Public Health Peparedness Bench Book:

A Guide for the Ohio Judiciary & Bar on Legal Preparedness for Public Health Emergencies & Routine Health Cases

Judge Robert P. Ringland
12th District Court of Appeals

PREFACE

This guide is designed to assist judges, court personnel, and members of the bar deal with catastrophes that may occur and interrupt the administration of justice and the courts. We all are aware of events such as 9/11 and other acts of terrorism, flooding in New Orleans and Findlay, Ohio, potential earthquakes and other incidents, such as the mercury spill at the Morrow County Courthouse. While there are events that may cause temporary incapacity or interruption, experts have raised concerns of an influenza pandemic rivaling the influenza outbreak of 1918.

Many experts predict such an outbreak could disrupt society and its institutions for six to nine months, requiring us to plan for even long-term catastrophes. This guide attempts to address issues judges may face during catastrophes in general and during a pandemic in particular.

I wish to acknowledge the efforts of the Center for Public Health Law Partnerships, whose Kentucky manual proved an invaluable resource for both topical federal law and the organization of this guide. I also wish to acknowledge the assistance of my staff attorney, Joshua L. Vineyard, Esq., without whose research and guidance this guide would not have been developed.

Judge Robert P. Ringland

* This guide was developed for exclusive use by members of Ohio's judiciary and bar. It is not intended to provide or constitute legal advice and should under no circumstance be construed as providing or constituting legal advice. Individuals requiring legal services should contact a licensed attorney.

TABLE OF CONTENTS

CHAPTER 1—JURISDICTION OVER PUBLIC HEALTH ISSUES

I. Federal v. State

A. The Federal Constitution and Public Health

1. ***Silence of the Federal Constitution***. The preamble's stated purpose of promoting the "general Welfare" is the closest the federal Constitution comes to addressing public health. The remainder of the Constitution and the amendments thereto are silent on the issue of the federal government's role in public health.
2. ***Tenth Amendment's Reservation of Undelegated Powers to the States***. When read in conjunction with the Tenth Amendment, the Constitution's silence regarding public health indicates that matters of public health are primarily the responsibility of the states.
   (a) The federal government's public health powers are limited; and extend only to those boundaries permitted by its powers to engage in defense, interstate commerce, and taxation.[2]
   (b) The federal government is charged with responsibility for discrete geographic areas under its direct control, such as military bases, despite the fact that they lie wholly within a given state.
3. ***Specially-Held Federal Powers***. Pursuant to certain itemized powers, the federal government has power to assume responsibility for public health emergencies caused by terrorism, acts of war, or pandemic.

B. The State's Primary Role in Matters of Public Heath

1. In all other cases, the individual states bear primary responsibility for dealing with public health threats within their borders.
   (a) *Jacobson v. Massachusetts* (1905), 197 U.S. 11 ("The safety and health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government.").
   (b) *Compagnie Francaise de Navagation a Vapeur v. State Bd. of Health* (1902), 186 U.S. 380 ("[T]he power of the states to enact and enforce quarantine laws for the safety and the protection and the health of their inhabitants … is beyond question.").
2. ***The Ohio Constitution***. The Ohio Constitution explicitly provides the General Assembly with the ability to promulgate emergency laws necessary for the immediate preservation of the public health.[3]
   (a) Such emergency laws must receive the vote of 2/3 of all members elected to each branch of the General Assembly.[4]

[2] See *Carolene Products Co. v. Evaporated Milk Assn*. (7th Cir. 1937), 93 F.2d 202 (stating that federal government's police power extends to acts within its constitutional jurisdiction, including protection and promotion of public welfare).

[3] Section 1d, Article II, Ohio Constitution.
[4] Id.

(b) The reasons for the law's necessity must be set forth in its own distinct section of the law. This section must be passed upon a separate roll call.[5]

3. ***Sources of the State's Authority to Act for the Public Health***. States derive their power to protect the public health from two sources of authority—the police power and the parens patriae power.
   (a) The police power. The states' "police power" is defined as the power to promote the public safety, health, and morals by restraining and regulating the use of liberty and property.[6]
   (b) The parens patriae power. The "parens patriae" power is the power held by a state to serve as guardians of those under legal disability.[7] "[A] state has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general."[8]

II. Determining State and Local Venue

A. Courts of Jurisdiction

1. ***Courts of Original Jurisdiction Over Public Health Matters***. Ohio's courts of common pleas are courts of general jurisdiction, and have original jurisdiction over all justiciable matters.[9]
   (a) Any judge of a court of common pleas may temporarily hold court in any county.[10]
2. ***Courts of Appellate Jurisdiction Over Public Health Matters***.
   (a) Courts of Common Pleas. The Ohio Constitution and the Revised Code provide for appellate review of the final orders, adjudications, or decisions of any public health officer, board, or department, or other division by the common pleas court of the county in which the principal office of the political subdivision is located.[11]
      (i) *Example 1*: Orders or decisions of the state Department of Health may be appealed to the Franklin County Court of Common Pleas.
      Example 2: Orders or decisions of the Clermont County local health board may be appealed to the Clermont County Court of Common Pleas.
   (b) Courts of Appeals. Ohio courts of appeals have appellate jurisdiction as may be provided by law to review and affirm,

[5] Id.

[6] *Medtronic, Inc. v. Lohr* (1996), 518 U.S. 470.

[7] *Heller v. Doe* (1993), 509 U.S. 312.

[8] *Alfred L. Snapp & Son, Inc. v. Puerto Rico* (1982), 458 U.S. 592.

[9] Section 4(B), Article IV, Ohio Constitution.

[10] Section 4(A), Article IV, Ohio Constitution.

[11] Section 4(B), Article IV, Ohio Constitution; R.C. 2506.01.

modify, or reverse judgments or final orders of the inferior courts of record within their respective districts.[12] Courts of appeals also possess appellate jurisdiction to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.[13]

(i) The court of appeals is required to hear each appeal in the county in which the claim originated. Exceptions may be made for good cause shown, allowing the appeal to be heard in another county of the district.[14]

(c) Ohio Supreme Court. Relevant to matters involving public health, the Ohio Supreme Court has appellate jurisdiction in those cases involving:

(i) Questions arising under the constitutions of Ohio or the United States,[15]

(ii) Revisions to the proceedings of administrative officers or agencies as may be conferred by law,[16] and

(iii) Matters of great general or public interest.[17]

B. Venue

1. *In General*. Cases involving public health matters may be venued in any Ohio court having jurisdiction.[18]
2. ***Challenges to Venue***. Where a party successfully challenges the propriety of venue, the judge of court in which the case was filed must transfer the matter to the court where venue is proper.[19]
3. ***Locations Where Venue is Proper***. Civ.R. 3(B) provides for proper venue in any one or more of the following counties relevant to public health-related cases:

(a) The county in which the defendant resides;[20]

(b) A county in which the defendant conducted activity that gave rise to the claim for relief;[21]

(c) A county in which a public officer maintains his or her principal office if suit is brought against the officer in the officer's official capacity;[22] and

[12] Section 3(B)(2), Article IV, Ohio Constitution.

[13] Id.

[14] R.C. 2501.05.

[15] Section 2(B)(2)(a)(iii), Article IV, Ohio Constitution.

[16] Section 2(B)(2)(d), Article IV, Ohio Constitution.

[17] Section 2(B)(2)(e), Article IV, Ohio Constitution.

[18] Supra at Section II.A.

[19] Civ.R. 3(C). The defense of improper venue must be asserted in a timely fashion so as to comport with Civ.R. 12.

[20] Civ.R. 3(B)(1).

[21] Civ.R. 3(B)(3).

[22] Civ.R. 3(B)(4).

(d) The county in which all or part of the claim for relief arose.[23]

4. ***Change of Venue***. Where it appears that a fair and impartial trial cannot be had in the county where the suit is pending, the court may transfer the case to an adjoining county within the state.[24] A change of venue may be occasioned by motion of any party or upon the court's own determination.[25]

III. The Administrative Process

A. Jurisdictional Matters

1. ***Exhaustion of Remedies***. The doctrine of exhaustion of administrative remedies requires that relief must be sought by exhausting an administrative remedy provided by statute before the courts will act.[26]
2. ***The Defense of Failure to Exhaust Remedies*.** A failure to exhaust administrative remedies is not a jurisdictional defect and does not justify a collateral attack on an otherwise valid and final judgment.[27] Instead, it is an affirmative defense which must be timely asserted in an action or considered waived.[28]
3. ***Exhaustion of Remedies: Not Limited***. The doctrine of exhaustion of administrative remedies is not limited to cases where there is no finality to the judicial order.[29]
4. ***Reference to Local Ordinances and Regulations Necessary*.** The Revised Code and Administrative Code grant much of the public health power to local health districts. While administrative regulations provide a basic operating framework for local health districts, they do not provide for a set administrative review process for the decisions of these bodies. Local ordinances may contain administrative appeals processes for public health-related orders and decisions.

---

[23] Civ.R. 3(B)(6).

[24] Civ.R. 3(C)(4).

[25] Id.

[26] 2 Ohio Jurisprudence 3d (2007), Administrative Law, Section 152. See also, e.g., *Woodfood v. Ngo* (2006), 126 S.Ct. 2378, 165 L.Ed.2d 368, and *Noernberg v. City of Brook Park* (1980), 63 Ohio St.2d 26, 406 N.E.2d 1095.

[27] See *Jackson v. Ohio Bur. of Workers' Comp*. (1994), 98 Ohio App.3d 579, 649 N.E.2d 30.

[28] See, e.g., *Gannon v. Perk* (1976), 46 Ohio St.2d 301, 348 N.E.2d 342; *Driscoll v. Austintown Assoc*. (1975), 42 Ohio St.2d 263, 328 N.E.2d 395; *The Salvation Army v. Blue Cross & Blue Shield of Ohio* (1993), 92 Ohio App.3d 571, 636 N.E.2d 399.

[29] *Ladd v. New York Cent. R. Co.* (1960), 170 Ohio St. 491, 166 N.E.2d 231.

CHAPTER 2—OHIO HEALTH AGENCIES & BOARDS

I. Ohio Department of Health

A. Creation and Composition

1. ***Two-Part Body***. The Department of Health is established by R.C. 121.02 and is composed of a Director of Health and a Public Health Council.[30]
2. ***Qualifications for Director***. The Director is required to be either (1) a licensed and experienced physician holding a medical degree from a state-approved medical college, or (2) an individual with significant experience in the public health profession.[31] The Director serves at the pleasure of the governor.[32]
3. ***General Duties of Director***. The Director serves as the chief executive officer of the Department of Health and administers laws and rules relating to health and sanitation. The Director also prepares public health rules for consideration by the Public Health Counsel. The Director sits at the meetings of the Public Health Counsel but has no vote.[33]
4. ***Composition of Public Health Counsel***. By law, the Public Health Council consists of seven members: three physicians, one registered nurse, one registered pharmacist, one registered sanitarian, and one member of the general public at least 60 years of age who is not associated with or financially interested in the practice of medicine, nursing, pharmacy, or environmental health.[34] Members are appointed to seven-year terms by the governor.[35]
5. ***Quorum***. Four members of the Public Health Council constitute a quorum for the transaction of business.[36]
6. ***Replacement of Members.*** As their terms expire, Public Health Counsel members shall continue in office until their successors take office or for 60 additional days, whichever comes first.[37] In the event of a vacancy on the Public Health Counsel during the vacating party's term, a replacement member may be appointed by the governor to fill the office for the remainder of such term.[38]
7. ***Meetings; Special Meetings.*** The Public Health Council meets four times each year, and may meet at such other times as may be required.[39]

---

[30] R.C. 3701.02.

[31] R.C. 121.10.

[32] R.C. 121.03(O). The Director is empowered to appoint two Assistant Directors, who serve at the pleasure of the Director throughout his or her term. R.C. 121.05.

[33] R.C. 3701.03(A) and (C).

[34] R.C. 3701.33.

[35] Id.

[36] Id.

[37] Id.

[38] Id.

[39] Id.

(a) The time and place for holding regular meetings shall be fixed in the bylaws of the council.[40]

(b) Special meetings may be called upon the request of any four members of the council or upon request of the director of health, and may be held at any place considered advisable by the council or director.[41]

8. ***Duties of Public Health Counsel.*** The Public Health Council is the primary rule-making body for the Department of Health and its powers and duties are set forth in law. It adopts, amends, and rescinds rules pertaining to public health.[42] It prescribes, by rule, the number and functions of divisions and bureaus and the qualifications of the chiefs of the divisions and bureaus with the Department. It also advises the director of health on matters affecting public health. The Public Health Council has no executive or administrative duties.[43]

B. Authority of Ohio Department of Health

1. ***General Powers***. The Department of Health receives its general authority by statute.
   (a) Supervisory Powers. The Department of Health has supervisory powers over all matters relating to the preservation of the life and health of the people.[44]
   (b) "Ultimate Authority" Regarding Quarantine and Isolation. The Department of Health has "ultimate authority" in matters of quarantine and isolation. It may declare, enforce, modify, relax, or abolish quarantine and isolation.[45]
   (c) Immunization. The Department of Health may approve methods of immunization.[46]
2. ***Special Duties and Powers of Director of Health***. The director of health is charged with several special powers and responsibilities under Ohio law.
   (a) Epidemic and Pandemic Investigation. The director is responsible for investigating the causes of epidemic or pandemic health conditions and taking prompt action to control and suppress them.[47] Such an investigation may be initiated when a local health district has reported documented cases of illness indicative of epidemic or pandemic conditions.[48]

---

[40] Id.

[41] Id.

[42] R.C. 3701.021.

[43] R.C. 3701.34.

[44] R.C. 3701.13.

[45] Id.

[46] Id.

[47] R.C. 3701.14(A).

(b) Animal-Based Diseases. The director may make and execute orders necessary to protect persons from animal-based diseases.[49]

(c) Volunteer Responders. The director is responsible for establishing a system for recruiting, registering, training, and deploying volunteers reasonably necessary to respond to public health emergencies.[50]

3. ***Delegation of Powers to Local Health Departments***. The state may assign or delegate its power to preserve the public health and the duties incident to that power to either state or local authorities.[51] It has done so through the General Assembly.[52] This delegated authority is not absolute, as the Revised Code sets forth minimum standards for local health departments.[53]

II. Local Health Departments

A. Creation and Composition

1. ***Health Districts***. R.C. 3709.01 divides the state into local health districts.[54]
   (a) Each city constitutes a "city health district."[55]
   (b) Townships and villages in each county are combined into a single "general health district."[56]
   (c) Contiguous districts may elect to join together to form city or general health districts within the strictures of R.C. 3709.07, 3709.071, and 3709.10.[57]
2. ***City and General Health District Advisory Counsels*.** The legislative authority of each city constituting a city health district shall establish a board of health.[58] The advisory counsel of each general health district is created by statute.[59]

---

[48] O.A.C. 3701-73-01(A)(1).

[49] Id.

[50] R.C. 3701.04(A)(7).

[51] *Ex parte Company* (1922), 106 Ohio St. 50, 139 N.E. 204.

[52] Id.

[53] R.C. 3701.342. By statute, local health departments are to provide for (1) analysis and prevention of communicable diseases, (2) analysis and treatment regarding the leading causes of morbidity and mortality, and (3) administration and management of the local department. Id. State health funds are conditioned upon the local health departments' compliance with these minimum standards. Id.

[54] The health districts created under R.C. Chap. 3709 exercise all the powers and perform all the duties formerly conferred and imposed by law upon municipal corporation boards of health. R.C. 3709.36.

[55] R.C. 3709.01.

[56] Id.

[57] See R.C. 3709.01.

[58] R.C. 3709.05(A).

[59] R.C. 3709.03(A).

(a) Composition of City Health Board. City health boards are composed of four members appointed by the mayor and confirmed by the legislative authority and one member appointed by the health district licensing council established under section 3709.41 of the Revised Code.[60]

(b) Composition of General Health District Advisory Counsel and Board. A general health district advisory counsel is comprised of the president of the board of county commissioners, the chief executive of each non-city municipal corporation, and the president of the board of the township trustees of each township.[61] Boards of health are comprised of five members, each serving a five-year term.[62] This advisory counsel appoints four persons to serve on the board of health, with the remaining member to be appointed by the health district licensing counsel.[63] At least one member of the board of health must be a physician.[64]

B. Authority of Local Health Departments

1. ***Orders and Regulations***. Local boards of health are granted broad authority for promulgating orders and regulations.
   (a) Local boards may make such orders and regulations as are necessary for their own governance.[65]
   (b) Local boards may make such orders and regulations as are necessary for the public health, and have primary responsibility for the health of those within their jurisdictions.[66]
   (c) Local boards may make such orders and regulations as are necessary for the prevention or restriction of disease.[67]
2. ***Emergency Powers***. In cases of public health emergencies or epidemics, local boards may adopt emergency orders and regulations without the prior advertisement, recordation, and certification procedures normally required by law.[68]
3. ***Limitations on Authority***. Local boards of health may not take certain actions without permission from the Department of Health.
   (a) Local boards may not close or prohibit travel on public highways.[69]

---

[60] R.C. 3709.05(A).

[61] R.C. 3709.03(A).

[62] R.C. 3709.02(A).

[63] R.C. 3709.03(B).

[64] Id.

[65] R.C. 3709.21.

[66] Id.

[67] Id.

[68] Id.

[69] R.C. 3707.05.

(b) Local boards may not establish a quarantine of one municipal corporation or township against another.[70]

C. Conflict Between State and Local Orders and Regulations

1. ***Cooperation Where Possible***. Ohio law requires that the Department of Health work in cooperation with the local health districts "[w]henever possible."[71]
2. ***Statutory Instruction***. Statutory language indicates that orders and regulations of the Department of Health trump those of the local health boards.
   (a) The Department of Health is vested with "supervision of ***all*** matters relating to the preservation of life and health of the people" and "***ultimate authority*** in matters of quarantine and isolation."[72]
   (b) The Department of Health "may make and enforce orders in ***local*** matters when an emergency exists, or when [the local department] has neglected or refused to act with sufficient promptness or efficiency."[73]
3. ***State Retains Ultimate Control Over Public Health Matters***. The Ohio Supreme Court has determined that the grant to a municipality of certain public health powers is not a relinquishment of the state's health control and authority within the municipality's territorial limits.[74]
4. ***Public Health Matter of Statewide Concern***. Since the subject of public health is a matter of statewide concern, courts find that enactments of the General Assembly prevail over local enactments that are in conflict.[75]

[70] Id.

[71] R.C. 3701.13.

[72] R.C. 3701.13 (emphasis added).

[73] Id. (emphasis added).

[74] *State Bd. of Health v. City of Greenville* (1912), 86 Ohio St.1, 98 N.E. 1019.
[75] *Kraus v. City of Cleveland* (C.P. 1953), 55 Ohio Op. 6, 116 N.E.2d 779, judgment aff'd, (1955) 163 Ohio St. 559, 127 N.E.2d 609.

CHAPTER 3—AUTHORITY OF GOVERNMENT ACTIONS TO ENSURE PUBLIC HEALTH

I. Searches and Seizures Generally

A. Constitutional Issues

1. ***No Unreasonable Searches and Seizures***. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[76]
2. ***Same Rights Under State and Federal Constitutions***. Ohio's constitutional provisions addressing unreasonable searches and seizures are substantially the same as those of the federal Constitution.[77]
3. ***Guarantees of Ohio Constitution***. Article I, Section 14 of the Ohio Constitution declares that the right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures is not to be violated, and provides that no warrant may issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.[78] These provisions constitute a guaranty to citizens against the invasion of their homes and the abridgement of their personal liberties.[79]
4. ***Definitions***.
   (a) Search. A search occurs when government action infringes upon an expectation of privacy that society recognizes as reasonable.[80]
   (b) Seizure.
      i. *Of Individual*. A seizure of an individual occurs when government action meaningfully interferes with an individual's freedom of movement.[81] The duration of the interference is irrelevant—any interference constitutes a seizure, "however brief."[82] Under this definition, the isolation or quarantine of an individual constitutes a seizure.
      ii. *Of Property*. A seizure of property occurs when government action meaningfully interferes with an individual's possessory interest in that property.[83]

[76] Amend. IV, U.S. Constitution.

[77] *Cochran v. State* (1922), 105 Ohio St. 541.

[78] Section 14, Article I, Ohio Constitution.

[79] See, e.g., *State v. Vuin* (C.P. 1962), 89 Ohio L. Abs. 193.

[80] See, e.g., *United States v. Jacobson* (1984), 466 U.S. 109; *City of Athens v. Wolf* (1974), 38 Ohio St.2d 267.

[81] See, e.g., *Michigan v. Summers* (1981), 452 U.S. 692.

[82] Id.

[83] See *Jacobson*, supra; *Bridges v. Butch* (1997), 122 Ohio App.3d 572.

(c) Government Action. The Fourth Amendment applies to the acts of all state officials, including both civil and criminal authorities.[84]

i. *State Hospital Employees as Government Actors*. Staff at state hospitals are considered government actors and are therefore subject to Fourth Amendment requirements.[85]

(d) Probable Cause. Probable cause exists when, under the circumstances, there are reasonable grounds for a belief of guilt that is particularized with respect to the person, place, or items to be seized.[86] The existence of probable cause must be determined by analyzing the totality of the circumstances surrounding the governmental intrusion, and involves a practical, common-sense review of the facts available to the government actor at the time of the search or seizure.[87]

5. ***Applicability of Fourth Amendment to Health and Safety Inspections***. The protections of the Fourth Amendment apply to non-criminal searches and seizures such as health and safety inspections.[88]

6. ***Applicability of Fourth Amendment to Physical Evidence Obtained from Individual***. The Fourth Amendment is implicated where the government seeks to obtain physical evidence from an individual.

(a) Detention to Obtain Evidence. The detention of an individual necessary to produce the evidence sought is a seizure if it amounts to a meaningful interference with the individual's freedom of movement.[89]

(b) Obtaining and Examining Evidence. Obtaining and examining physical evidence from an individual are searches if the acts infringe upon an expectation of privacy recognized by society as reasonable.[90]

(c) Physical Characteristics Exposed to Public. Individuals have no Fourth Amendment reasonable expectation of privacy in physical characteristics constantly exposed to the public, such as fingerprints, facial features, and vocal tones.[91]

(d) Invasive Intrusions and Emerging Procedures. Obtaining physical evidence through invasive personal intrusions like surgery must be determined on a case-by-case basis.[92]

---

[84] See, e.g., *New Jersey v. T.L.O*. (1985), 469 U.S. 325.

[85] *Ferguson v. City of Charleston* (2001), 532 U.S. 67.

[86] See, e.g., *Maryland v. Pringle* (2003), 540 U.S. 366.

[87] See, e.g, *U.S. v. Padro* (6th Cir. 1995), 52 F.3d 120.

[88] See *Torres v. Puerto Rico* (1979), 442 U.S. 465; *Marshall v. Barlow's Inc*. (1978), 436 U.S. 307; *Camara v. Municipal Court of San Francisco* (1967), 387 U.S. 523.

[89] See, e.g., *Skinner v. Railway Labor Executives' Assn*. (1989), 489 U.S. 692 and *Schmerber v. California* (1966), 384 U.S. 757.

[90] See *Ferguson*, supra; *Schmerber*, supra; *Cupp v. Murphy* (1973), 412 U.S. 291.

[91] See *Davis v. Mississippi* (1969), 394 U.S. 721 (addressing fingerprints); *United States v. Doe* (2nd Cir. 1972), 457 F.2d 895 (addressing facial features); *United States v. Dionsio* (1973), 410 U.S. 1 (addressing voice exemplars).

i. *Factors for reasonableness test*. The Supreme Court has identified factors to consider when determining the reasonableness of invasive procedures to obtain physical evidence.
   (A) The existence of probable cause to believe that relevant medical information will be revealed;
   (B) Whether a warrant has been obtained;
   (C) The extent to which the intrusion may threaten the individual's health and safety;
   (D) The extent of the intrusion upon the individual's dignitary interests in privacy and bodily integrity;
   (E) The community's interest in accurately determining the presence of disease or other medical threat; and
   (F) The availability of other evidence.[93]

ii. *Possibly Analogous Ohio Justification*. Ohio law permits invasive body cavity searches for any legitimate medical or hygienic reason.[94] A case can be made for the logical extension of such justifications to other invasive intrusions.

7. ***Lack of Physical Intrusion into Persons or Premises***. The Fourth Amendment applies to information obtained from persons or premises even when acquired without physical intrusion.[95] In the case of premises, the nature of the premises (home v. business) may trigger Fourth Amendment protections.[96]

8. ***Character of Technology Employed to Obtain Information***. Fourth Amendment protections are more likely implicated where information is obtained through the use of technology not in general public use.[97]

9. ***Analyzing the "Reasonableness" of Searches and Seizures***. The "reasonableness" of government action is assessed by balancing the intrusion upon the individual's Fourth Amendment interests against the legitimate governmental interests promoted by the action.[98]
   (a) Context. The reasonableness of a search or seizure depends upon the context in which it occurs.[99]

---

[92] *Winston v. Lee* (1985), 470 U.S. 753. For guidance, the *Winston* Court found the surgical removal of bullet from an individual's chest unreasonable under Fourth Amendment.

[93] Id.

[94] R.C. 2933.32(B)(3).

[95] See, e.g., *Kyllo v. United States* (2001), 533 U.S. 27 (use of thermal imaging scanner outside home implicated Fourth Amendment as a search).

[96] Compare *Kyllo*, supra, with *Dow Chemical Co. v. United States* (1986), 476 U.S. 227 (use of aerial surveillance of business complex did not implicate Fourth Amendment).

[97] See *Kyllo*, supra ("We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search—at least where (as here) the technology in question is not in general public use.").

[98] See *T.L.O.*, supra, and *Delaware v. Prouse* (1979), 440 U.S. 648.

[99] See *T.L.O.*, supra.

(b) Government Not Required to Employ Least-Restrictive Means. The reasonableness of a search or seizure does not hinge upon the government's use of least-restrictive means. A search or seizure may be reasonable despite the availability of less restrictive means.[100]

(c) The Warrant Requirement. Generally, government searches and seizures conducted without a valid warrant are presumptively unreasonable.[101]

i. *Location of Search or Seizure Irrelevant to Warrant Requirement*. The consent or warrant requirement applies equally to searches of and seizures on both residential and commercial property.[102]

ii. *Validity of Warrants*. To be valid, a warrant must be supported by probable cause as determined by a neutral and detached magistrate.[103]

iii. *The Probable Cause Requirement Applies to Individuals*. Probable cause to search or seize one individual does not, in and of itself, provide probable cause to search or seize another individual.[104]

(d) Exceptions to the Warrant Requirement. The general requirement that searches and seizures be accompanied by a valid warrant is subject to several exceptions relevant to the public health context. The state bears the burden of proving an exception from the warrant requirement by a preponderance of the evidence.[105]

i. *Consent Exception*. Knowing and voluntary consent provided by an individual with actual or apparent authority over the premises to be searched or items to be seized obviates the need for a warrant.[106]

(A) Voluntariness Requirement. "Voluntariness" is fact-specific, and must be evaluated in light of all surrounding circumstances.[107]

---

[100] See, e.g, *Veronica School Dist. v. Acton* (1995), 515 U.S. 646.

[101] See, e.g, *Camara*, supra; *City of Fairborn v. Douglas* (1988), 49 Ohio App.3d 20.

[102] See *Camara*, supra (search of residence) and *See v. City of Seattle* (1967), 387 U.S. 541 (search of commercial property).

[103] See *Pringle*, supra.

[104] *Ybarra v. Illinois* (1979), 444 U.S. 85.

[105] See *U.S. v. Matlock* (1974), 415 U.S. 164; *State v. Roberts*, 2006-Ohio-3665; *State v. Akron Airport Post No. 8975, Veterans of Foreign Wars of U.S.* (1985), 19 Ohio St.3d 49.

[106] *Illinois v. Rodriguez* (2000), 497 U.S. 177, see also *State v. Myers* (1997), 119 Ohio App.3d 376; *State v. Sisler* (1995), 114 Ohio App.3d 337.

[107] See *Ohio v. Robinette* (1996), 519 U.S. 33. Ohio law defines "voluntary" consent as that which is freely and intelligently given under the totality of all the surrounding circumstances. See, e.g., *Cincinnati v. Langan* (1994), 94 Ohio App.3d 22; *State v. Robinette* (1997), 80 Ohio St.3d 234.

