

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 24.147.1101 crematory)	ADOPTION, AND REPEAL
operation standards, 24.147.1102)	
casket/containers, 24.147.1110)	
integrity of identification process,)	
24.147.1111 cremation procedures,)	
24.147.1112 crematory prohibitions,)	
the adoption of New Rule I)	
transportation and custody of human)	
remains, II crematory records, III)	
cremation authorizations, IV military)	
training or experience, and the repeal)	
of ARM 24.147.1103 shipping)	
cremated human remains)	

TO: All Concerned Persons

1. On March 27, 2014, the Board of Funeral Service (board) published MAR Notice No. 24-147-36 regarding the public hearing on the proposed amendment, adoption, and repeal of the above-stated rules, at page 543 of the 2014 Montana Administrative Register, Issue No. 6.

2. On April 18, 2014, 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, 2014, deadline.

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

ARM 24.147.1101 Crematory Operation Standards

COMMENT 1: Subsection (1)(b) requires the maintenance of a "maintenance and repair schedule." Repairs are unpredictable and must be done when they become necessary and not on a schedule.

RESPONSE 1: While some repairs are unpredictable, others are predictable, and are the reason a manufacturer will recommend replacement or repair of parts in addition to maintenance of the parts.

COMMENT 2: Insert language in (1)(d) to reflect that a facility which has no telephone and uses only cell phones would not be required to post a sign near the telephone to call 911 in a fire or other emergency.

RESPONSE 2: Presently, there is no requirement for a crematory to maintain a landline. The proposed rule may reasonably be construed to apply to facilities that have a landline and for those who do not, to at least require the sign near the retort directing the call.

COMMENT 3: Regarding (1)(h), many crematories are located in the "garage area" of an existing facility where the floor will not have been constructed of impervious materials for cleaning and disinfecting similar to a preparation room. Enforcement of this rule may require such floors to be remodeled. The requirement for the body to be enclosed in a leak-resistant container should suffice in lieu of the proposed standard.

RESPONSE 3: Sealing or covering floor surfaces will allow adequate clean-up if a leak-resistant container fails, rather than to allow such fluids to soak into a wood or concrete surfaces. Additionally, the requirement for "impervious material" on the floors and walls is an existing rule - the board only seeks to add the words "to allow cleaning and disinfection of these surfaces" in order for people to understand what is meant by "impervious."

COMMENT 4: Regarding (2), it is illegal to impose the same regulation on crematories as mortuaries in regard to language requiring inspections, temporary permits, name changes, ownership transfer, or closure of the facility. Such requirements do not serve the public health, safety, or welfare.

RESPONSE 4: The rules are consistent with statutory authority and reasonably necessary to carry out the purposes of Title 37, chapter 19, MCA, and the administrative function of the department.

COMMENT 5: The proposed changes eliminate responsibility on the part of the "crematory operator" in favor of the "crematory facility," but only a person, not a facility, can act. The board's intent in making this change is to end stand-alone crematories.

RESPONSE 5: The terms are interchangeable depending on the context in which they are used, and using one term over another does not impact the existing law which requires a license for both a crematory operator and a crematory facility.

ARM 24.147.1102 Casket/Containers

COMMENT 6: In (2) after the phrase "...remove noncombustible materials...." insert "from the exterior of the cremation container".

RESPONSE 6: The board will not make the change as it is sufficiently clear as proposed.

COMMENT 7: Regarding (3), subjecting a crematory to the FTC "Funeral Rule" if it sells "urns and combustible containers" is incorrect because the Funeral Rule does

not cover free-standing crematories. Allowing the sale of containers conflicts with the statutory requirement that all containers must be closed when presented to a crematory and will amplify the confusion to the general public between a licensed mortuary and a stand-alone crematory.

Selling containers at a crematory may encourage the unlicensed practice of a crematory operator preparing or placing a body in a container it has sold to the consumer. The rules need to clearly prohibit this. There is no authority in law to allow the crematory facility or crematory operators to work with the general public in any way.

RESPONSE 7: A crematory which holds and handles combustible containers containing deceased persons is deemed by the Federal Trade Commission (FTC) to be engaged in "funeral services." If the crematory also sells "funeral goods," the Funeral Rule applies because both "funeral goods" and "funeral services" are provided. The board does not regulate who may sell "funeral goods," unless the seller also provides "funeral services."

Recently promulgated and these proposed rules allow the next of kin to work directly with a stand-alone crematory, but only to purchase a container and present it to the crematory for cremation with the body already placed inside the container. Every other step of the death process must be handled either by the next of kin or a licensed mortician. While the board recognizes the potential for "confusion," the present state of the law defines that transporting and preparing a dead human body for final disposition are within the scope of practice of a mortician and are not within the scope of practice of a crematory operator or crematory technician.

COMMENT 8: Regarding (3), the board does not have authority to prohibit crematories from selling combustible containers, urns, or other retail items incident to cremation. These same items can be purchased from non-regulated retailers. The board cannot adopt regulations which on their face discriminate against crematories to the advantage of competitors in the marketplace. The regulation does not serve the public health, safety, or welfare.

