District Court Benchbook
Judicial Review of Orders of Restriction

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Orders of restriction (OR) and judicial review of them are governed by Title 26, Chapter 6b, Communicable Diseases – Treatment, Isolation, and Quarantine Procedures, which supercedes Title 63, Chapter 46b, Administrative Procedures Act. §26-6b-1(2). Some parts of Title 26, Chapter 6, Communicable Disease Control Act, may also apply. As of the publication date there are no case examples in Utah, so this benchbook examines the relevant statutes and rules.

An OR is an order issued by the Utah Department of Health, a local health department, or the district court directing an individual or group to submit to examination, treatment, isolation or quarantine for (1) infection or suspected infection with a communicable disease, (2) contamination of suspected contamination with an infectious, chemical or biological agent, or (3) a condition or suspected condition that poses a threat to public health. §26-6b-2(3) & (5).

The petitioner will be either the Utah Department of Health represented by the Attorney General or a local health department represented by the county attorney. §26-6b-5(1). The petitioner will petition the court to review and approve an OR already entered by the petitioner. The cases may be a collection of individual actions or they may be consolidated as a single class action. URCP 23. The district court has exclusive jurisdiction to review an OR even if the respondent is a minor. §26-6b-3.2(1); §26-6b-5(1).

The respondent will be the individual or group subject to the OR and may be represented by retained or appointed counsel. The respondent may already be in custody or the petitioner may be asking that the respondent be taken into custody. If the respondent is in custody and decides not to consent to the OR, the state or local health department files the petition to review, §26-6b-3.1(1); §26-6b-3.2(1); §26-6b-4(2), but the respondent may proceed independently under URCP 65B.

The district court may establish the manner in which to review an OR "based on precautions necessary to prevent additional exposure to communicable or possibly communicable diseases or to protect the public health…." §26-6b-3.3(2)(c).

(a) Department of Health Orders of Restriction

(i) Authority for the OR.

The Utah Department of Health or a local health department (referred to collectively as DOH) may enter an OR. The OR may be written or, under certain conditions, verbal. §26-6b-3(1).

(ii) Basis for the OR.

The OR must be based on "the totality of the circumstances reported to and known by" the DOH. §26-6b-3(2). Totality of the circumstance includes observation, credible information, and "knowledge of current public health risks based on medically accepted guidelines as may be established by the Department of Health by administrative rule." §26-6b-3(2).

Note: Applying discretionary judgment about the risk of public contagion is a necessary feature of most public health issues. However, it appears from the statute that the "medically accepted guidelines" on which that judgment is based have to be established by Utah Department of Health rules. The relevant rules are R386-702-1 through R386-702-12.

(iii) Limits on the written OR.

The OR must (1) be for the shortest reasonable time to protect the public health, (2) use the least intrusive method of restriction, and (3) contain notice of the individual's rights. The first two of these conditions are met if they are satisfied "in the opinion of the public health official" who issues the order. §26-6b-3(2).

Note: It is, of course, this OR that the court will review. The form for a written order will have notice of rights as part of the boilerplate. The least intrusive method of restriction (examination, treatment, isolation or quarantine) will be determined by whether the individual is actually infected or contaminated or is well but has been exposed. The court may also review the duration, location and conditions of the restriction. The DOH is required to take proper care of a person who is detained. §26-6b-3(4).

(iv) Special conditions for a verbal OR.

The DOH can issue a verbal OR "if the delay in imposing a written order of restriction would significantly jeopardize the department's ability to prevent or limit" transmission of the disease or of the infectious, chemical or biological agent. A verbal OR is valid for 24 hours. §26-6b-3(2).

(v) Involuntary submission.

An individual can be required to submit to involuntary examination, treatment, isolation or quarantine as a result of a verbal OR while a written OR is being prepared or while a written OR is being reviewed by the district court. §26-6b-3(3).

Note: Involuntary submission is not a penalty. It is the circumstance that anyone subject to an OR faces: the OR is in effect while it is being reviewed. See §26-6b-3.2(2).

Law enforcement officers may enforce an OR. §26-6b-3(2); §26-6b-3.2(2); §26-6b-4(8).