(B) Scope of Consent. The permissible scope of a warrantless consent search or seizure is limited to the scope of the consent provided.[108]

ii. *Special Needs Exception*. Warrants are unnecessary when special needs beyond those ordinarily necessary for law enforcement are implicated.[109]

(A) Test. To meet the special needs exception, the warrantless search or seizure must be reasonable under all the circumstances. This determination is made by balancing the privacy interests of the individual against the legitimate interests of the government.[110]

(B) Careful Review of Government Action. The court may conduct a "close review" of evidence relevant to the government's alleged "special needs" and the efficacy of the government action.[111]

(C) Law Enforcement Purposes. For the "special needs" exception to apply, the primary and immediate purpose of the government action cannot involve the generation of evidence for law enforcement purposes.[112] Where promotion of the public health or prevention of epidemic or pandemic conditions is clearly the primary concern of a search or seizure, the "special needs" exception should be applicable.

(D) Exemption. The Fourth Amendment is not violated by mandatory legal and ethical reporting requirements imposed on medical personnel regarding certain information learned during treatment. This is true even if the information reported is ultimately provided to law enforcement.[113]

(E) Unsuitability of Probable Cause Requirement. The probable cause standard is often ill-suited to

[108] *Florida v. Jimeno* (1991), 500 U.S. 248; *Painter v. Robertson* (6th Cir. 1999), 185 F.3d 557.

[109] For general discussion regarding the applicability of the "special needs" exception to the warrant requirement, see *Bd. of Education v. Earls* (2002), 536 U.S. 822 (warrantless random drug tests administered to students participating in extracurricular activities upheld as "special need") and *T.L.O.*, supra (upholding warrantless searches of public school student property by school officials). In the realm of public health, see, e.g., *Love v. Superior Court of San Francisco* (1990), 226 Cal.App.3d 736 (upholding warrantless HIV testing of prostitutes as "special need" to protect public health); *Glover v. E. Neb. Comm. Office of Retardation* (8th Cir. 1989), 867 F.2d 461 (Fourth Amendment violated by required HIV and hepatitis testing for agency employees where risk of transmission was virtually non-existent).

[110] See *Earls*, supra, and *Acton*, supra.

[111] See, e.g., *Ferguson*, supra.

[112] See id. ("special needs" exception inapplicable where involuntary drug testing accompanied by substantial police and prosecutorial involvement and threats of arrest and prosecution).

[113] Id.

circumstances of "special needs" occurring outside of the criminal context.[114] This is particularly true in instances where the government seeks to prevent the development of hazardous conditions or detect latent or hidden health-related violations.[115]

(F) Finding of Individualized Suspicion Not Always Required. Under the "special needs" exception, sufficient governmental safety and administrative interests may obviate the need for a finding of individualized suspicion.[116]

(1) Suspension of the individualized suspicion requirement may occur when:

-The privacy interests implicated by the government actions are minimal;
-An important governmental interest furthered by the search and seizure would be jeopardized by a reasonable suspicion requirement; and
-Other available safeguards assure that the individual's reasonable expectation of privacy is not subject to the discretion of their officials in the field.[117]

(2) In cases where individualized suspicion is not practical, membership in a suspicious class may provide sufficient justification for a search or seizure under the "special needs" exception.[118]

iii. *Administrative Warrants and Modified Probable Cause Standard*. Administrative inspections implicate protected Fourth Amendment interests and require a warrant.[119] However, they may be issued based upon a modified probable cause standard.

---

[114] See *Natl. Treasury Employees Union v. Von Raab* (1989), 489 U.S. 656.

[115] See, e.g., *Earls*, supra and *Von Raab*, supra.

[116] See *Earls*, supra and *Skinner*, supra.

[117] See *Skinner*, supra and *T.L.O.*, supra.

[118] *Dunn v. White* (C.A. 10 1989), 880 F.2d 1188 (testing of persons within suspicious class justified on public health grounds); *People v. Adams* (Ill. 1992), 597 N.E.2d 331 (upholding mandatory HIV testing for prostitutes).

[119] See, e.g., *Marshall v. Barlow's Inc*. (1978), 436 U.S. 307 (warrant required for business inspections by OSHA) and *Camara v. Municipal Court* (1967), 387 U.S. 523 (warrant required for housing code inspections).

(1) Test. This standard is satisfied by a showing of:

(a.) Specific evidence of an existing violation; or

(b.) Reasonable legislative or administrative standards for conducting an inspection of a particular individual or establishment.[120]

(A) *Heavily Regulated Industries Exception*. Warrantless searches of businesses within certain industries are permitted on the basis that their extensive history of governmental oversight and heavy regulations prevents a reasonable expectation of privacy in their products.[121]

(1) Test. Such warrantless inspections are deemed reasonable if:

(a) A substantial governmental interest informs the regulatory scheme under which the inspection is made;

(b) The inspection is necessary to further the regulatory scheme; and

(c) The regulatory inspection program provides a constitutionally adequate substitute for a warrant in terms of its certainty and regularity of application.[122]

(2) Narrow Construction of Exception. The heavily regulated business exception to the warrant requirement is narrowly construed, and hinges on the history of governmental supervision providing notice to those entering the industry. Those choosing to enter a heavily regulated industry effectively consent to the regulation.[123]

---

[120] See *Barlow's Inc*., supra (warrant for OSHA inspection could properly issue upon showing of administrative plan derived from neutral sources such as a desired frequency of inspections for certain types of businesses); *Camara*, supra (warrant for housing code inspection could properly issue upon showing of factors such as the nature of the building, passage of time, and condition of surrounding area rather than specific knowledge of a particular building's condition).

[121] See, e.g., *New York v. Burger* (1987), 482 U.S. 692 (junkyards); *Donovan v. Dewey* (1981), 452 U.S. 594 (stone quarries); *U.S. v. Biswell* (1972), 406 U.S. 311 (firearms); *Colonnade Catering Corp*. v. U.S. (1970), 397 U.S. 72 (alcoholic beverages).

[122] See *Burger*, supra. To provide an adequate substitute for a warrant, the regulatory scheme must advise the owner of the premises that that search of defined scope is being made pursuant to law and limit the discretion of the inspecting officers.

(3) Insignificant Issues. If the regulatory scheme at issue serves legitimate regulatory purposes, the following issues lack constitutional significance:

(a.) The jurisdiction's penal laws address the same problem and goals addressed by the regulatory scheme;

(b.) Discovery of criminal evidence while enforcing the administrative scheme; and

(c.) Performance of the inspection by police officers rather than administrative inspectors.[124]

(B) *Checkpoints and Blanket Searches for Limited Safety-Related Purposes*. Government actors may conduct warrantless and suspicionless checkpoints to ensure public safety.[125]

(1) Test. The reasonableness of warrantless and suspicionless checkpoints is determined by balancing the nature of the threatened privacy interests and their connection to the particular law enforcement practices at issue.[126]

(2) Threat to Public Safety Not Dispositive of Means Utilized. The level of the threat to public safety is not dispositive of the means properly used by law enforcement officials.[127] However, urgent public safety considerations may require loosening the normal constraints upon law enforcement.[128]

(3) Primary Purpose Inquiry. Courts may inquire into and assess the primary purposes of warrantless and suspicionless checkpoints

---

[123] *Barlow's Inc*., supra, see also *Burger*, supra (discussing long history of extensive regulations applicable to junkyards).

[124] See *Burger*, supra and *Ferguson*, supra. However, such inspections may not be used as a pretext to an intended criminal investigation. *U.S. v. Johnson* (C.A. 10 1993), 994 F.2d 740 (warrantless inspection of taxidermy shop involving federal anti-smuggling agent not excepted from warrant requirement).

[125] Where the risk to public safety is substantial and real (in places such as borders, airports, and government buildings), limited searches calibrated to the risk are permitted. See *City of Indiananapolis v. Edmond* (2000), 531 U.S. 32 and *Chandler v. Miller* (1997), 520 U.S. 305; *Michigan Dept. of State Police v. Sitz* (1990), 496 U.S. 444 (upholding suspicionless vehicle sobriety checkpoints); *State v. Goines* (1984), 16 Ohio App.3d 168 (calculated pattern of inspecting motor vehicles at a designated checkpoint does not violate Fourth Amendment).

[126] *Edmond*, supra; *State v. Eggleston* (1996), 109 Ohio App.3d 217.

[127] Id.

[128] See *Edmond v. Goldsmith* (C.A.7 1999), 183 F.3d 659.

when assessing their validity under the Fourth Amendment.[129]

(4) No Pretextual Use of Checkpoints. The pretextual use of checkpoints for the primary purpose of uncovering criminal evidence violates the Fourth Amendment.[130]

(C) *Searches Incident to Lawful Arrest*. Warrantless searches incident to lawful arrest are permitted if reasonable under the circumstances.[131]

(1) Test. Searches incident to arrest must be justified by a need to either ensure the arresting officer's safety or prevent the destruction of evidence.[132]

(D) *Investigatory Stops Based on Reasonable Suspicion*. Warrantless stops and "pat downs" are permissible if based upon reasonable suspicion of criminal activity.[133]

(1) Test. "Reasonable suspicion" exists when there is a particularized and objective basis to suspect criminal activity based on specific and articuable facts and the rational inferences drawn from them.[134]

(E) *Exigent Circumstances Exception*. Warrantless searches are permissible if the delay associated with obtaining a warrant is likely to lead to injury, public harm, or the destruction of evidence.[135]

(2) Limitations on Scope of Search. A search conducted pursuant to the exigent circumstances exception is limited in scope to the exigencies justifying its initiation.[136]

---

[129] *Edmond*, supra.

[130] Id.

[131] See *Schmerber v. California* (1966), 384 U.S. 757 (blood sample obtained without warrant or consent deemed minor intrusion and reasonable where probable cause existed to believe that defendant was driving while intoxicated and delay to secure warrant may have led to destruction of evidence) and *Cupp v. Murphy* (1973), 412 U.S. 291 (warrantless scraping of fingernails deemed minor intrusion and reasonable where threat existed that evidence would be destroyed). See also *In re Jackson* (1970), 21 Ohio St.2d 215.

[132] See, e.g., *Marifam v. Buil* (1990), 494 U.S. 325.

[133] See, e.g., *Terry v. Ohio* (1968), 392 U.S. 1; *State v. Gonsior* (1996), 117 Ohio App.3d 481.

[134] *Terry*, supra; *State v. Brite* (1997), 120 Ohio App.3d 517.

[135] See *Schmerber*, supra, *Mincey v. Arizona* (1978), 437 U.S. 385 (fire constitutes exigent circumstances sufficient to permit reasonable entry without warrant).

[136] *Mincey*, supra.

B. Administrative Warrants and Public Health Grounds for Search Warrants

1. ***Administrative Entry Subject to Same Procedure as Entry for Criminal Investigation***. Under the Fourth Amendment, administrative entry by the government into premises may only be compelled within the framework of a formal warrant procedure.[137]
2. ***Issuance of Administrative Warrants***. Administrative warrants may only be issued as long as public need for effective enforcement of the regulation involved outweighs the owner's expectation of privacy.[138]
   (a) Lesser Probable Cause Requirement. Administrative warrants are not subject to the same stringent probable cause requirement as criminal search warrants. The evidence of a specific violation required to establish administrative probable cause must show that the proposed inspection is based upon a reasonable belief that a violation has been or is being committed.[139]
   (b) Flexibility of Probable Cause Standard. Probable cause with respect to the issuance of an administrative warrant to enter and inspect premises is subject to a flexible standard of reasonableness involving the agency's particular demand for access and the public need for effective enforcement of the regulation involved.[140]
3. ***Issuance of Search Warrant on Public Health Grounds***. Pursuant to the Revised Code, a judge may issue warrants permitting a search for existing or potential physical conditions hazardous to the public health, safety, or welfare.[141]

C. Confidentiality of Warrants

1. ***Record Definition***. A record is defined any document, devise, or item, regardless of physical form or characteristic, including an electronic record as defined by statute, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.[142]
2. ***Public Record Definition***. A public record is defined as a record required to be kept by any public office, including but not limited to state, city, county, village, township, and school districts and which is not specifically exempted from public viewing under the governing statute. Public records include judicial records.[143]

[137] 25 Ohio Jurisprudence 3d 270-271, Criminal Law, Section 191.

[138] Id.

[139] *U.S. v. Establishment Inspection of: Jeep Corp*. (6th Cir. 1988), 836 F.2d 1026.

[140] *State v. Finnell* (1996), 115 Ohio App.3d 583.

[141] R.C. 2933.21(F).

[142] R.C. 149.40.

[143] 80 Ohio Jurisprudence 3d 566, Records & Recording, Section 15.

3. ***The Public Records Act***. Ohio's Public Records Act requires complete access to all public records upon request unless the requested records fall within one of the specified exemptions.[144]
4. ***The Search Warrant as Public Record***. Upon its return, the warrant and all papers in connection with the warrant are filed with the clerk of courts.[145]
5. ***Public Record Exemptions***. The following records pertinent to public health issues are exempt from disclosure under the Public Records Act.
   (a) Medical Records. An official record is exempt from disclosure requirements as a medical record if it consists of any document or combination of documents which pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and which is generated an maintained in the course of medical treatment.[146] Any information directly or indirectly identifying a present or former individual patient or client of a governmental entity or agency or nonprofit corporation or association required to keep records pursuant to statute or the diagnosis, prognosis, or medical treatment of the patient or client is not a public record.[147]
      i. *Exceptions*. Records of births and deaths and the fact of admission to or discharge from a hospital are not exempt under this exception.[148]
   (b) Records Prohibited From Release by State or Federal Law. Records are exempt from public disclosure requirements if state or federal law prohibits their release. Medical records of a deceased person provided to the coroner, deputy coroner, or their representatives are specifically exempted by state law.[149]

II. Searches and Inspections of Premises and Property

In addition to the general constitutional requirements surrounding searches, Ohio law contains provisions directly addressing authority over property and premises for public health purposes.

A. Inspections to Contain or Prevent Infectious Diseases

1. ***Power of Local Health District***. Local health districts are vested with the authority to abate and remove all nuisances within their jurisdiction. In accordance with this power, they may order the owners or occupants of any lot, building, or structure to abate or remove nuisances.[150] When a

[144] R.C. 149.43; see also *State ex rel. Besser v. Ohio State Univ*., 87 Ohio St.3d 535, 2000-Ohio-475.

[145] Crim.R. 41(E).

[146] R.C. 149.43(A)(1) and (A)(3).

[147] R.C. 149.431(A)(1).

[148] R.C. 149.43(A)(3).

[149] R.C. 313.10.

[150] R.C. 3707.01.

building is deemed in a condition dangerous to public health, the local health district may declare it a public nuisance and order abatement.[151]

2. ***Right of Entry into House or Locality***. Ohio law expressly provides for the inspection of localities or premises by local health district commissioners upon reasonable belief that an unreported infectious or contagious disease is present.[152]
3. ***Procedure for Entry***. Those statutes granting the local health district the authority to enter, inspect, and take action to abate public health nuisances are silent as to any notice or warrant requirement to those found on the property entered. See Section B (Administrative Warrants and Public Health Grounds for Search Warrants) above for the requirements applicable to administrative entry by government officials.
4. ***Non-Compliance with Order of Local Health District***. The local health district is authorized to prosecute persons who may neglect or refuse to obey its orders.[153]
   (a) Arrest and Prosecution. The local health district may elect to cause the arrest and prosecution of non-compliant parties.[154]
   (b) Performance and Assessment of Abatement Activities. The local health district may elect to perform those abatement activities it had ordered performed and assess the material and labor costs as a tax lien against the property.[155]
      i. *Procedure*. The local health district must take the following steps in performing and assessing abatement activities:
         (A) Issuance of Citation. The local health district must issue and deliver a citation on the person(s) responsible for the property, either through service (if the person(s) reside in the local health district's jurisdiction), by registered letter (if not residing within the jurisdiction), or by leaving the citation at the premises (if the responsible person(s) cannot be located). The citation must recite the cause of the complaint and require the responsible person(s) to appear before the local health district at a specified time and place.[156]
         (B) Due Process. Appearance pursuant to the citation provides the responsible person(s) with notice of the cause of the complaint and an opportunity to be heard. At the conclusion of the hearing, the local

[151] Id.

[152] R.C. 3707.07.

[153] R.C. 3707.01.

[154] R.C. 3707.02.

[155] R.C. 3707.02.

[156] Id.

health district will then make an order as it deems proper.[157]

(1) If the responsible person(s) agrees to perform the abatement, the local health district grants a reasonable time for the work to be performed.[158]

(2) If the responsible person(s) does not agree to perform the abatement or fails to appear, the local health district will furnish the necessary materials, perform the necessary labor, and certify the expense to the county auditor for assessment.[159]

5. ***Destruction of Infected Structures***. If the local health district finds that the infected condition of a structure cannot be abated, it may have the structure appraised and destroyed.[160]

B. Quarantine of Premises

1. ***Ingress and Egress Prohibited***. Pursuant to their statutory authority to inspect houses or localities believed diseased, local health districts may prohibit ingress and egress from the premises.[161]

(a) Persons Exposed. Those persons exposed to disease located at a certain premises may either be removed from the premises or kept within the premises.[162]

2. ***Placarding of Premises***. Persons known to have been exposed to a quarantinable disease may be restricted to their place of residence and prohibited to leave without the written authority of the local health district.[163]

(a) Signage. Where premises are subject to quarantine, the local health district must place a placard having upon it, in large letters, the name of the disease.[164] The placard must be placed in a conspicuous position.[165]

i. *Prohibitions Regarding Signage*. The removal, destruction, or defacing of placards is subject to criminal penalty.[166]

---

[157] Id.

[158] Id.

[159] Id.

[160] R.C. 3707.12.

[161] R.C. 3707.07.

[162] Id.

[163] R.C. 3707.08.

[164] Id. Aside from the directive that the letters be "large," the statute provides no guidance regarding their minimum size.

[165] Id.

[166] Id.

3. ***Inspection and Closure of Schools***. During an epidemic or threatened epidemic, when a dangerous communicable disease is unusually prevalent, or for any other imminent public health threat as determined by the board, the board may close any school and prohibit public gatherings for such time as is necessary.[167]
   (a) Cost. The cost of quarantining a school or other public institution is borne by the county in which the school or public institution is located.[168]

C. Inspection and Destruction of Infected Personal Property

1. ***Authority to Disinfect or Destroy Infected Property***. The local health district is statutorily authorized to disinfect, renovate, or destroy the bedding, clothing, or other property belonging to corporations or individuals when necessary or as a reasonable precaution against the spread of contagious or infectious diseases.[169]
   (a) Disinfection Preferred. Prior to destroying infected property, the local health board must first determine whether it may be made safe by disinfection.[170]
   (b) Receipt Required for Destroyed Property. In association with property it destroys, the local health district must furnish a receipt to the owner showing the number, character, condition, and estimated value of the articles destroyed.[171]
   (c) Compensation for Property Destroyed. The legislative authority of the municipal corporation, upon presentation of the original receipt or written statement of the appraisers for articles or houses destroyed, shall pay to the owner the estimated value of the destroyed articles, or such sum deemed just compensation.[172]
      i. *Right to Sue for Value*. The owner retains the right to sue for the value of the destroyed property if dissatisfied with the estimate or just compensation figure reached by the legislative authority.[173]

[167] R.C. 3707.26.

[168] R.C. 3707.18.

[169] R.C. 3707.12 and 3707.32.

[170] See R.C. 3707.12.

[171] Id.

[172] R.C. 3707.13.

[173] Id.

III. Searches and Restraints of Persons

A. Obtaining Physical Evidence from Persons

1. ***Fourth Amendment Implicated***. The Fourth Amendment is implicated where the government seeks to obtain physical evidence from an individual. Detaining an individual long enough to obtain a sample from the body against his or her will constitutes a seizure of the person.[174]
2. ***Rationale***. Even in the event of a lawful detainment, human dignity and privacy interests forbid invasive procedures absent a clear indication that the desired evidence will be found. A "mere chance" of the desired evidence being recovered from the body is insufficient.[175]
3. ***Types of Bodily Intrusions and Examinations Deemed Searches***. Ohio law recognizes the following bodily intrusions as "searches" triggering the safeguards of the state and federal constitutions:
   (a) Blood Samples. Absent exigent circumstances, blood may be extracted from a person only upon issuance of a warrant or its functional equivalent.[176]
   (b) Urinalysis. Urinalysis constitutes a search despite the fact that urine is regularly discharged and the test procedure does not require penetration of the skin.[177]
   (c) Saliva.
4. ***Voluntary Receipt of Medical Care***. If a person voluntarily enters a hospital seeking medical care, substances or objects removed from the body and used by the state do not violate his due process rights.[178] While Ohio courts have not directly addressed the issue, it is logical that the voluntary nature of the patient's act and consent to the procedure may leave no lasting expectation of privacy in the substances once removed.

B. Medical Testing and Mandatory Treatment

1. ***Court-Ordered Testing for Sexually Transmitted Diseases***. R.C. 2907.27(A) permits warrantless testing of individuals charged with certain sex-related crimes upon the request of the prosecutor or victim.
   (a) Criminal Charges Triggering Statutory Testing. The following criminal charges permit warrantless testing of the accused:
      i. Rape.[179]
      ii. Sexual battery.[180]

---

[174] *Cupp v. Murphy* (1973), 412 U.S. 291.

[175] *Schmerber*, supra.

[176] *State v. Pearson* (1996), 114 Ohio App.3d 153 (absent exigent circumstances, blood may be extracted from a person only upon issuance of a warrant or its functional equivalent).

[177] *Feliciano v. City of Cleveland* (N.D.Ohio 1987), 661 F. Supp. 578.

[178] *State v. Wilson* (1972), 30 Ohio St.2d 199.

[179] R.C. 2907.02.

[180] R.C. 2907.03.

iii. Unlawful sexual conduct with a minor.[181]
iv. Soliciting.[182]
v. Loitering to engage in solicitation.[183]

(b) Warrantless Search Constitutional as a "Special Need." The court-ordered testing is deemed reasonable in light of several identified state interests.[184]
i. The state has an interest in protecting any victim who may have been exposed to a sexually transmitted disease.[185]
ii. The state has an interest in halting the spread of sexually transmitted diseases among the general population.[186]
iii. The state has an interest in protecting the health of its prison population by preventing the spread of diseases in the prison environment.[187]
iv. The state has an interest in providing appropriate medical care to any prison inmate suffering from a sexually transmitted disease.[188]

(c) Statute Upheld Against Constitutional Challenges. R.C. 2709.27 has been upheld against challenges that it violates the individual's rights of privacy, due process, freedom from unreasonable searches and seizures, and equal protection.[189]

2. ***Required Treatment for Disease upon Positive Test***. If the accused is found to be suffering from an infectious sexually transmitted disease, the accused is required by statute to submit to treatment.[190]

(a) Costs of Treatment. The costs of the required treatment shall be charged to and paid by the accused. If indigent, the accused must report to a local health district facility for treatment purposes.[191]

(b) Treatment as Condition of Community Control. If convicted and sentenced to community control, the offender may be required to submit to and follow a course of treatment as a condition of

[181] R.C. 2907.04.

[182] R.C. 2907.24.

[183] R.C. 2907.241.

[184] *State v. Wallace*, Montgomery App. No. 20030, 2005-Ohio-1913.

[185] Id.

[186] Id.

[187] Id.

[188] Id.

[189] Id.

[190] R.C. 2709.27(A)(2).

[191] Id.

community control. Failure to seek or receive treatment as required is grounds for a revocation of the offender's community control.[192]

3. ***Court-Ordered Testing for HIV or AIDS***. R.C. 2907.27(B) permits court-ordered testing for persons charged with crimes who are suspected of carrying HIV or AIDS.
   (a) Criminal Charges Permitting Warrantless Testing. R.C. 2907.27(B)(1)(a) permits warrantless HIV and AIDS testing upon request of the prosecutor, the victim, or any other person whom the court reasonably believes had contact with the accused in circumstances that could have caused transmission of HIV or AIDS when an accused is charged with one of the following crimes:
      i. Rape.[193]
      ii. Sexual battery.[194]
      iii. Unlawful sexual contact with a minor.[195]
      iv. Soliciting.[196]
      v. Loitering to engage in solicitation.[197]
      vi. Prostitution.[198]
      vii. Municipal ordinances substantially similar to those crimes listed above.[199]
   (b) Probable Cause-Based Testing for HIV and AIDS In All Other Cases. R.C. 2907.27(B)(1)(a) permits the court to order HIV and AIDS testing in all other criminal cases where the circumstances of the violation indicates probable cause that the accused, if infected with HIV or AIDS, may have transmitted the virus to another.
      i. *Parties Who May Request Testing*. The following parties may request the testing of the accused:
         (A) The prosecutor may request testing of the accused to determine whether the victim or any other person has been infected.[200]
         (B) The victim, upon obtaining the prosecutor's agreement, may request testing of the accused to determine whether he or she is infected.[201]

[192] Id.

[193] R.C. 2907.02.

[194] R.C. 2907.03.

[195] R.C. 2907.04.

[196] R.C. 2907.24.

[197] R.C. 2907.241.

[198] R.C. 2907.25.

[199] R.C. 2907.27(B)(1)(a).

[200] Id.

[201] Id.

(C) Any other person, upon obtaining the prosecutor's agreement, may request testing of the accused to determine whether he or she is infected.[202]

(c) Reporting of Test Results. The results of any test conducted pursuant to R.C. 2907.27(B)(1)(a)are communicated in confidence to the court.

i. *Disclosure of Results to Affected Parties.*

(A) Accused. The court informs the accused of the results of the test.[203]

(B) Victim. The court informs the victim that the test was performed and that the victim has a right to request the results.[204]

(C) Other person requesting test. The court informs the other person that the test was performed and that the person has a right to request the results.[205]

(D) Others; Reasonable Belief of Court. If the court reasonably believes that, in circumstances involving the violation, the accused had contact with another person that could have resulted in transmission of the virus, the court may inform that person that the test was performed and that the person has a right to request the results.[206]

ii. *Additional Disclosures of Results if Positive*.

(A) Department of Health. If the test is positive, the court informs the Department of Health of the positive results.[207]

(B) Jailer. If the test is positive, the court informs the sheriff, head of the state correctional institution, or other person in charge of any jail or prison in which the accused is incarcerated.[208]

(C) Arresting Agency. If the test is positive, and the accused is charged with soliciting, loitering to engage in solicitation, prostitution, or a substantially similar municipal ordinance, the court informs the law enforcement agency that arrested the accused.[209]

[202] Id.

[203] R.C. 2907.27(B)(1)(b).

[204] Id.

[205] Id.

[206] Id.

[207] Id.

[208] Id.

[209] Id.

(d) Testing as Condition of Bond. The court may revoke an accused's bond if the accused refuses to submit to a court-ordered HIV or AIDS test. The accused may be incarcerated until the test is performed.[210]

i. *Forcible Administration of Test*. If an incarcerated accused refuses to submit to a court-ordered HIV or AIDS test, the court must order the jail or prison authorities to take any action required to administer the testing, including forcibly administering the test if necessary.[211]

4. ***Disclosure of HIV and AIDS Test Results Where Test Not Ordered by Court***. Persons acquiring HIV and AIDS test results in the course of providing health care services or while employed by a health care provider are statutorily limited in their ability to disclose such results.[212]

(a) Application to Private Individuals and State Agents. The statute applies equally to private individuals and state agents.[213]

(b) General Ban on Disclosing Identity of Tested Individual. The following information generally may not be disclosed:

i. The identity of an individual on whom an HIV test is performed.[214]

ii. The results of an HIV test in a form that identifies the individual tested.[215]

iii. The identity of any individual diagnosed as having AIDS or an AIDS-related condition.[216]

(c) Permissible Disclosures of Identity of Tested Individual and Results. The following parties may obtain disclosure of test results and the identity of the tested individual:

i. The tested individual or his/her legal guardian.[217]

ii. The tested individual's spouse or sexual partner.[218]

iii. A person authorized by way of written release executed by the individual or his/her legal guardian.[219]

iv. The tested individual's physician.[220]

---

[210] R.C. 2907.27(B)(2).

[211] Id.

[212] R.C. 3701.243.

[213] R.C. 3701.243(A).

[214] R.C. 3701.243(A)(1).

