
Guidelines for Pandemic Emergency Preparedness Planning: A Road Map for Courts

March 2007



AMERICAN UNIVERSITY
WASHINGTON, DC

School of Public Affairs

Criminal Courts Technical Assistance Project

www.american.edu/justice

BJA Bureau of
Justice Assistance



Partnering To Keep Communities Safe

ACKNOWLEDGMENTS

Task Force on Pandemic Preparedness Planning for the Courts

James C. Swain, Chair

Judge Linda L. Chezem (ret.)

Caroline S. Cooper

*American University, School of Public Affairs,
Criminal Courts Technical Assistance Project*

Kim Ball Norris

Bureau of Justice Assistance

Carolyn E. Ortwein

National Center for State Courts

Judge Ronald J. Taylor (ret.)

Fred Wilson

National Sheriffs' Association

Francis Schmitz, Of Counsel

U.S. Department of Justice

Additional Contributors

Daniel O'Brien

Public Health Law Association

Clifford Reeves

Public Health Law Association

Elaine Snyder

Bureau of Justice Assistance

Thomas Rhatigan

National Sheriffs' Association

Joseph A. Trotter, Jr.

Christopher Billeter (Intern)

Tenzing Lahdon (Intern)

*American University, School of Public Affairs,
Criminal Courts Technical Assistance Project*

This publication was produced by the Criminal Courts Technical Assistance Project at American University under the leadership, guidance, and funding (grant number 2006-DD-BX-K013) of the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this document are those of the authors and do not necessarily reflect the views of the U.S. Department of Justice.

TABLE OF CONTENTS

Letter from Domingo S. Herraiz, Director, Bureau of Justice Assistance	v
Letter from Robert M. Bell, Chief Judge, Court of Appeals of Maryland	vi
I. Nature of the Challenge	1
Why the Attention to Pandemic Planning?	1
Avian Influenza and Pandemic Influenza Threats	2
Possible Governmental Responses to a Pandemic Outbreak	3
Judicial Leadership—Critical to Pandemic Planning	3
II. Issues Presented By Pandemics Not Addressed in General Continuity of Operations (COOP) Planning	3
III. Relationships of the Courts and Public Health Agencies in a Pandemic Emergency	4
Relationships of Local and State Public Health Agencies	4
Essential Coordination for Pandemic Responses	4
1. Required Interaction of Public Health Agencies and Courts	4
2. Role of Public Health Agencies During a Pandemic	5
3. Role of Courts During a Pandemic	7
4. Creating Working Partnerships To Oversee Pandemic Preparedness Planning and Responses	7
IV. Constitutional and Legal Questions	7
Substantive Legal Issues	7
Specific Considerations for Judges	7
1. Jurisdiction, Venue, Court Rules, and Public Health Authority	7
2. Government Actions To Ensure Public Health	8
3. Medical and Other Private Information Collection	8
4. Operation of the Courts Amid Public Health Threats	9
5. Courts During a State of Emergency	9
V. Court Operations During a Pandemic Outbreak: Proposed Approaches	9
1. First Things First—Reality Check	10
2. Operational Issues—Workload Implications	10
Loss of staff/impact of quarantine and isolation on court facilities and operations	10
Disruption in supply of necessary equipment and materials	10
Inability of other justice agencies to support judicial functions	10
Restriction of court access	11
Vital records	11
3. Communication Within the Court	11
4. Ongoing Information to the Public	11
5. Surge Workload	11

Primary matters arising from a pandemic	11
<i>Allegations of public nuisance</i>	12
<i>Orders of quarantine</i>	12
<i>Writs of habeas corpus</i>	12
<i>Searches and seizures</i>	12
<i>Emergency detention orders</i>	12
Secondary matters arising from a pandemic	13
6. Consolidation of Cases	13
7. Access to Court Facilities and Court Operations During a Quarantine	13
8. Other Human Resources Implications	13
9. Other Essential Justice Agencies During a Pandemic	14
Clerk of the court	14
Sheriffs, probation, and other community supervision and corrections agencies	14
VI. How to Proceed: A Summary	14
VII. Resources	15
VIII. Endnotes	16
APPENDIX: Tabletop Exercises: Hypothetical Scenarios Relating to the Impact of Public Health Emergencies on Court Administration	19



U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Assistance

Office of the Director

Washington, D.C. 20531

When President George W. Bush's *National Strategy for Pandemic Influenza* was released in November 2005, he communicated to the American people that "A new strain of influenza virus has been found in birds in Asia, and has shown that it can infect humans. If this virus undergoes further change, it could very well result in the next human pandemic." Among the key aspects of the President's strategy is preparing for a multilevel response by local, state, and federal governments. Of critical importance, however, is that local and state justice systems be prepared to respond to and uphold the rule of law throughout any crisis, whether natural or manmade. A pandemic, with elements of continued crisis and contagion, would present unique challenges to our justice system, including law enforcement, courts, and corrections.

In support of the *National Strategy*, in May 2006 the Bureau of Justice Assistance (BJA) facilitated a symposium entitled, "Justice and Public Health Systems Planning: Confronting a Pandemic Outbreak." The symposium provided an update to justice system leaders and professionals on the pandemic threat, information on promising approaches to planning and response, and a forum in which cross-discipline discussions could be held and planning could be strengthened. In addition, BJA also developed a web site for pandemic planning issues, available at www.ojp.usdoj.gov/BJA/pandemic/pandemic_main.html. The site's content is updated on an ongoing basis, providing justice professionals with the latest resources and information.

To take the planning process a step further, this publication was developed to encourage court planners throughout America to consider possible issues the court may face and how to solve them—in *advance* of a pandemic. Working together at the local, state, and federal levels, we will be better prepared to confront this or any public threat to America's communities.

A handwritten signature in black ink, appearing to read "D. Herraiz".

Domingo S. Herraiz
Director

Conference of Chief Justices

BOARD OF DIRECTORS

PRESIDENT

Robert M. Bell
Chief Judge
Court of Appeals of Maryland
634 Courthouse East
111 North Calvert Street
Baltimore, MD 21202
(410) 333-6396
FAX: (410) 347-3908

PRESIDENT-ELECT

Jean Hoefler Toal
Chief Justice
Supreme Court of South Carolina

FIRST VICE-PRESIDENT

Margaret H. Marshall
Chief Justice
Supreme Judicial Court of Massachusetts

SECOND VICE-PRESIDENT

F. Phillip Carbullido
Chief Justice
Supreme Court of Guam

IMMEDIATE PAST PRESIDENT

Randall T. Shepard
Chief Justice
Supreme Court of Indiana

Gerry L. Alexander
Chief Justice
Supreme Court of Washington

John T. Broderick, Jr.
Chief Justice
Supreme Court of New Hampshire

David Gilbertson
Chief Justice
Supreme Court of South Dakota

Leroy Rountree Hassell, Sr.
Chief Justice
Supreme Court of Virginia

Wallace B. Jefferson
Chief Justice
Supreme Court of Texas

Ruth V. McGregor
Chief Justice
Supreme Court of Arizona

Leah Ward Sears
Chief Justice
Supreme Court of Georgia

Clifford W. Taylor
Chief Justice
Supreme Court of Michigan

Eric T. Washington
Chief Judge
District of Columbia Court of Appeals

Association Services
Brenda A. Williams
National Center for State Courts
300 Newport Avenue
Williamsburg, VA 23185
(757) 259-1841
FAX: (757) 259-1520
E-mail: bwilliams@ncsc.dn.us
www.ncsconline.org

October 23, 2006

Dear Colleagues:

The potentially deadly effects of an Avian Flu Pandemic on court personnel and operations are frightening to contemplate. Steps can, and must, be taken in advance of its occurrence if its consequences are to be mitigated. We simply cannot wait until a pandemic arrives to act. That is the message of the Conference in establishing the CCJ/COSCA Security and Emergency Preparedness Committee. Chaired by Chief Justice Thomas J. Moyer of Ohio and co-chaired by Zygmunt Pines, State Court Administrator of Pennsylvania, that Committee is presently addressing the issue.

This "Road Map for Courts Facing a Pandemic", prepared by a Task Force of experienced judges and practitioners assembled by BJA, can ease your way to a state of readiness. Other resources such as those offered by the Conference of Chief Justices, the Conference of State Court Administrators, and the National Center for State Courts underscore the importance of early planning and preparation described in the Road Map.

I commend it to you and urge you to begin planning now, and to practice the plan you develop. The functioning of the court during a pandemic will be essential to preserving the rule of law.

