

## DRAFT PUBLICATION

# Management of Mass Fatalities in Pandemic and Mass Casualty Situations

By:

Jesse DePauw, Esq.

Amanda Hart

Sangeeta Ghosh, Esq.

Melissa Markey, Esq., EMT-P, CISSP

Laura Napiewocki, Esq., MHSA

Edited by Becky Glitman, Esq. and Liza Brooks, Esq.

This publication is intended to serve as a preliminary research tool for attorneys. It is not intended to be used as the sole basis for making critical business or legal decisions. This document does not constitute, and should not be relied upon, as legal advice. Additionally, this paper is a draft publication that the State Bar of Michigan Health Care Law Section has made available to its members to assist them in providing guidance to their clients during the ongoing public health emergency related to the coronavirus. The Health Care Law Section will issue an updated version of this publication in the near future.

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*You are sitting in your office on a Thursday afternoon, wondering why you chose the turkey and mayo sandwich from the cafeteria for lunch. You note that Facilities has finally turned on the heat for the winter, but it is getting very hot in your office. As you reach for the phone to ask that the vent be closed, the phone rings. It is the Chief Nursing Officer and the Chief Medical Officer. They advise you that there has been a trend of rising fatalities in the hospital, and that they have just been advised by the County Medical Examiner (“Medical Examiner”) that, due to similar trends across the city, the Medical Examiner is accepting transfers only of deaths apparently by violence. As the turkey and mayo sandwich continues to make its presence known, you hang up the phone and reflect on your knowledge of disposition of human remains, under standard operations. But what about in multi-casualty, pandemic, and disaster situations?*

In the ordinary course of business, there is a well-understood process for the disposition of bodies in the State of Michigan. There are clear criteria for determining when the decedent needs to be transferred to the Medical Examiner for evaluation of the cause of death, and when the body may simply be released to the funeral director. However, there are times that ordinary practices cannot be followed—when there is a pandemic or a major disaster that results in an overwhelming

number of fatalities. Understanding the standard, ordinary course of business processes, and considering modifications to those processes based on the recommendations of expert public health associations will help Michigan’s healthcare providers and their counsel prepare for, and respond to, such crises in a manner that promotes public health and meets legal requirements. This also helps legal counsel provide structure and guidance to facility staff regarding the disposition of bodies during high-fatality events.

### A. Determining and Pronouncing Death

The Michigan Determination of Death Act<sup>1</sup> defines legal standards for determining the moment of death, including irreversible cessation of all brain function, or of circulatory and respiratory function.<sup>2</sup> Physicians and registered nurses are empowered to pronounce death under these criteria, so long as the determination is in accordance with accepted medical standards.<sup>3</sup> Where the pronouncement is made in a licensed facility, the facility may also establish policies that specify which personnel are authorized to pronounce death in the facility; all determinations of death should be consistent with such policies.<sup>4</sup> Emergency medical services (“EMS”) agencies may also identify personnel that are authorized to pronounce death<sup>5</sup> and under State Bureau of EMS, Trauma & Preparedness Protocols, paramedics holding appropriate medical control authority may, while on duty with an advanced life support agency, pronounce death under this law in accordance with the protocol.<sup>6</sup> The time of death is memorialized by contacting EMS dispatch, but there is no requirement that on-line medical control be consulted.

**Table 1**

<b>Able to Pronounce Death</b>	<b>Irreversible cessation of circulatory and respiratory function</b>	<b>Irreversible cessation of all functions of the entire brain, including brainstem</b>
MD/DO	√	√
RN*	√	√
Paramedic*	√	√
* Must be consistent with medical standards and policies of facility.		
* Must comply with Protocol requirements, including DNR if circulatory cessation, on-duty with ALS agency, and designated by Medical Control.		

<sup>1</sup> M.C.L. 333.1031 *et. seq.*

<sup>2</sup> M.C.L. 333.1033.

<sup>3</sup> MCL 333.1033(3).

<sup>4</sup> *Id.*

<sup>5</sup> MCL 333.1033(c).

<sup>6</sup> Determination of Death, Death in an Ambulance, and Transport of Body, available at [https://www.michigan.gov/documents/mdhhs/Section\\_8\\_System\\_615670\\_7.pdf](https://www.michigan.gov/documents/mdhhs/Section_8_System_615670_7.pdf)

Notice to the Medical Examiner for the jurisdiction is required if the death is unexpected or the patient is not under attendance by a physician (or, if in home hospice, a physician or registered nurse has not seen the patient during the prior 48 hours), or if the cause of death is an abortion or violence. Notice to the Medical Examiner is also required for the death of a prisoner in a county or city jail. If the individual is pronounced by paramedics and transported to the hospital, EMS must advise the hospital of the reason the Medical Examiner must be notified; if the individual is not transported, EMS and law enforcement are responsible for notifying the Medical Examiner.<sup>7</sup>

**Table 2**

<b>Medical Examiner Cases</b>	
<b>Unexpected death</b>	<b>Suspicious circumstances</b>
Patient not under care of physician	Death to abortion, including self-induced
Home Hospice, not seen in past 48 hours	Death due to violence
Death of prisoner in county or city jail	No medical attendance in preceding 48 hours, unless physician can determine cause of death

Typically, if a death occurs in the community setting and the cause of death triggers a Medical Examiner's case, the body will not be moved from the location of death. In some cases, the Medical Examiner will determine that an autopsy will not be performed, and will authorize release of the body to funeral home. In some cases, where the death occurs in a public location, the body may be approved for movement, unless the location contains evidence related to the cause of death, or there are indications of criminal activity.<sup>8</sup> For those deaths that are pronounced in the field, if there is no basis for a Medical Examiner case, the body may be transferred to the funeral home; however, either law enforcement or EMS must retain physical custody of the body until the body is transferred.<sup>9</sup> Most deaths in nursing homes and hospices are not considered Medical Examiner cases.

## **B. Preparing the Death Certificate**

During routine operations, when a death occurs in a Michigan health facility, the attending physician must complete the medical certification portion of a death certificate within 48 hours after death, certifying to the time, date, place and cause(s) of death.<sup>10</sup> Deaths that are violent or

<sup>7</sup> *Id.*, Section II.

<sup>8</sup> *Id.*, Section III.

<sup>9</sup> *Id.*

<sup>10</sup> See Michigan Dept. of Community Health, Funeral Directors' Manual: Michigan, 2004 at 21.

unexpected require further investigation and in these cases, the medical certification must be completed by the Medical Examiner rather than the attending physician.<sup>11</sup> Most deaths that occur in health facilities do not require further investigation, and are released directly to funeral homes. In these cases, the health facility may contact a funeral director with the consent of a designated funeral representative, or, if none, the decedent's next-of-kin, and release the body directly to the funeral director for final disposition. Under Michigan law, an individual may designate a "funeral representative" who is authorized to "...make decisions about funeral arrangements and the handling, disposition, or disinterment of a decedent's body."<sup>12</sup> If a decedent has not designated a funeral representative to control the disposition of his or her body, Mich. Comp. L. 700.3206 specifies individuals, in order of priority, who may exercise this right.<sup>13</sup> If there is no person willing or available to act as a funeral representative, the right to control disposition of the body will pass to the Medical Examiner for the county where the decedent was domiciled at the time of his or her death.<sup>14</sup>

The health facility must notify the county Medical Examiner with jurisdiction to investigate and complete the medical certification section of the death certificate when: (a) an individual dies suddenly, unexpectedly, accidentally, violently, or as the result of any suspicious circumstances; (b) an individual dies without medical attendance during the 48 hours prior to death, unless the attending physician is able to determine accurately the cause of death, or the lack of medical attendance was based on religion; or (c) the death is likely the result of an abortion, whether self-induced or otherwise.<sup>15</sup> In such instances, the health facility is required to release the body to the Medical Examiner and may not release the body to a funeral director. If a healthcare staff member knows that two or more individuals involved in the same accident were approximately the same age, sex, height, weight, hair color, eye color, and race, and that one person died and other(s) survived, then this information must be reported to the Medical Examiner.<sup>16</sup> The body must also be released to the Medical Examiner when the health facility is unable to locate a family member or an appropriate funeral representative to authorize release of the body;<sup>17</sup> where it is not possible to identify an authorized individual to take responsibility for the body, the Medical Examiner is treated as the legally responsible individual.

