COURT OF APPEALS
STATE OF NEW YORK

----------X

ANDRE SHIPLEY and KORISHA SHIPLEY,
Plaintiffs-Respondents,

-against-

THE CITY OF NEW YORK and THE OFFICE OF THE NEW YORK CITY MEDICAL EXAMINER,
Defendants-Appellants.

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Richmond County Index No. 101114/06
APL-2013-00345

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PLEASE TAKE NOTICE, that upon the annexed Affidavit of Gregory G. Davis, M.D., sworn on the 16th day of December, 2014, and upon a copy of the proposed *Amicus Curiae* brief, attached hereto, in the above styled case, the undersigned, on behalf of the National Association of Medical Examiners, moves this Court at the Court of Appeals, 20 Eagle Street, Albany, New York 12207, for an order granting the National Association of Medical Examiners leave to file a brief as *Amicus Curiae* in the above captioned action. Attached hereto is a copy of the brief that Proposed *Amicus* wishes to submit to the Court.

Respectfully Submitted,

Dated: December 16, 2014

GREGORY G. DAVIS, MD
President,
National Association of Medical Examiners
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TO:

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COURT OF APPEALS
STATE OF NEW YORK
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ANDRE SHIPLEY and KORISHA SHIPLEY,
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THE CITY OF NEW YORK and THE OFFICE OF THE NEW YORK CITY MEDICAL EXAMINER,
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AFFIDAVIT OF GREGORY G. DAVIS, M.D. IN SUPPORT OF MOTION TO FILE *AMICUS CURIAE* BRIEF

Richmond County Index No. 101114/06
APL-2013-00345

STATE OF ALABAMA
COUNTY OF JEFFERSON, S.S.:

GREGORY G. DAVIS, M.D., being duly sworn, states:

1. I am a licensed physician in the State of Alabama, a forensic pathologist, and President of the National Association of Medical Examiners ("NAME") and, in that capacity, represent NAME to this Court in this matter.
2. I am familiar with the facts, circumstances, and legal proceedings in the above captioned action and submit this affidavit in support of the motion of NAME to seek status as *Amicus Curiae* in connection with the appeal and file a proposed brief on the merits of the appeal.
3. NAME is the leading U.S. professional association of medical examiners and has a membership of over 800, predominantly forensic pathologists practicing in the role of government medical examiners, and is an advocate for the medicolegal death investigation community.
4. NAME seeks leave to file the proposed *Amicus Curiae* brief because it believes that questions of law and policy matters presented by the opinion of the Appellate Division

are of great importance to NAME, its members, and the broader American medical examiner and coroner communities, and the existing parties cannot fully and adequately present NAME's interest to the Court. The proposed *Amicus Curiae* brief attached to NAME's motion explains how the decision affects the broader medicolegal death investigation community and elaborates on issues of importance for the Court's consideration in this matter.

5. NAME believes that the lower Court was not fully aware and cognizant of the nuances of the difficult and esoteric issues presented, resulting in a harmful ruling that sets a dangerous precedent for the nation's medicolegal death investigation community.
6. NAME is desirous of bringing certain information to the attention of the Court for its consideration.
7. NAME recognizes that this filing is late and further seeks approval of this late filing, due to delays inherent in deciding on and acting upon such weighty issues by a large all-volunteer professional organization, whose members are already busy performing their daily tasks for the benefit of our various public communities.

WHEREFORE, your Affiant respectfully requests an order and judgment of this court permitting NAME to file as *Amicus Curiae* in the instant appeal, together with the acceptance of the filing and service of the *Amicus Curiae* brief submitted herewith.

Subscribed and sworn to me, this
16 day of December,
2014

NOTARY PUBLIC

GREGORY G. DAVIS, M.D.
President,
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COURT OF APPEALS
STATE OF NEW YORK

ANDRE SHIPLEY and KORISHA SHIPLEY.

Plaintiffs-Respondents

- against -

THE CITY OF NEW YORK AND THE OFFICE OF THE
NEW YORK CITY MEDICAL EXAMINER.,

Defendants-Appellants.

AFFIDAVIT OF SERVICE

Richmond County Index
#101114/06
APL-2013-00345

STATE OF ALABAMA, COUNTY OF JEFFERSON, SS:

Henry M. Tidwell, being duly sworn, states:

1. I am over the age of 18 and not a party to this action.
2. **On December 16, 2014,** I served the Notice of Motion, Supporting Affidavit, Proposed Amicus Curiae Brief and Addendum the plaintiffs and defendants, by depositing a copy of it, enclosed in a post-paid, properly addressed wrapper, at the Federal Express office located at 169 State Farm Pkwy., Homewood, AL, 35209, directed to:

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Gregory G. Davis

GREGORY G. DAVIS, M.D.

Sworn to me before this 16 day of December, 2014

Sherry M. Tidwell

NOTARY PUBLIC

Exp. 2/24/2018

APL-2013-00345
Richmond County Clerk's Index No. 101114/06

COURT OF APPEALS
STATE OF NEW YORK

ANDRE SHIPLEY and KORISHA SHIPLEY,

Plaintiffs–Respondents,

against

THE CITY OF NEW YORK and THE OFFICE OF THE NEW YORK CITY MEDICAL EXAMINER,

Defendants-Appellants.

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MEDICAL EXAMINERS IN SUPPORT OF THE DEFENDANTS-APPELLANTS

NATIONAL ASSOCIATION OF MEDICAL EXAMINERS

31479 Arrow Lane
Marceline, MO 64658

GREGORY G. DAVIS, M.D.
PRESIDENT

December 16, 2014

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COURT OF APPEALS RULE 500.1(F) DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of the Court of Appeals of the State of New York, *Amicus Curiae*, the National Association of Medical Examiners, ("NAME") states that it has no parents, subsidiaries or affiliates.

STATEMENT OF INTEREST

The *Amicus Curiae,* the National Association of Medical Examiners ("NAME"), is the primary professional organization of forensic pathologists and associates in the U.S. It was founded in 1966 and has since expanded to include medical examiners and coroners, medicolegal death investigators and administrators throughout the world. Medicolegal death investigation is performed by coroner and medical examiner's offices to explain the occurrence of unexpected, suspicious, and violent deaths and to prevent premature death in the living. Often this requires an autopsy, which is performed by a forensic pathologist. The scientific and medical explanation of the death may be necessary to support criminal or civil litigation, allow for estate settlements, and ensure that insurance companies make appropriate payments. Forensic pathologists may provide key testimony that will permit the incarceration of murderers and thereby prevent future murders, recognize the death of a child to be from abuse by a caretaker, explain the industrial hazard of a death at work, reveal a previously unrecognized genetic disorder that will affect others in a family, and identify

human remains from a mass disaster so as to allow closure for the families. The *Amicus* recognizes that the current litigation will have implications for the practice of medicolegal death investigation nationally and internationally.

INTRODUCTION

The primary function of medicolegal death investigation authorities is the determination of the cause and manner of death. It is performed in the public interest for criminal justice, public health, homeland security and civil administration purposes. A fundamental tool for the determination of cause and manner of death is the autopsy. This case involves the retention of the brain of a child by the New York City Office of Chief Medical Examiner ("OCME"), after autopsy and return of the body for funeral services, in order to conduct further studies to determine the cause and manner of the death. The family subsequently discovered this retention and brought this action. The City is now appealing the lower Court ruling that the OCME has an obligation to return organs based upon the families' right of sepulcher, and that this obligation may be satisfied by notification of the retention. The new policy instituted by the OCME to comply with this decision has been onerous and burdensome, and has caused grief to many of the families so notified. It is of concern to the larger medicolegal death investigation community that does not agree that such policy is necessary or

beneficial and, indeed, believes that it is detrimental to the interests of NAME members and the public.

ARGUMENT

I. MEDICAL EXAMINERS HAVE A SUPERIOR RIGHT AND MEDICAL NECESSITY TO CONDUCT AN AUTOPSY AND RETAIN TISSUES AND ORGANS

Medical examiners and coroners are notified of cases that fall under their legal jurisdictions as specified by state law. Cases of death investigated by a coroner or medical examiner's office may result in a determination that the death does not fall within its statutory jurisdiction, in a death certificate issuing with little or no further investigation, in an external inspection of the body, or in a complete autopsy.

The complete autopsy, at a minimum where possible (absent severe decomposition or skeletonization), requires retention of various body fluids for potential chemical and toxicological analysis and of various organ and tissue biopsies. In fact, the primary purpose of autopsies, whether a private ("hospital") autopsy or a medicolegal ("forensic") autopsy, is to grossly examine the organs and tissues and to sample tissues for microscopic examination and laboratory tests. A complete medicolegal autopsy will include the collection of biological specimens. Typically, blood, urine, bile, eye fluid, portions of liver and gastric contents are taken for toxicology.

Samples of tissues are taken for microscopic (histologic) examination, to include a "stock jar" of specimens for future use. Tissues immediately processed for histologic examination will be contained in paraffin blocks and microscopic slides. Specimens may be obtained for microbiology or other clinical testing. A dried bloodstain may be collected on filter paper for potential DNA analysis. Hair exemplars and fingernail clippings may be taken in cases of suspected homicide. Vaginal, oral, and rectal swabs may be taken in the case of suspected sexual assault victims. It is not uncommon to cut out and retain the skin around a gunshot or stabwound. Brains, hearts, other organs, or blocks of tissues may be taken for special examination or retained for their evidentiary value, where deemed appropriate. Where jurisdiction is asserted and a medicolegal death investigation is made but an autopsy is not performed, an external examination ("inspection" or "view") is performed, and collection of biologic specimens (usually for toxicology) is often done for toxicology testing. In fact, the collection of biological specimens during medicolegal death investigation is necessary, as documented in NAME's *Forensic Autopsy Performance Standards:* "G(26). Specimens must be routinely collected, labeled, and preserved to be available for needed laboratory tests…," and in the NAME Accreditation and Inspection

Checklist: "C(6)(J). Are specimens routinely retained for toxicological and histological examination during autopsies?" [*See Addendum.*]

Biological specimen collection will vary somewhat from office to office and case to case. The forensic pathologist must necessarily make decisions about the need for an autopsy as well as the need to take, test, and retain biological specimens as a part of his or her medicolegal death investigation. This role is properly that of the forensic pathologist performing the autopsy, as he or she is in the best position by virtue of education, experience, and responsibility to make such determinations. In fulfilling their legal mandate of serving the public interest, medical examiners apply their professional expertise and judgment, bring the greatest scientific knowledge to bear on evidence as resources permit, and engage in full and unfettered investigation and consultation of sudden and/or unnatural deaths, potential crimes, and possible threats to public health. Some decisions as to whether to conduct an autopsy and perform certain tests are formalized in written policies, while others are case-dependent and made at the autopsy table or after further investigation. This professional discretion should take into account the interests of society and those of families.

