GETTING PREPARED: WHERE TO START AND HOW

Remarks To The
Supreme Court of Virginia Flu Preparedness Commission
Richmond, Virginia
March 17, 2009

John M. Cleland, Judge
Superior Court of Pennsylvania.
P.O. Box 774
4355 Route Six
Kane, PA 16735
john.cleland@pacourts.us
814-837-1501

Support for this presentation was provided by the Virginia Supreme Court and the Bureau of Justice Assistance Criminal Courts Technical Assistance Project at American University, Assignment No. 4-084, with funding provided by Grant No. 2006-DD-BX-K013 awarded by the Bureau of Justice Assistance to American University. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime. Points of view or opinions in this document are those of the author and do not represent the official position or policies of the United States Department of Justice.
GETTING PREPARED: WHERE TO START AND HOW

Remarks of John M. Cleland
Supreme Court of Virginia Flu Preparedness Commission
Richmond, Virginia
March 17, 2009

There are two very difficult things that must be done when you become involved in avian flu planning: the first is to start, the second is to stop. Inertia is endemic to the process. It keeps you from getting started; and once you are on a roll it develops a fascination all of its own and you can’t seem to get stopped. This morning, I hope to share my own experience with an eye toward helping you to get started in your planning, and then helping you to stop.

Perhaps it would be of some help if I told you how I got involved in this work.

Until I was appointed to our appellate court last summer I had been a general jurisdiction trial judge since 1984 --24 years. For 20 of those years, until a second judge was added, I was the only judge in a one-judge court in rural Pennsylvania, trying all types of civil, criminal, probate, family, and juvenile cases.

In March 2004, there were two white powder incidents within two weeks in two courthouses nearby. The response to the incidents varied dramatically. In one county, the County Commissioners took charge, closed the courthouse, and sent all employees home. In the other county, the County Sheriff and HazMat showed up in white suits, quarantined the courthouse under armed guard, and would not let anyone out.

As I was sitting in my chambers, I wondered how I would respond to a white powder incident in our courthouse. Evacuate, isolate, I didn’t know. So I called our state court administrator and suggested we ought to be giving guidance to judges about how to handle these situations. He said, “That is a great idea. Why don’t you take care of it!”

And that is how this all started. We convened a working group including public health experts, physicians, FBI, Pennsylvania State Police, public health lawyers, court administrators, and representatives of our state office of court administration. During 2005, we put together a guide for courthouse preparedness and response to biological hazards.

As we were doing that, I became acutely aware that I knew absolutely nothing about public health law -- I never had a course in it in law school, never had a case in my private practice or as a judge, never attended a continuing education program or had ever heard of one even being offered on the topic. Asking around among my judicial colleagues, I discovered they didn’t know anything about public health law either.

So the project for 2006 became to organize a group to write a bench book for Pennsylvania’s public health law. It is a useful tool, not an academic treatise.
In the course of doing that project, we realized that if we really had a public health emergency we had no idea how we would assure that the courts would meet the constitutional obligation to be "open." We did not have an effective statewide continuity of operations planning process. That became the project for 2007.

While all this was going on, I had been hearing about a new flu virus, something called H5N1. I had no idea what it was. I stumbled on John Berry’s book The Great Influenza, and began to realize the implications of any infectious disease outbreak, let alone a flu pandemic, as Toronto’s SRS experience amply demonstrated. The specter of infectious disease began to infuse all the work we were doing -- preparation of courthouses, teaching judges public health law, and assuring the courts could be kept open.

So a very simple question, evacuate or isolate?, borne of profound ignorance, started this whole process for me.

When it comes to pandemic planning, I do not hold myself out as an expert. The more I work in this field the less certain I become that I know anything about it.

I will offer some brief thoughts for your consideration, but I am no expert. Keep in mind my experience on Capitol Hill in Washington last fall.

I hadn’t been on Capitol Hill since my days in law school and I wasn’t exactly sure I knew where I was going. I had some time to kill before a meeting so I wanted to see an exhibit at the Library of Congress. The front door of the Library was closed for maintenance so I was looking for another entrance. Around the corner came a group of Chinese tourists huddled over a map, obviously they were also trying to get into the building. They didn’t know I was lost too. But I was wearing a grey suit, with a white shirt and tie, and carrying a briefcase. They assumed I was an expert. By that time, I had figured out where the side door was, pointed it out to them, and they went on their way after smiling and shaking my hand.

While waiting for the light to change so I could cross the street, I noticed a huge sign with an arrow pointing to the subway. An obviously stressed out tourist, tired children in tow, came up to me with a desperate look in her eye. “Can you tell me how to get to the subway?” she asked. She too had seen the suit, tie and briefcase and pegged me for an expert. I pointed her in the direction of the subway, which I had just learned of course from seeing the sign hanging above me. She was much relieved and very grateful.

From that experience, I learned how easy it is on Capitol Hill to be mistaken for an expert. And with that qualification, I will pass along what I hope will be helpful based on my own experience and from asking what I thought were simple questions.

