

MEDICAL EXAMINERS COMMISSION MEETING

Tampa Airport Marriot, Tampa International Airport
4200 George J. Bean Parkway
Tampa, Florida 33607
November 8, 2019 10:00 AM EDT

Commission Chairman Stephen J. Nelson, M.A., M.D., F.C.A.P. called the meeting of the Medical Examiners Commission to order at **10:02 AM**. He advised those in the audience that the meetings of the Medical Examiners Commission are open to the public and that members of the public will be allowed five minutes to speak. He then welcomed everyone to the meeting and asked Commission members, staff, and audience members to introduce themselves.

Commission members present:

Stephen J. Nelson, M.A., M.D., F.C.A.P., District 10 Medical Examiner
Barbara C. Wolf, M.D., District 5 Medical Examiner
Wesley Heidt, J.D., Office of the Attorney General
Kenneth T. Jones, State Registrar, Department of Health
Hon. Charlie Cofer, J.D., Public Defender, 4th Judicial Circuit
Hon. J. Harrell Reid, Hamilton County Sheriff (via Teleconference)
Hon. Jeffrey A. Siegmeister, J.D., State Attorney, 3rd Judicial Circuit
Hon. Carol R. Whitmore, R.N., Manatee County Commissioner

Commissioner members not present:

Robin Giddens Sheppard, L.F.D., Funeral Director

Commission staff present:

Vickie Koenig
Megan Neel

Chad Lucas
James D. Martin, J.D.

District Medical Examiners present:

Jon R. Thogmartin, M.D. (District 6)
Joshua Stephany, M.D. (District 9)
Kelly Devers, M.D. (District 13)

Russell S. Vega, M.D. (District 12)
Wendolyn Sneed, M.D. (District 15)

Other District personnel present:

Jeff Martin (District 1)
Lindsey Bayer (District 5/24)
Bill Pellan (District 6)
Ricardo Camacho (District 8)
Shanedelle S. Norford, M.D. (District 9)

Tim Gallagher, M.D. (District 1)
Noel A. Palma, M.D. (District 6)
Karla Orozco (District 7)
Sheri Blanton (District 9)

Guests present:

Bruce Goldberger, Ph.D. (UF)
Nicholas Thomas, Ph.D. (USF)
DiAnn McCormack (CorneaGen)
Chris Poindexter (LifeNet Health)
James Rosa (Lions Eye Institute)
Susan Rabel (LifeLink)
Tom Davis (Our Legacy)
Kelsi Kuehn (USF Student)
Ashley Perkins (USF)

Jonathan Rigsby (FDLE)
Karin Hoppmann (AUSA, Middle District of FL)
Ashley Perkins (USF)
Jonathan Bethard, Ph.D. (USF)
Rebekka McCollom (Lions Eye Institute)
Linda McCluskey (LifeLink)
Lynetta Oxendine (Our Legacy)
Phoebe Stonefield (UF)

A MOTION WAS MADE, SECONDED, AND PASSED UNANIMOUSLY FOR THE COMMISSION TO APPROVE THE AGENDA WITH THE ADDITION OF ASSISTANT US ATTORNEY KARIN HOPPMANN'S DISCUSSION OF FACT VS. EXPERT WITNESS AT THE END OF THE AGENDA.

A MOTION WAS MADE, SECONDED, AND PASSED UNANIMOUSLY FOR THE COMMISSION TO APPROVE THE MINUTES OF THE AUGUST 9, 2019 MEDICAL EXAMINERS COMMISSION MEETING.

ISSUE NUMBER 1: INFORMATIONAL ITEMS

- Status Update: DME and State Attorney MEC Reappointments: Mrs. Vickie Koenig informed the Commission that the Governor's Appointments Office has received everything they need for both Commission members and will process each application so that the appropriate reappointments can be made.
- Status Update: Appointments for Districts 4 & 16 and Reappointments for Districts 8, 10, 12, 14, & 18: Mrs. Koenig informed the Commission that the Governor's Appointments Office has received everything they need for these appointments and reappointments and they will process each application so that the appropriate appointments and reappointments can be made.
- 2020 Reappointments/Assessments for Districts 15-24: Mrs. Koenig informed the Commission that paper ballots and assessments will be mailed to constituents of Districts 15-24 in January, as a better response was given to mailed requests instead of e-mailed.
- District 1 Search Committee Update: Dr. Nelson informed the Commission that the search committee has met a couple of times in Pensacola and it has been the recommendation of the search committee to temporarily suspend actively seeking new district medical examiner candidates until the tensions stemming from Dr. Minyard's failure to obtain recommendation for reappointment from the Medical Examiners Commission can cool. So far, there has been a dearth of qualified applicants, and they have all since withdrawn themselves from consideration. The search committee is hoping to resume their search for a new district medical examiner around the beginning of the year. Dr. Thogmartin has also begun providing help and guidance to the search committee and the counties in this process.
- District 1 Interim Medical Examiner Appointment: Dr. Nelson informed the Commission that Tim J. Gallagher, M.D., M.H.S.A., has been named the interim district medical examiner for District 1. Dr. Gallagher was previously an associate medical examiner in District 1.
- District 19 Search Committee Update: Dr. Nelson informed the Commission that the search committee has met a couple of times in Ft. Pierce and, like District 1, there has been a dearth of qualified applicants for the position. Dr. Thogmartin has also provided guidance to the search committee and, since then, they have received 10 applications. Those 10 applications as well as any other applications received while the job posting is open will be reviewed at the search committee's next meeting on December 5th.
- 2018 Drugs in Deceased Persons Report Update: Mrs. Megan Neel informed the Commission that the annual report was published Wednesday, November 6th.

