

PANDEMIC INFLUENZA BENCHGUIDE:

**LEGAL ISSUES CONCERNING QUARANTINE
AND ISOLATION**



2019 EDITION

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**PANDEMIC INFLUENZA BENCHGUIDE
THIRD EDITION COORDINATOR**

Marshall Kapp, J.D., M.P.H.

**PANDEMIC INFLUENZA BENCHGUIDE
FIRST EDITION COORDINATOR**

The Honorable Janet Ferris, Second Circuit

CONTRIBUTING AUTHORS

The Honorable Janet Ferris, Second Circuit
The Honorable Kathleen Kroll, Fifteenth Circuit
Mr. John Ingle, Senior Attorney, Office of the General Counsel, Office of
the State Courts Administrator
Ms. Kristi Bergemann, Staff Attorney, Fourth District Court of Appeal
Ms. Nancy Isenberg, Staff Attorney, Second Circuit
Ms. Susan Faerber, Staff Attorney, Third District Court of Appeal
Mr. Brian Sites, Law Clerk, Publications Unit, Office of the State Courts
Administrator

**PANDEMIC INFLUENZA BENCHGUIDE EDITORS
(2019 edition)**

Marshall Kapp, Professor Emeritus of Medicine and Law, Florida State
University and Founding Director, FSU Center for Innovative Collaboration
in Medicine and Law

(2013 edition)

Marshall Kapp, Director, Center for Innovative Collaboration in Medicine
and Law, and Professor of Medicine and Law, Florida State University

(2007 edition)

The Honorable Robert Benton, First District Court of Appeal
The Honorable Melanie May, Fourth District Court of Appeal
Mr. Walter Carfora, Board Certified Health Attorney
Ms. Kim Tendrich, Attorney, Florida Department of Health

PUBLICATIONS COMMITTEE LEAD PROJECT STAFF

Ms. Madelon Horwich, Senior Attorney, Court Education,
Office of the State Courts Administrator

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PURPOSE

This benchguide was designed to serve as an educational resource for the courts in the event of a pandemic influenza or an analogous situation. Due to the quickly evolving area of public health law, a benchguide of this sort must, necessarily, continue to be revised in response to these changes. Therefore, since this benchguide cannot be definitive, readers are encouraged to check cited legal authorities before relying on them or on the proposed orders and checklists that derive from these legal authorities.

DISCLAIMER

Viewpoints reflected in this publication do not represent any official policy or position of the Florida Supreme Court, the Office of the State Courts Administrator, the judicial conferences of Florida judges, the Florida Court Education Council, or the Florida Court Education Council's Publications Committee.

PREFACE

At the most fundamental level, court access is a reality only when the courthouse doors are open and the courts are operational. If a court has to be shut down in response to a disaster of any sort—whether nature-inflicted or human-generated—then court access, and thus justice, is denied.

The tragedy of September 11, 2001, catalyzed the development of branch-wide policies and procedures for anticipating and managing court emergencies. Within two months of the terrorist attacks, then Chief Justice Charles Wells created the Work Group on Emergency Preparedness, directing it to “develop a plan for the State Courts System to better respond to emergency situations.” The workgroup was given two policy goals: to protect the health and safety of everyone inside the courts and to “keep the courts open” to ensure access to justice.

Since then, each Florida court has identified its mission-essential functions; each has a preparedness plan that includes emergency and administrative procedures as well as a continuity of operations plan; and each has designated an emergency coordinating officer, a court emergency management team, and a public information officer. In addition, the court system established a Unified Supreme Court/Branch Court Emergency Management Group (CEMG) that recommends policy for, prepares for, and responds to emergencies both in the Supreme Court building and in courts across the state. Finally, the judicial branch has opened lines of communication with executive branch agencies, as well as with local and statewide emergency management and first responder agencies, in order to expedite responses to threats and emergencies as well as to foster the coordination of resources. The emergency preparedness measures that Florida’s courts have instituted since 9/11 have been nationally recognized as a model of teamwork and intergovernmental collaboration.

Emergency management means being prepared for both human-made disasters (e.g., oil spills, biohazards, military or terrorist attack-related incidents, and extended information systems outages) and nature-made exigencies (e.g., tropical storms, hurricanes, tornados, floods, and pandemics). The calamities that afflict Florida are generally weather-inspired, so these are the kinds of emergencies on which the CEMG was initially focused.

However, with the global disease outbreaks in recent years—SARS in 2002—

2003, swine flu (which achieved pandemic proportions) in 2009–2010, the H7N9 strain of avian flu that began spreading in China in early 2013, the West African Ebola epidemic of 2013–2016, and the July 2019 WHO declaration of the Ebola outbreak in the Democratic Republic of the Congo a Public Health Emergency of International Concern—the CEMG recognizes that the court system also needs to be prepared for influenza pandemics. An exceptional category of natural disaster, a pandemic can spread to every corner of the world. Generally caused by a new virus, it readily infects people because its victims have little or no immunity; it overtaxes nations’ healthcare systems, rendering medical support inadequate; and it causes significant disruptions to both the economy and society.

Because it could conceivably disrupt court operations for 18 months or longer, an influenza pandemic could have almost unimaginable consequences, making it the sort of public health crisis that the courts have not had to deal with since the eruption of the Spanish flu in 1918. Then, Florida—a much simpler place socially, economically, politically, and technologically—had a far more rudimentary justice system. If a flu pandemic were to erupt in contemporary times, it could trigger massive absenteeism, dramatically curtailing the court system’s mission-essential functions. (According to estimates, up to one third of all judges and court personnel could be incapacitated due to illness or death). Also, although a pandemic influenza would not destroy or upend public utilities and services or court facilities and infrastructure, normal operations could certainly be reduced due to an inevitable lack of staffing resulting from quarantine, isolation, sickness, and death. Further, enforced quarantines and isolations by public health officials could have weighty legal ramifications: the CEMG anticipates that imposed confinements could instigate a significant increase in emergency matters and case filings. In addition, given the strict restrictions on face-to-face contact that could ensue, the courts, which would already be dealing with an overburdened caseload, would likely have to rely on technology-driven methods to enable court operations and procedures to go forward (e.g., remote audio or audio/video communications systems).

In 2006, in anticipation of such a prospect, the CEMG presented the Supreme Court with a report entitled *Florida State Courts Strategy for Pandemic Influenza: Keeping the Courts Open in a Pandemic*. The goals of this strategy document are consistent with all the emergency preparedness measures that the courts have undertaken since 9/11: to “deal with crises in a way that protects the health and safety of everyone at the court facilities”

and to “keep the courts open to ensure justice for the people.” After approving the document, the Supreme Court directed the courts to initiate immediate efforts to complete all applicable tasks described in the report. The first edition of *Pandemic Influenza Benchguide: Legal Issues Concerning Quarantine and Isolation* was produced in 2007 to address one of the requirements of the report.

The Publications Committee of the Florida Court Education Council was given the responsibility of developing this benchguide, which it designed to be a purposeful, concise, and practical repository of information that judges and attorneys can utilize in court proceedings. It begins with general information about the history of quarantine and isolation law, executive powers (presidential as well as gubernatorial) in public health emergencies, federal and Florida statutory provisions relating to public health emergencies, and executive branch procedures in a Florida public health emergency. Then it shifts to the specific role of the Florida courts in a public health emergency, focusing on practical, procedural issues such as habeas corpus proceedings, warrants, arrests of people who disobey quarantines, civil proceedings to enforce administrative orders regarding quarantines and isolations, legal authority for mandatory vaccinations, and the enforcement of curfew orders.

The Publications Committee conceptualized this benchguide as a resource that addresses current statutory and regulatory issues associated with quarantine and isolation. It provides links to relevant Florida Statutes and Florida Administrative Code Rules and, when helpful, to the Centers for Disease Control, panflu.gov, and other governmental websites. Additionally, it presents legal authorities that may be useful to judges as they strive to keep the courts open during a flu pandemic. However, the authors recognize that public health law is a developing area of law. Recent public health crises—e.g., threats of bioterrorism, emerging infectious diseases, and latent pandemics—have made it essential to evaluate current public health laws, to determine their potential applications and their limitations, and to readdress those laws as necessary to meet today’s contingencies. Undeniably, much in the way of public health law remains to be written, and this benchguide, in addressing what has already been set down, also calls attention to what has not yet been written. As a result, this benchbook was constructed to function as a work in progress that will be updated continually to reflect the law as it develops in this emerging field.

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Introduction to Pandemic Influenza

What is a Pandemic Flu?

According to the U.S. Department of Health and Human Services, in its *Pandemic Influenza Plan 2017 Update*,¹ “Influenza viruses have been shown to be capable of causing rapid, widespread morbidity and mortality among infected humans. Pandemics happen when new (novel) influenza A viruses emerge which are able to infect people easily and spread from person to person in an efficient and sustained way. Historically, pandemic outbreaks of influenza viruses have left tens of millions of people dead in their wake and have cost hundreds of billions of dollars in lost lives, wages, productivity and economic devastation.” A pandemic is defined as a worldwide epidemic.

Pandemics may come from a variety of sources; however, the path of an influenza pandemic is generally well understood. Influenza viruses are of three types: the generally stable and mild C type; the more severe and somewhat mutagenic B type; and the most severe and highly mutagenic A type. Influenza A type regularly causes seasonal epidemics and, less commonly, may cause pandemics.

Influenza evolves by two mechanisms; one a short-term survival mechanism and the other a long-term survival mechanism. The short-term mechanism is simple: as the virus copies itself, it does not detect slight errors in its genetic code. The result is a similar viral strain, yet one that is sufficiently different to evade immune system defenses. The long-term mechanism, however, is the mechanism most feared: when a host is infected with both human and avian influenza viruses, the two may swap genetic code, creating a new hybrid that is both potent and easily transmissible.

Pandemics frequently occur in waves of sickness, and the virus may increase in potency between outbreaks. For example, the mortality rate of the pandemic of 1918–1919 increased tenfold with the arrival of the second wave. Experts estimate that these waves generally last two to three months. Currently, scientists estimate the occurrence of pandemics to be about every 35 years, though the interval varies.²

¹ Available at <https://www.cdc.gov/flu/pandemic-resources/pdf/pan-flu-report-2017v2.pdf>, at 7.

² Tynan, Bill. “Pandemic Influenza: The Perfect Storm.” State Emergency Response Team, ESF-8. Pre-Governor’s Executive Leadership Table Top Exercise: Pandemic Influenza Planning Meeting. State Emergency Operations Center, Tallahassee, Feb. 3, 2006.

Quick Facts on Influenza

- The typical period between infection and the onset of symptoms is two days.
- Persons who have become ill may transmit the infection as early as one day before the onset of symptoms.
- The risk of infection is greatest the first two days of illness.
- Children play a substantial role in the transmission of influenza.

Pandemics of the Past

Pandemics are not a new threat; there have been documented pandemics since at least the sixteenth century. While pandemics vary in severity, the pandemic of 1918, sometimes termed the “Spanish flu,” is generally regarded as the most deadly disease event in human history, killing over 40 million people in less than a year. This 1918 pandemic also had another notable characteristic: while most deaths from influenza occur in the very young or very old, the deaths from this pandemic were primarily in those aged 15–35, with 99% of deaths in those under 65.

Three additional influenza pandemics have occurred since the outbreak in 1918. One occurred from 1957–1958, but the combined impact of the World Health Organization Global Influenza Surveillance Network, advanced medicinal capabilities, and a greater understanding of the influenza virus greatly lessened its impact. Notably, the 1957–1958 virus was much milder than that of 1918. Total deaths from the pandemic were estimated at two million people. A second pandemic occurred in 1968, though it was even milder than that of 1957, with estimates of mortality at approximately one million deaths.

In the spring of 2009, a novel influenza A (H1N1) virus emerged. It was detected first in the U.S. and spread quickly across the U.S. and the world. This new H1N1 virus contained a unique combination of influenza genes not previously identified in animals or people. This virus was designated as influenza A (H1N1)pdm09 virus. Though this most recent influenza pandemic primarily affected children and young and middle-aged adults, the impact of (H1N1)pdm09 virus on the global population overall during the first year was less severe than that of previous pandemics. The U.S. mounted a complex, multi-faceted and long-term response to the pandemic, summarized in [“The 2009 H1N1 Pandemic: Summary Highlights, April 2009-April 2010.”](#) On August 10, 2010, WHO declared an end to the global

2009 H1N1 influenza pandemic. However, (H1N1)pdm09 virus continues to circulate as a seasonal influenza virus and causes illness and deaths worldwide every year.³

Why Should We Plan Now?

The proceeding discussion should itself answer this question; if it does not, 21st century experience with an existing strain of influenza and its impact on the world provides a compelling answer.

In 2004, over 120 million birds died or were destroyed as a result of a current avian influenza type, the H5N1 strain. This number is higher than the combined total bird deaths of all prior highly pathogenic outbreaks recorded throughout the world over the previous four decades. Furthermore, the 2004 deaths occurred in just three months. In the subsequent months, H5N1 expanded to include other wild birds as well as domesticated ducks, and its host range now also includes mammals. The H5N1 strain has been found in tigers, and several isolated cells of human infection have occurred. Nearly 600 persons worldwide have been infected by H5N1. Experts estimated that, in the event of a pandemic, as many as 200,000 to two million persons in the U.S. alone might have died. In such circumstances the rate of absenteeism may reach as high as 40% as a result of those actually ill, those caring for ill family members, and those who refuse to go to work for fear of infection. According to the Congressional Budget Office's 2006 projections, an outbreak on the scale of the 1918 pandemic could result in a loss of 5% of gross domestic product, or a national income loss of approximately 600 billion dollars.⁴

In the words of the World Health Organization, "Taken together, these changes in the ecology of the disease and behaviour of the virus have created multiple opportunities for a pandemic virus to emerge. . . . Experts readily agree . . . that H5N1 virus has demonstrated considerable pandemic potential."⁵ While no one can state with complete certainty when a pandemic will occur, the signs point to it being a prudent time to begin careful and thorough preparation.

³ U.S. Centers for Disease Control and Prevention, *2009 H1N1 Pandemic (H1N1pdm09 virus)*, available at <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html>.

⁴ U.S. Congressional Budget Office, *A Potential Influenza Pandemic: An Update on Possible Macroeconomic Effects and Policy Issues* (2006).

⁵ World Health Organization, *Pandemic Influenza Risk Management* 13 (May 2017), available at <https://apps.who.int/iris/bitstream/handle/10665/259893/WHO-WHE-IHM-GIP-2017.1-eng.pdf;jsessionid=CFBF11DC180AF403E070BB8720A20287?sequence=1>.

World Health Organization and Department of Homeland Security Stages

Both the World Health Organization and the U.S. CDC have defined different phases and intervals of a pandemic, with federal and state/local indicators.⁶

Once a novel influenza A virus is identified and is spreading from person-to-person in a sustained manner, public health officials also use the **Pandemic Severity Assessment Framework** (PSAF) to determine the impact of the pandemic, or how “bad” the pandemic will be. There are two main factors that can be used to determine the impact of a pandemic. The first is **clinical severity**, or how serious is the illness associated with infection. The second factor is **transmissibility**, or how easily the pandemic virus spreads from person-to-person. These two factors combined are used to guide decisions about which actions CDC recommends at a given time during the pandemic. The framework is divided into two parts. The first part is the **initial assessment**, which happens early during a pandemic. The second part, or **refined assessment**, happens later in the pandemic when more information is available. This additional information helps to provide a more refined and accurate picture of pandemic impact, including assessments of the pact by age group.

The results of these assessments can be compared to past pandemics (or even seasonal influenza epidemics), creating a quick comparative snapshot of the potential impact of the pandemic.⁷

⁶ U.S. Department of Health and Human Services, *Pandemic Influenza Plan 2017 Update*, Table B1, available at <https://www.cdc.gov/flu/pandemic-resources/pdf/pan-flu-report-2017v2.pdf>. See also <https://www.cdc.gov/flu/pandemic-resources/national-strategy/intervals-framework.html>.

⁷ U.S. Centers for Disease Control and Prevention, *Pandemic Severity Assessment Framework*, available at <https://www.cdc.gov/flu/pandemic-resources/national-strategy/severity-assessment-framework.html>. See also C. Reed, M. Biggerstaff, L. Finelli, L.M. Koonin, D. Beauvais, A. Uzicanin, A. Plummer, J. Bresee, S.C. Redd & D.B. Jernigan (2013). *Novel Framework for Assessing Epidemiologic Effects of Influenza Epidemics and Pandemics* 19 (1) *Emerging Infectious Diseases*, 85-91 (2013), available at <https://wwwnc.cdc.gov/eid/article/19/1/12-0124-t2>.

Chapter 1

An Introduction to Public Health Law in the Context of a Public Health Emergency

§ 1.1 Quarantine and Isolation Law and Due Process

§ 1.2 Warrants and Crimes in a Pandemic Influenza Emergency

A pandemic in the U.S. would raise many legal issues in a variety of contexts. Some of the legal issues likely to arise are obvious, while others are less so. Quarantine and isolation law, for example, would almost certainly be tested in a pandemic. But other legal concerns may make their way to the courts also. Disputes over eminent domain (seizure of property to use as a clinic or morgue), equal protection (discrimination on the basis of illness), employment law (absenteeism at work and health accommodation issues), and the scope of administrative powers (authority of entities to respond to a pandemic) are just a few examples of legal issues that have been litigated in prior public health emergencies. While some pandemic law issues may be novel, many disputes will likely fall within existing precedent of the federal and state court systems. Even the law of quarantine and isolation, which is unfamiliar to most lawyers and judges, has been invoked in the context of illnesses like sexually transmissible diseases and tuberculosis. We can therefore assume that many of the legal theories and claims litigated during past public health emergencies will be used in a modern public health emergency, and we can look to existing precedent for guidance. This chapter will provide a brief introduction to two areas of pandemic law that represent some of the more difficult legal questions for the courts.⁸

§ 1.1 Quarantine and Isolation Law and Due Process

The power to isolate and quarantine individuals in order to protect the public from disease or illness is a clearly established power of the states. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (upholding mandatory vaccination program designed to address smallpox and stating “this court has . . . distinctly recognized the authority of a state to enact quarantine laws and ‘health laws of every description’”); *see also Compagnie Francaise de Navigation à Vapeur v. State Board of*

⁸ This section is not a comprehensive or exhaustive description of any of the areas of pandemic law. Instead, it is a narrative introduction with several helpful citations for those seeking to read more elsewhere.

Health, Louisiana, 186 U.S. 380, 22 S.Ct. 811, 46 L.Ed. 1209 (1902) (holding state quarantines do not unconstitutionally infringe on Congress's Commerce Clause power). However, quarantining or isolating someone represents substantial intrusion on privacy and liberty rights, especially since it may be restricting how that person spends the final days or hours of his or her life. Thus, even in a public health emergency, the requirements of procedural due process are applicable to some extent. Cf. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (discussing requirements of procedural due process); *Zinermon v. Burch*, 494 U.S. 113, 128-130, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) (same). A pandemic, especially one that is highly virulent, will force the hard question of how much process is required in the context of acting to save countless civilian lives.

Quarantines and isolation have been recognized as a valid state power across the U.S., and there can be little doubt that they are a necessary and powerful tool in preventing the spread of communicable disease. See, e.g., *City of Seattle v. Cottin*, 258 P. 520 (Wash. 1927) (recognizing power of state and city to create health and quarantine officers and pass related laws); *Moore v. Draper*, 57 So. 2d 648, 649 (Fla. 1952) (“That the preservation of the public health is one of the duties devolving upon the state as a sovereign power will not be questioned”); *State v. Hay*, 35 S.E. 459 (N.C. 1900) (“the public welfare is the highest law [and] is the foundation principle of all civil government”) (internal quotation omitted). Quarantine and isolation laws are given great deference in the courtroom. In *Varholy v. Sweat*, 15 So. 2d 267, 270 (Fla. 1943), the Florida Supreme Court upheld a quarantine statute, and concluded that the test to be applied to such laws is “whether they have some actual and reasonable relation to the maintenance and promotion of the public health and welfare, and whether such is in fact the end sought to be attained.” The court also noted that all reasonable presumptions would be indulged in favor of the validity of such acts.

It is, however, equally clear that quarantine and isolation laws have limits; they cannot, for example, be imposed in a discriminatory manner. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (striking down ordinance targeting Chinese laundries); *Jew Ho v. Williamson*, 103 F. 10 (C.C.N.D. Cal. 1900) (striking down bubonic plague quarantine because it was prejudicial towards Chinese). The legality of a quarantine or isolation order will necessarily require some threshold evidentiary showing of actual risk of contagion. See *Smith v. Emery*, 42 N.Y.S. 258 (N.Y. App. Div. 1896)

(requiring evidentiary showing of actual risk of exposure to punish for violation of quarantine). Additionally, the law requires that some process be afforded to allegedly ill persons subject to quarantine or isolation. In *Greene v. Edwards*, 263 S.E.2d 661 (W. Va. 1980), for example, the West Virginia Supreme Court held that under a statute permitting the confinement of tuberculosis patients, the persons being confined must be afforded adequate notice of the underlying basis of commitment, the right to counsel, the right to be present and cross-examine and present witnesses at the commitment hearing, the standard of proof of “clear, cogent and convincing evidence,” and the right to a verbatim transcript of the proceeding for appeal purposes.

Between those clearly prohibited (i.e., discriminatory) quarantines and isolations and the acknowledged power of the state to impose quarantines and isolation, there are limitless shades of gray. Courts addressing the petitions of individuals seeking to escape isolation or quarantine will be faced with difficult decisions. *E.g.*, *City of New York v. Antoinette R.*, 630 N.Y.S.2d 1008 (N.Y. Sup. Ct. 1995) (addressing patient who had failed to complete tuberculosis treatment regimen but alleged she had epiphany and expressed sudden willingness to cooperate with treatment if she was let out of quarantine).

Additional Representative Cases on Isolation and Quarantine Law:

- *Liberian Community Association of Connecticut v. Malloy*, 2017 WL 4897048 (D. Conn. Mar. 30, 2017) (upholding quarantine of individuals returning to U.S. after traveling to Ebola-infected African countries)
- *Hickox v. Christie*, 205 F.Supp.3d 579 (D. N.J. 2016) (upholding 80-hour quarantine of nurse returning to U.S. from Africa after treating patients with Ebola)
- *Henderson v. Thomas*, 913 F. Supp. 2d 1267 (M.D. Ala. 2012) (Alabama’s blanket segregation of HIV-positive prisoners violates Title II of ADA, 42 U.S.C. § 12101 et seq., and § 504 of Rehabilitation Act, 29 U.S.C. § 794: “ADOC must look at each HIV-positive prisoner separately and individually based upon that prisoner’s particular circumstances”; also, requiring HIV-positive prisoners to wear white armbands “does not serve a legitimate purpose. This policy constitutes unlawful, and, indeed, intentional, discrimination under the ADA.”)
- *State v. Snow*, 324 S.W.2d 532, 534 (Ark. 1959) (holding state failed

to meet preponderance of evidence standard in seeking to commit individual with tuberculosis, but issuing “immediate mandate in order that further proceedings may be taken” by state against individual)

- *Application of Halko*, 54 Cal. Rptr. 661 (Cal. Ct. App. 1966) (upholding four consecutive quarantine orders of tuberculosis)
- *Ex parte Martin*, 188 P.2d 287 (Cal. Dist. Ct. App. 1948) (upholding quarantine even though it involved 13 individuals sleeping in jail made for six and sleeping four to a bed)
- *Huffman v. District of Columbia*, 39 A.2d 558, 562 (D.C. 1944) (rejecting health department policy assuming that “members of the public who have been reported [as ill] ‘can be supposed to have the disease until proven otherwise’”)
- *People ex rel. Barmore v. Robertson*, 134 N.E. 815 (Ill. 1922) (upholding potentially endless quarantine of woman carrying typhoid)
- *City of Newark v. J.S.*, 652 A.2d 265 (N.J. Super. Ct. Law Div. 1993) (holding that illness alone does not permit confinement, but that homeless person suffering from active tuberculosis could be confined because other accommodations were insufficient)
- *In re Smith*, 40 N.E. 497 (N.Y. 1895) (holding that health officer has power to restrain citizen’s personal liberty but there must be facts justifying need for such restraint)
- *Matter of Bradley v. Crowell*, 694 N.Y.S.2d 617 (N.Y. Sup.Ct. 1999) (requiring “clear and convincing” evidence standard in communicable tuberculosis commitment)
- *People v. Adorjan*, 60 N.Y.S.2d 651 (N.Y. Ct. of S. Sess. 1946) (holding that insufficient evidence that particular dog had rabies required release of dog from quarantine)
- *In re Washington*, 735 N.W.2d 111 (Wis. 2007) (“no less restrictive alternative” language in tuberculosis control statute applies to place of confinement as well as fact of confinement for persons with noninfectious tuberculosis who are noncompliant with prescribed treatment regimen)

§ 1.2 Warrants and Crimes in a Pandemic Influenza Emergency

In addition to the standard criminal charges and warrant requests that will come before courts during a pandemic, the judiciary will likely face novel criminal and warrant issues. For example, how much individualized suspicion will be required to isolate, quarantine, or detain an individual suspected of being exposed to or infected with influenza? Existing Fourth

Amendment jurisprudence, as discussed in Chapter 5, provides a strong framework for this analysis. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668, 109 S.Ct. 1384, 1392, 103 L.Ed.2d 685, 703-704 (1989) (holding probable cause not required for combating threat that “rarely generate[s] articulable grounds for searching any particular place or person”); cf. *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967) (holding that warrants are required to inspect commercial buildings for health and safety code violations); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (holding that warrants are required to inspect private dwellings for health and safety code violations). However, existing Fourth Amendment standards were not premised on or tested in the special context of a pandemic. The classic question in Fourth Amendment law of “reasonableness” may be altered when, on the government’s side of the balancing, there is a substantiated interest in preventing the spread of a highly dangerous illness.

In addition to new warrant questions, courts may see an increase in otherwise uncommon criminal issues, such as arrests for violation of quarantine or isolation. See § 381.00315(6), Fla. Stat. (“Any person who violates any rule adopted under this section, any isolation or quarantine, or any requirement adopted by the department pursuant to a declared public health emergency, commits a misdemeanor of the second degree”). In addition to crimes specifically involving public health issues, other criminal provisions might be triggered in unexpected ways. Cf. *United States v. Sturgis*, 48 F.3d 784 (4th Cir. 1995) (holding that prisoner who bit two correctional officers and was aware he was HIV positive was properly convicted of assault with dangerous weapon). See also §§ 775.082, 775.083, and 384.24(2), Fla. Stat. (making it a crime if a person living with HIV (1) knows their HIV status, (2) has been informed that HIV may be transmissible through sexual intercourse, and (3) has sexual intercourse with any other person without disclosing their HIV status). Similarly, as state and federal government officials respond to the various problems a pandemic will create, they may turn to novel protocols that are ultimately challenged in court. Cf. *Reynolds v. McNichols*, 488 F.2d 1378 (10th Cir. 1973) (holding constitutional the choice given to recently arrested prostitute who, while detained in jail, was given option to take penicillin for sexually transmissible disease and be immediately released, or not take medication and remain in jail).

Finally, even time-honored elements of the legal system may be found inapplicable in light of the special concerns a pandemic presents. See *Varholy v. Sweat*, 15 So. 2d 267 (Fla. 1943) (denying bail to woman quarantined for having venereal disease because bail would defeat purpose of quarantine); cf. *In re Shambow's Estate*, 15 So. 2d 837 (Fla. 1943) (holding right to jury trial is waivable, thereby setting stage for subsequent cases on waiving right to 12-person trial, waiver that may at times be essential if jury members are too sick or too afraid to report for duty); *Blair v. State*, 698 So. 2d 1210, 1218 (Fla. 1997) (upholding proceeding with five jurors instead of six when one juror became sick, and recognizing general right to waive even constitutional rights; “personal on-the-record waiver, after consultation with counsel, provided a sufficient procedural safeguard to affirmatively show that [defendant] understood his rights and the options available to him”).

For an excellent, concise report that addresses federal and state public health laws pertaining to the quarantine and isolation of individuals, constitutional issues that may surface in the event that individual liberties are constrained in a quarantine or isolation scenario, and issues of federalism that may develop when federal and state authorities coincide, see Jared P. Cole, Congressional Research Service, *Federal and State Quarantine and Isolation Authority*, RL33201 (Oct. 9, 2014). For a targeted, critical focus on the constitutional law issues, see Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 Wake Forest J. L. & Pol’y 1 (2018). Regarding the potential role of the armed forces in enforcing public health measures, see the Posse Comitatus Act, 18 U.S.C. § 1385.

Chapter 2

Executive Powers in a Public Health Emergency – Statutory and Regulatory Law

§ 2.1 Introduction

§ 2.2 Emergency Powers of the President and Other Federal Officials

§ 2.3 Emergency Powers of the Florida Governor and Other State Officials

§ 2.1 Introduction

The underlying premise of this benchguide is that a major pandemic has hit the state of Florida. There would be consequent disruptions of our accustomed ways of doing things, bringing a whole new list of knotty legal issues both internally, as the courts must operate under severe limitations, and externally, as new causes are brought by litigants for resolution by the courts. For uniformity of presentation, this benchguide has focused on influenza. However, many of the legal issues would be the same if the public health crisis arose from another infectious disease or even from an act of bioterrorism or accidental release of dangerous organisms.

