



State of New Jersey

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ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2020-03

TO: All County Prosecutors
Director, Division of Criminal Justice

FROM: Gurbir S. Grewal, Attorney General

DATE: April 11, 2020

SUBJECT: Directive Regarding Non-Prosecution of Healthcare Facilities and Professionals Adhering to Triage Protocols During COVID-19 Pandemic

Healthcare providers across the country may soon confront a question with extraordinary moral weight and serious legal implications: how should they allocate scarce medical resources among patients in their care? The coronavirus disease 2019 (COVID-19) pandemic is pushing healthcare systems towards the limits of their capacity, and healthcare providers may be forced to decide how to withdraw or withhold certain types of treatment, including mechanical ventilation, from some patients and provide them to others.

In March 2020, the New Jersey Department of Health (DOH) convened a panel of medical experts to advise the State on the difficult ethical questions that New Jersey may face during this pandemic. Those efforts resulted in DOH's publication on April 11, 2020, of *Allocation of Critical Care Resources During a Public Health Emergency*, a model policy for health care facilities that may confront those difficult questions. DOH's model policy is based on the Model Hospital Policy for Allocating Scarce Critical Care Resources published by Douglas B. White, MD, MAS, of the University of Pittsburgh Department of Critical Care Medicine.

As healthcare professionals and facilities weigh the many implications of resource-allocation decisions, some have asked whether they will face civil or criminal liability for their triage judgments made during the COVID-19 pandemic. The question of civil liability was addressed in DOH's Executive Directive 2020-006 (Apr. 11, 2020), which provides:

A health care facility that adopts the Department of Health's model policy *Allocation of Critical Care Resources During a Public*



Health Emergency, as well as the health care facility's agents, officers, employees, servants, representatives and volunteers, shall not be civilly liable for any damages arising from an injury to a patient caused by any act or omission pursuant to, and consistent with, such policy. Such immunity supplements any other immunities and defenses that may apply.

However, the Executive Directive did not address criminal liability for triage decisions, nor did Executive Order No. 112 (2020), which provides another source of immunity from civil liability. *See* Executive Order No. 112 (2020), at ¶¶ 7–9 (stating that the Executive Order's immunity provisions "shall not extend to acts or omissions that constitute a crime, actual fraud, actual malice, gross negligence or willful misconduct"). As legal scholars have noted, a clinician who removes a ventilator from a patient—knowing that the patient will or might die as a result—could conceivably face criminal homicide charges, and the risk of such prosecution, however remote, could deter professionals from making medically appropriate decisions in the midst of a public health emergency. *See* I. Glenn Cohen, et al., *Potential Legal Liability for Withdrawing or Withholding Ventilators During COVID-19: Assessing the Risks and Identifying Needed Reforms*, JAMA (Apr. 1, 2020), available at <https://jamanetwork.com/journals/jama/fullarticle/2764239>. This Directive is designed to address those concerns and provide a clear framework for medical providers seeking guidance during peak COVID-19 hospital admissions.

Therefore, pursuant to the authority granted to me under the New Jersey Constitution and the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, I hereby DIRECT all law enforcement and prosecuting agencies operating under the authority of the laws of the State of New Jersey to implement and comply with the following policies, procedures, standards, and practices.

1. No prosecuting agency in New Jersey shall bring a criminal prosecution against any health care facility that adopts the Department of Health's model policy *Allocation of Critical Care Resources During a Public Health Emergency*, or against any of the health care facility's agents, officers, employees, servants, representatives or volunteers, arising from an injury to a patient caused by any act or omission pursuant to, and consistent with, such policy.
2. No prosecuting agency in New Jersey shall bring a criminal prosecution against any healthcare provider, including but not limited to a doctor, nurse, or hospital, for any act or omission in contravention of such an allocation policy without the approval of the Attorney General.

This Directive shall take effect immediately.



Gurbir S. Grewal
Attorney General

ATTEST:



Veronica Allende
Director, Division of Criminal Justice
Dated: April 11, 2020