The fluids and biopsies taken at autopsy are routinely retained by the medical examiner or coroner after the body has been returned to the family. Such

biological specimen collection should not normally affect funerary viewing. Standards in the forensic pathology community require retention of wet tissues, paraffin blocks and microscopic slides for substantial periods of time, because it is not uncommon to have to go back to the tissues for re-examination and re-testing. Some issues that require testing do not arise until trial preparation, during trial, or upon appeal. The College of American Pathologists' ("CAP") materials retention standards for forensic autopsies require a minimum retention of wet stock tissue for one year, bodily fluids and tissues for toxicology for one year, and paraffin blocks, glass slides, dried blood stain or frozen tissues for DNA analysis indefinitely. [*See Addendum.*] Similarly, NAME Inspection and Accreditation standards require retention of toxicology specimens for at least two months in routine cases and one year for homicides, for formalin-fixed and paraffin-embedded tissues for at least one year, and for glass microscopic slides indefinitely. [*See Addendum.*] Organ and tissue blocks are often kept until they are fully examined, the autopsy report is issued, or the criminal prosecution or civil litigation is final.

A forensic autopsy is not considered complete without a full gross examination of all the internal organs, including the brain. In selected cases, brains, hearts, or other organs and tissues may have to be retained by the forensic

pathologist for fixation in formalin for enhanced examination, other special processing, or examination by specialists. This is not only the usual and customary practice, but it is the necessary scientific practice demanded by the forensic and legal community to perform its duties. The retention of organs and tissues and their preservation in specialized solutions provides the forensic pathologist with the optimal conditions under which to examine the tissues in order to identify diseases and conditions that are the cause of death or are medically significant in other ways (e.g., potentially inheritable). In many instances, these diagnoses and conclusions would be challenging to make through dissection of organs that have not gone through the process of fixation. Unfortunately, in the field of forensic medicine there is usually no second chance, short of disinterment (where the body is not cremated), to look for a disease finding or other pathology that may have been missed.

This case involves the retention of a whole brain. Whole brains are the most commonly retained whole organ. While brains are not retained in every case, most medical examiner's offices routinely retain brains for examination in cases of known or suspected neuropathology. Brain pathology is involved in a significant proportion of all deaths seen by medicolegal death investigation offices

and is often the critical or only pathology in such deaths. In fact, an autopsy is not considered a complete autopsy without an examination of the brain.

While brains can be examined fresh, there is often a need for a more careful "neuropathology examination" after "fixation." Fixation in formalin fluid for two weeks renders the gelatinous brain sufficiently firm to permit thin sectioning. It takes two weeks for formalin to penetrate and properly fix the deepest portions of the brain. This fixation process, followed by neuropathologic examination, requires retention of the brain for a period of time that typically extends well beyond when the body has been released to a funeral home following autopsy, which is usually a day or two after death. Brains are retained and fixed for neuropathology examination in seizure disorders (where the focus of abnormality can be subtle); some cases of blunt force trauma to the head; gunshot wounds and other penetrating injuries of the head; child abuse; ruptured aneurysms; arteriovenous malformations and other cranial hemorrhages; vitamin deficiencies and metabolic conditions; and suspected parasitic, infectious, cancerous, developmental and congenital disease of the brain. Complications of medical therapy are also among the indications for a formal neuropathology examination. Retention and close examination of these specimens may make the difference between a suicide, accident, homicide, or natural death determination.

Authority for the taking of biological specimens from dead bodies during a forensic investigation is the same as for the performance of forensic autopsies. Autopsies and biologic specimen analysis are merely components of a full medicolegal death investigation. Each of these specimens is collected or retained specifically for cause and manner of death determinations as well as evidentiary and forensic investigative purposes. Failing to retain and process tissues in a proper medical manner would do a great disservice to the families of the deceased, who are often anxious and upset over the death of their family member, as well as the public.

Finding the accurate cause of death is vital to the healing and grieving process. If these diagnoses are lost because of inadequate tissue retention and preservation, the cause of death may have to be certified as "undetermined"—leaving questions unanswered and no sense of closure. In those cases where the cause of death has been ascribed to an injury, but in reality is due to another more compelling natural event, a specialized examination with careful attention to detail may be the only objective data that spares the innocent who is accused. Likewise, for the family dealing with self-imposed blame in an apparent suicidal or accidental drug overdose, where drug levels are often difficult to evaluate in a vacuum, only a detailed autopsy may shed the light on a reasonable alternative

diagnosis. This authority of the medical examiner or coroner to take and retain tissues in a forensic autopsy is authorized as a public good and has been found to be a superior right and takes precedence over the objections, if any, of the private wishes of the next-of-kin. *Albrecht v. Treon*, 617 F3d 890 (6th Circ. 2010); *Waeschle v. Dragovic*, 576 F3d 539 (6th Circ. 2009); *Picon v. County of San Mateo*, 2008 U.S. Dist. LEXIS 111416 (Northern Dist. Cal. 2008); *Macrelli v. Children's Hospital*, 451 Mass 690 (Sup. Jud. Ct. Mass. 2008).

In this case, the lower Court recognized the right of medical examiners to collect and retain tissues and organs. It wrote: "A medical examiner or coroner has the statutory authority to perform autopsies under certain specified circumstances" and described "the discretionary decision of Dr. de Roux to remove and retain Jesse's brain for further neuropathologic examination, an unquestionably legitimate and legally authorized procedure during an autopsy…in the same manner as the testing of other tissue samples and bodily fluids," concluding that "the statutory powers and discretionary authority of the Medical Examiner's Office are extensive." *Shipley v. City of New York*, 80 AD3d 171, 175-76 (2d Dep't 2010).

II. FAMILIES HAVE SUBSERVIENT SEPULCHRAL RIGHTS BUT NOT FULL PROPERTY RIGHTS IN THE BODY

In very early English law, dead bodies were treated as property, but this notion was found to be contrary to "every principle of law and moral feeling" *Jones v. Ashburnham*, 102 E.R. 905 (1804). By the middle of the nineteenth century, it was reasonably well-settled law that bodies were not property subject to execution of a debt. R.N. Nwabueze, *Biotechnology and the Challenge of Property: Property Rights in Dead Bodies, Body Parts and Genetic Information,* pp. 44-46, 56-66 (Ashgate Publishing Co., Burlington, VT, 2007); V.W. Weedn, M.T. Holdsworth, A.M. Barron, *Legal and Ethical Considerations in Forensic Pathology Research, Academic Forensic Pathology*, 1(3):288-301 (2011). Thus, the common law as inherited from England specifically held that there is no property interest in dead bodies. American courts were unhappy with this British "no property" rule and invented the concept of "quasi-property" precisely to circumvent the effect of this rule. Nwabueze, *supra*; Weedn, et al., *supra*; Am Jur 2d, *Dead Bodies.* Without having to declare the dead body to be property, the quasi-property concept permitted plaintiffs a remedy for mutilation of a corpse and other wrongs. This concept involved the next-of-kin's sepulchral rights to determine the time, place, and manner of burial and the right to have the body delivered as it lay.

Bodies and body parts are not owned or conveyed in the usual sense; only the next-of-kin are entitled to them and they are possessed merely for custodial reasons of burial. *Whitehair v. Highland Memorial Gardens*, 327 S.E. 2d 438 (Sup. Ct. of App. W.Va. 1985); *Diebler v. American Radiator and Standard Sanitary Corporation*, 92 N.Y.S. 2d 356 (Sup. Ct. Erie Cty. 1949). The primary legal causes of action of next-of-kin are for intentional tortious action, such as desecration of the body or interference with burial, rather than conversion or theft. Bodies and body parts cannot be levied. Statutes prohibit their sale for public policy reasons. In *Culpepper v. Pearl Street Building, Inc.*, 877 P.2d 877 (Sup. Ct. Colo. 1994), the Colorado Supreme Court explained that a dead body is not commercially transferable, has no monetary value and, therefore, is not property, and rejected an action for conversion.

Courts have also specifically avoided finding parts of bodies to be property in the few cases that have squarely dealt with the issue. The Supreme Court of California in *Moore v. The Regents of the University of California*, 793 P.2d 479 (Sup. Ct. Cal. 1990), declared that:

> [the] statute's (California Health and Safety Code) practical effect is to limit, drastically, a patient's control over the excised cells. By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that

> what is left amounts to 'property' or 'ownership' for purposes of conversion law.

The Court held that the patient had no proprietary interest in his removed cells and thus could not sustain an action for conversion, and noted its concern over the negative impact on scientific and commercial activities of public interest that the alternative holding would have. The few other reported cases on patient rights to tissues are in accord with *Moore*. *Greenberg v. Miami Children's Hosp. Research Institute,* 264 F. Supp. 2d 1064 (SD Fla. 2003); *Washington Univ. v. Catalona,* 400 F.3d 667 (8th Cir. 2007); *Evanston Insur. Co. v. Legacy of Life, Inc.*, 370 SW3d 377 (Sup. Ct. Tex. 2012). A holding otherwise might impinge upon the larger biomedical enterprise. Societal interests in organs and tissues, which include the need to determine cause and manner of death as well as research purposes, rise as the private interests of the families fade.

Accordingly, the lower Court herein observed: "New York's jurisprudence has long recognized the interest of a decedent's next of kin in the remains of their decedent, and infringement upon that interest repeatedly has been acknowledged to be actionable…As frequently formulated in the case law, 'the common-law right of sepulcher gives the next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial, and damages will be awarded against any person who unlawfully interferes with that

right or improperly deals with the decedent's body.'" *Shipley v. City of New York*, *supra*, 80 AD3d at 177.

In general, a body is not to be mutilated, disfigured or otherwise abused, so that a proper funeral may occur as desired by the family. N.L. Cantor, *After We Die: the Life and Times of the Human Cadaver*, pp. 43-44, 60-71 (Georgetown University Press, Washington D.C., 2010). However, it has long been recognized that autopsies are permitted. In the case of a private hospital autopsy, the next-of-kin give their consent for the procedure. In the case of a medicolegal ("forensic") autopsy, authority is given to perform the procedure on behalf of the public for their safety, even over the private objections of the family. That an autopsy is not a willful desecration or disfigurement has been judicially recognized. *Farley v. Carson*, 8 Ohio Dec. Reprint 119, 1880 WL 6831 (Hamilton Cty. Dist. Ct. 1880); *Gray v. Southern Pacific*, 21 CalApp2d 240 (Cal. Ct. of Appeals, 1st App. Dist., 1937).

