

NAME Position Statement on Forensic Pathologist Courtroom Testimony In Out-of-Jurisdiction Legacy Cases

Commonly, courtroom testimony for autopsies performed by forensic pathologists who have moved to a different jurisdiction (or who have died, become infirm, retired or moved to a remote location) is given by a surrogate forensic pathologist currently working in the original jurisdiction. There are advantages to the court system in continuing this practice. The review by a second forensic pathologist serves as a quality measure with an additional expert critically reevaluating the material, thus potentially increasing value to the court; a local expert is able to perform a full and expedited review of the file and notes; and there is ready access to this local expert for both prosecution and defense.

Recent United States Supreme Court rulings (e.g., *Melendez-Diaz v. Massachusetts* and *Bullcoming v. New Mexico*) have led some jurisdictions to conclude that the right of confrontation extends to the original forensic pathologist who conducted the autopsy examination and generated the autopsy report. It follows that a forensic pathologist who practices medicine in a jurisdiction different from where he or she performed the autopsy examination may be asked to return to the location of previous employment to testify.

NAME affirms that forensic pathologists should be willing to travel to a former jurisdiction to testify in a trial, or participate electronically (e.g. video). This practice satisfies the right of confrontation. However, NAME also asserts that utilization of the expertise of a local forensic pathologist is often of comparable value to the court.

NAME believes that courts and attorneys should recognize and respect the position of the original forensic pathologist. As he or she is not employed by the jurisdiction with an impending trial, the court and attorneys who issue a subpoena should:

- Compensate the expert witness forensic pathologist at the level of usual compensation for expert witness forensic pathologists, including preparation, travel and waiting time, and
- Accommodate the work schedule constraints of the forensic pathologist in the new place of employment.

It is always appropriate to respect the schedule of a physician expert witness employed locally or elsewhere. A forensic pathologist who has moved is obligated to an array of responsibilities in his or her current employment jurisdiction. Attorneys seeking expert testimony from the original forensic pathologist must recognize that the forensic pathologist must balance current and past commitments.

Fiscal constraints of prosecutors and defense attorneys are not the concern of the original forensic pathologist expert or the new jurisdiction wherein he or she works. It is incorrect to classify the forensic pathologist expert as a fact witness to reduce expenses. The forensic pathologist expert witness or current employer (usually a county or state government) should be compensated at rates that are usual in the field. It should not be assumed that the original forensic pathologist or the current employer would absorb the forensic pathologist's expert time devoted to legacy cases without compensation. Note that preparation and travel time might be a significant issue for the original forensic pathologist because he or she will have less

access to the case file, and distant travel consumes time. As with any expert witness, preparation time and travel time must be compensated.

A Medical Examiner or Coroner office has a responsibility to provide expert testimony to the best of its ability. Satisfying this obligation might or might not require testimony from the original forensic pathologist - this decision might depend on the individual case details and complexity. The court and attorneys should consult with the Medical Examiner or Coroner office to ensure that excellent evidence is presented and the right of confrontation is satisfied.

Approved by the Board of Directors of NAME October 2, 2015