- 2019 Interim Drug Data Update: Mrs. Neel informed the Commission that 2019 interim drug data is due by December 31st. She reported that some districts have submitted their data for review and will be sent to the Quality Assurance Committee soon.
- 2018 Coverdell Status Update: Mr. Chad Lucas informed the Commission that 17 of the 18 districts participating in the 2018 Coverdell Grant have submitted reimbursement requests so far. The one district that has not submitted a reimbursement request is due to personnel turnover at the medical examiner's office and their new Coverdell contact playing catchup. All but five districts spent every penny they were awarded. Any money that was not spent by those districts was due to a change in item prices from the original proposal or a warranty being prorated for falling outside of the grant period.
- 2020 Legislative Session: Mr. James Martin reported that the 2020 Legislative Session begins on January 14th and so far there are three bills of interest for the Medical Examiners Commission.
 - The Elder Abuse Fatality Review Team bills (House Bill 253, Senate Bill 400) would authorize the establishment of elder abuse fatality review teams in each judicial circuit, to be house, for administrative purposes only, in the Department of Elderly Affairs. A medical examiner is one of the participants that may be on the team.
 - The Reporting Abuse, Abandonment, and Neglect bill (Senate Bill 7000) includes a substantial rewording of Section 39.201, F.S., and indicates that a medical examiner is required to provide their name to the abuse registry when reporting abuse. It also mandates the medical examiner to accept a report of suspected child abuse that resulted in the child's death for investigation and report his or her findings to law enforcement, the State's Attorney's Office, and the Department of Children and Families.
 - The Procurement of Human Organs and Tissue bill (Senate Bill 798) amends Sections 765.542 and 873.01, F.S., to specify that a for-profit entity may not engage in the procurement of eye, cornea, eye tissue, or corneal tissue. It would also include an exemption for licensed hospitals, ambulatory surgical centers, and district medical examiners.
- VCDCC Recommendation for Dr. Vega: Dr. Nelson informed the Commission that he wrote a letter to the Governor on behalf of the Commission recommending Dr. Vega for reappointment to the Violent Crime Drug Control Council and thanked him for his service on the council.

ISSUE NUMBER 2: DEPARTMENT OF HEALTH VDRS UPDATE

Nicholas Thomas, PH.D., with the University of South Florida (USF) appeared before the Commission to give an update on the Florida Violent Death Reporting System. He reported that the program started a little late due to some contract negotiations between USF and the Department of Health. However, in June the project was finally able to begin. They have hired two full-time abstractors and a doctoral student for further support with abstraction. Dr. Thomas also stated that he is willing to help with the abstraction process when needed. He stated that as of November 7th, they had 3,967 cases in their database. At this time, they only have the death certificate information for those cases. They have abstracted another 383 cases on top of that. Of those 383 cases about 300 cases will be further abstracted using medical examiner data, while the other 50 or so cases are from law enforcement data. One county sheriff has started to send them data and the hope is that many more will have signed on by the next MEC meeting. There are a number of sheriffs and police departments where

data use agreements are being reviewed by legal counsel, but they are hoping to start receiving data soon.

In terms of next steps, they will not have the full data for 2019 completed until around April or May of 2021. In 2020 they will continue to expand the number of counties they will be including for law enforcement abstraction. They are currently discussing future research opportunities and looking for collaboration with their partners, so if there are any opportunities that law enforcement and medical examiner partners can bring to them, they will be happy to talk about those. They are also looking at how they can use this data to inform policies and interventions. For example, in Massachusetts the VDRS has been used to identify hydrogen sulfide suicides as an increasing risk in the state and in North Carolina they have used the data to identify particular areas where elder abuse was a problem and focused their efforts in those areas.

ISSUE NUMBER 3: OPO ORGAN RESEARCH DISCUSSION

Mrs. Koenig reported to the Commission that an e-mail was received in September asking the following question: If a medical examiner case goes into the operating room for organ recovery and it is determined that the organs are unsuitable for transplant, but are suitable for research, is it possible for the medical examiner to deny the organs on a case by case basis?

In e-mail discussion, Dr. Nelson informed Mrs. Koenig that since the decedent in going into the operating room for organ procurement, there is already consent from the next of kin. That consent covers organ procurement for both transplant and research. He did, however, ask for this to be put on the agenda for discussion since there was an issue in the past with an organ that was originally taken for transplant, but ended up being taken for research instead.

Ms. Susan Rabel, Vice President of LifeLink of Florida, appeared before the Commission to say that when an individual signs up on the donor registry they are giving legal consent for both transplantation and research for organs, tissue, and eyes. When they are not on the donor registry and the organ procurement organization (OPO) obtains authorization from them, they ask for the same consent. Most of the time, the OPOs are given authorization for transplantation and research of organs, tissue, and eyes. When the OPO clears a case with the medical examiner, they are clearing for both transplant and for research. If, for some reason, the organ that was intended for transplant is deemed not suitable for transplant, and the medical examiner wants to restrict the organ for research, then that is totally fine. The OPO just needs to have the understanding beforehand that the medical examiner is restricting the organ for research in order to determine a cause and manner of death.

Mrs. Carol Whitmore asked if the OPO has received informed consent from the donor, if that applied to both transplants and research. Ms. Rabel stated that when a donor signs up to be an organ donor at the time of receiving a driver's license they are signing up for everything when that box is checked. She went on to say that a donor can go into Donate Life America and be very prescriptive about what he or she wants donated. When the OPO is checking to see if someone is on the registry, they are checking for that. So if the individual who is signing up restricts what can be taken, then they honor that request. Once that is set in stone, no one can really change that. It is a rare occasion when a family member opposes a loved one's decision to donate, and when that happens it takes a lot of work to honor that wish. It is the OPO's obligation to honor the legal decision that a person made prior to death.

