



Crisis Standards of Care During the COVID-19 Pandemic – Real-time Legal Issues & Solutions

James G. Hodge, Jr., J.D., L.L.M.
Peter Kiewit Foundation Professor of Law
Director, Network - Western Region Office

Jennifer L. Piatt, J.D.
Research Scholar, ASU Law
Senior Attorney, Network –
Western Region Office

- **Legal Shifts to CSC Nationally**
- **Focus on Core Legal Topics**
- **Key Issues & Assessments**
- **Potential Actions & Solutions**
- **Rapid Take-aways**
- **Questions/comments**

Please note that information provided in this session is not intended to provide legal guidance in any jurisdiction. Always consult your attorney for specific legal advice.

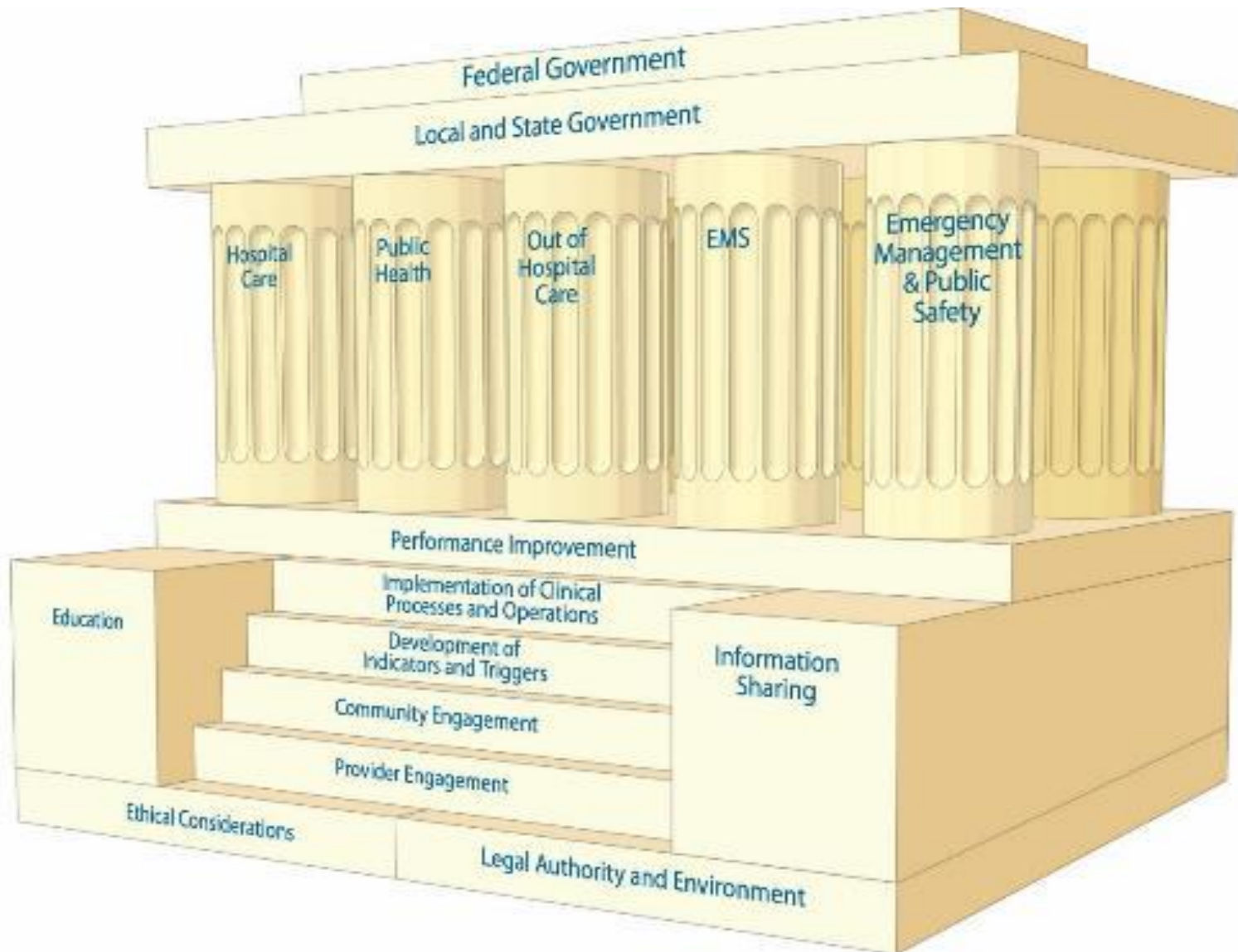
CSC = substantial change in usual healthcare operations & level of care due to a pervasive/catastrophic disaster.