A good bit of this benchguide is based on assumptions about the most likely immediate responses of the executive branch to a public health crisis. The executive branch is the branch that has the responsibility to initiate immediate action to cope with the emerging health problems and try to prevent the spread of infectious diseases. If the problems become widespread, the executive branch takes the lead in marshaling and allocating scarce health care resources and humanitarian aid as fairly and intelligently as is possible. The legislative branch at the state level is in session for only 60 days per year. In the early days of a rapidly evolving crisis, the courts could not wait for a special session, and the executive branch would have to proceed on the basis of the powers it presently has.

Among the possible public health implementation measures during a pandemic are: quarantine (ordering that a person who has been exposed to infection be restricted from contact with others until an incubation period has passed, to see if he or she develops the disease or not); isolation (ordering that a person who is actively infected be restricted from contact with others until he or she is no longer contagious); limiting travel either from or into an area that is free from cases of the disease; and closing public or private buildings where people congregate in numbers (and are thus likely

to transmit infections), such as schools, theaters, taverns, libraries – and courthouses. The term “quarantine” is sometimes used loosely to describe all of the foregoing measures; e.g., quarantining an area or a building. All of these measures are based on a disease model in which the disease is passed from person or animal to person at relatively close range, though not necessarily involving direct contact. Influenza is such a disease.

Although this guide focuses on Florida statutes and regulations, this chapter contains a brief outline of federal powers and authorities. When a problem becomes a pandemic, the federal government will inevitably be involved, varying from providing information, supplies, and assistance to states, at one end, all the way to a federal takeover of all state and local response efforts, at the other end.

Basic Sources and Limitations on Executive Powers

This chapter focuses on the statutory and regulatory powers of the Florida and federal executive branches to respond to a public health emergency such as a pandemic involving a highly contagious and virulent disease like a mutated avian influenza. At both the state and federal levels, there are two different sets of statutory and regulatory provisions that might come into play during a pandemic or other public health emergency. These legal provisions were enacted at different times for different purposes, but either or both might be selected as the basis for governmental responses.

The first type is the traditional public health law, administered by medical and public health personnel, dealing with sanitation, immunizations, communicable diseases, isolation, quarantine, and the like. The second type is the more generic “emergency response” or “disaster preparedness” type of law, administered by the Federal Emergency Management Agency (FEMA), the Florida Division of Emergency Management, and former civil defense officials, providing a wide range of powers (and often grants and loans) upon a declaration by the President or Governor, in response to a natural catastrophe such as a flood, hurricane, or wildfire, or a manmade one, such as 9/11 or an insurrection.

On the state level, the laws empowering the executive to act are based on the police power, which has been described as “the sovereign right of the State to enact laws for the protection of lives, health, morals, comfort, and General

welfare.”⁹ At the federal level, the justifications are couched in terms of the constitutional Commerce Clause and the Taxing and Spending Clause, since the existence of any general police power residing in the federal government has been rejected. See *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 132 S.Ct. 2566, 2578, 183 L.Ed.2d 450 (2012). Although wide latitude is allowed the state legislature in enacting laws under the police power, and wide latitude is accorded the executive branch in implementing such laws to protect the health, safety, and lives of the people in emergency conditions, such latitude does not extend to violating constitutional guarantees of due process, both substantive and procedural.

§ 2.2 Emergency Powers of the President and Other Federal Officials

Legal Basis for a Federal Rule or Order Imposing Quarantines or Isolation, Limiting Travel, or Closing Public or Private Buildings

Under the Disaster Relief laws, 42 U.S.C. § 5121 et seq., and the Emergency Assistance laws, 42 U.S.C. § 5191 et seq., the President and the director of FEMA have significant roles to play in “major natural disasters” such as hurricanes and tornadoes that cause significant property damage. Since a pandemic does not meet the criteria for that type of catastrophe, it would appear to qualify only for the lesser category of an “emergency,” defined as

any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

42 U.S.C. § 5122(1).

Under these laws, FEMA and other federal disaster agencies would be assisting states but probably not issuing orders to the populace. However, the Surgeon General and the Secretary of the Department of Health and Human Services (HHS) would have substantial roles and powers in a pandemic under federal public health laws and regulations. The only real statutory role for the President is in designating by Executive Order which communicable diseases are serious enough to warrant imposition of isolation or quarantine measures if they emerge. In 2003, then-President Bush designated avian flu, among others, as such a disease. Of course, the President appoints the

⁹ *Holley v. Adams*, 238 So. 2d 401, 407 (Fla. 1970).

Secretary of HHS and the Surgeon General, and it would not be surprising if announcements of actions taken by the Secretary or the Surgeon General came from the White House, but that is more politics than law.

The Surgeon General, with the approval of the Secretary of HHS, is authorized to:

make and enforce such regulations as in his [or her] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.

[42 U.S.C. § 264\(a\)](#).

Further,

Regulations prescribed under this section may provide for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a communicable stage and (A) to be moving or about to move from a State to another State; or (B) to be a probable source of infection to individuals who, while infected with such disease in a qualifying stage, will be moving from a State to another State. Such regulations may provide that if upon examination any such individual is found to be infected, he may be detained for such time and in such manner as may be reasonably necessary.

[42 U.S.C. § 264\(d\)](#); *see also* [42 C.F.R. Part 70](#) (Interstate Quarantine).

The Surgeon General may also, with the approval of the President, impose regulations prohibiting the entry into the U.S. of any cargo or persons from any country or place if doing so is necessary to decrease the danger of a communicable disease being introduced into this country. [42 U.S.C. § 265](#); *see also* [42 C.F.R. Part 71](#).

The Secretary of HHS may declare a public health emergency, and may take such action as may be necessary or appropriate to respond, which primarily triggers grants and the implementation of plans allowing the use of federal health resources to assist the states in coping with the emergency. [42 U.S.C. §§ 243, 247d\(a\)](#).

The Surgeon General’s authority to make “such regulations as in his [or her] judgment are necessary” is extremely broad, and it is possible that such regulations could come down to the level of requiring public buildings such as courthouses to close down for a time, but this is considered unlikely as long as the state authorities are responding adequately to the emergency.

§ 2.3 Emergency Powers of the Florida Governor and Other State Officials

Legal Basis for a Rule or Order by the Governor of Florida Imposing Quarantines or Isolation, Limiting Travel, or Closing Public or Private Buildings

Under [article IV, section 1 of the Florida Constitution](#), the Governor is vested with “supreme executive power,” is the commander-in-chief of the military forces of the state, and “shall take care that the laws be faithfully executed.” The Governor has the power to call out the militia (which is not just the National Guard, but is composed of “all able bodied inhabitants of the state who are or who have declared their intent to become citizens of the United States,” in order to preserve the public peace, execute the laws of the state, suppress insurrection, or repel invasion). [Art. X, § 2\(a\), Fla. Const.](#) None of these provisions give much specific guidance, so it is necessary to look to the implementing statutes.

For some time, one provision of the Florida Statutes appeared to limit the Governor’s powers slightly (“Any health regulation that restricts travel or trade within the state may not be adopted or enforced in this state except by authority of the department [of Health],” [section 381.0011\(6\)\(b\), Florida Statutes](#)). However, that provision was deleted in [chapter 2012-184, Laws of Florida](#), and in any case that language is undercut by some of the broad statutory powers discussed next. Under various provisions of [chapter 252, Florida Statutes](#), titled Emergency Management, the Governor may issue executive orders declaring a state of emergency, which shall activate the emergency mitigation, response, and recovery aspects of state and local emergency management plans in the affected area, and which shall be authority for the deployment and use of any forces or materials to which the plan applies. Among the Governor’s powers that may be exercised if deemed necessary during an emergency pursuant to [section 252.36, Florida Statutes](#), are to:

- issue, amend, and rescind executive orders, proclamations, and rules

- having the force and effect of law;
- assume direct operational control over all or part of the emergency management functions of the state or to delegate same;
 - suspend the provisions of any regulatory statute regarding the conduct of state business or the rules of any state agency;
 - utilize all the available resources of the state government and of each political subdivision;
 - commandeer or utilize any private property found necessary to cope with the emergency;
 - “[d]irect and compel the evacuation of all or part of the population from any stricken or threatened area”;
 - “[c]ontrol ingress and egress to and from an emergency area, the movement of persons within the area, and the occupancy of premises therein”;
 - take measures concerning the conduct of civilians, pedestrian and vehicular traffic, public meetings and gatherings, and the “evacuation and reception of civilian population”;
 - “take such action and give such direction to state and local law enforcement officers and agencies as may be reasonable and necessary for the purpose of securing compliance with [this chapter] and with the orders and rules made pursuant thereto”; and
 - “employ such measures and give such directions to the Department of Health . . . as may be reasonably necessary for securing compliance” with this chapter.

In addition to the Governor, the Division of Emergency Management and local governments may issue orders and make rules under [chapter 252](#). Existing laws inconsistent with those rules or orders are suspended to the extent of such conflict. [§ 252.46\(2\), Fla. Stat.](#) Violation of any provision of [chapter 252](#) or of any rule or order made pursuant thereto is a second degree misdemeanor; the law enforcement authorities of the state and its subdivisions are directed to enforce those orders and rules. [§§ 252.47, 252.50, Fla. Stat.](#)

Legal Basis for a Rule or Order by the Florida Department of Health Imposing Quarantines or Isolation, Limiting Travel, or Closing Public or Private Buildings

The State Health Officer, who is the State Surgeon General, [section 20.43\(2\), Florida Statutes](#), may

- issue public health advisories, and
- declare public health emergencies and isolation and quarantines after consulting with the Governor “to the extent possible.”
[§ 381.00315\(1\)\(c\), Fla. Stat.](#)

During a public health emergency, the State Health Officer may

- “take actions that are necessary to protect the public health.” Among those actions are
 - “[o]rdering an individual to be examined, tested, vaccinated, treated, isolated, or quarantined for communicable diseases.”

Any such order of the State Health Officer is immediately enforceable by a law enforcement officer. [§ 381.00315\(1\)\(c\), Fla. Stat.](#)

The Department of Health is authorized to

- make rules, [sections 381.0031\(7\), 381.006\(16\), 381.006\(18\), and 154.04\(1\)\(c\)4, Florida Statutes](#) (see [chapter 64D-3, Florida Administrative Code](#)) (certain rulemaking authority provisions were repealed as “unused” by [chapter 2012-184, Laws of Florida](#)); and
- declare, enforce, modify, and abolish isolation and quarantine of persons, animals, and premises as needed for the control of communicable diseases, including
 - restrictions on movement of persons or animals,
 - access of the department to isolated or quarantined premises,
 - the vaccination and treatment of isolated or quarantined persons, and
 - the disinfection of isolated or quarantined persons, animals, or premises, [§ 381.00315\(4\), \(5\), Fla. Stat.](#)

The broad powers granted to the Department of Health by the legislature are illustrated by the following provisions:

- The rules adopted by the department shall, as to matters of public health, supersede all rules enacted by other state departments, boards, or commissions, and ordinances and regulations enacted by state political subdivisions. [§ 381.00315\(6\), Fla. Stat.](#)
- It is a misdemeanor of the second degree to violate any rule adopted

by the department pursuant to [chapter 381](#) or to violate any isolation, quarantine, or other requirement “adopted by the department pursuant to a declared public health emergency.” [§ 381.00315\(6\), Fla. Stat.](#)

- To enforce [chapter 381](#) and its rules, the department may commence proceedings to enforce the performance of any act required by any person, officer, or board and may apply to any trial court judge empowered to issue warrants in criminal cases and request the issuance of a warrant (the statute does not specify what kind of warrant, or what kind of showing is required; e.g., probable cause), and “**the judge shall issue a warrant . . . to assist in any way to carry out the purpose and intent of this chapter**” (emphasis added). [§ 381.0012, Fla. Stat.](#)

However, this is not to say that the courts must acquiesce in the legislative directions quoted in bold above regarding warrants and the “judicial” nature of the department’s actions. The federal and state constitutions require that no warrant shall issue except upon probable cause, and this requirement trumps a contrary direction in a state statute. Similarly, the state constitution has a separation of powers provision, and the most that the legislature could ascribe to the actions of the Department of Health would be to characterize them as “quasi-judicial,” [article V, section 1](#); an executive branch agency, no matter what the emergency, is not performing acts that are “judicial in nature.”

Despite the statutes that do exist, there are no detailed procedures in the statutes or the rules concerning how or by whom Department of Health orders are to be issued, served, or enforced — or challenged by those affected. Ordinarily applicable procedures under the Administrative Procedure Act, [chapter 120, Florida Statutes](#), would not provide meaningful relief for several reasons, including timeliness. The Department of Health has suggested that someone whose liberty interests are affected could challenge a quarantine or isolation order by habeas corpus, but there is very little sign of an adequate system in place to represent the Department of Health at such hearings and no system in place to provide legal representation to indigent petitioners. For that matter, even petitioners who could afford counsel in an ordinary situation may have problems finding an attorney who is familiar with isolation or quarantine issues and is not ill or also subject to a quarantine or isolation order.

Legal Basis for a Rule or Order by a County Public Health Department

Imposing Quarantines or Isolation, Limiting Travel, or Closing Public or Private Buildings

The county health departments are hybrid creatures: they are at the same time part of county government and part of the Department of Health. §§ 20.43(5), 381.001, 154.01, and 154.04, Fla. Stat. The basic relationship between the Department of Health, the county health departments, and the counties is governed to some extent by these statutes, with other aspects governed as a matter of partnership, sections 381.001 and 154.001, Florida Statutes, cooperation, sections 154.01(1), 154.03(1), and 154.05, Florida Statutes, and contract, sections 154.01(3) and (4), Florida Statutes. The personnel of the county health departments are employed by, and work under the supervision of, the Department of Health. § 154.04(2), Fla. Stat. The Department of Health has delegated to the county health department director (a physician) or county health department administrator (a non-physician), or their designated representative, the same power, within his or her county, to give public notice of isolation and quarantine and to initiate and terminate conditions of isolation and quarantine as the State Health Officer. Fla. Admin. Code R. 64D-3.037 and 3.038. Accordingly, much of the same commentary from the previous section would apply to this section as well. The rules do not speak to the possibility that the county health department of county A might adopt some measure that is greatly at variance with a measure adopted by similarly situated county B; presumably, the state Department of Health would resolve the conflict.

Legal Status of an Order (Assuming the Issuing Authority Has Jurisdiction to Enter It) Directly Impacting the Operation of the Courts; e.g., an Order Requiring All Public Buildings, Including Courthouses, to Close Entirely or to Restrict Public Access for a Period of Time.

The court system would probably be required to obey a quarantine or isolation order regarding premises (e.g., courthouses or judicial offices), the same as if it were a private enterprise. There is no judicial immunity from infection by a pathogen, and the public health protection reasons for such an order would apply with equal force no matter how vital a function the courts perform. It would provide little benefit to the public if the courts dispensed justice along with exposure to a deadly disease. The same would apply to an individual quarantine or isolation order directed at a judge or other member of the judicial branch.

In the case of a binding regulation or order from a competent authority,

whether federal, state, or local (“binding order”), impacting the operation of the Florida courts, it is recommended that an administrative order be entered to implement same and to make provisions for the impact of the order on the affected court(s), the officers and employees of the court, and the rights and responsibilities of citizens summoned by or seeking access to the courts. If the binding order were statewide in scope, or covered a broad region, the chief justice might enter an order; if only one county were affected, the chief judge might be the appropriate one to address the local impact. In any event, if courthouses were closed as a result of the order, the chief justice would enter an order tolling the running of limitations periods and speedy trial requirements, pursuant to [rule 2.205\(a\)\(2\)\(B\)\(iv\), Florida Rules of Judicial Administration](#). Such orders are customarily entered and made retroactive after the facilities reopen, as in the case of hurricanes, but it is possible that such an order could be made prospectively.

Chapter 3

Florida Executive Branch Procedures and Players in a Public Health Emergency

- § 3.1 Introduction
- § 3.2 Florida Department of Health vs. County Health Departments
- § 3.2(a) Surveillance
- § 3.2(b) Quarantine and Isolation
- § 3.2(c) Access to Persons and Premises
- § 3.3 Procedural Vehicles for Circuit Court Jurisdiction to Review Final Orders of an Executive Branch Department
- §3.3(a) The Due Process Problems Arising from Pandemics and Quarantines and Isolation
- §3.3(b) Why Allow Any Hearings?
- §3.3(c) General Rule of No Jurisdiction
- §3.3(d) Exceptions – Vehicles for Circuit Court Review

§ 3.1 Introduction

With states looking to the U.S. Centers For Disease Control and Prevention for leadership and guidance in this area, in 2017 the Centers for Disease Control released *Community Mitigation Guidelines to Prevent Pandemic Influenza – United States, 2017*. This report represents a significant shift in emphasis over the past couple of decades away from the previous paradigm of coercive techniques, such as legally enforced quarantines, and towards public education and exhortation aimed at voluntary measures. Less restrictive measures include social distancing, coupled with other local government actions such as closure of schools and child-care facilities and cancellation of public gatherings. It is unknown to what extent the education-oriented approach, if it continues, will persuade state leaders to change their previous coercion-oriented contingency planning. It could mean fewer orders, and less involvement for the courts in reviewing orders.

The measures undertaken by public health authorities in response to a pandemic will depend in part on the pandemic's severity, geographic extent, and duration, all of which are unknowable before the fact. Responsive measures also will depend to some extent on the willingness of leaders to make hard decisions in a time of fear and uncertainty, and to take steps that probably will be very disruptive of everyday life and costly to individuals, the government, and the economy as a whole. Whatever decisions are made

will be criticized by some as excessive and by others as insufficient – and no doubt the courts will be hearing those criticisms expressed by litigants aggrieved by executive branch decisions.

One thing to bear in mind is that the Florida Department of Health has not issued a quarantine or isolation order for human beings in many years. *Cf.* State of Florida, Office of the Governor, Executive Order Number 14-280 (establishing Ebola Virus Disease Response Protocol, directing, in § 2, the Florida Department of Health to “quarantine all high-risk travelers from EVD-affected countries in West Africa who are identified by the CDC as being located in Florida for a period of 21 days following last known EVD exposure”). Procedures utilized today or tomorrow will be new and untested. Everyone involved — the public health officials, law enforcement, emergency management agencies, attorneys on all sides, and most judges — will be feeling their way through unfamiliar territory in the middle of a dire public health emergency.

In the face of these uncertainties, the approach of this benchguide is to address the worst-case scenarios – a severe pandemic, with a vigorous and early executive branch response. This response would include:

- utilizing mandatory quarantine and isolation orders as one of the means for controlling the spread of infection;
- giving mandatory vaccinations or other medical treatment;
- closing public and private facilities;
- banning of public gatherings and events;
- issuing other emergency orders dealing with the secondary effects of the crisis such as curfews and rationing; and
- drafting workers in essential services such as public safety and utilities.

If none of these measures ever needs to be implemented in the near future due to an influenza pandemic, we can count ourselves as truly fortunate. However, it will still be a useful exercise to think about the issues discussed herein, to wonder “what if...?”, and to try to develop better ways of handling these problems if they do occur someday.

§ 3.2 Florida Department of Health vs. County Health Departments

The county health departments in each of the 67 counties are hybrid entities: they are county agencies for some purposes, and part of the state Department of Health for other purposes, but all their employees are employed and paid by the state Department of Health. *See, e.g.*, §§ 20.43(5); 154.00–154.067; 381.001; 381.0019; 381.0062(1)(b); 381.0072(1)(a); and 381.008(2), Fla. Stat. A determination that there is a pandemic and the decision to declare a public health emergency in the first instance would most likely be made in Tallahassee. Implementation of any measures in response to the situation would almost certainly be in the hands of the county health departments, because they have the “troops” to take needed action and are the ones with familiarity about their local conditions and facilities. There is bound to be some degree of oversight from the state level, but its extent is unknown at this time. The county health departments would almost certainly be exercising their powers as part of, or pursuant to delegations of authority from, the state Department of Health.

In chapter 2012-184, *Laws of Florida*, the legislature amended the mission statement, responsibilities, and management structure of the Florida Department of Health. The statutory mission statements were reduced from 14 to seven (see section 381.0011, *Florida Statutes*), and the number of divisions was reduced from 11 to eight, with changes to the names of some of the divisions (see section 20.43, *Florida Statutes*). The amendments repealed the department’s eminent domain authority under former section 381.0013, *Florida Statutes*, and changed and moved certain statutory provisions relating to isolation and quarantine (see section 381.00315, *Florida Statutes*). There are two separate statutes authorizing the imposition of isolation and quarantine. Under section 381.00315(4), *Florida Statutes*, it is the duty of the Department of Health to “declare, enforce, modify, and abolish the isolation and quarantine of persons, animals, and premises . . . for controlling communicable diseases or providing protection from . . . a threat to public health.” There must be rules spelling out the conditions and procedures for imposing and releasing an isolation or quarantine, and the Department of Health has arguably complied with this requirement by adopting rules 64D-3.037 and 64D-3.038, *Florida Administrative Code*.

Pursuant to section 381.00315(1)(c), *Florida Statutes*, the State Health Officer, after consulting the Governor and notifying the “Chief of Domestic Security” in the Department of Law Enforcement, may declare public health

emergencies. Upon such a declaration, the State Health Officer (who is also the head of the Department of Health and thus could exercise or delegate the exercise of the power to declare isolation and quarantines under [section 381.00315\(1\)\(c\)](#)) may “take actions that are necessary to protect the public health.” Among such actions are “[o]rdering an individual to be examined, tested, vaccinated, treated, isolated, or quarantined for communicable diseases that have significant morbidity or mortality and present a severe danger to public health.” [§ 381.00315\(1\)\(c\)4, Fla. Stat.](#) Persons who do not consent to be vaccinated or treated for reasons of health, religion, or conscience have the option of being isolated or quarantined instead, unless there is no practical method to isolate or quarantine the person. In that case, the State Health Officer may “use any means necessary to vaccinate or treat the individual,” and any order by the State Health Officer rendered to implement this provision is immediately enforceable by a law enforcement officer.

The Department of Health has adopted rules on the subject of isolation and quarantine, which may be found in [chapter 64D-3, Florida Administrative Code](#). [Rule 64D-3.038\(1\)](#) requires that isolation and quarantine orders be in writing and contain an expiration date or specify conditions for ending the isolation or quarantine. [Rules 64D-3.037\(1\)](#) and [64D-3.038\(1\)](#) state that the State Health Officer, or the county health department director or administrator or their designee, shall have the authority to give public notice of isolation or quarantine, issue isolation or quarantine orders, and initiate or terminate conditions of isolation and quarantine. [Rule 64D-3.038\(7\)](#) provides that isolated or quarantined persons or animals may be transported or moved from the location where they are being isolated or quarantined only in accordance with conditions set forth in orders by the State Health Officer or the county health department director or administrator, or their designees.

The public health strategy for the response to an emerging influenza pandemic is based on: (1) surveillance – testing and reporting by health care providers and agencies to detect the onset and spread of the disease; (2) preventing or containing the spread of the infection as much as possible, either by vaccines or prophylactic use of antiviral drugs or by diminishing contacts between infected (isolation) or possibly infected (quarantine) people and those who have not been exposed to the infection; and (3) providing whatever level of medical care and support is feasible for those who are infected. Some of these efforts will involve public education and

requests for voluntary cooperation, but there will be some instances where mandatory measures will be needed. Those will be the most likely instances where persons affected will be seeking review or relief in the courts.

§ 3.2(a) Surveillance

[Section 381.0031\(2\), Florida Statutes](#), requires all physicians, hospitals, and licensed laboratories that diagnose or suspect the existence of a disease determined by the Department of Health to be of public health significance to immediately report same to the department. The information remains confidential and the making of the report is not a violation of the confidential relationship between the practitioner and patient. [§ 381.0031\(5\)](#). The Department of Health may inspect and copy records relating to cases reported. [§ 381.0031\(6\)](#). There are similar provisions in statutes relating to communicable diseases and school immunizations, tuberculosis, and sexually transmissible diseases. [§§ 381.003, 392.53, 392.61, and 384.25, Fla. Stat.](#)

Two types of controversies might come to the courts from these surveillance activities. The first is that a provider may be unaware that the law requires the reports, or may refuse to make the required reports out of concerns for the patient's privacy or some general antipathy towards governmental bureaucracy or interference with professional judgment. These concerns do not constitute valid excuses for failure to report under the statutes and regulations. There is a specific exemption in the federal Health Insurance Portability and Accountability Act privacy regulations for reporting required for public health purposes. [45 C.F.R. § 164.512\(b\)](#).

The second type of controversy that could arise from surveillance activities would involve the public health authorities thinking it necessary for an individual to be examined or tested for symptoms or other evidence of the disease, the individual declining, the county health department issuing an order requiring the individual to submit to examination, the individual refusing, and the county health department seeking the assistance of the courts to enforce its order. Alternatively, the county health department might obtain the assistance of a law enforcement agency, whose officers are prepared to force the individual to comply with the county health department order, and the individual seeks injunctive relief from the circuit court restraining the county health department and the law enforcement agency from taking any further action regarding the order.

Substantively, the Department of Health or State Health Officer, and, by extension or delegation, the county health department, has the authority in appropriate cases to require testing for communicable diseases in the context of quarantine measures. §§ 381.00315(1)(c)4 and (5)(c), Fla. Stat., and Fla. Admin. Code R. 64D-3.037 and 64D-3.038(1) and (2).

§ 3.2(b) Quarantine and Isolation

The word “quarantine” has a much more expansive meaning under Florida law than the common understanding of the word. Under the terms of [rule 64D-3.038\(1\), Florida Administrative Code](#), “Quarantine orders shall . . . restrict or compel movement and actions by or regarding persons, animals or premises consistent with the protection of public health and accepted health practices. . . .” Subsection (2) of that rule says: “For the purpose of orders regarding quarantine, the term ‘actions’ encompasses isolation, closure of premises, testing, destruction, disinfection, treatment, protocols during movement and preventive treatment, including immunization.”

Since there may not be any effective vaccine or other means of immunization against an emerging influenza for a substantial time after the influenza’s appearance, and since the existing antiviral drugs may have only a limited success rate against pandemic influenza, public health strategy leans heavily towards preventing people from becoming infected in the first place. Transmission of influenza viruses takes place predominantly during close (three feet or less) proximity with an infected person. Actual touching is not necessary, as the virus travels in tiny droplets from an infected person’s exhalations and is inhaled or, less commonly, absorbed through the skin or picked up by the hands and moved to the mouth or eyes of the uninfected person. The virus does not live very long outside a host’s body when floating in the air or being deposited on an inanimate object.

It therefore follows that, if infected persons can be kept physically separate from uninfected persons, the disease will not have a chance to spread, and this is the goal of “classic” quarantine. This is complicated by two facts: (1) a person who has been infected will not show signs of illness until a certain point, but will be contagious for as much as a day or a day and a half before symptoms appear, and (2) some people contract a mild case of the disease and never show any symptoms at all, even though they are contagious for a substantial time, as much as two or three weeks. Thus, if a community has any cases of the disease at all, any quarantine or isolation protocol is probably going to be a bit “leaky” and not stop all transmission of the

malady. However, quarantine and isolation measures, along with other steps, can greatly retard the spread of the disease and reduce the number of cases. Mandatory quarantine or isolation is most effective in the early stages of a pandemic. After a certain “critical mass” of the population is infected, the Department of Health plans to shift its emphasis away from quarantine and isolation, and toward other control measures.

One type of intervention (isolation) is aimed at isolating infected persons from contact with others until the infected persons are no longer contagious. A second type (quarantine) is designed to isolate a person who has been exposed to the disease until an incubation period has passed and the exposed person has not developed symptoms of the disease. There will be many cases where both types of orders are in effect in the same house or dwelling — one ill person subject to the first type of order, and an uninfected family member staying in the home to care for the ill person, but subject to the second type of order because of being exposed to the infected person. One of the Department of Health’s strategies is to try to persuade persons in both categories to enter into voluntary isolation or quarantine agreements, which would essentially be consent orders that bind the person upon agreement.

If persuasion does not work, a mandatory order would be an option. A mandatory isolation or quarantine order would typically direct the person to remain at home (or, in very severe cases, in a hospital or other setting) until the danger is past, or until a date in the future when the person has either developed the disease or not. Public health personnel would check in by telephone or in person with persons subject to the orders, to make note of temperature readings or other symptoms, as well as to see that supplies of medicine, food, and other necessities are delivered. If a person needs to leave the isolated or quarantined premises, this may be done in accordance with an order from the public health officials.

There are foreseeable complications when the rights of third parties are entangled in isolation or quarantine. Should a landlord whose rent has not been paid be forbidden to evict an isolated or quarantined tenant? Where is a homeless person going to be isolated or quarantined if not sick enough to be hospitalized? If the homeless person lists his or her address as the homeless shelter, will he or she be isolated or quarantined there if it means that the other 300 persons who sleep there and the volunteer staff will have to be isolated or quarantined also?

If individual isolation or quarantine orders do not prove effective, the

emphasis would shift to restricting or forbidding large gatherings of individuals in close enough proximity that transmission of the virus would be probable. Prime examples would be spectator sports and performances at theaters or arenas. Schools, both public and private, would be among the first to be shut down, because children are both very vulnerable and highly efficient disease spreaders. This same principle could apply to restricting the operation of restaurants, bars, public transportation, courthouses, shopping malls, offices, stores, and almost any venue where two or more people gather. Again, the Department of Health would try to achieve voluntary compliance with such measures, but could use its powers to issue mandatory isolation or quarantine orders directed at closure of premises or limiting the movement of persons with respect to gatherings.