Mrs. Whitmore then asked when someone makes that selection at the time of their driver's license, if it says organ donation and/or research. Ms. Rabel stated that the driver's license just says "organ

donor". "Organ donor", in the State of Florida, implies donation for transplantation for vascular organs, tissues, and eyes, and for research.

Dr. Nelson asked if LifeLink is the same as the other OPOs in the state when it comes to checking those organ donor databases. Ms. Rabel said that all OPOs check each of the databases. Dr. Nelson then asked if someone made a change on their organ donor status online, but didn't change it on their license at DHSMV, would the OPO know about it. Ms. Rabel confirmed that they would know about it.

Mrs. Koenig asked Dr. Nelson if the OPO contacted the medical examiner for transplant organs and they went in to get the organs and one organ (i.e. lung) is not suitable for transplant, but they wanted to use it for research, would the medical examiner potentially deny that request if it could be involved with cause and manner of death. Dr. Nelson said that it depends on the history of the death and that if the organ is working really nicely in the recipient, then it is proof-positive that there is nothing wrong with the organ. He went on to say that it really is a case-by-case basis on those types of requests.

Ms. Rabel said that if an organ is intended for transplant and it is determined to be not suitable for transplant in the operating room, the organ is not pulled for research unless the OPO has placed that organ with a research entity beforehand. Sometimes what they may do is go into the operating room with intent to recover organs for transplant with a backup for research, but that would have to be cleared with the research entity. Organs are not attempted to place for research unless the OPO knows they have not been restricted by the medical examiner for cause and manner of death. Barbara C. Wolf, M.D., stated that she doesn't think it's widely known that medical examiners can refuse a critical organ for research if it is done beforehand.

Mr. Jeffrey Siegmeister, J.D., said that he looked at the conditions of donation on donatelifeflorida.org, and it isn't clear that research is there. It does give the list so that a person can limit their organs, but nowhere on the website does it mention research to the public. Dr. Nelson said that as long as the family has consented for it, then he has no problem with it.

Dr. Nelson then asks Ms. Rabel how the OPO handles the donation discussion when talking to the family. Do they ask about organs for transplant, research, or both? Ms. Rabel said that when they ask for authorization for donation from a decedent who is not on the registry, they are asking for research. They have specific asks for vascular organs, tissue, eyes, and research and that she would have to look at donatelifeflorida.org to see what is there related to research. She went on to say that if a person is on the Florida registry, then by Florida Statute it includes research. Mr. Siegmeister said that he understands it may be in Florida Statute, but the website itself does not make that clear to the regular person looking to put themselves on the registry. Ms. Rabel said she would look at the website and have their public affairs people look at it as well.

Russell S. Vega, M.D., said that his understanding of when medical examiners are looking at organs for research vs. transplantation is that if the heart does not go for transplantation but goes for research, they do not expect to get a cardiac pathology report like they do when it is submitted for tissue. So, from the medical examiner's perspective, they are less likely to release a heart for research than other organs because the heart is so frequently critical in their determination of cause and manner of death and they want to get a good idea of what disease is present. Dr. Nelson said he was on the same page as Dr. Vega. Dr. Vega went on to say that one of the things they do is assume that research is on the table, so when considering a case they proactively say what the organs can and cannot be used for in order to avoid any miscommunications.

ISSUE NUMBER 4: MEC DRUG REPORT - TRACKED DRUGS: DIFLUOROETHANE & MITRAGYNINE

Mrs. Koenig made several proposals for changes to the MEC Drugs in Deceased Persons Report. After a discussion between the Commission members and Bruce A. Goldberger, Ph.D., it was decided that the following drugs will be removed from the 2020 Drug Report: Estazolam, Flunitrazepam, Flurazepam, Helium, Meperidine, Nitrous Oxide, and Triazolam. The following drugs will be added to the drug report: Gabapentin and Mitragynine. In addition, PCP and PCP analogs are being combined and the number of deaths caused by Difluoroethane will be added as a bullet point for the Drug Report's Executive Summary. Dr. Goldberger has requested the addition of a check box to denote when possible if the fentanyl found in the decedent was illicit in origin, which can generally be determined from scene factors presented at the time of death.

ISSUE NUMBER 5: UNIDENTIFIED DECEASED INITIATIVE

Mr. Jon Rigsby with FDLE's Unidentified Deceased Initiative reported two success stories for the Unidentified Deceased Initiative.

District 14 Success Story

This case involved a nearly skeletal white female located along the side of the interstate in Jackson County on December 20, 1984. The deceased was initially believed to be 18-25 years of age. Investigator Whit Majors of the District 14 Medical Examiner's Office contacted UDI for assistance in confirming the identity of the deceased. Initially identified by a fingerprint record located by the medical examiner's office, the deceased had a criminal history which included multiple identities. UDI examined the criminal history and contacted numerous law enforcement agencies in Louisiana and Mississippi in a search for records to determine the subject's true identity. Due to age and weather related disasters, no records existed. SCIA Rigsby contacted the state of Georgia Department of Vital Records (GDVR). GDVR produced a copy of a birth certificate related to one of the subject's identities: Deborah Pauline Bearden, age 29 at the time of death. The birth certificate listed both parents for the deceased, although public records indicated that they were also both deceased. This information was provided to Investigator Whit Majors.

District 16 Success Story

UDI received a request from staff at the District 16 Medical Examiner's office for assistance in locating the purported burial site of an unidentified deceased juvenile female. The decedent died in a plane crash in February 1992. The plane, an overloaded crop duster which originated in Cuba, crashed in the Gulf of Mexico. Numerous bodies were identified from the crash, but the identity of the juvenile was unknown. District 16 staff located an obituary for the girl's parents in a Cuban expat newspaper which provided a name for the decedent and a location for her remains. District staff attempted to contact the cemetery without success, and a request was made to UDI for outreach. UDI staff contacted the cemetery and was provided with the exact plot location of the decedent and her parents. This information was provided to the Medical Examiner's office for follow up in determining further steps to verify the decedent's identity.

