



HEALTH LAW SECTION

2019-2020 Officers

March 26, 2020

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Re: COVID-19 New York Public Health Emergency and Disaster
Conditions: Call for Essential Crisis Standards in New York

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Dear Governor Cuomo:

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I write to you today on behalf of the Health Law Section of the New York
State Bar Association in the context of the present COVID-19 crisis as it is
affecting the State of New York, its health systems and providers, and all
New Yorkers.

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Permit me at the outset to take this opportunity to commend you and each
of your respective offices on the clear direction and outstanding leadership
demonstrated in these unprecedented times as New York State and all New
Yorkers navigate through the maze of different layers of government and public
health organizations including the World Health Organization (WHO), federal,
state and local public health emergency and disaster declarations and conditions
here in our state.

Notwithstanding your unparalleled leadership, however, the escalating crisis in New York State
– both the rise in the number of cases and the projections of continued rapid escalations, and the
situation of scarce resources, call for immediate action in the form of adoption of essential crisis
standards.

As you know, while disaster and public health emergency declarations and action by the Federal
government, as called for by various groups such as the Hastings Center and the community of
bioethicists, are critical steps, further steps remain to fully respond to the present crisis.

1 The opinions expressed herein are those of the Health Law Section, and not those of the New York State Bar
Association until approved by the House of Delegates or the Executive Committee.

The New York State Bar Association is a statewide bar association with 74,000 members. We are proud to have a
robust Health Law Section with active members in diverse areas of practice concentration and legal scholarship.
Drawing on our members' breadth and depth of knowledge in health law, I have taken the initiative to establish a
Task Force to address the unique legal and ethical questions raised by COVID-19.

2 INST. OF MEDICINE, Crisis Standards of Care: A Systems Framework for Catastrophic Disaster Response, 1 (Dan
Hanfling, et. al. eds) (The National Academies Press) (2012) (hereinafter "IOM 2012").

3 THE HASTINGS CENTER, COVID-19 Petition, An Open Letter to the White House Coronavirus Task Force and the
U.S. Congress (Mar. 20, 2020) https://docs.google.com/document/d/1C-
LxnsqchtSlcXw_P1ANhdQHmUioSQ10532Gou5_UU/edit.

Providers on the ground are now faced with ethically challenging triage decisions triggered by scarcity of resources. While there will be expected improvement in surge capacity, thanks to your actions and those of the federal government, the scarcity of certain critical equipment, such as ventilators, may not be sufficiently altered soon enough to avoid the need for challenging triage decisions.

The Health Law Section formed a Task Force to examine the legal issues presented by the COVID-19 pandemic. The Task Force immediately identified the need for essential uniform crisis standards that will be consistent across health care institutions. Such standards would guide the ethical decisions of providers if they are forced to confront shortages affecting the ability to deliver care.

More specifically, the Task Force recommends that the following actions be duly considered and implemented to meet the COVID-19 emergency:

- Department of Health Actions:
 - adopt a uniform structure and issue a set of ethics guidelines and/or regulations that will guide health care institutions, institutional triage committees, and providers in making triage decisions in light of scarce resources;
 - assure the needs of vulnerable populations are met; and
 - assure provision of palliative care as an ethical minimum to mitigate suffering among those who are hospitalized during the COVID-19 crisis, especially when desired equipment or other resources are not available.

- Actions of Governor:
 - waive certain current NYS laws to protect from liability exposure practitioners who follow the guidelines; and
 - direct all state agencies to interpret and apply the law and regulations in a way to support compliance with the ethics/triage guidelines.

These recommendations are not inconsistent with Executive Order 202.10 issued on March 23, 2020.⁴

⁴ STATE OF NEW YORK, Exec. Order No. 202.10 Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency. See in particular the following provisions: Section 3002, 3002-a, 3003, and 3004-a of Public Health Law to the extent necessary to allow any emergency medical treatment protocol development or modification to occur solely with the approval of the Commissioner of Health;

Background

By way of background, international,⁵ federal,⁶ state⁷ and local⁸ declarations confirm the critical

⁵ WORLD HEALTH ORGANIZATION, *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of the novel coronavirus (2019-nCov)* (Jan. 10, 2020) [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) (declaration of a public health emergency for COVID-19). WORLD HEALTH ORGANIZATION, *WHO Director-General's opening remarks at the media briefing on COVID-19 11 March 2020* [https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020_\(Declaration of COVID-19 Pandemic\)](https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020_(Declaration%20of%20COVID-19%20Pandemic)).