Although there is overlap, continuity of operation planning is very different from pandemic planning and it is important to distinguish the two. When we started our work in Pennsylvania, we assumed that pandemic flu planning could be handled as a subset of continuity of operations planning and that they could be done at the same time. That turned out to be incorrect. Let me explain why.
All operations planning revolves around three things: stuff, staff and structure.

What stuff do you need to do your job -- what computers, desks, phones, files, data, cars, handcuffs, books, etc?

What staff is needed to do particular tasks -- which secretaries, judges, court security officers, filing clerks, stenographers, administrators, etc?

What structures are needed -- what courtrooms, jail cells, administrative offices, filing offices, etc.

When you think about planning in that way, it becomes quickly obvious that normal continuity of operations planning focuses on stuff and structure. A COOP plan responds to natural disasters -- floods, fires, tornadoes, power outages -- that destroy all or part of the court facility or equipment needed to operate the court.

In flu planning, however, the stuff and structure is all in place. It is staff that is the problem. In large numbers they will not be available to come to work -- either because they are sick, a family member is sick, they are afraid to come to work, or they are dead.

I suppose it is possible to do it in reverse, but in my view, it makes sense to do COOP planning first, and then follow up with flu planning. I say this for several reasons:

In terms of getting people started on the process, the threat of a pandemic is too obscure for most people to grasp at the outset. The consequences of a prolonged power outage or a courthouse fire people can understand. But in flu planning what I have heard over and over are things like, I don't have enough cots for my inmates and you want me to spend time worrying about some dead birds in Indonesia?

The practical reality after all is that you are more likely to activate a COOP plan in the next few months than a flu plan. In Pennsylvania, we required all county court systems to have a COOP plan in place by May 1, 2008, and already several courts have had incidents which would have triggered the COOP for at least some period of time. So beginning with the COOP process has some practical advantages.

It gets people invested in the planning process more quickly because the risks and consequences are more tangible.

You will collect information in the COOP process that you will also need in the flu plan. Names, addresses, phone numbers, cell phone numbers, e-mail addresses, organizational charts, legal opinion letters.

Compared to flu planning, COOP planning is much easier. With some thought, the consequences of a natural disaster can be anticipated with some reasonable accuracy. If the power goes out, or the water lines rupture, or a fire destroys your filing office you can make some reasonable judgments about what the consequences will be and plan to meet them. You
know what people will be available, what equipment you will need, which functions need to be restored first and so forth. Going through a process in which the consequences are at least somewhat predictable will help you think through the more difficult process of pandemic planning in which the consequences are largely unpredictable.

The resources for COOP planning are excellent and readily available. The National Center for State Courts, for example, has an excellent template. We adapted it for use in Pennsylvania and if you have questions about how we did it, and successfully so, I would be happy to answer them.

Again, I am not saying you can’t do a flu plan first; but you might give some thought to doing a COOP plan first.

Now in the interest of complete candor, I must tell you I venture into the land of heresy. This is not what you hear from the Department of Homeland Security or the Department of Justice or disaster planning consultants. What I will be saying is borne of my own experience as a judge working in a court system, locally and statewide, trying to apply those things the experts have told me and coming to terms with certain human and administrative realities. Take it for what it is worth.

Two bits of heresy. Here they are:

First, no matter what the emergency management people say, an emergency cannot be managed. An emergency can only be responded to. The consequences of an emergency are, by definition, unpredictable. That’s why it is called an emergency! Of course, we can plan to respond to an emergency. But that is different from thinking we can manage to control the consequences of an emergency. When we talk about “managing” an emergency we invariably create expectations that cannot be fulfilled.

And the second bit of heresy is that, while pandemic flu planning is based on certain generally accepted planning assumptions, the planning assumptions the government suggests we use are unreliable and perhaps unrealistic.

For example, the customary planning assumption is that 40% of employees will not show up for work. But that is based on extrapolations from the 1918 experience and may or may not be true for any specific disease outbreak, in any specific community, during any specific time frame, or for any particular court system. It could be more, could be less.

We cannot predict who the vulnerable populations will be. In one planning scenario, the vulnerable populations will be young children and older adults, those traditionally vulnerable to seasonal flu, and in another scenario, it would be those 20 to 35 years old and healthy, those uniquely victimized in the 1918 pandemic. Those scenarios require vastly different plans for court systems. In the first scenario, for example, it is the judges who will be the ones who get sick; and in the other, it will be probation officers, deputy sheriffs, child welfare caseworkers, and assistant district attorneys.
The recommended planning assumption is that the pandemic could last for a couple of months and will come in successive waves. However, we do not know that to be the case; and depending on how the public health community responds, the infection may spread in different ways and at different rates.

We cannot predict how many systems will be vulnerable, or unavailable, or compromised in their ability to function. What will the effect be on the banking system, public utilities, transportation, or even on government itself? Will the internet be up and running? If not, we will lose e-mail capability, employees will not be able to work from home, and we will not be able to communicate with larger audiences through web-based postings. Will food stores be able to keep supplied if a breakdown in the trucking industry leads to an inability to satisfy ‘just in time’ inventory practices?

