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KATHY W. COOK  
DENNIS T. FENWICK  
JESSICA G. FUNKHOUSER  
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General

WASHINGTON

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# Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

All Agencies of State Government  
State of Arizona

Ladies and Gentlemen:

I take great pleasure in presenting to you the second edition of the Arizona Agency Handbook. This handbook constitutes the work of several lawyers in the Attorney General's Office who recognized the need for revisions to the 1982 Handbook and took the necessary time from their busy schedules to write and edit the material you find in this book. I thank them for what I consider to be an outstanding public service and I hope that all agencies of state government find this edition of the handbook useful.

I, of course, welcome any comments or suggestions you may have on how to improve the handbook in future revisions.

Very truly yours,

A handwritten signature in cursive script that reads "Bob Corbin".

BOB CORBIN  
The Attorney General

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## FOREWARD

Over the past decade both the size and complexity of state government in Arizona have grown substantially. That growth has prompted an ever increasing number of laws governing the manner in which government must conduct its business. For the public officers and employees who must operate state government, the need for frequent legal assistance has become a necessity. Several years ago we recognized that this growing need for legal services could not be met simply by hiring more lawyers in the Office of the Attorney General. The Arizona Agency Handbook was conceived as a partial solution to this problem. The purpose of the handbook is to set forth and explain the major state laws that govern the operation of state agencies. We thank everybody in the Attorney General's Office who supported our work by providing secretarial services, legal research and word processing.

The handbook's discussion of statutes, rules, constitutional provisions and case law is current as of February 1, 1988. However, when using the handbook as a reference, the reader should always examine the statutes or rules in question to determine whether there has been a change in the law since February 1, 1988.

Based on the sheer volume of revisions required to update the original handbook, we found it necessary to re-publish the handbook in lieu of supplementing the last edition. This handbook is therefore intended to supersede in its entirety the 1982 publication.

EDITORIAL COMMITTEE  
ARIZONA AGENCY HANDBOOK  
OFFICE OF THE ATTORNEY GENERAL

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## CHAPTER 1

### THE ATTORNEY GENERAL AND DEPARTMENT OF LAW

**1.1 Scope of this Chapter.** This Chapter discusses the powers and duties of the Attorney General and his role in advising and representing state agencies, officers and employees. The discussion proceeds from the standpoint of how the Attorney General views his obligation to provide legal services, with an effort to give agencies an idea of when and under what circumstances they should seek assistance from the Attorney General. In addition, this Chapter charts the organizational structure of the Department of Law and indicates the responsibilities of each of the divisions within the office. If you have questions not addressed in this Chapter, you should contact the Assistant Attorney General assigned to represent your agency or the Chief Counsel of the appropriate division.

**1.2 Constitutional Powers and Duties of the Attorney General.** The office of the Attorney General was created by the Arizona Constitution in article V, section 1. The Attorney General has no common law or independent power, and he may exercise only those powers and duties conferred upon him by the Constitution or by state statute. Ariz. Const. art. V, § 9; Smith v. Superior Court, 101 Ariz. 559, 560, 422 P.2d 123, 124 (1967); Shute v. Frohmler, 53 Ariz. 483, 90 P.2d 998 (1939). The Constitution does not prescribe any powers or duties for the Attorney General but mandates the Legislature to set them forth.

#### **1.3 Statutory Powers and Duties of the Attorney General.**

**1.3.1 General Powers and Duties.** The Legislature has set forth the general powers and duties of the Attorney General in Title 41, Chapter 1, Article 5, of the Arizona Revised Statutes, consisting of §§ 41-191 to -196. The following subsections deal with those portions of the statutes relating to the powers and duties of the Attorney General in advising and representing state agencies. These subsections are not exhaustive but are merely an attempt to describe the general parameters of the powers and duties of the Attorney General. You should review the statutes pertaining to your individual agency to determine if the Attorney General has been given specific powers and duties pertaining to your agency.

**1.3.2 Power to Organize Office and Organizational Structure of the Department of Law.** The Attorney General has the power and duty to organize the department into such bureaus, subdivisions or units as he deems most efficient and economical, and consolidate or abolish them; in exercising this power, he may hire and assign such assistants as are necessary to perform the functions of the department. See A.R.S. § 41-192. The Attorney General is specifically required by law to organize the Civil Rights Division within the department and administer that division pursuant to the powers and duties provided in Title 41, Chapter 9.

Appendix 1.1, attached to this Chapter, is an organization chart of the department, listing those individuals responsible for each division, and containing a brief description of the function and responsibility of each division.

**1.3.3 Employment of Legal Counsel by the Attorney General and State Agencies.** Notwithstanding any law to the contrary, A.R.S. § 41-192(E) prohibits any state agency other than the Attorney General from employing legal counsel or making an

expenditure or incurring an indebtedness for legal services, except that the Residential Utility Consumer Office, the director of Water Resources, the Industrial Commission, the Arizona Power Authority, the Arizona Board of Regents, the Corporation Commissioners, the Arizona Health Care Cost Containment System Agency and the Corporation Commission, other than the Securities Division, are exempt from the provisions of this Section.

The statutes which set forth the powers and duties of some agencies and departments provide that compensation for personnel assigned by the Attorney General to perform legal services shall be a charge against the appropriations to that department or agency. See, for example, A.R.S. § 28-109. Other statutes, such as A.R.S. § 42-142(A), authorize agencies to employ and pay for legal services only with the consent of the Attorney General.

**1.3.4 General Representation Powers.** A.R.S. § 41-192 provides that the Attorney General shall have charge of and direct the Department of Law, and shall serve as chief legal officer of the state. In that regard, the Attorney General has the statutory duty to be the legal advisor to the various departments and agencies of the state and coordinate their legal services. As the agency's advisor, he represents the agency in both administrative and judicial proceedings concerning the enforcement of the agency's statutes, rules and orders. The Attorney General represents school districts, governing boards of school districts, and fire districts only in lawsuits in which a conflict of interest with other county offices exists. He represents political subdivisions, school districts and municipalities only in suits to enforce state or federal statutes pertaining to antitrust, restraint of trade, or price-fixing activities or conspiracies. A.R.S. § 41-192(A).

A.R.S. § 41-193 provides that the Attorney General shall prosecute and defend in the Arizona Supreme Court all proceedings in which the state or a state officer in his official capacity is a party. In addition, at the direction of the Governor or when deemed necessary by the Attorney General, the Attorney General has the responsibility to prosecute and defend any proceeding in a state court other than the Arizona Supreme Court in which the state or an officer thereof is a party or has an interest. The Attorney General also has the duty to represent the state in any action in a federal court.

**1.3.5 Representation of Individual Officers and Employees in Civil Actions.** A.R.S. § 41-192.02 provides that the Attorney General in his discretion is authorized to represent an officer or employee of this state against whom a civil action is brought in his individual capacity until such time as it is established as a matter of law that the alleged activity or events which form the basis of the complaint were not performed, or not directed to be performed, within the scope or course of the officer's or employee's duty or employment. You should refer to Chapter 13 for a more detailed discussion of the liability of state officers, agents and employees, and the Attorney General's function in handling claims and lawsuits involving state officers, agents and employees.

**1.3.6 Power to Settle Claims and Lawsuits Against the State. Boards, Commissions and Agencies of the State.** The Director of the Department of Administration ("DOA") is authorized to settle actions or claims for liability damages against the state or any state officer, department, board, or agency up to the amount of \$25,000 (or such higher limit established by the Joint Legislative Budget Committee). Claims between \$25,000 to \$50,000 may be settled with the approval of the Director of DOA and the Attorney General (the elected official himself). Claims over \$50,000 may

be settled with approval of the Director of DOA, the Attorney General, and the Joint Legislative Budget Committee. No state department, agency, board, commission, officer, agent or employee may make any payment, assume any obligation, incur any expense or maintain the individual right of consent for liability claims. A.R.S. § 41-621(M). See Chapter 13 for a more detailed description of the state's self-insurance program and the function of the Attorney General in connection with that program.

The Attorney General is authorized to compromise or settle other claims not involving liability self-insurance pursuant to A.R.S. § 41-192(B)(4) with the approval of the department, board or agency involved, or the Governor.

**1.3.7 Powers and Duties Relating to County Attorneys.** The Attorney General has the power to exercise supervision over county attorneys only in matters pertaining to their office and, at the direction of the Governor, or when deemed necessary, assist a county attorney in the discharge of his duties.

**1.3.8 Opinion Writing Authority.** A.R.S. § 41-193(A)(7) requires the Attorney General to render a written opinion upon demand by the Legislature, or either house thereof, any public officer of the state, or a county attorney, upon any question of law relating to their offices. See Section 1.5 for a detailed discussion on requesting and obtaining a written opinion from the Attorney General.

**1.3.9 Power to Certify Administrative Rules.** A.R.S. § 41-1041 requires the Attorney General to approve or reject all rules proposed by a state agency unless an agency is expressly exempted from the Administrative Procedure Act. See Section 1.6 of this Chapter describing the Attorney General's role with respect to the rule making and Chapter 11 for further detailed discussions concerning the procedures for adoption of rules.

**1.3.10 Authority to Approve Bonds.** The Attorney General is empowered to review and approve various forms of government bonds. See, for example, A.R.S. § 9-534 (Municipal bonds), A.R.S. § 15-1489 (Educational bonds), A.R.S. § 28-2009 (Transportation bonds), A.R.S. § 30-227 (Arizona Power Authority bonds), and A.R.S. § 36-1414 (Housing bonds).

**1.3.11 Criminal Prosecution Powers.** The Attorney General is authorized to prosecute certain criminal offenses. A.R.S. § 44-2032 (Securities Act), A.R.S. § 41-1279.22 (County, community college and school district audits), A.R.S. § 46-133 (Welfare laws), A.R.S. § 23-656 (Labor laws), A.R.S. § 20-152 (Insurance laws), A.R.S. § 21-421 (Grand Jury jurisdiction) and A.R.S. §§ 13-2301 to -2317 (Racketeering Act) are examples of some of these offenses.

Because the Attorney General's responsibilities vis-a-vis the Grand Jury and the Racketeering Act are important, they merit further discussion. A grand jury with statewide jurisdiction is continually in session. The Attorney General presents evidence of criminal conduct to the State Grand Jury and prosecutes all indictments returned by the jury. Basically, the State Grand Jury and the Attorney General have jurisdiction over white collar crime, organized crime, public corruption and crimes occurring in more than one county. See A.R.S. § 21-422(B) for an enumeration of the offenses under the jurisdiction of the State Grand Jury. Agencies should refer any matters that might involve criminal conduct within the jurisdiction of the State Grand Jury to the Attorney General's Office.

The Attorney General also investigates violations of and enforces the state's Racketeering Act, A.R.S. §§ 13-2301 to -2317. The Racketeering Act defines racketeering as any act committed for financial gain which is punishable by imprisonment for more than one year involving homicide, forgery, bribery, usury, extortion, obstructing justice, false claims or statements, securities or land fraud, money laundering and other similar activities. A.R.S. § 13-2301(D)(4). The Act provides criminal penalties and civil remedies for the control of any business either with racketeering proceeds, or through racketeering activity, A.R.S. § 13-2312(A), and for the conduct of a business through racketeering activity, A.R.S. § 13-2312(B).

The Attorney General is also authorized to obtain injunctive relief, disgorgement, divestiture, damages and other civil remedies against persons engaged in racketeering. A.R.S. § 13-2314. Any agency discovering conduct that would fall within the Racketeering Act should report that conduct to the Attorney General's Office.

The following list includes the principal areas of criminal jurisdiction and responsibility given to the Attorney General by the Legislature:

A. Attend, advise, investigate for, present evidence to and prosecute all indictments returned by the State Grand Jury, A.R.S. §§ 21-424 and -427, including offenses or violations of law:

1. Arising out of or in connection with the determination or collection of state taxes, the registration or failure to register securities, the offer or sale of securities, the offer or sale of interests in land, the formation or operation of banks, insurance companies, pension funds, labor unions, professional sports enterprises, corporate enterprises, or business enterprises, the making or collecting of loans, events leading to receivership or declaration of bankruptcy by a business enterprise, the sale or purchase of goods or services by or for the state or political subdivisions, bribery, obstruction of justice, hindering prosecution or any form of intentional, knowing or corrupt misconduct involving any person compensated by public funds; or

2. Arising out of or in connection with any fraud, theft or possession, receipt, sale or transportation of stolen property or other contraband, or gambling or prostitution or narcotics, which occurs in more than one county or which occurs in one county and affects the residents of another county or which may be prosecuted by more than one county attorney; or

3. Arising out of or in connection with perjury, false swearing, unsworn falsification, or any violation of title 13, chapter 28 in connection with any state grand jury proceeding, committed by any person testifying before it or in any trial or other proceeding involving any indictment returned by a state grand jury; or

4. Arising out of or in connection with any perjury by subornation or attempted perjury by subornation relating to testimony before it or in any trial or other proceeding involving any indictment returned by a state grand jury; or

5. Arising out of or in connection with any violation of title 13, chapter 23 or 38-421 or 39-161.

A.R.S. § 21-422.

B. Advise County Attorneys of cases investigated by the State Grand Jury and refer to them crimes discovered by the State Grand Jury but not within its jurisdiction. A.R.S. §§ 21-422(B) and -426.

C. Conduct investigations and prosecute violations arising out of or in connection with Arizona's Racketeering Act, A.R.S. §§ 13-2301 to -2817. A.R.S. § 21-422.

D. Prosecute by way of complaint any offense within the jurisdiction of the State Grand Jury. A.R.S. § 21-427(B).

E. Prosecute offenses arising out of the operation of the Arizona State Lottery. A.R.S. § 5-512.01.

F. Prosecute offenses arising out of the operation of a discount buyer's organization or service. A.R.S. §§ 44-1797 to -1797.20; see §§ 44-1797.04(B) and -1797.20.

G. Prosecute violations of the state's employment security program. A.R.S. § 23-656.

H. Prosecute violations of the state's workers' compensation program. A.R.S. § 23-929.

I. Prosecute offenses involving securities. A.R.S. § 44-2032(5).

J. Prosecute offenses arising out of any program administered by the Department of Economic Security. A.R.S. § 41-1963.

K. Prosecute offenses arising out of the administration of the tax laws under Titles 42 and 43 and bingo laws in Title 5. A.R.S. § 21-422.

L. Prosecute offenses related to the operation of pyramid schemes. A.R.S. § 44-1732.

M. Prosecute environmental crimes. A.R.S. §§ 49-263(F), -287, -924(B) and -925.

N. Prosecute offenses related to bidrigging or state bidding or purchasing laws. A.R.S. §§ 34-258 and 41-2616(C).

O. Prosecute offenses included in Title 16 involving any election for state office, members of the Legislature, Justices of the Supreme Court, Judges of the Court of Appeals or statewide initiative or referendum. A.R.S. § 16-1021.

P. Recover fines levied for violations of the picketing and secondary boycott laws. A.R.S. § 23-1324.

Q. Investigate and prosecute offenses arising in connection with the operation of the Arizona Health Care Cost Containment System program. A.R.S. § 41-1963.

R. Prosecute health care kickback and related frauds. A.R.S. § 13-3713.

S. Enforce laws related to conflicts of interest, A.R.S. §§ 38-501 to -510, and financial disclosure by public officers, A.R.S. §§ 38-541 to -545. A.R.S. § 21-422.

T. Prosecute and defend in the Supreme Court all proceedings in which the state or an officer thereof in his capacity is a party. A.R.S. § 41-193(A)(1).

U. At the direction of the Governor or when deemed necessary by the Attorney General, prosecute and defend any proceeding in a state court other than the Supreme Court in which the state or an officer thereof is a party or has an interest. A.R.S. § 41-193(A)(2).

V. Exercise supervisory powers over county attorneys of the several counties in matters pertaining to that office and require reports relating to the public business thereof and at the direction of the Governor, or when deemed necessary, assist the county attorney of any county in the discharge of his duties. A.R.S. § 41-193(A)(4), (5).

W. Investigate campaign contribution limitation violation complaints for criminal or civil action. A.R.S. § 16-905(L).

1.3.12 Power to Enforce the Consumer Fraud Act. The Attorney General investigates violations of and enforces the Consumer Fraud Act, A.R.S. §§ 44-1521 to -1534. This act makes it unlawful to engage in fraudulent or deceptive practices in connection with the advertisement or sale of any merchandise or services. A.R.S. § 44-1522. The Attorney General may obtain injunctive relief, restitution and civil penalties against any person found in violation of the Act.

As part of the Attorney General's investigative efforts under the Consumer Fraud Act, the Financial Fraud Division receives and processes thousands of written complaints each year from consumers. If the complaint falls within the jurisdiction of another state regulatory agency and can best be resolved by that agency, (for example, a complaint of poor workmanship against a contractor licensed by the Registrar of Contractors), it is the Financial Fraud Division's practice to immediately refer it to that agency. On the other hand, if an agency should receive a complaint involving fraudulent or deceptive practices which does not fall within the agency's jurisdiction or which the agency does not have the legal means to resolve, the agency should refer the complaint to the Financial Fraud Division of the Attorney General's Office. In addition, even if the agency intends to pursue the matter, the agency should send to the Financial Fraud Division informational copies of complaints involving fraud or deception. Although the Attorney General's Office wishes to encourage cooperation between an agency and its office, it does not want to encourage any agency to use referrals to the Financial Fraud Division as a means of avoiding handling unwanted complaints or reducing an agency's workload.

1.3.13 Power to Enforce the State Antitrust Law. A.R.S. §§ 41-191(D) and 44-1406(B) provide that the Attorney General shall enforce the provisions of the Arizona Uniform State Antitrust Law, A.R.S. §§ 44-1401 to -1415. The Antitrust Act prohibits agreements or actions that result in the restraint of trade or competition, including the fixing of prices.

A.R.S. § 44-1415 requires any state officer having knowledge of a violation of the Antitrust laws to notify the Attorney General and report the violation with names of witnesses by whom the violation can be proved.

In certain situations, state agencies by their actions can encounter serious problems concerning conduct prohibited under this act. For a more detailed discussion of this subject matter, you should read the comments contained in Chapters 5 and 9 of this handbook in order to avoid these problems.

**1.3.14 Power to Enforce the State Civil Rights Act.** A.R.S. § 41-1401 requires the Attorney General to enforce the state Civil Rights Act, A.R.S. §§ 41-1401 to -1484. The Act specifically governs the violations of individual civil rights in the area of voting, public accommodations and employment. The Act prohibits discrimination against the following protected classifications: race, color, national origin, religion, sex, age and physical handicap. The Attorney General is empowered to conduct investigations into the violation of an individual's civil rights in these areas upon the receipt of a written complaint. If the Attorney General determines there is reasonable cause to believe that the charge is true, he has the obligation to attempt to correct the violation by means of conference, conciliation or persuasion. In certain situations, the Attorney General may initiate a lawsuit to correct the violation or authorize the charging party to initiate such a suit. See Chapter 3 regarding equal employment opportunity and affirmative action.

**1.3.15 Power to Collect Debts.** Pursuant to A.R.S. §§ 41-191(E) and -191.03, the Attorney General has the power to initiate legal action outside this state in order to collect debts owed to the state. This power was recently given to the Attorney General and he is in the process of developing procedures to initiate such enforcement action.

**1.3.16 Open Meeting Law Enforcement.** The Attorney General may commence suit to require compliance with or prevent violations of the Open Meeting Law, A.R.S. §§ 38-431 to -431.09. See Chapter 7 regarding requirements of the Open Meeting Law.

**1.3.17 Miscellaneous Powers and Duties.** The Attorney General may release state liens on real estate, A.R.S. § 33-724; bring actions to enjoin the illegal payment and the recovery of state money illegally paid, A.R.S. § 35-212; inspect the records of state tax collectors, A.R.S. § 42-108(D)(2)(b); approve interstate agricultural-horticultural agreements, A.R.S. § 3-221; seek dissolution of corporations, A.R.S. § 10-094; seek quo warranto writs against persons improperly holding public office, A.R.S. § 12-2041; seek state court enforcement of state statutes challenged in federal court, A.R.S. § 12-932; investigate extradition cases on request of the Governor, A.R.S. § 13-3844; act as the state information agency under the Reciprocal Enforcement of Support Act, A.R.S. § 12-1666; handle quiet title actions, A.R.S. § 12-1101; register persons who conduct amusement gambling events, A.R.S. § 13-3311; and authorize emergency interceptions of wire, electronic or oral communications, A.R.S. § 13-3015.

#### **1.4 Role of the Attorney General in Representing and Advising State Administrative Agencies, Public Officers and Employees.**

**1.4.1 Administrative Agencies.** The Attorney General, as the state's chief legal officer, is responsible for safeguarding the interests of the state and its agencies. He is charged with the duty of coordinating the legal affairs of a multitude of clients, each of

which is responsible to the public interest. In addition, the Attorney General, as a constitutional officer and elected official, is also entrusted with the protection of the public interest and the defense of the state constitution.

It is not feasible to permit all state employees to consult with the Attorney General's Office at their option. It would be impossible to provide competent replies to all pleas for assistance in a timely manner. Therefore, agencies must necessarily form and utilize internal channels to route requests for legal assistance through officials who can discern the appropriate issues requiring Attorney General action.

Because of the widely varying demands upon the Attorney General's staff, priorities for doing work must be set. What might be regarded as having less priority, when staff time is pressed to its limits, may be accorded more detailed attention when staff time is not wholly committed to major problems. Setting forth here a scheme of priorities is difficult because many factors may be involved. However, among those things considered in establishing priorities for treatment of a request are its obvious merit, its bearing upon the Attorney General's particular duty to the concerned agency, and its need for attention compared to other existing needs.

The statutory powers and duties of the Attorney General, which form the basis for representing and advising state agencies, are set forth above in Section 1.3.

Note that because the Attorney General is elected by the people of this state, he has, in addition to his obligation to provide legal representation to state agencies, an obligation to the people of the state to insure that the laws empowering state agencies to act are carried out in a manner which is consistent with their intent as prescribed by the Legislature. The Attorney General's resources are not available for the purpose of helping any agency "get around" duties, obligations and laws. The Legislature establishes the laws; the Attorney General is responsible for insuring that these laws are obeyed. If you disagree with the laws imposed on you or your agency, do not ask the Attorney General to ignore them; he will not assist you in this manner. The Legislature is the proper body to address changes, alterations, or modifications to laws with which you disagree or which you believe need to be changed. You are encouraged to consult with the Legislative Council, which offers assistance to agencies in drafting proposed legislation. At the same time, please apprise the Assistant Attorney General advising your agency of your proposed legislation.

Although more than one attorney occasionally may provide legal services to an agency, one attorney is primarily responsible for furnishing the services. Any legal problems which an agency has should be first addressed to this attorney. If he is unavailable, the Assistant Chief or Chief Counsel of the appropriate division should be consulted. All requests for legal assistance should come through the head of the agency, his immediate assistant or an individual designated by the agency head to request legal assistance. Requests from individuals other than these persons may be denied.

The Attorney General will not perform administrative duties, maintain agency records, decide matters of policy or make the decisions for an agency which the law requires the agency to make. The Attorney General's role is to give legal advice. Once the Attorney General has rendered his advice, his role in the decision-making process is completed.

The Attorney General will also assist the agency by providing legal advice and representation in adjudicatory proceedings, licensing matters, rule making proceedings, enforcement proceedings, and in personnel matters involving the discipline of employees. A more detailed discussion of the Attorney General's role in representing and advising state agencies, public officers and employees is set forth in Section 1.10, "The Attorney General's Guidelines for Representation of State Agencies."

**1.4.2 Public Officers and Employees.** The Attorney General cannot render legal advice to public officers or employees on legal problems pertaining to personal matters, matters not relating to their public duty or employment, or matters arising as a result of conduct outside the scope of their employment, appointment or election.

The Attorney General is charged with investigating public corruption and certain other illegal activities that may involve public officers or employees. Consequently, he not only will not represent officers or employees accused of these activities, but will vigorously pursue an investigation and prosecution of any public officer or employee engaged in illegal activity. A more detailed discussion of the Attorney General's role in representing and advising state agencies, public officers and employees is set forth in Section 1.10, "The Attorney General's Guidelines for Representation of State Agencies."

**1.4.3 Legal Assistance to Members of the Public.** The Attorney General is not authorized to render legal advice or provide representation to members of the public. If legal services are requested by a public officer for the purpose of providing advice or representation to a member of the public, the Attorney General must refuse to provide the requested service. See A.R.S. § 41-191(B).

**1.4.4 Legislative Representation for Public Officers and Employees.** If an agency head determines that legislation needs to be enacted, assistance and guidance should be sought from the Legislative Council, either directly or through an interested member of the Legislature. You should also notify the Assistant Attorney General assigned to your agency of your proposed legislation. The Attorney General may, in his discretion, provide guidance and advice to your agency regarding proposed legislation. If necessary and appropriate, a representative of the Attorney General's Office can appear with an agency representative before legislative committees regarding proposed legislation. However, the Attorney General will not act as a lobbyist for state agencies.

## **1.5 Role of the Attorney General in Issuing Legal Opinions.**

**1.5.1 Authority to Issue Opinions.** The authority of the Attorney General to issue opinions is contained in A.R.S. § 41-193(A)(7), discussed in Section 1.3.8 above. As stated in A.R.S. § 41-193(A)(7), the only official opinions of the Attorney General are those that are written. They are also public records and must be made available to the public. See A.R.S. §§ 41-193(A)(7) and -194(A). The Attorney General is required by law to distribute a copy of each opinion to the Governor, the President of the Senate, the Speaker of the House and any department or agency required to perform some function necessary to implement the opinion. Pursuant to A.R.S. § 38-507, requests for opinions concerning violations of Article 8, Chapter 3, Title 38 (conflicts of interest) are confidential but the opinion issued is a matter of public record. Other opinion requests not covered by a specific grant of confidentiality are considered public records and made available to the public.

1.5.2 Request Procedure. Written opinions will be issued only upon the written request of a party entitled to receive an opinion. Requests for opinions must be signed or endorsed by the director of a state department before they will be considered. They should be directed to the Attorney General personally. The Attorney General assigns an attorney to prepare a draft response for his review, and upon his review and concurrence, issues the response to the requesting party. Although the attorney assigned to represent the agency making the request usually prepares a draft response, this is not the case in all instances. Every request is assigned a number for reference (an "R" number, e.g. R81-001), and receipt of the request is acknowledged informing the requestor of the reference number assigned. This number is used for identification and for tracking the request. After an opinion has been issued, it is given an issue number (an "I" number, e.g. I81-001) by which it is permanently filed. You should always refer to the "R" number when seeking information regarding a pending opinion and to the "I" number for reference to an issued opinion.

1.5.3 Scope of Opinions. Oral legal advice does not constitute an official opinion of the Attorney General; only formal written opinions signed by the Attorney General rise to this stature. This does not mean, however, that an agency cannot rely on oral advice from the attorney assigned to represent the agency; it merely means that such advice is not to be construed as the official opinion of the Attorney General himself. Oral advice is necessary for the day-to-day operation of the agency, and using written opinions to furnish this service is impossible. Written opinions are necessary when significant legal issues arise that cannot clearly be resolved without substantial legal research.

Written opinions are issued on questions of law relating to the official duties of the requesting party. Opinions must be confined to questions of law, not of fact. Ariz. Atty. Gen. Op. I80-231. Opinions will not be issued on matters pending before a court. Ariz. Atty. Gen. Op. I81-137. The Attorney General will not pass upon the constitutionality of legislation enacted by the Arizona Legislature except in cases where there exists a compelling need for such an opinion.

The Attorney General does not respond to opinion requests which have been prompted by constituents or third parties regarding legal questions they would like to have answered. The Attorney General has no legal authority to issue opinions in response to such requests and would appreciate your not asking him to do so. Ariz. Atty. Gen. Ops. I78-83, I78-81.

Opinions of the Attorney General are advisory and they do not have the same effect as decisions of a court of law. Green v. Osborne, \_\_\_ Ariz. \_\_\_, 758 P.2d 138 (1988); Marston's Inc. v. Roman Catholic Church, 132 Ariz. 90, 94, 644 P.2d 244, 248 (1982). However, no public officer is personally liable for acts done in his official capacity in good faith reliance on a written Attorney General Opinion. A.R.S. § 38-446.

1.5.4 Education Opinions. The Attorney General, within 60 days of receipt, must concur, revise, or decline to review opinions of county attorneys, or attorneys appointed with the consent of the county attorney, "relating to school matters" or issued to a community college district. A.R.S. §§ 15-253(B) and -1488(H). Governing board members shall have no personal liability for acts done in reliance on an opinion with which the Attorney General concurs or declines to review or on a revised opinion of the Attorney General. A.R.S. § 15-381(B).

The Attorney General has only the authority to review education opinions and does not accept opinion requests directly from school district governing boards.

**1.5.5 Opinion Summaries.** The Attorney General periodically issues summaries of recently issued opinions. This publication contains a reference to the number of the opinion, the person or agency requesting it, a citation of any statutes, constitutional provisions or laws construed or relied on and a brief summary of the conclusion of the opinion. They are published each month by the Secretary of State in the Administrative Register.

**1.6 Role of the Attorney General in the Adoption and Certification of Administrative Rules.** The authority of the Attorney General in connection with the adoption of rules by state agencies is set forth in A.R.S. § 41-1041. A more detailed explanation of the procedure for adopting, amending or repealing rules is contained in Chapter 11.

The Attorney General does not prepare rules for state agencies. That is the responsibility of each agency. Occasionally, because of pending litigation, legislation affecting all state agencies similarly or issues of statewide application, the Attorney General will suggest the adoption of rules by an agency.

Generally, the Attorney General will advise the agency on the proper procedures to follow in promulgating rules, informally review draft rules to identify obvious legal defects or problems, and formally review the rules for certification pursuant to A.R.S. § 41-1041. The Attorney General has the power to certify rules of agencies which are required to adopt rules in compliance with the Administrative Procedure Act, A.R.S. §§ 41-1001 to -1055, and he will refuse to certify or review rules of other governmental entities. See the definition of "agency" in A.R.S. § 41-1001(1).

**1.7 Role of the Attorney General in the Approval of Contracts, Leases and Intergovernmental Agreements.**

**1.7.1 Contracts and Leases.** With the exception of intergovernmental agreements discussed in Section 1.7.2 below, there is no requirement mandating that the Attorney General review contracts, agreements or leases entered into by state agencies. However, the Attorney General has the authority to perform this function based on A.R.S. § 41-192 and may do so at the request of any state agency.

The Attorney General will assist agencies in the preparation of contracts, agreements or leases when necessary. Because state agencies often engage in activities which can utilize a certain written agreement repeatedly, most agencies have contracts used in the past which only occasionally need updating to meet current needs.

When an original agreement needs to be drafted to cover a new area, the Attorney General should be consulted because, unlike the private sector, contracts concerning governmental agencies may require special clauses pursuant to statute, constitution or case law. An example of one statute which mandates certain language to be included in state contracts is A.R.S. § 38-511(G) regarding cancellation. That statute authorizes the Governor to cancel any contract made on behalf of the state or any of its departments or agencies if any person significantly involved in initiating, negotiating, securing, drafting or creating the contract becomes an employee or consultant for any other party to the contract during the period of time the contract or any extension of the

contract is in effect. Another example is A.R.S. § 12-1518(C) which requires all contracts entered into by state agencies to contain a clause that the parties agree to arbitrate certain disputes. In the absence of specific legislative authority, such as non-lapsing appropriations or revolving funds, an agency cannot legally bind itself to an agreement for the payment of public funds beyond the end of any current fiscal year.

The Assistant Attorney General assigned to represent your agency or the Chief Counsel of the Civil Division should be consulted for review or drafting of major agreements or for further information with regard to mandatory requirements for state contracts. Agencies are strongly encouraged to seek the assistance of the Attorney General in the early phases of significant contract procurements.

A.R.S. § 41-791.01 provides that the Department of Administration shall review all architectural, engineering and construction contracts prior to submission to the Attorney General. A.R.S. § 41-792 also requires all state leases of buildings to be approved by the Director of the Department of Administration if the square foot dollar cost exceeds the annual average figure established by the Lease Cost Review Board. Consequently, the Attorney General will decline to review any such contracts or leases that do not have the prior review of the Department of Administration, unless the contract is exempt from such review under A.R.S. § 41-790.01.

A.R.S. §§ 41-2533 and -2535 require sealed competitive bidding for expenditures exceeding \$10,000. Procurement requirements are more completely explained in Chapter 5.

**1.7.2 Intergovernmental Agreements.** Intergovernmental agreements are contracts between two or more public agencies for the joint exercise of powers common to the agencies, for joint or cooperative action or for services. Public agencies are defined to include the federal government or any department or agency thereof, an Indian Tribal Council, the state and all its departments, agencies, boards, and commissions, counties, school districts, cities, towns, all municipal corporations and any other political subdivision of this state or an adjoining state. The statutory sections controlling intergovernmental agreements are A.R.S. §§ 11-951 to -954. A.R.S. § 11-954 states that these statutes do not confer any additional power or authority on any agency that the agency does not already possess under other separate provisions of the law. In other words, the statutes merely detail the method of entering into these agreements and do not give an agency independent authorization to act.

A.R.S. § 11-952 applies only to contracts involving the joint exercise of a power common to the contracting parties. Thus, when two public agencies enter into an agreement for joint action, each agency must have the power to perform the action contemplated in the contract pursuant to which they agree to allocate responsibilities between them. See Ariz. Atty. Gen. Ops. I86-084, I83-057, I79-079. Where there is no joint exercise of powers common to the agencies involved, the requirements of A.R.S. § 11-952 do not apply to the agreement. The furnishing of services by one agency to another normally does not involve the exercise of joint powers, and therefore the contract entered into for this purpose would not be subject to the requirements of A.R.S. §§ 11-951 to -954.

The Attorney General is required by A.R.S. § 11-952(D) to review intergovernmental agreements or contracts involving a state agency, board or commission to determine "whether the said agreement is in proper form and is within the powers and

authority granted under the laws of this state to such public agency, board or commission." A.R.S. § 11-952(D). Accordingly, the Attorney General does not have authority to review and approve or disapprove intergovernmental agreements that do not involve at least one state agency as a party to the agreement.

Procedurally, the agency should submit the intergovernmental agreement to the Attorney General for his determination before it is signed. The agency should also submit to the Attorney General copies of the appropriate action taken by the agency, by resolution or otherwise, that authorizes the future execution (signing) of the agreement. The authority to sign an intergovernmental agreement may not be delegated by an agency head or board unless the agency or board is specifically authorized by statute to delegate its contract-related duties. Ariz. Atty. Gen. Op. 180-92. The agency should provide the Attorney General with an adequate and reasonable opportunity to review and propose necessary changes to the agreement.

The following is a checklist of items required by the Attorney General for approval of intergovernmental agreements:

1. Identify each public agency which is a contracting party by correct statutory title and indicate whether it is a state, county, city, town or other public or municipal agency or instrumentality.
2. Place into the recitals or elsewhere in the agreement, the exact statutory references under which each contracting party is empowered or authorized to exercise the powers contemplated.
3. State the duration preferably by specifying the beginning date and the ending date of the agreement.
4. State the purpose or purposes to be accomplished.
5. State the manner of financing the undertaking and where applicable, state the manner of establishing and maintaining a budget therefor.
6. State the method or means of partial or complete termination.
7. Where the property is to be acquired solely for the accomplishment of the purpose or purposes of the agreement, provide a means or method for disposing of such property upon termination or completion.
8. Provide in the agreement or contract that it shall be filed with the Secretary of State and that it shall not become effective at least until that filing occurs.
9. The governing board of the contracting authority must authorize the future execution (signing) of the contract or agreement before it is submitted to the Attorney General for his determination whether it is "in proper form and is within the powers and authority granted" by law. In other words, none of the parties should sign the agreement until after it has been referred to the Attorney General for review and approval.

If the Attorney General determines that the agreement is "in proper form and is within the powers and authority granted" by law, this determination will be noted on the agreement. All documents will then be returned to the party from whom the Attorney General received them. If the Attorney General determines that the agreement is not in proper form or is not within the powers and authority granted by law, all documents will be returned to the party from whom they were received with a letter pointing out the

deficiencies. After the Attorney General has made a favorable determination, the parties should then execute (sign) the agreement or contract and file it with the Secretary of State.

1.8 Investigative Services Within the Department of Law. Any requests that your agency has for investigative assistance from the Attorney General should be directed, in writing, to the Assistant Attorney General assigned to represent your agency or the Chief Counsel of the Special Investigations Division specifying in detail the nature and object of the investigation needed. An acceptable format for this request is shown in Form 1.2 attached to this Chapter. The Chief Counsel will evaluate the request and determine whether the Attorney General has the capability of assisting your agency and will so notify you.

1.9 Procedure for Receipt of Service of a Summons, Complaint, Subpoena or Other Document. The Arizona Rules of Civil Procedure prescribe the method for service of summons, complaints, subpoenas and other documents. These rules parallel the Federal Rules of Civil Procedure with respect to service of summons and complaints by authorizing both personal service and alternate service by mail in state. IT IS IMPORTANT, FOR THE REASONS SET OUT BELOW, THAT AGENCIES AND AGENCY PERSONNEL DO NOT "ACCEPT" DOCUMENTS THAT ARE TO BE SERVED UPON THE STATE OF ARIZONA, OR ANY AGENCY, BOARD OR COMMISSION OF THE STATE.

1.9.1 Service of Summons And Complaint Against the State: Personal Service: Rule 4(d), Rules of Civil Procedure. Personal service of a summons and complaint upon the Attorney General is provided for in Rule 4(d), Arizona Rules of Civil Procedure, as follows:

4(d) Summons; service; minors; nonresident minors. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be make as follows:

....

7. Upon the state, by delivering a copy of the summons and of the complaint to the attorney general.

8. Upon a county or municipal corporation or other governmental subdivision of the state subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer, the secretary, clerk, or recording officer thereof.

(Emphasis added.)

Any person attempting personal service of a SUMMONS and COMPLAINT upon the "STATE OF ARIZONA" or upon any "DEPARTMENT," "AGENCY," "COMMISSION" or "BOARD" of the state at the Phoenix office shall be directed to the receptionist's desk located on the first floor at the main entrance to the building; and, at the Tucson office shall be directed to the receptionist's desk located at the front window. These are the only locations within the Phoenix and Tucson offices authorized to receive personal service of process. The receptionist shall be authorized only to receive (not accept) service of process for the STATE OF ARIZONA or any DEPARTMENT, AGENCY, BOARD or COMMISSION of the state.

1.9.2 Service of Process for Individuals. The Receptionist has NO AUTHORITY to receive or accept service of process for individual officers, directors or employees of the state or this office, provided, however, that if the individual is an employee of the Attorney General's Office, the receptionist shall attempt to contact the employee by phone, and the employee may, after personal notice by the receptionist, specifically authorize the receptionist to receive service of process on his or her behalf or make other arrangements for receiving service of process.

If both the STATE or a DEPARTMENT, AGENCY, BOARD or COMMISSION of the state and an officer or employee are named, the receptionist or other designated relief person may receive the summons and complaint for the STATE and the DEPARTMENT, AGENCY, BOARD or COMMISSION only and must direct the process server to serve the individual directly unless the employee is an employee of the Attorney General's Office and the procedure outlined above has been followed.

If neither the STATE nor any DEPARTMENT, AGENCY, BOARD or COMMISSION of the state is named but a state officer or employee is named, the receptionist must refuse receipt of the summons and complaint and direct the process server to serve the individual directly unless the employee is an employee of the Attorney General's Office and the procedure outlined above has been followed.

If a state public officer or employee is personally served with a summons and complaint that involves acts concerning official duties, even if that person is named in his private capacity, the Attorney General's Office should be notified immediately and be provided a copy of the documents. The Attorney General's Office will then determine whether it may provide representation to the officer or employee pursuant to A.R.S. § 41-621. See Chapter 13.

1.9.3 Alternate Service by Mail: Rule 4(e)(7), Rules of Civil Procedure. Alternate service by mail of a summons and complaint is provided for in Rule 4 (e)(7) of the Arizona Rules of Civil Procedure as follows:

4 (e)(7) Alternate service by mail within the state

(a) Alternatively, a summons and complaint may be served within the state upon a defendant of any class referred to in paragraphs (1), (6), (7) [the state], (8) [other subdivisions of the state] and (9) of Section 4(d) of this Rule by mailing a copy of the summons and of the complaint, by first-class mail, postage prepaid, to the person to be served, together with two copies of a notice and acknowledgment of receipt of summons and complaint, and a return envelope, postage prepaid, addressed to the sender.

(b) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation, and returned to the sender. Service is complete, and the time periods for filing a responsive pleading commence to run, from the date upon which the acknowledgment of receipt is executed. Upon receipt of the acknowledgment, the sender shall cause it to be filed with the court in which the matter is pending.

(c) If no acknowledgment of receipt of summons and complaint under this subdivision is received by the sender within twenty (20) days after the date of mailing, service of such summons and complaint may be made as otherwise provided in this Rule. Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return, within twenty (20) days after mailing, the acknowledgment of receipt of summons and complaint.

(Emphasis added.)

Because the time for filing a responsive pleading begins to run from the date acknowledgment of receipt is executed, and because the Attorney General is the officer who must be served on behalf of the state **IT IS IMPORTANT THAT AGENCIES AND AGENCY PERSONNEL DO NOT "ACCEPT" MAILED DOCUMENTS THAT ARE TO BE SERVED UPON THE STATE OF ARIZONA, OR ANY AGENCY, BOARD OR COMMISSION OF THE STATE.**

If any agency receives by mail a summons and complaint and a form for acknowledgment of receipt of service of process that is intended to be served upon the State of Arizona, or any agency, board or commission of the state, it should return the entire packet to the sender. **DO NOT FILL OUT** the acknowledgment of receipt of service of process. An accompanying letter along the lines of the following is suggested:

You have attempted service of process on the State of Arizona by mailing documents to this office.

Please be advised that only the Attorney General may accept service of process for the state. The address for service of process by mail is:

Administration Division  
Office of the Attorney General  
1275 West Washington  
Phoenix, Arizona 85007

Accordingly, I am returning all of the documents you mailed to us without executing the acknowledgment of receipt of service of process.

**1.9.4 Procedure for Alternative Service of Summons and Complaint by Mail.** Any Attorney General's Office personnel in the Phoenix office who receives a summons and complaint served by mail under the alternative provisions of Rule 4(e)(7), Arizona Rules of Civil Procedure, shall immediately forward the summons and complaint and all copies thereof together with the copies of the notice and acknowledgment of receipt of summons and complaint and the return envelope to the Administration Division receptionist located in the northeast corner of the second floor of the building and in the Tucson office to the receptionist or designated relief personnel. **These will be the only locations within the Phoenix and Tucson Offices authorized to receive alternative service of process by mail.** All summons and complaints received in Phoenix by any other personnel or division of the office under the rules authorizing alternative service of process by mail shall be **immediately** forwarded to the Administration Division receptionist and in Tucson to the office receptionist for processing.

As with personal service of process the receptionist shall be authorized only to receive service of process by mail for the "STATE OF ARIZONA" or "DEPARTMENT," "AGENCY," "BOARD" or "COMMISSION" of the state. She or he has NO AUTHORITY to receive service of process by mail for individual officers, directors or employees of the state or of this office.

1.9.5 Service or Receipt of Subpoenas. The receptionist in the Phoenix and Tucson offices have NO AUTHORITY to accept or receive SUBPOENAS for any state employee, any employee of this office, or any state agency, board, commission or officer. The receptionist must tell the person attempting to serve the subpoena that he must serve it personally upon the individual named in the subpoena. If the subpoena names the "custodian of records for the Attorney General's Office," the receptionist shall direct the person attempting to serve the subpoena to the Chief Assistant Attorney General in the Phoenix office.

#### 1.10 Attorney General's Guidelines for Representation of State Agencies.

1.10.1 Preamble and Scope. In the course of performing his duties as the chief legal officer of state government and legal advisor to all state agencies, the Attorney General from time to time may be called upon to advise two state agencies that disagree on what the law is or how to proceed. The Attorney General also may be asked to represent one or more agencies appearing before another state agency acting as the decision maker, and also to represent or advise the decision maker. Often, the Attorney General will be called upon to participate as an advocate and also to act as an advisor to the hearing officer or decision-making officer or body of the agency on evidentiary and procedural matters that may arise during the course of a proceeding. The Attorney General also may be required to originate civil or criminal enforcement actions against public officers for whom he also serves as legal counsel. Finally, the Attorney General may serve on a board or commission before which he is also required to appear as an advocate. Guidelines for dealing with these situations are presented below.

Article V, Section 1 of the Arizona Constitution establishes the Office of Attorney General, and Article V, Section 9, provides that the duties of the Attorney General shall be as prescribed by law. In carrying out that constitutional mandate, the Legislature has prescribed the duties of the Attorney General. See principally A.R.S. §§ 41-192 to -193. Essentially, those statutes mandate that the Attorney General shall prosecute and defend in courts of the state and the United States all proceedings to which the state is a party, and shall be the "chief legal officer of the state" and serve as legal advisor to all state agencies. A.R.S. §§ 41-192(A) and -193. With limited statutory exceptions (Industrial Commission, Board of Regents, Arizona Corporation Commission, Residential Utility Consumer Office, Department of Water Resources, Arizona Power Authority, Board of Regents, Arizona Corporation Commission and Arizona Health Cost Care Containment System Administration), agencies other than the Attorney General are forbidden from employing legal counsel or spending state monies for legal services. A.R.S. §§ 41-192(E), -192.01 and 36-2903(O).

Except as otherwise provided by the Legislature, the Attorney General has a statutorily mandated duty to conduct the legal affairs of state government. As an elected state official, a constitutional official and the state's "chief legal officer," the Attorney General's broad responsibility of representing state government consists of providing legal advice to the various constituents that comprise that government entity and through which the state acts. This includes agencies, departments, and officers and

employees acting in their official capacity when performing their duties of defining, conducting and carrying out the public's business in a manner consistent with the law as prescribed by the Constitution and the Legislature. In this regard the Attorney General is entrusted with the protection of the public's interest while coordinating the legal affairs of a multitude of agencies of the state.

The Arizona Rules of Professional Conduct ("Ethical Rules"), which became effective on February 1, 1985, expressly recognize the unique and varying role of government lawyers such as the Attorney General. The Preamble to the Ethical Rules states, in part:

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intergovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority.

Arizona Rules of the Supreme Court, Rule 42 (emphasis added).

In a very real sense the Attorney General has only one client, the government of the State of Arizona. Although certain government functions may be assigned to different departments, all such departments conduct the government's business and the government lawyers' first obligation is to the government. The Ethical Rules recognize that the government lawyer in reality represents not a particular constituent state agency or department, but rather the state government as a whole. This principle is expressly articulated in a portion of the Comment to ER 1.13, which discusses government lawyers' ethical obligations when an organizational entity, such as the State of Arizona, is the client:

The duty defined in this rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to

act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This rule does not limit that authority.

Arizona Rules of the Supreme Court, Rule 42 (emphasis added).

Thus, the special constitutional status and statutory responsibilities of the Attorney General cannot be ignored or disregarded in defining the representational status and obligations of the Attorney General.

#### 1.10.2 Attorney General's Representational Role.

1.10.2.01 Attorney General's Relationship to the State, its Agencies and Employees. The Attorney General represents the State of Arizona, acting through its constituent agencies, departments and employees. Where a representative of the Attorney General's Office provides a public official or employee with legal advice concerning the employee's official duties, no personal attorney-client relationship arises between the individual employee and the lawyer. The state may, however, assert privilege on behalf of the state with regard to communications between a representative of the Attorney General's Office and the state's constituent officials and employees.

1.10.2.02 Adverse Interests Other than Enforcement Actions. When the Attorney General has adverse interests with another state agency other than in cases covered by 1.10.2.03, the Attorney General will not represent the agency on the matter in controversy. The Attorney General will continue, however, to represent the agency in all other matters as required by law. The agency may obtain outside counsel through the Attorney General to represent it in the matter in controversy. The principles set forth in Section 1.10.5 will apply in such circumstances.

1.10.2.03 Enforcement Actions Against State Officials. When the Attorney General is contemplating or has instituted civil or criminal proceedings against a state agency, public official or employee, the agency, public official or employee will not be entitled to public representation unless expressly allowed by law.

1.10.2.04 Agency Requests for Actions or Defenses that Are Not Legally Supportable or for Delay. If an agency, officer, or employee proposes to pursue an action or maintain a defense which the Attorney General determines is not legally supportable or has no substantial purpose other than delay, the agency shall be advised of such fact and that the Attorney General will not pursue the matter on the agency's behalf. In such cases the agency will not be entitled to public representation.

#### 1.10.2.05 Comments.

Attorney General's Relationship to the State, its Agencies and Employees. The Attorney General serves the people of Arizona as the attorney for the state and has the sworn obligation to uphold the constitution and laws of the state. As the state's lawyer, the Attorney General represents the constituent entities of the state including its agencies, officers and employees provided that such agencies, officers and employees are

acting as authorized by law in their official capacities and within their prescribed powers. Agencies, officers and employees acting in an individual capacity or in an unlawful manner or beyond their prescribed powers cannot, and will not, be represented by the Attorney General and should not assume or expect such representation. In fact, the Attorney General has a duty on behalf of the state to investigate and take appropriate action where there is any claim of illegality by state officers or employees. United States v. Troutman, 814 F.2d 1428 (10th Cir. 1987).

Agencies, officers and employees acting lawfully can expect that the Attorney General will maintain confidential communications. They should be aware, however, that such confidences are maintained on behalf of the state and its people and may be disclosed where it is in the best interests of the state to do. Thus, neither confidentiality nor conflict of interest per se will prevent disclosure of communications with the Attorney General when a disclosure is necessary on behalf of the state as, for example, where the Attorney General is investigating possible violations of the law.

Although the state is a distinct legal entity, it cannot act except through its officers, employees and other constituents. As noted above, the Attorney General represents the State of Arizona, acting through its constituent agencies, departments and employees. This does not mean that state officials and employees or other constituents are the individual clients of the Attorney General. Thus, an employee's position within the agency does not create an attorney-client relationship between the employee and the Office of the Attorney General. Where a representative of the Attorney General's Office provides an employee with legal advice concerning the employee's official duties, no attorney-client relationship arises between the individual employee and the lawyer. Because the official or employee who on behalf of the state or agency of the state obtains legal advice from the state's lawyers is not the "client," there is no individual attorney-client privilege which may be asserted by the employee. The state may, however, assert privilege as to the communication between a representative of the Attorney General's Office and the state's constituent officials or employees. Communications between the lawyer and the public official or employee are not privileged against disclosure to other state or public officials. As a result, in an adversary proceeding in which the official or employee is called as a witness, the state's lawyer who had communications with the official or employee, or another lawyer in the Attorney General's Office, may cross-examine the witness-official or witness-employee. Legal communications between the Attorney General and its agencies and employees regarding official business of the state shall not be disclosed to private parties without the prior agreement of the Attorney General. Failure by an agency and employee to first seek approval of the Attorney General before disclosing legal communications to third parties can jeopardize the interests of the state.

The issue of preserving communications between a public official and/or employee and the Attorney General as confidential and of asserting or waiving the attorney-client privilege as to a private party can be based solely on the best interests of the state as the represented client. In all criminal and enforcement matters independently undertaken by the Attorney General, the decision to assert or waive the state's privilege will be made by the Attorney General. The decision in unrelated civil matters whether to assert or waive the privilege should be made jointly by the Attorney General and the authorized representative of the public agency, if any, that is directly involved in a particular situation. If no agreement can be reached or a dispute arises between the Attorney General and the specific public agency as to the best interests of the state as a whole, the Attorney General shall present the matter to the Governor for review and resolution.

Representatives of the Attorney General's Office owe a fiduciary duty to the government of the State of Arizona as the client and not to an individual official or employee. ER 1.13. If, in the process of giving legal advice or representing an employee in his or her official capacity, a representative of the Attorney General's Office discovers that the official or employee has committed or intends to commit an illegal act or fraud that may materially injure the state, the lawyer must disclose this to the agency management and may also testify regarding such improprieties. In addition, the Attorney General may take official action against or prosecute the official or employee who has committed or intends to commit the illegal act or fraud.

These principles are embodied in the Comment to ER 1.13 which, in part, states the following:

When one of the constituents of an organizational client [such as the state or an agency of the state] communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by ER 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews, made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by ER 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by ER 1.6.

Arizona Rules of the Supreme Court, Rule 42 (emphasis added).

The Ethical Rules do provide that a lawyer representing an organizational entity, such as the state, may also represent its officers, employees, or other constituents, so long as consent to such representation with respect to the state's interests is given by an appropriate official of the organization other than the individual who is to be represented and if the individual's interests are not adverse to those of the organization with regard to the matter in controversy. This is consistent with A.R.S. § 41-192.02 which authorizes the Attorney General in his discretion to represent an officer or employee of the state against whom a civil action is brought in his individual capacity for conduct performed within the scope of the officer's or employee's official duties or employment. When the clients (that is, the state and the public official) consent to dual representation, the Attorney General will undertake such representation only so long as a good faith judgment can be made as early as practicable that no potential or actual conflict of interest exists between the state and the public official and/or employee. If prior to undertaking dual representation a good faith judgment cannot for whatever reason be made that an actual or apparent conflict does not exist, the state shall when appropriate provide for independent legal counsel to the individual public official or employee. Public officials will be notified in writing of the Attorney General's decision regarding representation and should understand and will be informed that dual representation of necessity will result in the disclosure to the state of information communicated by the public official to the Attorney General.

Adverse Interests Other than Enforcement Actions. In several types of proceedings the Attorney General is authorized to appear as a party contestant or appeal a decision from the agency which is otherwise represented by the Attorney General. Where the Attorney General assumes such a posture, Section 1.10.1.02 will be followed.

Where the Attorney General determines that the State of Arizona may be injured by an illegal or unlawful course of action the Attorney General has an obligation to proceed as is reasonably necessary to protect the best interests of the state. This ethical obligation of the Attorney General to his client, the State of Arizona, is explained by the Ethical Rules:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

ER 1.13(b), Arizona Rules of the Supreme Court, Rule 42. Because the public interest is involved, the Comment to the Ethical Rule also provides:

[I]n a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This rule does not limit that authority.

Arizona Rules of the Supreme Court, Rule 42.

Enforcement Actions Against State Officials. The Attorney General is responsible for enforcing certain state laws applicable to state officers and employees. See, e.g., A.R.S. §§ 35-212 (illegal payment of public monies); 12-2041 (quo warranto). These enforcement actions may be either criminal or civil. Again, the Comments to the Ethical Rules provide guidance in these circumstances:

[W]hen the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation.

Arizona Rules of the Supreme Court, Rule 42. Thus, where a civil or criminal enforcement action has been instituted or is contemplated, Section 1.10.2 will be followed.

Agency Requests for Actions or Defenses that are not Legally Supportable or for Delay. Finally, the Attorney General from time to time may be requested by a state agency to assert a claim or defense which the Attorney General believes is not legally supportable or has no substantial purpose other than delay. The applicable Ethical Rules preclude the Attorney General from pursuing such claims or defenses. ERs 3.1, 3.2. The

Supreme Court has directed all Arizona lawyers to pursue only meritorious claims and contentions, and to expedite litigation. Accordingly, the Attorney General will refuse to assert any claim or defense on behalf of a state agency which the Attorney General determines is not legally supportable or has no substantial purpose other than delay. See Section 1.10.2. In such cases, no employee of the Arizona Attorney General will assist the agency in pursuing such a claim or defense or in obtaining counsel to assist in such endeavor.

### 1.10.3 Multiple Representation of State Agencies.

1.10.3.01 Agency Representation. To the extent of available resources, the Attorney General shall represent all state agencies, except an agency exempt from such representation by statute or as provided in these guidelines.

1.10.3.02 Non-Judicial. When two or more state agencies have adverse interests and the dispute between the agencies is not part of a pending quasi-judicial or judicial proceeding, the Assistant Attorneys General representing or advising the agencies shall consult with the Attorney General and the Attorney General shall decide upon the advice to be given all agencies concerned. This advice may be communicated orally, in a letter or by formal Attorney General Opinion. Normally this will resolve the conflict. If, however, an agency disagrees with the Attorney General's decision, it may pursue the matter further only when it has the statutory authority to do so. If the agency needs outside legal counsel it may obtain such counsel through the Attorney General. The principles set forth in Section 1.10.5 will apply in such circumstances.

1.10.3.03 Quasi-Judicial Proceedings. When a state agency appears as a party before another state agency in a quasi-judicial proceeding, the agencies may consent to the continued representation in which case the Attorney General shall continue to represent all agencies so consenting. Continued representation of both agencies shall be provided by different Assistant Attorneys General in accordance with Section 1.10.4. If both agencies do not consent, the Attorney General will decide which agency to represent and the other agency may obtain legal counsel through the Attorney General. The principles set forth in Section 1.10.5 will apply in such circumstances.

1.10.3.04 Judicial Proceedings. The Attorney General will not represent two state agencies in judicial proceedings when the agencies are on opposite sides of the litigation. In those cases the Attorney General shall determine which agency's position is correct and shall continue to represent that agency in the particular matter. The agency that will not be represented by the Attorney General may obtain legal counsel only in accordance with Section 1.10.5.

1.10.3.05 Comments. The several departments and agencies of the state occasionally are in disagreement. It is these intragovernment disputes that pose potential problems for the government's lawyer—the Attorney General. The Arizona Supreme Court appears to be of the view that where the Legislature has expressly authorized one or both of the agencies to bring the dispute before the judicial branch for resolution, then the contesting agencies may do so. State of Arizona ex rel. Frohmiller v. Hendrix, 59 Ariz. 184, 124 P.2d 768 (1942); State Land Dept. v. State ex rel. Herman, 113 Ariz. 125, 547 P.2d 479 (1976). This position appears to be consistent with the commentators and decisions of other state courts. The area of disagreement concerns the ability of the Attorney General to advise and represent both contestants ethically.

As early as 1942 the Arizona Supreme Court considered whether the Legislature, under the statutory scheme then prescribing the duties of the Attorney General, intended that the state departments could be represented in legal matters only by the Attorney General or his assistants. State of Arizona ex rel. Frohmiller v. Hendrix, 59 Ariz. 184, 124 P.2d 768 (1942). In concluding that the Legislature had not so intended in every instance, the Frohmiller court commented on the propriety of the Attorney General representing two contesting public officers in litigation:

It not infrequently happens that one public officer may take a certain view of the law, while another may construe it in a contrary manner, and litigation may properly be commenced to determine the true construction. The attorney general obviously cannot properly represent both officers. He must choose which side he will take. If the other officer is not permitted to secure competent counsel to represent his point of view, it may be that the court will be misled into rendering a wrong judgment. Further, since the attorney general has no discretion to determine whether suits like the present one be commenced or maintained by the auditor, it would be unreasonable to hold that section 4-503, supra, was intended by the legislature to deny the officer, whose discretion it was to determine whether the suit should be instituted and maintained, the right to be represented by counsel whom she thought could and would present her view of the law, in a manner satisfactory to her, to the court.

59 Ariz. at 196-197, 124 P.2d at 774 (emphasis in original).

The Arizona Supreme Court again raised the issue of the Attorney General's representation of state officers with conflicting views in a footnote to the court's opinion in Arizona State Land Dept. v. State ex rel. Herman, 113 Ariz. 125, 126 n.\*, 547 P.2d 479, 480 n.\* (1976):

Since September 5, 1974, the practice of the staff of the Attorney General representing both sides of a controversy has ceased. On that date this Court denied jurisdiction of a petition filed by the Department of Economic Security for special action against the Department of Administration, both departments being represented by the Attorney General. Another party was substituted for the Department of Economic Security, and the action proceeded as Navajo Tribe v. Arizona Department of Administration, 111 Ariz. 279, 528 P.2d 623 (1975). The case at issue had been instituted prior to the above date. The fact that we allowed the matter to continue in its present posture does not reflect any change in our policy for actions instituted after September 5, 1974.

Implicit in this statement may be the court's view that the ethical rules preclude the Attorney General from representing two state agencies whenever they are on opposite sides of a controversy. The court, however, has not had the opportunity with the benefit of briefs and argument to reconsider its language in cases such as Frohmiller and the applicability of the recently-enacted ethical rules to the Attorney General when he performs his legislatively-mandated duties.

The highest courts of two other states have considered the role of the Attorney General in representing state agencies on opposite sides of a controversy. In Connecticut Commission on Special Revenue v. Connecticut Freedom of Information Commission, 174 Conn. 308, 387 A.2d 533 (1978), the Connecticut Supreme Court considered a case in which two assistant attorneys general represented state agencies both as appellant and appellee with conflicting positions. In overruling a lower court decision that such dual representation violated Canon 5 of the Code of Professional Responsibility and the Disciplinary Rules 5-105(A), (B) and (D) thereunder, which the lower court found took precedence over the Attorney General's duties prescribed by Connecticut statute, the Connecticut Supreme Court stated:

Clearly, on the bare face of the record, the formal appearance of the attorney general for both commissions on the appeals to the Court of Common Pleas and to this court seems anomalous and contrary to the ethical considerations underlying Canon 5 which is obviously based on the biblical maxim that "no man can serve two masters." Matthew 6:24. We are, however, not limited to consideration of the superficial seemliness of the dual appearances. An examination of the particular circumstances of the case, the unique position which is held by the attorney general and his relationship to the contesting commissions has convinced us that the trial court was in error and that the attorney general has not been guilty of any professional impropriety.

The attorney general of the state is in a unique position. He is indeed sui generis. A member of the bar, he is, of course, held to a high standard of professional ethical conduct. As a constitutional executive officer of the state he has also been entrusted with broad duties as its chief civil law officer and, . . . he must, to the best of his ability, fulfill his "public duty, as Attorney General, and his duty as a lawyer to protect the interest of his client, the people of the state." This special status of the attorney general — where the people of the state are his clients — cannot be disregarded in considering the application of the provisions of the code of professional responsibility to the conduct of his office.

. . . .

Clearly, the relationship between the attorney general and FOIC and COSR is quite different from that between private counsel and a client who retains him. The commissions have no corporate existence as such. They are merely agencies of the state and, by law, the attorney general is their legal advisor. The reasoning of the trial court would logically lead to the absurd conclusion that in the event of any dispute whatsoever between two state agencies, even though that dispute was not in litigation, the attorney general ethically could not act as legal adviser and lawyer for either agency because of the conflict indicated by their dispute.

. . . .

As we have noted, the real client of the attorney general is the people of the state. Any suggestion of professional impropriety on the part of the attorney general would be considerably lessened in cases such as the present one involving civil litigation of a dispute between two state agencies if the appearance of the attorney general were entered for the state of Connecticut and appearance for the separate agencies entered by assistant attorneys general particularly assigned as counsel for the separate agencies.

387 A.2d at 537-539 (citations omitted).

Similarly, in Environmental Protection Agency v. Pollution Control Board, 69 Ill.2d 394, 372 N.E.2d 50 (1977), the Illinois Supreme Court held that the Attorney General did not have such an interest in a controversy between the appellant and appellee state agencies, both of which he represented, so as to require the appointment of special counsel. In describing the duties of the Illinois Attorney General and the statutory scheme for representation of the State of Illinois, the court stated:

As the chief legal office of the state, the Attorney General has the constitutional duty of acting as legal advisor to and legal representative of state agencies. He or she has the prerogative of conducting legal affairs for the state. The effect of this grant of power to the Attorney General is that Illinois is served by a centralized legal advisory system. There are, arguably, at least two reasons for this centralization. First, private counsel for state agencies are expensive. (In the instant case, the Board argues that the fees of its private counsel should come from the Attorney General's budget.) Second, centralization is more efficient. Whatever the merits of these arguments, it remains true that the duties of the Illinois Attorney General encompass advising and representing state agencies.

372 N.E.2d at 51-52.

As the rationale for its decisions, the Illinois Supreme Court went on to say:

In addition, although an attorney-client relationship exists between a state agency and the Attorney General, it cannot be said that the role of the Attorney General apropos of a state agency is precisely akin to the traditional role of private counsel apropos of a client. Indeed, where he or she is not an actual party, the Attorney General may represent opposing state agencies in a dispute.

The Attorney General's responsibility is not limited to serving or representing the particular agencies, including opposing state agencies, but embraces serving or representing the broader interests of the state. This responsibility will occasionally, if not frequently, include instances where state agencies are the opposing parties. It

seems to us that if the Attorney General is to have the unqualified role of chief legal officer of the state, he or she must be able to direct the legal affairs of the state and its agencies. Only in this way will the Attorney General properly serve the state and the public interest.

372 N.E.2d at 52-53 (citations omitted).

In view of the case law and ethical rules recognizing the special role and functions performed by government attorneys, the Arizona Attorney General shall continue to represent the state and all of its agencies in accordance with these guidelines. The Attorney General will not represent two state agencies on opposite sides in a judicial proceeding unless the Arizona Supreme Court expressly permits multiple representation in court. See Section 1.10.3.04. With respect to all other representation, concern regarding appearances will be minimized by the use of separate assistant attorneys general without common direct supervision.

#### 1.10.4 Agency Adjudicatory Proceedings.

1.10.4.01 Advocate. An assistant attorney general participating as an advocate in a proceeding before an administrative tribunal shall not serve as an advisor to the tribunal respecting that proceeding during its pendency. The assistant attorney general may, however, act as an advisor to the agency on matters not related to the proceeding in which the attorney is appearing as an advocate.

1.10.4.02 Selection of Advisor. If the agency requests the assistance of the Attorney General to act as advisor during the pendency of the proceeding in which an assistant attorney general is appearing as an advocate, the request shall be directed to the Solicitor General. The Solicitor General shall designate a qualified assistant attorney general from either his division or any other division, except the division to which the advocate is assigned, to act as an advisor. The advisor so appointed shall, for purposes of that specific case, be under the sole and exclusive supervision of the Solicitor General.

1.10.4.03 Preliminary Matters. The advocate may, and usually will, be the same assistant attorney general who participated in the agency investigation and the drafting of the notice of hearing or complaint. The advisor shall not have participated in such preliminary matters, except as permitted in Section 1.10.4.06. During the course of the Attorney General's representation of an agency an assistant may advise an agency as to whether in his opinion the agency has grounds to commence a formal action. If such action is commenced the assistant may act as the advocate but shall thereafter refrain from discussing the matter with the decision maker as provided in Section 1.10.4.05.

1.10.4.04 Prohibition on Communication. No communication shall occur between the advisor and the advocate regarding (a) the adjudication of any fact or issue in dispute, or (b) the discovery, preparation or presentation of any fact or issue on behalf of any party participating in the proceeding.

1.10.4.05 Limitations on Advocate. The advocate shall not participate in the actual determination by the decision maker of any fact or issue in dispute. Moreover, the advocate shall not have any ex parte communications with the decision maker regarding the merits of the case. In this regard, the submission of proposed findings or a proposed

decision to the decision maker does not constitute "participation" in the decision of a case if the decision maker is free to accept, modify or reject the proposed findings and decision and a copy of the proposed findings or decision is promptly provided to all adverse parties or their respective counsel so as to enable them to respond.

1.10.4.06 Limitations on Advisor. The advisor shall limit his participation to providing the decision maker with advice on procedural matters, including questions concerning the admission or exclusion of evidence. If the decision maker wants advice on other matters, such as the ultimate factual or legal issues presented in the case, the decision maker should obtain that advice jointly from the advocate and all other participating parties through written memoranda or oral arguments during the course of the proceeding. The advisor should not in any manner advise the decision maker as to which of such legal arguments is correct or should be followed by the decision maker.

1.10.4.07 Disregard of Advice. If the decision maker takes any action contrary to the legal advice of the advocate or advisor, the Attorney General shall respect the right of said officer or tribunal to exercise its own independent judgment in order to assure fairness and impartiality in the hearing process.

1.10.4.08 Judicial Review. In the event of judicial review of the decision maker's decision, the Attorney General shall represent the decision maker unless the agency acted in a manner that causes the Attorney General to conclude that he is unable to represent the decision maker, in which case the Attorney General shall decline to represent the agency. See Section 1.10.3.02.

1.10.4.09 Comments. State and federal courts consistently have ruled that a combination of investigatory, prosecutorial and adjudicative functions within a single agency, standing alone, does not constitute a denial of due process. See Withrow v. Larkin, 421 U.S. 35 (1975); Rudin v. Nevada Real Estate Advisory Commission, 86 Nev. 562, 471 P.2d 658 (1970); and Laman v. Nevada Real Estate Advisory Commission, 95 Nev. 50, 589 P.2d 166 (1979); Winslow v. Department of Professional and Occupational Regulation, 348 So.2d 352 (Fla. App. 1977). At least one federal court also has held that an Attorney General may act both as prosecutor and advisor to the decision maker without violating the private parties' rights to due process. Shaw v. Board of Trustees of Frederic Community College, 396 F.Supp. 872 (D. Md. 1975).

The courts have acknowledged, however, that such a combination possesses "the potential" for unfairness. In order to perform his duties and to avoid a situation in which circumstances would permit the "potential" for unfairness to develop, the Attorney General (and his Assistant Attorneys General) shall adhere to the preceding guidelines when participating in administrative proceedings in which the Attorney General is advising the decision maker and is also appearing before the decision maker as an advocate of a particular decision. Again, these guidelines are consistent with the Attorney General's ethical restrictions which prohibit ex parte communications with judges and other officials of a tribunal. ER 3.5(b).

#### 1.10.5 Agency Representation by Outside Counsel.

1.10.5.01 Authority to Proceed. Before any action is taken to obtain outside counsel the Attorney General will first determine whether the agency has legal authority to proceed independently of the Attorney General. If it does, the following guidelines will apply. If the agency lacks such authority to proceed, employees of the office of the Attorney General shall not encourage or assist the agency in attempting to obtain such counsel.

1.10.5.02 Available Funds. If an agency will incur an obligation to pay for legal services it must first have the authority to expend such funds for the purpose of employing legal counsel and the funds available to pay such obligation. Funds for the payment of such legal counsel shall be transferred by the agency to the Attorney General who shall reimburse outside legal counsel on behalf of the state.

1.10.5.03 Appointment. Except in cases arising under Sections 1.10.2.02 or 1.10.2.03, the agency shall be assisted in obtaining such counsel, provided that in no case shall counsel be appointed without the approval of the Attorney General.

1.10.5.04 Control of Appointed Counsel. Once outside counsel is obtained, the Attorney General shall not exercise any control over such counsel's exercise of independent professional judgment.

1.10.5.05 Comments. These guidelines are designed to comply with A.R.S. § 41-192(E) as interpreted by the Supreme Court in State of Arizona ex rel. Frohmler v. Hendrix, 59 Ariz. 184, 124 P.2d 768 (1942).

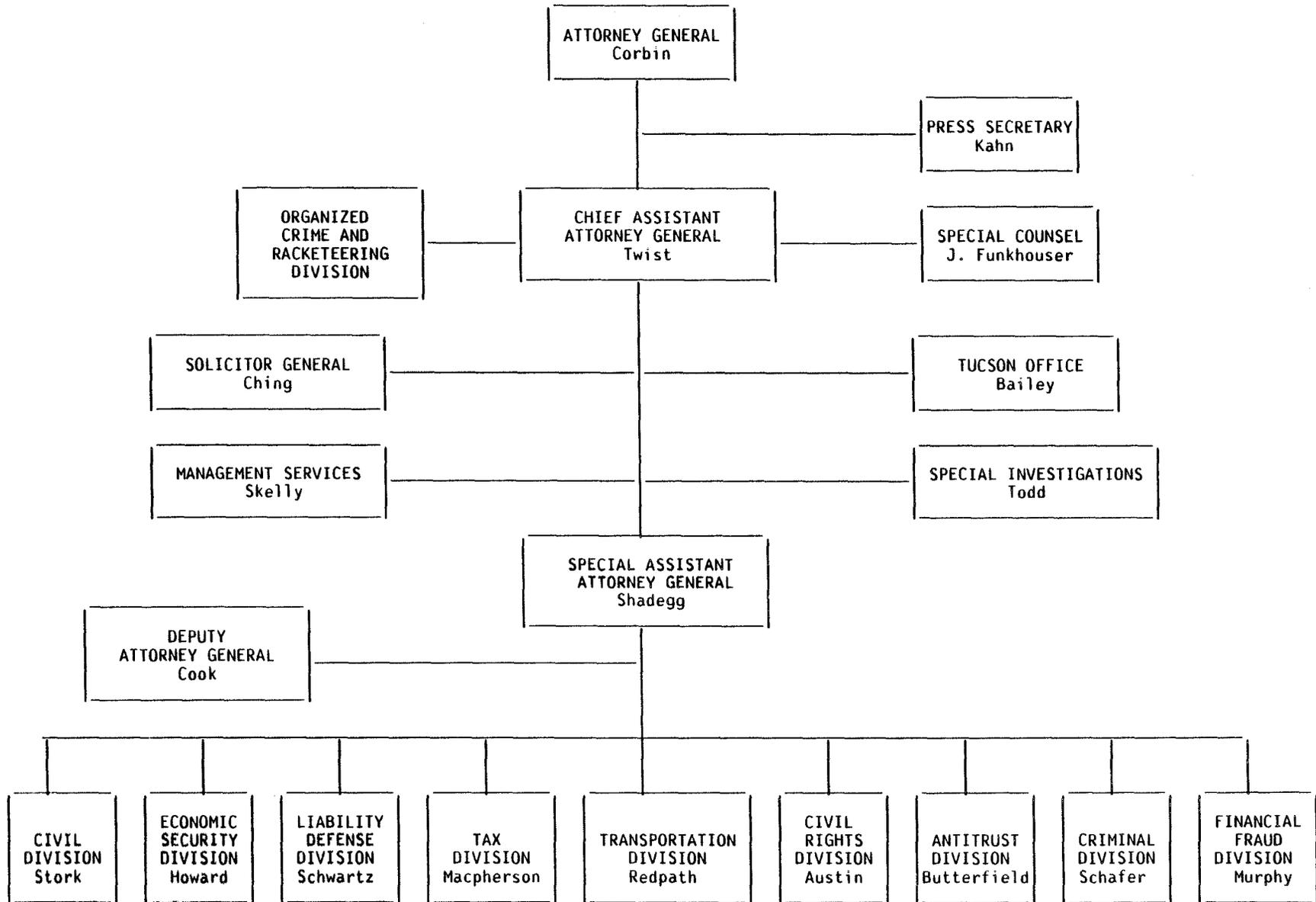
1.10.6 Attorney General's Membership on Quasi-Judicial Boards, Commissions, etc.

