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

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 Maryland 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.** Maryland law requires hospitals to have disaster plans. Governor Hogan has also required nursing homes to develop a surge staffing plan. Maryland's Secretary of Health can appoint a monitor to observe a facility's compliance with this directive.

   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:

   - Strategies to avoid the need to implement a plan,
   - What triggers the plan,
   - How treatment and supplies are allocated,
   - Whether the plan may result in withdrawing or withholding care, or 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. The Maryland Attorney General has also issued guidance stating that resource allocation plans are constrained by constitutional protections. 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.
   - **Governmental recognition of need to transition.** Guidance issued by the Maryland Healthcare Ethics Committee Network and Maryland's Attorney General explains that during a catastrophic health emergency, the Governor may issue an order implementing scarce resource rationing and allocation procedures pursuant to the Catastrophic Health Emergencies Act. As of March 5, 2020, the Governor declared a catastrophic health emergency in Maryland, but orders relating to crisis standards of care and allocation have not been issued.

   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 Maryland, providers are not generally civilly liable provided they act in accordance with generally accepted standards of care under the circumstances, and use such care or skill expected of a reasonably competent health care provider. In addition, current emergency declarations and Maryland law offer the following protections:[1]

   - Maryland hospitals and health care providers who render service in good faith during a catastrophic health emergency are immune from criminal and civil liability. Unless renewed by the Governor, this protection is currently set to expire along with the state of emergency and catastrophic health emergency on July 3, 2020.
   - The Maryland Good Samaritan law protects physicians who act in the event of an emergency and without compensation, unless the assistance provided constitutes gross negligence.

[1] These are the March 5, 2020, Proclamation of a State of Emergency and Catastrophic Health Emergency by Governor Hogan; the March 13, 2020, National Emergency Determination by President Trump; and the March 26, 2020, Maryland Major Disaster Declaration by President Trump.

- Under common law, hospitals can be immune from liability for refusing to render emergency care if they do not have the capacity to do so.
- Protection from tort claims may be available under the federal Public Readiness and Emergency Preparedness Act (PREP Act), 42 U.S.C. § 247d-6d. PREP 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.