If the decedent had a known communicable disease at the time of death, the body release form provided by the physician or Medical Examiner must alert the funeral director of the disease

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<sup>11</sup> MCL 333.2844(2).

<sup>12</sup> MCL 700.3206(1).

<sup>13</sup> *Id.*

<sup>14</sup> MCL 700.3206(8).

<sup>15</sup> MCL 52.203(1)(a)–(c).

<sup>16</sup> MCL 52.203(3).

<sup>17</sup> MCL 52.203.

and provide instructions for proper handling of the body.<sup>18</sup> The health facility also may, in certain instances, be required by law to report the presence of communicable disease to the Michigan Department of Health and Human Services (“MDHHS”).<sup>19</sup> If a person is discovered to be infected by one or more of a number of “serious communicable diseases,” including viral hemorrhagic fever, botulism, or chickenpox that are specified by MDHHS,<sup>20</sup> or if a patient presents with an “...unusual occurrence of any disease, infection or condition that threatens the health of the public...”,<sup>21</sup> the physician is required to report the diagnosis to MDHHS within 24 hours.<sup>22</sup> Coronavirus is a specified reportable disease.<sup>23</sup> While novel SARS-CoV-2 emerged in November, 2019, coronavirus was recognized as a cause of significant public health concern in prior disease outbreaks, including Severe Acute Respiratory Syndrome (“SARS”), caused by SARS-CoV, and Middle East Respiratory Syndrome (“MERS”), caused by MERS-CoV. If one of the specified conditions is suspected and not yet confirmed, reporting of the condition as “suspect” is still required.<sup>24</sup> A report may be written, oral, or transmitted electronically via the Michigan Disease Surveillance System.<sup>25</sup> Telephone and fax numbers for oral and written reports, which can be made to local health departments, are published on the MDHHS website.<sup>26</sup> Reports of acquired immunodeficiency syndrome (“AIDS”), human immunodeficiency virus (“HIV”), tuberculosis, and venereal disease are also reportable on specific MDHHS forms.<sup>27</sup> As duplicate reporting of the same illness may occur as a result of the requirement that both physicians and laboratories must report the infection, MDHHS encourages use of the online Surveillance System, which has de-duplication features.

If, at the time of death, a physician who is required to complete the medical certification section of the death certificate has “actual knowledge” of the presence of an infectious agent in the deceased individual, such as Ebola or AIDS, the physician is required by law to notify the funeral director, or the funeral director’s authorized agent, of the appropriate infection control precautions to be taken before the body is released to the funeral director.<sup>28</sup> Michigan law further establishes

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<sup>18</sup> MCL 333.2843b(1).

<sup>19</sup> See MCL 333.5111(1) and R 325.173

<sup>20</sup> *Id.* and [https://www.michigan.gov/documents/mdch/Reportable\\_Diseases\\_Michigan\\_by\\_Pathogen\\_478489\\_7.pdf](https://www.michigan.gov/documents/mdch/Reportable_Diseases_Michigan_by_Pathogen_478489_7.pdf)

<sup>21</sup> Mich Adm Code R 325.173(2).

<sup>22</sup> See MCL 333.5111(1) and R 325.173.

<sup>23</sup> [https://www.michigan.gov/documents/mdch/Reportable\\_Diseases\\_Michigan\\_by\\_Pathogen\\_478489\\_7.pdf](https://www.michigan.gov/documents/mdch/Reportable_Diseases_Michigan_by_Pathogen_478489_7.pdf).

<sup>24</sup> MDHHS, Health Care Professional’s Guide to Disease Reporting in Michigan: A Summary of the Michigan Communicable Disease Rules (2016).

<sup>25</sup> See R 325.173(10) and MDHHS, Health Care Professional’s Guide to Disease Reporting in Michigan (explaining the web-based communicable disease reporting system developed for the state of Michigan, which can be accessed by visiting [www.michigan.gov/mdss](http://www.michigan.gov/mdss)).

<sup>26</sup> [https://www.michigan.gov/documents/mdch/Reportable\\_Diseases\\_Michigan\\_by\\_Pathogen\\_478489\\_7.pdf](https://www.michigan.gov/documents/mdch/Reportable_Diseases_Michigan_by_Pathogen_478489_7.pdf), page 2.

<sup>27</sup> Mich Adm Code R. 325.173(12)–(14).

<sup>28</sup> MCL 333.2843b(1).

that a funeral director who receives notification of the presence of an infectious agent is forbidden to refuse to render services as a result of having received the notification.<sup>29</sup>

Once the physician or Medical Examiner has completed the cause of death portion of a death certification, and the body has been cleared for release, the partially completed death certificate is provided to the funeral director selected to manage the final disposition of the body.<sup>30</sup> The funeral director plays a significant role in filing the necessary paperwork and securing the necessary permits for transportation and final disposition of the body. Indeed, Michigan law requires the handling, disposition, or disinterment of a dead body to be supervised by a person licensed to practice mortuary science,<sup>31</sup> which can be either an embalmer or a funeral director.<sup>32</sup>

A death certificate must be filed with the local registrar of the district where the death occurred within 72 hours after death by a licensed funeral director, or an individual who holds a courtesy license under MCL 339.1806a.<sup>33</sup> It is the responsibility of the funeral director or a mortuary science licensee to ensure the completeness and timely filing of the death certificate.

If the funeral director is unable to obtain all necessary information within 72 hours, the funeral director must still file the incomplete death certificate within the 72 hour window and must provide a supplemental report with the missing information no later than 60 days after the death.<sup>34</sup> If the cause of death cannot be determined within 48 hours, the Medical Examiner has sole authorization to complete the medical certification by listing the cause of death as “pending.”<sup>35</sup> Once the delayed determination is made, the Medical Examiner must submit an Application to Correct a Certificate of Death to the local registrar and notify the funeral director.<sup>36</sup>

### **C. Funeral Director Disposition of the Body**

Along with the death certificate, a funeral director who first assumes custody of a dead body must also secure authorization for the final disposition of the body within 72 hours after death or discovery of the body.<sup>37</sup> This authorization entails securing a burial transit permit from the local registrar where the death certificate is filed.<sup>38</sup> A burial-transit permit is required to transport the

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<sup>29</sup> MCL 333.2843b(1).

<sup>30</sup> MCL 325.3215.

<sup>31</sup> MCL 700.3206(1).

<sup>32</sup> MCL 339.1801(e).

<sup>33</sup> See MCL 333.2843(3). Courtesy licenses may be issued at any time to a mortuary science or funeral director licensed in a state other than Michigan, and such licenses have a term of for two years.

<sup>34</sup> Mich Adm Code, R 325.3210(3).

<sup>35</sup> MCL 333.2844(3).

<sup>36</sup> See [https://www.michigan.gov/documents/Instlmedicalexaminer11-14-03\\_79697\\_7.pdf](https://www.michigan.gov/documents/Instlmedicalexaminer11-14-03_79697_7.pdf) at 5

<sup>37</sup> MCL 333.2848(1)

<sup>38</sup> MCL 333.2848(1).

body to the place of final disposition (either a cemetery or a crematory), and when the body is to be shipped by common carrier.<sup>39</sup>

Notably, funeral directors and mortuary science licensees are authorized to issue burial-transit permits to themselves when death occurs in an unincorporated area, on a Sunday or a holiday, or when immediate disposition or shipment makes it impossible to receive the permit in time from the registrar's office.<sup>40</sup> To exercise this authority, the necessary paperwork must be sent to the county clerk and post-marked within 72 hours after death.<sup>41</sup> This ability to self-issue permits could help prevent the spread of highly infectious diseases if an outbreak were to occur by facilitating the rapid disposition of contagious bodies.