And we cannot even begin to plan based on predictions about how citizens will react individually, or how society will react as a whole -- either when an outbreak first occurs or as it lasts over time. That depends on so many variables: Who is getting sick, children or adults? What is the mortality rate -- as with seasonal flu about 30,000 annually; or as in 1918, deaths by the hundreds of thousands? How contagious will it be? Will people comply with orders for quarantine, isolation and other social distancing measures such as school closings, banned church services and public gatherings? And on and on it goes.

If we can’t predict with any precision or confidence what happens to a simple mortgage once it enters the banking and finance system, I doubt we should take much comfort in presuming to understand what an efficient virus would do once it enters into our biological systems.

I don’t mean to paint a bleak, overdratic or sensationalized picture of all this. I do think there are things we can do, but we have to be realistic about what they are. Otherwise, we lull ourselves into a sense of false security that we are “prepared.” Or even worse, we mislead our citizens into thinking we are prepared. When it becomes apparent we did not, and could not, plan or prepare for every eventuality, then we risk the consequences of having a citizenry that has lost confidence in its government, and the resulting environment of lawlessness.

So what can we do and how do we do it?

First, and most important, define, align, and clarify the responsibilities and authority of executive staff, and their backups, to respond to an emergency. This is a critical first step in either COOP or pandemic planning.

Bureaucracies have a tendency to separate responsibility from authority. When there is a screw up in a system, if you look carefully you will frequently discover that the person with the responsibility to accomplish something on the ground did not have the authority needed to do the job. As a result, what needed to get done did not get done. Make sure authority is aligned with responsibility.
For example, if you have the responsibility to protect the safety of your employees, do you have the authority to send them home? Or to instruct them not to come to work? Who has the authority to close your courthouse? Or to extend time deadlines in your rules of court? Who is responsible for the operation of the court if the chief judge is sick? And is a power exercised by a chief judge also a power that can be delegated to a successor? How is that delegation made? And on it goes.

As part of the planning process, you should be researching these kinds of legal issues involving authority and responsibility.

Second, specifically regarding flu planning, since we cannot anticipate with any certainty the circumstances we will face, then we must “plan to react.” The goal of planning to react is to develop a plan that will permit us to react with resilience.

“Planning to react” essentially means we are prepared to react to circumstances we did not anticipate. We should be able to contact the people who are available to make decisions based on the circumstances that exist at the time. If we can do that, and that is harder than it sounds, then we can have some level of confidence the court system will be open to perform at least some minimal functions.

So how do you do begin the process of planning to react? Remember planning revolves around staff, stuff, and structure.

Staff. We have to be honest and repeat over and over to our employees, staff, friends and family exactly what the national planners are saying: if there is a pandemic, the resources of the government, at every level, will be quickly overwhelmed and they have to be prepared to sustain themselves for some period of time.

Do what you can to assure that the people who can come to work do come to work. That can be enhanced by assuring that sick leave and personnel policies are up to date; developing back-up pay policies to assure people can get paid; and training and reassuring staff that efforts will be made to protect their safety if they come to work and the safety of their families when they go home.

Second, stuff. Make sure you have a good communication system with appropriate equipment in place so the necessary staff can be contacted, and can communicate with each other, with other court employees and with the public.

An adjunct to stuff is good information. Make sure that decision makers have access to good technical information so they can make an accurate assessment of actual risk. For example, when a flood is underway, it is important to know how high the crest will be and when it will occur. In biological situations, the problem is more complex. Good information may take time to develop.

During Toronto’s SARS outbreak in 2003, medical researchers were literally learning as the outbreak evolved -- they developed, and then discarded as inaccurate, theories about how the
infection was spread and how patients should be treated. That made it difficult for judges, for example, to develop infection control measures for their courtrooms. It makes a difference in planning to know whether the mechanism of infection is airborne or by contact -- do you protect staff by providing facemasks or Clorox?

Lack of good scientific information will be a problem for decision makers. But you can make sure, in advance, that you have access to the sources of information. Know who your local public health officials are, for example. You probably won't want to meet them for the first time at a middle-of-the-night emergency meeting.

I am not suggesting that this is all you should do, but it is a start.

- Make sure responsibility and authority are defined, aligned, and clarified.
- Make sure you have good communications systems.
- Make sure you have the ability to get good technical information.
- Take care of your employees.

It sounds simple. Believe me it is hard. But it is the framework for a start. And it puts the framework in a form that will not overwhelm those you gather together to develop your plan.

So, who develops the plan?

The common wisdom is that everyone who could be affected should have a seat at the table. In my experience, that requires an awfully big table.

My preference is to assemble a smaller group of managers to meet on a weekly basis. If you meet more frequently people won't have time to get their assignments completed; if you meet less frequently the momentum gets lost, assignments get put off and the work gets sloppy.

