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UPDATED: Key Considerations for COVID-19 Emergency Triage Policies in Louisiana *(as of August 12, 2020)*

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 Louisiana 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.** In preparation for a health care "surge," 2018 guidance from the Louisiana Department of Health (LDH) recommends that you have a plan for allocating scarce resources in cases of extreme shortages. Louisiana case law recognizes that hospitals should prepare an emergency plan and properly implement existing emergency protocols. 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;
    - How to limit access to the facility;
    - Which procedures may be postponed, which patients may be transferred or discharged, and which patients' care may be withdrawn or withheld; and
    - Who will make allocation decisions for and among specific patients.
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 LDH guidance similarly states that health care providers should not make allocation decisions based on protected classes, including disability. 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 reasons 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. **Clear communication to patients and their families.** Consistent with guidance from the LDH, hospitals should keep patients and visitors informed of policy changes. Clear, accurate communication will ensure patients and their families know that care is being provided under an altered or crisis standard and that the hospital can decline a patient admission.
4. **The transition to alternate or crisis standards of care.** Transitioning to crisis standards of care is forced by the exhaustion of other options.

    - **Facility steps to confirm need to transition.** 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. The LDH draft guidance identifies several prerequisites. Here, the initiation of the National Disaster Medical System and National Mutual Aid and Resource Management Initiative, and a declared state of emergency have already occurred. Before implementing your plan, the hospital should confirm and additionally document the following:
        - Surge capacity is appropriately employed within the facility;
        - The hospital has maximized its efforts to conserve, reuse, adapt, and substitute conventional therapies;
        - Available supply of resources and infrastructure is insufficient to meet demand for conventional standard of care therapy;
        - The hospital has requested necessary resources and infrastructure from local and regional health officials; and
        - The institutional implementation team has requested the initiation of a crisis standard of care.

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.

5. **Liability protection under state or federal emergency declarations.** In Louisiana, providers generally are not civilly liable provided they act in good faith in accordance with generally accepted standards of care under the circumstances, and use such skill, prudence, and diligence as other members of the profession commonly possess and exercise. In addition, current emergency declarations applicable to Louisiana offer the following protections:[1]

    - Louisiana health care providers who render service during a public health emergency are statutorily immunized from civil liability, absent gross negligence or willful misconduct. This protection is currently set to expire along with the public health emergency on August 28, 2020.
    - The Louisiana Good Samaritan law immunizes from civil liability physicians, surgeons, and physician assistants and others who gratuitously provide care at the scene of an emergency or within a hospital

[1] These are the March 11, 2020, Proclamation of a Public Health Emergency by Governor Edwards; March 13, 2020, National Emergency Determination by President Trump; and March 24, 2020, Louisiana Major Disaster Declaration by President Trump.

when they have no prior treatment relationship with the patient, absent gross negligence or willful misconduct.

- 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.