NEW YORK STATE

PUBLIC HEALTH LEGAL MANUAL

A GUIDE *for* JUDGES, ATTORNEYS *and* PUBLIC HEALTH PROFESSIONALS

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EDITOR-IN-CHIEF

NEW YORK STATE
Unified Court System

NEW YORK STATE BAR ASSOCIATION

IN COLLABORATION WITH

STATE OF NEW YORK
DEPARTMENT OF HEALTH

NYC Health
NEW YORK CITY
DEPARTMENT OF HEALTH AND MENTAL HYGIENE

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Editorial Board

FOREWORD

Chief Judge Jonathan Lippman:

In today's world, we face many natural and man-made catastrophic threats, including the very real possibility of a global influenza outbreak or other public health emergency that could infect millions of people. While it is impossible to predict the timing or severity of the next public health emergency, our government has a responsibility to anticipate and prepare for such events. An important element of this planning process is advance coordination between public health authorities and our judicial and legal systems. The major actors in any public health crisis must understand the governing laws ahead of time, and must know what their respective legal roles and responsibilities are. What is the scope of the government's emergency and police powers? When may these be invoked, and by which officials? What are the rights of people who may be quarantined or isolated by government and public health officials?

These questions must be researched and answered now—not in the midst of an emergency—so that the responsible authorities have a ready-made resource to help them make quick, effective decisions that protect the public interest. This *New York State Public Health Legal Manual* is designed to serve this purpose. It will be an absolutely essential tool in guiding us through the effective management of future public health disasters. I am pleased that the New York State Unified Court System was able to play a key role in this historic collaboration along with the New York State Bar Association, the New York State Department of Health, and the New York City Department of Health and Mental Hygiene. I thank each of these organizations for their invaluable cooperation and contributions.

Stephen P. Younger, President, New York State Bar Association

Our vulnerability to public heath threats is more apparent than ever before. Thus, it has become increasingly essential that public health officials, judges and lawyers be prepared to deftly navigate the myriad statutes and rules that govern public health disasters. This *Manual*, which is the product of a collaborative effort, captures information gleaned from past disasters and will serve as a tremendous resource for future needs. The New York State Bar Association is grateful for the excellent work of

the Office of Court Administration in producing this manual, and for the tremendous support from the New York State Department of Health and the New York City Department of Health and Mental Hygiene, without which this *Manual* would not have been possible.

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CONTENTS

[1.0] I. INTRODUCTION

Recent outbreaks of potentially deadly communicable diseases, as well as a growing awareness of society's vulnerability to deliberate threats to public health, have required that greater attention be paid to the legal issues governing the handling of public health disaster emergencies. Many of the statutes governing responses to public health emergencies have not been revised for decades, and the application of those statutes to a contemporary world has become more complicated. This *Legal Manual* is an effort to assist judges, lawyers, and public health officials and practitioners in sorting through the myriad statutes and rules governing public health, and in applying the overriding constitutional principles that balance individual rights with societal health requirements.

The *Manual* addresses the laws governing control of the spread of communicable diseases and the laws governing abatement of nuisances, such as radiological and chemical contamination, that may cause public health emergencies. It does not specifically address statutes governing air and water pollution, but the principles discussed can be readily applied to public health emergencies from those sources as well.

Because the statutes and rules governing responses to public health emergencies contain gaps, and because the application of these statutes is fraught with constitutional issues, the *Manual* contains "commentary" sections that discuss how the existing law may be applied to these public health issues. These commentaries, as well as any constitutional analysis preceding the commentaries, are solely the views of the authors and are intended to be helpful, not definitive. Judges, of course, ultimately make their own decisions of how the law should apply.

One of the anomalies of the New York Public Health Law is that many of its provisions governing control of contagious diseases and nuisances do not apply to New York City. Consequently, where appropriate, the *Manual* contains separate references to the provisions of the New York City Health Code, New York City Charter and New York City Administrative Code that address these areas. The New York City provisions are almost always consistent with the Public Health Law provisions.

[1.1] II. APPLICABLE LAW

[1.2] A. New York Public Health Law

Article 21 of the New York Public Health Law [PHL], supplemented by Articles 22 and 23 addressing specific diseases, governs the control of communicable diseases within the state. Article 13 of the PHL governs the handling of nuisances that affect the public health. The PHL also sets forth the roles of the officials who exercise the authority under both Articles. With very limited exceptions (PHL §§ 2130 *et seq.* [HIV/AIDS reporting]; 2164 [immunizations]), the provisions of these Articles do not apply to New York City (*see* C, below).

[1.3] B. State Sanitary Code

The State Sanitary Code is part of the rules of the New York State Department of Health and is contained in Volume 10 of the New York Compilation of Codes, Rules and Regulations [NYCRR]. The Sanitary Code is a set of rules established by the state Public Health and Health Planning Council for general application throughout the state relating to the preservation and improvement of public health, including the control of communicable diseases. *See* PHL §§ 220 [membership of Council]; 225(1), (4), and (5)(e), (g)-(k) [power to establish Sanitary Code, including power to designate communicable diseases dangerous to the public health and to promulgate certain control measures]. All provisions of the State Sanitary Code must be approved by the State Commissioner of Health. PHL § 225(4). The Code applies statewide, including New York City, and supersedes all inconsistent local ordinances, although localities may enact sanitary regulations not inconsistent with the Code. PHL § 228(1) and (2). Provisions of the State Sanitary Code have the force and effect of law. PHL § 229.

[1.4] C. Laws of the City of New York

The provisions of the Public Health Law governing nuisances (Article 13) and communicable diseases (Article 21) for the most part do not apply to New York City. PHL §§ 1309, 2110, 2125, 2146, 2153. Instead, the authority to regulate both is contained in various sources of New York City law. Notably, section 556 of the New York City Charter provides the New

York City Department of Health and Mental Hygiene with the authority to "regulate all matters affecting health in the city of New York and to perform all those functions and operations performed by the city that relate to the people of the city." (The New York City Department of Health and Mental Hygiene will be referred to throughout this *Manual* as the "City Department of Health," and the Commissioner of that Department will be referred to as the "City Commissioner of Health.") Section 556(c) of the Charter authorizes the Department to supervise the reporting and control of communicable diseases and conditions hazardous to life and health, as well as to exercise control over and supervise the abatement of nuisances affecting or likely to affect the public health. In accordance with sections 558(b) and (c) of the Charter, the New York City Board of Health may promulgate and amend the City Health Code. The City Board of Health has promulgated Articles 3 and 11 of the Health Code, contained in Title 24 of the Rules of the City of New York [RCNY], to address the control of, respectively, nuisances and communicable diseases within New York City.

[1.5] D. Local Ordinances

Enforcement of the communicable disease and nuisance provisions of the Public Health Law and the State Sanitary Code is primarily the role of local health officers. Their actions are governed by local ordinances to the extent that the Public Health Law and Sanitary Code do not apply. Many less-populated counties are served by a district or regional office of the State Department of Health, whose role is limited to enforcement of the Sanitary Code and other environmental health regulations. *See*, *e.g.*, 10 NYCRR Parts 70-75. In such areas, the Department rules governing procedures for investigation and enforcement of public health laws by state officers apply. *See* 10 NYCRR Part 76.

Commentary

Enforcement of the provisions of the Public Health Law and State Sanitary Code governing threats to public health is primarily addressed at the local level. The provisions of the Public Health Law leave to local government how local enforcement should be handled, especially with respect to the administrative process for regulating

enforcement. The result is a multiplicity of enforcement procedures among the localities that are contained in local ordinances. For the most part, the provisions of the Public Health Law governing contagious disease, and many of the provisions governing nuisances, do not apply to New York City; New York City enforcement procedures are codified in the City Health Code in Title 24 of the Rules of the City of New York.

[1.6] III. JURISDICTION OVER PUBLIC HEALTH ISSUES

[1.7] A. Local Health Officers

[1.8] 1. Identity

A "local health officer" can be (1) the commissioner of health of a county or a city having a population of 50,000 or more and having an established health department; (2) a public health director (a person who administers and manages the public health programs within a county); (3) a county health director appointed pursuant to PHL § 356 in counties having a population of less than 150,000, but no charter or optional or alternative form of government; and (4) the officer of a city having a population of less than 50,000, a town, a village or a consolidated health district who administers and manages public health programs within such jurisdiction. *See* 10 NYCRR § 11.1. Local boards of health may consist of the boards of health of a county or a part-county health district, or the board of trustees of a village or the town board, depending upon how local legislators address this structure. *See* PHL §§ 302, 308, 340, 356. *See also* 10 NYCRR § 2.2(e) [Sanitary Code definition of "local health authority"—authority of a county, part-county, city, town, village, consolidated health district . . ."]. *But see* Commentary, below. • *New York City*: The provisions of Article 3 of the Public Health Law governing local health officers for the most part do not apply to New York City. PHL § 312. The "local health officer" in New York City is the City Commissioner of Health. New York City Charter § 551.

[1.9] 2. Responsibilities

Local health officers have the statutory authority to "enforce" the provisions of the Public Health Law and the State Sanitary Code. PHL

§ 324(1)(e). They are required to "immediately investigate" any outbreaks of contagious diseases, 10 NYCRR § 2.16(a), and to make an "immediate and thorough" investigation of "a nuisance which may affect health." 10 NYCRR § 8.1. Parallel authority of the New York City Health Commissioner with respect to nuisances and diseases is contained, respectively, in Articles 3 and 11 of the New York City Health Code [24 RCNY]. The initial implementation of all the provisions of law relating to isolation, quarantine, examinations, treatment, and searches and seizures is the responsibility of the local health officer. *See Grossman v. Baumgartner*, 17 N.Y.2d 345 (1966) ["the main business of safeguarding the public health has always of necessity been done by local boards or officers through sanitary by-laws or ordinances which have been accorded the force of law"].

[1.10] B. State Commissioner of Health

The State Commissioner of Health exercises general supervision over local health officers. PHL § 206(1)(b) ["general supervision over the work of all local boards of health and health officers, unless otherwise provided by law"]. The State Commissioner (a) monitors the control of contagious diseases by the local health officers through the requirement that all such diseases be reported by the local health officers to the State Commissioner, 10 NYCRR § 2.16(a); PHL § 2103; (b) monitors control of public nuisances through reports filed with the State Commissioner of those nuisances that have been reported by health officers but that are not being addressed, 10 NYCRR § 8.4; and (c) retains the reserved power to intervene directly in a health crisis to enforce the Public Health Law and State Sanitary Code. PHL § 206(1)(f) [State Commissioner shall "enforce" the PHL and Sanitary Code]; PHL § 16 [State Commissioner may issue a public health order where a condition "constitutes danger to the health of the people"]. *See also* PHL §§ 1301 [when required by the Governor, the State Commissioner "shall make an examination concerning nuisances or questions affecting the security of life and health in any locality"]; 1302 [the board of health of any health district "may appoint one of its members to act with and assist the commissioner during the investigation or examination of any nuisance"].

[1.11] C. Federal Government

The federal government generally leaves to the states regulation of public health issues through the exercise of the police powers of the individual states. It retains residual authority under the Commerce Clause of the United States Constitution to enact laws to control the spread of communicable diseases between states. *See* 42 U.S.C. § 264 [the federal government controls movement of persons into the United States to prevent the spread of communicable diseases and may control persons "moving between states" for that purpose]. The federal Centers for Disease Control and Prevention can take measures to prevent the spread of disease between states if local efforts are "insufficient." 42 CFR § 70.2. *See also* 42 U.S.C. §§ 5121 *et seq.* (the Stafford Act) [Federal Emergency Management Agency (FEMA) can implement health and safety measures after a federal declaration of emergency]. The Food and Drug Administration (FDA) regulates drug-based treatments and the circumstances of their use, and federal legislation (*see* VIII(C)(3), *infra*) regulates medical records and provides immunity with regard to vaccinations and drugs used in response to denominated public health emergencies.

Commentary

Control of public health is primarily handled on a local level. Ideally, local health departments and officers are staffed and equipped to be the first line of defense for control of disease outbreaks and other public health emergencies. The State Commissioner of Health is kept informed by local health authorities of outbreaks of communicable diseases and other public health concerns, but exercises primarily a monitoring and resource role, providing technical assistance, epidemiologic analysis, laboratory testing and often on-site assistance in dealing with disease outbreaks. The State Commissioner retains the reserved power to step in to exercise an active role where local intervention is inadequate. Although the Public Health Law and Sanitary Code provide (outside of New York City) for the establishing of local health officers below the county level, in actuality no such positions are operative. State health officials rely exclusively on county health officers as their link to city, town and village governments.

[1.12] IV. ISOLATION AND QUARANTINE

[1.13] A. Definitions

[1.14] 1. State Sanitary Code

[1.15] a. Isolation

10 NYCRR § 2.25(d) ["separation from other persons, in such places, under such conditions, and for such time, as will prevent transmission of the infectious agent, of persons known to be ill or suspected of being infected"].

[1.16] b. Quarantine

Quarantine of premises: 10 NYCRR § 2.25(e) [(1) "prohibition of entrance into or exit from the premises, as designated by the health officer, where a case of communicable disease exists of any person other than medical attendants and such others as may be authorized by the health officer; (2) prohibition, without permission and instruction from the health officer, of the removal from such premises of any article liable to contamination with infective material through contact with the patient or with his secretions or excretions, unless such article has been disinfected"]. *Personal quarantine*: 10 NYCRR § 2.25(f) ["restricting household contacts and/or incidental contacts to premises designated by the health officer"].

[1.17] 2. New York City Health Code

[1.18] a. Isolation

Health Code [24 RCNY] § 11.01(o) ["the physical separation of persons who have a contagious disease or are suspected of having a contagious disease from other persons who do not have such contagious disease"].

[1.19] b. Quarantine

Health Code [24 RCNY] § 11.01(q) ["the physical confinement, separation, detention, or restriction of activities, including entry or exit to or from premises or other places, of individuals who have been or are suspected of having been exposed to a contagious disease or possibly conta-

gious disease, from other persons who have not been exposed to that contagious disease"].

Commentary

The State Sanitary Code has statewide application, but localities may enact rules not inconsistent with the Code. PHL § 228(1) and (2). The City of New York has streamlined in its local rules the long-standing definitions of "isolation" and "quarantine" of the Code.

[1.20] B. Communicable Diseases Covered

10 NYCRR § 2.1(a) lists individually the communicable diseases that are reportable statewide and subject to the provisions of law implementing isolation and quarantine. There are currently more than 60 contagious diseases on the list, including tuberculosis, influenza (laboratory-confirmed), hepatitis, meningitis, and SARS (severe acute respiratory syndrome). The laws applicable to isolation and quarantine do not apply unless a disease is listed in section 2.1(a) as a communicable disease. PHL § 2100(1). Newly emergent communicable diseases may be added to the list by the State Commissioner of Health pending confirmation by the Public Health and Health Planning Council. 10 NYCRR § 2.1(a). • *New York City*: Section 11.03 of the City Health Code [24 RCNY] specifies diseases and conditions of public health interest that must be reported in New York City, and includes the diseases specified in 10 NYCRR § 2.1(a) as well as additional diseases and conditions. Isolation and quarantine are not limited to just the listed diseases; the City Health Code authorizes "removal or detention" for any contagious disease that "may pose an imminent and significant threat to the public health." §§ 11.17(a); 11.23(a). It also provides for other orders needed to prevent the spread of "contagious diseases or other illnesses that may pose a threat to the public health," including isolation or quarantine of a person at home or at a premises of such person's choice, and authorizes the decontamination of persons who have been contaminated with dangerous amounts of radioactive materials or toxic chemicals, and who may present a danger to others. § 11.23(k).

Commentary

The world of communicable disease health threats is ever-changing. Many devastating communicable diseases that were scourges of the late 19th and early 20th centuries (such as diphtheria, typhoid, and polio) are no longer prevalent in the United States, but there are new emerging health threats in the 21st century that include SARS and novel strains of influenza. Descriptions of the causation, symptoms and treatment of many of these communicable diseases are available at http://www.nyhealth.gov/diseases/ and http://www.cdc.gov/DiseasesConditions/. Note that HIV/AIDS is treated as neither a communicable nor a sexually transmitted disease and is subject to separate provisions of the PHL.