RESPONSE 8: As explained in the response to Comment 7, the board has no intention to restrict the sale of funeral goods by crematories and (3) is not capable of an interpretation that imposes such a restriction. By the FTC definition, if an entity (irrespective of practice or title acts) provides both "funeral services" *and* "funeral goods," FTC regulations entitle consumers to receive particular information about those goods and services. The rule serves public welfare by informing operators, inspectors, board staff, and the public of FTC jurisdiction.

COMMENT 9: Section (3) confuses funeral services with cremation services. They are two different professions and businesses. This is a board attempt to combine them and constitutes a monopoly by funeral services.

RESPONSE 9: The board recognizes that the laws define cremation services differently from funeral services. Licensing laws of all types of occupations and professions grant exclusive authority to engage in a particular activity.

ARM 24.147.1110 Integrity of Identification Process

COMMENT 10: Regarding (1), the cremation authorization form should have been provided as part of the proposed rules for review.

RESPONSE 10: The board apologizes for insufficient notice that the form was located on its web site.

COMMENT 11: The cremation authorization form is unnecessary and unjustly burdens small businesses. The form constitutes "micromanagement" of a crematory business and is illegal, anti-competitive, and anti-consumer. It unfairly singles out crematories as the board does not dictate to morticians every single service they provide. There is no required "form" dictating how morticians practice. The regulation does not serve the public health, safety, or welfare. The same comment applies to New Rules II and III.

RESPONSE 11: The board has determined at this time to adopt the proposed rules without requiring a board-approved cremation authorization form and will accordingly amend ARM 24.147.1110(1), New Rule II(1)(b), and New Rule III(2) references to "board-approved" form.

COMMENT 12: In (1), the language "warranties of truthfulness" regarding identification of the deceased is extreme and places the burden on other professional people.

RESPONSE 12: The rule uses the same language as 37-19-707, MCA, which refers to "warranting the truthfulness" of the identity of the deceased and the signer's authority to order cremation.

COMMENT 13: In (2)(a) it is not necessary for the authorization for removal and transit (ART) form to be produced as a condition to cremation if a cremation authorization exists.

RESPONSE 13: The board disagrees with the comment. The ART form is a state-required form to be signed by the coroner as a precondition to every cremation in the state of Montana. A "cremation authorization" form is the form signed by the authorizing agent, typically the next of kin of the deceased. Such comments are why the proposed rules are necessary.

COMMENT 14: Section (2) makes the labeling and tagging sound like an elaborate process. The current rules are ample.

RESPONSE 14: It is appropriate to elaborate upon a serious process such as handling and identifying cremated remains.

COMMENT 15: Subsection (2)(e) should state "closed" instead of "sealed."

RESPONSE 15: The board concurs with the comment and will make the proposed change here and in ARM 24.147.1111(6)(f).

ARM 24.147.1111 Cremation Procedures

COMMENT 16: This rule is unnecessary because procedures are set forth in statute and the rules are inconsistent with statute.

RESPONSE 16: The comment does not explain the inconsistency. The rule is reasonably necessary to help consumers, licensees, and board staff understand the process by filling in the details on the process set forth in the statute.

COMMENT 17: Regarding (9), the postal service has new requirements for shipping cremated remains.

RESPONSE 17: Without elaboration by the comment, the board can only note that section 451.22 and 451.3b of the United State Postal Service regulations govern the shipping of cremated remains and do not conflict with the proposed rule.

COMMENT 18: In (10), instead of directing that a crematory "may dispose of...", or "must maintain a record of," use passive voice to direct that "cremated remains may be disposed of...", and "a record must be maintained of...."

RESPONSE 18: The board prefers using active voice as it places clear responsibility on a particular actor. Without elaborating the reason for the suggested change, the board must speculate that the commenter would desire to apply the directive to both free-standing crematories and morticians who operate crematories; however, without making the proposed change, it is clear that the obligation accrues to both mortuary and non-mortuary-related (i.e., stand-alone) crematories.

COMMENT 19: The new standards should not apply to a crematory in construction or use prior to 1993.

RESPONSE 19: There is no "grandfather" provision in the current or proposed rules. Each licensee is required to comply with board rules as they are adopted and has a professional obligation to be familiar with them.

ARM 24.147.1111(5) Authorized Persons Permitted in Cremation Chamber Area - Crematory may not conduct viewing or funeral or memorial service.

COMMENT 20: This restriction is unconstitutional.

RESPONSE 20: The regulation is rationally related to the state's interest in regulating crematories and is based on the current statute.

COMMENT 21: Unless a family member has the right of disposition, the member will not be allowed to view the remains at a crematory.

RESPONSE 21: A viewing of a body may only take place in a mortuary or under the supervision of a mortician; however, authorizing agents may witness the cremation. The board is amending (5) to change "crematory procedure" to "cremation."

