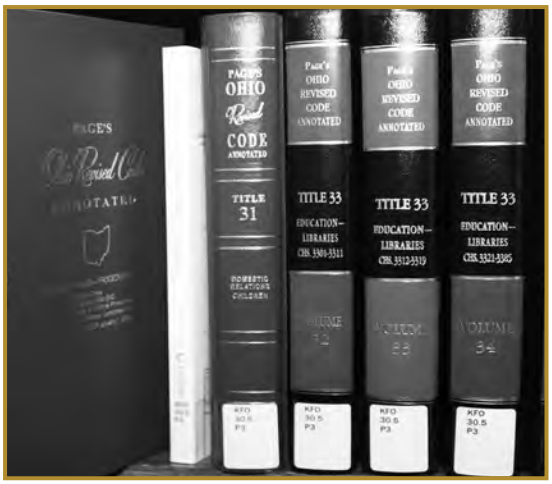
THE SUPREME COURT *of* OHIO

JUDICIAL GUIDE *to* Public Health



The Supreme Court *of* Ohio

JUDICIAL GUIDE TO PUBLIC HEALTH

Office of Judicial Services

MILT NUZUM

DIRECTOR OF JUDICIAL & EDUCATIONAL SERVICES

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This Judicial Guide to Public Health was developed under the guidance of dedicated public officials and subject-matter experts. The Supreme Court of Ohio wishes to extend special recognition and tremendous gratitude to those who contributed countless hours and devoted their collective effort, experience, expertise, and energy to drafting this guide, specifically:

BRANDILYN COOK, Cleveland Marshall College of Law, Cleveland State University

HON. PETER CORRIGAN, Judge, Cuyahoga County Court of Common Pleas, General Division

KIM CUNNINGHAM, Cleveland Marshall College of Law, Cleveland State University

AMBER G. DAMIANI, Former Intern, Office of the General Counsel, Ohio Department of Health ● 2019 Graduate, Capital University School of Law

HON. CARL DIFRANCO, Judge, Conneaut Municipal Court ● Association of Municipal/County Judges of Ohio

HON. MICHELE EARLEY, Judge, Cleveland Municipal Court

RUSS GATES, Cleveland Marshall College of Law, Cleveland State University

TRAVIS D. HUFFMAN, Former Intern, Office of the General Counsel, Ohio Department of Health ● 3L, Capital University School of Law

HON. JERRY METZ, Judge, Hamilton County Court of Common Pleas, General Division ● Ohio Common Pleas Judges Association

MAHJABEEN QADIR, Acting General Counsel, Ohio Department of Health

HON. JOHN RUSSO, Judge, Cuyahoga County Court of Common Pleas, General Division

TASHA RUTH, ESQ., Manager, Case Management Section, Office of Court Services Supreme Court of Ohio

SOCRATES TUCH, MA, JD, CPM, Senior Counsel/Privacy Officer, Office of the General Counsel, Ohio Department of Health

ASHLEY WATSON, ESQ., Brennan Manna Diamond

It is because of their assistance that the Court can offer this legal resource.

INTRODUCTION

This publication is designed to inform judges on public-health legal issues and provide a resource to respond in a timely manner and with confident authority on the weighty legal issues such an emergency would present.

It is unlikely that public health emergencies, in the context of life-threatening communicable diseases that have the potential to become epidemic or pandemic in proportion, are in the forefront of judges' minds.

But on Oct., 30, 2014, the Hon. Charles C. LaVerdiere, chief judge (retired) of the Maine District Court, had his "normal day shattered" when a nurse from his community returned from West Africa having been exposed to the Ebola virus. His small community became the epicenter of national attention as people were fearful that Ebola had come to our shores. He had to make legal decisions about her case "immediately."

Judge LaVerdiere's situation also illustrates that "emergencies" are not limited to community-wide matters. Public health issues can appear before a court from the perspective of an individual, a community, or the state. Simply, virus, bacteria, and other public health threats are not limited by borders, income, gender, race, or other human constructs. In short, threats to the public's health are usually inconvenient and often unexpected. The most important lesson Judge LaVerdiere said he learned was, "You need to be prepared for this type of matter before it hits!" That is the intent of this publication.

The development of this piece was encouraged by Chief Justice Maureen O'Connor. As a member of the Pandemic and Emergency Preparedness Task Force of the National Center for State Courts, she understands the necessary preparation in mind and in practice to address such an emergency.

It is fitting to acknowledge the contribution of the Hon. Robert P. Ringland, Twelfth District Court of Appeals, who wrote the first edition of this Judicial Guide to Public Health in 2010. We extend our gratitude to Judge Ringland. That resource has been reviewed and updated by contributors to this work to whom we also are equally indebted.

The electronic version of this publication is available on the Supreme Court of Ohio website. It will be updated regularly as statutes, administrative regulations, and case law dictate. We hope judges never have to use this information, but we trust they always will be prepared to use it if needed.

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CHAPTER I. JURISDICTION OVER PUBLIC HEALTH ISSUES

CHAPTER SUMMARY *This chapter covers basic principles of jurisprudence. The "police power" relating to public health is so foundational as to be axiomatic. Variation among and between state and the federal governments in the exercise of this power relates to jurisdictional and administrative details. Similarly, Ohio's courts have broad authority to review justiciable matters. However, the way public health matters appear before the courts varies according to the precise topic of concern and which public health authority is in question.*

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.[1]

    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.[2]

   a) Such emergency laws must receive the vote of two-thirds of all members elected to each branch of the General Assembly.[3]

   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.[4]

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.[5]

   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.[6] "[A] state has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general."[7]

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.[8]

   a) Any judge of a court of common pleas may temporarily hold court in any county.[9]

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[10] 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]

      (1) *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, 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]

(1) 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:

(1) Questions arising under the constitutions of Ohio or the United States;[15]

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

(3) 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***. When 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

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

4. ***Change of Venue.*** When 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 that 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 when 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.

CHAPTER I ENDNOTES

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

2 Ohio Constitution, Article II, Section 1d.

3 Id.

4 Id.

5 *Medtronic, Inc. v. Lohr* (1996), 518 U.S. 470.

6 See e.g., *Heller v. Doe* (1993), 509 U.S. 312.

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

8 Ohio Constitution, Article IV, Section 4(B).

9 Ohio Constitution, Article IV, Section 4(A).

10 This review is not always in the form of a direct appeal. See Isolation and Quarantine, p. 31, infra.

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

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

13 Id.

14 R.C. 2501.05.

15 Ohio Constitution, Article IV, Section 2(B)(2)(a)(ii).

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

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

18 Supra at Section 2(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).

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

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

25 Id.

26 (1) Should be 2 Ohio Jurisprudence 3d (2016), Administrative Law, Section 157. See also, e.g., *Woodford v. Ngo* (2006), 548 U.S. 81, 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 II. GOVERNMENT AUTHORITY TO ENSURE PUBLIC HEALTH

CHAPTER SUMMARY *This chapter covers the basic constraints on the government when preventing or managing a public health crisis. The first section on searches and seizures reviews the Fourth Amendment generally, covering the warrant requirement and its exceptions. Of note is the "special needs" exception to the warrant requirement, which is likely to be the court's legal standard for ruling on government action in such an emergency. An important concept is the court's role in balancing the privacy interests of individuals against the government's interest to protect the public.*

The second and fourth sections provide a general survey of the inspection and regulation of property by the government to mitigate health risks. The executive branch – in particular, the Department of Health and local health districts – has considerable authority to impose restrictions on property to ensure public health and safety. Quarantine of premises, evacuations, and the destruction of property are covered in section two, among other topics. A general review of the law on government takings also is provided at the end of the chapter.

The third section deals with the critical area of searches and seizures of persons in the public health context. Various factors must be weighed to determine when the government can force individuals to submit to medical testing. The Department of Health constantly is working with local health care providers to monitor the existence and possible outbreak of communicable diseases. This surveillance process includes the reporting requirements of health care providers and the laws controlling how the government manages such information. Reference to the existing legal framework for controlling sexually transmitted diseases also is covered.

Also, the topics of isolation and quarantine are reviewed in the third section. The case law on these subjects is relatively thin, while the power granted to the government is great. Most of the law is statutory, but there is some case law justifying strong governmental intervention. A good example of the difficulty in this area is the question of how to confine at-risk individuals, such as whether and how to apply a least-restrictive-means standard. A lengthy treatment of the law of involuntary hospitalization for the mentally ill is provided, as that is a well-developed system and may provide guidance.

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 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.[1]

2. ***Same Rights under State and Federal Constitutions.*** Ohio's constitutional provisions addressing unreasonable searches and seizures substantially are the same as those of the federal Constitution.[2]

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.[3] These provisions constitute a guaranty to citizens against the invasion of their homes and the abridgement of their personal liberties.[4]

4. ***Definitions.***

   a) Search. A search occurs when government action infringes upon an expectation of privacy that society recognizes as reasonable.[5]

   b) Seizure.

      (1) *Of Individual.* A seizure of an individual occurs when government action meaningfully interferes with an individual's freedom of movement.[6] The duration of the interference is irrelevant – any interference constitutes a seizure, "however brief."[7] Under this definition, the isolation or quarantine of an individual constitutes a seizure.

      (2) *Of Property.* A seizure of property occurs when government action meaningfully interferes with an individual's possessory interest in that property.[8]

   c) Government Action. The Fourth Amendment applies to the acts of all state officials, including both civil and criminal authorities.[9]

      (1) *State Hospital Employees as Government Actors.* Staff at state hospitals are considered government actors and are, therefore, subject to Fourth Amendment requirements.[10]

   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.[11] 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.[12]

5. ***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.[13]

    a) Context. The reasonableness of a search or seizure depends upon the context in which it occurs.

    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.

6. ***The Warrant Requirement.*** Generally, government searches and seizures conducted without a valid warrant are presumptively unreasonable.

    a) Residential or Commercial. The consent or warrant requirement applies to searches of and seizures on both residential and commercial property.

    b) Validity of Warrants. A warrant is valid if issued by a neutral and detached magistrate, upon the showing of probable cause, supported by oath or affirmation, and particularity in describing the place to be searched and the persons or things to be seized.

    c) No Guilt by Association. Probable cause to search or seize an individual is not satisfied merely by the existence of probable cause to search another in the proximity to the individual or the premises upon which the individual is located.

7. ***Applicability of Fourth Amendment to Health and Safety Inspections (outside criminal context).*** The protections of the Fourth Amendment apply to non-criminal searches and seizures, such as health and safety inspections.[14]

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

    a) Detention to Obtain Evidence as Seizure. 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.[15]

b) Obtaining and Examining Evidence as Search. Both obtaining physical evidence from an individual and examining that physical evidence from an individual are searches if these acts infringe upon an expectation of privacy recognized by society as reasonable.[16]

c) Physical Characteristics Exposed to Public Not Protected by Fourth Amendment. 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.[17]

d) Invasive Intrusions and Emerging Procedures. Obtaining physical evidence through significantly invasive or newly emerging medical procedures is unreasonable in certain circumstances. Personal intrusions like surgery must be determined on a case-by-case basis.[18]

(1) *Reasonableness Factors.* The Supreme Court identified factors to consider when determining the reasonableness of invasive medical intrusions 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.[19]

(2) *Possibly Analogous Ohio Justification.* Ohio law permits invasive body-cavity searches for any legitimate medical or hygienic reason.[20] A case can be made for the logical extension of such justifications to other invasive intrusions.

9. ***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.[21] In the case of premises, the nature of the premises (home v. business) may be determinative of whether Fourth Amendment protections apply.[22]

10. ***Character and Extent of Information Obtained Relevant to Analysis.*** The acquisition of information into an individual's lawful activities likely constitutes a search, subject to the Fourth Amendment.[23]

11. ***Character of Technology Employed to Obtain Information.*** Fourth Amendment protections are more likely implicated when information is obtained with technology that is not in general public use.[24]

B. Exceptions to the Warrant Requirement.

1. ***Burden of Proof.*** 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.[25]

2. ***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.[26]

    a) Voluntariness Requirement. "Voluntariness" is fact-specific and must be evaluated in light of all surrounding circumstances.[27]

    b) Scope of Consent. The permissible scope of a warrantless-consent search or seizure is limited to the scope of the consent provided.[28]

3. ***"Special Needs" Exception.*** Warrants are unnecessary when special needs beyond those ordinarily necessary for law enforcement are implicated.[29]

    a) Disclaimer. Officials from the Ohio Department of Health and local health districts do not search and seize materials for criminal prosecution; their mandate is protecting public health. However, law enforcement officers are required to escort health officials during the search for communicable diseases. If its requirements are met, the "special needs" exception likely would apply to both the health and law enforcement personnel. Thus, evidence discovered by law enforcement or turned over to law enforcement by health officials likely would fall under the "special needs" exception.

    b) Test. To meet the special-needs exception, the warrantless search or seizure must be reasonable under all circumstances. This determination is made by balancing the privacy interests of the individual against the legitimate interests of the government.[30]

        (1) *Nature of the Privacy Interest Affected by Government Action.*

            (a) Relevant factors:

                (i) Legitimate privacy expectations of the affected individual;

                (ii) Certain populations of individuals with heightened risks are presumed to have reduced expectations of privacy.[31]

                (iii) Relationship between the affected individual and the government; and

(iv) Existence of voluntary individual conduct that triggers environmental action.

(2) *Character of the Government Intrusion on the Individual's Privacy Interest.*

(a) Relevant factors:

(i) Manner in which the search or seizure is conducted;

(ii) Level of confidentiality afforded private information obtained during the search and seizure; and

(iii) Degree to which the use of private information obtained during the search or seizure is limited.

(3) *Nature and Immediacy of Concerns Giving Rise to Government Action and the Efficacy of the Action in Addressing Those Concerns.*

(a) Relevant factors:

(i) Practicability of the warrant and probable-cause requirements, though may be impracticable for infectious diseases having latent periods[32] in which illness is not outwardly manifested;[33]

(ii) Importance of government concern;

(iii) Implicated health and safety issues;

(iv) Need of government to prevent great harm;

(v) Heightened government responsibility with respect to affected individual(s); and

(vi) Degree to which government action is narrowly tailored to address concern.

(4) *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.[34]

(5) *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.[35] When promotion of the public health or prevention of epidemic or pandemic conditions clearly is the primary concern of a search or seizure, the "special needs" exception should be applicable.

(6) *Reporting to Law Enforcement by Medical Personnel.* 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 ultimately is provided to law enforcement.[36]

(7) *Unsuitability of Probable Cause Requirement.* The probable-cause standard is often ill-suited to circumstances of "special needs" occurring outside of the criminal context.[37] This is particularly true in instances when the government seeks to prevent the development of hazardous conditions or detect latent or hidden health-related violations that rarely generate articulable grounds for searching any particular place or person.[38]

(8) *Finding of Individualized Suspicion Not Always Required.*[39] Under the "special needs" exception, sufficient governmental safety and administrative interests may obviate the need for a finding of individualized suspicion.[40]

(a) Relevant factors:

(i) The privacy interests implicated by the government actions are minimal;

(ii) An important governmental interest furthered by the search and seizure would be jeopardized by a reasonable suspicion requirement; and

(iii) Other available safeguards assure that the individual's reasonable expectation of privacy is not subject to the discretion of officials in the field.[41]

4. ***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.[42]

a) Test. Such warrantless inspections are deemed reasonable if:

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

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

(3) The regulatory inspection program provides a constitutionally adequate substitute for a warrant in terms of its certainty and regularity of application.[43]

b) 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.[44] However, the mere fact that a business is involved in interstate commerce or subject to federal regulation and/or supervision is insufficient to trigger the exception. Rather, the critical element is the "long tradition of government supervision, of which any person who chooses to enter such a business must already be aware…the businessman in a regulated industry in effect consents to restrictions placed upon him."[45]

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

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

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

(3) Performance of the inspection by police officers rather than administrative inspectors.[46]

5. ***Checkpoints and Blanket Searches for Limited Safety-Related Purposes.*** Government actors may conduct warrantless and suspicion-less checkpoints to ensure public safety and prevent illegal immigration.[47]

a) Test. The reasonableness of warrantless and suspicion-less checkpoints is determined by balancing the nature of the threatened privacy interests and their connection to the particular law enforcement practices at issue.[48]

b) 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.[49] However, urgent public safety considerations may require loosening the normal constraints upon law enforcement.[50]

c) Primary Purpose Inquiry. Courts may inquire into and assess the primary purposes of warrantless and suspicion-less checkpoints when assessing their validity under the Fourth Amendment.[51]

d) No Pretextual Use of Checkpoints. The pretextual use of checkpoints for the primary purpose of uncovering criminal evidence violates the Fourth Amendment.[52]

6. ***Searches Incident to Lawful Arrest.*** Warrantless searches incident to lawful arrest are permitted if reasonable under the circumstances.[53]

a) 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.[54]

7. ***Investigatory Stops Based on Reasonable Suspicion.*** Warrantless stops and "pat downs" are permissible if based upon reasonable suspicion of criminal activity.[55]

    a) Test. "Reasonable suspicion" exists when there is a particularized and objective basis to suspect criminal activity based on specific and articulable facts and the rational inferences drawn from them.[56]

8. ***Exigent Circumstances Exception.*** Warrantless searches are permissible if the delay associated with obtaining a warrant likely is to lead to injury, public harm, or the destruction of evidence.[57]

    a) Limitations on Scope of Search. A warrantless search conducted pursuant to the exigent circumstances exception is limited in scope to the exigencies justifying its initiation.[58]

C. 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 only may be compelled within the framework of a formal warrant procedure.[59]

2. ***Issuance of Administrative Warrants.*** Administrative warrants only may be issued as long as public need for effective enforcement of the regulation involved outweighs the owner's expectation of privacy.[60]

    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 was or is being committed.[61]

    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.[62]

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.[63]

D. Confidentiality of Warrants.

1. ***Record Definition.*** A record is defined as 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.[64]

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.[65]

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 a specified exemption.[66]

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.[67]

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 that pertain to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the course of medical treatment.[68] Any information directly or indirectly identifying a present or former 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.[69]

        (1) *Exceptions.* Records of births and deaths and the fact of admission to or discharge from a hospital are not exempt under this exception.[70]

    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.[71]

II. SEARCHES AND INSPECTIONS OF PREMISES AND PROPERTY

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.[72] When a building is deemed in a condition dangerous to public health, the local health district may declare it a public nuisance and order abatement.[73]

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.[74]

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) of this chapter 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.[75]

    a) Arrest and Prosecution. The local health district may elect to cause the arrest and prosecution of non-compliant parties.[76]

    b) Performance and Assessment of Abatement Activities. The local health district may elect to perform those abatement activities it ordered performed and assess the material and labor costs as a tax lien against the property.[77]

        (1) *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.[78]

(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 health district then will make an order as it deems proper.[79]

(i) If the responsible person(s) agrees to perform the abatement, the local health district grants a reasonable time for the work to be performed.[80]

(ii) If the responsible person(s) does not agree to perform the abatement or fails to appear, then the local health district will furnish the necessary materials, perform the necessary labor, and certify the expense to the county auditor for assessment.[81]

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.[82]

B. Inspections to Ensure Compliance with Sanitary Standards.

1. ***Right to Inspect Buildings and Institutions***.

a) Any municipal corporation may regulate, by ordinance, the use, control, repair, and maintenance of buildings used for human occupancy or habitation, the number of occupants, and the mode and manner of occupancy, for the purpose of insuring the healthful, safe, and sanitary environment of the occupants thereof;

b) Owners of such buildings may be compelled to alter, reconstruct, or modify them, or any room, store, compartment, or part thereof, for the purpose of insuring the healthful, safe, and sanitary environment of the occupants thereof; prohibit the use and occupancy of such buildings until such rules, regulations, and provisions have been complied with.[83]

2. ***Right to Inspect Dwellings***.

a) City ordinances requiring occupants to keep occupied premises in a clean and sanitary condition do not violate due process when an owner is not personally served with notice of violations, but has actual notice.[84]

3. ***Right to Inspect Private Land for Pests and Vectors***.[85]

a) The board of county commissioners, board of township trustees, or legislative authority of a municipal corporation may authorize an agent to enter upon any lands in a quarantined area within the subdivisions for the sole purpose of inspecting such lands for the existence of the pest for which the quarantined area is established.[86]

C. Food, Drugs, and Cosmetics Inspections.

1. ***Free Access at All Times.*** The director of agriculture or the state board of pharmacy shall have free access at all reasonable hours to any factory, warehouse, or establishment in which foods, drugs, devices, or cosmetics are manufactured, processed, packed, or held for introduction into commerce, or to enter any vehicle being used to transport or hold foods, drugs, devices, or cosmetics in commerce, for the following purposes:[87]

    a) To determine if any prohibitions are being violated;

    b) To secure specimens of any food, drug, device, or cosmetic.