(vi) Consent to Order of Restriction

Informed consent. A person can consent to an OR. If a person consents to the OR, the court does not review it. The consent must be in writing. §26-6b-3.1(1). The statute does not expressly require the consent to be signed, but, presumably, the person's signature is required. The content of the consent to the OR, the notice of the OR, and of the OR itself are governed, more or less respectively, by §26-6b-3.1, §26-6b-3.2 and §26-6b-3.3. The following information must appear somewhere among the 3 documents:

1) The terms and duration of the OR. §26-6b-3.1(1); §26-6b-3.3(1).
2) The supporting documents. §26-6b-3.2(1). (The public health official's affidavit and the physician's statement accompanying the petition under §26-6b-5(2).)
3) The importance of complying with the OR. §26-6b-3.1(1).
4) The right to agree to the OR and waive judicial review. §26-6b-3.1(1).
5) The right to or refuse to consent to the OR and have judicial review. §26-6b-3.1(1); §26-6b-3.3(1).
6) The right to withdraw consent to the OR and have judicial review by giving 5 days written notice. §26-6b-3.1(1).
7) Notice that breach of a consent agreement may subject the individual to an involuntary OR. §26-6b-3.1(1).
8) The identity of the person subject to the OR. §26-6b-3.3(1).
9) The identity or location of any premises subject to the OR. §26-6b-3.3(1).
10) The date and time on which the OR begins and the expected duration of the OR. §26-6b-3.1(1); §26-6b-3.3(1).
11) The suspected communicable disease, chemical or biological agent, or other condition that poses a threat to public health. §26-6b-3.3(1).
12) The requirements for termination of the OR, such as necessary laboratory reports, the expiration of an incubation period, or the completion of treatment for the communicable disease. §26-6b-3.3(1).
13) Any conditions on the restriction, such as limitation of visitors or requirements for medical monitoring. §26-6b-3.3(1).
14) The medical or scientific information upon which the OR is based. §26-6b-3.3(1).
15) The right to a judicial review. §26-6b-3.1; §26-6b-3.3(2).
16) The right to be represented by counsel. §26-6b-3.3(2).
17) The right to notice of the date, time, and location of any hearing. §26-6b-3.3(2).
18) The right to participate in any hearing in a manner established by the court. §26-6b-3.3(2).
19) The right to respond and present evidence and arguments. §26-6b-3.3(2).

20) The right to cross examine witnesses. §26-6b-3.3(2).
21) The right to review and copy all records in the possession of the DOH that relate to the OR. §26-6b-3.3(2).
22) The right not to be terminated from employment if the reason for termination is based solely on the fact that the person is or was subject to an OR. §26-6b-3.3(4). (There statute provides for no civil or criminal penalties if an employer violates the statute, so the employee probably would have to file a civil action for damages.)

Note: The respondent also has the right to designate who is to receive notice of the hearing, §26-6b-4(2), but this does not need to be included in the notice of rights.

Periodic review. If a person consents to an OR, the DOH must reexamine the person's case at least every 6 months. If the conditions justifying the OR cease to exist, the DOH must immediately release the person. If the conditions continue to exist, the DOH must notify the person of

1) the department's findings,
2) the expected duration of the OR,
3) the reason for the decision; and
4) the person's right to request judicial review. §26-6b-3.1(2).

(vii) Medical records

Health care providers and facilities and governmental entities are to provide the person with relevant medical records. There is no charge for records from governmental health care facilities and governmental entities. The charge for records from private health care providers and facilities is limited by the presumed reasonable charges established for workers' compensation by administrative rule of the Labor Commission. §26-6b-3.4. CITE TO RULE.

Any medical records held by the district court are to be sealed. §26-6b-3.4.

Note: Typically medical records held by the court are classified as "private" rather than "sealed." CJA 4-202.02(4). When classified as private, the record is separated from public records and is available to the court and to the parties but not to the public. A sealed record is physically sealed and requires a court order to open. For ease of processing the file, the court should treat the records as private during the pendency of a case and seal the records at the end.

Section 26-6-27 regulates medical records in the possession of the DOH. Taken by itself, that section would prohibit the dissemination of the medical records even to the subject of the record, but §26-6b-3.4 is sufficient to overcome that restriction.

Section 26-6-28 provides: “No officer or employee of the department or of a local health department may be examined in a legal proceeding of any kind or character as to the existence or content of information retained pursuant to this chapter or obtained as a result of an investigation conducted pursuant to this chapter, without the written consent of the individual who is identified in the information or, if that individual is deceased, the consent of his next-of-kin.” This section appears broad enough to prohibit testimony by the public health official in the judicial review of an OR, and there appears to be nothing in Title 26, Chapter 6b to overcome it. Although the result surely was not intended by the Legislature, this point presents an interesting puzzle: The burden of proof is on the petitioner; if the respondent does not consent, the evidence does not come in; the petitioner cannot meet the burden of proof; case dismissed.