Freely bring in those with special expertise as needed. It will quickly become apparent how much specialized information you will need. It never occurred to me, for instance, until our building maintenance man pointed it out to me, that pumps at gas stations run on electricity, and if the electricity is out the pumps don't work and you can't put gas in your car, and employees might not be able to get to work.

Are there templates or samples for developing a plan?

I mentioned the work of the National Center for State Courts. They have an excellent model for COOP plans. Some states have excellent plans. Florida, for example, is a leader in this work borne of their experience with hurricanes. And, of course, have the Bureau of Justice Assistance and American University Roadmap for the Courts material.

The trick in COOP planning, and flu planning too, is to balance the need for some statewide uniformity with the need for localized application. In Pennsylvania what we said was that a "unified court system does not mean uniform court system." In other words, we set certain statewide operational standards and then let each local court system figure out how to meet those standards based on their own circumstances and resources.
For example, our Constitution says the courts shall be “open.” But what does “open” mean? Does it mean the ability to conduct jury trials, or hold bail hearings, or issue protection from abuse orders, or hold mental health review hearings, or file criminal or civil actions, or appoint guardians for children, or all of those things, and what others? Rather than requiring each county to go through the process of deciding that independently, we determined as a statewide standard what the “critical functions” of a court system are so if those are being performed, we can say, statewide, the courts are “open.” How those critical functions will be performed was left up to each county.

As an aside, we also discovered that defining the critical functions of a court system is a very complex task. So we took a lot of work off the shoulders of local officials by defining that result for them.

Similarly, we wanted uniform interpretations and understandings of the applicable statutes and regulations that govern the court system and its administrative officers. So our AOPC legal counsel researched and wrote opinions on every issue that arose from the planning process. For example: what is a judge’s control over personnel policies, who has authority to close a courthouse, can rule based deadlines can be extended and how, or who has the power to enter into contracts for emergency services?

Finally, we did extensive training for local court administrators and president judges, not just about COOP planning itself, but why such planning is necessary for both natural and biological disasters.

I told you that once you got started planning, the second difficult thing would be to stop planning -- to say the plan is to a point you can publish it, leaving fine tuning for later. And so I am going to try to stop now, but as you will discover in doing this work, it becomes an almost diabolical fascination. I could talk about this stuff all day!

So it is important to stay grounded and to remember that what we are talking about is what is going to happen to each of you where you live, in your own neighborhood, to your friends, neighbors, and family. You can hardly plan for what public health experts tell us will assuredly happen in the future without some feel for what it must have been like to have lived through the pandemic of 1918. One more story and then I am done.

I wondered what it must have been like in the fall of 1918 as the epidemic raged in the little town where I live. A couple of years ago I hired a researcher to look at the newspaper accounts from 1918 in our daily newspaper. The little town of Kane, then as now, had about 5000 people. The newspaper, then as now, was the Kane Republican. We discovered that the newspaper carried detailed daily accounts of life in Kane during the fall of 1918. It is a story of tragedy, ingenuity and remarkable courage.

Each day the newspaper dutifully recorded the name, address, and age of people who were reported to have been stricken with the flu or who had died. Reading the papers you can literally watch the H1N1 virus silently march along streets, through neighborhoods, spreading disease and death, sometimes devouring whole families.
Amazingly, the local Board of Health did exactly the same things we would do today -- close the schools, regulate business hours, ban church services and social gatherings, encourage social distancing, explain to people how to take care of each other, and arrange to deliver meals to the sick. They even organized a pool of drivers to ferry exhausted doctors from house call to house call.

The Presbyterians converted their pastor's home into an auxiliary hospital. At the Congregational Church, they turned their Sunday school rooms into an orphanage. The only real disagreement with the Board of Health arose when the ministerial association wanted authority to hold church services, arguing the community in a time of peril needed the assurance of eternal comfort. The Board of Health, trying to balance eternal comfort against the danger of earthly disease, suggested an alternative, which the ministerial association accepted. On Saturdays the newspaper carried an order of worship, complete with hymns and scripture passages, and each family was encouraged to worship at home on Sunday morning as the church bells rang.

Reading those accounts, I learned a lot about how a community might react to a new outbreak. Across a century the parallels are not exact, of course. But instructive, nevertheless. As you do your work, you might find it interesting, helpful, and motivating, to find out what happened in your neighborhood in 1918.

Last summer at the National Association for Court Management I told that story about my community in more detail. At the end of the talk a court administrator from one of the southern states came up to me in tears. She told me her great grandfather had been a farmer in rural North Carolina in 1918. As a child she had been told that during the flu epidemic her great grandfather hitched up his mule to his wagon and twice a week traveled among his neighbor's farms to collect their dead, take them home, build caskets, and assure a proper burial. She said to me, "I never really understood before what a courageous and caring thing he had done."