COMMENT 22: The rule would disallow a stand-alone crematory from having a viewing of the body or holding a funeral or memorial service with a gathering of friends and family as requested by a family or required by religious tradition. Montana should also prohibit gazing at one's deceased grandfather in hospital bed, considering how few hospitals are co-located with funeral parlors. There is nothing about a direct-to-consumer cremation facility that makes a viewing of the deceased problematic. The board should not restrict where a family holds a memorial service or a funeral. Why would a mortician be the only one allowed to make funeral arrangements? What does engage in funeral directing mean?

Consumers should be able to choose a crematory to transport human remains, to make arrangements, and to direct a funeral without the involvement of a mortician. Families and loved ones should be able to accompany the remains from the time of death to the burial site or to the cremation, including transportation and witnessing. Being involved with each step of the death process, including bathing, transporting, placing their remains in the retort, and collecting the ashes from the retort assists the grieving process. A parent of a deceased child should also care for that child in death if the parent so desires.

The board should not have rules that require everything to be turned over to a funeral home to deal with. The rules set crematories up to be only a subsidiary to a mortuary, and that limits a family's ability to have a home funeral, take the body to the crematorium, and have an experience where the family or friends are present to experience their farewell to a loved one. These rules would make that impossible, unless the crematorium is also associated with the mortuary. As such, the rules foreclose price and service competition in the state's funeral industry.

RESPONSE 22: The board understands that the death of a loved one is a traumatic experience, if not the most traumatic event a person will ever face. The board recognizes the common law duty of a family to care for their dead, as further explained in the response to comment 47.

The term "viewing" as used in Title 37, chapter 19, MCA, means/refers to the point in time after the body is removed from the place of death, and current law only allows such a viewing to take place at a licensed mortuary, branch mortuary, or other chapel or location under the supervision of a mortician as a matter of maintaining proper custody of the body. In contrast, current law proscribes the activity of a licensed stand-alone crematory facility to only receiving, holding, cremating, and returning or disposing of cremated human remains.

In Title 37, chapter 19, MCA, the terms "funeral directing," "making of funeral arrangements," "mortician," "mortuary science," and "mortuary" define the *scope of practice* of a mortician. Based on this scope of practice, current law prohibits consumers from choosing a stand-alone crematory (that is, a crematory not attached

to or associated with a licensed mortuary) to transport human remains, make funeral arrangements, direct a funeral, or conduct a viewing.

In contrast, the scope of practice of a crematory operator and facility are to only accept a closed combustible container, determine authorization to cremate, cremate, and return the cremated remains as directed.

While other states may have "direct-to-consumer cremation facility" laws, Montana does not. Many of the commenters expressed a desire for a "direct to consumer" cremation process, where cremation facilities are authorized to do some or all of the things a mortician does (except embalming). Legally however, the board may not expand by administrative rule what is not provided in the statute.

The statutes dictate legal duties that arise upon a person's death and dictate that these duties are performed in conjunction or by one or more of either a physician, a coroner, or a mortician: (1) "declaring" the death of a person, (2) authorizing the removal of the body from the place of death, (3) transporting of the body, (4) preparing for final disposition and providing custody of the body pending final disposition, (5) obtaining confidential medical and personally identifiable health information to properly handle the body, (6) creation of and filing of a death certificate, (7) obtaining a certification of the cause of death, (8) obtaining a coroner's authorization to cremate, and (9) recording the final disposition of the deceased.

The reasons for this process are to protect public health against communicable disease; to detect and rule out criminal conduct for a cause of death, to ensure the accurate and swift operation of the public vital statistics system, to operate against identity theft and social security fraud, prevent the trafficking of body parts, and to ensure the dignified treatment of deceased persons.

See also response to comment 37, regarding New Rule I Transportation and Custody.

COMMENT 23: Simultaneous cremations in (6)(a) seem problematic, especially with the morbidly obese.

RESPONSE 23: The rule is intended to recognize circumstances where simultaneous cremation, if feasible, may be authorized by an authorizing agent.

COMMENT 24: Specifying in (8) that ashes which do not fit within one container must be placed in a second container demeans those regulated by the rule. Doing so is reasonably necessary to care for the ashes of the deceased.

RESPONSE 24: The board's regulatory mission includes informing the public as well as licensees about what is expected for professional conduct.

COMMENT 25: In (10), giving permission to send a bill to a person for disposing of ashes the person does not want merely adds more language to the rule; the authority to bill exists independently of this rule, and it is unimaginable to even want to bill in such a situation.

RESPONSE 25: The authority to bill for disposition when a customer fails to retrieve the remains after having indicated intent to do so is not in statute and therefore is a

legitimate subject of rulemaking to provide direction to licensees, staff, and the public about what is an appropriate response in this circumstance.

COMMENT 26: Disposing of cremated remains after 90 days may be problematic; the crematory could legitimately store the remains while people are making payments for the services.

RESPONSE 26: The 90 days represents a minimum period of time after which the crematory may bury the cremated remains; the rule does not require burial after 90 days have expired.

ARM 24.147.1112 Crematory Prohibitions

COMMENT 27: Modify (1)(a) as follows: "transport human remains, unless properly trained and working for a mortuary, make arrangements, engage in funeral directing, or engage in mortuary science...."