A permit is not required to simply move a body from one place to another. In such case, all that is needed is consent of the physician or Medical Examiner who certifies the cause of death.<sup>42</sup> If the circumstances of the death are such that the Medical Examiner must be notified, it is unlawful for any person, including a funeral director, to remove the body from the place where death occurred without first receiving permission from the Medical Examiner.<sup>43</sup> Violations of this rule carry criminal misdemeanor charges and may result in both imprisonment for up to one year and a \$500 fine.<sup>44</sup>

If final disposition of the body is to be by cremation, the funeral director must further obtain a signed cremation authorization from the Medical Examiner.<sup>45</sup> A failure to do so once again carries criminal penalties.<sup>46</sup> Although a funeral director is responsible for supervising the disposition of a body, the funeral director does not have legal authority to make decisions regarding final disposition unless the director is also the deceased person's spouse or close relative.<sup>47</sup> The power to make funeral decisions is statutorily granted to individuals in order of priority ranging from the spouse and other relatives to the Medical Examiner in the event that a person with higher priority cannot be found or fails to perform their duties within a defined amount of time.<sup>48</sup>

Once a funeral director agrees to provide his or her services, final disposition must occur within 60 days or the funeral director faces criminal misdemeanor charges.<sup>49</sup> If final disposition

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<sup>39</sup> Mich Adm Code R 325.1143.

<sup>40</sup> Mich Adm Code R 325.4(2)–(3).

<sup>41</sup> *Id.*

<sup>42</sup> MCL 333.2848(4).

<sup>43</sup> Mich Adm Code R 52.204.

<sup>44</sup> Mich Adm Code R 52.204.

<sup>45</sup> MCL 333.2848(3).

<sup>46</sup> Mich Adm Code R 52.210.

<sup>47</sup> MCL 700.3206.

<sup>48</sup> MCL 700.3206(3).

<sup>49</sup> MCL 750.160c(1)(a) & (2)(a).

does not occur within 180 days, the funeral director may be guilty of a felony.<sup>50</sup> As would be expected, there are several exceptions to this rule, including the on-going investigation of the cause of death or identification of the decedent by the Medical Examiner.<sup>51</sup>

#### **D. Cemeteries**

Due to the funeral director's active involvement in advising families and overseeing the transportation and preparation of dead bodies, whether destined for cremation or interment, Michigan law requires complete financial separation between funeral homes and cemeteries.<sup>52</sup> A funeral establishment is not allowed to be conducted on property owned or leased by a cemetery,<sup>53</sup> nor is any employee or agent of a cemetery allowed to maintain a funeral establishment.<sup>54</sup> Though cemetery and funeral establishments are wholly independent, they are also necessarily intertwined.

For any burial to take place in Michigan a permit must be secured by a funeral director.<sup>55</sup> An individual in charge of a cemetery is prohibited from interring a body unless it is accompanied by this permit authorizing final disposition.<sup>56</sup> The individual in charge of the cemetery is further required to maintain a complete record of final dispositions taking place on the premises, and this record must document the name and address of the funeral director.<sup>57</sup> Once buried, if a body is to be disinterred and transported to another cemetery, the funeral director will again need to be contacted to secure all the necessary permits.<sup>58</sup> There is no exception for temporary interment, such as may occur in situations of pandemic. Temporary interment is a potential approach to managing large numbers of dead, as capabilities of funeral homes and cemeteries may be overwhelmed in pandemic situations. For example, the City of New York Pandemic Plan includes a tiered management plan, with temporary interment contemplated for both identified and unidentified bodies.<sup>59</sup> Florida's Pandemic Plan also contemplates temporary interment, and notes that in selecting temporary interment locations, planners should consider the possibility of family seeking disinterment for burial in a family plot, or designation of the interment location as a

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<sup>50</sup> MCL 750.160c(2)(b).

<sup>51</sup> MCL 750.160c(3).

<sup>52</sup> MCL 339.1812(1)–(3).

<sup>53</sup> MCL 339.1812(2).

<sup>54</sup> MCL 339.1812(1).

<sup>55</sup> MCL 333.2848(1).

<sup>56</sup> MCL 333.2850.

<sup>57</sup> MCL 333.2850.

<sup>58</sup> Mich Adm Code R. 325.1143.

<sup>59</sup> [http://www.nyc.gov/html/ocme/downloads/pdf/pandemic\\_influenza\\_surge\\_plan.pdf](http://www.nyc.gov/html/ocme/downloads/pdf/pandemic_influenza_surge_plan.pdf), Section VI.



memorial.<sup>60</sup> Beyond furnishing permits and transportation of bodies, a funeral director's role is minimal once the body is received by the cemetery.

In Michigan, cemeteries are registered and regulated by the Cemetery Commissioner within the Department of Licensing and Regulatory Affairs under the grant of authority in the Cemetery Regulation Act.<sup>61</sup> Given the strict laws regulating the financial and business aspects of a cemetery, it is striking how few laws regulate the actual burial. In fact, private burial grounds may be established in certain situations.<sup>62</sup> Of course, a cemetery must be approved by the local health department when initially established and may be subject to inspection at any time.<sup>63</sup>

A cemetery has legal obligations if weather conditions prevent immediate interment requiring the body to be stored,<sup>64</sup> or if a body is to be disinterred and moved somewhere other than that cemetery.<sup>65</sup> Cemeteries have almost unlimited discretion on the manner and methods of burial. One of the few statutory requirements is that a cemetery may not condition burial on the purchase of a vault to enclose a casket.<sup>66</sup> A cemetery is still free to require the use of a vault, it is only forbidden to require extra payment for such vault if an individual specifically opposes its use.<sup>67</sup>

In most circumstances, cemeteries are not as likely to face the serious public health concerns that could arise from a diseased body since the funeral director would have seen to the preparation of the body and its placement in a casket before its arrival to the cemetery. It is also significant that cemeteries are subject to local municipal authority, which has the discretion to order the removal of any buried body, and to promulgate rules as needed to protect public health. Thus, in the event of an outbreak or other public health concern, a municipality could quickly mobilize to impose new requirements in burying dead bodies within a cemetery.

Michigan also permits at-home burials.<sup>68</sup> Aside from needing signatures from a funeral director and a physician or Medical Examiner for the death certificate, at-home burials require zoning approval and a permit from the local health department.<sup>69</sup>

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<sup>60</sup> [https://femors.org/files/2013/02/Florida\\_Pan\\_Flu\\_Fatality\\_Management\\_Plan\\_V1.1\\_Draft041108.pdf](https://femors.org/files/2013/02/Florida_Pan_Flu_Fatality_Management_Plan_V1.1_Draft041108.pdf), Section 6.4.

<sup>61</sup> [https://www.michigan.gov/lara/0,4601,7-154-61343\\_35414\\_60647\\_35468-114303--,00.html](https://www.michigan.gov/lara/0,4601,7-154-61343_35414_60647_35468-114303--,00.html)

<sup>62</sup> MCL 128.111.

<sup>63</sup> MCL 333.2458.

<sup>64</sup> MCL 333.2852.

<sup>65</sup> Mich Adm Code R 325.1143.

<sup>66</sup> MCL 339.1811(1).

<sup>67</sup> MCL 339.1811(2).

<sup>68</sup> MCL 128.112, *see also* <https://www.freep.com/story/news/local/michigan/2015/01/11/home-funerals-becoming-popular/21605207/>

<sup>69</sup> MCL 128.112.

