

NEW YORK STATE BAR ASSOCIATION HOUSE OF DELEGATES: REVISED COVID-19 RESOLUTIONS

House of Delegates:

The following Resolutions, as clarified and revised, will be submitted to the New York State Bar Association (NYSBA) House of Delegates (HOD) for review, consideration and formal action on November 7th. Please note that the full Health Law Section COVID-19 Report was submitted to the HOD for the June 13th meeting and remains available at the links below:

<https://nysba.org/app/uploads/2020/09/Health-Law-Section-COVID-19-Report-September-20-2020.pdf>

<https://nysba.org/healthlawsectioncovid19/>

Resolution #1

Public Health Legal Reforms

The seriousness and magnitude of the present COVID-19 pandemic are unprecedented over the course of the last hundred years by any measure - the number of lives lost, the number of people afflicted with serious COVID-19 illness and the complications of pre-existing co-morbidities, the risks to health care workers and other frontline and essential workers, disruptions to businesses and the New York State (“the State”) economy, impacts upon employment and family life, and the profound trauma, losses and bereavement persons, families, communities, especially communities of color, have suffered and continue to suffer. Public health law and preparedness play an essential role in addressing disasters and emergencies. New York, like the rest of the country, was unprepared to deal with the pandemic. The report of the Health Law Section recommends reforms to public health law addressing identified gaps in the law to strengthen the preparedness and capacities of the State both during the present and in future pandemics, and to protect the public’s health.

The New York State Bar Association recommends: State Government to:

A.1.(a) Enact a **state emergency health powers act** addressing gaps in existing laws in New York, drawing upon the Model State Emergency Health Powers Act (MSEHPA), developed by the Center for Law and Public Health at Georgetown and John Hopkins Universities (2001), and other sources as appropriate;

A.1.(b) Adopt **crisis standards of care** addressing gaps in existing laws in New York, drawing upon the Crisis Standards of Care, developed by the Institute of Medicine (2012); The Arc, Bazelon Center for Mental Health Law, Center for Public Representation and Autistic Self Advocacy Network Evaluation Framework for Crisis Standard of Care Plans (Evaluation Framework); and other sources as appropriate.

Resolution #1 (continued)

A.1.(c) Provide comprehensive workforce education and training in the implementation of the above state emergency health powers act and crisis standards, including proper use and disposal of PPE and other equipment;

A.2.(a) Appoint and maintain a core team of emergency preparedness experts to review evidentiary sources and draft legislation to strengthen emergency preparedness planning; and

A.2.(b) Evaluate the public benefit and costs of laws and/or regulations waived during the COVID-19 emergency, and the Executive Orders and emergency regulations issued in response to the COVID-19 emergency and consider eliminating or amending those laws and/or regulations, as appropriate.

B.1.(a) Adopt **resource allocation guidelines** addressing gaps in existing laws in New York, drawing upon the New York State Task Force on Life and the Law 2015 Report, Ventilator Allocation Guidelines, the Evaluation Framework, and other sources as appropriate;

B.1.(b) Issue emergency regulations mandating all providers and practitioners follow the ethics guidelines, and ensure:

- i. the needs of vulnerable populations, including persons and communities of color, older adults and nursing home residents, persons with disabilities, persons who are incarcerated, and immigrants, are met in a non-discriminatory manner in the implementation of emergency regulations and guidelines;
- ii. provision of palliative care to all persons as an ethical minimum to mitigate suffering among those who are in institutional, facility, residential, or home care settings during the COVID-19 crisis;
- iii. provision of education and training to physicians, health care practitioners, and institutional triage and ethics committees; and
- iv. provision of generalist-level palliative care education and training for all health care workers and health-related service workers in all settings who are providing supportive care.

B.2. Amend the New York State Public Health Law: Article 29-C “Health Care Proxy,” to require in the case of a State Disaster Emergency Declaration:

B.2.(a) at least one, rather than two, witnesses, or

B.2.(b) attestation by a notary public in person or remotely.

Resolution #2

Legal Reforms in Care Provision, Congregate and Home Care, Workforce and Schools

The New York State Bar Association recommends: State Government to:

A.1. Evaluate the public benefit and costs of continuing the following laws and/or regulations which were waived by executive orders, for possible repeal and/or amendment:

A.1.(a) Ability to Exceed Certified Bed Capacity for Acute Care Hospitals: Continue the waiver by the Governor's Executive Orders 202.1 and 202.10 of the DOH regulations governing certified bed restrictions for the pendency of the State Disaster Emergency.