(b) Judicial Review of Orders of Restriction

(i) Petition.

The DOH must file a petition for judicial review within 5 days after issuing the OR or within 5 days after receiving notice of withdrawal of consent. §26-6b-3.1(2).

Note: The DOH is to proceed by petition for judicial review if the DOH decides not to seek consent to OR, the respondent withdraws consent, or the respondent decides against consent. §26-6b-4(1). In the last of these circumstances, the clock is running while the DOH attempts to obtain the respondent’s consent.

The petition itself can be a simple form asking the court to review the OR. Under §26-6b-5(2), the petition (called an “:application” in this one section) must be accompanied by:

1) an affidavit of the department stating:
   (a) a belief the respondent is subject to restriction;
   (b) a belief that the respondent is likely to fail to submit to examination, treatment, quarantine, or isolation if not immediately restrained;
   (c) that this failure would pose a threat to the public health; and
   (d) the personal knowledge of the respondent’s condition or the circumstances that lead to that belief; and
2) a statement by a licensed physician indicating the physician finds the respondent is subject to restriction.

Note: “Subject to restriction” means the respondent is:
“(a) infected or suspected to be infected with a communicable disease that poses a threat to the public health and who does not take action as required by the department to prevent spread of the disease;
(b) contaminated or suspected to be contaminated with an infectious agent that poses a threat to the public health, and that could be spread to others if remedial action is not taken;

(c) in a condition or suspected condition which, if the individual is exposed to others, poses a threat to public health, or is in a condition which if treatment is not completed the individual will pose a threat to public health; or
(d) contaminated or suspected to be contaminated with a chemical or biological agent that poses a threat to the public health and that could be spread to others if remedial action is not taken." §26-6b-2(5).

The requirements of the accompanying documents are somewhat redundant: (1)(a) and (2) require the same conclusion, the former by a public health official, the latter by a physician. The public health official might be a physician, thus satisfying both components. The affidavit must allege that failure to submit to examination, treatment, isolation or quarantine poses a threat to public health, but the threat to public health is also built into the definition of "subject to restriction."

Under (1)(d) the public health official must show personal knowledge why s/he believes the respondent is subject to restriction. This is redundant of the OR itself, which must contain the medical or scientific information upon which it is based. §26-6b-3.3(1).

Also under (1)(d), the public health official must show personal knowledge why s/he believes the respondent is likely not to submit to the OR if not immediately restrained. "Not immediately restrained" includes continued restraint, so, at this stage, the respondent may or may not be in custody. If the respondent is in custody, the petition is being filed because the respondent has decided not to consent to the OR. That fact alone is probably sufficient to meet this requirement. If the respondent is not in custody, s/he may not have had an opportunity to consent. In the latter event, the circumstances are more varied and the public health official will need to allege more specific facts to support the belief. The mere fact that the respondent is not in custody may lend support to the threat to public health, but probably not to a belief that the respondent will not voluntarily consent to the OR.

(ii) Venue.

Venue is in the county in which the respondent resides or is located. §26-6b-5(1). This special venue provision controls over §78-13-7. If the petition is filed in the respondent's county of residence, venue is proper under either statute. Section 78-13-7 probably does not create venue in the county in which the respondent happens to be found. This benchbook does not analyze whether venue would be proper, under §78-13-7, in the county in which the cause of action arises.

Determining the respondent's residence will fall within reasonably well-established principles. Determining where the respondent is located is a simple question of fact.

The court "may transfer the proceedings to any other district court … where venue is proper, provided that the transfer [is] not … adverse to the legal interests of the [respondent]." §26-6b-4(4). If the respondent is taken into custody and is being held in a county other than the county of residence, absent special circumstances, DOH should file, or the court should move, the case to the respondent's county of residence to be close to the respondent's personal support.

NEED TO STRETCH VENUE LAW A BIT SO WE CAN CONDUCT THE HEARING IN A BETTER (ELECTRONICALLY) EQUIPPED COURTROOM.

(iii) Notice of the petition.

If the respondent is in custody, the petitioner shall "provide" to the respondent written notice of the petition "as soon as practicable," and shall "send" the notice to the legal guardian, legal counsel, and any other persons and immediate adult family members whom the respondent or the district court designates.

