

THE SUPREME COURT of OHIO

CHAPTER VI. 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 Law²⁸ 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) *Arrest for Failure to Attend.* Ohio law provides for the arrest of persons drawn for jury service who do not attend and serve without excuse.³¹
 - (2) *Statutory Penalty for Non-Appearance.* Persons failing to appear for jury service may be fined not less than \$100.00 nor more than \$250.00 and may be punished for contempt of court.³²
 - (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.³³
 - (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) *Significant Prerequisites for Postponement.*
 - (b) *No Previous Postponement.* The prospective juror cannot have been granted a previous postponement.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 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 following information:
- (a) **Number.** The order must specify the number of additional jurors to be drawn.⁴⁴
- (b) **Time.** The order must specify the time the additional jurors shall be drawn.⁴⁵
- (2) *Location of Drawing.* The drawing may be made either in open court under the judge’s direction or in ordinary manner prescribed by law.⁴⁶
- (3) *Notice of Drawing.* No notice of the drawing is required if the required officers are present.⁴⁷
- (4) *Notice to Prospective Jurors Drawn.* The sheriff must notify persons selected to serve in the ordinary fashion provided by law.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.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 Health 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.
32 R.C. 2313.99; see also R.C. 2705.02(A).
33 R.C. 2313.29.
34 R.C. 2313.13(A)(1).
35 R.C. 2313.13(A)(2).
36 *Id.*
37 *Id.*
38 R.C. 2313.13(B).
39 *Id.*
40 *Id.*
41 *Id.*
42 R.C. 2313.14; R.C. 2313.99.
43 R.C. 2313.16.
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*

-
- 48 *Id.*; see also R.C. 2313.24 and 2313.25.
- 49 See R.C. 2945.29.
- 50 *Id.*
- 51 *Id.*
- 52 *Id.*
- 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).