ISSUE NUMBER 6: PRESCRIPTION DRUG MONITORING PROGRAM UPDATE

Bruce A. Goldberger, Ph.D., appeared before the Commission to provide an update on the State's Prescription Drug Monitoring Program (PDMP). He stated that he and Mrs. Koenig had a conversation with Becky Poston, the program director of Florida's PDMP, and they are quite resistant

to having medical examiners and their staff having direct access to the PDMP with reasoning that doesn't really make sense to Mrs. Koenig or him.

Mr. Ken Jones said that there is a new Surgeon General, a new Chief of Staff who has been in place for less than a month, and a new division director over Ms. Poston and the PDMP, and he would like to take this back and deal with upper management, legislative planning team, and legal team to see what they can do about getting direct access for medical examiners. Dr. Nelson said he would appreciate Mr. Jones doing that.

ISSUE NUMBER 7: EMERGING DRUGS

Dr. Goldberger provided the Commission with an update on emerging drug trends. One drug to be on the lookout for is Gabapentin, whereas the fentanyl analogs seem to be waning. He also said he would like to spend more time on vaping death as he believes there are more vaping related deaths than are being reported.

Dr. Goldberger also announced that FROST will be updated with the MEC Drug Report data around early January. The site has been completely redone and enhanced using funds from South Florida HIDTA (high intensity drug trafficking area). There are lots of new and interesting reports now on the site and data will be posted quarterly.

ISSUE NUMBER 8: DR. MINYARD LETTER

Dr. Nelson introduced a letter written by former District 1 Medical Examiner Andrea N. Minyard, M.D., into the record. He stated that Dr. Minyard requested some action on her letter, but he was not inclined to read the three page letter at the meeting. However, he would entertain any discussion or a motion from the Commission regarding the letter.

MR. SIEGMEISTER MADE A MOTION THAT THE LETTER BE PART OF THE OFFICIAL RECORD WITHOUT BEING READ AND WITH NO FURTHER DISCUSSION. MR. CHARLIE COFER, J.D., SECONDED THE MOTION. THE MOTION PASSED UNANIMOUSLY.

Mrs. Whitmore said that she read the letter and maybe some things could be done differently in the future if a situation like this occurs. She stated that she didn't support this from the beginning and felt that the counties in District 1 did not do their homework, which led to their shock at how much they were paying Dr. Minyard. She felt like this process could have been done better and asked if Dr. Nelson, as Chairman, would consider looking into better ways of handling next time.

ISSUE NUMBER 9: FEDERAL RULES OF CRIMINAL PROCEDURE: IS THE MEDICAL EXAMINER A "FACT WITNESS" OR AN "EXPERT WITNESS"?

First Assistant United States Attorney Karin Hoppmann, J.D., from the Middle District of Florida appeared before the Commission to address the concerns of the Fact vs. Expert Witness discussion held at the August 2019 MEC Meeting. She apologized for missing the August meeting due to a lost e-mail with the meeting information in it. She clarified that she is not the presidentially appointed US Attorney of the Middle District of Florida, but instead, the apex of everything else that goes on in the office including supervision of every attorney and all administrative personnel. She also made it clear that she was not appearing on behalf of Maria Chapa Lopez, the US Attorney for the Middle District.

She said that she has spoken to the US Attorneys with the Northern and Southern Districts of Florida and the fact vs. expert witness issue seems to only be confined to the Middle District. She had also reached out to the nationwide representatives for budget and policy, but she does believe that she is only speaking for the Middle District of Florida on these issues.

Ms. Hoppmann then proceeded to discuss the matter at hand and began by saying she believes the issue the medical examiners have is one of prestige or respect. She understands that her office has been seen as not affording the amount of respect due to people with expertise in profession, to the medical and Ph.D. doctors, and to the people who do the work on the autopsies for the state. She apologized and said she certainly does not want to be seen as an office that does not afford respect to the witnesses they work with, to law enforcement, or to the medical examiner offices. Aside from that, she said that she thinks this is a resource issue. She went on to say that when the US District Court subpoenas medical examiners as witnesses before the court, they cannot pay them. The US District Court is not an investigative agency and they are not funded at all to pay for investigations, nor can they actually pay for testimony or evidence. They don't reimburse people based on the type of testimony or the type of person giving the testimony or evidence. When a case comes into their office, usually they are interacting with a medical examiner or medical examiner personnel, is when a case comes to them through a state or local law enforcement agency for violent crime, opioids, etc. There is no federal medical examiner or federal authority for medical examiners. They do not deal with autopsies at all. In the past they have not dealt as much with cases involving close relationships with state and local law enforcement, which may be why this has recently come up as an issue. When a case comes to the US Attorney's Office, it is brought to them from an investigative partner usually in partnership with a federal investigative agency. If it is a case that has to do with a death, what is presented to them is what they would need as evidence in the case to show the cause of death. They look at the medical examiner's report along with the cause of death, and then decide whether they can make an excellent case under their federal statutes and take the case on. They then take the case to indictment and to a jury. When the US District Court calls a medical examiner to testify in the case, what they are doing is asking them to give the evidence that was produced before and give testimony about that to the jury. Because the US Attorney's Office has had a great relationship with medical examiners in the past, they only ask the medical examiners present the evidence and give testimony, but they also have the power to subpoena them if necessary. The US Attorney's Office is actually under a federal requirement under the 6th Amendment that says if a medical examiner produces a report, they have to be in court to introduce that report into evidence and give testimony about the report to the jury. She stated that they certainly may qualify medical examiners as Rule 702 or 703 experts, but when they subpoena medical examiners and ask them for the evidence, what they are doing is asking for preexisting evidence and asking for it to be presented to the jury. That is why they have no authority to pay for that evidence, just like any other witness. The US Attorney's Office's authorization for witnesses at trial are called fact witnesses because they are giving evidence about facts or events, which includes the previously formed opinion. However, that does not preclude them from hiring a medical examiner as an expert witness when the office goes to trial and needs to question or defend a medical examiner's report with another expert, or when they need to have another expert look at the medical examiner's report and give a new opinion. When that happens, the US Attorney's Office will go out and hire someone as an expert to come to court and create an opinion by looking at all of the evidence. Ms. Hoppmann believed that was the authority that had gotten everyone off on the wrong foot. She said she has pulled all of the contracts to see when they have done this, and she thinks they are possibly in trouble for hiring someone under an expert witness contract when they are only presenting evidence. She understands that Florida Statutes requires certain payment for the medical examiners testimony, but stated that the Federal Government is not bound by state statute. However, if this issue is stemming from a local resource issue, then the Federal Government could support the medical examiners if they were to go to the state authorities and discuss the resource issue. She doesn't think there is a possibility of doing a memorandum