[1.21] C. Identification and Reporting of Communicable Diseases

[1.22] 1. Physician

A physician must submit specimens for laboratory examination in cases of suspected communicable diseases listed in 10 NYCRR § 2.1(a). 10 NYCRR § 2.5. A physician must report to the local health officer every person with a suspected or confirmed case of a communicable disease within 24 hours after first seeing the case. 10 NYCRR § 2.10. *See* PHL § 2101(1) [duty to make such report "immediately"]. Where no physician is in attendance, any non-physician "having knowledge of an individual affected with any disease presumably communicable" must immediately report the affected person to a local health officer. 10 NYCRR § 2.12. • *New York City*: Suspected and confirmed cases or carriers of certain of the diseases and conditions identified in section 11.03(a) of the City Health Code [24 RCNY] must be reported immediately to the City Department of Health, § 11.03(b)(1), while the remainder must be reported within 24 hours. § 11.03(b)(2). The duty to report within 24 hours also includes "any unusual manifestation of a disease or condition of public health interest in an individual" or "an . . . emerging disease or a syndrome of uncertain etiology that could possibly be communicable." § 11.03(c).

[1.23] 2. Laboratory

A laboratory must "immediately" report evidence of a communicable disease to the local health official. PHL § 2102(1). *See* 10 NYCRR §§ 55-2.13(d)(5) [laboratory findings of "critical agent" to be reported within 24 hours or, for an autonomous detection system, within one hour]; 55-2.14 [requirements for laboratories using autonomous detection systems (systems that continuously or periodically sample the environment and trigger an alert when a critical agent is detected)]. • *New York City*: Health Code [24 RCNY] §§ 11.03(c), 11.05(a) [general reporting requirements]; Article 13 [specific requirements and procedures for reporting by laboratories].

[1.24] 3. Local Health Officer

A local health officer, upon receiving a report of a communicable disease, must report that affected individual to the State Commissioner of Health and immediately investigate the circumstances and causes, including submission of specimens to laboratories. 10 NYCRR §§ 2.6(a) and (b); 2.16(a). As a requirement in the State Sanitary Code, this requirement applies to New York City as well. *See also* Health Code [24 RCNY] § 11.03(e).

Commentary

The identification and reporting of communicable diseases is a collaborative effort among physicians, laboratories, hospitals and local health officers. The key to their collaboration is the timely reporting of the disease to the local health officer to enable that health officer to determine whether to move forward with other steps in the process, such as isolation and quarantine.

[1.25] D. Authority to Isolate

[1.26] 1. Physician

10 NYCRR § 2.27 ["It shall be the duty of the attending physician immediately upon discovering a case of highly communicable disease . . . to cause the patient to be isolated, pending official action by the health officer."]. • *New York City*: Health Code [24 RCNY] § 11.17(a) [duty of

medical facility to isolate person having or suspected of having a contagious disease].

[1.27] 2. Local Health Officer

10 NYCRR § 2.29 ["Whenever a case of a highly communicable disease . . . comes to the attention of the [local] health officer he shall isolate such patients as in his judgment he deems necessary."]; PHL § 2100(2)(a) [local health officer may "provide for care and isolation of cases of communicable disease in a hospital or elsewhere when necessary for protection of the public health"]. • *New York City*: Health Code [24 RCNY] §§ 11.17(b), (c) and (d) [authority of City Department of Health to order infected person who is not hospitalized to remain in isolation "at home or other residence of his or her choosing" or to direct isolation in other facility until transported to appropriate health care facility]; 11.23(a) [City Health Commissioner may order "removal and/or detention" of individual who "may pose an imminent and significant threat to the public health resulting in severe morbidity or high mortality"].

Commentary

The duty to isolate an infected person starts with the treating physician. The local health officer is typically brought into play through the reporting obligations of the physician, laboratory and hospital.

[1.28] E. Authority to Quarantine

PHL §§ 2100(1) [a health officer shall guard against communicable diseases "by the exercise of proper and vigilant medical inspection and control of all persons and things infected with or exposed to such diseases"]; 2100(2)(b) [a health officer may "prohibit and prevent all intercourse and communication with or use of infected premises, places and things"]. • *New York City*: Health Code [24 RCNY] §§ 11.17(d) [a "contact" who is not hospitalized may be ordered by the City Department of Health to remain in "quarantine" at home or elsewhere]; 11.23(a) [City Commissioner of Health may order "detention" of a "contact" in an "appropriate facility or premises"]. *See* § 11.01(g) ["'Contact' means an individual who has been identified as having been exposed, or potentially exposed, to a contagious or possibly contagious disease through such close, prolonged or repeated association with another individual or animal

that, in the opinion of the Department, there is a risk of such individual contracting the contagious disease."].

Commentary

In contrast to the New York City Health Code, the word "quarantine" is not used in Article 21 of the Public Health Law, and the authority to quarantine is derived from the authority of the local health officer to "control" persons "exposed to" the disease. While "quarantine" is given an extensive definition in the State Sanitary Code, 10 NYCRR § 2.25(e) and (f), it is used in that Code only with respect to specific diseases. *See* 10 NYCRR § 2.30 (diphtheria).

[1.29] F. Voluntary Isolation and Quarantine

In most cases, the preferred method of implementing isolation or quarantine is to convince the infected or exposed individuals to voluntarily agree to such restrictions. Nothing in the Public Health Law, State Sanitary Code or New York City Health Code specifically addresses voluntary compliance, but the State Department of Health provides guidance stating that localities should have in place procedures for voluntary compliance in the first instance. These may take the form of written and oral notice to the person of the nature of the disease and the consequences of failing to remain isolated, as well as (optimally) daily visits or phone calls by the local health officer to the place of confinement. *See* PHL § 2100(1) [obligation of local health officer to exercise "proper and vigilant medical inspection and control"]. Some localities have the patients sign written agreements to voluntarily remain isolated.

Commentary

Voluntary isolation and quarantine make up a common-sense approach to controlling communicable diseases and allow affected persons to stay in places of their own choosing. It avoids the burden and expense of compelling detention. The opportunity for voluntary compliance may also be constitutionally required as a least restrictive alternative to enforcing the requirements of isolation and quarantine. *See* G(1), below.

[1.30] G. Involuntary Isolation and Quarantine: Constitutional Standards

[1.31] 1. Substantive Due Process

Involuntary confinement, either by isolation or quarantine, directly affects a fundamental right—the right to liberty—and the requirements of substantive due process compel the locality to demonstrate that it has a "substantial government interest" in that confinement. *See Joyner v. Dumpson*, 712 F.2d 770 (2d Cir. 1983). *Cf. Beatie v. City of New York*, 123 F.3d 707 (2d Cir. 1997) [using "rational relationship" test for substantive due process challenge not involving a fundamental right]. In sustaining the "substantial government interest" in the involuntary confinement of an individual, the government must show (1) that the specific individual, in fact, poses a danger to society, *see O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975), and (2) that the same basic purpose—sustaining the "substantial government interest" cannot be achieved by less drastic means, *i.e.*, the "least restrictive alternative." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *City of New York v. Doe*, 205 A.D.2d 469 (1st Dep't 1994) [upholding involuntary isolation of TB patient]; *City of New York v. Antoinette R.*, 165 Misc. 2d 1014 (Sup. Ct., Queens Co., 1995) [same]; *Best v. St. Vincent's Hospital*, 2003 WL 21518829 (S.D.N.Y. 2003), *report and recommendation adopted*, 2003 WL 21767656 (S.D.N.Y. 2003), *aff'd in part, vacated in part*, *dismissed in part sub nom. Best v. Bellevue Hospital*, 2004 WL 2166316, 115 Fed. Appx. 459 (2d Cir. 2004) [upholding City Health Code procedures for involuntary isolation of TB patients and upholding isolation of plaintiff].

[1.32] 2. Procedural Due Process

Deprivation of a liberty interest also requires procedural due process. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). In cases challenging involuntary civil commitment, the courts have followed the standards of the seminal case of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in determining the adequacy of the commitment and retention process—requiring a weighing of the risk of erroneous deprivation of a person's liberty (including the possible value of additional safeguards) against the government's interest in the confinement (which can include consideration of fiscal and administrative burdens). *See Project Release v. Prevost*, 722 F.2d 960, 975-76 (2d Cir. 1983). In civil commitment cases, procedural due

process would require a right to notice, a right to be represented by counsel, a right to a hearing, and judicial review. *See Vitek v. Jones*, 445 U.S. 480, 494-96 (1980). The holding of the hearing must be within a reasonable time after detention, but what period of time would be reasonable depends upon a balance of the rights of the individual and the interests of society. Where loss of personal liberty is at stake, that time period is short. *See Project Release v. Prevost*, *supra*, 722 F.2d at 974-75 [court upholds New York's statutory scheme for involuntary commitment of the dangerous mentally ill, holding that the availability of a judicial hearing within five days of demand by the patient and the availability of habeas corpus relief meet procedural due process standards].

Commentary

The courts have long upheld the use of the police power of public officers to isolate and quarantine persons infected with or exposed to infectious diseases. *See Crayton v. Larabee*, 220 N.Y. 493 (1917) [quarantine of neighbor of person infected with smallpox]; *Gates v. Prudential Insurance Co.*, 240 App. Div. 444 (4th Dep't 1934) [Commissioner of Health may quarantine typhoid carriers]. (Probably the most famous case of quarantine in New York was the forcible quarantine of Mary Mallon, a/k/a "Typhoid Mary," on an island in the East River—first from 1907-1910, then again from 1915 until her death in 1938.) But the exercise of the power to isolate or quarantine is constrained by due process requirements. Those requirements for persons subject to confinement have significantly evolved over the past decades, and they must be read into the current PHL and Sanitary Code provisions governing communicable diseases, many of which were drafted in the 1950s and contain little guidance for addressing due process concerns.

Much of the due process jurisprudence for deprivation of personal liberty comes from cases adjudicating the legality of civil confinement of the mentally ill. But in terms of substantive due process, society may have a more substantial government interest in eliminating the risk of harm presented by contagion spreading through a community than the risk of harm presented by the discharge of a single mentally ill person. The few cases in New York addressing

issues of isolation and quarantine for contagious diseases principally deal with individual patients who have been noncompliant in following a prescribed regimen of treatment for diseases like tuberculosis. Courts will have to examine carefully how the required due process balance between government needs and personal liberty would be applied in the broader context of a widespread epidemic requiring the immediate isolation or quarantine of large numbers of people.

[1.33] H. Involuntary Isolation and Quarantine: Issuance of Health Order by Local Health Officer

[1.34] 1. Authority

PHL §§ 308(d) [power of local boards of health to make orders, consistent with the State Sanitary Code, for enforcement of PHL and health regulations]; 308(e) [same as to nuisances]; 309 [power to hold administrative hearings]; 324(1)(e) [power of local health officer to "enforce" the PHL and the State Sanitary Code]. *See* PHL §§ 2100(1) [authority of local health officer to "control" persons infected with or exposed to communicable diseases]; 2100(2)(a) [authority of local health officer to provide for the "isolation" of cases of communicable diseases]; 10 NYCRR § 2.29 [same]. • *New York City*: Health Code [24 RCNY] §§ 11.17(a) and (d); 11.23(a) and (k) [authority of City Commissioner of Health to issue orders relating to contagious diseases, including isolation and quarantine].

[1.35] 2. Standard for Health Order

PHL § 2100(2) ["necessary for protection of the public health"]. • *New York City*: Health Code [24 RCNY] §§ 11.23(a) [isolation of case, contact or carrier in medical facility or other designated location when person "may pose an imminent and significant threat to the public health resulting in severe morbidity or high mortality"]; 11.23(k) [other orders when "necessary or appropriate to prevent dissemination or transmission of contagious diseases or other illnesses that may pose a threat to the public health"].

[1.36] 3. Contents of Health Order

There are no provisions in the PHL or Sanitary Code setting forth what must be contained in a health order. In conformance with the require-

ments of procedural due process articulated in case law addressing involuntary civil commitment (G(2), *supra*), the State Commissioner of Health has advised local health authorities that a health order should contain:

1. the reasons for the health order (including why less restrictive alternatives are not appropriate);

2. the conditions of isolation or quarantine;

3. the right to contact a lawyer;

4. the procedures for administrative review of the order;

5. the right to seek review of the order in court.

• *New York City*: Health Code [24 RCNY] §§ 11.23(g) [health order must contain purpose, legal authority, basis for order, attempts at less restrictive alternatives, notice and instructions as to how to request release from detention, notice of right to counsel, notice of time limits on detention]; 11.23(e) [where detention is for a period not exceeding three days, the detainee, upon request, shall be afforded "an opportunity to be heard"].

[1.37] 4. Duration of Health Order

PHL § 2123(1) [until determination that "such person may be discharged without danger to the health or life of others"]. • *New York City*: Health Code [24 RCNY] § 11.23(c) [for orders under § 11.23(a)]; (c)(1) [case or carrier—until determination that "such person is no longer contagious"]; (c)(3) and (4)(ii) [contact of either confirmed case or suspected case—until determination that such contact "no longer presents a potential danger to the health of others"].

[1.38] 5. Enforcement of Health Order

[1.39] a. Civil Enforcement

State: PHL § 12 [State Health Commissioner may bring a civil action against a person who violates a health order to recover a civil penalty not to exceed $2000 per violation; the Attorney General may bring an action for an injunction]; PHL § 206(1)(f) and (4)(c) [State Commissioner may enforce PHL and Sanitary Code and assess a penalty not exceeding $2000

for any violation of an order]. • *Localities*: PHL §§ 309(1)(f) [local board of health may "prescribe and impose penalties for the violation of or failure to comply with any of its orders or regulations, or any of the regulations of the state sanitary code, not exceeding one thousand dollars for a single violation or failure, to be sued for and recovered by it in any court of competent jurisdiction"]; 309(1)(g) [local boards of health may appoint hearing officers to make findings of fact and recommendations to the board]; 324(1)(e) [local health officer shall enforce the PHL and State Sanitary Code]. • *New York City*: Health Code [24 RCNY] §§ 3.05(a) [prohibiting violation of any order of City Commissioner of Health, City Department of Health, or Board of Health]; 3.11(a) [violations subject to penalty or fine of $200–$2000 per day].

[1.40] b. Criminal Enforcement

PHL § 12-b [person who violates an order of the local health officer is guilty of a misdemeanor]. *See also* PHL § 229 [noncompliance with any provision of the State Sanitary Code is a violation]. • *New York City*: New York City Charter § 562 [failure to comply with any order of City Commissioner of Health or Board of Health is a misdemeanor].

Commentary

The issuance of a health order by the local health officer directing the confinement of an individual commences an administrative process for the isolation of infected persons or the quarantine of persons exposed to infected persons. Unlike the New York City Health Code, there is no mention of the term "health order" in the PHL or Sanitary Code; the issuance of the order flows from the authority of the local health officer to "enforce" the PHL and Code.

There is little guidance in the PHL, the Sanitary Code, or the New York City Health Code as to how this local administrative process works. Those provisions of the PHL that address administrative hearings pertain only to the State Commissioner of Health. *See* PHL §§ 12-a [authority of State Commissioner to conduct administrative hearings]; 16 [authority of State Commissioner to take summary action before a hearing is held where a condition "constitutes danger to the health of the people"]. *See*, *in general*, State Administrative

Procedure Act (SAPA). This authority of the State Commissioner to enforce the PHL and Sanitary Code is generally considered a reserved power to be used only in the absence of effective local enforcement. Localities are free to fashion, and most have fashioned, their own administrative review and enforcement processes —often through local health codes. *See* PHL § 309 [quasi-judicial powers of local boards of health].

Because health orders are administrative orders, they are subject to the full process of administrative review of government actions that localities provide—including evidentiary hearings. However, administrative orders directing the confinement of individuals against their will are rarely candidates for the ordinary deliberate administrative review process. Due process for involuntarily confined persons requires a right to an evidentiary hearing within a very brief period of time, *see* G(2), *supra*, and it is unlikely that the administrative review processes of most localities can accommodate this. Using the available avenues for court hearings in the first instance is often a more effective means of meeting these due process considerations. Therefore, to the extent that local health officers determine to issue health orders for isolation or quarantine, they often are used either to reinforce voluntary compliance or to serve as an intermediate enforcement step until a court order can be obtained. And to the extent that localities provide administrative review of these orders, the review is generally in the form of a summary review of the order by the local commissioner. *See* New York City Health Code § 11.23(e).