D. Food Establishment Inspections.

1. ***All Inspections Conducted under Rulemaking Powers of Agriculture Department.*** All inspections of retail food establishments are to be conducted by a licensor according to the procedures and schedule of frequency established by the agriculture department.[88]

2. ***Inspections May Include:***

    a) An investigation to determine the source of a particular food;

    b) Removal from use of any equipment, utensils, hand tools, or parts of facilities found to be in a condition that presents a clear and present danger to the public health.[89]

E. Inspection Reports.

1. Each inspection shall be recorded on a form prescribed and furnished by the director of health or a form approved by the director that was prescribed by a board of health, acting as licensor.

F. Regulation and Closure of Businesses.

1. In the event of a communicable disease epidemic, public health officials may find it necessary to limit public contact of individuals in affected communities.

2. The department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority in matters of quarantine and isolation, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either has been established.[90]

G. 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.[91]

a) Persons Exposed. Those persons exposed to disease located at certain premises either may be removed from the premises or kept within the premises.[92]

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.[93]

   a) Signage. When premises are subject to quarantine, the local health district must place a placard having upon it, in large letters, the name of the disease.[94] The placard must be placed in a conspicuous position.[95]

      (1) *Prohibitions Regarding Signage.* The removal, destruction, or defacing of placards is subject to criminal penalty.[96]

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.[97]

4. ***Cost.*** The expenses for quarantining a county home or county public institution shall be paid by the county when properly certified by the president and clerk of the board of health, or health commissioner where there is no board, of the city or general health district in which such institution is located.[98]

H. Inspection and Destruction of Infected Personal Property.

1. ***Authority to Disinfect or Destroy Infected Property.*** The local health district is authorized statutorily 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.[99]

   a) Disinfection Preferred. Prior to destroying an infected property, the local health board first must determine whether it may be made safe by disinfection.[100]

   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.[101]

   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.[102]

(1) *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.[103]

I. Evacuation.

1. Ohio statutes provide that the Department of Public Safety shall establish an Emergency Management Agency to develop evacuation policy.[104]

J. Animal Health.

1. Reports of births and deaths, the sanitary conditions and effects of localities and employments, the personal and business habits of the people that affect their health, and the relation of the diseases of man and best friend, shall be subjects of study by the director of health. The director may make and execute orders necessary to protect the people against diseases of lower animals and shall collect and preserve information in respect to such matters and kindred subjects as may be useful in the discharge of the director's duties and for dissemination among the people.[105]

III. SEARCHES AND RESTRAINTS OF PERSONS

A. Obtaining Physical Evidence from Persons.

1. ***Fourth Amendment Implicated in Three Ways.***

   a) Seizure of the Individual. Detaining an individual to obtain the sample constitutes a seizure of the person.[106]

   b) Seizure of the Physical Sample. Human dignity and privacy interests forbid invasive procedures absent a clear indication the desired substance will be found. A "mere chance" of the desired substance being recovered from the body is insufficient.[107]

      (1) Seizures of blood, saliva, and urine clearly are protected by the Fourth Amendment.[108]

      (2) Physical characteristics that are somewhat exposed to the public, such as underneath fingernails, also are protected.[109]

      (3) Characteristics that constantly are exposed to the public, such as facial features, fingerprints, and voices samples, are not protected by the Fourth Amendment.[110]

   c) Searching (Testing) the Sample Itself. Testing of the human sample is considered a search under the Fourth Amendment.[111] Factors to consider are whether a reasonable testing method is chosen, the likelihood of success of the method (reliability), and whether the test is conducted properly.[112]

2. ***Voluntary Receipt of Medical Care.*** If a person voluntarily enters a hospital seeking medical care, then substances or objects removed from the body and used by the state do not violate his due process rights.[113] While Ohio courts have not addressed the issue directly, 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.

3. ***Obtaining Physical Evidence from Persons in Non-Criminal Contexts.*** Courts have applied the reasonable suspicion test or the "special needs" exception to the warrant requirement when reviewing extraction of bodily evidence in a non-criminal context. Both tests balance personal interests against the public interest in obtaining the evidence.

    a) Special Needs Doctrine. The "special needs" doctrine likely would be used in the event of a public health emergency.[114] The doctrine permits warrantless searches or seizures when the government primarily is concerned with a special need other than gathering evidence for law enforcement, and the circumstances make the warrant and probable-cause requirements impractical.[115] Mandatory testing of bodily fluids, for example, could be justified by special needs to doctrine if the circumstances of a public health emergency make the warrant and probable-cause requirements impractical.

B. Public Health Surveillance

1. ***Two-Part Surveillance Strategy.*** The Ohio Department of Health monitors communicable diseases in two ways, passively and actively. Passive surveillance is receiving health information from health care providers, laboratories, and other entities that are required by law to report the discovery of specific communicable diseases. That list is summarized in the health department's Infectious Disease Control Manual (IDCM).[116] Active surveillance is proactive disease investigation by the department of health.

2. ***Authority and Purpose.*** The boards of local health districts and the state director of health are responsible for the surveillance and control of communicable diseases. Ohio law gives substantial authority to the department of health, and ultimately the director, to ensure that communicable diseases are identified and controlled.

    a) "Each board of health of a city or general health district shall study and record the prevalence of disease within its district and provide for the prompt diagnosis and control of communicable diseases."[117]

    b) "The director of health shall investigate or make inquiry as to the cause of disease or illness, including contagious, infectious, epidemic, pandemic, or endemic conditions, and take prompt action to control and suppress it."[118]

c) Entities in the public report information on the occurrence of communicable disease to the local health districts, which in turn report the information to the director.[119]

d) The director may release protected health information to the appropriate persons or entities, if the director determines the release to be necessary for managing a communicable disease.[120]

e) The director's authority of surveillance does not extend to conducting independent criminal investigations.

3. ***Disease Reporting and Notification***. Communicable diseases are divided into classes that must be reported by health care providers and laboratories to the local health district. This information is in the Infectious Disease Control Manual and Ohio Administrative Code, Chapter 3701-3.

a) Class A are the most severe diseases and must be reported immediately. Class A has a list of specific diseases, such as anthrax and smallpox, and a general provision for the occurrence of unlisted diseases that present a major public health concern.

b) Class B is a specific list of moderately severe diseases, such as malaria and tuberculosis. These diseases must be reported by the end of the next business day.

c) Class C is for the outbreak of other diseases that do not fall into Class A or B. These diseases must be reported by the end of the next business day.

d) "Health care provider" includes, but is not limited to, hospitals, medical clinics and offices, special care facilities, medical laboratories, physicians, dentists, physician assistants, registered and licensed practical nurses, emergency medical personnel, and ambulance service personnel.[121]

e) Other entities have their own reporting requirements.

(1) Pharmacies immediately must report by phone or electronically to the local health district significant changes or unexpected increases in medication usage that may be caused by bioterrorism, epidemic or pandemic disease, or established or novel infectious agents or biological toxins posing a risk of human fatality or disability. Pharmacies may be required to report prescriptions of uncommon or bioterrorism-related diseases, significant changes in prescriptions for communicable diseases, and unexpected increases in medication for fever or respiratory or gastrointestinal complaints.[122]

(2) Poison control and treatment entities must report to the department of health and the local health district events that may be caused by bioterrorism, epidemic or pandemic disease, or established or novel infectious agents or biological or chemical toxins posing a risk of human fatality or disability. Reporting may be required for the following: unexpected patterns or increases in inquiries regarding poisons, specialized treatment, or information requests on established or novel infectious agents or toxins that may be caused by bioterrorism.[123]

(3) Physicians, in addition to their reporting requirements for Class A, B, and C diseases, must report occupational diseases to the state director of health within 48 hours from the time of first attending such patient. Those occupational diseases are poisoning from lead, cadmium, phosphorous, brass, arsenic, mercury, wood alcohol or their compounds, or from compressed-air illness.[124]

f) Any individual having knowledge of a person suffering from a suspected communicable disease is authorized to report that information to public health authorities.[125]

4. ***Confidentiality of Protected Health Information***. The Ohio Revised Code prohibits the release of protected health information by the department of health, its director, or boards of local health districts, as detailed in R.C. 3701.17. Protected health information is any information about an individual's physical or mental condition, treatment, or purchases, that can be directly or indirectly used to identify the individual.

a) The information cannot be released without the consent of the individual unless:

(1) The information is necessary to treat the individual, correct accuracy of information, or is compelled by subpoena or warrant in relation to a criminal investigation or prosecution;[126] or

(2) "The director determines the release of the information is necessary, based on an evaluation of relevant information, to avert or mitigate a clear threat to an individual or to the public health. Information may be released pursuant to this [rule] only to those persons or entities necessary to control, prevent, or mitigate disease."[127]

b) Information that does not identify an individual is not protected health information and may be released in summary, statistical, or aggregate form. The information is a public record and, upon request, must be released by the director.[128]

c) Emergency medical workers and funeral service workers are permitted to receive a patient's test results for communicable diseases specified in R.C. 3701.248, if the worker has a reasonable basis (from a scientific/medical standpoint) to believe he or she was exposed while interacting with the patient.

5. ***Disease Investigation and Contact Tracing***

Investigation

a) "The department of health shall have supervision of all matters relating to the preservation of the life and health of the people***."[129]

(1) The director of health has a duty to "investigation or make inquiry as to the cause of disease or illness, including contagious, infectious, epidemic, pandemic, or endemic conditions, and take prompt action to control and suppress it."[130]

(2) "The department may make special or standing orders or rules *** for preventing the spread of contagious or infectious diseases *** and for such other sanitary matters as are best controlled by a general rule.[131]

(3) Accordingly, "The director of health and any person the director authorizes may, without fee or hindrance, enter, examine, and survey all grounds, vehicles, apartments, buildings, and places in furtherance of any duty laid upon the director or department of health or where the director has reason to believe there exists a violation of any health law or rule."[132]

b) Local health districts have broad authority to enter and examine houses and other localities "When a complaint is made or a reasonable belief exists that an infectious or contagious disease prevails***" within.[133]

(1) Similarly, "In time of epidemic or threatened epidemic, or when a dangerous communicable disease is unusually prevalent, the board of health of a city or general health district, after a personal investigation by its members or executive officer to establish the facts in the case, and not otherwise, may impose a quarantine on vessels, railroads, or other public or private vehicles conveying persons, baggage, or freight, or used for such purpose."[134]

(2) While "The board may make and enforce such rules and regulations as are wise and necessary for the protection of the health of the people of the community or state," the board shall prohibit "the running of any train or car on any steam or electric railroad, or of steamboats, vessels, or other public conveyances***."[135]

Contact Tracing

a) The director of health shall take prompt action to control and suppress the cause of disease or illness.[136] When the cause is a contagious or infectious agent or organism, it is necessary to identify the source. Standard epidemiologic methodology calls for tracing the chain of contact among people in order to identify the starting of the outbreak and victims who yet may not have been identified.

(1) To this end, "The director shall release information obtained during an investigation or inquiry that the director currently is conducting pursuant to division (A) of this section and that is not yet complete, if the director determines the release of the information is necessary, based on an evaluation of relevant information, to avert or mitigate a clear threat to an individual or to the public health."[137]

(2) However, "Information released pursuant to this division shall be limited to the release of the information to those persons necessary to control, prevent, or mitigate disease or illness."[138]

(3) The director of health shall develop and administer a confidential partner notification system to alert and counsel sexual contacts of individuals with HIV infection.[139]

b) Similarly, as local health departments are considered the "front line" agency, they are charged with the necessary field work to identify sources of disease and victims.[140]

C. Sexually Transmitted Diseases (STD): Duty to Warn; Mandatory Testing and Treatment

1. ***Duty to Warn.*** Individuals with HIV/AIDS must notify potential sex partners of their condition and must notify persons who will share the same hypodermic needle.[141] Failure to warn potential sex partners is felonious assault, a felony of the second degree.[142]

   a) Ohio's Transmission Statutes Concern Only HIV/AIDS.[143] Failure to warn sexual partners of other STDs could be considered assault (intent to inflict injury), but the charge would depend on the prosecutor's discretion.

2. ***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:

   (1) Rape (except for a minor under 13 years of age).[144]

(2) Sexual battery.[145]

(3) Unlawful sexual conduct with a minor.[146]

(4) Soliciting.[147]

(5) Loitering to engage in solicitation.[148]

b) Warrantless Search Constitutional as a "Special Need." The court-ordered testing is deemed reasonable in light of several identified state interests:[149]

(1) The state has an interest in protecting any victim who may have been exposed to a sexually transmitted disease;[150]

(2) The state has an interest in halting the spread of sexually transmitted diseases among the general population;[151]

(3) The state has an interest in protecting the health of its prison population by preventing the spread of diseases in the prison environment;[152] and

(4) The state has an interest in providing appropriate medical care to any prison inmate suffering from a sexually transmitted disease.[153]

c) Statute Upheld against Constitutional Challenges. R.C. 2907.27 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.[154]

3. ***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.[155]

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.[156]

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 community control. Failure to seek or receive treatment as required is grounds for a revocation of the offender's community control.[157]

4. ***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:

(1) Rape;[158]

(2) Sexual battery;[159]

(3) Unlawful sexual contact with a minor;[160]

(4) Soliciting;[161]

(5) Loitering to engage in solicitation;[162]

(6) Prostitution;[163]

(7) Municipal ordinances substantially similar to those crimes listed above.[164]

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 when the circumstances of the violation indicate probable cause that the accused, if infected with HIV or AIDS, may have transmitted the virus to another.

(1) *Parties Who May Request Testing.* The following parties may request 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;[165]

(b) The victim, upon obtaining the prosecutor's agreement, may request testing of the accused to determine whether he or she is infected;[166]

(c) Any other person, upon obtaining the prosecutor's agreement, may request testing of the accused to determine whether he or she is infected.[167]

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

(1) *Disclosure of Results to Affected Parties.*

(a) Accused. The court informs the accused of the results of the test.[168]

(b) Victim. The court informs the victim that the test was performed and that the victim has a right to request the results.[169]

(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.[170]

(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, then the court may inform that person that the test was performed and that the person has a right to request the results.[171]

(2) *Additional Disclosures of Results if Positive.*

(a) Department of Health. If the test is positive, the court must report the positive results to the department of health.[172]

(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.[173]

(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.[174]

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.[175]

(i) *Forcible Administration of Test.* If the accused is incarcerated and refuses to submit to a court-ordered HIV or AIDS test, then 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.[176]

5. ***Disclosure of HIV and AIDS Test Results When 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 limited statutorily in their ability to disclose such results.[177]

a) Application to Private Individuals and State Agents. The statute applies equally to private individuals and state agents.[178]

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

(1) The identity of an individual on whom an HIV test is performed.[179]

(2) The results of an HIV test in a form that identifies the individual tested.[180]

(3) The identity of any individual diagnosed as having AIDS or an AIDS-related condition.[181]

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

(1) The tested individual or his/her legal guardian;[182]

(2) The tested individual's spouse or sexual partner;[183]

(3) A person authorized by way of written release executed by the individual or his/her legal guardian;[184]

(4) The tested individual's physician;

(5) The department of health or a health commissioner to which reports are made under R.C. 3701.24;[185]

(6) Health care facilities receiving donated body parts from the individual;[186]

(7) Heath care facility staff committees or accreditation or oversight review organizations conducting monitoring, evaluations, or reviews.[187]

(8) Health-care providers, emergency services workers, or peace officers sustaining significant exposure to the body fluids of the tested individual if approved by the infection control or similar committee, but the identity of infected person shall not be revealed;[188]

(9) Law enforcement authorities pursuant to a search warrant or subpoena;[189]

(10) 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;[190]

(11) 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.[191]

(i) 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.[192]

(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.[193]

(i) Privacy of Proceedings. The proceedings shall be conducted in chambers, unless the tested individual agrees to a hearing in open court.[194]

(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.[195]

(i) 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.[196]

(d) Application to Both Civil and Criminal Proceedings. At least one Ohio court has determined that this procedure must be followed prior to introduction of an individual's HIV- related medical records into evidence in either civil or criminal matters.[197]

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.[198]

6. ***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 required statutorily to disclose this information to potential sexual partners or persons with whom the individual plans to share a hypodermic needle.[199]

D. Isolation and Quarantine.

1. ***Definitions***. Isolation is defined as "the separation of an infected individual from others during the period of disease communicability, in such a way that prevents, as far as possible, the direct or indirect conveyance of an infectious agent to those who are susceptible to infection or who may spread the agent to others."[200] Quarantine is defined as "the restriction of

the movements or activities of a well individual who has been exposed to a communicable disease during the period communicability, and in such manner that transmission of the disease may have occurred. The duration of the quarantine ordered shall be equivalent to the usual incubation period of the disease to which the susceptible person was exposed."[201]

2. ***History***. Isolation and quarantine long have been recognized as permissible techniques useful for containing the spread of infectious diseases.[202]

    a) State Power. The federal government recognizes the power of the states to institute quarantine to protect their citizens from infectious diseases.

    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.[203]

    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 U.S. Supreme Court recognizes that states have the authority to "enact quarantine laws and health laws of every description."[204]

3. ***Isolation and Quarantine as Arrest***. Several Ohio courts have declared that seizing and placing a person in quarantine, pursuant to health laws, constitutes an arrest.[205]

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 the State Department of Health.

        (1) *Supreme Authority*. The Department of Health has supreme authority in matters of quarantine, which it may declare, enforce, modify, relax, and abolish.[206]

        (2) *Emergency Actions*. The Department of Health may make and enforce orders in local health matters when an emergency exists.[207]

    b) Local Health Districts.

        (1) *Assigned Powers*. The state department of health has validly delegated most of its power to declare isolation and quarantine to local authorities.[208]

            (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 immediate emergency measures.[209]

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

(i) 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.[210]

(ii) 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 actions:

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

(B) Prohibit entrance to or exit from such place without the board's written permission.[211]

(iii) Powers upon Known Infection with Diseases Requiring Isolation. When a 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.[212]

(iv) 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 was restricted without the written permission of such board and until released from isolation or quarantine by it in accordance with the rules and regulations of the department.[213]

(v) Attendance of Quarantined Persons at Public Gatherings. Quarantined persons are prohibited from attending public gatherings.[214]

(vi) 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 a disease requiring quarantine or isolation.[215]

(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.[216]

(B) No Restriction on Number. The local health district may employ as many guards as necessary to ensure proper quarantine.[217]

(vii) 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 is necessary to establish the fact he has not contracted the disease.[218]

(A) Court Order Required. A court order must issue to permit confinement and isolation of exposed or infected inmates.[219]

(B) Notice Required Prior to Admission. The law prohibits admission of exposed or infected persons to prisons or jails, as well as a number of other public institutions (such as 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.[220]

(C) Location of Isolation or Quarantine. Construction of temporary buildings to house those exposed to or infected with disease is authorized by law.[221] The law also permits the removal of such persons to hospitals.[222]

(viii) 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.[223]

(c) Hospitals for Contagious Disease. Ohio law provides for the construction of specific-purpose hospitals for the care of those afflicted with contagious diseases and the removal of persons to those hospitals.

(i) 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.[224]

(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 first be obtained.[225]

(1) Consent Unnecessary. Prior consent shall not be necessary if the hospital is more than 800 feet from any occupied house or public highway.[226]

(ii) 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 a suitable vacant house or building within its jurisdiction for a quarantine hospital.[227]

(iii) 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.[228] 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.[229]

(iv) 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.[230]

(A) Payment for Care and Treatment Provided. The expense of treatment will be borne by the infected person if the person is financially able.[231]

(v) 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 infected persons.[232]

(A) Staffing. The local health district may employ nurses, physicians, laborers, and guards sufficient to operate the makeshift buildings.[233]

E. 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 quarantined individuals.[234]

   a) Medical Care. The local health district also is required to provide medicine, nurses, and medical attendance for those quarantined.[235]

   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 quarantined person when able. If the quarantined person cannot make the payments, the expenses are borne by the municipality in which the person is quarantined.[236] If the quarantined person is from another area, the municipality rendering services may deliver a sworn statement of expenses to the county or municipality of the person's legal settlement.[237]

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. Other states have statutory laws recognizing the standard, and the practice is recommended by other authorities.[238] Also, this right is well-ingrained in involuntary commitment law, bolstering the likelihood that least restrictive means would be recognized in Ohio courts for public health restrictions.[239]

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 24 hours after death.[240]

   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.[241]

   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.[242]

4. ***Involuntary Hospitalization***. Ohio law provides for the involuntary institutional admission of those afflicted with mental illness. Except for tuberculosis,[243] see R.C. 339.71, et seq., there is no equivalent public health procedure in the Ohio Revised Code. The material is included for circumstances involving individuals with a mental illness.

   a) Disclaimer. Involuntary hospitalization only addresses persons afflicted with mental illness. The rest of this section reviews the involuntary hospitalization process. This process may be instructive, by analogy, for the confinement of persons with communicable diseases.

   b) Generally. Involuntary hospitalization proceedings are governed by statute.[244]

   c) Jurisdiction and Venue. Ohio probate courts have jurisdiction over involuntary hospitalization proceedings.[245] Venue is appropriate with the county of the person's residence or where the person is institutionalized.

   d) Procedure. Involuntary hospitalization cases proceed as follows:

      (1) *Affidavit for Hospitalization*. Proceedings are commenced with the filing of an affidavit with the court.[246]

         (a) Contents. The affidavit may be filed by any person, either on reliable information or actual knowledge, whichever is determined proper by the court.[247] It must contain the following:

            (i) 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"[248] upon which jurisdiction is based.[249]

            (ii) Facts. A statement of alleged facts sufficient to indicate probable cause to believe that the named person is mentally ill and subject to hospitalization.[250]

            (iii) 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 was examined (or has refused an examination) and that the certifying medical professionals believe the person to be mentally ill and requiring hospitalization.[251]

            (iv) 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.[252]

(2) *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.[253]

(3) *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.[254]

(a) Right to Refuse Medical Treatment. The right to refuse medication is not absolute and it must yield when outweighed by a compelling governmental interest.[255]

(b) Duties of individuals with tuberculosis. An individual with tuberculosis shall complete the entire regimen prescribed to prevent the spread of tuberculosis.[256]

(i) Failure to take prescribed medication shall result in the tuberculosis control unit establishing a procedure under which the individual must be witnessed ingesting tuberculosis medication by a designated individual.[257]

(ii) An individual with communicable tuberculosis shall not attend any public gathering or be in any public place that the tuberculosis control unit determines cannot be maintained in a manner to prevent spread of the disease.[258]

(iii) An individual with active tuberculosis who intends to travel or relocate shall notify the tuberculosis control unit, which, in turn, shall notify the Department of Health.[259]

(4) *Initial Probable Cause Hearing.* Persons alleged to be mentally ill and subject to hospitalization are entitled to an initial probable cause hearing to determine their status.[260]

(a) 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.[261]

(b) 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.[262]

(c) Waiver of Probable Cause Hearing. The person named in the affidavit may waive the probable cause hearing and simply proceed to a full hearing.[263] If the person then is detained, a

full hearing must be held by the 30th day after the original involuntary detainment.[264] Failure to conduct the full hearing within this time results in the person's discharge.[265]

(5) *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.[266]

(a) Rights of Persons Alleged to Be Mentally Ill.

(i) 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.[267]

(B) All relevant documents, information, and evidence in the custody or control of the hospital in which the person is held or was held.[268]

(C) All other relevant documents, information, and evidence held by any hospital, facility, or person.[269]

(ii) 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.[270]

(iii) 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.[271]

(iv) 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.[272]

(A) Exceptions. Despite the closed nature of the hearing, the court still may 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.[273]

(v) Right to Subpoena Affiant. The person commencing the action by affidavit may be subpoenaed by either side.[274]

(vi) 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.[275]

(vii) Right to Testify. The person alleged to be mentally ill has the right to testify, but may not be compelled to testify.[276]

(viii) 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.[277]

(b) Evidentiary Standard. The standard of proof for a full hearing is that of clear and convincing evidence.[278]

(c) When 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.[279]

(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:

(i) If the person is a child, a hospital operated by the department of mental health.[280]

(ii) A non-public hospital, conditioned upon the person's acceptance into the hospital.[281]

(iii) The veteran's administration or other U.S. government agency, conditioned upon the person's acceptance.[282]

(iv) A board of mental health or agency designated by the board of mental health.[283]

(v) Receive private psychiatric or psychological care or treatment; conditioned upon the person's acceptance by the private provider.[284]

(vi) 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.[285]

(A) Final Order. A finding that the person is mentally ill and subject to hospitalization is a final order.[286]

(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.[287]

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

(i) The person's diagnosis, prognosis, and preferences.[288]

(ii) The person's projected treatment plan.[289]

(iii) The least restrictive alternative available and consistent with treatment goals.[290]

(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.[291]

(6) *Post-Hearing Issues.*

(i) Conclusion of Court-Ordered Treatment Period. If the case was not otherwise disposed at the end of the ordered treatment, then the person is discharged.

(ii) 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.[292]

(A) 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.[293]

(B) Evidentiary Standard. The standard of proof for continuing commitment is that of clear and convincing evidence.[294]

(C) Final Order. The judge's order on continuing commitment is a final order.[295]

(iii) Hearing for Release at Request of Person Committed. A committed person may request a hearing on his or her continuing commitment, either personally or through counsel.[296]

(A) Notification of Rights by Facility. Patients involuntarily committed to a hospital or other facility who raise questions regarding release or discharge immediately shall be informed of their rights regarding release or discharge.[297]

(B) 180 Days. The person generally is entitled to one hearing every 180 days.[298]

(1) 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.[299]

(C) Notice. Notice is required to those parties listed in R.C. 5122.12.[300]

(D) Final Order. The judge's order resulting from such a hearing is a final order.[301]

e) Voluntary Admission during Proceeding. Ohio law permits voluntary admission of patients to hospitals for the mentally ill.[302] If the person against whom proceedings are brought voluntarily admits him or herself, the court must dismiss the affidavit and terminate the proceedings.[303]

f) 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.[304]

(1) *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.[305]

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

(1) *Treatment Rights.*

(a) The right to professional treatment, evaluation, prognosis, and diagnosis.[306]

(b) The right to a written treatment plan consistent with the person's evaluation, prognosis, and diagnosis.[307]

(c) The right to receive treatment consistent with the treatment plan.[308]

(d) The right to receive periodic reevaluations of the treatment plan at 90-day intervals.[309]

(e) The right to be provided with adequate medical treatment for physical disease or injury.[310]

(f) The right to receive humane care and treatment, including the least-restrictive environment necessary to facilitate the goals of treatment.[311]

(g) The right to be notified of their rights within 24 hours of admission.[312]

(2) *Personal Rights.*

(a) The right to have their onsite personal property reasonably safeguarded.[313]

(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.[314]

(c) The right to maintain personal appearances according to their personal taste, including head and body hair.[315]

(d) The right to keep and use personal possessions, including toilet articles.[316]

(e) The right to access individual storage space for private use.[317]

(f) The right to keep and spend a reasonable sum of their own money for expenses and small purchases.[318]

(g) The right to receive and possess reading materials without censorship, unless the materials create a clear-and-present damage to personal safety.[319]

(h) The right to reasonable privacy.[320]

(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.[321]

(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.[322]

(i) 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.[323]

(3) *Communication Rights.*

(a) The right to communicate freely with and be visited at reasonable times by private counsel or legal rights service personnel.[324]

(b) The right to communicate freely at reasonable times with a personal physician or psychologist, unless prior court restriction was obtained.[325]

(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.[326]

(i) 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.[327]

(ii) 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.[328]

(iii) 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, or 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.[329]

(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.[330]

(4) *Freedom from Assault.*

(a) A person involuntarily committed must be provided reasonable protection from assault or battery by any other person.[331]

(5) *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.[332]

(i) Exception. Treatment may begin in the event of bona fide emergencies to prevent immediate physical harm to the person or others.[333]

(ii) Documentation. Staff must document the fact that the person was informed of his or her basic legal rights upon intake.[334]

(b) During Admission Process. As part of the admission process, the committed person must be provided with a pamphlet containing a detailed explanation of patients' rights and a brief oral explanation of patients' rights under the law.[335]

(i) Documentation. Staff must document that the person was provided the pamphlet and explanation of rights.[336]

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

(i) 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 patients' rights pamphlet in detail.[337]

(ii) Person Incapable of Understanding Rights. If the person is incapable of understanding the rights when contacted after admission, 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 90 Days. For the first 90 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.[338]

(B) After 90 Days. If the person still is incapable of understanding his or her rights after the first 90 days, the advocate or designee must continue to contact the person every 90 days until the person understands his or her rights.[339]

(iii) Documentation. Staff must document each attempt to inform the person of his or her rights after admission.[340]

(d) Understanding of Rights; Verification. Once the admitted person understands the explanation of patients' rights provided by staff, he or she shall be asked to sign a written acknowledgement to that effect.[341]

(i) 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.[342]

(e) Follow-up at Reasonable Intervals. Once the admitted person understands his or her rights, the advocate or designee must make contact with them at regular intervals until discharge to repeat the explanation and provide needed assistance.[343]

IV. GOVERNMENT TAKINGS FOR PUBLIC HEALTH PURPOSES

A. Takings Per Se. Takings per se entitle the property owner to compensation without a case-specific inquiry.

1. Two types of takings per se:

a) Physical invasions that occur when the government physically takes possession of an individual's private property for public purposes.[344]

b) When a government's regulation results in permanent denial of all economically beneficial or productive uses of the property (a "regulatory taking").[345]

B. Case-Specific Takings.

1. When a government regulation denies some, but not all, economically beneficial or productive uses of private property, a taking may nonetheless exist if the impact of the regulation on the property is sufficiently severe.[346]

2. Factors to analyze whether case-specific takings:

a) The economic impact of the regulation on the property owner;

b) The extent to which the regulation interfered with reasonable investment-backed expectations;

c) The character of the governmental action;

d) What uses the regulation permits;

e) Whether inclusion of the protected property was arbitrary or unreasonable; and

f) Whether judicial review of the agency decision was available.[347]

C. Compensating Property Owner for a Taking.

1. ***Emergencies under the U.S. Constitution.*** The government is not obligated by the U.S. Constitution to compensate a property owner for abatement or destruction of property pursuant to police power in cases of emergency.[348]

2. ***Takings Per Se.*** The government must compensate for per-se takings pursuant to police power unless the proscribed conduct or use was a restriction inherent in the owner's original title.[349]

   (a) Even if no part of physical property is taken or distributed, the owner is entitled to compensation.[350]

3. ***Other Takings.*** The government is not obligated to compensate a property owner for other publicly beneficial regulations pursuant to police power that affect property value.[351]

4. ***Takings of Infected Property.*** Under Ohio law, the local municipality must compensate the property owner for the destruction of infected property that cannot be made safe by disinfection.[352]

   a) The amount of the compensation will be the estimated value of the property or an amount the municipality deems is just compensation.[353]

   b) The property owner can sue the municipality if the owner is not satisfied with the municipality's amount of compensation.[354]

CHAPTER II ENDNOTES

1 U.S. Constitution, Fourth Amendment.

2 *Cochran v. State* (1922), 105 Ohio St. 541.

3 Ohio Constitution, Article I, Section 14.

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

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

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

7 *Id.*

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

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

10 *Ferguson v. City of Charleston* (2001), 532 U.S. 67.

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

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

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

14 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.

15 *Skinner v. R'y Labor Executives' Assn.* (1989), 489 U.S. 602 and *Schmerber v. California* (1966), 384 U.S. 757.

16 *Ferguson, supra*; Schmerber, *supra*; *Cupp v. Murphy* (1973), 412 U.S. 291.

17 *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).

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

19 *Id.*

20 R.C. 2933.32(B)(3).

21 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).

22 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).

23 *IL v. Caballes*, 125 S.Ct. 834, 838 (2005).

24 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.").

25 *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.

26 *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.

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

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

29 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 when risk of transmission was virtually non-existent).

30 See *Earls, supra*, and *Acton, supra.*

31 *U.S. v. Knights*, 534 U.S. 112 (2001) (probationer searched for explosive devices); *Dunn v. White* 880 F. 2d 1188 (10th Cir. 1989) (prisoner tested for AIDS); *People v. Adams*, 597 N.E.2d 574 (Ill. 1992) (probationers [sex traffickers] tested for AIDS).

32 "The interval between exposure to a carcinogen, toxin, or disease-causing organism and development of a consequent disease. www.dictionary.com. "latent period." Accessed June 9, 2017.

33 *People v. Adams, supra* n. 2.

34 See, e.g., *Ferguson, supra.*

35 See *id.* ("special needs" exception inapplicable when involuntary drug testing accompanied by substantial police and prosecutorial involvement and threats of arrest and prosecution).

36 *Id.*

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

38 See, e.g., *Earls*, *supra* and *Von Raab*, *supra*.

39 See *Ferguson*, *supra* ("[T]he "special needs" doctrine is "an exception to the general rule that a search must be based on individualized suspicion of wrongdoing.").

40 See *Earls*, *supra* and *Skinner*, *supra*.

41 See *Skinner*, *supra* and *T.L.O.*, *supra*.

42 See, e.g., *New York v. Burger* (1987), 482 U.S. 691 (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).

43 See *Burger, supra*. To provide an adequate substitute for a warrant, the regulatory scheme must advise the owner of the premises that "the property will be subject to periodic inspections undertaken for specific purposes and limit the discretion of the inspecting officers by carefully limiting the inspection in time, place, and scope."

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

45 *Burger*. 482 U.S. at 704-07.

46 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).

47 When 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 Indianapolis 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).

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

49 *Id.*

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

51 *Edmond*, *supra*.

52 *Id.*

53 See *Schmerber v. California* (1966), 384 U.S. 757 (blood sample obtained without warrant or consent deemed minor intrusion and reasonable when 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 when threat existed that evidence would be destroyed). See also *In re Jackson* (1970), 21 Ohio St.2d 215.

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

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

56 *Terry, supra* (note: *State v. Brite* overruled in 2005).

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

58 *Mincey, supra.*

59 25 Ohio Jurisprudence 3d 270-271, Criminal Law, Section 191.

60 *Id.*

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

62 *State v. Finnell* (1996), 115 Ohio App.3d 583.

63 R.C. 2933.21(F).

64 R.C. 149.40.

65 80 Ohio Jurisprudence 3d 566, Records & Recording, Section 15.

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

67 Crim.R. 41(E).

68 R.C. 149.43(A)(1) and R.C. 149.43 (A)(3).

69 R.C. 149.431(A)(1).

70 R.C. 149.43(A)(3).

71 R.C. 313.10.

72 R.C. 3707.01.

73 *Id.*

74 R.C. 3707.07.

75 R.C. 3707.01.

76 R.C. 3707.02.

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 R.C. 3707.12.

83 R.C. 715.29.

84 *Thrower v. City of Akron* (Ohio App. 9 Dist., Summit, 03-19-2003).

85 "Pests" are defined in R.C. 927.51 as "any insect, mite, nematode, bacteria, fungus, virus, parasitic plant, or any other organism or any stage of any such organism that causes, or is capable of causing, injury, disease, or damage to any plant, plant part, or plant product." "Vectors" are defined in R.C. 941.01 as "a disease carrier, usually from, but not limited to, the arthropod class, that transfers an infectious agent that may transmit a dangerously contagious or infectious disease from one host to another."

86 R.C. 927.40.

87 R.C. 3715.70.

88 R.C. 3717.27 and R.C. 3717.33.

89 R.C. 3717.27.

90 R.C. 3701.13.

91 R.C. 3707.07.

92 *Id.*

93 R.C. 3707.08.

94 *Id.* Aside from the directive that the letters be "large," the statute provides no guidance regarding their minimum size. While placarding is required by R.C. 3707.08, this statute conflicts with R.C. 3701.17 "Confidentiality of protected health information; release of information in summary, statistical, or aggregate form." From a practical standpoint, placarding does not happen, except when lead metal is present.

95 *Id.*

96 *Id.*

97 R.C. 3707.26.

98 R.C. 3707.18 and R.C. 121.02.

99 R.C. 3707.12 and 3707.32.

100 See R.C. 3707.12.

101 *Id.*

102 R.C. 3707.13.

103 *Id.*

104 R.C. 5502.22, establishing Ohio Emergency Management Agency (ema.ohio.gov).

105 Animal diseases are relevant to public health for several reasons. First, some animal diseases are directly capable of causing illness in humans. For example, monkeypox is a viral disease found primarily in rodents, but may be transmitted from infected animals to humans. In June 2003, several Americans became infected with monkeypox from their pet prairie dogs. Second, some animal diseases, although not initially transmissible to humans, may acquire this capability by mutating in certain hosts. For example, many experts believe that gene swapping between flu viruses in pigs created the highly virulent human influenza strains that led to the great flu outbreaks of the past century, including the Spanish Flu of 1918-1919 that claimed the lives of more than 20 million people worldwide (including approximately 500,000 Americans) and the 1957 Asian Flu that killed approximately 70,000 Americans. Finally, disease epidemics among animals frequently lead to widespread animal death and slaughter, both of which have the potential to create nuisances and other conditions hazardous to human health.

106 *Cupp v. Murphy* (1973), 412 U.S. 291.

107 *Schmerber v. California*, 384 U.S. 757 (1966)

108 *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989).

109 See *Cupp, supra.*

110 See *United States v. Dionisio*, 410 U.S. 1 (1973).

111 See *Schmerber, supra.*

112 *Id.*

113 *State v. Wilson* (1972), 30 Ohio St.2d 199.

114 See *Nat'l Treasury Emps. Union*, 489 U.S. at 668 (holding that probable cause is not required for combating threat that "rarely generate[s] articulable grounds for searching any particular place or person.").

115 *Id.*

116 odh.ohio.gov/healthresources/infectiousdiseasemanual.aspx.

117 R.C. 3709.22.

118 R.C. 3701.14.

119 See Ohio Adm.Code 3701-3.

120 R.C. 3701.17.

121 R.C. 3701.23(A).

122 R.C. 3701.232(B).

123 R.C. 3701.201(B).

124 R.C. 3701.25(A).

125 R.C. 3707.06.

126 R.C. 3701.17(B)(1) - (3).

127 R.C. 3701.17(B)(4).

128 R.C. 3701.17(C).

129 R.C. 3701.13.

130 R.C. 3701.14(A)

131 R.C. 3701.13.

132 R.C. 3701.06.

133 R.C. 3707.07 and 3707.38; see also, R.C. 3707.03, 3707.06, 3707.23, and 3707.26.

134 R.C. 3707.04.

135 *Id.*

136 R.C. 3701.14(A).

137 R.C. 3701.14(J).

138 *Id.*; see R.C. 3701.17(B)(4).

139 R.C. 3701.241(A)(3).

140 See R.C. 3707.01 - .34.

141 R.C. 2903.11.

142 *Id.*

143 See R.C. 3701.81.

144 *In re D.B.*, 129 Ohio St. 3d 104 (2011).

145 R.C. 2907.03.

146 R.C. 2907.04.

147 R.C. 2907.24.

148 R.C. 2907.241.

149 *State v. Wallace*, Montgomery App. No. 20030, 2005-Ohio-1913.

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*; Viral suppression science keeps evolving and the law does not always reflect or account for all scientific developments.

155 R.C. 2907.27(A)(2).

156 *Id.*

157 *Id.*

158 R.C. 2907.02.

159 R.C. 2907.03.

160 R.C. 2907.04.

161 R.C. 2907.24.

162 R.C. 2907.241.

163 R.C. 2907.25.

164 R.C. 2907.27(B)(1)(a).

165 *Id.*

166 *Id.*

167 *Id.*

168 R.C. 2907.27(B)(1)(b).

169 *Id.*

170 *Id.*

171 *Id.*

172 R.C. 3701.21 and R.C. 2907.27(B)(1)(c)(iii).

173 *Id.*

174 *Id.*

175 R.C. 2907.27(B)(2).

176 *Id.*

177 R.C. 3701.243.

178 R.C. 3701.243(A).

179 R.C. 3701.243(A)(1).

180 R.C. 3701.243(A)(2).

181 R.C. 3701.243(A)(3).

182 R.C. 3701.243(B)(1)(a).

183 *Id.*

184 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.

185 R.C. 3701.243(B)(1)(d).

186 R.C. 3701.243(B)(1)(e).

187 R.C. 3701.243(B)(1)(f).

188 R.C. 3701.243(B)(1)(g); see R.C. 3701.242(E)(6).

189 R.C. 3701.243(B)(1)(h).

190 R.C. 3701.243(B)(2)

191 R.C. 3701.243(C).

192 R.C. 3701.243(C)(1)(a).

193 *Id.*

194 *Id.*

195 R.C. 3701.243(C)(1)(b).

196 *Id.*

197 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 disclose the information at trial.

198 R.C. 3701.243(C)(1)(4).

199 R.C. 3701.243(F).

200 Ohio Adm.Code Ann. 3701-3-01.

201 *Id.*

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

203 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.

204 *Jacobson v. Massachusetts* (1905), 197 U.S. 11.

205 *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

206 R.C. 3701.13.

207 *Id.* Also see Chapter 5.

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

209 R.C. 3709.21.

210 R.C. 3707.07.

211 R.C. 3707.08.

212 *Id.*

213 *Id.*

214 R.C. 3707.16.

215 R.C. 3707.09.

216 *Id.*

217 *Id.*

218 R.C. 3707.20.

219 *Id.*

220 *Id.*

221 R.C. 3707.21.

222 R.C. 3707.22.

223 R.C. 3707.25.

224 R.C. 3707.29 and R.C. 3707.31.

225 R.C. 3707.31.

226 *Id.*

227 *Id.*

228 R.C. 3707.30 and R.C. 3707.31.

229 R.C. 3707.30.

230 *Id.*

231 *Id.*

232 R.C. 3707.32.

233 *Id.*

234 R.C. 3707.14.

235 *Id.*

236 *Id.*

237 R.C. 3707.17.

238 See *In re Washington* (Wis. 2006), 716 N.W. 176 (affirming the government's decision to confine a woman with tuberculosis in jail, stating there were no less restrictive means available). See also 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.

239 Cf. section on Involuntary Commitment, *infra*. However, statutory law grants final authority on quarantine decisions to the Department of Health (R.C. 3701.13) without mentioning least restrictive means, suggesting the manner of confinement would be at the discretion of the director of health; and the Supreme Court affirmed the authority of the state to quarantine in *Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health* (1902), 186 U.S. 380.

240 R.C. 3707.19.

241 *Id.*

242 R.C. 339.71, et seq.

243 *Id.*

244 See R.C. 5122.11 - .15.

245 R.C. 5122.11.

246 *Id.*

247 *Id.*, see R.C. 5122.11.

248 *Id.*

249 *Id.*

250 *Id.*

251 *Id.*

252 See R.C. 5122.05(B)(3), 5122.12, 5122.141(A), 5122.31(A).

253 R.C. 5122.13.

254 R.C. 5122.14.

255 *Cruzan v. Dir., MO Dept. of Health*, 497 U.S. 261, 278-79 (1990). See also *State v. Williams*, 88 Ohio St.3d513,523 (2000). In *Williams*, the Ohio Supreme Court held that rights outlined in Article I, Section 1 of the Ohio Constitution will, at times, yield to government intrusion when necessitated by the public good. [The court} first must determine which, if any, state interest outweighs an individual's right to refuse medication.

256 R.C. 339.82(A)(1).

257 R.C. 339.82(A)(2).

258 R.C. 339.82(B).

259 R.C. 339.82(C).

260 R.C. 5122.141(A).

261 R.C. 5122.141(D).

262 R.C. 5122.141(C).

263 R.C. 5122.141(E).

264 *Id.*

265 *Id.*

266 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).

267 R.C. 5122.15(A)(1)(a).

268 R.C. 5122.15(A)(1)(b).

269 R.C. 5122.15(A)(1)(c).

270 R.C. 5122.15(A)(2).

271 R.C. 5122.15(A)(4).

272 R.C. 5122.15(A)(5).

273 R.C. 5122.15(A)(6).

274 R.C. 5122.15(A)(7).

275 R.C. 5122.15(A)(11).

276 R.C. 5122.15(A)(12).

277 R.C. 5122.15(A)(14).

278 See R.C. 5122.15(B) - (C).

279 R.C. 5122.15(B).

280 R.C. 5122.15(C)(1); see also R.C. 5139.08.

281 R.C. 5122.15(C)(2); R.C. 5122.15(D).

282 R.C. 5122.15(C)(3); R.C. 5122.15(D).

283 R.C. 5122.15(C)(4).

284 R.C. 5122.15(C)(5); R.C. 5122.15(D).

285 R.C. 5122.15(C)(6); R.C. 5122.15(D).

286 R.C. 5122.15(K).

287 R.C. 5122.15(I).

288 R.C. 5122.15(E).

289 *Id.*

290 *Id.*

291 *Id.*

292 R.C. 5122.15(H).

293 *Id.*

294 *Id.*

295 R.C. 5122.15(K).

296 R.C. 5122.15(H).

297 Ohio Adm.Code 5124-2-01(B)(6); see R.C. 5122.29.

298 *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 when hearing not sought for more than 22 months).

299 *Id.*

300 *Id.*

301 R.C. 5122.15(K).

302 See R.C. 5122.02.

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

304 See R.C. 2317.02.

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

306 See R.C. 5122.27.

307 See *id.*

308 See *id.*

309 See *id.*

310 See *id.*

311 See *id.*

312 See *id.*

313 See R.C. 5122.29.

314 See *id.*

315 See *id.*

316 See *id.*

317 See *id.*

318 See *id.*

319 See *id.*

320 See *id.*

321 See *id.*

322 See *id.*

323 *Id.*

324 See *id.*

325 See *id.*

326 See *id.*

327 *Id.*

328 See *id.*

329 R.C. 5122.05(C).

330 R.C. 5122.29.

331 See *id.*

332 Ohio Adm.Code 5124-2-01(C)(3).

333 *Id.*

334 *Id.*

335 Ohio Adm.Code 5124-2-01(C)(5); see R.C. 5122.29.

336 *Id.*

337 Ohio Adm.Code 5124-2-01(C)(6).

338 Ohio Adm.Code 5124-2-01(C)(7).

339 *Id.*

340 *Id.*

341 *Id.*

342 *Id.*

343 Ohio Adm.Code 5124-2-01(C)(8); see R.C. 5122.29.

344 *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Panning Agency.* 535 U.S. 302, 322 (2002).

345 *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1018 (1992).

346 *Penn. Cent. Transp. Co.*, 438 U.S. at 136; *Penn Coal v. Mahon*, 260 U.S. 393, 415 (1922).

347 *Penn Cent. Transp., supra* n. 15 at 136-37; *Tahe-Sierra, supra* n. 13 at 330-32.

348 *Lucas v. S.C., supra* n. 16 at 1029; *Bowditch v. Boston*, 101 U.S. 16, 18 (1880).

349 *Lucas v. S.C., supra* n. 14 at 1026-27.

350 *State ex rel. McKay v. Kauer*, 156 Ohio St. 347 (1951) (granting compensation where government construction of roadway altered landowner's access to roadway, even though no part of landowner's property was part of construction.)

351 *Id.* at 1023-24.

352 R.C. 3707.12 - .13

353 R.C. 3707.13.

354 *Id.*

CHAPTER III. QUARANTINE AND BALANCING INDIVIDUAL RIGHTS

Contributors: Hon. Robert Ringland, Judge, Twelfth District Court of Appeals, retired; Megan Powley, Arthur Russell Morgan Fellow, Urban Morgan Institute for Human Rights, University of Cincinnati College of Law; and Hon. Jerome J. Metz, Jr., Judge, Hamilton County Court of Common Pleas.

CHAPTER SUMMARY *During times of disease outbreaks, the government must find a balance between protecting the health of the public and protecting the civil liberties of the individual. The Ohio Revised Code entrusts local health officials with the power to issue orders to restrict movement through means of isolation and quarantine as a way to prevent the spread of infectious disease. However, the Code does not provide a means for individuals who wish to challenge confinement. Nor does it provide statutory procedures for release from quarantine or isolation.*

Guidelines issued by the Ohio Department of Health state that a person should be released from quarantine when they no longer are a danger to the public, meaning when they are no longer sick or infectious.[1] But what happens when public panic agitates for unnecessary quarantine? While there have been only three challenges to quarantine or isolation in Ohio's history – and none since 1945 – quarantine became a major national issue in 2014 during the Ebola outbreak. Even though there were only a few cases in the United States, three states called for mandatory quarantining of medical workers who returned to the country after treating Ebola patients in Africa. The quarantine was to last for the 21-day incubation period of the disease.[2]

However, medical professionals were divided on the necessity of the mandatory quarantine, given that Ebola is spread only through contact with bodily fluids of an infected person.[3] Various government and non-governmental agencies trained volunteer medical personnel in the use of personal protective equipment and provided such equipment for use in Ebola afflicted areas.[4] Some argued that the mandatory 21-day quarantines were not supported by science, but resulted solely from fear of the disease. They also argued that the policy would not protect the public and would punish medical workers unreasonably.[5]

State quarantine laws are limited by the Due Process Clause of both the state and federal constitutions. Judges have the authority to protect civil liberties when they are infringed without cause. Historically, in those few cases in which quarantine was challenged, relief was sought through habeas corpus. Nationally, habeas corpus relief is rare and usually based on either violations of procedural due process or a lack of evidence to justify quarantine.[6] Of three Ohio cases that sought habeas corpus relief, only one petition was granted.[7]

I. GENERALLY

A. Legal and Equitable Relief from Allegedly Illegal Quarantine or Restraint on Liberty.

B. No Express Provision for Relief. The Ohio Revised Code chapters regarding public health and the permission of quarantine and isolation of persons suspected of having or having had a dangerous communicable disease do not expressly provide for any challenge to the allegedly illegal quarantine or restraints on liberty.[8]

1. The Ohio Department of Health has issued guidelines that allow local health departments to limit movement through devices such as isolation and quarantine for reason of containing disease.[9] These guidelines also state that limitations will be ended when "disease containment and control activities have been successful as determined by surveillance activities."[10]

C. Writ of Habeas Corpus. Persons restrained by allegedly illegal quarantines have successfully used habeas corpus to challenge their continuing detainment.[11]

1. ***In General.*** Ohio law permits someone who is unlawfully restrained of his or her liberty and someone who is entitled to the custody of another to prosecute a writ of habeas corpus in order to inquire into the cause of such restraint.[12]

   a) Class Actions. Class writs for habeas corpus are not prohibited, but may be maintained only if questions of law and facts common to class members predominate over any questions affecting only individual members.[13]

2. ***Unlawful Restraint.*** "Unlawful restraint" includes restraint of liberty through imprisonment or detention by a public officer with or without color of law.[14]

3. ***Habeas Corpus Proceedings.*** The habeas corpus proceeding transpires as follows:

   a) Original Jurisdiction. Original habeas corpus jurisdiction is vested with several courts.

      (1) *Constitutional Authority.* Original jurisdiction is vested constitutionally with the Ohio Supreme Court, the courts of appeals, and the common pleas courts.[15]

      (2) *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.[16] Juvenile courts have concurrent original jurisdiction with the courts of appeal to hear and determine any habeas corpus applications involving child custody.[17]

(3) *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.[18]

b) 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.[19]

(1) *Courts of County of Confinement.* Only the courts of the county in which the petitioner is confined have jurisdiction over a habeas corpus proceeding.[20]

(2) *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.[21]

c) 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.[22]

(1) *Information Required in Petition.* The petition seeking habeas corpus relief must contain the following:

(a) An assertion that the petitioner either is unlawfully restrained of liberty or is entitled to the custody of another;[23]

(b) The officer's name or the 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;[24]

(c) A specific description of the place of restraint or imprisonment, if known;[25]

(d) Particularized allegations regarding the extraordinary circumstances entitling the petitioner to the writ;[26]

(e) The signature and verification of the person seeking relief or someone on their behalf.[27]

(2) *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.[28]

(3) *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 action.[29] A person under quarantine is not an "inmate" for

this requirement unless they are "in actual confinement" in a state correctional institution, jail, or other criminal confinement.[30]

(4) *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.[31]

d) 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 petitions.[32]

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

(1) *Standard for Allowance.* If the petitioner makes a proper allegation of facts entitling him or her to habeas relief and has no other adequate remedy at law, the writ must be allowed.[33]

(2) *Issuance of Writ.* When a writ of habeas corpus is granted, the clerk of courts issues the writ under the seal of the court.[34]

(a) *Emergency.* In case of an emergency, the judge allowing the writ may issue it under his or her own hand.[35]

(3) *Meaning of Issuing Writ.* "Issuing" the writ means only that a return is ordered and a hearing will be held.[36] "Issuance" is not a final adjudication of the petitioner's request for release.

f) 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 another county or by a person deputized by the court issuing the writ.

(1) *Service in Case of Dismissal.* If the court determines the petition fails to state a facially valid claim and dismisses the petition, it need not be served.[37]

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

(1) *Signing and Swearing.* The return must be signed and sworn to by the person who makes it.[38]

(a) Exception. The return need not be signed and sworn to if made by a sworn public officer returning it in an official capacity.[39]

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

(a) Restraint by Officer. When the detainee is being imprisoned or restrained by an officer, the person making the return shall state this fact in the return.[40]

(i) Effect of Return. If the petition 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.[41]

(b) Restraint by Others. In cases where the person is being privately imprisoned or restrained by a person other than an officer, the party claiming custody must prove those facts.[42] In cases of private restraint or imprisonment, the return shall state the following:

(i) Fact or Custody or Restraint. The return must state whether or not the petitioner is in custody or under restraint.[43]

(ii) 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.[44]

(iii) 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.[45]

(3) *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.[46]

(4) *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.[47] 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.[48]

h) 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.[49]

(1) *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.[50]

(2) *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.[51]

(a) Penalties. For a first offense, the person who fails to obey the writ will forfeit to the petitioner $200.00.[52] For a second offense, the person who fails to obey the writ will forfeit to the petitioner $400.00.[53]

(i) 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.[54]

i) Hearing. A habeas corpus hearing is more in the nature of an inquest than a trial.[55] It must be conducted in the record.[56]

(1) *Decision Based Mainly on Petition and Return of Writ.* While the decision of whether to issue the writ is based mainly on the petition, the merits of the proceeding itself generally are determined upon the return of the writ.[57]

(2) *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.[58] However, if a legal or factual issue is raised during the process, it must be heard and determined.[59]

(3) *Witnesses at Hearing.* The court has the right to allow any interested or affected persons to appear and resist a habeas corpus application.[60]

(4) *Presumptions and Burden of Proof.* The judgment of the court committing the petitioner is presumed regular.[61] If the return sets forth a prima facie justification for the detention, the petitioner generally must prove (1) facts demonstrating that the detention is unlawful,[62] and (2) that the order of commitment was invalid or void.[63]

(a) In the case of quarantine for reason of contagious disease, if a person does not show signs of disease or is no longer contagious, guidelines issued by the Ohio Department of Health state that it is no longer appropriate or necessary to continue quarantine, thereby rendering a quarantine order void or invalid.[64]

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

(a) Generally. The evidence admissible at a habeas corpus hearing is limited to that determining whether there was jurisdiction over the petitioner.[65]

(b) Competent and Credible Evidence on Allegations of Petition. If the allegation 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.[66]

(c) The Record. The court may review the record of the commitment proceedings.[67]

(d) Evidence Dehors. The record/evidence may be received dehors the record to show that a proceeding was void for want of jurisdiction.[68]

(e) 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.[69] Parol evidence also is admissible to explain a discrepancy existing within the record.[70]

(i) 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.[71] The court only can consider what is in the record. If the record is incomplete, the court may compel the committing court to make its record complete.[72]

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

(i) 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.[73]

(ii) Unsupported and Uncorroborated Statements. Standing alone, the unsupported and uncorroborated statements of the petitioner are insufficient to overcome the presumption of regularity of the court's judgment.[74]

j) 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.

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

(a) In General: Satisfaction of Unlawful Detainment. A judge must discharge a petitioner from confinement upon being satisfied that the petitioner is detained unlawfully.[75]

(b) 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.[76]

(i) Specifically. Discharge is required if the face of the warrant, affidavit, and/or indictment demonstrate a lack of jurisdiction by the committing authority.[77]

(6) *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 still would be subject to commitment on other sentences.[78]

(a) Procedure. When 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.[79]

(7) *Recommitment.* Habeas corpus is directed only to the present confinement of a petitioner. The granting of the relief only serves to release the petitioner from that confinement. It is not an absolute discharge from the legal consequences of a crime, or presumably, a public health-related commitment.[80]

(a) Should a habeas corpus be granted to a person in medical quarantine and that person later shows signs of a contagious illness, this previous relief will not prevent recommitment.

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

(a) Exceptions: Res Judicata Inapplicable. Res judicata does not apply to a judgment of discharge when a new set of facts, different from those existing at the time the habeas corpus judgment issued, is shown to later exist.[81] Additionally, res judicata does not bar a subsequent prosecution or commitment for the same offense when the infirmities causing the release were remedied, unless the inquiry into the petition for release involved a full investigation into the merits.[82]

(9) *Review of Judgment.* Habeas corpus proceedings may be reviewed on appeal.[83]

k) Mootness. A petition for habeas corpus becomes moot if the petitioner is released from confinement prior to its adjudication.[84]

4. ***Ohio Habeas Corpus Actions Respecting Public Health Detentions; Generally.*** Ohio's only three challenges to quarantines seeking habeas corpus relief[85] indicate the following:

a) Ohio's quarantine regulations are a valid exercise of the state's police power;

b) The restraint of liberty necessarily accompanying quarantine or isolation is permissible if reasonable and justified under the circumstances;

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

5. ***Individual Public Health Habeas Corpus Cases***

a) Ex parte Company.[86] Two women were arrested on prostitution charges. During their pre-trial confinement, they each were found to be afflicted with venereal diseases. Despite being found not guilty of prostitution at trial, they each were 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.

(1) *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.

b) *In the matter of Mossie Jarrell*.[87] 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 later was found to be without infection. Furthermore, he neither saw nor made the order which placed her in quarantine. The court found the woman was improperly arrested without a warrant and unjustly quarantined, and granted her petition for habeas relief.

(1) *Import of Decision.* The *Jarrell* court 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.

c) *Ex parte Kilbane*.[88] 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 dropped.

(1) *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 of communicable disease, detainment is appropriate if reasonable and justified under the circumstances.

D. Injunctive Relief. Injunctive relief is an equitable remedy designed to protect rights from irreparable injury by prohibiting or commanding certain acts.[89] Injunctive relief from the orders of health authorities may be available in certain limited circumstances.

1. ***Generally***. As a general matter, Ohio courts may not restrain nor inquire into the motives of the legislative or executive branches of government in exercising their discretion.[90]

   Exceptions. Courts may exercise their equitable powers to restrain the acts of public boards or officers that are fraudulent, illegal, arbitrary, capricious, taken in bad faith, beyond their territorial limits, or amount to an abuse of discretion.[91] In the case of restriction of movement for public health concerns, the decision to place an individual in, or release them from, quarantine or isolation is at the discretion of the health commissioner of the county or municipality. Local health boards have a great deal of discretion and are not required to have an appeals process in place.

   a) Application to All Levels of Government. Injunctions may issue against the improper acts of state, county, or municipal officials.

   b) 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.[92]

   c) 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.[93]

2. ***Sovereign Immunity; Effect***. The fact that an individual holds a public office is not reason for denying injunctive relief from their illegal actions. The relief is sought to prevent the actions of the individual officeholder, not the state.[94]

3. ***Pleading Prerequisites***. Before an injunction may issue, the following must be observed:

   a) No Adequate Remedy at Law. To be entitled to an injunction, the party seeking relief must have no adequate remedy at law.[95]

      (1) *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.[96] 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.[97]

      (2) *Determination*. The determination of whether an adequate remedy at law exists is made from all available facts.[98]

(3) *Exhaustion of Administrative or Other Remedies*. When there is an available administrative or unofficial remedy to which the moving party has not resorted, injunction will not issue.[99]

(a) 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, the 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.[100]

b) Irreparable Injury. Injunctive relief should not be granted unless irreparable injury will result to the party seeking relief.[101]

(1) *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.[102]

(a) Financially Immeasurable and Impossible to Compensate. One measure of irreparable injury is when the injury cannot be measured in terms of money and, if not prevented by injunction, cannot afterward be compensated by any decree.[103] Freedom from an illegal confinement may well fit within this type of injury.

(i) Individuals held in quarantine for a communicable disease may face stigma due to public fear of the disease, even if the individual was not actually infected. Monetary damages are unlikely to lessen this stigma.

(2) *Standard of Proof*. The party seeking the injunctive must prove irreparable injury or the threat of irreparable injury by clear and convincing evidence.[104]

c) 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.[105]

5. ***Injunction Proceedings***. The injunction process transpires as follows:

a) Original Jurisdiction. Original jurisdiction for injunctive relief is vested with the following courts:

(1) *Common Pleas Court*. The common pleas courts have original jurisdiction over requests for injunctive relief.[106]

(2) *Probate Court*. The probate courts have original jurisdiction 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 when the common pleas or appellate judges are absent.[107]

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

(1) *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.[108]

(2) *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[109] and that (2) the legislature lacks the power to confer it.[110]

(a) Exception. The Supreme Court may grant a temporary injunction to maintain the status quo in matters where it otherwise has jurisdiction.[111]

c) Territorial Limits. The territorial limits of courts in injunctive relief cases are co-extensive with their ability to obtain personal jurisdiction over the defendant.[112]

d) 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.[113]

e) Application. The injunction proceeding begins with the filing of a complaint and application for preliminary injunction.[114]

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

(a) Legal Right. The complaint must show the plaintiff has a legal right.[115]

(b) Wrongful Act. The complaint must show the act complained of is wrongful.[116]

(c) Without Remedy. The complaint must show the plaintiff is without remedy except for in a court of equity.[117]

(d) Defendant's Actions and Injurious Effect. The complaint must show the defendant's actions are unlawful or unauthorized and the plaintiff was or will be injured thereby.[118]

(e) 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.[119]

(f) Facts Entitling Plaintiff to Action. The complaint must state facts entitling the plaintiff to the action.[120]

(2) *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.[121]

(3) *Verification.* Verification of the complaint is not required unless the plaintiff seeks a temporary restraining order without notice to the adverse party.[122]

(a) 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.[123]

f) Answer or Objection. After service, the defendant may answer or raise Civ.R. 12(B) objections as in any civil proceeding.[124] The waiver provisions of Civ.R. 12 apply to injunctive relief cases.[125]

g) Amendment of Petition for Injunctive Relief. A petition for an action for injunction may be amended.[126]

h) 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.[127]

(1) *Consolidation Possible.* The court has discretion to bypass a preliminary injunction hearing and consolidate it with the trial of the issues on the merits.[128]

(2) *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.[129]

(3) *Hearing on Preliminary Injunction.* The hearing provides the opportunity to be heard on controverted issues of both fact and law.[130]

(a) Evidence. Admissible evidence presented at the preliminary injunction hearing is preserved and need not be reintroduced at a trial on the merits.[131]

(i) 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.[132] Less adherence to stricture is required with evidence at the preliminary injunction stage than would be required at a trial.[133]

(ii) Burden of Proof. In an action for injunction, the plaintiff has the burden of establishing each factor by clear and convincing evidence in order to establish the need for the injunction.[134] Irreparable harm is not presumed, but rather must be proven.[135]

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

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

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

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

(iv) Public Interest. Whether the public interest would be served by the injunction.[136]

(c) Dismissal after Hearing on Preliminary Injunction. If the court finds that the plaintiff failed to state a claim for relief and could not state such a claim, it should dismiss the plaintiff's complaint.[137]

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

(i) 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 decided the injunction should not have been granted.[138] The injunction does not become operative until sufficient bond is posted.[139]

(ii) Other Security. In lieu of a bond, the successful plaintiff may deposit currency, a cashier's check, certified check, or negotiable government bonds in the amount fixed by the court with the clerk of courts.[140]

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

(a) Hearing Unnecessary. A hearing is not necessary when no triable issues of fact exist or when the trial court makes a preliminary injunction permanent and the issue is solely one of law.[141]

(b) Evidence. Evidence introduced at the preliminary injunction hearing is preserved and need not be reintroduced.[142]

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 only addresses general issues and 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.[143]

    a) Validity of Grant of Judicial Powers. The General Assembly may not confer upon administrative agencies powers that are strictly and conclusively judicial.[144] However, it may repose in such agencies' powers that are quasi-judicial in nature.[145]

        (1) *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.[146]

3. ***Jurisdictional Issues in the Administrative Setting***. Because administrative agencies are tribunals of limited jurisdiction, an agency order cannot be valid unless the agency specifically is authorized by law to make it.[147]

    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.[148]

        (1) *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.[149]

    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.[150]

4. ***Due Process Issues in the Administrative Setting***. Due process is required in the context of quasi-judicial hearings.[151] 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.[152]

a) Right to Jury Trial. The right to due process does not mean the right to a jury trial in administrative proceedings.[153]

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.[154] Decisions must be supported by at least some evidence.[155]

5. ***Administrative Proceedings; Generally.*** Proceedings before administrative agencies are not like a trial, but are in the nature of an inquiry. They require an opportunity to introduce testimony and a finding or decision made in accordance with statutory authority.[156]

a) Evidence. "Fair hearings" contemplate the taking of sworn testimony complete with the right of cross-examination.[157] Basic evidentiary procedures like the offering of exhibits for identification purposes and their admission for the record should be followed.[158]

(1) *Agency Not Bound by Rules of Evidence.* Administrative agencies are not bound by the rules of evidence applicable to courts.[159] Therefore, they are free to enact their own rules as to the admissibility of evidence in their hearings, but still must base their decisions upon competent evidence.[160]

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

(i) Hearsay Rule. The hearsay rule is relaxed in administrative proceedings.[161] Evidence will not be rejected solely because it is hearsay.[162]

(ii) Opinion Evidence. Opinion evidence is not necessarily barred from administrative proceedings.[163]

(iii) Testimony Under Oath. Testimony rendered at an administrative hearing need not be under oath.[164] In the absence of objection, unsworn testimony is competent evidence that may sustain an administrative order.[165]

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 process, the agency is required to specify the legal grounds upon which its decision was made.[166]

b) Effect of Final Adjudication Order. The doctrines of res judicata and collateral estoppel each may apply to administrative proceedings from which no appeals are taken.[167] However, their application should be based upon the nature of the prior administrative proceeding and the adequacy of the fact-finding procedures utilized.[168]

c) Reconsideration or Modification of Final Agency Order. Agencies generally may reconsider or modify the final orders until the actual institution of a court appeal or until expiration of the time for appeal.[169]

(1) *New Facts Required.* Agencies may not rehear or reconsider their adjudications in the absence of new facts.[170]

7. ***Judicial Review of Final Agency Order.*** Final administrative orders may be appealed to the courts.[171]

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.[172]

(1) *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 rare circumstances in which administrative actions lack any aspects that are reviewable by the courts.

(a) Review for Abuse of Discretion. Even where a statute specifically precludes review of an administrative order, courts still may review it for abuse of discretion.[173]

(b) Declaratory Judgment. The existence of other remedies does not preclude an action for declaratory judgment when the action involves a real controversy between adverse parties that is justiciable in character and that speedy relief is necessary to preserve what might otherwise be impaired or lost.[174]

(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.[175]

b) Matters Subject to Review; Examples. The following administrative matters are subject to judicial review:

(1) *Jurisdictional Issues.* Whether an administrative agency has acted within its jurisdiction or exceeded its statutorily conferred authority.

(2) *Compliance with Operating Statutes.* Whether an administrative agency complied with the legislative standard laid down for its operation.

(3) *Abuse of Discretion.* Whether the agency acted arbitrarily, capriciously, unreasonably, or abused its discretion.

(4) *Constitutional Violations.* Whether an agency's actions violated constitutional rights.

c) Jurisdictional Matters. Jurisdiction over judicial appeals from administrative agency decisions is granted as follows:

(1) *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.[176]

(2) *Ohio Supreme Court.* The Ohio Supreme Court maintains such revisory jurisdiction of administrative proceedings as may be conferred by law.[177]

(a) Revisory Jurisdiction. Revisory jurisdiction is akin to appellate jurisdiction and contemplates review of quasi-judicial proceedings only.[178]

(b) Legislative Authorization Required. Absent legislative authorization, the Ohio Supreme Court lacks any independent revisory jurisdiction.[179] The legislature also may impose limitations on this authority.[180]

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.[181] By its terms, the Act contemplates appellate review of the final decisions of local health districts.

(1) *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.[182]

(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.

(2) *"Final Order, Adjudication, or Decision."* Only "final orders, adjudications, or decisions" of administrative bodies may be appealed under the Act.[183]

(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.[184]

(i) 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 were issued with respect to a criminal proceeding.[185]

(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-judicial proceeding has occurred.[186] The word "appeal" imports judicial review of a proceeding in which the appellant had the opportunity to appear before an established governmental agency and set forth his or her case.[187]

(3) *Who May Appeal; Standing*. Generally, a party must be injured by an administrative order to appeal the order.[188]

(4) *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.[189]

(a) Purpose of Doctrine. The doctrine of exhaustion of administrative remedies is a court-made rule of judicial economy that generally is required to prevent premature interference with incomplete agency processes and allow for the compiling of a record adequate for judicial review.[190]

(b) Affirmative Defense. Failure to exhaust administrative remedies is not a jurisdictional defect.[191] It is an affirmative defense that must be timely asserted or considered waived.[192]

(5) *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.[193]

(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.[194]

(i) Exception. An exception exists to permit new evidence unavailable at the hearing before the agency.[195]

(b) Failure to Object to Testimony Given during Administrative Hearing; Effect. When counsel is present at an administrative hearing and fails to object to testimony that is not given under oath, counsel waives the right to raise its consideration as an issue on judicial appeal.[196]

(c) Subject Matter Jurisdiction of Agency Nonwaivable. Since subject -matter jurisdiction is a nonwaivable issue, a claim regarding the subject-matter jurisdiction of the administrative agency may be raised at any time.[197]

(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.[198]

(i) 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.[199]

(6) *Scope and Extent of Appellate Review.* Upon determining an existing right to judicial review, the common pleas court next must determine the scope of review and matters it will consider. Because these issues are addressed by 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.[200]

(7) *The Appellate Process.* As appeals will vary based upon the statutes creating and governing the administrative agency whose order is appealed, the following provides 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.

(i) Notice of Appeal. The proper filing of a notice of appeal is a jurisdictional prerequisite.[201]

(A) Notice to Whom. At least in the case of those agencies covered by the Administrative Appellate Procedure Act, notice must be filed with both the agency and the court.[202]

(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.[203]

(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.[204]

(d) Dismissal. Failure to timely file notice or include all required information is a jurisdictional defect requiring dismissal of the appeal.[205]

(1) 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.

- 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.[206]
- Timing. The transcript must be delivered to the court within 40 days after the notice of appeal is filed.[207]
- Cost of Transcript. The cost of the transcript is taxed as part of the costs of the appeal.[208]
- 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.[209]
    - Stay of Order Pending Appeal. An appeal does not stay execution of the agency's order until a stay of execution is obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and the supersedeas bond is executed.[210]

(d) Hearing. Upon receipt of the transcript, the court will schedule a hearing on the appeal. Briefs often may be filed.[211]

(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.[212]

- Exceptions. The court need not confine itself to the transcript provided by the agency in the following circumstances:
    - Transcript Incomplete. The transcript does not contain a report of all evidence admitted or proffered by the appellant.[213]

- 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.[214]
- Testimony Not Sworn. The testimony adduced at the hearing was not under oath.[215]
- 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.[216]
- Failure of Agency to Supply Conclusions of Fact. The agency failed to file conclusions of fact supporting its final order.[217]

• 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 and additional evidence as may be introduced by either party.[218]

- Witnesses at Hearing. If an exception applies, the parties may call, as if on cross examination, any witness previously giving testimony in opposition to that party.[219]

(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 ordinarily would be inadmissible in civil proceedings.[220]

(E) Standard of Review; Burden of Proof. The court is to weigh the evidence on appeal to 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.[221] Since the court must presume the validity of the agency decision, the appellant has the burden to overcome this presumption.[222]

(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.[223] This is particularly true in areas of agency expertise,[224] evidentiary conflicts,[225] and the agency's interpretation of its own rules.[226]

(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 the findings are internally inconsistent, impeached by a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable.[227]

(F) 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,[228] an abuse of discretion,[229] or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. The court also may find the agency's actions supported by the evidentiary record.[230]

(2) Decision. The court may affirm the agency's decision, or may reverse, vacate, or modify the agency's order. It also may remand the cause to the agency with instructions to enter an order, adjudication, or decision consistent with the court's findings.[231]

(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.[232] The court only needs to determine whether the order is supported by a preponderance of substantial, reliable, and probative evidence.[233]

(G) 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.[234]

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.[235] HIPAA generally serves to 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:

        (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

        (2) Relates to the past, present, or future physical or mental health or condition of an individual, or the past, present, or future payment for the provision of health care to an individual; and

        (3) Identifies the individual or with respect to when there is a reasonable basis to believe the information can be used to identify the individual.[236]

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.[237]

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 that provide health care services. HIPAA applies to the designated portions of the organization, but the non-designated portions of the organization need not comply with HIPAA's privacy requirements.[238]

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.[239]

      (1) *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 health matters as part of its official mandate.[240]

   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.[241]

   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.[242]

   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 authorized by law to notify such a person as necessary in the conduct of a public health intervention or investigation.[243]

   e) Employers. Protected health information may be disclosed to an employer if such information is related to workplace medical surveillance.[244]

   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.

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,[245] unless one of the following applies:

   a) Compelling Need. The state law serves a compelling need related to public health, safety, or welfare.[246]

   b) Controlled Substances. The principal purpose of the state law relates to the control of any controlled substance.[247]

c) More Stringent State Law. The state law provides more stringent privacy protections for health information than the applicable HIPAA provisions.[248]

d) Reporting. The state law provides for the reporting of disease, injury, child abuse, birth, death, or other public health surveillance or investigation.[249]

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.[250]

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 is available to predictable recipients of the information.[251]

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.[252]

   a) "Personal Information" Defined. Chapter 1347 broadly defines "personal information" as information describing anything about a person, indicates actions done by or to a person, indicates that a person possesses certain personal characteristics, and contains and can be retrieved from a system using a name, identifying number, symbol, or other identifier assigned to a person.[253] 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:

      (1) *Appointment of Manager.* Agencies must appoint one person directly responsible for their personal information system.[254]

      (2) *Rules.* Agencies must adopt and implement rules providing for the operation of the system in accordance with law.[255]

         (a) No Combined Systems. Agencies charged with maintaining personal information are prohibited from doing so by means of

an interconnected system.[256] Each agency must separately hold its own personal information.

(3) *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.[257]

(4) *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.[258]

(5) *Protection of Personal Information.* Agencies must take reasonable precautions to protect personal information in the system from unauthorized use, modification, disclosure, or destruction.[259]

(6) *Limitation on Information Maintained.* Agencies must ensure they collect, maintain, and use only information necessary and relevant to their functions.[260]

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:

(1) *Knowledge of Existence of Information.* Persons have the right to be informed that their personal information is contained within an information system.[261]

(2) *Inspection.* Persons have a right to inspect their personal information maintained in the information system.[262]

(a) Exception. A person is not entitled to disclosure of their 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.[263]

(3) *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.[264]

d) Disputing the Accuracy or Relevance of Personal Information Maintained by Agency. Persons maintain the right to request an agency investigate the status of their own personal information for accuracy, relevance, timeliness, or completeness.[265]

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:

(1) *Wrongful Maintenance.* Intentionally maintaining inaccurate, irrelevant, no longer timely, or incomplete personal information that may result in harm.[266]

(2) *Wrongful Disclosure.* Intentionally using or disclosing personal information in a manner contrary to law.[267]

(3) *Supplying or Using Known False Information.* Intentionally supplying known false personal information for storage in a personal information system or using or disclosing known false personal information maintained in a personal information system.[268]

(4) *Denial of Legal Rights Regarding Inspection and Dispute.* Intentionally denying the person the right to inspect and/or dispute personal information at a time when inspection or correction may have prevented harm.[269]

(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.[270] However, no cause of action may be brought later than six years after it accrues.[271]

(5) Injunctive Relief. Agencies or their employees who violate or propose to violate Chapter 1347 may be enjoined.[272]

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.[273]

a) Exceptions. Health information may be disclosed without the written consent of the subject individual in the following instances:

(1) *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.[274]

(2) *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.[275]

(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 written consent of the subject individual is prohibited.[276]

(3) *Accuracy of Information.* Protected health information may be released when: (1) the release is necessary to ensure accuracy of the information; and (2) the information is released pursuant to a written agreement requiring the recipient to comply with confidentiality requirements.[277]

(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.[278]

(4) *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.[279]

(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.[280]

(5) *Public Health Necessity.* Protected health information may be released when the director evaluates relevant information and determines it necessary to avert or mitigate a clear threat to an individual or to the public health.[281]

(a) Permitted Recipients. Under this exception, information may be released only to those persons or entities necessary to control, prevent, or mitigate disease.[282]

(b) No Written Statement of Confidentiality Required. When the director releases the information, it need not be accompanied by a written statement of confidentiality.[283]

CHAPTER III ENDNOTES

1 Ohio Department of Health, *Limitations on Movement and Infection Control Practices*, Version 3.0, Section III(VII)(a)(iii)(2011), odh.ohio.gov/PDF/IDCM/sect5.pdf, (accessed Nov. 3, 2017).

2 Holly Yan and Greg Botelho, *Ebola: Some U.S. States Announced Mandatory Quarantines - Now What?*, CNN, Oct. 27, 2014, cnn.com/2014/10/27/health/Ebola-us-quarantine-controversy.

3 Karen Weintraub, *When It Comes to Ebola, What Does Quarantine Really Mean?*, National Geographic, Oct. 28, 2014.

4 The White House, Office of the Press Secretary, *Fact Sheet: U.S. Response to the Ebola Epidemic in West Africa*, Sept. 16, 2014, obamawhitehouse.archives.gov/the-press-office/2014/09/16/fact-sheet-us-response-Ebola-epidemic-west-africa, (accessed Nov. 6, 2017); Jeffrey C. Hageman et al. *Infection Prevention and Control for Ebola in Health Care Settings – West Africa and United States*, Centers for Disease Control and Prevention, July 8, 2016, cdc.gov/mmwr/volumes/65/su/su6503a8.htm (accessed Nov. 6, 2017).

5 Jeffrey Drazen et al. *Ebola and Quarantine*, New England Journal of Medicine, Nov. 20, 2014, nejm.org/doi/full/10.1056/NEJMe1413139#t=article.

6 Christopher Ogollo, *Non-Criminal Habeas Corpus for Quarantine and Isolation Detainees: Serving the Private Right or Violating Public Policy*, DePaul Journal of Health Care Law, Vol. 14 Issue 1, Fall 2011 (p. 154), via.library.depaul.edu/cgi/viewcontent.cgi?article=1022&context=jhcl.

7 See below: *Ex Parte Company* (1922), 106 Ohio St. 50, 139 N.E. 204; *In the Matter of Mossie Jarrell* (C.P. 1930) 28 Ohio N.P. (n.s.) 473; and *Ex Parte Kilbane* (C.P. 1945), 32 O.O. 530, 67 N.E.2d 22.

8 See R.C. 3707.04 - .28.

9 Ohio Department of Health, *Limitations on Movement and Infection Control Practices*, Version 3.0, Section III.

10 Ohio Department of Health, *Limitations on Movement and Infection Control Practices,* Version 3.0, Section III, VII.

11 While some states have mandated time limits on quarantine that require an order be renewed to continue quarantine or allow for an official hearing on the matter when the time limit expires, Ohio's laws do not have such a limit. *State Quarantine and Isolation Statutes*, National Conference of State Legislatures, Oct. 29, 2014, ncsl.org/research/health/state-quarantine-and-isolation-statutes, (Accessed Nov. 13, 2017).

12 R.C. 2725.01.

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

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

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

16 R.C. 2725.02; R.C. 2101.24(B)(1)(b).

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

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

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

20 R.C. 2725.03.

21 *Id.*

22 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.

23 *Id.*

24 *Id.*

25 *Id.*

26 *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.

27 R.C. 2725.04.

28 *Id.*

29 R.C. 2729.25.

30 R.C. 2729.21.

31 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.

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

33 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.

34 R.C. 2725.07.

35 *Id.*

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

37 *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.

38 R.C. 2725.15.

39 *Id.*

40 R.C. 2725.14.

41 R.C. 2725.20.

42 See *id.* and compare with R.C. 121.10.

43 R.C. 2725.14(A).

44 R.C. 2725.14(B).

45 R.C. 2725.14(C).

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

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

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

49 R.C. 2725.12.

50 *Id.*

51 R.C. 2725.22.

52 *Id.*

53 *Id.*

54 *Id.*

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

56 R.C. 2725.26.

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

58 See *Chari v. Vore* (2001), 91 Ohio St.3d 323, 744 N.E.2d 763, see also *Gaskins v. Shiplevy* (1996), 76 Ohio St.3d 380, 667 N.E.2d 1194.

59 See *Ammon v. Johnson* (1888), 2 Ohio C.D. 149.

60 *In re Byers* (1940), 32 Ohio L. Abs. 497.

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

62 *Id.*

63 *In re Lambacher* (1961), 87 Ohio L. Abs. 350, 176 N.E.2d 312.

64 Ohio Department of Health, *Limitations on Movement and Infection Control Practices,* Version 3.0, Section III, VI(a)(iii).

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

66 53 Ohio Jurisprudence 3d 331 (2006), Habeas Corpus Section 59.

67 53 Ohio Jurisprudence 3d 332 (2006), Habeas Corpus Section 60.

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

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

70 *In re Lee* (1927), 5 Ohio L. Abs. 670.

71 53 Ohio Jurisprudence 3d 332 (2006), Habeas Corpus Section 60.

72 *Lillibridge v. State ex rel. Stewart* (1905), 7 Ohio C.C. (n.s.) 452.

73 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.

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

75 R.C. 2725.17.

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

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

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

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

80 *Id.*

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

82 *Id.*

83 R.C. 2725.26.

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

85 No such case has arisen since 1945.

86 (1922), 106 Ohio St. 50, 139 N.E. 204.

87 (C.P. 1930), 28 Ohio N.P. (n.s.) 473.

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

89 56 Ohio Jurisprudence 3d (2006) 95, Injunctions, Section 1.

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

91 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).

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

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

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

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

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

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

98 *Nevins v. McClure* (1936), 22 Ohio L. Abs. 187.

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

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

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

102 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.

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

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

105 See *Perkins v. Village of Quaker City* (1956), 165 Ohio St. 120, 133 N.E.2d 595.

106 R.C. 2727.03.

107 *Id.*

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

109 See, e.g., *Assoc. for Defense 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.

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

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

112 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.

113 See 56 Ohio Jurisprudence 3d (2006) 150, Injunctions, Section 149.

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

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

116 *Id.*

117 *Id.*

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

119 56 Ohio Jurisprudence 3d (2006) 318, Injunctions, Section 159.

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

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

122 Civ.R. 65(A).

123 *Id.*

124 See Civ.R. 12(B).

125 See *id.*

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

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

128 Civ.R. 65(B)(2).

129 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 grounds that the action is moot or when the defendant has ceased the allegedly harmful actions.

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

131 Civ.R. 65(B)(2).

132 See, e.g., *Dennedy v. St. Theresa's Home for the Aged* (1916), 25 Ohio C.A. 465.

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

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

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

136 *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.

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

138 Civ.R. 65(C).

139 Ohio Constitution, Article IV.

140 Ohio Constitution, Article IV.

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

142 Civ.R. 65(B)(2).

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

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

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

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

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

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

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

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

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

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

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

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

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

156 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.

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

158 *Application of Milton Hardware Co.* (1969), 19 Ohio App.2d 157, 250 N.E.2d 262.

159 *Id.*

160 *City of Bucyrus v. Dept. of Health of Ohio* (1929), 120 Ohio St. 426, 166 N.E. 370.

161 *Haley v. Ohio State Dental Bd.* (1982), 7 Ohio App.3d 1, 453 N.E.2d 1262.

162 See, e.g., *DiMatteo v. State* (1955), 71 Ohio L. Abs. 97, 130 N.E.2d 351.

163 *Chesapeake & O. Ry. Co. v. Public Util. Comm.* (1955), 163 Ohio St. 252, 126 N.E.2d 314.

164 *Id.*

165 *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.

166 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 be necessary even in the absence of statutory requirements).

167 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.

168 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.

169 See, e.g., *State ex rel. Borsuk v. City of Cleveland* (1972), 28 Ohio St.2d 224, 277 N.E.2d 419.

170 See, e.g., *State v. Ohio Stove Co.* (1950), 154 Ohio St. 27, 93 N.E.2d 291.

171 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.

172 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.

173 See *State ex rel. Davis v. Indus. Comm. of Ohio* (1937), 58 Ohio App. 325, 16 N.E.2d 556.

174 *Amer. Life & Acc. Ins. Co. of Ky. v. Jones* (1949), 152 Ohio St. 287, 89 N.E.2d 301.

175 See, e.g., *Meyer v. Parr* (1941), 69 Ohio App. 344, 37 N.E.2d 637.

176 Ohio Constitution, Article IV, Section 4(B).

177 Ohio Constitution, Article V, Section 2(B)(2)(d).

178 See, e.g., *Rankin-Thoman, Inc. v. Caldwell* (1975), 42 Ohio St.2d 436, 329 N.E.2d 686.

179 See, e.g., *Goodyear Synthetic Rubber Corp. v. Woldman* (1953), 159 Ohio St. 58, 110 N.E.2d 778.

180 *Goldman v. Harrison* (1951), 156 Ohio St. 403, 10 N.E.2d 848.

181 R.C. 2506.01 *et seq.*

182 R.C. 2506.01(A).

183 See *id.*; see also *Lakota Loc. Sch. Dist. Bd. of Ed. v. Brickner* (1996), 108 Ohio App.3d 637, 671 N.E.2d 578.

184 R.C. 2506.01(C).

185 *Id.*

186 See, e.g., *M.J. Kelley Co. v. City of Cleveland* (1972), 32 Ohio St.2d 150, 290 N.E.2d 562.

187 *In re Appropriation for Highway Purposes* (1957), 104 Ohio App. 243, 148 N.E.2d 242.

188 *Rollman & Sons Co. v. Bd. of Rev. of Hamilton Cty.* (1955), 163 Ohio St. 363, 127 N.E. 1.

189 See, e.g., *Noernberg v. City of Brook Park* (1980), 63 Ohio St.2d 26, 406 N.E.2d 1095.

190 See, e.g., *Nemazee v. Mt. Siani Med. Ctr.* (1990), 56 Ohio St.3d 109, 564 N.E.2d 477.

191 *Jackson v. Ohio Bur. Of Workers' Comp.* (1994), 98 Ohio App.3d 579, 649 N.E.2d 30.

192 See, e.g., *Gannon v. Perk* (1976), 46 Ohio St.2d 301, 348 N.E.2d 342.

193 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.

194 *Sicking v. State Med. Bd.* (1991), 62 Ohio App.3d 387, 575 N.E.2d 881.

195 *Id.*

196 *Levitt v. City of Cleveland Bd. of Bldg. Standards* (C.P.1970), 22 Ohio Misc. 54, 256 N.E.2d 631.

197 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.

198 See, e.g., *Bd. of Ed. of South-Western City Schools v. Kinney* (1986), 24 Ohio St.3d 184, 494 N.E.2d 1109.

199 See, e.g., *Am. Legion Post 0046 Bellevue v. Ohio Liquor Control Comm.* (1996), 111 Ohio App.3d 795, 677 N.E.2d 384.

200 *Hocking Valley Ry. Co. v. Public Util. Comm.* (1919), 100 Ohio St. 321, 126 N.E. 397.

201 *Williams v. Drabik* (1996), 115 Ohio App.3d 295, 685 N.E.2d 293.

202 See R.C. 119.12.

203 *Id.*

204 *Id.*

205 *Zier v. Bur. Of Unemployment Comp.* (1949), 151 Ohio St. 123, 84 N.E.2d 746.

206 R.C. 2506.02.

207 *Id.*

208 *Id.*

209 R.C. 2505.06; R.C. 2505.11.

210 R.C. 2505.09.

211 R.C. 119.12.

212 R.C. 2506.03(A).

213 R.C. 2506.03(A)(1).

214 R.C. 2506.03(A)(2).

215 R.C. 2506.03(A)(3).

216 R.C. 2506.03(A)(4).

217 R.C. 2506.03(A)(5).

218 R.C. 2506.03(B).

219 *Id.*

220 See, e.g., *Pennsylvania-Ohio Power & Light Co. v. Orwick (1930)*, 122 Ohio St. 497, 172 N.E. 366.

221 See, e.g., *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 407 N.E.2d 1265.

222 *State of W. Va. v. Ohio Hazardous Waste Facility Approval Bd.* (1986), 28 Ohio St.3d 83, 502 N.E.2d 625.

223 *Mayfield Hts. v. Snappy Car Rental* (1995), 110 Ohio App.3d 522, 674 N.E.2d 1193.

224 See, e.g., *Dudukovich v. Lorain Metropolitan Housing Authority* (1979), 58 Ohio St.2d 202, 389 N.E.2d 1113.

225 See, e.g., *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 407 N.E.2d 1265.

226 *State ex rel. DeMuth v. State Bd. of Ed.* (1996), 113 Ohio App.3d 430, 680 N.E.2d 1314.

227 *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 613 N.E.2d 591.

228 For a court to find an agency order unlawful or unreasonable, it must determine 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.

229 Courts rarely will disturb an administrative agency's order on this ground; before such action can be taken, 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.

230 R.C. 2506.04.

231 *Id.*

232 See, e.g., *Barker v. Kattleman* (1993), 92 Ohio App.3d 56, 634 N.E.2d 241.

233 *Id.*

234 *Geisert v. Ohio Motor Vehicle Dealers Bd.* (1993), 89 Ohio App.3d 559, 626 N.E.2d 960.

235 See 42 U.S.C. 1320d-2.

236 42 U.S.C. 1320d(6).

237 45 C.F.R. 160.102 and 160.103.

238 See 45 C.F.R. 164.504.

239 45 C.F.R. 164.512(b)(1)(i).

240 45 C.F.R. 164.501.

241 45 C.F.R. 164.512(b)(1)(i).

242 45 C.F.R. 164.512(b)(1)(iii).

243 45 C.F.R. 164.512(b)(1)(iv). Also 42 U.S.C. 1320d-7(b). Not be confused with R.C. 3701.17(B)(4) authority.

244 45 C.F.R. 164.512(b)(1)(v).

245 45 C.F.R. 160.203.

246 45 C.F.R. 160.203(a)(1)(iv).

247 45 C.F.R. 160.203(a)(2).

248 45 C.F.R. 160.203(b). – R.C. 3701.17 is "more stringent," even if it was subject to a HIPAA-preemption analysis.

249 45 C.F.R. 160.203(c). – 42 U.S.C. 1320d-7(b).

250 45 C.F.R. 160.203(d). – 45 C.F.R. 164.512(d); see 45 C.F.R. 164.501 ("Health oversight agency"); 45 C.F.R. 164.502(j)(1)(ii).

251 R.C. 3701.17(A)(2)(a - b).

252 See generally R.C. 1347.01 *et seq.*

253 R.C. 1347.01(E).

254 R.C. 1347.05(A).

255 R.C. 1347.05(B).

256 R.C. 1347.071.

257 R.C. 1347.05(C)-(D) and (F).

258 R.C. 1347.05(E).

259 R.C. 1347.05(G).

260 R.C. 1347.05(H).

261 R.C. 1347.08(A)(1).

262 R.C. 1347.08(A)(2).

263 R.C. 1347.08(C)(1).

264 R.C. 1347.08(A)(3).

265 See R.C. 1347.09.

266 R.C. 1347.10(A)(1).

267 R.C. 1347.10(A)(2).

268 R.C. 1347.10(A)(3).

269 R.C. 1347.10(A)(4).

270 R.C. 1347.10(A).

271 *Id.*

272 R.C. 1347.10(B); see also Section I.A.3 above.

273 R.C. 3701.17(B).

274 R.C. 3701.17(C); see also R.C. 149.43.

275 R.C. 3701.17(B)(1).

276 R.C. 3701.17(D).

277 R.C. 3701.17(B)(2).

278 R.C. 3701.17(D).

279 R.C. 3701.17(B)(3).

280 R.C. 3701.17(D).

281 R.C. 3701.17(B)(4).

282 *Id.*

283 R.C. 3701.17(D).

CHAPTER IV. FEDERAL, STATE & LOCAL AUTHORITY DURING STATE OF EMERGENCY

CHAPTER SUMMARY *The purpose of this chapter is to establish county, state, and federal powers during a state of emergency. Procedures, roles of officials, promulgation of rules, agency powers and creation, the Posse Comitatus Act, and the Insurrection Act are discussed at length. Rules for conduct and procedures for both during and after an emergency situation are provided.*

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.

    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.

2. ***Specific State Emergency Management Procedures.*** Ohio emergency management procedures include, but are not limited to, the following:

    a) Establishment of Emergency Management Agency. An emergency management agency is established within the Department of Public Safety and governed by the director of public safety.[1]

        (1) *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 appoint personnel necessary to plan, organize, and maintain emergency management adequate for the state's needs.[2]

        (2) *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 activities of all emergency management agencies within the state, liaises with the federal government and similar agencies of other states, and develops the statewide emergency operations plan in compliance with federal requirements.[3]

(3) *Additional Duties.* By statute, the executive director may be vested with additional authority, duties, and responsibilities as prescribed by the governor and director of public safety.[4]

(4) *Role of Executive Director with Respect to Federal Functions.* With 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 and state departments and agencies.[5]

(5) *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.[6]

b) Preparation of State Emergency Plan. Ohio law calls for the development of statewide emergency planning in accord with all federal requirements.[7]

(1) *Judicial Notice.* By law, courts are required to take judicial notice of plans adopted for emergency management purposes, i.e., "Ohio Emergency Operations Plan."[8]

c) Designation of Temporary Seats of State Government. Ohio law establishes a procedure by which the governor may designate temporary emergency 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.[9]

(1) *Procedure.* The governor may establish temporary seat(s) of state government by written proclamation.[10]

(2) *Attendant Gubernatorial Powers.* The governor may issue orders and take action as necessary for the orderly transition of government affairs to the temporary location.[11]

(3) *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.[12]

(4) *Requirement that Temporary Seat of Government Remain within State.* The temporary seat of government must remain within Ohio.[13]

(5) *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.[14]

(6) *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.[15]

(b) Cessation of Emergency. The governor may declare an end to the emergency and return the seat of government to its original location.[16]

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.[17]

(1) *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.[18]

(2) *Judicial Notice.* By law, courts must take judicial notice of ordinances, rules, resolutions, or orders adopted for emergency management purposes.[19]

e) Enactment of Interstate Emergency Management Assistance Compact. Ohio 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.[20]

3. ***Specific Local Emergency Management Powers.*** Ohio law provides 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.[21]

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.[22]

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 they establish an emergency management program.[23]

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.[24]

(1) *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.[25]

e) Designation of Temporary Government Seat. Ohio law establishes a procedure by which political subdivisions may designate temporary emergency 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.[26]

(1) *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.[27]

(a) Attendant Powers. The governing body of the political subdivision may make any necessary arrangements for the use of the alternative sites.[28]

(b) Other Sites of Convenience Permitted. In addition to the designated site, Ohio law provides that governing bodies may meet at "any other convenient site or place."[29]

(2) *Call to Substitute Site.* The presiding officer or any two members of the governing body may call the governing body to the substitute site.[30]

(3) *Requirement that Temporary Seat of Government Remain within State.* The temporary seat of government must remain within Ohio.[31]

(a) Temporary Seat Need Not Remain Within Political Subdivision. The temporary seat of government need not remain within the political subdivision itself.[32]

(4) *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.[33]

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.[34]

a) Broad Grant of Immunity. The state, its political subdivisions, its municipal agencies, emergency management volunteers, other states, the federal government, and foreign governments all are immune from liability while engaged in emergency management functions in Ohio.[35]

(1) *"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.[36]

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 state military authorities engaged in emergency management also are immune from liability.[37]

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 as absent willful misconduct.[38]

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.[39]

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 United States 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 United States 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 when public safety may require it.[40]

      (1) *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.[41]

         (a) State Equivalent. The Ohio Constitution contains a provision equivalent to its federal counterpart permitting suspension of habeas corpus.[42]

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: "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."[43]

a) Definition of "Posse Comitatus." "Posse comitatus" literally means the power of the county or the population of the county that the sheriff may summon for assistance.[44]

b) Passage of PCA. The PCA originally was 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.[45]

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.[46]

   (1) *Exception; National Guard if Not Federalized.* The PCA does not apply to National Guard troops if they are not federalized and taken under the command and control of the military.[47]

      (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.[48] This power includes the right to reject federalization when federalizing the National Guard would provide disaster relief in the home state.[49]

d) Supremacy of Civilian Law over Military Law. The PCA serves the purpose of codifying a general principle establishing civilian supremacy over the military.

   (1) *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.[50]

      (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.[51]

      (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.[52]

2. ***Effect of PCA; Criminalization of Domestic Military Law Enforcement***. 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 technically is a criminal statute.[53]

   b) No Convictions. There have been no individuals criminally convicted under the PCA since its enactment.

      (1) *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.[54]

   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.[55]

      (1) *Interpretation of "Executing the Laws."* The prohibition on military law enforcement does not prevent all assistance to civilian officials.[56]

         (a) Provision of Equipment. The military may provide equipment to civilian law enforcement officials without violating the PCA.[57]

         (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.

            (i) "Pervasive Activities" Test. One court measured the permissibility of military involvement on whether its activities "pervade that of civil authorities."[58]

            (ii) "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.[59]

         (c) Military Presence Directly Influencing Law Enforcement Decisions. Military presence directly influencing the decisions of civil law enforcement officials clearly would violate the PCA.[60]

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."[61]

(1) *Express Constitutional Authorization.* The Constitution does not expressly authorize direct military involvement in law enforcement activities.

(2) *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."[62]

(b) Constitutional Guarantee Against Domestic Violence. The Constitution guarantees the states protection against domestic violence.[63]

(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 government.[64] This allows for certain military actions:

(i) 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.[65]

(ii) 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.[66]

(3) *Effect of Exceptions; Generally.* The exceptions expressly noted in the PCA permit the military to take part in a 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.[67]

b) Statutory Exceptions. Statutory exceptions to the PCA are discussed 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.[68]

2. ***Powers of State Governor under Stafford Act.*** Declarations of major disasters or emergencies generally must be initiated by the governor.

a) Exception; Initiation of Stafford Act Powers by President. If the president decides 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.[69]

b) Declaration of Emergency or Major Disaster by Governor. In most cases, the governor initiates the process by declaring an emergency or major disaster.

(1) *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.[70]

(2) *Major Disaster Defined.* "Major disasters" are defined as natural catastrophes, or any catastrophes resulting in fire, flood, or explosion.[71]

(3) *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 describe and execute the state's own emergency plan before seeking federal resources.[72]

(b) Inadequacy of State Resources. The state's resources must be found inadequate to deal with or avert the threat posed by the catastrophe.[73]

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.[74]

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.[75]

b) Time Limitation; Ten Days. The Stafford Act limits the "essential assistance" of federal troops to 10 days' time.[76]

D. Federal Statutory Exceptions to PCA: Insurrection Act

1. ***Purpose; Powers of President.*** Under the Insurrection Act,[77] 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."

(1) *DOD Definitions.* Agency regulations promulgated by the Department of Defense may provide some assistance.

(a) Civil Disturbance. Though not found in the Insurrection Act, the term "civil disturbance" is defined elsewhere as "group acts of violence and disorders prejudicial to public law and order."[78]

b) Statutory Provisions Permitting Military Law Enforcement. The Insurrection Act provides three provisions permitting federal military law-enforcement activities. Of these, only one requires an invitation from the state.

(1) *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.[79]

(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[80] and during the Los Angeles riots of 1992.[81]

(2) *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.[82]

(3) *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 when states themselves resist.[83]

(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 unilaterally call upon the military to ensure and enforce them.[84]

(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.[85]

(i) Invocation of Section 333. Only when states refuse to enforce the civil rights of African-Americans has the president invoked the Insurrection Act without state request.[86]

c) Broad Discretion of President. The Insurrection Act vests the president with broad discretion in determining whether domestic unrest or violence warrants military intervention.[87]

d) Limitation; Statutory Mandate of Invocation as Last Resort. Generally, Department of Defense regulations addressing the Insurrection Act identify states as entities responsible for protecting the life and property of their citizens and maintaining order within their boundaries.[88] Invocation of the Act is reserved for situations of "last resort."[89]

(1) *Examples of Situations of "Last Resort."* Federal intervention is warranted in circumstances of natural disasters and emergencies that are beyond state capabilities, when protection of state functions is required, when states have exhausted their resources in dealing with emergencies or insurrections, or when 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."[90]

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.[91]

CHAPTER IV ENDNOTES

1 R.C. 5502.22(A).

2 *Id.*

3 *Id.*

4 *Id.*

5 R.C. 5502.22(B).

6 *Id.*

7 R.C. 5502.22(A).

8 R.C. 5502.36.

9 R.C. 5502.24(A).

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 R.C. 5502.25.

18 *Id.*

19 R.C. 5502.36.

20 R.C. 5502.40.

21 See R.C. 5502.26.

22 See R.C. 5502.27.

23 See R.C. 5502.271.

24 See R.C. 5502.29.

25 *Id.*

26 R.C. 5502.24(B).

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 See R.C. 5502.30.

35 R.C. 5502.30(A).

36 *Id.*

37 *Id.*

38 *Id.*

39 R.C. 5502.30(B).

40 U.S. Constitution, Article I, Section 9, cl. 2.

41 See *id.*

42 Ohio Constitution, Article I, Section 8.

43 Posse Comitatus Act, 18 U.S.C. 1385.

44 Black's Law Dictionary 1200 (8th Ed. 2004).

45 See Issac Tekie, "*Bringing the Troops Home to a Disaster: Law, Order, and Humanitarian Relief*," 67 Ohio St. L.J. 1227 (2006).

46 Department of Defense, Directive 5552.5.

47 See *Gilbert v. U.S.* (C.A.6, 1999), 165 F.3d 470.

48 *Perpich v. Dept. of Defense* (1990), 496 U.S. 344.

49 See Tekie, *supra*.

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *U.S. v. Jaramillo*, 380 F. Supp. 1375 (1974) and *U.S. v. Red Feather*, 392 F. Supp. 916 (1975).

56 *Id.*

57 *Id.*

58 *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.

59 *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.

60 See *Jaramillo, Red Feather*, and *McArthur, supra*.

61 Posse Comitatus Act, 18 U.S.C. 1385.

62 U.S. Constitution, Article II, Section 3, cl 3.

63 U.S. Constitution, Article IV, Section 4.

64 32 C.F.R. 215.4(c)(1).

65 32 C.F.R. 215.4(c)(1)(i).

66 32 C.F.R. 215.4(c)(1)(ii).

67 Sydney J. Freedberg, Jr., *Posse Comitatus: Tiny Law, Big Impact*, Nat'l J., Nov. 12, 2005.

68 42 U.S.C. 5170 (declaring major disaster) and 5191 (declaring emergency).

69 See 42 U.S.C. 5191(b).

70 44 C.F.R. 206.2(17).

71 *Id.*

72 See 42 U.S.C. 5170 and 5191(a).

73 See *id.*

74 See 42 U.S.C. 5170b(a)(3) and (c), 5192(a)(3).

75 See 42 U.S.C. 5131.

76 42 U.S.C. 5170b(c).

77 10 U.S.C. 331-35.

78 32 C.F.R. 215.3(a).

79 10 U.S.C. 331.

80 See Tekie, *supra.*

81 *Id.*

82 10 U.S.C. 332.

83 10 U.S.C. 333.

84 *Id.*

85 *Id.*

86 See *Bergman v. U.S.* (W.D. Mich. 183), 565 F. Supp. 1353.

87 *Id.*

88 See Department of Defense, Directive 3025.12.

89 *Id.*

90 10 U.S.C. 333(a)(1)(A), as amended by Pub.L. 109-364, 1076(a)(1) (Oct. 17, 2006).

91 See *id.*

CHAPTER V. OHIO HEALTH AGENCIES

CHAPTER SUMMARY *This chapter covers the basic structure and authority of public health entities in Ohio. It is important to note local health districts are independent political subdivisions of the state and the local health departments that serve the districts are not responsive to the state health department. The state health department does have some oversight authority in limited and specific circumstances.*

I. OHIO DEPARTMENT OF HEALTH

A. Creation and Composition

1. ***Creation.***[1] The Department of Health is established by R.C. 121.02 and is administered by the Director of Health.[2]

2. ***Qualifications for Director.*** The Director of Health is required to be either:

   a) A licensed and experienced physician holding a doctor of medical degree from a state-approved medical college, or

   b) An individual with significant experience in the public health profession.[3]

   c) The director is appointed by the governor, with the advice and consent of the Ohio Senate, and serves at the pleasure of the governor for the term of the appointing governor.[4]

3. ***General Duties of Director.*** The director serves as the chief executive officer of the Department of Health and shall perform the duties incident to that position.[5]

   a) The director administers laws and rules relating to health and sanitation.[6]

   b) The director may designate employees of the Department of Health to administer the laws and rules on the director's behalf.[7]

   c) During a public health emergency, the director may appoint any person to administer the laws and rules on the director's behalf.[8]

4. **General Powers and Duties of Director**. The director shall

   a) Require reports and make inspections and investigations the director considers necessary.[9]

b) Contract for the temporary or intermittent services of individuals or organizations, on a part-time or fee-for-service basis, of non-administrative duties,[10] as well as, contract for the use of facilities and services of public or private agencies or institutions.[11]

c) On behalf of the State, accept, hold, administer, and deposit in the state treasury to the Department of Health's general operating fund any grant, gift, devise, bequest, or contribution.[12]

d) Jointly with the executive director of the Ohio Emergency Management Agency, adopt rules pursuant to R.C. 5502.281 to do both of the following:

(1) Establish and maintain a statewide system for volunteers reasonably necessary to respond to an emergency declared by the State or a political subdivision.

(2) Establish fees, procedures, standards, and requirements necessary for recruiting, registering, training, and deploying the volunteers.[13]

e) The director may sell the Department of Health's services to local health districts, other departments, agencies, and institutions of the State of Ohio, other states, or the United States.[14]

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 has supervisory powers over all matters relating to the preservation of the life and health of the people.[15]

b) "Ultimate Authority" Regarding Quarantine and Isolation. The department has "ultimate authority" in matters of quarantine and isolation. It may declare, enforce, modify, relax, or abolish quarantine and isolation.[16]

c) Immunization. The department may approve methods of immunization for those immunizations required for school admission and take such action necessary to encourage vaccination against those diseases.[17]

d) Special or Standing Orders or Rules. The department may make such orders and rules for:

(1) Preventing the use of fluoroscopes for nonmedical purposes that emit doses of radiation likely to be harmful to any person;

(2) Preventing the spread of contagious or infectious diseases;

(3) Governing the receipt and conveyance of remains of deceased persons, and

(4) Such other sanitary matters as are best controlled by a general rule.[18]

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.[19] Such an investigation may be initiated when a local health district has reported documented cases of illness indicative of epidemic or pandemic conditions.[20]

   b) Animal-Based Diseases. The director may make and execute orders necessary to protect persons from animal-based diseases.[21]

   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.[22]

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.[23] It has done so through the General Assembly.[24] This delegated authority is not absolute, as the Revised Code sets forth minimum standards for local health departments.[25]

II. LOCAL HEALTH DEPARTMENTS

A. Creation and Composition

1. ***Health Districts.*** R.C. 3709.01 divides the state into local health districts.[26]

   a) Each health district is a separate political subdivision of the state.[27]

   b) Each city[28] constitutes a "city health district."[29] City health district boundaries are co-extensive with the city's limits.

   c) Townships and villages in each county are combined into a single "general health district."[30]

   d) Health districts may join together to form a single city or general health districts as set forth in R.C. 3709.051, 3709.07, 3709.071, and 3709.10.[31]

   e) Each health district shall be governed by a Board of Health.[32]

2. ***Board of Health.*** The legislative authority of each city constituting a city health district shall establish a board of health.[33] The District Advisory Council of each general health district shall establish the board of health for the general health district.[34] Boards of health are comprised of five members, each serving a five-year term.[35]

   a) ***Composition of City Health Board.*** City health boards are composed of:

      (1) Four members appointed by the mayor and confirmed by the legislative authority, and

      (2) One member appointed by the health district licensing council established under R.C. 3709.41.[36]

      (3) The composition also can be set forth in the city charter or in the agreement to combine with another health district.[37]

      (4) The mayor shall be president of the board,[38] but the board elects one of its members as president pro tempore to preside over meetings in the mayor's absence.[39]

   b) ***Composition of General Health Board.*** The General Health District Advisory Council appoints four persons to serve on the board of health, with the remaining member to be appointed by the health district licensing council.[40]

      (1) At least one member of the board of health must be a physician.[41]

      (2) A general health district advisory council is comprised of:

         (a) The president of the board of county commissioners;

         (b) The chief executive of each non-city municipal corporation; and

         (c) The president of the board of the township trustees of each township.[42]

         (d) The district advisory council must meet at least once a year in March to appoint the district's board of health.[43]

      (3) If the district advisory council fails to meet or select a board of health[44] or fill a vacancy,[45] the director of health may do so instead.

   c) Boards of Health shall determine the duties and salaries of its employees.[46]

   d) Boards shall study and record the prevalence of disease within the district and provide for the prompt diagnosis and control of communicable diseases; taking such steps as are necessary to protect the public health and prevent disease.[47] Boards also may provide for:

(1) The free treatment of venereal diseases;[48]

(2) The medical and dental supervision of school children;[49]

(3) The inspection of schools, public institutions, charitable, benevolent, and correctional institutions;

(4) The inspection of places where food is manufactured, handled, stored, sold, or offered for sale, and the medical inspection of persons employed therein;

(5) The inspection and abatement of nuisances dangerous to public health and comfort.[50]

e) Health District Licensing Council. The entity that appoints the board of health for the district may create a District Licensing Council.

(1) The Licensing Council is composed of one representative from each business activity licensed by the district's board of health.

(2) The Licensing Council members must be residents of the health district for which it was created.

(3) The Licensing Council must meet at least once a year and may adopt its own bylaws.

(4) The Licensing Council must appoint one of its members to serve as a member of the district's board of health, with one alternate if the appointment member must abstain from a matter before the board of health.

3. ***Health Commissioners***. Boards of Health shall appoint the health district's health commissioner.[51] The Boards of Health may appoint such other persons as is necessary.[52]

a) General Health District. A board appoints a health commissioner for a term not to exceed five (5) years.[53]

(1) The commissioner shall be a licensed physician, dentist, veterinarian, podiatrist, chiropractor, or the holder of a master's degree in public health or an equivalent master's degree in a related health field as determined by the members of the board of health in a general health district.[54]

(2) The commissioner shall serve as secretary of the board and the executive office of the board.

b) City Health District. The board of health shall appoint a full- or part-time health commissioner and such other persons as are necessary.[55] Health commissioners for cities do not have specific qualifications.

B. Authority of Local Health Departments

1. ***Orders and Regulations.*** Local boards of health are granted broad authority for promulgating orders and regulations.[56]

    a) Local boards may make such orders and regulations as are necessary for their own governance.[57]

    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.[58]

    c) Local boards may make such orders and regulations as are necessary for the prevention or restriction of disease.[59]

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.[60]

3. ***Limitations on Authority.***[61] 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.[62]

    b) Local boards may not establish a quarantine of one municipal corporation or township against another.[63]

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."[64]

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."[65]

        (1) Boards of health of a general or city health district, health authorities and officials, officers of state institutions, police officers, sheriffs, constables, and other officers and employees of the state or any county, city, or township shall enforce quarantine and isolation orders, and the rules the department of health adopts.[66]

        (2) Accordingly, the director of health, or any person charged with enforcing the rules of the Department of Health, may petition the court of common pleas for injunctive or other appropriate relief

requiring any person violating a rule adopted by or any order issued by the director of health under this chapter to comply with such rule or order.[67]

(3) The court of common pleas of the county in which the offense is alleged to be occurring may grant such injunctive or other appropriate relief as the equities of the case require.[68]

b) The Department of Health "may make and enforce orders in local matters or reassign substantive authority for mandatory programs *** when an emergency exists, or when [the local department] has neglected or refused to act with sufficient promptness or efficiency ***."[69]

(1) Additionally, when a contagious or infectious disease becomes, or threatens to become, epidemic in a municipal corporation or township, and

(2) The local authorities neglect or refuse to enforce efficient measures for its prevention,

(3) The director of health may appoint a medical or sanitary officer and such assistants as he may require, and authorize him to enforce such orders or regulations as the director deems necessary.[70]

3. ***State Retains Ultimate Control over Public Health Matters.*** The Ohio Supreme Court 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.[71]

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.[72]

CHAPTER V ENDNOTES

1 "Creation" refers to the establishment of the Ohio Department of Health and not to the police power exercised by the department.

2 R.C. 121.02(G)

3 R.C. 121.10.

4 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.

5 R.C. 3701.03(A).

6 *Id.*

7 *Id.*

8 *Id.*

9 R.C. 3701.04(A)(1).

10 R.C. 3701.04(A)(2).

11 R.C. 3701.04(A)(3).

12 R.C. 3701.04(A)(5).

13 R.C. 3701.04(B).

14 R.C. 3701.04(C).

15 R.C. 3701.13.

16 *Id.*

17 *Id.*

18 *Id.*

19 R.C. 3701.14(A).

20 O.A.C. 3701-73-01(A)(1).

21 *Id.*

22 R.C. 3701.04(A)(7).

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

24 *Id.*

25 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 subsidy funds are conditioned upon the local health departments' compliance with these minimum standards. *Id.* The director may conditional all department funding on the local health department being accredited by an accrediting body approved by the director. R.C. 3701.13.

26 The health districts created under R.C. Chapter 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.

27 R.C. 3709.36.

28 "Municipal corporations are hereby classified into cities and villages. All such corporations having a population of 5,000 or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law." Ohio Constitution, Article 1, Title XVIII.

29 R.C. 3709.01.

30 *Id.*

31 See R.C. 3709.01.

32 R.C. 3709.02 (general health districts) and R.C. 3709.05 (city health districts).

33 R.C. 3709.05(A) (a board of health can be set forth in a city's charter or set forth in a combined city health district agreement, pursuant to R.C. 3709.051).

34 R.C. 3709.03(A).

35 R.C. 3709.02(A).

36 R.C. 3709.05(A).

37 *Id.*

38 R.C. 3709.05(D).

39 R.C. 3709.12.

40 R.C. 3709.03(B).

41 *Id.*

42 R.C. 3709.03(A).

43 *Id.*

44 R.C. 3709.04.

45 R.C. 3709.03(C).

46 R.C. 3709.16.

47 R.C. 3709.22.

48 Currently referred to as "sexually transmitted infections" or STIs.

49 "Notwithstanding any other provision of law, a minor may give consent for the treatment of any venereal disease by a licensed physician." R.C. 3709.241.

50 R.C. 3709.22. See also, R.C. 3707.01 - .03.

51 R.C. 3709.11 (general health district) and R.C. 3709.14 (city health district). No member of a board of health shall be appointed as a health officer or ward physician. R.C. 3709.16.

52 *Id.*

53 R.C. 3709.11.

54 When the commissioner is not a physician, the board shall provide for adequate medical direction of all personal health and nursing services by employing a licensed physician as medical director on either a full-time or part-time basis. The medical director shall be responsible to the board of health. *Id.*

55 R.C. 3709.14; see also, R.C. 3709.15 (appointment of sanitarians and public health nurses, as well as collecting fees for public health nursing services).

56 There is no express grant of power in R.C. 3709.21, or elsewhere, allowing local boards of health unfettered authority to promulgate any health regulations deemed necessary. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, (2002) 96 Ohio St.3d 250, 2002-Ohio-4172. This statute merely confers rule-making authority. Local boards of health need both rule-making authority and subject-matter authority. *Id.*

57 R.C. 3709.21.

58 *Id.*

59 *Id.*

60 *Id.* See R.C. Chapter 3707; see also, Chapter III, *infra.*

61 See Footnote 51, *supra.*

62 R.C. 3707.05.

63 *Id.*

64 R.C. 3701.13.

65 R.C. 3701.13 (emphasis added).

66 R.C. 3701.56.

67 R.C. 3701.57.

68 *Id.*

69 R.C. 3701.13 (emphasis added). "In such cases, the necessary expense incurred shall be paid by the general health district or city for which the services are rendered." *Id.*

70 R.C. 3701.28.

71 *State Bd. of Health v. City of Greenville* (1912), 86 Ohio St.1, 98 N.E. 1019.

72 *Kraus v. City of Clevelan*d (C.P. 1953), 55 Ohio Op. 6, 116 N.E.2d 779, judgment aff'd, (1955) 163 Ohio St. 559, 127 N.E.2d 60.

CHAPTER VI. [1]JUDICIAL OPERATIONS DURING A PUBLIC HEALTH EMERGENCY

CHAPTER SUMMARY *Chapter 6 is a concise summary of the logistical responsibilities of the court to ensure it continues to operate during a public health crisis. The chapter is divided into seven sections, beginning with a consideration of Rule 14, "Declaration of Judicial Emergency," in the Rules of Superintendence for the Courts of Ohio. This rule vests ultimate authority to manage any aspect of the judiciary during an emergency in the chief justice. The chief justice can make new rules, intervene in local courts, etc., as the chief deems necessary, though consultation with the other justices and judges at the local level is encouraged. At the local level, the administrative judge has power to fill vacancies on the bench and temporarily relocate the court.*

The middle sections of the chapter deal with procedures for ensuring the court has enough petit jurors, grand jurors, witnesses, and a functioning clerk of court to operate in an emergency. Specific laws are identified that govern these topics; the laws allow for judicial discretion in some respects. Several government actors, such as administrative judges, directors of health, and sheriffs have the implied or explicit authority to close courthouses and move their operations elsewhere during an emergency.

Finally, the chapter briefly touches on the need for the court to be prepared, well in advance, for a public health crisis. Developing a communication plan and investing heavily in remote communication technology may be vital when movement of people is widely restricted.

I. ELECTED OFFICIALS' AUTHORITY

A. Powers of the Chief Justice.

1. ***Broad Scope of Powers.***

   a) "All Things Necessary" Language. Sup.R. 14(A) grants 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.[1] 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.[2]

2. ***Emergency Powers Granted to the Chief Justice by Sup.R. 14.***

   a) Sup.R 14 expressly authorizes the chief justice during a judicial emergency to:

      (1) Suspend operation of any local court rule.[3]

      (2) Promulgate temporary rules of court.[4]

(3) Assign and transfer emergency judicial duties to any judge within the state.[5]

(4) Reinstate retired judges where required.[6]

b) Accelerated Appointment of Judges. While not expressly listed as a Sup.R. 14 power, it likely is that the judicial appointment procedure may be accelerated if necessary to ensure the orderly and efficient administration of justice.[7]

c) Consultation with Other Justices Required When 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.[8]

(1) *Exception.* Where circumstances do not permit consultation with the other justices or a report to them, the chief justice may act alone.[9]

(a) 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.[10]

d) Duration of Powers. During a 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 crisis and the normal rules of court are reinstated.[11]

e) Judicial Notice. Generally, all courts should take judicial notice of emergency rules, orders, amendments, or rescissions by the other branches of government.[12]

3. ***Inability of Chief Justice to Act; Succession.***

a) 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.[13]

B. Judicial Vacancies and Disabilities.

1. ***Vacancy and Appointment Procedures.***

a) Temporary Appointment. Under the Ohio Constitution, when a judicial vacancy occurs, the governor appoints a temporary judge until a successor is elected and qualified.[14]

(1) *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 40 days after the vacancy occurs.[15]

(a) Exception. When the unexpired term ends within one year following the date of the next general election, the governor's appointee holds the position for the remainder of the unexpired term.[16]

2. ***Disability of Judge.***

a) 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 or she has familiarized himself or herself with the record.[17]

(1) *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 makes the appointment.[18]

(2) *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 trial record, he or she has discretion to grant a new trial.[19]

b) 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.[20]

(1) *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 makes the appointment.[21]

(2) *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 trial record, he or she has discretion to grant a new trial.[22]

C. Witness- and Jury-Related Concerns.

1. ***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.

a) Witnesses. A subpoena to appear before a court and provide testimony requires the witness to attend.

(1) *Arrest for Failure to Attend.* When a material witness is subpoenaed but refuses or neglects to attend in conformity with the subpoena, the witness is subject to arrest in order to compel attendance and punish disobedience.[23]

(2) *Contempt.* Witnesses who fail to appear in accordance with the terms of a subpoena may be found guilty of contempt.[24]

(a) Additional Grounds for Contempt Finding. Ohio's Rules of Civil Procedure,[25] Rules of Criminal Procedure,[26] Rules of Juvenile Procedure,[27] and the Administrative Procedure Law[28] each provide for contempt for failure to obey a subpoena.

(b) Contempt Possible Even with Cancellation of Trial. Witnesses may be held in contempt for failure to obey subpoenas requiring their appearance even when the trial at which they were to testify is cancelled.[29] Subpoenas require appearance, as well as testimony.[30]

b) Prospective and Acting Jurors.

(1) *Penalty for Failure to Attend.* Ohio law provides that persons drawn for jury service who were not excused and do not attend and serve may be cited for indirect, criminal contempt of court.[31]

(2) *Statutory Penalty for Non-Appearance.* Persons failing to appear for jury service may be fined up to $250.00 and up to 30 days in jail for contempt of court.[32]

(3) *Postponement or Excuse from Jury Attendance.* Prospective jurors have the ability, by law, to request an excuse from or postponement of their service.

(a) Prospective jurors may request to be excused from jury service due to conditions of hardship, many of which could exist in a post-crisis environment. [33]

(b) Prospective jurors may request, at least two business days before the juror's initial appearance, postponement of their service if they have had no previous postponements.[34]

(c) Agreement to Subsequent Service Dates.[35]

(i) 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 originally was called to serve.[36] Agreed service dates later than six months after the original service date are granted only in extraordinary circumstances.[37]

(d) Subsequent Summons Unnecessary. Upon a postponement, the prospective juror is required to appear on the agreed date without service of additional summons.[38]

(e) Subsequent Postponements. Subsequent postponements of jury service may be granted only by the judge, jury commissioner, or other authorized court employee and only in the event of extreme emergency.[39]

(i) 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.[40]

(ii) 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.[41]

(f) Failure to Attend after Postponed Service. The failure of a prospective juror to attend postponed service subjects the person to the same punishment as if the person failed to appear for initial service.[42]

c) Efforts to Remedy Inadequate Number of Available Prospective Jurors. Ohio law allows a judge to 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.[43]

(1) *Procedure.* The court's order must specify the number of additional jurors to be drawn.[44]

(2) *Location of Drawing.* The drawing is public under the judge's direction or in ordinary manner prescribed by law.[45]

(3) *Notice of Drawing.* Notice of the drawing is required by publication of the notice at least six days brefore the drawing date.[46]

(4) *Notice to Prospective Jurors Drawn.* The jury commissioner must notify persons selected to serve in the ordinary fashion provided by law, including by electronic notification.[47]

(5) *Emergency Procedure During Trial.* If all available jurors are excused with no other prospective jurors available by agreement of the parties, then other persons available in or about the courthouse may be summoned as jurors.[48]

2. ***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.[49]

    a) 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 discharge the juror.[50]

        (1) *Replacement with Alternate Juror.* The discharged juror is replaced with an alternate juror.[51]

        (2) *Exhaustion of Alternate Jurors.* If a juror becomes sick and must be discharged after all alternate jurors are exhausted, a new juror may be sworn and the case tried anew, or the entire jury may be discharged and a new jury empaneled.[52]

            (a) 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 in criminal cases.[53]

    b) Medical Attendance of Juror. If a juror becomes ill before the conclusion of the trial, the court may order medical attendance for that juror.[54]

        (1) *Costs.* Reasonable costs of the sick juror's medical attendance are to be paid from the judiciary fund.[55]

D. Grand Juries.

1. ***Constitutional Right.***

    a) General Guarantee. Article I, Section 10 of the Ohio Constitution guarantees the right to indictment by grand jury.

        (1) *Exceptions.* There are exceptions to the right to indictment by grand jury, certain of which are relevant to public health.[56]

            (a) Minor Crimes. There is no right to a grand jury indictment when the case involves an offense for which the penalty provided is not imprisonment.[57]

            (b) 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.[58]

2. ***Statutory Right to a Grand Jury.***

    a) 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 15 – 12 of whom must concur for an indictment.[59]

b) Discharge of Indicted Person When No Indictment Returned. Generally, the court shall discharge a person who is held in jail and is charged with an indictable offense if he or she is not indicted at the term of court at which he is held to answer.[60]

(1) *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.[61] In such an instance, the cause shall be heard when the witness becomes available.

3. ***Procedural Nature of Grand Jury Right Empowers Judiciary.***

a) Conflicting Authority. Article I, Section 10 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.[62] However, the Ohio Supreme Court ruled that the number of grand jurors is a procedural rather than a substantive issue, 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.[63]

b) Reduction of Number by Judiciary. The number of required grand jurors was reduced from 15 to nine – seven of whom are required to return a true bill.

c) Further Reduction; Public Heath Emergency. The Supreme Court could act again to reduce the number of grand jurors required by law in an emergency or disaster.[64]

(1) *Limitations.* Any further reduction in the number of grand jurors required by law likely would be subject to certain limitations:

(a) No Arbitrary Class-Based Exclusion. Reductions in numbers cannot arbitrarily exclude particular classes of persons from the jury rolls.

(b) Ratio. R.C. 2939.20 requires a four-fifths ratio for an indictment remain unchanged.[65]

4. ***Sickness, Death, or Refusal of Grand Juror to Attend.***

a) Selecting the Grand Jury. Current law directs the jury commission to seat the minimum number of persons required for grand jury service.[66]

(1) *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 and (2) proceed to fill these vacancies from those names in the order drawn.[67]

(a) Replacement of Grand Juror Once Sworn. Current law provides 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.[68]

(2) *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.[69]

(3) *Arrest for Grand Juror's Refusal to Attend.* Ohio law permits the arrest of persons drawn for grand jury service who do not attend and serve without excuse.[70]

(4) *Statutory Penalty for Non-Appearance.* Persons failing to appear for grand jury service may be fined not less than $100.00, nor more than $250.00 and may be punished for contempt of court.[71]

(a) 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.[72]

E. Clerk of Courts

1. ***Vacancy and Appointment Procedures.***

a) Vacancy. If a vacancy in the office of clerk of courts occurs more than 40 days before the next general election for state and county offices, a successor shall be elected for the unexpired term, unless such term expires within one year immediately following the date of such election.[73]

(1) *Appointment Pending General Election.* Prior to the next election, the vacancy must be filled by appointment per R.C. 305.02.[74]

b) 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.[75]

2. ***Inability of Clerk to Act.***

a) Generally. Whenever a county officer such as the clerk fails to perform the duties of office for 90 consecutive days, the office is to be declared vacant, triggering the appointment process of R.C. 305.03.

(1) *Sickness or Injury; Exception.* Whenever a county officer such as the Clerk is absent for 90 consecutive days because of sickness or injury, the office is not automatically declared vacant.[76]

F. Closure of Courthouse and Roads during Public Emergency

1. ***Authority to Close Courthouses Is Implied by Ohio Law.***

   a) Administrative Judge; Other Judges. Under R.C. 2301.04, the administrative judge can move the court operations temporarily to a location outside or inside the territorial jurisdiction of the court.

      (1) The administrative judge's authority under R.C. 2301.04 is independent of, and not dependent upon, the authority of the chief justice during a judicial emergency.

      (2) A 1965 attorney general opinion provides the authority of judges to close the courthouse in the event of public emergency.[77]

   b) Chief Justice. Sup.R. 14 authorizes the chief justice to take all necessary measures to ensure the orderly administration of justice, which implies the power to close a specific courthouse.

   c) "During an epidemic or threatened epidemic, or when a dangerous communicable disease is unusually prevalent, the board [of health of a city or general health district] may close any school and prohibit public gatherings for such time as is necessary."[78] A "public gathering" is not defined in law, but reasonably includes a public or private function that draws people into a defined space. Court functions, such as a trial, could be considered a public gathering. In certain circumstances, the Ohio director of health could exercise this authority.[79]

   d) County Commissioners and the Sheriff, Potentially. Pursuant to R.C. 311.07(A), "Under the direction and control of the board of county commissioners, [the] sheriff shall have charge of the court house."

2. ***Closure of Roads.***

   a) A board of health "shall not close public highways or prohibit travel thereon,*** or establish a quarantine of one municipal corporation or township against another municipal corporation or township, as such, without permission first obtained from the department of health and under regulations established by the department."[80] In certain circumstances, the Ohio director of health could exercise this authority.[81]

b) Director of Public Safety. Under R.C. 5502.25, for the emergency management of the state, the director of public safety shall adopt rules necessary to protect against "any hazard," which implies the power to close roads.

c) The Sheriff. Vested with authority to preserve the public peace, the sheriff has the implied power to close roads during a health emergency.[82]

G. Remote Appearance of Individuals and Telecommunication Preparedness of the Court.

1. ***Appearance by Means Other than in Person.***

a) Right to a Hearing. Due process of law affords individuals affected by quarantine or isolation the right to a hearing,[83] which places significant importance on telecommunications technology to allow for remote appearance.

b) Pre-Recorded Videotaped Testimony. Civ.R.40 provides that all 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.[84] Videotaped depositions are permitted by Civ.R. 30(B)(3).

(1) *Initiation of Videotape Trial.* A trial judge may order a videotape trial upon agreement of the parties for all or a portion of testimony and appropriate evidence.[85]

(2) *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.[86]

(3) *Presence of Counsel and Judge.* In jury trials, neither counsel for the parties nor the trial judge are 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.[87]

c) 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.[88]

2. ***Telecommunications Preparedness of the Court.***

   a) Prior Investment and Planning Is Critical. Courts should invest in the necessary IT equipment, personnel, and training capacity to conduct judicial proceedings from a distance. The ability to communicate effectively during a pandemic is critical, but also potentially very difficult. Communication plans should be developed in advance, which include identifying specific individuals (points-of-contact) within the court and across the entire judicial system who will be responsible for managing communications and courts should develop appropriate communication procedures.

CHAPTER VI ENDNOTES

1 Sup.R. 14(A).

2 See Commentary to Sup.R. 14.

3 *Id.*

4 *Id.*

5 Sup.R. 14(B).

6 *Id.*

7 See Sup.R. 14(A).

8 Sup.R. 14(C).

9 *Id.*

10 See generally Sup.R. 14.

11 See Commentary to Sup.R. 14.

12 E.g., R.C. 5502.36 expressly requiring judicial notice of emergency rules by the director of public safety; cf. R.C. 119.03 (outlining emergency rulemaking process), R.C. 3701.13 (emergency authority of director of health).

13 Sup.R. 14(A).

14 Ohio Constitution, Article IV, Section 13.

15 *Id.*

16 *Id.*

17 Civ.R. 63(A).

18 *Id.*

19 *Id.*

20 Civ.R. 63(B).

21 *Id.*

22 *Id.*

23 R.C. 1907.37; R.C. 2317.21.

24 R.C. 2705.02(A) and (C).

25 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.

26 Crim.R. 17(G).

27 Juv.R. 17(F).

28 R.C. 119.09.

29 *State v. Castle* (1994), 92 Ohio App.3d 732, 637 N.E.2d 80.

30 *Id.*

31 R.C. 2313.30; R.C. 2705.

32 R.C. 2313.99; R.C. 2705.05.

33 R.C. 2313.14.

34 R.C. 2313.15.

35 R.C. 2313.15(A)(2).

36 *Id.*

37 *Id.*

38 R.C. 2313.15(D).

39 R.C. 2313.15(B).

40 R.C. 2313.15.

41 R.C. 2313.15(B).

42 R.C. 2313.20; R.C. 2313.99.

43 R.C. 2313.07(B).

44 *Id.*

45 R.C. 2313.08(B).

46 R.C. 2313.08.

47 R.C. 2313.09 - 10.

48 R.C. 2313.11(B). *State v. Russell*, 2002-Ohio-3384 (3rd Dist.).

49 Civ.R. 47(D); Crim.R. 24(G); R.C. 2945.29.

50 *Id.*

51 Civ.R. 47(D); Crim.R. 24(G)(1)(non-capital cases); Crim.R. 24(G)(2) (capital cases); R.C. 2945.29.

52 R.C. 2945.29 for criminal cases. Civ.R. 48 permits the parties to stipulate to a lesser number of jurors to complete the trial in a civil case only.

53 R.C. 2945.36.

54 R.C. 2945.30.

55 *Id.*

56 Ohio Constitution, Article I, Section 10.

57 *Id.*

58 *Id.*

59 See R.C. 2939.02 and R.C. 2939.20.

60 R.C. 2939.24.

61 R.C. 2939.24(E).

62 *Id.*

63 *State v. Brown* (1988) 38 Ohio St.3d 305, 528 N.E.2d 523.

64 See *Brown*, *supra* at note 21.

65 Should the number of grand jurors drop below five, a unanimity requirement should be encouraged to guard against constitutional attack. This would preserve the protection to those indicted by retaining the four-fifths ratio required for a true bill initially approved by the legislature.

66 See R.C. Chapter 2939.

67 *Id.*

68 R.C. 2939.16.

69 *State ex rel. Burton v. Smith* (1962), 118 Ohio App. 248, 194 N.E.2d 70.

70 R.C. 2313.30.

71 R.C. 2313.99; see also R.C. 2705.02(A).

72 R.C. 2313.29.

73 R.C. 305.02(A).

74 *Id.*

75 See 1986 Ohio Atty.Gen.Ops. No. 86-083.

76 See R.C. 305.03(B).

77 1965 Ohio Atty.Gen.Ops. No. 65-106.

78 R.C. 3707.26.

79 See R.C. 3707.13, R.C. 3701.14(A), and R.C. 3701.28.

80 R.C. 3707.05.

81 See R.C. 3701.13, R.C. 3701.14(A), and R.C. 3701.28.

82 R.C. 311.01.

83 See, e.g., U.S. Constitution, Amend. V ("No person shall…be deprived of life, liberty, or property without due process of law[.]").

84 Civ.R. 40.

85 Sup.R. 13(B)(2).

86 Sup.R. 13(B)(1).

87 Sup.R. 13(B)(5).

88 Crim.R. 15(A).

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