Medical examiner's offices recognize and are sensitive to the requirement for family viewing in funeral parlors and make efforts to accommodate this need. The classic "Y" incision is made specifically to permit funerary viewing. Decomposition or massive trauma may prevent a proper viewing. Regardless, with the return of the body by the medical examiner office to

the family, the sepulcher interest of the family is met as a funerary viewing can be accomplished where possible. Thus, autopsies are not considered an unlawful interference with the sepulchral rights of the family.

III. FAMILIES HAVE NO REASONABLE EXPECTATION THAT THE BODY SUBSEQUENT TO AN AUTOPSY IS ENTIRELY COMPLETE

Because the absence of a brain or other specimens will not be apparent during a funerary viewing, families may believe that they are burying the entire body with all tissues, but this is simply not correct. At least some blood and tissue is inevitably lost during the process of an autopsy, and fluids and tissues are specifically retained for examination and testing. It should be realized that blood is a liquid tissue and microscopic slides contain thin slices of tissues. Analogous to cut hair on the floor of a barbershop, blood, urine, saliva, and purge fluid may be left at the scene of the death or lost during transport. During mass disasters, portions of bodies may not be recovered. Some blood, other fluids, and small fragments of tissue may be washed down the sink or blotted up and discarded with biohazard waste. There will even be residual fluid in the needles used for sample collection. Testing may involve consumption of the specimen. Thus, it is impossible to truly return all biologic material to the body or to the family after autopsy. All medical examiner's offices keep fixed tissue specimens for histology, paraffin blocks, and microscopic slides for at least a period of time, if not

indefinitely, and standards exist in the community on this point. Therefore, the autopsy process is inconsistent with recognition of a right to an entirely intact body following autopsy.

Funeral rites center on viewing of the body. An autopsy does not normally interfere with this viewing. This compatibility of autopsies with the sepulchral rights of the families exists despite the collection and storage of tissues for microscopic examination or potential microscopic examination, the collection and testing of samples for toxicologic analysis or other clinical testing, the spillage of blood and the disposal of waste. There can be no expectation that a body is totally complete when it is received back from a medical examiner's office. These offices typically place the dissected internal organs in a bag and then into the thoraco-abdominal body cavity, but some do not follow this process because organs can decompose quickly and the body is easier for funeral homes to preserve without the organs. Medical examiner's offices attempt to accommodate families when feasible; in the case of autopsies of, for example, deceased of the Orthodox Jewish faith, the offices may modify autopsy procedures precisely to minimize the blood spilled and tissues not returned to the body cavity. Nonetheless, the fact that a body is not completely whole does not prevent a funerary viewing.

The issue of retention is a broad one that strikes at the basic practice of forensic pathology. While families may accept that blood and small tissues might be lost or retained, it can be more difficult for them to understand the retention of whole organs. In this case, the plaintiffs are concerned solely with the retention of the whole brain; they have not complained of the other tissues lost or retained, and the lower Court only concerns itself with "one or more organs." *Shipley v. City of New York*, *supra*, 80 AD3d at 178. However, there is no legal or conceptual distinction between the authority for retention of a whole organ, a portion of an organ, tissues for microscopy, fluids for analysis or even other evidence, such as clothing. There is a danger that that the lower Court ruling will extend to other tissues and fluids collected, retained, disposed of or lost at autopsy. Moreover, the definition of whole organ is itself murky—does "brain" include the brainstem? Does "eye" include the optic nerve?

A rule mandating the return of all tissues would be entirely unworkable. A rule mandating the return of whole organs would interfere with the function of a medical examiner's office. While the assumption is that an examination is conducted and done with, new concerns may arise when forensic pathologists talk with colleagues, attorneys, or family members, and they may then need to return to re-examine the organ. Sometimes, a new medical test or

technological innovation makes an analysis possible that was not previously possible. Defense attorneys may want to have their expert re-examine an organ. Moreover, and most importantly, such return is sometimes seen by families as intrusive, insensitive, and emotionally distressing in their time of grieving. It may interfere with the funeral arrangements by the delay from the organ return or it may be a significant additional cost for later exhumation and reburial with the additional organ. In this case, "the plaintiffs alleged…they were required to endure a second funeral service, reliving all of the grief, emotional pain and mental anguish which accompany such an event," *Shipley v. City of New York*, *supra*, 80 AD3d at 179, yet to some degree this is precisely what happens when a medical examiner's office subsequently returns a retained organ or tissue.

The lower Court's determination that "the medical examiner…has the mandated obligation, pursuant to Public Health Law § 4215 (1) and the next of kin's common-law right of sepulcher, to turn over the decedent's remains to the next of kin for preservation and proper burial once the legitimate purposes for the retention of those remains have been fulfilled," *Shipley v. City of New York*, *supra*, 80 AD3d at 177, is, we believe, legally incorrect and inconsistent with the needs of medical examiners, families and the public.

IV. NOTIFICATION OF FAMILY MEMBERS IS PROBLEMATIC AND SHOULD NOT BE MANDATED

The lower Court held that "[the obligation to turn over the remains to the next of kin] may be satisfied in the present context by the simple act of notifying the next of kin that, while the body is available for burial, one or more organs have been removed for further examination. In this manner, the next of kin may make an informed decision regarding whether to bury the body promptly without the missing organs and then either accept the organs at a later date or authorize the medical examiner to dispose of them, or alternatively to wait until such time as the organs and body can be returned to them together, in as complete a condition as is reasonably possible for burial or other appropriate disposition by the next of kin." *Shipley v. City of New York*, *supra*, 80 AD3d at 178.

The traumatizing effect of notifying families that a brain is being retained, as required by the Court below, is particularly acute in light of the time needed to complete a proper neuropathology exam. Those family members who indicate an interest in obtaining the retained brain face an excruciatingly difficult choice: whether to take the body without the brain, allowing for the closure of a funeral within a few days, or to delay burial a minimum of two weeks for the fixation and examination process to be completed.

Because notification is thus problematic, the forensic pathology community is divided in its dealing with notification of families of retention of remains. Most medical examiners choose not to tell the families that remains have been retained. A 2006 NAME survey on the subject found: "It is not uncommon practice that families are NOT notified when an organ is retained, and it is relatively uncommon that families are specifically informed verbally or in writing (other than mention in an autopsy report." [*See Addendum.*] A recent 2014 NAME survey found the same thing: of 69 medical examiner respondents, 52 responded that their procedure involved no family notification of organ retention, 15 responded that families were verbally notified, and two responded that the family is notified in writing. [*See Addendum.*] The 2014 Survey report yielded the following results:

> - Information was obtained from at least one responder from each of 30 states, the Armed Forces Medical Examiner, Puerto Rico and three non-U.S. jurisdictions (two Canadian provinces and Italy);
> - Most responders (75%) do not notify the next of kin ("NOK") when a whole organ is retained after the autopsy;
> - Responders that do not notify the NOK cite statutes/laws specifically addressing organ/tissue retention and/or mention this in their office brochure, website, or form given to the funeral director when the body is released;

- Feedback suggests that some NOK are upset about both the retention of the organs and the notification; practices are not uniform within a given state.

Some responders to this survey were from offices in New York State outside New York City, who responded that they did not require notification of organ retention.

Discussions of body parts shortly after a death further traumatizes grieving families. Just talking about retained remains may provoke "grief, emotional pain, and mental anguish." *Shipley v. City of New York*, *supra*, 80 AD3d at 179. Medical examiners also do not want to give the misimpression that the family may dictate to the office what is or is not acceptable. If asked for permission to retain an organ shortly after learning of the death, family members may say no because they are emotionally upset and simply do not know what to do, only to later regret their decision when they realize that it interfered with the determination of cause and manner of death. Moreover, there are times when a family member is suspected of child abuse and the suspect should not be given an opportunity to prevent a proper medicolegal examination. Therefore, many medical examiner's offices have chosen a policy in which the next-of-kin are not notified beforehand or given an opportunity to consent, and specimens are not returned to the families. An autopsy report may note that specimens have been taken for histology (making microscopic slides) and toxicology or that whole

organs were retained and specially examined. This is the considered policy that the New York City Office of Chief Medical Examiner had chosen prior to the lower Court's order.

As an alternative to explicitly notifying families that an organ is being retained, some medical examiner's offices give families general information about the autopsy procedure, often through a brochure or a web link, and tell them that if they have any further questions or special requests to contact the office. Medical examiner's office policies are generally sensitive to family wishes, and medical examiners will usually attempt to accommodate families where they feel they can.

Some offices have instituted aggressive policies to more routinely and proactively ask family members about their specific desires for return of specimens for reburial if the situation arises. Even these jurisdictions do not discuss all the tissues and fluids retained from the body, but instead restrict discussions to whole organs. Both the 2006 and the 2014 NAME surveys indicate that very few offices specifically notify families. [*See Addendum.*] Hamilton County (Cincinnati), Ohio, takes this approach due to the District Court's decision in *Hainey v. Parrott*, 2005 U.S Dist. LEXIS 44837 (S.D Ohio 2005), after which then-Coroner Parrott ordered that families be asked permission to retain brains for neuropathologic examination. NAME members have been advised, based upon anecdotal

information obtained from practitioners then working in Hamilton County, that this notification inflamed many families, and its pathologists therefore became reluctant to perform the appropriate neuropathology examinations as they had done before the judicial order. Hamilton County at that time had a significant brain retention rate, but after families complained, medical examiners stopped approaching families and stopped performing the neuropathological examinations that they had been performing. The 2006 NAME survey specifically noted that, as a national response to the Ohio litigation, "It appears that most responders have not changed their practices in the past year, although about 16% have." and "Comments suggest that some areas have reduced or eliminated the retention of whole organs." [*See Addendum.*] [1]

In 2008, NAME adopted a Policy Statement on Collection, Retention, and Disposition of Biologic Specimens by Medicolegal Investigative Agencies, which specifically discusses notification:

> Notification: Some next-of-kin may wish the return of retained specimens, while other next-of-kin are disturbed or distraught by discussion or later contact of disposition

[1] One state has chosen to notify families of organ retention based on considerations other than a judicial mandate. The Office of the Medical Investigator in New Mexico takes this approach due, in large measure, to the sensitivities of the state's Native American populations. C.S. Krinsky, S.L. Lathrop, R.R. Reichard, *A Policy for the Retention and Extended Examination of Organs at Autopsy*, J. Forensic Sci., March 2012, 55(2), pp. 418-422.

