

ARIZONA JUDICIAL COUNCIL

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FROM:

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DISCUSSION:

This is an update of the status of the Public Health Law Judicial Reference Guide for Arizona Courts (AKA: Public Health Law Benchbook) which is in draft form and nearing completion. The vetting and publication process for the document will be discussed.

RECOMMENDED COUNCIL ACTION:

None required.

PUBLIC HEALTH LAW JUDICIAL REFERENCE GUIDE FOR ARIZONA COURTS

CENTER FOR PUBLIC HEALTH LAW PARTNERSHIPS

UNIVERSITY OF LOUISVILLE

A COLLABORATING CENTER OF
THE PUBLIC HEALTH LAW PROGRAM

CENTERS FOR DISEASE CONTROL & PREVENTION

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[list members of Louisville team who worked on other state guides--?]

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Disclaimers

This Reference Guide has been reviewed by the Arizona Judicial Council, but it is not an official publication of that body [?]; it is not a rule of the Arizona Supreme Court; [“manual”?]. It has been prepared to assist judges in the conduct of their work [although the author hopes it may also be of value to public and private attorneys working in public health law and to public health administrators].

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Introduction

In 1905 the United States Supreme Court decided the landmark case *Jacobson v. Massachusetts* [cite], upholding Massachusetts' law requiring citizens to be vaccinated against pending smallpox epidemics, over a citizen's constitutional challenge based on the "liberty" clause of the 14th Amendment. *Jacobson* firmly established the judiciary as both an enforcer of government public health policies and an arbiter of the conflicts between individual liberties and public interests that often arise when government acts to protect public health. The principles set forth in that case still constitute the bedrock of American public health law. See Wendy E. Parmet *et al.*, *Individual Rights v. the Public Health – 100 Years After Jacobson v. Massachusetts*, 352 NEW ENG. J. MED. 652 (2005).

One hundred years later, and notwithstanding the continuing centrality of *Jacobson*, scholars and policymakers are drawing attention to the need for a "renaissance" in public health law. The latter third of the 20th Century saw a decline in support for and attention to the infrastructure of the American public health system. At the same time, however, the emergence of new infectious diseases, concerns about bioterrorism, and other factors have prompted a sense of renewed urgency about the adequacy of the public health system to meet contemporary challenges. Far from avoiding such scrutiny, the legal underpinnings of that system have rightly received especially close attention. Events of fall 2001 starkly illustrated that renewed focus on both the administrative and legal dimensions of public health was needed in order to deal adequately with emerging public health threats, both man-made and natural. Such concerns were only heightened by the subsequent global epidemic of Severe Acute Respiratory Syndrome (SARS), and then by the emerging threat of avian flu. In recent years policymakers and scholars have turned a critical eye on public health "legal preparedness" – assessing current public health laws, updating those laws as needed, and educating those who enforce and apply public health laws to ensure adequate responses both to the novel threats noted above, and to more traditional ones that are likewise the subject of renewed concern, such as vaccination and tuberculosis.

Public health law is primarily state law. Several considerations make judicial interpretation of public health law especially challenging. First, like *Jacobson*, the majority of public health cases addressing infectious diseases or other conditions requiring the intervention of county or local health departments date to at least the early 20th Century. In Arizona, the statutory framework itself arose at precisely that time: the first comprehensive public health code was enacted in 1903 as Territorial Law. Much of that statutory law was re-adopted upon Arizona's transition to statehood, and much of it remains codified today -- in many instances literally unchanged. While such statutory and case-law doctrine clearly remains "good law" in a formal sense, its suitability to drastically changed state, national and global conditions can be challenged.

Second, the application of many public health laws is complicated by the fact that the authorizing statutes often predate current rules of evidence, procedure, and constitutional doctrine. That is -- in addition to the kinds of changes *outside* the law just noted -- there have been important changes in “surrounding” law. In constitutional law, for example, there has been a major transformation in the judicial recognition and protection of individual rights, beginning with the Warren Court at mid-century (initially in the criminal context and expanding subsequently into civil realms). Yet public health law itself, which is largely civil in nature, has not kept pace. To choose but one example: statutes providing for the management of tuberculosis generally predate the mid-20th Century. When TB re-emerged in the late 1980s and early 1990s, some patients, objecting to their treatment and confinement by government authorities, brought legal claims asserting that their rights to both procedural and substantive due process were being violated under application of the “old” laws (which, in many cases, were indeed blunt instruments by contemporary standards). With little else to go on, such courts frequently looked for guidance to their state laws on civil commitment of the mentally ill, where law reform to accommodate the new constitutional doctrines had already occurred. (In Arizona, we have a newly-drawn law specifically for TB, which largely reflects contemporary constitutional norms. Accordingly, this Reference Guide omits treatment of civil commitment (which is primarily relevant to “public health” for the analogies it can provide, rather than for its substance).

Third, public health experts in court proceedings often use complex scientific terminology in describing public health science methodology (e.g., epidemiology, biostatistics, contact tracing; see Appendix B for Public Health Glossary). In some situations, judges will need to adapt legal parlance to the public health context. For example, at law the term “quarantine” means (a) the right of a widow to remain in her deceased husband’s principal home for a period of forty days following his death; (b) the holding of potentially contaminated ships and other vessels of transportation away from the general public for a specified period (originally, forty days); (c) the segregation of plants and animals to prevent the spread of agricultural diseases; or (d) the placement of a prisoner into solitary confinement. Although several of these definitions are clearly health-related, none specifically captures the most common public-health usage of the term “quarantine”: the limitation of a healthy individual’s activities and movement after exposure (known or suspected) to a communicable disease, in order to prevent the disease’s spread during its period of transmissibility.

Finally, in the event of a public health emergency, the deliberative nature of the judicial process may be strained to keep pace with the rapid response and containment measures sought by members of the public health community and, perhaps, by the sheer scale of the emergency.

This Reference Guide was created as a significant part of the current public health emergency legal preparedness initiative under way at the Public

Health Law Program of the Centers for Disease Control and Prevention (CDC). This work, initiated in early 2001, has generated draft model state public health legislation; training materials and programs for public health personnel, law enforcement agents, emergency management, and state attorneys general, addressing issues such as the legal bases for coordinated responses to public health emergencies; checklists and other tools for assessing count- and state-level public health legal preparedness; and the CDC Public Health Emergency Legal Preparedness Clearinghouse, among other products and services. The Center for Public Health Law Partnerships was founded in October 2003, with funding from the Public Health Law Program, to improve legal preparedness by developing partnerships with public health agencies, judicial education organizations, and law enforcement training organizations. Several other states, notably Indiana and Kentucky, have already developed their own state judicial reference guides to public health law under this CDC program. This Arizona Reference Guide benefits greatly from the existence of those other guides, which in many particulars have served as models for the contents and organization of this book.

The Judicial Reference Guide is intended to protect the health and safety of communities by improving legal preparedness for both public health emergencies and more routine public health cases. In addition, the Reference Guide may help increase communication between the judiciary and public health agencies (and their attorneys) at the community, state, and national levels and across a broad spectrum of public health issues. Although courts have historically been vital protectors of the public's health (e.g., authorizing sanitary inspections through the issuance of warrants, enjoining nuisances, enforcing vaccination requirements), relationships between public health agencies and the judiciary remain rare. In this new era of bioterrorism, emerging infectious diseases, and potential pandemics, courts play an even more critical role in protecting the public's health. This Reference Guide is intended to be a tool that judges may use as they confront the range of public health issues that come into their courtrooms.

It would be impractical to address every aspect of the legal system potentially affected by public health concerns. Reference guides, or "bench books," are not exhaustive analytical works; rather, they are readily accessible legal references for judges to consult, providing, for example, procedural frameworks, statutory texts, summaries of relevant case law, and model orders. This Reference Guide to Arizona public health law focuses on nine discrete topics (each of which constitutes a chapter), grouped into three major areas, or "Parts." Part I, jurisdiction and government structure, focuses on the legal nature and authority of each of the institutions whose activities intersect around the contents of this document – the Arizona judiciary and the Arizona public health system. Chapter 1 explores jurisdictional matters, both in terms of federalism and within the state. Chapter 2 sets forth the structure, powers, and duties of

Arizona's government public health agencies – the “governmental public health infrastructure” -- at the state and local levels.

Part II explores many of the important areas where classic, recurring tensions arise between public health and individual liberties. Chapter 3 reviews public health “surveillance” – the collection of information about the population's health status that includes the reporting of communicable diseases and, therefore, raises issues about intrusions upon privacy and can lead to restrictions on behavior. Chapter 4 explores those restrictions, under the heading of “control” measures for communicable disease that may include isolation, quarantine, and less draconian interventions (such as temporary re-assignment of work responsibilities), as well as school immunization law and tuberculosis control. Chapter 5 explores applicable state and federal law on “health information privacy.” The topics in this Part are, in a sense, the “meat and potatoes” of much of traditional public health law.

In Part III, the Guide turns to the other major area where government policy to advance health and safety trenches upon cherished freedoms: the ownership, use and control of property. Chapter 6 explores constitutional dimensions of these issues and then turns to a review of traditional regulatory tools: nuisance control, sanitary laws, and “takings.” Chapter 7 is devoted to the specialized topic of animal control in the interests of human health and safety.

Finally, Part IV focuses solely on “emergency” powers of government. Chapter 8 sets forth the general provisions of state law under which emergencies are to be managed, including the operation of courts during an emergency, while Chapter 9 specifically explores emergency public health powers and their limits.

There are a number of other health-related regulatory functions undertaken by government which, as the above review suggests, are not included in this book. These include hospital licensure; licensure and certification of health care professionals; administration of the Arizona Health Care Cost Containment System (AHCCCS); environmental and land use planning; and a range of others. There is a lively debate over what, precisely, the subject of “public health law” should be understood as including and what it properly omits; some believe topics such as the foregoing fall within the term's ambit. All agree, however, that the matters chosen for inclusion in this book are *bona fide* “public health law” topics which, as such, are beyond that dispute. For this reason, as well as for considerations of space and scope, the nine chapter topics just described constitute the Guide's contents.

The Guide concludes with a series of model court orders to implement key public health powers of the state and local health authorities. Other materials in the Appendices include a short essay on Arizona case law dealing with public health (Appendix A); A Public Health Primer (Appendix B), A Public Health Glossary (Appendix C), forms related to the reporting of communicable diseases

(Appendix D), an Index of Statutes (Appendix E), an Index of cited cases (Appendix F), and a selective legislative history of Arizona public health law (Appendix G).

Table of Contents

Chapter/Section	Title	Page
-----------------	-------	------

Part I: Jurisdiction and Governmental Structure

1.00 Jurisdiction In Public Health Law

- 1.10 Federal and State
- 1.20 State and Local Venue Determination

2.00 Health Agencies and Boards

2.10 Arizona Department of Health Services (The Department)

- 2.11 Creation
- 2.12 Organization
- 2.13 Functions of the Department
- 2.14 Enforcement of State Statutes and Rules; Violations; Penalties
Local Health Departments
- 2.15 Powers and Duties of the Director
- 2.16 Advisory Health Council
- 2.17 County or District Liaison Officers

2.20 Local Health Departments

- 2.21 Establishment of Local Health Departments
- 2.22 Composition of Boards of Health of Local Health Departments
- 2.23 Powers of Local Health Departments
- 2.24 Powers and Duties of Directors of County Health Departments
- 2.25 Powers and Duties of Boards of Health of Local Health
Departments
- 2.26 County Rules and Regulations; Violations; Enforcement by
Administrative Civil Sanctions; Enforcement by Judicial Civil and
Criminal Sanctions
- 2.27 Relationship of County Health Services to Cities and Towns

Part II: Public Health and Individual Liberty

- 3.00 Information Collection: Public Health Surveillance and Reporting**
 - 3.10 Surveillance**
 - 3.11 General Authority of DHS to Engage in Public Health Surveillance
 - 3.12 Specific Categories of Public Health Surveillance Activities
 - 3.20 Reporting of Communicable Diseases**
 - 3.21 Definitions
 - 3.22 Statutory Reporting of “Contagious, Infectious, or Epidemic” Diseases
 - 3.23 Detailed Administrative Rules for Reporting “Communicable and Preventable” Diseases
 - 3.30 Enhanced Surveillance Advisories**
 - 3.31 Enhanced Surveillance Advisory; When Appropriate
 - 3.32 Measures Taken During an Enhanced Surveillance Advisory
 - 3.33 Increased Reporting During Enhanced Surveillance Advisory
 - 3.34 Patient Tracking During Enhanced Surveillance Advisory
 - 3.35 Laboratory Testing During Enhanced Surveillance Advisory
 - 3.36 Notification
 - 3.37 Coordination Among Public Health Authorities
 - 3.38 Discretionary Assistance With Reimbursement
 - 3.39 Termination of Enhanced Surveillance Advisory
 - 3.40 Effect of Enhance Surveillance Advisory on Health Agencies’ “Routine” Legal Powers of Surveillance and Control

- 4.00 Limitations on Personal Liberty and Intrusions on Bodily Integrity: Measures for the Prevention and Control of Communicable Diseases**
 - 4.10 General Provisions for Control of Communicable Diseases**
 - 4.20 Control of Vaccine-Preventable Diseases**
 - 4.21 Basic Rule: Proof of Immunization or Immunity as a Condition of Attendance at School or Child-Care Facility
 - 4.22 Exemptions from Immunization Requirements
 - 4.23 Required Immunizations; Other Matters
 - 4.24 Responsibilities of Schools and Child-Care Facilities
 - 4.25 School Liability Protection
 - 4.30 Control of Tuberculosis**
 - 4.40 Isolation and Quarantine in the Absence of an Emergency**
 - 4.41 Introduction

- 4.42 Local Health Departments: Duty to Investigate Infectious or Contagious Disease; Authority to Impose Isolation and Quarantine
- 4.43 Definitions
- 4.44 Diseases
- 4.45 Implementation of Isolation or Quarantine
- 4.46 Judicial Review of Isolation or Quarantine

- 4.50 No Compulsory Treatment by County or State**
 - 4.51 No Compulsory Treatment by County
 - 4.52 No Compulsory Treatment by State

5.00 Health Information Privacy

- 5.10 Privacy of Health Information Under the Health Information Portability and Accountability Act (“HIPAA”)**
 - 5.11 Applicability of HIPAA
 - 5.12 Permitted Uses and Disclosures of Protected Health Information for Public Health Activities
 - 5.13 Other Permitted Uses and Disclosures of Protected Health Information
 - 5.14 Preemption of State Privacy Law Contrary to HIPAA; Exceptions

- 5.20 Privacy of Health Information Under Arizona Health Law**

- 5.30 Privacy of Health Information and Arizona Open Records Law**

Part III: Public Health and Economic Freedom

6.0 Limitations on Economic Freedom: Controls on the Uses of Property in the Interest of Public Health and Safety

- 6.10 Searches and Inspections: Constitutional Dimensions**
 - 6.11 United States Constitution
 - 6.12 Arizona Constitution

- 6.20 Search Warrants**
 - 6.21 Definition
 - 6.22 How to Obtain Warrant

- 6.30 Public Nuisances**
 - 6.31 Public Nuisance and Private Nuisance Defined and Distinguished
 - 6.32 Public Nuisance Actions by Citizens

- 6.33 Public Nuisance Actions by Government
- 6.34 County Inspections of Premises for Nuisance and Other Violations; Warrantless Entry With Consent; Right to Enter With Warrant if Consent Withheld; Removal of Nuisance
- 6.35 Administrative Remedies for Abatement of Nuisances; Enforcement

- 6.40 Sanitary Rules and Regulations of Local Health Departments; Violations; Enforcement**
 - 6.41 Investigation of Nuisances; Duty to Make Regulations Necessary for Public Health and Safety; Public Notice of Regulations
 - 6.42 Administrative Enforcement Proceedings
 - 6.43 Judicial Enforcement Proceedings
 - 6.44 Criminal Sanctions and Proceedings

- 6.50 Government Takings**

7.00 Regulation of Animals in the Interest of Public Health and Safety

Part IV: Public Health in Emergencies

8.00 Emergencies: General Governmental Powers and Duties

- 8.10 Department of Emergency and Military Affairs**
 - 8.11 Organization

- 8.20 State of Emergency**
 - 8.21 Definition
 - 8.22 Proclamation of State Emergency; Gubernatorial Powers; Termination

- 8.30 State of War Emergency**
 - 8.31 Definition
 - 8.32 Governor's Powers During State of War Emergency; Termination

- 8.40 Powers and Duties of Local Governments and State Agencies**
 - 8.41 Authority of state agencies and local governments to issue orders, make rules
 - 8.42 Local Government Emergency Management
 - 8.43 Locally-Declared Emergencies; Powers

- 8.44 Authority of State and Local Governments to Accept Materials and Funds
- 8. 45 Acceptances of Professionals' Out-of-State Licenses
- 8.46 Immunity From Liability for Conduct During Emergency

- 8.50 Enforcement**
 - 8.51 Law Enforcement
 - 8.52 Violation

- 8.60 Operation of Courts During Emergency**

9.0 Emergencies: Public Health Powers

- 9.10 Public Health Authority During State of Emergency or State of War Emergency: General Powers and Limitations**
 - 9.11 Powers of department of health services during declared emergency or state of war emergency involving bioterrorism, epidemic, infectious agent or biological toxin
 - 9.12 Powers of Governor to Issue Orders During State of Emergency or State of War Emergency
 - 9.13 Powers of Governor to Issue Orders During State of Emergency or State of War Emergency Involving Smallpox, Plague, Viral Hemorrhagic Fevers Or Other Diseases
 - 9.14 Prohibition on Compulsory Treatment If Individual Cooperates With Less Intrusive Measures
 - 9.15 Exception for HIV Disease
 - 9. 16 Enforcement

- 9.20 Enhanced Surveillance Advisories**

- 9.30 Isolation and Quarantine Pursuant to a Gubernatorially-Declared Emergency**
 - 9.31 Conditions precedent to exercise of emergency isolation and quarantine powers; powers vested in governor.
 - 9.32 Implementation of Isolation or Quarantine
 - 9.33 Judicial Review of Isolation or Quarantine

- 9.40 Additional Power of Director of Department of Health Services: Emergency Measures for Control of Communicable or Preventable Diseases In the Face of a Threat to Public Health**

Appendices [t/k]

- Appendix A** **Essay: Arizona Public Health Case Law**
- Appendix B** **A Public Health Primer**
- Appendix C** **A Public Health Glossary**
- Appendix D** **Communicable Disease Reporting Forms**
- Appendix E** **Index of Statutes**
- Appendix F** **Index of Cases**
- Appendix G** **Selective Legislative History of Arizona Public Health Law**

1.0 JURISDICTION OVER PUBLIC HEALTH ISSUES

[T-K]

2.00 HEALTH AGENCIES AND BOARDS

[brief narrative link to come]

2.10 ARIZONA DEPARTMENT OF HEALTH SERVICES (THE DEPARTMENT)

2.11 Creation. There is established a department of health services, referred to throughout title 36, chapter 1 as “the department.” A.R.S. §§ 36-102.A, 36-101.3.

Note: For the names of predecessor agencies and their powers and duties to which the department succeeded in 1973, see A.R.S. § 36-103.01

2.12 Organization.

A. Director. In Title 36, chapter 1, “director” means the director of the department of health services. A.R.S. § 36-101.4

1. Appointment and Qualifications. The director is appointed by and serves at the pleasure of the governor. The criteria for appointment are:

- a. Administrative experience in the private sector, with progressively increasing responsibilities;
- b. An educational background that prepares the director for the administrative responsibilities assigned to the position; and
- c. Health related experience which insures familiarity with the peculiarities of health problems. A.R.S. § 36-102.C.

2. General Administrative Responsibilities. The director shall:

- a. Be the executive officer of the department of health services, as well as the state registrar of vital statistics.
- b. Perform all duties necessary to carry out the functions and responsibilities of the department;
- c. Prescribe the organization of the department, including appointment and removal of personnel and abolition of unnecessary positions (A.R.S. § 36-136.A.1-3; § 36-102.B.). The director may establish, abolish or reorganize positions or organizational units, subject to legislative appropriation (A.R.S. § 36-103.A.)

For a complete listing of the director’s powers and duties, see § 2.14, *infra*.

B. Deputy director. A deputy director is appointed by the director with the approval of the governor, serves at the director’s pleasure, and assists

the director in administering the department and its services. A.R.S. § 36-103(B).

C. Assistant directors. The director may appoint an assistant director, serving at the director's pleasure, to each organizational unit that he may establish. A.R.S. § 36-103(C).

2.13 Functions of the department

A. Specific Responsibilities. The department is charged with the following responsibilities, in addition to any other powers and duties vested in it by law:

1. **Health of the public.** Protect the health of the people in the state.
2. **Effective local health departments.** Promote the development, maintenance, efficiency and effectiveness of local health departments.
3. **Vital statistics.** Collect, preserve, tabulate and interpret all information required by law in reference to births, deaths and all vital facts, and obtain, collect and preserve information relating to the health of the people of the state and the prevention of diseases as may be useful in the discharge of the department's functions.
4. **Facilities operation.** Operate facilities (sanitariums, hospitals, others) assigned to it by law or by the governor.
5. **Health education.** Conduct a statewide program of health education; prepare educational materials on health of individuals and communities; prepare technical information for professionals, officials, and hospitals; prepare materials and technical assistance relating to education of children in hygiene, sanitation, and personal and public health; provide consultation and assistance to counties, communities, and groups of people.
6. **Public health nursing.** Administer or supervise a program of public health nursing; provide minimum qualifications therefor; encourage and coordinate local public health nursing services.
7. **State/local disease prevention.** Encourage and aid in coordinating local programs concerning control of preventable diseases in accordance with statewide plans formulated by the department.
8. **Maternal and child health.** Encourage and help coordinate local programs on maternal and child health, including midwifery, antepartum and postpartum care, and health of infants, preschoolers, and school children (including special

needs such as blindness prevention and sight- and hearing-conservation).

9. **Nutrition programs.** Encourage and help coordinate local nutrition programs
10. **Dental health.** Encourage, administer, provide dental services; help coordinate local programs on dental public health; deposit payments received for providing dental services in oral health fund.
11. **State laboratories.** Establish, maintain and staff laboratories (serological, bacteriological, parasitological, entomological, chemical) adequate for examinations, analyses, investigations, and research in matters affecting public health.
12. **Public bathing.** Supervise, inspect, & enforce rules adopted under A.R.S. § 36-136.H.10. regarding public bathing places, public/semi-public swimming pools **[X-reference]**
13. **Bottled water and food-handling water.** Ensure safety of bottled water sold to the public, and water used to process, store, handle, serve and transport food and drink.
14. **State and federal food and drug law.** Enforce state food, caustic alkali and acid laws (as specified); collaborate in enforcement of federal Food, Drug and Cosmetic Act.
15. **Public health personnel.** Recruit and train personnel for state, local and district health departments.
16. **Program evaluation and planning.** Conduct continuing evaluations of state, local and district public health programs; study, appraise, and develop plans to solve state health problems.
17. **Licensure of health care institutions.** License and regulate health care institutions.
18. **Required licenses and permits.** Issue or direct issuance of licenses and permits required by law.
19. **State civil defense.** Participate in the state civil defense program and develop the necessary organization and facilities to meet wartime or other disasters.
20. **Perinatal health.** Subject to available funds, develop and administer perinatal health care programs, including: early pregnancy screening for high risk conditions; comprehensive prenatal health care; maternity, delivery, and post-partum care; perinatal consultation (and transportation of pregnant women when medically indicated); perinatal education for professionals and consumers.
21. **Licensure of group homes for developmentally disabled.** License and regulate group homes for the developmentally disabled. (Details omitted). A.R.S. § 36-132.A.

Note: fees authorized by the foregoing provisions are regulated under A.R.S. § 36-132.C.

- D. *Grants and Donations.*** The department is authorized to accept grants or donations from, and to contract with, state, federal, and private sources to advance any program, project, research or facility authorized by Title 36. A.R.S. § 36-132.B.
- E. *Authority to Contract Regarding Organ Transplants and Renal Disease.*** The department is authorized to contract with organizations that perform non-renal organ transplants, and organizations that manage end-state renal disease, to provide, as payors of last resort, necessary prescription medications, transportation to and from treatment facilities, and contractually-specified administrative costs. A.R.S. § 36-132.D
- F. *Sharing information with federal health services agencies.*** Subject to the laws and department rules on confidentiality of information, the department shall furnish information to any agency of the United States that is charged with the administration of health services upon request. A.R.S. § 36-105.