RESPONSE 27: The board will modify the language to state "...without the direction of a mortician who is responsible for the transport."

COMMENT 28: In (1)(a), requiring involvement of a mortician conflicts with New Rule I, which refers to a "licensed mortuary, supervised by...." The conflict occurs "because a mortician can employ a crematory operator."

RESPONSE 28: The board is unable to discern what the conflict is, as both rules prohibit a stand-alone crematory facility, operator, or technician from transporting human remains.

COMMENT 29: The rule is contrary to the MCA in requiring a mortician. People other than morticians may transport, make arrangements, and assist at funeral services.

RESPONSE 29: Without further elaboration in the comment on how the rule contradicts the statute, the board reiterates its response to comment 22.

COMMENT 30: Regarding (1)(a), a crematory operator should be able to transport a body or help to place the body into a container, especially since a mortuary is allowed to have a person, without any special credentials other than being an employee of the facility, to move the body. Morticians possess no special skills necessary to transport dead people from point A to point B.

RESPONSE 30: Morticians are in fact required to possess a minimum level of skills acquired in a two-year degree in mortuary science and a one-year mortician internship that relate to risks associated with removing a body from the place of death and maintaining custody and supervision over the remains until final disposition. In contrast, a crematory operator need only demonstrate a high school diploma or equivalent.

Whether a crematory operator "should" have the authority is a moot point, because the statutes exclude such activities from the scope of practice of a crematory operator and include them in the mortician's scope of practice (as well as authority of the coroner). If the board were to interpret the current statutes to allow crematory operators to transport dead human bodies, there would be no practical limitation on who else may transport dead human bodies, which is not an outcome that serves the public health, safety, or welfare.

COMMENT 31: The board does not have legal authority to regulate transportation of deceased persons. This area is regulated by the Department of Public Health and Human Services (DPHHS), which has the authority to "adopt and enforce rules regarding transportation of dead human bodies," per 50-1-202, MCA. The same analysis applies to New Rule I.

RESPONSE 31: The board does not agree with the comment. DPHHS regulates the transporting of bodies from the communicable disease perspective. The board regulates transporting of bodies through the regulation of morticians whose scope of practice includes transporting bodies.

COMMENT 32: ARM 37.116.103(2)(c) grants "private conveyors" the right to transport dead bodies. This definition of "private conveyors" at ARM 37.116.101(12) creates a legal right for crematories to transport dead human bodies which the board cannot unilaterally abolish by regulation. The board's past legal counsel concluded the same. The same analysis applies to New Rule I.

RESPONSE 32: The administrative rules cited in the comment merely refer to time limits the body may be in transit without being embalmed or refrigerated, and that the standard differs depending on whether the transportation is by common carrier (e.g., railroads, airlines, or public transportation) or private conveyor, and should not be interpreted to conflict with the scope of practice in Title 37, chapter 19, MCA. Unless the individual has died during an ambulance transport, by statute, only a coroner or a mortician or persons acting under their direction and supervision have the legal right to transport a dead human body. The board is not obligated to follow a prior legal opinion.

COMMENT 33: The laws governing morticians and crematory operators are in separate parts of Title 37, chapter 19, MCA; the practice of one does not necessarily impact the other. To guide the work of one industry by the rules of a separate industry is ridiculous.

RESPONSE 33: Without further elaboration in the comment about the specific proposed language, the board cannot discern the point of the comment and cannot respond to its substance. See also the response to comment 4.

COMMENT 34: Regarding (1)(b), it is unknown what kind of permits and releases are necessary prior to the cremation of "fetuses, limbs, and body parts" and that specific direction should be included in the rule.

RESPONSE 34: The requirement for a permit from a "private or public health agency, medical doctor, or college or university" is in the current rule. The only clarification is that rather than a "release," the crematory should require a cremation authorization to meet the requirements of 37-19-704, MCA.

COMMENT 35: Regarding (1)(d), payment programs need not be "pre-need," unless the funeral industry is willing to do the same.

RESPONSE 35: The point of the comment is not clear.

COMMENT 36: In (1)(d), clarify that the mortician referred to "is a mortician working only under a crematory license without working under a licensed mortuary facility inspected to protect the general public from fraud."

RESPONSE 36: The board will not make the clarification because it is clear that a mortician may only work in conjunction with a licensed mortuary facility.

COMMENT 37: In (1)(e), define the term "basic combustible container."

RESPONSE 37: The wording of the rule is sufficiently clear.

COMMENT 38: In (1)(f), add language "prior to cremation, no removal of dental gold...unless authorized to do in the cremation authorization...."

RESPONSE 38: The proposed rule already contains that exception.

COMMENT 39: Regarding (1)(g), crematories should be allowed to remove hazardous implants. Such devices are easily removed because they are located directly under the skin and can be removed with minimal training. There is no reason a crematory cannot remove a pacemaker or other medical device from a body. A crematory operator has more at stake in ensuring the removal of the device as the risk is to the crematory operator and his or her employees and equipment. Other states allow crematory operators to remove implants.