> of retained specimens. NAME recognizes and supports that varying policy considerations cause medicolegal death investigation offices to vary in their policies and practices, but also that they must follow applicable state law. Some offices choose to treat all biologic specimens the same and not to concern families with details of their practices. Other offices, unless public safety concerns preclude it, may approach next-of-kin, either before or after autopsy, verbally or in writing, to request their desires for disposition of retained whole organ or large specimens. NAME notes that such apparent and practical distinction between small and large specimens is imprecise, artificial, and illusory and no true distinction exists. Still other offices may notify next-of-kin through pamphlets that describe specimen collection and retention and that families may make requests of specimen disposition, thereby placing an affirmative duty on the families to notify offices of any objection. However, NAME believes that such notice or request should not imply a right or create an expectation that the desires of the next-of-kin will necessarily be honored or that any requirement for consent for disposition as medical waste is necessary. Furthermore, NAME believes that such family accommodation should not inhibit collection and retention of organ, tissue, and fluid specimens as well as medical appliances and nonbiologic evidentiary items where indicated for the optimal medicolegal death investigation.

[*See Addendum.*]

NAME has members who work in the New York City Office of Chief Medical Examiner. The anecdotal response has been uniformly negative in the comments about the judicial requirement. These NAME members relate that families are annoyed at best and angry at worst at being approached with questions

about retaining an organ. They find it callous and insensitive to be approached concerning these matters during their time of grieving. A letter from the Chief Medical Examiner Dr. Barbara Sampson and First Deputy Medical Examiner Dr. Jason Graham, a member of NAME, to Dr. Gregory D. Davis, the President of NAME, states as follows:

> It has been our experience that the Shipley decision has had broadly negative and burdensome impact on the grieving families whom we serve as well as direct negative operational effects for the NYC Office of Chief Medical Examiner.
>
> Firstly, the negative impact to decedents' families has been seen in many ways, both emotional and practical. The fact that an organ has been retained from a loved one's body at autopsy is very emotionally difficult for families when presented with this information. This is compounded by the decisions families are then forced immediately to deal with regarding their wishes for disposition of the retained organ, which has proven overwhelming for many. In fact, in our experience, over 80% of decedent's next of kin decline to claim the retained organ either by direct choice or by default in ultimately being unable to decide what choice to make regarding their family member's retained organ. As a practical matter, those who choose to claim a retained organ after examination of the organ is complete but also after the decedent's body has been released and buried will incur additional expenses from a funeral home. Many who have chosen to claim a retained organ ultimately do not do so given the financial implications. Among all families notified of organ retention, a large number indicate that they regret

knowing of the retention at all and are ill-equipped to make the decisions necessary at the time. Many who are notified of organ retention and choose to claim the retained organ state that they are doing so as a matter of guilt, sensing no alternative once learning of the retention of an organ from a loved one. These issues clearly add to the difficulty of an already difficult moment in the lives of surviving family members.

Secondly, the NYC OCME has been forced to deal with the ramifications of the Shipley decision across numerous agency departments. Complex and timely notification systems regarding the initial organ retention, notification of next of kin, and disposition options chosen by families for retained organs have had to be established and appropriately staffed. Outreach efforts to locate and notify next of kin must be undertaken if next of kin is not immediately known, despite the involvement of friends or significant others who would immediately claim a decedent's body and provide burial. Coordination of efforts to comply with Shipley and to appropriately deal with its implications for families is time consuming, labor intensive and difficult to manage effectively. The significant workload burden imposed on OCME staff by Shipley is eclipsed only by the increased legal liability it imposes at all levels. The nature of the organ retention process and our efforts to honor family's wishes while adhering to this law leaves no room for human error; yet, the complexity of the required systems of notifications, updates, reuniting of organs with decedents' bodies, etc. sets up the possibility for significant errors or oversights at many points which may adversely impact families. Errors such as failure to notify a family of an organ retention before release of the body or release of a decedent's body without the

> retained organ as requested by the family are not only appropriately distressing to families, but are the source of civil litigation against the agency in addition to being public relations nightmares for all medical examiners.
>
> We strongly feel that the impact of Shipley has been uniformly negative with many unintended consequences for both families of decedents and for medical examiners.…"

[*See Addendum.*]

NAME believes that the policy decision concerning notification should be left to the professional discretion of the New York City Office of Chief Medical Examiner rather than mandated by a court. We believe that there should not be a universal rule; rather, some discretion should be permitted in each case to balance the needs of the office with efforts to accommodate families.

V. ORGANS AND TISSUES SHOULD PROPERLY BE CONSIDERED BIOHAZARDOUS WASTE

The lower Court noted that the Ohio Supreme Court, on similar facts, specifically held that the next of kin of a decedent upon whom an autopsy has been performed do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing. *Shipley v. City of New York*, *supra*, 80 AD3d at 178. This finding was upheld by the Sixth Circuit Court of Appeals in *Albrecht v. Treon*, *supra*, and *Waeschle v. Dragovic*, *supra*. Other jurisdictions

have similarly held on similar facts. *Macrelli v. Children's Hospital*, *supra*; *Picon v. County of San Mateo*, *supra*.

Furthermore, the Ohio legislature subsequently amended the pertinent regulations to this effect:

> Sec. 313.123 Removal and disposal of autopsy specimens-good faith immunity of coroner … (B)(1) Except as otherwise provided in division (B)(2) of this section [Religious exception], retained tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy are medical waste and shall be disposed of in accordance with applicable federal and state laws...

O.R.C. Ann. §313.123. Minnesota similarly declares (Minn. Stat.§ 390.11):

> …Such tissue retained by the coroner or medical examiner pursuant to this subdivision shall be disposed of in accordance with standard biohazardous hospital or surgical material and does not require specific consent or notification of the legal next of kin.

Iowa likewise states in its Administrative Code that:

> The office of the state medical examiner shall retain tissues, organs, and bodily fluids as necessary to determine the cause and manner of death or as deemed advisable by the state medical examiner for medical or public health investigation, teaching, or research. Tissues, organs, and bodily fluids shall be retained at a minimum for the time periods established by the National Association of Medical Examiners and may be retained for a longer time period at the discretion of the state medical examiner. Tissues, organs, and bodily fluids retained under this subrule shall be disposed of without the specific consent or notification of the legal next of kin and in accordance with applicable federal and state

> regulations including but not limited to OSHA-recommended biohazard and blood-borne `pathogen standards. The anatomical material shall be removed from the laboratory premises through use of a contracted, licensed, and bonded medical waste removal service to a medical waste processing center for final disposition.

641 IAC 127.3

As the Appellants point out, New York statutory law explicitly includes "tissue, organs, and body parts...[and] body fluids that are removed during...autopsy" within the definition of "regulated medical waste." PHL, § 1389-aa(1), (1)(b). The Public Health Law prescribes how such wastes are to be stored, contained, treated, and disposed of. PHL, § 1389-cc, dd. Thus, these statutes do not preclude releasing such tissue to a funeral home for burial or cremation, but clearly provide direction on disposal other than judicially-mandated return.

Disposal of most biological specimens is accomplished by incineration. Just as in hospital practice, they are considered medical waste. Routine reburial would be burdensome, expensive, and emotionally wrenching. Most families do not want to be re-contacted about residual body parts, tissues and fluids, as it resurfaces painful emotions concerning the death of their loved ones. Of course, as noted above, not all tissues and fluids can be returned to families as some are inevitably lost. If the remaining tissues and fluids are to be returned, they

would be returned in days, weeks, months, and years later at the conclusion of the autopsy, the histologic examination, the toxicology testing, a legal proceeding, when wet tissues are to be discarded, when paraffin blocks are to be discarded, etc. These necessary delays might be perceived as insensitive or cruel.

The sepulchral rights of the family should be limited to return of the body for funerary purposes and not extend to those fluids, tissues, or organs lawfully retained at autopsy. In fact, funerals are held routinely all over America without delay awaiting such residual materials. Where families do inform medical examiner offices of their special needs and desires, the medical examiner on a case-by-case basis can make appropriate accommodations where possible. However, the fundamental right and need of the medical examiner to retain evidence, notwithstanding family desires, must be preserved for public safety purposes. Courts should not mandate return or notification of the retention of such materials by the medical examiner.

CONCLUSION

For all the foregoing reasons, we, the National Association of Medical Examiners, believe that bodies should be returned to families, but that there is no lawful basis for a judicial mandate that retained organs, tissues and fluids be returned or for specific notification of such retention, and the lower Court's order should be amended accordingly.

Respectfully Submitted,

By: _____
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ADDENDUM

College of American Pathologists. Retention of Laboratory and Records and Materials

NAME Forensic Autopsy Performance Standards, 2014, Section G(26) Specimens for Laboratory Testing.

NAME Inspection and Accreditation Checklist, 2014-2019, Section C(J) Postmortem Examinations, question J.

NAME Inspection and Accreditation Checklist, 2014-2019, Section D(2) Histology Practices, questions (a) & (g).

NAME Inspection and Accreditation Checklist, 2014-2019, Section F(4) Toxicology Specimens, question (f).

NAME Position Statement on the Collection, Retention, and Disposition of Biologic Specimens by Medicolegal Investigative Agencies (2008)

NAME Survey # 8, Organ Retention Practice, Randy Hanzlick, MD, 2006

NAME Survey, Organ Retention Practice, Kathryn Haden-Pinerl, 2014.

Barbara Sampson and Jason Graham letter to Gregory Davis, dated December 8, 2014.