The notice required by §26-6b-4(2) appears to correspond to the service of process required by URCP 4. The statute requires the DOH to "provide … written notice" of the petition to the respondent and to advise "that a hearing may be held within the time provided by [Title 26, Chapter 6b]." §26-6b-4(2). Rule 4 adds more detail to these requirements.

The petitioner must serve the petition and summons as required by URCP 4, as well as the notice of hearings required by §26-6b-4(2).

If the conditions described in Rule 4(d)(1)(B), (C), or (D) are satisfied – that is, the respondent is under age 14, has been judicially declared to be of unsound mind or incapable of conducting his or her affairs, or is incarcerated in or committed to a governmental facility – the petitioner must satisfy the special service requirements of those subsections.

If, as a result of the OR, the respondent is in custody at a governmental health care facility, petitioner can serve the respondent's health care custodian under URCP 4(d)(1)(D). If, as a result of the OR, the respondent is in custody at a private health care facility, the health care facility might temporarily be considered the respondent's usual place of abode and the staff are of suitable age and discretion; but the staff do not reside at the facility, so that part of Rule 4(d)(1)(A) is not satisfied. However, §26-6b-2(c) authorizes the judge to direct the manner of service if normal service is not practical, and service on the private health care staff appears reasonable under these circumstances. To avoid unnecessary complications over service, the court should recognize, and if necessary authorize, service on the respondent's private health care custodian as sufficient for service on the respondent.

In either event, the petitioner could serve the petition and summons on the respondent personally, using suitable protection against contagion, on a person of

suitable age and discretion at the person's dwelling house, URCP 4(d)(1)(A), or by mail with a signed return receipt. URCP 4(d)(2).

URCP 4 permits service up to 120 days after the petition is filed. However, the statutory requirement to serve "as soon as practicable" should control.

The DOH also must send the written notice to the respondent's guardian and counsel, and to any other persons and immediate adult family members designated by the respondent or the district court. §26-6b-4(2). If the conditions described in Rule 4(d)(1)(B), (C), or (D) are satisfied – that is, the respondent is under age 14, has been judicially declared to be of unsound mind or incapable of conducting his or her affairs, or is incarcerated in or committed to a governmental facility – the petitioner must satisfy the special requirements of those subsections, which require personal service of the petition and summons on people other than the respondent.

For service on people listed in §26-6b-4(2) but not in URCP 4(d)(1), the statute, not the rule, governs. The statute does not describe what form the notice must take, but, presumably, it might be something other than the petition and summons. At a minimum it must notify the recipient of the petition and the hearings. The statute also does not define "send," but, again presumably, sending might be accomplished by first class mail.

For the purpose of determining who should receive notice of the petition under the statute, the person, even if an immediate adult family member, has to be designated by the respondent or the court. The phrase "immediate adult family members" is not defined, but, because the respondent can designate "any other persons" to receive notice, the lack of a definition probably does not matter. The court also may designate who other than the respondent should be notified, and may be called upon the do so if the respondent does not provide information necessary for service. §26-6b-4(2). The court may establish reasonable limits on the number of people the respondent may designate. §26-6b-4(2)(c); §26-6b-3.3(2)(c).

(iv) Appointed Counsel.

The court appoints counsel for a respondent who is indigent, and the county in which the respondent resides or is found pays the reasonable attorney fees. §26-6b-4(3). The Board of District Court Judges has approved standards for determining indigency, which are available on the web at: _____.

Presiding judges, trial court executives, state and local bar associations and the AOC are working with county governments to recruit and train lawyers willing to accept appointments as respondent's counsel. The list of lawyers for each county is available on the web at: _____.

The statute directs the county to pay for "reasonable" attorney fees "as determined by the district court." §26-6b-4(3). Unlike appointed counsel in criminal cases, who are usually under contract with the county and paid according to that contract, the district

court will have to determine reasonable attorney fees for representation in judicial review of an OR. URCP 73 describes the process for claiming attorney fees. There is no provision for recoupment of attorney fees. If the respondent is not a resident of the county in which the judicial review takes place, the judge will have to decide which county is responsible for the attorney fees.

Whether appointed or retained, counsel must be given time to consult with the respondent before any hearing. §26-6b-4(3).

NEED A PROCESS AS PART OF "BOOKING" TO GET RESPONDENT RETAINED OR APPOINTED COUNSEL. CANNOT HAVE THE HEARING REQUIRED FOR THE EXAMINATION ORDER WITHOUT COUNSEL.