[215] R.C. 3701.243(A)(2).

[216] R.C. 3701.243(A)(3).

[217] R.C. 3701.243(B)(1)(a).

[218] Id.

[219] R.C. 3701(B)(1)(b). The written release must specify both the party authorized to receive the results and the time period for which the release is effective.

[220] R.C. 3701.243(B)(1)(c).

v. The department of heath or a health commissioner to which reports are made under R.C. 3701.24.[221]

vi. Health care facilities receiving donated body parts from the individual.[222]

vii. Heath care facility staff committees or accreditation or oversight review organizations conducting monitoring, evaluations, or reviews.[223]

viii. Health care providers, emergency services workers, or peace officers sustaining significant exposure to the body fluids of the tested individual.[224]

ix. Law enforcement authorities pursuant to a search warrant or subpoena.[225]

x. Health care providers, their agents, and employees assisting with the diagnosis, treatment, or care of the individual and with a medical need to know the information.[226]

xi. Any other person or government agency complying with the following procedure:

(A) *Common Pleas Action*. The person or agency seeking the information must bring an action in the common pleas court requesting disclosure or authority to disclose the results of a specific individual.[227]

(1) Pseudonym. The tested individual shall be identified in the complaint by pseudonym. The name of the tested individual shall be communicated confidentially to the court, pursuant to an order restricting its use.[228]

(B) *Notice and Hearing*. In connection with the action, the court must provide the tested individual with notice of the suit and the opportunity to be heard on the matter of disclosure.[229]

(1) Privacy of Proceedings. The proceedings shall be conducted in chambers, unless the

[221] R.C. 3701.243(B)(1)(d).

[222] R.C. 3701.243(B)(1)(e).

[223] R.C. 3701.243(B)(1)(f).

[224] R.C. 3701.243(B)(1)(g).

[225] R.C. 3701.243(B)(1)(h).

[226] R.C. 3701.243(B)(2)

[227] R.C. 3701.243(C).

[228] R.C. 3701.243(C)(1)(a).

[229] Id.

tested individual agrees to a hearing in open court.[230]

(C) *Clear and Convincing Evidence Standard*. To succeed, the party bringing the suit must demonstrate, by clear and convincing evidence, a compelling need for disclosure of the information that cannot be accommodated by other means.[231]

(1) Assessment of "Compelling Need." In assessing the plaintiff's "compelling need" for disclosure, the court must weigh the need for disclosure against the privacy rights of the tested individual and any disservice to the public interest.[232]

(D) *Application to Both Civil and Criminal Proceedings*. At least one Ohio court has determined that this procedure must be followed prior to the introduction of an individual's HIV-related medical records into evidence in either civil or criminal matters.[233]

(d) Discovery Permitted in Civil Actions. Where a plaintiff seeks civil recovery from an individual defendant on the basis that the plaintiff contracted the HIV virus as a result of the defendant's actions, discovery of any HIV test administered to the defendant or any diagnosis that the defendant suffers from HIV or AIDS is expressly permitted by statute.[234]

5. ***Tested Individual's Disclosure Obligations***. An individual with knowledge that he or she has received a positive HIV test or has been diagnosed with HIV or AIDS is statutorily required to disclose this information to potential sexual partners or persons with whom the individual plans to share a hypodermic needle.[235]

C. Isolation and Quarantine

1. ***Definitions***. Isolation is defined as "the separation, for the period of communicability, of known infected persons in such places and under such conditions as to prevent or limit the transmission of the infectious agent."[236] Quarantine is defined as "the restriction of the activities of

[230] Id.

[231] R.C. 3701.243(C)(1)(b).

[232] Id.

[233] See *State v. Gonzalez*, 154 Ohio App.3d 9, 2003-Ohio-4421. The *Gonzalez* court concluded that Section (B) of the statute merely permits law enforcement to obtain the information, and that compliance with Section (C) is required for law enforcement to further disclose the information at trial.

[234] R.C. 3701.243(C)(1)(4).

[235] R.C. 3701.243(F).

[236] Stedman's Medical Dictionary (28th ed. 2006).

healthy persons who have been exposed to a communicable disease, during its communicability, to prevent disease transmission during the incubation period if infection should occur."[237]

2. ***History***. Isolation and quarantine have long been recognized as permissible techniques useful for containing the spread of infectious diseases.
   (a) State Power. The federal government recognizes the power of the states to institute quarantine to protect their citizens from infectious diseases.[238]
   (b) Isolation and Quarantine as Function of State's Police Power. The preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty. Whatever reasonably tends to preserve the public health is a subject upon which the Legislature, within its police power, may take action.[239]
   (c) Broad Rights in Establishing and Enforcing Quarantine. The right to establish and enforce quarantines is quite broad: to protect communities from epidemic diseases, the Supreme Court recognizes that states have the authority to "enact quarantine laws and health laws of every description."[240]
3. ***Isolation and Quarantine as Arrest***. Several Ohio courts have declared that the seizing and placing in quarantine of a person pursuant to the health laws constitutes an arrest.[241]
4. ***Vesting of Powers of Isolation and Quarantine***. The Department of Health and local health districts share authority in matters of isolation and quarantine.
   (a) Authority of Department of Health.
      i. *Supreme Authority*. The Department of Health has supreme authority in matters of quarantine, which it may declare, enforce, modify, relax, and abolish.[242]
      ii. *Emergency Actions*. The Department of Health may make and enforce orders in local health matters where an emergency exists.[243]

[237] Id.

[238] *Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health* (1902), 186 U.S. 380.

[239] See, e.g., *Kroplin v. Truax* (1929), 119 Ohio St. 610, 165 N.E. 498 and *Ex parte Company* (1922), 106 Ohio St. 50, 139 N.E. 204.

[240] *Jacobson v. Massachusetts* (1905), 197 U.S. 11.

[241] *State v. Kratzer* (1972), 33 Ohio App.2d 167, 293 N.E.2d 104; *Alter v. Paul* (1955), 101 Ohio App. 139, 135 N.E.2d 73.

[242] R.C. 3701.13.

[243] Id.

(b) Local Health Districts.

i. *Assigned Powers*. The state Department of Health has validly delegated most of its power to declare isolation and quarantine to local authorities.[244]

(A) Broad Delegation of Power. Local health districts may make such orders and regulations as are necessary for the public health. In the case of emergencies caused by epidemics of contagious or infectious diseases, the local health district may declare emergency measures effective immediately.[245]

(B) Specific Powers Regarding Isolation and Quarantine. Specific quarantine and isolation powers are enumerated at R.C. 3707.04 through 3707.34.

(1) *Powers Upon Suspicion or Reasonable Belief of Disease*. Upon complaint or reasonable belief of infectious or contagious disease, authorities may:

(a.) Send the diseased person to a hospital or other place provided for such persons.

(b.) Restrain the diseased person and others exposed within such house or locality from interaction with others and prohibit ingress and egress to or from such premises.[246]

(2) *Powers Upon Known Exposure to Quarantinable Diseases*. In the event of a known exposure to a communicable disease declared quarantinable, the local health district must immediately take the following action:

(a.) Restrict the exposed person to his place of residence or other suitable place so as to prevent contact with those not exposed.

(b.) Prohibit entrance to or exit from such place without the board's written permission.[247]

(3) *Powers Upon Known Infection with Diseases Requiring Isolation*. When a

[244] *Ex parte Company* (1922), 106 Ohio St. 50, 139 N.E.204.

[245] R.C. 3709.21.

[246] R.C. 3707.07.

[247] R.C. 3707.08.

person has, or is suspected of having, a communicable disease requiring isolation, the local health district must:

(a.) Immediately separate the infected person from other persons to prevent the spread of the disease to susceptible persons.

(b.) Prohibit entrance to or exit from such places of separation without the board's written permission.[248]

(4) *Restrictions on Movement Among Those Isolated or Quarantined; Written Permission Required*. No person isolated or quarantined by a board shall leave the premises to which he has been restricted without the written permission of such board until released from isolation or quarantine by it in accordance with the rules and regulations of the department.[249]

(5) *Attendance of Quarantined Persons at Public Gatherings*. Quarantined persons are prohibited from attending public gatherings.[250]

(6) *Employment of Quarantine Guards by Local Heath District*. In the event of a quarantine or isolation, the local health district may employ persons to execute its orders and guard any house or place containing any person affected with or exposed to quarantineable disease.[251]

(a.) Police Powers. The persons employed as quarantine guards have police powers, and may use all necessary means to enforce R.C. 3707.01 through 3707.53 and local health district orders.[252]

(b.) No Restriction on Number. The local health district may employ as many guards as necessary to ensure proper quarantine.[253]

[248] Id.

[249] Id.

[250] R.C. 3707.16.

[251] R.C. 3707.09.

[252] Id.

[253] Id.

(7) *Isolation and Quarantine in Jails and Prisons*. The law requires confinement and isolation of exposed or infected persons within the jail or prison or other proper place for any time that is necessary to establish the fact that he has not contracted the disease.[254]

(a.) Court Order Required. A court order must issue to permit confinement and isolation of exposed or infected inmates.[255]

(b.) Notice Required Prior to Admission. The law prohibits admission of exposed or infected persons to a prisons or jails (as well as a number of other public institutions (e.g., state hospitals for the physically and mentally handicapped, children's homes) without prior notice of their condition to the authority in charge of the public institution.[256]

(c.) Location of Isolation or Quarantine. Construction of temporary buildings to house those exposed to or infected with disease is authorized by law.[257] The law also permits the removal of such persons to hospitals.[258]

(8) *Application of Regulations and Orders to Persons Arriving After Declaration of Quarantine*. Rules and regulations passed by a local health district shall apply to all persons, goods, or effects arriving by railroad, steamboat, or other vehicle of transportation, after quarantine is declared.[259]

(C) Hospitals for Contagious Disease. Ohio law provides for the construction of specific-purpose hospitals for the care of those afflicted with

[254] R.C. 3707.20.

[255] Id.

[256] Id.

[257] R.C. 3707.21.

[258] R.C. 3707.22.

[259] R.C. 3707.25.

contagious diseases and the removal of persons to those hospitals.

(1) *Construction*. The legislative authority of a municipal corporation may purchase land, either inside or outside its boundaries, and erect hospital buildings to isolate, care for, or treat persons suffering from dangerous contagious disease.[260]

(a.) Prior Consent for Construction Outside Boundaries of Municipal Corporation. Prior to the construction of a hospital outside the boundaries of the municipality, the consent of the municipal corporation or township where the hospital is to be established must generally first be obtained. [261]

i. *Consent Unnecessary*. Prior consent shall not be necessary if the hospital is more than eight hundred feet from any occupied house or public highway.[262]

(2) *Emergency Situations; Seizure of Property*. When great emergency exists, the board of health of a city or general health district may seize, occupy, and temporarily use for a quarantine hospital a suitable vacant house or building within its jurisdiction.[263]

(3) *Care, Control, and Staffing of Hospital Buildings*. The local health board of the city or general health district in which such buildings are located is charged with control over them.[264] The board appoints all employees or other persons necessary to the use, care, and maintenance thereof, and regulates the entrance, care, and treatment of patients.[265]

[260] R.C. 3707.29 and 3707.31.

[261] R.C. 3707.31

[262] Id.

[263] Id.

[264] R.C. 3707.30 and 3707.31.

[265] R.C. 3707.30.

(4) *Removal of Persons to Hospital*. When a person suffering from a dangerous contagious disease is found in a hotel, lodging-house, boardinghouse, tenement house, or other public place in the municipal corporation, the board may remove such person to such hospital in the interest of the public health.[266]

(5) *Payment for Care and Treatment Provided.* The expense of treatment will be borne by the infected person if the person is financially able.[267]

(D) Erection of Temporary Buildings for Isolation and Quarantine. Local health districts may erect temporary wooden buildings or field hospitals necessary for the isolation or protection of persons supposed to be infected.[268]

(1) *Staffing*. The local health district may employ nurses, physicians, laborers, and guards sufficient to operate the makeshift buildings.[269]

D. Care of Isolated or Quarantined Individuals; Involuntary Hospitalization

1. ***Maintenance of Quarantined Individuals***. The local health district is required to provide food, fuel, and other necessaries of life to all individuals quarantined.[270]

(a) Medical Care. The local health district is also required to provide medicine, nurses, and medical attendance for those quarantined.[271]

(b) Costs. Expenses for disinfection, quarantine, and others strictly for the public health are paid by the municipality. Expenses for food, fuel, medicine, and necessaries are to be paid by the person quarantined when able. If the person quarantined cannot make the payments, the expenses are borne by the municipality in which the person is quarantined.[272] If the person quarantined is from another area, the municipality rendering services may deliver a sworn

[266] Id.

[267] Id.

[268] R.C. 3707.32.

[269] Id.

[270] R.C. 3707.14.

[271] Id.

[272] Id.

statement of expenses to the county or municipality of the person's legal settlement.[273]

2. ***Least Restrictive Means***. There appears to be no current Ohio law mandating that quarantined individuals must be held in the manner least restrictive of their freedoms. At least one court from another state has recently found that no such right exists.[274] However, as this right is well-ingrained in involuntary commitment law, Ohio courts are likely to recognize it.[275]
3. ***Disposal of Infected Bodies***. The bodies of those dying of a communicable disease requiring immediate disposal for the protection of the public heath shall be buried or cremated within twenty-four hours after death.[276]
   (a) No Public Funeral or Public Viewing. No public or church funeral shall be held in connection with the burial of such person, and the body shall not be taken into any church, chapel, or other public place.[277]
   (b) Attendees Restricted. Only adult members of the immediate family of the deceased and such other persons as are actually necessary may be present at the burial or cremation.[278]
4. ***Involuntary Hospitalization***. Ohio law provides for the involuntary institutional admission of those afflicted with mental illness.
   (a) Generally. Involuntary hospitalization proceedings are governed by statute.[279]
   (b) Jurisdiction and Venue. Ohio probate courts have jurisdiction over involuntary hospitalization proceedings.[280] Venue is appropriate with the county of the person's residence or where the person is institutionalized.
   (c) Procedure. Involuntary hospitalization cases proceed as follows:
      i. *Affidavit for Hospitalization*. Proceedings are commenced with the filing of an affidavit with the court.
         (A) Contents. The affidavit may be filed by any person, either on reliable information or actual knowledge,

[273] R.C. 3707.17.

[274] See *In re Washington* (Wis. 2006), 716 N.W. 176. In Washington, a homeless woman afflicted with tuberculosis refused to cooperate with Milwaukee public health officials' multiple attempts to cure her, leading to her ultimate confinement in jail. She had previously refused to cooperate with the very means of confinement she sought through the court. Compare this with the several model acts (specifically, the Turning Point Act and the Model State Emergency Health Powers Act) addressing epidemic preparedness and requiring officials to utilize the least restrictive means of confinement.

[275] See section on Involuntary Commitment, infra.

[276] R.C. 3707.19.

[277] Id.

[278] Id.

[279] See R.C. 5122.11 through R.C. 5122.15.

[280] R.C. 5123.01(V).

whichever is determined proper by the court.[281] It must contain the following:

(1) *Jurisdiction*. An allegation setting forth the specific category or categories under the statute defining the term "mentally ill person subject to hospitalization by court order"[282] upon which jurisdiction is based.[283]

(2) *Facts*. A statement of alleged facts sufficient to indicate probable cause to believe that the person named is mentally ill and subject to hospitalization.[284]

(3) *Doctor's Certificate*. The court may require that the affidavit be accompanied by a certificate from (1) a psychologist and a physician or (2) a psychiatrist, stating that the person has been examined (or has refused an examination) and that the certifying medical professionals believe the person to be mentally ill and requiring hospitalization.[285]

(4) *Filing*. When the affidavit is in proper form, the court is duty-bound to receive and file it. However, the affidavit need not immediately be made part of the public record. [286]

(B) Service of Affidavit. The affidavit and any temporary detention order must be served on the person named in the affidavit and the person's counsel, if counsel has been appointed or retained.

(C) Notice of Subsequent Proceedings. The court receiving the affidavit is required to provide notice of the filing of the affidavit and of any subsequent hearings to the following persons, unless they waive notice:

(1) The person alleged to be mentally ill.

(2) The person's legal guardian, if any, spouse, if any, and parents, if a minor, if their addresses are known to the court or can be reasonably obtained.

(3) The person who filed the affidavit.

---

[281] R.C. 5122.11.

[282] R.C. 5122.01(B).

[283] R.C. 5122.11.

[284] Id.

[285] Id.

[286] See *State ex rel. Bles v. Merrick* (1965), 2 Ohio St.2d 13, 205 N.E.2d 924.

(4) Any one person designated by the person, or if the person does not make a selection, the person's next of kin who did not file the affidavit if the address is known to the court or can be reasonably obtained.

(5) The person's counsel.

(6) The director, chief clinical officer, or other designee of the hospital, board, agency, or facility to which the person has been committed, if applicable.

(7) The board of mental health services of the person's county of residence.[287]

(D) Importance of Compliance with Notice Provisions. The court's failure to comply with all notice provisions in a given case renders it without jurisdiction and voids any ultimate judgment of commitment.[288]

ii. *Investigation of Allegations Required by Statute*. After the affidavit is filed, the court is required to refer the affidavit to the appropriate mental health agency for assistance in determining whether the person named in the affidavit should be hospitalized.[289]

(A) Role of Mental Health Agency. The mental health agency investigation is for the purpose of determining whether the affidavit provides a valid basis for further proceedings and whether the person alleged to be ill has been unfairly or unjustly charged.[290]

(B) Observation and Treatment. The person alleged to be mentally ill may be observed and treated during this period of investigation.[291]

(C) Report of Investigation. The person conducting the investigation must promptly make a written report to the court regarding his or her findings.[292]

(1) *Record Required*. The court is required to make a full record of the investigator's report.[293]

---

[287] R.C. 5122.12.

[288] *In re Bartlett* (1958), 108 Ohio App. 93, 161 N.E.2d 76.

[289] R.C. 5122.13.

[290] See *Merrick*, supra.

[291] R.C. 5122.11.

[292] R.C. 5122.13.

[293] Id.

(2) *Report Not Admissible*. The report is not admissible for the purpose of establishing whether or not the person is mentally ill and subject to hospitalization. It is merely a point of consideration for the court to determine the proper placement of the person if adjudicated mentally ill.[294]

(3) *Entitlement to Copy of Report*. The person alleged to be mentally ill is entitled to receive a copy of the investigator's report.[295]

iii. *Medical Examination at Court's Discretion*. Upon accepting the affidavit, the court may appoint (1) a psychiatrist or (2) a licensed clinical psychologist and a physician to examine the person named in the affidavit.[296]

(A) Role of Medical Examination. The medical examination assesses the mental condition of the person and his or her need for custody, care, or treatment in a mental hospital.[297]

(1) *Location*. The examination is to be held at a hospital or other medical facility, the person's home, or other suitable place least likely to have a harmful effect on the person's health.[298]

(B) Report of Findings. At the first hearing, the medical professional is required to report his or her findings to the court.[299]

(C) Report Admissible. The court may accept the written report of appointed medical professionals as evidence as to the person's mental illness and need for hospitalization.[300]

iv. *Initial Probable Cause Hearing*. Persons alleged to be mentally ill and subject to hospitalization are entitled to a initial probable cause hearing to determine their status.[301]

(A) Timing of Hearing. If possible, the hearing must be held before the person is taken into custody.[302]

[294] Id.

[295] Id.

[296] R.C. 5122.14.

[297] Id.

[298] Id.

[299] Id.

[300] Id.

[301] R.C. 5122.141(A).

[302] R.C. 5122.141(F).

Regardless, the hearing must be conducted within five court days from the day on which the person is detained or the affidavit is filed, whichever occurs first.[303]

(1) *Continuances Possible*. Motions for continuance made by the person alleged to be mentally ill, his or her counsel, the chief clinical officer of the facility, or the court itself may be granted for good cause shown.[304]

(a.) Continuance Limited to Ten Days. Any continuance is limited to ten days from the day on which the person is detained or the affidavit is filed, whichever occurs first.[305]

(b.) Immediate Discharge. Failure to conduct the hearing within the time required results in the immediate discharge of the person from any facility in which he or she is being held.[306]

(B) Location of Hearing. The hearing is to be conducted in a setting not likely to have a harmful effect on the person. The hearing may be conducted at a hospital inside or outside of the county.[307]

(C) Probable Cause Finding that Person is Mentally Ill and Subject to Hospitalization. If the court finds the person mentally ill and subject to hospitalization, it may issue an interim order of detention for purposes of observation and treatment.[308]

(D) Lack of Probable Cause Supporting Finding of Mental Illness. If the court finds probable cause lacking, it must order the immediate release of the person and expunge all records of the proceedings against him or her.[309]

(E) Waiver of Probable Cause Hearing. The person named in the affidavit may waive the probable

---

[303] R.C. 5122.141(B).

[304] Id.

[305] Id.

[306] Id.

[307] Id.

[308] R.C. 5122.141(D).

[309] R.C. 5122.141(C).

cause hearing and simply proceed to a full hearing.[310] If the person is then detained, a full hearing must be held by the 30th day after the original involuntary detainment.[311] Failure to conduct the full hearing within this time results in the person's discharge.[312]

v. *Full Hearing*. Full hearings on the issue of involuntary commitment must comport with due process, and must be conducted by a probate court judge or a designated referee, who must be an attorney.[313]

(A) Rights of Persons Alleged to be Mentally Ill.

(1) *Discovery and Evidence Rights*. Counsel for the person alleged to be mentally ill is entitled to receive the following prior to the hearing:

(a.) All relevant documents, information, and evidence in the state's custody or control.[314]

(b.) All relevant documents, information, and evidence in the custody or control of the hospital in which the person is being held or has been held.[315]

(c.) All other relevant documents, information, and evidence held by any hospital, facility, or person.[316]

(2) *Rights of Attendance and Counsel*. The person alleged to be mentally ill has the right to attend the hearing. The person may waive this right. The person has the right to be represented by counsel of his or her choice, and the right to have counsel appointed if indigent.[317]

[310] R.C. 5122.141(E).

[311] Id.

[312] Id.

[313] R.C. 5122.15(A). The powers of a referee are set forth in R.C. 5122.15(J). Put simply, the referee possesses all powers of a judge except the ability to find a party in contempt. The referee functions much like a magistrate in other settings, in that parties may object to the referee's order and seek a final ruling from the court. The judge may ratify, rescind, or modify the referee's order. See R.C. 5122.15(J).

[314] R.C. 5122.15(A)(1)(a).

[315] R.C. 5122.15(A)(1)(b).

[316] R.C. 5122.15(A)(1)(c).

[317] R.C. 5122.15(A)(2).

(3) *Right to Independent Expert Evaluation*. The person alleged to be mentally ill has the right to an independent expert evaluation, to be paid by the state if the person is indigent.[318]

(4) *Right to Closed Hearing*. The hearing must be closed to the public unless counsel for the person alleged to be mentally ill requests an open hearing.[319]

(a.) Exceptions. Despite the closed nature of the hearing, the court may still admit persons with legitimate interests in the proceedings for good cause shown. Where objections are made to the admission of any of these persons, the court must hear the objection and rule upon the persons' admission to the hearing.[320]

(5) *Right to Subpoena Affiant*. The person commencing the action by affidavit may be subpoenaed by either side.[321]

(6) *Rights to Subpoena Witnesses and Documents; of Examination and Cross-Examination*. The person alleged to be mentally ill may subpoena witnesses and documents, and may examine and cross-examine witnesses.[322]

(7) *Right to Testify*. The person alleged to be mentally ill has the right to testify, but may not be compelled to testify.[323]

(8) *Right to Transcript and Record of Proceedings*. The person alleged to be mentally ill has the right to obtain the transcript and record of the proceedings. If the person is indigent, the cost shall be borne by the state.[324]

---

[318] R.C. 5122.15(A)(4).

[319] R.C. 5122.15(A)(5).

[320] R.C. 5122.15(A)(6).

[321] R.C. 5122.15(A)(7).

[322] R.C. 5122.15(A)(11).

[323] R.C. 5122.15(A)(12).

[324] R.C. 5122.15(A)(14).

(B) Evidentiary Standard. The standard of proof for the full hearing is that of clear and convincing evidence.[325]

(C) Where Clear and Convincing Evidence of Mental Illness Not Present; Result. Unless the court finds that the person is mentally ill and subject to hospitalization by clear and convincing evidence, the court must order the person's immediate discharge.[326]

(D) Where Clear and Convincing Evidence of Mental Illness Present; Result. If the court finds the person mentally ill and subject to hospitalization by clear and convincing evidence, it may order the person to any of the following:

(1) If the person is a child, a hospital operated by the department of mental health.[327]

(2) A non-public hospital, conditioned upon the person's acceptance into the hospital.[328]

(3) The veteran's administration or other U.S. government agency, conditioned upon the person's acceptance.[329]

(4) A board of mental health or agency designated by the board of mental health.[330]

(5) Receive private psychiatric or psychological care or treatment; conditioned upon the person's acceptance by the private provider.[331]

(6) Any other suitable facility or person consistent with the person's diagnosis, prognosis, and treatment needs; conditioned upon the person's acceptance into the facility or by the provider.[332]

(a.) Final Order. A finding that the person is mentally ill and subject to hospitalization is a final order.[333]

---

[325] See R.C. 5122.15(B) and 5122.15(C).

[326] R.C. 5122.15(B).

[327] R.C. 5122.15(C)(1); see also R.C. 5139.08.

[328] R.C. 5122.15(C)(2); R.C. 5122.15(D).

[329] R.C. 5122.15(C)(3); R.C. 5122.15(D).

[330] R.C. 5122.15(C)(4).

[331] R.C. 5122.15(C)(5); R.C. 5122.15(D).

[332] R.C. 5122.15(C)(6); R.C. 5122.15(D).

(b.) Report of Admission. In the event of an admission, the chief clinical officer of the agency or hospital must make a report of the admission to the county board of mental health.[334]

(E) Factors in Determining Treatment Received. The court must consider the following factors in imposing confinement or treatment on persons adjudicated mentally ill:

(1) The person's diagnosis, prognosis, and preferences.[335]

(2) The person's projected treatment plan.[336]

(3) The least restrictive alternative available and consistent with treatment goals.[337]

(F) Inpatient Treatment as Least Restrictive Option. If the court determines that inpatient treatment is the least restrictive option consistent with the goals of treatment, its order must expressly state as such.[338]

vi. *Post Hearing Issues*.

(A) Ninety-Day Maximum. The person shall initially be ordered to treatment or confinement for a period no longer than ninety days.

(1) *Determinations During Period of Ordered Treatment*. During this period, the person shall be examined and treated.[339]

(a.) Suitability of Less Restrictive Environment. If at any time prior to the expiration of the period it is determined by the treatment provider that a less restrictive environment is suitable and amenable with the goals of treatment, the following events must occur:

i. *Immediate Release and Referral*. The person is immediately released from the treatment facility or

[333] R.C. 5122.15(K).

[334] R.C. 5122.15(I).

[335] R.C. 5122.15(E).

[336] Id.

[337] Id.

[338] Id.

[339] See R.C. 5122.15(C) and (F).

program and referred to the court with a report of the findings and recommendations of the treatment provider.[340]

ii. *Notification of Counsel and Court*. If the person is not confined, the treatment provider must notify the person's counsel of the reduction in treatment. If the person is confined, the treatment provider shall place the person in the lesser restrictive environment and notify the court and the person's counsel.[341]

iii. *Court Order*. The court shall dismiss the case or order the person's placement in the less restrictive environment.[342]

b. Suitability of More Restrictive Environment. Before a treatment provider may place a person into an inpatient setting from a less restrictive placement against his or her will, it must comply with each of the following:

i. *Risk of Harm Determination*. The provider must determine that the person is in immediate need of inpatient treatment because the person represents a substantial risk of physical harm to the person or others if allowed to remain in a less restrictive setting.[343]

ii. *Motion to Transfer*. The provider must file a motion to transfer the person to an inpatient setting with the court on the day of placement

[340] R.C. 5122.15(F)(1).

[341] R.C. 5122.15(F)(2).

[342] Id.