Log In/Register

Retention of Laboratory Records and Materials

Material/Record	Period of Retention
General Laboratory	
Accession log	7 years
Maintenance/instrument maintenance records	2 years
Quality control records	2 years
Surgical Pathology (including bone marrows)	
Wet tissue	2 weeks after final report
Paraffin blocks	10 years
Slides	10 years
Reports	10 years
Cytology	
Slides (negative/unsatisfactory)	5 years
Slides (suspicious/positive)	10 years
Fine needle aspiration slides	10 years
Reports	10 years
Non-Forensic Autopsy	
Wet tissue	2 months after final
Paraffin blocks	10 years
Slides	10 years
Reports	10 years
Forensic Autopsy	
Wet (bank) tissue	1 year
Paraffin blocks	Indefinitely
Reports	Indefinitely
Slides	Indefinitely
Gross photographs/negatives	Indefinitely
Accession log	Indefinitely
Body fluids and tissues for toxicology	1 year*
Representative tissue suitable for DNA analysis	Indefinitely
Clinical Pathology	
Patient test records	7 years
Serum/heparinized or EDTA plasma/CSF/body fluids (except urine)	48 hours*
Urine	24 hours*
**Exceptions must be made at the discretion of the laboratory director*	
Peripheral blood smears/body fluid smears	7 days
Permanently stained slides – microbiology (Gram, trichrome, etc)	7 days
Cytogenetics Records	
Permanently stained slides	3 years
Fluorescence stained slides	

	At the discretion of the laboratory director
Wet specimen/tissue	Until adequate metaphase cells are obtained
Harvest cell pellet	2 weeks after final report
Final reports	20 years
Diagnostic images (digitized, prints or negatives)	20 years
Flow Cytometry	
Dated dot plots and histograms	10 years
Blood Bank	
Donor and recipient records	10 years
Patient records	10 years
Records of employee signatures, initials, and identification codes	10 years
Quality control records	5 years
Records of indefinitely deferred donors, permanently deferred donors, or donors placed under surveillance for the recipient's protection (e.g., those donors that are hepatitis B core positive only, donors circulated to a hepatitis positive recipient)	Indefinitely
Specimens from blood donors and recipients	7 days post transfusion

Forensic Autopsy Performance Standards

Prepared by:
Garry F. Peterson, M.D. (Committee Chair, 2005)
Steven C. Clark, Ph.D. (NAME Consultant)

Approved by General Membership
October 17, 2005 NAME Annual Meeting, Los Angeles, California
October 4, 2010 NAME Annual Meeting, Cleveland, Ohio

Amendments Approved by General Membership
October 16, 2006 NAME Annual Meeting, San Antonio, Texas
August 11, 2011 NAME Annual Meeting, Ketchikan, Alaska
October 8, 2012 NAME Annual Meeting, Baltimore, MD
September 22, 2014 NAME Annual Meeting, Portland, OR

(Sunset date August 11, 2016)

Section G: Ancillary Tests and Support Services

The purpose of this section is to establish minimum standards for the use of scientific tests, procedures, and support services. This section also addresses the need for certain equipment and access to consultants. For toxicology reports, it also specifies the report content needed by the forensic pathologist for interpretation and establishes minimum standards for handling and documenting evidence.

Standard G25 Radiography

Radiographs of infants are required to detect occult fractures which may be the only physical evidence of abuse. Radiographs detect and locate foreign bodies and projectiles. Charred remains have lost external evidence of penetrating injury and identifying features.

The forensic pathologist or representative shall:

G25.1 X-ray all infants.
G25.2 X-ray explosion victims.
G25.3 X-ray gunshot victims.
G25.4 X-ray charred remains.

Standard G26 Specimens for Laboratory Testing

Specimens must be routinely collected, labeled, and preserved to be available for needed laboratory tests, and so that results of any testing will be valid. The blood specimen source should be documented for proper interpretation of results. Blood or other appropriate samples should be collected, whenever possible, for potential genetic testing in sudden, unexplained deaths that remain unexplained at the completion of the autopsy.

The forensic pathologist or representative shall:

G26.1 collect blood, urine, and vitreous.
G26.2 collect, package, label, and preserve biological samples.
G26.3 document whether blood is central, peripheral, or from cavity.

Standard G27 Histological Examination

Histological examination may reveal pathologic changes related to the cause of death.

The forensic pathologist shall:

G27.1 perform histological examination in cases having no reasonable explanation of the cause of death following gross autopsy performance, scene/circumstance evaluation, and toxicology examination, unless the remains are skeletonized or severely decomposed.

NAME Inspection and Accreditation Checklist

Adopted February 2014

Effective Date: January 2009
Date of Expiration: January 2019
Approved by Board of Directors February 2014

C	5		Radiology	P	Result		
		a	Is a written schedule of exposures (i.e., an x-ray "technique" chart) on hand, or is there an alternative system in place so as to ensure proper x-ray film exposure?	II	Y	N/A	N
		b	Are radiographs labeled with case number and right/left designation on each film?	II	Y	N/A	N
		c	Are the quality of radiographs commensurate with the purpose of the x-ray examination?	II	Y	N/A	N
		d	Are radiographs filed so as to be readily retrievable?	II	Y	N/A	N
		e	When performed in-house, are the x-ray development equipment and reagents routinely maintained according to a set schedule and is this documented?	II	Y	N/A	N
		f	Is in-house x-ray equipment periodically assessed for performance improvement, radiation protection, x-ray beam collimation, and biomedical safety, and are records of these evaluations maintained?	II	Y	N/A	N
		g	Is the x-ray film development subject to effective quality control and are x-ray films of good diagnostic quality?	II	Y	N/A	N
		h	Is there a documented program in place to assure that all personnel exposed to x-ray or other radiation sources are monitored for radiation exposure; as part of this policy, is there a mechanism in place to identify persons who are approaching, have reached, or have exceeded their exposure limits and to take appropriate actions?	II	Y	N/A	N
		i	Is x-ray equipment properly and currently licensed and maintained?	II	Y	N/A	N

C	6		Postmortem Examinations	P	Result		
		a	Does the office have a written and implemented policy or standard operating procedure covering postmortem examination procedures which is reviewed at least every two years?	II	Y	N/A	N
		b	Is there a written and implemented policy which specifies the criteria for the determination of when complete autopsies, partial autopsies, or external examinations are to be performed?	I	Y	N/A	N
		c	Are autopsies performed in greater than 95% of all cases suspected of homicide at the time of death?	II	Y	N/A	N
		d	Are autopsies performed in greater than 95% of all cases in which the manner of death is undetermined at the time an autopsy decision is made?	II	Y	N/A	N
			NOTE: Some inspector discretion allowed.				
		e	Are the circumstances of death, if known, reviewed prior to autopsy?	II	Y	N/A	N

		f	Does the medical examiner/autopsy physician personally examine all external aspects of the body in advance of dissection?	II	Y	N/A	N
		g	Is a medical examiner/autopsy physician responsible for the conduct of each postmortem examination, the diagnoses made, the opinions formed, and any subsequent opinion testimony?	II	Y	N/A	N
		h	Are all autopsy ex-situ dissections personally performed by a medical examiner/autopsy physician?	II	Y	N/A	N
		i	Is all assistance rendered by pathology assistants, autopsy technicians, dieners, or others without medical training performed in the physical presence of and under the direct supervision of a medical examiner/autopsy physician?	II	Y	N/A	N
		j	Are specimens routinely retained for toxicological and histological examination during autopsies?	II	Y	N/A	N
		k	Is there a written and implemented office policy which defines when radiographic examinations are to be performed?	I	Y	N/A	N
		l	Is there written and implemented office policy that defines when ancillary tests or procedures are to be undertaken (e.g., outlining when histological, toxicological, microbiologic, biochemical, genetic [including DNA], anthropological, and odontologic specimen collection, testing, or consultation is to be done or sought)?	I	Y	N/A	N
		m	Does the office have a written policy or standard operating procedure covering the retention and disposition of organ and tissue specimens taken at autopsy, that addresses whether, or under what circumstances, next-of-kin are to be notified of each retention?	II	Y	N/A	N
			NOTE: NAME recognizes the complexity and sensitivity of this issue, and acknowledges that either decision-to notify family members, or to avoid intrusion upon a family, is accepted and appropriate in the practice of death investigation.				
		n	Are samples routinely obtained for potential DNA analysis?	II	Y	N/A	N

C	7		Evidence and Specimen Collection	P	Result		
		a	Does the office have a written and implemented policy or standard operating procedure, signed within the last two years, covering evidence collection?	II	Y	N/A	N
		b	Does the office have a written and implemented policy or standard operating procedure, signed within the last two years, covering tissue and body fluid specimen collection?	II	Y	N/A	N
		c	Does the office have a written and implemented policy or standard operating procedure, signed within the last two years covering evidence and specimen disposition and destruction?	II	Y	N/A	N

D. HISTOLOGY

D D	1		HISTOLOGY Histological Laboratory Space	P	Result		
		a	Does the office have access to histology services?	II	Y	N/A	N
		b	Is adequate space and equipment provided for tissue cutting and for histological preparation of microscopic slides, including an area for special staining methods?	II	Y	N/A	N
		c	Is each work station supplied with electricity and water and properly vented to remove solvent and fixative fumes?	II	Y	N/A	N

D	2		Histology Practices	P	Result		
		a	Are microscopic slides retained indefinitely?	II	Y	N/A	N
		b	Are paraffin blocks stored in a cool area and retained for at least ten years?	II	Y	N/A	N
		c	In addition to routine H&E staining, are special stains available for microorganisms, iron, fat, and connective tissue?	II	Y	N/A	N
		d	Are special stains returned with appropriate control slides?	II	Y	N/A	N
		e	Is a cryostat available for rapid diagnosis and for fat stains?	I	Y	N/A	N
		f	Are microscopic slides prepared, examined, and reported in all sudden infant deaths, and where feasible, in unexplained deaths, and where necessary to establish a tissue diagnosis?	II	Y	N/A	N
		g	Are formalin-fixed or paraffin-embedded tissues stored for at least one year in cases in which microscopic slides are not prepared?	I	Y	N/A	N
			NOTE: In cases involving skeletonized remains and other remains not suitable for embedding or microscopy, this checklist item would not apply.				