(v) Hearings.

There are three types of hearings: a hearing for an examination order, a hearing on the merits of the petition, and review hearings. Several principles apply to all three.

Notice of hearings. Notice of the hearings must be served on the respondent, respondent's guardian, respondent's counsel and any other persons and immediate adult family members designated by the respondent or the court. §26-6b-4(2).

Participation in the hearings. The respondent must be present, unless the respondent shows good cause for waiving his or her attendance. The court must include the facts and finding of good cause on the record. §26-6b-4(3). If the respondent's condition and physical presence pose a health threat, the court may order that the respondent participate by telephone or other electronic means. §26-6b-3.3; §26-6b-4(3).

In addition to the petitioner and respondent, all other persons to whom notice is required to be given have the right to appear at the hearings, testify, and present and cross-examine witnesses. The district court may receive the testimony of any other person. §26-6b-4(3). The court may exclude any person not necessary for a hearing. §26-6b-4(5).

> Note: It is at this point that the need to regulate who receives notice of the petition under §26-6b-4(1) becomes obvious: they all have the right to testify and present and cross-examine witnesses, which may interfere with orderly proceedings. It is important that the family of a respondent know what is happening to the respondent, but it also is important to conduct proceedings in an orderly manner. The judge might control the proceedings in part by the Rules of Evidence. §26-6b-4(7). Although all who are required to be notified have the right to testify and to call and cross-examine witnesses, nevertheless that testimony must be relevant under URE 401.

Evidence at the hearings. The hearings are to be conducted in "as informal a manner as may be consistent with orderly procedure, and in a physical setting that is

not likely to have a harmful effect on the health of the [respondent] or others…." §26-6b-4(6). Since the Rules of Evidence apply, §26-6b-4(7), the statutory admonition for informality appears to be directed at the manner in which the hearing is conducted rather than the evidence on which the facts are determined. The Rules of Civil Procedure have no provision for how to conduct a fact-finding type of hearing. The court has general authority to provide for the orderly conduct of proceedings. §78-7-5.

Orders. The specifics of an order are governed by the purpose of the particular hearing. As a result of any of the hearings, the court may order that the respondent be moved to a more appropriate health care facility including one "outside of its jurisdiction…." §26-6b-4(4).

Note: Since the jurisdiction of the court is statewide, the phrase "outside of its jurisdiction" might be interpreted to mean transfer to an out-of-state facility. Probably the Legislature intended to permit transfer to a facility in another county.

(vi) Hearing for an examination order.

The court will first be called upon to enter an examination order. §26-6b-5(3). There is no statutory deadline for the hearing. It obviously is supposed to happen quickly. Given the short turn-around time, the court may have to direct the petitioner to give the best notice possible. §26.6b.-4(2).

Note: The court's examination order is required even though the OR already includes examination, as well as isolation, quarantine and treatment, §26-6b-2(3), and even though the DOH has the authority to order involuntary examination if the respondent refuses to take the action directed by the DOH. §26-6-4(2). The court's consideration of an examination order appears to be a preliminary judicial restraint on the executive authority to detain a person for medical reasons, similar to an arraignment. However, as discussed below, the court plays a very narrow role.

There is no exception from the examination order requirement if the respondent is in custody and decides not to consent to the OR. The court must still make this preliminary determination. If the respondent is not in custody, the hearing for the examination order is ex parte, §26-6b-(4).

The court shall issue the examination order if:

1) there is a reasonable basis to believe that the respondent's condition requires involuntary examination, quarantine, treatment, or isolation pending the hearing; or
2) the respondent has refused to submit to and examination as directed by the DOH or to voluntarily submit to examination, treatment, quarantine, or isolation.

Note: Under the first standard, the court evaluates whether there is a reasonable basis to believe that the respondent's condition requires involuntary examination,

treatment, isolation or quarantine pending the hearing on the merits. Under this standard, the court evaluates the objective reasonableness of the public health official's beliefs stated in the affidavit accompanying the petition.

However, the court will never get to this evaluation because under the second standard, the only issue is whether the respondent has "refused" examination, treatment, isolation or quarantine. The statute is a bit strident. Under this standard the court determines only whether the respondent has decided not to consent to the OR. That finding will always be in the affirmative since the petition for judicial review is never filed if the respondent does consent. Thus, this preliminary judicial restraint on the executive branch is really very narrow. The whole purpose of an examination order is unclear if the respondent has already been involuntarily examined by direction of the DOH. In that circumstance, the better procedure would be to move to the merits of the petition, but the statutes appear not to permit that course.