1.10.6.01 General Rule. The Attorney General shall recuse himself from participating in any manner as a member of a board, commission, or other public entity which functions as an administrative tribunal or in a quasi-judicial capacity in any proceeding in which an assistant attorney general participates as an advocate.

1.10.6.02 Issues of Compelling Public Interest. If the Attorney General determines that his participation in a particular proceeding as a member of a board, commission, or other public entity upon which he serves is of compelling public interest, he may decline to recuse himself from participating in the deliberation. If the Attorney General declines to recuse himself from participating in a particular proceeding, no assistant attorney general shall participate as an advocate in that particular proceeding. In such case, the board, commission, or public entity may obtain outside counsel to represent it in the matter in controversy through the Attorney General. The principles set forth in Section 1.10.5 will apply in such circumstances.

1.10.6.03 Application of Guidelines Regarding Agency Adjudicatory Proceedings. With respect to boards, commissions or other public entities on which the Attorney General serves as a member, the provisions of Section 1.10.4 (agency adjudicatory proceedings) shall apply in situations where an assistant attorney general participates as an advocate in proceedings before such board, commission or other public entity.

APPENDIX 1.1  
 ORGANIZATIONAL CHART  
 Section 1.3.2



If you have any questions relating to the Attorney General's Office, you should call the Chief Assistant Attorney General 255-4266.  
 If you have any questions relating to Attorney General Opinions, you should call Special Counsel at 255-4266.

Appendix 1.1  
DESCRIPTION OF DIVISIONS  
Section 1.3.2

In order to give you an idea of the function and responsibility of each division, the following provides a very brief description of the divisions:

CIVIL DIVISION

The Civil Division is responsible for providing professional legal services to over 100 state agencies, boards and departments. These services include advising and counseling clients, initiating and defending lawsuits and administrative hearings, drafting legal opinions and reviewing rules and regulations proposed for adoption by state agencies. This division is responsible for the legal representation of almost all state agencies in their day-to-day operations.

CIVIL RIGHTS DIVISION

The Civil Rights Division administers the Arizona Civil Rights Act which provides for enforcement in the areas of public accommodations, voting and employment discrimination. The Act prohibits discrimination against the following protected classifications: race, color, national origin, religion, sex, age and physical handicap. This division has power to investigate, conciliate and litigate charges of discrimination.

CRIMINAL DIVISION

The Criminal Division is responsible for criminal appellate matters and for providing prosecution assistance to county attorneys.

ORGANIZED CRIME AND RACKETEERING DIVISION

The Organized Crime and Racketeering Division is responsible for the prosecution of organized, white collar and state-wide crimes under the authority of Arizona's State Grand Jury Act.

FINANCIAL FRAUD DIVISION

The Financial Fraud Division is responsible for enforcement of the Arizona Consumer Fraud Act and the civil remedies under the new Anti-Racketeering Act. The division also represents certain state regulatory bodies including the Departments of Banking, Insurance, Real Estate and the Incorporating and Securities Divisions of the Corporation Commission.

LIABILITY DEFENSE DIVISION

The Liability Defense Division is responsible for handling all claims and lawsuits in connection with the state's self-insurance program.

TAX DIVISION

The Tax Division represents Arizona's tax agencies in the collection of revenue. The division is responsible for litigation and appeals involving property, sales and income tax issues.

### SOLICITOR GENERAL DIVISION

The Solicitor General Division is responsible generally for the supervision of all appellate work in the Attorney General's Office. It also is responsible for selected trial matters. It provides assistance to the decision maker in complex and sensitive cases as described in section 10.1.9 of Chapter 10. It also represents state administrative tribunals whose functions are mainly appellate, i.e. the State Land Department Board of Appeals. In addition it is also responsible for the development of continuing education and training of the office professional staff.

### ANTITRUST DIVISION

The Antitrust Division is responsible for the implementation of the Attorney General's policies for the enforcement of state antitrust laws and the representation of state and public entities in matters relating to antitrust.

### TRANSPORTATION DIVISION

The Department of Transportation and the Department of Public Safety are represented by this division.

### ECONOMIC SECURITY DIVISION

All legal services required by the Department of Economic Security are provided by this division.

From 1.2 - Request for Investigative Services  
(Text Section 1.1.8)



**STATE OF ARIZONA  
THE ATTORNEY GENERAL  
SPECIAL INVESTIGATION DIVISION**

**Request for Investigative Services:  
(Complete in Triplicate)**

To be completed by Requesting Authority

To be completed by Chief Investigator

Name: \_\_\_\_\_

Investigative Report No. \_\_\_\_\_

Address: \_\_\_\_\_

File No. \_\_\_\_\_

Phone No: \_\_\_\_\_

Assigned to: \_\_\_\_\_

Date of Request: \_\_\_\_\_

Date Assigned: \_\_\_\_\_

Request Completion Date: \_\_\_\_\_  
(Leave date open unless urgent)

Date Due: \_\_\_\_\_

Refer Report to: \_\_\_\_\_

Date Completed: \_\_\_\_\_

Priority: \_\_\_\_\_ Non-Priority: \_\_\_\_\_

Requested by: \_\_\_\_\_

Remarks: \_\_\_\_\_

Is any additional information attached?

Yes \_\_\_\_\_ No \_\_\_\_\_

**SPECIFY INFORMATION AND/OR SERVICES DESIRED:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



CHAPTER 2  
PUBLIC OFFICERS AND EMPLOYEES

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## CHAPTER 2

### PUBLIC OFFICERS AND EMPLOYEES

2.1 Scope of this Chapter. This Chapter discusses the qualifications, duties and responsibilities of public officers. Selected constitutional and statutory provisions concerning the appointment of and legal requirements imposed upon public officers and employees are also discussed.

2.2 Definition of "Public Officer." A "public officer" is the incumbent of any office, member of any board or commission, or his deputy or assistant, exercising the powers and duties of the officer. The definition excludes "clerks or mere employees of the officer." A.R.S. § 38-101. Generally, the executive heads of all state agencies and the members of all state boards and commissions are considered "public officers."

Public officers must familiarize themselves with laws and rules generally relating to the duties and responsibilities of public officers or agencies as well as those pertaining to their particular office and agency. An officer is obligated to discharge the duties of his office and may not delegate those duties to subordinates unless authorized by law. See Section 2.13.

2.3 Qualifications for Public Office. Persons seeking election to public office must meet Arizona constitutional and statutory requirements concerning election to public office. A person is not eligible for election or appointment to elective office unless he is a qualified elector of the state or political subdivision in which elected or appointed. Ariz. Const. art. VII, § 15. No person under guardianship, non compos mentis, or insane is a qualified elector, nor is any person convicted of treason or of a felony, whose civil rights have been not restored, a qualified elector. Id. § 2.

Arizona statutes generally require that a public officer must be at least 18 years old and a resident of Arizona. A.R.S. § 38-201. In addition, there are constitutional or statutory provisions establishing other specific qualifications for certain public officers. See, e.g., Ariz. Const. art. V, §§ 1, 2 (age and residency requirements for the Governor, Secretary of State, State Treasurer, Attorney General and Superintendent of Public Instruction).

2.4 Duties and Responsibilities of Public Officers. The public officer's primary duty is to impartially execute all laws and rules for which he is responsible. The Arizona Supreme Court stated in Button v. Nevin, 44 Ariz. 247, 257, 36 P.2d 568, 571 (1934):

Public officials may not violate the plain terms of a statute because in their opinion better results will be attained by doing so. They have but one duty, and that is to enforce the law as it is written, and, if the effect of their action is disastrous, the responsibility is upon the legislature and not upon them.

2.5 Nomination and Appointment. The method for nomination and appointment of officers is usually set forth in the statutes pertaining to the agency. Certain public officers are appointed by the Governor with the consent of the Senate, pursuant to A.R.S. § 38-211. Examples of such public officers include the Director of Health Services, the State Land Commissioner, the Director of Insurance, the Real Estate Commissioner,

the Registrar of Contractors, Racing Commissioners and the Director of Economic Security. Other public officers are appointed by the Governor without Senate approval. Examples of such officers include the members of the Board of Accountancy, Board of Medical Examiners and the Structural Pest Control Commission. Officers appointed by the Governor, or by the Governor with the consent of the Senate, are entitled to receive a commission of authority from the Governor. A.R.S. § 38-221.

2.5.1 Nomination Requiring Senate Consent. Pursuant to A.R.S. § 38-211, when a term of office expires or becomes vacant during a regular legislative session, the Governor shall nominate a person and transmit the nomination forthwith to the Senate president. If the Senate consents to the nomination, the person is appointed; if the Senate rejects the nomination, the Governor shall nominate another person within sixty days. If a nominee currently serving in the position is rejected, the position shall be declared vacant immediately. A.R.S. §§ 35-211(B) and -295(B).

If no formal action is taken on the nominee during the legislative session, the Governor, after the close of the session, may appoint the nominee to serve, subject to confirmation during the next legislative session. A.R.S. § 38-211(B). A nominee appointed to serve, subject to confirmation during the next legislative session, upon appointment has full authority to discharge the duties of office. A.R.S. § 38-211(D).

When a term of office expires or becomes vacant when the Legislature is not in regular session, the Governor shall nominate a person and transmit the nomination to the Senate during the first week of the next regular session.

A nominee may not serve in the office prior to consent by the Senate so long as the incumbent continues to hold office. See Section 2.11. A nominee may be appointed to serve only pursuant to the terms set forth in this Section and Section 2.9. No nominee may serve longer than one year after nomination without Senate confirmation. A.R.S. § 38-211(B).

2.6 Loyalty Oath. In Arizona, a loyalty oath is required of officers and employees of all government agencies. A.R.S. § 38-231(G); see Ariz. Atty. Gen. Op. I86-020. "Officer or employee" is defined for this purpose as any person elected, appointed or employed, either on a part-time or full-time basis, by the state, or any of its political subdivisions, or any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing. A.R.S. § 38-231(B).

All officers and employees are required to take and execute a loyalty oath as follows:

State of Arizona, County of \_\_\_\_\_, I,  
\_\_\_\_\_, do solemnly swear (or affirm)  
that I will support the Constitution of the United States and the  
Constitution and laws of the State of Arizona; that I will bear true  
faith and allegiance to the same, and defend them against all  
enemies, foreign and domestic, and that I will faithfully and  
impartially discharge the duties of the office of \_\_\_\_\_  
(name of office) according to the best of my ability, so help me God  
(or so I do affirm).

\_\_\_\_\_  
(signature of officer or employee)

A.R.S. § 38-231(G). Persons who fail to take and execute the loyalty oath are not entitled to receive compensation and are deemed to have vacated the office. A.R.S. §§ 38-231(D); -291(9).

An officer or member of a board or commission must take, subscribe and file the loyalty oath within ten days after he has received notice of his employment, or if an elected officer, any time after receiving the certificate of election and at least one day before the commencement of the term of office. A.R.S. § 38-232.

The loyalty oath of an elected officer shall be filed with the Secretary of State. The oaths of other officers and employees shall be filed with the administrative agency to which they have been appointed. A.R.S. § 38-233(A).

### 2.7 Fidelity Bond

Each officer and employee of an administrative agency is subject to a blanket fidelity bond in the amount of \$100,000 payable to the state, which is conditioned on the faithful performance of official duties. A.R.S. § 38-251. This bond is purchased and maintained by the state to cover all officers and employees. If an officer or employee does not faithfully perform his official duties, he may be liable on the bond to the State of Arizona as a result of the violation of his official duties, and the bonding company will have the legal right to obtain reimbursement from such officer or employee to the extent of the bonding company's payments. See Section 13.4.7. Notwithstanding the foregoing liability provisions, no public officer or employee is personally liable for acts done in his official capacity in good faith reliance on written opinions of the attorney general issued pursuant to A.R.S. § 41-193(A)(7). A.R.S. § 38-446.

2.8 Term of Office. Many public officers have terms of office specified by law, most often running from two to five years. Where the term of office has not been established by law, the officer holds his position at the pleasure of the appointing authority. A.R.S. § 38-295(A).

2.9 Vacancy in Office. A public office is deemed vacant if:

1. The office holder dies, is judicially determined to be insane, resigns and the resignation is accepted, is removed from office, is convicted of a felony or of an offense involving his official duties, or ceases to be a state resident. A.R.S. § 38-291(1), (2), (3), (4), (5) and (8).

2. The office holder fails to file the required oath or bond on time, is absent from the state without legislative permission for more than three consecutive months, for three consecutive months ceases to discharge the duties of the office, or violates the restrictions imposed by A.R.S. § 38-296. A.R.S. § 38-291(6), (7), (9) and (12).

3. No one is elected or appointed or a competent tribunal declares the election or appointment void. A.R.S. § 38-291(10), (11).

4. The Senate rejects the nomination, or fails to act on the nomination within one year of its submission to the Senate. A.R.S. § 38-295(B).

The Constitution provides that the Governor shall have the power to fill a vacant public office by appointment, unless otherwise provided in the Constitution or laws. Ariz. Const. art. V, § 8.

2.10 Resignation from Office. An officer seeking to resign from his office should prepare a written resignation to be delivered to the appointing authority. A.R.S. § 38-294. The resignation is not effective until accepted by the appointing authority. A.R.S. § 38-291. But cf., A.R.S. § 38-296(C) (the resignation of an incumbent elective officer duly filed in writing shall be deemed to have become effective as of the date of filing if not accepted within ten days). If the appointing authority does not accept the resignation, the officer must continue to discharge the duties of the office. See Cragin v. Frohmiller, 43 Ariz. 251, 257, 30 P.2d 247, 249 (1934); cf. Rogers v. Frohmiller, 59 Ariz. 513, 517, 130 P.2d 271, 273 (1942) (resignation and acceptance would not relieve officer from duty until his successor qualified).

2.11 Expiration of Term. An officer is required to continue to discharge his official duties after the expiration of his term of office, until his successor has been appointed and qualified. If an officer resigns and the resignation is accepted before the expiration of his term, an officer who is appointed to fill the vacancy can serve only for the remainder of the term. A.R.S. § 38-295.

2.12 Impeachment of Officers. All officers are liable to impeachment for "high crimes, misdemeanors or malfeasance in office." Ariz. Const. art. VIII, pt. 2, § 2; A.R.S. § 38-311.

2.13 Deputies and Assistants. Public officers may appoint deputies and assistants only when specifically authorized by law. A.R.S. § 38-461(A). The appointment shall be in writing and filed with the Secretary of State. A.R.S. § 38-461(C). Unless otherwise provided by law, a deputy may exercise all duties prescribed by law for that agency and the agency head. A.R.S. § 38-462. Public officers may hire clerks and other employees as necessary to facilitate the prompt discharge of official duties. Assistants, clerks and other employees may perform routine and ministerial tasks without delegation of authority or specific statutory authorization. See A.R.S. § 38-461.

2.14 Quorum Requirements. As a general rule a quorum must be present to enable a board or commission to transact business. Unless otherwise provided by law, a quorum consists of a majority of the statutory membership of the board or commission. A.R.S. § 1-216(B). For example, if the statute creating the board provides for a total membership of seven persons, the quorum for that board would be four members. This result would be the same even if there were only four members actually serving due to unfilled vacancies. For a discussion of the effects on the quorum requirement of the disqualification of a board or commission member see Section 10.9.4.

While a quorum is necessary for the transaction of business, the well-established rule is that only the concurrence of a majority of the quorum, although not a majority of the statutory membership of the board or commission, is sufficient to take any particular action. This rule may be altered by specific legislation requiring the concurrence of a different number of members, such as two thirds. See Ariz. Atty. Gen. Op. 184-165.

2.15 Compensation and Salaries. Public officers, members of boards and commissions, deputies and other employees are entitled to receive the salary authorized by law for their respective positions, and are prohibited from receiving any salary or

emolument in excess of the legally authorized salary. A.R.S. § 38-601. Also, the compensation of a public officer serving for a fixed term of office may not be increased or decreased during his term of office, except for officers serving on boards composed of two or more officers whose terms are not coterminous. Ariz. Const. art. IV, pt. 2, § 17. When the salary of one member of such a board is adjusted legislatively at the beginning of his term, the other members' salaries are also adjusted so those doing substantially the same work receive the same pay. See Maricopa County v. Rodgers, 52 Ariz. 19, 25, 78 P.2d 989, 991-92 (1938).

All state officers and employees subject to the provisions of the state personnel system receive salaries within the range of the Department of Administration salary plan as adopted or modified by the Legislature. If exempt from the state personnel system, they receive salaries within the range recommended annually by the Department of Administration to the Legislature and the Joint Legislative Budget Committee unless modified by the Legislature. Some members of boards, commissions, councils or advisory committees, who are authorized by law to receive compensation but not otherwise provided for, may receive compensation at a rate not to exceed \$30 for each day they serve. A.R.S. § 38-611. Certain state officers and employees are exempt from the foregoing compensation provisions. See A.R.S. §§ 38-611(C); 41-192(B)(3).

2.16 The Sunset Law. In 1978, the Legislature enacted a "Sunset Law" which provides for the automatic termination of certain administrative agencies unless specific justification can be given for continuing the existence of the agency. A.R.S. §§ 41-2351 to -2354. A "sunset review" of each administrative agency scheduled for termination is conducted by the Auditor General and committees of the Legislature. The sunset review includes (i) determining whether there is a need for the agency's program, (ii) assessing the degree to which the program objectives have been achieved, and (iii) assessing the situation or problem the agency was intended to address. A.R.S. § 41-2352(5). Unless specific legislation is enacted to continue the agency or modify its structure, the agency ceases existence on the scheduled termination date. A.R.S. § 41-2377(A). The scheduled termination dates for agencies may be found in A.R.S. §§ 41-2361 to -2376.04. A termination schedule is added by the Legislature each year.

2.17 Selected Criminal and Civil Liability Provisions. Public officers and employees should be familiar with certain criminal and civil liability provisions which may be relevant to their activities. These selected provisions follow:

Offense

Classification

1. Obstructing governmental operations.

Class 1 misdemeanor

Knowingly obstructing, impairing or hindering the performance of a governmental function by threat of violence or physical force. A.R.S. § 13-2402.

2. Impersonating a public servant.

Class 1 misdemeanor

Pretending to be a public servant with intent to induce another to submit to his "official" authority or to rely on his "official" acts. A.R.S. § 13-2406.

Offense

Classification

3. Tampering with a public record.

Class 6 felony

Knowingly, with intent to deceive, preparing, using or filing a false written instrument as a public record; or destroying, removing, mutilating or concealing public records. A.R.S. § 13-2407.

4. Bribery.

Class 4 felony

Conferring of a benefit on a public servant, with corrupt intent, to influence his vote, opinion, judgment, exercise of discretion or other action in his official capacity; or the solicitation or acceptance by a public servant of any benefit with the understanding that his vote, opinion, judgment, exercise of discretion or other action may thereby be influenced. A.R.S. § 13-2602.

5. Trading in public office.

Class 6 felony

Offering to confer, conferring or agreeing to confer, with corrupt intent, a benefit upon a public servant in exchange for appointment to a public office or soliciting or agreeing to accept any benefit in exchange for appointing another to a public office. A.R.S. § 13-2603.

6. Perjury.

Class 4 felony

Making a false sworn statement in regard to an issue which could have affected the course or outcome of any proceeding or transaction, believing it to be false. A.R.S. § 13-2702.

7. False swearing.

Class 6 felony

Making a false sworn statement, believing it to be false. A.R.S. § 13-2703.

Offense

Classification

8. Unsworn falsification.

Knowingly making a statement he believes to be false, in regard to an issue which could have affected the course or outcome of any proceeding or transaction, to a public servant in connection with an application for any benefit, privilege, or license; or knowingly making any statement which he believes to be false in regard to a material issue to a public servant in connection with any official proceeding. A.R.S. § 13-2704.

Class 2 misdemeanor  
(false application)  
OR  
Class 6 felony  
(false statement in  
connection with  
official proceeding)

9. Tampering with a witness.

Knowingly inducing a witness to unlawfully withhold testimony or testify falsely or absent himself from an official proceeding to which he has been legally summoned. A.R.S. § 13-2804.

Class 6 felony

10. Liability for failure to collect fees.

Neglecting or failing to collect fees for licenses, permits, certificates or other monies due a budget unit. A.R.S. § 35-143.

Civil liability

11. Liability for unauthorized obligations.

Incurring or ordering the incurrence of any obligation against the state or for any expenditure not authorized by an appropriation and an allotment. A.R.S. § 35-154.

Civil liability

12. Illegal withholding or expenditure of state monies.

Illegally withholding, expending or otherwise converting any state money to an unauthorized purpose. A.R.S. § 35-196.

Civil liability  
plus 20% penalty

13. Violation of fiscal provisions.

Knowingly failing or refusing to comply with any provision contained in Title 35, Chapter 1 (relating to budgeting, accounting and control of public finances). A.R.S. § 35-197.

Class 1 misdemeanor

Offense

Classification

14. Liability for approval, allowance or payment of unauthorized claim.

Civil liability, plus 20% penalty, interest, costs and attorney fees

Approving, auditing, allowing or paying a claim or demand against the state not authorized by law. A.R.S. §§ 35-211 and -212.

15. Influencing, obstructing or impairing audit.

Class 5 felony

With intent to defraud or deceive, improperly influencing, obstructing or impairing an audit being conducted or about to be conducted in relation to any contract or subcontract with the state. A.R.S. § 35-215.

16. Violation of duties of custodian of public monies.

Class 4 felony

Misappropriating public monies for personal use, loan or otherwise misusing public monies in his safekeeping. A.R.S. § 35-301.

17. Violation of loyalty oath.

Class 4 felony

Knowingly acting to overthrow, or advocating the overthrow by force or violence of state or local governments or becoming or remaining a member of the Communist party or other subversive organization (and subscribing to its goals) during his term of office. A.R.S. § 38-231(E). But see Elfbrandt v. Russell, 384 U.S. 11 (1966); Ariz. Atty. Gen. Ops. 179-156, 76-126.

18. Usurpation of office.

Class 2 misdemeanor

Knowingly intruding into a public office to which he has not been elected or appointed or knowingly exercising the functions of the office after his term has expired and a successor has been elected or appointed and qualified. A.R.S. § 38-234.

<u>Offense</u>	<u>Classification</u>
<p>19. Withholding or destruction of public records or property.</p> <p style="padding-left: 40px;">Knowingly withholding, detaining, mutilating, destroying or taking away property of office from a successor. A.R.S. § 38-363.</p>	Class 4 felony
<p>20. Charging excessive fees.</p> <p style="padding-left: 40px;">Demanding and receiving a higher fee than prescribed by law or any fee not established by law. A.R.S. § 38-413.</p>	Class 5 felony (Civil liability 4 times fee)
<p>21. Failure to report amount collected.</p> <p style="padding-left: 40px;">Knowingly failing to report fees or other monies collected or to file required statement. A.R.S. § 38-414.</p>	Class 2 misdemeanor (Removal from office)
<p>22. Stealing, destroying, altering or secreting public records.</p> <p style="padding-left: 40px;">Stealing, or knowingly, without lawful authority, destroying, mutilating, altering, falsifying, removing or secreting any public record, by an officer having custody, or permitting any other person to do so. A.R.S. § 38-421.</p>	Class 4 felony
<p>23. Making or giving a false certificate.</p> <p style="padding-left: 40px;">Making or giving as true, a certificate or writing containing a statement which he knows is false. A.R.S. § 38-423.</p>	Class 6 felony
<p>24. Acting as a public officer without qualifying.</p> <p style="padding-left: 40px;">Exercising the function of a public office without taking the oath of office or without giving the required bond. A.R.S. § 38-442.</p>	Class 2 misdemeanor
<p>25. Nonfeasance in public office.</p> <p style="padding-left: 40px;">Knowingly omitting to perform any duty required by law, unless special provision for punishment has been made. A.R.S. § 38-443.</p>	Class 2 misdemeanor

Offense

Classification

26. Asking or receiving illegal gratuity or reward.

Class 6 felony

Knowingly asking or receiving any emolument, gratuity or reward or any promise thereof for doing an official act. A.R.S. § 38-444.

27. Violation of conflict of interest prohibition.

Class 5 felony  
(Permanent bar from state office)

Making or having an interest in contracts, or becoming a vendor or purchaser at sales, or purchasing evidences of indebtedness when prohibited by law. A.R.S. § 38-447.

28. Purchase of appointment.

Class 6 felony

Knowingly giving or offering any gratuity or reward in consideration of being appointed to a public office, or being permitted to exercise or discharge the duties of such office. A.R.S. § 38-465.

29. Sale of appointment to office.

Class 6 felony  
(Forfeiture of office and permanent bar from office)

For a gratuity or a reward, appointing another to a public office or permitting another to exercise or discharge any duties of his office. A.R.S. § 38-466.

30. Unlawful employment of relatives.

Class 2 misdemeanor

Appointing or voting for the appointment of relatives related by affinity or consanguinity within the third degree to any office or position in an agency of which the appointing officer is a member. A.R.S. § 38-481.

31. Violating conflict of interest provisions.

Class 6 felony  
(Forfeiture of office or employment)

Intentionally or knowingly violating conflict of interest provisions. A.R.S. §§ 38-503 to -505.

Recklessly or negligently violating such provisions. A.R.S. § 38-510.

Class 1 misdemeanor

Offense

Classification

32. Liability for payment to disqualified persons.

Civil liability for  
twice the amount paid

Allowing, auditing or paying any warrant or other certificate of indebtedness for indebtedness for services performed to any person not qualified as provided in A.R.S. § 38-201. A.R.S. § 38-607.

33. Retention of subordinate's salary.

Class 5 felony

Accepting, retaining or diverting for his own use or the use of another any part of the salary or fees allowed by law to be paid to his deputy or other employees. A.R.S. § 38-609.

34. Violating personnel provisions.

Class 2 misdemeanor  
(Suspension or dismissal  
from state employment)

Violating laws or rules relating to the appointment, hiring, demotion, promotion or firing of any person with respect to employment in state service. A.R.S. §§ 41-773 to -775.

A public officer or employee convicted of a felony may be fined up to \$150,000 for each violation, A.R.S. § 13-801(A), and be incarcerated in the state penitentiary, A.R.S. § 13-701. Conviction of a misdemeanor may result in a fine up to \$1,000 for each violation, A.R.S. § 13-802(A), and a jail sentence of not more than six months, A.R.S. § 13-707. The amount of fine and term of imprisonment will depend on the classification of the offense, the number of violations, whether previous convictions exist and other factors.

In addition to the above-mentioned criminal provisions, public officers and employees should carefully examine provisions of law governing the operation of their agency to determine civil or criminal liabilities provided in those laws.



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## CHAPTER 3

### PERSONNEL

3.1. Scope of this Chapter. This Chapter presents a broad overview of pertinent state and federal laws relating to personnel matters. This is meant to highlight issues which should be brought to the attention of the Attorney General's Office, Civil Division, Employee Relations Section. In addition to the issues raised within, please refer any contact with attorneys for employees to the Attorney General's Office.

For purposes of this Chapter, "state employee" means an employee covered by the Arizona State Employee Merit System, A.R.S. §§ 41-761 to -775, and the Arizona State Personnel Rules, A.A.C. R2-5-101 to -902. Certain other state employees are governed by either the Law Enforcement Officers Merit System, A.R.S. §§ 38-1001 to -1007, or the Arizona Board of Regents Rules, A.A.C. R7-4-101 to -105. This Chapter does not discuss those enactments. "Discipline" means corrective or punitive measures which a supervisor may take to communicate to an employee inadequacies of job performance.

3.1.1 State Personnel Rules and Other Guidelines. The state personnel rules are the primary source of information concerning personnel matters. All supervisors and employees covered by the state merit system should be familiar with these rules. Copies may be obtained from the Department of Administration.

The Arizona Personnel Manual and Interpretations, both prepared by the Department of Administration, provide guidelines which, while not of binding legal effect, may be of assistance in dealing with various problems and procedures. Additionally, the Attorney General has rendered opinions interpreting statutes and rules affecting personnel matters.

One of the goals of the Department of Administration is to promote uniformity in employment practices, particularly disciplinary actions. Because each situation must be evaluated on its unique facts, in light of the employee's conduct and the extent to which it affects the agency function, setting forth guidelines covering all employment practices or disciplinary actions is impossible.

Several agencies have produced informational pamphlets and handbooks. You should be aware that informally prepared handbooks and pamphlets may establish rights in addition to those an employee has under a particular personnel system, and care should be used to insure that such publications are not inconsistent with statutes or existing rules. See Pima College v. Sinclair, 17 Ariz. App. 213, 496 P.2d 639 (1972).

3.2 The Relationship Between Employment Status and Disciplinary Actions. An employee's right to continue in public employment is prescribed by statutes and rules applicable to the employee's position. All public employees have a constitutional right to "due process"; however, what "process" is "due" depends upon employment status, statutes and rules, and any extraordinary events surrounding disciplinary action. The following paragraphs provide a brief description of the types of action that may be taken with respect to various classes of employees.

3.2.1 Uncovered Employees. Uncovered employees are employees in positions which are not covered by the state employee merit system. These employees are often referred to as "uncovered," "exempt" or "nonmerit system" employees. They have no right to continued employment or right of appeal to the Arizona Personnel Board from disciplinary actions taken against them.

An uncovered employee may be removed at any time by the appointing authority simply notifying him that his employment is terminated. The uncovered employee has no right to know and should not be told the reasons why he is being dismissed. Do not state any reasons for the dismissal, either orally or in writing, to the employee or any other person who is not a supervisor of the dismissed employee. Any statement of reasons may entitle the exempt employee to a hearing or subject the agency to a wrongful discharge claim. Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). See also Montoya v. Law Enforcement Merit System Council, 148 Ariz. 108, 713 P.2d 308 (Ct. App. 1985).

Dismissal of an uncovered employee is best accomplished by delivery of a simple notice, usually in the form of a short letter. See Form 3.15 as an example.

A permanent status state merit system employee who accepts appointment to an uncovered position, to another state agency or to another government jurisdiction, may be granted a mobility assignment with the right to return to his previous position for up to thirty-six months. A.A.C. R2-5-604.A. Thereafter, he may return to covered state service after tenure in the uncovered position is ended, if an appropriate vacant position and sufficient personnel services funds are available. An employee who has been granted such a mobility assignment may not be deprived of his status as a permanent employee without a hearing, even though he may be removed from the uncovered position without a hearing or statement of cause.

3.2.2 Covered Employees. Being "covered" by the state employee merit system means that an employee may be demoted, suspended or dismissed only for "cause." A.R.S. § 41-770 and A.A.C. R2-5-501 describe the conduct that constitutes "cause." Specific disciplinary actions that may be taken against covered employees are discussed in detail in Section 3.3.

3.2.3 Probationary Employees. Until an employee has achieved permanent status, he is considered a probationary employee. The probationary period is the time during which the agency has an opportunity to assess the employee's suitability for permanent employment. A.A.C. R2-5-213.C establishes generally a six-month basic probationary period. An agency may request that the Department of Administration authorize a different basic probationary period for any class of positions. However, a basic probationary period may not be shorter than ninety days or longer than one year.

Agencies may suspend, dismiss or demote an employee, during the basic probationary period, and the employee has no right of appeal. As with an uncovered employee, no reasons for the dismissal of a probationary employee should be given. See Form 3.2 as an example.

If, during the basic probationary period, the agency has been unable to make a decision on permanent status, it may request the Department of Administration to extend the probationary period, provided the agency takes all necessary steps well in advance of the end of the period. If no action is taken to extend probation or grant the employee permanent status, the employee's probation status is automatically extended for 30 days, and, after that, the employee automatically attains permanent status. A.A.C. R2-5-213.C.3.a.

For a discussion on promotional probation, see infra Section 3.6.4.

**3.2.4 Other Types of Employment.** The specific needs of an agency may be met by hiring other than permanent full-time personnel. Other types of employment include limited, temporary, seasonal, provisional, emergency and clerical pool status appointments. Employees in these positions may not have any tenure or appeal rights. No reasons for dismissal should be provided. See Forms 3.3 and 3.4. Consult A.A.C. R2-5-206 for a more detailed explanation of each of these other types of employment.

**3.3 Discipline of Covered Employees.** The following discussion covers the most common forms of discipline that apply to covered employees. In disciplining employees, the most difficult task is not to determine whether disciplinary action should be imposed but what type of discipline is appropriate. As a general rule, the progression of sanctions, from warnings to more severe penalties, is recommended, although the discipline must reasonably relate to the severity of the offense. You should contact your personnel representative for assistance when you contemplate disciplinary action.

**3.3.1 Reprimand and Counseling.** Reprimand and counseling are the least severe forms of discipline. They provide ways to point out problems in the employee's job performance and urge corrective action before the problems become serious. Reprimands may be oral or in writing. Oral reprimands express dissatisfaction with an employee's performance without leaving a permanent record. A written reprimand documents the supervisor's dissatisfaction with the employee's performance and should become a part of the employee's personnel file. See Form 3.9. Although oral or written warnings are not a prerequisite to the imposition of more severe disciplinary action, such warnings may avert the need for stronger measures. Similarly, a counseling session confirmation memorandum or memorandum of concern may be an effective tool for a supervisor to use in facilitating a behavior change. Such memorandum should become a part of an employee's personnel file. See Form 3.10 for a sample counseling session confirmation memorandum. A reprimand or memorandum of counseling may not be appealed to the Personnel Board, but may be grieved by the procedures set forth in A.A.C. R2-5-701 and -702.

**3.3.2 Suspension.** When an employee's departure from acceptable performance standards is such that a reprimand is not adequate, but dismissal is not warranted, an employee may be relieved of his duties, without pay, for up to 30 work days, A.A.C. R2-5-801.D, except in cases of improper political activity under A.R.S. § 41-772(D), in which case the employee must be suspended for not less than 30 days or dismissed. See Form 3.5 as an example of a suspension for 80 hours or less.

If an employee is suspended without pay for more than 80 hours, the employee has the right to appeal to the Personnel Board and the suspension letter should reflect that right. If the suspension is for 80 hours or less, it may be grieved. See A.A.C. R2-5-701 and -702. In issuing suspensions under 70 hours, care should be given when the suspension extends over a state holiday. See A.A.C. R2-5-402.C. Contact the Attorney General's Office with concerns over these issues.

**3.3.3 Demotion.** When an employee is moved for "cause" to a position in another class with a lower pay grade, he has been demoted. Reductions in pay grade due to legitimate reorganizations, reductions in force, A.A.C. R2-5-902, and reclassifications, A.A.C. R2-5-303.B, are not included within the definition of demotion. The reason for a

demotion usually is to place an employee in a position that the employee can handle competently. A.A.C. R2-5-802. See Form 3.6 as an example. A demotion is appealable to the Arizona Personnel Board. If, on the other hand, the reason for a reduction in grade is to accommodate the choice of an employee, it is not a demotion but rather a voluntary grade decrease pursuant to A.A.C. R2-5-605. See Section 3.7.2.

3.3.4 Dismissal. Dismissal of a permanent status employee is termination of state service for "cause" as defined in A.R.S. § 41-770 and A.A.C. R2-5-501. Before a permanent status employee may be dismissed, the agency head must give the employee written notice of the charges against the employee and an opportunity to respond to those charges. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). The employee must be allowed at least three working days to respond after receiving the notice of charges. A.A.C. R2-5-803.A. See Form 3.22. After the agency head reviews the employee's response, the agency head may dismiss the employee by attempting to serve the employee with written notice of the specific reasons for the dismissal which must include a statement of the employee's right to appeal to the Personnel Board. A.A.C. R2-5-803.B. If the employee is on an approved period of leave with pay, i.e., approved vacation or sick leave, the dismissal will not be effective until the conclusion of the approved leave. A.A.C. R2-5-803.B. See Form 3.1 as an example of a dismissal letter.

3.4 Appeal From Disciplinary Action. Covered employees may appeal to the Arizona Personnel Board an involuntary demotion, suspension without pay for more than 80 working hours or dismissal. Pursuant to A.R.S. § 41-785 the appeal must be filed with the Personnel Board not later than 10 days after the effective date of the action. The agency should be prepared at the time it takes disciplinary action to supply the information and witnesses necessary to establish the basis of its action. See Form 3.21. Although a procedure for notification is established when an appeal is filed, the agency should immediately notify the Attorney General's Office.

3.5 Employee Grievances. An employee who has an employment-related problem which cannot be addressed or resolved informally may file a request in writing to have his grievance reviewed administratively. The grievance procedure may be used to secure consideration of grievances concerning performance evaluations, discrimination and compliance with personnel rules. Grievances are processed and reviewed pursuant to A.A.C. R2-5-701 and -702. The procedure requires an employee to file his grievance within 10 working days of the event precipitating the complaint. A.A.C. R2-5-702.2.

Prompt compliance with the procedure is important. This is an important channel of communication which can serve to prevent more serious personnel problems. Also, repeated use of this procedure may indicate that the immediate supervisor is having a problem with subordinates, which may require the attention of a superior.

### 3.6 Agency Actions Affecting Employees.

3.6.1 Performance Planning and Evaluations. A performance planning and evaluation system has been established by the Director of the Department of Administration, but may be amended by the agency head subject to the approval of the Director of the Department of Administration. Permanent status employees must be evaluated annually, and may be evaluated more frequently when necessary to monitor an employee more closely. Probationary employees must be evaluated at least twice during the probationary period. See A.A.C. R2-5-503.

**3.6.2 Performance Adjustments in Salary.** Under A.A.C. R2-5-304, state employees may be eligible for performance increases or decreases. Permanent full-time employees may be granted a performance increase of up to 7.5 percent so long as the salary does not exceed the maximum in the pay grade. The increase is effective January 1 if the employee entered in state service on or before August 31 of that year, and effective the following July 1 if the employee was in state service by the end of February of that year. Similar rules apply to temporary or seasonal employees. A.A.C. R2-5-304.A.3 and -304.A.4. Employees who reach the maximum salary in their pay grade are eligible for a special performance award of up to 5.0 percent, effective January 1 for one year. The maximum increase any employee may receive is 7.5 percent in a fiscal year. Salaries may also be reduced up to 2.5 percent based on substandard performance so long as the salary is not reduced below that of entry level for the employee's class. Because there are budgetary restrictions on the granting of any salary increases, you should check with the budget analyst for your agency in order to understand what budget constraints apply.

**3.6.3 Merit Awards.** In addition to salary, an officer or employee may be eligible for a "merit award" of up to \$1,000 pursuant to A.R.S. § 38-613 if he suggests a procedure or idea which reduces state expenditures or improves operations, or performs a special act or service in the public interest. In order to be eligible, the action must not be part of regular employment duties.

**3.6.4 Promotions and Promotional Probation.** A.A.C. R2-5-601 provides that promotions are to be competitive unless the Director of the Department of Administration finds a noncompetitive promotion to be in the best interests of the state. To be promoted an employee must have obtained permanent status and meet the qualifications of the position. When promoted, an employee must serve a period of promotional probation. A.A.C. R2-5-213.D. An employee who has been promoted and fails to complete successfully the promotional probation in the new position should be returned to a like position as the one held prior to the promotion. A.A.C. R2-5-213.D.2. See Form 3.13. If an employee fails to complete the probationary period and no vacancy exists in that employee's former class within the employee's agency, then the rules of reduction in force apply. See Section 3.6.6.

Reversion to former position or transfer to another position for failure to complete a probationary period is not a disciplinary action, but merely an indication that the employee has failed to meet the level of performance expected by supervisors. Reversion to a former position, however, does not preclude disciplinary action.

**3.6.5 Transfer and Assignment of Tasks.** Agencies have the right to transfer employees and reassign tasks. See A.A.C. R2-5-602. However, the right to transfer employees and assign tasks is not without limitation. Although an employee has no right to remain in a particular assignment or at a particular work location, an agency may not use a transfer as a disciplinary measure, and any transfer must be done in good faith. See Lewis v. Jamieson, 135 Ariz. 322, 660 P.2d 1249 (App. 1983).

**3.6.6 Reorganization and Reduction in Force.** Agencies may, as a result of reorganizing or by reason of a reduction in funds or work requirements, have to reduce their work force. A.R.S. § 41-783(14); A.A.C. R2-5-902. When a reduction in force is necessary, the agency should notify the Director of the Department of Administration whose staff will assist the agency in determining the order of reduction. The order is determined by such things as employment status, qualifications, performance appraisals, work records, conduct and seniority of the affected employees.

Salary adjustments will be made as a result of reductions in force and reemployment in light of applicable rules. See A.A.C. R2-5-902.F. Employees may seek a review of the reduction in force by following procedures set forth in A.A.C. R2-5-902.G.

Although reductions in pay grade and reclassifications to a lower grade, when part of a legitimate reorganization, are not considered to be demotions, see Section 3.3.3, a reclassification to a lower grade as part of an improper reorganization constitutes a demotion that may be appealed to the Personnel Board. Rolfe v. State ex rel. Huerta, 131 Ariz. 592, 643 P.2d 505 (App. 1982).

### 3.7 Employee Options.

3.7.1 Voluntary Resignation and Resignation in Lieu of Dismissal. An employee may resign from state service. His resignation should be in writing and submitted at least 10 working days before the effective date of the resignation to be eligible for reinstatement rights, which are discussed in Section 3.7.3. A.A.C. R2-5-901.A. See Form 3.14 for examples.

If the agency intends to accept a written resignation, it should do so, in writing, immediately. An employee also may resign orally. If the agency intends to accept an oral resignation, the agency immediately should send a letter to the employee confirming and accepting the resignation. The agency may refuse to accept a resignation and proceed with a dismissal. A.A.C. R2-5-901.C. An employee may withdraw a resignation by written notification to his supervisor no later than the end of the next agency work day after the resignation. A.A.C. R2-5-901.D. If an employee who wishes to resign has filed an appeal or filed suit in connection with a disciplinary action, the supervisor should contact the Attorney General's Office before acting on the request to resign.

3.7.2 Voluntary Grade Decrease. Employees may voluntarily request a grade decrease. If the request is approved, it should be accepted by the agency in writing. See Forms 3.7 and 3.8. The employee shall not be placed on probation unless the employee was on original probation at the time of the request. A.A.C. R2-5-605.

3.7.3 Reinstatement and Reemployment. An employee with permanent status who has resigned, giving proper notice, see A.A.C. R2-5-901.C, or has been separated without prejudice, see A.A.C. R2-5-101.49 and -413.C.2, upon written application, is entitled to be placed on a reinstatement register for referral to positions for which the employee is qualified. A.A.C. R2-5-204.H. An employee with permanent status who has been separated as a result of reduction in force, upon written application, is entitled to be placed on a reemployment register to be referred to positions for which the employee is qualified. A.A.C. R2-5-204.F. Employees may remain on reinstatement or reemployment registers for up to two years after their separation and may be interviewed for positions without open competition. See A.A.C. R2-504.I.

### 3.8 Leave.

3.8.1 Holidays. State holidays are set forth in A.A.C. R2-5-402.A. Employees are entitled to be absent with pay for the number of their regularly scheduled hours (not to exceed eight hours), unless the employee was on leave without pay on the employee's working days immediately preceding or following the state holiday, A.A.C. R2-5-402.C, or the employee is required to work to maintain essential state services, A.A.C. R2-5-402.B. Employees required to work on state holidays receive holiday compensation as set forth in A.A.C. R2-5-402.E.

3.8.2 Annual Leave. Annual Leave, authorized under A.A.C. R2-5-403.A, is a broad category of leave that includes, in addition to normal vacation time, all other periods of approved absence with pay from regularly scheduled work that are not properly chargeable to some other category of leave.

Annual Leave may be used by the employee if approved by the appointing authority. A.A.C. R2-5-403.E. However, an agency must reasonably permit an employee to use accrued annual leave during the course of the calendar year. Although annual leave may be disapproved by the agency at a particular time if the agency's ability (staffing and expertise) to function will be adversely affected by the leave, the agency should arrange with the employee an alternative time for use of the leave. Once annual leave has been approved, it may be cancelled by the agency only when the work of the agency cannot be performed otherwise.

3.8.3 Sick Leave. Under A.A.C. R2-5-404.A, sick leave shall include any "approved" period of absence with pay of a state service employee resulting from:

1. Illness or injury which renders the employee unable to perform the duties of the position. Minor, nondisability injuries and illness do not qualify an employee for sick leave.
2. Disability caused by pregnancy, childbirth, miscarriage or abortion.
3. Examination or treatment by a licensed health care practitioner.
4. Illness, injury, examination, or treatment by a licensed health care practitioner of an employee's spouse or dependent child. Sick leave for this purpose cannot exceed 40 hours per calendar year.

Sick leave may be taken when approved by the agency head. A.A.C. R2-5-404.D.1.

The agency may require the employee to submit substantiating evidence including, but not limited to, a physician's certificate, see Form 3.16, or a health diagnosis and prognosis, see Forms 3.19 and 3.20. If the agency does not consider the evidence adequate, then the absence can be charged to another category of leave or considered absence without leave. Clear abuse of the use of sick leave is a basis for disciplinary action against the employee.

An agency head may require an employee to submit to an examination by a licensed health practitioner designated by the agency. See Forms 3.17 and 3.18. The agency pays for such an examination and the employee is not charged leave for time traveling or participating in the examination. If the practitioner determines the employee should not work, the agency head may place the employee on sick leave, or if the employee has exhausted all sick leave, on leave without pay. The agency may require the practitioner's approval prior to the employee returning to work. A.A.C. R2-5-404.D.3.

3.8.4 Compensatory Leave and Overtime Pay. All overtime work must be approved in advance by the agency head. A.A.C. R2-5-305.A. The Director of the Department of Administration determines, subject to the Fair Labor Standards Act,

29 U.S.C. § 201, which positions are entitled to compensatory leave or overtime pay. A.A.C. R2-5-305.B. Overtime work for employees covered by the Fair Labor Standards Act is compensated at either one and one-half of the employee's pay rate for each hour worked or one and one-half hours of compensatory leave for each hour worked. The agency determines if compensation is taken in leave or pay unless the employee accumulates the maximum number of leave hours set forth in A.A.C. R2-5-305.F, in which case the employee must be compensated by overtime pay.

Covered employees who are exempt from the Fair Labor Standards Act may receive compensatory leave on an hour-for-hour basis or, subject to approval by the Director of the Department of Administration, overtime pay at the regular pay rate. A.A.C. R2-5-305.D.

All compensatory leave time must be used before taking annual leave and, upon separation, any accumulated compensatory leave is paid as provided in A.A.C. R2-5-305.G and -305.H.

**3.8.5 Leave Without Pay.** Pursuant to A.A.C. R2-5-413, leave without pay must be approved in writing in advance by the agency head. Except in cases involving maternity leave, military leave, leave to forestall a reduction in force, or leave for a mobility assignment, first all annual, compensatory and, if applicable, sick leave should be exhausted. An employee who returns to work after leave without pay of 80 hours or less shall be returned to the same position previously held. An employee who returns to work after leave without pay of greater than 80 hours shall be returned to a position in the same class, if available. If a position in the same class is not available, the employee may be separated without prejudice, see A.A.C. R2-5-101.49, unless the employee is returning from maternity leave, military leave, industrial disability, leave to forestall a reduction in force, or mobility assignment, in which case a reduction in force must take place. A.A.C. R2-5-413.C.3.

An approval of leave time should always include a specific date for return to work. If the employee cannot return to work on the date specified, the agency may consider extending the leave without pay to another specified date, separation without prejudice, or dismissal, if appropriate. Contact the Attorney General's Office with any questions in this regard.

**3.8.6 Administrative Leave with Pay.** Employees may be placed on administrative leave with pay in emergency situations. Administrative leave with pay may be used also for the purpose of relieving employees of their duties temporarily during the active investigation of alleged wrongdoing. A.A.C. R2-5-409. See Forms 3.11 and 3.12 as examples.

**3.8.7 Other Leave.** Additional leave time may be provided for civic duty, A.A.C. R2-5-406, military orders, A.A.C. R2-5-407, education, A.A.C. R2-5-408, and bereavement, A.A.C. R2-5-410. Maternity leave is a combination of annual leave, sick leave, compensatory leave, or leave without pay taken by a female employee due to pregnancy, childbirth, miscarriage or abortion. See A.A.C. R2-5-411.

In cases of industrial disability, the employee uses leave in an amount which, when added to worker's compensation payments, does not exceed the employee's gross salary. A.A.C. R2-5-405.B. The employee first exhausts accumulated sick leave, then is placed on leave without pay unless the employee requests use of compensatory or annual leave. A.A.C. R2-5-405.A.

### 3.9 Conditions of Employment.

3.9.1 Standards of Conduct. All employees are required to know the standards of conduct set forth in A.A.C. R2-5-501. Requirements include honesty, impartiality, courtesy and compliance with state laws and rules. Violations of the standards of conduct constitute cause for discipline, including dismissal. Also prohibited is any action which impedes or interferes with employees' rights to join or refrain from joining an employee organization or to exercise any other right granted under the law or rules. Any action of prohibited reprisal may result in a suspension of up to 30 days or dismissal. A.A.C. R2-5-501.D.

3.9.2 Conflict of Interest. All employees are also required to know the conflict of interest laws set forth in A.R.S. §§ 38-501 to -511. An employee who has, or whose relative has, a substantial interest, as defined in A.R.S. § 38-502(11), in a contract with or decision of a public agency must declare that interest in official records and refrain from participating in the contract or decision. A.R.S. § 38-503. Employees are prohibited from representing another person before an agency by which the employee is or was employed within the preceding 12 months on matters in which the employee participated by a substantial exercise of discretion. A.R.S. § 38-504(A). For two years after employment, an employee retains the responsibility not to disclose or use for personal profit confidential information acquired during the course of official duties. A.R.S. § 38-504(B). Employees are prohibited from using or attempting to use their positions for personal gain, A.R.S. § 38-504(C), and may not receive direct or indirect compensation other than as provided by law for services performed by the employee in any matter which is pending before the agency by which the employee is employed. A.R.S. § 38-505. Penalties for violations of the conflict of interest laws include forfeiture of public employment and prosecution as a felony or misdemeanor. A.R.S. § 38-510. Notify the Attorney General's Office of any question in this regard.

3.9.3 Restricted Political Activity. A.R.S. § 41-772(B) limits covered employees' participation in political activities. The statute, commonly referred to as the state Hatch Act, provides as follows:

No employee or member of the personnel board may be a member of any national, state or local committee of a political party, or an officer or chairman of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take any part in the management or affairs of any political party or in any political campaign, except that any employee may express his opinion, attend meetings for the purpose of becoming informed concerning the candidates for public office and the political issues, and cast his vote.

For example, a covered employee may not participate in the political process as a deputy registrar or as a precinct committee person. Ariz.Atty.Gen.Ops. I69-1; I79-174. See also Ariz.Atty.Gen.Ops. I71-1, I78-26, I83-134 and I87-028 for additional discussions of the range of acceptable or prohibited activities. Prohibited political activity is a ground for disciplinary action, mandating a penalty of suspension for not less than 30 days or dismissal. A.R.S. § 41-772(D).

Additionally, certain state merit system positions and uncovered positions funded through federal monies are subject to the Federal Hatch Act, which also imposes restrictions on certain political activity. Supervisors and managers who administer programs subject to these restrictions should so inform the affected employees. See 5 U.S.C. § 7324.

3.9.4 Employment of Relatives. Employment of relatives is prohibited by A.R.S. § 38-481 and A.A.C. R2-5-207. Any question in this regard should also be directed to the Attorney General's Office.

3.10 Inquiries Concerning State Employees. When information regarding a state employee is requested, from other than another Arizona state agency, only the following information should be released: name of employee, dates of employments, current and previous class titles and dates received, name and location of current and previous agencies to which the employee has been assigned, current and previous salaries and dates of each change, and the name of the employee's current or last supervisor. A.A.C. R2-5-105.D. Do not release any further information without contacting the Attorney General's Office.

When the requesting party is another Arizona state agency, to which the employee has applied, you may relate the information necessary to apprise the hiring authority of the agency of the employee's work background and job performance. The information should be limited to facts relevant to the employee's employment history.

3.11 Equal Employment Opportunity. The State of Arizona and its agencies and instrumentalities are equal opportunity employers. The state, as an employer, may not discriminate against employees or applicants for employment differently with regard to hiring, discipline, discharge, compensation, terms, conditions or privileges of employment because of the individual's race, color, religion, sex, national origin, age or handicap. The Attorney General's Office is available to assist agencies with problems arising in the area of equal employment opportunity, through training and evaluating programs and practices to ensure compliance, and defending charges of discriminatory action.

#### 3.11.1 General Considerations Regarding Discrimination Complaints.

3.11.1.01 The Equal Employment Opportunity Commission ("EEOC"). Title VII of the Civil Rights Act of 1964, as amended, as well as the Age Discrimination in Employment Act ("ADEA"), are enforced through the EEOC, a federal agency. See 42 U.S.C. §§ 2000e and 6101. The Arizona Civil Rights Act, which parallels Title VII and ADEA, is found at A.R.S. § 42-1401. When a charge is filed with the EEOC, the EEOC will contact the state agency involved, requesting a statement of position. A copy of any charge should immediately be sent to the Chief Counsel of the Liability Defense Division of the Attorney General's Office and to the Department of Administration, Division of Risk Management. They will either process the charge or assist the agency. Contact the Attorney General's Office, Civil Division, Employee Relations Section, for any questions or assistance on discrimination matters not yet filed with investigative agencies.

3.11.1.02 Confidentiality. Discrimination complaints must be handled in a confidential manner. For this reason, and to ensure against charges of retaliation, the fact that a discrimination charge has been filed and an investigation undertaken should be discussed only on a need-to-know basis. Investigative and charge files should be kept separate from the agency's personnel files and in a secure area. The actions,

evaluation and recommendations of internal affirmative action officers are also confidential and should not be provided to outside sources, including federal agencies, without prior approval of the Attorney General's Office.

3.11.1.03 Settlement Agreements. Discrimination charges, whether formal or informal, may result in negotiated settlements. Settlements must be reviewed and approved by the Attorney General's Office before being finalized. When discussing possible settlement of discrimination complaints, you must make clear the fact that such settlements are subject to the approval of the Attorney General's Office and the agency head. See Section 1.3.3 of Chapter 1. The Attorney General's Office will assist during negotiations.

3.11.1.04 Unlawful Discrimination. Employment discrimination takes many forms, each with different legal bases, proof and ramifications. For example, when a person of one race, sex, religion, etc., receives treatment different from persons of another race, sex, religion, etc., who are otherwise similarly situated, discrimination may have occurred. If there is no nondiscriminatory explanation for the differences in treatment, then it may be inferred that race, sex, religion, etc. was a factor in the disparate treatment. Burdine v. Texas Department of Community Affairs, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The application of a neutral employment practice (i.e., height and weight requirements) applied to all employees or applicants but adversely impacting on one group is unlawful unless justified by business necessity (i.e., the requirement is job-related and no less discriminatory practice is feasible). Griggs v. Duke Power Co., 401 U.S. 424 (1971). The above are examples of the most common "types" of employment discrimination, but others exist. Check with the Attorney General's Office for advice on discrimination charges.

3.11.1.05 Retaliation. It is unlawful to retaliate against any employee who either files an external or internal discrimination charge or who assists or participates in the investigation of such charge. 42 U.S.C. § 2000e-3(a); A.R.S. § 41-1464(A).

3.11.1.06 Interviewing. Job applicants should never be asked a question not directly related to the qualifications for employment. For example, never ask an applicant about race, color, national origin, religion, age, sex, politics, marital or family status. Because employment decisions may not be made upon these bases, avoid raising the issues and decline to discuss these issues if brought up by the applicant. Similarly, questions relating to an individual's handicap and the ability to perform the work in question should not be discussed until a decision is made that the applicant is otherwise qualified and will be offered the position subject to the ability to demonstrate performance of the essential functions of the position with or without reasonable accommodation.

In addition, to ensure that all applicants receive the same consideration, oral interviews should be structured so that the same procedure is utilized for all applicants, with specific questions prepared in advance. Written notations of the reasons for any employment decision should be made and retained for one year after the employment decision has been made.

3.11.1.07 Nondiscriminatory Work Environment. The state as an employer has a responsibility to create a nondiscriminatory work environment. 42 U.S.C. § 2000-2; A.R.S. § 41-1463. Supervisors should neither make nor tolerate ethnic, religious, racial or sexual jokes or slurs, nor create or tolerate a hostile, intimidating or offensive working

environment. Supervisors should take disciplinary action against employees, up to and including dismissal, for such conduct. Failure to provide a harassment-free environment may create liability for the state and the individual involved.

3.11.1.08 Affirmative Action. Affirmative action means providing an opportunity for traditionally restricted groups to gain access to employment. Some statutes, federal contracts, and receipt of federal funds obligate an employer to avoid discrimination and exercise affirmative action plans. Some examples of these types of affirmative action obligations are found in contracts with or receipt of funds from the federal government under Sections 503 and 504 of the Rehabilitation Act of 1973. 29 U.S.C. §§ 793 and 794. Contact the Attorney General in this regard.

3.11.2 Race, Color and National Origin Discrimination. An employment decision may not be made on the basis of race, color or national origin, nor can employees be treated differently on any of these bases. All employees, applicants and clients must receive equal consideration and treatment without regard to their race, color or national origin. Any employee or supervisor who violates these principles subjects himself, the agency and the State of Arizona to significant legal liability. Furthermore, any employee or supervisor who violates these principles may be subject to disciplinary action including dismissal.

3.11.3 Sex Discrimination. Discrimination in employment on the basis of sex is prohibited by law. Sex discrimination includes decisions based on pregnancy, abortion, childbirth, marriage, related medical conditions, wages, hours and other terms and conditions of employment. 42 U.S.C. § 2000e-2, 29 U.S.C. § 206(d), A.R.S. § 41-1463.

Dress codes and hair length requirements, where appropriate, are generally not considered sex discrimination even though different standards may be applied to males and females. Gedom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982), cert. demissed, 460 U.S. 1074 (1983). Generally, sex discrimination has been limited to protection based on immutable characteristics, *i.e.*, those resulting from forces beyond an employee's control, such as gender, or attributes which result from the exercise of fundamental personal rights, such as parenthood or marital status. Dress requirements, however, that prescribe uniforms for females while specifying "normal business attire" for males, have been found unlawful as perpetuating sexual stereotypes. O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp 263 (S.D. Ohio 1987); Carroll v. Talman Federal Savings & Loan Association, 604 F.2d 1028 (7th Cir. 1979); cert. denied, 445 U.S. 929 (1980).

3.11.3.01 Sexual Harassment. It is unlawful to use one's position to obtain sexual favors or to imply that any term or condition of employment is dependent upon or related to the receipt of sexual favors. The creation of an offensive environment, even if a tangible economic loss is not coupled with compliance or submission, is also unlawful. Sexual harassment is cause for discipline up to and including dismissal. Supervisors who are aware sexual harassment is occurring but take no action may be subject to disciplinary action as well as legal liability. Liability may be incurred even if no employee has specifically complained that the problem is so widespread it is obvious. The employer may be held liable for the harassing acts of its supervisors even if it had no knowledge of the conduct. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

3.11.4 Religious Discrimination. Actions by state employees which either promote the establishment of a specific religion or religion in general, or which prohibit the free exercise thereof, violate both the federal and the state constitutions. Accordingly, all employees, applicants and clients of the state must be treated equally and without regard to the presence or absence of any religious belief. When religious beliefs conflict with job responsibilities, the employee has a responsibility to bring this conflict to his employer's attention and the employer has a duty to reasonably accommodate the employee's religious beliefs. Such accommodation might include a change in working schedule, a modification of a particular position's job responsibilities and making reasonable arrangements to permit an employee to observe his religious beliefs. The employer's duty to accommodate is limited to "reasonable" accommodation and the employer need not incur additional costs or permit the observance of religious tenets where to do so will unreasonably interfere with the performance of the agency's responsibilities and create undue hardship. 42 U.S.C. § 2000e(j); see A.R.S. § 41-1461(9); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977). The standard of reasonable accommodation for religion is less than that required for accommodation of a handicap. See Section 3.11.5 below. Check with the Attorney General's Office for assistance.

When an employee brings a religious conflict to his supervisor's attention, the supervisor must make a reasonable, courteous and prompt response in an effort to resolve the problem. Supervisors should keep clear records of each religious conflict brought to their attention and all steps taken in efforts to accommodate the religious conflict. Such records must be kept separate from the employee's personnel file.

3.11.5 Handicap Discrimination. Some statutes, federal contracts and receipt of federal funds may obligate the state to take affirmative action to employ and advance qualified individuals with handicaps. 29 U.S.C. §§ 793 and 794. See also A.R.S. § 41-1461(3), (4) and (8). The affirmative action requirements include taking reasonable steps to modify any tests or examinations, modifying job responsibilities and/or obtaining specialized equipment which will permit applicants or employees with handicaps to perform the job in question.

There are different definitions for "handicap" under state and federal law, and questions relating to handicap discrimination and reasonable accommodation depend upon the specific handicap and position involved. 29 U.S.C. § 706; A.R.S. § 41-1461(4), (7) and (8). Whenever a question arises in this area, contact the Attorney General's Office before any action is taken or a decision is made.

3.11.6 Age Discrimination. Age discrimination is proscribed under the Arizona Civil Rights Act and the Federal Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. §§ 621 to 634; A.R.S. § 41-1463. The protected age range under state law is 40-70 years. A.R.S. § 41-1465. The ADEA has been recently amended removing the age 70 ceiling, but the extent to which it overrules the state act is unclear. The state, however, must conform to the ADEA. In general, decisions to hire, promote, discharge, etc., cannot be based upon discrimination against individuals in the protected age group. You can require that employees meet the requirements of performing a particular job, provided all employees and applicants are required to demonstrate that they can meet those requirements and that the same test or evaluation procedures are applied to each employee or applicant regardless of age.

3.11.7 Discrimination Grievances. Employees may process a claim of discrimination through employee grievance procedures. A.A.C. R2-5-701 and -702. When an employee's grievance is based upon alleged discrimination, contact the Attorney General's Office. The use of the grievance procedure does not prevent an employee from filing charges with the EEOC.

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\* Forms developed by DOA and used with its approval.

Form 3.1

Dismissal of a Permanent Status Employee

Section 3.3.4

[DATE]

SSN: \_\_\_\_\_

John Q. Employee  
1234 Anyplace Avenue  
Any Old Place, Arizona 85000

Dear Mr. Employee:

This letter is official notice of your dismissal from the Department of \_\_\_\_\_ effective (date) at \_\_\_ o'clock \_\_.m.

This action is taken under the authority of Department of Administration, Personnel Rule R2-5-803.B. for "cause" as outlined in Section 41-770, Arizona Revised Statutes, and Department of Administration Personnel Rule R2-5-501, Standards of Conduct.

[Include here a statement that includes the employee's official class title, length of total state service and just how, because of this background, the employee should have been aware that his/her actions were inappropriate.]

As an Eligibility Worker II within the Department of Economic Security with 18 years of Arizona State Service, you are aware of the general employment conduct requirements contained in the Standards of Conduct, including the requirement to be courteous, considerate and prompt in dealing with and serving the public and to conduct yourself in a manner that will not bring discredit or embarrassment to the state. The last page of the DES New Employee Handbook that you signed on (date) attests to the fact that you are aware of your responsibility to adhere to the rules, policies, procedures and statutes referred to in the handbook, as well as all others which govern your conduct and performance as a state service employee.

The specific reasons for your dismissal are:

1. On January 5, 1987, on or about 10 a.m. you stated to your supervisor (Mr. or Ms. \_\_\_\_\_), "Go to hell, I will not attend," or words to that effect when your supervisor asked you to attend a meeting. Even though you later attended the meeting, your actions were inappropriate and disruptive to good order. (Include any additional information that would show the seriousness of the action. For example: You made that statement in the client reception area in front of clients and other employees thereby showing disrespect for your supervisor and causing embarrassment to the state.)

(Include any additional information that identifies any adverse impact on clients or employees that resulted from the employee's action.)

Form 3.1 - (Continued)

2. On January 6, 1987, on or about 3 p.m. you left your post at (give specific work area) before (state what job assignment remained to be done). You left your post without authority and without being properly relieved.

Your actions constitute a serious violation of department rules and policies and such misconduct calls for appropriate disciplinary measures. In arriving at the decision that dismissal was the appropriate disciplinary action to take in this matter, consideration also was given to the following facts:

1. You received an oral warning on July 14, 1986 for using obscene language towards another employee and for refusing to assist in taking an inventory. You were advised at that time that further misconduct on your part would result in more severe disciplinary action.

2. You received a written reprimand on August 6, 1986 for threatening to destroy another employee's personal property. You were advised at that time that further misconduct on your part would result in more severe disciplinary action.

3. You were suspended from work without pay for five days in November, 1986 for being absent without leave. You were advised at that time that further misconduct on your part would result in more severe disciplinary action.

Please return all state property immediately so that we can issue your final paycheck.

You have the right to appeal this dismissal if you wish. Your appeal should be made in writing to the State Personnel Board, 5050 N. 19th Ave., Suite 208, Phoenix, Arizona 85015. You must file your appeal within ten (10) calendar days from the date of this dismissal and must state the facts with specificity upon which your appeal is based, along with the action you request of the Personnel Board.

Sincerely,

Jane Q. Manager  
Institution Superintendent

cc: Arizona State Personnel Board  
Employee Personnel File  
Agency Personnel Manager  
Assistant Director for Personnel,  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations)

Form 3.2

Dismissal of an Original Probationary Employee

Section 3.2.3

[DATE]

SSN: \_\_\_\_\_

Sally Q. Employee  
4321 Anywhere Road  
This Is It, Arizona 85000

Dear Ms. Employee:

This letter is official notice of your dismissal from employment with the Department of \_\_\_\_\_. You are dismissed effective (date) at \_\_\_\_ o'clock \_\_.m.

This action is taken under the authority of Department of Administration Personnel Rules R2-5-213.C.3.b and R2-5-803.C.1.

As a probationary employee, you have no right to appeal or to request a review of this action by the Department of Administration. See Department of Administration Personnel Rule R2-5-803.C.1.

Please return all state property immediately so we can issue your final paycheck.

Sincerely,

Sally R. Manager  
Institution Superintendent

cc: Employee Personnel File  
Agency Personnel Manager  
Assistant Director for Personnel  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)

Form 3.3

Dismissal – Temporary and Seasonal Employees

Section 3.2.4

[DATE]

SSN: \_\_\_\_\_

Sally Q. Employee  
4321 Anywhere Road  
This Is It, Arizona 85000

Dear Ms. Employee:

This letter is official notice of your dismissal from the Department of \_\_\_\_\_ effective (date) at \_\_\_ o'clock \_\_.m.

As a (temporary or seasonal) employee, you have no right to appeal this action.

Please return all state property immediately so that we can issue your final paycheck.

Sincerely,

John Q. Supervisor

cc: Employee Personnel File  
Agency Personnel Manager  
Assistant Director for Personnel  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)

Form 3.4

End of Assignment Letter for Seasonal and Temporary Employees (Option No. 2)

Section 3.2.4

[DATE]

SSN: \_\_\_\_\_

Ms. Sally Q. Employee  
4321 Anywhere Road  
Tucson, Arizona 83000

Dear Seasonal Employee:

This is to inform you that your (temporary or seasonal) assignment will be ending on August 29, 1986 at 5:00 p.m. Your efforts to assist this agency to meet its objectives have been fully noted and appreciated.

Please note as a (temporary or seasonal) employee your job performance has been recorded as excellent.

Sincerely,

Jane Q. Supervisor

cc: Agency Personnel File  
Agency Personnel Manager  
Assistant Director for Personnel  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)

Form 3.5

Suspension Without Pay - 80 or Fewer Hours

Section 3.3.6

[DATE]

SSN: \_\_\_\_\_

Mr. John Q. Employee  
1234 Anyplace Avenue  
Anyplace, Arizona 85000

Dear Mr. Employee:

This letter is official notice of your suspension without pay from the Department of \_\_\_\_\_.

The period of suspension will begin at 8:00 a.m., August 2, 1986, and continue to 5:00 p.m., August 4, 1986 (24 hours). You are to report to work at 8:00 a.m., August 5, 1986.

This action is taken under the authority of Department of Administration Personnel Rule R2-5-801 for "cause" as outlined in section 41-770 of the Arizona Revised Statutes and Department of Administration Personnel Rule R2-5-501 (Standards of Conduct).

As a Journeyman Electrician with the State of Arizona, you are a fully qualified tradesman. You have completed apprenticeship lasting over four years, complemented with over 1,200 hours of classroom instruction. In addition, you took and passed the journeyman's examination. This background qualifies you to perform any maintenance and/or construction project pertaining to electrical work. In addition to the above qualifications, you have worked seven years in your journeyman field, primarily on construction and renovation type electrical work.

Specific reasons for your suspension are:

On July 23rd and July 25th, you stated in public and in front of at least six witnesses that the power failure at the "uniform power center" was caused by incompetency of the prime contractor. You also stated that a voltage drop was the fault of the same contractor. When questioned by the contractor to determine his role in these problems, you stated your meter indicated a drop of 32 volts. You were asked if your meter was correct, and you stated it was. The contractor's meter was calibrated by "Arizona Testing Laboratories" a week before his reading, and was found to read 240 volts. When he asked you to check the correctness of your meter, you were upset and yelled that there was nothing wrong with your meter. You stated it was his company's fault that things keep getting fouled up, and that his company blew up a transformer because they didn't know what they were doing.

Form 3.5 - (Continued)

The Contractor immediately pulled his crew (four persons) off the final phase of the contract. They were off three days before your management stepped in and mediated a resolution to the work stoppage. During that time, the state was billed for four persons work days, and an investigation revealed that your meter was in error. In addition, the investigation revealed that the blown transformer was the fault of the Manufacturer.

Hereafter, you are to work through your Maintenance Supervisor if there are any areas of quality concern. Any further problems of this nature will result in more severe discipline including dismissal.

You do not have the right to appeal this action. However, you may use the Employee Grievance Procedure if you feel the suspension is unjust. Grievances must be filed within ten working days after the effective date of suspension, which is date, the first day of suspension. Please refer to Department of Administration Rules R2-5-701 and R2-5-702.

Sincerely,

John Q. Supervisor

cc: Agency Personnel File  
Agency Personnel Manager  
Assistant Director for Personnel  
Department of Administration  
Civil Division of Attorney General's Office  
(Attn: Employee Relations Section)

Form 3.6

Demotion for Cause - Covered Employee

Section 3.3.3

[DATE]

SSN: \_\_\_\_\_

John Q. Employee  
1234 Anyplace Ave.  
Anyplace, Arizona 85000

Dear Mr. Employee:

This letter is official notice of your demotion from Nurse II, grade 16 at an annual salary of \_\_\_\_\_, to Nurse I, grade 15, at an annual salary of \_\_\_\_\_, effective (date).

This action is taken under the authority of Department of Administration Personnel Rule R2-5-802 for "cause" as outlined in section 41-770, Arizona Revised Statutes, and Department of Administration Personnel Rule R2-5-501 (Standards of Conduct).

Background: In the first semester of Nurses' training every student receives extensive instructions on how to "chart," the importance of "charting," the legal necessities of "charting," and the ramifications that may result if "charting" is not performed or is performed erroneously. In summary, "charting" of a patient's treatment is a basic but essential responsibility of all nurses.

The specific reasons for your demotion are:

1. On January 4, 1986 patient (use code) assigned to your ward and in residence at the time of your shift, had charting entries not in harmony with the attending physician's instructions. In addition, you admitted that medicine was given that was not entered on the patient's chart.

2. On November 3, 1986 patient (use code) assigned to your Ward and in residence at the time of your shift, had charting entries not in harmony with the attending physician's instructions. In addition, you admitted that medicine was given that was not entered on the patient's chart.

3. You have been counseled orally six times between July 1, 1986 and July 28, 1986 about the necessity of following physician's instructions and correct addressed charting.

Form 3.6 - (Continued)

It is our belief that you are in need of an intensified period of close supervision. A Nurse II classification has independent work activities assigned to it. Therefore, we are demoting you to Nurse I, a classification which is in harmony with your need for close supervision and is appropriate.

You have the right to appeal this demotion if you wish. If you appeal, it should be made in writing to the State Personnel Board, 5050 N. 19th Ave., Suite 208, Phoenix, Arizona 85015. You must file your appeal within ten (10) calendar days from the date of this demotion and must state the facts upon which your appeal is based, along with the action you request of the Personnel Board.

Sincerely,

John Q. Supervisor

cc: Employee Personnel File  
Agency Personnel Manager  
Assistant Director for Personnel  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)  
Personnel Board

Form 3.7

Voluntary Grade Decrease – Employee Requested

Section 3.7.2

DATE:

TO: Supervisor

FROM: Employee Name and Address

SUBJECT: Voluntary Grade Decrease

For personal reasons (OR – for the reasons listed below), I voluntarily wish to take a voluntary grade decrease from (present position), grade      effective (date).

I wish to accept a position as (new position title), position number, grade     , effective (date).

I fully understand that this voluntary grade decrease will result in an accompanying grade decrease to grade      and that my salary will be \$           per year.

(Give details of reasons for voluntary grade decrease if desired.)