[343] R.C. 5122.15(L)(1)

or the next court day. In the event the motion is mailed, the provider must communicate to the court that the motion has been mailed.[344]

iii. *Least Conspicuous Means of Transfer*. The provider must ensure that all reasonable and appropriate efforts are taken to transfer the person to an inpatient setting in the least conspicuous means possible.[345]

iv. *Notice*. The provider must immediately notify counsel on both sides of the matter of the transfer.[346]

aa. Hearing. At the person's request, the court will hold a hearing and make a final decision regarding the transfer within five days from the date of the person's placement in an inpatient setting.[347]

(2) *Conclusion of Court-Ordered Treatment Period.* If the case has not been otherwise disposed of at the end of the period of ordered treatment, the person is discharged.

(3) *Exception; Application for Continuing Commitment*. The state, through the mental health board or the prosecutor, may file with the court a written application for continuing commitment.[348]

[344] R.C. 5122.15(L)(2).

[345] R.C. 5122.15(L)(3).

[346] R.C. 5122.15(L)(4).

[347] Id.

[348] R.C. 5122.15(H).

(a.) Time. The application must be filed at least ten days before the expiration of the period of ordered treatment.[349]

(b.) Contents. The application must include a written report containing the diagnosis, prognosis, past treatment, a list of alternative treatment settings and plans, and identification of the treatment setting that is least restrictive consistent with treatment needs.[350]

(c.) Service and Notice. A copy of the application and written report must immediately be delivered to the committed person's counsel. Notice is required to those parties listed in R.C. 5122.12.[351]

(d.) Hearings Required. Hearings on continued commitment applications are mandatory and may not be waived.[352]

(e.) Timing of Hearings. The court must hold a full hearing on any application for continued commitments at the expiration of the first ordered period of treatment and at least every two years thereafter.[353]

(f.) Evidentiary Standard. The standard of proof for continuing commitment is that of clear and convincing evidence.[354]

(g.) Final Order. The judge's order on continuing commitment is a final order.[355]

(4) *Hearing for Release at Request of Person Committed*. A person committed may request a hearing on his or her continuing

[349] Id.

[350] Id.

[351] Id.

[352] Id.

[353] Id.

[354] Id.

[355] R.C. 5122.15(K).

commitment, either personally or through counsel.[356]

(a.) Notification of Rights by Facility. Patients involuntarily committed to a hospital or other facility who raise questions regarding release or discharge shall immediately be informed of their rights regarding release or discharge.[357]

(b.) 180 Days. The person is generally entitled to one hearing every 180 days.[358]

i. *Exception*. If the person's application for a hearing is accompanied by an affidavit of a psychiatrist or licensed clinical psychologist stating that the person is no longer mentally ill, the court may entertain the request at any time.[359]

c. Notice. Notice is required to those parties listed in R.C. 5122.12.[360]

d. Final Order. The judge's order resulting from such a hearing is a final order.[361]

(d) Voluntary Admission During Proceeding. Ohio law permits voluntary admission of patients to hospitals for the mentally ill.[362] If the person against whom proceedings are brought voluntarily admits him or herself, the court must dismiss the affidavit and terminate the proceedings.[363]

(e) Physician-Patient Privilege Issues. Ohio's physician-patient statute makes no exception for civil commitment proceedings. The statute applies as it would in all other contexts.[364]

[356] R.C. 5122.15(H).

[357] O.A.C. 5124-2-01(B)(6).

[358] Id. See also *State v. Rine* (1991), 68 Ohio App.3d 460, 588 N.E.2d 981 (committed individual entitled to full hearing on continued commitment where hearing not sought for over 22 months).

[359] Id.

[360] Id.

[361] R.C. 5122.15(K).

[362] See R.C. 5122.02.

[363] *In re Leitner* (1961), 87 Ohio L. Abs. 467, 180 N.E.2d 438.

[364] See R.C. 2317.02.

i. *Privilege Applies Only to Voluntary Treatment*. The physician-patient privilege applies only when a patient voluntarily seeks treatment. Evidence obtained through involuntary examinations may be used.

(A) Rationale. This evidence is not being used against the individual examined, but rather is being used to aid the court in evaluating treatment plans.[365]

(f) Additional Rights of Persons Involuntarily Committed. In addition to those referenced above, persons involuntarily committed pursuant to R.C. Chapter 5122 have the following rights:

i. *Treatment Rights*.

(A) The right to professional treatment, evaluation, prognosis, and diagnosis.[366]

(B) The right to have a written treatment plan consistent with the person's evaluation, prognosis, and diagnosis.[367]

(C) The right to receive treatment consistent with the treatment plan.[368]

(D) The right to receive periodic reevaluations of the treatment plan at ninety day intervals.[369]

(E) The right to be provided with adequate medical treatment for physical disease or injury.[370]

(F) The right to receive humane care and treatment, including the least restrictive environment necessary to facilitate the goals of treatment.[371]

(G) The right to be notified of their rights within 24 hours of admission.[372]

ii. *Personal Rights*.

(A) The right to have their on-site personal property reasonably safeguarded.[373]

(B) The right to wear their own clothes and maintain their own personal effects, or to be provided an adequate allowance for clothing if unable to provide their own.[374]

[365] See *In re Winstead* (1980), 67 Ohio App.2d 111, 425 N.E.2d 943.

[366] See R.C. 5122.27.

[367] See id.

[368] See id.

[369] See id.

[370] See id.

[371] See id.

[372] See id.

[373] See R.C. 5122.29.

[374] See id.

(C) The right to maintain personal appearances according to their personal taste, including head and body hair.[375]

(D) The right to keep and use personal possessions, including toilet articles.[376]

(E) The right of access to individual storage space for private use.[377]

(F) The right to keep and spend a reasonable sum of their own money for expenses and small purchases.[378]

(G) The right to receive and possess reading materials without censorship, unless the materials create a clear and present damage to personal safety.[379]

(H) The right to reasonable privacy.[380]

(I) The right to free religious exercise within the facility, including the right to services and sacred texts within the reasonable ability of the facility to provide.[381]

(J) The right to supervised social interaction with members of each sex, unless such interaction does not comport with the written treatment plan for clear treatment reasons.[382]

(1) *Clear Treatment Reasons*. For purposes of this statute, "clear treatment reasons" means that permitting the patient to communicate freely with others will present a substantial risk of physical harm to the patient or others or will substantially preclude effective treatment for the patient.[383]

iii. *Communication Rights*.

(A) The right to communicate freely with and be visited at reasonable times by private counsel or legal rights service personnel.[384]

---

[375] See id.

[376] See id.

[377] See id.

[378] See id.

[379] See id.

[380] See id.

[381] See id.

[382] See id.

[383] Id.

[384] See id.

(B) The right to communicate freely at reasonable times with a personal physician or psychologist, unless prior court restriction has been obtained.[385]

(C) The right to communicate freely with others, including the right to receive visitors at reasonable times and the right to reasonable telephone access to make and receive confidential calls, unless specifically restricted in the patient's written treatment plan for clear treatment reasons.[386]

(1) *Clear Treatment Reasons*. For purposes of this statute, "clear treatment reasons" means that permitting the patient to communicate freely with others will present a substantial risk of physical harm to the patient or others or will substantially preclude effective treatment for the patient.[387]

(2) *Assistance with Telephone Calls*. This right includes the ability to make a reasonable number of free calls if unable to pay for them and assistance in calling if requested and needed.[388]

(3) *Right to Immediate Telephone Access Upon Involuntary Intake*. Involuntarily admitted patients have the right to immediately make a reasonable number of telephone calls or use other reasonable means to contact an attorney, a licensed physician, or a licensed clinical psychologist, to contact any other person or persons to secure representation by counsel, or to obtain medical or psychological assistance, and be provided assistance in making calls if the assistance is needed and requested.[389]

(D) The right to have ready access to letter-writing materials, including a reasonable number of stamps if unable to pay for them, and to mail and receive unopened correspondence and assistance in writing if requested and needed.[390]

---

[385] See id.

[386] See id.

[387] Id.

[388] See id.

[389] R.C. 5122.05(C).

[390] R.C. 5122.29.

iv. *Freedom from Assault*.

(A) A person involuntarily committed must be provided reasonable protection from assault or battery by any other person.[391]

v. *Notification of Basic Rights*.

(A) Prior to Admission. Immediately upon arrival at a hospital or facility, before any evaluation or admission procedures have commenced, a person involuntarily committed must be informed of his or her basic legal rights and provided with a written statement of those rights.[392]

(1) *Exception*. Treatment may begin in the event of bona fide emergencies to prevent immediate physical harm to the person or others.[393]

(2) *Documentation*. Staff must document the fact that the person has been informed of his or her basic legal rights upon intake.[394]

(B) During Admission Process. As part of the admission process, the person committed must be provided with a pamphlet containing a detailed explanation of patient's rights and a brief oral explanation of patient's rights under the law.[395]

(1) *Documentation*. Staff must document the fact that the person has been provided the pamphlet and explanation of rights.[396]

(C) After Admission. The following notifications must occur after the person is admitted to the hospital or other facility:

(1) *Within 24 Hours*. Within 24 hours of the person's admission, the facility's client advocate or designee must contact the person committed and explain the contents of the patient's rights pamphlet in detail.[397]

(2) *Person Incapable of Understanding Rights*. If the person is incapable of understanding the rights when contacted after admission,

[391] See id.

[392] O.A.C. 5124-2-01(C)(3).

[393] Id.

[394] Id.

[395] O.A.C. 5124-2-01(C)(5).

[396] Id.

[397] O.A.C. 5124-2-01(C)(6).

the client advocate or designee shall continue to contact the person according to the following schedule until the person is able to understand his or her rights:

(a.) First Ninety Days. For the first ninety days, the advocate or designee must contact the person within three days of admission and every week thereafter until the person understands his or her rights.[398]

(b.) After Ninety Days. If the person is still incapable of understanding his or her rights after the first ninety days, the advocate or designee must continue to contact the person every ninety days until the person understands his or her rights.[399]

(3) *Documentation*. Staff must document each attempt to inform the person of his or her rights after admission.[400]

(D) Understanding of Rights; Verification. Once the person admitted has understood the explanation of patient's rights provided by staff, he or she shall be asked to sign a written acknowledgement to that effect.[401]

(1) *Documentation*. The acknowledgement or a written statement by the advocate or designee documenting the person's refusal to sign the acknowledgement must be added to the person's records.[402]

(E) Follow-Up at Reasonable Intervals. Once the person admitted understands his or her rights, the advocate or designee must contact them at regular intervals until discharge to repeat the explanation and provide any needed assistance.[403]

[398] O.A.C. 5124-2-01(C)(7).

[399] Id.

[400] Id.

[401] Id.

[402] Id.

[403] O.A.C. 5124-2-01(C)(8).

CHAPTER 4—CITIZEN RELIEF FROM GOVERNMENT ACTION

I. Legal and Equitable Relief

A. Relief from Allegedly Illegal Quarantine or Restraint on Liberty

1. ***No Express Provision for Relief***. Those provisions of the Revised Code permitting the quarantine and isolation of persons suspected of having or having a dangerous communicable disease do not expressly provide for any challenge to allegedly illegal quarantines or restraints on liberty.[404]
2. ***Writ of Habeas Corpus***. Persons restrained by quarantine have used habeas corpus to challenge their continued detainment.
   (a) In General. Ohio law permits one unlawfully restrained of his or her liberty or is entitled to the custody of another, which is unlawfully being deprived, may prosecute a writ of habeas corpus in quire into the cause of such restraint.[405]
      i. *Class Actions*. Class writs for habeas corpus are not prohibited, but may be maintained only if questions of law and fact common to class members predominate over any questions affecting only individual members.[406]
   (b) Unlawful Restraint. "Unlawful restraint" includes restraint of liberty through imprisonment or detention by a public officer with or without color of law.[407]
   (c) Habeas Corpus Proceedings. The habeas corpus proceeding transpires as follows:
      i. *Original Jurisdiction*. Original habeas corpus jurisdiction is vested with several courts.
         (A) Constitutional Authority. Original jurisdiction is constitutionally vested with the Ohio Supreme Court, the courts of appeal, and the common pleas courts.[408]
         (B) Statutory Authority. The Revised Code also grants original jurisdiction to the Supreme Court, the courts of appeal, and the common pleas courts, as well as the probate courts.[409] Juvenile courts have concurrent original jurisdiction with the courts of

[404] See R.C. 3707.04 through 3704.28.

[405] R.C. 2725.01.

[406] See *Harshaw v. Farrell* (1977), 55 Ohio App.2d 246, 380 N.E.2d 749; see also Civ.R. 23.

[407] See, e.g., *State ex rel. Smirnoff v. Greene* (1998), 84 Ohio St.3d 165, 702 N.E.2d 423.

[408] Section 2(B)(1)(c), Article IV, Ohio Constitution; Section 3(B)(1)(c), Article IV, Ohio Constitution; Section 4(B), Article IV, Ohio Constitution..

[409] R.C. 2725.02; R.C. 2101.24(B)(1)(b).

appeal to hear and determine any habeas corpus applications involving child custody.[410]

(C) No Jurisdiction. A state court cannot grant habeas relief to a person being held in the state by virtue of or under the color of federal authority.[411]

ii. *Venue*. The venue statutes relating to the commencement of ordinary civil actions are inapplicable to habeas corpus proceedings because the habeas corpus statute provides the basic summary procedure for bringing such an action.[412]

(A) Courts of County of Confinement. Only the courts of the county in which the petitioner is confined have jurisdiction over a habeas corpus proceeding.[413]

(B) Location of Institution of Confinement. The court of the county in which the institution where the petitioner is confined is the appropriate venue for a habeas corpus proceeding.[414]

iii. *Application*. The habeas corpus proceeding begins with the filing of a petition, signed and verified by the person seeking relief or by someone on their behalf.[415]

(A) Information Required in Petition. The petition seeks habeas corpus relief must contain the following:

(1) An assertion that the petitioner is either unlawfully restrained of liberty or is entitled to the custody of another.[416]

(2) The officer or name of the person by whom the prisoner is confined or restrained. If this information is unknown, the officer or person may be described, and the person served with the writ is deemed to be the person intended.[417]

---

[410] R.C. 2151.23(A)(3); *In re Black* (1973), 36 Ohio St.2d 124, 304 N.E.2d 394.

[411] See, e.g., *Ableman v. Booth* (1858), 62 U.S. 506; *In re Disinger* (1861), 12 Ohio St. 256.

[412] *Pegan v. Crawmer* (1995), 73 Ohio St.3d 607, 653 N.E.2d 659.

[413] R.C. 2725.03.

[414] Id.

[415] R.C. 2725.04; *Malone v. Lane*, 96 Ohio St.3d 415, 2002-Ohio-4908, 775 N.E.2d 527. For another to sign and verify the petition on behalf of the person detained, it must be verified that (1) there exists an adequate reason, such as inaccessibility to the court system, mental incompetence, or other disability, why the detainee cannot file the petition him or herself, and (2) there exists between the detainee and the person filing the petition a significant relationship causing the person to adequately protect the detainee's interests. *Novak v. Gansheimer*, 155 Ohio App.3d 268, 2003-Ohio-5981, 800 N.E.2d 764.

[416] Id.

[417] Id.

(2) A specific description of the place of restraint or imprisonment, if known.[418]

(3) Particularized allegations regarding the extraordinary circumstances entitling the petitioner to the writ.[419]

(4) The signature and verification by the person seeking relief or someone on their behalf.[420]

(B) Attachments to Petition. The petition must be accompanied by a copy of the commitment(s) or cause(s) of detention, if a copy can be obtained without impairing the efficiency of the habeas corpus remedy.[421]

(C) Affidavit. As with any civil action or civil appeal against a governmental entity, the petitioner (if an inmate), must file with the court an affidavit describing all civil actions or civil appeals that the person has filed in the previous five years and the disposition of any such actions.[422]

(E) Strict Compliance; Grounds for Dismissal. These statutory requirements are mandatory: failure to include the appropriate information within the petition or attach all required commitment papers or papers documenting the cause of detention constitute grounds for dismissal of the petition.[423]

iv. *Amendment of Petition*. Because Civ.R. 15(A), which permits a party to amend a pleading once as a matter of course before service of a responsive pleading, is not clearly inapplicable to habeas proceedings, courts permit such amendments to habeas petitions.[424]

v. *Allowance and Issuance of Writ*. When the petition is filed, the judge examines it and determines whether it should be allowed.

(A) Standard for Allowance. If the petitioner makes a proper allegation of facts entitling him or her to

[418] Id.

[419] *State ex rel. Wynn v. McFaul* (1998), 81 Ohio St.3d 193, 690 N.E.2d 7; *Workman v. Shiplevy* (1997), 80 Ohio St.3d 174, 685 N.E.2d 231.

[420] R.C. 2725.04.

[421] Id.

[422] R.C. 2969.25(A).

[423] See, e.g., *Johnson v. Mitchell* (1999), 85 Ohio St.3d 123, 707 N.E.2d 471; *Hadlock v. McFaul* (1995), 105 Ohio App.3d 24, 663 N.E.2d 667.

[424] *Gaskins v. Shiplevy* (1995), 74 Ohio St.3d 149, 656 N.E.2d 1282.

habeas relief and has no other adequate remedy at law, the writ must be allowed.[425]

(B) Issuance of Writ. When a writ of habeas corpus is granted, the clerk of courts issues the writ under the seal of the court.[426]

(1). *Emergency*. In case of an emergency, the judge allowing the writ may issue it under his or her own hand.[427]

(C) Meaning of Issuing Writ. "Issuing" the writ means only that a return is ordered and a hearing will be held.[428] "Issuance" is not a final adjudication of the petitioner's request for release.

vi. *Service of Petition*. Service of a writ of habeas corpus is governed by statute. A writ of habeas corpus may be served in any county by the sheriff of that or any other county or by a person deputized by the court issuing the writ.[429]

(A) Service in Case of Dismissal. If the court determines that the petition fails to state a facially valid claim and dismisses the petition, it need not be served.[430]

vii. *Execution and Return of Writ*. Upon receiving service of the writ of habeas corpus, the officer or person to whom the writ is directed must also make return of the writ as follows:

(A) Signing and Swearing. The return must be signed and sworn to by the person who makes it.[431]

(1) *Exception*. The return need not be signed and sworn to if made by a sworn public officer returning it in an official capacity.[432]

(B) Statement of Condition of Detainee. The return must include a statement regarding the whereabouts and condition of the detainee.

(1) *Restraint by Officer*. When the detainee is being imprisoned or restrained by an officer,

[425] R.C. 2725.06; See also *Chari v. Vore* (2001), 91 Ohio St.3d 323, 744 N.E.2d 763; *McBroom v. Russell* (1996), 77 Ohio St.3d 47, 671 N.E.2d 10; *Luchene v. Wagner* (1984), 12 Ohio St.3d 37, 465 N.E.2d 395.

[426] R.C. 2725.07.

[427] Id.

[428] See, e.g., *Hammond v. Dallman* (1992), 63 Ohio St.3d 666, 668, 590 N.E.2d 744, 746, fn. 7.

[429] Id.; R.C. 2725.11.

[430] *Buoscio v. Bagley* (2001), 91 Ohio St.3d 134, 742 N.E.2d 652; *State ex rel. Carrion v. Ohio Adult Parole Authority* (1998), 80 Ohio St.3d 637, 687 N.E.2d 759.

[431] R.C. 2725.15.

[432] Id.

the person making the return shall state this fact in the return.[433]

(a.) Effect of Return. If the petitioner is in custody under a warrant or commitment in pursuance of the law, the return is prima facie evidence of the cause of the detention.[434]

(2) *Restraint by Others*. In cases where the person is being privately imprisoned or restrained by a person other than an officer, party claiming custody must prove those facts.[435] In cases of private restraint or imprisonment, the return shall state the following:

(a.) Fact or Custody or Restraint. The return must state whether or not the petitioner is in custody or under restraint.[436]

(b.) Authority and Basis for Custody or Restraint. If the petitioner is in custody or under restraint, the person shall set forth the authority and the basis of the imprisonment or restraint with a copy of the writ, warrant, or other process on which the petitioner is detained.[437]

(c.) If Transferred. If the petitioner was in the person's custody or restraint but was transferred to another's, the person must state to whom, at what time, for what reason, and by what authority such transfer was made.[438]

(C) Rationale for Return; Answer. The return of the writ serves to provide the court with the detaining authority's position on the matter. It serves as an answer to the writ.[439]

[433] R.C. 2725.14.

[434] R.C. 2725.20.

[435] See id. and compare with footnote 31, supra.

[436] R.C. 2725.14(A).

[437] R.C. 2725.14(B).

[438] R.C. 2725.14(C).

[439] *State ex rel. Spitler v. Seiber* (1968), 16 Ohio St.2d 117, 243 N.E.2d 65.

(D) Failure to Make Return. Should the party required to make a return fail to do so, the habeas corpus petition will not automatically be granted on default.[440] Where the petition is frivolous, obviously lacks merit, or where the necessary facts can be determined from the petition itself, the court will rule upon the merits.[441]

viii. *Conveyance of the Detainee*. The officer or person to whom the writ of habeas corpus is directed must convey the detainee named in the writ on the specified date.[442]

(A) To Whom. Generally, the detainee must be delivered to the judge who granted the writ. However, if that judge is absent or disabled, the detainee must be delivered to another judge of the same court.[443]

(B) Refusal to Convey Detainee; Penalties. No person shall neglect or refuse to return the writ or convey a detainee as specified in a validly issued writ of habeas corpus under penalty of law.[444]

(1) *Penalties*. For a first offense, the person who fails to obey the writ will forfeit to the petitioner $200.[445] For a second offense, the person who fails to obey the writ will forfeit to the petitioner $400.[446]

(a.) Public Officer; Second Offense. In the event the person disobeying a writ for the second time is a public officer, he or she will be incapable of holding office.[447]

ix. *Hearing*. A habeas corpus hearing is more in the nature of an inquest than a trial.[448] They must be conducted on the record.[449]

(A) Decision Based Mainly on Petition and Return of Writ. While the decision of whether to issue the writ

[440] *State ex rel. Winnick v. Gansheimer*, 112 Ohio St.3d 149, 2006-Ohio-6521, 858 N.E.2d 409.

[441] *Allen v. Perini* (C.A. 6 1970), 424 F.2d 134.

[442] R.C. 2725.12.

[443] Id.

[444] R.C. 2725.22.

[445] Id.

[446] Id.

[447] Id.

[448] *Gishwiler v. Dodez* (1855), 4 Ohio St. 615; *In re Lambacher* (1961), 87 Ohio L. Abs. 350, 176 N.E.2d 312.

[449] R.C. 2725.26.

is based mainly on the petition, the merits of the proceeding itself are generally determined upon the return of the writ.[450]

(B) Hearing Not Always Required. Because the positions of the parties are often fully borne out by the petition and return, a hearing is not always required to determine the merits of the petition.[451] However, if a legal or factual issue is raised during the process, it must be heard and determined.[452]

(C) Witnesses at Hearing. The court has the right to allow any interested or affected person to appear and resist a habeas corpus application.[453]

(D) Presumptions and Burden of Proof. The judgment of the court committing the petitioner is presumed regular.[454] If the return sets forth a prima facie justification for the detention, the petitioner must generally prove (1) facts demonstrating that the detention is unlawful,[455] and (2) the invalidity or voidness of the order of commitment.[456]

(E) Evidence Permitted at Hearing. The following evidence may be introduced at a habeas corpus hearing:

(1) *Generally*. The evidence admissible at a habeas corpus hearing is limited to that determining whether there was jurisdiction over the petitioner.[457]

(2) *Competent and Credible Evidence on Allegations of Petition*. If the allegations of the petition, if proven, state a case entitling the petitioner to habeas corpus relief, the court must hear competent and credible evidence on the issues raised by the pleadings.[458]

---

[450] See *Leal v. Mohr* (1997), 80 Ohio St.3d 171, 685 N.E.2d 229.

[451] See *Chari*, supra, see also *Gaskins v. Shiplevy* (1996), 76 Ohio St.3d 380, 667 N.E.2d 1194.

[452] See *Ammon v. Johnson* (1888), 2 Ohio C.D. 149.

[453] *In re Byers* (1940), 32 Ohio L. Abs. 497.

[454] *Yarbrough v. Maxwell* (1963), 174 Ohio St. 287, 189 N.E.2d 136.

[455] Id.

[456] *In re Lambacher*, supra

[457] *Ex parte Wyant* (1909), 8 Ohio N.P. (n.s.) 207.

[458] 53 Ohio Jurisprudence 3d 331 (2006), Habeas Corpus Section 59.

(3) *The Record*. The court may review the record of the commitment proceedings.[459]

(4) *Evidence Dehors the Record*. Evidence may be received dehors the record to show that a proceeding was absolutely void for want of jurisdiction.[460]

(5) *Parol Evidence*. When no formal record of the commitment proceeding exists, parol evidence is admissible for the purpose of showing that the committing court did not render the judgment claimed.[461] Parol evidence is also admissible to explain a discrepancy existing within the record.[462]

(a.) Parol evidence inadmissible. While introduction of the record of the commitment proceedings is proper, it is improper to admit parol evidence to show what the record of the commitment proceedings should contain.[463] The court can only consider what is in the record. If the record is incomplete, the court may compel the committing court to make its record complete.[464]

(F) Evidence Not Permitted at Hearing. The following evidence is inadmissible at a habeas corpus hearing:

(1) *Guilt of Petitioner; Constitutional Matters*. Issues regarding the criminal guilt of the petitioner or constitutional matters surrounding the petitioner's conviction may not be considered.[465]

(2) *Unsupported and Uncorroborated Statements*. Standing alone, the unsupported and uncorroborated statements of the petitioner are insufficient to overcome the

[459] 53 Ohio Jurisprudence 3d 332 (2006), Habeas Corpus Section 60.

[460] *In re Martin* (1957), 76 Ohio L. Abs. 219, 140 N.E.2d 623.

[461] *State ex rel. Vuykov v. Bollinger* (1931), 10 Ohio L. Abs. 244.

[462] *In re Lee* (1927), 5 Ohio L. Abs. 670.

[463] 53 Ohio Jurisprudence 3d 332 (2006), Habeas Corpus Section 60.

[464] *Lillibridge v. State ex rel. Stewart* (1905), 18 Ohio C.D. 481.

[465] See *Hanson v. Smith* (1990), 67 Ohio App.3d 420, 587 N.E.2d 345, cause dismissed, 51 Ohio St.3d 702, 555 N.E.2d 323.

presumption of regularity of the court's judgment.[466]

x. *Judgment and Orders*. At the conclusion of the evidence at the hearing, or upon the petition and return if there is no hearing, the court rules upon the petition.

(A) Grounds for Discharge of Detainee. A petitioner is properly discharged from confinement in the following instances:

(1) *In General; Satisfaction of Unlawful Detainment*. A judge must discharge a petitioner from confinement upon being satisfied that the petitioner is unlawfully detained.[467]

(2) *Want of Jurisdiction*. If the court is satisfied that the committing authority lacked jurisdiction over the petitioner from the face of the record, the court must discharge the petitioner.[468]

(a.) Specifically. Discharge is required if the face of the warrant, affidavit, and/or indictment demonstrate a lack of jurisdiction by the committing authority.[469]

(B) Discharge Must be Complete. Release by way of habeas corpus contemplates a complete release from the petitioner's present confinement. Therefore, it may not be given where the petitioner would still be subject to commitment on other sentences.[470]

(1) *Procedure*. Where a petitioner's present confinement is found illegal because of a jurisdictional issue, the court may grant habeas corpus relief but remand the petitioner to the custody of the proper authorities for further proceedings or to cure defects in the sentence.[471]

(C) Recommitment. Habeas corpus is directed only to the present confinement of a petitioner. The granting of the relief serves only to release the petitioner from that confinement. It is not an absolute discharge from the legal consequences of a

[466] See *Yarbrough*, supra.

[467] R.C. 2725.17.

[468] *Ex parte Wyant*, supra.

[469] *Burns v. Tarbox* (1907), 76 Ohio St. 520, 81 N.E. 761.

[470] *Ball v. Maxwell* (1964), 177 Ohio St. 39, 201 N.E.2d 786.

[471] *Foran v. Maxwell* (1962), 173 Ohio St 561, 184 N.E.2d 398.

crime, or presumably, a public health-related commitment.[472]

(D) Res Judicata Effect of Judgment. The doctrine of res judicata applies in full to habeas corpus proceedings.

(1) *Exceptions; Res Judicata Inapplicable*. Res judicata does not apply to a judgment of discharge where a new set of facts, different from those existing at the time the habeas corpus judgment issued, is shown to later exist.[473] Additionally, res judicata does not bar a subsequent prosecution or commitment for the same offense where the infirmities causing the release have been remedied unless the inquiry into the petition for release involved a full investigation into the merits.[474]

(E) Review of Judgment. Habeas corpus proceedings may be reviewed on appeal.[475]

xi. *Mootness*. A petition for habeas corpus becomes moot if the petitioner is released from confinement prior to its adjudication.[476]

(d) Ohio Habeas Corpus Actions Respecting Public Health Detentions; Generally. There are three reported instances of persons isolated or quarantined seeking habeas corpus relief under Ohio law.[477] Taken together, these cases indicate the following:

i. Ohio's quarantine regulations are a valid exercise of the state's police power.

ii. The restraint of liberty necessarily accompanying quarantine or isolation is permissible if reasonable and justified under the circumstances.

iii. The powers to examine individuals and determine the need for quarantine, vested in the local health commissioners, are non-delegable.

(e) Individual Public Health Habeas Corpus Cases.

i. *Ex parte Company*[478]—Two women were arrested on prostitution charges. During their pre-trial confinement,

---

[472] Id.

[473] *In re Knight* (1944), 144 Ohio St. 257, 58 N.E.2d 671.

[474] Id.

[475] R.C. 2725.26.

[476] *Adkins v. McFaul* (1996), 76 Ohio St.3d 350, 667 N.E.2d 1171.

[477] No such case has arisen since 1945.

[478] (1922), 106 Ohio St. 50, 139 N.E. 204.

they were each found to be afflicted with venereal diseases. Despite being found not guilty of prostitution at trial, they were each quarantined immediately thereafter by the Akron health commissioner. Each sought habeas relief, unsuccessfully claiming unlawful detainment on the ground that the legislature lacked authority to delegate public health matters to local health districts.

(A) Import of Decision. The General Assembly may authorize local health districts to enact public health ordinances. The state may use its police power to subject persons to reasonable and proper restraints to secure the general public health.

ii. *In the matter of Mossie Jarrell*[479]—A woman was taken into custody by police officers without a warrant on suspicion of having a venereal disease. After an examination at a clinic, a clerk at the health commissioner's office issued an order requiring her quarantine. The health commissioner did not examine the woman, who was later found to be without infection. Furthermore, he neither saw nor made the order which placed her in quarantine. The court found the woman improperly arrested without a warrant and thereafter unjustly quarantined, and granted her petition for habeas relief.

(A) Import of Decision. The *Jarrell* court first determined that the woman was arrested without legal authority. The court then held that proper quarantine procedure required that the person first be diagnosed with a venereal disease and thereafter determined to be a threat to public health. These powers were delegated specifically to the health commissioner, who was without power to delegate them to others.

iii. *Ex parte Kilbane*[480]—A woman was arrested for selling liquor without a license at an address determined to be a focal point for the spread of venereal diseases. While she was detained on the liquor license charge, a custodial physical examination disclosed her infection with gonorrhea. She was quarantined, and petitioned the court for habeas relief. The court found her continued restraint for public health reasons appropriate despite the fact that the criminal charges were ultimately dropped.

(A) Import of Decision. The *Kilbane* court determined that the statutes and regulations permitting physical examination of arrested individuals was a valid exercise of the state's police power. Upon a finding

[479] (C.P. 1930), 28 Ohio N.P. (n.s.) 473.

[480] (C.P. 1945), 32 O.O. 530, 67 N.E.2d 22.

of communicable disease, detainment is appropriate if reasonable and justified under the circumstances.

3. ***Injunctive Relief***. Injunctive relief is an equitable remedy designed to protect rights from irreparable injury by prohibiting or commanding certain acts.[481] Injunctive relief from the orders of health authorities may be available in certain limited circumstances.
   (a) Generally. As a general matter, Ohio courts may not restrain nor inquire into the motives of, the legislative or executive braches of the government in exercising their discretion.[482]
   (b) Exceptions. Courts may exercise their equitable powers to restrain the acts of public boards or officers which are fraudulent, illegal, arbitrary, capricious, taken in bad faith, beyond their territorial limits, or amount to an abuse of discretion.[483]
      i. *Application to All Levels of Government*. Injunctions may issue against the improper acts of state, county, or municipal officials.
      ii. *Validity of Statute Giving Rise to Government Action*. The fact that the statute under which the public official purports to act is valid or constitutional does not prevent a court from issuing injunctive relief.[484]
      iii. *Disagreement Insufficient Cause for Injunction*. Caution in granting injunctions is required in cases affecting a public interest, such as health. Differences of opinion or judgment with the public board or official are never sufficient grounds for injunctive relief.[485]
   (c) Sovereign Immunity; Effect. The fact that an individual holds a public office is not a reason for denying injunctive relief from their illegal actions. The relief is sought to prevent the actions of the individual officeholder, not the state.[486]
   (d) Pleading Prerequisites. Before an injunction may issue, the following must be observed:

[481] 56 Ohio Jurisprudence 3d (2006) 95, Injunctions, Section 1.

[482] See *Miller v. Directors of Longview Asylum* (C.P. 1879), 7 Ohio Dec. Rep. 650.

[483] See, e.g., *State ex rel. Harrison v. Perry* (1925), 113 Ohio St. 641, 150 N.E. 78 (enjoining arbitrary acts); *Conway v. Cull* (C.P. 1943), 15 Ohio Op. 355, 38 Ohio L. Abs. 85 (enjoining arbitrary, capricious, and unjust acts); *Bd. of Ed. Of Akron v. Sawyer* (C.P. 1908), 7 Ohio N.P. (n.s.) 401, 19 Ohio Dec. 1 (enjoining oppressive acts); *State ex rel. Van Harlingen v. Bd. of Ed. Of Mad River Tp. Rural School Dist*. (1922), 104 Ohio St. 360, 136 N.E. 196 (enjoining acts taken in excess of authority); *State ex rel. Millikin v. Bd. of Ed. Of Riley Tp*. (Cir. Ct. 1892), 3 Ohio C.D. 703 (enjoining actions beyond territorial limits of public office); *Reilly v. Squire* (1938), 60 Ohio App. 207, 20 N.E.2d 374 (enjoining acts amounting to gross or manifest abuse of discretion).

[484] *Bd. of Ed. Of Akron v. Sawyer* (C.P. 1908), 7 Ohio N.P. (n.s.) 401, 19 Ohio Dec. 1.

[485] *State ex rel. Compton v. Bd. of Commrs. of Butler Cty*. (1923), 18 Ohio App. 462.

[486] See *Columbia Life Ins. Co. v. Hess* (1926), 28 Ohio App. 107, 162 N.E. 466.

i. *No Adequate Remedy at Law*. To be entitled to an injunction, the party seeking relief must have no adequate remedy at law.[487]

(A) Adequacy of Remedy. To be adequate, a remedy must be plain, adequate, and complete or as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.[488] In other words, an adequate remedy provides relief in reference to the matter in controversy and is appropriate to the particular circumstances of the case.[489]

(B) Determination. The determination of whether an adequate remedy at law exists is made from all available facts.[490]

(C) Exhaustion of Administrative or Other Remedies. Where there is an available administrative or unofficial remedy to which the moving party has not resorted, injunction will not issue.[491]

(1) *Administrative Appeals*. When an administrative agency has the jurisdiction to make an order, and a right of appeal from that order is provided by law, affected parties may not bring separate and independent actions seeking to enjoin the enforcement of the order. The grounds relied upon may be fully litigated in the appeal authorized by law.[492]

ii. *Irreparable Injury*. Injunctive relief should not ordinarily be granted unless irreparable injury will result to the party seeking relief.[493]

(A) Sufficient Harm. "Irreparable injury" is comprised of substantial injury to a material degree or the substantial threat of material injury coupled with the inadequacy of monetary damages.[494]

(1) *Financially Immeasurable and Impossible to Compensate*. One measure of irreparable

[487] See, e.g., *Fodor v. First Natl. Supermarkets, Inc*. (1992), 63 Ohio St.3d 489, 589 N.E.2d 17.

[488] *Mid-America Tire, Inc. v. PTZ Trading Ltd*., 95 Ohio St.3d 367, 2002-Ohio-2427, 768 N.E.2d 619.

[489] *Widmer v. Fretti* (1952), 95 Ohio App. 7, 116 N.E.2d 728.

[490] *Nevins v. McClure* (1936), 22 Ohio L. Abs. 187.

[491] *Schank v. Hegele* (C.P. 1987), 36 Ohio Misc.2d 4, 521 N.E.2d 9.

[492] *Brooks v. Village of Canfield* (1972), 34 Ohio App.2d 98, 296 N.E.2d 290.

[493] See, e.g., *Hardrives Paving & Constr., Inc. v. Niles* (1994), 99 Ohio App.3d 243, 650 N.E.2d 482.

[494] See *Warner Amex Cable Communications, Inc. v. Am. Broadcasting Cos., Inc*. (S.D.Ohio 1980), 499 F. Supp. 537 and *AgriGeneral Co. v. Lightner* (1998), 127 Ohio App.3d 109, 711 N.E.2d 1037.

injury is where the injury cannot be measured in terms of money and, if not prevented by injunction, cannot afterwards be compensated by any decree.[495] Freedom from an illegal confinement may well fit within this type of injury.

(B) Standard of Proof. The party seeking the injunctive must prove irreparable injury or the threat of irreparable injury by clear and convincing evidence.[496]

iii. *Action Pursuant to Statute*. The mere enactment of an unconstitutional or invalid statute or ordinance is insufficient to warrant injunctive relief. The equitable nature of injunctive relief requires action taken against the complaining individual that destroys or threatens to destroy their rights.[497]

(e) Injunction Proceedings. The injunction process transpires as follows:

i. *Original Jurisdiction*. Original jurisdiction for injunctive relief is vested with the following courts:

(A) Common Pleas Court. The common pleas courts have original jurisdiction over requests for injunctive relief.[498]

(B) Probate Court. The probate courts have original iurisdiction over requests for injunctive relief in causes pending therein. Probate courts also may grant injunctions in common pleas or appellate cases pending in their counties where the common pleas or appellate judges are absent.[499]

ii. *Appellate Jurisdiction*. Neither the courts of appeals nor the Ohio Supreme Court have original jurisdiction to issue injunctions. However, they each retain appellate jurisdiction.

(A) Courts of Appeal. While the Revised Code provides that the courts of appeals may grant injunctions, the Ohio Supreme Court has held that the appellate courts lack original jurisdiction to issue injunctions.[500]

---

[495] *Arthur Murray Dance Studios of Cleveland v. Witter* (C.P. 1952), 62 Ohio L. Abs. 17, 105 N.E.2d 685.

[496] *Robert W. Clark, M.D., Inc. v. Mt. Carmel Health* (1997), 124 Ohio App.3d 308, 706 N.E.2d 336.

[497] See *Perkins v. Village of Quaker City*, 165 Ohio St. 120, 133 N.E.2d 595.

[498] R.C. 2727.03.

[499] Id.

[500] *State ex rel. Forsyth v. Brigner*, 86 Ohio St.3d 71, 1999-Ohio-83, 711 N.E.2d 684; *Wright v. Ghee*, 74 OhioSt.3d 465, 1996-Ohio-283, 659 N.E.2d 1261.

(B) Ohio Supreme Court. While the Revised Code provides that the Ohio Supreme Court may grant injunctions, it has been held both that (1) the Court lacks original jurisdiction over requests for injunctive relief[501] and that (2) the legislature lacks the power to confer it.[502]

(1) *Exception*. The Supreme Court may grant a temporary injunction to maintain the status quo in matters where it otherwise has jurisdiction.[503]

iii. *Territorial Limits*. The territorial limits of courts in injunctive relief cases are co-extensive with the courts' ability to obtain personal jurisdiction over the defendant.[504]

iii. *Venue*. In the absence of statutory guidance to the contrary, an equity suit may be venued in any jurisdiction in which the defendant can be found.[505]

iv. *Application*. The injunction proceeding begins with the filing of a complaint and application for preliminary injunction.[506]

(A) Contents. The complaint must demonstrate the following on its face:

(1) *Legal Right*. The complaint must show that the plaintiff has a legal right.[507]

(2) *Wrongful Act*. The complaint must show that the act complained of is wrongful.[508]

(3) *Without Remedy*. The complaint must show that the plaintiff is without remedy except for in a court of equity.[509]

(4) *Defendant's Actions and Injurious Effect*. The complaint must show that the defendant's actions are unlawful or

[501] See, e.g., *Assoc. for Defnese of Washington Local School Dist. v. Kiger* (1989), 42 Ohio St.3d 116, 537 N.E.2d 1292; *State ex rel. Kay v. Brown* (1970), 24 Ohio St.2d 105, 264 N.E.2d 908.

[502] *State ex rel. Penn Mut. Life Ins. Co. of Philadelphia v. Hahn* (1893), 50 Ohio St. 714, 35 N.E. 1052.

[503] *Copperweld Steel Co. v. Indus. Comm*. (1944), 142 Ohio St. 439, 52 N.E.2d 735.

[504] See, e.g., *Scofield v. Lake Shore & M.S. R. Co*. (1885), 43 Ohio St. 571, 3 N.E. 907; *Philadelphia Baseball Club Co. v. Lajoie* (C.P. 1902), 13 Ohio Dec. 504.

[505] See 56 Ohio Jurisprudence 3d (2006) 150, Injunctions, Section 149.

[506] Civ.R. 65(B)(1). The application for preliminary injunction may be included in the complaint or made by separate accompanying motion.

[507] See, e.g., *National Cash Register Co. v. Heyne* (C.P. 1910), 10 Ohio N.P. (n.s.) 465.

[508] Id.

[509] Id.

unauthorized and that the plaintiff has been or will be injured thereby.[510]

(5) *Fundamental Requisites for Injunction*. The complaint must show the existence of the fundamental requisites for an injunction, e.g., the inadequacy of the remedy at law and the irreparable injury.[511]

(6) *Facts Entitling Plaintiff to Action*. The complaint must state facts which entitle the plaintiff to the action.[512]

(B) Supporting Affidavits. Affidavits accompanying a motion for injunctive relief must contain a full statement of the specific evidential facts from which the court may base its conclusion. General averments, such as those found in a pleading, are insufficient.[513]

(C) Verification. Verification of the complaint is not required unless the plaintiff seeks a temporary restraining order without notice to the adverse party.[514]

(7) *Method of Verification*. Verification may be accomplished by verified complaint or by affidavit. The verification is to be made upon the affiant's own knowledge, information, and belief, and shall state that the affiant believes the information to be true.[515]

v. *Answer or Objection*. After service, the defendant may answer or raise Civ.R. 12(B) objections as in any civil proceeding.[516] The waiver provisions of Civ.R. 12 apply to injunctive relief cases.[517]

vi. *Amendment of Petition for Injunctive Relief.* A petition for an action for injunction may be amended.[518]

---

[510] *Bucyrus Theatres Co. v. Picking* (1923), 1 Ohio L. Abs. 768; *Harnett v. Edmondston* (1932), 44 Ohio App. 304, 185 N.E. 426.

[511] 56 Ohio Jurisprudence 3d (2006) 318, Injunctions, Section 159.

[512] See, e.g., *Young v. Spangler* (Cir.Ct. 1887), 1 Ohio C.D. 636.

[513] *Brennan v. Cist* (Super.Ct. 1898), 6 Ohio N.P. 1.

[514] Civ.R. 65(A).

[515] Id.

[516] See Civ.R. 12(B).

[517] See id.

[518] *Lake Shore & M.S. R. Co. v. City of Elyria* (1904), 69 Ohio St. 414, 69 N.E. 738.

vii. *Hearing*. After the defendant answers or objects to the complaint and motion for injunctive relief, a preliminary injunction hearing must be held. Due process requires such a hearing.[519]

(A) Consolidation Possible. The court has discretion to bypass a preliminary injunction hearing and consolidate it with the trial of the issues on the merits.[520]

(B) Accrual of Right to Relief; Timing. The plaintiff's right to injunctive relief is determined as of the time of the hearing, not as of the filing of the action.[521]

(C) Hearing on Preliminary Injunction. The hearing provides the opportunity to be heard on controverted issues of both fact and law.[522]

(1) *Evidence*. Admissible evidence presented at the preliminary injunction hearing is preserved and need not be reintroduced at a trial on the merits.[523]

(a.) Admissibility. The admissibility of evidence in preliminary injunction cases is governed in the same fashion as the admissibility of evidence in other civil actions in equity. Greater latitude is permitted in equity cases than law cases.[524] Less adherence to stricture is required with evidence at the preliminary injunction stage than would be required at a trial.[525]

(b.) Burden of Proof. The plaintiff in an action for injunction has the burden of establishing each factor by clear and convincing evidence to establish the need for the injunction.[526]

---

[519] *Sea Lakes, Inc. v. Sea Lakes Camping, Inc*. (1992), 78 Ohio App.3d 472, 605 N.E.2d 422.

[520] Civ.R. 65(B)(2).

[521] See, e.g., *Antol v. Dayton Malleable Iron Co*. (1941), 34 Ohio L. Abs. 495, 38 N.E.2d 100; *Jukelson v. Hunter* (1969), 22 Ohio App.2d 182, 259 N.E.2d 749. Accordingly, injunctions may be denied on the grounds that the action has become moot or where the defendant has ceased the allegedly harmful actions.

[522] *County Sec. Agency v. Ohio Dept. of Commerce* (C.A.6 2002), 296 F.3d 477.

[523] Civ.R. 65(B)(2).

[524] See, e.g., *Dennedy v. St. Theresa's Home for the Aged* (1916), 28 Ohio C.D. 525.

[525] *Gould v. Chesapeake & O. Ry. Co.* (C.P.1910), 10 Ohio N.P. (n.s.) 313.

[526] *Procter & Gamble Co. v. Stoneham* (2001), 91 Ohio St.3d 1454, 742 N.E.2d 657.

Irreparable harm is not presumed, but rather must be proven.[527]

(2) *Judicial Consideration of Motion; Factors*. In considering the plaintiff's motion for preliminary injunction, the court must make the following preliminary fact findings:

(a.) Likelihood of Success. The likelihood of the plaintiff's success on the merits.

(b.) Irreparable Harm. Whether an injunction would save the plaintiff from irreparable harm.

(c.) Harm to Others. Whether the injunction would harm others.

(d.) Public Interest. Whether the public interest would be served by the injunction.[528]

(3) *Dismissal After Hearing on Preliminary Injunction*. If the court finds that the plaintiff has failed to state a claim for relief and could not state such a claim, it should dismiss the plaintiff's complaint.[529]

(4) *Granting of Preliminary Injunction*. Preliminary injunctions are granted to preserve the respective rights of the parties pending a final determination of the action.

(a.) Bond. If the court grants the preliminary injunction, the plaintiff is required to provide a bond to secure the enjoined party's damages in case it is finally decided that the injunction should not have been granted.[530] The injunction does not become operative until sufficient bond is posted.[531]

(b.) Other Security. In lieu of a bond, the successful plaintiff may deposit currency, a cashier's check, certified check, or negotiable government

[527] See, e.g., *Ohio Assn. of Cty. Bds. Of Mental Retardation & Developmental Disabilitis v. Pub. Emp. Retirement Sys*. (C.P.1990), 61 Ohio Misc.2d 836, 585 N.E.2d 597.

[528] *McDonald & Co. Securities, Inc. v. Bayer* (N.D.Ohio 1995), 910 F. Supp. 348, citing *In re DeLorean Motor Co*. (C.A.6 1985), 755 F.2d 1223.

[529] *George P. Ballas Buick-GMC, Inc. v. Taylor Buick, Inc*. (1982), 5 Ohio App.3d 71, 449 N.E.2d 503.

[530] Civ.R. 65(C).

[531] Id.

bonds in the amount fixed by the court with the clerk of courts.[532]

(D) Hearing on Permanent Injunction. Permanent injunctions are granted only after notice to the adverse party and, normally, a full evidentiary hearing at trial.

(1) *Hearing Unnecessary*. A hearing is not necessary where no triable issues of fact exist, or where the trial court makes a preliminary injunction permanent and the issue is solely one of law.[533]

(2) *Evidence*. Evidence introduced at the preliminary injunction hearing is preserved and need not be reintroduced.[534]

II. Administrative Relief

A. Administrative Agency Proceedings and Appeals from Agency Rulings

1. ***Consultation of Local Ordinances and Regulations Necessary*.** The Revised Code and Administrative Code grant much of the public health power to local health districts. While administrative regulations provide a basic operating framework for local health districts, they do not provide for a set administrative review process for the decisions of these bodies. Local ordinances may contain differing provisions addressing processes for administrative hearings and appeals for public health-related orders and decisions. Accordingly, this section will address only general issues and a general framework.

2. ***Administrative Proceeding as Quasi-Judicial Proceeding***. Ohio law holds that an administrative agency acts in a quasi-judicial capacity when it provides notice of hearing and an opportunity to introduce evidence.[535]

(a) Validity of Grant of Judicial Powers. The General Assembly may not confer upon administrative agencies powers which are strictly and conclusively judicial.[536] However, it may repose in such agencies powers which are quasi-judicial in nature.[537]

i. *Judicial Review Key*. The Ohio Supreme Court has accepted the legislative grant of quasi-judicial powers to administrative agencies so long as courts may review their determinations.[538]

---

[532] Id.

[533] *U.S. v. McGee* (C.A.6 1983), 714 F.2d 607.

[534] Civ.R. 65(B)(2).

[535] *State ex rel. Kilgore v. Indus. Comm. of Ohio* (1930), 123 Ohio St. 164, 174 N.E. 345.

[536] See, e.g., *Belden v. Union Cen. Life Ins. Co*. (1944), 143 Ohio St. 329, 55 N.E.2d 629.

[537] *State ex rel. Methodist Book Concern v. Guckenberger* (1937), 57 Ohio App. 13, 11 N.E.2d 277.

[538] *Stanton v. State Tax Comm*. (1926), 114 Ohio St. 658, 151 N.E. 760.

3. ***Jurisdictional Issues in the Administrative Setting***. Because administrative agencies are tribunals of limited jurisdiction, an agency order cannot be valid unless the agency is specifically authorized by law to make it.[539]
   (a) Primary Jurisdiction. An administrative agency has primary jurisdiction over an action when a court and the agency have concurrent jurisdiction over the same matter but when no statutory provisions coordinate the duties of the court and agency.[540]
      i. *Effect*. An agency's primary jurisdiction does not serve to allocate power between itself and the court, but rather permits the court to suspend the resolution of issues normally cognizable before it until the agency has an opportunity to apply its specific competence in the area and present its views. [541]
   (b) Consent to Jurisdiction. Parties may not stipulate or agree to confer subject matter jurisdiction on an administrative body where such jurisdiction does not otherwise exist.[542]
4. ***Due Process Issues in the Administrative Setting***. Due process is required in the context of quasi-judicial hearings.[543] Persons challenging the order of the administrative agency must be given reasonable notice and a fair hearing, even in the absence of a statutory requirement.[544]
   (a) Right to Jury Trial. The right to due process does not mean the right to a jury trial in administrative proceedings.[545]
   (b) Necessity of Evidentiary Basis for Ruling. The right to a full and fair hearing imposes upon the agency the duty of deciding the matter in accordance with the facts proved.[546] Decisions must be supported by at least some evidence.[547]
5. ***Administrative Proceedings; Generally***. Proceedings before administrative agencies are not like a trial, but are rather in the nature of an inquiry. They require an opportunity to introduce testimony and a finding or decision made in accordance with statutory authority.[548]

---

[539] See R.C. 119.06 and *City of Washington v. Public Util. Comm*. (1918), 99 Ohio St. 70, 124 N.E. 46.

[540] *Dana Corp. v. Blue Cross & Blue Shield Mut. Of N. Ohio* (C.A.6 1990), 900 F.2d 882.

[541] See, e.g., *Southern Ry. Co. v. Combs* (C.A.6 1973), 484 F.2d 145.

[542] *In re Kerry Ford* (1995), 106 Ohio App.3d 643, 666 N.E.2d 1157.

[543] *Ward v. Village of Monroeville, Ohio* (1972), 409 U.S. 57.

[544] *State ex rel. Ormet Corp. v. Industrial Comm. of Ohio* (1990), 54 Ohio St.3d 102, 561 N.E.2d 920.

[545] *Benckenstein v. Schott* (1915), 92 Ohio St. 29, 110 N.E. 633; *Fassig v. State* (1917), 95 Ohio St. 232, 116 N.E. 104.

[546] *Gen. Motors Corp. v. Baker* (1952), 92 Ohio App. 301, 110 N.E.2d 12.

[547] *Gennaro Pavers, Inc. v. Kosydar* (1975), 42 Ohio St.2d 491, 330 N.E.2d 665.

[548] See *Christian Care Home of Cincinnati, Inc. v. State Certificate of Need Review Bd*. (1988), 48 Ohio App.3d 158, 548 N.E.2d 981.

(a) Evidence. "Fair hearings" contemplate the taking of sworn testimony complete with the right of cross-examination.[549] Basic evidentiary procedures like the offering of exhibits for identification purposes and their admission for the record should be followed.[550]

i. *Agency Not Bound by Rules of Evidence*. Administrative agencies are not bound by the rules of evidence applicable to courts.[551] They are therefore free to enact their own rules as to the admissibility of evidence in their hearings, but must still base their decisions upon competent evidence.[552]

(A) Effect. The inapplicability of the rules of evidence have the following effect on evidence introduced during administrative proceedings:

(1) *Hearsay Rule*. The hearsay rule is relaxed in administrative proceedings.[553] Evidence will not be rejected solely because it is hearsay.[554]

(2) *Opinion Evidence*. Opinion evidence is not necessarily barred from administrative proceedings.[555]

(3) *Testimony Under Oath*. Testimony rendered at an administrative hearing need not be under oath.[556] In the absence of objection, unsworn testimony is competent evidence which may sustain an administrative order.[557]

6. ***Final Agency Order***. After taking evidence, the agency issues a final order.

(a) Agency's Findings Required to be Included. To ensure a proper review of the administrative agency decision and comport with due

[549] *Gen. Motors Corp. v. Baker* (1952), 92 Ohio App. 301, 110 N.E.2d 12.

[550] *Application of Milton Hardware Co*. (1969), 19 Ohio App.2d 157, 250 N.E.2d 262.

[551] Id.

[552] *City of Bucyrus v. Dept. of Health of Ohio* (1929), 120 Ohio St. 426, 166 N.E. 370.

[553] *Haley v. Ohio State Dental Bd*. (1982), 7 Ohio App.3d 1, 453 N.E.2d 1262.

[554] See, e.g., *DiMatteo v. State* (1955), 71 Ohio L. Abs. 97, 130 N.E.2d 351.

[555] *Chesapeake & O. Ry. Co. v. Public Util. Comm*. (1955), 163 Ohio St. 252, 126 N.E.2d 314.

[556] Id.

[557] *Stores Realty Co. v. City of Cleveland, Bd. of Bldg. Standards and Bldg. Appeals* (1975), 41 Ohio St.2d 41, 322 N.E.2d 629.

process, the agency is required to specify the legal grounds upon which its decision is made.[558]

(b) Effect of Final Adjudication Order. The doctrines of res judicata and collateral estoppel may each apply to administrative proceedings from which no appeals are taken.[559] However, their application should be based upon the nature of the prior administrative proceeding and the adequacy of the fact-finding procedures utilized.[560]

(c) Reconsideration or Modification of Final Agency Order. Agencies may generally reconsider or modify the final orders until the actual institution of a court appeal or until expiration of the time for appeal.[561]

i. *New Facts Required*. Agencies may not rehear or reconsider their adjudications in the absence of new facts.[562]

7. ***Judicial Review of Final Agency Order***. Final administrative orders may ultimately be appealed to the courts.[563]

(a) No Inherent Right to Appeal. There is no general or inherent right granting judicial review of an administrative order. To appeal an administrative order, a constitutional or statutory provision must authorize such action.[564]

i. *Exceptions as Rule*. There are certain actions a court may take irrespective of a constitutional or statutory right of appeal. These exceptions tend to overshadow the general rule, as there are only rare circumstances in which administrative actions lack any aspects which are reviewable by the courts.

(A) Review for Abuse of Discretion. Even where a statute specifically precludes review of an administrative order courts may still review it for abuse of discretion.[565]

---

[558] See, e.g., *A. Dicillo & Sons v. Chester Zoning Bd. of Appeals* (C.P.1950), 44 Ohio Ops. 44, 98 N.E.2d 352; *State ex rel. Bolsinger v. Swing* (1936), 54 Ohio App. 251, 6 N.E.2d 999 (holding that express agency findings may well be necessary even in the absence of statutory requirements).

[559] See *Scott v. City of East Cleveland* (1984), 16 Ohio App.3d 429, 476 N.E.2d 710; *Superior's Brand Meats, Inc. v. Lindley* (1980), 62 Ohio St.2d 133, 403 N.E.2d 996.

[560] See *Intl. Wire v. Local 38, Int. Broth. Of Elec. Workers* (N.D.Ohio 1972), 357 F. Supp 1018; *Cincinnati Bell Tel. Co. v. Public Util. Comm. of Ohio* (1984), 12 Ohio St.3d 280, 466 N.E.2d 848.

[561] See, e.g., *State ex rel. Borsuk v. City of Cleveland* (1972), 28 Ohio St.2d 224, 277 N.E.2d 419.

[562] See, e.g., *State v. Ohio Stove Co*. (1950), 154 Ohio St. 27, 93 N.E.2d 291.

[563] In some instances, final orders may be subject to examination by an agency review board or a similar body. Consultation of specific agency rules and administrative regulations is required.

[564] See, e.g., *Collyer v. Broadview Developmental Ctr*. (1991), 74 Ohio App.3d 99, 598 N.E.2d 75; *McAtee v. Ottawa Cty. Dept. of Human Serv.* (1996), 111 Ohio App.3d 812, 677 N.E.2d 395.

[565] See *State ex rel. Davis v. Indus. Comm. of Ohio* (1937), 58 Ohio App. 325, 16 N.E.2d 556.

(B) Declaratory Judgment. The existence of other remedies does not preclude an action for declaratory judgment where the action involves a real controversy between adverse parties which is justiciable in character, and that speedy relief is necessary to the preservation of rights which might otherwise be impaired or lost.[566]

(C) Due Process Review. Whether or not statutes grant power to the courts to review a particular administrative act, the guarantee of due process permits the courts to review due process issues.[567]

(b) Matters Subject to Review; Examples. The following administrative matters are subject to judicial review:

i. *Jurisdictional Issues*. Whether an administrative agency has acted within its jurisdiction or has exceeded its statutorily conferred authority.

ii. *Compliance with Operating Statutes*. Whether an administrative agency complied with the legislative standard laid down for its operation.

iii. *Abuse of Discretion*. Whether the agency acted arbitrarily, capriciously, unreasonably, or abused its discretion.

iv. *Constitutional Violations*. Whether the agency's actions otherwise violated constitutional rights.

(c) Jurisdictional Matters. Jurisdiction over judicial appeals from administrative agency decisions is granted as follows:

i. *Common Pleas Courts*. The common pleas courts have original jurisdiction over all justiciable matters and such powers of review of adjudicatory decisions reached in quasi-judicial administrative proceedings as provided by law.[568]

ii. *Ohio Supreme Court*. The Ohio Supreme Court maintains such revisory jurisdiction of administrative proceedings as may be conferred by law.[569]

(A) Revisory Jurisdiction. Revisory jurisdiction is akin to appellate jurisdiction and contemplates review of quasi-judicial proceedings only.[570]

(B) Legislative Authorization Required. Absent legislative authorization, the Ohio Supreme Court lacks any independent revisory jurisdiction.[571] The

---

[566] *Amer. Life & Acc. Ins. Co. of Ky. v. Jones* (1949), 152 Ohio St. 287, 89 N.E.2d 301.

[567] See, e.g., *Meyer v. Parr* (1941), 69 Ohio App. 344, 37 N.E.2d 637.

[568] Section 4(B), Article IV, Ohio Constitution.

[569] Section 2(B)(2)(d), Article V, Ohio Constitution.

[570] See, e.g., *Rankin-Thoman, Inc. v. Caldwell* (1975), 42 Ohio St.2d 436, 329 N.E.2d 686.

[571] See, e.g., *Goodyear Synthetic Rubber Corp. v. Woldman* (1953), 159 Ohio St. 58, 110 N.E.2d 778.

legislature may also impose limitations on this authority.[572]

(d) Ohio Administrative Appellate Procedure Act; Appeal. The Ohio Administrative Appellate Procedure Act permits an appeal to the common pleas court of every final order, adjudication, or decision of any officer, board, or department of any political subdivision of the state.[573] By its terms, the Act contemplates appellate review of the final decisions of local health districts.

i. *Venue*. Venue for judicial appeals under the Act is proper in the common pleas court of the county in which the principal office of the political subdivision is located.[574]

(A) Examples: A final decision of the Clermont County local health district may be appealed to the Clermont County Court of Common Pleas. A final decision of the Cleveland City local health district may be appealed to the Cuyahoga County Court of Common Pleas.

ii. "*Final Order, Adjudication, or Decision*." Only "final orders, adjudications, or decisions" of administrative bodies may be appealed under the Act.[575]

(A) Defined. A "final order, adjudication, or decision" is defined as an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person.[576]

(1) *Decisions Expressly Excluded from Review*. The Act expressly excludes from the definition those orders, adjudications, or decisions from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to hearing on such appeal is provided, or orders, adjudications, or decisions issued with respect to a criminal proceeding.[577]

(B) Contemplation of Prior Quasi-Judicial Proceeding. Because only those administrative actions of a quasi-judicial nature are appealable to the common pleas court, the Act contemplates that a prior quasi-

[572] *Goldman v. Harrison* (1951), 156 Ohio St. 403, 10 N.E.2d 848.

[573] R.C. 2506.01 et seq.

[574] R.C. 2506.01(A).

[575] See id.; see also *Lakota Loc. Sch. Dist. Bd. of Ed. v. Brickner* (1996), 108 Ohio App.3d 637, 671 N.E.2d 578.

[576] R.C. 2506.01(C).

[577] Id.

judicial proceeding has occurred.[578] The word "appeal" imports judicial review of a proceeding in which the appellant has had the opportunity to appear before an established governmental agency and set forth his or her case.[579]

iii. *Who May Appeal; Standing*. Generally, a party must be injured by an administrative order to appeal the order. [580]

iv. *Exhaustion of Administrative Remedies*. The doctrine of exhaustion of administrative remedies requires that relief must be sought by exhausting administrative remedies provided by statute before courts will act.[581]

(A) Purpose of Doctrine. The doctrine of exhaustion of administrative remedies is a court-made rule of judicial economy which is generally required to prevent premature interference with incomplete agency processes and allow for the compiling of a record adequate for judicial review.[582]

(B) Affirmative Defense. Failure to exhaust administrative remedies is not a jurisdictional defect.[583] It is an affirmative defense which must be timely asserted or considered waived.[584]

v. *Preservation of Issues for Appeal*. Generally, errors not brought to the attention of the administrative agency by objection or otherwise are waived and may not be raised on appeal.[585]

(A) Excluded Evidence. Evidence excluded by an agency must be made part of its record of proceedings before error may be predicated on the agency's ruling. This is because a reviewing court is limited to the record certified by the agency.[586]

(1) *Exception*. An exception exists to permit new evidence unavailable at the hearing before the agency.[587]

[578] See, e.g., *M.J. Kelley Co. v. City of Cleveland* (1972), 32 Ohio St.2d 150, 290 N.E.2d 562.

[579] *In re Appropriation for Highway Purposes* (1957), 104 Ohio App. 243, 148 N.E.2d 242.

[580] *Rollman & Sons Co. v. Bd. of Rev. of Hamilton Cty*. (1955), 163 Ohio St. 363, 127 N.E. 1.

[581] See, e.g., *Noernberg v. City of Brook Park* (1980), 63 Ohio St.2d 26, 406 N.E.2d 1095.

[582] See, e.g., *Nemazee v. Mt. Siani Med. Ctr*. (1990), 56 Ohio St.3d 109, 564 N.E.2d 477.

[583] *Jackson v. Ohio Bur. Of Workers' Comp*. (1994), 98 Ohio App.3d 579, 649 N.E.2d 30.

[584] See, e.g., *Gannon v. Perk* (1976), 46 Ohio St.2d 301, 348 N.E.2d 342.

[585] See, e.g., *Loyal Order of Moose Lodge No. 1473 v. Ohio Liquor Control Comm*. (1994), 95 Ohio App.3d 109, 641 N.E.2d 1182.

[586] *Sicking v State Med. Bd*. (1991), 62 Ohio App.3d 387, 575 N.E.2d 881.

[587] Id.

(B) Failure to Object to Testimony Given During Administrative Hearing; Effect. Where counsel is present at an administrative hearing and fails to object to testimony which is not given under oath, counsel waives the right to raise its consideration as an issue on judicial appeal.[588]

(C) Subject Matter Jurisdiction of Agency Non-Waivable. Since subject matter jurisdiction is a non-waivable issue, a claim regarding the subject matter jurisdiction of the administrative agency may be raised at any time.[589]

(D) Constitutional Issues. A party must raise the issue of the constitutionality of a statute at the first opportunity. It may not be presented for the first time on judicial appeal.[590]

(1) *Exception*. A party need not raise the question of the facial constitutionality of a statute before an agency to later present the issue on appeal to the trial court.[591]

vi. *Scope and Extent of Appellate Review*. Upon determining the right to judicial review exists, the common pleas court must next determine the scope of the review it may undertake and the matters it will consider. Because these issues are addressed by the statutes creating and governing the administrative agency whose order is appealed, consultation of specific agency governing law is required.

(A) In General. Regardless of the statutorily permissible scope of judicial review in a given case, it must be both substantial and adequate.[592]

vii. *The Appellate Process*. Under the Administrative Appellate Procedure Act, the appellate process generally proceeds as follows below. As appeals will vary based upon the statutes creating and governing the administrative agency whose order is appealed, the following provides only a general skeletal framework of a sample appeal under the Act.

(A) Notice of Appeal; Filing of Transcript. The judicial appeals process begins with the filing of the notice of appeal and transcript.

---

[588] *Levitt v. City of Cleveland Bd. of Bldg. Standards* (C.P.1970), 22 Ohio Misc. 54, 256 N.E.2d 631.

[589] See, e.g., *Springfield Loc. Sch. Dist. Bd. of Ed. v. Lucas Cty. Budget Comm*. (1994), 71 Ohio St.3d 120, 642 N.E.2d 362.

[590] See, e.g., *Bd. of Ed. of South-Western City Schools v. Kinney* (1986), 24 Ohio St.3d 184, 494 N.E.2d 1109.

[591] See, e.g., *Am. Legion Post 0046 Bellevue v. Ohio Liquor Control Comm*. (1996), 111 Ohio App.3d 795, 677 N.E.2d 384.

[592] *Hocking Valley Ry. Co. v. Public Util. Comm*. (1919), 100 Ohio St. 321, 126 N.E. 397.

(1) *Notice of Appeal*. The proper filing of a notice of appeal is a jurisdictional prerequisite.[593]

(a.) Notice to Whom. At least in the case of those agencies covered by the Administrative Procedure Act, notice must be filed with both the agency and the court.[594]

(b.) Timing. In the case of those agencies covered by the Administrative Procedure Act, notice of an appeal from their orders must be filed within 15 days after the mailing of the notice of the agency's order.[595]

(c.) Contents. In the case of those agencies covered by the Administrative Procedure Act, the notice of appeal must identify the names of the appellant and appellee, the order appealed from, and the grounds of the appeal.[596]

(d.) Dismissal. Failure to timely file the notice or include all required information is a jurisdictional defect requiring dismissal of the appeal.[597]

(2) *Transcript*. After the appellant files a notice of appeal, the administrative agency prepares the transcript of the agency proceeding and files it with the court.

(a.) Contents. The transcript must include all of the original papers, testimony, and evidence offered, heard, and considered in issuing the final order, adjudication, or decision.[598]

[593] Williams v. Drabik (1996), 115 Ohio App.3d 295, 685 N.E.2d 293.

[594] See R.C. 119.12.

[595] Id.

[596] Id.

[597] *Zier v. Bur. Of Unemployment Comp*. (1949), 151 Ohio St. 123, 84 N.E.2d 746.

[598] R.C. 2506.02.

(b.) Timing. The transcript must be delivered to the court within forty days after the notice of appeal is filed.[599]

(c.) Cost of Transcript. The cost of the transcript is taxed as part of the costs of the appeal.[600]

(d.) Supersedeas Bond Required. An appeal is not effective until the final order appealed is superseded by a bond or other adequate security, filed at the time of the notice of appeal.[601]

i. *Stay of Order Pending Appeal*. An appeal does not stay execution of the agency's order until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and the supersedeas bond is executed.[602]

(B) Hearing. Upon receipt of the transcript, the court will schedule a hearing on the appeal. Briefs may often be filed.[603]

(1) *Process*. The Revised Code states that the appeal shall proceed as in the trial of a civil action, but that the court is confined to the transcript provided by the agency.[604]

(a.) Exceptions. The court need not confine itself to the transcript provided by the agency in the following circumstances:

i. *Transcript Incomplete*. The transcript does not contain a report of all evidence admitted or proffered by the appellant.[605]

[599] Id.

[600] Id.

[601] R.C. 2505.06; R.C. 2505.11.

[602] R.C. 2505.09.

[603] R.C. 119.12.

[604] R.C. 2506.03(A).

[605] R.C. 2506.03(A)(1).

ii. *Absence from Hearing*. The appellant was not permitted to appear and be heard in person or through counsel in opposing the final order or present arguments or evidence, or examine and cross-examine witnesses.[606]

iii. *Testimony Not Sworn*. The testimony adduced at the hearing was not under oath.[607]

iv. *Lack of Subpoena Power*. The appellant was unable to present evidence due to a lack of subpoena power, resulting either from the agency's own lack of subpoena authority or the agency's refusal to permit the appellant to exercise subpoena power.[608]

v. *Failure of Agency to Supply Conclusions of Fact*. The agency failed to file conclusions of fact supporting its final order.[609]

(b.) Effect of Exceptions. If any of the exceptions apply to allow the court to deviate from the transcript, the court must consider both the transcript as well as additional evidence as may be introduced by either party.[610]

i. *Witnesses at Hearing*. If an exception applies, the parties may call, as if on cross-examination, any witness

[606] R.C. 2506.03(A)(2).

[607] R.C. 2506.03(A)(3).

[608] R.C. 2506.03(A)(4).

[609] R.C. 2506.03(A)(5).

[610] R.C. 2506.03(B).

previously giving testimony in opposition to that party.[611]

(2) *Evidence.* Agency proceedings are more liberal than court proceedings and are not subject to the rules of evidence. On appellate review, courts may consider evidence in the agency record that would ordinarily be inadmissible in civil proceedings.[612]

(C) Standard of Review; Burden of Proof. The court is to weigh the evidence on appeal to in fact determine if the agency order is supported by the requisite quantum of evidence. This inevitably involves a limited substitution of the reviewing court's judgment for that of the agency.[613] Since the court must presume the validity of the agency decision, the appellant has the burden to overcome this presumption.[614]

(1) *Due Deference to Agency Decision*. While the findings of the agency are not conclusive, the reviewing court may not blatantly substitute its own judgment in place of the agency's judgment.[615] This is particularly true in areas of agency expertise,[616] evidentiary conflicts,[617] and the agency's interpretation of its own rules.[618]

(2) *Findings of Fact Presumed Correct.* An agency's findings of fact are presumed correct, and the reviewing court must defer to them unless the court determines that the findings are internally inconsistent, impeached by a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable.[619]

---

[611] Id.

[612] See, e.g., *Pennsylvania-Ohio Power & Light Co. v. Orwick* (1930), 122 Ohio St. 497, 172 N.E. 366.

[613] See, e.g., *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 407 N.E.2d 1265.

[614] *State of W. Va. v. Ohio Hazardous Waste Facility Approval Bd*. (1986), 28 Ohio St.3d 83, 502 N.E.2d 625.

[615] *Mayfield Hts. v. Snappy Car Rental* (1995), 110 Ohio App.3d 522, 674 N.E.2d 1193.

[616] See, e.g., Dudukovich v. Lorain Metropolitan Housing Authority (1979), 58 Ohio St.2d 202, 389 N.E.2d 1113.

[617] See, e.g., *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 407 N.E.2d 1265.

[618] *State ex rel. DeMuth v. State Bd. of Ed*. (1996), 113 Ohio App.3d 430, 680 N.E.2d 1314.

[619] *Ohio Historical Soc. v. State Emp. Relations Bd*. (1993), 66 Ohio St.3d 466, 613 N.E.2d 591.

(D) Ruling of Common Pleas Court; Findings and Decision. After the hearing, the court will rule upon the issues presented.

(1) *Findings*. The court may find the administrative order unconstitutional, arbitrary, capricious, illegal, unreasonable,[620] an abuse of discretion,[621] or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. The court may also find the agency's actions supported by the evidentiary record.[622]

(2) *Decision*. The court may affirm the agency's decision, or may reverse, vacate, or modify the agency's order. It may also remand the cause to the agency with instructions to enter an order, adjudication, or decision consistent with the court's findings.[623]

(3) *No Duty to Address All Issues*. The common pleas court is under no duty to address all issues raised on appeal from an administrative order.[624] The court need only determine whether the order is supported by a preponderance of substantial, reliable, and probative evidence.[625]

(E) Appeal from Common Pleas Court Decision. The common pleas court's ruling may be appealed by any party on questions of law as provided by the Rules of Appellate Procedure and Chapter 2505 of the Revised Code. Such an appeal is treated as any other civil appeal.[626]

---

[620] For a court to find an agency order unlawful or unreasonable, it must determine that the legal rule applied by the administrative agency is erroneous or the facts found are manifestly against the weight of the evidence. See, e.g., *East Ohio Gas Co. v. Public Util. Comm. of Ohio* (1938), 133 Ohio St. 212, 12 N.E.2d 765; *Miami Cigar & Tobacco Co. v. Peck* (1954), 99 Ohio App. 60, 130 N.E.2d 729. For reversal, the error involved must be prejudicial to the appellant. See, e.g., *Indus. Energy Consumers v. Pub. Util. Comm*. (1992), 63 Ohio St.3d 551, 589 N.E.2d 1289.

[621] Courts will rarely disturb an administrative agency's order on this ground—before such action can be taken, the abuse of discretion must affirmatively appear. The degree of proof necessary for such a finding is the highest known to the law, greater than the standard required in criminal actions. *State ex rel. White v. Indus. Comm. of Ohio* (1940), 35 Ohio L. Abs. 96, 40 N.E.2d 453.

[622] R.C. 2506.04.

[623] Id.

[624] See, e.g., *Barker v.Kattleman* (1993), 92 Ohio App.3d 56, 634 N.E.2d 241.

[625] Id.

[626] *Geisert v. Ohio Motor Vehicle Dealers Bd*. (1993), 89 Ohio App.3d 559, 626 N.E.2d 960.

III. Privacy Rights

A. Disclosure of Medical Information Under HIPAA

1. ***General Limitations on Disclosure***. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") contains provisions intended to protect the privacy of certain individually identifiable health information.[627] HIPAA serves to generally limit the ability of certain entities to use and disclose an individual's protected health information without notification to or authorization from the individual.
   (a) "Individually Identifiable Health Information" Defined. The term individually identifiable health information means any information, including demographic information collected from an individual, that:
      i. Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
      ii. Relates to the past, present, or future physical or mental heath or condition of an individual, or the past, present, or future payment for the provision of health care to an individual; and
      iii. Identifies the individual or with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.[628]
2. ***Public Health Exception***. HIPAA contains numerous exceptions to this general rule. One such exception involves the use and disclosure of protected health information for public health activities.
3. ***Applicability of HIPAA Requirements***. HIPAA's privacy requirements apply only to three types of entities:
   (a) Health Plans. HIPAA applies to individual or group plans that provide or pay the cost of medical care.
   (b) Health Care Clearinghouses. HIPAA applies to public or private entities that process or facilitate the processing of health information.
   (c) Health Care Providers. HIPAA applies to providers of medical or health services or any person or organization that furnishes, bills, or is paid for health care in the normal course of business.[629]
4. ***Public Health Departments as Entities Covered by HIPAA***. Many public health departments and agencies provide health care services. Therefore, they are entities covered by the HIPAA privacy requirements.
   (a) Hybrid Status. Public health departments may designate themselves as "hybrid entities" and designate those portions of their organizations which provide health care services. HIPAA applies to the designated portions of the organization, but the non-

[627] See 42 U.S.C. § 1320d-2.

[628] 42 U.S.C. § 1320d(6).

[629] 45 C.F.R. §§ 160.102 and 160.103.

designated portions of the organization need not comply with HIPAA's privacy requirements.[630]

5. ***Uses and Disclosures of Protected Health Information for Public Health Activities***. Covered entities may disclose an individual's protected health information for public health purposes without authorization to the following persons or officials relevant to issues of pandemic disease.
   (a) Public Health Authority; Disease Prevention and Control. Protected health information may be disclosed to a public health authority authorized by law to collect such information to prevent or control disease, injury, or disability.[631]
      i. *Definition of "Public Health Authority."* A "public health authority" is an agency or authority of the United States, a state, a territory, a political subdivision of a state or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency that is responsible for public heath matters as part of its official mandate.[632]
   (b) Certain Foreign Government Agency Officials. Protected health information may be disclosed to officials of foreign government agencies acting in collaboration with a public health authority.[633]
   (c) FDA Officials. Protected health information may be disclosed to persons subject to the jurisdiction of the FDA for the purpose of activities related to the quality, safety, or effectiveness of an FDA-related product or activity.[634]
   (d) Exposed Persons; If Otherwise Legally Authorized. Protected health information may be disclosed to persons who may have been exposed to communicable diseases or who are at risk of contracting or spreading a disease if the covered entity is otherwise authorized by law to notify such a person as necessary in the conduct of a public health intervention or investigation.[635]
   (e) Employers. Protected health information may be disclosed to an employer if such information is related to workplace medical surveillance.[636]
   (f) Additional Uses of Protected Health Information. Covered entities may disclose protected health information without an individual's consent or authorization for additional purposes included in 45 C.F.R. § 164.512.

[630] See 45 C.F.R. § 164.504.

[631] 45 C.F.R. § 164.512(b)(1)(i).

[632] 45 C.F.R. § 164.501.

[633] 45 C.F.R. § 164.512(b)(1)(i).

[634] 45 C.F.R. § 164.512(b)(1)(iii).

[635] 45 C.F.R. § 164.512(b)(1)(iv).

[636] 45 C.F.R. § 164.512(b)(1)(v).

B. Disclosure of Medical Information Under State Law

1. ***General Preemption of State Privacy Law by HIPAA***. HIPAA requirements preempt contrary provisions of state law[637] unless one of the following applies:
   (a) Compelling Need. The state law serves a compelling need related to public health, safety, or welfare.[638]
   (b) Controlled Substances. The principal purpose of the state law relates to the control of any controlled substance.[639]
   (c) More Stringent State Law. The state law provides more stringent privacy protections for health information than the applicable HIPAA provisions.[640]
   (d) Reporting. The state law provides for the reporting of disease, injury, child abuse, birth, death, or other public health surveillance or investigation.[641]
   (e) Audits; Monitoring. The state law requires health plans to report or provide access to health information for purposes of financial audits or other program monitoring.[642]
2. ***Protected Health Information Under Ohio Law***. Ohio law defines "protected health information" as information, in any form, including oral, written, electronic, visual, pictorial, or physical that describes an individual's past, present, or future physical or mental health status or condition, receipt of treatment of care, or purchase of health products, if either of the following applies:
   (a) The information reveals the identity of the individual who is the subject of the information.
   (b) The information could be used to reveal the identity of the individual who is the subject of the information, either by using the information alone or with other information that is available to predictable recipients of the information.[643]
3. ***Governmental Care of Personal Information***. Chapter 1347 of the Revised Code provides the means by which state and local governmental agencies, including health agencies, must care for personal information within their possession.[644]
   (a) "Personal Information" Defined. Chapter 1347 broadly defines "personal information" as information describing anything about a person, or that indicates actions done by or to a person, or that

[637] 45 C.F.R. § 160.203.

[638] 45 C.F.R. § 160.203(a)(1)(iv).

[639] 45 C.F.R. § 160.203(a)(2).

[640] 45 C.F.R. § 160.203(b).

[641] 45 C.F.R. § 160.203(c).

[642] 45 C.F.R. § 160.203(d).

[643] R.C. 3701.17(A)(2)(a)—(b).

[644] See generally R.C. 1347.01 et seq.

indicates that a person possesses certain personal characteristics, and that contains, and can be retrieved from a system by, a name, identifying number, symbol, or other identifier assigned to a person.[645] The broad scope of this definition would seem to encompass protected health information.

(b) Duties of Agency. Agencies maintaining personal information must comply with the following:

i. *Appointment of Manager*. Agencies must appoint one person directly responsible for their personal information system.[646]

ii. *Rules*. Agencies must adopt and implement rules providing for the operation of the system in accordance with law.[647]

(A) No Combined Systems. Agencies charged with maintaining personal information are prohibited from doing so by means of an interconnected system.[648] Each agency must separately hold its own personal information.

iii. *Information and Compliance Management*. Agencies must inform employees responsible for operating or maintaining the system of all applicable laws respecting the use of personal information, implement disciplinary measures for violations, and develop procedures for monitoring the personal information within the system.[649]

iv. *Assistance with Requests for Personal Information*. Agencies must assist employees asked to supply personal information as to whether such information may or may not be supplied.[650]

v. *Protection of Personal Information*. Agencies must take reasonable precautions to protect personal information in the system from unauthorized use, modification, disclosure, or destruction.[651]

vi. *Limitation on Information Maintained*. Agencies must ensure they collect, maintain, and use only that information necessary and relevant to their functions.[652]

---

[645] R.C. 1347.01(E).

[646] R.C. 1347.05(A).

[647] R.C. 1347.05(B).

[648] R.C. 1347.071.

[649] R.C. 1347.05(C)-(D) and (F).

[650] R.C. 1347.05(E).

[651] R.C. 1347.05(G).

[652] R.C. 1347.05(H).

(c) Rights of Persons Who Are Subjects of Personal Information. Persons whose information is maintained by state or local agencies have the following rights with respect to that information:

i. *Knowledge of Existence of Information*. Persons have the right to be informed that their personal information is contained within an information system.[653]

ii. *Inspection*. Persons have a right to inspect their own personal information maintained in the information system.[654]

(A) Exception. A person is not entitled to disclosure of their own personal medically-related information if a physician, psychiatrist, or psychologist determines that disclosure will have an adverse effect on the person. In such an instance, the information shall be released to a physician, psychiatrist, or psychologist designated by the person or their legal guardian.[655]

iii. *Information Regarding Use*. Persons have a right to information regarding the types of uses of their personal information and the identities of users usually granted access to the system.[656]

(d) Disputing the Accuracy or Relevance of Personal Information Maintained by Agency. Persons maintain the right to request that an agency investigate the status of their own personal information for accuracy, relevance, timeliness, or completeness.[657]

(e) Actions for Wrongful Disclosure of Personal Information; Injunctive Relief. By statute, persons may seek civil recovery for wrongful disclosure from any person directly and proximately causing harm by doing any of the following:

i. *Wrongful Maintenance*. Intentionally maintaining inaccurate, irrelevant, no longer timely, or incomplete personal information that may result in harm.[658]

ii. *Wrongful Disclosure*. Intentionally using or disclosing personal information in a manner contrary to law.[659]

iii. *Supplying or Using Known False Information*. Intentionally supplying known false personal information for storage in a personal information system or using or disclosing known

[653] R.C. 1347.08(A)(1).

[654] R.C. 1347.08(A)(2).

[655] R.C. 1347.08(C)(1).

[656] R.C. 1347.08(A)(3).

[657] See R.C. 1347.09.

[658] R.C. 1347.10(A)(1).

