

# Jury News

PAULA HANNAFORD-AGOR



## AaaaaCHOOO! What's your plan for dealing with the coming flu pandemic?

Flu season is approaching again, and with it we hear increasing media reports about the possibility of an influenza outbreak of pandemic proportions, especially by the H5N1 avian influenza virus (bird flu). International and national agencies have developed sophisticated systems to monitor influenza outbreaks, to minimize the extent of contagion, to respond with medical assistance, and to support and maintain critical health and safety, financial and economic, and other public systems and infrastructures. Yet, the most important linchpin for all of these plans is coordination with state and local governments and community agencies and organizations. Courts obviously play an important role in any local community response.

Many courts have developed "Continuity of Operations" (COOP) procedures to deal with catastrophic events such as natural disasters (e.g., earthquakes, floods, fires) or terrorist attacks. These types of events typically occur suddenly, damaging or disrupting access to court facilities for weeks or even months after the event. A flu pandemic presents a different type of risk to court operations in that it principally affects the health of judges, court administrators, lawyers, jurors, and litigants rather than the actual building in which courts operate. Moreover, the most reliable scenarios for a flu pandemic predict an initial outbreak in the community lasting two to three months and a possible recurrence in a second (or more) outbreak within several months after the initial infection. Nationally, the pandemic could continue for up to 18 months or more until people develop immunity to the virus or public health systems develop effective prevention and treatment options. How should a court maintain jury operations — a decidedly people-intensive aspect of court operations — during a flu pandemic? If your court hasn't already developed COOP procedures for jury operations during a pandemic, maybe it's time to do so.

An important place to start is to understand exactly what a pandemic is and its implications for jury operations. A pandemic is a global disease outbreak for which humans have little or no natural immunity and which spreads easily from person-to-person. The World Health Organization (WHO) has developed an alert system to inform the world about the seriousness of a pandemic. Currently, the WHO Pandemic Alert is at Phase 3 for an influenza alert, which means that a new influenza virus (H5N1) exists to which humans have little or no immunity, but the virus is not easily transmittable from person-to-person. A Phase 6 Pandemic Alert would be the most serious situation, indicating that the virus has mutated to spread easily through human contact or airborne transmission (e.g., coughing, sneezing). Those who are infected can spread the disease before showing symptoms of illness, adding to the spread of contagion.

No one can predict how severe an influenza pandemic will be, but based on the three flu pandemics in the last century (in 1918, 1957, and 1968), experts agree that infection rates could range from 25 to 35 percent of the population and mortality rates could be as high as 2 percent of those who become infected. Normally, the most vulnerable populations will be young children, the elderly, pregnant women, and people with chronic health conditions. In the context of jury operations, one can expect shortages of jury staff as well as prospective jurors who are sick or taking care of sick family members. Although it may be necessary to suspend jury trials for a short period of time during outbreak peaks, constitutional guarantees to a speedy and impartial trial by jury preclude this as a viable solution for the duration of the pandemic. So what problems should a jury manager expect to address during a pandemic, and what are appropriate responses?



## REDUCTION IN JURY YIELD

Certainly the first problem that a jury manager can anticipate is a dramatic reduction in the jury yield due to last-minute calls from jurors who have become ill, who are caring for sick family members, or who are simply too afraid of contagion to report. Also, public transportation may be disrupted, so those who cannot drive to the courthouse may be unable to report. Typically, flu symptoms begin two days after becoming infected, so the court will not have time to mail additional summonses in the event of a juror shortage. Courts tend to err on the side of over-summoning jurors, so many courts may be able to satisfy the demand for jurors even with a reduction in the yield. Some courts may feel more comfortable increasing the number of summonses mailed to prospective jurors, but they should also be prepared to cancel jurors and keep them on standby for use on a future date if necessary.

During a pandemic, a large volume of jurors are likely to ask to be excused. Consequently, courts should be clear on policies and procedures for excusing or deferring jurors due to illness, including who has the authority to excuse jurors and the criteria for doing so. For example, does your court normally require documentation from a health care professional to excuse a juror on medical hardship grounds? Understand that doctors, nurses, and other health care professionals are likely to be overwhelmed by the pandemic and thus are not likely to have time to generate this type of documentation quickly or easily. Indeed, it is possible that only the most seriously ill jurors will have seen a health care professional; others will simply be home in bed trying to recover. How lenient should your court be in accepting undocumented requests to be excused or deferred?