 **NATIONAL ACADEMY OF MEDICINE**
Leadership • Innovation • Impact | for a healthier future



CSC = when sustained scarcities warrant real-time resource allocations to protect the public's health

CSC's Legal Foundations



CSC Legal Issues – Premier Topics

1

Understanding the role & effect of emergency declarations

2

Invoking CSC in public & private sectors

3

Resolving jurisdictional challenges within & across states

4

Alleviating licensure & scope of practice concerns

5

Assessing legal duties to care

6

Documenting decisions in transparent, lawful ways

7

Protecting against unwarranted risks of liability

8

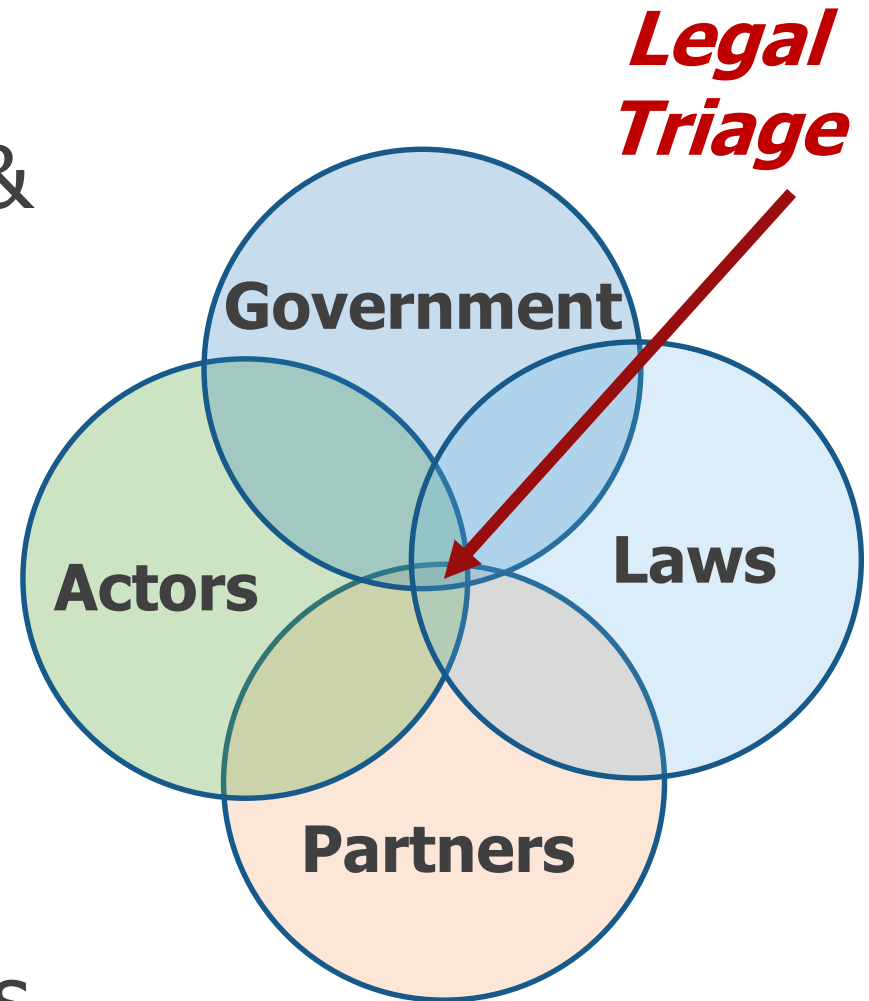
Mitigating legal issues ahead

UNPRECEDENTED RESPONSES

Public health authorities & powers vary depending on the type of emergency declared at every level of government

International	WHO Public Health Emergency of Int'l Concern January 30, 2020	Emergency Declarations by Foreign Governments Ongoing
Federal	HHS Public Health Emergency January 31, 2020	Stafford Act or National Emergencies Act March 13, 2020
State/Territorial/Tribal	Public Health Emergency	Emergency or Disaster
Local	Public Health Emergency	Emergency or Disaster

Efforts of legal actors & others in declared emergencies to build favorable legal environments by prioritizing issues & generating solutions that enable effective public health responses



Emergency Legal Tools & Powers



2. Invoking CSC



Conventional



Contingency



Crisis



CSC Legal Triggers

Federal Guidance

- National Academies
- HHS, ASPR, CDC & other federal agencies

Emergency Declarations

- State/territory/tribal public health emergencies
- Local public health emergencies

Executive Orders

- Gubernatorial order via emergency declaration
- State or local health commissioner