E. TOXICOLOGY

E E	1		TOXICOLOGY Toxicological Laboratory Space	P	Result		
		a	Does the office have access to a forensic toxicology laboratory?	II	Y	N/A	N
		b	Does the toxicology laboratory have suitable space, equipment, scientific instrumentation, reagents, and supplies to manage the caseload?	II	Y	N/A	N
		c	Is there an appropriate and safe storage system in place for chemicals and reagents, and is there provision for recognition and proper disposal of outdated and expired items?	II	Y	N/A	N
		d	Is there a properly ventilated and maintained fume hood in the laboratory or available to laboratory personnel for handling dangerous or unpleasant samples of reactions?	II	Y	N/A	N
		e	Is the toxicology laboratory used by the office accredited by an Accreditation Body who is a signatory to the International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition Arrangement (MRA) and offers forensic laboratory accreditation services or a major accreditation body acceptable to NAME?	II	Y	N/A	N

E	2		Toxicology Practices	P	Result		
		a	Is the toxicology laboratory in compliance with the guidelines of the Society of Forensic Toxicologists (SOFT), or accredited by the American Board of Forensic Toxicology (ABFT), the College of American Pathologists (CAP), or a state reference laboratory?	I	Y	N/A	N
		b	Is testing routinely available for ethanol and volatiles; carbon monoxide; major drugs of abuse; major acidic drugs; and major basic drugs?	II	Y	N/A	N
		c	Does the office have access to stat carbon monoxide testing?	I	Y	N/A	N
			NOTE: Toxicology by itself should not be used as a substitute for a forensic autopsy or as a substitute for a careful search of a death scene for health and safety hazards.				
		d	Are tests performed according to written standard operating procedures?	II	Y	N/A	N
		e	Does the toxicology laboratory participate in external drug proficiency testing for drugs of abuse, and are appropriate corrective actions undertaken and recorded when the results of this testing are outside of compliance limits?	II	Y	N/A	N
		f	Is there active monitoring of the laboratory for quality assurance, and are corrective actions taken when indicated?	II	Y	N/A	N

		g	Are 90% of toxicology examinations completed within 90 calendar days of case submission?	II	Y	N/A	N
		h	Are 90% of toxicology examinations completed within 60 calendar days of case submission?	I	Y	N/A	N
		i	If the office has computerized information management system, is there an appropriate security system in place to prevent intrusion, unauthorized release of information, or unauthorized addition, deletion, or alteration of data?	II	Y	N/A	N
		j	Is there a system to monitor and track overdue toxicology reports?	II	Y	N/A	N

E	3		Toxicologists	P	Result		
		a	Does the Chief Toxicologist have formal training and experience in forensic toxicology?	II	Y	N/A	N
		b	Does the Chief Toxicologist hold a relevant doctoral degree from an accredited institution?	I	Y	N/A	N
		c	Is the Chief Toxicologist certified by the American Board of Forensic Toxicology (ABFT) or certified in toxicological chemistry by the American Board of Clinical Chemistry (ABCC) or the international equivalent?	I	Y	N/A	N

E	4		Toxicology Specimens	P	Result		
		a	Does the office have a written and implemented policy or standard operating procedure, signed within the last two years, for the collection of toxicology specimens?	II	Y	N/A	N
		b	Is peripheral blood rather than central blood used for toxicological testing whenever possible?	I	Y	N/A	N
		c	Is the site of collection (peripheral, central [heart/great vessels], dural sinus, chest cavity, subdural hematoma, etc.) of blood used for toxicology recorded?	II	Y	N/A	N
		d	Are specimens for toxicology promptly delivered to the toxicology laboratory or stored in a secure refrigerator or freezer until delivery is effected?	II	Y	N/A	N
		e	When toxicology is requested, is the toxicologist made aware of the circumstances surrounding the death and any medications which may have been taken by the decedent?	II	Y	N/A	N
		f	Are toxicological specimens retained for at least two months in routine cases and 1 year in homicide cases after receipt of report by the medical examiner?	II	Y	N/A	N
		g	In cases of delayed death in hospitalized victims, does the office attempt to obtain the earliest available specimen from the hospital when appropriate?	II	Y	N/A	N

The Ad Hoc Committee on Organ Retention spent a year and developed the following policy statement which was endorsed by the NAME Executive Committee on 11/18/2008

NAME Position Statement on the Collection, Retention, and Disposition of Biologic Specimens by Collection, Retention, and Disposition of Biologic Specimens by Medicolegal Investigative Agencies

Collection and Retention: Complete autopsies, when necessary, encompass the removal and examination of all visceral organs, including the brain from the cranium. Autopsies are invasive procedures and some tissue and fluid loss necessarily accompanies all autopsies. The National Association of Medical Examiners (NAME) recognizes the necessity of the collection and retention of tissue and fluid specimens as an important aspect of routine forensic autopsy practice and necessary for an optimal medicolegal death investigation. Usually only fluids for toxicology and other laboratory analyses and small portions of tissues for microscopy are retained. However in some cases, as best determined by the forensic pathologist performing the autopsy, as a professional expert and governmental official or agent, whole organs or large tissue blocks may be collected and retained for further examination, testing, or for evidentiary purposes. Non-biologic evidence, such as bullets and medical appliances, may also be removed and retained. Furthermore, the nature and extent of these specimen collections are not always known prior to autopsy. NAME supports this collection and retention of specimens, in cases of medicolegal death investigation jurisdiction, as fulfilling the duty of the medicolegal death investigation office to determine cause and manner of death and otherwise to protect society. By contrast, absent special legislation, organs and tissues collected for transplantation or research are not collected for forensic purposes and specifically require the consent of the next-of-kin.

Disposition: The next-of-kin have sepulchral custodial interests in the corporeal remains of their loved ones and may choose the disposition of such remains. However, it is the view of NAME that these interests do not extend to the biological (including organs, tissues and fluids) and non-biological specimens that are specifically collected and retained for forensic examination, testing, potential future diagnostic use, or evidentiary purposes. Medicolegal death investigation offices have a public interest that supersedes private interests of next-of-kin to such specimens specifically collected for forensic purposes based upon an overarching investigative authority. Some biologic specimens must be kept beyond release of the corporeal remains to the next of kin (for burial or other disposition) in the course of customary and optimal medicolegal death investigation. Such biologic specimen collection should not normally affect funerary viewing. Standards exist in the field that mandate minimum storage requirements for certain materials. After such analysis or storage such specimens are usually considered medical waste and disposed of as biohazardous materials as is done by hospitals on a daily basis. On the other hand, medical examiners should attempt to accommodate family wishes as a matter of policy to the extent reasonable and practicable. Thus, with the assent of the medicolegal office, some large specimens, such as hearts or brains, may be returned to the custody of next-of-kin specifically for rebuial or other such disposal according to their wishes.

Notification: Some next-of-kin may wish the return of retained specimens, while other next-of-kin are disturbed or distraught by discussion or later contact of disposition of retained specimens. NAME recognizes and supports that varying policy considerations cause medicolegal death investigation offices to vary in their policies and practices, but also that they must follow applicable state law. Some offices choose to treat all biologic specimens the same and not to concern families with details of their practices. Other offices, unless public safety concerns preclude it, may approach next of kin, either

before or after autopsy, verbally or in writing, to request their desires for disposition of retained whole organ or large specimens. NAME notes that such apparent and practical distinction between small and large specimens is imprecise, artificial, and illusory and no true distinction exists. Still other offices may notify next-of-kin through pamphlets that describe specimen collection and retention and that families may make requests of specimen disposition, thereby placing an affirmative duty on the families to notify offices of any objection. However, NAME believes that such notice or request should not imply a right or create an expectation that the desires of the next-of-kin will necessarily be honored or that any requirement for consent for disposition as medical waste is necessary. Furthermore, NAME believes that such family accommodation should not inhibit collection and retention of organ, tissue, and fluid specimens as well as medical appliances and nonbiologic evidentiary items where indicated for the optimal medicolegal death investigation.

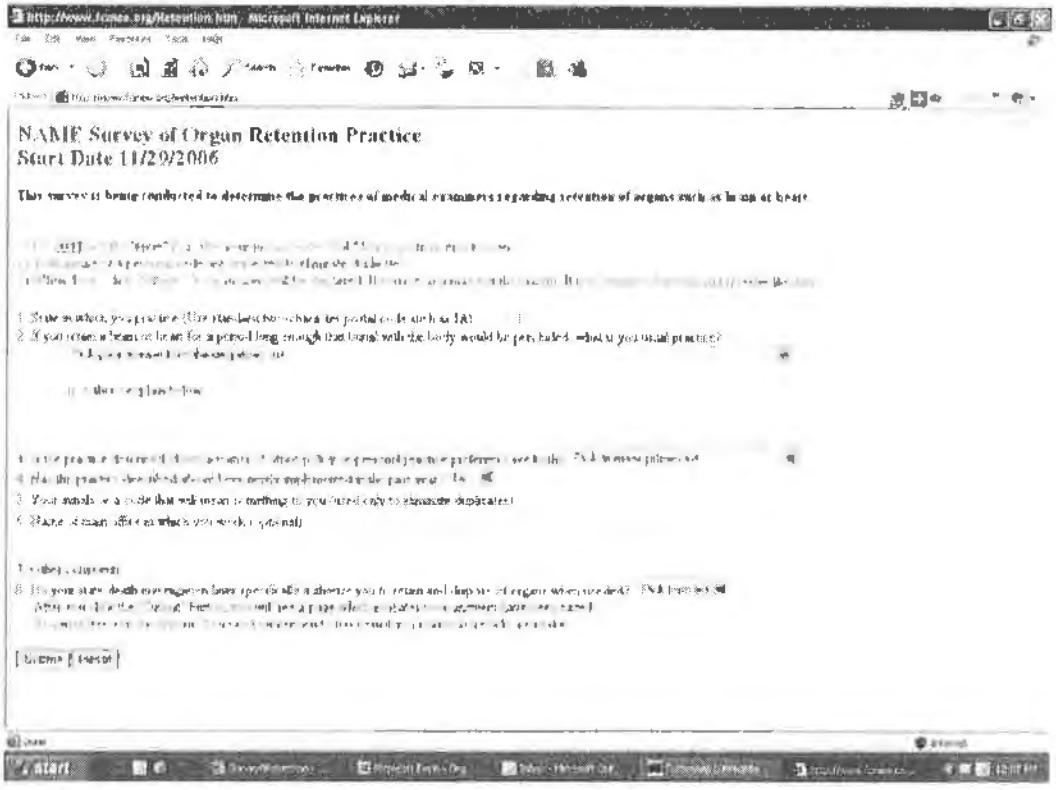
NAME Survey # 8
Organ Retention Practice
December, 2006
Prepared by Randy Hanzlick, MD, Chair, NAME Data Committee

Introduction

This survey was conducted at the request of NAME President John Hunsaker. NAME had been asked to offer assistance in Ohio, where there have been legal issues about the retention of organs such as brain.

Methods

On 11/29/06, a global email was sent to all NAME members with email addresses on file (approximately 860). The mail asked NAME members to complete a brief on-line survey (shown below). Because time was short for the project involved, a request was made that the survey be completed on an urgent basis.