## **E. Infectious Bodies**

Aside from a handful of enumerated exceptions, dead bodies infected with serious communicable diseases in Michigan are not subject to any mandatory embalming or disposition requirements, nor are they subject to federal DOT or state transportation specifications for hazardous substances. There are obvious public health concerns that could arise with at-home burials and the possible mishandling of a highly infectious, diseased body. This concern is all the more important considering the seven-day post-death survival of viruses such as Ebola.<sup>70</sup> Given that at-home burials can be carried out by a family member without the supervision of a funeral director and that the un-embalmed body can be buried without any encasement, there is the risk that improper home burials could lead to perpetuation of the virus to the soil and, depending on the proximity to groundwater, possible contamination beyond the immediate area. At the time of this printing, Michigan has no law prohibiting at-home burials even when the deceased has died of communicable disease, although it can be presumed that local health officials would be duly notified by the certifying physician or Medical Examiner.

Michigan administrative rules provide clear policies on the preparation and transportation of bodies transported more than 48 hours after death or bodies infected with six enumerated diseases: diphtheria, meningococcal infections, plague, poliomyelitis, scarlet fever, or smallpox.<sup>71</sup> When a body is transported 48 hours after death or is infected with an enumerated disease, transportation of the body is subject to Rule 325.1141, with a limited exception to the 48-hour rule for research or other “display purposes.”<sup>72</sup> Although embalming is not normally required by Michigan law, bodies transported under Rule 325.1141 must be embalmed *before* being transported. The shipping embalmer is also required to send notice to the health officer of the jurisdiction where the body is to be received, advising the date and time of arrival.<sup>73</sup> Clearly, this pre-transportation embalming requirement could have significant implications for both the Medical Examiner and the funeral director in the event that numerous deaths happened in a short span of time. The inundation of bodies would likely result in many bodies being held longer than 48 hours, and therefore subject to embalming requirements, which would further delay the final disposition of potentially infectious bodies that would not have otherwise been subject to the embalming requirement.

Outside of the six enumerated diseases, there appear to be few legal requirements for the disposition of dead bodies infected with other serious communicable diseases, even diseases as

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<sup>70</sup> <https://www.nbcnews.com/storyline/ebola-virus-outbreak/ebola-virus-lives-7-days-corpses-n305311>.

<sup>71</sup> Mich Adm Code R 325.1141.

<sup>72</sup> Mich Adm Code R 325.2 and Department of Licensing and Regulatory Affairs, Bulletin: Laws Concerning the Timing of Embalming, Final Disposition, and Funeral Establishment Inspections (June 26, 2018).

<sup>73</sup> Mich Adm Code R 325.1141(2).

deadly and contagious as Ebola. Under Michigan law, the presence of a “serious communicable disease,” such as Ebola, triggers reporting requirements,<sup>74</sup> but it does not trigger the safe preparation and transportation specifications found in Rule 325.1141. Instead, a body contaminated with a serious communicable disease that will reach its destination within 48 hours after death is subject to the same requirements as all other unenumerated causes of death, which fall within the scope of Rule 325.2. Rule 325.2 merely mandates that dead bodies be “encased in a sound shipping case” for transportation.<sup>75</sup> The Rule does not further delineate what is considered “sound,” though it can be assumed as a matter of basic necessity that a sound case would be fully disinfected on the outside and airtight to prevent leakage. This means a funeral director has considerable discretion in developing internal policies for transporting dead bodies, which may or may not include extra precautions when a body is infected with a serious communicable disease.

Despite the vast array of guidelines and regulations surrounding the safe handling and disposal of infectious disease-contaminated waste,<sup>76</sup> including the blood and tissue that is extracted during the embalming process, there is a surprising lack of guidance on the safe handling and disposition of an infectious disease-contaminated body, which is not considered “waste” and therefore not within the regulatory scope of medical waste or infectious substances. As noted below, occupational health regulations require that employees who are exposed to blood and body fluids use engineering controls, work processes, and PPE, to minimize the risk of exposure to infectious materials, and typically this suffices for transmission prevention in corpses. When the cause of death is a pandemic-level, easily transmissible communicable disease, however, additional precautions may be necessary. The most salient reason is the fact that while most do not, certain diseases can survive in a dead body for several days after death. For example, researchers in Montana found that the viral (*i.e.* contagious) genetic material of Ebola survived up to 7 days in the blood and tissue after death, and could be found on the surface of the skin.<sup>77</sup>

## **F. Disclosures of Information**

Often, questions arise regarding which disclosures of information are permissible under HIPAA with respect to decedents. Disclosures are permitted to coroners and medical directors,<sup>78</sup> and funeral directors as necessary to permit the funeral director to provide services to the decedent,

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<sup>74</sup> See MCL 333.5111(1) and R 325.173; Michigan Department of Health and Human Services, Michigan Interim 2019 Novel Coronavirus (COVID-19) Person Under Investigation (PUI)/Case Report Form Cover Sheet.

<sup>75</sup> Mich Adm Code R 325.2

<sup>76</sup> See OSHA Guide for Health Care Facilities: Infection Control and Medical Waste (2015); CDC, Procedures for Safe Handling and Management of Ebola-Associated Waste (2014); National Response Team Quick Reference Guide: Ebola and Marburg Hemorrhagic Fevers (2008); U.S. Dept. of Transportation Pipeline and Hazardous Materials Safety Administration, “Transporting Infectious Substances Safely” (Oct. 1, 2006).

<sup>77</sup> <https://www.nbcnews.com/storyline/ebola-virus-outbreak/ebola-virus-lives-7-days-corpses-n305311>

<sup>78</sup> 45 C.F.R. § 164.512(g)(1).

and may be made prior to and in anticipation to the patient's death.<sup>79</sup> Disclosures are also permitted for purposes of disease and epidemiological reporting to an authorized public health entity, such as disclosure of data and bio samples related to possible SARS-CoV-2 cases to U.S. Centers for Disease Prevention and Control ("CDC").<sup>80</sup> Information may also be disclosed to authorize disaster relief organizations for purposes of coordinating disaster relief efforts, including to notify family members of patient location and general condition.<sup>81</sup> Where possible, the agreement of the patient should be obtained; if it is not possible to seek the patient's agreement, the amount of information disclosed should be limited and the disclosure should be in the best interest of the patient.

### **G. Changes in Operations Due to Disaster and Pandemic**

In the event of an epidemic or mass casualty event, a health facility's legal obligation turns in part on whether the governor and other state officials have triggered the emergency disaster plans. An outbreak of cholera, tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers, or diphtheria may trigger special quarantine or detention procedures mandated by public health authorities. Absent this declaration of an emergency, and so long as the number of decedents do not overwhelm the facility's, and the region's, ability to timely process and transport those who have died, a facility's legal obligation largely ends once the provider gives the required notice and arranges for appropriate precautions.<sup>82</sup>

State law grants broad discretion to healthcare providers and funeral directors in establishing proper infectious disease controls. Experts in public health, such as the CDC, provide more specific guidelines regarding waste disposal and decontamination measures for serious communicable diseases. For example, in cases of viral hemorrhagic fevers it has been recommended that an autopsy not be performed on the infected body unless needed to establish the diagnosis, and that experts at the CDC should be consulted before an autopsy is performed. BioSeal™ containment material is reportedly effective for containment of all known hazardous substances, fluids, and gases, and may be used to enclose bodies or other items such as clothing.

A predominant characteristic of pandemic and other disasters is that needs overwhelm resources. In the context of mass casualty, disaster or pandemic (collectively, a "disaster"), operations must expand to encompass coordination with other organizations, including EMS, law enforcement, Emergency Management, non-governmental organizations such as the Red Cross, and governmental organizations such as the Federal Emergency Management Agency and

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<sup>79</sup> 45 C.F.R. § 164.512(g)(2).

<sup>80</sup> 45 C.F.R. § 164.512(b)(i).

<sup>81</sup> 45 C.F.R. § 164.510(l)(4).