Very truly yours,



Robert M. Bell
Chief Judge
Court of Appeals of Maryland

Guidelines for Pandemic Emergency Preparedness Planning: A Road Map for Courts

I. NATURE OF THE CHALLENGE

Of the many scenarios that may have a tremendous impact on the administration of justice, one of the least studied or planned for is that of a pandemic. However, with the recent outbreak of severe acute respiratory syndrome (SARS) in Canada and elsewhere, and the serious concern about the possible transfer of avian flu¹ to human populations, the subject is now being addressed at the highest levels.²

Should a pandemic occur, it will impact the very essence of society. Businesses will close. Government institutions will be crippled. Health systems will be overwhelmed. It should not come as a surprise, then, that the operation of the courts, like all government agencies, will be seriously affected. It is estimated that some 40 percent of the workforce will be unable or unwilling to report to work.³ When applied to the court system, this estimate cuts across the entire court structure from judges and court executives to clerks, court reporters, bailiffs, and office staff. Such a reduction of available human resources could be catastrophic to the continuation of court services.

On February 1, 2007, the U.S. Department of Health and Human Services' Centers for Disease Control and Prevention (CDC) issued guidance on several nonpharmaceutical measures that might be taken to reduce the harm caused by an influenza pandemic. The guidance introduced, for the first time, a Pandemic Severity Index, which uses a case fatality ratio as the critical factor in categorizing a pandemic's severity. The index, available at www.cdc.gov/od/oc/media/pdf/MitigationSlides.pdf, is modeled after the five levels of severity used for hurricanes and designed to help officials determine whether to take steps such as advising employers to promote telework, closing schools, or limiting public gatherings. It ranks the severity of a pandemic by the number of fatalities it causes, ranging from a Category One pandemic (90,000 deaths) to a Category Five pandemic (1.8 million deaths).

Depending on the severity of an imminent pandemic, local governments are expected to implement all or portions of their pandemic plans as appropriate, including pandemic mitigation interventions set forth in CDC's guidance.

While it may be difficult for court managers to envision the impact of a pandemic on court operations and to plan for such a scenario, it is imperative that such planning take place before such an event occurs. To "wait and see" if such a pandemic will actually occur is to risk the future operation of the court at a time when it would be most needed. The purpose of this "Road Map" is to suggest some of the potential impacts a pandemic outbreak may have on the court's operation and mission and to present some approaches the court might consider when planning for the worst.

Why the Attention to Pandemic Planning?

Since 1900, there have been three pandemics, the last of which occurred in 1968; it is anticipated that another is due. Whether the next pandemic will be mild or severe cannot be predicted. Given the historical impact that pandemics have had in terms of illness and deaths, it is vital to develop a structured plan for preparing the courts to cope with a pandemic outbreak.

For this reason, the Bureau of Justice Assistance's (BJA's) Criminal Courts Technical Assistance Project assembled a Task Force to develop a road map for local and state courts to guide their efforts in planning for a pandemic. The Task Force was charged with creating a framework that could be used by courts in each state to develop pandemic emergency plans. In response, the Task Force's planning process has been approached from four perspectives: (1) preserving the continuity, integrity, and independence of the judicial process (i.e., the rule of law) during a pandemic emergency; (2) substantive legal issues that will likely arise; (3) interagency relationships and coordination that will be needed, particularly among the courts and state and local public health agencies; and (4) the court as a workplace. The Task Force builds on the approach for addressing the threat of a pandemic influenza as outlined in the *National Strategy for Pandemic Influenza* (issued by the White House's Homeland Security Council in November 2005),⁴

the follow-up *Implementation Plan* (published in May 2006), and the deliberations at a symposium facilitated by BJA, Office of Justice Programs on May 24–25, 2006: “Justice and Public Health Systems Planning: Confronting a Pandemic Outbreak.”⁵

Avian Influenza and Pandemic Influenza Threats

Influenza pandemics occur when a novel influenza virus emerges for which the majority of the human population has no preexisting immunity, humans become infected by the virus, and the virus is efficiently transmitted from human to human. Animals are the most likely reservoir for such a virus, demonstrated by the fact that avian viruses played a role in the last three influenza pandemics. Influenza pandemics have occurred intermittently over the centuries. Although the timing cannot be predicted, history and science suggest that the world will face one or more influenza pandemics this century. A worldwide outbreak of a new influenza virus could potentially result in hundreds of thousands of deaths, millions of hospitalizations, and hundreds of billions of dollars in direct and indirect costs to North American economies.

The most likely source of an influenza pandemic threat stems from an outbreak of highly pathogenic avian influenza in Africa, Asia, and Europe caused by the H5N1 strain of the influenza A virus. To date, the virus has infected birds in more than 55 countries and resulted in the deaths—through both illness and culling—of more than 250 million birds across Asia. The virus is now endemic in Southeast Asia, present in long-range migratory birds, and unlikely to be eradicated in the short term.

Although the H5N1 virus has not yet shown an ability to transmit efficiently among humans, there is concern it will acquire this capability through genetic mutation or exchange of genetic material with a human influenza virus. If this does not happen with the H5N1 strain, history suggests that a different influenza virus will emerge and result in the next influenza pandemic.

The H5N1 virus has not yet reached North America, but preparations are being made for the day when it or some other virus does. A pandemic can occur in waves that last from 6 to 8 weeks. This means that

the virus could spread rapidly during the 6 to 8 week period, appear to be on the decline, then reoccur and continue to rise and decline until it is finally contained.⁶

With its fluctuating characteristics, such a widespread virus would disrupt if not halt the functioning of everyday institutions.⁷ For perspective, the global pandemic influenza outbreak in 1918, or Spanish flu, claimed an estimated 40 million lives worldwide. In 2 years it infected 20 percent of the world population. It was most fatal for people ages 20 to 40 years. The effect was so severe that the average life span in the United States was depressed by 10 years.⁸ The other two influenza pandemics that occurred during the 20th century occurred in 1957 and 1968, killing approximately 2 million and 1 million people worldwide, respectively.

The Spanish flu pandemic in 1918 claimed an estimated 40 million lives worldwide.

The U.S. Department of Health and Human Services, through its National Institute on Allergy and Infectious Diseases, has been working to test antiviral medications and prepare a vaccine in advance of a pandemic outbreak. However, it is highly unlikely that the most effective tool for mitigating a pandemic—a well-matched vaccine—will be available when a pandemic hits, and the production of such a vaccine is likely to take months. As a result, CDC is recommending that, depending on the severity of a pandemic, communities be prepared to implement other mitigation strategies to help keep society functioning and limit the spread of the pandemic, reduce disease and death, and lessen the impact on the economy. Recommended strategies are available at www.pandemicflu.gov/plan/community/commitigation.html.

Due to the nature of the threat, businesses, government agencies, community organizations, schools, hospitals, and other public institutions are urged to have plans in place to combat the effects of a possible pandemic on their respective organizations’ operations.

Possible Governmental Responses to a Pandemic Outbreak

Local and state health departments have a critical role in responding to such a public health crisis and have considerable authority to issue orders on matters such as treatment triage, vaccination distribution, quarantine, isolation or protective sequestration, resource distribution and consumption, movement of individuals, access to otherwise confidential information, and other measures that may be justified by the emergency.

Courts also will likely be called on to address a range of substantive legal issues arising out of a pandemic emergency. Preserving constitutional protections—including those relating to due process, searches and seizure, and equal protection of the laws—will fall to the courts in each community. Courts will need to review and rule on emergency orders, as well as develop mechanisms to ensure the continuity of vital court operations in a manner that does not jeopardize the health and safety of the judicial workforce or members of the public appearing before the court.

Judicial Leadership—Critical to Pandemic Planning

Regardless of the organization of the court system in each state, judicial leadership at both the local and state levels will be critical in developing policies and guidance for pandemic emergency planning by local courts. In court systems with administrative unification, the Chief Justice and the State Court Administrator may be able to develop statewide guidelines for pandemic planning responses that may include the capability for shifting personnel and resources from low-incidence areas to heavily impacted areas. In court systems with less administrative unification, the state court administrative office may still be able to develop general guidelines for pandemic planning that local courts can adopt or adapt, as necessary.⁹ In both of these scenarios, close coordination with local and state health departments will be essential, and the possibilities for developing mutual aid agreements to address a wide range of functions will need to be considered.