2.14 Enforcement of state statutes and rules; violations; penalties

A. *Administrative penalty for violation.*

- 1. *Civil penalty; notice of violation; appeal; hearing.*** A person who violates title 36, chapter 1, article 1 or a rule adopted thereunder is subject to a civil penalty of not to exceed three hundred dollars for each violation. Each day that a violation continues constitutes a separate violation. The director shall issue a notice of the violation and the penalty pursuant to title 41, chapter 6, article 10 (Administrative Procedure Act). A person may appeal the penalty by filing a written request for a hearing within thirty days after receiving the notice. The department shall conduct this hearing pursuant to title 41, chapter 6, article 10. The director shall not enforce the penalty until the hearing is concluded.
- 2. *Enforcement.*** The attorney general shall enforce penalties imposed under this section in the justice court or the superior court in the county in which the violation occurred.
- 3. *Cumulative penalties.*** Penalties imposed under this section are in addition to other penalties imposed under chapter 1. Penalties collected pursuant to this section shall be deposited in the state general fund. A.R.S. § 36-126

B. Procedures for hearings and appeals. Appeals heard by the department shall be conducted in accordance with title 41, chapter 6, article 10 (Administrative Procedure Act). A.R.S. §36-111.

C. Criminal penalty for violation. A person who violates a provision of title 36, chapter 1, article 2, or a regulation adopted pursuant thereto, is guilty of a class 3 misdemeanor for each violation. In the instance of continuing violation, each day constitutes a separate offense. A.R.S. § 36-140

2.15. Powers and duties of the director

A. General Powers and Duties. The director shall:

- 1. Manage department.** Be responsible for the direction, operation and control of the department. A.R.S. § 36-102.B.
- 2. Executive/registrar of vital statistics.** Be the executive officer of the department, and also the state registrar of vital statistics.
- 3. All necessary duties.** Perform all duties necessary to carry out the functions and responsibilities of the department.
- 4. Health and sanitation laws.** Administer and enforce health and sanitation laws, and rules of the department. A.R.S. § 36-136.A.1., 2., 4.
- 5. Departmental organization.** Prescribe the organization of the department, including appointment and removal of personnel and abolition of unnecessary positions (A.R.S. § 36-136.A.3), and may establish, abolish or reorganize positions or organizational units subject to legislative appropriation (A.R.S. § 36-103.A.)
- 6. Supervision of health and sanitation.** Exercise general supervision over all matters of health and sanitation in the state. In his/her discretion, the director may conduct sanitary surveys, and may enter, examine and survey any source and means of water supply, sewage disposal plant, sewerage systems, and many other listed facilities and institutions (details omitted), and any premises in which there is reason to believe there is a violation of any state health law or rule.
- 7. Preparation of sanitary and public health rules.** Prepare sanitary and public health rules.
- 8. Other duties prescribed by law.** Perform other duties prescribed by law. A.R.S. § 136.A.6.-8.
- 9. Deputization.** The director may deputize, in writing, any qualified departmental employee to perform any act the director is empowered or required by law to perform. A.R.S. § 36-136.C.

B. Specific Powers and Duties. The director shall:

1. Administer certain services.

(a) *Administrative services*, including without limitation accounting, personnel, standards certification, data processing, vital statistics, departmental buildings and grounds.

(b) *Public health support services*, including without limitation:

(i) consumer health protection programs (e.g., the functions of community water supplies, general sanitation, vector control and food and drugs).

(ii) Epidemiology and disease control programs (e.g., the functions of chronic disease, accident and injury control, communicable diseases, tuberculosis, venereal disease and others).

(iii) laboratory services programs.

(iv.) health education and training programs.

(v) Disposition of human bodies programs.

(c) *Community health services*, including but not limited to:

(i) medical services programs (e.g., maternal and child health, preschool health screening, family planning, public health nursing, premature and newborn program, immunizations, nutrition, dental care prevention, and migrant health).

(ii) dependency health care services programs (e.g., need determination, availability of health resources to medically dependent, quality control, utilization control, and industry monitoring).

(iii) crippled children's services programs.

(iv) programs for the prevention and early detection of mental retardation.

(d) *Program planning*, including without limitation an organizational unit for comprehensive health planning programs; program coordination, evaluation and development; need determination programs; health information programs. A.R.S. § 36-104.1

2. Administer staff services. Include and administer staff services, including without limitation budget preparation, public information, appeals, hearings, legislative and federal government liaison, grant development and management and departmental and interagency coordination.

- 3. Rules for departmental organization.** Make rules and regulations for the proper and efficient operation of the department.
- 4. Health emergencies.** Determine when a health care emergency or medical emergency situation exists or occurs within the state that cannot be satisfactorily controlled, corrected or treated by available health care delivery systems and facilities. Upon that determination, the director shall immediately report such situation to the legislature and the governor, including information on the scope of the emergency, recommendations for its solution, and estimates of costs involved. **(see infra sec. xx for state of emergency powers.)**
- 5. Coordinated state/county health services and programs.** Provide a system of unified and coordinated health services and programs between state and county governmental health units at all levels of government.
- 6. Policy and planning.** Formulate policies, plans and programs to effectuate the missions and purposes of the department. **[see also sec.s 36-132, and ____]**
- 7. Contracting authority.** Make contracts and incur obligations within the general scope of its [*sic*] activities and operations subject to the availability of funds.
- 8. Designated state agency.** Be designated as the single state agency [*sic*] for the purposes of administering and in furtherance of each federally supported state plan.
- 9. Information and advice to government, citizens.** Provide information and advice on request to agencies at all levels of government, citizens, businesses, and community organizations on matters within the scope of its duties, subject to departmental rules and regulations on confidentiality of information.
- 10. Account separation.** Establish and maintain separate financial accounts as required by federal law or regulations.
- 11. Legislative and gubernatorial advice.** Advise and make recommendations to the governor and the legislature on all matters concerning its [*sic*] objectives.
- 12. Health care cost containment.** Take appropriate steps to reduce or contain costs in the field of health services.
- 13. Planning assistance.** Encourage and assist in improving systems of comprehensive planning, program planning, priority setting and allocating resources.
- 14. Effective use of federal resources.** Encourage effective use of available federal resources in this state.
- 15. Health facilities development.** Research, recommend, advise and assist in the establishment of public and private community or area health facilities, and encourage the integration of planning, services and programs for the development of the state's health delivery capability.

16. Utilization of health manpower and health facilities.

Promote the effective use of health manpower and facilities which provide health care for the citizens of Arizona.

17. Health care services for medically dependent. Take appropriate steps to provide health care services to the medically dependent citizens of Arizona.

18. SIDS – Training (fire fighters and EMTs). Certify training on the nature of sudden infant death syndrome for use by professional fire fighters and certified emergency medical technicians as part of their basic and continuing training requirements.

19. SIDS – Training (law enforcement). Certify training on the nature of sudden infant death syndrome, including information on the investigation and handling of cases for use by law enforcement officers as part of their basic training requirement.

20. SIDS – autopsies. Adopt protocols for the conduct of an autopsy in cases of sudden infant death syndrome [check x-ref. to 11-597]

21. Cooperation with Arizona-Mexico commission. Cooperate with the Arizona-Mexico commission in the governor's office and with researchers at Arizona universities to collect data and conduct projects in the United States and Mexico on issues within the scope of the department's duties relating to quality of life, trade, and economic development.

22. Administer federal family violence act grants. Administer the federal family violence prevention and services act grants; the department is designated as Arizona's recipient of such grants.

23. Methamphetamine prevention programs – private funds. Accept and spend private grants of monies, gifts and devises for the purposes of methamphetamine education.

24. Methamphetamine prevention programs – other states as models. Identify successful methamphetamine prevention programs in other states that may be implemented in this state.

A.R.S. § 36-104.2-.24

C. Examination and Inspection of Properties. The director shall provide for the examination of any premises if the director has reasonable cause to believe that on the premises there exists a violation of any health law or rule of the state. A.R.S. § 36-136(A)(5). If the director has reasonable cause to believe that there exists a violation of any health law or rule of the state, the director may inspect any person or property in transportation through the state, and any car, boat, train, trailer, airplane or other vehicle in which that person or property is transported, and may enforce detention or disinfection as reasonably necessary for the public health. A.R.S. § 36-136(B).

D. *Delegation to local government authority.* The director may delegate to a local health department, county environmental department or public health services district any functions, powers or duties that the director believes can be competently, efficiently and properly performed by the latter, provided the latter is willing to accept the delegation and agrees to perform in accordance with the director's standards, and provided that money can be allocated to assure accomplishment of the delegated functions. A.R.S. § 36-136(D).

E. *Administrative Rulemaking.*

1. *General authority.* The director "may" make and amend rules necessary for the proper administration and enforcement of the laws relating to the public health. A.R.S. § 36-136(F).

2. *Specific subject areas.* The director "shall" make rules on the following specific subjects (A.R.S. § 36-136(H), except where otherwise indicated):

a. *Communicable and Preventable diseases:* Define and prescribe reasonably necessary measures for detecting, reporting, preventing and controlling communicable and preventable diseases. The rules shall declare certain diseases reportable; prescribe measures, including isolation or quarantine, reasonably required to prevent the occurrence of, or to seek early detection and alleviation of, disability, insofar as possible, from communicable or preventable diseases; include reasonably necessary measures to control animal diseases transmittable to humans. [cite to rules]

b. *Handling of dead bodies:* (details omitted). [cite to rules]

c. *Vital records:* Define and prescribe reasonably necessary procedures not inconsistent with law in regard to the use and accessibility of vital records, delayed birth registration, and the completion, change, and amendment of vital records. [cite to rules]

d. *Wholesome food and drink:* (details omitted). The rules shall provide for inspection and licensing of regulated premises and vehicles, and non-complying premises or vehicles shall be abated as public nuisances. [cite to rules]

e. *Meat and meat products sold at retail.* (details omitted). [cite to rules].

f. *Bottled drinking water.* (details omitted). The rules shall provide for inspection and certification of bottled drinking water sources, plants, processes and transportation, and for abatement as a public nuisance of any non-complying water supply, premises, equipment, process or vehicle. [cite to rules]

g. *Ice production, handling, storage and distribution.* (Details omitted). The rules shall provide for inspection and licensing of premises and vehicles, and for abatement as public nuisances any non-complying ice, premises, equipment, processes or vehicles. [cite to rules]

h. *Sewage and excreta disposal – camps, hotels, motels, trailer parks.* Define and prescribe reasonably necessary measures concerning sewage and excreta disposal, garbage and trash collection, storage and disposal, and water supply for recreational and summer camps, campgrounds, motels, tourist courts, trailer coach parks and hotels. (Details omitted). The rules shall provide for inspection of such premises, and for abatement as public nuisances of non-complying premises or facilities. [cite to rules]

i. *Sewage and excreta disposal – public schools.* Define and prescribe reasonably necessary measures concerning sewage and excreta disposal, garbage and trash collection, storage and disposal, water supply and food preparation of all public schools. The rules shall provide for inspections of covered premises and facilities, and for abatement as public nuisances any non-complying premises. [cite to rules]

j. *Water pollution and deleterious health conditions at public or semi-public swimming pools and bathing places.* (details omitted). The rules, to be developed in cooperation with the director of the department of environmental quality, shall provide for inspections, and for abatement as public nuisances of noncomplying premises and facilities. [cite to rules]

k. *Confidential information about patients and contacts.* Prescribe reasonably necessary measures to keep confidential information relating to diagnostic findings and treatment of patients, as well as information relating to contacts, suspects and associates of communicable disease patients; prohibit making confidential information available for political or commercial purposes. [cite to rules]

l. *HIV testing.* Prescribe reasonably necessary measures regarding HIV testing as a means to control transmission of the virus, including designation of anonymous test sites as dictated by current epidemiologic and scientific knowledge. [cite to rules]

m. *Asbestosis and mesothelioma.* The department shall develop and implement by rule standards and procedures to make asbestosis and mesothelioma diseases reportable to the department. A.R.S. § 36-134. [cite to rules] [check this stat.]

n. *Rules protecting confidential information.* The director shall promulgate such rules and regulations as are required by state or federal law to protect confidential information. No names or other information of any applicant, claimant, recipient

or employer shall be made available for any political, commercial or other unofficial purpose. A.R.S. §36-107 [cite to rules]

See *also* § 2.15.B.3. (rulemaking authority for departmental organization and operation).

3. Statewide application of rules; enforcement of rules by local boards of health and public health services districts; non-pre-emption of more restrictive local rules. The rules in the areas described in § 2.15.E.1& 2.a.-I., *supra* (rules adopted by the director under A.R.S. § 36-136) are of statewide application, and shall be enforced by each local board of health or public health services district. However, this does not limit the authority of any local board of health or county board of supervisors to adopt ordinances and rules authorized by law within their jurisdiction, as long as they do not conflict with state law and are equal to or more restrictive than the director's rules. A.R.S. § 36-136.I.

See Maricopa County Health Dep't v. Harmon, 750 P.2d 1364, 1368 (Ct. App. 1987) , in which the court upheld, under an earlier version of this statute, a local rule on control of communicable disease that was more restrictive than the state rule on the subject.

4. Rulemaking Procedures. The requirements of A.R.S. §§ 41-1001 *et seq.* (the Administrative Procedure Act) apply to all rules promulgated under Title 36 and to the actions of the director and the department (A.R.S. § 36-115.A.), except as otherwise indicated (A.R.S. § 36-115.B.,C).

F. Emergency Measures. Notwithstanding the normally-applicable rules regarding communicable and preventable diseases developed under § 2.15.D.2.a., *supra* (A.R.S. § 36-136.H.1.), the director may define and prescribe emergency measures for detecting, reporting, preventing and controlling communicable or infectious diseases or conditions if the director has reasonable cause to believe that a serious threat to public health and welfare exists. Emergency measures are effective for no longer than eighteen months. A.R.S. § 36-136.G. **(see infra sec. xx for state of emergency powers.)**

G. Sanitarians' Council. The director shall establish a 5-member sanitarians' council to classify, set standards concerning, examine, and register sanitarians (details omitted). A.R.S. § 36-136.01. A "sanitarian" is one who by education or experience in the physical, biological and

sanitary sciences is qualified to carry out educational, investigational and technical duties in the field of environmental health. A.R.S. § 36-136.01.J.

H. *Non-overlap of powers.* The powers and duties of the director under A.R.S. § 36-136 do not apply where the legislature has vested them in some other entity, except that the department and the department of agriculture each have distinct jurisdiction over the regulation of meat and meat products. A.R.S. § 36-136.J.

I. *Annual Report.* The director shall submit annually to the governor, the president of the senate and the speaker of the house of representatives a copy of the annual report setting forth the condition of the public health in the state, the activities of the department during the preceding fiscal year, the work done in each county, the character and extent of all diseases reported, the expenditures of the department and of each county or district health department, recommendations he deems advisable for protection of the public health, the financial statement of the affairs of the Arizona state hospital, and the operations and administration of the program of service for crippled children. A.R.S. § 36-137.

2.16 Advisory Health Council

A. *Purpose.* In order to form a council advisory to the governor and the department and representative of the needs of the people of Arizona, and with respect to providing health services, there is established the advisory health council. A.R.S. § 36-109.A.

B. *Membership of the Advisory Health Council.*

1. *Appointment.* Members of the advisory health council are appointed by the governor, in compliance with applicable federal regulations. A.R.S. § 36-109.B.

2. *Number.* The council consists of fifteen (15) members representing the public and relevant professional, health, hospital, labor, industry and educational organizations, who shall serve at the pleasure of the governor. A.R.S. § 36-109.C, D.

3. *Council Chairman.* The governor shall annually select the council chairman from the membership of the council. A.R.S. § 36-109.B.

C. *Special Purpose Councils.* The director may also establish special purpose councils (details omitted). A.R.S. § 36-109.E.,F.,G..

2.17 County or district liaison officers

A. *Appointment.*

1. The department shall assign a county liaison officer for each county of the state.
2. A county liaison officer may serve more than one county. A.R.S. § 36-110.A.
3. If the director determines that regional health planning has been established for the state, he shall establish, in lieu of the county liaison officers, district liaison offices in each of the regions that are established. Such district liaison offices shall carry out the same functions as the county liaisons. A.R.S. § 36-110.C.

B. *Duties.*

1. Each county liaison officer shall function as a liaison between the department and county health officials, local health planning groups, health consumer groups, private health care agencies and programs and any other health-related concerns within the county. A.R.S. § 36-110.A.
2. County liaison officers may:
 - a. evaluate the success of state programs, coordination and integration in local health planning.
 - b. relay deficiencies of local health programs and services to the department.
 - c. act as a means of input for local concerns of health to the department.
 - d. work to provide successful delivery of health services at the community level.
 - e. provide information on client needs and services effectiveness to the department. A.R.S. § 36-110(B).

2.20 LOCAL HEALTH DEPARTMENTS

Note: The phrase “local health departments” is used periodically throughout title 36, chapter 1, article 4, both in titles and headings and occasionally in statutory text. However, the term is not defined. In the context of its use, the phrase seems generally to signify county departments of health, although sometimes it might be read as including, as well, the other organizational option under state law: public health services districts. See § 2.21, *infra*.

2.21 Establishment of local health departments

A. *Establishment by county board of supervisors.* For the purpose of providing local full-time public health service, the board of supervisors of a county shall establish a county department of health or a public health services district. A.R.S. § 36-182A. “Full-time public health service”

means a funded, staffed service under the direction and supervision of a director appointed by the county board of supervisors and conducted in conformity with the rules, regulations and policies of the state department of health services. A.R.S. § 36-181.

Note: A public health services district, if established, assumes all the powers and duties of the county board of health for that county. A.R.S. § 48-5804.C. The board of supervisors serves as the district's board of directors. A.R.S. § 48-5803. Most importantly, a public health services district is empowered to levy a transaction privilege tax (sales tax) or a property tax, and to utilize the revenues therefrom to provide public health services. A.R.S. §§ 48-5805, 48-5804.A.5.

B. Authority upon establishment. Upon establishment of a county health department in conformity with title 36, chapter 1, article 4, or a public health services district under A.R.S. § 48-5802, the department or district succeeds to the authority of any existing city or local board of health in that county, and any references to a city or local board of health apply instead to that department or district. A.R.S. § 36-188.

B. Organizational planning by state department of health services. The state department of health services shall prepare a plan for recommendation to the counties, which shall outline a practical grouping of cities and counties of sufficient population and of such area as may be sustained with reasonable economy and efficient administration in order to provide efficient and effective local health services. A.R.S. § 36-182(D).

2.22 Composition of boards of health of local health departments

A. Counties having three supervisorial districts.

1. Presumptive five-member model. The board of supervisors shall appoint a five-member board for the county department of health, consisting of:

- a. one member of the board of supervisors,
- b one licensed allopathic or osteopathic [ck] physician and
- c. three citizens selected for their interest in public health, each citizen member to be a resident of a different supervisorial district, so that each district in the county has a representative on the board. A.R.S. § 36-183.A. Citizen members cannot be county health department employees. A.R.S. § 36-183.F.

2. Alternate nine-member model. The board of supervisors may determine by majority vote to appoint a nine-member board for the

county department of health. In that event, the board shall consist of:

- a. one member of the board of supervisors,
- b. one licensed allopathic or osteopathic [ck] physician,
- c. one member of a city governing body selected by the board, and
- d. six citizens selected for their interest in public health. The citizen members shall be residents of different supervisorial districts, so that each district in the county has two representatives on the board. A.R.S. § 36-183(B). Citizen members cannot be county health department employees. A.R.S. § 36-183.F.

3. Term. Under either model, the member selected from the board of supervisors shall serve during that member's term of office, and the term of office of the physician member and of the "first three" citizen members shall be four years. A.R.S. § 36-183.A.,B. In the event four additional members are appointed pursuant to the "alternate nine-member model," the city governing body member shall be appointed for a term of four years, to be served during his term of office [*sic*]; of the three additional citizen members, one shall be appointed for a term of one year, one for a term of two years, and one for a term of three years. A.R.S. § 36-183(B). Appointments to fill unexpired terms are for the balance of that term. A.R.S. § 36-183.D.

4. Ex officio: The county health department's director is a non-voting *ex officio* member of the board. A.R.S. § 36-183.E.

B. Counties having five supervisorial districts.

1. Composition. In a county having five supervisorial districts, the board of supervisors shall appoint a board of eleven members consisting of:

- a. one member of the board of supervisors,
- b. one licensed allopathic or osteopathic physician,
- c. five citizen members selected for their interest in public health, each citizen member to be a resident of a different supervisorial district so that all five supervisorial districts are represented on the board, and
- d. four citizen members appointed from the county at large. A.R.S. § 36-183.C.

Citizen members cannot be county health department employees. A.R.S. § 36-183.F.

2. Term. The term of office of each member shall be four years. A.R.S. § 36-183(C). Appointments to fill unexpired terms are for the balance of that term. A.R.S. § 36-183.D.

3. Ex officio: The county health department's director is a non-voting ex officio member of the board. A.R.S. § 36-183.E.

2.23 Powers of local health departments. A department of health may:

A. Health services. Develop health services with the use of any combination of federal, state or local funds. A.R.S. § 36-182.C.1. (Regarding financial assistance from the state department of health services, see also A.R.S. § 36-189 (details omitted)).

B. Expenditure of money. Expend monies budgeted for use of the department with the advice of the local board of health. A.R.S. § 36-182.C.2.

2.24 Powers and duties of directors of county health departments.

The director of a county health department shall:

- 1. Executive officer of department.** Be the executive officer of the department
- 2. Secretary.** Be the secretary of the board of health
- 3. Record of proceedings; monthly report.** Keep a record of the proceedings of the board of health and of the director's official acts and submit a monthly written report to the department on these proceedings and acts
- 4. Report health dangers and contagious diseases.** Report to the department when the health of persons is in danger or when any contagious or infectious disease occurs
- 5. Enforce state and local rules.** Enforce and observe the rules of the director of the department of health services, the director of the department of environmental quality and the local board of health, county rules and regulations concerning health, and laws of the state pertaining to the preservation of public health and protection of the environment.

Note: See also §§ 2.15.E.3., 2.23, *supra*, &, 2.26, *infra*.

- 6. Appoint personnel.** Appoint necessary personnel in accordance with regulations of the county board of supervisors

7. Annual report. Submit an annual report to the local board of health, the county board of supervisors, each city in the county and the director of the department. The report shall set forth:

- a. The condition of public health in the county.
- b. Activities of the department during the preceding year.
- c. The character and extent of all diseases reported.
- d. Expenditures of the department
- e. Such recommendations as the director deems advisable for protection of the public health.

8. Enforce public health laws, ordinances. Enforce any law or ordinance enacted or adopted by the respective jurisdiction relating to public health, including laws and ordinances that related to public businesses, rental properties and vacant properties. A.R.S. § 36-186.

9. Ex officio. Serve, without vote, as an *ex officio* member of the board of health. A.R.S. § 36-183(E).

2.25 Powers and duties of boards of health of local health departments.

A. Internal organization and administrative operation. (Details omitted) A.R.S. § 36-184.A., B.1,2,4.

B. Budgeting for local health department (details omitted). A.R.S. § 36-185.A.,B

C. Substantive responsibilities. The board of health shall:

- 1. Enact rules.** Make rules and regulations, not inconsistent with the rules and regulations of the department of health services, for the protection and preservation of public health. A.R.S. § 36-184.B.3.

Note: This statutory provision creates “independent” local authority that is “coextensive” with the statutory authority of the state department of health services on any given subject matter. *Maricopa County Health Dep’t v. Harmon*, 750 P.2d 1364, 1368 (Ct. App. 1987) (relying on this provision to uphold local authority to prescribe reasonably necessary measures for the control of communicable diseases, in light of fact that state department of health services possesses statutory power to do so).

Note: The *Maricopa County* court speaks of local “authority” coextensive with the state department of health services’ statutory powers. Arguably, however, the statutory language makes the adoption of such local policy mandatory – a “duty” rather than a “power.” (“The [county] board [of health]...*shall* make rules and regulations, not inconsistent with the rules

and regulations of the department of health services, for the protection and preservation of public health.” A.R.S. § 184.B.3)

See also § 2.15E.3., *supra*.

2. Enforce state laws and rules. Each local board of health or public services district shall enforce rules of the director of the state department of health services. See A.R.S. § 36-136.I (discussed at § 215.E.3 *supra*) and A.R.S. § 36-186.5 (discussed at § 2.24.5 *infra*).

3. Recommend rules to boards of supervisors. Recommend rules and regulations to the respective county boards of supervisors for adoption and enforcement in their respective counties. A.R.S. § 36-184.B.3,5.

2.26 County rules and regulations; violations; enforcement by administrative civil sanctions; enforcement by judicial civil and criminal sanctions

See chapter 7, *infra*.