RESPONSE 39: It is not within the scope of practice of a crematory operator or crematory technician to remove implants. There is no authority granted to a crematory operator or technician and they have no minimum qualifications requiring comparable training. Because there is risk for explosion of the batteries in devices during the cremation process, the board rules propose that a mortician conduct due diligence in ruling out the existence of such a device. A mortician's education includes how to locate and remove these devices in order to minimize risk of electric shock and knowing that certain nuclide devices should only be removed by a physician.

COMMENT 40: Crematory operators charge \$45 to remove hazardous implants. Such economic benefit should be available to people in this state.

RESPONSE 40: It is illegal for a stand-alone crematory to offer such services. If mortician costs for the same service are indeed higher, it would not be a surprise as the illegally operating crematory would not be subject to the same requirements the board expects of morticians and mortuaries. The board understands that the costs of funeral services can be significant. The board's mission includes providing assistance to consumers to ask the right questions, encourage them to compare prices and services, and to make informed decisions to make meaningful arrangements and to control the costs for themselves and their survivors.

COMMENT 41: The rule limits the ability to create a new business or new industry, unless person is a licensed mortician. This is an illegal, anti-competitive, and anti-consumer attempt to regulate crematoriums like mortuaries when the two are separate and distinct entities by statute.

RESPONSE 41: The Business Standards Division regulates over 35 professions and occupations requiring licensure for individuals and businesses and is therefore subject to the same criticism found in the comment. The law does not outlaw a monopoly if it is created legally and the board's actions are not anti-competitive. See also responses to comments 9 and 22.

COMMENT 42: The Montana Legislature or the general public - and not the funeral board - should decide who may remove implanted medical devices.

RESPONSE 42: The Montana Legislature has already determined by including within the scope of practice of a mortician in Title 37, chapter 19, MCA, to prepare dead human bodies for final disposition and narrowly defined the scope of a crematory operator which cannot be stretched to include removing hazardous implants. It is a misdemeanor crime to "dissect" or perform any other "postmortem examination" on a dead human body, as per 50-21-106, MCA, unless one is a physician, coroner, medical examiner, or mortician preparing a dead human body for final disposition. Section 50-21-105, MCA.

COMMENT 43: Regarding (2), relegating the removal of a pacemaker to a preparation room is not related to the public health, safety, or welfare.

RESPONSE 43: The removal of a pacemaker implicates communicable disease, bloodborne pathogens, use of sharps, their disposal and medical waste disposal, sinks and water supply for cleaning and disinfecting, and hand washing facilities.

COMMENT 44: Regarding (2), clarify where the record of removal of a hazardous implant and disposition of the implant should be kept. A crematory will have no record of the removal or disposition of implants; this is a function of the mortuary. The cremation authorization should suffice.

RESPONSE 44: The board will change the word "Crematories" beginning third sentence to read "Morticians" because only a mortician would handle a hazardous implant. See also response to comment 51.

COMMENT 45: Regarding (3), crematory personnel may discuss their professional obligations and practices without the oversight of a mortician. Crematory businesses conduct their business and sell crematory goods which should not be regulated by morticians.

RESPONSE 45: Crematory personnel may discuss cremation procedures *that are within their scope of practice* without the oversight of a mortician. Crematory businesses are indeed regulated by the board, which is comprised of morticians, a crematory operator, a cemetery representative, and a public member.

NEW RULE I Transportation and Custody of Human Remains

COMMENT 46: Regarding (1), precluding the use of ambulance services by morticians to transport human remains will adversely impact smaller and rural firms when conducting a funeral service in one area and a death occurring in another area. The current practice has been ongoing for many years in Montana and other states. Ambulance personnel have more training than some currently licensed morticians.

The rule would prohibit a coroner from removing a body by ambulance if the funeral home is delayed and on occasion, an ambulance is the most expedient way to remove the deceased from public view. Rather than serving the public health and safety, such a restriction constitutes a monopoly on post-mortem taxicabs. The board should make clear whether an ambulance service becomes an "employee" of that funeral home and define who is ultimately responsible for transportation in that situation.

RESPONSE 46: The board will change language to omit reference to "employee of a mortuary" and instead have it read "or person who is properly trained...and for whose actions the mortician in charge will be responsible..."

COMMENT 47: New Rule I limits those who currently are allowed under law as regular citizens to remove remains from their homes. Transporting human remains does not require a mortician and there is no reason why a person employed by a crematory could not be properly trained and supervised. A lay person with no experience is given complete freedom to do this work for a deceased family member. The rule is designed to inhibit a stand-alone crematory and enhance the position of the 'tied-in' crematory and its mortician owners.

RESPONSE 47: The rule reflects the current law which prohibits a stand-alone crematory from engaging with the public, including the transportation of dead human bodies. The statute does not expressly authorize family members to transport their deceased loved ones; however, the board recognizes the common law duty of such family members to care for their deceased. Beyond this, the board will continue to

enforce the current statute which recognizes that if a family wants to contract away its duty, it must do so with a licensed mortician. The public interest is served by restricting who may transport deceased persons and requiring that they possess minimum qualifications and comply with standards of conduct to do so. See also response to comment 22.

