

To: New Jersey Law Revision Commission
From: Vito J. Petitti, Counsel
Re: New Jersey AIDS Assistance Act
Date: September 9, 2013

MEMORANDUM

This Memorandum results from Staff monitoring of state judicial decisions discussing legislative intent. Staff seeks Commission authorization for a project that proposes to revise one or more subsections of the New Jersey AIDS Assistance Act, (“NJAAA”), N.J.S. 26:5C-1 et seq., to make clear the legislature’s intent regarding the disclosure of health information in certain criminal proceedings.

The federal Health Information Portability and Accountability Act of 1996, also known as HIPAA, provides protections for patients’ privacy rights, but allows disclosure in some cases, as does New Jersey law. The New Jersey AIDS Assistance Act, (“NJAAA”), N.J.S. 26:5C-1 et seq., requires the reporting and confidentiality of AIDS and HIV cases, but provides a limited number of conditions for disclosure of AIDS or HIV-related health records. The Superior Court of New Jersey, Appellate Division, recently analyzed the legislative intent behind NJAAA in order to determine whether the health records of an AIDS-diagnosed defendant were obtainable in a criminal proceeding.

In *State of New Jersey v. C.M.* a county prosecutor’s office appealed an order denying its application to obtain an HIV-positive defendant’s medical records in support of charges consisting of “two counts of third degree diseased person committing an act of sexual penetration.” 2013 WL 3582074.

In its appeal, the State argued that both HIPAA and NJAAA authorized disclosure of the medical records, relying specifically on N.J.S. 26:5C-9(a), which provides that:

The record of a person who has or is suspected of having AIDS or HIV infection may be disclosed by an order of a court of competent jurisdiction which is granted pursuant to an application showing good cause therefor. At a good cause hearing the court shall weigh the public interest and need for disclosure against the injury to the person who is the subject of the record, to the physician-patient relationship, and to the services offered by the program. Upon the granting of the order, the court, in determining the extent to which a disclosure of all or any part of a record is necessary, shall impose appropriate safeguards to prevent an unauthorized disclosure.

But the Appellate Division affirmed the trial court’s ruling, pointing out that the next section of the statute, N.J.S. 26:5C-9(b), deals with health record disclosures specifically in the context of *criminal prosecution*, as follows:

A court may authorize disclosure of a person’s record for the purpose of conducting an investigation of or a prosecution for a crime of which the person is suspected, only if the

crime is a first degree crime and there is a reasonable likelihood that the record in question will disclose material information or evidence of substantial value in connection with the investigation or prosecution.

The Appellate Division did not believe the legislature intended subsection (a) to apply to criminal prosecutions. It reasoned that that subsection (b), which permits disclosure only for first degree crimes (the State had filed only *third degree* criminal charges), “would be rendered meaningless” if disclosure were permitted for lesser crimes under subsection (a).

Preliminary research revealed 17 citing references to NJAAA, four of which are New Jersey cases involving requests for medical records disclosure. Based on what we have learned so far, one option *might* be as straightforward as adding language to Subsections (a) and (b) of N.J.S. 26:5C-9 to distinguish them as non-criminal and criminal proceedings, respectively.

Staff seeks Commission authorization to conduct additional research, including legislative history and intent and possibly some outreach, in order to make a recommendation regarding the possible revision of NJAAA.