Should your court implement a more lenient excusal policy for populations that are particularly vulnerable to influenza such as elderly, pregnant women, and people with chronic health conditions, even if they are not ill themselves, so they do not risk becoming infected by others at the courthouse? What about those people who live with or come into regular contact with vulnerable populations such as young children? What are the implications of such a policy for fair cross section requirements and random selection requirements in each jurisdiction? How aggressively should the court pursue individuals who failed to appear for jury service due to illness?

Should jurors be excused or deferred on grounds that they are caring for sick family members? Except for states with sole caregiver exemptions, most jurisdictions do not recognize this as a valid reason to be excused from jury service. On the other hand, do you really want to insist that people who may have been infected with the virus report for jury service and expose the rest of the jury pool?

## EFFECTIVE JUROR UTILIZATION TO PREVENT CONTAGION

The issue of who should be excused from jury service due to illness or risk of illness during an influenza pandemic raises the question of the court's obligation to prevent the spread of infection by limiting the opportunity for large groups of people to interact. Much of the current public health strategy to prevent the spread of influenza involves quarantines and isolation (e.g., closing schools, cancelling sports events and other community gatherings). Certainly the court should not be contributing to the pandemic by unnecessarily exposing citizens to possible contagion. In this sense, effective juror utilization — that is, not calling in any more jurors than is realistically needed to select juries — becomes a matter of public health and safety insofar that it limits the risk of unnecessary exposure for everyone.

Of particular importance will be the need to avoid having citizens report for service if the parties intend to accept a plea agreement or settlement rather than go to trial. Obviously, the same would be true for parties



seeking a continuance due to illness of counsel, the litigants, or witnesses. The court should be especially clear with the local legal community that litigants must inform the court of their intent to settle or plea in a timely manner to prevent jurors from reporting needlessly. In fact, some courts may find it more effective to have jurors report later in the day (e.g., after lunch) and retain the morning calendars to accept plea agreements, settlements, and motions for a continuance. For such a policy to be truly effective, there must be very clear communication between jury staff and the individuals courtrooms. It will not work if the judges are informed about the parties' intent but that information is not shared with the jury office in time to inform jurors not to report.

Another consideration for all jury operations is the possibility that the jury office will experience staffing shortages. Jury staff typically interact with more people on a daily basis and often in a more intimate manner (e.g., directly face-to-face rather than separated by Plexiglas or other barriers) than other court staff. It is critically important that those who are ill not come to work until they are completely well. Court management should emphasize the importance of this policy, not only to protect the individual's health, but also that of other court staff and the jurors. Management should also inform judges and courtroom staff about the possibility of delay (e.g., in processing jurors, bringing jury panels to courtrooms) as a result of jury staff shortages.

When a jury selection does begin, the smaller the jury panel, the less likely the risk of infection. A technique that the court may wish to consider is to have each panel report directly to the assigned courtroom rather than to the jury assembly room. This is standard practice in Travis County (Austin), Texas, which reportedly has improved juror utilization tremendously. The net result is that jurors would only be exposed to jurors assigned to that panel, not to the entire jury pool for the day. Another technique is to have jurors report for service on a staggered schedule during the day (e.g., 8 a.m., 10 a.m., noon, 2 p.m.), again limiting the number of jurors congregating in the jury assembly room at any one time. To the extent that jurors are sitting in the assembly room for long periods during the day, the court might consider providing surgical masks and gloves to jurors as additional protection.

During severe outbreaks, the court might consider how it conducts voir dire. For example, would it be possible to send case-specific voir dire questionnaires that jurors complete online or on paper? The lawyers can review the responses and ask the court to summon only those jurors who would survive a challenge for cause or peremptory challenges. Again, this technique limits the risk of contagion by summoning only as many jurors as are necessary to select a jury. To the extent possible, longer trials should be continued, at least until after the peak of the outbreak subsides, to avoid the possibility of extended recesses or even a mistrial if jurors become ill during trial. Judges might also consider impaneling extra alternates.

## RESOURCES

Any COOP procedures implemented to address jury operations during an influenza pandemic obviously should be consistent with state and local response plans. The court should know what those plans entail and how they apply to court operations generally and to jury operations specifically. For those courts that are just beginning to develop COOP procedures, the National Center for State Courts has many resources, including checklists, templates, and samples at its Continuity of Operations Web site at <http://www.ncsconline.org/emp/>. Another resource with particularly helpful information about influenza pandemic and links to federal, state, and local resources is the U.S. Department of Health and Human Services Web site: [www.pandemicflu.gov](http://www.pandemicflu.gov). Best wishes to all of you for a happy and healthy new year.