Results

Within 48 hours, 117 responses were received from offices in 40 different states, 3 Canadian Provinces, one Australian State, and Singapore..

Alberta
AL
AR
AZ
CA
CO
FL
GA
HI
IA
IL
IN
KS
KY
LA
MA
Manitoba
MD
MI
MN
MO
MT
NC
ND
NE
NH
NJ
NM
New South Wales
NY
NV
OH
Ontario
OR
PA
RI
SC
SD
Singapore
TN
TX
UT
VT
WA
WI

The breakdown of currently used procedures is:

No family notification if an organ is retained	55
Autopsy report indicates organ was retained	18
Family is verbally notified	16
Family is notified in writing	3
Other (see Table below)	25

Explanation
For homicides, we generally don't bring up the issue with the family. We try to not retain entire organs. If it is necessary, in other cases, the family may be told of the need to see what their response is. There is no formal procedure for this issue.
Autopsy report states that organ has been retained for further studies. Nothing else is said and it is eventually incinerated as all other histo specimens
Have not retained organs for years, partly because of liability issue, partly because don't have a neuropathologist anyway.
Notification is not made to next-of-kin but the retention is mentioned in the autopsy report. No discussion of what will become of the organ is put in the report.
Autopsy report indicates specimen was retained. Brain is held for at least 6 months after cutting in case family wants it.
This statement applies only to medicolegal autopsies. For clinical ("hospital") autopsies, only a notation that "the (organ) is retained for specialized examination" is made.
The family is notified that the organ(s) is/are retained and then they are disposed of routinely. Disposition occurs no less than a year after the date of the autopsy. The autopsy report also indicates that the organ was retained and that a detailed cardiopathological or neuropathological report will follow. Those reports are considered part of the original autopsy report.
The notification is sort of "read between the lines" in that I say I retain it and that retained tissues are held for 6 months. Doesn't go into explicit detail but sufficient to either raise the question in someone's mind or for them to say "I want this back". Not required, by the way. Law allows saving whatever is deemed necessary for diagnosis.
This has not occurred in the past year. However, if absolutely necessary to retain an entire organ, I would contact the family through the funeral home and honor their preference.
Retention is stated in autopsy report (which family may or may not get at their request), but no provision made to otherwise notify family of retention or disposition. Retained tissues undergo hospital incineration according to our schedule.
Autopsy report notes retention but does not make specific comment about reclaiming.
Verbal notification of retention and eventual disposal by hospital when finished; autopsy report states organ retained/sectioned at later date. IF MN CASE, this by statute is covered. On non-consented cases (i.e. not family/hospital request), all efforts to section at time of autopsy are done and return organs to body.

No organs are retained anymore since September 1, 2006. Extensive documentation by photography -at least 200 for each autopsy-exhumation autopsies are videoed and also documented by digital and 35mm photos-and in such cases we sometimes have up to 400 photographs available- and complete histopathology of all organs -including normal and abnormal -and any injuries of skin and soft tissues-with descriptive microlog-are part of detailed autopsy reports. CD-ROM of photographs are submitted with the final autopsy reports. In Alzheimer's Brain cases-where the family wants us to send the brain to a neuropathologist for research -we promptly send the brain via Fedex immediately without delay. As a matter of policy-we now place back all organs and tissues in the biohazard plastic bag and place the entire contents in the cavity of the deceased prior to removal by the funeral directors. Our initial poll after the institution of this policy-showed 100% satisfaction by the funeral directors and the families. The coroners we work with have also been happy-unbeknownst to us families -in the past-had always been asking the funeral directors and local coroners whether the organs retained by the pathologists were being used for research. I strongly recommend that all forensic pathologists follow our practice-especially giving the notoriety given to the retention of organs and tissues by the media. I am also a practicing attorney-at-law and I know that such sensational news can easily defame a physician who is not only highly skilled but also highly educated.
Followed up by letter
The autopsy report indicates that the organ or organs have been retained; it does not state that the organs can be claimed subsequently by the family. If a family requests return of the unused parts of the organ or organs, we release the tissue to their funeral director.
The family is notified both verbally and in writing. The verbal notification is made immediately following the autopsy either in person or by phone. Then, if in person, they are given a form which reiterates what was just discussed and lists the choices they have. They must choose (one choice says they cannot make choice now, but must notify us within 30 days of the choice), sign and date the form. If the discussion is made over the phone, a form is faxed to them (usually via the funeral home). In either case, they must sign and return the form before we will release the body to the funeral home.
Virtually never retain an entire organ. Because of the recent legal concerns in our state, should we do so, we would notify the family and offer to make the organ available following completion of our examination.
Currently, inform next of kin and ask them if they would like the organ back for burial or have medical disposal at a later date. Previously, did not disclose but no mention of retention was made
We now utilize a body release form that must be signed by the NOK prior to release of the body to the FH that indicates that we retain tissues and fluids in the normal course of business and will dispose of them in a proper method unless notified otherwise by NOK
If retention for additional studies is required, a "portion" is retained, just as is routinely with all other organs and tissues in the wet storage stock container.
If retention for additional studies is required, a "portion" is retained, just as is routinely done with all other organs and tissues in the wet storage stock container.
The coroner is notified.
Practice is not to retain organs unless there is clear reason to do so. However, if brain is retained, it is indicated in main autopsy report or supplementary report.
Until recently there was no standard where I work. Personally, I for years made no mention or notification. Then I began mentioning organ retention within the final autopsy report, and later the preliminary autopsy report. Most recently I began notification of NOK in writing using a form devised by my superior. Whenever possible, I make that notification verbally before funeral arrangements are made.
Retention and fixation of brain or other organ (rare) is typically made in the autopsy report, but

no notification is made. The organ is disposed of with other tissue on a regular basis after examination is completed.
Mention is made that the organ is retained for examination in the autopsy report. Then the results are stated. We dispose of the organ without talking to the family. Example: "The brain is retained for neuropathologic examination. Subsequent examination of the brain reveals...."
Statement made in the report, "Brain, spinal cord and meninges are retained in formalin for neuropathologic examination. A section of occipital lobe is returned with the body" After neuropath stock tissue is retained (six months by policy) non stock destroyed with hospital waste. Family not notified. Stock tissue eventually destroyed with hospital waste.
Retention of the organ is mentioned in the autopsy report and a separate Organ Retention Form stating the organ retained, the reason for retention, and the final disposition of the organ is added to the case file.
Each autopsy report includes the following statement: RETENTION: Blood, body fluids, tissues, and physical/trace materials that may be collected (the exact samples vary by case) during the examination are routinely held for a two year penod prior to biohazard disposal, unless transferred to a laboratory or other agency by the Medical Examiner's Office, or otherwise released by special arrangement.
The family is notified when we recognize we wish to retain an organ for later examination and is given the option to decline with the caveat that some information may be lost/incomplete. They may recover the tissue when the exam is done. In criminal cases (eg child abuse) we may retain any necessary tissue without family contact.
In the University hospital most major organs are saved; no notification is made. In county coroner's office all organs are usually returned to the body and exceptions are noted in autopsy protocol

Reason for current practice

Office Policy	50
Personal Preference	22
Both	45

Has the procedure changed in the past year?

Yes	19
No	98

Does your state law specifically allow retention of organs, as needed?

Yes	63
No	13
Unsure	35
No answer	6

Miscellaneous Comments

Comments
The Fatality Inquiries Act in Alberta permits the retention of organs provided that this is done for the sole purpose of establishing the cause of death
The law specifies tissue samples may be retained but does not specify how they are to be disposed.
similar practice in the Maricopa County Office. IF retention of the specimen is for anything other than routine fixation prior to completion of the exam (e.g. brain) permission is requested in writing. In all instances the final disposition is in accordance with disposal of all other biohazard waste.
Law allows retention and does not specify disposition
I rarely retain whole organs; part personal preference and part "sensitivity" to lawsuits around the country lately. The long list of states listed above is because although primarily my medicolegal autopsies are done in one state, 10 to 15 are performed annually in the other states).
This policy implemented approximately 2 - 3 years ago.
Florida statute 406 allows retention without notification and destruction after 1 year without notification
Organ and tissue retention is regulated by Florida Administrative Code. Question number three did not offer the choice of statute or administrative rule, so I had to pick office policy. You can find the FAC on line at the site for the Florida Medical Examiners Commission.
When saving a brain or virtually any other organ for later study, I always put at least a small section of the organ into the gut bucket, to be released with the body. This way, I can honestly say that not all of any particular organ was saved!
CAP guidelines for hospital autopsy practice prescribe retention, storage and cremation practices for surgical and autopsy tissues. Authority to perform an autopsy includes the implied consent to follow these standard of care. An autopsy done for a coroner or medical examiner should follow the same consent guidelines. We shouldn't have one standard for the ME, and another for family-consented hospital cases. If the practice for brain retention and consultation is the gold-standard for hospital consented cases, then that same procedure should be followed for ME cases. Families should not be able to select individual cases after the fact, where they claim that this practice is a violation of civil rights
The federal court decision in Ohio has made me reluctant to save entire organs.
Re 8: the law does not address retention of organs
After recent events in Ohio, we had a provision written into MN Law that specifically authorized the ME/C to retain and dispose of organs without specific knowledge or consent of NOK. This went into effect 7/1/06.
we've never had a problem with organ retention, but usually do not keep the whole organs
My forensic autopsy case load for the year is currently up to 2 (yes, TWO.)
Notification of the legal NOK is a "best policy" but we cover 20-25 counties, some that are > 150 miles from here. Local MEs receive no training or CME and we seldom know who the legal NOK is - not even a place for it on the Report of Investigation.
It is very important to note that the Royal College of Pathologists of London, U.K and the Faculty of Pathology of the Royal College of Physicians of Ireland have performed exhaustive investigations related to the issue of organ and tissue retention by pathologists during hospital and coroners' autopsies. In fact there have been uproar in both U.K and Ireland regarding such retention of organs-especially given the fact that families were never aware of such practice by pathologists.
We also inform every family by letter if ANY tissue is kept for histology and they have the option to reclaim that too (wet tissue only) when the case is completed.
These were the practices before I retired from there this past summer.
Regarding question 8, NY law does not specifically permit retention of organ(s). However, in one instance many years ago, the Nassau County medical examiner was sued for retaining a brain without family consent. The suit failed. I know of no other litigation in NY.