Both the State Commissioner and local health officers have the authority to seek civil penalties for violation of health orders directing isolation or quarantine. However, where the violation may create an immediate danger to the public, the remedy of criminal arrest and prosecution may be called for. *See* PHL § 12-b; New York City Charter § 562.

[1.41] I. Involuntary Isolation and Quarantine: Issuance of Court Order

[1.42] 1. Authority

[1.43] a. Public Health Law

PHL §§ 2120(1) [section applies whenever the infected person is "unable or unwilling to conduct himself and to live in such a manner as not to expose members of his family or household or other persons with whom he may be associated to danger of infection"]; 2120(2) [if the health officer finds that "a person so afflicted is a menace to others," the person shall be brought before a "magistrate"]; 2120(3) [where the magistrate finds "after due notice and a hearing" that the person "is a source of danger to others," the magistrate may "commit the said person to any hospital or institution"]; 2123 [the person may be discharged from that institution when that can be done "without danger to the health or life of others"]. *Venue*: PHL § 2120(2) [brought before a "magistrate"]; General Construction Law § 28-b ["a magistrate is a judge of any court of this state"].

[1.44] b. New York City Health Code

24 RCNY § 11.23(a) [upon determining that a "case, contact or carrier, or suspected case, contact or carrier" of a contagious disease "may pose an imminent and significant threat to the public health resulting in severe morbidity or high mortality, the Commissioner may order the removal and/or detention of such person or of a group of such persons by issuing a single order . . . . Such person . . . shall be detained in a medical facility or other appropriate facility or premises designated by the Commissioner"]; (g)(1)(ii) [the commissioner's order must set forth "less restrictive alternatives" that were attempted and not successful or that were considered and rejected]; (f) [when the person is ordered detained for more than three business days and requests release, "the Commissioner shall make an application for a court order" . . . . "detention shall not continue for more than five (5) business days in the absence of a court order authorizing detention" [and] . . . . "in no event shall any person be detained for more than sixty (60) days without a court order authorizing such detention"]; (k) [Commissioner may "seek enforcement of" orders of local health

officers necessary "to prevent dissemination or transmission of contagious diseases or other illnesses that may pose a threat to the public health," including orders requiring the person "to remain isolated or quarantined at home or at a premises of such person's choice that is acceptable to the Department and under such conditions and for such period as will prevent transmission of the contagious disease or other illness"]. *Venue*: Supreme Court.

[1.45] c. Habeas Corpus

New York Civil Practice Law & Rules [CPLR] 7002(a) ["A person illegally imprisoned or otherwise restrained in his liberty within the state" may petition for a writ of habeas corpus "to inquire into the cause of such detention and for deliverance."]; 7009(c) ["The court shall proceed in a summary manner to hear the evidence produced in support of and against the detention and to dispose of the proceedings as justice requires."]; 7010(a) ["If the person is illegally detained a final judgment shall be directed discharging him forthwith."]. *Venue*: CPLR 7002(b) [the Supreme Court in the judicial district where the person is detained; any Supreme Court justice; a county judge within the county where the person is detained].

[1.46] d. Article 78 Review

CPLR 7803 [a court may review a determination by a "body or officer" to determine if it was (3) "made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" or (4) if made after an evidentiary hearing, was "supported by substantiated evidence"]. *Venue*: CPLR 7804(b) [Supreme Court within the judicial district where the determination was made]. *See also* PHL § 2124 ["Nothing contained in this article shall be construed to prohibit any person committed to any institution pursuant to its provisions from appealing to any court having jurisdiction, for a review of the evidence on which commitment was made."].

Commentary

Requests for judicial orders seeking enforcement or review of involuntary confinement for communicable diseases can come either at the request of the local health officer—by seeking a court order pursuant to PHL § 2120 (or, in New York City, pursuant to Health Code [24 RCNY] § 11.23(f) [medical or other facility], (k) [home or place of person's choice]); or at the request of the confined individual—by seeking a writ of habeas corpus or by bringing an Article 78 proceeding requesting review of an administrative order of confinement. Local health officers will seek a court order where they believe there will not be voluntary compliance with a health order; in many jurisdictions they will seek a court order as a matter of course without ever issuing a health order.

The procedure contained in PHL § 2120 (applicable outside New York City) for obtaining a court order was enacted over a half-century ago. It requires a complaint by a local health officer to be brought before a "magistrate," which by definition could include any judge in the State of New York, including justices of town and village courts that otherwise have no jurisdiction to grant such equitable relief. The only remedy that it provides is the commitment of the infected person to a "hospital or institution," which, even if construed broadly to include a home health agency or local health department, still might not cover all confinements at home, which is a more likely result in the face of an epidemic. And it applies only to the person who is "afflicted with a communicable disease," and therefore does not encompass quarantine of persons who are not infected but who have been exposed to the disease. A literal reading of section 2120 would impair the ability of local health officers to obtain court orders in epidemics directed to the broad needs of the health of the public, and in many cases would leave health officers to seek only criminal prosecutions under PHL § 12-b for violation of health orders.

However, PHL § 2120 is not the only authority for obtaining judicial enforcement of isolation and quarantine. The power to isolate and quarantine in a health emergency is not ultimately dependent upon

some specific statutory authority to take action to preserve the health of the community, but may be exercised pursuant to the sovereign's common law police power. *See Mendez v. Dinkins*, 226 A.D.2d 219, 223 (1st Dep't 1996) ["the government has a paramount interest in protecting the public from imminent danger"]; *Daly v. Port Authority*, 7 Misc. 3d 299, 305 (Sup. Ct., New York Co., 2005) ["Salus populi expresses a common-law principle for the state's exercise of the police power (cite omitted). It amounts to a recognition that society has a right that corresponds to the right of self-preservation in the individual, and it rests upon necessity because there can be no effective government without it."]; *In re World Trade Center Disaster Site Litigation*, 456 F. Supp. 2d 520, 550 (S.D.N.Y. 2006), *aff'd in part and dismissed in part*, 521 F.3d 169 (2d Cir. 2008) ["[W]hen an emergent disaster threatens society as a whole, the doctrine of salus populi . . . requires the government to act . . . . Salus populi . . . encourage[s] immediate action to preserve society."]. *See also In re Cheesebrough*, 78 N.Y. 232, 236 (1879) ["The police power possessed by the State, and conferred by it upon municipal corporations, is very broad and far reaching . . . . In cases of actual necessity . . . the rights of private property must be made subservient to the public welfare; and it is the imminent danger and the actual necessity which furnish the justification."].

Since state and local health officers are authorized by law to exercise the power to protect the public health from the spread of communicable diseases, *see* PHL §§ 206(1)(f) [State Commissioner of Health]; 324(1)(e) [local health officers], they are the officers who may exercise the police power to enforce that mandate independent of the procedures set forth in PHL § 2120. The New York Supreme Court, with its general original jurisdiction in law and equity, can hear actions brought by local health officers to enforce this exercise of the police power. *See* State Const., Art. VI, § 7(a). Nor should the gaps in section 2120 be construed as limiting the type of judicial proceedings that local health officers can bring. *See City of Utica v. New York State Health Department*, 96 A.D.2d 719 (4th Dep't 1983) [laws enacted to protect the public health are to be liberally construed]; *Putnam Lake Community v. Deputy Commissioner*, 90 A.D.2d 850 (2d Dep't 1982) [same].

Most local health officers select the Supreme Court as the "magistrate" to hear these proceedings. The Supreme Court also may serve as a proper forum for a consolidation of the hearing of multiple civil actions and proceedings that may be brought relating to the confinement of an individual under the Public Health Law, and might possibly be able to simultaneously hear criminal misdemeanor enforcement proceedings as well. *People v. Darling*, 50 A.D.2d 1038 (3d Dep't 1975) [Supreme Court has constitutional authority to try misdemeanors]. *See also People v. Correa*, 15 N.Y.3d 213, 229 (2010) [depriving the Supreme Court of the power to try misdemeanors would create "a significant constitutional issue"].

By contrast, the more contemporary 24 RCNY § 11.23, applicable in the City of New York, sets forth a straightforward judicial process applicable to both isolation of infected persons and quarantine of contacts of infected persons, with no restriction on where the person is detained. In recognition of due process requirements, section 11.23 directs that the Commissioner forthwith seek a court order so that the detention not continue beyond five business days without a judicial review and confirmation.

[1.47] 2. Standard of Review

City of New York v. Doe, 205 A.D.2d 469 (1st Dep't 1994) [use standard of "clear and convincing evidence" for review of legality of confinement in hospital of person infected with tuberculosis]; *Bradley v. Crowell*, 181 Misc. 2d 529 (Sup. Ct., Suffolk Co., 1999) [same—proceeding under PHL § 2120]; *City of New York v. Antoinette R.*, 165 Misc. 2d 1014 (Sup. Ct., Queens Co., 1995) [same]; Health Code [24 RCNY] § 11.23(f) [New York City Commissioner of Health must prove necessity for detention "by clear and convincing evidence"]. *See Addington v. Texas*, 441 U.S. 418 (1979) [the standard of proof in a state involuntary civil commitment proceeding is clear and convincing evidence]; *Matter of Storar*, 52 N.Y.2d 363, 379 (1981) [the standard of clear and convincing evidence is required to be used where "important personal interests are at stake"].

Commentary

The constitutionally required standard of "clear and convincing evidence" for judicial review colors the review process where the court obtains jurisdiction over the validity of the confinement through proceedings brought by the confined individual—by Article 78 proceeding or by habeas corpus. Article 78 proceedings typically look to see whether administrative determinations are "arbitrary and capricious," CPLR 7803(3), with a "rational basis" test being applied to rebut that allegation. *See Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 230-31 (1974). Or, in the unlikely event that a full evidentiary hearing was held, whether the determination was supported by "substantial evidence." CPLR 7803(4). Neither would be a constitutionally permissible standard where the Article 78 proceeding challenges a determination by a local health officer for isolation or quarantine. It is not clear whether the oblique language in PHL § 2124 ["Nothing contained in this article shall be construed to prohibit [an institutionalized person] from 'appealing' for a 'review of the evidence on which commitment was made.'"] creates a review process independent of Article 78 review, but if used as such it would require the "clear and convincing evidence" standard as well. Similarly, to the extent that a court examines the legality of confinement under habeas corpus review, the "clear and convincing evidence" standard must apply.

[1.48] 3. Right to Counsel

PHL § 2120 is silent on the appointment of counsel to represent the confined individual where a judicial order of confinement is sought. The courts have ruled that a right to counsel exists where an individual's physical liberty is threatened by a state's action, *Project Release v. Prevost*, 722 F.2d 960, 976 (2d Cir. 1983), and the State Commissioner of Health has issued guidance to localities that, upon the issuance of a health order, they should advise confined individuals of their right to counsel. • *New York City*: Health Code [24 RCNY] § 11.23(g)(2)(iii) [notice to confined persons of the Commissioner's intent to seek a judicial order of confinement must advise the persons of "the right to request that legal counsel be provided, [and] that upon such request counsel shall be provided if and to the extent possible under the circumstances"].

Commentary

A right to counsel implies that counsel must be provided if the person cannot afford counsel. However, as the City Health Code recognizes, the timing and mechanics of the providing of such counsel may be dependent on the circumstances of the health crisis. *See* Health Code [24 RCNY] § 11.23(g)(1)(v) and (2)(iii). The responsibility of a public entity to pay for assigned counsel for indigents is governed by statute. *See* County Law, Article 18-B [county to pay in criminal cases]; Judiciary Law § 35 [state to pay in enumerated civil cases]. Neither Article 18-B nor section 35 applies here. In the absence of a statute setting forth which entity should pay for counsel provided to isolated or quarantined persons who are indigent, the locality would have to work out an arrangement with counsel.

[1.49] 4. Subsequent Judicial Retention Orders

There are no provisions in the PHL that require subsequent judicial review of the need for confinement. Nevertheless, some local plans provide for the local health officer to periodically seek judicial review of the initial PHL § 2120 judicial order, to ensure that there still is a justifiable basis for continued confinement. • *New York City*: Health Code [24 RCNY] § 11.23(f) [The Commissioner of Health must seek further court review of the confinement every 90 days].

Commentary

The same procedural due process requirements that apply to the deprivation of liberty caused by initial confinement of an infected person would apply to the continued confinement of that person. At some point, the confined individual would have a constitutional right to a hearing on the necessity for the continuation of the confinement. *See Project Release v. Prevost, supra*, 722 F.2d at 965 [upholding civil commitment statute that provided, inter alia, for judicial review every 60 days]. As with all procedural due process evaluations, the actual time limit for subsequent re-examination of the need for confinement would depend on the factual basis for the confinement and the balance between the individual and governmental interests at stake.

[1.50] 5. Costs of Isolation and Quarantine

PHL §§ 2100(2)(a) ["Every local board of health and every health officer may: (a) provide for care and isolation of cases of communicable disease in a hospital or elsewhere when necessary for protection of the public health."]; 2120(4) ["In making such commitment [to a hospital or institution] the magistrate shall make such order for payment for the care and maintenance of the person committed as he may deem proper."]. • *New York City*: Health Code [24 RCNY] § 11.23(d)(1) ["A person who is detained . . . shall, as is appropriate to the circumstances: (1) have his or her medical condition and needs assessed and addressed on a regular basis."].

Commentary

The implementation of isolation and quarantine includes responsibility for the "care" [PHL § 2100(2)(a)] and the "needs" [Health Code § 11.23(d)(1)] of the persons so detained. This includes ensuring that these persons have access to food, shelter and medical assistance as appropriate to the circumstances. *See* Health Code [24 RCNY] § 11.23(d). Since these responsibilities are placed by law with the localities, where there are no other sources of payment such as medical insurance, the costs of that implementation, in the first instance, most likely would be borne by the locality that is effectuating the orders of isolation and quarantine. *See* 6 Op. State Compt. 122 (1950); 1933 Op. Atty. Gen. 449. PHL § 2120(4) authorizes a judge to make such order for payment for care and maintenance "as he may deem proper," so that the statute could be applied not only to the scope of services to be provided, but also to designating a source of such payment other than the health officer's locality in special circumstances.

[1.51] J. Provisions Covering Isolation and Quarantine for Specific Diseases

[1.52] 1. Tuberculosis

10 NYCRR § 2.7(a) and (b) [responsibility of local health officer to examine and monitor TB patients; duty of physician to instruct TB patient and members of household about avoiding personal contact with others].

• *New York City*: Health Code [24 RCNY] § 11.21 [detailed provisions within New York City for the reporting, examination, exclusion, removal and detention of persons with TB]. *Cf.* § 11.23 [same as to all other communicable diseases].

[1.53] 2. Venereal [Sexually Transmissible] Diseases

PHL §§ 2300 [authority of local health officer to cause a medical examination to be made and to take specimens and to isolate a person who refuses to submit to such exam]; 2301 [authority to apply to court (Supreme, County, City) to get court order directing person to submit to examination and the taking of specimens or to comply with the restrictions of isolation]; 2302 [authority to isolate and treat any person found to have such disease]. Note that HIV/AIDS is not treated as a sexually transmissible disease and is subject to separate provisions of the PHL.

[1.54] 3. Typhoid

10 NYCRR §§ 2.28 [authority of local health officer to isolate typhoid (and measles) cases]; 2.28(b), 2.40, 2.42, 2.43 [control of typhoid carriers]. • *New York City:* Health Code [24 RCNY] § 11.19 [restrictions on typhoid carriers; medical tests to determine non-contagion].

[1.55] 4. Diphtheria

10 NYCRR § 2.30 [authorization of local health officer to isolate diphtheria patients and to quarantine members of household].

Commentary

The Public Health Law and State Sanitary Code retain laws and rules that were enacted in the past to control specific contagious diseases that were then prevalent; some remain prevalent today. All of these diseases are subject to the provisions of the Sanitary Code. To the extent that disease-specific procedures remain as part of the PHL and Sanitary Code and are consistent with constitutional due process requirements, they should be followed.