II. ISSUES PRESENTED BY PANDEMICS NOT ADDRESSED IN GENERAL CONTINUITY OF OPERATIONS (COOP) PLANNING

Planning for a pandemic such as the avian flu raises special issues for courts that are not commonly part of preparedness planning for other types of emergencies. The following features of a pandemic emergency are among those that require special attention when developing a plan for continued court operations:

- Potential for a wider geographic area to be affected, compared with the more localized operational disruptions that occur with hurricanes, earthquakes, and fire.¹⁰
- Potential for greater periods of disruption, since pandemics are generally of longer duration and can come in waves, rising and declining until they are contained.
- Potential disability of a significant proportion of the court's workforce, as well as litigants, jurors, and others involved in the court process.
- Required interagency planning and coordination among agencies not usually involved with court emergency planning for natural disasters, including local and state public health agencies, county attorneys, and state attorneys general offices.
- Likely need for the court to develop alternative strategies for face-to-face contact by courthouse staff with the public, people under probation supervision, and others involved with the court's day-to-day operations.
- Likely need for the court to deal with a range of substantive and due-process issues, particularly those relating to quarantine and isolation orders¹¹ and *habeas corpus* motions.

In addition, adequate preparation for a pandemic emergency will require courts to address a range of human resource issues including determining the court's obligation to and potential liability for employees who may be exposed to symptomatic

people entering the court; reviewing and modifying sick leave and compensation policies; and providing employee training and support regarding hygienic measures that need to be taken during a pandemic outbreak.

III. RELATIONSHIPS OF THE COURTS AND PUBLIC HEALTH AGENCIES IN A PANDEMIC EMERGENCY

Relationships of Local and State Public Health Agencies

The United States' first local board of health was created in the City of Baltimore in 1793 in response to a yellow fever epidemic. The first state law authorizing the creation of local boards of health was enacted in Massachusetts in 1797. Massachusetts also created the first state board of health in 1869, and every state has subsequently followed suit.¹²

Over the past 200 years, the relationship between local and state health departments has continued to evolve. Direct public health services are typically furnished through local agencies, while state agencies are more likely to publish regulatory standards and control the distribution of available funds. Some local health departments may offer direct clinical services such as immunization clinics, tuberculosis treatment, and other interventions to minimize the disease burden in a local community. State agencies often maintain statewide disease registries and coordinate disease outbreak investigations.

The legal structure for public health authorities varies widely depending on the state's constitutional and statutory framework. A state may choose to organize public health functions within a centralized health department that exercises extensive legal and operative control over local matters. Conversely, many states have implemented a decentralized system where local governments have significant control over local public health initiatives and expenditures. States also vary in defining the critical elements of public health and may disperse seemingly related functions across a number of executive branch agencies.

At the state level, the leading health official is usually the Governor-appointed Secretary of a department of health or board of health. At the local level, health departments are usually organized by law to serve a political subdivision of a state—such as a county, city, town, village, or borough—or a group of communities.¹³

The chain of response in a public health emergency for local and state agencies involved also will vary depending on the state's constitutional and statutory framework. If CDC, for example, issued warnings regarding an emerging influenza pandemic, state health departments would notify local authorities. If, on the other hand, a suspect case was identified in a particular community, the local health officer could typically order the isolation of that specific individual. State health officials might assist in the investigation and could generally order a broader range of prophylactic measures. An Executive Order from the Governor also might follow. In such a situation, some form of public health measure, such as the closing of schools, could also be issued by both local and state authorities.

For any public health emergency, court personnel can obtain guidance regarding the public health agency's response in the individual state from the agency's principal legal advisor—a position that is part of every state public health agency. A list of these legal advisors can be found at www2a.cdc.gov/phlp/statescontacts.asp.

Essential Coordination for Pandemic Responses

1. Required Interaction of Public Health Agencies and Courts

One of the most critical objectives set forth in the *National Strategy for Pandemic Influenza* is the need to coordinate local, state, and federal influenza response plans. Although the need for coordination between each *level* of government is now well recognized, the need for effective planning *between* each branch of government has received less attention.

Traditionally, the executive branch activities in the area of public health have entailed two components: (1) development and execution of health policy and delivery of health services and (2) legal actions

necessary to enforce the application of health policy, particularly in the event of public health threats. In regard to the first component, in recent years courts have worked increasingly with public health agencies to address substance abuse and other public health problems presented by defendants and other court litigants. However, in regard to the second component, most courts have had little experience working with public health agencies on requisite legal actions—actions that will likely occur in the event of a pandemic.

During an influenza pandemic, interaction between the judiciary and executive branches of government will be vital. Local and state courts will rely on clinical experts from local and state health departments. The manner in which this relationship is managed will have a significant impact on the court’s ability to effectively respond to the crisis.

Interaction between the judiciary and executive branches of government will be vital.

Thus, the court’s pandemic emergency plan should ensure consistent interactions between the courts and public health agencies for extended periods of time. This joint planning will enable the two branches to perform their respective functions in a timely and effective manner, balancing the best interests of society with the individual civil liberties guaranteed by law. Understanding the respective roles of each of these branches of government must be part of that planning. As an example, the following page provides a diagram summarizing the caseflow process for public health matters in Indiana’s justice system.

2. Role of Public Health Agencies During a Pandemic

Local and state public health agencies will play a primary response role during a pandemic outbreak. Local first responders, private physicians, and hospitals will most likely encounter the first cases of a novel strain of influenza. Suspected and confirmed cases would be reported to a local or state public health authority in accordance with the legal requirements governing disease control and surveillance. The local or state public health

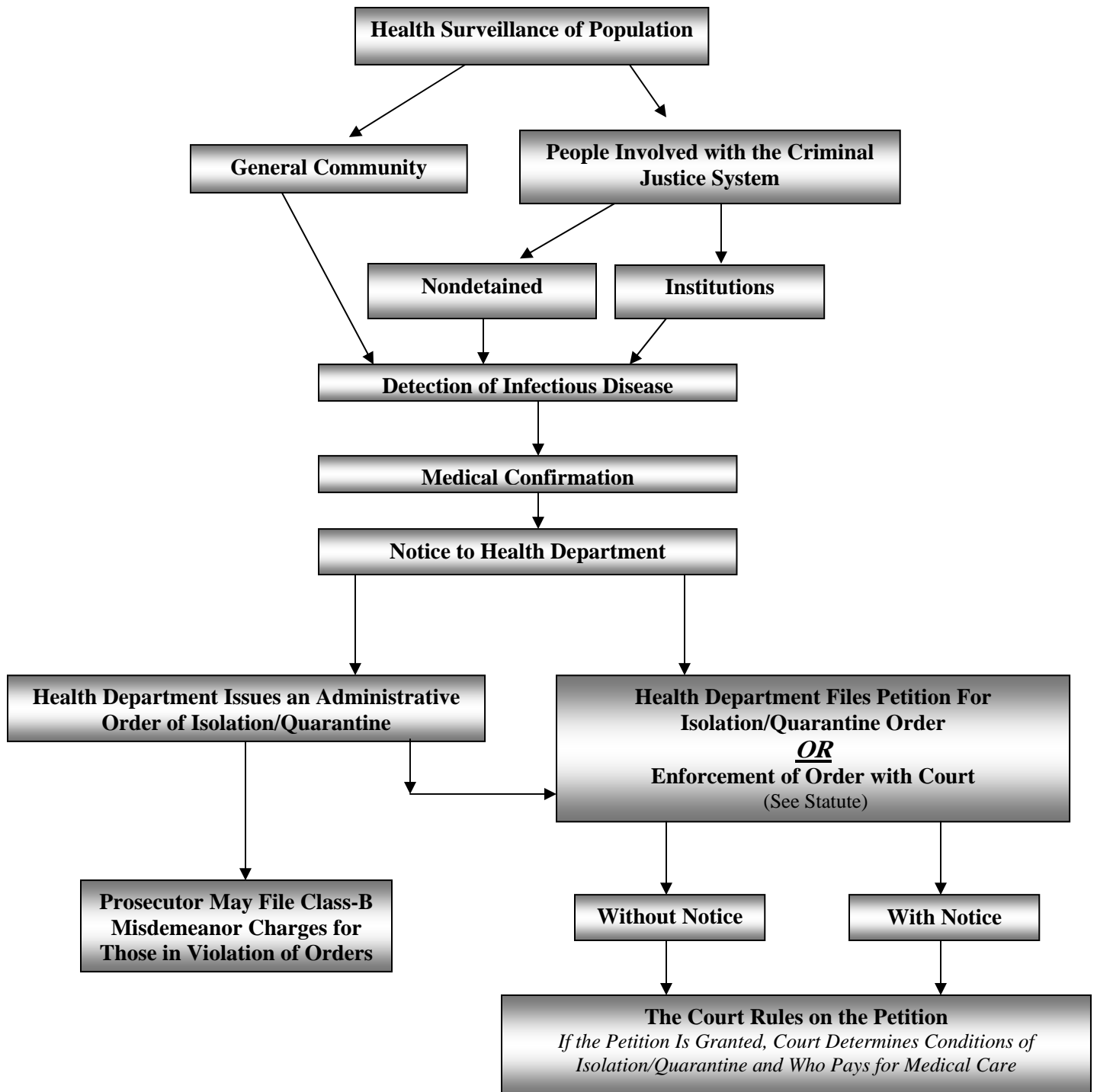
department also would report confirmed cases to CDC. While CDC would provide assistance in handling early cases, the real response to a pandemic will occur at the local level.