§ 3.2(c) Access to Persons and Premises

One other aspect of Florida isolation and quarantine law worthy of mention is the issue of access to persons and premises subject to quarantine orders. The Department of Health's rules provide:

- “The persons in charge of all premises upon which a person or persons or animals are quarantined shall allow access to the county health department director or administrator, the State Health Officer, or either of their designated representatives to assure that provisions of this chapter and orders applicable to the cases involved are observed.” [Fla. Admin. Code R. 64D-3.037\(2\)](#).
- “Subjects or objects of quarantine orders shall be accessible at all times to the Department or its designees for purposes related to declaration, enforcement, maintenance, modification or abolition of such orders. . . .” [Fla. Admin. Code R. 64D-3.038\(3\)](#).

These provisions could be read as the department bootstrapping itself into general trespass powers or even warrantless search powers. The statute only refers to “Access by the department to isolated or quarantined premises.” [§ 381.00315\(5\)\(e\), Fla. Stat.](#) The person in charge of premises within which a person is isolated or quarantined may not be named in the isolation or quarantine order, may be unaware of the order's existence, and may even be unaware that the isolated or quarantined person is present on the premises. It is possible that a representative of the local county health department may be appearing in the county or circuit court asking for a warrant pursuant to [section 381.0012\(4\), Florida Statutes](#), requiring the person in charge of the

premises to permit the official to enter on a continuing and regular basis to determine the status of an ill person isolated or quarantined therein.

§ 3.3 Procedural Vehicles for Circuit Court Jurisdiction to Review Final Orders of an Executive Branch Department

The Administrative Procedure Act

The Department of Health is a department of the executive branch of state government and is thus an “agency” within the meaning of the [Administrative Procedure Act](#). §§ 20.43 and 120.52(1)(a), Fla. Stat. That being the case, when it or its delegates issue orders which affect the substantial interests of persons (e.g., life, liberty, or property), the Department of Health is subject to the provisions of the Administrative Procedure Act, specifically [section 120.569, Florida Statutes](#), which states: “(1) The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency.” [Chapter 120](#) is a relatively self-contained system for administrative rulemaking and adjudication, and the circuit courts seldom become involved in the workings of the agencies as they implement [chapter 120](#).

§ 3.3(a) Due Process Problems Arising from Pandemics and Isolation and Quarantines

As a practical matter, in the context of a pandemic, the health authorities would have to issue many orders that take effect immediately. Preventing the spread of disease could not await the leisurely process of serving an administrative complaint, waiting at least 20 days for the respondent to request a hearing, transmitting the matter to the Division of Administrative Hearings for the assignment of an administrative law judge, scheduling and giving notice of a hearing, conducting a hearing, submitting a recommended final order to the department head, considering exceptions thereto, and the rendition of a final order by the agency head. *See* §§ [120.569](#), [120.57\(1\)](#), Fla. Stat.

Due process of law requires that a person deprived by government of some protected right be given notice and an opportunity to be heard. However, the opportunity to be heard need not always occur before the deprivation. There is ample precedent approving legislative determinations that hearings may be offered post-deprivation in some circumstances. *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); *Conner v. Carlton*, 223 So. 2d

[324 \(Fla. 1969\)](#). What is needed is something in the nature of an emergency temporary injunction without notice, with an opportunity for a hearing without delay after the service of the order. If an agency order were entered with *no* right to a hearing, either before or after the rendition of the order, it would be subject to summary reversal on appeal. The appellate court would not even have to reach the constitutional issue. Pursuant to [section 120.68\(7\), Florida Statutes](#):

The court shall remand a case to the agency for further proceedings . . . or set aside agency action . . . when it finds that:

- (a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts;
- (b) The agency’s action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to [ss. 120.569](#) and [120.57](#). . . .

However, the Administrative Procedure Act in its present form is ill-suited to providing an adequate procedural framework for the exigencies of a pandemic. There is a provision in the context of a proceeding involving state-issued licenses that permits an agency, upon a finding that immediate serious danger to the public health, safety, or welfare requires it, to order the emergency suspension, restriction, or limitation of a license, but only if the agency promptly initiates a regular proceeding which will give the respondent licensee an opportunity for a hearing. [§ 120.60\(6\), Fla. Stat.](#) There is no parallel provision giving a post-deprivation hearing in a non-licensing context. The only relevant part of the Administrative Procedure Act is [section 120.569\(2\)\(n\), Florida Statutes](#), which reads:

If an agency head finds that an immediate danger to the public health, safety, or welfare requires an immediate final order, it shall recite with particularity the facts underlying such finding in the final order, which shall be appealable or enjoinable from the date rendered.

On its face, this section makes no provision for any administrative hearing before or after an “immediate final order.” It would thus make any such order vulnerable to reversal on appeal. It could have a strongly adverse

effect on the executive branch's efforts to control a pandemic if the appellate courts summarily vacated the executive branch's isolation and quarantine orders. The remedies suggested in this subdivision are not perfect procedural vehicles, and they have not been extensively tested on appeal, but they could serve to provide sufficient procedural due process to allow the system to function during a pandemic. New legislation could address this situation.

§ 3.3(b) Why Allow Any Hearings?

It has been suggested that providing any type of hearing or other relief from emergency orders during a pandemic would be a luxury that society could not afford if the public health is to be protected. If disease is spread by close contact, then an isolation or quarantine order preventing close contact between an infected individual and the uninfected populace at large is a rational means of preventing the spread of disease and protecting the public. What would be the purpose of a hearing? The response of the judicial system, as always, must be that the justice system's core protections are most needed in times of tribulation. We are talking about checks and balances on a system run by imperfect human beings. Even if some executive agency order is totally justifiable in the abstract, the government officials involved may have named the wrong person or address, or misinterpreted a lab result or witness statement, or even misunderstood a rule or directive from the State Health Officer.

§ 3.3(c) General Rule of No Jurisdiction

The circuit courts are rarely presented with a case in which it is proper to review the merits of a final order rendered by a department in the executive branch of state government. This is because, in ordinary administrative proceedings in which there has been an opportunity for the respondent to request and receive a hearing before any final agency action is taken, jurisdiction for judicial review of the merits of an administrative final order is lodged exclusively in the district courts of appeal. [Art. V, § 4\(b\)\(2\), Fla. Const.](#); [§ 120.68, Fla. Stat.](#) However, three narrow exceptions to this general rule have been identified. See § 3.3(d) below.

§ 3.3(d) Exceptions — Vehicles for Circuit Court Review

The first exception applies in the case of an agency order which has the effect of significantly restraining an individual person in the exercise of personal liberty. Quarantine or isolation orders restricting the movements of

an individual would certainly fall under this category. Such orders are reviewable by the writ of habeas corpus, which is covered in chapter 4 of this benchguide. In fact, it has been argued that habeas is the sole remedy, because it would be outside the jurisdiction of an administrative law judge to conduct a hearing and enter an order regarding the isolation or quarantine of an individual given that an administrative law judge has no power to determine issues of constitutional law or release from confinement. No citation is offered in support of these arguments, which run contrary to the plain language of [chapter 120](#), but it is a moot point because [chapter 120](#) does not provide a means for an administrative hearing on an immediate isolation or quarantine order, either before or after the rendition of the order.

Habeas corpus is not a substitute for an appeal, and all the merits of the administrative order would not necessarily be before the court in a habeas proceeding, but the core issue of the legality of the individual's detention would likely be the most important one the parties would want settled. The limitation of this remedy is that it would only be available if an order restricted the liberty interests of an individual; if an order affected a corporation, or an individual's property, livelihood, familial or religious interest, or other protected interest, habeas would not lie.

The above-quoted language from [section 120.569\(2\)\(n\), Florida Statutes](#), provides the second hypothetical vehicle to get into court. An immediate final order is appealable or enjoinable from the date rendered. Thus, a respondent could elect to challenge this type of order either in circuit court, by seeking to enjoin its operation, or by appealing the order to a district court of appeal based on whatever record the agency had made. This election of judicial remedies is quite unusual in administrative practice and is limited to immediate final orders. If the respondent seeks injunctive relief in the circuit court from the terms of an immediate final order that had been entered without any hearing, it seems reasonable to assume that the legislature intended the scope of the circuit court hearing to encompass more than the traditional common law "irreparable injury/no adequate remedy at law" tests for injunctive relief, and could serve as a substitute for the hearing that the respondent was not afforded before the order was entered. It could equally be argued that being subjected to deprivations of constitutionally protected interests without the opportunity for a hearing meets the test for an irreparable injury, and, given the short-term nature of isolation and quarantine orders compared to the length of the appellate process, there would be no adequate remedy at law provided by an appeal. The order

would be moot and no damages would be possible due to sovereign immunity. Unless relief were afforded very quickly, it would be meaningless.

The third route to circuit court review could entail any administrative matter in which the state agency that has rendered a final order has filed a petition for enforcement in the circuit court pursuant to [section 120.69, Florida Statutes](#). If the petition is filed during the time period (30 days from rendition of the order) within which the respondent could file an appeal (“seek judicial review”), the respondent may assert as a defense that the agency’s order is invalid, which effectively puts the merits of the order at issue. [§ 120.69\(5\), Fla. Stat.](#) If the final order in question were an immediate final order, as most orders during a pandemic emergency are likely to be, the defense of invalidity could afford the respondent an opportunity for a *de novo* hearing in circuit court to test the sufficiency of the agency’s factual and legal determinations underlying its order.

Chapter 4

The Role of Florida Courts in a Public Health Emergency: Legal Issues

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§ 4.1 Introduction

In trying to anticipate the kinds of litigation Florida's trial courts might face in a pandemic influenza public emergency, the overriding objective is to address those legal issues directly related to the outbreak. While the courts will function at normal or reduced levels until that is no longer possible, litigants must continue to have access to the courts to hear matters related to

their interactions with the government during such a difficult time. Court access may have to be provided outside the courthouse; hearings may have to be convened by telephone, and an audio recording of the proceedings may be the only way to preserve a record. The unusual types of proceedings and the unusual manner in which they may have to be conducted suggest that Florida's courts will have to be creative and flexible in addressing our citizens' concerns. We can anticipate, then, that persons subject to isolation or quarantine orders issued by public health officials, persons whose animals face destruction to protect public health, individuals arrested for violation of isolation or quarantines, businesses shut down to protect public health, and other similar matters will be brought to the courts for resolution. There is general consensus that habeas corpus proceedings provide one avenue of relief for isolated and quarantined individuals, leading to the conclusion that the courts must be familiar with the requirements for habeas relief. Other litigants may choose injunctive or mandamus actions to prevent, or to require, some action, and judges will have to address those actions on an emergency basis. This benchguide is intended to provide information on some of these types of proceedings, and to gather relevant case law in each area. The research is not exhaustive and up-to-the-minute, however, and judges should supplement the benchguide as they see fit. Judges should also keep in mind that the Publications Committee's best efforts to predict the kind of litigation courts will confront are inexact and our courts will need to adjust appropriately to quickly changing conditions.

A. Habeas Corpus in the Context of a Pandemic Influenza Emergency

§ 4.2 Habeas Corpus, Generally

In the context of a public health emergency, there are two situations for which the courts must be prepared with regard to habeas corpus relief.

First, the courts must be prepared to handle normal habeas corpus petitions from persons challenging their incarceration when a large percentage of court personnel, including judges, are ill or not able to carry out their respective roles at the courthouse. In most circuits, habeas corpus petitions are handled as emergencies and are expedited. Because habeas petitions challenge an individual's detention by the government, there is an obvious need to expedite resolution of such petitions. Habeas corpus actions must be ruled upon "forthwith" under [section 79.01, Florida Statutes](#), and "without delay" pursuant to [article I, section 13 of the Florida Constitution](#). Local

operational plans for covering court functions should specifically address the emergency handling of habeas petitions, and should try to ensure that such petitions are considered in a timely manner.

Second, if a public health emergency results in Department of Health isolation or quarantines of persons to prevent the spread of disease, isolated or quarantined persons might challenge isolation or quarantine orders in the courts by petition for habeas corpus relief. [Section 381.00315\(4\), Florida Statutes](#), generally describes the Department’s authority to declare isolation and quarantines for the purpose of controlling communicable diseases. Likewise, if the Department of Health attempts to limit the movement of persons by seeking injunctive relief in the circuit court pursuant to [section 381.0012, Florida Statutes](#), a person subject to such an injunction might challenge with a claim that he or she is being unlawfully detained and therefore entitled to issuance of a writ of habeas corpus.

One other class of persons who might seek habeas relief are those charged with violating isolation or quarantine orders. Such individuals are subject to arrest under [section 381.00315\(6\)](#), which is a second degree misdemeanor. Individuals arrested for isolation or quarantine violations would likely be brought to the county jail or other isolation or quarantine facility, and could seek release on bail for the misdemeanor offense. The court would then have to consider whether pretrial release conditions would adequately protect public health, or instead release, with or without bail, should be denied. Although there is little case law dealing with the right to bail in such situations, the Florida Supreme Court case of [Varholy v. Sweat, 15 So. 2d 267 \(Fla. 1943\)](#), provides some guidance, and is more fully discussed below. *See* § 4.3.

While the writ of habeas corpus may be suspended “in case of rebellion or invasion,” the Florida Constitution does not provide for the suspension of the writ of habeas corpus in the event of a public health emergency or any other public safety emergency. *See* [Art. I, § 13, Fla. Const.](#)

In ancient English jurisprudence, several types of writs of habeas corpus existed, each for a separate purpose. However, today in American law, only two forms of habeas corpus survive.

First is “habeas corpus ad testificandum,” which exists in Florida as the order to jailers to produce a prisoner under a subpoena for testimony before the court. The issuance of the writ is in the discretion of the trial court,

Moody v. State, 418 So. 2d 989 (Fla. 1982); *Baker v. State*, 47 So. 2d 728 (Fla. 1950), and in most instances its use has been superseded by statute. “Section 914.001, Florida Statutes . . . , provides that witness subpoenas in criminal cases shall run throughout the state, and section 48.051, Florida Statutes . . . , specifically allows for service of process on state prisoners.” *Bolender v. State*, 422 So. 2d 833, 835 (Fla. 1982).

Second is “habeas corpus ad subjiciendum et recipiendum,” the “great writ,” commonly referred to today as simply “habeas corpus.” The Florida Supreme Court noted in *State ex rel. Deeb v. Fabisinski*, 152 So. 207, 210 (Fla. 1933):

The great writ of habeas corpus is the one mentioned in Magna Charta in the year 1215; the writ which alone was the subject of the acts of 16 Chas. I and 31 Chas. II. It was the writ referred to in the Declaration of Independence and secured to the people of this country by the Constitution of the United States and the Constitutions of the different states.

The particular constitutional provisions are [article I, section 9 of the U.S. Constitution](#), and [article I, section 13 of the Florida Constitution](#).

The modern habeas corpus remedy “is not an action or suit, but is a summary remedy open to the person detained. It is civil rather than criminal in nature and is a legal and not equitable remedy.” *State ex rel. Deeb v. Fabisinski*, 152 So. 207, 209 (Fla. 1933). This common law writ was “designed as a speedy method of affording a judicial inquiry into the cause of any alleged unlawful custody of an individual or any alleged unlawful, actual deprivation of personal liberty.” *Porter v. Porter*, 53 So. 546 (Fla. 1910).

Accordingly, a person whose personal liberty is actually curtailed by an isolation or quarantine order or other government action has the right to challenge such government action via a petition for writ of habeas corpus to the courts of this state under procedures specified in [chapter 79, Florida Statutes](#) (Habeas Corpus).

§ 4.3 Examples of Habeas Corpus Actions for Release from Isolation or Quarantine

Public health laws like [chapter 381, Florida Statutes](#) (public health generally), [chapter 384](#) (sexually transmissible diseases), and [chapter 392](#)

(tuberculosis control) provide public health officers with the authority to restrict the liberty of exposed or infected persons under certain circumstances. Although [chapters 381](#) and [392](#) do not specifically address the availability of habeas corpus actions to persons isolated or quarantined under those chapters, [chapter 384](#) does. *See* [§ 384.281\(5\), Fla. Stat.](#) It is interesting to note that both [chapters 384](#) and [392](#) provide detailed procedures that must be used by health officials when they seek to isolate, hospitalize, or place an infected person, and such actions cannot be taken without circuit court approval. Both chapters also provide for “prehearing detention” orders that may be obtained from a circuit court in certain circumstances, but such orders are subject to immediate review. Since [chapters 384](#) and [392](#) provide for pre-isolation or quarantine proceedings in circuit court, it is unlikely that many persons quarantined or isolated pursuant to their provisions would seek relief through habeas; [section 384.281\(5\)](#) does, however, address the issue of habeas relief by permitting “[a] person detained under this section [to] apply for a writ of habeas corpus attacking the detention.”

By contrast, [chapter 381](#) does not provide for the same pre-issuance circuit court proceedings for isolation or quarantine orders related to public health emergencies like an influenza pandemic. Since [chapter 381](#) does not provide for pre-detention due process, persons subject to isolation or quarantine orders would be likely to utilize habeas corpus petitions to challenge such orders, and the general provisions and case law precedent governing habeas corpus would apply. There is very little precedent, however, to guide the courts in resolving habeas petitions that challenge public health emergency isolation or quarantine orders in crises like an influenza outbreak.

Although not directly on point, there are a few reported cases that have considered the use of habeas corpus in public health situations. In [Varholy v. Sweat, 15 So. 2d 267 \(Fla. 1943\)](#), a county prisoner, Ms. Varholy, was charged with misdemeanor drunk and disorderly conduct. Ms. Varholy was also subject to a quarantine order of a public health officer due to her testing positive for a sexually transmissible disease (see [sections 384.28–384.285, Florida Statutes](#)). Ms. Varholy filed a petition for writ of habeas corpus challenging the trial court’s failure to release her on bail on the criminal charge due to the quarantine order. The trial court’s action was affirmed. The court stated that to “grant release on bail to persons isolated and detained on a quarantine order because they have a contagious disease which makes them dangerous to others, or to the public in general, would render

quarantine laws and regulations nugatory and of no avail.” *Varholy* at 270. It should be noted that [section 384.281\(4\), Florida Statutes](#), which was enacted long after the *Varholy* case was decided, contains a provision for “bail determination” for persons held under prehearing detention orders issued by the circuit court. *Varholy* is nonetheless an important acknowledgment by the Florida Supreme Court that public health considerations may be so compelling that they overrule the right to bail in some circumstances.

In *Moore v. Draper*, 57 So. 2d 648 (Fla. 1952), a person under an “emergency hold” order due to testing positive for tuberculosis challenged his detention via habeas corpus petition. See [§ 392.57, Fla. Stat.](#) Like [chapter 384, section 392.60, Florida Statutes](#), provides for appeal of such a health department order and recognizes a “petition for immediate release.” The court in *Moore v. Draper* denied habeas corpus and upheld the detention, finding a valid exercise of the public health agency’s duty to protect the public under [§ 392.57, Florida Statutes](#).

In *Moore v. Armstrong*, 149 So. 2d 36 (Fla. 1963), a tuberculosis patient challenged via habeas corpus petition his compulsory hospitalization under previous section 92.25 et seq., Florida Statutes (now [section 392.56, Florida Statutes](#)). Habeas corpus was denied, without prejudice to the plaintiff’s ability to file again in the future if he deemed himself cured. See also [§ 392.60, Fla. Stat.](#)

§ 4.4 Statutory Provisions for Habeas Corpus

Generally

[Chapter 79, Florida Statutes](#), governs habeas corpus proceedings in general. [Section 79.01, Florida Statutes](#), provides in pertinent part:

When any person detained in custody . . . applies to . . . any circuit judge for a writ of habeas corpus and shows by affidavit or evidence probable cause to believe that he or she is **detained without lawful authority**, the court, . . . or judge to whom such application is made shall grant the writ forthwith, against the person in whose custody the applicant is detained and returnable immediately before any of the courts, justices, or judges as the writ directs. (emphasis added)

Specific Situations Recognized by Statute

Florida statutes address habeas corpus proceedings in several specific circumstances:

- [Section 393.11\(13\), Florida Statutes](#), in the context of involuntary commitment of developmentally disabled persons.
- [Section 394.459\(8\), Florida Statutes](#), in the context of involuntary commitment of mentally ill persons.
- [Section 394.9215, Florida Statutes](#), in the context of involuntary commitment of sexually violent predators..

As was previously mentioned, in [chapters 384 and 392, Florida Statutes](#), dealing respectively with the forced isolation of those infected with tuberculosis and sexually transmissible diseases, isolated persons may appeal the detention orders of the Department of Health and may petition the court for immediate release. [§§ 384.285 and 392.60, Fla. Stat.](#)

§ 4.5 Who Represents the Parties?

Government

[Section 27.06, Florida Statutes](#), provides that the state attorneys of Florida “**shall**” represent the state in all habeas corpus actions against state agencies. Notice of the action is given to the state attorney in the court “wherein the statute under attack is being applied, the criminal law proceeding is being maintained, or the conviction has occurred.” [§ 27.06, Fla. Stat.](#) However, absent statutory provision to the contrary, the state attorney is not obligated to represent a private facility detaining mental health or [Baker Act](#) (see [section 394.467, Florida Statutes](#)) committed persons. [Op. Att’y Gen. Fla. 74-53 \(1974\)](#). As a practical matter, each circuit should determine whether the state attorney will represent the Department of Health or the county health units, or instead the county attorney’s office or the Attorney General’s office intends to appear on behalf of such entities to defend the isolation or quarantine orders.

Petitioners

Petitioners of Means

There is no statutory or constitutional provision creating a right to counsel at

public expense for non-indigent persons seeking habeas corpus relief. Successful petitioners are free to seek attorney's fees and court costs at the conclusion of the litigation.

Indigent Petitioners

Most authorities generally agree that persons wishing to challenge the lawfulness of their detention pursuant to an isolation or quarantine order should have appointed counsel if they are indigent. However, Florida law does not provide an easy answer to the question of who should provide that representation. *See Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18, 26-27, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640, 648 (1981) (“In sum, the Court’s precedents speak with one voice about what ‘fundamental fairness’ has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty”). Since Florida’s public defenders are statutorily authorized to represent mentally ill, [section 394.467\(4\), Florida Statutes](#), and developmentally disabled, [section 393.11\(6\)\(a\)](#), persons subject to involuntary commitment, it is logical to assume that public defenders additionally could undertake representation of isolated and quarantined individuals during a public health emergency. *See also* §§ [384.28\(3\)\(c\)](#), [384.281\(4\)](#), *Fla. Stat.* (right to appointed counsel for indigent person alleged to be infected with sexually transmissible disease and for whom hospitalization, placement, residential isolation, or prehearing detention order is sought) and §§ [392.55\(4\)\(c\)](#), [392.56\(3\)\(c\)](#), *Fla. Stat.* (right to appointed counsel for indigent person alleged to be infected with active tuberculosis and for whom physical examination and treatment, hospitalization, placement, or residential isolation is sought). The Public Defenders’ authority to represent people in civil proceedings, however, has been restricted by [section 27.51, Florida Statutes](#), which specifically provides for representation by the public defender of persons under arrest or charged with

- a felony;
- a misdemeanor prosecuted by the state attorney;
- a violation of [chapter 316](#) punishable by imprisonment (traffic laws);
- criminal contempt; or

- a violation of local laws ancillary to a state charge or, if not ancillary to a state charge, if the Public Defender contracts with local authorities to provide such representation.

Public defenders are also charged with representing

- alleged delinquent children;
- persons subject to proceedings for involuntary commitment under [chapter 394, Part I \(Baker Act\)](#), and [Part V \(Jimmy Ryce Act\)](#);
- persons subject to proceedings for involuntary commitment under [section 393.11\(6\)\(a\), Florida Statutes](#) (developmentally disabled persons); and
- persons convicted and sentenced to death, regarding appeal to the Supreme Court.

[§ 27.51\(1\)\(c\)–\(1\)\(e\), Fla. Stat.](#) The public defender also handles appeal of matters in cases listed above. [§ 27.51\(1\)\(f\), Fla. Stat.](#)

It, therefore, is not clear that the public defenders could voluntarily agree to provide representation to persons wanting to challenge actions taken by public health authorities, whether that action was an isolation or quarantine, mandatory vaccination, or other order impacting an individual's civil or constitutional rights. In an emergency, however, the public defender might be willing to accept an appointment, under the court's inherent authority to appoint counsel, until a statutory change could be considered by the legislature. It is also possible that voluntary legal aid organizations would be willing to provide such representation, but the logistics of notifying and arranging for volunteer lawyers during a chaotic period might prove unworkable. Each circuit should thoroughly discuss these issues with the public defender and any other organization willing to commit to providing representation in an emergency, and decide on a plan for appointing lawyers for indigent persons.

Indigent Persons with Other Claims

[Section 27.51, Florida Statutes](#), specifically prohibits the public defender from representing even indigent persons in civil actions brought under the Florida Rules of Civil Procedure or the Federal Rules of Civil Procedure, or in a rule challenge under [chapter 120, Florida Statutes](#), unless specific

statutory authorization exists. In *Graham v. Vann*, 394 So. 2d 176 (Fla. 1st DCA 1981), the court found that the public defender could represent indigent prisoners in a suit challenging prison conditions, but those prisoners were serving sentences for criminal convictions, unlike persons subject to isolation or quarantine.

§ 4.6 Filing Fees

The Florida Constitution provides that habeas corpus shall be available “**freely and without cost**” (emphasis added). Art. I, § 13, Fla. Const. Consequently, habeas corpus actions are not subject to the payment of a filing fee under section 28.241, Florida Statutes, or any other statute imposing filing fees on persons initiating legal action.

§ 4.7 Venue

Venue for habeas corpus actions lies in the county in which the petitioner is detained. § 79.09, Fla. Stat. For involuntarily committed persons, venue is “in the county where the patient is being held” under section 394.459(8)(b), Florida Statutes, and “in the circuit court for the county in which the facility is located” under section 394.9215(1)(a), Florida Statutes. Petitions for habeas corpus from prisoners detained in other counties should be transferred to the circuit court in the county in which the prisoner or detainee is held if he or she will be entitled to immediate release if he or she prevails. *Heard v. Florida Parole Commission*, 811 So. 2d 808 (Fla. 1st DCA 2002); *Stanley v. Moore*, 744 So. 2d 1160 (Fla. 1st DCA 1999).

§ 4.8 Pleadings: The Complaint

Basic Contents

A complaint for habeas corpus relief must contain:

- (1) the facts on which the petitioner relies for relief,
- (2) a request for the relief sought, and,
- (3) if desired, argument in support of the petition with citations of authority.

Fla. R. Civ. P. 1.630(b); *see also Sneed v. Mayo*, 66 So. 2d 865 (Fla. 1953) (allowing complaint to be informal, such as letter from prisoner).

§ 4.9 Parties

The Respondent

The respondent in a habeas corpus action is “the person in whose custody the applicant is detained.” § 79.01, Fla. Stat. *See also Alachua Regional Juvenile Detention Center v. T.O.*, 684 So. 2d 814 (Fla. 1996) (proper respondent in habeas corpus action is party with actual custody of petitioner and who is in position to physically produce petitioner). In challenges to isolation and quarantine orders, the matter of who, or what entity, is the proper party respondent may not be clear, since the order may require an exposed or infected person to remain at home. It might be preferable, in such circumstances, to require that petitioners always name the public official or public entity that issued the quarantine or isolation order as at least one of the respondents; since a person may be held at a hospital or other facility pursuant to a county health department isolation or quarantine order, the presence of both entities before the court may be required for a complete adjudication of the issues.

The judge who entered a detention order is not a proper party respondent in an action for habeas corpus. *T.O. v. Alachua Regional Juvenile Detention Center*, 668 So. 2d 243 (Fla. 1st DCA), *approved*, 684 So. 2d 814 (Fla. 1996).

The Petitioner

The petitioner in a habeas corpus action may be the friend, wife, husband, parent, or guardian of the person illegally detained. *See Seccia v. Wainwright*, 487 So. 2d 1156 (Fla. 1st DCA 1986). The petitioner filing on behalf of another must establish some reason why the prisoner could not file on his or her own behalf. *See Minerva v. Singletary*, 4 F.3d 938 (11th Cir.), *cert. denied*, 509 U.S. 944 (1993).

The public defender has standing in certain cases to file a habeas corpus action on behalf of indigent persons, but only with statutory authority. § 27.51(1)(d), Fla. Stat.; *see also Administrator, Retreat Hospital v. Johnson in and for Broward County*, 660 So. 2d 333 (Fla. 4th DCA 1995).

The petitioner may not be a class, and class action is not appropriate for habeas corpus relief. *See State ex rel. Williams v. Purdy*, 242 So. 2d 498 (Fla. 3d DCA), *appeal dismissed*, 248 So. 2d 171 (Fla. 1971).

§ 4.10 Substantive Allegations

When a petitioner files a complaint for habeas corpus in circuit court, the court must assess the legal sufficiency of the allegations and decide whether an Order to Show Cause (“writ of habeas corpus”) should be entered. [Fla. R. Civ. P. 1.630\(d\)](#). To establish a prima facie case for habeas corpus, the complaint must allege that:

1. the petitioner is currently involuntarily detained;
2. by the respondent;
3. the restraint or detention is unlawful (with specific factual and legal support); and
4. the respondent is entitled to immediate release.

See DeAngelo v. Strickland, 426 So. 2d 1264 (Fla. 1st DCA 1983) (complaint properly dismissed when no allegation that petitioner was being currently and illegally detained).