⁶ U.S. DEPT. OF HEALTH & HUMAN SERVICES, *Determination that a Public Health Emergency Exists* (Jan. 31, 2020) <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (2019 Novel Coronavirus (2019-nCoV) declared a public health emergency under §319 of the Public Health Service Act). FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA), *New York Covid-19 Pandemic (EM-3434), Emergency Declaration* (Mar. 13, 2020) <https://www.fema.gov/disaster/3434> (58 states and territories also have emergency declaration for COVID-19 on Mar. 13, 2020). Proclamation No. 9994, *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337 (Mar. 18, 2020) <https://www.govinfo.gov/content/pkg/FR-2020-03-18/pdf/2020-05794.pdf>. (Official proclamation of National Emergency under the National Emergencies Act (50 U.S.C. §1601) and the Social Security Act (42 U.S.C. § 1320b-5) beginning Mar. 1, 2020). See President Donald J. Trump, *Letter from the President* (Mar. 13, 2020) <https://www.whitehouse.gov/wp-content/uploads/2020/03/LetterFromThePresident.pdf> (President Trump declaring a National Emergency under the Robert B. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §5121, et. seq.)). See also FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA), *Coronavirus (COVID-19) Pandemic: Eligible Emergency Protective Measures* (Mar. 19, 2020) <https://www.fema.gov/news-release/2020/03/19/coronavirus-covid-19-pandemic-eligible-emergency-protective-measures> (emergency protective measures taken to respond to COVID-19 may be reimbursed under Category B of FEMA's Public Assistance Program). Exec. Order No. 16,227, *Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19*, 85 Fed. Reg. 16,227 (Mar. 18, 2020) <https://www.govinfo.gov/content/pkg/FR-2020-03-23/pdf/2020-06161.pdf>. (President Trump declared that the federal government, specifically the Secretary of Health and Human Services, may allocate medical resources under the Defense Production Act of 1950, 50 U.S.C. §4501, et. seq.). FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA), *New York Covid-19 Pandemic (DR-4480), Major Disaster Declaration* (Mar. 20, 2020) <https://www.fema.gov/disaster/4480>. See THE WHITE HOUSE, *President Donald J. Trump Approves New York Disaster Declaration* (Mar. 20, 2020) <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-approves-new-york-disaster-declaration-5/> (Seamus K. Leary (Dept. of Homeland Security) named as the Federal Coordinating Officer).

⁷ STATE OF NEW YORK, *Exec. Order No. 202, Declaring a Disaster Emergency in the State of New York* (March 7, 2020) https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.pdf. STATE OF NEW YORK, *Exec. Order No. 202.1 Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency* (March 12, 2020) https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202_1.pdf. STATE OF NEW YORK, *Exec. Order, No. 202.4, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency* (March 16, 2020) <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO%20202.4.pdf> (The State will organize the National Guard and work with building unions and private developers to find existing facilities -- such as dormitories and former nursing homes -- that can most easily be converted to medical facilities, with the goal of creating an additional 9,000 beds.). STATE OF NEW YORK, *Exec. Order, No. 202.9, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency* (March 21, 2020) https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.9.pdf (Governor Cuomo suspended any statute, local law, or other regulations which would "hinder or delay action necessary to cope with the disaster emergency."). See Governor Andrew M. Cuomo, *Governor Cuomo Issues Guidance on Essential Services Under The 'New York State on PAUSE' Executive order* (March 20, 2020) <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order> (All non-essential businesses are required to have 100% of their workforce work from home, if possible. Only essential health care operations and other essential services are to remain open. Further, Governor Cuomo created "Matilda's Law" creating stricter rules for vulnerable populations such as senior citizens and people with underlying respiratory issues.).

⁸ THE CITY OF NEW YORK, *Emergency Executive Order No. 98* (March 12, 2020) <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-98.pdf>. See also THE CITY OF NEW YORK, *Emergency Executive Order No. 100* (March 16, 2020)

nature of the public health emergency we now face and provide the authority for the related regulatory orders.

With these international, federal, state and local declarations in mind, the Section calls attention to the early development of crisis standards of care by the Institute of Medicine (IOM), commencing in 2009. These standards have been adopted in various forms by many other states,⁹ and are instructive regarding the present crisis.¹⁰

In 2012, the IOM issued a full report on Crisis Standards of Care.¹¹ Among other things, the report addresses the critical importance of palliative care as an ethical minimum in situations of scarcity.

<https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-100.pdf> (Major De Blasio required NYC Health and Hospitals to postpone or cancel all elective procedures within 96 hours of the order's issuance. Further, he directed all agency heads, Emergency Management, Department of Health and Mental Hygiene, and others to take all necessary and appropriate steps to preserve public safety.). THE CITY OF NEW YORK, Emergency Executive Order No. 101 (March 17, 2020) <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-101.pdf> (Mayor De Blasio made it a misdemeanor to violate both the Governor's Order and his Order during the reduction of opportunities for person-to-person transmission of COVID-19).