CDC will provide assistance in handling early cases, but the real response will occur at the local level.

A state health department also may implement the Governor’s Executive Orders, manage and establish stockpiles of medical supplies, direct the use of health care facilities, and coordinate the use of volunteer health care providers. Local health departments may perform some or all of these functions as well, including coordinating the treatment of “sentinel” cases (i.e., those first cases that provide the early detection and warning that the virus is present) during the initial outbreak. Quickly, however, a wider public health response may be needed. Infection control measures such as isolation or quarantine and social distancing measures such as prohibitions on public gatherings, the closure of schools and buildings, and restrictions on intrastate travel could all be ordered by local and state health departments. These actions are predicated on the inherent police powers retained by the states under the U.S. Constitution’s 10th Amendment. State statutes and regulations, in addition to local ordinances, also will be used to implement necessary public health measures. Local health authorities will need to have access to the courts throughout this process. With relatively few exceptions, challenges to these public health measures will be heard by state judges.

While there are many processes and laws currently in place, a pandemic may change some of those. For example, in some jurisdictions, predeprivation court proceedings will need to occur before the public health directive can be implemented. Conversely, even where state statutes allow the issuance of a public health order without benefit of prior judicial review, postdeprivation hearings will need to occur. Local and/or state health department personnel will need to explain and defend these actions. At the same time, the judiciary may need to seek guidance on public health issues to protect court personnel and help the court maintain safe operations in both civil and criminal proceedings.

Example: Public Health System/Judicial System Interaction in the Issuance of Isolation and Quarantine Orders in Indiana*



* This diagram summarizes the caseflow process for public health matters through Indiana’s justice system. Since the flow will differ from state to state depending on constitutional and statutory provisions, readers are encouraged to develop a diagram of the caseflow process applicable in their respective states during the pandemic plan development process.

The exercise of the state's police powers may be challenged in court, especially with the first quarantine and isolation orders. However, as the pandemic continues, other public health measures and public safety issues also may be the subject of judicial proceedings.

3. Role of Courts During a Pandemic

During a pandemic outbreak, courts will assume a fundamental role in preserving civil society. While judges must be prepared to handle the initial quarantine hearings, they also must have procedures in place to enforce ongoing public health orders. These might include price control measures, commandeering of private resources, and cessation of normal community activities. Even more important, the judicial system must continue to administer an impartial and effective justice system.

The range of actions courts may be required to perform during a pandemic can include determining whether a public health statute is constitutional, a public health agency's action is authorized by legislation, public health agency officials have sufficient evidence to support their actions, government officials have acted negligently, or an agency's actions are lawful. Resolution of these actions will be made more difficult because all parties will be simultaneously affected by the effects of the pandemic.¹⁴ The judiciary also may be requested to approve or extend the timeframe for emergency public health orders, as well as determine the applicability of emergency health department orders to specific entities or individuals. The specific role of the judiciary *vis a vis* public health department actions in any jurisdiction will depend on the state constitutional and statutory provisions that are relevant to the situation.

4. Creating Working Partnerships To Oversee Pandemic Preparedness Planning and Responses

Public health authorities can potentially play an important role in supporting court operations throughout the pandemic. Clinicians can advise courts on appropriate prophylactic measures to protect court personnel. Public health staff can provide a bridge to emergency management personnel involved in issuing identification to allow movement during curfews and other travel

restrictions. There also may be a need to access medications and vaccines for essential court personnel.

IV. CONSTITUTIONAL AND LEGAL QUESTIONS

Will court personnel catch the flu? No part of the justice system has immunity to an outbreak of pandemic flu, including its judges. As the justice system component historically focused on maintaining its independence and separation from other justice and executive agencies, the judiciary traditionally has not engaged in planning discussions with other branches of government nor discussed cases with litigants or the public. As a result, when asked to engage in a multiagency planning effort with parties who may appear before the judge, judges may be concerned about maintaining ethical standards and the appearance of impartiality.

In the case of a pandemic, however, it is vital to have the courts available and the judges prepared to effectively and fairly adjudicate whatever cases the emergency may generate. This requires a judiciary prepared and able to balance an individual's liberties with the community's public health interests to protect the U.S. Constitution and preserve the rule of law.

Substantive Legal Issues

Judges, regardless of their jurisdiction, should have a basic familiarity with public health law, including an understanding of the state's constitution and public health law and the applicable rules of procedure and evidence. Judges unsure of the jurisdiction of their court to hear petitions for isolation and quarantine, as well as other public health requests for orders, should review where and when they might have or obtain jurisdiction over such public health petitions.

Specific Considerations for Judges

1. Jurisdiction, Venue, Court Rules, and Public Health Authority

Every day, in courtrooms around the United States, judges hear cases that present no question of jurisdiction. Yet in a public health emergency the court's jurisdiction may be challenged for a variety of

reasons, including proper venue for the hearing or the laws being unfamiliar to the court. The nature of the emergency also may present issues relating to health and security threats, intergovernmental relationships, and scientific evidence in hearings that are anything but routine. In addition, in many jurisdictions the public health authority may be a relatively unknown entity.

Unlike other cases judges usually hear, questions of jurisdiction will arise in cases relating to public health emergencies. The first rule for any judge in these circumstances is to determine if the court has subject-matter jurisdiction. Judges will want to (1) determine whether this is an emergency and (2) whether the state or federal government is the primary actor. They also may need to address other issues, including the following:

- What are the protections provided by the U.S. Constitution for liberty interests in public health emergencies?
- What are the relevant provisions of the state constitution that may govern judicial decisions during a pandemic?
- How will venue be determined?
- What are the health authorities in the state, and what are their powers? From where are their powers derived?
- What are the statutory requirements for the health authorities' administrative processes?
- How will the local and/or state court trial and procedural rules control the processing of public health cases? What court administrative rules and rules of evidence apply to public health cases?
- What are the protections for an individual's liberty and privacy interests when the person has committed no crime but the state wants to enforce isolation, quarantine, or other public health orders against that person?

2. Government Actions To Ensure Public Health

Recognizing the critical role of the government in protecting public health, the court must take into

consideration constitutional protections for liberty and property interests of residents in the community. In determining the proper level of protection of these interests, the court must balance the interests against the health threat to the community.

The court must weigh constitutional protections for liberty and property interests of residents in the community.

The following list suggests some of the types of challenges courts may be asked to rule on. These matters are discussed in greater detail in Section V:

- Orders against the person.
- Procurement of physical evidence from an individual's body.
- Medical testing.
- Mandatory treatment.
- Writs of *habeas corpus*.
- Searches and inspections of premises.
- Public nuisances.
- Government takings.
- Regulation and closure of businesses.
- Animal welfare.
- Challenges to vaccine distribution based on a priority system.

3. Medical and Other Private Information Collection

Courts, as well as medical care providers, are just beginning to learn how to protect health privacy with electronic recordkeeping methods. The issue of privacy versus the need for data to protect others from an infectious disease will likely pose evidentiary challenges for medical testimony, as will how to manage court records. Some possible issues that may arise include the following:

- What administrative processes for the court's recordkeeping system are in place to protect the privacy of individuals against whom public health orders are sought?
- How will the privacy of nonparties be protected?
- How will the court maintain the confidentiality of evidence that describes disease investigations and contact tracing? What orders will the court enter with regard to sexual partner notification?

- Will the court issue “duty to warn” notices?
- How will the court handle agreements for disclosure of medical information with medical care providers, who are governed by the Health Insurance Portability and Accountability Act (HIPAA)?
- What are the state privacy laws, and how do they regulate disclosure of medical information?
- What are the state’s laws protecting public access to public records?

4. Operation of the Courts Amid Public Health Threats

By their very nature courts must be open to all members of the public. Nevertheless, most courts have instituted screening mechanisms to identify people seeking entry who pose public safety threats. In the event of a pandemic, people seeking entry to the courthouse who have been exposed to the virus may pose an equally serious threat to public health. What mechanisms can courts use to reduce the risks of exposing the judicial workforce and all who use the courts to such a public health threat? Issues to plan for include the following:

- Will or should the court allow individuals who pose a potential threat to public health to appear before court?
- Can someone appear by means other than in person?
- Can the court limit the access the press and other members of the public have to the courtroom?
- What are the statutory and constitutional requirements for the court’s location?
- Will the court be able to empanel juries, and if so, be able to implement procedures to help them avoid becoming infected?
- Can the court combine proceedings when numerous people are in similar circumstances?