Verified Complaint

The complaint must be verified, because [section 79.01, Florida Statutes](#), requires that the complaint must show “by affidavit or evidence” probable cause to believe that the petitioner is illegally detained. *See also Polk v. Crockett*, 379 So. 2d 368 (Fla. 1st DCA 1979). Verification is governed by [section 92.525, Florida Statutes](#). [Section 92.525\(4\)\(c\)](#) provides that “[t]he requirement that a document be verified means that the document must be signed or executed by a person and that the person *must state under oath* or affirm that the *facts or matters stated or recited in the document are true*, or words to that import or effect” (emphasis added). Documents may be verified by signing under oath before a judge, clerk of court, deputy clerk of court, or notary public, or by signing a written declaration that provides as follows: “Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true,” followed by the signature of the person making the declaration. [§ 92.525\(2\), Fla. Stat.](#)

§ 4.11 Issuance of the Order to Show Cause

If the complaint states a prima facie case for habeas corpus relief, and the petitioner is held in the county of filing, the court, via an ex parte

proceeding, shall issue a writ of habeas corpus. [Fla. R. Civ. P. 1.630\(d\)\(4\)](#). If the petitioner is held in another circuit, the case should be transferred to the circuit court in and for the county in which the person is detained. The terminology “writ of habeas corpus” in the rule is archaic, and an “Order to Show Cause” why the person should not be immediately released is currently in use. A copy of the complaint (made by the judicial assistant or clerk of court if the petitioner fails to send a copy) must be attached to the Order to Show Cause so that the lower court or agency may respond.

Response to the Writ (Response to Order to Show Cause)

The respondent agency shall respond to the writ (Order to Show Cause) “as provided in [rule 1.140](#).” [Fla. R. Civ. P. 1.630\(e\)](#). [Rule 1.140\(a\)\(1\)](#) provides that the respondent shall serve an answer within 20 days after service. It also provides for a reply by the petitioner within 20 days of the response to the Order to Show Cause. Of course, the court may set shorter deadlines in the Order to Show Cause.

This procedure differs from the procedures set out in [section 79.03–79.10, Florida Statutes](#). The procedure as set forth by the Supreme Court presumably takes precedence over the procedures in the statutes.

[Section 79.03](#) requires service of the writ (Order to Show Cause stage) by the sheriff of the county in which the petitioner is detained upon the officer or other person alleged to have immediate custody of the petitioner. The person upon whom the writ is served is then required to “bring the body of the prisoner [petitioner] . . . before the court . . . *without delay and at the same time certify to the cause of the detention*” (emphasis added). [§ 79.04, Fla. Stat.](#) Three days after service is the time limit for bringing the body of the petitioner before the court. [§ 79.05, Fla. Stat.](#) The court must then “inquire without delay into the cause of the petitioner’s imprisonment, and shall either discharge the petitioner, admit him or her to bail or remand him or her to custody, as the law and the evidence require. . . .” [§ 79.08, Fla. Stat.](#) If habeas corpus is denied and the court remands the petitioner to custody, appeal of the order does not stay the custody pending appeal, and the person remains in custody until the denial of habeas corpus is reversed on appeal. [§ 79.10, Fla. Stat.](#)

Contents of Response

The response (or “return to writ”) must allege the respondent’s right to

restrain or hold custody of the person detained. *Moody v. State*, 99 So. 665 (Fla. 1924). If the claimed right is based on a document, a copy should be attached. Fla. R. Civ. P. 1.130(a). In addition to filing an answer, the respondent must also produce the body of the detained person in court on the return day. § 79.04(1), Fla. Stat.

§ 4.12 Petitioner’s Reply to the Return

The petitioner may attack the sufficiency of the response to the order to show cause by a motion to quash or a motion for discharge notwithstanding the return. § 79.04(2), Fla. Stat. Either motion raises a question of substantive law. The motions are equivalent to a motion for judgment on the pleadings.

§ 4.13 Deciding the Case

Although many other types of habeas corpus petitions can be resolved without a hearing, most habeas proceedings directed to isolation or quarantine orders are likely to require a hearing. Since there are extraordinary time pressures in resolving challenges to isolation and quarantine orders, the time frames set forth in the rules of procedure should be shortened, and the hearing may be the only opportunity to receive necessary information and evidence. Because the pleadings may not be as fully developed as the rules of procedure contemplate, a complete record (or recording) of the hearing is extremely important. The scope of inquiry in a habeas corpus proceeding is not limited to the allegations of the complaint. The court may inquire into any matter that affects the legality of the detention. *Crooms v. Schad*, 40 So. 497 (Fla. 1906); *Henry v. Santana*, 62 So. 3d 1122 (Fla. 2011). This is the only civil proceeding in which the legal sufficiency of a pleading cannot be directly attacked or in which the parties are not limited to the issues raised in the pleadings or tried by consent.

§ 4.14 Final Judgment

After the hearing or trial, a judgment must be entered discharging the petitioner from involuntary detention, admitting the petitioner to bail, or remanding the petitioner to involuntary detention under the process originally authorizing his or her detention. See § 79.08, Fla. Stat.

In order to protect the petitioner’s confidential health care information, the petitioner’s identity should not be disclosed in petitions, orders, and other court records. The petitioner’s identity may be revealed to public

officials such as law enforcement officers and authorized representatives of appropriate state agencies if the petitioner's identity is necessary to protect the public health. See the following instructive public health statutes.

Florida Statutes

[Section 384.282, Florida Statutes, Naming of parties \(Sexually Transmissible Diseases\)](#)

[Section 392.545, Florida Statutes, Naming of persons subject to proceedings \(Tuberculosis\)](#)

[Section 384.29, Florida Statutes, Confidentiality \(Sexually Transmissible Diseases\)](#)

[Section 392.65, Florida Statutes, Confidentiality \(Tuberculosis\)](#)

[Section 381.0031, Florida Statutes \(Epidemiological research; report of diseases of public health significance to department\)](#)

§ 4.15 Checklist for Habeas Corpus Hearing

Purpose: To be used by judge for review of Quarantine (Exposed Individual) and Isolation (Ill Individual) Department of Health orders.

General Requirements:

1. You are an acting circuit judge, circuit judge, district court of appeal judge, or Supreme Court justice.
2. The petition is filed in the jurisdiction of the isolated or quarantined person/animal/property.
3. No filing fee is required.
4. No administrative agency review is required.
5. Speedy review is important (summary review).
6. Petition must be verified.
Note: Can be sworn before a judge.

7. Petition may be filed by a family member, legal guardian, or

friend.

Department's Order:

1. The order is signed by county health department director (medical doctor) or administrator (lay person).
2. The order concerns people or real property.

Note: Goods/animals are handled by Department of Agriculture.

3. The person or property is sufficiently identified.
4. The medical need is articulated. The person or property poses "serious and present danger of harm to others."
5. The time period of the quarantine or isolation is defined.
6. Sufficient notice of time and place of this hearing was given.
7. Personal service was made.

Hearing:

1. There is means for making a record (recording device).
Note: No free copy unless indigent.
2. Court, personnel, parties, and any others at health risk are protected.

3. Who can be present?
 Department of Health Representative
 Petitioner
 Counsel for Department [Dept. Att'y/Att'y General/County Att'y/State Att'y]
 Counsel for Petitioner [Private/Legal Aid (civil)/Public Defender (criminal)]
 Public/Press

Note: There is a right to counsel. If petitioner is indigent, supply counsel. (Quarantine and isolation are deprivations of a petitioner's liberty.)

4. The medical rights of the petitioner are protected.
5. The Department carried the burden of proof by “clear and convincing evidence” OR
6. The Department did not carry the burden of proof by “clear and convincing evidence.”

Things To Consider:

- _____ 1. Was there exposure to contagious illness or is the petitioner ill (if reviewing isolation order)?
- _____ 2. Is noncompliant conduct evident?
- _____ 3. Will petitioner’s freedom endanger the public?
- _____ 4. What is the severity of the disease?
- _____ 5. What is the treatment method?
- _____ 6. How is the infection spread?
- _____ 7. What is the time frame of the course of the illness?

Key: Match the restrictions to the threat.

Goal: Prevent the spread of a communicable disease.

Note: Check for bias in drawing a quarantine or isolation perimeter.

Ask the petitioner why the quarantine or isolation order is unfair.

Court Order:

1. The order must be written.
2. The order must state detailed facts.
3. The order must define the closure or area of quarantine or isolation and “restrict or compel movement and actions consistent with the protection of public health.”
Note: Liberty deprivation must be limited to the “least restrictive intervention possible.”
4. The order must give a remedy (e.g., “get medical test/obtain

vaccine/finish treatment” by “any qualified person authorized by Department”).

5. The order must make provision for the “necessities” of food/safety/medical care to petitioner.

Note: But the provision of these necessities must not endanger others or degrade other services.

6. The order must state expiration date or return date to court.
7. The order must state the penalty for violation of order – second degree misdemeanor.
8. The order must state the means of appeal.

B. Criminal Proceedings

§ 4.16 Arrests of Persons for Disobeying Isolation and Quarantines: Nature of the Offense

As was previously noted, the power to isolate and quarantine in Florida arises from [section 381.00315\(4\), Florida Statutes](#), which provides:

The department has the duty and the authority to declare, enforce, modify, and abolish the isolation and quarantine of persons, animals, and premises as the circumstances indicate for controlling communicable diseases or providing protection from unsafe conditions that pose a threat to public health, except as provided in [ss. 384.28](#) [sexually transmissible disease isolation protocols] and [392.545-392.60](#) [tuberculosis isolation protocols].

Once an individual has been properly isolated or quarantined pursuant to this section, violation of that isolation or quarantine order is governed by [section 381.00315\(6\), Florida Statutes](#):

. . . . Any person who violates any rule adopted under this section, any isolation or quarantine, or any requirement adopted by the department pursuant to a declared public health emergency, commits a misdemeanor of the second degree, punishable as provided in [s. 775.082](#) or [s. 775.083](#).

Although arresting officers may wish to take additional precautions in

arresting persons suspected of having avian influenza, all indications are that such arrests will otherwise be governed by standard arrest protocols, including *Miranda* rights, probable cause requirements, and other applicable criminal procedure standards.

§ 4.17 Arrests of Persons for Disobeying Isolation and Quarantines: Entitlement to Bond

Under [article I, section 14 of the Florida Constitution](#), individuals charged with non-capital offenses that are not punishable by life imprisonment are eligible for pretrial release on reasonable conditions. However, an isolation or quarantine order itself is not subject to bail, and issues related to bail would arise only if the isolated or quarantined individual is arrested for violating the isolation or quarantine order. See *Varholy v. Sweat*, 15 So. 2d 267 (Fla. 1943). Florida law does not clearly address violation of an isolation or quarantine order, but since a violation is only a misdemeanor, the defendant would potentially be eligible for pretrial release. In *Varholy*, the Florida Supreme Court allowed the detention, without bail, of a person quarantined for having a sexually transmissible disease. Relying on *Varholy*, it is anticipated that persons held in jail for the misdemeanor violation of a pandemic influenza isolation or quarantine order could be denied bail if there is no other way to protect public health. Judges should carefully consider the facts involved in each case to ensure that persons arrested for violating isolation or quarantine orders are not held, without bail, unnecessarily.

§ 4.18 Arrests of Persons for Disobeying Isolation or Quarantine: First Appearance Practical Tips

As with all personal contact during a pandemic, judges and other court staff should take appropriate precautions during the first appearance of a person charged with disobeying isolation or quarantine. Such precautions may very well include handling the first appearance by video or telephone, with the defendant isolated from others at the jail or detention facility. By isolating the defendant from other defendants and from the judge, counsel, and court staff, the likelihood of communicating influenza by saliva, coughing, and sneezing will be at least somewhat reduced. The core of effective prevention will be advance planning that (1) considers the potential for exposure by every individual involved in the process and (2) addresses avoiding such exposure. Each circuit should discuss, and address in detail, issues like the handling of first appearances of isolated, quarantined, and non-quarantined

individuals, the handling of emergencies including habeas corpus proceedings, and other issues related to handling court proceedings during a public health emergency. There is obviously no one correct way to handle these issues, but each circuit must ensure that it has a comprehensive plan for doing so. For more guidance regarding the management of hearings and the preparation of a record, please see chapters 6 and 7 of this benchguide.

Chapter 5**Other Legal Issues for the Courts in Public Health Emergencies****A. Warrants**

- § 5.1 Florida Isolation and Quarantine Law: Codified Authority and Requirements
- § 5.2 Florida Isolation and Quarantine Law: Precedent
- § 5.3 Isolation and Quarantine Law as Under the Fourth Amendment
- § 5.4 Warrants for Seizing Individuals for Isolation and Quarantine Purposes
 - § 5.4(a) Inspection Warrants
 - § 5.4(b) Consensual Encounters, Investigatory Stops, and Warrantless Arrests
 - § 5.4(c) Arrest Warrants
 - § 5.4(d) Search Warrants
- § 5.5 Warrant Exceptions: Exigent Circumstances
- § 5.6 Warrant Exceptions: Special Needs and Community Caretaker Doctrines
- § 5.7 Seizure of Bodily Fluids
- § 5.8 Just Compensation for Seized Property
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B. Mandatory Vaccinations

- § 5.10 Legality of Mandatory Vaccinations

C. Enforcement of Curfew Orders

- § 5.11 General Powers of Curfew
- § 5.12 In Whom the Power Is Vested
- § 5.13 Implementation
- § 5.14 Court Proceedings: Courts of Jurisdiction
- § 5.15 Enforcement
- § 5.16 Penalties for Violation of Curfew Orders

A. Warrants

- § 5.1 **Florida Isolation and Quarantine Law: Codified Authority and Requirements**

Florida law includes provisions applicable to the imposition of isolation and quarantines in the event of public health emergencies, such as an influenza pandemic. [Section 381.00315, Florida Statutes](#), provides for the declaration of public health emergencies and isolation and quarantines by the State Health Officer¹⁰ and sets forth the responses to a crisis that can be selected by the State Health Officer.

[Section 381.00315\(1\)\(c\)](#) defines “public health emergency” as “any occurrence, or threat thereof, whether natural or manmade, which results or may result in substantial injury or harm to the public health from infectious disease, chemical agents, nuclear agents, biological toxins, or situations involving mass casualties or natural disasters.” The scope of the section includes pandemic influenza, an infectious disease.

Of the four responses to a public health emergency available to the State Health Officer, one is relevant to the issue of isolation and quarantine. [Section 381.00315\(1\)\(c\)4](#) provides that one of the actions which can be chosen by the State Health Officer is:

Ordering an individual to be examined, tested, vaccinated, treated, isolated, or quarantined for communicable diseases that have significant morbidity or mortality and present a severe danger to public health. Individuals who are unable or unwilling to be examined, tested, vaccinated, or treated for reasons of health, religion, or conscience may be subjected to isolation or quarantine.

a. Examination, testing, vaccination, or treatment may be performed by any qualified person authorized by the State Health Officer.

b. If the individual poses a danger to the public health, the State Health Officer may subject the individual to isolation or quarantine. If there is no practical method to isolate or quarantine the individual, the State Health Officer may use any means necessary to vaccinate or treat the individual.

Any order of the State Health Officer given to effectuate this paragraph shall be immediately enforceable by a law

¹⁰ As defined in [section 20.43\(2\), Florida Statutes](#), the State Health Officer is the head of the Department of Health.

enforcement officer under [s. 381.0012](#).

[Rule 64D-3.038, Florida Administrative Code](#), further discusses public health emergencies and implements [section 381.00315\(1\)\(c\)4](#). [Rule 64D-3.038\(1\), Florida Administrative Code](#), which discusses Department of Health isolation and quarantine requirements in general, provides:

Quarantine orders shall be issued by the State Health Officer, or the county health department director or administrator, or their designee in writing; include an expiration date or specify condition(s) for ending of quarantine; and restrict or compel movement or actions by or regarding persons, animals or premises consistent with the protection of public health and accepted health practices except as otherwise governed by subsection (6).

“Actions” that quarantine orders can restrict or compel include “isolation and closure of premises, testing, destruction, disinfection, treatment, protocols during movement and preventive treatment, including immunization.” [Fla. Admin. Code R. 64D-3.038\(2\)](#). The rule also defines “Practical Method of Quarantine” as “[a] location where a person infected with or exposed to an infectious disease that threatens public health will have food, clothing and shelter as necessary while separated and restricted from contact with people who have not been infected with that disease or immunized against that infection.” [Fla. Admin. Code R. 64D-3.028\(20\)](#). Finally, the rule provides that “the subject individual may choose isolation in their domicile and such closure as needed to ensure that isolation, unless the Department determines that the subject individual’s domicile is not a practical method of quarantine.” [Fla. Admin. Code R. 64D-3.038\(4\)](#).

[Section 381.0012, Florida Statutes](#), sets forth several methods for enforcement of isolation and quarantine orders undertaken under the authority of [section 381.00315\(1\)\(c\)4](#). One of these methods is relevant to the issuance of warrants. [Section 381.0012\(4\)](#) provides: “The department may appear before any trial court judge empowered to issue warrants in criminal cases and request the issuance of a warrant. The trial court judge shall issue a warrant directed to any sheriff, deputy, or police officer to assist in any way to carry out the purpose and intent of this chapter.” The language of the section suggests that noncompliance with health officials and isolation or quarantine orders during times of public health emergency is to be treated like a criminal offense for purposes of the Fourth Amendment, thereby

placing the full panoply of warrants, not just administrative warrants and warrantless emergency circumstances, at the disposal of law enforcement directed to monitor compliance with orders issued by health officials. In fact, [section 381.00315\(6\), Florida Statutes](#), criminalizes such noncompliance:

. . . . Any person who violates any rule adopted under this section, any isolation or quarantine, or any requirement adopted by the department pursuant to a declared public health emergency, commits a misdemeanor of the second degree, punishable as provided in [s. 775.082](#) or [s. 775.083](#).

In addition to the remedies provided in [chapter 381, Florida Statutes](#), final orders of an executive branch agency such as the Department of Health are enforceable under the provisions of [section 120.69, Florida Statutes](#). This statute calls for a petition to be filed in circuit court seeking enforcement by way of declaratory relief, injunctions or other equitable relief, and fines and forfeiture.

§ 5.2 Florida Isolation and Quarantine Law: Precedent

Fortunately, there has not been a declared public health emergency since Florida began adopting the revised statutes and rules governing such emergencies in the wake of the September 11, 2001, terrorist attacks and ensuing anthrax scare. As a result, there are no Florida cases interpreting the statutes and rules as they regard issuing isolation and quarantine orders and obtaining warrants for their enforcement. Hence, it appears that general federal and state constitutional law will apply to the issuance of warrants to seize persons (and enter property to effect such seizures) for isolation and quarantine purposes in the event of a public health emergency. However, because the issue of warrants for isolation and quarantine purposes in public health emergencies has not been specifically addressed by the courts (nor has a human individual been isolated or quarantined in Florida since 1947, according to the Department of Health), how the Fourth Amendment could apply to such circumstances and how it has applied in analogous circumstances must be considered.

§ 5.3 Isolation and Quarantine Law Under the Fourth Amendment

The [Fourth Amendment to the U.S. Constitution](#) provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” “A ‘search’

occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.” *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85, 87-88 (1984). A “seizure” within the meaning of the Fourth Amendment occurs when “taking into account all of the circumstances surrounding the encounter, the police conduct would ‘have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.’” *Kaupp v. Texas*, 538 U.S. 626, 123 S.Ct. 1843, 1845, 155 L.Ed.2d 814, 819 (2003) (quoting *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)). The Fourth Amendment applies to the states through the Fourteenth Amendment. See *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Under article I, section 12 of the Florida Constitution, the right to be free from unreasonable searches and seizures “shall be construed in conformity with the 4th Amendment to the U.S. Constitution, as interpreted by the U.S. Supreme Court.” “However, in the absence of a controlling U.S. Supreme Court decision, Florida courts are still ‘free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution.’” *Soca v. State*, 673 So. 2d 24 (Fla. 1996).

§ 5.4 Warrants for Seizing Individuals for Isolation or Quarantine Purposes

There are three types of warrants, discussed below, that could be employed for purposes of seizing individuals for isolation or quarantine purposes in the event of a public health emergency. Inspection warrants may be used to identify those subject to isolation or quarantine and to secure premises. Arrest warrants may be used to seize persons located in public places, vehicles, and private premises. Search warrants may be used to enter private premises to seize persons.

§ 5.4(a) Inspection Warrants

Inspection warrants are addressed by section 933.20, Florida Statutes. Such warrants are directed to public officials to command “an inspection required or authorized by state or local law or rule relating to municipal or county building, fire, safety, environmental, animal control, land use, plumbing, electrical, health, minimum housing, or zoning standards.” Inspection warrants can be issued for a “place, dwelling, structure, or premises” to enforce health laws or regulations, but may not be used to obtain access to “[o]wner-occupied family residences.” § 933.21, Fla. Stat. It appears,

therefore, that inspection warrants cannot be employed to access residences occupied by owners to ascertain whether a subject of isolation or quarantine is present, but could be used to access residences occupied by non-owners or other buildings or lands to check for infected or exposed individuals.

However, for cause to exist to support the issuance of an inspection warrant, the inspection must be routine (which it would not be in the case of an emergency) or there must be a “reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, or premises which condition would constitute a violation of a state or local law or rule relating to municipal or county building, fire, safety, environmental, animal control, land use, plumbing, electrical, health, minimum housing, or zoning standards.” § 933.22, Fla. Stat. Therefore, in order to employ an inspection warrant for purposes of locating individuals for isolation or quarantine, it must be determined that a health law or regulation is being violated as to a particularized location. In other words, inspection warrants are not a basis for sweep searches.

[Sections 933.23–933.26, Florida Statutes](#), set forth the procedural requirements for inspection warrants. Of note, [section 933.26](#) provides information relevant to executing an inspection warrant in an emergency situation:

An inspection pursuant to a warrant shall not be made by means of forcible entry, except that the judge may expressly authorize a forcible entry when facts are shown which are sufficient to create a reasonable suspicion of a violation of a state or local law or rule relating to municipal or county building, fire, safety, environmental, animal control, land use, plumbing, electrical, health, minimum housing, or zoning standards which, if such violation existed, would be an immediate threat to health or safety or when facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful. When prior consent has been sought and refused, notice that a warrant has been issued shall be given at least 24 hours before the warrant is executed. Immediate execution of a warrant shall be prohibited except when necessary to prevent loss of life or property.

§ 5.4(b) Consensual Encounters, Investigatory Stops, and Warrantless Arrests

Turning to individuals at large in public places and vehicles or located on private premises, there are three levels of encounters between law enforcement and citizens: consensual encounters, investigatory stops, and arrests. *Popple v. State*, 626 So. 2d 185 (Fla. 1993).

The first level of encounter is a consensual encounter. “During a consensual encounter a citizen may either voluntarily comply with a police officer’s requests or choose to ignore them. Because the citizen is free to leave during a consensual encounter, constitutional safeguards are not invoked.” *Id.* at 186. In the event of consensual encounters occurring during a public health emergency, individuals could be examined by law enforcement and seized for isolation or quarantine if they voluntarily choose to comply with an officer’s request in this regard (and it is hoped that most individuals will voluntarily comply with the requests of health officials and law enforcement authorities should there be a public health emergency). However, individuals unwilling to comply would be free to ignore law enforcement, walk away, and force law enforcement to seek other means of examination and seizure for isolation or quarantine.

The second level of encounter is an investigatory stop.

At this level, a police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit, a crime. . . . In order not to violate a citizen’s Fourth Amendment rights, an investigatory stop requires a well-founded articulable suspicion of criminal activity. Mere suspicion is not enough to support a stop.

Id.

Section 901.151, Florida Statutes, also known as the Stop and Frisk Law, addresses investigatory stops of individuals, also known as *Terry*¹¹ stops. Section 901.151 permits such stops when a law enforcement officer has reasonable suspicion that an individual has committed, is committing, or will commit a violation of a criminal law or ordinance. Although section 901.151, Florida Statutes, does not expressly permit law enforcement to stop an individual for purposes of ascertaining whether he or she is the proper subject of an isolation or quarantine order in the event of a public health

¹¹ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

emergency, law enforcement likely can do so based on either the authority of [sections 381.0012\(4\)](#) and [381.00315\(6\)](#), which treat noncompliance with quarantine orders as a criminal offense, or the community caretaking doctrine discussed below. The officer must have reasonable suspicion that the individual is the subject of an isolation or quarantine order; this may be problematic when isolation or quarantine orders are few or scattered throughout the state, as opposed to blanket orders covering an area the officer is patrolling.

The third level of encounter is an arrest. An arrest “must be supported by probable cause that a crime has been or is being committed.” [Popple, 626 So. 2d at 186](#). An arrest can be effectuated without a warrant in the circumstances enumerated in [section 901.15, Florida Statutes](#). These circumstances address the commission of felonies, misdemeanors committed in the presence of law enforcement, and other specified offenses. It appears that arrests based on probable cause in public places are not expressly intended to address the seizure of persons for isolation or quarantine purposes, but could be used to do so based on the authority of [sections 381.0012\(4\)](#) and [381.00315\(6\)](#), which treat noncompliance with isolation or quarantine orders as a criminal offense (especially if noncompliance with isolation or quarantine orders can be deemed a misdemeanor committed in a law enforcement officer’s presence). Again, the officer will need probable cause to believe a particular individual is subject to an isolation or quarantine order.

§ 5.4(c) Arrest Warrants

Arrest warrants are addressed by [section 901.02, Florida Statutes](#), which provides for an arrest warrant to be issued when a trial judge “reasonably believes that the person complained against has committed an offense within the trial court judge’s jurisdiction.” “In order to obtain a warrant for an arrest, a law enforcement officer must present a written affidavit or sworn complaint to the committing magistrate demonstrating probable cause to believe that the accused has violated the criminal law of the State.” [Crain v. State, 914 So. 2d 1015 \(Fla. 5th DCA 2005\)](#). Again, it appears that arrest warrants based on probable cause are not expressly intended to address the seizure of persons for isolation or quarantine purposes, but could be used to do so based on the authority of [sections 381.0012\(4\)](#) and [381.00315\(6\)](#), which treat noncompliance with isolation or quarantine orders as a second degree misdemeanor. In seeking an arrest warrant, the officer may have more information at his or her disposal as to whether the individual is

already the subject of an isolation or quarantine order.

Additionally, warrantless arrests effectuated in private residences to enforce isolation or quarantine orders may be possible based on consent or the exigent circumstances exception to the warrant requirement (or the special needs doctrine, both discussed below). *See Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639, 653 (1980) (“In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant”). However, the exigent circumstances exception does not permit warrantless arrests in homes for misdemeanor offenses, and therefore may be of limited applicability in enforcing isolation or quarantine orders (the violation of which is classified as a misdemeanor by [section 381.00315\(6\)](#). *See M.J.R. v. State*, 715 So. 2d 1103 (Fla. 5th DCA 1998) (“[T]here is no authority given to a police officer to enter a suspect’s home to effect a warrantless arrest for a misdemeanor. . . . Stated differently, no exigent circumstance existed to justify the warrantless arrest of appellant in his home”).

Furthermore, [section 901.19\(1\), Florida Statutes](#), applies to arrests effectuated in buildings, including private dwellings, and provides:

If a peace officer fails to gain admittance after she or he has announced her or his authority and purpose in order to make an arrest either by a warrant or when authorized to make an arrest for a felony without a warrant, the officer may use all necessary and reasonable force to enter any building or property where the person to be arrested is or is reasonably believed to be.

This provision should facilitate and guide the enforcement of isolation and quarantine orders by law enforcement.

Regarding entry onto private premises to seize individuals for isolation or quarantine, “[i]t is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.” *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639, 650-651 (1980). Additionally, administrative searches, like searches attendant to a criminal investigation, entail “significant intrusions upon the interests protected by the Fourth Amendment” so that “such searches when authorized and conducted without

a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual.” *Camara v. Municipal Court of City & County of San Francisco*, 387 U.S. 523, 534, 87 S.Ct. 1727, 1733, 18 L.Ed.2d 930, 938 (1967).

§ 5.4(d) Search Warrants

There are three requirements for the issuance of a valid search warrant: *issuance by a neutral and disinterested magistrate*, *probable cause*, and *particularity in the description* of the items to be seized. *Dalia v. United States*, 441 U.S. 238, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979). Search warrants in general are addressed by [section 933.02, Florida Statutes](#), which provides for a search warrant to be issued in delineated circumstances mostly related to criminal investigations. As such, these search warrants do not appear to be intended to expressly encompass enforcement of an isolation or quarantine during a public health emergency (especially because violation of an isolation or quarantine order, although a misdemeanor, does not seem to be an offense of the type listed as justifying a search warrant). However, one circumstance in which search warrants under [section 933.02](#) can be issued is at least somewhat analogous to those presented when isolation or quarantine is necessary to abate a public health emergency. [Section 933.02\(4\)\(d\)](#) provides for the issuance of a search warrant when property is being held or possessed “[i]n violation of the laws relative to citrus disease pursuant to [s. 581.184](#).”¹² [Section 933.07\(1\), Florida Statutes](#), provides that probable cause is necessary for the issuance of a search warrant in instances of criminality and that a court proceeding is necessary for the issuance of a search warrant in instances of citrus disease quarantine under [section 933.07\(2\)](#).

Search warrants specifically directed at private dwellings are addressed in [section 933.18, Florida Statutes](#), which provides for a search warrant to be issued for the search of a private dwelling in delineated circumstances mostly related to criminality or other offenses not including misdemeanors or public health emergencies. Therefore, this provision regarding search warrants appears not to be expressly applicable to enforcing isolation or quarantine orders.