We must plan; it is irresponsible not to plan. But in the end, as in all crises that impact a democratic society, we must give our citizens the best information we can, provide whatever support we are able, and then rely on their courage, ingenuity and good judgment. As governmental leaders, it is our responsibility not to frighten people, but not to lull them into a sense of unjustified safety either. It is our job to do what we can to assure the institutions of government, specifically the courts, remain open and functioning -- serving as a visible reminder of the power of the rule of law and ultimately of the stability of democratic government.
GETTING PREPARED: WHERE TO START AND HOW

Remarks of John M. Cleland
Supreme Court of Virginia Flu Preparedness Commission
Richmond, Virginia
March 17, 2009

There are two very difficult things that must be done when you become involved in avian flu planning: the first is to start, the second is to stop. Inertia is endemic to the process. It keeps you from getting started; and once you are on a roll it develops a fascination all of its own and you can't seem to get stopped. This morning, I hope to share my own experience with an eye toward helping you to get started in your planning, and then helping you to stop.

Perhaps it would be of some help if I told you how I got involved in this work.

Until I was appointed to our appellate court last summer I had been a general jurisdiction trial judge since 1984 – 24 years. For 20 of those years, until a second judge was added, I was the only judge in a one-judge court in rural Pennsylvania, trying all types of civil, criminal, probate, family, and juvenile cases.

In March 2004, there were two white powder incidents within two weeks in two courthouses nearby. The response to the incidents varied dramatically. In one county, the County Commissioners took charge, closed the courthouse, and sent all employees home. In the other county, the County Sheriff and HazMat showed up in white suits, quarantined the courthouse under armed guard, and would not let anyone out.

As I was sitting in my chambers, I wondered how I would respond to a white powder incident in our courthouse. Evacuate, isolate, I didn't know. So I called our state court administrator and suggested we ought to be giving guidance to judges about how to handle these situations. He said, 'That is a great idea. Why don't you take care of it!'
And that is how this all started. We convened a working group including public health experts, physicians, FBI, Pennsylvania State Police, public health lawyers, court administrators, and representatives of our state office of court administration. During 2005, we put together a guide for courthouse preparedness and response to biological hazards.

As we were doing that, I became acutely aware that I knew absolutely nothing about public health law — I never had a course in it in law school, never had a case in my private practice or as a judge, never attended a continuing education program or had ever heard of one even being offered on the topic. Asking around among my judicial colleagues, I discovered they didn’t know anything about public health law either.

So the project for 2006 became to organize a group to write a bench book for Pennsylvania’s public health law. It is a useful tool, not an academic treatise.

In the course of doing that project, we realized that if we really had a public health emergency we had no idea how we would assure that the courts would meet the constitutional obligation to be “open.” We did not have an effective statewide continuity of operations planning process. That became the project for 2007.

While all this was going on, I had been hearing about a new flu virus, something called H5N1. I had no idea what it was. I stumbled on John Berry’s book *The Great Influenza*, and began to realize the implications of any infectious disease outbreak, let alone a flu pandemic, as Toronto’s SRS experience amply demonstrated. The specter of infectious disease began to infuse all the work we were doing — preparation of courthouses, teaching judges public health law, and assuring the courts could be kept open.

So a very simple question, evacuate or isolate?, borne of profound ignorance, started this whole process for me.

When it comes to pandemic planning, I do not hold myself out as an expert. The more I work in this field the less certain I become that I know anything about it.
I will offer some brief thoughts for your consideration, but I am no expert. Keep in mind my experience on Capitol Hill in Washington last fall.

I hadn’t been on Capitol Hill since my days in law school and I wasn’t exactly sure I knew where I was going. I had some time to kill before a meeting so I wanted to see an exhibit at the Library of Congress. The front door of the Library was closed for maintenance so I was looking for another entrance. Around the corner came a group of Chinese tourists huddled over a map, obviously they were also trying to get into the building. They didn’t know I was lost too. But I was wearing a grey suit, with a white shirt and tie, and carrying a briefcase. They assumed I was an expert. By that time, I had figured out where the side door was, pointed it out to them, and they went on their way after smiling and shaking my hand.

While waiting for the light to change so I could cross the street, I noticed a huge sign with an arrow pointing to the subway. An obviously stressed out tourist, tired children in tow, came up to me with a desperate look in her eye. “Can you tell me how to get to the subway?” she asked. She too had seen the suit, tie and briefcase and pegged me for an expert. I pointed her in the direction of the subway, which I had just learned of course from seeing the sign hanging above me. She was much relieved and very grateful.

From that experience, I learned how easy it is on Capitol Hill to be mistaken for an expert. And with that qualification, I will pass along what I hope will be helpful based on my own experience and from asking what I thought were simple questions.

Although there is overlap, continuity of operation planning is very different from pandemic planning and it is important to distinguish the two. When we started our work in Pennsylvania, we assumed that pandemic flu planning could be handled as a subset of continuity of operations planning and that they could be done at the same time. That turned out to be incorrect. Let me explain why.