between the state and Federal Government about who is responsible for payment when this sort of issue arises in federal cases, but it is something she would be willing to work on if the State's Attorney General were to approach the Federal Attorney General about the issue of resource allocation and federal cases. She went on to say that if this issue remains, it will impact their opioid and violent crime cases.

Mr. Wesley Heidt, J.D., asked Ms. Hoppmann if she was maintaining that the US District Court is using the medical examiner themselves to get around *Crawford vs. Washington* and be a records custodian and asked if federal law requires a medical examiner to do that. Ms. Hoppmann said it was based on the 11th Circuit case *United States v. Ignasiak, Jr.* She went on to say that in that case Judge Martin said that it was a Confrontation Clause issue to actually have another medical examiner to introduce the records because they were produced with the expectation that they would be used for law enforcement, and due to the close relationship between the medical examiner and law enforcement it would be a violation of the 6th Amendment. Mr. Heidt then asked if the medical examiner died, would those records never be admissible under federal law. Ms. Hoppmann said that would be a very interesting case, but that situation has not happened yet, and went on to say that all district courts are bound by that ruling in the 11th Circuit Court. She also said that Judge Martin left open the possibility of having a true independent expert, but then they would have to qualify them under the federal rules of evidence and have them testify about each and every report. Mr. Heidt then asked if she knew of a split circuit on this ruling. Ms. Hoppmann said she didn't because it wasn't a big enough issue anywhere. She believes that the 4th or 5th Circuit has addressed medical examiners, but went on to say that you will find a real dearth of case law on evidence of autopsy reports and medical examiner reports. Mr. Heidt then asked why she thought this was unique to the Middle district and not the Northern and Southern Districts. Ms. Hoppmann said she thought that it was because over the past several years, the Middle District has in several cases paid medical examiners under expert witness contracts when they should not have been, and the inconsistencies are the fault of her office.

Mr. Cofer said he understands this as the medical examiners being viewed by the District Court as experts when they are conducting the autopsy and up until the point in which they are rendering an opinion, and once that occurs they cease to be experts. At that point they can be subpoenaed to trial and the District Court does not have to qualify them as experts to render opinion during the course of the trial. Ms. Hoppmann said they absolutely qualify them if they need them to testify under Rule 702 or 703, but that has nothing to do with contracting authority. Mr. Cofer then said that the point is that they are viewed as experts. Ms. Hoppmann then said that under the Federal Rules of Evidence they are giving expert opinion testimony, but that has nothing to do with this issue, and there is nothing saying that if you are qualified to give expert opinion testimony in the Rules of Evidence, you must then draw up an expert witness contract as if you are hiring to look at someone else's work or to give a new professional opinion. Mr. Cofer then said that the Federal Government just doesn't want to pay the medical examiners for their expert opinion. Ms. Hoppmann then said that they can't pay anybody for their testimony.

Dr. Nelson then interjected that they can, however, pay an outside expert to say the report is good or not, but not the person who did the report. Ms. Hoppmann said that would only be if the report was challenged, and that they do not pay any witness who is presenting existing evidence. Dr. Nelson then asked Ms. Hoppmann if she was familiar with the Fees and Expenses of Witnesses document provided by the Department of Justice, which was released in 2018 and outlines a mandatory \$270,000,000 appropriation for payment of witnesses providing testimony on behalf of the Federal Government. The document also says that the expert witnesses provide technical and scientific testimony and are compensated based on negotiations with the respective Federal Government attorney. Ms. Hoppman said that was correct, but attorney could not negotiate a contract under a