Existing CSC Plans

- Express language of extant plans
- Specific addenda or clarifications

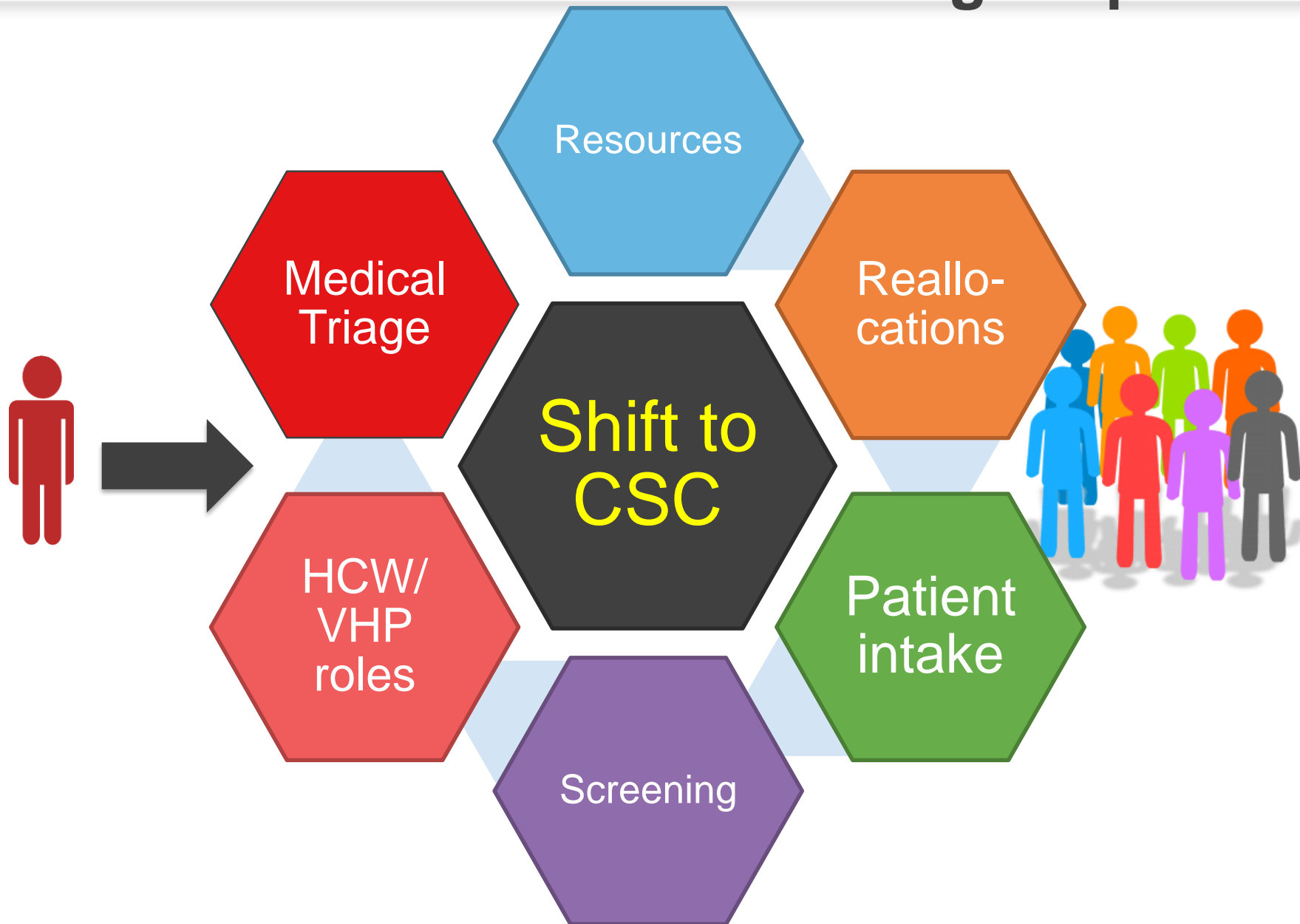
Regional Agreements

- Specific guidance from healthcare coalitions
- Resource sharing contracts among hospitals

