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June 17, 2020

UPDATED: Key Considerations for COVID-19 Emergency Triage Policies in Georgia

Ropes & Gray offers immediate practical guidance on how to navigate the legal and ethical issues raised by the need to have a clear plan for allocating scarce resources as COVID-19 strains Georgia hospitals in unprecedented ways. Below are key considerations as hospitals and academic medical centers evaluate policies and procedures to guide these challenging decisions.

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1. **Review your written disaster plan to ensure it addresses the anticipated shortages.** Georgia law requires hospitals to maintain disaster plans. Regulations issued by the Georgia Department of Community Health (DCH) mandate that hospitals have plans to ensure sufficient staffing and supplies to maintain safe patient care during emergency situations. In preparation for a health care "surge," this includes a plan for allocating scarce resources in cases of extreme shortages.

   A triage plan should include a clear statement of goals, be developed in an open and transparent manner, provide appropriate accountability for all decisions made, and clearly indicate the parties responsible for developing and updating the plan. At a minimum, it should address:

   - What triggers the plan,
   - How treatment and supplies are allocated,
   - Whether the plan may result in withdrawing or withholding care, or in any combination of the two, and
   - Who will make allocation decisions for and among specific patients, and
   - How and when the policies will be communicated to patients and their families.

2. **Your plan should comply with non-discrimination laws.** The federal Office for Civil Rights (OCR) recently issued guidance warning that supply shortages do not suspend anti-discrimination laws. Your triage plan should account for the following:

   - The triage plan should be facially neutral, meaning it does not discriminate against any protected class as written, and that its various measures and procedures are justified by necessity. Any plan should include a statement explaining why that specific plan is necessary to provide the applicable standard of care and the rationale behind it.

   - The greatest discrimination risk in triage plans is that they unfairly — and perhaps illegally — distinguish among patients based on underlying disabilities. In some cases, disabling conditions are co-morbidities that are appropriately considered in allocation of scarce medical resources, but those priorities should be established by clinical experience and ratified by senior medical staff, preferably by reference to professional or government guidelines.

3. **Confirmation of the need to transition to alternate or crisis standards of care**.

    - Transition to an alternate or crisis standard should not occur until allocation or rationing becomes necessary. A triage plan should be followed only as long as the circumstances require. Before implementing your plan, the hospital should confirm and document:
        - Which resources and infrastructure are critically limited;
        - The hospital has maximized its efforts to conserve, reuse, adapt, and substitute conventional therapies;
        - Available supply is insufficient to meet demand for conventional standard of care therapy;
        - Patient transfer is not feasible or creates undue strain, with provisions made for discussing individual cases with, and gaining consent from, patients and/or legally-authorized representatives; and
        - The hospital has requested necessary resources from appropriate government health officials.

    When the hospital is ready to implement its triage plan, be sure to check local laws and regulations to confirm mandates to coordinate with local authorities, if any.

4. **Liability Protection under state or federal emergency declarations.** In developing triage policies and procedures, it could be important to understand the contours of potential legal liability for certain decisions. In Georgia, providers are not generally civilly liable provided they use a reasonable degree of care and skill as other members of the profession commonly possess and exercise. In addition, current emergency declarations and Georgia statutes offer the following protections:[1]

    - Governor Kemp has issued an executive order limiting the civil liability of health care and medical facility employees and staff for the services they provide or perform within the health care or medical facility for the duration of the COVID-19 Public Health State of Emergency, except in cases where willful misconduct, gross negligence, or bad faith can be demonstrated. This protection is currently set to expire along with the public health emergency on July 12, 2020.
    - Georgia physicians and health care providers who render services to unstable patients in a hospital emergency department are statutorily immunized from civil liability, absent gross negligence.
    - The Georgia Good Samaritan law immunizes health care practitioners from civil liability who render emergency care in good faith without any charge.

[1] These are the March 14, 2020, Executive Order declaring a Public Health State of Emergency by Governor Kemp, constituting the first public health emergency in the state's history; the April 8, 2020 Renewal of the Public Health State of Emergency by Governor Kemp, renewing the emergency through May 13, 2020; the April 14, 2020 Designation of Auxiliary Emergency Management Workers and Emergency Management Activities; March 13, 2020, National Emergency Determination by President Trump; and the March 29, 2020 Georgia Major Disaster Declaration by President Trump.

- Protection from tort claims may be available under the federal Public Readiness and Emergency Preparedness Act (PREP Act), 42 U.S.C. § 247d-6d. The PREP Act protects the manufacture, distribution, administration, or use of medical countermeasures. Key questions are whether the hospital and its agents are "covered persons" and whether the specific care being providing is a "covered countermeasure." Any protection that is available under the PREP Act is expected to extend until 2024.