

WEST VIRGINIA LEGISLATIVE RULE
ATTORNEY GENERAL
CHAPTER 47-14, 46A-6, AND 46A-7
SERIES 8

FILED

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Title: Legislative rule pertaining to the
administration of preneed burial
contracts.

	<u>Page No.</u>
Section 1. General Provisions	1
2. Definitions	2
3. Annual Report	4
4. Application for Certificate of Authority or License; Contents of Application.	5
5. Initial Examinations	6
6. Second or Subsequent Examinations	6
7. Trust Accounts	8
8. Provision of Goods and Services Under Preneed Funeral Contract at Death of Contract Beneficiary	8
9. Contents and Execution of Contracts	10
10. Default by the Contract Buyer	13
11. Sale or Transfer of Certificate of Authority or License Prohibited	13
12. Multiple Price Lists Prohibited	14
13. Disciplinary Proceedings	14
14. Insolvency	15
15. Notice of Contract Irrevocability	15
16. Applicability of Freedom of Information Act	16
17. Violation of Rule; Enforcement	17

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Title: Legislative rule pertaining to the
administration of preneed burial
contracts.

Section 1. General Provisions.

~~1.1 Rule Designation - This rule is legislative.~~

1.2 Scope - This rule sets forth certain requirements for sellers of preneed burial contracts, the contract contents, and other matters pursuant to the Preneed Burial Contracts Act, W. Va. Code Sections 47-14-1 et seq.

1.3 Authority - The authority for this regulation is W. Va. Code Sections 47-14-9; 46A-6-103; and 46A-7-102(1)(e).

1.4 Filing Date - May 27, 1988

1.5 Effective Date - August 25, 1988

1.6 Repeal of Former Rule - Not Applicable.

1.7 Penalties - Except as indicated, a violation of the provisions of this rule shall constitute a violation of the provisions of the Preneed Burial Contracts Act, W. Va. Code Sections 47-14-1 et seq., and shall constitute an "unfair or deceptive act" as prohibited by W. Va. Code Section 46A-6-104, thereby triggering appropriate remedies provided for violations of that section.

1.8 Construction - These rules are to be liberally construed to effectuate the provisions of the Preneed Burial Contracts Act, W. Va. Code Sections 47-14-1 et seq., and the West Virginia Consumer Credit and Protection Act, W. Va. Code Sections 46A-1-101 et seq.

1.9 Severability - If, for any reason, any section, subsection, sentence, phrase, clause, or provision of this rule or the application thereof is held unconstitutional or invalid, such unconstitutionality or invalidity

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 1

shall not affect other sections, subsections, sentences, phrases, clauses, or provisions or its application to any other person or circumstance, and, to this end, each and every section, subsection, sentence, clause, phrase, or provision of this rule is hereby declared severable.

Section 2. Definitions.

2.1 "Annual report" means the report required to be filed with the Department under the provisions of W. Va. Code Section 47-14-3 and section 3 of this rule.

2.2 "Burial goods" means all goods supplied in regard to burial, entombment in a mausoleum, or inurnment in a columbarium, but does not include those services performed by a cemetery when acting only as a cemetery, or the sale by any person of cemetery lots, land, or interests therein, services incidental thereto, or the sale by any person of markers, memorials, monuments, equipment, crypts, urns, burial vaults, or vaults constructed or to be constructed in a mausoleum or columbarium. As used herein, "equipment" shall include only devices used to move, store or construct those other items specifically excluded from this definition. However, when any person, by the same contract, sells burial goods and other items or services excluded from this definition, such a contract shall be considered a "preneed funeral contract" within the meaning of this rule and Chapter 47, Article 14, of the Code.