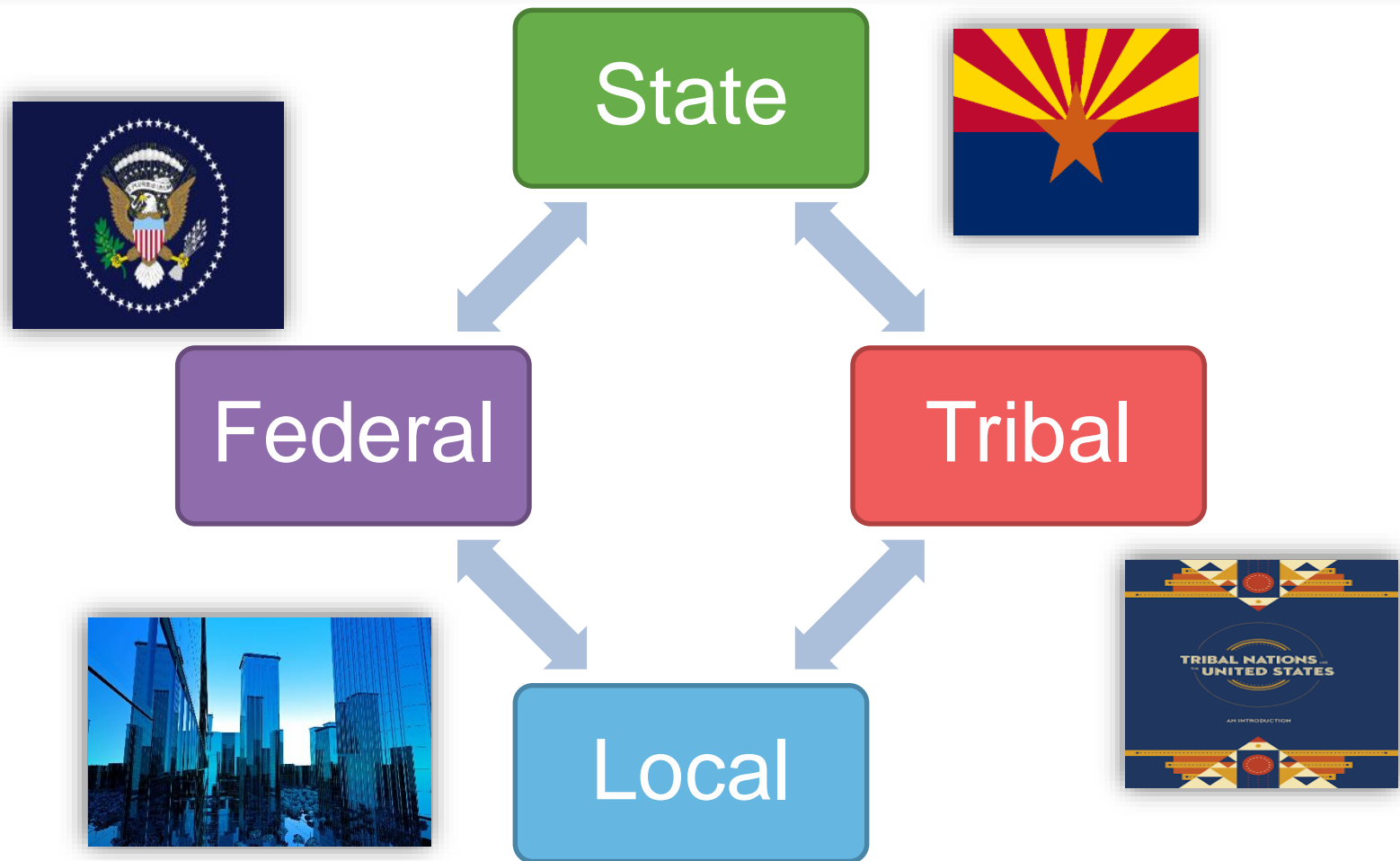
Health Care Entity Experiences

- Express allowances via state CSC plans
- Committee reports based on field experiences

Navigating Legal Options



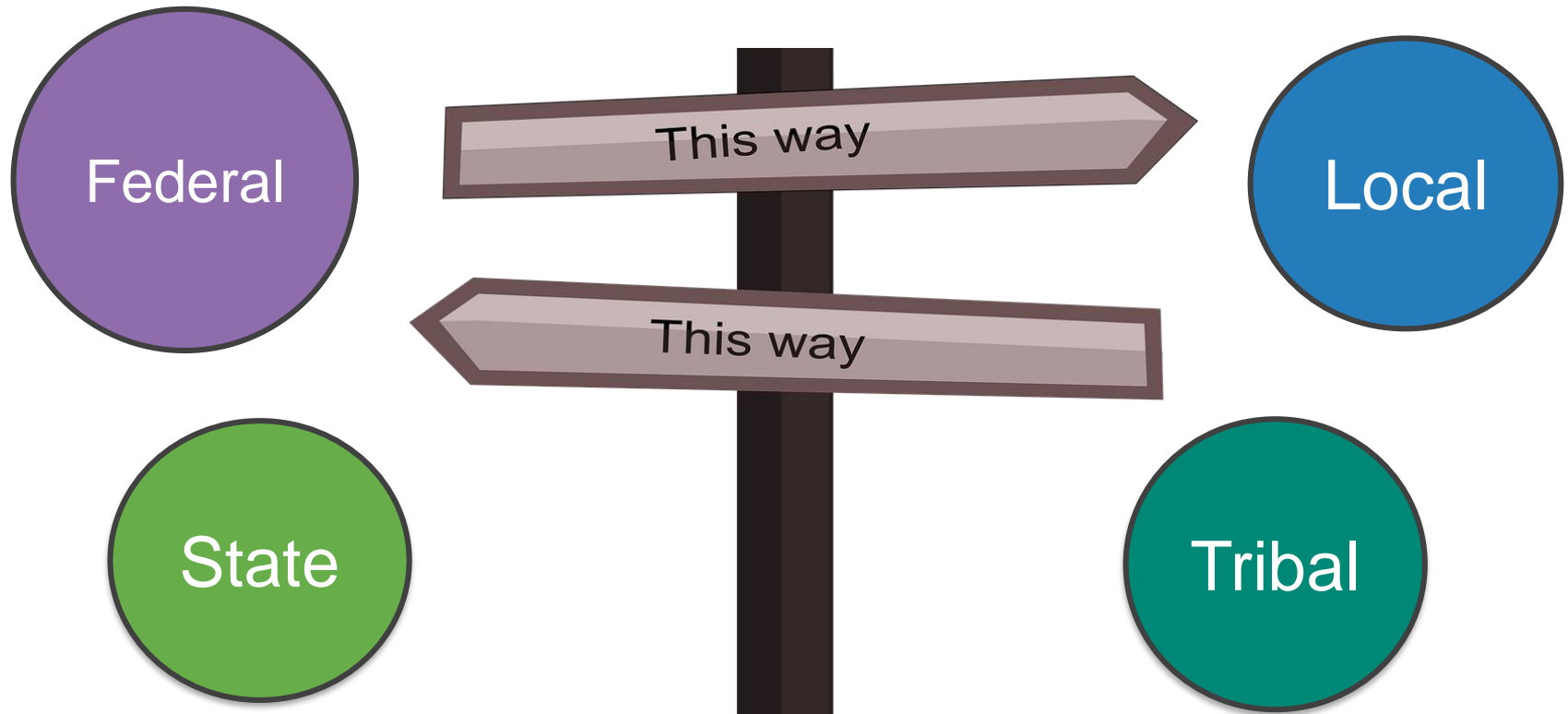
3. Jurisdictional Challenges



No single emergency declaration provides all necessary coverage, resources, or authorities.

Multiple Declarations/Plans

When planners differ on what actions should be taken, HCWs and others may face uncertainty.



How might intra-jurisdictional conflicts relating to scope of practice limitations be solved?



