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

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 Arkansas hospitals in unprecedented ways. Below are key considerations as hospitals and academic medical centers evaluate policies and procedures to guide these challenging decisions.

1. **Review your written disaster plan to ensure it addresses the anticipated shortages.** Arkansas regulations require hospitals to have disaster plans. 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 any combination of the two,
    - Who will make allocation decisions for and among specific patients,
    - How and when the policies will be communicated to patients and their families, and
    - How the plan will be tested and maintained.

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.

- **Governmental recognition of need to transition.** As of March 11, 2020, the Governor has declared a state of emergency in Arkansas and has provided that the Secretary of the Arkansas Department of Health may issue protocols without further approval or oversight as necessary to allow for the implementation of crisis standards of care. On June 15, the Governor recognized that health care providers may be immunized for liability arising from using crisis standards of care. Arkansas' emergency management plan also explains that during an emergency, the state may need to allocate resources, but allocation directives 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 Arkansas, providers are not generally civilly liable, provided they act in accordance with generally accepted standards of care in that or a similar location, and use such skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty. In addition, current emergency declarations and Arkansas law offer the following protections:[1]

[1] These are the March 11, 2020, Executive Order to Declare an Emergency and Order the Arkansas Department of Health to Take Action to Prevent the Spread of COVID-19 issued by Governor Hutchinson; the March 13, 2020, National Emergency Determination by President Trump, the April 3, 2020, Arkansas Major Disaster Declaration by President Trump; and the April 13, 2020, Executive Order to Amend Executive Order 20-03 Regarding the Public Health Emergency Concerning COVID-19 for the Purposes of Equipping Health Care Professionals with the Tools Necessary to Combat the COVID-19 Emergency issued by Governor Hutchinson; the June 15 Executive Order Pursuant to the Public Health Emergency Concerning COVID-10, as Declared in Executive Order 20-03 and Extended by Executive Order 20-25, For the Purpose of Ensuring Access to Healthcare Resources to Treat COVID-19 issued by Governor Hutchinson; and the June 18 Executive Order to Renew the Disaster and Public Health Emergency to Mitigate the Spread and Impact of COVID-19 issued by Governor Hutchinson.

- The Governor extended the Emergency Services Act to immunize health care providers from liability as a result of any act or omission when rendering care in support of the state's response to COVID-19, unless the assistance provided involves gross negligence or willful misconduct. A June 15 executive order specified that emergency management functions eligible for immunity include enacting crisis standard of care measures.Unless renewed by the Governor, this protection is currently set to expire along with the state of emergency on August 17, 2020.

- The Arkansas Good Samaritan law protects physicians who act in the event of an emergency and without compensation, unless the assistance provided involves gross negligence or willful misconduct.

- Arkansas health care professionals who render voluntary and uncompensated medical services at certain free or low-cost medical clinics are immune from civil liability.

- 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.