I also understand that I have no right to grieve this voluntary grade decrease, which I knowingly and voluntarily have requested.

cc: Employee Personnel File  
Agency Personnel Manager  
Assistant Director for Personnel  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)



Form 3.9

Reprimand

Section 3.3.1

SSN: \_\_\_\_\_

Sally Q. Employee  
4321 Anywhere Road  
Phoenix, Arizona 85000

Dear Ms. Employee:

This letter is an official reprimand for your actions on January 5, 1987.

You are a Correctional Officer, Grade 14, in our male youth facility. Your primary duties are to oversee, advise, and counsel young male wards. Your responsibilities include the protection of wards from physical and mental harm.

The specific reasons for this reprimand are:

On January 5, 1987 on or about 9:30 a.m. you permitted two wards under your supervision to engage in a boxing match. You did not obtain prior approval of your supervisor before allowing such activity. No protective equipment was provided to the wards. You did not properly document the activity for agency records.

Your actions constitute a serious violation of department rules and policies. Continued violation on your part will result in more severe disciplinary action, up to and including dismissal from state service.

You do not have the right to appeal this action. However, you may use the Employee Grievance Procedure if you feel the reprimand is unjust. Grievances must be filed within ten working days after the effective date of the action being grieved. See Department of Administration Personnel Rule R2-5-701 and R2-5-702.

Sincerely,

Jane R. Manager  
Institution Superintendent

cc: Employee Personnel File  
Agency Personnel Manager  
Assistant Director for Personnel  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)

(Note: Form 3.10 - Counseling Session Confirmation Memorandum may be used in lieu of or in addition to a reprimand.)

Form 3.10

Counseling Session Confirmation Memorandum

Section 3.3.1

DATE: (DATE)  
TO: Employee  
FROM: Supervisor  
SUBJECT: Meeting on January 5, 1987

Your recent actions and manner in performing routine office clerical tasks have led us to consider holding a meeting with you and to follow up that meeting with a written letter confirming those items of concern and what Management expects from you henceforth.

You are a Clerk Typist II, Grade 9, in the Administrative Secretary's office. As you clearly understood during your hiring interview, this office serves many Analysts assigned to the Director's staff, and also has a higher than normal number of office and inter-office contacts with all Divisions in the Agency. Another significant characteristic of this office is that we have a large number of general public personnel coming into the office areas to seek guidance on the processing of their applications and licenses.

At 1:30 p.m., on January 5, 1987, the following personnel attended a meeting in the District Manager's office for the purpose of explaining to you the need for corrective action in your daily work performance:

Mr. District Manager - Administrator of the area  
Mr. Supervisor - Employee's Supervisor  
Mr. Impartial - An Impartial Observer  
Mr. Employee - Affected Employee

During the meeting, it was stated very clearly to you that your performance is of a substandard nature due to the following reasons:

1. Discourteous interruptions of meetings and conferences.
2. Wasted time by needless visits and discussions of private business.
3. Failure to accomplish work on time.
4. Evident display of a lack of interest in your job.
5. Preparation of correspondence in a sloppy and unbusinesslike manner.
6. Lack of attention to detail and lack of accuracy in the performance of regular daily tasks.

Form 3.10 - (Continued)

After discussion of these items, I informed you that your work would be closely monitored and, if the deficiencies noted are not corrected in a manner considered to be satisfactory by your most current performance evaluation, some form of disciplinary action will result (including the possibility of dismissal).

Please note that this is the first formal meeting with you about this subject. However, an informal discussion outlining similar deficiencies took place in November of 1986. I want to be certain that there is no doubt in your mind as to the purpose of the meetings, the deficiencies noted and the improvements expected of you.

Sincerely,

Jane Q. Supervisor

Optional:

cc: Employee Personnel File  
Agency Personnel Manager

Form 3.11

Administrative Leave with Pay Pending Investigation

Section 3.8.6

[DATE]

SSN: \_\_\_\_\_

Sally Q. Employee  
1234 Anywhere Road  
Tucson, Arizona 85000

Dear Ms. Employee:

This letter is official notice that you have been placed on Administrative Leave with pay pending the results of an investigation, in accordance with Department of Administration Rule R2-5-409. Your leave will begin at     (date)     o'clock     .m., and continue until further notice.

While you are on Administrative Leave, you remain an employee of the State of Arizona and must continue to observe all rules and regulations regarding conduct of state service employees. You will continue to accrue all rights and benefits as an employee.

During your leave, you must contact your supervisor each work day and be available to provide information or services as required. Therefore you shall notify your supervisor of the locations, times and phone numbers where you can be reached during each work day.

Sincerely,

John Q. Supervisor

cc: Employee Personnel File  
Agency Personnel Manager  
Assistant Director for Personnel,  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)

Form 3.12

Return from Administrative Leave

Section 3.8.6

[DATE]

SSN: \_\_\_\_\_

Sally Q. Employee  
1234 Anywhere Road  
Tucson, Arizona 85000

Dear Ms. Employee:

On (date), you were placed on Administrative Leave pending the results of an investigation. The investigation has been completed, and you are instructed to return to work.

You are to report to your immediate supervisor, (name), on (date) at (time) o'clock .m. Your reporting place is (location).

Sincerely,

John Q. Supervisor

cc: Employee Personnel File  
Agency Personnel Manager  
Assistant Director for Personnel,  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)

Form 3.13

Reversion for Failure to Complete Promotional Probation

Section 3.6.4

[DATE]

SSN: \_\_\_\_\_

John Q. Worker  
1234 Anyplace Avenue  
Yuma, Arizona 85000

Dear Mr. Worker:

This letter is official notice that you have failed to successfully complete your promotional probation period and will be reverted to your former classification.

You will be reverted from  (title, grade)  to  (title)  effective  (date) .  
Your new monthly gross salary will be \$\_\_\_\_\_.

This action is taken under the authority of Department of Administration Personnel Rules R2-5-213(D) and R2-5-303(L).

As an employee on promotional probation, you do not have the right to appeal this action.

Sincerely,

John Q. Supervisor

cc: Agency Personnel Manager  
Assistant Director for Personnel,  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)  
Employee Personnel File

Form 3.14

Resignation

(In Lieu of Dismissal)

Section 3.7.1

[DATE]

SSN: \_\_\_\_\_

Mr. John Q. Employer  
1234 Anyplace Avenue  
Tucson, Arizona 85000

Dear Mr. Employer:

I hereby submit my resignation from my position as \_\_\_\_\_ with the Arizona Department of \_\_\_\_\_, effective (date), and waive all rights to reinstatement and reemployment in state service as set forth in A.A.C. R2-5-204.F and R2-5-204.H.

Sincerely,

OR

[DATE]

SSN: \_\_\_\_\_

Mr. John Q. Employer  
1234 Anyplace Avenue  
Tucson, Arizona 85000

Dear Mr. Employer:

I hereby submit my resignation from my position as \_\_\_\_\_ with the Arizona Department of \_\_\_\_\_, effective (date).

Sincerely,

Form 3.15

Dismissal of an Exempt Status Employee

Section 3.2.1

[DATE]

SSN: \_\_\_\_\_

Sally Q. Employee  
4321 Anywhere Road  
Yuma, Arizona (zip)

Dear Ms. Employee:

This letter is official notice that your services are no longer needed with the Department of \_\_\_\_\_, effective (date) at \_\_ o'clock \_\_.m.

As an exempt employee, you have no right to appeal this action. Please return all state property immediately so we can issue your final paycheck.

Sincerely,

John Q. Supervisor

cc: Employee Personnel File  
Agency Personnel Manager (or officer)  
Assistant Director for Personnel  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)

Requirement for Physician Statement – Repeated Illnesses

Section 3.8.3

SSN: \_\_\_\_\_

Mr. John Slacker  
8000 North Central Avenue  
Phoenix, Arizona 85000

Dear Mr. Slacker:

Within the past four months, you have taken 40 hours of sick leave. Thirty-two of those hours were either on a Friday or a Monday. The other eight were taken during the Phoenix Open.

You have been an employee of this Department for over three years and your accumulated sick leave balance is only 8 hours; yet I cannot recall that you have suffered from any prolonged illness. This is not to imply that your future requests for sick leave will not be granted, but the pattern of your illnesses is unusual. I am also concerned that you may some day suffer a serious accident or illness that would quickly exhaust your sick leave and create a hardship on your family. Therefore, prior to approving any further requests for sick leave, pursuant to Department of Administration Personnel Rule R2-5-404.D I am requiring that you submit a physician's certificate indicating the nature, extent and duration of the illness for which you seek sick leave. The certificate should state the physician's professional opinion on the degree of your disability and when you may resume work.

Please continue to follow our existing office practice of telephoning me within the first 10 minutes of the work day when you are suddenly ill. Further, you are to notify me as to the time and date of any doctor's appointments. After your appointment, you are to telephone me again and tell me your doctor's prognosis of the duration of your incapacity. Upon return to work, you are to submit the physician's certificate discussed above.

Sincerely,

Jane Q. Supervisor

cc: Employee Personnel File  
Assistant Director for Personnel  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)  
Agency Personnel Manager (or officer)

Form 3.17

Order for Medical Examination – Option No. 1

Section 3.8.3

SSN: \_\_\_\_\_

Ms. Susan Hurts  
34 East Coulter  
Phoenix, Arizona 85000

Dear Ms. Hurts:

On August 15, 1986, I was informed by your immediate supervisor that while on state business at Arizona State University on August 14, 1986, you received injuries to your arms which required suturing. Upon further investigation, I learned that the injury was a result of your fainting and falling into a thorny bush. When I spoke with you on August 15, 1986 concerning the incident, you advised me that the fainting was a result of cardiac irregularity and that you were on medication. Since that date, I have been informed of other fainting occurrences in the office on July 14 and August 4, 1986.

I am concerned about your well-being as well as the safety of others.

The state service recognizes and addresses a method whereby an employee is helped under these circumstances. This policy provides for the referral of an employee for medical examination at the expense of the agency with no charge to the employee's sick or annual leave and reimbursement while traveling to and from the examination, as per Rule R2-5-404.D. I hereby request that you see Dr. M. D. Physician, Phoenix Medical Arcade Building, 3002 North 3rd Avenue, Phoenix, Arizona, 85007, for the purpose of obtaining an examination to determine your capabilities to perform your duties. The physician's phone number is \_\_\_\_\_.

At this time, you are not to contact the physician. Your appointment will be arranged for you. Please meet with me on January 9, 1987, at 10:00 o'clock a.m. to discuss your appointment.

The results of the examination will be reported to me and shared only with those that have a need to know and who will assist in resolving this matter. Until a final determination is made, you are restricted from driving either a state vehicle or your own vehicle on state business. In addition, we also recommend that you not drive your vehicle for any purpose.

Sincerely,

John Q. Supervisor

cc: Employee Personnel File  
Agency Personnel Manager (or officer)  
Assistant Director for Personnel  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)

Form 3.18

Order for Medical Examination – Option No. 2

Section 3.8.3

[DATE]

SSN: \_\_\_\_\_

Mr. Richard Employee  
3600 North 7th Avenue  
Phoenix, Arizona 85018

Dear Richard:

It has been brought to my attention by your letter of September 8, 1986 and from my conversation with other staff that serious problems and concerns have developed as to your ability to adequately handle the day-to-day requirements and pressures of a Personnel Analyst II, Grade 19.

As a Personnel Analyst II (Classification Specialist), it is your responsibility to work with various Agency Management personnel to determine proper job titles and salary grades. As you know, this type of duty carries with it a great deal of stress and pressure, especially when your determinations conflict with management's perceptions of what the position should be paid and called. Therefore, we are concerned about your well-being.

The state service recognizes and addresses a method whereby an employee is helped under these circumstances. This policy provides for the referral of an employee for medical examination at the expense of the agency with no charge to the employee's sick or annual leave, and includes reimbursement while traveling to and from the examination, in accordance with R2-5-404.D.

You are directed to schedule an appointment with Dr. M. D. Physician no later than 30 days from the date of this letter. Dr. Physician's office is located at 44 North 6th Street, Phoenix, Arizona, 85007. The physician's phone number is \_\_\_\_\_.

A full mental and physical health diagnosis and prognosis will be given to me as it relates to your day-to-day performance as a Personnel Analyst II. Please note that the results of the examination are to be reported to me and shared only with those who have a need to know and who will assist in resolving this matter.

Form 3.18 - (Continued)

Until a final determination is made, you are restricted from driving either a state vehicle or your own vehicle on state business. In fact, we recommend that you avoid driving your private vehicle for any reason.

It is important that you tend to this immediately. Advise me of the time and date of your appointment as soon as possible. Your failure to follow these instructions will force us to consider formal disciplinary action which could result in your dismissal from the Department of \_\_\_\_\_ under A.R.S. Section 41-770 and the Standards of Conduct for the state service, Department of Administration, Personnel Rule R2-5-501, Standards of Conduct.

Sincerely,

Jane Q. Supervisor

cc: Employee Personnel File  
Agency Personnel Manager  
Assistant Director for Personnel  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)

Requirement for Physician's Statement - Option No. 3

Section 3.8.3

SSN: \_\_\_\_\_

Ms. G. D. Fancy  
77 East Missouri  
Phoenix, Arizona 85000

Dear Ms. Fancy:

It was of deep concern to me that I observed you yesterday at the China Doll Restaurant on 3336 North 7th Avenue at \_\_\_ o'clock \_\_.m.

This is of particular concern to me because on that the same day you called stating you were so incapacitated by your illness that you would not be able to return to work for approximately one week.

As a Clerk Typist II, Grade 09, in the Benefits Section, you assist with the completion of Life, Health, Dental and Disability forms for an Agency with over 2,800 positions.

You are aware that this is a very critical time in this Section because of the insurance open enrollment scheduled for the next two weeks and the additional workload it would cause the other staff due to your absence.

Our normal workload is 300 to 400 documents per month. However, during open enrollment, this workload increases to approximately 800 to 1,000 documents per week in a three week period. Your absences seriously impair the ability of this Section to accomplish its workload objectives.

This is not to imply that your request for sick leave will be denied, but due to the circumstances surrounding your leave, pursuant to Department of Administration Personnel Rule R2-5-404.D, I am requesting a full health diagnosis and prognosis by your current physician. Such a report will be beneficial to both of us in assessing the relationship between your health and work. This should be as complete of a status report on your health as your physician can give.

Sincerely,

John Q. Supervisor

cc: Employee Personnel File  
Agency Personnel Manager (or officer)  
Assistant Director for Personnel  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)

Form 3.20

Health Prognosis Requirement – Option No. 4

Section 3.8.3

[DATE]

SSN: \_\_\_\_\_

Mr. John Doe  
Anywhere Drive  
Phoenix, Arizona 85303

Dear Mr. Doe:

As you know, this Section is under tremendous pressure to complete our "Daily Production Operating Schedule." This pressure has been compounded with the recently added work associated with conversion to a new computer audit system. To meet our commitments it is essential that we have full-time employees able to perform effectively under workloads and pressures associated with our environment.

As a EDP Computer Operator II, Grade 13, you play a key role in data assembly and input, trial quality assurance, data updating and periodic data output reports which enable this Agency's computer audit programs to function. When you are absent, we are seriously and adversely affected in accomplishing our duties and responsibilities. Therefore, we need to address your absences so that we may determine how best to plan our work.

On Wednesday, August 20, 1986, at 7:55 a.m., you telephoned the computer room and informed your immediate supervisor that you had a health problem. She informed me of your call at 8:40 a.m. the same morning. It is my understanding that you have not returned to work because of a health problem (still unknown to us at this time), that you are under a physician's care, that you had an appointment to see your physician sometime Thursday (August 21, 1986), and that until then he has instructed you to stay home. Your immediate supervisor did request that you call me sometime Wednesday (August 20, 1986) in the morning. As of this date, I have not received any form of communication from you. Your health situation is of special concern to me, not only because of other work production consequences, but also because of the possible effects that the work requirements over the next months will have on your health.

Because of these concerns, I would like a written health diagnosis and prognosis from your current attending physician based on your recent series of tests and examinations (as per Department of Administration Rule R2-5-404.D). Such a health report will be beneficial to both of us in assessing the relationship between your health and work. This should be a complete status report on your health, including an assessment of your ability to perform your work responsibilities on a full-time basis in this Section.

Form 3.20 - (Continued)

Please supply the report by     (date)    . Let me know if there are any questions about this report or if you have any difficulty in obtaining the report from your doctor. I will be happy to speak with your doctor about the report, if you wish.

Sincerely,

Jane Q. Supervisor

cc: Employee Personnel File  
Agency Personnel Manager  
Assistant Director for Personnel  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)

Form 3.21

Information Request

(Confidential – for use only by the Attorney General)

Section 3.4

DATE:

TO:

FROM:

Assistant Attorney General  
Employee Relations Section

SUBJECT: (Name)

Date of Hearing  
Our File No. CIV87-

The appellant in the above-referenced matter has filed the attached notice of appeal of the disciplinary action taken by your agency. In order to prepare for the hearing of this matter, please obtain the following information and forward it to me no later than (10 days before hearing):

1. The name, address, title and phone number of your agency's representative who will be responsible for the gathering of all written or other information that will be required for the hearing and who will assist me by attending the hearing.

2. Please have the agency representative take a copy of the disciplinary letter and, for each factual allegation or contention stated in the letter, list the following (paragraph by paragraph):

a. The names of the witness(es) who will testify in support of the allegations in each paragraph, their phone numbers (home and work); and list home or business address, if not a state employee.

b. The written or physical evidence materials (i.e., letters, memos, notes, photographs, agency rules and policies, witness[es]' statements, Performance and Evaluation Reports, investigative reports, transcripts, etc.) that will support or assist in explaining the factual allegations in each paragraph.

c. The name(s), address(es), and phone number(s) (home and work) of any individuals who might have additional information which would assist in the preparation of this case.

d. The name(s), address(es), and phone number(s) (home and work) of any witnesses who have been contacted by the applicant to testify in this matter, if known.

Form 3.21 - (Continued)

3. Please indicate whether the employee was afforded an opportunity to resign in lieu of the disciplinary action which was taken by your agency and whether or not your agency might consider a resignation at this time.

4. Additionally, please furnish the following information:

a. Whether the applicant was given oral or written notice of the charges of misconduct relied upon by the agency to support disciplinary action.

b. If such notice was given orally, indicate who conducted the meeting with the employee/appellant.

c. If pretermination notice of charges was given in writing, provide a copy of the notice and all written responses and/or memoranda reflecting the employee/appellant's answer to the charges of misconduct. If pretermination meetings with the employee/appellant were tape-recorded, please disclose who is in possession of the tape-recording.

5. Provide a response to each allegation in appellant's appeal.

Again, please obtain the above information and forward it to me as soon as possible. Likewise, please have the agency representative contact me if there are any questions.

ENCLS: Agency's letter of disciplinary action  
Employee's appeal  
Notice of hearing

cc: Department of \_\_\_\_\_

Form 3.22

Pre-Dismissal Letter

Section 3.3.4

[DATE]

SSN: \_\_\_\_\_

Employee's Name  
Address

Dear Employee:

This letter is official notice of charge/s of misconduct. Pursuant to Department of Administration Rule R2-5-803.A, the purpose of this letter is:

1. To provide you with notice of allegation/s set forth below. A dismissal is being considered based on these allegations, which constitute cause for disciplinary action as outlined in Arizona Revised Statutes Section 41-770, and DOA Personnel Rule R2-5-501 (Standards of Conduct).

2. To provide you with an opportunity to respond to the allegations and present facts which are pertinent to them.

As an Equipment Mechanic I, Grade 15, you perform mostly passenger car and small pick-up truck tune-ups and general maintenance which includes: changing spark plugs and ignition wires; setting points and/or adjusting distributor timing; changing and/or rotating tires; replacing brake shoes, rotors and/or brake disks; grinding valves and valve seats; replacing gaskets and cylinder heads; changing coolant, belts, etc. You also are responsible for maintaining work orders and for completing these work orders so that work which has been completed will be properly recorded.

The specific charges and explanations are:

On March 7, April 4, May 2, June 6, July 7, August 1, September 5, October 3, November 7 and December 5, 1986, your supervisor asked that you pull, at random, five (5) completed work orders from your work assignment file. He then took your selected work orders and physically reviewed the actual completed work. He found in 78% of the completed work poor quality such as:

1. Actual spark plugs not changed;
2. Oil not changed;
3. Interior of vehicles dirty;

Form 3.22 - (Continued)

4. Tires with wrong air pressures;
5. Vacuum lines cut, new lines placed into inserts thus avoiding the necessity of removing carburetors for complete line replacements;
6. Erroneous dwell settings;
7. Alternator belts with different tensions thus avoiding the necessity of replacing belts; and
8. Reverse brake shoes on hydraulic brakes (two cases).

At the end of each of these random inspections, you were counseled and given correct procedures to follow. Yet you continue to produce very poor work and very dangerous work from a safety viewpoint.

You are directed to submit a written response to each specific allegation and include appropriate documentation to refute the charges. The response is to be delivered to the office of \_\_\_\_\_ at \_\_\_\_\_ (address) , by \_\_\_\_\_ (date and time) .

Sincerely,

cc: Employee Personnel File  
Agency Personnel Manager  
Assistant Director for Personnel,  
Department of Administration  
Civil Division, Attorney General's Office  
(Attn: Employee Relations Section)



CHAPTER 4  
PUBLIC MONIES  
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## CHAPTER 4

### PUBLIC MONIES

4.1 Scope of this Chapter. This Chapter contains a discussion of the law applicable to the receipt, custody, control and expenditure of "public monies" which are defined in A.R.S. § 35-302 as money belonging to, received or held by state officers and employees in their official capacity. That law may be found generally in Articles 3, 4, 5 and 6 of Chapter 1 and Chapter 2, Title 35, Arizona Revised Statutes. This Chapter will deal with revenues raised by operation of state law, monies received from the United States under programs sponsored by the United States and in which the state participates, and monies contributed voluntarily to support the activities of the state and its officers and employees.

#### 4.2 Collection of Revenues Raised by Operation of State Law.

4.2.1 Current Record of Revenues. The Department of Administration is directed in A.R.S. § 35-150 to keep current a detailed list of all sources from which monies accrue to the state. The list must be classified according to the budget units<sup>1/</sup> and other public agencies responsible for the collection of state monies and must show for each of the revenue-collecting agencies the various kinds of taxes, fees, permits and other monies collected or to be collected.

4.2.2 Collection of Fees. A.R.S. § 35-143 requires that fees for licenses, permits and certificates of any kind and all other amounts due to or accruing to the state for services must be collected at the time such licenses, permits or certificates are issued or at the time services are rendered.

4.2.3 Collection of Taxes, Assessments and Claims. A.R.S. § 35-143 also requires that all other monies such as taxes, assessments and claims accruing to the various budget units be collected at the time of accrual or otherwise at the time a claim therefor arises in favor of the state.

4.2.4 Failure to Collect Public Monies. The Department of Administration is empowered under A.R.S. § 35-150 to take any action necessary, including court action, to enforce the collection of state monies. A.R.S. § 35-143 imposes upon any officer or other person who neglects to collect state monies personal liability to the state for the amount not collected. Because the acceptance of checks as payment for fees, taxes, assessments and services has become commonplace, every state officer and employee responsible for collecting state monies should be advised that the state has not been paid money owed to it until a check accepted for payment has been paid by the bank on which the check is drawn. If a check is dishonored and not paid, and if the state ultimately suffers a loss from the nonpayment, the officer or employee who accepted the worthless check when he could have demanded cash may be held liable to the state for the loss. State officers and employees, for their protection, should verify the sufficiency of a check or wait until a check has been paid before taking action that could result in a loss if the check were not paid.

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<sup>1/</sup>The term "budget unit" appears throughout Title 35, Arizona Revised Statutes, and this Chapter. A budget unit is defined in A.R.S. § 35-101(5) as a department, commission, board, institution or other agency of the state organization receiving, expending or disbursing state funds or incurring obligations against the state.

#### 4.3 Deposit of Money Received.

4.3.1 Deposit in State Treasury. Unless a statute specifically provides otherwise, a state officer or employee, promptly upon the receipt of any money, irrespective of its source or the purpose for which it was received, must remit the money to the account of the State Treasurer, who is the custodian of all such money. A.R.S. §§ 35-142 and -146. Without express statutory authority, no state officer or employee may hold, use or deposit any money that he has received in his official capacity in any personal or special bank account. A.R.S. § 35-146.

4.3.2 Pay-In Vouchers and Receipts. The Department of Administration is responsible for issuing to the budget units a form known as a pay-in voucher. The head of each budget unit, or his authorized representative, when depositing money in the state treasury, must prepare the pay-in voucher form in triplicate and present the original to the Treasurer with the money. The Treasurer retains the original, the budget unit forwards the duplicate copy to the Department of Administration and retains the triplicate copy. The pay-in voucher must show the amount of money remitted to the Treasurer, the source of the money and the fund into which the money was paid. A.R.S. § 35-147. Upon receipt of money, the Treasurer issues his receipt and delivers a duplicate to the Department of Administration. A.R.S. § 35-142(B).

#### 4.4 Disposition of Monies Received into the State Treasury.

4.4.1 General Fund. A.R.S. § 35-142 provides that all monies "received for and belonging to the state" shall be credited to the general fund which, according to A.R.S. § 35-141, consists of "all money received into the state treasury except money designated by law for other statutory funds or other specifically designated purposes." According to A.R.S. § 35-148(B), when money belonging to the state comes into the possession of a state officer, by recovery at law or otherwise, and no provision of law exists for disposition of the money, it must be delivered to the State Treasurer and placed in the general fund.

4.4.2 Separate Statutory Funds and Accounts. A.R.S. § 35-142 provides generally the separate funds and accounts into which monies received into the state treasury shall be credited. For example, principal, interest, rentals and other money received as income from federal land grants must be placed in separate funds and accounts. Likewise, all private and quasi-private monies authorized to be paid to or held by the Treasurer are required to be placed in separate accounts. All monies collected by the Game and Fish Department are deposited in the "State Game and Fish Protection Fund." A number of regulatory agencies are funded through special state funds as prescribed in the statutes establishing such agencies. Under A.R.S. § 35-142(A)(7), such funds are not considered a part of the general fund.

4.4.2.01 Statutory Revolving Funds. A number of agencies are funded wholly or partially through separate statutory funds in the treasury known as revolving funds. Under such a scheme, certain designated monies collected by a budget unit are credited to the revolving fund upon their being paid to the Treasurer. Use of the monies in a revolving fund is limited to the purposes delineated by the statute establishing the fund. For example, A.R.S. § 6-135 establishes a banking department revolving fund to be administered by the Superintendent of Banks. Under that statute, investigative costs, attorneys' fees and civil penalties recovered for the state in actions brought under Title 6,

Arizona Revised Statutes, are deposited in the banking department revolving fund where they are held for use by the Superintendent of Banks and the Attorney General for investigative proceedings and for pursuing civil actions brought to enforce Title 6.

4.4.3 Federal Monies. All monies granted and paid to the state by the United States must be accounted for in the accounts or funds of the state in the necessary detail to meet federal and state accounting, budgetary and auditing requirements. A.R.S. § 35-142(C).

4.4.3.01 Reimbursement from Federal or Other Monies. When state monies are appropriated to a budget unit for a specific program and are to be reimbursed in whole or in part from federal monies or other monies, as noted in the appropriation act authorizing the expenditure of the state monies, the budget unit, upon receipt of the reimbursement, is required by A.R.S. § 35-142.01 to deposit the money with the State Treasurer to the credit of the general fund or the fund from which the appropriation originally authorized an expenditure.

4.4.4 Private Monies, Contributions and Suspense Funds. A budget unit may receive private monies or contributions for its support. A budget unit also may receive other receipts which either may be subject to refund or which have not yet accrued to the state (such "other receipts" being called "suspense funds" because their ultimate disposition is not known at the time of their receipt). When depositing such monies with the State Treasurer, the budget unit must certify to the Department of Administration, on a form furnished by the Department of Administration, the source of the monies, the conditions under which and the purposes for which the monies were received and the name of the person authorized to approve expenditures from the monies. Each such contribution or receipt must be kept entirely separate and apart from all other monies in the state treasury. A.R.S. § 35-149. A budget unit may receive private monies and contributions only for the support of activities that it is statutorily authorized to perform. Ariz. Atty. Gen. Ops. 178-78, 179-247.

#### 4.5 Authorization to Expend Money in the State Treasury.

4.5.1 General and Special Statutory Funds. Money in the general fund and other funds subject to the appropriation power of the Legislature may be paid out of the treasury only pursuant to an appropriation. Ariz. Const. art. IX, § 5; Cockrill v. Jordan, 72 Ariz. 318, 235 P.2d 1009 (1951); Ariz. Atty. Gen. Op. 168-6. A.R.S. § 35-141 provides that salaries of state officers, clerks and employees and all expenses incident thereto shall be paid from the general fund or the respective fund indicated as authorized in the general appropriation act or any other appropriation enacted by the Legislature.

4.5.1.01 Self-Supporting Regulatory Agency Special Funds. A.R.S. § 35-143.01 provides that all monies deposited with the State Treasurer in special agency funds of "self-supporting regulatory agencies" for use by such agencies for administration and enforcement are subject to annual legislative appropriation. For examples of special funds of self-supporting regulatory agencies, see A.R.S. § 32-1406, Board of Medical Examiners Fund, A.R.S. § 32-1907, Board of Pharmacy Fund, or A.R.S. § 32-2205, Veterinary Medical Examining Board Fund. Prior to the enactment of A.R.S. § 35-143.01, many such agencies were authorized by statute to expend the total of the agency's special fund. Ariz. Atty. Gen. Op. 172-9. A.R.S. § 35-143.01(B) now prohibits every special fund self-supporting regulatory agency from expending more than what is authorized annually by legislative appropriation.

4.5.1.02 Statutory Revolving Funds. Moneys in special statutory revolving funds may be expended for the purposes listed in the statutes creating the funds without any further legislative action because the statutes creating such funds also authorize expenditure of the monies in the funds. Such statutory authorizations are deemed to be continuing appropriations. Ariz. Atty. Gen. Op. I72-9. An agency must examine the specific statutes establishing a revolving fund to ascertain what restrictions exist on the agency's authority to make expenditures from the fund.

4.5.1.03 Interagency Services Agreement. Although monies earmarked for a special fund may be received, retained and expended for the purpose for which the fund was established, monies in a special fund retain their separateness only until the time of expenditure. This means that, in the absence of a statute providing to the contrary, any amount paid from one state budget unit to another from a special fund of the former would lose its separate character upon payment to the payee agency and would be credited to the general fund upon receipt by the payee agency. Thereafter, such money could be expended by the payee budget unit only pursuant to a legislative appropriation unless a special fund of the payee agency is designated by law for the purpose for which the money was paid and received or unless the agencies had entered into an interagency services agreement under A.R.S. § 35-148.<sup>2/</sup> Ariz. Atty. Gen. Op. I74-12.

4.5.2 Federal Monies. Moneys from a purely federal source are not subject to the appropriation power of the Legislature. Navajo Tribe v. Arizona Department of Administration, 111 Ariz. 279, 528 P.2d 623 (1974). Therefore, any budget unit authorized by statute to accept and expend federal monies or otherwise to participate in a program that is funded by the United States may expend the federal monies received without regard to a legislative appropriation. However, when state monies are appropriated to a budget unit for a specific program and the appropriation act provides for reimbursement of the state monies from federal monies, the federal monies, when received under such reimbursement circumstances, become state monies thereafter subject to expenditure only when authorized by an appropriation act. A.R.S. § 35-142.01.

4.5.3 Private Monies. If a budget unit is authorized to accept private monies and contributions for the support of its statutory work, it is authorized, without a separate legislative appropriation act, to expend such funds for the purposes for which the monies were received. A.R.S. §§ 35-141, -142 and -149; see Section 4.4.4.

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<sup>2/</sup>A.R.S. § 35-148(A) provides:

Interagency service agreements entered into between budget units may provide for reimbursement for services performed or advancement of funds for services to be performed. In either instance, monies received by the budget unit performing the services shall be credited to its appropriation account for its use in performing the services. If funds are advanced, the agency performing the services shall make an accounting of expenditures and return any advances not used to the appropriation account of the advancing agency.

4.5.4 Suspense Funds. Receipts which may be subject to refund or return to the sender and receipts which have not yet accrued to the state, see Section 4.4.4, are deemed not to be state monies subject to the appropriative power of the Legislature, and, therefore, may be refunded or returned or otherwise appropriately disposed of pursuant to the understanding attaching to their receipt, without a legislative appropriation. See Navajo Tribe v. Arizona Department of Administration, 111 Ariz. 279, 528 P.2d 623 (1974); Section 4.9.1.02

#### 4.6 Authorized Expenditures.

4.6.1 Classification of Appropriations. The Legislature frequently specifies the purposes for which money may be expended and the exact amount that may be expended for each such purpose by dividing into various classes or programs the appropriations authorizing the expenditures of state monies. The common classes are "personal services," "employee related expenses," "outside services," "travel," "other operating expenses" and "equipment." Expenditures must be made in accordance with the classes into which appropriations are divided. A.R.S. § 35-172.

On the other hand, the Legislature sometimes does not so divide appropriations. These undivided appropriations are called "lump sum" appropriations. They authorize a budget unit to expend state money as necessary within the limits of the total appropriation to carry out the budget unit's statutory duties.

4.6.2 Allotment of Appropriations. Before a budget unit may obligate any monies that it is authorized to expend, it must obtain from the Director of the Department of Administration approval of an allotment schedule detailing expenditures for a full fiscal year. The allotment schedule is based on the estimated annual requirement of the budget unit and schedules expenditures to cover the entire fiscal year's operation of the budget unit. A.R.S. § 35-173.

4.6.3 Transfer of Appropriated Funds. If a budget unit determines that the amounts that the Legislature has allocated to the various classes, subclasses or programs in the budget unit's appropriations will not meet its anticipated requirements in those classes, subclasses or programs, the budget unit, with the prior approval of the Director of Department of Administration, may transfer funds from one class or subclass to another, and between and within programs if funds are appropriated to the budget unit by programs. A budget unit may not, however, transfer funds from an appropriation for land, buildings and improvements or transfer funds to or from any appropriation for personal services or employee-related expenditures unless the Joint Legislative Budget Committee recommends the transfer and the Director of Department of Administration approves the transfer. A.R.S. § 35-173. Except as provided in A.R.S. § 35-173 or another statute, neither the Director of the Department of Administration nor the Joint Legislative Budget Committee is authorized to approve or take any other action to acquiesce in an expenditure by a budget unit in a manner inconsistent with the law or the appropriations for the budget unit.

4.6.4 Encumbrance Documents. Budget units are required to issue forms called "encumbrance documents" to cover all obligations, actual or anticipated, except for gross payrolls and related employee expenses of a budget unit and except for expenditures not exceeding \$500.00. Immediately upon a budget unit's becoming aware that an obligation will be or has been incurred, the budget unit must submit copies of encumbrance documents to the Department of Administration for its determination that the budget

unit's proposed expenditure is authorized by appropriation and allotment and does not exceed the unencumbered balance of such allotment. If the encumbrance is satisfactory, it is charged to the applicable appropriation and allotment, the result of which is to set aside from the appropriation the amount of the encumbrance, to be used exclusively for payment of the applicable claim when it is presented. If the Department of Administration finds a proposed expenditure to be contrary to law, the department must notify the head of the budget unit that the proposed expenditure is disallowed. A.R.S. § 35-151.

4.6.5 Public Purpose. Arizona Constitution, article IX, section 7, prohibits the state and its subdivisions from giving or loaning their credit in aid of, or making any donation or grant to, any person or entity. This section of the Constitution prevents governmental bodies from expending public monies to give advantage to special interests or to engage in nonpublic enterprises. Either objective may be violated by a transaction even though that transaction has surface indicia of public purpose, if the value to be received by the public is exceeded by the consideration being paid by the public. Wistuber v. Paradise Valley Unified School District, 141 Ariz. 346, 687 P.2d 354 (1984). Whether article IX, section 7 bans a particular transaction depends upon the circumstances surrounding the transaction. If the head of a budget unit is uncertain whether a proposed expenditure is consistent with article IX, section 7, he should consult the Attorney General.

4.7 Payment of Claims for Authorized Expenditures. This section deals with the payment of claims of those who have sold goods or who have rendered services to the state. A claim is "a demand against the state for payment of goods delivered or services performed." A.R.S. § 35-101(6). Payment of a claim is accomplished only through the payment of a warrant issued by the Department of Administration. A.R.S. § 35-142(B) provides that money may be withdrawn from the state treasury only for payment of such a warrant. Prior to the issuance of that warrant, a budget unit and a claimant must satisfy the statutory procedures prescribed for the payment of contractual obligations of the state.

4.7.1 Presentation of Claims. A.R.S. § 35-181.01 provides that all claims against the state for obligations authorized, required or permitted to be incurred by a budget unit are to be paid in accordance with procedures prescribed by the Director of the Department of Administration in the "Accounting Manual." Those procedures include the presentation to the Department of Administration of a claim form appropriate to the type of claim signed by the claimant and certified by the budget unit incurring the obligation. A.R.S. § 35-182. A.R.S. § 35-181.01 also permits a claim that has been made and approved contrary to the procedures established by the Director of Department of Administration, in the absence of fraud or bad faith, to be amended at any time during the fiscal year in which it originally was submitted so as to conform the claim to the requirements of the Director. A person may not submit a claim prior to the time that the state has received the goods or services for which the claimant seeks payment. Ariz. Atty. Gen. Op. I86-050.

4.7.2 Audit and Settlement of Claims. The Director of the Department of Administration is required by A.R.S. § 35-181.02 to audit, adjust and settle the amount of all claims against the state payable from funds of the state, unless another statute expressly authorizes some other officer to perform those functions. In auditing a claim, the Director of the Department of Administration must determine whether funds are available for payment and whether the claim form is signed by the appropriate budget unit

representative. The Director of the Department of Administration is required to establish procedures for the return and resolution of any claim for which funds are not available or the payment of which would be contrary to law.

4.7.3 Issuance and Payment of Warrants. After approval of a claim, the Director of the Department of Administration issues his warrant to the claimant. A warrant of the Department of Administration authorizes the State Treasurer to disburse monies in the state treasury in the amount set forth in the warrant. The State Treasurer is obligated to accept such warrants and to issue his check on a state depository bank in payment for the warrants. A.R.S. § 35-185. If the state treasury lacks sufficient monies to pay a warrant presented to the Treasurer, the State Treasurer must issue, in lieu of his check, a treasurer's warrant note equal to the face value of the warrant. A.R.S. § 35-185.01. No warrant upon the state treasury may be paid after two years from the date of issue. A.R.S. §§ 35-187; -184(B). The Director of the Department of Administration is authorized to issue duplicate warrants to replace those lost or destroyed prior to payment or not presented for payment within the time specified on the face of the warrant under procedures established by the Director of the Department of Administration for the issuance of duplicate warrants. A.R.S. § 35-186.

4.7.4 Payment of Obligations Incurred During Fiscal Year After Close of Fiscal Year. The Department of Administration is authorized to issue warrants against the available balances of appropriations made for a fiscal year for a period of one month after the close of such fiscal year for payment of obligations incurred during the fiscal year for which the appropriations were made and for fulfillment of contracts properly made during such fiscal year, as determined by the Director of the Department of Administration. A.R.S. § 35-190; Arizona Board of Regents v. Arizona York Refrigeration Co., 115 Ariz. 338, 565 P.2d 518 (1977); Ariz. Atty. Gen. Op. I70-18.

4.8 Lapsing of Appropriations. After expiration of the one month period discussed in Section 4.7.4, all balances of annual appropriations for the prior fiscal year lapse, and no further payments may be made under the authority of such lapsed appropriations, except as specifically provided for particular funds or appropriations and for administrative adjustment. A.R.S. § 35-190. Appropriations for construction or other permanent improvements do not lapse unless the purpose for which the appropriation was made has been accomplished or abandoned or the appropriation was available for an entire fiscal year without an expenditure from or an encumbrance on the appropriation. A.R.S. § 35-190(D). A.R.S. § 35-190, respecting the lapsing of appropriations, is not applicable to federal monies or the remaining balance of any special fund, private fund or suspense fund at the close of a fiscal year unless a statute specifically provides otherwise. A.R.S. § 35-190(E); Ariz. Atty. Gen. Op. I75-121.

#### 4.9 Administrative Adjustment of Claims.

##### 4.9.1 Claims Subject to Administrative Adjustment.

##### 4.9.1.01 Contract Claims.

4.9.1.01.1 Untimely Filed or Technically Defective Claims. A contract claim against the state that has not been paid because of a claimant's failure to file the claim within the time prescribed by law, or because of any other technical defect not affecting the validity of the contract or the state's liability under the contract, is subject to administrative adjustment. A.R.S. § 35-191.

**4.9.1.01.2 Claims for Goods or Services Received in Subsequent Fiscal Years.**

A claim arising from the procurement of goods or services that were ordered during one fiscal year but not received or performed until the next succeeding fiscal year is subject to administrative adjustment upon approval of the Director of the Department of Administration. A.R.S. § 35-191(A).

**4.9.1.01.3 Claims Arising from Administratively Determined Liability.**

A contract claim against the state that has not been paid because the state's liability on the claim cannot be determined until after the fiscal year during which the contract was made is subject to administrative adjustment when the state's liability is resolved administratively. A.R.S. § 35-191(F).

**4.9.1.02 Refunds.** A claim for refund of any fee, license, permit or erroneous payment, the revenue from which has been placed in a separate fund, or the general fund, is subject to administrative adjustment if another statute does not provide specifically for a refund. A.R.S. § 35-191(E).

**4.9.2 Payment of Claims Subject to Administrative Adjustment.**

**4.9.2.01 Contract Claims Not Exceeding \$300.00.** If a contract claim as described in Section 4.9.101.1 or 4.9.101.2 not exceeding \$300.00 from a prior fiscal year is presented to a budget unit for payment by June 30 of the fourth fiscal year following the fiscal year in which the claim accrued, the budget unit, upon determining that payment is in the best interest of the state and obtaining the approval of the Director of the Department of Administration, may certify the claim for payment from an available current year appropriation to the budget unit. A.R.S. § 35-191(D).

**4.9.2.02 Contract Claims Exceeding \$300.00 from the Prior Fiscal Year.** If a contract claim as described in Section 4.9.101.1 or 4.9.101.2 exceeding \$300.00 is presented to the Director of the Department of Administration within one year following the fiscal year in which the claim accrued, and if a balance sufficient to pay the claim remains in the lapsed appropriation applicable to the claim, the Director, upon his approval of the claim, is directed to draw a warrant to pay the claim from the fund to which the lapsed appropriation reverted. A.R.S. § 35-191(B).

**4.9.2.03 Contract Claims Exceeding \$300.00 and More than One Fiscal Year Old.** If a contract claim as described in Section 4.9.101.1 or 4.9.101.2 exceeding \$300.00 is presented to the Director of the Department of Administration more than one fiscal year, but less than four fiscal years, following the fiscal year in which the claim accrued, and if a balance sufficient to pay the claim remains from the lapsed appropriation applicable to the claim, the Director is directed to present the claim to the Legislature for an appropriation authorizing payment. A.R.S. § 35-191(C).

**4.9.2.04 Contract Claims Arising from Administratively Determined Liability.** A contract claim as described in Section 4.9.101.3 upon administrative determination of the state's liability thereon is payable from the appropriation for the fiscal year in which the liability is determined in accordance with procedures established by the Department of Administration. A.R.S. § 35-191(F).

**4.9.2.05 Refunds.** If a claim for refund of any fee, license, permit or erroneous payment is approved, payment is made from any unexpended or unappropriated balance in the fund in which the revenue to be refunded was placed. A.R.S. § 35-191(E).

#### 4.9.3 Claims Not Subject to Administrative Adjustment.

4.9.3.01 Claims for Damages for Injury to Person or Property. A claim for damages for injury to a person or property is not subject to administrative adjustment. A.R.S. § 35-191(H). Such a claim is subject to payment only as provided in Article 2, Chapter 7, Title 12, Arizona Revised Statutes, entitled "Actions Against Public Entities or Public Employees." See Chapter 15.

4.9.3.02 Contract Claims More than Four Fiscal Years Old. A contract claim for goods or services received four fiscal years or more prior to the presentation of the claim is not subject to administrative adjustment. A.R.S. § 35-191(H). A claimant's only recourse in such a situation is to petition the Legislature to enact a special appropriation act for the claimant's relief.

4.9.3.03 Claims Against Insufficient Lapsed Appropriations. If the balance remaining in a lapsed appropriation applicable to a claim described in Section 4.9.2.02 or 4.9.2.03, that otherwise would be subject to administrative adjustment, is not sufficient to pay the claim, the claim may not be paid through administrative adjustment. The claimant's only recourse respecting such a claim is to petition the Legislature to enact a special appropriation act for the claimant's relief.

4.10 Claims for Which No Appropriation Made. In all instances in which the law recognizes a claim for money against the state, but for the payment of which the Legislature has not enacted an appropriation, the claimant may present the claim to the Department of Administration, which shall audit and adjust the claim and, if approved, give the claimant a certificate of the amount of the claim and report it to the next succeeding regular session of the Legislature. A.R.S. § 35-189.

#### 4.11 Unauthorized Obligations and Illegal Expenditures of Public Money.

4.11.1 Close of Fiscal Year. Except as provided in A.R.S. §§ 35-190 and -191, after the close of a fiscal year, a state budget unit may not take any action to incur an obligation or make an expenditure under any appropriation made by the Legislature solely for such closed fiscal year. See Sections 4.7.4, 4.8 and 4.9.

4.11.2 No Public Purpose. See Section 4.6.5.

4.11.3 Lack of Appropriation. A.R.S. § 35-154 provides that no person shall take any action that would result in an obligation against the state or the expenditure of public monies unless the Legislature has authorized the obligation or expenditure by an appropriation. Moreover, A.R.S. § 35-154 makes an obligation incurred without authorization null and void and incapable of ratification by any executive authority.

4.11.4 Illegal Expenditures. A.R.S. § 35-154 makes an expenditure made without authorization an illegal act resulting in the joint and several liability to the state official authorizing or approving the payment and the person receiving the payment. A.R.S. § 35-196 imposes upon any state officer or employee who illegally withholds, expends or otherwise converts any state money to an unauthorized purpose individual liability for the amount of the money plus a penal sum of 20% of the amount. Either the Director of the Department of Administration or the Attorney General may institute an action against the erring officer or employee. See also Sections 4.12 and 4.13.

4.12 Recovery of Public Monies Illegally Paid. A.R.S. § 35-211 provides that any person who, acting under authority, approves, audits, allows or pays, or consents to, or connives at, approving, auditing, allowing or paying a claim or demand against the state not authorized by law, such person and the person in whose favor the claim or demand was made, are liable for the illegal payment plus 20% of such amount and interest at the legal rate. The Attorney General or, upon the Attorney General's failure to act for 60 days after being requested to do so, a taxpayer of the state may institute an action to enjoin the illegal payment, or if the money has been paid, to recover the money plus 20% of the amount and interest and costs. A.R.S. §§ 35-212 and -213. For this purpose A.R.S. § 35-212(B) defines public money as "all monies coming into the lawful possession, custody or control of state agencies, boards, commissions or departments or a state officer, employee or agent in his official capacity, irrespective of the source from which, or the manner in which, the monies are received."

4.13 Custodians of Public Money. A.R.S. § 35-301 provides that a public officer or other person responsible for the receipt, safekeeping, transfer or disbursement of public money is guilty of a class 4 felony and is disqualified from holding public office if such officer:

1. Without authority of law, appropriates it to his own use or to the use of another;
2. Knowingly loans it;
3. Knowingly fails to keep it in his possession until disbursed or paid out lawfully;
4. Without statutory authority knowingly deposits it in a bank, or with a banker or other person, except on special deposit for safekeeping;
5. Knowingly keeps a false account, or makes a false entry or erasure in an account of or relating to the public money;
6. Alters, falsifies, conceals, destroys or obliterates such an account with intent to defraud or deceive;
7. Knowingly refuses or omits to pay over, on demand, public monies in his hands, upon presentation of a draft, order or warrant drawn upon such money by competent authority;
8. Knowingly omits or refuses to transfer the money when a transfer is required by law;
9. Knowingly transfers the money when not authorized or directed by law; or
10. Knowingly omits or refuses to pay over to an officer or person authorized by law to receive it, money received by the officer when the law imposes a duty to pay over the money.

**CHAPTER 5**  
**PURCHASING**  
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CHAPTER 5  
PURCHASING

5.1 Scope of this Chapter. This Chapter generally reviews the law applicable to the expenditure of public monies by the state and its agencies for the acquisition of materials, services and construction. This Chapter also reviews the law applicable to the disposal of state materials. This Chapter does not consider acquisitions by school districts or other political subdivisions of the state and does not resolve all technical questions that may arise in the procurement process. This Chapter also does not consider the procurement of real property or the leasing of space. This Chapter will focus principally on the Arizona Procurement Code, A.R.S. §§ 41-2501 to -2652, and the Department of Administration rules, A.A.C. R2-7-101 to -1008, implementing the Code.

5.2 General Provisions and Applicability of the Procurement Code.

5.2.1 Scope of the Procurement Code. Unless a specific statutory exception applies, the Procurement Code applies to any expenditure of public monies<sup>1/</sup> by any state governmental unit<sup>2/</sup> under any contract<sup>3/</sup> for the procurement<sup>4/</sup> of materials,<sup>5/</sup> services<sup>6/</sup> and construction.<sup>7/</sup>

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<sup>1/</sup>See Chapter 4 for discussion of public monies. In the context of the Procurement Code, a public officer or employee should consider any money that is in his custody in his official capacity to be public money.

<sup>2/</sup>The term "state governmental unit" is defined in A.R.S. § 41-2503(19) as "any department, commission, council, board, bureau, committee, institution, agency, government corporation or other establishment or official of the executive branch or corporation commission of this state."

<sup>3/</sup>The term "contract" is defined in A.R.S. § 41-2503(4) as "all types of state agreements, regardless of what they may be called, for the procurement of materials, services or construction or the disposal of materials."

<sup>4/</sup>The term "procurement" is defined in A.R.S. § 41-2503(15) as "buying, purchasing, renting, leasing or otherwise acquiring any materials, services or construction. Procurement also includes all functions that pertain to the obtaining of any material, service or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration."

<sup>5/</sup>The term "materials" is defined in A.R.S. § 41-2503(13) as "all property, including equipment, supplies, printing, insurance and leases of property, but does not include land, a permanent interest in land or real property or leasing space."

<sup>6/</sup>The term "services" is defined in A.R.S. § 41-2503(18) as "the furnishing of labor, time or effort by a contractor which does not involve the delivery of a specific end

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5.2.2 Department of Administration's Responsibility for Procurement and Disposal. Except as specifically provided otherwise by statute, the Legislature has delegated to the Director of the Department of Administration the sole authority and responsibility for procurement and disposal. The Director of the Department of Administration in turn has adopted rules governing (a) the procurement of all materials, services and construction needed by the state; (b) the management of all inventories of materials belonging to the state; (c) the sale, trade and other disposal of surplus materials belonging to the state; and (d) the inspection, testing and acceptance of materials, services and construction.

5.2.2.01 Delegation of Department of Administration's Authority to State Governmental Units. A.R.S. § 41-2512 authorizes the Director of the Department of Administration to delegate procurement authority to any state governmental unit. The Director has done so pursuant to A.A.C. R2-7-201 and -202. The delegations have been both general and limited depending upon the capabilities of the state governmental unit seeking a delegation of procurement authority. Delegations must be in writing.

5.2.3 State Governmental Unit's Responsibility for Procurement of Services of Clergy, Certified Public Accountants, Lawyers, Physicians and Dentists. Under A.R.S. § 41-2513(A), the Legislature has delegated to each state governmental unit the authority to contract on its own behalf for the services of clergy, lawyers, when authorized by A.R.S. § 41-192(E), certified public accountants, physicians and dentists. A state governmental unit's procurement of such services must be performed in the manner required by the Procurement Code and the rules of the Director of the Department of Administration.

5.2.3.01 State Governmental Unit's Procurement of Legal Services. Under A.R.S. § 41-192(E), a state governmental unit is prohibited from procuring legal services from anyone other than the Attorney General except when a statute so authorizes, or when the Attorney General is not able to provide legal services and the lack of such services will prevent the governmental unit from performing a statutorily mandated duty. In the limited instances when a state governmental unit is authorized to procure legal services outside of the Attorney General's office, the Legislature has provided that the state governmental unit may do so only in compliance with the procurement requirements of the Procurement Code and with the approval of the Attorney General.

5.2.3.02 State Governmental Unit's Procurement of Services of Certified Public Accountants. Unless a statute provides otherwise, a state governmental unit may procure the services of a certified public accountant for financial and compliance auditing

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6/ (Continued)

product other than required reports and performance. Services does not include employment agreements or collective bargaining agreements."

7/"Construction" is defined in A.R.S. § 41-2503(3) as "the process of building, altering, repairing, improving or demolishing any public structure or building, or other public improvements of any kind to any public real property. Construction **does not** include the routine operation, routine repair or routine maintenance of **existing** structures, buildings or real property."

only upon approval of the Auditor General. The Auditor General is required to insure that such contract audits are conducted in accordance with generally accepted governmental auditing standards. An audit may not be accepted until it has been approved by the Auditor General.

5.2.4 Procurement by State Governmental Units Exempted from the Procurement Code and Separately Authorized to Purchase. The Legislature has exempted the Arizona Board of Regents, the State Compensation Fund, the Legislative Department and the Judicial Department of the state government from the Procurement Code; however, the Legislature has directed the Arizona Board of Regents and the Judicial Department to adopt rules substantially equivalent to the Procurement Code prescribing procurement policies and procedures for themselves and the institutions under their jurisdiction. A governmental unit that is exempt from the Procurement Code and is authorized to engage in procurement without complying with rules that are substantially equivalent to the Procurement Code is obliged to act in utmost good faith and in the best interests of the state in connection with every procurement. This is a fiduciary obligation that every state officer and employee owes to the citizens and taxpayers of the state. Brown v. City of Phoenix, 77 Ariz. 368, 272 P.2d 358 (1954); Osborn v. Mitten, 39 Ariz. 372, 6 P.2d 902 (1932).

In the opinion of the Attorney General competitive bidding should be employed in any procurement; the Attorney General's experience is that lack of competition in procurement generates abuse, results in favoritism and usually results in higher costs. Ariz. Atty. Gen. Op. I75-11.

5.2.5 Specific Procurements Exempted from the Procurement Code. The Legislature has exempted from the requirements of the Procurement Code certain specific procurements enumerated in A.R.S. § 41-2501. Any procurement not specifically exempted in A.R.S. § 41-2501 is governed by the Procurement Code. With respect to those exempted procurements, the Legislature has provided in A.R.S. § 41-2501(N) that the head of a governmental unit has the same authority to adopt rules, procedures or policies as is delegated to the Director of the Department of Administration in the Procurement Code. With respect to those exempted procurements, a governmental unit is obliged to act in utmost good faith and in the best interests of the state. This is a fiduciary obligation that every state officer and employee owes to the citizens and taxpayers of the state. The Attorney General thinks that competitive bidding should be employed in connection with these exempted procurements because lack of competition in procurement generates abuse, results in favoritism and usually results in higher costs. Ariz. Atty. Gen. Op. I75-11.

5.2.5.01 Design and Operation of the Lottery. The Legislature has exempted from the requirements of the Procurement Code procurement relating to the design and operation of the lottery and procurement of lottery equipment, tickets and related material, but has directed the Executive Director of the Lottery Commission to promulgate rules respecting such procurement substantially equivalent to the Procurement Code.

5.2.5.02 Arizona Health Care Cost Containment System Provider Contracts. The Legislature has exempted from the requirements of the Procurement Code the procurement of Arizona Health Care Cost Containment System provider contracts authorized in A.R.S. § 36-2904(A).

5.2.5.03 Arizona Industries for the Blind's Procurement of Finished Goods and Raw Materials. The Legislature has exempted from the requirements of the Procurement Code Arizona Industries for the Blind's procurement of finished goods from members of National Industries for the Blind and procurement of raw materials to be used in the manufacture of products for sale under programs operated or supported by the Department of Economic Security for the training and employment of blind persons.

5.2.5.04 Arizona Correctional Industries' Procurement of Raw Materials. The Legislature has exempted from the requirements of the Procurement Code the Arizona Correctional Industries' procurement of raw materials to be used in the manufacture of products for sale to the state, a political subdivision or to the public.

5.2.5.05 Construction of Transportation and Highway Facilities. The Legislature has exempted from the requirements of the Procurement Code procurement by the State Transportation Board and the Director of the Department of Transportation for engineering services, construction and reconstruction relating to transportation and highway facilities.

5.2.5.06 Arizona Highways Magazine. The Legislature has exempted from the requirements of the Procurement Code contracts for the promotion, distribution and sale of Arizona Highways Magazine and related products and for sole source creative works.

5.2.5.07 Publication and Sale of Administrative Code. The Legislature has exempted from the Procurement Code contracts entered into by the Secretary of State for the printing of the Administrative Code.

5.2.5.08 Professional Witnesses in Judicial Proceedings. The procurement of services of professional witnesses is exempt from the Procurement Code if the purpose of the procurement is to obtain professional services relating to an existing or probable judicial proceeding in which the state is or may become a party.

5.2.5.09 Special Investigative Services for Law Enforcement Purposes. The procurement of special investigative services for law enforcement purposes is exempt from the Procurement Code.

5.2.5.10 Settlement of Litigation. The Legislature has exempted from the Procurement Code agreements negotiated by legal counsel representing the state in settlement of litigation or threatened litigation.

5.2.5.11 Department of Economic Security Provider Contracts. The Procurement Code is not applicable to the Department of Economic Security's procurement of state-licensed or state-certified providers of child daycare services or family foster care services. The Procurement Code also is not applicable to Department of Economic Security contracts with area agencies on aging created pursuant to the Older American Acts of 1965, 42 U.S.C. § 3001.

5.2.5.12 Physician Services at Arizona State Hospital. The procurement of the services of physicians at the Arizona State Hospital is exempt from the Procurement Code.

5.2.5.13 Public Safety Personnel Retirement System. The procurement of materials and services by the Fund Manager of the Public Safety Personnel Retirement System is exempt from the Procurement Code.

5.3 Procurement Code Procedures. The Procurement Code provides for various procedures and requirements depending upon the nature and amount of materials, services or construction to be procured.

5.3.1 Materials and Services Under Existing Arizona State Contracts. State governmental units must purchase their requirements for the materials and services that are covered by Department of Administration Arizona State contracts. If a particular Arizona State Contract does not satisfy a governmental unit's needs, the governmental unit may not otherwise procure the required material or service without written approval from the State Purchasing Administrator. A.A.C. R2-7-311. A governmental unit should consult the State Purchasing Office if in doubt.

5.3.2 Purchases not Exceeding \$10,000 in the Aggregate. A.R.S. § 41-2535 authorizes the Director of the Department of Administration to promulgate procedures governing a procurement that does not exceed an aggregate dollar amount of \$10,000. Those procedures appear in the Administrative Code, A.A.C. R2-7-336, which requires verbal or written quotations, depending on the dollar amount, in order to satisfy the statutory requirement that purchases not exceeding \$10,000 be made with such competition as is practicable under the circumstances. The person with purchasing authority must make a good faith estimate of a procurement's aggregate dollar amount in order to determine whether the procurement is governed by the Department of Administration rule on purchases under \$10,000 or by the methods described in A.R.S. §§ 41-2533, Competitive Sealed Bidding, -2534, Competitive Sealed Proposals, -2538, Competitive Selection Procedures for Certain Professional Services, or other sections of the Procurement Code. Procurement requirements shall not be artificially divided or fragmented to circumvent the procedures requirements for purchases exceeding \$10,000.

5.3.3 Sole Source Procurement. A.R.S. § 41-2536 authorizes the awarding of a contract for a required material, service or construction item without competition if the Department of Administration determines in writing that there is only one source for the required material, service or construction item. A.A.C. R2-7-338 prohibits a sole source procurement in the absence of clear and convincing evidence that there is only one source. A governmental unit requesting such a procurement is required to provide written evidence to support a sole source determination. A written determination of the basis for the sole source procurement must be included in the contract file. However, A.R.S. § 41-2536 also provides explicitly that "[s]ole source procurement shall be avoided, except when no reasonable alternative sources exist."

5.3.4 Emergency Procurement. A.R.S. § 41-2537 and A.A.C. R2-7-339 and -340 authorize a procurement without complying with the usual requirements when there is a threat to public health, welfare, or safety or a situation making compliance with the two primary bidding statutes, A.R.S. §§ 41-2533 and -2534, impracticable, unnecessary or contrary to the public interest. An emergency procurement must be accomplished with the amount of competition that is practicable in the circumstances, a written determination of the basis of the emergency and the method of selecting the particular contractor documented in the contract file. A governmental unit, other than the Department of Administration, must obtain Department of Administration approval prior to engaging in an emergency procurement.

5.3.5 General Procurement of Material and Services. The principal method provided in the Procurement Code for the general procurement of material and services is competitive sealed bidding. A.R.S. §§ 41-2532 and -2533. The State Purchasing

Administrator, under A.A.C. R2-7-325, may determine in writing that competitive sealed bidding is either "not practicable or not advantageous to the state," in which case competitive sealed proposals, pursuant to A.R.S. § 41-2534, may be solicited. Generally, the competitive sealed proposal method is used to obtain outside professional services not governed by A.R.S. § 41-2538. See Section 5.3.6 for a discussion of A.R.S. § 41-2538. The competitive sealed proposal method cannot be used for obtaining construction services which are governed by A.R.S. §§ 41-2571 to -2578 and discussed in Section 5.3.7.

5.3.5.01 Competitive Sealed Bidding. A.R.S. § 41-2533 and A.A.C. R2-7-301 to -370 describe the procedures to be followed in competitive sealed bidding. Either the State Purchasing Administrator (Department of Administration) or another state governmental unit, if authorized, issues an Invitation for Bids ("IFB") describing what is to be purchased, the form of contract to be entered into by the successful bidder and the conditions of the procurement. The public must receive notice of the IFB at least 14 days before the bid is opened, A.A.C. R2-7-313, and the notice must be published twice for procurement of a service other than those described in A.R.S. §§ 41-2513 and -2578. The purchasing authority is required to mail or otherwise furnish the IFB, or notice thereof, to all prospective bidders registered at the State Purchasing Office for the specific material or service being bid. The bids must be opened in public and no bid may be inspected by the public or by other bidders until an award has been made. Bids must be evaluated solely upon the criteria set out in the IFB. The award must be made to the "lowest responsible and responsive bidder whose bid conforms in all material respects" to the IFB. A.R.S. § 41-2533(G).

5.3.5.01.1 Contents of the Invitation for Bids. An IFB must include the information listed in A.A.C. R2-7-313.B which includes instructions, evaluation criteria, contract terms and factors to be used in bid evaluation. An invitation for bids must include specifications: a description of the physical or functional characteristics or the nature of a material or service. A specification may include a description of any requirement for inspecting, testing or preparing a material or service for delivery. Bid specifications are required to "promote overall economy for the purposes intended and encourage competition in satisfying this state's needs and shall not be unduly restrictive." A.R.S. §§ 41-2565 and -2566. Because of this philosophy, proprietary specifications — those specifications which identify a product by brand name or which are so restrictive as to exclude all but a brand name product — are prohibited. See A.A.C. R4-7-401 to -411. As specifically stated in A.A.C. R2-7-404.B.5:

A solicitation that uses a Brand Name or Equal Specification shall explain that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition. The solicitation shall state that products substantially equivalent to those brands designated shall qualify for consideration.

Familiarity with a particular product, or a brand name product's past success, or the inconvenience of drawing specifications, under no circumstance justifies the use of proprietary specifications.

5.3.5.01.2 Bid Evaluation and Award. Under the competitive sealed bidding procedure, a state governmental unit shall award a contract to the lowest responsible and responsive bidder whose bid meets the requirements and evaluation criteria set forth in the Invitation for Bids. A responsive bidder is one who submits a bid that conforms in all material respects to the Invitation for Bids. A bidder who takes exception to a mandatory specification in an Invitation for Bid is not a responsive bidder and the procuring governmental unit must reject that bidder's nonresponsive bid. Ariz. Atty. Gen. Op. 178-94. Bids shall be evaluated to determine which bidder offers the lowest cost to the state in accordance with the evaluation criteria set forth in the Invitation for Bids. Only objectively measurable criteria that are set forth in the Invitation for Bids shall be applied in determining the lowest bidder. A record showing the basis for determining the successful bidder shall be retained in the procurement file.

5.3.5.02 Competitive Sealed Proposals. Only if the State Purchasing Administrator determines in writing that competitive sealed bidding is "not practicable or not advantageous to this state," may competitive sealed proposals be solicited. A.R.S. § 41-2534(A). Competitive sealed proposals may not be used in soliciting a contractor for a construction project. The notices which are to be given to the public when a Request for Proposal ("RFP") is issued are the same as those notices required for competitive sealed bidding described in Section 5.3.5.01.1 above and shall include the items listed in A.A.C. R2-7-326. Proposals must be opened in public; however, their contents, including price, must remain confidential from other proposers and from the public until an award is made in order that the negotiation process will not be prejudiced. The RFP must state the relative importance of price and other evaluation factors. After the first round of proposals, the procurement officer is allowed to discuss the proposals with those offerors whose proposals meet the requirements of the RFP for two purposes: to obtain clarification and to allow revisions for obtaining best and final offers. An award must be made which is "most advantageous to this state" based upon the RFP evaluation factors. A.R.S. § 41-2534(G). The basis of the award must be described in the contract file. A.A.C. R2-7-330, -331 and -332.

5.3.6 Procurement of Professional Services of Clergy, Certified Public Accountants, Legal Counsel, Physicians and Dentists. A state governmental unit in need of the services of clergy, certified public accountants, attorneys, physicians or dentists must procure such services in accordance with the provisions of A.R.S. § 41-2538. A.R.S. § 41-2538 authorizes the procurement of such services under A.R.S. § 41-2535 (procurements not exceeding \$10,000, see Section 5.2); A.R.S. § 41-2536 (sole source, see Section 5.2); A.R.S. § 41-2537 (emergency, see Section 5.2); and under the procedures established in A.R.S. §§ 41-2538 and -2513. Under A.R.S. § 41-2538 the procuring state governmental unit must give notice of its need for such services through a Request for Proposal that describes the services required and lists the type of information and data required of an offeror. The RFP also must contain the evaluation factors that the procuring unit will apply to the proposals when it makes an award. The procuring unit may conduct discussions with offerors to determine their qualifications for further consideration. Discussions shall not disclose any information derived from proposals submitted by other offerors. The award shall be made to the offeror determined in writing to be the best qualified based on the evaluation factors contained in the Request for Proposal at a fair and reasonable compensation. An award may be made without requiring priced proposals; however, if price is included in proposals submitted, an award may not be made solely on the basis of price. See A.A.C. R2-7-341 to -348.

5.3.7 Procurement of Professional Services of Architect, Engineer, Assayer, Geologist, Landscape Architect and Land Surveyor. Except as provided in A.R.S. § 41-2535 for procurements under \$10,000, A.R.S. § 41-2536 for sole source procurements and A.R.S. § 41-2537 for emergency procurements, procurements for the services listed above shall be conducted pursuant to A.R.S. § 41-2578 and A.A.C. R2-7-509 to -515. Awards of contracts for such services shall be based on demonstrated competence and qualifications for the type of services required at a fair and reasonable price. A selection committee appointed by the Director of the Department of Administration for each contract to be awarded shall evaluate the qualifications and conduct discussions with the firms engaged in rendering such services who have submitted a statement of qualifications and performance data. The committee shall select, if possible, the three most qualified firms based on criteria established and published by the selection committee.

5.3.7.01 Negotiated Contract. The procurement officer then may negotiate a contract with the most highly qualified firm at a fair and reasonable price. If the procurement officer is unable to negotiate a satisfactory contract with the most qualified firm, the procurement officer may undertake negotiations with the next most qualified firm in sequence until an agreement is reached or all proposals are rejected.

5.3.7.02 Request for Proposal for Fee. As an alternative procedure to negotiating a contract, the Director of the Department of Administration may invite proposals from qualified firms for evaluation by a committee. The selection committee shall request thereafter that the firms deemed to be the most highly qualified submit a fee proposal. Award shall be made to the responsible offeror whose proposal is determined in writing to be most advantageous to the state based upon the evaluation factors set forth in the RFP and the fee. No other facts or criteria may be used in the evaluation. No contract may be awarded solely on the basis of price.

#### 5.4 General Procurement Requirements.

5.4.1 Responsible Bidder. A contract, irrespective of the procurement procedure applicable thereto, may be awarded only to a responsible offeror. See A.A.C. R2-7-354. A responsible bidder is one who has the capability to perform the contract requirements and the integrity and reliability to assure good faith performance. Considerations for determining whether an offeror is responsible include the offeror's financial, physical, personnel and other resources, including its proposed subcontractors; record of performance and integrity; legal qualification to contract with the state; and whether all necessary information considering responsibility has been supplied. An unreasonable failure to supply information is grounds for determining nonresponsibility. Information supplied by an offeror is confidential and may not be disclosed to any other person or entity, except for law enforcement agencies, without prior written consent of the bidder or offeror. See A.R.S. § 41-2540(B).

Before a bidder or offeror is disqualified from receiving an award on the ground of nonresponsibility, the decision-making authority should contact the Attorney General.

5.4.2 Prequalification of Contractors. Prospective contractors may be prequalified for various types of contracts. When they are prequalified, they have a continuing duty to provide information of material changes that might affect prequalification. A.R.S. § 41-2541.

5.4.3 Conformity of Invitation for Bids or Request for Proposal to Specifications. All bids and proposals must conform in all material respects to the IFB or RFP and the specifications included therein in order for the bid to be considered for award of a contract. The courts have found that minor or insignificant variations from specifications do not prohibit the awarding of a contract, but if a specification is designated as mandatory ("shall"), a variation from such a specification may not be considered as insignificant or minor and may require invalidation of the bid or proposal.

5.4.4 Bid and Contract Security. Depending upon the nature of the performance, need for future protection to the state and specific statutory requirements, various forms of security may be required.

5.4.4.01 Construction Contracts. Bidding, awarding and performance of construction contracts are governed by specific statutory and rule security requirements. A bid on a project exceeding \$10,000 must be accompanied by bid security. A.R.S. § 41-2573. Upon award, a contract performance bond and a payment bond must be provided as specified in A.R.S. § 41-2574. Ten percent of all construction contract payments shall be retained by the state to insure proper performance. A.R.S. § 41-2576. At the option of the contractor, the contractor may provide substitute security in a form authorized by the Director of the Department of Administration. When a construction contract is fifty percent completed, one half of the retainage shall be paid to the contractor if the contractor is progressing satisfactorily. Progress payments under a construction contract can be made only on the basis of a "duly certified and approved estimate of the work performed during a preceding period of time . . . ." A.R.S. § 41-2577.

5.4.5 Cost or Pricing Data. Unless the State Purchasing Administrator determines that it is not advantageous to the state, contractors shall submit cost or pricing data in the following situations: contracts that may exceed \$100,000 that are awarded by competitive sealed proposals, sole source procurement, emergency procurement, and specified professional services where the price is negotiated and other contracts where it is advantageous to the state and where there is a price adjustment to a contract awarded by competitive sealed bidding that will increase the cost by \$100,000. A.R.S. § 41-2543 and A.A.C. R2-7-357 to -361.

5.4.6 Written Contract. A bid in response to an Invitation for Bids, or a proposal in response to a Request for Proposal is an offer to contract upon the terms contained in the Invitation for Bids or Request for Proposal and does not become a contract unless and until it is accepted by the making of an award. In the absence of a provision to the contrary in the Invitation for Bids or Request for Proposal, the contract is formed by the making of the award as distinguished from the formal signing of the contract. For this reason, all the necessary terms and conditions of the contract should be contained in the Invitation for Bids or Request for Proposal. The best way to do this is to attach to the Invitation for Bids or Request for Proposal the form of the contract that will be required to be signed by the successful contractor. Payment for services shall be made only pursuant to a written contract. A.R.S. § 41-2513(D).

5.4.7 Modification, Correction and Withdrawal of Bids. A bidder or offeror may modify or correct or withdraw its bid or proposal if the modification, correction or withdrawal is received before the time and date set for bid or proposal opening. If a modification, correction or withdrawal of the bid is received after the time and date set for bid, it is late, and shall be rejected unless it would have been timely received but for

the action or inaction of state personnel. See A.A.C. R2-7-316, -317 and -328. After the bid opening, a bid mistake based on an error in judgment may not be corrected or withdrawn. After the bid opening, a bid mistake not the result of a judgmental error shall be corrected to the intended bid if the mistake and the intended bid are evident on the face of the bid. A bidder may correct minor informalities if doing so is advantageous to the State. After the bid opening, the Department of Administration may permit a bidder to withdraw a bid if a nonjudgmental mistake is evident on the face of the bid but the intended bid is not evident. After the bid opening the Department of Administration may also permit a bidder to withdraw a bid if the bidder establishes by clear and convincing evidence that the bid contains a nonjudgmental mistake.

5.4.8 Cancellation of Invitation for Bids or Request for Proposal. The authorized procurement officer, when seeking bids or proposals, may cancel the procurement or reject any or all bids or proposals in whole or in part, as specified in the solicitation, if doing so is in the best interests of the state. Each Invitation for Bids and Request for Proposal shall state that the solicitation may be cancelled or bids or proposals rejected. The reasons for the cancellation or rejection must be sent to all persons who received or responded to an Invitation for Bids or Request for Proposal and be made a part of the contract file. See A.R.S. § 41-2539 and A.A.C. R2-7-351 to -353.