4. Licensure/ SOP Expansion

United States of America



Licensure Reciprocity



**Non-emergency reciprocity;
multi-state licenses**



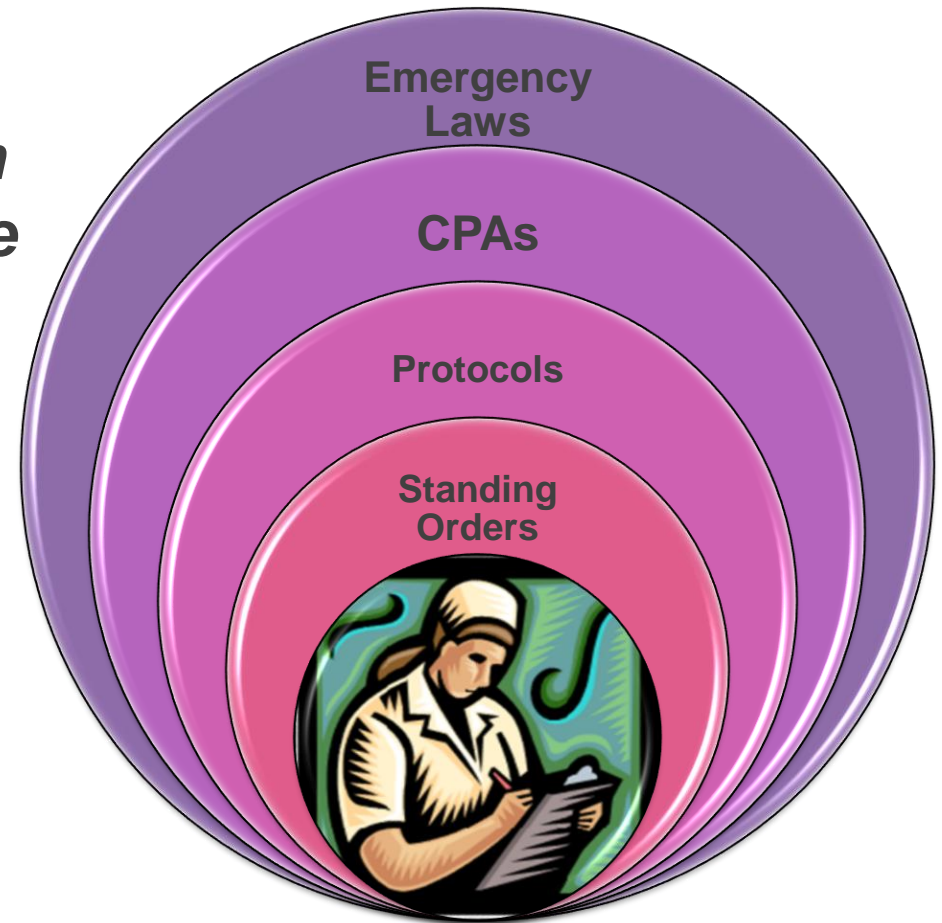
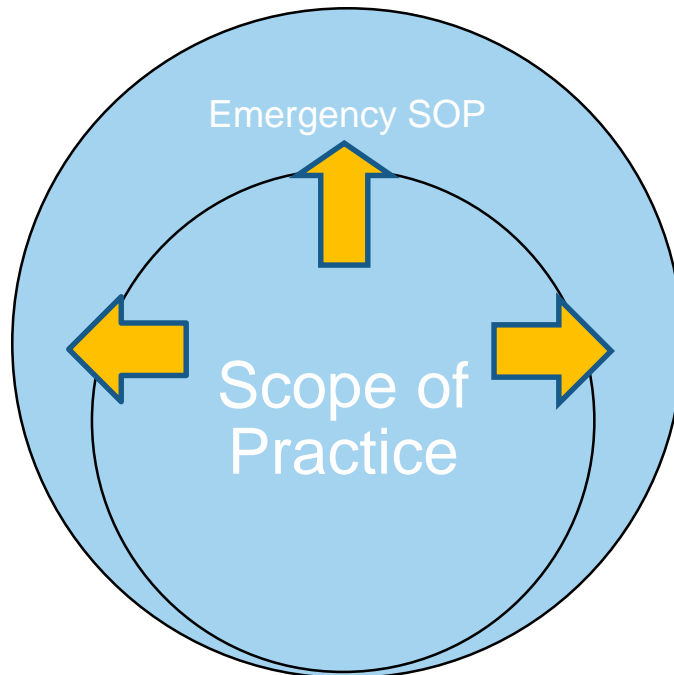
**Reciprocity triggered by
emergency declaration or
waiver**