2.3 "Funeral goods" means those items of merchandise sold or offered for sale directly to the public by any person which will be used in connection with a funeral or alternative for disposition of human remains, but does not include those services actually performed by a cemetery acting only as such, or in the sale by the cemetery of cemetery lots, land, or interest therein, services incidental thereto, or the sale by any person of markers, memorials, monuments, equipment, crypts, urns, burial vaults or vaults constructed or to be constructed in a mausoleum or columbarium. As used herein, "equipment" shall include only devices used to move, store or construct those other items

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 2

specifically excluded from this definition. However, when any person, by the same contract, sells funeral goods and other items or services excluded from this definition, such a contract shall be considered a "preneed funeral contract" within the meaning of this rule and Chapter 47, Article 14, of the Code.

2.4 "Funeral services" means those services usually performed by a funeral service licensee, including, but not limited to, care and preparation of human remains and coordinating rites, ceremonies, and processions in connection with the disposition of human remains carried out at the request of any individual responsible for funeral and disposition arrangements. However, when any person, by the same contract, sells funeral services and other items or services excluded from this definition, such a contract shall be considered a "preneed funeral contract" within the meaning of this rule and Chapter 47, Article 14, of the Code.

2.5 "Preneed funeral contract" means any contract, agreement, mutual understanding, series or combination of contracts, agreements and mutual understandings, other than a contract of insurance, under which, for a specified consideration paid in advance of death in a lump sum or by installments, a person promises to furnish or make available or provide funeral services, funeral goods or burial goods for use at a time determinable by the death of the "contract beneficiary" who is either named or implied. The payment of money to a person who provides funeral goods or services or burial goods or who sells or makes available preneed funeral contracts, which payment is to be applied toward the eventual funeral or burial expenses of a "contract beneficiary," creates a preneed funeral contract even though no particular goods or services are selected or promised.

2.6 "Reporting year" means, for the 1987 reporting year, the period commencing on June 14, 1987, and ending at midnight on December 31, 1987; for the 1988 reporting year, the period commencing on January 1, 1988, and ending at midnight of August 31, 1988; for all subsequent years, the twelve-month period commencing on September 1 and ending at midnight of August 31 in the following calendar year.

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 2

2.7 All other terms used in this rule shall be defined as those terms are defined in W. Va. Code Section 47-14-2.

Section 3. Annual Report.

3.1 Each and every person who applies for renewal of a certificate of authority pursuant to the provisions of W. Va. Code Section 47-14-3 shall be required to make an annual report for each reporting year or portion thereof as set forth in section 2.6 of this rule. Such report shall be filed at the time the application for renewal is filed.

3.2 Each annual report shall contain the following information:

3.2.1 An identification of all outstanding preneed funeral contracts, the dates upon which such contracts were entered, the names of all parties involved in such contracts or having any rights under such contracts, the amounts paid on such contracts, and the amounts owing on any contracts upon which payments are incomplete, or, with respect to contracts which will be funded by the proceeds of a life insurance or annuity contract for the contract beneficiary, the amount of such insurance or annuity, the insurance agent and insurer, the current beneficiary and the method of payment for such insurance or annuity contract;

3.2.2 The name of the seller and the name of the provider of services and goods and a statement that the provider has the capacity to perform all of its obligations under its contracts;

3.2.3 A statement that the seller and the person receiving funds paid thereunder have complied with applicable trust requirements of the Preneed Burial Contracts Act and this rule, identifying the present depository or holder of all trust funds with amounts thereof itemized as to each contract. This statement shall also include an accounting for each trust fund, describing all payments to and disbursements from the fund.

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 3

3.2.4 Any changes or amendments in any contracts or obligations of the contract seller or provider that have occurred during the reporting year which were not previously reported to the Department pursuant to W. Va. Code Section 47-14-8(f) and section 9.6 of this rule; and

3.2.5 The current price list of the provider for funeral goods and services and any other price list employed since the previous annual report.

3.3 No extensions shall be granted for any reporting year unless the holder of a certificate of authority is unable to gather the requisite information to complete the annual report and establishes such inability to the satisfaction of the Department. Any such extension shall be for a period and upon such terms as the Department, in its discretion, deems appropriate.

Section 4. Application for Certificate of Authority or License; Contents of Application.