different authority and they could not pay someone to produce evidence that has already been produced. Dr. Nelson then said that it isn't about producing evidence, but rather rendering an expert opinion. He stated that there were doctors in attendance who went the National Association of Medical Examiners (NAME) meeting about a month ago and conducted a poll which revealed that the Middle District of Florida is the only district where medical examiners are not compensated as expert witnesses when they come to federal court. Ms. Hoppmann said she would love to have that information to give to the CFO of the entire department, because they are unaware of that and those offices may be called into question. Dr. Nelson then said that he doesn't see where the line is being drawn when an expert ceases to be an expert when they come to court. Ms. Hoppmann replied by saying that this has nothing to do with exercising their expertise or being an expert. If a physician had treated somebody before they died were to come to court, they would not be paying them under an expert witness contract; they would be subpoenaing them to tell the court about the diagnosis. They would also have records issues with privacy, etc. Dr. Nelson said he thinks that's bizarre reasoning to not compensate them as an expert when the court is asking them for opinion testimony about the disease process whether the subject is dead or alive. Ms. Hoppmann said that information has already been given and thinks there is disconnect. When they call the medical examiner for the cause of death, it has already been determined and is in the report. Dr. Nelson said that when the medical examiner is being questioned about the cause of death, that is fine, but when they are questioned about specific details of the case regarding loss of blood pressure, how long the decedent lived, etc., that is expert witness testimony. Ms. Hoppmann said that she would say the conclusion of the cause of death is the most expertise that has been exercised, but questioned if the court would call the medical examiner in and have them testify on something that has not been done. Dr. Nelson said that when he has been called into Federal Court on a drug case they want to know the action of the drug on the dead person, and when there are multiple drugs they want to know what the action of the multiple drugs is. The judge even asks him questions requiring opinion testimony. Ms. Hoppmann said that if this is a multiple drug toxicity case, and that is what they are going to start getting into, they may need to hire an additional expert because the original medical examiner did not look at the multi drugs, etc., and did not form an opinion. Dr. Nelson stated that she may be incorrect if she is suggesting the medical examiner has not looked at the cause of death with multiple drugs and indicated what those drugs are in the cause of death. Ms. Hoppmann then asked what the attorneys on the Commission thought would happen if they began paying a witness, who has already formed an opinion, thousands of dollars to come into the court and then the defense council asks the expert about a changed opinion. Exactly how much better is that expert's opinion and where is our expert report from that expert that was disclosed to the other party? She said that would cause major problems if they were to start paying witnesses who have preexisting evidence. Dr. Nelson said that no one else makes a distinction like that for fact vs. expert witness.

Dr. Wolf said that she thinks Ms. Hoppmann is phrasing something wrong. The court isn't paying for the opinion of the witness. They are reimbursing them for the time of a doctor coming to court, so the court is in no way paying for their testimony. Even in the State's court system the medical examiner is asked how much they are paid so they can be reimbursed. As Dr. Nelson said, when a medical examiner comes to court, even Federal court, what they discuss goes far beyond the autopsy report. They offer time of death opinions and things of that nature. The court is not paying for those opinions, but instead, reimbursing the medical examiner for their time. Ms. Hoppmann said the Federal court doesn't have the authority to reimburse the medical examiner for their time either. They have the authority to pay witnesses who have been subpoenaed to present preexisting evidence plus travelling expenses. They cannot reimburse for time to travel or time to wait for court. Their reimbursement authority is extremely small. That is why she totally understands that this is a resource issue and the medical examiner's offices want to be compensated for the time without their doctors or staff. That is also why she is suggesting trying to find other ways to go about this, perhaps by having the State of Florida talk to the Department of Justice to make ends meet somehow.

Mr. Siegmeister said that he pays expert witness fees to medical examiners and that he is the only State Attorney who does not have a medical examiner.

Ms. Whitmore said that the Middle District is the only District in the state that isn't paying medical examiners, and she can see why those people are mad that they aren't getting paid, and she doesn't blame them. However, she feels that since the Middle District is the outlier on this issue, then Ms. Hoppmann needs to be reaching out to the other Districts or getting a legal opinion about this issue. Obviously the opinion she is working off of doesn't jibe with everyone else in the Federal Court system. She went on to say that she didn't think it was fair to the doctors in the Middle District that they are the only ones not getting paid for their time in court.

Dr. Nelson said that this actually is not a judge's opinion. In a case where he went to Federal Court, he moved for a protective order against the court, and the judge ordered that the court pay him as an expert witness. He also believes Dr. Thogmartin has also had a similar case where a judge ordered the court to pay him as an expert witness, but he doesn't think he has been paid yet. Ms. Hoppmann said that the court asked the judge if they could draw up an emergency purchase order that was not a contract in order to avoid the court violating the federal anti-injunction order. That would be a direction to the US Treasury to extend money, which would be a big deal. She then said that when medical examiners come to court she would encourage them to bring a Federal action based on the medical examiner's office instead of contacting the court. What happened in the case of the injunction was somebody called an ex-parte contact in the Federal judge's chambers and had that hearing because they had a death case that was going to trial the next week and they were being told that this was going to thwart the process. Dr. Nelson said in his case it was not an ex-parte conversation, but instead a filing in federal court for a protective order which got an immediate response from the judge stating that US and the defendant need to work out the issue. Ms. Hoppmann said she would love to see a copy of that protective order. Dr. Nelson said it was something her people did, and that he wasn't going to do her work for her, especially when this is the type of response he gets. Ms. Hoppmann said she apologized for offending. Dr. Nelson then said he still doesn't see why there is such a disconnect between what is a fact witness and what is an expert witness. He still is not clear on that simply because the medical examiner authors a report and yet when they come to court they don't just read from the report about what they found. They are asked questions about opinion testimony of that report. That opinion testimony is of an expert witness, and Ms. Hoppmann is standing here telling everyone that they are not expert witnesses. They are compensated as fact witnesses for that, and that is a giant disconnect for everyone in the room. Ms. Hoppmann said that she understands, but again, there is absolutely nothing about paying someone who is a Rule 702 or 703 qualified witness for their testimony. She went on to say that if Dr. Nelson is saying that he would like for them to talk to the medical examiners and maybe do a statewide look at the issue. Dr. Nelson said the medical examiners do not want a statewide look. What they want is to be compensated as experts when they come in to the court and give expert opinion testimony, just like they do in state court. He went on to say that he finds it odd that if the Federal Government has to hire an expert to come in to say he is correct, that they are going to pay that person as an expert, but they wouldn't pay him to come in and render opinions in court. Ms. Hoppmann said that it is because it is preexisting evidence that they need for the case. Dr. Nelson said it is not until he opens his mouth and tells the court what those opinions are. Otherwise, the report only states the cause and manner of death. If the court wants to more than what is stated on the report, then they are asking the medical examiner to expert opinion testimony. Ms. Hoppmann questioned that when they call someone as an expert, what is the authority to pay them based on Rule 702 or 703 versus another Rule of Evidence allowing it to come in?