<sup>82</sup> Mich Adm Code R 325.174.

response teams from the National Disaster Medical System (“NDMS”). Unlike disasters arising from earthquakes, weather, and man-made calamity, pandemic-related disasters are likely to persist for weeks or months, rather than days. The common reference point for pandemic is the Spanish Flu pandemic of 1918–1919, in which more than 675,000 people in the U.S. died. Some studies suggest that an influenza epidemic of similar virulence today would kill approximately 51–81 million people worldwide, probably in several multi-week surges.<sup>83</sup> The New York Office of the Chief Medical Examiner (the “NY Medical Examiner”) estimated that in a pandemic similar to the Spanish Flu, New York would experience an additional 51,747 deaths in an 8-week period, more than twice the number typically processed in a year. The calculations that led to these statistics involved a relatively conservative infection rate of 25%–35% of the population, and 2.1% mortality; many agencies use a 5–7% mortality rate when estimating similar impacts.<sup>84</sup> When the NY Medical Examiner calculated a slightly higher fatality rate of 3.5%, total deaths increased to 86,245; each hospital was expected to experience an average of 15 more deaths each day (1,032 total each day across all hospitals), and about 293 people were predicted to die at home each day.<sup>85</sup> In comparison, the NY Medical Examiner typically receives about 75 cases per day. While these are rough predictions, with many variables and unknowns, they are a useful indicator of the possible burden of pandemic.

The recent emergence of a novel coronavirus has again raised concerns of a possible pandemic, and raised awareness of the importance of emergency preparedness. The novel coronavirus, dubbed SARS-CoV-2,<sup>86</sup> causes a respiratory illness called COVID 19.<sup>87</sup> The disease, which first appeared in China in December, 2019, had spread to around the globe within three months. While this is an emerging disease and our understanding of it is evolving, as of March 1, 2020, the World Health Organization Situation Report 41<sup>88</sup> noted that 80% of reported cases experienced mild illness, with fever, dry cough and shortness of breath. As of that report, approximately 14% of reported cases were considered severe, and 5% of cases were critically ill.<sup>89</sup> While other early studies slightly different statistics, as of March 1, 2020, an early estimated overall case fatality rate was anticipated to be between 1–2.3%.<sup>90</sup> However, case fatality rates vary

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<sup>83</sup> See, The City of New York Office of Chief Medical Examiner Pandemic Influenza Surge Plan for Managing In- and Out-of-Hospital Deaths, dated October 2008, available at [http://www.nyc.gov/html/ocme/downloads/pdf/pandemic\\_influenza\\_surge\\_plan.pdf](http://www.nyc.gov/html/ocme/downloads/pdf/pandemic_influenza_surge_plan.pdf)

<sup>84</sup> *Id.* at 6.

<sup>85</sup> *Id.* at 7.

<sup>86</sup> <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/critical-preparedness-readiness-and-response-actions-for-covid-19>

<sup>87</sup> *Id.*

<sup>88</sup> See <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports> for the most recent version of the World Health Organization’s situation reports.

<sup>89</sup> *Id.*

<sup>90</sup> <https://www.medscape.com/viewarticle/925681>. See also <https://jamanetwork.com/journals/jama/fullarticle/2762510>.

widely across countries, including a case fatality rate over 7% in Italy<sup>91</sup>. The estimated case fatality rate is quite broad, due to the uncertainty regarding the true incidence of mild, unreported cases, and concerns regarding the accuracy of fatality reporting from some countries.

Based on the early data, COVID-19 is becoming a significant disease in many parts of the United States. As of this writing, community-based transmissions have occurred across the United States, and hospitals are reporting significantly increased patient volumes. New York has ordered hospitals to increase bed capacity by fifty percent. Fatality rates in the U.S. have been significant in the states that were hit earliest, and case reports indicate that case distribution includes all ages. Further, research indicates that healthcare workers are becoming infected and appear to have more serious disease; this will adversely impact the ability of the healthcare system to provide care. As fatalities grow, it is reasonable to anticipate that illnesses in healthcare workers will impair timely management of fatalities.<sup>92</sup> As workers become ill or are repurposed, the ability to process paperwork and transport bodies from location of death will be delayed.

The characteristics of emerging diseases change the nature of emergency and disaster response planning. Particularly where asymptomatic individuals are contagious, disease spread is unpredictable. It is unrealistic to handle every patient in full isolation gear, and when patients are unexpectedly encountered that are contagious, healthcare providers will have to be quarantined, thus decreasing the available staff to care for the ill. Further, working in full isolation gear is tiring, and staff need time to rest and recover. While EMS, law enforcement, and the Fire Department personnel are invaluable in assisting with short-term surge activities, their full-time jobs will still exist during the pandemic, and thus the ability to provide the same level of surge support should not be anticipated. Similarly, hospitals should anticipate that response fatigue will set in with their staff, as the psychological and physical burdens of intensive response accumulate. Consider also the fact that it is unlikely that hospital and other healthcare staff will remain untouched personally by the pandemic; they, too, will be mourning the loss of friends and family.

Management of fatalities from a disaster obviously must take the back seat to managing those who can be saved, but fatalities nonetheless must be managed and preparation and planning will permit better operational success. Uniformity of procedures will maximize the effectiveness of the response and prevent duplication of efforts. When faced with a disaster which produces a large number of fatalities, plans must be made to facilitate identification of bodies, particularly when there is a risk of loss of identifying characteristics due to the ravages of disease, lack of family members to assist with identification because the patient has been separated from home and

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<sup>91</sup> <https://jamanetwork.com/journals/jama/fullarticle/2763667>.

<sup>92</sup> See, e.g. <https://www.theguardian.com/world/2020/mar/19/generation-has-died-italian-province-struggles-bury-coronavirus-dead>.

family due to fear of contagion or due to the death of other family members, or because of the results of massive trauma. Accurate identification of bodies is critical to permit accurate notification to next-of-kin, and for law enforcement purposes. There have been unfortunate situations where hasty identification of a fatality resulted in questions, and required later exhumation of buried remains to confirm identification, causing continuing emotional trauma to affected family members.

An additional challenge for both in-hospital and out-of-hospital deaths is the availability of body bags. Most healthcare facilities operate on the basis of just-in-time inventory which will be quickly exhausted; this problem will be exacerbated by the fact that a pandemic will cause every facility worldwide to need greatly increased inventory at a time when employees may be ill or frightened of illness and are less likely to report to work and sole-sourcing of raw materials and products limit the ability of the supplier to increase output. Shortages of active pharmaceutical ingredients and medications are anticipated due to the SARS-CoV-2;<sup>93</sup> while fears of the virus have already caused consumers to start buying masks, resulting in shortages of N-95 respirators.<sup>94</sup> Similarly, additional facilities for storage of human remains, such as refrigerated trucks, likely will be needed.

Michigan has prepared a Michigan Emergency Management Mass Facility Support Plan (“Plan”), which sets forth an all-hazards approach to fatality management.<sup>95</sup> The Plan provides valuable guidance on planning for, and responding to, mass fatality incidents. Of particular value is Attachment H to this Plan, which notes possible tasks and responsibilities for various State agencies that are not commonly considered to be first responder Agencies. By way of example, such responsibilities include: assistance in locating refrigerated trucks, coordination of health supplies and medical equipment, support in performing lab analyses, and communication support for morgue operations.

While the obligations of Medical Examiners under the County Medical Examiners Act<sup>96</sup> are not expressly modified in the event of a mass fatality event, some changes to standard operations will be needed, and there are several statutory provisions that may provide some flexibility. Unlike medical personnel, funeral directors are not granted reciprocal operational authority under the Emergency Management Act, and the powers and authority granted to medical

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<sup>93</sup> <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-supply-chain-update>.