However, although search warrants are typically sought in cases involving criminal offenses, they also can be sought for administrative purposes. The

¹² Citrus disease quarantine enforcement may also be accomplished by the use of an agricultural warrant under [section 933.40, Florida Statutes](#).

probable cause standard for administrative warrants applies, but is subject to a slightly different formulation. The U.S. Supreme Court discussed administrative searches in *Camara v. Municipal Court of City & County of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), and described them as follows:

Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent the unintentional development of conditions which are hazardous to public health and safety. Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such minimum standards even upon existing structures. In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.

Id. at 535. Furthermore, “[s]uch standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multifamily apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.” *Id.* at 538. Therefore, public health officials may be able to obtain administrative search warrants (which are treated as at least similar to inspection warrants by most case law) for isolation or quarantine purposes in Florida in the event of a public health emergency, even without particularizing affidavits to identifiable individuals who may be infected or exposed, to search an entire neighborhood to seize any individual found within subject to isolation or quarantine.

§ 5.5 Warrant Exceptions: Exigent Circumstances

Although warrantless entries into private residences are generally unreasonable, there are five basic exceptions to the warrant requirement: “(1) consent, (2) incident to a lawful arrest, (3) with probable cause to search but with exigent circumstances, (4) in hot pursuit, and (5) stop and frisk.”

Gnann v. State, 662 So. 2d 406, 408 (Fla. 2d DCA 1995). The stop and frisk exception was discussed in § 5.4(b) regarding seizures of persons at large. Also, as discussed in that section in regard to consensual encounters, if an individual were to consent to a law enforcement officer entering a home to enforce an isolation or quarantine order and seize a person for isolation or quarantine purposes, such an entry would be permissible. However, the most relevant exception to the warrant requirement in cases of public health emergency is the exigent circumstances exception.

“The kinds of exigencies or emergencies that may support a warrantless entry include those related to the safety of persons or property . . . as well as the safety of police. . . . Of course, a key ingredient of the exigency requirement is that the police lack time to secure a search warrant.” *Rolling v. State*, 695 So. 2d 278 (Fla. 1997). “In other words, where safety is threatened and time is of the essence, we have recognized that ‘the need to protect life and to prevent serious bodily injury provides justification for an otherwise invalid entry.’” *Riggs v. State*, 918 So. 2d 274, 279 (Fla. 2005). In order to employ this exception, law enforcement or other authorities must rebut the presumption that warrantless entries of private premises are unreasonable, by demonstrating that the totality of the circumstances indicates that the need for entry is imperative and that there is insufficient time to secure a warrant. *Id.* Under this exception, it is “[i]mmaterial whether an actual emergency existed in the residence; only the reasonableness of the officer’s belief at the time of the entry is considered on review.” *Seibert v. State*, 923 So. 2d 460 (Fla. 2006).

The U.S. Supreme Court has found exigent circumstances to exist in only a narrow handful of circumstances: “pursuing a fleeing felon, preventing the destruction of evidence, searching incident to a lawful arrest, and fighting fires” (citations omitted). *Riggs*, 918 So. 2d at 279. The Florida Supreme Court has found exigent circumstances in at least one additional circumstance that the U.S. Supreme Court has discussed in dicta, namely, a “feared medical emergency.” *Id.* The Florida Supreme Court has upheld warrantless entries in several circumstances of medical concern, including to identify a chemical that poisoned several children who were in critical condition, “to prevent a feared suicide attempt,” and to ascertain the welfare of an individual who failed to attend a class, had a broken window, and let his mail accumulate. *Id.* at 280. The Florida Supreme Court concluded in *Riggs* (which involved medical concern for the caregiver of a small child who was wandering naked around an apartment complex in the middle of

the night): “Our decisions therefore confirm that authorities may enter a private dwelling based on a reasonable fear of a medical emergency. In those limited circumstances, the sanctity of human life becomes more important than the sanctity of the home.” *Id.* at 281.

Thus, law enforcement may be able to enter private dwellings to seize individuals for isolation or quarantine purposes without a warrant based on the exigent circumstances exception, assuming that the circumstances are reasonably believed to be exigent (even if not exigent in reality) as judged by the totality of the circumstances. The exception can be applied to a wide-scale public health emergency rather than an isolated incident of concern (especially when the inspection is based on the issuance of isolation or quarantine orders directed at particular individuals). *Id.* at 279 (“As is often the case under the Fourth Amendment, ‘[t]he reasonableness of an entry by the police upon private property is measured by the totality of existing circumstances’”). A standard of “reasonable suspicion,” without the obtaining of a warrant, may be permitted “when the balance of governmental and private interests makes such a standard reasonable.” *United States v. Knights*, 534 U.S. 112, 121, 122 S.Ct. 587, 592, 151 L.Ed.2d 497 (2001).

U.S. Supreme Court precedent also supports the constitutionality of administrative searches without warrants in circumstances of public health emergency. In *Camara v. Municipal Court of City & County of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), the Court noted that the Fourth Amendment did not “foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations.” *Id.* at 539. Several examples of such circumstances given by the Court, representing health dangers, support the application of its holding in the event of an influenza pandemic: unwholesome food, compulsory smallpox vaccination, and health quarantine. *Id.*

§ 5.6 Warrant Exceptions: Special Needs and Community Caretaker Doctrines

Although not among the classical exceptions to the warrant requirement, there are two other bases on which law enforcement or civil health authorities may be able to justify the entry into a private residence to seize an individual for isolation or quarantine purposes: the special needs doctrine and the community caretaking doctrine.

Under the special needs doctrine, a warrantless search unsupported by

probable cause may be constitutional “when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 829, 122 S.Ct. 2559, 2572, 153 L.Ed.2d 735 (2002); *Vernonia School District 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 2391, 132 L.Ed.2d 564 (1995) (citation omitted). The standard for determining when the special needs doctrine applies is

where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 1390-1391, 103 L.Ed.2d 685 (1989). For example, the government’s need to discover latent or hidden hazardous conditions on private premises “is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.” *Id.* at 668. Therefore, special needs searches could potentially be employed in public health emergencies to discover infected and exposed individuals subject to isolation or quarantine orders located on private premises, even without particularized suspicion, assuming that the circumstances render the warrant and probable cause requirements impracticable.

The community caretaking doctrine addresses those law enforcement functions that are “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706, 715 (1973).¹³ A caretaking search, such as that of a towed vehicle containing a gun that was vulnerable to theft by vandals, focuses on “concern for the safety of the general public” and is “not unreasonable solely because a warrant had not been obtained.” *Id.* at 447-448. It is feasible that a similar search could be employed to facilitate the seizure of infected and exposed

¹³ The Florida Supreme Court noted in *Riggs v. State*, 918 So. 2d 274, 280 n.1 (Fla. 2005), that some courts treat *Cady* as an exigent circumstances exception case rather than a community caretaking doctrine case.

individuals for isolation or quarantine without the issuance of a warrant. However, it is questionable whether the community caretaking doctrine could support the search of a private residence, as community caretaking cases typically involve vehicles. See *Riggs v. State*, 918 So. 2d 274, 280 n.1 (Fla. 2005) (noting that *Cady* was limited to vehicles and recognizing historical constitutional difference between vehicles and private premises). Thus, this doctrine may be best employed to seize individuals who are at large in their vehicles (as discussed earlier).

§ 5.7 Seizure of Bodily Fluids

Under the [Fourth Amendment](#) of the U.S. Constitution, a warrant is generally required for the seizure or search of persons, as discussed above. Seizing bodily fluids is generally governed by the same Fourth Amendment standards, and the default procedure for seizing bodily fluids is that a warrant is required.

Seizing bodily fluids includes up to three situations protected by the Fourth Amendment: (1) seizure of the person; (2) seizure of the physical sample; and (3) a search (analysis) of the sample. First, in order to take bodily fluids (such as blood samples, urine samples, or throat and nose swabs), some seizure of the person is necessary. Second, once the person is seized, an intrusion must be made into the skin for blood samples, into the person's privacy by requesting a urine sample, and so on. Finally, analyzing the physical sample is itself considered a search. See *Arizona v. Hicks*, 480 U.S. 321, 324-325, 107 S.Ct. 1149, 1152-1153, 94 L.Ed.2d 347, 353-354 (1987).

As in other Fourth Amendment law, there are some circumstances under which a warrant is not required. While it is possible that other warrant exceptions based on exigent circumstances might be triggered in a pandemic,¹⁴ the most likely exception applicable to the seizure of bodily fluids is the “special needs” doctrine. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668, 109 S.Ct. 1384, 1392, 103 L.Ed.2d 685 (1989) (holding probable cause not required for combating threat that “rarely generate[s] articulable grounds for searching any particular place or

¹⁴ See *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (holding exigent circumstances existed because, in DUI case, blood alcohol level evidence was diminishing with time and thus obtaining warrant was unreasonable); cf. *Cupp v. Murphy*, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973) (holding fingernail samples were constitutionally taken when man was trying to destroy physical evidence under his fingernails after coming voluntarily to police following strangulation death of his wife).

person”). Under the “special needs” doctrine, when special needs beyond the normal need for law enforcement make the requirement of getting a warrant impracticable, the reasonableness of a search or seizure of bodily fluids will not turn solely on whether a warrant was issued or probable cause existed. *Id.*

Different types of physical samples trigger different levels of Fourth Amendment protection. For example, characteristics exposed to the public, such as voice samples and fingerprints, are not constitutionally protected under the Fourth Amendment. *See United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973). Other characteristics somewhat exposed are still protected, such as fingernail samples. *See Cupp v. Murphy*, 412 U.S. 291, 295, 93 S.Ct. 2000, 2003, 36 L.Ed.2d 900 (1973) (man who voluntarily came to police department after strangulation death of his wife was subjected to, when police took fingernail scraping samples from him against his wishes, “severe, though brief intrusion,” of type that required “constitutional scrutiny,” but nevertheless, under the circumstances Court found search constitutionally permissible because it was incident to valid arrest and law enforcement had probable cause to believe he murdered his wife). Finally, some items are clearly protected, such as urine samples and blood samples. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1989) (urine samples of certain U.S. Customs employees protected); *but see Love v. Superior Court*, 226 Cal. App. 3d 736 (Cal. Ct. App. 1990) (discussing that blood tests are minimally intrusive and have become routine). *See also L.S. v. State*, 805 So. 2d 1004, 1007 (Fla. 1st DCA 2001) (statute requiring certain criminals to give blood sample for DNA testing was not unconstitutional because “minor intrusion of a blood test is outweighed by the strong State interest in preserving a positive recorded identification of convicted persons”). However, regardless of the level of protection the items may have, chemical analysis to obtain physiological data from the samples invokes privacy interests. *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602, 603, 109 S.Ct. 1402, 1405, 103 L.Ed.2d 639 (1989) (“This Court has long recognized that a compelled intrusion into the body for blood to be tested for alcohol content and the ensuing chemical analysis constitute searches”).

The “special needs” doctrine seems particularly applicable to a pandemic. For example, in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), the government sought to detect drug use among U.S. Customs employees in certain jobs by requiring

blood and urine. The Supreme Court held that no warrant was required because the hazards the blood and urine sample policy was avoiding were of the type that “rarely generate articulable grounds for searching any particular place or person.” 489 U.S. at 668. The need to discover or prevent these “latent or hidden conditions” justified the intrusion of a search without individualized suspicion as long as the prevention mechanism was a sufficiently “productive mechanism to justify [its] intrusion upon Fourth Amendment interests.” *Id.* at 668, 673. In *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), the Court considered similar Federal Railroad Administration regulations that, among other things, required blood and urine tests of railroad employees involved in train accidents. The Court noted that a warrant requirement would largely prove unhelpful, as the standardized method of testing and minimal discretion vested in those administering the test program left “virtually no facts for a neutral magistrate to evaluate” in contemplating issuing a warrant. 489 U.S. at 604. Pandemics present similar characteristics: “latent and hidden” symptoms are not always present when an individual is contagious, and standardized physical sample protocols could leave “virtually no facts for a neutral magistrate to evaluate.”

However, the “special needs” doctrine is premised on the existence of special needs not normally involved in ordinary law enforcement. Thus, if physical samples are taken in a situation in which the “special need” behind the program was intimately tied to the state’s interest in law enforcement, the “special needs” doctrine likely does not apply. *See Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (holding hospital’s warrantless testing of patients for cocaine use during pregnancy unconstitutional because hospital’s testing primarily had a local law enforcement purpose). Not all activity in which health officials report information to law enforcement is unconstitutional, however. The Court in *Ferguson* distinguished the case of mandatory reporting by health professionals of information gathered in the regular course of treatment, which does not violate the Fourth Amendment if the health professional did not set out to collect such evidence specifically for law enforcement purposes.

Florida’s Department of Health is equipped to use the special needs doctrine, or other applicable exigent circumstances as described above, under [section 381.00315\(1\), Florida Statutes](#). This section governs a State Health Officer ordering testing, vaccinating, or treating diseases during a “public health

emergency” as defined by [section 381.00315\(1\)\(c\)](#):

“Public health emergency” means any occurrence, or threat thereof, whether natural or man made, which results or may result in substantial injury or harm to the public health from infectious disease, chemical agents, nuclear agents, biological toxins, or situations involving mass casualties or natural disasters.

During such an emergency, [section 381.00315\(1\)\(c\)4](#) allows the State Health Officer to order

an individual to be examined, tested, vaccinated, treated, isolated, or quarantined for communicable diseases that have significant morbidity or mortality and present a severe danger to public health. Individuals who are unable or unwilling to be examined, tested, vaccinated, or treated for reasons of health, religion, or conscience may be subjected to isolation or quarantine.

Additionally, such orders by the State Health Officer are immediately enforceable by a law enforcement officer under [section 381.0012](#), which empowers the department to, among other things, seek warrants. Thus, if the State Health Officer were to use these capabilities in a manner unrelated to the state’s traditional interest in law enforcement, under the special needs doctrine the State Health Officer probably would not need a warrant to obtain samples by ordering an individual to be examined or tested.¹⁵ However, regarding tuberculosis, [section 392.55\(3\)](#), *Florida Statutes*, states that a warrant is required to seize individuals with an active case of the disease, and [section 392.55\(4\)](#) provides that the warrant may not be issued unless:

(a) A hearing has been held with respect to which the person has received at least 72 hours’ prior written notification and has received a list of the proposed actions to be taken and the reasons for such action. However, with the consent of the person or the person’s counsel, a hearing may be held within less than 72 hours.

(b) The person has the right to attend the hearing, to cross-

¹⁵ See also [Fla. Admin. Code R. 64D-3.038](#).

examine witnesses, and to present evidence. After review and consultation by the court, counsel for the person may waive the client's presence or allow the client to appear by television monitor where available.

(c) The court advises the person of the right to have legal counsel present. If the person is insolvent and unable to employ counsel, the court shall appoint legal counsel for the person pursuant to the indigence criteria in [s. 27.52](#).

A physician may, however, pursuant to [section 392.565, Florida Statutes](#), involuntarily hold an individual with active tuberculosis upon filing with the State Health Officer a certificate stating "that the person appears to meet the criteria for involuntary examination or treatment and stating the observation upon which that conclusion is based." This statute also requires that there be "reason to believe that the person is not likely to appear in a hearing scheduled under [s. 392.55](#) or [s. 392.56](#)." Florida provides that for an emergency hold of a person with active tuberculosis, the department of health may petition a circuit court and make various evidentiary showings as to the person's threat to the public if not held. The state's authority to hold a person involuntarily to prevent the spread of the contagious disease does not, however, automatically empower the state to treat the individual without consent. See [Washington v. Glucksberg](#), 521 U.S. 702, 112 S.Ct. 2258, 2267-2268, 138 L.Ed.2d 772, 787 (1997) (suggesting that competent individuals have constitutional right to refuse any medical treatment, even life-saving or life-sustaining treatment, quoting [Cruzan by Cruzan v. Director, Missouri Dept. of Health](#), 497 U.S. 261, 110 S.Ct. 2841, 2851, 111 L.Ed.2d 224, 241 (1990) ("the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment")).

§ 5.8 Just Compensation for Seized Property

Whether compensation is due in a declared public health emergency for the use of property that is not itself a hazard (such as commandeering property to shelter victims, contain bodies, or serve as a dispensary for medical treatment) may depend on the circumstances. Actual physical possession of property, even if temporary, can be considered a "taking," [Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency](#), 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002), and if the property itself is not producing "nuisance-like activity," [Keystone Bituminous Coal Association v.](#)

DeBenedictis, 480 U.S. 470, 492, 107 S.Ct. 1232, 1245, 94 L.Ed.2d 472 (1987), there may be a right to compensation. The state is not required to provide compensation for the seizure of property “to abate nuisances that affect the public generally.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 112 S.Ct. 2886, 2900, 120 L.Ed.2d 798 (1992).

Both the [Fifth Amendment to the U.S. Constitution](#) and [article X, section 6 of the Florida Constitution](#) provide that private property shall not be taken for public use without just compensation. (The Takings Clause of the Fifth Amendment applies to state action through the Fourteenth Amendment.) While these protections are written into the government’s acquisition of real property under [chapter 73, Florida Statutes](#), they also apply to “seizures” of property by government action apart from its formal acquisition by petition under statutory eminent domain procedures, for example when a government action restricts the use of a property. *See, e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). “Inverse condemnation is a cause of action by a property owner to recover the value of property that has been *de facto* taken by an agency having the power of eminent domain where no formal exercise of that power has been undertaken.” *Osceola County v. Best Diversified, Inc.*, 936 So. 2d 55, 59-60 (Fla. 5th DCA 2006).

§ 5.9 Summary

In summary, law enforcement and public health authorities may have several methods at their disposal for effectuating searches and seizures for purposes of isolating and quarantining infected and exposed individuals during a declared public health emergency, such as an influenza pandemic. The methods of enforcing isolation and quarantine during a public health emergency may include: inspection warrants, consensual searches of persons at large and private premises, investigatory stops, arrests and arrest warrants, administrative search warrants for private premises, searches of private premises under the exigent circumstances exception to the warrant requirement, searches of private residences subject to the special needs doctrine, searches of private residences and persons at large under the community caretaking doctrine, and others that may be developed under federal and state constitutional law if legal regimes addressing public health emergencies become tested.

B. Mandatory Vaccinations

§ 5.10 Legality of Mandatory Vaccinations

It is within the police power of the state to require mandatory vaccinations. See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905); *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922) (citing *Jacobson* for same); see also *State Dept. of Agriculture & Consumer Services, Division of Animal Industry v. Denmark*, 366 So. 2d 469 (Fla. 4th DCA 1979) (stating it is within police power of state to prevent spread of communicable diseases in animals). The legislature may empower a state board of health to specify the method of vaccination, and as long as the board exercises this power in a reasonable manner and does not prescribe an arbitrary method for vaccination, the method specified will likely be upheld. *Moore v. Draper*, 57 So. 2d 648, 649 (Fla. 1952) (“the courts will not interfere with the [preservation of public health under a state’s police power] except where the regulations adopted for the protection of the public health are arbitrary, oppressive and unreasonable. The court has nothing to do with the wisdom or expediency of the measures adopted”); see also *Allen v. Ingalls*, 33 S.W.2d 1099 (Ark. 1931) (same, citing and discussing additional cases).

The state cannot force any individual to receive a vaccination if it would be medically unsafe for that individual. See *Jacobson*, 197 U.S. 11. Statutes may or may not provide for an exemption based on religious or conscientious philosophical objection to mandatory vaccination and, in the event an exemption is provided, the statute must not discriminate between members of organized churches and religious groups, on one hand, and individuals who are not so organized, on the other. See, e.g., *Dalli v. Board of Education*, 267 N.E.2d 219, 220 (Mass. 1971) (addressing exception to vaccination only for objectors who subscribed to beliefs of “a recognized church or religious denomination,” and thus gave impermissible preferential treatment to recognized religions).

Florida has enacted a provision to address prevention of communicable diseases through vaccination programs. § 381.003(1)(e), Fla. Stat. Under such programs, vaccines could be used to immunize individuals during a pandemic. However, section 381.003, Florida Statutes, is not likely to be the source of any vaccination or treatment program in a pandemic because a pandemic would likely qualify as a public health emergency under section 381.00315(1)(c), Florida Statutes.

During a public health emergency, [section 381.00315\(1\)\(c\)4, Florida Statutes](#), permits the State Health Officer to order examination, testing, treatment, or vaccination of individuals. If individuals so ordered do not comply, “for reasons of health, religion, or conscience,” the State Health Officer may also order isolation or quarantine. If examination, testing, vaccination, or treatment is ordered, it must be performed by a “qualified person authorized by the State Health Officer.” [§ 381.00315\(1\)\(c\)4.a, Fla. Stat.](#) Pursuant to [section 381.00315\(1\)\(c\)4.b](#), any individual who “poses a danger to the public health” that cannot be isolated or quarantined by any “practical method” may be vaccinated or treated by the State Health Officer using “any means necessary.” Despite the extremely liberal language of this subsection, the State Health Officer should be bound to some standard of reasonableness. Finally, any order given by the State Health Officer “to effectuate [[section 381.00315\(1\)\(c\)4](#)] shall be immediately enforceable by a law enforcement officer.” *Id.*

In summary, Florida presently has the necessary statutes to effectuate a mandatory vaccination program during a public health emergency. In the event a pandemic does not qualify as a public health emergency (although it likely would), or in the event the state seeks an alternative statutory basis for vaccinations, [section 381.003\(1\)\(e\)](#) provides a basis.

For additional discussion of mandatory vaccination and related cases and statutes, see:

- [39A C.J.S. Health & Environment § 33 \(2019\)](#) (discussing vaccinations)
- [94 A.L.R.5th 613 \(2019\)](#) (discussing parental religious objections to child vaccination)
- [28A Fla. Jur.2d Health and Sanitation § 31 \(2019\)](#) (discussing communicable diseases generally)
- [Section 381.005\(2\), Florida Statutes](#) (requiring hospitals to implement an influenza immunization program during specific times of the year)
- [The National Childhood Vaccine Injury \[Compensation\] Act, 42 U.S.C. §§ 300aa-1 et seq.](#)
- [Moore v. Draper, 57 So. 2d 648, 650 \(Fla. 1952\)](#) (stating, in the context of a quarantine, that “[r]eligious freedom cannot be used as a cloak . . . to spread [a communicable] disease”)

C. Enforcement of Curfew Orders

§ 5.11 General Powers of Curfew

The Governor has the authority to declare a state of emergency and to impose a curfew pursuant to [chapter 252, Florida Statutes](#). The Governor and the Division of Emergency Management have the authority to carry out and delegate authority to direct and control the declared emergency to protect the health and safety of the people of Florida. *See* [§ 381.003, Fla. Stat.](#); *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996), *abrogated on other grounds*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *see also* *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964). *See generally* Joseph J. Jarret and Michele L. Lieberman, “*When the Wind Blows*”: *The Role of the Local Government Attorney Before, During, and in the Aftermath of a Disaster*, 36 *Stetson L. Rev.* 293 (Winter 2007); David G. Tucker and Alfred O. Bragg, III, *Florida’s Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 *Stetson L. Rev.* 837 (Winter 2001).

The Department of Health or the State Health Officer has the authority to impose a curfew if it is viewed as a method of isolation or quarantine, or as a permissible action pursuant to the State Health Officer’s public health emergency authority. *See* [§§ 381.00315\(1\)\(c\)4, \(4\), and \(5\)\(g\), Fla. Stat.](#)

[Section 870.043, Florida Statutes](#), expressly addresses the authority of a sheriff or a designated city official to declare a state of emergency when there is a “substantial defiance of, or resistance to, a lawful exercise of public authority” and the authorities believe that there is a “clear and present danger” of a “general public disorder, widespread disobedience of the law, and substantial injury to persons or to property, all of which constitute an imminent threat to public peace or order and to the general welfare of the jurisdiction.” [Section 870.045\(1\), Florida Statutes](#), permits the designated authorities to establish curfews pursuant to the declaration of a state of emergency.

§ 5.12 In Whom the Power Is Vested

[Section 252.36, Florida Statutes](#), empowers the Governor to declare an emergency and to issue, amend, and rescind executive orders, proclamations, and rules that have the force and effect of law. In addition to other actions, the Governor may control the ingress and egress to and from an emergency area, as well as movement of persons within an emergency area. [§ 252.36\(5\)\(g\), Fla. Stat.](#) The Governor may also take measures concerning

the conduct of civilians and the movement and cessation of movement of pedestrians and vehicles. [§ 252.36\(5\)\(k\), Fla. Stat.](#) This authority may be delegated to local city and county officials. [§ 252.36\(8\), Fla. Stat.](#)

The Department of Health has the authority to declare, enforce, modify, and abolish isolation or quarantine of persons and premises in order to control the spread of communicable diseases. [§ 381.00315\(4\), Fla. Stat.](#) This authority includes the power to restrict the movement of people or animals. [§ 381.00315\(5\)\(b\), Fla. Stat.](#) The State Health Officer has the power to issue a public health advisory and to declare a public health emergency after, to the extent possible, consulting with the Governor and notifying the Chief of Domestic Security. [§ 381.00315\(1\)\(c\), Fla. Stat.](#)

[Section 870.041, Florida Statutes](#), authorizes local officials to declare an emergency “[i]n the event of overt acts of violence, or the imminent threat of such violence, within a county or municipality and the Governor has not declared a state of emergency.” *See* [§ 870.042, Fla. Stat.](#) (designating local authorities permitted to declare an emergency and exercise emergency powers).

§ 5.13 Implementation

[Section 252.36, Florida Statutes](#), empowers the Governor to declare an emergency and to issue, amend, and rescind executive orders, proclamations, and rules that have the force and effect of law. [Section 252.46, Florida Statutes](#), authorizes and empowers entities designated by the Governor or in the state comprehensive emergency management plan to make, amend, and rescind orders and rules necessary for emergency management purposes. It also provides that such orders and rules have the full force and effect of law after adoption. All inconsistent existing laws and rules will be suspended to the extent they conflict with the emergency rules and orders. [§ 252.46\(2\), Fla. Stat.](#)

The Department of Health must adopt rules specifying the conditions and proceedings for imposing isolation and quarantine. [§ 381.00315\(5\), Fla. Stat.](#) During a public health emergency, the State Health Officer may take necessary actions to protect the public health by declaring a public health emergency. [§ 381.00315\(1\)\(c\), Fla. Stat.](#) [Section 120.54\(4\), Florida Statutes](#), authorizes state agencies to adopt emergency rules bypassing the regular process. [Sections 870.043–870.047, Florida Statutes](#), provide for the permissible emergency measures, declaration of emergency, and duration

and termination of the emergency. [Section 870.046, Florida Statutes](#), provides for publishing emergency measures by news media publication, posting, and loudspeakers.

§ 5.14 Court Proceedings: Courts of Jurisdiction

The circuit court in an affected area has jurisdiction to issue injunctions to enforce emergency rules and orders. [§ 381.0012\(2\), Fla. Stat.](#) Any trial court judge so empowered may issue warrants in criminal cases in the appropriate circuit. [§ 381.0012\(4\), Fla. Stat.](#) The circuit court also reviews emergency declarations and rules without the necessity of exhausting administrative remedies. [§ 120.54\(4\)\(a\)3, Fla. Stat.](#)

During an emergency involving protection of life or an exercise of the police powers, summary proceedings do not violate due process guarantees as long as the parties have the opportunity to be heard. *See Larson v. Warren*, 132 So. 2d 177 (Fla. 1961); *E.I. DuPont De Nemours & Co. v. Lambert*, 654 So. 2d 226 (Fla. 2d DCA 1995). The scope of review in any challenge to the emergency curfew's constitutionality "is limited to a determination whether the [executive's] actions were taken in good faith and whether there is some factual basis for the decision that the restrictions . . . imposed were necessary to maintain order." *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996), *abrogated on other grounds*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), quoting *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971).

§ 5.15 Enforcement

[Section 252.47, Florida Statutes](#), provides that law enforcement authorities of the state and its political subdivisions shall enforce the orders and rules issued pursuant to [sections 252.31–252.90, Florida Statutes](#). [Section 381.0012\(1\), Florida Statutes](#), provides that the Department of Health may "commence and maintain all proper and necessary actions and proceedings to enforce the rules adopted pursuant to this chapter and may defend all actions and proceedings involving the department's powers and duties."

[Sections 381.0012\(2\), \(3\), and \(4\), Florida Statutes](#), provide that the department may seek injunctions to restrain violation of the chapter requirements, request issuance of warrants directed to any sheriff, deputy, or police officer to assist in carrying out the purpose and intent of [chapter 381](#), and request assistance from appropriate state and county officials in

enforcing the laws and rules adopted under this chapter. [Section 381.0012\(5\)](#) mandates that designated and other appropriate city and county officials assist the department in enforcing the health laws and rules under this chapter.

[Section 381.00315\(4\) Florida Statutes](#), provides that any order of the State Health Officer effectuating actions taken pursuant to a public health emergency shall be enforceable by a law enforcement officer under [section 381.0012, Florida Statutes](#). [Section 870.04, Florida Statutes](#), lists the persons or entities entitled to disperse persons who are illegally assembled. [Section 870.042, Florida Statutes](#), designates the local authorities empowered to exercise emergency powers.