COMMENT 48: The rule seems to imply that only a coroner, mortician, or employee of a mortician may transport, but 50-15-405, MCA, the purported authorization for this statement, is not about who is authorized to remove a body, but about the authorization to move it. The law does not specify who is authorized to move a body.

RESPONSE 48: The rule implements not only 50-15-405, MCA, but various statutes in Title 37, chapter 19, MCA, including the definition of "mortuary" which includes "transportation" as part of the scope of practice of a mortuary and mortician at 37-19-101(28), MCA. Any "transportation" performed by a crematory only refers to the return of the cremated remains as directed.

NEW RULE II Cremation Records

COMMENT 49: In (1)(b), allowing a crematory operator to use a cremation authorization form will further confuse the public that the crematory operator has the same authority as a mortician.

RESPONSE 49: The board trusts that these rules provide sufficient guidance and that crematory operators will conform their conduct to them.

COMMENT 50: Regarding (1)(c), it is unclear what is required in this document.

RESPONSE 50: The rule refers to the statute and is sufficiently clear.

COMMENT 51: Subsection (1)(e) urges the board to make distinction and exceptions to rules like these between free-standing crematories and crematories that are essentially part of the mortuary.

RESPONSE 51: The rule applies to both a free-standing crematory and a crematory attached to a mortuary, the common denominator being a cremation. The records for the cremation must be kept; whether they are kept at the business office of a mortuary with an in-house crematory or in an office in the crematory is of no consequence. The board will change the name of the rule to CREMATION RECORDS to help avoid confusion on this point.

COMMENT 52: Regarding (1)(d), there is no point in keeping a record of when the deceased arrived at the funeral home when a crematory is attached to the funeral home. The commenter objects to requiring the "time" of arrival to be recorded.

RESPONSE 52: The reason for tracking the arrival time is to ensure that maximum time limits on holding a body without refrigeration or embalming are met and applies to all bodies intended to be cremated, whether the crematory is stand-alone or attached to a mortuary.

COMMENT 53: The "reason" uses the term "funeral practitioner." There is confusion about whether "funeral practitioner" includes a crematory operator and there should be a distinction.

RESPONSE 53: The term "funeral practitioner" refers to both a crematory operator and a mortician for the limited purpose of the paragraph in question. The term "funeral practitioner" is not used anywhere else in the rule notice and is not meant to convey that a crematory operator may perform "funeral-related" acts within its scope of practice other than limited to cremating as described elsewhere in this adoption notice.

COMMENT 54: The "reason" refers to the "funeral practitioner" being required to print and maintain copies of the death certificate, which is not necessary to keep on file when other forms meet the prerequisite to cremate. A death certificate can take additional time to receive, delaying cremation and creating additional costs to the consumer for refrigeration or embalming.

RESPONSE 54: The statement of reasonable necessity misstated the requirement for the death certificate to be kept in the cremation-related records. The death certificate is maintained by the mortuary for all deaths and not just those related to cremations. In the case of a free-standing crematory, as it has no authority with regard to the death certificate, one would not be kept on file in that case. The death certificate is maintained by the mortuary.

COMMENT 55: This rule appears to be reasonable and, hopefully, consistent with what is required of morticians.

RESPONSE 55: The rule is applicable to free-standing crematories and morticians who are dually licensed as crematory operators and morticians.

NEW RULE III Cremation Authorizations

COMMENT 56: This rule appears to be appropriate, other than the board's concern in (3) that crematory operators are out to sell prearranged funeral services. Funeral services include those things specific to funerals; cremation services include those things specific to cremations. Pre-need cremations should be part of the cremation industry and not be controlled by the mortician/funeral industry in the same way that pre-need funeral arrangements are not the purview of the crematory industry.

RESPONSE 56: Regardless of the commenter's suggested segregation of two separate "industries," the board still regulates both crematories and funeral services

and deems it reasonably necessary to emphasize that crematory operators may not enter pre-need contracts.

COMMENT 57: If the crematory is contracting with the mortuary to do a cremation and not the general public, this rule would be confusing and cause problems. It would be better to say that a crematory that is selling goods and services be attached to a licensed mortuary and that free-standing crematories are required to operate as such under the current regulation.

RESPONSE 57: See responses to comments 7 and 8.

COMMENT 58: The language of (2) poorly integrates the provisions in 37-19-708, MCA, and there is confusion about the interaction between a pre-need cremation authorization and the cremation authorization form, whether one supersedes, whether even if a pre-need cremation authorization form is executed, a cremation authorization form is still required to be executed.

RESPONSE 58: The rule is sufficiently clear.

COMMENT 59: There is a concern that the rule seems to remove a person's right to authorize their own cremation on a pre-need basis.

RESPONSE 59: The board does not agree.

COMMENT 60: If a pre-need cremation authorization may be executed, a cremation authorization form containing all of the proper disclosure and warranties must also be executed. Does the next of kin still need to sign off?

RESPONSE 60: An authorizing agent must execute a cremation authorization form prior to cremation.