<sup>94</sup> See, e.g., Coronavirus fears cause global run on face mask sales despite CDC's advice, <https://abc7news.com/5973087/>; There Aren't Enough Medical Masks to Fight Coronavirus. Here's Why It's Not Going to Get Better Anytime Soon, <https://time.com/5785223/medical-masks-coronavirus-covid-19/>; <https://www.wired.com/story/covid-19-amazon-curb-face-mask-price-gouging/>.

<sup>95</sup> Available at [https://www.michigan.gov/documents/msp/MDCH\\_Michigan\\_Mass\\_Fatality\\_Plan\\_454523\\_7.pdf](https://www.michigan.gov/documents/msp/MDCH_Michigan_Mass_Fatality_Plan_454523_7.pdf).

<sup>96</sup> MCL 52. 201.

personnel do not encompass the responsibilities held by the Medical Examiner.<sup>97</sup> However, Section 1a(2) of the County Medical Examiners Act authorizes each Medical Examiner to appoint investigators to assist the Medical Examiner in carrying out the Medical Examiner's obligations.<sup>98</sup> The Medical Examiner has the authority to specify the qualifications and the duties of the investigators; for those Medical Examiners that are planning ahead, this offers the opportunity to identify, train and empower assistants who can conduct the required initial examination and differentiate those unexpected deaths that require further evaluation, and those that are likely due to pandemic. Other possibilities exist under the Emergency Management Act. For example, under Section 5, the Governor is authorized to suspend regulatory statutes and rules that prescribe procedures for the conduct of state business if compliance would impede management of the disaster.<sup>99</sup> Counties and municipalities also have the authority to make, amend and rescind ordinances and rules as necessary for emergency management purposes,<sup>100</sup> and to staff and deploy disaster workers as needed for the response.<sup>101</sup> Through a combination of the appointment of Medical Examiner investigators, modification of state rules regarding the timing and responsibility for completion of death certificates, and implementation of alternative requirements regarding county requirements for post-mortem examinations, the burden on Medical Examiners may be better managed.

However, even with such adjustments, without action by the Michigan Legislature, the Medical Examiner will retain jurisdiction over the bodies of victims who die suddenly, unexpectedly or violently;<sup>102</sup> and it will be necessary for the Medical Examiner to manage any temporary support teams to assist with the process of identification, examination and processing. Consistent with the basic premise that disasters are local, Michigan has developed Regional Healthcare Coalitions which have regional mass fatality plans, and hospitals within each region that participate in the Office of the Assistant Secretary for Preparedness and Response Hospital Preparedness Program also have hospital-level plans. These plans provide for the sharing of resources and coordination of response activities; however, in a pandemic scenario, it is likely that each facility and each county will be overwhelmed, and significant mutual aid resources will not be available.

Where mass casualties threaten to overwhelm local resources, the Medical Examiner can notify the local Emergency Manager, who has authority to activate the Emergency Operations Center ("EOC"), which can request assistance from the State Emergency Operations Center

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<sup>97</sup> MCL 30.411(4)–(6).

<sup>98</sup> MCL 52.201a(2).

<sup>99</sup> MCL 30.405(1)(a).

<sup>100</sup> MCL 30.412(2).

<sup>101</sup> MCL 30.410(f).

<sup>102</sup> *Id.*



(“SEOC”). The SEOC is supported by the Michigan Department of Community Health’s Community Health Emergency Coordination Center (“CHECC”), which provides subject matter expertise, public health information in real time, and strategic countermeasure distribution.<sup>103</sup> Each affected Medical Examiner will consult with the CHECC to determine when state and, potentially, federal mortuary resources are needed to manage mass fatalities. The Michigan Mortuary Response Team (“MI-MORT”) is a multi-disciplinary team that is available to assist Medical Examiners, public health officials, and health facilities in mass-fatality incidents.<sup>104</sup> This team can help recover, identify, and process deceased bodies. MI-MORT also has a Disaster Portable Morgue Unit which can operate as a fully functional morgue.<sup>105</sup> If required, the SEOC, in coordination with the CHECC, can also request additional resources from the National Disaster Medical System, such as a Disaster Mortuary Response Team (“D-MORT”). This request process follows standardized Emergency Management Assistance Compact protocols.<sup>106</sup> However, we note that undue reliance on the MI-MORT and D-MORT, as well as other NDMS teams such as the D-MAT, is unwise in a pandemic scenario, as most of the members of these teams are actively practicing funeral directors, morticians, or healthcare professionals who will be needed to provide services in their own communities.

When overwhelming fatalities result from contagious disease or other disaster-related causes, it may be appropriate for the Medical Examiner to direct all deaths in the affected area to a central collection location, to facilitate efficient examination and processing of death certificates.<sup>107</sup> It is critical for healthcare providers and their counsel to understand the risks of contagion related to mass casualty, disaster, and pandemic fatalities, and to cooperate with the Medical Examiner in reassuring the public regarding the safety of maintaining a central collection facility. As noted by the World Health Organization, it is vital that “[t]he health sector...take the leading role in addressing concerns about the supposed epidemiological risks posed by dead bodies, and...provid[e] medical assistance to family members of the victims.”<sup>108</sup>

Due to scarcity of resources, burial without embalming may be necessary. In most cases, this poses no significant threat to public health; most communicable agents do not survive long in the body after death.<sup>109</sup> However, there are certain communicable diseases, including hemorrhagic fevers such as Ebola, and cholera where human bodies do present a substantial risk to public health

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<sup>103</sup> [https://www.michigan.gov/documents/mdch/OPHP\\_Promo\\_Brochure\\_339170\\_7.pdf](https://www.michigan.gov/documents/mdch/OPHP_Promo_Brochure_339170_7.pdf)

<sup>104</sup> [https://www.michigan.gov/mdhhs/0,5885,7-339-71548\\_54783\\_54826\\_56161-237200--,00.html](https://www.michigan.gov/mdhhs/0,5885,7-339-71548_54783_54826_56161-237200--,00.html)

<sup>105</sup> *Id.*

<sup>106</sup> See <https://www.emacweb.org/> for more information on the Emergency Management Assistance Compact.

<sup>107</sup> [https://www.michigan.gov/documents/msp/MDCH\\_Michigan\\_Mass\\_Fatality\\_Plan\\_454523\\_7.pdf](https://www.michigan.gov/documents/msp/MDCH_Michigan_Mass_Fatality_Plan_454523_7.pdf) at 15.

<sup>108</sup> *Management of Dead Bodies in Disaster Situations*, Disaster Manuals and Guidelines Series, No. 5, available at [https://www.who.int/hac/techguidance/management\\_of\\_dead\\_bodies.pdf](https://www.who.int/hac/techguidance/management_of_dead_bodies.pdf), Pan American Health Organization and World Health Organization, 2004.

