



TEXAS FUNERAL SERVICE COMMISSION

510 S. Congress Ave. Suite 206
Austin, Texas 78704-1716
Tel: (512) 479-7222 Fax: (512) 479-5064
email: tfsc@mail.capnet.state.tx.us

MS. ELIZA MAY, M.S.S.W.
Executive Director

October 23, 1997

Opinions Committee
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711

FILE # ML-39852-97
I.D.# 39852

RECEIVED

OCT 27 1997

RQ-1019

Opinion Committee

Dear General Morales:

The Texas Funeral Service Commission requests the Attorney General's opinion on whether the Commission has authority to promulgate a rule that exempts a funeral establishment that does not provide embalming services from the requirement of having a preparation room at its facility. If the Commission has such authority the Commission also requests the Attorney General's opinion on whether the Commission has authority to promulgate a rule specifying certain limited restorative embalming activities that may be performed by a licensed embalmer at an exempt facility.

The Texas Mortuary Laws are found at Article 4582b, Vernon's Civil Statutes. A "funeral establishment" is defined therein as a place of business where funeral directing services or embalming services are performed. In contrast a "commercial embalming establishment" is defined as a place of business where only embalming services are performed. Unfortunately the statute does not define a place of business where only funeral directing services are performed (i.e., a funeral establishment that engages in funeral directing activities and the retail sale of funeral merchandise to the public but does not provide embalming services). It is the increasing popularity of this third method of doing business that has prompted the Commission to seek this opinion.

1 The statute defines funeral establishment as follows:

The term "funeral establishment" as used herein is a place of business used in the care and preparation for burial or transportation of dead human bodies, or any place where one or more persons, either as sole owner, in co-partnership, or through corporate status, represent themselves to be engaged in the business of embalming and/or funeral directing, or are so engaged. Such funeral directing and embalming shall be performed only by a licensed funeral director, a licensed embalmer, a provisional licensee, or a qualified mortuary student under the supervision and direction of a licensed funeral director and/or embalmer.

(Article 5482b, Vernon's Civil Statutes, Section 1(G)).

2 The statute defines commercial embalming establishment as follows:

A "commercial embalmer" or "commercial embalming establishment" is one that embalms for licensed funeral establishments and does not sell any services or merchandise directly or at retail to the public, and shall otherwise meet the requirement of a licensed embalmer as provided in this Act. A commercial embalmer or commercial embalming establishment may not employ an embalmer who is not licensed under this Act.

(Article 5482b, Vernon's Civil Statutes, Section 1(L)).

The statute provides that each funeral establishment is required to have a physical plant as well as equipment which meet certain specified criteria, including a preparation room for the provision of embalming services.³ The statute specifically exempts a commercial embalming establishment from having to meet certain requirements that pertain to the provision of funeral directing services, such as a facility in which funeral services may be conducted and a casket display. (Article 4582b, Vernon's Civil Statutes, Section 4(C)). However there is no parallel provision in the statute exempting a business that performs only funeral directing services from any of the requirements pertaining to the provision of embalming services, most notably the requirement that the establishment have a preparation room.

The statute provides the Commission with authority to issue rules and regulations as shall comply with and shall effect the intent of the provisions of the statute relating to funeral establishments. (Article 4582b, Vernon's Civil Statutes, Section 4(F)). In addition the statute provides the Commission with authority to issue a rule specifying the facilities, equipment, and supplies required in a preparation room to ensure provision of adequate embalming services. (Article 4582b, Vernon's Civil Statutes, Section 4(c)(4)). Pursuant to this statutory authority the Commission adopted Rule 203.17 effective February 27, 1996 which prescribes the minimum standards required in a preparation room, and which further exempts a funeral establishment which does not provide embalming services from the requirement of having a preparation room at its facility if certain requirements are met.⁴ The exemption allows a funeral establishment that

³ The statute provides each funeral establishment is required to have a physical plant, equipment and personnel consisting of:

- (1) Some facilities in which funeral services may be conducted;
 - (2) A physical plant which meets building standards and fire safety standards of the state and of the municipality in which the establishment is located;
 - (3) Access to rolling stock consisting of at least one motor hearse;
 - (4) A preparation room containing facilities, equipment, and supplies required by commission rule to ensure provision of adequate embalming services and other facilities necessary to comply with the sanitary code of the state and the municipality in which the room is located;
 - (5) A display containing sufficient merchandise to permit reasonable selection, including five (5) or more adult caskets, provided that the least expensive casket offered for sale by a funeral establishment must be visibly displayed without concealment in the same general manner as other caskets are displayed;
 - (6) Sufficient licensed personnel who will be available to conduct the operation of the funeral establishment;
 - (7) A physical plant located at a fixed place, and not located on any tax-exempt property or cemetery; and
 - (8) A physical plant which meets the health standards or health ordinances of the state and of the municipality in which the establishment is located.
- (Article 4582b, Vernon's Civil Statutes, Section 4(C)) (Emphasis added).