Mr. Cofer said he suggests that she ask the people of the Northern District and the Southern District why they are paying the medical examiners as experts, because it is state law and it concerns him that the Federal Government says they don't even need to comply with the state provisions in terms of payment of medical examiners. Ms. Hoppmann said that she has asked the people of those districts and that the state provisions happen in state court. Mr. Cofer said that he understands that, and that the Federal Court is using state resources to assist the Federal Government, so show the state and its experts the courtesy of being paid for their services. Ms. Hoppmann said they use and subpoena state resources all the time, so they absolutely understand that there are state employees or contractors who come to their court, but what she is saying is that US District Court is not an investigative agency and are not funded or have the authority to pay medical examiners as expert witnesses. In fact, she is being told from people at very high levels that it should have never happened in the first place and the fact that it is happening in the Northern and Southern Districts is news to their First Assistant US Attorneys. She then asked if she could be supplied with the contracts that were entered into for the payments that would go very, very far to clearing up these issues. She understands that there is a lot of distress on the side of the medical examiners, but did not know of the amount of distress, and did not know that they had paid anybody under these contracts.

Dr. Nelson then asked why the Department of Justice has \$270,000,000 for witnesses, but she is saying there is no money available? It is a mandatory appropriation. Ms. Hoppmann said it covers all of their witnesses who go into court with a daily fee through the US Marshalls Office and reimbursement for travel expenses, and it covers all expert witness contracts including all of the contracts they enter into in the civil arena. She then suggested that the attorneys on the Commission look into the Civil Discovery Rule (she believes it is Rule 26.12) that splits up the expertise. Dr. Nelson said that they aren't talking about a civil case here, but instead criminal cases where medical examiners are talking about drugs, and when the medical examiners are coming to court it is for criminal cases and not civil. Ms. Hoppmann said that is why she mentioned the treating physician, because what happens in a civil case is that the person is not hired under an expert witness contract. They have those all the time and they cannot pay them under an expert witness contract. Dr. Nelson then asked if they even mention to those people that there is a form the witness can fill out that could allow them to be compensated as an expert witness. Ms. Hoppmann said they would have to sign the same contract that says they have selected them through a competitive process; they have negotiated for them, and what they would be performing for the court going forward. That same treating physician could be hired under an expert witness contract to come in and give additional evidence to create an opinion for the jury. She then said maybe she can look into whether or not they actually need to be qualifying witnesses under Rule 702 or 703 if all the witness is doing is relaying a previously formed opinion and not forming a new one. Dr. Nelson said that it is not that the medical examiner is relaying a previously formed opinion. The medical examiner has no idea what the prosecutors or defense attorneys are going to ask of them when they get to court in order to render an opinion. While the autopsy report says one thing, the medical examiner cannot predict what attorneys are going to ask them in court, and that is the essence of the expert opinion testimony. Ms. Hoppmann said that would go to the preparation for testimony, and they certainly could do a better job of that. Dr. Nelson said it is not just preparation, but actually being in court answering questions regarding expert opinion. Tell us how this drug is metabolized. Tell us what the effect of this drug is. That is not in an autopsy report. Ms. Hoppmann was asked if that what not used to create that autopsy report or form the opinion. Dr. Nelson said that it is in his head, and once it comes out, that is an opinion. Ms. Hoppmann said that she has a position that if a medical examiner can be qualified at any point under Rule 702 or 703, then an expert witness contract should be drawn up. Dr. Nelson said that is how it was done in the past. Ms. Hoppmann said that, with the exception of very few cases, they have not done that, and that is why this has come up.

Dr. Thogmartin said that Shauna Hale was on the Feldman case he worked. He said the way that interaction worked was very interesting. In that case, they did have a defense expert challenge the causes of death that he and Dr. Wilson had. Dr. Thogmartin was contacted by Shauna Hale and the lead DEA agent on the case. They came to Dr. Thogmartin, showed him what the defense's expert was saying, and he then suggested strategy to thwart the outside expert which led to a mistrial. A full 8-9 hours of time were spent helping Ms. Hale and the DEA agent try to thwart the outside expert. After that, there was more information, a second trial to appear at, more travel, and waiting a total of 10 hours while countless fact witnesses testified in the trials. He went on to say that he doesn't understand why they would bring in an outside expert who is going to be less of an expert on the case than the medical examiner who actually worked it. When the Federal Court seeks out an outside expert to back-up the medical examiner, he or she is not the independent medical examiner. The original medical examiner is the independent one because they did not choose the case, but instead the case chose them because they happened to randomly encounter it. His main concern though is that he is not a fact witness. Every time someone from his office goes to court they are qualified as expert. He would not have a problem being a fact witness and reading the autopsy report just to have it admitted into evidence, but he is always going to be asked questions about things that are not necessarily in the autopsy report. He suggested that maybe he can have his records custodian go and present a certified copy of the autopsy report to the court. Ms. Hoppmann said that they cannot do that because of the 6th Amendment case in the 11th Circuit. She then said that when Shauna specifically contacted him, she knew that the case was going to be challenged. Dr. Thogmartin said that she actually told him from the beginning that they would bring him in as an expert and asked him for his hourly rate. He then told Ms. Hoppmann that he just doesn't want to go to court prepared to be a fact witness and then be asked for expert opinion testimony by the defense and the US Attorney in cross-examination. Preparing to be an expert witness in a multi-drug overdose case can easily take 6-8 hours of preparation whereas preparation for being a fact witness takes little to no time. Ms. Hoppmann said that when he was told he was a fact witness, he was told that specifically because someone requested an expert witness contract and asked if that is why the term "fact witness" came up. Dr. Thogmartin said that he was specially told that they were going to be used as a fact witness and quoted someone from the Federal Court as saying "Dr. Palma will not be testifying in an expert capacity." Ms. Hoppmann then said that she looked at the court transcript and he walked that back in front of the court specifically. She thinks that the term fact witness was applied because someone had requested them to draw up an expert witness contract. Dr. Thogmartin said he would never request an expert witness contract and his main reason for doing the ex-parte thing is because he is not a lawyer and because it was a very high profile case and he did not want the case to be a fiasco and his deputy chief who has worked for him for 20 years to get in trouble. Ms. Hoppmann said that they will never again tell the medical examiner that they are not qualified and they will not be using Rule 702 or 703.