COMMENT 61: Regarding (5), the law does not specify that a mortician is necessary for the certification of the removal of a hazardous implant. At independent crematories, crematory operators receive certification from other persons.

RESPONSE 61: The mortician is required to certify or obtain a certification from the family member, a physician, or a coroner that the removal has been performed.

COMMENT 62: Regarding (5), where a mortician must certify that remains presented to the crematory are those of the decedent identified by the authorizing agent - typically the authorizing agent who can identify the person is the county coroner. Why would a mortician need to be involved in the identification of a deceased person? Typically a person's own next of kin can identify them well enough.

RESPONSE 62: In Montana, a mortician has the obligation to identify the human remains, whether by coroner, next of kin, or other reliable method.

COMMENT 63: Regarding (5)(c), personal property identified removed from the remains of the decedent, a commenter said you don't need a mortician to do that. Family members can do that.

RESPONSE 63: Certainly, family members may have removed personal property of the decedent, unless they had no chance to do so. However, providing the disclosure regarding personal property will protect the funeral provider as well as the family member.

COMMENT 64: Subsections (5)(a) and (b) cut out anyone trying to develop this kind of business and limits competition and violates "general business ideals."

RESPONSE 64: See responses to comments 9 and 22.

COMMENT 65: Numerous comments, both in favor and against the idea, were made addressing a proposed board-approved cremation authorization form.

RESPONSE 65: Due to limited resources available to further develop the form and concerns about the potential liability to the board for requiring use of such a form, the board determined at this time to adopt the proposed rules without requiring a board-approved cremation authorization form and will accordingly amend the ARM 24.147.1110(1), New Rule II(1)(b), and New Rule III(2) references to "board-approved" form.

General Comments

COMMENT 66: A number of senior citizen residents living in central Montana ask the board to avoid making rules that will make it difficult for them to know with certainty whether or not the funeral directives they wish to leave will be followed and at a reasonable price. The commenters stated that Central Montana Crematorium offered services at a reasonable cost and that its closure will result in increased costs to their families which they find unacceptable. The commenters asserted that the board's recent actions do not have the public benefit in mind and asked that the board make it possible once again for the service they expected from CMC, which was exemplary over the past ten years. The commenters expressed serious questions as to the motives behind these rule changes and asked the board to serve the public and not just some part of the funeral industry.

RESPONSE 66: See responses to comments 9, 22, and 47.

COMMENT 67: The proposed rules have no rational relationship to the public's health, welfare, and safety; they are not supported by scientific evidence nor do they comport with standard practice in the industry; they violate due process and equal

protection; they unfairly and illegally discriminate against crematories; and they are anti-competitive and unlawfully restrain trade in violation of state and federal law.

RESPONSE 67: The rules and the legislation on which the rules are based do not violate the Equal Protection Clause or Due Process Clause because there is a rational basis for restricting unlicensed practice of transporting, preparing, and supervising the final disposition of deceased persons for the benefit of communicable disease prevention, fraud prevention, accuracy in cause of death determinations, including the elimination of criminal conduct in the cause of death, and vital statistics records. The rules and legislation on which the rules are based do not unfairly or illegally discriminate against crematories: the requirement to hold a license to practice funeral services applies to everyone, not just owners of crematories. It is not a protected class.

COMMENT 68: The board should provide a definitive answer regarding whether these rules apply to a tribally incorporated mortuary located on an Indian reservation and to an individual licensed mortician associated with that mortuary.

RESPONSE 68: The rules apply to a licensed mortician regardless of whether the mortuary qualifies for an exception under federal or state law.

COMMENT 69: The rules will make it illegal to provide cremation services to consumers unless the business employs a full-service mortician. Board action in promulgating these rules constitutes abuse and exploitation of citizens, limits business, and limits choices for citizens. The proposed rules support archaic, traditional funeral homes that would otherwise need to adapt and modernize to serve contemporary consumer demands. The amendments seem more geared to protect the profits of funeral homes than to best represent the interests of Montana's funeral consumers.

RESPONSE 69: The rules clarify the current statutes, present in numerous other states, that allow a crematory to only provide "wholesale" services to mortuaries and not to the general public. The board, in attempting to serve consumer demands, has promulgated rules that allow immediate family members limited direct contact with crematories. See also responses to comments 22 and 47.

COMMENT 70: Funeral homes will provide, upon request, any variety of assistance the consumer requests.

RESPONSE 70: The board's mission includes to provide information to consumers and to educate them about the options that are available to them.

COMMENT 71: Public safety and welfare require regulations to prevent the occurrence of incidents that have occurred in other states without regulation where crematories failed to cremate remains and cemeteries failed to bury the dead.

RESPONSE 71: The board acknowledges its mission to serve the public safety and welfare to prevent these types of occurrences.

COMMENT 72: Concerns regarding the regulation of crematories should be addressed through the direct regulation of crematories, rather than assuming that funeral homes will oversee crematories regarding the appropriate dispersal of human remains.

RESPONSE 72: Crematories are regulated and are required to either provide services to a mortuary or provide limited services to the public.