2.27 Relationship of county health services to cities and towns.

A. Provision of county public health services to cities and towns.

The director of a county health department shall provide equal public health services to all residents of the county including residents of incorporated cities and towns and as consistent with any grant requirements. A.R.S. § 36-190. Whether or not a county forms a public health services district, it must provide public health services to the entire county, including cities and towns. A.R.S. § 48-5802.,B.,C.D. The county may spend monies for public health services to address a specific public health need that is unique to a particular area or condition. Any city or town may provide services to its residents beyond the county’s basic level of service and may use any combination of internal municipal departments or any other provider, including an intergovernmental agreement with a county for the provision of those services. A.R.S. § 36-190.

B. Charges to cities or towns.

1. A board of supervisors shall not impose any charges on any city or town for public health services unless a valid intergovernmental agreement was in effect during the period being charged. A.R.S. § 36-182.B.
2. A board of supervisors shall not require a city or town to contribute to the county’s public health budget if the board did not require the city or town to contribute monies to the county

for a portion of the county's public health budget before Jan. 1,
1999. 36-185.C.

3.00 INFORMATION COLLECTION: PUBLIC HEALTH SURVEILLANCE AND REPORTING

[brief narrative link to come]

3.10 SURVEILLANCE

3.11 General authority of DHS to engage in public health servillance

The department shall collect, preserve, tabulate and interpret all information required by law in reference to births, deaths and all vital facts (see § 3.42 *infra*), and obtain, collect and preserve information relating to the health of the people of the state and the prevention of diseases as may be useful in the discharge of functions of the department (§§ ___ - ___, *supra* [chapter 2]), not in conflict with several other statutory provisions (details omitted). A.R.S. § 36-132(A)(3).

3.12 Specific Categories of Public Health Surveillance Activities

A. *Vital Records and Public Health Statistics*

1. Vital records. The director of the department of health services is the state registrar of, and is responsible for a statewide system of, “vital records.” A.R.S. §§ 36-302.A; 36-302.B; 36-301.32.. Since “vital record” is defined as “a registered birth certificate or a registered death certificate” (A.R.S. § 36-301.33), those subjects describe the basic scope of the director/registrar’s activities under this chapter.

2. System of public health statistics. The DHS is also charged with administering a “system of public health statistics” (A.R.S. § 36-303A.2), defined as the “processes and procedures” for “tabulating, analyzing and publishing public health information derived from vital records data and [other statutorily authorized] sources...” and performing “other activities related to public health information.” A.R.S. § 36-301.31.

For further details, see A.R.S. Title 36, ch. 3, art’s. 1-5; Arizona Administrative Code Title 9, Ch. 19, Art’s 1-4

B. *Chronic disease surveillance system.* A central statewide chronic disease surveillance system is established in the DHS. (For *communicable* disease surveillance, see ____).

1. Covered diseases. Diseases shall include cancer, birth defects, and “other chronic diseases” required by the director of DHS to be reported to the department. A.R.S. § 36-133.A. The DHS has established the two

disease programs named in the statute; a pesticide illness program mandated by another statute (A.R.S. § 36-606); and (under “other” [?]), a blood-lead level monitoring program.

a. Cancer registry. Case reports “shall be submitted” by cancer clinics, doctors, and hospitals to the Arizona Cancer Registry (ACS), the cancer-surveillance unit located within DHS, on forms provided by ACS. Pathology laboratories “shall permit” the DHS to review pathology reports once every 90 days to collect necessary information; affirmative reporting by pathology laboratories does not appear to be required. For details and additional information, see Arizona Administrative Code Title 9, Chapter 4, Articles 4 and 1.

b. Birth defects monitoring program. A hospital, genetic testing facility, prenatal diagnostic facility, or the Children’s Rehabilitative Services (a program within DHS) that is treating an individual from the time of fertilization to one year of age who has been diagnosed with a birth defect (a defined term of art), “shall permit” the birth defects monitoring program within DHS to review and record specified information. Affirmative reporting does not appear to be required. For definitions, details and additional information, see Arizona Administrative Code Title 9, Chapter 4, Articles 5 and 1.

c. Pesticide illness. A health care professional, or medical director of a certified poison control center, who participates in the diagnosis of or identifies an individual with pesticide illness, “shall file” a report of such illness with the Department. For definitions, details and additional information, see Arizona Administrative Code Title 9, Chapter 4, Articles 2 and 1. This program has an express statutory source, as well, directing the establishment of a system for “reporting and preventing” pesticide-provoked illness. A.R.S. § 36-606 (details omitted).

d. Blood lead levels. Physicians who receive laboratory results showing certain levels of lead in the blood of their patients, and clinical laboratory directors whose test results show certain levels, “shall report” the results to the DHS. For definitions, details, and additional information, see Arizona Administrative Code Title 9, Chapter 4, Articles 3 and 1. **[check stats. To see if there is a specific stat. mandate, as it turns out that there is for pesticide]**

2. Characteristics of the system. In establishing the surveillance system, the department shall:

- a. provide a chronic disease information system
- b. provide a mechanism for patient followup
- c. promote and assist hospital cancer registries

- d. improve the quality of information gathered relating to the detection, diagnosis and treatment of patients with cancer, birth defects and other diseases included in the surveillance system
 - e. monitor the incidence patterns of diseases included in the surveillance system
 - f. pursuant to rules adopted by the director, establish procedures for reporting diseases included in the surveillance system. [check rules]
- 7. identify population subgroups at high risk for cancer, birth defects and other diseases included in the surveillance system
 - 8. identify regions of the state that need intervention programs or epidemiological research, detection and prevention
 - 9. establish a data management system to perform various studies, including epidemiological studies, and to provide biostatistics and epidemiologic information to the medical community relating to diseases in the surveillance system. A.R.S. § 36-133.B.

3. Use of data by others. DHS may authorize other persons and organizations to use chronic disease surveillance data:

- a. To study the sources and causes of cancer, birth defects and other chronic diseases.
- b. To evaluate the cost, quality, efficacy and appropriateness of diagnostic, therapeutic, rehabilitative and preventive services and programs related to cancer, birth defects and other chronic diseases. A.R.S. § 36-133.D.

4. Liability protection for reporters and authorized users. A person who provides a case report to the surveillance system or who uses case information from the system authorized pursuant to this section (A.R.S. § 36-133) is not subject to civil liability with respect to providing the case report or accessing information in the system. A.R.S. § 36-133.C.

5. Confidentiality of information; penalty. Information collected by the surveillance system that can identify an individual is confidential and may be used only for the designated purposes. A person who discloses confidential information in violation of this section (A.R.S. § 36-133) is guilty of a class 3 misdemeanor. A.R.S. 36-133.E.

C. Child immunization reporting system

1. System. The child immunization reporting system is established in the department of health services, to collect, store, analyze, release and report immunization data. A.R.S. § 36-135.A. It is known as the “Arizona State Immunization Information System.” R9-6-701.3

2. Reporting obligation of health care professionals. Health care professionals licensed under A.R.S. § 32-101 *et seq.* shall report to the DHS the type and date of administration of vaccine administered to a child; the child’s

name, address, telephone number, and social security number (if known and not confidential), gender, date of birth, and the mother's maiden name; and the health care professional's name, address, and telephone number. The information may be submitted to the DHS weekly or monthly, by telephone, facsimile, mail, computer, or any other method prescribed by the department. A.R.S. § 36-135.B,C. *See also* R9-6-707.H for details regarding required reporting.

3. Use and protection of information.

a. Release of information. The department shall release identifying information only to the child's health care professional, parent, guardian, certain health care institutions (details omitted), or a school official authorized by law to receive and record immunization records. The department may, by rule, release immunization information to persons for a specified purpose. A.R.S. § 36-135.D.

Note: The Department has in fact exercised the mentioned rulemaking authority, for several classes of persons and specified purposes. R9-6-709 (details omitted).

b. Confidential status of information. Identifying information in the system is confidential. A person authorized to receive confidential information shall not disclose it to any other person. A.R.S. § 36-135.D.,E.

c. Penalty. Any agency or person receiving confidential information from the system who subsequently discloses it to any other person is guilty of a class 3 misdemeanor. A.R.S. § 36-135.H.

4. Parental “opt out.” At the request of the child's parent or guardian, DHS shall provide a form for signature that allows confidential information to be withheld from all persons, including those otherwise authorized to receive it (§ C.1., *supra*). If delivered to the health care professional prior to immunization, the professional shall not report the information to the department as otherwise required (§ B, *supra*). A.R.S. § 36-135.I.

5. Non-identifying information. The department may release nonidentifying summary statistics. A.R.S. § 36-135.D

6. Protections and sanctions of health care professionals. A health care professional who provides information in good faith pursuant to this section (A.R.S. § 36-135) is not subject to civil or criminal liability. A health care professional who does not comply with the requirements of this section violates a law or task applicable to the practice of medicine and an act of unprofessional conduct [*sic*]. A.R.S. § 36-135.F.,G

D. *Newborn Screening Program*

1. Screening for congenital disorders

a. Program; database. The director of DHS shall establish a screening program for newborns within the department (A.R.S. § 36-694.D), maintaining a central database of newborns (those not more than 28 days old) and infants (children between 29 days and two years old) who are tested for congenital disorders. A.R.S. §§ 36-694.E; 36-694.K. The program shall include an education program for the general public, the medical community, parents and professional groups. A.R.S. § 36-694.D; *see also* R9-14-504, R9-14-501

b. Required reporters. The attending physician or person required to make a report on a birth “shall order or cause to be ordered” tests for congenital disorders. The results “must be” reported to the DHS. A.R.S. § 36.694.B. For detailed requirements on who must report, see R9-14-502B.-L, R9-14-501, R9-14-503.

Note: Is screening mandatory? Some parents may oppose newborn genetic screening on the basis of personal beliefs, religion, concern about the confidentiality of test results (addressed in A.R.S. § 12-2802 and R9-14-502.M), or concern about future access to a child’s genetic information that can be derived from a retained blood sample. Can parents effectively withhold consent to screening?

Arizona Revised Statutes § 12-2803.A. provides that “a genetic test shall not be conducted on an unemancipated minor without the consent of the parent or legal guardian...*except for* testing...under the newborn screening program pursuant to A.R.S. § 36-694.” (emph. added). This language could be read as authorizing -- and might provide immunity from liability for -- genetic screening either without parental consultation, or over parental objection, or both. (*Compare, e.g.,* A.R.S. § 36-792.42.C (*informed consent required* for test of adult or minor for sickle cell anemia). In practice, however, DHS accommodates parental refusals. The administrative rules for the program contemplate that some parents will in fact refuse the newborn screening test. *See* R9-14-502.D (“If a parent or guardian refuses the...test, a health care provider ...shall...[document the refusal in the newborn’s medical record, complete the form, and submit the collection kit to the newborn screening laboratory.]” Moreover, the DHS’s description of the program expressly states that “Parents/guardians may refuse consent for the newborn screening test for their infant after they have received information about the screening program and acknowledged that they understand the potential risks of refusal.” *See* ARIZONA NEWBORN SCREENING PROGRAM GUIDELINES, ARIZONA DEPARTMENT OF HEALTH SERVICES, August 2003, sec. 3.9, p. 3-4, available online at http://www.azdhs.gov/phs/owch/pdf/az_nbs_scrn_guide_2003.pdf (last visited October 5, 2006). Other states vary in treating newborn screening tests as mandatory or optional.

c. Disorders for which screening to be done; collecting and submitting specimens. DHS shall specify by rule the disorders to be screened for. A.R.S. § 36.694.B. The DHS director shall establish a committee (membership to be determined per A.R.S. § 36.694.H) to provide recommendations and advice, at least annually, regarding tests the

committee believes should be included; recommendations for inclusion are to be accompanied by cost-benefit analyses. A.R.S. § 36.694.G. DHS shall also specify by rule the process for collecting and submitting specimens, and reporting requirements for test results. A.R.S. § 36.694.B.

The aforementioned rules are found at Arizona Administrative Code Tit. 9, Ch. 14, Art. 5.

(1) *Disorders to be screened for:* The list of eight disorders for which screening is currently required is found at R9-14-502.A; R9-14-501. New rules, scheduled to take effect on ____, will expand the list to 29. See ____

(2) *Process for collecting and submitting specimens to DHS.* See R9-14-502.B-L, R9-14-503, R9-14-501 (details omitted)

d. Follow-up services. If tests conducted pursuant to this program indicate that a newborn or infant may have a congenital disorder, the screening program shall provide follow-up services to encourage the child's family to access evaluation services, specialty care and early intervention services. A.R.S. § 36.694.F.

e. Confidentiality. Test results are confidential subject to the disclosure provisions of Arizona Administrative Code Tit. 9, Ch. 1, Art. 3 (discussed at ____ *infra*)

2. Hearing tests. Hearing tests are a part of the newborn screening program, and test results are part of the DHS database. A.R.S. § 36.694.E. When tests are performed, their reporting is mandatory (A.R.S. § 36.694.C.,D.); but it does not appear that the tests *themselves* are mandatory. Followup on evidence of hearing loss is required. A.R.S. § 36.694.F.

E. Maternal syphilis tests. Upon first examining a woman who is pregnant, a physician is required to draw blood and send it to a laboratory for a syphilis test; if a woman has not been tested prior to delivery, a physician is required to submit a sample of umbilical blood at delivery. A.R.S. § 36.693A. Non-physicians permitted by law to attend births but not to draw blood have the same obligation, which is to be discharged through physician involvement. A.R.S. § 36.693A. An attending physician or other person required to report a birth shall, when reporting the birth or a stillbirth, state on the certificate whether a blood test for syphilis was made. A.R.S. § 36.693A.

Note: See also R-6-202 and Table 1 thereto, regarding required reporting of syphilis by health care providers and laboratories.

3.20 REPORTING OF COMMUNICABLE AND PREVENTABLE DISEASES

ARIZ. REV. STAT. § 36-136H.1. is an *omnibus* statute that delegates to the DHS director the duty and power to “prescribe reasonably necessary measures for detecting, reporting, preventing and controlling communicable and preventable diseases.” (See book sec.____) Sections § § 3.20-3.23 address reporting. Control measures are taken up in **chapter 4**.

It is necessary to begin with an explanation of the somewhat confusing use of terminology in applicable Arizona law

3.21 Definitions

A. Statute A.R.S. § 36-661.4 defines “communicable disease” as a “contagious, epidemic or infectious” disease (terms not further defined themselves [– ck]) that is required to be reported to a local board of health or to the DHS pursuant to Title 36, chapters 1 and 6. In short, this means any disease made reportable under the provisions discussed in § 3.

B. Administrative rule: The DHS defines “communicable disease” as an illness caused by an agent or its toxic products that arises through the transmission of that agent or its product to a susceptible host, either directly or indirectly. R9-6-101.2.

Note: Among public health professionals, *infectious* diseases are generally considered to be those diseases that can be transmitted *to* a human being by means of a virus, bacterium or parasite which infects a person. *Contagious* diseases – for which *communicable* is often a synonym -- constitute a subset of infectious diseases: those that can be transmitted *from* one person *to* another. Thus, many diseases are infectious, but not all of these are contagious/communicable.

Neither Arizona’s statutory nor administrative definition is in line with these conventions. The statute expressly embraces both infectious *and* contagious diseases in its definition of “communicable.” And the administrative rule defines the term in a way that usually describes the more-inclusive category of *infectiousness*. While somewhat odd in scientific terms, this approach may have a pragmatic rationale: since the authorizing statute (A.R.S. § 36-136H.1) applies to both “communicable” *and* “preventable” diseases, a broad definition of “communicable” allows treating both categories under a single “heading” for regulatory purposes – even though, of course, the strategies for control of contagious disease differ from those for non-contagious disease, given the different modes of transmission. In any event, reporting obligations for both categories of disease are treated in a unified codification in Title 9, Chapter 6, Article 2 of the Arizona Administrative Code, the provisions of which are described in the materials that follow.

3.22 Statutory reporting of “contagious, epidemic, or infectious” diseases.

Contemporary reporting requirements are largely handled through administrative rules under a general statutory delegation, as described in detail in § 3.23, *infra*. There are,

however, several vague, very old statutes (enacted as Territorial law¹) which require particular classes of individuals to report “contagious, epidemic, or infectious diseases” (terms which are not defined, but which seem to fall within the inclusive definition of “communicable” explained at § 3.21, *supra*). These statutes remain in effect. Moreover, their very generality makes it plausible that they might be invoked as authority to support a “catch-all” or “back-up” duty to report such diseases, beyond the specific requirements described in § 3.23, *infra*). Accordingly, they are summarized here.

A. Reporting by “persons” and attending physicians. “A person” shall immediately report such disease in writing to “the appropriate” board of health or health department, including names and residences of those afflicted. If the reporter is “the attending physician,” s/he shall report in writing on the condition of the person afflicted and the status of the disease at least twice each week. A.R.S. § 36-621

B. Reporting by innkeepers. A “keeper” of a private house, boarding house, lodging house, inn or hotel shall report in writing to “the local board of health or health department” of that jurisdiction each case of such disease “in his establishment” within twenty-four hours after its existence is known, including the name of persons afflicted and the nature of the disease. A.R.S. § 36-622.

C. Reporting of deaths by physicians. “Physicians” shall report in writing to “the local board of health or health department” the death of patients from such disease, within twenty-four hours after death, including the specific name and character of the disease. A.R.S. § 36-623

3.23 Detailed administrative rules for reporting “communicable and preventable” diseases

Under authority of ARIZ. REV. STAT. § 36-136H.1., the director of DHS has set forth in administrative rules (Title 9, Chapter 6, Article 2 of the Arizona Administrative Code) reporting obligations for particular classes of individuals; reportable diseases; information that must be reported; and agency responsibilities in connection with reporting. These provisions constitute the primary framework for disease reporting.

A. Duties of individuals and institutions to report communicable diseases to local health agency.

1. Health care providers² and administrators³ of health care institutions⁴ or correctional facilities.⁵ A health care provider who diagnoses, treats, or

¹ Laws 1903, Ch. 65, §§ 24-26.

² “Health care provider” means a physician (defined R9-6-101.39), physician assistant (defined R9-6-101.40), registered nurse practitioner (defined R9-6-101.42), or dentist (R9-6-101.27)

³ “Administrator” means the institution’s senior leader. R9-6-101.1

⁴ “Health care institution” is defined at R9-6-101.26

⁵ “Correctional facility” is defined at R9-6-101.15.

detects a case⁶ or suspect case⁷ of a communicable disease listed in Table 1 of R9-6-202 (of which there are 87), or who detects an occurrence listed in Table 1; and an administrator of a health care institution or correctional facility in which a case or suspect case of such a disease is diagnosed, treated, or detected, or an occurrence listed in Table 1 is detected, shall, personally or through a representative, submit a report to the local health agency⁸ within the time limitation in Table 1. The report shall include specified information about the case or suspect case;⁹ specified information about the disease;¹⁰ for certain kinds of sexually transmitted infections, specified information about treatment undertaken;¹¹ and the name, address and telephone number of the individual making the report.¹² Different information is called for in reports that must be submitted for each unexplained death with a history of fever.¹³ For each outbreak¹⁴ for which a report is required by the above, the provider or administrator shall submit a report describing the outbreak.¹⁵ Other provisions apply to reports regarding providers' performance of HIV-tests infants exposed perinatally to HIV.¹⁶

Except as specified in Table 1, the provider or administrator shall submit the report by telephone; in a document sent by fax, delivery service, or mail; or through an electronic reporting system authorized by the DHS.¹⁷ R9-6-202.

2. Administrators of schools,¹⁸ child care establishments,¹⁹ or shelters.²⁰ Analogous, though simpler, reporting requirements for 17 diseases apply to these reporters. R9-6-203 and Table 2.

3. Clinical laboratory²¹ directors. Analogous, though simpler, requirements for 53 diseases apply to these reporters. R9-6-204 and Table 3.

4. Pharmacists²² and pharmacy²³ administrators. These reporters are required to make specified reports when two or more of the following drugs are

⁶ "Case" is defined at R9-6-101.8

⁷ "Suspect case" is defined at 9-6-101.48

⁸ "Local health agency" is defined as county health department, public health services district, tribal health unit, or US Public Health Service Indian Health Service Unit. R9-6-101.34

⁹ See R9-6-202.C.1 (details omitted).

¹⁰ See R9-6-202.C.2 (details omitted).

¹¹ See R9-6-202.C.3 (details omitted).

¹² See R9-6-202.C.4.

¹³ See R9-6-202.D (details omitted).

¹⁴ "Outbreak" is defined as an "unexpected increase in incidence." See R9-6-101.36.

¹⁵ See R9-6-202.E. (details omitted).

¹⁶ See R9-6-202.F (details omitted)

¹⁷ See R9-6-202.G.

¹⁸ "School" is defined at R9-6-101.44 (details omitted).

¹⁹ "Child care establishment" is defined at R9-6-101.10 (details omitted).

²⁰ "Shelter" is defined at R9-6-101.45 (details omitted).

²¹ "Clinical laboratory" is defined at R9-6-210.1

²² "Pharmacist" is defined at R9-6-201.5

²³ "Pharmacy" is defined at R9-6-101.38

initially prescribed for an individual: isoniazid, streptomycin, any rifamycin, pyrazinamide, or ethambutol. R9-6-205 (details omitted). [TB?]

B. Responsibilities of local health agencies in connection with communicable disease reporting.

1. Reporting forms. Local health agencies (defined R9-6-101.34) shall distribute the proper form, provided by the DHS, to reporters (§ 3.23.A., *supra*) for use in reporting. R.9-6-206.A.

2. Report to DHS of unexplained death with history of fever. For each reported case or suspect case of unexplained death with a history of fever (defined R9-6-101.48, .50) [find relevant stat.], the local health agency for the jurisdiction in which the death occurred shall provide the DHS with prescribed information about the deceased individual and submit a written report of its required epidemiologic investigation (defined R9-6-101.19). R9-6-206.B (details omitted).

3. Report to DHS of epidemiologic investigation of a case. After the local health authority completes a required epidemiologic investigation of a case, it shall submit a report thereon to the DHS. R9-6-206.C (details omitted).

4. Report to DHS of original report. A local health agency shall forward to the DHS each original report it receives. R9-6-206.D (details omitted).

5. Report to DHS of epidemiologic investigation of outbreak. A local health agency shall submit to DHS a written summary of a required epidemiologic investigation of an outbreak (defined R9-6-101.36). R9-6-206.E. (details omitted).

6. Report to DHS of receipt of report of outbreak or suspect outbreak. A local health agency shall immediately notify the DHS when the agency receives a report or reports indicating an outbreak of suspect outbreak. R9-6-101.F

C. Federal or Tribal entity reporting. To the extent permitted by law, a federal or tribal entity (defined R9-6-207.B.) shall comply with certain specified reporting requirements of Title 9, Ch. 6, Article 2 (§ 3.23.A.,B., *supra*). R. 9-6-207.A (details omitted).

[Forms for Investigation and Reporting of various diseases: Exhibits III.A. to III.N,
Title 9, ch. 6, art. 3]

3.30 ENHANCED SURVEILLANCE ADVISORIES

Note: The provisions discussed in this section were enacted in 2002 (Ch. 303, Ariz. Laws 2002), as part of a legislative effort to address public health emergencies in the wake of 9/11 and other developments creating heightened awareness of new risks to public health. For discussion of enhanced governmental public health powers during gubernatorially-declared *emergencies*, see **chapter 9**.

- 3.31 Enhanced surveillance advisory; when appropriate. The governor, in consultation with the director of the DHS, may issue an enhanced surveillance advisory if the governor has reasonable cause to believe that an illness, health condition or clinical syndrome caused by bioterrorism (defined at A.R.S. § 36-781.1), epidemic or pandemic disease or a highly fatal and highly infectious agent or biological toxin has occurred or may occur or that there is a public event that could reasonably be the object of a bioterrorism event. A.R.S. § 36-782(A).

Exception: HIV/AIDS. The illness or health condition may not include acquired immune deficiency syndrome or any other infection caused by the human immunodeficiency virus. A.R.S. § 36-782(A).

- 3.32 Measures taken during an enhanced surveillance advisory. As determined by the governor after considering the least restrictive measures necessary that are consistent with public health and safety, the enhanced surveillance advisory shall direct the following in accordance with this article (Title 36, ch. 6, Art. 9):

A. *Those persons and entities required to report.*

B. *The clinical syndromes, any illness or health condition that may be associated with bioterrorism or a specific illness or health condition to be reported.*

C. *Patient tracking.*

D. *Information sharing.*

E. *Specimen testing coordination.* A.R.S. 36-782.B.

- 3.33. Increased reporting during enhanced surveillance advisory.