5.4.9 Multi-Term Contracts. If the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and money is available for the initial fiscal year of the contract term, contracts for materials or services may be awarded for a period up to 5 years. Contracts may be for more than 5 years upon the Director of the Department of Administration's determination in writing that it would be advantageous to the state. Payment and performance obligations of a contract beyond the fiscal year in which the contract first is executed are subject to the availability and appropriation of money. A.R.S. § 41-2546(A). A multi-term contract should contain a clause providing for its automatic termination without liability whenever the Legislature fails to authorize the expenditure of monies to continue the term of the contract beyond the current fiscal year.

5.4.10 Right to Audit Records. All contracts shall provide that all records relating to the contract shall be subject to inspection and audit by the state for 5 years after completion of the contract and that such records shall be produced at the state offices designated in the contract. A.R.S. §§ 35-214 and -2548.

5.4.11 Conflict of Interest. The state may cancel any contract if any person significantly involved in the contract on behalf of the state is an employee or consultant of the contractor at any time while the contract or any extension of the contract is in effect. A.R.S. § 38-511.

5.4.12 Prohibition Against Discrimination. Contractors must agree to comply with Chapter 9, Title 41, Arizona Revised Statutes (Civil Rights) and Executive Order No. 75-5, entitled "Prohibition of Discrimination in State Contracts - Nondiscrimination in Employment by Government Contractors and Subcontractors."

5.5 Materials Management. The Department of Administration is charged with managing all state materials during their entire life cycle, including the disposition of excess and surplus materials. A.R.S. § 41-2602 and A.A.C. R2-7-802 to -805.

## 5.6 Legal and Contractual Remedies.

5.6.1 Exclusive Remedy. Pursuant to A.R.S. § 41-2615 any contract claim or controversy, including protests, made by any bidder, offeror or contractor may be asserted against the state or an agency of the state only under the procedures provided in Article 9 of the Arizona Procurement Code and the rules promulgated thereunder, A.A.C. R2-7-901 to -937. Under no circumstances may a state governmental unit settle a claim or make a payment to a bidder, offeror or contractor making a claim or protest without compliance with these rules and the procedures set forth therein. The statutes authorizing actions against the state, A.R.S. § 12-820 to -826, and the Uniform Arbitration Act, A.R.S. § 12-1501 to -1518, are not applicable to a claim against the state relating to procurement governed by the Procurement Code. A claim or controversy arising from a procurement not governed by the Procurement Code is the subject of Section 15.3.5.

### 5.6.2 Protested Solicitations and Awards.

5.6.2.01 Procurement Officer. The procedure for resolving protested solicitations is found in A.A.C. R2-7-902 to -915. A solicitation protest is commenced when an "interested party," i.e., a person who has made or may make a bid or proposal, files with the procurement officer and the State Purchasing Administrator a written protest that contains a detailed statement of the grounds of the protest and the form of relief requested. Generally, protests of a solicitation must be filed before the applicable bid opening, or closing date. Protests of an award or proposed award shall be filed within 10 days after the protester knows or should have known the basis of the protest, whichever is earlier. A.A.C. R2-7-904. If the protest is filed before the award of a contract, the award may be made, unless the State Purchasing Administrator makes a written determination that there is a reasonable probability that the protest will be sustained and the stay of award of the contract is not contrary to the best interests of the state. A.A.C. R2-7-905. Within 14 days, unless extended for a period not to exceed 30 days, the procurement officer shall issue a written decision explaining the reasons for the decision with one of the remedies set forth in A.A.C. R2-7-908.

5.6.2.02 Appeals to the Director. An interested party who is dissatisfied with a decision of a procurement officer may file an appeal with the Director of the Department of Administration within 5 days from the date the procurement officer's decision is received. The appeal must contain the information listed in A.A.C. R2-7-909.B. The procurement officer must file a complete report within 7 days, responding to the appeal, including the information listed in A.A.C. R2-7-912.A. The appellant may file within 7 days appellant's comments to the procurement officer's report. If the Director does not dismiss the appeal pursuant to A.A.C. R2-7-913, a hearing shall be conducted as provided in Section 5.6.5 below.

5.6.3 Contract Claims and Controversies Between a Contractor and the State. All contract claims and controversies arising under a contract subject to the Procurement Code shall be resolved as provided in A.A.C. R2-7-916 to -921. The first step is for either party to bring the claim, either verbally or in writing, to the attention of the procurement officer. The procurement officer shall try to settle the problem by mutual agreement. Settlement or resolution of a controversy in excess of \$5,000 requires the prior written approval of the State Purchasing Administrator. In the event the contractor and the Procurement Officer cannot reach a settlement of the claim, the following appropriate procedure must be taken.

5.6.3.01 Claims Initiated by the Contractor. Once the contractor determines that it cannot reach a settlement with the procurement officer, the contractor must request a written decision of the procurement officer. The procurement officer shall issue the decision within 60 days and the decision shall include the items listed in A.A.C. R2-7-917.B. If the procurement officer fails to issue a decision within the time prescribed, the contractor may proceed as if the procurement officer had issued a decision adverse to the contractor.

If the contractor disagrees with the decision of the procurement officer, the contractor has 5 days from receipt of the decision to file an appeal with the Director of the Department of Administration. The appeal shall contain "the basis for the precise factual or legal error in the decision." A.A.C. R2-7-919. On receipt of the appeal the Director of the Department of Administration shall conduct a hearing. See Section 5.6.5 below.

5.6.3.02 Claims Initiated by the State. When a procurement officer determines that a claim asserted by the state will not be resolved by mutual agreement, the procurement officer promptly shall refer the claim to the Director of the Department of Administration, who shall conduct a hearing. A.A.C. R2-7-920. See Section 5.6.5 below.

5.6.4 Debarring or Suspending a Person from Participation in State Procurements. A.R.S. § 41-2613 and A.A.C. R2-7-922 to -933 establish authority and procedures for the Director of the Department of Administration to suspend or debar a contractor from participating in state procurement for up to 3 years after notice and hearing. The grounds for suspension or debarment appear in A.R.S. § 41-2613 and include conviction of a criminal offense arising from obtaining or attempting to obtain a contract or for embezzlement, theft, fraudulent schemes and artifices and practices, bid rigging, perjury, forgery, bribery, falsification or destruction of records or any offense indicating lack of integrity or honesty. The hearings required for debarment and suspension shall be conducted as provided in Section 5.6.5 below.

5.6.5 Hearings Under the Procurement Rules. Hearings conducted pursuant to the Procurement Code are governed by the Arizona Administrative Procedure Act, A.R.S. §§ 41-1061 to -1066, A.R.S. § 41-2611 and A.A.C. R2-7-914, -921, -925, -932.D, -934, -935, -936 and -937. Generally, the Director of the Department of Administration appoints a hearing officer. The hearing officer conducts prehearings, hearings and post hearings, and all matters connected therewith. At the conclusion of the hearing, the hearing officer prepares and submits the hearing officer's findings of fact, conclusions of law and recommended decision to the Director of the Department of Administration. The Director of the Department of Administration may affirm, modify or reject the recommendation.

5.6.6 Rehearing. Any party, including a governmental unit procurement officer, may file a written request for rehearing of a decision of the Director within 10 days after receipt of the decision. The request for rehearing must specify the particular grounds upon which the requesting party relies. Those grounds are listed in A.A.C. R2-7-937.E. An interested party may file with the Director a response including affidavits in opposition to the request for rehearing. The Director's decision on a request for rehearing must state in writing the basis of the decision. If the Director grants a rehearing, the decision granting the rehearing must specify the grounds on which the rehearing is granted. The rehearing shall cover only the matters so specified.

5.6.7 Judicial Review of Administrative Decisions. Within 35 days of the Director's final decision, any party to the proceeding before the Director may file a complaint in Maricopa County Superior Court seeking judicial review of the Director's decision. Judicial review is governed by A.R.S. §§ 12-901 to -914.

#### 5.7 Intergovernmental Procurement.

5.7.1 Cooperative Purchasing. Any public procurement unit<sup>8/</sup> may participate in, sponsor, conduct or administer a cooperative purchasing agreement with one or more public procurement units for the procurement of any materials, services or construction. Such an agreement is exempt from A.R.S. § 11-952(D), (E) and (F) concerning intergovernmental agreements. Parties under a cooperative purchasing agreement may cooperatively use materials or services; commonly use or share warehousing facilities, capital equipment and other facilities; and provide personnel. A public procurement unit requesting personnel must pay the public procurement unit providing the personnel the cost of providing the personnel.

5.7.1.01 Compliance with Procurement Code. If the public procurement unit administering a cooperative purchase complies with the Procurement Code, any public procurement unit participating in the cooperative purchase is deemed to have complied with the Procurement Code. Public procurement units may not enter a cooperative purchasing agreement for the purpose of circumventing the Procurement Code.

5.7.1.02 Controversies. Controversies arising under a cooperative purchasing agreement in which the state is a party shall be resolved pursuant to Section 5.6 above.

5.7.2 Purchasing from the Arizona Industries for the Blind and from the Arizona Correctional Industries. A committee appointed by the Director of the Department of Administration designates the materials and services provided by the Arizona Industries for the Blind and the Arizona Correctional Industries that satisfy state governmental unit requirements and establishes the purchase price for such materials and services offered for sale. State governmental units must purchase these materials and services if they are readily available. Purchases of approved materials and services directly from Arizona Industries for the Blind and Arizona Correctional Enterprises are exempt from competitive bidding.

#### 5.8 Violation of the Procurement Code.

5.8.1 Enforcement of the Procurement Code. The Attorney General is authorized to enforce the Procurement Code on behalf of the state. A.R.S. § 41-2616(C).

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<sup>8/</sup>A "public procurement unit" is either a local public procurement unit, the department [of Administration], any other state or an agency of the United States." A "local public procurement unit" is "any political subdivision and any agency, board, department or other instrumentality of such political subdivision." A.R.S. § 41-2631.

5.8.2 Civil Penalty. A person who contracts for or purchases any material, services or construction contrary to the Procurement Code and its rules is personally liable for the recovery of public monies paid, plus 20% of that amount, 10% interest from the date of payment, and costs and damages. A.R.S. § 41-2616(A).

5.8.3 Criminal Penalty. A person who intentionally or knowingly contracts for or purchases any material, services or construction pursuant to a scheme or artifice to avoid requirements of the Procurement Code is guilty of a class 4 felony. A.R.S. § 41-2616(B).

## 5.9 Procurement and the Antitrust Laws.

5.9.1 The Procurement Officer's Function. The procurement officer is in the best position to detect anticompetitive activity, and should therefore be familiar with the antitrust laws and be able to recognize anticompetitive practices. The following Sections discuss state and federal antitrust laws with an emphasis on their application to the operations of state government, highlight the type of conduct prohibited under antitrust laws, discuss antitrust laws as a remedy available to entities injured by restraints of trade, and generally assist the reader in understanding antitrust laws and recognizing antitrust practices.

Any questions concerning antitrust laws should be directed to the Antitrust Division of the Attorney General's office.

5.9.2 Objective of the Antitrust Laws. The general objective of the antitrust laws is the maintenance of competition. Competition is promoted when a large number of sellers or suppliers of a given product or service are striving to attract consumers.

In theory, the consumer in a competitive market is offered goods or services of higher quality at lower prices than he or she would be offered in a market where competition was restrained. Moreover, competition promotes free access to the marketplace, promotes better market performance, encourages a progressive technology and high productivity, and encourages conservation of scarce and irreplaceable resources.

### 5.9.3 Federal Antitrust Laws.

5.9.3.01 The Sherman Act. The Sherman Act was enacted in 1890 and is the first federal antitrust law. Section 1 of the Sherman Act prohibits contracts, combinations and conspiracies in restraint of trade. Section 2 of the Sherman Act prohibits monopolization, and attempts and conspiracies to monopolize. Although its prohibition taken literally is all encompassing, the courts have construed the Sherman Act to preclude only those contracts or combinations which "unreasonably" restrain competition.

Since 1974, violation of the Sherman Act has been a felony, carrying a maximum fine of \$1,000,000 for corporations, and a maximum fine of \$100,000 and up to three years imprisonment for individuals.

5.9.3.02 The Clayton Act. The Clayton Act was passed by Congress in 1914 to supplement and improve enforcement under the Sherman Act. It prohibits price discrimination, tying arrangements and exclusive dealing contracts, and certain mergers and acquisitions when the effect may be to substantially lessen competition or tend to create a monopoly.

The Clayton Act also creates a private action for treble damages (a successful plaintiff would receive three times his or her actual damages), provides for the relationship between public antitrust suits and subsequent private suits, governs procedural matters, and provides for injunctive relief from antitrust violations.

5.9.3.03 The Federal Trade Commission Act. The Federal Trade Commission Act is a statute passed in 1914 that created the Federal Trade Commission and condemns unfair methods of competition. Although not defined as an "antitrust law" in the federal statutes, it reaches anticompetitive practices which may fall short of violating either the Sherman Act or the Clayton Act. Under this statute, the Federal Trade Commission may restrain any conduct that is harmful or potentially harmful to competition.

#### 5.9.4 State Antitrust Laws.

5.9.4.01 Uniform State Antitrust Act. The Uniform State Antitrust Act (hereinafter "the Act"), A.R.S. §§ 44-1401 to -1415, which was adopted by the Arizona Legislature in 1974, is in essence a "little Sherman Act" and is to be construed by "interpretations given by the federal courts to comparable federal antitrust statutes." A.R.S. § 44-1412. The Act prohibits contracts, combinations, and conspiracies which restrain trade or commerce in Arizona. A.R.S. § 44-1402. It also forbids monopolization, attempts to monopolize, and conspiracies to monopolize. A.R.S. § 44-1403.

The Attorney General is authorized to enforce the Act by seeking appropriate injunctive relief and civil penalties of up to \$150,000 for each violation, plus reasonable costs and attorney fees. A.R.S. § 44-1407. The state, a political subdivision, any public agency, or an individual threatened with injury or injured in business or property by a violation of the Act may bring an action for appropriate injunctive relief, damages, and reasonable costs and attorneys fees. A.R.S. § 44-1408. Moreover, the Act provides for an award of treble damages to individuals if the violation is flagrant. A.R.S. § 44-1408(B).

The Act does not have a criminal remedy.

5.9.4.02 Bid Rigging Statutes. A.R.S. §§ 34-251 to -258, sometimes referred to as the "bid rigging" statutes, prohibit restraints of trade in connection with most contracts or subcontracts with a governmental agency. A.R.S. § 34-252. Such violations are crimes punishable as Class 4 felonies with a fine of up to \$150,000 and/or 4 years imprisonment. In addition, a governmental agency may suspend any person from agency bidding for a period of up to three years if the person is convicted of violating the antitrust laws of this state, or the antitrust laws of any other jurisdiction. A.R.S. § 34-257.

A.R.S. § 34-254 establishes improved civil remedies for governmental entities damaged by antitrust violations. Under A.R.S. § 34-254(B), a governmental entity can recover either 10% of the amount of the contract involved or actual damages. Under either measure, the governmental entity is entitled to recover treble the amount of damages actually awarded.

5.9.5 Conduct Which is Illegal Under Antitrust Laws. Numerous practices have been identified over the years as unreasonable trade restraints. Not all of those practices will be described here, but some examples are included. Note that in each example, the effect of the violation is a possible restriction of competition.

5.9.5.01 Price Fixing Among Competitors. Any arrangement between two or more competitors that interferes with price determination by free market forces is prohibited by the antitrust laws. Such arrangements, known as "horizontal" price fixing, are deemed so clearly anticompetitive and so devoid of any purpose except the stifling of competition that they are conclusively presumed to be illegal under the antitrust laws (they are unlawful per se). Price fixing includes not only agreements to charge a particular price, but also agreements to fix minimum prices or ranges of prices, manipulate bid prices, determine when prices are changed, and otherwise limit price competition.

5.9.5.02 Price Fixing in the Chain of Distribution – Resale Price Maintenance. Sometimes called "vertical" price fixing, resale price maintenance involves an agreement between a supplier and a dealer that the dealer will resell the supplier's product at a stipulated price. Such agreements take away the freedom of independent businesses to determine their own resale prices. Because one of the premises of the antitrust laws is that those who purchase goods for resale have the right to determine for themselves the price at which they will resell goods, even agreements setting maximum resale prices are prohibited.

Resale price maintenance is per se illegal under the Sherman Act, subject to some very important exceptions that are beyond the scope of this chapter.

5.9.5.03 Division of Territorial or Customer Markets. Agreements among competitors which involve the apportionment of territorial or customer markets are forbidden by the antitrust laws. Such agreements typically place limitations on the territories within which the competitors may sell, or the customers or class of customers to whom they may sell, or both. They may also involve the rotation of winning bids.

Manufacturer or supplier-imposed restrictions on the geographic area in which retailers or dealers may resell, or the customers to whom retailers or dealers may resell, may also have anticompetitive effects. Note, however, that although these restrictions will stifle competition between dealers who represent the same manufacturers, they may enable dealers to compete more efficiently with dealers of other manufacturers. Thus, this type of manufacturer or supplier imposed restriction may promote industry-wide competition. If the procompetitive effects of such an arrangement outweigh the anticompetitive effects, the restriction will not be unlawful.

5.9.5.04 Limitation of Production by Competitors. When competitors agree to limit production of a product or to limit expansion of services, an artificial scarcity can be created and prices can be expected to rise. Such agreements, because of their adverse effect upon prices, are unlawful.

5.9.5.05 Agreement by Competitors Not to do Business With Others – Group Boycott. Group boycotts are concerted forms of group action with competitors agreeing not to do business with others unless certain conditions are met. Group boycotts are unlawful.

5.9.5.06 Tying Arrangements. A tying arrangement is a seller-imposed condition under which a buyer may obtain the desired product (the tying product) only if it also agrees to take an additional product (the tied product), which may or may not be desired. The result of such an arrangement is that the tied product is sold because the tying product is desired — not on the basis of quality or price.

Full-line forcing is a type of tying arrangement which is not necessarily unlawful. Full-line forcing involves a situation in which the manufacturer or supplier of a line or series of products insists that a retailer or dealer carry all of its models or products and not just the most popular ones.

5.9.5.07 Monopolization. When a single firm controls such a large share of the output in any market that it effectively can control the total market output, and therefore increase its profits by reducing production, it has monopoly power. If it has achieved or maintains that dominant share of the market by exclusionary tactics (that is, something other than superior product, skill or historic accident), it is monopolizing. When monopolization occurs, effective competition is lacking and customers are left without real choices. Monopolizing is an offense under the antitrust laws.

5.9.6 Exemptions. Both the Arizona and federal antitrust laws contain specific exemptions. Among them are exemptions for described activities of labor organizations, exemptions for cooperative marketing arrangements by agricultural groups, state action exemptions, and exemptions for government unilateral action.

5.9.6.01 State Action Exemption. The federal courts have recognized that the federal antitrust laws do not apply to anticompetitive conduct which is compelled by a state statute or law under which a state, acting in its sovereign capacity, displaces competition with regulation or monopoly. This is known as the "state action exemption."

The courts have articulated a two-prong test for determining whether particular conduct falls within the state action doctrine. First, the challenged conduct must be undertaken pursuant to a clearly articulated state policy to displace competition with regulation. Second, the conduct must be actively supervised by the state. These two requirements are referred to as the "clear articulation" prong and the "active state supervision" prong of the state action test. However, this state action exemption is quite narrow. It does not permit a state to authorize or approve — and thus immunize — the anticompetitive conduct of private parties who violate the antitrust laws. Moreover, it does not provide immunity to state officials who participate in a private agreement or combination in restraint of trade.

5.9.6.02 Government Unilateral Action. When a governmental entity imposes an anticompetitive measure upon the private sector, the measure may be valid even though it does not satisfy the requirements for the state action immunity exemption from the federal antitrust laws. In Fisher v. City of Berkeley, 475 U.S. 260 (1986), the United States Supreme Court held that a rent stabilizing ordinance passed unilaterally by the City of Berkeley lacked the element of concerted action necessary for a Section 1 Sherman Act violation and upheld the validity of the ordinance. "A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law." Id., 475 U.S. at 267.

Thus, unilaterally enacted rate setting ordinances appear to be protected from antitrust challenge because they lack a substantive element of a violation — concerted action. The Sherman Act is not implicated, and the state action immunity doctrine is not activated.

5.9.7 Enforcement of the Antitrust Laws. The Arizona Legislature has delegated to the Arizona Attorney General the primary responsibility for public enforcement of the antitrust laws in Arizona. The Antitrust Division of the United States

Department of Justice and the Federal Trade Commission are responsible for enforcement of federal laws that promote competition. Government enforcement is augmented by private parties who are authorized by both state and federal statutes to bring damage actions under the antitrust laws.

5.9.8 Detecting Illegal Restraints of Trade in Bidding. Because the bidding process is such an integral part of a procurement officer's responsibility, this Section emphasizes the detection of bidding practices that indicate illegal restraints of trade. A procurement officer must be alert to the indications of possible illegal activity that are discussed in the subsections below, and should relay them to the Antitrust Division of the Attorney General's office for more intensive investigation and possible action.

5.9.8.01 Identical Bids. Receipt of identical bids in response to an invitation is an indication of a possible illegal trade restraint. Although identical bids do not always indicate collusion by suppliers, they show a lack of price competition and deserve the scrutiny of the procurement officer. Identical bidding is sometimes the result of agreements among competitors to adhere to a published price list, which is illegal. Public officials should note the date at which vendors change from competitive prices to identical prices and be alert to references to "association" or "industry" prices.

5.9.8.02 Simultaneous Price Increases and Price Maintenance. A procurement officer should also watch for simultaneous price increases. It is not necessary that all competitors charge the same for an item to indicate a conspiracy; an agreement to raise prices by a certain percentage increment is enough to violate the law.

The existence of resale price maintenance may come to a procurement officer's attention when bidders complain that suppliers require them to charge fixed markups or minimum prices. Refusals to bid may also be an indication that vertical price fixing is taking place; sometimes a vendor who will not go along with vertical price fixing finds himself unable to procure the necessary products for which the bid is being solicited. A call from a procurement agent to those who decline to bid may elicit indications of illegal activities on the part of those who have submitted bids.

5.9.8.03 Bid Rotation. Bid rotation is a scheme in which all vendors participating in the scheme submit bids, but by agreement take turns being the low bidder. A strict bid rotation defies the law of chance and should alert the purchaser to possible collusion.

Bid rotation also may be occurring in subcontracting. If unsuccessful bidders frequently receive subcontracts from the successful bidder, the subcontracts may be a reward from the successful bidder for the subcontractor's submitting a noncompetitive bid. Extremely close bids on construction projects or non-standardized items may also be an indication that bidrigging is occurring. Rotation according to contract size is another danger signal. Many cases of bidrigging have been uncovered where designated vendors or contractors get the contracts valued at an amount in excess of a certain figure, while others get the contracts valued below the figure.

The bidding on additions to existing structures, or contracts for continually-purchased commodities should also be monitored. Conspiracies have been uncovered which involve an agreement whereby the original low bidder on a building or on a contract for the sale of items or commodities would also be the successful bidder on additions to the building or future sales of identical items or commodities.

5.9.8.04 Customer Allocation. The unlawful allocation of customers is another technique used for bidrigging. Under this scheme, customers are divided among contractors or vendors with the understanding that one contractor or vendor will not bid on the contracts of a certain class of potential customers; in return, competitors will not bid on the class of customers previously allocated to the other contractor or vendor. The procurement officer occasionally should check with other purchasing agents who procure the same services or commodities to see if vendors are selling to some agencies but not to others.

5.9.8.05 Territorial Allocation. Territorial allocation is a scheme similar to customer allocation; the difference is that territories are allocated instead of customers. Thus, the agreement may demand that vendors not bid outside the boundaries of a certain county or section of a city or state.

Detection of this technique is similar to the detection of a customer allocation scheme: the procurement officer should acquaint himself with bidders in other areas on similar construction projects or contracts for the sale of commodities or services to determine if vendors are bidding in some areas but not in others. Refusals to bid are also an indication of a territorial allocation. On several occasions bid solicitations have been returned with notations such as, "I cannot bid on this because I am not your distributor. Contact John Smith in Phoenix." Such responses are obviously suspect.

5.9.8.06 Other Suspicious Bidding Practices. There are other miscellaneous antitrust violations which can also be detected just by being alert. For example, watch for sudden changes in the conditions of bidding. If vendors or contractors suddenly eliminate or cut back the period of warranty or the discount on the objects installed or sold, a conspiracy may have prompted the action. Finally, maintain a well-established network of communications between purchasing agents at all levels of government.

5.9.9 Application of the Antitrust Laws to State Employees Who Engage in Purchasing. Many state employees are called upon to participate in transactions in which the state acts either as the purchaser or seller of goods or services. In some cases those transactions are subject to the bidding process. In other cases, the Legislature has directed that state agencies establish schedules setting forth the maximum prices to be paid. In all cases, the state employee must strive to obtain or provide the best quality goods and services at the lowest possible price and should carefully avoid any involvement in conduct which might lessen competition.

As discussed in Section 5.9.6.01, the state action exemption does not afford immunity to state officials who participate in a private agreement or combination in restraint of trade. Public officials who participate in private restraint of trade are acting outside the scope of their authority and can be held liable under the federal antitrust laws.

In order to avoid antitrust claims or accusations, state employees must avoid any involvement with a group of sellers or buyers acting collectively in the determination of the price to be paid or received by the state for any item. Rather, those who buy and sell on behalf of the state must make their decisions on the basis of their independent investigation of the market and the best interests of the state.



CHAPTER 6  
PUBLIC RECORDS  
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CHAPTER 6  
PUBLIC RECORDS

6.1 Scope of this Chapter. This Chapter presents guidelines for an agency to use in determining which documents are subject to public scrutiny and under what circumstances Arizona law mandates their disclosure. It also discusses the preservation and disposition of records. The Federal Freedom of Information Act, 5 U.S.C. §§ 552, and the Federal Privacy Act, 5 U.S.C. § 552a, do not apply directly to state records and are not discussed in this Chapter.

6.2 Scope of Public Records Requirements

6.2.1 Applicability. The laws governing public records apply to any person elected or appointed to hold any office of any public body and the chief administrative officer, director, superintendent or chairman of any public body. A.R.S. § 39-121.01(A)(1). A public body includes the state; any county, city, town, school district, political subdivision or tax-supported district in the state, any branch, department, board, bureau, commission, council or committee of the foregoing; and any public organization or agency supported in whole or in part by funds received from the state or any political subdivision thereof, or expending funds provided by the state or any political subdivision thereof. A.R.S. § 39-121.01(A)(2). The county public defender is a public official and records made or received by him are records of the state subject to the requirements discussed in this Chapter. Ariz. Atty. Gen. Op. 185-101. By definition, the employees of public officers and public bodies are also bound by public records laws.

6.2.2 Maintenance of Records. Public officers and employees are required to maintain all records reasonably necessary or appropriate to keep an accurate account of their official activities, including records of all activities which are supported by funds from the state or any of its political subdivisions. A.R.S. § 39-121.01(B). Furthermore, each public body is responsible for preserving, maintaining and caring for that body's records. A.R.S. § 39-121.01(C).

6.2.3 Quality and Storage Requirements. All permanent public records are required to be transcribed or kept on paper or other material which is of durable or permanent quality and which conforms to standards established by the Director of the Department of Library, Archives and Public Records (the "department"). A.R.S. § 39-101(A). These public records must also be stored and maintained according to the standards established by the director of the department. A.R.S. § 39-101(B). A publication of these standards can be obtained from the department. A public officer who fails to keep permanent public records in accordance with the standards established by the director is guilty of a class 2 misdemeanor. A.R.S. § 39-101(C).

6.2.4 Size Requirements. All public records must conform to the standard letter size of 8-1/2 inches by 11 inches. A.R.S. § 39-103(A). Exempt from the size requirement are engineering drawings, architectural drawings and maps, computer generated printouts, output from test measurement and diagnostic equipment, machine generated paper tapes, public records smaller than 8-1/2 by 11 inches, and public records required by law to be a different size or otherwise exempt by law from the standard size requirement. A.R.S. § 39-103(B). In addition, the director of the department may approve exemptions from the standard size requirement if the director finds that the cost

of producing a particular type of public record in the standard size is so great as to not be in the best interests of the state. A.R.S. § 39-103(B).

6.3 Public Disclosure. A.R.S. § 39-121 sets forth the general policy of this state with respect to public inspection of governmental records:

Public records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person.

The terms "public records" and "other matters" are not defined by statute. However, the Arizona Supreme Court has said that the terms will be broadly construed so as to "obviate the need for any technical distinction between 'public records' or 'other matters' . . . ." Carlson v. Pima County, 141 Ariz. 487, 490, 687 P.2d 1242, 1245 (1984). Indeed there will be few, if any, records in the possession or control of a public officer which do not fall within the phrase "public records and other matters." Accordingly, the issue the custodian of the government records must resolve is whether any authorized grounds exist for denying public inspection. See Section 6.5.

6.4 Examples of Public Records and Other Matters. The following are some examples of documents which have been found to be "public records and other matters" and thus, as a general matter, available upon request to the public:

1. Permits and application forms for permits, Ariz. Atty. Gen. Op. I80-097;

2. Documents indicating the number of applicants per personnel position by race and national origin, where no personal identification of the applicant is sought, Ariz. Atty. Gen. Op. I80-044;

3. Official records of proceedings of state boards and commissions, such as the Arizona Board of Tax Appeals, Ariz. Atty. Gen. Op. I79-316; and the Industrial Commission, Industrial Commission v. Holohan, 97 Ariz. 122, 397 P.2d 624 (1964);

4. A taxpayer's property tax valuation and the Board of Tax Appeals' records on appeals of property tax valuations, Ariz. Atty. Gen. Op. I78-234;

5. Probate files, Henderson v. Las Cruces Production Credit Association, 6 Ariz. App. 549, 435 P.2d 56 (1967);

6. Budgets of both houses of the Legislature, Ariz. Atty. Gen. Op. I78-076;

7. Records of actual expenditures of public monies, Ariz. Atty. Gen. Op. I70-001;

8. Annual reports filed by corporations with the Arizona Corporation Commission, State v. Betts, 71 Ariz. 362, 227 P.2d 749 (1951); Ariz. Atty. Gen. Op. I61-114-L;

9. Books of accounts of a municipality, Ariz. Atty. Gen. Op. 156-008;

10. An "offense report" made by the sheriff of an assault by a prisoner in the county jail, Carlson v. Pima County, 141 Ariz. 487, 687 P.2d 1242 (1984); and

11. Petitions for annexation of land by cities, Moorhead v. Arnold, 130 Ariz. 503, 637 P.2d 305 (Ct. App. 1981).

6.5 Denying Public Inspection. Public inspection of government records may be denied when:

1. The record is made confidential by statute, Berry v. State, 145 Ariz. 12, 699 P.2d 387 (Ct. App. 1985);

2. The record involves the privacy interests of persons, Carlson v. Pima County, 141 Ariz. 487, 687 P.2d 1242 (1984); or

3. Disclosure would be detrimental to the best interests of the state, Carlson v. Pima County, 141 Ariz. 487, 687 P.2d 1242 (1984); see Mitchell v. Superior Court, 142 Ariz. 332, 334, 690 P.2d 51, 53 (1984).

6.5.1 Records Confidential by Statute. The Legislature has declared, by statute, certain records to be confidential and therefore not subject to general public scrutiny. These include: A.R.S. § 6-129, State Banking Department records; A.R.S. §§ 8-120 and -121, adoption; A.R.S. §§ 8-541, -542, and -546.03, child welfare and placement; A.R.S. § 11-593(D), fingerprint records of deceased; A.R.S. § 13-3011, court authorized wiretapping; A.R.S. § 13-4051, certain arrest records; A.R.S. § 15-537, evaluations of certificated teachers; A.R.S. § 16-165(C), death records received by county recorder; A.R.S. § 23-722, unemployment insurance tax reports; A.R.S. § 25-381.16, conciliation court; A.R.S. § 27-653, geothermal wells; A.R.S. § 28-317, license plates issued to law enforcement agents; A.R.S. § 28-675, automobile accident reports; A.R.S. § 28-1599.32, business information in fuel use tax reports; A.R.S. § 31-221, Department of Corrections records; A.R.S. § 32-1451.01(C), medical and investigative records held by the Board of Medical Examiners; A.R.S. §§ 36-107, -340, -509 and -714(B)(1), certain Department of Health Services records; A.R.S. § 36-404(3), limitation on disclosure of health care information; A.R.S. § 49-432(D), business information in air pollution investigation; A.R.S. § 38-431.03(B), minutes of executive sessions; A.R.S. § 41-1279.05, working papers and other audit files maintained by the Auditor General; A.R.S. § 41-1481(B), civil rights investigations; A.R.S. § 41-1482, preliminary unfair employment practices reports; A.R.S. § 41-1750, criminal history record information; A.R.S. § 41-1959, certain Department of Economic Security records; A.R.S. §§ 42-104 and -108, certain Department of Revenue records relating to tax information; and A.R.S. § 44-1525, consumer fraud information provided to Attorney General.

6.5.2 Records Involving Privacy Interests. The Arizona courts have also long recognized personal privacy as a basis for denying public access to government records. Industrial Commission v. Holohan, 97 Ariz. 122, 397 P.2d 624 (1964); Carlson v. Pima County, 141 Ariz. 487, 687 P.2d 1242, (1984); Church of Scientology v. City of Phoenix Police Dept., 122 Ariz. 338, 594 P.2d 1034 (Ct. App. 1979); see Mitchell v. Superior Court,

142 Ariz. 332, 690 P.2d 51 (1984). Under this exception, the custodian may deny public inspection when the disclosure of the record would amount to an unwarranted invasion of privacy that outweighs the public's right to know. See Ariz. Atty. Gen. Ops. 186-090; 185-097; see also 5 U.S.C. § 552(b)(6), (7)(C) (The Federal Freedom of Information Act). In the case of a convicted offender, the public's right to know generally outweighs the convicted offender's right to privacy. Mitchell v. Superior Court, 142 Ariz. 332, 690 P.2d 51.

6.5.3 Discretionary Refusal to Disclose. In the case of records which are not protected by a statutory grant of confidentiality the Arizona Supreme Court has said:

While access and disclosure is the strong policy of the law, the law also recognizes that an unlimited right of inspection might lead to substantial and irreparable private or public harm; thus, where the countervailing interests of confidentiality, privacy or the best interests of the state should be appropriately invoked to prevent inspection, we hold that the officer or custodian may refuse inspection.

Carlson v. Pima County, 141 Ariz. at 491, 687 P.2d at 1246, citing Mathews v. Pyle, 75 Ariz. 76, 251 P.2d 893 (1952).

The first exception to public disclosure recognized by the Arizona Supreme Court was for records the disclosure of which would be detrimental to the best interests of the state. Mathews v. Pyle, 75 Ariz. 76, 251 P.2d 893 (1952). The standard "detrimental to the best interests of the state" permits a public body to designate a record as confidential only when the effectiveness of the public body will be seriously impaired in the performance of its duties if disclosure of the information is made. Public officers must balance the possible adverse impact on the operation of the public body if the information in question is disclosed against the public's right to be informed about the operations of its government. The cloak of confidentiality may not be used, however, to save an officer or public body from inconvenience or embarrassment. Ariz. Atty. Gen. Op. 176-043.

For example, parole authorities may exclude from public scrutiny information from confidential sources regarding criminal conduct and chances for rehabilitation of convicted felons. This exclusion is permissible because, unless the providers of this information are guaranteed confidentiality, parole authorities will be unable to obtain the information, and thus will be unable to make informed decisions. Mathews v. Pyle, 75 Ariz. 76, 251 P.2d 893 (1952), citing Runyon v. Board of Prison Terms and Paroles, 26 Cal. App. 2d 183, 79 P.2d 101 (1938); but see Section 6.5.4.

6.5.4 Requests by Litigants. The foregoing guidelines on refusing public inspection may not be applicable when the person requesting access to the records is a party to litigation with the state. In those cases, the party may have a greater right to access than the public generally. See Grimm v. Arizona Board of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977).

6.6 Procedure for Handling Requests for Access to Public Records or Other Matters.

6.6.1 Scope of Disclosure. When protectable and public information are commingled in a single document, a copy of the document may be made available for

public inspection with the protectable material excised. If confidential material has been attached to an otherwise disclosable document, the material so attached may simply be removed. See Carlson v. Pima County, 141 Ariz. at 491, 687 P.2d at 1246; Ariz. Atty. Gen. Ops. I86-090; I85-097. The public body should make a notation in its records regarding precisely which material was excised and which material has been released.

6.6.2 Inspection of Public Records. The right to inspect documents is not without qualification. It may not be exercised at such times and in such manner as to cause disruption of public business. "Any person may request to examine or be furnished copies, printouts or photographs of any public record during regular office hours." A.R.S. § 39-121.01(D)(1). The public is entitled to inspect information within a reasonable time after a request is made, at a time and in a manner which would not cause disruption of public business. See Ariz. Atty. Gen. Ops. I80-097; I78-234; I70-001.

What is a reasonable time and manner must in all cases be a factual determination, depending upon the accessibility of the material. If the information requested is on microfilm and thus requires use of a reader/printer to view it, the inspection would necessarily depend upon the availability of the necessary equipment. If the requested material has been stored off the premises of the agency, additional time might be necessary to retrieve the document requested. Should this occur, the requesting party should be advised, in writing, of the delay and the reason for it. If the custodian of the record does not have the facilities for making copies, the person requesting such record must be granted access to it for the purpose of making copies. However, the copies must be made while the document remains in possession, custody, and control of the custodian. A.R.S. § 39-121.01(D)(2).

6.6.3 Charges for Copies. The Legislature has distinguished between the fees an agency may require for commercial and non-commercial requests for copies of public records. A.R.S. § 39-121.01(D)(1); -121.03(A).

6.6.4 Non-Commercial Use. A person requesting copies, printouts or photographs of public records for a non-commercial purpose may be charged a fee for the records. A.R.S. § 39-121.01; but see Section 6.6.6. The statutes no longer limit the amount that can be charged to "a reasonable fee, not exceeding a commercial rate for like service." Laws 1985 (1st Reg. Sess.) Ch. 213, § 4. An agency may charge a fee it deems appropriate for copying records, including a reasonable amount for the cost of time, equipment and personnel used in producing copies of records, but not costs of searching for the records. Ariz. Atty. Gen. Op. I86-090. If an agency is producing documents pursuant to a subpoena in a civil action to which the agency is not a party the fee is prescribed by A.R.S. § 12-351.

6.6.5 Commercial Use. Persons requesting reproductions for a commercial purpose must provide a certified statement setting forth the commercial purpose for which the records are requested. An individual who knowingly falsifies his certification for a document under these provisions is guilty of a class 6 felony. A.R.S. § 39-161. As used in this Section, commercial purpose is defined as:

the use of a public record for the purpose of sale or resale or for the purpose of producing a document containing all or part of the copy, printout or photograph for sale or the obtaining of names and

addresses from such public records for the purpose of solicitation or the sale of such names and addresses to another for the purpose of solicitation or for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of such public record. Commercial purpose does not mean the use of a public record as evidence or as research for evidence in an action in a judicial or quasi-judicial body of this state or a political subdivision of this state.

A.R.S. § 39-121.03(D). Upon being furnished with such a statement, the custodian may furnish the reproduction and assess a charge which shall include the following:

1. A portion of the cost to the [public body] of obtaining the original or copies of the documents, printouts or photographs.
2. A reasonable fee for the cost of time, equipment and personnel in producing such reproduction.
3. The value of the reproduction on the commercial market.

A.R.S. § 39-121.03(A). As with non-commercial requests, the determination of the fee to be charged is made in the first instance by the public body. Among the factors to be considered in making this determination are: the time personnel expended in retrieving the records; transportation costs, if any; and the actual cost to the public body in terms of special equipment or processing required in preparing the record for release.

A.R.S. § 39-121.03(B) authorizes the custodian of a public record to apply to the Governor requesting that the Governor by executive order prohibit the furnishing of copies, printouts or photographs in instances where the custodian determines that the commercial purpose stated in the verified statement is a misuse of public records or is an abuse of the right to receive public records.

**6.6.6 Free Copies.** A.R.S. § 39-122(A) provides that certain public records must be provided without charge, namely those concerning a claim for a pension, allotment, allowance, compensation, insurance or other benefits presented to the United States or a bureau or department thereof.

**6.6.7 Overcharges.** If a public officer demands and receives a higher fee than allowed by law as described above, the officer is liable to the aggrieved party in an amount four times the fee unlawfully demanded and received and may be charged with a class 5 felony. A.R.S. § 38-413.

## **6.7 Preservation, Maintenance, Reproduction and Disposition of Public Records.**

**6.7.1 Preservation and Maintenance Generally.** All records made or received by public officials in the course of their public duties are the property of the state. A.R.S. § 41-1347. A.R.S. § 39-121.01(C) provides that each public body and officer shall be responsible for the preservation, maintenance and care of the public records within their offices. See Sections 6.2.2, 6.2.3 and 6.2.4. Each officer and public body is required by statute to carefully secure, protect and preserve public records from deterioration, mutilation, loss or destruction, unless disposed of pursuant to law. See Section 6.7.3.

The head of each state agency must establish and maintain an active, continuing program for the economical and efficient management of the public records; make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency; submit to the director of the department, in accordance with established standards, schedules proposing the length of time each record series warrants retention for administrative, legal or fiscal purposes; submit a list of public records in the agency's custody that are not needed in the transaction of current business and that are not considered to have sufficient administrative, legal or fiscal value to warrant their inclusion in established disposal schedules; submit to the director of the department lists of all essential public records in the custody of the agency; and designate an individual within the agency to manage the records management program of the agency. A.R.S. § 41-1346.

The director of the department is also responsible for establishing standards, procedures and techniques for the effective management of records and establishing standards for the preparation of schedules providing for the retention of records of continuing value and for the prompt and orderly disposal of records no longer possessing sufficient administrative, legal, fiscal, research or historical value to warrant their retention. A.R.S. § 41-1345. This law also requires the department to be responsible for the preservation of public records.

**6.7.2 Reproduction of Public Records.** Each state agency may implement a program for the reproduction of records in its custody. However, prior to instituting the program the agency must obtain approval from the director of the department. A.R.S. § 41-1348.

**6.7.3 Disposition of Public Records.** The disposition of public records by the state or any of its political subdivisions is governed by A.R.S. §§ 41-1344, -1347, -1349 and -1351. A public officer or other person having custody or possession of any record for any purpose, who steals or knowingly and without authority destroys, mutilates, defaces, alters, falsifies, removes or secretes the record or permits any person to do so is guilty of a felony. A.R.S. § 38-421.



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OPEN MEETINGS  
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## CHAPTER 7

### OPEN MEETINGS

7.1 Scope of this Chapter. This Chapter discusses Arizona's Open Meeting Law, A.R.S. §§ 38-431 to -431.09, with particular emphasis on the Open Meeting Law application to the day-to-day operations of state officers and agencies. This Chapter does not resolve all issues that may arise under the Open Meeting Law but rather is intended to serve as a reference for public officials who must comply with the Open Meeting Law. Anyone faced with a situation not specifically addressed in this Chapter should consult with legal counsel before proceeding.

#### 7.2. Arizona's Open Meeting Law

7.2.1 History of Arizona's Open Meeting Law. All fifty states have enacted some type of legislation providing the public with a statutory right to openness in government. In addition, the United States Congress in 1976 enacted the Federal Open Meeting Act, 5 U.S.C. § 552b. Arizona's Open Meeting Law was first adopted in 1962 and amended extensively in 1974, 1975, 1977, 1978, 1982, 1983 and again in 1985. For a detailed discussion of the early history of the Open Meeting Law through 1975, see Ariz. Atty. Gen. Op. I75-7.

7.2.2 Legislative Intent. The Legislature has repeatedly expressed its intent that the Open Meeting Law be construed to maximize public access to the governmental process. In first enacting the Open Meeting Law in 1962, the Legislature declared that:

It is the public policy of this state that proceedings in meetings of governing bodies of the state and political subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this act that their official deliberations and proceedings be conducted openly.

In 1978 after a series of court opinions that narrowly construed the Open Meeting Law, the Legislature reiterated its policy as follows:

It is the public policy of this state, reflected in this article, that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. Toward this end, any person or entity charged with the interpretations of this article shall take into account the policy of this article and shall construe any provision of this article in favor of open and public meetings.

A.R.S. § 38-431.09. These statements make it abundantly evident that the Legislature intends for the Open Meeting Law to be broadly construed to maximize the public access to governmental decision making. In keeping with this expressed intent, any uncertainty under the Open Meeting Law must be resolved in favor of openness in government. Any question about whether the Open Meeting Law applies to a certain public body likewise must be resolved in favor of the Open Meeting Law's application.

### 7.3 Government Bodies Covered by the Open Meeting Law.

7.3.1 Generally. The provisions of the Open Meeting Law apply to all public bodies. A public body is defined in A.R.S. § 38-431(5) as follows:

"Public body" means the legislature, all boards and commissions of the state or political subdivisions, all multi-member governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, such public body.

This definition specifically includes public bodies of all political subdivisions. A political subdivision is defined in subsection (4) of A.R.S. § 38-431 to include "all political subdivisions of the state, including without limitation all counties, cities and towns, school districts and special districts."

The definition encompasses five basic categories of public bodies: 1) boards and commissions and other multi-member governing bodies; 2) quasi-governmental corporations; 3) quasi-judicial bodies; 4) advisory committees; and 5) standing and special committees and subcommittees of any of the above.

7.3.2 Boards and Commissions. All boards and commissions and other multi-member governing bodies of the state or its political subdivisions or of the departments, agencies, institutions and instrumentalities of the state or its political subdivisions are covered by the Open Meeting Law. The multi-member governing body must be created by law or by an official act pursuant to some legal authority. Examples of public bodies created by law include the Arizona Legislature, county boards of supervisors, city and town councils, school boards, the governing boards of special districts and all state, county and municipal licensing and regulatory boards. Examples of public bodies created pursuant to legal authority include citizen advisory groups created by an act of the Governor and advisory committees created by the Director of the Department of Health Services under A.R.S. § 36-109(E).

The Open Meeting Law applies only to multi-member bodies, and does not apply to the deliberations and meetings conducted by the single head of an agency. See Ariz. Atty. Gen. Op. I75-7. Accordingly, the director of a department is not subject to the Open Meeting Law in meeting with his staff to discuss the operations of the department.

7.3.3 Quasi-Governmental Corporations. The boards of directors of corporations and instrumentalities of the state or its political subdivisions are subject to the Open Meeting Law when the members of the board are appointed or elected by the state or its political subdivisions. For example, the Board of Directors of the Phoenix Civic Improvement Corporation falls into this category. In addition, the Open Meeting Law applies to a private non-profit hospital association which has a board of directors elected by the electorate of the hospital district. See Ariz. Atty. Gen. Op. I85-088; Laws 1985 (1st Reg. Sess.), Ch. 203.

7.3.4 Quasi-Judicial Bodies. The Open Meeting Law defines quasi-judicial bodies as follows:

6. "Quasi-judicial body" means a public body, other than a court of law, possessing the power to hold hearings on disputed matters between a private person and a public agency and to make decisions in the general manner of a court regarding such disputed claims.

A.R.S. § 38-431(6). This definition was added by the Legislature in 1978 to reverse the decision of the Arizona Supreme Court in Arizona Press Club Inc. v. Arizona Board of Tax App., 113 Ariz. 545, 558 P.2d 697 (1976), in which the court had held that the Open Meeting Law did not apply to bodies conducting quasi-judicial functions, such as license revocation proceedings. See Ariz. Atty. Gen. Op. I78-245 and Section 7.4.2. The Arizona Board of Tax Appeals and similar quasi-judicial bodies are now expressly covered by the Open Meeting Law.

7.3.5 Advisory Committees. Advisory committees are subject to all of the requirements of the Open Meeting Law, except the minute taking requirements. An advisory committee is defined as any group:

officially established, upon motion and order of a public body or by the presiding officer of the public body, and whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body.

A.R.S. § 38-431(1). This definition does not include advisory groups established by the single head of an agency unless they are created pursuant to a statute, city charter or other provision of law or by an official act pursuant to some legal authority. See Section 7.3.2. A staff committee consisting exclusively of employees of the public body is not an advisory committee.

7.3.6 Special and Standing Committees and Subcommittees. Special and standing committees and subcommittees of, or appointed by, any of the public bodies described above are also covered by the Open Meeting Law, except that subcommittees are not required to keep minutes. A special or standing committee may consist of members of the public body who have been appointed by or authorized to act for the public body. A.R.S. § 38-431(5). The fact that a committee consists, in whole or in part, of persons who are not members of the public body does not affect its status as a public body subject to the Open Meeting Law. The appointment or authorization of a standing or special committee or subcommittee may occur by an affirmative act of the public body.

7.3.7 Government Bodies Not Covered by the Open Meeting Law. A.R.S. § 38-431.08 expressly exempts from the Open Meeting Law the Commissions on Appellate and Trial Court Appointments and the Commission on Judicial Qualifications. This Section also exempts conference committees of the Legislature, but provides that all meetings of conference committees must be open to the public. The Open Meeting Law also permits either house of the Legislature to adopt a rule or procedure exempting itself from the notice and agenda requirements of the Open Meeting Law.

#### 7.4 The Actions and Activities Covered by the Open Meeting Law.

7.4.1 Generally. The Open Meeting Law provides that all meetings of a public body shall be public and all persons desiring to attend shall be permitted to attend and listen to the deliberations and proceedings. A.R.S. § 38-431.01(A). A meeting is defined to include the "gathering of a quorum of members of a public body to propose or take legal action, including any deliberations with respect to such action." A.R.S. § 38-431(3). The Open Meeting Law provides that all discussions, deliberations, considerations or consultations among a majority of the members of a public body regarding matters which may foreseeably require final action or a final decision by the governing body, constitute "legal action" and, therefore, must be conducted in a public meeting or executive session in accordance with the Open Meeting Law. Ariz. Atty. Gen. Op. I75-8; I79-4.

The question of whether the matter to be discussed may foreseeably require final action is the key to this inquiry. It is nearly impossible to establish a precise guideline as to when this foreseeability test has been met, and each case should be viewed on its own merits and all doubts resolved in favor of compliance with the Open Meeting Law. The safest course of action is to comply with the Open Meeting Law whenever a majority of the body discusses the business of the public body. Discussions and deliberations between less than a majority of the members of a governing body, or other devices, when used to circumvent the purposes of the Open Meeting Law, constitute violations of the Open Meeting Law. See Ariz. Atty. Gen. Op. I75-8; Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974).

If a quorum of the public body or a committee constituting a quorum of the public body is engaged in the above-described discussions, the body must comply with the Open Meeting Law. It does not matter what label is placed on the gathering. It may be called a "work" or "study session" or the discussion may occur at a social function. Ariz. Atty. Gen. Op. I79-04. Discussion of the public body's business may take place only in a public meeting or an executive session in accordance with the requirements of the Open Meeting Law.

7.4.2 Quasi-Judicial Proceedings. Contested case proceedings or quasi-judicial or adjudicatory proceedings conducted by public bodies are subject to all of the requirements of the Open Meeting Law. Rosenberg v. Arizona Board of Regents, 118 Ariz. 489, 578 P.2d 168 (1978); City of Flagstaff v. Bleeker, 123 Ariz. 436, 600 P.2d 49 (Ct. App. 1979); Ariz. Atty. Gen. Op. I75-7; see Section 7.3.4.

7.4.3 Proceedings Before Courts. The Open Meeting Law does not apply to judicial proceedings of courts within the judicial branch of government. A.R.S. §§ 38-431(6) and -431.08(A)(1).

7.4.4 Political Caucuses. The Open Meeting Law does not apply to the activities of a political caucus. A.R.S. § 38-431.08(A)(1). See Ariz. Atty. Gen. Op. I83-128.

7.4.5 Student Disciplinary Proceedings. A.R.S. § 15-843 provides that actions concerning the "discipline, suspension or expulsion of a pupil" are not subject to the Open Meeting Law. This same statute, however, prescribes the procedures which must be followed by the school board in handling these matters.

7.4.6 Insurance Guaranty Fund Boards. Special meetings of the property and casualty insurance guaranty fund in which the financial condition of any member insurer is discussed are exempt from the Open Meeting Law. A.R.S. § 20-671.

7.5 Executive Sessions. A.R.S. § 38-431.03 contains an exception to the general requirement of the Open Meeting Law that all meetings must be open to the public. That Section provides that in seven specific instances a public body may discuss matters in an executive session. An executive session is a meeting of the body conducted in private, without the public being allowed to attend and listen to the deliberations. An executive session may be convened solely for the purpose of discussing matters and no final action may be taken in the executive session.

7.5.1 Deciding to Go Into Executive Session. The Open Meeting Law requires that before a public body may go into executive session, a majority of the members constituting a quorum must vote in a public meeting to hold the executive session. A.R.S. § 38-431.03(A). Generally, the vote will be taken immediately before going into executive session. However, in some cases an agency may know that at a future date it will need to meet in executive session, in which case it can then vote at the public meeting to meet on the later date in executive session. On that future date, the agency does not have to first meet again in a public session.

7.5.2 Authorized Executive Sessions. The Open Meeting Law permits only seven categories of topics to be discussed in executive session. A.R.S. § 38-431.03(A). These seven categories are discussed in the following paragraphs. Because courts are likely to strictly construe these provisions, unless the proposed discussion plainly falls within an executive session category, it should take place only in a public meeting. Finally, the Open Meeting Law does not require that these discussions take place in executive session. If public disclosure of the public body's discussion is otherwise lawful and the vital interests of the government are not threatened, the better practice is to meet in public.

7.5.3 Personnel Matters. The discussion or consideration of employment, assignment, appointment, promotion, demotion, dismissal, salaries, disciplining, resignation or dismissal of a public officer, appointee or employee of a public body may take place in an executive session. A.R.S. § 38-431.03(A)(1); City of Flagstaff v. Bleeker, 123 Ariz. 436, 600 P.2d 49 (Ct. App. 1979). This authorization for an executive session applies only to discussions concerning specific officers, appointees and employees. This provision permits discussion in executive session about applicants for employment or appointment even though they may not be currently employed by the public body.

If the affected officer, appointee or employee requests, these discussions must be conducted in a public meeting and not in an executive session. Accordingly, the Open Meeting Law requires that an officer, appointee or employee who is the subject of the discussion in executive session must be given advance notice of the proposed executive session. Although written notice is not required, the notice given to the officer, appointee or employee must describe the matters to be considered by the public body in a manner sufficient to enable the employee to make the initial decision as to whether he desires to have the matters discussed in a public meeting. In addition, the notice must be given sufficiently in advance of the proposed meeting, and in no event less than twenty-four hours prior to the meeting, to enable the employee to make the foregoing

determination and to prepare an appropriate request for a public hearing. See Ariz. Atty. Gen. Op. I79-49. See Form 7.1. The Open Meeting Law does not provide for an emergency exception to this requirement of at least twenty-four hours notice. Accordingly, if it is necessary for the public body to act in less than twenty-four hours, it must do so at a public meeting.

Although the public body may permit the public officer, appointee or employee being discussed to attend the executive session, the Open Meeting Law is unclear whether he has the right to attend. Under A.R.S. § 38-431.03(B), the public body must make the minutes of the executive session available to the public officer, appointee or employee who was the subject of discussion in the executive session.

A public body may consider several persons for possible appointment to a position or consider several employees for possible disciplinary action. In such cases, the public body may consider the matter in executive session provided all those being considered are given the required notice. If some, but not all of those given notice request a public meeting, the public body has two options: the public body may limit the public discussion to those persons filing the request and discuss the remaining persons in an executive session; or, because the Open Meeting Law does not require the public body to discuss personnel matters in executive session, the public body may discuss the entire matter in a public meeting.

**7.5.4 Confidential Records.** An executive session may be held when the public body is considering or discussing "records exempt by law from public inspection." A.R.S. § 38-431.03(A)(2). This provision allows the use of an executive session whenever the public body intends to discuss or consider matters contained in records which are confidential by law. However, when confidential matters can be adequately safeguarded outside of an executive session, the discussion should take place during a public meeting. Cf. Ariz. Atty. Gen. Op. I87-038. The record being considered need not be expressly made confidential by statute, but rather may fall within the category of confidential records discussed in Chapter 6 of this manual. For example, preliminary audit reports of state agencies prepared by the Auditor General are confidential and should be discussed by the public body in executive session in order to preserve their confidentiality. Ariz. Atty. Gen. Op. I80-35.

**7.5.5 Legal Advice.** A public body may also go into executive session for the purposes of "discussion or consultation for legal advice with the attorney or attorneys of the public body." A.R.S. § 38-431.03(A)(3). In order for this exemption to apply, the attorney giving the legal advice must be the attorney for the public body. For purposes of this discussion, the "attorney for the public body" means a licensed attorney representing the public body, whether that attorney is a full time employee of the body, the attorney general or county, city or town attorney responsible for representing the public body, an attorney hired on contract or an attorney provided by an insurance carrier to represent the public body.

Because this provision is designed to preserve the attorney-client privilege, outside parties cannot attend this executive session. Accordingly, the only persons allowed to attend this executive session are the members of the public body, the public body's attorney and those employees and agents of both whose presence is necessary to obtain the legal advice. The mere presence of an attorney of the public body in the meeting room is not sufficient to justify the use of this executive session provision. This provision can only be used for the purpose of obtaining "legal advice," which involves the

exchange of confidential communications between the lawyer and his client. Once the legal advice has been obtained, the public body must go back into public session unless some other executive session provision applies and has been identified in the notice.

**7.5.6 Litigation.** A.R.S. § 38-431.03(A)(4) provides that a public body may hold an executive session for the purpose of:

Discussion or consultation with the attorneys of the public body in order to consider its position and instruct its attorneys regarding the public body's position in pending or contemplated litigation.

This provision allows a public body to give its attorneys instructions on how they should proceed in pending or contemplated litigation involving the public body. For example, the public body might authorize its attorney to settle a lawsuit on as favorable terms as possible up to a certain amount. Of course, if the attorney were to obtain an agreed settlement, the public body must formally approve it at a public meeting.

The discussion in Section 7.5.5 concerning the presence of outside parties and the definition of "attorney for the public body" applies with equal force to this Section.

**7.5.7 Employee Salary Discussions.** A.R.S. § 38-431.03(A)(5) provides that an executive session may be held for the purpose of:

5. Discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations with employee organizations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body.

This provision provides for an executive session so that a public body may consult and discuss with its representatives its position on negotiating salaries or compensation paid in the form of fringe benefits and instruct representatives on how they should deal with the employee organizations. It does not authorize an executive session for purposes of meeting with the employee's representative. If the public body or any standing, special or advisory committee or subcommittee of the public body conducts the negotiations, those negotiations must be conducted in a public meeting.

**7.5.8 International and Interstate Negotiations.** The Open Meeting Law provides that a public body may go into executive session for the purpose of "[d]iscussion, consultation or consideration for international and interstate negotiations." A.R.S. § 38-431.03(A)(6). This provision does not apply to meetings at which the public body receives recommendations from representatives of federal agencies. Ariz. Atty. Gen. Op. I80-159.

**7.5.9 Purchase or Lease of Real Property.** The Open Meeting Law provides that a public body may meet in executive session to discuss and consult with its representatives concerning negotiations for the purchase or lease of real property. A.R.S. § 38-431.03(A)(7). This provision does not authorize an executive session for the purpose of meeting with representatives of the party with whom the public body is negotiating. This provision permits the public body to instruct its representatives on such purchase or

lease. For example, the public body can authorize its representative to negotiate up to a certain amount. The final contract must, of course, be approved by the public body in a public meeting.

**7.5.10 Taking Legal Action.** In an executive session, the public body may discuss and consider only the specific matters authorized by the statute. Furthermore the public body may not take a final vote or make a final decision in the executive session, but rather must reconvene in a public meeting for purposes of taking such vote or making such decisions. Taking a straw poll or informal or preliminary vote in executive session is unlawful under the Open Meeting Law. See A.R.S. § 38-431.03(D).

The Arizona Supreme Court has held that the taking of legal action, including that taken after an executive session, must be preceded by both: 1) "disclosure of that amount of information sufficient to apprise the public in attendance of the basic subject matter of the action so that the public may scrutinize the action taken during the meeting;" and 2) "by an indication of what information will be available in the minutes pursuant to A.R.S. § 38-431.01(B) so that the public may, if it desires, discover and investigate further the background or specific facts of the decision." Karol v. Board of Education Trustees, 122 Ariz. 95, 98, 593 P.2d 649, 651 (1979). The court also specifically condemned the practice of voting on matters designated only by number, thereby effectively hiding its actions from public examination.

## **7.6 Notice of Meetings.**

**7.6.1 Notice to Members of the Public Body.** Notice of all meetings, including executive sessions, must be given to the members of the public body. Generally, this requirement is met by mailing a copy of the notice to each member of the public body.

**7.6.2 Notice to the Public.** Notice of all meetings, including executive sessions, must be given to the public. See Form 7.3. The procedure for giving public notice is a two step process. A.R.S. § 38-431.02.

**7.6.2.01 Disclosure Statement.** The first step is the filing by the public body of a disclosure statement identifying where public notices of its meetings will be posted. Public bodies of the state must file this statement with the Secretary of State. See Form 7.2. Public bodies of counties, school districts and other special districts must file this statement with the Clerk of the Board of Supervisors. Public bodies of cities and towns must file the statement with the City Clerk or Mayor's office. A.R.S. § 38-431.02(A).

**7.6.2.02 Public Notice of Meetings.** Once the disclosure statement has been filed, the public body must give notice of each of its meetings by posting a copy of the notice in the public place identified in the disclosure statement and by giving "such additional public notice as is reasonable and practicable as to all meetings." A.R.S. § 38-431.02(A). Various public bodies fulfill this obligation to provide "additional notice" by providing news releases to the news media concerning proposed meetings, by mailing notices to those asking to be informed of meetings, and by including the date and time of such meetings in their newsletters and other publications.

**7.6.3 Contents of the Notice.** Generally, the notice should include information identifying the public body, the date, time and place of the meeting. See Forms 7.3 and 7.4. In identifying the place of the meeting, the notice should specify the street address of the building and the room number or other information identifying the specific room in

which the meeting will be held. See Sample Notice, Form 7.10. In addition, the Open Meeting Law requires that notices of public meetings and notices of executive sessions contain an agenda of the matters to be considered by the public body at the meeting or contain information on how the public may obtain a copy of such an agenda. For a complete discussion of the agenda requirements, see Section 7.7.

The Open Meeting Law also requires that notice of a public meeting at which the public body intends to ratify a prior act must contain additional specific information. See Section 7.11.

**7.6.4 Time for Giving Notice.** As a general rule, a meeting may not be held without giving the required notice at least twenty-four hours prior to the meeting. There are three exceptions to the twenty-four hour notice requirement.

First, in the case of an actual emergency, the meeting may be held upon such shorter notice as is "appropriate under the circumstances." An actual emergency exists when, due to unforeseen circumstances, immediate action is necessary in order to avoid some serious consequence that would result from waiting until the required notice could be given. The existence of an actual emergency does not dispense with the need to give twenty-four hours notice to an employee to be discussed in executive session. A.R.S. § 38-431.02(D). See Section 7.5.3.

Second, notice of a meeting at which the public body is to consider the ratification of a prior act taken in violation of the Open Meeting Law must be given seventy-two hours in advance of the meeting. See Section 7.11.

Finally, less than twenty-four hours notice may be given when a properly noticed meeting is recessed to a later date. A.R.S. § 38-431.02(E) provides that a meeting may be recessed and resumed with less than twenty-four hours notice if public notice of the initial session of the meeting is given, and if, prior to recessing, notice is publicly given as to the time and place of the resumption of the meeting or the method by which notice shall be publicly given. Notice of the resumption of a meeting must comply with the agenda requirements respecting the matters to be addressed when resumed. This may be accomplished by the presiding officer of the public body either stating at the meeting the time, place and agenda of the resumed meeting or stating where a written notice and agenda of the resumed meeting will be posted. See Form 7.6. If an executive session is to be recessed and resumed with less than twenty-four hours notice, the time, place and agenda of the resumed meeting should be communicated to the members of the public body and to the public by reconvening in public session and following one of the two steps described above. See Form 7.7.

**7.6.5 Notice of Regular Meetings.** A public body that intends to meet for a specified calendar period on a regular day or date during the calendar period, and at a regular place and time, may post public notice of such meetings at the beginning of such period and need not post additional notices for each meeting. See Form 7.5. The notice must specify the period for which the notice is applicable. A.R.S. § 38-431.02(F). However, this method of posting notice will not satisfy the agenda requirements unless the notice also contains a clear statement that the agenda for any such meeting will be available at least twenty-four hours in advance of the meeting and a statement as to where and how the public may obtain a copy of the agenda. A.R.S. § 38-431.02(G).

**7.6.6 Notice of Executive Sessions.** When an executive session is to be held, the notice must state the specific provision of law authorizing the executive session. A.R.S. § 38-431.02(B). See Form 7.8. This provision requires that the notice specify the numbered paragraph of subsection (A) of A.R.S. § 38-431.03 which authorizes the executive session. A general citation to A.R.S. § 38-431.03 or subsection (A) of that section is insufficient. For example, a public body intending to meet in executive session for purposes of obtaining legal advice must cite in its notice "A.R.S. § 38-431.03(A)(3)." The public body must cite only the paragraphs applicable to the matters to be discussed and should not issue a standardized form notice that cites all executive session provisions. In addition, an agenda is required for an executive session. See Section 7.7.3.

In the case of an executive session concerning personnel matters, the public body must give special notice to the affected officer, appointee or employee in addition to the public notice described above. See Section 7.5.3 and Form 7.1.

**7.6.7 Combined Notice of Public Meeting and Executive Session.** In many cases the public body may want to have the option to retire into executive session during the course of a public meeting. Although separate notices of the public meeting and executive session may be given pursuant to Sections 7.6.5 and 7.6.6, the preferable method for giving notice in such a case is to combine the notice of the public meeting and of the possible executive session in one document. An example for doing so is set forth in Form 7.9 and the sample notice and agenda, Form 7.10.

**7.6.8 Maintaining Records of Notice Given.** Each public body should keep a record of its notices, including a copy of each notice which was posted and information regarding the date, time and place of posting. A suggested procedure is to file in the records of the public body a copy of the notice and a certification in a form similar to Form 7.11.

## **7.7 Agendas.**

**7.7.1 Generally.** In addition to notice of the time, date and place of the meeting, the Open Meeting Law requires that the public body provide an agenda of the matters to be discussed, considered or decided at the meeting. Although this Section provides guidelines for the preparation of agendas, it does not answer every question that will arise. Specific problems should be discussed with the public body's legal counsel. A public body should not have problems if it in good faith follows the Legislature's declaration of policy that agendas "contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided." A.R.S. § 38-431.09. If there is a doubt, all questions should be resolved in favor of greater disclosure of information.

**7.7.2 Contents of the Agenda — Public Meeting.** The agenda for a public meeting must contain a listing of the "specific matters to be discussed, considered or decided at the meeting." A.R.S. § 38-431.02(H). This requirement does not permit the use of agenda items such as "personnel," "new business," "old business," or "other matters" unless the specific matters or items to be discussed are identified. The degree of specificity which must be included in the agenda depends on the circumstances. For example, if an environmental board is going to consider the approval of pesticides for application within 1/4 mile of a school, a listing such as "Approval of pesticides for

application within 1/4 mile of a school" is sufficient. However, if the board is going to consider removing a pesticide from the approved list, the agency should specify the pesticide being considered for removal. See Sample Notice and Agenda, Form 7.10.

A public body may include in its agenda items such as "call to the public" to designate that part of the meeting at which members of the public may address the public body, since the public body will generally not know what "specific" matters will be raised. See Sample Notice and Agenda, Form 7.10. The more difficult question is whether the public body, in addition to "considering and discussing" the public comment, may take action on the matters raised. The Open Meeting Law provides that the public body may discuss, consider or decide only "matters listed on the agenda and other matters related thereto." Although this language may be read to permit the public body to act on a matter raised under "call to the public," the safer course of action is to reschedule the decision for a later meeting and list it specifically on the agenda. If it is essential that the body act immediately, it should declare an emergency and take action in accordance with the emergency procedure prescribed in A.R.S. § 38-431.02. See also Section 7.7.6.

If it is likely that the public body may find it necessary to discuss any particular agenda item in executive session with the public body's attorney, the agenda should plainly say so. For example, the agenda might include a provision stating "the board may go into executive session for purposes of obtaining legal advice from the board's attorney on any of the above agenda items pursuant to A.R.S. § 38-431.03(A)(3)."

**7.7.3 Contents of the Agenda—Executive Session.** The agenda for an executive session must contain a "general description of the matters to be considered," but should not contain any information that "would defeat the purpose of the executive session." A.R.S. § 38-431.02(I). In preparing such agenda items, the public body must weigh the legislative policy favoring public disclosure and the legitimate confidentiality concerns underlying the executive session provision. For example, if a board desires to consider the possible dismissal of its executive director, the board may list on the agenda "Personnel matter—consideration of continued employment of the board's executive director." However, when the public disclosure of the fact that the board is considering charges against an employee might needlessly harm the employee's reputation, the board may eliminate from the agenda description the identity of the employee being considered. If it is already publicly known that the board is considering charges against the employee, disclosure of his identity in the agenda would not defeat the purpose of the executive session.

**7.7.4 Distribution of the Agenda.** The agenda may be made available to the public by including it as part of the public notice or by stating in the public notice how the public may obtain a copy of the agenda and then distributing the agenda in the manner prescribed. See Forms 7.3, 7.5, 7.9 and 7.10.

Because both the public notice and the agenda as a general rule must be available at least twenty-four hours in advance of a meeting, the simplest procedure is to include the agenda with the public notice. See Sample Notice and Agenda, Form 7.10.

However, when the public notice is issued well in advance of the meeting, as in the case of notice of regularly scheduled meetings, see Section 7.6.5, the second option may be appropriate.

**7.7.5 Discussing and Deciding Matters Not Listed on the Agenda.** The Open Meeting Law specifically provides that the public body may discuss, consider or decide only those matters listed on the agenda and "other matters related thereto." A.R.S. § 38-431.02(H). The "other matters" clause provides some flexibility to a public body but should be used with extreme caution. The "other matters" must in some reasonable manner be "related" to an item specifically listed on the agenda.

If a matter not specifically listed on the agenda is brought up during a meeting, the better practice and the one which will minimize subsequent litigation is to defer discussion and decision on the matter until a later meeting so that the item can be "specifically" listed on the agenda. If the matter demands immediate attention, the public body should consider using the emergency exception described in Section 7.7.6.

**7.7.6 Emergencies.** The Open Meeting Law provides that a public body may discuss, consider and decide a matter not on the agenda when an actual emergency exists requiring that the body dispense with the advance notice and agenda requirements. See Section 7.6.4 for a discussion of what constitutes an actual emergency.

To use the emergency exception, the public body must do two things. First, prior to the emergency discussion, consideration or decision, the public body must announce in a public meeting the reasons necessitating the emergency action. If the emergency discussion or consideration is to take place in an executive session, this public announcement must occur at a public meeting prior to the executive session.

Second, the public body must place in the minutes of the meeting a statement of the reasons for the emergency. In the case of an executive session this statement will appear twice, once in the minutes of the public meeting where the reasons were publicly announced, and again in the minutes of the executive session where the emergency discussion or consideration took place. See Section 7.8.2.

**7.7.7 Changes in the Agenda.** If a public body finds it necessary to change an agenda by modifying the listed matters or adding new ones, a new agenda must be prepared and distributed in the same manner as the original agenda at least twenty-four hours in advance of the meeting. Ariz. Atty. Gen. Op. 179-045. Changes in the agenda within twenty-four hours of the meeting must be handled as an emergency in accordance with Section 7.7.6.

**7.8 Minutes.** The Open Meeting Law requires that minutes be taken of all public meetings and executive sessions, except that minutes need not be taken of meetings conducted by subcommittees and advisory committees.

**7.8.1 Form of and Access to the Minutes.** Minutes may be taken in writing or may be recorded by a tape recorder or video tape recorder. See Forms 7.13 and 7.14. The minutes of a public meeting must be available for public inspection within three working days after the meeting. The minutes of an executive session are confidential and may not be disclosed to anyone except certain authorized persons. See Section 7.8.4. Minutes must be reduced to a form which is readily accessible to the public. If the minutes have been recorded by a mechanical recorder, allowing the public to have access to that recording is sufficient. However, if the minutes were taken in shorthand, those minutes must be typed or written out in longhand in order to comply with this requirement. See Form 7.13.

**7.8.2 Contents of the Minutes of Public Meetings.** The minutes of a public meeting must contain the following information:

1. The date, time and place of the meeting;
2. The members of the public body recorded as either present or absent;
3. A general description of the matters discussed or considered. The Open Meeting Law requires that minutes contain information regarding matters considered or discussed at the meeting even though no formal action or vote was taken with respect to the matter;
4. An accurate description of all legal actions proposed, discussed or taken and the names of persons who proposed each motion. This does not require that the name of each person who votes on a motion be indicated, but only that the member who proposed it be shown in the minutes. Generally, however, the agency, for its own benefit, will include the names of the member who seconded and those who voted in favor or against the motion. In any case, the minutes must reflect how the body voted and the numerical breakdown of the vote, e.g. 3 in favor, 1 against, 1 abstention;
5. The name of each person making statements or presenting material to the public body and a specific reference to the legal action, see item 4, to which the statement or presentation relates;
6. If the discussion in the public session did not adequately disclose the subject matter and specifics of the action taken, the minutes of the public meeting at which such action was taken should contain sufficient information so that the public may investigate further the background or specific facts of the decision. See Section 7.5.10; Karol v. Board of Education Trustees, 122 Ariz. 95, 593 P.2d 649 (1979);
7. If matters not on the agenda were discussed or decided at a meeting because of an actual emergency, the minutes must contain a full description of the nature of the emergency. See Section 7.6.4 and Section 7.7.6; and
8. If a prior act was ratified, the minutes must contain a copy of the disclosure statement required for ratification. See Section 7.11.2.

