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December 6, 2019

Hon. Jeffrey Evangelos
465 Waldoboro Road
Friendship, ME 04547

RE: Complaints regarding Chief Medical Examiner

Dear Representative Evangelos:

Our office has received three complaints from you this year concerning the State's Chief Medical Examiner ("CME"), Dr. Mark Flomenbaum.

Summary of Complaints:

In the first complaint, which we received by email on March 6, 2019, you asserted that Dr. Mark Flomenbaum was "engaging in private business from his State Office on taxpayer time" based on a report in the Maine Sunday Telegram that Dr. Flomenbaum had answered the telephone number listed for his forensic pathology consulting business, Lincoln Forensics, LLC, during regular state office hours. You also asked us to explore why Governor Mills' Communications Director had told a Maine Sunday Telegram reporter that Governor Mills was not aware of Dr. Flomenbaum's outside employment while she served as Attorney General, even though a court filing by two Assistant Attorneys General had stated that the Attorney General had agreed to the CME engaging in such work.

On November 18, 2019, you submitted an additional complaint via e-mail, based upon a newspaper article about Dr. Flomenbaum's findings relating to the death of Jeffrey Aylward. According to the article, Dr. Flomenbaum's finding that Mr. Aylward died of acute and chronic alcoholism was erroneous and had been contradicted by other experts who had reviewed the findings.

Most recently, on November 21, 2019, you submitted a third complaint related to the contents of a job posting for the position of Deputy Chief Medical Examiner dated August 10, 2017, which you explained had been delivered to you by a source. You suggested that, if authentic, the posting was inappropriate and disrespectful to deceased persons and their families.

Outside Complaint Policy:

The Office of the Attorney General (“OAG”) has an established policy, in accordance with 5 M.R.S. §736(28), governing the handling of complaints by members of the public against employees of this Office. Complaints must be reviewed by the Chief Deputy or, in appropriate circumstances, the Attorney General or a designee, within a reasonable time and must be conducted “in a professional and confidential manner.” The employee is notified of the complaint, and the findings are shared with the employee. “Upon final disposition, and if appropriate, the complainant shall be notified that the matter has been looked into and dealt with by the Office. If appropriate, the complainant will be notified of the outcome of any review, to the extent permitted by civil service rules, applicable law and contract requirements.”

With respect to each complaint, after a preliminary review of the allegations, it was determined that the complaints would be reviewed internally, and that an investigation was not appropriate. Before conducting the review, our Office first had to address a threshold question of the extent of the Attorney General’s authority over the CME.

Threshold question:

According to statute, “the Office of Chief Medical Examiner for the State” “is created[] *in* the Department of the Attorney General.” 22 M.R.S. §3022(1) (emphasis added). However, the CME is not an employee of the OAG; he is appointed by the Governor for a “term of seven years and until the [CME’s] successor is appointed and qualified.” 22 M.R.S. § 3022(1). The CME’s salary is also set by the Governor. *Id.* § 3024. Under the Medical Examiner Act, 22 M.R.S. §§3021-3035, the Attorney General has certain specific grants of authority related to criminal prosecutions, but it is the CME who “is authorized and empowered to carry into effect” the Act and to make and enforce reasonable rules consistent with the Act. *Id.* §3032.

Analysis of the Medical Examiner Act as a whole reveals that the CME operates as an independent civil officer of the State, with broad authority and discretion to carry out his statutory duties. The CME is not subject to supervision of the Attorney General or the OAG with respect to how he carries out his professional obligations, as defined in statute. The OCME, which was originally created as a stand-alone unit of state government in 1967, was placed “in the Department of the Attorney General” in 1974, for purposes of budgetary and fiscal management and administrative reporting, not management of personnel, and not direct supervision of the CME. P.L. 1973, c. 722 (eff. June 28, 1974).¹

Notwithstanding that the OAG does not appear to have the requisite supervisory authority over the CME, the Office reviewed the complaints submitted, as described below.

¹ This change was made based on recommendations of the *Maine Management and Cost Survey* – a group of independent business leaders engaged to perform “a comprehensive survey of the “managerial, control and planning practices” of every agency of state government. (Gov. Curtis’ joint address to the Legislature on Jan. 24, 1973).

Results of Review:

1) Outside consulting work by the CME. Dr. Flomenbaum performs work as an expert witness and consultant under the business name, Lincoln Forensics, LLC, in cases outside of Maine and primarily on evenings and weekends. His business telephone number is the same as his personal cellphone number. Answering the reporter's call on his personal cell phone during working hours was akin to the incidental, brief contact that any state official or employee may have during the work day relating to personal or non-state matters. Such incidental use is permitted under Bureau of Human Resource policies and the OAG's policies. Moreover, there is substantial evidence that Dr. Flomenbaum works far more than a 40-hour week for the State as its CME, including substantial time on evenings and weekends. The OAG review found no indication that Dr. Flomenbaum has used state resources in the conduct of his consulting business or that he has done this work on state time.

Consulting work by CMEs and Deputy CMEs in cases outside of Maine has been a longstanding practice – since at least 1997 – and consistent with past practice, was expressly allowed by then Chief Medical Examiner Greenwald when Dr. Flomenbaum was hired as Deputy CME in early 2013. It is the view of the OAG that comments by the Governor's Communications Director are outside the scope of the OAG Outside Complaint Policy and thus outside the scope of this review. However, public records show that while the Governor's Communications Director, Scott Ogden, initially told the Maine Sunday Telegram that Governor Mills was not aware of Dr. Flomenbaum's outside employment when she was Attorney General, Mr. Ogden subsequently clarified that comment. He reported to the Bangor Daily News on March 8, 2019, that while the Governor was aware in her previous role as Attorney General that the CME occasionally testified as an expert and did consulting work in other jurisdictions, she did not recall being aware that he had formed a business entity, Lincoln Forensics, LLC, to do this work.