5. Courts During a State of Emergency

The constitution and implementing legislation in most states require that the court system operate on an ongoing basis. Only recently have a few states authorized the temporary closure of a local court in an emergency; in those instances the closure has been contemplated as temporary and of very brief duration. Most court COOP planning has included the identification of mission-critical functions (i.e., functions that the court is constitutionally and/or statutorily required to perform) and the timeframe for their performance. For example, such planning would include the mission-critical functions, in priority order, that must be performed given a disruption of 1 day, a disruption of more than 1 day but less than 1 week, and a disruption of more than 1 week but less than 1 month. Similar to COOP planning, a pandemic entails identifying how mission-critical functions of the court can be performed. However, it also requires that the court be able to address the issues that arise as a result of the pandemic, taking into consideration the potential protracted period of disruption.

As a start, judicial system officials should address the following:

- What are the requirements under the state constitution and the state statutes for declaring a state of emergency?
- What effect does a declaration of emergency have on court operations?
- What are the immunities of government actors during an emergency?

V. COURT OPERATIONS DURING A PANDEMIC OUTBREAK: PROPOSED APPROACHES

Without question a pandemic will significantly impact substantive and procedural aspects of the case process. Local court officials need to anticipate the range of issues and situations that may arise and delineate in advance how they will be addressed. These include the potential impact on constitutional rights, including the right to have a speedy trial, have a jury trial, and confront witnesses; sentencing options, particularly if the local jail or prison is full of

infected inmates; and the constitutional and/or statutorily prescribed functions the court must perform without interruption.

The following discusses some of the most significant implications of a pandemic on court operations:

1. First Things First—Reality Check

Courts are not like ordinary businesses, as they must continue operating to maintain the rule of law and ensure an orderly society under any circumstances. Criminal laws must continue to be enforced, personal rights and liberties must continue to be protected, cases must be adjudicated, and controversies resulting from pandemic conditions must be addressed.

2. Operational Issues—Workload Implications

Loss of staff/impact of quarantine and isolation on court facilities and operations. As previously noted, it is estimated that up to 40 percent of staff will be rendered unavailable by the impact of a pandemic.¹⁵ The majority of those affected will be sick, some will be taking care of ill family members, and some may be subject to containment measures that will make reporting for work unlawful. Whatever the reason, this degree of workforce reduction will cut across all lines of authority within the court structure and affect all areas of operation. As planning for such a situation will be difficult—since it is impossible to predict which employees will be absent—it is necessary that court planners assume that all areas of responsibility will be impacted and develop plans that address essential matters only. Such a planning effort entails a detailed examination of the constitutional and statutory requirements under which the court functions, as well as a review of lines of authority within the court staff and the determination of which staff positions are critical to the court's mission.

Next, lines of succession should be established for continuity of essential operations. Orders designating succession of key staff members should be clearly set forth, and cross-training of employees should be an ongoing process.

It also is likely that absenteeism will be a problem within the court's leadership. Accordingly, it is necessary that clear lines of authority be established

as a part of the emergency plan the court adopts. Presiding judges should issue the appropriate orders to establish who has authority for administrative management in an emergency situation and who should make decisions regarding the closing or relocation of court facilities, the reassignment of staff, the reallocation of resources to essential activities, and other critical matters relating to court administration.

Containment measures may limit employees' abilities to get to work or even restrict their access to the court facility itself. In such an event, the court's pandemic emergency plan should consider alternative methods of accessing those employees' expertise and abilities. Computers, along with fax machines and other telecommunication, should be considered to allow staff members to function offsite.

Disruption in supply of necessary equipment and materials. One of the less obvious impacts of a pandemic on the court system will be a disruption in its receipt of supplies, services, and equipment maintenance. This is due to the impact on those businesses and agencies that supply the court with necessary services and supplies. Such a breakdown requires that courts undertake a comprehensive review of outside services and stockpile priority items in advance to prevent disruption of essential court services. In addition, courts also should review their list of suppliers and seek alternative sources of priority items to help prevent interruption during a pandemic.

Inability of other justice agencies to support judicial functions. The court must concern itself with the difficult issue of a lack of support from agencies that are essential to court operation. The number of available staff from prosecutor, public defender, and probation and parole offices; child protective services; and jail and correctional institutions is likely to be severely reduced during a pandemic. These and many other agencies contribute to the day-to-day operation of the court, and the degree of disruption in their function must be considered in establishing a court emergency plan. It is essential these agencies be consulted during the pandemic planning process to increase the likelihood that at a minimum essential support will continue during a pandemic.

Restriction of court access. In the event of a public health emergency, public health officials or the court may deem it necessary to restrict public and even court user access to the court facility to prevent the spread of disease. The court should carefully consider the nature of such restrictions, availability of other means of assuring court proceedings, and need for those in the court process to attend court events. Employing technology such as televised court proceedings, public access to computerized information systems, and simultaneous court transcription to provide participants and the public access to court proceedings may help remedy this issue. The court also should review alternative court sites and other means by which to communicate with court participants.

Vital records. In addition to the need to preserve the integrity of existing records and those created in the course of ongoing court activities, the pandemic may create recordkeeping and handling needs. These needs should be recognized and planned for, as the manner in which the court deals with such matters will affect the ability of the health care system to cope with the crisis. For example, it is likely that the court will be asked to issue orders regarding emergency health needs, including quarantine or isolation orders. The court should develop the necessary processes to ensure the ability to handle such orders efficiently and effectively, including working with the sheriff's department or other process handling agencies as necessary.

3. Communication Within the Court

It is likely that normal lines of communication within the court also will suffer interruption or confusion during a pandemic. The court planner should anticipate the problems of keeping staff and leadership of the court informed during the crisis. The court may need to conduct business from disparate locations, some of which may be unusual and not well-configured for court operation. In these situations, communication between staff, judges, and court leadership will be critical. Outside agencies supporting the court's operation, such as prosecutors, public defenders, private counsel, corrections, and parole and probation staff may themselves be in a state of disruption. Accordingly, lines of communication within the court must be flexible, taking full advantage of modern technology including

teleconferencing. Courts should review their internal and external lines of communication and develop alternative and flexible plans to assure continuity during a pandemic. A number of courts already have established special call-in telephone numbers in the event of an emergency, as well as special web sites to facilitate communication with judges and court staff.

4. Ongoing Information to the Public

Emergency plans for continuation of court business must be effectively communicated to the public, taking into account that the typical manner of communication and the ability to get the word out will likely to be disrupted during a pandemic.

To minimize confusion and misinformation, it will be crucial that courts have clear lines of internal communication and a plan for public information in place. Such public information should be generated by court leadership and consistently be communicated by a single person on behalf of the court. It also is important to establish a line of succession for the position of court spokesperson.

Public information should be consistently communicated by a single person on behalf of the court.

5. Surge Workload

Additional demands will be made of the court arising out of the pandemic situation itself. This increase in court business due to the public health crisis may be referred to as "surge workload." The surge workload can include matters arising directly and indirectly from the pandemic emergency.

Primary matters arising from a pandemic. The bulk of the surge workload will likely arise from matters directly relating to the pandemic emergency. To manage such a health crisis, various government actions will be necessary—many of which will impact private citizens in ways that may stimulate court action. For example, the ordering of containment measures may cause filings by those who feel aggrieved or believe that such orders are being arbitrarily imposed. Government efforts to control public activities also may impact basic rights such as freedom of association, freedom of speech, and right to counsel. These restrictions on behavior also are likely to precipitate court activity to which

the court, already hampered by staff shortages and the other difficulties, will be required to respond.

Some of the claims that will likely be made as a result of the pandemic emergency are listed below. In all of these cases, the court planner should identify how such matters will be handled during the possibly prolonged course of the pandemic.