[1.56] V. MANDATORY EXAMINATION AND TREATMENT

[1.57] A. Authority

[1.58] 1. Examination

PHL § 2100(1) [local health officers shall guard against introduction of communicable disease "by the exercise of proper and vigilant medical inspection and control of all persons and things infected with or exposed to such diseases"]. • *New York City*: Health Code [24 RCNY] § 11.23(k) ["the Commissioner may issue and seek enforcement of . . . orders . . . to require the testing or medical examination of persons who may be exposed to or infected by a contagious disease"].

Specific diseases: PHL §§ 2201(1)(f) [State Commissioner has "full power and authority to examine or cause to be examined" hospital patients suspected of having tuberculosis]; 2300(1) [health officer "may cause a medical examination to be made" of persons suspected of having venereal disease]; 2301 [health officer may seek court order directing that person suspected of having a venereal disease "shall submit to such examination and permit such specimens of blood or bodily discharge to be taken for laboratory examination"]. • *New York City*: Health Code [24 RCNY] § 11.21(b) [requirements for examination of persons having contact with persons having active tuberculosis].

[1.59] 2. Treatment

PHL § 2100(2)(a) [local health officers shall "provide for care and isolation of cases of communicable disease in a hospital or elsewhere when necessary for protection of the public health"]. *See also* PHL §§ 206(1)(*l*) ["The [State Commissioner of Health] shall . . . establish and operate such adult and child immunization programs as are necessary to prevent or minimize the spread of disease and to protect the public health."]; 613 [State Commissioner shall assist localities in developing and implementing local programs of immunization]. *But see* PHL §§ 206(1)(*l*), 613(1)(c), 2164, 2165 [expressly foreclosing mandatory immunization as part of these programs except as to school admissions]. • *New York City*: Health Code [24 RCNY] § 11.23(k) ["the Commissioner [of Health] may issue and seek enforcement of . . . orders . . . to complete an appropriate, prescribed course of treatment, preventative medication or vaccinations,

including directly observed therapy to treat the disease . . . ."]. *Specific diseases*: PHL § 2303(1) [local health officers may require any person with communicable venereal disease "to submit to such treatment or isolation, or both, as may be necessary to terminate such communicable state"]. • *New York City*: Health Code [24 RCNY] § 11.21(d)(2) and (3) [Commissioner may seek court order requiring a person with active tuberculosis "to complete an appropriate prescribed course of medication for tuberculosis" or, if noncompliant, "to follow a course of directly observed therapy"].

Commentary

Effective control of communicable diseases may require that persons be subject to mandatory examination and treatment. The Public Health Law authorizes examination and treatment obliquely [§§ 2100(1): "proper and vigilant medical inspection"; 2100(2)(a): "care"]. The more contemporary New York City Health Code authorizes both examination and treatment directly, with the only requirement being that the person, upon request, be given "an opportunity to be heard." Health Code [24 RCNY] § 11.23(k). The Public Health Law addresses these areas with more specificity only when dealing with individual conditions such as tuberculosis and venereal disease.

[1.60] B. Constitutional Restraints: Examinations

The Fourth Amendment to the United States Constitution protects the right of people "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" and requires that no warrants may issue except "upon probable cause." *See also* N.Y. Const., Art. I, § 12 [same]. Intrusions into the human body are "searches" governed by the Fourth Amendment. *See People v. More*, 97 N.Y.2d 209, 212-13 (2002) [body cavity search]; *Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y.2d 57 (1987) [urine test]; *Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005) [DNA test—blood test or cheek swab]. *See*, *in general*, *Schmerber v. California*, 384 U.S. 757 (1966).

The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by "assessing, on the one hand,

the degree to which it intrudes upon an individual's privacy, and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 118-19 (2001), quoting from *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). While in the criminal context this balancing test usually requires the obtaining of a warrant based on a showing of probable cause (except in certain situations permitting searches made incidental to lawful arrests), the obtaining of warrants and a showing of probable cause are not indispensable components of reasonableness in every circumstance. *MacWade v. Kelly*, 460 F.3d 260, 268 (2d Cir. 2006). A standard of "reasonable suspicion," without the obtaining of a warrant, may be permitted "when a balance of the governmental and private interest makes such a standard reasonable." *United States v. Knights*, *supra*, 534 U.S. at 121. Where a search is not directed at uncovering evidence of a crime, the use of a "reasonable suspicion" test may satisfy that balance. *See Patchogue-Medford Congress of Teachers v. Board of Education*, *supra*, 70 N.Y.2d at 68-69 [urine test]; *Nicholas v. Goord*, *supra*, 430 F.3d at 660 [DNA test]. *Cf. City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) [roadblock search held unreasonable in absence of "individual suspicion of wrongdoing"]; *Tenenbaum v. Williams*, 193 F.3d 581, 599 (2d Cir. 1999) [holding stricter constitutional standard required to undertake "investigative examination" of child rather than "one that is 'medically indicated' and designed for treatment"].

There is, however, a "special needs" exception to the reasonable suspicion standard. Courts have upheld searches, in a non-criminal context, that are not based on any suspicion, but that are applied to everyone, or to those randomly selected, in an effort to achieve a greater public need. In doing so, courts have balanced (1) the weight and immediacy of the government interest, (2) the nature of the privacy interest compromised by the search, (3) the character of the intrusion imposed by the search, and (4) the efficacy of the search in advancing the government interest. *MacWade v. Kelly*, *supra*, 460 F.3d at 269 [applying special needs exception in upholding random package searches on subway platforms]. The courts have applied this "special needs" exception to non-criminal searches of the body. *See Nicholas v. Goord*, *supra*, 430 F.3d 652 [upholding DNA tests for all convicted felons]. *See also Patchogue-Medford Congress of Teachers v. Board of Education*,

supra, 70 N.Y.2d at 70 [discussing applicability of both the reasonable suspicion test and searches without reasonable suspicion in addressing random urine tests for teachers].

Commentary

When courts are called upon in non-criminal situations to review the legality of bodily searches and extraction of bodily fluids, i.e., examinations, they apply the reasonable suspicion test or its special needs exception. Both tests are based on a balancing of public and private interests, and where the government interest in controlling the spread of potentially deadly communicable diseases is at stake, it is likely that courts will find that minimal intrusions such as blood tests or internal swabs would outweigh what would otherwise be protected individual privacy interests. *See Matter of Storar*, 52 N.Y.2d 363, 377 (1981) ["The State has a legitimate interest in protecting the lives of its citizens. It may require that they submit to medical procedures in order to eliminate a health threat to the community."].

[1.61] C. Constitutional Restraints: Treatment

The constitutional restraints governing mandatory treatment are far greater than those governing mandatory examination. At common law, every adult of sound mind "has a right to determine what may be done to his own body . . . and to control the course of his medical treatment." *In re K.L.*, 1 N.Y.3d 362, 370 (2004); *Rivers v. Katz*, 67 N.Y.2d 485, 492 (1986); *Matter of Storar*, *supra*, 52 N.Y.2d at 376. This common law right must be honored even if the treatment is necessary to preserve the patient's life, *Id.* at 377, and is "coextensive with the patient's liberty interest protected by the due process clause of our State Constitution." *Rivers v. Katz*, *supra*, 67 N.Y.2d at 493.

The right to reject treatment must, however, yield to compelling state interests, including the exercise of the state's police power where the person "presents a danger to himself or other members of society." *Rivers v. Katz*, *supra*, 67 N.Y.2d at 495; *see* 14 NYCRR § 527.8(a)(4) and (c)(1) [patient may not receive treatment without consent unless the patient poses "a risk of physical harm to himself or others"]. (The standard of

harm to "self" presumably would not apply where the person is of sound mind or otherwise capable of making an informed and reasoned judgment as to treatment). This criterion would require persons to "submit to medical procedures in order to eliminate a health threat to the community." *Matter of Storar*, *supra*, 52 N.Y.2d at 377. Mandatory treatment then may continue "as long as the emergency persists." *Rivers v. Katz*, *supra*, 67 N.Y.2d at 496. *See Matter of Sampson*, 29 N.Y.2d 900, 901 (1972) [noting government right to direct treatment of child to protect public health].

In making the determination whether mandatory treatment is constitutional, courts apply the same substantive and procedural due process standards as they would for any serious deprivation of liberty, *i.e.*, the same standards applicable to isolation and quarantine. *See* IV(G), *supra*. These include a finding that the threat to the community is supported by "clear and convincing evidence," and that mandatory treatment is the "least restrictive alternative." *In re K.L.*, *supra*, 1 N.Y.3d at 372; *Rivers v. Katz*, *supra*, 67 N.Y.2d at 497-98. And the same procedural due process balancing test for the timing of the holding of a hearing for judicial review must apply as well. *In re K.L.*, *supra*, 1 N.Y.3d at 373-74. *See also* New York City Health Code [24 RCNY] § 11.23(*l*) [requiring a court order in New York City for the forcible administration of any medication].

The principles governing mandatory treatment apply as well to mandatory vaccination, which is but a subclass of treatment applicable to persons exposed to or potentially exposed to contagious diseases. To the extent that mandatory vaccination is not foreclosed by law (and so would first require a declaration of a health emergency and an order suspending that law (*see* VIII, *infra*)), there would have to be a balancing between a compelling government interest versus a fundamental personal right and, where there is a communicable disease health threat, that balance may well shift to the government. *Eichner v. Dillon*, 73 A.D.2d 431, 455 (2d Dep't 1980), *mod. sub nom. Matter of Storar*, 52 N.Y.2d 363 (1981) [an individual "may not refuse to be vaccinated where the refusal presents a threat to the community at large"]; *Ritterband v. Axelrod*, 149 Misc. 2d 135 (Sup. Ct., Albany Co., 1990) [rejecting constitutional challenge to DOH regulations requiring mandatory immunizations of health care workers for rubella]. *See* 10 NYCRR § 66-1.10 [in the event of an outbreak of vaccine-preventable diseases, the State Commissioner of Health

may order school officials to exclude from attendance all students without documentation of immunity]. *See also Jacobson v. Massachusetts*, 197 U.S. 11 (1905) [upholding mandatory participation in smallpox vaccination program as a reasonable use of state police power to protect the public health]. A state may constitutionally mandate vaccination even for those who object based upon religious belief. *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166-67 (1944). *But see* PHL § 2164(9) [requirement in New York that children be vaccinated against certain diseases in order to attend school is not applicable to children whose parents "hold genuine and sincere religious beliefs which are contrary to the practices herein required"].

Commentary

The statutory authorization for mandatory treatment as a method to control communicable diseases is tempered by the due process requirement that this treatment be the "least restrictive alternative." Where there is a finding that a communicable disease poses a public health threat, the court will have to examine whether the threat can be contained by isolation rather than mandatory treatment. This may be a particularly viable alternative where a person objects to treatment or vaccination for religious reasons.

[1.62] VI. INSPECTIONS AND SEIZURES OF PROPERTY

[1.63] A. Authority

[1.64] 1. Public Health Law [Communicable Disease]

PHL §§ 2100(1) [local health officer "shall guard against the introduction of such communicable diseases . . . by the exercise of proper and vigilant medical inspection and control of all persons and things infected with or exposed to such diseases"]; 2100(2)(b) [local health officer may, "subject to the provisions of the sanitary code, prohibit and prevent all intercourse and communication with or use of infected premises, places and things, and require, and if necessary, provide the means for the thorough purification and cleansing of the same before general intercourse with the same or use thereof shall be allowed"]. *See also* PHL §§ 206(1)(d) [State Commissioner of Health shall "investigate the causes of disease, epidemics, the sources of mortality, and the effect

. . . upon the public health"]; 206(2) [State Commissioner or designee may "enter, examine and survey all grounds, erections, vehicles, structures, apartments, buildings and places"].

[1.65] 2. State Sanitary Code [Communicable Disease]

10 NYCRR §§ 2.6(a) [local health officer shall, upon receiving a report of a communicable disease, "make such an investigation as the circumstances may require for the purpose of . . . ascertaining the source of the infection and discovering contacts and unreported cases"]; 2.16(a) [where there is an "outbreak of illness," the local health officer shall "exercise due diligence in ascertaining the existence of such outbreak or the unusual prevalence of diseases, and shall immediately investigate the causes of same"]. *See also* 10 NYCRR § 2.25(e) [defining "quarantine of premises" as (1) "prohibition of entrance into or exit from the premises" and (2) "prohibition . . . of the removal from such premises of any article liable to contamination with infective material"].

[1.66] 3. New York City [Communicable Disease]

Health Code [24 RCNY] § 11.03(e) ["the [City Health] Department may conduct such surveillance, epidemiologic and laboratory investigative activities as it shall deem necessary to verify the diagnosis, ascertain the source or cause of infection, injury or illness, identify additional cases, contacts, carriers or others at risk, and implement public health measures to control the disease or condition and prevent additional morbidity or mortality"]; New York City Administrative Code [NYC Admin. Code] § 17-159 [if a building is "infected with a communicable disease," the health department may issue an order to vacate the building].

[1.67] 4. Public Health Law [Nuisance]

PHL §§ 1301 [(1) Governor may require the State Commissioner of Health to "make an examination concerning nuisances or questions affecting the security of life and health in any locality"; (2) Governor may "declare the matters public nuisances . . . and may order them to be changed, abated or removed as he may direct"]; 1303 [(1) local health officer "may enter upon or within any place or premises where nuisances or conditions dangerous to life and health . . . are known or believed to

exist"; (2) local health officer "shall furnish the owners, agents and occupants of the premises with a written statement of the results and conclusions of any examination"; (3) local board of health "shall order the suppression and removal of all nuisances and conditions detrimental to life and health"]; 1305 [(1) owners and occupants of premises "shall permit sanitary examinations and inspections to be made"; (2) if owner or occupant of premises "fails to comply" with an order of the local health officer, the health officer "may enter upon the premises . . . and suppress or remove such nuisance or other matter"]; 1306 ["The expense of suppression or removal of a nuisance or conditions detrimental to health shall be paid by the owner or occupant of the premises or by the person who caused or maintained such nuisance or other matters."]. *See also* 10 NYCRR §§ 8.2 [local health officer to file report of nuisance complaint with local board of health]; 8.3 [local board of health to serve on owner or occupant written statement of condition found, a notice to appear before board of health at a stated time and place and, after a hearing, if condition constitutes "a nuisance dangerous to health," an order directing abatement].

[1.68] 5. New York City [Nuisance]

PHL § 1309 [most PHL nuisance provisions do not apply to New York City]. • *New York City*: New York City Charter § 556(c)(2) [City Department of Health authorized to exercise control over and supervise the abatement of nuisances affecting or likely to affect the public health]. NYC Admin. Code §§ 17-142 [a "nuisance" is something "dangerous to human life or detrimental to health"]; 17-145 ["Whenever any building[,] . . . premises[,] . . . matter or thing . . . shall be in a condition or in effect dangerous to life or health . . . the [board of health] may . . . order the same to be removed, abated, suspended, altered, or otherwise improved or purified, as such order shall specify."]; 17-165 [power to inspect and remove]; 17-160 to 17-162 [condemnation proceeding]. *See also* § 17-114 [in addition to all specified powers, Department has "all common law rights to abate any nuisance without suit, which can or does in this state belong to any person"]. Health Code [24 RCNY] §§ 3.03(a) ["The Department may seize, embargo or condemn any . . . article or thing that it determines . . . constitutes a danger or nuisance, or is otherwise prejudi-

cial to the public health."]; 3.03(b) ["The Department may destroy, render harmless, or otherwise dispose of all seized, embargoed or condemned material without compensation and, in its discretion, at the expense of the owner or person in control thereof . . . ."]; 3.03(e) ["Except where the Department determines that immediate action is required to protect the public health, the Department shall not seize, embargo, condemn, destroy, render harmless or otherwise dispose of any material pursuant to this section until the owner or person in control is notified . . . and is given opportunity to be heard . . . ."]. *See* § 3.01(a) ["The Department may inspect any premises, matter or thing within its jurisdiction, including but not limited to any premises where an activity regulated by this Code is carried on, and any record required to be kept pursuant to this Code, in accordance with applicable law."].

[1.69] 6. Eminent Domain; Public Health Law

PHL §§ 401(1) ["The commissioner [of health], when an appropriation therefor has been made by the legislature, may acquire any real property which he may deem necessary for any departmental purpose by purchase or acquisition pursuant to the eminent domain procedure law."]; 401(8)-(12) [procedures for payment of compensation]. Eminent Domain Procedure Law [EDPL]: §§ 201 [requirement for public hearings and findings]; 206(D) [public hearing requirement may be waived "when . . . because of an emergency situation the public interest will be endangered by any delay caused by the public hearing requirement"]; 402(B) [procedures for a vesting proceeding brought by public body to transfer title; filing of petition and notice of pendency]; 402(B)(6) ["When it appears to the satisfaction of the court at any stage of the proceedings, that the public interest will be prejudiced by delay, it may direct that the condemnor be permitted to enter immediately upon the real property to be taken, and devote it temporarily to the public use specified in the petition." Condemnor must deposit with the court a sum of money fixed by the court to be applied to ultimate compensation award].

Commentary

There is ample authority in the Public Health Law, State Sanitary Code and New York City Health Code for local health officers to enter onto private property to investigate sources of contagious diseases that may be dangerous to the public health, to abate or remove objects as required, and to prevent entry into or exit from those premises. *See, e.g.*, PHL §§ 2100(1) [authority to exercise "proper and vigilant medical inspection and control of all persons and things"]; 2100(2)(b) [authority to prohibit "communication with or use of the infected property" and to provide for a "thorough purification and the cleansing of" the property]; 10 NYCRR § 2.6(a) [authority to conduct an "investigation as the circumstances may require"]; Health Code [24 RCNY] § 11.03(e) [New York City Health Department has authority to "conduct such surveillance, epidemiologic and laboratory investigative activities" and to "implement public health measures to control the disease"]. As with the authority of local health officers to implement processes for isolation and quarantine, local health officers may fill in any gaps in the applicable provisions of these statutes and rules through the exercise of their common law police powers. *See supra*, Commentary to IV(I)(1).

The Public Health Law, and the New York City Health Code and New York City Administrative Code, similarly contain procedures addressing public nuisances and permitting the abatement of conditions dangerous to life or health. PHL § 1303; Health Code [24 RCNY] § 3.03; NYC Admin. Code § 17-145. These conditions go beyond contagious diseases and can be used to address, *e.g.*, radiological or chemical contamination that poses an immediate health threat to the public. While the procedures governing nuisances in Article 13 of the PHL are addressed to conditions that are essentially created by the owner (or occupier) of the property and that are required, after due notice, to be abated by that owner at the owner's expense, Article 13 should not be read as restricting local health officers from taking immediate action pursuant to their police powers to enter and seize property where the danger to the public health so requires. *See supra*, Commentary to IV(I)(1). *See also* PHL § 1303(3) ["Every local board of health shall order the

suppression and removal of all nuisances and conditions detrimental to life and health found to exist within the health district."]. *Compare* Health Code [24 RCNY] § 3.03(e) [In New York City, notice and hearing requirements may be dispensed with "where the Department determines that immediate action is required to protect the public health"].

Eminent domain comes into play only when the purpose of the government's action is to obtain actual ownership of the property. The culmination of the eminent domain process is a judicial "vesting" proceeding brought by the government in which the court may award title of the property to the government, followed by judicial determination of just compensation. *See* EDPL § 402(B); PHL § 401(8)-(12). While there are provisions in the EDPL for the government to seize the property for public use in an emergency situation before the transfer of ownership is completed, EDPL §§ 206(D); 402(B)(6), the ultimate objective of the eminent domain proceeding is the obtaining of ownership by the government. The addressing of public health emergencies rarely involves that objective.

[1.70] B. Constitutional Restraints

[1.71] 1. Fourth Amendment: Searches and Seizures

Administrative searches of private dwellings and commercial premises are governed by the Fourth Amendment's prohibition of unreasonable searches and seizures and the requirement that warrants not issue except upon probable cause. *See Camara v. Municipal Court*, 387 U.S. 523 (1967). As with the Fourth Amendment constraints on intrusions into the human body, *see* IV(B) and (C), *supra*, the ultimate finding of reasonableness depends upon a balancing of the governmental and private interests at stake. *See United States v. Knights*, 534 U.S. 112, 118-19 (2001). This entails a balance of the degree of expectation of privacy and the intrusiveness of the search versus the strength of the government's interest. *Id*.

The privacy expectations involved in an administrative search of a residence are extremely high. *See United States v. United States District*

Court, 407 U.S. 297, 313 (1972) ["physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"]. By contrast, privacy expectations in commercial premises are "particularly attenuated" in industries that are "closely regulated." *New York v. Burger*, 482 U.S. 691, 700 (1987). Nevertheless, administrative searches of a home can fall within the "special needs exception" to the requirement of obtaining a warrant pursuant to a showing of probable cause—"where special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *Board of Education v. Earls*, 536 U.S. 822, 829 (2002), citing *Griffen v. Wisconsin*, 483 U.S. 868, 873 (1987).

In applying the special needs exception, the courts perform the same balancing test of expectations of privacy versus governmental interest. Where the privacy interest is high, the governmental interest must be substantial. A substantial government interest would include "exigent conditions" where the government needs to discover "latent or hidden conditions" or to "prevent the development of hazardous conditions," *Board of Education v. Earls*, *supra*, 536 U.S. at 828-29, or seeks to "protect or preserve life." *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978). In the context of control of contagious diseases or other health hazards, facts supporting the seriousness of the threat and the need for immediate government action can justify a warrantless search. *See Camara v. Municipal Court*, *supra*, 387 U.S. at 539 ["nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations"], citing *North American Cold Storage v. City of Chicago*, 211 U.S. 306 (1908) [seizure of contaminated food]; *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) [mandatory smallpox vaccination]; *Compaignie Francaise v. Louisiana State Board of Health*, 186 U.S. 380 (1902) [health quarantine].

Seizures are subject to the same analysis. A seizure occurs where "there is some meaningful interference with an individual's possessory interests in that property," which would include the forced ejection of a person from the property. *Soldal v. Cook County*, 506 U.S. 56, 60 (1992). The same balancing test applicable to searches, including the special needs exception, would apply.

[1.72] 2. Fourteenth Amendment: Procedural Due Process

The Fourteenth Amendment prohibits deprivation of property without due process of law. A pre-deprivation hearing is rarely feasible in an administrative search and seizure context where property is seized incidental to a search, especially a warrantless search based upon exigent needs; procedural due process then must be satisfied by a meaningful post-deprivation remedy. *See Gilbert v. Horn*, 520 U.S. 924, 930 (1997) ["where a State must act quickly or where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requisites of the Due Process Clause"]; *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 299-301 (1981) [no prior hearing is necessary when a seizure responds to a situation in which swift government action is necessary to protect the public health and safety]. The availability of judicial actions for damages or replevin should satisfy the post-deprivation remedy requirement (and may do so even in non-emergency situations). *See Hudson v. Palmer*, 468 U.S. 517 (1984) [common law suit for damages sufficient post-deprivation remedy]; *Parratt v. Taylor*, 451 U.S. 527, 541 (1981) [same]; *Smith v. O'Connor*, 901 F. Supp. 644, 647 (S.D.N.Y. 1995) [meaningful post-deprivation hearings in action for damages, negligence, replevin or conversion are sufficient]; *Hellenic American Neighborhood Action Committee v. City of New York*, 101 F.3d 877, 881 (2d Cir. 1996) ["An Article 78 proceeding is a perfectly adequate post-deprivation remedy."].

[1.73] 3. Fifth Amendment; State Constitution, Article I, Section 7(a): Just Compensation for Seized Property

Both the Fifth Amendment to the United States Constitution and section 7(a) of Article I of the State 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 the Eminent Domain Procedure Law, they apply as well to "seizures" of property by government action apart from its formal acquisition by petition under the eminent domain procedures of the EDPL, *e.g.*, where a governmental action restricts the use of a property. *See, e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255 (1980) [challenge to zoning ordinance restricting development of property];

Gazza v. New York State Department of Environmental Conservation, 89 N.Y.2d 603 (1997) [challenge to administrative decision denying variance for construction in tidal wetlands]. Nor are compensable "takings" limited to real property; the constitutional protection applies to any "private property." *See, e.g.*, *Andrus v. Allard*, 444 U.S. 51 (1979) [takings clause analysis applied to prohibition of sale of eagle feathers]. *See also* EDPL § 708 [applying the procedures of the EDPL where a government is authorized to acquire for public use title to property other than real property].

In order for government action to be subject to the "just compensation" remedy, there must first be a "taking." Where there is a legitimate exercise of the police power supported by a substantial government interest, the test is whether the owner is deprived of property rights, *Gazza v. New York State Department of Environmental Conservation*, *supra*, 89 N.Y.2d at 616, and there is much case law addressing at what stage the government's adjustment of rights for the public good results in such a deprivation of property rights as to constitute a "taking" requiring compensation. *See Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 537-39 (2005) [enumerating government actions deemed takings of property]; *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322-23 (2002) [the government's taking of a leasehold and physical occupation of the property, even if temporary, is a taking; determining whether regulation of the use of property constitutes a taking "entails complex factual assessments of the purposes and economic effects of government actions"]; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) [holding that the line may be crossed regardless of the public good where a regulatory action deprives land of all economical beneficial use]; *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) [applying a balancing test for regulatory actions that weighs the economic impact of the regulation, the extent to which it has interfered with reasonable investment-backed expectations, and the character of the government action].

These principles, however, do not apply where the seizure of property is to address public health hazards related to the property. There is no deprivation of property rights in that context, because the ownership of property carries with it a limitation that "inhere[s] in the title itself, in the

restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas v. South Carolina Coastal Council*, *supra*, 505 U.S. at 1029. All property is held under the implied obligation that the owner's use of it is not injurious to the community. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 491-92 (1987). 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*, *supra*, 505 U.S. at 1029, or "for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others." *Id.* at n.16, citing *Bowditch v. Boston*, 101 U.S. 16, 18-19 (1880). As the Supreme Court has stated, "[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not taken anything when it asserts its power to enjoin the nuisance-like activity." *Keystone Bituminous Coal Association v. DeBenedictis*, *supra*, 480 U.S. at 491, n.20. *Cf.* PHL § 1306(1) ["The expense of suppression or removal of a nuisance or conditions detrimental to health shall be paid by the owner or occupant of the premises . . . ."].

Whether compensation is due in a public health emergency for the use of property that is not itself a hazard, such as commandeering property to shelter victims or to 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 v. Tahoe Regional Planning Agency*, *supra*, 535 U.S. at 322, and since the property is itself not producing the "nuisance-like activity," *Keystone Bituminous Coal Association v. DeBenedictis*, *supra*, 48 U.S. at 491, there may be a right to compensation. *See* New York City Charter § 560 [during "an epidemic or in the presence of great and imminent peril to the public health," the City Board of Health "may take possession of any buildings in the city for temporary hospitals and shall pay a just compensation for any private property so taken"]. However, where such property is needed in responding to an emergency where no statute requires compensation, no compensation may be due. *See In re Cheesebrough*, 78 N.Y. 232, 237 (1879) ["in cases of actual necessity, [including] the ravages of a pestilence . . . the private property of any individual may be law-

fully taken, used or destroyed for the general good, without [compensation]. In such cases, the rights of private property must be made subservient to the public welfare"].

Commentary

The power of government officers to search and seize private property in the course of administrative regulation is subject to considerable constitutional restraints to ensure that the government action is taken for proper purposes and respects the property rights of the affected persons. These restraints are lessened when addressing public health concerns, and are essentially set aside when exigent circumstances require immediate action to protect the public health. Local health officers may take any reasonable actions where health conditions require that immediate action be taken; violations of individual property rights, if actionable, would generally be sorted out after the need for such actions has ended.

[1.74] VII. CONTROL OF DOMESTIC ANIMALS WITH DISEASES AFFECTING HUMANS

[1.75] A. Agriculture and Markets Law [AML]

[1.76] 1. Searches and Seizures

AML §§ 72(1) ["The commissioner [of the Department of Agriculture and Markets [DAM]] may cause investigations to be made as to the best method for control, suppression or eradication of infectious or communicable disease . . . carried by domestic animals and affecting humans . . . . Whenever any such disease shall exist . . . the commissioner shall take measures promptly to suppress the same and to prevent such disease from spreading."]; 20 [agents of DAM "shall have full access to all places of business, factories, farms, buildings . . . used in the production, manufacture, storage, sale or transportation . . . of any article or product [where authority is conferred by AML]"]; 16(27) [DAM has authority to "seize, destroy or denature so that it cannot thereafter be used for food, any unwholesome food or food products [including diseased animals]"]; 85 [authority to destroy diseased carcasses]. *See also* 1 NYCRR § 52.1 ["The commissioner [of DAM], each veterinarian, inspector and other authorized employees of [DAM] shall have full access to all lands, buildings or

housing upon or in which there are kept for breeding, raising, feeding or slaughtering, domestic animals, including poultry, and may examine such animals . . . ."].

[1.77] 2. Vaccination

AML § 72(3) ["The commissioner [of DAM] may adopt and enforce rules and regulations for the control, suppression or eradication of communicable diseases in domestic animals or for the purpose of preventing the spread of infection and contagion . . . from such animals to humans . . . . When the commissioner finds that an emergency situation exists, the commissioner may by regulation require that all domestic animals of any designated species be immunized against any designated disease."] *See also* AML § 72(1), *supra*.

[1.78] 3. Quarantine

AML §§ 76(1) [DAM Commissioner or agent "may order any animal to be put in quarantine if such animal (a) is affected with a communicable disease, (b) has been exposed to a communicable disease, (c) is believed to be suffering from or exposed to a communicable disease or (d) is suspected of having biological or chemical residues in its tissues which would cause the carcass or carcasses of such animal, if slaughtered, to be adulterated . . . and may order any premises or farm where such disease or condition exists or shall have recently existed to be put in quarantine so that no domestic animal shall be removed from or brought to the premises quarantined during the time of quarantine"]; 76(3) [premises may be quarantined where owner refuses to let animals be tested]. *See also* AML § 72(1), *supra*.

[1.79] 4. Destruction of Animals Exposed to Disease

AML §§ 85 ["Whenever [in the judgment of the DAM Commissioner] it is necessary for the more speedy and economical suppression or prevention of the spread of any such disease, [the commissioner] may cause to be slaughtered . . . any animals or animals which by contact or association with diseased animals or other exposure to infection or contagion may be considered or suspected to be liable to contract or communicate the disease sought to be suppressed or prevented."]; 88 [provisions for indemnity

for destroyed animals]. *See also* AML § 72(1), *supra*; PHL §§ 2141, 2143, 2144, 2145 [special provisions for control of animals with rabies].

[1.80] B. New York City Health Code

[1.81] 1. Reports

Health Code [24 RCNY] § 11.25(a) and (b) [list of animal diseases that must be reported within 24 hours of diagnosis by veterinarian or other person responsible for animal care or treatment].

[1.82] 2. Investigation

Health Code [24 RCNY] § 11.25(d)(1) [City Department of Health to "make such investigation as the Department considers necessary for the purpose of verifying diagnosis, ascertaining source of infection and discovering other animals and humans exposed to the animal . . . . The Department may collect or require to be collected for laboratory examination such specimens as the Department considers to be necessary to assist in diagnosis or ascertaining the source of infection, and shall order the owner or other person harboring or having control of the animal to take such measures as may be necessary to prevent further spread of the disease and to reduce morbidity and mortality in animals and humans."].

[1.83] 3. Seizure and Isolation

Health Code [24 RCNY] § 11.25(d)(2) ["An animal infected with or suspected of having any disease listed in this section may be seized or impounded by the Department . . . and be ordered held or isolated at the owner's expense under such conditions as may be specified by the Department."].

[1.84] 4. Destruction

Health Code [24 RCNY] § 11.25(d)(2) ["[W]here the Department has determined that an animal presents an imminent and substantial threat to the public health, such animal may be humanely destroyed immediately . . . ."]. *See also* § 11.27 [special rules for control of animals with rabies].

Commentary

The laws governing domestic and other animals harboring diseases that are contagious to humans contain authority for control mechanisms that are similar to those that apply to contagious diseases in humans themselves—investigations, seizures, isolation, quarantine, vaccinations. These laws also authorize the ultimate remedy: the slaughter of the infected animals and any animals that may have been exposed to the disease. As with any order issued by an administrative body or officer, an order of the DAM or City Commissioner of Health is subject to judicial review by an Article 78 proceeding. The City of New York remains subject to the provisions of the Agriculture and Markets Law, but has issued its own rules to more precisely apply animal restrictions and control to an urban environment.