A.1.(b) Limitation on Resident Hours Working in Acute Care Hospitals: Continue the Governor's Executive Order 202.10's waiver of NYCRR Article 10, Section 405, limiting resident work hours for the pendency of the State Disaster Emergency.

A.1.(c) Temporary Changes to Existing Hospital Facility Licenses Services and the Construction and Operation of Temporary Hospital Locations and Extensions: Continue the waiver provided in Executive Orders 202.1 and 202.10 of the State requirements that restrict the ability of Article 28 facilities to reconfigure and expand operations as necessary, for the pendency of the State Disaster Emergency.

A.1.(d) Anti-Kickback and Stark (AKS) Law Compliance during the COVID-19 Emergency: New York State to adopt the waivers provided by CMS and the OIG as to the Anti-Kickback and Stark Laws in substantially similar form for the state versions of the Stark Law and AKS during the State Disaster Emergency, each as tailored for the particular statute at issue.

A.2. Congregate Care and Home Care: Ensure, as applicable to all congregate settings and residents thereof, and recipients of home care, including:

A.2.(a) Older Adults, Persons with disabilities, Persons with disabilities in Residential Facilities or Group Homes, Persons confined in Psychiatric Centers, Nursing Home and Adult Care Facilities Residents, and Nursing Home Providers and Adult Care Facilities Operators:

(i) Equitable allocation of scarce resources from the Public Health and Social Services Emergency Fund—established by the CARES Act—to older adults and their health care providers, prioritizing under-resourced long-term care providers;

(ii) Adequate provision of PPE;

(iii) Adequate levels of staffing;

(iv) Adequate funding of employee testing;

Resolution #2 (continued)

A.2.(a):

- (v) Consistent and timely tracking and reporting of case and death data;
- (vi) Adoption of non-discriminatory crisis standards and ethics guidelines;
- (vii) Recognition and honoring of Older New Yorkers' and New Yorkers' with disabilities right to health and human rights, including rights to be free from abuse and neglect and to care in the most integrated setting, as protected under federal law and international conventions; and
- (viii) Adequate resources for the Office of the State Long Term Care Ombudsman, which provides advocacy for nursing home residents and families and helps residents understand and exercise their rights to quality care and quality of life.

A.2.(b) Persons incarcerated and correctional facilities and care: Ensure:

- (i) Adequate access of persons incarcerated to COVID-19 testing, medical care and mental health and supportive services;
- (ii) COVID-19 testing of correctional staff and adequate provision of gloves, masks and other protective equipment;
- (iii) Release to the community of older persons and persons with disabilities who are incarcerated or living with advanced illness who do not pose a danger to the community;
- (iv) Adequate funding of prison-to-community transitions including access to housing, meals, and supportive services, and non-discriminatory access to employment opportunities; and
- (v) Recognition and honoring of the right to health and human rights of persons who are incarcerated, as protected under international conventions.

A.2.(c) Immigrants in detention facilities: In its exercise of state police powers in the COVID-19 public health emergency, New York State must take steps, similar to those outlined above, in cooperation with federal agencies, to ensure:

- (i) Reduction of risk of the spread of COVID-19 among immigrants being held in detention centers, and recognition and honoring of immigrants' right to health and human rights, as protected under international conventions.

A.3. Telehealth:

Eliminate restrictions on the provision of care by telehealth and increase reimbursement for services provided via telehealth.

Resolution #2 (continued)

B.1. State Government to:

B.1.(a) Prioritize additional childcare funding and implementing novel childcare staffing strategies, such as utilizing staffing firms dedicated to child care to supplement the childcare workforce, to ensure quality childcare services, effective and sustainable facility operations and the health and safety of our children and childcare providers, enabling businesses to effectively reopen with sufficient childcare resources and support;

B.1.(b) Prioritize education and training pertaining to crisis standards to assure all practitioners are supported as they exercise professional medical judgment in triage, treatment and services; and

B.1.(c) Prioritize enhanced employee assistance and other mental health counseling programs to address and mitigate the moral distress suffered by frontline workers under crisis conditions.