4.1 No person shall sell, offer for sale, make available or be a provider of a preneed funeral contract until such time as he has received a certificate of authority from the Department. Employees or agents of persons holding a certificate of authority and who are involved in actually selling preneed funeral contracts must have a license issued by the Department. No person shall be eligible to obtain a license to sell preneed funeral contracts unless he or she also holds a certificate of authority or is employed by the holder of a certificate of authority.

4.2 No person, other than a bank, trust company, savings and loan association or other financial institution as provided in W. Va. Code Section 47-14-3(a), may act as a trustee with respect to funds paid on preneed funeral contracts unless he has procured a certificate of authority.

4.3 The Department shall prescribe the necessary forms for applying for a certificate of authority or license. These forms shall be used by all applicants.

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 4

4.4 Application for the renewal of a certificate of authority or license for the year commencing January 1, 1988, shall be submitted by March 1, 1988. Applicants holding certificates or licenses from 1987 who submit timely renewal applications may continue to do business under the previous certificate or license until the renewal is granted or refused by the Department. In all subsequent years, commencing with November 1, 1988, all such renewal applications shall be due by November 1. Commencing with December 31, 1988, all such certificates of authority and licenses will expire on December 31 of each year.

Section 5. Initial Examinations.

5.1 Examination of the records of a holder of a certificate of authority by the Department, or at its direction, may occur with or without advance notice of such examination.

5.2 Holders of certificates of authority shall make all books, records, and other information relating to preneed funeral contracts available during regular business hours.

5.3 The Department shall be entitled to charge fees and expenses to a holder of a certificate of authority for an initial examination within a reporting year if the examination reveals or confirms any violation of the provisions of the Preneed Burial Contracts Act or this rule. Fees and expenses for such examination shall be assessed as provided in section 6.2 of this rule.

5.4 Failure to provide necessary records or submit to any examination or pay the expenses assessed therefore shall result in suspension or revocation of the certificate of authority.

Section 6. Second or Subsequent Examinations.

6.1 When the Department has reason to believe that a holder of a certificate of authority or a licensee

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 6

employed by a certificate holder is violating the provisions of the Preneed Burial Contracts Act or this rule, and an initial examination has already been conducted for such holder during the reporting year, the Department may petition the Circuit Court of Kanawha County or the circuit court of the county wherein such holder of a certificate of authority does business for permission to conduct a second or subsequent examination. Such court, if it concludes that the Department's determination is not clearly erroneous, shall order an examination of the records or compel the examination of any interested person under oath. The proceedings on such a petition shall be adversary, with notice to all interested parties.

6.2 In addition to an examination fee, up to a maximum of \$500.00 as fixed by the Department pursuant to W. Va. Code Section 47-14-3(i)(3), and an hourly charge, based on the examiner's salary, for the time spent in conducting the examination, the following expenses shall be assessed:

6.2.1 Travel expenses assessed at the mileage permitted by the state in using personal automobiles for travel on state business or the expenses incurred by the Department in securing a vehicle from the Department of Finance and Administration Motor Pool, or other actual expenses incurred in such travel for securing transportation;

6.2.2 Hotel or lodging expenses as necessary for any examination;

6.2.3 Meals and other services as permitted by travel regulations of the Department or the state;

6.2.4 Any other reasonable and necessary expenses incurred as a result of the examination, including, but not limited to: printing, photocopying, long distance telephone tolls; access fees, equipment rental expenses or fees of a court reporter or stenographer for transcribing or reproducing statements or testimony.

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 6

6.3 The provisions of this rule are in addition to the investigative powers of the Department as provided in W. Va. Code Section 46A-7-111 and are not intended to diminish or qualify such powers.

Section 7. Trust Accounts.

7.1 All funds paid to or collected by any person on a preneed funeral contract and not exempted by W. Va. Code Section 47-14-5(a)(1) or Section 16 of this rule, shall be deposited in a trust account within thirty days of receipt. The trust account shall be administered: (i) by the provider, contract seller, or person making the preneed funeral contract available, acting as trustee; (ii) under the terms of a trust instrument entered into with a national or state bank having trust powers and located in this state; or (iii) under the terms of a trust instrument entered into with a board of at least three individual trustees as provided in W. Va. Code Section 47-14-8(b).