A. *Persons required to report.*

1. Health care providers. A health care provider (defined at A.R.S. § 36-781.3 by cross-reference to A.R.S. § 12-2291) or medical examiner [ck def] shall report to the local health authority (defined at A.R.S. § 36-781.4) all cases of any illness, health condition or clinical syndrome specified in the enhanced surveillance advisory. The report shall provide additional information designated in the enhanced surveillance advisory. A.R.S. § 36-783(A).

2. Veterinarians. The state veterinarian [ck def], a veterinarian, a veterinarian laboratory professional or a wildlife professional shall report any case of

animal illness or death due to the disease or other health condition designated in the enhanced surveillance advisory to the department or local health authority. A.R.S. § 36-783(B) (details of report omitted).

3. Pharmacists. A pharmacist who identifies any unusual increase in prescriptions for antibiotics or any unusual increase in prescriptions or sales of over-the-counter pharmaceuticals to treat the illness, health condition or clinical syndrome identified in the enhanced surveillance advisory shall report this information to the local health authority. A.R.S. § 36-783(C) (details of report omitted)

B. Reporting requirements. The reports must be in writing or by any method directed by the department or local public health authority and must be submitted within twenty-four hours after identifying the reportable circumstance. All persons required to report under this section (A.R.S. § 36-783) must cooperate with the department and local health authority in effecting the enhanced surveillance advisory. Failure to report is an act of unprofessional conduct.

C. Confidentiality of information reported pursuant to an enhanced surveillance advisory. The department and local public health authority shall maintain as confidential any information or particular part of information provided pursuant to the enhanced surveillance advisory that, if made public, would divulge the trade secrets of a person or business, or other information likely to cause substantial harm to the person's or business' competitive position. A.R.S. § 36-783.E.

3.34 Patient tracking during enhanced surveillance advisory.

A. Power to access confidential patient information. During an enhanced surveillance advisory, in order to identify, diagnose, treat and track persons who may have been exposed to an illness, health condition or clinical syndrome identified in an advisory, the department and local health authority may access confidential patient information, including medical records, wherever held and by whomever held and whether or not patient identity is known,. A.R.S. §36-784.A.

B. Investigative authority. Authority in connection with identification of exposed persons and development of information relating to the source and spread of the illness or health condition. A.R.S. § 36-784.B. (details omitted)

C. Confidentiality. Any medical information or other information from which a person might be identified that is received by the department or local health authority in the course of an enhanced surveillance advisory is confidential and is not available to the public. A.R.S. § 36-784.C.

3.35 Laboratory testing during enhanced surveillance advisory.

A. *State laboratory to coordinate testing.* The state laboratory shall coordinate specimen testing. If necessary at state expense, the department may designate other laboratories to assist it.

B. *Laboratory criteria.* The department shall determine the criteria necessary for private or public laboratories to conduct clinical or environmental testing under the enhanced surveillance advisory.

C. *Transportation of samples.* A public safety authority, if requested by the department or local health authority, shall coordinate and provide transportation of clinical or environmental samples to the designated testing laboratory(ies). A.R.S. § 36-786/

3.36 Notification

A. *Notification of local health authorities.* The director shall notify local health authorities before the governor issues an enhanced surveillance advisory.

B. *Notification of required reporters.* The department and local health authorities shall provide the enhanced surveillance advisory to those persons and entities required by the advisory to report by using any available means of communication. A.R.S. § 36-782(C).

C. *Notification of DHS of receipt of reports.* The local health authority shall immediately notify the DHS of any reports received during the period of an enhanced surveillance advisory. A.R.S. § 36-783.F.

3.37 Coordination among public health authorities.

A. *Required meeting.* Before the governor issues an enhanced surveillance advisory, the department and local health authorities must meet with representatives of persons or institutions who will be affected by the enhanced surveillance advisory pursuant to A.R.S. § 36-783.A-C (reporting obligations; see § 3.33A.1-3, *supra*). If, because of an immediate threat to the public health, the department and local health authorities are not able to hold this meeting before the governor issues the advisory, the meeting must take place within seventy-two hours after the governor issues the advisory. A.R.S. § 36-782(D).

B. *Resource sharing.* To the extent possible, the department and local health authorities shall share department and local health authority personnel, equipment, materials, supplies and other resources to assist persons and institutions affected to implement the terms of the advisory. A.R.S. § 36-782(E)

C. *Information sharing.*

1. Notification of health authorities by public safety authority. During an advisory, when a public safety authority learns of a suspicious disease event, or it learns of a threatened bioterrorism act at any time, it shall immediately notify the department or the local health authority, and the agency that receives this information must immediately notify the other agency.

2. Notification of public safety and tribal authorities by health authorities. When the department or the local health authority identifies a reportable illness or health condition, unusual disease cluster or suspicious disease event that it reasonably believes may be caused by bioterrorism, the department or local health authority must immediately notify at any time the appropriate public safety authority (defined at A.R.S. § 36-7815) and, if appropriate, tribal health authorities.

3. Limitation on information-sharing; confidentiality. Sharing of information on reportable illnesses, health conditions, unusual disease clusters or suspicious disease events between public safety and local health authorities is limited to the information necessary to effect the enhanced surveillance advisory and does not include the release of medical records to public safety authorities. Information from which a person might be identified that is received by the department, local health authority or public safety authority in the course of an advisory is confidential and not available to the public. A.R.S. § 36-785.

- 3.38 Discretionary assistance with reimbursement. At the governor's direction, the department may use reasonable efforts to assist the persons and institutions to receive reimbursement of costs incurred because of the implementation of the advisory. A.R.S. § 36-782.F.
- 3.39 Termination of enhanced surveillance advisory. An enhanced surveillance advisory may be revised or terminated at any time by the director and automatically terminates after sixty days, unless renewed by the governor. A.R.S. § 36-782(G).
- 3.40 Effect of enhanced surveillance advisory on health agencies' "routine" legal powers of surveillance and control. The foregoing statutory provisions on enhanced surveillance advisories (Title 36, Ch. 6, Art. 9, §§ **3.30-3.39**) do not alter the ability of the DHS or a local health authority to monitor community health status (§§ **3.10-3.23**, *supra*) or implement control measures (discussed in **chapter 4**, *infra*) for the early detection of communicable and preventable diseases otherwise allowed by law. A.R.S. § 36-782.C.

4.00 LIMITATIONS ON PERSONAL LIBERTY AND INTRUSIONS ON BODILY INTEGRITY: MEASURES FOR THE PREVENTION AND CONTROL OF COMMUNICABLE DISEASES

[Notes for narrative link]: Interventions here deal with: coercion regarding physical freedom, from (temporary) restrictions on employment, to (temporary) exclusion from particular physical places (e.g., schools), to coercion for immunization, to the most draconian – isolation and quarantine. Note generally NOT truly involuntary medical treatment!! There are constitutional issues as well as statutory ones; recent revisions to the statutes governing TB, as well as emergency Q & I, reveal these issues, both PDD and SDP.

Not all “control measures” (see *infra*) infringe on personal liberty (e.g., disinfection of property v. restraint of physical movement); however, many do. Hence, this chapter treats control of communicable diseases generally, including but not limited to infringement on personal liberty and bodily integrity.

4.10 General Provisions for Control of Communicable Diseases

A. Definitions. See § 3.21.A.,B, *supra*.

B. Statutory Provisions on Control of “Infectious or Contagious” Disease

Most of the contemporary control measures for communicable diseases are set forth in administrative rules under a single general statutory delegation (§ 4.10.C, *infra*). There are, however, several individual statutes, originally enacted as Territorial law²⁴ (and in several cases never amended), which authorize or require local health agencies to employ particular measures for the control of “infectious or contagious” disease. (These terms are not defined, but they appear to be included within the broad current category of “communicable” diseases addressed in § 4.20, *infra*; see applicable definitions at § 3.21.A.,B, *supra*, and Note thereto). Because these statutes remain in effect, they are summarized here.

- 1. Quarantine and sanitary measures.** A.R.S. § 36-624. See § 4.50-4.55, *infra*, discussing quarantine separately; for sanitary measures, see **chapter 6**.
- 2. Disposition of contaminated articles; transportation of articles or persons.** A local board or health department may have beds, bedding, clothing, carpets or other articles exposed to contamination from infectious or contagious disease destroyed, and allow reasonable compensation. It may provide for disinfection of contaminated articles, and may provide transportation for the conveyance of articles or persons afflicted with contagious or infectious disease. A.R.S. § 36-626. [discussed elsewhere? If so, refer]

²⁴ Laws 1903, Ch. 65, §§ 31-35; 1901 Pen. Code, § 359.

- 3. Temporary hospitals.** A local board of health or health department is authorized to provide a temporary hospital or “place of reception” for persons with infectious or contagious diseases. A hospital or other place in which infectious disease exists shall be under the board’s or department’s control, and subject to its regulations, while the disease exists. During such period of hospital control, “inmates” shall obey the board’s or department’s regulations and instructions. A.R.S. § 36-627.

Note: This statute seems to confer on local government the power to take over temporary management and control of private health care facilities housing persons with “infectious or contagious” disease.

4. Care of and payment for afflicted persons.

- a. Local boards of health or health departments may employ physicians and others and provide “such necessities of life” as they “deem necessary” for care of those with contagious or infectious diseases.
- b. Expenses incurred under Title 36, ch. 6, art. 2 (contagious diseases) shall be a charge against the city or county.
- c. Expenses for the care, medical attendance or support of a sick person shall also be a charge against that person and those liable for his support, and may be collected by the city or county. Physician care directed by the local board or health department is a city or county charge. A.R.S. § 36-628.

[Retitle ff’g as “violations”? – see I & Q ch., consider putting there

- d. **Class 3 misdemeanor.** The following acts constitute class 3 misdemeanors, unless another classification is specifically prescribed in this article (Title 36, ch. 6, article 2):
 - 1. knowingly secreting oneself or others known to have a contagious or infectious disease;
 - 2. a health officer failing or refusing, with criminal negligence, to perform a duty;
 - 3. a person violating a provision of this article (Title 36, ch. 6, art. 2) or a rule, regulation, order, instruction or measure adopted and given the required publicity by a board of health. A.R.S. § 36-630]

[F. Class 2 misdemeanor: knowing exposure. A person who knowingly exposes himself or another afflicted with a contagious or infectious disease in a public place or thoroughfare, except in the necessary removal of such a person in a manner least dangerous to the public health, is guilty of a class 2 misdemeanor. A.R.S. § 36-631]

C. Control of “communicable and preventable” diseases: unified system of administrative rules

1. Introduction. ARIZ. REV. STAT. § 36-136H.1, the *omnibus* statute that authorizes the basic system of disease reporting (§ 3.20, *supra*), likewise give the director of DHS authority to provide for the “prevention and control” of communicable and preventable diseases. And like the reporting provisions, the control measures are largely embodied in DHS administrative rules (Title 9, Chapter 6, Article 2 of the Arizona Administrative Code). Under those rules, the “front line” responsibility for implementing control measures rests with local health agencies, as the following sections make clear.

2. Control measures

a. local health agency control measures: A local health agency shall:

- (1) review each report submitted to it (see § 3.23, *supra*) for completeness and accuracy
- (2) confirm each diagnosis
- (3) conduct epidemiologic and other investigations required under Title 9, ch. 6
- (4) facilitate notification
- (5) conduct surveillance
- (6) determine trends
- (7) implement control measures
- (8) disseminate surveillance information to health care providers

R9-6-302

b. Particular control measures for particular diseases. Title 9, chapter 6, Article 3 of the Arizona Administrative Code sets forth control measures to be undertaken by local health agencies for 84 different diseases. R9-6-304 to R9-6-387.

(1) Examples of diseases. The diseases run from “Amebiasis” to “Yersiniosis,” and include such more-familiar diseases as anthrax, coccidioidomycosis (valley fever), gonorrhea, the various forms of hepatitis, Lyme disease, malaria, measles, mumps, pertussis, polio, rubella, smallpox, syphilis, tetanus, and tuberculosis.

(2) Examples of “control measures.” Depending on the particular disease, examples of control measures include:

- (a) appropriate restrictions on individuals’ employment;
- (b) sterilization of contaminated objects;
- (c) boiling and discarding of contaminated food;

- (d) recommendations for appropriate medical treatment, including administration of antibiotics;
- (e) contact tracing;
- (f) exclusions from school;
- (g) sanitary inspection;
- (h) epidemiologic investigation;
- (i) isolation or quarantine; and
- (j) other measures (details omitted)

3. Persons subject to control measures. For most of the diseases, the rules prescribe measures for management of “cases” (generally, persons with documented illness; see definition at R9-6-101.8); where applicable, they also set forth measures for the control of “contacts” (generally, persons exposed; see definition at R9-6-101.14). For some diseases, measures for “environmental control” (undefined) and “outbreak control” are also specified (“outbreak” is defined at R9-6-101.36).

4.20 CONTROL OF VACCINE-PREVENTABLE DISEASES

Other than in gubernatorially-declared emergencies (**chapter 9**), the law on vaccine-preventable diseases focuses solely on immunization of children attending schools and child-care facilities

4.21 Basic rule: proof of immunization or immunity as a condition of attendance at school or child-care facility

A. Schools. A “pupil” (defined A.R.S. § 15-871.10) shall not be allowed to attend “school” (public, private, or parochial, grades K-12; A.R.S. § 15-871.11) without providing “documentary proof” (written evidence of immunization or laboratory evidence of immunity; A.R.S. 15-87.1). A.R.S. § 15-872.B. *See also* A.R.S. 15-872.B (documentary proof required for attendance unless student exempted, as described in § 4.22.A., *infra*).

Note: “Immunization,” “immunized,” and “laboratory evidence of immunity” defined at A.R.S. 15-871.5.-7.

B. Child-care facilities. The director of the DHS shall prescribe reasonable rules, which may include rules on immunization, regarding the health, safety and well-being of “children” (aged 0-14, or 0-18 if developmentally disabled; A.R.S. 36-881) cared for in a “child care facility” (defined A.R.S. 36-881.2.,3). A.R.S. 36-883A.,C. The director has in fact, promulgated administrative rules requiring immunizations for attendance at child-care facilities. R9-6-702

4.22 Exemptions from immunization requirements

A. Schools

1. Medical exemption; duration. “Documentary proof” is not required when a school administrator receives written certification, signed by the parent or guardian and the physician, that one or more required immunizations “may be detrimental to the pupil’s health,” and which indicates the “specific nature and probable duration” of the medical condition or circumstance which precludes immunization. Such an exemption is valid only for the duration of the circumstance or condition. A.R.S. §§ 15-73.A.2.,B; R9-6-706.E.

2. “Personal beliefs” exemption. “Documentary proof” is not required when a parent or guardian submits a signed statement to the school administrator stating that the parent or guardian:

- a. has received information about immunizations provided by the DHS; and
- b. understands the risks and benefits of immunizations and the potential risks of nonimmunization; and that
- c. due to “personal beliefs,” does not consent to immunization of the pupil. A.R.S. 15-873.A.1.

Note: Exemptions of this kind based on “personal beliefs” (or “philosophy”) are in place in about 18 states. Narrower “religious” exemptions are found in virtually all of the remaining states (and indeed in the law governing Arizona child-care facilities; see **4.22.B.2.**, *infra*).

The broad K-12 Arizona exemption essentially makes immunization voluntary, and therefore a proper subject of parental “informed consent,” as recognized by another statute (“A minor child shall not be immunized without the informed consent of the parent...” A.R.S. 36-673.D; R9-6-703.

B. Child care facilities

1. Medical exemption; duration. See R9-6-706.F.5.

2. Religious exemption. DHS regulations governing child-care facilities must exempt from immunization children whose parents adhere to “tenets and practices of a recognized church or religious denomination” that rejects immunization. A.R.S. 36-883.C.

Note: This narrow statutory religious exemption for child care facilities predates the broader “personal beliefs” exemption in the K-12 statute (see **4.22.A.2.**, *supra*); it is not otherwise clear why there should be two different standards. However, DHS seems to minimize the difference in practice. Unlike the rule for K-12 exemptions (R9-6-706.E), the rule for child-care exemptions does not expressly name *any* belief-based category of exemption (R9-6-706). More important, while the form that DHS uses correctly advises parents that a “religious” exemption is available, it omits the critical statutory language about “*tenets and practices of a recognized church or religious denomination*,” asking

instead only for a parental signature to the effect that immunizations are “against your religious beliefs.” See http://www.azdhs.gov/phs/immun/idr_forms.htm (last visited Oct. 28, 2006). This seems to be an effort to make this “religious” exemption operationally as similar as possible to the easily-invoked, broader “personal beliefs” exemption available in K-12 schools.

C. *Consequences of exemption: exclusion from school or child-care facility during outbreak.* Pupils who lack documentary proof of immunization “shall not attend school during outbreak periods” of communicable, immunization-preventable diseases as determined by the DHS or local health department, which shall notify school administrators of such determination. A.R.S. 15-873.C. The DHS rules apply the same policy to child care facilities. R9-6-705.H.

Note: cite to Maricopa case, or cross reference to discussion thereof

Note: the statute bars attendance, during outbreaks, by students who lack “documentary proof of immunization.” Because “documentary proof” is defined as written evidence of either “immunization” or of “laboratory evidence of immunity” (see A.R.S. 15-871.1.), the phrase “documentary proof of immunization” might be read to suggest that only actual past immunization -- not laboratory evidence of immunity -- suffices to allow a student to attend school during an outbreak. Probably this language was a drafting error rather than a policy choice, since its logic is not apparent. Moreover, DHS’s administrative rules on attendance during an outbreak make no such distinction. R9-6-705.H.

4.23 Required immunizations; other matters.

The following subjects are prescribed primarily by administrative rule, in accordance with statutory delegations of authority to the director of DHS:

A. *Required immunizations; dosages; schedules for administration*

- 1. diphtheria**
- 2. tetanus**
- 3. hepatitis A (for a child age 2-5 in Maricopa county)**
- 4. hepatitis B**
- 5. pertussis**
- 6. poliomyelitis**
- 7. measles (rubeola)**
- 8. mumps**
- 9. rubella (German measles)**
- 10. *Haemophilus influenzae* type B**
- 11. varicella**

For dosages, administration schedules, and related matters, see A.R.S. 36-672.A; 15-872.; R9-6-702; AAC Tit. 9, Ch.6, Art. 7, Tables 1,2.

B. *Documentary proof of immunization status* A.R.S. 15-872.A.,D; 36-672;.B.; 36-674; R9-6-704

C. Records; reporting requirements A.R.S. 15-874; R9-6-707.

D. Duties of local health agencies A.R.S. 36-673 (including providing and administering free immunizations, A.R.S. 36-673.B.,C); R9-6-703

4.24 Responsibilities of schools and child care facilities

A. Duty of public schools to publicize immunization requirements and exemptions. Each public school shall make full disclosure of the requirements and exemptions as prescribed in A.R.S. 15-872 and 15-873. A.R.S. 15-872.C.

B. Other Responsibilities of schools and child care facilities. R9-6-705; R9-6-706.G.

4.25 School liability protection

A school and its employees are immune from civil liability for decisions concerning the admission, readmission and suspension of a pupil which are based on a good faith implementation of the requirements of Chapter 15, Title 8 (school immunization). A.R.S. 15-872.I.

4.30 CONTROL OF TUBERCULOSIS

To come – explain why unique statute; explain const'l dimensions, and cite to a couple of the recent TB cases. Also, explain how use of the TB statute renders it unnecessary to explore the civil commitment statutes in any depth, because we already have a state-law model for observing procedural and substantive due process, in the TB stats.

4.40 ISOLATION AND QUARANTINE – “NON-EMERGENCY”

4.41 Introduction

Voluntary isolation is not particularly controversial: people in hospitals with contagious diseases are commonly isolated during treatment, with their consent, until they are non-contagious. However, *involuntary* isolation and quarantine are among the most liberty-restricting, and therefore most controversial, measures that can be imposed for disease control. Accordingly, the law (and this book) address involuntary isolation and quarantine separately from, and in greater detail than, other control measures (which are described in §4.10, *supra*)

In the absence of a gubernatorially-declared emergency, A.R.S. §36-624 (§4.42, *infra*) requires local health authorities to implement isolation and quarantine

“consistent with” two different legal authorities: generally-applicable (non-emergency) DHS rules on isolation and quarantine; and two statutes on isolation and quarantine that are otherwise applicable only *during* emergencies, A.R.S. §§ 36-788 and 36-789 (§§ 4.30-4.33). To minimize confusion that arises from some differences among these authorities, this book addresses governmental authority for “non-emergency” quarantine and isolation here (§§ 4.40-4.45, *infra*) *separately* from isolation and quarantine in an “emergency” (discussed in **chapter 9, at §§ 9.30-9.33**). The following materials identify areas of ambiguity and, where needed, propose and explain resolutions.

4.42 Local health departments: duty to investigate infectious or contagious disease; authority to impose isolation and quarantine

When a county health department or public health services district is apprised that infectious or contagious disease exists within its jurisdiction, it shall immediately make an investigation; if the investigation establishes that the disease does exist, the county department or district may adopt quarantine and sanitary measures to prevent the spread of the disease, consistent with DHS rules and with A.R.S. §§ 36-788 and 36-789. The county department or district shall immediately notify the DHS of the existence and nature of the disease and measures taken concerning it. A.R.S. § 36-624.

4.43 Definitions

A. “Isolation”: separation, during the communicable period,²⁵ of an infected individual or animal from others to limit the transmission of infectious agents. R9-6- 101.33. (“Isolate”): to separate an infected individual or animal from others to limit the transmission of infectious agents.... R9-6-101.32).²⁶

B. “Quarantine”: the restriction of activities of an individual or animal that has been exposed to a case²⁷ or carrier²⁸ of a communicable disease during the communicable period, to prevent transmission of the disease if infection occurs. R9-6-101.41.²⁹

²⁵ Defined at R9-6-101.13

²⁶ *Accord*, OXFORD TEXTBOOK OF PUBLIC HEALTH ____ (3d ed. 1997) (isolation is “the separation, for the period of communicability, of infected persons or animals from others in such places and under such conditions as to prevent or limit the direct or indirect transmission of the infectious agent from those infected to those who are susceptible to infection or who may spread the agent to others.”)

²⁷ Defined at R9-6-101.8

²⁸ Defined at R9-6-101.7

²⁹ *Accord*, OXFORD TEXTBOOK OF PUBLIC HEALTH ____ (3d ed. 1997) (quarantine is “the restriction of the activities of well persons or animals who have been exposed to a case of communicable disease during its period of communicability (i.e., contacts) to prevent disease transmission during the incubation period if infection should occur.”)

4.44 Diseases. A local health agency shall isolate or quarantine an individual or group when required to do so by the control measures prescribed for particular diseases in Title 9, ch. 6, art. 2 of the director's rules, as follows. R9-6-388.

A. Diseases for which isolation of "cases" and quarantine of "contacts" are both specified:

1. **diphtheria** (R9-6-323)
2. **emerging or exotic diseases** (R9-6-325, defined R9-6-101.18)
3. **SARS** (R9-6-364)
4. **smallpox** (R9-6-366)
5. **viral hemorrhagic fever** (R9-6-384).

B. Diseases for which isolation of "cases" alone is called for, without quarantine of "contacts":

1. **hemophilus influenzae: invasive disease** (R9-6-331)
2. **measles** (R9-6-347)
3. **meningococcal invasive disease** (R9-6-348)
4. **pneumonic plague** (R9-6-352)
5. **rubella** (R9-6-360)
6. **congenital rubella syndrome** (R9-6-361)
7. **tuberculosis** (R9-6-373)
8. **tularemia** (R9-6-374)
9. **vancomycin-resistant enterococcus spp.** (R9-6-379)
10. **vancomycin-resistant or vancomycin-intermediate staphylococcus aureus** (R9-6-380)
11. **vancomycin-resistant staphylococcus epidermidis** (R9-6-381)
12. **varicella (chicken pox)** (R9-6-382).

4.45 Implementation of isolation or quarantine.

A. Investigation by local health authority. See A.R.S. § 36-624 (§4.42, *supra*); A.R.S. 36-788.A (§9.32.A., *infra*).

B. Requirement for use of least restrictive means. See A.R.S. § 36.788.A. (§ 9.32.B., *infra*).

Note: A.R.S. § 36.788.A, applicable in *declared emergencies*, authorizes isolation or quarantine when, *inter alia*, such steps are the "least restrictive means" consistent with public protection. Does this requirement apply to *non-emergency* isolation or quarantine? Formally, perhaps not; in non-emergencies the requirements for employing isolation or quarantine are disease-specific and non-discretionary. See § 4.44, *supra*; § 4.45C.2., *infra*. On the other hand, for the relatively small number of listed diseases to which non-emergency quarantine or isolation apply (§ 4.44, *supra* § 4.45C.2., *infra*), such measures are arguably *ipso facto* the "least restrictive means" consistent with public protection. Finally, *constitutional* principles also suggest that it is necessary to employ

the “least restrictive means” when effecting a liberty deprivation such as involuntary isolation or quarantine. [Cites to TB cases; check Gostin]

C. Imposition of isolation or quarantine without court order; circumstances; limitations.

1. Requirement of immediate and serious threat to the public health.

The local health authority may isolate or quarantine a person or group of persons through a written directive without first obtaining a written order from the court *if any delay in the isolation or quarantine of the person would pose an immediate and serious threat to the public health.* A.R.S. § 36-789.A.