[1.85] VIII. EMERGENCY RESPONSES TO DISASTERS

[1.86] A. Authority

[1.87] 1. Executive Law [Exec. Law]

Executive Law Article 2-B addresses the local and State responses to "disasters," including epidemics and other public health emergencies. *See* Exec. Law § 20(2)(a) ["disaster" means "occurrence or imminent threat of widespread or severe damage, injury or loss of life or property resulting from any natural or man-made causes, including but not limited to . . . epidemic, air contamination . . . infestation . . . radiological accident, nuclear, chemical, biological or bacteriological release, water contamination . . . ."]. The provisions of Article 2-B of the Executive Law are applicable to New York City.

[1.88] a. Role of Localities

[1.89] (i) Local Disaster Emergency Plans

Executive Law §§ 23(1) ["Each county, except those contained in the city of New York, and each city, town and village is authorized to prepare comprehensive emergency management plans . . . . City, town and village plans shall be coordinated with the county plan."]; 23(7) ["Such plans shall include, but not be limited to: . . . . (b) Disaster response . . . [and]

shall include, but not be limited to: (1) coordination of resources, management and services . . . . (4) arrangements for activating municipal and volunteer forces . . . . (6) a plan for coordination [of] evacuation procedures . . . . (11) care for the injured and needy . . . . (13) control of ingress and egress to and from a disaster area . . . ."]. The comprehensive emergency plans also must include plans for disaster prevention and disaster recovery. Exec. Law § 23(7)(a) and (c).

[1.90] (ii) Local Responses to Disasters

Executive Law §§ 25(1) ["Upon the threat or occurrence of a disaster, the chief executive of any political subdivision is hereby authorized and empowered to and shall use any and all facilities, equipment, supplies, personnel and other resources of his political subdivision in such manner as may be necessary or appropriate to cope with the disaster or any emergency resulting therefrom."]; 25(7) ["Any power or authority conferred upon any political subdivision by this section shall be in addition to and not in substitution for or limitation of any powers or authority otherwise vested in such subdivision or any officer thereof."]; 26 [(1) "Upon threat or occurrence of a disaster, the chief executive of a county may coordinate responses for requests for assistance made by the chief executive of any political subdivision within the county" and (2) "shall utilize any comprehensive emergency management plans prepared by the affected municipality."]. *See* § 20(1)(a) [local government is "the first line of defense in times of disaster"].

[1.91] (iii) Local Use of Disaster Emergency Response Personnel

Executive Law §§ 29-b(2)(a) ["Upon threat or occurrence of a disaster, . . . the county chief executive may direct the emergency management director of a county to assist in the protection and preservation of human life or property by calling upon disaster emergency response personnel employed by or supported by that county . . . to perform the emergency response duties assigned to them."]; 29-b(2)(b) ["The disaster emergency response personnel of the county shall be regarded as a reserve disaster force to be activated . . . by the county emergency management director . . . when the county chief executive . . . is convinced that the personnel and resources of local municipal and private agencies normally available

for disaster assistance are insufficient adequately to cope with the disaster."]; 29-b(3) [same as to a city's use of disaster emergency response personnel]. *See* § 20(2)(g) ["'Disaster emergency response personnel' means agencies, public officers, employees or affiliated volunteers having duties and responsibilities under or pursuant to a comprehensive emergency management plan"].

[1.92] (iv) Local States of Emergency and Suspension of Local Laws

Executive Law § 24(1) ["in the event of a disaster . . . and upon a finding by the chief executive [of a county, city, town or village] that the public safety is imperiled thereby, such chief executive may proclaim a local state of emergency . . . . Following such proclamation and during the continuance of the local state of emergency, the chief executive may promulgate local emergency orders to protect life and property or to bring the emergency situation under control. As illustration, such orders may . . . provide for:

(a) the establishment of a curfew and the prohibition and control of pedestrian and vehicle traffic . . . ;

(b) the designation of specific zones within which the occupancy and use of buildings and the ingress and egress of vehicles and persons may be prohibited or regulated;

(c) the regulation and closing of places of amusement and assembly;

* * *

(e) the prohibition and control of the presence of persons on public streets and places;

* * *

(g) the suspension . . . of any of its local laws, ordinances or regulations, or parts thereof subject to federal and state constitutional, statutory and regulatory limitations, which may prevent, hinder, or delay necessary action in coping with a disaster or recovery therefrom [but only when a request has been made to the Governor for

> state assistance and the state assistance is necessary to supplement local efforts to save lives and to protect property, public health and safety, or to avert or lessen the threat of a disaster (Exec. Law § 24(7)) or whenever the Governor has declared a state disaster emergency pursuant to Exec. Law § 28(1)]."].

The powers afforded under Executive Law § 24 are in addition to all those the locality or its chief executive would otherwise have. Exec. Law § 24(4) ["Nothing in this section shall be deemed to limit the power of any local government to confer upon its chief executive any additional duties or responsibilities deemed appropriate."]. Violation of an order issued under Executive Law § 24 is a misdemeanor. Exec. Law § 24(5).

[1.93] b. Role of the State

[1.94] (i) State Disaster Preparedness Plans

Executive Law §§ 21(1) [establishment of state disaster preparedness commission]; 21(3)(c) [power of commission to prepare state disaster preparedness plans]; 22(3) [contents of state disaster preparedness plans —which include the same subject areas of disaster prevention, response and recovery that are included in section 23 of the Executive Law governing local disaster emergency plans (*see* A(1)(a)(i), above)]. All powers of the State Civil Defense Commission (*see* 3, below—State Defense Emergency Act) are assigned to the State Disaster Preparedness Commission. Exec. Law § 21(4).

[1.95] (ii) State Declaration of Disaster Emergency

Executive Law §§ 28 [(1) "Whenever the governor . . . finds that a disaster has occurred or may be imminent for which local governments are unable to respond adequately, he shall declare a disaster emergency by executive order"; (3) the order shall remain in effect for no more than six months, with additional orders not exceeding six months]; 29 ["Upon the declaration of a state disaster emergency," the Governor may direct state agencies "to provide assistance under the coordination of the disaster preparedness commission"—which includes equipment, supplies, medicines, food and personnel, as well as "performing on public or private lands tem-

porary emergency work essential for the protection of public health and safety."]; 29-b(1) ["The governor may, in his or her discretion, direct the state disaster preparedness commission to conduct an emergency exercise or drill under its direction, in which all or any of the personnel and resources of the agencies of the commission of the state may be utilized to perform the duties assigned to them in a disaster for the purpose of protecting and preserving human life or property in a disaster."].

[1.96] (iii) Suspension of Laws

Executive Law §§ 29-a(1) ["Subject to the state constitution, the federal constitution and federal statutes and regulations . . . the governor may by executive order temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency."]; 29-a(2)(a) [suspension for no more than 30 days; extensions for periods not to exceed 30 days]; 29-a(2)(b) ["no suspension shall be made which does not safeguard the health and welfare of the public and which is not reasonably necessary to the disaster effort"]; 29-a(2)(d) ["the order may provide for such suspension only under particular circumstances, and may provide for the alteration or modification of the requirements of such statute, local law, order, rule or regulation suspended, and may include other terms and conditions"]; 29-a(2)(e) [suspension shall provide for "the minimum deviation" from the requirements of the law or order "consistent with the disaster action deemed necessary"]; 29-a(3) [suspensions "shall be published as soon as practicable in the state bulletin"]; 29-a(4) [the Legislature by concurrent resolution may terminate the suspension of laws].

[1.97] 2. Additional Statutory Authority for New York City

New York City Charter § 560 [In the event of a "great and imminent peril to the public health," the City Board of Health may issue a "declaration of imminent peril" and "take such measures, and order the [City Department of Health] to do such acts beyond those duly provided for the preservation of the public health"]; Health Code [24 RCNY] § 3.01(d) ["Where urgent public health action is necessary to protect the public health against an imminent or existing threat, the [New York City Commissioner of Health] may declare a public health emergency . . . and . . . may establish procedures to be followed, issue necessary orders and take

such actions as may be necessary for the health or the safety of the City and its residents. Such procedures, orders or actions may include, but are not limited to, exercising the [Board of Health's] authority to suspend, alter or modify any provision of [the New York City Health Code], or exercising any other power of the Board of Health to prevent, mitigate, control or abate an emergency" until the Board has an opportunity to meet]. The City Commissioner's emergency powers under section 3.01(d) are "separate and apart" from the Mayor's emergency powers under Executive Law § 24, *see* § 3.01(e).

[1.98] 3. State Defense Emergency Act [SDEA]

The SDEA applies only to "an attack . . . by an enemy or foreign nation upon the United States." Unconsolidated Laws [Unconsol. Laws] § 9103(2) [an "attack" is "[a]ny attack, actual or imminent, or series of attacks by an enemy or foreign nation upon the United States causing, or which may cause, substantial damage or injury to civilian property or persons in the United States in any manner by sabotage or by use of bombs, shellfire, or nuclear, radiological, chemical, bacteriological, or biological means or other weapons or processes"].

[1.99] a. Civil Defense Plans

Unconsolidated Laws §§ 9121(3) [State civil defense commission to adopt "a comprehensive plan for the civil defense of the state"; detailed listing of what must be included in the plan] (The state civil defense commission is now the state disaster preparedness commission established pursuant to section 21 of the Executive Law. *See* Exec. Law § 21(4).); 9122(1) and (2) [Every county and city must "prepare and make effective" a civil defense plan and create a civil defense office]; 9123 [Every county and city must (1)(a) create a plan that provides for "full integration of existing resources, of manpower, materials, facilities and services into a civil defense force and a detailed plan for civil defense operations in the event of attack"; (4) "Equip and train the members of all municipal agencies for the performance of specific civil defense duties during and subsequent to attack"; (5) "Organize, approve, recruit, equip and train volunteer agencies for civil defense purposes"]. *See* § 9103(6) [definition of "civil defense forces"—"agencies, public officers, employees, and enrolled civil defense volunteers, all having duties and responsibilities under or pursu-

ant to this act in connection with civil defense"]. (The "civil defense forces" authorized pursuant to the SDEA have been effectively replaced by the "disaster emergency response personnel" governed by the Executive Law. *See* Exec. Law §§ 20(2)(g); 29-b].)

[1.100] b. Response to an "Attack"

Unconsolidated Laws § 9129 [(1) ["in the event of attack," the state civil defense commission may "(a) assume direct operational control of any or all civil defense forces"; (b) order the use of personnel and equipment where needed; (d) "take, use or destroy any and all real or personal property, or any interest therein, necessary or proper for the purposes of civil defense"; and (e) execute any of the civil defense powers and duties of counties or cities]; (2) [in the event of attack, a county or city (a) may compel evacuations (includes "anticipation" of an attack); (b) "shall control all pedestrian and vehicular traffic, transportation and communication facilities and public utilities; provide medical treatment, food, clothing, shelter and care for the injured and needy; provide for public safety and the protection and conservation of property; . . . and provide for the restoration of essential services and facilities"; (c) "to the extent necessary to perform such functions . . . it may take, use or destroy real or personal property and impress persons into service for the performance of such work"]; (3) and (4) ["just compensation must be paid to the owner of the property taken" pursuant to § 9129]].

Commentary

The statutory emergency provisions in the Executive Law exist in tandem with the other statutory and the common law police powers of local chief executives and health officers to take necessary action to deal with health emergencies—both those caused by contagious diseases and those caused by other conditions harmful to the public health. *See* sections IV (Isolation and Quarantine), V (Mandatory Examination and Treatment) and VI (Inspections and Seizures of Property). The localities' common law police power is especially broad-based and robust. *See* Commentary to IV(I)(1), *supra*. Where there is a "disaster," *i.e.*, "the occurrence or imminent threat of widespread or severe damage, injury or loss of life or property," Exec.

Law § 20(2)(a), the chief executive of the locality is authorized to "proclaim a local state of emergency." Exec. Law § 24(1). Once having done so, local authorities may establish curfews, quarantine wide areas, close businesses, restrict public assemblies and, under certain circumstances, suspend local ordinances. However, in the absence of the proclamation of a "local state of emergency," the existing statutory and common law police powers include most of the same powers that could be activated by the state-of-emergency declaration (except the suspension of laws). The distinction between the exercise of statutory and common law police powers and the exercise of statutory emergency powers is a matter of degree, with the declaration of a local state of emergency addressing responses to conditions that are "widespread or severe."

Where the Governor has made a finding that "local governments are unable to respond adequately" to a disaster, the Governor may declare a "disaster emergency" by executive order. Exec. Law § 28(1). Since the statutory scheme for responding to public health concerns places that response primarily in local authorities, it is unlikely that the State would take direct action in a public health crisis without a governor's order declaring a disaster emergency, unless the source of the crisis is identifiable and specific enough to be addressed by the issuance of an order of the State Commissioner of Health under PHL § 16.

One consequence of the issuing of a declaration of emergency on either the state or local level is that it can set into motion statutory provisions relating to the use of disaster emergency response personnel to meet the emergency. These "disaster emergency response personnel" are the replacements of the "civil defense forces" that were created pursuant to the State Defense Emergency Act, which was enacted in 1951 as a product of the "Cold War" to facilitate state and local responses in an enemy "attack." The SDEA does not apply to naturally occurring outbreaks of disease. While the SDEA remains in place to address enemy attacks, it has for the most part been subsumed by the Executive Law emergency response provisions that cover all emergencies, including attacks. *See In re World Trade Cen-*

ter Disaster Site Litigation, 456 F. Supp. 2d 520, 548-49 (S.D.N.Y. 2006), *aff'd in part and dismissed in part*, 521 F.3d 169 (2d Cir. 2008) [containing a detailed discussion of the interplay between the Executive Law emergency disaster provisions and the State Defense Emergency Act, holding that the SDEA remains viable, and concluding that while the Executive Law provisions would apply to all disasters, the SDEA applies to terrorist attacks and can be applied as such even without being invoked].

The Executive Law permits the local chief executive to suspend local laws or regulations after declaring a local state of emergency, but only when the Governor has declared a state disaster emergency or where the locality has requested state assistance because the disaster is beyond the capacity of local government to meet adequately. Exec. Law § 24(1)(g), (7). The Governor may suspend specific provisions of any laws or regulations, state or local, by declaring a state disaster emergency. Exec. Law § 29-a(1). But these suspensions of law are not necessary for local health officers to exercise fully their powers to isolate, quarantine, examine, treat or search and seize; those powers can already be exercised pursuant to existing statutes, rules and common law. Suspension of laws would be used predominantly to supplement this existing authority, such as the Governor's suspension of licensing requirements during the H1N1 flu pandemic to permit additional health practitioners to give flu shots. Executive Order No. 29, October 28, 2009.

The authority to suspend laws remains subject to federal and state constitutional requirements (and federal laws). Executive Law §§ 24(1)(g); 29-a(1). This should not prove to be an obstacle, because federal and state constitutional restraints permit expeditious actions in emergency situations. *See*, *supra*, IV(G) [Isolation and Quarantine]; V(B) and (C) [Mandatory Examination and Treatment]; VI(B) [Inspection and Seizure of Property].

[1.101] c. Allocation of Resources in Disasters

[No applicable statutes or rules]

Commentary

Among the most critical, and most sensitive, decisions that have to be made by medical professionals in response to public health disasters is how to allocate scarce resources to vulnerable populations. Epidemics—or biological, chemical or radiological disasters—could put overwhelming demands on the need for medicines, vaccines, medical devices (such as ventilators), and hospital facilities. There are no statutes or rules directly addressing which vulnerable persons should get priority to limited health resources, although federal and state anti-discrimination laws protecting various populations (*e.g.*, the elderly and the disabled) could constrain government actions that would otherwise have a discriminatory impact.