All operations planning revolves around three things: stuff, staff and structure.
What stuff do you need to do your job -- what computers, desks, phones, files, data, cars, handcuffs, books, etc?

What staff is needed to do particular tasks -- which secretaries, judges, court security officers, filing clerks, stenographers, administrators, etc?

What structures are needed -- what courtrooms, jail cells, administrative offices, filing offices, etc.

When you think about planning in that way, it becomes quickly obvious that normal continuity of operations planning focuses on stuff and structure. A COOP plan responds to natural disasters -- floods, fires, tornadoes, power outages -- that destroy all or part of the court facility or equipment needed to operate the court.

In flu planning, however, the stuff and structure is all in place. It is staff that is the problem. In large numbers they will not be available to come to work -- either because they are sick, a family member is sick, they are afraid to come to work, or they are dead.

I suppose it is possible to do it in reverse, but in my view, it makes sense to do COOP planning first, and then follow up with flu planning. I say this for several reasons:

In terms of getting people started on the process, the threat of a pandemic is too obscure for most people to grasp at the outset. The consequences of a prolonged power outage or a courthouse fire people can understand. But in flu planning what I have heard over and over are things like, I don't have enough cots for my inmates and you want me to spend time worrying about some dead birds in Indonesia?

The practical reality after all is that you are more likely to activate a COOP plan in the next few months than a flu plan. In Pennsylvania, we required all county court systems to have a COOP plan in place by May 1, 2008, and already several courts have had incidents which would have triggered the COOP for at least some period of time. So beginning with the COOP process has some practical advantages.
It gets people invested in the planning process more quickly because the risks and consequences are more tangible.

You will collect information in the COOP process that you will also need in the flu plan. Names, addresses, phone numbers, cell phone numbers, e-mail addresses, organizational charts, legal opinion letters.

Compared to flu planning, COOP planning is much easier. With some thought, the consequences of a natural disaster can be anticipated with some reasonable accuracy. If the power goes out, or the water lines rupture, or a fire destroys your filing office you can make some reasonable judgments about what the consequences will be and plan to meet them. You know what people will be available, what equipment you will need, which functions need to be restored first and so forth. Going through a process in which the consequences are at least somewhat predictable will help you think through the more difficult process of pandemic planning in which the consequences are largely unpredictable.

The resources for COOP planning are excellent and readily available. The National Center for State Courts, for example, has an excellent template. We adapted it for use in Pennsylvania and if you have questions about how we did it, and successfully so, I would be happy to answer them.

Again, I am not saying you can’t do a flu plan first; but you might give some thought to doing a COOP plan first.

Now in the interest of complete candor, I must tell you I venture into the land of heresy. This is not what you hear from the Department of Homeland Security or the Department of Justice or disaster planning consultants. What I will be saying is borne of my own experience as a judge working in a court system, locally and statewide, trying to apply those things the experts have told me and coming to terms with certain human and administrative realities. Take it for what it is worth.
Two bits of heresy. Here they are:

First, no matter what the emergency management people say, an emergency cannot be managed. An emergency can only be responded to. The consequences of an emergency are, by definition, unpredictable. That's why it is called an emergency! Of course, we can plan to respond to an emergency. But that is different from thinking we can manage to control the consequences of an emergency. When we talk about “managing” an emergency we invariably create expectations that cannot be fulfilled.

And the second bit of heresy is that, while pandemic flu planning is based on certain generally accepted planning assumptions, the planning assumptions the government suggests we use are unreliable and perhaps unrealistic.

For example, the customary planning assumption is that 40% of employees will not show up for work. But that is based on extrapolations from the 1918 experience and may or may not be true for any specific disease outbreak, in any specific community, during any specific time frame, or for any particular court system. It could be more, could be less.

We cannot predict who the vulnerable populations will be. In one planning scenario, the vulnerable populations will be young children and older adults, those traditionally vulnerable to seasonal flu, and in another scenario, it would be those 20 to 35 years old and healthy, those uniquely victimized in the 1918 pandemic. Those scenarios require vastly different plans for court systems. In the first scenario, for example, it is the judges who will be the ones who get sick; and in the other, it will be probation officers, deputy sheriffs, child welfare caseworkers, and assistant district attorneys.

The recommended planning assumption is that the pandemic could last for a couple of months and will come in successive waves. However, we do not know that to be the case; and depending on how the public health community responds, the infection may spread in different ways and at different rates.
We cannot predict how many systems will be vulnerable, or unavailable, or compromised in their ability to function. What will the effect be on the banking system, public utilities, transportation, or even on government itself? Will the internet be up and running? If not, we will lose e-mail capability, employees will not be able to work from home, and we will not be able to communicate with larger audiences through web-based postings. Will food stores be able to keep supplied if a breakdown in the trucking industry leads to an inability to satisfy 'just in time' inventory practices?