We made the change to this policy after the Federal District Court ruling of October 2005. Prior to that, there was no notification or mention of this in the autopsy report.
Our autopsies are sent to St. Elizabeth Hospital in Northern Kentucky so we follow their policies.
Following Hainey et al we began sending letters to family members after the autopsy indicating that we saved tissue/fluids and that they had a right to them. If we do not hear from NOK, we cremate the tissues. We only recently switched to incorporating it into the body release form. Our autopsy report has always stated within the context of the report that the brain was fixed in formalin to be examined at a later date and include the date of examination if we saved a brain.
Policy implemented as a direct result of recent actions in the Ohio court system concerning this issue.
Policy implemented as a direct result of recent actions in the Ohio court system concerning this issue.
I was sued for allegedly stealing organs at autopsy and selling them on the "Black Market". The case was dismissed with prejudice. Currently there are no specific regulations in SC governing organ retention that I am aware of.
Internal inventory system and Std Ops procedure in place to track retention and disposal. Disposal as per pathological materials in hospitals.
The Armed Forces Medical Examiner System is truly globally dispersed like no other ME office. You are likely to get different answers from us individually.
To retain mentioned in law. No mention of disposal. No problems in 34 yrs
We have had a case against our office in the past and the decision was made that we were able to hold tissue for determination of COD. However, the property issue, was never addressed and I think that is what the ohio issue is. So far I haven't made any changes to our current policy, but am anxiously waiting the ohio decision
Washington State Law: RCW 68.50.106 Autopsies, post mortems -- Analyses -- Opinions -- Evidence -- Costs. In any case in which an autopsy or post mortem is performed, the coroner or medical examiner, upon his or her own authority or upon the request of the prosecuting attorney or other law enforcement agency having jurisdiction, may make or cause to be made an analysis of the stomach contents, blood, or organs, or tissues of a deceased person and secure professional opinions thereon and retain or dispose of any specimens or organs of the deceased which in his or her discretion are desirable or needful for anatomic, bacteriological, chemical, or toxicological examination or upon lawful request are needed or desired for evidence to be presented in court. Costs shall be borne by the county. [1993 c 228 § 19; 1987 c 331 § 59; 1975-'76 2nd ex.s. c 28 § 1; 1953 c 188 § 10. Formerly RCW 68.08.106.]
This is an unusual event. I cut 95% of brains without fixation, and rarely keep entire organs long enough to become an issue.
There was a legal action regarding a retained organ involving a prior medical examiner that informed our current policy and preferences.
I was trained in Richmond, VA and worked in Milwaukee County, WI. We did it the same way there, and to my knowledge, never had a problem. I haven't had any trouble here, either.

Variation in practice within each state and jurisdiction

	No notification	In Autopsy Report	In Writing	Verbal	Other
Alberta	X				
AL	X				
AR	X				
AZ	X				X
CA	X	X	X		X
CO	X			X	
FL	X	X	X	X	
GA	X	X			
HI				X	
IA	X				
IL	X	X			
IN	X				
KS	X	X			
KY	X				
LA				X	
MA			X		
Manitoba		X			
MD	X				
MI	X				X
MN				X	X
MO	X	X		X	X
MT		X			
NC	X				
ND					X
NE					X
NH	X				
NJ	X	X			
NM				X	
New South Wales				X	
NY	X				X
NV					
OH	X			X	X
Ontario				X	
OR	X				
PA					X
RI	X				
SC	X	X			X
SD	X				
Singapore	X				
TN	X				X
TX		X			X
UT	X				
VT					X
WA	X			X	X
WI	X	X			X

Reported state law as to whether law specifically allows organ retention when needed

	Yes	No	Unsure
Alberta	X		
AL			X
AR	X		
AZ	X		
CA	X		X
CO		X	X
FL	X		
GA	X		X
HI			
IA	X		
IL	X		
IN		X	X
KS	X		
KY	X		
LA			
MA			
Manitoba			
MD		X	
MI		X	X
MN			
MO		X	X
MT			
NC			X
ND			X
NE		X	
NH	X		
NJ	X		
NM			
New South Wales			
NY	X	X	X
NV			
OH	X	X	
Ontario			
OR		X	X
PA			
RI			X
SC			X
SD			X
Singapore	X		
TN	X		
TX			
UT	X		
VT		X	
WA	X		
WI		X	X

*Those with no answer responded to the survey before Question 8 was added to the survey

Conclusions

- Information was obtained from at least one responder from 40 states and 5 non-US jurisdictions
- It is not uncommon practice that families are NOT notified when an organ is retained, and it is relatively uncommon that families are specifically informed verbally or in writing (other than mention in an autopsy report)
- It appears that most responders have not changed their practices in the past year although about 16% have
- It appears that at least 17 states have laws that allow retention of organs when needed, but it also appears that some responders were unsure of the provisions in their state laws while at least 10 states are reported NOT to have laws specifically allowing retention of organs
- Office policy and personal practice preferences each play roles in how retained organs are managed
- Comments suggest that some areas have reduced or eliminated the retention of whole organs
- Practices are not necessarily uniform within a given state

NAME Survey
Organ Retention Practice
December, 2014

Prepared by Kathryn Haden-Pinneri, MD, Chair, NAME ad hoc Organ and Tissue Retention Committee

Introduction

This survey was conducted at the request of NAME President Greg Davis, MD. NAME had been asked to offer assistance in NYC, where there have been legal issues about the retention of organs such as brain.

Methods

On 12/05/14, a global email was sent to all NAME members with email addresses on file (approximately 1200). The email asked NAME members to complete a brief survey (shown below). Because time was short for the project involved, a request was made that the survey be completed on an urgent basis.

- Does your office require permission before whole organs can be retained?
- Does your office notify the NOK (but does not need permission) prior to whole organ retention?
  If so, how do you do it?
  If not, is there specific wording in your policy/procedure manual or law that states you do not need to notify the NOK?
- Has your office had any feedback/legal problems regarding organ/tissue retention? If so, please provide information.

Results

Responses were received over a 5 day period. 69 responses were received from offices in 30 different states, the AFME, 2 Canadian Provinces, Puerto Rico and Italy.

AFME
Alberta
AZ
CA
CO
CT
DE
FL
GA
HI
IA
ID
Italy
KS
KY

LA
MA
ME
MI
MN
MO
NC
NJ
NY
OH
OK
Ontario
OR
PA
Puerto Rico
RI
TN
TX
WA
WI

The breakdown of currently used procedures is:
No family notification if an organ is retained: 53
Family is verbally notified: 15
Family is notified in writing: 2

Feedback received indicates displeasure by some NOK when notified about the organ retention. Most elect to have the organ retained by the office for disposal.

Conclusions

- Information was obtained from at least one responder from 30 states, the AFME and 4 non-US jurisdictions
- Most responders (75%) do NOT notify the next of kin (NOK) when a whole organ is retained after the autopsy
- Responders that don't notify the NOK cite statutes/laws specifically addressing organ/tissue retention and/or mention this in their office brochure, website or form given to the funeral director when the decedent is released
- Feedback suggests that some NOK are upset about both the retention of the organ and the notification
- Practices are not uniform within a given state

NYC
Office of Chief
Medical Examiner

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December 9, 2014

Dr. Gregory Davis
President
National Association of Medical Examiners
31479 Arrow Lane
Marceline, MO 64658

Dear Dr. Davis,

Thank you very much for your generous assistance along with the other leaders and members of the National Association of Medical Examiners regarding the Shipley decision dealing with organ retention at autopsy by medical examiners in New York. We are hopeful that our combined efforts will result in the reversal of this decision to the significant benefit of decedents' families and the medical examiner community. It has been our experience that the Shipley decision has had broadly negative and burdensome impact on the grieving families whom we serve as well as direct negative operational effects for the NYC Office of Chief Medical Examiner.

Firstly, the negative impact to decedents' families has been seen in many ways, both emotional and practical. The fact that an organ has been retained from a loved one's body at autopsy is very emotionally difficult for families when presented with this information. This is compounded by the decisions families are then forced immediately to deal with regarding their wishes for disposition of the retained organ, which has proven overwhelming for many. In fact, in our experience, over 80% of decedent's next of kin decline to claim the retained organ either by direct choice or by default in ultimately being unable to decide what choice to make regarding their family member's retained organ. As a practical matter, those who choose to claim a retained organ after examination of the organ is complete but also after the decedent's body has been released and buried will incur additional expenses from a funeral home. Many who have chosen to claim a retained organ ultimately do not do so given the financial implications. Among all families notified of organ retention, a large number indicate that they regret knowing of the retention at all and are ill-equipped to make the decisions necessary at the time. Many who are notified of organ retention and choose to claim the retained organ state that they are doing so as a matter of guilt, sensing no alternative once learning of the retention of an organ from a loved one. These issues clearly add to the difficulty of an already difficult moment in the lives of surviving family members.

Secondly, the NYC OCME has been forced to deal with the ramifications of the Shipley decision across numerous agency departments. Complex and timely notification systems regarding the initial organ retention, notification of next of kin, and disposition options chosen by families for retained organs have had to be established and appropriately staffed. Outreach efforts to locate and notify next of kin must be undertaken if next of kin is not immediately known, despite the involvement of friends or significant others who would immediately claim a decedent's body and provide burial. Coordination of efforts to comply with Shipley and to appropriately deal with its implications for families is time consuming, labor intensive and difficult to manage effectively. The significant workload burden imposed on OCME staff by Shipley is eclipsed only by the increased legal liability it imposes at all levels. The nature of the organ retention process and our efforts to honor family's wishes while adhering to this law leaves no room for human error; yet, the complexity of the required systems of notifications, updates, reuniting of organs with

decedents' bodies, etc. sets up the possibility for significant errors or oversights at many points which may adversely impact families. Errors such as failure to notify a family of an organ retention before release of the body or release of a decedent's body without the retained organ as requested by the family are not only appropriately distressing to families, but are the source of civil litigation against the agency in addition to being public relations nightmares for all medical examiners.

We strongly feel that the impact of Shipley has been uniformly negative with many unintended consequences for both families of decedents and for medical examiners. Again, we are grateful to the National Association of Medical Examiners for your collegiality and support of the NYC OCME in the appeal of the Shipley decision. If I may be of additional assistance in any way, please feel free to contact me directly.

Sincerely,

Barbara A. Sampson

Barbara A. Sampson, M.D., Ph.D.
Chief Medical Examiner

Jason K. Graham, M.D.
Acting First Deputy Chief Medical Examiner

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