⁴ The Rule provides as follows:

- (a) The commission will approve only those preparation rooms which meet the requirements of Texas Civil Statutes, Article 4582b, Section 4(C)(4), and the following minimum standards prescribe by the commission:

provides only funeral directing services to significantly reduce financial costs and decrease regulatory burdens associated with maintaining a preparation room. In such a situation the exempt funeral establishment would provide embalming services to customers either by contracting for such services with an off-premises licensed commercial embalming establishment or another licensed funeral establishment. In either case the facility providing the embalming services would be required to be fully licensed, would be required to be in compliance with the Texas Mortuary Laws and rules promulgated by the Commission (including Rule 203.17), and would operate under the regulatory purview of the Commission as well as applicable state and municipal health agencies. The Commission respectfully requests the opinion of the Attorney General on whether the Commission has authority under the statute to promulgate this rule.

If the Commission has such authority the Commission also requests the Attorney General's opinion on whether the Commission has authority under the statute to promulgate a

(1) must be of sufficient size and dimensions to accommodate an operating table, a sink with water connections, and an instrument table, cabinet, or shelves:

(A) the operating table must have a rust proof metal or porcelain top, with edges raised at least 3/4 inch around the entire table and a drain opening at the lower end;

(B) the sink must have hot and cold running water and drain freely;

(C) the faucet must be equipped with an aspirator;

(2) must contain an injection/embalming machine and sufficient supplies and equipment for normal operations;

(3) must be clean, sanitary, and not used for other purposes;

(4) must not have defective construction which permits the entrance of rodents;

(5) must not have evidence of infestation of insects or rodents;

(6) must be private and have no general passageway through it;

(7) must be properly ventilated with an exhaust fan that provides at least five room air exchanges per hour;

(8) must not have unenclosed or public restroom facilities located within the room;

(9) must have walls which run from floor to ceiling and be covered with tile, or by plaster or sheetrock painted with washable paint;

(10) must have floors of concrete with a glazed surface, or tiled in order to provide the greatest sanitary condition possible;

(11) must have doors, windows, and walls constructed to prevent odors from entering any other part of the building;

(12) must have all windows and openings to the outside screened.

(b) The majority owner or designated agent of record of a funeral establishment may submit a written petition to the commission requesting an exemption to subsection (a) of this section. Each petition shall clearly state:

(1) each location's name and address;

(2) that the exempt establishment is located within 50 miles of the facility at which embalming services are performed;

(3) that no embalming services will be performed at the exempt funeral establishment location;

(c) Upon receipt of the petition and the determination by the executive director that the criteria listed in subsection (b) of this section have been met, the executive director will notify the petitioner that the exemption has been granted and will remain in effect so long as the criteria listed in subsection (b) of this section remain unchanged.

rule specifying certain limited restorative embalming activities that a funeral establishment may perform at an exempt facility. When a body that has been embalmed at a licensed commercial embalming establishment or funeral establishment is transported to an exempt funeral establishment for a viewing or for a funeral service there may be emergency situations requiring that certain limited restorative embalming activities be performed before a viewing or funeral service can occur. Such emergency restorative embalming activities might include re-aspirating a body that already has been embalmed which needs further restorative aspiration work performed, or providing additional cosmetic work on a body that already has been embalmed. The Commission is requesting the opinion of the Attorney General on whether the Commission has authority to promulgate a rule outlining certain limited restorative embalming activities that are permissible to be performed at an exempt funeral establishment by a licensed embalmer, in lieu of re-transporting the body to the commercial embalming establishment or non-exempt funeral establishment where the embalming services were originally performed.

Any questions regarding this matter may be directed to me.

Very truly yours,



Jeffrey L. Schrader
Legal Counsel

cc: Eliza May, Executive Director