And we cannot even begin to plan based on predictions about how citizens will react individually, or how society will react as a whole -- either when an outbreak first occurs or as it lasts over time. That depends on so many variables: Who is getting sick, children or adults? What is the mortality rate -- as with seasonal flu about 30,000 annually; or as in 1918, deaths by the hundreds of thousands? How contagious will it be? Will people comply with orders for quarantine, isolation and other social distancing measures such as school closings, banned church services and public gatherings? And on and on it goes.

If we can't predict with any precision or confidence what happens to a simple mortgage once it enters the banking and finance system, I doubt we should take much comfort in presuming to understand what an efficient virus would do once it enters into our biological systems.

I don't mean to paint a bleak, overdramatic or sensationalized picture of all this. I do think there are things we can do, but we have to be realistic about what they are. Otherwise, we lull ourselves into a sense of false security that we are "prepared." Or even worse, we mislead our citizens into thinking we are prepared. When it becomes apparent we did not, and could not, plan or prepare for every eventuality, then we risk the consequences of having a citizenry that has lost confidence in its government, and the resulting environment of lawlessness.

So what can we do and how do we do it?
First, and most important, define, align, and clarify the responsibilities and authority of executive staff, and their backups, to respond to an emergency. This is a critical first step in either COOP or pandemic planning.

Bureaucracies have a tendency to separate responsibility from authority. When there is a screw up in a system, if you look carefully you will frequently discover that the person with the responsibility to accomplish something on the ground did not have the authority needed to do the job. As a result, what needed to get done did not get done. Make sure authority is aligned with responsibility.

For example, if you have the responsibility to protect the safety of your employees, do you have the authority to send them home? Or to instruct them not to come to work? Who has the authority to close your courthouse? Or to extend time deadlines in your rules of court? Who is responsible for the operation of the court if the chief judge is sick? And is a power exercised by a chief judge also a power that can be delegated to a successor? How is that delegation made? And on it goes.

As part of the planning process, you should be researching these kinds of legal issues involving authority and responsibility.

Second, specifically regarding flu planning, since we cannot anticipate with any certainty the circumstances we will face, then we must "plan to react." The goal of planning to react is to develop a plan that will permit us to react with resilience.

"Planning to react" essentially means we are prepared to react to circumstances we did not anticipate. We should be able to contact the people who are available to make decisions based on the circumstances that exist at the time. If we can do that, and that is harder than it sounds, then we can have some level of confidence the court system will be open to perform at least some minimal functions.
So how do you do begin the process of planning to react? Remember planning revolves around staff, stuff, and structure.

Staff. We have to be honest and repeat over and over to our employees, staff, friends and family exactly what the national planners are saying: if there is a pandemic, the resources of the government, at every level, will be quickly overwhelmed and they have to be prepared to sustain themselves for some period of time.

Do what you can to assure that the people who can come to work do come to work. That can be enhanced by assuring that sick leave and personnel policies are up to date; developing back-up pay policies to assure people can get paid; and training and reassuring staff that efforts will be made to protect their safety if they come to work and the safety of their families when they go home.

Second, stuff. Make sure you have a good communication system with appropriate equipment in place so the necessary staff can be contacted, and can communicate with each other, with other court employees and with the public.

An adjunct to stuff is good information. Make sure that decision makers have access to good technical information so they can make an accurate assessment of actual risk. For example, when a flood is underway, it is important to know how high the crest will be and when it will occur. In biological situations, the problem is more complex. Good information may take time to develop.

During Toronto’s SARS outbreak in 2003, medical researchers were literally learning as the outbreak evolved -- they developed, and then discarded as inaccurate, theories about how the infection was spread and how patients should be treated. That made it difficult for judges, for example, to develop infection control measures for their courtrooms. It makes a difference in planning to know whether the mechanism of infection is airborne or by contact -- do you protect staff by providing facemasks or Clorox?
Lack of good scientific information will be a problem for decision makers. But you can make sure, in advance, that you have access to the sources of information. Know who your local public health officials are, for example. You probably won't want to meet them for the first time at a middle-of-the-night emergency meeting.

I am not suggesting that this is all you should do, but it is a start.

- Make sure responsibility and authority are defined, aligned, and clarified.
- Make sure you have good communications systems.
- Make sure you have the ability to get good technical information.
- Take care of your employees.

It sounds simple. Believe me it is hard. But it is the framework for a start. And it puts the framework in a form that will not overwhelm those you gather together to develop your plan.

So, who develops the plan?

The common wisdom is that everyone who could be affected should have a seat at the table. In my experience, that requires an awfully big table.

My preference is to assemble a smaller group of managers to meet on a weekly basis. If you meet more frequently people won’t have time to get their assignments completed; if you meet less frequently the momentum gets lost, assignments get put off and the work gets sloppy.

Freely bring in those with special expertise as needed. It will quickly become apparent how much specialized information you will need. It never occurred to me, for instance, until our building maintenance man pointed it out to me, that pumps at gas stations run on electricity, and if the electricity is out the pumps don’t work and you can’t put gas in your car, and employees might not be able to get to work.