§ 5.16 Penalties for Violation of Curfew Orders

[Section 252.50, Florida Statutes](#), provides that any person in violation of the emergency rules and orders is guilty of a second degree misdemeanor punishable as provided in [section 775.082\(4\)\(b\)](#) and [section 775.083\(1\)\(e\), Florida Statutes](#).

[Section 381.00315\(6\), Florida Statutes](#), provides that a person who violates any isolation or quarantine order is guilty of a second degree misdemeanor, punishable as stated in [section 775.082\(4\)\(b\)](#) and [section 775.083\(1\)\(e\), Florida Statutes](#).

[Section 870.048, Florida Statutes](#), provides that any violation of [sections 870.041–870.047](#) or of any emergency measure is a first degree misdemeanor, punishable as stated in [section 775.082\(4\)\(a\)](#) and [section 775.083, Florida Statutes](#).

Chapter 6

Records of Trial Court Proceedings and Review of Trial Court Orders and Judgments During a Pandemic Health Emergency

- § 6.1 Introduction
- § 6.2 Appeal of Trial Court Order to District Court of Appeal: Notification
- § 6.3 Appeal of Trial Court Order to District Court of Appeal: Conveying of the Record
- § 6.4 Appeal of Trial Court Order to District Court of Appeal: Issuance of Opinions and Orders

§ 6.1 Introduction

Judges are accustomed to conducting the court's business at the courthouse. Following hurricanes, some courts have had to relocate to different facilities to operate properly, with the understanding that as soon as the courthouse is repaired, the court will return to its home. In a public health emergency like a pandemic influenza outbreak, the courthouse structure will not be affected, but there may be no safe way to conduct proceedings there. If public health officials determine that it is unwise or unsafe to allow people to congregate at the courthouse, or if a substantial number of the court's staff are ill, the court may not be able to conduct its business at the courthouse.

It is essential that every circuit have a detailed plan that explains how the court will function if access to the courthouse is restricted. In addition to the operational issues that have to be confronted, the courts will also have to be prepared to receive pleadings, compile records, appoint counsel, conduct hearings, enter final orders, and convey documents to the appellate court without physical access to the courthouse. The appellate courts are addressing some of the issues that directly affect appellate review, and will be providing guidance to the circuits within their respective jurisdictions. Trial courts must create a process for handling not only their own litigation, but for conveying records to the appellate court. The trial courts should test that process thoroughly to identify weak points.

These are not easy issues, and few of them have proven solutions. Most importantly, judges and court staff must thoughtfully discuss all options and, at the least, develop workable plans for conducting court business away from the courthouse. With these difficulties in mind, judges should do

whatever is necessary to protect citizen access to the courts.

**§ 6.2 Appeal of Trial Court Order to District Court of Appeal:
Notification¹⁶**

An emergency notification of appeal method must be established. To ensure uniformity, this matter could be addressed by emergency rule or administrative order of the district court of appeal or the Florida Supreme Court. Possible methods may include e-mail, facsimile, regular mail, overnight mail, courier, or internet.

**§ 6.3 Appeal of Trial Court Order to District Court of Appeal:
Conveying of the Record**

An emergency method of transmittal of a trial court record to the district court of appeal must be established. To ensure uniformity, this matter could be addressed by emergency rule or administrative order of the district courts of appeal or the Florida Supreme Court. Possible methods include e-mail, facsimile, regular mail, overnight mail, courier, or internet. Difficulties with using electronic delivery could involve the exhibits and physical evidence in the record. Exhibits and physical evidence could be conveyed photographically via e-mail or internet or by videoconference display. Parties can also stipulate to the record. [Rule 9.200\(a\)\(3\), Florida Rules of Appellate Procedure](#), provides:

The parties may prepare a stipulated statement showing how the issues to be presented arose and were decided in the lower tribunal, attaching a copy of the order to be reviewed and as much of the record in the lower tribunal as is necessary to a determination of the issues to be presented. The parties shall advise the clerk of their intention to rely on a stipulated statement in lieu of the record as early in advance of filing as possible. The stipulated statement shall be filed by the parties and transmitted to the court by the clerk of the lower tribunal within the time prescribed for transmittal of the record.

¹⁶ In an emergency such as a pandemic influenza, appellate procedures will likely be modified to permit different types of court access and records.

In the event that no report of the proceedings was made or the transcript is unavailable, [rule 9.200\(b\)\(5\), Florida Rules of Appellate Procedure](#), provides:

If no report of the proceedings was made, or if the transcript is unavailable, a party may prepare a statement of the evidence or proceedings from the best available means, including the party's recollection. The statement shall be served on all other parties, who may serve objections or proposed amendments to it within 10 days of service. Thereafter, the statement and any objections or proposed amendments shall be submitted to the lower tribunal for settlement and approval. As settled and approved, the statement shall be included by the clerk of the lower tribunal in the record.

**§ 6.4 Appeal of Trial Court Order to District Court of Appeal:
Issuance of Opinions and Orders**

Emergency methods to issue orders and opinions must be established. To ensure uniformity, this matter could be addressed by emergency rule or administrative order of the district courts of appeal or the Florida Supreme Court. Orders and opinions could be conveyed via e-mail, facsimile, regular mail, overnight mail, courier, or internet.

Chapter 7

Maintaining Designated Essential Court Functions During the Emergency

§ 7.1 Possibility of Emergency Rules from the Florida Supreme Court

§ 7.2 Emergency Orders from the Florida Supreme Court

§ 7.3 Maintaining Designated Essential Court Functions

§ 7.1 Possibility of Emergency Rules from the Florida Supreme Court

It seems reasonable to expect that the Florida Supreme Court would issue emergency rules in response to a public health emergency such as pandemic influenza. *See Fla. R. Jud. Admin. 2.140(d)*. Almost all aspects of court proceedings likely would be affected by the destructive impact of a pandemic flu on the public and daily life functions and activities. Some subjects of emergency rules could include the following:

1. Computation of time
2. The form of pleadings and motions
3. Service and filing of court documents
4. Continuances
5. Recording of proceedings
6. Confrontation rights
7. Open sessions of court
8. Form of the court record
9. Use of communication equipment
10. Oath (notary public or other person authorized to administer oaths must be present to witness)
11. Expedited review procedures
12. Composition and transmittal of records of the lower tribunal
13. Issuance of orders and opinions

§ 7.2 Emergency Orders from the Florida Supreme Court

It also seems reasonable to expect that the Florida Supreme Court would issue emergency orders in response to a public health emergency such as pandemic influenza. The Chief Justice has

the power, upon request of the chief judge of any circuit or district, or sua sponte, in the event of natural disaster, civil disobedience, or other emergency situation requiring the closure of courts or other circumstances inhibiting the ability of litigants to comply with deadlines imposed by rules of procedure applicable in the courts of this state, to enter such order or orders as may be appropriate to suspend, toll, or otherwise grant relief from time deadlines imposed by otherwise applicable statutes and rules of procedure for such period as may be appropriate, including, without limitation, those affecting speedy trial procedures in criminal and juvenile proceedings, all civil process and proceedings, and all appellate time limitations.

Fla. R. Jud. Admin. 2.205(a)(2)(B)(iv).

§ 7.3 Maintaining Designated Essential Court Functions

Examples of potential strategies for maintaining essential court functions may be found in the *Florida State Courts Strategy for Pandemic Influenza: Keeping the Courts Open in a Pandemic* (2006).¹⁷ This document provides that the “short-term and long-term tactical objectives are augmentations of existing [circuit/local] continuity of operations plans (COOP). These augmentations are designed to address the unique situation brought about by an influenza pandemic and may or may not apply to other emergency situations.” Relevant excerpts from the plan follow.

Short-Term Tactical Objective (Up to 90 Days)

In the first 90 days of COOP activation due to the outset of an influenza pandemic, the tactical objectives are to:

1. Have the capacity to perform all mission essential functions, as should be currently defined in each court’s continuity of operations plan (COOP); and
2. Have the capacity to address all emergency matters and

¹⁷ Available at https://www.flcourts.org/content/download/219222/1981278/panflu_strategy.pdf.

cases generated due to issues associated with the quarantine and isolation of individuals and other public health related cases brought by public health officials

These short-term objectives may need to be performed under a situation where no, or only limited, face-to-face contact is possible and with significant impact to judges, attorneys, parties, clerks and deputy clerks, sheriffs and deputy sheriffs, court administrators and staff, state and local public health officials, jurors, etc., due to illness or death.

While traditionally COOP allows for 30 days under which mission essential functions are performed, the limitation on face-to-face contact may require an addition[al] 60 days under which operations are limited to only mission essential functions.

Transition to full operations should be initiated as soon as possible. If full operations cannot be initiated within 90 days, efforts to achieve the long-term tactical objectives described below should be initiated within 90 days of COOP activation.

Long-Term Tactical Objective (90 Days and Longer)

Within 90 days of COOP activation, the tactical objective is to have the capacity to perform all criminal matters, including the capacity to conduct jury trials, have the capacity to address all emergency civil matters, and have the capacity to perform all other mission essential functions under a situation where no, or only limited, face-to-face contact is possible and with significant impact to judges, attorneys, parties, clerks and deputy clerks, sheriffs and deputy sheriffs, court administrators and staff, state and local public health officials, jurors, etc., due to illness or death.

Planning Assumptions for the Florida State Courts:

The following planning assumptions should be considered when developing court emergency preparedness plans to achieve the tactical objectives listed above:

- An increase in cases with individuals seeking relief and

- other matters may occur;
- Court operations may be detrimentally impacted by the pandemic for up to 18 months;
 - Response and recovery will be bottom-up with local court officials being primarily responsible for the response and recovery efforts in their area with only limited support from federal and state government officials;
 - At a minimum, each court should ensure they have the capacity to perform their mission essential function, as defined in their COOP, and all emergency matters and cases generated due to issues associated with the quarantine and isolation of individuals and other public health related cases brought by public health officials for the first 90 days of COOP activation;
 - If due to the nature of the pandemic, full operations can not be restored within 90 days of COOP activation, each court should ensure they have the capacity to:
 - Perform all criminal matters, including the capacity to conduct jury trials within 90 days of COOP activation;
 - Address all emergency civil matters within 90 days of COOP activation; and
 - Perform all other mission essential functions within 90 days of COOP activation;
 - Of the judges, attorneys, parties, clerks and deputy clerks, sheriffs and deputy sheriffs, court administrators and staff, state and local public health officials, jurors, etc., necessary to perform the mission essential functions, one third will not be available due to illness or death;
 - Face-to-face contact between judges, attorneys, parties, clerks and deputy clerks, sheriffs and deputy sheriffs, court administrators and staff, state and local public health officials, jurors, etc., necessary to perform mission essential functions may be dramatically limited or unavailable; and
 - The court facilities, court infrastructure, public utilities and services, and most, if not all, residences will be physically intact during the response and recover from

the pandemic but services may be limited due to isolation, quarantine, illness, or death within the impacted communities.

An updated (May 2007) version of this document is available at <https://www.flcourts.org/content/download/219225/1981296/Best-Practices-Pandemic-Planning.pdf>.

Additional guidance may be found in:

- The Office of the State Courts Administrator, *Pandemic Staffing Guide: Ensuring Staffing and Administering Attendance and Leave During a Pandemic* (August 2009)¹⁸
- Supreme Court of Florida, *Administrative Order: In re Response of the Florida State Courts System to Influenza A(H1N1)* (May 8, 2009)¹⁹

¹⁸ Available at <https://www.flcourts.org/content/download/219223/1981284/pandemic-staffing-guide.pdf>.

¹⁹ Available at <https://www.floridasupremecourt.org/content/download/240699/2129025/AOSC09-20.pdf>.

Chapter 8

Strategies for Practical Problems Arising from a Pandemic

In a pandemic, the first line of defense of every entity – the judiciary included – will be isolation and sanitation. Thus, every court should have in place detailed procedures that minimize the level of physical contact among individuals, both court personnel and visitors to the courthouse.

Informal procedures could include increased hand-washing immediately prior to handling documents, the wearing of protective garments such as latex gloves, and general sanitary precautions such as not touching one's face without thorough hand-washing first. Formal procedures could include an increased reliance on computer versions of files, a preference for electronically filed (by computer or by fax) documents,²⁰ the issuing of sanitary garments such as surgical masks and N-95 respirators, and the regular sanitization of surfaces that multiple individuals come in contact with (such as counsel tables and podiums, jury boxes, courthouse doors, and so on). At its core, a pandemic depends on basic methods of transmission, and by minimizing the risk of these various transmissions, judicial personnel will have a viable first line of defense against illness.

Beyond this initial, general defense, however, specific problems will arise that merit additional, more dramatic alterations of judicial functions. This section addresses these problems.

General Tools for Before or During a Pandemic

Because state, federal, and international health entities are concerned about the potential of a pandemic, courts should begin taking actions now. Some actions are likely already underway, such as continuation of operation plans. However, additional steps may both improve the well being of judicial branch employees during a pandemic and decrease stress that already exists because of the threat of a pandemic. The following are a few recommendations judicial administrators should consider:

- Before or during a pandemic, hold employee educational seminars on pandemics and health habits. At such seminars, discuss ways to avoid

²⁰ Rule 2.516(b)(1), *Florida Rules of Judicial Administration* (Service of Pleadings and Documents) provides that “all documents required or permitted to be served on another party must be served by e-mail. . . .” There are limited exceptions (e.g., for pro se litigants) and staggered effective dates based on the type of case involved.

contracting an illness such as influenza, including a review of simple preventative measures. For example, encourage employees to exercise regularly, get plenty of rest, cover coughs and sneezes, and most importantly, regularly wash hands for 15 seconds or more and avoid touching the eyes, ears, nose, or mouth. Practicing and encouraging these health habits before a pandemic will increase the chances that employees will engage in them during a pandemic.

- If a pandemic arrives, strongly encourage employees with sick relatives and sick family members to stay home. Even if an individual is not yet sick, he or she may be carrying the illness on clothes. Employees who are sick should also be strongly encouraged, if not required, to stay home.
- Encourage employees to stay informed. In addition to providing any of the above information or seminars, make sure employees have links to additional information such as that provided in the introductory chapters of this guide.
- Encourage employees to prepare at home for a pandemic. There are several things that every person can do before a pandemic to decrease the chances of contracting an illness during a pandemic. One tactic is to stock up on basic food and medical supplies so that leaving the home during a pandemic is not as necessary. Several state and federal websites now provide checklists for individual planning, and employees should be strongly encouraged to obtain and follow these lists (see Chapter 1 for some such links).
- Before or during a pandemic, engage in enhanced facility maintenance. For example, by using a damp cleaning supply for dusting (instead of dusting with a dry duster or dry towel), the chances of aerosolized germs spreading is decreased. Additionally, by engaging in (or encouraging employees to engage in) frequent cleaning of doorknobs, telephones, railings, and other public surfaces, the chance of contagion is reduced. However, it is important that the person doing the cleaning wear protective clothing such as disposable gloves and, if desired, an N-95 respirator mouth and nose mask (which is available commercially to the public as well as the health-care community).

- During a pandemic, courts might even consider designating an individual or individuals whose sole task is continuously cleaning the court facilities' most public surfaces.
- Finally, before a pandemic arrives, courts should review insurance and health policies, as well as illness and other human resource policies, that are likely to be important during a pandemic. By preparing a quick factsheet on these policies and how they interact with a pandemic, once a pandemic arrives the court may rapidly disseminate information to concerned employees.

Last Lines of Defense

It is hoped that, in any pandemic, the illness of the general public, and particularly of key judicial officials, will be minimal. However, should such key officials become sick, the myriad tasks of the courts may become difficult to perform. If technological innovations fail for whatever reason (such as lack of internet availability or out-of-service phone lines due to illness of information technology personnel), courts will have to turn to more rudimentary, though still complex, options. This section discusses some such options.

These options are not presented as recommended first-line of defense approaches to a pandemic. Instead, they are presented as options courts may turn to when other plans for prevention have failed or, in drafting a plan, when other options seem flawed. Many of these options, though available as fallback programs, require action to be taken both prior to and during the early stages of a pandemic. Thus, court personnel should consider these approaches in advance and not reserve this section as a “flip to in case of emergency” option.

Reduction to Essential Functions

Less a fallback procedure than a likely mandate, in a pandemic, courts should be prepared to scale back their operation to essential functions. For example, while some civil actions may potentially be of the sort that can be postponed and tolled, petitions for habeas relief from those isolated or quarantined cannot be ignored, for time-related reasons. Still, many actions may be postponed to reduce the extent of contact court personnel have with other individuals. By reducing to essential functions, courts both minimize the risk of contagion and reduce the likelihood of judicial absenteeism.

The great difficulty, however, will be determining which functions truly are essential and which tasks, though not essential, can still be performed despite a focus on essential functions. In the event of a pandemic, courts should look to the Florida Supreme Court and any emergency rules the Court adopts for guidance in determining which functions are essential and which non-essential functions could still be discharged.

Judicial Islands

In the SARS outbreak of 2003 and prior pandemics in the U.S., pockets of individuals managed to completely avoid infection. For instance, there have been reports of a small island military base entirely avoiding illness during a prior pandemic. This same isolationist model could serve a court well, if it could create a sufficiently isolated environment. If isolated from general society, judicial personnel could carry out their essential functions with less risk of infection.

In attempting to rely on judicial islands, however, courts face several difficulties. First, it will be difficult to achieve strict isolation, as court personnel will wish to return to their families after work. It seems unlikely that courts would simply begin to house every judicial staff member's family for the duration of a pandemic (potentially over a year). And even if courts did house personnel and their families, infection might still enter through the delivery of essential supplies. Second, the various methods of spread of a pandemic illness may make isolation difficult to achieve. If a virus were airborne, for instance, courts would need an isolated air supply.

Third, protocols for isolation would need to be created immediately so they could be implemented completely at the first sign of a pandemic. Otherwise, judicial personnel might get sick and contaminate the island of isolation. Finally, the best isolation situation is unlikely to be available: courts are unlikely to have access to the technology necessary to achieve strict isolation, such as (among other things) an airtight courtroom with internal air filtration and partitions separating individual parties from others.

If isolation could be achieved in such a manner that court personnel had no physical or shared-air contact with the outside world, it would offer the greatest protection against a pandemic. Certainly, a less foolproof implementation of isolation procedures would offer some added measure of protection to courts; wearing an N-95 surgical mask is a type of "isolation" in that it restricts the flow of contaminated air to the wearer, and it would

certainly be helpful. In sum, courts wishing to pursue judicial isolation should make plans immediately and carefully consider any weaknesses in their isolationist capabilities. Judicial islands offer the best and only potentially foolproof protection, though their implementation would be difficult at best.

Riding the Circuit

In the event individual courts are unable to handle the needs of their jurisdictions, Florida courts could turn to the historical practice of “riding the circuit.” Judges from different circuits could travel to different designated locations in Florida and hold court, such that the essential functions of every jurisdiction were preserved even if individual courts were entirely incapacitated. This solution does not address the prevention of illness but, instead, is a response to an isolated total incapacitation of a court. However, judges and personnel riding the circuit could face the same risk of infection as any other judicial personnel, and thus this option solves one problem (localized incapacitation) but is vulnerable to other pandemic concerns discussed elsewhere in this chapter.

Biological Immunity

In a pandemic, certain individuals will likely possess an inherent resistance to the illness. In particular, those who have already become ill but recovered should have an increased resistance to the pandemic illness. These personnel offer a baseline of judicial employees who may be able to carry on the essential functions of the courts with a reduced threat of illness.

However, reliance on these personnel requires several elements that may prove difficult. First, such individuals may wish to confirm they had recovered from the pandemic illness, not from some other illness they coincidentally got during the pandemic. Such confirmation may not be readily available from health professionals, given the constraints of medical technology.

Second, recovery from the pandemic illness may not provide total immunity to subsequent waves. Thus, those who recover still face some risk of repeat infection.

Third, those who recover may still be absent from work due to the illness of family members or a lasting debility from their own illness or circumstances. Fourth, even if immune to subsequent infection, those recovered could still

convey infection to those not immune. Finally, it may be difficult for someone coordinating a baseline work force to determine who has been sick and who has not.

In summary, biological immunity does not offer foolproof protection. However, a court may wish to track who has been sick and who has not, in the event such immunity is the last option available to the court in performing its essential functions, to the extent that tracking of individual employee health status can be accomplished within the bounds of federal and state laws pertaining to the privacy of personal health information and employment discrimination on the basis of handicap. In relying on potentially immune individuals, courts should continue to strongly emphasize the importance of taking protective sanitation steps.

Chapter 9

Pandemic Influenza Information and Legal Authorities Links

State/County/Local Government

- Centers for Disease Control and Prevention (CDC) link to states' public health law bench books
<http://www.cdc.gov/phlp/publications/type/benchbooks.html>
- National Association of County and City Health Officials
www.naccho.org
- Florida Department of Health
<http://www.floridahealth.gov/diseases-and-conditions/influenza/index.html>
<http://www.floridahealth.gov/diseases-and-conditions/influenza/pandemic-influenza.html>
- State of Florida, Office of the Governor, Executive Order Number 14-280 (establishing Ebola Virus Disease Response Protocol)
https://www.flgov.com/wp-content/uploads/orders/2014/EO_14-280.pdf
- Florida Department of Agriculture and Consumer Services
<https://www.freshfromflorida.com/Consumer-Resources/Animals/Animal-Disease-Information/Avian-Influenza>
- Florida Natural Disease Outbreak and the Pandemic Influenza Fatality Management Response Plan (Apr. 11, 2008)
http://femors.org/files/2013/02/Florida_Pan_Flu_Fatality_Management_Plan_V1.1_Draft041108.pdf
- The Florida State Courts Strategy for Pandemic Influenza (2007)
<https://www.flcourts.org/content/download/218228/1975314/Best-Practices-Pandemic-Planning.pdf>
- Florida State Courts Guidance on Personal Protective Equipment (PPE). As no federal or state guidance is currently available on the use of personal protective equipment in a courtroom setting, the Florida Courts are referring to those guidelines issued for health care and

other industries. This page offers links to such sites.

<https://www.cdc.gov/flu/avianflu/h5/worker-protection-ppe.htm>

- The Model State Emergency Health Powers Act (December 21, 2001)
<http://www.aapsonline.org/legis/msehpa2.pdf>

Federal Government

- Centers for Disease Control and Prevention, Community Mitigation Guidelines to Prevent Pandemic Influenza — United States, 2017— Recommendations and Reports, 66(1) *Morbidity and Mortality Weekly Report (MMWR)* 1-34 (Apr. 21, 2017)
<http://dx.doi.org/10.15585/mmwr.rr6601a1>
- Centers for Disease Control and Prevention, Influenza (Flu) (2019)
<https://www.cdc.gov/flu/index.htm>
- Congressional Research Service, Federal and State Quarantine and Isolation Authority (Oct. 9, 2014)
<https://fas.org/sgp/crs/homesec/RL33201.pdf>
- U.S. Department of Health & Human Services Pandemic Influenza Plan (Nov. 2005)
<https://www.cdc.gov/flu/pdf/professionals/hhspandemicinfluenzaplan.pdf>
- U.S. Department of Health & Human Services 2009 H1N1 Retrospective and Improvement Plan (2012)
<http://www.phe.gov/Preparedness/mcm/h1n1-retrospective/Pages/default.aspx>
- U.S. Department of Agriculture, Avian Influenza
<https://www.usda.gov/topics/animals/one-health/avian-influenza>
- U.S. Department of Justice, Bureau of Justice Assistance, “Guidelines for Pandemic Emergency Preparedness Planning: A Road Map for Courts,” April 2007
https://www.bja.gov/publications/pandemic_road_map.pdf
- U.S. Department of Labor, Occupational Safety and Health Administration (OSHA), OSHA Guidance Update on Protecting Employees from Avian Flu (Avian Influenza) Viruses (2006)

http://www.osha.gov/OshDoc/data_AvianFlu/avian_flu_guidance_english.pdf

- CDC, Information on Avian Influenza (2017)
<http://www.cdc.gov/flu/avianflu/>
- CDC, National Pandemic Influenza Plans (2017)
<https://www.cdc.gov/flu/pandemic-resources/planning-preparedness/national-strategy-planning.html>
- CDC, Quarantine and Isolation (Sept. 27, 2018)
<https://www.cdc.gov/quarantine/index.html>
- CDC, Laws and Regulations (Oct. 8, 2014)
<https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>
- CDC, Specific Laws and Regulations Governing the Control of Communicable Diseases (Mar. 21, 2017)
<https://www.cdc.gov/quarantine/specificlawsregulations.html>

International Organizations and Non-Governmental Organizations

- World Health Organization (WHO), Essential Steps for Developing or Updating a National Pandemic Influenza Preparedness Plan (Mar. 2018)
https://www.who.int/influenza/preparedness/pandemic/essential_steps_influenza/en/
- WHO, A checklist for pandemic influenza risk and impact Management: *building capacity for pandemic response* (Jan. 2018)
https://www.who.int/influenza/preparedness/pandemic/influenza_risk_management_checklist_2018/en/
- WHO, Pandemic Influenza Risk Management—A WHO Guide to Inform and Harmonize National and International Pandemic Preparedness and Response (May 2017)
https://www.who.int/influenza/preparedness/pandemic/influenza_risk_management_update2017/en/
- WHO, Pandemic Influenza Preparedness—Framework for the sharing of influenza viruses and access to vaccines and other benefits (2011)

https://www.who.int/influenza/resources/pip_framework/en/

- American Probation and Parole Association, Pandemic Influenza Preparedness and Response Planning: Guidelines for Community Corrections (Aug. 2009)
https://www.bja.gov/publications/appa_pandemic_planning_community_corrections.pdf
- World Association for Medical Law (WAML)
<http://wafml.memberlodge.org>
- American Public Health Association (APHA)
<https://www.apha.org/>
- Florida Public Health Association (FPHA)
<http://www.fpha.org/>

Federal Statutes

- 42 U.S.C. ch. 68, The Public Health and Welfare, Disaster Relief
- 42 U.S.C. § 243, General Grant of Authority for Cooperation
- 42 U.S.C. § 247d-1, Federal-State Cooperation; Vaccine Tracking and Distribution
- 42 U.S.C. § 264, Regulations to Control Communicable Diseases
- 42 U.S.C. § 265, Suspension of Entries and Imports from Designated Places to Prevent Spread of Communicable Diseases
- 42 U.S.C. § 5121, Disaster Relief; Congressional Findings and Declarations
- 42 U.S.C. § 5122, Disaster Relief; Definitions
- 42 U.S.C. § 5191, Disaster Relief; Procedure for Declaration

Florida Statutes

- Chapter 20, Executive Branch, Organizational Structure
- Chapter 79, Habeas Corpus

Chapter 9

- [Chapter 154, Public Health Facilities](#)
- [Chapter 252, Emergency Management](#)
- [Chapter 381, Public Health: General Provisions](#)
- [Chapter 384, Sexually Transmissible Diseases](#)
- [Chapter 392, Tuberculosis Control](#)
- [Chapter 775, Definitions; General Penalties; Registration of Criminals](#)
- [Chapter 870, Affrays; Riots; Routs; Unlawful Assemblies](#)
- [Chapter 901, Arrests](#)
- [Chapter 933, Search and Inspection Warrants](#)
- [Section 120.54, Rulemaking](#)
- [Section 768.28, Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs](#)

Florida Administrative Code Links

- [Chapter 64D-3: Control of Communicable Diseases and Conditions Which May Significantly Affect Public Health](#)

APPENDICES

Appendix A

Proposed Sample Forms*

Proposed Petition for Writ of Habeas Corpus

Proposed Final Order Granting Petition for Writ of Habeas Corpus

Proposed Final Order Denying Petition for Writ of Habeas Corpus

*It is suggested that judges have templates of these forms prepared for ready use. Note: in order to protect the Petitioner's confidential health care information, the Petitioner's identity should not be disclosed in petitions, orders, and other court records. The Petitioner's identity may be revealed to public officials such as law enforcement officers and authorized representatives of appropriate state agencies in the event that the Petitioner's identity is necessary to protect the public health. Please note that the following proposed orders state that a pseudonym shall be used for the Petitioner's true name. Please see the following instructive Florida public health statutes:

- **Section 384.282, Sexually Transmissible Diseases; Naming of parties**
- **Section 392.545, Tuberculosis Control; Naming of persons subject to proceedings**
- **Section 384.29, Sexually Transmissible Diseases; Confidentiality**
- **Section 392.65, Tuberculosis Control; Confidentiality**
- **Section 381.0031, Public Health; Epidemiological research; report of diseases of public health significance to department**

PROPOSED PETITION FOR WRIT OF HABEAS CORPUS

THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA

Petitioner,

v.

CIVIL DIVISION

Case No.:

20__-CA- _____ - _____

_____,¹

_____,²

of the Department of Health, State of Florida,
or the Department’s designee,

Respondent.

_____ /

PETITION FOR WRIT OF HABEAS CORPUS

1. This Court has jurisdiction pursuant to [Art. I, § 9, of the United States Constitution](#), [Art. I, § 13, of the Florida Constitution](#), and [Chapter 79, Florida Statutes](#).

2. The Petitioner has been ordered quarantined and is being confined by order of the Florida Department of Health or its designee:

(check one)

at his/her home at (address) _____

¹ Person signing order of quarantine if petitioner is confined to home or administrator of facility at which petitioner is confined.

² Name of facility if quarantined at location other than home.

OR

at (facility) _____ located at
(address) _____

by the Administrator (name), _____.

3. The Petitioner believes that he/she is being deprived of his/her freedom illegally. The Petitioner believes that his/her confinement is illegal because:

_____.

4. The Petitioner is unable to afford counsel and requests counsel to be appointed to represent him/her in the above captioned cause.