Content of the order. The examination order requires the respondent to submit to involuntary restriction (examination, treatment, isolation or quarantine) to protect the public health.

(vii) Hearing on the merits of the OR.

Deadline for hearing. The hearing must be held within 10 business days of the examination order. §26-6b-6(1). At least 24 hours before the hearing, the petitioner must file a written opinion of a qualified health care provider:

1) whether the respondent has an infectious communicable disease, is contaminated with a chemical or biological agent, or is in a condition that is a threat to the public health;
2) that despite the exercise of reasonable diligence, the diagnostic studies have not been completed;
3) whether the respondent has agreed to comply with necessary examination, treatment, quarantine, or isolation; and
4) whether the petitioner believes the respondent will comply without court proceedings. §26-6b-5(5).

Note. Item (1) requires only the conclusion, not necessarily the basis for the conclusion.

The statute says nothing about serving the respondent with this filing, but URCP 5(a) requires, in essence, that everything filed with the court be served on the parties. Therefore, this filing must be served on the respondent or the respondent's lawyer. Whether the other people designated under §26-6b-4(2) need to be served is unclear. They are not, strictly speaking, parties, so URCP 5 probably does not apply. Section 26-6b-4(2) provides only that notice of the petition and hearing need to be served. However, the people with notice have the

right to participate in the hearing and probably cannot do so effectively without this information. The court has the authority under URCP 5 to order that they be served, even if the rule and statute do not require it directly.

Canceling or postponing the hearing. If the respondent is not subject to restriction, (that is, not infected or not a threat to the public health) the court may dismiss the petition without holding the hearing. §26-6b-6(2). If the tests prove that the respondent is not subject to restriction, the court may dismiss the petition without holding the hearing. §26-6b-6(3).

Note: These two circumstances are in separate subsections of §26-6b-6, but it is unclear how they differ.

If the respondent stipulates to the OR, then the court may issue its order without holding the hearing. §26-6b-6(2).

The court may postpone the hearing on the merits of the petition and extend the examination order for a reasonable period up to 90 days if, after a hearing, the court has reason to believe that the respondent:

1) is contaminated with a chemical or biological agent that is a threat to the public health; or
2) is in a condition, the exposure to which poses a threat to public health, but despite the exercise of reasonable diligence the diagnostic studies have not been completed. §26-6b-6(3).

Note: This subsection creates significant confusion and difficulty.

Conducting the necessary tests within 10 days, especially in the midst of a pandemic, may not be possible. That is not the issue. The first issue is one of statutory construction. It appears from this subsection that if the court has reason to believe the respondent has an infectious communicable disease, but the tests have not yet been completed, the court cannot extend the examination order. This is an absurd result, and yet, of the three conditions for the initial examination order – the respondent has an infectious communicable disease, is contaminated with a chemical or biological agent, or is in a condition that is a threat to the public health, only the last two are listed as bases for extending the examination order.

The second issue is one of more fundamental fairness. If the court determines that the tests have not been competed despite the exercise of reasonable diligence, extending the examination order is fair. To extend the examination order on a “reason to believe” standard when the tests have been completed is not. Yet that is what the statute permits if the court has reason to believe the respondent is contaminated with a chemical or biological agent. Under such a

circumstance, the court should not extend the examination order, but should proceed to a hearing on the merits of the petition.

The focus for the purpose of extending the examination order will be on whether the DOH exercised "reasonable diligence" in trying to finish the tests. Since the court has already entered an initial examination order, the petitioner has already met the standard of "reason to believe" that the respondent's condition poses a threat to public health.

"Discovery." At the hearing, the petitioner is to provide to the court and to the respondent the OR, admission notes if the respondent was hospitalized, and medical records pertaining to the OR. The respondent can request the records be delivered before the hearing. §26-6b-6(4) and (5).

Findings and order. The court shall order the respondent to submit to the OR if, upon completion of the hearing and consideration of the record, it finds by clear and convincing evidence that:

1) the respondent is infected with a communicable disease, is contaminated with a chemical or biological agent, is in a condition the exposure to which poses a threat to public health, or is in a condition which if treatment is not completed the respondent will pose a threat to public health;
2) there is no appropriate and less restrictive alternative to the OR;
3) the petitioner can provide the respondent with adequate and appropriate treatment; and
4) it is in the public interest to order the respondent to submit to the OR.

If the court does not find all of these conditions, the court shall immediately dismiss the petition.

Note: In developing the findings, especially around items (2) and (3) the court should consider that under §26-6b-4(4) it can order the respondent moved to a more appropriate health care facility. Indeed, the respondent's position may be not to challenge the findings of the threat to the public health, but to argue for a more suitable treatment alternative.

The court's order must designate its duration, which may not be for more than 6 months. §26-6b-6(7) and (8).

Note: The order should be for no longer than is needed to protect the public health. §26-6b-3(2). For infection or contamination the order should be for no longer than is needed to treat the disease or contamination. The finding of "a condition which if treatment is not completed the respondent will pose a threat to public health," appears to be aimed at an OR that quarantines a healthy person for the incubation period of an infectious disease. If that is the case, the court should set the duration of the order for the incubation period.

(viii) Review hearings.

At least two weeks before the court's order expires, the petitioner must inform the court and immediately reexamine the reasons upon which the court's order was based. If the petitioner determines that the conditions justifying the order no longer exist, it shall discharge the respondent and report its action to the court, which shall terminate the order. Otherwise, the court shall schedule a hearing before expiration of its order and proceed under Sections 26-6b-4 through 26-6b-6.

> Note: The court should not rely on the DOH to monitor the respondents. The court should track the expiration of its order and initiate review proceedings earlier than required to allow more time for consideration and as a check on the DOH recordkeeping.

Order. After the review hearing, the court may enter an OR for an indeterminate time if the court finds by clear and convincing evidence that:

1) the respondent is infected with a communicable disease, is contaminated with a chemical or biological agent, is in a condition the exposure to which poses a threat to public health, or is in a condition which if treatment is not completed the respondent will pose a threat to public health;
2) there is no appropriate and less restrictive alternative to the OR;
3) the petitioner can provide the respondent with adequate and appropriate treatment;
4) it is in the public interest to order the respondent to submit to the OR; and
5) that these conditions will continue for an indeterminate time.

Otherwise, the maximum duration of the order is 6 months. §26-6b-6(8).

The petitioner shall reexamine the reasons upon which an indeterminate OR was based at six-month intervals. If the petitioner finds that the conditions justifying that the OR no longer exist, the petitioner shall discharge the respondent and immediately report its action to the court, which shall terminate the order. §26-6b-7(1).

If the petitioner finds that the conditions justifying the OR continue to exist, the petitioner shall file its report with the court and notify the respondent and counsel in writing that the OR will be continued, the reasons for that decision, and that the individual has the right to a review hearing by making a request to the court. Upon receiving a request for review, the court shall immediately set a hearing date and proceed under Sections 26-6b-4 through 26-6b-6. §26-6b-7(2).

(c) Transportation.

The sheriff of the county where the individual is located transports the respondent to court and to the place for examination, quarantine, isolation, or treatment. §26-6b-9.

(d) Costs.

The respondent and the respondent's insurance are responsible for the costs for examination, quarantine, isolation, and treatment. If the respondent and the insurance do not pay, the DOH pays. §26-6b-9.

(e) A group of individuals as respondents.

Title 26, Chapter 6b anticipates that the OR may cover a group of people, and the court needs to be prepared to manage a case in which several people are respondents. If an OR covers a group and some individuals consent to the OR while others do not, only the cases of those who do not consent will be presented for judicial review. §26-6b-4(1).

(i) Notice of the OR.

Notice for a group may differ from that for an individual, at least initially. The DOH may modify the method of providing notice to the group or modify the information contained in the notice if the DOH issues an OR for a group and if the public health official determines the modification of the notice is necessary to:

1) protect the privacy of medical information of individuals in the group; or
2) provide notice to the group in a manner that will efficiently and effectively notify the individuals in the group within the time period necessary to protect the public health. §26-6b-3.3(3)

The statute does not say what form group notice should take. If a DOH modifies the notice required for an individual, the DOH must provide each individual in the group with conforming notice as soon as practical. §26-6b-3.3(3).

(ii) Notice of the petition for judicial review.

If the court determines that written notice to each individual in the group is not practical, considering the threat to public health, the court may order the DOH to provide notice to group in a manner determined by the court. §26-6b-4(2).

Note. §26-6b-4(2) is the section that correlates to URCP 4(d) on service of process. If the court invokes this subsection, the court can direct appropriate service under URCP 4(d)(4) on other types of service.

(iii) Procedures

Rules of Civil Procedure. When a group is subject to an OR, the court has at least three procedures from which to chose to manage the petition for judicial review.

1) Join all of the individuals as respondents under URCP 20.

2) Consolidate the cases under URCP 42.
3) Certify the case as a class action under URCP 23.

Note: If the OR covers a group under the same factual circumstances, (For example, “all persons attending the theater on 123 Main Street on June 15.”) the simplest approach is to treat the individuals in the group as co-respondents in a single petition under URCP 20. If there are multiple petitions to review multiple ORs, each one covering a person with a different factual circumstance, consolidating the petitions under URCP 42 may be more appropriate. Although the facts may be different, the issues of law will almost always be the same. A class action under URCP 23 may be appropriate under some circumstances, but the rule was not developed with this type of judicial review in mind, and may present issues that make case management more difficult than under the other two options.

Master Calendar. Most cases, especially in counties with several resident judges, are assigned by individual calendaring. That is, the case is assigned to a judge upon filing, or at some other relatively early stage, and the assigned judge manages the case until final judgment. There are aspects of these petitions for judicial review that lend themselves to master calendaring. That is, a judge or a rotation of judges manages whatever cases are calendared for that particular day.

1) The cases have special procedures.
2) The issues of law will be substantially the same in all cases.
3) There may be multiple cases involving the same petitioner and attorneys.
4) The hearings may be held in the midst if a pandemic.

On-call Judge. [IS ONE NEEDED/ IS THERE ANYTHING SIMILAR TO AN AFTER-HOURS ARREST WARRANT?]

(4) COURT OPERATIONS DURING PUBLIC HEALTH EMERGENCY

(a) Operations Contingency Plan

(5) GLOSSARY OF TERMS

(6) STATUTES

26-6-2. Definitions.
26-6-3. Authority to investigate and control epidemic infections and communicable disease.
26-6-4. Involuntary examination, treatment, isolation, and quarantine.
26-6-7. Designation of communicable diseases by department -- Establishment of rules for detection, reporting, investigation, prevention, and control.
26-6-27. Information regarding communicable or reportable disease confidential -- Exceptions.

26-6-28. Protection from examination in legal proceedings -- Exceptions.
26-6-29. Violation -- Penalty.
26-6-30. Exclusions from confidentiality requirements.
26-6b-1. Applicability of chapter -- Administrative procedures.
26-6b-2. Definitions.
26-6b-3. Order of restriction.
26-6b-3.1. Consent to order of restriction -- Periodic review.
26-6b-3.2. Involuntary order of restriction -- Notice -- Effect of order during judicial review.
26-6b-3.3. Contents of notice of order of restriction -- Rights of individuals.
26-6b-3.4. Medical records -- Privacy protections.
26-6b-4. Judicial review by the district court -- Required notice -- Representation by counsel -- Conduct of proceedings.
26-6b-5. Petition for judicial review of order of restriction -- Court-ordered examination period.
26-6b-6. Court determination for an order of restriction after examination period.
26-6b-7. Periodic review of individuals under court order.
26-6b-8. Transportation of individuals subject to temporary or court-ordered restriction.
26-6b-9. Examination, quarantine, isolation, and treatment costs.
26-6b-10. Severability.

(7) RULES

(a) Court Rules

(b) DOH Rules

R386-702-1. Purpose Statement.
R386-702-2. Definitions.
R386-702-3. Reportable Diseases, Emergency Illnesses, and Health Conditions.
R386-702-4. Reporting.
R386-702-5. General Measures for the Control of Communicable Diseases.
R386-702-6. Special Measures for Control of Rabies.
R386-702-7. Special Measures for Control of Typhoid.
R386-702-8. Special Measures for the Control of Ophthalmia Neonatorum.
R386-702-9. Special Measures to Prevent Perinatal and Person-to-Person Transmission of Hepatitis B Infection.
R386-702-10. Public Health Emergency.
R386-702-11. Penalties.
R386-702-12. Official References.

(8) MODEL FORMS

(a) Court Forms

(b) DOH Forms

(9) CONTACTS

State Department of Health
Local Department of Health
County Attorney
Attorney General
Respondents' Attorneys

Stuff
HHS checklist
HHS practical considerations
Appx C&D from Florida