Are there templates or samples for developing a plan?
I mentioned the work of the National Center for State Courts. They have an excellent model for COOP plans. Some states have excellent plans. Florida, for example, is a leader in this work borne of their experience with hurricanes. And, of course, have the Bureau of Justice Assistance and American University Roadmap for the Courts material.

The trick in COOP planning, and flu planning too, is to balance the need for some statewide uniformity with the need for localized application. In Pennsylvania what we said was that a “unified court system does not mean uniform court system.” In other words, we set certain statewide operational standards and then let each local court system figure out how to meet those standards based on their own circumstances and resources.

For example, our Constitution says the courts shall be “open.” But what does “open” mean? Does it mean the ability to conduct jury trials, or hold bail hearings, or issue protection from abuse orders, or hold mental health review hearings, or file criminal or civil actions, or appoint guardians for children, or all of those things, and what others? Rather than requiring each county to go through the process of deciding that independently, we determined as a statewide standard what the “critical functions” of a court system are so if those are being performed, we can say, statewide, the courts are “open.” How those critical functions will be performed was left up to each county.

As an aside, we also discovered that defining the critical functions of a court system is a very complex task. So we took a lot of work off the shoulders of local officials by defining that result for them.

Similarly, we wanted uniform interpretations and understandings of the applicable statutes and regulations that govern the court system and its administrative officers. So our AOPC legal counsel researched and wrote opinions on every issue that arose from the planning process. For example: what is a judge’s control over personnel policies, who has authority to
Close a courthouse, can rule-based deadlines be extended and how, or who has the power to enter into contracts for emergency services?

Finally, we did extensive training for local court administrators and president judges, not just about COOP planning itself, but why such planning is necessary for both natural and biological disasters.

I told you that once you got started planning, the second difficult thing would be to stop planning -- to say the plan is to a point you can publish it, leaving fine tuning for later. And so I am going to try to stop now, but as you will discover in doing this work, it becomes an almost diabolical fascination. I could talk about this stuff all day!

So it is important to stay grounded and to remember that what we are talking about is what is going to happen to each of you where you live, in your own neighborhood, to your friends, neighbors, and family. You can hardly plan for what public health experts tell us will assuredly happen in the future without some feel for what it must have been like to have lived through the pandemic of 1918. One more story and then I am done.

I wondered what it must have been like in the fall of 1918 as the epidemic raged in the little town where I live. A couple of years ago I hired a researcher to look at the newspaper accounts from 1918 in our daily newspaper. The little town of Kane, then as now, had about 5000 people. The newspaper, then as now, was the Kane Republican. We discovered that the newspaper carried detailed daily accounts of life in Kane during the fall of 1918. It is a story of tragedy, ingenuity and remarkable courage.

Each day the newspaper dutifully recorded the name, address, and age of people who were reported to have been stricken with the flu or who had died. Reading the papers you can literally watch the H1N1 virus silently march along streets, through neighborhoods, spreading disease and death, sometimes devouring whole families.
Amazingly, the local Board of Health did exactly the same things we would do today—
close the schools, regulate business hours, ban church services and social gatherings,
encourage social distancing, explain to people how to take care of each other, and arrange to
deliver meals to the sick. They even organized a pool of drivers to ferry exhausted doctors from
house call to house call.

The Presbyterians converted their pastor’s home into an auxiliary hospital. At the
Congregational Church, they turned their Sunday school rooms into an orphanage. The only
real disagreement with the Board of Health arose when the ministerial association wanted
authority to hold church services, arguing the community in a time of peril needed the assurance
of eternal comfort. The Board of Health, trying to balance eternal comfort against the danger of
earthly disease, suggested an alternative, which the ministerial association accepted. On
Saturdays the newspaper carried an order of worship, complete with hymns and scripture
passages, and each family was encouraged to worship at home on Sunday morning as the
church bells rang.

Reading those accounts, I learned a lot about how a community might react to a new
outbreak. Across a century the parallels are not exact, of course. But instructive, nevertheless.
As you do your work, you might find it interesting, helpful, and motivating, to find out what
happened in your neighborhood in 1918.

Last summer at the National Association for Court Management I told that story about
my community in more detail. At the end of the talk a court administrator from one of the
southern states came up to me in tears. She told me her great grandfather had been a farmer
in rural North Carolina in 1918. As a child she had been told that during the flu epidemic her
great grandfather hitched up his mule to his wagon and twice a week traveled among his
neighbor’s farms to collect their dead, take them home, build caskets, and assure a proper
burial. She said to me, "I never really understood before what a courageous and caring thing he had done."

We must plan; it is irresponsible not to plan. But in the end, as in all crises that impact a democratic society, we must give our citizens the best information we can, provide whatever support we are able, and then rely on their courage, ingenuity and good judgment. As governmental leaders, it is our responsibility not to frighten people, but not to lull them into a sense of unjustified safety either. It is our job to do what we can to assure the institutions of government, specifically the courts, remain open and functioning -- serving as a visible reminder of the power of the rule of law and ultimately of the stability of democratic government.