[659] R.C. 1347.10(A)(2).

false personal information maintained in a personal information system.[660]

iv. *Denial of Legal Rights Regarding Inspection and Dispute*. Intentionally denying to the person the right to inspect and/or dispute the personal information at a time where inspection or correction may have prevented the harm.[661]

(A) Statute of Limitations. Actions for wrongful disclosure must be brought within two years after the cause of action accrues or within six months after the wrongdoing is discovered, whichever is later.[662] However, no cause of action may be brought later than six years after it accrues.[663]

v. *Injunctive Relief*. Agencies or their employees who violate or propose to violate Chap. 1347 may be enjoined.[664]

4. ***Governmental Release of Protected Health Information; Generally***. Protected health information reported to or received by the director of health, the department of health, or a local health district shall not be released without the written consent of the individual who is the subject of the information.[665]

(a) Exceptions. Health information may be disclosed without the written consent of the subject individual in the following instances:

i. *Non-Identifying Information*. Information that does not identify an individual is not protected health information and may be released in summary, statistical, or aggregate form. Such information is public record.[666]

ii. *Necessary for Treatment*. Protected health information may be released where (1) the release is necessary to provide treatment to the subject individual and (2) the information is released pursuant to a written agreement requiring the recipient to comply with confidentiality requirements.[667]

(A) Written Statement of Confidentiality. The released health information must be accompanied by a written statement informing the recipient that the information is being disclosed from protected records and instructing the recipient that further

[660] R.C. 1347.10(A)(3).

[661] R.C. 1347.10(A)(4).

[662] R.C. 1347.10(A).

[663] Id.

[664] R.C. 1347.10(B).; see also Section I.A.3, supra.

[665] R.C. 3701.17(B).

[666] R.C. 3701.17(C); see also R.C. 149.43.

[667] R.C. 3701.17(B)(1).

release of the information without the written consent of the subject individual is prohibited.[668]

iii. *Accuracy of Information*. Protected health information may be released where (1) the release is necessary to ensure the accuracy of the information and (2) the information is released pursuant to a written agreement requiring the recipient to comply with confidentiality requirements.[669]

(A) Written Statement of Confidentiality. The released health information must be accompanied by a written statement informing the recipient that the information is being disclosed from protected records and instructing the recipient that further release of the information without the written consent of the subject individual is prohibited.[670]

iv. *Criminal Investigation or Prosecution*. Protected health information may be released pursuant to subpoena or search warrant issued by or at the request of a grand jury or prosecutor in connection with a criminal investigation or prosecution.[671]

(A) Written Statement of Confidentiality. The released health information must be accompanied by a written statement informing the recipient that the information is being disclosed from protected records and instructing the recipient that further release of the information without the written consent of the subject individual is prohibited.[672]

v. *Public Health Necessity*. Protected health information may be released where the director evaluates relevant information and determines it necessary to avert or mitigate a clear threat to an individual or to the public health.[673]

(A) Permitted Recipients. Under this exception, information may be released only to those persons or entities necessary to control, prevent, or mitigate disease.[674]

(b) No Written Statement of Confidentiality Required. Where the director releases the information, it need

[668] R.C. 3701.17(D).

[669] R.C. 3701.17(B)(2).

[670] R.C. 3701.17(D).

[671] R.C. 3701.17(B)(3).

[672] R.C. 3701.17(D).

[673] R.C. 3701.17(B)(4).

[674] Id.

not be accompanied by a written statement of confidentiality.[675]

[675] R.C. 3701.17(D).

CHAPTER 5—EMERGENCY OPERATIONS DURING A PUBLIC HEALTH EMERGENCY

I. State Powers During State of Emergency

A. In General.

By providing for emergency management procedures, Ohio law recognizes the threat to public health and safety presented by both natural and man-made emergencies and disasters.

1. ***Use of State Resources to Maximum Extent Practicable***. The governor is required to utilize the services, equipment, supplies, and facilities of existing state and local agencies to the maximum extent practicable in coping with an emergency.[676]
   (a) Acceptance of Private Offers of Assistance. The state is authorized to accept gifts, grants or loans of services, equipment, supplies, materials, or funds offered by private parties to assist in emergency management.[677]
2. ***Specific State Emergency Management Procedures***. Ohio emergency management procedures include, but are not limited to, the following:
   (a) Establishment of Emergency Management Agency. Ohio law establishes an emergency management agency, which operates under rules adopted by the director of public safety.[678]
      i. *Composition*. The director of public safety, with the concurrence of the governor, appoints an executive director of the emergency management agency. The executive director may then appoint those personnel necessary to plan, organize, and maintain emergency management adequate for the state's needs.[679]
      ii. *Role of Executive Director With Respect to State Functions*. The executive director advises the governor and director of public safety on matters of emergency management, coordinates all activities of all emergency management agencies within the state, maintains liaison with similar agencies of other states and the federal government, and develops the statewide emergency operations plan in compliance with federal requirements.[680]
         (A) Additional Duties. By statute, the executive director may be vested with such additional authority, duties, and responsibilities as may be prescribed by the governor and director of public safety.[681]

[676] R.C. 5502.28(A).

[677] R.C. 5502.32.

[678] R.C. 5502.22(A).

[679] Id.

[680] Id.

[681] Id.

iii. *Role of Executive Director With Respect to Federal Functions*. With the approval of the director of public safety, the executive director may participate in federal programs, accept grants from, and enter into cooperative agreements or contractual arrangements with federal, as well as state, departments and agencies.[682]

iv. *Cooperative Nature of Power*. Whenever the duties of the executive director overlap with the rights or duties of other state or federal departments, agencies, or officials, the executive director may not infringe upon the rights or duties of the other entities.[683]

(b) Preparation of State Emergency Plan. Ohio law calls for the development of statewide emergency planning in accord with all federal requirements.[684]

i. *Judicial Notice*. By law, courts are required to take judicial notice of plans adopted for emergency management purposes.[685]

(c) Designation of Temporary Seats of State Government. Ohio law establishes a procedure by which the governor may designate emergency temporary locations for the seats of state government in the event an emergency renders it imprudent, inexpedient, or impossible to conduct governmental affairs at their normal location.[686]

i. *Procedure*. The governor may establish temporary seats of state government by written proclamation.[687]

ii. *Attendant Gubernatorial Powers*. The governor may issue such orders and take such action as is necessary for the orderly transition of government affairs to the temporary location.[688]

iii. *Change of Emergency Locations*. The seat of government may be changed at any time either before or during the emergency if the governor considers the change advisable.[689]

[682] R.C. 5502.22(B).

[683] Id.

[684] R.C. 5502.22(A).

[685] R.C. 5502.36.

[686] R.C. 5502.24(A).

[687] Id.

[688] Id.

[689] Id.

iv. *Requirement that Temporary Seat of Government Remain Within State*. The temporary seat of government must remain within the State of Ohio.[690]

v. *Binding Nature of Business Conducted At Temporary Seat of Government*. All governmental business conducted at the temporary location is binding as though conducted at the regular seat of government.[691]

vi. *End of Emergency; Reversion of Governmental Seat*. The emergency seat of government remains in effect until one of two events occurs.

(A) Establishment of New Location. The General Assembly may establish a new location for the seat of government.[692]

(B) Cessation of Emergency. The governor may declare an end to the emergency and return the seat of government to its original location.[693]

(d) Promulgation of Rules for Emergency Management. The director of public safety is authorized by law to adopt, rescind, amend, and enforce rules with respect to the emergency management of the state for the purpose of protecting the citizens against any hazard.

i. *Availability of Rules for Public Inspection*. The rules must be made available for public inspection at the emergency operations center and at other reasonable places and hours.

ii. *Judicial Notice*. By law, courts must take judicial notice of ordinances, rules, resolutions, or orders adopted for emergency management purposes.[694]

(e) Enactment of Interstate Emergency Management Assistance Compact. Ohio has enacted the Emergency Management Assistance Compact for the provision of equipment, personnel, and services to and by other states in the event of an emergency.[695]

3. ***Specific Local Emergency Management Powers***. Ohio law provides for emergency management procedures for county or municipal level localities.

(a) Countywide Emergency Management Agencies. Boards of county commissioners and chief executives of all or a majority of political subdivisions within a county may establish countywide emergency management agencies.[696]

[690] Id.

[691] Id.

[692] Id.

[693] Id.

[694] R.C. 5502.36.

[695] R.C. 5502.40.

[696] See R.C. 5502.26.

(b) Regional Emergency Management Authorities. Boards of county commissioners of two or more counties, with the consent of the chief executives of a majority of the participating political subdivisions of each county involved, may establish regional emergency management authorities.[697]

(c) Individual Political Subdivision Emergency Management Programs. For those political subdivisions not participating in emergency management activities at the county or regional level, Ohio law requires that they establish an emergency management program.[698]

(d) Mutual Aid Arrangements. Political subdivisions may collaborate with other private and public Ohio agencies to develop mutual aid arrangements for reciprocal emergency management aid and assistance in case of hazard too great to be dealt with unassisted.[699]

i. *Limitations*. Mutual aid arrangements may not relieve the chief executive of any political subdivision from the responsibility of entering into a countywide emergency management agency, regional emergency management authority, or establishing an individual emergency management program.[700]

(e) Designation of Temporary Government Seat. Ohio law establishes a procedure by which political subdivisions may designate emergency temporary locations for the seats of government in the event an emergency renders it imprudent, inexpedient, or impossible to conduct governmental affairs at their normal location.[701]

i. *Procedure*. The governing body of the political subdivision may establish and designate substitute sites for the emergency location of government by ordinance, resolution, or other manner.[702]

(A) Attendant Powers. The governing body of the political subdivision may make any necessary arrangements for the use of the alternative sites.[703]

(B) Other Sites of Convenience Permitted. In addition to the designated site, Ohio law provides that the

[697] See R.C. 5502.27.

[698] See R.C. 5502.271.

[699] See R.C. 5502.29.

[700] Id.

[701] R.C. 5502.24(B).

[702] Id.

[703] Id.

governing bodies may meet at "any other convenient site or place."[704]

ii. *Call to Substitute Site*. The presiding officer or any two members of the governing body may call the governing body to the substitute site.[705]

iii. *Requirement that Temporary Seat of Government Remain Within State*. The temporary seat of government must remain within Ohio.[706]

(A) Temporary Seat Need Not Remain Within Political Subdivision. The temporary seat of government need not remain within the political subdivision itself.[707]

iv. *Binding Nature of Business Conducted At Temporary Seat of Government*. All governmental business conducted at the temporary location is binding as though conducted at the regular seat of government.[708]

4. ***Immunity of Government Actors During State of Emergency***. Ohio law provides immunity to government actors engaged in the good faith performance of emergency management functions.[709]

(a) Broad Grant of Immunity. The state, its political subdivisions, its municipal agencies, emergency management volunteers, other states, the federal government, and foreign governments are all immune from liability while engaged in emergency management functions in Ohio.[710]

i. *"Emergency Management Volunteers" Defined*. For the purposes of the immunity statute, "emergency management volunteers" are limited to those individuals authorized to assist any agency performing emergency management functions during a hazard.[711]

(b) Acts Immune From Liability. Covered individuals performing emergency management services pursuant to an arrangement, agreement, or compact for mutual aid are immune from liability. Covered individuals who are carrying out, complying with, or attempting to comply with state or federal law, any mutual agreement or compact for assistance, or orders issued by federal or

[704] Id.

[705] Id.

[706] Id.

[707] Id.

[708] Id.

[709] See R.C. 5502.30.

[710] R.C. 5502.30(A).

[711] Id.

state military authorities engaged in emergency management are also immune from liability.[712]

(c) Extent of Immunity. Covered individuals performing covered acts are immune from liability stemming from the death of persons or damage to property as the result performing the covered acts during training periods, test periods, practice periods, false alerts, or other operations. This immunity extends to immunize covered acts during an actual or imminent hazard, and applies in the aftermath of such an actual or imminent hazard as well absent willful misconduct.[713]

(d) Immunity Respecting Structures. Ohio law grants immunity to the public or private owner of structures for the injury, death, or property damages sustained by persons therein for the purposes of emergency duty, training, or shelter.[714]

II. Federal Powers During State of Emergency

A. Scope of Permissible Federal Assistance; Effect on Habeas Corpus Rights.

Federal powers during states of emergency are governed by the Constitution, the Posse Comitatus Act (PCA), and the statutory exceptions to the PCA.

1. ***Suspension of Habeas Corpus***. Article I, Section 9, Clause 2 of the federal Constitution generally provides that the privilege of the writ of habeas corpus shall not be suspended.

   (a) Constitutional Exceptions. Habeas corpus may be suspended in cases of rebellion or invasion where the public safety may require it.[715]

      i. *Effect of Constitutional Exceptions*. The text of the Constitution would seem to establish a two-part requirement for suspending habeas corpus: a preliminary finding that a rebellion or an invasion is underway, and a secondary finding that public safety requires suspension of habeas corpus.[716]

         (A) State Equivalent. The Ohio Constitution contains a provision equivalent to its federal counterpart permitting suspension of habeas corpus.[717]

[712] Id.

[713] Id.

[714] R.C. 5502.30(B).

[715] Article I, Section 9, Clause 2, U.S. Constitution.

[716] See id.

[717] Article I, Section 8, Ohio Constitution.

B. Posse Comitatus Act (PCA).

The PCA was passed in 1878 and criminalizes law enforcement by the military.

1. ***In General***. The full text of the Posse Comitatus Act states as follows: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both."[718]
   (a) Definition of "Posse Comitatus." "Posse comitatus" literally means the power of the county, or that population of the county the sheriff may summon for assistance.[719]
   (b) Passage of PCA. The PCA was originally passed in response to (1) the use of federal troops in the South during the Reconstruction Era to safeguard elections, enforce the voting rights of former slaves, and maintain general order and (2) the authority of U.S. Marshals to summon army members in their territories to arrest criminals and carry out other law enforcement activities. Disapproval of these activities led to the PCA.[720]
   (c) Applicability to All Branches of Military. While the PCA directly references only the Army and Air Force, Department of Defense (DOD) regulations make it applicable to the Marines and Navy as well.[721]
      i. *Exception; National Guard if Not Federalized*. The PCA does not apply to National Guard troops if they have not been federalized and brought under the command and control of the military.[722]
         (A) Right to Reject Federalization of National Guard. The state governor may not prohibit federalization of the National Guard unless the state is facing an emergency that requires the Guard units in question.[723] This power includes the right to reject federalization where federalizing the National Guard would serve the purpose of disaster relief in the home state.[724]
   (d) Supremacy of Civilian Law Over Military Law. The PCA serves the purpose of codifying a general principle establishing civilian supremacy over the military.

[718] Posse Comitatus Act, 18 U.S.C. § 1385.

[719] Black's Law Dictionary 1200 (8th Ed. 2004).

[720] See Issac Tekie, "*Bringing the Troops Home to a Disaster: Law, Order, and Humanitarian Relief*," 67 Ohio St. L.J. 1227 (2006).

[721] Dep't of Defense, Directive 5552.5.

[722] See *Gilbert v. U.S.* (C.A.6, 1999), 165 F.3d 470.

[723] *Perpich v. Dept. of Defense* (1990), 496 U.S. 344.

[724] See Tekie, supra.

i. *Rationales for PCA*. The relevance and importance of the PCA may be rationalized as follows:

(A) Protection Against Forfeiture of Civil Liberties to a Centralized Government. The PCA guards against the fears associated with a forfeiture of liberties to a powerful centralized government by entrusting civil liberties to civilian leaders who remain supreme to the military.

(B) Preservation of Military Resources. The PCA guards against the temptation of using the military's organization and effectiveness for domestic purposes and thereby spreading limited military resources too thin.

(C) Prevention of Soldier Role Confusion. The PCA recognizes that military training is limited to the engagement of foreign enemies, not citizens with established constitutional rights to due process and reasonable searches and seizures.

2. ***Effect of PCA; Criminalization of Domestic Military Law Enforcement***. As stated, the PCA is a criminal statute that serves to prevent military law enforcement activities.

(a) PCA as Criminal Statute. By virtue of its placement in Title 13 of the United States Code and provision of a penalty for violating its terms, the PCA is technically a criminal statute.

(b) No Convictions. There have been no individuals criminally convicted under the PCA since its enactment.

i. *Use of Statute to Defeat Government Claims Regarding Lawful Exercise of Power*. The PCA has been used by the courts to interpret the lawful scope of the military's involvement in assisting in domestic functions.

(c) "Execution of the Laws" by the Military. Absent constitutional or statutory authority, courts have determined that military personnel are barred from "executing the laws" of the United States.

i. Interpretation of "Executing the Laws." The prohibition on military law enforcement does not prevent all assistance to civilian officials.

(A) *Provision of Equipment*. The military may provide equipment to civilian law enforcement officials without violating the PCA.[725]

(B) *Logistical Support and Technical Advice*. The question of whether the military may provide logistical support and technical advice to civilian law enforcement officials has been subject to separate tests.

(1) "Pervasive Activities" Test. One court has measured the permissibility of military

[725] *U.S. v. Jaramillo* (D.Neb. 1974), 380 F. Supp. 1375 and *U.S. v. Red Feather* (D.S.D.1975), 392 F. Supp. 916.

involvement on whether their activities "pervade that of civil authorities."[726]

(2) "Passive Support/Direct Assistance" Test. Other courts have focused primarily on the distinction between passive military support and active military assistance, such as actual equipment operation, holding that the PCA prohibits only the latter.[727]

(C) *Military Presence Directly Influencing Law Enforcement Decisions*. Military presence directly influencing the decisions of civil law enforcement officials would clearly violate the PCA.[728]

3. ***Express Exceptions to PCA; Generally***. As noted above, the PCA itself provides for exceptions permitting military involvement in domestic law enforcement activities.

(a) Constitutional Exceptions. Under the PCA, the military may actively and directly enforce the law "in cases and under circumstances expressly authorized by the Constitution" or by an "Act of Congress."[729]

i. *Express Constitutional Authorization*. The Constitution does not expressly authorize direct military involvement in law enforcement activities.

ii. *Implied Constitutional Authorization*. The Constitution may imply direct military involvement in law enforcement activities.

(A) Role of President as "Commander-in-Chief." The Constitution states that the President, as Commander-in-Chief of the armed forces, shall "take care that the laws be faithfully executed."[730]

(B) Constitutional Guarantee Against Domestic Violence. The Constitution guarantees the states protection against domestic violence.[731]

(C) Inherent Authority. Department of Defense regulations speak of an inherent Constitutional authority for the military to safeguard the public order and maintain the functioning of

[726] *Jaramillo*, supra. The *Jaramillo* court concluded that a reasonable trier of fact could conclude that could conclude that Army officials, by advising civilian officials, controlled the operation in question in a manner effectively pervading the activities of civilian law enforcement.

[727] *Red Feather*, supra, and *U.S. v. McArthur* (D.N.D. 1976), 419 F. Supp. 186. The *McArthur* court concluded that the PCA prohibited the military from exercising power that "was regulatory, proscriptive, or compulsory in nature," such as searches, seizures, or other activities commonly associated with police forces.

[728] See *Jaramillo*, *Red Feather*, and *McArthur*, supra.

[729] Posse Comitatus Act, 18 U.S.C. § 1385.

[730] Art. II, Section 3, Clause 3, U.S. Constitution.

[731] Art. IV, Section 4, U.S. Constitution.

government.[732] This allows for certain military actions.

(1) *Emergency Authority*. Emergency authority contemplates the use of the military to prevent the loss of life and property in sudden disasters and civil disturbances surpassing the capability of state and local authorities.[733]

(2) *Protection of Federal Property and Functions*. This does not require a disaster or disturbance, but authorizes the military to protect functions that are primarily federal in nature.[734]

iii. *Effect of Exceptions; Generally*. The exceptions expressly noted in the PCA permit the military to take part in a wide variety of direct and active law enforcement activities.

(A) Examples. The military has been used to enforce civil rights, stop looting, and restore law and order after riots and other disasters.[735]

(b) Statutory Exceptions. Statutory exceptions to the PCA are discussed below in Section C.

C. Federal Statutory Exceptions to PCA: Stafford Act

1. ***Primary Federal Disaster Relief Act***. The Stafford Act is the primary disaster relief statute authorizing the President to deploy the military for disaster relief upon the request of a state governor.[736]

2. ***Powers of State Governor Under Stafford Act***. Declarations of major disasters or emergencies must generally be initiated by the governor.

(a) Exception; Initiation of Stafford Act Powers by President. If the President decides that an emergency implicates interests exclusive to or within the preeminent responsibility of the United States, he may initiate federal action under the Stafford Act. In such a case, an emergency may be declared, but not a major disaster.[737]

(b) Declaration of Emergency or Major Disaster by Governor. In most cases, the governor will initiate the process by declaring an emergency or major disaster.

---

[732] 32 C.F.R. § 215.4(c)(1).

[733] 32 C.F.R. § 215.4(c)(1)(i).

[734] 32 C.F.R. § 215.4(c)(1)(ii).

[735] Sydney J. Freedberg, Jr., *Posse Comitatus: Tiny Law, Big Impact*, Nat'l J., Nov. 12, 2005.

[736] 42 U.S.C. §§ 5170 (declaring major disaster) and 5191 (declaring emergency).

[737] See 42 U.S.C. 5191(b).

i. *Emergency Defined*. "Emergency" is defined as any event necessitating federal intervention to save lives, protect property and the public health, or to avert a catastrophe.[738]

ii. *Major Disaster Defined*. "Major disasters" are defined as natural catastrophes, or any catastrophes resulting in a fire, flood, or explosion.[739]

iii. *Prerequisites for Declaring Emergency or Major Disaster*. Prior to seeking federal assistance under the Stafford Act, the state governor must take certain actions.

(A) Execution of State Emergency Plan. The governor must first describe and execute the state's own emergency plan before seeking federal resources.[740]

(B) Inadequacy of State Resources. The state's resources must be found inadequate to deal with or avert the threat posed by the catastrophe.[741]

3. ***Authorized Military Assistance***. The Stafford Act authorizes the military to perform a range of logistical and humanitarian functions, such as road clearing, debris removal, search and rescue missions, supplying food and medicine, and providing shelter.[742]

(a) Assistance and Supplementation of State Officials. While federal troops are deployed under the Stafford Act, they remain under their normal chain of command and serve the President. However, regulations require coordination with state and local officials.[743]

(b) Time Limitation; Ten Days. The Stafford Act limits the "essential assistance" of federal troops to ten days time.[744]

D. Federal Statutory Exceptions to PCA: Insurrection Act

1. ***Purpose; Powers of President***. Under the Insurrection Act,[745] the President may command any branch of the armed forces to quell insurrections, uprisings, and civil disturbances threatening the operation of state or federal laws.

(a) No Definitions. Nothing in the Insurrection Act defines the terms "insurrection" or "domestic violence."

i. *DOD Definitions*. Agency regulations promulgated by the Department of Defense may provide some assistance.

---

[738] 44 C.F.R. § 206.2(17).

[739] Id.

[740] See 42 U.S.C. 5170 and 5191(a).

[741] See id.

[742] See 42 U.S.C. §§ 5170b(a)(3) and (c), 5192(a)(3).

[743] 44 C.F.R. § 206.3.

[744] 42 U.S.C. § 5170b(c).

[745] 10 U.S.C. §§ 331-335.

(A) Civil Disturbance. Though not found in the Insurrection Act, the term "civil disturbance" is defined as "group acts of violence and disorders prejudicial to public law and order."[746]

(b) Statutory Provisions Permitting Military Law Enforcement. The Insurrection Act provides three main provisions permitting federal military law enforcement activities. Of these, only one requires an invitation from the state.

i. *Insurrection Against State Government; Invitation Required*. Section 331 of the Insurrection Act covers insurrections within a state against the state government. The legislature or governor of the state (if the legislature cannot be convened) may call upon the President to suppress the insurrection.[747]

(A) Invocation of Section 331. Federal assistance was invoked at the request of the state and local officials following mass looting in the wake of Hurricane Hugo in 1989[748] and during the Los Angeles riots of 1992.[749]

ii. *Insurrection Against Federal Authority; Invitation Not Required*. Section 332 of the Insurrection Act covers rebellions or other actions within a state that make it impracticable to enforce federal laws. The President may unilaterally call the military and National Guard into service within the state to enforce federal laws or to suppress the rebellion.[750]

iii. *State Denial of Equal Protection to its Citizens or Obstruction of Federal Authority; Invitation Not Required*. Section 333 of the Insurrection Act permits the president to unilaterally call the armed forces into service to suppress insurrection in certain circumstances where states themselves resist.[751]

(A) State Denial of Equal Protection to Citizens. Where the insurrection hinders the execution of state and federal laws in such a way that citizens are deprived of Constitutional rights, and the state is unwilling or unable to ensure those rights, the President may

[746] 32 C.F.R. § 215.3(a).

[747] 10 U.S.C. § 331.

[748] See Tekie, supra.

[749] Id.

[750] 10 U.S.C. § 332.

[751] 10 U.S.C. § 333.

unilaterally call upon the military to ensure and enforce them.[752]

(B) Opposition to or Obstruction of Federal Authority. Where the insurrection opposes or obstructs the execution of federal law or impedes the course of justice under federal law, the President may unilaterally call upon the military to ensure them.[753]

i. *Invocation of Section 333*. Only where states have refused to enforce the civil rights of African-Americans has the President invoked the Insurrection Act without state request.[754]

(c) Broad Discretion of President. The Insurrection Act vests the President with broad discretion in determining whether domestic unrest or violence warrants military intervention.[755]

(d) Limitation; Statutory Mandate of Invocation as Last Resort. Generally, Department of Defense regulations addressing the Insurrection Act identify the states as the entities responsible for protecting the life and property of their citizens and maintaining order within their boundaries.[756] Invocation of the Act is reserved for situations of "last resort."[757]

i. *Examples of Situations of "Last Resort.*" Federal intervention is warranted in circumstances of natural disasters and emergencies that are beyond state capabilities, where protection of state functions is required, where states have exhausted their resources in dealing with emergencies or insurrections, or where states refuse to take appropriate action.

3. ***Recent Amendment to Permit Use of Insurrection Act After Epidemic or Serious Public Health Emergency.*** A recent amendment to Section 333 of the Insurrection Act allows the President to employ the National Guard in federal service to restore public order and enforce laws after an "epidemic or serious public health emergency."[758]

(a) Discretion Rests with President. The president maintains the discretion to determine whether the state is capable of maintaining public order. If not, federal assistance may be employed without state invitation.[759]

---

[752] Id.

[753] Id.

[754] See *Bergman v. U.S.* (W.D. Mich. 183), 565 F. Supp. 1353.

[755] Id.

[756] See 32 C.F.R. 501.1(a).

[757] Id.

[758] 10 U.S.C. § 333(a)(1)(A), as amended by Pub.L. 109-364, § 1076(a)(1) (Oct. 17, 2006).

[759] See id.

CHAPTER 6—OPERATING THE JUDICIAL SYSTEM DURING A PUBLIC HEALTH EMERGENCY

I. Powers of the Chief Justice

A. Broad Scope of Powers.

In the event of a judicial emergency or civil disorder, Sup.R. 14 grants broad and significant powers to the Chief Justice of the Ohio Supreme Court. The rule gives the Chief Justice those powers necessary to facilitate the administration of justice for the duration of any judicial emergency caused by disaster or civil disturbance.[760]

1. ***"All Things Necessary" Language.*** Sup.R. 14(A) grants to the Chief Justice the powers to do and direct to be done "all things necessary to ensure the orderly and efficient administration of justice for the duration of the emergency.[761]

B. Individual Powers Granted the Chief Justice By Rule.

Sup.R. 14 vests the Chief Justice with the following powers:

1. ***Suspension of Local Court Rules.*** During a judicial emergency, the Chief Justice is expressly authorized to suspend the operation of any local court rule.[762]
2. ***Promulgation of Temporary Rules.*** During a judicial emergency, the Chief Justice is expressly authorized to promulgate temporary rules of court.[763]
3. ***Transfer of Powers to Judges Within State***. During a judicial emergency, the Chief Justice is expressly authorized to assign and transfer emergency judicial duties to any judge within the state.[764]
   (a) Reinstatement of Retired Judges. Emergency judicial duties may be assigned to retired judges where required.[765]
4. ***Accelerated Appointment of Judges***. While not expressly listed as a Sup.R. 14 power, it is likely that the judicial appointment procedure may be accelerated if necessary to ensure the orderly and efficient administration of justice.[766]
5. ***Consultation With Other Justices Required Where Possible***. The Chief Justice is to consult with and report to the other Ohio Supreme Court justices any actions contemplated or taken under Sup.R. 14.[767]

---

[760] See Commentary to Sup.R. 14.

[761] Sup.R. 14(A).

[762] Id.

[763] Id.

[764] Sup.R. 14(B).