Dr. Nelson said what is going to happen is the medical examiner is going to be qualified as an expert, but are not going to be paid as an expert. Dr. Thogmartin said that has already happened. There is an issue with billing and they won't pay for waiting or something. Dr. Nelson said that again, as far as courtesy goes, sitting on the bench all day long is not a good use of the medical examiner's time. Ms. Hoppmann said she understands and that with every single victim or witness they try to accommodate as best as they can. They are not asking them to do something they aren't asking everyone else to do. Dr. Nelson said they are asking them to do something different in that they are asking them to come there for free. Ms. Hoppmann said she understands and that what she needs to look at is whether they need to qualify the medical examiner and Rule 702 or 703 and if they don't need to because they cannot pay the medical examiner under an expert witness contract and facing the medical examiners not having any discussions beforehand and only relaying the information in the report. This would ensure that everything will need to be reexamined by an outside expert witness. Dr. Nelson said that he is more than happy to go for another protective order against the court at his

expense if necessary. Ms. Hoppmann asked for Dr. Nelson to please give her a copy of that protective order and asked if it was against the defendant or the United States. Dr. Nelson said it was against the United States for paying him as a fact witness instead of an expert witness to come to court for the day. Ms. Hoppmann said that she does not have any record of that protection order and was unaware of it before seeing the minutes for the last MEC meeting. Dr. Nelson said that the judge got involved and said to work it out because Dr. Nelson would be testifying as an expert witness. Ms. Hoppmann said the court can work that out on the defense side because the court actually releases funds for the defendant and funds for the expert. Dr. Nelson said that, just like in Dr. Thogmartin's case, it was the United States that said he was coming as a fact witness. Ms. Hoppmann said that this is also something they will look at with adopted cases. If there is a price tag that comes with the case that includes the medical examiner's involvement, they need to know that. Ms. Hoppmann then asked if there was anybody that represents the Commission as a whole because they are looking at a possible claim against the Treasury and the Department. Dr. Nelson said that this isn't a Commission issue and when the medical examiners come to court, they are not representing the Medical Examiners Commission. Ms. Hoppmann then asked if he would like her to make certain that the medical examiners are always under subpoena from now on because she understands that was an issue. Dr. Nelson said that they can subpoena the medical examiners, but if they subpoena them and tell them they will be a fact witness, it will get the same negative response. Ms. Hoppmann then said the question remains whether or not it is necessary to qualify a medical examiner under Rule 702 or 703 to relay the information in the autopsy report, and right now she doesn't know the answer to that. She said she will also need to look into qualifying additional experts on cases involving drugs for when the defense brings in outside toxicologists.

Dr. Thogmartin then asked Dr. Goldberger if he testifies as a fact witness or an expert witness when he goes to Federal Court to discuss one of his toxicology reports. Dr. Goldberger said he has never been subpoenaed to testify on one of his cases for Federal Court, but he does it for state court all the time and the university is always compensated for his time.

District 13 Medical Examiner Kelly G. Devers, M.D., said they just had a case in Federal Court and every person on the toxicology report, including forensic toxicologists and technicians, were subpoenaed and asked for opinion testimony about the drugs. Dr. Goldberger said he was hired as an expert witness under contract on that specific case.

Ms. Hoppmann said she will bring all of this back to the Department of Justice, the Chief Financial Officer, and the Chief policy person. Dr. Nelson said that he thinks this problem is coming from the money people in the government because that seemed to be the case when he was having issues with the Federal Court. Ms. Hoppmann said that it is a money issue in that their budget contracting officer, who is certified by the department, must sign the witness contracts. She said she will also contact the Northern and Southern Districts again to try and get additional information and asked that Dr. Nelson please provide her with any information regarding his protective order as well as any of the cases where medical examiners were hired as an expert witness. She then thanked the Commission for their time and reiterated that she would still like to send a representative from her office to future MEC meetings. Dr. Nelson said he would like follow-up information on the expert witness issue in the future as well.

ISSUE NUMBER 10: OTHER BUSINESS

- Mrs. Koenig reminded everyone about potential meeting dates for 2020. The first meeting of the year could occur February 11th-12th and could possibly be in the Sarasota area. April 29th - May 1st, August 4th-7th, and November 10th or 13th are the other potential meeting dates for the year.

There is a chance that the August meeting may be moved to July 22nd to coincide with the FAME Education Conference if an acceptable room rate can be agreed upon with the Hilton Orlando Bonnet Creek. As the commission meetings are coordinated by a state agency, room rates are limited to \$150 per night.

With no further business to come before the Commission, the meeting was adjourned at 12:20 P.M.