**7.8.3 Contents of the Minutes of Executive Sessions.** The minutes of executive sessions must contain the following information:

1. The date, time and place of the meeting;
2. The members of the public body recorded as either present or absent;

3. A general description of the matters considered. See Section 7.8.2(3);

4. A statement of the reasons for emergency consideration of any matters not on the agenda. See Section 7.8.2(7); and

5. Such other information as the public body deems appropriate. For example, the public body should record in its minutes that those present were advised that the information discussed in the session and the session minutes are confidential.

7.8.4 Confidentiality of Executive Session Minutes. The minutes of an executive session and all discussions which take place at an executive session are confidential and may not be disclosed to anyone, except that they may be disclosed to:

1. Any member of the public body which met in the executive session, including members who did not attend the executive session. Picture Rocks Fire District v. Updike, 145 Ariz. 79, 699 P.2d 1310 (Ct. App. 1985);

2. Any officer, appointee or employee who was the subject of discussion at an executive session authorized under A.R.S. § 38-431.03(A)(1). See Section 7.5.3;

3. Staff personnel to the extent necessary for them to prepare and maintain the minutes of the executive session;

4. The attorney for the public body to the extent necessary for the attorney to represent the public body;

5. The Auditor General in connection with the lawful performance of his duty to conduct a financial or performance audit as provided by law. A.R.S. § 38-431.03(B); Ariz. Atty. Gen. Op. 179-130; or

6. The court for purposes of a confidential inspection by the court under A.R.S. § 38-431.07(C).

The Open Meeting Law requires that a public body advise all persons attending an executive session or obtaining access to executive session minutes or information that such minutes and information are confidential.

In addition, upon receipt of an investigative request from the Attorney General or County Attorney requesting executive session minutes or other information concerning discussions at an executive session, the public body to whom it is directed must either comply with the request or, upon a majority vote at a public meeting, apply to superior court for a protective order preventing the disclosure. The public body may voluntarily disclose executive session minutes and discussions to the Attorney General or County Attorney even in the absence of a formal investigative request.

## **7.9 Public Access to Meetings.**

**7.9.1 Public Participation and Access.** The Open Meeting Law provides that the public shall be allowed to attend and listen to deliberations and proceedings taking place in all public meetings. The Open Meeting Law does not establish a right for the public to participate in the discussion or in the ultimate decision of the public body. Ariz. Atty. Gen. Op. 178-1. Other statutes may, however, require public participation or public hearings. For example, before promulgating rules, state agencies must permit public participation in the rule making process, including the opportunity to present oral or written statements on the proposed rule. See Chapter 11.

The Open Meeting Law requires that the public body provide the public with access to all public meetings. This requirement is not met if the public body invokes any procedure or device which obstructs or inhibits public attendance at public meetings, such as requiring persons to sign in before they are permitted to attend the meeting or holding the meeting in a remote location, in a room too small to accommodate the reasonably anticipated number of observers, in a place where the public does not have access, such as private clubs, or at an unreasonable time, such as 6:00 A.M. The Open Meeting Law, however, does not prevent a public body from requiring persons who intend to speak at the meeting to sign a register so as to permit the public body to comply with the minute taking requirements. See Section 7.8.2(5).

**7.9.2 Telephone Conferences.** If one or more members of a public body are unable to be present in person at a public meeting, they may, nevertheless, participate by telephone or video conference if the practice is approved by the public body and is not prohibited by statutes applicable to meetings of the public body. Ariz. Atty. Gen. Op. 183-135. This practice presents several practical and legal problems and should be used only where there are no reasonable alternatives.

A public body should comply with the following guidelines in order to avoid violations of the Open Meeting Law.

1. The notice and the agenda should state that one or more members of the public body will participate by telephonic or video communications.
2. The public meeting place where the public body normally meets should have facilities set up in order to permit the public to observe and hear all telephone or video communications.
3. The public body should develop procedures for clearly identifying all members participating by telephonic or video communications.
4. The minutes of the meeting should identify the members participating by telephonic or video communications and describe the procedures followed to provide the public access to all communications during the meeting.

**7.9.3 Recording the Proceedings.** The Open Meeting Law provides that all or any part of a public meeting may be recorded by any person in attendance by means of a tape recorder, camera or other means of reproduction. A public body may prohibit or restrict such recordings only if they actively interfere with the conduct of the meeting. A.R.S. § 38-431.01(E).

## 7.10 Sanctions for Violations of the Open Meeting Law.

7.10.1 Nullification. A.R.S. § 38-431.05 provides that all legal action transacted by any public body during a meeting held in violation of any provision of the Open Meeting Law is null and void unless subsequently ratified. The procedures for ratification are described in Section 7.11.

The Arizona Supreme Court, however, has held that violations of the Open Meeting Law are voidable within the discretion of the court. Karol v. Board of Education Trustees, 122 Ariz. 95, 593 P.2d 649 (1979). In the Karol case, the court held that:

[A] technical violation having no demonstrated prejudicial effect on the complaining party does not nullify all the business in a public meeting when to conclude otherwise would be inequitable, so long as the meeting complies with the intent of the legislature.

122 Ariz. at 98, 593 P.2d at 652. This decision imposes a substantial compliance test and requires a weighing of the equities before a court will declare an action void. The decision, however, preceded the 1982 amendment to the Open Meeting Law which specifically authorizes a procedure for ratification. It remains to be seen whether or not this change will cause the court to follow the literal language of the Open Meeting Law. Nevertheless, the serious consequences that flow from having an action of a public body declared void should serve to remind the public body that it should take every precaution possible to avoid even technical violations of the Open Meeting Law.

In some cases, the public body may have discussed a matter at an unlawful meeting but thereafter met in a lawful open meeting and took a formal vote in the form of "final action." The Arizona Court of Appeals has held that the subsequent "final action" taken at a lawful meeting is not void. Valencia v. Cota, 126 Ariz. 555, 617 P.2d 63 (Ct. App. 1980). The public body taking the final action at the subsequent lawful meeting should make available at that time the substance of all discussions that took place at the earlier unlawful meeting. If the public body wishes to preserve the effective date of the earlier action rather than simply redecide the matter, it must go through the ratification process. See Section 7.11.

7.10.2 Enforcement Actions. A.R.S. § 38-431.04 provides that when the provisions of the Open Meeting Law have not been complied with, a court of competent jurisdiction may issue a writ of mandamus requiring a meeting to be open to the public. A writ of mandamus is an order of the court compelling a public officer to comply with certain mandatory responsibilities imposed upon him by law.

Any person affected by "legal action" of a public body, the attorney general, or the county attorney for the county in which the alleged violation occurred, may file suit in superior court for the purpose of requiring compliance with or preventing violations of the Open Meeting Law or to determine whether the law is applicable to certain matters or legal actions of the public body. A.R.S. § 38-431.07.

7.10.3 Civil Penalty. In an action under A.R.S. § 38-431.07, the court may impose a civil penalty not exceeding five hundred dollars against any person found to have violated the Open Meeting Law. This penalty is assessed against the individual and not the public body and the public body may not pay the penalty on behalf of the person assessed.

7.10.4 Attorneys' Fees. The court may also order payment of reasonable attorneys fees to a successful plaintiff in an enforcement action brought under the Open Meeting Law. Normally those fees will be paid by the state or political subdivision of which the public body is a part or to which it reports. However, if the court determines that a public officer violated the Open Meeting Law "with intent to deprive the public of information or of the opportunity to be heard," the court must assess against that public officer all of the costs and attorneys fees awarded to the plaintiff. A.R.S. § 38-431.07(A). As in the case of an award of civil penalties, the public body may not pay such an award of attorney fees assessed against the public officer individually.

7.10.5 Removal From Office. If the court determines that a public officer violated the Open Meeting Law "with intent to deprive the public of information or of the opportunity to be heard," the court may remove the public officer from office, and as noted above, the court must personally assess the public officer with the plaintiff's costs and attorneys fees. A.R.S. § 38-431.07(A).

7.10.6 Expenditure for Legal Services by Public Body Relating to the Open Meeting Law. A public body may not retain counsel or expend monies for legal services to defend an action brought under this Open Meeting Law unless the public body has legal authority to make such an expenditure pursuant to other provisions of law and it approves the expenditure at a properly noticed open meeting prior to incurring the obligation. A.R.S. § 38-431.07(B).

## 7.11 Ratification.

7.11.1 Generally. A public body may ratify action previously taken in violation of the Open Meeting Law. Ratification is appropriate when the public body needs to retroactively validate a prior act in order to preserve the earlier effective date of the action. For example, a public body may be required by law to approve its budget by a certain date. If the public body discovered after the statutory deadline that its earlier approval is void due to a violation of the Open Meeting Law, it could face serious legal problems. Even if the body met quickly to properly approve the budget, the approval would not have been made prior to the statutory deadline. Accordingly, the 1982 amendments permit the public body to meet and approve retroactively the action previously taken—that is, ratify its prior action.

Ratification merely validates the prior action; it does not eliminate liability of the public body or others for the other sanctions under the Open Meeting Law, such as civil penalties and attorneys fees.

7.11.2 Procedure for Ratification. The Open Meeting Law provides in A.R.S. § 38-431.05(B) a detailed procedure for ratification. That procedure is as follows:

1. The decision to ratify must take place at a public meeting held in accordance with the Open Meeting Law;

2. The decision to ratify must be taken within thirty days after discovery of the violation or after such discovery should have been made by the exercise of reasonable diligence. A complaint from the public or the press that a public body has violated the Open Meeting Law should be investigated promptly as a court may view this communication as the "discovery" from which the thirty day period begins to run;

3. The public notice of the meeting at which ratification is to take place, in addition to complying with the other requirements of the Open Meeting Law, see Sections 7.6 and 7.7, must include (a) a description of the prior action to be ratified, (b) a clear statement that the public body proposes to ratify a prior action, and (c) information on how the public may obtain a written description of the action to be ratified. See Form 7.15;

4. In addition to the notice and agenda of the meeting, the public body must make available to the public a detailed written description of the action to be ratified and a description of all prior deliberations, consultations and decisions by members of the public body related to the action to be ratified.

5. The description required under paragraph 4 must be included as part of the minutes of the meeting at which the decision to ratify was made; and

6. The public notice, agenda and written description discussed in paragraphs 3 and 4 must be made available to the public at least seventy-two hours prior to the public meeting.

Form 7.1

Employee Notice of Executive Session

Section 7.5.3

[DATE]

[Name and Address of Officer  
or Employee who is the subject  
of discussion at the executive  
session]

Dear [Name of employee]:

This is to advise you that the [name of public body] will meet in executive session at its next meeting on [date, time, and place\*] to discuss [describe nature of matters to be discussed or considered]. You may request that the discussion take place during the [name of public body's] public meeting rather than in executive session, by contacting the undersigned not later than [date and time by which notification must be given\*\*].

Very truly yours,

[Authorized Signature]

\* "Place" includes building address and room number or other information identifying the specific room in which the meeting will be held. See Section 7.6.3.

\*\* Since the public body must post its notice of either a public meeting or executive session at least 24 hours before the meeting, the deadline for the employee to exercise his right to demand a public meeting must be more than twenty-four hours before the meeting.

Form 7.2

Disclosure Statement

Section 7.6.2.1

STATEMENT OF WHERE ALL NOTICES OF THE MEETINGS OF THE  
[NAME OF PUBLIC BODY] WILL BE POSTED

TO: THE HONORABLE SECRETARY OF STATE and THE CITIZENS OF ARIZONA

Pursuant to A.R.S. § 38-431.02, the [name of public body] hereby states that all notices of the meetings of the [name of public body] and any of its committees and subcommittees will be posted [identify the location where notices will be posted and include the hours during which such locations are open to the public i.e. "in the lobby of the State Capitol located at 1700 West Washington, Phoenix, Arizona, which lobby is open to the public Monday through Friday from 8:00 a.m. to 5:00 p.m. except legal holidays, and at the press room of the State Senate Building, 1700 West Washington, Phoenix, Arizona".] Such notices will indicate the date, time and place of the meeting and will include an agenda or information concerning the manner in which the public may obtain an agenda for the meeting.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

[name of public body]

By [authorized signature]

Form 7.3

Notice of Public Meeting of a Public Body

Section 7.6.2

NOTICE OF PUBLIC MEETING OF THE  
[NAME OF PUBLIC BODY]

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the members of the [name of public body] and to the general public that the [name of public body] will hold a meeting open to the public on [date, time, and place\*].

The agenda for the meeting is as follows:

[List the specific matters to be discussed, considered or decided.  
See sample agenda, Form 7.10.]

[OR]

A copy of the agenda for the meeting will be

available at [location where the agenda will be available] at least  
twenty-four (24) hours in advance of the meeting.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

[name of public body]

By [authorized signature]

\* "Place" includes building address and room number or other information identifying the specific room in which the meeting will be held. See Section 7.6.3.

Form 7.4

Notice of Public Meeting of a Committee of a Public Body

Section 7.6.2

NOTICE OF SPECIAL MEETING OF THE [NAME OF COMMITTEE]  
OF THE [NAME OF PUBLIC BODY]

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the members of the [name of committee] of the [name of public body] and to the general public that the [name of committee] of the [name of public body] will hold a special meeting open to the public on the [date, time, and place\*].

The agenda for the meeting is as follows:

[List the specific matters to be discussed, considered or decided. See sample agenda, Form 7.10.]

[OR]

A copy of the agenda for the meeting will be available at [location where the agenda will be available] at least twenty-four (24) hours in advance of the meeting.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

[name of public body]

By [authorized signature]

\* "Place" includes building address and room number or other information identifying the specific room in which the meeting will be held. See Section 7.6.2.

Form 7.5

Notice of Regular Meetings of a Public Body

Sections 7.6.2 and 7.6.5

NOTICE OF REGULAR MEETINGS OF THE  
[NAME OF PUBLIC BODY]

Pursuant to A.R.S. § 38-431.02(F), notice is hereby given to the members of the [name of public body] and to the general public that the [name of public body] will hold regular meetings on the [specific day of month] of each month during the year [year]. The meetings will begin at [time] and will be held at [place\*]. A copy of the agenda for the meeting will be available at [location where the agenda will be available] at least twenty-four (24) hours in advance of the meeting.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

[name of public body]

By [authorized signature]

\*\*"Place" includes building address and room number or other information identifying the specific room in which the meeting will be held. See Section 7.6.3.

Form 7.6

Notice of Resumed Public Meeting

Section 7.6.4

NOTICE OF RESUMED PUBLIC MEETING OF THE  
[NAME OF PUBLIC BODY]

Pursuant to A.R.S. § 38-431.02, notice is hereby given to members of the [name of public body] and to the general public that the public meeting of the [name of public body] held on [date], has been recessed and will be resumed on [date, time, and place\*]. The specific matters remaining on the agenda to be discussed, considered, or decided are as follows:

[List specific matters to be discussed, considered or decided.]

Dated this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

[name of public body]

By [authorized signature]

\* "Place" includes building address and room number or other information identifying the specific room in which the meeting will be held. See Section 7.6.3.

Form 7.7

Notice of Resumed Executive Session

Section 7.6.4

NOTICE OF RESUMED EXECUTIVE SESSION OF THE  
[NAME OF PUBLIC BODY]

Pursuant to A.R.S. § 38-431.02, notice is hereby given to members of the [name of public body] and to the general public that the executive session of the [name of public body] held on [date], and authorized under A.R.S. § 38-431.03, subsection (A), paragraph [list applicable provision], has been recessed and will be resumed on [date, time, and place\*]. The matters remaining to be discussed or considered include:

[Include a general description of the matters remaining to be discussed or considered.]

Dated this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

[name of public body]

By [authorized signature]

\* "Place" includes building address and room number or other information identifying the specific room in which the meeting will be held. See Section 7.6.3.

Form 7.8

Notice of Meeting and Possible Executive Session of a Public Body

Section 7.6.6

NOTICE OF MEETING AND POSSIBLE EXECUTIVE SESSION OF THE  
[NAME OF PUBLIC BODY]

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the members of the [name of public body] and to the general public that the [name of public body] will hold a meeting open to the public on [date, time, and place\*] for the purpose of deciding whether to go into executive session. If authorized by a majority vote of the [name of public body], the executive session will be held immediately after the vote and will not be open to the public.

The agenda for the meeting is as follows:

[Include a general description of the matters to be discussed or considered.]

[OR]

A copy of the agenda for the meeting will be available at [location where the agenda will be available] at least twenty-four (24) hours in advance of the meeting.

This executive session is authorized under A.R.S. § 38-431.03, Subsection (A), paragraph [list applicable provision].

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

[name of public body]

By [authorized signature]

\* "Place" includes building address and room number or other information identifying the specific room in which the meeting will be held. See Section 7.6.3.

Form 7.9

Notice of Combined Public Meeting and Executive Session

Section 7.6.)

NOTICE OF COMBINED PUBLIC MEETING AND EXECUTIVE SESSION OF  
[NAME OF PUBLIC BODY]

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the members of the [name of public body] and to the general public that the [name of public body] will hold a meeting open to the public on [date, time and place\*]. As indicated in the agenda, the [name of public body] may vote to go into executive session which will not be open to the public to discuss certain matters.

The agenda for the meeting is as follows:

[List the specific matter to be discussed, considered or decided. Identify those matters that may be discussed or considered in executive session and identify the paragraph of A.R.S. § 38-431.03(A) authorizing the executive session.]

[OR]

A copy of the agenda for the meeting will be available [at location where the agenda will be available] at least twenty-four (24) hours in advance of the meeting.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

[name of public body]

By [authorized signature]

\* "Place" includes building, address and room number or other information identifying the specific room in which the meeting will be held. See Section 7.6.3.

Form 7.10

Sample Notice of Public Meeting and Executive Session

Sections 7.6.3, 7.6.7, 7.7.2 and 7.7.3

NOTICE OF MEETING OF THE  
ARIZONA COMMISSION ON THE ENVIRONMENT

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the members of the Arizona Commission on the Environment and to the general public that the Arizona Commission on the Environment will hold a meeting open to the public on January 21, 1982, beginning at 8:30 a.m. in Room 201, Health Building, 1740 West Adams, Phoenix, Arizona. As indicated in the following agenda, the Arizona Commission on the Environment may vote to go into executive session, which will not be open to the public, to discuss certain matters.

The agenda for the meeting is as follows:

- I. Call to Order. (Chairman Smith)
- II. Approval of Minutes of December 18, 1986 Meeting.
- III. Committee Reports. (Oral reports of the following committees and discussion thereon.)
  1. Computer Committee. Report by the chairman of the Commission's Advisory Committee on proposals for acquiring a new computer system for the Commission.
- IV. Personnel.
  1. Consideration of applicants for Director of the Commission. The Commission may vote to discuss this matter in executive session pursuant to A.R.S. § 38-431.03(A)(1). (The names of the applicants may be obtained by contacting the Commission's Executive Secretary.)
  2. Selection of Director of the Commission. The Commission may defer a decision on this matter to a later date.
- V. Litigation.
  1. State v. Acme Polluters. Discussion and decision concerning possible settlement. The Commission may vote to discuss this matter in executive session pursuant to A.R.S. § 38-431.03(A)(3) and (4). The Commission may decide the matter in the public meeting or defer decision to a later date.
  2. Instituting Litigation. Discussion with and instruction to the Commission's attorneys concerning the filing of an enforcement action against The Murray Corporation. The Commission may discuss this matter in executive session pursuant to A.R.S. § 38-431.03(A)(2), (3) and (4). The Commission may decide the matter in the public meeting or defer decision to a later date.

Form 7.10 - (Continued)

VI. Consent Agenda.

Approval of routine warrants, purchase orders, travel claims, employee leave and transfer requests, and employee resignations. (Documentation concerning the matters on the consent agenda may be reviewed at the Commission's office.)

VII. Call to the Public.

Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.

VIII. Announcements.

Announcements of future meeting dates and other information concerning the Commission.

A copy of the agenda background material provided to Commission members (with the exception of material relating to possible executive sessions) is available for public inspection at the Commission's office, Room 402, Health Building, 1740 West Adams, Phoenix, Arizona.

Dated this 29th day of December, 1982.

ARIZONA COMMISSION ON THE ENVIRONMENT

Mary Basham  
Executive Secretary

Form 7.11

Certification of Posting of Notice

Section 7.6.8

CERTIFICATION OF POSTING OF NOTICE

The undersigned hereby certifies that a copy of the attached notice was duly posted at [place] on [date and time] in accordance with the statement filed by the [name of public body] with the [name of public officer with whom the statement was filed].

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
[name and title of person signing the certificate]

Form 7.12

Special Notice of Emergency Meeting

Section 7.7.6

**SPECIAL NOTICE OF AN EMERGENCY MEETING OF  
[NAME OF PUBLIC BODY] HELD [DATE]**

Pursuant to A.R.S. § 38-431.02(D), notice is hereby given that an emergency session of the [name of public body] was held on [date, time, and place\*].

At the emergency session the [name of public body] [describe the specific matters discussed, considered or decided, or in the case of matters considered in an emergency executive session, a general description of the matters considered, provided that no information is included that would defeat the purpose of the executive session].

Dated this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

[name of public body]

By [authorized signature]

\* "Place" includes building address and room number or other information identifying the specific room in which the meeting will be held. See Section 7.6.3.

Form 7.13

Minutes of Public Meeting

Sections 7.8.1 and 7.8.2

MINUTES OF PUBLIC MEETING OF THE  
[NAME OF PUBLIC BODY] OF MEETING HELD [DATE]

A public meeting of the [name of public body] was convened on [date, time, and place\*]. Present at the meeting were the following members of the [name of public body]: [names of members present]. Absent were: [names of members absent]. The following matters were discussed, considered and decided at the meeting:

1. [Generally describe all matters discussed or considered by the public body.]
2. [Describe accurately all legal actions proposed, discussed or taken and the names of persons who proposed each motion]
3. [Identify each person making statements or presenting material to the public body with a specific reference to the legal action about which they made statements or presented material]
4. [Other required information. See Section 7.8.2(6) (7) and (8)].

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

[name of public body]

By [authorized signature]

\* "Place" includes building address and room number or other information identifying the specific room in which the meeting will be held. See Section 7.6.3.

Form 7.14

Minutes of Executive Session

Section 7.8.3

MINUTES OF EXECUTIVE SESSION OF THE  
[NAME OF PUBLIC BODY] HELD [DATE]

An executive session of the [name of public body] was convened on [date, time, and place\*]. The [name of public body] voted to go into executive session at a public meeting on [date, time and place\*]. Present at the executive session were the following members of the [name of public body]: [names of members present]. Absent were: [names of members absent]. Also attending the executive session were: [names of those present including the reasons for their presence; i.e., attorney for the public body, etc.]

The following matters were discussed and considered at the meeting:

1. [Generally describe the matters discussed or considered by the public body.]
2. [If the executive session is held as an emergency session, include the statement of reasons for the emergency consideration. See Section 7.8.2(7).]
3. [Include such other information as the public body deems appropriate. See Section 7.8.3(5).]

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

[name of public body]

By [authorized signature]

\* "Place" includes building address and room number or other information identifying the specific room in which the meeting will be held. See Section 7.6.3.

Form 7.15

Notice of Action to be Ratified

Sections 7.6.3 and 7.11.2

NOTICE OF PUBLIC MEETING OF THE [NAME OF PUBLIC BODY]  
FOR THE PURPOSE OF RATIFYING PAST ACTION TAKEN  
IN VIOLATION OF OPEN MEETING LAW

Pursuant to A.R.S. § 38-431.05, notice is hereby given to the members of the [name of public body] and to the general public that the [name of public body] will hold a meeting open to the public on [date, time and place\*].

The purpose of the meeting is to ratify a prior action of the [name of public body] which may have been taken in violation of the Open Meeting Law. This action involved:

[Here list a general description of the action.]

The public may obtain a detailed written description of the action to be ratified, and all deliberations, consultations and decisions by members of the public body that preceded and relate to this action to be ratified at [identify the location and include hours] at least 72 hours in advance of the meeting.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

[name of public body]

By [authorized signature]

\* "Place" includes building address and room number or other information identifying the specific room in which the meeting will be held. See Section 7.6.3.

CHAPTER 8  
CONFLICT OF INTEREST

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## CHAPTER 8

### CONFLICT OF INTEREST

8.1 Scope of this Chapter. This Chapter is concerned with the conflict of interest laws contained in A.R.S. §§ 38-501 to -511, which establish minimum standards for the conduct of public officers and employees who are or may become involved with a contract or decision in their official capacity which might affect their personal pecuniary interests or those of their close relatives, *i.e.*, wife, husband, children, grandchildren, parent, grandparent, brother, sister and their spouses, or the parent, brother, sister or child of one's spouse. A.R.S. § 38-502(9).

The "interest" described in the conflict of interest laws refers to a pecuniary, financial, or proprietary interest by which a public officer or employee or his relative stands to gain or lose something of economic value as contrasted to general sympathy, feelings or biases. Yetman v. Naumann, 16 Ariz. App. 314, 492 P.2d 1252 (1972).

This Chapter is intended as a general guideline, and does not attempt to address every situation which may lead to a conflict of interest. Conflicts of interest not specifically addressed in this Chapter should be reviewed with legal counsel.

8.2 Other Conflict of Interest Laws. There are other state statutes which deal with certain specific conflicts of interest besides those specified in A.R.S. §§ 38-501 to -511. Examples of state statutes imposing additional prohibitions are: A.R.S. § 4-114, prohibiting members of the Liquor Board, the Liquor Superintendent or employees of the Department of Liquor Licenses and Control from having a financial interest in businesses licensed to deal in spirituous liquors; A.R.S. §§ 5-103, -103.01 and -115(E), prohibiting members, employees or appointees of the Racing Commission or department from holding certain interests in the racing industry or engaging in certain activities; A.R.S. § 6-113, prohibiting the Banking Superintendent and personnel of the Banking Department from engaging in certain business dealings or being employed by financial institutions under the jurisdiction of the department. Other statutes expressly regulating conduct of public officers or employees include A.R.S. § 35-705, board members of municipal development authority, A.R.S. § 16-531, election and tally board members, A.R.S. § 20-149, Insurance Department employees, and A.R.S. § 38-481, prohibiting public officials from appointing relatives to salaried public service positions.

This is not a complete listing of all statutes regulating potential conflicts of interest. The officer or employee should refer to the statutes governing the particular agency for any specific provisions regarding standards of conduct for that agency and its employees.

#### 8.2.1 Incompatibility Doctrine.

The common-law doctrine of incompatibility of public offices states that a conflict of interest exists when a person who occupies a public position accepts an additional public position and that second position has duties which either are in conflict with the first position or renders physically impossible the performance of the duties of

both positions. Coleman v. Lee, 58 Ariz. 506, 121 P.2d 433 (1942). Under this doctrine, the person in question is deemed to have automatically vacated the first position upon acceptance of the second, incompatible position.

### 8.3. Purpose of the Conflict of Interest Laws.

The purpose of Arizona's conflict of interest laws is to prevent self dealing by public officials. Maucher v. City of Eloy, 145 Ariz. 335, 701 P.2d 593 (Ct. App. 1985). The financial interests of public officers or employees must not conflict with the unbiased performance of their public duties: "one cannot serve two masters with conflicting interests." 145 Ariz. at 338, 701 P.2d at 596. The object of the statutes is to remove or limit the possibility of any personal influence, direct or indirect, which might bear on an official's decision as well as to discourage deliberate dishonesty. People v. Sobel, 40 Cal. App. 3d 1046, 115 Cal. Rptr. 532 (1974).

8.4 Persons Covered. The state's conflict of interest laws apply to all public officers and employees of the state and any of its departments, commissions, agencies, bodies or boards. The law also applies to all public officers and employees of incorporated cities or towns, counties, school districts, and all political subdivisions of the state.

8.4.1 Public Officers. The term "public officer" includes all elected and appointed officers of a public agency established by charter, ordinance, resolution, state constitution or statute, regardless of whether they are paid for their services. A.R.S. § 38-502(8). Members of advisory commissions, boards, councils and committees such as the Health Advisory Council are also public officers as that term is used in the conflict of interest laws. Ariz. Atty. Gen. Op. 175-211. For example, the State Mine Inspector is an elected officer and heads the Office of State Mine Inspector. He is covered by the conflict of interest laws. The Director of the Department of Health Services is appointed by the Governor and as such is an appointed officer of a public agency established by state statute and is also covered by the laws. The conduct of members of the Legislature is governed by a separate code of ethics adopted by the ethics committees in the senate and the house of representatives. See A.R.S. § 38-519.

8.4.2 Board Members. All members of Arizona's many regulatory boards are "public officers" covered by the conflict of interest laws whether they are paid for their services or serve on a voluntary basis.

It is a fact of board service that board members often have professional or social ties with the persons they license, regulate or discipline. Board members should therefore be sensitive to potential conflicts of interest.

A board member who has a substantial interest, see Section 8.5, in a board decision has a conflict of interest and should not participate in the deliberations or vote of the board, or communicate with the other board members or attempt to influence their decision in any manner. It is a violation of a licensee's fourteenth amendment due process rights to be judged by a board member who has a direct, personal, substantial or pecuniary interest in reaching a conclusion against him. Tumey v. State of Ohio, 273 U.S. 510 (1927).

Once the board member becomes aware of a conflict of interest involving an applicant or a licensee, he should immediately file a signed written disclosure statement fully disclosing the interest in the agency's special conflict of interest file or announce

the nature of the conflict of interest in open session at the board meeting and thereafter file a copy of the official minutes in the conflict of interest file maintained by that agency. See Sections 8.8.1 and 8.8.2.

A potential conflict of interest may arise if a board member is also a member of a professional association of the profession which the board regulates. Ariz. Atty. Gen. Op. I79-142 states that a state dental board member, who was a practicing dentist and a non-salaried officer of the State Dental Association, may rule on the competency of applicants for dental licenses along with the other board members as long as his economic interest in the matter is no greater than that of other licensed dentists. This type of interest falls under the category of "class interests" classified by the Legislature as a remote interest not requiring disclosure. See Section 8.6.11. However, if a board member allows the special interest of the professional association to affect his judgment on a board matter, a conflict of interest could arise. For example, the United States Supreme Court in Gibson v. Berryhill, 411 U.S. 564 (1973), held that the Alabama Board of Optometry, which was composed solely of independent practitioners, was disqualified from deciding that optometrists who were employed by corporations engaged in "unprofessional conduct" by "aiding and abetting . . . in the illegal practice of optometry . . ." 411 U.S. at 567-68. The district court had found that the corporation, Lee Optical, "did a large business in Alabama, and that if it were forced to suspend operations the individual members of the Board, along with other private practitioners of optometry, would fall heir to this business." 411 U.S. at 571.

8.4.3 Employees. Anyone employed by an incorporated city or town, political subdivision of the state, the state or any of its departments, commissions, agencies, bodies or boards for compensation, whether on a full-time, part-time or contract basis, is considered an employee for the purposes of the conflict of interest laws. A.R.S. § 38-502(2). For example, a consultant hired by the Department of Transportation to make recommendations regarding the route of an interstate highway would be covered. He would be prohibited from making such recommendations if he owned or had an interest in a parcel of land that might be affected by the highway department's decision concerning the route of the interstate highway.

As long as there is an agreement between a governmental agency and an individual in which the individual agrees to perform some function for the agency for compensation, that individual is considered an employee under the conflict of interest laws.

## 8.5 The Arizona Conflict of Interest Laws.

A.R.S. § 38-503 states in pertinent part:

A. Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any contract, sale, purchase or service to such public agency shall make known that interest in the official records of such public agency and shall refrain from voting upon or otherwise participating in any manner as an officer or employee in such contract, sale or purchase.

B. Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.

8.5.1 Substantial Interest. That "substantial interest" set forth in A.R.S. § 38-503 (A), (B) means any pecuniary or proprietary interest, either direct or indirect, of the public officer or employee or of his relatives, which is not defined by statute as a remote interest. A.R.S. § 38-502(11).

The Legislature has determined that certain economic interests are so "remote" that they do not constitute an impermissible influence on a person's decisions or actions. These "remote interests" are set forth in A.R.S. § 38-502. See Section 8.6. Unless the interest at issue falls within one of the statutory specified situations declared by the Legislature to be remote, the interest is substantial and creates a conflict of interest for that person. Yetman v. Naumann, 16 Ariz. App. 314, 492 P.2d 1252 (1972).

To determine whether a substantial interest exists, the public officer must ask the following questions:

1. Will the decision have an impact, either positive or negative, on an interest of himself or a relative?
2. Is the interest a pecuniary or proprietary interest?
3. Is the interest other than one statutorily designated as a remote interest? See Section 8.6.

If the answer to each of these questions is yes, then a substantial interest exists which requires disclosure and disqualification by the public officer or employee. See Section 8.8.

8.5.2 Relatives. An interest may be considered substantial if it belongs to either the public officer or employee or to a relative. "Relative" is defined to include:

1. Spouse;
2. Spouse's parents, brother, sister and child;
3. Child and grandchild;
4. Parent and grandparent;
5. Brother and sister and their respective spouses.

A.R.S. § 38-502(9).

Thus, although the officer or employee may not have a substantial interest in a decision in which he is about to participate, if one of his relatives described above has a substantial interest in the decision, he must disclose the interest and refrain from participating in the decision. See Section 8.8. He may not justify his failure to comply

with the conflict of interest laws by stating he was unaware of his relative's interest. Public officers and employees have an affirmative obligation to become aware of any interests their relatives may have in matters in which they may become involved.

## 8.6 Remote Interests.

8.6.1 Generally. A.R.S. § 38-502 excludes from the definition of a substantial interest ten enumerated remote interests. Any interest in a decision or contract not covered by one or more of the enumerated remote interests is a substantial interest requiring compliance with the disclosure and withdrawal requirements of the law. As a thorough understanding of the enumerated remote interests is essential in determining whether the conflict of interest laws applies in a given situation, these remote interests are discussed separately below. If an interest is classified as "remote," the officer or employee need not disclose it and may participate in the agency's action or decision.

8.6.2 Nonprofit Corporations. If the public officer or employee or his relative is a non-salaried officer of a nonprofit corporation, he has a remote interest in any decision affecting that corporation.

8.6.3 Landlord/Tenant of a Contracting Party. If the public officer or employee or his relative is a landlord or tenant of a party contracting with his agency, he has a remote interest in a decision regarding the contract.

8.6.4 Attorney of a Contracting Party. If the public officer's or employee's relative is the attorney for a client contracting with his agency, he has a remote interest in any decision made by the agency affecting the client's contract. For example, if the Director of the Department of Economic Security is considering awarding a contract to a day care center and that day care center is represented by an attorney who is the brother of the Director of the Department of Economic Security, the Director's interest in the awarding of the contract is remote.

8.6.5 Nonprofit Cooperative Marketing Associations. If the public officer or employee or his relative is a member of a nonprofit cooperative marketing association, he has a remote interest in any decision affecting that association.

8.6.6 Insignificant Stock Ownership. If the public officer or employee or his relative owns less than 3% of the shares of a corporation for profit, and if the income from those shares does not exceed 5% of the person's total annual income, he has a remote interest in any decision affecting that corporation.

8.6.7 Reimbursement of Expenses. If the public officer or employee or his relative is being reimbursed for actual and necessary expenses incurred in the performance of his official duties, he has a remote interest in any decision affecting such reimbursement.

## 8.6.8 Recipient of Public Services Generally Available.

If the public officer or employee or his relative is a recipient of public services provided by the governmental agency of which he is employed, and if those services are available to the general public, he has a remote interest in any decision affecting those services. For example, an employee of the Department of Transportation may participate

in decisions regarding the building of highways because the use of the highways is a service provided on the same terms and conditions to persons not officers or employees of the Department of Transportation. However, if the decision concerns the building of a highway adjacent to property owned by the employee, he could receive a substantial personal benefit from that decision, and may not participate.

**8.6.9 Relatives of School Board Members.** If a school board member has a relative, other than a spouse or dependent as defined in A.R.S. § 43-1001, who has a substantial interest in the decision made by the school board, the school board member is not barred from participating in the decision. For example, where the school board member votes on teachers' contracts for the district and he has a relative who is a teacher in the district, the board member's interest is remote and he may participate in the decision. However, if the school board member's spouse or dependent is a teacher covered by the contract, the board member must then disclose his relative's interest and refrain from participating in the decision, because the interest is no longer remote.

**8.6.10 Interests of Other Agencies.** A public officer or employee may participate in a decision that indirectly affects a relative who is an officer or employee of another public agency. For example, the head of the state agency responsible for allocating funds to local governments could participate in such decisions even though his spouse was an officer or employee of the local government. If, however, the decision confers some direct economic benefit or detriment to the spouse, such as a decision to terminate funding for a program which would result in the termination of a spouse's employment by the local government, a conflict of interest is present.

**8.6.11 Class Interests.** If the public officer or employee or his relative is a member of a trade, business, profession or other class of persons and his interest is no greater than the interest of the other members of the class, he has a remote interest in any decision affecting the class. For example, if a member of the Board of Optometry was considering the passage of a rule prohibiting certain types of advertising, his interest in the decision would be no greater than that of any other licensed optometrist and, therefore, he would not have to disclose the interest and would be allowed to participate in the decision regarding that rule.

**8.7 Contracts for Supplies or Services.** Any time a public officer or employee supplies goods or services to his agency in excess of \$300 in any single transaction, the contract may only be awarded pursuant to public competitive bidding. A.R.S. § 38-503(C)(2). This requirement of public competitive bidding is in addition to disclosure and compliance requirements discussed in Section 8.8. This requirement does not apply to school district governing boards in certain situations set forth in A.R.S. § 38-503(C)(1).

The public bidding requirements may not be evaded by a public officer or an employee who sells supplies or services to the agency through a corporation which is the alter ego of the officer or which was formed for the purpose of avoiding the bidding requirements of A.R.S. § 38-503(C). Ariz. Atty. Gen. Op. I86-036.

**8.8 Compliance.** The officer or employee must be aware of and identify the circumstances in which an agency's actions might affect the interests of himself or his relatives and to avoid any situation in which a conflict of interest exists. Once a

determination is made that the interest is a substantial and not a remote interest, disclosure of that interest and withdrawal from participation is mandatory. Even if the public officer or employee believes that he can be objective in the matter and that the public interest would not be harmed by his participation, he must both disclose the conflict and completely withdraw from any consideration of the matter in which his interests are involved. Disclosure and disqualification must occur even if there is little or no likelihood that the officer or employee would participate in the matter.

Arizona's conflict of interest statutes are broadly construed in favor of the public and, substantial civil and criminal penalties are provided for failure to comply with the statutory requirements. See Section 8.14.

8.8.1 Disclosure of Interest. A.R.S. § 38-509 requires that all state agencies "maintain for public inspection in a special file all documents necessary to memorialize" disclosures of potential conflicts of interest. Any public officer or employee who has a conflict of interest in any agency decision or in the award of a contract must disclose that interest in the special conflict of interest file of the public agency. A.R.S. § 38-503(A), (B). The officer or employee may either file a signed written disclosure statement fully disclosing the interest or file a copy of the official minutes of the agency which fully discloses the interest. A.R.S. § 38-502(3) and -509.

8.8.2 What To Do If You May Have A Conflict of Interest: Specific Disclosure and Blanket Disclosure. Any employee who feels that he may have a conflict of interest in a specific matter should immediately disqualify himself from participation in all related activities and decisions and prepare a memorandum, directed to the employee's supervisors, explaining in detail the conflict of interest and affirming that the employee has disqualified himself. This memorandum will be placed in the conflict of interest file maintained by the agency for public inspection pursuant to A.R.S. § 38-509. The employee should identify the specific matter in which there may be a substantial interest based on whatever knowledge he possesses.

Having disclosed the conflict of interest and disqualified himself, the employee must not communicate about the matter with anyone involved in the decision making process in order to avoid the appearance of impropriety.

8.8.2.01 Rule of Impossibility. In the unlikely situation that the majority of members of an agency have a conflict of interest and the agency is unable to act in its official capacity, A.R.S. § 38-508(B) provides the members may participate in the agency's decision after making known their conflicts of interest in the official records of their public agency.

8.9 Representation of Others. A.R.S. § 38-504(A) states:

No public officer or employee may represent another person for compensation before a public agency by which he is or was employed within the preceding twelve months or on which he serves or served within the preceding twelve months concerning any matter with which such officer or employee was directly concerned and in which he personally participated during his employment or service by a substantial and material exercise of administrative discretion.

For example, a Corporation Commission employee who was materially involved in a utility rate hearing involving a public service corporation may not represent that corporation in that action for a period of one year after he has resigned from state service.

**8.10 Disclosure or Use of Information Declared Confidential by Law.** Current and former public officers and employees are prohibited from disclosing or using, without appropriate authorization, any information designated confidential by statute or rule acquired by them in the course of their official duties. A.R.S. § 38-504(B). An example of such information is income tax returns received by an Assistant Attorney General during the course of his representation of the Department of Revenue. Such information is confidential pursuant to A.R.S. § 42-108. For a discussion of other information which is designated confidential as a matter of law, see Chapter 6.

**8.11 Disclosure or Use of Information Designated Confidential By Agency Action.** A.R.S. § 38-504(B) prohibits a public officer or employee from disclosing or using for profit information which is designated as confidential, other than by statute or rule, and which he obtained from his agency as a result of his employment or service with the agency. The prohibition exists during the course of employment and for two years after employment has terminated, unless appropriate authorization from his agency has been obtained. For example, if a former employee of the Department of Health Services acquired, during the course of employment, information the department had designated as confidential, he may not disclose such information or use it for personal profit for a period of two years after he has terminated his employment or service with the department.

The prohibition includes either the disclosure or use of the information. Thus, even though no personal profit inures to the benefit of the public officer or employee through its use, he still is prohibited from disclosing the information for the statutory period.

**8.12 Improper Use of Office for Personal Gain.** A.R.S. § 38-504(C) prohibits public officers and employees from using or attempting to use their official position in order to secure valuable benefits for themselves, unless such benefits are part of the compensation they would normally be entitled to for performing their duties. It is a class 4 felony for a public servant to solicit, accept or agree to accept any benefit upon an understanding that his vote, opinion, judgment or other official action may thereby be influenced. A.R.S. § 13-2602. It is a class 6 felony for a public officer to ask or receive any unauthorized gratuity or reward or promise of a gratuity or reward for doing an official act. A.R.S. § 38-444. For example, if a member of the Racing Commission offered to support an application for a permit to conduct horse racing meetings in return for a gift of a thoroughbred horse, the commission member would be in violation of the above-referenced criminal laws as well as the conflict of interest laws.

**8.13 Receiving Additional Income for Services.** A.R.S. § 38-505(A) prohibits a public officer or employee from agreeing to receive or receiving, either directly or indirectly, compensation other than as provided by law for services rendered by him in any case, proceeding, application or other matter pending before his agency.

#### **8.14 Sanctions for Violations.**

**8.14.1 Criminal Penalties.** The knowing or intentional violation of any provision of the conflict of interest laws is a class 6 felony. A.R.S. § 38-510(A)(1).

The negligent or reckless violation of the law is a class 1 misdemeanor. This means that a public officer or employee may be prosecuted if he fails to disclose a conflict of interest, of which he did not, but should have known. A.R.S. § 38-510(A)(2).

The knowing falsification, concealment or cover-up of a material fact pursuant to a scheme to defraud in any matter related to the business conducted by a state agency or any political subdivision of the state is a Class 5 felony. A.R.S. § 13-2311.

8.14.2 Forfeiture of Public Office. Upon conviction of a violation of the conflict of interest laws, a public officer or employee forfeits his public office or employment. A.R.S. § 38-510(B).

8.14.3 Contract Cancellation. Any contract made by the state or any of its departments or agencies is subject to cancellation by the Governor if anyone significantly involved in the contract process on behalf of the state was or is also employed by or acted as consultant to any other party to the contract during the time the contract or extension to the contract is in effect. A.R.S. § 38-511.

In addition, any contract entered into by a public agency in violation of the conflict of interest laws is voidable at the option of the agency. In Maucher v. City of Eloy, 145 Ariz. 335, 701 P.2d 593 (Ct. App. 1985), the Arizona Court of Appeals held that a contract entered into between the Eloy city engineer and the City of Eloy for private engineering services to be provided by the city engineer where the contract was let without public competitive bidding was entered into in violation of the Arizona conflict of interest laws and entitled the city to void the contract. The court ruled that the engineer could not recover his losses under the cancelled contract by any legal theory, including expectancy interest, restitution or quantum meruit. The court quoted with approval an authority on remedies which stated that the contractor will be denied recovery even though the contractor and the particular city officials were acting with complete honesty and good faith. 145 Ariz. at 338, 701 P.2d at 596.

Once the impermissible interest of a public officer or employee is shown, the contract will not be sustained even if the contract is fair, just and beneficial to the public agency. Stigall v. City of Taft, 58 Cal.2d 565, 25 Cal. Rptr. 441, 375 P.2d 289 (1962). A public agency may also recover any consideration or payments which it has paid to the public officer or employee under the contract without restoring the benefits received by the agency under the contract. This is true even though no actual fraud or dishonesty was involved on part of the public officer or employee. Thomson v. Call, 214 Cal. Rptr. 139, 38 Cal. 3d 633, 699 P.2d 316 (1985), cert. denied, 474 U.S. 1057 (1986)

8.14.4 Private Citizen Suits. Any person who is affected by a decision of a public agency which was made in violation of the conflict of interest laws may commence a civil suit in the superior court to have the contract or decision declared null and void. The court is further authorized by the Legislature to award costs and attorneys' fees to the prevailing party. A.R.S. § 38-506(B), (C). A person who claims that a public officer, employee or board member had a pecuniary interest in making a decision against him may also file suit in state or federal court alleging a violation of his 42 U.S.C. § 1983 civil rights.



## CHAPTER 9

### LICENSING

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## CHAPTER 9

### LICENSING

9.1 Scope of this Chapter. This Chapter discusses the licensing function of administrative agencies including the legal reasons for which agencies initiate disciplinary or other regulatory action. This Chapter also provides general information concerning other laws affecting the licensing function of agencies, including various procedural laws, the use of social security numbers, the effect of a restoration of civil rights and the access to, and use of, criminal history record information.

9.2 General Description. In Arizona, licensing is performed by those agencies responsible for regulating the various professions, occupations, and businesses. The majority of these professions, occupations and businesses are issued licenses with the remainder being either registered or issued certificates. For purposes of this Chapter, all of these procedures are included within the definition and discussion of "license" and "licensing." Where material distinctions between the procedures exist, they will be pointed out.

An agency empowered to issue a license usually grants to the person a license which carries with it the right to engage in a particular activity; unlicensed persons may not engage in that activity. An agency empowered to register or issue a certificate normally grants only the right to use a certain professional or occupational title; other persons are free to engage in such professional activities provided they do not use the reserved title. Examples of professions having a reservation of title include certified public accountants and psychologists. In either case, the grant of a license or a registration or certificate confers a preferred right or status in the profession or occupation.

The statutes pertaining to a licensing agency generally prescribe or authorize the establishment of the following: qualifications necessary to engage in certain activities; procedures for screening applicants to determine whether they meet these qualifications; and, procedures for issuing and denying licenses. In addition, the statutes set forth authority for the regulation of all licensed persons including the initiation of disciplinary actions. Implementation of statutory standards and directives is generally done through rule making. See Chapter 11.

9.3 Entry Requirements. Entry requirements are those requirements, established by the Legislature, which an applicant must satisfy in order to obtain a license to engage in a profession or occupation. Agencies are responsible for implementing and interpreting the established entry requirements. However, agencies may not impose entry requirements not authorized by law. Arizona State Board of Funeral Directors & Embalmers v. Perlman, 108 Ariz. 33, 492 P.2d 694 (1972). Entry requirements typically include:

1. education and experience requirements;
2. examination requirements;
3. character requirements; and,
4. minimum age requirements.

Entry requirements vary according to legislative prescription. Therefore, each agency should examine its governing statutes to determine what entry requirements have been established for individuals seeking licensure.

**9.3.1 Education and Experience.** An applicant may be required to satisfy specified education or experience requirements or both to qualify for licensure in a regulated profession or occupation. These requirements will vary according to the particular statute involved. Education requirements may include a specific degree from an accredited college or university, specific course studies as part of a degree program, specified hours of education in a prescribed course curriculum or completion of a designated training program. Experience requirements typically will prescribe a specific number of months or years of experience as an employee, apprentice or trainee of a licensee in a profession or occupation. In those instances in which a certificate or registration grants the use of a specific title but practice in the profession or occupation is not restricted to licensed individuals, a specified amount of experience practicing in the profession or occupation may be required as a prerequisite to licensure.

**9.3.2 Examinations.** Where examinations are required by statute, agencies may be responsible for preparing, administering or evaluating those examinations. In many cases, the statutes governing an agency authorize the use of national uniform examinations. *E.g.*, A.R.S. § 32-723(D) (uniform certified public accountants' examination). Other licensing schemes merely require that the applicant pass a written or oral examination or both which is conducted by the agency. Where the agency develops its own written or oral examination, extreme caution should be taken to ensure that the content and structure of each question, the method of evaluating the answers and the area of knowledge examined as it relates to the profession or occupation fulfills the statutory purpose of the examination.

To ensure the validity and integrity of the examination process and to limit actions for administrative review, agencies should adopt written procedures for conducting and reviewing examinations and for resolving instances of cheating by an examinee.

Oral examinations are particularly susceptible to challenge because of the subjectivity involved in asking questions and evaluating answers. Care should be taken to ensure that an examiner's evaluation is not influenced by the examinee's demeanor, appearance and confidence in responding to questions. An allegation that these factors actually influenced the examinee's grades may be difficult to refute as these factors may not be reflected in a recording or transcription of the oral examination.

**9.3.3 Character.** A licensee may be required to possess good moral character. The Legislature has given some agencies specific direction to determine the presence or absence of good moral character. For example, the statute governing contractors provides that lack of good character and reputation may be demonstrated by showing that the applicant has committed any act which, if done by a licensed contractor, would be grounds to initiate disciplinary proceedings. A.R.S. § 32-1122(D). However, even when no specific legislative direction is provided, agencies nonetheless are responsible for ascertaining whether persons applying to practice in a profession or occupation possess the requisite good moral character. Many agencies rely on affidavits of the applicant or letters of reference to assist their determinations. The development of rules which set forth complete definitions and procedures for submitting acceptable evidence of good moral character may facilitate an agency's task. If a license is denied for lack of good character, the basis for the agency's finding should be articulated.

9.3.4 Licensing by Reciprocity and Endorsement. Entry requirements established by the Legislature may not be waived by the agency responsible for implementing these requirements unless authorized by law. E.g., A.R.S. § 32-126(C). In rare instances when a profession is first regulated or is being re-regulated, entry requirements such as examination, education and experience may be waived by "grandfather" clauses which permit persons previously engaged in that profession or occupation to continue their activities. E.g. A.R.S. § 32-2212(C).

If authorized by statute, applicants who currently hold valid licenses in other states or jurisdictions may by virtue of that fact be granted licenses without satisfying certain entry requirements. These licensing procedures are commonly referred to as reciprocal licensing or licensing by endorsement.

Under either procedure, certain minimum licensing qualifications, such as age and good character, generally must be satisfied but some entry requirements, most typically written examination, may be waived for those licensed elsewhere. Nevertheless, other qualifications of an applicant for reciprocal or endorsement licensing frequently must meet statutorily prescribed standards. For example, several statutes require that the licensing requirements of the state in which the applicant already is licensed be substantially similar to those established by Arizona law. E.g., A.R.S. §§ 32-922.01 and -1683(5)(a). Other requirements for licensure by reciprocity or endorsement sometimes include successful passage of a uniform national examination or examination of another state or jurisdiction, e.g., A.R.S. § 32-1426(A), a particular educational background or degree, e.g., A.R.S. § 32-1922(B), a minimum level of experience in the profession or occupation, e.g., A.R.S. § 32-1523(3), or a requirement that the out-of-state license have been issued within a prescribed period prior to application for licensure in Arizona, e.g., A.R.S. § 32-1235(2). Reciprocal licensing adds the additional requirement that the state or jurisdiction where the applicant is licensed similarly treat the holders of Arizona licenses with the waiver of certain entry requirements. E.g., A.R.S. §§ 32-322(C) and -1723.

Each agency should examine its statutes to determine whether and under what conditions an applicant may be excused from satisfying specific entry requirements.

9.4 Issuing or Denying the License. An applicant who satisfies the experience, education, examination, age and character qualifications for licensure nevertheless may be denied a license based upon other specific grounds set forth in the agency's licensing statutes. These other grounds typically include: prior revocation of a license in the same or a related profession or occupation in this or another state; disciplinary action taken against the applicant's license in another state or jurisdiction; and, unlicensed conduct by the applicant prior to issuance of the license. Voluntary surrender of a license in another state or jurisdiction may, but does not in and of itself, justify denial of a license. Agencies must look to the underlying causes or circumstances of the surrender to determine whether grounds exist to deny the license.

9.4.1 Applications and Screening Methods. Agencies are responsible for ascertaining whether persons applying to practice in a profession or occupation meet the statutory entry requirements. This necessitates the review of educational credentials, personal background information and previous experience. Adoption of well-drafted and complete application forms will help this process operate efficiently.

The application form should require disclosure of information concerning all prior criminal convictions other than minor traffic offenses; any previous denials of application for licensure; all prior disciplinary actions and sanctions; and, any pending disciplinary actions against any licenses currently held by the applicant. The requested information regarding prior criminal convictions should include, at a minimum, the nature of the crime; the date of conviction; the name of the court and case number; and, the city and state of prosecution. The information regarding prior and pending disciplinary actions should be verified directly through the agency responsible for the disciplinary action. The application should contain a statement, requiring a notarized signature, that the applicant has read all questions and has provided true and complete answers, and should further contain a warning that false statements constitute serious criminal violations which may constitute grounds for denial or subsequent revocation of the license. Applicants should be encouraged to provide the agency with any court documents they may possess concerning the criminal conduct disclosed on the application. The agency, in turn, should not rely solely on statements made by the applicant because to do so tends to encourage false applications and to penalize applicants who are candid. Finally, if education is a requirement, certified copies of transcripts should be obtained.

Procedures to verify application information should be adopted. For example, if the applicant has been licensed in another state, disclosure of available information concerning criminal or disciplinary matters should be requested from the relevant agency of that state. If appropriate, a copy of the license application on file in the state should be obtained for comparison. If the applicant has been licensed in another profession or occupation in Arizona, the files of that agency should be viewed to verify information. See also Section 9.9.4.

**9.4.2 Issuance of the License.** An applicant who meets all entry requirements established by law must be issued a license. The license cannot be withheld arbitrarily when all requirements have been satisfied.

In the absence of specific statutory authority, the agency may not issue a conditional license placing restrictions on the licensee or the license. Further, applications must be processed in a timely manner and may not be held for unreasonable lengths of time.

**9.4.3 Denial of the License.** If an agency determines that the applicant does not meet the entry requirements, the agency may refuse to issue the license. Implementation of procedures for denying a license will facilitate the hearing process should the applicant challenge the denial.

Some agencies attach significant consequences to the denial of a license application. For instance, a contractor's license may not be issued to an applicant who has had a contractor's license refused within one year preceding the current application. A.R.S. § 32-1122(E). Where such consequences attach to the denial of an application, withdrawal of applications for licensure may be sought in order to avoid the taint of a refusal or denial of a license. Although applicants do not have an absolute right to withdraw license applications, an agency may wish to adopt rules governing the withdrawal of license applications to preclude controversies over requests for withdrawal.

**9.5 Licensing Regulation.** The agency created to administer each profession or occupation generally has the authority to regulate licensees and licensed activities in accordance with applicable statutes and rules.

Regulatory provisions frequently establish specific duties and obligations of the licensee. For example, licensees may be required to maintain records, e.g., A.R.S. § 32-2151.01; to notify the agency of personal or professional address information or changes, e.g., A.R.S. §§ 32-923(B) and -1435(B); to complete minimum or periodic training, e.g., A.R.S. §§ 32-1726(B) and -1825(B); to obtain liability insurance or surety bonding, e.g., A.R.S. §§ 32-1152(A) and -2613(C)(2); to register employees or agents, e.g., A.R.S. § 32-2315(A); or to possess identification documents, e.g., A.R.S. §§ 32-2316(B) and -2423(A), use seals, e.g., A.R.S. § 32-125 or display a license or proper signboard, e.g., A.R.S. §§ 32-351, -1262(C) and -2126(B).

Generally, an agency regulates activities within its jurisdiction and assures compliance with statutes and rules through investigations initiated upon receipt of a complaint or, if authorized, on the agency's own motion. Additionally, some agencies may conduct examinations of records and inspections of licensed activities or premises. E.g., A.R.S. §§ 4-213, 32-504(B), 32-1904(A)(4). Where violations are revealed and proved after appropriate administrative adjudicatory proceedings, enforcement sanctions may be imposed. Agencies typically are empowered to deny, refuse to renew, suspend or revoke a license and also may censure licensees or impose probation or civil monetary penalties. Further sanctions available to some agencies by specific statutory authority include letters of concern or other administrative warnings, practice limitations or restrictions, and public reproof. Under certain circumstances, many agencies are authorized to petition the Superior Court for an injunction restraining or prohibiting violations of licensing laws or restraining unlicensed activities. In addition, some agencies may issue cease and desist orders prohibiting unlicensed activities. More complete discussions of adjudicatory proceedings and enforcement activities are contained in Chapters 10 and 12, respectively.

**9.6 Disciplinary Actions.** Administrative agencies are generally authorized by statute to take disciplinary actions against licensees to enforce regulatory laws. Where statutes or rules establish such responsibility, licensees also may be disciplined for acts or omissions of employees or of supervised persons. E.g., A.R.S. §§ 4-210(B), 32-2041(F); A.A.C. R4-29-37. Since the grounds for such actions significantly vary among the agencies, each agency should examine its statutes and rules for specific guidance. Some of the more common grounds are discussed in the following paragraphs.

**9.6.1 Actions by Agencies in Other Jurisdictions.** An agency may be authorized to take disciplinary action against a licensee who has had a license refused, revoked or suspended in another state or jurisdiction and who has not been subsequently reinstated. The imposition of sanctions by another state or jurisdiction may itself suffice as a predicate for agency disciplinary action. E.g., A.R.S. §§ 32-1663(D)(6) and -1927(A)(11). Sometimes, however, to support disciplinary action, a denial, suspension or revocation of license by another state or jurisdiction must either specifically relate directly to the ability to practice a particular profession or occupation or be founded upon conduct which corresponds to grounds upon which disciplinary action could be taken in this state. See, for example, statutes relating to health professionals, of which A.R.S. § 32-1401(12)(o) is representative. Some statutes provide that the underlying enforcement sanction must have been imposed "for cause." E.g., A.R.S. §§ 32-741(A)(10) and -2321(B)(10). The phrase "for cause" requires that the foreign license have been revoked or suspended because of misconduct or illegal activity. A sanction for such acts as failure to pay fees or timely to renew a license is not considered to have been taken "for cause." A voluntary

surrender of a license in another jurisdiction, in and of itself, does not justify the initiation of disciplinary proceedings against a licensee. Agencies must look to the underlying causes or circumstances of the surrender to determine whether grounds exist to initiate disciplinary proceedings.

Because agencies in this state and other states or jurisdictions have the authority to take action against a licensee disciplined in another jurisdiction, agencies should develop procedures to assure the free flow of enforcement information among them.

**9.6.2 Conviction of a Criminal Offense.** Most licensing statutes set forth as a ground for disciplinary action (or for refusal to issue or renew a license) conviction of a felony or of a crime involving "moral turpitude." E.g., A.R.S. §§ 32-2153(B)(2), -1401(12)(d) and -2232(10). See A.R.S. § 13-702(H) for the effect of the conviction of a class 6 felony which, under certain circumstances, may be designated a misdemeanor. Moral turpitude is broadly defined as an act of depravity and baseness, City Court of Tucson v. Lee, 16 Ariz. App. 449, 452, 494 P.2d 54, 57 (1972), and connotes a fraudulent or dishonest intent, Howard v. Nicholls, 127 Ariz. 383, 388, 621 P.2d 292, 297 (Ct. App. 1980). Examples of crimes involving moral turpitude include kidnapping, sexual assault or abuse, theft, fraud, embezzlement and forgery. Conversely, the courts have held that offenses not significantly offensive to community moral standards do not constitute crimes involving moral turpitude. Examples of these include reckless driving, simple assault and disorderly conduct. State ex rel. Dean v. City Court of Tucson, 141 Ariz. 361, 363, 687 P.2d 369, 371 (Ct. App. 1984).

Many criminal offenses fall within a gray area necessitating specific legal advice to determine whether that offense is a crime involving moral turpitude. The conviction of a crime involving moral turpitude should be distinguished from those grounds for disciplinary action set forth in some statutes which relate to moral character, e.g., A.R.S. §§ 4-210(A)(11), 32-2001(A)(8)(h) or to other characteristics involving honesty, truthfulness or good reputation, e.g., A.R.S. § 32-2153(B)(4). Unlike crimes of moral turpitude, disciplinary action based on these latter grounds does not depend necessarily upon proof of a criminal conviction but requires instead a demonstration of a person's character or reputation.

It should be noted that A.R.S. § 13-904(E) authorizes agencies to consider a criminal conviction as a ground for disciplinary action only when the crime is reasonably or substantially related to the qualifications, functions or duties of the licensee, e.g., A.R.S. §§ 32-572(B) and -741(A)(2) or where the conviction arises from, or is committed in connection with, a license, A.R.S. § 32-2321(B)(8).

Finally, it should be observed that the term "conviction" includes a conviction following a plea of nolo contendere or no contest and includes a conviction upon a plea or verdict of guilty, e.g., A.R.S. § 32-572(C). See Section 9.9.1 for further discussion of no contest pleas.

**9.6.3 Violation of Civil or Licensing Laws.** Most agencies have the authority to take disciplinary action against any licensee who violates the agency's statutes or rules. Some agencies have the further authority to base disciplinary actions upon the violation of other federal, state or local laws, rules or regulations applicable to the practice of the profession or occupation involved whether or not the violation has resulted in a conviction or other sanction. E.g., A.R.S. §§ 32-854.01(18) and -1401(12)(a) (federal or state laws); -1363(A)(6) and -1743(12) (state laws); -1501(5)(s) (state, county or municipal laws).

9.6.4 Incompetence, Malpractice and Negligence. Substandard performance or ability in the practice of a profession or occupation is frequently included in the licensing statutes as a ground for disciplinary action. The language used to describe this ground varies among the agencies but generally contains in some form the terms "incompetence," "malpractice" and "negligence." The phrase malpractice or incompetency appears in A.R.S. §§ 32-353(2) (barbers), -572(A)(4) (cosmetologists). Gross or repeated malpractice is a ground commonly used in the statutes governing health professionals. E.g., A.R.S. §§ 32-854.01(16) (podiatrists); -1854(A)(6) (osteopathic physicians); -2933(7) (homeopathic physicians). Gross negligence or continuing negligence is referred to in the licensing laws applicable to such diverse professions as accountants, A.R.S. § 32-741(A)(4), funeral directors, A.R.S. § 32-1363(A)(11), and psychologists, A.R.S. § 32-2081(5)(e). Some statutes contain provisions specifically defining these terms. E.g., A.R.S. §§ 32-1401(9) and -2201(6).

9.6.5 Unprofessional Conduct. Regulatory provisions contained in the statutes of many agencies authorize disciplinary action for "unprofessional conduct," which is generally defined with particularity elsewhere in the statute or by agency rule. E.g., A.R.S. §§ 32-1401(12) and -1201(16). These definitional provisions routinely encompass a variety of proscribed acts, including some of those described immediately above. Many of these acts are of a general nature and are shared among several occupations or professions while others are peculiar to the particular occupation or profession involved. Some examples of unprofessional conduct not already referred to include: the failing or refusing to maintain adequate records; representing or holding one's self out as being a professional when such is not the fact; committing sexual intimacies with a patient or client in the course of treatment; and, having a professional connection with, or lending one's name to, an illegal practitioner. Each agency should consult its own statute to determine the definitional scope of "unprofessional conduct" where applicable.

9.6.6 Misleading or Fraudulent Conduct. Most agencies have statutory authority to take disciplinary action against a license holder who engages in conduct tending to defraud or mislead the public. This conduct may relate to the actual practice of a profession or occupation, for example, "an act which deceives, defrauds or harms the public," A.R.S. § 32-1663(D)(9); "making any false or fraudulent statement . . . in connection with the practice of dentistry," A.R.S. § 32-1201(16)(1); "obtaining a fee by fraud or misrepresentation," A.R.S. § 32-2081(5)(a), or to advertising connected with the practice. E.g., A.R.S. §§ 32-353(3) and -2232(9). Often, misleading or fraudulent conduct is contained within the definition of "unprofessional conduct," upon which disciplinary action may be based. E.g., A.R.S. §§ 32-1401(12)(c), (v) and -1501(5)(i), (o).

Many agencies have additional authority to initiate disciplinary action when a false or misleading statement is made in an initial or renewal application for a license, e.g., A.R.S. § 32-1391.14(4), or in a qualification examination, e.g., A.R.S. § 32-128(B)(1), or, more generally, for fraud or deceit in procuring or obtaining a license, e.g., A.R.S. §§ 32-741(A)(3) and -1663(D)(1).

9.6.7 Alcohol or Substance Abuse. Many licensing statutes, particularly those regulating health professionals, permit disciplinary action based upon intemperance in the use of alcohol or the abuse of controlled substances. Prohibitions relating to these areas typically contain terms such as "habitual," "chronic" or "addiction," to describe the degree

of use or consumption which will justify disciplinary action. E.g., A.R.S. §§ 32-924(A)(5), -1363(A)(2) and -1927(A)(5).

**9.6.8 Failure to Comply with Continuing Education Requirements.** Several agencies have requirements mandating continuing education within specific time limits. Failure to comply with these requirements may warrant disciplinary action. Some statutes specifically provide that noncompliance constitutes grounds for probation, suspension or revocation of a license. E.g., A.R.S. §§ 32-741(C) and -1434(C). In other cases, the agency may use the more general prohibition against violations of licensing laws, see Section 9.6.3 above, as a ground for sanctions to enforce continuing education requirements. Most often, however, the issue of continuing education is addressed in connection with license renewal.

**9.7 Cancellation or Surrender of License.** In a variety of circumstances, a licensee may wish to cancel or voluntarily surrender a license. However, a cancellation or surrender may be motivated by the licensee's desire to avoid possible sanctions by depriving the agency of jurisdiction to initiate or complete disciplinary action. Once investigations or disciplinary proceedings thus are terminated, the former license holder may seek to reapply for licensure or may apply for licensure in another state or country. To avoid this situation, some agency statutes provide that cancellation specifically does not prevent the initiation or completion of disciplinary proceedings, e.g., A.R.S. § 4-210(N), or that cancellation may be accepted only where no investigation has been initiated against a licensee or where the licensee admits pending administrative charges prior to acceptance of the cancellation request, e.g., A.R.S. § 32-1433. Further, if a health professional who has been charged with the violation of a statute or rule fails to renew a license or certificate, the license or certificate does not expire or terminate in the usual course, but instead is suspended until the charge is resolved. A.R.S. § 32-3202.

**9.8 Renewal and Reinstatement.** Most licensing statutes set forth procedures for the regular renewal of active licenses and for what is generally termed the reinstatement of licenses which may have been suspended or revoked. Agencies are urged to consult their specific laws for the particulars of these procedures.

**9.8.1 License Renewal.** Licensing statutes generally require that a license be renewed periodically upon the payment of an established fee. The time period and procedures for renewal and the amount of the fee required vary considerably among the agencies. Sometimes, a grace period is provided within which renewal must be made, although a financial penalty may be assessed.

Statutory provisions concerning the effect of a failure to renew and the procedures for reactivation of a license also differ. Upon failure to renew on the anniversary date or after expiration of the grace period provided, a license may be forfeited, voided, suspended, inactivated or simply expire. Compare A.R.S. §§ 32-1236(C) with -1334(A), -1125(A), -518(A) and -1430(C).

The requirements for reactivation or reissuance of a license after a failure to timely renew also vary. Reactivation may occur upon payment of certain fees or penalties. E.g., A.R.S. § 32-741(B). Proof of qualifications or competence may additionally be required. E.g., A.R.S. § 32-1642(D). Where the failure to renew extends over a considerable period (a year or years, depending on the particular statute involved) or results in the first instance in the expiration of a license, further requirements, such as reexamination, may be imposed or a reapplication as if for original licensure may be necessary. E.g., A.R.S. §§ 32-1236(C) and -1430(E).

9.8.2 Reinstatement of License. Where a license has been refused, suspended or revoked as a result of disciplinary action by an agency, reinstatement is necessary. Some statutes vest broad discretion in the agency to reinstate licenses. *E.g.*, A.R.S. §§ 32-1664(N) and -1928(D). Other laws require a demonstration of "good cause," *e.g.*, A.R.S. § 32-748(A), or verification that the basis of the suspension or revocation has been removed by the licensee, A.R.S. § 32-1552(A)(l). Several agencies are prohibited from granting reinstatement within a specified time (typically two years) following disciplinary action. *E.g.*, A.R.S. §§ 32-1693(C) and -1748(C). The statutes of some agencies are silent with respect to reinstatement, necessitating reapplication and full compliance with initial licensing provisions by persons who seek reinstatement.

## 9.9 Other Legal Provisions Affecting Licensing Agencies.

9.9.1 Effect of No Contest Pleas. As discussed in Section 9.6.2, an agency may have the authority to take disciplinary action or to refuse to issue or renew a license where the licensee or applicant has been convicted of a felony or crime of moral turpitude. The fact that a conviction may have resulted from a plea of no contest or nolo contendere does not deprive an agency of that authority. *See Bear v. Nicholls*, 142 Ariz. 560, 691 P.2d 326 (Ct. App. 1984). While a person who enters a no contest plea does not admit to the conduct resulting in the criminal charges, the conviction entered following the plea is no less a conviction than one entered after an admission of guilt or a jury verdict. A.R.S. § 32-572(C).

9.9.2 Restoration of Civil Rights. As mentioned earlier in this Chapter, an agency may have the authority to deny the issuance of a license or to suspend or revoke an existing license if an applicant or license holder has been convicted of a felony. By statute, a felony conviction automatically results in the suspension of certain civil rights of the person sentenced. A.R.S. § 13-904(A). However, upon completion of all terms of probation and other penalties imposed in connection with the felony conviction, and in some cases, with the approval of the court, a person may have his civil rights restored or his conviction set aside. A.R.S. §§ 13-905 to -912.

An agency may consider a conviction when making a licensing decision even if a person has had his civil rights restored. A.R.S. § 13-904(E). Likewise, an agency may consider a conviction which has been set aside or expunged pursuant to A.R.S. § 13-907 when making licensing decisions. *See Ariz. Atty. Gen. Op. 183-042.* Expunged convictions should be disclosed by applicants for polygraph examiner, private investigator and security guard and may be considered in determining whether to issue licenses under A.R.S. §§ 32-2625, -2414 and -2713. However, in each case the agency must determine whether the conduct resulting in the conviction bears a reasonable relationship to the purpose or activities for which the license is used. A.R.S. § 13-904(E). Conduct sufficient to justify the denial of a particular license may be wholly unrelated to the functions or duties associated with a different license. For example, a conviction for forgery, a class 4 felony, may sustain the refusal of a notary public commission by the Secretary of State, because the conduct underlying such conviction bears a reasonable relationship to the functions a notary public is expected to perform. *See Ariz. Atty. Gen. Op. 179-305.* However, the same conviction would not support denial of a barber's license, there being no reasonable relationship between the forgery offense and hair cutting. Similarly, a conviction for driving under the influence, a class 5 felony, does not have a reasonable relationship to the functions carried out by a licensed real estate salesman.

Thus, the real estate commissioner could not deny a real estate salesman license to an otherwise qualified applicant previously convicted of this crime. See Ariz. Atty. Gen. Op. I78-181. However, the conduct underlying that conviction may have a reasonable relationship to the qualifications necessary for the issuance of a liquor license.

If a license is refused to a person whose civil rights have been restored, the agency should include in its decision or order a specific finding describing the relationship between the conduct underlying the conviction and the functions of the profession or occupation involved.

**9.9.3 Social Security Numbers.** Under federal law, most state agencies do not have the authority to require the disclosure of social security numbers as a condition of licensure or other benefits. Federal law specifically provides that agencies whose functions involve the administration of taxes, benefit dispensation, driver's license or motor vehicle registration may require disclosure of social security numbers. In addition, state laws or regulations adopted prior to January 1, 1975 authorizing an agency to require the disclosure of social security numbers may be enforced.

Those agencies which may not require the disclosure of social security numbers, nevertheless may request the voluntary disclosure of a social security number. The form requesting this disclosure must include written notice stating that the disclosure is voluntary, identifying the authority by which the number is solicited and indicating the uses that will be made of the number. See Ariz. Atty. Gen. Ops. I78-185 and I82-119.

Any wrongful disclosure, use or request of a social security number may be prosecuted criminally. The penalty for a violation includes imprisonment up to one year or a fine of \$1,000, or both. See 5 U.S.C. § 552(a).

**9.9.4 Access to Criminal History Record Information.** State law specifically authorizes some agencies to receive criminal history record information concerning applicants for licensure. See A.R.S. § 41-1750(B)(8). Other agencies may receive criminal history record information by virtue of an order issued by the Governor. See A.R.S. § 41-1750(G). Agencies which have the authority to receive criminal history record information from the Department of Public Safety or other criminal justice agencies should be aware of the following points:

1. Criminal history record information is classified as confidential by the Department of Public Safety ("DPS"). See A.A.C. R13-1-01. Consequently, any criminal history record information or "rap sheets" received from the DPS or another criminal justice agency may be used only for the purpose of evaluating an applicant's fitness for a license or employment. A.R.S. § 41-1750(B)(8).