7.2 All trustees shall include in their annual report a statement accounting for fees charged against the trust, which fees shall be subject to review by the Department in order to determine whether they are reasonable in amount. Any fees found to be excessive shall be repaid to the trust.

7.3 All individual members of boards of trustees, as provided for in W. Va. Code Section 47-14-8(b) and section 7.1(iii) of this rule, shall obtain a fidelity bond as required by W. Va. Code Section 47-14-8(b) and shall file this bond with the Department at the time of application for a certificate of authority. No other trustee need obtain a fidelity bond.

Section 8. Provision of Goods and Services Under
Preneed Funeral Contract at Death of
Contract Beneficiary.

8.1 To the extent that a person who is a provider, contract seller or one who makes a preneed funeral contract available, based on price lists in effect at the

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 8

contract beneficiary's death, would charge more than the contract price for the goods and services provided, such person may have and use so much of the principal and interest of any trust fund as may be necessary to defray the cost over the contract price. In no event, however, unless the contract has been cancelled as provided in section 10 of this rule, shall such person fail or refuse to make available goods and services of the type for which the contract provides even though the costs exceed the value of the trust fund or other proceeds available for such purpose. The goods and services shall be provided for the amount available in the trust or other proceeds in such a situation. Substitution of goods of equivalent quality and value may be made only after notice to the contract buyer or the next of kin of the beneficiary and only when it can be demonstrated that the goods described in the contract are unavailable.

8.2 On or before the first day of January and the first day of July of each year, the trustee and the provider, contract seller or person who made the preneed funeral contract available shall file a report with the Department, describing the goods and services provided after the death of any contract beneficiary during the previous six-month period, accounting for all expenditures and disbursements from the trust or other proceeds, justifying by reference to current price lists any increase over the original contract cost and explaining any substitution of goods or services.

8.3 In the event that the contract buyer was not the contract beneficiary, all trust monies or other proceeds not properly applied toward the costs of providing the goods and services shall be returned to the contract buyer, his estate or designee. If the contract beneficiary was also the contract buyer, any such excess shall be paid to the contract beneficiary's estate or designee.

8.4 It is a purpose of the Act and this rule to enable the buyer of a preneed funeral contract to secure a fixed price for specific funeral goods and services or burial goods, subject only to increases authorized pursuant to sections 8.1 and 15.4 of this rule. No provider, contract

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 8

seller or person who makes a preneed funeral contract available may enter a preneed funeral contract which does not establish a fixed price for specific goods and services unless the buyer has been fully informed of the rights guaranteed by such a contract and such buyer has declined to specify goods, services and prices.

Section 9. Contents and Execution of Contracts.

9.1 All preneed funeral contracts which do not follow such official forms as may be promulgated by the Department shall be in writing and contain the following:

9.1.1 The name and address of the contract buyer and the contract beneficiary, if a different person;

9.1.2 Any statement required by the provisions of the Truth in Lending Act and Regulation Z, 15 U.S.C. Sections 1601 et seq., and 12 C.F.R. Section 226;

9.1.3 Any notice of cancellation required by the provisions of the Cooling Off Period For Door-to-Door Sales Rule, 16 C.F.R. Section 429 or the home solicitation sales provisions of W. Va. Code Sections 46A-2-132 to 135;

9.1.4 Any statement required by the provisions of the Preservation of Consumers' Claims and Defenses Rule, 16 C.F.R. Section 433.

9.1.5 Unless the contract is made irrevocable under the provisions of section 17 of this rule, a statement that the person shall have the right to cancel the preneed funeral services contract at any time and receive a refund of all monies paid and the return of any documents or instruments of obligation in the seller's possession; provided that, if any goods or services are being sold under the contract which are not "burial goods," "funeral goods" or "funeral services" as defined in W. Va. Code Section 47-14-2 and the contract seller wishes to retain monies paid therefor or the ten percent exclusion permitted by W. Va. Code Section 47-14-5, such right of retention and exclusion shall be clearly and

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 9

conspicuously set forth on the face of the contract in a clause which must be separately acknowledged by the contract buyer.