Note: This statute requires that, *in a gubernatorially-declared emergency*, an “immediate and serious threat to public health” must exist to warrant issuance of an order for isolation or quarantine without prior judicial approval. Should this “threat” requirement be read as applicable to *non-emergency* orders, as well? Formally, such a reading would add an additional element – “serious public health threat” – to rules whose text currently makes the issuance of a (judicially unapproved) quarantine order *non-discretionary*, depending only on a determination that the disease is one that triggers isolation or quarantine (*see* § 4.44, *supra*; § 4.45C.2, *infra*). Such an interpretive result seems strained. In practice, however, it may not matter much: isolation or quarantine in non-emergencies are undertaken only for specified diseases (*see* §4.44, *supra*; § 4.45C.2 *infra*) -- diseases which presumably *inherently* carry with them the “threat” specified in A.R.S. § 36-789.A. Thus, in practice it is likely that the threat to public health is established, either way, in the case of an order issued prior to judicial consideration.

2. Duty of local health agency to issue written order for isolation or quarantine of persons; circumstances. When a local health agency is required by Title 9, ch. 6, art. 2 of the Arizona Administrative Code to isolate or quarantine an individual or group of individuals (§ 4.44, *supra*), it shall issue a written order for isolation or quarantine and other control measures.

a. Notice to affected persons: The order shall be issued to each individual or group of individuals to be isolated or quarantined and, for each individual who is a minor or incapacitated adult, the individual’s parent or guardian. R9-6-388.A.; A.R.S. § 36-789.A.2.

b. Notice to affected persons; exception. If an order applies to a group of individuals, and it would be impractical to provide a copy to each individual, the local health agency may post the order in a conspicuous place at the premises at which the individuals are to be isolated or quarantined. R9-6-388.A.3; A.R.S. 36-789.A.2. .

3. Required contents of administrative order for quarantine or isolation. The order shall specify:

- a. Control measures being imposed.* The isolation or quarantine and other control measure requirements being imposed, which may include requirements for physical examinations and medical testing to ascertain and monitor each individual’s health status. R9-6-388.A.1.a.
 - b. Identity of persons.* The identity of each individual or group subject to the order. R9-6-388.A.1.b; A.R.S. § 36-789.A.1.
 - c. Premises.* The premises at which each individual or group is to be isolated or quarantined. R9-6-388(A)(1)(c); A.R.S. § 36-789.A.1.
 - d. Date and time commenced.* The date and time at which isolation or quarantine and other control measure requirements begin. R9-6-388.A.1.d; A.R.S. § 36-789.A.1.
 - e. Justification.* The justification for isolation or quarantine and other control measure requirements, including, if known, the disease for which the individual or individuals are believed to be cases, suspect cases, or contacts. R9-6-388.A.1., R9-6-388.A.1.d; A.R.S. § 36-789.A.1.
- 3. Discretionary content of administrative order for quarantine or isolation.** The written order may provide information about existing medical treatment, if available and necessary to render an individual less infectious, and the consequences of an individual’s failure to obtain the medical treatment. R9-6-388.2.
- 4. Noncompliance; assistance of law enforcement.** In the event of noncompliance with a written order for quarantine or isolation, a local health agency may contact law enforcement to request assistance in enforcing the order. R9-60388.D.

D. Conduct of isolation or quarantine.

- 1. Where conducted.** For provisions authorizing local health agencies to establish, operate, and regulate a temporary hospital or “place of reception” for persons with “contagious or infectious” disease, see § 4.10.B.3., *supra*, discussing A.R.S. § 36-627. See also § 9.32.D.1., *infra*, discussing A.R.S. 36-788.B.1.
- 2. How conducted.** See § 932.C.2., *infra*.

E. Restrictions on persons during period of quarantine or isolation. See § 9.32.E., *infra*.

F. Termination of isolation or quarantine. See § 9.32.F, *infra*.

G. Exception for HIV/AIDS. See §9.32.G, *infra*.

4.46 Judicial review of isolation or quarantine.

This section sets forth the provisions for *judicial review* of administratively-ordered isolation or quarantine.

A. Courts having jurisdiction. See § 9.33.A., *infra*.

B. Petition for judicial review. After issuing a written order for isolation or quarantine (§ 4.45.C., *supra*), if the local health agency determines that isolation or quarantine and other control measure requirements need to continue *for more than 10 days after the date of the order*, the agency shall file a petition for a court order authorizing the continuation of isolation or quarantine and other control measure requirements. R9-6-388.B; *see also* § 9.33.B., *infra*, discussing A.R.S. § 36-789.B.

1. When petition must be filed. The petition must be filed *within ten days after issuance of the written order*. R9-6-388.B; *see also* § 9.33.B.1., *infra*, discussing A.R.S. § 36-789.B.

2. Required contents of petition.

- a. **Basic Information.** The petition shall include the information listed in § 4.45.C.3.a.-e., *supra*. *See also* § 9.33.B.2.a, *infra*, discussing A.R.S. § 36-789.B.1-6.
- b. **Sworn Affidavit; other information.** The petition must be accompanied by a sworn affidavit of a representative of the local health agency or the DHS attesting to the facts asserted in the petition, together with any further information that may be relevant and material to the court's consideration. R906-388.B.2; *see also* § 9.33.B.2.b., *infra*, explaining A.R.S. § 36-789.C.

C. Notice, to affected individual, of petition to isolate or quarantine for more than 10 days. A local health agency filing a petition for a court order to extend isolation or quarantine and other control measures beyond 10 days shall provide notice to each individual or group identified in the petition according to the Arizona Rules of Civil Procedure, except that notice shall be provided within 24 hours after the petition is filed. R9-6-388.C. *See also* § 9.32.C.,D., *infra*, discussing A.R.S. § 36-789.D.,E.

- D. *Timing of judicial hearing.*** See § 9.32.D., *infra*.
- E. *Consolidation of claims.*** See § 9.32.E.1-4., *infra*.
- F. *Burden of proof.*** See § 9.32.F., *infra*.
- G. *Required elements of judicial order authorizing isolation or quarantine.*** See § 9.32.G.1-3, *infra*.
- H. *Duration of judicial order for isolation or quarantine*** See § 9.32.H.1.-2., *infra*.
- I. *Claims challenging isolation or quarantine; judicial hearings*** See § 9.32.I.1.-2, *infra*.
- J. *Record of proceedings.*** See § 9.32.J., *infra*.
- K. *Party unable personally to appear.*** See § 9.32.K., *infra*.
- L. *Provision of counsel.*** See § 9.32.L.1.-3., *infra*.

4.50 NO COMPULSORY TREATMENT BY COUNTY OR STATE

4.51 Limitation upon county health departments to impose treatment.

Nothing in title 36, chapter 1, article 4 authorizes a county department of health, its officers or representatives to impose on any person any mode of treatment against his will, or any examination inconsistent with the creed or tenets of a religious denomination to which the person is an adherent, provided that the person complies with sanitary and quarantine laws, rules and regulations. A.R.S. § 36-184.C.

Note: This little-recognized provision operates to preclude compulsory treatment by county health departments, under the stated circumstances, where less intrusive alternatives will meet public health objectives.

4.52 Limitation upon authority of state department of health services to impose treatment.

Nothing in title 36 authorizes the department of health services, its officers or representatives to impose on any person against his will, or contrary to his religious concepts, any mode of treatment, provided that the person complies with sanitary or preventive measures and quarantine laws. A.R.S. § 36-114.

Note: This little-recognized provision operates to preclude compulsory treatment by the department of health services, under the stated circumstances, where less intrusive alternatives will meet public health objectives.

5.00 HEALTH INFORMATION PRIVACY

[Brief narrative link t-k]

5.10 PRIVACY OF HEALTH INFORMATION UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (“HIPAA”)

The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) contains provisions intended to protect the privacy of certain individually identifiable health information, referred to as “protected health information” (“PHI”). See 42 U.S.C. 1320d-2 (2005). Generally speaking, the administrative rules adopted under HIPAA limit the ability of certain entities to use and disclose an individual’s PHI without notifying, and/or obtaining authorization from, that person. It is important to note that HIPAA contains numerous exceptions to this general rule. One of the most significant exceptions involves uses and disclosures of PHI for public health activities, as set forth in this section.

5.11 Applicability of HIPAA

A. Covered entities. The following are covered by HIPAA’s privacy regulations:

- 1. Health Plan:** An individual or group plan that provides or pays the cost of medical care
- 2. Health care clearinghouse:** A public or private entity that processes or facilitates the processing of health information.
- 3. Health care provider:** A provider 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. 45 C.F.R. § § 160.02, 160.103.

B. Public health departments as covered entities subject to HIPAA; “hybrid entity” limitation. Many public health departments and agencies provide health care services. See *generally* [Ariz. Stats]. On this basis (see § 5.10A.3., *supra*) they are covered entities.

However, a public health department may designate itself as a “hybrid entity” and designate those health care-providing components of its organization to which HIPAA applies. Then, the *non*-designated components need *not* comply with HIPAA’s privacy requirements. See 45 C.F.R. § 164.504.

5.12 Permitted uses and disclosures of PHI for public health activities. A covered entity may disclose PHI for public health purposes without an individual’s authorization provided such disclosure is made to:

A. Authorized public health authority: A public health authority authorized by law to collect such information to prevent or control disease, injury, or disability.

A “public health authority” is an agency or authority of the United States, a state, a territory, a political subdivision of 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.
45 C.F.R. § 164.501

B. International collaboration: An official of a foreign government agency that is acting in collaboration with a public health authority.

C. Authorize abuse/neglect authority: A public health authority or other government authority authorized to receive reports of child abuse or neglect.

D. FDA jurisdiction: A person subject to the jurisdiction of the Food and Drug Administration (FDA) for the purpose of activities related to the quality, safety, or effectiveness of an FDA-regulated product or activity.

E. Person exposed to disease: A person who may have been exposed to a communicable disease or is at risk of contracting or spreading a disease if the covered entity is otherwise authorized by law to notify such a person as necessary in the conduct of a public health intervention or investigation; or

F. Employer: An employer if such information is related to an employee’s workplace injury or workplace medical surveillance.

45 C.F.R. . § 164.512(b)

5.13 Other permitted uses and disclosures of PHI. A covered entity may also disclose PHI without an individual’s authorization in a number of other circumstances, which include:

A. Abuse or neglect: Disclosures about victims of abuse, neglect, or domestic violence to a government authority authorized to receive such reports.

B. Health oversight activities: Uses and disclosures for health oversight activities, such as audits, criminal investigations, or licensing actions.

C. Legal process: Disclosures for judicial and administrative proceedings in response to a court or tribunal order, subpoena, discovery request, or other lawful process.

D. Law enforcement: Disclosures for law enforcement purposes, such as identification of a suspect, apprehension of a criminal suspect, or ascertainment of a potential victim's cause of death or injury.

E. Deaths: Uses and disclosures about decedents for purposes such as identifying a deceased person or determining a cause of death.

F. Organ donation: Uses and disclosures for cadaveric organ, eye, or tissue donation purposes to organ procurement, banking, or transplantation organizations.

G. Public health research: Uses and disclosures for public health research purposes regardless of the source of research funding.

H. Threats to health and safety: Uses and disclosures to avert a serious threat to health or safety.

I. Workers' compensation: Disclosures for workers' compensation

J. Otherwise authorized: Uses and disclosures otherwise authorized by law.

45 C.F.R. § 164.512 (details concerning permissibility of above disclosures omitted).

5.14 Preemption of state privacy law contrary to HIPAA; exceptions

HIPAA provisions preempt contrary provisions of state privacy law unless:

A. Compelling need: The state law serves a compelling need related to public health, safety, or welfare;

B. Controlled substances: The principal purpose of the state law relates to the control of any controlled substance;

C. State law more stringent: The state law provides more stringent privacy protections for health information than the applicable HIPAA provisions;

D. Surveillance: The state law provides for the reporting of disease, injury, child abuse, birth, death, or other public health surveillance or investigation; or

E. *Monitoring*: The state law requires health plans to report or provide access to health information for purposes of financial audits or other programmatic monitoring.

45 C.F.R. § 160.203

5.20 PRIVACY OF HEALTH INFORMATION UNDER ARIZONA HEALTH LAW

t/k

5.30 DISCLOSURE OF HEALTH INFORMATION AND ARIZONA OPEN RECORDS LAW

T/K

6.00 LIMITATIONS ON ECONOMIC INTERESTS: CONTROLS ON THE USES OF PROPERTY IN THE INTEREST OF PUBLIC HEALTH AND SAFETY

[Add introductory scope note on section: first, constitutional limits (fed. and state); second, Arizona provisions on obtaining search warrant; third, Arizona provisions on the scope of and authority for the conduct of public health inspections -- for “nuisance,” sanitary inspections, etc.]

6.10 SEARCHES AND INSPECTIONS: CONSTITUTIONAL DIMENSIONS

The following materials explore the application of both federal and Arizona constitutional provisions to inspections – often called “administrative searches” – that are undertaken by public health authorities under regulatory programs aimed at protecting public health and safety.

6.11 United States Constitution

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Public health authorities regularly conduct administrative searches, or inspections, as a part of the enforcement of health and safety standards in a wide variety of industries. Since 1967, it has been clear that such inspections, like criminal searches, are governed by the Fourth Amendment. Accordingly, “unreasonable” searches and seizures are prohibited, and a pre-inspection warrant must presumptively be obtained, based on a showing of “probable cause.” *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 337 U.S. 541 (1967). *See also Donovan v. Dewey*, 452 U.S. 594, 598 (1981) (Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property).

The following materials set forth (A) the nature of the “probable cause” that presumptively must be shown prior to issuance of a warrant (since that standard differs from “probable cause” in the criminal context); (B) the judicially-recognized *exceptions* to the requirement for a pre-inspection warrant; (C) describes limitations on warrantless searches; and (D) “mixed” administrative/criminal searches. For additional information on these matters, see FRANK P.

GRAD, THE PUBLIC HEALTH LAW MANUAL 158-79 (3D ED. 2005); LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 256-58 (2000)

A. Nature of “probable cause” where warrant required. As noted, a warrant is presumptively required for an administrative search or inspection. However, the showing required to establish “probable cause” to support its issuance is different from the showing required to authorize a criminal search warrant. The two bases for “administrative search” probable cause are:

1. Specific evidence of an existing violation of a standard in the premises to be inspected. Based upon evidence known to it, a regulatory agency may well have reason to believe in the present existence of a violation of a health or safety rule at a particular premises. Such evidence will generally meet the requirement for issuance of a warrant. *Camara v. Municipal Court, supra*, 387 U.S. at 535-39. (In its requirement for an evidentiary basis, the determination of “probable cause” under this standard is not unlike the criminal standard, although with different “stakes.”)

2. Alternative basis: generalized legislative or administrative standard for conducting the inspection, supported by a valid public interest. This standard, which has no criminal analog, requires “a showing that ‘reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular . . . [premises].’” *Marshall v. Barlow’s, Inc., supra*, 436 U.S. at 320 (quoting *Camara v. Municipal Court of San Francisco, supra*, 387 U.S. at 538). Such standards might be the passage of time, the nature of the particular building, or the condition of an entire area., but “will not necessarily depend upon specific knowledge of the particular . . . [premises].” *Camara, supra*, at _____. For example, an agency can merely state that the entity has been selected for inspection on the basis of a general administrative plan for the enforcement of a legislative act derived from neutral sources. *Marshall v. Barlow’s, Inc., supra*, 436 U.S. at 321.

B. Circumstances where warrant generally not required. In a number of circumstances, courts have dispensed with the presumptive requirement for a pre-inspection warrant.

- 1. Consent.** Many inspections are conducted with the consent of the responsible person. A legally valid consent dissolves the need for a warrant. *J.L. Foti Construction Co. v. Donovan*, 786 F.2d 714 (6th Cir. 1986).
- 2. Emergency.** Immediate threats to public health or safety (e.g., fire; imminent risk of explosion) can justify a warrantless search, as can the need for prompt action to inspect quarantined fruit or vegetables that may be infected with pests. *See State v. Bailey*, 586 P.2d 648 (Ariz. 1978).

3. **Public places.** Areas open to the general public (such as the area of a restaurant in which customers eat), where the proprietor does not have a reasonable expectation of privacy, may be administratively searched without a warrant. *Donovan v. Lone Steer, Inc.*, 464 U.S. 498 (1984).
4. **“Pervasively regulated businesses.”** In *New York v. Burger*, 482 U.S. 691, (1987) the Supreme Court created a three-part test which, if satisfied, dispenses with the need for a warrant for inspection of “pervasively regulated businesses.” The rationale for the exception seems to be a combination of the importance of prompt, routine inspections for health and safety purposes (without the delay and opportunity for concealment that a warrant might facilitate), and the diminished expectation of privacy that characterizes heavily-regulated enterprises. *Id.* at 691, 704-07.

a. What constitutes “pervasively regulated business.” Examples of “pervasively regulated businesses,” taken from Supreme Court and 9th Circuit jurisprudence, include the vehicle dismantling industry, firearms dealers, the liquor industry, veterinary drug manufacturers, and liquified propane gas dealers. *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004) (holding that abortion clinics do not qualify and that warrant is therefore necessary).

b. The three elements that must be satisfied for warrantless search of pervasively regulated business.

(1). *“Substantial” state interest.* First, there must be a “substantial” government interest that informs the regulatory scheme pursuant to which the inspection is made. *See, e.g., Donovan v. Dewey*, 452 U.S. at 602 (“substantial federal interest in improving the health and safety conditions in the Nation’s underground and surface mines”). This interest can be demonstrated by a business that has a “long tradition of government supervision, of which any person who chooses to enter such a business must already be aware.” *Marshall v. Barlow’s, Inc.* 436 U.S. 307, 313.

(2) *Necessity of warrantless search.* The warrantless inspection must be “necessary to further the regulatory scheme.” *See, e.g., Donovan v. Dewey*, 452 U.S. at 600 (forcing mine inspectors to obtain a warrant before every inspection might alert mine owners or operators to the impending inspection, thereby frustrating the purposes of the Mine Safety and Health Act--to detect and thus to deter safety and health violations).

(3) *Regulatory statute provides notice to affected parties and limits discretion of inspectors.* The regulatory statute must:

- (a) advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope (statute must be “sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.”)

Note: On a related point, see *Mendez v. Arizona State Bd. of Pharmacy*, 628 P.2d 972, 974-75 (Ariz. Ct. App. 1981) (no Fourth Amendment violation where statutes provide expressly for warrantless access to pharmacy records).

- (b) limit the discretion of the inspecting officers (discretion of inspectors must be “carefully limited in time, place, and scope” by the statute. *New York v. Burger*, 482 U.S. 691, 702-03 (1987); *see also State v. Hone*, 866 P.2d 881, 882-83 (Ariz. Ct. App. 1993) (statute permitting livestock officers to stop any vehicle that may be transporting livestock, in order to determine whether driver has necessary permit to do so, does not sufficiently limit livestock officers’ discretion).

In contrast to the foregoing, “Warrantless inspections of commercial property may be constitutionally objectionable if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials.” *Donovan v. Dewey*, 452 U.S. 594, 599 (1981). Moreover, if a statute providing for administrative inspections “does not provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search,” then a warrant will be required. *Id.* [check this, and *Camara*]

C. *Limitations on warrantless inspections.*

1. Limitations on time, place, scope. The circumstances (time, place, scope) leading to inspection generally define the permissible boundaries of a warrantless search. *See, e.g., United States v. Biswell*, 406 U.S. 311 (1972).

2. Subsequent use of evidence wrongfully obtained without warrant. In reviewing administrative proceedings, courts may, but generally do not, apply the “exclusionary rule” to evidence obtained during an administrative inspection where the consequences of the proceeding are not criminal. *United States v. Article of Food Consisting of Twelve Barrels*, 477 F. Supp. 1185 (S.D.N.Y. 1979) (not applying exclusionary rule); *but see Finn’s Liquor Shop Inc. v. State Liquor Authority*, 294 Y.Y.S.2d 592 (App. Div. 1st Dep’t. 1968) (applying rule).

D. “Mixed” public health/criminal inspections. Where a public-health purpose predominates in an otherwise lawful inspection, neither the fact that the investigation also has a criminal objective, nor the discovery of criminal evidence, will render the inspection unlawful. *New York v. Burger, supra*, 482 U.S. at 716; *Michigan v. Clifford*, 464 U.S. 287, 294 (1984).

6.12 Arizona Constitution.

[Come back to this – I think it will be extremely brief, since there appears to be no AZ authority to the effect that, in the context of administrative searches, the AZ Constn is materially different from the federal.]

6.20 **SEARCH WARRANTS**

6.21 Definition

A search warrant is an order in writing issued in the name of the state of Arizona, signed by a magistrate, directed to a peace officer, commanding him to search for “personal property, persons or items described in § 13-3912.” ARIZ. REV. STAT. § 13-3911. One of the specified grounds for issuing a warrant in § 13-3912 is “When the property is to be searched and inspected by an appropriate official *in the interest of the public health, safety or welfare as part of an inspection program authorized by law.*” ARIZ. REV. STAT. §13-3912.5 (emph. added)

6.22 How to Obtain Warrant

A. Requirements for issuance of warrant

1. Probable cause required. No search warrant shall be issued except on probable cause, supported by affidavit, naming or describing the person and particularly describing the property to be seized and the place to be searched. ARIZ. REV. STAT. § 13-3913.

2. Affidavit.

- a. Before issuing a warrant, the magistrate may examine on oath the person or persons seeking the warrant, and any witnesses produced, and must take his affidavit to be subscribed by the party or parties making the affidavit. Before issuing the warrant, the magistrate may also examine any other sworn affidavit submitted to him which sets forth facts tending to establish probable cause for the issuance of the warrant. ARIZ. REV. STAT. § 13-3914.A..
- b. The affidavit(s) must set forth the facts tending to establish the grounds of the application, or probable cause for believing the grounds exist. ARIZ. REV. STAT. § 13-3914.B..
- c. An oral statement may be taken in addition to or in place of the written affidavit, and shall be deemed to be an affidavit (details omitted). ARIZ. REV. STAT. § 13-3914.C.

Other provisions regarding procedural and substantive aspects of the issuance and use of search warrants may be found at ARIZ. REV. STAT §§ 13-3915 to 13-3925.

See § 6.34, infra, regarding right to enter and inspect for nuisance or filth with consent, and right to enter with warrant if consent refused.

6.30 PUBLIC NUISANCES

Public nuisances are exceptionally difficult to define...At common law, a public nuisance was an act or omission “which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all.”...

Today, public nuisances are usually defined by the legislature. Alternatively, the legislature delegates to state and local public health agencies the power and duty...to define, prevent, and abate nuisances.... The legislative or administrative definition is often broad and virtually coterminous with the police power.... Legislatures or agencies also specify particular conditions as public nuisances....

Legislative or administrative definitions of nuisances are presumed constitutional, but courts reserve the right to determine the presence of a nuisance.

LAWRENCE O. GOSTIN, PUBLIC HEALTH: POWER, DUTY, RESTRAINT 259-60 (2000) (internal citations omitted)

In the context of public health, public nuisances are those actions or uses of property that significantly interfere with the public’s health or safety. *See generally* RESTATEMENT (SECOND) OF TORTS § 821(B)(2)(a) (1979).

6.31 Public nuisance and private nuisance defined and distinguished

- A. *Private nuisance*:** A “private nuisance” is one which affects a single individual or a definite number of persons in the enjoyment of some private right which is not common to the public. *City of Phoenix v. Johnson*, 75 P.2d

30, 34 (Ariz. 1938). The action for private nuisance is strictly limited to an interference with a person's interest in the enjoyment of real property (*Armory Park Neighborhood Ass'n v. Episcopal Community Services in Arizona*, 712 P.2d 914, 917 (1985)); a private nuisance constitutes "a nontrespasory invasion" of that interest. *Id.* Summary abatement of a private nuisance, by self-help, may be permitted if it can be achieved without a breach of the peace. *State ex rel. Herman v. Cardon*, 544 P.2d 657, 660 (1976).

- B. Public nuisance:** a "public nuisance" encompasses "any unreasonable interference with a right common to the general public," affecting the "rights of 'citizens as a part of the public...'" *Armory Park v. Episcopal Community Services*, 712 P.2d 914, 917 (Ariz. 1985) (quoting *City of Phoenix v. Johnson*, 75 P.2d 30, 34 (Ariz. 1938)). It must affect a "considerable number of persons or an entire community or neighborhood." *City of Phoenix v. Johnson*, 75 P.2d 30, 34 (1938); *Armory Park v. Episcopal Community Services*, *supra*, at 917. See also *Spur Industries, Inc. v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. 1972).

Unlike a private nuisance, a public nuisance claim is *not* limited to an interference with the use and enjoyment of the plaintiff's land. *Armory Park v. Episcopal Community Services*, *supra*, 712 P.2d at 917 (emph. added)

- C. Public and private nuisance claims not necessarily mutually exclusive.** Although public and private nuisance claims implicate different interests, "the same facts may support claims of both..." *Armory Park v. Episcopal Community Services*, *supra*, 712 P.2d 914 at 917. Thus, a nuisance "may be simultaneously public and private..." *Id.* Such a "mixed nuisance" affects the general public and at the same time inflicts some special injury upon a private individual, who accordingly may have a right of action under either theory. *City of Phoenix v. Johnson*, *supra*, 75 P.2d 30, 34.

6.32 Public nuisance actions by citizens.

A. Tort claim. Public nuisance is a tort claim, although it originated in criminal law. *Armory Park v. Episcopal Community Services*, *supra*, at 917.

B. Relationship to criminal law. The tort-based claim of public nuisance exists independent of criminal statute; it can be brought even though the underlying conduct is not prohibited by the criminal law. *Armory Park v. Episcopal Community Services*, *supra*, at 922-23.

C. Standing. although at common law only a public official could bring a public nuisance claim, in Arizona a private person can have standing to bring such a claim, provided that s/he alleges harm to an interest in use and enjoyment of real

property that is “special in nature and different in kind” from that experienced by citizens generally. *Armory Park v. Episcopal Community Services, supra*, at 918.

D. Applicability of nuisance doctrine to both individuals and municipalities.

Both individuals and municipalities are subject to liability for maintaining a nuisance. *See, e.g., City of Phoenix v. Johnson, supra*, 75 P.2d at 37 (holding that a city’s sewage plant constituted a public nuisance); A.R.S. 36-601.A.4 (any government place, condition, or building not maintained in a sanitary conditions constitutes a public nuisance).

E. Equity; balancing test; reasonableness.

- 1. Equitable concept.** A suit to enjoin a nuisance sounds in equity and the courts have long recognized a special responsibility to the public when acting as a court of equity. *Spur Industries, Inc. v. Del E. Webb Development Co.*, 494 P.2d 700, 706 (Ariz. 1972).
- 2. Overall reasonableness standard; balancing test.** “Since the rules of a civilized society require us to tolerate our neighbors, the law requires our neighbors to keep their activities within the limits of what is tolerable by a reasonable person. However, what is reasonably tolerable must be tolerated; not all interferences with public rights are public nuisances... [t]o constitute a nuisance, the complained-of interference must be substantial, intentional and unreasonable under the circumstances.” *Armory Park, supra*, 712 P.2d at 920. A balancing test is performed to determine the utility and reasonableness of the “interference” (*id.*; see also *McQuade v. Tucson Tiller Apartments, Ltd.*, 543 P.2d 150, 152 (Ariz. Ct. App. 1975), measured against the extent of harm inflicted and the nature of the affected [surroundings...]. *Armory Park, supra*, 712 P.2d at 920-21.

Note: As an example of the foregoing, a defendant’s compliance with zoning regulations is a factor in the determination of reasonableness, but not conclusive thereof; it does not by itself preclude enjoining activity as a public nuisance, since “the equitable power of the judiciary exists independent of statute.” *Armory Park, supra*, 712 P.2d at 921-22.

Note: Nuisances of the foregoing kind are sometimes called “nuisances *per accidens*” (nuisances in fact). Nuisances *per accidens* are a “class of acts, exercise of occupations or trades, and use of property which become nuisances by reason of their location or surroundings”; as to this category, “it is necessary not only to prove the act, but also to prove the circumstances which make it a nuisance. *Engle v. Scott*, 114 P.2d 236, 238 (Ariz. 1941). Compare “nuisances *per se*” (nuisances at law); *see, e.g., § 4.21.D, infra*.

6.33 Public nuisance actions by government.

A. Governmental regulation of public nuisance arises under police power. The regulation and abatement of nuisances is one of the ordinary functions of the police power, and demolition or abatement of a nuisance is not a “taking” under the power of eminent domain. *Moton v. City of Phoenix*, 410 P.2d 93, 94-95 (Ariz. 1966).

B. Specific conditions statutorily-determined to be “public nuisances dangerous to the public health,” to be abated by public health authorities. Notwithstanding the flexible nature of the concept of nuisance described in § 4.21.B, *supra*, above, certain specific conditions have been declared by statute to be “public nuisances dangerous to the public health.” These are to be abated by order of the director of the DHS. See ARIZ. REV. STAT. § 36-601.A.,B.

Note: Twenty such situations are listed. Examples include: in populous areas, breeding conditions for rodents, flies, mosquitoes and other disease-transmitting insect vectors; contaminated or spoiled food intended for human consumption; unsanitary food establishments; any unsanitary government building; exposed sewage; defective and leaking containers used in transport of garbage, human excreta and organic material; the presence of bedbugs, lice, mites, etc. in public sleeping accommodations; and a wide variety of other hazards.

Such conditions are sometimes placed in a category referred to as “nuisances *per se*” or nuisances at law -- “[a]n act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.” BLACK’S LAW DICTIONARY 962 (5TH ED.1979). [re-check the following two cases: The court must abate a nuisance *per se* by injunction. *Cactus Corp v. State*, 480 P.2d 375, 378 (Ariz. Ct. App. 1971). Compensation is not required for a nuisance *per se*. *Mutschler v. City of Phoenix*, 129 P.3d 71, 78 (Ariz. Ct. App. 2006).] “When anything is a nuisance *per se*, all that is necessary to establish the right of the public authorities to demand the proper remedy is to prove the act which, as a matter of law, constitutes the nuisance.” *Engle v. Scott*, 114 P.2d 236, 238 (Ariz. 1941).

C. Prosecution of public nuisance by public attorneys; crime.

1. ARIZ. REV. STAT. § 13-2917.

a. Definition of “public nuisance” for purposes of action by public attorneys: The Arizona criminal code defines “public nuisance” as any activity that, *inter alia*, is “injurious to health, indecent, offensive to the senses or an obstruction to the free use of property that interferes with the comfortable enjoyment of life or property by an entire community or neighborhood or by a considerable number of persons.” ARIZ. REV. STAT. § 13-2917.A.1. (Note similarity of definition to that for a civil claim, remarked upon by court in *Armory Park*, *supra*, 712 P.2d at 917, § . *supra*).

b. Equitable remedies. A county attorney, the attorney general, or a city attorney may bring an action in superior court to abate, enjoin, and prevent a “public nuisance” as defined in ARIZ. REV. STAT. § 13-2917.A.1 (§ 4.21.C.2.a, *supra*). ARIZ. REV. STAT. § 13-2917.C.

c. Public nuisance as a crime. Any person who knowingly maintains or commits such a “public nuisance” or who knowingly fails or refuses to perform any legal duty relating to its removal is guilty of a class 2 misdemeanor. ARIZ. REV. STAT. § 13-2917.D.

2. ARIZ. REV. STAT. § 13-2908

a. A person commits criminal nuisance:

1. If, by conduct, either unlawful in itself or unreasonable under the circumstances, such person recklessly creates or maintains a condition which endangers the safety or health of others.
2. By knowingly conducting or maintaining any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.

b. Criminal nuisance is a class 3 misdemeanor.

D. Unavailability of eminent domain power for nuisance abatement.

Municipalities may not abate a nuisance through the power of eminent domain, but may assess fines or assess the cost of removing the nuisance. *City of Tempe v. Fleming*, 815 P.2d 1, 5 (Ariz. Ct. App. 1991).

6.34 County inspections of premises for nuisance and other violations; warrantless entry with consent; right to enter with warrant if consent withheld; removal of nuisance

When a county board of health or health department deems it necessary to enter a building or structure within its jurisdiction for the purposes of examining, destroying, removing or preventing a nuisance, source of filth or cause of sickness and is *refused entrance*, any member of the board or officer of the department may make a complaint under oath to a justice of the peace. The *justice of the peace shall issue a warrant* directing the sheriff or other peace officer accompanied by and under the direction of at least one member of the board or department to destroy, remove or prevent, between the hours of sunrise and sunset, such nuisance, source of filth or cause of sickness. ARIZ. REV. STAT. § 36-603.

6.35 Administrative remedies for abatement of nuisances; enforcement

A. Local health authorities: removal or abatement of nuisance

1. Duty of local health authority to order removal, at owner's expense.

When a nuisance, source of filth or cause of sickness exists on private property, the county board of health, the local health department, the county environmental department or the public health service district shall order the owner or occupant to remove it within twenty-four hours at the expense of the owner or occupant.

2. Notice; service of process. The order may be delivered to the owner or occupant personally, or left at the owner or occupant's usual place of abode or served on the owner or occupant in the same manner as provided for service of process under the Arizona rules of civil procedure.

3. Penalty for failure to comply. If the order is not complied with, the board or department may impose a civil penalty pursuant to § 36-183.04 and shall cause the nuisance, source of filth or cause of sickness to be removed, and expenses of removal shall be paid by the owner, occupant or other person who caused the nuisance, source of filth or cause of sickness. ARIZ. REV. STAT. § 36-602.A..

4. City or county law authorizing assessment of abatement costs on offending land. A city or county may prescribe by sanitary ordinance or regulation a procedure for making the actual cost of this removal or abatement, including the actual costs of any additional inspection and other incidental costs in connection with the removal or abatement, an assessment on the lots and tracts of land on which the nuisance, source of filth or cause of sickness was abated or removed, subject to the following:

a. Any such ordinance or regulation shall include a provision for appeal of the assessment to the governing body or the board of supervisors or its designee.

b. The assessment, from the date of its recording in the office of the county recorder in the county where the lot or tract of land is located, is a lien on the lot or tract of land until paid.

c. Any assessment recorded is prior and superior to all other liens, obligations or other encumbrances, except liens for general taxes and prior recorded mortgages.

d. The city or county may bring an action to enforce the lien in the superior court in the county in which the property is located at any time after the recording of the assessment, but failure to enforce the lien by this action does not affect its validity. The recorded assessment is *prima facie* evidence of the truth of all matters recited in the assessment and of the regularity of all proceedings before the recording of the assessment.

e. A prior assessment for the purposes provided in this section is not a bar to a subsequent assessment or assessments for these

purposes, and any number of liens on the same lot or tract of land may be enforced in the same action.

f. An assessment or lien recorded pursuant to this section does not limit, restrict or otherwise affect the authority of a city or county to undertake any additional enforcement action that is authorized by law, including applicable ordinances or regulations.

g. The ordinance or regulation shall provide notice to all lienholders. ARIZ. REV. STAT. § 36-602(B).

B. *Authority of director of DHS to issue and enforce cease and desist order for nuisance; injunction.*

- 1. Reasonable cause; duty to issue cease and desist order.** When the director of the DHS has reasonable cause to believe from information furnished him or from investigation made by him that any person is maintaining a nuisance or engaging in any practice contrary to the health laws or rules of the state, he shall forthwith serve upon such person by certified mail a cease and desist order requiring the person, upon receipt of the order, forthwith to cease and desist from such act. ARIZ. REV. STAT. § 36-601.B.
- 2. Hearing.** Within fifteen days after receipt of the order, the person to whom it is directed may request the director to hold a hearing. The director, as soon as practicable, shall hold a hearing, and if he determines the order is reasonable and just and that the practice engaged in is contrary to the health laws or rules of the state, the director shall order such person to comply with the cease and desist order. ARIZ. REV. STAT. § 36-601(B).
- 3. Failure to comply with order; injunction.** Upon the failure or refusal of a person to comply with the order of the director, or if a person to whom the order is directed does not request a hearing and fails or refuses to comply with the cease and desist order served by mail under the provisions of ARIZ. REV. STAT. § 36-601.B (§ __B.2.), the director may file an action in the superior court in the county in which a violation has occurred, restraining and enjoining the person from engaging in further acts. The court shall proceed as in other actions for injunctions. ARIZ. REV. STAT. § 36-601(C).

C. *Destruction v. abatement.* Destruction of property causing or constituting a public nuisance is permissible if “there is no reasonable way of destroying the nuisance without also destroying the property.” *MacDonald v. Perry*, 255 P. 494, 499 (Ariz. 1927).

D. *Property owner not entitled to financial compensation for nuisance abatement; distinction between nuisance abatement and “taking.”* The abatement or destruction of property deemed a nuisance is an exercise of the government’s police powers to enforce a use restriction inherent in the owner’s property title, and not a taking. As such, the owner of property

abated or destroyed as a nuisance is not entitled to financial compensation from the government.

Note: See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (“Any limitation [that prohibits all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally . . .”).

[More recent US SC case?]

However, “[a]n arbitrary, conceived exaction, purportedly under the police power, will be nullified as a disguised attempt to take private property for public use without resort to eminent domain. [*Transamerica Title Ins. Co. v. City of Tucson*, 533 P.2d 693, 696 \(Ariz. Ct. App. 1975\).](#)”

6.40 SANITARY RULES AND REGULATIONS OF LOCAL HEALTH AUTHORITIES; VIOLATIONS; ENFORCEMENT.

6.41 Investigation of nuisances; duty to make regulations necessary for public health and safety; public notice of regulations. Each county shall:

- A. *Investigation; Regulations.*** Investigate all nuisances, sources of filth and causes of sickness and make regulations necessary for public health and safety. A.R.S. § 36-183.02.A.
- B. *Notice of Regulations.*** Give notice of all general orders and regulations by publishing them in a local newspaper; if there is none, by posting in five public places. A.R.S. 36-183.02.B

6.42 Administrative Enforcement Proceedings

A. *Notice of violation and demand for compliance.* If the director of a local health department or public health services district has reason to believe that a person has violated title 36, chapter 1, article 4 (dealing with powers of local health departments), or a sanitary ordinance or regulation, the director may issue a notice of violation and demand for compliance (by certified or registered mail or by hand delivery), stating with reasonable specificity the nature of the violation and the deadline for compliance. The notice of violation shall also state that the respondent may request a hearing.

B. *Timely compliance, request for hearing, or issuance of compliance order.* Unless the respondent either complies with the notice of violation by the stated

deadline, or requests a hearing within 15 days after service, the director of the local health department or public health services district may issue a compliance order consistent with the terms of the notice of violation.

C. *Hearing.* The director of a local health department, county environmental department or public health services district may appoint a hearing officer to conduct a hearing in accordance with title 41, chapter 6, article 6 (part of the Administrative Procedure Act). The hearing officer shall either issue or deny a compliance order and shall make a finding regarding a civil penalty.

D. *Appeal to director.* A compliance order is final and enforceable in superior court unless the respondent appeals to the director of the local health department, county environmental department or public health services district within 15 days after receiving the compliance order.

E. *Enforcement or appeal of director's decision.* On appeal, the director may affirm, modify or vacate the hearing officer's decision. The director shall consider the factors prescribed infra in sec. _____. The director's decision is enforceable as a judgment in superior court, and is subject to appeal pursuant to title 12, chapter 7, article 6.

F. *Civil penalty.* A compliance order may provide for a maximum civil penalty of \$750. per violation by an individual and \$5,000. per violation by an enterprise. A compliance order shall not impose a civil penalty for the same acts for which a court has previously imposed a civil or criminal penalty. In determining the amount of a civil penalty, the hearing officer and director shall consider the following factors:

- 1. the seriousness of the violation,**
- 2. as an aggravating factor only, any economic benefit** that results from the violation;
- 3. the history of that violation,**
- 4. the economic impact of the penalty on the violator,**
- 5. any good faith efforts to comply with the applicable requirements,**
- 6. the duration of the violation** as established by any credible evidence,
- 7. payment by the violator of penalties previously assessed** for the same violation, and
- 8. other factors** affecting the public health and safety that the director [and, presumably, the hearing officer] deems relevant.

Collected civil penalties shall be deposited in the county general fund.

A.R.S. § 36-183.04

6.43 Judicial Enforcement Proceedings

A. Civil Proceedings.

1. Remedies. If the director of a local health department, county environmental department or a public health services district has reasonable cause to believe that a person is violating title 36, article 4, any sanitary ordinance or regulation adopted pursuant to title 36, article 4, *or a nuisance-abatement order under A.R.S. § 36-602 [see book sec. ____]*, the director through the county attorney may file an action in the superior court:

a. For injunctive relief in the form of a temporary restraining order, a preliminary or permanent injunction or any other appropriate relief necessary to enjoin the person from further violations and to protect public health or the environment.

b. To compel compliance with a nuisance abatement order or a compliance order, including the collection of civil penalties assessed under that order.

c. To impose civil penalties of not to exceed one thousand dollars a day but not more than ten thousand dollars for each violation. A.R.S. § 36-183.05.A.

2. Amount and disposition of civil penalties. In determining the amount of a civil penalty, the court shall consider the same factors set forth in § 2.27.b.6, *supra*. A.R.S. § 36-183.05.B. Civil penalties shall be deposited into the county general fund. A.R.S. § 36-183.05.C

3. Settlement permitted by consent decree A.R.S. § 36-183.05.D

6.44 Criminal Sanctions and Proceedings.

A. Classification of violations as misdemeanor.

1. Violation of regulation; noncompliance with order. A person who violates a published order or regulation of a county, or maintains in an unsanitary condition premises located within the county and refuses or fails to place the premises in a sanitary condition within three days after being ordered to do so by the director of a local health department, county environmental department or public health services district, the county sanitary officer or any county peace officer acting under the direction and authority of the director or who thereafter refuses or fails to maintain the premises in a sanitary condition, is guilty of a class 3 misdemeanor if the person holds a valid permit under title 36, chapter 4, or a class 2 misdemeanor if the person does not hold such a permit. A.R.S. § 36-183.03

2. Violation of statute, ordinance, order, or nuisance abatement order. A person who violates title 36, chapter 1, article 4; a sanitary ordinance or regulation adopted or order issued pursuant thereto; or an order issued pursuant to A.R.S. § 36-602 (nuisance abatement) is guilty of a class 3 misdemeanor if the person holds a valid permit issued under this title 36, article 4, or a class 2 misdemeanor if the person does not hold such a permit. A penalty under this section [A.R.S. § 36-183] shall not be imposed for the same acts for which a civil penalty has been imposed under title 36, chapter 1, article 4. In determining the penalty, the court shall consider the same factors set forth in § 2.27.b.6, *supra*. Lack of criminal intent does not constitute a defense to violations alleged under this section [A.R.S. § 36-183]. A.R.S. § 36-183.A.-D.

3. Violation of statute or rules. A person violating any provision of title 36, article 4 or the rules and regulations adopted thereunder is guilty of a class 3 misdemeanor. A.R.S. § 36-191.

B. Health inspector’s notice of violation; notice to appear, notice of criminal sanctions. If a health inspector reasonably believes a person is violating title 36, article 4; a sanitary ordinance or regulation adopted or order issued pursuant thereto; or an order issued pursuant to A.R.S. § 36-602 (nuisance abatement), the inspector may serve a notice of violation. The notice of violation:

- 1. Specify the violation:** shall specify the statute, ordinance, regulation or order violated;
- 2. Notice of appearance:** shall contain a specific time and place for the alleged violator to appear;
- 3. Time for response:** must state the time prescribed for a response;
- 4. Service:** may be served in the manner provided in A.R.S. § 13-3903 [ck]. If a health inspector is unable to personally serve the notice, the notice may be served in the same manner prescribed for alternative methods of service by the Arizona rules of criminal procedure, and a response is required within the time prescribed by the rule under which it is served
- 5. Notice of Penalty:** shall specify the penalty sought pursuant to A.R.S. A.R.S. § 36-183.07 (§ 2.27.C.2.c, *infra*). A.R.S. § 36-183.06

6.50 GOVERNMENT TAKINGS

[t-k – especially in light of impact of Prop 207, just enacted!]

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V.

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the State treasury for the owner on such terms and conditions as the Legislature may provide, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

ARIZ. CONST., art. II, § 17.

7.00 Animal Health

[NEEDS REFORMATTING AND SOME LINKS]

- A. *The Department of Agriculture.*** The department of agriculture is the entity responsible for animal disease prevention and control. A.A.C. R3-2-402.
- B. *Mandatory Disease Reporting.*** All veterinarians and laboratories performing diagnostic services on animals shall notify the State Veterinarian at (602) 542-4293, within four hours of diagnosing or suspecting
1. Any Office of International Epizooties List A disease, Eighth Edition, 1999.
 2. Any of the following List B diseases: Anthrax, Aujeszky's disease, Babesiosis, Bovine brucellosis, Bovine spongiform encephalopathy, Bovine tuberculosis, Caprine and ovine brucellosis, Contagious caprine pleuropneumonia, Contagious equine metritis, Dourine, Enterovirus encephalomyelitis, Epizootic lymphangitis, Equine infectious anaemia, Equine piroplasmosis, Equine viral arteritis, Equine viral encephalomyelitis, Fowl typhoid, Glanders, Heartwater, Horse pox, Infectious haematopoietic necrosis of fish, Nairobi sheep disease, Ovine epididymitis, Paratuberculosis, Porcine brucellosis, Pullorum disease, Q fever, Rabies, Scrapie, Screwworm, Spring viraemia of carp, Surra, Theileriosis, Trypanosomiasis, Viral haemorrhagic septicaemia of fish. A.A.C. R3-2-402.
- C. *Individual Reporting of Swine.*** The owner, or the owner's agent, of an auction licensed by the USDA shall individually identify all swine in Arizona moving through the auction or other concentration point in intrastate and interstate commerce and shall submit the following information by the first of each month, to the State Veterinarian:
1. The name of the owner of the swine;
 2. The name of the buyer of the swine;
 3. The farm of origin;
 4. The individual identification of each swine; and
 5. The destination of the swine. A.A.C. R3-2-403.
- D. *Importation, Manufacture, Sale, and Distribution of Biologicals and Semen***
1. Any person importing, manufacturing, selling, or distributing any biological intended for diagnostic or therapeutic treatment of animals shall request, in writing, permission from the State Veterinarian.
 2. The State Veterinarian shall deny approval of the importation, manufacture, sale, or distribution of any biological that will interfere with the State disease control program.
 3. A person shall import semen only from boars in pseudorabies Stage IV or V states. A.A.C. R3-2-404.

E. *Depopulation of Animals Infected with a Foreign Disease.* When a foreign animal disease is diagnosed, the State Veterinarian shall order the owner to immediately depopulate and dispose of all infected and exposed animals on the premises if necessary to prevent the spread of the disease among animals. A.A.C. R3-2-405.

F. *Restricted Feeding Pens.*

1. **Feeding pen requirements.** A restricted feeding pen shall:
 - a. Be isolated from all other pens,
 - b. Have separate loading and unloading chutes, alleys, and handling facilities from all other pens,
 - c. Not share water or feeding facilities accessible to other areas,
 - d. Be posted at all corners with permanently affixed signs stating "Restricted Feeding Area,"
 - e. Have a minimum of eight feet between restricted and other pens and facilities, and
 - f. Have no common fences or gates with other pens. A.A.C. R3-2-406(A).
2. **Cattle placement.** An operator may place cattle in a restricted feeding pen as follows:
 - a. All cattle, except steers and spayed heifers, shall be branded with an "F", at least two inches in height, on the jaw or adjacent to the tailhead before entering the pen; and
 - b. Imported cattle, any age and from any area if accompanied by a permit number and an official health certificate; or
 - c. Native Arizona cattle accompanied by an Arizona livestock inspection certificate. A.A.C. R3-2-406(B).
3. **Cattle removal.** An operator may remove cattle from a restricted feeding pen as follows:
 - a. All animals, except steers and spayed heifers, shall be moved only to slaughter, to another designated feedlot, or to an auction market approved by the State Veterinarian or APHIS for sale to slaughter.
 - b. A steer or spayed heifer may be moved to any location. A.A.C. R3-2-406(C).

G. *Equine Infectious Anemia*

1. **Official Test.** The Arizona official test for EIA is either the agar-gel immunodiffusion test, known as the Coggins Test, or the Competitive Enzyme-Linked Immunosorbent Assay test, known as the CELISA test. The test shall be performed in a laboratory approved by APHIS, and required samples shall be drawn by an accredited veterinarian, the State Veterinarian, the State Veterinarian's designee, or an APHIS veterinarian. A.A.C. R3-2-407(A).
2. **Disposal of equine testing positive.**
 - a. When an Arizona equine tests positive to EIA, the testing laboratory shall immediately notify the State Veterinarian by telephone or fax.
 - b. The EIA-positive equine shall be quarantined to the premises where tested, segregated from other equine, and shall not be moved unless authorized by

- the State Veterinarian. The equine shall be retested by the State Veterinarian, the State Veterinarian's designee, or an APHIS veterinarian within two weeks of the notification.
- c. Within 14 days of being notified by the testing laboratory of a positive test conducted under subsection (2)(b), the State Veterinarian or the State Veterinarian's designee shall brand the equine on the left side of its neck with "86A" not less than two inches in height.
 - d. Within 10 days after being branded, the EIA-positive equine shall be:
 - i. Humanely destroyed,
 - ii. Confined to a screened stall marked "EIA Quarantine" that is at least 200 yards from other equine, or
 - iii. Consigned to slaughter at a slaughtering establishment. If consigned to slaughter, the equine shall be accompanied by a Permit for Movement of Restricted Animals, VS 1-27, issued by the State Veterinarian, the State Veterinarian's designee, or an APHIS veterinarian.
 - e. Offspring of mares testing EIA-positive shall be quarantined, segregated from other equine, and tested for EIA at six months of age. Offspring testing positive shall be handled as prescribed in subsections (2)(c) and (2)(d).
 - f. If an EIA-positive equine is located on premises other than those of the owner at the time a quarantine under this Section is effective, the State Veterinarian may authorize movement of the EIA-positive equine to the owner's premises if requested by the owner. Movement shall be under the direct supervision of the State Veterinarian or the State Veterinarian's designee. If the owner lives in another state, the owner may move the equine to that state with the permission of the chief livestock health official of the state and APHIS. A.A.C. R3-2-407(B).
3. **Required testing.** The State Veterinarian shall require testing of any equine located in the same facility as the EIA-positive equine or any equine considered exposed to the EIA-positive equine. The owner of the equine tested shall pay the expenses for the testing. A.A.C. R3-2-407(C).
 4. **No indemnification for loss.** The owner of any equine found to be EIA-positive shall not be indemnified by the state for any loss caused by the destruction or loss of value of the equine. A.A.C. R3-2-407(D).
- H. *Disposition of Livestock Exposed to Rabies.*** Livestock bitten by a known or suspected rabid animal shall be handled using the methods prescribed in the National Association of State Public Health Veterinarians' Compendium of Animal Rabies Control, 1999, Part III, Section 5. A.A.C. R3-2-408.
- I. *Rabies Vaccines for Animals.*** All animals in Arizona vaccinated against rabies shall be vaccinated as prescribed in the National Association of State Public Health Veterinarians' Compendium of Animal Rabies Control, 1999, Part II. A.A.C. R3-2-409.

[RABIES CONTROL not completed by Heather – see art. 5, AAC Title 9 ch. 7]

J. *Restricted Swine Feedlots.*

1. **Approval of restricted swine feedlots.** The State Veterinarian shall approve restricted swine feedlots for feeding swine from herds not known to be infected with pseudorabies and not tested for pseudorabies before importation if the imported swine meet all requirements in Article 6. Swine moved from a restricted swine feedlot shall be transported directly to a state or federal slaughter facility for immediate slaughter. A.A.C. R3-2-410(A).
2. **Breeding restrictions.** No breeding swine shall be located on or within 1/4 mile of a restricted swine feedlot. A.A.C. R3-2-410(B).
3. **Pseudorabies.** If pseudorabies is diagnosed in swine at a restricted swine feedlot, the feedlot shall be immediately quarantined and shall not receive any additional shipments of swine until the herd at the feedlot is declared free of pseudorabies or all swine are depopulated from the premises and the premises are cleaned and disinfected. A.A.C. R3-2-410(C).
4. **Monthly feedlot records.** A restricted swine feedlot owner or agent shall submit monthly feedlot records to the State Veterinarian, listing the animal's origin, health certificate number, permit number, slaughter destination, and shipping date. A.A.C. R3-2-410(D).

K. *Exhibition Swine.*

1. **Inspection.** All imported swine not moved directly to an exhibition in Arizona shall be inspected by a Department livestock officer or inspector within 30 days after entry. A.A.C. R3-2-411(A).
2. **Denial of entry.** Exhibit officials shall deny entry to any swine not accompanied by the following documents:
 - a. **Imported swine moved directly to an exhibition.** An official health certificate specified in R3-2-606 and an import permit specified in R3-2-607;
 - b. **Imported swine not moved directly to the exhibition.** A Department-issued certificate of inspection of exhibition swine containing the following:
 - i. The name, address, telephone number, and signature of the owner;
 - ii. The name of the inspector and the date, time, and location of the inspection;
 - iii. The individual identification of the swine, using an ear notch, that conforms to the universal swine-ear notch system, and the premises identification number using a tattoo or producer-furnished tamper-proof eartag that conforms to the USDA National Premises Identification System.
 - c. **Native Arizona swine.** A Department-issued certificate of inspection of exhibition swine containing the following:
 - i. The name, address, telephone number, and signature of the owner;
 - ii. The name of the inspector and the date, time, and location of the inspection;
 - iii. The individual identification of the swine, using an ear notch that conforms to the universal swine-ear notch system, and the premises identification number using a tattoo or producer-furnished tamper-

proof eartag that conforms to the USDA National Premises Identification System. A.A.C. R3-2-411(B).

3. **Department-issued certificate of inspection of exhibition swine.** The owner shall provide the Department with:

a. **Imported swine.**

- i. The certificate of veterinary inspection listing import permit and individual identification of the swine, using an eartag that conforms to the universal swine-eartag system, and the premises identification using a tattoo or a producer-furnished tamper-proof eartag that conforms to the USDA National Premises Identification System; and
- ii. If from a Stage IV state, documentation of a negative pseudorabies test conducted 15 to 30 days after entry.

b. **Native swine.**

- i. A bill of sale listing:
 - (A) The name of the seller and buyer;
 - (B) The individual identification of the swine, using an eartag that conforms to the universal swine-eartag system, and the premises identification using a tattoo or a producer-furnished tamper-proof eartag that conforms to the USDA National Premises Identification System; and
 - (C) The date of the sale; or
- ii. Verification that the swine has been raised in Arizona and the individual identification of the swine, using an eartag that conforms to the universal swine-eartag system, and the premises identification using a tattoo or a producer-furnished tamper-proof eartag that conforms to the USDA National Premises Identification System. A.A.C. R3-2-411(C).

L. **Exhibition Sheep and Goats.** An exhibit official shall deny entry to any sheep or goat not individually identified by the following:

1. **Imported sheep or goat.**

- a. The health certificate prescribed in R3-2-606 and the animal identification required in R3-2-614, and
- b. The import permit prescribed in R3-2-607.

2. **Native Arizona sheep or goat.** A method prescribed in [9 CFR 79.2\(a\)\(2\)](#) for a non-neutered sheep or goat, and a neutered sheep or goat more than 18 months of age. A.A.C. R3-2-412.

M. **Intrastate Movement of Sheep and Goats.**

1. **Identification required.** Before intrastate movement of a sheep more than 18 months of age, or a sheep or goat of any age not in a slaughter channel, the producer shall identify the animal to the flock of birth before leaving the flock of birth. A.A.C. R3-2-413(A).

a. **Definition.** A sheep or goat not in a slaughter channel includes an animal not for sale, transfer, or movement to:

- (A) A slaughter facility,
- (B) Custom slaughter, or

(C) A feeding operation before movement to slaughter. A.A.C. R3-2-413(A).

2. **Limitation on rule.** Identification of the animal is not required if:

- a. The first point of commingling with animals other than those in the flock of birth is an Arizona auction market, and
- b. The auction market acts as the owner's agent to identify the sheep or goat to the flock of birth. A.A.C. R3-2-413(B).

N. *Disease Control and Prevention.*

1. Disease control and eradication in cattle, bison, goats, and bovine are prescribed in the USDA publications for the following diseases.

- a. Tuberculosis. A.A.C. R3-2-501.
- b. Brucellosis. A.A.C. R3-2-503.
- c. Pseudorabies. A.A.C. R3-2-504.

2. Scrapie procedures for eradication are outlined in 9 C.F.R. 54. A.A.C. R3-2-505.

O. *Importation Requirements.*

1. **General Importation Requirements.** All animals and poultry transported or moved into the state of Arizona, unless otherwise specifically provided for in this Article, must be accompanied by:

- a. An official health certificate from the state of origin or a permit number, or both; and
- b. The health documentation shall be attached to the waybill or in the possession of the driver of the vehicle or person in charge of the animals. A.A.C. R3-2-602(A).

2. **Importation of Diseased Animals.**

- a. An animal affected with or recently exposed to any infectious, contagious, or communicable disease, or which originates in a state or federal quarantine area, shall not be transported or moved into the state of Arizona unless a permit for the entry is first obtained from the Arizona State Veterinarian's Office. All conditions for the movement of animals from a quarantined area established by the quarantining authority or APHIS shall be met. A.A.C. R3-2-603(A).
- b. The owner or owner's agent shall obtain prior permission from the State Veterinarian to ship or move into Arizona any animal from a lot or herd from which an animal shows a suspicious or positive reaction to a test required for admission to Arizona. A.A.C. R3-2-603(B).
3. **Quarantine of Animals Entering Illegally.** Animals entering the state without a valid health certificate or permit number, or both if required, or in violation of any Section under 3 A.A.C. 2, shall be held in quarantine at the risk and expense of the owner until released by an authorized representative of the State Veterinarian. Animals under quarantine for noncompliance with this Article may be released only after the State Veterinarian is satisfied by testing, dipping, or observation over time, that the animals are not a threat to the livestock industry. A.A.C. R3-2-605(A).

- a. **State Veterinarian Power.** The State Veterinarian may request that an imported animal failing to meet entry requirements be returned to the state of origin, consigned directly to slaughter, confined to a designated feedlot, or consigned to a feedlot in another state within two weeks of the request. Any extension to this time-frame shall be approved in writing by the State Veterinarian. A.A.C. R3-2-605(B).
 - b. **Failure to comply with request.** If the owner or owner's agent fails to comply with a request to return an animal to the state of origin within two weeks (unless extended by State Veterinarian), the Department shall require that the animal be immediately gathered at the owner's risk and expense to avoid exposure of Arizona animals. The owner shall pay the expenses no later than five days after receipt of the bill, or an auction of sufficient livestock to pay the just expenses shall be held within 10 days at a livestock auction market. If additional expenses occur due to lack of cooperation by the owner or the owner's agent, the Director shall order the further sale of livestock. A.A.C. R3-2-605(C).
- P. *Health Certificates.*** A health certificate is valid for not more than 30 days after the date of issue, except where otherwise noted in this Article, and shall contain:
1. The name and address of the shipper and receiver;
 2. The origin of the animal;
 3. The animal's final destination;
 4. Cattle.
 - a. The number of animals covered by the health certificate, and an accurate description and, except for steers, spayed heifers, or "F" branded heifers consigned to a designated feedlot identified by brand, one of the following individual identifications:
 - i. The USDA metal eartag number,
 - ii. The registration tattoo number, or
 - iii. The registration brand of a breed association recognized by VS;
 - b. The health status of the animals, including date and result of an inspection, dipping, test, or vaccination required by Arizona; and
 - c. The method of transportation;
 5. Swine.
 - a. Evidence that the swine have been inspected by the veterinarian issuing the health certificate within 10 days before the shipment,
 - b. A statement that:
 - i. The swine have never been fed garbage, and
 - ii. The swine have not been vaccinated for pseudorabies;
 - c. Except for feeder swine consigned to a restricted swine feedlot:
 - i. A list of the individual permanent identification for each exhibition swine, using an ear-notch that conforms to the universal swine-ear-notch system or for each commercial swine, using other individual identification, and the premises identification using a tattoo or producer-furnished tamper-proof eartag that conforms to the USDA National Premises Identification System;

- ii. The validated brucellosis-free herd number and last test date for swine originating from a validated brucellosis-free herd;
 - iii. The pseudorabies status of the state of origin; and
 - iv. The pseudorabies qualified negative herd number, if applicable;
 - d. Except for feeder swine consigned to a restricted swine feedlot, swine moving directly to an exhibition, and swine from a farm of origin in a state recognized by APHIS as a pseudorabies Stage V state, a statement that the swine shall be quarantined on arrival at destination and kept separate and apart from all other swine until tested negative for pseudorabies no sooner than 15 days nor later than 30 days after entry into Arizona; and
 - e. Feeder swine consigned to a restricted swine feedlot shall be identified by premises of origin using a tattoo or producer-furnished tamper-proof eartag that conforms to the USDA National Premises Identification System;
- 6. Sheep and goats.
 - a. Individual identification prescribed in R3-2-614;
 - b. A statement that:
 - i. The sheep or goats are not infected with bluetongue, or exposed to scrapie, and do not originate from a scrapie-infected or source flock;
 - ii. Breeding rams have been individually examined and are free of gross lesions of ram epididymitis; and
 - c. A statement that the sheep or goat test negative for *Brucella ovis* if a test is required by R3-2-614(B); and
- 7. Equine.
 - a. An accurate identification for each equine covered by the health certificate including age, sex, breed, color, name, brand, tattoo, scars, and distinctive markings; and
 - b. A statement that the equine has a negative test for EIA, as required in R3-2-615, including:
 - i. The date and results of the test;
 - ii. The name of the testing laboratory; and
 - iii. The laboratory accession number.
- 8. Other Rules Regarding Health Certificates.
 - a. Additions, deletions, and unauthorized or uncertified changes inserted or applied to a health certificate renders the certificate void. Uncertified photocopies of health certificates are invalid.
 - b. The veterinarian issuing a health certificate shall certify that the animals shown on the health certificate are free from evidence of any infectious, contagious, or communicable disease or known exposure.
 - c. An accredited veterinarian shall inspect animals for entry into the state.
 - d. The Director may limit the period for which a health certificate is valid to less than 30 days if advised by the State Veterinarian of the occurrence of a disease that constitutes a threat to the livestock industry. A.A.C. R3-2-606.

8.00 EMERGENCIES: GENERAL GOVERNMENTAL POWERS AND DUTIES

[brief narrative link to come]

8.20 STATE OF EMERGENCY

8.21 Definition

“State of emergency” means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety or persons or property within the state caused by air pollution, fire, flood or floodwater, storm, epidemic, riot, earthquake or other causes, except those resulting in a state of war emergency, which are or are likely to be beyond the control of the services, personnel, equipment and facilities of any single county, city or town, and which require the combined efforts of the state and political subdivision. A.R.S. ARIZ. REV. STAT § 26-301(15).

Note: “Epidemic” is expressly included as a triggering cause for a proclamation of emergency.

8.22 Proclamation of state of emergency; gubernatorial powers; termination

A. Proclamation.

1. Proclamation by governor; effective date; circumstances.

The governor may proclaim a state of emergency which shall take effect immediately in an area affected or likely to be affected if the governor finds that circumstances described in ARIZ. REV. STAT. § 26-301(15) (§ 6.21.A., *supra*) exist. ARIZ. REV. STAT. § 26-303(D).

2. Alternative proclamation by state emergency council. If the governor is inaccessible, the state emergency council (see ARIZ. REV. STAT. § 26-304 for membership and duties) may issue a state of emergency proclamation under the same conditions by which the governor could issue such a proclamation, if the action is taken at a meeting of the council called by the director and if not less than three council members, one of whom is an elected official, approve the action. ARIZ. REV. STAT. § 26-304.B.3.

B. Governor’s powers during state of emergency. During a state of emergency:

1. General authority: The governor shall have complete authority over all agencies of the state government and the right to exercise, within the area designated, all police power vested in the state by

the constitution and laws of Arizona in order to effectuate the purposes of Title 36, ch. 2.

2. Directives to state agencies. The governor may direct all agencies of the state government to utilize and employ state personnel, equipment and facilities for the performance of any and all activities designed to prevent or alleviate actual and threatened damage due to the emergency. The governor may direct such agencies to provide supplemental services and equipment to political subdivisions to restore any services in order to provide for the health and safety of the citizens of the affected area. ARIZ. REV. STAT. § 26-303(E).

C. Delegation. The governor may delegate any of the powers vested in the office of the governor under Title 26, chapter 2 to the adjutant general, who may further delegate the powers to the director of emergency management with stated exceptions (details omitted). ARIZ. REV. STAT. § 26-302

D. Termination of emergency and of governor's emergency powers.

1. By governor or legislature. The powers granted to the governor with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the governor or by concurrent resolution of the legislature declaring it at an end. ARIZ. REV. STAT. § 26-303(F).

2. Advice of the state emergency council. The state emergency council shall monitor each emergency declared by the governor and the activities and response of the division of emergency management (ARIZ. REV. STAT. §§ 26-301.4, 26-305) to the emergency. The council shall recommend to the governor or the legislature based on the reports submitted to it by the auditor that the emergency conditions have stabilized and that the emergency is substantially contained. ARIZ. REV. STAT. § 26-304(C).

E. Short-term authority of adjutant general pursuant to authorization by governor. If in the judgment of the adjutant general the circumstances described in ARIZ. REV. STAT. § 26-301.15 (§ __, *supra*) exist, the adjutant general may, upon authorization of the governor:

1. Powers. Exercise those powers pursuant to statute and gubernatorial authorization following a gubernatorial proclamation of a state of emergency.

2. **Financial obligations.** Incur obligations of twenty thousand dollars or less for each emergency or contingency payable pursuant to ARIZ. REV. STAT § 35-192 as though a state of emergency had been gubernatorially proclaimed. ARIZ. REV. STAT. § 26-303.H.
3. **Expiration.** The powers exercised by the adjutant general pursuant to ARIZ. REV. STAT. § 26-303.H (§ D.1.,2, *supra*) expire 72 hours after the adjutant general makes the determination that a state of emergency exists. ARIZ. REV. STAT. § 26-303.I

8.30 STATE OF WAR EMERGENCY

8.31 Definition

“**State of war emergency**” means the condition which exists immediately whenever this nation is attacked or upon receipt by this state of a warning from the federal government indicating that such an attack is imminent. ARIZ. REV. STAT § 26-301.16

Note: In contrast to the “state of emergency,” § 6.20, *supra*, there is no express requirement for a gubernatorial proclamation to trigger a “state of war” emergency.”

8.32 Governor’s powers during state of war emergency; termination

A. *Suspension of statutes governing conduct of state business; suspension of rules, orders.* The governor may suspend the provisions of any statute prescribing the procedure for conduct of state business, or the orders or rules of any state agency, if the governor determines and declares that strict compliance with the provisions of any such statute, order or rule would in any way prevent, hinder or delay mitigation of the effects of the emergency.

B. *Taking and use of property and personnel.* The governor may commandeer and utilize any property or personnel deemed necessary in carrying out the responsibilities vested in the office of the governor by this chapter as chief executive of the state and thereafter the state shall pay reasonable compensation therefor as follows:

1. **Temporary use.** If property is taken for temporary use, the governor, within ten days after the taking, shall determine the amount of compensation to be paid therefor. If the property is

returned in a damaged condition, the governor shall, within ten days after its return, determine the amount of compensation to be paid for such damage.

2. Taking title. If the governor deems it necessary for the state to take title to property under this section, the governor shall then cause the owner of the property to be notified thereof in writing by registered mail, postage prepaid, and then cause a copy of the notice to be filed with the secretary of state.

3. Owner refusal of amount of compensation offered. If the owner refuses to accept the amount of compensation fixed by the governor, the amount shall be determined by appropriate proceedings in the superior court in the county where the property was originally taken.

ARIZ. REV. STAT. § 26-303.A.1.,2.

C. Plenary authority over state government; police power. During a state of war emergency, the governor shall have complete authority over all agencies of the state government and shall exercise all police power vested in this state by the constitution and laws of this state in order to effectuate the purposes of this chapter. ARIZ. REV. STAT. § 26-303.B.

D. Delegation of governor's powers. See § 6.22.C., *supra*.

E. Termination. The powers granted the governor with respect to a state of war emergency shall terminate if the legislature is not in session and the governor has not, within twenty-four hours after the beginning of such state of war emergency, issued a call for an immediate special session of the legislature for the purpose of legislating on subjects relating to such state of war emergency. A.R.S. ARIZ. REV. STAT. § 26-303.C.

8.40 POWERS AND DUTIES OF LOCAL GOVERNMENTS AND STATE AGENCIES

8.41 Authority of state agencies and local governments to issue orders, make rules

A. Authority; procedure. State agencies when designated by the governor, and counties, cities and towns may make, amend and rescind orders, rules and regulations necessary for emergency functions, not inconsistent with orders, rules and regulations promulgated by the governor. Any order, rule or regulation issued by the governing body of a county or other political subdivision of the state is effective when a copy is

filed in the office of the clerk of the political subdivision. Existing laws, ordinances, orders, rules and regulations in conflict with Title 26, Chapter 2 or orders, rules or regulations are suspended during the time and to the extent that they conflict. ARIZ. REV. STAT § 26-307.A.,B.

B. *Waiver of procedures by local governments during state of war emergency.* In a state of war emergency, counties, cities and towns may waive procedures and formalities otherwise required by law pertaining to the performance of public work, entering into contracts, incurring obligations, employing permanent and temporary workers, utilizing volunteer workers, renting equipment, purchasing and distributing supplies, materials and facilities and appropriating and expending public funds when such governmental entity determines and declares that strict compliance with such procedures and formalities may prevent, hinder or delay mitigation of the effects of the state of war emergency. ARIZ. REV. STAT § 26-307.C.

C. *Power in absence of specific authority; necessity.* In the absence of specific authority in state emergency plans and programs, the governing body of each county, city and town of the state shall take emergency measures as deemed necessary to carry out the provisions of this chapter. ARIZ. REV. STAT. § 26-307.D.

Note: like Globe case and others recognizing such authority as implied; here, it is expressed.

8.42 Local government emergency management.

A. *Authority to spend money and distribute supplies.* Each county and incorporated city and town of the state may appropriate and expend funds, make contracts and obtain and distribute equipment, materials and supplies for emergency management purposes.

B. *Establishment of local emergency management.* Each county and incorporated city and town of the state shall establish and provide for emergency management within its jurisdiction in accordance with state emergency plans and programs. Each unincorporated community may establish such emergency management programs.

C. *Local director of emergency management.* The chief executive officer or governing body of each county, incorporated city or incorporated town may appoint a director who shall be responsible for the organization, administration and operation of local emergency management programs, subject to the direction and control of the such executive officer or governing body.

D. Requirement for local emergency plans. State emergency plans shall be in effect in each such political subdivision of the state. The governing body of each such political subdivision shall take such action as is necessary to carry out the provisions thereof, including the development of additional emergency plans for the political subdivision in support of the state emergency plans.

E. Contents of county management plans. Each county's emergency management organization shall:

1. List of organizations: Maintain a list of public and private organizations within the county which have personnel trained and available for assisting in meeting emergency needs.

2. Inventory of resources: Maintain an inventory of facilities, equipment, supplies and other resources within the county available for use in meeting emergency needs.

3. Information: Provide a summary of the information required in paragraphs 1 and 2 to the state director of emergency management.

ARIZ. REV. STAT § 26-308.

8.43 Locally-declared emergencies; powers

A. Declaration of local emergency. In addition to the powers granted by other provisions of the law or charter, whenever the mayor of an incorporated city or town or the chairman of the board of supervisors for the unincorporated portion of the county, shall deem that an emergency exists due to fire, conflagration, flood, earthquake, explosion, war, bombing, acts of the enemy or any other natural or man-made calamity or disaster or by reason of threats or occurrences of riots, routs, affrays or other acts of civil disobedience which endanger life or property within the city, or the unincorporated areas of the county, or portion thereof, the mayor or chairman of the board of supervisors, if authorized by ordinance or resolution, may by proclamation declare an emergency or a local emergency to exist. ARIZ. REV. STAT. § 26-311.A.

B. Additional powers during locally-declared emergency. If a local emergency is declared, the mayor or the chairman of the board of supervisors shall, during such emergency, govern by proclamation and shall have the authority to impose all necessary regulations to preserve the peace and order of the city, town, or unincorporated areas of the county, including but not limited to:

1. **Curfew.** Imposition of curfews in all or portions of the political subdivision.
2. **Business closure.** Ordering the closing of any business.
3. **Barring public access.** Closing to public access any public building, street, or other public place.
4. **Assistance of law enforcement.** Calling upon regular or auxiliary law enforcement agencies and organizations within or without the political subdivision for assistance.
5. **Notification.** Notifying the constitutional officers that the county office for which they are responsible may remain open or may close for the emergency.

ARIZ. REV. STAT. § 26-311(B).

C. Mutual aid

1. Powers of government to provide mutual aid. In periods of local emergency, including an emergency declared pursuant to subsection ARIZ. REV. STAT. § 26-311A. (**§ 6.43.A, supra**), political subdivisions have full power to provide mutual aid to any affected area in accordance with local ordinances, resolutions, emergency plans or agreements therefor. State agencies may provide mutual aid, including personnel, equipment and other available resources to assist political subdivisions during a local emergency in accordance with emergency plans or at the direction of the governor. ARIZ. REV. STAT. § 26-311(C), (D).

2. Mutual aid agreements and emergency plans, undertaken in advance of emergencies. During emergencies, outside aid may be provided to any county, city or town in accordance with emergency plans. The governor may, on behalf of the state, enter into reciprocal aid agreements or compacts, mutual aid plans, or other interstate arrangements for the protection of life and property with other states and the federal government, for such things as supplies, equipment, facilities, personnel and services. ARIZ. REV. STAT. § 26-309.

8.44 Authority of state and local governments to accept materials or funds

The governor on behalf of the state, or the governing body of a political subdivision of the state, may accept for purposes of emergency services

an offer of the federal government or an agency or officer thereof, or an offer of any person, firm or corporation of services, equipment, supplies, material or funds, whether by gift, grant or loan and may designate an officer of the state or subdivision thereof to receive them on behalf of the state or subdivisions subject to terms, if any, of the offeror. ARIZ. REV. STAT. § 26-312.

8.45 Acceptance of professionals' out-of-state licenses.

During a state of emergency or state of war emergency, any person holding any license, certificate, or other permit issued by any state evidencing the meeting of qualifications of such state for professional, mechanical or other skills may render aid involving such skill to meet the emergency as fully as if such license, certificate or other permit had been issued in this state, if any substantially similar license, certificate or other permit is issued in this state to applicants possessing the same professional, mechanical or other skills. ARIZ. REV. STAT. § 26-310.

8.46 Immunity from liability for conduct during emergency

A. *Immunity of state and political subdivisions for discretionary acts of emergency workers.* This state and its departments, agencies, boards, commissions and all other political subdivisions are not liable for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty by any emergency worker, excepting willful misconduct, gross negligence or bad faith of any such emergency worker, in engaging in emergency management activities or performing emergency functions pursuant to this chapter (Title 26, Ch. 1 (§___-___, *supra* – this material)) or Title 36, chapter 6, article 9 (§___-___ [enhanced surveillance advisories]; § ___-___ [public health authority during state of emergency or state of war emergency]; § ___-___ [isolation and quarantine during a state of emergency]). ARIZ. REV. STAT § 26-314.A.

B. *Extraterritorial activities of individuals.* The immunities from liability, exemptions from laws, ordinances and rules, all pensions, relief, disability workers' compensation and other benefits that apply to the activity of officers, agents, employees or emergency workers of this state or of any political subdivision when performing their respective functions within this state or the territorial limits of their respective political subdivisions apply to them to the same degree and extent while engaged in the performance of any of their functions and duties extraterritorially under this chapter (Title 26, Ch. 1 (§___-___, *supra* – this material)) or title 36, chapter 6, article 9 (§___-___ [enhanced surveillance advisories]; § ___-___ [public health authority during state of emergency or state of war emergency]; § ___-___ [isolation and quarantine during a state of

emergency]), excepting wilful misconduct, gross negligence or bad faith. ARIZ. REV. STAT. § 26-314.B.

C. *Liability of emergency workers; liability insurance.* Emergency workers engaging in emergency management activities or emergency functions under this chapter (Title 26, Ch. 1 (§___ - ___, *supra* – this material)) or title 36, chapter 6, article 9 (§___ - ___ [enhanced surveillance advisories]; § ___ - ___ [public health authority during state of emergency or state of war emergency]; § ___ - ___ [isolation and quarantine during a state of emergency]), in carrying out, complying with or attempting to comply with any order or rule issued under this chapter (Title 26, Ch. 1 (§___ - ___, *supra* – this material)) or title 36, chapter 6, article 9 (§___ - ___ [enhanced surveillance advisories]; § ___ - ___ [public health authority during state of emergency or state of war emergency]; § ___ - ___ [isolation and quarantine during a state of emergency]) or any local ordinance, or performing any of their authorized functions or duties or training for the performance of their authorized functions or duties, shall have the same degree of responsibility for their actions, and enjoy the same immunities and disability workers' compensation benefits as officers, agents and employees of the state and its political subdivisions performing similar work. This state and its departments, agencies, boards and commissions and all other political subdivisions that supervise or control emergency workers engaging in emergency management activities or emergency functions under this chapter (Title 26, Ch. 1 (§___ - ___, *supra* – this material)) or title 36, chapter 6, article 9 (§___ - ___ [enhanced surveillance advisories]; § ___ - ___ [public health authority during state of emergency or state of war emergency]; § ___ - ___ [isolation and quarantine during a state of emergency]) are responsible for providing for liability coverage, including legal defense, of an emergency worker if necessary. Coverage is provided if the emergency worker is acting within the course and scope of assigned duties and is engaged in an authorized activity, except for actions of wilful misconduct, gross negligence or bad faith. ARIZ. REV. STAT. § 26-314.C.

D. *Limitation.* No other state or its officers, agents, emergency workers or employees rendering aid in this state pursuant to any interstate mutual aid arrangement, agreement or compact are liable on account of any act or omission in good faith on the part of such state or its officers, agents, emergency workers or employees while so engaged, or on account of the maintenance or use of any equipment or supplies in connection with an emergency. ARIZ. REV. STAT § 26-314.D.

E. *Rules.* The division of emergency management shall adopt rules prescribing the procedures for registration of emergency workers. [check for rules?]

8.50 ENFORCEMENT

8.51 Law enforcement

The law enforcing authorities of the state and political subdivisions shall enforce orders, rules and regulations issued pursuant to Title 26, chapter 2. ARIZ. REV. STAT § 26-316

8.52 Violation.

Any person who violates any provision of this chapter or who knowingly fails or refuses to obey any lawful order or regulation issued as provided in this chapter shall be guilty of a class 1 misdemeanor. This provision does not apply to the refusal of any private organization or member thereof to participate in a local emergency or state of emergency as defined by this chapter. ARIZ. REV. STAT § 26-317

8.60 OPERATION OF COURTS DURING EMERGENCY. [t/k]

9.00 EMERGENCIES AND PUBLIC HEALTH

[Intro. note about source of these provisions – MSHEPA]

[similar note in earlier materials on isolation and quarantine, and enhanced surveillance advisories.

Other narrative link to come]

9.10 PUBLIC HEALTH AUTHORITY DURING STATE OF EMERGENCY OR STATE OF WAR EMERGENCY: GENERAL POWERS AND LIMITATIONS

9.11 Powers of department of health services during declared emergency or state of war emergency involving bioterrorism, epidemic, infectious agent or biological toxin.

During a state of emergency or state of war emergency declared by the governor in which there is an occurrence or imminent threat of an illness or health condition caused by bioterrorism, an epidemic or pandemic disease or a highly fatal infectious agent or biological toxin and that poses a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability, the department of health services shall coordinate all matters pertaining to the public health emergency response of the state. The department has primary jurisdiction, responsibility and authority for:

- A. Planning and executing** public health emergency assessment, mitigation, preparedness response and recovery for the state
- B. Coordinating public health emergency response** among state, local and tribal authorities.
- C. Collaborating with** relevant federal government authorities, elected officials of other states, private organizations and private sector companies.
- D. Coordinating recovery operations** and mitigation incentives subsequent to public health emergencies
- E. Organizing public information activities** regarding state public health emergency response operations
- F. Establishing, in conjunction with applicable professional licensing boards,** a process for temporary waiver of the professional licensure requirements necessary for the implementation of any measures required to adequately address the state of emergency or state of war emergency. **Note:** see ____, supra, re: this issue
- G. Granting temporary waivers of health care institution licensure requirements** necessary for implementation of any measures required

to adequately address the state of emergency or state of war emergency.

ARIZ. REV. STAT. § 36-787.A.

9.12 Powers of governor to issue orders during state of emergency or state of war emergency.

In addition to the authority provided in ARIZ. REV. STAT. § 36-787.A (§____ *supra*), the governor, in consultation with the director of the department of health services, may issue orders that:

- A. ***Mandate medical examinations for exposed persons [add Note]***
- B. ***Ration medicine and vaccines***
- C. ***Provide for transportation of medical support personnel and ill and exposed persons***
- D. ***Provide for procurement of medicines and vaccines***

ARIZ. REV. STAT. § 36-787.B.

9.13 Powers of governor to issue orders during state of emergency or state of war emergency involving smallpox, plague, viral hemorrhagic fevers or other diseases.

In addition to the authority provided in ARIZ. REV. STAT. §§ 36-787.A,B (§§____ *supra*), during a state of emergency or state of war emergency in which there is an occurrence or the imminent threat of smallpox, plague, viral hemorrhagic fevers or a highly contagious and highly fatal disease with transmission characteristics similar to smallpox, the governor, in consultation with the director of the department of health services, may issue orders that:

- A. ***Mandate treatment or vaccination of persons*** who are diagnosed with illness resulting from exposure or who are reasonably believed to have been exposed or who may reasonably be expected to be exposed.
- B. ***Isolate and quarantine persons***

ARIZ. REV. STAT. § 36-787.C.

[Comments on this with Note; contrast to state authority in other realms, and limit (no compulsory treatment)]

9.14 Prohibition on compulsory treatment if individual cooperates with less intrusive measures

If during a state of emergency or state of war emergency the public health is not endangered nothing in Title 36 shall authorize the department of health services or any of its officers or representatives to impose on any person against the person's will any mode of treatment, provided that sanitary or preventive measures and quarantine laws are complied with by the person. Nothing in Title 36 shall authorize the department or any of its officers or representatives to impose on any person contrary to his religious concepts any mode of treatment, provided that sanitary or preventive measures and quarantine laws are complied with by the person. ARIZ. REV. STAT. § 36-787.F

Note: This section appears to prohibit compulsory treatment on two grounds: (1) that treatment would be "against the...will" of a person (provided, however, that public health is not "endangered"); (2) that treatment would be "contrary to...[a person's] religious concepts."

Arguably, the broad first exemption encompasses the narrower second one. [See discussion of immunization exemptions, in which Arizona authorizes "personal beliefs" exemption – broad enough to include religion]. One might argue, contrarily, that the "religious" exemption is meant to command greater state deference than the "against personal will" exemption: taken as a whole, the statutory text might be read to suggest that the "religious" exemption, unlike the "personal will" exemption, is available even when the public health *is* "endangered." However, this view is met by the fact that *both* exemptions are expressly contingent upon the person's compliance with "sanitary or preventive measures and quarantine laws." These are steps (short of treatment) to prevent transmission; as such they are tantamount to a requirement -- applicable to *both* exemptions – to avoid "endangerment" of public health.

Finally, although the second exemption is not expressly limited to emergencies, it probably should be read that way by virtue of its context (location in the "emergency" statutes), as well as the fact that *other* statutes prohibit compulsory treatment in *non-emergencies*. See _____. [Other commentary?].

9.15 Exception for HIV disease. Diseases subject to this section (ARIZ. REV. STAT. § 36-787) do not include acquired immune deficiency syndrome or other infection caused by the human immunodeficiency virus. ARIZ. REV. STAT. § 36-787.E

9.16 Enforcement. Law enforcement officials of this state and the national guard shall enforce orders issued by the governor under this section (ARIZ. REV. STAT. § 36-787). ARIZ. REV. STAT. § 36-787.D.

Add 36-787.G to the materials on isolation and quarantine in earlier chapter!

9.20 ENHANCED SURVEILLANCE ADVISORIES

See §§ 3.30-3.40, *supra*, discussing ARIZ. REV. STAT. §§ 36-781 to 36-786.

Note: the cited sections of the book demonstrate that – unlike the other powers discussed in this chapter 9 -- a state of emergency or state of war emergency is *not* necessary to trigger the authority for enhanced surveillance.

9.30 ISOLATION AND QUARANTINE PURSUANT TO A GUBERNATORIALLY-DECLARED STATE OF EMERGENCY

9.31 Conditions precedent to exercise of emergency isolation and quarantine powers; powers vested in governor.

The governor, in consultation with the director of the department of health services, may issue orders that quarantine and isolate persons if:

- (1) The governor has declared a state of emergency or state of war emergency that is still in effect; *and*
- (2) There is an occurrence or the imminent threat of smallpox, plague, viral hemorrhagic fevers or a highly contagious and highly fatal disease with transmission characteristics similar to smallpox.
A.R.S. § 36-787.A., C.2.

9.32 Implementation of isolation or quarantine

A. *Investigation by DHS or by local health authority.* During a state of emergency or state of war emergency as declared by the governor pursuant to § 36-787, the department or local health authority must initiate an investigation if that agency has reasonable cause to believe that a highly contagious and fatal disease exists within its jurisdiction. A.R.S. §36-788.A.

B. *Requirement for use of least restrictive means.* Persons who have contracted the disease or who have been exposed to the disease may be subject to isolation and quarantine if the director determines that quarantine is the *least restrictive means* by which the public can be protected from disease, due to:

- 1. the nature of the disease and available preventive measures,**
or
- 2. refusal by an individual to accept less restrictive measures to prevent disease transmission.** A.R.S. § 36-788.A.

C. *Imposition of isolation or quarantine without court order; circumstances; limitations.*

1. Requirement of immediate and serious threat to the public health. The department or local health authority may isolate or quarantine a person or group of persons through a written directive *without first obtaining a written order from the court* if any delay in the isolation or quarantine of the person would pose an *immediate and serious threat to the public health*. A.R.S. § 36-789.A.

2. Required contents of administrative directive. The directive shall specify:

a. Identity of persons. The identity of the person(s) subject to isolation or quarantine. A.R.S. § 36-789(A)(1);

b. Premises. The premises subject to isolation or quarantine. A.R.S. § 36-789(A)(1);

c. Date and time commenced. The date and time at which isolation or quarantine commences. A.R.S. § 36-789(A)(1)

d. Disease. The suspected *highly contagious and fatal disease*, if known. A.R.S. § 36-789(A)(1)

e. Declared emergency. That a state of emergency has been declared by the governor. A.R.S. § 36-789.A.1

f. Notice to affected persons. The directive shall be given to the person(s) to be isolated or quarantined. If the directive applies to groups of persons and it is impractical to provide individual copies, it may be posted in a conspicuous place in the isolation or quarantine premises. A.R.S. § 36-789.A.2.

D. Conduct of isolation or quarantine.

1. Where conducted. The department or local health authority may, during the declared state of emergency or state of war emergency, establish and maintain places of isolation and quarantine, which may include the residence of the person quarantined. A.R.S. § 36-788.B.1..

For provisions authorizing local health agencies to establish, operate, and regulate a temporary hospital or “place of reception” for persons with “contagious or infectious” disease, see **§ 4.10.B.3.**, *supra*, discussing A.R.S. § 36-627.

2. How conducted.

a. Least restrictive means. The department of public health and safety or local health authority may require isolation or quarantine of any person by the *least restrictive means necessary* to protect the public health. A.R.S. § 36-788.B.2.

b. Preventing transmission to others in isolation or quarantine. The department or local health authority shall use *all reasonable means* to prevent the transmission of disease among the isolated or quarantined persons. A.R.S. § 36-788.B.2.

c. Safety, hygiene, and comfort. The department, a county health department or a public health services district shall ensure, *to the extent possible*, that the premises in which a person is isolated or quarantined is maintained in a safe and hygienic manner and is designed to minimize the likelihood of further transmission of disease or other harm to a person subject to isolation or quarantine. Adequate food, clothing, medication and other necessities, competent medical care and means of communicating with those in and outside these settings shall be made available. A.R.S. § 36-788.C.

E. Restrictions on persons during period of quarantine or isolation.

1. Persons quarantined or isolated. A person subject to isolation or quarantine shall comply with the department's or local health authority's rules and orders, shall not go beyond the isolation or quarantine premises and shall not come in contact with any person not subject to isolation or quarantine other than a physician or other health care provider, department or local health authority or person authorized to enter an isolation or quarantine premises by the department or local health authority. A.R.S. §36-788.D

2. Other persons. Other than a person authorized by the department or local health authority, a person shall not enter an isolation or quarantine premises. If, by reason of an unauthorized entry into an isolation or quarantine premises, the person poses a danger to public health, the department, or local health authority may place the person in isolation or quarantine pursuant to A.R.S. § 36-788 or § 36-789. A.R.S. § 36-788(E).

F. Termination of isolation or quarantine. The department or local health authority must terminate isolation or quarantine of a person if it

determines that the isolation or quarantine is no longer necessary to protect the public health. A.R.S. § 36-788.F.

G. Exception for HIV/AIDS: Isolation and quarantine may *not* be ordered for acquired immune deficiency syndrome (AIDS) or other infection caused by the human immunodeficiency virus (HIV). A.R.S. § 36-788.A.

9.33 Judicial review of isolation or quarantine.

This section sets forth the provisions for *judicial review* of administratively-ordered isolation or quarantine (§ 9.32.C.-F., *supra*).

A. Courts having jurisdiction. Title 36, Article 9 of the Arizona statutes does not specify the courts of jurisdiction for proceedings brought regarding disease control. Thus, jurisdiction is vested in state courts of general jurisdiction; see §1.21.A., *supra*

B. Petition for judicial review. The department or local health authority that implemented isolation or quarantine *shall* file a petition for a court order authorizing the initial or continued isolation or quarantine. A.R.S. § 36-789.B.

1. **When petition must be filed:** The petition must be filed *within ten days* after issuing the written directive (§ 9.32.C., *supra*), or when any delay in the isolation or quarantine of a person or group of persons *will not pose an immediate and serious threat* to the public health. A.R.S. § 36-789.B.

2. Required contents of petition.

- c. **Basic Information.** The petition shall include the information listed in § 9.32.C.2.a-d, *supra*, as well as a statement of compliance with the conditions and principles for isolation and quarantine, and a statement of the basis on which isolation or quarantine is justified pursuant to Title 36, ch. 6, art. 9 (public health emergencies). A.R.S. § 36-789.B.1-6.
- d. **Sworn Affidavit; other information.** The petition must be accompanied by a sworn affidavit of the department or local health authority attesting to the facts asserted in the petition, together with any further information that may be relevant and material to the court's consideration. A.R.S. § 36-789.C.

C. Notice to persons identified in a petition. Notice to a person or group of persons identified in a petition filed must be completed within twenty-four hours after filing the petition and in accordance with the rules of civil procedure. A.R.S. § 36-789.D.

D. Timing of judicial hearing.

1. **Within 5 days of filing.** A hearing must be held on a petition filed within five days after filing the petition. A.R.S. § 36-789.E.
2. **Continuance.** In extraordinary circumstances and for good cause shown, the department or local health authority may apply to continue the hearing date on a petition for *not more than ten days*. If the court grants a continuance it must give due regard to the rights of the affected persons, the protection of the public's health, the severity of the emergency and the availability of necessary witnesses and evidence. A.R.S. § 36-789.E.

E. Consolidation of claims. To promote the fair and efficient operation of justice and having given due regard to the rights of the affected persons, the protection of the public's health, the severity of the emergency and the availability of necessary witnesses and evidence, the court may order the consolidation of individual claims into groups of claims if:

1. The *number of persons involved* or to be affected is so large as to render individual participation impractical;
2. there are *questions of law or fact common* to the individual claims or rights to be determined;
3. the group *claims or rights to be determined are typical* of the affected person's claims or rights;
4. the entire group will be *adequately represented* in the consolidation. A.R.S. § 36-789.N.1-4.

F. Burden of proof. The court shall grant the petition filed by the department or local health authority if, by a *preponderance of the evidence*, isolation or quarantine is shown to be *reasonably necessary* to protect the public health. A.R.S. § 36-789.F.

G. Required elements of judicial order authorizing isolation or quarantine.

1. **Identify person or group.** The court order must identify the isolated or quarantined person or group of persons by name or shared or similar characteristics or circumstances. A.R.S. § 36-789.G.1.

2. **Justification.** The court order must specify factual findings warranting isolation or quarantine, including any conditions necessary to ensure that isolation or quarantine is carried out within the stated purposes and restrictions required. A.R.S. § 36-789.G.2.
3. **Service.** The court order must be served on an affected person or group of persons in accordance with the rules of civil procedure. A.R.S. § 36-789.G.3.

H. Duration of judicial order for isolation or quarantine

1. **Not more than 30 days.** A court order authorizing isolation or quarantine may do so for a period not to exceed thirty days. A.R.S. § 36-789.G. However:
 2. **Continuation for an additional 30 days.** *Before an isolation or quarantine order expires*, the department or local health authority may move to continue the isolation or quarantine for an additional period not to exceed thirty days. The court shall grant the motion if, by a *preponderance of the evidence*, isolation or quarantine is shown to be *reasonably necessary to protect the public health*. A.R.S. § 36-789.H.

I. Claims challenging isolation or quarantine; judicial hearings

1. **Application for order to show cause for release.** A person or group of persons isolated or quarantined pursuant to A.R.S. § 36-789 may apply to the court for an order to show cause why the person or group of persons should not be released. A.R.S. §36-789.I..
 - a. **Timing of ruling on application to show cause.** The court must rule on the application within 48 hours after it is filed. A.R.S. §36-789.I.
 - b. **Hearing; timing.** If the court grants the application, the court must schedule a hearing on the order to show cause within twenty-four hours after issuing it. A.R.S. §36-789.I..
 - c. **Effect of order to show cause on isolation or quarantine.** The issuance of an order to show cause does not stay or enjoin an isolation or quarantine order. A.R.S. §36-789.I.

2. Request for hearing on treatment and conditions of isolation or quarantine. A person isolated or quarantined may request a court hearing regarding the person's treatment and the conditions of the quarantine or isolation. A.R.S. § 36-789.J.

a. Timing of hearing. The court must hold a hearing within ten days of receiving the request. A.R.S. § 36-789.K..

b. Finding of noncompliance. If the court finds that the isolation or quarantine of the person or groups of persons does not comply with the requirements of § 36-788 or § 36-789, the court may provide *remedies appropriate to the circumstances of the state of emergency, the rights of the individual and in keeping with the provisions of Title 36, chapter 6, Article 9.* A.R.S. § 36-789.K.

J. Record of proceedings. A record of the proceedings pursuant to A.R.S. § 36-789 shall be made and retained. A.R.S. 36-789.L.

K. Party unable personally to appear. If, because of a declared state of emergency or state of war emergency, parties cannot personally appear before the court, the proceedings may be conducted by the *authorized representative* of the parties and held by any means that allows all parties to fully participate. A.R.S. § 36-789.L.

note here re: emergency planning – helpful!

L. Provision of counsel.

- 1. Court appointed counsel provided at state expense.** The court shall appoint counsel at state expense to represent a person or group of persons subject to isolation or quarantine under a state of emergency or state of war emergency and who is not otherwise represented by counsel.
- 2. Duration of representation.** Representation by appointed counsel continues *throughout the duration of the isolation or quarantine* of the person or group of persons.
- 3. Adequate means of communication.** The department or local health authority must provide adequate means of communication between the isolated or quarantined persons and their counsel. A.R.S. § 36-789(M).

9.40 ADDITIONAL POWER OF DIRECTOR OF DEPARTMENT OF HEALTH SERVICES: EMERGENCY MEASURES FOR CONTROL OF

COMMUNICABLE OR PREVENTABLE DISEASES IN THE FACE OF A THREAT TO PUBLIC HEALTH

Notwithstanding ARIZ. REV. STAT. § 36.136.H.1. (which requires the director of DHS to promulgate rules for the *routine* detection, reporting, prevention, and control of communicable and preventable diseases, including measures such as isolation and quarantine; see § 2.15E.2.a. and §§ 3.23, 4.10.C., *supra*), the director may define and prescribe *emergency measures* for detecting, reporting, preventing and controlling communicable or infectious diseases or conditions if the director has reasonable cause to believe that a serious threat to public health and welfare exists. Emergency measures are effective for no longer than eighteen months. ARIZ. REV. STAT. §36-136.G.

Note: Observe the generality and flexibility of this old statute, as well as the relatively long duration (18 months) of the emergency measures that it authorizes, in contrast with the detailed, generally more-stringent, and shorter-duration recent enactments discussed in §§ 9.30-9.33, *supra*). The latter, more specific provisions should probably apply in the event of doubt. However, there may be circumstances in which the authority created by the above statute could still properly be invoked.