2. If, in the course of the agency's processing of a license application, a public hearing must be held, the criminal history record information obtained from the Department of Public Safety or other criminal justice agency may not be used or disclosed at the hearing. Instead, certified copies of the conviction must be obtained from the respective courts for use as evidence in the hearing.

3. An agency authorized to receive criminal history record information from the Department of Public Safety must enter into a "user agreement" with the DPS. By the terms of the "user agreement", the agency must appoint a "system security officer" to control access to the criminal history record information files. Under this agreement, persons not involved in the evaluation process should not be permitted access to the files. These files should be maintained in separate and secure filing cabinets.

4. Criminal history record information obtained from the Department of Public Safety or other law enforcement agency should not be disclosed or provided to any person outside the agency, or otherwise disseminated to unauthorized persons or the public.

5. Agencies and their employees should familiarize themselves with the provisions of A.R.S. § 41-1750 and the provisions of the user agreement entered into with the Department of Public Safety. The wrongful release, procurement or use of criminal history record information for an unauthorized purpose is a criminal offense. A.R.S. § 41-1750(D).

9.10 Antitrust Considerations for Licensing Agencies. Licensing agencies restrain competition by limiting entry into a trade or profession. Although the restraint is compelled by an agency's statutory scheme, this does not mean that the agency or its employees are exempt from antitrust scrutiny. Thus, licensing decisions which have not been mandated by the Legislature should be reviewed to ensure that the anti-competitive aspect of a licensing requirement is subordinate to, and essential to the attainment of, the main purpose of the requirement. State officials who participate in a private agreement or combination in restraint of trade are acting outside the scope of their authority and can be held liable under the antitrust laws.

The following sections briefly discuss the anti-competitive practices which should be of particular concern to licensing personnel. Antitrust laws and anti-competitive practices are discussed in more detail in Chapter 5.

Any questions concerning antitrust laws should be directed to the Antitrust Division of the Attorney General's Office.

9.10.1 Restrictions on Price Competition. Restrictions on price competition are scrutinized under the antitrust laws. Any regulation which has a restrictive effect on price competition and which is not expressly required by statute should be reviewed with the Attorney General. Examples of regulations which restrict price competition include fee schedule mandates, prohibitions against price advertising and prohibitions against competitive bids.

9.10.2 Barriers to Entry. Entry requirements must be satisfied in order to obtain a license to engage in a profession or occupation and are therefore "barriers to entry." Because a requirement which unnecessarily restricts entry restrains competition and may violate antitrust laws, licensing agencies should ensure that the restraint imposed is no greater than necessary to afford the protection desired. This is especially true if members of the licensing authority are also members of the profession, as is frequently the case in Arizona.

An example of a regulation which would restrain competition but which would not provide any counterbalancing benefit for the public would be a regulation limiting the number of persons who could be licensed in a particular trade or profession.



CHAPTER 10  
ADJUDICATORY PROCEEDINGS

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## CHAPTER 10

### ADJUDICATORY PROCEEDINGS

10.1 Scope of this Chapter. This Chapter describes the procedures which state administrative agencies must follow when adjudicating the rights, duties and privileges of individual parties. These procedures are referred to throughout this Chapter as adjudicatory proceedings.

Nearly all adjudicatory proceedings conducted by state agencies are subject to the Administrative Procedure Act ("APA"), A.R.S. §§ 41-1001 to -1066. Accordingly, most of the procedural requirements discussed in this Chapter are required by the APA. Others have been prescribed by case law or are our recommendations. You should also review the specific statutes relating to your agency to determine if requirements differ from those described in this Chapter. If you have any questions, consult your legal counsel.

Adjudicatory hearings may be held before a board, before an agency head, or before a hearing officer appointed by the board or agency head. Throughout this Chapter, the board member responsible for conducting the proceeding before the board, usually the board chairman or president, is referred to as the presiding officer. A hearing officer or agency head conducting a hearing is also referred to in this Chapter as the presiding officer. See Section 10.13.1.

#### 10.2 Characteristics of Adjudicatory Proceedings.

10.2.1 Disciplinary and Enforcement Proceedings. State agencies generally use formal administrative hearings to determine whether disciplinary or enforcement actions should be taken against persons they license or otherwise regulate. The agency may deny, suspend or revoke a license, or impose other sanctions, such as the issuance of cease and desist orders or fines.

The agency, during the proceedings, hears the charges and the response of the licensee or respondent. The agency then makes findings of fact and conclusions of law and reaches a decision based on the evidence presented at the hearing.

10.2.2 Other Adjudicatory Proceedings. In addition to enforcement and disciplinary proceedings, some agencies conduct adjudicatory proceedings of a different nature. For example, rate hearings before the Corporation Commission involve a determination by the commission of the appropriate rates to be charged by public service corporations. Agencies may hold hearings to determine entitlement to benefits. Others hold hearings concerning disputes between private parties when the agency's role is solely that of a judge and the agency has no independent regulatory or enforcement purpose.

10.2.3 Nature of the Proceeding. Adjudicatory proceedings are similar, but usually less formal than, a judicial proceeding in court. Adjudicatory proceedings are often referred to as quasi-judicial proceedings. An adjudicatory proceeding before an agency is not subject to the strict procedural and evidentiary rules applicable in court proceedings. Agencies must, however, conduct adjudicatory proceedings in accordance with constitutional requirements of due process. They must also observe all procedural requirements imposed by statute or rule.

The purpose of an adjudicatory proceeding is to determine contested issues of fact and law, for example, whether the licensee did certain acts and, if he did, whether those acts violate statutes or rules administered or enforced by the agency, and to determine the appropriate enforcement action (for example, whether to suspend or revoke the license or take no action).

The agency must keep in mind that a reviewing court will give substantial weight to the determinations of fact made by the agency, as it hears the evidence and observes the demeanor of the witnesses. A reviewing court will also give deference to the determination of what action is appropriate in the case, for example, revocation versus suspension of the license, because the law presumes that the administrative agency has expertise in its area of responsibility. On the other hand the reviewing court is not bound by an agency's determinations of law. However, it will give weight to a long standing interpretation by the agency of a statute or rule it is charged with administering. Long v. Dick, 87 Ariz. 25, 29, 347 P.2d 581, 583-84 (1959).

**10.2.4 Role of the Agency.** In an adjudicatory proceeding, the agency is responsible for making a decision and rendering a final judgment. It is also responsible for conducting the hearing through either the governing body, agency head or a hearing officer appointed for that purpose. However, the agency, absent specific statutory authority, may not delegate its final decision making function to a hearing officer. See discussion regarding the use of hearing officers in Section 10.8.

**10.2.5 Participants - Disciplinary and Enforcement Proceedings.** In enforcement and disciplinary proceedings, there are usually two parties: the state or the state agency, which is bringing the charges, and the licensee or respondent against whom the charges have been brought. The state may bring charges as a result of a complaint filed by a private individual or other entity, but such person or entity is generally not an official party to the action. Some agencies, however, hold adjudicatory proceedings based on complaints and require the complainant to appear as a party as in proceedings before the Registrar of Contractors.

The state's case is generally prepared by a member of the agency's staff or other person who conducts an investigation and obtains evidence warranting certain action against the licensee or respondent. Generally, the evidence is presented and the arguments are made by the Assistant Attorney General assigned to represent the agency.

The other party is the person who holds a license issued by the board or against whom the enforcement action is to be taken. The licensee or respondent may also present evidence and may be represented by an attorney at the hearing.

The filing of a formal complaint does not mean that the agency has made a final decision or respondent is guilty of the charges. The commencement of a proceeding means only that the agency has concluded that enough evidence has been discovered to warrant a formal proceeding. In re Davis, 129 Ariz. 1, 628 P.2d 38 (1981). The role of the decision making authority is to conduct the proceeding, hear the evidence and reach a final decision based upon the record.

**10.2.6 Participants - Other Proceedings.** In other types of proceedings, such as proceedings involving the resolution of disputes between two private parties, the agency is usually not a party.

10.2.7 Rules of Procedure. Every agency empowered to conduct adjudicatory proceedings should adopt rules of procedure applicable to such proceedings. For example, see the Rules of Practice and Procedure Before the Superintendent of Banks, A.A.C. R4-4-1201 to -1220. These rules should describe the procedures which are followed in various adjudicatory proceedings before the agency and in particular should define the authority and responsibility of hearing officers and presiding officers.

10.3 Informal Disposition of Complaints. Not all allegations of wrongdoing are resolved by formal proceedings. Many are settled informally by the agency with the licensee or respondent without a formal hearing. This approach is often desirable when the issues are relatively simple. Furthermore, resolving a matter informally is more cost effective. A more detailed discussion of informal disposition of charges is contained in Chapter 12.

#### 10.4 Parties to the Proceeding.

10.4.1 Generally. The APA, in A.R.S. § 41-1001(8), defines "party" to include "each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party."

Generally, an agency has authority to institute adjudicatory proceedings regarding only those persons to whom they have issued a license or persons who are claiming a benefit or right under statutes administered by the agency. However, an agency may be empowered to take enforcement actions, such as issuing cease and desist orders against unlicensed individuals who have engaged in acts that violate the statutes and rules administered by the agency. When an agency initiates an action that will affect the rights, duties or privileges of any person, it must serve that person with notice of the proceeding. That person, known as the respondent, then becomes a party to the proceeding. The respondent may be a natural person, a partnership, a corporation, or some other entity. In order to determine whether a particular entity may be the subject of the proceeding, the specific statutes applicable to your agency should be consulted.

10.4.2 Procedure for Intervention. Intervention is the procedure by which a person who is not presently a party to a proceeding requests that he be included in the proceeding as a party.

A person who seeks to intervene in a proceeding before an agency must file a motion with the agency. The motion should state the name and address of the person making the motion, the name and number, if any, of the proceeding, the grounds justifying intervention and the claim or defense for which such intervention is sought. The statutes and rules applicable to some agencies require that the person seeking to intervene must serve a copy of the motion to intervene on all parties. The agency should rule on the motion as promptly as possible. Its ruling should set forth clearly any limits the agency establishes on the intervenor's rights as a party. If the motion is granted, the intervenor becomes a party for all purposes for which intervention has been allowed.

10.4.3 Intervention of Right. The statutes and rules applicable to the agency may require that a person be allowed to intervene in an adjudicatory proceeding under certain circumstances. In such a case, the agency must allow the person to become a party if the person files a motion in the proper form and in a timely manner, and meets the necessary requirements prescribed by statute or rule.

10.4.4 Discretionary Intervention. An agency may be authorized, by statute or rule, to allow persons other than the original parties to intervene in a contested case proceeding. Some think that allowing persons to intervene in a hearing confuses issues and facts in a case and needlessly delays the proceeding. Others take the view that intervention is valuable, because issues of policy are determined in such cases and intervenors may be able to provide perspectives which help the agency reach an informed and correct decision.

As a general rule, the agency should grant a motion to intervene only if: 1) the motion is timely, which usually means that it should be made before the hearing begins; 2) the person asking to intervene has an interest which would be substantially affected by the proceeding; 3) the person's interest is not adequately represented by another party to the proceeding; 4) the intervention would not cause serious delay, disruption, or otherwise burden the hearing process or unfairly prejudice the rights of existing parties.

In cases in which intervention of right is not available, the agency, in its discretion, may deny intervention or it may limit the scope of the intervention. This is a decision for the agency, and not for the person seeking intervention or the existing parties. Reviewing courts will uphold an agency decision on intervention, unless the agency clearly abuses its discretion.

#### 10.5 The Rights of the Parties.

10.5.1 Right to Appear. Any person who is a party to a proceeding, whether an original party or an intervenor, has a right to appear and to be heard, either in person or through counsel. The party also has a right to notice of the proceeding, which must include a statement of what accusations have been made and what issues are to be resolved in the proceeding. If, however, a party does not appear after proper notice has been given, the party may be considered to have waived these rights and the agency may proceed with the hearing without the presence of the party.

10.5.2 Right to Present Evidence and to Cross-Examine. Every party to a proceeding has the right to:

1. Present evidence on questions of fact, provided that such evidence is acceptable under the rules governing the hearing;
2. Present arguments on issues of law and policy;
3. Cross-examine witnesses.

10.5.3 Right to Counsel. A party to a proceeding has a constitutional and statutory right to be accompanied and represented by legal counsel. A.R.S. §41-1062(A)(1). He also has the right to be examined as a witness by his own counsel. There is no constitutional or statutory requirement, however, that the agency pay for or appoint legal counsel for a party, even if he is indigent.

The filing of an answer, a motion or other appearance by an attorney is considered his appearance on behalf of the party. The attorney is considered as continuing to appear in that capacity until he has notified the agency in writing that he has withdrawn from the proceeding.

A nonlawyer may not represent another in a judicial or quasi-judicial proceeding, unless the Arizona Supreme Court has authorized such representation. Hunt v. Maricopa County Employees Merit System Commission, 127 Ariz. 259, 619 P.2d 1036 (1980). The court has authorized lay representation under the following circumstances:

1. A nonlawyer may represent an employee in administrative hearings dealing with personnel matters where the representation is without compensation. Arizona Rules of the Supreme Court, Rule 31(a)(4)(B).

2. A duly authorized agent (and nonlawyer) who is not charging a fee for the representation, may represent either an individual claiming benefits or an employer in any proceeding before an Appeal Tribunal or the Appeals Board of DES. In addition, a duly authorized agent may represent such a party and charge a fee, provided that an attorney authorized to practice law in this state shall be responsible for and supervise such agent. Arizona Rules of the Supreme Court, Rule 31(a)(4)(A).

3. An Arizona law professor or law student certified by his law school with the Supreme Court as eligible to participate as a clinical law professor or legal intern may represent a client in civil proceedings before state agencies and elsewhere with the written consent of his client. Law students must be under the supervision of a licensed Arizona lawyer. Arizona Rules of the Supreme Court, Rule 38.

The Arizona Legislature has enacted several statutes which purport to authorize lay representation under other circumstances. The validity of these statutes is in doubt after the Hunt decision and you should first seek advice from your legal counsel before permitting lay representation in circumstances other than those described above.

10.5.4 Right to Judicial Review. A party generally has the right to seek judicial review of any final decision of the agency which adversely affects him. The right to judicial review is discussed further in Section 10.20.

#### 10.6 Initiating the Adjudicatory Proceeding.

10.6.1 Initiating the Process. An agency usually initiates an adjudicatory proceeding by issuing a Notice of Hearing or other similar document. The form and purpose of the notice or other document is described in Section 10.7. If an agency is authorized to deny an application for a license or permit without first conducting a hearing, it will usually do so by letter or order. The APA provides that the applicant may request a hearing within fifteen days after receipt of notice of the denial. A.R.S. § 41-1065. The hearing process is then commenced by the agency by issuing and serving a notice of hearing as described in Section 10.7.

10.6.2 The Need for a Formal Proceeding. The decision to proceed formally will result from one or more of the following considerations:

1. The agency believes that the charges are sufficiently serious to require a formal adjudication;

2. A person fails to respond to the agency's letter concerning a complaint and the agency believes that there is sufficient grounds to justify further action;
3. A person's response to the agency's letter or investigative demand has convinced the agency that action is necessary;
4. An informal hearing or conference has been held, but has failed to resolve the issues;
5. A person who has a right to be heard requests that the agency commence a proceeding.

10.6.3 Right to Hearing. The Fourteenth Amendment to the United States Constitution and Article II, Section 4, of the Arizona Constitution provide that no person may be deprived of life, liberty or property without due process of law. Generally, a formal hearing is required whenever an agency determination will affect a person's rights, duties or privileges. A person may choose to waive his right to a hearing, either by failing to appear or by consent order or settlement.

10.6.4 When a Hearing is Not Required. The exceptions to the requirement that a hearing must be held are summarized as follows:

1. A hearing need not take place when state law allows an agency to take action without first holding a hearing. Such provisions of law, however, should be balanced against the constitutional rights, and the decision to proceed without a hearing should be made with great caution. In most cases, taking action without a prior hearing must be promptly followed by a hearing which affords the party an opportunity to present his side of the case. For example, A.R.S. § 41-1064(C) provides that if an agency finds that public health, safety or welfare imperatively requires emergency action, and the agency incorporates a finding to that effect in its order, the agency may summarily suspend a license pending formal proceedings for revocation or other action. This statute also provides that the further proceedings must be promptly instituted and decided by the agency.

2. A hearing is not required when the agency's action is based solely upon the failure of a person to file a required report, application, or other material in a timely manner, or upon the failure to pay required fees, or maintain required bonds or insurance.

3. A hearing is not required when agency action is mandated by law, such as actions involving the suspension of drivers licenses upon obtaining a certain number or type of convictions for traffic violations.

## 10.7 Notice of the Proceeding.

10.7.1 Purpose of the Notice. Due process requires that an agency provide adequate notice of the formal adjudicatory proceeding to all parties. The notice, which is analogous to the complaint filed in a civil action in court, serves the purpose of informing the party of the existence and nature of a proceeding affecting his individual rights. Failure to give adequate notice may cause a reviewing court to set aside the final decision of the agency.

10.7.2 Form of Notice. Although we use the word "Notice," the statutes applicable to the particular agency may refer to the document as a complaint, petition or some other title. Unless the applicable statutes require a different title, the document should always be titled "Notice" or "Notice of Hearing."

10.7.3 Contents of the Notice. In order to serve its purpose and to meet the requirements of due process, the notice must contain certain information. The APA requires that the notice include the following:

1. A statement of the time, place and nature of the hearing.
2. A statement of the legal authority and jurisdiction under which the hearing is to be held.
3. A reference to the particular sections of the statutes and rules involved. If alleged conduct is claimed to be in violation of a statute or rule, the verbatim language of or a citation to the statute or rule must be included in the notice.
4. A short and plain statement of the matters asserted. This requires the agency to set forth the conduct of the party which is alleged to give rise to the violations set forth in the notice. If the agency is unable to state these matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, any party may, upon application for a more definite statement, request and must be provided with the more detailed statement of matters asserted.

The content of the notice is extremely important and careful consideration should be given to the composition of this document. The matters set forth in the notice frame the issues to be decided in the hearing. The agency cannot, for example, allege in its notice that a licensee has engaged in a certain type of misconduct, and then at the hearing introduce evidence of an entirely different type of misconduct. If such new evidence of misconduct arises, the agency must either treat it in a separate proceeding or suspend the proceedings and issue an amended notice allowing the party ample opportunity to prepare a defense for the additional charge.

10.7.4 Service of the Notice. Due process requires that the agency use a method of service likely to result in receipt by the party to whom it is directed. Generally, the statutes applicable to an agency prescribe the manner of giving notice. If the agency statutes do not prescribe the manner in which the notice must be served, the notice should be mailed by certified mail to the intended recipient at his last known address contained in the records of the agency, or by personal delivery upon the person. If the respondent is licensed by the agency and cannot be found through the use of these procedures, the agency may hold a hearing in the licensee's absence, because the licensee has an obligation to keep the board informed of his whereabouts.

Notice must be given to all parties sufficiently in advance of the hearing to allow a reasonable opportunity for the parties to prepare their case. Unless a specific statute applicable to the agency provides otherwise, the notice must be given to the party at least 20 days prior to the date set for hearing. A.R.S. § 41-1061(A).

10.7.5 Answer to the Notice. The parties may always file an answer to the notice, and indeed may be required to do so by statute or rule. The answer may contain a denial of some or all of the charges and an explanation of some or all of the facts alleged, or it may simply assert defenses to the charges. Depending upon the applicable statutes, failure to file an answer to the notice may carry important procedural consequences, such as limiting the party's right to introduce evidence.

The time for filing an answer may be prescribed by statute or rule. A party may file a motion requesting an extension of time, stating the reasons for the request. The agency may, in its discretion, grant the extension. This often is done when the respondent has been ill or has been unable to obtain legal counsel. The extension may also be granted when the case is so complex that additional time is needed for the preparation of a defense.

## 10.8 Hearing Officers.

10.8.1 Use of Hearing Officers. If authorized, the agency may delegate to a hearing officer, also sometimes referred to as a "hearing examiner," part or all of the responsibilities for conducting the hearing and recommending a decision. Walker v. DeConcini, 86 Ariz. 143, 151, 341 P.2d 933, 939 (1959). The delegation should be accomplished in writing, delineating the scope of delegation, and copies should be sent to all the parties to the proceeding. The hearing officer may be a member of the board, an employee of the agency or someone hired by contract with the agency. The agency, however, cannot delegate to the hearing officer the power to make the final decision in the absence of statutory authority to do so. In addition, if a hearing officer is used, a transcript or tape recording must be made of the proceeding for the decision maker's use in reviewing the hearing officer's recommendation. Walker v. DeConcini, 86 Ariz. at 151-53, 341 P.2d at 939-40.

The agency is responsible for deciding whether to use a hearing officer and, if so, what the hearing officer's responsibilities are. The use of a hearing officer is extremely helpful when the subject matter of the proceeding is technical or complex. Applicable statutes may require the use of hearing officers in certain cases.

Agencies that regularly employ hearing officers should adopt rules delineating the authority of the hearing officer. In addition, the agency should prepare a manual prescribing in detail the procedures the hearing officer should follow in performing his duties. A number of agencies, such as the State Accountancy Board, have adopted such manuals which can serve as models.

10.8.2 Duties of the Hearing Officer. The hearing officer exercises two functions: conducting the hearing and recommending a decision to the final decision maker. These functions depend, of course, on the authority delegated to the hearing officer. In general, he is responsible for insuring that the hearing is orderly, fair and expeditious. He may also be empowered to prepare findings of fact and conclusions of law which he recommends to the agency as well as a recommended order, such as the suspension or revocation of the license.

## 10.9 Disqualification.

10.9.1 Disqualification of the Hearing Officer or Board Member. A hearing officer or board member should disqualify himself or be disqualified whenever bias or prejudice would make him unable to conduct a fair and impartial hearing or when a

statutory conflict of interest prevents him from participating. The determination of bias involves many considerations. Bias, prejudice, and prejudgment about issues of fact in a case are reasons for disqualification, as is bias or prejudice for or against one party in a proceeding. Another ground for disqualification is a conflict of interest, *i.e.*, a financial interest or other property interest, by the hearing officer or board member, in the outcome of the proceeding. See Chapter 8. However, bias, prejudice, and prejudgment on issues of law or policy are not reasons for disqualification.

**10.9.2 Procedures for Disqualification.** If a hearing officer or board member determines that he is unable to conduct a hearing in an impartial manner or that he has a conflict of interest, he should promptly disqualify himself from any participation in the matter.

A party to a proceeding may file an affidavit or motion with the agency alleging that the hearing officer or a board member is unable to conduct the hearing because of bias or other disqualification. The affidavit or motion should state the grounds for disqualification as precisely as possible. Generally, the motion must be filed before the commencement of the hearing or at the first opportunity after the party becomes aware of the facts upon which the claim of disqualification is based. Agencies should adopt as part of their rules of practice and procedure a rule prescribing procedures for filing a motion to disqualify and prescribing the contents of such a motion and the circumstances under which it will be granted. See, *e.g.*, A.A.C. R4-4-1217(B).

**10.9.3 Action on Disqualification.** If, after an inquiry, the agency finds that the hearing officer cannot conduct the hearing in an impartial manner or has a conflict of interest, it should remove him and appoint another. The reasons for this decision should be made part of the record and all parties should be informed. The hearing then resumes, unless the new hearing officer determines that continuation will result in substantial prejudice to the rights of the parties. In that event, a new hearing should be initiated or the case dismissed without prejudice to the right of the agency to initiate a new proceeding.

If the removal of a board member is requested, the board should decide whether removal is appropriate and the board member sought to be removed should not participate in that decision. If the board member is removed, the hearing proceeds without him so long as there are enough members to constitute a duly qualified board.

**10.9.4 Effect of Disqualification on the Quorum Requirement.** The disqualification of a board member may make it difficult for the public body to obtain a quorum of its membership for purposes of discussing and deciding a particular matter. For a discussion of the quorum requirement, see Chapter 2, Section 2.14. The general rule on disqualification is that a disqualified member, even though present at a meeting of the public body, may not be counted for purposes of convening the quorum to discuss or decide the particular matter for which he is disqualified.

For example, if four members of a seven member board are present at a meeting of the board to discuss a variety of different matters, the board could not discuss a particular matter if one of the four members is disqualified, because for purposes of discussing or deciding that matter, the necessary quorum of four members is not present. Assuming that one or more of the other three positions on the board is filled by a duly qualified and serving member, the board must defer action on the proceeding until the

absent member or members can be present to convene a quorum. If the other three positions in the above hypothetical are vacant, the board cannot proceed until the appointing authority has filled at least one of the vacant positions.

If a majority of the total membership of a public body is disqualified, thereby making it impossible for the public body to convene a quorum to discuss or decide the matter, the disqualified members may disclose in the public record their reasons for disqualification and proceed to act as if they were not disqualified. A.R.S. § 38-508(B); Nider v. Homan, 32 Cal. App. 2d 11, 89 P.2d 136, 140 (1939).

#### 10.10 Preliminary actions.

10.10.1 Prehearing Conferences. The presiding officer may, at the request of a party or on his own initiative, order a prehearing conference. Such a conference may also be held by agreement of the parties. The purpose of the conference is to consider any or all of the following actions:

1. To reduce or simplify the issues to be adjudicated;
2. To dispose of preliminary legal issues, including the ruling on prehearing motions;
3. To stipulate to facts and legal conclusions that are not contested by the parties;
4. To stipulate to the admission of certain evidence or admission of facts in order to avoid unnecessary proof;
5. To identify documentary evidence or other physical evidence and to dispose of any questions by the parties about its authenticity;
6. To identify each party's witnesses;
7. To amend the pleadings, including the notice and answer to the notice;
8. To consider any other matters that will aid in the expeditious conduct of the hearing.

If a prehearing conference is to be held, written notice of the conference should be sent to all parties in advance of the conference, unless the scheduling of the conference is included in the notice of hearing.

10.10.2 Stipulations. The parties may stipulate (agree upon) certain issues or certain facts. Stipulated facts are not required to be proved at the hearing. Stipulations may also be used for extensions of time or changes in procedures to be followed at the hearing. An agency should not honor a stipulation in which all parties did not participate. A stipulation is never binding on a non-consenting party.

10.10.3 Consolidation and Separation of Hearings. The presiding officer may order that two or more cases be consolidated for a single hearing. He may take such action on his own motion, or at the request of a party. A consolidation may be ordered only if it would not substantially prejudice any party's interest, and only if some or all of the following circumstances exist:

1. The cases involve substantially the same questions of law;
2. The cases involve substantially the same questions of fact;
3. The cases involve the same or related parties. Conversely, the board may order that parties to one proceeding be heard separately if a joint hearing would be prejudicial to one or both of them.

In addition, notwithstanding different questions of law, two agencies may conduct a joint hearing when both cases concern the same licensee and involve substantially the same questions of fact. A consolidated agency hearing should not be used without first consulting with the respective agencies' legal counsel.

Notice of the consolidation or separation of hearings must be given to all affected parties.

10.10.4 Discovery. Discovery is the disclosure, prior to the hearing, of facts, documents or other things, which are within the knowledge or possession of another, and which are necessary to the party seeking discovery in order to prepare his case. The purpose of discovery is to minimize the element of surprise at the hearing and to give all parties a chance to fully prepare for the hearing. The extent to which discovery is available in administrative proceedings varies among agencies. Although some agencies are specifically authorized by statute or rule to permit discovery in their adjudicatory proceedings, no general statutory right is afforded parties to engage in discovery in administrative hearings.

The Administrative Procedure Act authorizes only one discovery procedure — the use of depositions. Depositions are written transcripts of testimony taken outside the presence of the hearing officer. Upon application of a party or the agency, the hearing officer may permit the taking of a deposition of a witness who cannot be subpoenaed or is unable to attend the hearing. A.R.S. §§ 12-2212, 41-1062(A)(4). There is no general right, as there is in civil court proceedings, to conduct depositions of any person who possesses relevant information about the case. The hearing officer should designate the manner and the terms under which the deposition shall be taken. At the hearing the deposition may be used in evidence as deemed appropriate by the hearing officer.

#### 10.11 Motions.

10.11.1 Use of Motions. A party may request, in the form of a motion, that the agency or its presiding officer take a particular action. Motions should be made in writing or stated on the record so that a written record can be maintained of all such requests. Oral motions not stated on the record provide no record and also give rise to problems of ex parte communications. See Section 10.13.7. All motions must be made at the appropriate time and in accordance with all procedural requirements applicable to the proceeding.

10.11.2 Responses to Motions. Any party may, within applicable time limits, file a response to the motion. A response may be in support of the motion or in opposition. Time limits are set by statute, rule, or, if not mentioned otherwise, in an order.

10.11.3 Argument on Motions. Oral argument or the presentation of evidence on a motion may be allowed, pursuant to applicable statutes or procedural rules, or in the absence thereof, at the presiding officer's discretion. The propriety of allowing argument or the presentation of evidence should depend on the importance of the motion. A motion may be a simple one, such as extending the period of time in which to file a pleading. These motions are usually allowed with liberality if they are made in a timely manner. On the other hand, a motion may be complex and require the determination of contested issues of law or fact, and perhaps even be dispositive of the case. Presentation of evidence would be appropriate in considering such motions. For example, a licensee may claim that the rule which he is charged with violating is unenforceable because it was improperly adopted. In considering such a motion, the agency may desire the presentation of evidence or argument, inasmuch as the determination of this motion will also determine significant issues of law and policy and may determine the ultimate result in the case.

10.11.4 Disposition of Motions. The presiding officer must rule on all motions. A ruling should be made as promptly as possible and should be committed to writing or stated in the record so that the record is clear.

## 10.12 Subpoenas.

10.12.1 Types of Subpoenas. A subpoena is an order for a witness to appear at a proceeding and testify or present documents. There are two types of subpoenas which can be issued in an administrative proceeding:

1. A subpoena requiring a person to appear and give testimony; and
2. A subpoena duces tecum, which requires that a person appear and produce books, records, correspondence or materials over which he has control, and testify.

10.12.2 Subpoena Authority. State agencies have authority under A.R.S. § 41-1062(A)(4) to issue subpoenas compelling the attendance of witnesses and the production of documents and other evidence at hearing in contested cases as defined in A.R.S. § 41-1001(A)(3). In addition, specific statutes applicable to the agency may authorize the issuance of subpoenas.

Generally, any party to an adjudicatory proceeding may request that the appropriate presiding officer issue a subpoena. The party requesting issuance of a subpoena is responsible for preparing the subpoena, obtaining the necessary signature and effecting service.

10.12.3 Application for Issuance of Subpoena. An agency should adopt, as part of its procedural rules, a rule requiring parties desiring to have a subpoena issued to file with the presiding officer an application for issuance of the subpoena. The application should set forth the name and address of the witness to be subpoenaed; the matters concerning which the witness is expected to testify; the documents, if any, sought to be provided; and the time and place of the hearing or deposition at which the witness is expected to appear. See, e.g., A.A.C. R4-4-1216.

10.12.4 Response to Subpoena. The person to whom a subpoena is directed must comply with it unless he files a motion with the agency to modify or quash the subpoena. Such a motion must be filed prior to the return date on the subpoena. The agency may decide to modify or quash the subpoena if it finds that:

1. The testimony required is not reasonably related to the subject matter of the hearing;
2. The subpoena does not adequately describe the evidence required to be produced;
3. The production of the evidence would impose difficulties that are not justified in light of its importance to the case, or would subject the witness to undue hardship;
4. The material or testimony requested is privileged by statute, rule, or constitutional guarantee;
5. The subpoena has been sought for the purpose of harassment or intimidation.

10.12.5 Enforcement of the Subpoena If a witness fails to comply with a subpoena, the agency or a party may apply to the superior court for an order holding the individual in contempt of court or an order compelling the person to comply. A.R.S. §§ 12-2212, 41-1062(A)(4).

Although the courts are available to enforce subpoenas, consideration should be given to the importance of the testimony or material sought compared to the delay that would result in petitioning the court for enforcement of the subpoena.

### 10.13 Conducting the Hearing.

10.13.1 The Presiding Officer. The presiding officer, either a hearing officer or board member, has an important role in the hearing. He is responsible for insuring that the hearing proceeds smoothly and that all parties are treated fairly. Presiding officers usually have the power, pursuant to statute or rules, to:

1. Regulate the discovery process in those cases where discovery is permitted;
2. Hold conferences for the simplification or settlement of issues;
3. Issue subpoenas;
4. Place witnesses under oath;
5. Take action necessary to maintain order in the hearing;
6. Rule on procedural questions arising during the hearing;
7. Call recesses or adjourn the hearing;
8. Prescribe and enforce general rules of conduct and decorum in the hearing;
9. Examine witnesses;
10. Appoint a clerk to perform ministerial tasks such as mailing exhibits and maintaining the record.

### 10.13.2 Standards of Conduct

To insure a fair and efficient hearing, the presiding officer must enforce proper conduct on the part of persons present. He should recognize the person who is entitled to speak and refuse to allow any person to speak unless he has been recognized. In the case of a disturbance, the presiding officer should ask the offending person to be quiet or leave the hearing room. If necessary, and after appropriate warning, he may rule that a person has forfeited his right to participate in the hearing, or he may order a person removed from the room.

10.13.3 Conduct of Board Members and Hearing Officers. Board members and hearing officers should prepare in advance for the hearing by reading the notice of hearing, the answer, if any has been filed, and any other pleadings, motions or briefs relating to the proceeding. Board members should plan to attend all the sessions necessary to conclude a hearing on a case. See Section 10.16.2. Board members and hearing officers should avoid any appearance of prejudice for or against any party, attorney or witness, especially when questioning a witness. Board members should not discuss a case with any person other than the parties and fellow board members, and should not discuss the case with another party unless in the presence of all parties. Board members should remember that their final decision must be based on the evidence in the record; they cannot base their decision on discussions they have had off the record or on matters they have read which have not been received in evidence.

10.13.4 Application of Open Meeting Law. Arizona's Open Meeting Law requires that the public be allowed to attend adjudicatory proceedings being conducted by public bodies. See Chapter 7. All evidentiary hearings before hearing officers and single agency heads are required to be open to the public. A.R.S. § 41-1062(A)(1). To the extent practicable, hearing officers and agency heads should conduct all other aspects of the proceeding, such as argument or motions, in an open proceeding. The Open Meeting Law permits those in attendance to record the proceeding by tape recorder or other device so long as the recording does not disrupt the proceedings. In addition, the Open Meeting Law requires that discussions concerning the case among a majority of the board members must take place in the open meeting.

10.13.5 Record of the Proceeding. The agency must make and maintain a formal record of the proceeding. Generally, the presentation of all oral arguments and oral testimony should be stenographically or mechanically recorded. The use of a tape or video recorder may be used to record the hearing. A.R.S. §§ 38-424, 41-1061(F). Agencies using recording devices, rather than a court reporter, should insure that the original tape is preserved for future reference and that the transcript is accurate. Mechanical recording devices are less expensive than court reporters; however, they have several drawbacks, including difficulty in identifying voices and understanding statements, particularly when two people have spoken at the same time. Conference recorders that use several microphones which record on separate tracks are helpful in eliminating this problem. Documentary evidence offered or admitted in evidence should be carefully marked and should remain in the custody of the presiding officer or his duly appointed clerk. A.R.S. § 41-1061(E) provides that the record shall include:

1. All pleadings, motions, and interlocutory rulings. Interlocutory rulings are rulings by the agency which do not finally dispose of the matter, such as rulings on discovery, disputes and motions for more definite statement;

2. Evidence received or considered. The agency should also include in the record documentary evidence which has been offered, but the admission of which was rejected by the presiding officer. Evidence which has been rejected should be included in the record but not considered in the final decision;
3. A statement of matters which have been officially noticed;
4. Objections and offers of proof and rulings thereon;
5. Proposed findings of fact, conclusions of law and recommendations and any exceptions or objections thereto;
6. Any decision, opinion or report by the presiding officer;
7. All staff memoranda, other than privileged communications, and data submitted to the hearing officer and members of the agency in connection with the consideration of the case.

10.13.6 Interpreters. The presiding officer shall appoint a qualified interpreter, A.R.S. § 12-242(H)(2), when the principal party in interest in the proceeding, or a witness in the proceeding, is deaf. A.R.S. § 12-242(B). If the only available interpreter is inadequate for the particular situation, the presiding officer may permit the deaf person to nominate an intermediary interpreter between the deaf person and the appointed interpreter. A.R.S. § 12-242(F). The hearing officer or presiding officer may, in his discretion, appoint an interpreter when a principal party or witness cannot speak or understand English. See A.R.S. § 12-241. No one should be appointed as a foreign language interpreter unless the appointing officer first determines that the interpreter is able to readily communicate with the person using the interpreter and is able to accurately repeat and translate the statements of such person.

10.13.7 Ex parte Communications. Ex parte communications are communications between the decision maker and one party to a proceeding, in the absence of other parties. Generally speaking, no member of the decision making body or the hearing officer may communicate ex parte with any party to a proceeding or his representative concerning any issue of fact or law involved in the proceeding, once notice of the proceeding has been issued. If the agency engages in such communications its final decision may be reversed on appeal. Western Gillette, Inc. v. Arizona Corporation Commission, 121 Ariz. 541, 542, 592 P.2d 375, 376 (Ct. App. 1979). All agencies that conduct adjudicatory proceedings should adopt a procedural rule on ex parte communications explaining the prohibition and providing sanctions for those who violate the prohibition. See Appendix 10.1.

#### 10.14 Order of Proceedings.

10.14.1 Convening the Hearing. The presiding officer calls the session to order and identifies the case by name and number. He should state for the record a brief summary of the subject of the hearing and cite the authority for holding the hearing. The presiding officer should ask the parties and their counsel to identify themselves. All parties should be given the opportunity to state for the record any objections they have to any of the prehearing proceedings, such as the service of the notice, and to make any prehearing motions. Finally, the parties should be allowed the opportunity to make an opening statement if they so desire.

10.14.2 Oaths and Affirmations. As a general rule, all testimony should be given under oath. The purpose of an oath is to impress upon the witness the seriousness of the occasion in order to assure that his testimony will be truthful. If the witness objects to "swearing" or "taking an oath," the word "affirm" may be substituted. If a witness' testimony is interrupted by a recess, the oath need not be readministered when the hearing reconvenes. The presiding officer, however, should remind the witness that he is still under oath.

10.14.3 Presentation of the Matter. The customary order of a disciplinary proceeding is as follows:

1. The person presenting the evidence against the respondent, usually an Assistant Attorney General, makes an opening statement of what he intends to prove, and what action he wants the agency to take;
2. The respondent makes an opening statement, explaining why he believes that the charges against him are untrue or that the agency should not take the action that is sought;
3. The person presenting the case against the respondent presents his evidence. At the conclusion of this person's examination of each of his witnesses the respondent or his counsel is permitted to cross-examine the witness. Further direct examination, after cross-examination, may be permitted;
4. The respondent presents his evidence. After each of the respondent's witnesses testify, adverse parties may cross examine the witness;
5. The person presenting the case against the respondent provides rebuttal evidence in the form of witness testimony or documentary evidence;
6. All parties make closing statements.

The foregoing order may be modified as necessary. In addition, in proceedings arising out of the denial of a license, the applicant should go first, as the burden of proof is placed upon the applicant in these types of proceedings. A.R.S. § 41-1065.

In the case of a proceeding to adjudicate the right of a person to receive benefits from the state, the order of proceedings should allow the applicant for such benefits to proceed first in the hearing, followed by the agency personnel, the employer or other person presenting the case in opposition to the applicant.

## 10.15 Evidence

10.15.1 Nature of Evidence. Evidence is the testimony, documents and other tangible items which establish the facts necessary to reach a decision in the case. The agency is not obliged to adhere to the technical rules of evidence which govern court proceedings, although evidence admitted must be of the type commonly relied upon by reasonably prudent men in the conduct of their affairs. Both the United States and Arizona Constitutions guarantee to parties the right to a decision based only on evidence presented at the hearing. This guarantee is also known as due process. A decision must be made based only upon the evidence presented at the hearing. A decision maker may not consider anything that he has heard or read about the case outside of the proceeding.

10.15.2 Forms of Evidence. Evidence may be in any of the following forms:

1. Oral testimony by a witness at the hearing;
2. The transcription of the oral testimony given by a witness at a deposition for which all parties had notice and an opportunity to attend and raise objections and cross examine;
3. Documentary evidence, *i.e.* written or printed materials including public, business or institutional records;
4. Physical or illustrative evidence, such as pieces of mechanical equipment, charts, graphs or other illustrations;
5. Admissions of parties, which are written or oral statements of a party made either before or during the hearing;
6. Stipulated facts, facts the parties have agreed may be treated as true;
7. Facts which have been officially noticed by the decision making body.

10.15.3 Admissibility Generally. When determining the admissibility of evidence, the presiding officer must follow all applicable statutory rules governing the proceeding.

10.15.4 Objections to Evidence. A party to the proceedings should inform the presiding officer if he objects to the admission of the evidence. If the presiding officer sustains the objection, the evidence is immediately withdrawn from consideration and should not be considered in making the final decision. Conversely, if the objection is overruled, the evidence is admitted, the proceeding continues and the evidence may be considered in the decision making process.

10.15.5 Hearsay. Unlike court proceedings, the agency may admit hearsay evidence. Hearsay is evidence in the form of a written statement or testimony by a witness regarding a statement made by another person outside the hearing, when the statement by the absent declarant is offered to prove the truth of the matter asserted. Such evidence is considered unreliable because the person who made the original statement was not under oath, because the opposing parties did not have the opportunity to cross examine the person, and because the truth of the statement depends upon whether the declarant is believable, and since he is not physically present, the decision maker is not able to observe his demeanor and manner of testifying. Although hearsay evidence, which would be inadmissible in court, is admissible in an administrative proceeding, the agency should not take action based solely on such hearsay evidence. For this reason, the agency should strive to recognize hearsay evidence when it is offered and insure that non-hearsay evidence is presented to support the fact proposed to be proven by the evidence.

10.15.6 Relevancy. Relevant evidence is defined in Rule 401 of the Rules of Evidence Applicable in Court Proceedings as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The rule should be consulted in determining whether a certain type of evidence is relevant or not relevant to

the proceeding. Irrelevant evidence should not be admitted in the administrative proceeding. Except as may otherwise be provided by law, evidence of a plea of guilty later withdrawn, or a plea of nolo contendere or no contest, or an offer to plead guilty, nolo contendere or no contest to a crime is not admissible against the person who made the plea or offer. Rule 410, Arizona Rules of Evidence. However, evidence of the conviction that resulted from such a plea is admissible where the fact of conviction is relevant, such as in a case where conviction constitutes grounds to deny or suspend or revoke a license.

10.15.7 Rules of Privilege. The presiding officer of the hearing should not permit the introduction of privileged evidence in the hearing. Generally, privileged evidence includes communications between client and attorney or accountant, physician and patient, husband and wife, penitent and clergyman or informant and newsman.

The agency may also not force a witness to testify if he invokes his Fifth Amendment privilege against self-incrimination. Inasmuch as the decision of the agency must be based on evidence presented in the case, a party refusing to testify by invoking his Fifth Amendment privilege may be looked upon as having presented no evidence on his behalf. This failure to testify may, from an evidentiary standpoint, weigh against him. The agency, however, may not take any action or make any factual determination based solely on a party's invocation of his Fifth Amendment privilege against self-incrimination and his resulting refusal to testify. Baxter v. Palmigiano, 425 U.S. 308 (1976).

10.15.8 Exclusion of Evidence. Evidence which is irrelevant, immaterial, incomplete, inaccurate, unsubstantiated, or unduly repetitious should be excluded. Examples are:

1. Irrelevant evidence which does relate to the issues, and has no bearing on the resolution. See Section 10.15.6;
2. Immaterial evidence which, though it may relate to the issues, has no bearing on the resolution, including repetitious evidence covering matters which have already been fully covered by other evidence. Some repetition may be allowed for emphasis;
3. Incomplete, inaccurate or unsubstantiated evidence such as technical evidence or opinion evidence submitted by an unqualified person.

10.15.9 Exhibits. The presiding officer should require that all documentary and physical evidence be marked for identification and that a list be kept, describing the exhibit and its identification number. The list should also note whether the exhibit was admitted as evidence. The offering party should furnish to every other party one copy of any document offered as evidence during or prior to the hearing. The original exhibit should be given to the presiding officer, unless he allows a copy to be submitted. Copies may be received in evidence in lieu of originals unless a party challenges the authenticity of the copy. Articles 9 and 10 of the Arizona Rules of Evidence may be helpful in resolving questions concerning the authenticity or admissibility of documentary evidence.

10.15.10 Notice of Judicial Facts and Technical and Scientific Facts. Generally the decision maker in making its decision may consider only the testimony, documents and other evidence offered and received in evidence at the hearing. However,

A.R.S. § 41-1062(A)(3) permits the decision maker to consider in addition to this evidence 1) judicially cognizable facts, and 2) generally recognized technical or scientific facts within the agency's specialized knowledge.

A judicially cognizable fact is one that is not subject to reasonable dispute because it is either generally known within the State of Arizona or is capable of accurate and ready verification from sources whose accuracy cannot be reasonably questioned. For example, the population of a given community can be readily ascertained from census reports and the time of sunrise and sunset for a given day can be ascertained from an almanac. The census report and almanac need not be offered and received in evidence.

Technical and scientific facts are those that are generally recognized within the applicable industry, trade or profession and are within the agency's specialized knowledge. For example, generally accepted auditing standards which are published by the American Institute of Certified Public Accountants are within the specialized knowledge of the Arizona Accountancy Board and can be taken as facts in a proceeding before that board.

Parties to the proceeding must be notified either before or during the hearing or by reference to preliminary reports or otherwise of the material to be noticed, including any staff memoranda or data. The parties must also be afforded an opportunity to contest the facts to be noticed. Such notice may be given by setting forth the facts to be noticed in the notice of hearing, in a separate document served on the parties prior to or during the hearing, or by an oral request during the hearing. It is permissible, although less desirable, to give the notice and consider the matters to be noticed following the conclusion of the hearing provided that all parties are given a reasonable opportunity to contest the matters to be noticed.

10.15.11 Evaluation of Evidence. Testimony of expert witnesses is not required to assist a board in evaluating evidence which is in the area of its expertise. Board members may use their own expertise. Croft v. Arizona State Board of Dental Examiners, \_\_\_ Ariz. \_\_\_, 755 P.2d 1191 (Ct. App. 1988).

#### 10.16. The Agency's Decision

10.16.1 Burden of Proof. As a general rule, the burden of proof rests on the party bringing the charges. In a proceeding involving the revocation or suspension of a license, the burden of proof is on the agency bringing the charges. In a hearing on the denial of an application for a license or an application for benefits, the burden of proof is generally on the applicant. See A.R.S. § 41-1065.

10.16.2 Making the Decision. At the conclusion of the presentation of evidence and argument, the decision maker must prepare its findings of facts based on the evidence submitted at the hearing. It must then determine what legal position the facts support and prepare the conclusions of law. For example, in a disciplinary proceeding, the decision maker must determine whether the findings of fact support the charges brought against the respondent. In making these determinations it is often helpful for the decision maker to obtain from each party their proposed findings and conclusions. This will assist the decision maker in identifying the factual and legal issues and in deciding whether the parties have proven their respective cases. If the agency has delegated responsibility for conducting the hearing to a hearing officer, the officer must prepare a report setting forth recommended findings of fact, conclusions of law and recommended decision, and

submit that report to the decision maker, who may adopt such findings and conclusions in whole or in part. Generally, he may amend or revise the hearing officer's findings and conclusions only if he has reviewed the transcript of the hearing and the evidence relating to the proposed changes, and only if the reasons for departing from the hearing officer's findings or recommendation are set forth in the agency's final decision. Voight v. Washington Island Ferry Line Inc., 79 Wis. 2d 333, 255 N.W.2d 545, 550 (Wisc. 1977).

10.16.3 Determining Sanctions. Once the agency has completed its fact finding function and made the necessary conclusions of law that a violation of one or more rules or statutes has been demonstrated, it must determine what sanction or other action is appropriate. The sanction must be based on the findings of fact and conclusions of law determined by the agency. The sanctions available to the agency are determined by the applicable statutes and may include revocation or suspension of the license, denial of the license, censure, the issuance of a cease and desist order, the payment of restitution to damaged parties, or the payment of fines. The agency may not impose a sanction greater than that permitted by the applicable statutes. However, legal authorities differ as to whether the agency may impose a lesser sanction than that specifically provided for by law. For example, if a statute provides only for suspension or revocation, whether the board may legally issue a reprimand or place the individual on probation has not been resolved. You should consult legal counsel if you wish to impose a lesser sanction.

10.16.4 Procedures for Making the Decision. The procedures for decision making vary with each agency. As a general rule, only those board members who are present during the entire hearing should participate in the decision. However, members who have reviewed the transcript and other evidence obtained in sessions from which they were absent may participate in the decision. Either the decision or the record should reflect that the absent but voting board member has so reviewed the evidence.

The vote of a board must be recorded and available for inspection to demonstrate that the findings and conclusions were adopted by the required majority. The Open Meeting Law requires that this vote and all deliberations on a final decision by a multi-member board must be taken in an open meeting for which proper notice under the Open Meeting Law has been given.

10.16.5 Form of the Decision. The decision maker's decision must be either stated in the record or set forth in a written document. It is preferable that the decision maker reduce the decision to a written document. The written decision must contain a caption identifying the agency before whom the proceeding took place, the title of the proceeding, the identity of the parties and the agency number for the proceeding, if any; separate statements of the findings of fact and conclusions of law adopted by the decision maker; and the decision maker's order reflecting the disposition of the matter. The document should be signed by the decision maker. If the decision maker is a multi-member body, the document should be signed by all members participating in the decision, or if their vote is recorded in the transcript of the proceeding and they have authorized one of their employees or one of their members to do so, that duly authorized person may execute the document on behalf of the decision making body.

If the decision making body does not intend to simply adopt the recommendations of the hearing officer because the decision making body desires to change the hearing officer's recommendation or because the decision making body did not utilize a hearing officer, the preferable procedure to follow is to direct the attorney for

the prevailing party to draft a recommended form of decision. All other parties to the proceeding should be given a fair opportunity to file objections to the proposed form of decision. The decision making body may then review the proposed form of decision and make whatever changes it deems necessary.

#### 10.17 Reconsideration of Decision.

10.17.1 Procedures. A.R.S. § 41-1062(B) requires that all state agencies adopt a rule providing a right to all parties to apply for a rehearing.

10.17.2 Model Rehearing Rule. A model rehearing rule has been provided to all state agencies by the Attorney General. See, e.g., A.A.C. R4-4-1219.

10.17.3 Effect of the Rehearing Rule. A.R.S. § 41-1062(B) provides that the agency decision shall not become final until either a rehearing has been timely applied for and denied or if the rehearing is granted, until after the conclusion of the rehearing. The failure to apply for rehearing in a timely fashion may permanently preclude a party from seeking review of the decision. If a motion for rehearing is granted, the decision of the agency is not final, and therefore is not effective until after the rehearing and after the issuance of the final decision.

10.18 Combining Investigative and Prosecutorial Functions with Adjudicatory Functions. In recent years, challenges have been raised to administrative agencies investigating, prosecuting and adjudicating charges against persons regulated by the agency. However, only the Pennsylvania Supreme Court has ruled that the practice is unconstitutional. The United States Supreme Court in Withrow v. Larkin, 421 U.S. 35, 46-55 (1975), has held that, absent a showing of special circumstances, combining such functions in the same agency is not unconstitutional. See also Croft v. Arizona State Board of Dental Examiners, \_\_\_ Ariz. \_\_\_, 755 P.2d 1191 (Ct. App. 1988); In re Davis, 129 Ariz. 1, 3, 628 P.2d 38, 40 (1981); Washington State Medical Disciplinary Board v. Johnston, 99 Wash. 2d 466, 663 P.2d 457, 463 (Wash. 1983).

In order to minimize problems in this area, the agency should consider implementing the following practices:

1. Do not permit the hearing officer or decision maker to participate directly in the investigation of a charge. Usually the investigation can be accomplished by the agency's staff. Of course, the decision maker will have to decide whether the results of the investigation warrant a formal hearing, and will have to issue the notice of hearing. This later act, however, is analogous to a judge issuing an order to show cause to a party requiring him to appear at a prescribed time and show cause why the relief requested should not be granted.

2. Do not permit the hearing officer or decision maker to be involved in the prosecution of the case. Prosecution decisions should be made by staff and the Assistant Attorney General presenting the case. But see Martin v. Superior Court of Arizona, 135 Ariz. 258, 268, 660 P.2d 859, 862 (1983) (upholding a Department of Transportation practice of permitting a hearing officer to question witnesses regarding the state's case with no prosecutor present).

3. Do not permit the hearing officer or decision maker to engage in ex parte discussions concerning the merits of the case with anyone outside the agency.

4. Where resources permit, use an independent hearing officer to conduct the hearing and make recommendations to the decision maker. In addition, insure that the hearing officer's recommendations are made part of the record.

10.19 Dual Functions of the Attorney General. In adjudicatory proceedings, the Attorney General has the duty to present evidence and arguments on behalf of the agency. Depending upon the significance of the matter, the gathering of evidence by agency staff may or may not have been done in cooperation with or at the direction of the Assistant Attorney General assigned to represent the agency. The function of the Attorney General is to organize and present relevant evidence to a hearing officer or the members of the board or commission responsible for deciding the matter. The Attorney General and his assistants will not determine for the agency how the matter should be decided or advise the agency on how to decide the case. Since the Assistant Attorney General presenting the case cannot advise the decision maker on how to decide the case, the decision maker should not be surprised when this assistant refuses to meet with him to advise him in connection with the deliberations. See Chapter 1, Section 1.10.

In complex and sensitive matters, the Attorney General may assign an assistant not involved in prosecuting the case to give the decision maker assistance in resolving legal questions arising in the case. This advice will be limited to procedural questions and legal questions on evidentiary matters. The assistant will not advise the decision maker on how to decide factual or legal disputes regarding the merits of the case.

10.20 Judicial Review. Nearly all final decisions entered in adjudicatory proceedings are subject to judicial review in the state superior court or court of appeals, either under the Administrative Review Act, A.R.S. §§ 12-901 to -914, or under special review statutes applicable to the agency's decisions. For a detailed discussion of these review procedures, consult Volume 3 of the Arizona Appellate Handbook published by the Arizona State Bar. Copies of the Handbook are available in the state library or they may be purchased from the Arizona State Bar. A detailed discussion of the procedures applicable to such appeals is beyond the scope of this Chapter and any questions in this regard should be directed to the Assistant Attorney General assigned to the agency.

Appendix 10.1

Model Rule on Ex Parte Communication

Section 10.13.7

A. In any contested case or proceeding (as defined in A.R.S. § 41-1001) before the commission, except to the extent required for disposition of ex parte matters as authorized by law or these rules of procedure:

1. No interested person outside the commission shall make or knowingly cause to be made to any commissioner, commission hearing officer, personal aide to a commissioner, or other employee or consultant who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

2. No commissioner, commission hearing officer, personal aide to a commissioner, or other employee or consultant who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the commission an ex parte communication relevant to the merits of the proceeding.

B. A commissioner, commission hearing officer, personal aide to a commissioner, or other employee or consultant who is or may be reasonably be expected to be involved in the decisional process of the proceeding, who receives, makes, or knowingly causes to be made a communication prohibited by this rule, shall place on the public record of the proceeding and serve on all parties to the proceeding:

1. All such written communications:

2. Memoranda stating the substance of all such oral communications; and

3. All written responses, and memoranda stating the substance of all oral responses, to the communications described in paragraph 1 and 2 of this subsection.

C. Upon receipt of a communication made or knowingly caused to be made by a party in violation of this section, the commission or its hearing officer, to the extent consistent with the interests of justice and the policy of the underlying statutes and rules, may require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

D. The provisions of this section shall apply beginning at the time in which the contested case proceeding is noticed for hearing or at the time a notice of opportunity for hearing is issued or a request for hearing is filed, whichever comes first, unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his or her acquisition of such knowledge.

Appendix 10.1 - (Continued)

E. For purposes of this section:

1. "Person outside the Commission" means any person other than a Commissioner, an employee or consultant of the Commission, or an attorney representing the Commission.

2. "Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

CHAPTER 11  
RULE MAKING  
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## CHAPTER 11

### RULE MAKING

11.1 Scope of this Chapter. This Chapter sets forth the procedures for adopting administrative rules pursuant to the Administrative Procedure Act ("APA"), A.R.S. §§ 41-1001 to -1055. All policy statements, standards, guidelines or directives affecting the public must be adopted as rules pursuant to the Administrative Procedure Act in order for them to be enforceable. The terms "rule making" and "adoption" as used in this Chapter, include the adoption, amendment or repeal of any agency rule. See A.R.S. § 41-1001(12), (13); A.A.C. R1-1-101(8).

11.2 Description of Rules. A rule is "an agency statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency." A.R.S. § 41-1001(12). It does not include matters "concerning only the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public." A.R.S. § 41-1005(A)(4). Rules have the force and effect of law once they have been certified by the Attorney General and accepted and filed by the Secretary of State. A.R.S. § 41-1032.

11.3 Authority to Adopt Rules. An agency has only the powers granted by statute. Consequently, an agency may adopt an administrative rule only when it is either authorized expressly to do so by statute, or when its authority may be reasonably and necessarily implied from its statutes.

In adopting rules, an agency is exercising powers that have been delegated to it by the Legislature. Rules are "invalid unless adopted and certified in substantial compliance" with the procedural requirements of the APA. A.R.S. § 41-1030.

11.4 Scope of Authority. The Legislature establishes policy and sets forth standards to guide the agency. An agency may then, within the scope of these standards, adopt rules in accordance with specific legislative policy and directives. An agency may adopt rules only when the legislature either mandates adoption or grants discretionary authority to do so. Furthermore, there must be substantial evidence that rules are necessary to meet demonstrated problems.

11.5 Limits on Authority. Within the permissible scope of rule making activities, there are limits on what an agency may do. An agency's action may not be arbitrary or unreasonable; an agency may not adopt a rule which deprives any person of his constitutional rights; an agency's actions must comply with statutory requirements concerning rule making procedures, see A.R.S. §§ 41-1021 to -1053; and an agency may adopt only such rules as are authorized by and consistent with its statutory authority.

11.6 Mandatory and Discretionary Rules. Mandatory rules are those which the agency is required by statute to adopt. For example, an agency may be required by statute to prescribe by rule minimum educational requirements for license applicants. Another example is a statute requiring an agency to adopt rules establishing standards for water quality. The Legislature usually uses the word "shall" in requiring a mandatory rule.

Discretionary rules are those which the agency may adopt, although it is not required to do so. A statute will contain the word "may" when setting forth discretionary authority. A common statute setting forth discretionary rule making authority is one which authorizes an agency to adopt "such rules as may be necessary" to carry out the purposes of the statutes pertaining to the agency. If, however, an agency finds it necessary to establish guidelines, policies or criteria which affect the public in order to carry out its statutory duties, it must adopt these standards through the rule making procedure of the APA in order for them to be enforceable. See Section 11.2.

11.7 Rules of Practice. An agency is required to adopt rules setting forth the nature and procedural requirements for all formal proceedings available to the public. A.R.S. § 41-1003.

11.8 Forms and Their Instructions. The rules must either set out the contents of all forms and instructions for their use, A.R.S. § 41-1005(A)(8), or incorporate the forms and instructions by reference. See Section 11.17 on incorporation by reference. If the forms themselves are incorporated by reference, they cannot be changed without going through rule making again to give the public notice and an opportunity for comment on the proposed changes. If the rule itself includes the substance of the forms, the format of a form may be changed from time-to-time, if necessary; however, matters of substance cannot be added to a form if that substance has not been included in the rule and approved through the rule making process.

11.9 Amendment or Repeal of Prior Rule. The amendment or repeal of a prior rule is subject to the same rule making procedures as the adoption of an original rule. A.R.S. § 41-1001(12). See Section 11.14 for format requirements prescribed by the Secretary of State for amendment and repeal of rules.

11.10 Exemption from Rule Making Procedures. The APA applies to all agencies and proceedings not expressly exempted. A.R.S. § 41-1002. For example, statements relating to internal management of the agency which do not directly and substantially affect the rights or duties of any segment of the public are expressly exempted. A.R.S. § 41-1005(A)(4). Note that the setting of a fee, such as a license application fee, must be accomplished only by following rule making procedures. See also A.R.S. § 41-1055 which provides specific exemptions from Article 5 (Governor's Regulatory Review Council, A.R.S. §§41-1051 to -1055) for certain agencies.

11.11 Rule Making Procedures. A rule is valid only if it is adopted in substantial compliance with the APA or other statutory procedure applicable to the agency. A.R.S. § 41-1030. Precise compliance with all statutory requirements will help ensure that a rule will be certified by the Attorney General and withstand possible court challenges.

The procedural requirements for rule making are discussed in the following sections of this Chapter. These requirements are designed to ensure adequate public participation in the rule making process.

11.12 Rule Making Docket. An agency must maintain a public rule making docket listing the subject matter of "each rule currently under active consideration within the agency for proposal." A.R.S. § 41-1021(B) (emphasis added). The docket should be begun before a rule has been formally proposed and must be kept up-to-date as a rule goes through the rule making procedure. It must contain the twelve items listed in A.R.S. § 41-1021.

11.13 Drafting Requirements. Rules must be clear, concise and understandable to permit approval of the rules by the Governor's Regulatory Review Council and certification by the Attorney General. A.R.S. §§ 41-1041(A)(2) and -1052(C)(4).

11.14 Format. The agency must draft a proposed rule in conformance with the form and style required by the Secretary of State, as set forth in the Arizona Administrative Code ("A.A.C."). See A.A.C. R1-2-101 to -108, R1-2-201 to -215. The Secretary of State may reject those rules that are not in compliance with the Secretary of State's prescribed numbering system, form and style. A.R.S. § 41-1011(B). All of the Secretary of State's rules should be reviewed before drafting rules; however some of the important format requirements are summarized as follows:

1. Originals required. An original of the appropriate rule making form (See A.A.C. R1-2-301) text of the rule and other documents, and 2 copies must be submitted for filing. A.A.C. R1-2-101(A), -103, -105(B) and -214(B).

2. Prenumbered Bond Paper. Rules must be double-spaced typewritten on 8 1/2 X 11 white prenumbered bond. A.A.C. R1-2-104.

3. Numbered Pages. All pages must be numbered beginning with the first page, including the table of contents, if any. A.A.C. R1-2-104.

4. Rule-Numbering System. The Secretary of State's numbering system must be used. A.A.C. R1-2-203.

5. Table of Contents. New rules must be accompanied by a table of contents if the packet includes more than one rule or a new article. A.A.C. R1-2-206(C)(2).

6. Repeals. An 8 1/2 X 11 photocopy of the rule being repealed, as it appears in the A.A.C., including the A.A.C. page number must be submitted. A diagonal line must be drawn across the page over the text of the rule being repealed. A.A.C. R1-2-206(D)(1).

7. New Rules. The text of a new rule must be typewritten and underlined. A.A.C. R1-2-206(D)(2).

8. Amended Rules. Language to be deleted shall be stricken through but legible; new language must be underlined; subsections and other units of a rule which are not changed shall be designated by number followed by "No Change." A.A.C. R1-2-206(D)(3).

9. Informative Summary. On 8 1/2 X 11 bond, the summary must briefly describe the action taken, need for the action and intended effect. A.A.C. R1-2-206(E).

11.15 Codification. The codification of rules is done by the Secretary of State in connection with the publication of the Arizona Administrative Code. An agency must obtain chapter, title and section numbers from the publications office of the Secretary of State's office. A.A.C. R1-2-201 to -206. The required numbering system is set out in A.A.C. R1-2-203.

#### 11.16 Drafting Guidelines.

1. The title of the rule must clearly identify the subject of the rule.
2. Each numbered rule must encompass one subject only.
3. Rules must be divided into sections and subsections at logical breaks in the subject matter for convenient reference and in accordance with the Secretary of State's numbering system set forth in A.A.C. R1-2-203.
4. Use the word "shall" when an action is mandatory and the word "may" when an action is discretionary; do not use terms such as "should," "will," "ought to," "if feasible," or "if possible."
5. References to statutes or other rules must be current and accurate.
6. Do not propose a rule that merely quotes or paraphrases statutory language or requirements.
7. Do not include extraneous matters in the text of the rule, such as a statement of purpose or authority, or a severability or effective date provision.
8. Do not use unnecessary verbiage such as "rule(s)," "two (2)," or "rules and regulations."

11.17 Incorporation by Reference. An agency may adopt by reference all or part of a rule, standard or code which has been adopted by another agency or entity if including the text in the body of the rules would be "unduly cumbersome, expensive or otherwise inexpedient." A.R.S. § 41-1028(A). The rule must clearly identify the material being incorporated, including its date and the date of any amendments to the material being incorporated. A.R.S. § 41-1028(B). Future amendments or editions of the material may not be incorporated by reference without complying anew with the provisions of the APA. A.R.S. § 41-1028(F).

The rule must contain the language, "incorporated herein by reference and on file with the Office of the Secretary of State." A.A.C. R1-2-207. If portions of referenced material are to be incorporated by reference, the rule must clearly identify the portions to be incorporated.

Three copies of the material, along with the rule incorporating it, must be filed with the Office of the Secretary of State at the time of filing a proposed rule or an emergency rule. A.R.S. § 41-1028(E). Because the Governor's Regulatory Review Council ("GRRC") forwards rules it approves to the Secretary of State, the three copies will ordinarily first be filed with the GRRC. A.A.C. R1-6-103(C). See Section 11.21.

11.18 Informal Review by the Attorney General. The Attorney General's staff does not draft rules for an agency. After preparing a working draft of the proposed rule, the agency may consult their Attorney General representative for advice and guidance. This practice is encouraged because the Attorney General must certify that the proposed rule is:

1. in proper form;
2. clear, concise and understandable;
3. within the power of the agency to adopt and within the legislative standards; and
4. adopted in compliance with procedural requirements.

A.R.S. § 41-1041(A). Serious language or legal defects in a proposed rule may be discovered and lengthy delays in the adoption proceedings may be avoided through informal review.

Informal review does not assure that the Attorney General will certify the rule when it is formally submitted for certification. The informal review usually is conducted by one Assistant Attorney General, whereas the formal certification procedure involves several stages of review.

**11.19 Rules Affecting Small Business.** Pursuant to A.R.S. § 41-1035, an agency is required to determine whether a proposed rule may have an impact on small businesses and, if so, to reduce the impact to the extent possible by utilizing one of the following methods:

1. Establish less stringent compliance or reporting requirements in the rule for small businesses.
2. Establish less stringent schedules or deadlines in the rule for compliance or reporting requirements for small businesses.
3. Consolidate or simplify the rule's compliance or reporting requirements for small businesses.
4. Establish performance standards for small businesses to replace design or operational standards in the rule.
5. Exempt small businesses from any or all requirements of the rule.

The contents of the Statement of Effect on Small Business is prescribed by A.R.S. § 41-1053(B).

**11.20 Economic Impact Statement.** Agencies which are subject to GRRC review must file an economic impact statement, evaluating the costs versus the benefits of a proposed rule. The contents of this statement are listed in A.R.S. § 41-1053(A). The Executive Budget Office offers assistance to agencies in preparing this statement and also provides written comments to the GRRC regarding rule packets. A.A.C. R1-6-107(B).

**11.21 Governor's Regulatory Review Council.** Unless an agency is exempt pursuant to A.R.S. §§ 41-1005 or -1055, the Governor's Regulatory Review Council ("GRRC") must approve a proposed rule, the economic impact statement and the statement of effect on small business before it can be filed with the Secretary of State. A.R.S. § 41-1052. The packet shall be submitted to the Executive Budget office and must contain an original and 10 copies of:

1. Form R101, A.A.C. R1-2-301(B)(1);
2. Informative Summary, A.R.S. § 41-1022(A)(4); A.A.C. R1-2-206(E);
3. Text of the rule, A.A.C. R1-2-206(D);
4. Economic Impact Statement, A.R.S. § 41-1053(A);
5. Statement of Effect on Small Business, A.R.S. §§ 41-1035 to -1053;
6. Copies of the text of the specific statutory authority for adopting the rule;
7. Copies of the text of the existing rule (if rule is being amended); and
8. Any other materials required by statute for a particular agency or rules.

A.A.C. R1-6-103(B). The agency also must submit three copies of any materials incorporated by reference. A.A.C. R1-6-103(C).

An agency representative must appear at a public meeting of the GRRC (usually held the first Tuesday of each month) to respond to questions. A.R.S. § 41-1052(D); A.A.C. R1-6-102(A) and -107(A).

The GRRC will not approve a rule unless the economic impact statement and statement of effect on small business contain the information and analysis prescribed by A.R.S. § 41-1053, see Sections 11.19 and 11.20; the information is generally accurate; the probable benefits outweigh the probable costs of the rule; and the rule is clear, concise and understandable. A.R.S. § 41-1052(C). If approved, the GRRC will forward an original and two copies of the rule packet to the Secretary of State. A.A.C. R1-6-108(B).

11.22 Agencies Exempt from GRRC. Agencies which are exempt from GRRC review are set out in A.R.S. § 41-1055. If a GRRC-exempt agency is not listed in the APA exemptions of A.R.S. § 41-1005, it must file an original and two copies of all documents listed in Section 11.21, except the economic impact statement, directly with the Secretary of State. It must also file three copies of any materials incorporated by reference with the Secretary of State. A.R.S. § 41-1028(E).

11.23 Notice Requirements. After the GRRC approves a rule and files the rule packet with the Secretary of State (or GRRC-exempt agency files its rule packet), notice will be published in the Administrative Register. A.R.S. § 41-1013. Notice must be published at least thirty days prior to any oral proceeding or adoption of the rule. A.R.S. § 41-1023(C).

An oral proceeding is not required unless five or more persons make a timely request, as long as there is a thirty-day period for persons to submit written comments to the agency. A.R.S. § 41-1023(A), (B). If an oral proceeding was not scheduled in the original notice and five or more persons request an oral proceeding, a new notice scheduling the oral proceeding must be filed and published, and thirty days must again elapse before the proceeding may be held.

11.24 Contents of Notice. A.R.S. § 41-1022, A.A.C. R1-2-206 and -301 prescribe the contents of the Notice of Proposed Rule Adoption (Form R101). It must include the following information:

1. Reference to each and every statutory provision upon which the agency relies for the authority to adopt the rule. For example, if an agency has a general rule making statute which authorizes it to adopt all rules "necessary to implement" the statutory scheme, it must list on the Form R101 this statute and also the specific statutory provisions which the rule seeks to implement.

2. The name, address and phone number of the agency contact person.

3. An informative summary of the proposed rule to be included in the Administrative Register to be published by the Secretary of State pursuant to A.R.S. § 41-1013. A.A.C. R1-2-206(E).

4. The exact words of the proposed rule.

5. A statement of the time, place and nature of the proceedings for consideration of the proposed rule, i.e., oral proceeding or deadline for written submissions.

6. Any other matters required by statute for a specific agency or rules.

7. The information required on the Secretary of State's Form R101, including the correct name of the agency with rule making authority. Do not use the agency name unless it is the statutorily designated body to adopt the rule. For example, the Director of the Insurance Department is authorized by statute to adopt rules. The adopting authority is the Director of Insurance and not the Insurance Department.

11.25 Time of Notice. Notice must be published in the Administrative Register at least thirty days prior to an oral proceeding or deadline for written submissions. More time should be allowed whenever practicable in order to provide maximum opportunity for public participation. Some agency statutes contain specific notice requirements in addition to the general requirements of A.R.S. §§ 41-1022 and -1023.

11.26 Agency Rule Making Record. For each rule proposed and noticed in the Administrative Register, the agency must maintain and make available for public inspection a rule making record. The contents of the record are listed in A.R.S. § 41-1029.

11.27 Provision for Public Comment. An agency must provide the public with a reasonable opportunity to comment on the proposed rule. A.R.S. § 41-1023. This comment may take the form of written submissions received at the time and place designated by the agency, one or more scheduled oral proceedings, or both. An oral proceeding is not mandatory unless five or more persons request one within 30 days after publication of the notice of proposed rule adoption. See Section 11.23.

Although all persons who are present at an oral proceeding need not be allowed to speak, the agency representative should allow different viewpoints to be presented. Adequate space must be provided to accommodate those in attendance. The location of the hearing must be easily accessible, not remote or difficult to find. If the rule will affect members of the public throughout the state, several public hearings should be held in different areas of the state to allow participation by those who will be affected by the rule.

At the outset of the hearing, the agency representative should present a statement of the reasons for proposing the rule. This statement should set forth the problem that led to the agency's action and the statutory basis for the rule. The agency representative should also announce any changes that are being seriously considered after publication of the notice.

**11.28 Conduct of the Hearing.** An oral proceeding hearing is not an adversary proceeding, and for that reason, those making statements need not be placed under oath. However, to insure a fair and efficient hearing, the agency or agency representative must enforce proper conduct on the part of all persons present. The agency representative should officially recognize a person before he is entitled to speak. Each person who speaks at the hearing, when recognized, may make an oral statement limited to the subject of the hearing. After the statement is concluded, the speaker may be questioned by the agency representative or board members.

The agency or its representative is responsible for insuring that the hearing is orderly, that all parties are treated fairly, and that the hearing progresses in an expeditious manner. An agency may take action necessary to maintain order, rule on motions and procedural questions arising during the oral proceeding, call recesses or adjourn the oral proceeding, recognize speakers and allot time for their presentations, question speakers, and grant extensions of the deadline for submitting comments.

