

**Maryland General Assembly
Department of Legislative Services**

**Proposed Regulations
Department of Health and Mental Hygiene
(DLS Control No. 14-169)**

Overview and Legal and Fiscal Impact

The proposed regulations make changes to the authority of the State Postmortem Examiners Commission in the Department of Health and Mental Hygiene and to the medical examiners and other staff that the commission employs in order to carry out its duties.

There are no legal issues of concern; however, there are several “special notes” of which the committee may wish to take note.

General fund expenditures increase minimally to cover higher body transportation reimbursement fees beginning in fiscal 2015 and continuing annually thereafter. General fund revenues also increase minimally from increased fees for medical examiner reports beginning in fiscal 2015 and continuing annually thereafter.

Regulations of COMAR Affected

Department of Health and Mental Hygiene:

Postmortem Examiners Commission: Medical Examiner Cases:
COMAR 10.35.01.01, .02, .08, .14, .19, .20, and .21

Legal Analysis

Summary of Regulations

The proposed regulations make changes to the authority of the State Postmortem Examiners Commission in the Department of Health and Mental Hygiene and to the medical examiners and other staff that the commission employs in order to carry out its duties. This includes (1) defining “medical examiner” to also mean a forensic investigator who has training or experience in trauma or death investigation and who assists the Chief Medical Examiner, the Deputy Chief Medical Examiner, or an assistant medical examiner; (2) authorizing a medical examiner to investigate any location believed to be associated with the death investigation regardless of the location of the body, pursuant to applicable law; (3) prohibiting a health care facility from refusing a medical examiner access to a body that is the subject of a medical examiner case; (4) specifying that once death is determined, the hospital should follow medical examiner guidance regarding management of the decedent; (5) requiring a hospital agent to respond to a medical examiner’s request promptly and specifying that failure to provide requested information within 24 hours will result in a report to the Office of Health Care Quality; (6) clarifying that a copy of the final autopsy report, not the autopsy protocol, must be submitted

by a hospital to the medical examiner; and (7) altering and establishing various fees relating to the services of the commission and the staff employed by the commission.

Legal Issues

There are no legal issues of concern; however, there are several “special notes” of which the Committee may wish to take note.

Statutory Authority and Legislative Intent

The department cites § 4-509 of the Estates and Trusts Article and §§ 5-301 et seq. and 18-213 of the Health – General Article as statutory authority for the proposed regulations. Section 4-509 of the Estates and Trusts Article governs the making of an anatomical gift. Title 5, Subtitle 3 of the Health – General Article establishes and sets forth the composition, meeting times, staff, and duties of the commission. Except in Baltimore City, § 5-306 authorizes the commission to appoint one or more deputy medical examiners, who must be physicians, and forensic investigators for each county. The deputy medical examiners may deputize other physicians and are entitled to fees for investigative and witness services. Section 5-307 authorizes the commission to adopt regulations to carry out the provisions of the subtitle. Section 5-309 requires a medical examiner to investigate the death of a human being if the death occurs by violence, suicide, casualty, suddenly under certain circumstances, or in a suspicious or unusual manner. Further, § 5-309 requires a medical examiner to “go to and take charge of [a] body” immediately upon notification that a medical examiner’s case has occurred. The medical examiner must investigate fully the facts concerning the medical cause of death and must keep a written record of these facts filed in the medical examiner’s office. Section 5-310 specifies when and by whom an autopsy must be performed, as well as the contents of an autopsy of a fire fighter or other personnel of the State Fire Marshall’s Office, the filing requirements of the findings and conclusions of an autopsy, and the procedure for correction of an autopsy report, when relevant. Section 5-311 specifies the requisite contents of an autopsy report. Section 5-312 authorizes a medical examiner to administer oaths, take affidavits, and make examinations regarding any matter within the medical examiner’s jurisdiction. Section 18-213 requires that an individual be notified of possible exposure to a contagious disease or virus if, while treating or transporting an ill or injured patient to a medical care facility, the individual who is emergency services or other personnel comes into contact with an individual who is subsequently diagnosed with a contagious disease or virus.

Notwithstanding the comments under “Special Notes” below, the regulations comply with the statutory authority and legislative intent of the law.

Special Notes

There are several issues of which the Committee may wish to take note, including: defining a “medical examiner” to also mean a forensic investigator; authorizing medical examiners to investigate *any* location, *regardless of the location of a body*; prohibiting a health care facility from refusing a medical examiner access to a body; and *suggesting* that a hospital follow medical examiner guidance.

Defining “medical examiner” to also mean a forensic investigator

Proposed 10.35.01.01B(3)(b) defines “medical examiner” to also mean a forensic investigator, who is an individual who has training or experience in trauma or death investigation. No other definition, training, or qualifications of forensic investigators exists in statute or regulation. The commission reports that forensic investigators (and deputy medical examiners) are not physicians, whereas all other “medical examiners” are physicians/pathologists (*i.e.*, the Chief Medical Examiner, the Deputy Chief Medical Examiner, and assistant medical examiners). The authority of the commission to employ and appoint forensic investigators (and deputy medical examiners) is not in doubt (*see* §§ 5-305(a)(2)(vii) and 5-306(b)(1) of the Health – General Article); however, the powers and duties bestowed upon medical examiners in both statute and regulation, including the performance of an autopsy and the signing of a death certificate, may be a legal issue if forensic investigators are given these powers and duties but are not properly qualified and trained for these powers and duties. The commission agrees that the intent of the regulations is not to empower forensic investigators to operate beyond the scope of their training and expertise and reports that clarification to this section will be made.