- **Allegations of public nuisance.** Public health authorities may attempt to alleviate conditions deemed hazardous by declaring them public nuisances, at which time the court will be obligated to determine the validity of such claims and issue and enforce orders of abatement. Courts should anticipate that large numbers of such cases will be brought forth during a pandemic and, in turn, identify the court personnel and procedures that will be necessary to handle the cases as promptly and expeditiously as possible.
- **Orders of quarantine.** Depending on the jurisdiction or general legal practices in localities, health authorities may be required to seek court approval for orders of quarantine or isolation or the closing of buildings or locations. Court planners should review local constitutional and statutory law, particularly those provisions pertaining to public health, to determine the possible impact of such cases on the court.
- **Writs of *habeas corpus*.** It is likely that some individuals will object to the application of orders of quarantine or isolation restricting their liberty and freedom to move around at will, associate with others, or return home or to work. The usual recourse for such governmental action would be to file writs of *habeas corpus* to challenge the legality of the restrictions. In a pandemic, orders of quarantine or isolation will likely affect large numbers of people. In planning for the effects of a pandemic, the court should develop mechanisms and methods for dealing with writs of *habeas corpus* cases in an expeditious and reasonable manner, including consolidating similar cases and holding joint proceedings.

Depending on each state's law, the court may be required to appoint counsel for indigent people

seeking *habeas corpus* relief to challenge orders or the courts and plan for such accordingly. Court planners also should remember that the usually designated attorneys may not be available; thus, they should develop backup capability, including special appointment of members of the private bar for this purpose, with agreements made with the organized bar and/or individual attorneys in anticipation of such a contingency.

The bar should be consulted during the planning process wherever it appears that client representation may be impacted during the pandemic. It would be worthwhile to establish a court-bar liaison committee if such a group does not already exist.

- **Searches and seizures.** The law of search and seizure may be seriously tested in the event of a major health emergency; for example, entry could be made into suspect areas to determine health risks. Orders of quarantine or isolation of individuals might be considered seizures for Fourth Amendment purposes. Challenges to health authorities' determinations and actions may be made on search-and-seizure grounds. In anticipation of these challenges, courts should review their constitutional and statutory authority regarding search and seizure issues.
- **Emergency detention orders.** In most states, public health authorities have the ability to issue emergency orders of detention or isolation of individuals or premises based on perceived health risks to the general public. Under most of these statutes, such orders are subject to court review and approval so they may remain in place for a limited amount of time. Court planners should review the public health laws in each jurisdiction to determine the authority of health officials to enter such orders, the limitations on such authority, and the requirements for court review. This review should be done with an eye to the establishment of court policies and procedures to provide efficient and effective handling of requests for review, while providing strict adherence to legal requirements.

In addition to issuing the previously mentioned orders, numerous extraordinary actions may be undertaken by governing authorities during the

course of a pandemic. For example, in the interest of public health, it may become necessary to actually *confiscate* private property, such as potentially infected, privately owned fowl flocks so they can be destroyed or real property for use as governmental facilities in dealing with pandemic-related activities.¹⁶ These actions may give rise to the notion of a public taking similar to condemnation under eminent domain theory pursuant to general police powers. Handling the potential volume of such cases may prove challenging for judges and court managers.

Secondary matters arising from a pandemic. In addition to surge cases arising as a direct result of actions taken during a pandemic, a secondary source of surge caseload may arise. For example, if there is a high mortality among wage-earning adults, a large increase in the need to appoint guardians for children and administer estates might result. Also, if the pandemic creates an economic downturn, then a surge in criminal cases, bankruptcies, marriage dissolutions, and support hearings might follow.

6. Consolidation of Cases

A significant number of the claims referred to above may be brought *en masse*, involving numerous individuals and locations. It is important that the court look at all options and authorities and develop appropriate guidelines to allow for the consolidation of individual claims so cases can be handled as expeditiously as possible.

Court planners should draft case consolidation guidelines, where possible, supported by appropriate legal authorities. These guidelines might allow the court to move *sua sponte* and consider consolidation as a tool in handling large numbers of such cases during a pandemic.

7. Access to Court Facilities and Court Operations During a Quarantine

In considering the implications of a pandemic on court operations, court planners must consider that the court facility itself may be ordered closed or allow only limited public access due to health risks. In such an event, it is possible that judges and staff may be restricted from entry to the normal court facilities or be restricted from leaving the court location. Furthermore, facilities in large urban areas

may have a significant number of employees who rely on public transportation to get to work; assuming such transportation will be adversely affected during a pandemic, a severe disruption of normal court operations will ensue.

Accordingly, court planners must seek facilities in other areas of the jurisdiction where court business can be conducted with as little disruption as possible. In the event the court already maintains more than one facility, contingency plans should provide for moving or dispersing court operations to help avoid human contact. If only one court facility is normally available, court planners should seek alternative sites outside the threatened area, including other government buildings or public facilities such as theaters, warehouses, or office buildings.

If access to court facilities is restricted, the court must consider alternative locations.

8. Other Human Resources Implications

A pandemic outbreak will likely cause other personnel policy and human resource issues involving significant numbers of judicial system employees. Human resource policies relating to emergency sick leave, work-at-home policies, and liability issues will need to be reviewed. Particular attention should be given to:

- Sick leave policies to encourage sick employees to stay home, particularly if their sick leave has been exhausted.
- Employees' refusal to work, unless vaccinated, in a situation in which they are exposed to a public health risk.
- Work-at-home policies, particularly for employees who can perform court functions from a remote location in the event the courthouse is not accessible.
- The court's obligation to its employees regarding provision for vaccines, if available.
- Relevant provisions of union or other employee agreements regarding public health-related issues and other matters such as reassigning employees

to perform essential functions of other positions in the event of staff shortages.

9. Other Essential Justice Agencies During a Pandemic

Clerk of the court. In many jurisdictions, the clerk of the court operates as the administrative arm of the judicial system, with responsibility for filing papers, retrieving documents, managing vital records, and providing courtroom support. Often, the public's primary connection with the court is through the clerk's office. Court planners must work closely with the clerk to assure continuity of vital operations during a pandemic. At a minimum, the clerk's office should provide some method to continue filing and retrieving important documents and provide clerk services to the court so essential court proceedings can continue. The clerk should anticipate that members of the bar or the public may be unable or unwilling to appear in person at the courthouse and thus explore alternative methods of document handling, such as remote electronic filing by computer or fax. They also should prepare procedures that allow courts to conduct essential proceedings without requiring witnesses, parties, and others to appear in person.

Practitioners or the public may be unwilling or unable to appear in person at the courthouse.

The court should review statutory legal requirements, court rules, and case law to determine if any impediments exist to developing such emergency procedures, then work with the legislature and rule makers to address any such conflicts.

Sheriffs, probation, and other community supervision and corrections agencies. Courts depend on sheriffs to provide a multitude of essential services, especially security. The sheriff also may have primary responsibility for protecting individuals in the courts, including prosecutors, defense attorneys, prisoners, offenders, and other members of the public who are in court facilities on a regular basis. To properly protect these individuals during a pandemic, the sheriff may need to reduce access to only essential personnel, restrict ingress and egress to the facility to better control the flow of individuals, or relocate judges and staff to an alternate facility. The sheriff also may need to use technology to provide

for offsite video booking and offsite magistrate or bail hearings.

The sheriff's department, like other agencies, will most likely suffer a significant reduction in workforce during a pandemic and will have to reassign key personnel to maintain vital court operations. Critical functions such as responding to emergency calls for service and the serving of quarantine and isolation orders during a pandemic may significantly deplete the sheriff's available manpower and resources, causing a cascading effect throughout the criminal justice system.

To protect as many individuals as possible and limit liability, the courts and sheriff will need to work closely to develop a plan that addresses all aspects of responding to a pandemic emergency. Such planning measures also should be taken on by prosecutors, indigent defense offices, probation offices, pretrial service agencies, and community corrections offices, as they will likely face similar hardships during a pandemic.

VI. HOW TO PROCEED: A SUMMARY

To ensure a court effectively carries out its judicial functions during a pandemic outbreak, the court will need to plan how it will address all of the issues outlined in this report. As a first step, existing legal authority relating to public health matters should be analyzed to ensure there is adequate legal foundation for any court actions.

The planning process should include the following key components:

- Formation of a planning committee composed of court personnel and stakeholders to ensure that local planning efforts reflect meaningful coordination between the courts and all entities of the local justice system.
- Clear designation of responsibilities for developing the plan and its components.
- A schedule of meetings, with assigned tasks, timeframes, and milestones that clearly define what is to be accomplished and establish the urgency of the effort.