<sup>109</sup> See, e.g., <https://www.who.int/diseasecontrol/emergencies/guidelines/risks/en/>.

after death, and therefore special precautions are required.<sup>110</sup> In these high-risk situations, autopsies are not recommended absent a significant reason for the examination. These recommendations arise from the fact that during the performance of the autopsy, the Medical Examiner and staff are potentially exposed to aerosolized body fluids and particles, and the risk of such exposure, even with personal protective equipment (“PPE”), is only reasonable when there is a significant reason to perform the autopsy. As of the time of this draft publication in March of 2020, the most recent emerging virus, SARS-CoV-2, is believed to be transmitted through respiratory droplets and potentially blood and body fluids. Therefore, transmission is not anticipated during normal body-handling procedures, and postmortem activities should be conducted in a manner that minimizes the creation of aerosolized particles, and includes the use of appropriate engineering controls and personal protection equipment.<sup>111</sup> Postmortem sample collection is recommended; the samples to be collected vary based on whether an autopsy is performed and detailed recommendations for safe collection of bio samples are provided<sup>112</sup> including the use of airborne infection isolation rooms for the conduct of autopsies, and the use of double surgical gloves with a layer of cut-proof mesh gloves and N-95 NIOSH-certified disposable respirator.<sup>113</sup>

For those who do not directly handle the body,<sup>114</sup> other than those notable exceptions such as hemorrhagic fevers and cholera, the mere presence of a corpse is not a significant risk for transmission of diseases. Most experts note that burial in mass graves, or cremation is typically not required from an epidemiological perspective.<sup>115</sup> In fact, “collective burial”, where multiple bodies are placed in a row in a trench, is “...not likely to be seen as morally acceptable in a modern society. Even temporarily, it could have a serious psychological impact on the bereaved...”<sup>116</sup> Collective trench burial should be a last resort<sup>117</sup> and reserved for situations in which storage and

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<sup>110</sup> *Id.*

<sup>111</sup> See CDC’s recommendations at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-postmortem-specimens.html>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Note that those who are charged with collecting, transporting and otherwise processing the dead, risks related to chronic communicable diseases, such as hepatitis, HIV, and tuberculosis, exists; these individuals should wear appropriate personal protective equipment. Morgan O. Infectious disease risks from dead bodies following natural disasters. *Rev Panam Salud Publica*. 2004;15(5):307–12.

<sup>115</sup> *Disease Control in Humanitarian Emergencies, Risks Posed by Dead Bodies After Disasters*. World Health Organization, available at [https://www.who.int/diseasecontrol\\_emergencies/guidelines/risks/en/](https://www.who.int/diseasecontrol_emergencies/guidelines/risks/en/); see also, *Management of Dead Bodies: Frequently Asked Questions*. World Health Organization, available at <https://www.who.int/hac/techguidance/management-of-dead-bodies-qanda/en/>, and *Interim Health Recommendations for Workers who Handle Human Remains After a Disaster*, Centers for Disease Control and Prevention, available at <https://www.cdc.gov/disasters/handleremains.html>.

<sup>116</sup> *Preparing for the Pandemic: A Guide for Cemetery and Crematorium Managers*, K. West, MBE (4/2006).

<sup>117</sup> FAQ #9, *Management of Dead Bodies: Frequently Asked Questions*. World Health Organization, available at <https://www.who.int/hac/techguidance/management-of-dead-bodies-qanda/en/>.

processing of the dead is completely overwhelmed<sup>118</sup>; if required, identification of the body and accurate recordation of burial location are important, to facilitate future re-burial at family request in the future.<sup>119</sup>

As noted above, Michigan law prohibits movement of the body of a fatality that qualifies as a Medical Examiner case without authorization from the Medical Examiner with jurisdiction. The logic behind such a rule is easy to see, but the lack of any exceptions applicable in the event of a wide-spread, sudden catastrophe could prove troublesome. Nonetheless, the Michigan Emergency Management Act provides broad protections from liability in the event of state or municipal-declared emergencies.<sup>120</sup> In the absence of exceptions or waiver by Executive Order, one may be able to look to these liability protections for relief.

While the communicable diseases that are at highest risk of post-mortem transmission are addressed, the risk of rapidly emerging and evolving pandemic diseases could leave funeral directors and others who are responsible for the safe transportation of and final disposition of bodies without much guidance on the safe containment of contagions. This challenge was seen in Canada with the SARS pandemic, when health and safety officials were unsure of the mode of transmission and unable to give clear guidance to the funeral industry regarding appropriate safeguards. Risks of transmission of emerging communicable diseases, such as SARS-CoV-2, can be minimize through the use of universal precautions by all employees who are exposed to blood and other potentially infectious materials, as required by Michigan Occupational Health Standards;<sup>121</sup> current best practices require that all blood and body fluids should be presumed to be infectious.<sup>122</sup> Taken together, (i) the exposure control plan,<sup>123</sup> (ii) policies and procedures regarding use of PPEs and development of contingency plans for situations in which compliance with standard operating procedures cannot be followed, (iii) the use of universal precautions, (iv) safe work practices,<sup>124</sup> and (v) awareness of known communicable diseases, typically will permit safe care of patients and preparation of decedents for burial. However, there is a risk of contamination of the caregiver or mortician in donning and doffing of PPE that should not be dismissed. The difficulty in precisely donning and doffing PPE was demonstrated during the introduction of Ebola into the United States in 2014; Emory University perfected and shared

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> MCL 30.401 *et. seq.*, Emergency Management Act, Act 390 Of 1976.

<sup>121</sup> Mich Adm Code R. 325.70005.

<sup>122</sup> *Id.* However, as noted above, when emerging diseases are transmitted by asymptomatic individuals, it may be the family member, rather than the patient, that is the transmission risk, and while most caregivers and morticians use gloves when expecting to be exposed to blood and body fluids, it is not common to mask and take eye precautions when interacting with patients and families in other, non-intervention situations.

<sup>123</sup> Mich Adm Code R. 325.70004.

<sup>124</sup> Mich Adm Code R. 325.70007.

protocols for donning and doffing PPE and other preparedness capabilities for serious and emerging diseases that are worth review.<sup>125</sup>

## **H. Potential Revisions to Michigan Law**

The Center for Law and the Public's Health at Georgetown and John Hopkins Universities has developed a draft Model State Emergency Health Powers Act, which includes a section on the safe disposal of human remains during a state of public health emergency. This Model Act allows a public health authority, during a state of public health emergency, to order the disposal of any contaminated and contagious human remains through burial or cremation within 24 hours after death.<sup>126</sup> If a dead body with an infectious disease cannot be identified prior to rapid disposal, the Act provides that "a qualified person shall, to the extent possible, take fingerprints and photographs of the human remains, obtain identifying dental information, and collect a DNA specimen."<sup>127</sup> The World Health Organization, in response to the Ebola outbreaks in Africa, similarly recommends that highly infectious, diseased bodies should not be embalmed and should instead be buried as quickly as possible.

Michigan has yet to legislate or promulgate any analogous policies on whether a public health emergency could affect the final disposition of an infectious dead body, or whether such an emergency could trigger an exception to Michigan's unclaimed body statutes. Presently, Michigan law requires an unclaimed body to be held at least 48 hours and that all reasonable measures be taken to identify family or friends of the deceased before allowing the local Medical Examiner the right to make final disposition decisions on behalf of the deceased.

## **I. The Challenge of Unclaimed Bodies**

### **a. County**

As noted above, Medical Examiner s are charged with the duty to investigate the cause of death of all persons who perish within the county without medical attendance by a physician. In the event of a pandemic or other multi-casualty crisis, the incidence of death outside of the presence of a physician will dramatically increase. Changes to the standard operations of the Medical Examiner must carefully balance the need to efficiently process the dead, while ensuring that the pandemic is not used as a means of hiding criminal activity. The Medical Examiner's

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<sup>125</sup> See <https://www.emoryhealthcare.org/ebola-protocol/videos.html>; see also, <https://www.youtube.com/watch?v=F2iOP-8fybQ&feature=youtu.be>.

<sup>126</sup> Model State Emergency Health Powers Act, Section 504(c).

<sup>127</sup> Model State Emergency Health Powers Act, Section 504(g).

office also is tasked with identifying deceased individuals and notifying their next of kin, a worthwhile endeavor that by necessity is likely to be deferred or delegated.<sup>128</sup>

In recent years, an increase in the amount of unclaimed bodies in Ingham,<sup>129</sup> Kent,<sup>130</sup> and Wayne<sup>131</sup> counties, along with the high costs associated with the process of their disposition, has shed a light on the frailty of the current regulatory framework. In addition to the issues of high cost and overcrowding, the occurrence of a pandemic likely would result in a collapse of the existing process for the disposition of unclaimed bodies. The interplay between the various Medical Examiner offices and other state and federal agencies involved in managing a pandemic situation, such as the MDHHS and the CDC, may lead to conflicts; however the proper use of the Incident Command System and the Emergency Operations Center will help resolve any potential conflicts. The best way to resolve those conflicts is through the development of emergency management plans that address cooperation between agencies and capabilities, the conduct of multi-agency exercises, and consideration of any advisable modifications in laws and regulations to permit flexibility in the event resources and capabilities are overwhelmed.