B.2. State government to: Enhance regulatory oversight, to ensure:

B.2.(a) adequate and non-discriminatory allocation of resources to persons and communities of color and vulnerable populations in conformity with state and federal laws;

B.2.(b) equitable access of persons and communities of color and vulnerable populations to health and mental health services in conformity with state and federal law, including palliative care as an ethical minimum to mitigate suffering among those persons who remain in institutional, facility, residential or home care settings, or are hospitalized during the COVID-19 crisis; and

B.2.(c) provision of PPE and testing to essential workers at highest risk in delivering essential services to vulnerable populations.

B.3. State government to: Monitor conformity with state and federal laws barring discrimination.

Resolution #3

COVID-19 Vaccine and Virus Testing: Legal Reforms and Guidelines

The authority of the State to respond to a public health threat and public health crisis is well-established in constitutional law and statute. In balancing protection of the public's health and civil liberties, the Public Health Law recognizes our interdependence, and that a person's health, or her/his/their lack of health, can and does affect others. This is particularly true for communicable and infectious diseases. Since the discovery of the smallpox vaccine in 1796, vaccines have played a crucial role in preventing the spread of dangerous and often fatal diseases. The New York Public Health Law mandates several vaccinations for students at school-age up through post-secondary degree educational levels, and for health care workers. The Public Health Law also mandates treatment for certain communicable diseases, such as tuberculosis.

The New York State Bar Association recommends:

To protect the public's health, it would be useful to provide guidance, consistent with existing law or a state emergency health powers act as proposed in Resolution #1, to assist state officials and state and local public health authorities should it be necessary for the state to consider the possibility of enacting a vaccine mandate. A vaccine must not only be safe and efficacious; it must be publicly perceived as safe and efficacious. Diverse populations, including people of color, older adults, women, and other marginalized groups, must be represented in clinical trials. The trials also must follow rigorous protocols that will establish a vaccine's safety and efficacy through expert consensus of the medical and scientific communities.¹

State Government to:

A.1. Ensure Access to Virus Testing: Establish a coordinated statewide plan for Virus Testing to ensure:

A.1.(a) frontline health care workers are prioritized in access to rapid diagnostic testing; and

A.1.(b) the most vulnerable individuals from health status and essential business/employee standpoint have equitable access to rapid diagnostic testing.

A.2. Adopt Ethical Principles Guiding Equitable Allocation and Distribution: Once available, a vaccine should first be equitably allocated and distributed based upon widely

¹ The National Academies of Sciences, Engineering and Medicine is an example of a recognized organization of medical and scientific experts that assists U.S. policymakers, such as in planning for equitable allocation of COVID-19 vaccines.

It is noted further that nothing in this Resolution or the underlying Report should be regarded as suggesting that emergency use authorization should be considered in determinations concerning any immunization requirement.

Resolution #3 (continued)

A.2.:

accepted ethical principles including maximizing benefit to the society as a whole through reducing transmission and morbidity and mortality; recognizing the equal value, worth and dignity of all human persons and human lives; mitigating suffering, health inequities and disparities; and ensuring fairness and transparency in decision making. Health care workers and other essential workers most endangered by COVID-19 and populations at highest risk must be afforded priority access to a vaccine.

A.3. Encourage Public Acceptance and Educational Programs: Efforts must be made to encourage public acceptance. Public health authorities should build on existing systems and infrastructures including community-based organizations and networks. The campaign must acknowledge distrust in communities of color from a history of medical exploitation. Efforts should include linguistically and culturally competent educational and acceptance programs, and stakeholder community engagement strategies, to build public trust, widely encouraging vaccine uptake and addressing vaccine hesitancy.

A.4. Take Steps to Protect the Public's Health and Consider Mandate As May Be Necessary to Reduce Risks of Transmission and Morbidity and Mortality: Our state and nation have suffered terrible losses from COVID-19. As of September 3, 2020, 186,000 Americans, including 26,000 New Yorkers, have lost their lives. Unemployment has been at the highest levels since the Great Depression. Numerous businesses have closed.

Should the level of immunity be deemed insufficient by expert medical and scientific consensus to check the spread of COVID-19 and reduce morbidity and mortality, a mandate and state action should be considered, as may be warranted, only after the following conditions are met and as a less restrictive and intrusive alternative to isolation, subject to exception for personal medical reasons:

- i) evidence of properly conducted and adequate clinical trials;
- ii) reasonable efforts to promote public acceptance;
- iii) fact-specific assessment of the threat to the public health in various populations and communities; and
- iv) expert medical and scientific consensus regarding the safety and efficacy of a vaccine and the need for immunization.