**No available reciprocity
provisions**

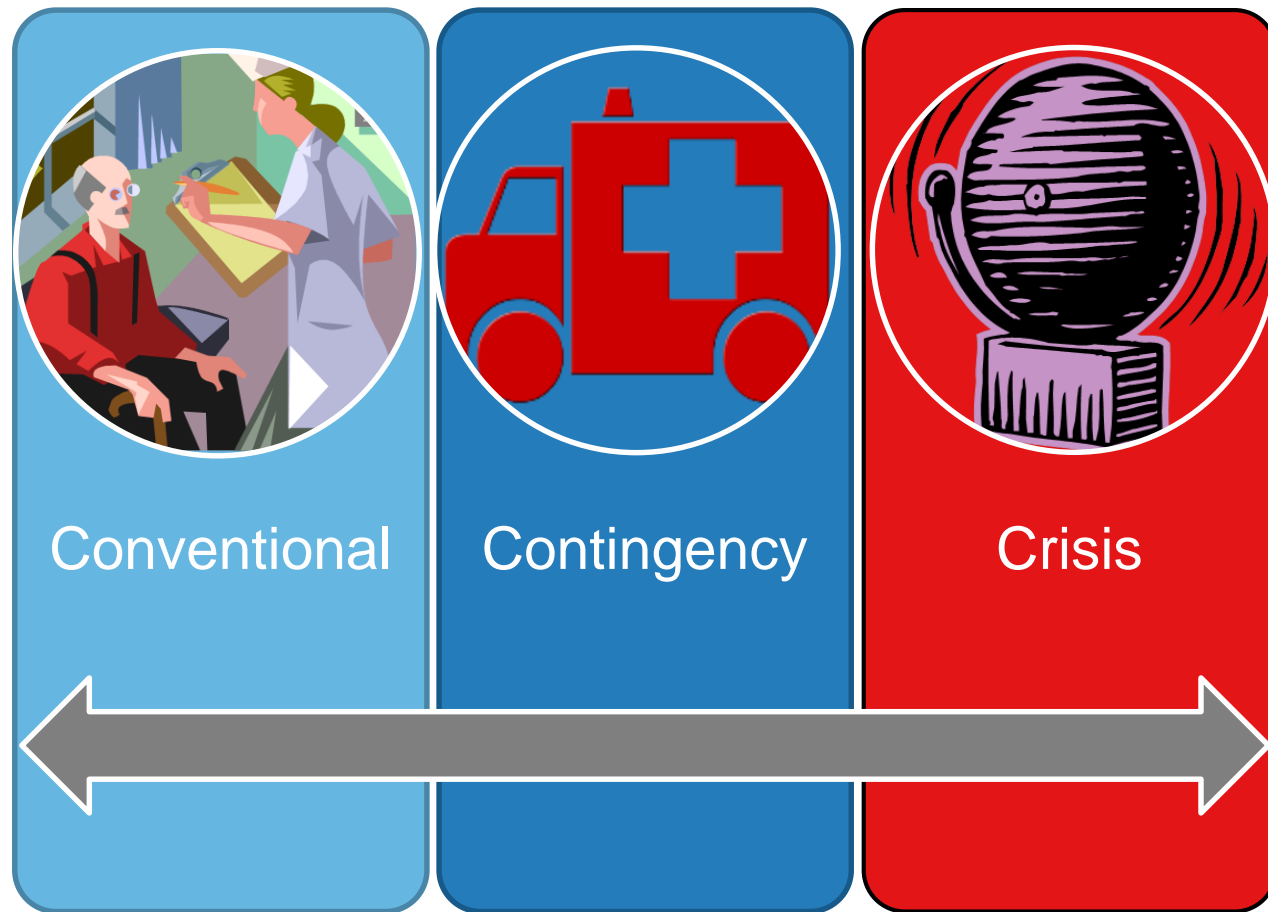
Scope of Practice

Emergency laws may provide for scope of practice expansions which CSC plans may incorporate or reference.



Example: Potential nursing SOP expansions

5. Legal Duties to Care



*Do legal duties change with
shifting standards of care?*



CSC anticipates the difficulties of meeting routine standards of care during sustained emergencies.



Common duties expressly required in CSC plans:

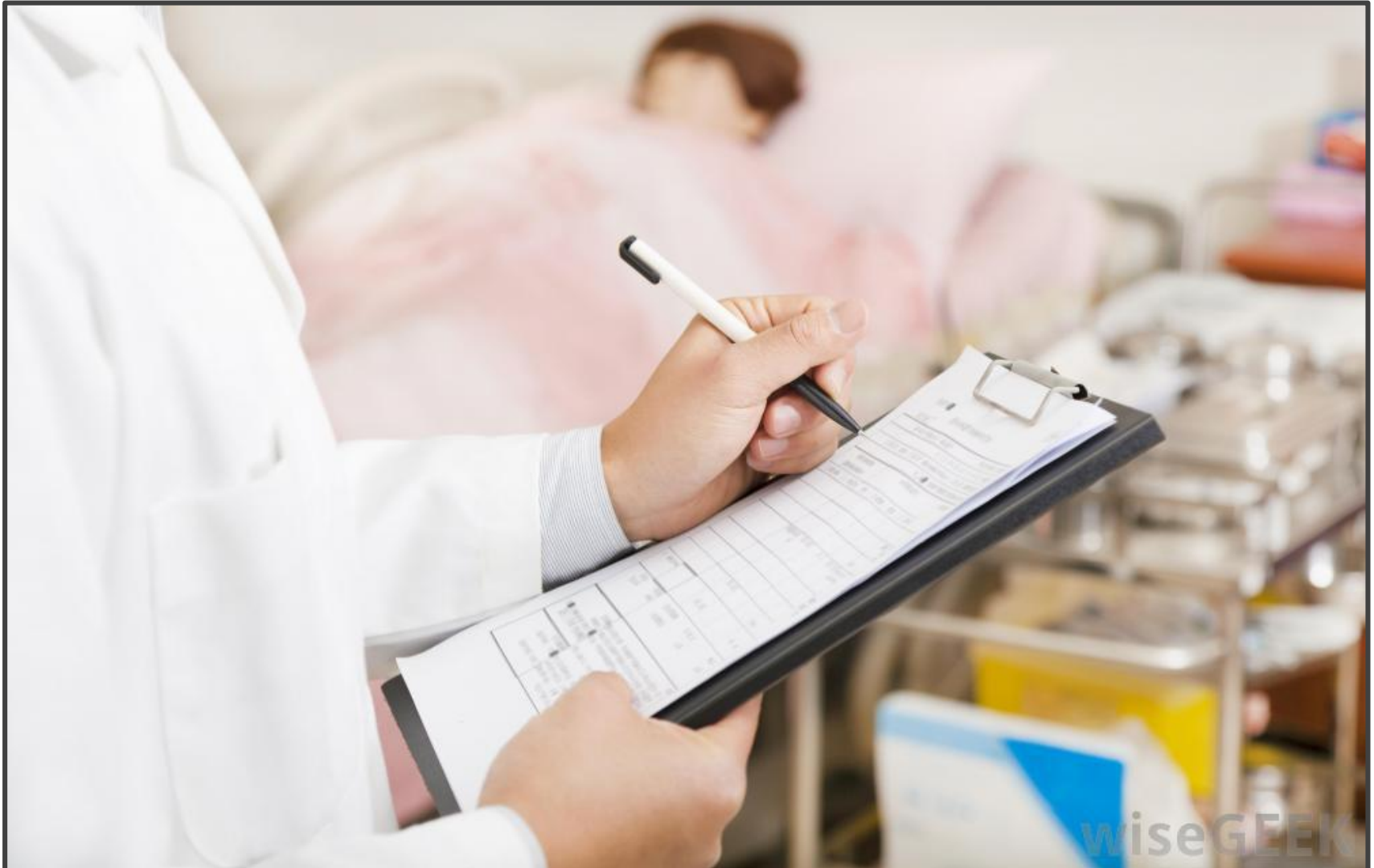
- Duty NOT to abandon.
- Duty to care despite risks;
reciprocal duty to support
and protect HCWs.
- Duty to provide comfort
care.