**11.29 Evidence.** The rules of evidence that govern court proceedings need not be followed, inasmuch as the purpose of the hearing is not to adjudicate the rights of individuals, but to allow an adequate expression of opinion on an issue and to guide the agency in its rule adoption. Because the primary object of the hearing is to gather relevant information to help determine policy, the agency representative should ensure that someone maintains a list of all physical and documentary material submitted in connection with the proceeding. The agency representative should also ensure that each exhibit is clearly identified and marked.

**11.30 Record of the Hearing.** If the agency or board does not conduct the oral proceedings, its designated representative must prepare a memorandum summarizing the public comments. A.R.S. § 41-1023(D). All oral proceedings must be recorded by stenographic or other means. The agency representative should keep a list of persons who present statements at the hearing, consisting of each person's name, address and, if applicable, the name of the party he represents. The list should record whether the person testified in favor of or in opposition to the proposed rule and such other information as is appropriate. A person wishing to testify without revealing his identity is entitled to do so. All rulings of the presiding officer should also be made a matter of record. If the officers ultimately responsible for adopting the rule are not present at the hearing, they must review the record prior to adopting the rule.

11.31 Modifications Requiring New Notice. The exact words of a proposed rule may be modified as a result of public participation in the rule making process if it is not "substantially different from the proposed rule." A.R.S. § 41-1025(A). The following criteria must be considered to determine if the rule is substantially different:

1. The extent to which all persons affected by the adopted rule should have understood that the published proposed rule would affect their interests.
2. The extent to which the subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule.
3. The extent to which the effects of the adopted rule differ from the effects of the published proposed rule if it had been adopted instead.

A.R.S. § 41-1025(B).

By way of example, if the Department of Health Services proposed the adoption of a sulphur emission limitation applicable to copper smelters of 20 pounds per hour and, after the hearing, changed it either to 10 pounds per hour or 30 pounds per hour, that change would not necessitate a new hearing. On the other hand, if the Department decided to expand application of the emission standard to power plants as well as copper smelters, a new rule adoption proceeding would be required in that the issue (*i.e.*, an emission limitation for power plants) was not posed in the original notice of proposed rule adoption. Schenley Affiliated Brands Corp. v. Kirby, 21 Cal. App. 3d 177, 98 Cal. Rptr. 609 (1971).

If the agency wishes to adopt a substantially different rule, it may do so by filing a Notice of Termination of Rule Making Proceeding (Form R104) with the Secretary of State, and complying anew with all requirements of the APA.

11.32 Close of Record. An agency may not adopt a rule until the rule making record is closed. A.R.S. § 41-1024(A). See Section 11.26 regarding the rule making record. The APA has no time limit for closing the record; however the record must be complete and closed within a reasonable amount of time from the oral proceedings or deadline for submitting written public comment. Multi-member bodies may close the record upon a vote of the body at a public meeting. A single agency head with rule making authority may simply indicate the date of the close of record on the Form R102 and date and sign that document.

11.33 Adoption of the Rule. After the close of the record, the agency has only 120 days to both adopt a rule and submit it to the Attorney General for certification. The exact words of the rule must be formally approved and adopted by the body or public officer who has authority to adopt a rule. If a multi-member body is adopting the rule, the rule must be adopted by a vote of the body at a public meeting and the appropriate person directed to transmit the rule to the Attorney General for certification. The motion might read like this: "I move that the proposed amendments to A.A.C. R3-1-201, filed with the Secretary of State on January 4, 1979, and as modified today, be adopted and forwarded by the executive secretary to the Attorney General for certification and

filing with the Secretary of State." The single head of an agency may adopt the rule by signing and dating the Form R102 and transmitting the form, together with the final text of the rule and accompanying documentation, to the Attorney General with a signed cover letter.

11.34 Concise Explanatory Statement. At the time an agency adopts a rule, an agency must issue a concise explanatory statement pursuant to A.R.S. § 41-1027(A) containing:

1. Reasons for adopting the rule.
2. Any change in the text of the final rule from the proposed rule and reasons for the change.
3. Evaluation of arguments for and against the rule.

It is particularly important to completely justify and support the reasons for adopting the rule: if the rule's validity is later challenged, only the reasons set out in the Concise Explanatory Statement may be relied upon to justify the rule. A.R.S. § 41-1027(B). Therefore, a complete statement of the factual, legal and policy reasons for choosing the provisions and substance of the particular rule is required. It is not sufficient, for example, to state merely "A.R.S. § \_\_\_\_\_ requires the agency to adopt rules on this subject by October 1, 1988."

11.35 Emergency Adoption of Rules. If immediate adoption of a rule is necessary for "immediate preservation of the public health, safety or welfare and notice and public participation requirements are impracticable," and the agency makes a written finding to that effect, the rule may be adopted and certified as an emergency rule, dispensing with the thirty-day notice requirement and the oral proceeding. A.R.S. § 41-1026.

Whether a bona fide emergency exists and the facts supporting emergency certification must be closely scrutinized by the Attorney General. A.R.S. § 41-1041(B). The Attorney General is prohibited from certifying a rule as an emergency if the "emergency" is created by the agency's delay or inaction and the emergency situation could have been averted by timely compliance with notice and public participation provisions of the APA, unless there is "substantial evidence" that failure to certify the rule will result in "imminent substantial peril to the public health, safety or welfare." A.R.S. § 41-1026(A).

An emergency rule is valid for only 90 days. One or more renewals of emergency certification may be obtained if the agency determines the emergency situation still exists. The same procedures for emergency certification are followed as set out above and the rule is certified by the Attorney General for each renewal.

11.36 Emergency Adoption Procedure. The procedure for preparing and filing an emergency rule is prescribed in A.A.C. R1-2-212. Secretary of State Form R103 and attachments will be filed with the Secretary of State, after being certified by the Attorney General. In submitting the rule packet to the Attorney General, the agency must include a transmittal letter (see Form 11.1); a separate detailed finding of emergency adopted by the rule making authority which must include a detailed explanation of the reasons for dispensing with notice and a public hearing and the facts justifying emergency certification; and an informative summary.

**11.37 Attaining Permanent Status of Emergency Rule.** Any rule adopted as an emergency rule will expire after ninety days unless recertified. An emergency rule may be adopted as a permanent rule by following the regular rule making procedures for its adoption. If a permanent rule is adopted and certified before the ninety-day period expires, the agency should specify that the permanent rule will become effective upon the expiration of the emergency rule or the emergency rule should be repealed. The Secretary of State's format requirements for permanent rules following emergency rules are set out in A.A.C. R1-2-213.

**11.38 Submission to the Attorney General.** In transmitting the rule to the Attorney General for certification, the agency should use a cover letter similar in form and content to Form 11.1. Except in the case of an emergency adoption, this letter and attachments must include:

1. The date the rule was approved by the Governor's Regulatory Review Council.
2. The date notice appeared in the Administrative Register
3. The date of all oral proceedings (if any) and the date of the deadline for submission of written comments on the rule.
4. The date of the close of record.
5. The date the rule was adopted by the agency.
6. An original form R102 (or R103).
7. An original typed text of the rule:
  - a. 8 1/2 X 11 paper;
  - b. numbered lines;
  - c. numbered pages.
8. Four copies of the text of the rule.
9. A copy of the Form R101 and the text of the proposed rule that was filed with the R101.
10. An original and four copies of the Concise Explanatory Statement.

The transmittal letter to the Attorney General must, in the case of a single agency head, be signed by the agency head himself or his duly authorized deputy; in the case of a multi-member body, the letter must be signed by the chairman or other member of the body or staff member designated and instructed by the body at the time of adoption to submit the approved rule to the Attorney General for certification.

**11.39 Attorney General Review.** The Attorney General has 90 days to review a rule to certify or reject it. An assigned Assistant Attorney General may work with an agency and return a rule packet for corrections or improvements during the 90-day period. The rule will also be reviewed by a Chief Counsel, Special Counsel and the Attorney General.

Each rule in a packet will be reviewed for compliance with the criteria set out in A.R.S. § 41-1041(A). See also Section 11.18. If a portion of the rules are uncertifiable and the remainder are certifiable, and the rules are severable from one another, the Attorney General may approve part of the rules and reject those that are uncertifiable.

11.40 Filing with the Secretary of State. After certification, the Attorney General will forward the original and two copies of the rule to the Secretary of State for filing. The Attorney General keeps one copy of the rule and one copy is returned to the agency. A rule takes effect when it is filed with the Secretary of State, unless a later time is prescribed by law or provided for in the rule. A.R.S. § 41-1032.

11.41 Termination of Rule Making. If an agency chooses not to adopt a proposed rule, or if more than 120 days from the close of record has elapsed and the rule has not yet been adopted and submitted to the Attorney General for certification, or the agency wishes to adopt a rule that is substantially different from a proposed rule, it must file a Notice of Termination of Rule Making Proceeding (Form R104) with the Secretary of State. A.R.S. § 41-1021(B); A.A.C. R1-2-211; A.A.C. R1-2-301(B)(4). The rule may again be proposed for adoption by following, anew, all of the requirements of the APA.

Form 11.1

Sample of Transmittal Letter to Attorney General

Section 11.38

[Date]

The Honorable Bob Corbin  
Attorney General  
1275 West Washington  
Phoenix, Arizona 85007

Re: [A.A.C. Rule Numbers and Titles]

Dear Mr. Corbin:

The above referenced rules have been adopted on   [date]   by   [name of promulgating authority]  , subject to certification by the Attorney General. The following information is provided for your use in reviewing the enclosed rules for certification pursuant to A.R.S. § 41-1041:

I. Description of the Rule

- a. A.A.C. numbers of rules adopted, amended or repealed and brief explanation of what the rule making accomplishes.
- b. Prior Attorney General action on rules (e.g., certification of rule to be amended or rejection of rule) and A.G. rule number.
- c. Name of Assistant Attorney General, if any, who was consulted on rules. Describe involvement (e.g., editing, informal review).

II. Form

State whether the rules are consistent with the numbering and other requirements of the Secretary of State in the following respects, when applicable:

- a. R1-1-103: organized under appropriate Titles and Chapters of the A.A.C.
- b. R1-2-103: original forms provided by the Secretary of State have been used.
- c. R1-2-104: new rules are typewritten, double-spaced on 8 1/2 x 11 paper and are assigned a chapter number by the Secretary of State.
- d. R1-2-203: numbering and use of terms such as "section" and "subsection" conform to system established by the Secretary of State.

Form 11.1 - (Continued)

- e. R1-2-206(D)(1): repealed rules are included in the packet with full text stricken.
- f. R1-2-206(D)(3): amended rules properly show deleted and added language. Unchanged portions of the rule are designated "No Change."
- g. R1-2-210: original form R102 is correctly completed.
- h. R1-2-212: original emergency rule form R103 is correctly completed and packet includes a Finding of Emergency.
- i. R1-2-213: permanent rule following emergency rule certification makes appropriate reference to the emergency rule.

III. Clear, Concise and Understandable

Discuss whether the rules are:

- a. grammatically correct;
- b. understandable;
- c. contain proper citations and cross references to other sections;
- d. contain key words which are defined or possess generally accepted meanings; and
- e. do not contain unnecessary verbiage such as:
  - (1) findings;
  - (2) a purpose statement;
  - (3) repetition of statutory provisions;
  - (4) use of:
    - (a) "rule(s);"
    - (b) "two (2);"
    - (c) "rules and regulations."

IV. Specific Authority for the Rule and Legislative Standards

- a. The agency's general rule making authority.
- b. The specific statute that authorizes rule making on this subject and why it provides authority.
- c. If the rule implements a statute, identify the specific statute.

Form 11.1 - (Continued)

V. Procedures followed

a. Regular Rule Making. Describe procedures followed in adopting the rule, including dates for the following:

- (1) Review and approval by the Governor's Regulatory Review Council.
- (2) Filing of proposed rule with the Secretary of State.
- (3) Publication of Notice in the Administrative Register, and publication in compliance with any other specific requirement applicable to the agency.
- (4) Public participation pursuant to A.R.S. § 41-1023:
  - (a) written comment deadline;
  - (b) any request for oral proceedings;
  - (c) oral proceedings, if any.
- (5) Close of record.
- (6) Adoption of rule subject to Attorney General Certification.
- (7) Compliance with the open meeting law if applicable.

b. Emergency Rules. State the following:

- (1) Specific factual reasons why emergency certification is necessary for immediate preservation of the public health, safety or welfare.
- (2) Why notice and public participation requirements are impracticable.
- (3) Why the emergency situation has not been created due to the agency's delay or inaction.

VI. Supporting Documents

I have enclosed, for your information, the following documents:

a. Regular Rule Making

- (1) Original R102 (no copies).
- (2) Original and 4 copies of the Concise Explanatory Statement.
- (3) Original and 4 copies of text of the rule adopted, amended or repealed.

Form 11.1 - (Continued)

- (4) 1 copy of Form R101.
- (5) 1 copy of text of rules filed with the Form R101.
- (6) 1 copy of receipt evidencing filing with the Secretary of State.
- (7) A record of the public hearing (written summary, minutes, transcript or tape).
- (8) Copies of written comments from the public (if voluminous, indicate that they are available to review).
- (9) 3 copies of any materials incorporated by reference, if not previously filed in the Office of the Secretary of State.

b. Emergency Rule Making

- (1) Original R103 (no copies).
- (2) Original and 4 copies of the Finding of Emergency.
- (3) Original and 4 copies of the Concise Explanatory Statement.
- (4) Original and 4 copies of the Summary of the rule.
- (5) Original and 4 copies of the text of the rule adopted, amended or repealed.
- (6) 3 copies of any materials incorporated by reference.

Very truly yours,

AGENCY

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Signature of Certifying Officer

CHAPTER 12  
ENFORCEMENT  
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## CHAPTER 12

### ENFORCEMENT

12.1 Scope of this Chapter. This Chapter describes the various civil enforcement powers available to administrative agencies and the strategies available for the implementation of such powers. This Chapter also discusses statutory and constitutional limitations on agency enforcement efforts, including restrictions applicable to the enforcement of state laws on Indian reservations and with respect to Indians.

If you have questions concerning your enforcement powers which are not addressed in this Chapter, you should consult the Assistant Attorney General assigned to represent your agency.

12.2 Development of an Enforcement Philosophy. As used in this Chapter the term "enforcement" means the steps that may be taken to insure compliance with regulatory laws, to remedy violations of such laws, and to impose discipline or other punishment for the violation of such laws. Development of an enforcement philosophy that effectively persuades the regulated parties to comply with applicable law with a minimum of formal proceedings and without compromising established standards requires a continued sensitivity to and an understanding of the underlying purposes of the regulatory scheme. For example, the promulgation of clear and meaningful rules and public education should not be overlooked as appropriate means for accomplishing enforcement objectives that endless investigations, complaint proceedings and disciplinary actions may never accomplish.

Traditionally, administrative agencies have adopted enforcement philosophies that are limited to merely reacting to problems brought to the agencies' attention. Unfortunately, a "reactive" enforcement strategy is oftentimes too late to provide meaningful protection to the public. Another approach is a "pro-active" enforcement strategy. A pro-active approach is designed to prevent problems from occurring in the first place, identifies problems in their early stages before substantial damage has occurred and actively searches out law violators. These goals may be attained by instituting education programs for consumers and the regulated industries, monitoring business trends that may foretell significant problems and soliciting input from other regulatory bodies and law enforcement agencies concerning problems that they have discovered or foresee in your agency's area of responsibility.

### 12.3 Investigations.

12.3.1 Authority to Conduct. As a general rule, all administrative agencies have authority to conduct investigations to determine whether someone has violated the laws administered by the agency. This authority includes noncompulsory and compulsory investigative powers. The authority to exercise compulsory investigative powers must be found in the agency's enabling legislation before such powers may be used.

12.3.2 Noncompulsory Investigative Powers. Most complaints or suspected violations are investigated through the use of noncompulsory investigative powers. Noncompulsory investigative powers include oral and written inquiries of witnesses, victims, and those being investigated. For example, an agency, upon the receipt of a complaint, may write the person complained against and solicit a response to the

complaint. That response may be evaluated and unresolved matters may be pursued by telephone or written inquiries of witnesses, the complainant or the person complained against. If these informal steps have not fully answered all questions, compulsory powers such as the investigative subpoena may be used to obtain the needed information where specifically authorized.

12.3.3 Compulsory Investigative Powers. Compulsory investigative powers include the power to compel a person to give sworn testimony, produce records, file reports or maintain records.

12.3.3.01 Required Records and Reports. Records and reports required to be maintained or filed with your agency can be a valuable tool for ascertaining compliance with applicable laws. An agency's power to require these records or reports must be pursuant to statute or a duly authorized and promulgated rule. Periodic reports may provide an initial warning of problems in a regulated business or industry without an agency having to conduct repeated field investigations or inspections. When an agency has authority to prescribe the types and form of records and reports, care should be given to establish a format that provides meaningful information.

12.3.3.02 On-site Inspection of Business Premises and Records. The power to enter business premises and inspect or examine the premises, its operations and its books and records does not exist without a specific grant of authority, unless the business voluntarily consents to such on-site inspections.

12.3.3.03 Subpoenas. A subpoena compels a witness to appear before the agency and answer questions under oath and, where required, produce records. The existence and scope of an agency's subpoena power are dependent on the language of the applicable statutes. Generally speaking, a subpoena is valid and must be obeyed so long as the inquiry is for a lawfully authorized purpose, the information sought sufficiently relates to that purpose and the conditions under which the production of records is ordered are not unreasonable. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

12.3.4 Immunity. Sometimes a witness refuses to answer questions put to him on the grounds his answers may tend to incriminate him. This is commonly referred to as the invocation of the witness's Fifth Amendment privilege. Even though the agency is conducting an administrative hearing or investigation, a witness has a constitutional right to refuse to answer questions and produce private papers which may tend to incriminate him in a subsequent criminal proceeding. An agency must honor the assertion of this right and may not force the witness to provide the testimony or papers unless the witness has been given immunity from criminal prosecution. A.R.S. § 41-1066 authorizes an agency, with the prior written approval of the Attorney General, to grant immunity to a witness who has invoked his Fifth Amendment privilege.

Before questioning an individual who has invoked his Fifth Amendment privilege, the agency should determine whether the information is essential to the completion of the investigation and then request that the Attorney General agree to grant the witness immunity under A.R.S. § 41-1066. The agency makes the request by preparing a formal order granting the individual immunity and forwarding it together with a cover letter to the Attorney General. The grant of immunity is not effective until both the Attorney General and the public officer or board or commission conducting the investigative proceeding have duly executed the order granting immunity.

Once immunity has been granted, the testimony and private papers produced in response to the order may not be used in a criminal prosecution of the witness, except a prosecution for perjury, false swearing, tampering with physical evidence or other similar offenses connected with the appearance made pursuant to the order. Questions about the grant or scope of immunity should be directed to the attorney representing the agency.

12.3.5 Drawing Adverse Inferences from the Invocation of the Fifth Amendment Privilege. If a party to an enforcement proceeding refuses to answer a question by invoking his Fifth Amendment privilege, the trier of fact may infer that his answer would have been adverse to his interests in the proceedings. This inference, together with other probative evidence, may be used to support findings of fact by the trier of fact.

12.3.6 Sources of Information. In addition to information which can be generated by the methods described above, agencies should take advantage of the large body of information available from other governmental agencies. For example, the Department of Public Safety maintains a criminal history information system which may be utilized to provide a person's criminal record. See Chapter 9. The Incorporating Division of the Arizona Corporation Commission maintains information concerning corporations doing business in Arizona, particularly the names and addresses of officers, directors and substantial stockholders of such corporations, and, in many cases, legal problems those individuals and corporations have had. The Department of Public Safety also maintains the public documents project, which is a computer containing investigative and licensing information concerning individuals and corporations in this state.

#### 12.4 Administrative Enforcement.

12.4.1 Informal Dispositions. Many complaints and other matters brought to an agency's attention may be settled informally by the agency and the licensee without a formal hearing. This approach is often desirable when the issues are relatively simple, because it takes less time and costs less than a formal hearing. Even when an entire complaint or problem may not be resolved in an informal manner, some issues may be disposed of informally, thereby reducing the scope of the formal hearing.

The Administrative Procedure Act authorizes state agencies to informally dispose of any "contested case" by stipulation, agreed settlement, consent order or default. A.R.S. § 41-1061(D).

The principal disadvantages of an informal disposition are that it often arouses suspicion in the mind of the public that the agency has shoved something under the rug, and fails to provide a public record of the nature and extent of the defendant's misconduct. Therefore, extreme care should be exercised and good records maintained when disposing of matters informally.

12.4.1.01 Disposition by Correspondence. One method of disposing of a complaint informally is through correspondence. The agency may write to the licensee explaining the nature of the complaint received and request a response from the licensee. The licensee's response may explain the situation to the agency's satisfaction, and the matter may be concluded at that time. The agency may also write to the licensee and suggest certain remedial action. If the licensee agrees to these suggestions, formal proceedings by the agency may be unnecessary. The person who filed the complaint with the agency should always be informed in writing how the agency resolved the complaint.

12.4.1.02 Disposition by Conference. Another informal method is for the agency to hold a conference with the licensee or his representatives. The informal conference is normally held prior to the institution of formal proceedings by the agency, but may be utilized even after the proceedings have been instituted. Care should be taken to insure that these conferences are not so informal that they amount to a denial of the licensee's constitutional rights. The licensee should be given adequate notice of the time and place of the conference and of the issues to be discussed, and should be allowed to be represented by legal counsel. The person who filed the complaint should also be given notice of the time and place of the conference. Because these conferences are informal, witnesses are generally not placed under oath and no subpoenas are issued. Statements made at the conference should not be introduced in evidence at a formal hearing unless all parties have consented.

12.4.1.03 The Decision Maker's Role in Informal Conferences. The officer, board or commission which will make the ultimate decision if formal proceedings are instituted should be careful not to become involved too directly in informal conferences and proceedings. The decision maker may not be able to act impartially in a formal hearing if it has been too closely involved in negotiating a potential settlement as part of an informal conference. A better practice is for the decision maker to designate a staff person to negotiate resolutions at informal conferences and make recommendations for resolution to the decision maker.

12.4.2 Consent Orders. A consent order imposes some type of disciplinary sanction or remedial action. It is entered by the decision maker with the consent of the licensee or other affected party. The consent order is generally not the result of the decision maker's deliberations, but represents the decision maker's acceptance of an agreement reached between the agency staff and the licensee. The consent order is issued by the decision maker to carry out the parties' agreement and generally involves a licensee's consent to some form of discipline or corrective action. The consent order must be in writing and approved and signed by the licensee.

Consent orders should contain findings of fact and conclusions of law which have been agreed to by the parties. This insures against a question being later raised by the licensee or others concerning either culpability or the reasons for the issuance of such consent order. At a minimum, the agency should not allow the issuance of a consent order without findings of fact, unless the licensee specifically states in the order that he neither admits nor denies allegations that have been made against him by the agency. Some agencies have specific rules which prohibit the issuance of consent orders where the licensee maintains his innocence of any wrongdoing.

12.4.3 License Revocation and Suspension. The most common administrative enforcement power available to state agencies is the power to suspend or revoke licenses and permits issued by the agency. The procedures to be followed in disciplinary proceedings are described in greater detail in Chapter 10.

12.4.4 Summary Suspension. The Administrative Procedure Act empowers any state agency to suspend licenses and permits on an emergency basis. A.R.S. § 41-1064(C). If an agency finds that the public health, safety or welfare imperatively requires emergency action, it may immediately order the suspension of a license or

permit. As this is an emergency action, there need not be notice or a hearing before the action is taken. A full evidentiary hearing must, however, be convened promptly. See Barry v. Barchi, 443 U.S. 55 (1979).

12.4.5 Probation. One of the options available to most state agencies is placing licensees on probation. It is generally conceded that the main purpose of imposing probation is to rehabilitate the licensee. Probation may be tailored to address specific aspects of the licensee's shortcomings, requiring continuing or remedial education, for example or requiring monitoring or supervision, if appropriate. Many agencies may also impose restitution as a condition of probation.

Placing a licensee on probation requires the agency to impose certain terms and conditions of probation upon the licensee. Agencies should consider as a term and condition of probation having licensees appear at regular intervals before the regulatory board for the purpose of monitoring the licensee's progress. Orders of probation should also warn the licensee that his failure to abide by such terms and conditions may lead to more serious disciplinary action.

12.4.6 Cease and Desist Orders. Some agencies have also been granted statutory authority to issue cease and desist orders. A cease and desist order is similar to a court injunction and may be used to order persons to cease activities in violation of regulatory laws and in some cases to take remedial steps to correct the consequences of past violations. The ability of an agency to issue cease and desist orders is dependent upon an express grant of statutory authority.

Unless the agency's statutes provide otherwise, cease and desist orders should: 1) be in writing and signed by the official authorized to issue the order; 2) specify the reasons for its issuance (including factual findings and legal conclusions); 3) identify the persons affected by the order; and 4) describe in reasonable detail, and not by reference to the complaint, notice of hearing or other document, the act or acts to be restrained. After identifying the persons restrained under the order, the agency should add the following language: "and their officers, agents, servants, employees, attorneys, successors and assigns and all persons in active concert or participation with them."

Agencies without statutory authority to issue cease and desist orders may not order a licensee by means of "warning" or "compliance" letters to cease an activity or correct a trade practice without first utilizing the appropriate statutory provisions and regulations governing the agency's disciplinary proceedings. In Merrick v. Rottman, 135 Ariz. 594, 663 P.2d 586 (Ct. App. 1983), the Board of Funeral Directors and Embalmers, which did not have statutory authority to issue cease and desist orders, ordered one of its regulated members to cease and desist certain alleged deceptive advertising practices. The court of appeals rejected the board's argument that its notice was merely a warning to the licensee before formal disciplinary proceedings were instituted. The court noted that the board's action was a formal act directed against the licensee and constituted an ex parte unlawful injunction. Given the specific enforcement powers granted to the board under the Funeral Directors and Embalmers Act, said the court, no additional power may be implied.

12.4.7 Administrative Fines. A small number of administrative agencies have also been granted authority to impose civil fines for violations of their regulatory laws. Generally, the authority to impose such fines must be expressly set forth in the agency's

statutes, which must set forth the standards upon which the fines will be assessed and the limits of the agency's fining authority.

## 12.5 Civil Court Enforcement.

12.5.1 Injunctive Actions. Most state regulatory agencies are authorized to bring an action in superior court to obtain a court injunction enjoining violations of applicable laws or acts in furtherance thereof. These actions are appropriate when the unlawful activity is continuing or likely to recur or when it is necessary to make a public record of the unlawful conduct.

12.5.2 Civil Penalties. Agencies may seek civil penalties for violations of their laws, when authorized by statute. Generally, civil penalties are only available where the violation was willful — that is, where the unlawful conduct was the result of something other than mere negligence.

12.5.3 Receiverships. In some cases, a business which has engaged in unlawful conduct may have to be placed into receivership. A receivership is a drastic remedy, not favored by the courts. However, it oftentimes is the only effective way of unwinding a series of unlawful transactions and making the victims whole again.

12.6 Criminal Enforcement. During the course of an agency's regulatory activity, the agency may uncover evidence of conduct which: 1) violates laws administered by the agency for which there are criminal penalties; or 2) violates general criminal statutes, such as those relating to bribery, embezzlement, schemes to defraud and falsification of records. Agencies should not dismiss such criminal conduct as not their concern, but should instead immediately notify the Attorney General's office. See Chapter 15.

## 12.7 Jurisdiction on Indian Reservations and Over Indian Affairs.

12.7.1 Introduction. One of the more complex issues facing the State of Arizona and its various agencies, departments and political subdivisions is that of the exercise of state jurisdiction over an Indian tribe or its interests. The entire field of "Indian law" is in a continuing process of evolution, involving not only actions by the United States Congress (Title 25, United States Code) and federal regulations promulgated pursuant to acts of Congress, but also interpretations of treaty provisions, enactments of various state legislatures and rulings of state and federal courts. Accordingly, the general analysis set forth in this section must be viewed with these considerations in mind. For a comprehensive overview of this complex area of law, see F. Cohen, Handbook of Federal Indian Law (1982), as well as the Indian Law Reporter, published by Commerce Clearing House, Inc.

12.7.2 State Jurisdiction Over Indian Affairs. The federal policy of leaving Indians free from state jurisdiction and control was first set forth in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832). In striking down an attempt by Georgia to apply its criminal laws to the Cherokee reservation, Chief Justice John Marshall stated:

The Cherokee Nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress.

This principle was reaffirmed in Williams v. Lee, 358 U.S. 217 (1959), where the United States Supreme Court held that tribal courts, not state courts, were the proper forum for a collection action brought by a non-Indian proprietor of a general store located on the Navajo reservation against a reservation Indian:

[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.

358 U.S. at 223, quoted in Smith Plumbing Co., Inc. v. Aetna Casualty and Surety Co., 149 Ariz. 524, 535, 720 P.2d 499, 510 (1986) (Feldman, J. dissenting). In McClanahan v. Arizona Tax Commission, 411 U.S. 163 (1972), the court found that the State of Arizona had no jurisdiction to impose an income tax on a Navajo Indian living on the reservation, with income derived from reservation sources. As stated in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980), "Tribal sovereignty is dependent upon, and subordinate to, only the Federal Government, not the States."

Another federal concern which potentially limits state assertion of jurisdiction over Indian affairs is the federal government's interest in encouraging Indian economic and commercial development. Washington v. Confederated Tribes of the Colville Indian Reservation; White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

State jurisdiction is therefore preempted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). An exception to this "balancing test" is in the special area of state taxation of Indian tribes and tribal members, which is not permissible absent explicit congressional consent. Id. at 208, n. 17 and authorities cited therein.

**12.7.3 Federal Preemption of State Laws.** States are generally precluded from exercising jurisdiction over Indians in Indian country or within an Indian reservation unless Congress has expressed an intention to permit state regulation. This general principle derives in part from the plenary authority of Congress in the area of Indian affairs, as well as the federal trust responsibility toward the Indian tribes. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); State of Washington v. Environmental Protection Agency, 752 F.2d 1465, 1469-70 (9th Cir. 1985).

A determination of federal preemption is not limited to an express congressional statement but may involve a particularized inquiry into the nature of state, federal and tribal interests. Federal preemption exists if there is a coordinated federal/tribal undertaking which so occupies an area that the state interest is insufficient to interfere with the federal and tribal undertaking. The following cases are examples of federal preemption.

In White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), the Supreme Court found that federal forestry statutes and regulations governing the harvest and transport of tribal timber were so comprehensive that the federal laws precluded the state's attempt to impose vehicle fuel taxes on a non-Indian logging company operating entirely on the reservation.

In California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), the Supreme Court held that federal laws promoting and overseeing tribal bingo and gambling enterprises, as well as the tribal interest in promoting economic self-sufficiency, effectively preempted the State of California's attempts to apply its gaming statutes to bingo and card games conducted on the reservations.

New Mexico's attempt to apply its hunting and fishing laws to non-members of the tribe on the reservation failed under federal preemption principles when the tribe had undertaken a reservation-wide scheme for managing the reservation's fish and wildlife resources which was approved and funded by the federal government in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

The federal Indian trader scheme effectively preempted imposition of Arizona transaction privilege (sales) taxes upon non-Indians who were subject to federal statutes and regulations with respect to their sale of goods and merchandise to Indians on their respective reservations in Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980), and Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965).

The Ninth Circuit Court of Appeals under federal preemption principles ruled that the Environmental Protection Agency properly refused to approve the State of Washington's program to regulate hazardous waste activities of Indians and non-Indians on Indian lands under the federal Resource Conservation and Recovery Act ("RCRA") because RCRA does not authorize the states to regulate environmental affairs on Indian lands absent clear congressional intent to extend state jurisdiction. State of Washington v. Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985). Congress, through amendments to the Clean Water Act, 33 U.S.C. §§ 1251 to -1387, the Safe Drinking Water Act, 42 U.S.C. §§ 300(f) to -300j-11, and the Comprehensive Environmental Response, Compensation and Liability Act ("Superfund"), 42 U.S.C. §§ 9601 to -9675, allow qualifying tribes to assume primary jurisdiction over reservation environmental programs. The qualifying tribes are, therefore, entitled to be treated the same as states in dealing with environmental matters on the reservation.

**12.7.4 Tribal Preemption.** Indian tribes retain certain inherent sovereign powers to regulate their own internal and social relations, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1982). A tribe's sovereign powers extend to both its members and its territory, and includes the power to exercise certain forms of civil jurisdiction over non-Indians, which power derives not only from the tribe's powers of self-government, including the raising of revenue to provide for essential services, but also from the power to exclude non-members from tribal land. Merrion v. Jicarilla Apache Tribe, 445 U.S. 130 (1982). A tribe may regulate through taxation, licensing or zoning laws the activities of non-members who enter consensual relationships with the tribe or its members through contracts, leases or other arrangements. The tribe's power to exclude non-members from hunting on reservation land or to impose conditions upon hunting such as by charging fees was affirmed in Montana v. United States, 450 U.S. 544 (1981). In Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), the Court of Appeals concluded that the Navajo Tribe had the sovereign power to enact and enforce its own civil laws regulating the conduct of non-Indians who come upon tribal land to repossess vehicles purchased off reservation boundaries.

Generally, the preemptive effect of tribal ordinances over state laws is the same as if preemption were being effected through the enactment of a federal law.

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). However, that case also stands for the proposition that there is no automatic preemption simply because the tribe may choose to pass its own laws.

12.7.5 Federal Authorization of State Jurisdiction. State laws may be applied to tribal Indians on their reservations if Congress gives its express consent. Congress has, in fact, enacted specific legislation like Public Law 280, which conveyed concurrent jurisdiction over Indians within a reservation to certain states. See 18 U.S.C. § 1162; 25 U.S.C. §§ 1321 to -1326; 28 U.S.C. § 1360. Public Law 280 granted to six states jurisdiction over certain criminal acts and civil causes of action occurring within the limits of Indian country located within those respective states, and provided for the assumption of jurisdiction by other states.

In Arizona, the question of the applicability of Public Law 83-280 is somewhat academic in view of the fact that Arizona took no steps to assume jurisdiction (with two notable exceptions discussed hereafter) under the terms of Public Law 83-280, nor did it make any attempt to assume jurisdiction under the successor statute to Public Law 83-280, Public Law 90-284. The only instances where jurisdiction under Public Law 83-280 has been conferred by the Congress or assumed by the State of Arizona are: 1) Arizona has mandatory jurisdiction over criminal activities and civil causes of action on the lands set aside for the Pascua Yaqui Tribe pursuant to Public Law 95-375, see Val/Del, Inc. v. Superior Court, 145 Ariz. 558, 703 P.2d 502 (1985); 2) Arizona has assumed jurisdiction over the enforcement of laws relating to air pollution control, including criminal offenses and civil causes of action arising on all Indian reservations in the state, A.R.S. § 49-561 (this statute may be constitutionally challenged in the future); 3) prior to its repeal in Laws 1986, Ch. 368, A.R.S. § 36-1865 assumed civil and criminal jurisdiction over Indian Country with regard to water pollution control. The constitutionality of such jurisdiction was questionable and there is no replacement statute for A.R.S. § 36-1865.

12.7.6 Application of State Laws to Indians and Non-Indians Located on Indian Reservations. There is not an inflexible *per se* rule precluding state jurisdiction over tribes and their members in the absence of express congressional intent. "[U]nder certain circumstances a State may validly assert authority over the activities of non-members on a reservation, and . . . in exceptional circumstances a State may validly assert authority over the on-reservation activities of tribal members." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983), quoted in California v. Cabazon Bank of Mission Indians, 480 U.S. at 208. In determining whether a state may assert its authority over non-Indians on an Indian reservation, a court must analyze the nature of the state, federal and tribal interests at stake. State v. Barola, 137 Ariz. 181, 669 P.2d 614 (Ct. App. 1983). Where reservation values are at stake such as tribal resources, the courts are likely to apply the doctrine of preemption. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (striking down application of New Mexico game and fish regulations to Indian reservation). However, commercial transactions between Indians and non-Indians, even when conducted on the reservation, do not enjoy blanket immunity from state taxation or regulation. In Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), the Supreme Court held that even in the absence of express congressional consent a state could tax cigarettes sold by reservation tribal smokeshops to non-Indians. The court pointed out that the tribes had no right to market an exemption from state taxation to persons who would normally do their business elsewhere. 447 U.S. at 155. In Rice v. Rehner, 463 U.S. 713 (1983), a case involving the application of state law to an Indian business on Indian lands, the court held that a

federally licensed Indian trader who was also a tribal member operating a general store on an Indian reservation could be required by the state to obtain a state liquor license to sell liquor for off-premises consumption.

**12.7.7 Tribal Immunity from State Court Jurisdiction.** As sovereigns predating the Constitution, Indian tribes are immune from suit in state or federal court absent an unequivocally expressed waiver of sovereign immunity by congressional act or consent of the tribe to suit. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); United States v. State of Oregon, 657 F.2d 1009 (9th Cir. 1982); Val/Del, Inc. v. Superior Court, 145 Ariz. 558, 703 P.2d 502 (1985). This immunity applies even though the tribe is engaged in proprietary functions off the reservation. Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968) (state courts lack jurisdiction over Indian tribe which committed a tort while engaged in business enterprise in Arizona but which was committed off the reservation); S. Unique Ltd. v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 674 P.2d 1376 (Ct. App. 1983) (subordinate business organization of tribe immune from suit for breach of contract arising out of business transaction initiated off the reservation). An interesting exception to this rule appears in Smith Plumbing Co. Inc. v. Aetna Casualty and Surety Co., 149 Ariz. 545, 720 P.2d 520 (1984), opinion approved as supplemented, 149 Ariz. 524, 720 P.2d 499, cert denied, 479 U.S. 987 (1986), which held that a state trial court has jurisdiction over an off-reservation materialman's claim against a surety on a performance bond for a White Mountain Apache tribal enterprise. The court declared that "[a]s the activity in question moves off the reservation the State's governmental and regulatory interest increases dramatically, and the federal protectiveness of Indian sovereignty lessens." 149 Ariz. at 530, 720 P.2d at 505. The Ninth Circuit Court of Appeals denied the tribe's attempt to enjoin the Arizona superior court from adjudicating the materialman's claim against the surety in White Mountain Apache Tribe v. Smith Plumbing Co., Inc., 856 F.2d 1301 (9th Cir. 1988).

This tribal immunity extends to tribal officials when acting in their official capacity and within the scope of their immunity. Davis v. Littell, 398 F.2d 83, 84-85 (9th Cir. 1968), cert. denied, 393 U.S. 1018 (1969); White Mountain Apache Tribe v. Shelly, 107 Ariz. 4, 480 P.2d 654 (1971). The doctrine does not immunize the individual members of the tribe. Puyallup Tribe, Inc. v. Dept. of Game of the State of Washington, 433 U.S. 165, 171-72 (1977).

**12.7.8 State Jurisdiction Over Indians Outside the Boundaries of the Reservation.** Insofar as the rights of Indians to state services are concerned, since Indians are citizens of the United States and residents of the State of Arizona as well, they are entitled to the same benefits and services otherwise available to any citizen and resident. See, e.g., Porter v. Hall, 34 Ariz. 308, 271 P.2d 411 (1928). In Begay v. Kerr-McKee Corp., 682 F.2d 1311 (9th Cir. 1982), the Ninth Circuit Court of Appeals held that states may apply their workers' compensation laws to all federal territory within state boundaries and the exercise of state jurisdiction over claims by Indians against non-Indian employers does not infringe upon tribal self-government.

The Supreme Court has held that Indians who venture beyond the geographical limits of their reservation trust lands and enter into state territory have the same duties and obligations as all other citizens. See, e.g., Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (tribal ski resort located off reservation held to be subject to New Mexico's gross receipts tax).

**12.7.9 Criminal Jurisdiction on Indian Reservations.** Criminal jurisdiction on Indian reservations is based on an allocation of authority among federal, state and tribal courts and depends in general upon three factors: subject matter, locus and person.

Under 18 U.S.C. § 1152 the general laws of the United States as to the punishment of crimes committed in any place within the sole exclusive jurisdiction of the United States, except the District of Columbia, are extended to Indian country. 18 U.S.C. § 1152 applies to offenses committed on Indian reservations by a non-Indian against the person or property of a tribal Indian, and vice versa. The Assimilative Crimes Statute, 18 U.S.C. § 13, is also applicable to offenses involving Indians and non-Indians on the reservations. See Williams v. United States, 327 U.S. 711 (1946).

Paragraph 2 of 18 U.S.C. § 1152 contains a broad exception which provides that the statute:

[S]hall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

The exception in the second paragraph of 18 U.S.C. § 1152 does not exempt Indians from the criminal laws of the United States that apply to acts that are federal crimes regardless of where committed, such as bank robbery, counterfeiting, sale of drugs, and assault on a federal officer. See United States v. Blue, 722 F.2d 383 (8th Cir. 1983); United States v. Smith, 562 F.2d 453 (7th Cir. 1977), cert denied, 434 U.S. 1072 (1978). Neither does it exempt Indians from the liquor law provisions of 18 U.S.C. § 1154. United States v. Cowboy, 694 F.2d 1234 (10th Cir. 1982).

In 1885 federal legislation was enacted granting federal courts exclusive jurisdiction over certain major crimes committed by an Indian against another Indian. Under the Major Crimes Act, 18 U.S.C. § 1153, federal courts have exclusive jurisdiction of all offenses named in the section when committed by a tribal Indian against the person or property of another tribal Indian or another person in Indian country. The offenses are for the most part defined by separate federal statutes except for burglary and incest, which look to the law of the state where the crime was committed for definition and punishment.

**12.7.9.01 Offenses by Non-Indians; Concurrent Federal-State Jurisdiction.** United States v. McBratney, 104 U.S. 621 (1882), is regarded as authority for the state's assertion of jurisdiction with regard to crimes committed on a reservation by a non-Indian against another non-Indian, as well as a variety of "victimless" offenses committed by non-Indians on Indian reservations. Accord, Draper v. United States, 164 U.S. 240 (1896); United States v. Wheeler, 435 U.S. 313, 325, n. 21 (1978).

Following the Supreme Court's holding in Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978), that the tribal courts do not have jurisdiction over non-Indians, The Office of Legal Counsel of the United States Attorney's Office has concluded that in most cases, the states have jurisdiction over victimless crimes committed by non-Indians. Thus, most traffic violations, most routine cases of disorderly conduct, and most offenses against

morals such as gambling, which are not designed for the protection of a particular, vulnerable class, should be viewed as having no real "victim" and therefore falling within state jurisdiction.

Certain other cases, however, are sufficiently a direct threat to Indian persons or property and may be stated to bring about an ordinarily "victimless" crime within federal jurisdiction, such as crimes calculated to obstruct or corrupt the functioning of tribal government. Another example which would adversely affect the tribal community are consensual crimes committed by non-Indian offenders with Indian participants, where the participant, although willing, is within the class of persons which a particular state statute is specifically designed to protect. See Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966).

Another group of offenses which may be punishable under the law of individual states and assimilated into federal law are cases where an Indian victim is actually identified in cases such as reckless endangerment, criminal trespass, or riot.

Crimes such as traffic violations, prostitution or gambling, which are committed by Indians on reservations, receive federal prosecution based on 18 U.S.C. § 1152 and the Assimilative Crimes Act, 18 U.S.C. § 13, if prosecution by the tribe is not forthcoming or inadequate.

12.8 Summary. At the present time, the State of Arizona lacks jurisdiction over the conduct of Indians occurring on their reservation lands with respect to the direct application of the state's laws of a substantive civil nature (e.g., taxation, zoning, motor vehicle registration, professional and business licensing and similar regulatory provisions) in the absence of a specific grant of authority to the states by the federal government to exercise such jurisdiction.

The State of Arizona may impose state law on non-Indians and non-Indian activities occurring on Indian Reservations provided that: 1) there has been no preemption of the particular activity by either federal or tribal action; and 2) the exercise of such jurisdiction over the non-Indian does not constitute an infringement or interference with the political or economic security or the health or welfare of the tribe.

State courts have no jurisdiction over Indians for any crimes on Indian reservations. Crimes by Indians against non-Indians, if a listed major crime, are prosecuted by the United States under 18 U.S.C. § 1153. Crimes committed by Indians upon Indians, if a listed major offense, are prosecuted under 18 U.S.C. § 1153; for a non-major offense the crime is prosecuted in the tribal court. Crimes by non-Indians against Indians in Arizona are prosecuted by the United States under 18 U.S.C. § 1152, as Arizona has not assumed jurisdiction under Public Law 83-280. Victimless crimes committed by Indians are handled by the federal government or the tribal courts. The state has jurisdiction for crimes on the reservation committed by one non-Indian against another non-Indian and has jurisdiction over victimless crimes committed on the reservations by non-Indians.

## Chapter 13

### LIABILITY AND IMMUNITIES

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## CHAPTER 13

### LIABILITY AND IMMUNITIES

13.1 Scope of this Chapter. This Chapter discusses the legal principles governing the liability of state and state officials for tortious conduct under state law and for misconduct under certain federal civil rights statutes.

This Chapter also discusses the immunities (defenses) available to the state and state officials in both state and federal court. In addition, indemnification and insurance are included. Workers compensation and employers liability insurance are not included in this Chapter. The Chapter concludes with a discussion of attorneys' fees.

#### 13.2 Liability and Immunity in State Court.

13.2.1 Liability. The spectrum of liability lawsuits filed against the state and its officials is as broad as the spectrum of state governmental operations. Any attempt to catalog the specific acts or omissions of state officials in all the operations and activities of state government which could subject the state to liability is beyond the scope of this Chapter. The Department of Administration, Division of Risk Management, has an excellent loss control program designed to assist state agencies in conducting a preventative liability audit. Both Risk Management and the Attorney General's Office will work with state agencies in identifying those situations that pose the greatest potential for liability.

Nearly all of the reasons underlying the acts or omissions that give rise to governmental liability can be grouped under four broad categories. Peter Schuck, in Suing Government: Citizen Remedies for Official Wrongs (1983) labels these four categories as comprehension-based illegality, capacity-based illegality, motivation-based illegality, and negligence-based illegality.

Comprehension-based illegality describes those injurious acts or omissions of public officials which are the result of ignorance or misunderstanding. State officials need to understand what the law expects of them. Communication breakdowns between supervisors and subordinates have resulted in supervisors being held liable for the injurious acts or omissions of their subordinates on the theory that the injury was caused by the supervisor's gross failure to properly direct, train, or supervise the subordinate.

Capacity-based illegality is generally rooted in inadequate resources. Even officials who clearly understand what should be done may be incapable of doing it in the correct manner because of insufficient resources. Presumably, a larger budget would translate into more realistic staffing, better training and supervision of subordinates, and improved employee morale and performance. In the real world, few state agencies ever receive all the funds they actually need.

Motivation-based illegality may spring from several sources. Officials at all levels may comprehend what the law requires and be fully capable of performing it, but fail or refuse to do so because they do not want to. Legislative or judicial directives are

sometimes viewed as uninformed or undesirable and therefore unworthy of compliance. It comes as no surprise that the harshest judicial sanctions are reserved for official misconduct of this type.

Negligence-based illegality is undoubtedly the largest of the four categories.

The many sources of negligence-based illegality have little in common; they are as varied as the elements of human frailty — carelessness, forgetfulness, low intelligence, poor coordination, lack of curiosity, slothfulness, fatigue, tension, passivity, distraction, and many others.

P. Schuck, Suing Government: Citizen Remedies for Official Wrongs 12 (1983).

13.2.2 Employment Liability. The one area of potential liability that all agencies have in common is liability for employment decisions. Not too many years ago, the only employment issues agency heads dealt with were those associated with the state civil service system. Today federal and state statutes and case law have significantly broadened employees' rights.

State employees are classified as: 1) "covered" employees, whose employment can only be terminated for cause; or 2) "uncovered" employees, whose employment can be terminated without cause. Covered employees have a property interest in their jobs which cannot be taken from them except for certain reasons and after compliance with certain procedures. Perry v. Sindermann, 408 U.S. 593 (1972); Orloff v. Cleland, 708 F.2d 372 (9th Cir. 1983). These employees are entitled to an explanation of reasons for the proposed termination and a pre-termination notice and hearing. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985); Fleming v. Pima County, 141 Ariz. 167, 685 P.2d 1319 (Ct. App. 1983) (county employee awarded damages where trial court found that his layoff was a subterfuge to fire the employee without having to go through the merit system), aff'd in part, 141 Ariz. 149, 685 P.2d 1301 (1984); A.C.C. R2-5-803.

In making the decision to discharge an employee for cause, the employer must consider several factors:

1. Do the reasons for the proposed discharge involve serious misconduct or failure of performance on the part of the employee?
2. Have other employees been discharged under similar circumstances?
3. Was a thorough investigation conducted prior to making the decision to discharge?
4. Was the decision to discharge made by an experienced administrator?
5. Has the decision to discharge been reviewed and evaluated by an administrator other than the one who made the decision to discharge?
6. Was the employee put on notice that these reasons would justify discharge?

7. Was progressive discipline applied?

8. Was the employee given an opportunity to correct deficiencies called to his attention?

9. How long had the employee been employed and had he received promotions, commendations, or increases in compensation?

10. Do the employee's prior performance evaluations reflect the problems which are being asserted as the basis for his discharge or do they reflect satisfactory performance?

11. Had the employee recently exercised any public or legal right, refused to engage in any illegal, immoral or unethical act, or voiced any complaint for which the discharge could be viewed as retaliation?

Causes for dismissal or discipline of state employees are listed in A.R.S. §§ 41-770 and -772. The Department of Administration has promulgated a code of ethics for state service, the violation of which constitutes grounds for discipline. A.A.C. R2-5-501. The specific reasons for terminating a state employee for cause must be legitimate, accurate, and well-documented. Employee performance evaluations which do not reflect the problems which are offered as the reasons for the discharge impeach the credibility of the officials responsible for the discharge.

State employees in the second group (the "uncovered" employees) have no property interest in their jobs and can be discharged at any time without cause. But even these discharges are now circumscribed by several new legal restrictions (these restrictions also apply to employees whose employment can be terminated only for cause). Any state employee whose reputation is harmed by demotion or discharge may claim a "liberty" interest violation which will entitle him to a post-termination name-clearing hearing. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Montoya v. Law Enforcement Merit System Council, 148 Ariz. 108, 713 P.2d 309 (Ct. App. 1985). The issue at the hearing is not the validity of the dismissal (except for one situation which will shortly be mentioned), but whether the employee was defamed in the process.

Another potential area of liability for employers of discharged employees is the release of privileged information from a discharged employee's personnel file or the offering of an opinion regarding the discharged employee in response to an inquiry from a prospective employer. A.R.S. § 23-1361 provides immunity from civil liability to employers who give recommendations in good faith to prospective employers. In addition, A.A.C. R2-5-105.D sets forth the type of information from a personnel file which may be automatically disclosed to any person. Requests for information or documents not set forth in A.A.C. R2-5-105.D are treated on a case-by-case basis. Questions regarding disclosure of such information should be directed to the Department of Administration, Personnel Division.

A public policy exception to the "employment-at-will" doctrine is the discharge of an uncovered (or covered) employee for "bad cause." A bad cause discharge is one that can be viewed as retaliation against the discharged employee for refusing to do an illegal act, for exercising a legal or constitutional right, or for exposing an illegal act or an act

of government mismanagement. Wagner v. City of Globe, 150 Ariz. 82, 722 P.2d 250 (1986); Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 710 P.2d 1025 (1985). The Arizona "whistleblower" law, A.R.S. §§ 38-531 to -532, prohibits a state or county officer or employer from taking reprisal against an employee for disclosure of information which the employee believes evidences a violation of any law, mismanagement, a gross waste of monies or an abuse of authority. Furthermore, a discharge that violates any important public policy such as those expressed in the federal anti-discrimination statutes will undoubtedly be considered a bad cause termination.

State employees should also be aware that representations contained in a personnel manual or any written or oral assurances given to the employee at the hiring interview or during employment may be interpreted as part of the employment contract and may limit an employer's ability to discharge the covered or uncovered employee. Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (1987); Wagner v. City of Globe, 150 Ariz. 82, 722 P.2d 250 (1986); Leikvold v. Valley View Community Hospital, 141 Ariz. 544, 688 P.2d 170 (1984).

Please turn to Chapter 3 for an overview of pertinent state and federal laws governing state personnel employment issues.

There are many other sources of potential liability arising from the employer-employee relationship, which is one of the most rapidly developing areas of the law. Issues such as sexual harassment, smoking in the workplace, AIDS, and drug or polygraph testing require the involvement of legal counsel in all major decisions and policymaking.

**13.2.3 State Court Immunity.** The State of Arizona and state employees were immune from liability for damages in tort actions brought in state court from territorial days until the Arizona Supreme Court abolished the doctrine of sovereign immunity in Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963). The doctrine did not die easily. Since governmental immunity had been so firmly entrenched and considered indispensable to fearless governmental decision making, it continued to live on after Stone in the form of judicial exceptions to the rule of liability. See Ryan v. State, 134 Ariz. 308, 310, 656 P.2d 597, 599 (1982) (the court indicated it was adopting an ad hoc approach to further development of the law in this field and invited legislative involvement) (overruling Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969)). In 1984 the Legislature responded by enacting the following immunity statutes:

**A.R.S. § 12-820.01. Absolute immunity**

**A. A public entity shall not be liable for acts and omissions of its employees constituting:**

- 1. The exercise of a judicial or legislative function; or**
- 2. The exercise of an administrative function involving the determination of fundamental governmental policy.**

**B. The determination of a fundamental governmental policy involves the exercise of discretion and shall include, but is not limited to:**

1. A determination of whether to seek or whether to provide the resources necessary for:

- (a) The purchase of equipment,
- (b) The construction or maintenance of facilities,
- (c) The hiring of personnel, or
- (d) The provision of governmental services.

2. A determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel.

3. The licensing and regulation of any profession or occupation.

**A.R.S. § 12-820.02. Qualified immunity.**

Unless a public employee acting within the scope of his employment intended to cause injury or was grossly negligent, neither a public entity nor a public employee is liable for:

1. The failure to make an arrest or the failure to retain an arrested person in custody.

2. An injury caused by an escaping or escaped prisoner.

3. An injury resulting from the probation, parole, furlough or release from confinement of a prisoner or from the terms and conditions of his probation, parole, furlough or release from confinement or from the revocation of his probation, parole, furlough or release from confinement.

4. An injury caused by a prisoner to any other prisoner.

5. The issuance of or failure to revoke or suspend any permit, license, certificate, approval, order or similar authorization for which absolute immunity is not provided pursuant to § 12-820.01.

6. The failure to discover violations of any provision of law requiring inspections of property other than property owned by the public entity in question.

**A.R.S. § 12-820.03. Affirmative defenses.**

Neither a public entity nor a public employee is liable for an injury:

1. Arising out of a plan or design for construction or maintenance of or improvement to highways, roads, streets, bridges, or rights-of-way if the plan or design is prepared in conformance with generally accepted engineering or design standards in effect at

the time of the preparation of the plan or design, provided, however, that reasonably adequate warning shall be given as to any unreasonably dangerous hazards which would allow the public to take suitable precautions.

2. Which is attributable to the fault of a person, other than a public employee, driving a motor vehicle while the person was under the influence of intoxicating liquor. This paragraph does not apply to persons who are not passengers or to minors who are passengers riding in or upon the motor vehicle.

A.R.S. § 12-820.04. Punitive and exemplary damages; immunity.

Neither a public entity nor a public employee acting within the scope of his employment is liable for punitive or exemplary damages.

A.R.S. § 12-820.05. Other immunities.

A. Except as specifically provided in this article, this article shall not be construed to affect, alter or otherwise modify any other rules of tort immunity regarding public entities and public officers as developed at common law and as established under the statutes and the constitution of this state.

B. A public entity is not liable for losses that arise out of and are directly attributable to an act or omission determined by a court to be a criminal felony by a public employee unless the public entity knew of the public employee's propensity for that action. This subsection does not apply to acts or omissions arising out of the operation or use of a motor vehicle.

Certain state regulatory boards have qualified immunity for actions taken in good faith. See, e.g., A.R.S. § 32-1402(F) (Board of Medical Examiners). A.R.S. § 38-446 provides that public officials are immune from personal liability for official acts done in good faith reliance on written Attorney General Opinions.

For now, the state and its employees have an ample arsenal for defending actions brought against them in state court. Additional protection is provided in A.R.S. § 41-621(H) and (I). Nevertheless, the Arizona Supreme Court has declared its intention to treat the state and state employees like private litigants. The statutory immunities provided by the Legislature may be narrowly construed.

These statutory immunities are not available in the state courts of sister states, Nevada v. Hall, 440 U.S. 410 (1979), or in federal court, Scheuer v. Rhodes, 416 U.S. 232 (1974), or in Arizona state courts as defenses to actions filed under 42 U.S.C. § 1983.

13.3 Liability and Immunity in State and Federal Court. In the past two decades many new federal judicial remedies have become available to persons whose civil rights have been violated by officials of state and local government. A basic understanding of the more important civil rights statutes is essential for every person performing a supervisory function in state government.

13.3.1 Section 1983 Liability and Immunity. One of the larger liability problems for state government is the ubiquitous remedy for constitutional torts provided by 42 U.S.C. § 1983 ("Section 1983"). A Section 1983 complaint is likely whenever the alleged wrongful conduct on the part of the governmental entity or its employees amounts to more than simple negligence and some constitutional or federal right is implicated. Furthermore, as the state Legislature passes various "tort reform" laws, under which certain types of claims are limited or eliminated, the likely result will be an increased number of Section 1983 suits in federal court.

Another impetus for Section 1983 suits is the Civil Rights Attorney's Fees Awards Act of 1976, an amendment to 42 U.S.C. § 1988, which authorizes substantial attorneys' fees to the prevailing party even where the constitutional violations are minor. At present the amount of the judgment in the underlying action is not a factor in determining the amount of the attorneys' fees to be awarded. In fact, a sharply-divided Supreme Court recently rejected a proposed proportionality rule. See City of Riverside v. Rivera, 477 U.S. 561 (1986).

A plaintiff need allege only two elements in order to state a claim under Section 1983: 1) action under color of state law, and 2) action violative of rights secured by the federal Constitution and laws. The "action under color of law" element was given an expansive interpretation in Monroe v. Pape, 365 U.S. 167 (1961) (overruled on other grounds by Monell v. Department of Social Services, 436 U.S. 658 (1978)). Public officials acting in any connection with their offices are probably acting "under color of" state law. Note that this is so even if the action in question actually violated state law.

The second element is the focus of substantially all Section 1983 litigation. A significant amount of this litigation involves the issue of whether immunity is available as a defense. This determination is critical because "[e]ven defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard." Davis v. Scherer, 468 U.S. 183, 190 (1984). Official immunity is an affirmative defense, meaning that the defendant must plead and prove it. The defense of immunity is frequently the only thing that saves the defendant from liability.

13.3.1.01 Entity Immunity. The Eleventh Amendment bars suits in federal courts by private citizens against a state. Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985). Congress did not abrogate the states' Eleventh Amendment immunity in 42 U.S.C. § 1983 and states are not subject to suit under Section 1983. Quern v. Jordan, 440 U.S. 332 (1979); Garcia v. State, 1 CA-CIV 9416 (Ariz. Ct. App. April 5, 1988).

The Eleventh Amendment forecloses suits against states and state officials for damages, some forms of injunctive relief, and for retroactive monetary relief, Edelman v. Jordan, 415 U.S. 651 (1974), but a suit challenging the federal constitutionality of a state official's action is not one against the state, and the federal court may award prospective injunctive relief that governs the official's future conduct. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984). Federal courts may not, however, instruct state officials on how to conform their conduct to state law. Id.

The protection afforded by the Eleventh Amendment extends to state departments, agencies, and other instrumentalities of the state, Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981), and state officials sued in their official capacities, if the state is the real, substantial party in interest, Pennhurst State School & Hospital, 465 U.S. at 101.

For entities, the determination of immunity "turns on whether the [body] is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 280 (1977). In Arizona the Arizona Board of Regents is considered an "arm of the State," but other school boards are not. See Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981).

The Eleventh Amendment bar cannot be circumscribed by naming an individual state official or state agency as a nominal defendant. The most important factor in determining whether the amendment bars federal jurisdiction is whether a judgment against the defendant will come out of state funds. Edelman v. Jordan, 415 U.S. 651, 663 (1974) (Congress enacted the Eleventh Amendment in order to protect state treasuries.) It should follow that if the state was self-insured and if the state indemnified its officials, it could thereby envelop them with Eleventh Amendment immunity. The Ninth Circuit has rejected this argument twice. Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984), cert. denied, 469 U.S. 1127 (1985); Ronwin v. Shapiro, 657 F.2d 1071 (9th Cir. 1981). Consequently, in states like Arizona, where state employees are indemnified, the successful plaintiff is likely to be paid by the state even though the state cannot be sued directly.

13.3.1.02 Public Official Immunity. Although Section 1983 does not mention official immunity as a defense, the Supreme Court has consistently held that government officials are entitled to some type of immunity from suits seeking damages. Two types of immunity defenses have been recognized: absolute and qualified. Absolute immunity defeats a suit at the outset, provided the official's actions are within the scope of the immunity. Qualified immunity shields government officials who perform discretionary functions if their conduct does not violate clearly established constitutional rights of which a reasonable person would have known.

Public official immunity is either absolute or qualified. Judges, prosecuting attorneys, and witnesses have absolute immunity. Briscoe v. LaHue, 460 U.S. 325 (1983) (witnesses called at trial); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Pierson v. Ray, 386 U.S. 547 (1967) (judges). Judges and prosecutors lose their immunity, however, when they act outside their respective judicial and prosecutorial offices. See, e.g., Beard v. Udall, 648 F.2d 1264 (9th Cir. 1981); Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974), cited with apparent approval in Stump v. Sparkman, 435 U.S. 349, 361 n. 10 (1978). Other public officials with absolute immunity are the President, Nixon v. Fitzgerald, 457 U.S. 731 (1982), parole board officials, Sellers v. Procnier, 641 F.2d 1295 (9th Cir. 1981), administrative law judges, Butz v. Economou, 438 U.S. 478 (1978), legislators, Tenney v. Brandhove, 341 U.S. 367 (1951), and city councils, Hernandez v. Lafayette, 643 F.2d 1188 (5th Cir. 1981). Other officials have absolute immunity when performing certain quasi-judicial or quasi-prosecutorial functions. Meyers v. Contra Costa County Department of Social Services, 812 F.2d 1154 (9th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 108 S. Ct. 98 (1987) (social workers performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings); Demoran v. Witt, 781 F.2d 155 (9th Cir. 1986) (probation officers preparing presentence reports).

Absolute immunity is a complete defense to Section 1983 suits seeking damages and can be asserted as a bar to such suits in the form of a motion to dismiss or a motion for summary judgment. Absolute immunity, however, does not bar the awarding of

prospective injunctive relief or attorneys' fees pursuant to 42 U.S.C. § 1988 (absolute legislative immunity will, however, bar prospective injunctive relief and attorneys' fees; the courts will permit no judicial interference with the legislative function).

A broader range of public officials receive qualified immunity. Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (hospital administrators); Scheuer v. Rhodes, 416 U.S. 232 (1974) (governor and officers of National Guard); Wood v. Strickland, 420 U.S. 308 (1975) (school board members); Pierson v. Ray, 386 U.S. 547 (1967) (police officers).

The applicable standard currently employed for determining entitlement to qualified immunity is an objective standard. This means that the actual intent of the defendant official is irrelevant; the operative question is whether the official's conduct violates clearly established constitutional or statutory rights of which a reasonable person would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

This objective test not only makes it easier to dispose of frivolous cases at their inception, it also spares the public official involved the hassle of being subjected to discovery until the threshold immunity question is resolved. The other edge of the sword, however, puts public officials who make no effort to know the law in jeopardy. A reasonably competent public official should know the law governing his official conduct.

The rule may be stated as follows: unless the law was "clearly established" at the time of the constitutional deprivation, the official is entitled to immunity (because an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful). Consequently, the critical question is, when is the law clearly established or settled? Can the law be clearly established or settled in the absence of binding precedent on the precise issue from the U.S. Supreme Court, the appropriate court of appeals, or the highest state court? The Ninth Circuit seems to think so. See Capoeman v. Reed, 754 F.2d 1512 (9th Cir. 1985).

Qualified immunity should be raised at an early stage in every case brought against state officials under Section 1983. Its raison d'etre is to promote the "unflinching discharge" of public duties and to prevent "the diversion of official energy from pressing public issues." Harlow v. Fitzgerald, 457 U.S. at 814. The defense protects officials from discovery until the issue is decided, provides a means for early disposition of unjustified suits and may be appealed immediately if denied. Mitchell v. Forsyth, 472 U.S. 511 (1985).

Public officials who are denied immunity and who are found liable for compensatory damages may also be assessed punitive damages. In fact, in some cases the standard for awarding punitive damages is no higher than the standard for awarding compensatory damages. In Smith v. Wade, 461 U.S. 30 (1983), the Court held that a jury may assess punitive damages in a Section 1983 action when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the plaintiff's federally protected rights. This standard applies even when the underlying standard of liability for compensatory damages is one of recklessness.

The plain message of Supreme Court opinions dealing with the defense of immunity is that public officials need to become more knowledgeable concerning the constitutional and statutory rights of their constituents to prevent civil rights actions for damages.

13.3.2 Liability Under Other Federal Civil Rights Statutes. State officials should also be aware of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. In addition, other federal statutes which play minor, but still important, roles will be noted.

13.3.2.01 Title VII of the Civil Rights Act of 1964. The language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, makes it an unlawful employment practice to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment on the basis of his race, color, religion, sex, or national origin. A Title VII violation is normally proven under one of two theories, i.e., "disparate impact" or "disparate treatment." Under the "disparate impact" theory, a prima facie case can be established without any proof of intentional discrimination if a business practice, neutral on its face, can be shown to have a substantial, adverse impact on some group protected by Title VII. The statute not only bars overt employment discrimination, "but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); see Watson v. Fort Worth Bank & Trust, 56 U.S.L.W. 4922 (June 29, 1988) (disparate impact analysis may be applied to claims of discrimination in employment).

Once the plaintiff has established a prima facie case under the "disparate impact" theory, the burden shifts to the defendant to establish that the practice being challenged is justified by business necessity. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Contreras v. City of Los Angeles, 656 F.2d 1267, 1275-80 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982). The defendant must produce evidence that the challenged test or requirement bears "a manifest relationship to the employment in question." Dothard v. Rawlinson, 433 U.S. 321 (1977), quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). The cases indicate that the "business necessity" defense is accepted only in those situations where the policy being challenged can be shown to be absolutely essential to the achievement of a legitimate business need. The defendant must then introduce some admissible evidence which shows a legitimate, nondiscriminatory reason for its action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The other major method of establishing a Title VII violation is the "disparate treatment" theory. Under this theory the plaintiff must prove intentional discrimination on account of his race, color, religion, sex, or national origin. The plaintiff carries the initial burden of "showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'" Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978). This is normally done by proving the four elements articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973): 1) that he belongs to a protected minority; 2) that he applied for and was qualified for a job for which the employer was seeking applicants; 3) that, despite his qualifications, he was rejected; and 4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S. at 802. This test is utilized in failure to promote situations as well as in failure to hire.

Once the defendant has produced enough evidence to raise a genuine issue of fact as to whether it was motivated by a "business necessity" in the "disparate impact" situation, or by a "legitimate, nondiscriminatory reason" in the "disparate treatment" situation, the burden of producing evidence again shifts to the plaintiff to prove by a preponderance of the evidence that a discriminatory reason more likely motivated the defendant than the proffered reason or that the proffered reason is unworthy of credence. At this point the presumption of discrimination drops from the case and the court must decide the ultimate issue of whether the particular employment decision at issue was made on the basis of one of the impermissible criteria listed in 42 U.S.C. § 2000e-2.

13.3.2.02 The Age Discrimination in Employment Act. The Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634, prohibits employment discrimination based on age. The ADEA protects individuals over the age of forty in state and county government as well as in the private sector.

The order and allocation of proof in an ADEA case is similar to the allocation of proof in a Title VII case. The plaintiff establishes a prima facie case by presenting evidence sufficient to create a reasonable inference that age was a determining factor in the employment decision. Cuddy v. Carmen, 694 F.2d 853, 856-57 (D.C. Cir. 1982). The six principal defenses to an ADEA action are:

1. The employer's actions were not based on age nor did they have a "disparate impact" upon a protected age group.

2. The alleged discriminatory action was taken for good cause, i.e., a legitimate, nondiscriminatory reason can be shown as the motivating force behind the action.

3. The position is one involving a bona fide occupational qualification ("BFOQ"). Age may be a BFOQ if the age criterion is "reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1); see EEOC v. County of Los Angeles, 706 F.2d 1039, 1042 (9th Cir. 1983), cert. denied, 464 U.S. 1073 (1984). The BFOQ defense is normally raised in suits involving public safety personnel.

4. The business necessity defense, i.e., the challenged practice is justified on the basis of business necessity.

5. The bona fide employee seniority system defense, 29 U.S.C. § 623(f)(2).

6. The bona fide employee benefit plans defense, such as retirement. 29 U.S.C. § 623(f)(2).

After the defendant has presented its evidence of a nondiscriminatory reason for the employment decision, the plaintiff has the burden of proving that this reason was pretextual. Plaintiff's ultimate burden is to show by a preponderance of the evidence that age was the difference in the employer's decision. Jackson v. Shell Oil Co., 702 F.2d 197, 200-01 (9th Cir. 1983).

13.3.2.03 Sexual Harassment Under Title VII of the Civil Rights Act of 1964. In 1980 the Equal Employment Opportunity Commission issued guidelines specifying that "sexual harassment," as defined by EEOC guidelines, is a form of sex discrimination prohibited by Title VII. Unwelcome sexual conduct constitutes "sexual harassment" whether or not it impacts on the economic interests of the victim, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3). The Supreme Court endorsed these guidelines in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

Every state agency should have a formal policy banning sexual harassment which incorporates the EEOC guidelines which are published in 29 C.F.R. § 1604.11. The state agency should develop a training program which explains the various forms of sexual harassment, the agency policy prohibiting it, and the procedure for reporting incidents. The employer has an affirmative duty to take prompt steps to eliminate this form of discrimination. See Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (1987) (affirming an award of damages to an employee for intentional infliction of emotional distress where the employer acted dilatorily in responding to an employee's complaints of sexual harassment).

13.3.2.04 The Pregnancy Discrimination Act of 1978. The Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), prohibits discrimination on the basis of childbirth, pregnancy, or related medical conditions. The Act prohibits firing, or refusing to hire or promote, a woman merely because she is pregnant or has had an abortion. The Act also prohibits forced leaves of absence provided the employee is still able to work. In Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983), the Supreme Court held that a health insurance plan that provided greater pregnancy-related benefits to female employees than to the wives of male employees violated the Act.

13.3.3 Other Employment Discrimination Statutes. State officers should also be aware of the Civil Rights Act of 1866, the Equal Pay Act, and the Rehabilitation Act.

Section 1981 of the Civil Rights Act of 1866 provides that all persons "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." The statute has been interpreted to prohibit racial discrimination in employment against white persons upon the same standards as racial discrimination against non-whites. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). Intentional discrimination must be proven. General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375 (1982). Plaintiffs may, and frequently do, file both Title VII and Section 1981 claims in the same lawsuit when the issue alleged is racial discrimination in employment.

The Equal Pay Act, codified at 29 U.S.C. § 206(d), was added in 1963 to the Fair Labor Standards Act of 1938. The Equal Pay Act prohibits discrimination in rates of pay to employees based upon the employee's gender. It does not prohibit discrimination in hiring, firing, or promoting employees. Nor does it apply to pay differentials in jobs that are not equal. The 1974 amendments made the Act applicable to governmental bodies. The plaintiff must establish that: an employer pays different wages to employees of the opposite sex in an establishment when they are doing equal work on jobs, the performance

of which requires equal skill, effort, and responsibility under similar working conditions. 29 U.S.C. § 206(d)(1). The defendant may then show that the payments are made pursuant to a bona fide seniority system, merit system, system based on quantity or quality of production, or system based on any factor other than sex. 29 U.S.C. § 206(d)(1).

The Rehabilitation Act of 1973 is a piecemeal approach to the problem of discrimination against the handicapped. The principal statute of the Act, 29 U.S.C. § 794, prohibits discrimination against otherwise qualified handicapped individuals in both programs and activities receiving federal financial assistance. In Southeastern Community College v. Davis, 442 U.S. 397 (1979), the Supreme Court held that an "otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." 442 U.S. at 406. Former drug addiction or alcoholism are disabilities covered by the Act, but current alcohol or drug abuse are not. 29 U.S.C. § 706(7)(B). The order and allocation of proof is similar to a Title VII case. If the plaintiff establishes a prima facie case, then the defendant must prove that persons who suffer from the handicap plaintiff suffers cannot safely and efficiently perform the essentials of the position in question. The plaintiff retains the ultimate burden of proving that the defendant treated him differently because of his handicap.

In addition to the unlawful employment practices outlined above, it is unlawful for an employer to retaliate against an employee for invoking the protections afforded by these statutes or for opposing practices these statutes make unlawful. These statutes all provide for the award of attorney's fees and costs to the prevailing party. The issue of attorney's fees is discussed at the conclusion of this Chapter. The Arizona Civil Rights Act, A.R.S. §§ 41-1461 to -1465, provides parallel protection to that afforded by the federal statutes discussed above. Generally, allegations of unlawful employment practices against state agencies that are filed with the Arizona Civil Rights Division and with the Equal Employment Opportunity Commission, except those involving alleged discrimination on the basis of handicap, are investigated and disposed of by the EEOC in order to avoid a conflict of interest or the appearance of impropriety.