NEW RULE IV Military Training or Experience

COMMENT 73: The language setting forth the military experience is too vague. The board should define how many years of education, in addition to military training, will qualify a person for licensure.

RESPONSE 73: The authorizing statute requires the board to allow relevant training, service, or education received in the military. The determination will have to be made on a case by case basis if such an application is presented to the board per 37-1-145, MCA.

COMMENT 74: The comment objects to allowing any less experience than what is currently required.

RESPONSE 74: The statute imposes a mandatory requirement on the board.

COMMENT 75: Because the rule suggests that a DD214 form is required, and certain non-activated reservists and national guardsmen do not receive a DD214, a commenter suggested the board amend the rule to permit other evidence to show an applicant's military discharge.

RESPONSE 75: The board will amend the rule as suggested in the comment.

4. The board has amended ARM 24.147.1101 and 24.147.1102 exactly as proposed.

5. The board has repealed ARM 24.147.1103 exactly as proposed.

6. The board has amended ARM 24.147.1110, 24.147.1111, and 24.147.1112 with the following changes, stricken matter interlined, new matter underlined:

24.147.1110 INTEGRITY OF IDENTIFICATION PROCESS (1) A crematory may not accept or cremate human remains until it has received warranties of truthfulness regarding the identity of the remains to be cremated and regarding the

authority of the signer to order cremation. A cremation authorization form ~~provided by the board~~, properly executed, shall satisfy these warranties.

(2) through (2)(d) remain as proposed.

(e) Staff shall affix an identification label to the ~~sealed~~ closed urn or container in a permanent manner that ensures the integrity of the identification of the remains.

(3) remains as proposed.

24.147.1111 CREMATION PROCEDURES (1) through (4) remain as proposed.

(5) Except for persons having the right of disposition who request to witness the ~~crematory procedure~~ cremation, board inspectors, or persons authorized by the crematory operator-in-charge to be present, unauthorized persons may not be permitted in the cremation chamber area while any human remains are being placed within the cremation chamber, being cremated, or being removed from the cremation chamber. This section may not be construed to allow a crematory that is not attached to a mortuary to:

(a) through (6)(e) remain as proposed.

(f) place the bag in a sturdy, properly ~~sealed~~ closed temporary container, or in an urn provided by the authorizing agent, with the name of the deceased person and other proper identification affixed to the outside of the containers; and

(g) through (10) remain as proposed.

24.147.1112 CREMATORY PROHIBITIONS (1) remains as proposed.

(a) transport human remains without the direction of a mortician who is responsible for the transport, make arrangements, engage in funeral directing, or engage in mortuary science, as such terms are defined in 37-19-101, MCA;

(b) through (g) remain as proposed.

(2) A hazardous implant may only be removed by a mortician at a mortuary or branch mortuary establishment with a preparation room, unless removal has taken place at a medical facility by appropriate medical personnel. The mortician shall keep a record of the removal and disposition of the implant. ~~Crematories~~ Morticians must recycle hazardous implants if such service is available, and may only discard them in accordance with federal, state, and local laws and regulations.

(3) remains as proposed.

7. The board has adopted NEW RULES I (24.147.408), II (24.147.1105), III (24.147.1107), and IV (24.147.508) with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I TRANSPORTATION AND CUSTODY OF HUMAN REMAINS

(1) Upon authorization specified at 50-15-405, MCA, by a physician, physician designee, coroner, or mortician to remove and transport human remains, only a coroner, mortician, or ~~employee of a mortuary~~ person who is properly trained and for whose actions supervised by the mortician-in-charge will be responsible may transport the body to either a mortuary, coroner's morgue, or, in cases in which direct cremation or burial is legally permissible and authorized, directly to a crematory or cemetery.

(2) and (3) remain as proposed.

NEW RULE II CREMATORY CREMATION RECORDS (1) through (1)(a)(ii) remain as proposed.

(b) a cremation authorization form ~~approved by the board~~ and signed by an authorizing agent;

(c) through (3) remain as proposed.

NEW RULE III CREMATION AUTHORIZATIONS (1) remains as proposed.

(2) A "cremation authorization" must be executed ~~on a board-approved form~~ by an authorizing agent and may not conflict with any pre-need cremation authorization executed by the decedent in accordance with 37-19-708, MCA, or disposition directions made in accordance with 37-19-903, MCA.

(3) remains as proposed.

(4) The ~~board-approved~~ cremation authorization form must include:

(a) through (6) remain as proposed.

NEW RULE IV MILITARY TRAINING OR EXPERIENCE (1) through (2)(d) remain as proposed.

(3) An applicant must submit satisfactory evidence of receiving military training, service, or education that is equivalent to relevant licensure requirements as morticians, mortician interns, crematory operators, and crematory technicians. ~~At a minimum, satisfactory~~ Satisfactory evidence shall include includes:

(a) a copy of the applicant's military discharge document (DD 214 or other discharge documentation);

(b) through (4) remain as proposed.

BOARD OF FUNERAL SERVICE
JOHN TARR, 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 August 25, 2014