- Review of constitutional provisions and pertinent authority under state law and regulations relating to actions that can be taken in the event of a pandemic outbreak and identification of the legal issues that need to be addressed.
- Consideration of technological and other capabilities needed to continue operations, including possible measures that will need to be instituted to limit face-to-face interactions and rules that will need to be drafted to provide for remote proceedings.
- Establishment of a stockpile of needed supplies and equipment, including sanitation items and routine supplies that may be inaccessible during a pandemic.
- Creation of special management teams to address operational functions and human resource issues and establishment of back-ups for staff who may be absent.
- Education of judicial and other agency staff regarding hygienic and other measures and precautions they should use to reduce the threat of infection and/or its spread.
- Development of internal and external communication components of the plan for meaningful communication within the court and to stakeholders and the public.
- Orientation and ongoing training of all court, justice system, public health, and related agency staff to assure that they understand the intent of the plan and their roles in the event of a pandemic.

Ultimately, a plan's effectiveness during a pandemic will depend on how knowledgeable each participant is about the plan's provisions and his or her respective responsibilities. Judicial training programs that reflect a priority for practical, essential responses to a pandemic outbreak can be very useful in meeting this need. To assist state and local courts and sheriffs' offices in implementing the suggested components provided in this Road Map, BJA has established dedicated technical assistance resources: the Criminal Courts Technical Assistance Project at American

University for court pandemic planning; the National Center for State Courts for general court COOP planning; the National Sheriffs' Association for pandemic planning by sheriffs' offices; the American Probation and Parole Association for pandemic planning by probation and parole agencies; the Police Executive Research Forum, Fraternal Order of Police, and International Association of Chiefs of Police for pandemic planning by law enforcement agencies; and the Association of State Correctional Administrators for planning by corrections agencies.

It also is useful to employ tabletop exercises and other hypothetical situations (see Appendix) to stimulate discussion of scenarios that might occur. Even if a pandemic does not materialize, the plans put together will provide a critical foundation and infrastructure, increasing the likelihood that courts can effectively operate in the face of other types of widespread natural or manmade public health crises.

VII. RESOURCES

The following list of resources directly relate to issues addressed in this publication. The Task Force urges readers to continually review web sites and other information sources to obtain guidance on relevant public health issues and emergency planning approaches pertinent to the courts and justice system.

Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice

The Bureau of Justice Assistance (BJA) has launched a major initiative to support pandemic emergency planning at the local and state levels among courts and other justice system agencies. BJA has established a web site for courts and other justice agencies, which provides links to pandemic planning issues and resources and information about who to contact for related training and technical assistance services—free of charge—from BJA training and technical assistance providers. The web site is updated regularly.

www.ojp.usdoj.gov/BJA/pandemic/pandemic_main.html

Centers for Disease Control and Prevention, U.S. Department of Health and Human Services (HHS)

The Centers for Disease Control and Prevention (CDC) web site offers a wealth of information regarding pandemic influenza, much of which is

designed for use in the medical community. To access any of this information, simply search “pandemic flu” on the CDC web site. HHS also manages Pandemicflu.gov, which provides the latest materials on pandemic influenza.
www.cdc.gov, www.pandemicflu.gov

Criminal Courts Technical Assistance Project, American University

The BJA-funded Criminal Courts Technical Assistance Project (CCTAP) serves criminal courts and related judicial system agencies. It offers a range of free and cost-share services, including onsite consultation by senior practitioners; workshops for judges and court and justice agency personnel; dissemination of publications; and office-based assistance, including offsite review of documents/plans by consultants and staff.
<http://spa.american.edu/justice/ccta.php>

National Strategy for Pandemic Influenza, Homeland Security Council (November 2005)

The *National Strategy for Pandemic Influenza* is an outline for federal government plans to prepare for, detect, and respond to a potential pandemic outbreak. The strategy is based on three pillars: Preparedness and Communication, Surveillance and Detection, and Response and Containment.
www.whitehouse.gov/homeland/pandemic-influenza.html

The *National Strategy for Pandemic Influenza: Implementation Plan*, released in May 2006, describes numerous critical actions needed at all levels to address the threat of a pandemic outbreak. The document is organized into a series of chapters that address pandemic planning from various perspectives to facilitate continuity of government and private sector operations and activities. Chapter 8, “Law Enforcement, Public Safety, and Security,” offers the most relevant information on pandemic preparedness in the courts.
www.whitehouse.gov/homeland/pandemic-influenza-implementation.html

Pandemic Influenza Tabletop Exercise Package, U.S. Department of Health and Human Services

This tabletop exercise package provides states and local jurisdictions with tools to help plan for a pandemic influenza. Exercises serve to identify

where plans may need to be refined or modified, leading to increased preparedness.
www.hhs.gov/nvpo/pandemics/tabletopex.html

Public Health Emergency Law Training, Centers for Disease Control and Prevention

CDC’s Public Health Law Program and Coordinating Office for Terrorism Preparedness and Emergency Response have developed a training course on public health emergency law. The training program features six PowerPoint lectures for professionals in public health and emergency management organizations.
www.2a.cdc.gov/phlp/phel.asp

Business Continuity Management Mini-Guide, National Association for Court Management (June 2006)

The *Business Continuity Management Mini-Guide*, published by the National Association for Court Management, addresses a range of issues to facilitate continuity of operations in the event of a disaster. A section on planning specifically for avian flu and other pandemics is included.
www.nacmnet.org/pubsorderform.pdf

State Resources

A number of state courts are devoting special segments of their web sites to pandemic emergency preparedness. For example, Florida has developed a comprehensive, court-specific plan to deal with a potential pandemic outbreak.
www.flcourts.org/gen_public/emergency/bin/panflu_strategy.pdf#search=%22Florida%20Court%20Pandemic%20Plan%22c

VIII. ENDNOTES

1. Avian (or bird) flu is caused by influenza viruses that occur naturally among wild birds. The H5N1 variant is deadly to domestic fowl and can be transmitted from birds to humans. No human immunity or vaccine is available.

Pandemic flu is a virulent human flu that causes a global outbreak—or pandemic—of serious illness. Because there is little natural immunity, the disease can spread easily from person to person. Currently, there is no pandemic flu.

Seasonal (or common) flu is a respiratory illness that can be transmitted from person to person. Most

people have some immunity, and a vaccine is available. See www.pandemicflu.gov.

2. *National Strategy for Pandemic Influenza: Implementation Plan*, Homeland Security Council, May 2006, see www.whitehouse.gov/homeland/pandemic-influenza-implementation.html.

3. Ibid.

4. *National Strategy for Pandemic Influenza*, Homeland Security Council, November 2005, see www.whitehouse.gov/homeland/pandemic-influenza.html.

5. See the special web site BJA developed for pandemic emergency planning, including materials presented at the symposium, at www.ojp.usdoj.gov/BJA/pandemic/pandemic_main.html.

6. There were three waves in the 1918 pandemic. See *The Influenza Pandemic of 1918*, Molly Billings, Stanford University, February 2005 (<http://virus.stanford.edu/uda>).

7. See www.pandemicflu.gov/general, “General Pandemic Information.”

8. Billings, February 2005.

9. Florida State Courts Strategy for Pandemic Influenza, *Keeping the Courts Open in a Pandemic*, see www.flcourts.org/gen_public/emergency/bin/panflu_strategy.pdf#search=%22Florida%20Court%20Pandemic%20Plan%22c.

10. An impacted court may not be able to turn to nearby locations or neighboring court systems for assistance with supplies, equipment, or staff shortages. As a result, planning will need to include preparation for a greater level of self-sufficiency.

11. Isolation refers to the separation of people who have a specific infectious illness from those who are healthy and whose movement is restricted to stop the spread of that illness. People in isolation may be cared for in their homes, in hospitals, or in designated health care facilities. In most cases, isolation is voluntary; however, local, state, and federal government have basic authority to compel isolation of sick people to protect the public.

Quarantine refers to the separation and restriction of movement of people who, while not yet ill, have been exposed to an infectious agent and therefore may become infectious. Quarantine of exposed people is a public health strategy that is intended to stop the spread of infectious disease. Quarantine is medically very effective in protecting the public from disease. See www.cdc.gov/ncidod/dq/sars_facts/isolation_quarantine.pdf.

12. *Public Health Law*, 3rd Edition, James A. Tobey, 1947, New York, NY: The Commonwealth Fund, pp. 11, 58.

13. See *The Sanitarians*, John Duffy, University of Illinois, 1990.

14. See *State Public Health Law—Assessment Report*, Lawrence O. Gostin and James G. Hodge, Jr., Center for Law and the Public’s Health at Georgetown and Johns Hopkins Universities, January 23, 2002, p. 16.

15. *National Strategy for Pandemic Influenza: Implementation Plan*, May 2006.