Authorizing medical examiners to investigate any location

Proposed 10.35.01.02B authorizes a medical examiner to “investigate *any* location believed to be associated with the death investigation *regardless of the location of the body...*” (emphasis added) The commission reports that the intent of this language is to authorize a medical examiner to investigate areas in the view of the public, unless the police are present, and then only as is consistent with applicable law. However, the language of the proposed regulations, authorizing investigation of “any” location, is much more expansive than the description provided by the commission. Further, although § 5-309 of the Health – General Article requires a medical examiner to “go to and take charge of [a] body” immediately on notification that a medical examiner’s case has occurred, the regulations authorize a death investigation to take place “regardless of the location of the body”. The commission explains that this language is reflective of the fact that a body is sometimes moved and that the regulation is intended to be able to “leverage...re-investigation” of an original scene by a police department when the medical examiner determines that the original investigation may not have been exhaustive. However, the scope of this regulation may go beyond the scope of the statute authorizing the regulation. It is unclear where the authority of the commission ends and the authority of law enforcement begins. The commission asserts that the intent of the regulation is not to usurp the authority of law enforcement and reports that clarification and a narrowing in scope to this section will be made.

Prohibiting a health care facility from refusing a medical examiner access to a body

Proposed 10.35.01.02C and .08B(2) prohibit a health care facility from refusing a medical examiner access to a body that is the subject of a medical examiner case. Although § 5-309 of the Health – General Article requires a medical examiner to “go to and take charge of [a] body” immediately on notification that a medical examiner’s case has occurred, the commission reports that there are many hospitals that refuse to allow a medical examiner to take a body unless it has been moved to the morgue, in favor of keeping the body in the emergency room for the family to view. Then, once the body has been moved to the morgue, some hospitals continue to refuse a medical examiner access to a body while awaiting various paperwork and records. This delay causes a medical examiner to lose transient evidence and sometimes causes transplant organizations to lose the opportunity for potential organ donors. While the

commission has statutory authority over the body of the decedent, the commission does not have authority over a health care facility which has policies in place in this regard. It is unclear where the authority of the commission ends and the authority of the health care facility begins.

A hospital should follow medical examiner guidance

Proposed 10.35.01.08B(2) states that “once death is determined, the hospital *should* follow medical examiner guidance as to management of the decedent.” (emphasis added) The commission reports that the intent of this language is to prevent a hospital from washing bodies or removing tubes, for example, which can destroy or introduce evidence. Further, this language is intended to prevent a hospital from ordering a rape kit or fingerprints, as the commission asserts that the best place for collecting this sort of evidence is in the controlled environment of the autopsy room. However, the word “should” has no legal force and effect and may create confusion. It is again unclear where the authority of the commission ends and the authority of the health care facility begins. The commission agrees, and reports that “should” will be changed to better reflect the statutory charge to the medical examiner to “go to and take charge of [a] body.” (See § 5-309 of the Health – General Article)

Fiscal Analysis

General fund expenditures increase minimally to cover higher body transportation reimbursement fees beginning in fiscal 2015 and continuing annually thereafter. General fund revenues also increase minimally from increased fees for medical examiner reports beginning in fiscal 2015 and continuing annually thereafter.

Agency Estimate of Projected Fiscal Impact

The department advises that general fund revenues increase by \$8,875 in fiscal 2015 and by \$12,529 in fiscal 2016 from increased fees for both paper and electronic autopsy reports, new processing fees for copies of photographs and slides, and increased fees for viewing slides in the Office of the Chief Medical Examiner facilities. The Department of Legislative Services concurs and notes that the increase in general fund revenue continues annually thereafter.

Additionally, the department advises that general fund expenditures increase by \$27,801 in fiscal 2015 and by \$39,249 in fiscal 2016 to cover the increased rate paid to body transportation service providers from \$3 per mile to \$3.30 per mile. The Department of Legislative Services concurs with these estimates and notes that the increase in general fund expenditures continues annually thereafter.

Impact on Budget

General fund expenditures increase minimally to cover higher body transportation reimbursement fees beginning in fiscal 2015 and continuing annually thereafter. General fund revenues also increase minimally from increased fees for medical examiner reports beginning in fiscal 2015 and continuing annually thereafter. The regulations have no impact on the State capital budget.

Agency Estimate of Projected Small Business Impact

The department advises that the regulations have minimal or no economic impact on small businesses. However, the Department of Legislative Services disagrees because, as the department notes, several body transportation services providers have stated that increased costs may force providers out of business. The department notes, and the Department of Legislative Services concurs, that increased revenues assist in offsetting these increased operating costs. Thus, to the extent that these body transportation service providers are small businesses, these regulations increase revenues for small businesses and may help prevent providers from going out of business.

Additional Information

The regulations establish a monetary compensation entitlement for deputy medical examiners or forensic investigators who are called as witnesses in a civil case. However, since this entitlement goes directly to the medical examiner or forensic investigator, it has no State fiscal impact.

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