5. The Petitioner requests that confidential health care information that is contained in this petition, subsequent related filings, and subsequent orders be protected from public disclosure by substituting a pseudonym for the Petitioner's name.

WHEREFORE, Petitioner respectfully requests that this Court (check those that apply):

- Appoint counsel to represent the Petitioner in this cause.
- Enter an order setting a return hearing on this Petition for the Respondent to show by what legal authority the Respondent holds Petitioner.
- I can be notified of the hearing of my Petition at
telephone number _____ and/or
fax number _____ and/or

cell phone number _____ and/or
by e-mail at _____.

I do not have a telephone, cell phone, or internet access. I must be notified at the address listed above.

I HEREBY CERTIFY that the above stated matters in the Petition are true and correct to the best of my information, knowledge, and belief.

Date: _____
Signature

Printed Name

[Certificate of Service]

PROPOSED FINAL ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA

_____ ,

Petitioner,

v.

CIVIL DIVISION

Case No.:

20__-CA- _____ - _____

_____ ,

_____ ,

of the Department of Health, State of Florida,
or the Department’s designee,

Respondent.

_____ /

**FINAL ORDER GRANTING
PETITION FOR WRIT OF HABEAS CORPUS**

THIS CAUSE came before the Court on the petition of the Petitioner,
_____, for a writ of habeas corpus. After
considering the petition and the evidence, presented in light of the record
and the applicable law, hearing argument of counsel, and being otherwise
fully informed in the premises, the Court finds that:

1. The Petitioner alleges that he/she is being illegally confined by virtue of a

quarantine order entered by an official of the State of Florida's Department of Health. By reason of the order of quarantine he/she is confined

to his/her home at _____

to the facility known as _____

located at _____

in the custody of _____, the Administrator.

2. The Court finds that the order of quarantine was legally insufficient and based on a mistake of law and/or fact in that _____

Wherefore, it is

ORDERED AND ADJUDGED that

1. The order in Case No. _____
quarantining the Petitioner _____ is hereby vacated.

2. The Petitioner is ordered released from confinement forthwith.

3. All records pertaining to this case shall be styled in a manner to protect the Petitioner's name from public disclosure. A pseudonym shall be used for the Petitioner's true name. The Petitioner's identity may be revealed to public officials such as law enforcement officers and authorized representatives of appropriate state agencies in the event that the Petitioner's identity is necessary to protect the public health.

DONE AND ORDERED in _____ County, Florida, on
this _____ day of _____, 20__.

Circuit Judge

Copies furnished:

PROPOSED FINAL ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

THE CIRCUIT COURT OF THE ___ JUDICIAL CIRCUIT
IN AND FOR _____ COUNTY, FLORIDA

_____ ,

Petitioner,

v.

CIVIL DIVISION

Case No.:

20__-CA-_____-_____

_____ ,

_____ ,

of the Department of Health, State of Florida,
or the Department’s designee,

Respondent.

_____ /

**FINAL ORDER DENYING
PETITION FOR WRIT OF HABEAS CORPUS**

THIS CAUSE came before the Court on the petition of the Petitioner,
_____, for a writ of habeas
corpus. After considering the petition and the evidence, presented in light of
the record and the applicable law, hearing argument of counsel, and being
otherwise fully informed in the premises, the Court finds that:

1. The Petitioner alleges that he/she is being illegally confined by virtue of a

quarantine order entered by an official of the State of Florida's Department of Health. By reason of the order of quarantine he/she is confined

to his/her home at _____

to the facility known as _____
located at _____

_____ in the custody of _____, the Administrator.

2. The Department of Health has proved by clear and convincing evidence that the Petitioner poses a threat to the public health and no less restrictive means of protecting the public health exists in that _____

_____.

Wherefore, it is

ORDERED AND ADJUDGED that

1. The relief requested by the Petitioner is denied.

2. The order of quarantine in Case No. _____ shall remain in effect until the Petitioner is released by the Florida Department of Health or its designee.

3. Violation of this quarantine is a second degree misdemeanor and punishable as provided in. [sections 775.082\(4\)\(b\) and 775.083\(1\)\(e\), Florida Statutes](#).

4. All court records pertaining to this case shall be styled in a manner

to protect the Petitioner's name from public disclosure. A pseudonym shall be used for the Petitioner's true name. The Petitioner's identity may be revealed to public officials such as law enforcement officers and authorized representatives of appropriate state agencies in the event that the Petitioner's identity is necessary to protect the public health.

5. If no one else can do so, the quarantining authority must ensure that the Petitioner is provided with basic life necessities such as food, water, medicine, and medical treatment since the Petitioner cannot leave the area of confinement until the order of quarantine is lifted.

6. The Petitioner has the right to appeal this order to the district court of appeal.

DONE AND ORDERED in _____, _____ County, Florida,
on this _____ day of _____, 20__.

Circuit Judge

Copies furnished:

Appendix B

Florida Department of Health, Office of General Counsel, White Paper on the Law of Florida Human Quarantine (January 2007;

this paper can be accessed at

<http://biotech.law.lsu.edu/cphl/articles/others/Florida-Quarantine-07.pdf>)

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 - 1. Antiviral Medications and Prioritizations
 - 2. Vaccine and Prioritizations
 - 3. Behavior Modification: Isolation, Quarantine, Travel Restrictions
- VI. Review of Quarantine Orders
 - 1. Administrative Side of DOH Authority
 - 2. Internal Review by DOH, Compared with CDC's Proposed Quarantine Review
 - 3. Judicial Review by external tribunals -- why [Article V, Fla. Const.](#) Court Review Is Correct
- VII. Conclusion
- VIII. Acronyms
 - ALJ -- Administrative Law Judge of DOAH (*infra*)
 - APA -- Florida Administrative Procedures Act
 - CDC -- US Centers for Disease Control and Prevention
 - CHD -- County Health Department
 - DACS -- Florida Department of Agriculture and Consumer Services
 - DC -- District of Columbia (Washington DC)
 - DOAH -- Florida Division of Administrative Hearings
 - DOD -- US Department of Defense
 - DOH -- Florida Department of Health
 - HHS -- US Department of Health & Human Services
 - SARS -- Severe Acute Respiratory Syndrome

SNS -- Strategic National Stockpile
WHO -- World Health Organization

I. Executive Summary:

For purposes of this White Paper, infectious diseases fall in two basic groups: those we know a lot about and those we know little about. Commentators for years have observed that ‘emerging disease’ is the public health threat of the present and future. Pandemic influenza falls in the category we know little about. Response to pandemic influenza is disease control activity of the Florida Department of Health (DOH).

Where a great deal is known about an infectious disease, for example, tuberculosis, there are often specific practices and procedures calculated to control disease at acceptable risk to the uninfected population. But where little is known, the legal tools available to DOH may be limited to the quarantine statute.

The Legislature gave DOH broad discretion in protecting the public health by preventing spread of disease through quarantine. Those powers and that discretion are consistent with US Supreme Court decisions, from the formation of the country down through present days – the courts decline to impose additional requirements on the health agency’s policy decisions in health matters, and they defer to the health agency’s expertise in reaching a public health strategy or response.

Judicial participation in Florida quarantine is post-deprivation review. The Florida scheme for quarantine comports with controlling law and decisions applying that law. Suggestions indicating the Florida scheme is ‘outdated’ are academic in nature and are made despite clear precedent and legal authority. In other words, they appear to be socially motivated and not legally sound.

Quarantine may play a role in panflu disease control, but it likely will be a very small role. In defeating dangerous disease threats DOH needs the voluntary cooperation and assistance of the citizens. DOH cannot defeat the disease unless we work with the people – not against them. Consistent with law and the duty to protect the public health, DOH will meet due process requirements in a way calculated to respect the individual while saving the maximum number of lives.

II. Introduction:

The DOH General Counsel Office understands the exercise of quarantine within the framework of two recent events – the Anthrax cases of 2001 (bio-terror) and SARS (emerging disease), identified in Asia November 2002 and spread to Toronto with a serious second ‘wave’ in May 2003.

The Anthrax cases, following on the heels of the September 11, 2001 terror attacks, began with a fatality at the AMI Building in Palm Beach County FL, September 19, 2001.¹ The AMI Building was both a crime scene and a public health hazard, and was immediately closed (quarantined) by order of the Palm Beach County Health Department (CHD). As of January 2007, it remains closed under quarantine, pending verification of cleanup efforts. On September 28, 2001 an assistant to NBC news anchor Tom Brokaw noticed Anthrax lesions on her arm. By October, anthrax was found in DC postal facilities, congressional offices and the White House. The modern era of US bio-terror

¹ Date of arrival of first Anthrax letter: September 19, 2001. Date of first death: October 5, 2001.

preparedness and response had begun.

SARS pathology still is not completely understood, although the viral agent was identified and categorized by World Health Organization (WHO) in March 2003 – nearly five months after the syndrome was identified. Between March and July 2003, over 8000 probable cases of SARS were reported from around 30 countries. Due to lack of case definition, an early outbreak in Toronto, Canada, was mistakenly considered over, and SARS resurfaced in May 2003 with widespread governmental response to population movement control. Toronto quarantine measures were cast as non-compulsory, though practitioners candidly admitted, “Well, it was voluntary so long as you complied.” The mythology of public health would lead people to believe that public health defeated SARS, but it is equally plausible that SARS simply evolved into a non-pathogenic organism (lost interest in us).

The current focus of public health quarantine likewise has moved on to preparedness for a potential pandemic influenza, eclipsing bioterrorism concerns of the US except for the law enforcement sector. ‘Pandemic’ is a term of medical art meaning: “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.”² It is difficult to predict how quarantine might be used in Florida, due to the dearth of reliable facts on panflu, which remains hypothetical except for the unquantified likelihood of eventual appearance. Nevertheless, since approximately November 2005 the federal government has strongly promoted panflu preparedness with checklists, guidance documents, and planning dollars.

There is a great deal of loose talk circulating regarding the obligations and limitations of public health authorities in responding to pandemic influenza. As lawyers, we view that loose talk as social agenda or commentary (opinion). It doesn’t matter that many law review articles assert public health laws are now ‘antiquated’ and that new laws must be enacted to state with specificity who will do what, and when, in response to a health crisis. As lawyers, we look to the statutes and the cases applying those statutes. We are not political or management advisers, unless asked. When the Florida and US Supreme Courts take a position, we are professionally obligated to respect that and to view that guidance as binding. We advise our clients to follow the law as it is, not as others wish it to be.

III. Instructive History of State Public Health Police Powers:

State and local governments have had wide-ranging power to respond to diseases since the colonial period.³ Until the advent of antibiotic treatments, infectious diseases such as cholera, yellow fever, and plague worked a severe drain on society and caused the public health authority to come into existence.⁴ The US Supreme Court recognized state

² U.S. Department of Health & Human Services, <http://www.pandemicflu.gov/#>.

³ Novack, *The People’s Welfare: Law and Regulation in Nineteenth Century America*, University of North Carolina Press (1996).

⁴ See 1798 yellow fever epidemic, reported at *Smith v. Turner*, 48 U.S. (7 How.) 283, 340-41 (1849) (argument of counsel), available at http://caselaw.lp.findlaw.com/scripts/prINTER_FRIENDLY.pl?page=us/48/283.html.

public health powers to regulate steamships on navigable waterways,⁵ to tax passengers (but not foreign passengers) arriving in the U.S.,⁶ and interstate shipments of cattle if narrowly tailored.⁷ States could not consistently use public health powers to regulate milk,⁸ or tobacco labeling.⁹

IV. Florida Quarantine History:

By 1885 county health departments were formed throughout the State of Florida to ensure compliance with local quarantine laws.

The [county] boards [of health] are invested with functions of a public nature, to be exercised for the public benefit, and consequently they are not liable, in an action of tort, for damages sustained by a vessel which was wrongfully ordered into quarantine by them; no such liability being expressly imposed on them by the statute, and the general power to sue and be sued not being sufficient to authorize the action.¹⁰

In 1952, the Florida Supreme Court commented favorably upon a Florida public health statute allowing for compulsory confinement of persons suffering from tuberculosis:

The health of the people is unquestionably an economic asset and social blessing, and the science of public health is therefore of great importance....

That the preservation of the public health is one of the duties devolving upon the state as a sovereign power will not be questioned. Among all the objects sought to be secured by governmental laws none is more important than the preservation of public health.... The constitutional guaranties that no person shall be deprived of life, liberty or property without due process of law, and that no state shall deny to any person within its jurisdiction the equal protection of the laws, were not intended to limit the subjects upon which the police power of a state may lawfully be asserted in this any more than in any other connection.¹¹

There is additional historical precedent for the health department closing Florida properties under quarantine. In the New World Tower matter, circa 1988, a downtown Miami skyscraper suffered a major fire resulting in the spread of dangerous PCB chemicals in burnt building materials. The Miami-Dade CHD declared a quarantine of certain building floors until nationally recognized experts established that the building was safe for re-occupancy. The building owner was cooperative due to liability considerations connected with exposure to toxins.

On April 4th, 2003, President Bush issued an Executive Order providing for the

⁵ [Gibbons v. Ogden, 22 U.S. 1 \(1824\).](#)

⁶ [Smith v. Turner, 48 U.S. \(7 How.\) 283, 573 \(1849\).](#)

⁷ [Hannibal & St. J.R. Co. v. Husen, 95 U.S. 465 \(1877\).](#)

⁸ [Miller v. Williams, 12 F.Supp. 236 \(D. Md. 1935\); Otto Milk Co. v. Rose, 99 A.2d 467 \(Pa. 1953\); contrast James v. Todd, 103 So.2d 19, 24, 267 Ala. 495, 502 \(Ala. 1957\).](#)

⁹ [Cippolone v. Liggett Group, Inc., 505 U.S. 504 \(1992\); Lorillard Tobacco Company v. Reilly, 533 U.S. 525 \(2001\).](#)

¹⁰ [D.S. Forbes v. Board of Health Escambia County, 9 So. 862 \(Fla. 1891\).](#)

¹¹ [Moore v. Draper, 57 So.2d 648 \(Fla. 1952\).](#)

apprehension, detention or conditional release of individuals to prevent the introduction, transmission, or spread of suspected SARS.¹² On April 9th, a six year old was placed in home isolation for ten days by the Okaloosa CHD under suspicion of having SARS.¹³ That same month, the Miami-Dade CHD persuaded a jewelry salesman (SARS suspect case) to voluntarily sequester himself for 10 days. During that time period, the Miami-Dade CHD persuaded a homeless person suspected of SARS to confine himself to a motel setting for a similar 10 days.

There were no formal, involuntary orders issued in any of these cases. A person would have to go back to the days when HIV was known as Green Monkey Virus to identify other human quarantine cases, and the last certain Florida involuntary order was issued approximately in 1947. There is no one working today in the Florida system who participated in events that far back in history.

V. Legal Support for Quarantine as Disease Control Tool:

In 1943 in the Jacksonville, Florida area, Pauline Varholy was confined to the county jail, awaiting transfer to a health department hospital. She petitioned the circuit (trial) court of Duval County for a Writ of Habeas Corpus, and, together with the Sheriff, health officials responded with facts indicating venereal disease and a curative plan of the health department. The trial court denied the petition for writ, and Ms. Varholy appealed directly to the Supreme Court of Florida, protesting detention and excessive bail. The Supreme Court said:

Generally speaking, rules and regulations necessary to protect the public health are legislative questions, and appropriate methods intended and calculated to accomplish these ends will not be disturbed by the courts. All reasonable presumptions should be indulged in favor of the validity of the action of the Legislature and the duly constituted health authorities. But the constitutional guarantees of personal liberty and private property cannot be unreasonably and arbitrarily invaded. The courts have the right to inquire into any alleged unconstitutional exercise or abuse of the police powers of the Legislature, or of the health authorities in the enactment of statutes or regulations, or the abuse or misuse by the Boards of Health or their officers and agents of such authority as may be lawfully vested in them by such statutes or regulations.

However, the preservation of the public health is one of the prime duties resting upon the sovereign power of the State. The health of the people has long been recognized as one of the greatest social and economic blessings. The enactment and enforcement of necessary and appropriate health laws and regulations is a legitimate exercise of the police power which is inherent in the State and which it cannot surrender. The Federal government also possesses similar powers with respect to subjects within its jurisdiction. The constitutional guarantees of life, liberty and property, of which a person cannot be deprived without due process of law do not limit the exercise of the police power of the State to preserve the public health so long as that power is reasonably and fairly exercised and not abused.

The legislative authority in this legitimate field of the police power, like as in other fields, is fenced about by constitutional limitations, and it cannot properly be

¹² White House Executive Order, April 11, 2003, sec. 36(b), Public Health Service Act ([42 U.S.C. 264\(b\)](#)).

¹³ Miami Herald, www.herald.com, Wednesday, April 9, 2003, page 3A.

exercised beyond such reasonable interferences with the liberty of action of individuals as are really necessary to preserve and protect the public health. It has been said that the test, when such regulations are called in question, is whether they have some actual and reasonable relation to the maintenance and promotion of the public health and welfare, and whether such is in fact the end sought to be attained. Not only must every reasonable presumption be indulged in favor of the validity of legislative action in this important field, but also in favor of the validity of the regulations and actions of the health authorities.¹⁴

This is a long quotation, but the [Varholy](#) case teaches several important issues, all germane to this White Paper: Quarantine already has passed constitutional muster in Florida; habeas is the proper remedy to challenge it; circuit court is the right place to bring the challenge; constitutional rights to liberty are not absolute and may have to bend to the public health police power; the proper constitutional test is rational relationship; the courts generally will not entertain challenges to the discretion of public health officers; quarantine is not a criminal matter, therefore bail is not available. The [Varholy](#) opinion comports with opinions of the US Supreme Court.

As Professor Edward Richards has observed, “If the courts review all agency decisions de novo, thus rehearing the experts and substituting their decisions for the agency, then the government will lose the value of agency expertise and flexibility.”¹⁵ The business of setting the proper standard for judicial review is controversial, “since agency deference prevents opponents of public actions from being able to contest these actions.”¹⁶ So what is the correct form of judicial review? Most commentators agree the seminal public health case is [Jacobson v. Massachusetts](#),¹⁷ a mandatory smallpox vaccination case from 1904. With language that some lawyers describe as ‘sweeping,’ the Supreme Court pronounced that the price of civilized society was the surrender of some individual autonomy, that Jacobson was not entitled to rely on the protection provided by vaccination of his neighbors (no free ride on ‘herd immunity’), and that Jacobson could not challenge the legislative policy decision with evidence of risks inherent in the vaccine – no collateral attack on the legislative decision. In a later decision, the Court restated its deference standard, saying,

The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory preten[s]e. Within the field where men of reason may reasonably differ, the legislature must have its way.¹⁸

The Florida Legislature has directed DOH to exercise quarantine authority, stating, “It is the duty of the Department of Health to declare, enforce, modify, and abolish quarantine of persons, animals, and premises as the circumstances indicate for controlling communicable diseases or providing protection from unsafe conditions that pose a threat

¹⁴ [Varholy v. Sweat](#), 153 Fla. 571; 15 So.2d 267; 1943 Fla. LEXIS 700 (1943).

¹⁵ Richards, Public Health Law as Administrative Law, <http://biotech.law.lsu.edu/cphl/articles/maryland-symposia-2007.pdf>

¹⁶ *Id.*

¹⁷ [Jacobson v. Commonwealth of Massachusetts](#), 197 U.S. 11 (1905).

¹⁸ [Williams v. Mayor of Baltimore](#), 289 U.S. 36 (1933).

to public health.”¹⁹ Authority to give notice of quarantine is delegated to the CHD Directors and Administrators.²⁰ Quarantine presently is routinely used to respond to rabies problems in counties around the state.

The legislature criminalized violation of quarantine orders,²¹ and requires certain officials connected with the criminal justice system to assist DOH in enforcement.²² It even described DOH public health actions as “prima facie just and legal,”²³ and as judicial in nature – though no one is certain exactly what that means other than a legislative pronouncement that public health action is very, very important.²⁴

It is well-settled that courts should defer to an agency’s interpretation of its enacting statutes and rules in determining how to implement them.²⁵ Interested persons are encouraged to read the DOH statewide pandemic influenza plan for further practical-level information about how quarantine might be a useful tool to mitigate a pandemic event.²⁶

1. Antiviral Medications and Prioritizations

Handling and distribution of antivirals (Tamiflu, Relenza) falls within the domain of DOH Pharmacy Services.²⁷ Florida has a minimal stockpile of antivirals, though more may be made available through the federal Strategic National Stockpile (SNS) in the future. Under the current HHS and CDC protocols, Florida has been allocated part of the SNS held by the federal government. In any event, antivirals would have to pass through many hands before arriving in Florida – WHO, HHS, CDC, perhaps DOD and others – with multiple opportunities for diversion of Florida’s allotment. Of course there is a complex and vigorous regulated-but-private market for pharmaceuticals, mostly through private medical services.²⁸

¹⁹ [Sec. 381.0011\(6\), F.S.](#) Note, DOH General Counsel Office does not consider [sec. 381.00315, F.S.](#) as general quarantine authority because the statute powers take effect only “upon declaration of a public health emergency.”

²⁰ [Rule 64D-3.005\(1\), F.A.C.](#)

²¹ [Sec. 381.0025\(1\), F.S.](#)

²² [Sec. 381.0012\(5\), F.S.](#)

²³ [Sec. 381.0015, F.S.](#)

²⁴ See, e.g., “[A statute providing] that the finding of the health officers shall be final is a sufficient evidence of legislative intent to leave the whole matter to the health officers without restraint on part of the courts.” [State ex rel. McBride v. Superior Court for King County](#), 103 Wash. 409, 174 P. 973 (Wa. 1918), *citing with approval* [State ex rel. Aberdeen v. Superior Court](#), 44 Wash. 526, 87 P. 818. Washington State Code, sec. 5546 Rem. Code 1915.

²⁵ [Chevron U. S. A., Inc. v. Natural Resources Defense Council](#), 467 U.S. 837 (1984) (where statutory grant of authority is broad or general, courts defer to agency regulation that reasonably implements legislative intent); [Agrico Chemical Co. v. State Dept. of Environmental Protection](#), 365 So.2d 759 (Fla. 1st DCA 1979) *cert. den.* 376 So.2d 74 (‘substantial interests’ for purposes of APA); [Pershing Industries, Inc. v. Dept. of Banking & Finance](#), 591 So.2d 991, 993 (Fla. 1st DCA 1991) (where agency interpretation is one of several permissible, it must be upheld despite existence of reasonable alternatives).

²⁶ FL DOH Pandemic Influenza Annex ver. 10.4 (Oct 06), Appx 7 Rapid Response & Containment, http://www.doh.state.fl.us/rw_Bulletins/FIPanFluv104Final.pdf.

²⁷ See, e.g., [sec. 381.0203, F.S.](#), DOH Central Pharmacy.

²⁸ See [Ch. 465, F.S.](#) (pharmacies generally).

HHS has promulgated a prioritization scheme for dispensing antivirals. As lawyers, we can expect to defend our government clients from lawsuits scheming to improve some persons' priority position at the expense of other persons' positions.

2. Vaccine and Prioritizations

It is not possible to create a vaccine to counter a lifeform that has not appeared on our planet yet. Since the current annual world-wide vaccine production capacity is 900 Million doses, and that capacity already is in use, there is significant lag time from strain identification to useful, administrable vaccine. When there is, the vaccine like antivirals will be a source of some litigation, for identical reasons. Vaccines are regulated by DOH²⁹ as well as the Food & Drug Administration and other federal entities.

3. Behavior Modification: Isolation, Quarantine, Travel Restrictions

Florida law speaks of quarantine authority only. Federal actors routinely speak of quarantine and isolation. As a legal matter, Florida quarantine includes isolation, testing, treatment and preventive treatment, destruction, vaccination and inoculation, closure of premises and disinfection.³⁰ Isolation or quarantine of an individual constitutes a seizure,³¹ but the US Supreme Court has approved state detention of persons for health purposes without the level of due process found in criminal proceedings.³² Criminal law concepts and analysis, while informative, are not controlling in the setting of public health matters.³³ Also, DOH has overlapping jurisdiction with the Florida Department of Agriculture and Consumer Services (DACS),³⁴ particularly as to animals and premises. Similar jurisdictional overlap certainly exists with Florida Fish and Wildlife Conservation Commission and other Florida state agencies as to wildlife, waterfowl, aquaculture, commercial animal venues, and so forth. DOH defers to sister agencies that clearly are lead in subject matter areas, and will cooperate and support those other-agency actions.

The lesson of history about community quarantine (self-quarantine), based on the 1918 pandemic influenza experience, is that large-scale quarantine is ineffective. Certain islands effectively maintained their quarantine; others failed despite efforts.³⁵ The subject matter collectively referred to as 'social distancing' attempts to capture efforts at minimizing disease transmission without involuntary orders and other forms of governmental coercion.³⁶ Social distancing may be loosely defined as keeping your distance from your neighbor, or alternatively, as maintenance of a three-to-six foot space

²⁹ See, e.g., [sec. 381.003\(3\), F.S.](#)

³⁰ [Sec. 381.0011\(6\), F.S.](#); [Rule 64D-3.007-.010, F.A.C.](#)

³¹ [Michigan v. Summers, 452 U.S. 692, 696 \(1981\).](#)

³² [Addington v. Texas, 441 U.S. 418 \(1979\); Bell v. Wolfish, 441 U.S. 520 \(1979\).](#)

³³ [Chezem, Public Health Law Bench Book for Indiana Courts, sec. 3, pg. 24](#) ("The application of criminal procedure principles to public health action is . . . often complicated by numerous factors, including the differing philosophies underlying the two bodies of law and the lack of societal condemnation attached to many persons deemed threats to public health.")

³⁴ [Sec. 570.07\(2\), \(15\), \(19\), \(21\); 570.36\(2\); 585.002\(1\); 585.003\(1\)\(a\)-\(b\); 585.007\(2\); 585.01\(10\), \(13\), \(18\); 585.08\(1\), \(2\)\(b\), \(3\)-\(5\); 585.145; 585.147; 585.15; 585.16; 585.22; 585.23; 585.40, F.S.](#)

³⁵ [Markel, US Naval Training Station, Yerba Buena Island, San Francisco CA, <http://www.iom.edu/Object.File/Master/37/379/Markel%20IOM%20Lecture.pdf>](#) .

³⁶ [FL DOH Pandemic Influenza Annex ver. 10.4 \(Oct 06\), Appx 8 Community-Based Control and Mitigation Interventions, \[http://www.doh.state.fl.us/rw_Bulletins/FIPanFluv104Final.pdf\]\(http://www.doh.state.fl.us/rw_Bulletins/FIPanFluv104Final.pdf\)](#)

between people. There is no specific law on social distancing, although the general police powers may provide authority.³⁷ Quarantined persons may apply for a travel or transportation permit.³⁸

VI. Review of Quarantine Orders:

Influential commentators have written about the ‘revolutionary shift’ in judicial review of governmental (public health) matters³⁹ beginning approximately in the 1960s. In particular, there is a suggestion that due process rights have somehow obsoleted the existing law on quarantine. This is not the case.

1. Administrative Side of DOH Authority

Florida DOH is an executive branch agency created by the Florida Legislature.⁴⁰ Like all executive branch agencies, many of its actions are subject to Florida’s Administrative Procedures Act (APA).⁴¹ DOH has a specific mandate to enact quarantine rules on certain topics⁴² and a general mandate for rulemaking on any provision of law conferring duties upon it,⁴³ and has enacted such rules.⁴⁴ DOH already has statutory authority to quarantine, therefore enactment of further rules is not a predicate to exercise of its quarantine authority to protect the public health from known and emerging threats.

2. Internal Review by DOH, Compared with CDC’s Proposed Quarantine Review

The federal scheme (proposed): On Nov. 22, 2005 CDC released its draft quarantine rule (crafted for Quarantine Stations, international travel via airlines and ship lines, and potential interstate movements). The CDC proposed rule still is not finalized as of January 2007, pending consideration and response to critical comments during the federal rulemaking process.⁴⁵ CDC’s quarantine rule contemplates 1) a 3-day provisional quarantine with no review, 2) a subsequent (also could be stand-alone) formal quarantine order with internal administrative review, and 3) judicial review via petition for writ of habeas corpus.⁴⁶

The federal 3-day provisional quarantine is intended to ‘freeze’ movements of persons with suspected communicable disease. The provisional quarantine must be based on objective scientific evidence (e.g. high fever, respiratory distress, chills) and

³⁷ See, e.g., [sec. 870.04; 870.043; 870.045, F.S.](#)

³⁸ [Rule 64D-3.008, F.A.C.](#)

³⁹ Gostin, *Public Health Theory and Practice in the Constitutional Design*, p. 43, <http://papers.ssrn.com/abstract=293348> .

⁴⁰ [Sec. 20.43, F.S.; Ch. 381, F.S.](#), generally.

⁴¹ Freund, *Administrative Powers Under Health Legislation, Administrative Powers Over Persons and Property, A Comparative Survey*, Ch. 25 (University of Chicago Press, 1928).

⁴² [Sec. 381.0011\(6\), F.S.](#)

⁴³ [Sec. 381.0011\(13\), F.S.](#)

⁴⁴ [Rules 64D-3.007 et seq., F.A.C.](#)

⁴⁵ Proposed rule pending; comments period closed March 1, 2006. <http://www.cdc.gov/ncidod/dq/nprm/viewcomments.htm> .

