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
Contents

• 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.

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

- **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.
Executive Orders

CSC Invocations

Statutory Waivers

Authorized Takings

Regulatory Waivers

Expedited Procurements

Liability Protections

Scope of Practice Expansion

Licensure Reciprocity

Emergency Legal Tools & Powers
2. Invoking CSC

Conventional

Contingency

Crisis
<table>
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<th>Category</th>
<th>Triggers</th>
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| 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      | • Express allowances via state CSC plans  
                          • Committee reports based on field experiences                               |

| Health Experiences      |                                                                                   |
Navigating Legal Options

- Medical Triage
- Resources
- Reallocations
- HCW/VHP roles
- Patient intake
- Screening

Shift to CSC
No single emergency declaration provides all necessary coverage, resources, or authorities.
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
Non-emergency reciprocity; multi-state licenses

Reciprocity triggered by emergency declaration or waiver

No available reciprocity provisions
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
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

- Abandonment
- Due Process
- Equal Protection
- Search/Seizure
- False Imprisonment
- Battery
- Assault
- Constitutional

*Civil*
- Negligence
- Malpractice
- Vehicle Liability
- Invasion of Privacy
- Privacy

*Admin.*
- Defamation

*Criminal*
- HIPAA
- Unprofessional Conduct
- State Privacy Law
Path 1 - *Follow the Evolving Standard of Care*

Conventional Care → Contingency Care → Crisis Standards of Care

Increasing:
- Patient #s
- Patient needs
- Risks

Decreasing:
- HCWs
- Volunteers
- ICU beds
- PPE

Path 2 - Provide Enhanced Liability Protections for HCWs & Entities
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

- Risk Mitigation
  - Advance + Real-time Planning
  - Transparency
  - Oversight & Internal Review
  - Accountability
  - Consistency of Process
  - Ethical Adherence

Ethical Adherence

Consistency of Process

Accountability

Oversight & Internal Review

Advance + Real-time Planning
## CSC Legal Issues – Key Take-aways

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<th>Emergency declarations authorize numerous powers essential to effectuating CSC</th>
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<td>Legal invocation of CSC may arise via different routes and entail multiple options for public and private sectors</td>
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<td>3</td>
<td>Resolving jurisdictional challenges across states may require utilizing emergency authorities to resolve conflicts</td>
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<td>Alleviating licensure &amp; scope of practice concerns through SOP expansions or reciprocity can ameliorate shortages</td>
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<td>Shifting standards of care do not belie general legal duties or additional CSC duties owed to patients</td>
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<td>6</td>
<td>Documenting decisions lawfully and transparently implicates CSC shifts internally and externally</td>
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<td>7</td>
<td>Manifold liability protections help assure HCWs, volunteers, and entities can implement CSC</td>
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<td>8</td>
<td>Mitigation of legal risks entails advance planning, real-time interventions &amp; commitment to sound process/ethics</td>
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Questions

• 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