Additional duties:

- Duty not to experiment.
- Duty to screen or accept
patients.



6. Documenting decisions



Internal Reporting

Effective CSC
implementation

Documentation
legally required
by CSC plan

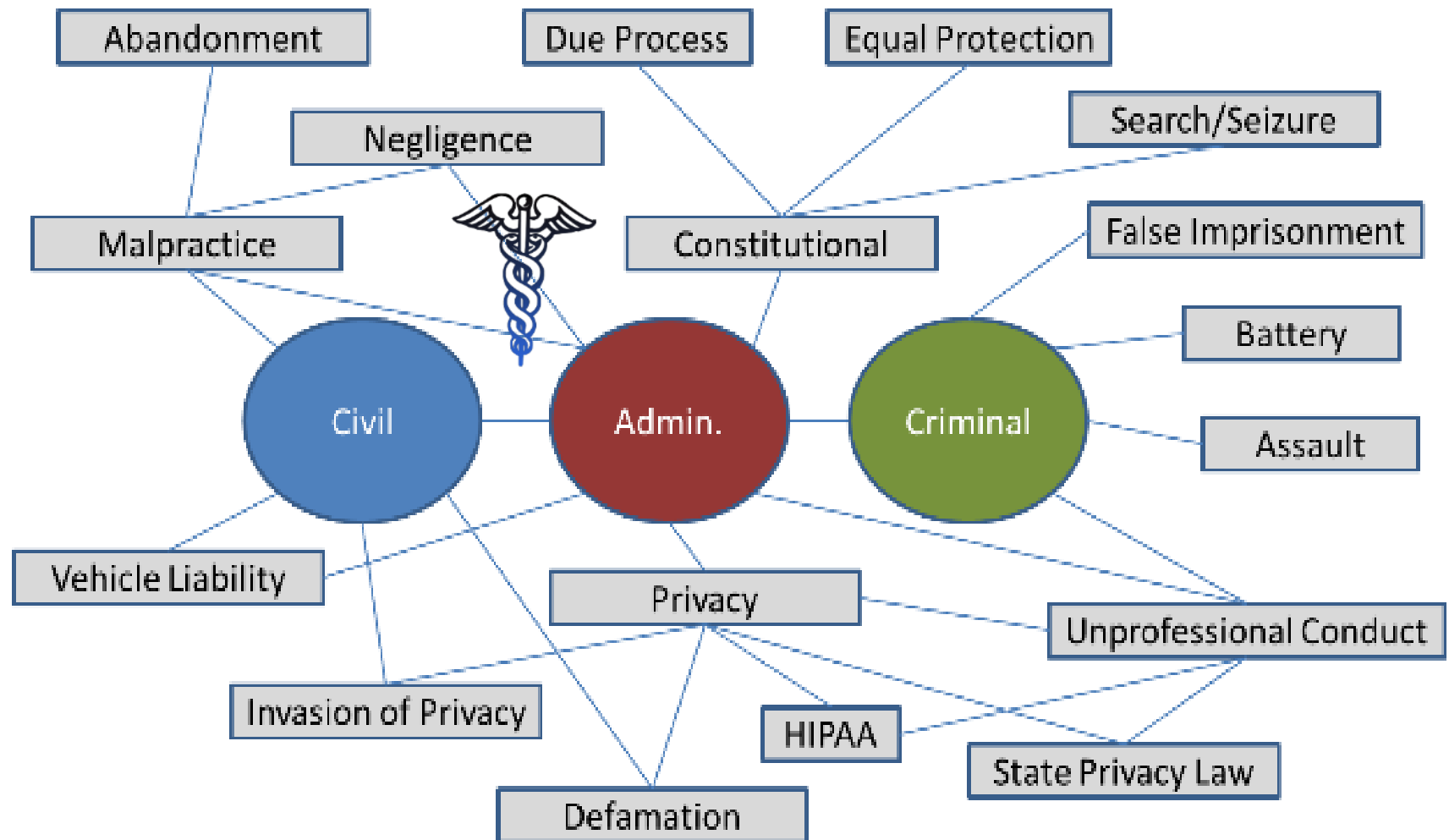
Based on
individualized
determinations &
best available
evidence

