

BRIEFS

2019-20 JUDICATURE EDITORIAL BOARD

DAVID W. ICHEL, CHAIR
Arbitrator-Mediator-Special Master,
X-Dispute LLC (retired partner, Simpson
Thacher & Bartlett LLP)

JUDGE J. MICHELLE CHILDS
U.S. District Court, District of South Carolina

JUSTICE CHRISTINE M. DURHAM
Utah Supreme Court (retired)

BRANDON L. GARRETT
L. Neil Williams, Jr. Professor of Law,
Duke Law School

MITU GULATI
Professor of Law, Duke Law School

CHIEF JUSTICE NATHAN L. HECHT
Texas Supreme Court

JACK KNIGHT
Frederic Cleaveland Professor of Law and
Political Science, Duke Law School

MARGARET H. LEMOS
Robert G. Seaks LL.B. '34 Professor of Law
and Senior Associate Dean for Faculty &
Research, Duke Law School

MARIN K. LEVY
Associate Professor of Law, Duke Law School

ALAN MANSFIELD
Shareholder, Greenberg Traurig LLP

DARRELL A.H. MILLER
Melvin G. Shimm Professor of Law,
Duke Law School

JUDGE ANDREW J. PECK
Senior Counsel, DLA Piper
(former U.S. Magistrate Judge,
Southern District of New York)

JUDGE ROBIN L. ROSENBERG
U.S. District Court, Southern District of Florida

**JUSTICE PATRICIA TIMMONS-
GOODSON**
North Carolina Supreme Court (retired)

JUDGE DON R. WILLET
U.S. Court of Appeals for the Fifth Circuit

from THE NATIONAL CENTER FOR STATE COURTS



Preparing courts for a pandemic

As the coronavirus emerged around the globe early this year, it quickly began to affect every facet of society and government, including state courts. Unlike in prior instances of mass illness — such as the Spanish flu in 1918, which forced state courts to close for weeks on end — courts can rely on lessons learned as they develop and implement emergency plans.

Planning for legal issues

In 2016, the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA), with the support of the State Justice Institute, produced *Preparing for a Pandemic: An Emergency Response Benchbook and Operational Guidebook for State Court Judges and Administrators*. The document focused on both the legal ramifications associated with pandemic and public health in general. Among the recommendations issued:

- State judges should understand state and federal roles in the area of public health. The federal government has tradition-

ally played a limited role in this area, with public health deemed to be under the purview of state government. In *Jacobson v. Massachusetts* (1905), the U.S. Supreme Court upheld a Massachusetts state law requiring mandatory vaccines for smallpox, emphasizing that “[t]he safety and health of the people . . . [are] for [the] Commonwealth to guard and protect. They are matters that do not ordinarily concern the National Government.” *Jacobson v. Massachusetts*, 197 U.S. 38 (1905).

- Judges should know the role of the executive branch in public health.
- Judges should anticipate issues related to searches, seizures, and other government actions.
- Judicial proceedings regarding limitations on individual liberties and the rights of petitioners will likely occur.
- State statutes and regulations vary widely in the area of public health. For example, while managing public health may traditionally be the executive branch’s

job, the specifics of that job, the limits of the executive's authority, and the level of that authority (state or local) differ from state to state.

In addition, many of these statutes date back to a time when tuberculosis and similar ailments were the primary concern of large-scale public health. Because these laws tend to be older and, thankfully, rarely used, judges with decades of experience on the bench may not even be aware of their existence. For that reason, it's highly recommended that each state develop and maintain its own benchbook, including state-specific statutes and caselaw, and distribute it to all state courts.

With the U.S. outbreak of the coronavirus in early 2020, many states moved quickly to inform their bench. When the *Preparing for a Pandemic* report was developed in 2016, several states had already created public health or pandemic benchbooks, and several more developed books after the report was published. That meant that many state-level judicial leaders were able to quickly update and distribute existing benchbooks to address the emerging coronavirus crisis.

Planning for managerial and administrative needs

At the time of this writing, there have been no legal challenges associated with a quarantine order by an executive branch entity, but state courts have been confronted with staff ailments and a correlated impact on operations. Because courts are a central location where large numbers of people congregate on a regular basis — and most courthouses are multi-purpose and include other government offices and operations — many courts

Many of these statutes date back to a time when tuberculosis and similar ailments were the primary concern of large-scale public health. . . . For that reason, it's highly recommended that each state develop and maintain its own benchbook, including state-specific statutes and caselaw, and distribute it to all state courts.

have been addressing questions of self-quarantine, the ability to close court proceedings or clear a courtroom after coughing in the gallery, and concerns from prospective jurors or others. Among those efforts to date:

- The Rhode Island Chief Justice and state court administrator sent emails to staff with information on how to prepare for the coronavirus after reports indicated some staff were under self-quarantine.
- The Georgia Court of Appeals has plans in place to operate almost entirely remotely for extended periods of time.
- Hawaii's judiciary posted information online and issued a press release urging people who were being called for jury duty or a court date to call the court if they thought

they might be ill. Many states quickly followed suit.

- Puerto Rico's judiciary used its social media to send out information from the Centers for Disease Control.
- Many state judiciaries created dedicated webpages to address both public and staff concerns about the coronavirus and to provide updated information on court operations.
- States activated existing emergency management or continuity of operations groups. Florida Chief Justice Charles T. Canady said courts in that state went into a "watch and prepare" mode that included convening the state's Court Emergency Management Group.
- Several states have held judge-specific online training and updates to prepare court staff and to assist judges who are seeing legal challenges connected to the virus and containment efforts.

National monitoring efforts

In early March, the National Center for State Courts (NCSC) hosted a Facebook live event featuring Nora Sydow, a principal court management consultant who served as staff to the CCJ/COSCA 2016 Pandemic and Emergency Response Task Force and project director for the 2019 CCJ/COSCA National Pandemic Summit. The discussion examined historical developments in public health and pandemics that relate to the courts and reviewed much of the material noted above. Please visit the NCSC at [ncsc.org/pandemic](https://www.ncsc.org/pandemic) for that presentation and for continually updated information for state courts.

– **WILLIAM RAFTERY** blogs about state legislation and courts at [gaveltogavel.us](https://www.gaveltogavel.us).