Health care providers therefore need to work within an ethical framework that balances the duty to care for patients with the duty to use scarce resources wisely. In serious health emergencies, this most likely would involve a triage system that balances the obligation to save the greatest number of lives against the obligation to care for each single patient. *See* 42 U.S.C. § 1395dd; 42 CFR § 489.24(1) [hospitals that have emergency departments have obligation to provide a medical screening examination and stabilizing treatment to every patient who arrives for care]. Such a system would generally be based on clinical evaluations of which persons would have the best chance to survive given the resources available. The specific criteria for making such grim decisions remain a source of active debate in the health care community. The State Department of Health, in coordination with the New York Task Force on Life and the Law, and the Federal Centers for Disease Control and Prevention (CDC) have issued plans for allocation of scarce resources in specific situations (*see* State plan for allocation of ventilators in an influenza pandemic, available at http://www.nyhealth.gov/; CDC prioritization of H1N1 vaccine recipients in 2009, available at http://www.cdc.gov/) but, absent such prioritization, health care providers are not required to institute any specific allocation protocols. Failure to comply with any existing state and federal requirements and guidelines could carry severe consequences, including loss of government funding.

[1.102] C. Statutory Immunity From Liability

[1.103] 1. State Defense Emergency Act

Unconsolidated Laws § 9193(1) ["The state, any political subdivision, municipal or volunteer agency . . . or a civil defense force thereof . . . or any individual . . . in good faith carrying out, complying or attempting to comply with any law, any rule, regulation or order duly promulgated or issued pursuant to this act . . . including but not limited to activities pursuant thereto, in preparation for anticipated attack, during attack or following attack or false warning thereof, or in connection with an authorized drill or test, shall not be liable for any injury or death to persons or damage to property as the result thereof."]. *See* Exec. Law § 29-b(1), below.

[1.104] 2. Executive Law

Executive Law §§ 25(5) ["A political subdivision shall not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of any officer or employee in carrying out the provisions of this section" [which authorize the chief executive of any political subdivision to use any facilities, equipment and personnel "in such manner as may be necessary or appropriate to cope with the disaster or any emergency resulting therefrom." § 25(1)]]; 23-a(6) ["A county shall not be liable for any claim based upon the good faith exercise or performance or the good faith failure to exercise or perform a function or duty on the part of any officer or employee in carrying out a local disaster preparedness plan."]; 26(3) ["A chief executive or any elected or appointed county, city, town or village official shall not be held responsible for acts or omissions of municipal employees, disaster preparedness forces or civil defense forces when performing disaster assistance pursuant to a declared disaster emergency or when exercising comprehensive emergency management plans."]; 29-b(1) ["The governor may, in his or her discretion, direct the state disaster preparedness commission to conduct an emergency exercise or drill under its direction, in which all or any of the personnel and resources of the agencies of the commission of the state may be utilized to perform the duties assigned to them in a disaster for the purpose of protecting and preserving human life or property in a disaster. During a disaster or such drill or exer-

cise, disaster emergency response personnel in the state shall operate under the direction and command of the chair of such commission and shall possess the same powers, duties, rights, privileges and immunities as are applicable in a civil defense drill held at the direction of the state civil defense commission under the provisions of the New York State defense emergency act."] (see below for definition of "drill" under the SDEA); 29-b(2)(e) ["When performing disaster assistance pursuant to this section, county disaster emergency response personnel shall operate under the direction and command of the county emergency management director and his or her duly authorized deputies, and shall possess the same powers, duties, rights, privileges and immunities they would possess when performing their duties in a locally sponsored civil defense drill or training exercise in the civil or political subdivision in which they are enrolled, employed or assigned emergency response responsibilities."]; 29-b(3)(e) ["When performing disaster assistance pursuant to this subdivision, disaster emergency response personnel [of a city] shall operate under the direction and command of the city emergency management director and his or her duly authorized deputies, and shall possess the same powers, duties, rights, privileges, and immunities they would possess when performing their duties in a locally sponsored civil defense drill or training exercise in the city in which they are enrolled, employed or assigned emergency response responsibilities."]; 29-b(2)(h) ["Neither the chief executive of a city, nor the county chief executive, nor any elected or appointed town or village official to whom the county chief executive has delegated supervisory power as aforesaid shall be responsible for acts or omissions of disaster emergency response personnel when performing disaster assistance."]; 29-b(3)(h) ["Neither the chief executive officer of a city, nor the county chief executive, shall be held responsible for acts or omissions of disaster emergency response personnel when performing disaster assistance."]. *See* Unconsol. Laws § 9103(14) ["drill" includes "assistance by civil defense forces in combating natural or peacetime disasters upon the direction of a public officer authorized by law to call upon a civil defense director for assistance in protecting human life or property"].

[1.105] 3. Federal Public Readiness and Emergency Preparedness Act

The Public Readiness and Emergency Preparedness Act (the PREP Act), 42 U.S.C. § 247d-6d, provides a wide range of persons and entities, including governmental entities and public health workers, with broad-based immunity from claims arising from the production and use of "countermeasures," including vaccines and other drugs, in response to a denominated "public health emergency." The list of such emergencies currently includes those caused by smallpox, pandemic flu, anthrax and botulism. *See also* 42 U.S.C. § 233(p) [providing for federal indemnification for claims arising from vaccination against smallpox].

[1.106] 4. Federal Volunteer Protection Act

The Volunteer Protection Act, 42 U.S.C. §§ 14501 *et seq*., provides volunteers with immunity from liability in circumstances where the volunteer was acting within the scope of his or her responsibilities in a non-profit organization or governmental entity. *See* 42 U.S.C. § 14503.

Commentary

The State Defense Emergency Act, which is applicable only to enemy attacks, grants immunity from liability to a broad range of government entities and public and private individuals who were "in good faith carrying out, complying with or attempting to comply with any law." Unconsol. Laws § 9193(1). Section 29-b of the Executive Law governs all disaster emergencies, including those caused by attacks, and extends this SDEA immunity provision to a wide range of disaster emergency response personnel (including volunteers) preparing for and responding to a "disaster." Exec. Law § 29-b(1). *See also* § 29-b(2)(e) and (3)(e). To the extent that the conditions of section 29-b may not be met, the Executive Law contains multiple provisions granting immunity to political subdivisions, counties, and county and local "officials" when performing disaster assistance. *See* Exec. Law §§ 23-a(6), 25(5), 26(3), 29-b(2)(h), 29-b(3)(h). And there may be a retroactive legislative response addressing immunity in specific public health disaster emergencies.

In those instances where statutory immunity would not apply, actions against governmental entities, officials and employees, and public health workers and other emergency responders would be limited by general common law principles of liability. *See, e.g.*, *Crayton v. Larabee*, 220 N.Y. 493, 502 (1917) [action for damages for quarantine; no liability for "mere error in judgment" but action may be maintained if decision to quarantine was "arbitrary, unreasonable or oppressive," or in excess of authority]; *Caristo v. Sanzone*, 96 N.Y.2d 172, 175 (2001) [emergency action doctrine—a person faced with "a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration" is judged on whether response is that of a reasonably prudent person under the circumstances]. *See*, *in general*, *McLean v. City of New York*, 12 N.Y.3d 194, 203 (2009) ["Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general."].

Public employees may be eligible to receive indemnification from the state or locality should they be subject to liability. Public Officers Law [POL] §§ 17 (defense and indemnification of state officers and employees) and 18 (defense and indemnification of local officers and employees) [both affording public employees, including "volunteer[s] expressly authorized to participate in a publicly sponsored volunteer program," representation and indemnification for acts while the employees were acting within the scope of their public employment, but not indemnification where the injury or damage resulted from intentional wrongdoing]; General Municipal Law [GML] § 50-k(1)(e), (3) [same as to employees of the City of New York and authorized volunteers]. Should the immunity provisions of the Executive Law not cover an employee (or an authorized volunteer) of a municipality or other political subdivision of the state, the immunity provisions directly applicable to the political subdivisions themselves may be able to serve as a basis for immunity for their employees because of the legal obligation of the political subdivisions to expend public moneys to indemnify the employees. *See Ebert v. New York City Health and Hospitals Corporation*, 82 N.Y.2d 863, 866 (1993) [holding that HHC's obligation to indem-

nify its employees under section 50-k of the General Municipal Law makes HHC "the real defendant in interest under the judgment" and the statutes governing the rate of interest on a judgment to be paid by HHC should prevail]; *Simmons v. New York City Health and Hospitals Corporation*, 71 A.D.3d 410 (1st Dep't 2010) [same as to statute of limitations]. *See also* POL §§ 17(9), 18(11); GML § 50-k(9) [all providing that the indemnification provisions therein shall not be construed to impair or restrict any immunity available to any unit, entity or officer or employee in the public sector provided by any other provision of law].

[1.107] IX. CONFIDENTIALITY OF PATIENT RECORDS

[1.108] A. New York Authority

[1.109] 1. Patient Records Maintained by Health Care Providers

PHL §§ 18(2) [right to access to patient information by "qualified persons"]; 18(1)(g) ["qualified person" means subject, parent, guardian or attorney]; 18(3)(a), (d) [limitations on access by qualified persons]; 18(3)(i) [release of patient information is subject to "(iv) any other provisions of law creating special requirements relating to the release of patient information"]; 18(6) [record-keeping obligations where release is to other than a "qualified person"]. *See* 10 NYCRR §§ 405.10(a)(6) [requiring hospitals to ensure confidentiality of patients' records]; 751.7(g) [same as to clinics]. *See also* Education Law § 6530(23) [physician's unauthorized revealing of personally identifiable information is professional misconduct]; 8 NYCRR § 29.1(b)(8) [same for non-physician medical professionals]. *And see* PHL §§ 2782(4), 2785(2) [special requirements for disclosure of confidential HIV-related information].

[1.110] 2. Patient Information Contained in Records of Public Agencies

Personal Privacy Protection Law [applicable to state agencies and entities (POL § 92(1))]. Public Officers Law § 96(1) ["No agency may disclose any record or personal information unless such disclosure is: . . . (b) to those officers and employees of, and to those who contract with, the agency that maintains the record if such disclosure is necessary to the per-

formance of their official duties pursuant to a purpose of the agency required to be accomplished by statute or executive order or necessary to operate a program specifically authorized by law; or . . . (d) to officers or employees of another governmental unit if each category of information sought to be disclosed is necessary for the receiving governmental unit to operate a program specifically authorized by statute and if the use for which the information is requested is not relevant to the purpose for which it was collected; or . . . (f) specifically authorized by statute or federal rule or regulation"]. *See also* PHL § 206(1)(j) [data received by State Department of Health for the purpose of certain scientific studies, or through improvement of quality of medical care through conduction of medical audits, is confidential]. • *New York City*: Health Code [24 RCNY] §§ 11.11(a) [records of cases and contacts and suspect cases and contacts of diseases and conditions of public health interest reported to the City Department of Health are confidential]; 11.11(c) [records protected under (a) may be released, in the discretion of the Department, "to any person when necessary for the protection of public health"]. *See also* § 3.25(a) and (b) [records of Department containing individually identifiable information are confidential but may be disclosed "to any person when necessary for the protection of health"]; New York City Charter § 556(d)(2) [information received by City Health Department in conducting research for purpose of improving the quality of medical and health care is confidential].

Commentary

Patient health records maintained by health care providers are confidential under common law. *Doe v. Community Health Plan-Kaiser Corp.*, 268 A.D.2d 183, 187 (3d Dep't 2000). Section 18 of the Public Health Law sets forth the relatively narrow criteria for who is a "qualified person" entitled to access these records from the health care provider—principally patients and their authorized representatives—and the special circumstances when access by such qualified person may be curtailed. *See* PHL §§ 18(1)(e), (g); (2)(a), (c); (3)(a), (d). However, section 18(3)(i) provides that the release of patient information shall be subject to: " . . . (iv) any other provisions of law creating special requirements relating to the release of patient information." As set forth in IV(C), *supra*, there are strict requirements in the Public Health Law, State Sanitary Code and New York City

Health Code for physicians, laboratories, hospitals and local health officers to identify and report to public health officials cases of communicable diseases and any other medical conditions that are significant threats to public health. *See* 10 NYCRR §§ 2.1, 2.10, 2.12, 2.16; PHL § 2101(1); Health Code [24 RCNY] § 11.03(c). *See also* PHL § 229 [State Sanitary Code provisions have the force and effect of law]. These provisions could be read to fall within "other provisions of law creating special requirements relating to the release of patient information," and so remove health providers and health technicians from the restrictions of section 18 in those circumstances. Moreover, a specific statute will take precedence over a general statute, *People v. Zephrin*, 14 N.Y.3d 296, 301 (2010), and the above laws directing disclosure to public health officials in specific instances should govern over the general confidentiality requirements of PHL § 18. New York law thus would permit exchange of most patient information between and among health care personnel and public health officials as required by public health concerns. *See* PHL requirements for HIV-related information, *supra*. These reporting requirements also are recognized exceptions to the physician/patient privilege codified in CPLR 4504. *See* McKinney's Cons. Laws of New York, CPLR 4504, Practice Commentaries, C4504:4, Exceptions.

Where public health officials maintain this patient information in their own records, it remains confidential to the extent it is not otherwise required or authorized to be disclosed pursuant to laws governing the reporting of personal information to protect the public health. POL § 96(1)(b), (d), (f); Health Code [24 RCNY] § 11.11(c). *See also* New York Freedom of Information Law (POL Article 6) [all public agencies, including those of localities, are not required to provide access to information which, if disclosed, would constitute an unwarranted invasion of personal privacy. POL §§ 87(2)(b); 89(2)(b)].

[1.111] B. Health Insurance Portability and Accountability Act of 1996

The federal Health Insurance Portability and Accountability Act of 1996 [HIPAA] proscribes "individually identified health information . . . created or received by a health care provider, health plan, employer or health care clearinghouse" from being disclosed to others without the written authorization of the individual, except for disclosures for certain specified purposes, such as treatment, payment and health care operations. 42 U.S.C. § 1320d(6)(A); 45 CFR §§ 164.502, 164.508, 164.510. The covered health care providers, which include hospitals and physicians, are those who "transmit any health care information in electronic form in connection with a transaction covered by this chapter." 45 CFR § 160.102(a).

[1.112] 1. Application to Public Health Officials

45 CFR §§ 164.512(b)(1) ["A covered entity may use or disclose protected health information without the written authorization of the individual . . . for the public health activities and purposes described in this paragraph to: (i) a public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, . . . the conduct of public health surveillance, public health investigations, and public health interventions."]; 164.512(j) [disclosure permitted when "necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public"]; 164.510(b)(4) [disclosure permitted to a public or private entity authorized to assist in disaster relief efforts where necessary to notify family members and others of an individual's location, condition or death]. *See* 45 CFR § 164.502(b) [disclosure should be the "minimum necessary" except in certain circumstances, including treatment and where the disclosure is required by law]. *See also* 42 U.S.C. § 1320d-7(b) ["Nothing in this part shall be construed to invalidate or limit the authority, power or procedures established under any [state] law providing for the reporting of disease or injury, child abuse, birth, or death, public health surveillance, or public health investigation or intervention."]; 45 CFR § 164.512(a)(1) [no authorization needed for disclosures that are required by state or local law or rules].

[1.113] 2. Application to Court Records

The requirements of HIPAA do not apply to court records, as a court is not a covered entity subject to those requirements. *See* 42 U.S.C. § 1320d(6)(A) [proscribing only the wrongful disclosure of individually identifiable health information created or received by "a health care provider, health plan, employer or health care clearinghouse."]; 45 CFR § 160.103 [description of "covered entities"].

Commentary

The strict requirements of HIPAA that patient information may not be released without the written authorization of the subject do not apply to public health activities for the preventing or controlling of disease or to public health surveillance, investigations or interventions. In fact, the HIPAA rules specifically allow disclosure of such information, without the patient's written authorization, to public officials and other organizations for various reasons relevant to a public health emergency.

As to court records, while 45 CFR § 164.512(e) contains special requirements for covered entities in the production of personal health information in response to a trial subpoena or discovery request, once the information becomes part of the court record it is no longer subject to HIPAA. This information then becomes subject to the general statutory and common law requirements that court records are open to the public unless otherwise sealed by the court or made confidential by statute. In the absence of applications for protective orders from persons seeking to limit public access to their health information, courts may *sua sponte* decide when the public interest requires that the identities of persons with diseases should be concealed where litigation concerns public health threats.