Mechanisms for
compliance with
emergency
mandates



Open and
transparent
communication
with public

7. Protections from Liability



2 Paths Re: CSC Liability Claims

Increasing:

- Patient #s
- Patient needs
- Risks



**Path 1 - *Follow the Evolving
Standard of Care***



**Path 2 - Provide Enhanced Liability Protections
for HCWs & Entities**



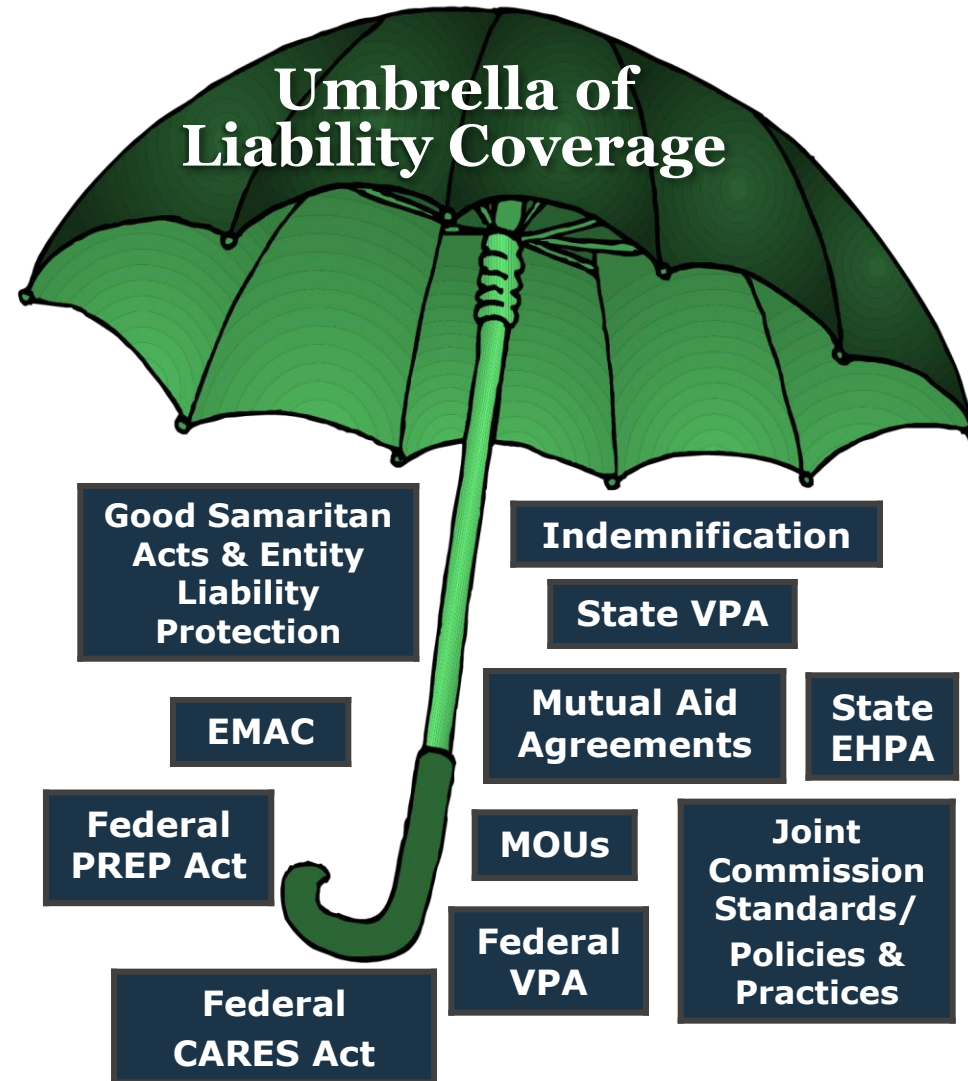
Lessening:

- HCWs
- Volunteers
- ICU beds
- PPE

Emergency Liability Protections



Multiple liability protections may apply to HCWs, volunteers & entities for acts of negligence – but not intentional misconduct.



8. Minimize Legal Risks in CSC



Risk Management Legal Options



CSC Legal Issues – Key Take-aways

1

Emergency declarations authorize numerous powers essential to effectuating CSC

2

Legal invocation of CSC may arise via different routes and entail multiple options for public and private sectors

3

Resolving jurisdictional challenges across states may require utilizing emergency authorities to resolve conflicts

4

Alleviating licensure & scope of practice concerns through SOP expansions or reciprocity can ameliorate shortages

5

Shifting standards of care do not belie general legal duties or additional CSC duties owed to patients

6

Documenting decisions lawfully and transparently implicates CSC shifts internally and externally

7

Manifold liability protections help assure HCWs, volunteers, and entities can implement CSC

8

Mitigation of legal risks entails advance planning, real-time interventions & commitment to sound process/ethics



- Please share your questions/comments via the **“Question and Answer”** function via Zoom
- james.hodge.1@asu.edu | @jghodgejr
- Jennifer.Piatt@asu.edu | @Jen_Piatt
- For more information & ongoing updates, check out the COVID-19 legal information at the [**Network for Public Health Law**](#)