Enforcement of any immunization requirement should be along the lines of current New York law.

WITHDRAWN from Resolutions: Resolution #2 Provisions and Resolution #4

WITHDRAWN: Resolution #2 Provisions

WITHDRAWN:

2.A.1. Purchasing Necessary Supplies: Amend New York General Business Law Section 396-r to include prohibition from exorbitant pricing of all equipment and products of any kind used either in patient care or to protect health care workers from infection.²

WITHDRAWN:

2.B.1.(a) Provide clear, timely guidance and support to all non-health care businesses and academic institutions to coordinate effective implementation of universal precautions and other workplace safety best practices to facilitate public health and trust, while mitigating disparate conditions during the phase-in process and long-term.³

2.B.1.(b) Consider publicly posting essential/non-essential business operations decisions with an industry-wide impact on the Empire State Development (ESD) website in real time to mitigate confusion and enhance institutional compliance.⁴

WITHDRAWN: Resolution #4 in its entirety⁵

A. COVID-19 Qualified Legal Immunities for Providers and Practitioners

3.A.1. Patient Care Immunities: Federal and NYS Governments:

Provide/extend criminal and civil immunity for physicians, nurses and other health care practitioners and Article 28 facilities related to provision of care to patients in connection with the COVID-19 disaster emergency (excluding willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm).

3.A.2. Ethics Guidelines Immunities: Governor or DOH :

3.A.2.(a) waive/suspend certain NYS laws to provide/extend immunity from civil and criminal liability to providers and practitioners who follow the ethics guidelines (excluding willful or

² S.8189 amending Section 396-r of the New York General Business Law was signed by Governor Cuomo in June 2020. See amendments to law expanding scope of law to “the public” or “the general public,” and the term “goods and services” to include the following: consumer goods and services, essential medical supplies and services, and any other essential goods and services to promote health or welfare of the public. For exact language changes in full and tracking of such changes, *See*: <https://legislation.nysenate.gov/pdf/bills/2019/S8189>.

³ State government has implemented recommendation and continues to do so on an ongoing basis.

⁴ State government has publicly published detailed industry-wide guidance online and the specific recommendation noted in report.

⁵ Chapter 134 of 2020 was signed by Governor Cuomo in August 2020, narrowing the application of Article 30-d of the Public Health Law, the “Emergency or Disaster Treatment Protection Act.”

WITHDRAWN: Resolution #4 in its entirety (continued)

3.A.2.(a):

intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm); and

3.A.2.(b) direct all state agencies to interpret and apply the law and regulations in a way to support compliance with the ethics/triage guidelines.

3.A.3. DNR/Medical Futility Immunities: Governor, DOH, or Amend Law: provide/extend immunity from criminal and civil immunity for physicians, nurses and other health care practitioners and Article 28 facilities, when the following steps are taken (excluding willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm):

3.A.3.(a) a practitioner, as defined in Public Health Law Section 2994-a, determines that a patient's resuscitation would be "medically futile" as defined in PHL 2961.12;

3.A.3.(b) a second practitioner concurs with the determination; and

3.A.3.(c) both practitioners document their determination in the medical record; and in connection therewith, revoke or amend all laws and regulations prohibiting or penalizing such determinations and actions, including without limitation, those set forth on page 12 of this Report.

B. COVID-19 Business of Health Care Immunities:

3.B.1. Anti-Kickback and Stark Laws: New York State:

Adopt the waivers provided by CMS and the OIG as to the Anti-Kickback and Stark Laws in substantially similar form for the state versions of the Stark Law and AKS during the State Disaster Emergency, each as tailored for the particular statute at issue.

3.B.2. Vendors: New York State:

Consider extending immunity under NY UCC section 2-615(a) to supply chain vendors where specific performance under a contract becomes impracticable due to unforeseen event or good faith compliance with governmental orders or regulations during crisis.

C. COVID-19 Regulatory Waiver Immunities: New York State:

3.C. Provide/extend immunity from civil and criminal liability for practitioners and providers related to acts or omissions under regulatory waivers, such as would be applicable to credentialing, licensure, registration, and scope of practice, during the COVID-19 declared emergency and disaster (excluding willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm).