQUIREMENTS (1) Morticians with active licenses, beginning with their first full year of licensure, shall complete a minimum of 12 hours of approved continuing education in a two-year period, beginning July 1, 2015, with a minimum of three hours addressing the FTC funeral rule, federal or state regulations governing safety and sanitation of funeral services practice, board rules governing funeral trusts, or funeral services ethics. The board will conduct the first audit under this rule after July 1, 2015, and every odd-numbered year thereafter. Morticians with active licenses licensed less than two full years on their first audit must provide proof of six hours of continuing education.

(2) through (6) remain as proposed.

~~(7) Licensees may receive continuing education credit by attending a regularly scheduled board meeting.~~

(8) through (13) remain as proposed, but are renumbered (7) through (12).

6. The board has adopted NEW RULE I (24.147.904) exactly as proposed.

7. The board has repealed ARM 24.147.301, 24.147.503, 24.147.506, 24.147.1501, 24.147.2108, 24.147.2109, 24.147.2302, 24.147.2303, 24.147.2304, 24.147.2305, and 24.147.2401 exactly as proposed.

BOARD OF FUNERAL SERVICE  
R.J. (DICK) BROWN, MORTICIAN 396  
CHAIRPERSON

/s/ DARCEE L. MOE

Darcee L. Moe  
Rule Reviewer

/s/ PAM BUCY

Pam Bucy, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State July 1, 2013