[765] Id.

[766] See Sup.R. 14(A).

[767] Sup.R. 14(C).

(a) Exception. Where circumstances do not permit consultation with the other justices or a report to them, the Chief Justice may act alone.[768]

i. *Effect*. Where circumstances require, the Chief Justice may serve as the ultimate authority responsible for continued operations of Ohio courts during an emergency and may unilaterally act to this end with minimal oversight.[769]

6. ***Duration of Powers***. During the disaster or emergency, any temporary rules promulgated under Sup.R. 14 govern the operation of the courts. The language of Sup.R. 14 suggests both that the Chief Justice's authority to exercise these emergency powers lapses at the conclusion of the emergency or disaster and that rules passed during the emergency or disaster expire and that the typical rules of court are reinstated.[770]

C. Inability of Chief Justice to Act; Succession.

Sup.R. 14 provides for succession planning in the event of the Chief Justice's disability during a civil disturbance, judicial emergency, or disaster.

1. ***Longest Tenured Justice Becomes Chief***. In the event that the Chief Justice is absent or becomes disabled during a civil disturbance, disaster, or judicial emergency, the available justice having the period of longest total service as an Ohio Supreme Court justice serves as the acting Chief Justice.[771]

II. Judicial Vacancies and Disabilities

A. Vacancy and Appointment Procedures.

The Ohio Constitution provides the means by which vacancies in the position of judge are filled.[772]

1. ***Temporary Appointment***. In the case of judicial vacancy prior to the expiration of the judge's elected regular term, the governor appoints a temporary judge until a successor is elected and qualified.[773]

(a) Election of Successor for Remainder of Unexpired Term. The vacating judge's successor is elected at the first general election held for the office occurring more than forty days after the vacancy occurs.[774]

i. *Exception; Ending of Unexpired Term In Less Than One Year*. When the unexpired term ends within one year following the date of the next general election; the

[768] Id.

[769] See generally Sup.R. 14.

[770] See Commentary to Sup.R. 14.

[771] Sup.R. 14(A).

[772] Section 13, Article IV, Ohio Constitution.

[773] Id.

[774] Id.

governor's appointee holds the position for the remainder of the unexpired term.[775]

B. Disability of Judge.

The Civil Rules provide guidance for the disability of a judge.[776]

1. ***Disability During Trial***. If a judge is unable to proceed with a jury trial, for any reason, another judge may proceed with and finish the trial upon certifying in the record that he has familiarized himself or herself with the record.[777]
   (a) Appointment of New Judge. The new judge is appointed by the administrative judge, unless the division is a single judge division. If the division is a single judge division, the Chief Justice of Ohio Supreme Court makes the appointment.[778]
   (b) Inability of New Judge to Properly Familiarize Himself or Herself With the Record. If the new judge cannot adequately familiarize himself or herself with the record of the trial, he or she has discretion to grant a new trial.[779]
2. ***Disability After Return of Verdict or Findings***. If a judge is unable to with dispense his or her duties after a verdict is returned or findings of fact and conclusions of law are filed, another judge may perform those duties.[780]
   (a) Appointment of New Judge. The new judge is appointed by the administrative judge, unless the division is a single judge division. If the division is a single judge division, the Chief Justice of Ohio Supreme Court makes the appointment.[781]
   (b) Inability of New Judge to Properly Familiarize Himself or Herself With the Record. If the new judge cannot adequately familiarize himself or herself with the record of the trial, he or she has discretion to grant a new trial.[782]

[775] Id.

[776] Civ.R. 63.

[777] Civ.R. 63(A).

[778] Id.

[779] Id.

[780] Civ.R. 63(B).

[781] Id.

[782] Id.

III. Witness and Jury-Related Concerns

A. Subpoena Power in General.

Courts possess the power to subpoena witnesses to appear before them and provide their testimony in both civil and criminal proceedings.[783]

1. ***Issuance in Criminal Cases***. In all criminal cases, the common pleas clerk shall issue writs of subpoena for the witness named therein and direct them to the sheriff of the county where the witness is located. Subpoenas may issue to any county within the state by statute.[784]

B. Failure or Refusal of Witness or Prospective Juror to Appear.

During a widespread pandemic outbreak, it is likely that many persons called before a court may be reluctant to appear out of fear of infection. The law provides remedies for failure or refusal of a witness or juror to appear.

1. ***Witnesses***. A subpoena to appear before a court and provide testimony requires the witness to attend.
   (a) Arrest for Failure to Attend. Where a material witness is subpoenaed but refuses or neglects to attend in conformity with the subpoena, the witness is subject to arrest to compel his attendance and punish his disobedience.[785]
   (b) Contempt. Witnesses who fail to appear in accordance with the terms of a subpoena may be found guilty of contempt.[786]
      i. *Additional Grounds for Contempt Finding*. Ohio's Rules of Civil Procedure,[787] Rules of Criminal Procedure,[788] Rules of Juvenile Procedure,[789] and the Administrative Procedure Law[790] each provide for contempt for failure to obey a subpoena.
      ii. *Contempt Possible Even With Cancellation of Trial*. Witnesses may be held in contempt for failure to obey subpoenas requiring their appearance even where the trial at which they were to testify is cancelled.[791] Subpoenas require appearance as well as testimony.[792]

[783] See Civ.R. 45 and Crim.R. 17.

[784] R.C. 2945.45.

[785] R.C. 1907.37; R.C. 2317.21.

[786] R.C. 2705.02(A) and (C).

[787] Civ.R. 45(E). Civil Rules relative to compelling witness attendance and testimony and contempt proceedings extend to criminal cases as far as applicable. See R.C. 2945.46.

[788] Crim.R. 17(G).

[789] Juv.R. 17(F).

[790] R.C. 119.09.

[791] *State v. Castle* (1994), 92 Ohio App.3d 732, 637 N.E.2d 80.

[792] Id.

2. ***Prospective and Acting Jurors***. Persons whose names are drawn and who are summoned to report for jury service must report at the date and time specified in the notice and, if chosen for service, from day-to-day.[793] This requirement applies equally to grand juries, petit juries, and special juries.[794]
   (a) Arrest for Failure to Attend. Ohio law provides for the arrest of persons drawn for jury service who do not attend and serve without excuse.[795]
   (b) Statutory Penalty for Non-Appearance. Persons failing to appear for jury service may be fined not less than one hundred nor more than two hundred fifty dollars and may be punished for contempt of court.[796]
      i. *Remission of Fine*. The judge maintains the discretion to remit the fine for non-appearance in whole or in part. This must be done in open court, before the end of the same term, and for good cause shown.[797]
   (c) Postponement or Excuse from Jury Attendance. Prospective jurors have the ability, by law, to request an excuse from or postponement of their service.
      i. *Procedural Requirements for Postponement*. To obtain a postponement, a prospective juror must adhere to the procedure set forth by statute.[798]
         (A) Timing of Request. The prospective juror must request postponement of service at least two business days in advance of his or her scheduled initial appearance.[799]
         (B) Contact of Appropriate Court Official. The prospective juror must contact the appropriate court employee specified by the court.[800]
            a. *Means of Contact*. Contact must be made by phone, e-mail, or in writing.[801]
         (C) Additional Prerequisites for Postponement. To obtain a postponement, the prospective juror must also meet the following prerequisites:

[793] R.C. 2313.29.

[794] Id.

[795] R.C. 2313.30.

[796] R.C. 2313.99. See also R.C. 2705.02(A).

[797] R.C. 2313.29.

[798] See R.C. 2313.13.

[799] R.C. 2313.13(A).

[800] Id.

[801] Id.

(1) *No Previous Postponement*. The prospective juror cannot have been granted a previous postponement.[802]

(2) *Agreement to Subsequent Service Dates*. The prospective juror must agree to a specified service date on which the person will appear for service.[803]

(a.) Time Limits for Subsequent Service Dates. Under normal circumstances, the agreed service dates may not be more than six months from the date for which the prospective juror was originally called to serve.[804] Agreed service dates later than six months after the date service was originally required are granted only in extraordinary circumstances.[805]

(3) *Subsequent Summons Unnecessary*. Upon a postponement, the prospective juror is required to appear on the agreed date without service of additional summons.[806]

ii. *Subsequent Postponements*. Subsequent postponements of jury service may be granted only by the judge, and only in the event of extreme emergency.[807]

(A) Examples of "Extreme Emergencies" Permitting Subsequent Postponements. Deaths in the prospective juror's family, sudden illness of the prospective juror, and national disasters or emergencies in which the prospective juror is personally involved that could not be anticipated at the time of the initial postponement may permit subsequent postponements.[808]

(B) Agreement to Subsequent Service Dates. Before receiving a subsequent postponement, the prospective juror must agree to a specified date on which the person will appear for service.[809]

[802] R.C. 2313.13(A)(1).

[803] R.C. 2313.13(A)(2).

[804] Id.

[805] Id.

[806] R.C. 2313.13(B).

[807] Id.

[808] Id.

[809] Id.

iii. *Failure to Attend After Postponed Service*. The failure of a prospective juror to attend postponed service subjects the person to the same punishment as though the person failed to appear for initial service.[810]

4. ***Efforts to Remedy Inadequate Number of Available Prospective Jurors***. Ohio law provides that a judge may order an additional number of jurors to be drawn from the pool at any time for the full term, a partial term, or for immediate service in a particular case.[811]

(a) Procedure. The court's order must specify the following information:

i. *Number*. The order must specify the number of additional jurors to be drawn.[812]

ii. *Time*. The order must specify the time that the additional jurors shall be drawn.[813]

(b) Location of Drawing. The drawing may be made either in open court under the judge's direction or in ordinary manner prescribed by law.[814]

(c) Notice of Drawing. No notice of the drawing is required provided that the required officers are present.[815]

(d) Notice to Prospective Jurors Drawn. The sheriff must notify the persons selected to serve in the ordinary fashion provided by law.[816]

C. Sickness Affecting Seated Jurors.

In the event of a pandemic outbreak, jurors may be impacted during the course of a trial. Ohio law provides guidance.[817]

1. ***Sickness Before Conclusion of Trial***. If a juror becomes sick before the conclusion of a trial, or is unable to perform his or her duty for other reasons, the court may order the juror discharged.[818]

(a) Replacement with Alternate Juror. The discharged juror is replaced with an alternate juror.[819]

(b) Exhaustion of Alternate Jurors. If, after all alternate jurors are exhausted, a juror becomes sick and must be discharged, a new

[810] R.C. 2313.14; R.C. 2313.99.

[811] R.C. 2313.16.

[812] Id.

[813] Id.

[814] Id.

[815] Id.

[816] Id.; see also 2313.24 and 2313.25.

[817] See R.C. 2945.29.

[818] Id.

[819] Id.

juror may be sworn and the case tried anew, or the entire jury may be discharged and a new jury empaneled.[820]

i. *Effect of Discharging Jury in Criminal Proceeding*. The trial court may discharge a jury for the sickness of a juror or other calamity without prejudice to the prosecution.[821]

2. ***Medical Attendance of Juror***. In the event a juror becomes ill before the conclusion of the trial, the court may order medical attendance for that juror.[822]

(a) Costs. The reasonable costs of the sick juror's medical attendance are to be paid from the judiciary fund.[823]

IV. Grand Jury Rights

A. Constitutional Right.

While no similar federal constitutional right exists, the Ohio Constitution generally guarantees the right to indictment by grand jury.[824]

1. ***General Guarantee***. Article I, Section 10 of the Ohio Constitution guarantees the right to indictment by grand jury.

(a) Exceptions. There are several exceptions to the right to indictment by grand jury, certain of which are relevant to public health.[825]

i. *Minor Crimes*. There is no right to a grand jury indictment where the case involves an offense for which the penalty provided is not imprisonment.[826]

ii. *Cases Arising in the Militia When in Actual Service During Time of Public Danger*. No right to grand jury indictment exists in cases arising with the active militia when called to service in times of public danger.[827]

2. ***Specifics of Grand Jury Rights as Province of Legislature***. Section 10, Article I of the Ohio Constitution leaves both the number of grand jurors to serve and the number required to concur for an indictment as a legislative task.[828]

[820] Id.

[821] R.C. 2945.36.

[822] R.C. 2945.30.

[823] Id.

[824] See Section 10, Article I, Ohio Constitution.

[825] Id.

[826] Id.

[827] Id.

[828] Id.

B. Statutory Rights to Grand Jury.

Taking its cue from the Constitution, the General Assembly has promulgated statutes governing grand jury rights.

1. ***Statutory Guarantee***. The right to a grand jury is guaranteed by R.C. Chapter 2939. This statute sets the number of persons to serve as grand jurors at fifteen, twelve of which must concur for an indictment.[829]
2. ***Discharged of Indicted Person When No Indictment Returned***. Generally, if a person held in jail charged with an indictable offense is not indicted at the term of court at which he is held to answer, he shall be discharged.[830]
   (a) Exception; Illness or Accident of State's Witness. The person need not be released if it appears to the court of common pleas that a witness for the state has been enticed or kept away, detained, or prevented from attending court by sickness or unavoidable accident.[831] In such an instance, the cause shall be heard when the witness becomes available.

C. Procedural Nature of Right; Judicial Usurpation of Power from Legislature.

The Ohio Supreme Court has determined that the number of grand jurors is a procedural rather than a substantive, permitting Crim.R. 6(A) of the Rules of Criminal Procedure to control the matters of the number of jurors required to return an indictment.[832]

D. Reduction In Required Number of Grand Jurors.

1. ***Reduction of Number by Judiciary***. The Supreme Court's characterization of the number of grand jurors as a procedural right has permitted a reduction in required number of grand jurors from fifteen to nine, seven of which are required to return a true bill.
   (a) Rule-Making Power. Responsibility for setting the required number of grand jurors is therefore squarely within the rule-making power of the Ohio Supreme Court.[833]
2. ***Further Reduction; Public Heath Emergency***. It appears that the current number could be reduced again under existing laws and rules should a health emergency manifest itself.
   (a) No Legislative Action Required. As no legislative action is required when affecting a procedural right, the Supreme Court could act again to reduce the number of grand jurors required by law in case of an emergency or disaster.[834]

[829] See R.C. 2939.02 and 2939.20.

[830] R.C. 2939.24.

[831] R.C. 2939.24(E).

[832] *State v. Brown* (1988) 38 Ohio St.3d 305, 528 N.E.2d 523.

[833] See, e.g., *State v. Wilkerson* (Franklin App. Apr. 19, 1979), Case No. 78AP-539, 1979 WL 209017, at *8.

[834] See *Brown*, supra at note 21.

(b) Limitations. Any further reduction in the number of grand jurors required by law would likely be subject to certain limitations:

i. *No Arbitrary Class-Based Exclusion*. Reductions in numbers OK so long as it does not arbitrarily exclude particular classes of persons from the jury rolls.

ii. *Ratio*. Prudence dictates that the 4/5 ratio of jurors required by R.C. 2939.20 for an indictment remain unchanged.[835] Should the number of grand jurors drop below five, a unanimity requirement should be encouraged to guard against constitutional attack.[836]

(c) Procedure. Under current law and rules, the Supreme Court could accomplish such a reduction by either (1) a preemptive judicial amendment of Crim.R. 6 adding "in case of emergency" language and procedures, or if necessary, (2) a post-outbreak exercise of the broad emergency powers granted the Chief Justice under Sup.R. 14 to ensure the orderly and efficient administration of justice.

E. Sickness, Death, or Refusal of Grand Juror to Attend.

1. ***Selecting the Grand Jury; Generally***. Current law provides means for guaranteeing the seating of the minimum number of persons required for grand jury service.[837]

(a) Initial Selection. By statute, the jury commissioner selects at least twenty-five persons for possible selection. The first fifteen persons whose names are drawn shall constitute the grand jury, if they can be located and serve and are not excused by the court for reason such as illness.[838]

(b) Inability to Seat Grand Jury. If any of the first fifteen persons whose names are drawn cannot be located or are unable to serve for reason such as sickness, the judge presiding over the grand jury must designate the person whose name appears next on the list of names drawn for service.[839]

i. *Continuation*. In the event that the next person is unable to serve for reason such a sickness, the judge must continue down the list of selections until the necessary number of grand jurors may be seated.[840]

ii. *Exhaustion of List*. If the list of possible grand jurors is exhausted before a grand jury can be seated, the judge must (1) direct the jury commissioner to draw additional names

[835] See R.C. 2939.20 (setting the required number of grand jurors to return a true bill at twelve of fifteen).

[836] This would preserve the protection to those indicted by retaining—and indeed, increasing— the four-fifths ratio required for a true bill initially approved by the legislature.

[837] See R.C. Chap. 2939.

[838] R.C. 2939.02.

[839] Id.

[840] Id.

and (2) proceed to fill these vacancies from those names in the order drawn.[841]

2. ***Replacement of Grand Juror Once Sworn.*** Current law provides for procedures to permit replacement of a sworn grand juror in the event of sickness, death, or refusal to attend in permitting the common pleas judge to exercise discretion in causing another person to be sworn in the unavailable juror's stead.[842]

(a) Limitations. However, prior to the administration of the oath to members of the grand jury, the court has no similar authority to substitute another person to serve upon the panel of jurors drawn for service.[843]

(b) Arrest for Grand Juror's Refusal to Attend. Ohio law provides for the arrest of persons drawn for grand jury service who do not attend and serve without excuse.[844]

(b) Statutory Penalty for Non-Appearance. Persons failing to appear for grand jury service may be fined not less than one hundred nor more than two hundred fifty dollars and may be punished for contempt of court.[845]

i. *Remission of Fine*. The judge maintains the discretion to remit the fine for non-appearance in whole or in part. This must be done in open court, before the end of the same term, and for good cause shown.[846]

V. Clerk of Courts

A. Vacancy and Appointment Procedures.

In the event of a vacancy by death or resignation in the office of the Clerk of Courts, the Revised Code provides the procedure by which it must be filled.[847]

1. ***Vacancy Occurring More than Forty Days Before Next General Election***. If the vacancy occurs more than forty days before the next general election for state and county offices, a successor shall be elected at such election for the unexpired term unless such term expires within one year immediately following the date of such election.[848]

(a) Appointment Pending General Election. Prior to the next election, the vacancy must be filled by appointment.[849]

---

[841] Id.

[842] R.C. 2939.16.

[843] *State ex rel. Burton v. Smith* (1962), 118 Ohio App. 248, 194 N.E.2d 70.

[844] R.C. 2313.30.

[845] R.C. 2313.99. See also R.C. 2705.02(A).

[846] R.C. 2313.29.

[847] See R.C. 305.02.

[848] R.C. 305.02(A).

[849] Id.

i. *Procedure for Appointment*. In the event of a vacancy in the office of Clerk of Courts, the following occurs:

(A) Appointment. The county central committee of the political party of the office's last occupant shall make the appointment.[850] The appointee holds the office until a successor is elected and qualified.[851]

(1) *Exception; Officer-Elect*. In the event the vacancy occurs because of the death, resignation, or inability of an officer-elect to take office, the central committee of the political party of the officer-elect's affiliation shall make the appointment.[852] The appointee shall fill the office at the beginning of the term.

(2) *Exception; Independent Candidate or Office-Holder*. In the event the last occupant of the Clerk's office was elected as an independent candidate, the board of county commissioners makes the appointment by the same process described herein.[853]

(B) Timing of Appointment Process; Central Committee Meeting. By law, the central committee of the political party must hold an appointment meeting not less than five nor more than forty-five days after the office is vacated.[854]

(1) *Notice of Central Committee Meeting*. No less than four days before the date of the meeting, the chair or secretary of the central committee must send notice to eligible central committee members regarding the meeting.[855]

(a.) Contents of Notice. The notice must contain the time, place, and purpose of the meeting.[856]

[850] R.C. 305.02(B).

[851] Id.

[852] Id.

[853] R.C. 305.02(D).

[854] R.C. 305.02(C).

[855] Id.

[856] Id.

(2) *Voting on Appointee*. The appointment is made by a majority of the central committee members present at this meeting.[857]

(C) Acting Officers Pending Completion of Appointment Process. While the appointment process unfolds, the county commissioners may appoint a temporary acting officer to perform the Clerk's duties from the period of vacancy to the time the appointment process is completed.[858] This prevents an extended vacancy of the office.

ii. *Certification of Appointee*. Once made, appointments are to be certified by the political party central committee or county commissioners to the county board of elections and Secretary of State.[859]

iii. *Post-Certification; Duties and Compensation*. Upon certification, the appointee assumes the duties of the Clerk of Courts until a successor is elected and qualified.[860] The appointee is entitled to the remuneration accompanying the office to which he or she is appointed.[861]

iv. *No Authority for Pre-Planning by Resolution*. The Ohio Attorney General has opined that county commissioners lack the authority to adopt a resolution designating their interim successors in the event of emergency.[862] Similar pre-planning in designating a successor Clerk's office would without doubt be similarly frowned upon.

B. Inability of Clerk to Act.

Ohio law provides guidance in the event of the Clerk of Court's inability to act due to extended absence or sickness.[863]

1. ***Generally***. Whenever a county officer such as the Clerk fails to perform the duties of office for ninety consecutive days, the office is to be declared vacant,[864] triggering the appointment process of Section A. above.[865]

(a) Sickness or Injury; Exception. Whenever a county officer such as the Clerk is absent for ninety consecutive days because of sickness

[857] Id.

[858] R.C. 305.02(F).

[859] R.C. 305.02(E).

[860] See generally R.C. 305.02.

[861] R.C. 305.02(E).

[862] See 1986 Ohio Atty. Gen. Op. No. 86-083.

[863] See generally R.C. 305.03.

[864] R.C. 305.03(A).

[865] R.C. 305.03(E).

or injury, the office is not automatically declared vacant.[866] However, the following process applies:

i. *Physician's Certificate*. The officer must cause to be filed with the county commissioners a physician's certificate documenting his or her extended illness or injury.[867]

(A) Timing. The certificate must be filed with the county commissioners within ten days after the expiration of ninety consecutive days of absence.[868]

(1) *Effect of Failure to Timely File Physician's Certificate*. If the certificate is not timely filed, the office is declared vacant,[869] triggering the appointment process of Section A. above.[870]

ii. *Grace Period; Thirty Additional Days*. Upon filing the physician's certificate, the officer has an additional thirty days from the last day upon which the certificate could have been filed (the 100th consecutive day of absence) to return to his or her duties.[871]

(A) Inability to Return. If the county officer is unable to return to his or her duties within the additional thirty days, the office is declared vacant,[872] triggering the appointment process of Section A. above.[873]

2. ***Caution; Effect of 1985 Ohio Atty. Gen. Op. No 85-062***. In a 1985 opinion, the Ohio Attorney General's Office found that R.C. 305.03 specifically contemplated absences from the county as opposed to a general inability to perform the duties of office due to sickness or injury. Without an extended absence from the county, the Attorney General opined that incapacity or disability alone was insufficient cause for declaring an office vacant.[874]

(a) Possible Solution. In light of Ohio Atty. Gen. Op. No. 85-062, a possible solution to the lingering illness of an officer such as the Clerk would be his or her voluntary resignation. Resignation triggers a vacancy in the office and permits the appointment

---

[866] See R.C. 305.03(B).

[867] Id.; R.C. 305.03(C).

[868] R.C. 305.03(B).

[869] Id.

[870] R.C. 305.03(E).

[871] R.C. 305.03(C).

[872] Id.

[873] R.C. 305.03(E).

[874] See 1985 Ohio Atty. Gen. Op. No. 85-062.

process of R.C. 305.02 to commence, as the office is no longer occupied by an incumbent.[875]

VI. Closure of Courthouse and Roads During Public Emergency

A. Unsettled State of Ohio Law.

Ohio law does not currently delegate authority regarding the closure of courthouses or roads in the event of public emergency.

1. ***Closure of Courthouse***. While the most likely persons to be vested with such authority are (1) the county commissioners of the county in which the courthouse is located, (2) the judges who sit in the courthouse, and (3) the sheriff of the county in which the courthouse is located, their respective roles are not clearly defined.
   (a) ***Possible Statutory Authority of County Commissioners***. County commissioners are responsible for providing courthouses, when, in their judgment, courthouses are needed. They also have statutory discretion in providing those resources necessary for the proper conduct of county offices.[876]
      i. Rationale. County commissioners may be vested with the power to close courthouses under the rationale that they possess the power to provide them.
   (b) ***Additional Possible Authority of County Commissioners***. At least Ohio court has alluded to the authority of the county commissioners to close the county courthouse in the event of inclement weather, but cited no basis for its statement.[877]
   (c) ***Possible Authority of Judges***. A 1965 attorney general opinion provides for the possible authority of judges to close the courthouse in the event of public emergency.[878]
      i. Public Office Hours of Operation Within Discretion of Officeholder. County commissioners lack the legal authority to fix the opening and closing times of county offices. This matter is left to the discretion of the individual officeholder.[879]
      ii. Extrapolation of Rationale. The commissioners' lack of authority to set county office hours of operation is extrapolated to a lack of authority to close the courthouse on any particular day.[880]

[875] See id.; see also R.C. 305.02.

[876] R.C. 307.01.

[877] See *Berry v. McClain* (7th Dist. Feb. 7, 1985), Case No. 494, 1985 WL 10379, at *2 (court responded to defense counsel's assumption that courthouse was closed for inclement weather by stating that the Carroll County Commissioners did not close courthouse).

[878] 1965 Ohio Atty. Gen. Op. No. 65-106.

[879] Id., citing 1943 Ohio Atty. Gen. Op. No. 6048 and referencing R.C. 307.01 and 1.04.

[880] Id., citing 1954 Ohio Atty. Gen. Op. No. 3480.

iii. Closure of County Offices; Closure of Courthouse. The courthouse could be closed only if all county officers located therein decided to close their offices on a particular day.[881]

(d) ***Possible Authority of County Sheriff***. County sheriffs have the broad power and duty to take such actions as necessary to "preserve the public peace."[882]

i. Rationale. In the event of a public health emergency, the sheriff may seemingly take whatever steps are needed to ensure public safety. These steps could reasonably include closing public buildings.

2. ***Closure of Roads***. Authority to perform such tasks as closing roads and forbidding travel appears to fall to the sheriff.

(a) Power to Preserve Public Peace. The sheriff is responsible for preserving the public peace.[883] This power allows sheriffs to temporarily close county and township roads in the event of inclement weather where necessary and reasonable,[884] and is easily extrapolated to public health emergencies.

VII. Appearance of Individuals Posing Potential Health Threats

A. Appearance by Means Other Than In Person.

Individuals affected by isolation or quarantine orders are entitled to attend a full hearing on the subject.[885] However, the person may be physically unable to appear in court due to illness, or the court may not be willing to permit an infected person to appear in person due to the attendant health risks. In such events, and in all other cases where personal attendance of the ill may constitute a public health risk, the court may wish to consider alternative procedures. Additional legislation may be needed.

1. ***Pre-Recorded Videotaped Testimony***. Civ.R.40 provides that all of the testimony and other evidence as may be appropriate may be presented at a trial by videotape, subject to the provisions of the Rules of Superintendence.[886] Videotaped depositions are permitted by Civ.R. 30(B)(3).

(a) Initiation of Videotape Trial. A trial judge may order a videotape trial upon agreement of the parties, as to all or a portion of testimony and appropriate evidence.[887]

[881] Id.

[882] R.C. 311.07(A).

[883] R.C. 311.07.

[884] See 1986 Ohio Atty. Gen. Op. No. 86-023.

[885] See, e.g, Amend. V, U.S. Constitution ("No person shall … be deprived of life, liberty, or property without due process of law[.]")

[886] Civ.R. 40.

[887] Sup.R. 13(B)(2).

(b) Videotape as Exclusive Medium. In videotape trials, videotape is the exclusive medium of presenting testimony irrespective of the availability of the individual witness to testify in person.[888]

(c) Presence of Counsel and Judge. In jury trials, counsel for the parties and the trial judge are not required to be in the courtroom when the videotape testimony is played to the jury. In the absence of the judge, however, a responsible officer of the court must remain with the jury.[889]

2. ***Use of Deposition Testimony In Criminal Matters***. If it appears probable that a prospective material witness will be unable to attend or will be prevented from attending a trial or hearing, the court may order upon motion that the person's testimony be taken by deposition.[890]

[888] Sup.R.13(B)(1).

[889] Sup.R. 13(B)(5).

[890] Crim.R. 15(A).