⁹ 18 states and Washington D.C. have adopted the CSC. TRACIE HEALTHCARE EMERGENCY PREPAREDNESS INFORMATION GATEWAY, ASPR TRACIE Technical Assistance Request (Jun. 8, 2016) <https://files.asprtracie.hhs.gov/documents/aspr-tracie-ta-crisis-standards-of-care-state-strategies-508.pdf> (defines the crisis standards of care plans for Washington D.C., Minnesota, Arizona, Delaware, Indiana, Kansas, Louisiana, Michigan, Oregon, South Carolina, Texas and Virginia). CALIFORNIA DEPT. OF PUBLIC HEALTH, Standards and Guidelines for Healthcare Surge during Emergencies (2008) <http://bepreparedcalifornia.ca.gov/EPO/CDPHPrograms/PublicHealthPrograms/EmergencyPreparednessOffice/EPOProgramsServices/Surge/StandGuide/SSG1.htm>. COLORADO DEPT. OF PUBLIC HEALTH & ENVIRONMENT, CDPHE All Hazards Internal Emergency Response and Recovery Plan, Annex B: Colorado Crisis Standards of Care Plan (July 13, 2018) <https://drive.google.com/file/d/1j4OIj7qstpJaR7XQcr2ayTFZFYyrBzq2/view>. MASSACHUSETTS DEPT. OF PUBLIC HEALTH & HARVARD ALTERED STANDARDS OF CARE WORKING GROUP, Altered standards of care during an influenza pandemic: identifying ethical, legal, and practical principles to guide decision making (2009) <https://www.ncbi.nlm.nih.gov/pubmed/19755912>. MISSISSIPPI STATE DEPT. OF HEALTH, Office of Emergency Planning and Response, Crisis Standards of Care (2017) https://msdh.ms.gov/msdhsite/_static/resources/7221.pdf. NEW MEXICO DEPT. OF HEALTH, New Mexico Crisis Standards of Care (2018) <https://nmhealth.org/publication/view/plan/4877/>. THE UTAH HOSPITALS AND HEALTH SYSTEMS ASSOCIATION, Utah Pandemic Influenza Hospital and ICU Triage Guidelines (2009) http://pandemicflu.utah.gov/plan/med_triage081109.pdf. VERMONT DEPT. OF HEALTH, Vermont Crisis Standards of Care (CSC) Plan (2019) <https://www.healthvermont.gov/sites/default/files/documents/pdf/Vermont%20Crisis%20Standards%20of%20Care%20Rollout%20PP%2009-04-2019a.pdf>.

¹⁰ In 2009, in the midst of the Influenza A/H1N1 pandemic, the U.S. Department of Health and Human Services issued a charge to a newly formed committee of experts to develop guidance for establishing Crisis Standards of Care ("CSC") for use in disaster.¹⁰ "Crisis standards of care" were defined as follows: "Substantial change in the usual health care operations and the level of care it is possible to deliver . . . justified by specific circumstances and . . . formally declared by a state government in recognition that crisis operations will be in effect for a sustained period." Inst. of Medicine, Guidance for Establishing Crisis Standards of Care for Use in Disaster Situations: A Letter Report, 3 (Bruce M. Altevogt, et. al. eds.) (The National Academies Press) (2009) (hereinafter "IOM 2009).

¹¹ IOM 2012, *supra* note 1.

Department of Health Actions

The New York State Task Force on Life and the Law completed draft Ventilator Guidelines in 2015.¹² Consideration of the Task Force on Life and the Law's work would be appropriate at this time.

The Health Law Section Task Force urges that any ethics guidelines include assurances that the needs of vulnerable populations will be met, and of the provision of palliative care as an ethical minimum to mitigate suffering among those who are hospitalized during the COVID-19 crisis, especially when desired equipment or other resources are not available.

Actions of Governor

In order to make the guidelines effective, certain laws may need to be waived when health care providers follow the ethical guidelines during the COVID-19 crisis. This would include relief from liability for following the ethical guidelines. The laws that must be considered include NYS Public Health Law § 29-C: Health Care Agents and Proxies, § 29-CC: Family Health Care Decisions Act (FHCDA), § 29-CCC: Non-hospital DNR Law, § 2504: Enabling Certain Persons to Consent for Certain Medical, Dental, Health and Hospital Services, and § 2805-D: Limitation of Medical, Dental or Podiatric Malpractice Action Based on Lack of Informed Consent; NYS Ed. Law §§ 130;131-A: Professional Misconduct; and NYS SCPA § 1750-B: Health care decisions act for people with intellectual disabilities.

Consideration should also be given to a direction to all state agencies to interpret and apply the law and regulations in a way to support compliance with the ethics/triage guidelines.

Adoption of Crisis Standards for the COVID-19 Crisis in New York

As you have recognized, there is a need to move swiftly in response to COVID-19. The need to assure an orderly and ethical process in allocation of scarce resources, protection of vulnerable populations, and access to palliative care as an ethical minimum in the context of the public health emergencies and disasters must happen swiftly.

Thank you for your timely attention to these issues of grave and collective concern.

Very truly yours,

A handwritten signature in black ink, appearing to read 'H. Fernandez', with a long, sweeping horizontal stroke extending to the right.

Hermes Fernandez
Chair, Health Law Section
New York State Bar Association

¹² NEW YORK STATE DEPT. OF HEALTH, Ventilator Allocation Guidelines (New York State Task Force on Life and the Law) (2015)
https://www.health.ny.gov/regulations/task_force/reports_publications/docs/ventilator_guidelines.pdf.

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