CMEs across the country perform similar private consulting work, serving as expert witnesses in death cases outside the jurisdictions where they are employed. The National Association of Medical Examiners (NAME) recognizes this practice and has even included presentations at its annual meetings on topics such as "how to get started managing a medicolegal consulting practice." The president of the Association, Dr. Jonathan Arden, was quoted by the Maine Sunday Telegram, and in Rep. Evangelos' complaint, as acknowledging that this is a "very common practice." Defense counsel in Maine benefit from this practice because it enables them to retain CMEs from other states to testify as experts in trials in this State, and it provides a check on the Maine OCME's work. Consistent with this common practice, the OCME has an established personnel policy permitting outside employment "as long as [it] does not involve a conflict of interest with his/her OCME employment."

The CME's outside consulting work is minimal and has not interfered with his ability to fulfill his statutory duties as CME for the State of Maine. The results of this review show that Dr. Flomenbaum has devoted his full effort to complete his government work as CME, thus meeting the standard suggested by the president of his professional association.

2) Aylward Autopsy Findings. The complaint relating to Mr. Aylward challenges the autopsy findings of the CME relating to a contributory cause of death. The determination of a Medical Examiner in the OCME as to the cause and manner of death is made by a medical professional independent of oversight by the Attorney General. Accordingly, disagreement with a conclusion regarding the cause or manner of death or other findings on an autopsy report would not be a proper subject of review under the OAG Outside Complaint Policy. In this case, the cause of death in the original autopsy report was listed as “atherosclerotic and hypertensive cardiovascular disease due to diabetes mellitus,” with “acute and chronic alcoholism” listed as a contributory cause.

If there is a concern about a finding made by a medical examiner, that concern should be directed to the OCME. The CME has the ability to amend his autopsy findings and conclusions upon receipt of additional information. That is what happened here. Additional information was provided to the CME, which prompted the OCME to conduct additional laboratory tests in accordance with standard practice. On Friday, November 22, 2019, Dr. Flomenbaum made additional findings and amended the death certificate to remove the reference to a contributory cause of death, after review and analysis of the additional information relating to Mr. Aylward. It is not uncommon for medical examiners to amend reports or death certificates when new information is brought forward or further analysis is conducted. Accordingly, this complaint has been resolved.

3) August 10, 2017 Job Posting. The OAG provides human resources, fiscal and administrative support for the OCME. The human resources support provided by the OAG includes the posting of job vacancies, even though the Chief Medical Examiner, not the Attorney General, is the appointing authority and makes the hiring decisions for all employees within the OCME (except the Chief Medical Examiner, who is appointed by the Governor).

The announcement of the Deputy Chief Medical Examiner vacancy was posted on August 10, 2017, by the OAG in accordance with the usual practice for posting vacancies in the OCME. Upon review, I agree with your assessment that the language used does not convey to the public the high standards of professionalism and dignity that we should expect from state offices and state officials.

Overall work of Maine’s OCME:

Dr. Flomenbaum’s work at the OCME has been found to be exemplary by the National Association of Medical Examiners, which, in February 2018, accredited the Maine OCME under Dr. Flomenbaum’s leadership. This is the first time the Maine OCME had received this accreditation. In the inspection report related to the accreditation, the inspector notes that “[t]he Office of the Chief Medical Examiner for the State of Maine is a very effective law-enforcement entity. Dr. Mark Flomenbaum leads by personal example. The high-quality reports are furnished with exemplary speed and accuracy.” Based upon an extensive and professional review, which included a review of 25 randomly picked case files, the Maine OCME was found by the National Association of Medical Examiners to be “one of the best medical examiner offices in the country.” On November 11, 2019, after an updated review, the National

Association of Medical Examiners advised Dr. Flomenbaum that the OCME had achieved “continuing full accreditation” reflecting “the highest quality of death investigation system.”

Dr. Flomenbaum’s credibility as an expert witness in State homicide cases is regularly tested by defense counsel, and has been integral to many murder convictions, including most recently in *State v. Gaston*, No. CUMCD-CR-16-488, and prior to that in *State v. Coleman*, 2018 ME 41, *State v. Haji-Hassan*, 2018 ME 42, and *State v. Davis*, No. AROCD-CR-2013-137. This is appropriate in our adversarial system of criminal justice. It should be noted that in the recent *State v. Gaston* case, press reports suggested that Dr. Flomenbaum “changed” his opinion regarding the direction of the gunshot wound. This is a misunderstanding of Dr. Flomenbaum’s opinion and subsequent testimony. After the matter was heard at trial, the defense forensic expert agreed with Dr. Flomenbaum’s report and Dr. Flomenbaum’s trial testimony.

Nothing in this review undermines the confidence of the Attorney General’s Office in the Chief Medical Examiner or in the quality of his work and that of the Office of Chief Medical Examiner.

Sincerely,


AARON M. FREY
ATTORNEY GENERAL

cc: Governor Janet T. Mills
Dr. Mark Flomenbaum, Chief Medical Examiner