13.3.4 Procedure Upon Receipt of Notice of Charge of Discrimination. Employment discrimination matters are covered by Department of Administration, Risk Management Division. Before an employee may file a discrimination lawsuit he must first file a charge alleging the unlawful discrimination with the Equal Employment Opportunity Commission or with the Arizona Civil Rights Division. The state agency which receives a notice of a charge of discrimination should immediately contact the Assistant Director, Risk Management Division, Department of Administration, and the Chief Counsel of the Liability Defense Division of the Attorney General's Office. All state agencies, employees and officers are required to cooperate in the investigation and defense of discrimination claims.

13.4 Insurance/Self-Insurance. A.R.S. §§ 41-621 to -624 authorizes the state to purchase liability and property insurance or establish a system to self-insure for liability or property claims brought against the state and its employees. See also A.A.C. R2-10-101 to -105. The Department of Administration has elected to provide self-insurance rather than purchase insurance for almost all property and liability risks.

13.4.1 Indemnification of State Employees. In order to allay concerns over potential liability and thereby promote productivity, the state Legislature has provided

for mandatory indemnification of state officials and employees by insurance or self-insurance coverage. A.R.S. § 41-621(A)(3) provides:

A. The department of administration shall obtain insurance against loss . . . on the following:

....

3. The state and its departments, agencies, boards and commissions and all officers, agents and employees thereof and such others as may be necessary to accomplish the functions or business of the state, its departments, agencies, boards and commissions, against liability for acts or omissions of any nature while acting in authorized governmental or proprietary capacities and in the course and scope of employment or authorization except as prescribed by this chapter.

Coverage also includes litigation costs and attorneys' fees. A.R.S. § 41-622(A). Exclusions from coverage are outlined in Section 13.4.9. All coverage provided by self-insurance is excess over any other valid and collectible insurance available from any other source. A.R.S. § 41-621(D).

13.4.2 Course of Employment. With few exceptions, employees of the state are protected if their conduct occurs within the course and scope of their employment. No one definition of "course and scope of employment" will cover all fact situations. A very general definition includes all acts that are performed by an employee in the pursuit of the state's business.

13.4.3 Extent of Coverage. If the conduct of the employee falls within the terms of the statute, he will be defended by the Attorney General's Office or, at the Attorney General's discretion, by outside legal counsel. All attorneys' fees, court costs, and litigation expenses will be paid out of the permanent liability loss revolving fund of the Department of Administration. A settlement or judgment will also be paid out of this fund.

The agency and employee involved must cooperate fully with the Attorney General in the defense of the claim. A.R.S. § 41-621(L); A.A.C. R2-10-102(C).

13.4.4 Automobile Coverage. Insurance coverage is provided for all employees acting within the course and scope of their employment while driving state-owned vehicles on state business. Coverage also exists for employees driving state-owned vehicles to and from work or lunch. If an employee is driving a non-state-owned vehicle, he will not be covered while driving to and from work or lunch unless on state business and in travel status. In other words, when travel expenses are covered by the state, insurance coverage exists. There is no coverage for employees while driving either state-owned or non-state-owned vehicles outside the course of their employment.

13.4.5 Punitive Damages. The State of Arizona is a sovereign and cannot be held liable for punitive damages in either state or federal court. A.R.S. § 41-621(I); State v. Sanchez, 119 Ariz. 64, 579 P.2d 568 (Ct. App. 1978). Punitive damages are awarded to punish an individual for outrageous conduct, to publicize such wrongful acts, and to deter others from engaging in similar conduct. Punitive damages may now be awarded only when the acts evidence an "evil mind." Rawlings v. Apodaca, 151 Ariz. 149, 726 P.2d 565

(1986); Linthicum v. Nationwide Life Insurance Co., 150 Ariz. 326, 723 P.2d 675 (1986). The state will defend covered state employees against claims for punitive damages if the act or conduct giving rise to the punitive damage claim arose out of the scope and course of employment or authorization and is not determined by a court to be a felony.

13.4.6 Immunities. An employee acting in good faith, without wanton disregard of his statutory duties and under the authority of an enactment that is subsequently declared to be unconstitutional, invalid, or inapplicable, is not personally liable for injuries or damages caused thereby except to the extent that he would have been personally liable if the statute were valid. A.R.S. § 41-621(H). Likewise, an employee is not personally liable for injuries or damage resulting from his act or omission in his official capacity where the act or omission was the result of the exercise of the discretion vested in him, provided his discretion was exercised in good faith and without wanton disregard of his statutory duties. A.R.S. § 41-621(I).

13.4.7 State Officers and Employees Bond Coverage. Each state officer and employee is covered by the risk management fund insuring the faithful performance of his duties. If the risk management fund is required to make a payment as a result of the unfaithful performance of duties by the covered state employee, the employee is personally liable to the state for monies paid out on his behalf.

13.4.8 Property Coverage. A.R.S. § 41-621 also provides coverage against loss or damage to all state owned buildings in which the state has an insurable interest as determined by the Department of Administration, except buildings of community colleges. The contents of any building owned, leased, or rented by the state and reported to the department are covered against loss or damage. All personal property owned by the state and all non-owned personal property that is under the clear responsibility of the state because of written leases or other agreements and reported to the department is covered against loss or damage. Excluded from this coverage is loss of property due to obsolescence, nonserviceability, mysterious disappearance, or inventory shortage. A.R.S. § 41-622(B).

#### 13.4.9 Acts Excluded from Insurance Coverage.

13.4.9.01 Acts Constituting Felonies. Losses caused by acts determined by a court to be felonies, unless the state knew of the employee's propensity for the particular acts, are excluded from coverage, except those acts arising out of the operation or use of a motor vehicle. A.R.S. § 41-621(K)(1).

13.4.9.02 Contractual Breaches. Losses arising from contractual breaches are excluded from coverage. A.R.S. § 41-621(K)(2).

13.5 Claims Procedure. In order to afford public entities the opportunity to investigate and assess their liability and avoid costly litigation by early settlement, the Legislature enacted A.R.S. § 12-821, which requires timely presentation of claims to public entities as a prerequisite for filing actions against them. See Mammo v. State, 138 Ariz. 528, 675 P.2d 1347 (Ct. App. 1983). The statute reads:

A. Persons who have claims against a public entity or public employee shall file such claims in the same manner as that prescribed in the Arizona Rules of Civil Procedure, Rule 4(D) within

twelve months after the cause of action accrues. Any claim which is not filed within twelve months after the cause of action accrues is barred and no action may be maintained except upon a showing of excusable neglect if the action is brought within the otherwise applicable period of limitations, provided that if there is no excusable neglect, and if the absence of excusable neglect is because of the conduct of the claimant's attorney, then the action shall proceed, and the public entity and public employee shall have a right of indemnity against the claimant's attorney for any liability assessed in the action.

B. Notwithstanding subsection A, a minor or an insane or incompetent person may file a claim within twelve months after the disability ceases.

C. A claim against a public entity or public employee filed pursuant to this section is deemed denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days.

D. A claim for medical malpractice under chapter 5.1, article 1 of this title is excluded from the provisions of this section as no claim is necessary to bring a medical malpractice action.

E. For the purposes of this section "excusable neglect" means reasonable and foreseeable neglect or inadvertence.

The statute does not have any application to suits brought under 42 U.S.C. § 1983. Burnett v. Grattan, 468 U.S. 42 (1984).

13.5.1 Reporting Incidents. Whenever an employee is involved in or has knowledge of an incident which results in injury to a person or damage to property, the employee must immediately notify his supervisor and the Department of Administration, Risk Management Division.

A.A.C. R2-10-102 sets forth specific reporting procedures and outlines the contents of the report that is required to be made by the employee for any accident or incident that might lead to a claim against the state or the employee. A.A.C. R2-10-104 sets forth the procedure for reporting loss or damage to state property. Forms for reporting accidents or incidents are provided by Risk Management Division, Department of Administration.

An employee must notify the Department of Administration, Risk Management Division, of any and all oral or written communications made by an injured party or his representative. The employee, on the other hand, should not make any statements or release any information concerning the accident or incident without first obtaining the approval of Risk Management or the Attorney General's Office.

13.5.2 Investigating and Settling Claims. Upon receipt of a claim, Risk Management will investigate and, where appropriate, attempt to settle the claim directly with the claimant. Claims (or lawsuits) involving a settlement sum of \$25,000 or less may

be settled with the approval of the Director of the Department of Administration. When the payment to be made in settlement is \$25,000 - \$50,000, the Director of the Department of Administration and the Attorney General are needed for approval, and when the settlement sum exceeds \$50,000, the Director of the Department of Administration, the Attorney General, and the Joint Legislative Budget Committee must approve the settlement. A.R.S. § 41-621(M). If a claim does not have merit, or has merit but cannot be settled on reasonable terms, Risk Management will either deny the claim or, more often, take no action with respect to it. After denial of the claim or sixty (60) days after filing of the claim, the claimant may then file a lawsuit on the claim. Settlement of all claims and lawsuits is the exclusive province of the Department of Administration, Risk Management Division, the Attorney General, and the Joint Legislative Budget Committee. A.R.S. § 41-621(M).

**13.5.3 Delivering Summons and Complaint.** A claimant may file a lawsuit against the employee alone, the employee and the state jointly, or the state alone. Upon receipt of the summons and complaint, the employee must immediately hand deliver them to Risk Management in order that a response may be filed in a timely fashion. Risk Management will then deliver the summons and complaint to the Attorney General's office for proper handling. The employee involved will be contacted by the attorney handling his defense and may be called upon to provide further assistance. An employee may, at his own expense, hire private legal counsel to work with legal counsel provided by the state.

**13.6 Costs and Attorneys' Fees.** In the absence of an agreement or statute, the prevailing party in litigation is not normally entitled to an award of attorneys' fees. Specific statutory provisions have been enacted by our Legislature and Congress that now authorize the award of costs of litigation, including attorneys' fees, when a citizen prevails in certain types of litigation against a public entity. This section will focus on the prominent state statutes which authorize attorneys' fees awards and the preeminent federal statute, 42 U.S.C. § 1988. Of course, Section 1988 is not the only federal statute which authorizes attorneys' fees. Several federal statutes contain similar provisions, including Title VII and other civil rights statutes. The issue of attorneys' fees has become so significant in civil rights litigation that it is commonly referred to as the "second trial."

**13.6.1 State Court Actions.** In 1981 the Legislature authorized awards of reasonable attorneys' fees, expert witness fees, and other costs to parties who prevail in specified actions against the state, as well as cities, towns, and counties. A.R.S. § 12-348 states:

A. In addition to any costs which are awarded as prescribed by statute, a court shall award fees and other expenses to any party other than this state or a city, town or county which prevails by an adjudication on the merits in any of the following:

1. A civil action brought by the state or a city, town or county against the party.
2. A civil action brought by the party against the state to challenge the assessment or collection of taxes.

3. A court proceeding to review a state agency decision, pursuant to chapter 7, article 6 of this title, or any other statute authorizing judicial review of agency decisions.

4. A proceeding pursuant to § 41-1034.

5. A special action proceeding brought by the party to challenge an action by the state against the party.

6. An appeal by the state to a court of law from a decision of the personnel board under title 41, chapter 4, article 6.

B. The court in its discretion may deny the award provided for in this section or may reduce the award if it finds that any of the following applies:

1. During the course of the proceeding the prevailing party unduly and unreasonably protracted the final resolution of the matter.

2. The reason that the party other than the state or a city, town or county has prevailed is an intervening change in the applicable law.

3. The prevailing party refused an offer of civil settlement which was at least as favorable to the party as the relief ultimately granted.

C. A party may apply pursuant to the applicable procedural rules for an award of attorney fees and other expenses authorized under this section and shall include as part of the application evidence of the party's eligibility for the award and the amount sought, including an itemized statement from the attorneys and experts stating the actual time expended in representing the party and the rate at which the fees were computed.

D. The court shall base any award of fees as provided in this section on prevailing market rates for the kind and quality of the services furnished, except that:

1. An expert is not eligible for compensation at a rate in excess of the highest rate of compensation for experts paid by this state or a city, town or county.

2. The award of attorney fees may not exceed the amount which the prevailing party has paid or has agreed to pay the attorney or a maximum amount of seventy-five dollars per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceeding involved, justifies a higher fee.

3. An award of fees against a city, town or county as provided in this section shall not exceed ten thousand dollars.

E. The particular state agency over which a party prevails shall pay the fees and expenses awarded as provided in this section from any monies appropriated to the agency for such purpose. If no agency is involved or if an agency fails or refuses to pay fees and other expenses within thirty days after demand by a person who has received an award pursuant to this section, and if no further review or appeals of the award are pending, the person may file a claim for the fees and other expenses with the department of administration, which shall pay the claim within thirty days, in the same manner as an uninsured property loss under title 41, chapter 3.1, article 1. If, at the time the agency failed or refused to pay the award, it had appropriated monies either designated or assignable for the purpose of paying such awards, the legislature shall reduce the agency's operating appropriation for the following year by the amount of the award and appropriate the amount of the reduction to the department of administration as reimbursement for the loss.

F. A city, town or county shall pay fees and expenses awarded as provided in this section within thirty days after demand by a party who has received an award if no further review or appeal of the award is pending.

G. This section does not:

1. Apply to an action arising from a proceeding before this state or a city, town or county in which the role of this state or a city, town or county was to determine the eligibility or entitlement of an individual to a monetary benefit or its equivalent, or to adjudicate a dispute or issue between private parties or to establish or fix a rate.

2. Apply to proceedings brought by this state pursuant to title 13 or 28.

3. Entitle a party to obtain fees and other expenses incurred in making application for an award pursuant to this section for fees and other expenses.

4. Apply to proceedings involving eminent domain, foreclosure, collection of judgment debts or proceedings in which the state or a city, town or county is a nominal party.

5. Personally obligate any officer or employee of this state or a city, town or county for the payment of an award entered under this section.

6. Apply, except as provided in subsection A, paragraph 6 of this section, to proceedings involving the personnel board under title 41, chapter 4, article 6.

7. Apply to proceedings brought by a city, town or county pursuant to title 13 or title 28.

8. Apply to proceedings brought by a city, town or county on collection of taxes or pursuant to traffic ordinances or to criminal proceedings brought by a city, town or county on collection of taxes or pursuant to traffic ordinances or to criminal proceedings brought by a city, town or county on ordinances which contain a criminal penalty or fine for violations of such ordinances.

H. As used in this section:

1. "Fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the court to be necessary for the preparation of the party's case and reasonable and necessary attorney fees, and in the case of an action to review an agency decision pursuant to subsection A, paragraph 3 of this section, all such fees and other expenses incurred in the contested case proceedings in which the decision was rendered.

2. "Party" means an individual, partnership, corporation, association or public or private organization.

3. "State" means this state and any agency, officer, department, board or commission of this state.

A.R.S. §§ 12-349 and -350 also authorize attorneys' fees awards against litigants, including the state and its political subdivisions, for: 1) bringing or defending a claim without substantial justification; 2) bringing or defending a claim solely or primarily for delay or harrassment; 3) unreasonably expanding or delaying a proceeding; or 4) engaging in an abuse of discovery. Other important attorneys' fees statutes are found in A.R.S. § 12-341.01, contract actions, and A.R.S. § 12-2030, mandamus actions. See also Arizona Rule of Civil Procedure 11. In all, the Legislature has enacted more than sixty statutes authorizing awards of attorneys' fees. Note, Statutory Attorney's Fees in Arizona: An Analysis of A.R.S. Section 12-341.01, 24 Ariz. L. Rev. 659 (1982); 1 Arizona Appellate Handbook ch. 10 (1986).

13.6.2 Federal Court Actions. In order to encourage the private enforcement of civil rights laws Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976 as an amendment to 42 U.S.C. § 1988. The pertinent portion of the Act provides that

[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983 . . . and other civil rights statutes the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

The term "prevailing party" in the operative language of Section 1988 has been liberally construed to include not only a judgment on the merits, but also a successful settlement and even the filing of a lawsuit which acts as a catalyst in bringing about voluntary compliance with the Constitution or federal law. Maier v. Gagne, 448 U.S. 122 (1980); International Society for Krishna Consciousness, Inc. v. Andersen, 569 F.2d 1027

(8th Cir. 1978). A plaintiff must receive at least some relief on the merits before he can be said to "prevail". Hewitt v. Helms, \_\_\_ U.S. \_\_\_, 107 S. Ct. 2672 (1987). The public entity being sued is not entitled to attorneys' fees merely by winning the litigation. A public entity "prevails" only where the court finds the plaintiff's action to be frivolous, unreasonable, or without foundation. Hughes v. Rowe, 449 U.S. 5 (1980). Although Section 1988 is couched in terms of discretion, the practice is to routinely award attorneys' fees to prevailing plaintiffs unless special circumstances justifying denial are shown.

In determining the reasonableness of attorneys' fees, the court considers the number of hours expended on the case, the hourly rate based upon the prevailing market rates in the relevant community, and other factors. Some of the relevant factors, commonly called the "Johnson Guidelines," are found in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The fee is determined in a two-part process. First, the court calculates the lodestar, *i.e.*, the number of hours reasonably expended multiplied by a reasonable hourly rate. The remaining Johnson factors and other factors are then used to adjust the lodestar. Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980).

The two leading Supreme Court cases on fee awards are Blum v. Stenson, 465 U.S. 886 (1984) and Hensley v. Eckerhart, 461 U.S. 424 (1983). In Hensley the Supreme Court held that "[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." 461 U.S. at 440. In Blum, the Court held that an upward adjustment in a fee award is appropriate

only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'

465 U.S. at 899.

Many questions still remain unanswered after more than a decade of litigation under the attorneys' fees provision of Section 1988. One requirement that is not in doubt is that of clear, contemporaneous time records. The Attorney General's Office will oppose any poorly documented or unwarranted claims for attorneys' fees.



CHAPTER 14  
DETECTION OF CRIMINAL CONDUCT

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## CHAPTER 14

### DETECTION OF CRIMINAL CONDUCT

14.1 Scope of this Chapter. This Chapter discusses crimes that state employees might uncover while engaged in agency operations. Those crimes fall into three categories: 1) crimes committed by state employees, 2) crimes against the state, and 3) crimes against the public which come to the attention of a state agency. This Chapter also sets forth the procedures which should be followed when an agency uncovers any of these possible criminal violations.

14.1.1 Introduction. White collar crime is generally defined as the obtaining of money or other advantage by means of fraud, deception or misuse of position. White collar crimes have a corrosive and corrupting effect on society, and their impact on our economy is destructive: the United States Department of Commerce has reported that one third of all business failures are related to some form of fraud.

The Arizona Legislature has created several different devices and funded several enforcement agencies to fight white collar crime. However, because of the nature of the crime, fraud cannot be detected and prosecuted successfully without the active cooperation of the public and of state agencies. Very often, a state agency, either through its normal operation of business or through contact with the public, will unearth fraudulent activity. Because an agency often discovers fraud long before police authorities hear of it, the agency can provide a vital early warning to law enforcement. Early detection and reporting prevents harm to potential future victims, and timely investigation of the fraud greatly increases the likelihood of successful prosecution.

White collar crime succeeds because the criminal can rely on a low level of detection. State agencies can significantly increase the level of detection by being aware of the warning signs of white collar crime. The list of crimes included in this Chapter is intended only as a guideline and is not meant to be exhaustive or the sole reference for the agency. The detection of white collar crime is largely a matter of common sense, so the agency should in no way be discouraged from relying on the common sense of its personnel. If "something fishy" is suspected, the agency should contact the Attorney General's Office immediately, even if the dubious activity is not discussed here. Furthermore, the mere attempt to do any of these illegal acts is also a crime and should be reported.

14.2 Crimes by State Employees and Officers. The acts described below are criminal offenses which undermine the integrity of state government, and violate the trust reposed in state employees by our citizens. These crimes fall into three general categories: theft, fraud, and violations of the public trust.

Note: Many statutes governing the conduct of state employees impose personal financial liability for any violation, in addition to criminal penalties. For example, charging excessive fees, A.R.S. § 38-413, the illegal withholding, expenditure or conversion of state money for an unauthorized purpose, A.R.S. §§ 35-196 and -197, approving or paying a claim or demand against the state not authorized by law, A.R.S. §§ 35-211 and -212, the unlawful use of public records for commercial purposes, A.R.S. § 39-121.03(C), and contracting or purchasing materials, services or construction contrary

to the provisions of the Procurement Code, A.R.S. § 41-2616, are criminal offenses which carry additional personal financial sanctions.

14.2.1 Theft. Theft is the taking or unauthorized use of another person's property. In the context of government, the state or an agency is considered a "person," so that the taking or unauthorized use of state or agency property is a criminal offense. An example of theft, besides the more commonly recognized pilfering or stealing, is the unauthorized use of a state vehicle. A.R.S. § 13-1802. Accessing, altering or destroying computer programs in the course of a theft or fraudulent scheme is a felony. A.R.S. § 13-2316. The use of state-owned computer facilities, whether hardware, software or communication systems for private purposes, is also theft. A.R.S. § 13-1802. Obtaining property or services by means of a threat to take or withhold action as a public servant is theft by extortion. A.R.S. § 13-1804.

Embezzlement is another type of theft. This crime occurs when a person has a right to hold money or property entrusted to him, but then uses, keeps or transfers it improperly for his own benefit or use. Examples of embezzlement include the misappropriation of public money by a public officer or employee to his own use or to the use of another, A.R.S. § 35-301, or the diverting of salary or fees of subordinates for a public officer or employee's own use, A.R.S. § 38-609. The property involved need not be money or equipment; theft, destruction, or unauthorized removal of a public record is a crime. A.R.S. § 38-421.

14.2.2 Fraud. Fraud is the crime of misleading another person, either by making a false statement or by omitting an important fact. There are numerous examples with reference to state employment: filing a false time or leave report, travel expense report, per diem voucher, or any other type of claim against the state. Another type of fraud occurs when a state employee, such as an inspector or auditor, files a false report relating to the performance of his official duties. See A.R.S. § 13-2407 (making, presenting or filing a false public record); A.R.S. § 39-161 (presentment of a false instrument for filing in a state public office); A.R.S. § 13-2310 (fraudulent schemes and artifices); A.R.S. § 13-2311 (fraudulent schemes or practices in any matter related to the business conducted by the state or a political subdivision).

14.2.3 Violation of the Federal Copyright Laws. Copyrighted works, such as maps, books or computer software, are protected by federal law against copying — there are both civil and criminal remedies available to the copyright owner whose rights have been infringed. Software publishers, in particular, have taken aggressive action to protect their works. Unauthorized copying by state employees can subject the state to substantial financial liability, while the employee may also face criminal prosecution. Any questions about copying of such works should be referred to the Attorney General's Office. See 17 U.S.C. §§ 107, 117, 506(a); 18 U.S.C. § 2318(b)(3).

14.2.4 Abuse of Public Trust. Abuse of public trust is a category of crime involving the misuse of a public office or position. Examples of this type of offense include:

1. Nonfeasance in office – failure to perform a required duty. A.R.S. § 38-443.
2. Violating the budgetary or fiscal requirements for agencies set forth in Title 35. A.R.S. § 35-197. See Chapters 4 and 5.

3. Violating the conflict of interest laws. A.R.S. §§ 38-447, -481 and -510. See Chapter 8.

4. Charging fees for public services higher than the law allows, A.R.S. § 38-413, failing to file required reports of monies collected, A.R.S. § 38-414, or refusing inspection of financial records, A.R.S. § 38-422.

5. Soliciting or accepting a bribe or gratuity, which is the offer of anything of value, in exchange for a particular decision or action, A.R.S. §§ 38-444, -465, -466 and 13-2602, or trading in public office by offering a nomination or appointment to public office in exchange for any benefit, A.R.S. § 13-2603.

6. Destroying, withholding, falsifying, or tampering with official records, or filing a false writing, or allowing another person to do so. A.R.S. §§ 38-363, -421 and -423; 13-2407. Violating a duty to keep permanent public records is also a crime. A.R.S. § 39-101. See Chapter 6.

7. Accessing the Arizona Criminal Justice Information System in violation of the applicable regulations, or improperly releasing or using such information. A.R.S. § 41-1750.

8. Unauthorized disclosure or use by a public employee of confidential information, or the disclosure or use of such information for personal profit. A.R.S. §§ 38-504 and -510.

9. Violation of the Arizona statutes governing the interception, recording or obtaining of the contents of wire, electronic or oral communications. A.R.S. §§ 13-3001 to -3014.

10. Acting as public officer even though the person has not been elected or appointed to the position, or has failed to take the oath of office or post a required bond. A.R.S. §§ 38-234 and -442.

In addition to potential criminal prosecution for violation of statutes dealing with theft, fraud and abuse of public trust, the public officer or employee may face discharge from state employment, as well as the imposition of damages, civil penalties, costs and attorneys' fees in a civil action filed by the state against the particular employee or public officer. State employees should be warned that these infractions are serious and those who violate these laws are risking more than the loss of state employment.

**14.2.5 Investigating Crimes Committed by State Employees.** When there is reason to suspect that a state employee may have committed a crime, the agency should immediately contact the Attorney General's Office. The rules applicable to criminal investigations are complex and constantly changing, and even innocent mistakes may prevent successful investigation and prosecution. Early consultation is important in order to prevent legal problems, provide that evidence is identified and preserved, and to ensure a fair and thorough investigation.

**14.3 Crimes Against the State.** The second category of crimes includes those offenses which an agency will encounter while it is engaged in its regular business. These crimes may be committed by a government employee, an individual, or a business entity such as a corporation or partnership.

**14.3.1 False Statements or Documents.** The crime most directly linked to any agency is the making or filing of false statements or documents. The false statement may be sworn or unsworn, may be oral or in writing, and may still be a criminal violation even though the false statement itself may not actually be part of a public record. Terms such as "record" or "written instrument" do not necessarily refer to the form of the writing: records may be maintained on computer tapes, paper, microfiche, and many other media. Definitions of public records can be found in A.R.S. §§ 13-2407 and 41-1350. See Chapter 6.

**Note:** There are many other more specialized statutes which incorporate false-filing provisions carrying criminal penalties. See, e.g., A.R.S. § 42-137, false information relating to taxation.

1. Forgery includes making, completing or altering a written instrument, or knowingly possessing a forged instrument, or offering or presenting the forged instrument with the intent to defraud. A.R.S. § 13-2002. Related offenses are criminal simulation; making, altering or presenting an object so that it appears to have an antiquity, rarity, source, authorship or value that it does not in fact possess, A.R.S. § 13-2004; or obtaining a signature by deception, A.R.S. § 13-2005.

2. Tampering with a public record includes a range of offenses such as falsifying, forging or altering a record, or presenting it for recording or filing knowing that it contains false entries, or destroying, mutilating or concealing a public record. A.R.S. § 13-2407. A similar provision in A.R.S. § 39-161 makes it an offense to acknowledge, certify, notarize, or to procure or offer for filing a false or forged instrument.

3. Perjury is the making of a false sworn statement in regard to a material issue, believing it to be false. A.R.S. § 13-2702. Perjury is a class 4 felony. False swearing is the making of any false sworn statement, believing it to be false. False swearing is a class 6 felony. A.R.S. § 13-2703.

4. Unsworn falsification is making a statement believed to be false, to a public servant in connection with an application for any benefit, privilege or license, or in connection with any official proceeding involving testimony or other evidence under oath. A.R.S. §§ 13-2704 and -2801.

5. Simulating legal process is the sending or delivering of a document which falsely purports to be an order, or which simulates civil or criminal process. A.R.S. § 13-2814.

6. Fraudulent schemes and practices involve making a false statement or using false documents, or concealing or covering up a material fact, in connection with a matter related to the business of any department or agency of the state (or one of its subdivisions), pursuant to a scheme or artifice to defraud. A.R.S. § 13-2311.

7. Computer fraud includes acts such as accessing, altering, destroying, or damaging computer systems, software, or data. A.R.S. § 13-2316.

**14.3.2 Interference with Governmental Functions.** A second group of crimes against the state deals with interference with governmental functions. These offenses may involve the attempt to corrupt a public servant, or to prevent government agencies

from carrying out their duties in a particular matter. It is important to remember that even if one of these activities is unsuccessful, the attempt itself is a crime.

1. Obstruction of public administration is the threat or use of violence or physical force to impair or hinder a public servant's performance of a governmental function. A.R.S. § 13-2402.

2. The knowing attempt by means of bribery, misrepresentation, intimidation or threat of force to obstruct or prevent the reporting of or information or testimony relating to the commission of a crime is a class 5 felony. A.R.S. § 13-2409. A related offense is accepting or agreeing to accept a pecuniary benefit in exchange for not reporting, giving information, or seeking prosecution of a criminal offense. A.R.S. § 13-2405.

3. Impersonating a public servant involves a pretense and conduct which are intended to induce another to submit to pretended official authority, or to rely on pretended official acts. A.R.S. § 13-2406.

4. Bribery of a public servant is the attempt, with corrupt intent, to influence a public servant or party officer's vote, opinion, judgment, exercise of discretion or action in his official capacity by offering, conferring, or agreeing to confer any benefit. A.R.S. § 13-2602. A related offense is offering or agreeing to confer any benefit upon a public servant for a nomination or appointment to a public office. A.R.S. § 13-2603.

5. Making a claim or representation that one can or will improperly influence the action of a public servant in order to obtain a benefit from another person is a class 4 felony. A.R.S. § 13-2606.

6. Witness tampering, a class 6 felony, is committed where a person induces a witness to withhold testimony or testify falsely or absent himself from any official proceeding, including administrative proceedings. A.R.S. § 13-2804. Threatening or offering to confer a benefit to a witness in an official proceeding with the intent to influence the testimony of the witness or to induce the witness to absent himself from the proceeding is a class 5 felony. The witness who knowingly solicits or agrees to accept such a bribe is guilty of a class 5 felony. A.R.S. § 13-2803.

**14.4 Crimes Against People.** In this category are the many frauds which victimize the public and which too often come to the attention of law enforcement authorities only after an individual learns he has been victimized and reports the crime. Alert actions by state agencies will allow for earlier detection of fraud, much less loss to victims, and a greater chance for recovery of victims' money. There is one primary way a state agency can provide this public service: by having the agency employees who go out in the field — the inspectors, auditors, investigators and examiners and the agency employees who receive calls from the public — be attentive to the warning signs of an ongoing fraud.

**14.4.1 Warning Signs of Potential Criminal Activity.** An agency may unearth criminal violations during the course of many of its normal functions — an audit or inspection of a regulated enterprise's books or premises, a review of an application for a license or permit, an administrative investigation, or an official or informal administrative proceeding. Many of the following indicators may apply equally to charitable and business organizations. The warning signs involved are:

1. The organization turns assets into untraceable forms or keeps an inordinate percentage of its assets in liquid form, such as cash, traveler's checks or cashier's checks.
2. The organization has excessive overhead expenses.
3. The enterprise pays for significant private expenditures, for example, the mortgage payments of an officer.
4. The organization pays very high salaries, dividends, or interest payments.
5. Very little of the monies coming into the enterprise go back into the business.
6. The organization shows high profits but little capitalization.
7. The organization is not licensed, is using non-licensed personnel, or is selling unregistered securities. A.R.S. § 44-2036.
8. A foreign corporation is not registered in Arizona.
9. The organization's records are totally inadequate.
10. Records show transfers of money or property to public officials.
11. The records of the company show unusual or undocumented payments of money or transfers of property.
12. A license applicant's claimed educational credentials or work history cannot be verified or is supported by suspicious-looking documentation.
13. A pattern of complaints of excessive billing or "double billing" of patients and insurance companies occurs.
14. A health care practitioner promotes questionable treatments or cures.
15. An agency employee instinctively feels that something is "not quite right."

Individuals often call a state agency with a question or complaint about a person under the agency's jurisdiction. If a person calls complaining about any of the following, the agency should refer the complaint to the Complaint and Information Center at the Attorney General's Office.

**14.4.2 Warning Signs of Potential Fraudulent Conduct.** The warning signs of fraudulent activity are:

1. The individual is required to make a large investment immediately or lose the opportunity to invest.
2. The individual is "guaranteed" a profit or a market.

3. The company breaks its promise to give an individual an "exclusive territory"; a "refund on request"; "complete training"; "marketing assistance"; or "company advertising."
4. There is a long delay in receiving the particular equipment or product.
5. The equipment or product received is shoddy.
6. The company is uncooperative and has not returned the individual's calls.
7. The company's check bounces.
8. The individual is given a "run-around" by the company.
9. Other investors are complaining.
10. High pressure sales tactics are used.
11. The offered product or investment is a once in a lifetime opportunity based upon a new scientific breakthrough or government activity which is available to the consumer only through this company.
12. The salesman emphasizes his knowledge in the product area, but cannot answer questions beyond his script.
13. The salesman assures the customer that he is selling the product primarily as a public service, not because of his commissions.
14. A mail drop rather than an actual business location is the sole address available to the customers.
15. The local sales organization sells solely to out-of-state customers, while Arizona customers may buy solely from the out-of-state affiliate of the local company.
16. A refusal to provide names of satisfied customers.

Remember that the items mentioned in these lists are not exhaustive and are not meant to replace the common sense and expertise of the agency's personnel.



CHAPTER 15  
CONTRACTS AND TORT CLAIMS

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## CHAPTER 15

### CONTRACTS AND TORT CLAIMS

15.1 Scope of this Chapter. This Chapter primarily concerns the procedure for obtaining judicial review of denials of contract and tort claims against the state and its various agencies, boards, commissions, officers and employees. Corresponding procedures for county and municipality practice are discussed at Section 15.5.

15.2 Applicability of Statutes. From statehood until August 7, 1984, the procedure for bringing negligence and contract claims against the state was governed by now-repealed versions of A.R.S. §§ 12-821 to -825 and their predecessors. The initial text of this Chapter, including its 1981 and 1983 supplements, was devoted to a discussion of practice under those statutes. However, in 1984, the legislature made extensive modifications in the procedure for making contract and tort claims against the state, establishing procedures for the handling of contract claims substantially different from those made applicable to tort claims.

In Chapter 251 of the 1984 session laws, the Legislature enacted the Arizona Procurement Code, which became effective January 1, 1985. The prior versions of A.R.S. §§ 12-821 to -825 were repealed effective August 7, 1984 by Chapter 285 of the 1984 sessions laws. Thus, it would appear there were no statutes in effect between August 7, 1984 and January 1, 1985 governing the bringing of contract claims against the state.

The Procurement Code governs virtually all purchasing by the state and its agencies. See A.R.S. §§ 41-2501 to -2637, as well as modifications of many other statutes which prescribe procurement procedures for various specific agencies. Under the Procurement Code disputes over contract claims are resolved through procedures promulgated by the director of the Department of Administration (director) using procedures prescribed by the Administrative Procedure Act (A.R.S. §§ 41-1001 to -1015) ("APA") and, if necessary, by judicial review under the Administrative Review Act (A.R.S. §§ 12-901 to -914) ("ARA"). For a general discussion of the Procurement Code, see McConnell, Contracting With the State Under the Newly Enacted Arizona Procurement Code, Ariz. B.J., June/July 1985, p. 27.

In Chapter 285 of the 1984 session laws, which became effective August 7, 1984, the legislature also enacted statutes to govern the procedure for making tort claims against the state and its agencies, officers and employees. A.R.S. §§ 12-821 to -823. This act also repealed the prior §§ 12-821 to -823. See Section 15.4. The official title of Chapter 285, which refers to "tort liability" and "tort claims," indicates that contract claims are not included, as does the context of the act as a whole. Because the title of Chapter 285 speaks of "tort" claims, rather than claims in general, the act itself is limited to tort claim procedure. Ariz. Const. art. IV, pt. 2, § 13; see, e.g., State v. Sutton, 115 Ariz. 417, 565 P.2d 1278 (1977), Hudson v. Brooks, 62 Ariz. 505, 158 P.2d 661 (1945), and Taylor v. Frohmiller, 52 Ariz. 211, 79 P.2d 961 (1938). In addition, A.R.S. § 41-2615 specifically provides that the provisions of A.R.S. §§ 12-821 to -823 are inapplicable to any claims arising from all contracts covered by the Procurement Code. This is a further indication that A.R.S. §§ 12-821 to -823 are not applicable to contract claims.

The new statutory scheme applies to all tort claims; the former statutes applied only to negligence claims. Landry v. Superior Court, 125 Ariz. 337, 609 P.2d 607 (Ct. App. 1980). See Section 15.4. Unlike the prior claims statutes, A.R.S. §§ 12-821 to -823 also apply to tort claims against political subdivisions of the state, which include cities and counties. A.R.S. § 12-820(6). See Section 15.5.

### 15.3 Contract Claims.

15.3.1 Applicable Statutes. Since January 1, 1985, applicable provisions of the Procurement Code have provided "the exclusive procedure for asserting a claim against this state or any agency of this state arising in relation to any procurement conducted under this chapter." A.R.S. § 41-2615. The Procurement Code, with limited exceptions, "applies to every expenditure of public monies, including federal assistance monies . . . by this state, acting through a state governmental unit [which includes all executive branch agencies and the corporation commission] . . . under any contract." A.R.S. § 41-2501(B). "Contract" is defined in A.R.S. § 41-2503(4) as "all types of state agreements, regardless of what they may be called, for the procurement of materials, services or construction or the disposal of materials." "Procurement" is defined in A.R.S. § 41-2503(5) to include "renting" and "leasing" as well as purchasing. In light of the Procurement Code, Arizona Security Center, Inc. v. State, 142 Ariz. 242, 689 P.2d 185 (Ct. App. 1984), which held that contracts for installation and leasing of equipment were not within the term "purchase of contractual services" under prior statutes requiring competitive bidding, is therefore now moot.

15.3.2 Exceptions Not Covered by the Procurement Code. Only the Board of Regents, the legislative and judicial branches of government and the State Compensation Fund are excluded from coverage under the Procurement Code, except that the Board of Regents and the judicial branch must establish their own procurement rules. A.R.S. §§ 41-2501(D) and (E). See Section 15.3.5.01. A.R.S. § 12-2501(F) - (L) provides limited exemptions for particular contracts of specified agencies. But see Section 15.3.5.1.

### 15.3.3 Procedures for Making Contract Claims.

15.3.3.01 Procedures Under Title 35. Although the Procurement Code does not say so, A.R.S. § 35-181(A) requires that all claims against the state arising from contracts "shall be paid in accordance with procedures prescribed by the director of the Department of Administration." Claimants should therefore use the claim-filing procedures in effect when the claim is filed. In most cases payment will be made by the state when these procedures have been followed and the claim is valid. It is beyond the scope of this Chapter to discuss these procedures. It is only when a dispute arises that the problem-solving procedures of the Procurement Code come into play.

15.3.3.02 Claim Audit and Approval Under Title 35. Claim approval is a two-step process. First, A.R.S. § 35-182 requires that the contracting agency must certify any claim prior to audit and final payment by the director of the Department of Administration pursuant to A.R.S. § 35-181.02. Although the director has succeeded to the duties of the former state auditor, this process is virtually unchanged from the procedures in effect at least since 1928.

Under the prior law, if a dispute arose and a state agency or officer refused to certify a claim under prior versions of A.R.S. § 35-182, a special action in the nature of mandamus against the agency or officer was the proper vehicle with which to adjudicate

the merits of the dispute and to compel the agency or officer to approve the claim as a prerequisite to payment by the director. See, e.g., Dunshhee v. Manning, 59 Ariz. 430, 129 P.2d 924 (1942). Under the two-step approval process, after a court had issued a writ of mandamus, requiring the agency to certify the claim to the auditor, the auditor might still have declined to approve the claim for payment, forcing the claimant to bring a second action (this one under the prior A.R.S. §§ 12-821 to -825) to compel final payment of his claim. In State v. Angle, 56 Ariz. 46, 53, 104 P.2d 172 (1940), the court noted this theoretical possibility, but observed that "there is no likelihood that [the auditor] would [reject the claim] after it had been held legal by the court."

The Procurement Code substitutes a scheme of administrative review by the director of an agency's refusal to certify a claim and further Administrative Review Act review of the director's decision for the prior mandamus procedure. Under the present procedure, it would be theoretically possible for the director or a court to order an agency to certify a claim under A.R.S. § 35-182, yet have the director refuse final approval under A.R.S. § 35-181.01, but such a result seems highly unlikely, under the Angle rationale.

15.3.3.03 Dispute-Resolving Procedures of the Procurement Code. A.R.S. § 41-2611(A) provides that the director of the Department of Administration "shall adopt rules of procedure providing for the expeditious administrative review of all contract claims or controversies both before the purchasing agency and through an appeal heard before the director in accordance with the provisions of [the APA applicable to contested cases, A.R.S. §§ 41-1001, -1009 to -1011]." The director has promulgated the required rules, A.A.C. R2-7-901 to -937. Some of these rules apply to protested bid solicitations and awards and to suspension or debarment of contractors, rather than to breach of contract controversies and contract claims. As indicated in the rules, the process is commenced by filing a request for written decision with the proper officer of the contracting agency. The APA and the case authority interpreting it should be consulted for the appropriate manner of proceeding when appealing a procurement officer's final decision to the director. See generally A.R.S. §§ 41-1001 to -1015, A.R.S. §§ 12-901 to -914.

A.R.S. § 41-2615 states that the provisions of A.R.S. §§ 41-2611 to -2617 and rules adopted under these sections provide the exclusive procedure for asserting claims against the state and its agencies concerning procurements made under the Procurement Code. The statutes providing for arbitration, A.R.S. §§ 12-1501 to -1518, are expressly made inapplicable to such procurements.

15.3.4 Judicial Review of Decisions of the Director in Contract Claims Disputes. A.R.S. § 41-2614 provides that judicial review of decisions of the director under the Procurement Code may be had under the Administrative Review Act, A.R.S. §§ 12-901 to -914. A.R.S. § 41-2615 provides that this remedy is exclusive. Venue is exclusive in the Maricopa County Superior Court and the time limits for filing are those contained in A.R.S. § 12-904. A.R.S. § 41-2614. Presumably, all other matters would be governed by the ARA and its judicial interpretations. See generally A.R.S. §§ 41-1001 to -1015, A.R.S. §§ 12-901 to -914.

A jurisdictional prerequisite to bringing an ARA suit involving a contract claim is filing a motion for rehearing as provided in A.A.C. R2-7-927. See A.R.S. § 12-901(2), A.R.S. §§ 41-1001 to -1015, A.R.S. §§ 12-901 to -914.

### 15.3.5 Contract Claims Not Covered by the Procurement Code.

15.3.5.01 Situations in Which There Are Procedural Rules Applicable to Contract Claims. In some cases in which an agency or particular contracts of an agency are exempt from the Procurement Code, the affected agency is nevertheless required to adopt rules "substantially equivalent" to its policies and procedures. See, e.g., A.R.S. § 41-2501(E), (F). In other cases involving exempt contracts the affected agency has the same authority (if it wishes to exercise it) to adopt rules as does the director. A.R.S. § 41-2501(N). In 1985, the requirement that such rules must be "substantially equivalent" to the policies and procedures of the Procurement Code was deleted from A.R.S. § 41-2501(N). Laws 1985 (1st Reg. Sess.) Ch. 290, § 1. Presumably, any such rules would provide some sort of administrative dispute-resolving procedure. However, no such procedure is prescribed by statute. The first step to take when a contract dispute arises is to see if the Procurement Code applies. If it does not, the next step is to see if the rules of the contracting agency provide a procedure for adjudicating contract disputes. If so, that procedure should be followed.

15.3.5.02 Situations in Which There Are No Procedural Rules Applicable to Contract Claims. If the contracting agency has no applicable rules, either because it is not required to have any or because it has failed or refused to promulgate any, the claimant might choose to bring a special action in the nature of mandamus to require the agency or officer to certify the claim for payment as required under A.R.S. § 35-182. For cases holding this to be the proper procedure under the prior statutory scheme see Dunshee v. Manning, 59 Ariz. 430, 129 P.2d 924 (1942); State v. Barnum, 58 Ariz. 221, 118 P.2d 1097 (1941); State v. Angle, 56 Ariz. 46, 104 P.2d 172 (1940). Under the reasoning of these cases, the director cannot pay a claim without the certification required by A.R.S. § 35-182. A special action may be the only procedural vehicle available to compel the contracting agency or officer to make the necessary certification. The claim should be reviewed to ensure it satisfies the requirements of A.R.S. § 35-181.01 prior to bringing a special action. See Section 15.3.3.1.

15.3.5.03 Contracts Entered into Prior to January 1, 1985. By its terms the dispute-resolving and judicial review provisions of the Procurement Code are not applicable to procurements initiated prior to the Code's effective date, unless the parties agree otherwise. A.R.S. § 41-2501(A). Therefore, absent such an agreement, the special action procedure discussed in Section 15.3.5.2 should be followed to pursue claims arising from those contracts if claims are rejected by an agency or officer.

15.3.6 Applicability of Procurement Code Procedures to Tort Claims Arising Out of Contracts. A.R.S. § 41-2615 provides that the procedures afforded by the Procurement Code for "asserting a claim against this state or any agency of this state arising in relation to any procurement conducted under this chapter" are exclusive notwithstanding other statutes, especially notwithstanding A.R.S. §§ 12-821 to -823. Because those statutes are not relevant to contract actions, the specific reference to them appears to be for the purpose of directing that those cases sounding in tort, but arising out of contracts, such as tortious breach of contract claims, shall be governed by procedures found in the Procurement Code.

15.3.7 Attorneys' Fees. A.R.S. § 12-341.01, which permits the award of attorneys' fees in an "action arising out of a contract," is applicable to disputes between a contractor and the state under a contract awarded pursuant to the Procurement Code.

It is also likely that this section would be held applicable to a suit by an unsuccessful bidder challenging an award under the Procurement Code. Cf. ASH, Inc. v. Mesa Unified School District No. 4, 138 Ariz. 190, 673 P.2d 934 (Ct. App. 1983), Lewin v. Miller Wagner & Co., 151 Ariz. 29, 725 P.2d 736 (Ct. App. 1986), with Marcus v. Fox, 150 Ariz. 333, 723 P.2d 682 (1986), vacated in part, 150 Ariz. 342, 723 P.2d 691 (Ct. App. 1985).

In addition, A.R.S. § 12-348(A)(3), which provides that attorneys' fees shall be awarded against the state or a city, town or county in certain instances, has been interpreted as applying to cases brought under the ARA. New Pueblo Constructors, Inc. v. State, 144 Ariz. 95, 696 P.2d 185 (1985). Because contract actions against the state are now brought under the ARA, this provision would apply.

Finally, newly-enacted A.R.S. §§ 12-349 and -350, which provide for the mandatory award of attorneys' fees in unjustified actions or in the case of unjustified defenses, would also apply to actions brought under the Procurement Code.

#### 15.4 Tort Claims.

15.4.1 Applicable Statutes. Most of the case law interpreting A.R.S. §§ 12-821 to -825 was modified by the revision of those statutes made by the Thirty-sixth Legislature. No reported appellate court opinions construing the amended statutes have yet been issued. Consequently, the principles set forth in this section are derived directly from the statutes and supplemented by relevant case law unaffected by the 1984 amendments.

15.4.2 Presentation of Claim Mandatory. Prior to the commencement of a tort suit in state court against any public entity or employee, notice of the claim must be filed in compliance with the provisions of A.R.S. § 12-821. State v. Miser, 50 Ariz. 244, 72 P.2d 408 (1937); State v. Stone, 8 Ariz. App. 118, 443 P.2d 933 (1968), vacated and decided on other grounds, 104 Ariz. 339, 452 P.2d 513 (1969); Cf. American Credit Bureau v. Pima County, 122 Ariz. 545, 596 P.2d 380 (Ct. App. 1979) (dealing with A.R.S. §§ 11-621 to -644, suits against a county); Mammo v. State, 138 Ariz. 528, 675 P.2d 1347 (Ct. App. 1983). An alternate theory is that the state has not consented to be sued except in accordance with A.R.S. §§ 12-821 to -825. See Arizona Board of Regents v. Arizona York Refrigeration Co., 115 Ariz. 338, 565 P.2d 518 (1977); Ariz. Const. art. IV, pt. 2, § 18.

There is authority indicating that compliance with statutory pre-action mandates is jurisdictional, cannot be waived, and accordingly renders a judgment void when noncompliance is shown. See American Credit Bureau v. Pima County, 122 Ariz. 545, 596 P.2d 380 (Ct. App. 1979) (failure to file a claim prior to suit held to be jurisdictional); see also State v. Williams, 12 Ariz. App. 498, 472 P.2d 109 (1970). Furthermore, noncompliance can be raised for the first time on appeal. See Mammo v. State, 138 Ariz. 528, 675 P.2d 1347 (Ct. App. 1983).

The purposes and justification for the statutory requirement of presentation of the claim as a condition precedent to the maintenance of an action are set forth in State v. Brooks, 23 Ariz. App. 463, 534 P.2d 271 (1975).

Claims for medical malpractice are exempted from compliance with A.R.S. § 12-821. That statute is also inapplicable to "constitutional torts" brought in federal court [or state court] against public entities or employees under 42 U.S.C. § 1983. See Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969).

#### 15.4.3 Presentation.

15.4.3.01 Contents of the Claim. The form and content of the notice of claim are not statutorily prescribed, but have been defined by judicial opinions. In State v. Brooks, 23 Ariz. App. 463, 534 P.2d 271 (1975), Division One of the Arizona Court of Appeals stated that a valid claim notice must contain sufficient information to allow the public entity to investigate the merits of the claim intelligently and to assess its potential liability, so that it can conscientiously allow or disallow the claim. The claim must also request relief in a specific dollar amount so that the public entity can assess the wisdom and appropriateness of settlement. Later, in Dassinger v. Oden, 124 Ariz. 551, 606 P.2d 41 (Ct. App. 1979), Division One held that a claim which requested specific dollar amounts for certain damages, but also claimed damages in unspecified amounts for loss of wages and pain and suffering, was deficient under the criteria established in State v. Brooks, 23 Ariz. App. 463, 534 P.2d 271 (1975). Disallowing a claim not specifying a dollar amount did not cure the deficiency in the claim. Dassinger v. Oden, 124 Ariz. 551, 606 P.2d 41 (Ct. App. 1979). In sum, a notice of claim should contain the time, the place, and the circumstances of the alleged tort, the character of the injury sustained, and the total amount of damages or compensation the claimant is seeking.

In Evans v. Arizona Department of Corrections, 139 Ariz. 321, 678 P.2d 506 (Ct. App. 1983), Division One also held that a claim filed on behalf of a class is deficient. A.R.S. § 12-821 requires the identification of specific claims and claimants.

15.4.3.02 Service. A claim must be served in the manner prescribed in Rule 4(d), Arizona Rules of Civil Procedure. A.R.S. § 12-821(A). Claims against the state must be served upon the Attorney General. Rule 4(d)(7), Arizona Rules of Civil Procedure. Claims against other public entities must be served upon "the chief executive officer, the secretary, clerk, or recording officer thereof." Rule 4(d)(8), Arizona Rules of Civil Procedure.

15.4.3.03 Time for Filing. A claim must be filed within 12 months after the cause of action accrues. A.R.S. § 12-821(A). This subsection also suggests that suit on any tort claim against the state must be brought within the applicable statute of limitations, each of which provides that actions shall be brought within a specified time "after the cause of action accrues." It seems safe to assume that the date on which a cause of action accrues is the same for the purpose of filing a claim as it is for filing the tort action itself.

15.4.3.04 Excusable Neglect. Failure to file a claim within 12 months after the cause of action accrues bars the filing of an action on the claim unless excusable neglect is shown. A.R.S. § 12-821(A). Excusable neglect is defined as "reasonable and foreseeable neglect or inadvertence." A.R.S. § 12-821(E). Upon a showing of excusable neglect, an action may be filed, if otherwise within the applicable period of limitations. A.R.S. § 12-821(A).

15.4.3.05 Attorney Misconduct. If the claim is not filed within 12 months, excusable neglect is not shown and the absence of excusable neglect is attributable to claimant's attorney, the action may be filed. However, the public entity or employee being sued will have a right of indemnity against the claimant's attorney for any liability assessed in the action. A.R.S. § 12-821(A).

15.4.3.06 Legal Disability. Minors, insane or incompetent persons may file their claims within 12 months after their disabilities cease. A.R.S. § 12-821(B).

15.4.3.07 Disallowance. Claims are deemed denied 60 days after filing unless the claimant is advised of the denial in writing before the expiration of 60 days. A.R.S. § 12-821(C).

15.4.4 Settlements. Upon receipt of a claim, the Department of Administration will, with the aid of the Attorney General's Office, investigate and, where appropriate, attempt to settle the claim directly with the claimant. Claims [or lawsuits] involving a settlement sum of \$25,000 or less may be settled with the approval of the Director of the Department of Administration. When the payment to be made in settlement is from \$25,000 to \$50,000, approval by the Director of the Department of Administration and the Attorney General is required. When the settlement sum exceeds \$50,000.00, the Director of the Department of Administration, the Attorney General, and the Joint Legislative Budget Committee must all approve it. A.R.S. § 41-621(K).

15.4.5 Jurisdiction and Venue. The statutes are silent as to which courts have jurisdiction of suits under A.R.S. §§ 12-821 to -825. The superior court has general jurisdiction of the subject matter if a claim exceeds \$1,000, Ariz. Const. art. VI, § 14, and is the normal forum for such actions. However, claims for less than \$1,000 must be brought in the appropriate justice court. A.R.S. § 22-201(B). Claims ranging from \$1,000 to \$2,500 may be brought either in the superior or justice courts.

The statutes are also silent as to proper venue. Therefore, it would seem that the action may be brought in any superior or justice court which would be proper under the general venue statute, A.R.S. § 12-401. In many cases, if the state is the defendant, venue will be proper in Maricopa County. When an action against the state is pending in another county, the Attorney General may secure a change of venue to Maricopa County at or before the time of answering. A.R.S. § 12-822(B). See Gila Valley Irrigation District v. Superior Court, 144 Ariz. 288, 697 P.2d 681 (1985).

15.4.6 Defendants. A.R.S. § 12-821 now governs tort claims against all public entities and employees. Relevant terms are defined in A.R.S. § 12-820. Although the "State of Arizona" is the usually-named defendant, an agency or individual officer is occasionally named as a defendant. See, e.g., Arizona Board of Regents v. Arizona York Refrigeration Co., 115 Ariz. 338, 565 P.2d 518 (1977); Grimm v. Arizona Board of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977). However, unless the agency is specifically authorized to sue and be sued, Kimball v. Shofstall, 17 Ariz. App. 11, 494 P.2d 1357 (1972), holds that it is an improper party and that a dismissal can be obtained as to the agency. Grimm v. Arizona Board of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977), held that the provisions of A.R.S. § 12-821 to -825 apply to claims against a board as an entity, but not to claims against the individual members of the board. Since A.R.S. § 12-821 now expressly applies to claims against "public employees," the continued viability of Grimm's holding on this issue is questionable.

15.4.7 Pleadings and Process. A.R.S. § 12-822 directs that service of the summons in an action authorized under A.R.S. § 12-821 be made pursuant to Rule 4(d), Arizona Rules of Civil Procedure, but is silent as to the contents of the summons or the complaint. The complaint must comply with the general requirements imposed by the Rules of Civil Procedure for civil complaints. Accord, Tanner Companies v. Superior Court, 123 Ariz. 599, 601 P.2d 599 (1979). In addition, the complaint should contain allegations sufficient to show compliance with the statutory requirements of presentation of the claim, since it has been stated that these procedures are essential to confer jurisdiction on the court. State v. Miser, 50 Ariz. 244, 72 P.2d 408 (1937). But see Ames v. State, 143 Ariz. 548, 694 P.2d 836 (Ct. App. 1985), holding that the mere lack of an allegation in the complaint of compliance with A.R.S. § 12-821 does not constitute a jurisdictional defect. Since the decisional authorities are in conflict on this issue, compliance should be alleged affirmatively.

15.4.8 Judgment, Punitive Damages, Interest, Costs and Attorneys' Fees. A.R.S. § 12-823 provides: "If judgment is rendered for the plaintiff, it shall be for the amount actually due from the public entity to the plaintiff, with legal interest thereon from the the obligation accrued and with court costs." Public entities and public employees acting within the scope of their employment are immune from punitive damages. A.R.S. §§ 12-820.04, 41-621(H).

A.R.S. § 12-823 specifically authorizes including pre-judgment interest in the judgment. See also Fleming v. Pima County, 141 Ariz. 149, 685 P.2d 1301 (1984).

It is now plain that court costs may be awarded against the state. A.R.S. § 12-823. In construing the prior statute, A.R.S. § 12-825, the Arizona Supreme Court held that the phrase "without costs" did not prohibit an award of attorneys' fees against the state. See New Pueblo Constructors, Inc. v. State, 144 Ariz. 95, 696 P.2d 185 (1985) (construing former A.R.S. § 12-825). Historically, the Arizona rule has been that the term "costs" does not include attorneys' fees. 144 Ariz. at 107, 696 P.2d at 197. A.R.S. § 12-341.01 applies only to actions brought on contracts and is thus inapplicable to actions brought under A.R.S. §§ 12-821 to -823.

In addition, A.R.S. § 12-348 has been held not to apply to actions brought under prior A.R.S. §§ 12-821 to -825, because these actions were not brought to review agency decisions. New Pueblo Constructors, Inc. v. State. This reasoning would appear to be applicable to the new versions of A.R.S. §§ 12-821 to -823 as well.

In 1985, the Legislature added two attorneys' fees statutes, A.R.S. §§ 12-349 and -350. These statutes require that an award of fees be assessed against a party or an attorney, including the state and its political subdivisions, for (1) bringing or defending a claim without substantial justification, (2) bringing or defending a claim solely or primarily for delay or harassment, (3) unreasonably expanding or delaying a proceeding or, (4) engaging in an abuse of discovery. Laws 1985 (1st Reg. Sess.) Ch. 225. In all, the Legislature has enacted more than 60 statutes authorizing awards of attorneys' fees. See Rambow, Statutory Attorney's Fees in Arizona: An Analysis of A.R.S. Section 12-341.01, 24 Ariz. L. Rev. 659, 660 n.9 (1982).

15.4.9 Satisfaction of Judgment. Judgments are satisfied from the permanent liability loss revolving fund as provided in A.R.S. § 41-622. This statute impliedly repeals A.R.S. § 12-826 as to tort judgments.

15.4.10 Constitutionality. Although no Arizona appellate court has passed on the question, courts in other jurisdictions have invalidated claims procedures similar to A.R.S. §§ 12-821 to -825 on the grounds that the claim-filing precondition arbitrarily divides tortfeasors into two classes, i.e., private tortfeasors, to whom no notice of claim is owed, and governmental tortfeasors, to whom notice of claim is owed. See Turner v. Staggs, 89 Nev. 230, 510 P.2d 879, cert. denied, 414 U.S. 1079 (1973). Other courts have rejected this argument and upheld the constitutionality of the claim-filing procedure. See Crowder v. Salt Lake County, 552 P.2d 646 (Utah 1976). The reported cases are fairly evenly split on this issue. In Norcor of America v. Southern Arizona International Livestock Association, 122 Ariz. 542, 596 P.2d 377 (Ct. App. 1976), Division Two of the Arizona Court of Appeals rejected the equal protection argument as to contract claims. It stated:

Appellant has cited no authority for the proposition that the claims statutes are constitutionally invalid when applied to contract claims. . . . [Appellant's cases] all point out that since governmental immunity was abolished by the legislature, the clear legislative intent was that nongovernmental and governmental tortfeasors were to be put on an equal footing. Therefore, there is only one natural class of tortfeasors and the claims statutes irrationally divide this natural class. This rationale cannot be carried over into contract claims. The legislature has never expressed an intent that government and nongovernmental promisors be on an equal footing.

122 Ariz. at 545, 596 P.2d at 380.

## 15.5 Claims Against Counties and Municipalities.

### 15.5.1 Claims Against Counties.

15.5.1.01 Contract Claims Against Counties. The statutory procedures governing the filing of contract claims against counties are found in A.R.S. §§ 11-621 to -630. These provisions are conditions precedent to the filing of suits against counties on claims to which these statutes are applicable. The presentation of the claim has been held a necessary predicate to confer subject-matter jurisdiction on the court. American Credit Bureau v. Pima County, 122 Ariz. 545, 596 P.2d 380 (Ct. App. 1979). For a list of claims not subject to A.R.S. §§ 11-621 to -630, see Norcor of America v. Southern Arizona International Livestock Ass'n, 122 Ariz. 542, 596 P.2d 377 (Ct. App. 1979).

The Procurement Code is not applicable to counties. A.R.S. §§ 41-2501(B) and -2503(19). However, A.R.S. § 41-2501(C) provides that a county "may adopt all or any part of [the Procurement Code] and the regulations adopted pursuant to [the Code]." Therefore, before initiating the claim process, counsel should ascertain whether the county has adopted any part of the Procurement Code or its implementing rules.

15.5.1.02 Tort Claims Against Counties. The provisions of new A.R.S. §§ 12-821 to -826 apply to tort claims brought against counties. A.R.S. §§ 12-820(6) and -821(A). The discussion at Section 15.4 is thus applicable to such claims as well.

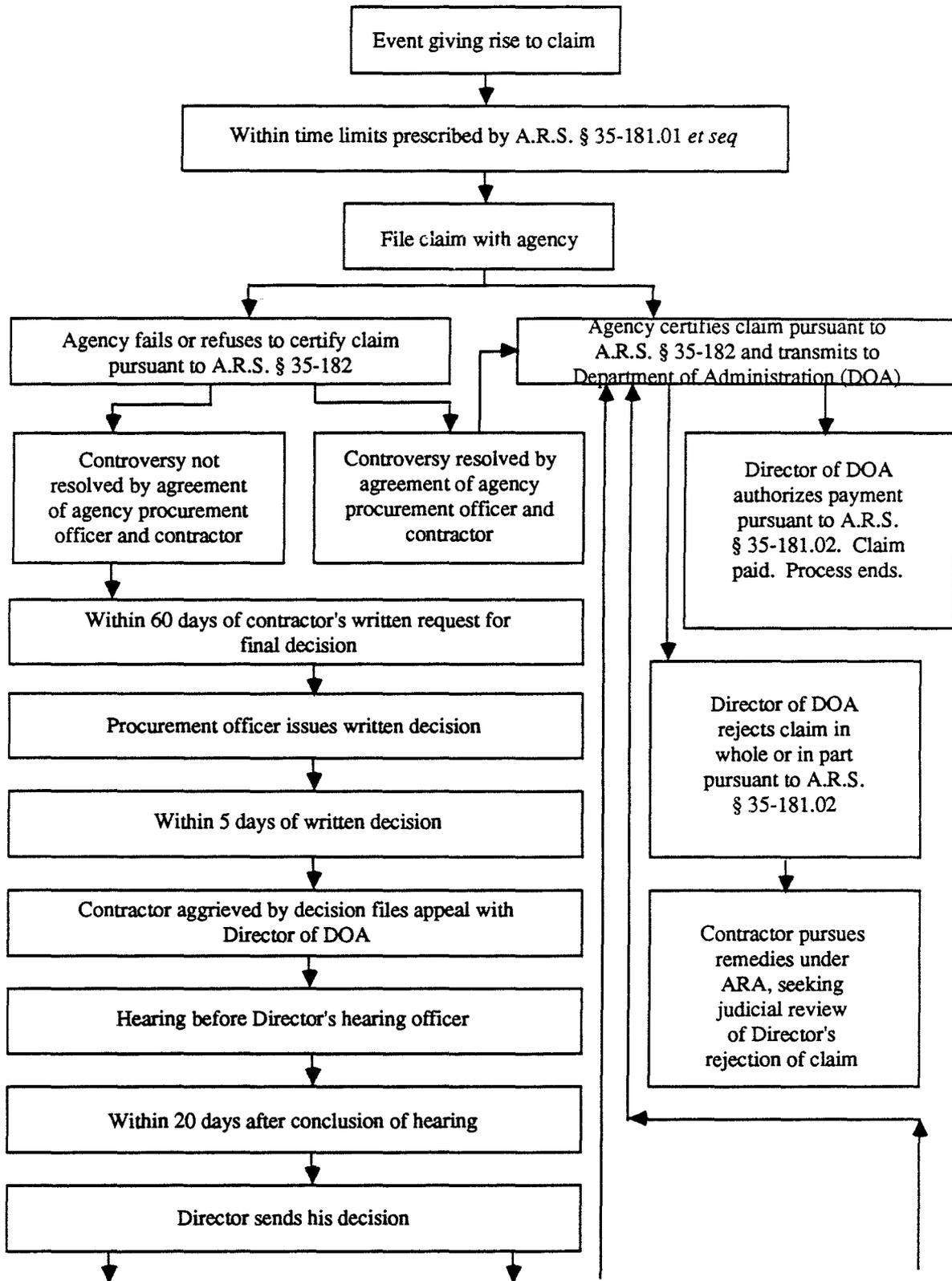
## 15.5.2 Claims Against Municipalities.

15.5.2.01 Contract Claims Against Municipalities. There are no statutes governing the filing of contract claims against municipalities such as those applying to counties, A.R.S. §§ 11-621 to -630, discussed in Section 15.5.1.01. Moreover, the Procurement Code is not applicable to municipalities. A.R.S. §§ 41-2501(B) and -2503(19). However, A.R.S. § 41-2501(C) provides that a municipality "may adopt all or any part of [the Procurement Code] and the regulations adopted pursuant to [the Code]." Therefore, before initiating the claim process, counsel should ascertain whether the municipality has adopted any part of the Procurement Code or its implementing rules.

However, even if a municipality has not adopted any part of the Procurement Code or its implementing rules, it may have other valid contract claim-filing procedures which may have to be observed. See, e.g., City of Phoenix v. Mayfield, 41 Ariz. 537, 20 P.2d 296 (1933) (dicta assuming validity of contract claim-filing procedures in the city charter).

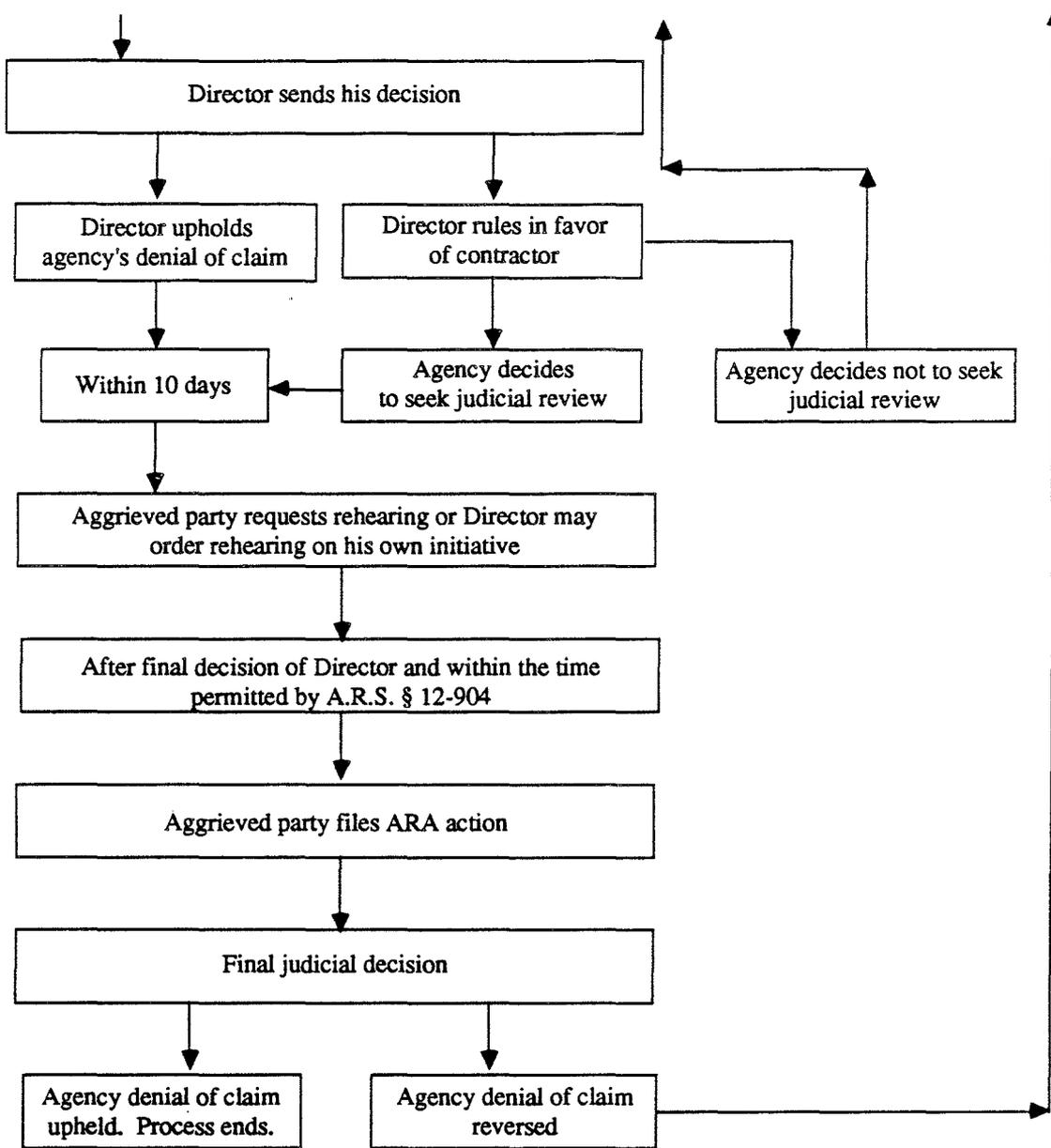
15.5.2.02 Tort Claims Against Municipalities. The provisions of new A.R.S. §§ 12-821 to -826 apply to tort claims brought against municipalities. A.R.S. §§ 12-820(6) and -821(A). The discussion at Section 15.4 is thus applicable to such claims as well.

**Flow Chart - Contract Claims Subject to the Procurement Code.**



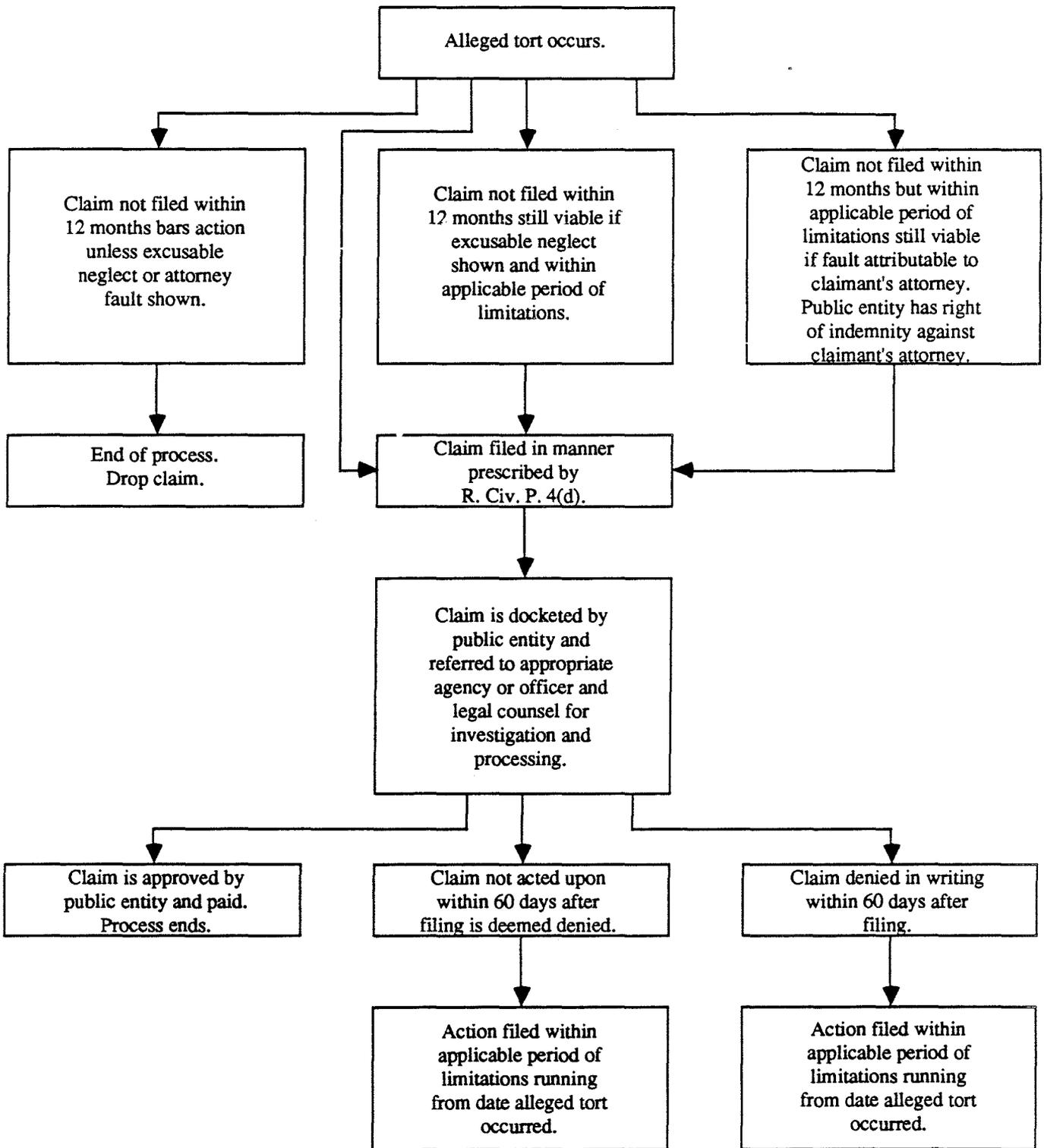
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Flow Chart - Contract Claims Subject to the Procurement Code continued.



Contracts and Tort Claims

Flow Chart - Tort Claims Against the State.





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