Once the Medical Examiner takes charge of the body, the Medical Examiner is required to “immediately and as compassionately as possible notify the next of kin of the decedent’s death and the location of the body.”<sup>132</sup> After the Medical Examiner’s office, or a representative from the state or local police, makes a “diligent effort” to locate and notify the next of kin, the Medical Examiner is permitted to order and conduct an autopsy of the decedent without the consent of the next of kin.<sup>133</sup> If the Medical Examiner is not able to identify or contact next of kin or a representative of the deceased, he or she is permitted to bury the body.<sup>134</sup> The Medical Examiner or a representative from state or local police also is required to keep a record of the efforts taken to locate next of kin for at least 1 year.<sup>135</sup>

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<sup>128</sup> MCL 52.205(4)

<sup>129</sup> LeBlanc, *Dying alone: The story of Lansing’s unclaimed bodies*, Lansing State Journal (Aug. 30, 2017) available at <https://www.lansingstatejournal.com/story/news/local/2017/08/30/unclaimed-lansing-forgotten-bodies-find-final-resting-place/489157001/>.

<sup>130</sup> Fenton, *Kent County's unclaimed bodies on the rise: Where they go, and who pays to bury them*, mLive (May 15, 2014) available at [https://www.mlive.com/news/grand-rapids/2014/05/number\\_of\\_unclaimed\\_bodies\\_aft.html](https://www.mlive.com/news/grand-rapids/2014/05/number_of_unclaimed_bodies_aft.html).

<sup>131</sup> Dietz, *Unclaimed bodies pile up at Wayne County morgue*, Click On Detroit, available at [https://www.clickondetroit.com/news/local/detroit/unclaimed-bodies-pile-up-at-wayne-county-morgue\\_20151201151557169](https://www.clickondetroit.com/news/local/detroit/unclaimed-bodies-pile-up-at-wayne-county-morgue_20151201151557169).

<sup>132</sup> MCL 52.205(4).

<sup>133</sup> MCL 52.205(5).

<sup>134</sup> MCL 52.205(6).

<sup>135</sup> MCL 52.205(6).

**b. Michigan Department of Health and Human Services**

In addition to the various Medical Examiners, the MDHHS plays an important role in the regulation and disposition of unclaimed bodies, and in a pandemic situation, the department's authority to direct that unclaimed bodies be used for educational and research purposes could have a significant impact on reducing the scope of a pandemic.

The Michigan Public Health Code grants MDHHS the authority to adopt rules for “the transportation, reception, preservation, storage, records, and allocation of unclaimed bodies or parts.”<sup>136</sup> The Public Health code defines an “unclaimed body” as a “dead human body for which the deceased has not provided a disposition, for which an estate or assets to defray costs of burial do not exist, and that is not claimed for burial by a person, relative, or court appointed fiduciary who has the right to control disposition of the body.”<sup>137</sup> As reflected in the Medical Examiners Act, the Public Health Code mandates that an “official of a public institution or a state or local officer in charge or control of an unclaimed body,” which, for most unclaimed bodies, is the Medical Examiner, must use “due diligence” to notify the next of kin of an unclaimed body.<sup>138</sup> The act also provides that, if there is no next of kin identified after due diligence, the unclaimed body becomes available to MDHHS.<sup>139</sup>

MDHHS is tasked with receiving unclaimed bodies and allocating them for scientific and educational purposes. Once a Medical Examiner is unable to locate next of kin of a deceased individual, MDHHS, in the event that it chooses to take control of the body, is charged with allocating the body to various hospitals and educational institutions for the “purpose of instruction, study, and use in the promotion of education in the health sciences in this state.”<sup>140</sup> The recipient of the unclaimed body, whether a hospital, medical center, or research institution, bears the expenses associated with preservation and transportation of an unclaimed body, which is arranged by MDHHS.<sup>141</sup> MDHHS also is authorized to designate Michigan State University, the University of Michigan, or Wayne State University to perform the duties associated with receiving, allocating, and transporting unclaimed bodies for scientific purposes.<sup>142</sup> In a pandemic situation, the department's procedures for obtaining and transporting an infected unclaimed body would be critical, not only for the health and safety of those coming into contact with the body, but also for

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<sup>136</sup> MCL 333.2678.

<sup>137</sup> MCL 333.2653(1).

<sup>138</sup> MCL 333.2653(1).

<sup>139</sup> MCL 333.2653(2).

<sup>140</sup> MCL 333.2652(1).

<sup>141</sup> MCL 333.2655.

<sup>142</sup> MCL 333.2652(2).

preserving the body and any potential bacteria or other organisms that may be the subject of important research.

Once an institution receives an unclaimed body from MDHHS or one of the universities authorized to allocate and distribute unclaimed bodies, the institution is required to hold the body for 30 days, during which time the body is subject to identification and claim by next of kin or any other person with authority over the body.<sup>143</sup> The reason for this delay is unclear, given that, in order for a body to be considered “unclaimed” and thus available to the department, the Medical Examiner must have diligently attempted to identify any next of kin. The requirement also could be problematic in a pandemic situation, where a statutorily required delay before examining or studying a body could expose numerous persons to risk of infection if the body continues to transmit infectious diseases, such as may be the case with an Ebola infection, or delay obtaining critical information about the cause of the pandemic, and could quickly overwhelm storage capabilities. It is unclear whether this requirement could be waived in a pandemic situation, or whether a federal regulatory body, such as the CDC, might attempt to exercise its authority and take control over the unclaimed body.

In addition to statutory authority governing the receipt, study, and disposition of unclaimed bodies used for scientific and educational purposes, MDHHS implemented additional administrative rules related to the institutions’ use of unclaimed bodies. Institutions seeking bodies for scientific or educational purposes may make written requests to MDHHS for such bodies.<sup>144</sup> The institutions are required to have facilities for the storage and handling of the bodies that are “acceptable” to MDHHS.<sup>145</sup> Once a body is received by an institution, the body is the “sole responsibility of that institution, including final disposition of the bodies,”<sup>146</sup> which is done by cremation.<sup>147</sup> Institutions also are permitted to transfer bodies to or from other receiving institutions.<sup>148</sup>

The responsibility of MDHHS to oversee and actively facilitate the process of transferring unclaimed bodies from the authority of Medical Examiner s to receiving institutions means that MDHHS likely would be intimately involved with other state and federal organizations during a pandemic situation. Many of the existing rules and regulations discussed above may not be suitable to a pandemic situation. In order to better prepare for an influx of unclaimed, potentially diseased bodies during a pandemic, it would be useful for MDHHS to coordinate with other state

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<sup>143</sup> MCL 333.2655.

<sup>144</sup> Mich Adm Code R 325.955(2).

<sup>145</sup> Mich Adm Code R 325.955(3).

<sup>146</sup> Mich Adm Code R 325.955(6).

<sup>147</sup> Mich Adm Code R 325.953(7).

<sup>148</sup> Mich Adm Code R 325.955(4).

agencies to adopt a protocol for obtaining, studying, and disposing of unclaimed bodies, with particular attention to the unique risks and needs associated with a pandemic situation.

### **Conclusion**

The same threats that give rise to the critical need for emergency preparedness – natural disasters, emerging diseases, and other unanticipated major events – can result in significant fatalities that overwhelm standard operational capabilities. Unclaimed bodies are already revealing significant weaknesses in the systems for dealing with bodies of those who are dispossessed or do not have family in the area. When the system is overwhelmed, operational changes will be necessary to respond effectively and with empathy to those that are affected. By planning ahead, fatalities can be managed in a way that meets both legal and public health requirements.