[1.114] C. Constitutional Right of Privacy

In addition to the common law and statutory recognition of the confidentiality of medical records, the courts have recognized a constitutional right of privacy, which includes an "individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). The

courts have applied this constitutionally protected right to nondisclosure where a medical condition is especially serious or likely to expose a person to stigma. *See, e.g.*, *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) [HIV/AIDS]; *Fleming v. State University of New York*, 502 F. Supp. 2d 324, 343 (E.D.N.Y. 2007) [sickle cell anemia]; *O'Connor v. Pierson*, 426 F.3d 187 (2d Cir. 2005) [psychiatric records]. Nevertheless, the right of privacy of medical information is not absolute but "will vary with the conditions," *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999), and when a protected interest exists, a court will balance the individual's right against the government interest in disclosure. *Whalen v. Roe*, *supra*, 429 U.S. at 878; *O'Connor v. Pierson*, *supra*, 426 F.3d at 201-02.

Commentary

It is unlikely that the disclosures of medical information permitted by statutes and rules governing responses to public health emergencies would be vulnerable to constitutional challenge based on a right to privacy. When courts apply the constitutional balancing test, the societal interest in addressing the health emergency will generally outweigh the individual's interest in privacy.

[1.115] X. OPERATION OF COURTS AMID PUBLIC HEALTH THREATS

[1.116] A. Emergency Relocation of Court Terms

[1.117] 1. Authority to Relocate

Judiciary Law [Jud. Law] §§ 8(1) ["Notwithstanding any other provision of law, if an emergency or other exigent circumstance or the imminent threat thereof prevents the safe and practicable holding of a term of any court at the location designated by law therefor," then (a) the Governor [after consultation with the Chief Judge] may by executive order appoint another location for the temporary holding of such term if it is a term of a trial court; or (b) where no action by the Governor, or if it is an appellate court, "the chief judge or his or her designee (or the presiding justice of an appellate division or his or her designee [for an appellate court within that jurisdiction]) may by order appoint another location for the temporary holding of such term . . . ."]; 8(2) ["To the extent practica-

ble, an order pursuant to subdivision one of this section: (a) shall designate the most proximate location in which such term of court safely and practically can be held, without limitation based on the judicial department, judicial district, county, city, town, village or other geographical district for which such court was established . . . ."]; 8(2)(c) [consultation requirements]; 8(3) [orders effective for no more than 30 days and may be reauthorized for successive periods of no more than 30 days].

[1.118] 2. Applicable Law in Relocated Courts

Judiciary Law § 8(4) ["every action and proceeding in such [relocated] term shall be subject to the same substantive and procedural law as would have applied had such term not been temporarily relocated"].

[1.119] 3. Cost

Judiciary Law § 8(5) ["the costs of temporarily providing facilities suitable and sufficient for the transaction of business of such court outside of such county, city, town or village shall be charges upon the office of court administration"].

Commentary

In 2009, the Legislature enacted a new section 8 of the Judiciary Law [2009 N.Y. Laws ch. 263] to replace statutes dating back a century that had long since faded into obsolescence. New section 8 places in both the Governor and the Chief Judge the authority to temporarily relocate trial courts in emergencies without being constrained by local boundaries, with the state paying the costs where the relocation is to a different locality. Section 8(4) provides that these relocated courts will continue to function under the same procedures as if they had never been moved, so that a relocation may have to address such matters as the feasibility of long-distance jury selection.

[1.120] B. Case Management in Emergencies

[1.121] 1. Authority of Court Administrators

State Constitution, Article VI, § 28(b) ["The chief administrator, on behalf of the chief judge, shall supervise the administration and operation of the unified court system."]; Jud. Law § 211(1) ["The chief judge, after consultation with the administrative board, shall establish standards and administrative policies for general application to the unified court system throughout the state, including . . . (a) the dispatch of judicial business, the . . . transfer of judges and causes among the courts of the unified court system, the assignment and reassignment of administrative functions performed by judicial and nonjudicial personnel . . . ."]; Jud. Law § 212 ["(1) The chief administrator of the courts . . . shall have such powers and duties as may be delegated to him by the chief judge and, in addition, the following functions, powers and duties . . . (c) Establish the hours, terms and parts of court, assign judges and justices to them, and make necessary rules therefor . . . . (2) The chief administrator shall also . . . temporarily assign judges and justices [between different categories of courts]."]; 22 NYCRR § 80.1(b)(6) [the Chief Administrator shall "adopt administrative rules for efficient and orderly transaction of business in the trial courts"]; 22 NYCRR § 200.11(d)(4) [Criminal cases—superior courts: "The Chief Administrator may authorize the transfer of any action and any matter relating to an action from one judge to another in accordance with the needs of the court."]; 22 NYCRR § 202.3(c)(5) [Civil cases—superior courts: "The Chief Administrator may authorize the transfer of any action or proceeding and any matter relating to an action or proceeding from one judge to another in accordance with the needs of the court."].

[1.122] 2. Authority of Judge

Judiciary Law § 2-b(3) ["A court of record has power . . . to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it."]. *See also* State Constitution, Article VI, § 30 ["Nothing herein contained shall prevent the adoption of regulations by individual courts consistent with the general practice and procedure as provided by state or general rules."].

[1.123] 3. Authority of Governor

Executive Law § 29-a(1) ["Subject to the state constitution, the federal constitution and federal statutes and regulations . . . the governor may by executive order temporarily suspend specific provisions of any statute . . . during a state disaster emergency."].

Commentary

The Chief Judge and Chief Administrator of the Courts together have "complete" administrative authority over the Unified Court System, including significant flexibility in assigning judges, non-judicial personnel and cases to meet court needs. *See Met Council, Inc. v. Crosson*, 84 N.Y.2d 328, 335 (1994); *Corkum v. Bartlett*, 46 N.Y.2d 424, 429 (1979) ["The Chief Judge's administrative powers are complete, and the Chief Administrator may employ them fully when and while and to the extent they have been delegated to him."]. *See also Marthen v. Evans*, 83 A.D.2d 415, 418 (4th Dep't 1981) [court administrators have broad power to temporarily assign judges "to enhance judicial efficiency and to promote the public interest"]. While the Legislature, by statute, may impose upon court administrators specific powers and duties, those administrators "[are] not restricted to narrow readings of powers expressly conferred by the statute, but [may exercise] implied powers necessary for the proper discharge of those broad responsibilities," which, in turn, include "reasonable acts on [their] part to further the regulatory scheme." *Matter of New York State Criminal Defense Lawyers v. Kaye*, 96 N.Y.2d 512, 518 (2001). *See also People v. Correa*, 15 N.Y.3d 213, 223 (2010) ["UCS administrators possess broad express and implied powers to take whatever actions are necessary for the proper discharge of their responsibilities."]; *Levenson v. Lippman*, 4 N.Y.3d 280, 291 (2005) [court administrators may fill legislative gaps in the exercise of administrative powers]. In short, during a public health emergency that affects the operation of the courts, court administrators have the authority to step in and take whatever reasonable administrative steps are required to keep the courts operational during the emergency—as long as these actions are not contrary to existing law. Where the emergency reduces the availability of judges

and court personnel, those administrative steps may include centralized hearings, case consolidations, the holding of multiple proceedings before a single judge, and the adjustment of priorities in the hearing of cases (especially those arising as a direct result of the emergency). And where the exigencies of holding isolation and quarantine hearings for infected individuals may require the movement of the hearing to a local site other than the courthouse, court administrators may work with local authorities to do so as well.

Because court administrators remain bound by existing law, the administrative response to public health emergencies affecting court operations may have to be supplemented by adjustments to those laws, especially to the procedural requirements of the Criminal Procedure Law [CPL] and the CPLR. These adjustments can be made through the Governor's power to suspend laws pursuant to a declaration of emergency. Exec. Law § 29-a(1). The management of cases by the courts during a public health emergency thus requires a cooperative effort of the Chief Judge and Chief Administrative Judge with the Governor—the former to reallocate court resources, and the Governor to suspend those statutes, consistent with the rights of the parties to fair hearings, that restrict court administrators from successfully meeting the challenge of operating the courts during a disaster emergency. *See*, *e.g.*, Executive Order No. 113.7, September 12, 2001 [suspending CPLR statutes of limitations and CPL periods of trial readiness during the emergency caused by the closing of courts and destruction of law offices in New York County as a result of the 9/11 attacks]; Executive Order 113.28, October 4, 2001 [reinstating statutes of limitations except for persons "directly affected by the disaster emergency"].

Should court administrators have to take steps that include the centralization of hearings and the consolidation of cases, the judges hearing cases under those conditions have broad authority to devise court procedures to facilitate the hearing of those cases. Section 2-b(3) of the Judiciary Law permits judges "to devise and make new process and forms of proceedings," and the courts have cited this statute, together with a judge's inherent rule-making powers as recognized in section 30 of Article VI of the State Constitution, in

upholding a judge's adapting procedures to the needs of the court as long as the new procedures are "consistent with general practice as provided by statute." *People v. Ricardo B.*, 73 N.Y.2d 228, 232 (1989) [trial court has authority to empanel two juries, despite clear statutory references to a single jury and no statutory authorization for multiple juries]. *See id.* at 233 ["the courts may adopt new procedures which are fair and which facilitate the performance of their responsibilities"].

[1.124] C. Remote Appearances

[1.125] 1. Legislative Authorization

CPL § 182.20(1) [court may dispense with the personal appearance of a criminal defendant "except an appearance at a hearing or trial" and may "conduct an electronic appearance" (in certain listed counties) with the authorization of the Chief Administrator and the consent of the defendant]; 22 NYCRR Part 106 [rules implementing § 182.20]; CPL § 65.10(2) [when a court declares a child witness to be "vulnerable," it shall "authorize the taking of the testimony of the vulnerable child witness from the testimonial room by means of live, two-way closed-circuit television"].

[1.126] 2. Authority of Judge

Judiciary Law § 2-b(3) ["A court of record has power . . . to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it."]. *See also* State Constitution, Article VI, § 30 ["Nothing herein contained shall prevent the adoption of regulations by individual courts consistent with the general practice and procedure as provided by state or general rules."].

Commentary

The constitutional and statutory authority of judges to devise special procedures for the hearing of cases in public health emergencies (*see* B, above) extends to procedures permitting remote appearances in situations where a quarantine or other health-related restriction may prevent litigants, attorneys or witnesses from physically appearing

in court. As long as a statute does not specifically foreclose or otherwise control the use of remote appearances, the courts "may fashion necessary procedures consistent with constitutional, statutory and decisional law" to permit remote appearances. *People v. Wrotten*, 14 N.Y.3d 33, 37-38 (2009) [upholding video trial appearance of witness in a criminal case who was too ill to travel to New York from California, notwithstanding the existence in the CPL of statutes authorizing video appearances for vulnerable child witnesses and criminal defendants and no statutes addressing video appearances for other witnesses].

Remote appearances in criminal cases do not violate the Confrontation Clause. United States Constitution, Sixth Amendment; New York Constitution, Article I, section 6 ["In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her."]. Courts have permitted video appearances where a fact-specific analysis of a particular case shows that a denial of "physical, face-to-face confrontation" is "necessary to further an important public policy" and "the reliability of the testimony is otherwise assured." *People v. Wrotten*, *supra*, 14 N.Y.3d at 39, quoting *Maryland v. Craig*, 497 U.S. 836, 850 (1990). The Court of Appeals in *Wrotten* upheld a live two-way video appearance by a witness as "reliable"—because it preserved all the other elements of the confrontation right, including testimony under oath, opportunity for contemporaneous cross-examination, and the opportunity for the judge, jury and defendant to view the witness's demeanor. *Id*. And the public policy requirement was satisfied notwithstanding that the public policy was not codified in statute. *Id*. at 39. The Court of Appeals concluded: "We agree that the public policy of justly resolving criminal cases while at the same time protecting the well-being of a witness can require live two-way video testimony in the rare case where a key witness cannot physically travel to court in New York and where, as here, defendant's confrontation rights have been minimally impaired." *Id.* at 40.

The exercise of a judge's authority to permit remote appearances remains governed by statutes that address specific areas of testimony. Insofar as the defendant in a criminal case is concerned, CPL § 182.20(1) authorizes such appearances "except an appearance at a hearing or trial" (and requires the consent of the defendant for any such remote appearance). Were a public health emergency to lead to a need for a criminal defendant to appear remotely at a trial, and assuming that the remote appearance satisfied the requirements of the Confrontation Clause, the appearance could be had only if the Governor exercised his or her power during a state disaster emergency to suspend CPL § 182.20.

The Confrontation Clause, by its terms, does not apply to civil cases, and the courts have found no absolute right to confrontation in civil trials. *See Pope v. Pope*, 198 A.D.2d 406 (2d Dep't 1993) [no right for prisoner to appear personally at civil trial in which he or she is a party]. Civil trials are instead governed by general principles of due process, and a denial of confrontation would be one element in a determination of whether a party received a fair trial. *See*, *e.g.*, *Beeley v. Spencer*, 309 A.D.2d 1303, 1305-06 (4th Dep't 2003) [examining impact on fairness of personal injury trial of statements of eyewitnesses being introduced without their testimony]. Issues of remote appearances in civil trials due to public health emergencies may best be handled by obtaining the consent of the parties.

[1.127] D. Protection of Court Personnel

[No applicable statutes or rules]

Commentary

Outbreaks of contagious diseases can put judges and nonjudicial court personnel at risk if the participants in court proceedings have those contagious diseases. One option is to bar the presence of such infected individuals from the courthouse. This can be done by adjourning proceedings involving litigants who are known to have an infectious disease, or by getting infected individuals to voluntarily absent themselves physically from the courtroom where the pro-

ceeding is scheduled and arranging for their testimony either by interrogatories or by remote appearance. *See* C, above.

Where the presence of a participant who has a contagious disease occurs, and the court determines that the hearing of the case cannot be postponed, protocols are currently in place for addressing the health threat. Where the disease is transmitted by a blood-borne pathogen, court personnel may wear protective gloves; where the disease is transmitted by an air-borne pathogen, court personnel may wear respirators. This equipment is already available at many courthouses. However, the wearing of respirators by the multiple participants in a courtroom setting would no doubt be disruptive to the proceeding, and courts may have to explore alternatives, such as requiring the infectious person to wear the respirator or isolating an infectious litigant in a separate room with an audio-visual connection to the courtroom. *Cf. Illinois v. Allen*, 397 U.S. 337, 342-43 (1970) [the right to be present at trial is not violated where a trial judge removed a criminal defendant from the courtroom for disruptive behavior].

Screening of members of the public for contagious diseases is not practicable. If an epidemic of a contagious disease is so severe that members of the public generally would all be susceptible to infection, then the best approach, short of adjourning the case, may be to relocate the courthouse away from the infected area. Should a court proceeding be held entirely electronically, with no participants or members of the public physically appearing at the courthouse, there must be, at the very least, a complete audio-visual reproduction of the proceeding available to the public. *See* Jud. Law § 4 ["The sittings of every court within this state shall be public, and every citizen may freely attend the same . . . ."].

[1.128] XI. CONCLUSION

The potential for a public health emergency is a grave concern to all citizens. Public health professionals, attorneys and judges are deeply concerned with the legal issues brought about by the chaos, confusion and ad hoc responses that can occur in an emergency situation. As we learned in

the World Trade Center disaster, having clear lines of authority, areas of responsibility and chains of command go far to protect the victims, the public at large and the rule of law. It is hoped that this *Manual* will help judges, lawyers and public health officials and professionals in their efforts to navigate the myriad statutes and rules, many of which were adopted at a time when recent emergencies could not have been foreseen, and apply the constitutional principles that balance individual rights with societal health requirements.

CASES

STATUTES, RULES & REGULATIONS

FEDERAL

United States Code

Code of Federal Regulations

NEW YORK STATE

Agriculture & Markets Law

Civil Practice Law & Rules

County Law

Criminal Procedure Law

Education Law

Eminent Domain Procedure Law

Executive Law

General Construction Law

General Municipal Law

Judiciary Law

New York State Constitution

N.Y. Comp. Codes, Rules & Regs.

Public Health Law

Public Officers Law

Unconsolidated Laws

NEW YORK CITY

N.Y. City Administrative Code

N.Y. City Charter

Rules of the City of New York (Title 24)

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