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COVID-19 and the Courts: The Judicial Branch's Response to the Pandemic

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Chairman Westerfield, Chairman Petrie, and members of the Committee. Thank you for inviting me to appear remotely today to update you on the status of the court system's response to the COVID-19 emergency and our efforts to expand court operations and resume in-person services.

But before I get to my prepared remarks, the previous speakers' passion and our nation's collective grief compels me to briefly address the racism and injustice that continue to oppress here in the Commonwealth and across the country.

As my colleague in North Carolina, Chief Justice Cheri Beasley, so eloquently stated when addressing this issue in her state, the protests we are witnessing across the country and the world highlight the fact that "racism and prejudice have remained stubbornly fixed and resistant to change."

As a justice system, we must be willing to recognize our failures. And we must be willing to not only listen, but to actually hear the very valid concerns raised by people who have been marginalized, degraded, or made to feel less than.

The court system and the legal profession must continue to advocate for a diverse bench and bar to reflect the communities that we serve. We must continue to improve communication between the courts, justice partners, and court participants. And we must constantly evaluate and address institutional racism and our own implicit biases.

I recognize that we—all of us—have a long way to go. But I am pleased with the progress the court system has made over the past few years to provide diversity and cultural collision trainings to all judges, clerks, specialty courts staff, and pretrial staff across the state.

The Administrative Office of the Courts has also established the Statewide Department Equity Committee, whose focus is reducing racial and ethnic disparities within the court system. The Committee meets quarterly to analyze data, determine areas of racial disparity, and discuss current strategies each department is implementing and areas of improvement.

These strategies have had the most impact in our Family and Juvenile Services Department, where these policies and practices have directly impacted the individualized client approach that our Court Designated Worker staff provide to the youth they work with daily.

I want to assure the members of this Committee—and everyone listening today—that the Kentucky Court of Justice is committed to hearing your cries for justice and working to eradicate the racial and ethnic disparities within our system. I pledge to you that we will do better.

Background

Turning now to the other crisis facing our country, the first case of COVID-19 was announced in Kentucky on March 6, 2020. Approximately one week later, the Supreme Court entered an administrative order that included a number of unprecedented measures for the Kentucky court system, including limiting in-person proceedings; encouraging judges to use telephonic or video technology to conduct hearings; postponing all civil trials, hearings, and motions; and suspending new juror orientations.

As the COVID-19 emergency continued to develop, the Supreme Court placed additional limitations on court proceedings. By April 1, all court facilities were closed to in-person services, with very limited exceptions. Judges were ordered to allow all attorneys and necessary parties to participate remotely in court proceedings and eviction filings were put on hold based on state and federal moratoriums on those proceedings.

In conjunction with the Court's overarching emergency order, additional administrative orders were entered to address staffing in clerks' offices, existing custody and parenting time orders, continuing legal education deadlines, appellate filing deadlines, and emergency release of individuals arrested for certain offenses.

Most of the administrative orders were amended over time to extend their effective dates. Initially, the Supreme Court attempted to extend the orders in two-week intervals in the hopes that the curve would be flattened and we would be able to return to in-person proceedings sooner than later. But as the coronavirus lingered, the Court eventually determined that a later effective date would provide judges, attorneys, and parties with more notice and allow for more consistent scheduling going forward. Accordingly, in mid-April, the orders were extended through the end of May.

I want to take a moment here to note that while in-person services were limited at court facilities during much of April and May, our courts were never closed. Judges, clerks, and court staff stayed busy behind the scenes, processing filings and payments, taking phone calls from the public, rescheduling future court dates, navigating a new world of remote court proceedings, and preparing for the eventual resumption of in-person services. In fact, I would argue that many of our elected officials and employees have worked harder than normal to keep things running throughout the pandemic.

Reopening Plan

As we got closer to June and began to look toward resuming in-person court services, it was important to the Court that we take the concerns and suggestions of judges and clerks into consideration. To ensure our elected officials had input, we created a task force for each level of the court system and assigned a member of the Court to chair each task force. I am grateful to Deputy Chief Justice Lisabeth T. Hughes, chair of the Circuit Court Task Force; Justice Debra Hembree Lambert, chair of the Family Court Task Force; and Justice Michelle M. Keller, chair of the District Court Task Force, for their leadership in guiding their respective committees. The feedback we received from the judges and clerks on the task forces helped shape the Court's guidance and directives.

We also looked to the Governor's requirements for reopening businesses and government offices to ensure we followed strict standards for health and safety. One of our guiding principles was the involuntary nature of most court proceedings. People can choose whether to eat at a restaurant or go shopping, but in most instances they don't get to choose whether they go to court. And as one family court judge wisely noted, the job of the judiciary, at its core, is to preserve peace and protect life, which makes it incumbent upon us to do all we can to keep people from being exposed to a potentially fatal virus. So we incorporated as many of the Governor's requirements as possible into our orders to maintain a high standard of safety for our employees, elected officials and the public.

The Supreme Court entered two main orders to provide guidance on the expansion of court operations: a general order relating to the health and safety requirements for expanding court operations, and a more specific order with guidance on certain case types. Both of these orders – Administrative Order 2020-43 and Administrative Order 2020-44 – are included in the materials that were provided for you today.

The general order, Administrative Order 2020-43, emphasizes the continued use of remote technology for all court proceedings, unless a judge determines in his or her discretion that an in-person hearing is necessary. If a hearing is conducted in-person, strict health and safety measures must be observed, including the mandatory use of a facial covering while on court premises; limited courtroom capacity; six-foot social distancing; and frequent disinfecting of surfaces.

The Court's specific guidance, which can be found in Administrative Order 2020-44, includes a suspension of all jury trials until at least August 1; directives on eviction filings and judicial sales; and a suspension of show cause dockets for nonpayment of fines and court fees until November 1.

As we prepared over the past few weeks for the expansion of court operations, our staff at the Administrative Office of the Courts—and specifically our three employees responsible for purchasing equipment and supplies for every court facility and office across the state—worked countless hours to source the necessary personal protective equipment and cleaning supplies needed for a safe resumption of in-person services. For purposes of comparison, in April and May of this year, the AOC processed more than 2,300 orders. During the same period in 2019, 560 orders were processed.

Included in your materials is the catalog of COVID-related products that we have made available to all of our elected officials. Along with providing face masks, gloves, thermometers, cleaning supplies, and necessary signage, we have also installed plexiglass shields on the public-facing windows in our circuit clerk's offices and, when requested, on judicial benches. We have also made a significant investment in technology, including the purchase of additional laptops to allow for more telework and licenses for remote video conferencing services.

All of these expenditures were certainly necessary to address the challenges presented by the pandemic, but they were not funded in the Judicial Branch budget. The Governor's Office for Policy and Management has provided us with the application for funding through the CARES Act, which may allow for some retroactive reimbursement of COVID-related expenditures. We recognize that CARES funds are limited but we remain hopeful that the Judicial Branch will be able to recoup some of this necessary outlay.

The "grand reopening" for in-person court services began this past Monday, June 1. I am confident there will be some bumps in the road as we expand court services over the next few weeks. If we have learned anything in the past few months—and believe me, we have learned a lot—it is that it is impossible to navigate this new normal without encountering some glitches. But I think we have, for the most part, struck a delicate balance between addressing our constitutional obligations to hear pending matters while also protecting the health of court staff and the public.

Lessons Learned/Positive Outcomes

To paraphrase my friend, Chief Justice Bridget McCormack of the Michigan Supreme Court, the COVID-19 pandemic is not the crisis courts wanted, but it may be the crisis courts needed. In many ways, the response to this pandemic has allowed us to reconsider the way we do business, which will ultimately improve the efficiency of the services we provide.

Some of the processes that have been adopted as a response to the pandemic, like the use of phone and video conferences for routine hearings and motion hours, have been discussed by the Civil Justice Reform Commission as a best practice for civil dockets. And we have quickly realized the economic benefits and efficiencies of using remote technology in criminal matters, especially in cases where inmates otherwise would have been transported from another county to attend an in-person hearing. I anticipate many courts will choose to integrate these remote proceedings into their regular court processes going forward, even after the current crisis is over.

The pandemic has also highlighted the need to focus on electronic filing as the standard rather than the exception. The ability to submit court filings from your desk—or your kitchen table, for those of us who have been working from home—allows the work of lawyers and courts to continue regardless of whether the courthouse doors are open. This will be an important piece of the puzzle as we evaluate both the lessons learned from the pandemic and our future operations.

Our statewide departments have continued to operate throughout the pandemic, some with great success.

Pretrial Services

One of the most beneficial unintended consequences of the COVID emergency has been the decrease we've seen in the pretrial populations in our county jails. On March 20, I asked judges to work with jailers and other county officials to responsibly release as many inmates as possible as quickly as possible to avoid the potential for a devastating outbreak. I am proud of how swiftly our criminal justice partners—judges, jailers, prosecutors, and defenders—worked together to safely release low-risk defendants.

The Supreme Court followed-up this directive by temporarily expanding the Administrative Release Program to include certain non-violent, non-sexual Class-D felons who are not high risk for new criminal activity. Charges that are specifically excluded from eligibility include all violent and sexual misdemeanor and Class D felonies, DUI 2nd or greater, and escape-related charges.

Before the pandemic, the pretrial population, without holders, in county jails averaged 7,000 inmates. We began monitoring daily jail populations closely in April. Since then, the pretrial population has varied from a low of 4,490 on May 5th to a high of 5,177 on May 25th.

I also want to acknowledge law enforcement for safely limiting the number of arrests over the past several months to avoid introducing new inmates into county jails. Before COVID, the daily arrest rate averaged between 500 and 700. By contrast, in April, there was an average of 193 arrests per day. That number began increasing in May as the state started to reopen and we are now averaging approximately 300 arrests per day.

I'm pleased to report that the re-arrest rate for defendants released by Pretrial Services between April 15 and May 31 of 2020 was 4.6%, which was the same re-arrest rate for defendants released by Pretrial Services during the same period in 2019. From April 15 to May 31 of this year, 6,024 people were released and, of those, 276 were charged with a new crime while pending trial.

Family & Juvenile Services

Throughout the pandemic, our Family and Juvenile Services Department has successfully utilized virtual platforms for diversion programming, screenings, assessments, tele-health services, and ongoing case monitoring that links youth to resources necessary for their success. As of May 31, our Court Designated Workers were actively managing 3,282 diverted youth complaints. CDW staff are providing remote diversion programming, on-line educational tools, youth care packages, self-care projects, and youth development activities.

Since February of this year, there has been a significant decrease (68%) in the number of complaints resulting in detention. At the end of May, 78 juveniles were in residential Youth Development Centers statewide and 34 youth were residing in DJJ group homes. I am grateful to our CDW staff for helping keep kids out of detention during the pandemic. I am especially grateful to them for the support they are providing local communities by connecting youth and their families to much needed help obtaining housing, unemployment benefits, food and clothing.

The Citizen Foster Care Review Boards (CFCRB) are meeting statutory timeframes and reviewing cases of children in foster care by utilizing virtual means as well. From March 1 through May 31, CFCRB volunteers completed 5,494 remote reviews. FJS staff has actually experienced more participation by interested parties after shifting to a virtual platform; therefore, staff will continue to utilize remote tools for this population.

Specialty Courts

Realizing that over 2,000 drug court, mental health court, and veterans treatment court participants across the state could not wait for in-person services to be available, our specialty courts quickly transitioned to an online format. Staff began meeting daily with participants by phone or through technologies like Zoom or Skype.

Although court was being held differently, we were encouraged to learn that in Kentucky, as well as across the nation, treatment court participants were maintaining their recovery and, in many situations, thriving in this new virtual environment. One of our veteran's treatment courts reported the need to add additional remote court sessions because participants were more comfortable discussing issues when speaking with the court through a virtual platform than they were in-person. And participants who were still reporting to work expressed a desire that we continue to provide an online option in the future because it allowed them to step away from their job to attend court or counseling and return quickly to their essential duties.

Specialty court participants shared with staff they felt more in control of their own recovery process when no longer required to rely on someone else for transportation to court and therapy. Group meetings and counseling attendance increased with the availability and ease of access to telehealth resources. Individuals began engaging with others also in recovery across the commonwealth and realized there was a large support network available to them online.

Of course, the remote format has not been ideal for all participants. Some have expressed frustration because they needed to budget minutes and data for treatment sessions, court meetings and daily conversations with their case managers. And drug testing, which is a cornerstone of specialty courts, has been impacted by the need for social distancing. Urine drug screening has always been the recognized gold standard for treatment courts. In our efforts to keep our specialty court participants safe, we switched from urine drug testing to oral fluid testing. Oral fluid screening detects the presence of Marijuana, Cocaine, Opiates, Benzodiazepines, Methamphetamine, Buprenorphine, Oxycodone, PCP, and Methadone.

Although we recognize, understand and expect individuals will struggle with substance use disorder and turn to familiar coping mechanisms during times of stress, we continue to connect and support our participants in all areas of their recovery during this time and in the process have discovered some valuable insights into procedures that will support those in recovery moving forward.

Judicial Branch Budget

Finally, I know the Judicial Branch budget was not my assigned topic for today. But given the current economic downturn and the abysmal outlook from the Consensus Forecasting Group, I would be remiss if I failed to address the impending budget crisis facing the courts.

We were already facing the mandatory \$7.5 million fund transfer that was included in our FY 20 budget. If we combine that fund transfer with the requested 4% contribution to the Governor's budget reduction plan, we are returning \$12.1 million to the general fund this year.

For FY 21, we anticipate a decrease in restricted funds due to the impact of the pandemic on filing fees, judicial sales, and background checks in addition to a possible decrease in our general fund budget.

To prepare for this shortfall, the Supreme Court instituted a hiring freeze effective May 15. We are hopeful that the freeze, combined with careful management of vacancies and a decrease in travel expenses due to the continued use of remote technology, will help to offset any deficit to some degree. But we can only manage our way through this shortfall for so long before we will confront tangible impacts to court services.

Closing Remarks

I want to end today by noting that, without question, the most important lesson I have learned from this pandemic is the incredible resiliency of our judges, clerks, and court staff. It is impossible to completely shift the course of a vessel as large as the Kentucky Court of Justice without hitting some bumps along the way. But I am immensely proud of how quickly our elected officials and employees have adapted to a completely new way of doing business and how willingly they learned and adopted new technologies. Their service to the Commonwealth is always admirable, but it has been especially commendable throughout this challenging and evolving situation.

Thank you again for inviting me to testify today and for allowing me to appear remotely. I am happy to answer any questions you may have.

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