

Practice Update

Taking Triage to Trial

April 6, 2020

By Kirk S. Davis

The COVID 19 epidemic is bound to overwhelm available medical resources in the United States. Healthcare institutions and practitioners will be forced to make impossible life-or-death decisions regarding the allocation of manpower and supplies. They must also be ready to defend those decisions against a backlash of grief—and lawsuits—once the crisis has passed.

A defensible triage protocol must enable reasonable decisions and must include three components:

- Clearly defined written policies and procedures
- Written documentation that the policies were followed
- Training on the materials

Written Policies and Procedures

On March 28th, the head of the emergency department (ED) at NYU Langone sent an email instructing ED doctors to “think more critically about who we intubate.” The directive was based on the hospital’s pre-COVID-19 guidelines. However, doctors complained that asking them to make “snap judgements about how well a patient will do based on little to no information is a tremendous burden to place on them” and “way too close to playing God.” (Article available [here](#).)

Related People

Kirk S. Davis

Related Work

Healthcare
Hospitals and Health
Systems

Related Offices

Miami
Tampa

Health Law Rx

Akerman Perspectives
on the Latest
Developments in
Healthcare Law

[Visit this Akerman blog](#)

NYU Langone doctors have legal cause for concern as well. That same day, the U.S. Department of Health and Human Services' Office of Civil Rights (OCR) issued a bulletin regarding these types of decisions. The bulletin warned that denying medical care based on "stereotypes, assessments of quality of life, or judgments about a person's relative 'worth' based on the presence or absence of disabilities or age" was a violation under federal law.

The controversy is a stark reminder of the difficult task at hand. Healthcare providers will ultimately be forced to defend their pandemic decision-making against established standards of care. In order to protect both patients and providers, healthcare institutions must step up *now* with pandemic-specific triage guidelines. These guidelines must be:

1. written and readily accessible.
2. designed to prevent critical decision-making from doctors at the point of care. This will protect physicians dealing with complex procedures outside their areas of expertise. It will also protect physicians thrust into critical decision-making roles with incomplete medical training. (See article available here.)
3. vetted by all relevant stake holders, including the hospital's Chief Medical Officer, legal counsel, ethics committee, and risk and compliance departments.
4. clear about chains of command within the hospital (if a decision is not clear to the attending medical professional, whose help must she/he seek?)
5. based on a patient's comprehensive health care history, as opposed to single (potentially legally and ethically fraught) considerations such as "age" or "potential quality of life." (See related articles available here and here.)

Written documentation

Once the triage protocol is established, *written* documentation must cover *every* decision made:

1. Who made the decision to provide or exclude care?
2. Where and when was the decision made? For example, was it made at the time of admission or as another patient with a better prognosis arrived?
3. Why was the decision made?
4. What intrinsic factors did the healthcare provider consider before arriving at their decision? For example, was it based upon the number of ventilators, or the number of adequately trained personnel?

This documentation will become critical when grieving relatives start seeking answers—and the institutions are placed in a position to defend their medical choices.

If the documentation does not exist, post pandemic, the only evidence remaining will be the bad outcome.

Training

Implementing a new policy during the crisis might prove difficult when so many risk and compliance departments are working from home. At a bare minimum, the institution must ensure that every potentially affected party receives the written protocol and is trained on its contents.

In the end, reasonableness will be the standard. The documentation must make the case that:

1. The right decision was made;
 2. At the right time; and
 3. For the right reason.
-

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.