⁴⁶ 42 U.S.C. Parts 70, 71. http://www.cdc.gov/ncidod/dq/nprm/docs/42CFR70_71.pdf . Comment period extended through March 2006.

epidemiologic criteria (e.g. travel to or from an affected area and/or contact with known cases). Therefore three days is needed to investigate and gather further scientific evidence. The formal quarantine must be “an additional order based on scientific principles such as clinical manifestations, diagnostic or other medical tests, epidemiologic information, laboratory tests, physical examination, or other available evidence of exposure or infection.”⁴⁷ Persons subject to provisional and formal quarantine orders may refuse treatment, prophylaxis or vaccination, but must otherwise cooperate with the orders.

The administrative review of the CDC formal quarantine order must be conducted by a knowledgeable person appointed by the CDC Director, and the scope of the review hearing would be limited to the factual and scientific evidence concerning the CDC decision to quarantine – not to review legal or constitutional issues.⁴⁸ Those issues are properly argued and tested as part of a habeas proceeding before a judicial officer.

The Florida scheme (proposed): Review of quarantine orders may be internal, external, or both. DOH proposes its own internal review process patterned on the federal proposal, specifically, a review of the factual basis for an individual’s quarantine order. That review should be performed by the Deputy State Health Officer or designee, within 48 hours of the request for review, and written decision back to the individual and the CHD within a total of 72 hours. The internal review would not consider or entertain any legal issues, but would consider the factual basis for quarantine. Such a review would satisfy the minimum constitutional due process rights set out in [Matthews v. Eldridge](#)⁴⁹ and would be consistent with the nature and duration of a health emergency – at least one such as pandemic influenza, the only known scenario where DOH might impose quarantines more widely than it has in the past, such as for specific incidents of rabies or anthrax exposure.

DOH does not intend to ‘manage’ or in any way restrict the relief sought by persons subject to a quarantine order. And although DOH is an executive branch agency subject to Florida’s APA, there is a valid argument that liberty restrictions are beyond the scope (outside the jurisdiction) of APA proceedings generally and the Division of Administrative Hearings specifically, absent a specific grant of legislative authority.

Review of quarantine orders through Ch. 120 proceedings is inappropriate because quarantined petitioners cannot meet the ‘substantial interests’ prong of the standing test.⁵⁰ Specifically, petitioners cannot show an injury of a nature which the proceeding is designed to protect. A quarantine controls movement to slow or stop the spread of disease, is designed to protect the health of the public rather than the individual, and is action outside DOH’s ordinary regulatory jurisdiction. Quarantine declarations, predicated on objective scientific criteria, are not agency action designed to protect an individual’s liberty interests, but instead are designed to protect the public health. Moreover, APA proceedings are lengthy in comparison to a quarantine which may last only days; that is, there will be no resolution of material facts in dispute before the

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ [Matthews v. Eldridge](#), 424 U.S. 319, 335 (1976) (due process requires consideration of 1) private interest, 2) risk of error from procedure, and 3) governmental interest).

⁵⁰ [Agrico Chemical Co. v. DER](#), 406 So.2d 478 (Fla. 2d DCA 1981), *rev. den.* 415 So.2d 1359, cited supra FN 25.

quarantine expires or is modified; neither DOH nor DOAH have jurisdiction to determine Constitutional issues; and DOH has exclusive authority among executive branch agencies to modify or lift its quarantines.

3. Judicial Review by external tribunals -- why [Article V, Fla. Const.](#), Court Review Is Correct

We agree with the federal government position in that every person in the US is entitled to petition for writ of habeas corpus⁵¹ to test whether he or she is wrongly held, regardless of any state or federal agency administrative reviews. Petitioners are not entitled to counsel at public expense,⁵² though the public defender may be appointed for indigent petitioners.⁵³

Consistent with the [Varholy](#) opinion, habeas actions should be heard by [Florida Constitution, Article V](#) courts. Florida circuit judges are more likely familiar with the many considerations that surround restrictions of liberty, and their courts are the correct forum for such extraordinary writ proceedings.⁵⁴ Administrative law judges of the Division of Administrative Hearings (DOAH) lack jurisdiction to consider constitutional issues⁵⁵ and to entertain extraordinary writs.

Even if review of DOH quarantine orders fell within APA, the failure to exhaust administrative remedies would be a waivable defense to a petition for writ of habeas corpus. It is the opinion of the DOH General Counsel office that in habeas proceedings, the Department would routinely waive the defense of failure to exhaust administrative proceedings as part of its effort to get to the merits of the petition. Either way, the fundamental point is that decisions of administrative courts are binding on reviewing courts only as to the factual determinations, not as to the conclusions of law. An administrative hearing officer, including DOAH judges, has no general jurisdictional authority to grant liberty to a detained person matter how they got there, no matter what the facts are.⁵⁶

Conclusion:

The commentary and objections raised about Florida quarantine authority have been raised and answered in the past, by the Florida Supreme Court and the US Supreme Court. There is no law controverting or overturning the Florida Department of Health's

⁵¹ [Art. 1, Sec. 9, US Const.](#) habeas proceedings are civil in nature, not criminal. [Hilton v. Braunskill](#), 481 US 770, 107 S.Ct. 2113, 2118 (1987); [Art. I, sec. 13, Fla.Const.](#)

⁵² [Keegan v. State](#), 293 So.2d 351 (Fla. 1974).

⁵³ [State ex rel. Smith v. Jorandby](#), 498 So.2d 948 (Fla. 1984).

⁵⁴ [Varholy v. Sweat](#), 153 Fla. 571; 15 So.2d 267; 1943 Fla. LEXIS 700 (1943).

⁵⁵ [Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.](#), 361 So.2d 695, 699 (Fla. 1978) *reh. den.* Sept. 11, 1978, *citing*: [Department of Revenue v. Young American Builders](#), 330 So.2d 864 (Fla. 1st DCA 1976). [Shinholster, et al. v. Graham](#), 527 F.Supp. 1318, 1322 (N.D. Fla. 1981).

⁵⁶ *But see*, Florida Baker Act (mental health commitments), [sec. 394.451-394.4789, F.S.](#) Under the Baker act, the patient litigates through habeas while the institution litigates through an administrative path. The patient may question the cause and legality of detention ("placement") via habeas corpus at any time. [Sec. 394.459\(8\)\(a\), F.S.](#) After initial placement, the institution may petition in administrative court for continued commitment. [Sec. 394.467\(7\)\(b\), F.S.](#) The DOAH ALJ may order continued commitment for up to 6 months. [Sec. 394.467\(7\)\(d\), F.S.](#)

general authority in that regard, indeed the opposite is true. DOH has a lawful obligation to use its discretion and expertise to protect the public health to the maximum extent possible within the broad bounds of its statutory authority and constitutional limitations.

VIII. Acronyms:

ALJ	--	Administrative Law Judge of DOAH (<i>infra</i>)
APA	--	Florida Administrative Procedures Act
CDC	--	US Centers for Disease Control and Prevention
CHD	--	County Health Department
DACS	--	Florida Department of Agriculture and Consumer Services
DC	--	District of Columbia (Washington DC)
DOAH	--	Florida Division of Administrative Hearings
DOD	--	US Department of Defense
DOH	--	Florida Department of Health
HHS	--	US Department of Health & Human Services
SARS	--	Severe Acute Respiratory Syndrome
SNS	--	Strategic National Stockpile
WHO	--	World Health Organization

Appendix C

Public Health Glossary

acute	Sudden; occurring quickly and, generally, without warning. An acute condition may, but need not necessarily, be severe.
adenopathy	Swelling of the glands. Typically refers to swollen lymph nodes.
antigen	A protein, typically foreign, that elicits a specific immune response.
antigenic drift	Point mutations leading to changes in antigenicity of the major H and N antigen subtypes of an influenza virus.
antigenic shift	Change in circulating major antigen (H and N) determinants either through exchange and reassortment of genetic material or adaptation to human transmission.
asymptomatic	Without symptoms.
attack rate	The proportion of susceptible individuals exposed to a specific risk factor in a disease outbreak that become cases. For an infectious risk factor, the attack rate is the number of secondary cases occurring within the accepted incubation period divided by the number of susceptible individuals in a closed group exposed to the primary (index) case.
carrier	“(a) A person who harbors pathogenic organisms of a communicable disease but who does not show clinical evidence of the disease; or (b) A person to whom evidence points as the source of one (1) or more cases of any communicable disease but who refuses to submit clinical specimens to the Department or county health department for examination; or (c) A person who, in the judgment of the State Health Officer or county health department director or administrator or their designee, is suspected to be a carrier and who refuses to submit to examination when ordered to do so for good cause shown by the State Health Officer or county health department director or administrator or their designee; or (d) A person reported to the Department or the county health department to be a carrier by the health authorities of any municipality, county, or state in the United States, of any foreign nation or of any international organization of which

	<p>the United States is a member; or (e) An animal which, in the judgment of the State Health Officer or county health department director or administrator or their designee, is suspected to harbor pathogenic organisms of a communicable disease without presentation of clinical evidence of disease.” FLA. ADMIN. CODE RULE 64D-3.028(4).</p>
case	<p>“An instance of a suspected or diagnosed disease or condition in a person or animal.” FLA. ADMIN. CODE RULE 64D-3.028(5).</p>
census	<p>A sample that includes every individual in a population or group.</p>
clinical utility	<p>“[T]he likelihood that the test will, by prompting an intervention, result in an improved health outcome. The clinical utility of a test is based on the health benefits related to the interventions offered to persons with positive test results.” NATIONAL CANCER INSTITUTE AT THE NATIONAL INSTITUTES OF HEALTH, <i>Levels of Evidence for Cancer Genetics Studies (PDQ®)</i>, at https://www.cancer.gov/publications/pdq/levels-evidence/genetics#section/_29</p>
clinical validity	<p>“[T]he predictive value of a test for a given clinical outcome (e.g., the likelihood that cancer will develop in someone with a positive test). It is primarily determined by the sensitivity and specificity with which a test identifies people with a defined clinical condition.” NATIONAL CANCER INSTITUTE AT THE NATIONAL INSTITUTES OF HEALTH, <i>Levels of Evidence for Cancer Genetics Studies (PDQ®)</i>, at https://www.cancer.gov/publications/pdq/levels-evidence/genetics#section/_27.</p>
communicable	<p>Capable of being transmitted from one organism or person to another.</p>
communicable disease	<p>“An illness due to a specific infectious agent or its toxic products which arises through transmission of that agent or its products from a reservoir to a susceptible host either directly as from an infected person or animal or indirectly, through an intermediate plant or animal host, vector or the inanimate environment.” FLA. ADMIN. CODE RULE 64D-3.028(6).</p>

constitutional symptoms	General indications of disease pertaining to the body as a whole.
contact	“A person or animal that has been in such association with an infected person or animal or a contaminated environment as to have had opportunity to acquire the infection. This will include household members or persons who frequent the dwelling of the case or carrier. For sexually transmitted diseases contact means a sex/needle sharing partner.” FLA. ADMIN. CODE RULE 64D-3.028(7) .
contact tracing	“Identification and location of persons who may have been exposed to” an infectious disease, which “may result in regular monitoring for evidence of illness and strict or modified quarantine.” CENTERS FOR DISEASE CONTROL & PREVENTION, DEPT. OF HEALTH & HUMAN SERVICES, Severe Acute Respiratory Syndrome (SARS): Appendix 2 – Glossary, at https://www.cdc.gov/sars/guidance/core/app2.html . Contact tracing has been used to control contagious diseases “for decades. A disease investigation begins when an individual is identified as having a communicable disease. An investigator interviews the patient, family members, physicians, nurses, and anyone else who may have knowledge of the primary patient’s contacts, anyone who might have been exposed, and anyone who might have been the source of the disease. Then the contacts are screened to see if they have or have ever had the disease. The type of contact screened depends on the nature of the disease. A sexually transmitted disease will require interviewing only infected patients and screening only their sex partners. A disease that is spread by respiratory contact, such as tuberculosis, may require screening tens to hundreds of persons, such as other inmates in a prison.” THE MEDICAL & PUBLIC HEALTH LAW SITE, LOUISIANA STATE UNIVERSITY LAW CTR., Contact Tracing, at https://biotech.law.lsu.edu/Books/lbb/x578.htm .
contagious disease	See communicable disease .
cyanosis	A dark bluish or purplish discoloration of the skin and mucous membrane due to deficient oxygenation of the blood.

demographic information	The personal characteristics of age, sex, race, residence, and occupation. Demographic information is used in descriptive epidemiology to define the population at risk.
disease	An interruption, cessation, or disorder of a body, system, or organ structure or function; a departure from a state of health.
disease agent	A microorganism whose presence or absence results in disease.
disease vector	See vector .
dyspnea	Shortness of breath, usually associated with disease of the heart or lungs.
edema	Accumulation of an excess amount of watery fluid in cells or intercellular tissues.
effectiveness	The extent to which a treatment achieves its intended purpose in an average clinical environment.
efficacy	The extent to which a treatment produces a beneficial result under ideal conditions.
endemic	Denoting a temporal pattern of disease occurrence in a population in which the disease occurs with predictable regularity and only relatively minor fluctuations in its frequency over time.
enteric disease	“An infection or condition transmitted by ingestion of such agents as <i>Campylobacter jejuni</i> , <i>Cyclospora cayetanensis</i> , <i>Cryptosporidium parvum</i> , <i>Escherichia coli</i> O157:H7 and other pathogenic <i>E. coli</i> , hepatitis A, <i>Giardia lamblia</i> , <i>Salmonella</i> species, <i>Shigella</i> species and <i>Vibrio cholerae</i> .” FLA. ADMIN. CODE RULE 64D-3.028(11) .
enterovirus	A large and diverse group of viruses, including poliovirus types 1 to 3, that inhabit the digestive tract.
epidemic	“Occurrence of more cases of disease than expected in a given area or among a specific group of people over a particular period of time.” CDC Epidemiology Glossary .
epidemic period	The time span of an epidemic.

epidemiological investigations	“An inquiry into the incidence, distribution and source of diseases or conditions to determine its cause, means of prevention or control, and efficacy of control measures.” FLA. ADMIN. CODE RULE 64D-3.028(12) .
epizootic	“The occurrence in animals in a community, institution, region or other defined area of a group of cases of an illness of similar nature in excess of normal expectancy.” FLA. ADMIN. CODE RULE 64D-3.028(13) .
exposure	Coming into contact with a cause of, or possessing a characteristic that is a determinant of, a particular health problem.
fomes/fomites	Objects, such as clothing, towels, and utensils, that possibly harbor a disease agent and are capable of transmitting it.
health authorities	“The State Officer or any local county health department director or administrator or their designee; any chief health official of any municipality, county, or state in the United States, of any foreign nation or of any international organization of which the United States is a member.” FLA. ADMIN. CODE RULE 64D-3.028(16) .
hemagglutinin	One of the two major surface proteins. Important for virus attachment to cells of the respiratory epithelium. Subtypes include H1 to H15. H1, H2 and H3 are the only described determinants involved in sustained human-to-human transmission.
hemoptysis	Spitting of blood from the lungs or bronchial tubes as a result of pulmonary or bronchial hemorrhage.
high-risk group	A group of people whose risk for a particular disease, health condition, or type of injury is higher than that of the rest of the community or population.
horizontal transmission	Transmission of a disease agent from an infected organism or individual to another susceptible individual.
hyperthermia	Extremely high fever, often occurring as a side effect of therapeutic regimens.
hypothermia	A body temperature significantly below normal (97.7–99.5°F or 36.5–37.5°C).

identifiable health information	<p>“[I]nformation [in any form] that relates to an individual’s past, present, or future physical or mental health status, condition, treatment, service, products purchased, or provision of care, and [a] reveals the identity of the individual . . . ; or [b] there is a reasonable basis to believe the information could be utilized (either alone or with other information that is, or should reasonably be known to be, available to predictable recipients of such information) to reveal the identity of that individual.”</p> <p>PUBLIC HEALTH STATUTE MODERNIZATION COLLABORATIVE, TURNING POINT, Model State Public Health Act: A Tool for Reforming Public Health Laws (Aug. 2003), available at https://law.asu.edu/sites/default/files/multimedia/faculty-research/centers/phlp/turning-point-model-act.pdf.</p>
immune response	<p>“[A] bodily response to an antigen that occurs when lymphocytes identify the antigenic molecule as foreign and induce the formation of antibodies and lymphocytes capable of reacting with it and rendering it harmless — called also <i>immune reaction</i>.”</p> <p>Merriam Webster’s Medical Dictionary (2019).</p>
immune system	<p>“[T]he bodily system that protects the body from foreign substances, cells, and tissues by producing the immune response.”</p> <p>Merriam Webster’s Medical Dictionary (2019).</p>
immunity	<p>1) A state in which a host is not susceptible to infection or disease, or 2) the mechanisms by which this is achieved. Immunity is achieved by an individual through one of three routes: natural or innate immunity genetically inherited or acquired through maternal antibody; acquired immunity conferred after contact with a disease; and artificial immunity after a successful vaccination.</p>
immunogenicity	<p>The ability of a vaccine to stimulate the immune system, as measured by the proportion of individuals who produce specific antibody or T cells, or the amount of antibody produced.</p>
immuno-suppression	<p>A reduction in the capacity of the immune system caused by infection (e.g. HIV), drug treatment, pregnancy and malnutrition, among other factors. Immunosuppressed individuals are commonly referred to as immunocompromised</p>

in vitro	In an artificial environment, such as a test tube or culture medium.
in vivo	In the living body.
incidence	The frequency with which a new health problem, such as a new injury or case of illness, occurs in a population during a specific time period.
incidence rate	The rate that measures the frequency with which a new health problem, such as a new injury or case of illness, occurs in a population during a specific time period. In calculating the incidence rate, the numerator is the number of new cases occurring in the population during the given period of time and the denominator is the total population at risk during that same time period.
incubation period	Time interval between invasion of the body by an infecting organism and the appearance of the first sign or symptom it causes or when the vector is capable of transmitting the disease to a human host. During the incubation period, the disease is developing. Incubation periods are disease-specific and may range from hours to weeks.
index case	“[A]n instance of a disease or a genetically determined condition that is discovered first and leads to the discovery of others in a family or population.” Merriam-Webster’s Medical Dictionary (2019) .
infectious agent	A microorganism that causes infectious disease through transmission.
infectious disease	A disease resulting from the presence and activity of a microbial agent.
infectious period	The time period during which infected persons are able to transmit an infection to any susceptible host or vector they contact. The infectious period may not necessarily be associated with symptoms of the disease.
influenza-like illness (ILI)	An acute respiratory infection with measured fever of 38°C or greater, cough, and onset within the last ten days. World Health Organization (2017) .
isolation	Separation for the period of communicability of known infected people or animals from others, so as to prevent or

	limit the transmission of the infectious agent.
latent period	See incubation period .
lymph node	“[A]ny of the rounded masses of lymphoid tissue that are surrounded by a capsule of connective tissue, are distributed along the lymphatic vessels, and contain numerous lymphocytes which filter the flow of lymph passing through the node — called also <i>lymph gland</i> .” Merriam-Webster’s Medical Dictionary (2019) .
morbidity	“[A] diseased state or symptom.” Merriam-Webster’s Medical Dictionary (2019) .
mortality rate	The proportion of individuals in a population that die in a given period of time, usually a year and usually multiplied by a 10 ⁿ population size so it is expressed as the number per 1,000, 10,000, or 100,000 individuals per year.
mortality rate, age-adjusted	A mortality rate that has been statistically modified to account for the effect of different age distributions in different populations.
mortality rate, cause-specific	The mortality rate from a specified cause.
mucous membrane	“[A] moist membranous layer rich in mucous glands that lines body passages and cavities (as of the digestive, respiratory, and genitourinary tracts) which connect directly or indirectly with the exterior, that functions in protection, support, nutrient absorption, and secretion of mucus, enzymes, and salts, and that is composed of epithelium supported below by the lamina propria and sometimes by the muscularis mucosae — called also <i>mucosa</i> .” Merriam-Webster’s Medical Dictionary (2019) .
necrosis	Death of living tissue.
neuraminidase	One of the two major surface proteins of the influenza virus.
notifiable disease	A disease that is “required by law to be reported to official public health authorities.” Merriam-Webster’s Medical Dictionary (2019) .
novel virus (strain)	A virus that has not been seen before.

outbreak	“An increase in the number of cases of a disease or condition compared to the expected number in a particular period of time and geographical area. For diseases where the expected number is zero, a single case constitutes an outbreak.” FLA. ADMIN. CODE RULE 64D-3.028(19) .
outcome(s)	Any or all of the possible results that may stem from exposure to a causal factor or from preventive or therapeutic interventions.
pandemic	An epidemic occurring over a very wide area (several countries or continents) and usually affecting a large proportion of the population.
pathogenicity	The proportion of people who are infected by an agent and then develop clinical disease.
population	The total number of inhabitants of a given area or country. In sampling, the population may refer to the units from which the sample is drawn, not necessarily the total population of people. A population can also be a particular group at risk, such as everyone who is engaged in a certain occupation.
predictive value	The likelihood that a given test result correlates with the absence or presence of disease. A positive predictive value is the ratio of patients with the disease who test positive to the entire population diseases where the expected number is zero, a single case constitutes an outbreak.
prevalence	The number of people who are affected with a particular disease at a given time.
prevalence rate	The percentage of a population that is affected with a particular disease at a given time.
proband	See index case .
prophylaxis	Acting against or preventing a disease.
proportion	A dimensionless number between 0.0 and 1.0 (if a probability), or between 0% and 100% (if a percentage), consisting of one count as the numerator divided by another count as the denominator.
prostration	Complete physical or mental exhaustion.”

public health agency	<p>“[A]ny organization operated by federal, tribal, state, or local government that principally acts to protect or preserve the public’s health.”</p> <p>PUBLIC HEALTH STATUTE MODERNIZATION COLLABORATIVE, TURNING POINT, Model State Public Health Act: A Tool for Reforming Public Health Laws (Aug. 2003), available at https://law.asu.edu/sites/default/files/multimedia/faculty-research/centers/phlp/turning-point-model-act.pdf.</p>
public health emergency	<p>“[A]n occurrence or imminent threat of an illness or health condition that: [a] is believed to be caused by . . . (i) bioterrorism; (ii) the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin; or (iii) a natural disaster, a chemical attack or accidental release, or a nuclear attack or accidental release; and [b] poses a high probability of . . . : (i) a large number of deaths in the affected population; (ii) a large number of serious or long-term disabilities in the affected population; or (iii) widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.”</p> <p>PUBLIC HEALTH STATUTE MODERNIZATION COLLABORATIVE, TURNING POINT, Model State Public Health Act: A Tool for Reforming Public Health Laws (Aug. 2003), available at https://law.asu.edu/sites/default/files/multimedia/faculty-research/centers/phlp/turning-point-model-act.pdf.</p>
public health law	<p>“[T]he study of the legal powers and duties of the state . . . to assure the conditions for people to be healthy (to identify, prevent, and ameliorate risks to health in the population) and of the limitations on the power of the state to constrain the autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals. The prime objective of public health law is to pursue the highest possible level of physical and mental health in the population, consistent with the values of social justice.”</p> <p>Lawrence O. Gostin & Lindsay F. Wiley, Public Health Law: Power, Duty, Restraint 4 (University of California Press 3rd ed. 2016).</p>
public health official	<p>“[T]he head officer or official of a state or local public health agency who is responsible for the operation of the agency and has the authority to manage and supervise the agency’s</p>

	activities.” PUBLIC HEALTH STATUTE MODERNIZATION COLLABORATIVE, TURNING POINT, Model State Public Health Act: A Tool for Reforming Public Health Laws (Aug. 2003), available at https://law.asu.edu/sites/default/files/multimedia/faculty-research/centers/phlp/turning-point-model-act.pdf .
public health surveillance	The systematic, ongoing collection, analysis, interpretation, and dissemination of health data.
pulmonary	Relating to the lungs.
pyrogenic	Causing fever.
quarantine	The separation and the restriction of movement of persons as yet not ill who have been exposed to an infectious agent and may become ill or infectious.
R₀	Basic reproduction number, R ₀ , or the number of secondary infected cases produced by one infected case in an uninfected but susceptible population.
rate	“[A] quantity, amount, or degree of something measured per unit of something else.” Merriam-Webster’s Medical Dictionary (2019) .
ratio	“[T]he relationship in quantity, amount, or size between two or more things.” Merriam-Webster’s Medical Dictionary (2019) .
risk	“[P]ossibility of loss, injury, disease, or death.” Merriam-Webster’s Medical Dictionary (2019) .
reportable disease	See notifiable disease .
<i>Salmonella</i>	“[A] genus of aerobic gram-negative rod-shaped nonspore-forming usually motile bacteria of the family Enterobacteriaceae that grow well on artificial media and form acid and gas on many carbohydrates but not on lactose, sucrose, or salicin, that are pathogenic for humans and other warm-blooded animals, and that cause food poisoning, acute gastrointestinal inflammation, typhoid fever, and septicemia.” Merriam-Webster’s Medical Dictionary (2019) .

sample	“[A] finite part of a statistical population whose properties are studied to gain information about the whole.” Merriam-Webster’s Medical Dictionary (2019) .
screen	“the systematic application of a test or exam to a defined population.” PUBLIC HEALTH STATUTE MODERNIZATION COLLABORATIVE, TURNING POINT, Model State Public Health Act: A Tool for Reforming Public Health Laws (Aug. 2003), available at https://law.asu.edu/sites/default/files/multimedia/faculty-research/centers/phlp/turning-point-model-act.pdf .
seasonality	Relating to, occurring in, or varying with a particular season.
sensitivity	The ability of a screening test to detect true positives.
sentinel surveillance	A surveillance system using a prearranged sample of sources (e.g., physicians, hospitals, clinics) who have agreed to report all cases of one or more notifiable diseases.
Severe Acute Respiratory Syndrome (SARS)	A viral respiratory illness caused by a coronavirus called SARS-associated coronavirus (SARS-CoV).
species	“[A] category of biological classification ranking immediately below the genus or subgenus, comprising related organisms or populations potentially capable of interbreeding, and being designated by a binomial that consists of the name of the genus followed by a Latin or latinized uncapitalized noun or adjective agreeing grammatically with the genus name.” Merriam-Webster’s Medical Dictionary (2019) .
specificity	The ability of a screening test to distinguish between true positives and true negatives.
sputum	“[M]atter expectorated from the respiratory system and especially the lungs in diseased states that is composed of mucus but may contain pus, blood, fibrin, or microorganisms (as bacteria).” Merriam-Webster’s Medical Dictionary (2016) .
stochastic model	A mathematical model that takes into consideration the presence of some randomness in one or more of its parameters or variables. The predictions of the model

therefore do not give a single point estimate but a probability distribution of possible estimates.

Strategic National Stockpile (SNS)	A federal cache of medical supplies and equipment to be used in emergency and disaster situations.
surveillance	The ongoing collection, analysis, interpretation, and dissemination of data for the purpose of preventing and controlling disease and injury.
symptom	Subjective evidence of disease or physical disturbance experienced by the patient. This is distinguishable from a “clinical sign,” which is an observable effect of a disease or physical disturbance.
syndromic	Referring to symptoms that typically occur together.
test	A critical examination, observation, evaluation, or trial, used to collect data with which to prove or disprove a hypothesis.
transmissible agent	<p>“[A] biological substance capable of causing disease or infection” through conveyance from one organism to another.</p> <p>PUBLIC HEALTH STATUTE MODERNIZATION COLLABORATIVE, TURNING POINT, Model State Public Health Act: A Tool for Reforming Public Health Laws (Aug. 2003), available at https://law.asu.edu/sites/default/files/multimedia/faculty-research/centers/phlp/turning-point-model-act.pdf.</p>
transmission	The conveyance of disease from one organism to another.
transmission (of infection)	Any mode or mechanism by which an infectious agent is spread to a susceptible host.
vaccine	<p>“[A] suspension of attenuated or noninfectious microorganisms or derivative antigens administered to stimulate antibody production or cellular immunity against a pathogen for the purpose of preventing, ameliorating, or treating an infectious disease.”</p> <p>PUBLIC HEALTH STATUTE MODERNIZATION COLLABORATIVE, TURNING POINT, Model State Public Health Act: A Tool for Reforming Public Health Laws (Aug. 2003), available at https://law.asu.edu/sites/default/files/multimedia/faculty-research/centers/phlp/turning-point-model-act.pdf.</p>

vector	“[A]n organism (such as an insect) that transmits a pathogen from one organism or source to another.” Merriam-Webster’s Medical Dictionary (2019) .
vertical transmission	Transmission of a disease agent from an individual to its offspring.
viremia	“[T]he presence of viruses in the blood.” Merriam-Webster’s Medical Dictionary (2019) .
virulence	The relative severity or malignancy of a disease.
virus	“[A]ny of a large group of submicroscopic, infective agents that are usually regarded as nonliving, extremely complex molecules or sometimes as very simple microorganisms, that typically contain a protein coat surrounding an RNA or DNA core of genetic material but no semipermeable membrane, that are capable of growth and multiplication only in living cells, and that cause various important diseases in humans, animals, and plants.” Merriam-Webster’s Medical Dictionary (2019) .
zoonosis	An infectious disease “that can be naturally transmitted from animals to humans.” FLORIDA DEPT. HEALTH, DIVISION OF DISEASE CONTROL & HEALTH PROTECTION, at http://doh.state.fl.us/Environment/medicine/arboviral/Zoonoses/Zoonotic-index.html .

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