16. The confiscation could be the taking of hospital facilities or private vendors’ food and medical supplies. The state has a history of cases determining how much compensation owners are entitled to receive because of a government taking. Indiana’s bench book includes some statutory language applicable to confiscation of private property:

Right to Inspect Dwellings. The Indiana State Department of Health (ISDH), local boards of health, and some city boards of health may make sanitary and health inspections to ensure public health and safety. IND. CODE §§ 16-19-3-1 (ISDH general powers), 16-19-3-7 (ISDH inspection regarding causes and sources of disease), 16-20-1-21 (local board sanitary and health inspection), 16-20-1-23(a) (local board inspection regarding causes and sources of disease), 16-20-4-18 (city board sanitary and health inspection). In addition, a municipal building inspector may exercise all inspection powers with regards to dwelling as are granted in the applicable local ordinance(s). IND. CODE § 16-41-20-2.

Right to Inspect Public and Private Land for Pest and Vectors. A local health officer may enter upon private

or public land at any reasonable time to inspect for pest and vector breeding grounds that have adverse health significance to humans, domestic animals, and/or livestock. IND. CODE § 16-41-33-6(b)(2).

APPENDIX

Tabletop Exercises: Hypothetical Scenarios Relating to the Impact of Public Health Emergencies on Court Administration

The seven scenarios below identify potential situations courts may encounter in the event of a pandemic emergency. Each scenario focuses on substantive legal and administrative issues that may arise and would require response by the courts and other agencies involved in the judicial process.

Scenario 1: Juvenile Detention Centers

A male juvenile, age 15, is charged with battery and robbery. He has been held at a juvenile detention center for 16 hours and is scheduled for an initial hearing in 1 hour. He says he does not feel good, but his complaints are nonspecific. He does not appear to be running a fever. He was taken into custody from his home, where his large, extended family resides. The family has a few chicken coops near the house and a number of dogs.

Questions to answer:

- What policies are in place at the detention center to determine the state of a detainee's health at the time of arrival or before joining the inmate population?
- How closely do the practices follow the policies?
- What processes are in place to monitor and check on the health of anyone who has been in close physical proximity to a new arrival?
- What is the response to complaints from a detainee about "not feeling so good"?
- At what point are the new arrivals put into contact with other youth?
- How (or would) your response differ if:
 - There is an avian flu outbreak in your area?
 - The extended family includes recent arrivals from countries with avian flu outbreaks?
 - Avian flu has reassorted and transmits human to human?
- What are the detention center's policies for protecting staff from avian flu and other infectious diseases?
- What plans are in place to hold detainees in the event of isolation and quarantine orders resulting from a pandemic?

Scenario 2: Court Clerk and Staff

It is the middle of January, and it is snowing outside. Clients in the clerk's office are sneezing and blowing their noses—a scene typical of this time of year. Suddenly, the county health officer enters the

office, announces that it looks like there's an avian flu, and says he is seeking orders of isolation for two non-English-speaking people who appear to have a very serious case of avian flu.

Questions to answer:

- Do you ask if the health officer has seen the affected individuals and, if so, did he wear a mask?
- Is the health officer exposing you or staff to the infectious disease?
- Should the officer, you, and any of your staff who came into contact with him be quarantined?
- Do you ask where the affected people are being treated? If they are still at home, is the county health officer seeking enforcement of quarantine orders for the remainder of their households?
- Does the sheriff have effective policies and practices in place to serve orders during an outbreak to protect deputies from exposure to the infectious disease?
- How do you set the petition for enforcement of health orders for hearing?
- How will notice be served?
- Where will the hearing be held?
- Are the health petitions sealed?
- How is the personal health information of the respondents protected?
- Are names and addresses protected from public review?

Scenario 3: In the Court Room

Joe, a repeat offender, is sitting next to his attorney at his preliminary hearing. The judge orders Joe released on his own recognizance, after which time Joe tells his attorney that he sure is glad to get out jail because the guys in his cell were really sick. Besides, his wife and kids need him back at work washing dishes at the local steakhouse. Three days later, Joe's attorney tells you that Joe is very ill, has been hospitalized, and may die. Later that day, Joe dies as a result of a flu strain with a high mortality rate—the same flu strain, it turns out, as his cellmates, who also died. In turn, the health officer starts contact tracing.

Questions to answer:

- What court policies are in place to protect the attorneys from exposure to infectious diseases?
- What plans has the local bar—in consultation with the court—made to avoid exposing attorneys to an infectious disease in the first days of the outbreak?
- If there is an outbreak in the jail or prison, should the judge inquire about defendants' health before releasing them on their own recognizance?
- Should all preliminary hearings be conducted via video conferencing?

- Should the courts seek special air handling systems and filters to decrease cross contamination by litigants?
- How should the judge respond if told that Joe could not be released because the jail Joe had been held in was under quarantine?
- What rights do prisoners have if the jail is quarantined?

Scenario 4: All Branches of Government

A Capitol County Court with proper jurisdiction issues a mass quarantine order for Capitol County per the state health commissioner's request. It appears that avian flu has broken the human-to-human barrier, a particularly big concern for the county, given that many of its residents house a large number of fowl in close proximity to humans.

Questions to answer:

- Are the Governor and his or her staff subject to such an order?
- How will the Court of Appeals convene to hear the appeal of the order?
- How will the Supreme Court and the Administrative Office of the Courts continue to function and issue the necessary orders and instructions?
- To what extent will federal facilities obey the order? For example, would the order require anyone landing at the nearby airport to be held until the quarantine ended?
- What will the legislature do if it is in session? Are legislators subject to court orders that restrain their activities while in session?

Scenario 5: Presiding Judge and Court Administrators

News has broken that avian flu can now be transmitted from human to human and even in its mutated form has retained its characteristic high mortality rate. As court administrator, judges and court staff really depend on you to facilitate court operations—including pandemic planning.

Questions to answer:

- What policies are needed, and who should write them?
- What supplies should be purchased?
- Have appropriate masks been purchased for each employee?
- What vaccinations are required to work in the court?
- If available, can flu medications be obtained for staff and judges?
- What are the leave policies for illness?

- What are the emergency staffing plans in the event of illness?
- What provisions are made for employees with chronic conditions such as asthma?
- Have health experts been identified to advise the court on the transmission of infectious diseases and how to protect the judges and staff?

Scenario 6: Procedure and Evidence

The health commissioner is seeking a quarantine order for those who live in identified sections within a large town.

Questions to answer:

- How will notice be given to those against whom the order is being sought?
- How will the judge and staff be protected from exposure at hearings?
- What is the standard of proof?
- What evidence will be required to make such an order, and where will the physical evidence be safely secured?
- How will the qualifications required to serve as an expert be determined?
- What is the court's role in ensuring quarantined citizens are given adequate food, shelter, and medical care?
- How will the court know what provisions should be made and whether they are realistic?

Scenario 7: Enforcing an Isolation Order from Another Jurisdiction

Mr. Business has been traveling all week and is looking forward to getting home. His daughter has a big ball game, and he can't wait to treat the team to ice cream—win or lose. His plane lands, but it does not taxi to the terminal. Instead, the plane stops; steps are pulled up to it, and a number of people in moon suits enter the plane and inform the passengers that a person who was diagnosed with avian flu has violated an isolation order and is on the plane.

The order for isolation is from another jurisdiction. The allegedly ill person says he did not receive a notice of hearing, nor was he provided an attorney. In response to this emergency, the county health officer has issued an order of quarantine for the nondiagnosed passengers. However, no orders of quarantine have been issued for the crew because they are scheduled to continue the flight to another city.

Questions to answer:

- How enforceable is the order, particularly if the allegedly ill person says he received no order of quarantine and was not provided an attorney?

- What authority does the county health officer have to issue an order of quarantine for nondiagnosed passengers and the crew?
- What procedures are in place for issuing such a quarantine?
- Who will represent the father so he can see his daughter play ball?
- Who will represent the airline?
- Who will represent the allegedly ill person who is on the plane?

NOTES

Bureau of Justice Assistance Information

For more indepth information about BJA, its programs, and its funding opportunities, contact:

Bureau of Justice Assistance

810 Seventh Street NW.
Washington, DC 20531
202-616-6500
Fax: 202-305-1367
Web site: www.ojp.usdoj.gov/BJA
E-mail: AskBJA@ojp.usdoj.gov

For information about BJA-funded training and technical assistance in support of pandemic planning, contact BJA's partner:

Criminal Courts Technical Assistance Project

Joseph A. Trotter, Jr. or Caroline S. Cooper
Justice Programs Office, School of Public Affairs
American University
4400 Massachusetts Avenue NW., Brandywine, Suite 100
Washington, DC 20016
202-885-2875
Fax: 202-885-2885
Web site: <http://spa.american.edu/justice/ccta.php>
E-mail: justice@american.edu