9.1.6 Statements particularly describing all limitations, terms, and conditions of the contract and all rights and duties of the parties under the contract, including, but not limited to:

9.1.6a The total cost of such contract;

9.1.6b The amount of each periodic payment;

9.1.6c The timing of each periodic payment;

9.1.6d The amount of any finance charge assessed and the rate of assessment of finance charges;

9.1.6e The total of all payments under the contract including the downpayment;

9.1.6f Whether the seller is taking a security interest in any property in which the contract buyer has any interest;

9.1.6g The name and address of the contract seller and a contract number commencing with the digits of the year such contract was sold and a readily identifiable chronological numbering method;

9.1.6h The existence of and method of calculation of any late charges or deferral charges;

9.1.6i A statement describing the method of funding of the preneed funeral contract if other than through the establishment of a trust fund;

9.1.6j A specific description of the funeral or burial goods and funeral services to be provided, the cost of the goods and services in conformity with the provisions of the Federal Trade Commission's Funeral Practices Rule as in

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 9

existence on the effective date of this Rule, and the name(s) of all provider(s) for the preneed funeral contract.

9.2 Each and every preneed funeral contract shall be signed by the seller or a representative of the seller and the buyer. Such contract shall be dated as of the time of signing and shall contain all representations made during the sales presentation.

9.3 Each and every preneed funeral contract shall be presented to the buyer prior to execution. The contract buyer shall be entitled to review it prior to execution and to remove such contract from the seller's premises to conduct a review. To that end, any offer contained within a preneed funeral contract shall be valid for five business days from the date of presentation of the offer.

9.4 No preneed funeral contract shall be presented to any buyer unless all spaces have either been filled in or marked through.

9.5 Upon execution of a preneed funeral contract, the buyer shall immediately be given a copy of the contract.

9.6 After execution, copies of the preneed funeral contract shall be distributed as follows:

9.6.1 One copy to the buyer;

9.6.2 One copy to be retained by the seller;

9.6.3 One copy for the provider;

9.6.4 One copy for the contract beneficiary if other than the buyer and such distribution is desired by the buyer;

9.6.5 One copy for the trustee, if a separate party; and

9.6.6 One copy to be provided to the Department within ten days of execution.

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 10

Section 10. Default by the Contract Buyer.

10.1 A preneed funeral contract and any trust associated therewith may be terminated by the contract seller only upon default by the buyer. If a contract buyer is in default for more than one hundred eighty days with respect to any payment or installment due on or pursuant to the contract, the seller may, on ten days' prior written notice, cancel the contract. Upon cancellation, the seller must refund all funds in the trust fund, including monies paid for items which are excluded from the definitions of burial goods, funeral goods and services and which are not subject to the buyer's right of cancellation under W. Va. Code Section 47-14-6; provided that the seller may retain up to ten percent of the monies paid as liquidated damages if such a deduction was not previously made as provided in section 16 of this rule.

10.2 If payment for a preneed funeral contract is not complete at the time of the contract beneficiary's death and the seller has not cancelled the contract as aforesaid, or if a life insurance or annuity contract intended to fund the preneed funeral contract has lapsed, the heirs or personal representative of the beneficiary may pay the balance remaining on the preneed funeral contract and obtain performance as provided.

Section 11. Sale or Transfer of Certificate of Authority or License Prohibited.

11.1 No holder of a certificate of authority or license to sell preneed funeral contracts may sell or transfer such certificate of authority or license to any other person.

11.2 No holder of a certificate of authority or license to sell preneed funeral contracts shall transfer such certificate of authority or license to another business location without first notifying the Department.

11.3 In the event that the holder of a certificate of authority is other than a natural person, the Department

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 11

shall be notified of any sale or transfer of the stock or assets of such an entity. Any substantial change in corporate ownership shall, in the Department's discretion, necessitate application for a new certificate of authority.

Section 12. Multiple Price Lists Prohibited.

12.1 No seller, provider, or other person who makes preneed funeral contracts available to the public shall maintain multiple price lists for the provision of the same goods and services.

12.2 Each seller, provider, or other person who makes preneed funeral contracts available to the public shall maintain a record copy of each price list for goods and services offered under any preneed funeral contract and set forth on such price list the duration or time period to which each list is applicable.

Section 13. Disciplinary Proceedings.

13.1 In addition to the provisions of W. Va. Code Section 47-14-11, a holder of a certificate of authority or licensee may face disciplinary action for violating the provisions of this rule or failing to submit to any examination conducted by the Department.

13.2 The penalties which may be imposed administratively by the Department for violating the provisions of this rule shall include one or more of the following:

13.2.1 Denial of any application for a certificate of authority or license;

13.2.2 Revocation or suspension of a certificate of authority or license;

13.2.3 Imposition of a fine in the amount not to exceed \$1000.00 for each county in which a violation occurred;

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 13

13.2.4 Issuance of a reprimand; or

13.2.5 Imposition of a period of probation upon the holder of a certificate of authority or license under such terms and conditions as may be deemed appropriate by the Department.

13.3 In the event that the Department has reason to believe that the holder of a certificate of authority or license has committed willful or widespread violations of this rule or the Preneed Burial Contracts Act, is or may be insolvent or otherwise poses a threat to the security of trust assets, the Department shall immediately suspend the certificate of authority or license upon notice to the holder and prior to any hearing; provided that the holder in such circumstances shall be entitled to an expedited hearing.

Section 14. Insolvency.

14.1 If an audit reveals that a trust account or trustee appears to be insolvent, the Department shall have the authority, in the reasonable exercise of discretion, to find a substitute trustee to undertake the management of the trust funds.

14.2 For the purposes of this section, "insolvency" means the occasion or occurrence of any event or series of events whereby the current trust obligations exceed the total current assets of the trust.

Section 15. Notice of Contract Irrevocability.

15.1 No preneed funeral contract shall be made irrevocable without the express, written, informed consent of the contract buyer. Absent such consent, the preneed funeral contract shall be revocable.

15.2 Each preneed funeral contract which is irrevocable shall contain the following notice in boldface on the front of the contract:

Attorney General
Legislative Rule, 47-14, 46A-6, & 46A-7
Series 8, Sec. 15

"NOTICE OF IRREVOCABILITY

THIS PRENEED FUNERAL CONTRACT SHALL BE IRREVOCABLE DURING THE LIFETIME OF THE CONTRACT BENEFICIARY. NEITHER THE BUYER NOR ANY OTHER PERSON AS BENEFICIARY WILL BE ENTITLED TO CANCEL THIS CONTRACT OR RECEIVE A REFUND OF PAYMENTS MADE UNDER THIS CONTRACT.

(Buyer's Signature) (Date) "

15.3 Any buyer who has purchased a preneed funeral contract may elect after consummation to amend the contract to make it irrevocable by notifying the contract seller and trustee and by placing his signature on the original copy of the contract and giving the true date of the signature.

Section 16. Applicability of Freedom of Information Act.

16.1 The contents of an application for a certificate of authority or license, and any renewal thereof or any annual report, shall be exempt from public disclosure under the provisions of the Freedom of Information Act, W. Va. Code Sections 29B-1-1 et seq., as shall be information on individual preneed funeral contracts or trusts or any information disclosed in an audit of a certificate holder or licensee. All such information is exempt from disclosure under the provisions of this rule and W. Va. Code Sections 29B-1-4(1) and 29B-1-4(2).

Section 17. Violation of Rule; Enforcement.

17.1 Violation of any term or provision of this rule shall be an unfair and deceptive act or practice in violation of W. Va. Code Section 46A-6-104 and a violation of the provisions of W. Va. Code Sections 47-14-11(a)(1) and 47-14-13.